No. 22-125,304-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of
W.L. and G.L.,
By and Through Next Friend M.S. and M.S., Individually,
Plaintiff-Appellee,
and
E.L.
Respondent-Appellee,
v.
C.L.,
Appellant.

AMENDED BRIEF OF APPELLANT C.L.

Appeal from the District Court of Crawford County, Kansas
Pittsburg Division
Honorable Gunnar A. Sundby, District Judge
District Court Consolidated Case Nos. 2017-DM-000476-P and
2019-DM-000476-P

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Oral Argument: 15 minutes

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NATURE OF THE CASE

Appellant C.L. ("Wife") [1] appeals the district court's March 26, 2022 Journal Entry dismissing her Petition for Determination of Paternity of W.L. and G.L., the seven-year-old twin boys whose welfare is the subject of these ongoing proceedings. (R.1, 88-90) This is the second appeal arising from the underlying same-sex parentage case—but the first appeal brought by Wife, who was not named as a party in the 2018 appeal brought by Appellee M.S. ("Partner"). *See Matter of W.L.,* 56 Kan. App. 2d 958, 959–60 (2019), *rev'd,* 312 Kan. 367 (2020).

Here, Wife challenges the propriety of the Crawford County District Court's dismissal of her parentage petition, following remand by the Kansas

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[1] For clarity and ease of reference, this Brief refers to the parties in this appeal as follows.

1. "Wife" means C.L. (Appellant in this case), also designated as Intervenor in Crawford County District Court Case No. 2017-DM-000476-P (parentage), and Respondent in Crawford County District Court Case No. 2019-DM-000476-P (divorce).
2. "Biological Mother" means E.L. (Appellee in this case), also designated as Appellee in the first appeal, Respondent in Crawford County District Court Case No. 2017-DM-000476-P (parentage); and Petitioner in Crawford County District Court Case No. 2019-DM-000476-P (divorce).
3. "Partner" means M.S. (Appellee in this case), also designated as Appellant in the first appeal, and Petitioner in Crawford County District Court Case No. 2017-DM-000476-P (parentage).

Supreme Court on November 6, 2020.

STATEMENT OF THE ISSUES

Issue I: **The District Court Erred In Dismissing Wife's Petition For Determination of Parentage Under K.S.A. 60-212(b)(6), Because The Allegations In The Petition Were Sufficient To State A Claim of Maternity Under the Kansas Parentage Act.**

Issue II: **The District Court Erred In Dismissing Wife's Petition for Determination of Parentage, Because It Misinterpreted The Plain Language And Purpose Of The Kansas Parentage Act In Concluding That Wife Could Not Establish A Legal Fiction Of Biological Parentage, Because No Competing Presumption of Maternity Existed At The Time of Birth.**

STATEMENT OF FACTS

A. Introduction.

The events leading up to Wife's instant appeal began after the Kansas Supreme Court decided two same-sex parentage cases on November 6, 2020: (1) *Matter of W.L.,* 312 Kan. 367 (2020), No. 119,536 ("*W.L. I*"); and (2) *Matter of M.F. by and through K.L.*, 312 Kan 322 (2020), No. 117,301. This Court is familiar with the procedural history of this case prior to issuance of the Mandate on December 8, 2020, in which the Supreme Court reversed and remanded the trial court's May 22, 2018 judgment, denying E.L. ("Biological Mother")'s former partner M.S.'s Petition for Determination of Parentage of W.L. and G.L. (R.1, 10). In the interest of brevity, this Brief of Appellant C.L.

avoids unnecessarily recounting facts previously presented to this Court.

Wife raises two points of error for this Court's determination: (1) whether the district court erred in dismissing Wife's Petition for Determination of Paternity for failure to state a claim on which relief may be granted under K.S.A. 60-212(b)(6); and (2) whether the district court erred in denying Wife's petition for legal parentage because Wife could not show "notorious recognition of maternity at the time the children were born." (R.9, 80-83). The material facts and relevant procedural history necessary to this Court's determination of the issues on appeal are as follows.

B. *January 2017-May 2019:* Wife and Mother Marry and Co-parent W.L. and G.L.

Wife and Mother started dating in January 2017, just after the children's second birthday and approximately fifteen months after the relationship ended between Mother and Partner.(R.15, 11); *W.L. I*, 312 Kan. at 369. Wife first met the children "in passing" on the couple's second date; about a month later, Wife, Mother, and the children began spending significant time together.(R.16, 4)

In July 2017, Wife and Mother moved in together and became engaged. (R.15, 213-14) The children were three years old when Wife and Mother were married on January 13, 2018. (R.15, 206) That summer, Wife quit her job and became a "full-time, stay-at-home mother" to W.L. and G.L. and Mother

worked full time. (R.9, 50-52) On August 7, 2018, Wife's petitions to adopt the children were filed in Crawford County District Court. (R.9, 55-58)

The marriage between Wife and Mother began to deteriorate in Spring 2019. (R.1, 81) Despite challenges in their relationship, the women worked well together as coparents:

> [I]n August of 2019, the boys started preschool. [E.L.] listed herself and [C.L.] as the boys' parents with the school. The boys and everyone who knew the boys knew that [C.L.] was the boys' mother.[C.L.] picked the boys up from preschool and cared for them after school every day. [E.L.] and the boys called [C.L.] "Mama Chacha."

(R.9, 50)

C. *October 2019-December 2020*: Separation and Coparenting.

When the parties separated in October 2019, Mother stayed in the parties' martial home and Wife moved 20 minutes away; Mother refused to permit Wife to exercise parenting time or keep the boys overnight at her new residence in Wichita. (R.10, 9-29) On October 24, Mother filed her Petition for Divorce in Crawford County District Court, Case No. 2019-DM-000476. (R.10, 1-2) On December 4, Wife filed her Answer and Counter-Petition. (R.10, 8-11) Paragraph 3 of the Counter-Petition alleged: "[t]here are two (2) children of this marriage, to wit: [W.L. and G.L.]." (R.10, 6) Paragraph 8 stated: "[C.L.] is a parent to the two (2) minor children. The acknowledgment, establishment, and recognition of her parentage is in the best interests of the children as

supported by K.S.A. 23-2201 et. seq., the findings in *Frazier v. Goudschaal*, 296 Kan. 730 (2013), and other cases." (R.10, 9)

On December 23, 2019, Mother filed her Answer to Wife's Counter-Petition. (R 10, 14) Mother did not respond directly to Wife's allegations in Paragraph 3, that W.L. and G.L. "are two (2) children of this marriage." (R.10, 8) Instead, Mother responded generally: "[t]he Allegations contained in paragraphs one through seven are admitted." (R.10, 14) Mother denied the allegations in Paragraph 8 of Wife's Counter-Petition, but admitted "that [Wife] has a stepparent relationship to the two minor children and therefore may be entitled to some parenting time." (R.10, 14)

The divorce case remained "on hold" for the next 14 months until the end of April 2021—after the Supreme Court reversed the 5/22/2018 Judgment Decision and Order Denying Parentage (R.1, 11-39); and after the district court issued its Order following remand, declaring Appellee M.S. the legal parent of the W.L. and G.L. (R.1, 41-52) Although the parties were not engaged in litigation during the interim period, on September 30 and October 2, 2020, Mother and Wife respectively signed and had notarized a Co-Parenting Agreement detailing the specific agreed-upon terms for joint legal custody and joint physical custody of the children. (R.10, 31-34)

The introductory paragraph of the Co-Parenting Agreement stated the

parties' intent to share legal and physical custody of the children, as follows:

> [E.L.] (biological mother) and [C.L.] (mother), desire individually and cooperatively to bring forth and love two children, [W.G.L.] (12/20/2014) and [G.T.L.] (12/20/2014), within the context of a loving and diverse community and according to the values they hold in relation to spiritual, cultural, and political matters, hereby enter into the following agreement. It is the biological mother and mother's intention to share in the physical, emotional, and financial support of the child. The process that led to this agreement has been a considered and conscious one.

(R.10, 31) Regarding residential custody, the Co-Parenting Agreement provided:

> We intend for the child[ren] to have a strong emotional bond with both parents. The child[ren] shall reside with the biological mother and mother as stated below, with the goal of fostering a strong relationship with both parents. The biological mother and mother both acknowledge that each has a strong commitment to the child[ren] being reared [ ] with the help of other adults, and furthermore, both parents intend to foster and support these extended community relationships with the child[ren].

(R.10, 31). For the regular parenting time schedule, the children would reside with Wife every other weekend from Saturday at 9:00 a.m. until Sunday evening, and every Wednesday evening beginning after the release of school or at 4:00 p.m. (R.10, 31 The parties would share holidays equally, on an alternating-year holiday schedule. (R.10, 31). Concerning joint legal custody, Wife and Mother agreed to "make decisions regarding health care, childcare, and education by consensus." (R.10, 32) In addition to signing the Co-Parenting Agreement on September 30, 2020, Mother provided Wife with a

signed and notarized medical power of attorney for both children, a durable power of attorney for Mother regarding healthcare decisions, and a copy of Mother's Last Will and Testament. (R.15, 227)

D. *November 2020-November 2021*: Supreme Court Decision and Remand Proceedings in Parentage Case; Consolidation of Divorce and Paternity Actions.

On November 6, 2020, the Supreme Court of Kansas released its Opinions in *W.L. I*, 312 Kan. 367; and its companion case, *Matter of K.L.*, 312 Kan. 322. The Court articulated a new standard under the Kansas Parentage Act, announcing that the former same-sex romantic partner of a woman who becomes pregnant via artificial insemination and gives birth during the relationship, may establish a presumption of maternity by "notoriously or in writing recogniz[ing] paternity of the child. . . ." K.S.A. 23-2208(a)(4).

The Supreme Court reversed the district court's 5/22/2018 Order denying Appellee M.S.'s parentage petition, because the Order erroneously focused on other factors and circumstances irrelevant to the issue of parentage; rather than solely considering whether Mother's former romantic partner M.S. sufficiently proved "she ha[d] notoriously recognized maternity and the rights and duties attendant to it at the time of the child's birth," and that Mother had consented to "share her due process right to decision-making" about the children's care, custody and control with M.S. *See W.L. I,*

312 Kan. at 382. As stated in the Opinion, "the district judge will be free to allow submission of additional evidence by the parties if he deems such evidence necessary to conduct the legal analysis we have outlined. This evidence may extend to proof of the existence or nonexistence of competing presumptions." *Id.*

The Supreme Court explained that Senior District Judge Richard M. Smith erred in relying on "what he believed to be the current wife's positive impact on the twins' lives" to determine whether M.S. could demonstrate a presumption of paternity. *Id.* The Court also suggested that Wife's relationship with Mother and her positive role in the children's lives potentially could establish a competing presumption of parentage in Wife's favor:

> Our reading of the record before us leads us to believe that E.L.'s counsel never truly pursued the possibility that this case may involve *competing presumptions* under K.S.A. 2019 Supp. 23-2208(c). . . . Yet the district judge relied in part on what he believed to be the current wife's positive impact on the twins' lives. We applaud the district judge's compassion on this point; no member of this court wishes anything less for these boys as a function of their birth mother's current relationship. But, unless E.L. is trying to establish a competing presumption in favor of her wife's maternity under K.S.A. 2019 Supp. 23-2208(c), her wife and her relationship to the twins is irrelevant to whether M.S. can establish her pre-existing maternity under K.S.A. 2019 Supp. 23-2208(a)(4) and (b).

Id. (Emphasis added) (citations omitted). The Court reiterated in the very last sentence of the Opinion's Conclusion, that the district court would be

"free to allow submission of additional evidence by the parties if he deems such evidence necessary to conduct the legal analysis we have outlined. *This evidence may extend to proof of the existence or nonexistence of competing presumptions." Id.* at 384 (emphasis added).

Following issuance of the Mandate on December 28, 2020, the parentage case was reassigned to Senior Judge Gunnar A. Sundby on February 1, 2021. (R.1, 40) Because Wife was never named as a party in M.S.'s paternity case, she wasn't notified electronically of filings or hearing dates after proceedings were reopened from the Mandate on February 1, 2021. (R.1, 40) Neither M.S. nor E.L. kept Wife informed or encouraged her to participate in the parentage action following remand. (R.1, 56-7).

When Wife discovered that a hearing had been scheduled for 10:00 a.m. on Monday, February 22, 2021, she immediately began calling Crawford County attorneys, hoping to obtain legal counsel to represent her as an interested party at the upcoming status conference, and in subsequent remand proceedings in the parentage case. Four days before the hearing, on Thursday February 18, 2021, Attorney Geoffrey Clark agreed to represent Wife in the proceedings following remand; on Monday February 22, Mr. Clark entered his appearance as Wife's attorney of record just before the hearing began at 10:00 a.m. (R.2, 3). Because Wife was not named as a party, the

court asked counsel for E.L. and M.S. whether either of them knew who Mr. Clark was representing. (R.2, 3) Attorney Sara Beezley, E.L.'s trial counsel, answered:

> [E.L.] who is my client and the respondent in this case is married to [Wife] and [Wife] was actually present at the hearing and a witness at the hearing and so they got married[. . . .] Since that time last spring [E.L.] filed a petition for divorce from [Wife] and they've attempted to reconcile and do counseling and the whole thing.
>
> But in [Wife]'s response she alleged that she's a parent to the two minor children. The acknowledgment, establishment, and recognition of her parentage is in the best interest of the children so she's claiming a role as the mother of these children and, I believe, that's why Mr. Clark has entered his appearance to represent [Wife]'s claim as to maternity.

(R.2,3-4).

Asked if either party objected to Mr. Clark's presence at the hearing, Attorney Valerie Moore, M.S.'s trial counsel responded: "[n]o objection to him appearing in today's status hearing. Obviously, I object to any argument that [Wife] would be considered a legal parent." (R.2, 4) Likewise, Ms. Beezley did not object to Mr. Clark's presence. (R.2, 4) The court then permitted Mr. Clark to enter into the Zoom hearing, stating: "I understand you represent [Wife]. . . who may have some interest in this case. At this point not deemed to be a party to the case but at least we're going to let you in for observation purposes at this point." (R.2, 5)

The court reminded the parties that "the Supreme Court left open the

ability to take further evidence concerning the presumptions and absent that then, of course, we have the ultimate decision as to the role of the parties as far as custody and visitation," and asked both counsel to weigh in on whether additional discovery was necessary and whether the case would need to be scheduled for trial or "do we do it on the record from the first trial or how do you see this going." (R.2, 5-6) Ms. Moore opined that because she was not involved with Mother or present at the time of the children's birth, Wife could not establish a competing presumption of parentage; therefore, M.S. should "just be declared a parent . . . based on the record alone and we should just proceed to the parenting schedule and reintegration." (R.2, 6-7) Ms. Beezley replied:

> I think there is going to be an issue of competing presumptions. [Wife] has actually been in these boys' lives for longer than [M.S.] has been in their lives, especially during the period of time that ha[s] been more formative. . . . They call her mom. She's been around three plus years so I think that's going to be the question for this Court. . . where we have a *Ross* hearing on the issue of these competing presumptions.

(R.2, 8) Ms. Moore then stated, "I guess my question to Mr. Clark would be is [Wife] going to be asserting" a competing presumption of parentage. (R.12, 8) Although Mr. Clark was present only in an "observer" capacity, and informed the court that because he'd been hired only four days earlier, he hadn't had a chance to review the entire history of the district court case, the briefs and Opinion issued by this Court, or the briefs and Opinion issued by the Kansas

Supreme Court in the first appeal, he stated, "I don't think she's going to assert the presumption Judge. I think she' s going to ask for stepparent visitation in this. . . . [*T]hat's my understanding*." (R.2, 9) (emphasis added).

On April 5, 2021, five months before granting Wife's Motion to Intervene on September 3, 2021, and without taking any new evidence regarding Wife's competing presumption of maternity; the district court filed its Order Establishing Parentage, in which it declared M.S. the legal parent of W.L. and G.L., awarded M.S. and E.L. joint legal custody of the children, and adopted a reintegration parenting time schedule for M.S. (R.1, 42-52) The 10-page Order is entirely devoid of mention of Wife's name—never mind any reference to parenting time, visitation, or the relationship between Wife and the children who know her as their mother.(R.1, 42-52)

On July 1, 2021, Wife filed her Motion to Intervene in the parentage case. (R.1, 53-55) M.S. objected, claiming among other things that Wife "does <u>not</u> have a presumption of parentage under K.S.A. 23-2208(a)(4)," and that M.S.'s parentage "had already been established by a Court Order." (R.1, 56-57) (emphasis in original). On July 21, 2021, Mother filed a separate Answer to Wife's Motion to Intervene, arguing that Wife's Motion should be denied "due to the fact that there is a case pending involving [Wife and Mother] and that is where any issues concerning stepparent visitation need to be

addressed." (R.1, 59) Also on July 21, 2021, the court appointed Maradeth Frederick as guardian ad litem for W.L. and G.L. in the divorce case. (R.10, 44-45) Less than a month later, Wife and Mother were divorced on August 19, 2021. (R.10, 46-55) In the Journal Entry and Decree of Divorce filed 8/19/2022, the Custody and Visitation section provided as follows: "[t]he parties have not reached an agreement on any of the issues regarding W.G.L. and G.A.L." (R.10, 48)

After Wife and Mother were officially divorced, on September 3, 2021, the court granted Wife's Motion to Intervene in the parentage case over the objections of Mother and former Partner.(R.1, 62-63) On December 3, 2021, Wife filed her own Petition for Determination of Parentage of G.L. and W.L. (R.1, 80-84) On December 14, Mother and former Partner filed a Joint Motion to Dismiss Wife's Petition for Determination of Parentage, arguing among other things that Wife failed to state a claim under the Kansas Parentage Act, because:

(1) Wife "d[oes] ***not*** have a presumption of parentage under K.S.A. 23-2208(a)(3)(A)." (R.9, 41) (emphasis in original);

(2) Wife "did not intervene or file a counterclaim of parentage" until December 2021. (R.16, 43);

(3) Because Wife filed a "*stepparent* adoption action," she "recogniz[ed]

that she was not a presumptive parent to these children." (R.9, 42) (emphasis in original);

(4) A child in Kansas cannot have three parents, "nor is there any legal precedent for a stepparent to file a parentage action after parentage has already been established by a Court." (R.9, 43);

(5) The district court had "zero authority to order stepparent visitation in this parentage action" because Wife chose to file a parentage petition rather than a petition for stepparent visitation; and she "cannot claim to be both: either she is a stepparent or a parent." (R.9, 43). Yet at the same time, Wife herself negated any competing presumption of parentage she might have been able to establish; by alleging in the alternative a right to stepparent visitation, which constitutes an "acknowledgement by [C.L.] that she is not a legal parent but a stepparent." (R.9, 43); and

(6) "[T]he only two parents for these minor children are [M.S.] and [E.L.]," because: (a) Wife knew about M.S.'s parentage petition, (b) Wife "participated in the trial as a witness for [Mother]," (3) M.S.'s parentage had "already been established by a Court Order" by the time Wife filed her own petition for determination of parentage, and (4) "[t]here is zero legal precedent or argument for adding another parent post-Decree." (R.9, 43).

After hearing arguments of counsel on March 21, the district court filed

its Journal Entry on March 26, 2022, sustaining Appellees' joint motion to dismiss, finding "that there were no competing presumptions at the time of the children's birth," and dismissing Wife's Petition for Determination of Parentage of W.L. and G.L. (R.1, 89-90). This appeal follows.

ARGUMENTS AND AUTHORITIES.

Issue I: The District Court Erred In Dismissing Wife's Petition For Determination of Parentage Under K.S.A. 60-212(b)(6), Because The Allegations In The Petition Were Sufficient To State A Claim of Maternity Under the Kansas Parentage Act.

A. Standard of Review.

A district court's order granting a motion to dismiss is a legal question, which this Court reviews *de novo*. *Rodina v. Castaneda*, 60 Kan. App. 2d 384, 386 (2021) (reversing trial court's grant of motion to dismiss negligence action for failure to state a claim, where plaintiff was entitled to a judicial determination of defendant's comparative fault). The Court of Appeals "must assume the truth of the facts alleged by the plaintiff, along with any inferences that can reasonably be drawn from those facts. This court will then decide whether those facts and inferences state a claim under any possible theory." *Id.* (citations omitted). In Kansas, "[t]he granting of motions to dismiss has not been favored by our courts." *Halley v. Barnabe*, 271 Kan. 652, 656 (2001). A petition should not be dismissed for failure to state a claim

unless:

> [A]fter reviewing the petition in the light most favorable to plaintiff, and with every doubt resolved in plaintiff's favor that under plaintiff's pleadings, the plaintiff can prove no set of facts, either under plaintiff's theory or under any other possible theory, in support of plaintiff's claim which would entitle plaintiff to relief. Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim.

Dye v. WMC, Inc., 38 Kan. App. 2d 655, 661 (2007) (citations omitted).

Where the district court considered matters outside the pleadings in sustaining a motion to dismiss for failure to state a claim under K.S.A. §60-212(b)(6), "the standard of review is the same as that for summary judgment." *Fairfax Portfolio LLC v. Carojoto LLC*, 312 Kan. 92, 94 (2020). A trial court's order granting summary judgment is also a legal question, reviewed by this Court *de novo. Id.* Summary judgment is proper when:

> [T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought.

Davis v. Miller, 269 Kan. 732, 737 (2000). In opposing a motion for summary judgment, the adverse party "must come forward with evidence to establish a dispute as to a material fact. To preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case." *Moon v. City of Lawrence,* 267 Kan. 720, 726–27 (1999).

B. Preservation Statement.

The arguments contained in Issue I were raised in the district court proceedings below and preserved for appeal. In her Response to Appellees' Joint Motion to Dismiss filed 1/06/2022, Wife argued that the trial court should deny Appellees' motion because Wife was an "interested party" and had standing under the Kansas Parentage Act to "bring an action to determine the existence or nonexistence of a mother and child relationship." (R.16, 53) (quoting *Frazier v. Goudschaal*, 296 Kan. 730, 745 (2013) (holding that "the only constraint to bringing an action to determine the existence of a mother and child relationship . . . is that [the petitioner be] an 'interested party.'")).

At the hearing on March 21, 2022, Wife's trial attorney Geoffrey Clark first explained that he had requested oral argument "to reiterate the standard on a motion to dismiss, which forces that the motion must be denied unless the allegations in the petition viewed in the light most favorable to [C.L.] clearly demonstrate that she's not entitled to relief under any set of facts." (R.8, 5) Mr. Clark asked the trial court to deny the joint motion to dismiss because Wife's petition stated a valid cause of action under the KPA by alleging that Wife had "openly and notoriously recognized that she is the parent of these children," and was a presumed parent under K.S.A. 23-

2208(a)(4). (R.8 15) The district court disagreed and granted the joint motion to dismiss, explaining that "I am looking at it on the basis that at the time of birth and conception there was no competing interest or presumption," and advising that Wife had "a right, of course to appeal the decision of this Court." (R.8, 25)

C. Argument.

This Court should reverse the district court's Journal Entry granting Appellees' Joint Motion to Dismiss, because assuming the truth of the facts alleged in Wife's Petition along with any reasonable inferences drawn from those facts, the allegations of the petition do not "clearly demonstrate [Wife] does not have a claim." *See Dye,* 38 Kan. App. 2d at 661. Kansas appellate courts have repeatedly affirmed the central holding of *Frazier*:

> A harmonious reading of all of the KPA provisions indicates that a female can make a colorable claim to being a presumptive mother of a child without claiming to be the biological or adoptive mother, and, therefore, can be an " interested party" who is authorized to bring an action to establish the existence of a mother and child relationship.

296 Kan. at 747. Even in the first appeal involving these parties, the Supreme Court reiterated: "we hold that the same-sex partner of a woman who conceives through artificial insemination may establish a legal fiction of biological parentage by asserting the KPA presumption of maternity in K.S.A. 2019 Supp. 23-2208(a)(4) (notorious recognition of maternity)." *W.L. I,*

312 Kan. at 381.

When competing presumptions arise in favor of different parents, the district court "is required to conduct a hearing to determine which presumption is founded on the weightier considerations of policy and logic, including the best interests of the child," before determining the child's legal parentage. *Greer ex rel. Farbo v. Greer*, 50 Kan. App. 2d 180, 181, 191-92 (2014) (reversing dismissal of biological father's petition where district court refused to consider his competing presumption of paternity based on genetic test results, which arose after the non-biological father's presumption of legitimacy based on his marriage to the child's mother) (internal citations omitted). This Court noted in *Greer* that "the judge's failure to recognize both competing presumptions, legitimacy and genetic, and then conduct the weighing of presumptions was the cause of the error we have found here." *Id.* at 192.

Here, the allegations in Wife's Petition were sufficient to state a claim of parentage under "any possible theory" which would entitle Wife to relief, and dismissal of her petition was not justified. Initially, Wife alleged facts sufficient to meet the sole requirement to state a claim for a determination of parentage—that she was an "interested party." *See Frazier*, 296 Kan. at 745-56. Wife claimed she was the children's presumed parent under K.S.A. 23-

2208(a)(3)(A) because "after the children's birth, [E.L.] and [C.L.] married and [C.L.] acknowledged maternity of the children in writing"; and under K.S.A. 23-2208(a)(3)(C) because after the children's birth, Wife and Biological Mother were married, "and [C.L.] [wa]s obligated to support the children under a written voluntary promise." (R.1, 81-8) Wife also alleged she was a presumed parent under the "notorious recognition of maternity" presumption in K.S.A. 23-2208(a)(4), and that Wife and Biological Mother were parties to a separate divorce case "which involve[d] custody or visitation with the children." (R.1, 82)

Further, Wife alleged that a declaration of her status as the children's legal parent was in their best interests, because "at [E.L.]'s instigation, since the children were two years old, the children have known [C.L.] as their mother and called [C.L.] their mother," and that the children were bonded with Wife "[a]t E.L.'s instigation and with her encouragement." (R.1, 81) Wife acknowledged that the district court previously declared M.S. to be the children's legal parent before Wife was permitted to participate in the case; Wife argued that it was in the best interests of the children for C.L., M.S., and E.L. to be granted joint legal custody and joint physical custody of the children. (R.1, 82) Were the court to deny her parentage petition, Wife asked that she be awarded stepparent visitation pursuant to Wife's proposed

Parenting Plan. (R.1, 83)

In their Joint Motion to Dismiss, Appellees argued with no citation to supporting legal authority, that Wife "does *not* have a presumption of parentage under K.S.A.23-2208(a)(3)(A)." (R.9, 41) (Emphasis in original). According to Appellees, Wife's petition came too late:

> 2. At the time of the children's birth in 2014, there existed two presumptions of parentage: the Petitioner's [M.L.] and the Respondent's [E.L.]. [M.L.] filed a *Petition for Determination of Parentage* in October of 2017.
>
> 3. [C.L.] did not marry the [E.L.] until January of 2018.
>
> 4. [C.L.] did not intervene or file a counterclaim of parentage prior to December of 2021, some four years after [M.L.] filed her request.

(R.9, 41). These statements may accurately reflect Mother's and former Partner's personal opinions as to why the district court should have determined that M.S.'s competing presumption of parentage was "founded on the weightier considerations of policy and logic, including the best interests of the child." *See Greer*, 50 Kan. App. 2d at 181. But they do not accurately reflect the law in Kansas regarding Wife's status as an "interested party," in order for Wife to establish a claim of maternity by asserting a competing presumption under the KPA. *See* K.S.A. 23-2208(c).

Even the Supreme Court in *W.L. I* indicated that Wife could state a claim for legal parentage by asserting a competing presumption, pointing out

that Mother's counsel "never truly pursued the possibility that this case may involve competing presumptions" under K.S.A. 23-2208(c); that Wife's relationship with the children would have been relevant to the court's determination of former Partner's petition—had Mother been "trying to establish a competing presumption in favor of her wife's maternity," and that following remand, the district judge would be free to permit additional evidence, if necessary, which "may extend to proof of the existence or nonexistence of competing presumptions." *W.L. I,* 312 Kan. at 382, 384.

Dismissal was not justified in this case, because Wife's petition established several grounds as an interested party for a determination of parentage. The trial court erred in finding that because Wife did not have a competing presumption of "notorious recognition" of parentage at the time of the children's birth, Wife could prove *no set of facts* under her own theory or any other possible theory which would entitle her to relief. This Court should reverse and remand for an evidentiary hearing to determine which presumption "is founded on the weightier considerations of policy and logic, including the best interests of the child." K.S.A. 23-2208(c).

Issue II: The District Court Erred In Dismissing Wife's Petition for Determination of Parentage, Because It Misinterpreted The Plain Language And Purpose Of The Kansas Parentage Act In Concluding That Wife Could Not Establish A Legal Fiction Of Biological Parentage Because No Competing Presumption of Maternity Existed At The Time of Birth.

A. Standard of Review.

Statutory interpretation involves a question of law, which this Court reviews de novo. *Nauheim v. City of Topeka*, 309 Kan. 145, 149–50 (2019).

B. Preservation Statement.

The arguments contained in Issue II were raised in the district court proceedings and preserved for appeal. During the hearing on March 21, 2022, Wife's attorney argued that the Kansas Parentage Act does not preclude a party from seeking a determination of legal parentage merely because the court previously issued an order of parentage declaring another party to be the child's legal parent. (R.8, 23-25) In this case, Wife was not named as a party to the action when M.S. was declared the children's legal parent, and nothing in the KPA provides that Wife is prohibited from asserting her own competing parental presumption— even after Mother's former Partner was determined to be the children's legal parent by court order. (R.8, 10-11)

The district court disagreed, finding that under the KPA, "I have to look at it and I am looking at it on the basis that at the time of birth and

conception there was no competing interest or presumption." (R.8, 25). The court reasoned that when it conducted a hearing where Wife was neither present nor represented, and subsequently declared M.S. to be the children's legal parent, "no matter how close and loving that relationship has become [between Wife and the children] as a stepparent, *that can't rise to the level of a parent or to a presumption of parentage.*" (R.8, 25) (emphasis added). Based on its interpretation that the KPA did not permit the court to "create the concept of a third parent" and the children already had two legal parents, the court granted the Joint Motion to Dismiss. (R.1, 89-90)

C. Argument.

The district court erroneously interpreted the Kansas Parentage Act, and this Court should reverse. First, the plain language of the KPA does not provide that a non-biological party may only demonstrate a presumption of parentage if the presumption arose *at the time of the child's birth*. For example, under K.S.A. 23-2208(a)(3), a man is presumed to be the father of a child if:

> *After the child's birth, the man and the child's mother have married. . . and*:
>
> (A) The man has acknowledged paternity of the child in writing;
>
> (B) With the man's consent, the man is named as the child's father on the child's birth certificate; *or*

(C) The man is obligated to support the child under a written voluntary promise or by a court order.

K.S.A. 23-2208(a)(3) (emphasis added).

In September 2022, this Court held that "the creation of a legal fiction [is] appropriate for *someone the birth mother meets and marries after the birth of the child an*d for whom an actual biological link is impossible, but who otherwise would be a presumptive parent under K.S.A. 2021 Supp. 23-2208(a)(3)." *Matter of A.K.*, ___ Kan. App. 2d. ___, 518 P.3d 815 (Kan. Ct. App. 2022), 2022 WL 4281851, at *6 (September 16, 2022) (citing *M.F.*, 312 Kan. at 344-5) (emphasis added). In *A.K.*, a birth mother's former girlfriend established a presumption of parentage under K.S.A. 23-2208(a)(4), by notoriously recognizing maternity at the time of the child's birth. *Id.* at *5, *7. Additionally, the birth mother's husband—who was not biologically related to the child and hadn't even met the child until she was 18 months old—established a competing presumption of parentage under K.S.A. 23-2208(a)(3), because he had married the child's mother and was added as the child's father to her Missouri birth certificate. *Id.* at *6. The court weighed the competing presumptions and found that husband's presumption prevailed. *Id.* at *1.

On appeal, this Court affirmed the trial court's determination that husband had established a competing presumption of paternity, which arose

after the former girlfriend's presumption arose:

> Based on the plain language of K.S.A. 2021 Supp. 23-2208(a) with no statutory time limit, and the undisputed evidence, we hold that [husband] has established a presumption of parentage under (a)(3)(B). He married [mother] after the birth of the child and, with his consent, he is named as the child's father on the child's birth certificate. We reject [former girlfriend's] argument to the contrary.

Id. at *8. The trial court did not err in determining that husband's presumption was "founded on the weightier considerations of policy and logic, including the best interests of the child." *Id.* at *8 ("From our review of the record, we see that the district court did exactly what the Act calls for—to weigh conflicting presumptions and rule for the prevailing party.")

As this Court explained, the KPA does not set a specific time limit after which a nonbiological parent has no standing to assert a presumption of paternity under K.S.A. 23-2208(a)(3):

> K.S.A. 2021 Supp. 23-2208(a)(3)(B) states a man is presumed to be the father of a child if: "*After* the child's birth, the man and the child's mother have married . . . and . . . with the man's consent, the man is named as the child's father on the child's birth certificate." The statute does not say how long "after" the child's birth. There is no time limit set by that section of the statute. The Legislature did limit the application of the presumptions created in sections (a)(1) and (a)(2) to "within 300 days" but did not use similar language in (a)(3). That is significant.

2022 WL 4281851, at *7 (emphasis in original). Appellees' arguments are unavailing, that Wife cannot state a claim because she filed her own Petition for Determination of Parentage after she and Biological Mother were

married, and after M.S. filed her initial petition for determination of parentage.

Nor was Wife precluded from asserting a competing claim of parentage after Partner had already been declared the children's legal parent via court order. (R.9, 45) In *A.K.*, this Court held that the "time of birth" analysis applies only "to a determination of whether a parent has notoriously recognized maternity or paternity" under K.S.A. 23-2208 (a)(4). *See* 2022 WL 4281851, at *8. But in a situation where one party's presumption of parentage arose at the time of the child's birth, and another party's competing presumption arose several years later, "[t]he reasonable way for a court to consider the "time of birth" analysis in a stepparent case such as this is to consider that analysis as one more factor to be weighed." *Id.*

The Court of Appeals concluded that its analysis was supported by the plain language of the statute, which permits a party to assert a marital presumption of parentage *after* the birth of the child: "[w]hen in doubt, follow the statute." *Id.* Additionally, the decision reflected the purpose of the Kansas Parentage Act—to ensure that the legal rights and obligations attendant to the parent-child relationship are carried out, and to accurately identify a child's parent when a "credible suggestion of paternity in another person" arises. *Id.*

Here, the only difference between the husband in *A.K.* and Wife in this case, is that the husband's name was added to the child's Missouri birth certificate in *A.K.,* which established the resumption of paternity under K.S.A. 23-2208(a)(3)(B). *See* 2022 WL 4281851, at *8. In this case, although Wife's name was not added to the children's birth certificates, Wife and Mother had entered into a signed, notarized Co-Parenting Agreement, which detailed the specific terms by which the parties agreed to share joint legal custody and residential parenting time with the children. (R.10, 31-34) Wife has thus established her own competing presumption for a determination of parentage under K.S.A. 23-2208(a)(3)(A), in which "[th]e man has acknowledged paternity of the child in writing," and under K.S.A. 23-2208(a)(3)(C), in which "the man is obligated to support the child under a written voluntary promise or by court order."

The district court misinterpreted the plain language of the KPA, which permits a party to establish a competing presumption of parentage after the birth of a child. The court also misconstrued the purpose of the KPA as preventing the creation of a third parent, rather than ensuring that the "legal obligations, rights, privileges, duties, and obligations incident to the father and child relationship." *A.K.*, 2022 WL 4281851, at *9. This Court should reverse the decision below and remand for an evidentiary proceeding to

determine which competing presumption "is founded on the weightier considerations of policy and logic, including the best interests of the child." K.S.A. 23-2208(c).

CONCLUSION

For the foregoing reasons, Appellant C.L. respectfully requests that this Court reverse the district court's Journal Entry dismissing her Petition for Determination of Paternity of W.L. and G.L., vacate all district court orders and judgments adverse to C.L. and issued prior to C.L.'s entry as a named party in the underlying case, remand the matter for an evidentiary hearing to weigh the two competing presumptions of parentage according to the Kansas Parentage Act, and for any further relief this Court deems fair, just, and equitable.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Brief of Appellant was filed on the Kansas E-file system, which automatically notifies the parties of record for this proceeding and provides them with a true and correct copy, on this 10th day of March 2023.

/s/ Allison G. Kort
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