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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF BROOKE S.B.,

Respondent, (Papers sealed)

-against-

No. 91

ELIZABETH A. C.C.,

Respondent.

MATTER OF ESTRELLITA A.,

Respondent, (Papers sealed)

-against-

No. 92

JENNIFER D.,

Appellant.

20 Eagle Street
Albany, New York 12207
June 02, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE MICHAEL J. GARCIA

1 CHIEF JUDGE DIFIORE: Number 91 on this
2 afternoon's calendar, Matter of Brooke S.B. v.
3 Elizabeth A. C.C.

4 Good afternoon, counsel.

5 MR. WRUBEL: Good afternoon, Your Honor.
6 May I reserve two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may.

8 MR. WRUBEL: Thank you. May it please the
9 court, I'm Eric Wrubel from the firm of Warshaw
10 Burstein. I'm appellate counsel to the attorney for
11 the child in this case, who is John - - - the
12 attorney for the child is John Rankin (ph.). Mr.
13 Rankin filed the appeal on behalf of - - - of his
14 client. This appeal concerns the most precious of
15 relationships that we know, the parent-child
16 relationship. To sever that relationship causes a
17 child to suffer deep psychological anguish. That's
18 not anecdotal evidence. That's sociophysiological
19 evidence.

20 JUDGE PIGOTT: Assum - - - assuming all of
21 that, what it seems to come down to, though, is you
22 got - - - you got a biological parent and you got a
23 nonbiological parent. We have - - - we have laws
24 that say you can adopt, and if you don't adopt,
25 you're not the - - - you're not a parent. How do we

1 change that?

2 MR. WRUBEL: Well, Your Honor, I think that
3 the - - - that the fact that you don't adopt doesn't
4 mean that you're not a parent. I think that - - -
5 that people act in that role all the time when
6 they're not a biological or a legally adopted
7 individual.

8 JUDGE PIGOTT: But you see, the legal is
9 the thing that - - - that I'm hoping you can address
10 because one of things that strikes me is what happens
11 in - - - in estates, in surrogate's court if someone
12 dies? If - - - if you want to - - - if a parent or
13 someone who's not a biological parent, not an
14 adoptive parent says I want to be deemed a parent,
15 does that child then inherit in - - - in the event of
16 the death of that - - - that now parent?

17 MR. WRUBEL: Well, I think that would
18 matter - - - that there would have to be a hearing to
19 determine - - -

20 JUDGE PIGOTT: Why? I mean wouldn't it be
21 a yes or a no? Or do you say, oh, well, you know, it
22 was deemed a parent in family court but not in
23 surrogate's court?

24 MR. WRUBEL: Well, Your Honor, I think that
25 we should go back to your decision in Juanita A.,

1 because you deemed someone who was not biologically
2 related to a child nor legally related to the child
3 through adoption to be that child's father
4 notwithstanding the fact that the biological father
5 was known. But this child - - -

6 JUDGE PIGOTT: Right.

7 MR. WRUBEL: - - - in Juanita A. had a - -
8 - a relationship, a bonded relationship, with this
9 child, and you found that that nonbiological,
10 nonlegal person should be the person who is
11 recognized as the father.

12 JUDGE PIGOTT: And I ask the same question
13 - - - should we discontinue this? I mean can - - -
14 can we at some point say, you know, well, we lived
15 together for twelve years, so, you know, I'm a
16 parent?

17 MR. WRUBEL: I think it's more than that.
18 I think that the - - - that the test that you applied
19 has to do with the biological person consenting and
20 fostering a relationship with the nonbiological,
21 nonadoptive person and the child. And - - -

22 JUDGE STEIN: Can that happen to more than
23 one person, to serial people?

24 MR. WRUBEL: No, Your Honor.

25 JUDGE STEIN: Why not?

1 MR. WRUBEL: Be - - - because the statute's
2 very clear that it talks about either parent, and we
3 have two parents. And - - -

4 JUDGE PIGOTT: Now what statute are you
5 talking about now?

6 MR. WRUBEL: DRL 70.

7 JUDGE PIGOTT: All right.

8 MR. WRUBEL: It's - - - and it - - - and in
9 that statute, it talks about the best interests of
10 the child so that that is clear that we're talking
11 about that that's the standard that should be
12 applied. That's the standard that this court has
13 applied in three cases essentially decided on the
14 same day: H.M. v. E.T., Debra H., and your case,
15 Juanita A. All decided on the same day and all
16 coming to the same conclusion, that it was in the
17 best interests of the child to continue to have a
18 relationship with a parent who was nonbiological and
19 nonadoptive.

20 JUDGE PIGOTT: Is - - -

21 JUDGE GARCIA: Counsel - - -

22 JUDGE PIGOTT: Is that all you're asking
23 for, though, is visitation?

24 MR. WRUBEL: No, I'm asking for absolute -
25 - - for custody and visitation, decision-making - - -

1 to - - - to have the right to have standing to make
2 the claim for visitation and for custody.

3 JUDGE RIVERA: So let - - - let me just be
4 clear on what your proposed test is that - - - that
5 the nominal parents in this way consent and that
6 there's a fostering of a relationship with the child?

7 MR. WRUBEL: Correct.

8 JUDGE RIVERA: Okay. So - - - so in the
9 relationship, let's say, we've consented during the
10 time that the part - - - one of the partners is
11 pregnant, but we break up during the pregnancy. Any
12 claim? Have you got standing? You didn't have an
13 opportunity to foster.

14 MR. WRUBEL: There was no opportunity to
15 foster a relationship with the child, so I - - - I
16 would have to say at that point, I think, the court
17 would be hard pressed to - - - to have a best
18 interest challenge. A - - - it would follow in terms
19 of with - - - with paternity actions a person - - -
20 the putative father is not required to provide
21 support during the pregnancy until the child is born,
22 so there has to be the birth of the child for that
23 relationship to start and for that obligation of
24 support to begin.

25 JUDGE PIGOTT: You're talking about a

1 biological father in that situation, right?

2 MR. WRUBEL: Yes.

3 JUDGE PIGOTT: Okay.

4 JUDGE RIVERA: So - - - so the
5 determination of consent and fostering then, it would
6 be a case-by-case as it has been in the past; is that
7 what you're suggest - - - or at least on the
8 fostering?

9 MR. WRUBEL: Your Honor, I think that it's
10 always on a case-by-case with a child. There's no
11 case that is done in matrimonial law, that I'm aware
12 of, having practiced for only twenty years, so I'm
13 still a novice, but it - - -

14 JUDGE RIVERA: What would constitute
15 consent?

16 MR. WRUBEL: Consent is - - - is, I think,
17 based on a factual determination, but you have to
18 look at the facts. In this case, consent is that the
19 parties consented and agreed to have a child
20 together, to - - - to raise the child together, to
21 live together, to - - -

22 JUDGE STEIN: How about holding out to
23 third parties that - - -

24 MR. WRUBEL: Absolutely. How - - -

25 JUDGE STEIN: Is that - - - is that an

1 indication of consent, or does it have to be just
2 some communication between the - - - the partners?

3 MR. WRUBEL: I think that it's all the
4 facts of how the parties live their lives, and in
5 this case, we saw that they had birth announcements,
6 they had a - - - a baptism, those are things that
7 tell the community who the parents are and who the
8 child belongs to and who's raising this child, and
9 those are all very important facts. It's how we live
10 our lives. And that's what we do when we do best
11 interest determinations. We look at how the parties
12 and the child have lived their lives and held
13 themselves out, and that's what's really important in
14 these cases.

15 JUDGE RIVERA: Well, then at what point do
16 you have fostering after the birth? Let's say the
17 child is born with terrible, terrible, terrible
18 ailments and doesn't survive more than two weeks.

19 MR. WRUBEL: The child doesn't - - - the
20 child dies?

21 JUDGE RIVERA: Correct, but has been born.

22 MR. WRUBEL: Okay.

23 JUDGE RIVERA: And let's - - - let's say
24 the partners are there every day in that hospital
25 praying, hoping, don't even get to take the baby

1 home.

2 MR. WRUBEL: Um-hum. But the child - - -

3 JUDGE RIVERA: I'll agree to the consent,
4 obviously. Let - - - let's take your - - - your test
5 for the consent. Obviously, they've gotten this far.
6 Is there an opportunity for fostering it? I guess
7 I'm trying to explore what - - - what that particular
8 part means.

9 MR. WRUBEL: Well, the fostering - - -

10 JUDGE RIVERA: It doesn't strike me as,
11 perhaps, more difficult to establish under this test.

12 MR. WRUBEL: No, not at all because it's
13 the - - -

14 JUDGE RIVERA: Do you need to bond with the
15 child?

16 MR. WRUBEL: I think that there's a - - -
17 that there is a bond with the child, and - - - and I
18 would actually submit that there are several studies
19 done about the bonding that occurs from birth during
20 - - - even during the first year. But in your - - -
21 in your example, it's the love, it's the attention,
22 it's the financial, it's everything that a parent
23 does. I mean to - - - to talk about what parents do,
24 it - - - it's everything. It's the emotional, it's
25 the financial, it's the physical, it's whether you're

1 holding that child's hand in the hospital, or you're
2 paying that bill or it's - - - or it's stroking the
3 child's hair while it's laying - - -

4 JUDGE PIGOTT: But can - - -

5 MR. WRUBEL: - - - in the bed.

6 JUDGE PIGOTT: Can the nonbiological parent
7 walk away? I mean in - - - in these cases that we're
8 dealing with, the - - - the nonbiological parent
9 wants to be a part. Now you represent the child.

10 MR. WRUBEL: Yes.

11 JUDGE PIGOTT: Can the nonbiological parent
12 say I don't care what that kid said, I'm not - - - I
13 want nothing to do with this relationship, I'm gone,
14 I'm done, I'm finished?

15 MR. WRUBEL: I think, like any other father
16 or mother, a parent can walk away, but it is up to a
17 court to determine that relationship and then - - -

18 JUDGE PIGOTT: Well, when you say can walk
19 away, I'm say - - - I'm saying I've got no
20 relationship with it. I understand that we went
21 through all of - - - you know, all of this stuff and
22 it was wonderful, and as long as it lasted, it was
23 great. There is no legal document, there is no law
24 that says I have any obligation whatsoever to this
25 child, and even though maybe last week I wanted the -

1 - - I wanted my parental rights and I wanted
2 visitation and custody, now I don't, so I'm leaving.

3 MR. WRUBEL: I'd say, respectfully, you're
4 incorrect based upon Juanita A. Because in that
5 case, you found that the nonbiological, nonadoptive,
6 who was not a party to that - - - to that action, was
7 the actual father, and when you remanded that back to
8 the trial court, you directed that the nonbiological
9 nonadoptive parent be made a part of that hearing.

10 JUDGE ABDUS-SALAAM: Do we - - -

11 MR. WRUBEL: So I'd say your - - - so I'd
12 say that that person cannot just walk away.

13 JUDGE PIGOTT: Well, that - - - that
14 happened in a court. I'm - - - I'm curious, you
15 know, I mean, not everybody's got to come here, you
16 know, to - - - to have their parental rights decided.

17 MR. WRUBEL: Well, I think you made a very
18 important statement by doing that, and so I think
19 that - - - that this court - - - you know, what we're
20 asking the court to do is not radical. What we're
21 asking the court to do is take a test, that the - - -
22 that the judges in this state know very well, and
23 apply - - - and apply it on a financial basis, in
24 terms of child support, and take that test and use it
25 to maintain relationships between children and their

1 parents.

2 JUDGE STEIN: But isn't there an elephant
3 in the room, though? And - - - and that is - - -

4 MR. WRUBEL: Could be me, but okay.

5 JUDGE STEIN: And - - - and that is Debra
6 H.? How - - - so what's - - - what has changed in
7 the last six or so years?

8 MR. WRUBEL: Marriage Equality Act has - -
9 - has - - -

10 JUDGE STEIN: But an act - - -

11 MR. WRUBEL: - - - established that - - -
12 the state legislature has stated that families are
13 not created just by biology alone. By having that
14 statute, you are acknowledging that gay and lesbian
15 families are not necessarily the biological parents
16 of their children. And Obergefell has - - - has
17 mandated that across the United States.

18 JUDGE PIGOTT: Does that mean, by the way
19 then, that - - - that cases like this will go away?

20 MR. WRUBEL: No, because people will - - -
21 will not necessarily get married, and people will not
22 necessarily be able to afford adoption. I mean that
23 goes back to your point which you started off with
24 which is - - - is adoption. It is an expensive
25 proposition. And there - - -

1 JUDGE ABDUS-SALAAM: How expensive is it,
2 counsel?

3 MR. WRUBEL: Excuse me?

4 JUDGE ABDUS-SALAAM: How expensive? Give
5 us a range of what is possible.

6 JUDGE PIGOTT: Before we ask you your
7 hourly.

8 MR. WRUBEL: Having gone through two
9 adoptions of my own for my own children and - - - and
10 my - - - it's - - - it can be upwards of 10,000
11 dollars or more, depending upon - - -

12 JUDGE PIGOTT: Well, doesn't that depend on
13 where your - - - I mean there's a lot of factors.

14 MR. WRUBEL: There's a lot of factors.

15 JUDGE PIGOTT: I mean if - - - if I wanted
16 to adopt my sister's daughter, how much would that
17 cost?

18 MR. WRUBEL: According to the brief
19 submitted, the amicus brief submitted by the American
20 Academy of Adoption Lawyers, several thousands of
21 dollars.

22 JUDGE PIGOTT: I disagree. I think it's -
23 - - I think I can go to family court with a petition,
24 and I can get it done in about a week - - - not a
25 week, but a little bit longer than that, and I think

1 it's almost minimal.

2 MR. WRUBEL: I would - - - I would
3 respectfully say that, notwithstanding the two
4 adoptions and the two second-parent adoptions I had
5 to go through, it is at least a year and it is - - -
6 it is several thousands of dollars.

7 CHIEF JUDGE DIFIORE: Thank you, Mr.
8 Wrubel.

9 MR. WRUBEL: Thank you, Your Honor.

10 CHIEF JUDGE DIFIORE: Counsel.

11 MS. SOMMER: Thank you. May it please the
12 court, I am Susan Sommer here for the petitioner-
13 respondent, Brooke S.B. Judge Ciparick, in her
14 concurrence in Debra H., paraphrasing quoted the
15 words of Chief Judge Kaye from Alison D. She wrote,
16 "The majority in Alison D. rendered an opinion that
17 fell hardest on the children of nontraditional
18 relationships limiting their opportunity to maintain
19 bonds that may be crucial to their development. The
20 majority retreated from the court's proper role by
21 tightening rules that should, above all, retain the
22 capacity to take the children's interests into
23 account." Those words are even more true today than
24 they were in 1991.

25 JUDGE STEIN: What - - - what interests of

1 children are being protected by the current rule?

2 MS. SOMMER: The - - - the current rule is
3 disserving, not protecting, the interests of
4 children. It's not protecting the interests of the
5 child of Brooke S.B.

6 CHIEF JUDGE DIFIORE: Prospectively,
7 counsel, what should the rule be?

8 MS. SOMMER: The - - - the standard that we
9 suggest is that a person can be established as a
10 parent if, one, the child's already legally
11 recognized parent, the biological or adoptive parent,
12 consented to and fostered the formation of the
13 parent-child bond, and, two, that person did take on
14 the - - - the role of a parent, performing the tasks
15 and taking the financial responsibility of
16 parenthood.

17 JUDGE RIVERA: How - - - how is it
18 different from - - -

19 MS. SOMMER: It - - - it - - -

20 JUDGE RIVERA: - - - the attorney for the
21 child's proposed approach?

22 MS. SOMMER: We - - - we completely agree
23 with the attorney for the child's approach. We are
24 fully aligned.

25 CHIEF JUDGE DIFIORE: But does that

1 encompass a person who was not in a child's life at
2 the moment that the child was born? Does that - - -
3 that rule - - -

4 MS. SOMMER: It could certainly include
5 that type of a person. In this case, my client was
6 firmly in this child's life from the second the child
7 was born and - - - and since the ex-partner became
8 pregnant with the child. And they fully intended for
9 my client to parent that child. Indeed, her name is
10 the last name given to the child on the birth
11 certificate notwithstanding she is not the genetic
12 parent of the child.

13 JUDGE STEIN: Have your - - -

14 JUDGE GARCIA: Do we need - - - do we need
15 to overrule Alison D. to put in place your test?

16 MS. SOMMER: Not necessarily, but in all
17 likelihood, you would need to do that, and I think it
18 is time for the court to do that. We are light years
19 away from the understanding of the term parent that
20 was interpreted in Alison D. from Domestic Relations
21 Law Section 70. And as my colleague has pointed out,
22 we now have the Marriage Equality Act, and we have
23 the Obergefell case that explain what it means to be
24 a same-sex couple and to form a family and to parent
25 children, and we are gone from the assumptions that -

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JUDGE RIVERA: So circling back to that initial quote, are you saying that what used to be nontraditional is no longer so, at least in the State of New York, with same-sex marriage and, of course, from the U.S. Supreme Court's decision in Obergefell? That - - - that these are - - - these relationships are now ones that this - - - this state has embraced?

MS. SOMMER: Exactly. And also, the - - - our understanding of parent, the operative term and the operative person, who means so much in a child's life, has also changed and evolved. We understand that a parent is somebody not just related by biology or adoption but can be the same-sex partner of a child's genetic or adoptive parent.

JUDGE STEIN: If the rule applies to people - - - because this is going - - - if we were to adopt the rule that you suggest, it would apply not only to same-sex partners but also to opposite-sex partners, correct?

MS. SOMMER: Yes, it might well.

JUDGE STEIN: Okay. And - - - and if - - - if the rule were not to - - - to be limited to the partner who was there when the child was conceived and/or born, how - - - how would that - - - how could

1 that be limited to just one person?

2 MS. SOMMER: Because the rule does require
3 that the consent of the - - - the child's parent be
4 conferred.

5 JUDGE STEIN: Yes, but - - -

6 MS. SOMMER: And if the child has two
7 parents - - -

8 JUDGE STEIN: That's - - - that's my
9 question. Are there only two parents?

10 MS. SOMMER: Under the conception of the
11 rule at this point, yes, indeed, and - - - and as my
12 colleague observes, Domestic Relations Law Section 70
13 seems to acknowledge that there are two parents. Let
14 me also - - -

15 JUDGE RIVERA: You mean at the same time?

16 MS. SOMMER: That's right. That's right.

17 JUDGE RIVERA: You don't mean if one parent
18 - - - let's just give an example, one parent dies and
19 then another parent enters into this picture, another
20 person enters into the picture who then either adopts
21 or somehow under, perhaps, this proposed rule, fits
22 the definition. So it's possible that a child could
23 experience more than two parents in their lifetime.

24 MS. SOMMER: Yes, just as it is now for - -

25 -

1 JUDGE RIVERA: Yeah.

2 MS. SOMMER: - - - children who aren't
3 suffering under this rule. And - - -

4 JUDGE ABDUS-SALAAM: Why - - - and,
5 counsel, why wouldn't such a rule apply after the
6 child is born? That's what I'm trying to get to.
7 You're saying that it - - - the person has to be a
8 parent when the child is born, but - - -

9 MS. SOMMER: I - - - I am not saying that.
10 It is - - - the child - - - the relationship could
11 occur after the child is born, and I think we could
12 see that very shortly after the child is born, a
13 partner is part of the family, embraced into the
14 family, the child is reared understanding that this
15 is their parent.

16 JUDGE RIVERA: So does this then eliminate
17 any incentive for adoption, and if so, is there some
18 benefit to adoption that is then lost through this
19 proposed rule?

20 MS. SOMMER: I don't necessarily think so.
21 I think adoption remains a - - - a very viable and
22 strong way of securing these relationships. This is
23 here for if there is a rupture in the family, and the
24 family had not taken the step of an adoption, which
25 is, indeed, as many of the amici and lower courts

1 have pointed out, an expensive process.

2 JUDGE STEIN: And it could be a problem
3 because if the - - - the adoption didn't occur before
4 the schism in the relationship, then there wouldn't
5 be the consent for the adoption, right?

6 MS. SOMMER: Exactly, which is a scenario,
7 unfortunately, that we've seen over and over again,
8 and, in fact, was the scenario in the Debra H. case.
9 And yet, the court did step in and protect the child
10 in the Debra H. case by importing, via comm - - - its
11 common law powers, Vermont's common law standard to
12 recognize a parental status, and no less should occur
13 now. It shouldn't be that only children whose
14 parents were able to marry, and this child's parents
15 were not able to marry under New York law, or who
16 choose to marry, get the security for their
17 relationships with the nongenetic parents.

18 JUDGE RIVERA: Can I - - - I'm just - - -
19 I'm just trying to clarify if there are any
20 distinctions between what you're suggesting and what
21 the attorney for the child has suggested. Because I
22 thought I heard you say the - - - the biological
23 parent consents, the nonbiological parent takes on
24 the responsibilities of a parent, I believe that's
25 what you said, and yet, he suggested that we're

1 looking at consent and fostering a relationship. So
2 could you explain what you mean by taking on the
3 responsibilities of a parent?

4 MS. SOMMER: Well, I - - - I do believe
5 that would - - - would be the second prong of the
6 test that my colleague is proposing, but the
7 fostering relat - - - the relationship is the legal
8 parent, the genetic parent's consent and fostering of
9 that relationship.

10 JUDGE RIVERA: So - - - so - - -

11 MS. SOMMER: They - - - they work together.

12 JUDGE RIVERA: So a same-sex couple with a
13 child where one, the nonbiological parent, works out
14 of the home all the time and doesn't do daycare,
15 doesn't buy the food for the child, but - - - but
16 spends time with the child. You - - - if there is a
17 relationship that's been fostered with the child, you
18 would say - - -

19 MS. SOMMER: Absolutely.

20 JUDGE RIVERA: - - - that, nevertheless,
21 fits the - - - fits your proposal?

22 MS. SOMMER: Abs - - - absolutely. And
23 also, it would include financial support and other
24 forms of support for the child just like many
25 children receive in - - - in the hypothetical - - -

1 JUDGE RIVERA: Yep.

2 MS SOMMER: - - - Your Honor has offered.
3 That's - - - that's the experience of many children's
4 families.

5 JUDGE PIGOTT: Before you go, I'm always
6 looking at these legal questions I come up with.
7 Let's assume for a minute that we agree with you and
8 you have this situation. The biological parent then
9 strikes up a different relationship with someone
10 else, can that someone else adopt this child?

11 MS. SOMMER: No, absolutely not. The child
12 has two parents already.

13 JUDGE PIGOTT: And that - - - and that
14 second parent is found where, in - - - in a family
15 court order?

16 MS. SOMMER: Yes, or what happ - - - or if
17 what happens is that the family proceeds - - - the
18 two parents break up but second parent continues to
19 visit, have visitation with the child, the child
20 spends lots of time - - -

21 JUDGE PIGOTT: So it's sort of a common law
22 marriage?

23 MS. SOMMER: Pardon? No. Well, then - - -
24 then proposed adoptive parent comes along, the second
25 nongenetic parent would - - - would be able to

1 object. This child already has two parents.

2 JUDGE STEIN: What if they don't notify
3 that the - - - the other parent?

4 MS. SOMMER: Well, I would say they should
5 notify the other parent.

6 JUDGE PIGOTT: So, I mean, you'd need a
7 court order or something, don't you? I mean you - -
8 - you - - -

9 MS. SOMMER: I - - - I think that the - - -
10 acting in good faith, that the first parent should
11 recognize their rights, and the - - - the second
12 parent is - - - been active, would know, would see.
13 And you're also speaking about, frankly, a
14 hypothetical that should not stand in the way of a
15 rule that will protect children who are continuing to
16 fall through the cracks.

17 JUDGE ABDUS-SALAAM: Counsel, I just - - -
18 I have a slightly different question to ask you about
19 the amicus Sanctuary for Families. They proposed a
20 test based on the intent of the two partners and
21 their joint agreement to conceive and raise a child.
22 Do you support that, and if - - - that test, and why
23 or why not?

24 MS. SOMMER: Well, I think that's a good
25 test, but it shouldn't exclu - - - no test should

1 exclusively hinge on the consent to conceive the
2 child, because there may be occasions, as - - - as
3 has been pointed out, where the second parent enters
4 the child's life, or the family's life, right after
5 conception. It shouldn't really matter, the
6 mechanics of whether - - - when you were there in the
7 picture. Because the reality for the child is, and
8 the reality for both of the adults are, that you were
9 the intended parent, frankly, from virtually the get-
10 go. Thank you.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MS. BJORK: Good afternoon, Your Honors.
13 My name is Sherry Bjork. I'm the attorney for the
14 biological mother, Elizabeth. A number of issues are
15 raised by this case that certainly bear looking into
16 or we wouldn't be here today. And I'm reminded of a
17 phrase that my grandparents used to say to me when I
18 was younger that it takes a village to raise a child.
19 However, a village doesn't have a legal right to that
20 child. Only the parents have the legal right to the
21 child.

22 JUDGE STEIN: Well, isn't that what we're
23 talking about is how do we define what a parent is,
24 and - - - and the proposals here are that it be
25 limited to two people.

1 MS. BJORK: I think it has to be limited to
2 two people. Perhaps, a stepparent would also be
3 included. I think that needs to be looked at very
4 carefully.

5 JUDGE STEIN: Well, what's the different
6 between a stepparent and - - - and this situation?

7 MS. BJORK: This situation, Your Honor - -
8 -

9 JUDGE STEIN: Marriage? Is that the
10 difference?

11 MS. BJORK: I think that would be the
12 difference, certainly. But also we're presuming that
13 there is an intent that Brooke was the other parent
14 of this child.

15 JUDGE STEIN: Well, it sounds like that's
16 the - - - again, the test proposed by everybody here
17 is that that's - - - yeah, that's - - - that's a
18 requirement. It has to be consensual.

19 MS. BJORK: It - - - and in this case, Your
20 Honor, I - - - I'm not certain that that is - - - we
21 didn't get to that point. My client has a different
22 version of that. The - - -

23 JUDGE PIGOTT: But your - - - your
24 argument, as I understand it, is she can't even come
25 in the door.

1 MS. BJORK: That's exactly my argument,
2 Your Honor.

3 JUDGE PIGOTT: So for her to at least make
4 the argument that counsel's making of all of this
5 stuff, it might be interesting and it might be in the
6 best interest of the child, so why can't the judge at
7 least hear it?

8 MS. BJORK: Because, Your Honor, the laws
9 are very clear, from what I understand. Parents are
10 defined as either the biological or the adoptive
11 parent. The biological parent in this particular
12 case - - -

13 JUDGE STEIN: Wait, who defined that? Is
14 it the court that defined it?

15 MS. BJORK: The legislature defined that,
16 and then the court also - - -

17 JUDGE STEIN: Where did the legislature
18 define it? Under DRL Section 70, is there a
19 definition of parent there?

20 MS. BJORK: It's the definition regarding
21 biological. I think there's also the adoptive part
22 of that.

23 JUDGE STEIN: Where - - - where do you find
24 that in - - - in the statute?

25 MS. BJORK: I'm looking at Domestic

1 Relations Law Section 70.

2 JUDGE STEIN: Right, it talks about a
3 parent.

4 MS. BJORK: A parent, and then the case law
5 has determined, I'm sorry - - -

6 JUDGE STEIN: So - - - so it's the courts
7 that have defined parent - - -

8 MS. BJORK: Parent.

9 JUDGE STEIN: - - - under that statute,
10 right?

11 MS. BJORK: Under the statute.

12 JUDGE STEIN: Okay.

13 MS. BJORK: And I think it's been very
14 clear that that's either by biology or it's through
15 adoption.

16 JUDGE ABDUS-SALAAM: It's only clear
17 because of, what, Alison D. or the cases that follow
18 it?

19 MS. BJORK: Alison D. and the cases that
20 follow that.

21 JUDGE ABDUS-SALAAM: And why - - - why
22 wouldn't we revisit that in light of the developments
23 that have occurred since that time? It's been
24 almost, what, thirty years, twenty-something years.

25 MS. BJORK: Revisit what part, Your Honor,

1 exactly?

2 JUDGE ABDUS-SALAAM: The definition of
3 parent in Alison D.

4 MS. BJORK: I think it does need - - - it
5 bears revisiting, it bears looking into. But I think
6 we have to be careful that, in this particular case,
7 that we're not taking away from the biological mother
8 who ended her relationship with the other person, who
9 has now since - - -

10 JUDGE ABDUS-SALAAM: Counsel, biological
11 mothers - - -

12 MS. BJORK: - - - remarried.

13 JUDGE ABDUS-SALAAM: - - - end
14 relationships with other - - - with the other parent
15 often, right?

16 MS. BJORK: Correct.

17 JUDGE ABDUS-SALAAM: Unfortunately.
18 Unfortunately - - -

19 MS. BJORK: Absolutely.

20 JUDGE ABDUS-SALAAM: - - - that happens
21 very often.

22 MS. BJORK: Absolutely. And I think to
23 further complicate this, after terminating her
24 relationship with Brooke, she has since remarried.
25 She's been remarried for almost four years.

1 JUDGE STEIN: But that happens in - - - in
2 different sex marriages also.

3 MS. SOMMER: Also, yes, absolutely. And I
4 think that's - - -

5 JUDGE STEIN: And that doesn't mean that
6 the original parent loses his or her rights - - -

7 MS. BJORK: If - - -

8 JUDGE STEIN: - - - because the - - - the
9 other parent remarries, right?

10 MS. BJORK: Absolutely. I completely
11 agree, but I think we have to look at was this
12 original person considered a parent? Was she
13 actually a parent?

14 JUDGE ABDUS-SALAAM: Well, doesn't the
15 child bear - - -

16 MS. BJORK: My client disagrees with that.

17 JUDGE ABDUS-SALAAM: Doesn't the child bear
18 her last name?

19 MS. BJORK: Yes, she does. And - - -

20 JUDGE ABDUS-SALAAM: So what would - - -

21 MS. BJORK: Or he does, excuse me, and my -
22 - -

23 JUDGE ABDUS-SALAAM: Or he does. So what
24 would not make - - - other than not being a
25 biological or adoptive parent, what would not make

1 the - - - this person, Brooke, a parent?

2 MS. BJORK: Well, I think we'd have to look
3 at the facts of the case. We'd certainly have to
4 explore that if that were going to be how we
5 determined if she was a parent. I just don't think
6 we get to that point based on the way that we have
7 our laws and the case law established so far.

8 JUDGE RIVERA: But - - - but that's the
9 point, right? Isn't that the reason you and the
10 people sitting behind you are here?

11 MS. BJORK: Correct.

12 JUDGE RIVERA: Right, whether or not - - -
13 put aside the world; put aside the U.S. The - - -
14 the State of New York is at a different place, and
15 whether or not your client and her former partner are
16 - - - that relationship is one that is now not
17 treated as somehow inferior. And if that is the
18 case, and if they are on equal footing then,
19 regardless of their sex, gender, then - - - then why
20 not treat them the same and - - - and find a - - - a
21 rule that makes sense?

22 MS. BJORK: I think there should be, Your
23 Honor. I certainly do. I represented children and
24 families for twenty years, and it needs to be
25 changed.

1 JUDGE PIGOTT: What would your rule be?

2 JUDGE ABDUS-SALAAM: Yeah.

3 MS. BJORK: I don't know if I'd have a
4 specific rule without looking at a lot of factors. I
5 think we need to look at the impact of the child.
6 Again, in this case, if I could just reiterate that
7 my client has remarried, and the child now has a
8 stepmother that she - - -

9 JUDGE PIGOTT: But if we - - - if we
10 started there, wouldn't we then have to give standing
11 to the - - - to the nonbiological parent for purposes
12 of making those determinations?

13 MS. BJORK: If you determine that the
14 nonbiological parent does have standing and is a - -
15 -

16 JUDGE PIGOTT: Well, I'm looking for your
17 rule, and - - - and your rule said things have to
18 change. We've got to - - - we've got to address this
19 issue.

20 MS. BJORK: Yes.

21 JUDGE PIGOTT: You represent a lot of
22 children. In order for us to address the issue,
23 don't we need all the parties in front of us?

24 MS. BJORK: You'd have to have a full
25 hearing, I feel, to - - - to look at all the facts,

1 absolutely.

2 JUDGE PIGOTT: Right. In order to get the
3 nonbiological at the hearing, don't we have to give
4 him or her standing?

5 MS. BJORK: Yes, going forward you'd have
6 to do that, but I think you'd have to determine
7 somehow how you give that person the standing.

8 JUDGE STEIN: Well, if your - - -

9 MS. BJORK: What determines what that
10 standing is going to be.

11 JUDGE STEIN: If your client's new spouse
12 was in the process of adopting - - -

13 MS. BJORK: She actually has been trying to
14 do that for two years.

15 JUDGE STEIN: Okay. And then her
16 relationship with Elizabeth ended, what would be her
17 standing?

18 MS. BJORK: She would have no standing,
19 Your Honor.

20 JUDGE STEIN: And she - - -

21 MS. BJORK: She wouldn't - - -

22 JUDGE STEIN: - - - shouldn't, according to
23 you?

24 MS. BJORK: And she should not have any
25 standing until there is a change that is made,

1 absolutely. She's tried to adopt this child for
2 almost two years now.

3 JUDGE STEIN: What - - -

4 MS. BJORK: And - - -

5 JUDGE STEIN: Is - - - is that being held
6 up because of this litigation?

7 MS. BJORK: Because of this, Your Honor.
8 And the concern my client has is should something
9 happen to my client, should she have an unfortunate
10 accident, where does this child go?

11 JUDGE STEIN: But I'm confused because you
12 keep saying that we should - - - we should look at
13 this but that we shouldn't - - - that there shouldn't
14 be any standing, she shouldn't have any rights, until
15 we change something. But what is it that you think
16 should be changed?

17 MS. BJORK: I'm not sure that the court
18 here today, with all due respect, is the proper forum
19 for determining that. I think this court has made it
20 very clear in past decisions what is considered to be
21 a parent. I think a much more probative look into
22 everything, the circumstances, what we have our
23 legislators for, what they do, how they make those
24 laws, they need to be looking as this. I'm not
25 saying it's actually this court - - -

1 and - - -

2 MS. BJORK: My understanding is, because
3 I'm handling that proceeding, as well, we were
4 prepared to go forward, that there was no standing -
5 - - there was no issue for her to be considered the
6 legal parent. The adoption was almost - - - the home
7 study was completed. Everything was at the doorstep.
8 But the Appellate Division had received the appeal,
9 and then it was brought to the Court of Appeals, so
10 that has been put on hold - - -

11 JUDGE RIVERA: What - - - why - - -

12 MS. BJORK: - - - until there's a decision.

13 JUDGE GARCIA: Why should this wait for the
14 legislature given - - - given same-sex marriage? Why
15 aren't - - - why wait?

16 MS. BJORK: Because - - -

17 JUDGE RIVERA: It's not - - - you've
18 basically said this is outside the sphere of this - -
19 -

20 MS. BJORK: Bec - - -

21 JUDGE RIVERA: - - - august body, so why is
22 that the case?

23 MS. BJORK: Because I believe this court
24 has already addressed this issue very clearly in the
25 cases that have been before it, Debra H. being one of

1 them. These people in this particular case did not
2 form a civil union of any kind. They didn't make any
3 attempts to. They did not marry once they were able
4 to under New York State law. We just don't get to
5 that point, Your Honor, so we respectfully ask - - -

6 JUDGE ABDUS-SALAAM: Hadn't - - - hadn't
7 there been a rift in the - - - in the relationship by
8 the time same-sex marriage was decided in this state?

9 MS. BJORK: Long before, Your Honor. There
10 was a rift, yes.

11 JUDGE ABDUS-SALAAM: Yeah, so you wouldn't
12 expect them to marry if there was already a rift.

13 MS. BJORK: Exactly, but we're also
14 presuming that they might have married. We don't
15 know that, and I think that's pure speculation. They
16 did not marry. They did not take any steps to engage
17 in a civil union or - - - or formalize that union.

18 JUDGE RIVERA: Well, let - - -

19 MS. BJORK: So - - -

20 JUDGE RIVERA: Let me just clarify. My
21 point was not so much that same-sex couples can now
22 marry so isn't the State done and can't we now
23 reconsider the prior case law. We could kind of look
24 at it that way, of course. The point is isn't what
25 the legislature and the State of New York recognized

1 that what was once in the State of New York
2 nontraditional, an inferior relationship, now on a -
3 - - on an equal footing with every other loving
4 relationship, and that that is where we start?

5 MS. BJORK: I don't know, Your Honor. I
6 honestly don't because the number of children that
7 have relationships with people who - - - who may not
8 be a parent, per se, how do we draw that line?
9 Because we have people - - -

10 JUDGE STEIN: Well, you - - - you concede
11 that the legislature could find a way to draw the
12 line, right?

13 MS. BJORK: How do they draw that line?
14 And I don't know that they can.

15 JUDGE STEIN: But - - -

16 MS. BJORK: But I'm saying - - -

17 JUDGE STEIN: Oh, and if they did - - -

18 MS. BJORK: How - - -

19 JUDGE STEIN: - - - that would be the law.

20 MS. BJORK: How are they going to do that
21 and - - - or how is the court going to interpret
22 that? I don't know. I don't know the - - - what the
23 answer is. I know there are many children who are
24 affected by having relationships with people, whether
25 it be their aunt, their uncle, their grandparent,

1 their babysitter, their older sister who's stepped
2 into a role and provided some parenting in one way,
3 shape, or form, and a relationship unfolds, for
4 whatever reason, and then they're no longer allowed
5 to be a part of that person's life. Siblings do have
6 the right; grandparents do have the right under
7 certain provisions of our law. But, again, how do we
8 protect all of these people? How do we protect the
9 children?

10 JUDGE STEIN: Yes, and - - - and that's a
11 call just because of that status which is different
12 from this status. This status is about being an LGBT
13 couple. This is not about I'm a grandparent, I'm an
14 uncle, I'm a friend, right. Anybody can be in that
15 situation. These are - - - this is about a
16 particular class that turns on gender and sex and the
17 nature of that relationship which is very different
18 from the examples you've given.

19 MS. BJORK: It is, Your Honor, but how do
20 we know in this relationship? We don't get to that
21 point. The court did not get to that point because
22 she did not have standing to bring that petition. So
23 we're presuming that they did have intent to have a
24 child together or that they did have intent to marry.
25 We do not know that, and my client would adamantly

1 infer that that is not correct.

2 JUDGE STEIN: Don't - - - don't we grant or
3 deny standing in - - - in many, many, many kinds of
4 cases based on certain allegations, and if those
5 allegations set forth the necessary elements, then
6 there's standing, and then you go to the next step,
7 right?

8 MS. BJORK: Absolutely. And that's what
9 happened in this case. The - - - the allegations
10 were not there. There was not an adoption. There
11 was not a marriage. And yes, I agree completely.

12 CHIEF JUDGE DIFIORE: Thank you, Ms. Bjork.

13 MS. BJORK: Thank you for your time, Your
14 Honors.

15 CHIEF JUDGE DIFIORE: Mr. Wrubel, I assume
16 you're familiar with the test in - - - that Judge
17 Abdus-Salaam referred to in the Sanctuary amicus?

18 MR. WRUBEL: Yes, I am.

19 CHIEF JUDGE DIFIORE: What's the rule?

20 MR. WRUBEL: And I did want to address
21 that.

22 CHIEF JUDGE DIFIORE: Yeah, please.

23 MR. WRUBEL: It's another bright-line rule,
24 and it's a bright-line rule that really pertains to
25 lesbian couples, and it's a bright-line rule that

1 actually just talks about a contract rather than
2 doing what family courts and matrimonial courts do,
3 which is really looking at the relationship between
4 the child and the parent.

5 JUDGE PIGOTT: Yeah, but you - - - being a
6 matrimonial lawyer, maybe you can - - - I think this
7 is true, I didn't look it up, but was - - - didn't it
8 take a statutory change to get grandparents, you
9 know, the - - - the standing and their ability to - -
10 - to intercede in family life with respect to their
11 grandchildren?

12 MS. BJORK: Actually, it took the Supreme
13 Court of the United States in Troxel v. Granville.
14 So - - -

15 JUDGE PIGOTT: Didn't we - - - didn't we
16 modify the DRL or - - -

17 MR. WRUBEL: We did.

18 JUDGE PIGOTT: - - - or the Family Court
19 Act?

20 MR. WRUBEL: We did, to give them standing
21 for visitation.

22 JUDGE PIGOTT: Right, so took a - - - took
23 a - - -

24 MR. WRUBEL: They don't - - - they don't
25 make decisions for children yet.

1 JUDGE PIGOTT: But it took a statute to do
2 it, is my point.

3 MR. WRUBEL: That's true.

4 JUDGE PIGOTT: Okay.

5 MR. WRUBEL: It's - - - the legislature
6 decided to do that. It still could have been done
7 purely with the - - - with the Supreme Court. But
8 once again, you know, the - - - the - - -

9 JUDGE STEIN: But the difference here is
10 that we're - - - that we're looking at the definition
11 of parent in an existing statute.

12 MR. WRUBEL: Correct.

13 JUDGE STEIN: Right?

14 MR. WRUBEL: Correct. And it's based upon
15 a decision from 1991 that referred to parents as
16 mothers and fathers. Not mothers and mothers, not
17 fathers and fathers, and that's the point of the
18 Marriage Equality Act, that's the point of
19 Obergefell. And I would say that the Sanctuaries
20 (sic) for Families' test really talks about two
21 people, and that's - - - that's the adults. It's
22 another test, just like Alison D., that does not
23 focus on this parent-child relationship and doesn't
24 take the child's best interests into any
25 consideration. And so that's where I think that that

1 Sanctuaries for Families' test fails. In terms of -
2 - - Justice Garcia, you talked about - - -

3 JUDGE STEIN: But they do raise some - - -
4 some issues, some potential problems for victims of
5 domestic violence and - - - and that sort of thing.
6 Do you think that those problems are avoided by the
7 test that you propose?

8 MR. WRUBEL: I think that - - -

9 JUDGE STEIN: I mean, obviously, you can't
10 prevent domestic but - - - but, you know, the - - -

11 MR. WRUBEL: I think those are problems
12 that are - - - that are endemic to all custody cases.
13 That if they were not victims of domestic violence,
14 they could still be argued for other parents. I - -
15 - was the former president of Hope's Door, which I
16 know Judge DiFiore knows is a domestic violence
17 shelter in Upper Westchester. So I am very sensitive
18 to the issues of - - - that are raised in Sanctuaries
19 for Families.

20 I will point out, though, that Her Justice,
21 formerly InMotion, sign - - - did not sign onto that
22 brief, did not want that test. They actually signed
23 onto the brief, I believe, by the Association of the
24 Bar of the City of New York, and that is the test
25 that we are putting forward. So that - - - and

1 Hope's Door did not sign onto the Sanctuaries for
2 Families, either. So, you know, I - - - I think
3 that's - - - you know, they raise issues that are not
4 just specific to the victims of domestic violence,
5 nor should this court fashion a test solely based
6 upon that.

7 And - - - and just to talk to Justice
8 Garcia's point about overruling Alison D., I - - - I
9 know that this court is - - - doesn't necessarily
10 want to overrule precedent from the same court.
11 However, I think that the - - - that the legislature
12 and the Supreme Court has spoken and spoken very
13 loudly about where this court should go, and - - -
14 and the fact that the children are the one who need
15 this - - - this new test.

16 JUDGE RIVERA: Well, the legislature could
17 have taken this up, and it did not. Isn't that a
18 message?

19 MR. WRUBEL: Legislature hasn't taken up
20 many things, and it had twenty-five years to so. And
21 I don't think anybody - - -

22 JUDGE RIVERA: I understand this, but
23 you're - - - when you're doing marriage equality
24 given the - - - the case law from this court, does it
25 not speak volumes? I understand your point. Don't

1 get me wrong.

2 MR. WRUBEL: Your Honor, I don't - - - I
3 don't want to talk politics because I think that - -
4 - that Albany has its own problems to deal with, and
5 I don't think that necessarily relying on them to fix
6 - - - fix this for the children of New York now - - -

7 JUDGE RIVERA: Well, my - - - my only point
8 is that I - - - I thought you were suggesting, you
9 can correct me if I'm - - - I'm wrong in trying to
10 interpret what you were saying, I thought you were
11 suggesting that - - - that New York State's
12 legislature had spoken as a result of past
13 legislation, that it was time.

14 MR. WRUBEL: It is time, and it's telling
15 this court to review and revise its decision on what
16 a - - - who a parent is in New York.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 JUDGE ABDUS-SALAAM: Or - - - or maybe it
19 doesn't need to because we already have the methods
20 and means to do that without the legislature doing
21 anything.

22 MR. WRUBEL: You absolutely do. It - - -
23 the - - - the fact of the matter is, as - - - as, and
24 I'm sorry to pick on Judge Pigott - - -

25 JUDGE PIGOTT: Please do.

1 MR. WRUBEL: - - - and I apologize - - -

2 JUDGE PIGOTT: The rest of them do too.

3 MR. WRUBEL: But you're picking on me, too,
4 so it's okay. But I - - - but I do think that, you
5 know, our New York courts know - - - know this test,
6 and so we're not asking this - - - this court to
7 adopt a new test. It's a test that this court has -
8 - - has utilized and that the courts in New York have
9 utilized for more than fifty years. So it's not - -
10 - we don't have to re-indoctrinate our - - - our
11 justices on what to do.

12 JUDGE PIGOTT: No, but you don't want - - -

13 MR. WRUBEL: They know the test.

14 JUDGE STEIN: You don't want a rule that
15 says, you know, you - - - you've raised your child
16 until he's sixteen, he's your child, your biological
17 child, but we've decided that it's in the best
18 interest of that child to take him away from you and
19 give him to somebody who's - - - who's not a
20 biological parent.

21 MR. WRUBEL: That's not the test I'm
22 asking.

23 JUDGE PIGOTT: I know. But that - - -

24 MR. WRUBEL: I'm asking to - - - to do,
25 Your Honor - - -

1 JUDGE PIGOTT: What I'm suggesting to you
2 when I ask you about a rule, and we've talked about
3 rules, is the rule has got to be one where we
4 consider, you know, the - - - the - - - all the
5 possibilities, and some of them get pretty squirrely
6 if you simply say best interest only.

7 MR. WRUBEL: Well, that's why that there's
8 consent, because the person who is the biological per
9 - - - individual has - - - has consented to that
10 other person having a bonded relationship with the
11 child. They know that that - - - they know about
12 that relationship. Even in this case, Elizabeth
13 created a relationship and she fostered and consented
14 to Brooke being the parent for this child. Not only
15 through the name, but also through birth
16 announcements and everything that they did together,
17 living together, holding themselves out. That's
18 clear consent. You just have to look at the way the
19 relationship and how the family lives to see it.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. WRUBEL: Thank you, Your Honor.

22 CHIEF JUDGE DIFIORE: The next matter on
23 the calendar is number 92, Matter of Estrellita A. v
24 Jennifer D.

25 Counsel.

1 MR. CHIMERI: Good afternoon, Your Honors;
2 and may it please the court. I would respectfully
3 request two things. First, two minutes for rebuttal
4 and, secondly, of Justice Pigott, if I could please
5 have permission to raise my rates on adoption.
6 Apparently, I'm charging way too little.

7 JUDGE PIGOTT: I thought you were going to
8 ask me to recuse myself.

9 MR. CHIMERI: Not at all, Your Honor.
10 Yours Honors, my name is Christopher Chimeri, and I,
11 along with co-counsel, Margaret Schaefer, represent
12 the appellant, Jennifer D., in this case. All right.
13 This case presents, really, two issues, and it's akin
14 to the earlier matter, is, first, whether a court may
15 find, as a factual matter, that a nonbiological,
16 nonadoptive, unmarried, romantic partner, whether gay
17 or straight, is a parent for custody and visitation
18 purposes. And - - -

19 JUDGE STEIN: Was that raised?

20 MR. CHIMERI: I'm sorry, Your Honor. I
21 couldn't hear you.

22 JUDGE ABDUS-SALAAM: Did you preserve it?

23 JUDGE STEIN: I - - - I thought that this
24 was a little bit of a - - - a different posture, this
25 case, that it really focused on the judicial estoppel

1 issue, and - - - and not on the definition of parent
2 or anything like that. So is - - - is the argument
3 that I think you're enunciating or articulating, was
4 that preserved?

5 MR. CHIMERI: It is preserved, Your Honor,
6 and it's preserved by the motion to dismiss of
7 January 29th, 2013, which basically asserted - - - or
8 not basically, in - - - in actual words asserted that
9 the petitioner, Estrellita, had no standing to bring
10 her application because she was a nonparent. The
11 opposition to that motion to dismiss was here's this
12 amended petition, which annexes an order of the
13 family court in an equitable estoppel hearing
14 conducted under Article 5 of the Family Court Act
15 adjudicating Estrellita as a parent. The question of
16 judicial estoppel comes up peripherally as to whether
17 the court even has the jurisdiction to make that
18 declaration for custody and visitation purposes.
19 It's the argument of the appellant, and it was the
20 argument - - -

21 JUDGE RIVERA: Why - - - why isn't it
22 central? What is - - - why isn't it about
23 inconsistent totally oppositional - - -

24 MR. CHIMERI: Judicial - - -

25 JUDGE RIVERA: - - - versions of what this

1 relationship is?

2 MR. CHIMERI: Because judicial estoppel,
3 Your Honor, requires two - - - it requires three
4 elements. First, if there's a quote "clearly
5 inconsistent position", secondly, that there's an
6 attempt - - -

7 JUDGE RIVERA: Why don't we have that here?

8 MR. CHIMERI: Because they're legal
9 positions, not factual positions, Your Honor. We're
10 talking about whether the court - - - when the court
11 adjudicated Estrellita a parent in the support
12 matter, it was establishing, based upon a cause of
13 action for equitable estoppel by Jennifer. Jennifer
14 sought child support and she checked a box,
15 effectively, in an OCA form that said we have a child
16 in common and this person is chargeable for support.
17 But the Family Court Act, through the legislature of
18 the State of New York, has told us that you don't
19 have to be a parent to pay child support. In fact,
20 your court has told us that you don't have to be a
21 parent to pay child support. But it's not
22 necessarily so when dealing with the rights of
23 custody and visitation, which you have been treated
24 as more - - -

25 JUDGE RIVERA: What - - - what are going to

1 be the other grounds on that Estrellita and - - - and
2 the child support issue? I'm a little confused.

3 MR. CHIMERI: I'm sorry, Your Honor. I - -
4 -

5 JUDGE RIVERA: Yeah, but I'm saying, are
6 you saying anybody is going to be liable for child
7 support?

8 MR. CHIMERI: Not - - - not at all, Your
9 Honor. The legislature, and the court, and the case
10 law has set forth what - - -

11 JUDGE RIVERA: And in this case, aren't
12 there particular grounds for the child support, i.e.,
13 this relationship, this shared child, the bonding
14 with the child?

15 MR. CHIMERI: The elements of the equitable
16 estoppel, absolutely, Your Honor. Absolutely. And
17 under the - - - and under the Family Court Act - - -

18 JUDGE RIVERA: So then why can't, once you
19 - - - once you get past that, the judicial estoppel
20 apply that you've taken these oppositional positions?

21 MR. CHIMERI: But it's the appellant's
22 position that they're not apposite as a legal matter
23 and that the - - - the case law that develops
24 judicial estoppel as a doctrine, including federal
25 case law when applying New York law, talks about the

1 fact that, for instance, in Maharaj v. Bank America
2 Corp., that the - - - the factual assertion, not the
3 legal contention, is what's at issue because - - -

4 JUDGE STEIN: Well, isn't - - - isn't
5 parenthood sort of, and we've talked a little bit
6 about this in the criminal context today, a mixed
7 question of law and fact?

8 MR. CHIMERI: It is a mixed question of law
9 and fact, Your Honor, but I would submit to the court
10 that it's not necessarily so here because you're
11 dealing with chargeability for support. That's all
12 you need to determine for a justice, a trial court
13 justice, to determine - - -

14 JUDGE STEIN: But as Judge Rivera said, not
15 anybody can be chargeable with - - - for - - - for
16 support. It - - - it requires a parent-like
17 relationship, doesn't it?

18 MR. CHIMERI: Absolutely, Your Honor.

19 JUDGE STEIN: Isn't that what equitable
20 estoppel's all about?

21 MR. CHIMERI: Absolutely, Your Honor.

22 JUDGE STEIN: And - - - and didn't we have
23 equitable estoppel in support cases before the
24 legislature ever acted?

25 MR. CHIMERI: To - - - to an extent, yes.

1 JUDGE STEIN: So it's the - - - the
2 legislation or the statute isn't determinative,
3 right?

4 MR. CHIMERI: It's - - - it's determinative
5 to the extent that it sets forth a test that the
6 court applied, and - - - and the appellant, as the
7 petitioner in the support matter, set forth her cause
8 of action and met the elements and - - - and obtained
9 the order that estopped the - - - that estopped
10 Estrellita from disclaiming chargeability and
11 responsibility for child support. You know, one of
12 the other things that - - - that came up is that the
13 Fifth Circuit stated in Republic of Ecuador that the
14 parties should be able to, without fear of - - - of
15 judicial estoppel, adopt different technical
16 positions, and that comes back to that mixed question
17 of law and fact, Your Honor, and - - - and whether
18 the court, in the - - - in the first instance, could
19 make a statement that this individual is, in fact,
20 the parent. Do we have the ability as trial courts
21 to make that determination - - -

22 JUDGE GARCIA: But wouldn't - - - I'm
23 sorry, counsel. But wouldn't a redefinition of
24 parent in the Alison D. context get us away from this
25 type of position that we're in now where you can have

1 this proceeding where you're declared a parent for
2 child support purposes and there are allegations that
3 you've acted in that role but don't try to come visit
4 the child because, in this context, you don't meet
5 the stringent definition of parent? And isn't there
6 something fundamentally wrong with that?

7 MR. CHIMERI: There's certainly
8 fundamentally - - - I would concede that there's
9 something that can be said to be unfair about having
10 to pay child support for a child that one is not
11 necessarily able to see. But that's not a completely
12 inconceivable result under different sets of facts
13 here.

14 JUDGE GARCIA: Not inconceivable but
15 unfair.

16 MR. CHIMERI: Well, but that might be
17 unfair to somebody that may be un - - - unduly
18 excluded from their child's life in the context of
19 other - - -

20 JUDGE RIVERA: Yeah, but - - - but - - -

21 MR. CHIMERI: - - - other proceedings.

22 JUDGE RIVERA: But the point here is that
23 the - - - the attempt to exclude is because it's a
24 same-sex relationship. It's not because of the - - -
25 the - - - otherwise, as far as I can tell, the

1 conduct of the person or so forth. It's about that
2 essential identity.

3 MR. CHIMERI: Your Honor, I would
4 respectfully disagree on two points. First of all,
5 that, as a matter of fact, and it's contained within
6 the appendix with the - - - the trial court's
7 September 2011 - - - I'm sorry, September 11th, 2013,
8 order, that there was no exclusion. She was granted
9 parental - - - she was granted access. She had time
10 - - - and I'm referring she to Estrellita, she was
11 given visitation, and that was the decision of - - -
12 of Jennifer to have that continued contact. So this
13 isn't a case that cries out for - - -

14 JUDGE RIVERA: But is it something that - -
15 - that the biological parent can tomorrow decide you
16 know what, I've changed my mind?

17 MR. CHIMERI: As a - - - as a purely legal
18 matter, yes. Yes, Your Honor, and it absolutely is -
19 - -

20 JUDGE RIVERA: And isn't that what's - - -
21 what's in contention?

22 MR. CHIMERI: It's in contention, Your
23 Honor, but the problem with it is the flip side is -
24 - - is what's more concerning. Your court told us in
25 Debra H. - - - actually, I believe, in Alison D. the

1 court stated that while one may dispute in an
2 individual case what may or may not be necessarily in
3 the child's best interest to have contact with an - -
4 - an individual, whether it be a parent, a nonparent,
5 whomever that may be, when you're talking about the
6 broader definition, I - - - I couldn't help but
7 listen in the earlier argument, Your Honors. There -
8 - - I don't see a bright-line rule here that works.
9 You can have - - - say - - -

10 JUDGE PIGOTT: Well, one of them would be
11 similar to what Judge Garcia, I think, is implying.
12 It does seem really inconsistent to tell me I've got
13 to - - - I've got to pay for your child's support.

14 MR. CHIMERI: The - - -

15 JUDGE PIGOTT: And - - - but I can't see
16 the child. I mean I - - - I don't get it. It - - -

17 MR. CHIMERI: I don't disagree with Your
18 Honor - - - with Your Honors, and - - - and certainly
19 it was something that struck me when I, you know,
20 came into this case only at this stage of the matter.
21 But what - - - what also strikes me is that the - - -
22 the litigant, the - - - Jennifer, was under the
23 impression, based on this court's jurisprudence, that
24 that was her right to do.

25 JUDGE PIGOTT: But she had - - - she must

1 have had the - - - the thought that there was a
2 sufficient relationship there that she could ask for
3 money.

4 MR. CHIMERI: Absolutely.

5 JUDGE GARCIA: So the idea that she thought
6 she could do that under our precedent, to me, doesn't
7 that suggest that maybe our precedent needs to be
8 revisited? Because why should you be able to do
9 that?

10 MR. CHIMERI: The problem with revisiting
11 the precedent, Your Honor, is that once you start
12 fashioning a de facto test for parentage, it's
13 impossible to draw a line - - - I see my time is up.
14 I'd like to just conclude answering your question,
15 Your Honor. One of - - - one of the biggest problems
16 that - - - that I see with that is consider the
17 circumstances of a single mother who's - - - the
18 father has left, has not been in the child's life,
19 and there's a live-in au pair who's there for ten
20 years and establishes the same parent-like
21 relationship, and where is the difference? Where are
22 we drawing the line?

23 JUDGE GARCIA: I don't think you get child
24 support from the au pair.

25 MR. CHIMERI: I don't know. I don't know.

1 I don't know what the factors could be. It could be
2 depending if - - - if they were holding themselves
3 out under - - - under a plain reading of the
4 equitable estoppel, I don't know that it's not
5 conceivable that that could happen.

6 JUDGE ABDUS-SALAAM: Well, wouldn't a
7 hearing resolve some of those issues?

8 MR. CHIMERI: But the problem is how many
9 people are going to have hearings to determine
10 whether they are or not a parent.

11 JUDGE ABDUS-SALAAM: But in - - - in the
12 sense of, you know, there are other limits, too, like
13 consent of the biological parent, and you said the
14 consent was actually given here in terms of, you
15 know, fostering a relationship and other things.

16 MR. CHIMERI: But I think consent as a de
17 factor matter versus consent as a pure, unequivocal -
18 - - unequivocal instance, such as adoption - - -
19 which was one of the things the Second Department
20 harped on was that this was - - - this was the
21 consent because she sought to involve - - - Jennifer
22 sought to involve Estrellita in the child's life for
23 support purposes. The adoption forms, when you sign
24 off on an adoption, there is clear, unequivocal,
25 giant bold print language that says you may be

1 waiving your parental rights. That is entirely
2 different than checking a - - -

3 JUDGE STEIN: But don't we do this kind of
4 analysis every day in - - - in paternity cases where
5 equitable estoppel is - - - is raised to prohibit a
6 known nonbiological pers - - - father from denying
7 paternity? I mean what - - - what makes this any
8 different? The courts are used to doing this, aren't
9 they?

10 MR. CHIMERI: Are used to the - - - I'm
11 sorry? I didn't - - -

12 JUDGE STEIN: Are used to making these
13 kinds of determinations based on the facts at hand
14 without just opening - - - saying that the next-door
15 neighbor can be responsible for supporting a child
16 because they babysat them every day and - - - and
17 made their, you know, breakfast, lunch, and dinner.

18 MR. CHIMERI: But I think one of the
19 problems with having the equitable estoppel hearing
20 is does - - - where does it stop? Is it first in
21 time, first in right? There was a situation
22 presented before where in - - - in the earlier case,
23 they're talking about now this - - - this second life
24 partner who's - - - who's now a spouse, wants to come
25 in and adopt. Well, you know, who's going to be

1 first? When do we draw that line? That comes back
2 to at childbirth versus at some point during a
3 child's life, and do we have two or more parents.
4 And I think that those questions are so broad where
5 there's - - -

6 JUDGE ABDUS-SALAAM: Isn't - - - isn't that
7 the modern-day family, more than one - - - a lot of
8 families have more than three parents. You have
9 stepparents. There are, you know, some stepparents
10 galore in some families.

11 MR. CHIMERI: I don't disagree with Your
12 Honor's point at all, and I think that that's
13 certainly the - - - that supports deference to the
14 legislature in this connection.

15 CHIEF JUDGE DIFIORE: Thank you, sir.

16 MR. CHIMERI: Thank you, Your Honors.

17 CHIEF JUDGE DIFIORE: Counsel.

18 MR. ESTES: May it please the court, Andrew
19 Estes on behalf of Respondent Estrellita A. At issue
20 in this case is whether Estrellita has standing as a
21 parent to request visitation. In other words,
22 whether her relationship with her seven-year-old
23 daughter can be terminated by the unilateral decision
24 of Jennifer without any court consideration.

25 JUDGE PIGOTT: Did she appeal the order

1 that required her to pay the child support?

2 MR. ESTES: No. She did not appeal that
3 order. She accepted it as final. And once that
4 order was entered and it was final and - - - and not
5 challenged, Estrellita has been proud to be a parent,
6 as she was before the order, as well. I think it's
7 important to note that, going forward, Estrellita has
8 the right to be a parent and that future decisions
9 regarding the child's interests should be consistent
10 with that order.

11 JUDGE RIVERA: Did Estrellita first take
12 the position that she was not a parent until the
13 court said otherwise?

14 MR. ESTES: When Jennifer brought the
15 petition for support, Estrellita wanted to be an
16 adjudicated a parent. She wanted her status
17 recognized in an order. She was going to pay
18 support.

19 JUDGE PIGOTT: Did she cross-petition?

20 MR. ESTES: I - - - I don't know, but I
21 don't believe she cross-petitioned. I believe there
22 was first the petition in the support matter, and
23 then a - - - a separate petition, the one for custody
24 and - - - and visitation under a different docket.

25 JUDGE ABDUS-SALAAM: Did she petition for

1 the pet - - - petition to be determined a - - - a
2 parent and then change or she amended her petition
3 after the first determination on support? Isn't - -
4 - isn't that what happened, I think?

5 MR. ESTES: Yes.

6 JUDGE ABDUS-SALAAM: Yes. Yeah.

7 MR. CHIMERI: That's what happened is first
8 the support petition was filed, then there was the
9 custody/visitation petition, then the order came
10 down, and so then she amended it to reflect her
11 status as an adjudicated parent.

12 JUDGE RIVERA: So she's always taken the
13 position that she's a co-equal parent?

14 MR. ESTES: Yes, she's always seen herself
15 as a parent, and as the family court found after the
16 best interest hearing, that Estrellita had never
17 denied her role as a parent. That's in the record.
18 I believe that's at page A-12 of the appendix.

19 JUDGE ABDUS-SALAAM: Was Jennifer D.
20 actually taking inconsistent positions by petitioning
21 for support and then another position that your
22 client is not a parent in the - - - in the custody
23 and - - - and visitation?

24 MR. ESTES: Yes, these are wholly
25 contradictory positions, and are through classic

1 judicial estoppel. The saying that this person is a
2 parent of my child in the petition and testifying to
3 that - - -

4 JUDGE STEIN: Is that a legal position or a
5 factual position?

6 MR. ESTES: Well, I think it's a - - - it's
7 a factual position. This court in the matter of H.M.
8 discussed how that is what the family court is doing
9 when, you know, adjudicating support needs to
10 determine whether a female respondent is, in fact,
11 the child's parent. That's exactly - - -

12 CHIEF JUDGE DIFIORE: Do you say it's
13 factually inconsistent?

14 MR. ESTES: I - - - I would say it's - - -

15 CHIEF JUDGE DIFIORE: Flesh that out a
16 little?

17 MR. ESTES: I beg your pardon?

18 CHIEF JUDGE DIFIORE: Flesh that out a
19 little bit.

20 MR. ESTES: Well, it's a - - - it is
21 factually consistent - - -

22 CHIEF JUDGE DIFIORE: How so?

23 MR. ESTES: - - - to say that this person
24 is a parent, that that's what happened in the - - -
25 in the support matter is determining whether, in

1 fact, Estrellita is a parent to their child, that
2 they have a child in common.

3 JUDGE ABDUS-SALAAM: Wasn't it also - - -
4 isn't - - - well, it could be read as a legal
5 position because of our decision in Debra H.?

6 MR. ESTES: I mean to the extent that it -
7 - - the court sees it as a legal or as a mixed
8 question of - - - of law and fact, I - - - I don't
9 think that it really turns on that. I think the
10 judicial estoppel doctrine is broad enough to
11 consider mixed questions of law and fact and also,
12 legal issues, as well. The Fifth Circuit - - -

13 JUDGE RIVERA: So you're saying we can - -
14 - we can resolve this case or decide this case
15 without having to revisit existing precedent?

16 MR. ESTES: I think this court could decide
17 it on existing precedent that Estrellita's status as
18 an adjudicated parent is fully consistent with this
19 court's precedent. However, we would also urge that
20 this court, you know, reconsider its decision in - -
21 - in Alison D. that, if looking at the fortuity of
22 whether a child support petition is brought, if that
23 has to be what determines a parent-child
24 relationship. I think it should be broader than
25 that.

1 JUDGE GARCIA: Beyond that, and I think the
2 problem for me with judicial estoppel only is what's
3 underlying this conflicting situation that we have
4 here. So if we just went on judicial estoppel
5 grounds potentially here, would a parent, biological
6 parent, then say I'm not going to seek child support
7 which would be in the child's best interest because I
8 don't want to create this situation where I'm going
9 to have to give up visitation rights. And - - - and
10 is that - - - is that a situation that we would want
11 to tolerate, because they don't want to get into a
12 situation where, okay, now it's judicial estoppel?

13 MR. ESTES: No, I - - - I think that that
14 situation is - - - is not one that - - - that the
15 court should tolerate, and that advocates in favor of
16 expanding who is a parent. That as a consequence of
17 the bright-line rule from Alison D. of putting those
18 categories in those boxes, that if that's not the
19 rule going forward, there won't be that situation and
20 the courts will be allowed to consider the best
21 interests of the child.

22 JUDGE PIGOTT: I hate to sound old, but was
23 there any attempt to adopt in this - - - in this
24 situation?

25 MR. ESTES: I - - - I don't know. I

1 believe that there was maybe some discussion - - -

2 JUDGE PIGOTT: They have an inexpensive
3 adoption lawyer.

4 MR. ESTES: - - - but I don't know how far
5 it went.

6 JUDGE ABDUS-SALAAM: Counsel, assuming we
7 agree with your position and the other nonbiological
8 parent that we should revisit Alison D., what test
9 should we - - - what test should we adopt? What's
10 the rule?

11 MR. ESTES: Well, in our case, at minimum,
12 someone who has been adjudicated a parent at the
13 request of a biological parent should be a parent
14 going forward legally, that that's really the minimal
15 rule. But more generally speaking, I think going to
16 the heart of the issue is the same standard should
17 apply in the support context as it does in custody
18 and visitation, that considering the same tests that
19 the family court applies as well as the Supreme Court
20 in determining paternity disputes, as well as in - -
21 - in support for equitable estoppel, that that should
22 apply here, as well. But really, whatever test or -
23 - - or rule that this court provides, it - - - it
24 sounds like the attorney for the appellant and - - -
25 and respondent in the last case were - - - were in

1 agreement, we would support that rule, as well, as we
2 think it would support Estrellita's standing here as
3 an adjudicated parent.

4 And going to a point that Judge Garcia had
5 said about whether it would be, you know,
6 fundamentally unfair or fundamentally wrong to have
7 someone be, you know, held to be a parent for
8 purposes of support and then have no visitation, I
9 mean we would completely agree but would also want to
10 add, just to be very clear and sure, there will be
11 situations, undoubtedly, where someone is a parent
12 and required to pay support but it's not in the
13 child's best interest to have visitation and custody,
14 and I just want to be clear that that's not what's an
15 issue in this case, that is just standing - - -

16 JUDGE GARCIA: Yeah, of course.

17 MR. ESTES: - - - so wanted to - - -

18 JUDGE RIVERA: Could I just - - - just ask
19 so in these two cases, it's obvious, because we're
20 talking about same-sex lesbian couples, that someone
21 can be the biological parent. But for gay male
22 couples, what - - - what happens to the rule in that
23 case? Does it matter? Is the rule the same? It
24 won't - - - it won't affect that because we're
25 looking at intent to consent or something else?

1 MR. ESTES: Well, I think the rule that
2 this court should fashion should really be designed
3 to include all families. We recognize that families,
4 whether it's gay men, whether it's lesbians, whether
5 it's opposite sex couples that it's in a very
6 different place from where it is - - - from where it
7 was in 1991, and - - - and I do think that the rule
8 should, you know, encompass that and not, you know,
9 set out certain couples of saying, you know, gay men,
10 you're - - - you're different and you're not going to
11 be treated as equally as - - - as lesbian couples
12 because one of them, you know, actually be the birth
13 mother, would certainly encourage that in that
14 situation.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MR. ESTES: Thank you.

17 CHIEF JUDGE DIFIORE: Counsel.

18 MR. BELMONTE: Thank you, Your Honors. May
19 it please the court, my name is John Belmonte, and I
20 represent the child in this matter. Your Honors, my
21 client was born into a family with two parents. That
22 became clear because one was - - - she was raised to
23 call mommy and the other she was raised to call mama.
24 When, unfortunately, these parents split up, mommy
25 took mama to court to charge her with child support,

1 to prove the fact that my client was entitled to be
2 supported by her. Having established that fact, she
3 now turns around and takes a contrary position and
4 says my client has no right to have her best interest
5 considered because this person can't be a parent.

6 JUDGE ABDUS-SALAAM: It might be a fairness
7 argument, counsel, but what - - - what about the
8 legal implications? You know, in Debra H. we said,
9 essentially, that you had to be an adoptive parent or
10 a biological parent, so why wouldn't that - - -

11 MR. BELMONTE: Well, I think, actually,
12 this case - - - Debra H. actually supports what
13 happened here in this case. Because ultimately in
14 Debra H., this court recognized that it could grant
15 comity to a civil union in Vermont, which basically
16 stands for the proposition that with the consent of
17 the biological parent, she can use judicial machinery
18 to create a situation where this other person does
19 get parental rights. And here, what's happened is
20 she used the machinery of justice by going and
21 seeking a declaration that this person is a parent
22 and obtaining child support, and the court can now
23 recognize that as an established fact and say this
24 person has standing.

25 JUDGE GARCIA: But I'm worried with that

1 analysis that you're going to discourage people from
2 using the machinery because they're afraid of losing
3 other rights.

4 MR. BELMONTE: And - - -

5 JUDGE GARCIA: And is that really in the
6 best interest of the child?

7 MR. ESTES: That - - -

8 JUDGE GARCIA: So is - - - is your position
9 that that's the basis we should rule on in this case,
10 or do you support a different definition of parents?

11 MR. BELMONTE: Honestly, that - - - that is
12 a problem, and I agree with you. And personally, I -
13 - - I agree with the position in the other case, the
14 companion case, that Alison D. really should be
15 revisited.

16 JUDGE GARCIA: And what should the test be
17 if we revisit Alison?

18 MR. BELMONTE: Well, I think the test is
19 already there. I think it's the same test that the
20 courts - - - family courts do almost every day on
21 paternity estoppel issues, and it really has to be
22 focused on the child. It's was this child raised to
23 believe this is my parent?

24 JUDGE PIGOTT: Well, the - - - the two
25 cases both have standing issues, and are you

1 suggesting that the child can almost determine the
2 standing issue?

3 MR. BELMONTE: Yes, I think - - - because
4 best interest of the child really is at the core of
5 just about everything the family court does. It's in
6 the DR - - - it's in the - - - in DRL 70 that the
7 best interest is supposed to be considered, so I
8 think the focus has to be on what did these people
9 do, and what does this child - - - how has this child
10 - - -

11 JUDGE STEIN: What if the child's only six
12 months or seven months old?

13 MR. BELMONTE: Well - - -

14 JUDGE STEIN: So - - -

15 MR. BELMONTE: Yes, I - - - I think time is
16 a factor here.

17 JUDGE STEIN: So this would only apply if
18 the child's old enough to speak and - - - or, you
19 know, to call them something or to - - - to have some
20 cognition of what a parent - - -

21 MR. BELMONTE: I think that would play in -
22 - -

23 JUDGE STEIN: - - - is?

24 MR. BELMONTE: I think that absolutely
25 would play into it. Yeah, as if something - - -

1 JUDGE STEIN: Or is that one factor?

2 MR. BELMONTE: I think that would be a
3 factor. Again, we deal with these issues on a case-
4 by-case basis all the time in these child support
5 proceedings. There are paternity estoppel hearings
6 all of the time, so the court can parse those out at
7 as it goes. But certainly, yes, that - - - that
8 factor will be a major factor. What does this child
9 - - - I mean that's one of the things we do as
10 attorneys for the children when - - - when we - - -
11 we see - - - we get a case sent to us. Oh, there's
12 an estoppel issue here. We go out and we try to see,
13 you know, without giving away the game, what does
14 this kid think? Who's - - - who does this kid think
15 his daddy is?

16 CHIEF JUDGE DIFIORE: This isn't really
17 about the adults. This is really about the children.

18 MR. BELMONTE: It's about the children.

19 CHIEF JUDGE DIFIORE: Reliance that the
20 children have on a relationship that has been
21 developed and fostered for their benefit.

22 MR. BELMONTE: Absolutely.

23 JUDGE PIGOTT: But doesn't that - - -
24 doesn't that give too much power to the child in the
25 sense that if you had decided that Estrellita does

1 not - - - you know, does not deserve the
2 consideration, you decide that she has no standing
3 because you don't bring her into the case?

4 MR. BELMONTE: Too much power to the child
5 is what - - -

6 JUDGE PIGOTT: In other words, the - - -
7 the argument on these cases is that the - - - the
8 nonbiological parent has no standing.

9 MR. BELMONTE: Right.

10 JUDGE PIGOTT: I asked you earlier, you
11 know, because of the best interest of the child, does
12 the child then confer standing, and you said
13 absolutely.

14 MR. BELMONTE: Yes.

15 JUDGE PIGOTT: Well, if the - - - if the
16 child is the one that determines it and - - - and the
17 child decides that, you know, we don't like
18 Estrellita, we don't want anything to do with her, so
19 she can't bring a petition by herself and we decide
20 that she doesn't have standing.

21 MR. BELMONTE: Okay, that's an interesting
22 point. That might - - - that could be a problem, an
23 older child who's being difficult, but I - - -

24 CHIEF JUDGE DIFIORE: Well, the standing
25 goes to the parent.

1 MR. BELMONTE: But I - - -

2 CHIEF JUDGE DIFIORE: To the adult.

3 MR. BELMONTE: Yes, I still - - - the
4 standing goes to the adult, and I still think the
5 courts can look at this and see how has this - - -
6 you know, is this a child who's now just saying yeah,
7 that's not my mommy because I don't - - - I'm - - -
8 I'm mad at her. But has that child really comes to
9 rely on that as her mommy.

10 JUDGE PIGOTT: No, no, I guess the child is
11 my point. I - - - I think somebody - - - something
12 other than the child's got to decide whether or not,
13 in this case, Estrellita has standing or not,
14 probably us.

15 MR. BELMONTE: Correct, but I think the
16 court's inquiry has to focus on what that child came
17 to rely on.

18 JUDGE RIVERA: Well, the - - -

19 MR. BELMONTE: What that child believed.

20 JUDGE RIVERA: Can I try - - - can I try
21 from a different place, perhaps.

22 MR. BELMONTE: Okay.

23 JUDGE RIVERA: Is - - - is it possible that
24 the real flaw, let me put it that way, in the
25 precedent is the focus on biology?

1 MR. BELMONTE: Yes.

2 JUDGE RIVERA: The factor to be removed is
3 biology.

4 MR. BELMONTE: Yes.

5 JUDGE RIVERA: And we can otherwise try and
6 resolve these questions.

7 MR. BELMONTE: Correct, and - - - and we've
8 already removed biology in the child support arena.
9 And - - - and in fact, I think, another interesting
10 thing that comes up is that we have - - - we have to
11 consider the Obergefell case now, which really
12 relied, not only on fundamental rights but on equal
13 protection. So if equal protection was a concern in
14 recognizing same-sex marriage, we have to look at
15 same-sex couples, in general, even if they're not
16 married, and are we treating them differently in a
17 certain situation? And in the paternity situation,
18 when we have a - - - a father who's - - - a purported
19 father who is not allowed to get out of being it,
20 even if we know he's not really the father, we don't
21 tell that guy he doesn't have standing to seek
22 visitation. But in the same-sex couple area,
23 suddenly, we're saying, oh, you can't come and seek -
24 - - seek visitation, and I think that raises an equal
25 protection concern. So I think that is something

1 that the - - - the court should be mindful in
2 revisiting Alison D. too.

3 Now, in this case I know the courts are
4 often reluctant to overrule themselves, so that's why
5 I really took the position that you don't have to
6 overrule Alison D. in this case. However, that
7 raises Judge - - - Judge Garcia's concern about
8 people not seeking the help of the court when they
9 really should because they're afraid that now if I
10 give child support to this person, now I have this
11 person in my life.

12 But if the court wants to go that way, too,
13 I mean that does - - - it - - - back in Shondel J.
14 this court basically said that sometimes the - - -
15 "At times the law intersects with the providence of
16 personal relationships and some strain is
17 inevitable." So that would be an example of that.
18 The biological parent would be put to a tough choice,
19 do I seek child support and have this person have
20 rights to see my child, or do I give up the child
21 support because I want to keep my child away from
22 this person. Of course, that does ignore the best
23 interests of the child, so the better rule would be
24 to overrule Alison D. If there are no further
25 questions, I'll rely on my brief. Thank you very

1 much.

2 CHIEF JUDGE DIFIORE: Thank you. Counsel.

3 MR. CHIMERI: Thank you, Your Honors.

4 CHIEF JUDGE DIFIORE: Um-hum.

5 MR. CHIMERI: I'll - - - I'll work somewhat
6 backwards and - - - and first, to just deal with Your
7 Honor's point is that there is, certainly, I think a
8 perceived or potential chilling effect if this rule -
9 - - if the ruling below and the Appellate Division's
10 decision is affirmed. There is a potential chilling
11 effect on a parent exercising their rights to collect
12 child support from potentially a nonparent seeking to
13 estop somebody who is purported or - - - or may be a
14 nonparent.

15 JUDGE ABDUS-SALAAM: If we - - - if we take
16 the route of revisiting Alison D., and then,
17 essentially, redefining parent, would that be a
18 solution to what your - - - and - - - and what Judge
19 Garcia was - - - was concerned about?

20 MR. CHIMERI: I think the problem with that
21 is, Your Honors, and - - - and certainly, it's not my
22 job and my capacity as the advocate for the appellant
23 in this case to fashion the rule for Your Honors, but
24 I - - - I haven't heard a rule today that works,
25 either in this case or the companion case. What I've

1 heard in - - - in the context of this case is a child
2 - - -

3 JUDGE ABDUS-SALAAM: Why doesn't it work?

4 MR. CHIMERI: Your Honor, it's a child - -
5 - what I've heard now is a child-centric rule. A
6 child-centric rule is fraught with danger, fraught
7 with problems. We're dealing with - - - it's not
8 just chronological age, you're dealing with maturity
9 issues, a child who may not be as developed. It
10 might be a ten-year-old child but - - -

11 JUDGE STEIN: But isn't - - - hasn't our
12 law been, for as long as I can remember, at least, or
13 - - - or read about that - - - that when we talk
14 about custody issues, it's all about the child?

15 MR. CHIMERI: It is - - -

16 JUDGE STEIN: That's nothing new.

17 MR. CHIMERI: That's correct, Your Honor,
18 but this court has also determined that we first look
19 at and - - - and certainly, Supreme Court precedent,
20 as well, that biology plus, there's something
21 biological and there's something else. So I don't
22 think, Your Honor, that we discard biology completely
23 in the test. I think it's absolutely relevant to
24 that, and I just want to correct - - -

25 JUDGE RIVERA: But why? Why? Why does it

1 matter?

2 MR. CHIMERI: Why does what matter?

3 JUDGE RIVERA: Why does it matter? Why
4 does biology matter in trying to - - -

5 MR. CHIMERI: Because the legislature - - -

6 JUDGE RIVERA: - - - determine parental
7 relationships and what's in the best interest of the
8 child?

9 MR. CHIMERI: Because the legislature has
10 told us that it does.

11 JUDGE RIVERA: There are plenty of parents
12 who are the biological parents who have their rights
13 terminated because they're horrible to their
14 children.

15 MR. CHIMERI: I don't disagree with that
16 point, Your Honor. And certainly this court back in
17 1976 in Bennett v. Jeffreys said that there are
18 certain circumstances under which that can be done.
19 None of those are present here. In fact, they
20 weren't even alleged. I want to correct one point
21 with respect to the record because I think it's - - -

22 JUDGE RIVERA: Yeah, but I'm not going to
23 let you off this. I'm trying to understand why you
24 think biology should be this proxy for the - - -
25 allow standing to argue a parenthood status.

1 MR. CHIMERI: Because for one of the oldest
2 - - - all of the Supreme Court precedent going back
3 to the 1920s talks about this fundamental right when
4 one bears a child and to - - - to completely just
5 overrule that at the state - - -

6 JUDGE RIVERA: I understand. But - - - I
7 understand that. There's a - - - there's a lot of
8 things that are in the past that we don't do anymore,
9 for better and for worse. But we now - - -
10 certainly, the State of New York recognizes that
11 people can be in loving, familial relationships,
12 romantic relationships, and that that's - - - biology
13 is not relevant to that.

14 MR. CHIMERI: Well, certainly, Your Honor,
15 I think there's two - - - two different distinctions
16 there. In the Marriage Equality Act, if - - - if the
17 legislature wanted to step in and redefine parent, it
18 had the opportunity to do so. I certainly was
19 celebrating when the Marriage Equality Act was
20 enacted. It rendered me able to book my marriage,
21 but that's not the point here. The point here is
22 we're talking about a couple that chose not to marry
23 in another state, not to marry - - - well, in this
24 state, the timeline, it wouldn't have been able to
25 do.

1 Your Honor, I see my time is up. I would
2 like to just come back to my factual point with
3 respect to the record, and that is that Estrellita in
4 this case, did, in fact, disclaim responsibility for
5 child support and did, in fact, disclaim parentage,
6 and that was her defense which is why there was a
7 two-day equitable estoppel hearing which Justice
8 Whalen presided over. If there was no consent to
9 that, there wouldn't have been a hearing. Your
10 Honors, if there are no other questions, I'll rely on
11 my contentions in my brief, and I thank you for your
12 time.

13 CHIEF JUDGE DIFIORE: Thank you.

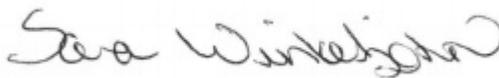
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Brooke S.B. v. Elizabeth A. C.C., No. 91, and Matter of Estrellita A. v. Jennifer D, No. 92 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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