

No. 17-118212-A

IN THE
COURT OF APPEALS
OF THE
STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF C.D.F.
DOB XX/XX/2009
Petitioner-Appellant

BRIEF OF THE APPELLANT

Appeal from the District Court of Shawnee County, Kansas
Honorable Frank J. Yeoman, Judge
District Court Case No. 2017-AD-000022

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Oral Argument: 15 minutes

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Nature of the Case

This is an appeal of the District Court's Memorandum Decision and Order of August 3, 2017 finding that the consent of the natural father, D.O.F. was necessary for the adoption and sustaining D.O.F.'s Petition to Dismiss. (RI p88)

This is not a custody case. It is not a divorce case. It is not a paternity case. It is not a Child in Need of case. It is a stepparent adoption case controlled by the Kansas Adoption and Relinquishment Act. K.S.A. 59-2111 *et. seq.* All of the parties were known at the time the petition was filed and no other court had jurisdiction over this adoption.

The issues before the court presently are simple: 1) whether or not the consent of the natural father can be deemed necessary without a hearing, based solely upon the pleadings and statements made by counsel; and 2) whether it was appropriate for the District Court to appoint counsel for an unknown or unfound father prior to Petitioner attempting to locate said father and filing an Affidavit of Diligent Search.

As a result of the actions of the District Court, the stepfather was denied due process, as he had no opportunity to be heard on the petition and present evidence to the trier of fact. Nowhere in the applicable case law can it be found that an adoption was either granted or denied without a hearing.

This appeal follows that judgment.

Statement of Issues

- Issue I: Whether the District Court, without a hearing of the evidence, improperly sustained the natural father's Petition to Dismiss when it issued a Memorandum Decision and Order based solely on the pleadings in the matter.
- A. The District Court erred in its interpretation of the Kansas Adoption and Relinquishment Act when it failed to have a hearing on the Petition for Adoption and Termination of Parental Rights as part of K.S.A. 59-2134(a).
 - B. The District Court erred when it found that the non-consenting natural father's consent was necessary in this stepparent adoption under K.S.A. 59-2136(d).
- Issue II: Whether the District Court improperly appointed counsel for an unknown or unfound father, when W.E.R. had not yet attempted to locate and serve the natural father with the Notice of Hearing nor filed an Affidavit of Diligent Search under K.S.A. 59-2136(c).

Statement of Facts

Jurisdiction and venue are proper in Shawnee County, Kansas.

Petitioner-Appellant (hereinafter W.E.R.) and the mother of the child were married in 2011 and have lived with and provided for the proposed adoptee together since that time. (RI p8) During this same time, and more specifically, during the two years preceding the filing of the petition, the natural father had not independently contacted the child, had no place for the child to stay during his parenting time, and most importantly, failed to provide a substantial portion of the child support as required by judicial decree when financially able to do so by failing to disclose his annual income to the mother. (RI p39-41)

W.E.R. filed his Petition for Adoption and Termination of Parental Rights on March 28, 2017. (RI p8) On March 30, 2017, W.E.R.'s attorney was contacted by the Court to say that an attorney was being appointed for an unknown/unfound father. Attorney advised that W.E.R. knew the natural father, his address, and phone number. Attorney was subsequently advised that an attorney was being appointed regardless. (RIII p8) With this, the appointed attorney was provided with the natural father's address and phone number. Appointed counsel made contact with the natural father the same day.

At the status hearing on April 13, 2017, the Court asked W.E.R.'s counsel to amend the petition to include more substantive information concerning the whereabouts of the natural father and the basis upon which D.O.F.'s parental rights were to be terminated. (RII p10) This was completed and filed on April 17, 2017. (RI p38)

At the status hearing on May 26, 2017, a discovery deadline was set and W.E.R. was asked for a responsive pleading to the Father's Answer and Amended Petition to Dismiss Amended Petition for Adoption and Termination of Parental Rights. (RIII p16-17) At this time, W.E.R. disputed the continued participation of D.O.F.'s counsel as being outside the scope of his appointment under K.S.A. 59-2136(c), as he was appointed merely to locate, not to represent the natural father. (RIII p3-4) No Affidavit was filed to determine indigence with regard to natural father. (RIII p9)

The Court filed its Memorandum Decision and Order on August 3, 2017, whereby dismissing W.E.R.'s Petition for Adoption, without a hearing of the evidence. (RI p84)

This appeal followed.

Arguments and Authorities

Standard of Review

Statutory interpretation is a legal question over which appellate courts exercise unlimited review, unfettered by the trial court's interpretation. *In re. J.M.D.*, 293 Kan. 153, 158 260 P.3d 1196, 1200 (2011) (quoting *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006)).

- Issue I: Whether the District Court, without a hearing of the evidence, improperly sustained the natural father's Petition to Dismiss when it issued a Memorandum Decision and Order based solely on the pleadings in the matter.
- A. The District Court erred in its interpretation of the Kansas Adoption and Relinquishment Act when it failed to have a hearing on the Petition for Adoption and Termination of Parental Rights as part of K.S.A. 59-2134(a).

Adoption is a creature of statute and is not recognized at common law, it is wholly a creature of statute. *In re Application to Adopt H.B.S.C.*, 28 Kan. App. 2d 191, 196, 12 P.3d 916 (2000). When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's

language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the legislature's intent. *In the Matter of the Adoption of I.M.*, 48 Kan. App. 2d 343, 345 (2012) citing *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 271-72, 202 P.3d 7 (2009).

K.S.A. 59-2134(a) clearly states,

Upon the hearing of the petition, the court shall consider the assessment and all evidence, including evidence relating to determination of whether or not the court should exercise its jurisdiction as provided in K.S.A. 59-2127 offered by any interested party. If the adoption is granted, the court shall make a final decree of adoption.

There is no ambiguity here. The plain language of the statute unambiguously calls for a hearing on the petition. It calls for the presentation of evidence to the trier of fact and a decision to be rendered on the merits. Pleadings are not evidence, they are merely allegations, “[I]t is the evidence that sustains or defeats [these allegations] upon the final hearing.” *Terry v. Jones*, 44 Miss. 540, 1871 WL 8412 (1871).

The Court recognized the need to either set a hearing on the motion to dismiss or to schedule the case for trial. (RII p. 13) However, the District Court moved *sua sponte* to sustain the Petition to Dismiss. A review of the relevant case law can uncover no other case in which a court has acted in this manner with regard to a Petition for adoption by a stepparent. In denying W.E.R. a hearing, the District Court not only denied W.E.R. due process, but also abused its discretion

in holding that a presentation of evidence would not lead to a different finding based solely on the words of counsel. (RI p87)

Additionally, the Court, in its Discussion section quoted *In re. J.M.D.*, “Kansas uses a two part ledger to determine the requirements of K.S.A. 59-3326(d), one column is looking at financial support while the other is looking at the love and affection toward the child.” However, this is a misinterpretation of this case, in that the Kansas Supreme Court, in reversing the Court of Appeals, “put to rest the artificial constraints of the two-sided ledger approach and return[ed] to the historical approach of considering ‘all surrounding circumstances.’” See *J.M.D.*, 293 Kan. 153 at 167. (RI p86)

Further, the Court, again in the Discussion section, cited two other cases that directly speak to a factual determination, based on the evidence after a consideration of all the surrounding circumstances. See *In the Matter of the Adoption of F.A.R. and D.M.R.*, 242 Kan. 231, 747 P.2d 145 (1987) (“The question whether or not an individual has failed or refused to assume the duties of a parent... is a factual one to be determined by the trier of facts upon competent evidence after a full and complete hearing.”) See also *In re. Sharp*, 197 Kan. 502, 504, 419 P.2d 812 (1966) (“...adoption statutes are to be strictly construed in favor of maintaining the rights of a natural parent, especially where it is claimed that consent to adoption is not required due to the natural parent’s failure to fulfill parental obligations.”) (RI p86-87)

The District Court improperly sustained the Petition to Dismiss without a full and complete evidentiary hearing. Moreover, by not allowing W.E.R. an opportunity to be heard, taking only the statements made by D.O.F.'s counsel as true, the District Court abused its discretion and denied W.E.R. due process. These errors of law demand reversal.

- B. The District Court erred in its interpretation of the Kansas Adoption and Relinquishment Act when it found that the non-consenting natural father's consent was necessary in this stepparent adoption under K.S.A. 59-2136(d).

K.S.A. 59-2136(d) states,

In a stepparent adoption, if a mother consents to the adoption of a child who has a presumed father under subsection (a)(1), (2) or (3) of K.S.A. 2016 Supp. 23-2208, and amendments thereto, or who has a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the consent of such father must be given to the adoption **unless** 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 or is incapable of giving such consent. In determining whether a father's consent is required under this subsection, the court **may** disregard incidental visitations, contacts, communications or contributions. In determining whether the 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, there shall be a **rebuttable presumption** that if the father, after having knowledge of the child's birth, has knowingly failed to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, for a period of two years next preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent. 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. (Emphasis added)

While no hearing was held, providing no evidence upon which to rule, the Amended Petition, filed April 17, 2017, alleges that D.O.F. was under order by the state of Arkansas to provide the natural mother (hereinafter K.J.R.) annually income tax returns for the purposes of calculating child support. (RI p 39-40) D.O.F. knew, or should have known, that the consequence of a failure to pay could result in the termination of his parental rights as it was clearly spelled out in the Divorce Decree and the Mandatory Supplemental Orders. By his own admission, D.O.F. admits that he has never provided this information to K.J.R. (RI p44) It should be noted that the Arkansas Decree of Divorce also ordered D.O.F. to obtain insurance for the minor child, pay one-half of related expenses, and that the non-custodial parent's insurance would be considered the primary insurance. He has done none of this.

In a review of the case law, consistently it has been held that a failure to provide a substantial portion of support, when financially able to do so and ordered by a court, there is a rebuttable presumption that the parent has, "failed to assume the duties of a parent" under K.S.A. 59-2136(d). See *In re. Adoption of R.W.B.*, 27 Kan. App. 2d 549, 555, 7 P.3d 306, 311 (2000) (finding, "[A] father has failed to provide a substantial portion of the child support as provided by K.S.A. 59-2136(d) when he fails to pay at least 69 percent of court-ordered

support. As a result, the rebuttable presumption that the father failed and refused to perform his parental duty of providing support to his children is applicable.”)

Under facts similar to those in the instant case, in *R.W.B.*, this court affirmed the district court when it found that the consent of the natural father was not necessary because he, among other things, failed to provide a substantial portion of the ordered child support and medical insurance coverage. *R.W.B.* at 555.

In addition to the financial aspect regarding the support of a child making consent necessary, the courts have also consistently found that a natural parent has an obligation to provide for the mental and emotional health of their children. This court said in *J.M.B.*, “As this discussion of the development of Kansas stepparent adoption law demonstrates, we have consistently repeated that all surrounding circumstances are to be considered when determining whether a natural parent must consent to a stepparent adoption.” *J.M.B.* at 167. This court went on to say, “...[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,’ even though all of the conditions for the statutory presumption have not been met. In other words, as we call on district courts to do in many other contexts the trial court must look at the totality of the circumstances when determining whether a natural father has failed to assume his parental duties under K.S.A. 2010 Supp. 59-2136(d).” *Id.*

K.S.A. 59-2136(d) allows for the court to, “[D]isregard incidental visitations, contacts, communications or contributions.” Incidental in this context has been defined as, “casual; of minor importance; insignificant; or little consequence.” *In re. Adoption of McMullen*, 236 Kan. 348351, 691 P.2d 17, 20 (1984).

In both the Petition for Adoption and Termination of Parental Rights and D.O.F.’s Answer, it could be shown that D.O.F.’s contacts with C.D.F. were at best incidental. He provided no transportation to/from his parenting time; he has not independently contacted C.D.F. either by telephone, email, Skype; all communication has been initiated by the paternal grandmother and/or the mother; C.D.F. does not reside with D.O.F. during his parenting time, but rather with his mother; and D.O.F. has provided no cards, gifts, or letters to C.D.F. for the entirety of the time C.D.F. has lived in Kansas (RI p40-41, 44-45)

Had there been a hearing on the petition, evidence would have been presented that would have supported the presumption that D.O.F. failed to assume the duties of a parent for the two years prior to the filing of the petition. With this, the District Court must be reversed.

Issue II: Whether the District Court improperly appointed counsel for an unknown or unfound father, when W.E.R. had not yet attempted to locate and serve the natural father with the Notice of Hearing nor filed an Affidavit of Diligent Search under K.S.A. 59-2136(c).

Upon the Court's own action, two days after filing the Petition, an attorney was appointed to locate and provide notice to D.O.F. At no time was D.O.F. unknown, as the natural parents were married at the time C.D.F. was conceived. (RI p9) Additionally, W.E.R. and the natural mother knew the home address and telephone number for D.O.F. This information was provided to appointed counsel, but at no time had additional counsel been requested by W.E.R. (RIII p8)

There are two instances in which counsel could be appointed in a stepparent adoption. First, where a parent is unknown or whose whereabouts are unknown, as prescribed by K.S.A. 59-2136(c). This statute makes this appointment discretionary by the court,

In stepparent adoptions under subsection (d), the court *may* appoint an attorney to represent any father who is unknown or whose whereabouts are unknown. In all other cases, the court shall appoint an attorney to represent any father who is unknown or whose whereabouts are unknown. 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)

Once notice had been achieved, either by personal service or publication, the appointed attorney is directed by K.S.A. 59-2136(f) that, "Proof of notice shall be filed with the court before the petition or request is heard."

Second, when a parent is identified, appears, and asserts parental rights but is financially unable to afford counsel, an attorney shall be appointed. K.S.A. 59-2136(h)(1),

When a father or alleged father appears and asserts parental rights, the court shall determine parentage, if necessary pursuant to the Kansas parentage act, K.S.A. 2016 Supp. 23-2201 *et. seq.*, and amendments thereto. If a father desires but is financially unable to employ an attorney, the court *shall* appoint an attorney for the father. (Emphasis added)

It is clear then, that the statute contemplates a narrow role for appointed counsel in the first instance and a broader role in the second. In this matter, counsel was appointed in the first instance, charged with locating and providing notice *only*. “An attorney appointed to represent an unknown or unlocated natural father is appointed to assess whether a due diligence search has been made to identify and locate the birth father, and to review the adequacy of the notice. If the father is identified and located, and he objects to the termination of his parental rights, the appointed counsel can continue *only if* the birth father is unable to afford an attorney.” (Emphasis added) Martin W. Bauer & Megan S. Monsour, *Adoptions Under Kansas Law in Practitioner’s Guide to Kansas Family Law* 18-1, 18-31 (Scott M. Mann, 2016 Rev., Kan. Assn. 2016).

Here, while there is no case law on this narrow issue, a plain reading of the statute points to two acts appointed counsel must perform. Under K.S.A. 59-2136(c)(f), appointed counsel’s role, in this case, ended once; 1) notification of the proceedings to D.O.F. was made; and 2) a proof of notice was filed with the court.

D.O.F. then had a choice to make, after being duly advised by counsel that he needed to either retain private counsel, or if found to be indigent by the court, continue with appointed counsel. In any event, appointed counsel, on his own volition continued to work on D.O.F.'s behalf, all outside the scope of the original appointment.

The appointment of counsel was erroneous in the first place. The provisions of K.S.A. 59-2136(c) provide that counsel may be appointed for an unknown or unfound father to do a specific set of tasks. At the time of the appointment, there was no unknown or unfound father.

Conclusion

As a result of the District Court's Order based solely on the pleadings, the Court's action was contrary to the statutory scheme intended by the legislature. It is clearly provided that once the petition was filed and the appropriate notices had been given, if a parent does not consent to the adoption of their child a hearing is held. If this were not so, there would have been no provision for it in the statutes.

The issues before this court presently are simple: 1) whether or not the consent of the natural father can be deemed necessary without a hearing, based solely upon the pleadings and statements made by counsel; and 2) whether it was appropriate for the district court to appoint counsel for an unknown or unfound

father prior to Petitioner attempting to locate said father and filing an Affidavit of Diligent Search.

Because the District Court abused its discretion by failing to have a hearing, the stepfather was denied due process, as he had no opportunity to be heard on the petition and present evidence to the trier of fact. For each of the foregoing reasons, the judgment of the District Court should be reversed, and the Petition to Dismiss should be vacated with the matter being remanded for a hearing on the evidence.

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing was filed with the e-flex system for Kansas Electronic Filing, thereby effecting service on Milfred Dale, and that a copy of the same also was sent via electronic mail on October 12, 2017, to buddalelaw@aol.com.

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