



May 14, 2015

## Protect Your Family: Visitation Rights of Non-Biological Parents

Generally, only a child's biological or adoptive parent can claim a right to custody or visitation of the child under New York law. However, in a recent decision<sup>1</sup> involving visitation rights of spouses or partners of biological or adoptive parents, Warshaw Burstein attorneys, Alex Goldberg and Marc Lavaia, successfully obtained visitation rights for our client, the non-biological father of a nine-year-old girl who had known him as her father since she was one year old. The girl's biological mother (with whom our client also has two biological children) made a motion requesting that the court declare him a legal stranger to the child and modify a prior court order setting his visitation schedule with all three children by removing this child. The favorable decision of the New York Supreme Court in Westchester County was reported on the front page of the New York Law Journal on April 1, 2015 [available at <http://www.newyorklawjournal.com/id=1202722231678>].

The court agreed with Warshaw Burstein's argument that the non-biological father has a right to visitation with the child, despite the lack of biological or adoptive bond, under the legal doctrine of judicial estoppel. This doctrine states that if someone makes an argument or allegation to a court and the court rules in favor of that person on the basis of that allegation, the person cannot turn around and make a contradictory allegation in a subsequent court proceeding in support of relief on another issue. In this case, the biological mother previously had filed a petition requesting that the non-biological father pay her child support. Her petition was granted and the non-biological father was ordered to pay support on behalf of the three children. In denying the mother's later motion to block the non-biological father's visitation with the child, the judge stated in her decision that what the mother was seeking was "known as 'having your cake and eating it too.'"

The decision in this case provides a narrow exception under which some non-biological parents who have formed bonds with their former spouses' or partners' biological children can enforce a right to visitation. Unfortunately, this narrow exception will not be helpful to most non-biological and non-adoptive parents who wish to maintain a relationship with their children, because this sort of relationship is not recognized under current New York law. Despite the fact that these spouses or partners of biological parents often form strong parental bonds with their non-biological children, these step-parents have no rights to visitation with the children. This means that a child's

biological parent has the right to sever immediately and permanently that relationship without any legal ramifications. This type of relationship is particularly prevalent among same-sex parents, for whom only one person in the couple can be the biological parent of the child. Unless the other parent adopts the child, he or she has the same legal relationship with the child as a step-parent, despite the fact that he or she may have been the child's "parent" since before conception.

A number of states have recognized this problem and have enacted legislation providing these "*de facto*" parents with a right to petition a court for custody and visitation. There is a bill pending before the New York State legislature to grant this right to New York's *de facto* parents, but as yet, it has not been approved for a vote.

If you or someone you know has a non-biological child or is planning a family that may include non-biological children, we can help you take the steps necessary to ensure that the parental relationship will be protected in the event of a breakup or divorce. For further information about the rights of non-biological parents, please contact any of the undersigned or your regular Warshaw Burstein attorney.

Alex R. Goldberg	<a href="mailto:agoldberg@wbcsk.com">agoldberg@wbcsk.com</a>	(212) 984-7786
Marc A. Lavaia	<a href="mailto:mlavaia@wbcsk.com">mlavaia@wbcsk.com</a>	(212) 984-7740
Linda Genero Sklaren	<a href="mailto:lsklaren@wbcsk.com">lsklaren@wbcsk.com</a>	(212) 984-7832
Neena Tankha	<a href="mailto:ntankha@wbcsk.com">ntankha@wbcsk.com</a>	(212) 984-7755
Eric Wrubel	<a href="mailto:ewrubel@wbcsk.com">ewrubel@wbcsk.com</a>	(212) 984-7735

---

<sup>1</sup> *J. P. v. J. P.*, [Index Number Redacted by Court], NYLJ 1202722256605 (Sup. Ct., Westchester County, March 27, 2015), available at <http://www.newyorklawjournal.com/id=1202722256605/J-P-Plaintiff-v-J-P-Defendant-Index-Number-Redacted-by-Court>.