SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
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Matrimonial Series #2: The Changing Definition of Family in New York State

FACULTY

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March 18, 2019
Suffolk County Bar Association, New York

SPEAKER BIOS

Judge Chris Ann Kelley was appointed to the Court of Claims by Governor Cuomo in June 2018 and presently serves as an Acting Justice of the Supreme Court assigned to the Suffolk County Family Court. Chris was first elected a Suffolk County District Court Judge in 2007 and was re-elected in 2013. During her tenure as a District Court Judge and Acting County Court Judge, Chris served in a Criminal Court Trial Part, in the Domestic Violence Part, and in the dedicated Driving While Intoxicated Part.

Judge Kelley began her legal career in 1985 as an Assistant District Attorney in Suffolk County, working in the District Court Bureau, Grand Jury Bureau, Family Crime Bureau and East End Bureau. After leaving the District Attorney's Office, she worked in private practice for 14 years, handling civil and criminal litigation and representing children in Family Court proceedings. Chris also represented indigent adults in Criminal Court and Family Court as a member of the Assigned Counsel Defender Plan. Between 2002 and 2007, Chris served as a Court Attorney-Referee in the Suffolk County Supreme Court Integrated Domestic Violence Part and in the Suffolk County Family Court.

Judge Kelley is a cum laude graduate of SUNY Stony Brook (1981) and earned her J.D. degree from Western New England College School of Law (1984). She is a member of the Suffolk County Bar Association where she presently serves on the Lawyers Helping Lawyers Committee and is founder and co-chair of the LGBTQ Law Committee. Chris is also a member of the Suffolk County Women's Bar Association, the Suffolk County Criminal Bar Association, the New York State Bar Association (serving on the Lawyer Assistance Committee and Judicial Wellness Committee) and is a member and former co-chair of the Suffolk County Women in the Court's Committee. Judge Kelley is also an Adjunct Professor of Law at Touro Law Center where she has taught a course in "Selected Topics in Criminal Justice."

Chris resides in Port Jefferson with her spouse and two children.

Hon. John J. Leo is Justice of the Supreme Court of the State of New York, County of Suffolk. Admitted to practice in New York and before the Supreme Court of the United States, the United States District Court of the Southern and Eastern Districts. Prior to Justice of the Supreme Court, Justice Leo was Town Attorney for the Town of Huntington where he managed a $180 million dollar budget. Justice Leo is a graduate of Fordham University (*B.A. cum laude*), New York University Graduate School of Business (*M.B.A., 1979*), and Fordham University School of Law (*J.D., 1981*).

Lewis A. Silverman is a Suffolk County District Court Judicial Hearing Officer assigned to Suffolk Traffic Court. Prior to that he was Director of the Family Law Clinic and Associate Professor of Clinical Law at Touro College, Jacob D. Fuchsberg Law Center in Central Islip, New York from 1995 until his retirement in 2016. He received his B.A. in 1973 from New York University and his J.D. in 1976 from Boston University. He served from 1976-1985 as an Assistant Suffolk County Attorney assigned to the Family Court Bureau, including Unit Head of the Child Abuse/Neglect Unit and Deputy Bureau Chief of the Family Court Bureau. From 1985 until joining the Law Center in 1995 he was a Hearing Examiner in Suffolk County Family Court where he presided at hearings to determine child support and spousal support obligations. He served as President of the New York State Hearing Examiners Association from 1988 to 1995 and had numerous decisions published by the *New York Law Journal*. He presently serves as chair of the New York State Bar Association's Special Committee on LGBT People and the Law and has also served as chair of the New York State Bar Association's Committee on Social Services, as an officer of the Suffolk Academy of Law, and the first chair of the Suffolk County Bar Association's Family Court Committee.

SPEAKER BIOS

Rosalia Baiamonte, Esq. Ms. Baiamonte has extensive experience dealing with a full range of matrimonial issues, among them: agreements (pre-nuptial, post-nuptial, and separation), custody and visitation, equitable distribution, spousal and child support issues, license and professional practice valuations, enforcement and modification proceedings, awards of counsel fees and experts' fees. Ms. Baiamonte has extensive appellate advocacy experience, having prosecuted and defended dozens of appeals involving complex matrimonial and family law issues. Ms. Baiamonte was recently installed as a Fellow of the American Academy of Matrimonial Lawyers, New York Chapter. Ms. Baiamonte is a graduate of Brandeis University (B.S., *cum laude*, 1990) and Syracuse University College of Law (J.D., *magna cum laude*, 1993; Senior Notes and Comments Editor, Syracuse Law Review), where she received the Order of the Coif. She was admitted to the Bar in January, 1994. Since admission to the Bar, Ms. Baiamonte has been engaged exclusively in the practice of matrimonial and family law.

Hon. Isabel E. Buse was a Support Magistrate of the Suffolk County Family Court from 2003 until May 2018. From 1985-2003 she served as a Family Court Hearing Examiner in Central Islip, NY. During most of those years, Support Magistrate Buse also served as a member of the Attorneys for Children Advisory Committee for the Tenth Judicial District, Suffolk County, NY.

Christopher J. Chimeri, Esq. concentrates primarily on divorce and related litigation, with a further focus on appellate matters before the Appellate Division, Second Judicial Department. He has also argued and participated in handling matters in the Courts in the First and Fourth Departments and was the principal attorney for one of the parties on a seminal case litigated in and decided by the Court of Appeals of the State of New York. Mr. Chimeri sits on the Board of Directors of the Matrimonial Bar Association of Suffolk County and is a co-founder and co-chair of the Suffolk County Bar Association's LGBTQ Law Committee. From 2014 through 2018, he was peer selected as a Thomson Reuters Super Lawyers® "Rising Star," and is a numerous-times past recipient of the "Top Legal Eagles" award from Long Island Pulse Magazine. In 2017, Chimeri was featured in Forbes Magazine's 2017 *New York Leaders in Law*; New York Magazine's 2017 Leaders in Law and received Long Island Business News's Leadership in Law award. In 2018, Long Island Business News honored Chimeri with a "40 under 40" Long Island professional award.

Jodi Ann Donato, Esq. is a sole practitioner concentrating her practice on matrimonial and family law, misdemeanor defense, probate and administration, residential real estate transactions, estate planning, and debt collection defense. Ms. Donato is a Small Claims Arbitrator for the Suffolk County District Court. She is a volunteer attorney for the Suffolk County Pro Bono Project and received the Pro Bono Attorney of the Month award twice. She was admitted to the New York State Bar in 1993 and the U.S. Supreme Court in 1996. She received her Bachelor of Business Administration and Finance from Hofstra University and her Juris Doctor from Touro Law School.

Laura C. Golightly, Esq. is a sole practitioner in Hauppauge, NY. From 2010-2014 she was the Principal Law Clerk to Hon. John C. Bivona, New York State Supreme Court, Central Islip, NY. Ms. Golightly was admitted to the NYS Bar in May 2002. She holds a BA in Psychology from Rhode Island College and a JD from Touro College Jacob D. Fuchsberg Law Center. She is a member of the Suffolk County Bar Association, New York State Bar Association, Past President and member of the Board fo Directors of the Suffolk County Matrimonial Bar Association and is a frequent lecturer at the Suffolk County Bar Association and the Suffolk County Women's Bar Association.

Suffolk Academy of Law

The Changing Definition of Family in New York

Lewis A. Silverman, Esq.

March 18, 2019

Thanks to Louis L. Sternberg, Esq., for his assistance in the preparation of this outline.

STATUTES

Domestic Relations Law § 10-a.
Parties to a marriage

1. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.
2. No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.

Domestic Relations Law § 24.
Effect of marriage on legitimacy of children

1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both birth parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.
2. Nothing herein contained shall be deemed to affect the construction of any will or other instrument executed before the time this act shall take effect1 or any right or interest in property or right of action vested or accrued before the time this act shall take effect, or to limit the operation of any judicial determination heretofore made containing express provision with respect to the legitimacy, maintenance or custody of any child, or to affect any adoption proceeding heretofore commenced, or limit the effect of any order or orders entered in such adoption proceeding.

Domestic Relations Law § 70.
Habeas corpus for child detained by parent

(a) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the

court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.
...

Domestic Relations Law § 73.
Legitimacy of children born by artificial insemination

1. Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.
2. The aforesaid written consent shall be executed and acknowledged by both the husband and wife and the physician who performs the technique shall certify that he had1 rendered the service.

Domestic Relations Law § 110.
Who may adopt; effect of article

An adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor married couple together may adopt a child of either of them born in or out of wedlock and an adult or minor spouse may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

An adult married person who has executed a legally enforceable separation agreement or is a party to a marriage in which a valid decree of separation has been entered or has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding and who becomes or has been the custodian of a child placed in their care as a result of court ordered foster care may apply to such authorized agency for placement of said child with them for the purpose of adoption. Final determination of the propriety of said adoption of such foster child, however, shall be within the sole discretion of the court, as otherwise provided herein.

Adoption is the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person.

A proceeding conducted in pursuance of this article shall constitute a judicial proceeding. An order of adoption or abrogation made therein by a surrogate or by a judge shall have the force and effect of and shall be entitled to all the presumptions attaching to a judgment rendered by a court of general jurisdiction in a common law action.

No adoption heretofore lawfully made shall be abrogated by the enactment of this article. All such adoptions shall have the effect of lawful adoptions hereunder.

Nothing in this article in regard to a minor adopted pursuant hereto inheriting from the adoptive parent applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred seventy-three, nor alters, changes or interferes with such will, devise or trust. As to any such will, devise or trust a minor adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created. Nothing in this article in regard to an adult adopted pursuant hereto inheriting from the adoptive parent applies to any will, devise or trust made or created before April twenty-second, nineteen hundred fifteen, nor alters, changes or interferes with such will, devise or trust. As to any such will, devise or trust an adult so adopted is not an heir so as to alter estates or trusts or devises in wills so made or created.

It shall be unlawful to preclude a prospective adoptive parent or parents solely on the basis that the adopter or adopters has had, or has cancer, or any other disease. Nothing herein shall prevent the rejection of a prospective applicant based upon his or her poor health or limited life expectancy.

Domestic Relations Law Article 8

Domestic Relations Law § 121.
Definitions

When used in this article, unless the context or subject matter manifestly requires a different interpretation:

1. "Birth mother" shall mean a woman who gives birth to a child pursuant to a surrogate parenting contract.
2. "Genetic father" shall mean a man who provides sperm for the birth of a child born pursuant to a surrogate parenting contract.
3. "Genetic mother" shall mean a woman who provides an ovum for the birth of a child born pursuant to a surrogate parenting contract.
4. "Surrogate parenting contract" shall mean any agreement, oral or written, in which:

(a) a woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband; and

(b) the woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.

Domestic Relations Law § 122.
Public policy

Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.

Domestic Relations Law § 123.
Prohibitions and penalties

1. No person or other entity shall knowingly request, accept, receive, pay or give any fee, compensation or other remuneration, directly or indirectly, in connection with any surrogate parenting contract, or induce, arrange or otherwise assist in arranging a surrogate parenting contract for a fee, compensation or other remuneration, except for:

(a) payments in connection with the adoption of a child permitted by subdivision six of section three hundred seventy-four of the social services law and disclosed pursuant to subdivision eight of section one hundred fifteen of this chapter; or

(b) payments for reasonable and actual medical fees and hospital expenses for artificial insemination or in vitro fertilization services incurred by the mother in connection with the birth of the child.

2. (a) A birth mother or her husband, a genetic father and his wife, and, if the genetic mother is not the birth mother, the genetic mother and her husband who violate this section shall be subject to a civil penalty not to exceed five hundred dollars.
(b) Any other person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section shall be subject to a civil penalty not to exceed ten thousand dollars and forfeiture to the state of any such fee, compensation or remuneration in accordance with the provisions of subdivision (a) of section seven thousand two hundred one of the civil practice law and rules, for the first such offense. Any person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section, after having been once subject to a civil penalty for violating this section, shall be guilty of a felony.

Domestic Relations Law § 124.

Proceedings regarding parental rights, status or obligations

In any action or proceeding involving a dispute between the birth mother and (i) the genetic father, (ii) the genetic mother, (iii) both the genetic father and genetic mother, or (iv) the parent or parents of the genetic father or genetic mother, regarding parental rights, status or obligations with respect to a child born pursuant to a surrogate parenting contract:
1. the court shall not consider the birth mother's participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations; and
2. the court, having regard to the circumstances of the case and of the respective parties including the parties' relative ability to pay such fees and expenses, in its discretion and in the interests of justice, may award to either party reasonable and actual counsel fees and legal expenses incurred in connection with such action or proceeding. Such award may be made in the order or judgment by which the particular action or proceeding is finally determined, or by one or more orders from time to time before the final order or judgment, or by both such order or orders and the final order or judgment; provided, however, that in any dispute involving a birth mother who has executed a valid surrender or consent to the adoption, nothing in this section shall empower a court to make any award that it would not otherwise be empowered to direct.

Constitutional Law Cases

Biology alone is not sufficient for a father to assert constitutional rights. He must seize the opportunity to be a father-in-fact.
Lehr v. Robertson, 463 U.S. 248 (1982)

There may be a constitutional protected liberty interest for a biological father in his relationship with the child even if the mother is married to another man at the time of conception.
Michael H. v Gerald D., 491 U.S. 110 (1989)

The living together requirement of DRL §111(1)(e) is unconstitutional as it imposes as an absolute condition an obligation only tangentially related to the parental relationship.
Matter of Raquel Marie X., 76 N.Y.2d 387 (1990)

The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.
Troxel v. Granville, 530 U.S. 57 (2000)

Same-Sex Parenting

Standing for Custody

Matter of Alison D. v. Virginia M., 77 N.Y.2d 651 (1991)
Debra H. v. Janice R., 14 N.Y.3d 576 (2010)

In *Alison D.*, Court of Appeals declined to adopt the concept of "de facto" parenting or "parent by estoppel." Visitation petition brought by former domestic partner of child's biological mother. Court deferred to Legislature to expand custody standing as defined in the Domestic Relations Law. Vigorous dissent by Jude Kaye called for an expanded definition of "parent" to allow the court, under doctrine of *parens patriae*, to consider child's best interests.
In *Debra H.* the Court of Appeals adhered to its previous determination and declined the invitation to overrule *Alison D.* or to extend the concept of equitable estoppel from paternity to custody cases and again deferred to the Legislature to establish a different policy regarding who may seek custody other than a known biological parent. But then, in a twist worthy of Agatha Christie, the Court of Appeals granted comity to the Vermont civil union which had existed between the women at the time the child was conceived and found that the Vermont statute gave the non-biological parent rights to custody and visitation. Three of the seven judges concurred in the result but would have overruled *Alison D.* outright.

Nonparent former same-sex domestic partner sought custody or visitation with child. Parties had another child that petitioner had adopted, but adoption had not been finalized for subject child when relationship terminated. Trial court found no extraordinary circumstances to justify a "best interests" analysis. Equally unavailing was the doctrine of equitable estoppel in a custody case, not did the doctrine of *parens patraie* justify interfering with the biological mother's constitutionally protected liberty interest in raising her child. The petition was dismissed as to that child.
Matter of C.M. v. C.H., 6 Misc.3d 361 (Supreme Court NY County 2004)

Same-sex couple married in Connecticut before effective date of NY Marriage Equality Act. Supreme Court should have afforded comity to Connecticut marriage and recognized [non-biological] parent under NY law, thereby granting standing for custody/visitation.
Counihan v. Bishop, 111 AD3d 594(Second Dept. 2013). See also: *Laura WW. v. Peter WW.*, 51 AD3d 211 (Third Dept. 2008); *Matter of Ranftle*, 81

AD3d 566 (First Dept. 2011); *Wendy G-M. v. Erin G-M.*, NYLJ 1202655070125, at *1 (Supreme Court Monroe County 5/7/2014).

Domestic Relations Law §70 permits a non-biological, non-adoptive parent to achieve standing to petition for custody and visitation. Standing will be granted where there is clear and convincing evidence that the couple jointly planned and explicitly agreed to the conception of the child with the intention of raising the child as co-parents. No ruling made on the test where there is no pre-conception agreement. Case specifically overruled *Matter of Alison D. v. Virginia M.*, 77 NY2d 651 (1991).
Matter of Brooke S.B. v. Elizabeth A. C.C. and *Matter of Estrellita A. v. Jennifer L.D.*, 28 NY3d 1, (2016).

The parties first entered into a registered domestic partnership in California in 2004 prior to the birth of Z.S. and thus Kelly S. was presumed parent of Z.S. by virtue of the parties' status as registered domestic partners. Kelly S. also gave her consent to be named as a parent on the birth certificate of Z.S. and the parties were later married in California in 2008. Family Court properly recognized Kelly S. as the parent of the subject children under New York law. The parties' failure to comply with California's artificial insemination law does not preclude the recognition of Kelly S.'s parentage under California law. Here, the parties' failure to comply with the requirements of Domestic Relations Law §73 does not preclude the recognition of Kelly S. as a parent of the children. The record reflected that the parties made an informed, mutual decision to conceive the subject children via artificial insemination and to raise them together, first while registered in a domestic partnership in California and later legally married in that state. Family Court properly determined that Kelly S. has standing to seek visitation with the subject children. [Case predates *Matter of Brooke S.B.*]
Matter of Kelly S. v. Farah M., 139 A.D.3d 90 (App. Div. Second Dept. 2016)

Domestic partner, not biologically related to subject children, has established by clear and convincing evidence that he entered into pre-conception agreement to conceive the children and raise them together as parents. He therefore has standing to seek custody or visitation. In companion case, his sister, who was the surrogate and biological mother, has standing for temporary visitation. Surrogacy contracts are void in NY and DRL §124(1) states that participation shall not be adverse to mother's parental rights. Remanded for hearing on father's petition to relocate, and partner and mother's petitions for custody/visitation.
Matter of Frank G. v. Renee P.-F., 142 A.D.3d 928 (Second Dept. 2016)

On remand, the trial court gave custody to the non-biological father and awarded counsel fees. On a second appeal, the Appellate Division declined to review standing, ruling it was "law of the case" from the previous appeal, and affirmed the award of custody to the non-biological father in the best interests of the children.
Matter of Renee P.-F. v. Frank G., --AD3-- (Second Dept. 5/30/18)

At time of birth, plaintiff was married to defendant father. Plaintiff apparently unable to conceive and carry a pregnancy to full term, so with consent of plaintiff child conceived by defendant father and third party, but raised for first eighteen months by all three in unconventional family relationship. Plaintiff and defendant father then divorced; defendant father established custody/visitation agreement with third party biological mother, who continued to raise child with plaintiff. Plaintiff sought custody/visitation order, with consent of biological mother, to establish her rights against father. Trial court found shared custody by father and both mothers was in best interests of child, granting a tri-custodial arrangement, calling it a logical evolution of *Brooke S.B.* and the Marriage Equality Act.
Dawn M. v. Michael M., 47 N.Y.S.3d 898, 55 Misc.3d 865 (Sup. Ct., Suffolk County, March 8, 2017)

Parties, two men married to each other and biological mother, agreed to a tri-party custody arrangement, although no formal contract was executed. Many decisions were made jointly but disputes inevitably arose. Trial court granted non-biological father standing for custody and visitation but did not grant an order of parentage as no paternity petition was filed. The court further held that, pursuant to *Brooke S.B.*, a party may seek custody and visitation as a "parent" under DRL § 70(a) without a determination that he is a legal parent.
Matter of Raymond T. v. Samantha G., 59 Misc.3d 960, 2018 WL 1749894 (Family Court, New York County 2018).

Petitioner, former partner of adoptive mother, sought joint custody. Trial court held that petitioner did not prove by clear and convincing evidence that parties had a plan to adopt and raise a child together that continued unabated. Parties, prior to adoption, had legally separated and Respondent considered Petitioner as a "godmother" to the child; court characterized her as a "dear friend."
K v. C, 55 Misc.3d 723 (Supreme Court, NY County, 2017)

Trial court found that Petitioner had established by clear and convincing evidence that biological mother created, fostered, furthered, and nurtured a

parent-like relationship between the children and non-biological partner, establishing standing for custody and visitation.
Matter of J.C. v. N.P., NYLJ 1202799690525, at *1 (Family Court Nassau County, Decided September 27, 2017)

Application of *Brooke S.B.* to heterosexual couple. On the present record, appellant (never established as biological father) has not established by clear and convincing evidence that he has standing to seek visitation or custody. He has not proved by clear and convincing evidence that he and the mother agreed to conceive and raise the child together, or that the mother consented to the post-conception creation of a parent-like relationship between appellant and the child. If the child ever lived with appellant, and the record does not demonstrate that she did, he certainly has not done so since the child was placed in foster care at the age of two weeks, and he does not assert that he took steps to establish a parental relationship with, or to provide support for her.
In Re Jaylanisa M. A., 157 A.D.3d 497 (First Dept. 2018)

Family Court affirmed in finding that the petitioner failed to sustain her burden of establishing standing to seek visitation. The petitioner failed to demonstrate that the mother consented to anything more than the petitioner assisting her with child-rearing responsibilities. For example, the petitioner does not contend that the child referred to her as his mother, and the petitioner was not listed as a parent on school records or legal documents. Most importantly, after the mother was diagnosed with terminal cancer, she executed a will providing that the respondents be appointed the child's guardians. Under the particular circumstances of this case, the court properly granted the respondents' motion to dismiss the visitation petition based on lack of standing.
Garnys v. Westergaard, 158 A.D.3d 762 (Second Dept. 2018)

Although parties established a legal relationship and agreed to adopt and raise a child together, standing denied because the relationship was legally terminated before the child was offered to Respondent for adoption, thereby terminating the preconception/adoption plan.
Matter of K.G. v. C.H., --AD3d--, 2018 NY Slip Op 04683 (First Dept. 6/26/18)

Trial court dismissed custody petition for lack of standing at conclusion of Petitioner's case. Reversed. A motion for judgment as a matter of law (CPLR §4401) should not be granted when facts are in dispute or where the

issue depends on credibility. The evidence must be accepted as true in deciding whether Petitioner has established a prima facie case.
Matter of deMarc v. Goodyear, --AD3d--, 2018 NY Slip Op 05095 (Fourth Dept. 7/6/18)

Modification of Custody

Religious clauses in a custody agreement will only be enforced if in the best interests of the children. Parents both members of Hasidic Jewish community, but mother expressed lesbian feelings, which ultimately caused divorce, with mother receiving, on consent, residential custody. Several years later, as mother moved away from a strict Orthodox lifestyle, father sought change in custody. Supreme court granted the application but was reversed by the Second Department, which found that the trial court had impermissibly allowed religion to be a determining factor. In the final paragraph the court admonished both parents not to denigrate the other in front of the children, comments clearly directed at the father.
Weisberger v. Weisberger, 154 AD3d 41 (Second Dept. 2017)

Adoptions
Unmarried partner of child's biological parent, whether heterosexual or homosexual, who is raising the child together with the biological parent, can become the child's second parent by means of adoption.
Matter of Jacob, 86 N.Y.2d 651 (1995)

Children (twins) conceived in India as a result of surrogacy contract which would be illegal in New York. Court found that, where a surrogacy contract exists and an adoption has been filed to establish legal parentage, the surrogacy contract does not foreclose the adoption proceeding. Court not being asked to enforce surrogacy contract.
Matter of J.J., 44 Misc.3d 297 (Queens County Family Court 2014)

Surrogate declined to grant adoption to biological mother's same-sex spouse because, under DRL 10-a, that she was already the legal mother and stated that the purpose of adoption was to create a *new* legal relationship where one did not already exist. Mothers were concerned that Ohio, a state of possible relocation, would decline to honor New York law on parentage without an adoption decree. Court stated that issue would have to be litigated in Ohio. [Decision roundly criticized for its legal conclusions and policy determinations.]
Matter of Seb C-M, NYLJ 1202640527093, at *1 (Surrogate Court NY County 1/6/2014).

Fathers legally married at time they engaged a surrogate and child born within marriage. Surrogate's parental rights were terminated and genetic father given sole custody by Missouri court; thereafter fathers returned to Florida where they resided together with the child as a family. Subsequently non-genetic father went to UK and genetic father entered into new relationship and moved to New York where he and his new boyfriend petitioned for the BF to adopt the child. Before adoption finalized non-genetic father commenced Florida divorce action. No notice to other father and adoption granted. Non-genetic father then moved to set aside the adoption. Granted by Family Court and affirmed by First Department. Presumption of legitimacy applied and not rebutted by Missouri custody order as against the surrogate. Non-genetic father therefore entitled to notice of adoption. [Not to mention the material misrepresentations made in the adoption petition.]
Matter of Maria-Irene D., 153 AD3d 1203 (First Department 2017).

Presumption of Legitimacy

Child born to two women civilly united determined to be the child of both partners, including the non-biological parent. Court discarded presumption of legitimacy under Vermont law, but found statute did not limit definition of parent, and several factors supported court's determination, including the valid civil union, expectation and intent of both parties to parent the child, participation by the non-biological partner in the decision to allow artificial insemination and active participation in prenatal care and birth. Both women treated the non-biological partner as a parent during the time they resided together, and biological parent identified other partner as a parent in the dissolution petition.
Miller-Jenkins v. Miller-Jenkins, 180 Vt. 441, 912 A.2d 951 (Vermont 2006).

Fathers legally married at time they engaged a surrogate and child born within marriage. Surrogate's parental rights were terminated and genetic father given sole custody by Missouri court; thereafter fathers returned to Florida where they resided together with the child as a family. Subsequently non-genetic father went to UK and genetic father entered into new relationship and moved to New York where he and his new boyfriend petitioned for the BF to adopt the child. Before adoption finalized non-genetic father commenced Florida divorce action. No notice to other father and adoption granted. Non-genetic father then moved to set aside the adoption. Granted by Family Court and affirmed by First Department. Presumption of legitimacy applied and not

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Matter of Maria-Irene D., 153 AD3d 1203 (First Department 2017).

Attempt by sperm donor to seek paternity against two women who were married to each other at time of birth. Apparently a written contract had been informally executed where he waived parental rights (it had been destroyed but trial court credited its existence and substance). Appellate Division held that a child born to a same-gender married couple is presumed to be their child and the presumption of parentage [legitimacy] is not defeated solely with proof of the biological fact that, at present, a child cannot be the product of same gender parents.
Matter of Christopher YY. v. Jessica ZZ. and Nicole ZZ., 159 AD3d 18 (Third Dept. 2018).

Similar to Christopher YY (and citing it) attempt by sperm donor to seek paternity and visitation against two women who were married to each other at time of birth. A written contract had been executed where he waived parental rights. Appellate Division held that a child born to a same-gender married couple is presumed to be their child and the presumption of parentage [legitimacy] is not defeated solely with proof of the biological fact that, at present, a child cannot be the product of same gender parents.
Matter of Joseph O. v. Danielle B., 158 AD3d 767 (Second Dept. 2018)

Standing for Child Support and Paternity

Companion case to *Debra H.* Biological mother and child had returned to Canada after termination of relationship. Through UIFSA (Uniform Interstate Family Support Act) biological mother sought child support, and petition transferred to non-biological partner's court in NY. Court of Appeals reversed dismissal of petition and remanded for hearing on whether E.T. was a parent liable for support pursuant to the Child Support Standards Act.
Matter of H.M. v. E.T., 14 N.Y.3d 521 (2010)

Petitioner, gay man, served as sperm donor for subject child, who was raised by her mother and mother's lesbian partner, who also had a child. Father's name was not on birth certificate, but ultimately became known to the child and exercised some informal visitation. He then filed a paternity petition, which was dismissed by the trial court. In reversing, the Appellate Division narrowed the issue to whether or not he was the biological father (which was

not in dispute) and therefore had a right to an Order of Filiation. The Appellate Division noted that this was not a custody, visitation, or even an adoption proceeding, where the father's consent might be required. The mother was estopped from denying the father's paternity and an Order was to be issued pursuant to Family Court Act §542(a). [Not so many years ago the child was the cover story in the *New York Times* Sunday Magazine.]
In re Thomas S. v. Robin Y., 209 A.D.2d 298 (First Dept. 1994)

Mother sought child support from her husband. His defense was that he was, in fact, a female and not the father of the subject children, although "he" had accepted responsibility as the "husband" before the mother was artificially inseminated. Family Court declined to dismiss the petition, stating that respondent was estopped from denying parentage for the purposes of support. The court noted that its finding did not affect the validity of the marriage or any proceeding custody, visitation or inheritance rights.
Matter of Karin T. v. Michael T., 127 Misc.2d 14 (Family Court Monroe County 1985)

Trial court found that lesbian co-parent entitled to an order of filiation/ parentage beyond standing only for custody/visitation.
Matter of A.F. v. K.H., 56 Misc.3d 1109 (Rockland Cty. Fam. Ct. 2017)

Dissolution of Civil Union

NY should entertain a dissolution petition to dissolve a Vermont civil union. NY grants comity to the civil union and, absent a proceeding in Supreme Court, the parties will have no other remedy as they do not meet the residency requirements of Vermont law for a dissolution in that state. No custody or support issues involved.
Dickerson v. Thompson, 88 A.D.3d 121 (Third Dept. 2011)

Surrogacy and Gestational Parents

The California Supreme Court determined that both the gestational mother and the genetic mother could arguably be considered the child's natural mother and employed an "intent" test to determine maternity.
Johnson v. Calvert, 5 Cal. 4th 84 (1993)

Wife was gestational carrier, but not genetic mother as husband's sperm had been fertilized with donated eggs and implanted in wife. Court found that "intent" test of Johnson v. Calvert was to be adopted and a declaration of maternity could be granted to wife.
McDonald v. McDonald, 196 AD2d 7 (Second Dept. 1994)

Husband and wife owned "pre-zygotes" which were defined as "eggs which have been penetrated by sperm but not yet joined genetic material." Upon divorce, wife wanted possession to implant eggs; husband wanted eggs donated to IVF program for research purposes. Court of Appeals found that parties' agreement, at time of IVF procedure was clear and unambiguous and was repeated in an informal writing shortly after their separation. Court found contract should be enforced and ordered husband to have custody of pre-zygotes.
Kass v. Kass, 91 N.Y.2d 554 (1998).

Surrogate (gestational) mother became pregnant when egg of genetic mother was fertilized with sperm of her husband and implanted in gestational mother's uterus. Action brought pre-birth sought to have genetic mother listed on birth certificate. Appellate Division found ample authority for Supreme Court to issue such a declaration without need for genetic mother to seek an adoption to establish her rights. The court also suggested that restrictions on determination of maternity based on gestation might be constitutionally suspect gender classifications.
T.V. v. New York State Department of Health, 88 A.D.3d 290 (Second Dept. 2011)

Surrogacy agreement by mother in excess of medical costs is akin to "trafficking in children" and is against public policy. [Case preceded adoption of DRL §121 – 124.]
In the Matter of Paul, 146 Misc.2d 379 (Family Court Kings County 1990)

Situation where court had to confront issue of gestational mother not being biological mother. Mother was unable to bear children, but her eggs were fertilized with her husband's sperm and the fertilized ova were carried to term by mother's sister, who gave birth to triplets. All parties acknowledged who were the genetic parents, and court ultimately directed NYC Department of Health and Mental Hygiene to issue two sets of birth certificates: one with the name of the gestational mother to be immediately sealed, and one with the name of the genetic mother to be released to the parents.

Doe v. New York City Board of Health, 5 Misc.3d 424 (Supreme Court NY County 2004)

Twins were genetic children of father; eggs were from an anonymous donor and a genetically unrelated surrogate was implanted (in California.) Judgment of parental relationship issued by California court declaring husband and wife as twins' sole parents. Surrogate found NY should recognize the results of the California courts regarding parentage. Court also noted that while NY does not recognize surrogacy agreements, enforcement of the contract is not at issue, and the rights of children born as a result of surrogacy agreements are not affected by the possible illegality of the contract.
Matter of John Doe, 7 Misc.3d 352 (Surrogate's Court NY County 2005)

Action was brought against doctor who was supposed to implant the insemination. An action for breach of contract cannot be brought for failure to comply with a surrogate contract, as said contract is illegal. [Appellate Term probably got it wrong; could have drawn a distinction between assisted reproduction and surrogacy.]
Itskov v. New York Fertility Institute, Inc., 11 Misc.3d 68 (Appellate Term, Second Dept. 2006)

Equitable estoppel

Although husband was not biological father of child, child born during marriage, he was named as child's father on birth certificate, he was held out as father for seven years, he established a strong father-daughter relationship with the child, and he supported the child financially throughout the marriage, all with wife's acquiescence. He was only father figure in child's life. Father established a prima facie case for to equitably estop mother from denying he had standing for custody and visitation, but remanded for a further hearing on the best interests of the child.
[See discussion of this case in *Matter of C.M. v. C.H.,, supra.* Post *Brooke S.B.*, this case appears to be good law and *Matter of C.M. v. C.H.* is the outlier.]
Jean Maby H. v. Joseph H., 246 AD2d 282 (Second Dept. 1998).

Man expressly represented that he was the father of the child, and a parent-child relationship existed between the two. He was equitably estopped from denying paternity despite genetic marker test precluding him. Paternity by estoppel should be determined before genetic marker tests are ordered, Family Court Act §§418(a), 532(a). The Court of Appeals noted that paternity by estoppel, which had its origins in case law, was now a public policy choice made by the Legislature. The Court further noted that, even if the mother committed fraud (and they found no evidence of it), the child could not have committed fraud and the child is the party denominated by the Legislature whose best interests must be considered.
Matter of Shondel J. v. Mark D., 7 N.Y.3d 320 (2006)

Petitioner sought to intervene in couple's divorce action and to have blood testing performed for purpose of being declared father of child. Appellate Division affirmed denial of his petition based on equitable estoppel, because of the presumption of legitimacy and the fact that petitioner waited nearly four years to assert his claim.
David L. v. Cindy Pearl L., 208 A.D.2d 502 (Second Dept. 1994). See also *Matter of Juan A. v. Rosemarie N.*, 55 A.D.3d 827 (Second Dept. 2008)

Gay man agreed to donate sperm to lesbian couple, and respondent gave birth to two children. Man's name was put on birth certificate and he was consistently involved with the children, including regular visitation and they called him "Daddy." Mother estopped from claiming a waiver or an estoppel precluding father from visitation.
Matter of Tripp v. Hinckley, 290 A.D.2d 767 (Third Dept. 2002)

Petitioner was a woman living as a pre-operative male, and had entered into a marriage with the mother, who subsequently bore a child as a result of artificial insemination. When the parties separated competing custody petitions ensued, and mother tried to dismiss "father's" petition for lack of standing. Trial court ruled that, on the basis of extraordinary circumstances, including child's relationship with petitioner and respondent's active complicity in any possible fraud regarding marriage to another female, mother was estopped by denying that petitioner was the father. [This case precedes the Marriage Equality Act.]
K.B. v. J.R., 26 Misc.3d 465 (Supreme Court Kings Co. 2009)

Custody petition brought by non-biological former domestic partner of mother; mother sought to dismiss on basis of *Alison D.* and *Debra H.* Trial court distinguished those cases because biological mother had already alleged a "child in common" in order to get child support, received and estoppel hearing, and testified that the non-biological "mother" "was in fact a parent." Biological mother was judicially estopped from asserting inconsistent legal positions in different proceedings. This slightly distinguishes the case from the traditional equitable estoppel doctrine espoused in *Shondel J.*
Estrellita A. v. Jennifer D., 40 Misc.3d 219 (Family Court Suffolk Co. 2013)

Father sought, in child support proceeding, to vacate twelve-year-old Order of Filiation. Family Court ultimately denied father's application, including for a genetic marker test, and Appellate Division affirmed. "The paramount concern in applying the doctrine of equitable estoppel…is the best interests of the subject child [citations omitted]." Here, the fifteen year-old child had visited with the father, the father attended some school functions, had telephone contact with the child and saw her on some birthdays. The child considered the father to be her father and had never known any other father.
Matter of Shawn H. v. Kimberly F., 115 A.D.3d 744 (Second Dept. 2014)

Child born 12/2010 and Acknowledgment of Paternity signed immediately. Three years later mother sought to vacate Acknowledgment believing another man to be the father, confirmed by DNA testing. Trial court dismissed mother's petition on two bases. First, the Court found the mother's original declaration that B.H. was father could not be a "mistake of fact" that he was not because she knew it as a fact (there were no sexual relations in the time period of conception) and therefore she was precluded from moving to vacate the Acknowledgment on grounds of fraud. The court further made a finding

that B.H. had consistently availed himself of parenting time and opportunities and therefore mother was equitably estopped from denying he was the father. *Matter of A.S. v. B.H.*, 43 Misc.3d 1231A (Onondaga County Family Court 2014)

Mother's former husband sought custody. Child was born during marriage, but another man commenced paternity proceeding; husband defaulted and Order of Filiation issued in favor of other man. Family Court properly dismissed former husband's custody application as the prior finding of paternity precluded him from claiming he was a parent and there were no extraordinary circumstances. A careful reading of the majority opinion in *Debra H.* suggests that the paternity adjudication in favor of a non-husband should have had no effect on the husband's attempt to obtain custody, even on default, and he should not have been precluded and the case is wrongly decided.
Matter of Vega v. Vega, 120 A.D. 3d 1427 (Second Dept. 2014)

Attempt by sperm donor to seek paternity against two women who were married to each other at time of birth. Apparently a written contract had been informally executed where he waived parental rights (it had been destroyed but trial court credited its existence and substance). After Appellate Division held that the presumption of parentage [legitimacy] applied to same-gender married parents, it also held that biological father was equitably estopped from establishing paternity as against the best interests of the child who had bonded and established a family relationship with both mothers.
Matter of Christopher YY. v. Jessica ZZ. and Nicole ZZ., 159 AD3d 18 (Third Dept. 2018)

Similar to *Christopher YY*, attempt by sperm donor to seek paternity and visitation against two women who were married to each other at time of birth. A written contract had been executed where he waived parental rights. After Appellate Division held that the presumption of parentage [legitimacy] applied to same-gender married parents, it also held that biological father was equitably estopped from establishing paternity as against the best interests of the child who had bonded and established a family relationship with both mothers.
Matter of Joseph O. v. Danielle B., 158 AD3d 767 (Second Dept. 2018)

Complicated fact pattern. Mother conceded at some point Petitioner was biological father but another man (JAC) was permitted to execute Acknowledgment of Paternity. At some point Petitioner received Order of

Filiation which AFC sought to vacate. Court held equitable estoppel will not apply where petitioner has consistently and diligently asserted his paternity; attempted to visit the hospital in time for child's birth; attempted to support child financially; commenced proceedings and consistently appeared in court by telephone or in person, as he was able. By contrast, both the mother and JAC made repeated efforts to frustrate petitioner by keeping child's whereabouts from petitioner and frustrating his legal efforts, including not attending court appearances in person or by telephone. A lengthy one-judge dissent disputes the facts and the legal conclusion of the majority regarding estoppel.
Matter of Michael S. v. Sultana R., 2018 NY Slip Op. 05404 (First Dept. 7/19/18)

Equitable estoppel requires careful scrutiny of the child's relationship with the relevant adult and is ultimately based upon the best interest of the child. In the context of standing under DRL §70, equitable estoppel concerns whether a child has a bonded and de facto relationship with a nonbiological, nonadoptive adult. The underpinning of an equitable estoppel inquiry is whether the actual relationship between the child and the relevant adult rises to the level of parenthood. The focus is and must be on the child. Matter remanded as record is incomplete on this issue.
Matter of K.G. v. C.H., --AD3d--, 2018 NY Slip Op 04683 (First Dept. 6/26/18)

Equitable estoppel does not apply to permit the mother's (former) same-sex partner to assert rights against the biological parent because he consistently opposed her interference in his relationship with the child and he continuously asserted his paternal rights against the biological mother. The proof does not support a finding that Mr. R. was either aware of Ms. H.'s involvement with A. or that he tacitly, or otherwise, acquiesced in her involvement. Furthermore, a fair review of the record permits a reasonable inference that both Ms. H. and Ms. S. did not want Mr. R. to be involved with A. and that they acted to interfere with his contacts with his daughter.

Matter of T.H. v. J.R., 61 Misc.3d 775, Monroe County Family Court, 2018

Carla A. v. Jenna B.

Petitioner commenced this proceeding seeking joint custody of, and visitation with, the subject child, who was born to respondent and conceived by the implantation of a fertilized egg using a sperm donation from Petitioner's brother, Danny.

The parties were involved in a romantic relationship from early 2012 to the end of 2014. During that time they sought to have a child, which would be biologically related to both of them. Carla's brother, Danny, agreed to donate his sperm and at least three zygotes were created with Jenna's eggs in mid-2014. The procedure was performed through a certified medical facility. There was a written agreement between Jenna and Danny that she would have final control over the zygotes. The document did not mention whether Danny would surrender parental rights and did not mention any other party who might be involved in the process (e.g. Carla.)

The parties ceased residing together in late 2014, although the reasons are disputed. Jenna alleges that Carla had become controlling and verbally abusive; Carla denies the allegations and alleges that Jenna became interested in another relationship that only lasted a few months and that, while Carla gave Jenna her space, their own relationship has continued sporadically, even if they no longer reside in the same household.

In mid-2015 Jenna became impregnated with the zygote and gave birth to a girl, Danielle, in March, 2016. Only Jenna's name is listed as "parent" on Danielle's birth certificate, but the child carries the middle name of "A.," that is the family name shared by both Carla and her brother. Sadly, Danny was killed in an automobile accident two months before the child's birth.

With respect to her standing to commence this proceeding, Carla alleges that she and respondent had previously been involved in a romantic relationship, and that they entered into an agreement to raise and co-parent a child. The agreement was a written "Domestic Partnership Agreement (DPA)" that they downloaded from the Internet; it was signed by both but not notarized. The DPA provided that it was the "intent" of the parties that their relationship would produce one or more children and it was the "expectation" that they would jointly raise any children as co-parents. No other provisions were made for custody or visitation. The DPA made no provision for its termination.

Carla alleges that the child spends a minimum of two nights per week at her home and sometimes more, especially if Jenna must travel for work. Because of her schedule, she picks the child up at day care every day and takes the child to her home before Jenna arrives. Several times a week Carla provides dinner for the three of them. She also alleges that Jenna told several mutual friends and the fertility physician that she "wanted to raise a family with" Carla.

Jenna acknowledges that the women were previously in a relationship and that it ended in late 2014. She acknowledges that Carla's deceased brother, Danny, provided the sperm for the zygote before the women separated, but that there was never a clear agreement to raise a child together as co-parents. She says that Carla is nothing more than Danielle's aunt and that any help she provides is purely out of love for her niece and not as a second mother. She is challenging standing for custody and visitation, although she wants Danielle to continue to know her biological aunt.

Danielle is a generally well-adjusted two-year-old. She calls Jenna "Momma" and calls Carla "Carlie." She does tend to fuss more than other children and occasionally throws temper tantrums when she does not get her way. The day care center reports that Danielle tends to play by herself rather than in a group and that she does not smile very much, but that she is generally cooperative and meeting all of her growth goals on schedule

It should be noted that Jenna has sought and received an Order of Filiation against Danny's estate pursuant to Family Court Act §519. Danny's parents acknowledged his paternity, which was also confirmed by the fertility clinic. Jenna has applied for Social Security Survivor's benefits on behalf of Danielle.

The Changing Definition of Family in New York:

Suffolk Academy of Law

Lewis A. Silverman, Esq.

March 18, 2019

- **The holding of *Brooke S.B.*:** When parties enter into a pre-conception agreement to conceive and raise a child as co-parents, if proven by clear and convincing evidence it is sufficient for a non-biological non adoptive person to establish standing for custody or visitation pursuant to DRL §70(a).

Unanswered Questions

- Must the agreement be in writing? Must it be subscribed?
- Can agreement be made orally?
- Must it be pre-conception? Can it be made at any time prior to litigation?
- Must the sperm/egg donor sign any agreement to waive parental rights?
- Can an agreement be made by conduct?
- Will equitable estoppel apply, especially against the biological parent?
- Does the presumption of legitimacy (DRL §24) provide automatic standing to a spouse, regardless of any other factor?
- Can *Brooke S.B.* be extended to heterosexual couples?
- Can a child have more than two parents?
- What is a parent-like relationship?
- Will a NY defined family receive interstate and international recognition?

Elements of Proof of a Parent-Child Relationship

- Consent of the biological or adoptive parent.
- Intent of the non-biological parent to form a parent-child bond, and to take on the privileges, responsibilities, and obligations of parenthood.
- The development of the relationship, including emotional bond, between the child and the functional parent.
- Residence with the child for a reasonable period of time.
- Assuming parental and financial responsibilities without expectation of financial compensation, including financial support, holding the child out to be his or her own, spending sufficient time with the child in the absence of the legal parent, or taking time off of work to engage in parental obligations.
- The parties jointly make decisions on behalf of the child.
- The parties give the child the non-biological parent's last name.
- Standard of review: clear and convincing vs. preponderance