

August 31, 2016

### Court Expands the Definition of “Parent” in New York – Custody and Visitation No Longer Based Solely on Biology or Adoption

We announce the news of a recent landmark victory achieved by the Firm in a parental rights case in the New York Court of Appeals. The case involved a dispute between two former same-sex partners. The biological mother had severed the access rights of the second, non-biological mother to the child who was conceived and raised during their relationship, and who carries the last name of the non-biological mother. Partners Eric Wrubel and Linda Genero Sklaren and associate Alex Goldberg wrote the prevailing appellate briefs. Eric Wrubel argued the appeal. The Firm was appellate counsel to R. Thomas Rankin, attorney for the child, who sought and was granted leave to appeal the lower court decisions denying the non-biological second parent access to the child.

In the ground-breaking August 30, 2016 decision in *Matter of Brooke S.B. v Elizabeth A. C.C.*, the Court overturned the 25-year old, outdated precedent of *Alison D. v. Virginia M.* (1991), which had created the “bright line” rule that defined the term “parent” under the Domestic Relations Law as a person related to a child solely through biology or adoption. It held that this definition “had become unworkable when applied to increasingly varied familial relationships.” It was based on a “foundational premise of heterosexual parenting and nonrecognition of same-sex couples [which] is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court’s Holding in *Obergefell v. Hodges.*” (citation omitted)

Under the Court’s expanded definition of parent, where a party can show, by clear and convincing evidence, that there was a pre-conception agreement to conceive and raise a child as co-parents, that person is a parent who has standing to seek custody or visitation rights. As in all such cases, the best interests of the child will govern the ultimate determination of access. The Court left open for another day, questions regarding the standard to be applied in cases where a biological or adoptive parent agreed to the “creation of a parent-like relationship between his or her partner after conception.”

Many couples raise children without getting married, where one partner has no biological relation to the child, and where the couple does not proceed with a second-parent adoption. In the case of same-sex couples, the area where the vast majority of the reported New York cases arise, one parent, and in some cases neither parent, is biologically related to his or her child. Often couples cannot meet the financial costs attendant with an adoption; in some cases, the parents' relationship terminates before the lengthy process of an adoption can be finalized.

Mr. Wrubel argued that *Alison D.* was out of touch with the realities of modern life and that "parenthood needs to be determined by looking at how the parties live as a family, and who cares for and provides for the child -- both emotionally and financially."

The Court agreed, acknowledging that *Alison D.* "has inflicted disproportionate hardship on the growing number of nontraditional families across our State." It abandoned the "overly-restrictive definition of 'parent' that sets too high a bar for reaching a child's best interest and does not take into account equitable principles."

As a result of the new ruling, the case will be remanded back to family court for a hearing where the non-biological, non-adoptive parent, Brooke S.B., will be able to offer proof that she and her former partner entered into a pre-conception agreement to conceive and raise the child together and, if established, she can seek restoration of custody and visitation rights to the child.

The facts of the case and the winning argument are more fully described in an article in the August 31 New York Law Journal and in an article in the August 31 New York Times, a copy of which is available [here](#).

The full text of the Court of Appeals decision can be found [here](#).

\*\*\*\*\*

|                      |  |                |
|----------------------|--|----------------|
| Eric Wrubel          | <a href="mailto:EWrubel@wbcsk.com">EWrubel@wbcsk.com</a>     | (212) 984-7735 |
| Linda Genero Sklaren | <a href="mailto:LSklaren@wbcsk.com">LSklaren@wbcsk.com</a>   | (212) 984-7832 |
| Alex R. Goldberg     | <a href="mailto:AGoldberg@wbcsk.com">AGoldberg@wbcsk.com</a> | (212) 984-7786 |
| Neena Tankha         | <a href="mailto:NTankha@wbcsk.com">NTankha@wbcsk.com</a>     | (212) 984-7755 |