NOT DESIGNATED FOR PUBLICATION

No. 98,090

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Adoption of
BABY L., A MINOR FEMALE.

MEMORANDUM OPINION

Appeal from Riley District Court; PAUL E. MILLER, judge. Opinion filed September 7, 2007. Affirmed.

*P. Bernard Irvine*, of Morrison, Frost, Olsen & Irvine, LLP, of Manhattan, for appellant natural father.

*Austin K. Vincent*, of Topeka, for appellees adoptive parents.

Before RULON, C.J., BUSER, J., and KNUDSON, S.J.

*Per Curiam*: J.P., the natural father (Father) of Baby L., appeals the termination of his parental rights in this adoption case. We affirm.

On January 11, 2007, the district court terminated Father's parental rights to Baby L. This ruling was predicated on two grounds. First, the district court found that Father, having knowledge of A.L.'s (Mother) pregnancy, failed without reasonable cause to provide support for the mother during the 6 months prior to Baby L.'s birth. See K.S.A. 2006 Supp. 59-2136(h)(1)(D). Second, the district court found that Father was an unfit parent, which was a situation not apt to change in the foreseeable future. See K.S.A. 2006 Supp. 59-2136(h)(1)(B). Proof of either one of these statutory grounds may be sufficient to terminate parental rights after giving primary consideration to the physical, mental, or emotional condition and needs of the child. K.S.A. 2005 Supp. 38-1583(e). *In re J.J.G.*, 32 Kan. App. 2d 448, 454, 83 P.3d 1264 (2004).

On appeal, Father contends the district court's ruling was not supported by substantial competent evidence.

Our standard of review is well known:

> "'To terminate parental rights in an adoption proceeding, the duty of an appellate court extends only to a search of the record to determine whether substantial competent evidence exists to support the trial court's findings. An appellate court must not reweigh the evidence, substitute its evaluation of the evidence for that of the trial court, or pass upon the credibility of the

witnesses. It must review the evidence in the light most favorable to the party prevailing below.' [Citations omitted.]" *In re T.S.*, 276 Kan. 282, 286, 74 P.3d 1009 (2003).

With this precedent in mind, we separately review the two factors supporting the district court's parental termination decision.

*Failure to Provide Support*

In ruling that Father had failed to support Mother during the 6 months immediately preceeding Baby L.'s birth, the district court found:

"The evidence is clear that [Father] provided no support to [Baby L.]. The evidence is clear that [Father] was employed by at least two different employers during the critical period and could have provided support had he chosen to do so. . . .

"[I]f [Father] wanted to be a father it was incumbent on him to take the steps necessary to protect his rights. He failed to do so."

On appeal, Father concedes that he failed to provide support to Mother during the pregnancy. He maintains, however, that he offered to provide support, that Mother never

sought support, and that she had other means of support. Father also claims his offers were rebuffed by Mother.

As noted by the adoptive parents, a natural father must do more than make vague offers. See *In re Adoption of M.D.K.*, 30 Kan. App. 2d 1176, 1178, 58 P.3d 745 (2002). For example, a natural father who "made some attempts to help" but "never sent any money or provided any other assistance," failed to assume his duties. *In re Adoption of Baby Girl S.*, 29 Kan. App. 2d 664, 670, 29 P.3d 466 (2001), *aff'd* 273 Kan. 71, 41 P.3d 287 (2002). "By statute . . . the unwed father must act affirmatively during the mother's pregnancy to protect his rights to the child." 29 Kan. App. 2d at 666.

The record here shows only vague offers of support from Father. He never attempted to send money or anything else of worth to the mother. The fact that Mother did not request support and had other means of support did not relieve Father of his duties. See *In re Adoption of Baby Boy W.*, 20 Kan. App. 2d 295, Syl. ¶¶ 2 and 4, 891 P.2d 457 (1994).

Father also does not show that he failed to provide support "'because of interference by the mother.'" *In re Adoption of M.D.K.*, 30 Kan. App. 2d at 1179. Although Mother eventually obtained a no-contact order against Father, she testified this

was in response to his continuing insistence on a relationship. Mother testified she would have accepted financial assistance from Father and he admitted at trial that Mother never actually refused support. Father also admitted he could have provided support through intermediaries.

Considering "all the relevant surrounding circumstances," *In re Adoption of Baby Boy B.*, 254 Kan. 454, Syl. ¶ 4, 866 P.2d 1029 (1994), substantial competent evidence supported the district court's finding that Father failed to pursue "the opportunities and options which were available to carry out his duties to the best of his ability." *In re Adoption of Baby Boy W.*, 20 Kan. App. 2d at 299.

*Parental Unfitness*

In ruling that Father was an unfit parent, the district court found:

> "the evidence is that [Father] is incarcerated with the Kansas Department of Corrections and will continue to be for the better part of the next five years. He is incarcerated for, and has a history of, sexual abuse with minor girls. In fact, the birth of the baby in this case arose from [Father's] illegal sexual relations with the baby's mother."

The district court also specifically considered Father's plan to place Baby L. with his mother (Grandmother) until Father's release from prison. The district court rejected this proposal stating: "Placing the child with her grandmother is not an option, especially since that person has had the parental rights to her first three children severed."

Father concedes on appeal that he will be confined in prison for the foreseeable future. The reason for his incarceration is also not contested. Father's plan to have Grandmother care for Baby L. for the next 5 years seems problematic given her parental history and the fact she was also present in the house when Father conceived Baby L. with Mother who was 15 years old at the time. Review of this evidence in the light most favorable to the adoptive parents supports the district court's conclusion that Baby L.'s placement with grandmother was "not an option."

Moreover, upon Father's release, Baby L. would obviously not be bonded to him. Father testified he could not care for the child even then, anticipating that he would leave her with Grandmother until "I was able to get on my feet and substantially provide for the baby." Father did not indicate how or when this would occur. Because Father did not provide financial support to Mother during her pregnancy, the evidence supported the district court's conclusion that Father would not provide "a stable and secure life" for

Baby L. See K.S.A. 2006 Supp. 59-2136(h)(2)(A) (in deciding whether to terminate parental rights, the court may "[c]onsider and weigh the best interest of the child.").

Finally, there were Father's sex offenses. Eighteen years old at the time of trial, Father had committed three sex offenses against minor females. A social worker testified that Father knew the conditions of release from juvenile detention, but that he violated them with Mother within 6 weeks of returning home. Father then pled as an adult to felony unlawful consensual sexual relations for his actions with the mother. See K.S.A. 2006 Supp. 21-3522. These facts also supported the district court's termination decision. See K.S.A. 2006 Supp. 38-2269(b)(2) (unfitness is shown by "conduct toward a child of a . . . sexually cruel . . . nature"); K.S.A. 2006 Supp. 38-2269(e) (unfitness is shown by conviction for a "felony in which sexual intercourse occurred, and as a result . . . a child is conceived"); *In re Adoption of A.P.*, 26 Kan. App. 2d 210, Syl. ¶ 1, 982 P.2d 985, *rev. denied* 268 Kan. 886 (1999) (factors showing unfitness under Kansas Code for the Care of Children may be considered in adoption proceedings).

In summary, there was substantial competent evidence of an overwhelming nature that Father was unfit to parent Baby L. in the present or foreseeable future.

*Admission of Expert Witness Testimony*

For his final claim of error, Father contends the district court erred in admitting expert testimony from Dr. John Fajen, a psychologist, in violation of the psychologist-client privilege established by K.S.A. 74-5323. The relevance of the psychologist's testimony is undisputed, and "[o]nce relevance is established, evidentiary rules governing admission and exclusion may be applied either as a matter of law or in the exercise of the district judge's discretion, depending on the contours of the rule in question. [Citation omitted.]" *State v. Gunby*, 282 Kan. 39, 47, 144 P.3d 647 (2006).

Father argues for de novo review in this case, and while the adoptive parents suggest we should review for abuse of discretion, they also maintain "there was no error due to a statutory exception." We agree the issue turns on statutory interpretation, meaning it is a question of law. See *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006).

K.S.A. 74-5323 establishes a psychologist-client privilege with some important exceptions. The exception at issue here allows a psychologist to testify "in court hearings concerning . . . adoption." K.S.A. 74-5323(b). The adoption exception is listed along with others such as "child abuse, child neglect, or other matters pertaining to the welfare

of children." K.S.A. 74-5323(b). Although these exceptions were added to the statute in 1999, L. 1999, ch. 117, sec. 28, they reflected an already-recognized principle, that a "parent's right of confidentiality in . . . psychological counseling records" is outweighed by "the best interests of the child." *In re Marriage of Kiister*, 245 Kan. 199, Syl. ¶ 2, 777 P.2d 272 (1989) (visitation dispute).

Dr. Fajen was ordered by the district court to evaluate Father in the county jail a few months before the termination hearing. The record is unclear, but it appears Dr. Fajen conducted the evaluation in conjunction with one of Father's several juvenile cases.

Dr. Fajen testified over objection that Father "lacks the capacity to put a child's needs ahead of his own," and that he "would tend to use the child in a manipulative fashion, perhaps sexually, perhaps not sexually." Offered here in an adoption case, Dr. Fajen's opinions based on his evaluation of Father pertained to the welfare of Baby L. They do not appear privileged under K.S.A. 74-5323(b).

Nevertheless, assuming arguendo, the admission of Dr. Fajen's testimony was erroneous, we conclude Father was not prejudiced. K.S.A. 74-5323(a) defines the psychologist-client privilege with reference to the attorney-client privilege. See *State v. Munyon*, 240 Kan. 53, 57-58, 726 P.2d 1333 (1986). When the attorney-client privilege

is violated at trial, "the admission of such testimony does not require reversal if there is substantial competent evidence to support the decision of the trial court without reference to such privileged communications." *Ferrell v. Ferrell*, 11 Kan. App. 2d 228, Syl. ¶ 3, 719 P.2d 1, *rev. denied* 239 Kan. 693 (1986); see also *Girrens v. Farm Bureau Mut. Ins. Co.*, 238 Kan. 670, 680, 715 P.2d 389 (1986) (applying K.S.A. 60-261 harmless error standard to violation of attorney-client privilege).

Dr. Fajen's expert testimony was not relevant to the district court's finding that Father had failed to support Mother during the 6 months immediately preceding Baby L.'s birth. Moreover, with regard to the district court's finding of unfitness, we conclude (without consideration of Dr. Fajen's expert opinions) there was substantial competent evidence of an overwhelming nature to support termination of Father's parental rights.

Affirmed.