D072309 (Civil)
DF122089 (Superior Court)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

COUNTY OF SAN DIEGO,

Petitioner and Appellee

vs.

M.V.

Respondent and Appellee.

P.R.

Custodial Parent and Appellant.

RESPONDENT M.V.'S RESPONSE BRIEF

APPEAL FROM

SUPERIOR COURT OF SAN DIEGO COUNTY

DEPARTMENT 802

HON. TERRIE E. ROBERTS, COMMISSIONER

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SUMMARY

This case demonstrates the profound importance of equity in family law. The trial court used its broad equitable powers of discretion to avoid a terribly inequitable result.

Appellant, P.R., induced Respondent, M.V. to believe P.R. closed the child support case after learning that M.V. was not the father. M.V. also instructed the county did stop collecting support. M.V. relied on this and believed in good faith that he was not obligated to pay support. Meanwhile, P.R.'s partner of 17 years raised the child since the child was two years old. Nevertheless, about 15 years later, when M.V. had a wife and three minor children of his own to support, P.R. decided she wanted the $80,000.00 in arrears that accrued. After reviewing extensive evidence, the court found forcing M.V. to pay arrears would be a tremendous inequity and injury that "far outweighs the accrual of arrears," and held that P.R. is equitably estopped from collecting arrears for the period November 2001 through January 2015. The court also found P.R. had unclean hands, her testimony was not credible, and she will "say anything" to collect arrears. Further, the issue of arrears was not barred by res judicata, because support had not even been collected prior to the time the motion to determine arrears was filed.

"Family law court is a court of equity." *In re Marriage of Boswell* (2014) 225 Cal.App.4th 1172, 1175. "A family law court, in the exercise of its broad equitable discretion, and upon a finding of 'unclean hands,' may decline to enforce a child support arrearage judgment." *Ibid.* If there is any case in which equity is applicable, it is this one. The trial court did the right thing. The decision should be upheld.

STATEMENT OF FACTS

On August 23, 1999, the County of San Diego (hereafter "The County") filed a Complaint to Established Parentage and Child Support against Respondent M.V. (hereafter "M.V.") for Appellant P.R.'s (hereafter "P.R.") child, who was about three months old (DOB May 29, 1999). (Clerk's Transcript (hereafter "CT") 00013.) On September 1, 1999, the County served the Complaint and a Summons upon M.V. (CT 00017.) On September 24, 1999, M.V. stipulated to paternity, and the court placed support on reserved status. (CT 00018.)

On October 23, 2000, M.V. took a genetic test, and the result excluded him as the biological father of the child. (CT 00033.) On March 15, 2001, before knowing about the genetic test result, the County filed a motion to establish support. (CT 00022.) On May 22, 2001, M.V. told the County about the genetic test results. (Statement of Decision (hereafter "Decision") p. 3, CT 000350.). The County told him to bring the test result to the hearing. (Decision, p. 3, CT 000350.) The hearing was set for June 5, 2001, but it was continued to August 21, 2001 to allow M.V. to file a proper motion for genetic testing through the County. (CT 00029; Decision, p. 3, CT 000350.)

On June 28, 2001 and August 11, 2001, P.R. told the County that a genetic test excluded M.V. as the father, and she instructed he County to close the case and to take M.V. off the child's health insurance. (Decision, pp. 3-4, CT 000350 - 000351.)

On August 21, 2001, neither party appeared at the hearing, and the court was not informed that P.R. asked the County to close the case. (Decision, p. 4, CT 000351.) The

court ordered M.V. to pay support of $203.00 per month effective April 1, 2001, based on M.V.'s gross monthly income of $1,083. (CT 00030.) The County then initiated wage and health insurance assignments against M.V.'s employer and collected payments on October 11, 2001 and October 29, 2001. (Decision, p. 4, CT 000351.)

On November 1, 2001, P.R. again asked the County to close the case. (Decision, p. 4, CT 000351.) The County signed a closure that day, and told P.R. that, because Medi-Cal was active, the County would still enforce the health care assignment. (Decision, p. 5, CT 000352.) On November 2, 2001, the County terminated the wage assignment order and stopped enforcing support. (Decision, p. 5, CT 000352.)

On November 13, 2001, P.R. told the County her husband wanted to adopt the child, and that M.V. is not the father. (Decision, p. 5, CT 000352.) She was upset that the County refused to remove the child from M.V.'s health insurance. (Decision, p. 5, CT 000352.) The County told her that to completely close the case, genetic testing would have to be done through the County. (Decision, p. 5, CT 000352.)

On May 15, 2002, M.V. asked the County why he was still required to provide health insurance. (Decision, p. 5, CT 000352.) The County transferred him to the genetic testing line with instructions to obtain genetic tests through the County. (Decision, p. 5, CT 000352.)

On January 21, 2003 and January 23, 2003, P.R. asked the County about re-opening the case, and was told that she would be given paperwork. (Decision, p. 5, CT 000352.) No further activity occurred. (Decision, p. 5, CT 000352.)

On August 22, 2007, M.V. asked the County about closing the case, and explained that P.R. told him she had closed the case. (Decision, p. 6, CT 000353.) He was told he had to obtain genetic testing through the County. (Decision, p. 6, CT 000353.)

On December 12, 2012, P.R. submitted an application to re-open the support case. (Decision, p. 7, CT 000354.) On January 29, 2013, P.R. told the County that M.V. had no contact with the child since the genetic testing in 2001 excluded him as the father, and P.R. expressed a concern that if she re-opened the case, M.V. might want to be involved with the child. (Decision, p. 7, CT 000354.)

On January 31, 2013, the County served M.V. with charging papers to re-open support. (Decision, p. 7, CT 000354.) That same day, the County called P.R. and discussed genetic testing, but P.R. hung up and did not answer when the County called back. (Decision, p. 8, CT 000355.) The County left a voice message with P.R. but P.R. did not call back. (Decision, p. 8, CT 000355.) P.R. was so uncooperative that the County withdrew the charging instructions and told her they were being revoked due to her non-cooperation. (Decision, p. 8, CT 000355.)

On January 31, 2013, in pro per, M.V. filed a motion to set aside paternity, with a hearing set for March 13, 2013. (CT 00031.)

On March 13, 2013, at the hearing, P.R. told the court she does not object to genetic testing and that she wanted to know who the father was. (Decision, p. 9, CT 000356.) M.V. testified that he thought the case was closed, that he relied on P.R.'s statement that she stopped enforcement, that enforcement stopped in 2001, and that he

believed everything was over with. (Decision, p. 9, CT 000356; RT, V1, p. 111, lines 3-5.) He also testified that he has three children[1] of his own to support and cannot afford to pay arrears. (RT, V. 1, p. 109, line 8.) The County testified that they were not charging support because P.R. was uncooperative. (Decision, p. 10, 000357.) Honorable Kery G. Katz tentatively denied the motion (CT 00042) but also continued it to June 5, 2013 to allow M.V. to obtain counsel. (RT, V1, p. 111, lines 13-25; Decision, p. 10, 000357.) However, the Minute Order did not state why the matter was continued, but only stated the motion was denied, with a new hearing date of June 5, 2013. (CT 00042.)

On February 14, 2013, the County filed a Responsive Declaration opposing M.V.'s motion on the basis that it was untimely, and the County objected to the admissibility of the genetic test. (CT 00035.)

On June 5, 2013, at the hearing, M.V. appeared with counsel. (CT 00044.) The Honorable Katz saw that the Minute Order of March 13, 2013 stated the motion was denied, and apparently forgot that she also allowed M.V. to return with counsel, so she asked: "what are we here for? I already denied the motion." (RT, V2, p. 207, lines 12-13.) M.V.'s counsel stated that she was not sure because she is new to the case but that M.V. believed he could still proceed with his motion, and that she ordered the transcript of the March 13, 2013 hearing. (RT, V2, p. 207, lines 22-23, 26-27.) The court stated: "Well, then you can file a motion. Once you get the transcript and the transcript shows there's a problem, which may be, who knows, then you can file a motion. But there's

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[1] M.V.'s children are now ages eight, ten, and fifteen, all living with him and his wife.

nothing filed today. I can't hear anything today. I'm not going to continue it. I'll set it off calendar. Dad can file a motion." (RT, V2, p. 207 line 28 – p. 208 lines 1-5, p. 208 lines 1-6, p. 209 lines 6-12.) The court further stated: "Dad can get the transcript and file whatever motion he wants and the court will listen to it." (RT, V2, p. 209, lines 7-8.)

That same day, after the hearing, M.V.'s counsel filed a Request for Order (hereafter "RFO") to set aside the judgment and to obtain genetic testing. (CT 00046 – 00054.) The hearing set for July 17, 2013. (CT 00046 – 00054.)

On July 17, 2013, at the hearing, the County told the court the case was a **Medi-Cal only case and that support was not being enforced**. (RT, V3, p. 305, lines 19-22; Decision, p. 11, 000358.) P.R. testified: (1) That M.V. is the only person who could be the father (RT, V3, p. 312, line 1); (2) That she never said she did not object to genetic testing, despite the County's statement that she did (RT, V3, p. 313 line 22 – p. 314 line 21); (3) That she spoke with M.V. after seeing the genetic test but does not recall what she said (RT, V3, p. 316, lines 23-24); and (4) That she believed the genetic tests were false because M.V. did not want to take another test (RT, V3, p. 317, lines 8-28).[2] M.V.'s counsel argued that there was extrinsic fraud. (RT, V3, p. 324, lines 11-14.) The court found no extrinsic fraud and therefore denied the motion. (CT 00064; RT, V3, p. 328, lines 14-24.)

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[2] On a later date, in the Decision, the Judge noted that when M.V.'s attorney stated P.R. told M.V. she would "take care of it," P.R. nodded her head. (Decision, p. 11, 000358.)

On July 30, 2013, the County told P.R. they still are not charging for child support but that she can fill out paperwork to re-open the case if she wanted to. (Decision, p. 12, 000359.)

On August 14, 2013, the County re-opened the case and notified P.R. that, since the case had been closed, she may not qualify for arrears. (Decision, p. 12, 000359.)

On September 11, 2013, P.R. called the County and **asked them to close the case**, stating they had yet **another genetic test done that again excluded M.V. as the father**. (Decision, p. 12, 000359.) The County told her the case would be closed and the **balance** would be zero. (Decision, p. 12, 000359.) She asked for help removing M.V. from the child's birth certificate and had referred her to Vital Records. (Decision, p. 12, 000359.)

On October 7, 2013, the County told P.R. that child support had been stopped per her request, but that the health insurance order is still being enforced because Medi-Cal was active. (Decision, p. 12-13, 000359 - 000360.)

On December 3, 2013, P.R. asked the County for a referral to file a motion for genetic testing and to set aside paternity, and she was given a referral. (Decision, p. 13, 000360.)

On December 12, 2013, P.R. told the County she wanted to re-open the case. (Decision, p. 13, 000360.) She was advised to apply online. (Decision, p. 13, 000360.)

On April 8, 2014, P.R. emailed M.V. stating she found the father, Jeremy, and she wanted to give Jeremy the right to be the father. (CT 000194.) On September 19, 2014, P.R. told the County to remove M.V. from the case because she obtained another DNA

test that again found M.V. is not the father. (Decision, p. 13, 000360.) The County gave her a referral. (Decision, p. 13, 000360.)

On February 6, 2015, P.R. filed an application to re-open the case. (Decision, p. 13, 000360.) On March 25, 2015, the County told M.V. the case was being re-opened and that support would be effective February 1, 2015. (Decision, p. 13, 000360.)

On July 13, 2016, the County filed a motion for child support. (CT 00068.)

On July 17, 2016, M.V. filed a motion to set aside the judgment and for genetic testing. (CT 00096.)

On July 25, 2016, P.R. filed a motion for determination of arrears. (CT 00106; Decision, p. 13, 000360.) On August 5, 2016, M.V. filed a response, arguing, *inter alia,* that equity should apply, that the judgment and arrears should not be enforced because he is not the father and because P.R. told him support would not be collected, and the response attached genetic testing an and other evidence. (CT 00125 – 138.)

On August 23, 2016, the trial court granted a stipulated judgment, apparently regarding health insurance, although it is not clear what is was. (CT 00145.)

On September 7, 2016, M.V. filed a response to PR's motion. (CT 00155 – 161.)

On September 12, 2016, at the hearing, the County told the court "**this is a Medical need only case.**" (RT, V4, p. 504, lines 23-24.) Honorable Terrie E. Roberts noted there were three motions on calendar: (1) P.R.'s motion to set arrears filed on July 25, 2016; (2) P.R.'s motion regarding attorney fees; and (3) the County's motion to modify. (RT, V4, p. 504 line 26 – p. 506 line 10.) M.V.'s counsel argued that arrears

should not be enforced because it would be inequitable given that P.R. led M.V. to believe she was removing him from the case, that the child is now 17, and that enforcing arrears would be devastating to M.V. because he has three children and a wife. (RT, V4, p. 510 line 10 – 28, p. 512 lines 13 – p. 513 line 28.) The court stated paternity would not be set aside, and stated it was going to set arrears at $34,069.23 and interest at $49, 210.79. (RT, V5, p. 515 lines 5-28, p. 517 lines 12-16, p. 522 lines 7-14.)

At that point, M.V. spoke up on his own, and the following exchange occurred:

MV: "Your honor, I want to ask how can she be entitled to arrears if she was never enforcing the orders?"
Court: "The court ordered the child support in 2001. She had the court order. And why you didn't have it or you weren't paying, I don't know."
M.V.: "She stopped enforcement is why."
Court: "Ok well if you thought that she stopped enforcement . . . you thought she stopped enforcement?"
M.V.: "She did stop enforcement. The County garnished two of my checks then, and then they stopped garnishing it due to the fact that she called and stopped it after I presented her with the first DNA test."

The court then asked the County: "Did the County stop enforcing after a certain time?" (RT, V5, p. 523, lines 25-26.) The County replied: "**This case has been closed at mom's request**." (RT, V5, p. 523, lines 27-28.) The court asked P.R.'s counsel if that was true, and P.R.'s counsel replied that P.R. made that request mistakenly, intending it to be for a different case involving her current partner but not M.V. (RT, V5, p. 524, lines 15-23.) After further inquiry of both parties, the court allowed 90 days for M.V. to file a motion to set aside based on equitable estoppel. (RT, V5, pp. 523-527; Decision, pp. 14-15, CT 000361-000362; CT 000169 – 000171.)

On November 1, 2016, M.V. filed a motion to modify the judgment and for equitable estoppel. (Decision, p. 15, 000362; CT 000179.) On December 14, 2016, at the hearing, the court continued the hearing to January 11, 2017 because M.V.'s counsel was awaiting subpoenaed records from the County. (RT, V6, pp. 603-604.)

On January 11, 2017, at the hearing, the court asked P.R.'s counsel about P.R. instructing the County to close the case, and P.R.'s counsel argued that P.R.'s did that by mistake, and really meant to close a different case involving one Jeremy Serrano. (RT, V7, p. 712, lines 4-14.) The court replied that P.R. waited from 2002 to 2013, 11 years, without receiving any payments and did not inquire. (RV, V7, p. 712, lines 16-19.) The court continued the hearing to January 25, 2017, the date that the County's motion to quash M.V.'s subpoenas was already pending, and the court requested a copy of the 2013 transcript. (RT, V7, p. 724, lines 3-6.)

On January 25, 2017, at the hearing, the court stated: "The issue here is whether or not, through mom's verbal representations to [M.V.], through her verbal representation to the County, and through the --- actually through what actually happened in terms of the support, the issue is whether or not mother made a change to the support order by her conduct, by her – by her actions and by her statements. So that is the issue. And if the court makes that determination that will have an effect on the arrears, and it's not a matter of modifying the judgment." (RT, V8, p. 806 lines 14-23.) The court ordered the parties to produce additional documents, including the communications between them and the County. (RT, V8, pp. 809-814; Decision, p. 17, CT 000364; CT 000292.)

On March 23, 2017, after documentation was provided, the court entered a Statement of Decision with numerous findings and exhibits attached. (Decision, p. 17, 000364.) The court found P.R. was incorrect in stating M.V. refused to pay child support since 2001. (Decision, p. 17, 000364.) The court further found:

- In 2001, after genetic testing excluded M.V. as the father, P.R. told M.V. she would "take care of it and close the case with the County" (Decision, p. 17, 000364);
- On August 11, 2001 P.R. asked the County to close the case (Decision, p. 17, 000364);
- On November 1, 2001 P.R. submitted forms to the County requesting to close the case (Decision, p. 17, 000364);
- On November 2, 2001 the County terminated the wage assignment (Decision, p. 17, 000364);
- P.R. took numerous steps to remove the child from M.V.'s health insurance, though she was not able to (Decision, p. 17, 000364);
- From November 2001 to January 2015 P.R. did not seek enforcement of support and never expected nor sought support despite knowing M.V.'s whereabouts during that time (Decision, p. 17, 000364);
- M.V. never refused to pay support, but sincerely believed he was no longer obligated to pay support and reasonably relied on P.R.'s statement that she would take care of it and close the case (Decision, p. 18, 000365);

- P.R.'s actions of adamantly attempting to remove the child from M.V.'s health insurance, calling M.V.'s employer and demanding that the child be removed, and attempting to remove M.V. from the birth certificate, further manifested the understanding between the parties regarding M.V.'s obligations to pay support. (Decision, p. 18, 000365);
- Numerous emails from P.R. to M.V., attached to the Decision, further supported that understanding (Decision, pp. 19-21, 000366 - 000368);
- The totality of evidence showed P.R. did not intend to enforce support after the 2001 DNA test excluded M.V. as the father (Decision, p. 18, 000365);
- P.R.'s testimony had numerous contradictions and she has a propensity to "say whatever she needs to say to support her claim for arrears and accordingly, the court does not find her to be a credible witness" (Decision, p. 23, 000370); and,
- M.V.'s testimony was credible (Decision, pp. 17-24, CT 000364 - 000371).

The court considered the child's needs, noting the child emancipates in June 2017, the child's needs were met by P.R.'s partner who had been acting as the father since the child was two years old, that P.R. never had to go on aid to support the child, that P.R. obtained a DNA test in September 2014 and informed the County that M.V. was not the father and that she wanted him removed from the case; and that as soon as P.R. re-opened the case in February 2015, M.V. has been paying support through wage assignment since that time. (CT 00435 – 00437.) The court found forcing M.V. to pay $80,000.00 in arrears he never avoided paying but P.R. chose non-enforcement would be a tremendous

inequity and injury to M.V. that "far outweigh the accrual of arrears." (CT 00437, lines 3-7.) The court held it will "not use its judicial power to achieve an inequitable result," and thus refused to enforce arrears (Decision, p. 30, CT 000377), and refused to enforce arrears for the period November 2001 through January 2015 (CT 00412 lines 12-13).

P.R. appealed.

STANDARD OF REVIEW

On appeal, purely legal issues are reviewed *de novo*. *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799. Questions of fact are reviewed for abuse of discretion. *People v. Holmes* (2004) 32 Cal. 4th 432.

In general, orders regarding child support are reviewed for abuse of discretion. *In re Marriage of Cheritan* (2001) 92 Cal.App.4th 269, 282-283. "In a legal sense discretion is abused whenever in the exercise of discretion the court exceeds the bounds of reason, all of the circumstances before it being considered." *Westinghouse Electric Corp. v. Superior Court* (1983) 143 Cal.App.3d 95, 101. Thus, in this case, since the issues relate to child support, the trial court's findings of fact and the application of equity thereon are reviewed for abuse of discretion.

Rulings concerning the existence of an equitable estoppel are factual issues and are normally reserved for resolution by the trial court and will be upheld if supported by substantial evidence. *In re Marriage of Iberti* (1997) 55 Cal. App. 4th 1434, 1442.

ARGUMENT

I. FAMILY COURTS ARE COURTS OF EQUITY AND EQUITABLE ESTOPPEL APLIES IN FAMILY LAW.

"Family law court is a court of equity." *In re Marriage of Boswell, supra,* 225 Cal.App.4th at 1175. The equitable doctrine of equitable estoppel is codified in Evidence Code Section 623, which states:

> Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

Equitable estoppel has long been upheld by the California Supreme Court. *Wilk v. Vencill* (1947) 30 C.2d 104, 107. Wrongful intent or fraud are not necessary for equitable estoppel to apply. "An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. . . . An estoppel may arise from silence as well as words." *Calistoga Nat. Bank v. Calistoga Vineyard Co*. (1935) 7 C.A.2d 65, 73. Either unjust enrichment or a change in position[3] may be the basis of an unconscionable injury which will bar a person from asserting the requirement of a writing. *Ibid.*

Family law embraces the concept of equitable estoppel. *In re Marriage of Stephenson* (1984) 162 Cal. App. 3d 1057, 1072; *In re Marriage of Recknor ("Recknor")* (1982) 138 Cal.App.3d 539, 546 ("Estoppel applies to prevent a person from asserting a right where his conduct or silence makes it unconscionable for him to assert it").

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1. Family Code Section 17560(d) further provides authority for an express waiver of support arrears that are being enforced by a county.

The definition of equitable estoppel as applied to family law is set forth by the Court of Appeal as follows:

> The doctrine of equitable estoppel is 'pre-eminently' the creature of equity and '[i]ts foundation is justice and good conscience.' It has been defined by Professor Pomeroy as '. . . the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, or contract, or of remedy.' In short, it is the object of equitable estoppel to prevent a person from asserting a right which has come into existence by contract, statute or other rule of law where, because of his conduct, silence or omission, it would be unconscionable to allow him to do so.

Brown v. Brown (1969) 274 Cal. App. 2d 178, 188.[4]

The elements of equitable estoppel are "representation or promise; made with knowledge of the facts; to a party ignorant of the truth; with the intent that the other party act on it; when the other party has, in fact been induced to rely on it." *Recknor, supra,* 138 Cal.App.3d at 546. In *Recknor,* a man went through a marriage ceremony with a woman while she knew her prior marriage was still valid. Her prior marriage was dissolved about five months later. The man and woman continued cohabitating for almost 15 years, after which the woman petitioned for dissolution and requested custody,

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[4] Equitable estoppel has applied to other areas of family law as well, including parentage (*Kristine H. v. Lisa R*. (2005) 37 Cal. 4th 156), spousal support (*In re Marriage of Iberti*, *supra,* 55 Cal. App. 4th at 1434), and separation dates (*In re Marriage of Umphrey* (1990) 218 Cal. App. 3d 647.

child support, spousal support, and attorney fees. The man argued that the marriage was void as a matter of law because, when they married, the woman was still legally married to her former spouse. The trial court held that the putative spouse doctrine did not apply because the woman knew the marriage was invalid, but that the man's actions estopped him from invalidating the marriage. The Court of Appeal affirmed, stating:

> Equity or chancery law has its origin in the **necessity for exceptions to the application of rules of law in those cases where the law, by reason of its universality, would create injustice in the affairs of men**. Equity acts 'in order to meet the requirements of every case, and to satisfy the needs of progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.**' Equity need not wait upon precedent but will assert itself in those situations where right and justice would be defeated but for its intervention**.

Recknor, supra, 138 Cal.App.3d at 546 (citations omitted) (emphasis added).

Accordingly, the Court of Appeal held that the man was properly estopped to deny that he was validly married to the woman, because he went through a formal marriage ceremony with her knowing that her divorce was not final, and continued to live with her as her husband for 15 years, during which time they had two children, and only after 15 almost 15 years did he attempt to assert the invalidity of his marriage to Eve. *Id.,* at 547.

II. THE TRIAL COURT PROPERLY APPLIED EQUITABLE ESTOPPEL DUE TO P.R.'S UNCLEAN HANDS AND INDUCEMENT OF M.V.'S GOOD FAITH BELIEF THAT HE WAS NOT OBLIGATED TO PAY SUPPORT BECAUSE HE WAS NOT THE FATHER.

"A family law court, in the exercise of its broad equitable discretion, and upon a finding of 'unclean hands,' may decline to enforce a child support arrearage judgment." *Boswell, supra,* 225 Cal.App.4th at 1175. Moreover, as the decision in *Boswell* illustrates,

a finding of unclean hands justifying equitable estoppel is *not* limited to cases of active concealment occurring past the child's age of majority.

In *Boswell,* a father was ordered to pay $70.00 per month per child for several children. After paying for two months, the mother disappeared with the children. The father did not see the children for 15 years. When *one* of the children reached the age of majority, the mother gave custody of the 16-year-old child to the father. The mother then sought to recover arrearages, while one child was still a minor. The trial court found the mother acted with unclean hands by concealing the child, and thus the court used its equitable powers to deny enforcement of arrearages. The Court of Appeal affirmed. In doing so, the court made it clear that the key issue is "whether the trial court should have used judicial power to achieve an "inequitable result." Specifically, the court stated:

> Family law court is a court of equity. Those who seek equity, must do equity and have 'clean hands'. "Family law cases 'are equitable proceedings in which the court must have the ability to exercise discretion to achieve fairness and equity. We need not dwell upon or explicate in detail underlying principles of "active concealment," "estoppel," or "retroactive modification of child support." **The only issue here is whether the trial court should have used judicial power to achieve an "inequitable result."** It is sufficient to observe that mother did actively conceal the children. This equitably estops her from enforcing a child support judgment. The trial court found that mother had been "unjust" in her unilateral decision to remove father from the children's lives. This is tantamount to a finding of "unclean hands." We reiterate our statement in *Keith G. v. Suzanne H.*: "These are some of the dirtiest hands we have seen." As expressly indicated by the trial court, this was "terribly egregious." "The "clean hands" rule is of ancient origin and given broad application. It is the **most important rule affecting the administration of justice.**

Id., at 1174-75 (emphasis added) (citations omitted).

Boswell confirmed the importance of equity in family court, and that such equity takes precedence over stricture and inflexibility when issues of justice and equity arise. Likewise, this is one of those case where enforcing arrears would lead to a terribly egregious inequity, and the court's powers of equity needs to be utilized.

M.V. has a wife and three minor children of his own. He cannot afford to pay arrears for a 15-year old case that he was repeatedly induced to believe he did not have to pay and had no idea was accruing for those 15 years because he was told by both the mother and by the County that it was not being enforced. The evidence, including the emails, the County's records, and the testimony, overwhelmingly showed that this was the understanding between the parties, and that M.V. did not expect, or have reason to expect, that arrears were accruing. Not only did P.R. repeatedly tell M.V. that she was removing M.V. from the case, but the County told M.V. they are not enforcing it, and in court they repeatedly said they are "not collecting" and that this was a "medical only case." P.R. even called M.V.'s employer and told them to stop the assignment.

M.V. obviously did not understand all the intricacies of the law. But he did understand what he was being told, and he always acted ethically and in good faith. The court found his testimony was credible, while P.R.'s was not, and that she would "say whatever she needs to say to support her claim for arrears and accordingly."

P.R. cites *Marriage of Damico ("Damico")* (1994) 7 Cal.4th 637, 685 to argue that the defense of estoppel is limited to the custodial parents' active concealment until the age of majority. (Opening Brief (hereafter "OB"), p. 49.) This is untrue. *Damico* limits

the scope if its own ruling to the facts of that particular case, *i.e.,* a case involving active concealment, and where the active concealment went past the child's age of majority. Specifically, *Damico* states:

> [W]e cannot, and do not, express an opinion on the rule when the concealment ends while the child is still a minor and might yet benefit from payment of the arrearages. Because estoppel is an equitable defense, the equities might be different if the concealment were for a shorter time, especially if the innocent child particularly needed the arrearages.

Id., at 685. Thus, *Damico* only addressed whether active concealment past the age of majority was a *sufficient* condition to refuse to enforce arrears in equity – not whether it was a *necessary* condition for the same.

Moreover, the reasoning in *Damico* supports the trial court's decision in this case by stating the difference between concealment and mere interference is that concealment "obliterates the entire relationship between the child and the custodial parent." *Id.,* at 675. Likewise, P.R.'s inducement of M.V. to not believe he was required to pay, instructing the County to stop collecting, and removing M.V. from the child's life, all served to obliterate the relationship between M.V. and the child. In fact, after that occurred in 2001, M.V. had zero contact with the child, who was raise by P.R.'s partner.

Domico further distinguishes concealment from mere interference by stating: "it is the inability to make the support payments that distinguishes concealment from mere interference." *Id.,* at 686. Likewise, M.V.'s good faith belief that he did not have to pay is more analogous to the inability to pay than to mere interference. In fact, it goes beyond inability to pay. If one cannot pay due to concealment, they still *know they are*

obligated to pay and can at least set the money aside in case they find the child or the other parent. By contrast, M.V. had no knowledge that he was obligated to pay. Had he known, he could have paid and avoided arrearages and interest. Enforcing arrears against him would be even more inequitable than in cases of active concealment.

P.R. argues that M.V. "could have simply paid the County." (OB, p. 51.) But he had no reason to believe he was obligated to pay the County. The trial court properly found that, based on the understanding he had with P.R. and the County's ending of enforcement, M.V. had no expectation that he had to pay. While the County did tell M.V. if he wanted the case closed completely to include the judgment of paternity and the health insurance he had to file a motion, that was separate from the issue of whether support was required, as he believed that was about the paternity judgment and health insurance, not support. When he was told, repeatedly, that support is not being collected, he had every reason to believe it, as that is exactly what P.R. and the County told him.

P.R. argues that estoppel cannot be imputed to the County, and cites two cases in support of this argument. Those cases are *In re Marriage of Comer ("Comer")* (1996) 14 Cal.4th 504, 510, 529, and *In re Marriage of Walters ("Walters")* (1997) 59 Cal.App.4th 998, 1006-1007. But it is *not the County against whom estoppel was imputed*. Rather, estoppel was imputed against P.R. We briefly examine those two cases here.

In Walters, the mother, who was on welfare, actively concealed the child, and the father stopped paying support to the county. The concealment ended while the child was still a minor. The trial court, and the Court of Appeal, refused to hold that the county was

estopped from collecting, because the father was able to pay the county even while the child was concealed. The point of the ruling was that the father was able to pay the county *and* knew he was obligated to, whereas the county did not do anything to induce him to believe otherwise. Specifically, the Court of Appeal points out that the father "received notices from the district attorney's office for 16 or 17 years," and:

> Having failed to make any direct request to the district attorney for assistance in locating his daughter, appellant cannot now complain that the county failed to provide that assistance. Nor has he presented any evidence of affirmative acts or representations by the county which induced his reliance.

Id., at 1005-1006. The court went on to distinguish *Damico* because *Damico* did not involve the County. Specifically, the court stated:

> The question of estoppel is *closer as to the nonwelfare arrearages.* In *Damico*, the Supreme Court held that a custodial parent who actively conceals herself and the child from the noncustodial parent until the child reaches the age of majority is estopped from later collecting child support arrearages for the time of the concealment. The court rested its decision on the fact that the concealment precluded the payment of child support and hence defeated the purpose of the judgment, which was the support of the child, and it also precluded the noncustodial parent from invoking remedies which would assist in locating the child. Our case differs from *Damico* in one significant aspect--during the nonwelfare periods (when respondent was not collecting AFDC), appellant was under court order to make child support payments to the court trustee. *The fact that respondent concealed herself and the child did not prevent appellant from making the ordered child support payments to the trustee*.

Id., at 1006-1007 (emphasis added).

Likewise, in *Comer,* the mother collected welfare, actively concealed the child, and the concealment ended while the child was still a minor. The trial court and Court of

Appeal held that the mother and the county were estopped from enforcing arrears due to the concealment. The California Supreme Court reversed for the same reasons set forth in *Walters,* while also pointing out that allowing estoppel in such a case could invite noncustodial and custodial parents to collusively deceive government agencies while obtaining public assistance. Specifically, the California Supreme Court stated:

> We decline to interpret the governing statutes in a manner that at once may invite noncustodial parents to ignore their legal and financial obligations to their children while encouraging custodial parents to deceive government agencies in order to obtain public assistance. We therefore conclude that when the custodial parent's concealment of the whereabouts of both the parent and the child is asserted by the noncustodial parent as a justification for ignoring the latter's obligation to pay child support arrearages to the custodial parent, the noncustodial parent may not assert such a defense against a the county or other governmental agency that has been assigned the right to receive support arrearages for AFDC reimbursement or other public assistance payments. . . . As we recognized in Moffat v. Moffat [citation], one readily may sympathize with the plight of a noncustodial parent who is deprived of the right to visitation with his or her child under circumstances --such as those presented here, involving concealment that ended while the children still were minors--that do not subject the custodial parent to the defense of estoppel to a claim for child support arrearages. The noncustodial parent in that situation certainly is deprived of the opportunity to maintain a meaningful relationship with the child. But, as noted above, the noncustodial parent's appropriate recourse lies with the remedies provided by the legal system--and not in extra-legal "self-help" alternatives or, as was the case here, in having the children bear the burden of that parent's failure to fulfill court-ordered child support responsibilities. We conclude, therefore, that the Court of Appeal erred in holding that mother's concealment of herself and her children, terminating before either child reached the age of majority, eliminated the children's right to receive child support arrearages and estopped assignee Gila The County from seeking AFDC reimbursement.

Id., at 529-530 (citations omitted). *Id.,* at 510.

Both *Walters* and *Comer* are inapposite here because in those cases the father knew he was obligated to pay the county and was never induced to believe he was not obligated to pay. Here, P.R. induced M.V. to believe he did not have to pay, and the County *stopped enforcing support*. The only issue remaining that M.V. knew of was health insurance. Moreover, the more recent 2014 case of *Boswell* held that even if the unclean hands (in that case, by active concealment) ended before the child reached the age of majority, *estoppel can still apply in such an egregious case*. The instant case is clearly an egregious one. P.R. was fully aware that she lead M.V. to believe he did not have to pay. She was aware that the County stopped collecting. She was aware of the understanding between them. And yet during those 15 years she never said otherwise to M.R. or instruct the County to collect. In fact, she was uncooperative with the County when they tried to work with her.

But 15 years later she changed her mind. She wants $80,000.00 from M.V., who now has a wife and three minor children to support. Like in *Boswell,* P.R. has the "dirtiest hands." The trial court confirmed this by pointing out repeated inconsistencies and lack of credibility, and that she will say anything to collect the arrears. The trial court made the just and equitable decision to avoid a terribly inequitable result.

III. THE TRIAL COURT'S FINDINGS WERE SUBSTANTIALLY SUPPORTED BY THE EVIDENCE.

Rulings concerning the existence of an equitable estoppel are factual issues, are normally reserved for resolution by the trial court, and will be upheld if supported by substantial evidence. *In re Marriage of Iberti, supra,* 55 Cal. App. 4th at 1442. Under

the substantial evidence standard, factual findings of the trial court are presumed correct, and a party challenging a judgment has the burden of showing reversible error by an adequate record. Absent a contrary showing in the record, all presumptions in favor of the trial court's action are made by the appellate court. *In re Marriage of Bonds* (2000) 24 Cal. 4th 1, 31; *Schmidlin v. City of Palo Alto* (2007) 157 Cal. App. 4th 728, 737.

In this case, the trial court's findings were substantially supported by the evidence. The court ordered the County to produce its entire record of communications between the parties. The court not only reviewed that record but also heard testimony from both parties and the County. The evidence substantially showed that in 2001, after genetic testing excluded M.V. as the father, P.R. told M.V. she would "take care of it and close the case with the County." P.R. asked the County several times to close the case, which the County did. M.V. reasonably relied on P.R.'s promises and inducement and believed in good faith that he was no longer obligated to pay support because he was not the father. Numerous emails from P.R. to M.V., attached to the Decision, further supported that understanding. P.R. further manifested that understanding by taking numerous steps to remove the child from M.V.'s health insurance, calling M.V.'s employer, and even attempting to remove M.V. from the child's birth certificate. For fifteen years, from November 2001 to January 2015, P.R. did not seek enforcement of support, despite knowing M.V.'s whereabouts. The totality of evidence substantially showed P.R. did not intend to enforce support after the 2001 DNA test that excluded M.V. as the father, and she made that very clear to him. He had every reason to rely on that inducement.

Moreover, the trial court found that, while M.V.'s testimony was credible, P.R.'s testimony had numerous contradictions and she has a propensity to "say whatever she needs to say to support her claim for arrears and accordingly, the court does not find her to be a credible witness." Accordingly, the trial court held it will not use its judicial power to achieve an inequitable result. This was a solid and just ruling.

IV. THE DECISION IS NOT BARRED BY RES JUDICATA, BECAUSE THERE WAS NO PRIOR ENFORCEMENT OF ARREARS AND NO COURT HEARING REGARDING ARREARS.

P.R. argues that "the claim is barred by res judicata." (OB, pp. 53-57.) This is untrue. M.V. raised the issue of estoppel before at the hearing on the determination of arrears, and there was no enforcement of arrears before the motion on which the Decision was made. Thus, there was no issue of arrears before the court prior to the filing of the motion to determine arrears. The facts pertinent to res judicata are as follows:

On November 1, 2001, the County signed closure documents at P.R.'s request. No action took place for over ten years. Then on January 21, 2013, upon P.R.'s request, the County served charging papers upon M.V. stating they intend to reopen the case for support. M.V. filed a motion to set aside on January 31, 2013. At the hearing on March 13, 2013, the County stated they have **not been enforcing support**. The court denied the motion to set aside but nonetheless continued the hearing to June 5, 2013 to allow M.V. to obtain counsel. Not only was this not a motion about arrears, but the fact that it was continued means the ruling was only tentative pending the next hearing.

On June 5, 2013, at the hearing, the judge took the matter off calendar, apparently forgetting that it had continued the hearing to allow M.V. to get counsel. M.V.'s new counsel did not know for sure what happened at the last hearing, and thus told the court that the transcript was ordered. So the court stated that, after M.V.'s counsel obtains the transcript, M.V. can file another motion and the court "will hear it." Even if this was a motion about arrears (it was about re-opening support, not arrears), the matter was effectively *reserved* by the court's statement that M.V. can still file the motion and the court will hear it. *See In re Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 1075 (when a court takes a matter off calendar but reserves on the issue, the court retains jurisdiction over that matter). Thus, even if, *arguendo,* the hearing was about arrearages (it was not), the issue was reserved for M.V. to file a motion, which he did that very day.

On July 17, 2013, the matter came to hearing again. And again, the County stated in court that they were **not enforcing support but that this was a Medi-Cal only case**. Thus, enforcement of arrears was **not the issue before the court**. Rather, the issue before the court was re-opening support. M.V.'s counsel argued that the paternity judgment should be vacated due to intrinsic fraud. The court found no intrinsic fraud and denied the motion. But this was not about arrears, and thus did not establish res judicata.

From that point forward, the County was **still not enforcing support**. It was not until March 23, 2015 that the County re-opened the support matter at P.R.'s request, and told P.R. that support will be effective as of February 1, 2015. The County then filed a motion for support on July 13, 2016. M.V filed a motion to set aside on July 17, 2016.

Then on July 25, 2016, P.R filed a motion to determine arrears. **This was the first time the issue of arrears was before the court.** M.V. filed a response on September 7, 2016. The matter came to hear on September 12, 2016. The County again told the court this was a **Medi-Cal only case**. After testimony, the court took the matter off calendar but allowed M.V. 90 days to file a motion opposing the enforcement of arrears based on collateral estoppel. This effectively reserved the issue of arrears and estoppel pursuant to *Freitas, supra.* 209 Cal.App.4th at 1075. Again, no res judicata.

On November 1, 2016, M.V. filed a timely motion opposing the enforcement of arrears on the ground of equitable estoppel**.** It was upon this motion that the court applied equitable estoppel in the Decision on March 23, 2017. The Decision did not vacate the judgment of paternity. It simply refused to enforce arrears, which had not been addressed previously by the court. Thus, the Decision is not barred by res judicata.

V. THE FACT THAT PARTS OF THE REPORTER'S TRANSCRIPT ARE ALLEGEDLY MISSING DOES NOT JUSTY VACATING THE DECISION.

P.R argues, briefly, that the Decision should be vacated because some portion of the Reporter's Transcript is missing. (Opening Brief, p. 47.) However, P.R. fails to substantiate how substantial controversial issues would prevent an appeal being heard on the merits because of the missing portions.

Although Code of Civil Procedure Section 914 allows courts to grant a new trial in the event of loss of *substantial* parts of a reporter's notes, the party seeking retrial on such ground is entitled thereto only if the loss would prevent an appeal from being heard

on the merits, and not when such trial by reasonable use of stipulations or agreed statements merits of appeal can be fully presented. *Lilienthal v. Hastings Clothing Co.* (1954), 123 Cal. App. 2d 91. The moving party on such a motion for new trial must indicate substantial controversial issues concerning which judgment on merits would depend. *Kraemer v. Kraemer* (1959) 167 Cal. App. 2d 291. And the party's attempts to obviate the necessity of a new trial and work out a statement or stipulation to resolve the issue are factors to consider in deciding such a motion. *Lilienthal, supra.*

In this case, P.R. fails to provide any enough explanation as to how the missing sections would deny P.R. a fair appeal, other than to tersely say she relies on an argument of res judicata. That alone does not apprise M.V., or the Court, of how missing portions of the transcript would justify a new trial. Nor has P.R. made any efforts that M.V. is aware of to try to resolve the issue by way of working out a statement or stipulation.

VI. THE FACT THAT M.V. IS NOT THE BIOLOGICAL FATHER, THOUGH TIME-BARRED, SHOULD LEND FURTHER SUPPORT TO THE COURT'S USE OF ITS EQUITABLE POWERS.

The trial court held that a challenge to paternity was time-barred. Nonetheless, the fact that two genetic tests found M.V. is not the biological father, and that P.R. told the County he is not the father, should lend further support to the court's use of equitable powers in this case. Forcing someone to pay support for a child that is not their own raises serious ethical issues of injustice, hardship on the person's own biological children, and Constitutional rights under the 13th Amendment and United States Code, Title 42,

Section 1983. Henry, R. K., “The Innocent Third Party: Victims of Paternity Fraud," 40 Family Law Quarterly 51 (ABA) (Spring 2006)).[5]

Some of these issues were raised in *County of Los Angeles v. Navarro* (2004) 120 Cal.App.4th 246. In that case, a man was being forced to pay for a child after genetic testing excluded him as the biological father. The Court of Appeal held:

> It is this state’s policy that when a mistake occurs in a child support action, the county must correct it, not exploit it. When the Legislature enacted the Child Support Enforcement Fairness Act of 2000, it declared “The efficient and fair enforcement of child support orders is essential to ensuring compliance with those orders and respect for the administration of justice. . . . Thousands of individuals each year are mistakenly identified as being liable for child support actions. As a result of that action, the **ability to earn a living is severely impaired, assets are seized, and family relationships are often destroyed**. It is the moral, legal, and ethical obligation of all enforcement agencies to take prompt action to recognize those cases where a person is mistakenly identified as a support obligor in order to minimize the harm and correct any injustice to that person.” (Stats. 1999, ch. 653 (A.B. 380), italics added.) The county, a political embodiment of its citizens and inhabitants, must always act in the public interest and for the general good. It should not enforce child support judgments it knows to be unfounded. In particular, it should not ask the courts to assist it in doing so. Despite the Legislature's clear directive that child support agencies not pursue mistaken child support actions, the county persists in asking that we do so. We will not sully our hands by participating in an unjust, and factually unfounded, result.

Navarro, supra, 120 Cal.App.4th at 249-250 (emphasis added).

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[5] At least one court has ordered the biological father to reimburse the paternity fraud victim. *R.A.C. v. P.J.F.* (No. A-6130-02T2) (N.J. Super.Ct.App.Div., Aug. 31, 2005). And courts in other countries have authorized compensation to victims of paternity fraud. Sage, *Husband Makes Cheating Wife Pay for Time Spent Raising Lover’s Child,* TIMES OF LONDON, May 3, 2005, *available at* http://www.timesonline.co.uk. (reporting that CAEN Appeal Court in Normandy, France, ordered former wife and lover to reimburse 15,000 Euros and pay 8,000 Euros in damages).

On January 1, 2005, *Navarro* was superseded by the enactment of Family Code Sections 7646-7649 with regard to default paternity judgments. *See County of Fresno v. Sanchez* (2005) 134 Cal.App.4th 15. But the equitable principles are still valid. [6]

Moreover, the trial court took consideration of the child's needs in making its decision. (CT 00435 – 00437.) The court noted that:

(1) the child emancipates in June 2017;

(2) P.R. brought the motion for judicial determination of arrears on July 25, 2016, 11 months before the child would emancipate;

(3) there was evidence the child's needs were met during those 14 years by Mr. Serrano, P.R.'s partner of 17 years, who had been acting as the child's father since the child was two years old;

(4) P.R. never had to go on aid to support the child;

(5) as late as September 2014 P.R. took it upon herself to obtain genetic testing and informed the County that M.V. was not the father and that she wanted M.V. removed from the case; and,

(6) as soon as P.R. re-opened the case in February 2015, M.V. has been paying support through wage assignment since that time. (CT 00435 – 00437.)

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[6] In 2004, when then-Governor Gray Davis vetoed a paternity reform bill (Assembly Bill 2240), his veto message stated: "paternity fraud is a serious issue and has the potential for damaging an individual's livelihood." He then created a Paternity Workgroup to address the problem. This ultimately led to the passage of a compromise bill and the enactment of the above statutes.
See www.leginfo.ca.gov/pub/01-02/bill/asm/ab_2201-2250/ab_2240_vt_20020926.html.

CONCLUSION

The trial court's Decision was sound, just, and substantially supported by the evidence. The longstanding doctrine of equitable estoppel applies in this case to avoid an inequitable result. For all the foregoing reasons, the Decision should be upheld.

RESPECTFULLY SUBMITTED.

Dated: August 21, 2018 NATIONAL COALITION FOR MEN

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M.V.

WORD COUNT CERTIFICATION

I certify the word count in this brief is 8,868 using Word XP Word Count.

Dated: August 21, 2018 Marc Angelucci
Marc E. Angelucci, Esq.