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9-6-2016

## Obergefell, Parenthood, and Property

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September 6, 2016

On August 30, 2016, the New York Court of Appeals joined a growing list of state courts that have allowed unmarried, same-sex partners who agreed with their companions to create and rear a child to later seek custody and visitation when the couple separates. In the Matter of Brooke S.B. v. Elizabeth A.C.C., 26 N.Y.3d 1113, 46 N.E.3d (2016). The result was particularly interesting because the party seeking access to the child was the not the genetic parent; her partner was. Nor was the couple married; the child was born before same-sex marriage was lawful in New York. In addition, the court overruled a case decided twenty-five years ago that had declined to grant standing to a non-genetic partner in a virtually identical fact situation.

The United States Supreme Court's affirmation of the right of same-sex couples to marry in *Obergefell v. Hodges*, 576 U.S. \_\_\_, 135 S.Ct. 2584 (2016), had a significant impact on the New York result. But the state court, after a lengthy discussion of *Obergefell* and an array of other legal and cultural shifts in perspective about same-sex relationships, did not decide *Brooke S.B.* as a Constitutional case. Perhaps that was a wise path. It may be premature to structure results about the rights of non-marital same-sex partners and non-genetic parents in ways that are reviewable by the Supreme Court. But there is no doubt that the long-term impact of *Obergefell* on family law and family property law is likely to be enormous. The range of potential issues is staggering. Just musing about the past, present, and future meaning of "parent" and property is enough to make your head spin.

Two centuries ago, the default definition of "parent" linked a man, a woman, their marriage, their intimacy, and birthing by the wife to their children. Non-marital relationships certainly produced bastard children, but the definition of parenthood was frequently diluted in such settings. In short, man, woman, marriage, and sex were the *sine qua non* of parenting. The first alterations in that pattern involved the imposition of a duty to support upon genetic fathers, even in non-marital settings, and the creation of inheritance rights in bastard children. But man, woman, and sex were still central to the definition of "parent" and marriage was the default setting in which children were supposed to exist. Simply framed, parents were opposite-gender genetic forebears who had sex, produced a pregnancy, and gave birth, typically inside marriage.

The first major break in the pattern occurred after the Civil War when adoption statutes began to appear. The presence of wayward children in urban areas, the decline in willingness of religious organizations to take in unwanted offspring, and other cultural shifts led to the placement of more and more children in new homes. The pattern froze the genetic parents out of the picture, typically kept the background of the adoptees' forebears secret, and defined the new mother and father as if they were the genetic parents. For the first time, a major break in the link between genetics, sex, birthing, and parenthood was forged.

After World War II the links between marriage, gender, intimacy, and parenthood further eroded. By the middle of the last century, artificial insemination became reasonably common, especially among married couples unable to produce a pregnancy. In response state legislatures adopted laws providing that if married couples used the procedure under a doctor's supervision, the donor of male

genetic material would be deemed a non-parent and the intended husband/father would be deemed the real parent. Marriage was still the default setting, but, as in adoption, the resulting child was not genetically linked to the father.

Since those early shifts, tectonic changes have occurred. Increases in divorce rates, the appearance of large numbers of “melded” families with children from multiple relationships, the rise of non-marital families, the large number of single parent families, inter-generational child rearing, and a host of other “new” family structures have placed enormous additional strain on the traditional links between marriage, genetics, sex, and birthing as the defining characteristics of parenthood. New doctrines like “psychological parents” and “defacto parents” have arisen in an effort to accommodate the need to resolve custody and visitation disputes in the best interests of children.

The links between marriage, genetics, sex, and birthing now have been definitively broken by the combination of alternative reproduction technology and same-sex relationships. Of necessity children are being born into such families either as a result of artificial insemination or in vitro surrogacy. In all such settings, there is at least one parent who is neither a genetic nor a birthing forebear. Intimacy, either between the partners or any other couple, is not the predicate to pregnancy. While marriage now may be present, all the traditional, defining characteristics of parenthood—genetics, sex, birthing, and marriage—often are absent. We are left without standard anchors to define the core meaning of a parent.

Not surprisingly, Justice Kennedy discussed in his *Obergefell* opinion the need to affirm the legality of same-sex marriage in order to regularize the lives of many children now residing in two-dad and two-mom households. Writing for the Court he opined:

[Another] basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. \* \* \* Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples. \* \* \* This does not mean that the right to marry is less meaningful for those who do not or cannot have children. Precedent protects the right of a married couple not to procreate, so the right to marry cannot be conditioned on the capacity or commitment to procreate.

This reasoning was used to support the right of adults to marry. But what might it say about the rights of such adults to be parents or the rights of youngsters to claim that an adult is their parent? At the most basic level it must mean that same-sex married partners who *intend* to create a child with any method available to them must be presumptive parents. Two traditional characteristics of parenthood—genetics and sex—are partially or totally broken in all such cases. Birthing is not present in another set. Marriage is present in a case like *Obergefell*, but of course may not appear in all cases. The sine qua non of parenthood appears to be intention—the stated and acted upon desire to have a family. That also is the case with adoptions by a married couple and true for one adult when adopting a child of the other partner. The degree to which marriage will change the calculus of parenthood determinations is not at all clear. There is no obvious reason why the presence or absence of a marriage should make any difference.

How far will the idea of intention to parent be carried? Will it apply to an unmarried same-sex couple? Opposite-sex, unmarried, genetic forebears, have long been deemed presumptive parents if both partners participate in welcoming and rearing the children. Shouldn't similarly situated same-sex, unmarried partners be treated the same way after *Obergefell*? When opposite-sex, unmarried, genetic parents separate, another adult typically may not adopt their children without the agreement

of the genetic parents. Will that also apply to unmarried, same-sex “intended” parents? Some states still find surrogacy contracts void as against public policy and treat a genetic birth mother as a potential parent. Can that still be true after *Obergefell* for married couples? For unmarried couples? Can a child seek intestacy inheritance rights from a non-genetic, intended parent after a same-sex relationship breaks up? Will children whose “intended” parents do not specifically disinherit them be able to claim shares of their estates, as typical state statutes provide?

And the questions go on and on. They are of three sorts. Will married opposite-sex couples and same-sex couples with children be treated the same? Will unmarried opposite-sex couples and same-sex couples with children be treated the same? And will children of any type of parents be treated alike? The future of family and family property law promises to be fascinating.

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