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.

REPLY 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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REPLY ARGUMENT AND AUTHORITIES

I. Statement of Compliance With Rule 6.05.

Pursuant to Kansas Supreme Court Rule 6.05, Appellant C.L. ("Wife") submits this Reply Brief of Appellant, made necessary by new material contained in the Brief of Appellees M.S. and E.L. Appellees' Brief raises new factual contentions, including that the trial court "ordered temporary stepparent visitation between C.L. and the minor children," which this Court should reject as misleading and inaccurate. App'ee Br. at 5. Appellees' Brief also raises new material in all three arguments, that: (1) C.L.'s Petition for determination of parentage is barred by the doctrine of collateral estoppel and/or res judicata, App'ee Br. at 6-13; (2) C.L.'s Petition for determination of parentage is barred because "there exists no authority in Kansas for a finding that three parties can be equal parents of a child," App'ee Br. at 14-16; and (3) that C.L. cannot establish a competing presumption of parentage because she cannot meet the "time of birth" requirement under K.S.A. 23-2208(a)(4).

Rule 6.05 provides that "[a] reply brief must include a specific reference to the new material being rebutted and may not include, except by reference, a statement, argument, or authority already included in a preceding brief." For clarity and ease of reference, this Reply Brief makes specific references to the new material being rebutted in the same order as presented in Appellees' Brief.

II. Reply to Appellees' Statement of Facts.

Appellant rebuts the new material contained in Argument I of Appellees' Statement of Facts as follows. App'ee Br. at 1-6. First, Appellees raise new factual contentions that are not "supported by reference to the record in the same manner as required of the appellant under Rule 6.02." Kan. Sup. Ct. R. 6.03(a)(3). Among other things, the entire first paragraph of the Statement of Facts is devoid of reference to the record:

> At the time of the children's birth, the parties agreed to use the last name of L.S. (a combination of both M.S. and E.L.'s last names) for both children. M.S. provided substantial financial support on behalf of the minor children including payment of daycare costs, healthcare expenses, and various other expenditures aimed at supporting the minor children. M.S. and E.L. lived in a jointly owned home in Olathe, Kansas raising the children together until they permanently separated in January of 2016. Upon the parties' separation, E.L. moved to Pittsburg, Kansas. One month later, in February of 2016, M.S. also moved to Pittsburg. From February 2016 until October of 2017, M.S. enjoyed parenting time with the children in by agreement of both M.S. and E.L. That agreement's initial terms provided for alternating weekends (Friday evening - Monday morning)and then expanded to alternating weekends plus one day during the work week. In February of 2017, E.L. began dating C.L.

App'ee Br. at 1-2.

Second, Appellees erroneously allege that the trial court "ordered temporary stepparent visitation between C.L. and the minor children by agreement of E.L. and C.L. (Vol. 5, pgs. 12-14)." App'ee Br. at 5. Volume 5 of the Record on Appeal is the transcript of proceedings which

occurred on August 19, 2021 before Senior District Court Judge Sundby, on Wife's Motion to Intervene in the parentage case, alleging among other things: (1) Wife "asserted in the divorce action that she is a parent of the minor children at issue"; (2) E.L. claimed Wife was "not a parent but asserts that [C.L.] is entitled to stepparent visitation"; and (3)Wife was "presumed to be. Parent of the minor children pursuant to K.S.A. §23-2208(a)(4)." (R.1, 53). The only references to "stepparent visitation" on pages 12-14 of Volume 5 are the following:

- THE COURT: The parties were going to converse to see if something could -- some solution could be reached as to the competing interest of the parties on having *parental access or stepparent access* to these children. (R. 5, 12);

- MR. CLARK (C.L.'s trial counsel): And during this temporary thing that *she'll refer to herself as a stepparent*. (R. 5, 13); and

- MS. BEASLEY (E.L.'s trial counsel): I mean, we're fine with this for a temporary agreement but *we thought it was an agreed upon order for stepparenting time*. (R5, 14).

(R. 5, 12-14)(emphasis added).

The court did not award "stepparent visitation" following the hearing, despite E.L.'s attorney Valerie Moore's explanation of her client's understanding, that C.L. "was dismissing her request to be declared a parent and is just going to go forward with stepparent visitation and the parties were going to work that out so if that's not the case I think we kind of know

that." (R.5, 15). The trial court then asked Ms. More: "[t]he parenting time, or, excuse me, the stepparent time that they've talked about does not interfere at all with your client's interests; is that correct," and Ms. Moore answered "[c]orrect, Your Honor." (R. 5, 15).

Instead of awarding "stepparent visitation," the court specifically addressed the parties' agreement that the children would refer to C.L. as "Cha Cha," and that C.L. would be known to the children's school as a stepparent so she could attend and participate in school activities:

> THE COURT: The last thing I want to discuss before I start making rulings is I handled a domestic docket for a number of years and one of the things and issues that came up when there were stepparents or other interested parties involved is the nomenclature the parties use. You know, how they call them, mom or they call them mother, do they call them stepmom or do they call her aunt or call them, you know, something like that.
>
> Have the parties reached a role because this is a unique family and we have several people involved. Have we -- do we have that nomenclature decided or do you think we need to talk a little bit about that?
>
> Miss Frederick, do you have any clue what the children call each one of these parents --stepparents?
>
> MS. FREDERICK (Guardian ad litem): I'm not for sure Judge. I think, you know, if this family decides what everybody should be called that's fine with me. Yeah, I don't have an opinion on that.
>
> MS. BEEZLEY: I think they call her Cha Cha and I think everyone is okay with that.
>
> C.L.: They call me Mama Cha Cha now but I think if everyone just starts referring to me as Cha Cha, Your Honor, the boys will catch on to that.

THE COURT: Miss Moore, on behalf of [M.S.].

MS. MOORE: Your Honor, with respect to my client the parties have been following the recommendations of the therapist. They're working towards coming up with the correct title, but because she was gone out of their lives for three years we're not pressing that issue at this point. We are following the lead of the therapist, but the goal is to get to where she has the title of mom, mother, something.

THE COURT: Okay. I just wanted, while we're all here in the same room we talk about, maybe to some people thought it was a simple thing, but yet I can see sometimes considerable discussion and argument about who calls whom what and so I wanted to make sure we open that discussion today. It sounds like we're reaching goals to make sure it's clear for the children how they address each other. . .

Well, what I would suggest we do and here's what I'm thinking is that we can schedule thins for a hearing in like November. . . . Say, okay, today we have a temporary order of every other Wednesday after school to 7:30 p.m. Miss [C.L.] is granted then the right to have that visitation to occur. She'll be using the name of —well, she'll be able to attend school activities and be known as a stepparent and will receive notice of those activities and be able to participate.

(R.5, 18-21).

This Court should reject those statements in Appellees' Brief which are unsupported by references to the record on appeal, and misconstrue the proceedings and holdings of the trial court below.

III. Reply to Appellees' Issue I.

C.L. rebuts the new material contained in Issue I of Appellee's Brief, specifically referenced in this subsection of her Reply Brief as follows. App'ee Br. at 6-13.

As an initial matter, Appellees are precluded from raising their collateral estoppel and/or res judicata arguments for the first time in their

brief. App'ee Br. at 6. *See Board of Lincoln County Comm'rs v. Nielander,* 375 Kan. 257, 268 (2003) (declining to review argument raised for the first time on appeal by appellee, that "boards of county commissioners, not sheriffs, must be given the final authority to decide which expenditures are necessary and which are discretionary in order to enable those boards to control discretionary spending). In *Nielander*, the Kansas Supreme Court held that the appellee's argument was "outside the purview of the district court's order and was not raised below. Issues not raised before the trial court cannot be raised on appeal." *Id.*

Here, neither Appellees nor the trial court ever mentioned collateral estoppel or *res judicata* at any point during the remand proceedings. This Court should reject Appellees' argument that the district court "properly exercised the doctrine of collateral estoppel and/or res judicata when denying C.L.'s parentage petition and granting E.L. and M.S.'s joint Motion to Dismiss." App'ee Br. at 6.

Second, collateral estoppel does not apply because M.S.'s original appeal did not address the issue in C.L.'s petition involving "the court's concerns for preserving 'vital bonds' that develop between parent and child and for the stability of the child do come into play in a case like this"; where one party's presumption of parentage begins at the birth of the child and a second presumption arises several years later. *See Matter of A.K.*, 518 P.3d

815, 823–24 (Kan. App. 2022). Contrary to Appellees' argument, the prior Judgment on the merits of M.S.'s presumption of parentage did not determine C.L.'s ability to establish a competing presumption of parentage, arising several years after the children were born. App'ee Br. at 10.

Nor is C.L. the same party or "in privity" with M.S. App'ee Br. at 11. Appellees cite the Tenth Circuit Bankruptcy panel decision in *In re Thompson,* 240 B.R. 776, 780 (B.A.P. 10th Cir. 1999), for the proposition that an exception exists to the rule that a judgment cannot be rendered against a non-party, when that person:

> Controls the action. The Tenth Circuit in Phelps noted that control, as it applies to issue preclusion and as set forth in the Restatement of Judgments, is "the ability to exercise effective choice as to the legal theories and proofs to be advanced, as well as control over the opportunity to obtain review."

App'ee Br. at 11, *quoting Thompson*, 240 B.R. at 780 (citing *Phelps v. Hamilton*, 122 F.3d 1309, 1319 (10th Cir. 1997)). In *Phelps*, the Tenth Circuit further described the "control" exception as follows: "[h]owever, the 'control' need not be exercised directly by the non-litigating party. 'It is sufficient that the choices were in the hands of counsel responsible to the controlling person; moreover, the requisite opportunity may exist even when it is shared with other persons.'" *Id.*

There, the court held that appellant Margie Phelps—who was not a party to the underlying motions to dismiss—was in privity with plaintiffs

Jonathan Phelps, Charles Hockenbarger, and Fred Phelps for two reasons. *Id.* First, the court's examination of the record led to the conclusion that "throughout the state and federal court proceedings in this matter, the plaintiffs have continually asserted that they have been singled out by [appellee, Shawnee County District Attorney Joan] Hamilton as one entity because of their common membership in the Westboro Baptist Church and their picketing activities." *Id.* Second, the Tenth Circuit held that:

> In applying the definition of "control" for purposes of finding privity, it is clear that Margie Phelps, as listed attorney for each of the plaintiffs, not only had input into the legal theories and arguments advanced, but could be said to be directly responsible, along with co-counsel, for "controlling" the entire course of the state court proceedings. On this basis, we hold that privity exists between the parties in this action such that Margie Phelps may be bound by the state court determinations on the other three plaintiffs' motions to dismiss.

Id.

Unlike Margie Phelps, C.L. and M.S. never asserted they were "singled out" by E.L. as "one entity" because of their common interest in establishing parentage of the two children—if anything, C.L. and M.S. had opposing, competing interests rather than a common one. *Id.* Obviously, C.L. was not listed as an attorney for M.S., such that she could have been "directly responsible, along with co-counsel, for controlling the entire course of" M.S.'s parentage proceedings. *Id.*

Finally, M.S's presumption of parentage litigated in the original

proceedings, did not determine C.L.'s ability to establish a presumption of parentage during remand proceedings. App'ee Br. at 12-13. The prior judgment determining M.S.'s presumption of parentage under the "notoriously or in writing" at the time of birth analysis of K.S.A. §23-2208(a)(4), did not determine the rights and liabilities of C.L. under the "marriage to biological mother" analysis of K.S.A. 23-2208(a)(3) based on ultimate facts as disclosed by the pleadings and judgment. App'ee Br. at 7. This Court should reject Appellees' suggestion that C.L. should be precluded from litigating her parentage claim, particularly given the Supreme Court's repeated suggestion that C.L. could assert a competing presumption of maternity following remand:

> 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). . . . But, unless E.L. is trying to establish a competing presumption in favor of [C.L.]'s maternity[, C.L.] 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). . . .
>
> We remand to the district court for further proceedings consistent with this opinion. As in *In re M.F.*, on remand, 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.

Matter of W.L., 312 Kan. 367, 383-4 (2020).

IV. Reply to Appellees' Issues II and III.

Appellees' remaining claims likewise cannot withstand scrutiny. Appellees inappropriately attempt to refute the merits of C.L.'s possible arguments in support of her petition for determination of parentage, ignoring this Court's standard of review on appeal from a dismissal for failure to state claim. *See Dye v. WMG, Inc.*, 38 Kan. App. 2d 655, 661 (2007) (explaining that in reviewing the dismissal of a petition for failure to state a claim, this Court must assume the truth of the facts alleged by appellant along with any reasonable inferences, and may affirm the dismissal only upon a determination "with every doubt resolved in plaintiff's favor," that the appellant can prove no set of facts which would entitle her to relief.).

Appellees are wrong that this Court should affirm the district court's dismissal of C.L.'s petition, based on Appellees' contention that because "[t]here is zero statutory authority for the declaration of three parties as parents to a child," C.L. is unlikely to prevail on the merits of her petition to establish a presumption of parentage. App'ee Br. at 14-15. Similarly, Appellees are wrong that this Court should affirm the district court's dismissal of C.L.'s petition, based on Appellees' contention C.L. cannot prevail on a hypothetical presumption based on "notorious and open recognition of parentage" argued because "it fails to meet the 'time of birth requirement.'" App'ee Br. at 16-22. Because C.L. did not argue she was

entitled to a presumption of parentage arising at the time of birth, Appellees' argument on this point warrants no consideration, and this Court should reverse. *See* Appellant Br. at 24.

CONCLUSION

For these reasons and those in Appellant's Brief, this Court should reverse the March 26, 2022 Journal Entry dismissing C.L.'s Petition for Determination of Paternity of W.L. and G.L., vacate all district court orders and judgments adverse to Appellant, remand for an evidentiary hearing on C.L.'s petition for determination of parentage, 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 Brief of Appellant was filed on the Kansas E-file system, which automatically notifies the parties of record of this proceeding and provides them with a true and correct copy, on this 8th day of March 2023.

/s/ Allison G. Kort
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