NOT DESIGNATED FOR PUBLICATION

No. 102,287

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF:

BABY GIRL P.

MEMORANDUM OPINION

Appeal from Johnson District Court; LAWRENCE E. SHEPPARD, judge.

Opinion filed January 22, 2010. Affirmed.

Zach Chaffee-McClure, of Shook, Hardy & Bacon, L.L.P., of Kansas City, Missouri, and *Debra A. Vermillion*, of Vermillion Law Office, L.L.C., of Kansas City, Kansas, for appellant father.

Kevin W. Kenney, of Kevin W. Kenney, P.A., of Prairie Village, for appellees adoptive parents.

Martin W. Bauer, of Martin, Pringle, Wallace & Bauer, L.L.P., of Wichita, for *amicus curiae* The American Academy of Adoption Attorneys.

Before McANANY, P.J., ELLIOTT and LEBEN, JJ.

LEBEN, J.: When Devon M. discovered that he was a father to a baby girl, he hired a lawyer and attempted to stop the adoption proceeding that the birth mother, Lauren P., had begun. But the district court found that Devon had failed to support the child after birth and that the best interests of the child would be served by terminating Devon's parental rights and allowing the adoption to proceed. On appeal, Devon argues that the evidence was insufficient to support the order terminating his parental rights, but the evidence does support the district court's factual finding that Devon failed to support the child after her birth. Further, that factor, combined with the best interests of the child, gave the district court a sufficient basis to terminate Devon's parental rights under K.S.A. 2008 Supp. 59-2136(h)(1). We therefore affirm the judgment of the district court.

Devon and Lauren had a relationship for a period of several months, and Lauren became pregnant. But Lauren ended the relationship during the early months of pregnancy. About 3 months after they broke up, Lauren sent Devon a text message in which she told him that she'd had a miscarriage; she also asked that he have no further contact with her. Devon tried to confirm the miscarriage with one of Lauren's friends, who told Devon that she didn't believe Lauren was still pregnant. Devon did not contact Lauren's parents, who, like Devon and Lauren, also lived in Johnson County.

Baby Girl P. was born June 23, 2008. Lauren waived her parental rights and placed the child with an adoption agency, which found a couple to adopt her. Lauren told the adoption agency that Devon lived in Florida, even though her last contact with him had been in Johnson County; she also gave them an incorrect last name for him. Lauren testified that she didn't do this to delay contact by the adoption agency with Devon, though it did have that effect.

Devon learned of Baby Girl P.'s birth when an investigator called his mother in August 2008. Devon immediately met with an attorney to initiate legal proceedings to assert his parental rights. The prospective adoptive parents had filed an adoption action in July 2008, and Devon filed an answer in that case, asking for custody, in early September.

At about the same time, Devon sent a letter to the adoptive parents. While that letter included no money, it expressed joy at meeting his daughter and contained an offer of support: "If ever, at any given point and time, if you need something, anything at all I am here for her. So just let me know, [it's] not a problem whatsoever. [It's] my responsibility & duty and I am ready for that." Later, near Christmas, Devon and his mother delivered some gifts for Baby Girl P. to the adoption agency; those gifts included a handmade quilt, three or four shirts, and two baby bibs.

After an evidentiary hearing, the district court ruled against several of the grounds on which the adoptive parents had sought to terminate Devon's parental rights. But the court found that Devon had failed in two ways: (1) that he had failed to support the child after learning of her birth, and (2) that the child's best interests would be served by terminating Devon's parental rights. In support of its first finding, the court explained that Devon had not "provided or offered financial support" for the child even though he had a job paying $25,000 per year. The court also said that he had not brought a separate paternity lawsuit, which could have established an order of support he would have been required to pay. Second, the court found that the child's best interests would be served by terminating Devon's parental rights and allowing the adoption to proceed. In support of this finding, the court noted that Devon had failed to timely discover the child's birth; the court indicated that since Devon was living in the same county as Lauren,"[t]he opportunity . . . to confirm [the child's] birth was available to Devon regardless of Lauren's warnings to leave her alone." The court also said that Devon's failure to provide financial support for the child supported the best-interests finding. The court concluded that "[t]he best interest of [the child] tips the evidentiary scale for this court in concluding that Devon's parental rights . . . should be terminated."

On appeal, we review the district court's decision terminating parental rights to determine whether its factual findings were highly probable, while reviewing the evidence in the light most favorable to the prevailing party. If so, then the findings meet

the required standard for clear-and-convincing evidence. We may not weigh conflicting evidence, pass on witness credibility, or redetermine factual questions. *In re M.R.C.*, 42 Kan. App. 2d 772, Syl. ¶ 1, 217 P.3d 50 (2009).

The district court considered several proffered grounds for terminating Devon's parental rights. K.S.A. 2008 Supp. 59-2136(h)(1) sets out the potential reasons for terminating a parent's rights. The district court cited two statutory grounds related to its conclusion that Devon hadn't supported his child: (1) that "the father has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth," K.S.A. 2008 Supp. 59-2136(h)(1)(C), and (2) that "[t]he father abandoned or neglected the child after having knowledge of the child's birth." K.S.A. 2008 Supp. 59-2136(h)(1)(A). If the district court finds the existence of at least one of the factors, the statute provides that "the court *may* order that parental rights be terminated." (Emphasis added.) K.S.A. 2008 Supp. 59-2136(h)(1). In making that determination, the statute allows the district court to consider the child's best interests. K.S.A. 2008 Supp. 59-2136(h)(2)(A).

The evidence supports the district court's factual finding of Devon's failure to provide financial support, even under the clear-and-convincing evidence standard. After the child's birth, Devon's support consisted of a vague offer of "something, anything" that might be needed but without specifics. Other than that, the only items of value he

provided were a quilt, some shirts, and two baby bibs. Our cases have held that neither general offers of support nor inconsequential or incidental provisions are sufficient. *In re M.R.C.*, 42 Kan. App. 2d at 777; *In re M.D.K.*, 30 Kan. App. 2d 1176, 1178, 58 P.3d 745 (2002); see also K.S.A. 59-2136(h)(2)(B) (district court may disregard incidental contributions).

The district court also noted that Devon had not brought a separate paternity lawsuit that could have established a support order for him to pay. Devon doesn't dispute that, and previous decisions from our court and our Supreme Court emphasize the importance of this fact. Our Supreme Court recently decided *In re Adoption of A.A.T.*, 287 Kan. 590, 196 P.3d 1180 (2008), *cert. denied* ___ U.S. ___, 173 L. Ed. 2d 1088 (2009). Although that case didn't arise under K.S.A. 2008 Supp. 59-2136(h), the court nonetheless held that a birth father's constitutional liberty interest in having a relationship with his child did not rise to a protected interest when the father merely stood by to await court orders without taking any affirmative steps to provide support. 287 Kan. at 612.

In another recent case, *In re Adoption of Baby W.*, 2009 WL 2030478, at *5 (Kan. App. 2009) (unpublished opinion), our court found that the principles announced in *A.A.T.* were applicable when considering termination of parental rights under K.S.A. 2008 Supp. 59-2136(h)(2). The *Baby W.* case, like Devon's, involved termination of a father's rights for failure to provide support after the child's birth. Based on the principles

announced in *A.A.T.*, our court affirmed the termination of parental rights when the natural father had not provided financial support after the child's birth: "[I]t is insufficient for a father to merely stand ready, and the father should have taken affirmative action to provide support for Baby W. upon learning of the child's birth rather than waiting to see what the court might eventually order." 2009 WL 2030478, at *6; see also *M.R.C.*, 42 Kan. App. 2d at 779 (citing specific acts, such as setting up a bank account, that the father could have taken to support the mother even though the mother declined contact).

We agree with Devon that the district court's finding that he neglected the child under K.S.A. 2008 Supp. 59-2136(h)(1)(A) must be set aside because the only evidence cited to support it was the evidence already used to support the finding of a failure to provide financial support under K.S.A. 2008 Supp. 59-2136(h)(1)(C). Subsection (C) clearly relates to financial support, and we presume that the legislature did not provide a list of redundant factors. Thus, even if a failure to provide financial support might form part of the evidentiary basis for a finding of neglect under subsection (A), it surely cannot be the *only* basis for that finding, as it was here. We interpret the statutory language independently, without any required deference to the district court. See *In re Adoption of G.L.V.*, 286 Kan. 1034, 1040, 190 P.3d 245 (2008). But the elimination of neglect under subsection (A) as a basis for the court's order does not change the result of this case; the district court need only find *one* of the listed statutory grounds. Once one has been

found—here under subsection (C)—the district court has the discretion to terminate the father's parental rights, and it may consider the child's best interests when doing so.

We should note that the district court more clearly tied its finding of a failure of financial support to subsection (A) than to subsection (C). But the court cited both subsections in its opinion, and the legal test under subsection (C) was surely met based on the factual conclusions the district court made. Even if the district court had erroneously relied only on subsection (A), its ruling would still be upheld; a district court's ruling is upheld when it is correct under the law, even if the district court relied upon the wrong ground in support of its decision. See *In re Marriage of Bradley*, 282 Kan. 1, 8, 137 P.3d 1030 (2006).

The district court's conclusion regarding the child's best interests is also supported by the evidence. Devon did not use all means at his disposal to investigate Lauren's claim of miscarriage, and Kansas courts have found in other cases that an expectant father may not necessarily rely upon the expectant mother's statements about miscarriage or abortion. See *A.A.T.*, 287 Kan. at 624; *M.R.C.*, 42 Kan. App. 2d at 779-80. Nor did Devon use all means at his disposal to provide support for the child after he learned of her birth. In addition, the court had some evidence about the adoptive parents as well through a home-visit report filed with the court before trial. Thus, although the district

court didn't make specific findings comparing the child's potential homes, it had sufficient evidence upon which to make a judgment about that. No request was made to the district court for additional findings; and in the absence of some objection to the district court to the adequacy of the findings, we must presume that the district court found all facts necessary to support its judgment. *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006); *In re Adoption of E.A.C.*, 2006 WL 1379657, at *3 (Kan. App. 2006) (unpublished opinion).

In addition to his argument that the evidence in support of the district court's findings was insufficient, which we've now rejected, Devon makes four additional arguments on appeal. We do not find them persuasive.

First, he argues that the district court was legally required to find that he failed both to provide financial *and* emotional support. He notes that in stepparent adoptions, our court has required that failure in both categories be shown before the natural father's rights may be terminated. *E.g.*, *In re Adoption of J.M.D.*, 41 Kan. App. 2d 157, 162-63, 202 P.3d 27 (2009), *rev. granted* June 4, 2009 (case argued October 28, 2009). But those cases arise primarily under a different statutory provision, K.S.A. 2008 Supp. 59-2136(d). We also note that our Supreme Court has observed that the caselaw rule that a failure both to provide financial and emotional support must be shown is "only loosely based" on the statutory language regarding stepparent adoptions. *G.L.V.*, 286 Kan. at 1049. We

decline to graft that caselaw tweak of the stepparent-adoption statute onto the separate statutory provision for other adoptions. K.S.A. 2008 Supp. 59-2136(h)(1)(C) seems clear enough to us based on the words the legislature used: if the father "has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth," his rights may be terminated. The legislature chose "or" not "and," so either a failure to provide support or a failure to communicate will suffice under the statute.

Second, he argues that the adoptive parents didn't cite to subsection (C) in the pretrial order, so he didn't have notice that the case might be determined on the question of his financial support. But even though subsection (C) wasn't cited, subsection (A) was, and it referenced neglect. In the context of a child, neglect generally includes the failure to provide necessities to such an extent that harm results. See Black's Law Dictionary 1133 (9th ed. 2009) (definition of child neglect). Devon knew that he needed to provide whatever evidence he could that he hadn't abandoned or neglected his child, and financial support could negate those claims at least in part. Devon's attorney offered as evidence the letter he had written offering support to the adoptive parents, and Devon's attorney asked both Devon and his mother about that offer. Devon also responded to questions from the opposing attorney about his income and whether he had provided support, and Devon's attorney did not object that these questions were outside the scope of the hearing. When issues not raised in the pleadings are tried with the express or

implied consent of the parties, they are treated as if they had been raised. See K.S.A. 60-215(b). We find that to be the case here.

Third, he argues that the adoptive parents and the adoption agency interfered with his ability to exercise his parental rights. While it's true that only limited visitations between him and Baby Girl P. were ever arranged, Devon has not cited to anything the adoptive parents or the adoption agency did to interfere with his ability to provide *financial* support. Although they didn't ask for support, the caselaw makes it clear that the district court may exercise its discretion to terminate his parental rights when he has taken no affirmative steps to provide support and instead had decided to wait to see what may be ordered.

Fourth, he argues that the district court improperly made "best interests" the controlling factor. He argues that "best interests" may only be used to support a natural parent's rights, not to terminate them. But the statutory scheme is quite clear that the child's best interests may not be considered unless the district court has already found the existence of a factor that, by itself, provides authority for the district court to terminate his parental rights. Once that factor has been found to exist, we see no error in the district court considering the child's best interests when making the decision whether to terminate parental rights. Under the statute, the court is not required to terminate parental rights even when it finds that one of the factors is present—the statute provides merely that the

court *may* do so. Consideration of the child's best interests at that stage is appropriate and permissible. The district court's phrasing that best interests "tips the evidentiary scale" may not have been the most appropriate because it might suggest that best interests affected the weighing of evidence on the required statutory factor. We find no indication of that here. The district court first found a statutory factor, and it then considered best interests in determining whether to terminate parental rights.

In sum, the district court's factual findings regarding a failure to provide financial support and the child's best interests were supported by substantial evidence and by Kansas caselaw, especially the *A.A.T.*, *M.R.C.*, *M.D.K.*, and *Baby W.* cases.

Before we conclude our opinion, we move briefly to what author David Allen might call the 50,000-foot level in which purpose and principle are broadly evaluated here to consider the condition of our law on parental rights—most often the father's rights as the cases come to us. Our courts have long held that the statutory procedures and protections must be strictly construed in favor of maintaining the rights of natural parents. But cases like this one do not seem to adhere to that standard, which is itself designed to ensure respect for the constitutional rights of parents.

As the caselaw has developed, perhaps we are asking too much from our young new parents. Many human qualities vary among the population, and that distribution can

be plotted on a bell curve. Most of us fall in the middle with only a select few at the upper and lower ends—yet it seems that we require a new parent to be truly exceptional to maintain parental rights under our legal expectations. In addition, that person must also locate an equally exceptional attorney to successfully navigate the journey required to maintain parental rights.

The facts of this case highlight this point. Devon hired an attorney immediately upon learning that he was a father. The attorney was experienced and well-regarded in the local bar. Devon appeared in the adoption proceeding and asserted his rights there. Yet he falls short under our legal expectations because he didn't file an additional lawsuit for paternity where he could have obtained a support order that the prospective adoptive parents didn't want. He also falls short under our legal expectations because he didn't set up a bank account for the benefit of his child, even though the account wouldn't have been used unless he first won the legal case. It's possible that his attorney recommended these steps, and Devon rejected that advice. But it seems more likely that neither Devon nor his attorney figured out—in real time—all the steps that we might deem necessary. Even if they did, Devon's resources were not unlimited. Our legal system leaves it to him to hire an attorney, a burden that's not inconsequential.

Like most people, judges can fall prey to hindsight bias, in which an answer seems obvious after the fact but may not have been so when the situation was encountered. See

Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 778, 799-805 (2001). But a new father's parental rights should not "turn on his lack of clairvoyance." *A.A.T.*, 287 Kan. at 655 (Beier, J., dissenting).

Devon has permanently lost his rights as a parent because he didn't sufficiently provide financial support for the child after he learned of her birth, even though he offered support and no one else involved with his child wanted anything from him at that time (other than a waiver of his rights and consent to the adoption). The district court found that Devon could have done more, and that's literally true in respects that Kansas caselaw finds significant. We must follow the direction set by our Supreme Court, and we believe we have done so in this case and in the other decisions of our court that we have cited here. If there is to be some change in direction, that decision should be made by our Supreme Court. As that court has noted, strong interests are in play here beyond those of the father, including the State's interest in determining the child's status as early as possible so that the child may have a stable life. *A.A.T.*, 287 Kan. at 611-12. Balancing these concerns, when applying a general constitutional concept like a parent's "liberty interest," is primarily the role of our Supreme Court and the United States Supreme Court. Unless some new course is suggested by those courts, Kansas families and our district judges are entitled to rely upon existing precedents. We believe that those precedents call upon us to affirm the district court's decision in this case.

The judgment of the district court is therefore affirmed.