

## LGBT

# Age-Old Law of Equitable Estoppel Helps Changing and Expanding Families Enjoy Modern Recognition in Court

By Christopher J. Chimeri

Unless you practice law under a large boulder, readers know by now that in 2016, the State Court of Appeals decided *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016). Among the holding in *Brooke* was the High Court's statement that "the definition of 'parent' established by this court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships . . . today, we overrule *Alison D.*" This means that the bright-line rule from *Alison D.* that "a partner without a biological or adoptive relationship to a child is not that child's 'parent' for custody or visitation" is a thing of the past.

Cases subsequent to *Alison D.* but before *Brooke S.B.* routinely prohibited a litigant using equitable estoppel to establish standing as a parent for custody/visitation. See generally, *Debra H. v. Janice R.* 14 N.Y.3d 576 (2010) (holding that equitable estoppel does not apply for the purpose of standing in a custody proceeding). *Brooke* overruling the judicial ban on equitable estoppel in custody cases means equitable estoppel is now available to assert standing in custody/visitation cases.

So, exactly what is equitable estoppel in the context of a custody case, and how does it apply? An earlier decision of the Court of Appeals provides summary guidance. In *Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326 (2006), the Court of Appeals explained that:

The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, ad loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fair-

ness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions has been misled into a detrimental change of position.

The doctrine of estoppel in paternity [declaration of parentage] and child support proceedings exists and is applied with a view of the best interests of the child. *Id.* at 326. As has long been the application of the doctrine in paternity cases, the person on whose behalf an equitable estoppel is asserted is the child, who has relied upon the representations of a man to the effect that he is the child's father. *Angelo A.R. v. Tenisha N.W.*, 108 A.D.3d 561, 562-63 (2d Dep't 2013) ("[A] man who has held himself out to be the father of a child, so that a parent-child relationship developed between the two, may be estopped from denying paternity," in light of the child's justifiable reliance upon such representations, and the resulting harm that his denial of paternity would engender).

The doctrine is the same when it comes to custody cases, the primary concern being the "best interests of the child." Thus, subsequent decisions after *Brooke* have taken the same, long-established, estoppel doctrine/test and applied them in custody/visitation proceedings at the standing phase (if the other parent objects to standing).

As applied, equitable estoppel requires careful scrutiny of the child's relationship with the relevant adult and is ultimately based upon the best interest of the child. In



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the context of standing under DRL §70, equitable estoppel concerns whether a child has a bonded and de facto relationship with a nonbiological, nonadoptive adult. The underpinning of an equitable estoppel inquiry is whether the actual relationship between the child and the relevant adult rises to the level of parenthood. The focus is and must

be on the child. *Matter of K.G. v. C.H.*, 163 A.D.3d 67 (1st Dep't 2018), *Matter of Joseph O. v. Danielle B.*, 158 A.D.3d 767 (2d Dep't 2018) (biological father was equitably estopped from establishing paternity as against the best interests of the child who had bonded and established a family relationship with both mothers, See also, *Matter of Christopher Y.Y. v. Jessica Z.Z. and Nicole Z.Z.*, 159 A.D.3d 18 (3d Dep't 2018).

Notably, the rule has implications outside of LGBTQ families. An outlier case from 1998 saw a husband whom was not biological father of child, but the child was born during marriage to the mother, the man was named as the child's father on the birth certificate, he was held out as the father for seven years, he established a strong father-daughter relationship, and he supported the child financially, all with wife's acquiescence, such that he was only father figure in child's life. The Second Department held that the father established a prima facie case to equitably estop the mother from denying he had standing for custody and visitation, subject to a hearing on best interests. *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282 (2d Dep't 1998).

The cases are extremely fact-specific in that the petitioner is required to demonstrate ample facts to invoke the doctrine of equita-

ble estoppel. Most recently, the Second Department explained this analysis in *Matter of Chimienti v. Perperis*, 2019 NY Slip Op 02866 (2d Dep't 2019). After undertaking a lengthy explanation citing to the trial court's even more lengthy findings, the court held: "[t]he Family Court's determination that [C.] demonstrated by clear and convincing evidence that [P.] created and fostered a parent-child relationship between [C.] and the children is entitled to great weight inasmuch as the court's determination depended in large part on its assessment of the credibility of the witnesses and the parties (citations omitted)."

It is therefore advisable that the practitioner monitor trial court decisions as most instructive for the factors considered in such cases, which will be instructive because, especially in this post-*Brooke* era, the overwhelming trend appears to favor affirmance by the Appellate Divisions in these fact-based inquiries.

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## CHARITY FOUNDATION

## SCBA Charitable Foundation Had a Successful Year with Big Plans Ahead

Counselors Who Care, the SCBA Charitable Foundation, is coming to the close of a successful fiscal year. More money was raised by the foundation than in any prior year and put to good use to assist individuals in Suffolk County, particularly children. Additionally, attorneys who had not been previously involved in working on the foundation's fundraising efforts have joined the ranks and the foundation's big events have attracted participation across our bar association.

Recognition must be given to this year's director, Francine H. Moss; Assistant Director Sean Campbell; and to the following individuals who have given of their time to help fulfill the foundation's mission: Evie Zarkadis, Lynn Poster-Zimmerman, Arza Feldman, Steve Hellman, Hon. John Leo, Teri Mari, Catherine Miller, Jodi Ann Donato, Debra Rubin, Margaret Schaeffler, Hon. Jennifer Mendelsohn, Stephanie Judd, Michelle Conroy, Karen Silverman and Renee Pardo.

Where has the money gone that has been

raised? The foundation continued its tradition of purchasing stuffed animals to be distributed to children at the Family Court in order to make them feel more comfortable in that environment. Four families were adopted during the Christmas holidays. In three of those families, children were in the care of a grandparent and in the fourth, in the care of a 21-year-old sibling. The circumstances surrounding those situations can only be described as tragic. In addition, funds were provided to two teenage girls who were in a residential facility, had become friends and had no relatives visiting them, so that they could purchase presents for each other and a little something for themselves. A mother who had recently had her children returned to her was provided with funds to prevent an eviction. A father who had completed all of his necessary programs and was ready to have his children returned to him, needed to have some overnight visits before that could be accomplished. He was living in a shelter and the overnights could

not occur there. Funds were provided for a hotel room. The children have now been returned.

The foundation has partnered with a local VFW post. The post is establishing a baseball program for children in Wyandanch where there are no Little League teams and no baseball program at the middle or high schools. The children could not afford the small amount required for insurance. The foundation came through for them.

Interactive games have been purchased for Cohalan Cares. The foundation is in the process of purchasing window air conditioning units for senior citizens who have breathing issues as well as the purchase of things such as toothpaste, shampoo and the like for seniors. Pak-n-plays have been purchased so that CPS need not remove infants from their parents for lack of proper sleeping accommodations. The foundation has been advised that the purchase of these items over the last several years by the foundation greatly contribut-

ed to the fact that in the last year for the first time there were no infant deaths as a result of sleep accidents.

In the next fiscal year, the foundation has plans to increase its fundraising so that more can be accomplished. The annual Halloween party, a family style event, will take place on Oct. 25 at the bar association. The Fashion Show, which was a new event this year, will return in 2020 with the date to be announced. An entirely new event is set to take place on Sept. 13 at the bar association and the foundation is betting that you will have a wonderful time and that significant money will be raised. It is suggested that you watch the Counselors Who Care Facebook page for further information. And the foundation will be working with a VFW post to host a Veterans Day dinner for those who have served.

The foundation welcomes requests for assistance and anyone who would like to work on fundraising projects. Of course, it also welcomes the financial support of SCBA members and others.