Square Pegs and Round Holes: Shoehorning Modern Family Dynamics into Antiquated Laws

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Square Pegs and Round Holes: Shoehorning Modern Family Dynamics into Antiquated Laws

A few years ago, a white woman and a black woman visited a fertility clinic, each woman to be inseminated with one of her own eggs fertilized with her husband’s seed. The white woman became pregnant. The black woman did not. Nine months later, the white woman gave birth to a black baby; she had accidentally been inseminated with the fertilized egg of the black couple.

The Solomonic legal issue was this: whose child was this — the black couple whose reproductive chemistry created the embryo, or the white woman who carried it to term and then delivered? And if the child belonged to the biological parents, was the gestational mother entitled to visitation?

Whenever the applicable law was written, nobody envisioned a scenario in which the biological and gestational mother could be anything but one and the same person. But the courts have had to apply existing law to a circumstance the law never envisioned.

A unanimous First Department panel in Perry-Rogers v. Fasano held for the black couple in a thoughtful opinion by Justice David Saxe. The court resolved the dispute in this case, but wisely declined to declare that no gestational mother may ever assert visitation rights with the infant she carried simply because she is a “genetic stranger” to the child. The court prudently conceded that we simply don’t know where science and the law is taking us; hence it would be unwise to venture beyond where we can see:

In referring to the rights and responsibilities of parents, the laws of this State, as well as the commentaries and case law, often use the term ‘natural parents,’ as distinguished from adoptive parents, step-parents, and foster parents. Until recently, there was no question as to who was a child’s ‘natural’ mother. It was the woman in whose uterus the child was conceived and borne. It was only with the recent advent of in vitro fertilization technology that it became possible to divide between two women the functions that traditionally defined a mother, at least prenatally. With this technology, a troublesome legal dilemma has arisen: [w]hen one woman’s fertilized eggs are implanted in another, which woman is the child’s ‘natural’ mother?

With the evolving definition of family—not to mention the brave new world of genetic science—judges are increasingly forced to think in ways they previously had not while applying laws in a way that was never contemplated when they were drafted, synchronizing old laws and old views with new realities.

A perfect example is the Third Department’s recent holding in Matter of Christopher YY v. Jessica ZZ and Nichole ZZ which held, apparently for the first time, that the presumption of legitimacy that attaches to a child born within marriage applies to a child born to a same-sex marriage. That may seem obvious and self-evident; after all, Domestic Relations Law §24 (entitled, “Effect of Marriage on Legitimacy of Children”), simply and clearly states that “[a] child…born of parents who prior to or subsequent to the birth of such child shall have entered into a civil or religious marriage…is the legitimate child of both parents.” There is no question that Jessica and Nichole were legally married. But there is a glitch that the drafters of §24 likely never foresaw. The presumption of legitimacy is rebuttable, traditionally upon proof that the child is the offspring of someone outside the marriage. In other words, in that construct, legitimacy is solely a biological question. The fact pattern in Matter of Christopher undermines the entire premise and forces the courts to reconsider what “legitimacy” means in this day and age and in the context of a law designed to preserve the family unit and assure the children of stability.

Here, Jessica and Nichole were married in August 2014. Subsequent to their marriage, Jessica conceived a child through sperm donated by Christopher. Jessica and Nichole waived any right to child support from Christopher; Christopher expressly waived any right to paternity, custody or visitation. Several months after the child was born, Christopher asserted his paternity and sought custody of his biological child.

Family Court ordered paternity testing, and the Third Department reversed, notwithstanding the fact that

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nine months earlier a slightly differ-
ent panel of the same court (three of
which were on both cases) had unani-
mously concluded that the product of a
same-sex marriage, at least not inher-
tently problematic" when dealing with
same-gender couples.

This changing legal and social
landscape requires reexamination of
the traditional analysis govern-
ing the presumption of legitimacy... While a workable rubric has not yet
been developed to afford children the
same protection regardless of the gender composition of their par-
ents’ marriage, and the Legislature has not addressed this dilemma, we
believe that it must be true that a child born to a same-gender married
couple is presumed to be their child and, further, that the presumption of
parentage is not defeated solely with proof of the biological fact that, at
present, a child cannot be the product of same-gender parents. If we were to
conclude otherwise, children born to same-gender couples would be denied
the benefit of this presumption with-
out a compelling justification. The
difficulty is in fashioning the pre-
sumption so as to afford the same,
and no greater, protection.3

To again quote Justice Mulvey, “[t]he Legislature has not addressed this
dilemma.” (emphasis added).

Courts, of course, do not have the luxury of waiting for the Legislature
to get around to addressing dilemmas, especially those that were not foresee-
able until a legal dispute brought the issue to the fore. With the seismic shift
in the perception of “family” over the past generation, judges are more and
more called upon to force the square peg of modern culture into the round hole
of the law, and sometimes even our most esteemed high courts, down the road, the
reset button.

That is what happened with the Court of Appeals’ landmark 2016 opin-
ton in Brooke S.B. v. Elizabeth A.C.C.6 In that case, the court backtracked from
a 25-year-old precedent in Alison D. v. Virginia M.7 and found, lo and behold,
that Domestic Relations Law §70 per-
mits “a non-biological, non-adoptive par-
ent to achieve standing to petition for
custody and visitation”9 after all. Alison
D. said just the opposite, concluding that a dedicated caregiver to sue for visitation
rights after separating from the biolog-
ical mother. Only then-Associate Judge Judith S. Kaye saw the writing in the
wall back in 1991.

In her dissent, Judge Kaye observed that DRL §70 states that the person
seeking custody or visitation must be the “parent,” a term the Legislature found
no need to define, undoubtedly because

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Superme Court denied the c...