

Court OKs 'Portee' Claim for Same-Sex Spouse in Child Death Case

"A rational jury can find that Benning was a de facto mother to the child, and felt her loss as deeply as any parent facing that horrific event," wrote Appellate Division Judge Jose Fuentes.

By **Michael Booth** | August 17, 2018 at 04:12 PM

A [New Jersey appeals court ruled](#) that the nonbiological mother in a same-sex couple can sue for bystander negligent infliction of emotional distress in connection with the death of a 2-year-old Trenton girl in a horrific accident.

When *Portee v. Jaffe* was decided decades ago, the Appellate Division said, "The notion of same-sex couples and their children constituting a 'familial relationship' worthy of legal recognition was considered by a significant number of our fellow citizens as socially and morally repugnant and legally absurd.

"The overwhelming number of our fellow citizens now unequivocally reject this shameful, morally untenable bigotry; our laws, both legislatively and through judicial decisions, now recognize and protect the rights of LGBTQ people to equal dignity and treatment under law," the court said Aug. 17 in *Moreland v. Parks*.

The panel's ruling overturned a ruling by Mercer County Superior Court Judge William Anklowitz, who said plaintiff Valeria Benning had not developed a sufficient emotional and familial relationship with the young girl, l'Maya Moreland, to support a *Portee* claim, and dismissed the claim on summary judgment.

"A rational jury can find that Benning was a de facto mother to the child, and felt her loss as deeply as any parent facing that horrific event," wrote Appellate Division Judge Jose Fuentes. Judges Thomas Manahan and Karen Suter joined in the ruling.

l'Asia Moreland was the biological mother of l'Maya Moreland, and is the mother of an older son, l'Zhir Moreland, the court said. Moreland and Benning lived together as a married couple with the children, according to the decision.

The accident occurred on Jan. 30, 2009, as Moreland, Benning, the two children and Benning's live-in stepson, Armanti Martinez, were waiting to cross Route 129 in Trenton to get to the Sun Bank Arts Center to attend a performance of "Disney on Ice," according to the decision.

Benning was holding l'Maya Moreland's hand when a city firetruck, driven by Firefighter Ronald Hubscher, collided with a pickup truck driven by a man named William Parks. Parks' pickup truck struck Moreland, propelling her 65 feet from the accident site. She died as the result of her injuries.

The family's attorney, Robin Lord, filed lawsuits against multiple defendants, including the city, Mercer County, Hubscher and Parks. One of those claims was for negligent infliction of emotional distress on behalf of Benning.

Anklowitz dismissed that claim on summary judgment, saying Benning did not present sufficient evidence that she has an "intimate familial relationship" with

l'Maya Moreland to make out a claim under the state Supreme Court's 1980 ruling in *Portee*.

Garden State Equality, an organization supporting gay rights groups, and the New Jersey State Bar Association, asked to participate as amici. They argued that Benning did not have to be a legally recognized member of l'Asia Moreland's family to sustain her claim.

The appeals court agreed.

"We conclude the motion judge erred in dismissing Benning's claim under *Portee* as a matter of law," Fuentes said.

The appeals court noted that l'Asia Moreland and Benning met in 2007, while Moreland was working at a sporting good store and Benning was a customer. The two exchanged phone numbers and soon began dating. The two then moved in together, and Moreland's two children began calling Benning, who became intimately involved in maintaining the household, "mom." Moreland and Benning married in 2014, about a year after same-sex marriage was legalized in New Jersey.

Anklowitz, according to the opinion, referred to the two women as "lovers," and that their relationship was "family-ish." He said they had been together 17 months at most and that there was no evidence of a personal bond between Benning and l'Maya.

The Appellate Division initially refused to hear an appeal, but the Supreme Court ordered it to review the issue.

"What constitutes a 'familial relationship' is perforce a fact-sensitive analysis, driven by social and moral forces," Fuentes said. "No one can question that

the social and moral concept of 'family' has significantly evolved since the court decided *Portee* in 1980."

At that time, he said, non-heterosexuals were shunned, ostracized and unprotected by the state's anti-discrimination laws.

Now, same-sex relationships are nearly universally accepted.

"The evidence shows that at the time of the accident, Benning and her now wife l'Asia Moreland, had cohabited for at least 17 months, sharing the responsibility for the care of the children," Fuentes said.

Robin Kay Lord, who heads a firm in Trenton, represented Benning and said she is grateful that appeals court ruled in the family's favor. "I'm surprised that it took this long in this day and age," she said.

Cherry Hill solo John Morelli represented the city. Mercer County was represented by assistant county counsel Lillian Nazzaro. Elizabeth Chierici of Moorestown's Chierici, Chierici & Smith represented Parks. William O'Kane Jr. of Archer & Greiner in Haddonfield represented Hubscher. None returned calls seeking comment.