

## NOT DESIGNATED FOR PUBLICATION

No. 109,820

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF

N.I.E.

## MEMORANDUM OPINION

Appeal from Pratt District Court; FRANCIS E. MEISENHEIMER, judge. Opinion filed November 22, 2013. Affirmed.

*Candace R. Lattin*, of Pratt, for appellant natural father.

*Josh V.C. Nicolay*, of Stull & Beverlin, LLC, of Pratt, for appellee.

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

*Per Curiam*: R.E., the natural father (Father) of N.I.E., appeals the trial court's granting of a stepparent adoption without his consent. Father argues that the adoption should be set aside because of a lack of clear and convincing evidence that he failed to assume his parental duties for the 2 years next preceding the filing of the adoption petition. We disagree. Accordingly, we affirm.

N.I.E. was born to J.C. (Mother) and Father on August 2, 2005. Mother and Father never married but lived together in Pratt County on and off during Mother's pregnancy and the first few years of N.I.E.'s life. The couple, however, did not live together for a substantial period of time while Father was incarcerated. Specifically, Father was incarcerated for the following approximate time periods: December 2005 to October

2007; December 2007 to April 2008; July 2011 to September 2011; and August 2012 to January 2013.

After Father was released from prison in December 2007, his relationship with Mother deteriorated and his regular contact with N.I.E. stopped. Eventually, Mother began a relationship with B.C. Mother married B.C. on May 14, 2011.

On October 12, 2012, B.C. filed a petition for adoption. Mother consented to the adoption, while Father filed a response to the petition, asserting his parental rights and refusing to consent to the adoption. The trial court held a bench trial on the contested adoption petition on February 28, 2013. Both Mother and Father testified at trial. According to Mother, Father had failed to provide financial support for N.I.E. Mother testified that all she had received from Father since N.I.E.'s birth was \$20, a pair of pajamas, and a bottle of bubble bath. Moreover, Mother testified that Father had not visited N.I.E. within the last 5 years. Mother admitted, however, that Father had seen N.I.E. at least once approximately 3 years before trial while N.I.E. was at a gas station with B.C.

Father did not dispute the lack of financial support he had provided for N.I.E. Father also conceded that he saw N.I.E. on only a few occasions between 2008 and 2012. In particular, Father interacted with N.I.E. once at the local Walmart and once at a gas station. Father also testified that he saw N.I.E. during Easter in 2011 and "a couple times" while N.I.E. was at the house of his mother. Father described the interactions as "[j]ust kind of an in and out type thing."

The parties also testified regarding N.I.E.'s paternal grandmother's involvement with N.I.E. Mother and Father agreed that N.I.E.'s paternal grandmother had been in consistent contact with the child since birth. Even after Mother and Father's relationship broke down, N.I.E.'s paternal grandmother continued to spend time with the child.

Indeed, Father admitted that his mother continued to visit with N.I.E. after his relationship with Mother had ended. Nevertheless, Father maintained that his mother prevented him from seeing N.I.E. Father's testimony implied that he could not visit N.I.E. at his mother's house because Mother had threatened to terminate the paternal grandmother's contact with N.I.E. if Father showed up. Mother denied Father's accusation during her testimony. According to Mother, she simply told N.I.E.'s paternal grandmother to tell her if Father visited her while N.I.E. was there.

After hearing the testimony and arguments, the trial court held that Father had failed to financially and emotionally support N.I.E. Consequently, the trial court held that Father failed to assume the parental responsibilities of a parent for the 2 years next preceding the filing of the adoption petition and terminated his parental rights.

Our Supreme Court, in *In re Adoption of Baby Girl P.*, 291 Kan. 424, 430-31, 242 P.3d 1168 (2010), set forth the standard of review and general legal principles relevant to termination of parental rights cases:

"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. K.S.A. 2009 Supp. 59-2136(d) expresses Kansas' public policy that the best interests of children are served by fostering their relationships with their natural parents in cases where the parents have assumed parental duties toward their children. *In re Adoption of G.L.V.*, 286 Kan. 1034, 1057-58, 190 P.3d 245 (2008).

"We strictly construe adoption statutes 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. *Adoption of G.L.V.*, 286 Kan. 1034, Syl. ¶ 6. A natural parent's right to raise his or her child is tempered by the extent to which the parent has assumed his or her parental responsibilities. When a natural father has assumed a sufficient level of parental

responsibility under Kansas law, his parental rights are entitled to constitutional protection. *Adoption of G.L.V.*, 286 Kan. at 1061-62.

"A petitioner in an adoption proceeding under K.S.A. 2009 Supp. 59-2136 has the burden of proving by clear and convincing evidence that termination of parental rights is appropriate. *In re Adoption of B.B.M.*, 290 Kan. 236, 243, 224 P.3d 1168 (2010). A court is to consider all of the relevant surrounding circumstances in an action based on K.S.A. 2009 Supp. 59-2136(h)(1)(D). Poverty alone is an insufficient basis for termination under that provision. *Adoption of B.B.M.*, 290 Kan. at 245.

"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. *Adoption of B.B.M.*, 290 Kan. at 244.

"A determination of whether to terminate parental rights incident to an adoption is subject to K.S.A. 2009 Supp. 59-2136. K.S.A. 2009 Supp. 59-2136(h)(1) allows a district court to terminate parental rights upon finding by clear and convincing evidence any of the following factors:

- '(A) The father abandoned or neglected the child after having knowledge of the child's birth;
- '(B) the father is unfit as a parent or incapable of giving consent;
- '(C) the father has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth;
- '(D) 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;
- '(E) the father abandoned the mother after having knowledge of the pregnancy;
- '(F) the birth of the child was the result of rape of the mother; or
- '(G) 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. 2009 Supp. 59-2136(h)(2) further provides that, when making such a determination, the district court may consider and weigh the best interest of the child and may disregard incidental visitations, contacts, communications, or contributions."

Father's only argument is that the trial court erred when it held that B.C. presented clear and convincing evidence to show that Father had failed to assume his parental duties for the 2-year period next preceding the adoption petition. B.C. disagrees arguing that he produced "[s]ubstantial and competent evidence" to support the trial court's decision.

Here, Father concedes in his brief that he did not provide financial support or love and affection to N.I.E. during the 2 years next preceding the October 12, 2012, adoption petition: "Unfortunately, the record is clear in that [Father] did not provide much financial support or love and affection to the child, N.I.E. during the two years next, prior to the filing of the Petition for Adoption in this case."

Father's concessions are supported by the evidence. First, the evidence indicates that the only financial support that Father provided for N.I.E. was \$20, a pair of pajamas, and a bottle of bubble bath. Moreover, from 2008 to 2012, Father saw N.I.E. only briefly on the following occasions: once at the local Walmart; once at a gas station; once at Easter in 2011; and a couple times at N.I.E.'s paternal grandmother's house. The trial court properly disregarded Father's interaction with N.I.E. from 2008 to 2012 and his financial support as incidental. See K.S.A. 2012 Supp. 59-2136(h)(2)(B); *In re Adoption of McMullen*, 236 Kan. 348, 350-51, 691 P.2d 17 (1984) (disregarding mother's contributions of \$25, two small gifts, and a few greeting cards as incidental). Moreover, Father admitted that he failed to pursue other options to stay in contact with N.I.E., *i.e.*, securing agreed upon visitation or filing for court-ordered visitation.

To combat his failure to assume his parental duties, Father contends that Mother and N.I.E.'s paternal grandmother prevented him from seeing the child. Specifically, Father argues that during the 2-year time period, October 2010 to October 2012, he "repeatedly tried to see N.I.E. or talk to [N.I.E.] when [paternal grandmother] had the child (which she did on a regular weekly basis) and he was again refused or thwarted in his goal by his own mother." According to Father, paternal grandmother "believed that if she gave [Mother's contact] information to [him] or let him see the child when she had the child, her ability to talk with and spend time with her grandchild, N.I.E. would be jeopardized."

Our courts have held that evidence indicating the consenting parent interfered with a natural parent's rights to maintain contact with their child can be considered when determining whether a parent has failed to assume his or her parental duties. See *In re Adoption of F.A.R.*, 242 Kan. 231, 237, 747 P.2d 145 (1987) (no error under 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"); *In re Adoption of R.J.A.*, No. 100,723, 2009 WL 2030386, at \*5 (Kan. App. 2009) (unpublished opinion).

In this case, however, Father's argument that he was prevented from maintaining contact with N.I.E. is not supported by the evidence. Paternal grandmother did not testify at trial, and Mother expressly denied that she or paternal grandmother prevented Father from maintaining contact with N.I.E. Instead, Mother simply told paternal grandmother to tell her if Father went to paternal grandmother's house while N.I.E. was there. As mentioned earlier, "[i]n assessing the sufficiency of the evidence, an appellate court should not reweigh the evidence or pass on the credibility of witnesses." *In re Adoption of J.M.D.*, 293 Kan. 153, 171, 260 P.3d 1196 (2011). Here, the trial court concluded that Mother's version of events was more credible than Father's. The evidence supports the trial court's conclusion.

Finally, to the extent that Father argues that his incarceration between October 2010 and October 2012 prevented him from assuming his parental duties, his argument is misplaced. Here, Father was in jail or prison only for approximately 25% of the applicable 2-year time period. At trial, Father testified that he wrote letters to his mother while incarcerated. Once when writing his mother, Father noted that he "even threw a letter in for [N.I.E.]," which he believes N.I.E. never received. Our Supreme Court has held that a parent can assume his or her parental duties while incarcerated. See *In re F.A.R.*, 242 Kan. at 236, 239-40 (incarcerated father assumed parental duties by asking mother to bring children for visit, by mailing letters and Christmas cards to the children, and by sending \$100 to mother).

We determine that the trial court properly concluded that clear and convincing evidence showed that Father had failed to assume his parental duties in the 2 years next preceding the adoption petition. K.S.A. 2012 Supp. 59-2136(h)(1)(G). Moreover, we determine that the trial court properly concluded that clear and convincing evidence showed that termination of R.E.'s parental rights and the adoption were in the best interests of N.I.E.

Affirmed.