

NOT DESIGNATED FOR PUBLICATION

No. 102,696

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In The Matter of the Adoption of N.K.F.,
AKA Baby Girl M, A Minor.

MEMORANDUM OPINION

Appeal from Butler District Court; CHARLES M. HART, judge. Opinion filed
February 5, 2010. Affirmed.

Joshua S. Andrews, of Cami R. Baker & Associates, P.A., of Augusta, for
appellant father.

Richard J. Peckham, of Andover, for appellees.

Before STANDRIDGE, P.J., MARQUARDT, J., and BRAZIL, S.J.

Per Curiam: J.M. appeals the termination of his parental rights in a third-party
adoption case. He argues the court erred in terminating his parental rights and considering
the child's best interests when terminating his rights. We affirm.

J.M. learned that his girlfriend, D.M., was pregnant in November or December 2006. She assured him that he was not the father but that "the Mexican" was the child's father. Nonetheless, J.M. and D.M. continued to live together until March 2007 and J.M. "paid for everything" during their cohabitation.

J.M. paid D.M. \$200 in February to support the child in utero and D.M.'s other child. Even after the couple split in March 2007, he continued to support D.M. by paying for a hotel room for her and her mother, paying electric bills for her, and paying bond fees related to an October 2006 charge.

Support ended in April 2007 when J.M. was incarcerated on a 72-month sentence; he has been in a Texas prison ever since. J.M. has a criminal record dating back to 1997. In brief, he has been convicted of unauthorized use of a firearm, conspiracy, misdemeanor assault, family violence, and possession of methamphetamine with intent to distribute, and has had his driver's license suspended for not having insurance. Also, he was apparently involved in a fight in the prison shortly after he began serving his 72-month sentence.

N.K.F. was born in July 2007. After her birth, D.M. realized that the Mexican was not N.K.F.'s father, and a later DNA test proved that J.M. was N.K.F.'s father. J.M. told D.M. to contact his mother, L.M., to get some support, but D.M. did not do so.

D.M. relinquished her parental rights to Adoption Connections in July 2007. She also filed an affidavit, stating that J.M. had not supported her in a significant way during the last 6 months of her pregnancy. The district court terminated J.M.'s parental rights on May 15, 2009, after hearing in-person testimony from a social worker and a psychologist, and testimony over the phone from L.M., D.M., and J.M.—both D.M. and J.M. were incarcerated at the time of the hearing. J.M.'s parental rights were terminated after the court found that he had not supported D.M. enough to retain his parental rights during the last 6 months of her pregnancy and was unfit to be a parent.

Prior to the hearing, N.K.F. was placed with an adoptive family and the psychologist and social worker conducted home visits where they observed N.K.F. and her adoptive family. A decree of adoption was issued on May 15, 2009, ordering that N.K.F. be adopted by her adoptive family.

Termination of parental rights

The district court found two main reasons for terminating J.M.'s parental rights under K.S.A. 2008 Supp. 59-2136(h)(1).

"1) The birthfather gave some support to the birthmother during the final six months of her pregnancy, however, that it did not rise to the level

necessary to retain is parental rights; 2) Of even greater significance, [J.M.] is unfit to assume the duties of a father caring for a small child."

The court went on to cite J.M.'s 11-year criminal history, poor anger control, and drug abuse. Then the court noted that "[i]t is in [N.K.F.]'s best interest to remain with the adoptive family."

On appeal, J.M. argues that none of the seven factors of K.S.A. 2008 Supp. 59-2136(h)(1)(A)-(G) apply and, therefore, his rights should not have been terminated. But because the court based its decision on two specific factors, we will not address the five other factors in detail.

Under K.S.A. 2008 Supp. 59-2136(h)(1)(B) and (D), the court may terminate parental rights upon a finding by clear and convincing evidence that the father is unfit as a parent or that the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the last 6 months of the pregnancy. In determining whether parental rights should be terminated, the court may consider the best interests of the child and can disregard incidental visitations, contact, communications, or contributions. K.S.A. 2008 Supp. 59-2136(h)(2).

When this court reviews a district court's termination of parental rights, the 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 parent's rights should be terminated.]" *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008). This court on appeal does not weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact. 286 Kan. at 705.

Fitness as a parent

J.M. argues that there is no evidence to prove he is unfit. He contends that while he has had problems in the past, "the testimony presented at trial was that he would be a good father." While incarcerated, he completed parenting and drug education courses. However, that J.M. has taken these classes is the only evidence he put forth to argue that he is not unfit.

J.M. is currently serving a 72-month sentence in a Texas prison for possession of methamphetamine with intent to distribute. He has a criminal record dating back to 1997 and continuing through 2007. In finding J.M. unfit, the district court noted:

"The testimony of [J.M.], [D.M.] and [L.M.], along with the documentary evidence from the Federal Bureau of Prisons, confirms 11 years of commission of felonies, including drug use and drug sales, chronic anger, and recidivism. He is 32 years of age and remains chronically

unstable, motivated by anger, antisocial behavior and drug use. [D.M.] acknowledged that they both sold drugs during the period they lived together, ending April 13, 2007, when [J.M.] commenced the most recent incarceration."

Kevin Hays, a psychologist and consultant for a therapeutic preschool, said he had concerns about J.M.'s fitness as a parent after listening to the hearing testimony and reviewing J.M.'s criminal record.

"[B]ut at age 32 you should have a few years of a better pattern in terms of preparing for parenthood. . . . If there was a pattern—let's say if 2003 was the last pattern of poor behavior or bad choices, I would be more optimistic; but here we are into 2007 with another pretty bad choice and not a change in behavior or patterns."

These "red flags" in J.M.'s past led Hays to believe that J.M. is unfit to parent N.K.F.

"And starting back with 1997 I see guns; 2001 I see assault—I circle these words he mentioned—2003 I see family violence; 2007 I see meth, meth being one of the more dangerous drugs in terms of affecting our central nervous system. Even the presence of those chemicals around a child would—could affect their central nervous system. . . . Anger came up. [J.M.] mentioned he had a bad anger problem at some point. . . . Someone is going to have to teach him how to be a parent. He doesn't know how to be a parent at this present time."

Hays went on to say that the success rate for incarcerated parents also dealing with addiction issues is "very low."

When the evidence is viewed in the light most favorable to the prevailing party, it is highly probable that J.M. is unfit to parent N.K.F. Therefore, the district court's termination should be upheld.

Support during last 6 months of pregnancy

The court also lists J.M.'s lack of support for D.M. during the final 6 months of her pregnancy as a basis for termination of J.M.'s rights. While there is not as much support for this basis of termination, the termination should nonetheless be upheld because of the clear and convincing evidence that J.M. is unfit to be a parent.

The court found that J.M. "supplied minimal support for mother and child during the six months prior to the birth of the child; February 2007 - \$200 and no support for the five month period March 2007 to July 2007." The court goes on to conclude that this support "did not rise to the level necessary to retain his parental rights."

Support under K.S.A. 2008 Supp. 59-2136(h)(1)(D)

"does not require that the father provide total support for the mother; however, support that is incidental or inconsequential in nature is not sufficient. Support from the father during the last 6 months of an unwed mother's pregnancy must be of some consequence and reasonable under all of the circumstances. [Citation omitted.]" *In re Adoption of Baby Girl S.*, 29 Kan. App. 2d 664, 667, 29 P.3d 466 (2001), *aff'd* 273 Kan. 71, 41 P.3d 287 (2002).

While the couple was living together, J.M. said he "paid for everything." In addition, J.M. gave D.M. \$200 in February 2007. However, part of that money was meant to support D.M.'s other child and part of it was to support N.K.F., who was then in utero. But D.M. did testify he supported her up until he went to jail in April 2007.

J.M. said he'd told D.M. to go to his mother to get help after he was incarcerated, but D.M. refused. "The mother's refusal of assistance offered by the natural father is a factor in determining if the father provided support to the mother." *Adoption of Baby Girl S.*, 29 Kan. App. 2d at 667. J.M.'s incarceration for the last 4 months of D.M.'s pregnancy may also be a factor when determining if he supported D.M. "In a situation where a natural parent is incarcerated, different standards must be applied than when the natural parent is free from such constraints. [Citation omitted.]" *In re Adoption of A.J.P.*, 24 Kan. App. 2d 891, 893, 953 P.2d 1387 (1998). In *A.J.P.*, the court was looking at whether the jailed father had refused or failed to assume his parental duties for the 2 years prior to the filing of the adoption petition. A.J.P.'s natural father had been in prison for

the last 5 years. 24 Kan. App. 2d at 892-93. While *A.J.P.* dealt with a different factor of K.S.A. 2008 Supp. 59-2136(h)(1), it is arguable that the natural father in this case should be given some leeway when determining if he supported the mother because of his incarceration during the last 4 months of her pregnancy.

The district court noted that J.M.'s support to D.M. was not enough to maintain his parental rights. Viewing the evidence in the light most favorable to the prevailing party, we could find that it is highly probable that J.M. did not support D.M. in a significant way for the final 6 months of her pregnancy because his support ended in April 2007. However, we could also determine that J.M.'s incarceration was "reasonable cause" under K.S.A. 2008 Supp. 59-2136(h)(1)(D) to excuse his failure to support her. Yet, because the finding that J.M. was unfit to be a parent was correct and should be affirmed, this basis for termination is unnecessary. Under K.S.A. 2008 Supp. 59-2136(h)(1), the finding of unfitness is enough to affirm termination of J.M.'s parental rights.

The child's best interests

J.M. contends that the court used the best interests of the child as a stand-alone basis for termination of his parental rights. Both sides agree that the child's best interests cannot be the sole basis for termination of parental rights. Under K.S.A. 2008 Supp. 59-2136(h)(2), the court may consider the child's best interests in determining if parental rights should be terminated. The "Kansas Legislature intended to expressly permit courts,

in weighing decisions whether to terminate parental rights, to consider the best interests of the child as a factor but not as a stand-alone basis for terminating parental rights." *In re Adoption of D.D.H.*, 39 Kan. App. 2d 831, 835, 184 P.3d 967 (2008). While N.K.F.'s best interests were considered by the district court, they did not serve as the sole basis for termination of J.M.'s parental rights.

Affirmed.