NOT DESIGNATED FOR PUBLICATION

No. 108,358

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF

BABY R, a MINOR MALE

MEMORANDUM OPINION

Appeal from Shawnee District Court; FRANK J. YEOMAN JR., judge. Opinion filed February 15, 2013. Affirmed.

Aaron R. Bailey, of Sloan, Eisenbarth, Glassmann, McEntire & Jarboe, L.L.C., of Topeka, for appellant natural father.

Austin K. Vincent, of Topeka, for appellees adoptive parents.

Before MCANANY, P.J., BUSER and STANDRIDGE, JJ.

Per Curiam: This is a termination of parental rights case. A.E., the biological father (Father) of Baby R., appeals from the district court's order terminating his parental rights. The district court determined that under K.S.A. 2011 Supp. 59-2136(h)(1)(D), Father failed without reasonable cause to support Baby R.'s birthmother, A.R. (Mother), during the 6 months prior to the baby's birth. We affirm the termination of Father's parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father are the unwed, biological parents of Baby R. who was born in September 2011. The parents agree that in late January or early February 2011, shortly

after Baby R. was conceived, Mother informed Father of the pregnancy. Father has never doubted his paternity of Baby R. and genetic testing confirmed that fact.

Mother and Father began a romantic relationship in the fall of 2010. In mid-October 2010, Father, Mother, and J.W. (Mother's daughter from a previous relationship) began living together at the home of Father's mother. About 1 month later, Father, Mother, and J.W. moved into Father's current residence, a house trailer. Father provided some support for Mother and J.W. while they were living together. Mother said that she paid for food using food stamps and other governmental welfare and supported J.W. with child support payments from J.W.'s father and the assistance of her close friends, L.B. and D.B.

Shortly after disclosure of the pregnancy, Mother and Father's relationship deteriorated. Consequently, in February 2011, Mother and J.W. moved from Father's residence, ultimately living for the duration of the pregnancy with L.B. and D.B. Father helped Mother with the moving and allowed her to store some possessions in his house trailer for a few months.

Because Mother did not work while she was pregnant, L.B. and D.B. paid all of her living expenses. At trial, Father admitted that he was aware of Mother's living arrangements throughout her pregnancy, and he knew the location of L.B. and D.B.'s residence because he had driven to their home on several occasions.

Mother continued to communicate with Father through text messages and an occasional in-person conversation. They discussed several options regarding the pregnancy, including parenting the baby, giving Father sole custody, arranging an adoption or having an abortion. In mid-March 2011, Mother decided to pursue adoption and she claimed she told Father he "needed to get a lawyer if he wanted to stop the adoption." On March 24, 2011, Mother sent Father the following message on Facebook:

"'Seriously, [Father] leave me alone. I've already made my decision so stay off my Facebook.'"

Father testified that he never supported the adoption and emphatically expressed his disagreement with Mother's plan. Father explained, "[H]e's my child and I love him and I want to be a man and raise my own child. And I told [Mother] that and she told me I was stupid . . . [b]ecause I'm [supposedly] an unfit parent." While Father did not specifically recall Mother instructing him to obtain a lawyer, he conceded it was possible. Father indicated that he did not obtain legal counsel prior to Baby R.'s birth.

Mother and Father's communications stopped in April 2011, after Father filed a report with the Kansas Department of Social and Rehabilitation Services (SRS) alleging he had witnessed Mother smoking marijuana while pregnant. According to Father, the "safety of [his] unborn child" motivated him to file the report. SRS subsequently sent Mother a letter informing her that a "child abuse/neglect" report had been filed. Mother confronted Father, and during these conversations, Mother testified that Father acknowledged that SRS had advised him that he "needed to support [her] within the last six months of pregnancy."

Subsequently, Mother terminated contact with Father and asked him to leave her alone. Father said he honored Mother's wishes by not contacting her for "a while" because he "didn't want to stress [Mother] out since she was pregnant, and . . . [he] didn't want the stress to affect the baby." Additionally, Father testified that he also stopped contacting Mother because her mother had threatened to pursue a restraining order if he continued to bother Mother.

Mother testified that Father did not leave her alone. He sent numerous text messages to her mother and her friends, and he frequently drove by L.B. and D.B.'s home and her mother's residence. According to Mother, Father's behavior "got to the point

where it kind of scared [her] a little bit," so she verbally threatened Father with a restraining order if he continued to harass her.

When Mother arrived at the hospital to give birth to Baby R., she completed a form prohibiting the hospital from informing Father or his family about her hospitalization and excluding Father from having access to her or the baby. Still, Father soon learned about Baby R.'s birth. The day after the birth, Mother relinquished her parental rights and the prospective adoptive parents took the baby home from the hospital.

Because Father refused to consent to the adoption, Baby R.'s prospective adoptive parents filed a motion to terminate his parental rights. They asserted that under K.S.A. 2011 Supp. 59-2136(h)(1)(D), Father failed, without reasonable cause, to support Mother in the 6 months preceding Baby R.'s birth, and/or under K.S.A. 2011 Supp. 59-2136(h)(1)(C), Father failed to make a reasonable effort to support or communicate with Baby R. after having knowledge of his birth.

The final adoption hearing was held on April 10, 2012. At the hearing, the parties essentially agreed that Father did not provide Mother with any financial support during the 6 months preceding Baby R.'s birth, but they disagreed about whether Father sufficiently supported Mother through other means, and alternatively, whether his actions or omissions were justified by reasonable cause.

At the hearing, Father testified that his financial situation was precarious, because he had trouble paying his bills and "[s]ometimes . . . would have to overlook one or two." According to Father, he received about $15,650, from various sources, during 2011, and at least until mid-summer 2011, he paid "a $200 a month car payment; $270 per month for lot rent; $120 a month to cell phone and insurance; $150 to $200 for [his] home, and

then [$]60 to [$]70 for gas; [$]60 for electric and [$]45 for water[,]" and an additional sum for groceries.

Still, Father acknowledged that he knew of his obligation to support Mother, and he gave conflicting testimony regarding whether poverty prevented him from supporting her. Father admitted that despite his limited financial resources, he "could have given [Mother] some [money]," and he indicated that $50 a month was probably a "realistic" support figure. Father also indicated that he told Mother he would "provide for her" if she continued living with him, and around the time Mother moved out, he offered to provide her with some financial support when he had available funds.

Nevertheless, Father conceded that he never actually provided Mother any financial assistance because Mother "put up a wall, basically[,] [and] [w]ouldn't let [him] attempt to do anything." Father explained, "If I would try to contact her, I was afraid that she wouldn't even listen or she threatened me with restraining orders, abortions, all that type of stuff. All that worried me. I didn't want a restraining order. I sure as heck didn't want an abortion." Moreover, Father testified that Mother told him that she would not "take any money from [him] because [he] would use it against her in court" as a means for disputing the adoption. Still, Father was unable to explain why, in light of this statement, he never attempted to provide Mother with any support, and he admitted that he did not do "everything in [his] power to provide support to [Mother] during the last six months of her pregnancy."

On the other hand, Mother testified that Father only discussed the issue of support with her on one occasion and at that time he offered to provide some support "'when [he] [got] the money.'" Mother denied saying or doing anything to suggest she would not accept support. She also denied telling Father that she did not want any support because he would use it against her in court. Finally, Mother testified that she would have accepted financial support from Father had it been offered.

About 1 month before the birth, Father prepared a space in his home for Baby R. because he was "[e]xcited" and wanted "to be ready." According to Father, he purchased a crib and "some blankets and stuff," and he decorated the space by putting "some little clowns on the wall." Father's mother also purchased baby items.

After considering the evidence, the district court issued an order terminating Father's parental rights. In particular, the court cited K.S.A. 2011 Supp. 59-2136(h)(1)(D), in finding that Father failed, without reasonable cause, to support Mother in the 6 months preceding Baby R.'s birth. The court explained:

> "Because [Father] only made general offers of support, but did not actually tender any support during the statutory 6 month period prior to birth, termination of his parental rights is appropriate pursuant to K.S.A. [2011 Supp.] 59-2136(h)(2). While poverty alone is an insufficient basis for termination, [Father] admits that despite his limited income, he could have provided at least $50 a month to [Mother]. While [Mother] terminated contact with [Father] and threatened him with a restraining order, [Father] had other avenues he could have used to provide support to [Mother], such as through [M.R.], or by mailing support to [L.B. and D.B.'s] residence. Because [Father], having knowledge of [Mother's] pregnancy, failed without reasonable cause to provide support during the 6 months prior to [Baby R.'s] birth, this Court finds by clear and convincing evidence that it is in [Baby R.'s] best interest to terminate [Father's] parental rights."

Although the district court noted that it "appear[e]d that [Father] did make an effort to support and communicate with [Baby R.] after birth," the court determined it was unnecessary to decide whether Father's effort was reasonable, under K.S.A. 2011 Supp. 59-2136(h)(1)(C), because the evidence was sufficient to terminate his parental rights under K.S.A. 2011 Supp. 59-2136(h)(1)(D). Father appeals.

TERMINATION OF PARENTAL RIGHTS FOR FAILURE TO SUPPORT MOTHER DURING THE LAST 6 MONTHS OF PREGNANCY

On appeal, Father contends the district court's termination of his parental rights to Baby R., under K.S.A. 2011 Supp. 59-2136(h)(1)(D), for failing to support Mother during the last 6 months of her pregnancy was not shown by clear and convincing evidence. Alternatively, Father argues that any failure to sufficiently support Mother was justified by reasonable cause, *i.e.*, his poverty and Mother's efforts to thwart his attempts to assist her.

At the outset, we are guided by Kansas law and our standards of review regarding termination of parental rights. K.S.A. 2011 Supp. 59-2136(h)(1)(D) provides that a district court may terminate a natural father's parental rights incident to an adoption if the court determines "the father, 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." The petitioner in an adoption proceeding has the burden of proving that termination is appropriate by clear and convincing evidence, which is an intermediate standard of proof between a preponderance of the evidence and beyond a reasonable doubt. K.S.A. 2011 Supp. 59-2136(h)(1) (findings made under subsection must be based on "clear and convincing evidence"); *In re Adoption of Baby Girl P.*, 291 Kan. 424, 430, 242 P.3d 1168 (2010); *In re B.D.-Y.*, 286 Kan. 686, 691, 187 P.3d 594 (2008). Clear and convincing evidence is evidence "sufficient to establish that the truth of the facts asserted is 'highly probable.'" *In re B.D.-Y.*, 286 Kan. at 696.

"Natural parents who have assumed their parental responsibilities have a fundamental right, protected by the United States Constitution and the Kansas Constitution, to raise their children." *In re Adoption of Baby Girl P.*, 291 Kan. at 430. Accordingly, "'[g]enerally speaking, adoption statutes are strictly construed in favor of maintaining the rights of natural parents in those cases where it is claimed that, by reason of a parent's failure to fulfill parental obligations as prescribed by statute, consent to the

adoption is not required.' [Citation omitted.]" *In re Adoption of B.B.M.*, 290 Kan. 236, 244, 224 P.3d 1168 (2010). Thus, in an action based on K.S.A. 2011 Supp. 59-2136(h)(1)(D), district courts must consider "all of the relevant surrounding circumstances" before terminating a natural father's rights to his child. 290 Kan. at 244-45. When making this determination, however, a district court may "consider and weigh the best interest of the child and may disregard incidental visitations, contacts, communications, or contributions." *In re Adoption of Baby Girl P.*, 291 Kan. at 431; K.S.A. 2011 Supp. 59-2136(h)(2). In this context, "incidental means 'casual, of minor importance, insignificant, and of little consequence.' [Citation omitted.]" 291 Kan. at 434.

When a district court terminates a father's parental rights under K.S.A. 2011 Supp. 59-2136(h)(1), the court's factual findings will be reviewed on appeal to determine if, after reviewing all the evidence in the light most favorable to the prevailing party, the findings were highly probable, *i.e.*, supported by clear and convincing evidence, that the termination was appropriate. K.S.A. 2011 Supp. 59-2136(h)(1); *In re Adoption of B.B.M.*, 290 Kan. at 244. When conducting this analysis, appellate courts do not reweigh conflicting evidence, make determinations regarding witness credibility, or redetermine questions of fact. *In re Adoption of B.B.M.*, 290 Kan. at 244.

We begin our analysis with an uncontroverted fact: Father did not provide any money to Mother during the last 6 months of her pregnancy. He argues, however, that when the surrounding extenuating circumstances are considered, clear and convincing evidence does not support the district court's decision to terminate his parental rights.

First, Father insists that he took sufficient affirmative steps, both before and during the 6-month statutory period, to support Mother and assert his parental rights. Specifically, Father argues that he "provided substantial support to Mother" around the time Baby R. was conceived, and during the relevant 6-month timeframe, he "indirectly" supported Mother by acquiring "numerous items for the baby in anticipation of the birth"

and by allowing Mother to store her belongings, free-of-charge, in his house trailer. On the contrary, Baby R.'s adoptive parents contend that Father failed to provide Mother with support of any consequence even though he knew he had a statutory obligation to do so.

Our statutes do not require a father to provide total support for the mother but a father's duty of support includes "'not only the [common-law] duty of financial support, but also the natural and moral duty of a parent to show affection, care and interest toward his or her child.' [Citation omitted.]" *In re Adoption of M.D.K.*, 30 Kan. App. 2d 1176, 1178, 58 P.3d 745 (2002); K.S.A. 2011 Supp. 59-2136(h). Nevertheless, "support that is incidental or inconsequential in nature is not sufficient. The support must be of some consequence and reasonable under all the circumstances. Mere general offers of support are not sufficient. [Citation omitted.]" *In re M.R.C.*, 42 Kan. App. 2d 772, 777, 217 P.3d 50 (2009).

We are persuaded that Father failed to sufficiently exercise his affirmative duty to financially support Mother. While all of the surrounding circumstances must be considered, any support Father provided Mother more than 6 months prior to the baby's birth is irrelevant because this assistance occurred prior to the statutory timeframe specified in K.S.A. 2011 Supp. 59-2136(h)(1)(D), and it does not really explain or prove his conduct, or lack thereof, during the statutory period. See K.S.A. 2011 Supp. 59-2136(h)(1)(D); *In re Adoption of B.B.M.*, 290 Kan. at 245. Moreover, Father's conduct during the relevant 6 month period, *i.e.*, acquiring undelivered baby items and providing storage space to Mother, under the circumstances, does not qualify as support as set forth in K.S.A. 2011 Supp. 59-2136(h)(1)(D).

With respect to Father's storage of some of Mother's belongings for a few months, there was no description of the quantity of items stored or the estimated monetary value of the storage. In fact, Father's mother, provided the only testimony regarding Father's

storage of Mother's belongings and her testimony was both brief and vague. As a result, it is not apparent that Mother actually benefitted financially from this storage, and whether it qualifies as support of "some consequence" as required by *In re M.R.C.*, 42 Kan. App. 2d at 777; see K.S.A. 2011 Supp. 59-2136(h)(1)(D).

Similarly, the baby items Father acquired also do not qualify as support under K.S.A. 2011 Supp. 59-2136(h)(1)(D) because Father admitted these items were never delivered to Mother for her or the baby's use. As Baby R.'s adoptive parents point out, Father is the only person to reap a benefit from those items because the evidence suggests he acquired them for his own use in anticipation of acquiring custody of Baby R. See *In re Adoption of Baby Girl S.*, 29 Kan. App. 2d 664, 670, 29 P.3d 466 (2001), *aff'd* 273 Kan. 71, 41 P.3d 287 (2002) ("[Mother] received no benefit from the used baby clothing and furniture [Father] solicited because they were not delivered to her. This cannot be considered support, since [Mother] did not reap the benefits.").

Father posits a second, alternative argument. He contends that if he did not sufficiently support Mother, he had reasonable cause for this failure—his poverty and Mother's interference with his attempts to support her. Baby R.'s adoptive parents counter that neither of these excuses justifies Father's failure to support Mother because Father admitted that he had sufficient financial resources to provide some assistance, and while Mother interfered with Father's ability to *contact* her, Mother's actions did not preclude Father from *supporting* her and the baby.

With regard to Father's poverty, he complains that the district court improperly ignored "substantial evidence" of his poor financial condition. In particular, during the pregnancy, he was "living paycheck to paycheck and struggled to pay his monthly bills in a timely fashion." Moreover, Father contends the court's findings regarding his income and expenses during the 6 month period were speculative. Yet, the court's findings

closely reflected the income and expenses that Father submitted in his proposed findings of fact after the hearing.

While poverty alone is an insufficient basis for the termination of parental rights, the district court did not improperly overlook substantial, relevant evidence of Father's financial condition. See *In re Adoption of B.B.M.*, 290 Kan. at 245. Father testified that despite his limited financial resources, he could have provided Mother with some type of monetary assistance or support. When directly asked whether it was his position that he "could not afford during the pregnancy to support [Mother]," Father responded, "No, that's not my position." Moreover, during his deposition, Father testified that by "do[ing] without a few things," he could have provided Mother with *$200 a month*. While Father later recanted this statement, he did not claim financial destitution; instead, he testified that after reconsidering his financial position, $50 a month was a more "realistic" figure. In short, Father's admissions alone constitute clear and convincing evidence in support of the district court's finding that he had sufficient finances to provide consequential support to Mother in the 6 months prior to the baby's birth.

Father attempts to mitigate his own testimony by asserting the district court failed to consider that his estimate of his financial capabilities was inflated. Father asserts, "[he] is very prideful and is obviously embarrassed by his meager wages and the perception that he does not have the financial means to care for his family." For example, near the end of his testimony, Father suggested that due to the humiliation and embarrassment associated with his poverty, he overstated his financial resources. Yet, the district court's conclusion that Father could have afforded to provide Mother at least $50 a month indicates that it found Father's earlier testimony to be more credible and compelling, and it is not proper for this court to reweigh the evidence or question the trier of fact's credibility determinations on appeal. See *In re Adoption of B.B.M.*, 290 Kan. at 244.

In addition to his claim of poverty, Father also asserts there was reasonable cause for him not to support Mother because she interfered with his ability to support her. When "'"a father's reasonable efforts to provide for his child's welfare failed because of interference by the mother, adoption agency, or adoptive parents, the statute should not operate to terminate his parental rights." [Citations omitted.]'" *In re M.R.C.*, 42 Kan. App. 2d at 777. And a mother's refusal of assistance offered by the natural father is a factor in determining whether the father supported the mother. *In re Adoption of M.D.K.*, 30 Kan. App. 2d at 1179-80. A mother's failure, however, to act upon a general offer of assistance by neglecting to inform the father of her specific needs does not amount to interference or a refusal of financial help. 30 Kan. App. 2d at 1180. Even in the most rancorous situations, the natural father must pursue "'the opportunities and options which were available to carry out his duties to the best of his ability. [Citations omitted.]'" 30 Kan. App. 2d at 1179.

We acknowledge that our statutory scheme does not render "the assertion of paternal rights a Herculean task." *In re Adoption of Baby Girl P.*, 291 Kan. at 433. Still, in her concurring opinion in *In re M.D.K.*, Judge Carol A. Beier, now Justice Beier, elaborated on an unwed father's duty to support the prospective mother:

> "An unwed man who learns that his unwed sexual partner is pregnant and intends to [have the baby] has only one way to ensure he can exercise his parental rights after the birth, regardless of whether the mother intends to exercise hers: He must relinquish possession and control of a part of his property or income to the [mother] during the last 6 months of the pregnancy so that she may use the items or money to support herself or prepare for the arrival of the child. He must do this regardless of whether his relationship with the [mother] continues or ends. He must do this regardless of whether the [mother] is willing to have any type of contact with him whatsoever or to submit to his emotional or physical control in any way. . . .
>
> "Even in the most acrimonious of situations, a [father] can fund a bank account in the [mother's] name. He can have property or money delivered to the [mother] by a neutral third party. He can—and must—be as creative as necessary in providing material

> assistance to the [mother] during the pregnancy and, the law thus assumes, to the child once it is born. He must not be deterred by the [mother's] lack of romantic interest in him, even by her outright hostility. If she justifiably or unjustifiably wants him to stay away, he must respect her wishes but be sure that his support does not remain equally distant." 30 Kan. App. 2d at 1182-83.

We find Father's claim that he was thwarted in his attempts to support Mother to be of doubtful merit, notwithstanding Mother's request for no contact. Granted, Father testified that Mother told him that she would not "take any money from [him] because [he] would use it against her in court." But Mother denied making that statement or saying or doing anything that would imply an intention to refuse support. Moreover, no evidence was presented that Mother refused a bona fide offer of support from Father. The district court's factual findings show that it considered Mother's testimony to be more credible and compelling, and as explained above, it is not this court's burden on appellate review to question the trier of fact's credibility determinations. See *In re Adoption of B.B.M.*, 290 Kan. at 244.

Additionally, as Baby R.'s adoptive parents point out, Father failed to take advantage of several opportunities to support Mother. For example, while Father explained that he did not personally bring financial support to L.B. and D.B.'s front door "because they didn't like [him]" and he feared for his safety due to L.B.'s temper, he acknowledged that he "[p]robably" could have "mailed [financial support] there and not had any problems at all." Moreover, Mother's mother testified that Father could have given her any financial support he wished to give to Mother. Finally, Father admitted that he did not do "everything in [his] power to provide support to [Mother] during the last six months of her pregnancy." Father conceded, "I could have done more."

In conclusion, when viewed in the light most favorable to the petitioners, we conclude that clear and convincing evidence supported the district court's decision to terminate Father's parental rights. Father did not provide consequential support to Mother

during the 6 months prior to Baby R.'s birth. We are also convinced there was no reasonable cause for Father to fail in his support responsibilities. Father had sufficient finances to provide some meaningful support to Mother. Mother did not prevent Father from supporting her and there were avenues available for him to provide support.

VIOLATION OF FATHER'S DUE PROCESS RIGHTS

While Father acknowledges that K.S.A. 2011 Supp. 59-2136(h)(1)(D) has previously been declared constitutional, for the first time on appeal, he claims the district court applied K.S.A. 2011 Supp. 59-2136(h)(1)(D) in an unconstitutional manner. See *In re Baby Boy N.*, 19 Kan. App. 2d 574, 585, 874 P.2d 680, *rev. denied* 255 Kan. 1001, *cert. denied* 513 U.S. 1018 (1994) ("As construed by the courts, statutes such as [K.S.A.] 59-2136(h) incorporate the parental preference doctrine by their protection of due process rights and the 'clear and convincing' burden of proof required to terminate the rights of natural parents.").

Specifically, Father asserts that the district court violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution by depriving him of his fundamental liberty interest to "'make decisions regarding the care, custody, and control'" of his child. According to Father, K.S.A. 2011 Supp. 59-2136(h)(1)(D) unconstitutionally permitted the district court to "evaluate direct support" to Mother as "the paramount factor" in determining whether to terminate his parental rights and to "overlook the other actions taken by [him] . . . to assume his parental responsibilities" in a form not specifically articulated in the statute.

At the outset, Father concedes that he did not raise this issue before the district court. This is an important concession because, as a general rule, constitutional grounds for reversal asserted for the first time on appeal are not properly before this court for

review. *State v. Coman*, 294 Kan. 84, 89, 273 P.3d 701 (2012). As a consequence, we question whether Father has properly preserved this issue for appellate review.

Our Supreme Court has recognized three exceptions to this general rule:

> "'(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason.' [Citations omitted.]" *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010).

Father does not brief the issue of whether it is appropriate for this court to apply one of these exceptions. Instead, he asserts that we may properly consider the merits of his argument because the constitutionality of a statute can be addressed for the first time on appeal "'if addressing that issue i[s] necessary to determine the merits of the action or where the issues cannot be intelligently decided without doing so.' [Citation omitted.]"

The exception Father claims has been employed in past appellate court decisions. See *e.g.*, *U.S.D. No. 443 v. Kansas State Board of Education*, 266 Kan. 75, 91, 966 P.2d 68 (1998); *In the Matter of the Adoption of Baby H.*, No. 96,220, 2006 WL 3775277, at *7 (Kan. App. 2006) (unpublished opinion) (In a newborn adoption proceeding, a panel of this court addressed a challenge to the constitutionality of K.S.A. 59-2136, raised for the first time on appeal, because it "appear[e]d that the merits of th[e] case [could not] be intelligently decided without dealing with [this] claim.")

Recent caselaw, however, emphasizes the importance of claiming the applicability of one of the three exceptions quoted above in order to merit appellate review. See *e.g.*, *State v. Astorga*, 295 Kan. 339, 350, 284 P.3d 279 (2012) (The Kansas Supreme Court declined to address, for the first time on appeal, a defendant's challenge to the constitutionality of the statute governing jury instructions because the defendant failed to

prove one of the three exceptions applied.); *State v. Gaudina*, 284 Kan. 354, 372, 160 P.3d 854 (2007) (In a case involving a challenge to the constitutionality of a statute, the Kansas Supreme Court noted, "appellate courts may consider constitutional issues raised for the first time on appeal if the issue falls within the three recognized exceptions."). Accordingly, we doubt that the exception Father cites is sufficient, by itself, to justify appellate review.

Assuming the validity of Father's exception, however, it appears inappropriate for this court to address the merits of his argument for two reasons. First, Father simply mentions this exception in his brief; he does not provide any analysis as to why this exception should apply in this case, *i.e.*, why the issues in this appeal cannot be intelligently decided without addressing the constitutionality of K.S.A. 2011 Supp. 59-2136(h)(1)(D). This amounts to a failure to properly brief the constitutional issue because a point raised incidentally in a brief and not argued therein is deemed waived and abandoned. See *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 71, 274 P.3d 609 (2012).

Second, Father's exception appears to be similar to the ends of justice exception wherein consideration of the claim for the first time is necessary to serve the ends of justice or to prevent the denial of fundamental rights. See *Gomez*, 290 Kan. at 862. Father's argument does not appear to qualify for the ends of justice exception, however, because his analysis is inherently factual.

In *State v. Ortega-Cadelan*, 287 Kan. 157, 160-61, 194 P.3d 1195 (2008), our Supreme Court suggested that inherently factual issues do not fall within the ends of justice exception because in such circumstances, had the alleged error been brought to the attention of the district court, it is highly probable that the necessary facts would have been made a part of the record of the proceeding. Resolution of Father's constitutional challenge appears to involve both factual and legal questions, as the crux of his argument

is that K.S.A. 2011 Supp. 59-2136(h)(1)(D) is unconstitutional whenever the district court fails to consider whether the natural parent showed "a commitment to parenting responsibilities in a form not specifically found in [the statute]." Similar to *Ortega-Cadelan*, had Father raised this issue below, the district court could have entertained evidence and argument regarding whether Father's actions were sufficient to demonstrate such a commitment to parenting responsibilities.

Accordingly, we find that Father's claimed exception is not applicable because Father did not provide the district court with the opportunity to sufficiently develop a factual record in order to permit consideration of the merits of his argument for the first time on appeal.

Affirmed.