NOT DESIGNATED FOR PUBLICATION

No. 112,764

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

EMILY GREER,
A Minor Child, By and Through Her
Next Friend, JOHN FARBO,
Appellants,

v.

DANA GREER and
JACK GREER,
Appellees.

MEMORANDUM OPINION

Appeal from Franklin District Court; ERIC W. GODDERZ, judge. Opinion filed November 6, 2015. Affirmed.

John A. Boyd, of Finch, Covington & Boyd, Chtd., of Ottawa, for appellants.

No appearance by appellees.

Before LEBEN, P.J., GREEN, J., and JEFFREY E. GOERING, District Judge, assigned.

LEBEN, J.: John Farbo appeals the district court's refusal to grant him paternity rights to his biological daughter, Emily, who was born to Dana Greer during her marriage to Jack Greer (who is still her husband). In a prior appeal, our court told the district court to weigh the presumption that John is the father (based on a paternity test) against the presumption that Jack is the father (because he is married to the child's mother) while also considering the child's best interests. See *Greer v. Greer*, 50 Kan. App. 2d 180, 191-96, 324 P.3d 310 (2014).

Weighing conflicting presumptions and determining the best interests of a child are judgment calls for the district court, which hears the evidence directly, and we review its decision only for an abuse of discretion. See *Harrison v. Tauheed*, 292 Kan. 663, 672, 256 P.3d 851 (2011). Under that standard, we must uphold the district court's decision unless it was based on a mistaken view of the facts or the law or no reasonable person would agree with it. *In re F.*, 51 Kan. App. 2d 126, 128, 341 P.3d 1290 (2015). We have carefully reviewed the underlying record and the district court's ruling; we find no abuse of its discretion.

John raises two other arguments on appeal. First, he claims that denying him a relationship with his biological daughter denies him and his daughter their constitutional rights to form a family together. Second, he argues that the district court should have heard additional testimony he offered when the case came back to the district court after the first appeal to our court.

We find no error by the district court on these issues, either. The United States Supreme Court found no constitutional violation when a biological father was denied the right to parent a child born while the mother was married to another man in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989) (plurality opinion). On the evidentiary issue, we review the decision not to allow further evidence only for abuse of discretion. See *City of Mission Hills v. Sexton*, 284 Kan. 414, 429-30, 160 P.3d 812 (2007). The parties had a full opportunity to present evidence at the district court hearing held before the earlier appeal. We find no abuse of discretion in the district court's refusal to hear the further testimony John offered (from the child's maternal grandfather) when we sent the case back. We therefore affirm the district court's judgment.

DISCUSSION

With that summary in place, we will proceed to discuss each of the issues in a bit greater detail. The facts are set out in our court's earlier opinion. See *Greer*, 50 Kan. App. 2d at 181-84. In sum, Jack and Dana Greer were married in 2009 but separated in August 2011. During the separation, Dana had a relationship with John. Jack and Dana reconciled in February 2012, and shortly after that, Dana told John she was pregnant. John told Dana that he wanted to be part of the child's life and that he would help support the child.

Emily was born in October 2012. On their own, John and Dana obtained genetic testing that established John as the biological father. John then filed a paternity suit seeking a determination that he was Emily's natural father. The district court held an evidentiary hearing at which it took testimony from John, Dana, and Jack. John said that he had seen Emily about 22 times between her birth and the June 2013 hearing, mostly when Jack was temporarily living away from the marital residence. Dana testified that she and Jack had participated in marital counseling and that Jack had a strong parental bond with Emily.

The district court found that the child's best interests would be served by maintaining Jack as her only father, but our court concluded that the court needed to give greater consideration to the presumption that John was the father based on genetic testing. We held that the district court must weigh both presumptions against each other and also consider the child's best interests. 50 Kan. App. 2d 180, Syl. ¶ 3; see K.S.A. 2014 Supp. 23-2208(c).

The district court first discussed the two presumptions—the presumption that a woman's husband is the father of a child born during their marriage and the presumption that a man whose paternity is established by genetic testing is the father. As our court

noted in the earlier appeal, when presumptions conflict, K.S.A. 2014 Supp. 23-2208(c) provides that "the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control." See *Greer*, 50 Kan. App. 2d at 181, 186, 193-95. The district court concluded that Jack's presumption of paternity should be considered stronger than John's. On this point, the court concluded that it is currently easier in our society for a child to be raised in an intact family than to be raised with an open acknowledgment that the child's father was not the mother's husband. The court noted that Emily regarded Jack as her only father.

The district court also discussed Emily's best interests. It noted that our court had set out 10 different factors for it to consider, see 50 Kan. App. 2d at 195, and said that "if you look at the balance of those factors overall, they also weigh in favor of the presumption of legitimacy for [Jack]."

Before further reviewing the district court's comments on Emily's best interests, we should note the factors our court said a court should consider:

> "Over the years, courts have distilled the best interests of the child consideration present in paternity cases to include approximately 10 factors. 1 Elrod and Buchele, Kansas Family Law § 7.15 (1999). These factors have been summarized as including: (1) whether the child thinks the presumed father is his or her father and has a relationship with him; (2) the nature of the relationship between the presumed father and child and whether the presumed father wants to continue to provide a father-child relationship; (3) the nature of the relationship between the alleged father and the child and whether the alleged father wants to establish a relationship and provide for the child's needs; (4) the possible emotional impact of establishing biological paternity; (5) whether a negative result regarding paternity in the presumed father would leave the child without a legal father; (6) the nature of the mother's relationships with the presumed and alleged fathers; (7) the motives of the party raising the paternity action; (8) the harm to the child, or medical need in identifying the biological father; (9) the relationship between the child and any siblings from either the presumed or alleged father; and (10) whether there have

> been previous opportunities to raise the issue of paternity. 1 Elrod and Buchele, Kansas Family Law § 7.15 (1999)." *Greer*, 50 Kan. App. 2d at 195.

The district court explicitly considered each factor, and we find no error in its analysis. In applying these factors to our case, where the factors refer to a "presumed" father, we consider that a reference to Jack; where they refer to an "alleged" father, we consider that a reference to John:

1. *Child's view of and existence of relationship with Jack*. The district court viewed this factor as favoring Jack because Emily thinks Jack is her father and has a relationship with him.
2. *Nature of child's relationship with Jack and Jack's willingness to provide care*. The district court also considered this factor in favor of Jack, noting that he had the stronger bond with Emily and wanted to continue to care for her.
3. *Nature of child's relationship with John and John's willingness to provide care.* The district court found this factor of little weight because there was only "a short time period" in which John had contact with Emily; given Emily's young age, the court said it "would be surprising that [Emily would] even know[] who [John] is." The court did not specifically note that John was willing to provide care for Emily, but it surely was aware of that.
4. *Potential emotional impact of establishing paternity in John's favor*. The court said it appeared that "establishing a biological paternity at this point in [Emily's] life" would have a negative impact. The court presumably based this conclusion on its stated findings that Emily only knew Jack as her father and that there was no "psychological reason to impose an additional father figure in that child's life."
5. *Whether denying John's claim would leave Emily without a legal father.* The district court considered this factor irrelevant since Emily would have a legal father no matter how the court ruled.
6. *Nature of mother's relationship with John and Jack*. The court considered this factor in Jack's favor because Dana only wanted a relationship with Jack.

7. *John's motives in bringing the action*. The district court considered this a neutral factor because both John and Jack wanted a relationship with Emily.
8. *Harm to Emily from identifying the biological father.* The court considered this factor moot since genetic testing had already been done.
9. *Relationship between Emily and any siblings from either John or Jack*. As we understand it, John has no other children, while Jack has a daughter from another relationship. Emily won't lose any sibling relationships even if she no longer has a relationship with John. The district court found that this factor wasn't important in this case.
10. *Previous opportunities to raise the paternity issue*. The district court also found that this factor didn't apply.

John emphasizes that he has shown himself capable of caring for Emily and that his relationship with Dana took place while she and Jack were separated. John also addresses the concern expressed in many judicial opinions—and cited here by the district court—"that a child born during the marriage should not be bastardized." John argues that "Emily will not become a 'bastard' if John is allowed to assume the role of a non-residential parent in her life." He also argues that "[t]he 'apple cart' of the nuclear family in this case has already been upset" since paternity tests show that he's the biological father.

As we understand it, John's basic point is that he has much to offer to Emily; that point does not seem to be seriously disputed. But the district court faced a different question. It had to decide which statutory presumption—one favoring John or one favoring Jack—was founded on "weightier considerations" of policy and logic when everything was considered.

On that question, the district court faced an inherently difficult judgment call. It found in Jack's favor, and we find no abuse of discretion.

We proceed next to John's argument that the district court's decision violates both his and Emily's constitutional rights. We will first consider John's constitutional rights. Two court decisions guide our analysis: *Michael H.*, 491 U.S. 110, a United States Supreme Court decision with no single opinion representing a majority of the justices; and *In re D.B.S.*, 20 Kan. App. 2d 438, 888 P.2d 875, *aff'd* 258 Kan. 396, 903 P.2d 1345 (1995), a Kansas case in which the Kansas Supreme Court adopted an opinion from our court in its entirety. Like our case, both *Michael H.* and *In re D.B.S.* involved the claim of a man seeking to establish paternity to a child born while the mother was married to another man.

In *Michael H.*, four justices, in an opinion by Justice Antonin Scalia, concluded that the putative father had no constitutionally protected liberty interest at all. 491 U.S. at 118-32. Justice John Paul Stevens, who concurred in the resulting judgment against the putative father, said that he "would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this." 491 U.S. at 133 (Stevens, J., concurring). But he found no constitutional violation in denying the putative father the chance at a court hearing to establish the man's status as the child's father. 491 U.S. at 133. In support of this conclusion, Justice Stevens noted that he read the state statute to allow a court separately to give the putative father visitation rights (although Stevens conceded that the justices who joined Justice Scalia's opinion disagreed). 491 U.S. at 133-34. Ultimately, Justice Stevens assumed for the purpose of his opinion that the putative father had a liberty interest in the relationship with his child but found no constitutional violation where a man was given the chance to show that he was the child's natural father and to have his rights considered:

> "Under the circumstances of the case before us, Michael was given a fair opportunity to show that he is Victoria's natural father, that he had developed a relationship with her, and that her interests would be served by granting him visitation

> rights. On the other hand, the record also shows that after its rather shaky start, the marriage between Carole and Gerald developed a stability that now provides Victoria with a loving and harmonious family home. In the circumstances of this case, I find nothing fundamentally unfair about the exercise of a judge's discretion that, in the end, allows the mother to decide whether her child's best interests would be served by allowing the natural father visitation privileges. Because I am convinced that the trial judge had the authority under state law both to hear Michael's plea for visitation rights and to grant him such rights if Victoria's best interests so warranted, I am satisfied that the California statutory scheme is consistent with the Due Process Clause of the Fourteenth Amendment." 491 U.S. at 135-36 (Stevens, J., concurring).

The dissenting justices found that the putative father had a liberty interest in the relationship with his child so that he was entitled to due process, including a hearing, before that right could be overcome. 491 U.S. at 136-37, 148-56 (Brennan, J., dissenting, joined by Marshall and Blackmum, JJ.); 491 U.S. at 157-63 (White, J., dissenting, joined by Brennan, J.). Even three of the dissenting justices explicitly recognized, however, that the putative father still might be denied visitation rights if that was in the child's best interests—they simply required that he first receive a hearing to present his case. 491 U.S. at 156 (Brennan, J., dissenting). Professors Ronald D. Rotunda and John E. Nowak conclude from *Michael H.* that "a majority of Justices . . . will require a state to give a male asserting biological parenthood of a child some form of hearing to determine whether the father should be allowed visitation rights and opportunities to establish a relationship with the child." 3 Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure § 17.4(c)(ii), p. 92 (5th ed. 2012).

In *In re D.B.S.*, our court held that when a putative father had failed to establish a relationship with the child fairly soon after birth (in that case, within the child's first 4 years of life), the putative father had no liberty interest in the relationship that would require due process and give that father a right to paternity testing. 20 Kan. App. 2d at 452. Our court also held that "it is not unconstitutional for the State to give categorical

preference" to the husband of an intact marriage over a putative biological father. 20 Kan. App. 2d 438, Syl. ¶ 6. And our court said that when a putative father "has not developed a meaningful relationship with the child, the best interests of the child test does not impermissibly infringe on his constitutional rights." 20 Kan. App. 2d 438, Syl. ¶ 8. As we have already noted, the Kansas Supreme Court approved and adopted our court's opinion in *In re D.B.S.*, 258 Kan. at 396-97.

Based on *Michael H.* and *In re D.B.S.*, we find no violation of John's constitutional rights. A majority of justices in *Michael H.* concluded either that the putative father had no liberty interest or that his liberty interest would be appropriately protected by giving him a hearing. No justice suggested that the putative father's constitutional rights—whatever they may be—would trump a court's determination of the best interests of the child. Nor does anything in *In re D.B.S.* suggest that a putative father's constitutional rights are violated when a court determines, after a hearing, that the child's best interests will be served by giving preference to the presumption that the mother's husband is the child's father.

John emphasizes factual differences between his case and *Michael H.* and *In re D.B.S.* Unlike *In re D.B.S.*, for example, John already has paternity tests showing that he is the biological father. But the father in *Michael H.* had that too. 491 U.S. at 114. John also emphasizes that he did have some contact with Emily and tried to have more. But these factual differences are not reasons to believe that John's constitutional rights were violated. He received a full hearing at which the district court heard evidence and then weighed the relevant considerations. We find no violation of his constitutional rights.

As for Emily, John contends that she has a constitutional right to form a relationship with him. John cites no court decision concluding that a child's right to form a relationship with a biological father trumps the other interests that have been carefully weighed in this case. As Kansas Supreme Court Justice Carol A. Beier has noted, only

one United States Supreme Court justice has said in an opinion that a child has a fundamental liberty interest in preserving parent-child relationships. See *In re Adoption of A.A.T.*, 287 Kan. 590, 667-68, 196 P.3d 1180 (2008) (Beier, J., dissenting), *cert. denied* 556 U.S. 1184 (2009). In Emily's case, an attorney appointed to represent her interests as guardian ad litem recommended that the district court rule in Jack's favor, and the district court ruled in Jack's favor after carefully balancing everyone's interests, including Emily's. This is not an appropriate case in which to sort out whether—in some situations—a child may have a protected liberty interest in developing or preserving a relationship with a parent.

John's final argument is that the district court should have allowed him to present additional evidence when the case came back to the district court on remand. Specifically, John sought to present testimony from Joe Nocero, Dana's father (Emily's maternal grandfather). John submitted an affidavit from Nocero stating that he and others in the family believed that John should have contact with Emily. Based on the affidavit, John apparently also wanted to present Nocero's testimony about his experiences with and observations of both Jack and John. The district court refused to take additional evidence, concluding that it "did not believe that additional evidence would help in resolution of this matter."

As we have already noted, we review the district court's decision to exclude evidence only for abuse of discretion. See *Sexton*, 284 Kan. at 429-30. In this case, the district court held an evidentiary hearing before we heard the case on its first appeal. In that hearing, the parties had a full opportunity to present evidence. We find no abuse of discretion in the district court's refusal to hear additional testimony when we sent the case back for further consideration of the factors involved in making a decision about Emily's best interests.

We affirm the district court's judgment.