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SUPREME COURT GRANTED DISCRETIONARY REVIEW MARCH 14, 2007

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000834-ME

JACQUELINE HINSHAW (now LENARZ) APPELLANT

APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE VIRGINIA WHITTINGHILL, SPECIAL JUDGE
ACTION NO. 03-CI-502107

REN RICKY HINSHAW;
SANDRA RAGLAND;
DONNA L. DELAHANTY (GUARDIAN AD LITEM) APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND TAYLOR, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Jacqueline Ann Hinshaw (now Lenarz) appeals from an order of the Jefferson Family Court awarding her joint custody of her son, Asher John Hinshaw, with her ex-husband, Ren Ricky Hinshaw, and designating Ren as the primary

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

residential custodian. She also appeals from the portion of the court's order directing her to pay $25,000 of Ren's attorney fees. We affirm.

Jacqueline and Ren were married on December 29, 1988. Asher was born on June 28, 1999. Ren was present in the delivery room and cut the umbilical cord. Asher's birth certificate lists Ren as the father.

In January 2003, Jacqueline filed for divorce. In her verified petition of dissolution, she stated that she and Ren were the parents of one child, Asher. Later, however, Jacqueline amended her petition and alleged that Ren was not the child's father. She also sought court-ordered DNA testing to prove her claim.

The DNA test results, introduced by avowal, indicated that there was a 0.00% chance that Ren was Asher's biological father. Following the disclosure of the test results, Jacqueline filed an amended petition and named a third party as the biological father. She also sought to have the court deny Ren custody because he was not the biological father.

Over Jacqueline's objections, the court appointed a clinical psychologist, Dr. Edward P. Berla, to serve as the custodial evaluator. Dr. Berla conducted interviews with the child and with both parties. He concluded that "Asher has bonded with the Respondent [Ren] and it would be very

devastating to him if Respondent was not in his life." Dr. Berla also stated in his report that "severing [the relationship between Ren and Asher] would at the very least cause Asher severe emotional and psychological harm."

The evidence showed a strong father-son relationship between Ren and Asher. From the start, Ren has been active in all parts of Asher's life. Ren often served as the principal caregiver because his work hours allowed more flexibility than Jacqueline's. Ren shared equally in caring for and raising Asher. This included changing, feeding, daycare, potty training, and teaching to talk. Ren is also active as a volunteer at Asher's school, and he has served as a coach for extracurricular activities in which Asher was involved.

Jacqueline never revealed to Ren that he was not Asher's father until after filing for divorce. At all times in the marriage, she represented to Ren that he was Asher's biological father. She encouraged the strong father-son relationship between Ren and Asher, and Ren is the only father Asher has ever known.

The family court concluded that equitable estoppel applied to preclude Jacqueline from challenging Ren's custody rights based on DNA testing. The court found that Ren was Asher's legal father, and it determined that the parties were on equal footing in the matter of custody. The court then ordered

that the parties should share joint custody, with Ren being the primary residential custodial. Further, the court directed Jacqueline to pay $25,000 of Ren's attorney fees. This appeal by Jacqueline followed.

Jacqueline first argues that the court erred in its application of KRS[2] 406.011 and KRS 406.111. KRS 406.011 provides in part that "[a] child born during lawful wedlock, or within ten (10) months thereafter, is presumed to be the child of the husband and wife." That presumption is rebuttable, however. See Simmons v. Simmons, 479 S.W.2d 585, 587 (Ky. 1972).

KRS 406.091(3) provides that "[g]enetic test results are admissible and shall be weighed along with other evidence of the alleged father's paternity." KRS 406.111 provides in part that "[i]f the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the test, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly." Jacqueline argues that the DNA test results conclusively rebut the presumption of paternity and that Ren may not stand on equal footing with her in the custody dispute.

Jacqueline's argument overlooks the fact that this case is not about paternity but is about the custody rights

[2] Kentucky Revised Statutes.

between a husband and wife as they relate to a child born and raised within the confines of their marriage. In Bartlett v. Com. ex rel. Calloway, 705 S.W.2d 470 (Ky. 1986), the Kentucky Supreme Court recognized that an action to determine the paternity of a third party to a child born during a marriage between a husband and wife did not adjudicate the rights and duties of the husband, who was not a party to the case. Id. at 473. In short, the determination that Ren is not Asher's biological father does not mean Ren is without custody rights.

Jacqueline next argues that the family court erred in its application of equitable estoppel. She maintains that equitable estoppel could not be properly asserted by Ren and that, even if it the doctrine could have been asserted otherwise, it was error by the court to allow it to be asserted by Ren in this case.

Jacqueline argues that equitable estoppel could not be invoked by Ren because Kentucky law has not recognized the use of the doctrine in child custody cases and because the doctrine was specifically rejected in such a case by this court in Consalvi v. Cawood, 63 S.W.3d 195 (Ky.App. 2001). We agree that the doctrine has not been adopted by the courts of this state in child custody cases. However, we disagree that this court rejected the applicability of the doctrine in the Consalvi case. In fact, the court there recognized that "[i]t may be that an

argument for estoppel can be made; however, the trial court specified that its finding was based on a principle of waiver[.]" Id. at 198.

The court here relied on cases from other jurisdictions in determining that the doctrine of equitable estoppel was applicable. In Pettinato v. Pettinato, 582 A.2d 909 (R.I. 1990), the court concluded, in circumstances similar to those herein, that equitable estoppel applied to preclude the mother from denying the husband's custody rights based on DNA test results. Id. at 912. As in this case, in Pettinato the couple engaged in sexual relations during the time of conception, the husband was named as the father on the birth certificate, and the husband first became aware of the paternity issue when it was raised in the divorce proceeding. After DNA testing revealed that the husband was not the child's father, the mother sought to deny his custody rights.

The appellate court in Pettinato ultimately concluded that "a mother should be equitably estopped from using the genetic blood testing permitted by [statute] to disestablish a child's paternity in connection with a routine divorce proceeding." Id. The court further stated that "[t]he underlying rationale of the equitable-estoppel doctrine is 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.'" Id. at 912-13, quoting John M. v. Paula T., 571 A.2d 1380, 1386 (Pa. 1990). The court further concluded that the "evidence of genetic blood tests is considered irrelevant in a divorce proceeding wherein the basic issue is the termination of the marriage bond – not the paternity of a child." Id.[3] Finally, the court stated that "[t]he law will not permit a person in these situations to challenge the status which he or she has previously accepted [or created]." Id.[4]

In J. Branham Erecting & Steel Serv. Co., Inc. v. Kentucky Unemployment Insur. Comm'n, 880 S.W.2d 896 (Ky.App. 1994), this court set forth the elements of equitable estoppel as follows:

> These elements include: (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.

[3] Likewise, the family court here disallowed the DNA test results as evidence.

[4] Ren has cited several other cases from other jurisdictions that support the application of the doctrine of equitable estoppel in situations like those here. See Boyles v. Boyles, 466 N.Y.S.2d 762 (N.Y.App.Div. 1983); Sharon GG v. Duane HH, 467 N.Y.S.2d 941 (N.Y.App.Div. 1983); In re Hodge, 733 P.2d 458 (Or.Ct.App. 1987); Riddle v. Riddle, 63 Ohio Misc.2d 43, 619 N.E.2d 1201 (Ohio Ct. of Common Pleas 1992).

Id. at 898, quoting Gray v. Jackson Prod. Credit Assoc., 691 S.W.2d 904, 906 (Ky.App. 1985). We conclude that the sound reasons given by the Rhode Island court in the Pettinato case to apply the doctrine of equitable estoppel are equally applicable to this case. Therefore, we conclude that the family court here did not err or abuse its discretion in this regard.

Jacqueline further argues that even if equitable estoppel would otherwise be applicable, it should not apply in this case because Ren did not rely on her conduct to his detriment. She reasons that Ren would have continued his relationship with and support for Asher even had he known that he was not Asher's biological father.

Saying that Ren would have continued his relationship with and support for Asher is not the same as saying he would have taken no action. By withholding the true state of Ren's relationship to the child, Jacqueline precluded Ren from seeking legal advice as to the extent of his relationship with Asher and his rights and obligations in relation to Jacqueline and the biological father.

For example, had Ren known the truth, he might have sought to have Jacqueline institute legal action to terminate the biological father's parental rights so that he could adopt the child. As an adoptive parent, Ren would have been on equal footing with Jacqueline in any custody dispute. Given the

knowledge denied Ren by Jacqueline's actions, we conclude it was not error for the court to conclude that Ren relied on Jacqueline's representations to his detriment. Therefore, we further conclude that the court did not abuse its discretion in applying equitable estoppel and in granting the parties joint custody with Ren as the primary residential custodian.

Finally, we turn to Jacqueline's argument that the court erred when it directed that she pay $25,000 of Ren's attorney fees. She asserts the court erroneously determined that $20,000 given to Ren from his father to help defray Ren's attorney fees was a loan rather than a gift.

Contrary to Jacqueline's assertion, the court did not base its award to Ren solely on its finding that Ren intended to pay his father back. In fact, the court first noted that it was required to consider the financial resources of the parties and that Jacqueline earned substantially more money than Ren. See KRS 403.220. The court also noted that Jacqueline was now experiencing a higher standard of living than she had before.

The award of attorney fees is entirely within the discretion of the trial court. Poe v. Poe, 711 S.W.2d 849, 852 (Ky.App. 1986). We conclude that the record supported the findings of the court in this matter. Therefore, we find no abuse of discretion in the award.

The order of the Jefferson Family Court is affirmed.

ALL CONCUR.

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