

## NOT DESIGNATED FOR PUBLICATION

No. 97,522

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Adoption of D.J.D.

## MEMORANDUM OPINION

Appeal from Jefferson District Court; GARY L. NAFZIGER, judge. Opinion filed August 24, 2007. Affirmed.

*Jody M. Meyer*, of Lawrence, for appellant stepfather.

*Michael C. Hayes*, of Oskaloosa, for appellee natural father.

Before GREEN, P.J., ELLIOTT and HILL, JJ.

*Per Curiam*: The stepfather of D.J.D. appeals the trial court's order denying his petition to adopt D.J.D. for lack of consent of the biological father. The trial court found stepfather had failed to meet his burden of establishing consent was not required on the ground father had failed or refused to assume the duties of a parent during the 2 years prior to the filing of the adoption petition under K.S.A. 59-2136(d). We affirm.

D.J.D. was born in October 1997 and about 3 months later, father went to prison; father was incarcerated for the first 8 years of D.J.D.'s life. Mother and father never married, but a paternity action established father as the putative father in 2000.

Stepfather filed his petition for adoption on June 3, 2004, alleging father's consent was not necessary; in the alternative, stepfather alleged father was unfit and asked that father's parental rights be terminated.

Father contested the adoption; following a hearing, a magistrate judge entered a decree of adoption, ruling father's consent was not required under K.S.A. 59-2136(d). The magistrate also found father unfit and terminated his parental rights.

Father appealed to the district court. Following a hearing, the district court reversed the magistrate judge's ruling, holding stepfather had not met his burden to prove father had failed or refused to assume parental duties during the statutory time frame (June 2002 to June 2004).

The district court stated: "The father did communicate with the minor child through mail and through telephone conversations facilitated by the paternal grandmother. There was no more that the father could do under the circumstances of his incarceration."

Whether a parent has refused or failed to assume parental duties is a question of fact, and on appeal, we review only to determine whether the decision is supported by substantial competent evidence; we must examine all surrounding circumstances. *In re Adoption of B.M.W.*, 268 Kan. 871, 882-83, 2 P.3d 159 (2000).

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

The duties of a parent under K.S.A. 59-2136(d) require financial support and also love, affection, and interest toward the child, and the statute is to be construed in favor of maintaining the rights of biological parents. *In re Adoption of K.J.B.*, 265 Kan. 90, Syl. ¶ 3, 959 P.2d 853 (1998).

When, as here, a nonconsenting parent is incarcerated and unable to fulfill the customary parental duties, courts must determine whether the parent has pursued the opportunities and options that may be available to carry out those 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).

Consideration must be given to whether the incarcerated parent made reasonable attempts, under all the circumstances, to maintain a close relationship with the child and whether those attempts were sufficient to require the parent's consent to an adoption. *In re Adoption of S.J.R.*, 37 Kan. App. 2d 28, 39, 149 P.3d 12 (2006).

We note that although K.S.A. 59-2136(d) was recently amended to allow the trial court to consider the best interests of the child and the fitness of the nonconsenting parent in a stepparent adoption, the statute in effect at the time the adoption petition in the present case was filed in 2004 did not provide for such consideration. See K.S.A. 59-2136(d); L. 2006, ch. 22, sec. 1; *In re Adoption of S.E.B.*, 257 Kan. 266, Syl. ¶ 2 (In making a determination under the statute "of whether consent of a parent to an adoption is unnecessary for failure to assume parental duties, neither the best interests of the child nor the fitness of the nonconsenting parent are controlling factors in the decision.").

We see no indication the language added to the statute was to operate retrospectively; therefore, we do not consider the best interests of D.J.D. or father's fitness as controlling factors in deciding the appeal of the present case. See *In re Adoption of S.J.R.*, 37 Kan. App. 2d at 38.

To judicially sever parental rights pursuant to K.S.A. 59-2136(b), 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). Father's ability to provide financially for D.J.D. is limited since he makes only \$12 per month while in prison.

Stepfather claims father's contact with D.J.D. has been incidental and mainly due to the efforts of the paternal grandmother. Incidental contact has been defined as "casual, of minor importance, insignificant, and of little consequence." *In re Adoption of C.R.D.*, 21 Kan. App. 2d 94, 98, 897 P.2d 181 (1985).

Whether contacts are incidental and therefore disregarded is determined on a case-by-case basis. *In re Adoption of A.J.P.*, 24 Kan. App. 2d 891, 892-93, 953 P.2d 1387 (1998).

In the present case, father earns \$12 per month while in prison and testified he had sent no money to mother for D.J.D. since he has been in prison. Father sent a birthday card to D.J.D. on her first birthday in 1998 and continued to send birthday and Christmas cards every year thereafter. Father also testified he has sent D.J.D. a letter at least once a month. Father also had gifts sent to D.J.D. through the Angel Tree program in prison. Father also had some phone contact with D.J.D. during 2002 and 2003 when the child was visiting her paternal grandmother. Sometime in 2003, mother stopped allowing any

visits with the paternal grandmother and father's phone contacts ceased at that time.

In reversing the magistrate's ruling, the trial court held stepfather had not met his burden of proving father had failed or refused to assume parental duties within the statutory time frame. This is a negative finding of fact and, on appeal, it will not be disturbed absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. *General Building Contr., LLC v. Board of Shawnee County Comm'rs*, 275 Kan. 525, 541, 66 P.3d 873 (2003). Here, no such showing has been made.

The record, when viewed in a light most favorable to father, supports the trial court's ruling. Accordingly, the trial court did not err in denying stepfather's petition for adoption.

Affirmed.