

**IN THE COURT OF COMMON PLEAS, LYCOMING COUNTY,
PENNSYLVANIA**

JRH,		:	PATERNITY
	Plaintiff	:	
vs.		:	NO. 19-SP-00006
		:	
MA,		:	
	Defendant	:	

OPINION AND ORDER

AND NOW, this 29th day of **August, 2019**, after a hearing held in part on May 31, 2019, and finished on August 7, 2019, at which time JRH was present with his counsel, Michael Morrone, Esquire, and MA was present with her counsel, Bradley Hillman, Esquire. This hearing was held in regard to a Complaint to Establish Paternity and for Genetic Testing filed by JRH on March 15, 2019.

The Court makes the following findings of fact based upon the testimony presented in this matter:

MA is the biological mother of MaA, born January 4, 2015. Mother married KA on July 7, 2007, and continues to remain legally married to date.

In late December, 2014, or early January, 2015, Mother became involved in a sexual relationship with JRH while still living with and married to KA. Mother told JRH she and her husband were separated and living like roommates. She also stated that Husband was sleeping on the couch. Husband learned of Mother's affair at some point. The sexual relationship between Mother and JRH ended in or around February, 2015.

On March 20, 2015, Mother was involved in a car accident. At some point after the accident, Mother reached out again to JRH. Mother and JRH again began a sexual

relationship which lasted for several weeks. Several months later, JRH found out that Mother was pregnant through a post that was placed on Facebook. JRH reached out to Mother to ask if the child was his and Mother indicated to him that she did not know.

When Mother told her husband, KA, that she was pregnant, he asked if the child was his as he knew she had an affair. Mother responded that she did not know. At that time, Mother and her husband agreed that a baby would give them a reason to work harder on their relationship.

MaA was born on January 4, 2016. After her birth, husband held the child out as his child. JRH did not attempt to contact Mother. Mother did not contact JRH.

In July of 2018, Mother reached out to JRH and indicated to him that she and her husband, KA, had conducted a home paternity test and she had mailed in the kit. Mother was going on vacation and said she would contact JRH once she had the results. In August, 2018, Mother contacted JRH and advised him that her husband, KA, was not the biological father of the child. She also told JAH that the child looked like him and was probably his child. Mother and JRH again began a sexual relationship which lasted from approximately August through November, 2018. During that time, Mother gave JRH a key to her home and he spent overnights at the home. JRH spent time with MaA including having visits in his home as well as Mother's home, as well as JRH's family having contact with the child. Mother referred to JRH as "Daddy" or "Dad" to the child during this time. She referred to JAH's mother as "Mimi" to the child. JRH was listed by Mother as an emergency contact on the child's emergency contact card at daycare. JRH's mother provided childcare for MaA at times. JRH deposited money into

a savings account Mother set up for MaA. JRH and Mother did things with MaA and Mother's son, JA. MaA spent Thanksgiving of 2018 with JRH and his family.

At some point in October, 2018, JRH and Mother were involved in an altercation. Mother alleges JRH assaulted her while holding MaA. JRH did not deny the allegation and indicates he had been drinking Jameson. After the incident, Mother ended her relationship with JRH. JRH and his family continued to have contact with MaA up until February, 2019, when JAH filed a Complaint for Custody. Mother stated she was advised to do so. Mother has allowed JAH's family to see MaA in her home since February, 2019.

Husband, KA, testified that Mother told him from the time she first learned she was pregnant it was a possibility that the child was JRH's. Husband and Mother physically separated in August, 2018, when Husband obtained his own home. They continue to live in separate homes up to the present time. He testified that it was because of him and not her that he moved out and that it was not because of the paternity test results. KA testified that he had been intimate with someone else as recent as a month ago. Husband testified that he and Mother could be intimate with others so they could get back together.

Mother and Husband entered into a Custody Stipulation filed to Docket No. 18-21300 filed on September 28, 2018. The Custody Stipulation only addressed their child, JA, born October 14, 2008. The Order grants Mother primary physical custody of the child and for KA to have visitation as agreed upon. There is no mention of MaA in the agreement.

During her testimony, Mother testified that she and Husband have been on and off throughout their marriage and had not been intimate with each other in the last nine to ten months. Mother also testified that from November, 2018, through January or February, 2019, she had a relationship with MF. She told MF that JRH could be MaA's father. Mother's relationship with MF ended in March, 2019. Mother has dated another individual since MF.

In Pennsylvania the law on paternity is well defined. If a child is conceived during the marriage or born into the marriage there is a presumption that Mother's husband is the father. **Brinkley v. King**, 701 A.2d 176, 177 (1997). This presumption can only be rebutted by clear and convincing evidence of sterility or that the husband had no access to the wife at the time of conception. **Id.** "[T]he *presumption is irrebuttable* when a third party seeks to assert his own paternity as against the husband in an intact marriage." **Martin v. Martin**, 710 A.2d 61, 63 (Pa. Super 1998) (quoting **Brinkley** @ 179). The policy behind the presumption is to preserve the marriage and family unit. **Martin** at 65 (Pa. Super 1998) (see also **Brinkley**). The Superior Court has held that the presumption of paternity is only to be applied when the presumption will advance the policy; if there is not an intact family to protect the presumption is not applicable. **Brinkley** at 181(see also **Martin**).

In the present case the Court must consider whether the application of the presumption of paternity would advance the policy behind the presumption by protecting Mother's intact marriage. The Court does not find that Mother is in an intact marriage with KA. Once a paternity test showed that KA was not MaA's biological father, he moved out into his own apartment. Thereafter, Mother and KA entered into a Custody

Stipulation in which they intentionally did not include MaA. Both Mother and KA have been sexually involved with other individuals up to the recent time. In the same month that Mother and KA physically separated into two separate homes, Mother re-established her relationship with JRH which included him having a key to her home and spending overnights. Mother has since that time ended her relationship with JRH, but has continued to have sexual relations with men other than her husband. Mother and KA do not currently live together as a married couple and both continue to the present date to have relationships outside of each other. This is not an intact marriage. Though KA states that he and Mother could be intimate with others so they could get back together, there is no guarantee that will ever occur. Mother and KA, though still married on paper, do not live the life of a couple with an intact marriage. As there is not an intact marriage to preserve, the Court finds that genetic testing is warranted based upon the facts of this case.

KA also argues that Paternity by Estoppel is applicable to this case. KA states in his brief:

“Where the worthy father has held the child out to be his own; and, that can be demonstrated, as in this case, it clearly is, and the father is spending time with the child and that the child calls him dada or father and where father has represented to others the child is his own. In this situation, the father is estopped or prevented from denying paternal legal proceedings. K.E.M. v. P.C.S., 38 A.3d 798 (Pa. 2012)

Here, Defendant’s husband “father” is not seeking to deny parentage but rather, is reaffirming that he, regardless of biological parentage is M.E.A.’s dad and desires to continue to be her father. In the instant case even after mother had informed her husband that M.E.A. may not be his biological child, he still has continued to support, care and love M.E.A. as his own. Mother and husband believe and have testified that the “best interests” of M.E.A. is to apply the doctrine of Paternity by Estoppel, as it is husband’s desire to continue his fatherhood of M.E.A. Husband had welcomed M.E.A. into the family home and treated M.E.A. as his own in an effort to

save his marriage and perhaps his family, and, he has supported the child financially and emotionally and now desires to continue in that role, his conduct should be encouraged by this Court.”

The Court finds KA’ argument to be misplaced. As stated in R.W.E. v A.B.K. and M.K., 961 A.2d 161, 169-170 (Pa. Super. 2008):

“The doctrine of paternity by estoppel has been applied by courts to prevent putative fathers who hold themselves out as the fathers of their children from substantially *denying* their parentage . . . Our appellate courts have not expanded this doctrine to allow putative fathers to use the doctrine offensively, in order to *assert* their paternity rights by and through their prior conduct. We decline to do so here, particularly at the expense of a biological father who did not earlier claim paternity only because of Mother’s and Robert’s decision to deprive him of the opportunity to do so. See *Vargo*, 940 A.2d at 464 (“Evidence of fraud or misrepresentation with regard to issues of paternity is relevant to the application of estoppel and must be considered by the trial court”).”

Paternity by Estoppel is not applicable in this case.

Based upon the foregoing, it hereby ORDERED and DIRECTED that JRH, MA and MaA shall undergo genetic testing at the Lycoming County Domestic Relations Office. The cost of the testing of \$56.85 shall be paid by JRH in advance of the testing payable by money order to the Lycoming County Domestic Relations Office. The Domestic Relations Office shall schedule a date and time for the testing and provide notice of such to both parties. Mother shall appear with the child at the scheduled time. The results of the testing shall be provided to the Court for distribution.

By the Court,

Joy Reynolds McCoy, Judge