

## NOT DESIGNATED FOR PUBLICATION

No. 112,702

## IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Application of CURTIS N.,  
to Adopt K.H.D. and N.T.D., Minor Children.

## MEMORANDUM OPINION

Appeal from Pratt District Court; FRANCIS E. MEISENHEIMER, judge. Opinion filed April 24, 2015. Affirmed.

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

*Janice J. Jorns*, of Hanson, Jorns & Beverlin, LLC, of Pratt, for appellee stepfather.

Before GREEN, P.J., ARNOLD-BURGER, J., and BURGESS, S.J.

*Per Curiam*: Under Kansas law a father's consent is not required in a stepparent adoption if "such father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption." K.S.A. 2014 Supp. 59-2136(d). After Crista N. (Mother) and Daryl D. (Father) divorced, Mother moved their two children to Pratt, Kansas, and married Curtis N. (Stepfather). About 8 years later, Stepfather filed a petition to adopt the two children. Father objected to the adoption, but the district court determined after a hearing that Father's consent was not required because he failed to assume the duties of a parent in the 2 years before Stepfather filed the petition. Because we find that there was substantial competent evidence to support the district court's conclusion, we affirm.

### FACTUAL AND PROCEDURAL HISTORY

Mother and Father are the biological parents of two children: K.H.D and N.T.D. In April 2006, Mother and Father divorced in Calvert County, Maryland. Shortly after the divorce, Mother moved to Kansas, where she married Stepfather. In February 2014, Stepfather petitioned the district court to adopt K.H.D. and N.T.D., and when Father objected to the stepparent adoption, the district court held an evidentiary hearing on the matter. Stepfather, Mother, and Father all testified. A summary of their testimony follows.

With the exception of 2 weeks when they resided with Stepfather's parents, Stepfather and Mother have lived together in Pratt, Kansas and provided financial support for K.H.D. and N.T.D. since marrying in 2006. Although the district court in Maryland ordered Father to pay child support, his payments were "[i]nconsistent" and stopped entirely in January 2012.

Mother explained that prior to moving to Kansas in October 2006, she provided Father with the required 45-day written notice. Father never objected to the move with the Maryland court. Father claimed he did not receive the notice in the mail until 90 days after Mother had already moved, although he had no proof of the late delivery nor any explanation for it. Since the divorce, Father never petitioned the Maryland court to enforce his visitation rights.

Mother also testified that although she knew Father moved around some after the divorce, she did not know his permanent address. She received notice of his places of employment, but only through the child support payment center. However, she also admitted that she knew how to contact Father's family but chose not to attempt contact through them to avoid giving the children false hope about seeing Father. Father testified that he believed Mother knew his whereabouts at all times. Although he admitted that he

had not provided Mother his most recent address. Father testified that his attempts over the years to contact Mother or her family from both his and others' phones failed.

With regards to any notice of Father's whereabouts, Stepfather's attorney proffered that Stepfather attempted to provide Father notice of the adoption petition at both his Phoenix address (which was the last address that Mother had) and at Father's parents' home. When notice failed to reach Father that way, Stepfather's attorney sent notice to Father through his employer using an address that she discovered on the internet.

Mother testified that other than child support payments, Father provided no financial support for K.H.D. and N.T.D. Father testified that he had "been laid off and not had proper income, or enough income to support the child support," and he "didn't want to make a minimum amount of payment and then get behind," especially as he "just didn't feel like [he] had enough money to send in." He also acknowledged that aside from a few times, he never submitted voluntary payments. Father provided a copy of his check, showing that he earned only 9 dollars an hour at his current job at Gold's Gym.

Regarding Father's relationship with the children, there was no dispute that the last time Father saw K.H.D. and N.T.D. was in October 2007 when Father picked up the children in Pratt for trick-or-treating and to spend the night at his hotel room before bringing them home the next morning.

There was a significant dispute regarding how much contact Father had with the children since the October 2007 visit. According to Mother, Father never corresponded with the children, called them, or personally sent them birthday gifts or cards. Instead, Father's family would send cards with Father's name on them. Although the children visited Father's parents in their home, Father did not attend that visit.

Contrary to Mother's testimony, Father stated that he sent the children cards and letters himself but never received a response. He also testified that he spoke to the children on the phone in August 2013 and on their respective birthdays. He admitted that he had no proof of sending the children letters at their home in Pratt. He also had no proof that he called the children on their birthdays as he "used other family members' phones to try and get in contact because [Mother] wasn't responding to [his phone]." Father indicated that between January 2012 and January 2014, he sent the children gifts for their birthdays and Christmas. However, Father could not describe K.H.D.'s birthday gifts in any detail, and when asked about N.T.D.'s birthday gifts, he acknowledged that the gifts were collectively from himself, his parents, and his sister. When pressed, he also could not recall N.T.D.'s birthday gifts and admitted that his parents sent the gifts on his behalf. But Father did provide a phone record that showed he called Mother's cell phone on Thanksgiving in November 2013. Mother could not remember Father calling.

Mother testified that although she initially wanted Father to maintain a relationship with the children after the divorce, the connection broke down as she lost contact with him and "he discontinued trying to get a hold [*sic*] of" her and the children. She indicated that she never denied any requests from Father to visit the children. Contrary to Father's assertion, she insisted she never required Father to travel all the way to Kansas and never refused to meet him halfway. Father could not remember exactly when Mother said these things, but he believed that she said it "one or two times" a few years before the hearing. On one occasion, Mother admitted bringing the children to Maryland to visit her relatives without notifying Father.

Mother testified that Father "didn't show any desire to stay updated or care to stay in contact." However, Mother emphasized that she "had no problem with the children seeing him" either in Kansas or elsewhere. She also candidly admitted that, in terms of keeping the children in contact with Father, "[t]he effort [she] put forth was the same that he did." Father testified that although he did not see the children often after the move, it

was because he "didn't get any response" when attempting to contact Mother, and "it seemed to [him] like she was trying to keep them away from [him]." However, he also acknowledged that Mother never told him that outright.

Based on this testimony, Stepfather argued that Father did not need to consent to the adoption because he failed to assume the duties of a parent for the 2 years prior to Stepfather filing of the petition to adopt. In terms of financial support, Stepfather pointed out Father's failure to pay child support and to provide the children anything other than incidental gifts of clothes—purchased jointly with his parents—since January 2012. Similarly, Stepfather argued that Father's absence from the children's lives since 2007 constituted a failure to provide children with love and affection, especially as the only phone call Father could prove making occurred in November 2013 and lasted for only 2 minutes according to telephone records. As such, Stepfather asked the district court to allow him to adopt K.H.D. and N.T.D. Father, in contrast, argued that his failure to provide financial support arose solely out of an inability to pay. Father also contended that Mother both hampered his efforts to contact the children and failed to contact other members of his family to help facilitate a relationship between him and the children. As such, Father argued that Stepfather failed to demonstrate that Father did not need to consent.

Ultimately, the district court allowed Stepfather to adopt the children. The district court determined that although Father was unemployed or underemployed for some of the time since the divorce—and, indeed, for some of the time since January 2012—he still "provided zero financial support" even after starting his job at Gold's Gym. The district court also noted that Father never attempted to lessen his child support obligation through court proceedings. Regarding his contact with the children, the district court found that Father had not seen the children since the Halloween visit in 2007 and that although he claimed to have signed some of the cards to the children and to have provided birthday gifts, those contacts were "incidental at best." Despite Father's testimony that Mother

failed to facilitate contact between them, the district court determined that the record was completely devoid of Father offering to visit the children at home or transport the children to his home but being refused by Mother. The district court recognized the dispute between the parties as to whether Father had called and spoken to the children on the phone but again called those contacts "incidental at best." And although the district court noted that Mother "did not enable [contact] or did not go out of her way to run [Father] down to try to schedule visitation," the district court found no effort by Father to establish himself in the children's lives—and therefore, no real attempt by Mother to thwart Father's efforts. Accordingly, the district court determined that Father did not need to consent to the stepparent adoption. Moreover, the district court added that it was in K.H.D. and N.T.D.'s best interests "to have two consistent, supportive parents."

The district court then entered a decree of adoption, finalizing Stepfather's adoption of the children and changing the children's last names. Father timely appealed this order.

#### ANALYSIS

On appeal, Father argues that the district court erred in determining that he failed to assume the duties of a parent for the 2 years before Stepfather filed the petition to adopt. Father contends that he only failed to pay child support due to his lack of financial means and that Mother thwarted all his other attempts to contact the children. Father also argues that the children's best interests are not served by allowing Stepfather to adopt them.

Under our Kansas Adoption and Relinquishment Act, Stepfather is permitted to adopt Mother's children provided that both of the children's living parents—that is, Father and Mother—consent to the adoption. K.S.A. 59-2112(d); K.S.A. 2014 Supp. 59-2129(a)(1), (c). However, the district court in this case determined that Father's consent

was unnecessary and therefore granted Stepfather's adoption over Father's objection. This exception to the consent rule is permitted by statute. K.S.A. 2014 Supp. 59-2129(a)(2). Specifically, the statute at issue provides that a father's consent is not required in a stepparent adoption if "such father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption." K.S.A. 2014 Supp. 59-2136(d). The statute continues:

"In determining whether a father's consent is required . . . the court may disregard incidental visitations, contacts, communications or contributions. . . . The 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. 2014 Supp. 59-2136(d).

The statute also provides for a rebuttable presumption if the father fails to "provide a substantial portion of the child support as required . . . when financially able to do so," but the district court in this case elected against applying the presumption. K.S.A. 2014 Supp. 59-2136(d).

In the past, our Kansas courts have recognized that the duties encompassed by this statute "include not only the duty of financial support, but also the natural and moral duty of a parent to show affection, care, and interest toward his or her child." *In re Adoption of K.J.B.*, 265 Kan. 90, Syl. ¶ 3, 959 P.2d 853 (1998), *abrogated by In re Adoption of J.M.D.*, 293 Kan. 153, 260 P.3d 1196 (2011). However, our Supreme Court recently rejected the idea that these two categories of support create a "two-sided ledger" upon which a district court must score a parent before determining whether he or she failed to assume parental duties. *J.M.D.*, 293 Kan. at 167. Instead, the trial court must recognize "that there are numerous duties associated with being a parent" and that "all such duties may be considered in the context of all surrounding circumstances." 293 Kan. 153, Syl. ¶ 2. Importantly, however, "a district court is not precluded from considering a natural father's unfavorable child support payment performance as part of 'all of the surrounding

circumstances" regardless of whether that district court applies the statutory presumption regarding child support. 293 Kan. at 167. When evaluating whether contacts and communications between the parent and child are incidental, the court must consider the specific case at hand and ask whether the contacts are ""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).

Because the issue of whether a father refused or failed to assume his parental duties under K.S.A. 2014 Supp. 59-2136(d) raises a question of fact, this court must review the district court's ruling under a substantial competent evidence standard. See *J.M.D.*, 293 Kan. at 170-71. Moreover, this court cannot "reweigh the evidence or pass on the credibility of witnesses" and must "review the facts of the case in the light most favorable to the prevailing party below." 293 Kan. at 171.

Turning first to Father's contention that he only failed to pay child support due to lack of financial means, a review of the record indicates that Father probably did have limited means at some points during the 2 years prior to Stepfather's petition. Father testified that he was unemployed for at least part of that 2-year period. However, at the time of the hearing, Father testified that he was employed at Gold's Gym and earning 9 dollars an hour. Although this amount is less than what Father earned at the time of the divorce, Father testified that he simply felt as though he could not afford child support and, for that reason, offered no payments. Specifically, Father stated that he "didn't want to make a minimum amount of payment and then get behind" and instead never paid at all.

Additionally, Father failed to provide any other kind of financial support for the children. The only nonmonetary financial support Father recalled providing was clothes for the children on their birthdays, but he could not remember any details about these gifts and later admitted that his parents sent the clothes on his behalf. The record is not

clear whether Father contributed money toward these gifts, but he admitted that his parents at least assisted with the purchase. But aside from these few, jointly purchased gifts, Father failed to provide the children with any financial assistance for the 2 years since he stopped paying child support.

Possibly more telling than Father's failure to provide financial support, however, is Father's failure to provide K.H.D. and N.T.D. with "affection, care, and interest." See *K.J.B.*, 265 Kan. 90, Syl. ¶ 3. Both Mother and Father testified that Father had not seen either child since Halloween 2007, when Father cut the visit short and brought the children home earlier than planned. Although Father testified that he sent some cards and gifts, Mother testified that his family sent the cards on his behalf and signed his name; although Father contended that he sent letters that never received a reply, Mother testified that Father never corresponded with the children. In terms of phone calls, Mother could not recall Father contacting either child via phone in the recent past, and she did not personally remember receiving the one documented call to her cell phone on Thanksgiving 2013. Mother testified that she did not know Father's address or how to contact him after he moved to Arizona. Mother also very clearly testified that Father never requested to visit the children and that although she stopped reaching out to Father due to what she perceived as disinterest, she never prevented him from seeing them, felt uncomfortable about maintaining the relationship, or denied any of his requests to visit.

Father contended during his testimony that much of what Mother claimed was untrue—that he had tried to contact and visit the children but that Mother refused to facilitate the relationship—but many of the details were either general or confused. For example, despite testifying that Mother refused to help facilitate travel for the children to visit him, Father could not recall when Mother made these statements or the exact grounds of her refusal. In fact, Father's testimony suggested that Mother's last refusal occurred a few years before the hearing and, therefore, outside the 2-year window. He also never sought to enforce parenting time through a court order. Moreover, Father

could not remember with certainty when he called the children and at what phone number. He presented confused testimony on whether he called K.H.D. on a cell phone that his mother provided to her or on Mother's cell phone, and he could not recall exactly when the cell phone incident occurred. And he provided no proof of the letters he sent or phone calls he claimed to make—excepting, of course, the Thanksgiving 2013 phone call. In sum, Father contacted the children only minimally during the 2-year period before Stepfather's petition—contacts that the district court determined to be "incidental at best."

In short, the record demonstrates that Father provided essentially no financial support and limited emotional care and affection to K.H.D. and N.T.D. in the 2 years preceding their Stepfather's petition to adopt. Despite earning some money, Father elected against paying any child support and instead helped buy a few gifts for the children jointly with his parents; despite knowing where Mother and the children lived, Father did not visit, offer to visit, call, or otherwise correspond with the children on a regular basis or even semi-regular basis. Although Father argues that Mother attempted to block his efforts to visit the children, the district court believed Mother's account of Father's efforts (or lack thereof) to visit and maintain a relationship with them rather than his. This court cannot reweigh the district court's credibility determination on appeal. See *J.M.D.*, 293 Kan. at 171. Therefore, substantial competent evidence supports the conclusion that Father failed to assume the duties of a parent for the required 2-year period, and the district did not err in granting the adoption without his consent.

But Father also contends that the district court erred in finding that K.H.D. and N.T.D.'s best interests would be served by allowing Stepfather to adopt them. K.S.A. 2014 Supp. 59-2136(d) allows the district court to consider the best interests of the child when determining whether to grant a stepparent adoption. However, "[a] determination of the best interests of the child cannot override the requirement that a natural parent who has assumed his or her parental responsibilities must consent before a stepparent adoption can be granted." *J.M.D.*, 293 Kan. 153, Syl. ¶ 3.

Father's argument is predicated on the assumption that he *did* assume the duties of a parent—or, in the alternative, that he failed to assume the duties due to Mother's behavior and not through his own inaction. However, as previously explained, the record clearly demonstrates that Father failed to support the children financially and emotionally for at least 2 years before Stepfather filed the petition. Additionally, and perhaps more importantly, the statute allowing for stepparent adoptions provides that a best interests determination is *not* required. See K.S.A. 2014 Supp. 59-2136(d) ("The court *may* consider the best interests of the child." [Emphasis added.]). After examining the structure and language of this statute, our Kansas Supreme Court determined that K.S.A. 2014 Supp. 59-2136(d) as a whole demonstrates the legislature's implicit intent to serve the best interests of the child by "protect[ing] the child's relationship with the child's natural parent when that parent has embraced his or her parental responsibilities." *In re Adoption of G.L.V.*, 286 Kan. 1034, 1064, 190 P.3d 245 (2008). The additional best interests language, then, simply "provides the court with additional discretionary powers to consider the best interests of the child in denying the adoption—even where a natural parent has not assumed the duties of a parent as articulated by this court—for unique reasons." 286 Kan. at 1064. The court even suggested some possible unique reasons, such as the child's desire to maintain the parental relationship with the natural parent, friction in the stepfamily, or the stepparent's history of instability. 286 Kan. at 1064.

Father argues no unique reason in this particular case. He points to no friction in the family, no instability in Stepfather's life, and no testimony indicating that the children did not want Stepfather to adopt them. In fact, Mother testified at the hearing that both children wanted to be adopted by Stepfather and to take his last name. In short, nothing in the record suggests that the district court failed to consider some overriding concern about the children's best interests when granting the adoption. Accordingly, we affirm the decision of the district court granting the adoption.

Affirmed.