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Notes and Comments

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DeMille v. DeMille: The Case of the Missing Rule of Law

As an avid fan of Nelson DeMille's novels, I was particularly attracted to his recent litigation which again raises the question whether the six-year statute of limitations is tolled during marriage so as to permit an action to set aside a pre- or post-nuptial agreement six years after its execution. Alas, the enlightening decision that the bar was anxiously awaiting from the second judicial department in *DeMille v. DeMille*[1] was never written, and we all shall continue to remain in the dark until the Court Of Appeals revisits this issue. Instead we remain relegated to the confusing application of CPLR 203(d).

The answer to this knotty question may depend upon the judicial department where you reside. After two lower and two appellate court decisions, and one by the Court of Appeals[2] in another case, it appears that if DeMille himself had crafted this plot, he could not have done a better job at creating mystery, intrigue and suspense.[3]

Following is the only language contained in the second appellate *DeMille* decision that was just decided:

> The issue of the timeliness of the plaintiff's challenges to the enforceability of the parties' prenuptial agreement, including the ground raised in her motion for leave to renew, was argued and determined on a prior appeal (see *DeMille v DeMille* 5 AD3rd 428 [2004]). Thus, upon renewal, the Supreme Court should not have granted the plaintiff's prior motion for summary judgment dismissing the defendant's second counterclaim to enforce the agreement and should not have set aside the agreement based on such challenges.[4]

The two prior lower court decisions in *DeMille* were written by Justice Falanga in the Nassau County Supreme Court. When they are carefully scrutinized, it is clear that he believed a wrong was perpetrated against Mrs. Demille in the negotiation and execution of the pre-nuptial agreement and that the statute of limitations should not bar her relief. He felt that the proper remedy was to award her summary judgment to set it aside, and not be forced to await her husband's action for divorce before doing so.

It is to be remembered that in *DeMille*,[5] issue was not joined in the lower court when the motions and cross motions were heard, which is a clear statutory violation. The motions should have been dismissed with leave to renew upon joinder. In *DeMille* 2, Justice Falanga believed that the first decision of the appellate division was a nullity because of the joinder problem, but then permitted issue

Inside

Equitable Estoppel and the Nonbiological or Nonadoptive Parent

By Elliott Scheinberg

The latter quarter of the past century observed a major resculpting of the complexion of the traditional family once mirrored by the Ozzie and Harriet Nelson and June and Ward Cleaver households. The contemporary family loom now interweaves untraditional fibers and patterns into its fabric, such as couples unrelated by marriage, whether gay or heterosexual, where: (1) a party joins a single parent household, or (2) during the course of an existing relationship one party alone either adopts or gives birth by way of artificial insemination from a third-party sperm donor. In each instance, a loving bond is galvanized between the legally unrelated party, "the legal stranger," and the child, where the child considers and loves that party as a parent in every sense.

Heartbreak occurs when that nurturing parent-child bond constructed across many years between the unrelated party and the child is severed upon the dissolution of the relationship between the legal parent and the legal stranger. Governing law states that, "no matter how close and loving [the] relationship with [the] child" may have developed,[1] the legal stranger does not have standing to seek visitation with the child notwithstanding the biological/adoptive parent's former encouragement to foster a nurturing parent-child relationship with the legal stranger, and further notwithstanding the role of the unrelated party as an equal parent:

> . . . under controlling law, the petitioner, who is neither an adoptive nor a biological parent, lacks standing to seek visitation . . . and cannot rely on the doctrine of equitable estoppel to establish her status as a de facto or psychological parent. Respondent's having fostered the development of a psychological bond between the petitioner and the child was deemed insufficient, standing alone, to establish extraordinary circumstances that would overcome the established right of a legal parent to choose with whom her child may associate. . . . [Absent adoption] the petitioner [became] a legal stranger to the child.
>
> Equitable considerations that arise when a man has been held out by a child's biological mother as the child's biological father in birth and baptismal certificates or in judicial proceedings . . . are not present when a boyfriend, stepfather, or same-sex partner of an adoptive or biological mother seeks visitation or custody of the legal mother's child[2] (cites omitted).

Equitable Estoppel

The doctrine of equitable estoppel has universally, albeit unsuccessfully, been asserted by every nonbiological or nonadoptive parent seeking visitation with a child following a failed relationship with the biological/adoptive parent.

Equitable estoppel precludes the assertion of a right by a party once that party has led another to form "the reasonable belief" that the right would not be asserted, provided there is a simultaneous showing of loss or prejudice to the misled party if the right were asserted. Otherwise stated, the law imposes this doctrine as a matter of fairness *to preclude a party from speaking against his own acts, commitments, or representations* which induced another, who reasonably relied on such words or conduct and who would suffer injury if such conduct or representations were allowed to stand.[3] It prevents the enforcement of rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position[4] to either act or forbear.[5] The doctrine examines whether the person to be estopped has through false language or conduct induced another to act in a certain way, with the result that the other person has been injured in some way."[6]

Equitable estoppel can be used offensively to enforce rights created by words or conduct, or defensively to cut off rights; an estoppel defense is applicable where the failure to promptly assert a right has given rise to circumstances rendering it inequitable to permit the exercise of the right after a lapse of time.[7] In the context of paternity and custody, equitable estoppel is applied only where it furthers the best interests of the child who is the subject of the controversy.[8]

The heart of the estoppel argument urges that the legal parent's once-active efforts to forge a parent-child relationship with the legal stranger equitably estops the legal parent from acting inconsistently with that prior conduct.

However, pursuant to the *Bennett v. Jeffreys*[9] rule, New York law establishes "primacy in parental rights": "the right of the parent [is] superior to all others, to the

care and custody of the child. This right [can] be dissolved only by abandonment, surrender, or unfitness." The Court of Appeals stressed that "visitation rights may not be granted on the authority of the *Bennett v. Jeffreys* extraordinary circumstances rule, to a biological stranger where the child, born out of wedlock, is properly in the custody of his mother."[10]

The appeals court has declined to extend parental status by estoppel because a biological or adoptive parent has the right to choose with whom the child may associate,[11] a right, over three-quarters of a century old, firmly anchored in the United States Supreme Court,[12] which has "repeatedly recognized [that the] right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party.' . . . The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character."[13] New York's high court holds firm that any expansion of rights must occur via legislative fiat.[14]

Accordingly, [where] "no one questions the mother's fitness to raise her child and no one seeks to change custody . . . [the] inquiry is directed solely to the State's power to interfere with the mother's [right] to choose those with whom her child associates. The State may not interfere with that fundamental right unless it shows some compelling State purpose which furthers the child's best interests (*Stanley v. Illinois*, 405 U.S. 645 (1972))."[15] However, a child's heart and mind are not programmed to fathom nuanced legal distinctions; the reciprocal love between a child and a lifelong parent figure is identical irrespective of whether or which legal entity offers its imprimatur. Can it, therefore, not be posited that the emotional devastation brought to bear upon a child arising from the de facto parent's having suddenly been wrenched from the child's life constitutes a compelling state interest? Chief Judge Judith Kaye's analysis in her dissent in *Alison D. v. Virginia M.*[16] is simply brilliant in every way and gives pause for rethinking current law; it should be the cornerstone of any progressive laws on this issue.

Bank v. White

In *Bank v. White*,[17] the respondent had a daughter and was pregnant with another child, both from a prior marriage. She and the petitioner married and lived together with the children for approximately eight years. The petitioner played a role in their daily upbringing and served as their "father figure." Under governing law, his application for visitation with the children was correctly denied because of lack of standing. However, the opinion incorrectly cited *Herbert PP. v. Chenango County Dept. of Social Services*[18] in support of the argument that the petitioner might have prevailed had he demonstrated that "he had the requisite contacts or undertook any effort to maintain a relationship with the subject children since he left the marital residence" rather than simply bringing his motion "only in response to the wife's request for interim maintenance." The aforementioned argument is exclusively relevant to grandparental visitation cases because those statutes specifically authorize the consideration of equitable factors.[19]

Bank further erred by stating that "the doctrine of equitable estoppel was not warranted in this case . . . although [it] has been applied by this court to visitation disputes under compelling circumstances . . . we decline to apply it under the facts of this case. . . . (*Multari v. Sorrell*, 287 A.D.2d 764 [2005]; *Anonymous v. Anonymous*, 20 A.D.3d 333 [2005])." Significantly, neither *Multari v. Sorrell* nor *Anonymous v. Anonymous* stands for that proposition; they stand for the exact opposite. *Bank* does not accurately reflect controlling law and should not be relied upon by de facto parents contemplating an application for visitation.

Conclusion

The trauma to a child occasioned by the sudden disappearance of a parent figure is tragic, especially when that parent figure is within reach. The time for either direct legislative action or the application of the doctrine of equitable estoppel is long overdue. Occasional sympathetic courts and dissenting jurists have expressed their frustrations. One Family Court justice creatively and cogently argued that a child has an independent constitutional right to maintain contact with "the legal stranger"[20]:

> The historical development of family law in America, and the expansion of individual constitutional rights by the Supreme Court of the United States and the Court of Appeals of the State of New York, give foundation to a holding that a child has a constitutional right to maintain contact with a person with whom the child has developed a parent-like relationship. Accompanying that right, is also a right to the equal protection of the laws. This requires that the child have the due process necessary to claim his right. This claim can be given constitutional protection, while at the same time giving due recognition, respect and protection to a parent's constitutional right to the custody, care and control of his or her child.

The unfortunate results emanating from these situations can be easily obviated by permitting judicial review on an individual basis so as to avoid abusive practice and any possible extant rights of a biological parent.

Endnotes

1. *Multari v. Sorrell*, 287 A.D.2d 764 (3d Dep't 2001).
2. *Behrens v. Rimland*, 2006 WL 2691610, *1 (2d Dep't 2006), the Court also rejected constitutional arguments raised on behalf of the child that the decision disadvantaged him on the basis of the petitioner's and the respondent's sexual orientation; *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991); *Anonymous v. Anonymous*, 20 A.D.3d 333 (1st Dep't 2005).
3. *Commissioner of Social Services ex rel. R.B. v. W.L.*, 9 Misc. 3d 973 (N.Y. Fam. Ct., 2005); *Sandra S. v. Larry W.*, 175 Misc. 2d 122 (N.Y. Fam. Ct., 1997).
4. *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175 (1982).
5. *Charles v. Charles*, 296 A.D.2d 547 (2d Dep't 2002).
6. *Shondel J. v. Mark D.*, 7 N.Y.3d 320 (2006) (in dissent).
7. *Charles*, 296 A.D.2d 547.
8. *John Robert P. v. Vito C.*, 23 A.D.3d 659 (2d Dep't 2005).
9. *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976).
10. *Ronald FF v. Cindy GG*, 70 N.Y.2d 141 (1987).
11. *Ronald FF*, 70 N.Y.2d 141; *Multari v. Sorrell*, 287 A.D.2d 764 (3d Dep't 2001); *Bessette v. Saratoga County Com'r of Social Services*, 209 A.D.2d 838 (3d Dep't 1994); *Amy M. v. Leland C.*, 8 Misc. 3d 1011(A), 801 N.Y.S.2d 776 (U) (N.Y. Fam. Ct., 2005).
12. *Meyer v. Nebraska*, 262 U.S. 390 (1923).
13. *Troxel v. Granville*, 530 U.S. 57 (2000).
14. *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991).
15. *Ronald FF v. Cindy GG*, 70 N.Y.2d 141 (1987); *David M v. Lisa M*, 207 A.D.2d 623 (3d Dep't 1994).
16. *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991).
17. *Bank v. White*, 30 A.D.3d 453 (2d Dep't 2006).
18. *Herbert PP. v. Chenango County Dept. of Social Services*, 299 A.D.2d 780 (3d Dep't 2002).
19. Domestic Relations Law § 72; Family Court Act § 651.
20. *Webster v. Ryan*, 189 Misc. 2d 86 (N.Y. Fam. Ct., 2001), this theory is not dissimilar from the one in *Weiss v. Weiss*, 52 N.Y.2d 170 (1981), which held that "visitation is a joint right of the noncustodial parent and of the child," that a child enjoys a concomitant right of visitation with the other parent. In this extremely lengthy decision, Justice W. Dennis Duggan provides a profound historical review of thinking and law.