NOT DESIGNATED FOR PUBLICATION

No. 108,175

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Adoption of
BABY R.

MEMORANDUM OPINION

Appeal from Shawnee District Court; FRANK J. YEOMAN, JR., judge. Opinion filed February 8, 2013. Affirmed.

Richard W. Benson, of the Law Office of Richard W. Benson, of Topeka, for appellant.

Austin K. Vincent, of Topeka, for appellee.

Before ATCHESON, P.J., PIERRON, J., and LARSON, S.J.

Per Curiam: Father of Baby R. appeals the district court's granting of an adoption to Mr. and Mrs. Jensen without his consent. He argues the adoption should be set aside due to (1) equitable estoppel, (2) an unconstitutional statute, (3) a defective petition, (4) lack of clear and convincing evidence of unfitness, (5) inconsistent findings regarding unfitness, (6) erroneously admitted evidence of unfitness, (7) erroneously excluded evidence regarding unfitness, (8) lack of notice, and (9) cumulative error. We affirm.

Baby R. was born to 17-year-old Mother on October 18, 2011. The next day, the Jensens filed a petition to adopt Baby R. Their petition stated that they would file either the father's consent to the adoption, or a petition to terminate his parental rights based on failure to support. Mother filed her consent to the adoption that same day. Mother also filed an affidavit stating that (1) Baby R.'s father was either Father or another young man;

(2) she informed Father of her pregnancy "at least 7 months prior to" Baby R.'s birth; (3) she never suggested to Father that Baby R. would not be born; (4) no man supported her before or after Baby R.'s birth; and (5) Father never offered, gave, or attempted to give her any support, nor did she refuse his support, during the 6 months before Baby R.'s birth. The district court awarded temporary custody of Baby R. to the Jensens and ordered that "the consenting parties" be given notice of the adoption hearing.

On October 24, 2011, the Jensens filed a petition to terminate Father's parental rights. Their petition alleged that Father failed without reasonable cause to provide support for Mother after having knowledge of the pregnancy, and, consequently, his consent to the adoption was not required. The district court ordered that if Father's consent was not obtained, he was to be served personally or by certified mail, then by publication if those methods were not possible.

On November 23, 2011, 17-year-old Father, through his father B.W., answered the termination petition and moved to dismiss the adoption petition. His pleading claimed that (1) DNA testing had confirmed his paternity; (2) he supported Mother during the pregnancy "to the best of his ability" by "regularly provid[ing] food and comfort;" (3) he told Mother he wanted to keep, care for, and support Baby R. and would not consent to an adoption; (4) he subsequently received correspondence from the Jensens' attorney asking him to cease contact with Mother because it was causing her stress; and (5) it could not be proven by clear and convincing evidence that he failed to provide support for Mother during the 6 months prior to Baby R.'s birth.

Before trial, the Jensens amended their petition to allege unfitness as an additional ground for terminating Father's parental rights. Father also amended his answer to claim that (1) he worked part-time during the pregnancy earning minimum wage; (2) he "regularly offer[ed] to purchase maternity clothing and provide transportation for" Mother; (3) he asked but was denied the opportunity to participate in Mother's doctor's

appointments; (4) Mother told him he was not Baby R.'s father after he expressed his opposition to an adoption; (5) he was repeatedly told that "nothing was financially needed" and he was unable to force Mother to accept financial support; and (6) the Jensens could not prove by clear and convincing evidence that he was an unfit parent.

After hearing all the evidence at trial, the district court made the following findings relevant to the issue of support:

- Mother told Father about the pregnancy in late February or early March 2011.
- Father told Mother he would support her.
- Father testified that Mother "told him she didn't need anything from him," and "he never provided any financial support" to her.
- One of the reasons Mother put Baby R. up for adoption was that she had not received financial support from Father and she could not rely on him to help raise Baby R.
- Father was aware that Mother's "financial circumstances were particularly difficult during the time of her pregnancy"—she was unemployed and completely dependent on her mother, J.V., who lost her job in April 2011.
- The only material support Father provided to Mother during the pregnancy was one package of cookies and one or two 2-liter bottles of pop.
- Father had a job from May until July 2011 at which he reported earning between $400 and $500 per month, and he secured a new job in August at which he reported earning about $2,900 through December 2011.
- Father made no attempt to give Mother any of his earnings.
- Father chose to attend football practice instead of accepting Mother's invitation to her doctor's appointment in August 2011.
- Father had "few required expenses" before December 4, 2011, when he turned 18 years old and his father made him start paying rent.
- There was no evidence to support Father's claim that "he made numerous offers by text or phone to provide financial and other support to [Mother] but [she] declined all offers."
- Father testified that "it would not have been too much for him to provide $100 a month to [Mother] once he was employed."

The district court also made these findings relevant to the issue of equitable estoppel:

- Mother contacted the Jensens about the adoption in late April 2011, and they agreed to adopt her baby shortly thereafter.
- The Jensens believed that the father did not oppose adoption.
- Father had said that he might consider consenting to an open adoption.
- After Father informed him of the pregnancy in June 2011, B.W. arranged a meeting with Mother and J.V.
- B.W. told Mother and J.V. that Father "would take responsibility for the child" if it was his.
- The Jensens told Father that they were "willing to back away from the adoption . . . if he was serious about having the child and would fulfill his responsibilities to [Mother]."
- Although the Jensens gave him information about paternity testing in early July 2011, Father waited until after Baby R. was born to confirm his paternity.
- Father never doubted his paternity.
- The Jensens resumed their pursuit of the adoption after hearing that Father did not attend Mother's doctor's appointment.
- The Jensens' attorney sent Father a letter in early September 2011 advising him of Mother's "intent to proceed with the adoption and that, because of the stress involved, any contact or communication with [her] should be arranged through the attorney's office."
- Father never attempted to contact Mother through the Jensens' attorney or otherwise.

Finally, the court made findings regarding unfitness that are unnecessary to consider in this appeal.

The district court reached the following conclusion based on its findings:

> "The evidence here clearly supports the contention that the natural father failed, when able to do so and without just excuse, to provide support for the mother of the child during the last six (6) months of her pregnancy with his child. There is no 'reasonable cause' shown for his failure. I have, in reaching that conclusion from this evidence and record, considered that Father was still a high school student. I have also taken into

> account that this father, being still of high school age, was a high school age young man with few resources."

The court also concluded that Father was an unfit parent. Ultimately, the court terminated Father's parental rights and allowed the adoption to proceed without his consent based on his failure to support, unfitness, or both. He timely appeals

First, Father argues that his due process rights were violated because he was not given notice of the adoption proceeding.

"Service of process is for the purpose of notifying a defendant of the claim or charge against him so that he may properly prepare himself to answer it. It is this notice which gives the court jurisdiction to proceed." *Hopkins v. State*, 237 Kan. 601, 605, 702 P.2d 311 (1985). Jurisdictional issues are subject to review at any time. *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 369, 130 P.3d 560 (2006).

Whether a party's due process rights were violated is a question of law over which an appellate court has de novo review. *Hemphill v. Kansas Dept. of Revenue*, 270 Kan. 83, 89, 11 P.3d 1165 (2000). Furthermore, jurisdiction and statutory interpretation are questions of law subject to unlimited review. *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010); *Foster*, 281 Kan. at 369.

Considering the petition for adoption indicated that the Jensens hoped Father would consent to the adoption, the district court rightly ordered that notice be given to "the consenting parties." See K.S.A. 59-2133(b) (notice of hearing on adoption petition must be given to parents or presumed parents). But the Jensens did not follow Kansas law with respect to their petition for termination of parental rights because the docket sheet contains no entry for proof of service. See K.S.A. 2011 Supp. 59-2136(f) (proof of notice to father must be filed with court before termination petition is heard).

In examining the notice requirement in K.S.A. 59-2133, an appellate court's ultimate concern is whether the parent received notice of the adoption hearing. See *In re Adoption of A.S.*, 21 Kan. App. 2d 714, 719, 907 P.2d 913 (1995) ("[W]e are not concerned with the type of notice [mother] received, only that there is evidence in the record that she received actual notice of the hearing and was therefore able to attend the hearing if she chose to do so."). Here, the record shows that Father had actual notice of the adoption and termination petitions: He retained counsel, filed a pleading entitled "Response/Answer to Petition for Termination of Parental Rights of Father and Motion to Dismiss Petition for Adoption," and appeared at every hearing accompanied by his father. Therefore, Father's due process rights were not violated.

Second, instead of arguing that the district court should not have terminated his parental rights based on failure to support, Father argues that equitable estoppel bars the Jensens from claiming failure to support in order to circumvent the need for his consent to the adoption. Simply put, Father claims that the Jensens could not prevent him from supporting Mother during the pregnancy and then claim he failed to support her.

Equitable estoppel is an affirmative defense that must be pled before the district court. K.S.A. 60-208(c). Because Father raised the issue indirectly in his pleadings—by claiming that he was not permitted to attend Mother's doctor's appointments, he repeatedly offered support but it was never accepted, and the Jensens asked him to cease contact with Mother—we will consider the issue.

A party may claim equitable estoppel only when that party reasonably relied upon the other party's actions and would now be prejudiced if the other party were allowed to take a different position. *Owen Lumber Co. v. Chartrand*, 283 Kan. 911, 927, 157 P.3d 1109 (2007). Equitable estoppel "is not available for the protection of one who has suffered loss solely by reason of his own acts or omissions. Equity aids the vigilant and

not those who slumber on their rights." *Rex v. Warner*, 183 Kan. 763, 771-72, 332 P.2d 572 (1958). Here, there is no evidence that anyone prevented Father from providing support to Mother during the pregnancy. In fact, there is evidence that the Jensens backed away from the adoption, giving Father an opportunity to fulfill his parental duties. Because Father "slumbered on his right" to care for his unborn child, equitable estoppel does not bar the Jensens from bypassing the consent requirement by claiming failure to support.

Father also argues that the district court should not have terminated his parental rights based on unfitness. His argument consists of four prongs: (1) the Jensens' adoption petition was defective for failing to give him sufficient notice of their unfitness claim; (2) medical records detailing his suicide attempt should have been excluded; (3) evidence of ex-girlfriend's motive for testifying about his unfitness should have been admitted; (4) the court made inconsistent findings regarding unfitness; and (5) there was not clear and convincing evidence of unfitness.

> "Appellate courts will uphold termination of parental rights if, after reviewing all the evidence in the light most favorable to the prevailing party, they deem the district court's findings of fact to be highly probable, *i.e.*, supported by clear and convincing evidence. Appellate courts do not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine factual questions. [Citation omitted.]" *In re Adoption of Baby Girl P.*, 291 Kan. 424, 430-31, 242 P.3d 1168 (2010).

Under the Kansas Adoption and Relinquishment Act, K.S.A. 59-2111 *et seq.*, consent to an independent adoption can be given by one of the child's parents, if the other's consent is deemed unnecessary under K.S.A. 2011 Supp. 59-2136. K.S.A. 2011 Supp. 59-2129(a)(2). The court can terminate parental rights in the adoption context upon finding, by clear and convincing evidence, that the father "is unfit as a parent" or "after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth." K.S.A. 2011 Supp. 59-

2136(h)(1)(B), (D); see *In re Adoption of Baby Girl S.*, 29 Kan. App. 2d 664, 667, 29 P.3d 466 (2001), *aff'd* 273 Kan. 71, 42 P.3d 287 (2002) ("Support" does not mean total support but "must be of some consequence and reasonable under all of the circumstances.").

Viewing the evidence in the light most favorable to the Jensens, the district court's finding that Father failed to support Mother during the 6 months before Baby R.'s birth is supported by clear and convincing evidence. The record substantiates all of the court's factual findings regarding Father's failure to support. Despite having a job, few expenses, and knowledge of Mother's lack of financial resources, Father never made any actual offers of support to Mother and never attended any of her doctor's appointments. The court properly disregarded the fact that Father provided Mother with cookies and pop during the pregnancy. See K.S.A. 2011 Supp. 59-2136(h)(2)(B) (the court can "disregard incidental visitations, contacts, communications or contributions" in determining whether to terminate parental rights); see also *In re Adoption of Baby H.*, No. 96,220, 2006 WL 3775277, at *7-8 (Kan. App. 2006) (unpublished opinion) (finding failure to support despite fact that father gave mother $300 and attended her doctor's appointments). Therefore, even though the court erroneously declared Father an unfit parent, its finding that he failed to support Mother remains intact.

The district court did not err by granting the adoption of Baby R. without Father's consent.

Third, Father argues that the Woman's Right to Know Act, K.S.A. 65-6701 and K.S.A. 65-6708 to K.S.A. 65-6715 violates the Equal Protection Clause of the United States Constitution and § 1 of the Kansas Constitution Bill or Rights.

An appellate court may consider constitutional grounds for reversal for the first time on appeal where the issue involves a stictly legal question that will be determinative

of the case or where consideration of the issue is necessary to serve the interests of justice or to prevent a denial of fundamental rights. *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008), *cert. denied* 555 U.S. 778 (2009).

> "When a statute's constitutionality is attacked, the statute is presumed constitutional and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe that statute as constitutionally valid, this court has the authority and duty to do so. [Citations omitted.] Appellate courts conduct unlimited review of questions regarding a statute's constitutionality because they are issues of law. [Citation omitted.]" *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012).

Kansas' statutory abortion laws are wholly inapplicable here. The only evidence regarding abortion is Father's testimony that Mother asked him to help her get an abortion and to punch her in the stomach so she would lose the baby. The district court must not have found Father's testimony credible because it did not mention abortion in its factual findings.

Kansas' statutory adoption laws control the outcome of this case. The statute through which Father's parental rights were terminated as an alternative to his consent applies to both mothers and fathers. K.S.A. 2011 Supp. 59-2136(b) ("Insofar as practicable, the provisions of this section applicable to the father also shall apply to the mother and those applicable to the mother also shall apply to the father."). And the only place where the statute distinguishes between the father and the mother (support before birth and abandonment during pregnancy) is where there is a difference in the circumstances—only women can become pregnant and give birth. See *In re Adoption of Baby H.*, 2006 WL 3775277, at *7-8 (rejecting father's challenge to constitutionality of K.S.A. 2011 Supp. 59-2136[h] on equal protection grounds). Therefore, Father's right to equal protection of the laws was never in jeopardy.

Finally, Father argues that cumulative error violated his right to a fair trial but fails to cite specific trial errors. A point raised incidentally in a brief and not argued therein is deemed abandoned. *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 71, 274 P.3d 609 (2012). Therefore, the merits of this issue will not be considered. In any event, there was not cumulative error of the court to cause us to reverse.

Affirmed.