At a term of the Family Court of the State of New York held in and for the County of Nassau, at 1200 Old Country Road, Westbury, New York, on September 27, 2017.

PRESENT: HON. THOMAS RADEMAKER

In the matter of a proceeding under article 6 of the Family Court Act,

J. C.,

Petitioner,

-against-

N. P.,

Respondent.

File No.
Docket No. V-
V-

DECISION AND ORDER

The Court conducted a hearing to determine whether, in the absence of a pre-conception agreement, the petitioner, JC, has standing to seek custodial and visitation rights of the subject children (CC and AJ) as against the respondent biological mother, NP.

It is undisputed that the parties had no specific, written pre-conception agreement prior to the birth of the subject children. Nevertheless, this Court finds guidance in the Court of Appeals decision, *In the Matter of Brooke S.B.,* 28 NY3d 1 (2016). Clearly the *Brooke* Court decided upon the standard of proof to apply when it is alleged that partners have a pre-conception agreement. Specifically, the Court of Appeals left open for another day what standard is to be applied in the absence of a pre-conception agreement. To wit, the Court of Appeals stated in *Brooke*, "we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement." *Id* at 28 (emphasis added).

It is doubtful the Court of Appeals meant that no test should apply and it is beyond doubt that the Court of Appeals carefully tailored their holding to the fact specific case before them. Simply put, the holding in *Brooke* applies to situations when a pre-conception agreement is proven to exist by clear and convincing evidence. Further, it can be said the Court of Appeals contemplated the particular situation before this Court in that it stated plainly:

> "it would be premature for us to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after

> conception, the partner can establish standing to seek visitation and custody." *Id* at 27, 28.

Inasmuch as the case at bar concerns a couple without a pre-conception agreement, and given a plain reading of the guidance offered by *Brooke*, this Court must decide what test to apply in order to determine standing. While the standard of what is in the best interest of the children could be argued as the overriding and controlling rule of any matter in Family Court as it is inextricably interwoven into all of the decisions made here, exclusively applying that standard in the case at bar and similarly situated cases provides for a far too amorphous standard.

Given precedent, the social and legal acknowledgment of same sex marital status, parentage, and the like, this Court looks to the doctrine of equitable estoppel for guidance in the instant matter. Clearly, in proceedings involving equitable estoppel, it is not uncommon that a non-biological male partner can be adjudicated to be a child's father when, *inter alia*, that partner holds themselves out to be the father, the child or children recognize him to be the father, the biological mother acknowledges him to be the father and provides for and consents to authority over the child or children by the non-biological partner. In those matters, courts can and usually do find that it is in the best interests of the children that the non-biological partner be adjudicated the father.

When applied in the context of paternity cases, the doctrine of equitable estoppel may be invoked to preclude "a man who has held himself out to be the father of the child, so that a parent-child relationship developed between the two," from denying paternity (*Shondel J. v. Mark D.*, 7 NY3d 320, 327 [2006]). "The doctrine in this way protects 'the status interests of a child in an already recognized and operative parent-child relationship'" (*Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 5 [2010] *quoting In re Baby Boy C.*, 84 NY2d 91 [1994]). In other words, "where a child justifiably relies on the representations of a man that he is his or her father with the result that he or she will be harmed by the man's denial of paternity, the man may be estopped from making such a denial" (*Jose F. R. v. Reina C.A.*, 46 AD3d 564 [2d Dept 2007]). "In cases involving paternity, child custody, visitation and support, the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the child or children who are the subject of the controversy" (*Charles v. Charles*, 296 AD2d 547, 549 [2d Dept 2002] [citations omitted]; *see also Juanita A.*, 15 NY3d at 5 ["[T]he 'paramount' concern in such cases 'has been and continues to be the best interests of the child.'"] [quoting another source]).

To prevail on the grounds of estoppel, the moving party bears the burden of proving, by clear and convincing evidence, that she has a right to the relief being sought (*see Bergner v. Kick*, 85 AD2d 911, 912 [4th Dept 1981]; *Sandra S. v. Larry W.*, 175 Misc. 2d 122, 124 [Fam. Ct. Bronx Cty. 1997] ["The petitioner has the burden of proving each of the elements of an estoppel by clear, convincing and entirely satisfactory evidence, leaving nothing to inference or speculation."]). There are no rigid guidelines or factors to be considered when applying equitable estoppel and this Court does not see a reason to create such an exclusive list in the instant matter. However, just as the Court of Appeals required proof of a pre-conception agreement by clear and convincing evidence, this Court believes any factors to be considered, including those as briefly outlined above, must also be proven by clear and convincing evidence.

FINDINGS OF FACT

In the instant matter the Court finds that petitioner and respondent entered into a relationship on or about January 10, 2014. At that time, respondent was married to another person but separated and living apart.[1]

Almost immediately after the inception of the litigants' relationship, on January 16, 2014, respondent was successfully artificially inseminated and became pregnant with the subject child CC. On January 30, 2014, petitioner and respondent together listened to a voicemail from Reproductive Specialists of New York ("RSNY") confirming the pregnancy. On February 7, 2014, petitioner and respondent went to RSNY together for a sonogram. Further, petitioner was invited to, attended, and scheduled with respondent, the majority of respondent's appointments with RSNY regarding the pregnancy. Throughout their relationship, including the pregnancies, the parties lived together in each other's homes which they separately owned, dividing time between the two homes depending upon the season and work schedules.

CC was born on September 29, 2014, with petitioner being the only person other than medical staff present in the delivery room. Testimony provided that petitioner was given a "father" bracelet for access purposes, and that petitioner stayed overnight in the hospital for the entirety of respondent's stay when CC was born. The couple returned with the newborn to petitioner's home wherein they had a nursery for CC with all of the customary furnishings including but not limited to a picture frame hung on the wall over the crib containing three photos, one of respondent with CC as a newborn, one of CC, and one with petitioner and CC as a newborn. In addition, a copy of a "baby memory book" was received into evidence. Respondent acknowledged that in her own handwriting on a page of that same book entitled "The Day of Your Arrival" she wrote under the heading of "People Present" the words "Mommy (JC)" (the first name of petitioner was used but in the interests of the parties' privacy initials have been substituted).

Throughout testimony given in this case, the parties, themselves, have testified that petitioner was referred to as "Mommy" and respondent was referred to as "Momma." Respondent indicated same in the aforementioned book referring to herself as "Momma" as distinguished from the title of "Mommy" she ascribed to the petitioner. Some attention in this matter was given to a "birth announcement" made by a company known as "Mom 365." A birth announcement purportedly containing the names of CC, respondent, and petitioner was made but

[1] Although respondent contends that her marriage to another woman at the time of CC's conception gives rise to the presumption that CC is legally the child of respondent's former spouse, it has been held that the presumption of legitimacy is a presumption of a biological relationship, not a legal relationship, and therefore has no application to same-gender married couples (*see Matter of Paczkowski v Paczkowski*, 128 AD3d 968 [2d Dept 2015]). Moreover, respondent's judgment of divorce from her prior spouse clearly rebuts any presumption that CC is a child of that marriage (*see Matter of Walker v Covington*, 287 AD2d 572 [2d Dept 2001]), and respondent is bound by that determination under the doctrine of collateral estoppel (*see Matter of Mary S.S. v Charles T.T.*, 209 AD2d 830 [3d Dept 1994]).

never sent out because by respondent's own testimony she found out same was a mistake made by the company and not the fault of petitioner. A corrected announcement was eventually made with solely CC's name and vitals at birth and was mailed out to family and friends. The couple planned and attended CC's "40 day blessing" (a Greek Orthodox tradition) and CC's baptism. Petitioner paid for a substantial part of the cost and had approximately 50 to 70 of her family members attend the baptism. It was undisputed that some of petitioner's family members participated in a lighting of candles ceremony at the baptism. In this regard, hundreds of photos were entered into evidence showing the parties and the subject children at these events (the subject child AJ also had a "40 day blessing" and baptism). Moreover, there are countless photos of petitioner and respondent with only the children, with each other's family members, and of them without the children but participating in the ceremonies and holidays. Respondent called a professional photographer to testify that petitioner was not included in the instructions to photograph "family" members. The Court finds the testimony of the photographer to be unpersuasive.

Petitioner and respondent both testified to separately and jointly caring for the children in the usual child rearing manner when the children were healthy and sick, both children as newborn infants sleeping in the room with respondent and petitioner, and, caring for the children including night time feedings. It was undisputed petitioner often took the children to doctor's appointments by herself, even going so far as to seek out and obtain breast milk from a friend who had recently given birth when a doctor determined that the infant CC was not "thriving." The children's pediatrician testified that petitioner and respondent together and separately attended the children's appointments and that she viewed them as a family.

Additionally, credible testimony was elicited regarding numerous additional instances of petitioner caring for the children on her own, overseeing a babysitter, providing transportation for the children, traveling with respondent and her family members, including sharing a room with respondent and both children during trips taken before and after the relationship ended in January, 2017. It is further undisputed that petitioner took the child CC to see her family member's soccer games and even enrolled the child CC in a "farm class" and paid for it.

Further evidence in support of petitioner's case in the form of e-mails and videos were admitted into evidence. Four (4) brief videos unequivocally show the child CC referring to petitioner as "Mommy." The Court finds incredible respondent's explanation, as well as her witnesses' testimony, that the child called everyone "Mommy," with one witness even testifying the child called the cat "Mommy."

At least one email admitted into evidence, written by respondent, sent to her parents, and copied to petitioner on October 16, 2015, states in pertinent part: "Since I have a child, don't have a legal will and [JC] and I aren't married yet, I figured I would put my wishes in writing just in case of an unfortunate event and I don't return from Miami safely. Since [JC] is [CC's] coparent and other mommy, My wish is for her to have full custody and raise [CC] as her own in the instance I'm not on this earth to raise her myself. Thank you!" (emphasis added) (initials used for privacy). Respondent testified that she wrote this email to "shut her up," referring to petitioner, as they were on the way to the airport and petitioner would not stop talking about what

would happen to CC if something were to happen to respondent. Other than the possibility that she was completely sincere, this Court cannot find any plausible circumstance wherein respondent would express wishes of this magnitude unless she was doing so under duress, not in a competent state of mind, or otherwise incapacitated. Simply put, these were not the circumstances that generated the e-mail. The Court finds respondent's explanation lacking and concludes that respondent meant what she wrote.

It is undisputed that in early 2017, after the relationship between petitioner and respondent ended, the parties separated, however petitioner continued to see, care for, and tend to the children. Moreover, in February 2017, the parties went on a vacation ski weekend together with the children sharing the same room together with the children after the relationship purportedly ended.

There was testimony that, on a few occasions, petitioner stated she would be adopting the children and that the parties were going to sell their properties and move into one home together with the children. Respondent points to her quick negative response in each instance as well as petitioner's subsequent apologies for those statements as evidence that respondent had no intention to create a parent-like relationship between the children and petitioner. This Court declines to assign more weight to her spoken words than to her actions. Not only does respondent's testimony in this regard completely contradict her writings, both in the "baby book" and the email of October 16, 2015, but it contradicts her admitted and undisputed actions. Various emails and texts written by and between respondent and petitioner were admitted evidencing the reliance on and need of respondent to have petitioner co-parent with respondent. It could well be argued this need and want began to patently manifest while CC was *in utero*. At that time, respondent purchased a gift for petitioner, writing a note with the gift as if in the voice of the unborn child they had then called "New Moon." Simply stated, respondent may have been apprehensive at times about the course of the relationship and perhaps even embarrassed by comments made by petitioner at particular family events but respondent's daily words and actions with and toward petitioner, as well as CC and AJ, throughout the relationship were, in fact, quite different.

Moreover, it is undisputed that respondent, while in the relationship with petitioner, was artificially inseminated and became pregnant with AJ, who was born on May 20, 2016. Again, petitioner was present for almost all prenatal and post natal care visits, having been listed on documents and scheduled appointments related thereto, was present in the delivery room, cut the umbilical cord of the child, and, stayed overnight with respondent every night except one until respondent was discharged. It is further undisputed that AJ and CC are biological siblings. There was no credible testimony that petitioner's actions towards AJ were any different than they were towards CC. Furthermore, there was no credible testimony that respondent's actions towards petitioner as she related to the children were any different than they were after AJ was born. Similar life events and milestones unfolded in substantially the same manner with the couple and AJ as they did for the couple and CC. To that end, this Court's analysis is the same for AJ as it is for CC.

CONCLUSION

The Court recognizes that *Brooke* may have left the possibility open for no standard to be applied in a case for standing in the absence of a pre-conception agreement. Surely, the Court of Appeals did not intend for there to be an all or nothing result when it opined what test "*if any*" should be applied in cases without pre-conception agreements. *Id.* at 28 (italics added). The list of problematic scenarios is endless were there to be no test to determine standing in such cases. Likewise, and equally as intolerable, would be to set the standard as requiring the existence of a pre-conception agreement. In this regard, it could be argued that the latter example would prove to have constitutional implications. Nevertheless, the *Brooke* court clearly suggested the test to be applied when it framed the issue for future cases as "[w]hether a partner without such [a pre-conception] agreement can establish standing and, if so, what factors a petitioner must establish to achieve standing based on equitable estoppel" (*Brooke*, 28 NY3d at 28).

Based upon the foregoing, the Court finds that petitioner has established by clear and convincing evidence that respondent created, fostered, furthered, and nurtured a parent-like relationship between the children and petitioner. Commencing just a few days after the older child's conception, and continuing until well after the demise of the parties' relationship, respondent acted as if petitioner was a parent and acknowledged to petitioner, the children, and others that petitioner was essentially a parent, to wit, a "Mommy," and both respondent and the children benefitted from this parent-like relationship on a daily basis for years. Petitioner is adjudicated to be a parent of the subject children and therefore, has standing to seek visitation and custody.

All parties and counsel are directed to appear on October 4, 2017, for CONFERENCE at 9:00 a.m.

This constitutes the Decision and Order of the Court.[2]

ENTER

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HON. THOMAS RADEMAKER,, J.F.C.

Dated: September 27, 2017

[2]The Court would like to acknowledge the invaluable assistance of Court Attorney Jeremy Jorgensen in the preparation of this decision.

Check applicable box:

☐ Order mailed on [specify date(s) and to whom mailed]:____________________________

☐ Order received in court on [specify date(s) and to whom given]:______________________