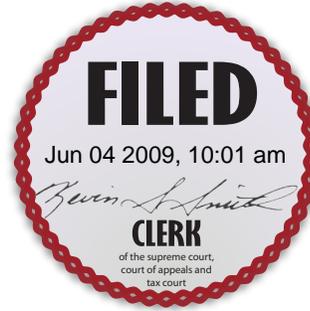


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

A.E.
West Union, Illinois

ATTORNEY FOR APPELLEE:

JOHN L. KELLERMAN, II
Kellerman Law Office
Batesville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

A.E.,)
)
Appellant,)
)
vs.) No. 69A01-0901-CV-31
)
J.E.,)
)
Appellee.)

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0804-DR-65

June 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

A.E. (“Father”) appeals the trial court’s denial of his motion to correct error. We affirm.

Issue

Father raises one issue, which we restate as whether he is estopped from challenging a paternity affidavit the parties executed in 2002.

Facts and Procedural History

The facts are not disputed. J.E. (“Mother”) became pregnant with E.E. before she met Father. E.E. was born in 2000. Mother and Father married in 2001. In 2002, Mother and Father executed a paternity affidavit, in which each stated falsely that Father was the biological father of E.E. They now stipulate, however, that “[g]enetic testing would exclude [Father] as [the biological] father.” Appendix at 4-5.

Father petitioned for dissolution of the marriage. The trial court issued a Decree of Dissolution determining, among other things, that Father was the legal father of E.E. Subsequently, it denied Father’s motion to correct error.

Father now appeals the trial court’s denial of his request that it set aside the paternity affidavit.

Discussion and Decision

The parties’ disagreement rests in how Indiana Code Section 16-37-2-2.1, concerning the rescission of paternity affidavits, applied to the facts of this case. The interpretation of a statute is a question of law, which we review de novo. Porter Dev., LLC v. First Nat’l Bank

of Valparaiso, 866 N.E.2d 775, 778 (Ind. 2007).

When a statute is susceptible to more than one interpretation, it is ambiguous and thus open to judicial construction. Sees v. Bank One, Ind., N.A., 839 N.E.2d 154, 157 (Ind. 2005). The primary goal of statutory construction is to implement the intent of the legislature. Id. We attempt to harmonize two conflicting statutes. State v. Universal Outdoor, Inc., 880 N.E.2d 1188, 1191 (Ind. 2008). “[T]he implied repeal of a statute is recognized only when a later act is so repugnant to an earlier one as to render them irreconcilable, and a construction which will permit both laws to stand will be adopted if at all possible.” N. Ind. Pub. Serv. Co. v. Citizens Action Coal. of Ind., Inc., 548 N.E.2d 153, 159 (Ind. 1989). Where two statutory provisions are irreconcilable, that passed later in time prevails. Baldwin v. Reagan, 715 N.E.2d 332, 340 (Ind. 1999); Milk Control Bd. v. Pursifull, 219 Ind. 49, 36 N.E.2d 850, 852 (1941).

Indiana Code Section 16-37-2-2.1 was amended in 2001¹ and 2006.² E.E.’s paternity affidavit was executed in 2002. As to paternity affidavits executed between the two revisions, one panel of this Court applied the 2006 version (In re H.H., 879 N.E.2d 1175, 1177 (Ind. Ct. App. 2008)), but a different panel applied the 2001 version (In re E.M.L.G., 863 N.E.2d 867, 869 n.2 (Ind. Ct. App. 2007)). While the H.H. Court did not address which version to apply, the E.M.L.G. Court concluded that “[b]ecause [the 2006] amendment cannot apply retroactively to these cases, we rely upon the version of the statute before such

¹ 2001 Ind. Acts, Pub. L. No. 138-2001, § 4.

² 2006 Ind. Acts, Pub. L. No. 145-2006, § 140; and Pub. L. No. 146-2006, § 10.

amendments became effective.” E.M.L.G., 863 N.E.2d at 869 n.2. Here, the trial court applied the 2001 version. We agree with the E.M.L.G. Court and the trial court that the 2001 version controls the disposition of this case.

A paternity affidavit establishes paternity. Ind. Code § 16-37-2-2.1(g)(1) (West Supp. 2001). It must contain sworn statements from the mother and the man signing the affidavit; specifically, mother’s statement asserting that the man is the child’s biological father and the man’s statement attesting to a belief that he is the child’s biological father. I.C. § 16-37-2-2.1(e) (West Supp. 2001). After sixty days, a paternity affidavit may not be rescinded “unless a court has determined that fraud, duress, or material mistake of fact existed in the execution of the paternity affidavit.” I.C. § 16-37-2-2.1(i) (West Supp. 2001). Meanwhile, “[t]he court shall set aside the paternity affidavit upon a showing from a genetic test that sufficiently demonstrates that the person who executed the paternity affidavit is excluded as the child’s biological father.” I.C. § 16-37-2-2.1(k) (West Supp. 2001).

In some scenarios, Subsections (i) and (k) were compatible. Under one scenario, however, they conflicted. Where a genetic test excluded the man as the biological father, but the trial court found no fraud, Subsection (k) required the paternity affidavit to be set aside, while Subsection (i) forbade it from being rescinded. Thus, the 2001 version was ambiguous, at best.³

Here, the parties stipulated that Father was not the biological father of E.E. Although

³ This conflict was addressed in the 2006 revision, which provided that a paternity affidavit may not be rescinded unless a court both (1) found fraud; and (2) ordered a genetic test that excluded the affiant as the biological father. 2006 Ind. Acts, Pub. L. No. 146-2006, § 10.

the trial court did not make an explicit finding regarding fraud, one was implied. The trial court concluded as a matter of law that “the exclusive method to rescind that affidavit is by proving fraud or duress perpetrated, or mistake of fact, by the person signing the affidavit.” App. at 5 (emphasis in original). It then ordered that Father was the legal father of E.E. Thus, it is apparent that the trial court found no fraud to have been committed. Accordingly, this dispute constitutes the scenario in which Subsections (i) and (k) would yield opposite results. Under Subsection (i), the paternity affidavit could not be rescinded; under Subsection (k), the trial court was required to set it aside.

As noted above, where two statutory provisions are irreconcilable, the provision passed later prevails. Baldwin, 715 N.E.2d at 340. The language of Subsection (k) was included in the first iteration of the statute. 1995 Ind. Acts, Pub. L. No. 133-1995, §14; Pub. L. No. 46-1995, § 63. The provision regarding fraud, duress, or material mistake of fact was added two years later. 1997 Ind. Acts, Pub. L. No. 257-1997 (ss), § 31. Thus, per the rule in Baldwin and Milk Control Board, Subsection (i) prevails. For paternity affidavits executed between 2001 and 2006, a trial court could not set aside the affidavit without a finding of fraud.

This conclusion is supported by our reasoning in In re H.H., 879 N.E.2d 1175, 1177 (Ind. Ct. App. 2008). The facts in H.H. were very similar to those in the instant case. There, as here, the mother and a non-biological father executed a paternity affidavit, despite the fact that each knew that the man was not the biological father. Mother contested the affiant’s petition to establish custody, support, and parenting time. The trial court rescinded the 2004

affidavit, finding fraud. We reversed, concluding,

We do not believe the legislature intended this statute to be used to set aside paternity affidavits executed by a man and a woman who both knew the man was not the biological father of the child.

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.” . . . 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.

Id. The H.H. Court noted that the affiant was the only father the child had ever known. Id. at 1178. In light of each party’s false assertion in the paternity affidavit, we asserted that “[n]either [of the parties] may now challenge his paternity.” Id.

Here, Father did not provide the transcript of the dissolution hearing. The record reveals only that E.E. was born in 2000 and that the paternity affidavit was executed less than two years later. In the interim, Father and Mother married. Thus, as in H.H., it would appear from the appellate record that E.E., now eight, understands Father to be her father. Having falsely attested, almost seven years ago, to a belief that he was E.E.’s biological father, Father is estopped from challenging the validity of the paternity affidavit.

Father argues that our holding in Seeger v. Seeger, 780 N.E.2d 855 (Ind. Ct. App. 2002) requires the paternity affidavit to be set aside. We disagree. As here, the parties in Seeger agreed that the affiant was not the biological father. The Seeger Court affirmed the trial

court's setting aside the paternity affidavit. Id. at 858. However, it misread the statute.⁴

The statute provided that a paternity affidavit could be executed through a hospital or a local health department. I.C. § 16-37-2-2.1(a) (West Supp. 1997). The former could occur no later than three days after birth. I.C. § 16-37-2-2.1(c)(1) (West Supp. 1997). Immediately before or after the birth, hospital personnel attending the birth could provide an opportunity for executing a paternity affidavit to the mother and “a man who reasonably appears to be the child’s biological father.” I.C. § 16-37-2-2.1(b)(1)(B) (West Supp. 1997). The Seeger Court based its holding upon the fact that the father did not reasonably appear to be the biological father. Seeger, 780 N.E.2d at 857. However, the paternity affidavit in Seeger was executed more than eight years after the child’s birth – clearly beyond three days. Thus, the provision in Subsection (b) regarding “a man who reasonably appears to be the child’s biological father” was not applicable in Seeger. Nor did it apply here.

Furthermore, reasoning that the parties’ actions were tantamount to adoption, the Seeger Court objected to the absence of notice to the biological father. Seeger, 780 N.E.2d at 858. Where the biological father is a party, this analysis would be relevant. To the contrary, however, where the party seeking to rescind a paternity affidavit is a man who falsely attested to a belief that he was the child’s biological father, he is collaterally estopped from challenging the affidavit’s validity. For these reasons, we do not rely on Seeger.

In light of our statutory analysis and our conclusion that Father is estopped from

⁴ Mother seeks to distinguish Seeger, arguing that it applied the 1997 version of the statute. Appellee’s Brief at 5. This is irrelevant, as the provisions addressed by the Seeger Court were not amended in 2001.

challenging the paternity affidavit, the trial court did not err in refusing Father's request to set aside the paternity affidavit.

Affirmed.

DARDEN, J., and ROBB, J., concur.