IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TEN

STATE OF KANSAS, EX REL., SECRETARY DEPARTMENT FOR CHILDREN AND FAMILIES, Petitioner, J.L.S. AND M.L.B.S. BY AND THROUGH HER NEXT FRIEND J.L.S., Necessary Third Party, vs. W.M., Respondent and A.B., Intervenor/Third Party Defendant	)	Case No. 2007-DM-568

MEMORANDUM DECISION AND ORDER

The above captioned matter comes before the Court following a *Ross* Hearing held in this matter on November 18, 2014 and subsequent briefing by the parties on the issue of which of two competing presumptions of parenthood should control. Specifically before the Court are the Petitioner's Memorandum on the Superior Presumptive Parent Pursuant to the Kansas Parentage Act, filed October 2, 2015 ("Petitioner's Memorandum"); A.B.'s Arguments to Show that the Weight of the Presumptions and Best Interests of the Child Demand that the Court Preserve Her Status as Parent, filed November 15, 2015; the Guardian ad Litem's Response to Petitioner's Memorandum, filed on November 16, 2015; W.M's Response, filed on November 16, 2015; the Petitioner's Rebuttal, filed on November 30, 2015; A.B.'s Surrebuttal, filed on December 15, 2015; and W.M.'s Surrebuttal, filed December 15, 2015.

The Court deems the matter fully briefed and argued and, thus, ripe for ruling. After careful consideration, the Court finds and concludes as follows:

NATURE OF THE CASE

Fundamentally, this case asks the Court to decide who, of two possible individuals, should be deemed to be the parent of M.L.B.S., a minor child, in the eyes of the law. One of the individuals, W.M., is the biological father of the child. The evidence demonstrates that he intended to act as a sperm donor, although not necessarily an anonymous sperm donor. The other person, A.B., was the partner of the child's biological mother, J.L.S., from about 2002 to 2010. In 2008, A.B. and J.L.S.—both women—decided that they wanted to have a child of their own. Inexplicably, they neither consulted a lawyer nor utilized the services of a physician or medical clinic. Rather, A.B. and J.L.S. placed advertisements on the "Craigslist" website seeking a sperm donor in 2009; using sperm provided by W.M., J.L.S. became pregnant and, ultimately, gave birth to M.L.B.S. in December of 2009. Subsequently, J.L.S. applied for, and received, benefits with the Department of Children and Families ("DCF").

This case originated from the State's efforts to collect the cash value of the benefits paid on behalf of M.L.B.S, by having W.M. named as M.L.B.S.'s parent, pursuant to the Kansas Parentage Act, K.S.A. 23-2201 *et seq.* ("KPA"), and holding W.M. responsible to pay $1,625.92, in addition to ongoing child support. The brief of the minor child's Guardian ad Litem ("GAL"), the brief of W.M., and the joint brief of A.B. and J.L.S. all reflect a desire to have A.B., not W.M., deemed the parent of M.L.B.S.

The Court held a hearing pursuant to *Matter of Marriage of Ross*, 245 Kan. 591, 783 P.2d 331 (1989) ("the *Ross* Hearing") on November 18, 2014 and, thereafter, found that it was in the best interest of M.L.B.S. to order genetic testing. The Court issued this ruling in a Memorandum

Decision and Order filed April 24, 2015. Genetic testing showed a 99.99% probability that W.M. was M.L.B.S.'s biological father. The parties subsequently submitted briefing, as identified above, as to which, of two competing presumptive parents, should be determined to be M.L.B.S.'s parent as a matter of law. The case is now ready for ruling.

STATEMENT OF UNCONTROVERTED FACTS

1. From about 2002 to about 2010, J.L.S. and A.B. were engaged in a romantic relationship together.
2. Both A.B. and J.L.S. are women.
3. A.B. and J.L.S. were never married. They are now separated.
4. In 2008, A.B. and J.L.S. decided to have a child of their own. In order to obtain sperm to enable the creation of the child—which J.L.S. would carry—A.B. placed advertisements on the Craigslist website, seeking a sperm donor, in 2009
5. W.M. responded to the advertisement, and met with A.B. and J.L.S. to discuss the use of his sperm to artificially inseminate J.L.S.
6. Using sperm provided by W.M., J.L.S. became pregnant and, ultimately, gave birth to M.L.B.S. in December of 2009.
7. No one provided W.M.'s semen to a licensed physician. J.L.S. and A.B. artificially inseminated J.L.S., using W.M.'s semen, without the aid of a medical provider.
8. Subsequently, J.L.S. applied for, and received, benefits with DCF.
9. A.B. and W.M. communicated, via email, at several times during J.L.S.'s pregnancy, for the purpose of providing updates to W.M.
10. W.M. visited M.L.B.S. shortly after her birth, while she was still in the hospital.

11. W.M. also saw M.L.B.S. in June of 2012, while she and J.L.S. were at a carnival. Afterwards, A.B. sent W.M. an email on June 2, 2012, stating:

> We welcome anytime a chance to share [M.L.B.S.] with you and Kim. Children can never have enough love in their lives. I Also waned [sic] to ask if it would be possible to get a copy of the pictures you took while visiting [M.L.B.S.] the day of her birth of the three or [sic] you. Jen and I would like to have it for [M.L.B.S.]'s baby book.

In response, W.M. sent an email, on June 7, 2012, which stated, in part:

> [Y]es I will see that we have pictures from the hospital and the other day at the carnival [I] would like to see more of [M.L.B.S.] when we set up time. . . .

12. A.B. is unable to work. However, A.B. receives social security disability insurance benefits.

13. A.B., along with J.L.S., has acted as the parent of M.L.B.S. for the entirety of the child's life, up to this point.

14. M.L.B.S. believes that A.B. is her parent.

15. A.B. wishes to continue her parent-child relationship with M.L.B.S.

16. A.B. and J.L.S. have filed a parenting plan with this Court and have affirmed that they follow the plan and will continue to do so.

17. A.B. and J.L.S. remain good friends and, according to testimony offered by A.B. at the *Ross* Hearing, speak daily about the child.

18. W.M. has seen M.L.B.S. two times in the child's life. He has no other relationship with M.L.B.S.

19. W.M. has stated that he does not want a relationship with M.L.B.S. and that he *will* not want one if he is, ultimately, deemed to be M.L.B.S.'s parent as a matter of law.

20. W.M. did not intend to be involved with M.L.B.S.'s life, although he had no objection with the child eventually contacting him, should she choose to do so at some point in the future.

21. W.M. never offered to financially support the child or to take any sort of role in the child's life.

22. M.L.B.S. does not know, at this point, about W.M.'s role in her creation.

23. M.L.B.S. has sibling relationships with four other children under A.B.'s sole care and with another child, Maddie, who has a legal relationship with both A.B. and J.L.S.—specifically, A.B. is Maddie's guardian and J.L.S. has adopted Maddie.

24. W.M. has no children.

25. W.M. has no relationship with any of the children with whom M.L.B.S. has a sibling relationship.

26. Genetic testing has demonstrated that there is a 99.99% probability that W.M. is M.L.B.S.'s biological father.

CONCLUSIONS OF LAW

K.S.A. 23-2208 provides the basic starting point for this inquiry:

> (a) A man is presumed to be the father of a child 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. 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.

(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.

(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.

(d) Full faith and credit shall be given to a determination of paternity made

> by any other state or jurisdiction, whether the determination is established by judicial or administrative process or by voluntary acknowledgment. As used in this section, "full faith and credit" means that the determination of paternity shall have the same conclusive effect and obligatory force in this state as it has in the state or jurisdiction where made.
>
> (e) If a presumption arises under this section, the presumption shall be sufficient basis for entry of an order requiring the man to support the child without further paternity proceedings.
>
> (f) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.

Emphasis added. Because the KPA is "gender-neutral, so as to permit both parents to be of the same sex," the use of the terms "man" and "father" in K.S.A. 23-2208 do not render the provisions of that section inapplicable to A.B. *Cf. Frazier v. Goudschaal*, 296 Kan. 730, 755, 295 P.3d 542 (2013).

Under the facts of the case, A.B. fits the presumption of K.S.A. 23-2208(a)(4), while W.M. fits the presumption of K.S.A. 23-2208(a)(5). Because these two presumptions conflict, this Court must evaluate "the weightier considerations of policy and logic, including the best interests of the child" as required by K.S.A. 23-2208(c). In doing so, the Court looks to *Greer ex rel. Farbo v. Greer*, 50 Kan. App. 2d 180, 324 P.3d 310 (2014) for guidance.

In *Greer*, the Kansas Court of Appeals evaluated the competing presumptions set forth in K.S.A. 23-2208(a)(1) ("legitimacy") and 23-2208(a)(5) (genetic"). 50 Kan. App. 2d at 191. The case was one of first impression on this issue, and the court, without setting forth an explicit test on the issue of "the weightier considerations of policy and logic," pointed that *other* states' courts have declined to expressly set forth a conclusive test on the issue, either:

> A few courts around the country have tried to parse the considerations of policy and logic language. The Wyoming Supreme Court noted that this

> language is not only limited to legal policy but "clearly implies that a court should consider the broader sociological and psychological ramifications of its decision as to which man should be adjudicated the legal father." See *GDK v. State, Dept. of Family Services*, 92 P.3d 834, 839 (Wyo.2004). The Minnesota Court of Appeals observed that the statutory language embraces "the policy of not unnecessarily impairing blood relationships" and requires that the outcome be "logically based on the facts." *In re Paternity of B.J.H.*, 573 N.W.2d 99, 103 (Minn.App.1998). Appropriately, the policy and logic portion of the inquiry appears in part to be heavily based on a state's individual caselaw and policy. See *Ex parte C.A.P.*, 683 So.2d 1010, 1011–12 (Ala.1996) (weighing presumptions by relying heavily on Alabama precedent).

Greer, 50 Kan. App. 2d at 193. Noting that the Kansas Supreme Court has recognized both biological parentage and "marriage to the child's mother" to be a "weighty factors," the court nonetheless went on to observe that:

> In the case of a paternity action, if both presumptions were disregarded, the child would be left without a presumptive father at all, defeating the entire purpose of the KPA. Accordingly, the judge in a paternity action must make the difficult choice while always including the overarching consideration of the best interests of the child in the equation.

Greer, 50 Kan. App. 2d at 194–95.

In applying the "best interests of the child" analysis, the *Greer* court went on to discuss "approximately 10 factors" that, while nonexclusive, have been "distilled" by the courts over the years:

> (1) whether the child thinks the presumed father is his or her father and has a relationship with him; (2) the nature of the relationship between the presumed father and child and whether the presumed father wants to continue to provide a father-child relationship; (3) the nature of the relationship between the alleged father and the child and whether the alleged father wants to establish a relationship and provide for the child's needs; (4) the possible emotional impact of establishing biological paternity; (5) whether a negative result regarding paternity in the presumed father would leave the child without a legal father; (6) the nature of the mother's relationships with the presumed and alleged fathers; (7) the motives of the party raising the paternity action; (8) the harm to the child, or medical need in identifying the biological father; (9) the relationship

> between the child and any siblings from either the presumed or alleged father; and (10) whether there have been previous opportunities to raise the issue of paternity.

Greer, 50 Kan. App. 2d at 195. The court pointed out that "a best interests analysis is incredibly fact-specific and rarely limited to a narrow number of factors" and that, "Accordingly, it is clear that courts weighing two or more conflicting presumptions may consider a wide array of nonexclusive factors when deciding which presumption serves the child's best interests." *Greer*, 50 Kan. App. 2d at 196.

The evidence presented by the parties showed that A.B. is unable to work and subsists on Social Security Disability income. The State focuses on this financial concern. The State's position, however, is not necessarily consistent with the best interests of the child. W.M. has no relationship with the child; he has seen her twice in her life, and, however receptive he may have been to *eventually* meeting her later in life, the evidence is clear that he intended to act solely as a sperm donor to facilitate A.B. and J.L.S.'s creation of a child – albeit without taking the proper legal steps to bring him under the safe harbor provision of K.S.A. 23-2208(f).

Considering the ten criteria enunciated in *Greer* in relation to the best interests of the child, the Court concludes as follows:

(1) The child believes A.B. to be her parent and the uncontroverted evidence shows that she has a relationship with A.B. Conversely, she does not know W.M. and has no relationship with him.

(2) A.B. wishes to continue her relationship with the child, while W.M. does not wish to have a future relationship with the child.

(3) W.M., has never intended to support the child, either financially or emotionally.

(4) The evidence demonstrates that the parties intended to inform M.L.B.S. of the identity

of her biological father, but not until she was mature enough to understand and appreciate the circumstances that ultimately led to her birth. The parties did not believe this eventual revelation would cause M.L.B.S. any harm, but that such disclosure should not take place until the child was older. The Guardian ad Litem's Response outlines that "It is the opinion of everyone I have interviewed that to inform the child, at this point in her development, that she was conceived by artificial insemination and that she has a biological father who is not part of her life would be unwise and could only lead to confusion and possible more negative side effects." Guardian ad Litem's Response, at 8.

(5) A negative result regarding W.M. might leave M.L.B.S. without a financially solvent parent, but it would not leave M.L.B.S. without a legal parent.

(6) J.L.S. has no relationship with W.M., other than the few contacts they have had over the years. A.B., in contrast, had a relationship with J.L.S. for a number of years and continues to be on good terms with J.L.S. for the purposes of raising the child who calls them both mother.

(7) The Court finds no improper motive in raising this paternity action.

(8) The opinion of the child's caregivers is that the child at this time is not ready to learn the identity of the biological father. The Court credits these opinions.

(9) Because W.M. has no children, M.L.B.S. has no sibling relationships to be gained from a declaration that he is her parent. Conversely, the evidence shows that M.L.B.S. has sibling relationships on A.B.'s side of the family.

(10) It is not clear to the Court whether there have been previous opportunities to raise the issue of paternity. This factor therefore has little weight, if any, in the Court's analysis.

In light of the above analysis and the facts of the case set forth above, the Court finds that A.B.'s presumption of parenthood is superior to W.M.'s presumption.

CONCLUSION

For the reasons stated above, the Court finds and concludes that, while W.M. and A.B. have competing presumptions of parenthood in regard to the minor child M.L.B.S., the evidence demonstrates that "the weightier considerations of policy and logic" fall in favor of the Court's finding that A.B. is the parent of M.L.B.S. Thus, the State's Petition is DENIED.

The Court further enters an order, pursuant to K.S.A. 23-2208, declaring that A.B. is the parent of M.L.B.S. and is, accordingly, obligated by law to provide for the support of the child.

This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

Dated this 22nd day of November, 2016.

Hon. Mary E. Mattivi
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by first class mail, postage prepaid, on November 22, 2016.

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