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This memorandum is uncorrected and subject to revision before  
publication in the New York Reports.  
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No. 57 SSM 44  
In the Matter of Commissioner of  
Social Services, on Behalf of  
Elizabeth S.,  
Appellant,  
v.  
Julio J.,  
Respondent.

Submitted by Deborah A. Brenner, for appellant.  
Submitted by George E. Reed, Jr., for respondent  
Submitted by Brenda S. Soloff, for Elizabeth S.

MEMORANDUM:

The order of the Appellate Division should be reversed,  
without costs, the order of Family Court reinstated, and the  
certified question answered in the negative.

Before a party can be estopped from denying paternity or from obtaining a DNA test that may establish that he is not the child's biological parent, the court must be convinced that applying equitable estoppel is in the child's best interest (Matter of Shondel J. v Mark D., 7 NY3d 320 [2006]). The party seeking to prove paternity, whether by estoppel or otherwise, must do so by clear and convincing evidence. Here, although the Appellate Division stated that its reversal was on the law, that court, considering the same evidence as Family Court, made different factual findings to support its conclusion that the Commissioner of Social Services had not proven by clear and convincing evidence that respondent Julio J. should be estopped from denying paternity. Accordingly, we review the record to determine which set of findings more nearly comports with the weight of the evidence (see Matter of Jamie M., 63 NY2d 388, 393 [1984]).

We conclude that the evidence more nearly comports with Family Court's findings that the child, who was eight years old at the time of the hearing, knows respondent, with his encouragement, as her father; that a relationship existed insofar as the child was concerned; and that the child relied on respondent to be her father sufficiently such that it would be to her detriment for the court to direct DNA testing. Upon those findings, Family Court properly decided that respondent should be equitably estopped from asserting nonpaternity.

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On review of submissions pursuant to section 500.11 of the Rules, order reversed, without costs, order of Family Court, New York County, reinstated, and certified question answered in the negative, in a memorandum. Chief Judge Lippman and Judges Graffeo, Read and Pigott concur. Judge Smith dissents and votes to affirm, concluding that the findings of the Appellate Division more nearly comport with the weight of the evidence.

Decided January 10, 2013