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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002360-MR

M.L.H. APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 05-CI-00079

COMMONWEALTH OF KENTUCKY, *EX REL.*
CABINET FOR HEALTH & FAMILY SERVICES;
and J.A.H. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, GUIDUGLI, AND VANMETER, JUDGES.

VANMETER, JUDGE: M.L.H. appeals from an order entered by the Montgomery Circuit Court in a postdissolution proceeding declaring his paternity by estoppel and requiring him to pay child support. For the reasons stated, we affirm.

M.L.H. and J.A.H. married some five months after J.A.H.'s son was born in 1998. It is undisputed that the child was conceived prior to the couple's relationship and that M.L.H. knew all along that the child was not his. However, M.L.H. agreed to be named as the father on the child's birth

certificate and the child was given his last name. M.L.H. treated the child as his biological son and the child believed that M.L.H. was his biological father.

In April 2005, the parties entered into a separation and property settlement agreement which was filed with the circuit court. The parties agreed that J.A.H. would have full custody of the minor child "born to the marriage," that visitation would be at the parties' discretion, and that there would be "no set child support as [the parties] will take care of all of the monetary needs of the minor child while in her and/or his care." However, before a decree of dissolution was entered, the Commonwealth of Kentucky, *ex rel.* Cabinet for Health and Family Services, and J.A.H. filed a motion seeking to establish M.L.H.'s child support obligation based on the parties' incomes and the Kentucky child support guidelines. Some two weeks later, however, the parties filed a joint document acknowledging that they had knowingly agreed to deviate from the child support guidelines, and that the only state assistance J.A.H. received on behalf of the child was medical insurance which she purchased for $20 per month.

Although the court then entered a judgment adopting the parties' settlement agreement and dissolving the marriage, it subsequently determined that because M.L.H.'s paternity had been established by estoppel, he should not be "relieved of his

responsibility as a father." The court therefore entered an order establishing M.L.H.'s child support obligation. This appeal followed.

A panel of this court recently conducted an exhaustive analysis of the issue of paternity by estoppel. In *S.R.D. v. T.L.B.*, 174 S.W.3d 502 (Ky.App. 2005), the court defined the doctrine of equitable estoppel as follows:

> Where one has, by a course of conduct, with a full knowledge of the facts with reference to a particular right or title, induced another, in reliance upon such course of conduct, to act to his detriment, he will not thereafter be permitted in equity to assume a position or assert a title inconsistent with such course of conduct, and if he does he will be estopped to thus take advantage of his own wrong.

Id. at 506 (quoting *Farmer v. Gipson,* 201 Ky. 477, 257 S.W. 1, 2 (1923)). The court stated further:

> The doctrine is often stated in terms of the following factors: (1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon, and (5) the other party in fact relied on this conduct to his detriment.

Id. at 506 (citing *J. Branham Erecting & Steel Serv. Co. v. Kentucky Unemployment Ins. Comm'n,* 880 S.W.2d 896, 898 (Ky.App. 1994)).

Applying the doctrine of equitable estoppel to the facts before it, the *S.R.D.* court noted that although the wife had asserted that the husband might not be the father of the youngest of three children born during the marriage, the husband treated all three children as his own. However, when the youngest was eight years old and the parties had been divorced some six years, the husband obtained DNA testing which confirmed that he was not the biological father of the youngest child. The husband then filed a CR 60.02 motion seeking to terminate his child support obligation for that child, although he wished to continue acting as the child's father in all other respects. The trial court denied the motion as not being in the child's best interest, noting that for a substantial period the husband had held himself out as the child's father even in the face of doubt. This court agreed, stating that although the husband knew for many years that he might not be the youngest child's biological father, he treated her as his own and intended that she would believe that he was her father. The child relied on that representation and had no knowledge that another man might be her biological father. As stated by the court, the husband "made a material misrepresentation to [the child], upon which [she] relied, to [her] detriment and prejudice" because the husband's conduct effectively foreclosed the child from having any financial or other relationship with her biological father.

Id. at 508-09. This court concluded that the trial court did not abuse its discretion by finding that equitable estoppel precluded the husband from denying his paternity and his financial obligations toward the child.

Here, as in *S.R.D.*, M.L.H. was named on the child's birth certificate, and he raised and held the child out as his own even though he in fact was not the child's biological father. Although here no element of marital deceit led to the husband's uncertainty about his paternity as in *S.R.D.*, in both cases the children were led to believe that they were the husbands' biological offspring. Moreover, in the matter now before us, M.L.H. furthered the misrepresentation to the child by listing his name on the child's birth certificate although the parties were unmarried and it was undisputed that he was not the biological father. As M.L.H. thereafter held himself out as the child's father for over six years, including through the initial dissolution proceedings, we must conclude that he was equitably estopped by his own behavior from denying his child support obligations on behalf of the child. Thus, the trial court did not err by finding that M.L.H. is obligated to provide child support.

The court's order is affirmed.

ABRAMSON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, DISSENTING. I respectfully dissent. The majority herein believes *S.R.D. v. T.L.B.*, 174 S.W.3d 502 (Ky.App. 2005), to be controlling. I disagree that the facts herein are sufficiently similar with the *S.R.D.* case and further I disagree with the holding of that case establishing paternity by estoppel. Rather, I believe Judge Henry's dissent in *S.R.D.* accurately states the law relative to the reason paternity by estoppel should not be adopted by the courts. In addition, I believe this to be an issue that needs to be addressed first by the legislative branch and not the judicial branch of government. At appropriate hearings before legislative committees, the social, economic, emotional, and any other impact such a major change in existing law would have, could be properly explored. There are numerous issues that must first be addressed, such as how paternity by estoppel promotes family life, how it impacts blended family relationships, who is primarily responsible for child support (i.e., the natural father, the first step-father, the second step-father, or a combination), can the natural father be relieved of his child support obligation if a step-father takes over a paternal relationship, and the time-frame of when one becomes a father by estoppel (One year? Two years? Five years?). From a legal standpoint, how does an attorney now advise a client who is contemplating marriage to another who has children? The list of

unanswered questions is great. Based upon the reasons listed above, those set forth in the dissent of *S.R.D.*, prior case law, and other reasons too numerous to mention herein, I respectfully dissent.

BRIEF FOR APPELLANT:

Angela A. Patrick
Mt. Sterling, Kentucky

NO BRIEF FOR APPELLEE