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 born. 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: [when 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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Foley Griffin, LLP is pleased to announce that Chris McDonough, Esq. has joined the firm as “Special Counsel”

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Hon. Gail Prudenti

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nine months earlier a slightly differ-
eted analysis 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 their 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 Mulve, “[t]he Legislature has not addressed the
dilemma.” (emphasis added). Courts, of course, do not have the
luxury of waiting for the Legislature to get around to addressing dilemmas, es-
pecially those that were not foreseeable
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, hit the
reset button. That is what happened with the Court of Appeals’ landmark 2016 opin-
on in Brooke S.B. v. Elizabeth A.C.C.4 In that case, the court backtracked from
a 25-year-old precedent in Alison D. v. Virginia M.5 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”6 after all. Alison
D. said just the opposite, concluding that
logically, only a biological mother can be a “legal
stranger” with no right to seek visitation
rights after separating from the biolog-
ic 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 requires that the person seeking
child custody or visitation must be the
“parent,” a term the Legislature found
no need to define, undoubtedly because
at the time the meaning was self-evident
and unambiguous. The majority was young, unprepared for the definition beyond its
traditional intended meaning, understan-
dably concerned that doing so could open the floodgates and permit every
deserving caregiver to sue for visitation, while upsetting myriad legal principles.
Judge Kaye, however, believed there was
room for a medium, and said her col-
leagues “overlook and misportray the Court’s role in defining otherwise unde-
fined statutory terms to effect particular statutory purposes, and to do so narrow-
ly, for those purposes only.”7

It is not my intention to spell
out a definition but only to point out that it is surely within our
competence to do so. It is indeed regretable that we will need to exer-
cise that authority in this visita-
tion matter, given the explicit stat-
utory objectives, the courts’ power, and the fact that all consideration of the
child’s interest, is, for the future, otherwise absolutely foreclosed.8

In Brooke S.B., the court found “lim-
ited exceptions” when DRL §70 per-
mits a non-biological, non-adoptive par-
tent to achieve standing to petition for
custody and visitation. Judge Sheila Abdus-Salaam, writing for the court, held:
The definition of ‘parent’ estab-
lished by this Court 25 years ago in
Alison D. v. Virginia M. has become un-
workable when applied to increasingly varied familial relationships...Under
the current legal framework, which emphasizes biology, it is impossible—
without marriage or adoption—for both partners of a same-sex couple to have standing, as only one
can be biologically related to the child. By contrast, where both partners in a
heterosexual couple are biologically related to the child, both former partners
will have standing regardless of
marriage or adoption. It is this con-
text that informs the Court’s deter-
mination of a proper test for standing that ensures equality for same-sex
parents and provides the opportunity for their children to have the love and
support of two committed parents.9

Without question, the definition of “family” is constantly changing and
has shifted continuously since the very founding of the republic.10 The new fami-
ly paradigm is there is no paradigm. The nuclear family “ideal” glorified in such
programming as Ozzie and Harriet and Leave it to Beaver — breadwinner
father, homemaker mother, “natural” family and all that. The U.S. Census Bureau
gave way to family units with a single parent, same sex parents who may or may not
share DNA with children they may or may not have adopted and residues with one
child.11

And the problems that arise therefrom must be resolved by the courts, whether
there is clear legislative guidance or
president or not.

Judge Kaye in Alison D. recognized the court’s legitimate role in defining
terms undefined by the Legislature—
such as “parents”—to effect the overreach-
ing intent of the statute. That is a role
the courts must embrace, with all due
cautions and restraint. Culture, science and
law are intersecting in unprecedent-
ed ways, and much of the time the resul-
tant social and legal questions arise in the
courts that need to be brought to the attention of lawmakers.

Judge Gail Prudenti is Dean of the Nassau A.
A. Deane School of Law at Hofstra
University and Executive Director of the Center for Children, Families and the Law.
She was previously Chief Administrative Judge of the State of New York and
Presiding Justice of the Appellate Division, Second Department.

2. Id.
9. Alison D., 77 N.Y.2d at 661 (Kaye, dissenting).
10. Id. at 662.
13. See https://www.census.gov/programs-surveys/technical-documentation/subject-definitions.html#Family

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Supreme Court denied the certiorari
petition of the family. As of the writing of this article, this litigation
was pending and Dream Act legislation has not been passed.

A trend emerging in the trend from the executive office to eliminate immigration
programs authorized by that branch. Bernadette Fasano, et al. v. Regents of the State University of New York,
cases have been either invalidated, overturned, or blocked by
the courts. The American Immigration Law

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tion law for 37 years and has a bi-lingual law office in Hempstead. Ms. Nanos is a
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