

STATE OF INDIANA  
 COUNTY OF GRANT

SS:

IN THE GRANT SUPERIOR COURT 2  
 2008 TERM

### RESPONDENT'S MEMORANDUM OF LAW

The law clearly states that a paternity affidavit may be rescinded upon a showing of fraud or mistake of material fact. The facts proven at the November 13, 2008 hearing support a finding of either fraud or mistake of material fact. Under, the court must order a genetic testing of the infant.

*In re the Paternity of M.M.*, 889 N.E. 2d 846 (Ind. App. 2008) controls this case. The Indiana Court of Appeals set forth how the grounds for a last ditch setting aside of a paternity affidavit:

When more than sixty days have passed since the execution of the paternity affidavit, the affidavit may be rescinded only when a court:

- (1) has determined that fraud, duress, or material mistake of fact existed in the execution of the paternity affidavit; and
- (2) at the request of a man described in subsection (h), has ordered a genetic test, and the test indicates that the man is excluded as the father of the child.

Ind. Code § 16-37-2-2.1(i). These provisions reflect the legislature's intent to provide assistance to a man who signed a paternity affidavit due to fraud, duress, or material mistake of fact. *In re Paternity of H.H.*, 879 N.E.2d 1175, 1177 (Ind. Ct. App. 2008)....

*Paternity of M.M.* at 847-88. *M.M.* needs distinguished from *Fairrow v. Fairrow*, 559 N.E.2d 597 (Ind. 1990) and its line of cases. ~~*M.M.* had not had a genetic test done to confirm the "fraud, duress, or material mistake of fact existed" while in *Fairrow* there was scientific evidence.~~ *M.M.* instructs us that upon the showing of fraud, duress, and/or material mistake of fact then the trial court must order genetic testing. If the genetic testing confirms that a putative father as not being the actual father, then the paternity affidavit must be rescinded by the court.

*M.M.* differs from *In Re the Paternity of E.M.L.G.* 863 N.E.2d 867 (Ind.App. 2007) by Respondent having asserted fraud, duress, or material mistake of fact as grounds for rescinding the paternity affidavit.

Respondent believes the evidence shows fraud and/or material mistake of fact. He requests this court order a genetic test to confirm or deny the testimonial evidence.

#### Fraud

Fraud consists of two varieties, actual fraud and constructive fraud. Actual fraud has five requirements:

- 1) that there was a material misrepresentation of past or existing fact;

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- 2) that the representation was false;
- 3) that the representation was made with knowledge or reckless ignorance of its falsity;
- 4) that the complaining party relied on the representation; and
- 5) that the representation proximately caused the complaining party's injury.

See *Darst v. Illinois Farmers Ins. Co.*, 716 N.E.2d 579, 581 (Ind. Ct. App. 1999), *trans. denied* (2000); *Wells v. The Stone City Bank*, 691 N.E.2d 1246, 1250 (Ind. App. 1998); *Rice v. Strunk*, 670 N.E.2d 1280, 1289 (Ind. 1996).

The material misrepresentation of fact is the mother's sexual relation with another man. The evidence showed that Mother did not disclose the extent of her sexual activity at the party. The State seemed to argue that Respondent also had a duty to investigate the extent of the sexual activity, but Mother's silence overwhelms this argument. Her silence about the fact of coitus gave Respondent no grounds for investigation into what may have been a relatively benign indiscretion. As whether Mother's misrepresentation was made knowingly or recklessly, the evidence fits either mental state. Without Mother's silence about having had sexual intercourse with another man, Respondent would not have willingly signed the paternity affidavit.

Indiana law defines constructive fraud as follows:

1. a duty owing by the party to be charged to the complaining party due to their relationship,
2. violation of that duty by the making of deceptive material misrepresentations of past or existing facts or remaining silent when a duty to speak exists,
3. reliance thereon by the complaining party,
4. injury to the complaining party as a proximate result thereof, and
5. the gaining of an advantage by the party to be charged at the expense of the complaining party.

See *Darst v. Illinois Farmers Ins. Co.*, 716 N.E.2d 579, 581 (Ind. Ct. App. 1999), *trans. denied* (2000). "Constructive fraud arises by operation of law when there is a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the actual intent to defraud." *Wells v. The Stone City Bank* at 1250 citing to *Mullen v. Cogdell*, 643 N.E.2d 390, 401 (Ind. Ct. App. 1994).

Respondent asserted at the hearing the Mother's duty to inform him that her sexual relations with another man might mean he was not the father of her child. The two were in an intimate relationship at the time, cohabitating together, and moving towards a familial relationship. That relationship's intimacy creates a relationship

of duties to one another. The Respondent relied upon the Mother's silence regarding the extent of her sexual relationships with other men during their relationship that he signed the paternity affidavit without question and to his detriment.

The following from *In the Matter of the Paternity of HH*, implies a mother's duty to a putative father:

Rather, we believe the legislature intended to provide assistance to a man who signed a paternity affidavit due to "fraud, duress, or material mistake of fact." Ind. Code § 16-37-2-2.1(i). A woman who gives birth knows she is the parent of the child, see *In re Paternity of B.M.W.*, 826 N.E.2d 706, 708 (Ind. Ct. App. 2005) ("We have always been able to tell with absolute certainty who is the mother of a child."), but men do not have the same certainty. See *Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1059 (Ind. 1992) ("Because it is generally not difficult to determine the biological mother of a child, a mother's legal obligations to her child arise when she gives birth. It is more difficult, however, to determine the biological father."). Frequently, the woman is the only one who could know whether more than one man might be the father of her child. Accordingly, a woman always has the information necessary to question paternity prior to signing the affidavit. A man, however, could easily sign an affidavit without awareness of the questionable nature of his paternity; this is the situation we believe the legislature intended to address.

879 N.E.2d at 1177-78.

Respondent has shown a viable case under either variety of fraud. Therefore, this court should order genetic testing.

### **Material Mistake of Fact**

In none of the cases cited does the Indiana Court of Appeals define material mistake of fact. Under the evidence presented, counsel believes that a material mistake of fact exists under two different but interrelated theories.

With the Mother mistaking the person who impregnated her for the Respondent constitutes one mistake of fact. Without that mistake, Mother would not have lead the Respondent to believe he was the father.

The other material mistake derives from the first. Let us remember that the Mother is Caucasian, the Respondent is of Hispanic descent and the other possible father is African-American. Mother and RESPONDENT believed the child was his at birth. Mother changed her mind when the child reached six months. I believe Mother testified that the child was darker at six months than was the Respondent.

Respondent has made a case under the standard set out in Paternity of M.M. and there is no reason for this court to withhold an order for genetic testing.

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**Certificate of Service**

I hereby certify that a copy of the foregoing has been furnished to Grant County Prosecuting Attorney, attorney for Petitioner, by direct, pre-paid United States mail on November 26, 2008.

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Samuel C. Hasler