Nonbiological Parents Beware: How the Court in *In re W.L.* Incorrectly Applied *Frazier v. Goudschaal* as a Result of Its Prejudice for a Nonbiological Parent [*In re* W.L., 441 P.3d 495 (Kan. Ct. App. 2019), review granted (Sept. 3, 2019).]

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In In re W.L., a Kansas appellate court confidently proclaimed that Kansas law requires a written co-parenting agreement in order to recognize parentage of a nonbiological parent in an artificial reproductive technology ("ART") case because the Kansas Supreme Court in Frazier v. Goudschaal said so. The only problem? That was not the holding in Frazier v. Goudschaal. An analysis of both cases suggests that the appellate court misstated the law in order to procure a particular outcome against an unfavorable nonbiological parent. As a result, it is likely that the Kansas Supreme Court will reverse the appellate court's holding in In re W.L. when it reviews the case because the appellate court's holding fails to consider Kansas's public policy in ART cases.

I. INTRODUCTION

Some say that bad facts make for bad law, and this saying especially rings true in *In re W.L.*[1] In that case, the trial and appellate courts were prejudiced against a nonbiological parent of twin boys because the parent made a few bad decisions through the course of her relationship with the biological mother and the children.[2] Despite the nonbiological parent's shortcomings, she still had redeeming qualities.[3] Neither the trial court nor the appellate court properly considered her relationship with the children.[4]

1. *See generally In re* W.L., (Kan. Ct. App. 2019), *rev'd, In re* Parentage of W.L. 475 P.3d 338 (Kan. 2020).
2. *See id.*
3. *See id.*
4. *See id.*

The appellate court seemingly allowed the bad facts of this case to cloud its judgment when it applied an incorrect bright-line rule that requires written parentage agreements in artificial reproductive technology ("ART") cases.[5] A rule requiring written parentage agreements in ART cases is cold, unforgiving, and is not—and should not be—the standard in Kansas ART parentage cases.[6] As a result, the Kansas Supreme Court should reverse the appellate court's holding[7] because its holding is not supported by Kansas case law and is unduly prejudicial against the nonbiological parent.[8] Instead, the Kansas Supreme Court should clarify that parentage agreements in ART cases are not required to be written.[9]

II. BACKGROUND

A. Summary of In re *W.L.*

In re W.L. arose out of an appeal from a trial court order denying a Petition for Determination of Parentage filed under the Kansas Parentage Act ("KPA")[10] by a woman who alleged a parent-child relationship with two minor children who were conceived by artificial insemination.[11]

The biological mother ("Ellen"[12]) and Petitioner ("Mary"[13]) were in a same-sex relationship for four years, although they never married nor did they enter into a civil union.[14] After a year of dating, the couple jointly decided to conceive a child through ART.[15] The couple also decided that Ellen would undergo ART to conceive.[16] Soon thereafter, Ellen became pregnant with the twins.[17]

The women were in a relationship when Ellen conceived the children, during Ellen's pregnancy, and after the children were born.[18] Mary was

5. *Id.* at 507.

6. *Cf.* Frazier v. Goudschaal, 295 P.3d 542, 555–57 (Kan. 2013).

7. The Kansas Supreme Court granted review of this case on September 3, 2019. At the time of writing this Comment, the Kansas Supreme Court had only granted review but, during the editing process, the court indeed reversed the appellate court. *See In re* Parentage of W.L., 475 P.3d 338 (Kan. 2020). Regardless, the author and the *Washburn Law Journal* Board believe this Comment still provides valuable legal analysis.

8. *Compare In re W.L.*, 441 P.3d 495, *with Frazier*, 295 P.3d 542.

9. *See generally Frazier*, 295 P.3d 542.

10. *See* KAN. STAT. ANN. § 23-2206 (West, Westlaw through 2020 Reg. and Spec. Sess.) (previously codified at KAN. STAT. ANN. § 38-1112).

11. *In re W.L.*, 441 P.3d at 499.

12. Pseudonym to preserve anonymity.

13. Pseudonym to preserve anonymity.

14. *In re W.L*, 441 P.3d at 499.

15. *Id.* at 500. The evidence suggested that Ellen paid for all artificial reproductive technology ("ART") expenses. *Id.* There was dispute at trial, however, about whether Mary repaid Ellen for some of these expenses. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

present for the artificial insemination of Ellen.[19] Once Ellen became pregnant with the twins, Ellen included Mary in her pregnancy, such as sending out a pregnancy announcement with both Ellen's and Mary's names on it and having a joint baby shower where they opened gifts together.[20] Mary also attended some prenatal appointments with Ellen.[21]

Although Mary provided support during Ellen's pregnancy, Mary "did not change her lifestyle while [Ellen] was pregnant and continued to party with friends."[22] For example, the night before Ellen gave birth, Mary attended a work-sponsored Christmas party where she became so intoxicated that Ellen and Ellen's mother had to pick Mary up.[23] On the way home, Mary asked to stop at McDonalds "[e]ven though [Ellen] was in pain and in tears."[24] A few hours later, Ellen's water broke, and because Mary "was still drunk," Ellen's mom drove them to the hospital.[25]

Mary, however, was present at the birth of the twins.[26] Although the children's birth certificates did not list Mary as a biological parent, the certificates contained a hyphenated combination of Mary's last name with Ellen's last name.[27] Mary did not, however, adopt the children or enter into a parenting agreement with Ellen.[28]

Thereafter, Ellen and Mary lived together with the twins.[29] Ellen claimed that she made all the major parenting decisions regarding daycare, nutrition, and healthcare.[30] Mary contributed significantly to household expenses and helped pay for daycare, healthcare, and various other expenses.[31]

The relationship between Ellen and Mary deteriorated when Mary "did not change her lifestyle after the children were born."[32] For example, Mary "went out with a friend" when the children were ill.[33] Two months later, Mary was in a car accident and received a citation for driving under the influence ("DUI").[34] In another instance, when several members of Ellen's

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* (internal quotations omitted).
25. *Id.*
26. *Id.*
27. *Id.* Adding Mary's last name was not something that she and Ellen discussed beforehand. However, "[a]ccording to [Ellen], this was something [Ellen] wanted to do so that [Mary] would feel included." *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

family visited the couple, Mary "had been drinking heavily."[35] During this visit, Ellen also "found [Mary] having sex with [Ellen's] sister's boyfriend in the backyard."[36]

Subsequently, the couple ended their relationship.[37] Ellen then moved to Pittsburg, Kansas, with the children and changed their last names, removing Mary's last name, so the children's last names only included Ellen's.[38] One month after Ellen and the children moved, Mary also moved to Pittsburg to be near the children.[39]

Ellen continued to have concerns regarding Mary's lifestyle.[40] For example, Mary took the children out of state without asking for Ellen's permission.[41] Further, Ellen claimed Mary drove while intoxicated with the children in the car.[42] Ellen was also concerned about Mary's interactions with the children while Mary "was presenting symptoms of a strain of the herpes virus."[43]

Despite Ellen's concerns, she still allowed Mary to have parenting time with the children overnight every other weekend and once during the week.[44] This informal parenting agreement ended when Mary asked Ellen if she could be named a guardian of the children.[45] When Ellen refused, Mary filed suit to determine parentage.[46]

At trial, Mary testified that she considered the twins to be her children and that she thought of herself as their mother because they "feel her love and support and go to her for comfort."[47] When Mary had parenting time with the children, she was their primary caregiver.[48] She "fed them, bathed them, read to them, provided discipline, and played with them."[49] She also testified that the children called her "Mama."[50]

Conversely, Ellen testified that she never regarded Mary as a parent of the twins.[51] Ellen acknowledged that the children enjoyed spending time with Mary but indicated that the children also enjoyed spending time with

35. *Id.*
36. *Id.*
37. *Id.* at 501.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 502.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

many non-parental figures in their lives.[52] Ellen testified that Mary "loves the children, but that [Mary] was not ready to be a parent."[53]

After a two-week bench trial, the trial court denied Mary's Petition for Parentage.[54] The court denied parentage despite evidence supporting a presumption of parentage, including Mary's "financial contributions, her move to Pittsburg, her visitation time with the children, and the fact that the children's birth certificate originally listed their last names [to include Mary's]."[55]

The court found that Ellen rebutted the parentage presumption by clear and convincing evidence because Mary failed to utilize any legal recourse—such as adoption—to become a legal parent.[56] The court also emphasized that Mary and Ellen "never married—even after the children were born, never picked up the rings that they had ordered from a jeweler, and never entered into any written agreements regarding artificial insemination or otherwise recognizing [Mary] as a parent."[57]

The court denied parentage despite the fact that "there was a time in which [Ellen] truly hoped that [Mary] would focus her attention on the family unit and act in a fashion expected of one who truly intends to assume the responsibilities of being a parent."[58] The trial court found that Mary was more of a "ride along than an active participant in the determination to form a parent-child relationship."[59] As a result, the court found that Mary failed to demonstrate she was a psychological, de facto, or functional parent and denied Mary's petition for parentage.[60]

B. Legal Background

1. Kansas Parentage Act

In *In re W.L.*, Mary sought parentage through the KPA.[61] Under the KPA, a parent-child relationship is defined as "the legal relationship existing between a child and the child's biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations."[62] Further, the child-parent relationship "extends equally to

52. *Id.*
53. *Id.*
54. *Id.* at 503.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*; KAN. STAT. ANN. § 23-2205 (West, Westlaw through 2020 Reg. and Spec. Sess.) (previously codified at KAN. STAT. ANN. § 38-1111).
62. § 23-2205.

every child and to every parent, regardless of the marital status of the parents."[63]

Under the KPA, a parent-child relationship may be established by one of three ways.[64] First, a mother-child relationship may be established by proof of the mother giving birth to the child.[65] Next, a father-child relationship may be established by a voluntary acknowledgment of paternity.[66] Finally, adoptive parents may establish a parent-child relationship by proof of adoption.[67]

2. *Frazier v. Goudschaal*

In reaching its conclusion in *In re W.L.*, the Kansas Court of Appeals relied heavily on the prior Kansas Supreme Court case *Frazier v. Goudschaal*.[68] In *Frazier*, a same-sex partner brought an action against her former partner requesting enforcement of a co-parenting agreement regarding their two children.[69]

Specifically, in *Frazier*, the same-sex couple had two children via ART.[70] Before the birth of each child, the couple signed a co-parenting agreement, which identified the nonbiological mother as a de facto parent and specified that her relationship with the children should be "protected and promoted," and that the parties intended "to jointly and equally share parental responsibility."[71] The agreements further stipulated that "all major decisions affecting the children shall be made jointly by both parties."[72]

Then, when their relationship ended, the nonbiological mother sought enforcement of the co-parenting agreement.[73] The trial court found the co-parenting agreement to be valid.[74] Based in part on the co-parenting agreement, the trial court found that awarding joint legal custody and primary residential custody to the biological mother was in the child's best

63. § 23-2206 (previously codified at KAN. STAT. ANN. § 38-1112).
64. § 23-2207.
65. § 23-2207(a).
66. § 23-2207(b). A voluntary acknowledgment must meet the requirements of section 23-2204. *Id.* Section 23-2204 requires a written description of the rights and responsibilities of paternity. § 23-2204. If, however, an acknowledgment of paternity is completed without the written disclosures required by section 23-2204(b), the acknowledgment is not necessarily invalid. § 23-2204(d). An acknowledgment of paternity without written disclosure may create a rebuttable presumption of paternity. § 23-2208.
67. § 23-2207(c).
68. *See In re* W.L., 441 P.3d 495 (Kan. Ct. App. 2019). *See generally* Frazier v. Goudschaal, 295 P.3d 542 (Kan. 2013).
69. *See generally Frazier*, 295 P.3d 542.
70. *Id.* at 546.
71. *Id.* (internal quotation marks omitted).
72. *Id.* (internal quotation marks omitted).
73. *Id.*
74. *Id.* at 547.

interest.[75] The biological mother appealed, challenging the trial court's authority to "award joint custody and parenting time to an unrelated third person."[76]

On appeal, the Kansas Supreme Court affirmed the trial court's order and upheld the co-parenting agreement, concluding that the agreement did not violate public policy and was enforceable as a matter of law.[77] Specifically, the court held that the co-parenting agreement was not prohibited as "sale of the children"[78] because the biological mother "retain[ed] her parental duties and responsibilities."[79] The court further held that the agreement was not injurious to the public because "it provides the children with the resources of two persons, rather than leaving them as the fatherless children of an artificially inseminated mother."[80]

III. COURT'S DECISION

On appeal in *In re W.L.*, the Kansas Court of Appeals held that Ellen met her burden to overcome Mary's presumptive parentage because the couple was not married, and because they did not enter into a written parentage agreement.[81] Specifically, the court held that Kansas does not "recognize a parentage agreement in an ART case unless it is in writing."[82]

The court determined that clear and convincing evidence supported a finding that there was never a "meeting of the minds" between Mary and Ellen regarding parentage.[83] The appellate court noted that the trial court believed Ellen's testimony to be more credible than Mary's.[84]

The appellate court emphasized several factors in affirming that Ellen successfully rebutted Mary's presumptive parentage by clear and convincing evidence.[85] The appellate court determined that Mary's relationship with the children was "primarily incidental rather than sharing in the responsibilities of parenting."[86] Additionally, the appellate court found it significant that the parties never married.[87] Finally, the court noted

75. *Id.*
76. *Id.* at 545–46.
77. *Id.* at 558.
78. "Sale of children" refers to a transaction that transfers a child from one person to another for compensation or other consideration. David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children*, 43 PEPP. L. REV. 265, 277 (2016) ("[A] child sold for purposes of adoption is a victim of the sale of children, whether or not he or she is a trafficked child.").
79. *Frazier*, 295 P.3d at 558.
80. *Id.*
81. *See In re* W.L., 441 P.3d 495, 507 (Kan. Ct. App. 2019).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 507–08.
86. *Id.*
87. *Id.*

that Mary never attempted to adopt the children or inquire about the possibility of becoming the children's legal guardian until more than three years after the children were born.[88]

As a result of the foregoing, the appellate court held that (1) Ellen rebutted Mary's presumption of parentage by clear and convincing evidence; and (2) the trial court correctly found that Mary was unable to overcome Ellen's clear and convincing evidence regarding parentage.[89]

IV. COMMENTARY

The Kansas Supreme Court should reverse the appellate court's holding regarding *In re W.L.* on two grounds.[90] First, the appellate court incorrectly applied *Frazier v. Goudschaal*, the leading Kansas Supreme Court case on ART parentage agreements.[91] Therefore, the Kansas Supreme Court should clarify that ART parentage agreements are not required to be in writing. Second, the appellate court was unduly prejudiced against Mary due to her lifestyle choices.[92]

A. The Pick-and-Choose Method: The Court in In re W.L. *Incorrectly Interpreted* Frazier v. Goudschaal

The Kansas Court of Appeals in *In re W.L.* misconstrued the Kansas Supreme Court's holding in *Frazier v. Goudschaal*.[93] The court in *In re W.L.* essentially used a "pick-and-choose" method when interpreting *Frazier*: the court picked out the parts of the precedent that suited the holding it wanted to issue and disregarded the rest.[94] Ultimately, the appellate court's decision in *In re W.L.* cannot be reconciled with the Kansas Supreme Court's decision in *Frazier v. Goudschaal*.[95]

First, although *Frazier* granted parentage to a nonbiological parent because the two parents entered into a written co-parenting agreement, the court did not explicitly hold that a written co-parenting agreement is the only method by which a court may recognize a nonbiological parent as a child's parent.[96] Nevertheless, the appellate court in *In re W.L.* incorrectly

88. *Id.* at 508.
89. *Id.*
90. The Kansas Supreme Court granted review of this case on September 3, 2019. At the time of writing this Comment, the Kansas Supreme Court had only granted review but, during the editing process, the court indeed reversed the appellate court. *See In re* Parentage of W.L., 475 P.3d 338 (Kan. 2020). Regardless, the author and the *Washburn Law Journal* Board believe this Comment still provides valuable legal analysis.
91. *See In re W.L.*, 441 P.3d at 499; Frazier v. Goudschaal, 295 P.3d 542, 558 (Kan. 2013).
92. *See In re W.L.*, 441 P.3d at 508.
93. *See id.* at 507; *Frazier*, 295 P.3d at 557.
94. *See In re W.L.*, 441 P.3d at 507.
95. *Compare In re W.L.*, 441 P.3d 495, with *Frazier*, 295 P.3d 542.
96. *See Frazier*, 295 P.3d at 557.

concluded that *Frazier* requires a written co-parenting agreement to recognize a nonbiological parent of a child conceived via ART as a legal parent.[97]

Nowhere in the *Frazier* opinion did the court hold that a parenting agreement must be in writing.[98] At most, the decision simply allows written co-parenting agreements in ART cases.[99] Specifically, regarding a co-parenting agreement, the court in *Frazier* held,

> [t]he [coparenting] agreement is not injurious to the public because it provides the children with the resources of two persons, rather than leaving them as the fatherless children of an artificially inseminated mother. No societal interest has been harmed; no mischief has been done. . . . [T]he coparenting agreement here contains "no element of immorality or illegality and did not violate public policy," but rather "the contract was for the advantage and welfare of the children." . . . Consequently, the coparenting agreement in this case does not violate public policy and is not unenforceable as a matter of law.[100]

This language is a far cry from the bright-line rule declared by the court in *In re W.L.* that absolutely requires written parentage agreements in ART cases.[101]

Additionally, the Kansas appellate court's holding in *In re W.L.* entirely disregarded the Kansas public policy that it is in the children's best interest to have two parents rather than one.[102] The *Frazier* court upheld the co-parenting agreement because it provided the children with "the resources of two persons, rather than leaving them as the fatherless children of an artificially inseminated mother."[103]

The court in *In re W.L.* did not even consider this policy in its decision.[104] Instead, the court reached the opposite result, which left the children without a second parent to love and support them.[105] In fact, the court did more than leave the children without a second parent. The court went as far as to rip the children from the arms of their "Mama." Clearly, the court in *In re W.L.* went directly against the ingrained public policy of Kansas.

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97. *In re W.L.*, 441 P.3d at 507 ("[W]e do not believe our Supreme Court would recognize a parentage agreement in an ART case unless it is in writing.").

98. *See generally Frazier*, 295 P.3d 542. Both oral and written parenting agreements are enforceable as valid contracts when they do not violate public policy. *See id.* (discussing *In re* Estate of Shirk, 350 P.2d 1 (Kan. 1960)).

99. *Id.* at 558.

100. *Id.* (citations omitted).

101. *In re W.L.*, 441 P.3d at 507.

102. *Frazier*, 295 P.3d at 557.

103. *Id.* at 558.

104. *See generally In re W.L.*, 441 P.3d at 508.

105. *Id.*

B. Bad Facts Make Bad Law: The Court in In re W.L. *Was Unduly Prejudiced Against the Nonbiological Parent*

The appellate court in *In re W.L.* appeared prejudiced against Mary.[106] This prejudice caused the court to make bad law that, if upheld by the Kansas Supreme Court, will negatively impact non-biological and non-adoptive parents that do not have a written parentage agreement in ART cases.[107] It appears that the court decided not to grant Mary parentage, then molded the law around that decision, rather than first interpreting the law and, then, applying that law to the facts.[108] As a result, the court created a bright-line rule that disallows future courts to consider the totality of the circumstances in ART parentage cases.[109]

From the outset, the appellate court framed the facts to portray Mary in a negative light to justify its decision in Ellen's favor.[110] The court mentioned Mary's "party[ing]" before the twins were even born.[111] The court also mentioned her alleged sexually transmitted disease, which had nothing to do with her ability to parent the twins.[112]

Conversely, the court dismissed important facts as inconsequential, when in reality, these facts proved that Mary was truly a parent to the twins.[113] First, Mary considered the twins to be her children.[114] She provided the twins with love and support.[115] The twins went to Mary for comfort, and they even called Mary "Mama."[116] Mary also moved from Kansas City to Pittsburg to be close to the twins when Ellen relocated with them.[117] Further, after the couple separated, Mary had regular parenting time with the twins until Ellen disallowed it when the arrangement no longer suited her.[118] The court failed to consider these facts in its analysis and simply concluded that Mary was a "ride along" rather than "an active participant" in the mother-child relationship.[119]

Undoubtedly, Mary made several bad decisions in the course of her relationship with Ellen.[120] However, the court clearly used these bad

106. *See id.*
107. *Id.*
108. *See id.*
109. *Id.* at 507.
110. *See id.* at 500.
111. *Id.* ("Evidently, [Mary] did not change her lifestyle while [Ellen] was pregnant and continued to party with friends.").
112. *Id.* at 501 ("[Ellen] had concerns about [Mary's] interactions with the children while she was presenting symptoms of a strain of the herpes virus.").
113. *See id.* at 502.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 501.
118. *Id.*
119. *Id.* at 508.
120. *See id.* at 500.

decisions as reasons to deny her parentage and to disguise its distaste for Mary by misstating that the law requires a written co-parenting agreement.[121]

The appellate court's prejudice could negatively affect similarly situated nonbiological parents in future ART cases. As a result of the bad facts of this case, a "good" parent who is clearly a de facto parent of children conceived through ART will be denied parentage because they failed to procure a piece of paper that secures their rights to parent their own children.[122] Such an inflexible rule makes it virtually impossible to recognize the parentage status of nonbiological parents without a written agreement.[123] This standard clearly does not align with Kansas's public policy that having two parents rather than one is in the child's best interest.[124]

V. CONCLUSION

The Kansas Supreme Court should reverse the appellate court's holding in *In re W.L.* The appellate court improperly construed Kansas precedent, disregarded Kansas public policy, and exhibited improper prejudice against the nonbiological parent.[125] The improper rule, which the appellate court created, could unfairly affect future nonbiological parents in ART cases.[126]

If the Kansas Supreme Court does not reverse this holding, "good" nonbiological parents and children conceived through ART will suffer unfair consequences at the hands of cold, unforgiving courts that have no choice but to rip families apart[127]—all because the parent-child relationship, and the love and support fostered by that relationship, is not documented on a piece of paper.[128] Kansas public policy demands better for families created through ART.[129]

121. *Id.* at 507.
122. *Id.*
123. *Id.*
124. *See* Frazier v. Goudschaal, 295 P.3d 542, 557 (Kan. 2013); *see also In re W.L.*, 441 P.3d at 508.
125. *See In re W.L.*, 441 P.3d at 499; *Frazier*, 295 P.3d at 545.
126. *See In re W.L.*, 441 P.3d at 499; *Frazier*, 295 P.3d at 545.
127. *In re W.L.*, 441 P.3d at 507.
128. *Id.*
129. *See Frazier*, 295 P.3d at 557.