LAW AND THE FAMILY

"VISITATION RIGHTS OF NON-PARENTS"

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NEW YORK custody determinations are based upon our public policy that courts should do what is in the best interest of the child. [FN1] However, such determinations are subordinate to our public policy that biological parents are entitled to bring up their children as they see fit, absent interference from others, unless the child's best interests would be endangered. [FN2]

Case Law

In Bennett v. Jeffreys, [FN3] the Court of Appeals held that unless there was proof of "abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstances which would drastically affect the welfare of the child," a person who was not a biological parent had no standing to apply for custody in the face of opposition by a biological parent. A finding of extraordinary circumstances does not justify depriving a natural parent of the custody of a child. Instead it gives the petitioner standing which triggers the court's right to make a disposition that is in the child's best interests. [FN4] The court noted that "extraordinary circumstances" do not arise solely because it is in the child's best interests. [FN5]

In Matter of Adoption of L., [FN6] the Court of Appeals held that once it is found that a parent is fit and has not abandoned, surrendered or otherwise forfeited his parental rights, the inquiry as to whether a parent or third party shall have custody ends. [FN7] In Matter of Ronald FF. v. Cindy GG. [FN8] the Court of Appeals declined to extend Bennett's "extraordinary circumstances" rule to allow a nonbiological individual to have visitation with a child against the wishes of the custodial parent. It held that "[v]isitation rights may not be granted on the authority of the * * * extraordinary circumstances rule, to a biological stranger where the child, born out of wedlock, is properly in the custody of his mother." While noting

that "visitation is a subspecies of custody," the Court of Appeals explained that the two relational categories differed fundamentally in degree, thereby precluding a casual extension of the extraordinary circumstances rule to the area of visitation.

In Alison D. v. Virginia M., the Court of Appeals affirmed a judgment, which dismissed a habeas corpus proceeding to obtain visitation rights. The child was born by artificial insemination of the respondent, pursuant to the couple's decision to raise a family together. When the child was two years and four months old, the parties terminated their relationship, but agreed to a visitation schedule between the petitioner and the child. Respondent subsequently terminated petitioners' communication with the child. The Court noted that DRL 70 gives either parent standing to apply to the supreme court for a writ of habeas corpus ... and authorizes it to award the "custody of such child to either parent. It held that although DRL 70 does not define the term "parent" the petitioner was not a biological parent, within the meaning of the statute and could not achieve standing under DRL 70 to apply for a habeas corpus writ [FN9]. Petitioner claimed to have acted as a "de facto" parent or that she should be viewed as a parent "by estoppel." The Court held that these claims were insufficient to give her standing, because to allow the Court to award visitation, a limited form of custody, to a third person would necessarily impair the parents' right to custody and control. It specifically rejected petitioners' invitation to read the term parent in DRL 70 to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child.

In Lynda A.H. v. Diane T.O. [FN10] the Appellate Division, Fourth Department, held that petitioner, as a non-parent, of a child born to her lover by artificial insemination, could not obtain visitation rights to a child in the custody of her natural mother, without a showing of extraordinary circumstances, which she had not made. Petitioner, who was not a parent of the child, had no standing to obtain custody of or visitation with the child in the absence of extraordinary circumstances. It emphasized that it is insufficient to show that the child has bonded psychologically with the non-parent. Absent evidence that respondent has abandoned, surrendered or otherwise forfeited her parental rights, "the inquiry ends."

Nevertheless, in Jean Maby H. v. Joseph H [FN11] the Second Department, held that a nonbiological parent may invoke the doctrine of equitable estoppel "to preclude the biological parent from cutting off custody or visitation with the child."

When the plaintiff and the defendant began dating in 1987, the plaintiff was already pregnant with Kelly H., who had been fathered by a man other than the defendant. The parties began to live together at the time that Kelly was

born in 1988. They were married in October 1990, and in March 1992 the plaintiff gave birth to the parties' son, Todd H. The plaintiff commenced the divorce action in June 1995, seeking, inter alia, custody of Kelly and Todd, child support for Todd, and a judgment declaring that the defendant was not Kelly's father. The court ordered a hearing on the issue of whether the defendant could invoke the doctrine of equitable estoppel to preclude a challenge to his fatherhood of Kelly.

The Supreme Court stated that, although the evidence seemed to suggest that defendant had established a prima facie basis for the application of equitable estoppel, Ronald FF. and Alison D. precluded its application since the doctrine was inconsistent with those cases.

In the Second Department

The Second Department reversed, and remitted the matter for a hearing to determine whether equitable estoppel should be applied in the best interests of the child. It stated that the doctrine of equitable estoppel "is imposed by law in the interest of fairness to prevent the enforcement of rights which would work [a] fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought." It noted that courts have recognized this doctrine as a defense in proceedings involving challenges to paternity.

The Second Department refused to read Ronald FF. and Alison D. as precluding the application of equitable estoppel because such an interpretation would effectively preclude the application of the doctrine in a myriad of cases such as the paternity cases it cited in its opinion. It found that they were distinguishable on their facts because in Ronald FF. the nonbiological father never raised the doctrine of equitable estoppel, the father and mother were never married and they resided together off and on for approximately two years after the child was born. While the father and child had developed a relationship during that time, the father was not residing with the mother and child when he brought the petition to stay her relocation to Texas. As to Alison D., it believed that the issue of equitable estoppel was "merely brushed upon by the gay cohabitant."

The court said that a further rationale for not applying "the apparent rule" espoused in Ronald FF. and Alison D. and finding that they were distinguishable was its belief that recent decisions of the Court of Appeals have placed a greater emphasis on the best interests of the child as the determinative or prevailing concern, and that the best interests of the child would not be served if they were blindly applied.

The Third Department

In Multari v. Sorrell [FN12] the Third Department refused to find that petitioner was a parent by estoppel and agreed with the Fourth Department that a non-parent does not have standing to seek visitation with a child. Petitioner was the former boyfriend of respondent Renee B. Sorrell. They never married but lived together for six years during which time petitioner formed a close and loving relationship with respondents' son, who was approximately 18 months old when petitioner and respondent met and eight years old when their relationship ended. The child had regular unsupervised contact as an infant with his biological father, which eventually became supervised and then stopped altogether when the child was about two years old. His biological father recently resurfaced and visitation between the two was re-established.

After their breakup in August 1998, respondent permitted petitioner to have contact with the child to ease the transition of their separation for the child. These visits decreased in frequency and duration and terminated altogether in May 1999. Petitioner thereafter commenced a proceeding seeking visitation, which he alleged would be in the best interest of the child. Petitioner claimed that he was "requesting the Court to intervene in this situation based upon the doctrine of equitable estoppel." Following a hearing as to whether the court could invoke this doctrine, the court found that he failed in this burden and dismissed the petition.

Although concluding that Family Court correctly determined that petitioner failed to make out a prima facie case of equitable estoppel, the Third Department found that affirmance was mandated on the more fundamental ground that petitioner lacked standing to seek visitation and "cannot get around this insurmountable legal hurdle by attempting to offensively invoke the doctrine of equitable estoppel." It found that the facts of the case were governed squarely by the Court of Appeals' decisions in Matter of Ronald FF. and Matter of Alison D.

'Matter of Ronald FF'

The Third Department found that as firmly established in Matter of Ronald FF. the rights of a custodial parent "include the right to determine who may or may not associate with [that parent's] child" and the State may not interfere with this fundamental right absent a showing of "some compelling State purpose which furthers the child's best interest." As there was no dispute that respondent was a fit parent and the proper custodian for the child, Matter of Alison D. further established that, no matter how close and loving petitioners' relationship was with respondents' child, petitioner, as a biological stranger to that child, lacked standing to seek visitation. It noted that in Matter of Alison D. the Court of Appeals specifically rejected the petitioner's claim that her status as a parent "by estoppel" was sufficient to confer standing to seek visitation.

It reviewed the briefs in that case to both the Court of Appeals and the Second Department and noted that the petitioner specifically argued in both courts for the application of the doctrine of equitable estoppel to prohibit the respondent from denying her visitation, an argument that both courts rejected. The grounds advanced for application of the doctrine in that case were nearly identical to those advanced by petitioner in this case. Also of note, was "Alison D. explicitly argued to the Court of Appeals that "[a]t the very least, [she had] raised a factual question regarding whether Virginia M. should be estopped from denying visitation" (an argument that the Court obviously rejected) and requested "a full hearing on her claim of equitable estoppel" (which the Court obviously denied). Thus, no matter how terse its language on the issue of equitable estoppel, and no matter how much we might be inclined to agree with our concurring Justice philosophically, we are bound to adhere to the Court of Appeals' decision in Matter of Alison D. v. Virginia M. (77 NY2d 651, supra), which stands for the proposition that a nonbiological parent cannot invoke equitable estoppel to get around his or her lack of standing to assert visitation." The Court noted that any change in the state of the law in this regard is for the Legislature or the Court of Appeals.

The Court acknowledged that some courts have ruled that the doctrine of equitable estoppel may be applied to custody and visitation disputes in certain circumstances, particularly circumstances far more compelling than those in the instant matter but it declined to expand the use of this doctrine by applying it to the facts of this case.

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FN(1) DRL 240; Finlay v. Finlay, 240 NY 429 (1925)

FN(2) Soc Serv L 384-b (1)(a)(ii)

FN(3) 40 N.Y.2d 543, 387 N.Y.S.2d 82 (1976)

FN(4) Matter of Adoption of L. supra; Merritt v. Way (1983) 58 NY2d 850,460 NYS2d 20; Bennett v. Jeffreys, supra.

FN(5) Re Sheila G. (1984) 61 NY2d 368, 474 NYS2d 421; Re RR (1979) 48 NY2d 117, 421 NYS2d 863; Re K. (Anonymous) (1979) 47 NY2d 374, 418 NYS2d 339.

FN(6) Supra.

FN(7) People ex rel. Kropp v. Shepsky, 305 N.Y. 465, 113 N.E.2d 801 (1953); People ex rel. Scarpetta v. Spence-Chapin Adoption Service, 28 N.Y.2d 185, 321 N.Y.S.2d 65 (1971); Dickson v. Lascaris, 53 N.Y.2d 204, 440 N.Y.S.2d 884 (1981); Matter of Adoption of L., supra

FN(8) 70 N.Y.2d 141, 517 N.Y.S.2d 932

FN(9) (1990, 2d Dept.) 155 App Div 2d 11, 552 NYS2d 321, 77 NY2d 651, 569 NYS2d 586 (1991)

FN(10) 243 AD2d 24, 673 N.Y.S.2d 989 (4th Dept, 1998).

FN(11) 246 AD2d 282 (2d Dept., 1998)

FN(12) AD2d , NYS2d , NYLJ, 10-22-01, P.21, Col. 3 (3d Dept., 2001)

12/19/2001 NYLJ 3, (col. 1)