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Q&A: Attorney Eric Wrubel on arguing about parenting to New York's high court

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June 29 - Attorney Eric Wrubel appeared before New York's highest court this month in a challenge to New York's legal definition of a parent.

Wrubel, a partner at Warshaw Burstein who handles family and matrimonial matters, represented the attorney for the child in the Matter of Brooke S.B. v. Elizabeth A. C.C., a same-sex couple who split up after raising a child for several years.

Brooke sought custody and visitation of the young boy, but biological mother Elizabeth argued that her former partner lacked standing because she was not related by blood and had not adopted the child.

New York Family Court agreed, dismissing Brooke's petition. The Appellate Division, Fourth Department affirmed, but granted leave to the Court of Appeals.

The high court may decide the case as soon as Thursday.

Reuters spoke with Wrubel about his arguments that the law should be changed, particularly in light of the right of same-sex couples to marry.

The questions and answers have been edited for brevity and clarity.

Q: What is the current legal definition of a parent in New York?

Wrubel: Parent is not defined in the New York Domestic Relations Law or the New York Family Court Act. So it was left to the Court of Appeals to define the term, and in 1991 the court said it was an individual biologically related to a child or related through adoption. That definition has existed since.

Q: What case set that precedent?

Wrubel: Alison D. v. Virginia M. The non-biological mother in Alison D. had argued she was a parent through equitable estoppel, including that she had created a bondable relationship with the child. If the biological mother invites the person into the life of the child, and the person has provided psychological and financial support, the person should have standing based on equitable estoppel to assert parental rights.

Equitable estoppel is a remedy available in New York state in child support cases. The (non-biological) father says, 'I'm not related to this child.' The court says, 'No, we're not going to accept that. You've acted as a father. You created a relationship as a father. You are going to pay child support.' It's to make sure that children are being supported. Alison D. argued it extended to custody cases. It was denied.

Q: Fast forward to 2014, to Brooke's case.

A: Alison D. is the law of the land. Tom Rankin, the attorney for the child, and Brooke file appeals. The Fourth Department says you have no standing. The attorney for the child says, everyone's missing the point. There's a change here and that's marriage equality that didn't exist in 1991, an acknowledgement that gay and lesbian couples can marry and that biology is not the only way for families to be created. You have to expand the definition. The court granted leave for the child, who wants to have both parents in his life. The bright line rule created by Alison D. doesn't talk about the best interests of the child. Q: Where does New York stand among states on this issue? A: There are 27 other jurisdictions in the U.S. that have some types of de facto parentage where they don't look at purely biology and adoption.

Q: The court heard another case at the same time as Brooke D. Tell me about that.

A: Estrellita A. v. Jennifer D. is (an unmarried) lesbian couple from Suffolk County who have a child and split up after the child is born. The biological mother goes to court and files a petition for support from the non-biological, non-adoptive parent. The court adjudicates the non-biological woman as a parent and says you now have to pay child support. The non-biological mother then files a custody petition in Family Court. The biological mother says, 'You're only a parent for support.' The court says, 'you can't do that. You can't have your cake and eat it, too.' The Second Department affirmed, based on judicial estoppel, you cannot assert contrary positions.

Q: What's your take on the current court versus that in 1991?

A: Alison D. refers to parents as mothers and fathers and, when you look at the make-up of the court in 1991, except for Judith Kaye, you're talking about a conservative group of men who had a very traditional view of family, notwithstanding that the case before them was a lesbian couple. The court today is a much more liberal group. I think this court is troubled by the state of the law and they want to change it.

Q: How do you think they will rule?

A: I think they're going to utilize equitable estoppel, largely because it's a standard that the New York judges already use for child support cases.

Q: What impact would that decision have?

A: It's going to have a major impact for families in New York to know, if you can't be biologically related and many can't, and sometimes you can't adopt, at least your relationship with your child is secure through this third definition of parent.

Q: Why not use adoption as the sole alternative to blood?

A: It costs thousands of dollars to have an adoption. That's not something that's necessarily affordable, and it can take more than a year. It can't be available to everyone. Also, prior to Obergefell v Hodges, some states weren't allowing second-parent adoptions for gay parents.

Q: How would you prove this other definition of parent?

A: By showing a court how you have lived together and raised a child together. The proof is the birth announcements, the birthday announcements, the forms for school, how you fill out your contacts for pediatricians, photographs, and witnesses who say what the child does with the parent. Then you can have someone examine the relationship. It doesn't take much to see if a child knows who their parent is.

Q: If the couple is married, does that change the game?

A: Yes, then there's a presumption of legitimacy. A child born of a marriage, or prior to the marriage, is presumed to be the child of that marriage.

Q: So does marriage equality make this argument passe?

A: No. There are still going to be people who chose not to marry and can't adopt, and the adverse consequences will be felt by those children. This assures that those children can maintain their relationships with their own parents.

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