

RENDERED: OCTOBER 24, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001462-ME

J.E.M.

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 06-CI-00369

S.C.F. (FORMERLY M.)

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON, COMBS, AND DIXON, JUDGES.

CAPERTON, JUDGE: The Appellant, J.E.M. (husband), appeals the July 31, 2013, order of the Powell Family Court continuing his child support obligation for a child born during his marriage to Appellee, S.C.F. (wife), recently determined to have been fathered by another man. Upon review of the record, the arguments of

the parties, and the applicable law, we reverse and remand this matter for additional proceedings consistent with this opinion.

The parties were married on August 2, 1997. In her petition for dissolution of marriage, wife stated that two children were born during the marriage – C.M. and E.M. Husband admitted same in his response and affidavit. A decree of dissolution of marriage was entered on August 22, 2007, as was an agreed order which divided property and debts and awarded joint custody of the children to the parties. Wife was named as primary residential parent and a schedule for timesharing was established. Wife was awarded child support for both children in the amount of \$1,096.00 per month. Husband was to provide health insurance for the children and wife was to provide dental insurance. Each party was to pay their pro rata share of extraordinary medical expenses, with husband paying 73% and wife paying 27%.

Four years passed, and as E.M. matured husband grew concerned that she might not be his biological child. He discreetly conducted two over-the-counter paternity tests in late 2011, which seemed to confirm his suspicion. Husband approached wife to discuss this matter in 2011. Wife denied this possibility to husband, and also to her attorney. She then filed a motion to cease husband's visitation with both children. On March 12, 2012, husband moved the court for DNA testing and for an order of contempt against wife for unilaterally stopping his visitation.

The court ordered the requested paternity testing and the results confirmed that husband was not E.M.'s biological father. A hearing was held before the court on all outstanding motions of the parties on May 7, 2012. During the course of the hearing, wife alleged for the first time that the child was a product of rape and she refused to identify the perpetrator. The trial court ultimately removed the children from wife's primary care in July of 2012 due to "deterioration of her mental and emotional state and fear for the children." Wife moved the court to have the children returned to her custody in August of 2012, and the court set a matter for a hearing on August 29, 2012.

Thereafter, on October 8, 2012, the court entered an order finding that husband's continued timesharing with E.M. was in her best interest. It also found that the children have historically had a good interaction and relationship with both parties and their extended families, and that wife's home was appropriate for the children and that wife did not need any services. The court also acknowledged the results of the DNA test and stated at that time that husband had not moved for a reduction in child support as a result. In so finding, the court stated that husband had maintained that despite the test results, he loved both of the children, was willing to continue to pay child support for both children and wanted to continue to exercise timesharing with both children.

Subsequent to the entry of that order, husband did file a motion to modify child support on the basis of the test results which he believed constituted a substantial and continuous change in circumstances. He also moved to hold wife

in contempt for failing to abide by the court-ordered telephone communication schedule, for failing to consult with him on any decision regarding the minor children, to restore the standard visitation schedule of the 39th Circuit and for attorney fees. He further stated that it was his belief that wife had introduced E.M. to her biological father despite her assertions that E.M. was the product of rape; wife denied doing so.

In that motion, husband offered to continue to carry E.M. on his health insurance and to pay a portion of her extraordinary medical expenses. In response, wife moved the court for an increase in child support, asserting that she had begun to carry insurance for the children effective in 2013. Husband disputed that increase asserting that he still carried effective health insurance for the children.

The court ordered counsel for both parties to tender a proposed order and memorandum of law regarding the issue of whether or not husband should pay child support for E.M.; to exchange proof of the parties' incomes, child care costs, and costs of health insurance for the minor children; and to consult with the Powell County Attorney's Division of Child Support Enforcement Office to determine how both parties' purchase of health insurance coverage for the children affected the calculation of child support. In an order entered on July 31, 2013, the court found that husband was equitably estopped from denying his paternity of E.M. and

that, accordingly, his request to cease monthly child support was denied. It is from that order that husband now appeals to this Court.¹

On appeal, husband argues that the trial court erred in its reliance upon the doctrine of equitable estoppel as to husband's child support obligation for E.M. Husband asserts that his child support obligation in this matter was derived from wife's long-standing and continued misrepresentation of facts to husband, and that husband has done nothing to perpetuate any fraud upon the court. Husband accordingly argues that equitable estoppel was improperly applied here because the application of that doctrine is dependent upon the knowledge of the parent to be estopped and the actions taken by that parent on the basis of that knowledge. Husband asserts that after discovering the truth about the paternity of E.M. and after the order of paternity was entered by the court, he immediately and properly moved to terminate child support and that he did so at his earliest available opportunity. Accordingly, he urges this Court to reverse the lower court's order and to terminate his child support obligation to E.M. going forward.

In response, wife argues that the court did not err in applying the doctrine of equitable estoppel in this instance. In making this assertion, she relies upon the holding of our Kentucky Supreme Court in *Brummitt v. Commonwealth of Kentucky*, 357 S.W.2d 37 (Ky. 1962), wherein the Court held that a stepfather is

¹ We note that the parties do not make arguments concerning the court's other findings concerning visitation, health insurance, or tax issues on appeal to this Court. They address only the matter of Eric's child support obligation to E.M. Accordingly, we address only that issue in this opinion. In light of our holding herein, the parties and the court below are free to revisit those issues in accordance with applicable law.

under no legal obligation to support the child of his wife by a former marriage, but that if he voluntarily takes such child into his family as a member of his household and places himself in *loco parentis* and assumes an obligation to maintain and support the child, the relationship is substantially the same as that of parent and child.

Wife asserts that husband only requested DNA testing after the divorce was finalized and that despite the results of that testing he has continued by choice to be involved in E.M.'s life even after she requested that visitation cease. Wife asserts that husband cannot continue visitation with E.M. while simultaneously refusing to assume financial responsibility for that relationship. Upon review of the record, the arguments of the parties, and the applicable law, we believe that the court erred in finding that husband was equitably estopped from seeking termination of his child support obligation *sub judice*.

In determining that husband was equitably estopped from seeking termination of his child support obligation, the court below stated that “[husband] represented to [E.M.] that he was her father; he acted with the intention that [E.M.] would consider him as her father and [E.M.] relied upon this conduct to her detriment.” The court, in finding as it did, relied heavily upon the holding of this Court in *S.R.D. v. T.L.B.*, 174 S.W.3d 502 (Ky. App. 2005), wherein the husband sought to terminate his support obligation for the youngest child. Therein, in the petition for dissolution of marriage the husband alleged that he was the child’s father, despite the fact that the wife had informed him that his paternity of the child

was questionable. Indeed, paternity was an issue that surfaced repeatedly throughout the marriage. Therein, the husband held himself out as the child's father and did not seek paternity testing until six years after the parties divorced despite his constructive knowledge to the contrary.

Upon review of *S.R.D.*, it is clear that the set of facts contained therein are certainly distinguishable from the facts of the matter *sub judice*. In that case, the legal father was distinctly aware of the possibility that he might not be the child's biological father, but nevertheless represented to the child that he was her father. Both husband and E.M. were denied the truth as to the identity of E.M.'s biological father and husband sought a DNA test when paternity was questionable.

This is a very different situation than that set forth in *S.R.D.*, as explained by Professor Louise Graham:

While the *S.R.D.* court emphasized the child's best interest, its ruling depended first upon the father's actual knowledge of the true facts and his failure to act upon them. The focus of equitable estoppel is on the activity of the party subject to estoppel, in this case the adult parent. If the adult parent does not have the requisite knowledge, it may not be possible to use the child's best interest as the fulcrum for the decision. The crux of these paternity cases continues to be parental knowledge and action, rather than the needs of the children involved.

Louise E. Graham & James R. Keller, 16 Kentucky Practice Series – Domestic Relations Law, §23.20 (3rd Ed., 2008; database updated 2013).

Wife concealed the fact of E.M.'s parentage and acted with the intent that husband and E.M. would form a father-child relationship. We note that in

2011, upon suspicion that he might not be the biological father, husband obtained an over-the-counter test and confronted wife with it only to be met with denial. He then filed a motion for a formal test and waited for an order in that regard. Upon obtaining entry of a formal order husband moved, and this Court believes properly, for an order terminating support.

Certainly, husband's continued child support was pursuant to court order and temporary in nature in light of the time frame on which the court based its findings. Husband had pursued the DNA testing upon his suspicion that he was not the biological father of E.M., and it can be inferred that any support or obligation assumed by him for the brief period from March through October was temporary and not intended to be permanent.

As husband has correctly noted in his brief to this Court, there is nothing to prevent the biological father of E.M. from establishing his own rights and responsibilities with respect to his daughter. He could indeed commence proceedings to assert paternity, establish visitation, and wife could in fact commence proceedings to have that individual legally named as the father of E.M. and to have him pay child support. Our holding herein is limited only to the finding that husband should not have been equitably estopped from seeking to terminate support in light of the facts of this matter. Accordingly, we believe reversal is appropriate.²

² In so finding, we do note that despite our holding concerning support, the court below will have the opportunity to address the issue of husband's continued timesharing and/or visitation with E.M., and whether continued visitation may be in the child's best interest regardless of whether or not husband assumes a support obligation. We therefore make no ruling herein upon

Wherefore, for the foregoing reasons, we hereby reverse the July 31, 2013, order of the Powell Family Court continuing husband's child support obligation for E.M., and we remand this matter for additional proceedings consistent with this opinion.

DIXON, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I respectfully dissent from the majority opinion. In applying the doctrine of equitable estoppel, the Family Court properly relied upon both *Brummit, supra*, and *S.R.D., supra*. Husband has sought to maintain a relationship with E.M. as if he were indeed her biological father while petitioning simultaneously for termination of his obligation to pay child support. The two forms of relief that he asks of the Court are diametrically at odds with one another.

Professor Louise Graham's learned treatise emphasizes the element of knowledge of the parent as a litmus test for applying the doctrine of equitable estoppel. The majority opinion cites Professor Graham as follows: "The focus of the equitable estoppel is on the *activity* of the party subject to the estoppel, in this case the adult parent." (Emphasis added). I would note that despite husband's initial lack of knowledge, his *activity* of seeking to maintain a relationship while

husband's continued visitation and/or timesharing with E.M., as this is an issue to be addressed by the court below on remand, in light of what the court determines is in the best interest of E.M. in accordance with applicable law.

evading support should qualify as a basis for the equitable estoppel that the Family Court applied.

Therefore, I would affirm the ruling of the Powell County Family Court.

BRIEF FOR APPELLANT:

Susan Hanrahan McCain
Springfield, Kentucky

BRIEF FOR APPELLEE:

Leah Hawkins
Mt. Sterling, Kentucky