

NOT DESIGNATED FOR PUBLICATION

No. 108,980

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Adoption of
S.L.P., a Minor.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; RICHARD T. BALLINGER, judge. Opinion filed July 12, 2013. Affirmed.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant natural father.

Lynnette A. Herrman, of Beall & Mitchell, L.L.C., of Wichita, for appellee stepfather.

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

Per Curiam: The natural father of S.L.P., a 7-year-old minor child at the time of the proceedings below, appeals the district court's granting of a stepparent adoption without his consent. He argues the adoption should be set aside due to a lack of clear and convincing evidence that he failed to assume his parental duties for the 2 years preceding the filing of the adoption petition. We affirm.

S.L.P. was born to C.A.H. (Mother) and R.P. (Father) on June 2, 2004. In January 2008, a child in need of care (CINC) petition was filed. S.L.P. entered state custody on or about January 22, 2008. Mother and Father were divorced on August 11, 2008, but child support was not ordered because S.L.P. was in state custody. C.H. (Stepfather) married Mother on February 26, 2009.

On January 15, 2010, the district court reviewed the CINC case, finding that S.L.P.'s reintegration with Mother had begun in September 2009 and seemed to be going

very well, and Father had stopped contact around that time. Consequently, the court granted Mother sole custody of S.L.P. until further proceedings, if any, in the domestic department. Father had knowledge of this ruling.

On May 22, 2012, Father filed a motion in the divorce case, seeking change of custody, establishment of parenting time, an order against negative statements about Father, and orders requiring notification of S.L.P.'s address, telephone number, and possible change of address. Attached to his motion was a domestic relations affidavit, which stated his monthly income (\$694 in disability), living expenses (\$450), and child support obligations (\$25 for each of his two other children). The affidavit also included Mother's address and telephone number.

On June 1, 2012, Stepfather filed a petition for adoption. Subsequently, Mother filed a consent to the adoption, while Father filed a response to the petition, asserting his parental rights and refusing to consent to the adoption.

On June 5, 2012, the district court held a hearing in the divorce case, finding that Father's last contact with S.L.P. was in March 2010 and appointing a case manager to determine whether "therapeutic parenting time [wa]s feasible or not." Ultimately, the court refused to grant Father parenting time in the absence of a case manager's recommendation.

On October 5, 2012, after hearing all the evidence at trial, the district court made these relevant factual findings:

- Father had collected disability since before the 2 years preceding the filing of the adoption petition.
- Father had worked part-time during the 2 years preceding the filing of the petition.
- Father had made current and past-due child support payments for his oldest two children.

- Father had not been ordered to pay child support for S.L.P.
- Father had not set aside any money for S.L.P.
- During the 2 years preceding the filing of the petition, Father had the financial ability to either set aside money for S.L.P. or pay for her support.
- Some items were purchased for S.L.P. and delivered by Father's parents.

The court also explicitly found Father's testimony not credible, specifically his claims that he did not have S.L.P.'s contact information and that he had set aside money for S.L.P. in his father's bank account.

The district court reached this legal conclusion: Stepfather had proved, by clear and convincing evidence, that Father had failed to assume the duties of a parent for the 2 years preceding the filing of the adoption petition because (1) Father failed to provide financial support for S.L.P.; (2) the items S.L.P. received from Father's parents did not constitute financial support; (3) Father failed to provide emotional support to or visit S.L.P.; (4) any contact between Father and S.L.P., including gifts, was incidental; (5) Father's actions regarding S.L.P. "were always dependent upon other people, not his own overt actions"; and (6) Father's motion for change of custody was considered but found to be "too little too late."

Ultimately, the district court terminated Father's parental rights and allowed the stepparent adoption to proceed without his consent based on his failure to assume his parental duties. Father timely appeals.

On appeal, Father argues the district court erred in terminating his parental rights, asserting there was not clear and convincing evidence supporting this action because Mother had denied Father contact with S.L.P. and Father did not know Mother's contact information. Stepfather counters that the district court's findings and termination of Father's parental rights were supported by clear and convincing evidence.

"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).

A district court may terminate a father's parental rights in the course of a stepparent adoption proceeding if it finds by clear and convincing evidence that "the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition." K.S.A. 2011 Supp. 59-2136(h)(1)(G). The "duties of a parent" include both the duty of financial support and the duty to show affection, care, and interest toward one's child. *In re Adoption of F.A.R.*, 242 Kan. 231, 239, 747 P.2d 145 (1987); see *In re Adoption of J.M.D.*, 293 Kan. 153, 173, 260 P.3d 1196 (2011) (parent must "support his or her child to the extent to which the parent is financially able" and "nurture the child[]'s mental and emotional health"). If a parent failed to assume those duties, a stepparent adoption does not require that parent's consent. *In re Adoption of G.L.V.*, 286 Kan. 1034, 1061, 190 P.3d 245 (2008).

In determining whether a parent failed to assume his or her parental duties, the district court must consider "all surrounding circumstances" and may "disregard incidental visitations, contacts, communications or contributions." *In re Adoption of J.M.D.*, 293 Kan. at 167; K.S.A. 2011 Supp. 59-2136(h)(2)(B). See *In re Adoption of F.A.R.*, 242 Kan. at 236 (considering whether incarcerated father pursued his "available options" to assume his parental duties "to the best of his ability"); *In re Adoption of Steckman*, 228 Kan. 669, 673-74, 620 P.2d 319 (1980) (considering hardship of noncustodial parent whose visitation rights were controlled by former spouse); see also *In re Adoption of McMullen*, 236 Kan. 348, 351, 691 P.2d 17 (1984) (defining "'incidental'" as "'casual; of minor importance; insignificant; [and] of little consequence'").

Viewing the evidence in the light most favorable to Stepfather, the district court's finding that Father had failed to assume his parental duties for the 2 years preceding the filing of the adoption petition is supported by clear and convincing evidence. The record substantiates all of the district court's findings regarding Father's failure to provide financial and emotional support to S.L.P. The court properly disregarded the fact that Father saw S.L.P. fleetingly on two occasions and gave S.L.P. gifts through his family members. See K.S.A. 2011 Supp. 59-2136(h)(2)(B); *In re Adoption of McMullen*, 236 Kan. at 350-51 (disregarding mother's contributions of \$25, two small gifts, and a few greeting cards as incidental).

In sum, despite the fact that he had disposable income from his part-time job and paid child support for his other children, Father neither furnished nor set aside any money for S.L.P.'s support. He knew Mother's contact information but he never requested visitation with S.L.P. While it is relevant that Mother—following the CINC professional's advice—prevented Father from contacting S.L.P. until he had completed his reintegration requirements, see *In re Adoption of Steckman*, 228 Kan. at 673-74, Father failed to pursue his other options—secure agreed-upon visitation (*i.e.*, complete his reintegration requirements), file for court-ordered visitation in a timely fashion, deliver gifts to S.L.P., telephone S.L.P., write letters to S.L.P., or send cards to S.L.P. on special occasions. *Cf. In re Adoption of F.A.R.*, 242 Kan. at 236, 239-40 (incarcerated father assumed parental duties by asking mother to bring children for visit and mailing letters and Christmas cards to children and \$100 to mother, all of which were returned).

Therefore, the district court did not err by granting the stepparent adoption of S.L.P. without Father's consent.

Affirmed.