Family Law in Kansas Update

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FAMILY LAW UPDATE: ATTORNEYS, PARENTAGE, AND MISCELLANEOUS

by

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for
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I. Attorneys and Family Law

A. Adoption

1. Consent of unwed fathers

K.S.A. 59-2136(h)(1)(D) provides reasons to dispense with a parent's consent to adoption. The mother gave birth claiming she did not know she was pregnant. Unwed father certainly did not know. When notified for consent, he immediately filed a paternity action in Shawnee County. The attorney for adoptive parents, Kenney, filed for adoption in Wyandotte claiming the father's rights could be terminated because the father had not assumed the duties of a parent. After two years of litigation, the Kansas Supreme Court reversed the adoption and ordered that father was entitled to his child. To use failure to support, the father must know there is a pregnancy. *In re Adoption of C.L.*, 308 Kan. 1268, 427 P.3d 951 (2018).

2. Termination of parental rights

The baby was born on September 19, 2018. After the mother consented to the adoption and relinquished the child, the adoptive parents filed to terminate the mother and two possible fathers' parental rights. The natural father argued that he supported the mother during her last six months of pregnancy but the evidence showed otherwise and father suffered from drug addiction. The court of appeals affirmed the district court's termination of his rights. The Kansas Supreme Court found that father failed to preserve the issue of the constitutionality of K.S.A. 59-2136(h)(1)(D) for appeal. The evidence showed the father failed to provide adequate support to the mother six months before birth and the

court affirmed termination. *In re Adoption of Baby Girl G.,* 311 Kan. 798, 466 P.3d 1207 (2020).

3. A Verified Petition Must Be True

Kenney, the attorney in *C.L. supra*, was disbarred for false allegations under oath. *In re* Kenney, 313 Kan. 785, 490 P.3d 1194 (2021). The 28 page opinion includes this language:

> The respondent's admitted pattern of conduct in these cases is egregious. He knowingly made false statements to a court with the intent to circumvent a father's constitutional rights to parent his own child and to obtain a fraudulent termination of that father's parental rights. In so doing, he "won" adoptions of the children for his clients which a significant time later had to be overturned due to the respondent's fraud. In effect, respondent used the legal process to traffic children. It is not hyperbole to put the matter this starkly, and we can think of no breach of trust more significant or damaging than this. Our legal system depends on the highest standards of professionalism, integrity, truthfulness, and trustworthiness of our lawyers. Without this, we cannot be said to have a system of law, only a corrupt game of power and manipulation with a façade of lawfulness. A lawyer cannot come back from a breach of trust so grave. The confidence of the public and the sanctity of the rule of law can only be protected and preserved by meting out the most serious sanction available to us— disbarment. Disbarment is the appropriate sanction when "a lawyer, with the intent to deceive the court, makes a false statement . . . and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." ABA Standards for Imposing Lawyer Sanctions, § 6.11 (1992).
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> The harm respondent caused can hardly be understated—to his own clients (who were forced to suffer the heartbreaking judicial reversal of the adoptions of their children); to the fathers (who lost years of crucial parenting time with their children); to the children (who doubtless will suffer early childhood trauma which may reverberate through their lives); and to the people of Kansas whose confidence in our legal system's ability to arrive at just and

suitable resolutions to such disputes is seriously undermined by such misconduct.

B. What is a Reasonable Fee?

A father's refusal to pay his share of uninsured medical expenses and the resulting litigation also involved an appeal. The court found that since the district court had authority to grant attorney fees, it had the authority to award attorney fees for services on appeal. The mother's motion for fees specified that her attorney (Joe Booth) and his paralegal spent 42.1 hours working on the appeal. The attorney billed at an hourly rate of $400 and the paralegal billed at an hourly rate of $150. *The motion was appropriately itemized and documented*. * * * the equities related to the "the nature of the issues before this court" weighed in favor of awarding the mother appellate attorney fees because of the father's failure to reimburse her for his share of the children's reasonable and necessary, but uninsured, medical expenses. The court noted that "*rather than accept the district court's ruling and expeditiously reimburse Kathryn as ordered, which would have been in the best interests of both parties, he prolonged the litigation by taking this appeal."* Based on the court's decision that the father failed to properly reimburse mother for his share of the uninsured medical expenses, justice and equity compel us to conclude that he was responsible for the costs incurred by Kathryn in defending the appeal. *In re* Marriage of Lask, No. 122,147, 2020 WL 5849366 (Kan. Ct. App. Oct. 02, 2020) (unpublished). The court evaluated the reasonableness of the fee by looking at the factors in the Kansas Model Rules of Conduct 1.5(a):

a. *The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly* Appellate counsel was hired based on his experience as an appellate attorney practicing solely in the area of family law. Appellate counsel was not the attorney who tried the matter before the district court. This meant appellate counsel was required at the outset to spend time reviewing the record, briefs, and motions filed with the district court. After getting up to speed with the case, appellate counsel's billing records reflect that he reviewed father's 38-page brief, conducted research, drafted mother's 35-page response brief, reviewed father's 14-page reply brief, and then prepared for and participated in oral argument.

b. *The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer* Appellate counsel stated his practice is full time, and he regularly must turn away business because of scheduling.

c. *The fee customarily charged in the locality for similar legal services*

Appellate counsel stated his fee is customarily $400 per hour with $150 an hour for his paralegal's time and both are similar to those charged by attorneys focusing on family law issues in the Johnson County Court and nearby areas.

d. *The amount involved and the results obtained*

Father sought to be relieved from a judgment in excess of $96,299.92 as well as some undesignated amount in refund of child support he already paid. Mother was the prevailing party on all claims.

e. *The time limitations imposed by the client or by the circumstances*

The circumstances required appellate counsel to file mothers' brief within 30 days after receiving father's brief. Appellate counsel stated he filed a timely response brief and did not request additional time to do so because a delay would have been costly to his client.

f. *The nature and length of the professional relationship with the client*

Appellate counsel was retained for the appeal and did not represent the mother in proceedings before the district court.

g. ***The experience, reputation, and ability of the attorney performing the services***

Appellate counsel states he has a practice that includes a significant amount of appellate work in Kansas, as well as other jurisdictions, and has focused primarily on family law issues since 1998. Appellate counsel further states that many of the appeals are filed under his name but that he does act as a consultant and assistant in drafting appellate briefs that are filed under the names of other attorneys. Appellate counsel was the liaison between the American Bar Association and the Uniform Law Commission (formerly NCCUSL) to the drafting of the Uniform Interstate Family Support Act (2001 and 2008 versions). Counsel is the co-chair of the ABA Family Law Section Publications Board and sits on the ABA Family Law Section Counsel. He also is a Fellow in the American Academy of Matrimonial Lawyers, a Fellow of the International Academy of Family Lawyers, has served in the past as a judge pro tem for the Johnson County District Court, and teaches family law issues as an Adjunct Professor for Washburn University School of Law.

h. *Whether the fee is fixed or contingent*

Fees were hourly and appellate counsel charged $400 per hour for the time spent on this appeal and $150 an hour for his paralegal's time.

The court evaluated the factors and found the $15,840 requested by former wife for appellate attorney fees was a reasonable sum.

C. Sanctions for Incivility - Inherent Power of Court

Civility has been on the wane in some areas. An interesting unpublished case found a trial court has broad inherent power to fashion remedies and impose sanctions when "reasonably necessary for the administration of justice, provided these powers in no way contravene or are inconsistent with substantive statutory law." Even if the district court lacked authority under K.S.A. 60-211 to sanction for an abusive unfiled paper, the court had inherent authority to do so. The case involved a long-standing contentious child custody dispute. Conciliation and case management had failed. The father and his attorney had exhibited particularly egregious conduct. The father repeatedly filed baseless accusations and derogatory statements against the Washburn Law Clinic, the GAL, a former case manager, the court trustee, and the court's administrative assistant - basically anyone who disagreed with him. The guardian ad litem filed an emergency motion to move the case to CINC court and submitted a report which the attorneys could read. Shawnee County District Court Rule 3.407(4) prohibits attorneys from giving copies of, or allowing them to read, investigative reports in domestic cases. The father's attorney allowed him to read it. The mother filed for sanctions under Rule 3.407 and K.S.A. 60-211. While the court did not find the lawyer in contempt, it did impose a sanction of $2500 as a deterrent to future conduct and a requirement that the lawyer pay for and attend six hours of CLE on civility. The Court of Appeals upheld the sanction. *Mboumi v. Horton*, No. 123,546, 2022 WL 263112 (Kan. App., Jan. 28, 2022).

D. Malicious Prosecution

Client tells lawyer she thinks she is married – long term cohabitation. Lawyer Walker filed a petition for divorce on September 15, 2016, on client Tanking's behalf in Johnson County. The petition alleged the existence of a common-law marriage between Tanking and Budd, requested a dissolution and division of the marital assets, and asserted an alternative claim for equitable division of the assets based upon *Eaton v. Johnston*, 235 Kan. 323, 681 P.2d 606 (1984). Walker testified he believed that if the district court did not find a common-law marriage, it would then follow *Eaton* and equitably divide the jointly owned property. Budd, the male cohabitant. filed in Wyandotte county for declaratory judgment that no marriage existed. Judge agreed. Budd then brought malicious prosecution action

against female cohabitant and her attorney, alleging that female cohabitant's claims in divorce action that there was a common law marriage between the parties were without probable cause and brought with malicious intent. Male and female cohabitants settled their claims, and attorney moved for summary judgment. Court denied. Jury found lawyer guilty and awarded compensatory and punitive damages. The Court of Appeals reversed. The Johnson County court deferred to no marriage decision but did award the female cohabitant a 20% interest in the house and the piano. *Budd v. Walker*, 60 Kan. App. 2d 189, 491 P.3d 1273 (2021).

II. Parentage Issues

1. Kansas Parentage Act is the "oldest" version based on the 1973 Act. K.S.A. 23-2202 et seq.

   K.S.A. 23-2208 includes presumptions of parentage based on the traditional "presumption of legitimacy" based on marriage and attempted/void marriage, notorious recognition, and court order of parentage. Later additions were for genetic testing of 97% and voluntary acknowledgments of parentage. After *Obergefell v. Hodges*, 576 U.S. 644 (2015), same sex married couples have the same presumption of legitimacy. The U.S. Supreme Court required the same-sex spouse's name to be put on the child's birth certificate. *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

2. Unmarried partners and parentage.

   The Kansas Supreme Court found that a woman could bring an action to establish visitation with two children born of artificial insemination during a thirteen year same-sex partnership. The parties had co-parenting contracts and both acted as parents for several years. The Kansas Supreme Court found that the nonbiological partner was a presumed mother under K.S.A. 23-2208(a)(4). *Frazier v. Goudschaal*, 296 Kan. 730, 295 P.3d 542 (2013). The concurring opinion found that a gender neutral reading of the UPA presumptions could come to same result. Biles, J. concurring.

   See also In re Parentage of M.F., 312 Kan. 322, 475 P.3d 642 (2020). Same-sex partners lived together from 2007 to approximately 2014. One became a mother through artificial insemination. After the couple separated, the non biological partner sought a judicial recognition of legal parentage under K.S.A. 23-2208(a)(4). Both the district court and the court of appeals ruled that the partner had no parenting rights because she failed to meet the burden of proof established in *Frazier*. The Supreme Court reversed because the trial court had not applied the correct legal standard. Under *Frazier*, the court must analyze whether the individual became a parent and not whether they are a fit parent. Tests that

measure an individual's parenting abilities are irrelevant. The same-sex partner of a woman who conceives through artificial insemination may establish a legal fiction of biological parentage by asserting the KPA presumption of maternity. A written or oral co-parenting agreement is not required to establish parentage, only proof that an individual "notoriously recognized" parentage and the duties arising from it. The evidence that is permitted to establish parentage through (a)(4) includes "evidence material and probative of it." A written parenting agreement is not essential. The biological mother must have "implicitly or explicitly consented to share parenting duties with the partner. On remand, the court should consider the party's intentions at the time of the child's birth because this is the "crystallization" which "configures the family."

In a companion case, same-sex partners had a serious relationship from 2012 to 2015. Nine months after one partner gave birth to twins, the couple separated, and the other partner filed a parentage petition through K.S.A. 23-2208(a)(4). The District Court had ruled that the partner had no parenting rights based on a parentage test from Wisconsin because the KPA was not "tailored to the situation" and required clear and convincing evidence. The Court of Appeals affirmed. The Kansas Supreme Court reversed in accordance with the guidelines set out by *In re M.F.* which established that the quality of parenting is not relevant to these cases. The birth mother also should not change their opinion regarding who is considered the child's legal parent as time progresses. *In re W.L.,* 312 Kan. 367, 475 P.3d 338 (2020).

3. Uniform Parentage Act (2017)

Kansas did not adopt the Uniform Parentage Act (2002) which added presumptions of maternity and paternity based on marriage and gestational surrogacy provisions. Kansas, however, is looking at the UPA (2017). The UPA (2017) reflects a transformative and unified scheme of parentage regulation. It frames parentage around five separate parentage classifications: acknowledged, adjudicated, alleged genetic, intended, and presumed. Six states have already enacted it: California, Connecticut, Maine, Rhode Island, Vermont, Washington. Several others have introduced it into their legislatures this year.

a. Gender neutral language. It removes gendered divisions in establishing paternity versus maternity by using gender neutral language.

b. It applies equally to same-sex couples.

c. It recognizes parental relationships based on functional de facto relationships.

d. It precludes the creation of a parent-child relationship between a perpetrator of sexual assault and the child conceived through sexual assault.

e. It modernizes parentage laws in the context of surrogacy, gestational vs. traditional.

f. It adds a new article governing assisted reproductive technologies. This includes new children's rights to access information about their donors, requiring disclosure of non-identifying donor medical history. It also requires clinics and institutions to ask donors whether they would like their identifying information revealed at the age of majority.

III. CHILD SUPPORT - UNIFORM INTERSTATE FAMILY SUPPORT ACT

A. Initial Jurisdiction

To impose an obligation for child support, the court must have personal jurisdiction over the obligor. *Kulko v. Superior Court of California*, 436 U.S. 84 (1978). *See Tompkins v. Tompkins*, 597 S.W.3d 99 (Ark. Ct. App. 2020) (Arkansas court had personal jurisdiction over the father even though the child had lived in Germany with the mother for several years. The court had subject matter jurisdiction to establish a support order upon the mother's request, absent an existing order elsewhere).

1. Kansas Code of Civil Procedure and Long Arm Statute; K.S.A. 60-308(b)(1)(H).

2. The Uniform Interstate Family Support Act (UIFSA) (1992) provides for establishing and enforcing support orders. In 1996, PRWORA, the welfare reform legislation, mandated states adopt UIFSA by 1998. All states did. In 2001, UIFSA was amended to add an expanded long arm. In 2008, UIFSA was amended to ratify the Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance.

Uniform Interstate Family Support Act § 201(a); K.S.A. 23-36,201(a)

* * *

(1) the individual is personally served * * *within this State;
(2) the individual submits to the jurisdiction of this State by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
(3) the individual resided with the child in this State;
(4) the individual resided in this State and provided prenatal expenses or support for the child;
(5) the child resides in this State as a result of the acts or directives of the individual;
(6) the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse;

(7) [the individual asserted parentage in the [putative father registry] * * *;

or

(8)] there is any other basis consistent with the constitutions of this State and the United States for the exercise of personal jurisdiction.

B. Continuing Exclusive Jurisdiction

1. Decree state retains as long as one party there.

UIFSA uses the principle of continuing, exclusive jurisdiction. If the state properly had jurisdiction to issue the child support order and one party or the child continues to reside in the state, the decree state retains continuing exclusive jurisdiction. Even if the state is not the residence of the obligor, the parties can make a written consent to jurisdiction. UIFSA Section 205.

Where all parties lived in Kansas when the child support order was entered in 1991 and the mother and children continued to live in Kansas, Kansas retained exclusive continuing jurisdiction. Even though California where father was living entered a support order against him and he made some payments, the order was void. The parties did not consent in writing to the jurisdiction of the California court. The district court could not order income withholding or an award of arrearages of $80,000 based on the void California order. *In re Henson*, 58 Kan. App. 2d 167, 464 P.3d 963 (2020). *See also Harvey v. Harvey*, 432 So. 3d 786 (La. Ct. App. 2020) (Louisiana court lacked jurisdiction under UIFSA to modify the Florida child support order where the mother and children were still in Florida).

2. All parties leave the state - play an "away game"

If all parties leave the decree state, the person seeking relief must go to the state in which the other party "resides." Alaska courts determined that the term "presently resides" in UCCJEA and UIFSA provisions governing exclusive, continuing jurisdiction should be interpreted consistently with "residency" under Alaska law. Father intended to return to Alaska at end of his military deployment so all of the parties' physical presence in South Carolina did not deprive the Alaska court of its exclusive, continuing jurisdiction. *Mouritsen v. Mouritsen,* 459 P.3d 476 (Alaska 2020).

C. Interstate Enforcement - Registration of Support Order

1. History

Interstate enforcement of child support has always been problematic. Prior to 1995, there were two acts - Uniform Reciprocal Enforcement of

Support Act (URESA) (1950) and Revised Act (RURESA) (1968), neither of which were particularly effective because of modification issues. The Uniform Law Commission replaced URESA and RURESA with the Uniform Interstate Family Support Act (UIFSA). It provides for a one court order procedure and allows for registration and enforcement in other states without modification of the order.

2. Registration of Other State Order - UCCJEA vs. UIFSA

UCCJEA and UIFSA are different in the registration requirements because custody and support issues are not the same. A mother properly registered a Florida child custody order in North Carolina, but it was found insufficient to register a foreign child support order. The Virginia father, as the non-registering party, was entitled to notice. The court rejected the "substantial compliance" argument because the petition in form and substance was a petition to register a foreign custody order. The mother did not follow UIFSA requirements. The North Carolina court summed it up:

> . . . Mother's arguments overlook the essential differences in registration of foreign orders under the UCCJEA and UIFSA. For purposes of child custody, the focus is on the residence of the children, and personal jurisdiction over a parent is not required. . . For purposes of child support modification and enforcement, the focus is on the residence of the obligor, since the obligee who is seeking enforcement normally registers the order in the state of the obligor's residence so the court will have personal jurisdiction over the obligor. . . .
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> . . . Jurisdiction for modification of child support . . . is distinct from modification of custody under the federal Parental Kidnapping Prevention Act (PKPA), 42 U.S.C. § 1738A, and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) §§ 201-202. These acts provide that the court of exclusive, continuing jurisdiction may "decline jurisdiction." ***Declining jurisdiction, thereby creating a potential vacuum, is not authorized under UIFSA.*** Once a controlling child-support order is established under UIFSA, at all times thereafter there is an existing order in effect to be enforced. Even if the issuing tribunal no longer has continuing, exclusive jurisdiction, its order remains fully enforceable until a tribunal with modification jurisdiction issues a new order in conformance with this article. [Emphasis added]

> UIFSA and UCCJEA seek a world in which there is but one order at a time for child support and custody and visitation. Both have similar restrictions on the ability of a tribunal to modify the existing order. The major difference between the two acts is that the basic jurisdictional nexus of each is founded on different considerations. UIFSA has its focus on the personal jurisdiction necessary to bind the obligor to payment of a child-support order. UCCJEA places its focus on the factual circumstances of the child, primarily the "home state" of the child; personal jurisdiction to bind a party to the custody decree is not required. An example of the disparate consequences of this difference is the fact that a return to the decree state does not reestablish continuing, exclusive jurisdiction under the UCCJEA. *See* UCCJEA § 202. Under similar facts UIFSA grants the issuing tribunal continuing, exclusive jurisdiction to modify its child-support order if, at the time the proceeding is filed, the issuing tribunal "is the residence" of one of the individual parties or the child. *See* Section 205.

The court upheld father's motion to dismiss the mother's registration under UIFSA. *Halterman v. Halterman*, 855 S.E.2d 812 (N.C. Ct. App. 2021).

2. Proper Registration is not subject matter jurisdiction

A Kansas case involved an unwed father who was a member of the Miami Heat who had a Florida child support order. The mother and child had moved to Kansas. When the father retired and moved out of Florida, he attempted to reduce his child support obligation by registering the Florida judgment in Wichita, Kansas, but a paralegal failed to attach the two certified copies of the support order. Even though the mother failed to contest the registration within 20 days, the court found that she could challenge the court's subject matter jurisdiction under UIFSA. The Court of Appeals upheld the trial court's decision that failure to file the certified copies meant the court lacked jurisdiction to modify the award. *Chalmers v. Burrough*, 472 P.3d 586 (Kan. Ct. App. 2020), rev'd 2021.

The Kansas Supreme Court reversed, agreeing with the dissenting judge. There is a difference between subject matter jurisdiction over a type or class of cases and judicial authority to adjudicate a specific legal dispute between specified parties. Registration alone is not enough to permit a court to modify an out-of-state support order. The party seeking modification of the order also must show: (1) the payor of the support, the recipient of the payments, and the child for whose benefit the support is due no longer reside in the state that issued the order; (2) he or she is not a

resident of the state in which modification is sought; and (3) the district court can exercise personal jurisdiction over the party who is not seeking modification. All of those requirements were met. The failure to properly register the out of state child support order did not deprive the district court of subject matter jurisdiction. *Chalmers v. Burrough*, 314 Kan. 1, 494 P.3d 128 (2021).