In the Missouri Court of Appeals
Eastern District

DIVISION ONE

JASON BOWERS,	)	ED103176
	)	
Respondent,	)	Appeal from the Circuit Court of
	)	the City of St. Louis
v.	)	1322-FC01612
	)	
JESSICA BOWERS,	)	Honorable Elizabeth B. Hogan
	)	
Appellant.	)	Filed: May 30, 2017

OPINION

Jessica Bowers ("Jessica") appeals from the judgment of the trial court dissolving her marriage to Jason Bowers ("Jason") and granting Jason third-party sole legal and physical custody of minor child J.B. (J.B.), pursuant to Section 452.375.5(5).[1] We affirm.

BACKGROUND

I. Factual Background

In October 2007, when Jessica and Jason began their romantic relationship, it is undisputed that Jessica was pregnant with a child conceived with her former paramour, Stephen

[1] All statutory references are to RSMo Cum. Sup. 2012, unless otherwise indicated.

Nugent ("Stephen").[2] During Jessica's pregnancy, she and Jason jointly concluded that Jason should be the father of the child, rather than Stephen. Jessica was concerned about Stephen's ability to take responsibility and be a parent due to Stephen's propensity to eschew his parental responsibilities towards his other children that he has sired with other women. Stephen acquiesced to Jessica's request that he remain uninvolved in the life of J.B. and voluntarily permitted Jason to act as J.B.'s father.

Jason attended prenatal medical appointments with Jessica and was present in the delivery room when Jessica gave birth to a girl, J.B., on April 28, 2008. Four days after the birth of J.B., Jessica and Jason, now cohabitating, executed a Missouri Affidavit Acknowledging Paternity ("Acknowledgment"), which resulted in the State of Missouri issuing a birth certificate naming Jason as the "father" of J.B.[3]

Approximately two years after J.B.'s birth, Jason and Jessica wed on April 3, 2010. Jessica, Jason, and J.B. resided together as a family from prior to J.B.'s birth until the parties separated in August 2012. For the entirety of J.B.'s life, Jason fulfilled his role as her father: he taught J.B. how to walk and ride her bike; he attended her medical appointments; he accompanied J.B. to church services; he danced, sang, and cooked with J.B.; and he provided for J.B.'s financial support. At no time during the first five years of J.B.'s life did she have any interaction or contact with Stephen, nor did Stephen provide any financial support for J.B.

II. Procedural Background

[2] Insomuch as Jason and Jessica share a surname, and Jason and Stephen each hold themselves as a "father," we will refer to all parties, except the child, by their first names to avoid confusion. No familiarity or disrespect is intended.

[3] This court is cognizant of the fact that at the time of executing the Acknowledgment, Jessica, Jason, and Stephen were all aware Jason was not the biological father of J.B. Their common scheme may have been a circumvention of our adoption statutes. However, the legal significance of this action was not raised before the trial court or this appellate court.

On May 10, 2013, Jason filed a "Petition for Dissolution of Marriage, for Determination of Physical and Legal Custody and for Order of Child Support" (hereinafter, "Petition for Dissolution"). Jason alleged J.B. was "born of the marriage," and prayed the trial court award joint legal and physical custody of J.B. to Jason and Jessica, pursuant to the authority of the Missouri Uniform Parentage Act ("MoUPA"), Section 210.817, *et seq*.

Thereafter, Jessica filed two pleadings: (1) her Answer to Jason's Petition for Dissolution, denying the allegation that J.B. was "born of the marriage;" and (2) her "Cross Petition for Dissolution of Marriage," claiming J.B. to be born prior to the marriage, but designating Jason as the "legal father" based upon the executed Acknowledgement. Jessica requested, *inter alia*, the trial court award her sole legal and physical custody of J.B. with rights of visitation to Jason, under the authority of Chapter 452, the Dissolution of Marriage Act.

In January 2014, Stephen made his first appearance in J.B.'s life, vis-à-vis the dissolution proceedings, by filing a "Motion to Intervene and Third-party Respondent's Petition for Determination of Father-Child Relationship and Judgment and Order of Custody" (hereinafter, "Motion to Intervene"). Stephen sought, *inter alia*, to establish his own paternity and an award of joint legal and physical custody of J.B., pursuant to the MoUPA. Over Jason's objections, the trial court granted Stephen's Motion to Intervene.

Genetic testing revealed there was a 99.9% probability Stephen was the biological father of J.B. Consequently, Jessica filed a motion to dismiss Jason's requests for J.B.'s custody and support. Jason filed an "Alternative Motion for Third-Party Custody pursuant to [Section] 452.375.5(5)," seeking sole legal and physical custody of J.B.

III. Judgment of the Trial Court

Following a bench trial on the respective petitions and motions of Jessica, Jason, and Stephen regarding dissolution, paternity, custody, and visitation, and during which all interested parties were present, the trial court entered its Findings of Fact, Conclusions of Law, and Judgment (hereinafter, "Judgment"). The trial court found Jessica and Stephen credible solely in their admissions that they repeatedly violated court orders during the pendency of this litigation. Stephen was found unfit, unsuitable, and unable to be the custodian of J.B. Similarly, Jessica's conduct, in contravention of numerous court orders, demonstrated her shortcomings as a parent. Specifically, the trial court found Jessica was unlikely to obey court orders requiring J.B. continue frequent and meaningful contact with Jason. During the course of litigation, Jessica attempted, on numerous occasions, to sever J.B.'s ties with Jason, without regard for the detrimental consequences of her actions upon her child.

The trial court found Jessica and Jason were unable to co-parent, thus rendering joint physical and legal custody impossible. The trial court awarded sole legal custody and physical custody of J.B. to Jason as a third-party custodian, pursuant to Section 452.375, with rights of visitation to Jessica. Stephen was not awarded any rights of custody or visitation. However, the trial court ordered J.B.'s birth certificate be amended to reflect Stephen, not Jason, as her father. Jessica now appeals.

DISCUSSION

On appeal, Jessica assigns two points of error. In her first point, Jessica maintains the trial court erred in awarding sole legal and physical custody to Jason as a third-party custodian, because the finding of the Judgment that Jessica was "unfit, unsuitable, or unable to be a custodian" was

against the weight of the evidence and was not supported by substantial evidence. In her second point, Jessica contends the trial court erred as a matter of law in designating Jason as a third-party custodian because Jason was already a party in the dissolution pursuant to Section 452.375. No cross-appeals were filed by Jason or Stephen. Fully cognizant of the extraordinarily complicated set of circumstances in this case, we stress that throughout this opinion we have only addressed those issues presented to this Court on appeal. Although discussed at length in the dissenting opinion, we are not addressing the Mo. Acknowledgment of Paternity Statute found in Section 210.823, the paternity presumptions in Section 210.822.2 concerning "weightier considerations of policy and logic", nor equitable parenting, since these issues were not raised in Jessica's appeal.

STANDARD OF REVIEW

In a bench tried case, the judgment of the trial court will be affirmed unless there exists no substantial evidence to support it, it is against the weight of the evidence, or it erroneously applies or declares the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976); see also Richmond v. Richmond, 164 S.W.3d 176, 178 (Mo. App. E.D. 2005). However, we review *de novo*, any points which turn upon the interpretation of statutes and Missouri Supreme Court Rules and the application of the same to specific facts. Belden v. Belden, 389 S.W.3d 717, 722 (Mo. App. S.D. 2012); see also Muhm v. Myers, 400 S.W.3d 846, 849 (Mo. App. E.D. 2013) (*de novo* review applicable to the interpretation of Missouri Supreme Court Rules).

PROCEDURAL ISSUES

At the outset, we address the procedural issues in this case. In 2004, the Supreme Court of Missouri adopted an Operating Rule 4.05.3 which states: "Dissolutions and paternity actions shall be filed separately. A separate case number shall be assigned for each dissolution and each

paternity action filed and shall be related in the automated case management system for scheduling and other processing." However, Section 210.829.1 of the MoUPA grants courts the authority to join a course of action under the MoUPA "by separate document with an action for dissolution of marriage, annulment, separate maintenance, support, custody, or visitation …" While seemingly contradictory, we do not find Operating Rule 4.05.3 and Section 210.829.1 to be in conflict. Operating Rule states these actions should be filed separately; however, nowhere does it limit the joining of any related custody or visitation matters for trial.

In the matter before us, the dissolution, paternity action, and Section 452.375.5 petition all regarded the custody and visitation of J.B. and were tried together. As the trial court found, the resolution of these matters together promoted judicial efficiency. Although ideally separate files should have been maintained, because this issue and the joint nature of the trial were not raised as points in this appeal, we need not address this further.

POINT I

In her first point on appeal, Jessica argues the trial court erred in finding there was substantial evidence to support that she was unfit or unsuitable to have custody of J.B. We disagree.

We view the evidence and inferences therefrom in the light most favorable to the judgment, and we disregard all contrary evidence and inferences. Kropf v. Jones, 489 S.W.3d 830, 834 (Mo. App. E.D. 2015) (citing Potts v. Potts, 303 S.W.3d 177, 184 (Mo. App. W.D. 2010). "Judging credibility and assigning weight to evidence and testimony are matters for the trial court, which is free to believe none, part, or all of the testimony of any witnesses." Id. Consequently, we defer to the trial court's credibility determinations. Id.

Here, in its Judgment, the trial court found Jessica was unfit to have sole legal and physical custody of J.B. The trial court also determined that Stephen was the biological father of J.B. but was unfit to have custody of J.B. Stephen did not appeal these findings.

During the course of the trial, which lasted many days, the trial court heard and considered evidence involving all parties and other witnesses. In addition to other findings, the trial court found that Jessica disregarded medical needs of J.B. and repeatedly failed to follow trial court orders while the case was pending. The trial court also considered the lengthy testimony of therapist, Dr. Anne Duncan-Hively about the interactions of all of the parties especially regarding J.B. In her testimony, Dr. Duncan-Hively stressed the strong bond between Jason and J.B. She suggested that Jessica had deliberately at times tried to destroy the strong bond between Jason and J.B. by denying them time together without any recognition of the possible serious significant emotional harm to J.B. Witnesses at trial and the record of the numerous pleadings and hearings held in this matter support this finding. Moreover, the trial court reviewed Section 452.375.2 which lists the eight factors to be considered in making a determination of custody and visitation. It found that it did not have to make a detailed finding on each factor pursuant to Lalumondiere v. Lalumondiere, 293 S.W. 3d 110, 113 (Mo. App. E.D. 2009). Notably, in its Judgment, the trial court especially focused on factor 4 of Section 452.375.2 in making its findings: "Which parent is more likely to allow the child frequent, continuing, and meaningful contact with the other parent." The trial court found, and there was substantial evidence in the record to support, that Jessica tried to keep J.B. from Jason, in an attempt to alienate the child from Jason, and in doing so, consciously disregarded the best interests of J.B.

Based on the foregoing as well as the lengthy testimony of Dr. Anne Duncan-Hively, and other evidence, the trial court correctly found that Jessica was unfit to have custody of J.B. After a thorough review of the record, we find there was substantial evidence to support the trial court's findings of Jessica's unfitness and this finding was not against the weight of the evidence. Point I is denied.

POINT II

In Point II, Jessica argues that the trial court erred in finding that Jason was a third-party custodian under Section 452.375.5, because Jason was already a party in the dissolution proceeding. Given the conclusions of the trial court that both biological parents were unfit, the trial court correctly considered Jason's petition for third-party custody of J.B.[4]

Section 452.375.5(a) states:

> When the court finds that each parent is unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires and it is in the best interests of the child, then custody, temporary custody or visitation may be awarded to any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment for the child. Before the court awards custody, temporary custody, or visitation to a third-party under this subdivision, the court shall make that person a party to the action.

Here, we find that it is significant in this joined matter, that Jason was a party to the dissolution, filed a petition for third-party custody under Section 452.375.5(5), and all matters including paternity determinations were heard in the same proceeding. As a result, we conclude there was no error in finding Jason to be a third-party custodian because all actions related to the determination of custody or visitation of J.B. Crucially, all interested parties were given a full and fair opportunity to present their evidence and be heard by the trial court on all issues.[5]

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[4] See generally In re Matter of T.Q.L v. L.L., 386 S.W.3d 135, 139 (Mo. banc 2012).

[5] We find D.S.K. ex rel., J.J.K.v. DL.T., 428 S.W.3d 655 (Mo. App. W.D. 2013), In re Marriage of Said, 26 S.W.3d 839 (Mo. App. S.D. 2000) and Courtney v. Roggy, 302 S.W.3d 141 (Mo.

Finally, Jason did not appeal the Judgment of the trial court and therefore we are only reviewing those issues specifically raised in Jessica's two points on appeal. Additionally, we note that Jessica does not challenge the finding that Jason was suitable for custody of J.B. but rather attacks the procedure for naming Jason as third-party custodian. Jessica has offered no evidence that firmly convinces this Court that the welfare of J.B. requires a different custody and visitation schedule than that ordered by the trial court. As such, the evidence supported the trial court's determination that awarding sole custody to Jason was in the best interests of J.B. In affirming the trial court's Judgment with respect to this point, we rely on longstanding precedent and presume that the trial court reviewed all the evidence and awarded custody in the manner it believed would be in the best interests of J.B. "This presumption is based upon the trial court's better position to judge not only the credibility of the witnesses and parties directly but also their sincerity, character, and other trial intangibles which might not be completely revealed by the record." Hartig v. Hartig, 738 S.W.2d 160, 161 (Mo. App. E.D. 1987). Point II is denied.

CONCLUSION

The Judgment is affirmed.

Honorable Mary K. Hoff

Robert M. Clayton III, Presiding Judge, concurs.
Lisa P. Page, Judge, dissents in separate opinion.

App. W.D. 2009) factually distinguishable from the present case because here the dissolution, paternity, and third-party custodian issues were heard concurrently, and the custody of the child was sought and relevant to all claims.

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DISSENT

I must strongly and respectfully, in equal measure, dissent. Jason is J.B.'s "natural father." This is not a case requiring an award of third-party custody.

Third-Party Custody is Erroneous

As discussed in great detail, infra, I disagree with the majority opinion that Stephen is J.B.'s natural father. I begin my dissent assuming, *arguendo*, the majority opinion is correct. However, under the facts of this case, even if I could agree that Stephen is J.B.'s natural father, third-party custody is wholly inappropriate for the following reasons.

Admittedly, the procedural legal authority governing an award of third-party custody is confusing. Compare In re T.Q.L., 386 S.W.3d 135 (Mo. banc 2012) (putative, but non-biological, father was permitted to seek third-party custody because mother was deemed "unfit" and biological father was unknown) with D.S.K. ex rel. J.J.K. v. D.L.T., 428 S.W.3d 655, 657-60

(Mo. App. W.D. 2013) (prohibiting the husband from intervening in the paternity action of the children born during his marriage, but leaving open the possibility that the husband could file an independent third-party cause of action). However, the law is clear that the custody of J.B. cannot be decided within the dissolution of Jessica and Jason if Stephen is the natural father. D.S.K. ex rel. J.J.K., 428 S.W.3d at 659 ("[T]he court does not have the authority in a dissolution proceeding to determine the custody of children not born of the marriage or adopted by the parties."). Unfortunately, the legal quagmire presented to the trial court, infra, resulted in a judgment that appears to adjudicate the custody of J.B. within the dissolution of Jason and Jessica. Warlop v. Warlop, 254 S.W.3d 262, 263 (Mo. App. W.D. 2008) ("Where there are no children born of the marriage or adopted by the parents and no allegations of the natural parent being unfit, the trial court in a divorce proceeding does not have jurisdiction to determine the custody of one party's child.").

Accordingly, the only *possibilities* for the adjudication of Jason's petition (or motion) for third-party custody, herein, were within Stephen's paternity action or an independent cause of action. I am skeptical, however, whether the trial court had the authority to award Jason third-party custody within Stephen's paternity as the majority opinion implies or whether Jason has standing to file an independent third-party custody action. See, e.g., D.S.K. ex rel. J.J.K., 428 S.W.3d at 659-60 ("[A]lthough Husband failed to establish that he had an interest *in the paternity case* entitling him to intervene as a matter of right, nothing prevents him from asserting his third-party custody claim as *an independent cause of action*.") (emphasis added); see also Chipman v. Counts, 104 S.W.3d 441, 446-48 (Mo. App. S.D. 2003) (grandmother lacked standing to seek custody of grandchild under Chapter 452 because the parents of the grandchild were never married).

Nevertheless, despite the confusion surrounding the proper procedural adjudication of third-party custody, there is no confusion regarding the substantive law governing the adjudication of third-party custody: in Missouri, natural parents are not to be denied custody of their minor child, unless the third-party seeking custody first meets its burden of showing that *each* parent is unfit, unsuitable, or unable to be a custodian *or* the welfare of the child requires, *and* it is in the best interest of the child. Jones v. Jones, 10 S.W.3d 528, 535 (Mo. App. W.D. 1999); see also Section 452.375.5(5)(a).[1] If the majority opinion is correct and Stephen is the "natural father," then, in this case, the law mandates that Jason be denied third-party custodial rights.

Here, the sole focus of the trial court's determination of Jessica's alleged unfitness is the acute acrimony between her and her now former husband, Jason. In fact, absent Jessica's inability to co-parent, the trial court's judgment lacks a single finding Jessica is an unfit custodian.[2] Flathers v. Flathers, 948 S.W.2d 463, 466 (Mo. App. W.D. 1997) ("We read the unambiguous language of this statute as creating a rebuttable presumption that parents are fit, suitable, and able custodians of their children and that their welfare is best served by awarding their custody to their parents.").

Paradoxically, after labeling Jessica as "unfit," the trial court proceeded to award Jessica 5 out of 14 nights of physical custody. The majority appears to concede the trial court's contradictory findings and affirms the award of third-party custody to Jason upon the "welfare of

[1] Stephen does not appeal the trial court's judgment, thus, this court need not address the trial court's finding of Stephen's unfitness.

[2] Interestingly, 13 of the 14 allegations regarding Jessica's "unfitness," set forth in Jason's motion for third-party custody, relate solely to Jessica's and Jason's acrimonious relationship. The fourteenth allegation set forth therein was not even mentioned in the trial court's judgment.

the child," pursuant to Section 452.375.5(5).[3] However, the trial court's findings do not refer to J.B.'s "welfare," but instead focus solely upon Jessica's inability to co-parent with Jason.

In those few cases where our trials courts have divested a biological parent of custodial rights premised upon the "welfare of a child," the facts are much more egregious and extreme than here. Further, most third-party custody cases award custody to a biological relative, as opposed to a former step-parent. Most crucially, awards of third-party custody are not and should not be premised upon the acrimony between the natural parent and former step-parent.

For instance, in Giesler v. Giesler, 800 S.W.2d 59 (Mo. App. E.D. 1990), this court affirmed third-party custodial rights to the paternal aunt and uncle of the children, because the father was absent and the mother "was unable to cope with the demands of parenthood[.]" Giesler, 800 S.W.2d at 60. In Giesler, the mother neglected to transport her children to and from school, lacked any interest in her children's educational progress, disregarded timely medical immunizations, and did not obtain regular and suitable childcare for her children. Id. at 60-61. Moreover, the mother's new paramour (with whom she resided) "used extremely vile language" in front of the children, "engaged in physically abusive conduct toward" the mother, "incited and fomented discord regarding custody matters between and among the parties[,]" and used the children to "torment and provoke the children's aunt and uncle." Id. at 61. This court affirmed the trial court's determination that "the welfare of the minor children manifestly demands, and it is in the best interests of all the children that their primary custody should go to" the aunt and uncle. Id. at 62.

Similarly, in K.S.H. ex rel. M.S.H. v. C.K., 355 S.W.3d 515 (Mo. App. S.D. 2011), the Missouri Court of Appeals, Southern District, affirmed the trial court's determination that the

[3] The term "welfare" is "not to be treated as the equivalent of 'best interests.'" Jones, 10 S.W.3d at 536.

welfare of the child required the grandmother be awarded third-party custody, because "there was evidence of physical abuse, emotional abuse, a chaotic home environment, neglect of health needs, the lack of a healthy parent-child relationship, emotional manipulation, and consistent poor judgment by [the mother]." K.S.H. ex rel. M.S.H., 355 S.W.3d at 521.

Conversely, in T.W. ex rel. R.W. v. T.H., 393 S.W.3d 144 (Mo. App. E.D. 2013), this court reversed the trial court's award of third-party visitation to the maternal grandmother, because the grandmother improperly intervened in the father's paternity action, and the award impermissibly impinged upon the mother's constitutional rights. T.W. ex rel. R.W., 393 S.W.3d at 146-47. In T.W. ex rel. R.W., this court found that despite the grandmother's significant assistance and active participation in the first decade of the child's life, the grandmother "failed to meet the initial procedural requirements for intervention" in the father's paternity action. Id. at 152. Moreover, even if the grandmother had properly intervened in the paternity action and properly pled a claim for third-party custody, insomuch as the trial court found the mother "was a fit, able, and willing parent," the trial court lacked the authority to award third-party custody without "impermissibly imping[ing] on the mother's fundamental constitutional right to make decisions concerning the care, custody and control of her child." Id. at 147.

In awarding third-party custody, the common denominator in T.Q.L., Giesler, and K.S.H. ex rel. M.S.H. is the unfitness and/or inability of *both* natural parents to enjoy the legal and physical custody of their child. That common denominator, as in T.W. ex rel. R.W., is absent in this case. Jessica is not "unfit, unsuitable, or unable" nor does the "welfare" of J.B. require third-party custody.

Although I do not condone Jessica's conduct (especially her failure to follow the trial court's orders), her actions do not necessitate an award of third-party custody. Jessica's actions

are not comparable to the conduct of those parents in Giesler or K.S.H. ex rel. M.S.H. On the contrary, Jessica's conduct more closely resembles the conduct of the mother in T.W. ex rel. R.W.—Jessica may not be a perfect parent, but she is, indeed, fit, suitable, and able. Johnston v. Johnston, 573 S.W.2d 406, 412 (Mo. App. 1978) ("The law is clear that custody proceedings may not be used to reward or punish a parent."); see also In re S.M.H., 160 S.W.3d 355, 372 (Mo. banc 2005) ("The law does not require parents to be perfect or be model parents. Poor conduct or character flaws are irrelevant unless they could actually result in future harm to the child."). If the majority is correct and Stephen is, indeed, J.B.'s natural father, then Jason is merely J.B.'s former step-father. Simply excising Jason from J.B.'s life would eliminate the basis of Jessica's "unfitness" and render Jessica "fit"—according to the trial court—and better serve J.B.'s "welfare."

By awarding Jason third-party custodial rights, the majority opinion inadvertently resurrects the concept of "equitable parentage," which our Supreme Court effectively interred nearly twenty years ago in Cotton v. Wise, 977 S.W.2d 263 (Mo. banc 1998). In Cotton, the Supreme Court set forth compelling reasons for rejecting the "equitable parentage" doctrine; reasons that still exist today and are relevant to this case. Id. at 264-65.

In this case, the trial court made numerous and repeated findings regarding the significance of Jason's paternal role in J.B's life and indicated the enormously detrimental effects of severing that precious bond. Jason's strong and loving relationship with and commitment to J.B. may be the perfect catalyst for reconsideration of "equitable parentage." Such a reconsideration of "equitable parentage," however, is not for the trial court, or this court. The Missouri Supreme Court rejected all theories of "equitable parentage," including those camouflaged by the third-party custody provision of Section 452.375.5(5).

A step-parent has no biological or legal relationship to a step-child upon dissolution of their marriage to the natural parent. Missouri's precedent has never afforded former step-parents such sweeping custodial rights to former step-children as those bestowed upon Jason (if he were merely J.B.'s step-father and not, as I conclude, her natural father). This court should not permit such an outcome in this matter—regardless of the palatable outcome of maintaining a relationship between Jason and J.B.—absent instruction from our constitutional partner, the Missouri Legislature (the policy-setting branch of our government), or our Supreme Court, which sets the precedent this court must follow. See MO. CONST. ART. 5, § 2.

In family courts across Missouri, good step-parents frequently lose their loving and meaningful relationships with their step-children upon dissolution of their marriages to the natural parents of those children. If the natural parent is fit, suitable, and able, and the welfare of the child does not necessitate, I simply cannot agree with the majority that a former step-parent should be able to completely divest his or her former spouse of legal and physical custody.

Let us make no mistake: the majority opinion sets precedent that will open the floodgates to our family courts. Step-parents (and potentially step-grandparents) may now wrest custody from biological parents merely by demonstrating that the nebulous "welfare of the child" so requires.[4]

Therefore, if the majority is correct and Stephen is the "natural father" of J.B., then Jason's petition (or motion) for third-party custody should fail as a matter of law. Jessica should be awarded sole legal and sole physical custody of J.B, and Jason should not be awarded any legal rights to J.B.

[4] This precedent is easily subject to abuse. Initiating third-party custody petitions (or motions) will soon be employed by step-parents, during dissolutions, in pursuit of obtaining unfair bargaining power over the other spouse. This is especially true where there may already be a significant power imbalance, such as those cases involving domestic violence.

Response to Jessica's Points on Appeal

I now proceed to discuss why Jason is the "natural father" of J.B. "I know of no way to make clearer or more concise the reasons for my dissent than to refile my proposed draft for a principal opinion [with minor revisions,] which draft was rejected by the majority." Lowe v. Norfolk and W. Ry. Co., 753 S.W.2d 891, 896 (Mo. banc 1988) (Welliver, J., dissenting).

For purposes of comprehension, I elect to first address Jessica's second point on appeal.

I. Trial Court Erred in Denominating Jason as a "Third-Party Respondent" (Point II)

In its entirety, Jessica's second point on appeal reads as follows:

> The Circuit Court erred in designating Mr. Bowers as a third party in this dissolution of marriage proceeding ***and making an award of custody to him in that third party capacity*** because such designation is impermissible under Mo. Rev. Stat. § 452.375.5, the statute governing awards of custody to third parties, in that (1) the statute requires that a court make the third party seeking custody a party to the custody action, (2) a husband and wife always are parties to an action to dissolve their marriage, and (3) the legislature thus did not intend that the statutory term "third person" include a husband or wife in a dissolution action.

(emphasis added).

I agree with Jessica that Jason, as a party to the marriage—regardless of whether he is the petitioner or respondent—cannot be designated as a "third-party respondent" within his own dissolution action. I also agree with Jessica that the trial court erred in awarding third-party custody to Jason. However, that is the extent of my agreement with Jessica regarding this point. Jason should, indeed, have been awarded sole legal and sole physical custody as the natural father of their child.[5]

Standard of Review

[5] Although the trial court's thoughtful and insightful analysis regarding the best-interest factors was not appropriate for determining grounds for third-party custody, it certainly justified an award of sole legal and sole physical custody to Jason as her natural father. See Morgan v. Morgan, 497 S.W.3d 359, 373-74 (Mo. App. E.D. 2016).

The principal opinion properly sets forth the appropriate standard of review for this court to follow. Nonetheless, the principal opinion does not appear to apply that standard of review in disposing of Jessica's second point on appeal. I would grant this point, as Jason is not a third-party, but, rather, the "natural father."

Although this court applies the Murphy v. Carron standard of review, supra, in a bench tried case, matters of law are reviewed *de novo*. Rhea v. Sapp, 463 S.W.3d 370, 375 (Mo. App. W.D. 2015) (""We review *de novo* questions of law decided in court-tried cases."). As the principal opinion accurately acknowledges, questions of law include the interpretation of statutes and Missouri Supreme Court Rules and the application of the same to specific facts. Belden, 389 S.W.3d at 722; see also Myers, 400 S.W.3d at 849 (*de novo* review applicable to the interpretation of Missouri Supreme Court Rules). "When an appellate court's review is *de novo*, it need not defer to the trial court's determination of law." State v. Kamaka, 277 S.W.3d 807, 810 (Mo. App. W.D. 2009); see also Amanda Peters, The Meaning, Measure, and Misuse of Standards of Review, 13 Lewis & Clark L. Rev. 233, 246 (2009) ("Courts using de novo review examine the trial court's application of the law without affording the lower court discretion.").

Jessica's second point on appeal explicitly asserts the trial court erred *as a matter of law* in designating Jason as a third-party respondent within their dissolution matter because he was already the Petitioner. Accordingly, this court is obligated to apply a *de novo* review.

However, the principal opinion evades the question of law whether Jason can actually be designated as a "third party." Instead, the principal opinion either: (1) presupposes the designation was appropriate as matter of law, and, thus, merely applies a Murphy v. Carron standard of review in affirming the trial court's custody award; or (2) conflates three possible separate causes of actions—dissolution, paternity, and an independent third-party custody

petition—and fails to clarify in which action Jason is a "third-party respondent." Merely affirming the custody award does not answer Jessica's point on appeal.

Although I agree with the principal opinion that the trial court reviewed all the evidence when awarding custody, I disagree with the principal opinion that Jessica's second point on appeal is merely an "attack[] on the procedure for naming Jason as a third-party custodian." Rather, Jessica's second point is a question of law that requires resolution by this court. As I will discuss, the commingling of causes of action sounding in dissolution, paternity, and third-party custody should be halted immediately as to avoid the legal morass created herein.

I believe Jessica's second point on appeal authorizes this court to opine on these issues not addressed by the majority opinion because of our *de novo* review.

Analysis

The ultimate legal question presented in this appeal—which resulted in Petitioner (Jason) becoming a third-party respondent within his dissolution—is a matter of first impression for this State. The legal issue is both distinct and challenging as it relates to the interpretation and application of Missouri's laws of parentage, and the effect upon "fathers." Analogous legal questions have been broached by the courts of many states, and, indeed, several states have attempted, either legislatively or judicially, to define a "father." B.H. v. K.D., 506 N.W.2d 368, 381 (N.D. 1993) ("The progress of science surpasses the capacity of jurisprudence to cope with change."). However, the statutory construct of each state is distinct, resulting in a dearth of consensus in deciphering this familial puzzle. Sarah McGinnis, You Are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interests of Children, 16 Am. U. J. Gender Soc. Pol'y & L. 311, 312 (2007). In an effort to establish homogeneity where

appropriate and applicable,[6] this court has conducted an exhaustive search for persuasive authority from other jurisdictions. Nevertheless, here, as the trial court's errors were both procedural and substantive in nature, our disposition of this matter must rest upon the harmonization of this State's unique paternity statutes, dissolution statutes, and our Supreme Court Rules.

From the outset, I note the extraordinary importance of a paternity proceeding. In re K.A.W., 133 S.W.3d 1, 12 (Mo. banc 2004) (a parent's right to raise his or her child is "one of the oldest fundamental liberty interests recognized by the United States Supreme Court" and is stringently guarded by the constitutional guarantee of due process). A paternity proceeding determines a child's "legal" parents, and, therefore, who will enjoy the rights and responsibilities of legal parenthood, including custody and visitation, the right to direct a child's education, health, education, and religion, and the right to direct a child's daily activities. N.A.H. v. S.LS., 9 P.3d 354, 359 (Colo. 2000). Correspondingly, legal parenthood also imposes significant obligations, including, but not limited to, financial support. Id.

A. Supreme Court Operating Rule 4.05(3): Dissolutions and Contested Paternity Determinations Should Be Severed and Given Separate Cause Numbers.

As an initial matter, I must address the faulty underlying procedural posture of this matter, which has spawned many legal complications, both in the trial court and on appeal.

What began as a cause of action for dissolution, commenced under Chapter 452, the Dissolution of Marriage Act, evolved into a labyrinth of counter-petitions and counter-motions for paternity, filed under the MoUPA, supra, and third-party custody, instituted under the auspices of Section 452.375.5(5). Although our courts have historically permitted dissolutions

[6] The Missouri Uniform Parentage Act ("MoUPA") explicitly contemplates uniformity and, in fact, mandates this court to apply and construe the MoUPA "to effectuate its general purpose to make uniform the law . . . among the states enacting it." Section 210.850.

and contested paternity determinations to be adjudicated simultaneously and under the same cause number, contested paternity determinations and dissolutions must now be severed and given separate causes numbers.[7] See, e.g., In re Marriage of B., 619 S.W.2d 91, 92 (Mo. App. S.D. 1981) (allegations that child born during the marriage was sired by someone other than husband was permitted to be litigated during the dissolution proceeding of husband and wife).

Chapter 452 is, indeed, extensive and governs many facets of family law. However, Chapter 452 lacks an independent procedural framework to adjudicate contested paternity matters; as such, our courts, eventually, mandated the prescriptions of the MoUPA be followed in such circumstances. In re Marriage of Fry, 108 S.W.3d 132, 136 (Mo. App. S.D. 2003); see also Piel v. Piel, 918 S.W.2d 373, 375 (Mo. App. E.D. 1996). "Paternity actions, as well as dissolution actions, involve the determination of separate rights and liabilities of parents for their children." Ballenger v. Ballenger, 444 S.W.3d 914, 918 (Mo. App. W.D. 2014); see; e.g., In re Marriage of Said, 26 S.W.3d 839, 843-44 (Mo. App. S.D. 2000) (demonstrating the confusion and complexity occasioned by joining additional parties to a custody dispute in a dissolution).

In 2004, the Supreme Court of Missouri abrogated the long line of cases permitting dissolutions and contested paternity actions to proceed concurrently and under the same cause number. Supreme Court Operating Rule 4.05(3)[8] plainly and unambiguously mandates trial courts separate contested paternity actions from dissolution proceedings:

> Dissolutions and paternity actions shall be filed separately. A separate case number shall be assigned for each dissolution and each paternity action filed and

[7] As discussed in the first part of my dissent, supra, left unresolved is the question of the proper procedural mechanisms to adjudicate third-party custody motions and petitions.

[8] I note Section 210.829.1, of the MoUPA, grants courts the authority to join a cause of action commenced under the MoUPA "by separate document with an action for dissolution of marriage, annulment, separate maintenance, support, custody or visitation . . . ." Although Missouri Supreme Court Operating Rule 4.05(3) and Section 210.829.1 appear to be in conflict, both are, nevertheless, procedural in nature, and, as such, Supreme Court Operating Rule. 4.05(3) prevails. Gabriel v. Saint Joseph License, LLC, 425 S.W.3d 133, 139 (Mo. App. W.D. 2013) ("[A] rule always prevails over a statute if it addresses procedure.").

> shall be related in the automated case management system for scheduling and other processing.

This case demonstrates one of many practical effects of the adoption of Supreme Court Operating Rule 4.05(3). If the trial court had complied with Supreme Court Operating Rule 4.05(3) and severed the contested paternity and dissolution proceedings, these legal complications would have been avoided. The trial court's determination in Stephen's contested paternity action would result in one and only one "natural father" for this child, J.B. If Stephen had prevailed, then the custody and support of J.B. would have been adjudicated in the paternity action as between Jessica and Stephen. If Jason prevailed, Stephen's paternity cause of action would have been concluded, and the trial court would then adjudicate custody and visitation in the dissolution action as between Jessica and Jason.[9] Either way, Jason would not have been erroneously designated a third-party respondent for purposes of third-party custody *within his own dissolution proceeding*. Thus, it is incumbent upon trial courts to adjudicate a contested paternity issue as a preliminary matter and separately from a dissolution action.

In T.W. ex rel. R.W., this court was "troubled by the casual manner in which the guardianship and paternity actions were pleaded, combined, and tried[.]" T.W. ex rel. R.W., 393 S.W.3d at 152. I agree with such prudent wisdom and am equally troubled by the similar manner in which the dissolution, paternity, and third-party custody actions were pleaded, combined, and tried, which resulted in a trial court judgment that impinges upon the constitutional rights of the parents—both Jessica *and* Jason. See, e.g., id.

[9] The severance of dissolutions and contested paternity determinations serves three practical purposes: (1) a separate paternity determination obviates Stephen's intervention in the dissolution proceedings; (2) *both* Jason and Stephen do not forever remain a party in future modifications of child custody and support, regardless of which man prevails in the paternity matter; and (3) the confidentiality of the parties required by Supreme Court Operating Rule 4.24(1)(f) is preserved in a manner lacking when paternity is adjudicated within a dissolution proceeding.

We remind trial courts and litigators alike that Supreme Court Operating Rule 4.05(3) is not a mere suggestion from our Supreme Court.[10] It is meant to be followed, and had the parties done so, this matter would have escaped the legal quagmire encountered herein. Nevertheless, because the trial court erroneously adjudicated the contested paternity of J.B. as part and parcel of the underlying dissolution, I begin my analysis with the trial court's paternity determination.

B. Canons Governing Statutory Interpretation

To analyze the paternity action, this court must interpret and construe Missouri's facially conflicting paternity statutes. "This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." Parktown Imp., Inc. v. Audi of Am., Inc., 278 S.W.3d 670, 672 (Mo. banc 2009). It is important that "[t]he entire legislative act . . . be construed together, and if reasonably possible, all provisions must be harmonized." Mo. ex rel. Bouchard v. Grady, 86 S.W.3d 121, 123 (Mo. App. E.D. 2002); Schubert v. Schubert, 366 S.W.3d 55, 67 (Mo. App. E.D. 2012) ("In reading the statute, we look not to an isolated sentence, but rather to the provisions of the law in its entirety[.]"). However, if ambiguity exists, this court will construe the statutes in manner so as to avoid unreasonable, oppressive, or absurd results. Mosley v. English, 501 S.W.3d 497, 505 (Mo. App. E.D. 2016).

Words are given their plain and ordinary meaning and this court does not construe clear and unambiguous language. Id. "When determining whether statutory language is clear and unambiguous, we determine whether the terms are plain and clear to one of ordinary intelligence." Renner v. Dir. of Revenue, 288 S.W.3d 763, 765 (Mo. App. E.D. 2009) (citations omitted). For instance, if statutory language is subject to more than one reasonable interpretation

[10] Judicial economy authorizes contemporaneous adjudication of paternity and dissolution matters, but Supreme Court Operating Rule 4.05(3) requires separate judgments in separate cause numbers.

or a key term is left undefined, requiring the court to fill in the term, then the statute is ambiguous. State v. Graham, 204 S.W.3d 655 S.W.3d 655, 657 (Mo. banc 2006); City of Univ. City v. AT&T Wireless Serv., 371 S.W.3d 14, 19 (Mo. App. E.D. 2012).

Often, when a statute is ambiguous, legislative intent can be determined by tracing the "historical development of the legislation" and examining the purpose, objective and policy behind the statute. State ex rel. Lebeau v. Kelly, 697 S.W.2d 312, 314–15 (Mo. App. E.D. 1985). In fact, "[i]t is a cardinal rule of statutory interpretation that the legislature is presumed to know the existing law when enacting a new piece of legislation." State ex rel. Nothum v. Walsh, 380 S.W.3d 557, 567 (Mo. banc 2012) (citations omitted).

C. Paternity Establishment Pursuant to the MoUPA

In 1987, the Missouri Legislature adopted the Uniform Parentage Act of 1973. See Section 210.817, *et seq.*; see, generally, Unif. Act on Parentage (1973). The MoUPA establishes a framework by which Missouri courts determine the "parent and child relationship" as between a child and the "natural father." Section 210.819(2); see also Jefferson v. Jefferson, 137 S.W.3d 510, 513 (Mo. App. E.D. 2004); Dept. of Soc. Servs., Div. of Child Support Enforcement v. Rainez, 74 S.W.3d 824, 825 (Mo. App. W.D. 2002) ("The Uniform Parentage Act established a comprehensive procedure for determining children's paternity and for compelling support for them, whether or not they were born in wedlock.").

Pursuant to the MoUPA, a "parent" is defined as "either a natural or an adoptive parent," and "parent child relationship" is specified as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations." Section 210.817(3)-210.817(4). "The parent and child relationship

extends *equally* to *every* child and *every* parent, regardless of the marital status of the parents." Section 210.818 (emphasis added).

Challenges in statutory construction are immediately apparent because the MoUPA fails to define that which the MoUPA seeks to establish—the "natural father." See Section 210.817, *et seq.*; cf. Miss. Code. Ann. § 91-1-15(1)(d) (defining "natural parents" as the "biological" parents). As such, on its face, the MoUPA is ambiguous because a key term is left undefined, requiring the court to define the term of "natural father." City of Univ. City, 371 S.W.3d at 19.

Insomuch as we find the MoUPA facially ambiguous, we seek to give effect to the legislative intent as reflected in the plain language of the statute.[11] Parktown Imp., Inc., 278 S.W.3d at 672. One simple, commonsense definition of the term "natural father" is "biological father." See White v. White, 293 S.W.3d at 1, 10 n.6 (Mo. App. W.D. 2009) (citing BLACK'S LAW DICTIONARY (8th ed. 2004)); see also Am. Healthcare Mgmt., Inc. v. Dir. of Revenue, 984 S.W.2d 496, 498 (Mo. banc 1998) ("Absent statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary.").

However, a review of the MoUPA, in *pari materia*, reveals our Legislature elected not to adopt such a simple definition, although it certainly could have done so. In fact, conspicuously absent from the MoUPA is any reference to the terms "biology" or "biological."[12] Oberreiter v. Fullbright Trucking Co., 117 S.W.3d 710, 714 (Mo. App. E.D. 2003) ("This Court utilizes rules of statutory construction that subserve rather than subvert legislative intent.") (citations omitted); see, e.g., Doe v. Doe, 52 P.3d 255, 262 (Hawaii 2002) ("If the genetic testing presumption 'controlled' as a matter of law, then [the statute] would plainly say so[.]"); In re T.K.Y., 205

[11] Nevertheless, I am conscious that "it is the function of the courts to construe and apply the law and not to make it." Renner, 288 S.W.3d at 765.

[12] The MoUPA only employs the phrases "blood tests" and "genetic tests" to refer to the men who proves paternity through such testing. See Sections 210.834, 210.822.

S.W.3d 343, 351 (Tenn. 2006) ("The legal father may or may not be the biological father of a child.").

Accordingly, we find the Missouri Legislature, which used the undefined key term of "natural father," intended a broader interpretation than just "biological fathers." If the Legislature had intended a more narrow definition for "natural father," they could have explicitly done so, or, alternatively, the Legislature could have utilized a different term. City of Univ. City, 371 S.W.3d at 19. Moreover, our inclusive interpretation of the term "natural father" is in harmony with the obvious legislative intent, objective, and policy, in that the MoUPA authorizes, in limited circumstances, for a non-biological father to be adjudicated as the "natural father." See Section 210.822.2 (permitting the court to select a "natural father" based upon "weightier considerations of policy and logic"); Section 210.823 (permitting an unmarried man to attest that he is the "natural father" of a child born out of wedlock).

1. Section 210.823: Acknowledgments of Paternity

In 1997, upon the financial incentive of the federal government,[13] the Missouri Legislature amended the MoUPA, inserting Section 210.823. In operable part, Section 210.823 reads as follows:

> 1. A signed acknowledgment of paternity form pursuant to section 193.215 shall be considered ***a legal finding of paternity*** subject to the right of either signatory to rescind the acknowledgment, in writing, by filing such rescission with the bureau within the earlier of:
> (1) Sixty days from the date of the last signature; or
> (2) The date of an administrative or judicial proceeding to establish a support order in which the signatory is a party. The acknowledgment may thereafter only be challenged in court on the basis of fraud, duress or material mistake of fact with the burden of proof upon the challenger. ***No judicial or administrative***

[13] The origins of Section 210.823 are rooted in federal legislation encouraging states to formulate mechanisms so as to swiftly adjudicate paternity in order to assist in the acquisition of child support. Jane C. Murphy, Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children, 81 Notre Dame L. Rev. 325, 346-47 (2005).

> ***proceeding shall be required or permitted to ratify an unchallenged acknowledgment of paternity.***
> 2. Except for good cause shown, the legal responsibilities of the parties, including child support obligations, shall not be suspended during the pendency of any action in which an attempt is made to revoke the signed acknowledgment under this section.
> 3. The acknowledgment shall be filed with the bureau. An acknowledgment effectuated under the law of any other state or territory shall be given the same effect in this state as it has in the other state or territory.

Section 210.823 (emphasis added).[14] According to the plain and unambiguous language of Section 210.823, a duly executed Acknowledgment constitutes a **legal finding of paternity** after the 60-day rescission period has expired. See Section 210.823.1(1); see also In re Adoption of N.L.B. v. Lentz, 212 S.W.3d 123, 128 (Mo. banc 2007).[15] An executed Acknowledgment has the effect of a judgment signed by a judge, yet without the substantive and procedural safeguards of a judicial proceeding. Therefore, a man who executes an Acknowledgment becomes the "natural father," unless and until disestablished.

Pursuant to Section 210.823, the current Missouri Acknowledgement is a legal paternity determination, precluding *either signatory* from any further action to establish paternity or to declare non-paternity under the auspices of the MoUPA. See Section 210.823.1(2). In fact, neither a judicial nor administrative proceeding "*shall* be required or *permitted* to ratify an

[14] Today, in the State of Missouri, over forty percent of all children are born to unwed mothers. U.S. Dept. of Health & Human Servs., National Center for Health Statistics, Births: Final Data for 2014, *National Vital Statistics Reports*, Vol. 64, No.12 (2015). Whereas, nationally, in 1970, ninety percent of all children were born to married mothers. U.S. Dept. of Health & Human Servs., National Center for Health Statistics, Nonmarital Childbearing in the United States, 1940-99, *National Vital Statistics Reports*, Vol. 48, No. 16 (2000). Consistent with more children being born out of wedlock, voluntary acknowledgements of paternity have become the "second most common way for a parenthood to be established in someone other than the birth mother[,]" Katharine K. Baker, Legitimate Families and Equal Protection, 56 B.C. L. Rev. 1647, 1686 (2015), and "the most common way that legal paternity of children born to unmarried mothers is established." Leslie Joan Harris, The Basis for Legal Parentage and the Clash Between Custody and Child Support, 42 Ind. L. Rev. 611, 620 (2009).

[15] Section 193.215.6 reveals an Acknowledgement is only available to the "parents of a child born out of wedlock." Section 193.215.6; see also Section 193.087 (outlining the requirements for hospital staff to provide a voluntary acknowledgment of paternity affidavit to an "unmarried mother"). However, the Missouri "Affidavit Acknowledging Paternity" states that said form may be used for a child born during a marriage if mother, husband, *and* the biological father sign the Acknowledgment.

unchallenged acknowledgement of paternity." Id. (emphasis added). The language of Section 210.823.1(2) defeats any standing Jason and Jessica had to bring a cause of action under the MoUPA.[16]

Currently, the Missouri Acknowledgment, provided by the Missouri Department of Health and Senior Services, Bureau of Vital Records, does not require the male affiant be the "genetic father;" rather, the Missouri Acknowledgment only requires the affiants attest to the man being the "natural father." Conversely, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Parentage Act (2000) (hereinafter, "UPA 2000"), which amended the Acknowledgment statutes in an effort "to prevent circumvention of adoption laws . . . by requiring a sworn assertion of *genetic* parentage of the child." Unif. Parentage Act (2000) § 301, Acknowledgment of Paternity, Comment (emphasis added). Missouri has either elected not to or has yet to adopt these modifications to the Acknowledgment form, thereby sanctioning the execution thereof by a non-biological man. Whether intended, incidental, or accidental, the Legislature's enactment of Section 210.823 furnished a means of establishing paternity of child in a non-biological man.

Upon the execution of an Acknowledgment, the child has the identical status, rights, and duties of a child born in lawful wedlock effective from birth. In re Gendron, 950 A.2d 151, 154 (N.H. 2008) ("By signing the acknowledgment, the mother, by her own volition, accepted that the father is the child's biological father," and "[a]ccordingly . . . the acknowledgment now has the same force and effect as a Massachusetts court judgment."); In re Parentage of G.E.M., 890

[16] Although not challenged on appeal, the standing of the individual parties to commence a cause of action under the MoUPA, could, in and of itself, produce a voluminous opinion. Insomuch as standing was not raised on appeal and in an endeavor not to detract from my analysis, herein, I do find that Stephen had standing to institute a MoUPA cause of action. See Section 210.826.1; see also Wilson v. Cramer, 317 S.W.3d 206, 209 (Mo. App. W.D. 2010) (holding an executed Acknowledgment does not impede standing for an alleged biological father).

N.E.2d 944, 963-64 (Ill. App. 2008) (voluntary acknowledgment "operates as a judgment binding on both parents").

2. Section 210.822.1: "Presumed Natural Father"

Absent an executed Acknowledgement, and its corresponding legal effect, the MoUPA fashions a functional set of rules that point to a likely natural father for purposes of establishing paternity. Section 210.822.1 enumerates those men that shall be categorized as a "presumed natural father:"

> (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within three hundred days after the marriage is terminated by death, annulment, declaration of invalidity, or dissolution, or after a decree of separation is entered by a court; or
> (2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with the law, although the attempted marriage is or may be declared invalid, and:
> (a) If the attempted marriage may be declared invalid only by a court, the child is born during the attempted marriage or within three hundred days after its termination by death, annulment, declaration of invalidity or dissolution; or
> (b) If the marriage is invalid without a court order, the child is born within three hundred days after the termination of cohabitation; or
> (3) After the child's birth, he and the child's natural mother have married or attempted to marry each other by a marriage solemnized in apparent compliance with law, although the marriage is or may be declared invalid, and:
> (a) He has acknowledged his paternity of the child in writing filed with the bureau; or
> (b) With his consent, he is named as the child's father on the child's birth certificate; or
> (c) He is obligated to support the child pursuant to a written voluntary promise or by court order; or
> **(4) An expert concludes that the blood tests show that the alleged parent is not excluded and that the probability of paternity is ninety-eight percent or higher, using a prior probability of 0.5.**

Section 210.822.1 (emphasis added); see also White, 293 S.W.3d at 10-11 (noting the differences in "presumptions" as between the MoUPA and the Uniform Parentage Act of 1973).

3. Section 210.822.2: Conflicting Presumptions

Although more than one individual may fulfill the statutory criteria that gives rise to a "presumption" of paternity under Section 210.822.1, ultimately there can be just one "natural father." Accordingly, Section 210.822.2 contemplates the possibility of conflicting presumptions and prescribes the method of resolution:

> A presumption pursuant to this section may be rebutted in an appropriate action only by clear and convincing evidence, except that a presumption under subsection 1 of this section that arises from a blood test or the filing of an acknowledgment of paternity in a state or territory in which the blood test or the filing creates a conclusive presumption by law also has conclusive effect in Missouri. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing the paternity of the child by another man.

Section 210.822.2 has been incorporated in our paternity chapter since its inception in 1987, and at the time of its enactment, Section 210.822.2 mirrored, *in toto*, the langue of the Uniform Parentage Act of 1973. Unif. Act on Parentage (1973) § 4 [Presumption of Paternity]; see also S.B. 328 (1987). Although the language of Section 210.822.2 has been modified through subsequent legislative action, the basic premise remains unaltered. See Section 210.822.2. However, Section 210.822.2 has yet to be interpreted in its entirety.

First, the trial court must ascertain whether, in an appropriate action,[17] "there is 'clear and convincing' evidence to rebut a presumption that a presumed natural father is, in fact, the natural father." Courtney v. Roggy, 302 S.W.3d 141, 146 (Mo. App. W.D. 2009). Second, if the first

[17] I note the MoUPA also lacks a definition for the phrase "appropriate action." I assume, *arguendo*, this was an "appropriate action" for Stephen to challenge the paternity of J.B. Even if this court were to attempt to more precisely define "appropriate action," the matter was not raised on appeal and a single common meaning is lacking across the other states. See, e.g., In re Estate of Jotham, 722 N.W.2d 447, 455 (Minn. 2006) (defining "appropriate action" as "an action in which the party seeking to rebut a paternity presumption would not be barred from bringing an action declare the nonexistence of the presumed father-child relationship"); In re Estate of Murray, 344 P.3d 419, 423 (Nev. 2015) ("appropriate action" means a paternity presumption may be rebutted only by one who meets the standing and timeliness requirements for action to declare the nonexistence of the presumed-father child relationship); In re Nicholas H., 46 P.3d 932, 941 (Cal. 2002) ("When it used the limiting phrase *an appropriate action*, the Legislature was unlikely to have in mind . . . an action in which no other man claims parental rights to the child, an action in which rebuttal of the . . . presumption will render the child fatherless.") (emphasis in original).

step "fails to eliminate all but one presumed father, the trial court must then . . . weigh those remaining presumptions conflicting with each other to determine which one, on the facts, is founded on the 'weightier considerations of policy and logic.'" Id. (quoting Section 210.822.2).

Section 210.834—which also gives rise to a conclusive presumption—was enacted concurrently with the adoption of the MoUPA. See S.B. 328 (1987). However, unlike Section 210.822.2, the Missouri Legislature did not adopt Section 210.834, *in toto*, from the Uniform Parentage Act of 1973. See Unif. Act on Parentage (1973) § 11 [Blood Tests]. Rather, the Missouri Legislature supplemented the language of the Uniform Parentage Act of 1973 by incorporating subsection 4 of Section 210.834, which currently reads, in pertinent part, as follows: "Whenever the court finds that the results of the blood tests show that a person is presumed or alleged to be the father of the child is not the father of such child, such evidence shall be *conclusive of nonpaternity* and the court *shall* dismiss the action as to that party . . . ." Section 210.834.4 (emphasis added); Dobyns v. Phillips, 936 S.W.2d 588, 589 (Mo. App. E.D. 1996) ("Under the [MoUPA] blood testing is deemed conclusive evidence of nonpaternity if the results so indicate.").[18]

Accordingly, the plain language of the MoUPA, and the legislative history thereof, reveals a legislative intent to favor the biological father. The statutes disfavor a husband who is not the biological father and who is married to the mother at the time of the child's birth.

Courtney v. Roggy, 302 S.W.3d 141 (Mo. App. W.D. 2009) exemplifies this. In Roggy, a child was born during the marriage of husband and wife; both husband and wife were named on the child's birth certificate. Id. at 144. However, prior to wife's conception of her child,

[18] Although Missouri did not enact the Uniform Act on Paternity of 1960—the precursor to the Uniform Parentage Act of 1973—said Act includes a similar provision as that which has been incorporated in Section 210.834.4. See Unif. Act on Paternity (1960) § 10 [Effect of Test Results].

husband had undergone a vasectomy. Id. Both husband and wife were aware husband was not the biological father of the child. Id. While husband believed wife's pregnancy was the result of rape, wife was actually engaged in a long-term sexual affair with the biological father of the child. Id. at 144-45. Upon the termination of that affair—but while wife and husband remained wed—biological father commenced a cause of action under the MoUPA seeking to be declared the father of the child. Id. at 145. After the trial court granted biological father's petition for declaration of paternity, the Missouri Court of Appeals, Western District, affirmed, finding biological father's DNA blood tests rebutted, by clear and convincing evidence, husband's presumption as the natural father, pursuant to Section 210.822.2. Id. at 146-47.

The holding in Roggy demonstrates that a "presumed natural father," pursuant to Section 210.822.1(4) (genetic testing), will be able to sufficiently rebut, by clear and convincing evidence, all other "presumed natural fathers." See Roggy, 302 S.W.3d at 146-47; see also D.S.K. ex rel. J.J.K., 428 S.W.3d at 657 (husband was dismissed from paternity cause of action because of the negative genetic test results). Effectively, a "presumed natural father" under Section 210.822.1(4) is transformed into a conclusive presumption because the trial court is required to dismiss all other men. See Section 210.834.4; see also Dobyns, 936 S.W.2d at 589 ("Under the [MoUPA] blood testing is deemed conclusive evidence of nonpaternity if the results so indicate."). Thus, the second step of Section 210.822.2 does not apply because such conflicting presumptions will seldom, if ever, exist due to the easy and inexpensive access to genetic testing. Whereas, at the time the MoUPA was enacted in 1987, genetic testing was far from accessible, which made the second step of Section 210.822.2 more significant.

However, in this MoUPA cause of action, we find the second step of Section 210.822.2 applies. Dubinsky v. St. Louis Blues Hockey Club, 229 S.W.3d 126, 130 (Mo. App. E.D. 2007)

("[W]e presume that the legislature did not insert superfluous language or idle verbiage in a statute."). Stephen's positive genetic test results all but guaranteed he would be able to rebut, by clear and convincing evidence, all other "presumed natural fathers." See Section 210.834.4; see, e.g., Roggy, supra. Yet, upon execution of the Acknowledgment, seven years prior to Stephen's MoUPA cause of action, Jason was legally established as J.B.'s "natural father." See Section 210.823. Therefore, the trial court was required to determine the paternity of J.B. between two conflicting conclusive statutes: a biological father (Stephen), pursuant to Section 210.834.4, and a legally-adjudicated father (Jason), pursuant to Section 210.823.[19]

D. Adjudicating the Paternity of J.B.

In order for Stephen to establish his paternity of J.B., the trial court must select a "natural father," premised upon "weightier considerations of policy and logic" as between (1) the man who executed an Acknowledgment and (2) a man who has proven he is the biological father. Section 210.822.2. This is a case of first impression in Missouri and, thus, no cases guide this court in employing the "weightier consideration of policy and logic" standard. Thus, we find it instructive to examine cases from other jurisdictions. See Hibbs v. Berger, 430 S.W.3d 296, 308 (Mo. App. E.D. 2014); see also Section 210.850, supra.

The Supreme Court of Wyoming explained that this standard is not limited to legal policy but "clearly implies that a court should consider the broad sociological and psychological ramifications of its decision as to which man should be adjudicated" as the father. GDK v. State, Dept. of Family Servs., 92 P.3d 834, 839 (Wyo. 2004). Similarly, the Supreme Court of

[19] I note with concern that the legislative paradigm of the MoUPA affords a non-biological man who has executed an Acknowledgment with greater rights and protections than a man who is married to a woman at the time of the child's birth. See, e.g., D.S.K. ex rel. J.J.K, 428 S.W.3d at 659. The result may merit further legislative consideration because the presumption that a child born within a marriage is deemed to be the child of the husband *was* one of "strongest" presumptions known in law. 57 A.L.R.2d 729 (Originally published in 1958).

Colorado held that this standard demands a "fact-intensive" inquiry to ensure a "child's best interest." N.A.H. v. S.L.S., 9 P.3d 354, 362 (Colo. 2000); see also Matter of Welfare of C.M.G., 516 N.W.2d 555, 560 (Minn. App. 1994) ("a child's best interest is a valid policy factor in resolving a conflict between competing paternity presumptions"). Correspondingly, California has interpreted the language to mandate the trial court make a determination which gives the greatest weight to the child's "well-being." Craig L. v. Sandy S., 125 Cal. App.4th 36, 53 (Cal. App. 2004). "Appropriately, the policy and logic portion of the inquiry appears in part to be heavily based on a state's individual caselaw and policy." Greer ex rel. Farbo v. Greer, 324 P.3d 310, 319 (Kan. App. 2014).

The policy and precedent in Missouri is clearly comparable to those states that have addressed similar issues. The "overriding concern" under the MoUPA is the best interest of the child. Harmon v. Headley, 95 S.W.3d 154, 159 (Mo. App. W.D. 2003). In fact, the purpose of the UPA "was to establish a uniform method for determining paternity which would protect the rights of all parties involved, *especially the children*." See also Piel, 918 S.W.2d at 375 (emphasis added). As such, in applying the "weightier considerations of policy and logic" standard set forth in 210.822.2, the trial court should primarily consider the best interest of the child, but is not restricted thereto and may consider other factors.

Here, the trial court's Findings of Fact and Conclusions of Law contain a thorough and thoughtful analysis that clearly concludes Stephen utterly failed to present a single iota of evidence why he should prevail in consideration of a policy and logic test. See Rule 73.01(c) ("All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached."). First, the Judgment of the trial court found Stephen had a proclivity for siring children "and being uninvolved in providing financial or

emotional support for [his children]." That penchant was unbroken in regards to J.B.: Stephen was informed of J.B.'s existence before her birth, but Stephen voluntarily "agreed to be uninvolved with" J.B. Stephen, in fact, never appeared in J.B.'s life until the filing of his Motion to Intervene. Similarly, there is no evidence Stephen ever provided financial support for the benefit of J.B. The trial court determined Stephen was unsuitable and unfit and awarded him no rights of custody or visitation—a determination he chose not to appeal.

Second, the Judgment of the trial court found J.B. perceived Jason as her father, was attached to him, and had a good relationship with him. J.B. had a meaningful relationship with Jason's family, Jason raised J.B. since birth, and Jason participated in J.B.'s recreational, religious, and other activities. Jason also provided financial support for J.B. In fact, Jason is the only father J.B. has ever known.

Third, the trial court determined J.B.'s best interest required sole legal and sole physical custody be awarded to Jason, because J.B. was "completely bonded to Jason" and it would have been "profoundly detrimental to her emotional growth and development if he were no longer an intricate part of her life."

Therefore, I find, in accordance with Rule 73.01(c), the trial court effectively determined, based upon the "weightier considerations of policy and logic," that Jason was the "natural father" of J.B., and judgment should have been entered in his favor, thereby concluding Stephen's MoUPA cause of action. This is neither an erroneous application of the law nor against the weight of the evidence. Moreover, the judgment would have precluded the patently absurd result of depriving J.B. of her father (as found by the trial court), in favor of a mere third-party

custodian, by naming Stephen as J.B.'s natural father (without the attendant rights and obligations).[20]

For the foregoing reasons, I would grant Jessica's Point II, reverse the trial court's judgment, and remand with instructions to deny Stephen's cause of action filed under the MoUPA and to adjudicate Jason as the "natural father" of J.B.

II. Trial Court Did Not Err in Awarding Sole Legal and Physical Custody (Point I)

Jessica's first point on appeal contests the trial court's judgment regarding the custody of J.B. Although improperly designated as a third-party custodian, Jason was awarded sole legal and sole physical custody of J.B., with rights of visitation to Jessica. I firmly agree with the majority opinion "that the trial court reviewed all the evidence and awarded custody in a manner it believed would be in the best interests of J.B.[,]" See *Slip. Op.* at p.9. As such, I, too, would find no error in the trial court's result, but for reversing to properly designate Jason as the "natural father." Ludwig v. Ludwig, 693 S.W.2d 816, 819 (Mo. App. W.D. 1985) ("If any reasonable theory supports the judgment, it must be affirmed.").

Standard of Review

In a bench-tried case, the judgment of the trial court will be affirmed unless there exists no substantial evidence to support it, it is against the weight of the evidence, or it erroneously applies or declares the law. Carron, 536 S.W.2d at 32.

"A trial court's custody determination is afforded greater deference than other decisions." McGahan v. McGahan, 237 S.W.3d 265, 269 (Mo. App. E.D. 2007). When this court reviews

[20] Jessica shall remain hoisted upon the petard of her own actions; Jessica permitted Jason to execute the Acknowledgment, knowing Jason was not the biological father. The majority opinion, however, does not premise its disposition upon the Acknowledgment. Thus, under the precedent set forth by the majority opinion, even those parents who did not execute an Acknowledgment may still be divested of their custodial rights to their biological children by a step-parent.

whether a custody determination is against the weight of the evidence, "we proceed under the presumption that the trial court reviewed all evidence and based its decision on the child's best interests." Mahoney v. Mahoney, 162 S.W.3d 512, 517 (Mo. App. W.D. 2005) (quoting in part Wright ex rel. McBath v. Wright, 129 S.W.3d 882, 884 (Mo. App. W.D. 2004) (internal quotations omitted)). Thus, this court considers all evidence and any reasonable inferences therefrom in the light most favorable to the judgment, disregarding contradictory evidence. Ratteree v. Will, 258 S.W.3d 864, 868 (Mo. App. E.D. 2008). If evidence does not "clearly preponderate in favor of either parent, *we will reverse the trial court's award only when there has been an abuse of discretion*." Gulley v. Gulley, 852 S.W.2d 874, 876 (Mo. App. E.D. 1993) (emphasis added).

Discussion

A. J.B. is a "Child of the Marriage"

As discussed in great detail, supra, the trial court's failure to separately adjudicate the paternity cause of action created a ripple effect that has cascaded throughout this matter. As a result, the trial court erroneously adjudicated its custody determination upon Jason's Alternative Motion for Third-Party Custody (pursuant to Section 452.375.5(5)),[21] which was filed merely as a consequence and in response to Stephen's erroneous intervention and subsequently filed MoUPA cause of action.

When Jason and Jessica executed an Acknowledgment and subsequently married, J.B. was "legitimized"—as if she was *born of the marriage* as between Jason and Jessica. Jeffries v. Jeffries, 840 S.W.2d 291, 295 (Mo. App. E.D. 1992) (our common law has extended the

[21] I express no opinion on the issue of what rights, if any, Jason would have in an independent third-party cause of action if Stephen had prevailed in his petition for paternity. See T.Q.L, 386 S.W.3d at 139; D.S.K. ex rel. J.J.K, 428 S.W.3d at 659.

definition of "children of the marriage" to embrace those children born before a marriage and whose parents subsequently wed). Insomuch as J.B. can be deemed "born of the marriage," the trial court was afforded the authority to adjudicate the custody and support of J.B. in the dissolution of Jessica and Jason as the custody and support provisions of Chapter 452 would govern. See In re Visitation of J.P.H., 709 N.E.2d 44, 47 (Ind. App. 1999) ("Once a child has been legitimated by his parents' marriage and his father's acknowledgment of paternity, his status of legitimate cannot be changed.").

A converse result (i.e., J.B. was not "legitimized"), would produce an absurd and circular conclusion, requiring Jason and Jessica to file a cause of action for custody and support under the MoUPA (even though both are precluded from contesting paternity, pursuant to Section 210.823, supra) in order to reach the custody and support provisions of Chapter 452—the chapter already governing their dissolution. Day ex rel. Finnern v. Day, 256 S.W.3d 600, 602 (Mo. App. E.D. 2008) ("Section 452.375 governs the initial award of custody in paternity cases."). Therefore, I conclude that Supreme Court Operating Rule 4.05(3) does not require a separate action to establish paternity when parents have signed an Acknowledgment pursuant to Section 210.823 and subsequently marry.[22]

Accordingly, if the trial court had given proper legal effect to the Acknowledgment and subsequent marriage of Jason and Jessica, the trial court would have been afforded the authority to adjudicate the custody and support of J.B. within the legal framework of a dissolution.

[22] This outcome must be differentiated from other circumstances because the custody and support provisions of Chapter 452 are not directly available without the MoUPA. Parents who subsequently marry after a child is born out of wedlock, but who do not execute an Acknowledgment, must still file a cause of action under the MoUPA to establish paternity and then adjudicate custody and support. Similarly, children born to unwed parents who never marry but who execute an Acknowledgment must also employ the MoUPA, not to establish paternity but to adjudicate custody and support as Chapter 452 is not available to unwed parents. See Section 210.841.3 (requiring the trial court to adjudicate the child custody and support during a paternity cause of action); Section 210.853 (prescribing parenting plans in a paternity cause of action).

B. The Trial Court Properly Determined Custody

The trial court determined the custody arrangements for J.B. upon consideration of her best interests and all relevant factors, including the eight factors listed under Section 452.375.2. On appeal, Jessica is requesting that this court reweigh certain evidence and determine custody in a different manner than the trial court. However, even if the evidence may have supported an alternative custody determination, it is not the duty of this court to substitute our judgment for the judgment of the trial court. In this matter, it is abundantly clear the trial court thoughtfully considered the evidence presented in extensively addressing the eight factors under Section 452.375.2 and provided numerous other reasons in awarding sole legal and physical custody to Jason. The trial court did not err in awarding Jason sole legal and sole physical custody.

This court gives great deference to the trial court, especially regarding child custody. Jessica offers none and I find no evidence that firmly convinces me that the best interests of J.B. requires a different custody award and corresponding visitation schedule than that ordered by the trial court.

Therefore, I would deny Jessica's Point I, and I would affirm the trial court's custody and support determinations in regards to J.B., with Jason designated as the "natural father."

CONCLUSION

For the foregoing reasons, I would affirm the judgment of the trial court in part and reverse and remand with instructions in part for proceedings in accordance with this opinion.

Lisa P. Page, Judge