

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

P.A.P.	:	IN THE SUPERIOR COURT
	:	OF PENNSYLVANIA
	:	
	:	
	:	
v.	:	
	:	
	:	
T.A.P.,	:	
	:	
Appellant	:	No. 1932 MDA 2012

Appeal from the Order entered on October 1, 2012,  
in the Court of Common Pleas of Berks County, Domestic Relations  
Division, No. 12-01132

BEFORE: PANELLA, SHOGAN, and COLVILLE\*, JJ.

MEMORANDUM BY PANELLA, J.:

Filed: April 4, 2013

T.A.P. ("Father") appeals from the trial court's order entered on October 1, 2012, which denied Father's Petition for Special Relief, concluding that the doctrine of paternity by estoppel is applicable to the facts of the case and decreeing that Father's Petition for Paternity Testing of his female child, S. ("Child"), born in April 2008, is denied. We affirm.

Father and P.A.P. ("Mother") married in 1991 and divorced in 1997. They remarried in 2003. Father and Mother have two other female children besides Child: V. (born in January of 1994), and S. (born in July of 1995). V. and Child reside with Mother; S. resides with Father. N.T., 9/6/2012, at 22. Father and Mother separated in either August or September of 2011.

\* Retired Senior Judge assigned to the Superior Court.

**See id.**, at 18, 44. Father noted that he separated from Mother at that time because he believed that Mother was involved with another man. **See id.**, at 18.

In January 2012, Mother filed a Complaint in Divorce in Berks County, Pennsylvania. In February 2012, Father filed a Complaint in Divorce in Schuylkill County, Pennsylvania. **See id.**, at 16. Mother and Father agreed to allow the Schuylkill County divorce action to proceed. **See id.**, at 17. Father does not intend to get back together with Mother. **See id.**, at 19.

On January 31, 2012, Mother filed a Complaint for Support against Father in Berks County, seeking child support for V. and Child. On February 18, 2012, Father and Mother participated in a support conference, during which Father raised the issue of Child's paternity. The trial court did not enter an order for paternity testing at the time of the conference because a prior order for child support had been entered in 2010 in Schuylkill County for Child and the court found nothing in the record to suggest that Father contested paternity in those proceedings. **See id.**, at 3; Trial Court Opinion, 11/19/2012, at 1-2. The Schuylkill County order for child support was dismissed in March of 2011 at Mother's request. **See id.**, at 3.

As Father and Mother could not agree on child support during the Berks County support conference, a support hearing was scheduled for May 18, 2012. On April 27, 2012, Father filed a petition seeking paternity testing

to establish paternity with regard to Child. On September 6, 2012, the trial court held a hearing.

At the hearing Mother testified that, following her second marriage to Father, and prior to Child's birth, she had a brief affair with A., whom she now believes is the biological father of Child. Originally, Mother believed that Father was Child's biological father, due to the shortness of her affair with A., *i.e.*, a few weeks, and the fact that she was careful when sexually active with A. Mother also testified that she was not careful when she was sexually active with Father. Mother conceded that, when questioned by Father about the paternity of Child in the early stages of the pregnancy, Mother insisted that Father was Child's biological father and concealed her affair with A. **See** N.T., 9/6/2012, at 42-43. Approximately four years after Child's birth, Mother and Father again separated. Father testified that, in December 2011, Father privately performed a paternity test on Child and the DNA test confirmed his suspicions that he is not Child's biological father. **See id.**, at 22.

After discovering that he is not Child's biological father, Father admitted that he did not cease all contact with Child. Rather he reduced his custodial time with Child from the then-existing 50/50 custody arrangement to every other weekend. Father also testified that he continues to treat Child as his own, takes her to family functions, including visits to his sick father, and attends events at her school as Child's father. Child refers to

Father as "Daddy." In addition, Father claimed Child as a dependent on his income tax return. ***See id.***, at 22-26. No evidence in the record suggests that Child is aware that Father is not her biological father.

By Order of October 1, 2012, the trial court denied Father's petition for special relief, finding that Father is estopped from denying the paternity of Child. Father filed a timely notice of appeal and concise statements of errors complained of on appeal pursuant to Pa.R.A.P. 1925(a)(2)(i) and (b) on October 31, 2012.

On appeal, Father presents the following three issues for our review:

1. Is the Pennsylvania [Supreme] Court case, ***K.E.M. v. P.C.S.***, 38 A.3d 798 (Pa. 2012), controlling in the instant action?
2. Does the doctrine of paternity by estoppel apply to the instant case and support the denial of Father's request for testing to disestablish paternity?
3. Does [Father's] conduct after learning that [Child] was not his biological child require the application of paternity by estoppel?

Father's Brief, at 4.

We review the trial court's order for an abuse of discretion or error of law. ***See Vargo v. Schwartz***, 940 A.2d 459, 462 (Pa. Super. 2007). Our Supreme Court has summarized the analysis required for legal determination of the paternity of a child:

[F]irst, one considers whether the presumption of paternity applies to a particular case. If it does, one then considers whether the presumption has been rebutted. Second, if the presumption has been rebutted or is inapplicable, one then questions

whether estoppel applies. Estoppel may bar either a plaintiff from making the claim or a defendant from denying paternity.

**N.C. v. M.H.**, 923 A.2d 499, 502-503 (Pa. Super. 2007) (quoting **Brinkley v. King**, 549 Pa. 241, 250, 701 A.2d 176, 180 (1997)).

As Father's issues are interrelated, we will discuss them together. After a review of the record and the evidence presented, the trial court found that it is uncontested that Child was conceived and born during Father's and Mother's second period of marriage. However, the marriage was no longer intact at the time of the hearing, as the parties had filed for divorce. Thus, the rebuttable presumption of paternity is not applicable since Father and Mother no longer had an intact marriage to be preserved. **See** Trial Court Opinion, 11/19/2012, at 1; **J.C. v. J.S.**, 826 A.2d 1, 5-6 (Pa. Super. 2003).

Consequently, the trial court turned to the doctrine of estoppel that has been described as "the legal determination that because of a person's conduct (e.g., holding out the child as his own or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage . . . ." **Doran v. Doran**, 820 A.2d 1279, 1283 (Pa. Super. 2003). In **Brinkley**, our Supreme Court explained that the doctrine of paternity by estoppel:

is based on the public policy that children should be secure in knowing who their parents are. If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the

potentially damaging trauma that may come from being told that the father he has known all his life is not in fact his father.

701 A.2d at 180; *see also Ellison v. Lopez*, 959 A.2d 395 (Pa. Super. 2008) (putative father who is not the child's biological father is estopped from challenging paternity after he has held himself out as the child's father or provided support).

In addition, our Supreme Court recently handed down its decision in *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012), to specifically address the question "[w]hether the doctrine of paternity by estoppel, as applied in Pennsylvania, should be maintained, revised, or abrogated in its entirety?" The Court held that, "[P]aternity by estoppel continues to pertain in Pennsylvania, but it will apply only where it can be shown, on a developed record, that it is in the best interest of the involved child." *Id.*, at 810.

In this case, after reviewing the evidence, the trial court found that Father was estopped from denying paternity because Father had suspicions during Mother's pregnancy with Child and questioned her during that time, and that he continued to act as Child's father, despite the fact that, in December of 2011, he privately performed a paternity test on Child, which confirmed that he is not Child's biological father. *See* Trial Court Opinion, 11/19/2012, at 2-3. Evidence further revealed that, once Father discovered that he was not Child's biological father, he did not cease all contact with Child. *See id.*, at 3. Rather, Father reduced his custodial time with Child

from “the then-existing 50/50 custody arrangement to every other weekend.” ***Id.*** Father continues to treat Child as his own. In addition, Father has only told immediate family about the fact that he is not Child’s biological father. Father takes Child to family functions, including visits to his critically ill father, and attends events at Child’s school and hold himself out as Child’s Father. Father spends time with Child on Christmas, Easter, and Father’s Day. Child refers to Father as “Daddy.” Father also claims Child as a dependent on his income tax return. ***See id.***, 5-6; N.T., 9/6/2012, at 22-26, 36. Therefore, the trial court found no evidence in the record to suggest that Child is aware that Father is not her biological father. The record reveals that she had no contact with A. The trial court opined that, “even after finding that he is not Child’s biological father, [Father] has continued to treat [Child] very much as his own daughter.” Trial Court Opinion, 9/6/2012, at 6. The trial court’s findings are amply supported by the record.

Paternity by estoppel can, however, be overcome in certain instances by a showing of fraud, as argued by Father. ***See Ellison***, 959 A.2d at 398. The test for fraud is: (1) a misrepresentation; (2) a fraudulent utterance; (3) an intention by the maker that the recipient will be thereby induced to act; (4) justifiable reliance by the recipient upon misrepresentation; and (5) damage to recipient as a proximate result. ***See id.***

In the instant case, after a review of the record and the evidence presented, the trial court found that the Father is estopped from denying paternity. The court determined that there are bound to be misrepresentations surrounding an extra-marital affair, but the misrepresentations must rise to the level of fraud. In this case, from the beginning of Child's conception, evidence reveals that Father had suspicions as to whether or not he was Child's biological father, as he was familiar with Mother's previous behavior, but did nothing about them. Evidence revealed that Mother terminated her affair with A. within a matter of weeks, and remained with Father, insisting that he was the biological father of Child and concealing her short-term, extramarital affair from Father.

At the hearing, Father testified that he believed Mother, despite the fact that they had not been intimate around the time of Child's conception. **See** N.T., 9/6/2012, at 18-19. Mother testified that she had been intimate with both Father and A. during the time in question. **See id.**, at 43-44. Neither Father nor Mother was positively aware that Father was not Child's biological father, until Father received the results of his privately performed paternity test on Child. **See** Trial Court Opinion, 11/19/2012, at 2-4; N.T., 9/6/2012, at 18-19. The trial court determined that Father should have pursued his doubts before "creating an indelible bond between himself and the Child." **Id.**, at 8. The trial court reaffirmed the Supreme Court's holding in **K.E.M.**, that, in such instances as the present case, "there are



arguments to be made that the best interest of a child should remain the predominant consideration." Trial Court Opinion, 11/19/2012, at 7-8.

Therefore, the trial court correctly found that the evidence clearly reveals that it is in the best interest of Child that paternity by estoppel should be applied, and Father not be permitted to have a court-ordered paternity test. ***See Brinkley, supra; K.E.M., supra.*** The trial court opined that, "[i]n this present matter, we have a four-year-old girl who is strongly bonded to the only father she has ever known, and therefore the legal destruction of that relationship would only cause harm to this child, who is the most innocent of all the parties involved." Trial Court Opinion, 11/19/2012, at 7-8. The trial court did not abuse its discretion.

Order affirmed.