FACTS AND PROCEDURAL STATUS

This matter is before me on H. A., Jr.'s motion to vacate this court's order terminating his parental rights to his daughter A. N..[1] His rights, as the then-unknown father of A. N., were terminated on September 4, 2001. For the reasons stated below, the motion to vacate the order is denied.

A. N. was born on July 28, 2001. On that same date, her mother, R. N., filed a petition to voluntarily terminate her parental rights and involuntarily terminate the parental rights of the father, a person she claimed she could not identify.

Approximately four months prior to A. N.'s birth, the Does, a party to this litigation by way of stipulation of the parties, were notified Ms. N. had selected them as the adoptive resource for A. N.. Upon her birth, A. N. was placed in foster care where the Does visited her two to three times per week. Shortly after an order terminating the parental rights of Ms. N. and the unknown father of A. N. was issued, she was placed in the Does' home in anticipation of her adoption. She has remained in their home since that time.

On September 4, 2001, Ms. N. appeared in court and consented to the termination of her parental rights. In support of her petition to involuntarily terminate the parental rights of the father, she testified that she had only one sexual encounter during the statutory conceptive period (September 30, 2000 to November 29, 2000). She adamantly asserted that she did not know the name of, or any other identifying information about, the individual with whom she had engaged in this sexual encounter. She also testified she did not know anyone who knew him; could only vaguely and generally describe his physical appearance; had not seen him since and could not provide any information that might lead to the discovery of his identity. By her account at that hearing, A. N. was the product of a sexual encounter in a cornfield during a bonfire party while both she and the unknown father were inebriated. According to her testimony, they did not even exchange first names. She was further insistent that she did not know any other individual at the party, other than the friends with whom she went, and those individuals did not know any of the other people at the party. Ms. N. persisted in these assertions despite the significant skepticism it generated

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[1] A. N. is a nonmarital child.

during the hearing and emphatic warnings that lying about the identity of the father could have grave consequences for A. N.'s future. The concern and skepticism was perhaps best evidenced by my raising the specter of the Baby Richard case. Transcript of Hearing, September 4, 2001, p. 39.

On the basis of that information, the only effort undertaken to notify the unknown father of A. N. was publication notice in the Capital Times of Madison, identifying A. N. and her mother and referencing a place of conception as an "[u]nknown location between Madison and Mineral Point". Further testimony during the hearing, including testimony establishing that no declaration of paternal interest had been filed, Tr. September 4, 2001, p. 36, established a basis to involuntarily terminate the parental rights of the unidentified father for having failed to assume parental responsibility, sec. 48.415 (6), Stats. An order entered on that date, terminated the parental rights of Ms. N. and the unknown father and transferred custody and guardianship to Children's Service Society, allowing A. N. to be placed for adoption. As noted above, A. N. was placed with the Does shortly thereafter and has remained in their home since that time.

On January 14, 2002, Attorney Deal, counsel for Children's Service Society received information that Mr A. believed himself to be the father of A. N.. Pursuant to the guardianship agency's petition, I ordered that genetic testing be undertaken, which established that Mr A. is A. N.'s biological father. On March 21, 2002, Mr A., through counsel, filed a motion to vacate the order terminating his parental rights as the unknown father of A. N. pursuant to sec. 806.07, Stats. He asserts that the order resulted from fraud perpetrated by Ms. N..

Testimony and other evidence adduced during the hearing on his motion established the following facts. He and Ms. N. lived together, in Mr A.'s and his mother's home, during the months of September and October, 2000. At the end of October, Ms. N. moved out of the home, however a relationship continued until the end of December, 2000. During the period they resided together, Mr A. estimates they had sexual relations sixty times. A sexual relationship continued during November and December, 2000, but this occurred only during his weekend visits to her home in Mineral Point. All of the sexual encounters were "unprotected". Mr A. was aware that Ms. N. was already the mother of three children. He testified that during this four-month period, he knew of only one instance of Ms. N. having her menstrual cycle; most likely occurring in early October. Ms. N. ended their

relationship on or about December 26, 2000. Mr A. did not seek or have any contact with Ms. N. after that date, apparently until the filing of this motion. Arndt Depo., p. 25, lines 22-25; p. 53, lines 3-7; p. 55, lines 6-9.

Mr A. asserts that he was unaware that Ms. N. was pregnant, or of A. N.'s birth, until four months after her birth. On January 8, 2002, Mr. Frank filed a paternity action on behalf of Mr A. in Iowa County Circuit Court. Among the allegations in the petition was an assertion on Mr A.'s part that he believed Ms. N. "has fraudulently placed the child for adoption without notice to him". He requested a determination of paternity and an award of legal custody. The action was dismissed when Mr A. became aware of the termination of parental rights order issued by this court. As noted above, after genetic testing established his biological relationship to A. N., he filed the motion to vacate the order on March 21, 2002.

There is little factual dispute in regard to the motion to vacate the order. Ms. N. lied, blatantly lied, to this court in her testimony regarding her knowledge of the identity of potential fathers of A. N. and the individuals with whom she had sexual relations during the conceptive period.[2] She persisted in those lies despite the warnings of the potential consequences for A. N.'s future.[3] Mr A. is A. N.'s biological father. Ms. N. knew or had significant reason to believe this to be the fact at the time of A. N.'s birth and at all times during these proceedings. A. N. is the product of one of many sexual encounters between Ms. N. and Mr A. during the conceptive period.

The critical area of factual dispute before me relates to when Mr A. knew that Ms. N. was pregnant with A. N.; a child he would have every reason to believe may be his. While Mr A. has repeatedly asserted that he did not know this until four months after A. N.'s birth, I do not believe this testimony. There is clear, credible evidence before this court that Mr A. knew of the birth as of September, 2001, and knew of the pregnancy in approximately April, 2001.[4] Jennifer B testified that in September of that

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[2] Ms. N. apparently continues to assert that the sexual encounter in the cornfield did, in fact, occur.

[3] I have previously advised the parties I have already drafted a letter to the District Attorney for his consideration of perjury charges against Ms. N.. While I have no desire to further complicate what appears to be a difficult life, I simply feel compelled to forward my letter to Mr. McCann for his consideration. A copy of the letter is attached.

[4] Mr A. certainly had reason to believe he may have impregnated Ms. N. long before April, 2001. Arndt Depo. p. 14, line 4 to p. 16, line 5; p. 19, lines 22-24. I have not considered his conduct, or lack of conduct, during the period preceding April, 2001, in determining the applicability of the doctrine of equitable estoppel or the existence of a constitutionally protected interest in his relationship to A. N.. However, a

year, Mr A. told her that Ms. N. had given birth; he thought the child may be his; and that he knew she had been pregnant since she was "six months along" or words to that substantial effect. This testimony was corroborated by the testimony of Michael S. and Suzanne B., the mother of Jennifer.

LEGAL ISSUES PRESENTED

A. N., through her guardian ad litem, Children's Service Society, the guardianship agency, and Mr. and Mrs. Doe all oppose the motion to vacate the order. While not overtly conceding the merits of Mr A.'s claim that the order resulted from a fraud perpetrated on this court by Ms. N., they offer little significant argument to rebut this assertion. This is understandable in that there is no doubt that Ms. N.'s false testimony as to the individual(s) with whom she had intercourse during the conceptive period underpins the order terminating Mr A.'s parental rights and, in part, resulted in Mr A. not being notified through personal service of notice of the termination proceedings. However, they raise two other significant challenges to his motion, the second of which raises a third issue which has only been peripherally addressed by the parties, but one I feel compelled to address and resolve. Those issues are as follows.

1. Does Mr A. having standing to bring the motion to vacate?

2. Is Mr A. equitably estopped from bringing the motion to vacate?

3. Does the imposition of the doctrine of equitable estoppel in the context of this case deprive Mr A. of a constitutionally protected interest without due process of law?

While there can be no doubt that the order terminating Mr A.'s parental rights resulted, in part, from the fraud perpetrated on this court by Ms. N., he is equitably estopped from asserting that fraud as a basis for relief from the order terminating his parental rights. In addition, the holding to that effect does not deprive him of any constitutionally protected interest in his relationship with A. N..

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very reasonable argument can be made that his failure to file a declaration of paternal interest any time after December, 2000, would be a valid consideration as to those issues.

STANDING

In all frankness, I am not certain that I fully comprehend the argument offered primarily by Mr. and Mrs. Doe that Mr A. has no standing to bring the motion. Mr. Hayes, on their behalf, asserts that on the basis of the record at the time the order was entered, Mr A. was not a person entitled to notice of the proceedings and to participate as a party to the proceeding. Mr A., through counsel, concedes this fact. Prior to the entry of the order, testimony was adduced, in compliance with sec. 48.422 (6) (a), Stats., as to the paternity of A. N.. On the basis of that testimony, I concluded that "all interested parties who [were] known" had been notified of the proceedings as required by sec. 48.42 (2) (b) and 4 (b), Stats. This conclusion was premised on testimony that no person had filed a declaration of paternal interest under sec. 48.025, Stats.; the identity of the person who may have been the father was unknown and no reasonable means of discovering his identity was available; and no person had lived in a familial relationship with the child who might be the father of the child. The conclusion was further premised upon publication notice to the unknown father that is referred to above.

Reasserting that Mr A., based upon the information known to this court at the time of the entry of the order, was not a person to whom notice was required to be provided in a termination proceeding involving a nonmarital child, Mr. Hayes claims Mr A. does not have standing to bring this motion.

I disagree. The argument ignores the entire premise of Mr A.'s position. He did not fall into the category of an alleged father, entitling him to notice of the proceedings under sec. 48.42 (2) (b), Stats., precisely because Ms. N. offered blatantly fraudulent testimony. If she had been truthful with this court as to her knowledge of the identity of the alleged father, efforts to serve Mr A. in person would have clearly been required, sec. 48.422 (2) (b) (2), Stats., and likely would have resulted in his full participation. Mr A. has standing to bring this motion.

ESTOPPEL

The Does, A. N., through her guardian ad litem, and the guardianship agency[5], all assert that Mr A. should be estopped from obtaining the relief he seeks from this court. Equitable estoppel lies when action or inaction on the part of the party against whom the doctrine is asserted induces reasonable reliance to the detriment of the party relying upon the doctrine. Yocherer v. Farmers Insurance, 2002 Wi. 41.

Between April, 2001, the month this court has concluded that he knew of Ms. N.' pregnancy, and January, 2002, when he filed the paternity action, Mr A. failed to file a declaration of paternal interest. He failed to file a paternity action. See, Section 767.45 (3), Stats. (allowing the filing of a paternity action prior to the birth of a child). He openly acknowledges he made no effort to locate Ms. N. or A. N.; he made no offers of financial support or other assistance in meeting the myriad of needs a pregnant woman and newborn infant present. He did not offer to help defray the costs of medical services related to the pregnancy and delivery. He did not offer to marry Ms. N.. He failed to indicate in any way that he intended to commit himself to the responsibilities of parenthood and develop a substantial parental relationship with his child. Arndt Depo. p. 25, lines 18-25; p. 30, line 25 through p. 31, line 6; p. 53, lines 3-7.

In reliance on Mr A.'s pervasive inactivity, the Does have taken A. N. into their home in anticipation of her adoption. Between September, 2001, and January, 2002 (filing of the paternity action) or March, 2002 (filing of the present motion), and continuing to the present, they have committed themselves financially and emotionally to this child.[6] They have met with the biological mother and with social workers and, now, incurred legal costs. Without doubt, they have endured tremendous emotional turmoil as they contemplate potential resolutions of this litigation. A. N., also without doubt, and despite her tender age, has bonded to the Does who, for the last ten months, have acted as her parents in all respects. Children's Service Society has, of course, accepted custody and guardianship of A. N. in anticipation of her adoption. Section 48.427 (3m) (a) (3), Stats.

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[5] Ms. N. is, of course, not in a position to assert the doctrine of equitable estoppel given her "unclean hands". Emmco Ins. Co. v. Palatine Ins. Co., 263 Wis. 558, 569, 58 N.W.2d 525 (1953).

[6] There is no indication in the record as to whether the Does did or did not defray medical costs incurred by Ms. N. as permitted by sec. 48.913,Stats. I therefore assume that they have not incurred those costs.

It is, I believe, important to note that the Lehr court rejected the procedural due process claims of the putative father under what I would characterize as far more compelling circumstances than those asserted by Mr A. The Court acknowledged that the trial judge and the petitioning mother in the underlying adoption proceedings knew, at the time the adoption was granted, the identity and whereabouts of the biological father, and that he had commenced a paternity proceeding prior to the issuance of the final order of adoption. Reiterating that the filing of a declaration of paternal interest (putative father registration) would have guaranteed Mr. Lehr notice and a right to participate, the Court summarily discounted his procedural due process argument, noting that notice had been provided to all parties entitled to notice under the statute and concluded that "[t]he Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights." Lehr, at 265. Mr A. failed to assert and protect his own rights and he cannot now transform that failure on his part into a transgression of his constitutional rights by this court, Children's Service Society, A. N. or the Does.

Mr A.'s motion to vacate the order is denied.

Dated this 12th day of July, 2002, at Milwaukee, Wisconsin.

By the Court

Christopher R. Foley
Circuit Judge