1-26-2015

Gordon v. Hedrick Appellant's Reply Brief 1 Dckt. 42191

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 42191-2014

ROGER CARL GORDON,

Plaintiff-Respondent/Cross-Appellant,

v.

SHANNON LEE HEDRICK,

Defendant-Appellant/Cross-Respondent.

APPELLANT'S REPLY AND CROSS-APPEAL BRIEF

Appeal from the District Court of the Third Judicial District for Canyon County
Case No. CV-2013-2118
The Honorable Duff McKee, District Judge
The Honorable Gary D. DeMeyer, Magistrate Judge

For Appellant/Cross-Respondent Shannon Lee Hedrick, Responding Parent of Minor:

Tamara L. Boeck, ISB No. 8358
Email: tami.boeck@stoel.com
W. Christopher Pooser, ISB No. 5525
Email: christopher.pooser@stoel.com
STOEL RIVES LLP
101 S. Capitol Boulevard, Suite 1900
Boise, Idaho 83702
Telephone: (208) 389-9000
Facsimile: (208) 389-9040

VOLUNTEER ATTORNEYS VIA THE IDAHO VOLUNTEER LAWYERS PROGRAM

For Respondent/Cross-Appellant Roger Carl Gordon:

Richard L. Hammond
Email: richard@hammondlawoffice.com
Hammond Law Office, P.A.
2805 Blaine Street, Suite 140
Caldwell, Idaho 83605
Telephone: (208) 453-4857
Facsimile: (208) 453-4861

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

I. INTRODUCTION

Ultimately this appeal raises two issues concerning the challenge Appellant Shannon Lee Hedrick ("Shannon") made to a voluntary acknowledgment of paternity ("VAP") identifying Respondent Roger Carl Gordon ("Gordon") as "the biological father" of her child, M.H. A genetic test later showed that Gordon was not M.H.'s biological father. Under the Idaho Paternity Act, a VAP "shall constitute a legal finding of paternity," Idaho Code § 7-1106(1), and "may be challenged only in court on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the party challenging the acknowledgment," Idaho Code § 7-1106(2).

The first issue asks whether "material mistake of fact" under Section 7-1106(2) means a *mutual* mistake that was completely unexpected by both parties to the VAP. Relying on principles of contract law, that was how the district court interpreted the terms. The literal language of the Paternity Act, however, does not include the word "mutual," provide that both parties must share the mistake, or require anything more than a "material mistake of fact." The district court erred by reading words into the statute that do not exist, and the court's decision must be reversed.

The second issue asks whether there was sufficient proof that Shannon made a material mistake of fact when she identified Gordon as M.H.'s biological father in the VAP. The district court found the genetic test proving Gordon's nonpaternity was not evidence of such a mistake. That finding was also made in error. Federal guidelines set forth in Chapter 7, Title IV, Part D of the Social Security Act ("Title IV-D") allow states to decide for themselves how to treat the presumption of paternity established by a VAP and the role genetic testing plays in establishing

paternity. Under the Paternity Act, genetic testing excluding a male from possible paternity is "conclusive evidence of nonpaternity." Idaho Code § 7-1116(5).

The record shows that Shannon stated her belief in the VAP that Gordon was the biological father at the time of M.H.'s birth. Because genetic testing conclusively proved that statement was wrong, the magistrate rescinded the VAP and ordered Gordon's name removed from M.H.'s birth certificate. Because the Paternity Act allows the court to determine custody only upon a finding of paternity, the magistrate properly dismissed Gordon's custody complaint. Allowing Gordon's fictional paternity to stand also creates constitutional issues and absurdities under Idaho law. The district court erred by reversing the magistrate based on its improper interpretation and application of the Paternity Act, and the district court itself must be reversed.

As for Gordon's "cross-appeal" issues, Idaho Rules of Civil Procedure ("I.R.C.P.") 7(b)(1) and 56(c) do not provide alternative grounds to reverse the magistrate. Shannon clearly stated the basis for her motion to dismiss Gordon's complaint for custody and to remove his name from M.H.'s birth certificate. Gordon raised no objection to the form, timing, or substance of the motion, instead waiting to object in a motion for relief from judgment. There Gordon raised, for the first time, Section 7-1106 of the Paternity Act, and the parties addressed and argued the effect of the statute before the magistrate. Gordon thus waived his objections and, in any event, cannot show the prejudice required under I.R.C.P. 61.

II. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

Throughout his response and cross-appeal briefing, Gordon misrepresents the record before the magistrate and the district court—and ultimately the appellate record—with respect to

two points. The two points largely relate to Gordon's cross-appeal issues, but nonetheless permeate his brief.

First, Gordon repeatedly states that Shannon raised Idaho Code § 7-1106(2) for the first time on appeal before the district court. *See, e.g.*, RCAB at 2, 12-13; RRBS at 2.[1] The record does not support that assertion. Gordon's complaint for custody was based on the singular allegation that he was M.H.'s biological father. R. at 7 (¶¶ IV, V). Once Dr. Karl-Hans Wurzinger determined the probability of Gordon's paternity was "0.00%" through genetic testing, Shannon moved to dismiss his complaint for failure to state a claim and to remove his name from M.H.'s birth certificate. *Id.* at 37-38. The results of Dr. Wurzinger's genetic test were submitted by his affidavit and accompanied the motion. *Id.* at 40-45.

Shannon's motion to dismiss was thus based on a complete lack of evidence to support Gordon's claim for relief—which, again, was based solely on the allegation that he was M.H.'s biological father. *Id.* at 37-38. In response to Shannon's motion, Gordon did virtually nothing. He filed no written objection to the motion or to the results of the genetic test. *See generally id.* at 2. He offered no evidence to support his stated claim for relief. *See id.* At the hearing on the motion, Gordon raised a single argument: he was a de facto custodian of M.H. under Idaho Code § 32-1705 (under the De Facto Custodian Act), an argument he later abandoned before the

[1] As in Shannon's opening appeal brief ("AB"), the Clerk's Record is cited as "R." For ease of reference, the transcripts (including the transcripts included as exhibits to the Clerk's Record) are cited as "Tr.," followed by the hearing date: *e.g.*, "Tr. at 4:2-4 (July 25, 2013)." Gordon's Respondent/Cross Appellant's Brief (filed Dec. 8, 2014) is cited as "RCAB," and Respondent's Reply Brief Supplement (filed Dec. 29, 2014) is cited as "RRBS."

district court.[2] Tr. at 4-5 (July 25, 2013).

Based on the evidence and argument before it, the magistrate granted Shannon's motion. *Id.* at 5; R. at 46-47. Gordon then moved the magistrate for relief from judgment pursuant to I.R.C.P. 60(b). R. at 59-61. Only then did Gordon present the VAP that he and Shannon signed following M.H.'s birth in 2010. *Id.* at 63-64. Gordon also raised Idaho Code § 7-1106 for the first time and argued: "Respondent's Verified Motion to Dismiss violated Idaho Code 7-1106(2) as the Defendant did not allege or produce admissible evidence or meet the burden to establish "fraud, duress or material mistake of fact." *See id.* at 76.

In response, Shannon addressed Section 7-1106(2) and the relevance of the genetic evidence she presented via Dr. Wurzinger's affidavit under the Paternity Act. *Id.* at 83-84. She argued that the results of Dr. Wurzinger's genetic test were unrefuted and proper pursuant to Idaho Code § 7-1115(4). *Id.* She also argued that results of the genetic test established a material mistake of fact on the part of Shannon under Section 7-1106(2). *Id.* The magistrate heard those arguments at the October 3, 2013 hearing, and denied Gordon's motion for relief from judgment. *See* Tr. at 4-11 (Oct. 3, 2013); R. at 101-102. Thus, contrary to Gordon, Shannon's arguments regarding the application of Section 7-1106(2) were raised before the magistrate and not for the first time on appeal to the district court.

---

[2] To be a de facto custodian under that statute, an individual must be "related to a child within the third degree of consanguinity." Idaho Code § 32-1703(1)(a). Clearly Gordon could not meet that requirement. In his motion for relief from judgment and before the district court, Gordon asserted an entirely new basis for his de facto custodian claim—under Idaho Code § 15-5-213. R. at 15, 114-115.

The second point Gordon misrepresents is that Shannon admitted she knew, at M.H.'s birth, that Gordon was not the child's biological father. *See, e.g.*, RCAB at 3, 17, 20-21, 22. Gordon bases that assertion on a statement made by Shannon's counsel in a pre-trial brief filed not in this case but in Gordon's separate and later guardianship action. *Id.* at 3, 17. The actual statement made was never introduced into evidence before the magistrate or the district court and is not part of the record before the Court.[3] Thus the statement cannot be substantiated by the record and cannot be considered on appeal.[4] *See Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 821, 979 P.2d 1174, 1179 (1999) ("[T]he burden remains on the party who wants to have information in the record to make sure that the information is, indeed, properly made part of the record.").

---

[3] As explained in Shannon's opening brief, Gordon filed a Petition for Guardianship in June 2013. AB at 4. Before the magistrate and the district court, Gordon sought judicial notice of the "repository" maintained in the guardianship action. *See* R. at 60, 91. Neither court did so, and Gordon does not raise either court's refusal to take judicial notice as an issue on appeal. *See generally* RCAB. In any event, taking judicial notice of the "repository" would not result in judicial notice of Shannon's pre-trial brief and the statements made there. I.R.E. 201(d) states that "the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items." Gordon never specifically identified the pre-trial brief or any other document from the guardianship action, only the register of actions, and thus failed to comply with I.R.E. 201(d).

[4] But even if the Court could consider a statement made in the pre-trial brief, it was not an admission that Shannon knew Gordon was not M.H.'s biological father at birth and does not show misconduct. The record shows that the true identity of M.H.'s biological father remained unknown until Dr. Wurzinger issued his findings on July 3, 2013. *See* R. at 35, 40-41, 63. As even Gordon acknowledges, Shannon filed the pre-trial brief in the guardianship action months *after* the results of the genetic test were made known. *See* RCAB at 17. Thus any acknowledgment that Gordon was not M.H.'s biological father was made with the benefit of hindsight and knowing he was, in fact, not the child's father.

III. REPLY ARGUMENT

A. The District Court Erred in Holding That Shannon Must Show a "True Mutual Mistake Had Been Made by Both Parties" to Disestablish Paternity Under Idaho Code § 7-1106(2).

1. Interpreting the Plain Language of Idaho Code § 7-1106(2) and the Paternity Act as a Whole Shows the Statute Does Not Require a *Mutual* Material Mistake of Fact.

In her opening appeal brief, Shannon explained why the district court erred as a matter of law in holding that a "material mistake of fact" under Idaho Code § 7-1106(2) "must mean a *mutual* material mistake" and that "[i]t must be shown that *both parties truly believed* that the named father was the actual father of the child, to the exclusion of all others." AB at 11-24 (citing R. at 173-174 (emphases added)). In response, Gordon ignores the district court's introduction of mutuality into the meaning of "material mistake of fact," *see* RCAB at 18-25, and simply maintains, without support of any legal authority or argument, that the district court's interpretation was correct, *id.* at 18.

The legal error made by the district court in interpreting "material mistake of fact" under Section 7-1106(2), however, cannot be overlooked. The express and plain language of the statute does not include the term "mutual" or state that both parties must share a completely unexpected mistake, only that a party may challenge a VAP on the basis of "material mistake of fact." Nor does the provision—or any other provision of the Paternity Act—require or infer that a VAP must be treated according to contract law. As Shannon explained in her opening appeal brief, domestic relationships in Idaho are governed by status, not contract, and contractual

principles have no place in determining parental rights to a child. *See* AB at 15-17. Indeed, it is illegal to contract for a child under Idaho law. *See id.* at 15 (citing Idaho Code § 18-1511).

The district court's reliance on contractual principles to find both parties must have made a true mutual mistake before setting aside a VAP is indistinguishable from allowing two parties to illegally contract for a child. For those reasons and the others expressed in Shannon's opening brief, the Court must reverse the district court's interpretation of "material mistake of fact" under Section 7-1106. Neither the provision itself nor any other provision of the Paternity Act requires a showing of a mutual material mistake or a completely unexpected mistake.

2. Based on the Literal Language of the Paternity Act and Under the Facts Before the Magistrate, Genetic Testing Results Proving Nonpaternity Are a Material Mistake of Fact.

Rather than address whether a "material mistake of fact" means a mutual mistake, Gordon argues that the mere fact a VAP names the wrong father does not constitute a material mistake under the Paternity Act. RCAB at 18 (citing R. at 172). According to Gordon, there must be more: "only the party who was mistaken about a material fact when the VAP was executed should be able to raise a challenge based on a mistake of fact." *Id.* at 19. He also argues that Shannon was not mistaken because she already knew Gordon was not M.H.'s biological father at the birth and thus the genetic test results proving Gordon was not the biological father are immaterial. *See id.* at 20-21.

Here, the evidence before the magistrate showed otherwise—Shannon was mistaken about a material fact set forth in the VAP. As already explained (at page 5), there is nothing in the record that demonstrates Shannon knew at birth that Gordon was not M.H.'s biological

father. In fact, Shannon's belief that Gordon was M.H.'s biological father is verified in the VAP itself. *See* R. at 63. The day following M.H.'s birth, Shannon signed the VAP and stated: "I acknowledge that the man named above [Gordon] *is the biological father* of my child." *Id.* (emphasis added). In addition, to support her request for a genetic test, Shannon presented evidence to the magistrate showing there was "[a] genuine question as to the identity of the biological father."[5] *See* R. at 35. Gordon never refuted that evidence and never objected to the request for a genetic test or to Dr. Wurzinger's findings.

That there was a significant error or misconception in Shannon's belief that Gordon "is the biological father" was conclusively proven by the results of the genetic test. The Paternity Act grants conclusive weight to genetic evidence that proves nonpaternity in any proceeding in which paternity is questioned. *See* Idaho Code §§ 7-1116(5), 7-1118. Gordon attempts to downplay the weight the legislature chose to give genetic evidence under the Paternity Act by reading Idaho Code § 7-1106 in isolation and refusing to consider the whole of the Paternity Act or its context. RCAB at 21-22. According to Gordon, the sections of the Paternity Act that address the role of genetic testing in determining true paternity are not applicable when a man and woman have signed a VAP. *Id.*

[5] In an affidavit supporting the request, Shannon stated that immediately prior to beginning her relationship with Gordon, she was intimate with another male friend. R. at 35 (¶ 5). She also stated: "A genuine question as to the identity of the biological father; my intimate relationship[s] with both [Gordon] and my other male friend were in close proximity to the time of conception." *Id.* (¶ 6).

But it is well-settled under Idaho law that the objective of statutory interpretation is to derive the legislative intent underlying the statute. *Idaho Youth Ranch, Inc. v. Ada Cnty. Bd. of Equalization*, 157 Idaho 180, 335 P.3d 25, 29 (2014). It is equally settled that "[s]uch intent should be derived from a reading of the whole act at issue." *Id.* (internal quotation marks and citation omitted); *see also AmeriTel Inns, Inc. v. Pocatello–Chubbuck Auditorium or Cmty. Ctr. Dist.*, 146 Idaho 202, 204, 192 P.3d 1026, 1028 (2008) ("[T]he Court must consider all sections of applicable statutes together to determine the intent of the legislature."); *Kaseburg v. State, Bd. of Land Comm'rs*, 154 Idaho 570, 577, 300 P.3d 1058, 1065 (2013) ("The various sections of a statute must be construed as a harmonious whole.").

It follows that statutory provisions "cannot be read in isolation, but must be interpreted in the context of the entire document." *Westerberg v. Andrus*, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988) (citing cases); *see also Hartley v. Miller–Stephan*, 107 Idaho 688, 690, 692 P.2d 332, 334 (1984) ("We will not construe a statute in a way which makes mere surplusage of the provisions included therein."), *reh'g denied* (Dec. 31, 1984); *Moss v. Bjornson*, 115 Idaho 165, 166-67, 765 P.2d 676, 677-78 (1988) (refusing to interpret Idaho Code § 6–1001 "in a vacuum"); *Wright v. Willer*, 111 Idaho 474, 476, 725 P.2d 179, 181 (1986) ("Statutes must be read to give effect to every word, clause and sentence."); *Johnson v. Studley-Preston*, 119 Idaho 1055, 1058-59, 812 P.2d 1216, 1219-20 (1991) (interpreting "child born out of wedlock" under Paternity Act considering other sections of statute).

Reading the literal language of the Paternity Act as a whole, and in context, demonstrates the import of genetic testing in any proceeding in which paternity is to be established. Idaho

Code § 7-1106(2) clearly allows an executed VAP to be "challenged ... in court." The Paternity Act also commands that "[t]he court may, and upon request of a party *shall*, require the child, mother, [or] alleged father ... to submit to genetic tests." Idaho Code § 7-1116(1) (emphasis added). The act also specifically identifies the results of genetic testing as evidence relevant and relating to paternity. Idaho Code § 7-1115(3), (4). Here Shannon sought to establish true paternity for M.H., and Gordon raised no objection. *See* R. at 31-35.

The relevance and role of genetic testing to VAPs under the Idaho Paternity Act are confirmed by the federal guidelines set forth in Title IV-D. Title IV-D requires states to establish "[p]rocedures which create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child." 42 U.S.C. § 666(a)(5)(G); *see also* 45 C.F.R. § 302.70(a)(5)(vi). Here, the Paternity Act does that, as genetic testing that excludes any male from possible paternity is "conclusive evidence of nonpaternity." Idaho Code § 7-1116(5). If the court finds nonpaternity based on the expert's conclusions, "the question of paternity shall be resolved accordingly, and the action shall be dismissed ...." Idaho Code § 7-1118.

The unique scheme and treatment of genetic testing under the Paternity Act also undermines Gordon's reliance on an Illinois decision, *In re N.C.*, 993 N.E.2d 134 (Ill. App. Ct. 2013), *aff'd*, 12 N.E.3d 23 (Ill. 2014). Gordon cites *N.C.* to support his contention that Gordon's biological relationship to M.H. is immaterial to challenging the VAP. *Id.* at 18-19. In her opening appeal brief, Shannon discussed the differing statutory schemes of other states to address the district court's misplaced reliance on *Allison v. Medlock*, 983 So. 2d 789, 790 (Fla.

Dist. Ct. App. 2008).[6] AB at 17-19. As explained there, virtually every state has decided for itself how to define the grounds to set aside a VAP identified under Title IV-D. *Id.* at 17-19. For example, the Florida statute at issue in *Allison* approached genetic testing very differently than the Paternity Act and cannot be used to prescribe meaning to Section 7-1106(2). *Id.*

Illinois is no different. *See id.* at 17 n.8. In *N.C.*, the court interpreted the Illinois Parentage Act and found that DNA results disproving the paternity of a father named on a VAP did not establish a material mistake of fact under the circumstances there. 993 N.E.2d at 142. Like the Florida statute, the Illinois Parentage Act offers a statutory scheme very different from the Idaho Paternity Act. Notably, under the Illinois statute, the presumption of parentage created by a VAP becomes "conclusive" if not immediately rescinded. 750 Ill. Comp. Stat. 45/5(b). In fact, the VAP explicitly waived the father's right to genetic testing. *N.C.*, 12 N.E.3d at 26. The Illinois statute thus prevents a man who signed a VAP from obtaining a DNA test to determine if he is truly the biological father.[7] *See N.C.*, 993 N.E.2d at 142.

But, as explained, the Idaho Paternity Act is far different, as it focuses on the scientific reliability of genetic testing to determine a child's parentage and the certainty of paternity that is shown by such findings. The statute allows and gives conclusive weight to genetic testing results

---

[6] The district court cited *Allison* to supports its holding that "material mistake of fact" means a mutual material mistake. *See* R. at 173.

[7] *N.C.* is also different factually from this case. There the state of Illinois challenged the VAP based on a DNA test that the appellate court found the state had no legal right to seek in the first place. 993 N.E.2d at 141-42. Both the mother and the challenged father, who were married, contested the state's ability to request the DNA test and set aside the VAP. *Id.* at 139.

as evidence of nonpaternity and does not prohibit those signing a VAP from seeking such evidence. *See* Idaho Code §§ 7-1115, 7-1116. The Paternity Act thus establishes procedures for the use of genetic testing results in proceedings to either establish or challenge paternity. Because a genetic test can overcome a presumption of paternity, the statute does not require mutuality in a material mistake of fact and elevates genetic testing proving nonpaternity to conclusive proof of a material mistake of fact.

3. Interpreting "Material Mistake of Fact" to Mean a Mutual and Unexpected Mistake Raises Serious Constitutional Issues and Creates an Absurd Result.

In her opening appeal brief, Shannon addressed the constitutional concerns that are raised by the district court's interpretation of "material mistake of fact" under Idaho Code § 7-1106(2). AB at 21-24. Gordon objects to this line of argument because it was not raised below. RCAB at 22. Shannon also addressed that issue and explained that the constitutional issues raised were not apparent before the district court's ruling and should be addressed, as "[d]oubts concerning interpretation of statutes are to be resolved in favor of that which will render them constitutional." AB at 21 n.10 (citing *State v. Wymore*, 98 Idaho 197, 198, 560 P.2d 868, 869 (1977)). Interpreting Section 7-1106(2) to require a mutual and completely unexpected mistake before a VAP can be challenged implicates the liberty interests of Shannon in parenting M.H., as well as the interests of Nicholas Bobos ("Bobos"), M.H.'s biological father. *Id.* at 21-24.

In his response brief, Gordon argues Shannon was not entitled to notice of what "material mistake of fact" actually means. RCAB at 22. As M.H.'s natural mother, however, Shannon enjoys due process rights under the Fourteenth Amendment to make decisions concerning his

care, custody, and control. See *Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho 195, 200, 245 P.3d 506, 511 (Ct. App. 2010) (citing *Troxel v. Granville*, 530 U.S. 57, 65-67 (2000)). Title IV-D also requires states to give the mother and putative father notice "of the alternatives to, the legal consequences of, and the rights ... and responsibilities that arise from, signing the acknowledgment." 42 U.S.C. § 666(a)(5)(C)(i). Shannon signed a VAP that does not give any explanation of the legal consequences to her rights as a mother in the event Gordon was not M.H.'s biological father.

To be sure, the executed VAP contains two affidavits on its first page, one for the "Biological Father to Complete" and one for the "Mother to Complete." R. at 63. While both affidavits reference the "Rights and Responsibilities of acknowledging paternity," the back page of the VAP only contains the "Rights and Responsibilities *of Biological Father*."[8] *See* Exhibits to Clerk's Record (emphasis added). Thus Shannon was not advised of the significant legal consequences established by the district court related to her liberty interest in raising M.H. Shannon was simply not informed that Gordon would nevertheless obtain an interest in M.H. in the event his paternity was disproved or how the VAP would impact his relationship with his biological father.

[8] On November 13, 2014, the Court granted Appellant's Request for Judicial Notice of the complete, certified copy of the Acknowledgement of Paternity Affidavit signed by Shannon and Gordon on November 4, 2010. *See* Order Granting Request for Judicial Notice and Setting Oral Argument at 1. The complete, certified copy was placed with the Exhibits for the convenience of the Court. *Id.*

The district court's ruling effectively identified a liberty interest in a man who is not biologically related to a child and who is not a legal guardian, adoptive parent, step-parent, blood relative, or foster parent. No such right has been identified under Idaho law. *See Idaho Dep't of Health & Welfare v. Doe*, 150 Idaho at 200, 245 P.3d at 511. Further, allowing Gordon to maintain paternity creates an absurdity, as Gordon is not a "parent" who rights can be terminated, *see* Idaho Code §§ 16-2005(1), 16-2002(11), or a person whose consent is necessary for adoption, *see* Idaho Code § 16-1504(1).

Gordon also argues that the constitutional rights of Bobos are not impacted by the district court's ruling. RCAB at 23. According to Gordon, as an unmarried biological father, Bobos has failed to develop any sort of relationship with M.H. *Id.* at 24. One of the problems with Gordon's argument is that his fictional paternity interferes with Bobos' right and opportunity to develop a substantial relationship with M.H. if the district court's interpretation of Idaho Code § 7-1106(2) stands. Another problem is the legislature's prerogative, when balancing the competing interests in a dispute over a child's paternity, to eliminate uncertainty and confusion as to the child's parentage. *See* Idaho Code §§ 7-1115, 7-1116.

Holding that a material mistake of fact requires a mutual and completely unexpected mistake would allow a party defending paternity to merely state indifference to the true identity of the child's biological father. A mistake in the identity of the true biological father could not be mutual or unexpected, and thus a material mistake of fact as to the VAP would never result. As a result, a non-biological male with nothing more than a written acknowledgment could interfere with the liberty interest shared by the child's biological parents. Idaho's parental

termination and adoption statutes do not operate in such a manner. *See* Idaho Code § 16-2005 (prescribing procedures for terminating parental rights); Idaho Code § 16-1504 (prescribing procedures for adoption).

B. Because the Genetic Test Results Conclusively Rebut Gordon's Paternity, the District Court Erred Reversing the Magistrate's Dismissal of the Custody Action.

Gordon can only maintain his custody action if the magistrate made a finding of paternity, and here, after paternity was challenged, the magistrate did not. *See* Idaho Code § 7-1102 (allowing trial court "to order support and determine custody" in "any such proceeding in which it makes a finding of paternity"). The material mistake of fact at issue here must be viewed by the representations made in the VAP itself and the Paternity Act. Shannon asserted such a mistake in her belief that Gordon was, in fact, M.H.'s "biological father." Dr. Wurzinger's finding of nonpaternity was "conclusive evidence" that Gordon is not M.H.'s biological father. *See* Idaho Code § 7-1116(5). Based on Dr. Wurzinger's findings, the magistrate necessarily found the evidence before it was sufficient to dismiss Gordon's custody complaint and remove his name from M.H.'s birth certificate. R. at 101-102. The district court's decision to reverse that ruling was made in error and should be overturned.

IV. CROSS-APPEAL ARGUMENT

Despite the fact that the district court reversed the magistrate and entered judgment in his favor, Gordon cross-appeals the magistrate's dismissal of his custody complaint on various grounds. Because Gordon does not seek reversal or modification of the judgment—it was, after all, entered in his favor—Shannon treats the issues raised as alternative grounds to reverse the magistrate, should the district court's judgment itself be reversed by the Court. *See Bewley v.*

Bewley, 116 Idaho 845, 847, 780 P.2d 596, 598 (Ct. App. 1989) (recognizing that respondent can make any argument to sustain lower court judgment). None of the additional grounds Gordon raises on cross-appeal, however, support the reversal of the magistrate. The Court should reverse the district court for the reasons stated in Section III of this brief. In the event it does, the Court should also affirm the magistrate's dismissal of Gordon's custody complaint.

A. Based on the Record and Legal Arguments Before It, the Magistrate Correctly Granted Shannon's Motion to Dismiss; Further, Gordon Waived Any Objection to the Motion Under I.R.C.P. 7(b)(1) and 56 by Failing to Object to the Motion's Form, Timing, or Substance.

Gordon's first cross-appeal issue asserts that the magistrate should have denied Shannon's motion to dismiss his complaint for failing to comply with I.R.C.P. 7(b)(1) and 56(c). RCAB at 5-11. Gordon contends Shannon violated Rule 7(b)(1) by failing to cite any authority or evidentiary support for her motion. *Id.* at 5-9. He also contends Shannon gave him inadequate notice or opportunity to respond to the motion under Rule 56(c).[9] *Id.* at 9-11. The record does not support those contentions.

I.R.C.P. 7(b)(1) states that written motions "shall state with particularity the grounds therefor including the number of the applicable civil rule, if any, under which it is filed, and shall set forth the relief or order sought." As noted earlier (at page 3), Gordon's complaint for custody was solely based on the claim that he was, in fact, M.H.'s biological father. R. at 7 (¶¶ IV, V).

[9] Shannon moved to dismiss Gordon's complaint pursuant to I.R.C.P. 12(b)(6) based on Dr. Wurzinger's affidavit and finding of nonpaternity. R. at 37-38. As noted in Shannon's opening appeal brief, the magistrate considered the affidavit, and thus the motion should have been treated as a motion for summary judgment. AB at 7 n.3. But as noted herein, Gordon did not object to the form or timing of Shannon's motion and thus has waived any such objection.

Because Dr. Wurzinger found otherwise, Shannon's motion to dismiss was based on a simple premise: "The original grounds plead[ed] in Plaintiff's Complaint are no longer based on fact" and "the Plaintiff has not been found to be the natural father of" M.H. *Id.* at 37-38.

Gordon was thus clearly informed of the basis for Shannon's motion and the relief sought and, as such, was afforded an opportunity to be heard and to advance legal argument. Rule 7(b)(1) requires "reasonable specification," and that requirement is met if the other party cannot assert surprise or prejudice. *Patton v. Patton*, 88 Idaho 288, 292, 399 P.2d 262, 264-65 (1965) (internal quotation marks and citation omitted). Gordon can claim no surprise or prejudice. Shannon's motion clearly asserted that Gordon failed to state a claim because he was not M.H.'s biological father. This is not a case where the appellant received no notice of the issues to be determined by the district court, such as in *Patton*, 88 Idaho at 294, 399 P.2d at 266, or where a trial court raised issues *sua sponte*, without giving any notice to the plaintiff, such as in *Mason v. Tucker & Associates*, 125 Idaho 429, 431-32, 871 P.2d 846, 848-49 (Ct. App. 1994).[10]

Moreover, Gordon waived any claim of procedural defects under I.R.C.P. 7(b)(1) or I.R.C.P. 56(c). It was his burden to establish a genuine issue for trial or justify the failure to do

[10] Gordon quotes a number of cases, including *Patton* and *Mason*, addressing the particularity requirement of I.R.C.P. 7(b)(1) and notice requirements of I.R.C.P. 56(c), but none of those cases involved circumstances similar to those here. *See* RCAB 6-10. In *Fournier v. Fournier*, 125 Idaho 789, 791-92, 874 P.2d 600, 602-03 (Ct. App. 1994), the Idaho Court of Appeals vacated an award of attorney fees because the moving party failed to advance *any* authority for the award. In *Saykhamchone v. State*, 127 Idaho 319, 321-22, 900 P.2d 795, 797-98 (1995), the Supreme Court reversed the summary disposition of a petition for post-conviction relief because the district court failed to give the petitioner notice of its intention to dismiss, as required by Idaho Code § 19-4906. *Id.* at 322, 900 P.2d at 798.

so. *See* I.R.C.P. 56(f). Yet Gordon filed no written objection to the timing, form, or substance of the motion. *See generally* R. at 2. Nor did he object to the results of the genetic test or request additional time to respond. *Id.* At the hearing on the motion, Gordon simply argued he was a de facto custodian under Idaho Code § 32-1705.[11] *See* Tr. at 4-5 (July 25, 2013). Having failed to object, Gordon waived any objection to the form or timing of Shannon's motion. *See Rosenberg v. Toetly*, 94 Idaho 413, 421, 489 P.2d 446, 454 (1971) ("[T]his Court will not review on appeal objections not made at trial.").

That principle was applied in *Bennett v. Bliss*, 103 Idaho 358, 360, 647 P.2d 814, 816 (Ct. App. 1982), to address an appellant's argument that the trial court erred when it considered a motion for summary judgment not served within the time prescribed by I.R.C.P. 56(c). The Idaho Court of Appeals found the appellant waived that argument by failing to object. *Id.* Because Gordon failed to raise his objections to Shannon's motion before the magistrate, the same reasoning applies here. Having waived his objections, he cannot show any violation of his substantial rights. *See* I.R.C.P. 61; *Heer v. Oil, Chem. & Atomic Workers Int'l Union*, 123 Idaho 889, 890, 853 P.2d 634, 635 (Ct. App. 1993) (holding that, by failing to object, party waived any claim that opposing party's failure to comply with notice requirements under I.R.C.P. 56(c) violated his substantial rights).

Even so, Gordon later moved the magistrate for relief from the dismissal of his custody complaint and removal of his name from M.H's birth certificate, and was heard on that motion.

---

[11] *See supra* n.2.

See R. at 59-61, 72-77, 88-93; Tr. at 4-9 (Oct. 3, 2013). As part of the motion, Gordon introduced, for the first time, the VAP that he and Shannon signed following M.H.'s birth. *Id.* at 60, 63. He also addressed Idaho Code § 7-1106(2) and other potential grounds for his standing to assert custody to M.H. *See id.* at 72-77, 88-93. It follows that the merits of Shannon's motion to dismiss were essentially addressed anew and reargued before the magistrate. *See id.*; *see also id.* at 78-85; Tr. at 4-11 (Oct. 3, 2013). Gordon cannot show a violation of his substantial rights for that reason too. *See* I.R.C.P. 61.

In sum, Shannon provided Gordon clear notice of the grounds and basis of her motion to dismiss under I.R.C.P. 7(b)(1). Further, Gordon failed to object to the form, timing, or substance of the motion and has now waived any claim that such procedures were improper or violated his substantial rights. Having not been presented with those issues, the magistrate did not err in granting Shannon's motion, and its judgment must be affirmed.

B. The District Court Did Not Err When It Considered the Application of Idaho Code § 7-1106(2) on Appeal or When It Refused to Impose Attorney Fees Against Shannon for Positions She Took Before the Magistrate.

1. Shannon Did Not Raise New Arguments for the First Time on Appeal Before the District Court.

As part of his cross-appeal arguments, Gordon also contends the district court erred in considering the application of Idaho Code § 7-1106(2) to Gordon's right to maintain a custody claim. RCAB at 12-13. According to Gordon, Shannon argued there was a material mistake of fact as to the VAP for the first time before the district court and thus the district court should not have considered it. *Id.* As explained at pages 3-4 above, the record below does not support Gordon's contentions. Whether the VAP should have been rescinded because of a material

mistake of fact under the Paternity Act, based on the results of the genetic test, was an issue presented to the magistrate and was properly before the district court.

2. Gordon Waived His Right to Attorney Fees Before the Magistrate, and Even if He Has Not, Shannon Raised Legitimate Issues Regarding the VAP and Gordon's Right to Maintain a Custody Action Under the Paternity Act.

Gordon's final cross-appeal issue contends the district court erred when it failed to grant him attorney fees under Idaho Appellate Rule ("I.A.R.") 11.2, I.R.C.P. 11(a)(1), and Idaho Code §§ 12-121 and 12-123. RCAB at 13-17. According to Gordon, the district court should have awarded him attorney fees because Shannon and her trial counsel asked the magistrate to remove him from M.H.'s birth certificate without basis in the law and failed to disclose controlling legal authority. *Id.* It should be noted that Gordon does not request an award of attorney fees *on appeal* before this Court.[12] *See id.* at 4. Nor did he request attorney fees *on appeal* before the district court.[13] *See* R. at 103-118. Rather, Gordon's claim of error is limited to the district court's refusal to impose attorney fees against Shannon and her trial counsel for the positions taken before the magistrate. RCAB at 4.

---

[12] Before this Court, Gordon has identified the issue as: "Did the District Court err or abuse its discretion when it failed to grant Plaintiff attorney fees in spite of Defendant's failure to comply with the obligation of candor and pursuit of their motion without any basis in law and fact?" RCAB at 4. Gordon did not separately list attorney fees from this Court as an additional issue on appeal as required by I.A.R. 35(b)(5). *See also* I.A.R. 35(a)(5), 41(a); *Evans v. Sayler*, 151 Idaho 223, 228, 254 P.3d 1219, 1224 (2011) (finding respondent was not entitled to attorney fees when request failed to comply with I.A.R. 35(b)(5)).

[13] Before the district court, Gordon's opening brief contains no request for attorney fees. R. at 103-118. Gordon later filed a supplemental brief asking the district court to impose attorney fees against Shannon and her trial counsel for pursuing the dismissal of his custody complaint before the magistrate. But that brief is not included in the appellate record.

Gordon, however, has not preserved his claim of error based on the appellate record. As just noted (in n.13), there is no record before the Court that shows Gordon's basis for claiming attorney fees from the district court. The Court cannot presume the district court abused its discretion in absence of an adequate record on appeal. *See Idaho Dep't of Health & Welfare*, 150 Idaho at 199, 245 P.3d at 510 (finding challenge to effect of rights under termination statute from custody order was not properly before court when copy of custody order was not in record on appeal). Even so, Gordon did not request attorney fees before the magistrate, *see generally* R. at 2-4 (register of actions), and thus the issue was not properly before the district court. *See Abolafia v. Reeves*, 152 Idaho 898, 904, 277 P.3d 345, 351 (2012) (issues not raised below and presented for first time on appeal will not be considered or reviewed).

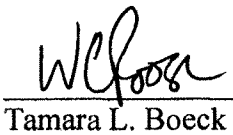
In any event, an award of attorney fees was not appropriate given the legitimate issues involved here. Shannon had (and has) a good faith basis for arguing that Gordon—as an unmarried, nonbiologically related man who is not an adoptive parent—has no right to maintain a custody action for M.H under the Paternity Act. As explained in Shannon's opening appeal brief and in Section III of this brief, under the Paternity Act a genetic test that proves nonpaternity conclusively rebuts the finding of paternity rendered by a VAP and is proof of Shannon's material mistake of fact. Because Shannon has not pursued that position frivolously or without legal basis, Gordon is not entitled to an award of attorney fees. *See Roe Family Servs. v. Doe*, 139 Idaho 930, 939, 88 P.3d 749, 758 (2004) (denying request for attorney fees because there were legitimate issues regarding interpretation of provisions of adoption and termination statutes, which Court had not previously addressed).

V. CONCLUSION

For the reasons set forth above, Shannon respectfully requests that the Court reverse the district court's decision and affirm the magistrate's dismissal of Gordon's custody complaint and denial of his motion for relief from judgment.

DATED: January 26, 2015.

STOEL RIVES LLP



Tamara L. Boeck
W. Christopher Pooser
Attorneys for Appellant/Cross-Respondent Shannon L. Hedrick

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January, 2015, I served a true and correct copy of the foregoing **APPELLANT'S REPLY AND CROSS-APPEAL BRIEF** in the above-entitled matter by the method described below:

Richard L. Hammond Hammond Law Office, P.A. 2805 Blaine St., Suite 140 Caldwell, Idaho 83605 Fax: (208) 453-4861 *Attorney for Respondent/Cross-Appellant*	[ ] Via U.S. Mail [ ] Via Facsimile [ ] Via Overnight Mail [ ] Via Hand Delivery [X] Via Email
Tyler Rounds Lovan Roker & Rounds, P.C. 717 S. Kimball Ave., Suite 200 Caldwell, Idaho 83605	[ ] Via U.S. Mail [ ] Via Facsimile [ ] Via Overnight Mail [ ] Via Hand Delivery [X] Via Email

By: _____
W. Christopher Pooser