NOT DESIGNATED FOR PUBLICATION

No. 112,219

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Adoption of D.A.J.D.

MEMORANDUM OPINION

Appeal from Saline District Court; JARED B. JOHNSON, judge. Opinion filed May 8, 2015. Affirmed.

Janice Norlin, of Marietta, Kellogg and Price, of Salina, for appellant.

Russel B. Prophet, of Hampton & Royce, L.C. of Salina, for appellee.

Before SCHROEDER, P.J., ATCHESON and BRUNS, JJ.

Per Curiam: C.B. appeals the district court's decision denying his request to adopt D.A.J.D., who is his minor stepson. His wife, M.B., is the biological mother of the child, and she consented to the adoption. However, the child's biological father, B.D., did not consent to the adoption. On appeal, C.B. contends that the district court misinterpreted and misapplied K.S.A. 2013 Supp. 59-2136. In addition, he contends that the district court's decision to deny the stepparent adoption was not supported by substantial competent evidence. Based on our review of the record, we find that the district court properly interpreted and applied the factors set forth in K.S.A. 2013 Supp. 59-2136. Furthermore, we find that the district court's decision was supported by substantial competent evidence. Therefore, we affirm the district court's decision not to terminate B.D.'s parental rights and to deny the amended petition for stepparent adoption.

FACTS

D.A.J.D. was born in 2009. At the time, his natural parents—B.D. and M.B.—lived together but were not married. In December 2010, B.D. moved out of the home he shared with M.B. and their young son. A review of the record reveals that the relationship ended, in large part, as a result of B.D.'s use of drugs. For a few months after B.D. moved out, B.D. would see his minor son for a few hours after work during the week and every other weekend.

In April 2011, M.B. and C.B. began living together and D.A.J.D. lived with them. During an unsupervised visit with D.A.J.D. on April 16, 2011, B.D. left his 17-month old son unattended in a hotel room in Abilene where he was found by police. A juvenile intake officer contacted M.B. and D.A.J.D. was returned to her. On April 29, 2011, M.B. filed a paternity action against B.D. in Saline County, and he was served with process while he was being held in the Dickinson County Jail. B.D. subsequently pled guilty to and was convicted of possession of methamphetamine and obstruction of official duty, and he was sentenced to 18 months of probation with an underlying 26-month prison sentence.

B.D. failed to answer the petition or appear in the paternity case. As a result, the district court granted M.B. sole custody of D.A.J.D. Although the district court ordered that B.D. have no contact with his son, he continued to request parenting time. The district court also ordered in the paternity case that B.D. pay $177 a month in child support effective May 1, 2011. Subsequently, between July 26, 2011, and January 4, 2012, M.B. allowed B.D. to have 14 visits with D.A.J.D. that she supervised—notwithstanding that it appears the no contact order was still in place.

On January 4, 2012, M.B. learned that B.D.'s current girlfriend was pregnant. When B.D. texted M.B. asking to see D.A.J.D. on January 17, 2012, she refused and told

him he needed to move on. Nevertheless, B.D. repeatedly texted M.B. between January 27, 2012, and December 11, 2012, to ask to see D.A.J.D. and to inquire about his well-being. Subsequently, B.D. tested positive for methamphetamine in violation of the terms of his probation. At a revocation hearing held on March 27, 2013, B.D.'s probation was revoked and reinstated for 18 months. In addition, the district court imposed a 60-day jail sanction and ordered that B.D. obtain a drug and alcohol evaluation. It appears that B.D. has tested negative for alcohol and drugs since that time.

On July 26, 2013, C.B. filed a petition for stepparent adoption. Although M.B. consented to the adoption of D.A.J.D., B.D. declined to do so. At the time the petition was filed, B.D. owed past due child support. However, he began making monthly child support payments in the amount of $227 in October 2013. Also, on October 17, 2013, B.D. filed a motion to modify custody and to establish parenting time in the paternity case.

On January 14, 2014, the district court held a hearing on C.B.'s petition for adoption. In addition to M.B., C.B., B.D., and B.D.'s wife, a former City of Abilene police officer testified. The former police officer testified about the incident on April 16, 2011, when D.A.J.D. was left unattended in a motel room. According to the officer, he contacted B.D. across the street from the Ford dealership in Abilene as part of an investigation for a reported burglary at that Ford dealership that morning. During the investigation, it was discovered that B.D. was staying in a room at a Holiday Inn Express in Abilene. When officers went to the motel room, they heard a child crying. Upon entering the room, they found D.A.J.D. inside on the bed next to an open window. At the time, the outside temperature was 37 degrees. Thereafter, the child was returned to his mother, and B.D. was arrested.

On February 4, 2014, the district court filed a journal entry in the stepparent adoption case. The district court concluded that B.D.'s 14 visits with his son during the

applicable 2-year period were not incidental contacts, and that his attempts to have additional contacts with D.A.J.D. were likewise not incidental. Thus, the district court concluded that C.B. had failed to meet his burden of proof by clear and convincing evidence and that, therefore, B.D.'s consent to the stepparent adoption was necessary under K.S.A. 2014 Supp. 59-2136(d).

On February 14, 2014, C.B. filed a motion to alter or amend the judgment. In his motion, C.B. argued that K.S.A. 2014 Supp. 59-2136(d) did not apply because B.D. was not the presumed father of D.A.J.D. under K.S.A. 2014 Supp. 23-2208(a)(1), (2), or (3) but was instead the child's presumed father under K.S.A. 2014 Supp. 23-2208(a)(4) and (6). Specifically, C.B. argued that the district court should have determined B.D.'s parentage under K.S.A. 2014 Supp. 59-2136(e) and (h), and if the district court had applied its findings of fact to those statutes instead, the stepparent adoption would have been granted. C.B. also argued that the district court should reconsider its finding that B.D.'s contacts with his son were not incidental.

Subsequently, on February 19, 2014, C.B. filed a motion for leave to amend his adoption petition. In the motion to amend, C.B. again argued that B.D. was the child's presumed father under K.S.A. 2014 Supp. 23-2208(a)(4) and (6) instead of K.S.A. 2014 Supp. 23-2208(a)(1)-(3). As a result, C.B. argued that K.S.A. 2014 Supp. 59-2136(e) and (h) actually govern the adoption case instead of K.S.A. 2014 Supp. 59-2136(d). Moreover, C.B. argued that the amendment should relate back to the original filing date of his petition. In response, B.D. filed an objection, arguing that if C.B. was allowed to amend his petition, the amendment should not relate back to the date of the original pleading.

The district court held a hearing on March 13, 2014, to consider C.B.'s motions. Although the district court agreed to grant C.B. leave to file an amended petition, it did not allow the amendment to relate back to the initial petition. The following day, C.B.

filed an amended petition for stepparent adoption of D.A.J.D. in which he alleged that under K.S.A. 2014 Supp. 59-2136(h), B.D.'s consent to the adoption was not required because he was an unfit parent and had failed to assume his duties as a parent during the 2 years immediately preceding the petition.

On May 15, 2014, the district court held a hearing on C.B.'s amended petition. Once again, M.B., C.B., and B.D. testified at the hearing. Also testifying was the mother of another biological child fathered by B.D. whose husband adopted the child in 2011. In addition, the parties agreed that the testimony at this hearing was to supplement the testimony and exhibits from the hearing held on January 14, 2014.

On June 20, 2014, the district court filed a 19-page memorandum decision and order. The district court noted that the 2-year statutory window under K.S.A. 2014 Supp. 59-2136(h)(1)(G) was March 14, 2012, to March 14, 2014. First the district court considered under K.S.A. 2014 Supp. 59-2136(h)(1)(B) whether C.B proved by clear and convincing evidence that B.D. was unfit. In doing so, the district court specifically considered the factors in K.S.A. 2014 Supp. 38-2269(b)(3), (4), (5), (8), and K.S.A. 2014 Supp. 38-2269(c)(2) and (4), and determined that C.B. failed to prove by clear and convincing evidence that B.D. was an unfit parent. The district court next found that C.B. failed to prove by clear and convincing evidence that B.D. was financially able to provide a substantial portion of child support.

Under K.S.A. 2014 Supp. 59-2136(h)(2)(A), the district court considered whether termination was in D.A.J.D.'s best interest. The district court stated that it was in D.A.J.D.'s best interest for M.B. and C.B to have residential placement, but that it was not in D.A.J.D.'s best interest to terminate B.D.'s parental rights.

Ultimately, the district court concluded:

> "[B.D.] has not moved on and it is not in [D.A.J.D.'s] best interests for him to abandon the relationship. Despite [B.D.'s] faults, it is in [D.A.J.D.'s] best interest for B.D. to be drug free and involved in [D.A.J.D.'s] life. As B.D. noted in court, it is in [D.A.J.D.'s] best interest for him to know that he has two fathers."

Thereafter, C.B. timely filed a notice of appeal to this court.

ANALYSIS

C.B. contends that in denying his petition for adoption, the district court improperly applied the two-prong ledger test found in K.S.A. 2014 Supp. 59-2136(d) rather than any of the seven factors from K.S.A. 2014 Supp. 59-2136(h)(1). He argues that under the inapplicable two-prong ledger test found in K.S.A. 2014 Supp. 59-2136(d), the adoption should be denied if the biological father meets either the emotional or the financial side of the ledger, and under the factors in K.S.A. 2014 Supp. 59-2136(h)(1)—which are the factors applicable under the amended petition—the adoption should be granted if the biological father fails either to provide emotional or financial support. Furthermore, C.B. argues that he proved that B.D. failed or refused to assume the duties of a parent for 2 consecutive years next preceding the filing of the petition.

Although the district court applied the two-prong test from K.S.A. 2014 Supp. 59-2136(d) in its decision on the initial petition, the district court did not apply that test in its decision on the amended petition. The district court simply found that C.B. did not prove by clear and convincing evidence that B.D. had failed to provide both emotional and financial support during the 2 years preceding the filing of the amended petition for stepparent adoption. Thus, we find that the district court applied the correct standards in denying the amended petition.

Next, C.B. contends that the district court's decision was not supported by substantial competent evidence. Substantial competent evidence is evidence possessing

both relevance and substance that a reasonable person could accept as being adequate to support a conclusion. *State v. Schultz*, 289 Kan. 334, 340, 212 P.3d 150 (2009). In reviewing this contention, it is important to remember that adoption statutes must be strictly interpreted in favor of maintaining the rights of the natural parents where the statute is being used to terminate the right of a natural parent without consent. See *In re Adoption of Baby Girl P.*, 291 Kan. 424, 430, 242 P.3d 1168 (2010).

Moreover, the party seeking termination of parental rights has the burden of proving by clear and convincing evidence that termination is appropriate under K.S.A. 2014 Supp. 59-2136. 291 Kan. at 430; see also In re M.R.C., 42 Kan. App. 2d 772, Syl. ¶ 2, 217 P.3d 50 (2009). "Clear and convincing evidence is evidence that shows that the truth of the asserted facts is highly probable. [Citation omitted.] It is an intermediate standard of proof between a preponderance of the evidence and proof beyond a reasonable doubt. [Citation omitted.]" Becker v. Knoll, 301 Kan. 274, 276, 343 P.3d 69 (2015). An appellate court that is reviewing a ruling based on a clear and convincing evidence standard reviews all of the evidence in the light most favorable to the party bearing the burden of proof and will not reverse if it is convinced that a rational factfinder could have found the factual conclusions to be highly probable. 301 Kan. at 276.

Despite C.B.'s arguments, the district court's conclusions were supported by substantial competent evidence. One factor the district court considered was the 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. See K.S.A. 2014 Supp. 38-2269(b)(8). C.B. argues that at the time of the first trial on January 14, 2014, it had been over a year since B.D. last texted M.B., 33 months since B.D. had been alone with D.A.J.D., and 14 months since B.D.'s last supervised visit with D.A.J.D. The district court, however, considered the fact that B.D. should have filed a motion to modify custody earlier—when M.B. began denying him access to D.A.J.D. But overall, the district court did not believe this evidence supported a finding that B.D. was unfit.

Additionally, the use of drugs or alcohol can create the need to terminate parental rights if it is of such duration or nature as to render the parent unable to care for the ongoing physical, mental, or emotional needs of the child. See K.S.A. 2014 Supp. 38-2269(b)(3). C.B. argues that the district court erred in finding that B.D.'s struggle with drugs and/or alcohol did not keep him from meeting D.A.J.D.'s needs because B.D. admitted he drank one or 2 beers in a Salina bar about a month before trial and did not report it to his probation officer. But the district court acknowledged that complying with this section was a struggle for B.D. Nevertheless, the district court considered that B.D. was undergoing counseling as a condition of probation and that he tested clean since March 2013.

A conviction of a felony and imprisonment can also lead to termination of parental rights in an adoption proceeding. See K.S.A. 2014 Supp. 38-2269(b)(5). C.B. argues that B.D. and his wife were charged with disorderly conduct and battery in Salina Municipal Court in December 2013, for which they failed to inform the court at their January 2014 trial. Furthermore, C.B. argues that text messages between M.B. and B.D.'s wife between January 26, 2013, and March 4, 2013, showed that B.D. still struggled with drugs and alcohol. The district court noted that B.D. had been convicted of crimes, was on probation at the time of the court's ruling, and spent time in jail. But the district court did not find that these rendered B.D. unfit under the statutes. After a March 13, 2013, probation violation for a drug test that was positive for methamphetamine, B.D. had apparently complied with his probation requirements and remained drug and alcohol free.

Another factor for the district court to consider in determining parental fitness is a failure to maintain regular visitation, contact, or communication with the child or with the custodian of the child. See K.S.A. 2014 Supp. 38-2269(c)(2). C.B. argues that substantial competent evidence supports that M.B. was justified in discontinuing supervised visits with D.A.J.D. in January 2012, and that father only texted M.B. 11 times after that. C.B. also points out that D.A.J.D. believes C.B. is his father. The district court noted that B.D.

remained in contact with the "custodian of the child"—the statute does not require constant contact—and B.D. finally filed the appropriate motion for visitation in court in October 2013, even though the district court believed B.D. should have done that sooner.

Failure to pay a reasonable portion of child support based on ability to pay is another factor. See K.S.A. 2014 Supp. 38-2269(c)(4). B.D. was ordered to pay $177 per month in child support starting May 1, 2011. C.B. contends that B.D. did not make his first payment until October 2013, even though he had income before that. C.B. also points out that B.D. admitted that he was aware of but did not help mother with D.A.J.D.'s medical bills or hospitalization. The district court, however, noted that although it was clear that B.D. could have paid more, C.B. failed to prove by clear and convincing evidence that B.D. had the ability to pay all of the support. B.D. testified at both hearings about his financial difficulties including a threat of foreclosure on his home.

Under K.S.A. 2014 Supp. 59-2136(h)(1)(G), a district court may terminate parental rights if it finds clear and convincing evidence that "the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition." C.B. argues that the district court's finding under this section that B.D.'s efforts were more than incidental is not supported by substantial competent evidence.

C.B. does not show that any of the evidence relied on by the district court was incorrect. Instead, C.B. argues that although the district court relied on text messages B.D. sent M.B. from March 2012 to December 2012, B.D. sent texts on only 11 days during the critical 2-year period. C.B. also argues that there was no evidence to support the district court's statement that B.D. would have continued visits if M.B. had not decided to discontinue contact. C.B. complains that the text messages were not evidence

of a desire for B.D. to have a relationship with D.A.J.D. since D.A.J.D. was only 2 years old and could not read a text message.

Additionally, C.B. takes issue with the district court relying on the fact that he retained counsel in the paternity case because B.D. did not retain counsel until 19 months into the 24-month look back period. But it was still within the period. C.B. complains that the district court relied on gifts or assistance. He argues that B.D. provided no gifts or assistance during the 2-year period. This is true—there was no evidence that B.D. provided any gifts during the 2-year timeframe at issue here. But the district court just mentioned that B.D. gave gifts on a few occasions, which he had done before the 2-year period at issue. This alone is not reversible error.

Regarding B.D.'s offers of financial support, C.B. argues that the district court erred in finding his offer of support to be more than incidental. According to the record, C.B. argues that B.D. could have paid child support all along, but he did not. All he did was ask mother if she needed anything, and then failed to provide anything because she said they had everything they needed. C.B. contends that this factor should have weighed in his favor not B.D.'s because there was evidence that B.D. had income—$16,839 in 2011, $33,944 in 2012, and $31,000 in 2013—and yet B.D. made only 6 of 30 child support payments due during that time. C.B. contends that these 6 payments did not amount to "substantial" under the rebuttable presumption in K.S.A. 2014 Supp. 59-2136(h)(3).

Nevertheless, B.D.'s income alone does not show that the district court's finding that C.B. failed to prove that B.D. could have paid the child support sooner. B.D. testified at both hearings that his jobs were somewhat temporary, and he was having trouble paying the mortgage on his home. C.B. had the burden to prove by clear and convincing evidence that B.D. failed to pay when he had the ability to pay. The district court's finding that he did not meet that burden is supported by substantial competent evidence.

C.B. further argues that the district court's finding that M.B. interfered with B.D.'s relationship with D.A.J.D. is not supported by substantial competent evidence. C.B. contends that the district court "arbitrarily disregarded Mother's undisputed testimony of the events and circumstances prior to March 2012, relevant to explain and prove Mother's conduct during the same two-year period."

Although the district court stated a few times in its decision that M.B. interfered with B.D.'s conduct, it does not appear that the district court over exaggerated this interference. The district court weighed the testimony and determined that M.B. allowed B.D. to see his son—albeit supervised—even after B.D. left D.A.J.D. alone in a hotel room. The district court, which was able to view the witnesses and determine credibility, determined that M.B. ceased visitation once she learned that B.D.'s current girlfriend was pregnant. This court cannot reweigh the evidence. "'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.' [Citation omitted.]" *Adoption of N.A.P.*, 23 Kan. App. 2d 257, 267, 930 P.2d 609 (1996). The district court's finding that B.D. would have continued with supervised visits if M.B. had allowed it is supported by the record.

Finally, C.B. argues that adoption is in D.A.J.D.'s best interest because B.D. testified in January 2014 that it had been 2 years since he had seen D.A.J.D. in person and it was B.D.'s choice not to pursue the options and opportunities available to him to change that. Nevertheless, the district court's finding that termination was not in D.A.J.D.'s best interests is likewise supported by substantial competent evidence. There is substantial evidence in the record to support the district court's conclusion that B.D. has continually attempted to have a relationship with his son.

In summary, this court is not to reweigh conflicting evidence or judge the credibility of witnesses on appeal. *In re Swanson*, 288 Kan. 185, 186, 200 P.3d 1205 (2009); *Becker*, 301 Kan. at 276. Moreover, we "cannot nullify a trial judge's disbelief of

evidence nor can it determine the persuasiveness of evidence which the trial judge may have believed." *Mohr v. State Bank of Stanley*, 244 Kan. 555, 568, 770 P.2d 466 [1989]). Accordingly, because we find that the district court applied the appropriate law and that its decision was supported by substantial competent evidence, we must affirm.

Affirmed.