When Marijuana Becomes a Risk to Children: A Jurisdictional Perspective from California

Introduction

Understanding the relationship between marijuana use and child maltreatment is critical to protecting the safety and welfare of children. Illicit drug abuse is a significant factor among families involved in the child welfare system. In recent years, public opinion has shifted from a culture of anti-marijuana sentiment to one of general acceptance. California led the movement in 1996, when its citizens voted into law Proposition 215, known as the Compassionate Use Act, making it the first state to legalize medical marijuana.1 Since then, 25 other states have passed similar laws.2

In 2014, 27 million Americans aged 12 and older were illicit drug users, just over 10 percent of the population.3 Marijuana is the most commonly used illicit drug and accounts for more than eight percent of illicit drug use in the United States.4

Marijuana remains classified by the Federal Drug Enforcement Administration as a Schedule I drug, meaning it has a

Rethinking Parental Cannabis Use

25 states and Washington, D.C. have implemented medical cannabis programs, and four states (Colorado, Washington, Oregon & Alaska), along with the capital, have enacted laws allowing recreational use of marijuana for adults.2 All of these states, along with those who have enacted decriminalization laws, have eliminated criminal penalties associated with marijuana possession or sale if an individual’s conduct complies with state law. The effect of these laws on non-criminal state actions, however, is far less clear, and courts and agencies across the nation have struggled to define the impact of these laws outside of the criminal context, particularly in the areas of housing, employment, and family law.

In family law, the thorniest issue by far is deciding what effect, if any, to give a parent’s use of cannabis in making determinations of child custody and parental fitness. Although the issue certainly arises in disputes between parents, nowhere is it more salient than in child welfare cases, where the need to protect children from abuse or neglect is paramount. While it is true that some families may become CPS-involved due to allegations of marijuana use by a parent, far more common is that the use of cannabis becomes an issue once the case has already opened. To achieve reunification, child

4. Id.
high potential for abuse and no currently accepted medical use in the United States. According to the National Institute on Drug Abuse, marijuana affects areas of the brain associated with thinking, memory, coordination, and time. Marijuana can cause depression, anxiety, paranoia, agitation, hallucinations, impair memory and problem-solving abilities, and affect the development of the brain in the fetus, infants, and adolescents. Four states have legalized recreational marijuana, Alaska, Colorado, Oregon, and Washington. This year, voters in at least five states, including California, will decide whether to legalize recreational marijuana.

This article neither intends to address the wisdom of legalizing marijuana, nor the morality of its use. Rather, it stresses that in light of changing attitudes about the dangers of marijuana, and liberalizing state laws, child welfare advocates must carefully assess the impact that marijuana has on children coming before the juvenile court. The following will examine how California courts have done just that.

### Defining Substance Abuse in California

The state’s Legislature has declared that the “[p]rovision of an environment free from the negative effects of substance abuse is a necessary condition

9. MPP, Ballot Initiative Campaigns, MPP (September 3, 2016) [https://www.mpp.org/initiatives/].

welfare agencies routinely impose a drug testing requirement upon parents whose children have been removed from their home. If the reported allegation is drug use, or if a parent has tested positive in the past or self-disclosed drug use, service plan tasks often include enrolling in substance abuse treatment.

The problem with these practices, in light of changing cannabis laws, is that they do not account for the fact that some marijuana use by adults is now legally permissible in half the country. In states where recreational use is legal for adults, cannabis consumption is virtually identical to alcohol or tobacco consumption. While perhaps disfavored, no one could argue that a parent who smokes or drinks is—categorically and for an extended period of time—impaired to the point of being unable to safely supervise their children. Yet that is precisely the conclusion often drawn from a positive drug screen result showing that a parent has consumed cannabis. This is despite the fact that metabolites of THC, the active ingredient in marijuana, are detectable in urine for up to a month following frequent use. In other words, toxicology testing is an extremely poor indicator of recent impairment due to marijuana use, and reveals little, if any, information useful in evaluating a person’s present ability to care for children (or, for that matter, carry out any number of other daily activities). Similarly, use is not the equivalent of abuse, and just as many people partake in non-problematic use of alcohol, it is possible to be an occasional marijuana user who would reap no benefit from substance abuse treatment meant for those managing addiction. The limited research of the impact of marijuana on human subjects has not borne out the widespread belief that even its frequent use significantly alters one’s ability to perform

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for the safety, protection, and … well-being of the child.” However, when the Legislature amended the code in 1987 to include as a basis for jurisdiction a parent’s inability to provide regular care for his or her child due to substance abuse, it did not include a definition of the term “substance abuse.”

In 2012, the court in Drake M. proposed a definition of substance abuse based on the definition of “Substance Abuse Disorder” in the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR). A finding of substance abuse must be based on “evidence sufficient to (1) show that the parent [has] been diagnosed as having a current substance abuse problem by a medical professional; or (2) … has a current substance abuse problem as defined in the DSM-IV-TR.” Although reliance on this definition is “not mandated by the legislature or Supreme Court,” courts have found it to be a “generally useful and workable definition of substance abuse.”

The DSM-IV-TR defines “substance abuse” as “[a] maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one or more of the following, occurring within a 12-month period: (1) a failure to fulfill major role obligations at work, school, or home (repeated absences or poor work performance); (2) engaging in substance use in hazardous situations (driving an automobile or operating machinery when impaired by substance use); (3) a pattern of recurring substance-related legal problems (arrests for substance-related conduct); and (4) continued substance use despite recurrent social or interpersonal problems (arguments with spouse of intoxication, physical fights)."

cognitive tasks. Regular instances of acute alcohol intoxication—not detectable in toxicology testing, as routinely implemented—present a far greater risk to children than either prolonged or acute use of cannabis.

Many child welfare cases begin with a report from hospital personnel after a baby is born testing positive for a controlled substance. Despite little evidence of negative birth outcomes associated with prenatal exposure to cannabis, its presence in a neonate’s system is often presumed to indicate neglect, or at least a likelihood of future neglect. However, cannabis is known to alleviate symptoms of hyperemesis gravidarum (severe morning sickness) during pregnancy, and some women prefer to use it (often ingesting it in non-smokable forms such as teas or infused edibles) as a natural alternative to prescription anti-nausea medications. Treating drug use during pregnancy, and some women prefer to use it (often ingesting it in non-smokable forms such as teas or infused edibles) as a natural alternative to prescription anti-nausea medications. Treating drug use during pregnancy, and some women prefer to use it (often ingesting it in non-smokable forms such as teas or infused edibles) as a natural alternative to prescription anti-nausea medications. Treating drug use during pregnancy, and some women prefer to use it (often ingesting it in non-smokable forms such as teas or infused edibles) as a natural alternative to prescription anti-nausea medications. Treating drug use during pregnancy, and some women prefer to use it (often ingesting it in non-smokable forms such as teas or infused edibles) as a natural alternative to prescription anti-nausea medications. Treating drug use during pregnancy, and some women prefer to use it (often ingesting it in non-smokable forms such as teas or infused edibles) as a natural alternative to prescription anti-nausea medications. Treating drug use during pregnancy, and some women prefer to use it (often ingesting it in non-smokable forms such as teas or infused edibles) as a natural alternative to prescription anti-nausea medications. Treating drug use during pregnancy, and some women prefer to use it (often ingesting it in non-smokable forms such as teas or infused edibles) as a natural alternative to prescription anti-nausea medications.
Case Examples Addressing Marijuana Abuse

In cases of child abuse and neglect, a parent's failure to fulfill major role obligations at home is one of the most significant manifestations of parental substance abuse.

Consider Christopher R., where the trial court found that father's use of marijuana resulted in his inability to fulfill major role obligations at home by virtue of his daughter's age. The Court of Appeal noted that cases finding a substantial risk of harm to children typically fall into two categories. One group involves an identified, specific hazard in the child's environment ... [Citations.] The second group involves children of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety. In this case, father was a 22-year-old, unemployed, former gang member, who used marijuana daily in the aftermath of being shot. Father's efforts to obtain a medical marijuana recommendation failed and he continued to test positive, violating his probation. In holding that Father's persistent use of marijuana created a risk of harm to his infant daughter, who was only three months old at the time jurisdiction was taken, the court noted that it "need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child."

On the other hand, consider Drake M., where the Court of Appeal disagreed that father's use of marijuana created a serious risk of harm to his 14-month-old son. In that case, father used marijuana three times each week at the beginning of his day or around lunchtime. He had been employed for many years, had no involvement with the criminal justice system, and a valid recommendation from a physician to use marijuana for chronic knee pain. At least four hours passed between his use of marijuana and the time he

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17. Id.
20. Id.
21. Id.
23. Id. at 767.
24. Id.
picked his son up from daycare after work.\textsuperscript{25} Even in light of the child’s young age, the Court of Appeal found no evidence that father failed to fulfill major role obligations and home or work and therefore, father was not identified as a substance abuser for purposes of juvenile court jurisdiction.\textsuperscript{26}

Long before courts deferred to the DSM-IV-TR for a definition of “substance abuse,” courts were assessing marijuana’s risk to children using similar factors. In Alexis E., the father used medical marijuana in the family home, in the presence of his children.\textsuperscript{27} One child said, “My dad sucks drugs; he does them all the time. It looks like daddy’s going to set a fire on the house and it stinks.”\textsuperscript{28} The court drew from state laws that forbid the use of medical marijuana near schools, recreation centers, and youth centers and inferred that such prohibitions must mean that the use of marijuana near others can have a negative effect on them.\textsuperscript{29} As a result, father is exposing his children to the negative effects of second hand marijuana smoke.\textsuperscript{30} Thus, the manner in which father uses marijuana presents a risk of harm to his children.\textsuperscript{31}

**Conclusion**

Regardless of its legality, when gauging the risks of a parent’s marijuana use, advocates must recognize that the evaluation begins and ends with the child. The issue is not whether the use of marijuana has negative consequences to the parent, but rather to the child.\textsuperscript{32} California’s juvenile welfare system is concerned with providing “maximum safety and protection” for children who are being abused or neglected or at risk of such harm.\textsuperscript{33} “[P]arents do not represent a competing interest in this respect,” because “even legal use of marijuana can be abuse if it presents a risk of harm to minors.”\textsuperscript{34}

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\textsuperscript{25}Id.
\textsuperscript{26}Id.
\textsuperscript{28}Id. at 451.
\textsuperscript{29}Id. at 451-452.
\textsuperscript{30}Id. at 451-452.
\textsuperscript{31}Id. at 453.
\textsuperscript{32}Id. at 452.
\textsuperscript{33}Cal. Welf. & Inst. Code, § 300.2 (West 2016).
\textsuperscript{34}In re Jason L., 222 Cal. App. 3d 1206, 1214 (1990); In re Alexis E., supra note 27, at 452.

7. In the only published appellate court decision on the issue of which the author is aware, the Maine Supreme Court concluded that a parent’s medical marijuana use could be considered in making determinations of parental rights, under a provision of Maine’s Medical Use of Marijuana Act which states that parental rights and responsibilities may not be denied based on conduct in accordance with the law, “unless the person’s conduct is contrary to the best interests of the minor child.” Daggett v. Sterneck, 109 A.3d 1137 (Me. 2015). See Me. Rev. Stat., tit. 22, § 2431-E(3).
President’s Message

This Fall, leaves are not the only things changing around the NACC; the departure of two staff members creates new opportunities to join our vibrant team!

Executive Director Kendall Marlowe has resigned to pursue a position in direct child welfare services. The NACC has been fortunate to have Marlowe at the helm these past three years. During his tenure, NACC realized substantial gains in membership, produced a new policy agenda, and published the 3rd Edition of the leading treatise Child Welfare Law and Practice. NACC also increased its digital reach, with the publication of a weekly law and policy blog, Children, Families and the Law.

Senior Staff Attorney D. Andrew Yost transitioned to a Management Consultant position at Public Knowledge, LLC at the beginning of September. In his three years at the NACC, Andy expanded our national training program, brought revolutionary adult learning theory and practice to our annual conference, and helped start the direct child representation program.

Please join the Board of Directors in wishing Kendall and Andy every success in their new endeavors!

The NACC Board of Directors will conduct a search this fall for a new Executive Director. If you are interested in applying, please contact NACCed@NACCchildlaw.org.

H.D. Kirkpatrick, Ph.D.
President
NACC Board of Directors

NACC’s mission is to improve the lives of children and families by ensuring that court proceedings produce justice. We dedicate our efforts to providing all of you who do this important work with the training, resources, and support necessary to help you achieve that vision on a day-to-day basis. NACC is committed to promoting excellence in the profession, and we ask for your support. Your gift will help us continue to serve as a valuable resource for child welfare attorneys.

You can make a donation on our website, or if you prefer, at www.justgive.org. Thank you!
Let’s talk ‘Diversity’

At the NACC’s annual conference in Philadelphia a group of advocates convened for a diversity roundtable break out session. This session was intended to be the first of many meetings among child welfare and juvenile justice professionals dedicated to increasing diversity within our field. Although in its early stages, I am excited about the possibilities and the opportunities we have to make an impact on issues related to diversity in our field. It is disheartening that in 2016 many minority groups continue to be disproportionately represented in both the child welfare and juvenile justice systems. The three groups that statistics show as the most disproportionately represented in the child welfare system are American Indian children, African American children and LGBTQ children. Interestingly, but perhaps not surprisingly, statistics also show that the percentage of attorneys who are American Indian, African-American and LGBTQ are also disproportionately low.

There are many benefits to, and good reasons for, increasing the diversity of the professionals working within the child welfare and juvenile justice systems. Just one of which is the theory that if we increase the diversity within the field of child welfare and juvenile justice professionals, it will decrease the disproportionality of minority children in the two systems. I don’t know if a causal effect can be made, but I would be willing to bet that there is a strong correlational relationship that can be established.

The Multi-Ethnic Placement Act (MEPA) is a federal law that requires each state to conduct a diligent recruitment of foster and adoptive parents that reflects the ethnic and racial diversity of the children residing in that state. Why? Because as well intentioned as we are and as sensitive to the needs of others as we may be, there is something to be said for having lived a similar experience. I am not suggesting that on an individual level, we can or should only represent those who are similar to us racially, ethnically or in terms of life experience. But on a systemic level, the field is struggling to find ways to both increase the diversity of the workforce and decrease the disproportionality of the children in the system. I am suggesting that those two goals are interrelated.

Certainly each of us has our own individual story that is uniquely ours and cannot be completely understood even by those who share our race, ethnicity, sexual orientation, etc. But sometimes just knowing that another person shares an aspect of our experience can open the door to further understanding. As legal advocates, we have a duty to ensure that our clients’ legal rights are protected. In doing so, we often must strive to understand where our clients are coming from, what they need from the system and what barriers exist that may inhibit the outcomes that they desire. Having a more diverse workforce of child welfare and juvenile justice attorneys helps us all become better advocates and improves the system as a whole.

If you are interested in becoming more involved in the initiative to increase diversity in our field, we welcome your participation. Please contact staff attorney Brooke Silverthorn for more information on how to get involved.

by Brooke Silverthorn, JD, CWLS, NACC Staff Attorney
Child Welfare Law Certification

by Daniel Trujillo, Certification Director

CWLS Diversity Series – Young Lawyers

We are continuing our series of scholarships to promote diversity with our Young Lawyers Scholarship. At least one applicant will receive a full funding to apply for certification. The deadline is October 31, 2016. Form and details can be found on our website. We have completed and awarded our racial diversity, LGBTQ+, and persons with disabilities scholarship and we’ll wrap up this year with scholarships for GALs, RPCs, and agency attorneys starting in November.

Colorado 8th Judicial District

We love to see our CWLS being hired, promoted, and recognized for their hard work and dedication. This time we get to see it up close. Congrats to Susan Blanco who was just appointed to the Colorado 8th Judicial District Bench. We look forward to seeing your continued excellence on the bench Judge Blanco!

Red Book Third Edition and Certification Exam

The third edition of the Red Book was just released in August and we have plenty of applicants asking the same question — when will the exam change to the third edition? The 2016 exam will be on the second edition. The 2017 exam year will be split so we encourage anyone with only a second edition to sit this year or early 2017.

Congratulations to These New CWLS!

● First Washington State CWLS

Congrats to Jill Malat, a manager at The Office of Civil Legal Aid and now Washington’s first Child Welfare Law Specialist!

● Sherry Ann Powell, JD, CWLS

Louisiana DCFS

“I am an Attorney Supervisor with the Louisiana Department of Children and Family Services. I have practiced law for 23 years and for the last 19 years I have devoted my career to Child Welfare law. Because I strive to provide the highest quality legal representation to my client, DCFS, I sought CWLS certification. Recognizing Child Welfare as a distinct legal specialty provides credibility to practitioners in this field. The CWLS certification process promotes competent counsel for children, parents and social service agencies which collectively will lead to better outcomes for the children and families we serve. I am honored to be recognized as a CWLS which allows me to reflect to the bar, judiciary and DCFS my personal commitment to Child Welfare.”

● Additional new CWLS:

- Dane Burcham, JD, CWLS
  Children’s Advocacy Group, Inc.
  San Bernardino, CA

- Hong Chew, JD, CWLS
  Law Office of Hong Chew
  San Francisco, CA

- William Connolly, JD, CWLS
  Connolly & Shireman LLP
  Houston, TX

- Elizabeth Higgins-Brooks, JD, CWLS
  Hempfling & Associates Law Firm, LLC
  Covington, GA

- Amy Ishee, JD, CWLS
  Tennessee Dept of Children’s Services
  Alcoa, TN

- Seetha John-Holmes, JD, CWLS
  Office of Law Guardian
  Mt. Holly, NJ

- Kellie Johnson, JD, CWLS
  Mental Health Advocacy/Child Advocacy Program
  Baton Rouge, LA

- Rebecca May-Ricks, JD, CWLS
  Mental Health Advocacy Service
  Baton Rouge, LA

- Te’ya O’Bannon-Martens, JD, CWLS
  O’Bannon Law, PC
  Council Bluffs, IA

- Brenda Robinson, JD, CWLS
  Children’s Law Center of California
  Monterey Park, CA

- Jill Smith, JD, CWLS
  Dependency Legal Group of San Diego
  San Diego, CA
A thank you from Judge Meinster

The reason I went to law school was to work with children and families. I have had the good fortune of being able to devote my career to child advocacy. I’ve been a GAL, Respondent Parent Counsel, County Attorney, Magistrate, and now a Presiding Juvenile Judge. I always knew what I wanted to do and I love what I do today even more than the day I began.

The field of child welfare law has evolved and changed over the 30 years I have been involved. It is an exciting time to be involved in juvenile law and I have great hope for the future. Those of us who have been around a long time acknowledge that the ways in which we have traditionally handled dependency cases, especially those of older youth, have not led to good outcomes for children and families. Today we are less likely to look to foster care, residential placements and terminations of parental rights as successful interventions. We know we need to use them more sparingly. There are several trends I see that are changing our practice and bode well for the future.

First, best practices are being defined and established. We rely on research and evidence to inform our practices. Organizations such as NACC, NCJFCJ, and Children and Family Futures give us guidance, support and occasionally funding to institute reforms. For example, there is a new initiative through the Office of Juvenile Justice and Delinquency Prevention (OJJDP): the Statewide System Reform Program (SSRP). The SSRP seeks to infuse effective family drug court (FDC) strategies into more dependency and neglect cases in order to better serve court-involved families affected by substance use and/or mental health disorders. This initiative seeks to determine which practices lead to improvements in safety, permanency and well-being for children and families within a treatment-focused environment. I am pleased that Colorado is one of the five states participating in this initiative. Continuing to move forward with implementing evidence based practices is critical to improving outcomes in relationship to children and families in the dependency system.

Second, there is an increased awareness of the importance of multi-disciplinary collaboration. The issues we face within the child welfare system are complex and overwhelming. One example of effective collaborations are the State Court Improvement Programs throughout the country that have been instrumental in establishing Best Practice Teams; multi-disciplinary teams tasked with improving dependency outcomes within their judicial districts. There is an increased focus on both strong advocacy on behalf of children and collaborative skills and a realization that they are not mutually exclusive. Legal professionals are part of the effort to overcome barriers to information sharing. We are learning the importance of sharing data and joining forces with other stakeholders to achieve our goals. We understand the goals we set cannot be accomplished by any one person or agency working in isolation from others.

Finally, and perhaps most significantly, juvenile law is becoming increasingly recognized as an area of specialty. The NACC has been in the forefront of this movement. Nowhere is that more apparent than in their pioneering effort to accredit legal professionals practicing in the dependency field as experts. It was extremely important to me to receive the CWLS accreditation. I believe practicing in this field requires expertise, and that it takes years of experience and effort to achieve. Increasingly, practitioners are recognized as specialists. I am currently involved in a project for the Colorado Institute for Faculty Excellence in Judicial Education to improve the quality of judicial officers presiding over child welfare cases. It is my hope that we reach a point in this country where juvenile judges have experience in the field prior to their appointment on the bench, receive ongoing training and support, and remain in that assignment for a minimum of five years.

Reaction to Winning

I was stunned! I received the email while I was at the Child Welfare League of America annual conference in Anaheim, California. I must have re-read it 20 times before it started to sink in! It was all the more exciting because my husband, son and daughter-in-law were with me and got to share in the excitement. Those are the people who have given me the unwavering support to continue the work I love so much. I’m very excited to attend the Civility Promise Conference next year and feel humbled and honored to represent all the great CWLS across the country.

Congratulations to Judge Meinster, winner of this year’s CWLS competition to attend Civility Promise Conference — an eight day seminar in Tuscany, Italy. Her experience, dedication, and excellence in child welfare law were apparent in her application and glowing references. She has shared some thoughts with us about our ever-evolving field, her hopes, and winning this national competition of specialists.
CHILD WELFARE LAW and PRACTICE: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases 3RD EDITION

Child welfare law is complex and ever-changing. The practice of representing children, parents, and agencies in dependency cases requires extensive knowledge and skill in both legal and non-legal subjects. This third edition of Child Welfare Law and Practice (“The Red Book”) captures the wide body of information and expertise that define child welfare law as a specialized field, from legal standards in federal law to techniques for interviewing children to innovations in serving older youth.

The 35 chapters in this edition include extensive updates and revisions from the second edition, including new chapters on issues such as coping with secondary trauma and engaging in systemic advocacy for policy change. The National Association of Counsel for Children (NACC) has certified dependency attorneys and judges as Child Welfare Law Specialists (CWLS) since 2006. This treatise serves readers as a practice reference, a training manual, and a study guide for the CWLS certification exam.

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Membership Matters

by Sara Whalen, NACC Membership Director

Featured Member

Rosa Maria Gonzalez, BA, JD, CWLS

Rosie has devoted her career as an attorney to obtaining fairness and justice for the disenfranchised and the voiceless. She is also committed to insuring that women have a seat at the policy making table of their respective communities of origin. She has received the Adele Advocate for the Poor Award, has been inducted into the Order of Barristers, and is a recipient of the Presidential National Leadership Award. She is a past Commissioner on the Hispanic National Bar Association’s Commission on the Status of Latinas in the Legal Profession and has served on multiple non-profit and educational boards, as well as acts as a consultant to women seeking political/public office. She is also a board certified attorney/specialist in the area of Child Welfare Law by the National Association of Counsel for Children.

Have questions or need help logging in? Contact us at Membership@NACCchildlaw.org.
Abstracts are Open!


The conference will be held August 10–12, 2017 at the Roosevelt New Orleans with our pre-conference sessions held on August 9, 2017. As always, presenters will receive complimentary registration to the conference.

We strive to select conference sessions which will expand attendees’ understanding of child law and provide them with practical tools to help protect the rights of the children, youth, and families they serve.

Visit our website for more information about the conference, suggested topic areas, selection process, or to submit an abstract.

Please contact us at Conference@NACCchildlaw.org with any questions or comments. We are looking forward to another exciting conference!

Early Registration is Open, Too!

You can now register for the 40th National Child Welfare, Juvenile and Family Law Conference in New Orleans! Visit our conference page to register.

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Can’t wait to…

See ya in NOLA
Brooke S.B. v. Elizabeth A. C.C.: Court of Appeals of New York Overrules Case Denying Parental Rights of Non-Biological, Non-Adoptive Parents

On August 30, 2016, the Court of Appeals of New York issued a decision overruling long-standing precedent that precluded non-biological, non-adoptive parents from seeking custody or visitation of a child.1 Previously, the court’s decision in Alison D. v. Virginia M. prevented a non-biological, non-adoptive parent from seeking custody or visitation of a child although both parents mutually decided to have the child and both played an integral role in the child’s life prior to termination of the relationship.2 Based on significant changes in demographics and a shifting concept of the average American family, the court overruled Alison D., giving non-biological, non-adoptive parents standing to petition for custody and visitation when the parent agreed with the biological parent to conceive and raise the child as co-parents.3

Brooke S.B. v. Elizabeth A. C.C. consists of two cases where a non-biological, non-adoptive parent sought visitation or custody of a child after a same-sex relationship had ended. In Brooke S.B., the petitioner and respondent entered into a relationship in 2006 and later became engaged. At the time, same-sex couples could not yet legally marry in New York. Shortly after the engagement, the couple decided to have a child and determined that the respondent would carry the child. The respondent became pregnant in 2008 and the petitioner was involved throughout the pregnancy. The petitioner was present when the child was born and the child was given the petitioner’s last name. After the child was born, the parties continued to live together and shared all parental responsibilities until 2010, when the relationship ended. The couple’s relationship deteriorated further over the next few years and in 2013 the respondent terminated the petitioner’s contact with the child.4

The petitioner thereafter commenced a proceeding seeking custody and visitation of the child. The court appointed an attorney for the child, who determined that regular visitation with the petitioner would be in the child’s best interest. The respondent moved to dismiss based on a lack of standing under Domestic Relations Law § 70 as interpreted by Alison D. The respondent argued that the petitioner was not a parent within the meaning of the statute because she had no biological or adoptive connection with the child. The petitioner, along with the attorney for the child, opposed the motion to dismiss, arguing that Alison D. should no longer be followed in light of the recent enactment of the Marriage Equality Act.5 The parties also argued that the long-standing relationship between the petitioner and the child conferred standing under principles of equitable estoppel.6 The family court dismissed the case, following Alison D., noting that the petitioner had no adoptive or biological relationship with the child. The attorney for the child appealed.7

The second case, Estrellita A. v. Jennifer D., similarly consists of a same-sex couple who had entered into a relationship and jointly decided to have a child.8 The couple determined that the respondent would bear the child and that the sperm donor should share the same ethnicity as the petitioner. The respondent became pregnant in 2008 and gave birth later that year. The petitioner was involved throughout the pregnancy and present at the birth. The child lived with the couple in their home and the couple shared all parental responsibilities for several years. In 2012, the relationship...
Case from previous page

ended, but the petitioner maintained contact with the child.\textsuperscript{10}

Later in 2012, the respondent commenced a proceeding seeking child support from the petitioner, maintaining that the petitioner was a “parent” of the child for these purposes. The family court agreed and granted the respondent’s child support petition.\textsuperscript{11} While the child support case was pending, the petitioner filed a petition for visitation. After the child support case had been decided, the petitioner amended the petition for visitation arguing that after having been adjudicated a “parent” for support purposes, she now has standing for visitation purposes. The child’s attorney supported visitation and opposed the respondent’s motion to dismiss. The petitioner also argued that the respondent’s motion to dismiss should be denied based on a theory of judicial estoppel, which prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another.\textsuperscript{12}

The family court denied the respondent’s motion to dismiss, acknowledging that the petitioner would not have standing under equitable estoppel or as a “de facto parent.” The court instead based its decision on the doctrine of judicial estoppel and the fact that the respondent had previously argued that the petitioner was a “parent” in the child support case.\textsuperscript{13} The appellate division affirmed unanimously, finding that Alison D. does not preclude standing based on the doctrine of judicial estoppel. The Court of Appeals of New York granted leave to appeal in both cases.

The threshold issue in both cases is focalized on the definition of the term “parent” under Domestic Relations Law § 70 for the purposes of custody and visitation. Further, the doctrine of \textit{stare decisis} is implicated in determining whether retention of the definition in Alison D. is warranted or not. Ultimately, the question for the court was whether or not to follow Alison D. in denying standing for non-biological, non-adoptive parents to petition for custody or visitation.

Domestic Relations Law § 70 states:

“Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.”\textsuperscript{14}

Like the couples in this case, the couple in Alison D. was a same-sex couple that had jointly decided to have a child.\textsuperscript{15} The couple agreed that the respondent would carry the child, while both parties would raise the child jointly.\textsuperscript{16} After the child was born, the petitioner was actively involved in the parenting of the child in all major aspects.\textsuperscript{17} The petitioner provided financial, emotional, as well as practical support. The relationship ended and the couple subsequently moved out of their shared home. The petitioner continued to visit with the child until age 6, when the respondent terminated contact between them.\textsuperscript{18} The petitioner requested visitation from the court under Domestic Relations § 70, but was denied standing due to the fact that a “de facto” parent is not a “parent” with standing under the rule.\textsuperscript{19} The Court of Appeals affirmed, holding that “parent” should be interpreted to preclude standing for a de facto parent who might otherwise be recognized as a parent for visitation purposes. The court based its decision upon the need to strictly protect the rights of biological parents. The court reasoned that recognizing standing for de facto parents “would necessarily impair the [biological] parents’ right to custody and control.”\textsuperscript{20}

Under the doctrine of \textit{stare decisis}, a court’s decision on a particular issue of law should generally bind the court in future cases that concern the same issue.\textsuperscript{21} Here, the court would generally be required to follow the decision that the court came to in Alison D. The court in Brooke S.B. was faced with the same issue of whether a non-biological,

\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{13} Brooke S.B. supra.
\textsuperscript{14} N.Y. Dom. Rel. Law § 70 (McKinney).
\textsuperscript{15} 77 N.Y.2d at 655.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 657.
\textsuperscript{20} Id.
non-adoptive parent has standing to ask the court for visitation or custody. The purpose of the doctrine is to promote predictability in the law, engender reliance on court decisions, encourage judicial restraint, and reassure the public that “court decisions arise from a continuum of legal principles rather than the personal caprice of the members of this Court.” This requirement is not absolute, and the court may overrule a prior decision if an “extraordinary combination of factors” undermines the reasoning and viability of the prior decision.

In coming to the conclusion that Alison D. should not be followed, the court relied on the fact that Domestic Relations Law § 70 had already evolved alongside equitable practices. For example, the rule previously applied to a husband and wife, but now refers to either parent regardless of the relationship. This shows that the court had already taken steps to ensure that a needlessly narrow interpretation of the term “parent” does not lead to inequitable results. The court also points out the inequitable result that can occur in which a party may be adjudicated a “parent” for the purposes of child support, but later denied visitation rights due to lack of standing as a non-biological, non-adoptive parent. According to the Court of Appeals of New York, “Alison D. has created an inconsistency in the rights and obligations attendant to parenthood.” Further, “Alison D.’s foundational premise of heterosexual parenting and non-recognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court’s holding in Obergefell v. Hodges which noted that the right to marry provides benefits not only for same-sex couples, but also for the children being raised by those couples.”

The court emphasized the great hardship that the hard line rule of Alison D. has put on the growing number of nontraditional families in New York. Demographics have changed drastically in the past 25 years, moving further and further from the traditional nuclear family. The court also pointed to social science evidence showing that children suffer significant trauma after being separated from a primary attachment figure, regardless of biological or adoptive ties.

The Court of Appeals of New York concluded by overruling Alison D., finding that Domestic Law Relations § 70 permits a non-biological, non-adoptive parent to achieve standing to request custody and visitation. According to the court, “where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child.” The court’s decision in this case reflects not only a just outcome for the rights of nontraditional parents, but also for their children. The court has shown resilience through its ability to adapt to changing norms and demographics when necessary to provide for the best interests of the child.

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27. Brooke S.B., supra.
29. Brooke S.B., supra.
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