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
vs.

C.L.
Appellant

BRIEF OF APPELLEE

Appeal from the District Court of Crawford County, Kansas
Honorable Gunnar A. Sundby, District Judge
District Court Case No. 2017-DM-000476-P

Valerie L. Moore, #19849
15700 College Boulevard, Suite 102
Lenexa, Kansas 66219
913.317.8999 (telephone)
913.327.8492 (facsimile)
valerie@vintonmoorelaw.com
Attorney for the Appellee

Oral Argument: 15 minutes

Table of Contents

Nature of the Case

Following the entry of an Order Establishing Parentage, C.L., Appellant, filed a *Petition for Determination of Parentage or, in the alternative for Step-Parent Visitation*. The Petitioner, M.S., and the Respondent, E.L., filed *a Joint Motion to Dismiss the Petition*. The District Court dismissed the *Petition for Determination of Parentage or, in the alternative for Step-Parent Visitation* and C.L. has appealed that determination.

Statement of Issues

Issue I: **The 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*.**

Issue II: **The Court properly found that there exists no authority in Kansas for a finding that three parties can be equal parents of a child.**

Issue III: **C.L.'s claim of notorious and open recognition of parentage is barred as it fails to meet the "time of birth" requirement**

Statement of Facts

Petitioner (hereinafter "M.S.") and Respondent (hereinafter "E.L.") began a romantic relationship in January of 2012. In May of 2014, E.L. became pregnant with twins W.L. and G.L. via artificial insemination. E.L. gave birth to the twins in December of 2014. 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.

In September of 2017, M.S. filed a *Petition for Determination of Parentage* (Vol. 12, pgs. 12-15). A Trial on the *Petition* was held on April 26th and April 27th of 2018. Both parties were present, represented by counsel, and testified under oath. The Guardian ad Litem was present and cross-examined witnesses. C.L. was present in the courtroom and presented testimony. On May 22, 2018, the District Court issued its final order, denying M.S.'s *Petition for Determination of Parentage* (Vol. 13, pgs 70-87). M.S. timely filed an appeal. The Court of Appeals sustained the District Court in a published opinion (*In re W.L.*, 56 Kan. App. 2d 958, 441 P.3d 495 (2019)). That same year, E.L. filed for divorce from C.L. (Vol. 1, p. 53 and pg. 81).

Following the Court of Appeals' ruling, M.S. filed a *Petition for Review* with the Supreme Court of Kansas which was accepted. The Supreme Court reversed the decisions of the Court of Appeals and District Court, and remanded the matter to the District Court. The District Court was tasked with re-examing the evidence under the correct legal theory outlined in the opinion as well as the ruling in *Matter of M.F.* (312 Kan. 322, 324, 475 P.3d 642 (2020), a substantially similar fact pattern decided by the Supreme Court contemporaneously with the decision on this matter. C.L., in the vacuum created between the Court of Appeals denial of M.S.'s claim of parentage, but before the Supreme Court's ruling and remand of the case back to District Court, attempted to assert legal parentage within her divorce action from E.L. (Vol. 1, p. 53 and pg. 81).

The mandate from the Supreme Court was received by the District Court on December 28, 2020 (Vol. 1, pg. 10-39). Upon remand, the matter was re-assigned to retired Judge Gunnar Sunby.[1]

The first hearing following the remand was on February 22, 2021 (Vol. 9, p. 2, and Vol. 2, pgs. 1-14). M.S., E.L., and C.L. all appeared at this hearing, with counsel, which was held via Zoom. At that hearing C.L.'s counsel indicated, "I don't think she [C.L.] is going to assert the presumption [of parentage] Judge. I

[1] E.L. is related to a judge in Crawford County; as such, the judges in Crawford County all recused themselves from this matter. As Judge Smith was no longer available, the matter was transferred to retired Judge Sunby.

think she's going to ask for stepparent visitation in this." (Vol. 2, p. 9). C.L. did not file any pleadings in advance of this hearing alleging parentage.

The next hearing was held on February 25, 2021 (Vol. 3, pgs. 1-18). M.S., E.L., and C.L. all appeared at this hearing, with counsel, which was held via Zoom. The original Guardian ad Litem also appeared on behalf of the children. At that hearing, C.L. indicated that she intended to file a *Motion to Intervene* in the parentage action (Vol. 3, p. 15). C.L. did not assert a presumption of parentage at this hearing nor did C.L. file any pleadings alleging a presumption of parentage.

The next hearing was on March 2, 2021 (Vol. 4, pgs. 1-11). M.S., E.L., and C.L. all appeared, with counsel, at this hearing which was held via Zoom. C.L. once again did not assert a presumption of parentage at this hearing nor did C.L. file any pleadings alleging a presumption of parentage. At the time of this March 2, 2021, hearing, E.L. was not prepared to stipulate that M.S. was a parent and the matter was set for trial in April of 2021.

In the interim, E.L. and M.S. attended mediation with a private mediator and reached an agreement. The *Order Establishing Parentage* was filed with the Court on April 5, 2021 (Vol. 1, pgs. 41-52). As part of that Order establishing M.S.'s parentage, the parties agreed that the amount of M.S.'s child support arrearage was $35,000. M.S. agreed to pay $20,000 in back child support immediately with another $15,000 paid out over the course of six years. These arrearages were to be

in addition to monthly child support obligations of $1,069.00 per month (Vol. 1, p. 46).

On July 1, 2021, almost five months after first indicating her intention to intervene, C.L. filed a *Motion to Intervene* in the parentage action (Vol. 1, pgs. 53-55). In that *Motion to Intervene*, C.L. alleged parentage pursuant to K.S.A. 23-2208(a)(4). The Court at the hearing on August 19, 2021, granted the *Motion to Intervene* but did not grant the request to consolidate C.L. and E.L.'s divorce action and the parentage action (Vol. 5, pgs. 25-26). The Court instead ordered temporary stepparent visitation between C.L. and the minor children by agreement of E.L. and C.L. (Vol. 5, pgs. 12-14).

On November 21, 2021, a *Journal Entry Approving Parenting Plan and Finalizing Child Support* was approved by the Court (Vol. 1, pgs 65-79).

On December 3, 2021, C.L. filed a *Petition for Determination of Parentage or, in the alternative for Step-Parent Visitation* (Vol. 16 pgs. 80-84).

At the hearing on the M.S. and E.L.'s *Joint Motion to Dismiss* on March 21, 2022, the Court found:

> But the facts are, as I think we have to look at it from a – not from the facts you wish to present to support her care and her love and closeness to this child, 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. Then a hearing was held and found –and she was found to be a parent and no matter how close and living that relationship has become as a stepparent, that can't rise to the level of a parent or to a presumption of parentage.

> Only then the court would – this Court would be creating new law, which is not applicable, to create the concept of a third parent. And that doesn't appear to fly with the legislature. That doesn't appear to be contained within the language of the past cases issued by the Appellate Courts and so, therefore, the Court will grant the motions to dismiss at this time. (Vol. 8, p. 25)

Following the finding by the Court that "there were no competing presumptions at the time of the children's birth" (Vol. 1, pgs 88-90), C.L. filed her *Notice of Appeal*.

Argument and Authorities

Issue I: The 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.

Collateral Estoppel, a common law equitable doctrine, exists to prevent multiple litigations over the same topics and parties.

> The essential element is that the party against whom estoppel is asserted had a full and fair opportunity to litigate, in the prior action, the issue he now seeks to relitigate. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 333, 91 S.Ct. 1434, 1445, 28 L.Ed.2d 788 (1971).

C.L. had a high incentive and a "full and fair opportunity to litigate" her presumption of parentage in the action between M.S and E.L.. However, C.L. waited on the sidelines and declined to address the issue in the parentage action until *after* the Court had already issued final orders declaring M.S. a parent.

C.L. appeared with legal counsel at the hearings on February 22, 2021, February 25, 2021, March 3, 2021 – all prior to the issuance of an *Order of Parentage*. C.L. had knowledge of the hearings and, in fact, personally appeared at all hearings. She indicated that she would file a *Motion to Intervene* (Vol. 3, p. 3) so that her counsel would be able to view the pleadings in the matter and officially receive notice of pleadings as they were filed as well as hearing dates. C.L. was afforded the chance to argue that there were competing presumptions of parentage but did not allege parentage within the parentage action until almost three months after the *Order of Parentage* had been entered.

Collateral Estoppel, a common law equitable doctrine, may be invoked by the Court when

> (1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based on ultimate facts as disclosed by the pleadings and judgment;
>
> (2) the parties must be the same or in privity; and
>
> (3) the issue litigated must have been determined and necessary to support the judgment. (See *Huelsman v. Kansas Dep't of Revenue*, 267 Kan. 456, 458, 980 P.2d 1022 (1999).
>
> All three of those requirements are met in the instant action.
>
> ***(1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based on ultimate facts as disclosed by the pleadings and judgment;***

The issue of C.L.'s parentage was discussed in Court hearings – hearings where C.L. was present. E.L.'s attorney stated:

> But in [C.L.]'s response [to the divorce petition filed by E.L.] she alleged that she's a parent to the two minor children. The acknowledgement, establishment, and recognition of her parentage is in the best interest of the children so she's claiming a role as mother of these children, and, I believe that is why Mr. Clark [C.L.'s counsel] has entered his appearance to represent [C.L]'s claim as to maternity. (Vol. 2, p. 4)
>
> Well, I think there is going to be an issue of competing presumptions (Vol. 2, p. 7)

When confronted with the information that E.L. was going to allege that C.L. was a parent, counsel for M.S. asked of C.L.'s counsel:

> I guess my question to Mr. Clark would be is [C.L.] going to be asserting a presumption because I think if that's the case then we probably need to brief the Court on that matter because it's my position that the K.L. case is right on point and says specifically that's not to be considered because she wasn't involved when the children were born.
>
> The fact that she's been involved since this case is no fault of my client, that's essentially because she [M.S.] was kicked out of the matter since the Court's ruling, so she wasn't able to have parenting time because the District Court ruled she wasn't a parent so that's not her fault, but during this time period, the additional time that C.L. has had with the child, but that would be my question to Mr. Clark is she even going to assert that presumption? (Vol. 2, pgs. 8-9)

C.L.'s counsel's response to that inquiry: "I don't think she's going to assert that presumption, Judge. I think she's going to ask for stepparent visitation in this." (Vol. 2, p. 9)

After a brief continuance, the Court held another hearing on February 25, 2021. At that hearing counsel for M.S. stated:

> Your honor, Miss Beezley and I have had some discussion as well as Mr. Clark. It is my understanding that Miss Beezley just wants to quick review the transcript to make sure, but assume what I sent to her was correct, and she's able to verify it, I believe we can just go ahead and stipulate that my client [M.S.] is a parent and then what we talked about doing was giving them 45 days to come up with a reintegration plan that everyone agrees to. (Vol. 3, p. 4)

When discussing the next setting, the Court engaged in some dialogue with the parties:

> Court: Mr. Clark, I've had you sitting there just so you could observe. Obviously, you're not an interested party or you've not intervened in the case yet so I just thought I'd let you be involved with our discussions today. You're welcome to join us next Tuesday if you want.
>
> Mr. Clark: I appreciate that, yes, sir. I have ready to file a motion to intervene in this case, too, that I'll be filing today as well.
>
> Ms. Beezley: May I ask if that's a request for stepparent based on the pending divorce.
>
> Mr. Clark: Yes
>
> Ms. Beezley: Okay (Vol. 3, p. 15)

At the hearing on March 2, 2021, E.L.'s counsel requested a hearing on "the ultimate issue of whether or not she consented to share her due process rights so we understand there's already the presumption there but the burden now fall on us, Your Honor. (Vol. 4, p. 4). The Court then set the matter for hearing in April.

No *Motion to Intervene* was filed by C.L. in advance of the March 2, 2021 hearing date.

The District Court issued a "prior judgment on the merits" of the case April 5, 2021. The Court made fifteen specific findings (Vol. 1, pgs. 41-52). The most pertinent of which are as follows:

- The Petitioner, M.S. , is declared the legal parent of the minor children W.L. and G.L. pursuant to the Kansas Parentage Act, K.S.A. 23-2208(a)(4) "notoriously or in writing recognizing paternity of the child.

- The parties [M.S. and E.L.] shall be awarded joint legal custody of the minor children.

- Pursuant to the Child Support Worksheet . . . Petitioner [M.S.] shall pay the sum of $1,069.00 per month as and for child support. Child support payments shall commence on April 1, 2021

- The parties agree that the amount of arrearage for all child support, daycare and non-covered medical expenses for the minor children from birth through March 31, 2021 is $35,000.

- Petitioner [M.S.] shall make a lump sum payment to Respondent [E.L.] of $20,000 within 60 days of the file-stamped date on this Journal Entry.

This "prior judgement on the merits" meets the first requirement for a collateral estoppel claim. The *Order of Parentage* was ented in April 2021 the appeal period ran without action (Vol. 1, pgs. 41-52). The only pleading alleging a presumption of parentage on file in the parentage action at the time the final order of judgement was entered was the *Petition for Determination of Parentage* filed by

M.S. on October 6, 2017 (Vol. 12, pgs. 12-15). As such, the *Order of Parentage* "determined the rights and liabilities of the parties on the issue based on the ultimate facts as disclosed by the pleadings and judgement." The Order resolved the issue of parentage. The Order resolved the issue of legal custody. The Order resolved the issue of child support including child support arrearage. The Order resolved the issue of the retroactive child support and the arrearage.

(2) the parties must be the same or in privity;

> "When deciding if the parties are privies, a careful examination of the facts and circumstances of the case is required. Id. at 1319 (citing Goetz v. Bd. of Trustees, 203 Kan. 340, 454 P.2d 481 (1969))." The general rule in Kansas is that a judgment cannot be rendered against one who is not a party or who does not intervene. Id. (citing Winsor v. Powell, 209 Kan. 292, 497 P.2d 292, 297 (1972)). An exception exists when a person, who is not a party, controls the action. Id. 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.'" Id. (quoting Restatement (Second) of Judgments § 39 cmt. c (1982)). (*In re Thompson*, 240 B.R. 776 (B.A.P. 10th Cir. 1999))

The parties in this action have always been the same. At the time of the filing of the initial action, C.L. was E.L.'s fiancé. However, by the time the District Court conducted its trial on this action in April of 2018, C.L. and E.L. were married to one another. C.L. had the ability to "control" the action. She had the ability to file a *Motion to Intervene* before the final judgement was entered. She had the ability to assert a presumption of parentage in the paternity action – something she did

not do until well after the *Order of Parentage* was entered and some four years after M.S. filed her original *Petition for Determination of Parentage.*

(3) the issue litigated must have been determined and necessary to support the judgment.

This matter was properly litigated. There was a two-day trial in April of 2018. At no point prior to the entry of the *Order of Parentage* did C.L. assert a claim of parentage. Following the remand and the binding authority from the Supreme Court in both *Matter of M.F.* and *In re W.L.* (312 Kan. 382, 475 P.3d 338 (2020), M.S. clearly met her burden to establish that she was a parent to these children. The biological mother, E.L., agreed that M.S. met her burden to establish a presumption of parentage and made the determination that she did not wish to offer any evidence to rebut that presumption. When the presumption was not rebutted, the matter was concluded. At this point M.S. had been affirmatively, and correctly, declared the second parent of W.L. and G.L. The two parties that had been involved in the children's lives since their birth agreed that they were equal parents to W.L. and G.L.

The matter was properly litigated, and the findings are supported by the record.

In *Hutchinson Nat'l Bank & Trust Co. v. English,* (209 Kan. 127, 129, 130, 495 P.2d 1011 (1972)) it was held that the doctrine of collateral estoppel may be invoked only as to questions and issues shown to have been actually decided in

the prior action. *See also Weaver v. Frazee*, 219 Kan. 42, 51, 52, 547 P.2d 1005 (1976). The declaration of a parent was "actually decided" by the Court when M.S. was adjudged to be the parent of W.L. and G.L. and, therefore, C.L is collaterally estopped from relitigating the issue of parentage.

Similarly to collateral estoppel, the common-law rule of equity, res judicata, exists to prevent actions from being litigated twice. Four elements must be met before res judicata will apply: "(a) the same claim; (b) the same parties; (c) claims that were or could have been raised; and (d) a final judgment on the merits. *Cain v. Jacox*, 302 Kan. 431, at 434, 354 P.3d 1196 (2015).

As with collateral estoppel, C.L.'s claim of parentage is the (1) same claim as previously litigated, (2) it involves the same parties, (3) the claim could have been raised, and the (4) final judgement was based on the merits. As such, C.L. is collaterally estopped and barred by res judicata from relitigating the already-decided issue of parentage.

C.L. had a full and fair opportunity to litigate her parentage claim and was incentivized to do so in the action between M.S. and E.L.. Allowing C.L. to enter the picture at the 11th hour, after she consciously remained on the sideline while parentage was being established at the District Court level, would be against the interests of justice.

Issue II: The Court properly found that there exists no authority in Kansas for a finding that three parties can be equal parents of a child.

There is no caselaw in Kansas that stands for the premise that three individuals can be declared to be equal parents of a child.

C.L. appears to argue now on appeal that she has a competing presumption of parentage; however, in the actual pleadings filed and statements made in Court she did not allege a competing presumption of parentage. She instead proffered that the children could have three parents and she was one of those parents. Within her *Petition for Determination of Parentage* is the allegation "[t]hat it is in the child's best interest that M.S., E.L, and C.L. be granted joint legal custody of the minor child (Vol. 1, p. 80-84). The parties should have parenting time pursuant to the C.L.'s *Proposed Parenting Plan* filed herewith." (Vol. 1, pg. 82). Likewise, C.L.'s *Proposed Parenting Plan* states that "E.L., M.S., **and** C.L shall have joint legal custody" of the minor children. (Vol. 9, p. 32 ***emphasis added***)

Unlike M.S.'s claim to parentage, C.L. had (and continues to have) another avenue available to her to ensure that her relationship with the children continues: stepparent visitation. K.S.A. 23-3301 provides a stepparent with the ability to be granted court-ordered visitation through the divorce action. M.S., as a former partner - but not spouse -of E.L., is not afforded this luxury. M.S.'s only course of action was to file a parentage action. When the District Court ruled M.S. was not

a parent, her parenting time was immediately suspended, and she was unable to continue her visits with the children missing out on **three years** of milestones with the children until such time as the appeal process was completed.

There is zero statutory authority for the declaration of three parties as parents to a child. One could imagine a scenario where ***if*** (1) *all three* parents are in agreement, (2) *all three* parents enter into a written co-parenting agreement, and (3) *all three* parents specifically waive any parental preference for the purpose of co-parenting as three equal parents, the Court ***could*** enforce such an agreement. A contract to parent is not "automatically rendered unenforceable as violating public policy merely because it contains the biological mother's agreement to share the custody of her children with another, so long as the intent and effect of the arrangement will promote the welfare and best interests of the children." (*Frazier v. Goudschaal*, 296 Kan. 730, 732, 295 P.3d 542, at 751 (2013)). However, in the instant case, there was no agreement signed by *all three* parents agreeing to equally share their parental responsibilities – nor was there any waiver of parental preference.

Instead E.L. and C.L. entered into a parenting agreement during the vacuum of time between the District Court's denial of M.S.'s *Petition for Determination of Parentage* (May 22, 2018) and the Supreme Court's ruling

(November 6, 2020): a time period where M.S. still had constitutionally protected rights to assert her parentage.

As the claim of three parents is frivolous and without any statutory or case law support in Kansas, and the District Court properly declined to consider such an argument.

Issue III: C.L.'s claim of notorious and open recognition of parentage is barred as it fails to meet the "time of birth" requirement.

First and foremost, the divorce action between C.L. and E.L. was never consolidated with the parentage action. As such, the pleadings and offerings with the divorce action should be barred from discussion within this appeal. M.S. was never a party to that divorce action and never had access to the pleadings and/or the discussions within that case.

The Court specifically made the finding at the August 19, 2021 hearing:

Mr. Clark: Your Honor, I was going to do the entry so its consolidated into the –

The Court: No, no. The motion to intervene is granted.

Mr. Clark: Intervene is granted, very good Judge. Thank you very much.

Ms. C.L.: Thank you Your Honor.

The Court: I accepted the argument of Miss Moore that would open up too many things to have intervention –to consolidate so I just granted a motion to intervene –

Mr. Clark: I didn't have that written down.

The Court: -- over her objections. (Vol. 5, pgs. 25-26)

The *Journal Entry* from that August 2021 hearing state: "[o]ver the Petitioner and Respondent's objections C.L. is granted permission to intervene." (Vol. 20, p. 22). There was never a consolidation of the divorce action and parentage action and, as such, it is improper to include those documents within this appeal.

Notwithstanding the incorrect inclusion of the divorce action, C.L.'s claim in the instant parentage action, regardless of the claim she may or may not have made within the divorce action, fails.

The uncontroverted facts give rise to M.S. meeting the standard of "notoriously or in writing" of parentage (K.S.A. 23-2208(a)(4)). M.S. and E.L. discussed getting pregnant prior to getting pregnant. The testimony by both parties was that they discussed getting pregnant and having children together (Vol. 15. pgs. 13-15, Vol. 16. p. 8). Prior to the children's birth, M.S. participated in the OBGYN appointments (Vol. 15, pg. 16, Vol. 16. p.14), and the ultrasound where the parties found out the sex of the twins (Vol. 15, p. 16). The parties jointly made Facebook Posts announcing the pregnancy and the sex of the children and those posts included both M.S. and E.L. (Vol. 17. pgs 4, 5, and 6).

Family members held a joint shower for M.S. and E.L. where they jointly opened presents and jointly wrote "thank you" notes for the gifts received (Vol.

15, pgs. 17-18, Vol. 15. p. 127, 136-137, and Vol. 17, pg. 6). M.S. was present at the birth of the children (Vol. 15, p. 21) and the children were given the hyphenated name of L.S. at birth (Vol. 15, p. 22-24, Vol. 16. p. 22, Vol. 17, pg. 18). Following the birth of the children, M.S. openly, notoriously, and in writing refers to the children as "my boys" and to herself as a "mom" or "mommy." (Vol. 17, pg. 25 and Exhibit 14 and 108-116). The children's first nanny indicated that [M.S.] referred to the children as her own and that "They both referred, you know, [E.L.] had pictured in her mind that her and [M.S.] were going to have the boys together but it didn't end up working out like that" (Vol. 15, p. 175). The GAL's witness, M.S.'s former girlfriend stated that M.S. referred to the children "as her children" (Vol. 15, p. 240). She also testified that "it seemed like her [M.S.] and [E.L.] had a decent co-parenting relationship" and that [M.S.] loves the children as a mother (Vol. 15, p. 241 -242). M.S.'s relationship with the children clearly satisfies the elements of parentage laid out in K.S.A. 23-2208(a)(4).

Appellant improperly relies on the *In re A.K.* (Kan. App. 2022) to support her argument regarding competing presumptions of parentage. At the time the underlying *Petition for Parentage* was filed *In re A.K.*., the child's stepfather had already added his name to the child's birth certificate with the biological mother's permission and consent; as such, at the time of the filing of the action, there were competing presumptions of parentage. Because stepfather met the statutory

requirements of K.S.A. 23-2208(a)(3)(B) and non-biological mother met the statutory requirements to establish parentage under K.S.A. 23-2208(4) and because there was also an absentee biological father, the Court was required to address the issue of the three competing presumptions using the best interests' standard.

The difference between that case and the case at hand is simple:

(1) C.L. is not on either child's birth certificate. She does not qualify for a presumption of parentage under K.S.A. 23-2208(a)(3)(B) as she is not named as the children's parent on the birth certificates. The stepfather *In re A.K.* met this requirement, thereby establishing his presumption of parentage; and

(2) C.L.'s only "claim" to a presumption of parentage is based on the creation of a legal fiction under K.S.A. 23-2208(4). In *Matter of M.F.*, the Supreme Court discussed this "legal fiction"

> "Plainly, in circumstances such as the one before us, when the known egg of only one of the two women in a same-sex couple is fertilized through artificial insemination, any "biological" link to the woman's partner of the same sex is a legal fiction. As recognized in *Frazier*, the legal fictions underlying the statutory presumptions of paternity or maternity can be used as the first step in establishing the legal fiction that a non-biological parent is to be treated in law as the biological parent, i.e., bears the rights and duties attendant to a legally binding relationship created before any court's adjudication. *See Frazier*, 296 Kan. at 745-46, 295 P.3d 542" (internal quotation omitted). (*Matter of M.F. by and through K.L.*, 312 Kan. 322, 324, at 339 475 P.3d 642 (2020)

C.L.'s assertion of a presumption based on this legal fiction fails for several reasons. It is undisputed that C.L. was not present when the children were born.

In fact, she did not marry the biological mother until after the *Petition for Determination of Parentage* was filed by M.S. (Vol. 15, p. 206). The timing issue was discussed *In re E.A.* In that case, a child had resided with his paternal grandfather since he was seven months old. A paternity action was funded by the grandfather to establish his son as the child's legal parent when the child was very young. Seven years later, while disputing an adoption petition filed by the paternal grandmother, grandfather filed an action asking to be declared the legal parent of his grandson based on his "notoriously or in writing" acknowledgement of parentage; however, the Court of Appeals did not support that position:

> On closer inspection, Grandfather's argument fails under the ruling in *In re Parentage of M.F.*, 312 Kan. 322, 352, 475 P.3d 642 (2020), in which our Supreme Court added a timing element to the "notoriously or in writing" recognition of paternity presumption. Neither party acknowledges this recent case.
>
> *In re M.F.* involved a woman attempting to establish a presumption of maternity of a child conceived through artificial insemination under K.S.A. 2019 Supp. 23-2208(a)(4) after she split with the child's birth mother. Our Supreme Court held that the presumption stated in K.S.A. 2019 Supp. 23-2208(a)(4) does not allow a person to "unilaterally pursue parenthood." 312 Kan. at 351. The court recognized the parental preference doctrine and held the birth mother must have consented, implicitly or explicitly, to share parenting with the person claiming the presumption. The court further held that the timing of the acknowledgment of the paternity/maternity was "critical." **The court designated the time of the child's birth as when the birth mother must have consented to a shared parenting arrangement, and the person claiming the presumption must have notoriously recognized paternity/maternity of the child**. 312 Kan. at 351-53.

> When Grandfather became E.A.'s father in every meaningful way for the child, E.A. was at least seven months old when that arrangement began. Grandfather alleged, "On August 2013, at seven months of age, the natural parents of EJA became unable and/or unwilling to care for EJA." That is when Grandfather "took physical custody of EJA and agreed to integrate him into his family to raise him as his own."
>
> But that was too late under the ruling in *In re M.F.* Moreover, in September 2013, Grandfather did not claim that E.A. was his own child. Rather, Grandfather "caused and funded" a court action so that C.A. would be legally named E.A.'s father. Later on, Grandfather and C.A. entered into written agreements pertaining to E.A.'s custody and C.A. told Grandfather that E.A. was Grandfather's son. But, at that point, Grandfather could not be E.A.'s legal parent without filing an adoption petition in a court-which he could have done but did not. *In re E.A.* (Kan. App. 2022)

Similar to the grandfather *In re E.A.*, C.L. cannot meet the "at birth" requirements of *Matter of M.F.* C.L. testified that she started dating E.L. in January of 2017 (Vol. 15, p. 227), that she first met the boys in February of 2017 (Vol. 15, p. 228) when the children were two years old, that she moved in with E.L. in July of 2017 when the children were two and half years old, (Vol 15, p. 230), and that she married E.L. in January of 2018 (Vol. 15, p. 206) when the children were three years old. Further, the testimony was clear that the children referred to Chalcea as "Chalcea or ChaCha" and not as mom, mommy, mother, mamma, etc. (Vol. 15, p. 217).

Conversely, M.S. has been with the children since birth. She exercised parenting time while the children and E.L. resided in their joint home, exercised

parenting time following her breakup with E.L. up until the filing of this action, and exercised parenting time per temporary orders up until the finding by the District Court that she was not a parent (May of 2018). (Vol. 15, pgs. 40 – 41, 118-119, 129, Vol. 16, p. 48-49). M.S. paid medical expenses for the children from birth through the filing of the action totaling $8,681.67 (Vol. 15, p. 29, Vol. 17, pgs 36-50), daycare expenses totaling $17,868.93 (Vol. 15, pgs. 31-32, Vol. 15, p. 166-168, Vol. 15, p. 177, Vol. 17, pgs 51-70), and various other expenses totaling $2,863.50 (Vol. 15, pgs. 46-47, Vol. 16, p. 61, Vol. 17, pgs 71-74).

If C.L. was permitted to create a presumption of parentage five years after the birth of the children by arguing that she has created a relationship with the children– during a time period that M.S. was unable to exercise parenting time as a result of the District Court's incorrect ruling - that places M.S. in the untenable position of having to "win" a claim of parentage against a party (C.L.) that was afforded the luxury of residing in the same residence as the minor children during the appeal years. C.L. should not reap a reward of parentage while M.S. is punished because the appellate process took three years to complete. Holding so would be manifestly unfair and against the interests of justice.

Conclusion:

The evidence is undisputed. M.S. established by a preponderance of the evidence that she "notoriously and in writing" recognized parentage of the children. When given the chance to assert a claim of parentage in the parentage action, C.L. failed to act. There are no competing presumptions of parentage for these children. At birth through the District Court's erroneous ruling, only M.S. and E.L. were the parents of these children. From the entry of the *Order of Parentage* onward only M.S. and E.L. have stood in the role as parents. There exists only one presumption of parentage at the time of the children's birth, and that presumption is with M.S.; as such, the district court's ruling should be affirmed.

SUBMITTED BY:

/s/ Valerie L. Moore
VALERIE L. MOORE
Sup. Ct. I.D. #19849
15700 College Boulevard, Suite 102
Lenexa, Kansas 66219
valerie@vintonmoorelaw.com
913.317.8999 (tel.) 913.327.8492 (fax)
Attorney for Appellee M.S.

JOINING IN THE BRIEF:

/s/ Sara S. Beezley
SARA S. BEEZLEY
Sup. Ct. I.D. #10267
126 S. Ozark – Box 352
Girard, Kansas 66743
beezleylaw1@ckt.net
620.724.4111 (tel.) 620.724.6411 (fax)
Attorney for Appellee E.L.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Extension to File Brief 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 8th day of March, 2023.

/s/ Valerie L. Moore
Valerie L. Moore #19849