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No. 14-112219-A

**IN THE COURT OF APPEALS OF THE STATE OF KANSAS**

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<b>In the Matter of DAJD,</b>	)	
<b>CHRISTOPHER BRECHEISEN,</b>	)	
	)	
	)	
<b>Petitioner,</b>	)	
<b>vs.</b>	)	<b>Case 13 - AD - 13</b>
	)	
<b>BRIAN DICKERMAN,</b>	)	
	)	
<b>Respondent.</b>	)	

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**BRIEF OF APPELLEE**

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Appeal from the District Court of Saline County, Honorable Jared B. Johnson, Judge,  
District Court Case No. 13 AD 13.

Russel B. Prophet, #20392, of  
HAMPTON & ROYCE, L.C.  
9th Floor - United Building  
119 West Iron - P.O. Box 1247  
Salina, Kansas 67402-1247  
Attorneys for Respondent-Appellee

Oral Argument: 15 minutes.

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## NATURE OF THE CASE

This case arises from the district court's denial of Mr. Brecheisen's request to terminate Brian Dickerman's parental rights and to grant his petition for step parent adoption. Brecheisen asserted that Dickerman's consent to the adoption was not necessary on grounds that he had failed or refused to assume the responsibilities of a parent for two years preceding the filing of the adoption petition. Dickerman denied this allegation, asserting he had been involved in the child's life and had paid child support, but that the child's mother had denied his requests for visitation.

Trial on the case was initially held on January 14, 2014. Following the trial, the district court issued a four page ruling that found Dickerman failed to provide sufficient financial support, but did provide affection and emotional support and on those grounds denied Brecheisen's petition for adoption.

Brecheisen's then filed a motion to alter and amend the trial court judgment, which was denied, and a motion to amend his petition, which was granted with the caveat that it would not be allowed to relate back to the original petition.

A second trial in the case was then held on May 15, 2014. Following the second trial, the district court issued a 19 page ruling that Brecheisen had failed to demonstrate by clear and convincing evidence that Dickerman was an unfit parent or that he had failed or refused to adopt to assume the duties of a parent for two consecutive years preceding the filing of the amended petition. It appears that Brecheisen appeals this decision of the trial court.

**STATEMENT OF ISSUES**

- I. Did the district court err in its application of K.S.A. 2013 Supp. 59-2136?**
- II. Was the district court's decision to deny the step parent adoption supported by substantial competent evidence?**



## STATEMENT OF FACTS

Dickerman notes that the first 9 pages of the trial court's decision in this case, dated June 20, 2014 (Vol. 1, p.109-127, attached here as Appendix A), contain a thorough recounting of the facts testified to in court and are largely repeated in Brecheisen's own statement of facts.

Dickerman would additionally note Judge Johnson's clarification of statements he made regarding placement of the minor child with Brecheisen being in the child's best interest. In the July 11, 2014, hearing the court's statement concerning the best interests of the child from the initial January 14, 2014 trial was raised by Brecheisen's counsel (Vol. 5, p.17). Judge Johnson responded by stating, "I want to clear something up for the record,"... "My intention for that remark was to say that nothing negative had been said about the stepfather"... "if I was to compare the two, for placement, who's been more involved, etc., that best interest standard would clearly say that that would be the stepfather. I was not talking long-term whether to terminate his rights at that point regarding, that was not the analysis I was trying to communicate to both parties (Vo. 5, p.18-19).



## ARGUMENT AND AUTHORITIES

### **I. The district court did not err in its application of K.S.A. 2013 Supp. 59-2136.**

Appellate courts exercise de novo review of a trial court's interpretation of a statute. State v. Bryan, 281 Kan. 157, 159, 130 P.3d 85 (2006). The petitioner in an adoption proceeding has the burden to prove by clear and convincing evidence that termination of parental rights is warranted. In re Adoption of BBM, 290 Kan. 236 (2010). "Adoption statutes are strictly construed in favor of maintaining the rights of natural parents in those cases where it is claimed that, by reason of a parent's failure to fulfill parental obligations as prescribed by statute, consent to the adoption is not required." In the Matter of the Adoption of GLV and MJV, 288 Kan. 1034, Syll. (2008). A court reviewing a request to involuntarily terminate parental rights may not seek "better families" for children whose family circumstances are challenging or financially difficult. In re Adoption of Baby Girl P, 291 Kan. 424, 435-436 (2010). "The preservation of a father's relationship with his child is the starting point of a termination proceeding, not the finish line that a father must labor to reach." *See id at 433*.

Brecheisen argues that the trial court incorrectly applied K.S.A. 2013 Supp. 59-2136(h)(1)(G) to require Dickerman to fail to provide both emotional and financial support for a two-year period preceding the filing of the amended petition. The Court's order of June 20, 2014, however, never states that it required Brecheisen to prove failure by Dickerman to provide emotional and financial support to satisfy the requirements of 2013 Supp. 59-2136(h)(1)(G). Rather, the district court specifically found that Brecheisen

failed to meet his burden of clear and convincing evidence that Dickerman did not provide emotional or financial support.

With regard to emotional support, the court noted that Dickerman had been active in the child's life and maintained a relationship with him until the child's mother intentionally blocked him from further contact. As the district court noted, it must consider all surrounding circumstances and can consider conduct prior to the two-year look back period. In re Adoption of JMD, 293 Kan. 153 (2011); In re Adoption of AP, 26 Kan. App. 2d 210 (1999). The district court's summary of Dickerman's involvement with the child is a full two pages of its 19 page opinion (p.13-14), including living with the child until December 2010, regular visits with the child after separation from his mother, and at least 14 separate visits with the child from July 2011 through January 4, 2012.

The district court notes on page 13 of its opinion, "Melinda affirmatively prohibited Brian from seeing Drake." Vol. 5, p.13. had actively blocked Dickerman's requests for visitation with the child after January 4, 2012. The court notes on page 16 of its opinion, "one of the circumstances this court considered was the fact that Melinda interfered with Brian's repeated requests to visit Drake." The court went on to note that Dickerman demonstrated affection, care and interest towards the child by his repeated text messages to the mother, his actions in retaining counsel and filing a request to modify custody to allow him visitation in October of 2013. The court noted that it "does not doubt that Brian would have continued visits absent Melinda's decision to discontinue contact. The text messages, retention of counsel, and the motion to modify

custody were not incidental acts, “[t]hese are the actions of a father who is attempting to maintain a relationship with his child, not the actions of a father who is neglecting his child.”, *citing In re Adoptoin of Baby Girl P*, 291 Kan. 424, 434 (2010).

With regard to financial support, the trial court noted that Dickerman made 6 child support payments in the two years preceding the amended petition with additional amounts applied to the child support arrearage. Vol. 5, p.17. The court noted that Dickerman and his family were battling foreclosure on their home and struggling financially. *Id.* The court stated that Dickerman may have been able to pay more toward child support, but specifically found that Brecheisen failed to meet his clear and convincing burden of proof to show that the payments made under the circumstances did not constitute a substantial portion of child support.

The district court specifically addressed both emotional and financial support, and in both circumstances found that Brecheisen had not demonstrated a failure of support by Dickerman in either regard. The error in application of the statute alleged by Brecheisen, that the district court required him to prove both failure of emotional and financial support, is irrelevant as the court found he failed to show any failure of support by Dickerman. Moreover, the alleged requirement of proof of both failures is never made in the court’s extensive 19 page opinion.

**II. The district court’s decision to deny the step-parent adoption was supported by substantial competent evidence.**

A trial court’s decision is reviewed in the light most favorable to the prevailing party below to ascertain whether it was supported by substantial competent evidence. In

the Matter of JMD, 293 Kan. 153, 171 (2011). Substantial competent evidence possesses both relevance and substance and provides a substantial basis of fact from which the issues can be reasonably determined. Frick Farm Properties v. Kansas Dept. Of Agriculture, 289 Kan. 690, 709, 216 P.3d 170 (2009). An appellate court should not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. In re BDY, 286 Kan. 686, 705, 187 P.3d 594 (2008).

Brecheisen argues that the court did not have substantial competent evidence that Dickerman had been shown to be unfit, that his contacts with the child were incidental only, that Dickerman should have paid more child support, that the mother did not interfere with Dickerman's attempts to visit the child, and that it was in the child's best interests to terminate Dickerman's parental rights. Brecheisen's arguments universally fail to recognize that it was his burden to demonstrate by clear and convincing evidence his claims.

With regard to unfitness, the district court noted that the mother and child lived with Dickerman until December 2010 and was involved in the child's daily activities until his relationship with the mother ended. The court noted that Dickerman has a history of criminal convictions related to drug use and was involved in an April 2011 incident in which his son was left alone in a motel room. Nonetheless, the mother saw the benefit of him having relationship with his son and had continued to allow him visits. When the mother obtained sole custody in an uncontested paternity case, she still continued to allow Dickerman to spend time with his child on a regular basis, including at least 14 visits from July 2011 through January 2012. The court specifically found that the

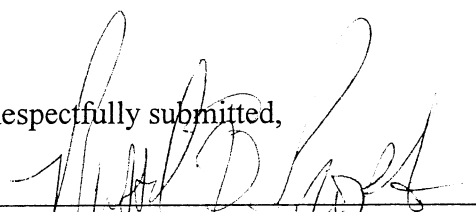
mother discontinued visits with Dickerman not because she was concerned about his possible drug use or from fear for her son's safety, but because she was angry at him for getting his wife pregnant and not paying her child support. The court noted that Brian persisted in his attempts to have a relationship with his son despite the mother's urging that he "move on". The court noted the factors in K.S.A. 38-2269(b) regarding findings of unfitness, but after weighing them with the testimony concluded that there had not been a clear and convincing showing of parental unfitness. This finding should not be disturbed on appeal.

Brecheisen argues that the father's contacts with the child were incidental only, and could have been disregarded under 2013 Supp. 59-2136(h)(2)(B). The court noted that during the two-year look back period Dickerman texted the mother repeatedly to express his affection concerning his son and request to see him and retained counsel and requested through that counsel to have court ordered parenting time. As discussed previously, the court specifically noted that the child's mother mislead Dickerman by initially telling him he could see his son on holidays and his birthday, requiring some period of time for Dickerman to realize she did not intend to allow him any further visits. Relying in part on In re Baby Girl P, 291 Kan. 424, 242 P.3d 1168 (2010), which specifically noted actions in retaining counsel to obtain visitation, offering to give gifts or assistance, and demonstrating a commitment to assuming the role of a father or not incidental contact, the district court correctly found Dickerman's actions to be more than incidental.

With regard to child support, the court noted the testimony concerning Dickerman's financial troubles, the fact that he was dealing with a mortgage foreclosure at the time of the hearing, and his regular monthly payments of child support beginning in October of 2013 that included a voluntary amount to be applied toward his arrears in holding his financial support was sufficient in the circumstances. Again, it is Brecheisen's duty to present clear and convincing evidence to convince the court Dickerman had not paid a substantial amount of child support when able to do so, and evidence was provided that supported the court's decision to find the financial support sufficient.

On the child's best interests, testimony was provided that Dickerman was a good father early in the child's life and that he made repeated attempts to assume his duties as a father after the parties separation. Dickerman's parental rights are fundamental, constitutionally protected rights. Adoption of GLV, 286 Kan. 1034, 1061-1062 (2008). Although Brecheisen may appear in some respects to be a better choice as a father to the child, the court cannot reassign children parents. No grounds exist in this case to terminate Dickerman's rights, and the district court in this case correctly refused to do so.

Respectfully submitted,



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Russel B. Prophet, #20392, of  
HAMPTON & ROYCE, L.C.  
9th Floor - United Building  
119 West Iron - P.O. Box 1247  
Salina, Kansas 67402-1247  
(785) 827-7251  
Attorneys for Appellee

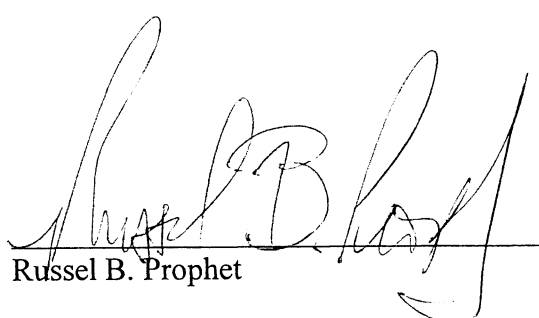
**CERTIFICATE OF SERVICE**

I, Russel B. Prophet, hereby certify that on this 23rd day of December, 2014, I mailed two (2) true and correct copies of the above and foregoing Brief of the Appellants by United States mail, first class, portage prepaid to:

Janice Norlin  
Marietta, Kellogg and Price  
148 S. 7<sup>th</sup> Street  
Salina, KS 67401

that on that same date, I mailed sixteen (16) a true and correct copies of the same for filing to:

Carol Green  
Clerk of the Kansas Court of Appeals  
Kansas Judicial Center  
301 S.W. 10<sup>th</sup> Ave  
Topeka, KS 66612-1507



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Russel B. Prophet



# **APPENDIX “A”**

FILED  
DISTRICT COURT  
2014 JUN 20 AM 11:34

In the Matter of the Adoption of )  
)  
)  
v. )  
)  
Drake Alan Johnson Dickerman )  
)  
\_\_\_\_\_ )

Case No. 2013 AD 13

**MEMORANDUM DECISION & ORDER**

In chambers, on June 20, 2014, the Court, after reviewing the pleadings, the evidence presented at hearing on January 14, 2014 and at hearing on May 15, 2014, and considering arguments of counsel, enters the following decision on the Petition for Step Parent Adoption-Amended.

**FINDINGS OF FACT**

1. Drake Alan Johnson Dickerman (“Drake”) was born in 2009 to Brian Dickerman (“Brian”), the natural father, and Melinda Brecheisen (“Melinda”) the natural mother.
2. Petitioner, Chris Brecheisen, is Melinda’s husband. Petitioner and Melinda married on July 4, 2013.
3. From approximately 2008 through December 2010, Brian and Melinda resided together as a couple. According to Melinda, Brian was a loving and affectionate father when they lived together.
4. In December 2010, Brian moved out of the residence. Brian and Melinda’s relationship ended in large part due to Brian’s drug use. Toward the end of the relationship, Brian would leave the residence for weeks at a time, return, and leave again for days at a time. Brian brought drugs into the home.

5. From December 2010, Brian visited Drake after work for a “couple” of hours. Brian visited Drake every other weekend. Melinda and Brian would meet in New Cambria, she would leave Drake with Brian, and she would pick up Drake on Sunday.
6. Petitioner and Melinda began dating in December 2010 and they moved in together in April 2011.
7. Visitation between Drake and Brian continued until April 16, 2011. On that date, Brian had Drake for visitation over the weekend. Brian left Drake in a hotel room unattended. When law enforcement arrived at the hotel room, they could hear Drake crying. A juvenile intake officer contacted Melinda and returned Drake to her.
8. As a result of the April 16, 2011 investigation, Brian was arrested and charged with possession of illegal drugs and obstructing legal process in Dickinson County Case Number 11 CR 63.
9. The Dickinson County Attorney filed a Child in Need of Care case number 11 JC 37.
10. On April 29, 2011, Melinda filed a paternity action against Brian in Saline County, Kansas case number 11 DM 408.
11. The Dickinson County Child in Need of Care case was subsequently dismissed upon the filing of the Saline County Paternity case.
12. On May 5, 2011, Brian was served in the paternity case while being held in the Dickinson County Jail.

13. Brian neither appeared, nor did file an Answer in the paternity case. Brian was not represented by counsel and was incarcerated at the time of the final hearing in that matter.
14. Brian was determined to be Drake's biological father and Melinda received sole custody. Although the Court ordered that Brian have no contact with Drake, he continued to request, and Melinda allowed parenting time with Drake.
15. The Journal Entry included an order for child support in the amount of \$177 a month effective May 1, 2011.
16. Sometime in September 2011, at Melinda's request, Brian agreed to "look into" the income withholding order from Grain Belt Supply, his employer. Brian was aware of the child support order.
17. Subsequent to the paternity case, Brian received parenting time supervised by her and at Melinda's discretion. The visits occurred at the park, the mall, McDonald's, and at a relative's home. According to Melinda, she was not concerned with Drake's safety during visitation when she was present. Brian would text Melinda asking to see Drake and Melinda would text back with the date and location to meet. Brian was allowed supervised visitation with Drake on the following dates:
  - a. July 26, 2011
  - b. August 3, 2011
  - c. August 12, 2011
  - d. September 2, 2011
  - e. September 21, 2011

- f. October 3, 2011
- g. October 7, 2011
- h. October 18, 2011
- i. October 26, 2011
- j. November 9, 2011
- k. November 12, 2011
- l. December 7, 2011
- m. December 14, 2011
- n. January 4, 2012

18. During the period Brian was allowed to visit Drake, Brian gave Drake clothes, diapers, a toy, a cowboy hat and video game for his birthday in November 2011, and a Christmas present at the January 4, 2012 visit.

19. On January 4, 2012, Melinda learned that Brian's girlfriend (current wife), was pregnant.

20. On January 2, 2012 Brian texted Melinda asking to see Drake because he missed him. Melinda responded "I will let u know tmrw." The text conversation is silent until January 11, 2012 when Brian texts stating "You not talking to me now." Melinda responds, "I will contact you when drake and I are available."

21. Six days later on January 17, 2012, the following exchange occurred between Melinda and Brian via text messaging:

- a. Melinda: "I hate to keep you wondering when u will see drake but I have to be honest.....my job is to protect him and you keep popping out kids

as if it is a game!!!! I have SOLE custody and u owe 4,000 in child support. So to be honest.....u can see drake holidays and birthdays.”

- b. Brian: “No im none of those I don’t know what to say I don’t want to fight with you and I love drake so much and I will do anything to prove it”
- c. Melinda: “U have already shown that..... I don’t want to fight either but my job, life and concern is drake!!!! I don’t want to confuse him and he is soooo happy!!
- d. Melinda: “U need to move on!!!!”
- e. Brian: “Ill never move on from him you’ll see”
- f. Melinda: “No ur choice”

22. Brian texted Melinda and asked to see Drake or inquire regarding his well being on the following dates:

- a. January 27, 2012
- b. February 14, 2012
- c. February 19, 2012
- d. March 6, 2012 (Brian also informed Melinda of new employment)
- e. April 7, 2012
- f. May 13, 2012
- g. June 16, 2012
- h. June 19, 2012
- i. August 2, 2012
- j. October 16, 2012
- k. November 3, 2012

- l. November 6, 2012
- m. November 9, 2012
- n. November 14, 2012
- o. December 11, 2012

23. From January 2012 through December 2012, Brian sent Melinda approximately 91 text messages. Of those 91 texts, Brian asked for and received 25 photographs of Drake; Brian specifically asked to see or visit Drake in 12 of the texts. Brian asked if there was anything he could do or provide for Drake in 3 of the texts, including his offer to purchase gifts for Drake's birthday and for Christmas.

24. On one occasion Brian texted Melinda regarding Drake's well-being because he heard Drake was in the hospital.

25. After January 4, 2012, Melinda consistently denied Brian's requests for visitation and declined Brian's offers of gifts or assistance for Drake.

26. In early November 2012, Brian was again expressing his love for Drake and desire to see him in this series of texts:

- a. Brian: "Honestly there has not been one day since the last time I got to see him and hug him that I have not thought about him and it tears my heart apart knowing he is so close but I cannot see him I tear up everytime anyone asks me about him or how he is and i cannot answer them."
- b. Brian: [Melinda does not respond directly to the above text and on November 6, 2012 Brian texts Melinda] "Is drake getting excited about turning 3"
- c. Melinda: "Yes. He says my birthday coming!"



- d. Brian: "What does he want for his birthday"
- e. Melinda: "He is happy with what he has. He is too young to even know what he wants he is not picky."
- f. Brian: "Can I still see him on his birthday like you said I'd love to see and hold again."
- g. Melinda: "Brian.....I don't think that's a good idea for a lot of reasons. 1) would not remember u and be scared 2) I don't want to confuse him 3) I'm just not ready I still have a lot of anger about what happened or could of happened. I have tried to block it out of my mind and every time I think of that phone call saying we have ur son at Dickinson county jail I want to scream!!! I may not have trusted you with us but I trusted u with drake. I'm getting angry talking about it. Please respect my decision."
- h. Brian: "I do and I understand I just hope that one day you will be able to forgive me and let me our son who I love so much again hope you guys have a great nite give him an extra hug and Kiss tonight from me at least."
- i. Melinda: "K. Thanks for respecting my decision."

27. Melinda testified that she denied Brian opportunities to meet with Drake and to give him presents. Melinda believed that Drake "deserved something better." Melinda believes her current husband will be a better father.

28. After Melinda discontinued Brian's visits with Drake, she began communicating with Mindy, Brian's current wife, about Brian. Melinda became fearful when she learned about Brian's drug use through Mindy.

29. From January 1, 2011 until July 26, 2013, the filing of the original petition, Brian spent 171 days in jail.
30. In December 2011, Brian gave Melinda \$100.
31. Brian made the following child support payments for a total of \$1,362 during the two years preceding the amended petition:
- a. \$227-October 2013
  - b. \$227-November 2013
  - c. \$227-December 2013
  - d. \$227-January 2014
  - e. \$227-February 2014
  - f. \$227-March 2014
32. Petitioner and Melinda resided together continuously since April 2011. According to Melinda and Petitioner, Drake believes Petitioner is his father and “doesn’t have a clue who Brian is.”
33. Drake is on Petitioner’s health insurance plan. Petitioner and Melinda provide for Drake financially.
34. Petitioner is employed as a pilot for Blue Beacon. Petitioner has worked for Blue Beacon for the past 10 years and has a good reputation in the community. Petitioner desires to be Drake’s father. Petitioner has 3 other children from a previous relationship.
35. Brian is currently employed by a construction company in Salina, KS. He is married to Mindy Dickerman and they have one child together, Bryce, born July

- 31, 2012. Mindy Dickerman has one or more children from a previous relationship that reside in their home.
36. Brian is currently on probation supervised by the Eighth Judicial District Community Corrections for three separate Dickinson County cases. On March 27, 2013 his probation was revoked and reinstated for 18 months with a 60 day jail sanction and the added condition that he obtain a drug and alcohol evaluation and comply with the recommendations thereof.
37. Brian currently has a case pending in Salina Municipal Court for Disorderly Conduct and Battery.
38. Brian tested positive for methamphetamine on March 20, 2013, thereafter, Brian tested negative for any illegal substances or alcohol.
39. Since March 2013, Brian reported to all probation appointments, obtained a drug and alcohol evaluation, and began counseling through Sandstone Bridge Center of Salina, KS.
40. Between March 2012 and March 2014, Brian spent the following dates in jail:
- a. February 25, 2013 (released the same day)
  - b. March 20, 2013 through May 19, 2013
  - c. Plaintiff filed the original Petition for Step Parent Adoption on July 26, 2013.
41. Respondent retained counsel and opposes the Petition and Amended Petition for Step Parent Adoption.
42. Respondent filed a Motion to Modify Custody and Establish Parenting time on October 17, 2013 in Saline County District Court Case No. 11 DM 408.

43. The first trial in this matter occurred on January 14, 2014. After presentation of evidence, this Court denied Plaintiff's step-parent adoption. Thereafter, plaintiff's counsel filed a Motion to Alter or Amend Judgment and a Motion for Leave to Amend the Adoption Petition. Petitioner acknowledged that K.S.A. 59-2136(d) does not apply and reference thereto in the original Petition was in error. Brian is the child's presumed father pursuant to K.S.A. 23-2208(a)(4) and (6) not pursuant to K.S.A. 23-2208(a)(1), (2) or (3) as referenced in K.S.A. 59-2136(d). Therefore, K.S.A. 59-2136(e) and (h) govern this case.

44. This Court denied Plaintiff's Motion to Alter or Amend Judgment but granted the Motion for Leave to Amend the Petition. The Court denied Plaintiff's request for the amended Petition to relate back. Therefore, the two year window is now March 14, 2012 to March 14, 2014.

#### CONCLUSIONS OF LAW

The petitioner in an adoption proceeding has the burden to prove by clear and convincing evidence that termination of parental rights is warranted. *See In re Adoption of BBM*, 290 Kan. 236 (2010).

"Adoption statutes are strictly construed in favor of maintaining the rights of natural parents in those cases where it is claimed that, by reason of a parent's failure to fulfill parental obligations as prescribed by statute, consent to the adoption is not required." *See In the Matter of the Adoption of G.L.V. and M.J.V.*, 288 Kan. 1034, Syll. (2008).

Pursuant to K.S.A. 59-2136(h)(1)(G), the district court may terminate a biological father's parental rights in a step parent adoption proceeding if the "father has

failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition.” “The duties of a parent” are two-fold. The parent has the duty to provide financial support as well as the duty to show “affection, care, and interest toward one’s child.” See In the Matter of the Adoption of S.L.P., 303 P.3d 727 (2013)(unpublished); citing In re the Adoption of F.A.R., 242 Kan. 231 (1987); and In re Adoption of J.M.D., 293 Kan. 153 (2011).

The court may disregard all incidental contacts, including incidental communications or contributions, but must consider “all surrounding circumstances.” See In re Adoption of J.M.D., 293 Kan. 153 (2011) and K.S.A. 59-2136(h)(2)(B). A biological father’s actions in retaining counsel, filing documents to obtain visitation, providing gifts, and even in making an offer to provide support for the children are not incidental or insignificant acts, but instead demonstrate a commitment to assuming the role of the father. See In re Adoption of Baby Girl P, 291 Kan. 424, 434 (2010). A court reviewing a request to involuntarily terminate parental rights may not “seek ‘better’ families” for “children whose family circumstances are challenging or financially difficult.” See id. at 435-36. “The preservation of a father's relationship with his child is the starting point of a termination proceeding, not the finish line that a father must labor to reach.” See Id. at 433.

Pursuant to K.S.A. 59-2136(h)(1) “...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;
- (G) the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition.

(2) In making a finding whether parental rights shall be terminated under this subsection, the court may:

(A) Consider and weigh the best interest of the child; and

(B) Disregard incidental visitations, contacts communications or contributions.

(3) 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. *(subparagraphs A, and C-H excluded)*

The trial court may consider the factors listed in the Revised Code for Care of Children, K.S.A. 38-2201, *et seq.* when determining whether a parent is unfit pursuant to K.S.A. 59-2136(h)(2). *See In re Adoption of A.P.*, 26 Kan.App.2d 210 (1999); *see also* K.S.A. 38-2269(b) and (c).

It is not error to admit evidence regarding circumstances that occurred prior to the two-year period "to the extent it is relevant to explain or prove conduct or lack thereof during the two-year period." *See In re Adoption of F.A.R.*, 242 Kan. 231 (1987). The court in *F.A.R.* noted it was appropriate for the trial court to consider the fact that the natural mother interfered with the father's rights to maintain contact. *See id.* at 237.

***Is the biological father unfit or incapable of giving consent according to K.S.A. 59-2136(h)(1)(B)?***

More specifically, did the Petitioner prove by clear and convincing evidence that Brian is unfit? The events prior to and after March 2012 are relevant to understand Brian's fitness, or lack thereof, as a parent. The following is a review of Brian's involvement with Drake since birth.

Neither party disputes that Brian has made many mistakes as a father. He struggles with drug use, has a criminal record, and is behind on child support. Most significantly, in April 2011, Brian left Drake, a small helpless child at the time, alone in a hotel room. Brian was involved in illegal drugs and arrested that same day after law enforcement arrived at the room and found Drake crying and alone near an open window.

Brian was in a relationship with Melinda at the time of Drake's birth. They lived together as a couple and Brian lived with Melinda and Drake until December 2010. He was involved in the daily activities of raising a child until Melinda and his relationship deteriorated due to Brian's drug use. Melinda was aware of Brian's problems and instabilities but continued to allow Brian unsupervised visitation with Drake. After April 2011, Melinda obtained sole custody of Drake through a paternity case that Brian did not oppose. The court in the paternity case imposed child support. Brian failed to make any child support payments for Drake prior to October 2013. Although the court order prohibited Brian's contact with Drake, Melinda allowed Brian to have supervised visitation with Drake. Brian had supervised visitation with Drake on at least 14 occasions from July 2011 through January 4, 2012. The January 4, 2012 visitation was the last contact Brian had with Drake until this Court allowed supervised visitation earlier this year. Melinda affirmatively prohibited Brian from seeing Drake. She did not discontinue visitation because she was concerned with Brian's possible drug use. She did not discontinue visitation because she was concerned with Brian harming or neglecting Drake. She discontinued visitation when she learned Brian's girlfriend, now wife, was pregnant. Melinda discontinued visitation because she was angry that Brian kept "popping out kids" and owed her more than \$4,000 in child support.



Melinda did not initially tell Brian that all contact was discontinued, instead she informed Brian that he could see Drake on holidays and birthdays. However, that was never her intention. Brian responded by texting Melinda and inquiring about Drake's well-being. He repeatedly asked to see Drake, which Melinda repeatedly denied. Brian asked for Drake's photograph which Melinda provided.

Brian has other children that were born prior to Drake. Brian failed to pay child support for those children and on at least one case, his parental rights were terminated. His failings in those situations are not imputed to his relationship with Drake. It is apparent, however, that Melinda believed based on Brian's past behavior with his other children, that he would "move on" and not be involved in Drake's life. Brian did not move on. He clearly decided to pursue visitation with Drake by appeasing Melinda. He did so by communicating with her and asking to see Drake. Once Melinda discontinued his visitations, Brian should have immediately filed a motion to modify visitation in the domestic case. Instead he waited until October 2013 to do so after his repeated requests to Melinda failed and the step parent adoption was filed.

With that factual context in mind, the Court turns to the question of unfitness and considers the factors listed in the Revised Code for Care of Children. Paragraphs 1, 2, 6, 7, 9 of K.S.A. 38-2269(b) do not apply to the facts of this case. Paragraph 3 is relevant in that Brian struggled with drugs, specifically methamphetamine. However, he is undergoing counseling pursuant to the terms of his probation and he has tested negative, or clean, since March 2013. Brian's struggle with drugs and/or alcohol has not rendered him unable to care for the ongoing physical, mental, or emotional needs of Drake.

Paragraph 4 is relevant in that Brian neglected Drake in April 2011 by leaving him in the motel room. One could argue that Brian neglected Drake by acquiescing to Melinda's decision to not allow contact beginning in January 2012. However, the numerous texts, questions, and requests for contact along with the motion for modification of custody in the domestic case and his payments of child support from October 2013 to the present day contradict that argument. Although, he would have been better served by filing the motion to modify earlier, Brian did not neglect Drake.

Paragraph 5 is relevant in that Brian was convicted, is on probation, and spent time in jail as noted above. However, based on Brian's progress thus far his time in jail did not render him unable to properly care for Drake nor does it indicate conduct or a condition that is unlikely to change in the foreseeable future.

Although paragraph 7 does not apply, this court recognizes the fact that Brian was not afforded the opportunity to have appropriate public or private agencies provide reasonable efforts to rehabilitate the family and the fact that Petitioner requests this court to apply the standards of unfitness in the absence of such an opportunity is noted.

Paragraph 8 is relevant and the facts demonstrate that Brian attempted to reunite with Drake by appeasing Melinda when he simply should have filed a motion to modify custody when she began denying him access. This factor will be discussed in more detail below regarding Brian's failure to maintain regular visitation.

Paragraphs 1 and 3 of K.S.A. 38-2269(c) do not apply to the facts of this case. However, Brian was not provided a "reasonable plan approved by the court directed toward the integration of the child into a parental home" as would be required in a child in need of care case.

Paragraph 2 is relevant in that Brian did not have visitation with Drake after January 2012 when Melinda decided to discontinue contact. Despite the previous court order granting her sole custody and eliminating Brian's visitation, Melinda routinely allowed visitation after April 2011. Brian did not fail in that regard. His failure lies in his decision to continually ask Melinda for visitation instead of seeking judicial intervention sooner. Brian remained in contact with the "custodian of the child" and filed the appropriate motion in October 2013. One of the circumstances this court considered was the fact that Melinda interfered with Brian's repeated requests to visit Drake. *See In re Adoption of F.A.R.*, 242 Kan. at 237.

Finally, paragraph (4) is relevant to the extent it applies, if at all, to child support. As far as this court is aware Brian provided financial support for Drake until December 2010 when he left the home. A very small amount of support and a few gifts were noted above for January 2011 through September 2013. Thereafter, Brian routinely made monthly child support payments including an amount applied to arrears. The petitioner failed to prove by clear and convincing evidence that Brian had "the ability to pay" all of the ordered child support. It is clear that he could have paid more, however, based on the financial information presented, Brian has been struggling financially and was battling to avoid foreclosure on his home.

The Petitioner failed to prove by clear and convincing evidence that Brian is unfit.

*Did Brian fail or refuse to assume the duties of a parent for two consecutive years next preceding the filing of the petition?*

Again, Petitioner must prove this allegation by clear and convincing evidence. Although this Court looks to the two years preceding the filing of the amended petition, the events and circumstances prior to March 2012 are relevant to explain and prove Brian's conduct during the two-year period.

Brian demonstrated affection, care, and interest toward Drake as evidenced by his repeated text messages to Melinda from March through December 2012, the fact that he retained counsel, provided gifts on a few occasions, and by filing the motion to modify custody in October 2013. *See Adoption of Baby Girl P*, 291 Kan. at 434. Petitioner focused on the fact that Brian did not visit Drake during this 2 year period, however, that was due in part to Melinda's decision to discontinue visitation. The fact that Melinda initially led Brian to believe that he would see Drake on holidays and birthdays is not lost on this Court. Considering the frequency and character of visitations prior to January 2012, and the repeated requests for continued visitation thereafter, this Court does not doubt that Brian would have continued visits absent Melinda's decision to discontinue contact. The text messages, retention of counsel, and the motion to modify custody were not incidental acts, "[t]hese are the actions of a father who is attempting to maintain a relationship with his child, not the actions of a father who is neglecting his child." *See In re Adoption of Baby Girl P.*, 291 Kan. 424, 434 (2010).

Brian made six child support payments during the two year period preceding the amended petition. Those payments included an additional amount applied to arrears. Evidence was also presented that Brian and his family were battling foreclosure on their home and struggled financially. Although it is clear that Brian could have paid more toward child support during the two year period, Petitioner failed to prove by clear and

convincing evidence that Brian was financially able to provide a substantial portion of child support.

*Is termination in Drake's best interests?*

Pursuant to K.S.A. 59-2136(h)(2)(A), when making a decision regarding termination of parental rights, the court may consider the best interests of the minor child. However, this Court will not “seek ‘better’ families” for “children whose family circumstances are challenging or financially difficult. *See Id.*, 291 Kan. at 435-36.

It is in Drake's best interest for Melinda and Petitioner to have residential placement. Petitioner is a stable, respected person who has provided love and affection for Drake. According to the evidence, Drake believes Petitioner is his father. Melinda believes her current husband is a better father for Drake than Drake's biological father, Brian. That is not the test for this Court to determine whether Brian's parental rights should be terminated nor is it the test to determine what is in Drake's best interests. The best interest standard does not mean this Court should decide termination by comparing Petitioner's and Brian's merits as fathers and then seeking a “better” family for Drake based on that comparison.

Brian has continuously demonstrated a commitment to be involved with Drake and is working toward that end. Brian was with Drake at birth and for the early months of his life. Even after the relationship between Brian and Melinda dissolved, Brian continued with visitation until Melinda discontinued it in January 2012. Thereafter, Brian repeatedly requested contact and was told initially that he would see Drake on holidays and birthdays. He made monthly support payments since October 2013 despite the potential foreclosure on his home. Prior to that he retained an attorney and took the

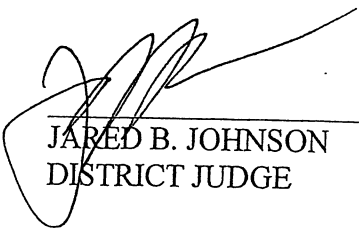
appropriate steps to modify custody. Brian is not a danger to Drake in supervised visitation.

Brian wants to be involved in Drake's life and has demonstrated as much. Although Melinda requested that Brian "move on" and in essence stay out of Drake's life, Brian did not. Brian's responded to Melinda's text by claiming that he will "never move on..." Brian has not moved on and it is not in Drake's best interests for him to abandon the relationship. Despite Brian's faults, it is in Drake's best interest for Brian to be drug free and involved in Drake's life. As Brian noted in court, it is in Drake's best interest for him to know that he has two fathers.

For these reasons, the Amended Petition is denied.

This Memorandum Decision and Order shall serve as the Journal Entry of the Court's ruling herein.

IT IS SO ORDERED.



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JARED B. JOHNSON  
DISTRICT JUDGE

On June 20, 2014, the original of the above Memorandum Decision and Order was filed with the Clerk of the District Court and copies were mailed to:

Russell B. Prophet  
Hampton & Royce, L.C.  
119 West Iron-P.O. Box 1247  
Salina, KS 67402-1247

Janice Norlin  
Marietta, Kellogg & Price  
P.O. Box 2478  
Salina, KS 67402-2478