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Cooley & Handy Successfully Argues in Buck County Custody Matter that “Paternity by Estoppel” is Applicable where Biological Father Failed to Challenge Putative Father’s Acknowledgement of Paternity for Nine Years Despite Actual Knowledge of Probability that Child was his Biological Child.

The trial court in a Bucks County custody matter recently accepted Cooley & Handy’s argument that a biological father should be estopped from challenging a putative father’s legal paternity of a child because the biological father had failed to challenge the putative father’s acknowledgement of paternity for nine years, despite knowledge of facts suggesting he might be the biological father.

In K.Y. v. M.D. and K.S., one day after the child was born, putative father signed an acknowledgement of paternity and his name was added to the birth certificate. Although the parties (mother and putative father) were not married, they had been involved in a long-term relationship and lived as a family with their daughter for approximately two years after her birth when the couple separated. Soon after the couple first separated, mother and putative father worked out a custody arrangement pursuant to which putative father exercised partial physical custody of the child. Custody litigation thereafter ensued between mother and putative father regarding modification to the agreed custody arrangement. In all relevant pleadings there was no indication that there were any other potential fathers.

Unbeknownst to putative father, around or about August 2008, mother and the biological father, in connection with recent custody litigation instigated by mother, submitted to DNA testing on themselves, as well as the child. The testing determined that there was a 99.99% probability that biological father fathered the child. Soon thereafter, biological father filed a Complaint for Custody of the child. A custody hearing was held before the Bucks County Court of Common Pleas on biological father’s custody petition in late 2008 on the narrow issue of when biological father learned of mother’s pregnancy and the extent of his knowledge in that regard.

At the hearing, biological father explained that, after mother learned of her pregnancy, they discussed her circumstances. He noted that at that time he did think he might be the father—that there was “a chance.” However, mother testified that she did, in fact, tell him when she discovered that she was pregnant and during the pregnancy that there was a possibility that he could be the father, although she was not certain of this due to her doctor’s explanation of her period of conception. In addition, biological father acknowledged that he has lived within five to ten miles of mother and putative father since the child’s birth and they all have mutual friends.

Notwithstanding this information, as well as his physical proximity to this family during the entire duration of the child’s life, biological father admitted that he never attempted to seek custodial rights over the child until 2008 (8 1/2 years after the child’s birth) and had never financially supported the child. He further conceded that he knew putative father had acknowledged paternity and “served as father to [the child] in all sense of the word over the past eight years,” yet never confronted putative father regarding paternity issues. Biological father

also testified that, in the past, friends who live next door to mother had suggested he and the child looked alike, causing him to wonder whether or not she was his child. Still, he took no action.

In contrast, putative Father testified that before 2008, when the custody litigation ensued, he was never informed that biological father could have fathered his daughter. To this end, he stated, he has never been subjected to a DNA test regarding his daughter.

Based on these facts, Cooley & Handy argued that biological father should be precluded from challenging putative father's legal paternity and from seeking custody of the child based on the doctrine of "paternity by estoppel."

The Supreme Court of Pennsylvania has addressed the doctrine of paternity by estoppel (or equitable estoppel), and stated that "under certain circumstances, a person might be estopped from challenging paternity where that person has by his or her conduct accepted a given person as father of the child." See, e.g., Commonwealth ex. rel. Palchinski v. Palchniski, 253 Pa. Super. 171, 383 A.2d 1285 (1978); Commonwealth ex. rel. Andreas, 245 Pa. Super. 307, 369 A.2d 416 (1976). "[Paternity by estoppel] is a principle which applies to prevent a party from assuming a position or asserting a right to another's disadvantage inconsistent with a position previously taken." See Andreas, 369 A.2d at 418 (citation omitted). Under equity principles parental relationships can be established constructively and these relationships and their corresponding duties "merit judicial recognition and enforcement." See Manze v. Manze, 362 Pa. Super 153, 161, 523 A.2d 821 (1987).

The equitable principle is now held not only to bar parents from disavowing a previously held position, but also third-party litigants, as well. See In the Matter of Green, 439 Pa. Super. 606, 650 A.2d 1072, 1075 (1994) (holding that the doctrine is applicable against an agency such as that the Department of Human Services ("DHS"), operating in the best interest of a child, just as it would apply to a mother challenging a father's paternity or a father attempting to prove or disprove his own paternity; see also, Lebanon CCYS v. Wagner, 2008 Pa. Super. 102, 948 A.2d 871 (2008) (standing for the same proposition). If paternity by estoppel were not applied to those outside of the parental unit, the equitable principles behind the theory would be rendered meaningless. The courts are bound to preserve the parental relationship where it may. See id.

Specifically, the Superior Court has explained that, in keeping with the Commonwealth's interest in protecting its children and securing their financial support from their parents:

Absent any overriding equities in favor of the putative father, such as fraud, the law cannot permit a party to renounce even an assumed duty of parentage when by doing so, the innocent child would be victimized. Relying upon the representation of the parental relationship, a child naturally and normally extends his love and affection to the putative parent. The representation of parentage inevitably obscures the identity and whereabouts of the natural father, so that the child will be denied the love, affection and support of the natural father. As time wears on, the fiction of

parentage reduces the likelihood that the child will ever have the opportunity of knowing or receiving the love of his natural father. While the law cannot prohibit the putative father from informing the child of their true relationship, it can prohibit him from employing the sanctions of the law to avoid the obligations that their assumed relationship would otherwise impose.

Andreas, 369 A.2d at 418.

The General Assembly has also now codified the principle of paternity by estoppel in 23 Pa. C.S.A. § 5102(b), which states:

Children; Legitimacy, determination of paternity

(b) For purposes of prescribed benefits to children born out of wedlock by, from and through the father, paternity shall be determined by any one of the following ways:

(1) If the parents of a child born out of wedlock have married each other.

(2) If during the lifetime of a the child, the father openly holds out the child to be his and receives the child into his home, or openly holds the child to be his and provides support for the child which shall be determined by clear and convincing evidence.

(3) If there is clear and convincing evidence that the man was the father of the child, which may include a prior determination of paternity.

Importantly, if paternity by estoppel is applied, blood testing to disaffirm or establish alternative paternity is wholly inadmissible and irrelevant, as the same would be barred under the principles of the doctrine. Section 23 Pa.C.S.A. § 5104(c), in relevant part, states that in any case in which paternity is at issue, the court, upon its own or by suggestion of any person whose blood is involved, so as not to delay proceedings, shall order the mother, child and alleged father to submit to blood tests. Id. However, where traditional notions of paternity by estoppel are applicable, blood tests may well be *irrelevant*, for the law will not permit a person in these situations to challenge a status which he or she has previously accepted. See, e.g., Commonwealth ex rel. Gonzalez v. Andreas, 245 Pa. Super. 307, 369 A.2d 416 (1976); Commonwealth ex rel. Palchinski v. Palchinski, 253 Pa. Super. 171, 384 A.2d 1285 (1987); In the Matter of Michael Ronald Montenegro, Jr., 365 Pa. Super. 98 (1987); Gulla v. Fitzpatrick, 408 Pa. Super. 269 (1991); Seeger v. Seeger, 377 Pa. Super. 391, 547 A.2d 424 (1988); Cf. Wieland v. Wieland, 948 A.2d 863 (2008) (in a support proceeding between a husband and wife and third-party biological father blood testing was warranted, as the presumption of paternity and equity principles were not relevant and there was no current support order in effect).

In fact, the Superior Court has recently affirmed the position that a third party may also be barred by the paternity by estoppel doctrine from introducing DNA evidence to establish paternity. In a distinctly similar case to K.Y. v. M.D. and K.S., the Superior Court recently applied the paternity by estoppel doctrine to bar a third-party, alleged biological father, from challenging a putative father's parental status by the introduction of DNA evidence. See B.K.B. v. J.G.K. v. M.M.K., 954 A.2d 630 (Pa. Super. 2008). Although in B.K.B. the child at issue was born during the mother and father's marriage, the reasoning of the case is entirely applicable to K.Y. v. M.D. and K.S. In B.K.B., a former husband petitioned for primary custody of the child arguing, among other things, that mother was currently engaged in a relationship with the child's alleged biological father and she was threatening to reveal to the child her biological father's true identity. The alleged biological father petitioned to intervene in the parents' custody dispute, requesting partial custody and alleging that DNA testing established that he was the natural father of the child. The trial court denied biological father's petition and he appealed.

The Superior Court held that the alleged biological father was estopped from challenging former husband's paternity and, therefore, blood testing was irrelevant and inadmissible evidence. It noted that, upon the child's conception, mother continuously assured her husband that he was the child's father, she named him as the father on the child's birth certificate, he was present at the child's birth, the child had his last name, he was involved in the child's school activities, rearing and religious upbringing, he covered the child under his medical insurance policy and, generally, held the child out as his own both during and after the marriage to the child's mother, all of which mother acquiesced in. Id. at 635. Clearly, the former husband and the child had established a father-son relationship that never waived during the child's entire nine year's of life. Id. at 635-36. There was never a question regarding paternity until mother made an allegation at a second custody hearing that former husband was not the child's biological father and then only a second time when the alleged biological father attempted to intervene nine years after birth. Id.

In contrast, the alleged biological father was found to have voluntarily accepted former husband's status as the child's father for the first nine years of the child's life without any efforts to challenge paternity. In fact, the record showed that the biological father never attempted to financially or emotionally support the child, nor intervene as a "father" in any meaningful way for the first nine years of the child's life. Id. at 635-36. To introduce a second father at this time, the Court opined, would serve only to invoke further damaging trauma "that may come from being told that the father he has known all his life is not in fact his father." Id. at 636 (citing Brinkley v. King, 549 Pa. 211, 701 A.2d 176, 180 (1997)). "[D]ue to his inaction for a period of nine years encompassing the birth of [the child] until his petition to intervene, [the Court held], [biological father] is estopped from asserting that former husband is not the biological parent of [the child]. Id. at 636 (citations omitted). Because paternity by estoppel was applied to bar a party's attempts to assert parental rights, results of DNA testing to establish parentage were also barred. B.K.B., 954 A.2d at 637. The Court relied on the reasoning of Buccieri v. Campagna, 889 A.2d 1220 (Pa. Super. 2005), which previously held that a potential biological father's delay and inactivity for eight years barred him from confirming or asserting his paternity through genetic tests. See Buccieri, 889 A.2d at 1227 (holding that the potential biological father was estopped by his own past conduct from obtaining genetic tests to establish his paternity and/or assert paternal rights).

The case law, therefore, supports the proposition that a potential biological father who voluntarily accepts a putative father's role in a child's life for a significant period of time, shall be barred from asserting any parental rights over the child. See e.g., C.T.D. v. N.E.E. and M.C.E., 439 Pa. Super. 58, 653 A.2d 28 (1995) (finding that a potential biological father's failure to act in child's first two years of life, so as to constitute abandonment, may preclude him from now raising a claim of paternity, including the utilization of blood testing and remanded the case for such inquiry); see also Strayer v. Ryan, 725 A.2d 785, 786 (Pa. Super.1999) (even in the context of a child born out of wedlock, when estoppel principles apply, blood testing may not be warranted to challenge paternity).

The case of Moyer v. Gresh, 904 A.2d 958 (Pa. Super. 2006), further buttresses putative father's position in K.Y. v. M.D. and K.S that paternity by estoppel bars the biological father's belated attempts to intervene. In Moyer, mother and the putative father were married when the child was born. The couple acted as an intact family unit, sharing in all the responsibilities of rearing the child, including attending doctor visits, participating in school and recreational activities, and providing financial support. After the parties divorced, the putative father continued to assume responsibility for child's well-being, including maintaining child's health care and fostering a continued close relationship for at least nine years. Id. at 960-961. Mother and biological father, who had never been involved in child's life before, became romantically involved and later married. Upon their marriage, biological father claimed child as a dependant, carried his health insurance, and became involved in most other aspects of child's life. Biological father then filed a Petition for Custody of the child. Id. The court held that, because the biological father *voluntarily* relinquished his parental rights as evidenced by his conduct during the first nine years of the child's life, and allowed former husband to continue supporting child when child was living with biological mother and father after mother's divorce, father accepted former husband as the child's actual father and must be barred from challenging the former husband's paternity. Id. at 962-963.

These estoppel principles are applied to produce fair and just results. Although Moyer occurred in the context of a former husband and wife, the principle advanced by its reasoning is wholly applicable to K.Y. v. M.D. and K.S.

Essentially, this Commonwealth does not want children to go fatherless in either a financial sense or a psychological or emotional sense. Consequently, if an individual has either held himself out to be the father of a child (both caring for that child emotionally and financially) and others have not timely challenged this assumed status, the law is not going to order blood testing to interfere with that established relationship.

Applying the law of "paternity by estoppel" to K.Y. v. M.D. and K.S., Cooley & Handy argued that putative father could not now be disavowed of the parental status that he has assumed for all of the child's life and which has been previously determined through Court proceedings. See B.K.B., 954 A.2d at 635-36. Biological father, by his own testimony, *voluntarily* supported putative father's assumed parental status for years without making any efforts to assert his alleged parental rights. Because he had always accepted putative father's parental status over the child, the law dictated that biological father could not challenge that status by the introduction of

DNA testing. See Buccieri, 889 A.2d at 1227. From the time mother learned of her pregnancy, biological father *knew* that there was a chance that he had fathered the child. Notwithstanding this knowledge and his conversations with mother regarding her pregnancy, he chose to allow putative father to assume all parental duties over the child from the time of her birth until 2008 – approximately 8 ½ years later. In that entire duration of time, regardless of the commentary from neighbors that the child looked like him, he sat back and assumed no responsibility over the child. Clearly, as evidenced by his filing a petition for custody in 2008, he knew all along that he had access to the court system as a venue to assert his rights. Interestingly, even after he filed his petition for custody, he continued to offer the child no financial support whatsoever.

Due to biological father's inactivity for 8 ½ years encompassing the child's birth in August 2000 until his petition for custody filed in September 2008, and based on the prior determinations as to putative father's parentage, Cooley & Handy argued that biological father should be barred from asserting that putative father is not the biological parent of the child. See B.K.B. 954 A.2d at 637. The Pennsylvania Superior Court has indicated that a failure to act in much less time may very well be deemed an abandonment of one's parental rights so as to preclude any intervention in a putative father's relationship with his child. Surely 8 ½ years is too long. See C.T.D., 439 A.2d at 63.

In contrast to biological father, Cooley & Handy argued that putative father had been present in the child's life since her conception. He had never waived in his efforts at providing her with the utmost love, emotional and financial support. Initially he and mother lived with the child as a family. Although mother's and putative father's relationship ended, he always had equal physical and legal custody of the child and has served as her putative father in every aspect of her life. There was never any accusation or assertion that he had not provided for her financially or otherwise. Putative father was also never subjected to DNA testing and has never questioned his paternity. At all relevant times, putative father was unaware that there could be another potential father. By mother's own account, the child considers putative father her "dad" and mother and putative father have done their best to provide the child with stability and love throughout the child's life.

To introduce another father at this late time, Cooley & Handy argued, would only serve to cause the child total confusion and emotional trauma. The Commonwealth's primary interest is in ensuring that a child has the financial and emotional support of her parents and that the courts are acting in the child's best interest. It will not sever sound ties between a father and child, threatening to cause the child significant confusion and psychological dismay, simply based on the untimely, and questionable, intervention of a potential father who easily could have asserted his potential rights at the time of conception or soon thereafter. See Andreas, 369 A.2d 416. Biological father's belated interest in his potential fatherhood cannot serve as a basis in which to sever a meaningful father-daughter relationship that he voluntarily supported for 8 ½ years. To do so would only serve to cause irreparable damage to the child and to her relationship with her putative father. See id.

In the end, the trial court accepted Cooley & Handy's arguments and dismissed biological father's Complaint for Custody with prejudice.