

NOT DESIGNATED FOR PUBLICATION

No. 109,247

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Application to Adopt

A.M.M.,
d/o/b February 20, 2007, a minor child.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; RICHARD T. BALLINGER, judge. Opinion filed October 4, 2013. Reversed.

Richard A. Samaniego, of counsel at Young, Bogle, McCausland, Wells & Blanchard, P.A., of Wichita, for appellant natural mother.

Megan S. Monsour, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Wichita, for appellee step-mother.

Before MCANANY, P.J., GREEN and HILL, JJ.

Per Curiam: This case involves a contested stepparent adoption of a minor child, A.M.M. The natural mother (Mother) of A.M.M., a 5-year-old minor child when the proceedings started, appeals the trial court's finding that her consent was not necessary under K.S.A. 59-2136(d), because the mother had failed or refused to assume the duties of a parent for the 2 years preceding the filing of the adoption petition.

The record reveals that Mother was not an exemplary mother before the filing of the stepmother's adoption petition. Nevertheless, we determine that under the law of this state, the record lacks substantial competent evidence to support the conclusion that

Mother had failed to assume the duties of a parent for the 2 years preceding the filing of the petition such that the adoption can proceed without her consent. Accordingly, we reverse.

A.M.M. was born to H.M. (Mother) and D.M. (Father) on February 20, 2007. Mother and Father were never married. In February 2008, Mother and Father separated. After separating, Mother and Father shared joint custody of A.M.M. until May 2009.

On May 24, 2009, the police removed A.M.M. from Mother's custody after finding the child at a birthday party with Mother where Mother was intoxicated. The police were called to the party after a fight broke out and Mother's cousin was stabbed. Mother was underage when the incident occurred, and she admitted to being drunk while A.M.M. was in her care that night.

A child in need of care case was opened for A.M.M., and she was placed in Father's care full-time. Mother was allowed visitation with A.M.M., which she took advantage of until October 2009, when she admitted herself into Parallax for treatment of her alcoholism. Mother remained at Parallax for 3 months and then lived in a halfway house until May 2010. Mother saw A.M.M. two to three times per month while she was at Parallax. Mother and Father returned to joint 50-50 custody from May 2010 until July 2010.

On July 11, 2010, Mother was pulled over and arrested for her third DUI, possession of methamphetamine, and assault/battery on a law enforcement officer. A.M.M. was in the car when Mother was pulled over and arrested.

Mother admitted that she was an alcoholic and that she had been drinking since 7th grade. Mother further testified that she received her first DUI when she was 17 and her second DUI in December 2008.

Following Mother's July 2010 arrest, Mother was incarcerated in Reno County jail until November 5, 2010. Mother did not see A.M.M. while she was in jail.

On July 13, 2010, Father moved for sole legal custody of A.M.M. The trial court terminated Mother's visitation rights "subject to her coming back into Court to request parenting time." Since Mother's arrest, Father has had sole residential custody of A.M.M.

After Mother was released from jail, she entered court-ordered intensive inpatient treatment at CKF for 45 days. After completing that treatment, Mother transferred to King's treatment facility, a reintegration facility. While at King's, Mother was able to leave and go home for the weekend. Mother testified that during the 10 months that she was at King's, she saw A.M.M. once a month at her mother's house, her father's house, or her brother's house. Mother further testified that these visits would be from Friday evening until Sunday evening.

Mother left King's in October 2011 and moved in with her brother. Mother saw A.M.M. once a month in October, November, and December 2011. Mother testified that she initiated these visits until December 2011 when she received a text message from stepmother that told Mother to stay away from A.M.M. Father admitted that he and Stepmother had decided to stop any type of visitation with Mother. Father further testified that every visit was initiated by Mother's mother (the grandmother) and never by Mother.

Mother testified that she has been "clean" since she went to jail and that she has not failed a UA since her arrest. Mother testified that she did not provide financial support for A.M.M. while she was in jail but stated that she did provide some support at other times. Mother further testified that no child support order was ever entered in this case. Mother explained that although she did not pay child support she did send Father \$80 for a few months to help cover her cell phone bill which was approximately \$50.

Father was then allowed to use the remaining \$30 for whatever he wanted. Mother admitted that she never told Father to use the extra money for A.M.M.

Father moved to Wichita in January 2011 to live with R.M. (Stepmother) and her four children ages 11, 9, 8, and 5. Father and Stepmother married in July 2011. Father testified that A.M.M. has a great relationship with Stepmother, that she has blossomed, and that she is doing very well in school.

Mother filed a motion to reestablish parenting time in the Reno County case in May 2012. Shortly thereafter, Stepmother filed her petition for adoption on August 3, 2012. Father consented to the adoption, while Mother filed a response to the petition, asserting her parental rights and refusing to consent to the adoption.

On October 25-26, 2012, the trial court held a bench trial on the contested adoption petition. The parties made the following stipulations at trial:

- "[A.M.M.] was born on February 20, 2007.
- The birth parents were never married and were not together as a couple after February 2008.
- Since July 2010, [A.M.M.] has been in the sole residential custody of D.M. [Father].
- Reno County Court entered an Order on July 19, 2010, in Case 09 DM 548 stating, 'that the visitation rights of the Mother shall be terminated subject to her coming back into Court to request parenting time.' This Order was in effect the entire two years preceding the filing of the adoption petition. Respondent filed a Motion requesting parenting time before the two years preceding the filing [of the adoption petition].
- H.M. [Mother] has been convicted of Possession of Methamphetamine, severity level D-4, nonperson felony; Battery on Law Enforcement Officer, Class A, person misdemeanor; Assault on Law Enforcement Officer, Class A, nonperson misdemeanor; Driving Under the Influence of Alcohol (2nd Offense), Class A nonperson misdemeanor. [A.M.M.] was in the car at the time of the incident.
- H.M. [Mother] has been convicted of driving under the influence three times.

- No financial support was provided to D.M. [Father] for [A.M.M.'s] care and support or set aside for her by H.M. [Mother] from August 2010—March 2011 or from July 2011 to the present. H.M. [Mother] has not set up a bank account for the benefit of A.M.M.
- H.M. [Mother] does not have a valid driver's license and is unable to obtain one at this time due to DUI convictions.
- H.M. [Mother] is still currently serving a probation term, voluntarily."

After hearing the evidence and arguments, the trial court held that Mother was unfit and that she failed to financially and emotionally support the child. Thus, the trial court held that Mother failed to assume the parental responsibilities of a parent for the 2 years preceding the filing of the adoption petition and terminated her parental rights.

In the present appeal, Mother contends that the evidence was insufficient for the trial court to hold that she had failed to assume her duties as a parent for 2 years preceding the filing of the stepparent adoption petition under K.S.A. 2010 Supp. 59-2136(d).

K.S.A. 2010 Supp. 59-2136(d) applies to stepparent adoptions. The statute provides that a mother must consent to the adoption "unless such [mother] has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption" In making a determination whether consent is required, "the court may disregard incidental visitations, contacts, communications or contributions." K.S.A. 2010 Supp. 59-2136(d). In this context, the word "incidental" means ""casual, of minor importance, insignificant, and of little consequence."" *In re Adoption of S.J.R.*, 37 Kan. App. 2d 28, 42, 149 P.3d 12 (2006).

If a mother knowingly fails "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 [mother] has failed or refused to assume the duties of a parent." K.S.A. 2010 Supp. 59-2136(d). Moreover, "[t]he 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." K.S.A. 2010 Supp. 59-2136(d).

In addition, our Supreme Court has stated that "the trial court must look at the totality of the circumstances when determining whether a [mother] has failed to assume [her] parental duties under K.S.A. 2010 Supp. 59-2136(d)." *In re Adoption of J.M.D.*, 293 Kan. 153, 167, 260 P.3d 1196 (2011).

On appeal, this court must determine whether substantial evidence supports the trial court's factual finding under K.S.A. 2010 Supp. 59-2136(d). 293 Kan. at 171. In making this determination, an appellate court must review the record in the light most favorable to the prevailing party below. Indeed, an appellate court must give "a great deal of deference to the trial judge's determination, even in those instances where [we] might have decided the case differently." 293 Kan. at 171.

Because the petition for adoption was filed on August 3, 2012, the relevant time period for our review is from August 3, 2010, to August 3, 2012.

Did the Trial Court Err in Finding Mother Unfit under K.S.A. 2010 Supp. 59-2136(d)?

Mother contends that the trial court erred in finding that she was unfit. Mother argues the trial court's finding that she was unfit is not supported by substantial competent evidence. She further maintains that the trial court failed to provide support for its finding of unfitness.

Unfitness carries an inherent meaning that "the parent is unfit now and in all reasonable likelihood will remain in the future." *In re Brooks*, 228 Kan. 541, 550, 618 P.2d 814 (1980).

In *In re J.M.D.*, our Supreme Court held:

"[A] natural parent's unfitness will not obviate the need for his or her consent to a stepparent adoption, unless the district court finds that the unfitness has prevented the natural parent from assuming the duties of a parent for 2 consecutive years next preceding the filing of the petition for adoption." 293 Kan. at 169.

Before a court can say a natural parent's consent to a stepparent adoption is not needed, the court must find that the unfitness has prevented the natural parent from assuming the duties of a parent for 2 consecutive years next preceding the filing of the petition for adoption. This is a condition precedent. To not need Mother's consent in this case, the court must find that unfitness prevented Mother from assuming the duties of a parent for the period of limitation—2 consecutive years next preceding the filing of the adoption petition.

The *In re J.M.D.* court gave an example that although a parent may have frequent visits with his or her children, the parent's unfitness can still prevent the parent from assuming the duties of a parent if the contacts with the children are deemed to be psychologically or emotionally abusive for the children. The court then cited K.S.A. 2010 Supp. 38-2202(d), the statute for defining a child in need of care.

In this case, the trial court made the following finding regarding Mother's unfitness: "In considering the totality of the circumstances and balancing the best interests of the child along with Respondent's criminal past and past decision-making placing her child in danger, the Court finds that Respondent is unfit as to this child."

In making its oral finding, the trial judge stated:

"We have someone who has several DUIs. And I don't say this to keep throwing up and punishing for past bad acts, but I don't need to go into the two main situations that were testified about where the child was involved.

....

"And the Respondent has taken some absolute clear positive steps to change a horrible lifestyle into a positive lifestyle.

....

". . . But unfortunately, your steps have come too late, under the circumstances that I have to also consider. And because of that, I have to look at what happened in the last two to three years instead of what is going to happen in the future."

There are no Kansas cases since *In re J.M.D.* that apply and analyze the unfitness factor under K.S.A. 59-2136(d). Nevertheless, our court has held in other cases that a trial court considering the issue of unfitness in an adoption case may also consider the nonexclusive list of factors for a finding of unfitness found in the Kansas Code for Care of Children. See *In re Adoption of A.P.*, 26 Kan. App. 2d 210, Syl. ¶ 1, 982 P.2d 985, *rev. denied* 268 Kan. 886 (1999); *In re Adoption of L.E.C.*, No. 98,841, 2008 WL 624712 (2008 Kan. App.) (unpublished opinion). Those factors are now contained in the Revised Kansas Code for Care of Children, K.S.A. 2012 Supp. 38-2201, *et seq.*

Specifically, K.S.A. 38-2269(b)(8) provides that a finding of unfitness may be appropriate when "lack of effort on the part of the parent to adjust the parent's circumstances, conduct or conditions to meet the needs of the child." The testimony in this case does not support a finding of unfitness based on a lack of effort. Within the relevant 2-year time period, Mother had stopped drinking, received rehabilitation, and remained in contact with A.M.M. Thus, Mother had clearly put forth an effort to adjust her circumstances and conduct to meet the needs of A.M.M. Moreover, the trial judge continuously noted how Mother had done more than most parents in these types of cases and that she had taken positive steps to better herself; yet, the court found her to be unfit. Moreover, K.S.A. 38-2269(a) provides for a finding of unfitness when something renders

the parent incapable of properly caring for the child and this situation "is unlikely to change in the foreseeable future." Even taken in the light most favorable to the stepmother, the evidence does not support such a finding. As stated earlier, there is plenty of evidence that during the relevant 2-year time period Mother has continued to take positive steps to change herself and her situation and that she is clearly putting forth the effort to better herself. Although Mother's alcoholism rendered her incapable of properly caring for A.M.M. in the past, there was no evidence presented to lead the trial court to believe that Mother was unlikely to change in the foreseeable future especially since she had already changed for the better throughout the 2-year time period.

Based on the record, it appears that the trial court based its finding of unfitness on Mother's two previous incidents (the party where a stabbing occurred and the DUI arrest with possession of methamphetamine) where she placed A.M.M. in danger, both of which were outside the 2-year timeframe. There is no doubt that these two incidents bring into question Mother's fitness and ability to assume her duties as a parent, but the trial court failed to connect these incidents to any evidence regarding A.M.M.'s psychological or emotional health. Moreover, the trial court failed to cite any statutes to support its finding that the mother was unfit. Whereas in *In re J.M.D.*, our Supreme Court relied on the child in need of care statute and also had evidence presented at trial from the children's counselor and treating psychologist that discussed the children's psychological and emotional health. Additionally, the father in *In re J.M.D.* was verbally berating and abusing his children in addition to committing violent acts in front of them. We do not have any of that evidence in our case.

As stated earlier, unfitness means that "the parent is unfit now and in all reasonable likelihood will remain so in the future." *In re Brooks*, 228 Kan. at 550. Although there is no doubt that Mother placed A.M.M. in danger on the two previous incidents, there is no evidence that Mother has continued to mentally or emotionally abuse A.M.M. In fact, the evidence presented by Mother at trial showed A.M.M. smiling

and happy during her visits with Mother. Thus, there is no evidence that Mother's unfit behavior continued throughout the relevant 2-year time period. In fact, the stepmother's counsel, during oral argument, conceded that none of the past improper behavior of Mother occurred during the relevant 2-year time period.

The trial court has failed to show that these past incidents prevented Mother from assuming the duties of a parent for the 2 consecutive years next preceding the filing of the adoption. There is evidence that Mother was no longer drinking or driving during this period. Moreover, there is no evidence of continued criminal behavior of the Mother. While the court commended Mother for taking positive steps in her life, the court found that those steps were not voluntary because Mother was on probation. Nevertheless, the record shows that within the relevant 2-year period, Mother was not drinking, had not failed any UA's, had completed rehabilitation, and promised to be a better parent in the future.

Therefore, substantial competent evidence does not support the trial court's finding of unfitness based on the relevant 2-year time period.

Was there Sufficient Evidence to Support the Trial Court's Finding that Mother Failed to Assume Her Parental Duties for the 2-Year Period Preceding the Adoption Petition?

Next, Mother challenges the sufficiency of the evidence to support the trial court's finding that she failed to assume the duties of a parent for the 2-year period preceding the filing of the stepmother's adoption petition.

"In assessing the sufficiency of the evidence, an appellate court should not reweigh the evidence or pass on the credibility of witnesses. Rather, the appellate court should review the facts of the case in the light most favorable to the prevailing party below to ascertain whether the trial court's decision is properly supported by substantial competent evidence. [Citation omitted.]" *In re J.M.D.*, 293 Kan. at 171.

"[A]ppellate review of factual questions should accord a great deal of deference to the trial judge's determination, even in those instances where the appellate jurists might have decided the case differently." *In re J.M.D.*, 293 Kan. at 171.

The duties of a parent under K.S.A. 59-2136(d) require not only financial support but also love, affection, and interest toward the child. *In re Adoption of K.J.B.*, 265 Kan. 90, Syl. ¶ 3, 959 P.2d 853 (1998). The evidence established that Mother had failed to perform her duties as parent on the financial support, but the evidence did not establish that Mother had failed to perform her duties as parent on the contact and emotional support.

Financial Support

Mother argues that the trial court incorrectly found a rebuttable presumption under K.S.A. 59-2136(d) that Mother "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 2 years next preceding the filing of the petition for adoption." Mother contends that there was no order by judicial decree for support so the rebuttable presumption does not apply in this case. The parties conceded during oral argument that no judicial decree for support had ever been entered against Mother.

Nevertheless, it is unclear whether the trial court found that the rebuttable presumption applied in this case. The trial judge did not mention the rebuttable presumption in the journal entry, but he did during his oral ruling on the record. The trial judge stated the following:

"The first, of course, is the financial support, which is really the only easy issue. And it's clear that factually the respondent has failed to financially support the minor child for the two years preceding, and even before that. Certainly was doing so when they were living together, but I don't even need to go into what all's required by case law

specifically. And I don't even—like I said, this is the easy part, because this clearly was not done. *And so there is that rebuttable, which has not been rebutted in this case.*"

(Emphasis added.)

For a rebuttable presumption to arise, Mother would have had to fail to provide a substantial portion of the *judicially decreed* child support for the 2-year period immediately preceding the filing of the adoption petition. As stated earlier, there was never a judicial decree for child support in this case. Therefore, under a strict and literal reading of K.S.A. 2010 Supp. 59-2136(d), the circumstances necessary to create the statutory rebuttable presumption were simply not present.

Nevertheless, even if a rebuttable presumption was not in effect here, Mother still had a duty to support A.M.M. to the extent to which she was financially able. See *In re J.M.D.*, 293 Kan. at 173 (parents have a duty to support their minor children, regardless of any statute imposing such an obligation).

In this case, Mother stipulated that she did not provide any financial support to Father for A.M.M.'s care and support or set aside any money for A.M.M. from August 2010 through March 2011 or from July 2011 to the present. Mother further stipulated that she had never set up a bank account for the benefit of A.M.M. Mother testified that she paid Father a total of \$150 during the relevant 2-year period.

The evidence supports the trial court's finding that any financial support that was paid was incidental. Therefore, we determine that the trial court's conclusion that Mother failed to meet her financial obligations for the 2-year period at issue is supported by substantial competent evidence.

Contact and Emotional Support

Here, the trial court found that Mother's efforts to contact or communicate with A.M.M. were minor and incidental. Mother testified that she saw A.M.M. roughly once a month for an entire weekend. Mother testified that she got A.M.M. gifts on holidays and bought her new clothes for school 1 year within the 2-year time period. The trial court admitted that Mother had more contact with A.M.M. than usual in termination of parental rights proceedings. The trial judge stated:

"[C]learly there were contacts with the minor child. Everyone agrees to that. And the contacts, the type of contacts that were and the number of contacts are more than usual in a case of this type. . . . And there was some emotional and physical support provided by the respondent to the minor child. Obviously, within the contacts."

In *in re J.M.D.*, our Supreme Court stressed the importance of the parental duty to provide for and nurture a child's mental and emotional health. The court stated that simply because a parent has frequent contact with a child does not mean that parent is assuming a parental duty. For example, "[a] father who verbally berates and abuses his child is not assuming a parental duty, even if that contact is made three times a day." *In re J.M.D.*, 293 Kan. at 173.

In this case, there is no doubt that Mother made numerous parenting mistakes with A.M.M. Mother admits to making those. Nevertheless, as the court correctly noted, Mother has been sober since July 2010 and has never failed a UA since being arrested and has not violated the terms of her probation. The trial court gave Mother credit for taking positive steps in her life but found that those positive steps were too late. The trial judge stated:

"[B]ut I have had an issue of where I've had people with convictions coming into court and promised not to do it again and to become the parent they should be. Very few of

them have taken the positive steps you have. But, unfortunately, your steps have come too late, under circumstances that I have to also consider."

As the trial court readily found, Mother has taken positive steps to better her life. The trial court also found that Mother had contact with A.M.M. and even stated that "the type of contacts that were and the number of contacts are more than usual in a case of this type." Yet, to the trial court, those facts were not enough to overcome the lack of financial support.

On July 19, 2010, the Reno County District Court terminated Mother's visitation rights subject to her coming back to court to request parenting time. Mother admittedly did not file a request for parenting time until May 2012 because Father had been allowing access to A.M.M. until February 2012. Mother testified that she had no contact with A.M.M. since January 2012 because the father and the stepmother refused to allow Mother to see A.M.M. Father admitted in his testimony that he and the stepmother decided to cut off all communication with Mother. The stepmother's counsel, during oral argument, conceded that the father and stepmother had stopped Mother from having contact with A.M.M. in January 2012.

The trial court held the following regarding Mother's contact with A.M.M.:

"The contacts between Respondent [Mother] and the child were centered around the maternal grandmother for reasons that resulted due to voluntary acts and criminal conduct by Respondent. Respondent's criminal history resulted in her being unable to obtain a valid driver's license and her participation in probation, treatment and time in jail restricted her availability to see her child. These facts cannot be used as excuses by Respondent. Further, during the time Respondent spent in inpatient treatment she had two weekends a month available but only saw the child one of the two weekends each month, leaving one weekend a month to herself."

After reviewing the journal entry and the transcript of the trial judge's oral decision, the trial court did not ever mention the fact that the father and the stepmother cut off all contact between Mother and A.M.M.

Our courts have held that evidence indicating the consenting parent interfered with a natural parent's rights to maintain contact with his or her child can be a factor considered in determining whether a parent has failed to assume his or her parental duties. See *In re Adoption of R.J.A.*, No. 100,723, 2009 WL 2030386 (Kan. App. 2009) (unpublished opinion), and *In re Adoption of F.A.R.*, 242 Kan. 231, 747 P.2d 145 (1987) (no error in trial court's finding that certain "actions by the mother constitute interference with the rights of the non-custodial parent to maintain contact with his sons").

Here, there is no evidence in the trial court's ruling that it even considered this evidence. The trial court clearly considered the fact that Mother was in jail and in rehab during the relevant 2 years, but it failed to consider the fact that once Mother was out of jail and rehab and had time to see A.M.M., the father and the stepmother prevented Mother from having contact with A.M.M.

Contact is clearly an important factor to consider when determining whether a parent has failed to assume his or her parental duties. Evidence of contact and emotional support become even more important when there is a lack of financial support, such as in this case. Although Mother failed to support A.M.M. financially during the relevant 2-year time period, Mother attempted to assume her duties as parent but was prevented from doing so by the father and the stepmother.

Thus, under the totality of the circumstances, there was insufficient substantial evidence to support the trial court's ruling that Mother failed to assume her parental duties under K.S.A. 2010 Supp. 59-2136(d).

Reversed.