

NOT DESIGNATED FOR PUBLICATION

No. 99,892

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION TO ADOPT M.R.G.

MEMORANDUM OPINION

Appeal from Harvey District Court; THEODORE B. ICE, judge. Opinion filed November 21, 2008. Reversed.

*Keith E. Martin*, of Smith, Shay, Farmer & Wetta, LLC, of Wichita, for appellant natural father.

*Marilyn M. Wilder*, of Adrian & Pankratz, P.A., of Newton, for appellee step-father.

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

*Per Curiam:* This appeal arises from proceedings in which B.R. seeks to adopt his stepdaughter, M.R.G. A.G. is M.R.G.'s natural father. E.R. is M.R.G.'s mother. Father appeals the district court's termination of his parental rights, the determination that father's consent was not needed to permit stepfather to adopt father's child, and the granting of the adoption petition to stepfather.

2003

The child was born to mother and father in Texas in December 2003. Mother and father were never married, but they lived together when the child was born. Father had overdosed on drugs 2 years earlier. He was convicted of possession of a controlled substance in August 2003. He was convicted of DUI in November 2003. He had struggled with alcohol abuse and marijuana use since high school. His first conviction on a drug charge was in August 2000. Mother and father separated twice before 2003 due to father's drug use. As a result of his ongoing substance abuse, mother again left father and moved to Kansas shortly after her daughter's birth in December.

2004

Father followed mother to Kansas a short time later, and they reconciled in about

March 2004. Father took a job as a waiter in a restaurant in Newton, and the following month, he changed jobs and began working at a restaurant in Wichita. When father first arrived in Kansas, mother and her family held an intervention with father to address his drug and alcohol use. Mother's parents encouraged father to attend AA and NA meetings, and attempted to direct him to treatment services in Wichita. Father entered, but failed to complete, a drug treatment program.

In May 2004, father was convicted of driving on a suspended license. When father's drug problems continued, mother and father separated again in the summer of 2004. Father moved to Wichita, and he continued to work at the restaurant. In November 2004, father was arrested for driving with a suspended license and for possession of marijuana and paraphernalia. He was placed on probation.

#### *2005*

Father had about four overnight visits with his daughter in the summer of 2005, and approximately four 1-day visits. Stepfather and mother initiated these visits. The child was taken to the Wichita restaurant where father worked for brief visits with her father every 4 to 6 weeks that year. Mother or the maternal grandfather initiated these restaurant visits.

Father testified that at some point he and mother agreed on child support of \$350 per month during the period before the district court ordered him to pay support. Mother testified that the agreement was for father to pay \$300 per month.

There was testimony at the final hearing that father made three child support payments totaling \$1,100 in March 2005; and additional payments of \$350 in May, \$350 in June, and \$350 in December. There was testimony that father also paid \$300 for half of a medical check-up for his child, and that from April 2004 until February 2006, he provided a prepaid medical debit card and health insurance for his daughter through his Wichita employment. Mother testified that she used this insurance "in '05 quite a bit."

*2006*

Father had no contact with his daughter during 2006.

In December 2005, the Kansas Department of Social and Rehabilitative Services (SRS) brought an action against father for child support. Father responded, claiming visitation rights. The case was set for mediation, but mother refused to cooperate because she and stepfather were already planning to pursue a stepparent adoption. Mother also refused to allow father to have phone contact with his daughter in 2006 on a "few"

occasions. She testified that father "probably would have seen [his daughter] as much as he could have had he had a valid driver's license and could get there."

Father worked at the Wichita restaurant until February 2006 when he left to return to Texas to work on an oil rig. Father was still on probation when he went to Texas. When he failed to report as required by the court, a warrant was issued for his arrest and, at some point, he was apprehended in Texas.

In March 2006, mother married stepfather. Stepfather has a daughter from a previous relationship whom he supports, but with whom he has no contact. Mother and stepfather have one child born of their union. Stepfather has the means and desire to support and care for his stepdaughter in addition to his other two children.

In April 2006, father offered to provide health insurance for his daughter through his Texas employment. Mother refused this offer because the child was already covered by stepfather's health insurance plan.

In July 2006, the district court ordered father to pay child support of \$131 per month. The journal entry memorializing this order was not filed until October 3, 2006, but the order stated it was to be effective July 1, 2006. For the purpose of this adoption,

the trial court determined that the support order bound father beginning October 2006. There was testimony that father made \$500 child support payments in July and August 2006, and that these payments went directly to mother since the order for child support had not yet been memorialized in the later-filed journal entry of support.

In October 2006, father filed a motion for visitation. There is no indication in the record that father took any action to pursue resolution of this motion.

Father testified to additional payments of \$131 in October and \$65.50 in November. He claimed he made other payments in April, May, and June, but provided no evidence to support this claim.

*2007*

In January 2007, stepfather petitioned to adopt the child. He alleged that father had failed or refused to assume his parental duties and last had contact with his daughter in November 2005. Accordingly, stepfather claimed that father's consent was not required for the adoption.

In February 2007, father was extradited to Kansas from Texas. In March 2007, there was evidence that he made a final child support payment of \$229.58. In April 2007, the court revoked father's probation and he was sent to the Labette Correctional Conservation Camp.

The final hearing on stepfather's adoption petition was held in June 2007. Father was transported from Labette in order to participate in this hearing. Following the presentation of evidence, the court granted the adoption petition. It found that father's consent to the adoption was not necessary because (1) he is an unfit parent by reason of his continuing drug and alcohol problems, (2) he made no effort to see his daughter in 2006, (3) he failed to make required support payments, (4) he has been convicted of a felony and is currently confined, and (5) it is in the child's best interest to allow the adoption.

Father moved to alter or amend the judgment. Following a hearing the court denied the motion, noting that father last saw his daughter in November 2005. The court also noted that after father moved to Kansas in 2004, father's visits with his daughter were initiated by others. The court further found that within the critical 2-year period before these adoption proceedings, father did not see his daughter on any regular basis, did not otherwise communicate with her, and he did not send her cards or gifts. The court

concluded that father's infrequent and incidental contacts were insufficient "to meet the . . . test of love and affection."

As we will discuss later, on the matter of support, the court's findings are unclear.

On the matter of father's fitness, the court recounted his history of substance abuse and run-ins with the law. The court concluded that "[t]his is illustrative of the fact that the father has a continuing substance abuse problem and a lack of respect for the law, which makes him unfit as a parent." The court concluded that "it appears to be in the best interest of the child to allow the adoption to proceed without the consent [of] the father in order to have the child raised in a more stable environment."

Father appeals. He raises issues regarding his emotional and financial support for his child, the court's reliance on the best interests of the child and parental unfitness, and the court permitting an amendment to stepfather's petition on the day of the final hearing. We will first consider the issue of the extent of father's financial support of his child.

#### *The Statute*

K.S.A. 2007 Supp. 59-2136(d) provides in relevant part:



"[A natural father's consent to an adoption is required] 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 determining whether a father's consent is required . . . the court may disregard incidental visitations, contacts, communications or contributions. . . . [T]here shall be a rebuttable presumption that if the father . . . 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 such father has failed or refused to assume the duties of a parent. The 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."

In *In re Adoption of G.L.V.*, 286 Kan. 1034, 190 P.3d 245 (2008), decided after the proceedings in this case, our Supreme Court examined the cases relating to K.S.A. 2007 Supp. 59-2136(d). The court held that "all surrounding circumstances are to be considered when determining whether a natural parent must consent to a stepparent adoption — that is, whether the natural parent has 'assume[d] the duties of a parent for two consecutive years next preceding the filing of the petition.'" 190 P.3d at 259.

The courts use a "two-column ledger" approach in analyzing the requirements of K.S.A. 2007 Supp. 59-2136(d). *In re Adoption of B.M.W.*, 268 Kan. 871, 882, 2 P.3d 159 (2000). First, the adoption petitioner must show that the natural parent failed for the 2

years preceding the filing of the adoption petition to demonstrate love and affection toward the child by failing to visit, contact, communicate with, or make contributions to the child. *G.L.V.*, 190 P.3d at 259. Second, the adoption petitioner must show that the natural parent failed to substantially support the child by failing to provide child support "as required by judicial decree" for the 2 years preceding the filing of the petition. 190 P.3d at 259. *G.L.V.* reaffirmed that these two elements are the *sine qua non* of a K.S.A. 2007 Supp. 59-2136(d) analysis because these duties are specifically contemplated by the statute. 190 P.3d at 259.

The "best interests of the child" (BIC) and the "parental unfitness" factors were added to K.S.A. 2007 Supp. 59-2136(d) in 2006. L. 2006, ch. 22, sec.1. The effect of the 2006 amendment's inclusion of the BIC standard, according to the Supreme Court, was to provide a trial court

"with additional discretionary powers to consider the best interests of the child in *denying* the adoption – even where a natural parent has not assumed the duties of a parent as articulated by this court – for unique reasons. For example, a court may determine, based upon testimony of the child or other evidence, that the child desires to remain the son or daughter of the natural parent based upon the parent's promise of commitment to the child, based upon friction in the stepparent family, or a pattern of instability in the stepparent history." (Emphasis added.) 190 P.3d at 265.

Therefore, the BIC standard does not "permit a court to override the requirement in K.S.A. 2007 Supp. 59-2136(d) of mandatory consent when a natural parent has assumed his or her parental responsibilities." 190 P.3d at 265.

The Supreme Court did not discuss the significance of the "parental unfitness" provision. 190 P.3d at 265. The Court of Appeals majority in *G.L.V.*, however, noted:

"Simply put, the court may consider the best interests of the child and the fitness of the nonconsenting parent in a stepparent adoption case, but it can only grant the adoption without the natural parent's consent if the natural parent has failed to fulfill his or her parental duties under the statute." *In re Adoption of G.L.V.*, 38 Kan. App. 2d 144, 152, 163 P.3d 334 (2007).

#### *Father's Child Support*

*G.L.V.* makes clear that stepfather must demonstrate father's failure to provide both love and affection and support in order to proceed with the adoption without father's consent. If stepfather does not establish father's failure on both sides of the ledger, the adoption must be denied. 190 P.3d at 259.

The district court found that father failed to pay a substantial amount of support for his child. Father argues that the court erroneously calculated the child support he paid during 2005 and 2006, and erroneously concluded that his support was insubstantial.

The amount of father's child support payments pursuant to the court's order is a finding of fact which we review using the substantial competent evidence standard, considering the evidence in the light most favoring the stepfather. *In re Adoption of D.R.B.*, 21 Kan. App. 2d 790, 794, 908 P.2d 198, *rev. denied* 259 Kan. 927 (1995). Whether the amounts paid constituted a "substantial amount" of the support owed is a legal conclusion which we review *de novo*. 21 Kan. App. 2d at 794.

Substantial support is support that is "[o]f real worth and importance; of considerable value; valuable." *In re Adoption of C.R.D.*, 21 Kan. App. 2d 94, 99, 897 P.2d 181 (1995) *reversed on other grounds by In re Adoption of G.L.V.*, 190 P.3d at 263-64. It "assumes something more than nominal or casual efforts." *C.R.D.*, 21 Kan. App. 2d at 100. Payment of 64% of a support obligation, even when made involuntarily, will preserve a father's parental rights. *B.M.W.*, 268 Kan. at 883-84. Also, payment of 23% of child support due plus provision of medical insurance has been found to be sufficient to maintain a father's parental rights. *In re Adoption of R.W.B.*, 27 Kan. App. 2d 549, 553, 7 P.3d 306, *rev. denied* 270 Kan. 898 (2000) (citing *C.R.D.*, 21 Kan. App. 2d at 99). But,

paying 31% of child support due and failing to provide court-ordered medical insurance was found to be insufficient in *R.W.B.*, 27 Kan. App. 2d at 555.

We are hampered in our consideration of this issue because the record discloses no specific findings of fact on the issue of support. At the conclusion of the final adoption hearing on June 22, 2007, the court addressed the support issue as follows: "[W]hile there were monies paid, the payments certainly did not reach the financial obligation, by any means, that he had for the support of this child." Here, the court was referring to father's financial obligation to pay the full amount of court-ordered support. Father clearly did not pay the full amount he owed, but the test is substantial compliance, not full compliance. K.S.A. 2007 Supp. 59-2136(d). The court made no other mention of the support element of the statute. In its decree of adoption the court's only reference to the issue of support was its finding that father's "payments of support did not reach his financial obligations as set out in Sedgwick County District Court Case . . . ."

In Father's post-trial motion he challenged the court's finding that he failed to provide substantial financial support. When the motion was argued to the district court on November 15, 2007, the court took the matter under advisement. In a letter dated December 6, 2007, the court made the following ruling on the support issue:

"Regarding the issue of support there was no support ordered by the Court until October, 2006 which ordered support of \$131.00 per month. After the order was entered, approximately 25% of . . . ."

This concluded page 2 of the letter. Page 3 begins in mid-sentence with a discussion of the child's best interests. The court did not return to the issue of support. We do not know what facts the district court relied upon to support its conclusion that father failed to provide substantial support.

Ordinarily this lack of specific findings would require us to remand the case for findings of fact by the district court. The trial court is in the best position to weigh conflicting evidence and make determinations of credibility; we are not. Here, however, the evidence is essentially undisputed as to the support father provided in the relevant 2-year time period. Thus, we need not remand the case to the district court for factual findings since we are equally able to consider the undisputed testimony on the extent of father's support for his child.

There was conflict in the testimony on one issue regarding support. Mother and father testified differently regarding their informal agreement for child support before the district court's order of support in July 2006. Ironically, father testified to a higher amount of monthly support for the child (\$350) than did mother, who testified to an

agreement for father to pay \$300 per month. We will view the facts in the light most favoring the stepfather. Thus, we will conduct our analysis based upon a pre-court-ordered support of \$350 per month. If father provided substantial support by that measure, he clearly provided substantial support by the lesser \$300 per month measure.

Further, there arose a dispute regarding father's support payments made directly to mother after the July effective date of the court's order but before the order was filed in October. The district court treated these payments as gifts and did not recognize them as support payments. Since this is a conclusion of law rather than a finding of fact, we review this conclusion de novo.

At trial, there was a colloquy between father's counsel and the court regarding these support payments made directly to mother after the court ruled on the issue of support but before the journal entry was filed memorializing the court's support order. Father's point was that until the journal entry was on file, there was no mechanism in place for him to make payments through the Kansas Payment Center. The trial court treated these payments as gifts instead of support for the child because the support order was effective July 1, 2006.

K.S.A. 2007 Supp. 59-2136(d) creates a *rebuttable* presumption that father failed in his duties as a parent when father does not pay a substantial portion of court ordered support when able to do so. It seems to us that in considering this most severe of sanctions on a parent - termination of parental rights, as opposed to contempt for failing to pay court ordered child support - the Supreme Court requires the court to take into account all payments made by father for support of his child as part of the surrounding circumstances of a case, not merely payments made through the Kansas Payment Center. 190 P.3d at 259.

Including father's payments from July 1, 2006, when the court ordered support, to October 2006 when the journal entry was filed, we arrive at the following calculations of support owed and support paid. Commencing January 16, 2005 (2 years before commencement of this action), father owed child support as follows:

1/16/05 to 7/1/06 (17.5 months x \$350)	\$6,125
7/1/06 to 1/16/07 (5.5 months x \$131)	<u>\$720.50</u>
Total:	\$6,845.50

During this period father paid support as follows:

1/16/05 to 7/1/06	\$2,450
7/1/06 to 1/16/07	<u>\$1,196.49</u>
Total:	\$3,646.49



Father claimed other payments which he could not document to the district court and which the district court disregarded. We do likewise. Thus, during the relevant 2-year period father paid 53% of his child support obligation (\$3,646.49 / \$6,845.50).

In addition, father provided mother with a prepaid medical debit card for his daughter in 2005 which mother used "quite a bit." He also maintained his daughter on his health insurance plan through his place of employment until February 2006 when he left to return to Texas. Two months later he offered to place his daughter on his health insurance plan in Texas, but mother refused because the child had been included in stepfather's insurance plan.

Hewing closely to our case law and taking into account the constitutional presumption in favor of maintaining father's parental rights, *In re Adoption of K.J.B.*, 265 Kan. 90, 95, 959 P.2d 853 (1998), we conclude that father's support was "substantial" during the 2 years before the petition was filed.

Father's history of support (53% of child support paid plus health insurance for more than half of the 2-year period) is more like the situations in *B.M.W.*, 268 Kan. at 884 (64% paid, no health insurance), and *C.R.D.*, 21 Kan. App. 2d at 99 (23% paid plus health insurance), cases in which the natural fathers' parental rights were preserved, rather than

like *R.W.B.*, 27 Kan. App. 2d at 555 (31% paid, no health insurance), in which father's parental rights were terminated. Whatever his other failures, it cannot be said that father paid an insubstantial amount of support during the relevant time period. Therefore, stepfather failed to meet his burden of proof with regard to the support side of the adoption ledger. Since K.S.A. 2007 Supp. 59-2136(d) and *G.L.V.* require parental failure on both sides of the ledger before a stepparent adoption may proceed without the consent of such parent, the trial court's order granting the adoption without father's consent must be reversed. 190 P.3d at 259.

This renders moot father's remaining issues.

Reversed.