NOT DESIGNATED FOR PUBLICATION

No. 111,348

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In The Matter of the Adoption of
Z.N.E.

MEMORANDUM OPINION

Appeal from Harvey District Court; JOE DICKINSON, judge. Opinion filed August 8, 2014. Affirmed.

Donald R. Snapp, of Newton, for appellant, natural mother

Jay Sizemore, of Sizemore, Burns, & Gillmore, of Newton, for appellee, stepmother

Before LEBEN, P.J., PIERRON and STEGALL, JJ.

Per Curiam: A.D., the natural mother of Z.N.E., appeals the district court's decision ordering the adoption of Z.N.E. by her stepmother, E.E. Specifically, A.D. challenges the court's decision denying her request to set aside her consent to the adoption. The court, after holding an evidentiary hearing on the matter, determined that A.D. had failed to meet her burden of showing that her consent was not freely and voluntarily given. On appeal, A.D. argues the court's decision was erroneous. She contends she did not freely and voluntarily consent to the adoption because her consent was obtained by duress and undue influence and was the result of a mistake and lack of understanding. Nevertheless, the record supports the court's decision to deny A.D.'s request to withdraw her consent. We affirm.

On May 16, 2013, A.D. signed a consent form allowing the adoption of her biological child, Z.N.E., by E.E., who is Z.N.E.'s stepmother. A.D. signed the consent

form at the office of her attorney, Gregory Nye, after discussing the content of the consent form and her rights with Nye.

On May 21, 2013, E.E. filed a petition for adoption of Z.N.E. Along with the petition, E.E. filed consents to the adoption from both A.D. and Z.N.E.'s natural father, L.E. A hearing on the petition was set for June 28, 2013.

On May 29, 2013, Nye received a letter from A.D. stating that she wished to discuss with him the withdrawal of her consent to the adoption. On June 5, 2013, Nye filed a motion to withdraw as A.D.'s counsel, stating that A.D. had expressed dissatisfaction with his representation. The district court granted the motion, appointed new counsel for A.D., and rescheduled the hearing to determine whether her consent had been freely and voluntarily given.

The district court eventually held a hearing on January 16 and 17, 2014, to determine whether A.D. had met her burden under K.S.A. 59-2114(a) of proving by clear and convincing evidence that her consent was not freely and voluntarily given. A.D. testified she had signed the consent form but she believed she had 30 days after signing it to change her mind. According to A.D., she owed more than $5,000 in child support to L.E. at the time she signed the consent form, and she signed it because she felt pressure from owing child support. She believed that if she signed the document, she would be relieved from that pressure for those 30 days in order to decide what to do.

A.D. also testified she signed the consent form because L.E. would not let her see Z.N.E. According to A.D., L.E. has "a more dominant type personality." Before A.D. signed the consent form, she tried to get legal help, but she could not afford it. At the time she signed the consent form, she felt like she had no other options. A.D. stated she never intended to give up parental rights to her daughter.

A.D. stated that she only spoke to Nye on the day she signed the consent form, and her conversation with Nye led her to believe she had a 30-day window within which to withdraw her consent. L.E. drove A.D. to Nye's office and gave her a ride home afterwards. But L.E. was not in Nye's office when she discussed and signed the form. In fact, only Nye and his assistant were in the office at that time. A.D. testified that either she read the consent form before signing it or someone read it to her. She did not remember it well because she "was pretty upset that day." A.D. received a copy of the petition for adoption at the time she signed her consent.

On cross-examination, A.D. could not point to anything in any document she received that stated she had 30 days to withdraw her consent. She thought that maybe Nye told her. She wanted child support to stop, but she did not sign the form in order to stop having to pay child support.

E.E.'s attorney called Angela Gonzales, Nye's legal assistant, to testify at the hearing. Gonzales had notarized A.D.'s consent form. Gonzales testified A.D. had called Nye's office on the day she signed the form to set up the appointment with him.

E.E.'s attorney then called Nye to testify. Nye also recalled that A.D. had called to make the appointment with him. He testified she set up the appointment because her child's father's wife wanted to adopt her child and they needed to get her consent in order to do a stepparent adoption. When he met with A.D., Nye explained to her that he was her attorney, which he believed she understood. She was dressed appropriately and did not appear to be under the influence of alcohol or drugs. Nye recalled he read the form to A.D. and she followed along, reading faster than he was reading aloud. Nye explained to A.D. the document would sever all of her rights in connection with the child and it was not revocable.

Nye testified A.D. told him that she could not have any more children, so Nye urged her to consider that in deciding to give up her rights to the child. He also asked whether she had any parents or grandparents who could help her, and she told him that they were not involved. A.D. asked Nye about a guardianship, and he explained that the difference between that and a stepparent adoption was that a guardianship could be revoked but an adoption could not. A.D. appeared to be appropriately sorrowful, with tears in her eyes when she signed the document.

According to Nye, A.D. understood what she was signing. Ney never told her she could revoke the consent after 30 days. He explained to her that signing the document would be permanent. A.D. did not tell Nye that anyone was pressuring her to sign the consent form, and Nye did not pressure her.

The hearing was continued, and Nye testified again the following day. Nye testified about receiving the letter from A.D. 13 days after his meeting with her. In the letter, A.D. stated she wanted to meet with Nye at the earliest opportunity to discuss the withdrawal of her consent to the adoption. The letter also alleged that L.E. had paid Nye to represent her. Nye called A.D. that day and asked her to come in on June 5, but that was his last contact with her. According to Nye, after he filed his motion to withdraw, A.D. called Gonzales and said she had not meant to upset Nye with the letter and she had had help writing it. Nye testified he had never had a conversation with L.E.

E.E.'s attorney also called L.E. to testify. L.E. testified it was A.D. who brought up the possibility of E.E. adopting Z.N.E. after A.D. missed several of her weekend visits with Z.N.E. because she did not have a stable place for Z.N.E. to stay. L.E. stated he never spoke to Nye, and he did not pressure her to sign the consent to the adoption. L.E. did not tell A.D. she had 30 days to revoke her consent. L.E. stated he never threatened A.D. about child support. L.E. paid for Nye's representation of A.D., but L.E. testified he

did so because he wanted A.D. to be fully aware of her rights when deciding whether to consent to the adoption.

A.D. testified in rebuttal that she wrote the letter to Nye and she did not receive help from anyone in writing it. She clarified that Nye had told her that after signing the document, she had 30 days—or until they went to court—to withdraw her signature from the consent form. She testified she only signed the consent document because of stress and pressure.

At the end of the hearing, the district court announced it was finding A.D. had failed to meet her burden of proof by clear and convincing evidence that her consent was the result of coercion or duress. The court approved E.E.'s adoption of Z.N.E.

On February 10, 2014, the district court filed its journal entry denying A.D.'s motion to withdraw her consent because the court found her consent had been freely and voluntarily given. The district court also journalized its granting of the adoption.

A.D. timely filed a notice of appeal.

On appeal, A.D. first argues that her consent to the adoption was not freely and voluntarily given and the district court, therefore, erred in failing to allow her to withdraw her consent to the adoption.

> "An appellate court's role in reviewing a motion to revoke a consent to adopt is to determine whether the district court's findings of fact and conclusions of law are supported by substantial competent evidence. Substantial evidence possesses both relevance and substance, furnishing an adequate basis of fact from which the legal conclusions may be drawn. [Citation omitted.]" *In re Adoption of Baby Girl T.*, 28 Kan. App. 2d 712, 717, 21 P.3d 581, *rev. denied* 271 Kan. 1036 (2001).

K.S.A. 59-2114(a) states:

> "Consent shall be in writing and shall be acknowledged before a judge of a court of record or before an officer authorized by law to take acknowledgments. . . . A consent is final when executed, unless the consenting party, prior to final decree of adoption, alleges and proves by clear and convincing evidence that the consent was not freely and voluntarily given. The burden of proving the consent was not freely and voluntarily given shall rest with the consenting party."

The clear and convincing evidence burden of proof is more substantial than a mere preponderance of the evidence. Additionally, A.D. had the burden of proof, which the district court found she had not met. This amounts to a negative finding, which cannot be disturbed on appeal absent arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. See *In re Adoption of Baby Girl T.*, 28 Kan. App. 2d at 719-20; *In Re Adoption of N.A.P.*, 23 Kan. App. 2d 257, 267, 930 P.2d 609 (1996), *rev. denied* 261 Kan. 1085 (1997). "'An appellate court cannot nullify a trial judge's disbelief of evidence nor can it determine the persuasiveness of evidence which the trial judge may have believed.'" *Adoption of N.A.P.*, 23 Kan. App. 2d at 267 (quoting *Mohr v. State Bank of Stanley*, 244 Kan. 555, 568, 770 P.2d 466 [1989]).

In *In re Adoption of Irons*, 235 Kan. 540, 547, 684 P.2d 332 (1984), the Kansas Supreme Court stated that when a consent to adoption is properly acknowledged, the acknowledgement serves as prima facie proof that the consent is valid and it was freely and voluntarily given. In order to rebut the presumption of validity there must be a showing of fraud, duress, undue influence, mistake, or lack of understanding. 235 Kan. at 547. The court further stated:

> "Whether a consent to adoption was freely and voluntarily given or was tainted by undue influence necessarily depends on the facts and circumstances of each case. As

such, these issues are to be determined by the trier of fact who has the best opportunity to weigh the evidence and test the credibility of witnesses." 235 Kan. 540, Syl. ¶ 10.

See *In re Adoption of X.J.A.*, 284 Kan. 853, 876, 166 P.3d 396 (2007).

Substantial competent evidence supports the district court's finding that A.D. failed to meet her burden to prove by clear and convincing evidence that her consent was not freely and voluntarily given. Nye properly informed A.D. of her rights. The district court found that A.D.'s allegation that she was informed she had 30 days to withdraw her consent was not credible, and we cannot reweigh the evidence. None of A.D.'s allegations rose to the level of clear and convincing evidence of duress, undue influence, mistake, or lack of understanding. Moreover, A.D. has not shown that the district court's decision was based on an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. We, therefore, affirm the district court's decision.

Affirmed.