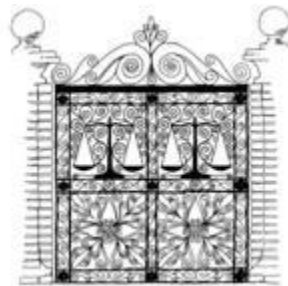


**JUDICIAL ESTOPPEL: YOU CAN'T HAVE IT  
BOTH WAYS!**

**HOT TIPS CLE  
Friday, September 19, 2003**

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**HOW IS THE DOCTRINE OF JUDICIAL ESTOPPEL APPLICABLE  
IN THE FAMILY COURT?**

Consider the following: Husband listed rent from his ownership of a lucrative commercial building on his financial declaration in his first divorce. The court relied upon that income in awarding child support. Assume that the income has not changed. In a divorce from his second wife, he failed to list this income on his financial declaration is the Husband now estopped from arguing against the second wife's expert testimony about the rental income?

Under the doctrine of judicial estoppel, a Court can estop Husband from his stance in the second action because his stance is clearly inconsistent with his previous position upon which another court based its ruling.

In *Hayne Federal Credit Union v. Bailey*, the Credit Union argued the doctrine of judicial estoppel to estop Bailey from taking the position that he now had an ownership interest in a house. While the doctrine of judicial estoppel was specifically embraced by our Supreme Court in *Hayne*, the facts in *Hayne* slightly differ from the scenario above because it involved a divorce in the first action, and the subsequent action involved the estoppel. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

In *Hayne*, the Defendant, Bailey, purchased a house. Bailey put the deed in his son's name to hide the asset from his wife, whom Bailey planned to divorce. During the course of Bailey's divorce, he denied any legal interest in the property, claiming it was titled solely in his son's name. Later, the son died leaving all of his property to his own



wife (Son's Wife) and Bailey did not make a claim against the son's estate as to the property. Son's Wife gave a mortgage to Plaintiff Credit Union using the home as security. Son's wife then encountered financial problems so she filed bankruptcy.

After she filed bankruptcy, Bailey filed a claim in Bankruptcy Court asserting he was the real owner of the home. On appeal, our Supreme Court ruled Bailey was estopped from asserting an ownership claim in the property because he previously swore in his prior divorce action that he had no legal interest in the property. Thus, Bailey's attempts to hide his ownership of the home from his now ex-wife backfired in the subsequent bankruptcy because the Court would not let him assert his ownership claims when he clearly attempted to take inconsistent positions when it benefited him to do so. (Also, note the Court did not reopen the divorce to allow Bailey's ex-wife to make a claim against the home. Rather, the Court found Bailey had no interest in the home. Therefore, the Court relied upon Bailey's first set of allegations even though he may have been the rightful owner.)

According to the *Hayne* court, "[j]udicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Id.* 327 S.C. at 251, 489 S.E.2d at 477. "When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Id.* 327 S.C. at 251, 489 S.E.2d at 477.

The application of judicial estoppel "is an equitable concept, depending on the facts and circumstances of each individual case, [and] application of the doctrine is discretionary." *Carrigg v. Cannon*, 347 S.C. 75, 83-84, 552 S.E.2d 767, 772 (Ct. App.



2001) (quoting *Hawkins v. Bruno Yacht Sales, Inc.*, 342 S.C. 352, 368, 536 S.E.2d 698, 706 (Ct. App. 2000)).

Generally, for this doctrine to apply, courts consider three factors:

First, a party's later position must be clearly inconsistent with its earlier position;

Second, did the party succeed in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and

Third, the court considers whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

*New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); *Cothran v. Brown*, 350 S.C. 352, 566 S.E.2d 548 (Ct. App. 2002).

Judicial estoppel is designed to prevent inconsistent positions with regard to matters of fact in different trials. Consequently, when a party successfully puts forth a position as a matter of fact in one trial and is successful in that assertion, the party is then estopped from asserting a different position on the same matter of fact in a second trial. Clearly, another factor is that the party who is to be estopped must be the same party in both actions and the issue for which the party is estopped must be one that is related in both proceedings.

In November 2000, the Court of Appeals issued a decision in *Quinn v. Sharon Corp.*, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000). In *Quinn*, the Plaintiff testified in a prior action that his daughter owned and operated Sharon Corporation. He also testified earlier that he had no authority to bind Sharon Corporation in any way. The Plaintiff later brought an action against his daughter and the corporation asserting that he did have an ownership interest in the Corporation.



The Court of Appeals held the father's claim "is in direct contravention to his assertions in the prior litigations. [sic] Were we to allow Joseph to change his position as to the facts and now claim ownership of the Corporation, 'the truth-seeking function the judicial process [would be] undermined.' We therefore hold Joseph's claim for ownership of the Corporation is barred by the doctrine of judicial estoppel." *Id.* at 251-52, 489 S.E.2d at 477 (citing *Hayne*, 327 S.C. at 252, 489 S.E.2d 477.)

Judge Huff, writing the Court's opinion, also noted:

[Our Supreme Court] expressly adopted the doctrine of judicial estoppel, as it relates to matters of fact, in the case of *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). The doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. *Id.* The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts. *Id.* The Supreme Court explained, [sic] In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. *The doctrine thus **punishes those who take the truth-seeking function of the system lightly.** When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.*

*Id.*, at 251-52, 489 S.E.2d at 477. Emphasis added.

In another South Carolina case, the Defendant gave an affidavit in a prior criminal action in which he plead guilty for drunken driving and swore the resulting accident was entirely his fault. *Cothran v. Brown*, 350 S.C. 352, 566 S.E.2d 548 (Ct. App. 2002)(withdrawn, substituted and refiled on July 29, 2002). In the subsequent civil action (the case on appeal), Brown gave a second affidavit. This time, he blamed the decedent for the cause of the accident. The Honorable Kaye Hearn, writing for the Court of Appeals, held Brown was judicially estopped from denying liability for the death of the decedent because he could not claim the set of facts he swore to in the earlier action



were completely contrary to the same set of circumstances he presented under oath in a subsequent action. *Id.*

The application of judicial estoppel is not limited to South Carolina. It is applied in other jurisdictions where in litigation subsequent to the divorce, a spouse has been judicially estopped from taking an inconsistent position from the one taken in the divorce. See, *Bidani v. Lewis*, 285 Ill. App. 3d 545, 675 N.E.2d 647 (1996) (Plaintiff judicially estopped from claiming that he had an interest in a business when in a previous divorce he had claimed he had no interest); *Levin v. Robinson, Wayne & La Sala*, 246 N.J.Super. 167, 586 A.2d 1348 (1990) (Husband in a divorce proceeding represented to the Court he had received all compensation to which he was entitled from his law firm. Based on that representation, he and his former Wife concluded a property settlement that resolved the litigation. Thereafter, the Husband sued his law firm for additional compensation in an unrelated action. The Court in the second action held the Plaintiff, Husband in the divorce, was judicially estopped from asserting the claim by reason of his inconsistent representation in the divorce action. Even though the divorce proceeding had ended in a settlement, the Court found the Plaintiff's position in the earlier divorce proceeding had substantially influenced the terms of the settlement); *Allen v. Allen*, 550 P.2d 1137 (Wyo. 1976) (Son admitted in one divorce proceeding that certain property at issue was transferred to him from his father through a straw man; the son was, therefore, estopped in a later proceeding from establishing a different set of facts regarding transfer of the land.).

In *International Engine Parts, Inc. v. Feddersen & Co.*, 64 Cal. App.4th 345, 353 (1998) the debtor plaintiff had an accounting malpractice claim against its accountant, but



debtor Plaintiff failed to disclose this claim in multiple disclosure statements filed with the bankruptcy court even though debtor Plaintiff was well aware of the claim. The lawsuit against the accountants was filed the same day as an amended modification of Plaintiff's plan of reorganization, and the modification made no mention of the claim against the accountants. The court found judicial estoppel appropriate because Plaintiffs "were fully aware of their claim and did not act under ignorance, fraud, or mistake." *Id.*, 64 Cal. App.4th at 353.

Another example of judicial estoppel occurred on February 18, 2003, when the United States Court of Appeals for the Eleventh Circuit held a debtor's discrimination and retaliation claim against his former employer was barred by the doctrine of judicial estoppel. The Court held:

Judicial estoppel bars a plaintiff from asserting claims previously undisclosed to the bankruptcy court where the plaintiff both knew about the undisclosed claims and had a motive to conceal them from the bankruptcy court, applies equally in Chapter 13 bankruptcy cases.

*DeLeon v. Comcar Industries*, 321 F.3d 1289, Nos. 01-10417 and 01-13326, 2003 U.S. App. LEXIS 2927 (11<sup>th</sup> Cir. Febr. 18, 2003).

The Court also stated if it were to allow a debtor who intended to conceal facts in separate proceedings to prevail, such a ruling would "make a mockery of the judicial system." *Id.* At 321 F.3d.1289.

### **APPLICATION OF JUDICIAL ESTOPPEL TO PUTATIVE FATHER CASES**

What if you represent a woman who became pregnant by her boyfriend while married to someone else? The boyfriend, by definition, is the putative father. The legal presumption is Husband is the child's legal father because the law presumes the child is legitimate.



The presumption that Husband is the legal father is often both upheld and rebutted under estoppel theories. While there are no South Carolina appellate decisions on point, other states have applied estoppel arguments, and these opinions apply different types of estoppel based upon the facts of the case and the role of the moving party.

In *Lockhart v. Lockhart*, No. W2000-02922-COA-R3-CV (Tenn.Ct.App. 2002), the parties entered into a separation agreement and received a divorce in 1998. Mr. Lockhart obtained custody of the parties' two children as part of the parties' agreement. Eight months later, Ms. Lockhart filed a motion for change of custody. In the subsequent proceedings, she stated her ex-husband was not really the father of their daughter, Amber. The trial court denied Ms. Lockhart's petition to modify the divorce decree.

Ms. Lockhart appealed the trial court's decision and the Tennessee Court of Appeals stated, "where one states on oath in former litigation, either in a pleading or in a deposition or on oral testimony, a given fact as true, he will not be permitted to deny that fact in subsequent litigation, although the parties may not be the same." *Id.* "Due to her statement in the marital dissolution agreement that the parties had two minor children, Amber and Zachary, Ms. Lockhart was judicially estopped to deny the truth of that statement in the later proceeding on the petition to modify the final decree of divorce." *Id.* Here, the court appeared to apply judicial estoppel versus equitable estoppel because the mother was in a better position to know the identity of the biological father, yet the mother helped establish by earlier court order that her husband was the legal father. The Court thus ruled she could not attempt to change the facts or her position because the doctrine of judicial estoppel would not allow her to do under these circumstances.





Equitable estoppel, on the other hand, differs from judicial estoppel in many ways. A party may invoke equitable estoppel to prevent his opponent from changing positions if (1) he was an adverse party in the prior proceeding; (2) he detrimentally relied upon his opponent's prior position; and (3) he would now be prejudiced if a court permitted his opponent to change positions. Equitable estoppel focuses on the relationship between the parties, and it is designed to protect litigants from injury caused by less than scrupulous opponents. By contrast, judicial estoppel focuses on the relationship between the litigant and the judicial system, and is designed to protect the integrity of the judicial process.

By definition, equitable estoppel requires privity, reliance, and prejudice because the doctrine concentrates on the relationship between the parties to a specific case. Conversely, none of these elements is, or should be, required under the judicial estoppel doctrine. The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather, it is the intentional assertion of an inconsistent position that perverts the judicial machinery. Ziegler, *Judicial Estoppel: The Doctrine of Preclusion of Inconsistent Positions*, 11 Inside Litigation No. 3 (Mar. 1997) p. 15.

In *Tregoning v. Wiltschek*, 2001 PA Super 243, 782 A.2d 1001 (2001) the Appellant was named as the child's father on the child's birth certificate. When custody litigation occurred later, the issue of paternity was raised. On appeal, the Court stated "[a] party may be estopped from denying a husband's paternity of a child if either the husband or the wife holds the child out to be the child of the marriage." *Id.* 782 A.2d at 1003. Since the wife previously held her husband out as the father through the birth



certificate and passport, she could not now assert facts to the contrary. Thus, the court applied a form of equitable estoppel.

It appears courts use judicial estoppel when a party in prior proceedings had reason to know the true nature of a child's parentage. In a subsequent action, such party cannot try to change his or her position.

Equitable estoppel, on the other hand, appears to apply in cases where there is either a holding out, such as the birth certificate in *Tregoning* or where the putative father may learn about the child after a judicial hearing takes place. The key, again, is equitable estoppel focuses on the relationship between the parties and attempts to protect the litigants from unscrupulous opponents, while judicial estoppel focuses on the relationship between the litigant and the judicial system such that our courts will not allow a litigant to take one position in court and then twist the same facts in a subsequent action.

### **CONCLUSION**

It is clear the courts of our state and other states, as well as our federal appellate courts and bankruptcy courts, will not allow a party to take factually inconsistent positions in a second action from those used in a previous action to manipulate the legal system to a party's advantage. In taking such a strong stance, our courts consistently hold the doctrine of judicial estoppel is appropriate to PUNISH a party when the party attempts to obtain relief by manipulating the judicial system. While the remedy may appear harsh, especially if the facts presented in the second action more accurately reflect the truth, our courts make clear that such contradictory positions will not be tolerated because the allowance of such actions is an insult to our legal system which is predicated on truth finding.



While many of the cited cases illustrate situations where the divorce was involved in the first action and a party other than a spouse benefited in the subsequent action under the doctrine of judicial estoppel, it is obvious the same remedy is available in divorce actions. The Hot Tip, therefore, is to remind all practitioners to request information through discovery about the opposing spouse's involvement in prior litigation to determine whether the opposing party took a stance your client could use against them in the subsequent divorce or custody action.

**Suggested Interrogatories:**

- \* Have you (or any entity in which you have or had any legal or equitable interest) ever been a party to any civil or criminal litigation other than the within matter? If so, provide a description of each such litigation and the names and addresses of all parties thereto, together with the name of the court and address of the clerk of the court in which each such litigation is or was pending, the state and county of vicinage, the docket number and the name and address of the attorney for each party.
- \* For each litigation identified in answer to the prior interrogatory, state whether any offers of settlement have been made by any party to any other party and, if so, the amount of offer in settlement, from whom the offer was made, to whom, and attach true copies of any document containing or referring to any such offer.

