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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.LB.S. BY AND THROUGH HER NEXT FRIEND J.L.S. NECESSARY THIRD PARTY,	)	Case No. 12 D 2686
VS.	)	
W.M. RESPONDENT	)	

MEMORANDUM DECISION AND ORDER

On the 25th day of October 2013, the above captioned matter came on for hearing on the Petitioner's Motion for Summary Judgment. The appearances were as follows: Timothy Keck, Melissa Johnson, and David Davies, attorneys for Petitioners; W.M., Respondent, along with attorney Benoit Swinnen, attorney for Respondent; Jill Dykes, Guardian *ad litem*; and Jennifer Berger, attorney for J.L.S., the natural mother. There were no other appearances.

I. INTRODUCTION

Kansas law is clear that a "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." K.S.A. 23-2208(f). In this case impregnation took place by artificial insemination ("AI"), but the Respondent as donor of the semen provided it directly to J.L.S. and her partner, and not to a licensed physician. The question before this court is whether, in the face of a written non-paternity agreement between the donor and the mother, the donor can be determined to be

the father of the child conceived by AI when a licensed physician was not involved in the AI process. This court finds that, because the parties did not provide the donor sperm to a licensed physician, the statutory basis for preclusion of paternity does not apply, and the donor therefore *can* be determined to be the father of the child.

II. FACTS

A.B. and J.L.S. are a same-sex couple, formerly living in a committed relationship, who desired to have a child together. In March 2009, the couple placed an advertisement on the website Craigslist, seeking a man interested in private sperm donation. The Respondent answered the advertisement.

The Respondent and the couple began correspondence in late March, with the first in-person meeting having taken place on March 23, 2013. At this time the Respondent was presented with a Sperm Donor Contract that he believed to have been downloaded from the Internet, and which he took home for further review. It is uncontroverted that the Respondent did not seek any legal advice during this process.

On March 30, 2009, the parties executed the Sperm Donor Contract at the home of A.B. and J.L.S. Then, on three consecutive nights in April 2009, the Respondent provided his semen to the women at their home, each time delivering it in a specimen cup. The women in turn used the semen to inseminate J.L.S. at their home. The at-home insemination was successful and M.L.B.S. was born in December 2009. The couple continued to live together until at least the early part of December 2010, at which time they separated.

On April 10, 2009, prior to the birth of M.L.B.S., J.L.S. first applied for benefits with the Kansas Department of Children and Families ("DCF," formally the Kansas Department of Social

and Rehabilitation Services). In this application she did not list A.B. as a member of the household.

On February 7, 2011, J.L.S. completed a second application to DCF for food, cash and medical assistance for M.L.B.S. J.L.S. indicated in Section H of this application that the child's father was a "donor." She did not identify A.B. as a co-parent, nor did she indicate any financial support that she was receiving from A.B. for M.L.B.S. A copy of the Sperm Donor Contract was requested by DCF in January 2012, however J.L.S. said that she could not produce one because it was unavailable to her at that time.

On July 28, 2012, J.L.S. completed a third application for benefits related to M.L.B.S., in a similar manner as the February 2011 application. In this document J.L.S. indicated that the father of M.L.B.S. was an "anonymous sperm donor," and she made no mention of A.B. as a co-parent or source of support.

In September 2012, after services were discontinued to J.L.S. for failure to supply the requested information (*i.e.*, the executed Sperm Donor Contract), J.L.S. presented a "copy" of the Contract for DCF's review. Because the Contract had the signatures of all of the parties (A.B., J.L.S., and W.M.), it was clear to DCF that this was not an anonymous sperm donation.[1]

III. PROCEDURAL HISTORY

On October 3, 2012, a Petition to Determine Paternity was filed by the Secretary of DCF ("the Secretary") seeking to have the Respondent adjudicated the father of M.L.B.S. The State was assigned the support rights for M.L.B.S. and, as a result, had expended cash and medical assistance to J.L.S. The Petitioner further requested: a) an order of child support according to the Kansas Child Support Guidelines; b) a judgment payable to the Secretary for expenses for the

[1] The copy that was given to DCF was not the actual contract that was executed by the parties. This instead was a "spare" that J.L.S. had in her possession, and which was signed for W.M. and A.B. by a friend of J.L.S. Except for the signatures, it is identical to the original in all respects.

support of the child; c) a judgment payable to J.L.S. for expenses of support and education of the child, as well as medical expenses related to the child's birth; and d) an order that the Respondent pay for the costs of this action.

On October 24, 2012, the Respondent filed an Answer in which he denied all the allegations of the Petition and offered Affirmative Defenses. Respondent attached a copy of a Contract (Sperm Donor Contract) as Exhibit A.

On January 9, 2013, a Guardian *ad litem* was appointed to represent the interests of the minor child, and on February 25, 2013, the Petitioner filed a Motion to Order Genetic Testing.

On February 27, 2013, the Respondent filed a Motion pursuant to K.S.A. 60-219 so that A.B. could be joined as a Necessary Party to this matter. The Respondent argued that because A.B. was a signatory to the Contract and had a co-parenting agreement to share the custody of the minor child with J.L.S., A.B. is the intended parent of M.L.B.S. On the same day, A.B. filed a Motion to Intervene as an interested party in the action. A.B. argued that, because the child was conceived through artificial insemination and had been parented jointly by both herself and the child's natural mother, the child enjoyed a constitutional right that A.B. and J.L.S. be named co-parents.

On March 4, 2013, the Guardian *ad litem* ("GAL") filed a Motion for a Parenting/Best Interest of the Child Evaluation. Citing Kansas public policy to act in the best interest of the child, the GAL recommended Dr. Susan Voorhees conduct the evaluation to assist both the court and counsel in determining the parent-child relationship and to set a *Ross* hearing to determine whether or not it was in the child's best interest to have genetic testing ordered.

On March 8, 2013, attorney Joseph Booth, counsel for A.B., filed a parenting plan between A.B. and J.L.S. concerning the care and custody of the child, as well as a Child Support

Worksheet, and a copy of the Sperm Donor Contract executed by A.B., J.L.S., and W.M. that was executed on March 30, 2009.

On April 5, 2013, this Court entered an Order bifurcating the action, electing to address the issue of Respondent's status under K.S.A. 23-2208 first.

On May 24, 2013, the Petitioner filed a Motion for Summary Judgment, as well as a memorandum in support. The Petitioner raised one clear argument: the Respondent, A.B. and J.L.S. did not comply with the plain language of K.S.A. 23-2208(f) as the Respondent did not provide the semen to a licensed physician and instead he provided his semen to A.B. and J.L.S., which was used to artificially inseminate J.L.S. and resulted in a full-term pregnancy. The Petitioner argued that, because of this failure by the parties to adhere to the statutory requirement, the Respondent is not afforded the statutory bar to paternity.

On June 24, 2013, J.L.S. filed her response to the Petitioner's Motion for Summary Judgment. She opposed the Petitioner's motion and urged the court to rely on the intent of the parties that W.M. not be considered the father of the child. J.L.S. also claimed that introducing a virtual stranger into the family unit would violate the right to family integrity.

On July 18, 2013, the GAL and A.B. (not presently a party) filed a joint Response to Petitioner's Motion for Summary Judgment. They argue a finding that W.M. is a presumptive parent would replace A.B. as a parent.

On July 22, 2013, the Respondent filed a Response to Petitioner's Motion for Summary Judgment and Cross-Motion for Summary Judgment. He contested a number of facts as stated by the Petitioner, but none that are relevant to the sole issue presently pending before the court. He opposed the Petitioner's motion for summary judgment and, as indicated by the title of the pleading, he cross-moved for summary judgment in his favor.

On July 31, 2013, A.B. filed an Amended Answer to Cross Claim and Third-Party Claim where she admitted all of the allegations in Respondent's pleading *except* for Paragraph Five.

On August 20, 2013, J.L.S. filed an Answer to Cross Claim and Third-Party Claim where she admitted all of the allegations set forth by the Respondent *except* for Paragraph Five.

On October 25, 2013, oral arguments were heard in this matter. Each party reiterated its position in support of its respective Summary Judgment motions.

IV. ISSUE PRESENTED

> Whether the Respondent's status under K.S.A. 23-2208(f) is that of sperm donor or birth father, even in the face of a written non-paternity agreement, when his semen was used in an artificial insemination procedure that resulted in a live birth but was not provided to a licensed physician.

V. ANALYSIS

Through K.S.A. 23-2208(f), the Kansas legislature has afforded a woman a statutory vehicle for obtaining semen for AI in a manner that protects her and her child from a later claim of paternity by the donor. Similarly, the legislature has provided a man with a statutory vehicle for donating semen to a woman in a manner that precludes later liability for child support. The limitation on the application of these statutory vehicles, however, is that the semen must be "provided to a licensed physician." Otherwise there can be a determination of paternity, along with all of the rights, duties, and obligations that follow such a determination. And as the Kansas Supreme Court has instructed, "[g]enerally speaking, mere ignorance of the law is no excuse for failing to abide by it." *In re K.M.H.*, 285 Kan. 53, 83 (2007), *citing State ex rel. Murray v. Palmgren*, 231 Kan. 254, 536 (1982).

A. Uniform Parentage Act and Kansas Parentage Act

At the time K.S.A. 23-2208 was adopted by the Kansas legislature in 1994, the practice of artificial insemination (AI) had been used for more than a century and was not new to the law.

Determination of parentage was dictated by statutes across the states, and these statutes varied in scope and reach. The Uniform Parentage Act (UPA) came into being in 1973, shortly after the decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), where the United States Supreme Court held that in some instances unmarried fathers have constitutional rights concerning the care and custody of their children. Many states adopted the UPA in whole or in part, and Kansas was no exception.

The UPA specifically addressed AI: "The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[2] The Kansas legislature wholly adopted this language, with the additional provision that in order for a donor to *preserve* his parental rights, he must expressly reserve these rights in a writing executed between the parties.

Much time has passed since this statute was enacted, and it is clear from the litigation in this and other jurisdictions in the intervening years that, as written, the Uniform Law Commissioners anticipated the myriad legal issues arising out of parties' use of Assisted Reproductive Technology (ART). The UPA was modernized in 2000 and again in 2002 to reflect the changes in both the times and technology, and it clarified the issue of parentage concerning children born as a result of all forms of ART, including AI. Not all states have adopted the revisions made by the Commissioners, however. And for reasons known only to the legislature, Kansas is one of the states that remains in line with the UPA of 1973. It is from here that this Court must apply the law.

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[2] UPA § 5(b) (1973).

As indicated in its order of April 5, 2013, this Court has chosen to address the issue of the Respondent's status under K.S.A. 23-2208(f) before addressing any other issue presented in the case at bar. While "donor" is not defined within our statutes, it is clear from the evidence provided to this court the Respondent did supply A.B. and J.L.S. with his semen, on more than one occasion, in order that J.L.S. might become pregnant. It is undisputed that the Respondent was never married to either A.B. or J.L.S. It is also uncontroverted that J.L.S. conceived as a result of the AI procedure that was performed by A.B. in their home and a full-term pregnancy resulted. Furthermore, it is uncontroverted that the semen was not provided to a licensed physician.

B. K.S.A. 23-2208(f)

The Kansas Parentage Act, as adopted in 1994, governs parentage proceedings:

> KSA 23-2208(f) Presumption of paternity.
> 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*]

The Kansas Supreme Court said in *In re K.M.H.*, 285 Kan. at 79-80, "When we are called upon to interpret a statute, we first attempt to give effect to the intent of the legislature as expressed through the language enacted. When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it. We need not resort to statutory construction. It is only if the statute's language or text is unclear or ambiguous that we move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to effect the legislature's intent." See *CPI Qualified Plan Consultants, Inc. v. Kansas Dept. of Human Resources*, 272 Kan. 1288, 1296, 38 P.3d 666 (2002); *State v. Robinson*, 281 Kan. 538, 539-40,

132 P.3d 934 (2006). Because the language of the statute is clear and unambiguous, analysis of the reasoning and the intent of the legislature is not necessary.

The Respondent argues that this case falls outside of the statute by saying that the statute is not directive as it pertains to the physician requirement but is merely instructive as to the measures necessary to preserve parental rights should a donor choose to do so. This argument does not square with the plain language of K.S.A. 23-2208(f) because it requires the court to give meaning where meaning was not intended and to add words where none appear. It requires the Court to omit the phrase, "*is treated in law as if he were not the birth father of a child thereby conceived*," and go directly to the conjunction *unless* that links the dependent clause, "*agreed to in writing by the donor and the woman.*" Statutory interpretation does not allow hopscotching through the statute, as the Respondent would like. The Kansas Supreme Court in the oft-cited *In re K.M.H.* rejected this type of interpretation when D.H. attempted to argue that because he did not personally deliver the semen sample to the physician, the statutory bar did not apply to him. 285 Kan. at 80. The same type of interpretation is likewise rejected here.

The Respondent's semen was not provided to a licensed physician by any of the parties at any point during the AI process. Accordingly, the statute as written does not afford the Respondent the bar to paternity that he seeks.

Although this appears to be a matter of first impression in Kansas, a California court has dealt with a very similar issue. The opinion in that case informs the court's opinion here. *Jhordan C. v. Mary K.*, 179 Cal.App.3d 386 (1986), was a paternity action concerning a child conceived by artificial insemination with semen donated personally to the mother by plaintiff donor. Jhordan C. provided his semen to Mary K., without physician involvement, and Mary K. conceived using that semen. Jhordan C. then sought to be involved in the upbringing of the

child, over the objection of Mary K. and Victoria T., who were raising the child together. The relevant California statute, adopted from the UPA, was very similar to K.S.A. 23-2208(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 natural father of a child thereby conceived." Calif. Civ. Code § 7005(b). The trial court found Jhordan C. to be the father of the child, and specifically to not qualify as a sperm donor, because the parties did not involve a licensed physician in the AI process and had therefore failed to follow the statute. The California Court of Appeals affirmed.

The California court held that, in adopting Civ. Code § 7005(b), which offers a statutory basis for preclusion of paternity in a situation involving AI, the California Legislature embraced the apparently conscious decision by the drafters of the Uniform Parentage Act to limit the application of the donor non-paternity provision to instances in which semen is provided to a licensed physician. The Kansas Legislature made a similar such decision in adopting K.S.A. 23-2208(f), and it is this court's obligation to apply that statute as written.

C. Voluntary termination/relinquishment of parental rights

The Respondent argues that the Sperm Donor Contract clearly indicates the parties' intent that W.M. not have any parental rights or responsibilities for the child conceived using his semen. A parent may not terminate parental rights by contract, however, even when the parties have consented. Termination of parental rights is controlled by statute, and in Kansas it may be accomplished only in one of the three following ways: (1) through relinquishment and adoption (K.S.A. 59-2136); (2) through adjudication as a child in need of care (under K.S.A. 38-2269); or (3) through a finding of parental unfitness by the court (K.S.A. 38-2271).

The Respondent, J.L.S. and A.B. executed an agreement on March 30, 2009, that would effectively terminate the Respondent's parental rights to any child born through the AI then-contemplated. According to the relevant provision of the Sperm Donor Contract:

> 4. Each Party acknowledges and agrees that [W.M.] provided his semen for the purpose of said artificial insemination and [J.L.S.] and [A.B.] accept it for the said purpose with the clear understanding that [W.M.] agrees that he would not demand, request, or compel any guardianship, custody, or visitation rights with any child(ren) born for *(sic)* the artificial insemination procedure. Further, [W.M.] acknowledges that he fully understands that he will have no paternal rights that are traditionally vested in the biological father of a child(ren).

The Kansas legislature does not authorize this manner of termination of parental rights. It is well established under Kansas law that a child is entitled to support from its parents, and that obligation may not be abandoned. See *Harris v. Harris*, 5 Kan. 46 (1869); *Riggs v. Riggs*, 91 Kan. 593 (1914); *Grimes v. Grimes*, 179 Kan. 340 (1956); *Stecker v. Wilkinson*, 220 Kan. 292 (1976). As there is no pending adoption of this child, there has been no finding of unfitness of W.M., and the child has not been adjudicated as a child in need of care, this contract can not accomplish the parties' desire, and it is outside the ability of this court to terminate W.M.'s parental rights under these facts; W.M.'s status as birth father precludes termination.

D. Remaining issues raised by the Respondent

In his cross-motion for summary judgment the Respondent makes a number of additional arguments, none of which are relevant to determination of the issue properly before the court. The Respondent argues the presumption, absent an applicable statute, that a sperm donor is not a father. Under the facts of this case, however, the Respondent does not meet the statutory definition of a sperm donor; accordingly, this argument is not applicable. The Respondent argues that the Constitution is violated by the state regulatory scheme applicable here, as well as by the statute that seeks reimbursement from only a father and not a mother for reimbursement of

expenses. Determination of whether the Respondent meets the paternity bar present in the Kansas Parentage Act does not by itself trigger either of these provisions, however, so the Respondent's constitutionality argument is not applicable. Finally, the Respondent's argument concerning a Ross hearing is not applicable to the issue of whether or not he qualifies as a sperm donor or a birth father.

VI. CONCLUSION

The sole issue presently before this court is whether, under K.S.A. 23-2208(f), W.M. is a sperm donor or a presumptive father as a matter of law. In this case, quite simply, the parties failed to conform to the statutory requirements of the Kansas Parentage Act in not enlisting a licensed physician at some point in the AI process, and the parties' self-designation of W.M. as a sperm donor is insufficient to relieve W.M. of his parental rights and responsibilities to M.L.B.S. The court is bound by the ordinary meaning and plain language of K.S.A. 23-2208(f), and it may not look the other way simply because the parties intended a different result than that afforded by the statute.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED and DECREED that the Petitioner's Motion for Summary Judgment is granted, finding that W.M. is the presumptive father of M.L.B.S.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED and DECREED that the Respondent's Cross-Motion for Summary Judgment is denied.

This Memorandum Decision and Order shall serve as the journal entry of judgment. No further journal entry is required.

In light of this decision, Plaintiff's counsel is to coordinate with opposing counsel in the next 10 business days to secure a date and time for a status conference from the Court's Administrative Assistant.

BY THE COURT IT IS SO ORDERED.

Dated this 22nd day of January, 2014.

Honorable Mary E. Mattivi
Judge of the District Court