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POLICY REVIEW: Introduction to *Thomas S. v. Robin Y*

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INTRODUCTION TO *THOMAS S. v. ROBIN Y.**

BACKGROUND

In *Thomas S. v. Robin Y.*, petitioner sought an order of filiation and an order of visitation for Ry, a girl who was born in 1981 as the result of respondent's artificial insemination with petitioner's sperm.¹ In planning for Ry's birth, Robin Y. and Sandra R., who are involved in a lesbian relationship, intended to raise Ry as co-parents.² As the sperm donor, Thomas S., who is a gay man, agreed that he would have no parental rights or obligations and that he would make himself known to Ry only if she asked about her biological origin.³ The parties did not put the terms of their agreement in writing nor did respondent seek to legally sever petitioner's parental rights under California law.⁴

Thomas S. resides in California, while Robin Y., Sandra R. and their daughters, Cade and Ry, have lived in New York since July 1982.⁵ For the first three years of Ry's life, Thomas S. did not attempt to see her at all.⁶ In early 1985, when Ry began asking about her biological origin, Robin Y. and Sandra R. contacted Thomas S. and arranged for Ry to meet him.⁷ "Between 1985 and 1991, Thomas S. visited with Robin Y., Sandra R. and the girls

* 157 Misc.2d 858, 599 N.Y.S.2d 377 (Fam. Ct. 1993), *rev'd*, 618 N.Y.S.2d 356 (1st Dep't 1994), *leave to appeal granted* Nos. M-6440, M-6441, 1995 N.Y. App. Div. LEXIS 1420 (1st Dep't Feb. 7, 1995).

¹ *Id.* at 858-59, 599 N.Y.S.2d at 377.

² *Id.* at 859, 599 N.Y.S.2d at 378. In 1980, Sandra R. gave birth to a baby girl, Cade, as a result of her successful insemination with the sperm of Jack K. Sandra R. and Robin Y. have raised Cade as co-parents and intended to raise Cade and Ry as siblings.

³ *Id.*

⁴ *Id.* (citing CAL. CIVIL CODE § 7005 (West 1983)).

⁵ *Id.*

⁶ *Id.* at 866, 599 N.Y.S.2d at 382.

⁷ *Id.* at 860-61, 599 N.Y.S.2d at 379.

several times a year. All contacts between Thomas S. and the girls were at the complete discretion of Robin Y. and Sandra R."⁸ Thomas S. eventually became disenchanted with this arrangement⁹ and, in late 1990 or early 1991, he requested visitation with Ry outside the presence of Robin Y. and Sandra R.¹⁰ When Robin Y. and Sandra R. refused his request, Thomas S. initiated a legal action to obtain an order of filiation and visitation.¹¹

I. FAMILY COURT

In 1993, the Family Court of the City of New York refused to grant Thomas S. an order of filiation.¹² While conceding that there was clear and convincing evidence that Thomas S. is Ry's biological father, Judge Edward Kaufmann refuted petitioner's argument that such evidence triggered a mandatory grant of filiation under section 542 of the Family Court Act.¹³ Alternatively, Judge Kaufmann applied the doctrine of equitable estoppel to deny a filiation order for Thomas S.¹⁴ Judge Kaufmann reasoned that the doctrine "applies to circumstances where the action or inaction of one party induces reliance by another to his or her detriment or where the failure of a party to assert a right promptly has created circumstances rendering inequitable to permit exercise of the right after a lapse of time."¹⁵ In estopping Thomas S. from exercising paternity rights, Judge Kaufmann emphasized that Thomas S. had not demonstrated any interest in exercising his rights, as shown by his limited contact with Ry during her early development.¹⁶ In fact, Judge Kaufmann characterized Thomas S.

⁸ *Id.*

⁹ Judge Edward Kaufmann speculated that Thomas S.'s discovery in 1987 that he is HIV positive motivated him to redefine his role in Ry's life. *Id.* at 861 n.5, 599 N.Y.S.2d at 379 n.5.

¹⁰ *Id.* at 861, 599 N.Y.S.2d at 379.

¹¹ *Id.*

¹² *Id.* at 867, 599 N.Y.S.2d at 382.

¹³ *Id.* at 864, 599 N.Y.S.2d at 381.

¹⁴ *Id.* at 865, 599 N.Y.S.2d at 381.

¹⁵ *Id.* (citations omitted).

¹⁶ *Id.* at 866, 599 N.Y.S.2d at 382.

as “an outsider attacking [Ry’s] family . . . for his own selfish reasons.”¹⁷

II. APPELLATE DIVISION

In 1994, the Appellate Division of the New York State Supreme Court, First Department, reversed the family court in a three to two decision, granting Thomas S. an order of filiation and remanding the case for a hearing on visitation.¹⁸ Contrary to the family court, the First Department reasoned that if paternity has been established by clear and convincing evidence, then section 542 of the Family Court Act mandates the entry of an order of filiation.¹⁹ The First Department criticized the family court’s focus on whether a grant of filiation would destroy the family that Ry had established with Robin Y., Sandra R. and Cade.²⁰ The First Department focused solely on whether Thomas S.’s rights as a biological parent should be terminated, while it disregarded the potential impact of visitation and custody on Ry and her family.²¹ Moreover, the First Department concluded that “the doctrine [of equitable estoppel] is more appropriately applied against” Robin Y. than against Thomas S. in this case, because she chose the method of conception and initiated and fostered a relationship between Ry and Thomas S.²²

In a dissenting opinion, Justice Betty Weinberg Ellerin, joined by Justice Presiding Ernst Rosenberger, affirmed the family court’s decision, “which denied a declaration of paternity to petitioner sperm donor on the basis of equitable estoppel.”²³ She based this conclusion on the grounds that “the mere existence of a biological link does not merit constitutional protection”²⁴ of a sperm donor’s parental rights. Justice Ellerin reasoned that the equitable estoppel doctrine applies to this case because the imposition of estoppel

¹⁷ *Id.*

¹⁸ *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (1st Dep’t 1994).

¹⁹ *Id.* at 359.

²⁰ *Id.* at 358-59.

²¹ *Id.* at 359.

²² *Id.* at 362.

²³ *Id.* at 363 (Ellerin, J., dissenting).

²⁴ *Id.* at 365 (Ellerin, J., dissenting).

would serve the best interests of the child,²⁵ emphasizing that “a declaration of paternity in this case . . . would be only the first step in ongoing litigation [over visitation] which will inevitably cause severe traumatic consequences to the child and her family.”²⁶ Justice Ellerin also commented that “[t]his case . . . demonstrates . . . the inadequacy of current law and litigation as instruments capable of satisfactorily accommodating the competing desires and interests of each of the parties involved.”²⁷

III. COURT OF APPEALS

On February 7, 1995, the Appellate Division of the New York State Supreme Court, First Department, granted Robin Y.’s motion for leave to appeal to the New York Court of Appeals.²⁸ The First Department, however, denied a stay of its declaration of paternity pending appeal.²⁹

COMMENTARY

Although *Thomas S. v. Robin Y.* involves a dispute between a lesbian couple and a gay man, the core issue is the composition of a family unit, rather than the parenting abilities of lesbian and gay people. The following policy review essay by Marc E. Elovitz, staff counsel for the American Civil Liberties Union—National Lesbian and Gay Rights Project, presents one perspective on some of the legal and social concepts addressed in *Thomas S. v. Robin Y.* His essay uses *Thomas S. v. Robin Y.* as the context for evaluating issues that arise when lesbian and gay people attempt to create families.

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Executive Articles Editor

²⁵ *Id.* at 368 (Ellerin, J., dissenting).

²⁶ *Id.* (Ellerin, J., dissenting).

²⁷ *Id.* at 363 (Ellerin, J., dissenting).

²⁸ *Thomas S. v. Robin Y.*, Nos. M-6440, M-6441, 1995 N.Y. App. Div. LEXIS 1420 (1st Dep’t Feb. 7, 1995).

²⁹ *Id.*