

No. 93,429.

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of THE ADOPTION OF B.S.C.,

A Minor Child.

Appeal from Sedgwick District Court; Michael Corrigan, judge. Opinion filed June 17, 2005. Affirmed.

Elizabeth Lea Henry, of Fletcher & Mathewson, P.A., of Wichita, for appellant natural father.

G. Nelson Van Fleet, of Wichita, for appellee.

Before JOHNSON, P.J., ELLIOTT and MALONE, JJ.

MEMORANDUM OPINION

PER CURIAM.

In this stepparent adoption case, J.T.C., biological father of B.S.C., appeals the trial court's decision that his consent to the adoption was not required under K.S.A. 59-2136(d).

B.S.C. was born in 1991 to J.L.B. (mother) and J.T.C. (father). Mother and father were divorced in 1993, and father was ordered to pay child support. In 1997, mother married C.W.B. (stepfather). Father has been incarcerated in El Dorado since June 1998.

In May 2004, stepfather filed a petition for adoption and for termination of father's rights. The trial court, after a hearing, found father had failed to provide substantial child support and failed to show affection, care, and interest toward B.S.C. from May 2002 to May 2004. Accordingly, the trial court terminated father's parental rights and ordered stepfather could proceed with the adoption without father's consent.

On appeal, father claims the trial court erred in ruling he did not assume parental

duties under K.S.A. 59-2136(d). That determination is ordinarily a factual one to be decided by the trier of facts after a full hearing. *In re Adoption of K.J.B.*, 265 Kan. 90, 94, 959 P.2d 853 (1998).

We do not reweigh the evidence or pass on the credibility of witnesses; we must review the evidence in the light most favorable to the party prevailing below. *In re R.W.B.*, 27 Kan.App.2d 549, 550, 7 P.3d 306, *rev. denied* 270 Kan. 898 (2000).

K.S.A. 59-2136(d) provides:

"In a stepparent adoption, if a mother consents to the adoption of a child who has a presumed father under subsection (a)(1), (2) or (3) of K.S.A. 38-1114 and amendments thereto, or who has a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the consent of such father must be given 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 or is incapable of giving such consent. In determining whether a father's consent is required under this subsection, the court may disregard incidental visitations, contacts, communications or contributions. In determining whether the 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, there shall be a rebuttable presumption that if the father, after having knowledge of the child's birth, has knowingly failed 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 father has failed or refused to assume the duties of a parent."

This statute is to be strictly construed in favor of maintaining the rights of biological parents. *K.J.B.*, 265 Kan. at 95. The duties of a parent under the statute require not only financial support, but also a duty to show affection, love, and interest toward the child. 265 Kan. 90, Syl. ¶ 3.

But when a nonconsenting parent "is incarcerated and unable to fulfill the customary parental duties required of an unrestrained parent, the court must determine whether such parent has pursued the opportunities and options which may be available to carry out such duties to the best of his or her ability." *In re Adoption of S.E.B.*, 257 Kan. 266, 273, 891 P.2d 440 (1995).

In the present case, father was incarcerated at all times during the 2 years preceding the filing of the adoption petition. When a father is incarcerated and unable to provide financial support for the child, the focus of the trial court's inquiry shifts to the love and affection side of parenting.

Assuming the father failed to provide financial support for his child, the trial court's inquiry nonetheless continues to the emotional side of the ledger. To sever parental rights under K.S.A. 59-2136(d), there must be a failure of both financial and emotional support. *In re Application to Adopt H.B.S.C.*, 28 Kan.App.2d 191, 201, 12 P.3d 916 (2000).

Here, ample evidence exists to support the trial court's ruling father had not assumed parental duties with respect to B.S.C. in the 2 years prior to the filing of the adoption petition. Father admits he has not financially supported B.S.C. during his incarceration but argues he has attempted to maintain as much of a relationship with the child as possible, given the circumstances of his incarceration.

Conflicting testimony tilts the other way. Contrary to father's claims, mother testified during the 2-year period in question, father never sent B.S.C. any letters, birthday cards, or gifts.

Mother testified father's relatives knew where she lived. Further, stepfather testified father's family has their current address and phone number. Father himself admitted he had not written any letters to B.S.C. during the 2-year period.

Father also testified he never asked relatives for B.S.C.'s current address, and never made any inquiry to B.S.C.'s school about her grades nor filed a motion to establish visitation at any time during the 2-year period.

Additionally, we can find no evidence in the record which would indicate mother or stepfather ever attempted to discourage B.S.C. from having a relationship with father or that they attempted to hide B.S.C.'s whereabouts from him.

Father claims his failure to contact B.S.C. was caused by mother's failure to notify him of their new address as required by K.S.A.2004 Supp. 60-1620. This statute, as amended in 2000, requires a custodial parent to notify the noncustodial parent of any change in the child's residency. K.S.A.2004 Supp. 60-1620(a).

But as father acknowledges, at the time of the divorce in 1993, the statute only required notification when the child was moved out of state. K.S.A. 60-1620(a). Here, mother did not move B.S.C. to a different state; she merely moved to a different address in Wichita.

Generally, statutes operate prospectively unless language clearly indicates a legislative intent to operate retrospectively. *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 220, 73 P.3d 753 (2003). Nothing in the language of K.S.A.2004 Supp. 60-1620 indicates the legislature intended it to operate retrospectively. Father's argument fails.

Substantial competent evidence supports the trial court's finding father failed to assume parental duties during the 2 years prior to the filing of the adoption petition.

Additionally, father has filed a motion with us seeking appellate costs and attorney

fees. This court may award fees for services on appeal in any case where the trial court had authority to award fees. Supreme Court Rule 7.07(b) (2004 Kan. Ct. R. Annot. 53).

K.S.A. 59-2134(c) provides costs of the adoption proceedings are to be paid by petitioner or as ordered by the court. Absent statutory authority, attorney fees are not part of costs. *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 703, 957 P.2d 379 (1998).

A panel of this court has held that fees of an attorney appointed to represent an indigent biological parent are costs which may be assessed against a petitioner. See *In re Adoption of D.S.D.*, 28 Kan.App.2d 686, Syl. ¶ 3, 19 P.3d 204 (2001).

The *D.S.D.* panel looked to articles 1 and 2 of chapter 59 and ruled those articles are general provisions applicable to all cases filed under chapter 59, including adoption cases. 28 Kan.App.2d at 687-88. Under K.S.A.2000 Supp. 59-104(d), "other fees" includes "attorney fees."

Accordingly, the *D.S.D.* panel held that when "K.S.A. 59-2134(c) is read in conjunction with K.S.A.2000 Supp. 59-104(d), it is apparent the legislature intended that the fees of an attorney appointed to represent an indigent biological parent could be included as costs that may be assessed against a petitioner in an adoption proceeding." 28 Kan.App.2d at 688.

This may seem harsh to some-requiring an adoptive parent to pay the attorney fees for an attorney appointed to represent the parental rights of a biological parent. Adoption becomes a high price to pay.

But we are compelled to agree with the rationale and holding of the *D.S.D.* panel. This is precisely the result the legislature intended. Father's motion for attorney fees and costs is granted.

Affirmed. Father's attorney is granted fees and costs in the amount of \$2,443.09.