FAMILY LAW UPDATE 2022

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ACQUIESCENCE AS BAR TO APPEAL—Payment of Medical Expense Judgment. *Fox v. Ozkan,* Docket No. 123,643, 2022 WL 2188027 (Unpublished Kan. Ct. of Appeals 6.17.2022. Johnson—Judge Burmaster. Appeal Dismissed). Through income withholding order, Ozkan, the father, paid a judgment against him for medical expenses. He never objected to the IWO. When he filed a Notice of Appeal, he believed that filing would stay the IWO so he took no further action with respect to that issue. "Acquiescence to a judgment—which cuts off the right to appellate review—occurs when a party voluntarily complies with a judgment by assuming the burdens or accepting the benefits of the judgment contested on appeal." A party that voluntarily complies with a judgment should not be allowed to pursue an inconsistent position by appealing from that judgment. **The issue is whether the payment of the judgment was voluntary.** As acquiescence is jurisdictional, it is subject to unlimited review. When Ozkan took no step to halt execution on the judgment, he acquiesced in it. Ozkan was given notice of the IWO, admitted such notice, and did nothing to stop it.

ADOPTION AND PARENTAGE—Claim of Paternity Must be Made at the Time of Child's Birth, and in Adoption, versus later Parentage Action. *In the Matter of the Parentage of E.A., a minor child,* Docket No. 123,710, 2022 WL 4112388, ____ Kan. App. 2d _____, ____P.3d ____ (Sept. 2022-Shawnee-Judge Wilson, Affirmed). Highly summarized: the paternal grandfather acted as a parent for his son's son (thus, his grandson) for about 6 years after the child was born, by agreement with both the natural mother and natural father. The child became part of his family, and his status as a grandson versus son was unknown to him. No complaint is made that he was anything but a good father to the child. He funded a paternity case for his son very shortly after his grandson was born. **His grandson's father (thus grandfather's son) was declared the father of the child in that action.** However, over 5 years after this arrangement had been in place, the child's biological paternal grandmother and her husband picked the child up from his grandfather and never returned him. They filed an adoption petition in Shawnee County District Court. **Grandfather was denied standing in this matter when he attempted to intervene** as he was not a "party in interest." The adoption court made that determination in part because the child's paternity had already been established, apparently such that paternal grandfather had no standing to assert otherwise (e.g. that he was the child's father) because of that prior determination.

Grandfather then filed a petition for determination of parentage under the Kansas Parentage Act. He asked the court to determine that he was a presumed parent. The paternal grandmother and her husband opposed the parentage action. The district court dismissed that case, ruling (a) there could be no presumption of parentage in that case because parentage was established in an earlier parentage case (in which the natural father was declared the father); (b) parental rights cannot be terminated in a Parentage Act case; and (c) a child cannot have more than two parents under the Parentage Act. Grandfather's motion for summary judgment was denied and the case was dismissed by the district court.

In the case of *In re Parentage of M.F.,* 312 Kan. 322, 352, 475 P.3d 642 (2020) the Kansas Supreme Court held that one who claims a presumption of paternity by openly and notoriously acting as a parent must do so at the time of the child's birth. The grandfather did not do so. His paternity action constituted a collateral attack on an adoption. Parentage issues must be resolved in one case.

This case is a treatise for those interested.

ATTORNEY FEES – Court's Jurisdiction to Determine Fairness of Attorney Fees. *In the Matter of the Marriage of Parrish and Pippen,* Docket No. 124,343, 2022 WL 1122692 (Unpublished Kan. Ct. of App. April 15, 2022-Miami-Appeal Dismissed). This is a divorce action between Joy Parrish and Brien Pippen. A divorce decree was entered. During the divorce proceedings, Mick Lerner represented Mr. Pippen. After the district court issued the divorce decree, but while various post-decree motions were pending, Mr. Lerner sought to withdraw from the divorce case. In response, his client filed a "motion to set and allow a reasonable fee pursuant to KRPC 1.5(e)," arguing the attorney fees Mr. Lerner claimed he owed were unreasonable. The district court found it had "permissive jurisdiction" to address the fee issue, but the court then declined to resolve the fee dispute without further guidance from the appellate court and certified that ruling for appeal under K.S.A. 60-254(b). Pippen filed the appeal which is before the Court of Appeals, with Mr. Lerner as the appellee (**note he is not a party to underlying divorce action**), seeking a ruling on whether the district court had jurisdiction to address his motion for attorney fees and various issues related to the scope, application, and procedure for determining the reasonableness of fees under KRPC 1.5(e). **Mr. Lerner asserted that the appellate court lacked jurisdiction over the appeal.** While the appeal was pending, Mr. Lerner filed a civil action against Mr. Pippen in the Johnson County District Court seeking a judgment for the balance of his claimed attorney fees in the divorce case, in the amount of $327,315.00. While the case was pending in district court, **the district court found that Mr. Lerner's rate was significantly higher than the rate charged in the court's pending divorce cases, that Mr. Lerner did not demonstrate familiarity with divorce cases, and that the requested fee was far in excess of the time and expense necessary.** Mr. Lerner moved to withdraw as Mr. Pippen's attorney. Mr. Lerner moved to dismiss Mr. Pippen's motion to determine reasonable attorney fees in the district court, asserting that the court lacked subject matter jurisdiction over such a motion because Mr. Lerner was not a party to the divorce, the divorce was final, KRPC 1.5(e) is not a basis for civil liability, and the court never ruled on the agreement between Lerner and Pippen when the representation began. Mr. Pippen opposed the motion to dismiss, **stating he had paid Mr. Lerner $146,589.66 in fees and that Mr. Lerner claimed he owed a balance of $327,315.11.** Mr. Lerner asserted that the appellate court lacked jurisdiction over the appeal under K.S.A. 60-254(b). **The appellate court determined that the district court order dismissing Mr. Pippen's motion for a determination of the reasonableness of the attorney fees was not a final judgment, let alone a final judgment on one or more, but fewer than all, claims or parties. Mr. Lerner was not a party to the divorce action.** K.S.A. 60-254(b) does not apply because the district court never entered a final judgment on any claim involving the reasonableness of the attorney fees. **Thus, the appellate court is without jurisdiction to determine the appeal**. *See Gillespie v. Seymour*, 263 Kan. 650, 655, 952 P.2d 1313 (1998). Mr. Pippen pointed to no valid authority to invoke the court's jurisdiction over the district court's non-final ruling on Mr. Pippen's motion against Mr. Lerner, a non-party to the divorce action. The Court of Appeals concluded that it lacked jurisdiction to address the merits of the appeal. Because it had no jurisdiction over the appeal, it had no jurisdiction to address the motion to stay the district court proceedings in Johnson County and dismissed the appeal.

CHILD SUPPORT—Agreement Enforceability. *Soebbing v. Lesser*, Docket No. 124,003, 2022 WL 1053299, (Unpublished Kan. Ct. of App. April 8, 2022. Shawnee—Affirmed). "Can a father be held responsible for his adult daughter's $1,400.00 per month rent as an education expense under the terms of a separation agreement he made with his wife before their divorce **20 years earlier**?" The answer is "**yes.**" The PSA included this language: "[A]ny expenses of the children for post-high school education not funded in full by the savings account as set forth above, or not funded by a scholarship, shall be paid for by the parties equally or 50% by wife and 50% by husband until the child attains the age of 24 years. Post-high school education expenses include, without limitation, tuition, books, fees, and room and board." One of the parties' children was attending "post-high school education classes" and therefore, father was responsible for her room and board as set forth in the agreement, even though the agreement was made 20 years earlier. As long as the child was under the age of 24 and enrolled in and taking classes, father was responsible for half of her relevant expenses as delineated in the settlement agreement.

CHILD SUPPORT—Modification. *In the Matter of the Parentage of N.P. by and through C.M. and T.P.,* Docket No. 123,842, 2022 WL 333890 (Unpublished Kan. Ct. of App. 2.4.2022. Johnson-Judge Rokusek affirmed). In a case where physical custody of a child was disputed (i.e. which parent had the child over what periods of time), and father was charged with a child support arrearage accumulating over a period of time during which he alleged he had the child, the court said: "Kansas law provides that child support may be modified whenever circumstances make such change proper, 'but the modification operates prospectively only.' "*In re Marriage of Schoby,* 269 Kan. 114, 117, 4 P 3d 604 (2000). Under K.S.A. 2020 Supp. 23-3005(b), an order modifying child support can only be retroactive to the first day of the month following the filing of the motion to modify." Although a trial court has authority to modify a previous support order, the new order cannot increase or decrease amounts past due. The district court may not retroactively decrease an amount due for child support.

CHILD SUPPORT—Overpayment Credit Resulting from Payments Under Missouri Decree. *Daniels v. Yasa,* Docket No. 122,080, 2021 WL 5758245 (Unpublished Kan. Ct. of App. 12.3.2021. Harvey-Judge Hilgers affirmed in part, reversed in part, vacated in part, and remanded for further proceedings.) As part of the divorce decree, father was ordered to continue to pay child support for his son, and to pay half of the educational and medical expenses for his son after he graduated high school, if he met certain conditions imposed by Missouri statutes. The son failed to satisfy Missouri's college enrollment, performance, and reporting requirements, all of which are statutory. After discovering his son's failure to meet these requirements entitling him to receive continued child support, father sought termination of his child support obligation and for reimbursement of overpaid amounts. The Circuit Court terminated father's child support obligation October 1, 2018 (which, under Missouri statute, is the date by which son had to satisfy the statutory eligibility requirements) but did not order any refund or offset against amounts owed. Father appealed, claiming his child support should have ended upon his son's graduation from high school in May, 2016, and that he is entitled to a refund for overpaid amounts. The Court of Appeals terminated father's child support obligation upon son's graduation from high school, because the son failed to comply with the statutory requirements entitling him to support after that time. The Court of Appeals also agreed with father that he is entitled to a refund, plus interest, of any child support payments he made after his son's emancipation, which did not occur as a matter of law in Missouri until his son's

college informed him that he was not eligible to re-enroll. The child support judgment against father for support allegedly owed after his son's graduation should be vacated and a credit equaling the amount he wrongly paid should be issued against any arrearages he may owe. The case was affirmed in part, reversed in part, vacated in part, and remanded for further proceedings.

CHILD SUPPORT—Sanctions for Failure to Disclose Income. *In the Matter of Williams and Williams*, Docket No. 123,395, 2022 WL 4281725 (Unpublished Kan. Ct. of App. 9.16.22-Sedgwick-Judge Kirby-Affirmed). Because Kansas child support obligations largely derive from parents' incomes, they must disclose any material change of circumstances that could affect the amount of child support due. Father failed to disclose over $700,000 income over three years. The district court, affirmed on appeal, entered sanctions equal to the amount of child support father would have paid had his true income been timely disclosed. The importance of the case lies in the arguments father made **that did not persuade the appellate court.** 1. An August, 2018 order resolved the amount of child support due through the end of 2018. The appellate court agreed but pointed out **its sanction order was not a child support order**. The August, 2018 order did not address sanctions. **The court does not have jurisdiction to modify child support payments previously due. Kansas law only allows modification of child support obligations beginning one month after a party has moved to modify those obligations.** 2. While there is no discretion to modify a child support order in the first three years after a court orders child support unless there is a material change of circumstances, after three years have elapsed, this showing is not necessary. 3. The parties cannot by agreement (which they did not directly attempt) deprive the court of its power to sanction. 4. Sanctions were not an impermissible retroactive modification of child support. They were sanctions. 5. The August, 2018 order was not *res judicata*, because it was not a final judgment, because an issue (imputed income) remained for future determination. Every issue relating to child support was not determined in the August, 2018 order, so it was not a final judgment, because imputed income was left for future determination. 6. The sanction, judgment for which was over $60,000, was not unreasonable because it stemmed from calculating what the support would have been if calculated on father's true income. 6. Father was not granted a hearing on the sanctions calculations. According to the Court of Appeals, he never asked for one.

CINC—Clinical or Substance Abuse Evaluation. *In the Interest of E.L., a Minor Child*, Docket No. 123, 707, 2021 WL _____, 61 Kan. App. 2d 311, 502 P. 3d 1049 (Kan. Ct. of App. 11.24.2021. Sedgwick—Judge Hogan Affirmed). A requirement that a parent undergo a clinical or substance abuse evaluation in a child in need of care proceeding does not violate the parent's Fifth Amendment right under the United States Constitution against self-incrimination. When deciding whether to terminate parental rights, a district court's consideration of a parent's failure to comply with a court order to undergo a clinical or substance abuse evaluation in a child in need of care proceeding does not violate that parent's Fifth Amendment right under the United States Constitution against self-incrimination. A parent's demonstrated lack of willingness to participate in treatment may be considered in determining whether the state has made active efforts to reunify an Indian family under the Indian Child Welfare Act.

CINC-Video conference on motion to terminate parental rights does not violate due process rights of participants. *In the Interest of C.T.*, Docket No. 123,618, 61 Kan. App. 2d 218, 501 P.3d 899 (10.29.2021-Miami-Judge Harth, Affirmed.). A District Court conducting child in need of care proceedings by videoconference, including a hearing on a motion to terminate parental rights, does not violate the due process rights of the participants so long as certain safeguards are present. These safeguards include adequate audio quality, which allows all participants to hear the proceedings, the ability of participants to observe the witnesses, the ability of parties to access all exhibits, and the ability of parties to confer privately with their attorneys.

DEBT PAYMENT ORDERS VIOLATIONS—Contempt and Motion to Enforce. *In re Marriage of Martin*, Docket No. 124,721, 2022 WL 4115581 (Unpublished Ct. of App. Sept. 2022-Labette—Judge Johnson reversed). The district court ordered wife to pay certain debts both during the pendency of the case and in the final decree. She did not. Husband filed for a contempt citation and to enforce the orders. Husband paid the debts to protect his credit and sought judgment against his wife for the amount he paid, and for attorney fees. The district court denied the contempt motion and found husband's payment of the debts a "gift" and denied both motions. The Court of Appeals reversed and remanded with directions to reconsider its ruling on the contempt. The decision husband's debt payments were a gift was an error. The district court found wife failed and refused to make the payments and refused to comply with the court orders but did not find her in contempt and did not make a finding that, e.g., payment was excused based on wife's testimony or for some other reason. The district court's findings were "confusing and incomplete."

GRANDPARENT VISITATION—Allowed for mother of deceased father. *In the Matter of the Marriage of Schwarz,* Docket No. 123,444, Kan. Ct. of App., 62 Kan. App. 2d 103, 506 P.3d 950 (March 18, 2022) (Johnson-Affirmed). The mother of two minor boys challenges the district court's orders giving her sons' paternal grandmother visitation rights under K.S.A. 23-3301. The district court granted grandmother visitation with her grandchildren. The district court had jurisdiction to consider grandmother's petition, and the Court of Appeals had jurisdiction to consider mother's appeal. The natural mother and natural father of the children at issue were in the midst of a divorce action when the father suddenly died. Father's death ended both the marriage and the pending divorce action. Thereafter, mother began limiting contact between her sons and the paternal grandmother. As a result, grandmother filed an action in November, 2018 for grandparent visitation rights under K.S.A. 23-3301. That statute allows a district court to grant visitation rights to grandparents upon a finding "that visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established." K.S.A. 23-3301(b). Paternal grandmother contended that visitation was justified because of the strong bond she had formed with her grandsons before her son's death, and it would be in their best interests to continue the relationship. The district court applied K.S.A. 23-3301(c) because the children's father was deceased and the petitioner was the children's paternal grandmother. The appellate court noted conflicting analyses of different panels of the Court of Appeals on the issue of subject matter jurisdiction in a grandparent visitation case. Grandparent visitation is not a right at common law. The history of jurisdiction and grandparent visitation cases is reviewed. Motions for grandparent's visitation are no longer limited to pending dissolution of marriage actions. This court determined that under *Frost*

v. Kansas Department for Children and Families, 59 Kan. App. 2d, 404, 413, 483 P.3d, 1058, *rev. denied* 313 Kan. 1040 (2021), and particularly K.S.A. 23-3303, "an action for reasonable visitation rights for grandparents as provided by 'this act' shall be brought in the county in which the child resides with the child's parent, guardian or other person having lawful custody." Because the legislature expanded grandparent rights under 23-3303, *Frost* concluded there is a legislative policy of preserving grandparent rights, and they are not limited to divorce cases. So, although the divorce case between natural mother and natural father ended when natural father died, this court found the district court had subject matter jurisdiction to consider grandmother's independent action for grandparent visitation rights under K.S.A. 23-3301. Highly summarizing, the balance of the opinion, and against mother's argument that she believed no contact was in her children's best interests based on a history of the children's relationship with the grandmother and natural father's extended family, including, but not limited to, the grandmother blaming the natural mother for natural father's death, in fact apparently alleging that mother killed the father; the district court nonetheless determined that the district court should apply the presumption that as a fit parent she was entitled to make decisions which were in her children's best interests. "Perhaps the oldest of the fundamental liberty interests is the fundamental right of parents to make decisions concerning the care, custody and control of their children." Troxel v. Granville, 530 U.S. 57, 65-66 (2000). When considering a parent's constitutional due process rights, the best interests of the child standard alone is an insufficient basis to award grandparent visitation. A court must presume that a fit parent is acting in the child's best interests and must give special weight to the parent's proposed visitation schedule. A court cannot reject a fit parent's visitation plan without finding it unreasonable. But a parent's determination is not always absolute because otherwise the parent could arbitrarily deny grandparent visitation without the grandparent having any recourse. The district court adheres to constitutional standards by giving deference, **but not absolute deference**, to the decision of a mother as a fit parent regarding children's contact with their grandmother. Notwithstanding mother being a fit parent entitled to all the constitutional deference allowed her in deciding whether and when a third party can spend time with her children, the court found that mother's proposed visitation plan: no visitation; was unreasonable and not in her children's best interests.

HAGUE CONVENTION—Abduction. *In the Interest of S.L., a Minor Child,* Docket No. 123,535, 61 Kan. App. 2d 276, 503 P.3d 244 (12.3.2021-Johnson-Judge Gyllenborg reversed in part, vacated in part, remanded with directions). If you have a Hague Convention case, read this. It is a virtual textbook.

The Hague Convention on the Civil Aspects of International Child Abduction and of the International Child Abduction Remedies Act, 22 U.S.C. § 9001 et seq., provides for the return of children wrongfully removed or retained from their habitual residence. The primary purpose of the 1980 Hague Convention is to preserve the status quo custody arrangement of the parties and to deter a parent from crossing international boundaries in search of a more sympathetic court. The merits of any underlying custody claims are not to be determined.

Courts analyzing claims under the 1980 Hague convention are to follow a three-step analysis. (1) Did an abduction occur? (2) Does an exception apply? (3) If a court properly invokes an Article 13 exception, what is the effect on jurisdiction and custody? In this third step, courts in the child's habitual residence analyze the foreign court's decision, applying principles of comity. If a petitioner shows a wrongful transfer or wrongful retention, the burden shifts to the respondent to show that an Article 13

exception applies, allowing courts to refuse to return the child. Courts may order a child returned to their habitual residence even if Article 13 exceptions apply, because the language of Article 13 is permissive and courts are not required to invoke an exception. **The convention was not intended to be used as a vehicle to litigate the child's best interest.** The person opposing the child's return must show the risk of the child's return is grave and not merely serious.

In the instant case, a child with dual citizenship in the Netherlands and the United States was sent to the Netherlands by his father and stepmother to stay with his sister and her partner for spring break. Once the child arrived in the Netherlands, the aunt and uncle filed accusations of child abuse with a child protective service in the Netherlands. A Dutch court suspended father and stepmother's parental rights. The Dutch court put the child into foster care, assigning residential placement with the aunt and uncle. Father and stepmother filed a "Petition for Issuance of Child Abduction Prevention Measures under the Uniform Child Abduction Act. The result of this 41 page opinion is that, according to the Court of Appeals , the father and stepmother lost on jurisdictional grounds. This is a must-read for those involved in Hague cases.

JURISDICTION TO MODIFY PARENTING TIME—Ends When Child Reaches Age 18. *Marriage of Lewis and Bush*, Docket No. 124,454, 62 Kan. App. 2d 284, 513 P.3d 494 (June 10, 2022-Johnson-Judge Rokusek—Affirmed in part and dismissed in part). *Pro se* father appeals court's ruling regarding his parenting time (which the court decreased) after the teenage child's step-mother (his most recent wife) and the child experienced a physical altercation which resulted in his not seeing the child for about a year. The Court of Appeals holds "the district court's jurisdiction over parenting time and custody ended when the child reached the age of majority," which occurred while the appeal was pending. "Because the district court lost jurisdiction to enter any child custody and parenting time orders once the child reached the age of majority, any question concerning the propriety of its parenting time order became moot." **"Because the child has reached the age of majority, she now has the right to choose her own residence and how often she sees [her father]."**

JURISDICTION TO MODIFY CHILD SUPPORT—May Extend Beyond Age of Majority. *Marriage of Lewis and Bush*, Docket No. 124, 454, 62 Kan. App. 2d 284, 513 P.3d 494 (June 10, 2022-Johnson-Judge Rokusek—Affirmed in part and dismissed in part). There is no linkage of parenting time and child support. Just because a parent is paying child support does not mean that such parent is entitled to parenting time. K.S.A. 23-3001(b). Even though a child support obligation may extend beyond the age of majority and into the child's 19th year of life because she was held back in school, there is no provision extending the district court's jurisdiction over parenting time, even if a parent's child support obligation is extended. K.S.A. 23-3001(b)(3).

MAINTENANCE MODIFICATION—Grounds. *In the Matter of the Marriage of Freeman*, Docket No. 123,568, 2022 WL 1123358 (Unpublished Kan. Ct. of App. April 15, 2022)(Johnson-Affirmed). The trial court reduced ex-husband's monthly maintenance obligation, including on the basis that the court may do so exclusively because of a decrease in the payor's income. Kansas case law does not provide that maintenance cannot be modified due to a foreseeable event (loss of business income and clients) contemplated by spouses when negotiating their PSA.

MAINTENANCE—Temporary-Dormancy. *In re Marriage of Clark*, Docket No. 123,233, 2022 WL 881722 (Unpublished Kan. Ct. of App. March 25, 2022) (Sedgwick, Affirmed) The district court ruled that monthly temporary maintenance payments husband was ordered to pay wife became dormant and then unenforceable under K.S.A. 60-2403(a)(1) because she took no steps to collect or otherwise preserve those delinquencies, **which languished for over a decade**. The appellate court found that statutory dormancy and cancellation provisions apply to **final** money judgments. Temporary maintenance payments are not final money judgments. Therefore, **they cannot become dormant**. The payments owed under temporary orders continue until they are modified or until a final judgment settling the couple's property rights and fixing permanent maintenance, if any, are entered. Periodic permanent maintenance payments become judgments after they are delinquent. Unpaid temporary maintenance payments do not. *Krogen v. Collins,* 21 Kan. App. 2d 723, 727, 907 P.2d 909 (1995). A divorcing spouse's obligation for temporary maintenance does not become dormant or dischargeable under K.S.A. 60-2403(a)(1). Permanent maintenance payments are generally limited to 121 months. K.S.A. 23-2904. There is no comparable limitation on temporary support and maintenance orders in K.S.A. 23-2707. This is a divorce case that, for numerous reasons, stayed on the court's docket for over a decade, and the temporary maintenance payments were not made final for years. Payor husband argued they became dormant and/or dischargeable. The district court agreed. The Court of Appeals did not. A divorcing husband and wife cannot agree between themselves to reduce or eliminate court-ordered child support. *See, for example, Marriage of Schoby*, 269 Kan. 114, Syl.¶ 1, 4 P.3d 604 (2000). The same rules apply to temporary support as to permanent support. **The district court could not have given legal effect to any purported agreement husband and wife had to substitute mortgage payments for temporary child support**. A court may, but need not, adjust parties' mutual indebtedness by setoff. *Mynatt v. Collis*, 274 Kan. 869, 881, 57 P.3d 513 (2002). The doctrine may be applied to interlocking financial obligations of divorcing spouses, including delinquencies in maintenance or support payments. *See In re Henson,* 58 Kan. App. 2d 167, 184, 464, P.3d 963, *rev. denied* 312 Kan. 892 (2020) (recognizing setoff may be applicable to disputed arrearage in child support). In 2014, the legislature amended K.S.A. 23-2707(a) to provide that a district court may make, modify, vacate and enforce by attachment temporary orders. **This amounted to a legislative overruling of *Marriage of Brown*, 295 Kan. 966, 291 P.3d 55 (2012), for the proposition the district court lacked authority to modify or set aside orders for temporary maintenance and child support. District courts now exercise a broad right to adjust temporary orders and the amounts due under them during a divorce proceeding to maintain a fair and equitable financial balance. A district court has the authority to reduce or eliminate temporary maintenance if the recipient experiences a sharp and unexpected increase in income or wealth during the divorce.**

PARENTAGE ACT—Competing Presumptions. *In the Matter of the Parentage of A.K.*, ____ Kan.App. 2d ____, ___ P.3d ____, 2022 WL 4287851 (Kan. Ct. of App. 9.23.2022-Johnson-Judge Wonnell affirmed). The Kansas Parentage Act recognizes claims of parentage, not only based on genetics but also based on a child's circumstances. These circumstances give rise to statutory presumptions of parentage, and two presumptions can conflict. In a case of conflicting presumptions, a court must decide which presumption is based on weightier considerations of policy and logic, and account for the best interests of the child. Under the Kansas Parentage Act, a parent and child relationship means the legal relationship existing between a child and the child's biological or adoptive parents. K.S.A. 23-2205. A woman can be a presumptive mother under K.S.A. 23-2208(a)(4) without claiming to be a biological or adoptive mother. Such a presumption is a "legal fiction" of biological parentage in cases involving artificial insemination. Thus, a child can have two mothers rather than a mother and a father. A presumption under K.S.A. 23-2208(a)(4) does not arise or is rebutted if either the birth mother did not consent to share parenting duties or the petitioner did not notoriously recognize maternity at the time of the child's birth. A man is presumed to be the father of a child if after the child's birth, the man and the child's mother have married and, with the man's consent, the man is named as the child's father on the child's birth certificate. The statute does not say how long after the child's birth. There is no time limit set by K.S.A. 23-2208(a)(3).

This case is a treatise on Parent Act presumptions. Highly summarized, a man the biological mother met and married after the child's birth and was named with his consent on the child's birth certificate, was able to establish a statutory presumption of parenthood which was determined by the district court to be a weightier statutory presumption of parenthood than that of a woman the mother was with at the time of the child's birth, but with whom, e.g., she had no written parenting arrangement.

PARENTAGE ACT—Competing Presumptions. *In the Matter of the Parentage of C.R.*, Docket No. 124, 696, 2022 WL 4588547 (Unpub. Kan. Ct. of App. 9.30.2022—Atchison-Judge Asher affirmed in part, reversed in part, and remanded with directions). "This is a dispute between two presumed fathers seeking to be declared the legal father of C.R., a child born in 2016." One candidate was in jail when the child was conceived and born. He is the natural and legal father of two older children he "shares" with C.R.'s mother, who knowingly and voluntarily named this candidate, "P.R.," on the birth certificate. He established a parental relationship with the child. In a court hearing in 2017, the court determined P.R. to be the child's legal father because of their established relationship, the intention of the mother regarding that relationship, and that the mother and all the children lived with P.R.'s parents for a period including the time surrounding C.R.'s birth. An interloper identified as J.P. intervened in the action 3 years later, and genetic testing proved he was the biological father. He alleged, and the court found, he had no notice of the proceeding in which P.R. was found to be the legal father, so the district court, correctly according to the Court of Appeals, set aside its earlier order. The Court of Appeals found "[t]he first paternity order was void for lack of subject matter jurisdiction because J.P. as the known, presumed biological father, was not made a party to the action. K.S.A. 23-2211(a)."

So, the district court held a second paternity hearing and determined J.P. to be C.R.'s legal father. P.R. appealed. The Court of Appeals found "the district court's determination of J.P.'s paternity was an abuse of discretion because it failed to properly employ the standard set in K.S.A. 23-2208 (c) to the competing presumptions and did not fully apply the appropriate legal standard to the facts presented. **It reversed the paternity finding and remanded for further proceedings.**

The lesson is, just because one is a biological father does not mean he will automatically be determined to be the legal father. P.R. is still **statutorily presumed** to be the father because he notoriously or in writing recognizes paternity of the child. J.P. is also presumed to be the father because of the results of genetic testing. The court **abused its discretion** in not following 23-2208(c), in not deciding which presumption was founded on the weightier considerations of policy and logic, ***including the best interests of the child.*** The district court also improperly cited *Ross,* as its holding regarding genetic testing did not apply to this case. The court set out the "best interests" standard in paternity cases as encompassing 10 factors, which it listed, which are found in *Greer*, 50 Kan. App. 2d at 195 (citing 1 Elrod and Buchele, Kansas Family Law §7.15[1999]).

PARENTAGE ACT-Competing Presumptions. *In the Matter of the Parentage of R.R.*, Docket No. 123,833, 2022 WL 7813894 (Unpublished Kan. Ct. of App. 10.14.2022-Barton-Judge Johnson, Affirmed). The presumption of paternity in favor of the man to whom a mother is married when her son is born overcomes, under the facts of this case, the presumption that the biological father of the child, with whom mother had sex during the course of the marriage, is the legal father of the child. The case is another treatise on competing presumptions—mother's husband at the time of birth versus biological father. The district court determined the husband, by whom the mother had another child who was the brother of the child who is the subject of this case, had the stronger presumption based on a laundry list of factors including the length of time spent with the child and his relationship with him, and the effect the declaration of a different man being his brother's father would have had on him, although neither man was alleged to be "bad," and both had significant connections and interplay with the child, as did their families.

PROPERTY DIVISION—Premarital Assets and Tax Consequences. *In the Matter of the Marriage of Zillinger*, Docket No. 123,563, 2022 WL 35658528 (Unpublished Ks. Ct. of App. 3.11.2022-Cherokee-Judge Lynch affirmed). This was an 8 year marriage involving substantial pre-marital assets, their increase in value, and substantial debt. K.S.A. 23-2801 controls. The standard on appeal is abuse of discretion. *Marriage of Vandenberg*, 43 Kan. App. 2d 697, 715, 229 P. 3d 1187 (2010). The division of property need not be equal, but must be fair and equitable. *LaRue v. LaRue*, 216 Kan. 242, 250, 531 P. 2d 84 (1975). *In re Marriage of Hair*, 40 Kan. App. 2d 475,480-82, 193 P.3d 504 (2008) approved setting aside an inheritance to the party who inherited it, although the inheritance was received during the marriage. The issue in this case was the ability of the husband to trace specific items of property to that inheritance. Also, while a district court must consider the tax consequences of its property division, K.S.A. 23-2802 (c)(9), the parties do not have to be treated the same in this regard, and in this case, the district court's failure to reduce the value of certain cattle due to tax implications was not an abuse of discretion. Failure to **reduce value** by tax consequences is not the same as failing to **consider** them.

RETIREMENT ACCOUNT DIVISION—Dormancy Applies. *Marriage of Holliday*, Docket No. 124,116, 2022 WL 4391026 (Unpub. Kan. Ct. App. 9.23.2022—Jackson- Judge Etzel reversed). The divorce decree awarded wife one-half husband's KPERS account. It said "The petitioner's KPERS retirement account shall be divided equally between the parties, with the valuation date to be the date the divorce petition was filed herein. A QDRO shall be prepared by [wife] to effectuate this division within 60 days of the filing of

the MEMORANDUM DECISION." Wife never filed a QDRO. 12 years later, husband moved to extinguish the judgment awarding wife half of the KPERS account because she never filed a QDRO or a judgment renewal affidavit. Wife mailed a copy of the Decree to KPERS after she received her ex-husband's motion. (1) KPERS does not need a QDRO to divide a KPERS account, because it is exempt from ERISA. KPERS needs only a Decree which is sufficiently clear in dividing the benefit. This means at least a decree setting the percentage of the division of the account and of the valuation date. (2) Wife, when her ex-husband retired, would be entitled to a one-time lump-sum payment for her portion of the account, based on the division set out in the divorce decree. The District Court ruled that, because the divorce decree was filed within seven years of the judgment, and no QDRO was required by KPERS, the judgment was preserved. (3) Husband argued that wife had to deliver a copy of the decree to KPERS within seven years to preserve her judgment. (4) A judgment remains active for five years. If nothing is done with it, it becomes dormant. Once it is dormant for two years and nothing is done to revive it, the judgment debtor can seek its release. The judge has no option and must release the judgment if the conditions are satisfied. There are exceptions, such as those set forth in K.S.A. 60-2403 (c). **Some action must be taken to enforce a judgment dividing a retirement account to prevent dormancy of that judgment. Notifying KPERS of the judgment by providing it a copy of the Decree satisfies that requirement if done within 7 years of the decree's filing. While the underlying judgment (Decree) dividing the retirement benefits was filed within 7 years of the judgment, execution (e.g. delivery of a copy of the Decree to KPERS) did not occur within that time. Notification to KPERS is execution on the judgment. With no execution, the judgment can become dormant and then subject to expiration.**

RETIREMENT—MILITARY—Clarification of Decree--Dormancy. *In re Marriage of Shafer and Webster*, Docket No. 124,529, 2022 WL 4390875 (Unpub. Kan. Ct. of App. 9.23.2022-Johnson-Judge Jayaram reversed and remanded with directions). The Court of Appeals held the Decree contained an incomplete calculation mechanism, making the order not susceptible to enforcement, and was therefore not subject to dormancy. The Decree provided wife would receive a share of husband's Army Reserve and National Guard retirement pay equal to "50% of months of marriage divided by the total months in the Reserves [and Guard]." **The precise length of the parties' marriage was not readily discernible from either the decree or the division of assets.** Husband retired from the service about 15 years after the divorce was finalized. Wife contacted DFAS soon afterward, intending to collect her assigned share of her ex-husband's retirement pay. She provided that office with copies of the decree along with the court's division of assets, but her request was denied **because neither document identified the length of time, in months, that the parties were married.** DFAS said it could not accomplish the court's order until that number was known.

Wife then filed a motion in District Court for clarification, requesting that the court refine its earlier order by identifying the number of months the parties were married in order to effectuate its intent for wife to receive a precise portion of her ex-husband's retirement pay. The court conducted a hearing on the motion. Husband argued that K.S.A. 60-260 prohibited her from seeking enforcement of the court's 15-year-old order. The court sustained husband's motion, finding that K.S.A. 60-260(b) required her to bring her request within one year of the entry of judgment. However, 60-260(b)(6) "vests a trial court with broad discretionary power to relieve a party from a final judgment for any reason that justifies such relief as long as this request is made within a reasonable time." The District Court erred in classifying the decree as a final judgment subject to dormancy and that it was without jurisdiction to rule on wife's

motion. Wife is entitled to a hearing where the merits of her claim can be an important proper consideration.

TERMINATION OF PARENTAL RIGHTS---Abusive Father. *In the Interest of S.R. and R.R.*, Docket No. 124,019, 2021 WL 5758271 (Unpublished Ks. Ct. of App. 12.3.2021-Rice-Judge Hipp affirmed.)

TERMINATION OF PARENTAL RIGHTS-Imprisonment. *In the Interest of T.H., a Minor Child.* Docket No. 123,504, 60 Kan. App. 2d 536 , 494 P.3d 851 (8.21.2021, Smith-Judge Thompson, Reversed). Incarceration is not an automatic basis for a finding of parental unfitness. The facts of each case dictate how the court should view the incarceration of a parent. In this case, a father had custody of his son, with the blessing and encouragement of the state, whose son was thriving in his care, and who arranged for his son to be cared for by someone with whom they both had a close relationship while father went to prison. Father provided for his son financially while he was in prison and had a home and a job waiting for him when he got out. Father maintained contact with his son on a regular basis while he was in prison. When father went to prison, and not one minute before, the child was placed with the child's maternal grandparents. Father continued to provide for his son, and the state continued to assure the father that it would agree to a permanent custodianship of his son with a close family friend, rather than seek to terminate his parental rights. "And then, seemingly out of nowhere, the state moved to terminate this father's parental rights for no other reason than his incarceration." The appellate court found the district court's finding of father's unfitness was not supported by clear and convincing evidence, and its decision that it was in the child's best interests to have father's parental rights terminated was unreasonable. The District Court was reversed. **However**, this is a 61 page opinion with substantial dissent.

TERMINATION—Unfitness of Father. *In the Interest of C.H., a Minor Child*, Docket No. 123,971 2021 WL 5858618 (Unpublished Kan. Ct. of App. 12.10.21-Johnson- J. Sloan affirmed). The District Court found by clear and convincing evidence that efforts made by DCF and KVC to contact and involve father in the case, and father's lack of effort in seeking to meet the needs of C.H., establish a case plan, or to maintain any visitation, contact or communication with his daughter, led the District Court to believe father was unfit. The court also found that father's unfitness was unlikely to change in the immediate or foreseeable future based on his continued failure to involve himself in the case. The appellate court must consider whether the evidence presented by the state would convince a rational fact-finder that the facts found by the District Court were highly probable. K.S.A. 38-2269 lists several nonexclusive factors that can render a parent unfit. The existence of any single factor may establish unfitness if proven by clear and convincing evidence. The court relied on these factors in making such a determination: "failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family; lack of effort on the part of the parent to adjust the parent's circumstances, conduct or conditions to meet the needs of the child; and failure to maintain regular visitation, contact or communication with the child or with the custodian of the child." Also, father failed to appear at the hearing on the State's motion to terminate his parental rights, from which he now appeals. After finding a parent unfit, a district court must determine whether termination of parental rights is "in the best interests of the child." K.S.A. 38-2269(g)(1). Because determining what is in a child's best interests is based only on a preponderance of evidence and is

inherently a judgment call, the Court of Appeals will only overturn a District Court's best interest termination when it constitutes an abuse of discretion. "Although the District Court's explanation of its decision to terminate Father's parental rights was rather brief, it cannot be classified as either an error of fact or law. It likewise cannot be said that no reasonable person would agree that termination was in the best interests of C.H. The decision of the district court was affirmed."

TERMINATION OF PARENTAL RIGHTS—Unfitness in the Foreseeable Future. *In the Interests of A.H. and C.P., Minor Children*, Docket No. 124,131, 2022 WL 333683, (Unpublished Kan. Ct. of App. 2.4.2022. Sedgwick—J. Hoelscher, affirmed). Mother challenges the district court's findings regarding her unfitness in the foreseeable future, not her present unfitness. Mother did not complete the majority of requested/required U.A.'s or hair follicle tests; did not complete case plan tasks including Mother's inability to find stable income and housing; told staff she was hiring private investigators to look into her case; that she would kidnap the children; that people were following her after her visitations with the children; and made threatening comments that made staff fear for their own safety. The issue Mother raised was whether the state presented clear and convincing evidence that her unfitness, which included drug use, living in a dangerous part of Wichita, physical, mental and emotional abuse of her children, and lack of effort on Mother's part to adjust her circumstances, conduct or condition to meet her children's needs; was unlikely to change in the foreseeable future. The case included a laundry list of Mother's failures. The Court of Appeals found the district court gave primary consideration to the physical, mental and emotional health of the children in terminating Mother's parental rights, and Mother did not show the district court's decision was unreasonable.

TERMINATION OF PARENTAL RIGHTS—Unfitness in the Foreseeable Future. *In the Interests of A.T, C.W., L.J.W., and L.T., Minor Children*, Docket No. 123,908, 2022 WL 333650 (Unpublished Kan. Ct. of App. 2.4.2022. Sedgwick—J. Walters, affirmed). Father challenges the district court's findings regarding his unfitness in the foreseeable future, not his present unfitness. The district court relied on K.S.A. 2020 Supp. 38-2269(b)(7)-(8), (c)(2)-(3), finding clear and convincing evidence that father would remain unfit in the foreseeable future due to his instability in housing, instability in employment, failure to complete required classes, and failure to show he could meet the needs of his children, despite having been given 39 months in which to do so. St. Francis made reasonable efforts to rehabilitate Father and the children, which failed. Father lacked effort to adjust his circumstances, conduct or conditions to meet his children's needs. Father failed to maintain regular visitation, contact and communication with his children or their foster parents. Father failed to carry out a reasonable, court-approved plan to achieve reintegration of the children into his home.