

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **CIVIL ACTION**

J. P.,
Petitioner,

vs.
K. O.,
Respondent,

Case No. 00 DR 000 N

ORDER DENYING PETITIONER’S MOTION FOR A D.N.A. TEST

This matter having come before the court today on the petitioner’s “Motion for Scientific Testing, Etc.,” filed 6/24/2011, it is ordered:

The court’s Order dated 6/20/2011 is clear. The petitioner must join the respondent’s husband in this case by serving him with process according to law. The respondent’s husband is an indispensable party in this case. The court has no jurisdiction to proceed until the respondent’s husband is joined in this case.

Further, as stated in the Order dated 6/20/2011, it appears that the petition does not state a cause of action because the respondent is married and living with her husband in an intact marriage and the child was born while she was married. A judgment based on a petition that does not state a cause of action is void, unenforceable, and a nullity that can be set aside at any time under Rule 1.540(b)(4).

See, e.g., Southeast Land Developers, Inc., v. All Florida Site and Utilities, Inc., 28 So.3d 166, 167 (Fla. 1st DCA 2010): “A default judgment is void and should be set aside when the complaint fails to state a cause of action”; and *Slowinski v. Sweeney,* ___ So.3d ___ (Fla. 1st DCA 2011) citing *G.F.C. v. S.G.,* 686 So.2d 1382 (Fla. 5th DCA 1997), in which the 5th district court held that a biological father had no right to sue for paternity where the child was born to a woman who was married, the marriage was intact, and her husband declared himself to be the father of the child by having his name put on the child’s birth certificate. *See also Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 104 L.Ed.2d 91 (1989), in which the United States Supreme Court held that a constitutional right to “biological fatherhood” does not exist in a factual situation almost identical to the facts in this case.

See also State Department of Health and Rehabilitative Services v. Privette, 617 So.2d 305 (Fla. 1993), which requires the appointment of a guardian ad litem and consideration of the privacy rights of the husband, that is, the legal father, and the best interests of the child to preserve his presumption of legitimacy before the court may order a D.N.A. test. *Privette* “expressed a strong commitment to protecting the legitimacy of children and the interests of legal fathers.” *G.F.C., supra,*

For the foregoing reasons the motion is denied.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
_____, Esq., and K. O., *pro se*, (Address omitted)