NOT DESIGNATED FOR PUBLICATION

No. 96,275

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF
J.A.S., JR., and M.D.S., MINOR CHILDREN.

MEMORANDUM OPINION

Appeal from Atchison District Court; MARTIN J. ASHER, judge. Opinion filed November 22, 2006. Affirmed.

Marlin Johanning, of Johanning Law Office, of Atchison, for appellant.

Patrick E. Henderson, of Henderson Law Office, of Atchison, for appellees.

Before McANANY, P.J., ELLIOTT and BUSER, JJ.

Per Curiam: This appeal involves the termination of the Father's parental rights to J.A.S., Jr., and his ultimate adoption. The child's Father appeals the termination of his parental rights. The Adoptive Parents cross-appeal the district court's order that they pay Father's attorney fees.

The child's parents were both incarcerated in St. Charles, Missouri, when Mother discovered she was pregnant. Mother and Father were never married. There is no issue about paternity. Father did not provide any support to Mother during the pregnancy. Mother was released from jail 3 months before the child was born. Father was still incarcerated. Mother then went to live in Atchison with her brother and sister-in-law.

The child was born May 8, 2001. After the child's birth, Father continually made promises that he intended to take care of Mother and the child but never sent any money. He wrote approximately 13 letters to Mother while he was incarcerated regarding the child, two of which Mother did not open. Father was released from prison in about January 2002, and took up residence near St. Louis, Missouri. In February 2002, Father saw the child for the first time. The visit, which took place at the home of Mother's brother and sister-in-law, lasted a couple of hours.

From May 2002 until March 2004, Father was incarcerated again on different

charges. Mother allowed Father to speak with the child on the telephone whenever he called, which was sporadically. Father sent Mother three cassette tapes of him reading a book for her to play for the child. Father sent the child a couple of gifts for his birthday and for Christmas.

Following his release from prison in March 2004, Father and his girlfriend visited the child again in June 2004. Father had gotten drunk the evening before and still smelled of alcohol. During the visit, Father became angry when they discussed visitation. He stormed out but returned the next day for an additional 2 hours with the child. After this visit Father only wrote one or two more letters and discontinued sending any gifts to the child. He did not send any holiday greeting cards or birthday cards to his child or attempt to schedule any further visits.

Though Father claimed that he spoke with the child by telephone approximately 100 times, Mother's brother and sister-in-law recalled only about 10-20 times over the 3 years since the child's birth, and in some of those calls Father apparently was drunk.

Father's paternity was formally established in June 2003. The Kansas Department of Social and Rehabilitation Services was granted a judgment of $1,841.50 for reimbursement of support it had provided to the child and $4,064.88 for reimbursement of

medical expenses related to the child's birth. Father was ordered to pay $189 per month in child support. Father has paid $1,153.44 of the $11,894.38 that he currently owes in support and expenses. Except for one payment received in April 2005, all of Father's payments were the product of wage garnishments in May and June of 2004 when he was out of prison and working. His only other efforts to provide for his child consisted of a few articles of clothing on the child's birthday or at Christmas.

While released from prison, Father entered a 30-day alcohol treatment program which he failed to complete. He moved in with his girlfriend in June 2004 and quit his job. He was unable to drive because his license had been revoked due to his numerous DUI convictions. After that, Father worked at seven other jobs, the longest of which lasted for 2 weeks.

Mother relinquished her parental rights to the child and consented to his adoption in April 2005. The Adoptive Parents then petitioned for termination of Father's parental rights and for adoption of the child without Father's consent. They obtained temporary custody of the child. From that day forward Father did not call, write, send any gifts, or provided any support for the child. In July 2005, Father was sentenced to 5 years in prison in Missouri for felony DUI and felony driving while having a revoked license.

The hearing on the petition of the Adoptive Parents was scheduled for November 15, 2005. The district court issued an order directing that Father be transported to the hearing, but the Missouri prison officials refused to honor the order. However, Father was able to testify by way of interrogatories which were admitted at trial. His girlfriend, now fiancée, attended the hearing. However when the Adoptive Parents invoked the exclusionary rule, since she intended to testify on Father's behalf, she was excluded from the hearing until her testimony was completed.

Following the hearing the district court made extensive findings regarding Father's lack of fitness. The court found that Father had a serious problem with alcohol abuse. He was convicted of DUI in July 1996, in August 1999, and most recently on July 14, 2005. He has been incarcerated three times in the last 4 1/2 years. He was currently serving a 5-year sentence for felony DUI. He had several other felony convictions, including burglary and theft in November 2002 for breaking into a bar and stealing four cases of beer. He visited the child when he had been drinking heavily and smelled of alcohol. He telephoned the child when drunk. He failed to maintain regular visitation or communication with the child though he was encouraged to do so. He had only seen his child twice. There was no parental bond between Father and child. He had been in prison for 40 out of the child's 55 months of life. He had approximately 4 1/2 years left on his current sentence. He had made no reasonable efforts to support his child during

the times he was not incarcerated. He had not adjusted his conduct to meet the child's needs.

The district court terminated Father's parental rights and found that his consent to the adoption was not necessary. On December 2, 2005, the district court entered an order granting the Adoptive Parents' petition to adopt the child. The court ordered the Adoptive Parents to pay Father's attorney fees in the amount of $800 and expenses in the amount of $109.17.

Sequestration of Witnesses

Father first argues that the district court erred by excluding his fiancée from the hearing for the period prior to her testimony when the Adoptive Parents requested that the sequestration rule be invoked.

Father relies on *In re S.M.*, 12 Kan. App. 2d 255, 258, 738 P.2d 883 (1987), to argue that the district court abused its discretion in not allowing his fiancée to remain in the courtroom to afford Father "substitute procedural safeguards." *In re S.M.* is factually distinct. There, the district court summarily overruled the father's request that he be released from prison to attend the hearing, even though his presence could have been

obtained. Here, Father does not argue that his due process rights were violated by his own absence from the hearing. The district court took actions to protect Father's due process rights by issuing an order directing that he be transported to the hearing from prison. When the Missouri prison officials refused to honor the order, Father was permitted to testify through interrogatory answers.

The sequestering of the witnesses, including Father's fiancée, was a matter of judicial discretion. *State v. Perez*, 26 Kan. App. 2d 777, 788, 995 P.2d 372 (1999), *rev. denied* 269 Kan. 939 (2000). See K.S.A. 38-1552. Father's fiancée was not an interested party. She was permitted to testify and presented testimony to controvert many of the facts asserted through the testimony of other witnesses. The "substitute procedural safeguards" which Father claims would have been provided by his fiancée's presence during the hearing would have been at the expense of the very purpose of the sequestration rule: to assure that testimony from a nonparty witness is not tainted or influenced by the testimony of other witnesses at the hearing. Further, it is not clear what "substitute procedural safeguards" the fiancée's presence would have afforded. Father suggests that his fiancée's mere presence in court would have moderated the testimony of other witnesses. We fail to see why this would be so. Father's fiancée was there to testify on his behalf. It is reasonable to conclude that Father's counsel was well aware of her anticipated testimony. There is no suggestion that counsel, knowing the fiancée's

anticipated testimony, was unable to adequately cross-examine witnesses with information the fiancée could have provided had she been in the courtroom. The district court did not abuse its discretion in excluding Father's fiancée from the hearing for the period prior to her testimony.

Sufficiency of the Evidence

Father next argues that the district court erred by failing to take into consideration Mother's interference in preventing Father from having contact with the child and by not giving enough weight to Father's telephone calls, gifts, and the audio-cassettes for the child.

While we recognize the fundamental liberty interest of a father in maintaining a familial relationship with his child, we cannot retry the case on the record and draw our own conclusion regarding the weight and credit to be given the evidence at trial. Those issues were for the trial court, before whom the witnesses appeared. Our role is to determine if there is substantial competent evidence to support the trial court's findings. In doing so, we view the evidence in the light most favorable to the prevailing party; here, the Adoptive Parents. See *In re J.J.G.*, 32 Kan. App. 2d 448, 454, 83 P.3d 1264 (2004). We also note the provision in K.S.A. 2005 Supp. 38-1583(c) that the district court may, in

a case such as this, disregard "incidental visitations, contacts, communications or contributions."

The Kansas Code for Care of Children provides that the court may terminate parental rights when the court finds by clear and convincing evidence that a parent is unfit by reason of conduct or condition which renders the parent unable to care properly for the child and the conduct or condition is unlikely to change in the foreseeable future. K.S.A. 2005 Supp. 38-1583(a). K.S.A. 2005 Supp. 38-1583(b) and (c) sets forth the nonexclusive factors the court should consider when deciding whether to terminate parental rights. It is the task of the trial court to make its determination based upon all the applicable factors, giving primary consideration to the physical, mental, or emotional condition and needs of the child. Any one of the statutory factors may, but does not necessarily, establish grounds for termination. K.S.A. 2005 Supp. 38-1583(e).

Father argues that Mother's interference with his relationship with his child should preclude a finding of unfitness. For support he relies on *In re Adoption of Harrington*, 228 Kan. 636, 620 P.2d 315 (1980), a case in which the mother discouraged visitation and encouraged the father to discontinue the regular, consistent child support payments he had been making. *Harrington* does not apply. Unlike in *Harrington*, Father failed to make regular child support payments when he was not incarcerated and could have done so.

There was no evidence that Mother discouraged Father from paying child support. On the issue of discouraging visitation, Father would have us reweigh the evidence which we are not permitted to do.

Finally, Father argues that the district court placed too much emphasis on the unpaid child support, given the fact that Father was in prison for about three-fourths of the child's life. For support he relies on *In re Adoption of A.J.P.*, 24 Kan. App. 2d 891, 953 P.2d 1387 (1998), and *In re Adoption of F.A.R.*, 242 Kan. 231, 747 P.2d 145 (1987). Both cases hold that the trial court must consider whether the incarcerated parent has made reasonable attempts, under all the circumstances, to maintain a close relationship with the child, and whether those attempts are sufficient to require the parent's consent be given to an adoption. *F.A.R.*, 242 Kan. at 236; *A.J.P.*, 24 Kan. App. 2d at 893.

Here, the district court did not ignore the fact of Father's incarceration. Rather, the court focused on Father's conduct when he was not in prison. There was substantial evidence of Father's failure to make reasonable efforts to support his child when he was out of prison.

Once again, upon a showing of substantial evidence of Father's failure to provide support for his child when he could have done so, we are not in a position to question the

weight the trial court gave this in relation to the other evidence. We do note, however, that in the trial judge's thoughtful and detailed five-page memorandum decision he discussed Father's lack of support in only one short paragraph. Father's lack of support was only one of several factors the court considered. In all, the trial court found that the following statutory factors applied: his excessive use of intoxicating liquors; his mental or emotional neglect of the child; his conviction for a felony and subsequent imprisonment; his lack of effort to adjust his circumstances, conduct, and conditions to meet the needs of the child; and his failure to maintain regular visitation, contact, or communication with the child. It is apparent that the district court considered the totality of Father's circumstances in finding him unfit. There is substantial competent evidence to support the district court's finding that Father is unfit and that his unfitness is unlikely to change in the foreseeable future.

Attorney Fees

In their cross-appeal the Adoptive Parents argue that if we set aside the district court's order terminating Father's parental rights, then on remand we should direct the district court to reconsider its order for attorney fees. Since we are affirming the district court, this issue is now moot.

Affirmed.