State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 30, 2024 536127

In the Matter of JACOB G.,
Respondent,
v MEMORANDUM AND ORDER

ANTONIA H.,
Appellant.

Calendar Date: March 27, 2024

Before: Egan Jr., J.P., Aarons, Pritzker, Lynch and Fisher, JJ.

Karen R. Crandall, Schenectady, for appellant.

Carolyn Snyder Lemmon, Albany, for respondent.

Veronica Reed, Schenectady, attorney for the child.

Aarons, J.

Appeal from an order of the Family Court of Schenectady County (Mark W. Blanchfield, J.), entered August 19, 2022, which, in a proceeding pursuant to Family Ct Act article 5, ordered genetic marker testing for the purpose of establishing petitioner's paternity of a child born to respondent.

Respondent (hereinafter the mother) is the mother of a child (born in 2018). The mother and petitioner were in a romantic relationship in 2018 when the mother became aware she was pregnant with the child. Shortly thereafter, petitioner was incarcerated, and the parties' relationship dissolved. During the mother's pregnancy, she began a relationship with another man (hereinafter the paramour), which relationship continues to

the present. Following petitioner's release from custody to parole supervision, petitioner became involved in the child's life in July 2019. In August 2019, an order of protection was issued against petitioner in favor of the mother, and petitioner was reincarcerated for a parole violation. Petitioner was released from custody in October 2020.

Petitioner commenced this proceeding in March 2020, while still incarcerated, seeking to establish paternity. The mother opposed and asserted the affirmative defense of equitable estoppel. A multiday hearing ensued, after which Family Court, in an August 2022 order, concluded that the mother had not met her initial burden to establish that petitioner should be equitably estopped from claiming paternity and ordered genetic testing. The mother appeals, and we affirm.[1]

"The paramount concern for a court in a paternity proceeding is the child's best interests" (*Matter of Mario WW. v Kristin XX.*, 173 AD3d 1392, 1393 [3d Dept 2019] [citations omitted], *lv denied* 40 NY3d 901 [2023]). Accordingly, "[g]enetic marker testing shall not be ordered when a court finds that 'it is not in the best interests of the child on the basis of . . . equitable estoppel' " (*Matter of Darrell RR. v Donaisha SS.*, 216 AD3d 1234, 1234 [3d Dept 2023], *lv dismissed* 40 NY3d 967 [2023], quoting Family Ct Act § 532 [a]). As the party asserting equitable estoppel, the mother must first make an initial showing that a genetic marker test would disrupt an existing parent-child relationship, and only then does the burden shift to petitioner to demonstrate that it would be in the child's best interest to order genetic marker testing (*see Stephen N. v Amanda O.*, 173 AD3d 1280, 1282 [3d Dept 2019], *lv dismissed* 34 NY3d 1033 [2019]; *Matter of Patrick A. v Rochelle B.*, 135 AD3d 1025, 1026 [3d Dept 2016], *lv dismissed* 27 NY3d 957 [2016]). "The application of the doctrine of equitable estoppel does not involve the equities between adult participants to the paternity proceedings; rather, in the context of a paternity proceeding, it is the child's justifiable reliance on a representation of paternity that is considered and, therefore, the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the subject child" (*Matter of John D. v Carrie C.*, 202 AD3d 1355, 1357 [3d Dept 2022] [internal quotation marks, brackets, emphasis and citations omitted]).

[1] The August 2022 order is nondispositional in nature and therefore not appealable as of right (*see* Family Ct Act § 1112 [a]). Nevertheless, we "treat the mother's notice of appeal as a motion for leave to appeal and grant it" (*Matter of Darrell RR. v Donaisha SS.*, 216 AD3d 1234, 1234 n 1 [3d Dept 2023], *lv dismissed* 40 NY3d 967 [2023]).

The record supports Family Court's conclusion that the mother failed to satisfy her initial burden. Although petitioner has had minimal contact with the child since his birth, petitioner, while incarcerated, participated in the child's birth by telephone and attempted to file several paternity petitions. The evidence also showed that the mother and the paramour facilitated petitioner's relationship with the child by, for example, arranging for petitioner to see the child while petitioner was incarcerated and upon his release. The paramour has not held himself out as, nor do others consider him to be, the child's biological father. Indeed, the evidence indicated that the adults in the child's life regard petitioner as the child's likely biological father. Relevantly, the child bears petitioner's last name and lives with maternal half siblings who are also not – nor do they believe themselves to be – the paramour's biological children, suggesting that the child's interests will not be adversely affected by learning that someone other than the paramour is his biological father (*see Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 5 [2010]; *Matter of John D. v Carrie C.*, 202 AD3d at 1358-1359). As such, the mother failed to show the genetic marker test would disrupt "an already recognized and operative parent-child relationship" (*Matter of Stephen N. v Amanda O.*, 173 AD3d at 1281 [internal quotation marks and citations omitted]; *see Matter of Darrell RR. v Donaisha SS.*, 216 AD3d at 1235).

Egan Jr., J.P., Pritzker, Lynch and Fisher, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court