Missouri Court of Appeals

Southern District

Division One

IN RE THE MATTER OF T.Q.L., a minor child,	)	
M.M.A.,	)	
Plaintiff-Appellant,	)	
vs.	)	No. SD31142
L.L.,	)	**Filed: February 14, 2012**
Defendant-Respondent,	)	
and UNKNOWN NATURAL FATHER,	)	
Defendant.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable Daniel W. Imhof, Associate Circuit Judge

AFFIRMED

M.M.A. ("Appellant") brings this appeal after the dismissal of his Third Amended Petition for the failure to state a claim. Accepting as true, as we must in a dismissal of the pleadings for failure to state a claim, all of the allegations in his Third Amended Petition, Appellant claims to have been deceived by L.L. into believing that a child, T.Q.L., who was born in 2003, was his biological child. As a result of that belief,

Appellant behaved as T.Q.L.'s father; he spent substantial money[1] and time on behalf of the child. He continued in his relationship with L.L., but at some point the personal relationship with her dissolved. Appellant subsequently filed a paternity action but, after initially objecting to DNA testing, he learned he was not the biological parent. Since that time, considerable court time was involved with further "legal wrangling," including a prior appeal in this Court. ***T.Q.L. ex rel. M.M.A. v. L.L.***, 291 S.W.3d 258 (Mo. App. S.D. 2009).

The issues raised in this appeal are:

(1) Did the trial court err in dismissing Appellant's Third Amended Petition for failure to state a claim because, under the "law of the case," our previous opinion recognized a cause of action under equitable principles for nonparental custody and visitation when it serves the best interest of the child?; and

(2) Did the trial court err in dismissing the Third Amended Petition for failure to state a cause of action because Appellant adequately pled a claim under the doctrine of equitable estoppel and nonparental custody under section 452.375.5(5)?[2]

The answer to the first question is a simple "no." The trial court did not err in dismissing the petition under the principles of the "law of the case." The holding in the first case was simply that the trial court erred in refusing to grant leave to Appellant to amend his pleading. This Court did not determine whether Appellant had a valid claim

[1] Father makes much of his financial contribution. Although that contribution was significant, the creation of a cause of action in this case will necessarily affect any third party seeking custody in this manner, including those that have the resources and those that do not. At the motion for rehearing proceedings, the guardian ad litem stated, "[Appellant] has provided a great deal of financial support for this child, but that's not the issue."

[2] All references to statutes are to RSMo Cum. Supp. 2005, unless otherwise specified.

under his theory of equitable estoppel or any other theory. Specifically, this Court discussed the law concerning allowing a party to amend a pleading and concluded:

> In this case, it is clear Father will suffer a hardship by the trial court's failure to grant him leave to amend his petition. Here, after rejecting the Second Amended Petition, the trial court dismissed the case as set out in the First Amended Petition, thus, Father was then without a remedy and this matter was foreclosed. Allowing the amendment to the pleadings would permit Father to have an opportunity to present his claims to the trial court. Further, Father was unable to earlier assert his arguments relating to equitable estoppel and equitable parenting prior to this time in that the DNA testing had only recently revealed that he was not the biological father of Child. Additionally, Father attempted to amend his pleadings in a timely manner after discovering this foregoing fact, and his amended pleading would serve to cure the deficiency pointed out in the GAL's motion to dismiss, which is that Father could no longer bring a statutory claim, at least not under the Uniform Parentage Act, because he was not, in fact, Child's biological father. Additionally, this Court sees no injustice to Mother in permitting the amendment to Father's pleading and determines its allowance would not be contrary to the best interest of Child. Accordingly, given the circumstances of this case, the trial court should have granted Father's request for leave to amend his petition. *Id.*; *see also Manzer v. Sanchez,* 985 S.W.2d 936, 939 (Mo.App.1999) (finding that a severe hardship exists where denial of leave to amend results in preclusion of cause of action).

T.Q.L. ex rel. M.M.A. v. L.L., 291 S.W.3d at 268.

Appellant was able to amend his petition and attempt to make a valid claim. The trial court followed the mandate of this Court and allowed the petition to be amended so that Appellant could present his claim and assert his claims to some type of action. The law of the case is not applicable. Point I is denied.

We now address the heart of Appellant's claim: whether Missouri recognizes a claim for custody by a nonparent under equitable principles, in other words, with no statutory authority for such a claim. We decline to create a cause of action. Appellant has cited us to no Missouri cases which have allowed such a claim of action in the context of a custody case. Instead, Appellant cites cases, such as ***Farmland Industries,***

Inc. v. Bittner, 920 S.W.2d 581 (Mo. App. W.D. 1996), which sets forth the elements of equitable estoppel:

> The doctrine of equitable estoppel seeks to foreclose one from denying his own expressed or implied admission that has, in good faith and in pursuance of its purpose, been accepted and relied upon by another. There are three essential elements to such a claim: (1) an admission, statement, or act inconsistent with the claim afterwards asserted and sued upon; (2) action by the other party on the faith of the admission, statement, or act; and (3) injury to such other party, resulting from allowing the first party to contradict or repudiate the admission, statement, or act.

Id. at 583 (internal citations omitted).

Farmland may be instructive on the dangers of using equitable estoppel to establish custody rights. In ***Farmland***, Bittner and his business partner signed a guaranty agreement that personally guaranteed payment of all purchases so that their partnership could be approved for a credit application to Farmland to make purchases on open account. ***Id.*** at 582. Subsequently, the partnership was converted to a corporation, at which time Bittner transferred his company stock to his former partner and orally requested that Farmland release him from the guaranty agreement; however, he never canceled the agreement in writing as was required by the agreement. ***Id.*** After the corporation made a number of purchases that resulted in an unpaid balance, Farmland filed suit against the corporation and Bittner and his former partner individually. ***Id.*** at 583. The trial court found that Farmland was equitably estopped from asserting that Bittner's oral revocation of a guaranty agreement was invalid under the statute of frauds as Bittner acted reasonably when he orally requested to be released from the agreement and relied on Farmland's representative's statement to him that he had, in fact, been released. ***Id.***

On appeal, Farmland claimed that the oral revocation was invalid in that both the statute of frauds and the agreement itself required that any modification of the guaranty be in writing, and that Bittner was not entitled to plead equitable estoppel because he failed to read the agreement, which clearly stated that any revocation of the guaranty had to be in writing. ***Id.*** The Western District of this Court agreed and reversed, stating, "[O]ne cannot set up another's act or conduct as the ground of an estoppel when he knew or had the same means of knowledge as the other to the truth. There can also be no estoppel when acquiescence by all concerned is due to a common mistake." ***Id.*** (internal citations omitted). The court held that Bittner could not claim equitable estoppel when his lack of knowledge was due to his own failure to read the agreement before signing it. ***Id.*** at 584. Bittner argued that Farmland's representatives should have also known that any revocation had to be in writing, and their failure to inform him of this requirement estopped Farmland from claiming it. ***Id.*** at 584. The court further held that "constructive knowledge is generally not sufficient to establish estoppel," both parties had the same means of knowledge as to the writing requirement, and the trial court misapplied the law when it held that Farmland was equitably estopped from asserting that Bittner's oral revocation was invalid under the statute of frauds. ***Id.***

With the holding of ***Farmland*** in mind, we shall attempt to analyze Appellant's claim under the principles of equitable estoppel. We will accept as true Appellant's allegation that L.L. previously acted inconsistently with her claim now that Appellant is not the father of T.Q.L.[3] We will accept as true that Appellant acted upon L.L.'s statement that he was the father of T.Q.L. It is the third element, the injury to such other

[3] Appellant does not claim in his petition that L.L. knew Appellant was not the father of T.Q.L. at the time of any representations.

party resulting from allowing the first party to contradict or repudiate such admission, statement or act, which causes a dilemma in applying equitable estoppel to a custody determination. It has never been a factor in a custody determination that one party to the determination would be harmed by the custody award.[4] Currently, the law is simply that the court shall determine custody in accordance with the best interests of the child, pursuant to section 452.375.2, but only to parties as allowed by law.

More importantly, even if the doctrine of equitable estoppel allowed such a claim, ***Farmland*** held that when both parties have equal knowledge one party cannot claim equitable estoppel against the other. ***Farmland***, 920 S.W.2d at 584. Appellant had equal access to the knowledge of T.Q.L.'s paternity. He could have sought a paternity test, he was not named on the birth certificate, he was not married to L.L., and he does not claim to be a putative father. It is not clear if L.L. at one time also believed Appellant was T.Q.L.'s father. There currently is no law permitting Appellant to seek custody under the claim of equitable estoppel. We decline the invitation to introduce a new cause of action for the custody of a child based upon a claimed misrepresentation invoking equitable estoppel principles. Point II is denied.

The judgment is affirmed.

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Nancy Steffen Rahmeyer, Judge

Burrell, P.J., Lynch, J., concur.

Attorneys for Appellant -- John C. Holstein, Jennifer R. Growcock
Attorney for Respondent -- Darryl B. Johnson, Jr.
Division I

[4] Furthermore, the determination of an injury to a relationship or lack of relationship is fraught with peril. For instance, can Appellant claim he has not benefited in the relationship with T.Q.L., even if it was limited in time? How are such sensitive matters determined by the fact finder?