NOT DESIGNATED FOR PUBLICATION

No. 112,605

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Application of J.C.J.
to Adopt T.S.C.F., minor child.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; TIMOTHY G. LAHEY, judge. Opinion filed May 22, 2015. Affirmed.

Sean M. A. Hatfield, of Maughan Law Group LC, of Wichita, for appellee natural father.

Kellie E. Hogan, of Kansas Legal Services, of Wichita, for appellant maternal great grandmother.

Before POWELL, P.J., MCANANY, J. and BUKATY, S.J.

Per Curiam: J.C.J., the maternal great-grandmother of 9-year-old T.S.C.F., filed a petition to adopt the child. The natural father, M.C.F, (father) filed an objection. The natural mother consented to the adoption. The district court terminated the parental rights of father and granted the maternal great-grandmother's petition to adopt T.S.C.F. Father appeals that ruling. We find the record contains clear and convincing evidence that the father is unfit and it is in the best interests of T.S.C.F. that the maternal great-grandmother adopt the child. We affirm.

Facts

T.S.C.F. was born in February 2006. Father was incarcerated in Sedgwick County Jail on a traffic warrant at the time. T.S.C.F. lived with both his mother and father for the first year of his life. In 2007, the mother filed a paternity action, resulting in the father

admitting he was the natural father and an order being issued requiring him to pay child support.

In August 2008, father was convicted of aggravated robbery and aggravated burglary. He received a prison sentence of 216 months. The Kansas Supreme Court affirmed his convictions and sentence. *State v. Frierson*, 298 Kan. 1005, 1022, 319 P.3d 515 (2014). Father presently has a release date from prison of December 2023, approximately 2 months before T.S.C.F.'s 18th birthday.

After the first year of his life, T.S.C.F. lived with his mother and whomever she happened to be living with, including T.S.C.F.'s maternal great-grandmother, paternal aunt, and paternal grandmother. Approximately 3 years before the trial on the matter of T.S.C.F.'s adoption, the mother, who was using drugs and involved with people using drugs, contacted the maternal great-grandmother and asked her to take T.S.C.F. and his siblings because she felt in danger at her house as it had been taken over by other people. T.S.C.F. and his siblings have been residing with the maternal great-grandmother ever since. The maternal great-grandmother is active in a church community. She has located a positive male role model for T.S.C.F.'s benefit and to help her when T.S.C.F. is out of control.

Since T.S.C.F. has been in the care of the maternal great-grandmother, the paternal grandmother has taken T.S.C.F. to visit his father three times in prison. The maternal great-grandmother discontinued the prison visits because of T.S.C.F.'s emotional state and negative behavior following the visits. Father sent a letter to the maternal great-grandmother in response to her decision to stop the prison visits but has never sent any other letters to the maternal great-grandmother or to T.S.C.F. Nor has he ever phoned T.S.C.F. despite the maternal great-grandmother's request that he do so. The father has given T.S.C.F. one Christmas gift and has never acknowledged T.S.C.F.'s birthday or any other special holidays. The father last saw T.S.C.F. in late 2012.

Although the father was ordered by the district court to pay child support in 2007, he only paid $10 in 2009 and $10 in 2010. He made no payments in 2011 or 2012. His infrequent payments led to a significant arrearage resulting in a $11,546.10 judgment entered against him for unpaid child support. During 2013, he paid $2,365.11 in child support, which was primarily the result of a withholding order recovering approximately $2,200 from his prison account. The father does not know how the funds came to be in that account. His $21 a month prison wages are currently being garnished $13 for child support.

In September 2013, the maternal great-grandmother filed a petition seeking to adopt T.S.C.F. without consent from the father based on a claim that the father had failed or refused to assume the duties of a parent for 2 consecutive years prior to filing of the petition and had failed to make reasonable efforts to support or communicate with T.S.C.F. The petition included the mother's consent to the adoption. The district court granted a temporary custody order placing T.S.C.F. in the custody of maternal great-grandmother.

T.S.C.F.'s paternal grandmother filed an objection to the adoption on the grounds that both she and the father wanted her to adopt T.S.C.F. The father also formerly contested the adoption, in which he asserted that he did not want to give up his parental rights, objected to the maternal great-grandmother's adoption request, and asserted he wanted T.S.C.F. placed in the guardianship of the paternal grandmother.

The district court held a 2-day bench trial in March and April of 2014. In addition to considering the maternal great-grandmother's testimony, witnesses called on behalf of the petitioner included three social workers, T.S.C.F.'s therapist, and the friend of the maternal great-grandmother who acts a role model and who T.S.C.F. stays with when he becomes out of control. The district court also heard testimony from the father, who was

present at trial, the father's sister, the paternal grandmother, a couple of friends of the paternal grandmother, and the maternal great-grandmother's neighbor.

The district court heard evidence that social workers from Saint Francis Community Services visited the family home approximately 43 times between August 2013 and December 2013 to see the mother and a newborn baby who was living with the maternal great-grandmother at the time. Julie Ladd, a marriage and family therapist with Saint Francis, conducted approximately 20 of the 43 visits. She found that the living conditions were appropriate and expressed no concerns about the way that T.S.C.F. was being raised by the maternal great-grandmother or with the proposed adoption of T.S.C.F. Thursa Weier, a social worker, visited the home approximately five to six times between August 2013 and November 2013 and has had continuing contact with the maternal great-grandmother through the local community center. She testified that it would be in T.S.C.F.'s best interest to be adopted by the maternal great-grandmother given that T.S.C.F. has essentially lived with the maternal great-grandmother his whole life and she is his "parental figure."

Connie Mayes, a social worker contacted by the maternal great-grandmother's attorney to do an adoption assessment, recommended that the maternal great-grandmother be allowed to adopt T.S.C.F. She testified that T.S.C.F. is a bright, social, and engaging child but has poor impulse control and lacks focus. Mayes attributed these negative traits to T.S.C.F.'s chaotic early life before residing with the maternal great-grandmother. T.S.C.F. has also begun exhibiting aggressive behavior at school. Mayes clarified that living with the maternal great-grandmother and his siblings would provide T.S.C.F. the stability and consistency he needs and that the maternal great-grandmother is best prepared to understand T.S.C.F.'s "high needs."

The district court also heard testimony from T.S.C.F.'s therapist, Candra Henson. To address T.S.C.F.'s moods and aggression, the maternal great-grandmother sought

counseling from the Wichita Child Guidance Center in January 2013. Henson diagnosed T.S.C.F. with anxiety and provides him with cognitive behavioral therapy and play therapy approximately two times per month. Henson has also conducted individual sessions with the maternal great-grandmother, family sessions including T.S.C.F.'s siblings, and visited T.S.C.F.'s school with the maternal great-grandmother. Henson testified the maternal great-grandmother was adept at finding the available community resources to help T.S.C.F. and that she had no concerns with the maternal great-grandmother adopting T.S.C.F.

After reviewing the above evidence, the district court, based on K.S.A. 2014 Supp. 38-2269 and K.S.A. 2014 Supp. 59-2136, found that the father was unfit and it was in the best interests of T.S.C.F. that T.S.C.F. be placed in the maternal great-grandmother's home with his three siblings, whom the maternal great-grandmother has also adopted. On appeal, the father argues the evidence presented to the district court does not support its findings.

Analysis

We first set out the law applicable to the issue presented along with our standard of review.

Where the adoption statutes are cited to terminate the right of a natural parent without consent, the statutes are strictly interpreted in favor of maintaining the rights of the natural parents. *In re Adoption of Baby Girl P.*, 291 Kan. 424, 430, 242 P.3d 1168 (2010). The Due Process Clause of the Fourteenth Amendment to the United States Constitution also provides substantive protection for a parent when he or she has assumed parental duties. However, when a parent has not accepted some measure of responsibility for his or her child's future, the Constitution will not protect that parent's mere biological

relationship with the child. *In re Adoption of G.L.V.*, 286 Kan. 1034, 1060, 190 P.3d 245 (2008).

Whether a district court can terminate a father's parental rights after the mother consents to the adoption of her child is controlled by K.S.A. 2014 Supp. 59-2136(h)(1). That section provides, in relevant part, that "the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following: . . . (B) the father is unfit as a parent or incapable of giving consent." K.S.A. 2014 Supp. 59-2136(h)(1)(B). In making this determination the district court may "(A) Consider and weigh the best interest of the child; and (B) disregard incidental visitations, contacts, communications or contributions." K.S.A. 2014 Supp. 59-2136(h)(2)(A) and (B).

When a district court has terminated a person's parental rights based on factual findings made under K.S.A. 2014 Supp. 59-2136(h)(1), an appellate court reviews those findings on appeal to determine if, after considering all the evidence in the light most favorable to the prevailing party, the findings were highly probable, *i.e.*, supported by clear and convincing evidence. *In re Adoption of B.B.M.*, 290 Kan. 236, 244, 224 P.3d 1168 (2010). When making such a determination, an appellate court does not weigh conflicting evidence, pass on the witnesses' credibility, or redetermine questions of fact. 290 Kan. at 244.

While the probate code does not provide a definition of "unfit," it is appropriate for the district court to incorporate the factors set forth in the Revised Kansas Code for the Care of Children when making such a determination. See *In re Adoption of A.P.*, 26 Kan. App. 2d 210, 214-15, 982 P.2d 985, *rev. denied* 268 Kan. 886 (1999). K.S.A. 2014 Supp. 38-2269 provides a nonexhaustive list of eight factors that a district court shall consider in determining whether a parent is unfit by reasons or conduct which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future. See K.S.A. 2014 Supp. 38-2269(a) and (b). The

"foreseeable future" is viewed from the child's perspective. *In re M.B.*, 39 Kan. App. 2d 31, 45, 176 P.3d 977 (2008). And K.S.A. 2014 Supp 38-2269(c) provides four additional considerations when a child is not in the physical custody of the parent.

In determining that the father was an unfit parent, the district court here considered three statutory factors as a basis for its ruling: "conviction of a felony" under K.S.A. 2014 Supp. 38-2269(b)(5); "failure to assure care of the child in the parental home when able to do so" under K.S.A. 2014 Supp. 38-2269(c)(1); and "failure to maintain regular visitation, contact, or communication with the child or with the custodian of the child" under K.S.A. 2014 Supp. 38-2269(c)(2).

Finally, when, as in the case here, a nonconsenting parent is incarcerated and, therefore, unable to fulfill the usual parental duties performed by unrestrained parents, the district court must decide whether the parent has sought the opportunities and options which might be available to enable the parent to perform those duties to the best of his or her abilities. See *In re Adoption of S.E.B.*, 257 Kan. 266, 273, 891 P.2d 440 (1995). The maternal great-grandmother, as 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. See *In re Adoption of Baby Girl P.*, 291 Kan. at 430.

In father's argument that the district court's decision lacked the support of substantial competent evidence he makes four specific claims: (1) he has paid child support in the past and currently pays child support; (2) despite being incarcerated he has attempted to maintain a relationship with T.S.C.F. and only stopped seeing T.S.C.F. because he was prohibited from doing so by the maternal great-grandmother; (3) the work he does with various programs while in prison is evidence of his fitness as a parent; and (4) the maternal great-grandmother's age and health combined with the fact she already takes care of T.S.C.F.'s three siblings is too much for her to also meet the needs of T.S.C.F.

Father's claims essentially ask us to reweigh the evidence which we cannot do. In our view, the record contains ample evidence to support to decision to terminate father's parental rights. See *In re Adoption of B.B.M.*, 290 Kan. at 244.

The record leaves little doubt that T.S.C.F. is receiving the benefits of the care and support of a stable home while living with his maternal great-grandmother and his siblings. The consistent testimony from the social workers recommending the adoption proceed along with the maternal great-grandmother's actions in caring for T.S.C.F. all provide clear and convincing evidence to support the district court's determination that it is in the best interests of T.S.C.F. to remain in the home of the maternal great-grandmother with his siblings.

In ruling that the father is unfit, the district court found that because the father will be incarcerated until T.S.C.F. is almost 18 years old, he "will not be able to provide the individual attention which T.S.C.F. requires." Since incarceration is one of the express factors to be considered by the court under K.S.A. 2014 Supp. 38-2269(b)(5), father's incarceration alone amounts to sufficient evidence to support a conclusion that he is unfit.

The district court also concluded the father's condition would not change in the foreseeable future. The evidence demonstrated that at the time of the 2014 trial, the father had approximately 116 months remaining to serve on his 216-month prison sentence. In *In re M.B.*, this court determined that as little as 7 months of remaining incarceration exceeded the foreseeable future from the viewpoint of a child. 39 Kan. App. 2d at 47-48; see also *In re C.C.*, 29 Kan. App. 2d 950, 954, 34 P.3d 462 (2001) (evidence of 30 months of additional parental incarceration exceeded what is the foreseeable future in the eyes of a child).

Moreover, the father's actions while incarcerated also provide sufficient evidence that he had not sought the available opportunities and options to perform his parental duties to the best of his abilities or maintain contact with T.S.C.F. See *In re Adoption of S.E.B.*, 257 Kan. at 273. Specifically, the district court found the father (1) had been incarcerated since T.S.C.F. was 2 years old; (2) had only seen T.S.C.F. three times since being incarcerated; (3) had made no contact by letter, phone or otherwise since T.S.C.F. began living with the maternal great-grandmother; (4) despite the father claiming not to have the maternal great-grandmother's phone number, he had made no effort to obtain the phone number; and (5) had only paid a fractional amount of child support owed and any amount paid was not a willful or affirmative action by the father. Such evidence also supports the district court's conclusion that any such contact the father had with T.S.C.F. was incidental under K.S.A. 2013 Supp. 59-2136(h)(2)(B) and that "there is no persuasive evidence that the father was ever meaningfully involved in [T.S.C.F.'s] day to day life."

To summarize, T.S.C.F. was 8 years old at the time of the termination hearing, and the father had already been incarcerated for the majority of T.S.C.F.'s life. Father made almost no effort to establish or maintain a relationship with T.S.C.F. during his incarceration, particularly during the 3 years prior to the hearing. This evidence was sufficient to establish that the father was an unfit parent, a condition unlikely to change in the foreseeable future from the point of view of T.S.C.F. The district court did not err in terminating the father's parental rights and granting the adoption of T.S.C.F., which it found was in the best interests of the child.

Affirmed.