# *BRIEF*

# THE SOCIAL CONSTRUCTION OF PARENTHOOD IN ONE PLANNED LESBIAN FAMILY

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The case of *Thomas S. v. Robin Y.*[1] concluded in the Spring of 1995, when Thomas S. withdrew his petition requesting an order of paternity and visitation after the New York Court of Appeals had agreed to review the decision of the Appellate Division.[2] Thus ended four years of litigation in one of the most contentious legal disputes that had arisen to date in the context of a planned lesbian family.

One question dominated the *Thomas S.* litigation: Can a child be consciously raised, in a deliberately structured family, to know the man who is her biological father without attaching any great significance to the biological connection and without considering him one of her parents? If the answer to that question is yes, then the corollary question was whether existing doctrine could be flexible enough to accord that fact legal significance. I wrote the *amicus* brief that follows this introductory essay on behalf of three gay and lesbian legal organizations and the two largest associations of lesbian and gay parents in this country.[3] In it, I argued both that a child in a planned lesbian family can define parenthood without regard to biology and that the doctrine of equitable estoppel permits a court to recognize that reality.

The twenty-six day trial of *Thomas S. v. Robin Y.* was a cacophony of disputed facts. Most salient facts, however, are not disputed. Robin Y. and Sandra R. were, in the early 1980s, a lesbian couple who wanted to raise children. First, Sandra R. became pregnant after insemination by the semen of Jack K., and Cade was born in 1981. Next, Robin Y. became pregnant by the semen of Thomas S., and in 1983 Ry was born. The women had an oral agreement with each donor that he would not seek parental rights to any child conceived, that they would not seek support for their children

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1. 618 N.Y.S.2d 356 (App. Div. 1994), *rev'g* 599 N.Y.S.2d 377 (Fam. Ct. 1994).

2. Thomas S. v. Robin Y., 86 N.Y.2d 779 (1995).

3. Brief *Amicus Curiae* on behalf of the National Center for Lesbian Rights, Lambda Legal Defense and Education Fund, Gay and Lesbian Advocates and Defenders, Center Kids, and Gay and Lesbian Parents Coalition International, in Support of Respondent-Appellee, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994) *reprinted in* 22 N.Y.U. REV. L. & SOC. CHANGE 213 (1996) [hereinafter *Amicus* Brief]. For a description of these organizations and their interest in the case, see *Amicus* Brief, *supra* this note, at 215-17.

from him, and that each man would agree to be known to the child when the mothers determined that this was in their child's best interests. When Ry was three and a half years old, after her five-year-old sister began asking questions about where she came from, Sandra R. and Robin Y. travelled with the children from their home in New York to San Francisco, where both Thomas S. and Jack K. lived, to introduce the children to both men.[4]

A warm relationship developed between Thomas S. and the R.-Y. family. Over the next six years they saw each other irregularly, by scheduling joint vacations and getting together when Thomas S. was visiting New York or the R.-Y. family was visiting California. Robin Y. and Sandra R. had asked Thomas S. to treat Cade and Ry equally as sisters, and he did so. Ry knew during this period that Thomas S. was her biological father, she sometimes referred to him as "dad," and she enjoyed her contact with him. Thomas S. was never responsible for Ry's care, he never stayed overnight with her when her mothers were not also present, and he had no obligation for, and little knowledge of, her daily life. He paid no child support for Ry, nor did Robin Y. and Sandra R. want him to provide child support. He did send her presents and take her on special outings, such as a carriage ride in Central Park.[5]

When Ry was nine, Thomas S. wanted her to come to California to meet his parents and other family members. He did not want Robin Y. and Sandra R. to come with her. This request reflected his desire to have a relationship with Ry independent of his relationship with Ry's mothers. Robin Y. and Sandra R. denied this request and expressed alarm that Thomas S. was trying to change the nature of his relationship with Ry. Thomas S. asked them to go to mediation with him. They responded that they were not willing to mediate about their children. He then filed a court action in New York seeking an order of filiation (paternity) and visitation, including two weeks of immediate visitation that summer. The court denied Thomas S.'s request for immediate visitation and appointed a guardian ad litem to represent Ry. Subsequently, a court-appointed psychiatrist examined both the mothers; Thomas S.; his partner, Milton; Ry; and her sister, Cade.[6]

In April, 1993, after twenty-six days of trial, the family court judge issued an order denying Thomas S.'s petition.[7] This was consistent with the recommendations of the court-appointed psychiatrist and the guardian ad litem. The court considered the full context of Ry's life, which included having two mothers and a sister, and found that Ry did not consider

4. *Thomas S.*, 618 N.Y.S.2d at 357-58.
5. *Id.* at 363-64 (Ellerin, J., dissenting).
6. *Thomas S.*, 599 N.Y.S.2d at 379.
7. *Id.* at 382.

Thomas S. a parent.[8] The court also found that Thomas S.'s conduct, beginning before Ry's birth until the filing of the court action, estopped him from obtaining such order of paternity.[9]

Thomas S. appealed. On November 17, 1994, the New York Supreme Court, Appellate Division reversed the trial court in a 3-2 decision.[10]

The Appellate Division majority opinion rejected the two principal arguments in my *amicus* brief: 1) that a child's knowledge of her genetic composition should not be equated with her perception of who constitutes her family,[11] and 2) that children in gay and lesbian families should be accorded the full range of protections available to children in heterosexual families.[12]

The majority opinion failed to acknowledge the possibility that a man identified to a child as her biological father could have a relationship with that child that was not parental in nature.[13] It was enough for the majority that there was some relationship and that Ry knew that he was her biological father. The majority's blind spot resulted from both the minimal demands placed on fathers by this culture and an unwillingness to examine the social construction of parenthood in planned lesbian and gay families.

The appellate court concluded that Thomas S. was Ry's father, despite the majority's acknowledgment that he had no relationship with her until she was three, and that he saw her only between 60[14] and 148[15] days of her entire life (characterized by the majority as "considerable contact"[16]). The court seemed particularly influenced by "photographs . . . [which] depict a warm and amicable relationship between petitioner and Ry, and . . . [the] numerous cards and letters from Ry to petitioner in which she express [sic] her love for him."[17] From these facts alone, the majority began to refer to Ry as Thomas S.'s daughter and thus characterized the trial court's denial of his paternity petition as a termination of parental rights.

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8. *Id.* at 380.

9. *Id.* at 382.

10. *Thomas S.*, 618 N.Y.S.2d 357 (App. Div. 1994), *rev'g* 599 N.Y.S.2d 377 (Fam. Ct. 1994).

11. *Compare id.* at 360 *with Amicus* Brief, *supra* note 3, at 227-29.

12. *Compare Thomas S.*, 618 N.Y.S.2d at 361 *with Amicus* Brief, *supra* note 3, at 230-31.

13. *Thomas S.*, therefore, stands in sharp contrast to *Leckie v. Voorhies*, No. 60-92-06326 (Or. Cir. Ct. Apr. 19, 1993), a trial court decision I analyzed in my *amicus* brief. *See Amicus* Brief, *supra* note 3, at 229, 232-33. After this brief was filed, the trial court decision in *Leckie* was affirmed on appeal. 875 P.2d 521 (Or. Ct. App. 1994). In *Leckie*, the child had what appeared to be a considerably more extensive relationship with her mother's semen donor than Ry had with Thomas S. Under the relevant statutes, and because he had agreed to waive his parental rights, Leckie was denied an order of paternity. The court refused to find any constitutional violation in denying an order of paternity pursuant to his agreement. 875 P.2d at 522-23.

14. Robin Y.'s count. *Thomas S.*, 618 N.Y.S.2d at 358.

15. Thomas S.'s count. *Id.*

16. *Id.* at 357.

17. *Id.* at 358.

Subsequently, the majority referred to the sufficiency of the "nature, duration, and constancy" of Thomas S.'s "interest and concern" for Ry.[18] Yet, many adults are deeply interested in and concerned about children they know, and those children often express love in return. This does not make these relationships parent-child in nature. Perhaps because Thomas S.'s involvement with Ry seemed no different from the minimal involvement many fathers have in their children's lives, the appellate court majority could not envision the possibility that, having been raised in a deliberately structured, planned lesbian family, Ry could understand that Thomas S. was not one of her parents.

The ease with which the majority defined Thomas S. as Ry's father paralleled the opinion's evisceration of Sandra R. as Ry's mother.[19] Repeatedly, the court characterized actions taken jointly by Robin Y. and Sandra R., including selecting Thomas S. as a semen donor, conducting the insemination, and initiating contact between Ry and Thomas S., as Robin Y.'s actions alone. The court only once referred to Ry having "mothers;"[20] it more often identified Sandra R. as Robin Y.'s lifetime companion and domestic partner rather than as Ry's mother.[21] In addition, the court referred to Cade as Ry's sister only once; it instead identified her as "Sandra's child,"[22] and it cited the relevant family constellation on more than one occasion as Ry, her mother, and Sandra R., omitting Cade entirely.[23]

The court revealed both its minimal expectations of Thomas S. as a father and its obliteration of Sandra R. as a second mother in a gratuitous statement that "the notion that a lesbian mother should enjoy a parental relationship with her daughter but a gay father should not is so innately discriminatory as to be unworthy of comment."[24] Since no one had argued,

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18. *Id.* at 362.

19. Thomas S. has also treated Sandra R. as something other than Ry's mother. During the twenty-six day trial, he continuously invoked the rule on witnesses to bar Sandra R., who was technically not a party, from the courtroom. His position was that he would not allow Sandra R. in the courtroom unless his partner, Milton, was also permitted in the courtroom. By attempting to equate his partner, who had even less of a relationship with Ry than he did, with Sandra R., who was one of Ry's mothers since her birth, Thomas S. demonstrated in the most graphic form his disregard and repudiation of Ry's family structure. In an interview in the *Washington Blade* after the appellate court's decision, Thomas S., again refusing to acknowledge Sandra R.'s parental relationship with Ry, was quoted as saying that the decision "does nothing to undermine Ry's relationship with her biological mother and her mother's partner." Walsh, *Sperm Donor Wins Legal Right to Visit Daughter*, WASH. BLADE, Dec. 2, 1994, at 21.

20. *See, e.g., Thomas S.*, 618 N.Y.S.2d at 357 ("at the insistance of her mother," "donor known to her mother"); *id.* at 360 ("her mother and Sandra R."); *id.* at 358 ("unless the *mothers* accompanied them") (emphasis added).

21. *See, e.g., id.* at 357 (referring to Sandra R. as "the mother's lifetime companion"); *id.* at 360 (referring to Sandra R. as Robin Y.'s "domestic partner").

22. *Id.* at 357.

23. *See, e.g., id.* at 359; *id.* at 360 ("[P]etitioner's desire to communicate and visit with his daughter is portrayed as a threat to the stability and legitimacy of the family unit constituted by Ry, respondent, and Sandra R.")

24. *Id.* at 361.

and the trial court had not held, that Thomas S.'s petition should be denied because he was gay, this statement responded to nothing that was at issue in the case. Rather, by ignoring Sandra R. in its formulation and by equating the parental status of Robin Y. with that of Thomas S., it contorted Ry's family structure from something it refused to acknowledge—two mothers and two children, to something it presupposed—a mother, a father, and a child.

This characterization of the relationships among these five individuals stands in marked contrast to the characterization contained in the trial court's decision. The trial judge recognized and valued the family that Sandra R. and Robin Y. created.[25] Within that deliberately created family structure, the judge evaluated the relationship between Ry and Thomas S. and concluded that it was not parental in nature, that "in Ry's family, there has been no father."[26]

The trial court then demonstrated the value it attached to this family by according Ry the same security provided to children with heterosexual parents, through application of the doctrine of estoppel. It held that Thomas S. was estopped from obtaining an order of paternity because he had stated that "he had no interest in exercising [his] parental rights;"[27] because he had engaged in a course of conduct over ten years consistent with that representation;[28] because, as a result of his actions, Ry viewed him as "an important man in her family's life," but not as a father;[29] and because a paternity order would be contrary to Ry's best interests.[30]

The appellate court, on the other hand, embraced Thomas S.'s interpretation of estoppel doctrine in paternity cases. According to the majority and Thomas S., the purpose of estoppel is the preservation of a child's legitimacy, defined narrowly as a child's status as the offspring of a married mother and father.[31] In other words, estoppel is limited to those situations where a determination of paternity based upon biology would render a child "illegitimate." Thomas S. argued, and the majority accepted, that the doctrine was inapplicable here because nothing could render Ry "legitimate" in this sense.[32]

The court distinguished the one New York case estopping a paternity action in which the child did not believe she was the offspring of a married mother and father.[33] In that case, the seventeen-year-old child had believed that another man, then deceased, had been her father, whereas in this case, Ry already knew the biological facts and therefore the court argued that

25. *See, e.g., Thomas S.*, 599 N.Y.S.2d at 379 (describing the R.-Y. family).
26. *Id.* at 380.
27. *Id.* at 382.
28. *Id.*
29. *Id.* at 380.
30. *Id.* at 382.
31. *Thomas S.*, 618 N.Y.S.2d at 361.
32. *Id.*
33. Terrence M. v. Gale C., 597 N.Y.S.2d 333 (App. Div. 1993).

"mere acknowledgment of petitioner's legal status [would not] result in a shock to [Ry's] sensibilities."[34] This was yet another expression of the court's refusal to entertain the possibility that a child could know the identity of her biological father and still not consider him a parent, thereby making a legal declaration that he was her parent a "shock" to her experience of her family.

The appellate court dismissed the extensive argument in my *amicus* brief that numerous cases applied estoppel to preserve the child's image of her family, not the child's "legitimacy."[35] Only such an interpretation could provide children in lesbian families the protection that equitable estoppel affords children in heterosexual families, as a child in a lesbian family will never, by definition, believe herself to be the child of a married mother and father. The court characterized my attempt to gain this security for children in lesbian families as a "sweeping change in the legal concept of legitimacy,"[36] which was therefore the prerogative of the legislature.

The failure to acknowledge and honor the reality of parental relationships in lesbian families is sadly reminiscent of the numerous court decisions denying parental status to nonbiological[37] mothers whose access to their children is cut off after the dissolution of the parents' relationship with each other.[38] In such cases, the legislature has been invoked as the proper forum to gain the requested protection.[39] Yet estoppel is a common law doctrine, not a statutory one, and it is explicitly equitable in nature. The numerous New York cases applying estoppel to determinations of parenthood were all judicial applications of this common law doctrine,[40] and there is no justification for refusing to apply it to preserve the image that a child with lesbian mothers holds of her family other than a blatant refusal to honor the *legitimacy* of such a family.[41]

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34. *Thomas S.*, 618 N.Y.S.2d at 362.

35. *Compare id.* at 361-62 *with Amicus* Brief, *supra* note 3, at 238-41.

36. *Thomas S.*, 618 N.Y.S.2d at 362.

37. I use nonbiological here as a proxy for all parents who are not legally related to the child. It therefore includes, in a family where the children are adopted, the parent who is not the legal adoptive parent.

38. *See, e.g.*, Alison D. v. Virginia M., 552 N.Y.S.2d 321 (App. Div. 1990) (denying rights of a lesbian co-mother).

39. *See, e.g., id.* at 324.

40. *See, e.g.*, cases cited in *Amicus* Brief, *supra* note 3, at 237-51.

41. After refusing to apply estoppel to Thomas S.'s petition for an order of paternity, the court noted that estoppel would be more appropriately applied against Robin Y. because she "initiated and fostered a relationship between petitioner and Ry." *Thomas S.*, 618 N.Y.S.2d at 362. Given the infrequency of Thomas S.'s contact with Ry, his lack of participation in the caretaking and responsibilities normally associated with parenting, and the conclusion of both the court-appointed psychiatrist and the trial judge that Ry did not consider him a parent, this section of the opinion, although dicta, is an additional indication that when lesbian mothers in New York choose known semen donors, these men will be legally recognized as fathers of their children.

Part of the majority's negation of the reality of this lesbian family structure was its unwillingness to acknowledge the family's vulnerability. The majority chastised the trial court, the dissent, and Robin Y. and Sandra R. for asserting that an order of paternity would be disruptive of Ry's life.[42] The majority minimized the significance of its decision, stating that it was merely entering an order of filiation and leaving questions of custody and visitation to another day.[43] The majority further characterized custody as "unlikely ever to be an issue"[44] and blamed Robin Y. and Sandra R. for instilling in Ry fear based on "the misapprehension that visitation by petitioner necessarily poses an immediate threat to the stability of the household."[45]

Yet the majority itself noted that, if opposed by Thomas S., the rights held by Sandra R. are an open question explicitly not resolved in this case.[46] It is the court's order of filiation that places the question on the table. Scores of court decisions, scholarly articles, and popular texts underscore the vulnerability of planned lesbian and gay families.[47] Whatever the ultimate outcome, it cannot be overreaction for Sandra R., Robin Y., Ry, and Cade to fear ongoing litigation in which Sandra R.'s status as Ry's mother and Cade's status as Ry's sister are in dispute.

Ultimately, the majority pictured Thomas S. as a caring, involved, and beleaguered father; Robin Y. and Sandra R. as unreasonable, alarmist, and manipulative; Ry as a victim of Robin Y. and Sandra R.'s unwarranted hysteria; and Cade as invisible. It constructed this picture because, in spite of the conclusions of both the court-appointed psychiatrist and the trial judge who observed the parties and witnesses and spoke to Ry in chambers, it could not acknowledge both Robin Y. and Sandra R. as Ry's parents, and because it presupposed Thomas S.'s status as Ry's father. For example, the majority characterized the onset of the litigation as follows:

> Petitioner is portrayed by the dissent as the villain of this case for having the temerity to request that Ry and her sister accompany him on an unsupervised visit to meet his parents, causing a "rift" and precipitating this litigation. The record, however, indicates that it was Robin Y. and Sandra R. who opposed this visit and does not reflect any initial resistance on the part of Ry.[48]

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42. *See, e.g., Thomas S.*, 618 N.Y.S.2d at 359 ("Even more disturbing is the suggestion that the judicial process will pose 'severe traumatic consequences' to the child . . ."); *id.* at 359-60 ("The apparent manipulation of an innocent child's affections and the obvious damage wreaked upon the once harmonious relationship with her father do not deter the dissent from the view that the child's 'haunting fear' of being taken away from 'the woman whom she has consistently thought of as her second parent' must have been instilled by petitioner.").

43. *Id.* at 359.

44. *Id.* at 358.

45. *Id.* at 362.

46. *Id.* at 361.

47. *See, e.g.*, cases and commentators cited in *Amicus* Brief, *supra* note 3, at 221-27.

48. *Thomas S.*, 618 N.Y.S.2d at 359.

It seems self-evident that parents have the right to determine when, whether, and with whom their nine-year-old child will travel without them. It may not be temerity for a nonparent to suggest such a trip, but it is certainly temerity for a nonparent to insist upon it. Whether the nine-year-old child wishes to take the trip is wholly irrelevant to the parent's authority to determine if the trip takes place.[49] The court could only write these sentences, using the tone it takes, because it had predetermined that Thomas S.'s minimal involvement with Ry entitled him to at least equal authority with Robin Y.[50] to determine the structure of his visits with Ry.

The dissent defined the constellation of relationships involved in this case in a manner consistent with the trial court and with my *amicus* brief. Ry lived her entire life in a family unit consisting of her two mothers and her sister. Unlike the majority, the dissent was unwilling to presuppose Thomas S.'s parental status simply because he was known to Ry and had occasional contact with her.[51] The dissent reviewed the specific details of Ry's life,[52] attempted to define parenthood with reference to statutory and common sense guideposts,[53] and concluded that Thomas S. did not have a parental relationship with Ry.[54] It thereby disputed the majority's characterization of the trial court's action as a termination of parental rights.

The dissent then contested the majority's reading of past case law on equitable estoppel and its purpose. Noting that "no authority is cited to support the majority's conclusion that the preservation of the legitimacy in its legal sense is a *sine qua non* for the imposition of equitable estoppel," the dissent found that the overriding consideration in determining whether estoppel should be applied is the child's best interests.[55] It concluded in a lengthy analysis that the doctrine should be applied in this case. It reviewed Thomas S.'s limited involvement with Ry throughout her life and reasoned that

> [w]hile the child has always known that petitioner is her biological progenitor, it has consistently been demonstrated by petitioner himself that this factor did not confer upon him any authority or power over her life, that it did not mean that Sandra R. was less her mother than Robin Y., and that it did not mean that her sister was not her full sister. To now grant him the standing to claim the

49. I illustrate my point as follows: Imagine your mother, the parents of your daughter's best friend, or a trusted teacher wants to take your nine-year-old child to Disney World. Imagine the child wants to go. It would certainly be temerity for the inviting party to push the point once you, as the parent, had refused the child permission. Such insistence would not be less audacious because the child had no initial resistance to the trip.

50. I use Robin Y. singularly here because the court deliberately avoids a determination of whether Sandra R. is entitled to any authority over Ry and, if so, how that authority compares to that of Thomas S.

51. *Thomas S.*, 618 N.Y.S.2d at 363.

52. *Id.* at 364-65.

53. *Id.* at 365.

54. *Id.* at 367-68.

55. *Id.* at 366.

> very considerable authority and power held by a parent, against her wishes, would change her life in drastic ways . . . .
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> . . . [T]he court ordered psychiatrist clearly testified that he did not believe the child's fears [of the impact of an order of paternity] were the result of "brain-washing," but were consistent with her long held commitment to her family.[56]

The dissent characterized Thomas S.'s request to take Ry and Cade to visit his parents without their mothers as attempting to "markedly alter the prior course of the relationship between [himself] and Ry's family,"[57] and found that this course of action "dramatically demonstrated to the child that petitioner is no longer supportive of her family unit and seeks to abrogate the family setting in which she has been nurtured since birth."[58] Rather than perceiving Ry as a manipulated child who had nothing to fear from contact with her benign father, the dissent saw a child who "is already aware that her family is vulnerable to attack on a number of fronts," who knows that Sandra R.'s status is "ambiguous," and whose feelings of security were understandably undermined by the "platform" that the paternity order gives Thomas S.[59]

The difference of opinion among the six judges who have considered this case reflects profound disagreement about what makes a person a parent, or, perhaps more accurately, about what makes a man a father. The trial judge and the appellate court dissenters looked beyond the existence of a relationship between Ry and the man she knew as her biological father, and looked towards an understanding of how parenthood can be constructed in a planned lesbian family. The appellate majority lacked this vision, seeing nothing atypical in the relationship between Thomas S. and Ry and no reason to speculate that she might have considered him anything other than a noncustodial parent.[60] Because this case will not be decided by the New York Court of Appeals, these competing visions remain unresolved in New York, as they are in most jurisdictions.

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56. *Id.* at 367.
57. *Id.* at 364.
58. *Id.* at 368.
59. *Id.* at 368.
60. *See, e.g., id.* at 358. However, the majority and the dissent were in accord that the original agreement that Thomas S. would not seek parental rights was not enforceable. Although the trial court had found it part of Thomas S.'s course of conduct and the dissent considered it evidence of his lack of full commitment to parenthood, the majority treated it as a nullity because it could not have been enforced. The *amici* organizations in this case have consistently encouraged and supported the creation of agreements, preferably written, establishing the status of all the parties. *See Amicus* Brief, *supra* note 3, at 215-17. Given the concurrence on this issue between the majority and the dissent, there seems little doubt that, however useful such agreements may be in clarifying the intentions of the parties, they are unenforceable in New York.