SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 26, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Kapnick, Webber, Oing, JJ.

5408-
5409 Joseph Liporace, Jr., et al.,
Plaintiffs-Respondents,

-against-

Neimark & Neimark, LLP, et al.,
Defendants-Appellants.

Index 153323/15

Lewis Brisbois Bisgaard & Smith LLP, New York (Mark K. Anesh of counsel), for Neimark & Neimark, LLP, Marshall Adam Neimark, Esq. and Richard Neimark, Esq., appellants.

Goldberg Segalla LLP, New York (Stewart G. Milch of counsel), for Budin Reisman Kupferberg & Bernstein LLP, Harlan Budin, Alice Kupferberg and Adam Bernstein, appellants.

Ronemus & Vilensky LLP, Garden City (Lisa M. Comeau of counsel), for respondents.

Orders, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 18, 2016, which, to the extent appealed from as limited by the briefs, denied defendants' motions to dismiss the legal malpractice claim as against them, unanimously affirmed, without costs.

The complaint sufficiently alleges a claim for legal malpractice against both the Budin defendants and the Neimark defendants as plaintiff has sufficiently met the minimum pleading

requirements (*see Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 198 [1st Dept 2003]).

The Budin defendants, as successor counsel, had an opportunity to protect plaintiff's rights by seeking discretionary leave, pursuant to General Municipal Law § 50-e(5), to serve a late notice of claim. Whether the Budin defendants would have prevailed on such motion will have to be determined by the trier of fact (*see Davis v Isaacson, Robustelli, Fox, Fine, Greco & Fogelgaren*, 284 AD2d 104 [1st Dept 2001], *lv denied* 97 NY2d 613 [2002]; *F.P. v Herstic*, 263 AD2d 393 [1st Dept 1999]). We do not find this determination to be speculative given that Supreme Court will weigh established factors in exercising its General Municipal Law § 50-e(5) discretion (*see e.g. Rodriguez v City of New York*, 144 AD3d 574 [1st Dept 2016]; *Matter of Strohmeier v Metropolitan Transp. Auth.*, 121 AD3d 548 [1st Dept 2014]).

We agree with plaintiff's argument that the Neimark defendants' failure to serve a timely notice of claim, as of right, on the New York City Department of Education in the underlying personal injury action remains a potential proximate cause of his alleged damages. Plaintiff has a viable claim against the Neimark defendants despite the fact that the Budin defendants were substituted as counsel before the expiration of

time to move to serve a late notice of claim. Thus, the Budin defendants' substitution can only be deemed a superseding and intervening act that severed any potential liability for legal malpractice on the part of the Neimark defendants if a determination is made that a motion for leave to serve a late notice of claim would have been successful in the underlying personal injury action (*see Pyne v Block & Assoc.*, 305 AD2d 213 [1st Dept 2003]).

The Decision and Order of this Court entered herein on January 9, 2018 (157 AD3d 473 [1st Dept 2018]) is hereby recalled and vacated (*see* M-665 and M-667, decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6964 The People of the State of New York, Respondent, Ind. 2134/86

-against-

Ramon Perez, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Arielle Reid of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alice Wiseman of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Eugene Nardelli, J.), rendered June 4, 1987, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first degree and criminal possession of a weapon in the third degree, and sentencing him to an aggregate term of 15 years to life, unanimously dismissed.

Defendant absconded during trial, and was tried and convicted in absentia. His attorney filed a notice of appeal, but defendant did nothing to perfect his appeal while he remained a fugitive, for close to 20 years, until he was returned involuntarily on a warrant. The People seek to dismiss defendant's appeal based on the "failure of timely prosecution or perfection thereof," pursuant to CPL 470.60(1). Where a defendant's appeal remained pending for a long time while he or

she was a fugitive, whether the appeal should be permitted to proceed once the defendant is returned to custody is "subject to the broad discretion of the Appellate Division" (*People v Taveras*, 10 NY3d 227, 233 [2008]; *see also People v Perez*, 23 NY3d 89, 101 [2014]). In exercising its discretion, the Appellate Division may consider factors including whether defendant's flight caused "a significant interference with the operation of [the] appellate process"; whether defendant's absence "so delayed the administration of justice that the People would be prejudiced in locating witnesses and presenting evidence at any retrial should the defendant be successful on appeal"; the length of the defendant's absence; whether the defendant "voluntarily surrendered"; and the merits of the appeal (*Taveras*, 10 NY3d at 233).

Applying these standards, we exercise our discretion to dismiss the appeal. There was an extensive delay – more than 27 years – from June 12, 1987, when counsel, on defendant's behalf, filed a notice of appeal, until September 2014, when defendant sought poor person relief and assignment of counsel, and defendant finally filed his appellate brief in June 2017, 30 years after his conviction. The delay was caused entirely by defendant's own conduct in absconding from trial, and remaining a fugitive for close to 20 years. Defendant did not surrender

voluntarily; rather, he was returned involuntarily on the warrant after being arrested and convicted under another name in Massachusetts. An important transcript and the court file, each of which has a bearing on issues defendant seeks to raise on appeal, have been lost, and it is unreasonable to expect a court to preserve such materials forever. The delay of over 30 years would severely prejudice the People if required to retry the case after appeal. Thus, these factors demonstrate that dismissal is appropriate (*see Taveras*, 10 NY3d at 230-32). We also note that this Court has fully complied with the requirement, set forth in *Perez* (*Lopez*)(23 NY3d at 101-102), that this determination be made after appellate counsel has been assigned and permitted to review the record.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6965 In re Jisselle F.,
Petitioner-Respondent,

-against-

Jose T.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

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Order, Family Court, New York County (Gail A. Adams, Referee), entered on or about October 11, 2016, which, after a hearing, found that respondent committed a family offense and ordered him to stay away from petitioner and petitioner's dog for one year, unanimously affirmed, without costs.

Although the court did not specify the degree of harassment it found respondent to have committed, a fair preponderance of the evidence supports a finding of harassment in the second degree (Penal Law § 240.26[3]), one of the enumerated offenses upon which the issuance of an order of protection may be premised (Family Ct Act § 812[1]; *see Matter of Lorin F. v Jason D.*, 156 AD3d 548, 549 [1st Dept 2017]). There exists no basis to disturb the credibility findings of the Referee (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

The record shows that respondent, who was petitioner's father-in-law, had been staying in petitioner's apartment, in

which petitioner and her husband (respondent's son) lived with their dog, for an extended period of time. When the living situation became too strained, petitioner's husband asked respondent to vacate the apartment. Respondent, however, proceeded to threaten petitioner physically and inappropriately propositioned her, broke personal items in the apartment, walked around naked, and hit and attempted to poison petitioner's dog. During this time, respondent maintained that the apartment was his, notwithstanding that petitioner's husband had resided there for six years and his was the only name on the lease. Indeed, respondent was unable to produce a lease for the apartment with his name on it, and his explanation for his failure to do so was not believable. By his own admission, although he ostensibly had vacated the apartment, he returned to the apartment to shower, nap and change when petitioner and her husband were not home, despite the fact that petitioner's husband had never given him a key. Petitioner testified that as a result of respondent's conduct, she felt threatened and feared for her safety.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Gesmer, Kern, JJ.

6967-
6968 Index 650140/12

CNH Diversified Opportunities Master Account, L.P., et al.,
Plaintiffs-Appellants,

-against-

Cleveland Unlimited, Inc., et al.,
Defendants-Respondents.

_____

Drinker Biddle & Reath LLP, New York (James H. Millar of counsel), for appellants.

Holwell Shuster & Goldberg LLP, New York (James M. McGuire of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 7, 2018, inter alia, dismissing the complaint pursuant to an order, same court and Justice, entered January 16, 2018, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiffs' motion for summary judgment, unanimously affirmed. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court properly dismissed plaintiffs' breach of contract claim based on section 6.07 of the parties' Indenture. A fair reading of the Indenture, Collateral Trust Agreement and Security Agreement (Agreements) demonstrates that the collateral trustee was authorized to pursue default remedies, including the strict

foreclosure at issue here, if so directed by a majority of the noteholders. Section 6.07 of the Indenture, which sets forth that the holder's right to payment of principal and interest on the note, or to bring an enforcement suit, "shall not be impaired or affected without the consent of such Holder," does not supersede the numerous default remedy provisions of the Agreements, nor does it conflict with them. Section 6.07 of the Indenture, which tracks the language of section 316(b) of the Trust Indenture Act of 1939 (15 USC § 77ppp[b]) "prohibits only non-consensual amendments to an indenture's core payment terms" (*Marblegate Asset Mgt., LLC v Education Mgt. Fin. Corp.*, 846 F3d 1, 3 [2d Cir 2017]). Here, the strict foreclosure and debt equity restructuring did not amend the core payment terms in violation of section 6.07 of the Indenture, even if it had a "similar effect" (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 330 [2007]). Furthermore, the record shows that plaintiffs received

and accepted the resulting equity from the debt restructuring.

We have considered plaintiffs' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6970- Index 156415/16
6971 Samuel Edelman, et al.,
Plaintiffs-Appellants,

-against-

New York State Department of Taxation
and Finance, et al.,
Defendants-Respondents.

_____

Hodgson Russ LLP, Buffalo (Timothy P. Noonan of counsel), for appellants.

Eric T. Schneiderman, Attorney General, Albany (Kate H. Nepveu of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 13, 2017, which granted defendants' motion to dismiss the complaint for failure to state a cause of action, and denied plaintiffs' motion to convert defendants' motion into a motion for summary judgment pursuant to CPLR 3211(c), unanimously affirmed, without costs.

This appeal turns on whether *Matter of Tamagni v Tax Appeals Trib. of State of N.Y.* (91 NY2d 530 [1998], *cert denied* 525 US 931 [1998]), in which plaintiffs' present arguments were rejected by the Court of Appeals, was abrogated by the decision of the U.S. Supreme Court in *Comptroller of the Treasury of Maryland v Wynne* (___ US ___, 135 S Ct 1787 [2015]). We conclude that *Tamagni* was not abrogated by *Wynne* and therefore that the instant

complaint was correctly dismissed for failure to state a cause of action.

Plaintiffs' argument is that New York's tax scheme violates the dormant Commerce Clause by unfairly permitting double taxation of their intangible income by both New York, where they were "statutory residents," and Connecticut, where they were domiciled (see 20 NYCRR 120.4[d]). Plaintiffs contend that this taxation burdens interstate commerce, particularly by inhibiting their free movement into New York State to work and their ability to buy or lease a home in New York due to the risk of being deemed a resident and subject to double taxation of intangible income. Further, they maintain that New York's tax scheme fails the "internal consistency" test, which requires fair apportionment of income between states and nondiscrimination against interstate commerce (*see generally Complete Auto Tr., Inc. v Brady*, 430 US 274, 279 [1977]; *Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d 85, 90 [2003], *cert denied* 541 US 1009 [2004]).

Contrary to plaintiffs' argument, *Wynne* is distinguishable from *Tamagni*, and from the instant case, in two critical respects. First, it did not involve individuals who faced double taxation on intangible investment income by virtue of being domiciliaries of one state and statutory residents of another.

Second, the income subject to tax in *Wynne* was not intangible investment income, but business income, traceable to an out-of-state source. Notably, New York tax law does not permit double taxation of such out-of-state income, but provides for a credit for taxes paid to the other state.

Plaintiffs contend that, unlike *Tamagni*, *Wynne* makes clear that a tax scheme is not immune from Commerce Clause scrutiny simply because it is "residency-based," i.e., imposed on taxpayers by virtue of their status as New York statutory residents. Indeed, the Supreme Court said that the state's "raw power to tax its residents' *out-of-state income* does not insulate its tax scheme from scrutiny under the dormant Commerce Clause" (*Wynne*, 135 S Ct at 1799 [emphasis added]). However, the income at issue in *Tamagni* (and in the instant case) was not "out-of-state income" but intangible investment income, which "has no identifiable situs," "cannot be traced to any jurisdiction outside New York," and is "subject to taxation by New York as the State of residence" (*Tamagni*, 91 NY2d at 536). Further, while *Tamagni* referred to the "inapplicability of dormant Commerce Clause analysis to State resident income taxation" (91 NY2d at 544), which is inconsistent with *Wynne*, it did so only after recognizing that the statute "dictate[s] some level of dormant Commerce Clause scrutiny" (*id.* at 538-539) and engaging in a

thorough analysis that concluded that the taxation scheme did not violate the dormant Commerce Clause.

Nor does *Wynne*, by establishing that the "internal consistency" test must be applied wherever there is Commerce Clause scrutiny, abrogate *Tamagni's* "core holding" that, even if Commerce Clause scrutiny was necessary, there was no reason to apply the test. Where Commerce Clause scrutiny reveals that the statute at issue does not affect interstate commerce, there is no need for a test determining whether the statute unduly burdens interstate commerce.

The motion court correctly denied plaintiffs' motion pursuant to CPLR 3211(c). In the context of defendants' motion pursuant to CPLR 3211(a)(7), the court's focus was on whether plaintiffs had stated a claim for declaratory relief under the Commerce Clause, not on whether they could prevail on such a claim (*see Law Research Serv. v Honeywell, Inc.*, 31 AD2d 900 [1st Dept 1969]).

We have considered plaintiffs' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6972 In re New York State Division of Human Rights,
Petitioner,

-against-

International Financial Services Group, et al.,
Respondents,

Crystal Martinez,
Nominal Respondent.

Index 251456/16

Caroline J. Downey, N.Y.S. Division of Human Rights, Bronx (Aaron M. Woskoff of counsel), for petitioner.

Determination of petitioner New York State Division of Human Rights (DHR), dated May 19, 2015, granting the complaint for disability discrimination, awarding complainant $64,436.03 in back pay and $10,000 for emotional distress, and assessing a civil penalty of $20,000 (the proceeding having been transferred to this Court by order of Supreme Court, Bronx County [Julia Rodriguez, J.], entered on or about March 3, 2017), unanimously confirmed, without costs.

Substantial evidence supports the agency's findings that respondents engaged in disability-based employment discrimination against complainant, in violation of the New York State Human Rights Law (*see Matter of McEniry v Landi*, 84 NY2d 554, 559-560

[1994]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). The record further supports the imposition of liability upon individual respondent Carlos Zapata, for aiding and abetting discriminatory conduct, since he directly participated in the discriminatory conduct by, among other things, terminating complainant (*see* Executive Law § 296[6]; *Peck v Sony Music Corp.*, 221 AD2d 157, 158 [1st Dept 1995]; *Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 479 [Sup Ct, NY County 2011], *affd in part, mod on other grounds in part* 94 AD3d 563 [1st Dept 2012]).

The award of compensatory damages for back pay is appropriate (*see* Exec Law § 297[4][c][ii]-[iii]; *Rio Mar Rest. v New York State Div. of Human Rights*, 270 AD2d 47, 48 [1st Dept], *lv denied* 95 NY2d 763 [2000]), as is the award of damages for mental anguish (*see Matter of New York State Div. of Human Rights v Milan Maintenance, Inc.*, 152 AD3d 412 [1st Dept 2017]; *Matter of New York State Div. of Human Rights v Neighborhood Youth & Family Servs.*, 102 AD3d 491 [1st Dept 2013]).

The agency did not abuse its discretion in setting the amount of the civil penalty at $20,000 (*see* Executive Law § 297[4][c][vi]; *Matter of Jacobs v New York State Div. of Human Rights*, 131 AD3d 883 [1st Dept 2015]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6973-
6974 Index 655216/16

Sushi Tatsu, LLC,
Plaintiff-Respondent,

-against-

Bahram Benaresh, doing business
as Bahram Benaresh Realty,
Defendant-Appellant.

_____

Sperber Denenberg & Kahan, P.C., New York (Steven B. Sperber of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered August 31, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff tenant's motion for partial summary judgment and declared that plaintiff properly exercised the option to terminate its lease, determined that plaintiff was entitled to recover amounts paid upon execution of the lease, severed the causes of action seeking consequential damages and attorneys' fees and directed an inquest on those claims, dismissed the affirmative defense of failure to comply with a condition precedent, and, sub silentio, denied defendant landlord's cross motion for summary judgment dismissing said causes of action, unanimously modified, on the law, to the extent of vacating the order directing an inquest with respect to the

cause of action seeking consequential damages and granting the cross motion for summary judgment dismissing said cause of action, and otherwise affirmed, without costs. Judgment, same court and Justice, entered September 21, 2017, awarding plaintiff the principal sum of $153,000, unanimously affirmed, without costs.

The landlord's inaction in failing to cure the Landmarks violation was the cause of the delay that prevented the tenant from building out the leased premises and therefore justified the tenant's exercise of its option to terminate the lease. The lease acknowledged the existence of a Landmarks violation and expressly imposed on the landlord the obligation to cure it, without any express conditions precedent. It would have improperly negated this express provision to require the tenant, as an implied condition precedent or as an implied duty of good faith, to first file an application for a work permit and then await the objections of the Department of Buildings (*see Transit Funding Assoc., LLC v Capital One Equip. Fin. Corp.*, 149 AD3d 23, 30 [1st Dept 2017]).

The instant circumstance is distinguishable from that in *6243 Jericho Realty Corp. v AutoZone, Inc.* (71 AD3d 983 [2d Dept 2010], *lv denied* 14 NY3d 714 [2010]), upon which the landlord relies. In *Jericho Realty*, it was held that the implied

obligation of good faith imposed on the tenant the duty to obtain necessary approvals before exercising its option to terminate the lease on the ground of the landlord's delay where the lease imposed on the tenant a deadline, and hence the obligation, to obtain the necessary approvals in the first place.

To the extent that the motion court's directing an inquest on consequential damages indicates that it held the landlord liable for such damages, this was error. While the court was justified in searching the record despite the tenant's failure to move for summary judgment on this cause of action until its reply, because the landlord first raised the issue in its cross motion, the tenant was not entitled to consequential damages because the lease did not provide for them (*see 1009 Second Ave. Assoc. v New York City Off-Track Betting Corp.*, 248 AD2d 106, 108 [1st Dept 1998], *lv dismissed* 92 NY2d 947 [1998]).

We have considered the landlord's other contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6977 The People of the State of New York, Respondent, Ind. 477/11 1718/11

-against-

Daniel Brown, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christine DiDomenico of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about March 7, 2017, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence supported the court's point assessments for defendant's history of drug or alcohol abuse, which included a DWI conviction and possession of a substantial amount of cocaine, for his failure to accept responsibility based, among other things, on his denial of responsibility throughout most of his incarceration, and for his conduct while confined, including his possession of pornography and a weapon.

The record also supports the court's alternative determination that a discretionary upward departure was

warranted. The risk assessment instrument did not adequately account for the extreme brutality of defendant's attacks on the two victims and aggravating surrounding circumstances (*see e.g. People v Sanford*, 47 AD3d 454 [1st Dept 2008], *lv denied* 10 NY3d 707 [2008]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6978 In re Gerald J. Duerr, etc. SCI 2385D/13

- - - - -

Sandra Branch Trust, et al.,
Petitioners,

Bonnie Diaz,
Respondent-Appellant,

New York State Attorney General,
Respondent-Respondent.

_____

Susan R. Nudelman, Dix Hills, for appellant.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about October 6, 2016, which granted the New York State Attorney General's motion for summary judgment to the extent of holding that a trust created by Sandra Branch on October 17, 2006 (the 2006 Trust) was neither amended nor revoked by a trust she created on November 6, 2012 (the 2012 Trust), unanimously affirmed, without costs.

Even though the order appealed from did not resolve all of the disputes among the parties, it was not an improper advisory opinion because it set parameters for the litigation (*see Matter of New York City Asbestos Litig.*, 130 AD3d 489, 490 [1st Dept 2015]).

It is undisputed that the 2012 Trust was never funded.

Thus, it never became operative (*see e.g. Pinckney v City Bank Farmers Trust Co.*, 249 App Div 375, 377 [3d Dept 1937] [trust "becomes operative when adequately constructed"]; *Hickok v Bunting*, 67 App Div 560, 562 [1st Dept 1902] ["to constitute a trust there must be a *res* to which it can attach"]; Estates, Powers & Trusts Law § 7-1.18). Since the 2012 Trust never became operative, it could not have revoked the 2006 Trust.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6979-
6980 Index 652715/15

Paul B. Gottbetter, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Crone Kline Rinde, LLP, et al.,
Defendants-Respondents-Appellants.

- - - - -

CKR Law LLP formerly known as
Crone Kline Rinde, LLP,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Adam Gottbetter, et al.,
Third-Party Defendants.

_____

Venturini & Associates, New York (August C. Venturini of counsel), for appellants-respondents.

Lawrence E. Tofel, P.C., Brooklyn (Lawrence E. Tofel of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered September 28, 2016, which, to the extent appealed from, upon plaintiffs' motion to dismiss the counterclaims and to strike certain references in the answer and defendants' motion to disqualify plaintiffs' counsel, ruled on the merits of the complaint, and order, same court and Justice, entered on or about September 23, 2016, as amended by order entered on or about September 30, 2016, which denied plaintiffs' motion to dismiss the counterclaims and strike references to the settlement

negotiations from the answer, and denied defendants' motion to disqualify August Venturini as plaintiffs' counsel, unanimously modified, on the law, to vacate any discussion of the merits of the complaint and to grant plaintiffs' motion to dismiss the counterclaims and strike references to the settlement negotiations, and otherwise affirmed, without costs.

The merits of the complaint, including the enforceability of the parties' July 1, 2014 agreement, were not before the motion court, and we therefore vacate the court's statements addressed thereto. We note in addition that, notwithstanding the court's conclusion that "there is a viable claim against [plaintiff Paul Gottbetter] for a breach of the underlying agreement," no counterclaim was asserted against Paul Gottbetter for breach of the agreement.

Contrary to defendants' argument, certain emails at issue constitute settlement communications, and detailed references to those negotiations are inadmissible and therefore must be stricken from the answer (CPLR 4547; *PRG Brokerage Inc. v Aramarine Brokerage, Inc.*, 107 AD3d 559, 560 [1st Dept 2013]). In addition, the first counterclaim must be dismissed because it is predicated upon allegations that Paul Gottbetter waived his rights under the agreement during the course of the settlement discussions. We note that, in any event, the inadmissible

communications do not demonstrate such a waiver.

The second counterclaim for fraudulent concealment must be dismissed for failure to state a cause of action. To state a claim for fraudulent concealment, a plaintiff must allege that the defendant had a duty to disclose material information and failed to do so, that the omission was intentional so as to defraud or mislead the plaintiff, that the plaintiff relied on the omission and that the plaintiff suffered damages (*see P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

Here, the second counterclaim fails to state a cause of action for fraudulent concealment as it fails to allege that Gottbetter & Partners, LLP had a duty to disclose Adam Gottbetter's guilty plea and then-impending disbarment and incarceration and that CKR Law LLP suffered damages directly resulting from the failure to disclose such information.

Defendants' motion to disqualify plaintiffs' counsel pursuant to the advocate-witness rule was properly denied, since

the motion is based on the inadmissible settlement communications.

We have considered defendants' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6981 The People of the State of New York, Ind. 3438/15
Respondent,

-against-

Kevin Langston,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Katherine Kulkarni of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J.), rendered April 21, 2016,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6984- Index 105375/08
6985 Michael Borst, et al., 100115/09
Plaintiffs,

-against-

Lower Manhattan Development
Corporation, et al.,
Defendants,

Bovis Lend Lease LMB, Inc., et al.,
Defendants-Appellants.

- - - - -

Vincent Massa,
Plaintiff-Respondent,

-against-

Bovis Lend Lease LMB, Inc., et al.,
Defendants-Appellants,

Lower Manhattan Development
Corporation and Lower Manhattan
Construction Command Center, et al.,
Defendants.

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (John F. Watkins of counsel), for appellants.

The Altman Law Firm, PLLC, New York (Michael T. Altman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered August 26, 2016, which, in these consolidated actions, insofar as appealed from as limited by the briefs, denied defendants Bovis Lend Lease LMB, Inc. and Bovis Lend Lease, Inc.'s (Bovis) motions for summary judgment dismissing plaintiffs

Steve Olsen and Cathy Olsen's, and Vincent Massa's, claims for punitive damages, unanimously affirmed, without costs.

These actions arise from a fire that occurred at the former Deutsche Bank building located at 130 Liberty Street in Lower Manhattan on August 18, 2007. Over a hundred firefighters sustained injuries; two lost their lives. At the time, the building was being decontaminated and demolished. In connection with the abatement work, wooden barriers were erected over the stairwells, preventing quick access to the fire and quick escape when fire conditions got out of control. Also, the water standpipe system was nonoperational due to the removal of a 42-foot section of the pipe in the basement. Bovis was the general contractor on the project.

The court properly denied Bovis's motions for summary judgment insofar as they sought dismissal of plaintiffs' claims for punitive damages. Conduct justifying punitive damages "must manifest 'spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton'" (*Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013], quoting *Dupree v Giugliano*, 20 NY3d 921, 924 (2012); *see also Bishop v 59 W. 12th St. Condominium*, 66 AD3d 401, 402 [1st Dept 2009]). Although issues of fact exist as to

whether Bovis's site safety manger, Jeff Melofchik, was present shortly after the subcontractor removed the 42-foot section of the pipe in November 2006, and whether Melofchik became aware at that point that the segment was part of the standpipe, it is undisputed that Melofchik did not test the standpipe system to ensure that it was operational during the 16-month period from March 2006 (when Bovis became the general contractor on the project) to August 2007 (when the fire occurred). Given that the project consisted of demolition of a high-rise building located in a densely populated area, with many workers on site and potential for fire hazards, the jury could reasonably find that Melofchik's failure to test the standpipe system to ensure it was operational during the 16-month period and failure to enforce the no smoking policy constituted wilful and wanton disregard for the interests of others, justifying an award of punitive damages. We note that Bovis admitted it was required by Department of Building regulations to ensure the readiness of the standpipes for use. Also Melofchik's failures affected the public generally (*see Matter of 91st St. Crane Collapse Litig.*, 154 AD3d 139, 156-157 [1st Dept 2017]; *Fabiano v Philip Morris Inc.*, 54 AD3d 146, 150-151 [1st Dept 2008]).

Bovis's contention that it may not be held liable for punitive damages because nothing showed that a "superior officer"

of the corporation ratified Melofchik's egregious conduct is unavailing. An employer may be assessed punitive damages for an employee's conduct "only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant," such that it is complicit in that conduct (*Loughry v Lincoln First Bank*, 67 NY2d 369, 378 [1986]). Complicity is evident when "a superior officer in the course of employment orders, participates in, or ratifies outrageous conduct" (*id.*). Although Melofchik was not a "superior officer" and nothing suggests that Bovis management authorized or ratified Melofchik's conduct, an issue of fact exists as to whether management was aware of Melofchik's incompetence but still "deliberately retained the unfit servant (*id.*)."

The court properly exercised its discretion in permitting plaintiff to proceed on the second set of opposition papers filed

by plaintiffs, as the new papers were submitted before Bovis's reply papers were due, did not change the substance of what was originally served, and did not prejudice Bovis (*cf. Fleck v Calabro*, 268 AD2d 738, 738-739 [3d Dept 2000]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6986- Index 157086/16
6986A Midtown Acquisitions L.P.,
Plaintiff-Respondent,

Barclays Bank PLC, et al.,
Plaintiffs,

-against-

Essar Global Fund Limited,
Defendant-Appellant.

_____

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Daniel B. Rapport of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Margaret A. Chan), entered May 18, 2017, which, to the extent appealed from as limited by the briefs, denied defendant's motions to vacate a judgment by confession pursuant to CPLR 5015(a)(3) and CPLR 3218, unanimously affirmed, with costs.

Defendant's motion to vacate the judgment by confession pursuant to CPLR 5015(a)(3) based on fraud was properly denied because issues of fact exist that must be resolved by trial in a plenary action rather than by motion (*see Scheckter v Ryan*, 161 AD2d 344 [1st Dept 1990]; *Affenita v Long Indus.*, 133 AD2d 727 [2d Dept 1987]). Even assuming that the filing of the confession of judgment was conditioned on defendant's default, the parties

dispute whether such a default occurred, i.e., whether defendant had repaid $40 million or $50 million under the governing term sheet by the time of the filing of the confession of judgment. This issue cannot be resolved on the motion papers.

Although defendant's CPLR 3218 motion was not duplicative of the CPLR 5015 motion, it was properly dismissed on the same ground, namely, that a plenary action is required.

We have considered defendant's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6987- Index 159840/16
6988N Sumner M. Redstone,
Plaintiff-Respondent,

-against-

Manuela Herzer,
Defendant-Appellant,

Hotel Carlyle Owners Corporation,
Defendant.

_____

Law Offices of Ronald Richards & Associates, A.P.C., Beverley Hills, CA (Ronald N. Richards of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Matalon Shweky Elman PLLC, New York (Howard I. Elman of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Erika M. Edwards, J.), entered October 26, 2017, which, inter alia, granting plaintiff's motion for summary judgment on his first cause of action for a declaration that defendant Manuela Herzer has no valid claim to an ownership interest in a certain apartment, directing defendant Hotel Carlyle Owners Corporation to cancel a proprietary lease and 2,110 shares for the apartment issued to plaintiff and Herzer and issue a new proprietary lease and shares to the apartment solely to plaintiff, and denying Herzer's application for a mental competency examination of plaintiff on an expedited basis,

unanimously affirmed, without costs. Order, same court and Justice, entered January 19, 2018, which, insofar as appealed from as limited by the briefs, denied Herzer's motion to renew, unanimously affirmed, without costs.

Plaintiff and Herzer entered into an agreement which clearly stated that plaintiff was purchasing the subject apartment and that he intended to give the apartment as a gift to Herzer upon his death. In the agreement, Herzer acknowledged that notwithstanding the inclusion of her name on the contract of sale, proprietary lease and shares, the apartment belonged exclusively to plaintiff until his death, and that adding defendant's name was a matter of convenience for plaintiff.

"[T]o make a valid inter vivos gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee" (*Gruen v Gruen*, 68 NY2d 48, 53 [1986]). The proponent of a gift has the burden of proving these elements by clear and convincing evidence (*id.*). Here, Supreme Court properly concluded, based on the clear language of the agreement, that plaintiff did not make an inter vivos gift of the apartment to Herzer. The court properly refused to consider extrinsic evidence of the parties' intent based on the express terms of the agreement.

The court also correctly denied Herzer's motion to renew as she presented no new evidence that would have changed the result (CPLR 2221[e]). Evidence of interfamilial squabbling had no bearing on the agreement, which was clear on its face.

An expedited mental examination of plaintiff was unwarranted because a person of unsound mind who was not judicially declared incompetent may sue in the same manner as anyone else (*see Rau v Tannenbaum*, 85 AD2d 522 [1st Dept 1981]). No evidence was presented that plaintiff was judicially declared incompetent. Furthermore, Herzer admitted that plaintiff was of sound mind when he signed the agreement which limited the gift. Thus, his present mental condition was not relevant.

We have considered Herzer's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

6989N Sune Gaulsh, Index 654346/15
Plaintiff-Appellant,

-against-

Diefenbach PLLC,
Defendant-Respondent.

_____

Sune Gaulsh, appellant pro se.

Diefenbach PLLC, New York (Gordon Price Diefenbach of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about March 13, 2017, which, to the extent appealed from, denied plaintiff's motion for a default judgment, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for an assessment of damages.

Plaintiff established its entitlement to a default judgment against defendant, and defendant failed to offer either a reasonable excuse for its failure to answer the complaint or a meritorious defense to the action.

Defendant failed to even attempt to offer a reasonable excuse nor could it, given that the record demonstrates the default was willful and deliberate. Further, the only purported defense provided by defendant was the submission of the arbitration award, which was a nullity and inadmissible (Rules of

Chief Admin of Cts [22 NYCRR] § 137.8[c]; *see Landa v Dratch*, 45 AD3d 646, 647-648 [2d Dept 2007]), and which contained no facts of the underlying contested issues.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Judith J. Gische
Jeffrey K. Oing
Anil C. Singh, JJ.

5186
Index 309154/16

_____x

In re K.G.,
Petitioner-Appellant-Respondent,

-against-

C.H.,
Respondent-Respondent-Appellant.

- - - - -

The Lesbian and Gay Law Association Foundation of Greater New York,
Amicus Curiae.

_____x

Petitioner appeals from an order and judgment (one paper) of the Supreme Court, New York County (Frank P. Nervo, J.), entered April 13, 2017, which, after a trial, denied the petition for joint custody of the parties' child and dismissed the proceeding for lack of standing, and denied respondent's motion to the extent it sought costs and sanctions under 22 NYCRR 130-1.1.

Kaplan & Company LLP, New York (Roberta A. Kaplan and John C. Quinn of counsel), Morrison Cohen LLP, New York (Danielle C. Lesser and Andrew P. Merten of counsel), and Chemtob Moss & Forman, LLP, New York (Nancy Chemtob and Jeremy J. Bethel of counsel), for appellant-respondent.

Cohen Rabin Stine Schumann LLP, New York (Bonnie E. Rabin, Gretchen Beall Schumann, Tim James and Lindsay Pfeffer of counsel), for respondent-appellant.

Latham & Watkins LLP, New York (Virginia F. Tent, Matthew J. Pickel, Iris H. Xie and Naseem Faqihi Alawadhi of counsel), for amicus curiae.

GISCHE J.

In this action, petitioner (KG) claims that she is a parent with standing to seek custody of and visitation with A., the adopted child of respondent (CH), her now ex-partner. KG is not biologically related to A., who was born in Ethiopia, nor did she second adopt the child. KG's claim of parental standing is predicated upon the recent landmark Court of Appeals decision in *Matter of Brooke S.B. v Elizabeth A.C.C.* (28 NY3d 1 [2016]), which expansively defines who is a "parent" under Domestic Relations Law § 70. On appeal, KG primarily claims 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 does not deny that the parties had an agreement in 2007, but claims 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. KG alternatively claims on appeal that based upon the relationship between her and A., which developed after he came to New York, this Court should find she has standing as a parent under principles of equitable estoppel. As a further alternative, KG claims that the matter should be remanded because the trial court improperly truncated the record on equitable estoppel.

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 court did not substantively address any issue of equitable estoppel. Mid-trial, after KG's case closed, the court ruled that it was only considering KG's claims of standing based upon whether the parties had a viable plan to adopt and raise a child together.

All of the legal issues raised on this appeal have *Brooke* as their underpinning. In *Brooke,* decided only days before this proceeding was commenced, the Court of Appeals, is an opinion written by Judge Sheila Abdus-Salaam, overruled *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) and abrogated *Debra H. v Janice R.* (14 NY3d 576 [2010], *cert denied* 562 US 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. Although pursuant to Domestic Relations Law § 70(a), "either parent" may petition the court for custody of a child, the statute does not define that term. In *Alison D.*, decided before *Brooke*, the Court of Appeals, over a prescient dissent by Chief Judge Judith Kaye, declined to

construe the term parent to include nonbiological, nonadoptive parents. The effect of these earlier precedents was that only biological or adoptive parents had standing to seek custody and visitation. In deciding *Brooke*, the Court recognized that its narrow interpretation of "parent" under *Alison D.* had produced inequitable results, especially for children being raised by same sex couples. In departing from its earlier precedents, the Court of Appeals expansively defined Domestic Relations Law §70 in *Brooke*, permitting nonbiological, nonadoptive parents to achieve standing to petition for custody and visitation (*Brooke* at 26-27). The decision was celebrated for its ground breaking recognition of the rights of members of nontraditional families (*e.g.* Alan Feur, *New York Court Expands Definition of Parenthood*, NY Times, August 31, 2016 at A17).

Closely hewing to the reasoning of Judge Kaye's dissent in *Alison D.*, the *Brooke* Court recognized that parenthood was broader than biology or adoption, but it also held that the criteria to determine parenthood must be appropriately narrow to take into account the fundamental rights to which biological and adoptive parents are "undeniably entitled" (*id.* at 27). In this regard, the Court placed the burden of proving standing, by clear and convincing evidence, on the party seeking it (*id.* at 28). The Court also recognized that in order to prove standing under

Domestic Relations Law § 70, more than just a loving relationship with the child was warranted (*id* at 26-28).

Notwithstanding the stated limitations, the *Brooke* 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 fact, 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" (*id.* at 27-28). In

Estrellita, however, the Court resolved the question of standing differently, applying the doctrine of judicial estoppel (*id.* at 29). 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 calls by the amici and the parties 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:

> "Inasmuch as the conception test applies here, 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. We simply conclude 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. Whether a partner without such an agreement can establish standing and, if so, what factors a petitioner must establish to achieve standing based on equitable estoppel are matters left for another day, upon a different record" (*id*. at 28).

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 (see *Matter of Gardiner*, 69 NY2d 66, 73 [1986] [addressing New York State's long-standing, unbroken and fundamental public policy to treat adoptive and biological children equally in family settings]).

KG contends that the 2007 agreement satisfies the conception/adoption test enunciated in *Brooke*. She argues that the trial court was factually mistaken in holding that the 2007 plan "abated" when the parties romantic relationship ended. KG

also argues that the court should never have looked at whether the 2007 plan terminated, because once the parties made their plan, legal standing was conferred on her to seek custody of or visitation with any child that CH later conceived or adopted. We do not find these arguments persuasive. As more fully discussed, there is 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*.

At trial, the parties stipulated that in 2007 they had an agreement to internationally adopt and raise a child together. Their plan envisioned that after CH completed an international adoption, and a child was brought to the United States, KG would second adopt that child, thereby becoming a legal parent as well. It is also undisputed that the parties' romantic relationship ended in December 2009, well before any particular child was identified by the international agency and offered to CH for adoption. The parties sharply dispute whether their agreement to jointly adopt survived the dissolution of their romantic

relationship. CH contends that KG broke up with her because KG had misgivings about becoming a mother and no longer wanted to bring a child into their relationship. CH argues that the parties' conduct at the time of their breakup vitiated the 2007 pre-adoption agreement. KG contends that she remained committed to the adoption plan and continued her cooperation with it beyond the end of their romantic relationship.

While there were conflicting facts presented at trial, those conflicts were resolved by the trial court in favor of CH's position. Facts supporting the conclusion that by the time A. was identified and adopted by CH the parties no longer had a viable agreement to adopt and raise a child together include at least the following: The parties began a romantic relationship in 2004. At some point they began talking about adopting a child. In 2007 the parties jointly purchased an apartment on Sullivan Street. A cohabitation agreement, dated May 18, 2007, set forth the partes' respective rights in the apartment, which they refer to as the "familial residence." The parties agree that the cohabitation agreement was made in contemplation of, and as a foundation for, their plan to adopt and raise a child together, even though the agreement makes no reference to their planned adoption.

The parties thereafter took affirmative steps to effectuate

their plan. By February 2009, the parties initiated their application for an international adoption. Only CH was listed on the application as the prospective adoptive parent; KG was identified as a household member. They agree that this was solely done to avoid the prevalent restrictions on same-sex international adoptions. Both parties participated in a preadoption home study, they were fingerprinted, and they provided extensive information about their finances.

Later in 2009, beginning in the fall and into the next winter, the parties' romantic relationship devolved. They frequently argued and made separate travel plans. Much of the unraveling of their relationship is described in email exchanges, which included content concerning whether to go forward with an adoption at that time. In one exchange KG expresses confusion about the relationship and CH responds that she is "sad" to be involved with someone who is unsure about their future together and "about building a second generation." CH also tells KG they have "lots to discuss" because she is now qualified as an adoptive parent under two programs. CH asks KG whether "we should just put the idea on hold completely until you feel good about it. Or just tank the idea completely," adding that they have to give an answer "ASAP." CH assures KG in the same email that they can "roll our relationship anyway" even though "[it]

isn't perfect 100%," but in response, it is KG who expresses co-parenting might be a disservice to "a kid." KG tells CH that they will talk about "everything" on Saturday (December 12, 2009). That Saturday, KG broke up with CH, disclosing a rekindled relationship with an ex-girlfriend. Following the breakup, CH and KG continued to live together at the Sullivan Street apartment, but CH moved into the guest bedroom.

Throughout 2010, the parties began an extended process of emotionally and financially disentangling their relationship. Some of their email exchanges during this period document the shift in their relationship from romantic to friendship. The emails also capture KG's disconnection from the original plan to co-adopt and raise a child. KG's communications demonstrate her understanding that CH was now pursuing the plan to adopt and raise a child alone. For instance, in a January 2010 email sent by KG to CH, she suggests that "[y]ou could get urself (sic) a Haitian orphan." In an extended email exchange between the parties taking place over the course of two days in February 2010, KG expresses remorse about their breakup and writes to CH that she had "envisioned what it would be like for you and the kid to be here, whizzing about London together, all the dreams we've had for our future together. It makes me cry to even just write this and think I've put it all in jeopardy." CH responds

that "[w]e're evolving into something else at the moment and that's brave not many couples do that."

In March 2010, CH notified KG that she had spoken to "my" case worker who had suggested that "I find another country to apply to other than Nepal" and CH says "my choice now is to take my $2,000 Nepal fee and second apply to another country" and that "at this point there have been no referrals for adoptive families who applied in 2009 with my agency . . . ."

In an email dated April 21, 2010, KG wrote to CH and suggested that "[s]ince you are the one getting a kid, would u consider staying at 181 [Sullivan Street] and have me move out? It's only me and I don't need much space" adding in a subsequent email that her needs were not as great as CH's because "you're bringing a kid into the world."

In May 2010, the parties, with the assistance of their attorneys, negotiated a separation agreement. In the separation agreement, dated May 28, 2010, the parties formally terminated their cohabitation agreement and memorialized the end of their romantic relationship. The separation agreement, among other things, provided for CH to move out of the Sullivan Street and Fire Island properties. Upon CH's execution of transfer deeds, KG would pay CH the sum of $350,000. The separation agreement made no reference, direct or oblique, to CH's adoption

application. Although KG contends that the money she paid to CH was to provide her with the means to support a yet to be identified child for adoption, the separation agreement itself contains no such reference.

The parties remained in touch after the execution of the separation agreement. KG's communications continued to demonstrate that she did not consider herself a part of any ongoing plan to pursue an adoption and raise a child with CH. In a December 5, 2010 email to CH, KG, then in Bogota, Colombia, writes that "you could get a kid here so easy, they actually have ads in the paper and they're beautiful. kind of sad, but . . . ." In another December 2010 email, KG tells CH that "the reality of our relationship ending" and that there is so much "I don't even know about you anymore" has set in and that her feelings "about the baby, and how left out of that process I felt, continue to surface as the day draws near on something we started together over three years ago." KG expresses regrets about "our beautiful life now shattered." In a January 2011 email, KG again expresses sadness that she's "lost everything" including "the baby that will never be, the life that will never be."

In March 2011 the adoption agency identified and offered A., a 15 months old orphan in Ethiopia, as a "match" for adoption by CH. After CH sent a photo of A. to KG, KG sent two emails. In

the first, KG writes that "I'm sure this is a big day for you. He's perfect" and in the second one, less than two hours later KG wrote:

> "I can't stop looking at him. I am doing my best to temper my own emotional reaction to this and want you to know I am so proud of you for following your dream. You made this happen. He was supposed to be our son. I'm not sure I will ever get over my regret and sorrow over that. But I will be very very happy for you and for him, and hope to find a way to be in your lives."

In a May 18, 2011 email, KG wrote to CH telling her "I am so happy for you. I want you to know I will be here to support you through this . . . emotionally, financially, etc. . . . I am so melancholy that I've missed this opportunity in so many ways, but I will be here for you both however you need me." In June 2011, KG wrote to CH telling her she looked forward to updates about the child and asking CH if she felt like "he's your guy?"

CH proceeded with the adoption process and in August 2011 made plans to bring A. to New York. KG, who was in Hamburg, Germany on business, exchanged her plane ticket to meet CH and A. in London, England and fly back with them to New York. CH filed a petition for adoption in the New York Surrogate's Court; it was completed in January 2012. KG did not second adopt A. nor was that ever discussed by the parties anytime after A. was identified by the adoption agency (see *Matter of Jacob*, 86 NY2d

651 [1995]).

Following his arrival in New York, KG and her extended family had contact with A. CH does not dispute that KG and A. have a loving and affectionate relationship. The nature and extent to which this relationship was parent like is sharply disputed. At some point CH decided that she wanted to move to London with A.[1] It was the convergence of CH's desire to relocate and the Court of Appeals' decision in *Brooke* that precipitated KG's application.

The resolution of whether the parties' agreement remained in effect beyond the termination of the parties' romantic relationship was dependent upon facts from which differing inferences could be drawn. After weighing the evidence, and finding CH's version of the events more credible, the trial court determined that the parties' mutual intention to raise an adopted child together did not survive the end of their romantic relationship. There is more than sufficient evidence in the record supporting the trial court's finding (*see Brown Bros. Elec. Contrs. v. Beam Const. Corp.*, 41 NY2d 397 [1977]), and we find no basis to disturb it (*see Matter of Brown v Rosario*, 272

[1]CH is originally from London and has extended family there.

AD2d 205 [1st Dept 2000]).[2] Contrary to KG's argument, the trial court did not determine that in every case the end of a romantic relationship, as a matter of law, ends any plan to adopt and raise a child together. It only held that under the facts of this case, the parties' preadoption agreement to jointly adopt and raise a child together ended when their romantic relationship ended.

We also reject KG's contention that the trial court was precluded under the doctrine of law of the case from making findings that the parties' agreement was no longer viable at the operative time, just because CH's motion to dismiss at the close of KG's case was denied. A decision on a motion to dismiss, in which the non-movant is given every favorable inference, does not preclude a different factual determination once all the evidence is before the court (*RXR WWP Owner LLC, v WWP Sponsor, LLC*, 145 AD3d 494 [1st Dept 2016]; *Bodtman v Living Manor Love, Inc.*, 105

[2]We reject KG's collateral argument that the trial court improperly considered evidence of events occurring after the adoption in reaching this conclusion. On KG's affirmative case she testified to after adoption events and called witnesses, including family members, who also so testified. This evidence bore upon whether the parties were acting in a manner consistent with their intended plan, providing at least circumstantial evidence that the parties' agreement had not terminated (*see e.g. Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229 [1999]; *Martin v Peyton*, 246 NY 213, 218 [1927]). Once raised by KG, the court was entitled to weigh such evidence in making its decision.

AD3d 434 [1st Dept 2013]).

KG argues that, on the issue of standing, once the existence of the 2007 agreement was established, the trial court should not have inquired further. KG's argument essentially is that if parties at any point in time agree to jointly conceive or adopt and raise children, that agreement is a predicate for standing to seek custody/visitation of any after born and/or adopted child of either party, no matter the circumstances. We do not believe that even the most expansive definition of who is a "parent" supports this sweeping interpretation.

Contrary to KG's argument, the trial court's consideration of whether the preconception/adoption plan was still in place at the operative time is not inconsistent with *Brooke*, because the issue was never raised, nor considered, by the Court in *Brooke*. There was no dispute in *Brooke* that the parties' plan to conceive and raise children together was in place when the children were conceived.

The trial court's inquiry is consistent with the salutary goal of *Brooke*. It serves the ameliorative purpose of allowing a nonbiological, nonadoptive parent a means of achieving standing, while also heeding *Brooke's* requirement that criteria to determine parenthood must also take into account the rights of the biological and adoptive parents. The parties in this case

had a preadoption agreement, but when the agreement terminated, no child had yet been identified for adoption. Consequently, from the time the plan was formulated and going forward up until the time the plan ended, neither partner could be identified as a "parent" under Domestic Relations Law § 70. A. was not offered to CH for adoption until almost 15 months later. This situation is distinguishable from *Brooke*, where the plan was still in effect at the time the children were conceived. KG's position that any agreement made at any time confers standing would result in perpetual standing to seek custody and/or visitation as to any after born and/or adopted children of either party, regardless of whether and for how long before the conception and/or adoption parties went their separate ways. More significantly, it would be regardless of what the parties actually intended. The purpose of *Brooke* is to protect parental relationships in nontraditional families, not to mechanically confer standing at a time when (and for children that) the parties never intended to co-parent.

The requirement that the plan be in effect at the time a child is identified does not add any heightened barrier for same sex families. It applies equally to nonmarried, nonadoptive parents, whether in same sex or heterosexual relationships. Even standing based upon biology requires that an actual child be identified.

Contrary to KG's arguments, this legal analysis does not eviscerate *Brooke*. If the parties have a plan in place when a particular child is identified, then they become parents under Domestic Relations Law §70 at that time, with standing thereafter to seek custody/visitation in the event of a change in the household.

KG alternatively raises arguments on appeal with respect to equitable estoppel. In *Brooke*, the Court of Appeals acknowledged that equitable estoppel could be considered an independent basis to establish standing under Domestic Relations Law §70. The actual issue of standing in *Brooke*, however, was resolved based upon the parties' plan to conceive and jointly raise children. Consequently, other than acknowledging it as a separate theory of standing, *Brooke* never decided any substantive legal issues regarding equitable estoppel. The Court expressly stated that the factors necessary to establish equitable estoppel would have to wait for another day on another record (28 NY3d at 28).

Unlike *Brooke*, in this case the trial court ultimately found, and we agree, that there was no preadoption plan in effect that made KG a parent of A. Consequently, KG was free to try and establish standing under an alternative theory of equitable estoppel. Notwithstanding that each of the parties urges this Court to rule on what substantive factors are necessary to

establish equitable estoppel, we decline to do so because the record developed at trial is incomplete and will not support such a sweeping decision.

KG makes several arguments on appeal concerning equitable estoppel. She argues that based upon the evidence presented, and relying on the factors enunciated, but not ruled upon, by the trial court, this Court should find in her favor on the issue of equitable estoppel. Alternatively, KG argues that the matter should be remanded for a continued hearing on equitable estoppel, because she was prevented from developing a full record. In particular, KG argues that the court repeatedly denied her applications to appoint an attorney for the child and refused to permit her expert witness, a psychologist, to testify. In opposition, CH argues that the trial court's decision should be affirmed because KG failed to prove CH's consent, a necessary element of equitable estoppel.[3]

Although the original petition did not expressly state that

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[3]At oral argument of this appeal CH additionally argued that KG waived any equitable estoppel arguments at trial. Although KG's primary position was that the parties had a preadoption agreement, we do not find any knowing or voluntarily withdrawal of arguments regarding equitable estoppel (*see L.K. Comstock & Co. v New York Convention Ctr. Dev. Corp.*, 179 AD2d 322 [1st Dept 1993]). When the court stated that it would not consider equitable estoppel, KG's attorneys expressed their disagreement with the court's ruling.

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. In September 2016, well before KG closed her case, the issue had not only been raised, but the court posited an nonexhaustive list of factors that needed to be considered on the issue. Although there was also ongoing colloquy about whether KG's bare-boned petition was sufficient to raise an equitable estoppel claim, given the introduction of the issue early on in the proceedings, the parties had sufficient notice and the trial court should have allowed them the opportunity fully develop the issue on the merits.

KG was actually given fairly wide latitude to present relevant evidence on the issue of equitable estoppel. Her evidence included the extent and nature of her relationship with A. once he came to New York. While this evidence was also relevant to whether the parties acted in conformity with an ongoing oral agreement to jointly adopt and raise a child, it is the same evidence that KG relies upon to argue on this appeal that she has established parenthood by equitable estoppel. Other than issues regarding an attorney for the child and disallowance of testimony by the psychologist proffered by her as an expert, KG makes no other arguments on appeal about offered proof that

was disallowed at trial.

At the conclusion of KG's prima facie case, in a written decision dated January 6, 2017, the court denied CH's motion to dismiss the petition, finding that KG had made out a sufficient showing of a plan to jointly adopt and that the hearing on standing should go forward to conclusion. The court did not address the equitable estoppel issue. At a January 24, 2017 court appearance, however, the court expressly stated that it would not be ruling substantively on the equitable estoppel issue because it was not raised in KG's papers; it was not pleaded.[4] KG's attorney objected, but faced with the court's ruling, she sought to preclude CH from presenting evidence opposing equitable estoppel. The court granted KG's application.

KG's request on appeal, that this Court now decide equitable estoppel in her favor on the record as developed at trial, must be denied. At the very least, denial is warranted because CH was foreclosed from putting in evidence opposing this issue. Having truncated CH's ability to present opposing

[4]The court stated in colloquy: "I reviewed the papers and noted that nowhere in your papers did you raise, on behalf of petitioner, the estoppel issue. The evidence having been heard, at the conclusion of your case I ruled on the matter with respect to what you in fact pled, a plan to adopt and raise a child together. We'll limit ourselves to that factor alone from this point forward; all understand?"

evidence on the issue of equitable estoppel at the trial level, KG cannot, on appeal, obtain a judgment in her favor on the merits. The matter cannot be decided without CH having the opportunity to be heard and on an otherwise patently incomplete record (*see Public Serv. Mut. Ins. Co. v Fireman's Fund Amer. Ins. Cos.*, 71 AD2d 353, 354 [1st Dept 1979]).

The record is incomplete in other respects as well, precluding this Court from reaching the merits of the parties' respective substantive claims on the issue of equitable estoppel on this appeal. KG validly argues that any case involving parenthood by equitable estoppel should provide a viable means by which the child's voice is heard.[5] From the outset of the

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[5]In New York State, even the youngest of children is entitled to have his or her point of view heard in cases involving custody and/or visitation. Pursuant to The Rules of the Chief Judge (22 NYCRR) § 7.2[d]), an attorney for the child must zealously advocate a child's position where the child is capable of knowing, voluntary and considered judgment. If the attorney for the child is convinced that the child lacks capacity for knowing, voluntary and considered judgment, the attorney for the child may advocate a position that is contrary to the child's wishes (*Venecia V. v August V.*, 113 AD3d 122, 127-128 [1st Dept 2013]). The age of a child may inform the attorney for the child's conclusion regarding the child's capacity and the attorney for the child's duty to exercise substituted judgment (*Audreanna VV. v Nancy WW.*, 158 AD3d 1007 [3d Dept 2018] [attorney for the child properly exercised substituted judgment given children' ages, disabilities and the grandmother's hostility to the mother]; *Matter of Hassina S. v Nadia S.* 59 Misc 3d 1202[A], 2018 NY Slip Op 50350[u] [Family Ct, Monroe County 2018] [attorney for the child properly substituted judgment for a two year old]). Thus, even a child as young as A. at the time of

proceeding, the trial court denied repeated requests by KG's attorney for the appointment of an attorney for the child, a forensic evaluation and/or a *Lincoln* hearing. Thus, the record is devoid of any means by which A.'s interest in the parties' dispute is voiced to the court.[6]

Although prior to *Brooke* the doctrine of equitable estoppel was not available to establish standing on behalf of nonbiological, nonadoptive parents, it has been relied upon by New York courts in resolving many family disputes involving children. For instance, the legal doctrine has been applied to prevent an adult from denying paternity where a child has justifiably relied upon the representations of a man that he is the father and a parent-child relationship has developed (*Matter of Shondel J. v Mark D*, 7 NY3d 320, 326 [2006]). It has been applied to prevent a mother from challenging her husband's paternity (*Matter of Sharon GG. v Duane HH.*, 63 NY2d 859 [1984],

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the hearing, should have had his interests expressed to the court, separate and apart from those of the adult parties to the proceeding.

[6]Before KG closed her case her attorneys asked to recall KG to the stand to testify about conversations she had with A. The court expressed skepticism about the admissibility of such statements because they were hearsay. Nonetheless the court ruled that KG could be recalled and that it would rule on the objections question by question. KG, however, decided not to retake the stand.

affg 95 AD2d 466 [3d Dept 1983]). It has also been applied to prevent a biological father from asserting paternity when he has acquiesced in the establishment of a strong parent-child bond between the child and another man (*Matter of Cecil R. v Rachel A.*, 102 AD3d 545, 546 [1st Dept 2013]). Recently, it was successfully invoked to prevent a sperm donor from asserting paternity to a child born in an intact marriage (*Matter of Joseph O. v Danielle B.*, 158 AD3d 767 [2d Dept 2018]). A unifying characteristic of these cases is the protection of "'the status interests of a child in an already recognized and operative parent-child relationship'" (*Shondel*, 7 NY3d at 327, quoting *Matter of Baby Boy C.*, 84 NY2d 91, 102n [1994]). 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 (*see Shondel at* 326; *see also* Family Court Act § 418). Likewise, 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.[7]

Although the appointment of an attorney for the child is discretionary *(Quinones v Quinones,* 139 AD3d 1072, 1074 [2d Dept 2016]; *Matter of Ames v Ames*, 97 AD3d 914, 916 [3d Dept 2012], *lv denied* 20 NY3d 852 [2012]), 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 (*see Shondel J.,* 7 NY3d at 326; *Matter of Augustine A. v Samantha R.S.*, 138 AD3d 458 [1st Dept 2016]); *Matter of Darlene L.-B. v Claudio B.*, 27 AD3d 564 [2d Dept 2006]). 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 is totally silent in this record.

We reject, however, KG's argument that the trial court improperly refused to allow a psychologist retained by her to testify about the general effects of separating a child from someone the child loves. The psychologist, who had never met A.,

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[7]We recognize that the nature of equitable estoppel in some circumstances may require substituted judgment because the petitioning adult may be a stranger to the child. Nonetheless, facts about who the child regards as his or her parent my be elicited from the child his or herself.

could offer no relevant information about the child's relationship with KG or other relevant opinions on the issue of equitable estoppel.

In view of our conclusion that the record is incomplete, we do not reach CH's argument that because CH did not consent to holding KG out as a parent, KG cannot prove equitable estoppel. While some courts in other jurisdictions consider consent of the biological/adoptive parent an outcome determinative factor in equitable estoppel cases *(see e.g. Pitts v Moore*, 90 A3d 1169, 1179 [Me Sup Jud Ct 2014]; *Matter of Parentage of LB*, 155 Wash 2d 679, 708, 122 P3d 161, 176 [2005], *cert denied* 516 US 975 [1995]; *In re Custody of H.S.H.-K.*, 193 Wis 2d 649, 694-695, 533 NW2d 419, 435-436 [1995], *cert denied* 516 US 975 1995]), New York has not yet formulated any dispositive test. Judge Kaye, in her dissent in *Alison D.*, generally posited that the test for someone claiming standing on the basis of loco parentis should require that the relationship with the child came into being with the consent of the biological or legal parent (77 NY2d at 661-662). Notwithstanding that Judge Kaye favored consent as a factor in determining issues of de facto parenthood, she also would have remanded the matter to the trial court to devise an actual test. *Brooke*, although liberally citing Judge Kaye's dissent, did not reach this issue all.

We recognize that not every loving relationship that a child has with an adult will confer standing under Domestic Relations Law § 70, no matter how close or committed. It requires a relationship that demonstrates the relevant adult's permanent, unequivocal, committed and responsible parental role in the child's life. The underpinning of an equitable estoppel inquiry is whether the actual relationship between the child and relevant adult rises to the level of parenthood. Anything less would interfere with the biological or adoptive parent's right to decide with whom his or her child may associate (*Troxel v Granville*, 530 US 57 [2000]; *Brooke* at 26 [recognizing that any expansion of the definition of parent must be appropriately narrow to account for the fundamental liberty rights of biological and adoptive parents]). Consent, whether express or implied, is an important consideration that bears upon the issue. It may be that in this case the issue of CH's consent becomes a predominant consideration in the ultimate determination of whether equitable estoppel can be established. We only hold that the record developed at trial does not permit us to make the full consideration necessary to finally determine the issue of equitable estoppel at this point.

Because the record on equitable estoppel is incomplete, we remand this matter for further proceedings consistent with this

decision. We find no basis for KG's further request that the matter be reassigned to a different judge.

On the cross appeal we find that the Supreme Court providently exercised its discretion in denying sanctions against KG in the form of CH's legal fee (*Matter of Alissa E. v Michael M.*, 154 AD3d 526 [1st Dept 2017]). Although the Supreme Court ultimately decided disputed factual matters in CH's favor, it does not mean that KG's assertions of material factual statements at trial were false (22 NYCRR 130.1-1).

Accordingly the order and judgment (one paper) of the Supreme Court, New York County (Frank P. Nervo, J.), entered April 13, 2017, which, after a trial, denied the petition for joint custody of the parties' child and dismissed the proceeding for lack of standing, and denied respondent's motion to the extent it sought costs and sanctions under 22 NYCRR 130-1.1, should be modified, on the law and the facts, and the

matter remanded for further proceedings consistent herewith, and otherwise affirmed, without costs.

M-5695 - *In re K.G. v C.H.*

Motion for leave to file amicus curiae brief granted, and the brief deemed filed.

All concur.

Order and judgment (one paper), Supreme Court, New York County (Frank P. Nervo, J.), entered April 13, 2017, modified, on the law and the facts, and the matter remanded for further proceedings consistent herewith, and otherwise affirmed, without costs.

Opinion by Gische, J. All concur.

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Judith J. Gische
Jeffrey K. Oing
Anil C. Singh, JJ.

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In re K.G.,
Petitioner-Appellant-Respondent,

-against-

C.H.,
Respondent-Respondent-Appellant.

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The Lesbian and Gay Law Association Foundation of Greater New York,
Amicus Curiae.

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Petitioner appeals from an order and judgment (one paper) of the Supreme Court, New York County (Frank P. Nervo, J.), entered April 13, 2017, which, after a trial, denied the petition for joint custody of the parties' child and dismissed the proceeding for lack of standing, and denied respondent's motion to the extent it sought costs and sanctions under 22 NYCRR 130-1.1.

Kaplan & Company LLP, New York (Roberta A. Kaplan and John C. Quinn of counsel), Morrison Cohen LLP, New York (Danielle C. Lesser and Andrew P. Merten of counsel), and Chemtob Moss & Forman, LLP, New York (Nancy Chemtob and Jeremy J. Bethel of counsel), for appellant-respondent.

Cohen Rabin Stine Schumann LLP, New York (Bonnie E. Rabin, Gretchen Beall Schumann, Tim James and Lindsay Pfeffer of counsel), for respondent-appellant.

Latham & Watkins LLP, New York (Virginia F. Tent, Matthew J. Pickel, Iris H. Xie and Naseem Faqihi Alawadhi of counsel), for amicus curiae.

GISCHE J.

In this action, petitioner (KG) claims that she is a parent with standing to seek custody of and visitation with A., the adopted child of respondent (CH), her now ex-partner. KG is not biologically related to A., who was born in Ethiopia, nor did she second adopt the child. KG's claim of parental standing is predicated upon the recent landmark Court of Appeals decision in *Matter of Brooke S.B. v Elizabeth A.C.C.* (28 NY3d 1 [2016]), which expansively defines who is a "parent" under Domestic Relations Law § 70. On appeal, KG primarily claims 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 does not deny that the parties had an agreement in 2007, but claims 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. KG alternatively claims on appeal that based upon the relationship between her and A., which developed after he came to New York, this Court should find she has standing as a parent under principles of equitable estoppel. As a further alternative, KG claims that the matter should be remanded because the trial court improperly truncated the record on equitable estoppel.

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 court did not substantively address any issue of equitable estoppel. Mid-trial, after KG's case closed, the court ruled that it was only considering KG's claims of standing based upon whether the parties had a viable plan to adopt and raise a child together.

All of the legal issues raised on this appeal have *Brooke* as their underpinning. In *Brooke,* decided only days before this proceeding was commenced, the Court of Appeals, is an opinion written by Judge Sheila Abdus-Salaam, overruled *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) and abrogated *Debra H. v Janice R.* (14 NY3d 576 [2010], *cert denied* 562 US 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. Although pursuant to Domestic Relations Law § 70(a), "either parent" may petition the court for custody of a child, the statute does not define that term. In *Alison D.*, decided before *Brooke*, the Court of Appeals, over a prescient dissent by Chief Judge Judith Kaye, declined to

construe the term parent to include nonbiological, nonadoptive parents. The effect of these earlier precedents was that only biological or adoptive parents had standing to seek custody and visitation. In deciding *Brooke*, the Court recognized that its narrow interpretation of "parent" under *Alison D.* had produced inequitable results, especially for children being raised by same sex couples. In departing from its earlier precedents, the Court of Appeals expansively defined Domestic Relations Law §70 in *Brooke*, permitting nonbiological, nonadoptive parents to achieve standing to petition for custody and visitation (*Brooke* at 26-27). The decision was celebrated for its ground breaking recognition of the rights of members of nontraditional families (*e.g.* Alan Feur, *New York Court Expands Definition of Parenthood*, NY Times, August 31, 2016 at A17).

Closely hewing to the reasoning of Judge Kaye's dissent in *Alison D.*, the *Brooke* Court recognized that parenthood was broader than biology or adoption, but it also held that the criteria to determine parenthood must be appropriately narrow to take into account the fundamental rights to which biological and adoptive parents are "undeniably entitled" (*id.* at 27). In this regard, the Court placed the burden of proving standing, by clear and convincing evidence, on the party seeking it (*id.* at 28). The Court also recognized that in order to prove standing under

Domestic Relations Law § 70, more than just a loving relationship with the child was warranted (*id* at 26-28).

Notwithstanding the stated limitations, the *Brooke* 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 fact, 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" (*id.* at 27-28). In

Estrellita, however, the Court resolved the question of standing differently, applying the doctrine of judicial estoppel (*id.* at 29). 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 calls by the amici and the parties 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:

> "Inasmuch as the conception test applies here, 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. We simply conclude 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. Whether a partner without such an agreement can establish standing and, if so, what factors a petitioner must establish to achieve standing based on equitable estoppel are matters left for another day, upon a different record" (*id*. at 28).

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 (see *Matter of Gardiner*, 69 NY2d 66, 73 [1986] [addressing New York State's long-standing, unbroken and fundamental public policy to treat adoptive and biological children equally in family settings]).

KG contends that the 2007 agreement satisfies the conception/adoption test enunciated in *Brooke*. She argues that the trial court was factually mistaken in holding that the 2007 plan "abated" when the parties romantic relationship ended. KG

also argues that the court should never have looked at whether the 2007 plan terminated, because once the parties made their plan, legal standing was conferred on her to seek custody of or visitation with any child that CH later conceived or adopted. We do not find these arguments persuasive. As more fully discussed, there is 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*.

At trial, the parties stipulated that in 2007 they had an agreement to internationally adopt and raise a child together. Their plan envisioned that after CH completed an international adoption, and a child was brought to the United States, KG would second adopt that child, thereby becoming a legal parent as well. It is also undisputed that the parties' romantic relationship ended in December 2009, well before any particular child was identified by the international agency and offered to CH for adoption. The parties sharply dispute whether their agreement to jointly adopt survived the dissolution of their romantic

relationship. CH contends that KG broke up with her because KG had misgivings about becoming a mother and no longer wanted to bring a child into their relationship. CH argues that the parties' conduct at the time of their breakup vitiated the 2007 pre-adoption agreement. KG contends that she remained committed to the adoption plan and continued her cooperation with it beyond the end of their romantic relationship.

While there were conflicting facts presented at trial, those conflicts were resolved by the trial court in favor of CH's position. Facts supporting the conclusion that by the time A. was identified and adopted by CH the parties no longer had a viable agreement to adopt and raise a child together include at least the following: The parties began a romantic relationship in 2004. At some point they began talking about adopting a child. In 2007 the parties jointly purchased an apartment on Sullivan Street. A cohabitation agreement, dated May 18, 2007, set forth the partes' respective rights in the apartment, which they refer to as the "familial residence." The parties agree that the cohabitation agreement was made in contemplation of, and as a foundation for, their plan to adopt and raise a child together, even though the agreement makes no reference to their planned adoption.

The parties thereafter took affirmative steps to effectuate

their plan. By February 2009, the parties initiated their application for an international adoption. Only CH was listed on the application as the prospective adoptive parent; KG was identified as a household member. They agree that this was solely done to avoid the prevalent restrictions on same-sex international adoptions. Both parties participated in a preadoption home study, they were fingerprinted, and they provided extensive information about their finances.

Later in 2009, beginning in the fall and into the next winter, the parties' romantic relationship devolved. They frequently argued and made separate travel plans. Much of the unraveling of their relationship is described in email exchanges, which included content concerning whether to go forward with an adoption at that time. In one exchange KG expresses confusion about the relationship and CH responds that she is "sad" to be involved with someone who is unsure about their future together and "about building a second generation." CH also tells KG they have "lots to discuss" because she is now qualified as an adoptive parent under two programs. CH asks KG whether "we should just put the idea on hold completely until you feel good about it. Or just tank the idea completely," adding that they have to give an answer "ASAP." CH assures KG in the same email that they can "roll our relationship anyway" even though "[it]

isn't perfect 100%," but in response, it is KG who expresses co-parenting might be a disservice to "a kid." KG tells CH that they will talk about "everything" on Saturday (December 12, 2009). That Saturday, KG broke up with CH, disclosing a rekindled relationship with an ex-girlfriend. Following the breakup, CH and KG continued to live together at the Sullivan Street apartment, but CH moved into the guest bedroom.

Throughout 2010, the parties began an extended process of emotionally and financially disentangling their relationship. Some of their email exchanges during this period document the shift in their relationship from romantic to friendship. The emails also capture KG's disconnection from the original plan to co-adopt and raise a child. KG's communications demonstrate her understanding that CH was now pursuing the plan to adopt and raise a child alone. For instance, in a January 2010 email sent by KG to CH, she suggests that "[y]ou could get urself (sic) a Haitian orphan." In an extended email exchange between the parties taking place over the course of two days in February 2010, KG expresses remorse about their breakup and writes to CH that she had "envisioned what it would be like for you and the kid to be here, whizzing about London together, all the dreams we've had for our future together. It makes me cry to even just write this and think I've put it all in jeopardy." CH responds

that "[w]e're evolving into something else at the moment and that's brave not many couples do that."

In March 2010, CH notified KG that she had spoken to "my" case worker who had suggested that "I find another country to apply to other than Nepal" and CH says "my choice now is to take my $2,000 Nepal fee and second apply to another country" and that "at this point there have been no referrals for adoptive families who applied in 2009 with my agency . . . ."

In an email dated April 21, 2010, KG wrote to CH and suggested that "[s]ince you are the one getting a kid, would u consider staying at 181 [Sullivan Street] and have me move out? It's only me and I don't need much space" adding in a subsequent email that her needs were not as great as CH's because "you're bringing a kid into the world."

In May 2010, the parties, with the assistance of their attorneys, negotiated a separation agreement. In the separation agreement, dated May 28, 2010, the parties formally terminated their cohabitation agreement and memorialized the end of their romantic relationship. The separation agreement, among other things, provided for CH to move out of the Sullivan Street and Fire Island properties. Upon CH's execution of transfer deeds, KG would pay CH the sum of $350,000. The separation agreement made no reference, direct or oblique, to CH's adoption

application. Although KG contends that the money she paid to CH was to provide her with the means to support a yet to be identified child for adoption, the separation agreement itself contains no such reference.

The parties remained in touch after the execution of the separation agreement. KG's communications continued to demonstrate that she did not consider herself a part of any ongoing plan to pursue an adoption and raise a child with CH. In a December 5, 2010 email to CH, KG, then in Bogota, Colombia, writes that "you could get a kid here so easy, they actually have ads in the paper and they're beautiful. kind of sad, but . . . ." In another December 2010 email, KG tells CH that "the reality of our relationship ending" and that there is so much "I don't even know about you anymore" has set in and that her feelings "about the baby, and how left out of that process I felt, continue to surface as the day draws near on something we started together over three years ago." KG expresses regrets about "our beautiful life now shattered." In a January 2011 email, KG again expresses sadness that she's "lost everything" including "the baby that will never be, the life that will never be."

In March 2011 the adoption agency identified and offered A., a 15 months old orphan in Ethiopia, as a "match" for adoption by CH. After CH sent a photo of A. to KG, KG sent two emails. In

the first, KG writes that "I'm sure this is a big day for you. He's perfect" and in the second one, less than two hours later KG wrote:

> "I can't stop looking at him. I am doing my best to temper my own emotional reaction to this and want you to know I am so proud of you for following your dream. You made this happen. He was supposed to be our son. I'm not sure I will ever get over my regret and sorrow over that. But I will be very very happy for you and for him, and hope to find a way to be in your lives."

In a May 18, 2011 email, KG wrote to CH telling her "I am so happy for you. I want you to know I will be here to support you through this . . . emotionally, financially, etc. . . . I am so melancholy that I've missed this opportunity in so many ways, but I will be here for you both however you need me." In June 2011, KG wrote to CH telling her she looked forward to updates about the child and asking CH if she felt like "he's your guy?"

CH proceeded with the adoption process and in August 2011 made plans to bring A. to New York. KG, who was in Hamburg, Germany on business, exchanged her plane ticket to meet CH and A. in London, England and fly back with them to New York. CH filed a petition for adoption in the New York Surrogate's Court; it was completed in January 2012. KG did not second adopt A. nor was that ever discussed by the parties anytime after A. was identified by the adoption agency (see *Matter of Jacob*, 86 NY2d

651 [1995]).

Following his arrival in New York, KG and her extended family had contact with A. CH does not dispute that KG and A. have a loving and affectionate relationship. The nature and extent to which this relationship was parent like is sharply disputed. At some point CH decided that she wanted to move to London with A.[1] It was the convergence of CH's desire to relocate and the Court of Appeals' decision in *Brooke* that precipitated KG's application.

The resolution of whether the parties' agreement remained in effect beyond the termination of the parties' romantic relationship was dependent upon facts from which differing inferences could be drawn. After weighing the evidence, and finding CH's version of the events more credible, the trial court determined that the parties' mutual intention to raise an adopted child together did not survive the end of their romantic relationship. There is more than sufficient evidence in the record supporting the trial court's finding (*see Brown Bros. Elec. Contrs. v. Beam Const. Corp.*, 41 NY2d 397 [1977]), and we find no basis to disturb it (*see Matter of Brown v Rosario*, 272

[1]CH is originally from London and has extended family there.

AD2d 205 [1st Dept 2000]).[2] Contrary to KG's argument, the trial court did not determine that in every case the end of a romantic relationship, as a matter of law, ends any plan to adopt and raise a child together. It only held that under the facts of this case, the parties' preadoption agreement to jointly adopt and raise a child together ended when their romantic relationship ended.

We also reject KG's contention that the trial court was precluded under the doctrine of law of the case from making findings that the parties' agreement was no longer viable at the operative time, just because CH's motion to dismiss at the close of KG's case was denied. A decision on a motion to dismiss, in which the non-movant is given every favorable inference, does not preclude a different factual determination once all the evidence is before the court (*RXR WWP Owner LLC, v WWP Sponsor, LLC*, 145 AD3d 494 [1st Dept 2016]; *Bodtman v Living Manor Love, Inc.*, 105

[2]We reject KG's collateral argument that the trial court improperly considered evidence of events occurring after the adoption in reaching this conclusion. On KG's affirmative case she testified to after adoption events and called witnesses, including family members, who also so testified. This evidence bore upon whether the parties were acting in a manner consistent with their intended plan, providing at least circumstantial evidence that the parties' agreement had not terminated (*see e.g. Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229 [1999]; *Martin v Peyton*, 246 NY 213, 218 [1927]). Once raised by KG, the court was entitled to weigh such evidence in making its decision.

AD3d 434 [1st Dept 2013]).

KG argues that, on the issue of standing, once the existence of the 2007 agreement was established, the trial court should not have inquired further. KG's argument essentially is that if parties at any point in time agree to jointly conceive or adopt and raise children, that agreement is a predicate for standing to seek custody/visitation of any after born and/or adopted child of either party, no matter the circumstances. We do not believe that even the most expansive definition of who is a "parent" supports this sweeping interpretation.

Contrary to KG's argument, the trial court's consideration of whether the preconception/adoption plan was still in place at the operative time is not inconsistent with *Brooke*, because the issue was never raised, nor considered, by the Court in *Brooke*. There was no dispute in *Brooke* that the parties' plan to conceive and raise children together was in place when the children were conceived.

The trial court's inquiry is consistent with the salutary goal of *Brooke*. It serves the ameliorative purpose of allowing a nonbiological, nonadoptive parent a means of achieving standing, while also heeding *Brooke's* requirement that criteria to determine parenthood must also take into account the rights of the biological and adoptive parents. The parties in this case

had a preadoption agreement, but when the agreement terminated, no child had yet been identified for adoption. Consequently, from the time the plan was formulated and going forward up until the time the plan ended, neither partner could be identified as a "parent" under Domestic Relations Law § 70. A. was not offered to CH for adoption until almost 15 months later. This situation is distinguishable from *Brooke*, where the plan was still in effect at the time the children were conceived. KG's position that any agreement made at any time confers standing would result in perpetual standing to seek custody and/or visitation as to any after born and/or adopted children of either party, regardless of whether and for how long before the conception and/or adoption parties went their separate ways. More significantly, it would be regardless of what the parties actually intended. The purpose of *Brooke* is to protect parental relationships in nontraditional families, not to mechanically confer standing at a time when (and for children that) the parties never intended to co-parent.

The requirement that the plan be in effect at the time a child is identified does not add any heightened barrier for same sex families. It applies equally to nonmarried, nonadoptive parents, whether in same sex or heterosexual relationships. Even standing based upon biology requires that an actual child be identified.

Contrary to KG's arguments, this legal analysis does not eviscerate *Brooke*. If the parties have a plan in place when a particular child is identified, then they become parents under Domestic Relations Law §70 at that time, with standing thereafter to seek custody/visitation in the event of a change in the household.

KG alternatively raises arguments on appeal with respect to equitable estoppel. In *Brooke*, the Court of Appeals acknowledged that equitable estoppel could be considered an independent basis to establish standing under Domestic Relations Law §70. The actual issue of standing in *Brooke*, however, was resolved based upon the parties' plan to conceive and jointly raise children. Consequently, other than acknowledging it as a separate theory of standing, *Brooke* never decided any substantive legal issues regarding equitable estoppel. The Court expressly stated that the factors necessary to establish equitable estoppel would have to wait for another day on another record (28 NY3d at 28).

Unlike *Brooke*, in this case the trial court ultimately found, and we agree, that there was no preadoption plan in effect that made KG a parent of A. Consequently, KG was free to try and establish standing under an alternative theory of equitable estoppel. Notwithstanding that each of the parties urges this Court to rule on what substantive factors are necessary to

establish equitable estoppel, we decline to do so because the record developed at trial is incomplete and will not support such a sweeping decision.

KG makes several arguments on appeal concerning equitable estoppel. She argues that based upon the evidence presented, and relying on the factors enunciated, but not ruled upon, by the trial court, this Court should find in her favor on the issue of equitable estoppel. Alternatively, KG argues that the matter should be remanded for a continued hearing on equitable estoppel, because she was prevented from developing a full record. In particular, KG argues that the court repeatedly denied her applications to appoint an attorney for the child and refused to permit her expert witness, a psychologist, to testify. In opposition, CH argues that the trial court's decision should be affirmed because KG failed to prove CH's consent, a necessary element of equitable estoppel.[3]

Although the original petition did not expressly state that

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[3]At oral argument of this appeal CH additionally argued that KG waived any equitable estoppel arguments at trial. Although KG's primary position was that the parties had a preadoption agreement, we do not find any knowing or voluntarily withdrawal of arguments regarding equitable estoppel (*see L.K. Comstock & Co. v New York Convention Ctr. Dev. Corp.*, 179 AD2d 322 [1st Dept 1993]). When the court stated that it would not consider equitable estoppel, KG's attorneys expressed their disagreement with the court's ruling.

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. In September 2016, well before KG closed her case, the issue had not only been raised, but the court posited an nonexhaustive list of factors that needed to be considered on the issue. Although there was also ongoing colloquy about whether KG's bare-boned petition was sufficient to raise an equitable estoppel claim, given the introduction of the issue early on in the proceedings, the parties had sufficient notice and the trial court should have allowed them the opportunity fully develop the issue on the merits.

KG was actually given fairly wide latitude to present relevant evidence on the issue of equitable estoppel. Her evidence included the extent and nature of her relationship with A. once he came to New York. While this evidence was also relevant to whether the parties acted in conformity with an ongoing oral agreement to jointly adopt and raise a child, it is the same evidence that KG relies upon to argue on this appeal that she has established parenthood by equitable estoppel. Other than issues regarding an attorney for the child and disallowance of testimony by the psychologist proffered by her as an expert, KG makes no other arguments on appeal about offered proof that

was disallowed at trial.

At the conclusion of KG's prima facie case, in a written decision dated January 6, 2017, the court denied CH's motion to dismiss the petition, finding that KG had made out a sufficient showing of a plan to jointly adopt and that the hearing on standing should go forward to conclusion. The court did not address the equitable estoppel issue. At a January 24, 2017 court appearance, however, the court expressly stated that it would not be ruling substantively on the equitable estoppel issue because it was not raised in KG's papers; it was not pleaded.[4] KG's attorney objected, but faced with the court's ruling, she sought to preclude CH from presenting evidence opposing equitable estoppel. The court granted KG's application.

KG's request on appeal, that this Court now decide equitable estoppel in her favor on the record as developed at trial, must be denied. At the very least, denial is warranted because CH was foreclosed from putting in evidence opposing this issue. Having truncated CH's ability to present opposing

[4]The court stated in colloquy: "I reviewed the papers and noted that nowhere in your papers did you raise, on behalf of petitioner, the estoppel issue. The evidence having been heard, at the conclusion of your case I ruled on the matter with respect to what you in fact pled, a plan to adopt and raise a child together. We'll limit ourselves to that factor alone from this point forward; all understand?"

evidence on the issue of equitable estoppel at the trial level, KG cannot, on appeal, obtain a judgment in her favor on the merits. The matter cannot be decided without CH having the opportunity to be heard and on an otherwise patently incomplete record (*see Public Serv. Mut. Ins. Co. v Fireman's Fund Amer. Ins. Cos.*, 71 AD2d 353, 354 [1st Dept 1979]).

The record is incomplete in other respects as well, precluding this Court from reaching the merits of the parties' respective substantive claims on the issue of equitable estoppel on this appeal. KG validly argues that any case involving parenthood by equitable estoppel should provide a viable means by which the child's voice is heard.[5] From the outset of the

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[5]In New York State, even the youngest of children is entitled to have his or her point of view heard in cases involving custody and/or visitation. Pursuant to The Rules of the Chief Judge (22 NYCRR) § 7.2[d]), an attorney for the child must zealously advocate a child's position where the child is capable of knowing, voluntary and considered judgment. If the attorney for the child is convinced that the child lacks capacity for knowing, voluntary and considered judgment, the attorney for the child may advocate a position that is contrary to the child's wishes (*Venecia V. v August V.*, 113 AD3d 122, 127-128 [1st Dept 2013]). The age of a child may inform the attorney for the child's conclusion regarding the child's capacity and the attorney for the child's duty to exercise substituted judgment (*Audreanna VV. v Nancy WW.*, 158 AD3d 1007 [3d Dept 2018] [attorney for the child properly exercised substituted judgment given children' ages, disabilities and the grandmother's hostility to the mother]; *Matter of Hassina S. v Nadia S.* 59 Misc 3d 1202[A], 2018 NY Slip Op 50350[u] [Family Ct, Monroe County 2018] [attorney for the child properly substituted judgment for a two year old]). Thus, even a child as young as A. at the time of

proceeding, the trial court denied repeated requests by KG's attorney for the appointment of an attorney for the child, a forensic evaluation and/or a *Lincoln* hearing. Thus, the record is devoid of any means by which A.'s interest in the parties' dispute is voiced to the court.[6]

Although prior to *Brooke* the doctrine of equitable estoppel was not available to establish standing on behalf of nonbiological, nonadoptive parents, it has been relied upon by New York courts in resolving many family disputes involving children. For instance, the legal doctrine has been applied to prevent an adult from denying paternity where a child has justifiably relied upon the representations of a man that he is the father and a parent-child relationship has developed (*Matter of Shondel J. v Mark D*, 7 NY3d 320, 326 [2006]). It has been applied to prevent a mother from challenging her husband's paternity (*Matter of Sharon GG. v Duane HH.*, 63 NY2d 859 [1984],

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the hearing, should have had his interests expressed to the court, separate and apart from those of the adult parties to the proceeding.

[6]Before KG closed her case her attorneys asked to recall KG to the stand to testify about conversations she had with A. The court expressed skepticism about the admissibility of such statements because they were hearsay. Nonetheless the court ruled that KG could be recalled and that it would rule on the objections question by question. KG, however, decided not to retake the stand.

affg 95 AD2d 466 [3d Dept 1983]). It has also been applied to prevent a biological father from asserting paternity when he has acquiesced in the establishment of a strong parent-child bond between the child and another man (*Matter of Cecil R. v Rachel A.*, 102 AD3d 545, 546 [1st Dept 2013]). Recently, it was successfully invoked to prevent a sperm donor from asserting paternity to a child born in an intact marriage (*Matter of Joseph O. v Danielle B.*, 158 AD3d 767 [2d Dept 2018]). A unifying characteristic of these cases is the protection of "'the status interests of a child in an already recognized and operative parent-child relationship'" (*Shondel*, 7 NY3d at 327, quoting *Matter of Baby Boy C.*, 84 NY2d 91, 102n [1994]). 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 (*see Shondel at* 326; *see also* Family Court Act § 418). Likewise, 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.[7]

Although the appointment of an attorney for the child is discretionary *(Quinones v Quinones,* 139 AD3d 1072, 1074 [2d Dept 2016]; *Matter of Ames v Ames*, 97 AD3d 914, 916 [3d Dept 2012], *lv denied* 20 NY3d 852 [2012]), 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 (*see Shondel J.,* 7 NY3d at 326; *Matter of Augustine A. v Samantha R.S.*, 138 AD3d 458 [1st Dept 2016]); *Matter of Darlene L.-B. v Claudio B.*, 27 AD3d 564 [2d Dept 2006]). 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 is totally silent in this record.

We reject, however, KG's argument that the trial court improperly refused to allow a psychologist retained by her to testify about the general effects of separating a child from someone the child loves. The psychologist, who had never met A.,

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[7]We recognize that the nature of equitable estoppel in some circumstances may require substituted judgment because the petitioning adult may be a stranger to the child. Nonetheless, facts about who the child regards as his or her parent my be elicited from the child his or herself.

could offer no relevant information about the child's relationship with KG or other relevant opinions on the issue of equitable estoppel.

In view of our conclusion that the record is incomplete, we do not reach CH's argument that because CH did not consent to holding KG out as a parent, KG cannot prove equitable estoppel. While some courts in other jurisdictions consider consent of the biological/adoptive parent an outcome determinative factor in equitable estoppel cases *(see e.g. Pitts v Moore*, 90 A3d 1169, 1179 [Me Sup Jud Ct 2014]; *Matter of Parentage of LB*, 155 Wash 2d 679, 708, 122 P3d 161, 176 [2005], *cert denied* 516 US 975 [1995]; *In re Custody of H.S.H.-K.*, 193 Wis 2d 649, 694-695, 533 NW2d 419, 435-436 [1995], *cert denied* 516 US 975 1995]), New York has not yet formulated any dispositive test. Judge Kaye, in her dissent in *Alison D.*, generally posited that the test for someone claiming standing on the basis of loco parentis should require that the relationship with the child came into being with the consent of the biological or legal parent (77 NY2d at 661-662). Notwithstanding that Judge Kaye favored consent as a factor in determining issues of de facto parenthood, she also would have remanded the matter to the trial court to devise an actual test. *Brooke*, although liberally citing Judge Kaye's dissent, did not reach this issue all.

We recognize that not every loving relationship that a child has with an adult will confer standing under Domestic Relations Law § 70, no matter how close or committed. It requires a relationship that demonstrates the relevant adult's permanent, unequivocal, committed and responsible parental role in the child's life. The underpinning of an equitable estoppel inquiry is whether the actual relationship between the child and relevant adult rises to the level of parenthood. Anything less would interfere with the biological or adoptive parent's right to decide with whom his or her child may associate (*Troxel v Granville*, 530 US 57 [2000]; *Brooke* at 26 [recognizing that any expansion of the definition of parent must be appropriately narrow to account for the fundamental liberty rights of biological and adoptive parents]). Consent, whether express or implied, is an important consideration that bears upon the issue. It may be that in this case the issue of CH's consent becomes a predominant consideration in the ultimate determination of whether equitable estoppel can be established. We only hold that the record developed at trial does not permit us to make the full consideration necessary to finally determine the issue of equitable estoppel at this point.

Because the record on equitable estoppel is incomplete, we remand this matter for further proceedings consistent with this

decision. We find no basis for KG's further request that the matter be reassigned to a different judge.

On the cross appeal we find that the Supreme Court providently exercised its discretion in denying sanctions against KG in the form of CH's legal fee (*Matter of Alissa E. v Michael M.*, 154 AD3d 526 [1st Dept 2017]). Although the Supreme Court ultimately decided disputed factual matters in CH's favor, it does not mean that KG's assertions of material factual statements at trial were false (22 NYCRR 130.1-1).

Accordingly the order and judgment (one paper) of the Supreme Court, New York County (Frank P. Nervo, J.), entered April 13, 2017, which, after a trial, denied the petition for joint custody of the parties' child and dismissed the proceeding for lack of standing, and denied respondent's motion to the extent it sought costs and sanctions under 22 NYCRR 130-1.1, should be modified, on the law and the facts, and the

matter remanded for further proceedings consistent herewith, and otherwise affirmed, without costs.

M-5695 - *In re K.G. v C.H.*

Motion for leave to file amicus curiae brief granted, and the brief deemed filed.

All concur.

Order and judgment (one paper), Supreme Court, New York County (Frank P. Nervo, J.), entered April 13, 2017, modified, on the law and the facts, and the matter remanded for further proceedings consistent herewith, and otherwise affirmed, without costs.

Opinion by Gische, J. All concur.

Tom, J.P., Renwick, Gische, Oing, Singh, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 26, 2018

CLERK