NOT DESIGNATED FOR PUBLICATION

No. 108,176

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Relationship of:
BREE DOWNS, as Mother and Next Friend of
OWEN DOWNS-GILMORE, a Minor Child,
Appellant,

and

TIFFANI GILMORE,
Appellee.

MEMORANDUM OPINION

Appeal from Seward District Court; BRADLEY E. AMBROSIER, judge. Opinion filed March 8, 2013. Reversed and remanded with directions.

Derek Miller and *Tessa French*, of Miller Law Firm, of Liberal, for appellant.

Wayne R. Tate, of Tate & Kitzke L.L.C., of Hugoton, for appellee.

Before LEBEN, P.J., PIERRON and STANDRIDGE, JJ.

LEBEN, J.: While in a committed, same-sex relationship, Bree Downs and Tiffani Gilmore decided to have a child together. They jointly chose the sperm donor, and Gilmore carried the child. They lived together and coparented that child, Owen, for 3 years. The women then ended their romantic relationship, and Gilmore decided that she would no longer share Owen with Downs.

Downs brought a suit under the Kansas Parentage Act (KPA or Parentage Act), seeking recognition of a mother-child relationship between herself and Owen. Gilmore moved to dismiss the case, arguing that the Kansas Parentage Act didn't recognize same-sex partners as ones who might establish paternity under the statute. The district court dismissed Downs' petition due to lack of standing under the KPA. But our Supreme Court has now held that "[a] woman claiming to be a presumptive mother of a child is an interested party under the KPA." *Frazier v. Goudschaal*, No. 103,487, 296 Kan. ___, Syl. ¶ 6, ___ P.3d ___, 2013 WL 646309 (February 22, 2013). We therefore reverse the district court and send the case back for further proceedings.

ANALYSIS

Before we discuss the facts in greater detail, we must establish the procedural framework that guides our review of the district court's ruling. Neither the parties nor the district court focused much on the procedural standards applicable to Gilmore's motion to dismiss the suit, but we must first determine these standards—both in the district court and on appeal.

Kansas courts apply the Kansas Rules of Civil Procedure in parentage actions when more specific provisions are not contained in the Kansas Parentage Act. K.S.A. 38-1120; *e.g.*, *In re K.M.H.*, 285 Kan. 53, 59, 169 P.3d 1025 (2007) (applying summary-judgment standard under K.S.A. 60-256 in parentage action). Gilmore's motion is properly characterized as one to dismiss for failure to state a claim—since she claims Downs had no standing to state a legal claim—which is governed by K.S.A. 2011 Supp. 60-212(b)(6). Normally, when a district court has granted a motion to dismiss for failure to state a claim, the appellate court must accept as true the facts alleged by the party bringing the lawsuit, along with any reasonable inferences that may be drawn from those facts. We then determine whether a legal claim has been stated. See *Cohen v. Battaglia*, 296 Kan. ___, Syl. ¶ 2, 293 P.3d 752 (2013).

In our case, however, the district court held an evidentiary hearing on the motion, allowing both sides to present evidence to frame the dispute. That's allowed under K.S.A. 2011 Supp. 60-212(i), and when the district court uses that procedure, an appellate court reviews the matter under its normal standard of review for disputes resolved after an evidentiary hearing before the district court. See *Murphy v. Scheider National, Inc.*, 362 F.3d 1133, 1139-40 (9th Cir. 2004). Under that standard, we accept the district court's factual findings if they are supported by substantial evidence, and considering those facts, we then independently review the district court's legal conclusions. See *Owen Lumber Co. v. Chartrand*, 283 Kan. 911, 915-16, 157 P.3d 1109 (2007).

With those legal standards in mind, we turn to the specifics of this lawsuit. Downs filed a petition under the Kansas Parentage Act, K.S.A. 38-1110 *et seq.* (We cite to the statute as it stood when Downs filed this case. As part of a general recodification of Kansas family law, the Kansas Parentage Act has since been moved to K.S.A. 2012 Supp. 23-2201 *et seq*. The substance of the provisions we discuss here has not been changed.) Downs asked that she be declared Owen's mother and that she be granted custody rights and parenting time. Gilmore filed a motion to dismiss, alleging that Downs lacked standing, which is a party's ability to bring a legal action. Gilmore argued, as she does on appeal, that a woman who was neither a biological nor an adoptive parent had no standing under the Parentage Act.

The district court made several factual findings, which are sufficient to decide whether Downs had standing to bring an action to establish parentage. Those findings, supported by testimony heard by the district court, are: (1) Gilmore and Downs "entered into a committed same-sex relationship"; (2) Owen was conceived through artificial insemination "[a]s a result of the parties' joint decision"; (3) Gilmore and Downs "actively parented Owen jointly from birth"; and (4) "Owen has a strong bond with [] Downs and sees her in the role of a parent." The court said that if it had had jurisdiction,

it would have appointed a guardian ad litem to represent Owen's interest so that the court could determine "what type of parenting plan would be in the child's best interest." But the court ruled that Downs did not have standing to bring an action under the Parentage Act.

We would add some additional background facts to provide context. Gilmore and Downs were in a romantic relationship for nearly 5 years, beginning in late 2006. The lived together in a three-bedroom house; they had a commitment ceremony and had rings tattooed on their left ring fingers. They decided to have a child together, but they did not enter into any written agreement. Downs testified that she and Gilmore had an oral agreement to raise the child together as parents; Gilmore said they didn't have such an agreement. Downs participated in the selection of the sperm donor—who was a friend of hers—and attended the doctor-supervised artificial insemination. Downs also attended prenatal doctor's appointments, and she drove Gilmore to the hospital where Gilmore gave birth to Owen on May 11, 2008. They gave Owen the last name of Downs-Gilmore. The three of them lived together for 3 years, with Owen and Gilmore calling Downs "Mom," while Gilmore was called "Mommy."

Gilmore and Downs broke up in August or September 2011. Downs brought the parentage action after Gilmore stopped providing parenting time to Downs. During the time Gilmore and Downs were together, Downs did not adopt Owen.

Shortly after our court heard oral argument from the parties on appeal, the Kansas Supreme Court decided the *Frazier* case. That case is similar to ours except that there was a written coparenting agreement between the two women who were acting as parents, and there were two children instead of one.

The Kansas Supreme Court held that the woman in *Frazier* who—like Downs—was neither a biological parent nor an adoptive parent could nonetheless bring an action

to establish a mother-child relationship under the Parentage Act: "Under the Kansas Parentage Act (KPA), any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. K.S.A. 38-1126. A woman claiming to be a presumptive mother of a child is an interested party under the KPA." *Frazier*, Syl. ¶ 6. In our view, that holding resolves this appeal.

Gilmore argued that only a biological or adoptive parent could bring an action seeking to establish her parental rights. In support, she cited K.S.A. 38-1111, which defines "parent and child relationship" as "the legal relationship existing between a child and the child's biological or adoptive parents." But, as our Supreme Court noted in *Frazier*, there are more provisions in the Parentage Act than this single definition, and they must be construed together.

K.S.A. 38-1114(a) provides for several situations in which a man may be declared the father of a child. Only one of those, K.S.A. 38-1114(a)(5), is based on genetic testing showing biological parentage. Among the other ways of establishing parentage for a father are when the man has either "notoriously or in writing recognize[d] paternity of the child," K.S.A. 38-1114(a)(4).

Downs seeks to apply that presumption to herself, citing K.S.A. 38-1126, which provides for actions to determine a *mother*-child relationship. That statute provides that "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship." K.S.A. 38-1126 then provides that provisions applicable to the father-child relationship, like K.S.A. 38-1114, shall apply to the determination of a mother-child relationship "[i]nsofar as practicable."

Gilmore and Downs disagreed in this appeal about whether it was "practicable" to apply the presumption of K.S.A. 38-1114(a)(4)—where the man has "notoriously . . .

recognize[d] paternity"—to someone claiming to be a mother. But that issue has now been decided in *Frazier*:

> "Obviously, except for subsection (5), the parental relationship for a father can be legally established under the KPA without the father actually being a biological or adoptive parent. That is important because K.S.A. 38-1113 states that a mother 'may be established . . . under this act [KPA]' and K.S.A. 38-1126, dealing with the determination of the mother and child relationship, specifically incorporates the provisions of the KPA applicable to the father and child relationship, insofar as practicable. A harmonious reading of all of the KPA provisions indicates that a female can make a colorable claim to being a presumptive mother of a child without claiming to be the biological or adoptive mother, and, therefore, can be an 'interested party' who is authorized to bring an action to establish the existence of a mother and child relationship." *Frazier*, slip op. at 21.

Frazier, like Downs, claimed that she had standing to bring a parentage action based on the presumption in K.S.A. 38-1114(a)(4) for having "notoriously or in writing" recognized she was the child's parent. See *Frazier*, slip op. at 13. Our Supreme Court held that she was an interested party who could bring that action under K.S.A. 38-1126. Accordingly, our Supreme Court concluded that the district court in *Frazier* "had the authority . . . to determine the existence or nonexistence of a mother and child relationship between Frazier and the two children." *Frazier*, slip op. at 22.

We do not consider the lack of a written coparenting agreement, which was present in *Frazier*, of any significance in determining the standing issue. K.S.A. 38-1126 grants "[a]ny interested party" the right to bring an action to determine the existence or nonexistence of a mother-child relationship, and the Supreme Court determined that the paternity presumption in K.S.A. 38-1114(a)(4) could be applied when determining whether a mother-child relationship exists. That presumption has two paths—one in which the parent "notoriously" recognizes parentage, meaning the parent has openly recognized the child, and another in which the parent does so "in writing." Either suffices

under the statue for a supposed father, and our Supreme Court applied K.S.A. 38-1114(a)(4) to a case involving a supposed mother in *Frazier*. The court also noted that the Uniform Parentage Act, upon which our statute is based, and "the KPA are gender-neutral, so as to permit both parents to be of the same sex." *Frazier*, slip op. at 30.

Because Downs had standing to bring an action under the Parentage Act to determine the existence or nonexistence of a mother-child relationship between her and Owen, we reverse the district court's judgment and remand the case for further proceedings.