NOT DESIGNATED FOR PUBLICATION

No. 110,937

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Adoption of:
R.C.B.

MEMORANDUM OPINION

Appeal from Johnson District Court; MICHAEL P. JOYCE, judge. Opinion filed October 24, 2014. Affirmed.

Marc H. Berry, of Olathe Legal Clinic, LLC, of Olathe, for appellant.

Jill K.B. Kenney, of Olathe, for appellee mother.

Darrell L. Smith, of Olathe, for appellant father.

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

LEBEN, J.: C.B. appeals the district court's decision setting aside her adoption of R.C.B., the natural daughter of A.T. and K.H. The district court found three errors in the adoption proceedings: (1) A.T. didn't receive proper notice of his child's adoption hearing; (2) A.T.'s due-process rights were violated because he wasn't given notice of his child's adoption and thus had no chance to object; and (3) K.H. didn't have advice from an independent attorney before she consented to the adoption. The district court found that each of these errors could independently warrant setting aside R.C.B.'s adoption under K.S.A. 2013 Supp. 60-260(b)(3) because the errors resulted from C.B.'s misrepresentations and misconduct.

C.B. argues that the district court erred because A.T. had been notified of the adoption and had not formed a sufficient relationship with R.C.B. to justify due-process protection and because K.H. did have counsel when she consented to the adoption. But the attempt to provide notice to A.T. didn't comply even with the statutory notice requirement for an *unknown* father (and C.B. and K.H. knew that A.T. might well be the child's father), A.T. had a due-process right to notice because he had taken prompt and affirmative action to be a father to R.C.B, and K.H.'s attorney didn't provide independent advice to her because K.H.'s consultation with the attorney was effectively controlled by C.B. (who, as the adoptive parent, was the adverse party to the birth mother in the adoption). We therefore affirm the district court's judgment, which set aside the adoption.

FACTUAL AND PROCEDURAL BACKGROUND

K.H. had been living with her guardian, C.B., and her guardian's husband, whom she called Mom and Dad, for 7 years when she became pregnant. C.B. had been aware that K.H. was sexually active—primarily with a boy named A.T.—and before learning of K.H.'s pregnancy, C.B. had attempted to file criminal charges against A.T. for having sex with the then-13-year-old K.H.

K.H. claimed that she believed A.T. was the father of the baby, R.C.B., though she admitted to briefly wondering if another boy, H.R., could have been the baby's father. C.B. denied knowing who the father was, but the district court didn't believe her because she'd specifically tried to keep A.T. from learning about K.H.'s pregnancy and had tried to press charges against A.T. after K.H. became pregnant. In fact, a prosecutor had decided not to press criminal charges against A.T. for his relationship with K.H. because K.H. refused to testify against him and C.B. refused to allow the baby to be DNA tested because she did not want A.T. involved in R.C.B's life.

K.H. told A.T. that she was pregnant a few months into her pregnancy. A.T. believed from the beginning that the child was his, and a DNA test later confirmed his belief. He testified to seeing K.H. 20 to 40 times while she was pregnant and to offering her money almost as often to help with the pregnancy and the baby. K.H. refused to take financial assistance because she did not want C.B. to know that she had told A.T. about the baby and was continuing to communicate with him.

K.H. testified that A.T. had continuously attempted to support her and the baby but that she had not let him because she was afraid of what C.B. would do if she found out. K.H. said that A.T. had tried to visit her at the hospital once R.C.B. was born but could not find her. K.H. also testified that A.T. had wanted to be R.C.B.'s father and had offered to accept responsibility for the child.

K.H. testified that C.B. had told her that if she didn't give C.B. the baby, C.B. would have A.T. imprisoned for rape. Because of that, K.H. told A.T. to stay away from R.C.B. and did not tell him about any of the custody hearings or C.B.'s plans to adopt the baby.

C.B. and her husband filed a petition to adopt R.C.B., and a hearing was scheduled for November 7, 2011. In C.B.'s petition, she stated that she didn't know who the father of the child was because K.H. had slept with 9 or 10 men during the time of conception, thereby confusing the issue of paternity. Notice to the unknown fathers of the November 7 hearing was published for 3 weeks in October, but there is no record that a hearing was held on November 7, 2011.

Instead, C.B. filed an amended petition on November 7 seeking to adopt R.C.B. on her own and removing the name of her husband, who had died since they had filed the original petition. A consent form, signed by K.H., accompanied the petition. As a result of the information C.B. provided in the adoption petition about R.C.B.'s paternity, the

court declared the baby's father "unknown" and appointed an attorney, Bruce Hedrick, to represent the unknown potential fathers of R.C.B. Hedrick spoke with C.B. but never with K.H. alone and was unable to find the baby's father. He considered that A.T. might be the father, but Hedrick dismissed that possibility because he was told that A.T. and K.H. weren't involved during the time of conception. The court concluded that proper notice had been given, terminated the father's parental rights, and found that the father's consent wasn't necessary to proceed with the adoption.

Before approving the adoption, however, the court ordered C.B. to arrange for K.H. to meet with an independent attorney to receive legal advice on the consequences of consenting to the adoption. C.B. attended the meeting with K.H.'s attorney, did almost all of the talking, and didn't allow K.H. to speak with the attorney alone. During the meeting, K.H. agreed to allow C.B. to adopt R.C.B.

On March 21, 2012, the adoption court held that all interested parties had been properly notified and that K.H.'s consent was valid. The court concluded that the notification by publication had been sufficient to protect the rights of the unknown fathers and to give the court jurisdiction to approve the adoption. The court approved the adoption, listing the father's name as "unknown."

After the adoption was finalized, K.H. told A.T. that C.B. had adopted the baby. A.T. was upset because he had not known about the proceedings. K.H. said that A.T. would call her and cry about not being able to see the baby.

Once A.T. learned of R.C.B.'s adoption, he contacted Hedrick and told him he was the father. A.T. testified that he had not filed a paternity suit earlier because he feared that if he did, he'd go to jail. He told Hedrick that if he had known about the adoption, he would have objected and would have sought to raise the baby with his family. A.T. then filed a motion to have the adoption set aside on the grounds that he had not been notified

in compliance with Kansas law and that this failure resulted in the violation of his due-process rights.

K.H. filed her own petition to have the adoption set aside once C.B. terminated her guardianship of K.H. and once R.C.B. had been listed on a petition as a potential child in need of care. K.H. told social-service workers who were investigating the care C.B. was providing to R.C.B. that she had never wanted to give R.C.B. up for adoption but that she didn't want to upset her family and that she didn't want A.T. to go to jail. She told a social-service worker that C.B. had told her to lie and say that she had had 9 or 10 sexual partners during the time of R.C.B.'s conception because C.B. wanted the adoption to be "uncontested and approved with ease." K.H. argued that the adoption should be set aside because her consent was invalid—both because it wasn't voluntary and because she had not been provided independent counsel.

The district court set aside the adoption. It held that A.T. was deprived of the required notice of the adoption and that his due-process rights had been violated. In the alternative, it held that the adoption should be set aside because K.H.'s consent was coerced and given without the assistance of independent counsel and was thus invalid. C.B. has appealed to this court.

ANALYSIS

C.B. argues that the district court erred in setting aside her adoption of R.C.B. because she contends that: (1) A.T. was notified in compliance with Kansas law; (2) A.T.'s parental rights were not entitled to due-process protection; and (3) K.H. was provided with counsel independent of C.B. at the times mandated by statute.

I. *A.T. Was Not Properly Notified of R.C.B.'s Adoption.*

C.B. first argues that the district court erred by holding that A.T. wasn't provided proper notice of R.C.B.'s adoption. As an initial matter, the parties disagree over what type of notice A.T. was entitled to under Kansas law—notice by personal service or certified mail provided to known or potential fathers under K.S.A. 2013 Supp. 59-2136(f) or notice by publication provided to unknown fathers under K.S.A. 2013 Supp. 59-2136(c). We need not decide which type of notice A.T. was entitled to because, as the district court held, the court and C.B. failed to comply with even the less-burdensome procedure for notifying unknown fathers.

For the purposes of this analysis, we will assume that A.T. was an "unknown father" under the notification statute. Under K.S.A. 2013 Supp. 59-2136(c), a court must order publication notice of the hearing on the adoption of an unknown father's child. If, after publication, no man appears and asserts his custodial rights, the court can terminate the unknown father's rights without having to determine whether termination is in the child's best interests or whether the father had legitimized his relationship to the child. K.S.A. 2013 Supp. 59-2136(g)-(h). An unknown father, however, is entitled to notification of his child's adoption hearing regardless of whether he participated in the child's life or acknowledged paternity of the child. *Aslin v. Seamon*, 225 Kan. 77, 79, 587 P.2d 875 (1978).

We review the district court's notice finding in two steps. First, we look at the factual findings that support the district court's conclusion to ensure they are supported by substantial evidence. See *Gannon v. State*, 298 Kan. 1107, 1175-76, 319 P.3d 1196 (2014). Substantial evidence is evidence that a reasonable person would find sufficient to support a conclusion. 298 Kan. at 1175. In reviewing the evidence to see whether it supports the district court's findings of fact, we do not reweigh it, examine the credibility of witnesses, or substitute our judgment for that of the district court. *State v. Lewis*, 299

Kan. 828, 835, 326 P.3d 387 (2014). We also disregard any conflicting evidence or other inferences that might be drawn from the evidence. *Gannon*, 298 Kan. at 1175-76. If we find that evidence did support the district court's factual findings, we then look to see whether the district court correctly applied the law without deference to the district court's legal conclusion. 298 Kan. at 1176.

C.B. argues that the district court's conclusion—that A.T. wasn't properly notified—isn't supported by the evidence. She notes that notification was published for 3 weeks in October and contends that this published notice was sufficient to meet the statute's essential requirement that notice of the hearing be published before the hearing. K.S.A. 2013 Supp. 59-2136(c). But as the district court noted, the published notice of the hearing was insufficient in this case because: (1) it notified potential fathers to come forward on a date when no hearing was held; and (2) no later publication corrected the error or directed fathers to appear on the date when parental rights were terminated or the adoption approved.

These facts are supported by the record and sufficient to support the conclusion that A.T. was not notified of his child's adoption hearing. The notice, which was published on October 11, 18, and 25, 2011, stated that the hearing on the adoption petition would be heard by the court on November 7, 2011. Our record shows no hearing held on that date, and the district court, which had full access to its entire file, found the same thing. And our record shows no further attempts to notify the unknown father of R.C.B.'s adoption, other than to notify the attorney representing the unknown fathers—and he did nothing further to provide notice to them.

Because the law requires that unknown fathers be given notice of the *hearing*—of the specific time and date when their child may be adopted—and no notice of a hearing on the date it was actually held was given in this case, we affirm the district court's holding that A.T. wasn't properly notified. See K.S.A. 2013 Supp. 59-2136(c) ("If no

person is identified as the father or a possible father, the court shall order publication notice *of the hearing* in such manner as the court deems appropriate." [Emphasis added.]).

II. *A.T.'s Due-Process Rights Were Violated.*

C.B. next argues that the district court erred by holding that A.T.'s procedural-due-process rights were violated when he was not notified about R.C.B.'s adoption or given a chance to object. She argues that A.T.'s due-process rights could not have been violated because his relationship with R.C.B. does not warrant due-process protection.

Procedural due process protects an individual when an interest in the person's life, liberty, or property is at stake, requiring that the State provide notice and the opportunity to be heard before limiting a fundamental interest. *In re Adoption of A.A.T.*, 287 Kan. 590, 600, 196 P.3d 1180 (2008). Notice and the opportunity to be heard must be provided to the individual whose rights are in jeopardy within a meaningful time and in a meaningful manner to comply with due-process guarantees. *A.A.T.*, 287 Kan. at 600.

The district court held that A.T. had a liberty interest in parenting R.C.B. that was entitled to due-process protection and was violated when he wasn't notified about R.C.B.'s adoption or given the chance to be heard and to object. We exercise unlimited review over a district court's determination that an individual's due-process rights were violated. *In re K.E.*, 294 Kan. 17, 22, 272 P.3d 28 (2012). First, we determine whether the individual has alleged deprivation of a life, liberty, or property interest that is entitled to due-process protection. *In re Adoption of B.J.M.*, 42 Kan. App. 2d 77, 81, 209 P.3d 200 (2009). Second, we determine what process is due, recognizing that procedural due process is flexible according to the demands of a particular situation. 42 Kan. App. 2d at 82.

The parties here don't dispute that *if* A.T. was entitled to due-process protection for his parental relationship with R.C.B., he would be entitled to proper notice and a chance to be heard on the issue of her adoption. Thus, the second element of the due-process inquiry is not at issue here because the parties agree on the process due (and it's clear that A.T., whose location was known, wasn't notified). But the parties disagree on whether A.T. was entitled to due-process protection at all.

Parents have a liberty interest in the companionship, care, custody, and management of their children that is considered fundamental and protected by procedural due-process guarantees. *A.A.T.*, 287 Kan. 590, Syl. ¶ 3. The liberty interest of a parent in his or her child originates from the biological relationship between parent and child, but a biological relationship doesn't guarantee a liberty interest in the parental rights of an unwed father. 287 Kan. 590, Syl. ¶ 3. Rather, the biological interest gives the father a unique opportunity to develop a relationship with the child; if the father takes that opportunity, he has a protected liberty interest in the fatherhood of that child. 287 Kan. at 601 (citing *Lehr v. Robertson*, 463 U.S. 248, 261-62, 103 S. Ct. 2985, 77 L. Ed. 2d 614 [1983]).

Conversely, due-process protection does not attach to the parental rights of an unwed father who doesn't seize the opportunity to create a relationship with his offspring. *A.A.T.*, 287 Kan. 590, Syl. ¶ 3; *Lehr*, 463 U.S. at 261. In order to acquire due-process protection for the parental relationship with his child, an unwed natural father must transform the opportunity interest into a liberty interest by: (1) diligently taking affirmative action to manifest a full commitment to parenting; and (2) doing so during the pregnancy or within a short time of when he learned or should have learned that the mother was pregnant with his child. *A.A.T.*, 287 Kan. 590, Syl. ¶ 4.

Under the first condition—whether the father took diligent affirmative action to show a commitment to parenting—courts measure the father's efforts to make a financial

commitment to the child's upbringing, to legally substantiate his relationship with the child, and to provide other support to the mother during her pregnancy. 297 Kan. 590, Syl. ¶ 5. The second condition—the timeliness of the father's response—merely recognizes the narrow biological window in which a man must act to form a relationship with his child—from its conception to the time the mother places the child up for adoption. 287 Kan. 610-11. If a father who failed to timely assume parental responsibilities could thwart an adoption at any time, the State's legitimate interests in encouraging families to adopt the children of unwed mothers and in the finality of adoptions would be undermined—thus, timeliness of action is required to protect the interests of all the parties to an adoption. 287 Kan. at 611-12.

Because A.T. is an unwed natural father, we must determine whether he promptly acted to establish a parental relationship with R.C.B. so as to entitle his parental relationship to due-process protections. Whether he did so presents a close call in light of the three areas we examine under the first consideration—financial contributions, legal recognition, and other support:

- *Financial Support*: Both before and after R.C.B.'s birth, A.T. offered K.H. money to help with the pregnancy and with expenses for the baby. A.T. can hardly be blamed for the fact that K.H. refused to take the money that he offered, and it should be acknowledged that he continued to offer financial assistance to K.H. despite her refusal to accept it. C.B. points out that A.T. never bought K.H. or the baby anything, but this is partially refuted by A.T.'s testimony—which the district court believed—that K.H. turned down his offers to buy things for K.H. and the baby or to get K.H. things she needed and bring them to her. Under the facts of this case—where A.T. continuously and persistently offered financial support despite the mother's refusal to accept it—the first factor (financial support) favors finding that A.T. promptly established a paternal relationship with R.C.B.

- *Legal Recognition*: A.T. made no efforts to legitimize his relationship with R.C.B. before her adoption was finalized. He believed that R.C.B. was his child, but he did not even consult an attorney about how to assert his parental rights. Though the fact that he believed he would be sent to prison if he did is a sympathetic reason for his failure, C.B. is correct that the second factor weighs against giving A.T. and R.C.B.'s relationship due-process protection.
- *Other Support*: C.B. argues that no evidence shows that A.T. provided any support to K.H. during or after the pregnancy, emotional or otherwise. But evidence contradicts this: A.T. spoke to K.H. frequently through email about the baby, even after the two were no longer dating; he called K.H. on the phone about the baby and expressed his grief over not being part of her life; and he attempted to visit the baby at the hospital when the baby was born. Though the support A.T. provided K.H. was not ideal, it nonetheless shows affirmative effort on A.T.'s part to assist with his child. Thus, the third factor provides support for finding that A.T. seized the opportunity interest he had in parenting R.C.B. so as to justify due-process protections.

In sum, two of the three considerations favor protecting A.T.'s relationship with his child by providing him notice and the opportunity to be heard.

Still, C.B. argues that a Kansas Supreme Court decision—*In re Adoption of A.A.T.*—requires that we decide this issue in her favor. In that case, a father moved to have his child's adoption set aside after he learned that the mother had lied to him about having an abortion and had concealed her pregnancy from him. *A.A.T.*, 287 Kan. at 595. The father didn't argue that he had converted his opportunity to parent into a liberty interest worthy of due-process protection other than to say that if he would have known about the child, he would have offered to support the mother. 287 Kan. at 612. The Kansas Supreme Court held that merely standing by and being willing to provide support

was insufficient to justify disrupting the child's adoption after it was final in light of the fact that the father had not assumed parenting responsibilities. 287 Kan. at 612. It said that to gain due-process protection for a parent-child relationship, an unwed father must assume responsibility and take affirmative action. 287 Kan. at 612.

C.B. claims that A.T. is like the father in *A.A.T.* because he merely offered support and did not take affirmative steps to parent. That argument, however, takes the Kansas Supreme Court's "affirmative action" requirement out of its context. In *A.A.T.*, the father didn't even make any offers of support to the mother during her pregnancy—despite the fact that he suspected she was still pregnant. 287 Kan. at 612. All he did was state, after the pregnancy was done and the adoption final, that he *would have* offered support if he had known. 287 Kan. at 612. Here, A.T. did act and did offer support—both financial and otherwise—during the narrow time frame after the baby's birth and before adoption. Kansas courts have held that the efforts an unwed father must make to establish a relationship with his child do not need to be Herculean to entitle his relationship to due-process protection. *In re Adoption of Baby Girl P.*, 291 Kan. 424, 433, 242 P.3d 1168 (2010); *In re R.L.J.*, No. 109,257, 2013 WL 5507486, at *6-7 (Kan. App. 2013) (unpublished opinion.), *rev. denied* February 18, 2014. Thus, *A.A.T.* does not control the outcome of this case.

A.T.'s acts were sufficient to create a liberty interest in parenting R.C.B. that was entitled to due-process protection. Because A.T. had no notice of R.C.B.'s adoption and wasn't afforded the chance to object, the district court correctly held that A.T.'s due-process rights were violated.

III. *K.H. Could Invalidate Her Consent Because She Did Not Have Independent Counsel During Its Execution.*

C.B.'s final argument is that the district court erred by setting aside the adoption based on two statutory grounds related to K.H.'s consent: (1) that it wasn't voluntarily and freely given; and (2) that she lacked the consultation with independent legal counsel that minors must have before consenting to an adoption.

C.B. first argues that K.H.'s claim that her consent wasn't freely and voluntarily given under K.S.A. 59-2114(a) is time barred because the statute requires parents to challenge the validity of their consent "prior to the final decree of adoption." C.B. is correct that once an adoption is final, K.S.A. 59-2114(a) is not an independent basis for setting aside an adoption. But a party may still seek to set aside the adoption under a general civil statute, K.S.A. 2013 Supp. 60-260. See *In re Adoption of J.H.G.*, 254 Kan. 780, Syl. ¶ 7, 869 P.2d 640 (1994). Here, K.S.A. 2013 Supp. 60-260(b)(3) allows the adoption judgment to be set aside based on fraud, misrepresentation, or misconduct by an opposing party if those facts are shown to the court and the motion to set aside the judgment is made within "a reasonable time" and no more than 1 year after the adoption became final. See K.S.A. 2013 Supp. 60-260(c); *In re Marriage of Beardslee*, 22 Kan. App. 2d 787, Syl. ¶ 2, 922 P.2d 1128, *rev. denied* 260 Kan. 993 (1996).

The adoption decree was entered March 22, 2012, and K.H. moved to set aside the adoption about 8 months later, on November 20, 2012. A.T. moved to set aside the adoption on February 28, 2013. Both motions were within the 1-year time limit established by K.S.A. 2013 Supp. 60-260(c), and C.B. has not made any argument in this appeal that these motions were not filed within a reasonable time under that statute.

The district court did not purport to set aside the adoption under K.S.A. 59-2114(a). Rather, it explicitly said that it based its decision to set aside the adoption (on all three issues) on K.S.A. 2013 Supp. 60-260.

K.H. has separately argued that her consent was *invalid* because she wasn't provided independent legal counsel before the adoption was final. Especially when dealing with the consent of a minor, as K.H. was at the time she signed the consent in this case, the lack of a valid consent is significant. K.H. did not turn 18 years old until May 5, 2013. A minor's consent to an adoption is valid only if statutory requirements are met.

K.S.A. 59-2115 governs those requirements. The statute is phrased in the negative, providing that consent isn't invalid just because the parent is still a minor, but the statute conditions the validity of the consent upon the availability of "independent legal counsel":

> "Minority of a parent shall not invalidate a parent's consent or relinquishment, except that *a minor parent shall have the advice of independent legal counsel as to the consequences of the consent or relinquishment prior to its execution.* The attorney providing independent legal advice to the minor parent shall be present at the execution of consent or relinquishment." (Emphasis added.)

Under this provision, then, a minor must have independent counsel to advise her about the consequences of consenting to the adoption and during the execution of the consent. See *In re Adoption of N.A.P.*, 23 Kan. App. 2d 257, Syl. ¶ 3, 930 P.2d 609 (1996), *rev. denied* 261 Kan. 1085 (1997). The statute is intended to protect minors from consenting to an adoption without knowledge of the consequences and independent legal advice. 23 Kan. App. 2d at 264-65.

We review the district court's finding that K.H. lacked appropriate independent legal counsel for substantial evidence. *In re N.A.P.*, 23 Kan. App. 2d at 265. Substantial

evidence is legal and relevant evidence that a reasonable person would find sufficient to support a conclusion. *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009); *In re Marriage of Johnson*, No. 106,037, 2012 WL 1650168, at *2 (Kan. App. 2012) (unpublished decision). In reviewing a district court's findings for substantial evidence, we look at the evidence in the light most favorable to the district court's decision, and we do not reweigh the evidence, substitute our evaluation of the evidence for that of the district court, or pass upon the credibility of the witnesses. *In re J.J.G.*, 32 Kan. App. 2d 448, 454, 83 P.3d 1264 (2004).

Here, substantial evidence supports the district court's finding that K.H. was not provided with independent legal counsel before consenting to the adoption of R.C.B. As the district court noted, C.B.'s presence during K.H.'s meeting with her "independent counsel" rendered counsel's advice useless because it prevented K.H. from expressing her own opinion or asking questions about the adoption for fear of repercussions from C.B.: "[K.H.] would never have been able to obtain meaningful legal advice regarding the adoption in [C.B.'s] presence. The evidence showed that [K.H.] would have done and said anything because of [C.B.'s] coercive tactics and for [C.B.'s] approval and continued support." Specifically, K.H. testified that she did not speak to this attorney alone and that she mainly just said "yes" in response to his questions.

C.B. argues, however, that K.H. was provided independent counsel because she had counsel before and during the process of giving consent and because K.H. admitted that the attorney had told her the consequences of consenting to R.C.B.'s adoption. C.B. is correct that K.H. had counsel who advised her at the appropriate times, but C.B.'s argument ignores the statute's plain language. The statute requires more than a discussion regarding the minor's rights—something that any party's attorney could theoretically provide. Instead it requires that the minor have *independent* counsel. Independent in this context means "not subject to control by others" (Webster's New Collegiate Dictionary

584 [1973]) or "[f]ree from the influence, guidance, or control of another" (American Heritage Dictionary 892 [5th ed., 2010]).

Here, K.H.'s meeting with an attorney about her consent to the adoption was not controlled by K.H. but by the *adverse party*, C.B. In an adoption proceeding, the mother's consent is for the benefit of the adoptive parents, who are the adverse parties. See *In re Adoption of A.A.T.*, 287 Kan. at 628 (noting that natural father and mother are not adverse to one another in adoption proceeding for their child but that the adverse party is the adoptive parents). Another indicator that K.H. lacked truly independent advice is that the attorney-client privilege, which allows a party to fully confide in an attorney for the purpose of seeking legal advice, would not have applied to K.H.'s meeting with this attorney. That's because the presence of a third party—here the *adverse* party—operates to waive the attorney-client privilege, making the client's statements to the attorney confidential. See *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 375-76, 22 P.3d 124 (2001) (noting that disclosing confidential information otherwise subject to attorney-client privilege to a third party waives the privilege); *Fisher v. Mr. Harold's Hair Lab, Inc.*, 215 Kan. 515, Syl. ¶ 1, 527 P.2d 1026 (1974) (holding that communications made to attorney in presence of third party are not privileged from disclosure); *Cherryvale Grain Co. v. First State Bank of Edna*, 25 Kan. App. 2d 825, 833, 971 P.2d 1204 (1999) (holding that attorney-client privilege did not apply to person's conversation with attorney while his sibling was present).

C.B. argues that the *N.A.P.* case—where an adoption was upheld—should control the outcome here. In *N.A.P.*, the minor parents were represented by the same attorney as the adoptive parents before the day the adoption was finalized. But the birth parents in *N.A.P.* had a one-on-one meeting with an independent attorney before the adoption was finalized and during the execution of their consent. *In re N.A.P.*, 23 Kan. App. 2d at 259. By contrast, K.H. never met with anyone without C.B. present.

The district court's conclusion that K.H. never had independent counsel is supported by substantial evidence. On the facts that we have described here, the district court's legal conclusion is also sound: K.H.'s consent was invalid because she did not have independent counsel.

IV. *The District Court Didn't Abuse Its Discretion When It Set Aside R.C.B.'s Adoption Under K.S.A. 2013 Supp. 60-260(b)(3) Because of C.B.'s Misconduct, Misrepresentations, and Fraud.*

Finally, we must consider whether—based on these errors—the adoption itself may be set aside. The district court held that because of these three errors (the failure to give proper notice to A.T., the violation of A.T.'s due-process rights, and the lack of valid consent from K.H.), the adoption could be set aside under K.S.A. 2013 Supp. 60-260(b)(3), a civil statute that allows a court to provide relief from a judgment if the judgment resulted from the fraud, misconduct, or misrepresentations of one of the parties. The party seeking relief from the order must be adverse to the party who committed the fraud, misconduct, or who made the misrepresentations. K.S.A. 2013 Supp. 60-260(b)(3). In an adoption proceeding, as we have already noted, the natural parents are adverse to the adoptive parents. *A.A.T.*, 287 Kan. at 628.

We review a district court's decision to set aside an adoption decree under K.S.A. 2013 Supp. 60-260(b)(3) for an abuse of discretion. *In re Marriage of Reinhardt*, 38 Kan. App. 2d 60, 62, 161 P.3d 235 (2007). A district court abuses its discretion when it bases its decision on an error of fact or law or when its decision is so arbitrary or capricious that no reasonable person could agree with it. *State v. Laurel*, 299 Kan. 668, 676, 325 P.3d 1154, 1160 (2014). If reasonable minds could disagree about the propriety of the district court's decision and there's no mistake of fact or law, then this court must affirm the decision. *State v. Florentin*, 297 Kan. 594, 602, 303 P.3d 263 (2013).

Substantial evidence supports the district court's determination that C.B.'s misconduct, misrepresentations, or fraud resulted in the errors that led to the approval of R.C.B.'s adoption. For instance, evidence demonstrated that C.B. knew or strongly suspected that A.T. was R.C.B.'s father and had gone so far as to seek to have criminal charges brought against him for statutory rape. Yet while C.B. told the police she didn't want A.T. involved in the baby's life, she did not disclose to the court or the attorney for unknown fathers that A.T. was the potential father. Further, the district court—which is in the best position to determine a witness's credibility—believed K.H. when she testified that C.B. had told her to lie to everyone about the baby's father and to say it could have been one of 9 or 10 men because C.B. wanted an uncontested adoption.

Thus, C.B.'s misrepresentations about R.C.B.'s paternity led directly to the insufficient notice provided to A.T., which in turn resulted in the deprivation of his due-process protections. We therefore find no abuse of discretion: A reasonable person could conclude that the adoption should be set aside because C.B. acted in bad faith and intentionally misled the court to prevent A.T. from exercising his parental rights.

Likewise, substantial evidence supported finding that K.H.'s consent was invalid because of C.B.'s misconduct. K.H. testified that she felt pressured into consenting to R.C.B.'s adoption because she believed that if she didn't, A.T. would go to jail and C.B.—her guardian and source of support—would be mad at her. The district court believed K.H.'s testimony that C.B. coerced her into consenting by threatening A.T.

In light of these circumstances, the district court did not abuse its discretion in setting aside R.C.B.'s adoption on the grounds that the adoption was procured by the misconduct, misrepresentation, or fraud of C.B. We affirm the district court's judgment.