

NOT DESIGNATED FOR PUBLICATION

No. 105,650

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION TO ADOPT:
B.W., J.W., and T.W.,
Minor Children.

MEMORANDUM OPINION

Appeal from Kingman District Court; LARRY T. SOLOMON, judge. Opinion filed October 7, 2011.
Affirmed.

Janice J. Jorns, of Hanson & Jorns, LLC, of Pratt, for appellant father.

Bradford L. Williams and *Rebecca J. Faurot*, of Williams & Williams, P.A., of Kingman, for appellee adoptive stepfather.

Before BRUNS, P.J., BUSER, J., and KNUDSON, S.J.

Per Curiam: J.W. (Father) is the biological father of three minor children, B.W., J.W., and T.W. The children reside with their biological mother (Mother) and her current husband (Stepfather) in Kingman County. After Stepfather petitioned to adopt the three children without the consent of Father, the district court held an evidentiary hearing. Following the hearing, the district court determined that Father's consent to the adoption was not necessary under K.S.A. 2010 Supp. 59-2136(d) because Father had failed to fulfill his parental duties for 2 consecutive years immediately prior to the filing of the adoption petition. We find that the district court considered all of the surrounding circumstances in making this determination. We further find that there is substantial evidence in the record to support the district court's decision. Thus, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Father and Mother were married on January 9, 1999. The three children involved in this action, J.W., B.W., and T.W., were born during the marriage. On November 9, 2006, Father and Mother were divorced in Johnson County District Court. The parties entered into a parenting plan, and Father was ordered to pay \$290 a month in child support.

The parenting plan, which was incorporated into the divorce decree, gave Mother residential custody of the children. Father was granted supervised visitation at the home of the children's paternal grandparents in De Soto. The visits were to occur every other weekend from 6 p.m. Friday to 6 p.m. Sunday. Although the paternal grandparents moved to Tennessee for approximately a year, Father never moved to modify the parenting plan.

Mother married Stepfather on August 2, 2008. They live with the children in Kingman County. On December 29, 2009, an adoption petition was filed by Stepfather in Kingman County District Court. At the same time, Mother filed a written consent to the adoption. In the adoption petition, Stepfather alleged that Father's consent was not required because he had failed to fulfill his parental duties during the 2 years immediately preceding the filing of the petition. On February 18, 2010, a letter was faxed by Father, who was incarcerated in the Sumner County Jail at the time, to the Kingman County District Court that stated his objection to the adoption.

An evidentiary hearing was conducted by the district court on October 26, 2010. Following the hearing, the district court issued a 14-page letter decision on December 9, 2010. In the decision, the district court determined that Father had failed to assume his parental duties for more than 2 consecutive years immediately prior to the filing of the adoption petition. Accordingly, the district court concluded that Father's consent to the

adoption was not necessary and that the Stepfather's petition for adoption should be granted. Thereafter, Father filed a timely appeal.

ISSUES PRESENTED

There are two issues presented on appeal. The first issue is whether the district court erred in finding that Father failed to fulfill his parental duties for a period of 2 consecutive years preceding the filing of the adoption petition. The second issue is whether the district court failed to consider the best interests of the children in granting the adoption.

ANALYSIS

K.S.A. 2010 Supp. 59-2136(d) applies to stepparent adoptions. The statute provides that a presumed father must consent to the adoption "unless such father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption" In making a determination whether consent is required, "the court may disregard incidental visitations, contacts, communications or contributions." K.S.A. 2010 Supp. 59-2136(d). In this context, the word "incidental" means "'casual, of minor importance, insignificant, and of little consequence.'" *In re Adoption of S.J.R.*, 37 Kan. App. 2d 28, 42, 149 P.3d 12 (2006).

If a presumed father knowingly fails "to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, for a period of two years next preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent." K.S.A. 2010 Supp. 59-2136(d). Moreover, "[t]he court may consider the best interests of the child and the fitness of the nonconsenting parent in determining whether a stepparent adoption should be granted." K.S.A. 2010 Supp. 59-2136(d).

Recently, the Kansas Supreme Court "put to rest the artificial constraints of the two-sided ledger approach, and return[ed] to the historical approach of considering 'all surrounding circumstances.'" *In re Adoption of J.M.D.*, 293 Kan. ___, No. 99,687, filed September 16, 2011, slip op. at 18. Furthermore, our Supreme Court held that "the trial court must look at the totality of the circumstances when determining whether a natural father has failed to assume his parental duties under K.S.A. 2010 Supp. 59-2136(d)." Slip op. at 18.

On appeal, this court must determine whether substantial evidence supports the district court's factual finding under K.S.A. 2010 Supp. 59-2136(d). *In re Adoption of J.M.D.*, slip op. at 22; see *In re Adoption of B.M.W.*, 268 Kan. 871, 882-83, 2 P.3d 159 (2000). In making this determination, we must review the record in the light most favorable to the prevailing party below. *In re Adoption of J.M.D.*, slip op. at 22. Likewise, we must give "a great deal of deference to the trial judge's determination, even in those instances where [we] might have decided the case differently." Slip op. at 22-23.

In the present case, Father contends that the district court erred in finding that he failed to fulfill his parental duties in the 2 years immediately prior to the filing of the adoption petition because he maintained as much contact with the children that his circumstances allowed. In addition, Father contends that he paid a significant amount of child support during the relevant time period. In response, Stepfather contends that Father's contact, visitations, communications, and support of the children were incidental at best.

Because the petition for adoption was filed on December 29, 2009, the relevant time period for our review is from December 29, 2007, to December 29, 2009. During this time period, we find that Father's contact with the children was at best sporadic. Moreover, through much of this time frame, neither Mother nor the paternal grandparents knew where Father was residing or how to contact him.

The record reflects that during the 24-month period prior to the filing of the adoption petition, Father did not see the children for at least 21 months. On the two or three times Father did see the children during 2008 and 2009, it was the paternal grandparents, not Father, who arranged for the visits. Specifically, the children spent Thanksgiving with their paternal grandparents in November 2008, and Father was evidently present for at least part of the time. Likewise, the children spent Christmas with their paternal grandparents in December 2008, and Father may have been present. Finally, the children attended a family wedding in March 2009, and Father also attended the wedding.

Furthermore, the record reflects that there were at least 18 months during the 24-month period prior to the filing of the adoption petition in which Father had no contact with the children. It appears that Father may have spoken with one or more children on the telephone three times in 2008 and 2009. On two occasions, Father spoke to only one of the children for his or her birthday. On the other occasion, he spoke to the children when they were visiting their paternal grandparents in Tennessee. In addition, he sent one of the children a birthday card. After weighing the evidence, the district court found these contacts to be incidental.

Father offered several excuses to the district court for not visiting or contacting his children, including the fact that he was arrested seven times and attended four rehabilitation centers during the relevant time period. After hearing the evidence, however, the district court found Father's testimony "was not credible on visitations and contacts and was mostly self-serving, unspecific, and/or evasive." Moreover, the record clearly reveals that Father made little effort to fulfill his parental duties even when he was not incarcerated or in rehabilitation.

Father also contends that he was unable to visit with the children personally because his parents were to supervise the visitation at their home. However, there is nothing in the record to indicate that Father ever sought to modify the parenting plan in light of his parents' move to Tennessee. Thus, we will not replace our judgment for that of the district court regarding the conclusion that Father had only incidental contact with the children during the 2 years immediately prior to the filing of the adoption petition.

Turning to the area of financial support, the record reflects that Father was employed for a brief period from March 2008 to June 2008. During that period of time, the court-ordered child support was withheld from his wages. After he stopped working, however, he made only one other child support payment during the 2 years prior to the filing of the adoption petition. Hence, of the more than \$6,900 in court-ordered child support owed by Father during the relevant time period, he paid only \$1,917 or approximately 27%. In other words, approximately 73% of the support obligation for the relevant time period was not paid.

Regardless of whether the statutory presumption is applied in this case, the failure to provide financial support for a child is a relevant factor included in considering all surrounding circumstances. See K.S.A. 2010 Supp. 59-2136(d). Moreover, the fact that Father was incarcerated during a portion of the 2-year period does not relieve him of his duty to provide financial support to his children. See *In re Adoption of C.L.O.*, No. 101,944, 2009 WL 3378217, at *4 (Kan. App. 2009) (unpublished opinion). Thus, we conclude that the district court's finding that Father "put his own desire for drugs over and above working, having a roof over his head and paying child support," is supported by substantial evidence.

Finally, Father also argues that the district court erred in failing to find that the best interests of the children required that the adoption be denied. Although this is one factor to be considered, it is not the controlling factor. See *In re Adoption of J.M.D.*, slip

op., Syl. ¶ 3. A review of the district judge's decision shows that the district judge did take this factor into consideration. However, based on the totality of the evidence, the district court concluded that Father had not fulfilled his parental duties to his children.

Additionally, there is evidence in the record from which a reasonable person could conclude that the stepparent adoption was in best interests of the children. Specifically, there is evidence in the record that the Stepfather has been active in the children's lives and has financially supported them since he married their mother. On the other hand, the evidence in the record reveals that Father has struggled with drug addiction and has been in jail on several occasions. Also, as indicated above, a review of the record reveals that Father's personal contacts with and financial support of the children has been minimal.

In summary, the district court had the opportunity to hear the witnesses and to weigh the evidence. Viewing the record in the light most favorable to prevailing party below and after considering all surrounding circumstances, we find that there is substantial evidence in the record to support the district court's conclusion that Father failed to fulfill his parental duties during the 2-year period prior to the filing of the adoption petition and that his consent was not required. Although we applaud the efforts of the paternal grandparents to foster a relationship with the children, and we are hopeful that this relationship continues, it is the Father's actions and failure to act that we are required to consider. Thus, we affirm the district court's judgment.

Affirmed.