# *Bits and Bytes*™

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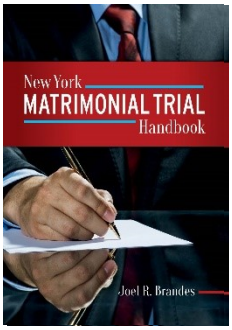


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**The New York Matrimonial Trial Handbook was reviewed by Bernard Dworkin, Esq., in the New York Law Journal on December 21, 2017. His review is reprinted on our website at http://www.nysdivorce.com with the permission of the New York Law Journal.**

## Appellate Division, First Department

### First Department Holds Brooke's Reasoning Applies with Equal Force Where Child Is Legally Adopted by One Partner and Other Partner Claims He or She Is A "Parent" With Co-Equal Rights Because Of Preadoption Agreement. Observes Equitable Estoppel Requires Close Scrutiny of Child.

**In re K.G., v. C.H., --- N.Y.S.3d ----, 2018 WL 3118937 (1st Dept., 2018) petitioner (KG) claimed that she was a parent with standing to seek custody of and visitation with A., the adopted child of respondent (CH), her now ex-partner. KG was not biologically related to A., who was born in Ethiopia, nor did she second adopt the child. KG's claim of parental standing was predicated upon the Court of Appeals decision in Matter of Brooke S.B. v. Elizabeth A.C.C. (28 NY3d 1 [2016]), which expansively defined who is a "parent" under Domestic Relations Law § 70. On appeal, KG primarily claimed that in 2007, before A. was identified and offered to CH for adoption, the parties had an agreement to adopt and raise a child together. CH did not deny that the parties had an agreement in 2007 but claimed that the 2007 agreement terminated when the parties' romantic relationship ended in 2009, before A. was first identified and offered for adoption to CH in March 2011. After a 36–day trial, Supreme Court held that notwithstanding the parties' agreement to adopt and raise a child together, KG did not remain committed to their agreement, which terminated before the adoption agency matched A. with CH. The court denied KG standing to proceed and dismissed the petition for custody and visitation.**

**The Appellate Division observed that in Brooke, the Court of Appeals overruled Matter of Alison D. v. Virginia M. (77 N.Y.2d 651 [1991]) and abrogated Debra H. v. Janice R. (14 NY3d 576 [2010], cert denied 562 U.S. 1136 [2011]), its earlier precedents, thereby greatly expanding the definition of who can obtain status as a parent and have standing to seek custody and visitation of a child. The Brooke Court placed the burden of proving standing, by clear and convincing evidence, on the party seeking it. The Court recognized that there could be a variety of avenues for a movant to prove standing. It expressly rejected the premise that there is only one test that is appropriate to determine whether a former same-sex nonbiological, nonadoptive party has parental standing. In Brooke and its companion case of Matter of Estrellita A. v. Jennifer L.D., the Court of Appeals recognized each petitioner's status as a parent but did so applying two completely different tests. The Court of Appeals also left open the possibility that a third "test," involving the application of equitable principles, such as the doctrine of equitable estoppel, could be utilized to confer standing in certain circumstances. In Brooke, the Court of Appeals recognized that where a former same-sex partner shows by clear and convincing evidence that the parties had jointly agreed to conceive a child that one of them would bear, and also agreed to raise that child together once born, the nonbiological, nonadoptive partner has standing, as a parent, to seek custody and visitation with the child, even if the parties' relationship has ended. The Court referred to these circumstances as the parties having a preconception agreement and applied the "conception test"). In Estrellita, the Court resolved the question of standing differently, applying the doctrine of judicial estoppel. In Estrellita, the child's biological parent (Jennifer L.D.) had previously petitioned Family Court for an order requiring Estrellita A., the nonbiological, nonadoptive partner to pay child support. Jennifer L.D.'s support petition was granted and she was successful in obtaining child support from Estrellita A. Subsequently, Estrellita A. sought custody and visitation with the child, but Jennifer L.D. denied that Estrellita A. had standing as a parent. The Court of Appeals determined that Jennifer L.D. had asserted an inconsistent position in the support action, because Jennifer L.D. had successfully obtained a judgment of support in her favor and therefore, was judicially estopped denying Estrellita A.'s status as a parent given Family Court's prior determination that Estrellita A. was in fact, a legal parent to the child (id. at 29).**

**In deciding Brooke, the Court rejected the argument that it should adopt only one, uniform test to determine standing as a parent. The Court observed that a different test might be applicable in circumstances where, for instance, a partner did not have any preconception agreement with the legal parent. In Brooke it concluded that where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child.**

**The First Department held that although Brooke was decided in the context of children who were planned and conceived through means of artificial insemination, the Court's reasoning applies with equal force where, as here, a child is legally adopted by one partner and the other partner claims he or she is a "parent" with co-equal rights because of a preadoption agreement.**

**The Appellate Division found ample support in the record for the trial court's factual conclusion that the parties' 2007 agreement to adopt and raise a child together had terminated before A. was identified by the agency and offered to CH for adoption. Nor was the trial court's consideration of whether the plan was in effect at the time the particular child in this proceeding was identified for adoption an impermissible reformulation or restriction on the plan test originally enunciated in Brooke.**

**Although the original petition did not expressly state that KG was claiming standing under Domestic Relations Law § 70 under an alternative theory of equitable estoppel, the issue was raised early on in the proceeding by the trial court itself.**

**The Court found that the record was incomplete precluding it from reaching the merits of the parties' respective substantive claims on the issue of equitable estoppel on the appeal. It observed that 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 the context of standing under Domestic Relations Law § 70, equitable estoppel concerns whether a child has a bonded and de facto parental relationship with a nonbiological, nonadoptive adult. The focus is and must be on the child (Brooke, 28 NY3d at 27). It is for this reason that the child's point of view is crucial whenever equitable estoppel is raised. Although the appointment of an attorney for the child is discretionary, it is commonplace and should be the norm where the issue raised is equitable estoppel. This is because equitable estoppel necessarily involves an analysis and determination of what is in the best interests of the child. Even if a court denies the appointment of an attorney for the child, there are alternative means to obtaining this information, including a forensic evaluation or a Lincoln hearing. Here, the child's voice was totally silent in this record.**

**In view of its conclusion that the record was incomplete, the Court did not reach CH's argument that because CH did not consent to holding KG out as a parent, KG cannot prove equitable estoppel. It only held that that the record developed at trial did not permit it to make the full consideration necessary to finally determine the issue of equitable estoppel at this point. Because the record on equitable estoppel was incomplete, it remanded the matter for further proceedings consistent with the decision.**

## Appellate Divison, Second Department

### Income tax liability of the parties is subject to equitable distribution

**In Greenberg v Greenberg, --- N.Y.S.3d ----, 2018 WL 3041099, 2018 N.Y. Slip Op. 04539 (2d Dept., 2018) the parties were married in 1995 and had four children. During the marriage, the defendant owned an Internet-based business, which he sold in approximately January 2009. In June 2009, the Federal Trade Commission commenced a civil action against, among others, the defendant, in connection with the operation of his Internet company. In August 2009, the plaintiff commenced the action for a divorce. In January 2014, the defendant was convicted in federal court of, among other things, wire fraud, aggravated identity theft, and money laundering. In the ongoing divorce action, Supreme Court conducted a hearing in June and July 2014 with respect to the parties' finances and equitable distribution. The defendant was sentenced in federal court on October 31, 2014, to seven years' imprisonment and ordered to pay restitution in the sum of $1,125,022.58.**

**After trial Supreme Court, inter alia, found that in all respects the defendant was not credible. It imputed an income of $100,000 per year to the defendant for the purposes of calculating child support obligations. As to equitable distribution, the court found that the only assets available for equitable distribution were two adjacent properties in Lawrence. The properties had been the marital residence and had no present value but might generate income. The court awarded the plaintiff the two properties upon considering a number of factors, including that the real estate was acquired during the marriage; the defendant's income increased substantially during the marriage, while the plaintiff delayed her own career advancement and remained at home caring for the parties' four children; the businesses, which were marital property and would have been subject to equitable distribution, could not be evaluated because the defendant failed to keep appropriate records; the defendant caused the businesses acquired and created during the marriage to be completely destroyed through his criminal activity; and it was likely that the defendant had transferred business assets without fair consideration. In light of the equitable distribution award and the circumstances**

**of the case, the court declined to award the plaintiff maintenance. It also determined that the defendant would be responsible for any marital debt, including an FTC judgment against him for more than $2,000,000. Finally, the court awarded $50,000 to the plaintiff's attorney for outstanding counsel fees and $25,000 to the plaintiff for counsel fees previously paid by her, because the defendant had engaged in dilatory tactics and failed to comply with prior orders, causing the plaintiff to incur additional legal expenses. In an amended judgment of divorce entered February 6, 2015, the Supreme Court, among other things, directed the defendant to pay a pro rata share of child support and certain expenses of the children based on the imputed income, awarded the plaintiff the two properties, directed that the defendant would be responsible for any taxes, interest, penalties, and deficiencies that result as a direct consequence of his actions, and directed the defendant to pay the total sum of $75,000 in counsel fees to the plaintiff and her attorney. The defendant appeals.**

**The Appellate Division affirmed. It held held that under the circumstances of the case, the Supreme Court did not improvidently exercise its discretion with regard to the awards. The Court observed that the income tax liability of the parties is subject to equitable distribution. Where a party "shared equally in the benefits derived from the failure to pay, she [or he] must share equally in the financial liability arising out of tax liability" (Conway v. Conway, 29 A.D.3d at 725–726, 815 N.Y.S.2d 233; see Lago v. Adrion, 93 A.D.3d at 700, 940 N.Y.S.2d 287). "However, if one spouse makes the financial decisions regarding the income tax return and earned virtually 100% of the parties' income during the period, the court, in its discretion, may direct that spouse to pay the entire tax liability". Here, the Supreme Court deemed the defendant responsible for, inter alia, all of the parties' tax liabilities incurred during the marriage, including the plaintiff's own failure to file tax returns for her personal income or to pay taxes on her income, of which failings she had reason to be aware by virtue of notices she received from the Internal Revenue Service. Under these circumstances, it was not equitable to hold the defendant, rather than the plaintiff, liable for any taxes, interest, penalties, and deficiencies that resulted from the plaintiff's failure to file income tax returns and to pay taxes on income that she individually earned during the marriage.**

## Family Court

### Family Court Suggests That Legislature Consider Revising Family Court Act §812 (3) To Balance the Root of Its Intent with What Has Become Its Perverted Application

**In Matter of Maliha A., v. Onu M., 2018 WL 3074532 (Fam Ct., 2018) Ms. A. testified that she and Mr. M. had been dating on and off for approximately 5 years. She told the Court that in Fall of 2017, they had a difficult separation and there remained unresolved issues between them. She stated that when the parties ended their relationship, they agreed that they would no longer communicate with each other. Thereafter, Ms. A. posted a series of tweets on her Twitter account indicating that the two were never compatible and her life had improved since their breakup. Ms. A. testified that she never mentioned Mr. M.'s name in the Tweets but acknowledged that it would have been obvious to anyone that knew them that she had been referring to Mr. M. Ms. A. told the Court that after the texts were posted, Mr. M. texted her three times asking her to stop speaking about him on social media. She stated that she was puzzled as to why he would contact her if they had agreed not to communicate, and she deleted his texts immediately. Ms. A. testified that Mr. M.'s fiancé then contacted her to tell her that she was trying to calm Mr. M. because he was upset about the Tweets. Ms. A. stated that Mr. M.'s fiancé told her that she had been speaking with Mr. M. in an effort to keep the peace between him and Ms. A. Ms. A. told the Court that during that time period, her uncle sent her a screenshot of a text that Mr. M. had sent to him in which Mr. M. said, "it's a wrap." Ms. A. testified that she received that message poorly, believing that it was a threat, even though the text**

**was not sent directly to her. Ms. A. testified that she wanted an order of protection against Mr. M. because "there is no telling what he might say or do." At the close of Ms. A.'s case, the Court dismissed her petition since Ms. A. did not meet her burden of proving conduct that rose to the level of a family offense.**

**Family Court observed that it did not appear that a non-violent, bad break-up was ever intended by the framers of the Family Court Act to be the basis for invoking the family court's authority to issue orders of protection where none are necessary. The Court noted that Family Court Act § 812(3) provides that no court official or law enforcement official "shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose." The application of this statute nowadays allows individuals claiming to have some kind of "intimate" relationship to freely file, without vetting, family offense petitions on any set of alleged facts they wish, regardless of whether those facts, if actually proven, would ultimately make out a family offense. The unintended consequence is that family offense petitions can be filed on factual allegations by ex-girlfriends and ex-boyfriends that amount to nothing more than name-calling that results in hurt feelings, and disrespectful behavior manifested by ill-advised posts on social media or extreme test messages. It is time for the statute to be revisited in light of modern technology and the expansion of family court jurisdiction to "intimate relationships." All too often in these types of cases, the family court does not act as a legal authority but as an informal mediator, an unofficial "minister of bitter breakups," whose judicial function is to preside over the dissolution of a dating relationship that ends poorly, perhaps artlessly, but not criminally. Sometimes the apparent goal of the petitioner is not protection from, but rather a continued connection with, the respondent through repeated court proceedings that continue a temporary order of protection in their favor, thereby imposing a power dynamic placing the petitioner in control. At other times, the court is asked to mend the relationship so that the parties can start anew, or failing that, to bring some type of closure to a broken relationship. None of these functions are judicial in nature. The overburdened family court could certainly benefit from the Legislature's closer look at revising the statute to balance the root of its intent with what has become its perverted application.**

**Joel R. Brandes, the President of Joel R. Brandes Consulting Services, Inc. is the author of Law and The Family New York, 2d (9 volumes) (Thomson Reuters Westlaw), and Law and the Family New York Forms (5 volumes) (Thomson Reuters Westlaw).**

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