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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 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

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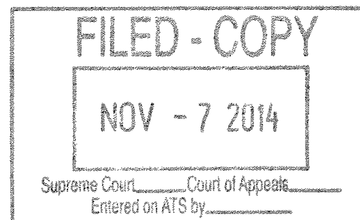

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This appeal concerns an action filed by Respondent Roger Carl Gordon ("Gordon") for the custody of a minor child, M.H. Appellant Shannon Lee Hedrick ("Shannon") is M.H.'s natural mother. Gordon and Shannon have never been married. At the time of M.H.'s birth, Gordon and Shannon signed a voluntary acknowledgment of paternity ("VAP") stating that Gordon "is the biological father" of M.H. That statement was proven wrong when a genetic test revealed that Gordon has a 0.00% probability of paternity. Hence Shannon moved to dismiss Gordon's custody complaint and challenged the VAP on the basis of a "material mistake of fact" under Section 7-1106(2) of the Idaho Paternity Act. Based on Gordon's nonpaternity, the magistrate dismissed his action and ordered his name removed from M.H.'s birth certificate.

On appeal, the district court reversed the magistrate. Based on principles of contract law, the district court interpreted "material mistake of fact" to mean a mistake that is mutual and completely unexpected by both parties. In effect, the district court found the VAP conclusive and incontestable, regardless of later genetic testing. That holding does not conform with the Paternity Act and undermines Idaho law governing domestic relationships. Under the Paternity Act's plain and unambiguous language, a genetic test proving nonpaternity conclusively rebuts the presumption of paternity and is proof of a material mistake of fact. Otherwise, Gordon would remain M.H.'s "biological father" and have legal standing to custody to M.H. despite his status as an unmarried, nonbiological man who is not an adoptive parent.

Because Gordon is not M.H.'s biological father, the district court erred when it reversed the magistrate's order dismissing Gordon's custody action and removing his name from the birth certificate. The Court should overturn the district court's decision and remand this matter to the magistrate for dismissal.

B. Statement of Facts and Course of Proceedings.

1. After M.H.'s Birth, Shannon and Gordon Signed an Acknowledgment of Paternity and Identified Gordon as the "Biological Father."

Shannon and Gordon began living together in April 2010. R. at 35 (¶ 4).[1] Just before their relationship began, Shannon was intimate with another male friend. *Id.* (¶ 5). According to Shannon, "my intimate relationship[s] with both Roger and my other male friend were in close proximity to the time of conception." *Id.* (¶ 6). Shannon gave birth to M.H. in 2010. *Id.* at 64. The following day, Shannon and Gordon signed an Acknowledgment of Paternity Affidavit, stating that Gordon "is the biological father" of M.H and consenting to the recording of Gordon's name on M.H.'s birth certificate. *See id.* at 63.

For the next two years, Shannon and Gordon lived together with M.H. in the same home. *See id.* at 6 (¶ I), 21 (¶ 4(a)). Shannon and Gordon have never been married. *See id.* at 7 (¶ III), 20 (¶ 2). According to a parenting assessment, Gordon worked while Shannon stayed home to care for M.H. *See id.* at 205 (Ex. at 1, 4 ("Although Mr. Gordon reports that he was involved in

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[1] The Clerk's Record is cited as "R." The Clerk's Record also includes, as exhibits, transcripts from hearings held on July 25, 2013 and October 3, 2013. *See* R. at 205. The Reporter's Transcript of Proceedings is a transcript from a May 1, 2014 hearing. For ease of reference, the transcripts are cited as "Tr.," followed by the hearing date, *e.g.*, "Tr. at 4:2-4 (July 25, 2013)."

[M.H.]'s care, it appears that Shannon Hedrick was the primary caregiver."))[2] The assessment also found that Shannon and Gordon had a troubled, volatile relationship, which had a negative impact on M.H. *See id.* (Ex. at 3-8). Nothing in the record below shows that Gordon adopted M.H. or obtained legal custody of M.H. during his short time living with Shannon.

2. Gordon Filed This Action, and the Magistrate Ordered a Genetic Test, Which Showed Gordon Is Not M.H.'s Biological Father.

On February 28, 2013, Shannon obtained a Civil Protection Order against Gordon and moved herself and M.H. into a women's shelter. *See id.* at 21 (¶ 4(b)), 30. On March 1, 2013, Gordon filed this action *pro se*, seeking custody of M.H based on the allegation that he was M.H.'s biological father. *See id.* at 6-9, 7 (¶ V). Shannon answered and counterclaimed for legal and physical custody of M.H. *Id.* at 20. As part of her counterclaim, Shannon alleged that Gordon "has frequently stated he doubts he is the child's parent. Genetic testing of the parties and child should be done to confirm parentage before entry of further orders." *Id.* at 20. Gordon, now represented by legal counsel, denied that allegation. *Id.* at 30.

The magistrate appointed an expert to complete a parenting assessment. *Id.* at 25. The expert submitted a Brief Focused Assessment to the magistrate on May 30, 2013. *See id.* at 205 (Evaluation of Brianne Asumendi-Topmiller). In the meantime, Shannon filed a motion seeking an order requiring a genetic test to determine the paternity of M.H., pursuant to Idaho Code § 7-1116. *Id.* at 31-32. Gordon did not oppose the motion, *see generally id.* at 1-2, and the

[2] The parenting assessment, the Evaluation of Brianne Asumendi-Topmiller, is included in the record as a confidential exhibit. *See* R. at 205.

magistrate granted it, *id.* at 36A-36B. Dr. Karl-Hans Wurzinger, a qualified expert in the field of paternity testing, performed the test and found the probability of Gordon's paternity of M.H. was "0.00%." *Id.* at 40-41. According to Dr. Wurzinger, "[t]hese results indicate that ROGER GORDON is not the biological father of the child …." *Id.* at 40.

3. Based on the Genetic Test Results, the Magistrate Dismissed Gordon's Action and Ordered His Name Removed from M.H.'s Birth Certificate.

Based on the results of the genetic test, Shannon filed a motion to dismiss Gordon's complaint for failure to state a claim pursuant to Idaho Rule of Civil Procedure ("I.R.C.P.") 12(b)(6), to remove his name from M.H.'s birth certificate, and to have a new birth certificate issued. *Id.* at 37-38. Dr. Wurzinger's affidavit and the genetic test results accompanied the motion. *Id.* at 40-45. Gordon filed no written objection to that motion either. *See generally id.* at 2; Tr. at 4-5 (July 25, 2013). Nor did Gordon contest the results of Dr. Wurzinger's genetic test. *See id.* After hearing the motion, the magistrate dismissed Gordon's complaint and ordered the removal of his name from the birth certificate. *See* R. at 46-47; Tr. at 4-5 (July 25, 2013).

Gordon appealed to the district court. R. at 48. A week later, he moved the magistrate for relief from judgment pursuant to I.R.C.P. 60(b)(1), (2), (3), (4), and (6). *Id.* at 59-61. As part of that motion, Gordon also requested that his complaint for custody be consolidated with a separate action, a Petition for Guardianship, that he filed *pro se* on June 24, 2013. *Id.* The magistrate denied the motion for relief from judgment and the request to consolidate the guardianship action. *See* Tr. at 11 (Oct. 3, 2013); R. at 101-102. Gordon filed an amended notice of appeal. R. at 97.

4. Based on Principles of Contract Law, the District Court Reversed the Magistrate and Held Paternity Was Conclusively Established Absent Proof of a Mutual Mistake That Is Completely Unexpected.

After the magistrate filed a proper final judgment, *id.* at 167, the district court heard Gordon's appeal. Tr. at 5-57 (May 1, 2014). On May 14, 2014, the district court entered a decision reversing the magistrate's dismissal of the custody action. R. at 174-175. According to the district court, to disestablish paternity under the Paternity Act on the basis of "material mistake of fact," the mistake must be completely unexpected to both parties. *Id.* at 172-173. Citing contract law, the district court concluded that in the absence of proof that Shannon and Gordon were mutually mistaken as to the true facts, "the birth certificate as issued is conclusive and incontestable, regardless of the later genetic testing." *Id.* at 173-174.

Shannon filed the instant appeal on June 3, 2014, *id.* at 177, and Gordon cross-appealed on June 25, 2014, *id.* at 197. Thereafter, Gordon filed an Amended Complaint for Custody, Visitation and Support, *id.* at 182, which Shannon answered, *id.* at 204A.

5. Nicholas Bobos Is M.H.'s Biological Father.

Since Gordon filed this action, Shannon and M.H. have resided in Nevada. *Id.* at 183-184 (¶ 5(a)), 204C (¶ VII(a)). Nicholas Bobos ("Bobos") was identified as M.H.'s biological father. *Id.* at 184 (¶ 5(d)), 204C (¶ VII(d)). A custody action between Shannon and Bobos is currently pending in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe as Case No. FV14-01686. *Id.* at 184 (¶ 5(c), (d)), 204C (¶ VII(c), (d)).

II. ISSUES PRESENTED ON APPEAL

1. Did the district court err in interpreting a "material mistake of fact" under Idaho Code § 7-1106(2) based on principles of contract law to mean a mutual mistake that was completely unexpected by both parties?

2. Did the district court err when it reversed the magistrate's dismissal of Gordon's custody action when genetic testing conclusively established that Gordon is not M.H.'s biological father?

III. STANDARD OF REVIEW

District Court's Decision: When reviewing a decision made by the district court in its appellate capacity, the Court does not directly review the magistrate's decision but the district court's decision. *Idaho Dep't of Health & Welfare v. McCormick*, 153 Idaho 468, 470, 283 P.3d 785, 787 (2012), *cert. denied,* 133 S. Ct. 1632 (2013). To determine if the district court erred in reversing the magistrate, the Court independently reviews the record before the magistrate "to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." *Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012) (quoting *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008)). The Court reviews questions of law, such as the interpretation of a statute and its meaning, de novo. *McCormick*, 153 Idaho at 470, 283 P.3d at 787; *In re Adoption of Doe*, 156 Idaho 345, __, 326 P.3d 347, 350 (2014).

Summary Judgment: The standard of review for a dismissal on summary judgment is the same standard used by the trial court.[3] *Goodman v. Lothrop*, 143 Idaho 622, 626, 151 P.3d 818, 822 (2007). Summary judgment is appropriate "if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The Court must view all facts and inferences from the record in favor of the nonmoving party. *Goodman*, 143 Idaho at 626, 151 P.3d at 822. Judgment is appropriate if the nonmoving party fails to make a showing sufficient to establish the existence of an element that is essential to its case, and on which it will bear the burden of proof at trial. *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

Motion for Relief from Judgment: The standard of review for a motion for relief from a judgment under I.R.C.P. 60(b) turns on which subsection of the rule is invoked. *Berg v. Kendall*, 147 Idaho 571, 576, 212 P.3d 1001, 1006 (2009). If discretionary grounds are asserted, the standard of review is for abuse of discretion. *Id.* In that situation, the Court must examine whether the trial court (1) recognized the issue as discretionary, (2) acted within the boundaries of its discretion and consistent with the legal standards applicable to the specific choices available to it, and (3) reached its decision through an exercise of reason. *Id.* If the appellant

[3] While Shannon moved to dismiss Gordon's complaint pursuant to I.R.C.P. 12(b)(6), she did so based on Dr. Wurzinger's affidavit and finding of nonpaternity. Because the magistrate considered the affidavit in its ruling, the decision should be treated as granting summary judgment. *See Goodman v. Lothrop*, 143 Idaho 622, 626, 151 P.3d 818, 822 (2007). Even so, on appeal, the standard of review for a dismissal under I.R.C.P. 12(b)(6) is the same standard of review applied in I.R.C.P. 56. *Losser*, 145 Idaho at 672-73, 183 P.3d at 760-61.

asserts nondiscretionary grounds under Rule 60(b), the question presented is one of law, and the Court exercises free review. *Id.*

IV. ARGUMENT

Before a trial judge can determine custody as allowed under the Idaho Paternity Act, Idaho Code § 7-1101, *et seq.*, it must make a finding of paternity. *See* Idaho Code § 7-1102. Here the magistrate rescinded the VAP signed by Shannon and Gordon based on a finding of nonpaternity and grounds of a material mistake of fact. On that basis, the magistrate dismissed Gordon's custody action and ordered his name removed from M.H.'s birth certificate. Because Gordon has no parental rights, he cannot demonstrate an injury in fact and thus has no standing to maintain a custody action. *See, e.g., Doe v. Roe*, 142 Idaho 202, 204, 127 P.3d 105, 107 (2005) (considering threshold question of whether biological father had parental rights that must be terminated in action to terminate parental rights). The magistrate was correct to dismiss this action, and the district court erred in reversing that judgment.

A. The Idaho Paternity Act Establishes Procedures for the Voluntary Acknowledgment of Paternity in Accordance with Federal Law.

Chapter 7, Title IV, Part D of the Social Security Act ("Title IV-D") creates a child support enforcement program that the states must comply with to obtain federal funding for their public assistance programs. *See* 42 U.S.C. § 651, *et seq.* Under Title IV-D, states are required to establish expedited procedures to establish paternity and financial responsibility for a child. *Id.* §§ 654(20), 666. Procedures include "a simple civil process for voluntarily acknowledging paternity." *Id.* § 666(a)(5)(C)(i). States must 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," *id.*, establish a "hospital-based program for the voluntary acknowledgment of paternity," *id.* § 666(a)(5)(C)(ii), and develop "an affidavit for the voluntary acknowledgment of paternity," *id.* § 666(a)(5)(C)(iv). *See also* 45 C.F.R. § 302.70(a)(5)(iii).

Title IV-D requires a signed VAP be "considered a legal finding of paternity, subject to the right of any signatory to rescind the acknowledgment" within 60 days. 42 U.S.C. § 666(a)(5)(D)(ii)(I). After that period, state procedures must provide that a "signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger." *Id.* § 666(a)(5)(D)(iii). Federal law also requires states to implement "[p]rocedures under which the voluntary acknowledgment of paternity creates a rebuttable or, at the option of the State, conclusive presumption of paternity, and under which such voluntary acknowledgment is admissible as evidence of paternity." 45 C.F.R. § 302.70(a)(5)(iv).

Genetic testing also plays a role under the federal requirements. Title IV-D requires procedures that allow, in certain cases, the genetic testing of the child and all other parties upon the request of a party. 42 U.S.C. § 666(a)(5)(B). State procedures must allow the admission of the results of a genetic test into evidence and must address when and how objections to the results can be made. *See id.* § 666(a)(5)(F). In addition, states must 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." *Id.* § 666(a)(5)(G).

Idaho implements the requirements of Title IV-D through its Paternity Act. Under Idaho Code § 7-1106(1), "[a] voluntary acknowledgment of paternity for an Idaho birth shall be admissible as evidence of paternity and shall constitute a legal finding of paternity upon the filing of a signed and notarized acknowledgment with" the Idaho Bureau of Vital Records and Health Statistics (the "Bureau of Vital Records").[4] In effect, the provision allows an executed VAP to be filed "in lieu of contested paternity proceedings." *Johnson v. Studley-Preston*, 119 Idaho 1055, 1059 n.1, 812 P.2d 1216, 1220 n.1 (1991) (citing earlier version of Section 7-1106).

The Paternity Act also prescribes procedures to disestablish paternity. The statute allows any party to the acknowledgment to file a notarized rescission within 60 days. Idaho Code § 7-1106(1)(a). After the 60-day period, "an executed acknowledgment of paternity 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 Bureau of Vital Records must create forms for acknowledging paternity and nonpaternity. Idaho Code § 7-1106(4).

The Paternity Act also provides that evidence relating to paternity may include the results of genetic testing. Idaho Code § 7-1115(3), (4). "The court may, and upon request of a party shall, require the child, mother, alleged father … to submit to genetic tests." Idaho Code § 7-1116(1). Genetic testing must be performed by a qualified expert, and a party may challenge the admission of the expert's report before trial or request that independent tests be performed by

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[4] The Bureau of Vital Records is an agency of the Idaho Department of Health and Welfare. *See* http://www.healthandwelfare.idaho.gov/?tabid=82.

other qualified experts. *See id.* Testing that excludes any male witness 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.

B. 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, Unambiguous Language of Idaho Code § 7-1106(2) and the Paternity Act as a Whole Shows the Statute Does Not Require a Mutual or Completely Unexpected Mistake.

The district court erred as a matter of law holding that the magistrate must find a "true mutual mistake had been made by both parties" before setting aside the VAP signed by Shannon and Gordon. *See* R. 172. According to the district court, "material mistake" under Idaho Code § 7-1106(2) "must mean a *mutual* material mistake. It 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. The discovery that he was not must come as a *completely unexpected revelation*." *Id.* at 173 (emphases added; internal citations omitted). Thus the district found that unless "both parties were mutually mistaken as to the true facts … the birth certificate as issued is conclusive and incontestable, regardless of the later genetic testing." *Id.* at 173-174.

The district court's error can be traced to its failure to follow basic principles of statutory interpretation. Statutory interpretation begins with the statute's literal words. *In re Adoption of Doe*, 156 Idaho at ___, 326 P.3d at 351. The provisions should not be read in isolation but interpreted in the context of the entire statute and considered as a whole. *McCormick*, 153 Idaho

at 472, 283 P.3d at 789. Where that language is unambiguous, the Court does not engage in statutory construction but gives effect to the statute as written. *Id.*; Idaho Code § 73-113(1). The words of the statute should be given their plain and ordinary meaning, "unless a contrary legislative purpose is expressed or the plain meaning creates an absurd result." *Doe v. Boy Scouts of Am.*, 148 Idaho 427, 430, 224 P.3d 494, 497 (2009).

The Paternity Act does not define "material mistake of fact," and the Idaho appellate courts have not defined the words within the context of the statute. But the statute is not ambiguous with respect to disestablishing paternity. It states that an executed VAP filed with the Bureau of Vital Records is "a legal finding of paternity." Idaho Code § 7-1106(1). The statute itself then provides the means to set aside an executed VAP, first allowing any party to a VAP to rescind it within 60 days. Idaho Code § 7-1106(1)(a). After the 60-day period, "an executed acknowledgment of paternity 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 statutes also establishes procedures for the use of genetic test results. *See, e.g.*, Idaho Code § 7-1116.

Reading Section 7-1106(2) alone and within the context of the Paternity Act does not require (1) the mistake be mutual or (2) a mistake that was completely unexpected. The provision simply does not include the term "mutual" or state that both parties must share the mistake. Nor does the literal language require anything more than a "material mistake of fact." Nothing in the statute requires an inquiry into what both parties knew or expected when signing the VAP, just a material mistake regarding a fact related to the VAP signed by the parties.

The executed VAP in this case contains two affidavits on its first page. R. at 63. Under the heading "Affidavit for the Biological Father to Complete," Gordon stated "that *I am the biological father* of [M.H.], a child born on/to be born on or about [2010], at West Valley Medical Center, Caldwell, Canyon [County], Idaho, to Shannon Hedrick." *Id.* (emphasis added). Under the heading "Affidavit for the Mother to Complete," Shannon stated that "I acknowledge that the man named above *is the biological father* of my child." *Id.* (emphasis added). The question ultimately posed to the magistrate was whether it is a "material mistake of fact" that Gordon "is the biological father" of M.H.

The leading law dictionary defines "material" as "[h]aving some logical connection with the consequential facts" or "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." *Black's Law Dictionary* 1124 (10th ed. 2014); *see also State v. Gawron*, 124 Idaho 625, 628, 862 P.2d 317, 320 (Ct. App. 1993) (defining "material" similarly, quoting *Black's Law Dictionary* 976 (6th ed. 1990)). "Mistake" is defined as "[a]n error, misconception, or misunderstanding; an erroneous belief." *Black's Law Dictionary* 1153. The plain meaning of "material mistake of fact" under Section 7-1106(2) thus means there is a significant error that Gordon "is the biological father" of M.H. Because he is not, there was a material mistake of fact as to the executed VAP.

Reading the Paternity Act as a whole confirms that interpretation and shows that the party seeking to disestablish paternity is not required to show a mutual mistake or a mistake that was completely unexpected. "The various sections of a statute must be construed as a harmonious whole." *Kaseburg v. State, Bd. of Land Comm'rs*, 154 Idaho 570, 577, 300 P.3d 1058, 1065

(2013); *see also Johnson*, 119 Idaho at 1058-59, 812 P.2d at 1219-20 (interpreting "child born out of wedlock" considering surrounding sections). Interpreting "material mistake of act" within the context of the entire Paternity Act requires one to consider the key role genetic testing plays in determining paternity under the statute.

Indeed, the statute requires genetic testing if requested and the results admitted unless challenged. Idaho Code § 7-1116(1); *see also id.* § 7-1115(4) (stating that evidence relating to paternity may include genetic tests). Results that show nonpaternity are conclusive: "[w]henever the results of the tests exclude any male witness from possible paternity, the tests shall be *conclusive evidence of nonpaternity* of the male witness." *Id.* § 7-1116(5) (emphasis added). Further, if the court finds, based on genetic testing, "that the defendant is not the father of the child, *the question of paternity shall be resolved accordingly*, and the action shall be dismissed with costs awarded to the defendant." *Id.* § 7-1118 (emphasis added).

Thus, when paternity is contested under the Paternity Act, the statute gives conclusive weight to a genetic test proving nonpaternity. That is also true with respect to the presumption of paternity of a child born during marriage. *See* Idaho Code § 7-1119(1). Under the statute, the presumption is overcome by genetic testing proving the husband is not the biological father of the child. *Id.* ("The presumption of legitimacy of a child born during wedlock is overcome by: Genetic tests which show that the husband is not the father of the child."). Given the conclusive effect of a genetic test proving a man's nonpaternity, it follows that the district court's ruling does not conform to, and is inconsistent with, the Paternity Act. Because a genetic test can

overcome a presumption of paternity, the statute does not require mutuality in a material mistake of fact or that the mistake be completely unexpected to both parties.

2. Contractual Principles Do Not Apply When Interpreting the Meaning of "Material Mistake of Fact" as Used in the Paternity Act.

Ignoring the plain language of the Paternity Act, the district court relied on contract law to find "material mistake of fact" means mutual mistake. R. 172-173 (citing Idaho decisions on defense of mutual mistake under contract law). The district court's reliance on contractual principles was improper for at least three reasons. First, as just noted, the Paternity Act itself prescribes the procedures for rescinding an executed VAP—the 60-day rescission period followed by challenges based on "fraud, duress, or material mistake of fact." Nothing in the statute requires or infers that a signed VAP must be treated according to contractual principles.

The second reason follows from the first: it would be improper to treat the determination of paternity pursuant to contractual principles when it is illegal to contract for a child under Idaho law. *See generally* Idaho Code § 18-1511 (making it illegal to "sell or barter any child for adoption or for any other purpose"). To be sure, domestic relationships in Idaho are regulated by statute based on status, not contract. For instance, although Idaho law defines marriage as a "civil contract," the State regulates marriage by requiring a license and a solemnization; two people cannot enter into a marriage with a purely private contract. *See* Idaho Code § 32-201(1) ("Marriage created by a mutual assumption of marital rights, duties or obligations shall not be recognized as a lawful marriage.").

And like paternity, the custody and guardianship of a child is also regulated by statute. *See, e.g.*, Idaho Code § 32-717 (allowing court to evaluate parents' custody arrangements in divorce action and only giving grandparents same standing as parent if child is residing with grandparent in stable relationship); Idaho Code § 32-1703(1) (defining "de facto custodian" to mean individual related to child within third degree of consanguinity). To be sure, an adult cannot adopt a child by contract. *See* Idaho Code § 18-1511; Idaho Code § 16-1501 ("Any minor child may be adopted by any adult person residing in and having residence in Idaho, in the cases and subject to the rules prescribed in this chapter."). Idaho has thus intentionally taken relationships involving a child and a parent or custodian out of the realm of contracts.[5]

Third, even if contractual principles apply (and again, they do not), the defense of mistake does not necessarily require the mistake be mutual to avoid a contract. A unilateral mistake is also grounds to rescind or modify a contract. *Belk v. Martin*, 136 Idaho 652, 657, 39 P.3d 592, 597 (2001) ("A contract containing a unilateral mistake may be rescinded or modified if there has been a misrepresentation or knowledge of the mistake by the other party."). Thus mistake under contract law does not require that a mistake be mutual in all cases and cannot be

[5] There are numerous other examples of the State regulating domestic relationships in the context of children and their parents and custodians. *See, e.g.*, Idaho Code § 6-210(3) (defining "parents" for purposes of recovering damages for economic losses willfully caused by minor); Idaho Code § 7-1119 (presuming paternity when child is born during marriage); Idaho Code § 15-1-201(33) (defining "parent" for purposes of probate code); Idaho Code § 15-5-213 (defining "de facto custodian" for purposes of probate); Idaho Code § 16-2002(11) (defining "parent" for purposes of termination of parent and child relationship); Idaho Code § 32-1005 (allowing court to inquire into custody of child of marriage when husband and wife live separately but without being divorced); Idaho Code § 32-1007 (providing that father and mother of "legitimate unmarried minor child" are equally entitled to child's custody, services, and earnings).

extended to mean that a "material mistake of fact" under Section 7-1106(2) must be mutual.

3. The Paternity Act Must Be Interpreted According to Its Literal Language and Context, Not According to the Statutory Schemes of Other States.

The district court also relied on a Florida decision to support its conclusion that "material mistake of fact" under the Paternity Act means a mutual, completely unexpected mistake. *See* R. at 173 (citing *Allison v. Medlock*, 983 So. 2d 789, 790 (Fla. Dist. Ct. App. 2008)). That decision cannot support interpreting those words under the Idaho statute. Consistent with Title IV-D's direction, virtually every state has decided for itself how to define the grounds to disestablish paternity and the extent of the presumptions created by an executed VAP and genetic testing results. *See generally* 45 C.F.R. § 302.70(a)(5). For instance, some states have enacted statutes that provide genetic testing alone is sufficient to disestablish paternity.[6] Others require the trial court to consider the child's best interests before ordering genetic testing[7] or find a signed VAP conclusive and do not allow any genetic testing.[8]

Allison is a prime example of the different procedures implemented by states to comply with Title IV-D and how differently states treat VAPs. In that case, Allison and the mother of a child signed a VAP in accordance with a Florida statute. 983 So. 2d at 790. For four years, Allison was treated as the child's father. *Id.* When the mother relocated the child out-of-state,

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[6] *See, e.g.*, Ala. Code §§ 26-17A-1(a), 26-17-308(a); Alaska Stat. § 25.27.166(c); Ind. Code § 16-37-2-2.1(h)(5), (k), (l), (n); Or. Rev. Stat. § 416.443; Utah Code Ann. §§ 78B-15-307, -608.

[7] *See, e.g.*, *Allison*, 983 So. 2d at 791; *Reese v. Muret*, 150 P.3d 309, 313 (Kan. 2007); *Diana E. v. Angel M.*, 799 N.Y.S.2d 484, 485 (N.Y. App. Div. 2005).

[8] *See, e.g.*, *People ex rel. Dep't of Pub. Aid v. Smith*, 818 N.E.2d 1204, 1205 (Ill. 2004).

Allison filed a petition to determine paternity and for temporary custody. *Id.* The trial court granted the mother's request for a DNA test, and Allison sought review of the order. *Id.* On review, the Florida Court of Appeals quashed the order for a DNA test.

The court found there was no good cause to order DNA testing because the mother did not allege or demonstrate fraud, duress, or material mistake of fact. *Id.* According to the court, before ordering a DNA test, the trial court must find the test is in the best interest of the child, and the trial court did not. *Id.* The court also addressed the mother's testimony that she and Allison knew, at the child's birth, that he was not the father. *Id.* The court observed that testimony demonstrated that neither the mother nor Allison was operating under a mistake of fact when the VAP was signed.[9] *Id.* at 791. *But see State, Dep't of Revenue, Office of Child Support Enforcement v. Ductant*, 957 So. 2d 658, 660 (Fla. Dist. Ct. App. 2007) (finding DNA test confirming defendant was not child's biological father was sufficient to show material mistake of fact as to paternity of child).

Thus the court in *Allison* interpreted a Florida statute that is very different from the Idaho Paternity Act. Idaho allows a genetic test upon the request of a party and finds results that prove nonpaternity conclusive and the question of paternity must be resolved accordingly. Idaho Code § 7-1116(1), (2); Idaho Code § 7-1118. In addition, the statute does not require consideration of the interests of the child in a challenge to paternity, only in the custody action after paternity has

[9] The court's finding that the mother could not show a mistake of fact at the time the VAP was signed is dicta. The mother did not allege material mistake of fact and the trial court did not make any findings that the mother had demonstrated material mistake of fact. *Allison*, 983 So. 2d at 790-91.

been established. *See* Idaho Code §§ 7-1102, 7-1126. Given the unique statutory scheme of the Idaho Paternity Act, *Allison* offers no guidance on its interpretation or application.

4. The Policies Underlying the Paternity Act Confirm That Genetic Test Results Proving Nonpaternity Are a Material Mistake of Fact.

The district court's interpretation of "material mistake of fact" under Section 7-1106(2) is also contrary to the legislative purpose of the Paternity Act. The Paternity Act was enacted to remedy the problem of illegitimacy. *Crain v. Crain*, 104 Idaho 666, 671, 662 P.2d 538, 543 (1983). One of its primary purposes is "to insure that reliable medical evidence be made available to determine the issue of paternity." *Id.* In *Crain*, this Court observed that the statute was enacted, in part, to prevent "cases in which a man who had been scientifically excluded by test results was found to [be] the father of a child." *Id.* at 672, 662 P.2d at 544 (citing Idaho Code § 7-1118).

Thus, Idaho law does not protect the presumption of marriage-based paternity; as noted, it can be rebutted by a genetic test that shows the husband is not the father of the child. Idaho Code 7-1119(1). "Such legislative enactment deals primarily with the determination of paternity of illegitimate children and its emphasis is upon the utilization of blood tests to insofar as possible determine the paternity of such children." *Alber v. Alber*, 93 Idaho 755, 758, 472 P.2d 321, 324 (1970). Against that backdrop, the Paternity Act establishes procedures for VAPs as required by Title IV-D. *See* 42 U.S.C. § 666.

As discussed earlier (at pp. 8-9), VAPs are intended to establish paternity of a child born outside of marriage to facilitate the payment of child support obligations by noncustodial parents.

In other words, the mother and father should be responsible for the financial well-being of the child, not the state. (There is no concern here regarding establishing financial responsibility for M.H., as Bobos is his biological father and is maintaining a custody action in Nevada). Title IV-D allows the states to determine procedures under which an executed VAP may be challenged. *See* 42 U.S.C. § 666(a)(5)(D)(iii). That includes the procedures under which the VAP and genetic test results create "a rebuttable or, at the option of the State, conclusive presumption of paternity." 45 C.F.R. § 302.70(a)(5)(iv), (vi).

Pursuant to the Paternity Act, Idaho chose to adopt Title IV-D's language that a VAP is a "legal finding of paternity," Idaho Code § 7-1106(1), and include the presumption that a genetic test excluding a putative father from paternity is conclusive evidence of nonpaternity and fully resolves the question of paternity, Idaho Code §§ 7-1116(2), 7-1118. That choice aligns with Idaho's policy to ensure paternity findings correctly identify a child's biological father.

The policy behind the Paternity Act was undermined by the district court's decision to reverse the magistrate's dismissal of Gordon's complaint. Genetic testing found that Gordon was wrongly identified as M.H.'s biological father, and in the meantime, Bobos was identified as M.H.'s biological father. Disestablishing Gordon's paternity allows M.H.'s true biological parents to exercise and fulfil their fundamental rights and responsibilities as parents pursuant to the laws governing domestic relationships rather than a VAP intended to capture the payment of child support obligations by noncustodial parents. Indeed, as genetic test results are conclusive as to paternity under Idaho law, parent and child relationships are dictated by status, not contract.

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

Interpreting "material mistake of fact" under Idaho Code § 7-1106(2) to require a mutual and unexpected mistake before an executed VAP can be rescinded also leads to an absurd result. Any challenge to a VAP between the natural mother and the legal father necessarily requires one of the parties to challenge the father's true paternity. In the absence of fraud or duress, the only basis to disestablish paternity is a "material mistake of fact." The district court's interpretation of the words makes them meaningless as a basis to challenge a VAP. If mutuality is required, the party defending paternity need only state that they were indifferent to the true identity of the child's biological father. As a legal and practical matter, a mistake in the identity of the true biological father would be neither mutual nor unexpected and thus a material mistake of fact as to the VAP would never result.

Such an absurdity also leads to constitutional violations; the Court should favor an interpretation of the Paternity Act that does not create such issues.[10] *See Leonardson v. Moon*, 92 Idaho 796, 806, 451 P.2d 542, 552 (1969) ("When a statute is susceptible to two constructions, one of which would render it invalid and the other would render it valid, the

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[10] Generally, this Court will not consider constitutional issues for the first time on appeal. *E.g.*, *Cox v. Hollow Leg Pub & Brewery*, 144 Idaho 154, 159, 158 P.3d 930, 935 (2007). The district court's interpretation of Idaho Code § 7-1106(2), however, raises constitutional issues that were not previously apparent. Those issues should be addressed, as "[d]oubts concerning interpretation of statutes are to be resolved in favor of that which will render them constitutional." *State v. Wymore*, 98 Idaho 197, 198, 560 P.2d 868, 869 (1977). The Court may also consider constitutional issues if the case requires further proceedings. *Messmer v. Ker*, 96 Idaho 75, 78, 524 P.2d 536, 539 (1974).

construction which sustains the statute must be adopted by the courts."). As M.H.'s biological mother, Shannon enjoys due process rights under the Fourteenth Amendment due to her liberty interest in parenting M.H. *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)). The effect of the district court's ruling allows Gordon to remain M.H.'s "biological father"—despite being an unmarried, nonadoptive, nonbiological man—and thereby to have legal standing to acquire custody of M.H.

Before the district court's ruling, such a right was unknown and unrecognized in Idaho. *See id.* ("No jurisdiction has identified a liberty interest in a nonbiological person who is neither a legal guardian, adoptive parent, step-parent, blood relative, nor foster parent."). Because Shannon's liberty interest is threatened, the question becomes the extent of due process procedural protections. *Id.* At a minimum, based on Title IV-D, Shannon was entitled to oral or written 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); *see also Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (finding fundamental requirement of due process is notice).

The VAP signed by Shannon did not inform her of the legal consequences established by the district court. *See* R. at 63.[11] The VAP did not give notice that paternity can only be

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[11] *See also* Appellant's Request for Judicial Notice (filed Oct. 21, 2014), which is currently pending before the Court. That request asks the Court to take judicial notice of the complete, certified copy of the Acknowledgement of Paternity Affidavit signed by Shannon and (continued . . .)

disestablished after the 60-day rescission period if there is fraud, duress, or a *mutual*, material mistake of fact. *See id.* Nor did the VAP advise that acknowledging paternity is conclusive and incontestable—even if a genetic test proves the acknowledgement false—unless both parties truly believe the acknowledged father is the biological father. *See id.* Because the VAP fails to give such notice, if the district court's ruling stands, Shannon's due process rights were violated.

The district court's interpretation of "material mistake of fact" also leads to additional constitutional concerns, including the liberty interest of Bobos. As M.H.'s biological father, Bobos shares Shannon's fundamental interest and right to maintain a relationship with M.H. *See Idaho Dep't of Health & Welfare*, 150 Idaho at 200, 245 P.3d at 511. Yet, the district court's ruling threatens his interest as well, without notice or an opportunity to be heard, and perhaps renders Idaho's parental termination statutes an absurdity or even void. *See* Idaho Code § 16-2005 (prescribing procedures for terminating parental rights). Ironically, Gordon is not a "parent" whose rights can be terminated. *See* Idaho Code § 16-2002(11) (defining "parent" as adoptive father, biological father of child conceived or born during marriage to mother, or unmarried biological father whose consent to adopt child is required); *Idaho Dep't of Health & Welfare*, 150 Idaho at 197-200, 245 P.3d at 508-11 (finding unwed, nonbiological male had no statutory or equitable parental interest subject to termination).

* * *

(. . . continued)
Gordon on November 4, 2010. The complete, certified copy includes the second page of the VAP, which identifies the "Rights and Responsibilities of Biological Father."

In sum, the district court's interpretation of "material mistake of fact" under Idaho Code 7-1106(2) must be reversed. The purpose of statutory interpretation is to determine and give effect to legislative intent. *Doe v. Boy Scouts*, 148 Idaho at 430, 224 P.3d at 497. Mutuality plays no role in disestablishing paternity under the Paternity Act. Nor is there a requirement that the material mistake be completely unexpected by both parties. Based on the plain language and context of the Paternity Act, a genetic test proving nonpaternity is conclusive, overcomes the presumption of paternity established by a VAP, and thus is a material mistake of fact.

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

The district court erred when it reversed the magistrate's order dismissing Gordon's custody action and removing his name from M.H's birth certificate. Gordon can only maintain his custody action if the magistrate made a finding of paternity, and here 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"). As evidence of paternity, the results of Dr. Wurzinger's genetic testing were properly before the magistrate. *See* Idaho Code § 7-1115(4). At no time did Gordon object to or challenge the results of the genetic test. Dr. Wurzinger's finding of nonpaternity was thus "conclusive evidence" that Gordon is not M.H.'s biological father. *See* Idaho Code § 7-1116(5).

The genetic test results thus established a material mistake of fact pursuant to Section 7-1106(2) sufficient to rebut the presumption of Gordon's paternity. Again, the fact stated in the executed VAP was that Gordon "is the biological father of my child." The question of paternity

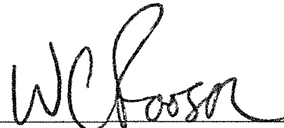
was conclusively resolved based on Dr. Wurzinger's findings, and the magistrate was authorized to dismiss the action. *See* Idaho Code § 7-1118. Given that Gordon is not M.H.'s biological father, Shannon carried her burden to show a material mistake as to the executed VAP. On that basis, the magistrate correctly dismissed Gordon's action as a matter of law based on undisputed evidence. *See* I.R.C.P. 56(c). Further, the magistrate did not abuse its discretion or commit legal error in denying Gordon's motion for relief under I.R.C.P. 60(b). The district court's decision reversing the magistrate should be reversed.

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: November 7, 2014.

STOEL RIVES LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2014 I served a true and correct copy of the foregoing **APPELLANT'S 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*	[X] Via U.S. Mail [ ] Via Facsimile [ ] Via Overnight Mail [ ] Via Hand Delivery [X] Via Email
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By:
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