NOT DESIGNATED FOR PUBLICATION

No. 125,595

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Parentage of A.S.

MEMORANDUM OPINION

Appeal from Douglas District Court; SALLY D. POKORNY, judge. Opinion filed July 14, 2023. Reversed and remanded with directions.

Pantaleon Florez, Jr., of Topeka, for appellant O.G.

No brief filed by appellee M.G.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ.

PER CURIAM: This case comes to us at the behest of the biological father to analyze the propriety of the paternity hearing conducted by the district court to determine the interests of two presumptive fathers. One enjoys a presumption as a simple matter of biology while the other arises by virtue of father's marriage to mother. The child resides with the matrimonial father, but his older sister has filled the role of primary caregiver. Even so, biological father has maintained a relationship with the child since he was born. The district court determined it was not in the child's best interest to designate paternity with the biological father because the child lived with his mother's husband from an early age and understood that man to be his father. The issue we are tasked with resolving is whether the district court's abrupt termination of the hearing and refusal to accept other evidence was erroneous. A thorough review of the claim alongside the record leads us to conclude that error occurred, and reversal is needed to afford the biological father a full hearing to fairly litigate his interests. We further find that the court erred in finding that

O.G.'s motion to alter or amend was "frivolous" and of the sort that required him to pay attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

Mother entered into a relationship with O.G. while her husband, M.G., was working out of state. The two eventually moved in together and in 2013 they welcomed a child whom they named after O.G.'s father but graced with Mother's last name. While it is undisputed that O.G. is the child's biological father, the line for the father's name was left blank on the child's birth certificate. The couple remained together and shared caretaking responsibilities of the child for two years.

M.G. and Mother reconciled when he eventually returned to Kansas. The child then resided with Mother, M.G., and four siblings. In the years that followed he was raised believing that O.G. was his uncle and M.G. was his father. O.G. maintained contact with the child up to three times a week and each year celebrated the child's birthday alongside the entire family.

Mother succumbed to cancer in late 2019 which prompted O.G. to pursue more frequent visits with the child, but the family gradually denied him that access. The following year, the child's adult sister petitioned for and received guardianship over him with M.G. appointed as his standby guardian. Truly, this designation merely formalized the living arrangement the child already enjoyed as his sister had filled the role of his primary caregiver from the time Mother and M.G reunited.

In January 2021, O.G. filed this petition to establish paternity. A guardian ad litem (GAL) appointed to represent the child conducted interviews with him, the older sister-guardian, O.G. and M.G. O.G. advised the GAL that he wanted to be the child's guardian and raise him, but it was not his desire to take him away from M.G. He simply wanted

the child to know that he was his father. M.G. told the GAL that he viewed the child as his own and always financially supported the child whereas O.G. did not.

Sister advised the GAL that she permitted O.G. to continue to visit the child after Mother passed, but that O.G.'s decision to inform the child of his parentage during the child's birthday party caused her concern because it was so confusing and upsetting to the child. She also relayed an additional, equally frightening incident for the child, where O.G. told the child that he should live with O.G.

The GAL described the child's response when she asked him about O.G.:

> "[He] became tearful and told the GAL that his Tio [Uncle] scares him and he doesn't want to see him. He said that Tio told him that he would take him away, and that he doesn't want to leave [Sister] and his dad. He brought up the birthday party and said that [O.G.] lied and said that his dad wasn't his dad that it upset him."

The GAL stated that it was not in the child's best interest to establish paternity with O.G. because the child was largely raised in a household with M.G. and viewed M.G. as his father. The GAL acknowledged O.G.'s presence in the child's life but highlighted the role he fulfilled was that of an uncle, not a father.

O.G. testified during the hearing and explained that he simply wanted to have his son gradually embrace him as his biological father and understand that O.G. could be counted on to support the child in that capacity. During cross-examination, O.G. clarified that he had no interest in immediately disrupting the child's living situation and recognized that would be troublesome for the child.

At that point, the Sister's attorney requested that paternity be established with M.G. because O.G.'s request to disclose his biological status, yet also inform the child he would remain in his current home, was too confusing for an eight-year-old to process.

O.G.'s attorney responded that the court had the authority to order a gradual transition. The trial court stated there was "no such thing as a gradual transition" in this case because the Mother was deceased and the court could not order third party placement.

At that point the court terminated the trial without receiving any other evidence and remarked that O.G.'s proposal was "unworkable." It found there was no factual dispute "other than the best interest of the child," adopted the facts presented in the GAL's report, and determined it was in the child's best interest to declare M.G. the legal father and enable him to remain with the family he knew.

O.G. moved to alter or amend the judgment contending the court failed to conduct a full evidentiary hearing as required by K.S.A. 2022 Supp. 23-2208, *In re Marriage of Ross*, 245 Kan. 591, 601-02, 783 P.2d 331 (1989), and due process. As a result, he was denied the opportunity to present evidence concerning M.G.'s lack of interest or involvement in the child's life as illustrated by the fact the child's sister was the primary caregiver and guardian. The sister responded that evidence was presented concerning the active role M.G. played in caretaking responsibilities and the close bond he shared with the child. O.G. directed the district court back to the report filed by the GAL which he asserted reflected the contrary to be true.

The trial court granted a hearing on the motion and O.G.'s counsel explained he wanted the chance to conduct redirect with O.G. and elicit details related to his plan to share the child with M.G. in a manner reminiscent of stepparenting. Counsel also informed the court he would like the opportunity to present evidence about M.G.'s lack of involvement in the child's life and the frequency of O.G.'s visits with the child, as well as to clarify the incident where O.G. told the child he was his father.

The trial court denied the motion and stated there was "no evidence that would change my mind." It reiterated that shifting paternity from the matrimonial father to the biological father would be detrimental to the emotional well-being of the child. The court then ordered O.G. to pay the attorney fees incurred from the filing of what it considered to be a "frivolous and vexatious" motion.

O.G. timely brings this matter to us for an analysis of what, if any, error occurred through the manner in which the court concluded the paternity hearing.

LEGAL ANALYSIS

The trial court properly interpreted and applied K.S.A. 2022 Supp. 23-2208 when it found two conflicting presumptions were present and that resolution of the paternity issue required an assessment of the child's best interests under subsection (c) of that provision.

O.G. contends that M.G.'s presumption of paternity was overcome by clear and convincing evidence—the acknowledgment from all parties that O.G. was the biological father. Therefore, the trial court should have allowed O.G. to establish the existence of a father and child relationship under K.S.A. 2022 Supp. 23-2208(b), rather than jumping to K.S.A. 2022 Supp. 23-2208(c).

Resolution of this issue requires an analysis of K.S.A. 2022 Supp. 23-2205 and 23-2208. Statutory interpretation presents a question of law over which appellate courts have unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

Under the Kansas Parentage Act, K.S.A. 2022 Supp. 23-2201 et seq., the phrase "'parent and child relationship' means the legal relationship existing between a child and the child's biological or adoptive parents." K.S.A. 2022 Supp. 23-2205. Kansas recognizes certain "legal fictions" of biological parentage enumerated in the statute. See

In re Parentage of M.F., 312 Kan. 322, 339-40, 475 P.3d 642 (2020). K.S.A. 2022 Supp. 23-2208(a) lists several presumptions of paternity to aid in the assessment of a parent and child relationship. A man is presumed to be the child's father if:

> "(1) The man and the child's mother are, or have been, married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death or by the filing of a journal entry of a decree of annulment or divorce.
>
> "(2) Before the child's birth, the man and the child's mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is void or voidable and:
>
> > "(A) If the attempted marriage is voidable, the child is born during the attempted marriage or within 300 days after its termination by death or by the filing of a journal entry of a decree of annulment or divorce; or
> >
> > "(B) if the attempted marriage is void, the child is born within 300 days after the termination of cohabitation.
>
> "(3) After the child's birth, the man and the child's mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is void or voidable 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.

> "(4) The man notoriously or in writing recognizes paternity of the child, including but not limited to a voluntary acknowledgment made in accordance with K.S.A. 2022 Supp. 23-2223 or K.S.A. 65-2409a, and amendments thereto.
> "(5) Genetic test results indicate a probability of 97% or greater that the man is the father of the child.
>
> "(6) The man has a duty to support the child under an order of support regardless of whether the man has ever been married to the child's mother." K.S.A. 2022 Supp. 23-2208(a).

The presumptions are rebuttable and the burden toggles back-and-forth between the party seeking recognition of parentage and the party disputing its existence:

> "(b) A presumption under this section may be rebutted only by clear and convincing evidence, by a court decree establishing paternity of the child by another man or as provided in subsection (c). If a presumption is rebutted, the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence." K.S.A. 2022 Supp. 23-2208.

When, as here, presumptions of paternity arise in more than one individual, the trial court must determine the weightier presumption, which includes consideration of what is in the child's best interests:

> "(c) If two or more presumptions under this section arise which conflict with each other, the presumption which *on the facts* is founded on the weightier considerations of policy and logic, *including the best interests of the child*, shall control." (Emphasis added.) K.S.A. 2022 Supp. 23-2208.

O.G.'s argument reflects a somewhat flawed understanding of the provision. A party seeking to establish parentage by using a presumption in K.S.A. 2022 Supp. 23-2208(a) bears the initial burden to demonstrate the existence of the relevant presumption. Under subsection (b), if a party succeeds with that endeavor, the burden shifts to the party

opposed to establishment of the relationship to rebut the presumption by clear and convincing evidence, by court decree establishing paternity or maternity of someone other than the presumed parent, or under K.S.A. 2022 Supp. 23-2208(c). If a presumption is rebutted, the burden shifts back to the party seeking establishment of the parent and child relationship, who must go forward with the evidence. See *In re M.F.*, 312 Kan. at 341.

Both O.G. and M.G. demonstrated an initial presumption of paternity. The presumption applicable to O.G. is that described under subsection (a)(5) because all parties conceded that he was the biological father. We do note this collective assertion was never formally established through any measure of genetic testing. M.G. falls under the presumption set out at (a)(1) because he was married to Mother when the child was born.

This is not a case in which either party successfully rebutted the other's presumption with clear and convincing evidence or by a court decree establishing paternity. For example, O.G. did not put forth any evidence that the marriage between Mother and M.G. was invalid in some way when the child was born, nor was there evidence which cast doubt on the fact that O.G. was the child's biological father. See *In re Parentage of R.R.*, No. 123,833, 2022 WL 7813894, at *4 (Kan. App. 2022) (unpublished opinion), *rev. granted* January 29, 2023.

Even if only implicitly, Kansas courts have long held that simple biology, cannot by itself rebut the presumption that a man is the father of a child born during his marriage to the mother. For example, in *In re Marriage of Ross*, 245 Kan. at 601-02, the court held that when there is a presumed father to a child born into a marriage, the district court should consider the best interests of the child before ordering a genetic test that may reveal someone else is the child's biological father. "The shifting of paternity from the presumed father to the biological father could easily be detrimental to the emotional and

physical well-being of any child." 245 Kan. at 602. At the time *Ross* was issued, the statute did not contain either the presumption based on genetic test results or subsection (c)'s treatment of competing presumptions. The provision was not amended to take on its current form, in that regard, until several years later. See L. 1994 ch. 292 § 5.

Later, in a similar case, this court commented, "If DNA evidence is conclusive on the issue of paternity, we could simply do away with the judicial process in paternity cases. . . . We do not perceive the law to require or to recommend that result, and we hold the DNA evidence is not conclusive on the issue of paternity." *Ferguson v. Winston*, 27 Kan. App. 2d 34, 38, 996 P.2d 841 (2000). *Greer v. Greer*, 50 Kan. App. 2d 180, 324 P.3d 310 (2014), is also instructive. In that case, when faced with competing presumptions of biology and legitimacy established before the paternity action was filed, this court directed the district court to weigh the two competing presumptions under K.S.A. 2013 Supp. 23-2208(c). 50 Kan. App. 2d at 192-93. Finally, not too terribly long ago, our Supreme Court reaffirmed the validity of the "legal fiction" of biological parenthood established in *Ross*. See *In re M.F.*, 312 Kan. at 340 ("biology is not necessarily destiny under the KPA.").

We are satisfied from our analysis that the undisputed fact O.G. was the biological father of the child was not sufficient to rebut M.G.'s presumption of parentage. Thus, the trial court did not err by weighing the competing presumptions under K.S.A. 2022 Supp. 23-2208(c).

The trial court neglected to scrupulously honor O.G.'s right to due process when it terminated the paternity hearing prematurely and declined to receive further evidence.

In his next contention of error, O.G. claims the district court denied him due process when it terminated the paternity hearing before he could call each of his

designated witnesses or even complete his own testimony. He raised this concern in his motion to alter or amend the judgment, but the trial court never addressed the issue.

Whether due process was protected and provided for under specific circumstances raises an issue of law subject to unlimited appellate review. *In re Care & Treatment of Ellison*, 305 Kan. 519, 533 385 P.3d 15 (2016). To establish a violation occurred, O.G. carries the burden to establish that he was "both entitled to and denied a specific procedural protection." *In re P.R.*, 312 Kan. 767, 784, 480 P.3d 778 (2021)

When life, liberty, or property are the interests at stake, procedural due process demands that a party receive notice of a potential dispossession of their interest and a meaningful opportunity to be heard regarding the deprivation. *In re Adoption of A.A.T.*, 287 Kan. 590, 600, 196 P.3d 1180 (2008). A parent has a fundamental liberty interest in the right to make decisions concerning the care, custody, and control of his or her children, but that right is not without limits. *In re P.R.*, 312 Kan. at 778. For example, a natural father's right to raise his child is tempered by the extent to which he has assumed his parental responsibilities. Only when a sufficient level of responsibility is assumed is he entitled to constitutional protection of his parental rights. *In re Adoption of Baby Girl P.*, 291 Kan. 424, 430, 242 P.3d 1168 (2010). The Constitution will not protect his mere biological relationship with the child. *In re Adoption of G.L.V.*, 286 Kan. 1034, 1060, 190 P.3d 245 (2008).

In re Wald, No. 90,242, 2004 WL 235468, at *1 (Kan. App. 2004) (unpublished opinion), presented an issue that was strikingly similar to what is before us. There, as here, the petitioner claimed he was the biological father of a child born while the mother was married to another man, but the district court summarily dismissed his paternity petition. On appeal, the petitioner argued that decision undermined his constitutional right to procedural due process because he was denied the opportunity to present evidence or cross-examine the guardian ad litem. The respondent countered that the

nature of petitioner's relationship with the child did not give rise to a due process right. The panel concluded the record lacked adequate information to illustrate the nature of the relationship, due at least in part to the court's refusal to conduct an evidentiary hearing. Thus, the case was remanded with directions to proceed with a *Ross* hearing. 2004 WL 235468, at *2-4.

O.G. had a constitutionally protected liberty interest that required a meaningful hearing before the court could fairly and properly deny him the right to parent the child. This is not a case in which the natural father lacked any meaningful relationship with the child. To the contrary, O.G. testified he resided with Mother and the child for up to two years after the child was born and he developed a bond with the child as he actively engaged in the full spectrum of caretaking responsibilities throughout those two years. Then, following his separation from Mother, O.G. maintained contact with the child roughly three times a week and continued to celebrate milestones with the child. Accordingly, we find the trial court erred when it abruptly terminated the evidentiary hearing before O.G. had the opportunity to present the full extent of his claim. O.G.'s due process rights were implicated here and like *Wald*, a full evidentiary hearing was required to ensure the matter was properly litigated.

For a similar reason, we agree with O.G.'s assertion that the court abused its discretion when it denied the motion to alter or amend judgment that he pursued in an effort to obtain a rehearing that might ultimately allow him to make a full presentation of the facts, citing K.S.A. 2022 Supp. 60-259(a)(1)(A), (C), (D) and K.S.A. 2022 Supp. 60-260(b)(6) as authority for his request. Again, when faced with competing presumptions of paternity under K.S.A. 2022 Supp. 23-2208(c), the trial court generally must hold a *full* hearing to consider which presumption is "founded on the weightier considerations of policy and logic, including the best interests of the child." See *Jensen v. Runft*, 252 Kan. 76, 78-79, 843 P.2d 191 (1992) (exclusion of expert testimony was error); *Greer v. Greer*, 50 Kan. App. 2d at 181. The best interest's analysis "is incredibly fact-specific and

rarely limited to a narrow number of factors." *Greer*, 50 Kan. App. 2d at 196. A GAL's recommendation concerning the best interests of the child is "is merely one factor the district court must consider when determining the best interest of the child"; it is not determinative of the case. *Guth v. Wagne*r, No. 103,398, 2010 WL 2978091, at *7 (Kan. App. 2010) (unpublished opinion).

Here, the trial court recognized there was a factual dispute over the best interests of the child but did not hear all of the facts. Instead, the trial court stated, "there is no evidence that would change my mind." This was an abuse of discretion as it points to a legally flawed proceeding. Analysis of this component bolsters our conclusion that reversal is required.

The trial court abused its discretion in awarding attorney fees to M.G.

Finally, O.G. contends the trial court's award of attorney fees was not supported by the required findings and was based on an incorrect legal standard. We share this conclusion.

The issue of the district court's authority to award attorney fees is a question of law over which appellate review is unlimited. *In re Estate of Oroke*, 310 Kan. 305, 317, 445 P.3d 742 (2019). Where the district court has authority to grant attorney fees, the amount awarded is reviewed under the abuse of discretion standard. *Schmidt v. Trademark, Inc.*, 315 Kan. 196, 208, 506 P.3d 267 (2022).

The court ordered O.G. to pay the attorney fees incurred from his filing of the motion to alter or amend. As noted above the motion had merit and does not meet the "frivolous" or "vexatious" classification assigned to it by the district court.

Reversed and remanded with directions to conduct an evidentiary hearing consistent with the findings of this opinion.