NOT DESIGNATED FOR PUBLICATION

No. 101,944

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF
C.L.O.

MEMORANDUM OPINION

Appeal from Reno District Court; PATRICIA MACKE DICK, judge. Opinion filed October 16, 2009. Affirmed.

Franklin T. Bruce, of Forker, Suter & Rose, of Hutchinson, for appellant natural father.

Thomas D. Arnhold, of Hutchinson, for appellee stepfather.

Before BUSER, P.J., MARQUARDT and CAPLINGER, JJ.

Per Curiam: J.R.O. (Father), the natural father of C.L.O., appeals the district court's decision finding his consent for the adoption of C.L.O. by her stepfather was not

required because Father failed to assume his parental duties for 2 consecutive years preceding the filing of the petition.

Factual and procedural background

C.L.O. was born to Father and J.L.S. (Mother) in February 1999. Father and Mother separated in December 2000. In May 2001 Father was judicially declared C.L.O.'s natural father and was ordered to pay $127 per month in child support beginning May 1, 2001, to maintain health, dental, and vision insurance for C.L.O., and to pay a proportionate share of C.L.O.'s medical expenses not covered by insurance.

Sometime thereafter, Father moved to the state of Washington. Mother attempted to foster a relationship between Father and C.L.O., but Father failed to maintain regular contact with the child. Father's last visit with C.L.O. occurred when C.L.O. was between 3 and 5 years old.

In October 2006 Father was arrested for two robberies. He was convicted in February 2007 and sentenced to serve 46 months' imprisonment with the Washington Department of Corrections.

In April 2008 Mother married B.L.S. (Stepfather). Stepfather, Mother, and C.L.O. had lived together for 2 1/2 years before the marriage. In August 2008 Stepfather petitioned to adopt C.L.O. with Mother's consent. In the petition, Stepfather alleged that Father had failed to pay child support or contact C.L.O. within the 2 years preceding the filing of the petition and that Father was an unfit parent. Father contested the adoption, asserting that since his incarceration he had "made every attempt to contact [C.L.O.] by letter."

In October 2008 a bench trial was held on the matter of C.L.O.'s adoption. Father participated in the trial by phone due to his incarceration. The district court heard testimony from Stepfather, Mother, Father, and several of Father's relatives.

Following the trial, both parties submitted proposed findings of fact and conclusions of law. The district court subsequently issued a memorandum decision finding: (1) Father had not seen C.L.O. during the relevant 2-year time period, but C.L.O. maintained contact with Father's relatives; (2) Father committed felony crimes in Washington in October 2006 and was convicted and sentenced to serve 46 months' imprisonment in February 2007; (3) Father was under court order to pay $127 per month in child support but, during the relevant time period, made only four child support payments totaling $49.20; (4) Father sent eight letters and cards to C.L.O. during the

relevant time period by mailing them to C.L.O.'s paternal grandmother; (5) Father had phone conversations with C.L.O. during the relevant time period, but Mother was not aware of the calls.

Based on these findings, the district court determined that Father failed to assume his parental duties for 2 consecutive years next preceding the filing of the petition for adoption. The court specifically found Father's visitations, contacts, communications, and contributions to be "incidental" and disregarded them pursuant to K.S.A. 2008 Supp. 59-2136(d). Accordingly, the district court determined Father's consent was not required under K.S.A. 2008 Supp. 59-2136(d), and granted Stepfather's petition for adoption.

Discussion

In this appeal, Father contends that the district court misapplied the law and erroneously concluded his consent was not required.

Stepparent adoptions are governed by K.S.A. 2008 Supp. 59-2136(d), which 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 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."

Whether a parent has refused or failed to assume his or her parental duties for the 2 consecutive years next preceding the filing of a petition for stepparent adoption is a question of fact which is normally reviewed for substantial competent evidence. *In re Adoption of B.M.W.*, 268 Kan. 871, 882-83, 2 P.3d 159 (2000); *In re Adoption of S.J.R.*,

37 Kan. App. 2d 28, 39, 149 P.3d 12 (2006). Both parties suggest that this court should apply a substantial competent evidence standard in this case. However, we question the application of that standard in light of our Supreme Court's recent decision in *In re B.D.-Y.*, 286 Kan. 686, Syl. ¶ 4, 187 P.3d 594 (2008), a case involving child in need of care (CINC) statutes.

In *B.D.-Y.*, the court clarified that the "clear and convincing evidence" standard of proof applies when "particularly important individual rights" are at stake, including parental termination cases and specifically including CINC cases. 286 Kan. at 697. The court explained that "clear and convincing evidence" requires the factfinder to believe "that the truth of the facts asserted is highly probable." 286 Kan. at 697.
Further, the *B.D.-Y.* court held that when the factfinder applies a clear and convincing evidence standard of review, an appellate court "should consider whether, after review of all the evidence, viewed in the light most favorable to the State, it is convinced that a rational factfinder could have found it highly probable, *i.e.*, by clear and convincing evidence, that the child was a CINC." 286 Kan. at 705.

Here, in applying K.S.A. 2008 Supp. 59-2136(d), the district court did not specify a particular standard of proof. Moreover, that statute does not specify the standard of

proof. *Cf.* K.S.A. 2008 Supp. 59-2136(h)(1) (requiring "clear and convincing evidence" to terminate parental rights under that subsection).

However, our Supreme Court has often stated that the facts warranting an exception to the required consent of one of the natural parents in a stepparent adoption case must be clearly proven. See *B.M.W.*, 268 Kan. at 882; *In re Adoption of S.E.B.*, 257 Kan. 266, 273, 891 P.2d 440 (1995). Nonetheless, our Supreme Court has generally reviewed the district court's factual findings in stepparent adoption cases for substantial competent evidence. See *B.M.W.*, 268 Kan. at 882-83; *S.E.B.*, 257 Kan. at 273-74; *In re Adoption of F.A.R.*, 242 Kan. 231, 239, 747 P.2d 145 (1987). *In re Adoption of B.C.S.*, 245 Kan. 182, 186-88, 777 P.2d 776 (1989) (requiring "substantial competent evidence"); see also *S.J.R.*, 37 Kan. App. 2d at 39-45 (applying substantial competent evidence standard).

We note this inconsistency only because, as this court has pointed out, the term "clearly proven" appears to be synonymous with "clear and convincing evidence." See *In re Adoption of R.J.A.*, No. 100,723, unpublished opinion filed July 10, 2009 (2009 WL 2030386, at *4). Even though we acknowledge that K.S.A. 2008 Supp. 59-2136(d) does not require a specific standard of proof, because proceedings under that statute may

ultimately lead to the termination of parental rights, we conclude application of the clear and convincing evidence standard of review identified in *B.D.-Y.* is appropriate.

Accordingly, we must determine whether, after reviewing all the evidence in the light most favorable to Stepfather, this court is convinced that a rational factfinder could have found it highly probable, *i.e.*, by clear and convincing evidence, that Father failed to assume the duties of a parent and his consent was not required for the adoption. In making this determination, we do not reweigh the evidence or pass on the credibility of witnesses. See *B.D.-Y.*, 286 Kan. at 705-06; *B.M.W.*, 268 Kan. at 882-83.

Our courts have adopted a "two-sided ledger approach" for determining whether a nonconsenting parent has assumed his or her parental duties under K.S.A. 2008 Supp. 59-2136(d). See, *e.g.*, *In re Adoption of G.L.V.*, 286 Kan. 1034, 1048-54, 190 P.3d 245 (2008) (reaffirming viability of two-sided ledger approach); *In re Adoption of K.J.B.*, 265 Kan. 90, 101-02, 959 P.2d 853 (1998), *modified in part by G.L.V.*, 286 Kan. at 1058-61 (endorsing the two-sided ledger approach).

On one side of the ledger is emotional support and participation in parental duties, *i.e.*, love and affection established by parental visitations, contacts, communications, and contributions, and on the other side is financial support, *i.e.*, child support as required by

judicial decree. *G.L.V.*, 286 Kan. at 1053-54 (citing *B.M.W.*, 268 Kan. at 882; see K.S.A. 2008 Supp. 59-2136(d). A nonconsenting parent must fail to assume duties on both sides of the ledger before a court can determine that his or her consent is not required for a stepparent adoption. See *K.J.B.*, 265 Kan. at 101-02.

All surrounding circumstances are to be considered when determining whether a nonconsenting parent's consent is required. See *G.L.V.*, 286 Kan. at 1053. Accordingly, special considerations apply when a nonconsenting parent is incarcerated. In that situation, the court must determine whether the parent has pursued available opportunities to perform parental duties to the best of his or her abilities. *S.E.B.*, 257 Kan. at 273.

Although Father's appeal brief is not entirely clear, it appears Father essentially claims the district court (1) failed to properly consider his incarceration status when it determined he failed to provide financial support for C.L.O. and (2) erred in finding that his contacts and communications with C.L.O. were incidental.

A. The District Court Properly Considered Father's Incarceration Status In Concluding He Failed to Provide Financial Support for C.L.O.

The plain language of K.S.A. 2008 Supp. 59-2136(d) requires courts to apply "a rebuttable presumption that if the [nonconsenting parent] . . . 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 [nonconsenting parent] has failed or refused to assume the duties of a parent." (Emphasis added.)

Focusing on the italicized language above, Father argues the district court failed to consider his inability to provide financial support for C.L.O. because of his unemployment or incarceration during the relevant time period. See *S.E.B.*, 257 Kan. at 274 (when nonconsenting parent is incarcerated, court is required to consider the period of time parent has been unable to provide financial support due to his or her incarceration).

Contrary to Father's argument, while the nonconsenting parent's period of incarceration is relevant in considering application of the statutory presumption, an incarcerated parent is not relieved of his or her duty to provide financial support. See *In re Application to Adopt H.B.S.C.*, 28 Kan. App. 2d 191, 201, 12 P.3d 916 (2000) ("K.S.A. 59-2136(d) requires a finding the father failed to support a child 'when financially able to do so' in order to form a rebuttable presumption."); *In re Adoption of A.J.P.*, 24 Kan. App. 2d 891, 893, 953 P.2d 1387 (1998) (rejecting natural father's contention that his incarceration status created an exception to his statutory parental responsibilities).

Instead, courts consider whether the incarcerated parent has pursued available opportunities to perform parental duties to the best of his or her abilities. *S.E.B.*, 257 Kan. at 273; *In re Adoption of J.M.D.*, 41 Kan. App. 2d 157, 165-66, 202 P.3d 27 (2009), *rev. granted* June 4, 2009.

The facts necessary to resolve this issue are undisputed. Based on Stepfather's filing of the adoption petition in August 2008, the relevant 2-year time period was August 2006 to August 2008. See K.S.A. 2008 Supp. 59-2136(d). Father was arrested in October 2006, convicted and sentenced in February 2007, and remained incarcerated throughout the adoption proceedings.

Effective May 1, 2001, Father was under court order to pay $127 per month in child support, provide C.L.O.'s health, dental, and vision insurance, and pay a proportionate share of C.L.O.'s medical expenses not covered by insurance. However, during the relevant 2-year period, Father made child support payments totaling only $49.20, provided no health, dental, or vision insurance and paid no medical bills.

Regarding his failure to pay child support, Father explained he was unemployed for a "few months" before his incarceration. However, Father testified that he "worked for pretty much the whole time" he was incarcerated and earned a monthly income of $55.

According to Father, a percentage of his monthly prison income was withheld by the state of Washington for child support obligations he owed for another child. Nevertheless, he claimed that he assumed a portion of his prison withholding was sent to Kansas for C.L.O. Further, Father explained that he had paid no insurance costs because he assumed C.L.O. had insurance coverage through the state of Kansas. Finally, Father testified he had not been presented with any medical bills.

The district court did not apply the statutory presumption in this case; instead, the court disregarded Father's child support payments as "incidental" under K.S.A. 2008 Supp. 59-2136(d), which allows a district court to "disregard incidental visitations, contacts, communications or contributions." However, the term "contributions" has been interpreted by our courts as falling on the emotional support side of the two-sided ledger. See *G.L.V.*, 286 Kan. at 1053 (citing *B.M.W.*, 268 Kan. at 882).

But even if the district court erred in terming Father's financial contributions as "incidental," the evidence clearly supports the district court's factual determination that Father failed to assume his parental duty to provide financial support for C.L.O., even taking into account his limited ability to do so.

Father's testimony established that he had a steady monthly income of $55 throughout his incarceration. Even assuming he did not begin earning this income until he was sentenced in February 2007, Father made no child support payments for C.L.O. in the first year (August 2006 to July 2007) of the relevant 2-year period and ultimately made only four payments totaling $49.20 in the second year (August 2007 to August 2008) of the relevant time period.

In this regard, the instant case is distinguishable from *In re Adoption of J.M.D.*, 41 Kan. App. 2d 157. There, after the natural father was incarcerated, he sought and received a reduction in child support from $254 per month to $20 per month. The natural father then paid $8.50 per month for 10 months of the relevant 2-year period.

In concluding that J.M.D.'s natural father knowingly failed to provide a substantial portion of support when financially able to do so for a period of 2 years next preceding the filing of the petition for adoption, the district court applied the rebuttable presumption of K.S.A. 2008 Supp. 59-2136(d). On appeal, a panel of this court concluded that the district court's finding was not supported by substantial competent evidence. The panel particularly noted that the natural father satisfied his reduced child support obligation for 10 months of the relevant 2-year period. 41 Kan. App. 2d at 166-67.

Here, unlike the natural father in *J.M.D.*, Father took no affirmative action to reduce his child support obligation after his incarceration, nor did he make consistent child support payments during his incarceration. Instead, Father simply "assumed" a percentage of his income was being sent to Kansas for C.L.O. Father also failed to pay C.L.O.'s health, dental, or vision insurance and made no effort to do so, simply assuming C.L.O. was covered by the state of Kansas.

Under these circumstances, we conclude that although Father was incarcerated for a majority of the relevant 2-year period, the district court could have found it highly probable, *i.e.*, by clear and convincing evidence, that Father failed to assume his parental duty to provide financial support for C.L.O.

B. The District Court Did Not Rely on Unsupported Facts to Determine Father's Contacts and Communications with C.L.O. Were Incidental.

Next, Father claims the district court relied on unsupported evidence to determine that Father's contacts and communications with C.L.O. were incidental. Father asserts the court disregarded his incarceration status, his testimony about his repeated attempts to communicate with C.L.O., and evidence of Mother's attempts to interfere with his relationship with C.L.O.

If an incarcerated parent has made reasonable attempts to contact and maintain an ongoing relationship with his or her child, it is for the trial court to determine the sufficiency of such efforts. *F.A.R.*, 242 Kan. at 236; *J.M.D.*, 41 Kan. App. 2d at 168. Moreover, under the plain language of the statute, the court "may disregard incidental visitations, contacts, communications or contributions." K.S.A. 2008 Supp. 59-2136(d). "'Incidental'" has been defined as "'casual, of minor importance, insignificant, and of little consequence.'" *In re Adoption of McMullen,* 236 Kan. 348, 351, 691 P.2d 17 (1984).

It is undisputed that Father had no physical contact with C.L.O. during the relevant time period. The evidence was conflicting, however, regarding the extent of Father's phone contacts and written communications with C.L.O..

Mother testified she was aware of one card that Father sent to C.L.O. at C.L.O.'s paternal grandmother's (Grandmother) house. Mother testified that she was not aware of any phone calls between C.L.O. and Father during the relevant time period and that C.L.O. had not mentioned receiving any phone calls or letters from Father.

Grandmother testified that C.L.O. spoke with Father twice on the phone. Grandmother also testified that she had a "manila envelope . . . stuffed with cards and letters" that Father sent to C.L.O.

Father testified he spoke with C.L.O. on the phone three times during the relevant 2-year period, and all three calls were made after he was incarcerated. Additionally, although Father testified he sent "countless letters and cards" to C.L.O., none of these items were produced at trial. Instead, the district court permitted Father to include the cards and letters with his posttrial proposed findings of fact and conclusion of law.

The parties also presented conflicting testimony regarding whether Mother interfered with Father's ability to contact or communicate with C.L.O. C.L.O.'s Grandmother testified she had weekly contact with C.L.O. and C.L.O. frequently stayed with the Grandmother for overnight or weekend visits. Grandmother testified that Mother told her C.L.O. was not allowed to talk to Father. C.L.O.'s aunt testified that Mother terminated C.L.O.'s visits with her aunt after Mother learned that the aunt allowed C.L.O. to talk to Father.

Mother testified she never tried to hide her or C.L.O.'s whereabouts, never told anyone C.L.O. was not allowed to speak with Father, never cut off contact between C.L.O. and Father's relatives, and never refused or returned Father's letters for C.L.O.

After hearing the testimony and allowing Father to submit evidence of the cards and letters he sent to C.L.O., the district court found that during the relevant 2-year period, Father "made phone calls" to C.L.O. and sent her eight cards and letters—one in 2006, three in 2007, and four in 2008. The court then determined that these contacts and communications were incidental and disregarded them as allowed by K.S.A. 2008 Supp. 59-2136(d).

Father argues the district court's factual findings are not supported by the evidence. Essentially, Father asks this court to reweigh the evidence presented at trial and reassess the witnesses' credibility—tasks clearly beyond our limited scope of review. See *B.M.W.*, 268 Kan. at 882-83; *J.M.D.*, 41 Kan. App. 2d 165. Instead, we conclude the district court could have found it highly probable, *i.e.*, by clear and convincing evidence, that Father's contacts with C.L.O. were incidental and, thus, could be disregarded in considering whether Father failed to emotionally support C.L.O. in the 2-year period preceding the filing of the petition.

Because we find the evidence clearly supports the district court's factual determination that Father failed to assume his parental obligations to provide financial and emotional support to C.L.O. for 2 consecutive years preceding the filing of

Stepfather's petition for adoption, we affirm the district court's determination that Father's consent was not required under K.S.A. 2008 Supp. 59-2136(d).

Affirmed.