NOT DESIGNATED FOR PUBLICATION

No. 112,027

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

GREGORY P. ANDERSON,
Appellant,

v.

SHANNON L. RICHARD,
Appellee.

MEMORANDUM OPINION

Appeal from Saline District Court; JEROME P. HELLMER, judge. Opinion filed February 20, [illegible]. Reversed and remanded with directions.

Joseph A. Allen and *James D. Sweet*, of Allen & Sweet, of Minneapolis, for appellant.

Janice Norlin, of Marietta, Kellogg, and Price, of Salina, for appellee.

Before STANDRIDGE, P.J., GREEN, J., and JOHNSON, S.J.

Per Curiam: Gregory P. Anderson appeals the trial court's judgment dismissing his paternity action with prejudice. On appeal, Anderson contends that the trial court abused its discretion in dismissing his paternity action. Finding merit in Anderson's contention, we reverse and remand with directions to the trial court to allow Anderson to amend his pleadings.

Anderson filed a petition to determine the paternity of A.A.R. In his petition, Anderson requested genetic testing because he believed that he is the biological father

A.A.R. He joined A.A.R.'s mother, Shannon L. Richard (mother), in the petition. But he did not join A.A.R. or A.A.R.'s presumed father, Anthony A. Richard, in the petition.

In response, the mother moved to dismiss the matter with prejudice. The mother argued that Anderson did not meet the presumption of paternity under the Kansas Parentage Act (KPA), see K.S.A. 2014 Supp. 23-2201 *et seq.*, and consequently Anderson lacked standing to bring the action. The trial judge decided to have both parties submit proposed findings of facts and law.

Based on both parties proposed findings, the trial judge held a hearing and dismissed Anderson's paternity action with prejudice. The trial judge found that the court lacked jurisdiction because Anderson did not join A.A.R. or Anthony A. Richard, necessary parties, in his petition. Moreover, the trial judge held that "Anderson lacks the standing necessary to bring the action that he has filed in this matter, that he is unable to bring, join, and name additional parties which would be required, [and] that there is a presumed father to the minor child in this matter . . . ."

The trial judge specifically found that Anderson lacked standing because K.S.A. 2014 Supp. 23-2209(a)(2) "may only be employed if there is not already a father and child relationship that is presumed."

Did the Trial Court Err When it Dismissed Anderson's Paternity Action With Prejudice

A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services*, 296 Kan. 906, 935, 296 P.3d 1106 (2013). "An abuse of discretion necessarily results when the district court applies incorrect legal standards in the exercise of its discretion." *Graham v. Herring*, 297 Kan. 847, 855, 305 P.3d 585 (2013). Moreover, interpretation of a statute is a question of law

over which this court has unlimited review. *Cady v. Schroll*, 298 Kan. 731, 734, 31[illegible] 90 (2014). When a statute is plain and unambiguous, this court should not speculate [illegible] the legislative intent behind that clear language, and it should not read something [illegible] statute that is not readily found in its words. 298 Kan. at 738-39.

On appeal, Anderson concedes that he did not join A.A.R. or the presumed [illegible] Anthony A. Richard as parties in his paternity action. Except in child support actions [illegible] provided in K.S.A. 2014 Supp. 23-2211(b), K.S.A. 2014 Supp. 23-2211(a) of the KP[illegible] requires that the child, mother, and each presumed or alleged father be made parties [illegible] any action. Not joining the proper parties deprives the trial court of subject matter jurisdiction. *State ex rel. Secretary of SRS v. Stephens*, 13 Kan. App. 2d 715, 717, 78[illegible] P.2d 68 (1989) (superseded regarding child support actions by *Florida Dept. of HRS v. Breeden*, 21 Kan. App. 2d 490, 901 P.2d 1357 [1995]). Thus, under Anderson's origin[illegible] petition, the trial court lacked subject matter jurisdiction.

Nevertheless, Anderson argues the trial court abused its discretion when it dismissed his case with prejudice. Anderson specifically argues that the trial court sh[illegible] have given him leave to amend his petition to comply with K.S.A. 2014 Supp. 23-22[illegible] dismiss his case without prejudice. As discussed below, the trial judge dismissed Anderson's paternity action with prejudice because he determined that Anderson did [illegible] have standing and could never have standing under K.S.A. 2014 Supp. 23-2209(a). [illegible] trial court, however, incorrectly interpreted K.S.A. 2014 Supp. 23-2209(a). Thus, the [illegible] court abused its discretion when it dismissed Anderson's paternity action with prejudi[illegible]

Before the trial court, Anderson argued that he had standing to bring a paterni[illegible] action under K.S.A. 2014 Supp. 23-2209(a)(2). K.S.A. 2014 Supp. 23-2209(a)(2) state[illegible] that "[a] child or *any person on behalf of such a child*, may bring an action at any time until three years after the child reaches the age of majority to determine the existence [illegible] father and child relationship which is not presumed under K.S.A. 2014 Supp. 23-2208

and amendments thereto . . . ." (Emphasis added.) Anderson interpreted the statute to mean that he or any other person on behalf of the child could bring a paternity action.

In its finding, however, the trial judge dismissed Anderson's paternity action with prejudice because he found that Anderson could never have standing under K.S.A. 2014 Supp. 23-2209(a)(2). In regards to this conclusion, the trial judge stated the following:

> "Mr. Sweet [Anderson's attorney] has argued that the statute should be read and interpreted that any person and his brief and response to the brief in this matter continues to point out that Mr. Anderson, in his opinion, would not be barred from pursuing this matter because any person may from the reading of the statute as Mr. Sweet has advanced the case to the Court at this time.
> "However, Miss Norlin [mother's attorney] points out 23-2209(a) may only be employed if there is not already a father and child relationship that is not presumed and in the instant case we have that presumption and the father is present and has been in the child's life since birth.
> "The law at this point in time, is that Mr. Anthony Richard is A.A.R.'s presumed and legal father and under those circumstances as Mr. Sweet is asking that the Court find that any person may, K.S.A. 23-2209(a)(2) would not apply on behalf of Mr. Anderson."

Nonetheless, the plain language of the KPA, caselaw, and the family law handbook the trial judge relied on in his decision do not support the trial judge's interpretation of K.S.A. 2014 Supp. 23-2209(a). First, the plain language of K.S.A. 2014 Supp. 23-2209(a) does not say anything about barring a person from bringing an action once a presumed father exists. K.S.A. 2014 Supp. 23-2209(a) clearly states that "any person on behalf of such child" may bring an action to determine the existence of a father and child relationship presumed under K.S.A. 2014 Supp. 23-2208 or to determine the existence of a father and child relationship at any time until 3 years after the child reaches the age of majority when there is no presumed father under K.S.A. 2014 Supp. 23-2208. As a result, K.S.A. 2014 Supp. 23-2209(a)(1) does not prevent others from bringing an action because a presumed father already exists.

Furthermore, K.S.A. 2014 Supp. 23-2208(c) discusses what factors a trial court should consider when there are two or more presumed fathers. For example, K.S.A. 2014 Supp. 23-2208(c) requires that a determination must be made as to which presumption will be in the best interest of the child. Thus, because K.S.A. 2014 Supp. 23-2208(c) sets out a procedure for what should occur when multiple presumed fathers exist, this shows that the trial judge's statutory interpretation of K.S.A. 2014 Supp. 23-2209(a) was incorrect. For if no other man trying to establish paternity would have standing once a presumed father exists, there would be no need for the KPA to include K.S.A. 2014 Supp. 23-2208(c), which sets out the procedures to follow when there are multiple presumed fathers.

Second, there is no caselaw that says K.S.A. 2014 Supp. 23-2209(a) may only be employed if no presumed father exists. While the trial court cited *Stephens* in its basis for dismissing the paternity action, *Stephens* does not hold that a person lacks standing if a presumed father already exists. Instead, the *Stephens* court held that the alleged father lacked standing to make an admission that the trial court had subject matter jurisdiction under the KPA that could bind the child, mother, or presumed father when they were not joined as parties to the suit. 13 Kan. App. 2d at 717.

Third, in its decision that Anderson lacked standing, the trial judge incorrectly interpreted the language in a family law handbook discussing K.S.A. 38-1115 (the previous version of K.S.A. 2014 Supp. 23-2209). In its journal entry, the trial court quoted the following passage in the Kansas Family Law Handbook:

> "K.S.A. 38-1115 provides that either a child whose paternity has not been determined or any person on behalf of a child may initiate an action to establish paternity at any time if there is a presumed father. *If there is not a presumed father*, the action can be brought until three years after the child reaches the age of majority." (Emphasis added.) 1 Elrod and Buchele, Kansas Law and Practice, Kansas Family Law, § 7.2, p. 447 (1999.)

From its finding, it seems that the trial court interpreted the italicized language "if [illegible] not a presumed father" to mean that if a presumed father existed then no other person could have standing. The trial court's application of this passage was in error.

The passage does not say that the existence of a presumed father bars other paternity actions. Although the language in the handbook is not as clear as K.S.A. [illegible] Supp. 23-2209(a), when read in conjunction with K.S.A. 2014 Supp. 23-2209(a), it is readily apparent that the existence of a presumed father does not bar another person bringing an action under the KPA. K.S.A. 2014 Supp. 23-2209(a)(1) provides a means for a child or any person on behalf of the child to determine the existence of a father and child relationship *which is presumed* under K.S.A. 2014 Supp. 23-2208. K.S.A. 2014 Supp. 23-2209(a)(2) provides a means for a child or any person on behalf of the child to determine the existence of a father and child relationship *which is not presumed* under K.S.A. 2014 Supp. 23-2208. The handbook states that when there is a presumed father then the father-child relationship can be established at anytime, and when there is not a presumed father, the father child relationship can be established up to 3 years after the child reaches the age of majority.

When reading the handbook and K.S.A. 2014 Supp. 23-2209(a) together, the presumed father referenced in the handbook is not a preexisting presumed father, but the status of a father and child relationship involved in the current action. It seems that the trial court confused this language. The trial court interpreted the "presumed father" referenced by the handbook to mean a preexisting presumed father, not the status of father and child relationship to be determined in the current action. Thus, the trial court incorrectly interpreted the language in the handbook and statute in finding that Anderson lacked standing.

Accordingly, the trial court erred when it found that Anderson lacked standing and would never have standing under the KPA. This is clear from the plain language of the

KPA. As a result, no case law supports the trial judge's interpretation of K.S.A. 20[illegible] Supp. 23-2209(a). Disregarding standing, the only other issue involved in Anderson's paternity action concerns his failure to join all the necessary parties in his petition. K.S.A. 2014 Supp. 60-241(b) states that involuntary dismissals due to "lack of jurisdiction, improper venue or failure to join a party under K.S.A. 60-219" are not an adjudication on the merits. For this reason, dismissal of Anderson's case with prejudice was improper as an abuse of discretion.

Finally, it is important to note that Anderson also raises two other issues in his brief. First, even though Anderson concedes that the trial court could find Anthony A. Richard is A.A.R.'s presumed father, Anderson argues that the trial court should not have made this determination without actual evidence presented. Second, Anderson contends that the court erred when it granted the mother's motion to dismiss by making findings not supported by the record. Anderson merely mentions in his brief that he took issue with these two actions. Anderson does not cite the record or any law to support his arguments. Issues not briefed by the appellant are deemed waived and abandoned. *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011). Points raised incidentally and not argued in a brief are also deemed abandoned. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 645, 294 P.3d 287 (2013). Thus, we determine that Anderson has waived and abandoned these arguments on appeal.

Reversed and remanded with directions to the trial court to allow Anderson to amend his pleadings.