NOT DESIGNATED FOR PUBLICATION

No. 125,990

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Estate of
JACOB A. BARNES.

MEMORANDUM OPINION

Appeal from Sedgwick District Court, ROBB W. RUMSEY, judge. Submitted without oral argument. Opinion filed December 22, 2023. Affirmed in part and dismissed in part.

Gregory J. Barnes, appellant pro se.

Jeffrey R. Emerson, of Conlee Schmidt & Emerson LLP, of Wichita, for appellee Richard Ciemny.

G. Andrew Marino and *Nolan W. Wright*, of Gibson Watson Marino LLC, of Wichita, for appellees Charlene Killebrew, Lonnie Barnes, and Elizabeth Ann Thomas.

Before ARNOLD-BURGER, C.J., SCHROEDER and COBLE, JJ.

PER CURIAM: Jacob A. Barnes died intestate leaving seven individuals who identified as his children. Over the objection of Barnes' son, Gregory Barnes, the district court found the four children Gregory objected to were Jacob's children. Gregory now appeals pro se the district court's orders determining the four individuals were Jacob A. Barnes' children. Gregory raises four general issues on appeal: (1) The district court erroneously determined Charlene Killebrew was Jacob's child; (2) the district court further erred in determining Lonnie Barnes, Charles Johnson, and Elizabeth Ann Thomas (Ann) were also Jacob's children; (3) Jacob's body should not have been exhumed to obtain DNA in order to determine heirship of the disputed children; and (4) the district

court should not have awarded Charlene her attorney fees. After the appeal was docketed, Charlene, Lonnie, and Ann jointly moved for appellate attorney fees and expenses. The administrator of the estate also moved for appellate attorney fees and expenses.

As we explain below, Gregory's notice of appeal does not provide us with jurisdiction over all of his issues. Therefore, upon review of the record presented, we affirm in part and dismiss in part. Additionally, we find the amount of attorney fees and expenses jointly requested by Charlene, Lonnie, and Ann and the amount of attorney fees and expenses requested by the administrator of the estate are reasonable and grant both motions.

FACTS

Upon Jacob's death in Sedgwick County in June 2019, Charlene petitioned the district court to administer Jacob's intestate estate, alleging she, Ann, Lonnie, and Gregory were Jacob's surviving children, along with Antonio Barnes and Debra Barnes who had predeceased Jacob. Charles was later added to the action. Gregory and Debra's mother, Cora Barnes, was married to Jacob at the time of their births, and Gregory admitted Jacob had adopted Antonio. Richard Ciemny, a professional fiduciary, was appointed to administer Jacob's estate. Gregory contested the heirship of Charlene, Ann, Lonnie, and Charles.

Administration of the estate did not go smoothly. Ciemny requested Ann, Charlene, Charles, Gregory, and Lonnie submit to DNA testing. Ann, Charlene, Charles, and Lonnie (the heirship claimants) complied with Ciemny's request; Gregory refused. The results of the initial DNA testing established all four heirship claimants had a common father. In light of Gregory's refusal to undergo DNA testing, Ciemny filed a petition in February 2020, asking the district court for instructions on how to proceed. Ultimately, the court requested briefing on the determination of heirs.

The district court held a hearing on December 15, 2020, and found it was undisputed Gregory was Jacob's biological child. Because the heirship claims of Ann, Charlene, Charles, and Lonnie were disputed, the district court found they had a right to establish whether they were Jacob's children and set the matter for an evidentiary hearing if any of the heirship claimants filed a petition requesting such hearing.

Charlene timely petitioned for an evidentiary hearing, alleging she was Jacob's biological child under K.S.A. 59-501(a), or, in the alternative, she qualified as a child based on a presumption of paternity under the Kansas Parentage Act (KPA), K.S.A. 2022 Supp. 23-2201 et seq., because Jacob notoriously or in writing recognized paternity of Charlene. See K.S.A. 2022 Supp. 23-2208(a)(4). The other heirship claimants did not request evidentiary hearings, although Cora's sons, born before Cora and Jacob were married, each also filed petitions requesting a hearing. The district court held a two-day hearing in September 2021 at which several witnesses testified, including Gregory, the heirship claimants, other relatives of both Jacob and Cora, a family friend, and the doctor who was also the records custodian for the company that performed the initial DNA testing.

Testimony established that Jacob had notoriously recognized Charlene, Ann, Charles, and Lonnie as his children during his lifetime and had provided for them in various ways as they grew up and became adults. Gregory admitted that, on several occasions, Jacob referred to Charlene, Lonnie, Charles, and Ann as his children. Jacob's estate planning documents and funeral program also reflected Charlene, Lonnie, Charles, and Ann were Jacob's children. While Charles did not testify at the hearing and largely has not been involved in the proceedings, comparative DNA testing reflected Charles shared a common father with the other heirship claimants.

Following this hearing, the district court issued a journal entry containing numerous findings of fact and conclusions of law. The court specifically found Charlene

was Jacob's biological child and found the other three heirship claimants were likely Jacob's biological children. The court also determined that Cora's sons, born before Cora and Jacob married, were not Jacob's children.

In May 2022, Ciemny petitioned for an order to exhume Jacob's remains in order to obtain a sample for comparative DNA testing, detailing the prior unsuccessful efforts to confer with Gregory. Gregory objected to Ciemny's request, asserting the district court lacked subject matter jurisdiction to allow the heirship claimants to prove paternity in probate proceedings, and moved to dismiss Ciemny's petition. Gregory generally disputed Ann, Charlene, Charles, and Lonnie were Jacob's children because they were not born out of the marriage between Jacob and Jacob's late wife, Cora.

On June 14, 2022, the district court heard Ciemny's petition. Over Gregory's objections, the district court gave Gregory until June 17, 2022, to submit to DNA testing; otherwise, Jacob's body would be exhumed for testing. The order was memorialized in the district court's journal entry from July 22, 2022.

On September 20, 2022, Ciemny had Jacob's remains exhumed for testing pursuant to the district court's July 22, 2022 journal entry as Gregory had not complied with the district court's deadline. Ciemny subsequently filed the test report of Dr. George Maha on October 26, 2022, which indicated a 99.99 percent probability Jacob was the heirship claimants' biological father. On December 8, 2022, the district court held a hearing wherein Dr. Maha testified about the comparative DNA testing and conclusions in his report. On January 6, 2023, the district court filed its journal entry determining there was clear and convincing evidence Jacob was Ann, Charles, and Lonnie's biological father based on the results of DNA testing and a separate presumption of paternity by notorious recognition existed, which had not been rebutted. Therefore, Ann, Charles, and Lonnie were Jacob's heirs.

On January 11, 2023, Gregory filed a notice of appeal challenging the district court's January 6, 2023 journal entry. Additional facts are set forth as necessary.

ANALYSIS

Gregory's briefing of the issues is difficult to discern and is further complicated by a jurisdictional problem created by Gregory's notice of appeal. Essentially, there are three overarching considerations at issue in this appeal: (1) whether we have jurisdiction to consider Gregory's claims; (2) whether the district court acted within its statutory authority under the Kansas probate code, K.S.A. 59-101 et seq., the Kansas rules of civil procedure, K.S.A. 2022 Supp. 60-201 et seq., and the KPA; and (3) whether the evidence before the district court properly supported the factual findings underlying its legal conclusions.

The heirship claimants argue Gregory's notice of appeal is largely defective as it identifies a single ruling; thus, we do not have jurisdiction over most of the issues raised in Gregory's brief. Gregory responds his notice of appeal should be liberally construed and we should review all the issues he raises.

Standard of Review and Applicable Legal Principles

Whether subject matter jurisdiction exists is a question of law subject to unlimited review. See *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 889, 451 P.3d 459 (2019). We have a duty to question jurisdiction on our own initiative, but our jurisdiction is limited by statute. Where the record discloses a lack of jurisdiction over the issues raised on appeal, those claims must be dismissed. *Wiechman v. Huddleston*, 304 Kan. 80, 84-85, 86-87, 370 P.3d 1194 (2016).

K.S.A. 2022 Supp. 60-2103(b) provides: "The notice of appeal shall specify the parties taking the appeal; *shall designate the judgment or part thereof appealed from*, and shall name the appellate court to which the appeal is taken." (Emphasis added.) It is well-established we only obtain jurisdiction over the rulings identified in the appellant's notice of appeal. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 293 Kan. 633, 637, 270 P.3d 1074 (2011). However, Kansas appellate courts may liberally construe pro se notices of appeal, although the liberal construction rule is generally stricter in civil cases. See *Garetson Brothers v. American Warrior, Inc.*, 56 Kan. App. 2d 623, 643, 435 P.3d 1153 (2019).

Garetson Brothers provides a helpful summary of the caselaw applying the liberal construction rule to pro se notices of appeal in civil cases. The panel explained:

> "[I]n *Key v. Hein, Ebert & Weir, Chtd.*, 265 Kan. 124, 129-30, 960 P.2d 746 (1998), the Kansas Supreme Court construed a civil notice of appeal to confer jurisdiction over all the issues raised on appeal when it was drafted by a pro se litigant and included 'catch-all' language. Key's notice of appeal stated he was appealing from the December 19, 1996 order. An order granting Key's motion for summary judgment was issued in December 1995, and an order denying Key's motion to amend that decision was issued in December 1996. On appeal, the defendants argued that the notice of appeal failed to identify the trial court's order from December 1995.
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> "In rejecting this argument, our Supreme Court noted a liberal construction of the notice of appeal was particularly appropriate because it was drafted by a pro se litigant. The Supreme Court held that the language '"grant[ing] the defendant Memorandum Decision order"' in the notice of appeal could be construed to include references to both the December 1995 and 1996 orders, and noted that the 'catch-all' language in his notice of appeal—'"And from each and every order entered [contrary] to plaintiff"'—encompassed the 1995 summary judgment order, and found that the defendants had not been prejudiced by the notice of appeal. 265 Kan. at 129-30." *Garetson Brothers*, 56 Kan. App. 2d at 643-44.

Garetson Brothers further explained the holding in *In re Marriage of Lay v. Sternadori*, No. 91,701, 2004 WL 2384238, at *1 (Kan. App. 2004) (unpublished opinion), as follows:

> "There, appellant's notice of appeal stated: '"Notice is hereby given that Appellant Rich Sternadori appeals the Division 8 Court's January 2, 2004 decision in the above case."' 2004 WL 2384238, at *6. Applying the Supreme Court's decision in *Key*, the *Lay* panel determined that the liberal construction approach did not apply because the notice of appeal did not reference any earlier decisions by the district court nor did it contain any 'catch-all' language. Therefore, the *Lay* panel determined it only had jurisdiction to address the issues in the January 2004 decision. 2004 WL 2384238, at *6." *Garetson Brothers*, 56 Kan. App. 2d at 644-45.

The *Garetson* panel noted three other Court of Appeals decisions applying similar rationale: *Gates v. Goodyear*, 37 Kan. App. 2d 623, 627-29, 155 P.3d 1196 (2007) (failure to include "'catch-all'" language in notice of appeal limited appellate jurisdiction to ruling identified in notice of appeal); *In re J.D.D.*, 21 Kan. App. 2d 871, 873, 908 P.2d 633 (1995) ("appellate court jurisdiction limited to rulings specified in notice of appeal"); and *Raney-Neises v. HCA Health Service of Kansas, Inc.*, No. 93,740, 2006 WL 1460614, at *9 (Kan. App. 2006) (unpublished opinion) (same). *Garetson Brothers*, 56 Kan. App. 2d at 645. Based on these decisions, the panel found it did not have jurisdiction to consider five issues raised in pretrial motions which were not addressed in the district court's permanent injunction order—the only ruling identified in the notice of appeal—because there was no catch-all language in the notice of appeal challenging any other adverse rulings or judgments. 56 Kan. App. 2d at 645.

Recently, another panel of this court addressed a similar issue in *G.S. v. J.P.*, No. 124,545, 2023 WL 2194550, at *3-7 (Kan. App. 2023) (unpublished opinion). Relying on *Garetson Brothers* and the authorities discussed therein, the panel held, even liberally construing J.P.'s pro se notice of appeal, it only had jurisdiction over the ruling identified

therein, which did not include any "catch-all language" allowing consideration of the other rulings and orders complained of in J.P.'s brief. 2023 WL 2194550, at *4-5. The reasoning in *G.S.* is sound and we apply it here.

Gregory filed three prior notices of appeal during the pendency of the district court case. He first filed a "Notice of Interlocutory Appeal" on January 28, 2021, challenging the rulings in the district court's journal entry from January 19, 2021, which, among other things, addressed whether and how comparative DNA testing would occur. That appeal was dismissed by another panel of this court as interlocutory on March 18, 2021. In October 2021, Gregory filed a notice of appeal challenging the district court's "Determination of Heirship." Although he referred to the date of the order as September 8, 2021, it appears he intended to challenge the October 8, 2021 journal entry. That appeal was also dismissed by another panel of this court as interlocutory on February 4, 2022.

Gregory filed the notice of appeal in the instant case on January 11, 2023, indicating he appealed from the district court's "January 6, 2023 journal entry determining heirship." His notice of appeal also stated: "The appeal should be joined with the prior-appeal pending in the Court of Appeals under docket number 22-125786-A." The notice of appeal for that case, filed November 14, 2022, appealed from the district court's "July 27, 2022 journal entry." But another panel of this court issued an order dismissing that appeal as interlocutory on January 12, 2023. Gregory did not file an amended notice of appeal to include any ruling(s) he wished to challenge in the prior appeal. However, given how the January 2023 notice of appeal was drafted, we will liberally construe it as also challenging the district court's journal entry of July 27, 2022.

Gregory's brief raises several rulings which were not identified in either of his two relevant notices of appeal:

- the order for comparative DNA testing entered on January 19, 2021;
- the district court's October 8, 2021 journal entry adjudicating Charlene as Jacob's heir;
- the award of interim attorney fees and expenses to Charlene through September 30, 2021, entered on December 9, 2021; and
- the order for exhumation of Jacob's body entered on July 22, 2022.

Accordingly, the only relevant rulings over which we have jurisdiction are: (1) the district court's determination that Ann, Charles, and Lonnie were also Jacob's heirs, and (2) the district court's order enforcing its earlier award of Charlene's attorney fees following the prior dismissal of Gregory's interlocutory appeals. But Gregory fails to advance a meaningful argument on either issue.

The district court properly determined Ann, Charles, and Lonnie were Jacob's heirs.

Gregory makes several arguments about the orders for exhumation and DNA testing related to Charlene, which we will not consider for lack of jurisdiction. Gregory then asserts the same arguments apply to Ann, Charles, and Lonnie, without any further analysis of the point. Gregory claims the issue was raised below but never indicates where it was ruled on below. His citation is also improper because it only refers to page numbers without specifying the particular volume(s) of the record. Accordingly, Gregory has not complied with Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36). Our Supreme Court has held Rule 6.02(a)(5) is to be strictly enforced. *State v. Godfrey*, 301 Kan. 1041, 1043-44, 350 P.3d 1068 (2015). An appellant who fails to comply with this rule "risk[s] a ruling that an issue improperly briefed will be deemed waived or abandoned." *State v. Williams*, 298 Kan. 1075, 1085-86, 319 P.3d 528 (2014). Thus, given his lack of meaningful argument, we discern no valid issue for us to review on appeal.

As to Ann, Charles, and Lonnie, Gregory concedes in his brief: "For the purposes of simplicity, Appellant accepts the testimony and the findings with respect to Elizabeth Ann Thomas, Lonnie Barnes, and Charles Johnson as detailed in the last journal [entry]." Because Gregory does not dispute the findings underlying the district court's decision, there is effectively no claim of error on appeal. "'Determinations of fact, unappealed from, are final and conclusive.'" *Powell v. Simon Mgt. Group, L.P.*, 265 Kan. 197, 199, 960 P.2d 212 (1998).

Under K.S.A. 59-501(a), heirship can be established through notorious recognition of paternity under the KPA, as well as by evidence of biological paternity, i.e., DNA testing. See K.S.A. 2022 Supp. 23-2208(a)(4); *In re Estate of Fechner*, 56 Kan. App. 2d 519, 522, 432 P.3d 93 (2018). The issue of the DNA evidence is not properly before us as the rulings ordering exhumation and DNA testing were not properly identified in Gregory's notice of appeal; therefore, we have no jurisdiction to consider them. Gregory admits he is not challenging the evidence and factual findings underlying the determination of paternity as to Ann, Charles, and Lonnie, and he does not argue the district court's findings are unsupported by substantial competent evidence. Because one issue has not been properly appealed and the other has been conceded by Gregory, we affirm the district court's determination that Ann, Charles, and Lonnie are Jacob's children.

Gregory's challenge to Charlene's attorney fees granted below was not properly appealed.

Gregory argues the estate should not pay Charlene's attorney fees. However, we cannot review the district court's award of attorney fees to Charlene because the relevant ruling is not properly identified in Gregory's notice(s) of appeal. Nevertheless, Gregory's argument would fail on the merits because it hinges on his other unreviewable arguments that Charlene is not Jacob's lawful heir. To the extent we have jurisdiction over any point

relevant to the award of attorney fees, it is only regarding the order in the district court's July 27, 2022 journal entry enforcing its earlier award of Charlene's attorney fees following another panel of this court's dismissal of a prior interlocutory appeal. We observe no argument by Gregory there was any error in the order to enforce the prior award; he only argues the award itself was improper. A point not briefed is deemed waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). Thus, we observe no reviewable claim of error on appeal and dismiss this claim.

Ann, Charlene, and Lonnie are entitled to their appellate attorney fees.

Ann, Charlene, and Lonnie jointly filed a brief in response to Gregory's. On July 6, 2023, we sent out our letter assigning this case to a nonargument calendar. On July 18, 2023, Ann, Charlene, and Lonnie timely filed a motion under Supreme Court Rule 7.07(b)(1) (2023 Kan. S. Ct. R. at 52) for expenses and attorney fees on appeal in the amount of $49,308.75.

Under Rule 7.07(b)(1), if the district court has the authority to award attorney fees in a particular matter, we may also award attorney fees for services on appeal. Here, the district court clearly had authority to award attorney fees under K.S.A. 59-1504.

> "The clear language of [K.S.A. 59-1504] indicates that four requirements must be met before attorney fees may be recovered: (1) The party who may be allowed the fees by the court must be an heir at law or a beneficiary under a will; (2) the party must have exercised good faith and have had a good cause for incurring such fees; (3) the party must be successful in his or her action; and (4) the action must ultimately benefit the recipients of the estate. When the requirements are met, the court must exercise its discretion to allow fees." *In re Estate of Gardiner*, 29 Kan. App. 2d 158, 163, 23 P.3d 902 (2001).

The district court found, as Charlene argued, that she had

> "successfully prosecuted her action for a determination of the proper heirs, in good faith and for good cause, for the benefit of the estate because she has—over vigorous objection—established both her status as an heir and good cause to believe that others are also heirs of the estate."

Thus, the district court awarded Charlene attorney fees in the proceedings below. For largely the same reasons, we find an award to Ann, Charlene, and Lonnie of attorney fees and expenses on appeal is proper. In support of their motion, Ann, Charlene, and Lonnie have included documentation establishing the fees and expenses incurred, and we find the requested attorney fees reasonable under Rule 1.5(a) of the Kansas Rules of Professional Conduct (KRPC) (2023 Kan. S. Ct. R. at 333). Accordingly, we grant their motion for expenses and attorney fees on appeal in the amount of $49,308.75.

Ciemny is entitled to his appellate attorney fees.

Ciemny also timely filed a motion for attorney fees and expenses under Rule 7.07(b)(1), requesting $29,797.15. K.S.A. 59-1717 provides:

> "Every fiduciary shall be allowed his or her necessary expenses incurred in the execution of his or her trust, and shall have such compensation for services and those of his or her attorneys as shall be just and reasonable. At any time during administration the fiduciary may apply to the court for an allowance upon his or her compensation and upon attorneys' fees."

As administrator of Jacob's estate, Ciemny is entitled to his reasonable attorney fees irrespective of the outcome of these proceedings. He has submitted documentation properly supporting the amount requested in his motion, and we find the attorney fees

reasonable under KRPC 1.5(a). Therefore, we grant Ciemny's motion for attorney fees and expenses on appeal in the amount of $29,797.15.

In summation, we find substantial competent evidence reflects Charlene, Ann, Charles, and Lonnie are Jacob's children. Thus, all seven of Jacob's children—Charlene, Gregory, Debra, Antonio, Ann, Charles, and Lonnie—or their respective heirs shall share proportionately in Jacob's estate.

Affirmed in part and dismissed in part.