Custody Battles Brought By Abusers Who Are Not Legal Parents Of The Children: How Has *Brooke S.B.* Changed The Rules?

By Nancy S. Erickson*

In this comprehensive expert legal analysis of a landmark decision by the New York State Court of Appeals—the highest court in that state—attorney Nancy S. Erickson explains the implications of this ruling for battered mothers and LGBT couples who wish to protect their children from an abusive ex-partner who files legal claims for custody or visitation. As Ms. Erickson points out, Brooke S.B. changed the rules in the direction of benefitting both abused women and gay/lesbian couples—a "win-win" for both of these groups, who historically have faced daunting challenges in their attempts to gain safety and freedom for themselves and their children post-separation.

Note: An amicus brief submitted to the NYS Court of Appeals by Sanctuary for Families, the Battered Mothers Custody Conference, and a number of other DV-related organizations is included in full in the electronic version of this issue of FIPVQ.

INTRODUCTION

In August of 2016, the New York Court of Appeals—the highest court in New York State—handed down an important decision for domestic abuse victims and survivors: *Brooke S.B. v. Elizabeth A.C.C.*[1] The decision may prevent

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[1] 28 N.Y.3d 1 (2016).

virtually all abusive non-marital partners[2] who are not biological or adoptive parents of the children of their victims from successfully claiming custody or visitation rights over the children.[3] At the same time, it was a legal victory for many LGBT partners who live with and jointly decide to have and raise children together. A win-win situation.

Brooke S.B. is a big win for large numbers of LGBT couples, because it expands the legal pathways for them to become joint parents. In addition to marriage,[4] adoption,[5] and surrogacy (in jurisdictions where surrogacy is permitted) they now have the pathway authorized by the Court of Appeals in *Brooke S.B.*, which we will call the pre-conception estoppel pathway.

On its face, *Brooke S.B.* does not appear to have anything to do with abusive partners – whether same sex or opposite sex. However, by virtue of what the Court of Appeals did not do in *Brooke S.B.*, it will help victims and survivors of domestic abuse.

Brooke brought the case seeking custody or visitation rights to a child born to her ex-partner, Elizabeth. While they were living together, they planned to have the baby, and the child was conceived by artificial insemination with donor sperm. The child was born in 2009, prior to the New York marriage law authorizing same-sex marriages.[6] They had not married in any state where same-sex marriage was authorized. Nor had Brooke and Elizabeth entered into a civil union in another state. The child was raised by both of them until they separated.

After they separated, Brooke still saw the child until Elizabeth no longer permitted it. Brooke had no biological connection with the child and had not adopted the child. She was legally a non-parent. The Family Court[7] and the Appellate Division[8] had held that, as a non-parent, she had no standing to seek custody or visitation. Yet, the Court of Appeals held that under the particular

[2] And some abusive spouses.

[3] This article is geared toward abuse victims and their advocates, and most of the cases they deal with involve heterosexual women and their abusive male partners. However, domestic abuse also takes place in all types of relationships, including LGBT relationships. The *Brooke* case may help many survivors of abuse from all types of relationships, as will be further discussed below.

[4] See discussion of the presumption that a child born during a marriage is a child of both marital partners, at text accompanying notes 40 to 43 *infra*. The United States Supreme Court has held unconstitutional an Arkansas law that did not allow the spouse of a woman who gave birth to be listed on the child's birth certificate as the child's parent if the spouse was a woman rather than a man. Pavan v. Smith, 582 U.S. ___ , 137 S. Ct. 2075 (2017).

[5] Matter of Jacob, 86 N.Y.2d 651 (1995).

[6] The New York Marriage Equality Act, L. 201, ch. 95. This was also prior to *Obergefell v. Hodges*, 576 U.S. __, 135 S. Ct. 2584 (2015), in which the United States Supreme Court held that the Constitution bars states from prohibiting same-sex marriages.

[7] Brooke S. Barone v. Elizabeth A. Chapman-Cleland, Chatauqua Co. Fam. Ct, S. Claire, J., 2015 (n.o.r), *aff'd*, Brooke S. Barone v. Elizabeth A. Chapman-Cleland, 129 A.D.3d 1578 (4th Dept. 2015), *rev'd*, Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1 (2016).

[8] Brooke S. Barone v. Elizabeth A. Chapman-Cleland, 129 A.D.3d 1578 (4th Dept. 2015).

facts of her case, by virtue of an estoppel theory,[9] she was a parent and had standing to seek custody or visitation. The Court stated that

> where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under [New York custody law] Domestic Relations Law Section 70.[10]

The case was sent back to the trial court for a determination as to whether, under the best interests of the child test, Brooke should get custody or visitation.[11]

The Court of Appeals decision in *Brooke S.B.* was more than 25 years too late. The Court missed its first opportunity to right the same wrong in *Alison D. v. Virginia A.*, in 1991.[12] Although that case was decided by the court of Appeals in 1991, its roots went back to 1977, when Alison and Virginia began their relationship. In March 1978 they began living together, and in 1980 they agreed to have a child by artificial insemination and raise the child together. From then on, they shared expenses for the household and the child. Their son was born to Virginia in 1981, and for more than two years, they jointly made decisions regarding the child and shared caretaking responsibilities. In 1983, they split up, and Alison moved out of their jointly owned home. However, pursuant to an agreed upon visitation schedule, Alison continued to visit the child regularly until 1986, when Virginia began to restrict her visitation. In 1987, Alison went to Ireland to pursue career opportunities, but she continued her relationship with the child until Virginia terminated all visitation later that year. At that time, their son was six years old.

Alison then commenced a proceeding seeking visitation rights.[13] She alleged that she stood "in loco parentis"[14] to the child and therefore must be considered a parent within the meaning of Domestic Relations Law Section 70, entitled to a hearing as to whether visitation was in the best interests of the child. She also contended that she should be viewed as a parent by estoppel.[15] However, the Court of Appeals, over a vigorous and prescient dissent by Chief Judge Judith Kaye, was not ready to expand the definition of "parent" when the Legislature could have done so but had not.

The Court of Appeals missed its second chance to right the same wrong in 2010 when the case of *Debra H. v. Janice R.*[16] presented itself. In *Debra H.*,

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[9] See discussion of estoppel theory at text accompanying notes 45 to 50 *infra*.
[10] Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1, at 14.
[11] Brooke is now able to continue to have a relationship with the child. See note 91 *infra*.
[12] Alison D. v. Virginia A., 77 N.Y.2d 651 (1991).
[13] There is no indication in the decisions that she ever sought custody.
[14] "In loco parentis" means "in the position of a parent," or "describing a person or institution that has assumed, at least for some purposes, the rights and responsibilities of a parent toward a child." J. CLAPP, RANDOM HOUSE WEBSTER'S DICTIONARY OF THE LAW 228 (NY: Random House, 2000).
[15] 77 N.Y.2d 651, 656.
[16] Debra H. v. Janice R., 14 N.Y. 3d 576 (2010).

on facts almost identical to those in *Alison D*., the Court of Appeals still was not ready to act without legislative authority, but Debra and Janice had entered into a civil union in Vermont the month before their child's birth, so the Court was able to use that fact to hold that Debra had parental status, because the Vermont law gave that status to her.[17]

When the Court of Appeals, in *Brooke S.B*., finally did what it had been asked to do in *Alison D.* and *Debra H.*, it perfectly crafted its decision to correct the inequity in the law without creating unfair and unintended consequences. If the Court of Appeals had written its decision differently, based on a broader theory of how parental status could be gained, a new category of domestic abuse victims might have been faced with custody battles.

If a parent is married and being abused by her/his spouse, s/he faces not only the problem of stopping the abuse but also a potential custody battle over the children. The same threat exists when the victim of abuse is not married to the abuser, but the abuser is the biological or adoptive parent of the children. Perpetrators of domestic abuse are notorious for initiating custody battles to intimidate, retaliate against, and/or assert power and control over their victims. However, if the children are not the biological children of the abuser and the abuser has not adopted the children, then the abuser has no "standing" to seek custody or visitation. In New York, even a stepparent has no standing to seek custody or visitation, except under extraordinary circumstances.[18]

Brooke S.B.'s primary effect will be to confirm the parental status of lesbian partners in *Brooke*-like circumstances. *Brooke S.B*. should also benefit

[17] Accord, Counihan v. Bishop, 111 A.D.3d 594 (2d Dept. 2013) (same sex partners had married in Connecticut) and Wendy G-M. v. Erin G-M., 985 N.Y.S.2d 845 (Sup. Ct., Monroe Co., 2014) (marriage in Connecticut; the litigation took place after New York enacted the Marriage Equality Act in 2011). Some supporters of Debra H. had argued for a broad definition of persons entitled to standing to seek custody or visitation, using a functional parent theory. See text accompanying notes 69 to 76 *infra*. Opposition to such a broad definition had been presented to the Court in an amicus brief on behalf of Single Mothers by Choice and other organizations. In fact, some parts of the Court of Appeals decision in *Debra H*. seem to be taken almost verbatim from that brief. The brief on behalf of SMC alerted the Court to a fact that otherwise might have been lost—that the issue in *Debra H*. was "not a gay/lesbian or same-sex vs. heterosexual issue." Brief of Amici Curiae Single Mothers by Choice and others, p. 19. The eventual decision in *Debra H*. would be applicable to heterosexual single parents. Thus, if the Court adopted a "de facto" or "functional parent" test, it would apply to single heterosexual parents and would "threaten[] to trap single biological and adoptive parents and their children in a limbo of doubt." The brief asked:

> Are single mothers supposed to refuse to enter into romantic relationships for fear that they are giving up rights to their child? Does "moving in" create "*de facto* parent" status?. . . . Does . . . living with the child do it?. . . . For how long would one need to live with the child? Rather than leave people in a situation where they cannot possibly know whether their relationship will ultimately mean that they have given up rights over raising their children, the current standard has no such gray area. Either there is a second-parent adoption or there is not. *Id.* at 23.

[18] There is no statute in New York that gives standing for either custody or visitation to stepparents, although grandparents and siblings are given standing to seek visitation under certain circumstances. See Domestic Relations Law Sections 72 and 71. Under the "extraordinary circumstances" doctrine, discussed below, it is possible for a stepparent to have standing and even to get custody. *See, e.g.*, Doe v. Doe, 92 Misc. 2d 184 (Sup. Ct., NY Co. 1977). However, as the term "extraordinary" implies, such cases are supposed to be rare.

gay male partners who agree to have a child through surrogacy or to become parents through adoption. In terms of heterosexual couples, it is unlikely *Brooke S.B.* will help many heterosexual men to get standing to seek custody or visitation, because an unmarried man is unlikely to be able to prove that he and his girlfriend "agreed to conceive a child and to raise the child together" when the resulting child would not be the man's biological child. This would generally occur only, if for some reason, the man was unable, or the parents were unwilling, to have a child that was not biologically his child, so that the insemination would have to be by donor sperm.

The Court of Appeals in *Brooke S.B.* could have written its decision in a way that would have given more abusers standing to seek custody or visitation but did not. The Court could have left out the requirement that the parties agreed to "conceive" the child together, so that the only requirement would be that the parties agreed to "raise" the child together. If that had been the holding in *Brooke S.B.*, it could be used to give more abusers standing.

Before *Brooke S.B.*, the theory of equitable estoppel[19] had been used in New York by partners of single parents to gain parental status regarding the children of those parents. There were cases where a woman who was pregnant by another man when she met and lived with a new male partner. Then, later, she was held estopped from claiming that the new partner was not the child's father. In those cases, however, the woman and her partner usually had held the child out as their child, and the partner's name was often put on the child's birth certificate as the father. Therefore, the courts reasonably held that because the mother agreed to raise the child with the new partner as though he was the father, she should not be permitted to later deny he was the father.[20] The Court of Appeals in *Brooke S.B.* used an estoppel theory too, but the Court required a pre-conception agreement. If the Court had left out the requirement of a pre-conception agreement, more new partners – including abusers—might have been able to claim standing with regard to older children, not just babies.

Another alternative the Court in *Brooke S.B.* could have used is a "functional parent" test, which is described below.[21] Either a test not requiring a pre-conception agreement or a functional test would mean that if a single parent became intimately involved with a man or woman and they lived together, the single parent would have to fear that her new partner would, at some undetermined point, gain parental status, which would allow that partner to seek to remove the child from the legal parent as a result of a custody battle or to have significant control over the legal parent by gaining visitation rights to the legal

[19] But not the Brooke S.B. "pre-conception estoppel" theory.

[20] See, e.g., Jean Maby H. v. Joseph H., 246 A.D.2d 282 (2d Dept. 1998) and cases cited therein.

[21] See text accompanying notes 69 to 76 *infra* for a discussion of the "functional parent" test. A review of all states in which the functional parent test has been adopted is beyond the scope of this article. For examples of some such states, see D. NeJaime, "Marriage Equality and the New Parenthood," 129 *Harvard Law Review* 187 (2016) and amicus briefs in *Brooke S.B.* in support of Brooke's position.

parent's child. If the partner was abusive, the danger presented by the partner potentially gaining parental status would be even more frightening.

But the *Brooke S.B.* case does not mean that abuse victims and survivors and their advocates can rest, believing that they are safe from such threats. The Court did not say it would not extend the holding in that case to parents whose factual situations were different from the pre-conception estoppel situation in *Brooke S.B.* In fact, the Court specifically said that it might do so.[22] That could be dangerous for some abuse victims.

Persons not familiar with New York custody cases involving domestic abuse might not understand the danger to abuse victims and survivors posed by custody litigation and therefore might not understand why it would be dangerous to give standing to abusers. They might think that all judges would be careful to protect children from abusers by denying them custody and making sure that any visitation would be safe for the child and the custodial parent. Unfortunately, that is not always the way cases are resolved in the real world.

The New York statute concerning custody when domestic abuse has occurred is not as protective of victims as the laws of most states, which generally create a presumption against courts granting custody to an abuser.[23] However, on its face, the New York law, when enacted in 1996, appeared to provide a good deal of protection. It stated:

> Where either party to an action concerning custody of or a right of visitation with a child alleges in a sworn petition or complaint that the other party has engaged in a act of domestic violence against the party making the allegation or a family or household member of either party, . . . and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making such a direction pursuant to this section.[24]

The legislative history of the statute indicates that the Legislature intended that domestic violence should be a weighty factor,[25] but by 2009, the Legislature found it necessary to pass an amendment to the 1996 statute, stating

> In 1996, the legislature recognized the harmful effects of domestic violence on children and established domestic violence as a factor that courts must consider in child custody and visitation proceedings. Thirteen years later, studies indicate that the presence of domestic violence

[22] Brooke S.B. v. Elizabeth A.C.C. 28 N.Y.3d at 27-28.

[23] Articles and charts on the state laws on domestic violence and custody exist in several places. For example, see the National Council of Juvenile and Family Court Judges chart at http://www.ncjfcj.org/sites/default/files/chart-custody-dv-as-a-factor.pdf.

[24] NY Domestic Relations Law Section 240(1), originally enacted as L. 1996, ch.85, Section 2 (subsequently amended by L. 2009, ch.476, Section 2).

[25] Legislative Memorandum in Support of L. 1996, Ch. 85 Section 1.

> often has little impact on custody and visitation determinations. This bill would require courts to state on the record how the findings, facts and circumstances of domestic violence or child abuse were factored into the custody or visitation determination, where such abuse was established by a preponderance of the evidence.[26]

Unfortunately, case law interpreting the statute has continued to demonstrate that, in practice, abusers still obtain sole or joint custody in surprisingly many cases.[27] Part of the reason may stem from the fact that judges rely heavily on custody evaluations by mental health professionals.[28] Those individuals are often not well trained in domestic violence. Additionally, many custody evaluators (sometimes called "forensics") unreservedly accept and apply the empirically unsupported theory of "parental alienation syndrome" (PAS), which was invented by Richard Gardner in the 1980's.[29] PAS, under whatever name is substituted for PAS by its supporters, such as "parental alienation," "alienation," "gatekeeping," or some other appellation, has not been accepted by the American Psychiatric Association, the America Psychological Association, or any other reputable mental health organization.[30]

According to Gardner's original theory, mothers (his theory was sex biased) often attempt to obstruct or even destroy the father-child relationship by false allegations of domestic violence, child sexual abuse, or other maltreatment or wrongdoing. His cure was to take the mother out of the child's life altogether for months, without contact of any kind, to allow the

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[26] N.Y. Domestic Relations Law Section 240(1), L. 2009, ch. 476, Section 2.

[27] *See, e.g.*,cases cited in M. BREGER, D. KENNEDY, J. ZUCCARDY & L. ELKINS, NEW YORK LAW OF DOMESTIC VIOLENCE, Sections 4:21 and 4:22 (Toronto: Thomson Reuters, 2013). See also L. Rosen & C. O'Sullivan, "Outcomes of Custody and Visitation Petitions When Fathers are Restrained by Protection Orders: The Case of the New York Family Courts," 11 *Violence Against Women* 1054 (No. 8, August, 2005). This is not unique to New York. Abusers often get custody even in states with laws that would seem on the surface to be more protective of the children of abused parents. *See, e.g.*, J. Meier, "Mapping Gender: Shedding Empirical Light on Family Courts' Treatment of Cases Involving Abuse and Alienation," 35 *Law & Inequality* 311 (2017).

[28] M. Davis, C. O'Sullivan, K. Susser, & M. Fields, Custody Evaluations and Domestic Violence: Practices, Beliefs and Recommendations of Professional Evaluators, NCJ 223465, NIJ-sponsored (156 pages), available at https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf. New York courts have held that a judge may not arbitrarily disregard an evaluation. *See, e.g.*, cases cited in M. BREGER, D. KENNEDY, J. ZUCCARDY & L. ELKINS, NEW YORK LAW OF DOMESTIC VIOLENCE, Section 413 (Toronto: Thomson Reuters, 2013).

[29] See, e.g., J. Meier, "A Historical Perspective on Parental Alienation Syndrome and Parental Alienation," 6 *Journal of Child Custody,* 232 (2009).

[30] N. Erickson , "Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse," in M. HANNAH & B. GOLDSTEIN (eds). DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES, 20-1 to 20-38 (Kingston, N.J.: Civic Research Institute, 2009). An updated version of the book chapter, with the same title, may be found in 6 *Family & Intimate Partner Violence Quarterly* 35 (2013). See also M. BREGER, D. KENNEDY, J. ZUCCARDY & L. ELKINS, NEW YORK LAW OF DOMESTIC VIOLENCE Section 4:14 (Toronto: Thomson Reuters, 2013) and sources cited therein.

father time to "deprogram" the child.[31] Custody evaluators have often convinced judges to change custody from a primary caretaker parent to an abusive parent on an alienation theory and to prohibit the primary caretaker parent from even having phone calls with the children for months, disregarding the psychological damage to the child caused by removal from the primary caretaker parent.[32]

Another reason for the great number of cases where abusers – especially where the abuser is the father – are granted sole or joint custody is undoubtedly the fact that fathers generally have more financial resources than mothers, allowing them to have more comfortable homes, to hire experienced attorneys and to wage scorched earth warfare against mothers. Courts are sometimes heavily influenced by the wealthier parent's financial resources.[33]

Such warfare itself is so damaging to domestic violence survivors and their children that to grant parental status – and, therefore, to grant standing to seek custody – to categories of non-parents should be done only after thoughtful consideration. In *Debra H.*, the Court had been concerned that without a "bright line rule" on standing, "disruptive battles" over standing would precede "further potential combat over custody and visitation."[34]

In *Brooke S.B.*, the New York Court of Appeals set down a new "bright line rule," at least temporarily. The Court carefully considered not only the parties' briefs and the amicus briefs[35] supporting a broader extension of parental rights to unmarried non-biological parents but also carefully considered the amicus brief submitted by a group of organizations seeking to carefully and cautiously limit that extension of rights, in order to avoid unintended consequences. That brief was referred to by the Court as the Sanctuary for Families amicus brief. Sanctuary for Families is an organization that advocates for and represents primarily victims and survivors of domestic abuse.

[31] R. GARDNER, TRUE AND FALSE ALLEGATIONS OF CHILD SEX ABUSE (Cresskill, N.J.: Creative Therapeutics, 1992). See also sources cited *Id*.

[32] S. Dallam & J. Silberg, "Recommended Treatments for "Parental Alienation Syndrome" (PAS) may Cause Children Foreseeable and Lasting Psychological Harm," 13 *Journal of Child Custody* 134-143 (2016).

[33] *See, e.g.*, Carl T., Sr. V. Yajaira A.C., 95 A.D.3d 640 (1st Dept. 2012), where the decision to change custody from the mother, who had an order of protection against the father, to the abusive father was based in part on the father's ability to provide a more stable financial situation. The decision did not note whether the father had been paying child support. If he had not, that could well have caused the mother's financial instability. Sometimes, of course, it is the mother who has superior resources, especially if she has married after her relationship with the father has ended.

[34] Debra H. v. v. Janice R., 14 N.Y.3d 576, at 594-595 (2010).

[35] Amicus curiae means "friend of the court," which is a "non-party that volunteers or is invited by the court to submit its views on the issues presented in a case, because it has an interest in or perspective on the matter that may not be adequately represented by the parties. Usually the amicus curiae (or amicus for short) only submits a brief (called a brief amicus curiae or amicus brief), but sometimes the amicus is also allowed to participate in oral argument." J. CLAPP, RANDOM HOUSE WEBSTER'S DICTIONARY OF THE LAW 27 (NY: Random House, 2000).

Other organizations were also signatories to the Sanctuary for Families brief, so the brief represented the views not only of domestic violence organizations but also organizations representing low income and other vulnerable parents.[36] The Sanctuary for Families amicus brief appears to have influenced the Court's decision to take one step at a time when extending parental rights.

WHO IS A LEGAL PARENT UNDER NEW YORK LAW?

In order to understand the enormity of the step taken by the Court of Appeals in *Brooke S.B.*, it is important to understand what consequences flow from being held to be a child's parent. Most people – even most attorneys—think they know what words like "parent," "custody," and "visitation" mean, but the definitions are more complex than they often seem on the surface.

A person who is a parent of a child has a whole bundle of rights regarding the child – not just the right to seek "custody" or "visitation." A parent has the right to sue for money damages if someone hurts or kills the child. A parent has the right to inherit from a child if the child dies without leaving a will. A parent has the right to prohibit a child from obtaining most types of medical care without the parent's consent. On the child's side, through a legal parent the child may gain many valuable legal rights and benefits from a parent, such as the right to support and care, social security on the parent's account, possible life insurance benefits, health insurance, the right to sue for money damages if someone kills or injures the parent, and possible inheritance rights.

For most parents of children who have not reached majority, the most important right they have is the right to seek custody (or visitation, which is a lesser form of custody). There are two kinds of custody: (1) "legal" ("decision making") custody, which is the right to make all decisions regarding the child's upbringing – education, religion, medical care, etc., and (2) "residential" ("physical") custody, which is the right to have the child live with that parent.

The right to visitation (sometimes called "access" or "parenting time") is the right to spend time with the child – usually regularly scheduled time—and to make any decisions that are necessary while the child is with that parent. The non-custodial parent can also make decisions that are necessary in an emergency. For example, in a medical emergency that might arise during the non-custodial parent's visitation with the child, the non-custodial parent may make necessary medical decisions. However, the custodial parent must be notified immediately and takes over decision-making at that point.

[36] Amici curiae on the brief were: Sanctuary for Families, the Battered Mothers Custody Conference, Brooklyn Defender Services, The Center for Family Representation, the Domestic Violence Legal Empowerment and Appeals Project, My Sisters' Place, and the New York University School of Law Family Defense Clinic. The author assisted with the drafting of the brief on behalf of Sanctuary for Families and the Battered Mothers Custody Conference. The Sanctuary for Families Amicus Brief is attached to the online version of this article as an Appendix.

If parents are married, they usually reside together with the child, and married parents have joint legal custody of any child that is the child of both, so they make all decisions regarding the child together (theoretically at least – abusers often make the decisions and coerce the other parent to follow those decisions). In New York, when married parents are in the process of separating or divorcing, then the issue arises of who will have decision-making custody and residential custody, along with the issue of visitation to the non-custodial parent. Similarly, if unmarried parents separate, the same issues of custody and visitation arise.[37] The parents can come to an agreement regarding custody and visitation or a court has to decide.

If a parent is granted sole legal custody by agreement or court order, that parent can make all the major decisions regarding the child and all the smaller, daily decisions as well while the child is with that parent. If a parent has "joint" legal custody, that parent and the other joint legal custodian must try to make all the major decisions regarding the child together. If they disagree and cannot come to an agreement, then they must go back to court.

TRADITIONAL WAYS TO GAIN "STANDING" TO SEEK CUSTODY OR VISITATION

In order to have custody or visitation rights to a child, an individual must first have legal parent status or must have another basis for "standing" to claim custody or visitation. Obviously, if a parent was abused by her/his partner, s/he would not want the partner to have or to obtain "standing" to seek custody or visitation, because that could be harmful both to the parent and to the child.

In the past, a single parent who was a woman could be assured that her male partner would not be able to get standing to seek custody or visitation if she was not married to him because "putative" fathers had no legal rights or obligations. Later, biological fathers got custody and visitation rights if they could prove their paternity, so a mother could no longer avoid a custody or visitation battle by her abusive partner if he could prove he was her child's biological father.[38] Those are the two traditional ways – marriage to the mother or proof of paternity – for a man to gain standing to seek custody or visitation. Now (and even before *Brooke S.B.*) a mother has to be concerned that her abusive ex-partner might get standing on an equitable theory – either "equitable estoppel" or "extraordinary circumstances."

[37] In some states, if parents were never married, the mother automatically has sole custody unless and until the biological father's paternity is established and he convinces a court that joint custody (or sole custody to him) is in the best interests of the child. In New York, the parents have equal custody rights unless and until a court decides otherwise. See discussion of the development of New York law in the concurring and dissenting opinion of Judge Mangano in *Gloria S. v. Richard B.*, 80 A.D.2d 72 (2d Dept.1981) and cases cited therein.

[38] Stanley v. Illinois, 405 U.S. 645 (1972) and Caban v. Mohammed, 441 U.S. 380 (1979). But see Lehr v. Robertson, 463 U.S. 248 (1983), in which an unmarried father who failed to take certain steps required by New York law to establish his parentage was denied the right to notice and a hearing prior to the child's adoption by the mother's new husband.

We will first discuss the traditional ways for parents to gain standing. Traditionally, a woman gains legal parent status regarding a child if she gives birth to the child. A man is usually recognized as a legal parent if he is the biological father of the child, as noted above,[39] but the most common way that a man gains legal parent status is by marriage to the mother.[40] A married man will also become the legal parent to a child conceived by his wife by means of artificial insemination, if done with his consent.[41]

In some cases, the husband is not actually the biological father of a child born to his wife, because the child was conceived as the result of a relationship with another man. If either spouse later seeks to deny the husband's parentage, a rebuttable presumption arises that he is the father.[42] Until modern science began to be used to test parentage, it was very difficult to rebut the presumption of paternity. Now state laws often allow the use of genetic testing to show that the husband is not the father, especially if another man claims to be the father. However, the husband can be precluded from getting genetic testing to disprove his paternity if the concept of estoppel applies to his case.[43]

If a mother is not married at her child's birth, a man alleged by the mother to be the father or claiming to be the father may be adjudicated to be the father. This can be done in most states by an agreement between them that is ratified by a court, even if they know the child is not biologically his or they are uncertain. If he denies paternity, he can be adjudicated the father by a court after genetic testing that shows he is the father.

Either a man or a woman can also gain parental status by adopting a child. Under the original adoption laws in New York, only a married couple could adopt a child, but that law was expanded a few times until, in 1995, the Court of Appeals held that any person – single or married, regardless of sexual orientation – may adopt.[44]

PARENTAL STATUS BASED ON EQUITABLE ESTOPPEL

Some states seek to protect a child's relationship with its mother's husband, even if he is not or may not be the biological father, by applying an equitable

[39] *Id*.

[40] A presumption of paternity arises if the parents are married. In New York, that is found in Domestic Relations Law Section 24 and Family Court Act Section 417. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the United States Supreme Court, by a very slim majority, held a California law constitutional which made the presumption irrebuttable unless either the mother or her husband sought blood tests to disprove the presumption. In the Michael H. case, the man who claimed to be (and probably was) the biological father of the child sought to be adjudicated the father of the child over the objection of the mother and her husband. It should be noted that now, almost thirty years later, it is questionable whether a case on these laws and these facts would result in the same decision.

[41] New York Domestic Relations Law Section 73.

[42] See statutes cited in note 40 *supra*.

[43] See New York Family Court Act Section 418. See estoppel cases at text accompanying notes 45 to 50 *infra*.

[44] Matter of Jacob, 86 N.Y. 2d 651 (1995).

estoppel theory. For example, if the mother's husband has brought up the child as his own and the child believes him to be the father, then the court may not allow the husband to disclaim the child – he is "estopped" from disclaiming the child—because the child would then lose the only father the child knows and, presumably, loves, and would lose support from the man.[45] Similarly, if the mother knows the child is not the child of her husband but lets the husband believe he is the father, she may not be permitted later on to deny that he is the father, because she is "estopped" from denying it.[46]

One New York Court of Appeals case defined "equitable estoppel" as follows:

> [T]he purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position.[47]

In many states, the doctrine of estoppel can apply in non-marital situations the same way as has been described for marital parents. Most commonly, this arises when a child's legal parent – most often the mother – lives with a man and they hold him out as the child's father, even knowing he is not, and the child grows up believing the man is his or her father. Later, typically if the parties separate, if the man decides to avoid the responsibilities of parenthood by challenging his paternity, a court may hold that he is estopped from denying that he is the father.[48] Similarly, if the mother tries to claim he is not the father, a court may hold that she is estopped from denying paternity. However, proof of domestic violence by the man that caused her to fear his violence if she did not concede to his wishes to be viewed as the father might be able to persuade a court that the mother should be allowed to deny his paternity.[49]

A related form of estoppel – called judicial estoppel – may be applied in certain circumstances. For example, if a mother sues for child support and her former non-marital partner either agrees that he (or she) is the father

[45] *See, e.g.*, Richard B. v. Sandra B.B., 209 A.D.2d 139 (1st Dept. 1995).
[46] *See, e.g.*, Jean Maby H. v. Joseph H., 246 A.D.2d 282, 676 N.Y.S.2d 677 (2d Dept. 1998); Christopher S. v. Ann Marie S., 173 Misc. 2d 824 (Family Ct. Dutchess Co. 1997).
[47] Matter of Shondel J. v. Mark K., 7 N.Y. 3d 320, at 326 (2006).
[48] *Id*.
[49] Jeannette G.G. v. Lamont H.H., 77 A.D.3d 1076 (3d Dept. 2010). For a case in which a mother was held not estopped to deny the paternity of the apparently abusive man she lived with when the child was born, even though he was named on the child's birth certificate, see L.P. v. L.F., 2014 WY 152 (Supreme Ct, December 2, 2014). The Court also considered whether he should be held to be a functional parent but declined to do so. It does not appear that the Court rested its decision on whether he was abusive or not.

(or mother) or is adjudicated to be the father (or mother) of the child and is ordered to pay child support, the biological mother will be estopped from claiming that her former partner is not entitled to seek custody or visitation.[50] Having sought and gained the benefits of her former partner's parental status, she may not deny her former partner's parental status where it would disadvantage her.

GAINING CUSTODY BASED ON "EXTRAORDINARY CIRCUMSTANCES."

Some states allow persons who have cared for a child to have standing to seek custody or visitation in "extraordinary circumstances." Often the "extraordinary circumstances" are caused by the legal parent. In New York, for example, in *Bennett v. Jeffreys*,[51] an unmarried teenage biological mother, Joanne Bennett, had left her newborn child with Mrs. Marie Jeffreys, a family friend. She then came back when the child was 8 years old to claim custody, alleging that Mrs. Jeffreys had no rights to the child because she was not a legal parent. The child wanted to stay with Mrs. Jeffreys.[52] The Court of Appeals held that Mrs. Jeffreys had standing to seek custody or visitation, stating:

> The State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances. If any of such extraordinary circumstances are present, the disposition of custody is influenced or controlled by what is in the best interest of the child. In the instant case, extraordinary circumstances, namely the prolonged separation of mother and child for most of the child's life, require inquiry into the best interest of the child.[53]

Ultimately, the court determined that the case should be remanded to determine whether custody to Mrs. Jeffreys was in the best interests of the child.[54]

The extraordinary circumstances doctrine has the potential to assist abused parents and their children in some circumstances. For example, if a father and his child live with the paternal grandmother, and the abusive mother has not been in the child's life in any significant way, then if the father dies, the "extraordinary circumstances" doctrine might allow the child to stay with the paternal grandmother, especially because the child needs to recover

[50] Matter of Estrellita A. v. Jennifer L.D., decided on August 30, 2016, along with Matter of Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1 (2016), applied this theory of "judicial estoppel" to same-sex partners.

[51] Bennett v. Jeffreys, 40 N.Y.2d 543 (1976).

[52] *Id*. at 551 (Fuchsberg, J., concurring).

[53] Bennett v. Jeffreys, 40 N.Y. 2d at 544.

[54] If a person gains custody based on extraordinary circumstances, that person gets only custody, not parental status, and the legal parent retains her/his parental status. See *id*. at 551.

from the trauma of losing its father.[55] In such a case, not only the abuse by the mother but also her failure to be a significant part of the child's life contributes to the creation of the "extraordinary circumstances," because the fact that she made herself a virtual stranger to the child puts her in a position where she cannot be a comfort to the child when the child's father dies. In fact, if the child were required to live with her, without the child's grandmother's comforting presence, the child might be further traumatized.

However, there are also cases in which it appears that courts may have failed to use the extraordinary circumstances doctrine in situations in which it arguably should have been applied. For example, in *Matter of Nadia Kay R.*,[56] there are hints that Nadia's mother may have been abused by her husband, but he was granted custody after the mother's death nonetheless.

Nadia's parents were married in Tennessee in 1980 when her mother was 3 months pregnant, and Nadia was born that year.[57] They were divorced in 1982. The mother got custody and moved first to New York to be with her parents and then to New Orleans to be with her brother. The father never visited the child and, after a while, stopped paying child support (he later claimed he did not know where the mother lived).

In 1984, when Nadia was 4 years old, her mother was murdered, and Nadia was left with her body for 3 days. It had been the mother's expressed wish that if anything happened to her, Nadia should live with her aunt and uncle. That fact raises a red flag – the mother clearly believed the father would not be a good parent for the child. The police found Nadia and gave her to her mother's brother, who took Nadia to her aunt and uncle in New York. Eight months later, they petitioned for custody. They did not know where the father was, so they were allowed to serve him via his last known employer and last known address in Kentucky, but the court papers were returned unclaimed. Then a guardian ad litem was appointed in 1985, and the GAL located the father through his father and brother in Tennessee. The father, who was working in Florida, sought custody, but he did not visit the child or send child support to the aunt and uncle while the child was with them.

The trial court dismissed the petition of the aunt and uncle. The Appellate Division affirmed, saying that there were no "extraordinary circumstances," such as unfitness or a protracted voluntary separation from the child, that would justify a best interests hearing that could allow the court to give custody to a non-parent over the objections of the parent, citing *Bennett v. Jeffreys.*

However, one judge vigorously dissented, saying that the child was "extremely traumatized by the tragic events" and had been living in a "caring and nurturing environment" for two years.

[55] Facts taken from a case in which author was involved. See also *Gomez v. Lozado*, 40 N.Y.2d 839 (1976), which was decided along with *Bennett v. Jeffreys*, and *Antoinette M. v. Paul Seth G.*, 202 A.D.2d 429 (2d Dept. 1994).

[56] Matter of Nadia Kay R., 125 AD.2d 674 (2d Dept. 1986).

[57] Under these facts, he may not have been Nadia's father, but that issue was never raised.

The dissenting judge stated:

> The natural father . . . has not seen or spoken to the child, nor has he made any support payments, since her departure from Tennessee in May 1983. His only proffered excuse is that his former wife left no address when she and the girl left Tennessee, and that when he telephoned the mother's brother in New Orleans, the brother refused to apprise him of their whereabouts.[58]

The dissenting judge also noted that the father's job required a lot of travel and the father had no plans for employment that would allow him to live in one place with Nadia. He concluded:

> Here, where the father has virtually abandoned his daughter and where the aunt and uncle have been conscientious and caring guardians, it would be an egregious error to precipitously return the girl to her apparently neglectful and uncaring father. I am convinced that extraordinary circumstances exist here to as to require a determination of what is truly in the best interests of the child. . . ."[59]

This case not only illustrates that courts may miss some red flags regarding possible domestic abuse or the safety and wellbeing of the child but also illustrates the broad discretion of the courts when determining what constitutes "extraordinary circumstances." Such broad discretion could make this doctrine dangerous when used by an abusive non-parent seeking to get custody from a legal parent.

For example, in *Boyles v. Boyles*,[60] an early Appellate Division case, a blood grouping test excluded the husband as the father of his wife's child, but the trial court held he had standing to seek custody, declaring that, on the facts of the case, extraordinary circumstances existed. The parties had gotten married when the mother was pregnant. The birth certificate listed the husband as the child's father, the child was given the father's last name, and the parties and the child lived together as a family unit in Hawaii, where the father was stationed in the army, until the child was about 2 ½ years old. The father then took the child and went to Sullivan County, New York, where they had grown up and married. The court noted that there was "a factual dispute as to whether [the father] took the child over [the mother's] objections or [she] consented."[61] However, there was no reason given as to why the mother would agree to the father taking her child to New York and leaving the mother without any support thousands of miles away from her child and her family of origin.

[58] 125 A.D.2d 674, at 679.
[59] *Id*. at 680.
[60] Boyles v. Boyles, 95 A.D.2d 95 (3d Dept. 1983).
[61] *Id*. at 96.

The mother returned to Sullivan County more than a year later. Both spouses sought custody of the child. The Family Court, relying on *Bennett v. Jeffreys*,[62] did not find that extraordinary circumstances existed.[63] The court concluded that the mother had not abandoned the child and was not unfit. Therefore, since the husband was not the child's father, the Family Court held that the mother was entitled to custody without a determination of the child's best interests.

The Appellate Division reversed, saying that extraordinary circumstances existed because "during the first two and one-half years of the child's life, [the mother's] conduct had the effect of authorizing and encouraging the development of a father-son relationship between [the husband] and the child. . . . [Therefore, the mother], through her involvement and development of the father-son relationship . . . has put the child in a situation where his welfare could be affected drastically and, thus, an extraordinary circumstance exists requiring inquiry into the child' best interests."[64] In essence, the court was saying that the situation was the fault of the mother, because the court viewed the mother as not only allowing the relationship to develop but encouraging it.

In a footnote, however, the Appellate Division admitted that the mother had given a far different explanation of the circumstances. She "asserted at the hearing that she was coerced into remaining silent about [her husband's] paternity."[65] The Appellate Division admitted that the Family Court had made no finding concerning the mother's claim of coercion. However, the Appellate Division took it upon itself to make findings of fact, stating "we find [her claim of coercion] unsubstantiated in view of her conduct and her admissions that she was employed, had access to the family car, was not physically restrained or abused and, yet, made no attempt to remove herself and her child from the family abode."[66] This sounds like the old question asked so often before the law recognized that domestic abuse is not necessarily perpetrated by physical violence alone – the old question of "If she really was abused, why didn't she just leave?" In 1983, when this case was decided, that was the attitude toward victims of abuse, because it was not recognized that domestic abuse, at its core, is a matter of coercive control.[67]

We do not and cannot know whether the wife was coerced into allowing the husband to develop a father-son relationship with the child, but we do know that the elasticity of the extraordinary circumstances theory allowed the court to find a way to place a non-parent on an equal standing with a parent.[68]

[62] 40 N.Y.2d 543 (1976).
[63] Boyles v. Boyles, 95 A.D.2d 95, at 96.
[64] *Id*. at 99. The court also held that the mother was estopped from claiming that her husband was not the father.
[65] *Id*. at 101.
[66] *Id*. at 101.
[67] E. STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (New York: Oxford University Press, 2007).
[68] The Appellate Division also found that the wife was equitably estopped from claiming that the husband was not the child's father. In other words, the same facts upon which a finding of equitable estoppel was made could also be the basis of a finding of extraordinary circumstances.

"FUNCTIONAL" OR "DE FACTO" PARENTHOOD

Some states have granted standing to persons who were not legal parents on the ground that those persons took on the role of a parent, with the permission of the legal parent, even though the legal parent did not "hold out" her/his partner as the child's parent, so that no facts constituting estoppel were present. New York has not chosen to do so.

For example, in some states, one category of such "functional parents," or "de facto"[69] parents, as they are sometimes called, is stepparents. Stepparents have the legal obligation in most states to support their stepchildren financially during the marriage, and normally they act as a parent to their stepchildren in many other ways. However, if the stepparent and legal parent divorce, and the stepparent has not adopted the child, the stepparent usually has no right to seek custody or visitation unless the state recognizes stepparents (or broader categories of functional parents) as having such rights.[70]

Some states have gone farther and have granted such rights to persons who were never legal stepparents to the children at issue but took on a parental role. Initially, most of those cases involved traditional opposite sex partners, where the legal parent (usually the mother) lived with an individual (usually a male partner) who helped raise the child with her but did not adopt the child and was not held out as the child's parent. When they later split up, the court had to decide whether he qualified as a functional parent. Later cases sometimes involved same-sex partners.

The most often cited case, *In re Custody of H.S.H-K,*[71] involved a lesbian relationship. In that case, the Wisconsin Supreme Court set forth a functional parent test for standing to seek visitation. It should be noted that the court limited persons who "passed" the test to seeking visitation only, not custody. Thus, the term "functional parent" is somewhat misleading, because even passing the test would not turn a non-parent into a parent but only a potential visitor.

The case involved Sandra Holtzman and Elsbeth Knott, who met in 1983 and started living together. Although Wisconsin law did not authorize same-sex marriage at that time, they had a ceremony in 1984 in which they exchanged vows and rings. They decided to raise a child together by artificial insemination (ADI – artificial donor insemination), and Elsbeth became pregnant in 1988.

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[69] "De facto" means "existing in fact, without regard to legal requirements or formalities; said of things that came into being without legal blessing, but that the law may chose to take cognizance of for practical reasons." J. CLAPP, RANDOM HOUSE WEBSTER'S DICTIONARY OF THE LAW 228 (NY: Random House, 2000).

[70] For example, New York law does not give a former stepparent—after divorce from the legal parent – rights to custody or visitation, absent extraordinary circumstances or a finding of estoppel. In contrast, by statute in New York, grandparents and siblings are provided the right to seek visitation under certain circumstances. New York Domestic Relations Law Sections 72 and 71.

[71] 193 Wis.2d 649 (1995).

The child was born on December 15, 1988, and Sandra took on all the usual duties of a parent. Sandra's parents and other family members were recognized as the child's grandparents, and her sister as the child's godmother. Their church recognized both Elsbeth and Sandra as the child's parents.

Their relationship deteriorated in 1992, and on January 1, 1993, Elsbeth declared the relationship over. In May, Elsbeth moved with the child to another residence, but Sandra tried to maintain her relationship with the child until August 24, 1993, when Elsbeth said she was terminating Sandra's contact with the child. Two days later, Elsbeth sought a court order restraining Sandra from having any contact with her or the child, claiming Sandra had threatened or intimidated her. At the hearing they agreed the petition would be dismissed and Sandra would not contact Elsbeth. In September, Sandra filed for custody and visitation, and Elsbeth responded by filing a motion for summary judgment to get the case dismissed on the ground that Sandra was not a parent of the child. Although a guardian ad litem for the child reported that the child viewed both Elsbeth and Sandra as his parents and wanted to continue to see Sandra, the trial court "reluctantly" granted the motion for a summary judgment, concluding that the law "ignores the welfare of children reared . . . in nontraditional relationships when those relationships terminate."[72] Sandra appealed.

The Supreme Court of Wisconsin, after finding that Wisconsin statutes gave no basis for an award of either custody or visitation to Sandra, found such a basis in the court's equitable power to protect the best interests of the child by ordering custody under circumstances not included in the statutes. The court declared that although a parent has a constitutional right to rear his or her child free from unnecessary state intervention, if a parent-like relationship develops "with the consent and assistance of the biological or adoptive parent," then state intervention may be warranted to "protect a child's best interests by preserving the child's relationship with an adult who has been like a parent."[73]

Under the Wisconsin functional test set forth in *In re Custody of H.S.H-K*, the person seeking visitation must meet two requirements: that "he or she has a parent-like relationship with the child" and that (2) "a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent." To determine the existence of a "parent-like relationship," the court must find that the person seeking visitation has sufficiently proven four elements:

> (1) That the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without

[72] 193 Wis.2d 649, at 662, discussing the trial court's decision.
[73] 193 Wis. 2d 649, at 696.

> expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature."[74]

It is significant that the first of the four elements is the consent of the legal parent. Theoretically, functional parenthood cannot be proven if consent was lacking. Especially in the context of domestic abuse, however, it may be difficult to determine whether the legal parent consented or was intimidated.[75]

Under the Wisconsin functional parent test, if all four elements are proven, the person seeking visitation must then demonstrate that a "significant triggering event" has occurred. In most cases, that event would not simply be that the partner and the legal parent are no longer living together as partners but that the legal parent has stopped allowing the partner to see the child. In other words, the mere cessation of the relationship between the two adults would not justify state intervention, but state intervention would be justified if the legal parent severed the relationship between the child and the other parent, which presumably could harm the child as well as the second parent.

It should be noted that although the functional parent test set forth by the Wisconsin court does not require that the non-biological parent be invited by the parent to participate in the planning of the child's conception, or to be involved at all before the child's life begins, in *In re Custody of H.S.H-K*, Sandra and Elsbeth did in fact have a pre-conception agreement to have a child and raise the child as a couple. This fact was crucial in the *Brooke* case, which was decided on the pre-conception estoppel theory. Consequently, if Wisconsin had adopted the pre-conception estoppel theory, Sandra would not have needed to argue for the application of a functional parenthood doctrine.

It should also be noted that if Sandra had been a man, the court could have held Elsbeth estopped from claiming Sandra was not the child's parent (father) because Elsbeth (and Sandra, with Elsbeth's consent) held out Sandra as the child's parent. However, because Sandra was female, it was impossible for Sandra to really be the child's biological parent,[76] regardless of what Elsbeth claimed, so no one would have believed that Sandra was the child's biological parent. The only other way that Sandra could have been the child's parent would have been by adoption.

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[74] 193 Wis.2d 649 at 694-695.

[75] See discussion of *Boyles v. Boyles*, 95 A.D.2d 95 (3d Dept. 1983) in text accompanying notes 60 to 68 *supra*.

[76] Now it is possible for a child to have two biological mothers. For example, an egg from Sandra could have been fertilized and then implanted in Elsbeth's uterus. But at that time – over twenty years ago – science had not progressed to that point. Even with such facts, one could argue that only Sandra was a mother of the child resulting from such procedure, if one viewed Elsbeth as merely providing a uterus, but we are starting to learn that even in such a situation, the embryo (and, later the fetus) might gain some biological elements from the woman in whose uterus it grows. F. Vilella, J.M. Moreno-Moya, N. Balaguer, *et. al.*, "Hsa-miR-30d, Secreted by the Human Endometrium, is Taken up by the Pre-Implantation Embryo and Might Modify its Transcriptome." 142 *Development* 3210-3221 (2015).

New York does not accept the functional parenthood doctrine, although some states do. In *Brooke S.B,* the Court of Appeals was asked by the non-biological mother to accept that doctrine, but the Court declined to so in that case. However, it left open the possibility of accepting the functional parenthood doctrine in the future.

THE BROOKE S.B. CASE: A HARD CASE WITH A SYMPATHETIC PLAINTIFF

Like Alison[77] and Debra,[78] Brooke was in a relationship with another woman, the two lived together as a couple, the two decided to have a child together by artificial insemination and raise the child together, a child was born, they raised the child together, and then they separated. Also like Alison and Debra, Brooke was allowed by the biological mother to continue a relationship with the child for a while, but later was cut off from the child's life by the biological mother. Finally, all three children of those mothers viewed both of their two mothers as their mothers.

Unlike in the *Alison D.* and *Debra H.* cases, however, the Court of Appeals was ready to expand the definition of "parent" to couples in the general fact pattern of those cases. The Court also had a particularly sympathetic plaintiff seeking that expansion. Brooke had "stayed at home with the child for a year while [Elizabeth] returned to work,"[79] so Brooke was the "primary caretaker" for the child. Additionally, she was so poor that she could not afford to appeal, so the appeal was taken by the attorney for the child.[80]

Judge Abdus-Salaam wrote the majority opinion, with four other judges concurring. Judge Pigott concurred in the result but not in the reasoning of the majority.

The majority opinion reviewed the facts in *Brooke S.B.,* the arguments presented, and the decisions in the two courts below. The Court also reviewed the previous cases where, under virtually identical facts, the Court had declined to expand the definition of parent. The Court then turned to the changed legal landscape since *Alison D*,[81] stating

> *Alison D.*'s foundational premise of heterosexual parenting and nonrecognition of same-sex couples 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*, 576 U.S. ___,

[77] Alison D. v. Virginia M., 77 N.Y.2d 651 (1991).
[78] Debra H. v. Janice R., 14 N.Y.3d 576 (2010).
[79] Brooke S.B. v. Elizabeth A.C.C., 28 NY3d 1, at 14.
[80] See D. NeJaime, "The Story of Brooke S.B. v. Elizabeth A.C.C.: Parental Recognition in the Age of LGBT Equality," forthcoming in M. MURRAY, K. SHAW & R. SIEGEL (eds.), REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Foundation Press, forthcoming 2019). A Preliminary Draft of this article was found on line, and it was marked: "Please do not cite or circulate without author's permission." The author's permission was granted by email to Nancy S. Erickson dated March 19, 2018.
[81] Alison D. v. Virginia A., 77 N.Y.2d 651 (1991).

> 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples. Under the current legal framework, which emphasizes biology, it is impossible – without marriage or adoption – for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child (see *Alison D.*, [citations omitted]). By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption. It is this context that informs the Court's determination of a proper test for standing that ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents.[82]

The Court recognized that the "fundamental nature" of the right of biological or adoptive parents to control the upbringing of their children "mandates caution in expanding the definition of [parent] and makes the element of consent of the biological or adoptive parent critical."[83]

However, the Court also recognized that it would be inappropriate to set "an overly-restrictive definition of 'parent' that sets too high a bar for reaching a child's best interest and does not consider equitable principles [citing to Judge Ciparick's concurrence in *Debra H.*]"[84] Accordingly, the Court overruled *Alison D.*

After overruling *Alison D.*, the Court in *Brooke S.B.* reviewed the various tests that had been proposed by Brooke's attorneys and by amici in order to determine which test would be appropriate in the case before it and possibly in future cases. The Court noted that Judge Kaye, in her dissent in *Alison D.*, had cautioned that any test to expand the definition of parent would have to be narrow because of the fundamental constitutional right of a biological or adoptive child to raise her or his child.[85]

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[82] Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1, at 24-25.

[83] *Id*. at 26.

[84] *Id*.

[85] Alison D. v. Virginia M., 77 N.Y.2d 651, at 660-61 (Kaye, J., dissenting). There are cases in other jurisdictions where courts would not expand the definition of "parent" because any expansion would be viewed as infringing on the constitutional rights of a biological or adoptive parent. *See, e.g.*, *Jane Doe v. Jane Doe I*, decided by the Idaho Supreme Court on June 7, 2017, 2017, opinion No. 60, Docket No. 44419. In New York after *Brooke S.B.*, this case probably would have been viewed as a pre-conception estoppel case, and the partner of the biological mother would have been declared a parent to the child. However, the trial court granted the parent only visitation, not full parental status. On appeal, the Idaho Supreme Court held that the law did not even permit the partner to seek visitation, because of the biological mother's "constitutional right to care, custody, and control of their children," citing *Troxel v. Granville*, 530 U.S. 57, at 66 (2000). *See also* De Los Milagros Castellat v. Pereira, Florida Third District Court of Appeal, August 16, 2017, No. 3D16-1855. In New York after *Brooke S.B.*, this case too probably would have been viewed as a pre-conception estoppel case, and the partner of the biological mother would have been declared a parent to the child. However, based on the Florida Constitution's right to privacy, which was interpreted as being even more protective than the federal Constitution, the case was dismissed. The Florida court held that "absent evidence of detriment to the child, courts have no authority to grant custody or to compel visitation by a person who is not a natural parent and that agreements providing for visitation by a non-parent are unenforceable," citing to prior Florida caselaw.

The majority in *Brooke S.B.* mentioned first the "functional parent" test urged by Brooke's attorneys and some of the amici and noted that it had been adopted in some other jurisdictions, such as Wisconsin (for visitation only, not custody) in the case discussed above – *In re Custody of H.S.H-K.*.[86] The Court pointed out, as has been noted above, that many of the factors in the functional parent test "relate to the *post-birth* relationship between the putative parent and the child."[87]

In contrast, it referenced the Sanctuary for Families amicus brief, saying that the test proposed in that brief "hinges on whether petitioner can prove, by clear and convincing evidence, that a couple 'jointly planned and explicitly agreed to the conception of a child with the intention of raising the child as co-parents. . . .'"[88]

The Court noted that it had been asked to declare one test that would be applicable to all situations, but it declined to do so, stating "We reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered." It then declared that, in this particular case, it would apply the Sanctuary for Families test, which it referred to as the "conception test," adding a note for future cases:

> Because we necessarily decide these cases based on the facts presented to us, it would be premature for us to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. *Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody*.[89]

This language is the crucial language for domestic abuse victims and survivors, especially those who are single parents. If, in future cases, the Court of Appeals leaves the *Brooke S.B.* test unchanged, single parents will not have to fear that a significant other or even a spouse will be able to get custody or visitation rights simply by living with the parent and having some kind of parental role with the parent's already existing children.[90] On the other hand, if the Court of Appeals adopts a "functional parent" test, then single parents will be at risk of such an outcome, even if estoppel does not apply because the new partner is not held out as the parent of the children.

[86] 193 Wis.2d 649 (1995), discussed at text accompanying notes 71 to 76 *supra*.
[87] Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1, at 27 (emphasis added).
[88] Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1, at 27.
[89] *Id*. at 27-28 (emphasis added)
[90] This assumes that the courts will not use the "extraordinary circumstances" doctrine to hold that a partner of a legal parent has standing to seek custody despite that partner's failure to meet the *Brooke S.B.* test.

The majority in *Brooke S.B.* concluded by reiterating that these tests were for standing only, and that, in order to get custody or visitation, Brooke would have to prove to the trial court on remand that custody or visitation was in the best interests of the child. Reportedly, Brooke ended up sharing parenting with Elizabeth, and both Brooke and Elizabeth married new partners.[91]

COMPARING THE *BROOKE S.B.* TEST WITH THE "FUNCTIONAL PARENT" TEST

The functional parent test would be much more dangerous for a battered woman (or battered man) than the *Brooke S.B.* test.

Taking the Wisconsin version of the functional parent test as an example of the various functional parent tests throughout the United States, we will reiterate what that test requires in order to compare it with the *Brooke S.B.* pre-conception estoppel test.

To determine the existence of a "parent-like relationship" under the Wisconsin test, the court must find that the person seeking visitation has sufficiently proven four elements:

> (1) That the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature."[92]

For abused parents, there are two very important differences between this test and the *Brooke S.B.* test. First is the matter of timing. Under the Wisconsin test, there is no requirement that the two individuals must have agreed to the conception of the child. The consent on the part of the legal parent and the other parent need only be that the legal parent consented to (and fostered) the "formation and establishment of a parent-like relationship with the child" after the birth of the child. Second, the standard of proof the partner must meet is higher in the *Brooke* test.

Comparing the two tests in more detail, we come to the following conclusions:

1. Neither test explicitly requires the parents to be romantic partners, although the *Brooke S.B.* test arose in such a context and the Wisconsin test seems to assume it.

[91] D. NeJaime, "The Story of Brooke S.B. v. Elizabeth A.C.C.: Parental Recognition in the Age of LGBT Equality," note 80 *supra*.
[92] 193 Wis.2d 649, at 694-695.

2. Both tests would cover any couple, whether opposite sex or same sex.
3. The Wisconsin test requires the partners to live together with the child; the *Brooke S.B.* test does not, so the partners could be living in separate residences.
4. Both tests require some sort of meeting of the minds regarding raising the child together. The *Brooke S.B.* test requires an agreement prior to conception to raise the child together, which makes this arrangement equivalent in a sense to marriage, because one assumption underlying a marriage is that if the parties have children, they will raise the children together. Further, the *Brooke S.B.* opinion emphasizes the need for consent, because legal parents have a constitutional right to "control the upbringing of their children."[93] The Wisconsin test requires that the legal parent "consented to and fostered" the non-biological parent's "formation and establishment of a parent-like relationship with the child." Under the Wisconsin test, the legal parent is not required to "agree" that s/he and the partner will "raise" the child together, which implies caring for the child and having a relationship with the child at least until the child reaches the age of majority.
5. The terms "agree" (in the *Brooke S.B.* test) and "consent to" (in the Wisconsin test) may have slightly different meanings. "Agree" implies a certainty and a full bi-lateral meeting of the minds, such as when parties freely sign an agreement. "Consent to" could mean something more akin to "acquiesce," so it could encompass a situation where the partner chooses to act like a parent and the legal parent fails to disagree with or interfere with the partner's behavior toward the child. For example, the parent may make it clear to the partner that the parent is the one in charge and that the partner may not discipline the child or make decisions regarding the child. Alternatively, the parent may simply allow the partner to decide whether or not s/he will function fully as a parent. A third alternative could be that the partner might coerce the parent into letting the partner run the show. That third alternative would most likely be the case if the partner was abusive, but it would look to the outside world as though the parent was consenting to the partner functioning fully as a parent, whereas in truth s/he was being coerced.
6. Both tests use the phrase "parent-like relationship," but we do not know whether both states mean the same thing by that phrase. After all, what is a "parent-like relationship"? That is a

[93] 28 N.Y. 3d 1, at 26, citing to *Alison D. v. Virginia A.*, 77 N.Y.2d 651 (1991). and *Troxel v. Granville*, 530 U.S. 57, at 65 (2000).

culture-bound concept, deeply entrenched in sex roles. A "parent-like relationship" of a mother with a child in many cultures would be very different from a "parent-like relationship" of a father with a child. So if there are two people of the same sex who are living together, and the legal parent's partner claims to be in a "parent-like relationship" with a child, what facts would evidence such a relationship? For example, would simply living in the same home with a child but almost never seeing or communicating with the child on account of working long hours be sufficient evidence if the child called the adult "mom" or "dad"? Or would more be required?

7. The Wisconsin test apparently would require only the ordinary standard of proof—proof by a preponderance of the evidence – while the *Brooke S.B.* test requires clear and convincing proof of all elements. Thus, an abusive partner in New York might have a more difficult time establishing standing under the *Brooke S.B.* test than under the Wisconsin test.
8. Neither test makes an explicit exception for "extraordinary circumstances," but there would be nothing to prevent a court from applying that concept in a particular case.
9. Neither test requires that the members of the couple remain together any specific period of time in order for the partner to gain parental or visitation rights. The *Brooke S.B.* test apparently would allow the partner of the legal parent to gain parental rights even if s/he agreed to conceive and raise the child together with the legal parent but then changed his/her mind after the conception (in this sense, the partner parent would be no different from a spouse who leaves his/her spouse after a child is conceived – the departing spouse is still legally a parent to the child). The Wisconsin test would require the non-parent to prove s/he "has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." That requirement is vague. Proof of a "bonded, dependent relationship parental in nature" would likely require substantial testimony and other evidence, including expert testimony of mental health professionals.
10. Neither test requires that the partner make any contributions to the well-being of the legal parent (as opposed to the child) during the time that they are together; nor would the partner be required to pay support for the legal parent if they separated, as might be the case if they were married.
11. The *Brooke S.B.* case does not require the partner to make any contributions to the well-being of the child in order to gain parental

status, because parental status is gained as soon as the child is born.[94] The Wisconsin test does require that in order to gain visitation rights, the partner must make contributions to the child's support while the partner is living with the child.

12. The *Brooke S.B.* test does not require that the partner ever have a relationship with the child, much less a loving relationship,[95] although there was a lot of language in the majority opinion in *Brooke S.B.* about the child possibly suffering from a loss of the relationship. Instead, the *Brooke S.B.* test is based primarily on a concept of fairness as between the two adults. The Wisconsin test does require that the child have developed a relationship with the partner of the legal parent and seems to be based on a theory that the child would be damaged by the loss of a relationship with the non-biological parent.
13. The Wisconsin test specifically eliminates paid caretakers such as nannies and babysitters from obtaining visitation rights. The *Brooke S.B.* test does not have any such exemption, but the whole context of the case would lead to the conclusion that paid caretakers could not gain parental rights.
14. The *Brooke* test creates bi-lateral obligations and rights. The partner of the legal parent gains the status of parent, but if the partner decides not to take advantage of that status, s/he is still required to assume the obligations of that status, such as child support, because s/he has gained full parental rights. The Wisconsin test is unclear about whether it operates in a bi-lateral manner; in other words, it is unclear whether the legal parent, having "consented to and fostered" her/his partner's "formation and establishment of a parent-like relationship with the child," can demand anything (such as child support) from the partner if the latter decides to give up that relationship.
15. If the facts in a case pass the *Brooke S.B.* test, the non-biological parent gains full parental rights, including the right to either custody or visitation. If the facts in a case pass the Wisconsin test as set forth in *In re Custody of H.S.H-K.,* the non-biological parent gains only the right to seek visitation, not custody.[96]

[94] Theoretically, even if the child was stillborn, the partner would be considered the child's parent and would therefore have an equal say in final plans for the child's body.

[95] In this respect, the legal situation is the same as if the partners had been married and a child was conceived during the marriage, because a spouse is still a parent even if s/he abandons her/his spouse after the child is conceived and never has a relationship with the child.

[96] 193 Wis.2d 649, at 657 (1995). The author has not researched the Wisconsin cases following *In re Custody of H.S.H-K*. It is possible that Wisconsin cases now hold that a partner passing the Wisconsin test would gain actual custody rights, rather than merely rights to visitation with the child.

16. Neither test would explicitly allow the legal parent to avoid an outcome that would give parental rights or visitation rights to a partner (or to terminate the rights of a partner) on the grounds of domestic abuse or even child abuse. Ordinary state laws on these issues would apply. Therefore, in New York, the partner would have the right to sue for full or joint legal custody and, if s/he did not get full or joint custody, s/he could still get visitation. Under New York law and the law of most states, visitation is assumed to be in a child's best interests, and a parent can be stripped of all visitation only if visitation would be detrimental to the child.[97] Conditions may be imposed on visitation, but only to the extent necessary for the child's safety.

What this all means for a single parent with a child who meets an individual and ends up living with that individual is that if all the requirements of the Wisconsin test are fulfilled, the individual gains the right to have visitation with the child, even against the wishes of the legal parent. If the individual is abusive or becomes abusive, it is unclear whether that individual's visitation rights could be terminated or whether – as in the case of a biological or adoptive parent – it would be almost impossible to terminate his visitation rights.[98] Under the New York *Brooke S.B.* test, on the other hand, such a partner would not even be able to gain rights, because the partner came into the picture after the child was conceived.

CONCLUSION

In *Brooke S.B.*, the New York Court of Appeals overturned *Alison D.*[99] and determined that the concept of equitable estoppel could be used in cases involving same-sex unmarried couples. The test set by the Court is as follows:

> [W]here a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under [New York custody law] Domestic Relations Law Section 70.[100]

This test has been called the "conception" test or the "pre-conception estoppel" test. This test will recognize the parental status of the partners of

[97] M. BREGER, D. KENNEDY, J. ZUCCARDY & L. ELKINS, NEW YORK LAW OF DOMESTIC VIOLENCE, Section 4:23 (Toronto: Thomson Reuters, 2013).

[98] The biological or adoptive parent presumably would be able to get an order of protection under certain circumstances, but such orders in New York rarely are for more than a few years. If the abuse was against the child, Child Protective Services may decide to bring a case against the abusive parent, and that might end in termination of the abusive parent's rights, but that process is not in the hands of the innocent parent.

[99] Alison D. v. Virginia A., 77 N.Y.2d 651 (1991).

[100] Brooke S.B. v. Elizabeth A.C.C., 28 N.Y. 3d 1, at 14.

large numbers of women who give birth after agreeing with their partners to have children and raise them together. It can also be applied to gay male couples who use surrogacy.[101] Additionally, it would not be a stretch for the courts to apply the test to couples who plan to adopt and raise children together.[102]

Brooke S.B. has already been applied in cases with very complex facts. For example, a court applied the *Brooke S.B.* test to married men who agreed to have a child with a surrogate mother.[103] The sperm of one was used to inseminate the egg of the surrogate mother. The plan was that the other partner would adopt the child, but before that happened, the first parent became involved with another partner and married that man. That marriage was void, of course, and the question presented to the court was whether the first partner had a right to seek custody of the child. The court determined that he did, because they both signed the surrogacy agreement and the child was conceived and born while the parties were married.

It is interesting that just recently the United States Supreme Court left standing a decision by the Supreme Court of the State of Arizona that granted parental status to a lesbian non-biological mother in a fact pattern almost identical to that of *Brooke S.B.* and partly on the same pre-conception estoppel test.[104] Perhaps this test will take hold in additional states as well.[105]

If the *Brooke S.B.* test is applied in cases involving single mothers who later meet and cohabit with abusive men (or women), then the abuser will be precluded from successfully claiming that s/he has become a parent to her or his victim's, child because they did not plan the child's conception. However, the Court in *Brooke S.B.* indicated that it might apply other tests – possibly including some type of "functional parent" test – in different situations.

A functional parent test would present potential dangers to single mothers, no matter what their sexual orientation, if the person claiming to be a

[101] Anonymous v. Anonymous, 206 N.Y. App. Div. Lexis 5833 (9/6/16).

[102] In *Kelly Gunn v. Circe Hamilton*, Sup. Ct., NY Co, 4/11/17 (Judge Nervo), a lesbian couple entered into a cohabitation agreement in 2007. They planned to adopt and raise a child together. However, they entered into a separation agreement in 2010. In 2011, Hamilton started the process to adopt a child. Gunn claimed she continued to cooperate with the adoption process even after the parties separated, but Hamilton claimed that the plan to adopt ended with the dissolution of the parties' relationship. The court held, after 36 days of testimony and 341 exhibits, that Gunn did not "meet her burden of proof by clear and convincing evidence that the parties had a plan to adopt and raise a child together that continued unabated," citing *Brooke S.B.*

[103] Matter of Marie-Irene D., Carlos A. et al. v. Han Ming T., 153 A.D.3d 1203, 61 N.Y.S.3d 221 (1st Dept. 2017).

[104] McLaughlin v. Jones, 401 P.3d 492 (Sup. Ct. Ariz. 2018), vacating 240 Ariz. 560 (App. 2016), cert denied, ____ S.Ct. ____ (Feb. 26, 2018). The couple in *McLaughlin* had married, and the Arizona Supreme Court based its decision partly on the marriage (not recognized under Arizona law) and partly on the estoppel theory.

[105] Prior to the Arizona Supreme Court decision in *McLaughlin*, several other jurisdictions had held that the non-biological mother in cases with the same fact pattern as *Brooke S.B.* – a pre-conception agreement on the part of a couple to conceive and raise a child – may get parental rights. See N. Polikoff, "A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century," 5 *Stanford Journal of Civil Rights and Civil Liberties*, 201-268 (2009).

functional parent was abusive. Even if the person claiming status as a functional parent ultimately did not prevail in court, the legal parent would be put through a taxing and expensive legal battle, which could go on for years and would undoubtedly be detrimental to the child as well.

Additionally, a functional parent test is no longer needed to give same-sex partners equality with opposite-sex partners, because same-sex partners can now marry and can adopt the children of their partners. They also have the protection of the holding in *Brooke S.B.*, which allows them to get parental rights without marriage if that is their choice.

It remains to be seen whether the New York Court of Appeals, in a case where the facts fail to meet the pre-conception estoppel test, will further expand the definition of parent or will leave any such expansion to the Legislature.[106]

What is clear, however, is that the United States Supreme Court may ultimately be asked to determine whether a state may define "parent" to include a functional parent or may grant visitation to someone who fits the definition of a functional parent. Then the Court would need to determine whether a functional parent test infringes too significantly on the legal parent's rights under the Constitution.[107]

[106] A bill has been introduced in the New York Senate that would amend Section 70 of the Domestic Relations Law to allow a "de facto parent" to apply for custody of a child. S-3468, Introduced by Senator Parker on January 23, 2017. In the bill, the definition of "de facto" parent is almost identical to the definition of functional parent in *In re Custody of H.S.H-K.*, 193 Wis.2d 649 (1995). As discussed above, such a law would present very serious dangers to single mothers. In addition, although the legislature has never given standing to stepparents, such a bill would have the effect of giving standing to most stepparents.

[107] See cases cited in note 85 *supra*.