

NOT DESIGNATED FOR PUBLICATION

No. 102,136

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IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Adoption of

J.R.M. and Z.T.M.

MEMORANDUM OPINION

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

Opinion filed January 22, 2010. Affirmed.

Jon A. Blongewicz, of Jon A. Blongewicz, Attorney at Law, P.A., of Leawood, for the appellant.

Jeffrey A. Dehon, of Kansas City, for the appellee.

Before MARQUARDT, P.J., PIERRON, J., and BUKATY, S.J.

Per Curiam: M.J.M. (Father) fathered two minor children, J.R.M. and Z.T.M. He and the mother (Mother) never married. Mother later married M.T.L. (Stepfather). Stepfather filed a petition to adopt J.R.M. and Z.T.M. Mother consented to the adoption and Father did not. The district court granted the petition over the objection of Father

finding that Father had failed in his obligations as a parent for the 2 years prior to the filing of the petition.

Apparently, Father had no contact with the children during the 2 years prior to the filing of the Stepfather's petition. He apparently is disabled and receives disability payments from Social Security Administration (SSA). The children also each receive payments from SSA as a result of Father's disability. Father has paid little or nothing himself to the children in the way of support. The primary issue in this case is whether the payments the children received from SSA satisfy Father's obligation to provide financial support such that his consent is required before Stepfather can adopt. We answer the question "no" and affirm.

Stepfather filed his petition on July 17, 2008. Most of the relevant facts leading up to that date are not disputed.

Father was 41 years old at the time of the adoption trial. He had graduated from high school and attended college in California for 3 years but had not received a college degree. He had been a painter most of his adult life.

Father and Mother first met in 1997 and lived together sporadically from time to time until 2004. As we stated, they never married. Z.T.M. was born in 1998 and J.R.M

in 2001. Mother testified that Father was volatile and physically abusive at times and was very manipulative.

Mother and Father ceased being a couple in March or April 2004. Almost immediately after they separated, Father moved to California to live with his brother. He was kicked out of his brother's house several months later and was homeless for a time. About this time Stepfather came into Mother's life. Mother and Stepfather began dating in the spring or summer of 2004 and began living together in the fall of the same year.

Father began receiving social security benefits in May of 2001, for what he identified as bilateral hip dysplasia. The children each received social security benefits based on Father's condition. Although he was receiving disability payments, Father found some work as a painter in 2004 after moving to California. He did not send any portion of the monies he received for painting (approximately \$2,000) to Mother for the children's support. He testified he did not send any money because of a restraining order that had been issued. However, the earliest restraining order discussed in the record was issued in April 2006.

When he moved to California, Father continued to receive disability benefits, including the checks for the children. Father admitted keeping 2 or 3 months of the boys' payments. Father testified he notified the SSA about redirecting the children's checks at the same time Mother had talked to SSA. Mother testified, however, that Father kept the

boys' social security checks from the time he moved to California until June of 2005 (over a year's worth). She testified she finally went to the local SSA office to change the payments, and the SSA began sending the boys' checks to Mother effective July 2005. It was undisputed that the Father provided no financial support on his own to the children after January 1, 2005. Besides the support provided by Mother and Stepfather, all the children received were these social security benefits of \$66 per child sent by the SSA.

Mother and Stepfather married in August of 2005, and the children resided with them in Johnson County, Kansas. Mother and Stepfather also had a child together in 2005. Mother does not work, and Stepfather is the primary means of support for the entire family. Stepfather also has provided the children with emotional support, taught them to play sports, ride bikes, and provided all forms of parental guidance. Stepfather owns a carpet cleaning and water restoration company.

It is undisputed that Father has had no physical contact with his sons on or after April 2004, and his last telephone communication was late in 2004. Mother and Stepfather originally set up a schedule for Father to call from California 2 nights a week, but Mother and Stepfather stopped the calls after Father spoke inappropriately to the children. Father would also call Mother's home and Stepfather's business in the middle of the night making threats and leaving profane messages. After learning Mother was pregnant with another child, Father told Stepfather he hoped the baby died and that he (Father) would kill the baby. Stepfather testified the harassing phone calls went on for a

year after the end of 2004. Stepfather finally filed a police report regarding the on going calls in late 2005.

Father testified he sent a Christmas package to J.R.M. and Z.T.M. in December of 2004, with shoes and other items. Mother testified the last package Father sent was in the summer of 2004. She stated the package included baseballs and hats, as well as drug paraphernalia, rolling papers, and a flyer for a marijuana club. Mother testified the Christmas 2004 package was from Father's friend in California.

Father provided no cards, presents, or gifts to the boys after January 1, 2005, except four letters he sent to them in July and August of 2006. Father testified these letters were returned to him due to an incorrect post office box number. He resent the same letters to Stepfather's street address, but these were also returned. These letters included statements expressing love for the children, but also repeatedly indicated that he missed Mother, questioned her motives, told the children she had cheated, and said that Mother was real, real sick. One letter indicated Mother had betrayed him and the children.

As early as April of 2006, restraining orders had been in place prohibiting Father from contact with the children, Mother, and Stepfather. That year, he threatened Mother and Stepfather via telephone from California and was charged with four counts of criminal threat. Kansas extradited Father and he eventually plead guilty to two counts.

He was then incarcerated or in community corrections from June 13, 2006, to May 4, 2007.

Upon his release, Father was on probation and reported to an intensive supervision officer (ISO). He apparently had been prescribed various anxiety medications. The ISO advised him he could not contact the children under the terms of his post supervision order, but he could go to court to attempt to obtain visitation rights.

The ISO testified that on June 19, 2007, Father reported to her by telephone. At that time, he told her that he had rented a car and was following Stepfather to his work and his home. During this conversation, Father blamed Stepfather for all his problems and stated that if Stepfather was gone, his problems would be gone. The ISO filed a police report based on Father's statements. At some point, Father also admitted to his ISO that he was using marijuana and drinking alcohol. As a result he was sent to the Osawatomie mental health facility for evaluation.

Soon after the above incident, the ISO filed a motion to revoke Father's probation. In addition, the State filed new charges alleging that Father was stalking Stepfather. Father threatened his ISO with bodily harm when he was arrested at her office.

Father denied that he ever stalked Stepfather and sent a 23-page letter to Stepfather and Mother protesting his innocence and claiming the ISO lied about his

comments. Father ultimately plead guilty to attempted criminal threat, a felony. Father again was incarcerated, this time from June 26, 2007, to October 8, 2008, 1 week before the adoption trial began.

The district court also heard evidence about Stepfather's criminal history of and recent legal difficulties he had in his business. He had served 4 1/2 years in prison as a result of a robbery/kidnapping incident that involved his accosting a convenience store clerk, forcing her outside, and demanding her car keys. Also, at the time of the trial on the adoption petition he was on probation for trespassing and burglary as a result of an incident in which his ex-wife was the victim.

In a memorandum decision, the district court granted Stepfather's petition for adoption and ordered the last name of the children be changed. It terminated Father's parental rights and found his consent to their adoption was unnecessary. In its rationale, the court indicated that Father's relationship with his sons had been "largely non-existent" since March or April of 2004. It also noted Father's financial support consisted solely of monthly disability checks of \$66 per child from SSA and there was no evidence Father had supported the children with any other earned income. The court also found that Father admitted taking several disability payments intended for the children. The court concluded that Father's relationship with the children was affected both by his mental disabilities and his violent temperament; the latter being reflected in his convictions of criminal threats in 2006 against Stepfather and Mother, and the stalking charges in 2007.

In its concluding paragraph, the district court stated: "In summary, [Father] fails the balance sheet test of demonstrating 'love and affection' for [Z.T.M.] and [J.R.M.] and he is an unfit parent. It is not in their best interests that [Father] continue to have parental rights in them."

The court also recognized that neither the "best interests" factor nor the "fitness" factor could alone provide the basis for granting the adoption and neither "need be controlling factors in the court's decision."

Father filed a timely motion to reconsider which was denied.

Father's Parental Duties

Father appeals the district court's finding that he failed or refused to assume the duties of a parent for the 2 years preceding the petition for adoption. He contends the court erred in not considering the social security disability checks sent to J.R.M. and Z.T.M., based on his disability, as adequate financial support to establish he assumed financial responsibility under K.S.A. 2008 Supp. 59-2136(d). He also asserts, in passing, that his failure to show emotional support to the children is excused by the restraining orders issued against him and/or is irrelevant since he satisfied the financial side of the "ledger" test judicially created pursuant K.S.A. 2008 Supp. 59-2136(d).

K.S.A. 2008 Supp. 59-2136 provides, in relevant part:

"(d) In a stepparent adoption, if a mother consents to the adoption of a child who has a presumed father . . . , 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 part 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.*" (Emphasis added.)

Father challenges both the sufficiency of the evidence to support the district court's factual findings and the court's interpretation and application of the law to those facts. Because this case required the factfinder to make findings based upon clear and convincing evidence, we review those factual findings to determine whether, after review of all the evidence, viewed in a light most favorable to the prevailing party, we are convinced that a rational factfinder could have found the required factual determination

to be highly probable. *In re B.D.-Y.*, 286 Kan. 686, 705-06, 187 P.3d 594 (2008) (revising the standard of reviewing when the clear and convincing evidence burden of proof is applied in the district court).

To the extent the appeal requires us to interpret the statute and apply it to the proven facts, the issue is a legal question over which we have unlimited review. *In re Adoption of G.L.V.*, 286 Kan. 1034, 1040, 190 P.3d 245 (2008).

Father's Duties Under The Ledger Test

The standards used in determining whether a "father has failed or refused to assume parental duties" under K.S.A. 2008 Supp. 59-2136(d) have evolved over the years from consideration of ""all the surrounding circumstances""[citation omitted]" to a two-prong ""ledger"" approach. *G.L.V.*, 268 Kan. at 1045-49. This test was first set forth in *In re Adoption of C.R.D.*, 21 Kan. App. 2d 94, 100-01, 897 P.2d 181 (1995) (Lewis, J. concurring), and endorsed by the Kansas Supreme Court in *In re Adoption of K.J.B.*, 265 Kan. 90, 101, 959 P.2d 853 (1998), and *In re Adoption of B.M.W.*, 268 Kan. 871, 881-82, 2 P.3d 159 (2000). Under the test, the court must evaluate whether a natural parent failed to assume *both* the "duty of financial support" of a children and the "duty of a parent to show affection, care, and interest" toward their children. *B.M.W.*, 268 Kan. at 873. Unless the parent has failed on both sides of the "ledger" for the 2 consecutive years

preceding the filing of the adoption petition, the parent's consent is necessary for the adoption. 268 Kan. at 873-74.

Here, Father does not dispute that he had no contact and sent no gifts, cards, or letters to J.R.M. and Z.T.M. at any time during the 2-year period prior to the filing of Stepfather's petition on July 17, 2008, except for three or four letters written in July and August of 2006. Father does not necessarily dispute that his contacts constitute a failure under the "love and affection" side of the ledger. Instead, he asserts only in passing, that there was a restraining order in effect which prohibited him from contacting Mother, Stepfather, or the children.

We found no cases that discuss whether a failure on the love and affection side of the ledger can be excused because of a restraining order issued as a direct result of the threatening or abusive conduct of the restrained parent. Father failed to cite to legal authority supporting such a contention. Failure to adequately brief this issue constitutes a waiver or abandonment of any challenge to this part of the district court's findings. *Cooke v. Gillespie*, 285 Kan. 748, 758, 176 P.3d 144 (2008) (a point incidentally raised is deemed abandoned); *State v. Conley*, 287 Kan. 696, 703, 197 P.3d 837 (2008) (failure to support legal point with pertinent authority is akin to failing to brief issue).

As we stated at the outset, Father's primary argument on appeal is that the district court erred in finding he failed on the "financial side" of the ledger test. He asserts that

his application for social security benefits, which resulted in monthly payments of \$66 per child during the entire 2 years preceding the petition, was sufficient to establish that he assumed his parental duties. He relies heavily on *In re Adoption of K.J.B.* Stepfather argues these payments were "incidental" and should be disregarded.

In *K.J.B.*, 265 Kan. 90, the Kansas Supreme Court addressed whether the receipt of social security payments for the benefit of minor children qualified as a credit against court-ordered child support and whether such benefits established assumption of parental duties under the stepparent adoption statute. There, the natural father was ordered to pay child support of \$254 per month for his two children. In the 2 years preceding the adoption petition, natural father had only incidental contacts or attempts to communicate with his children. However, for those 2 years, mother received social security benefits for both children based on natural father's disability. Apparently, the children's social security benefits at the time of the trial nearly equaled the amount of monthly child support ordered.

Our Supreme Court held that the natural father's consent to the stepparent adoption was required in *K.J.B.* Specifically, the court held that the rebuttable presumption under K.S.A. 59-2636—that failing to provide a "substantial portion" of the court-ordered child support created a presumption of failure to assume parental duties—was lacking in that case because the father should be given credit for the social security benefits for the children against the support he was judicially ordered to pay. Therefore, because father

had provided a substantial portion of the court ordered child support, the presumption did not apply. 265 Kan. at 97-98. The court further provided that because of the social security benefits, natural father had not failed on the financial side of the ledger test. 265 Kan. at 101-02.

What the Supreme Court did not specify in *K.J.B.*, however, was that *any* amount of benefits from SSA would suffice to satisfy a parent's obligation on the financial side of the ledger. Also, the facts in this case do not involve a court-ordered child support amount. Obviously then, the rebuttable presumption under K.S.A. 59-2136 does not arise in this case. There simply was no order in place requiring Father to pay. *K.J.B.* has little applicability to Father's arguments here.

Additionally, none of the cases cited by the parties address how to evaluate a parent's financial contributions to children to determine whether they are "incidental" in the absence of court-ordered child support payments. As previously stated, during the key 2-year period, each child here received \$66 per month in social security benefits.

"Incidental," as used in the statute means "casual, of minor importance, insignificant, and of little consequence." *In re Adoption of McMullen*, 236 Kan. 348, Syl. ¶ 1, 691 P.2d 17 (1984). Although the case of *In re Adoption of R.W.B.*, 27 Kan. App. 2d 549, 7 P.3d 306 (2000), is not directly on point because it involves a child support order, it does provide some guidance in determining whether the payments from SSA for the

children were incidental. In the context of child support payments, the *R.W.B.* court determined that an "amount of \$23.08 per week, or only \$11.54 per child, is totally inadequate for the proper physical, mental, and emotional development of the father's two children." 27 Kan. App. 2d at 555. Here, the payments for the children totaled \$15.23 per week per child. ($\$66 \times 12 \text{ months} / 52 \text{ weeks} = \15.23)

Also, the case of *In re F.A.R.*, 242 Kan. 231, 747 P.2d 145 (1987) provides some guidance in light of the facts here. There, our Supreme Court held that if an incarcerated parent is unable to perform his or her parental duties, "the court must determine whether such parent has pursued the opportunities and options which may be available to carry out such duties to the best of his or her ability." 242 Kan. at 236. When making this decision, the court must consider "all the surrounding circumstances." 242 Kan. at 236. Nonetheless, an incarcerated parent is not relieved of his or her duty to provide financial support. See *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).

We note that Father was incarcerated for almost 22 months of the 2-year period prior to the filing of Stepfather's petition. He was obviously not gainfully employed during this time. He testified, however, that he received his social security payments of \$680 per month every month since 2001. We may properly infer Father continued to receive the benefits while in prison. While Father would presumably not be paying rent,

utilities, or other expenses, he apparently chose to keep all of the benefits for himself.

The record is devoid of any action Father took to provide his children with any additional amounts over their \$66 per month SSA benefit.

As in *R. W.B.* this approximately \$2.18 per day is "totally inadequate for the proper physical, mental, and emotional development" of a child. 27 Kan. App. 2d at 555. When this reality is combined with the fact that Father had minimal expenses of his own during most of this relevant 2-year period, it is easy to conclude that the benefits to the children were incidental.

Under these facts, and considering all of the surrounding circumstances, we agree with the district court that Father utterly failed on both sides of the ledger. He admits to no contact with the children during the 2-year period prior to the filing of Stepfather's petition. Father's financial contributions were wholly inadequate for the proper physical, mental, and emotional development of his children and were, at most, incidental. While incarcerated, he refused to make *any* reasonable attempts to maintain a close relationship with his children or to pursue *any* of the opportunities and options that were available to him to increase his financial contributions and otherwise assume his parental duties. The district court did not err by finding Father's consent to Stepfather's adoption was unnecessary.

Father's Fitness as a Parent and the Best Interests of the Children

Father contends the district court erred in finding him unfit as a parent and also erred in finding that it was in the best interests of the children that the adoption be granted. As to the finding of unfitness, he specifically contends the court did not make detailed findings as to his unfitness and the evidence does not support such a finding. As to the best interests of the children, he specifically contends that Stepfather's criminal record establishes it is not in their best interests to be adopted.

The legislature added the following language to K.S.A. 59-2136(d) in 2006: "The court may consider the best interest of the child and the fitness of the nonconsenting parent in determining whether a stepparent adoption should be granted." Our Supreme Court has interpreted this sentence to authorize a court to deny a stepparent adoption even if the nonconsenting parent has failed to fulfill his or her parental duties on either side of the ledger. At the same time, it held the language did not authorize the court to grant the adoption if the nonconsenting parent had fulfilled parental duties on at least one side of the ledger. See *In re Adoption of G.L.V.*, 286 Kan. at 1042.

The problem with Father's argument here is that this language says a court *may* consider the factors of "best interests" and "fitness." It does not say that it *shall* or *must* consider them. The plain language allows the court discretion to consider them or not consider them. It is difficult then to fathom how the district court could have erred in failing to render detailed findings regarding the two factors when it was not required to

even consider them. It is likewise difficult to fathom how or why a lack of evidence to support either finding should result in reversal of the district court's granting of this adoption. Perhaps it would have been better if the district court had detailed its reasons it found Father unfit. However, since it previously found that Father had not fulfilled his parental duties under both sides of the ledger, we find no error in his failure to do so.

In any event, we conclude that under the evidence before the district court which we have set forth previously in this opinion, we are convinced that a rational factfinder could have found Father to be unfit as a parent and that it was in the best interests of the children to grant the adoption.

As to the "fitness" factor, the record clearly establishes Father repeatedly threatened Mother and Stepfather. He attempted to involve the children in his dispute with Mother by telling them that she "cheated," "was sick," and that she had betrayed them. He admitted using marijuana and alcohol while on parole. He sent very inappropriate gifts to the children containing items associated with illegal drug use.

As to the "best interests" factor, we do not want to minimize Stepfather's criminal record. But we do note that none of the conduct in that record appears to have involved or endangered children. Additionally, he appears to have steady work in running his own business, and appears to have a stable relationship with Mother. More

importantly, based on the undisputed testimony, he appears to have a very good relationship with the children. Father literally has no such relationship.

The district court did not err in determining that Father was unfit and that it was in the best interests of the children to grant the adoption.

Affirmed.