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**No. 14-112219-A**

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

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

**CHRISTOPHER BRECHEISEN  
Petitioner-Appellant**

**and**

**BRIAN DICKERMAN  
Respondent-Appellee**

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**BRIEF OF APPELLANT  
CHRISTOPHER BRECHEISEN**

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**Appeal from the District Court of SALINE County, Kansas  
Honorable Jared B. Johnson  
District Court Case No. 13 AD 13**

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**ORAL ARGUMENT**

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### Nature of the Case

Stepfather, Christopher Brecheisen, appeals the District Court's Order denying the stepparent adoption in Saline County Case Number 13 AD 13.

### Statement of Issues

- Issue I: The District Court misinterpreted and misapplied K.S.A. 2013 Supp. 59-2136 in denying the stepparent adoption.**
- Issue II: The District Court's decision to deny the Stepparent Adoption was not supported by substantial competent evidence.**

### Statement of Facts

D.A.J.D. was born in 2009 to B.D., the natural father ("Father") and M.J. the natural mother ("Mother"). (R. I, 109). Mother and Father never married. (R. IV, 26, lines 15-16).

C.B. (Stepfather) and Mother married on July 4, 2013. (R. II, 28, lines 5-6). C.B. is Mother's spouse and D.A.J.D.'s Stepfather. (R. I, 109) (R. IV, 30, lines 3-9). C.B. filed the original Petition for Stepparent Adoption on July 26, 2013. (R. I, 1).

From Approximately 2008 through December 2010, Father and Mother resided together as a couple in Salina, Kansas. According to Mother, Father showed love and affection to D.A.J.D. when they lived together. (R. II, 60, lines 16-25; 61, 1; R. I, 109).

In December 2010, Father moved out of the residence. (R.II, 14, lines 14-18). Father and Mother's relationship ended in large part to Father's drug use. Toward the end of the relationship, Father would leave the residence for weeks at a time, return, and leave again for days at a time. Father brought drugs into the home. (R. I, 109).

From December 2010, Father visited D.A.J.D after work for a “couple” of hours. Father visited D.A.J.D every other weekend. Mother and Father would meet in New Cambria, she would leave D.A.J.D with Father, and she would pick up D.A.J.D on Sunday. (R. I, 110).

C.B. and Mother began dating in December 2010 and they moved in together in April 2011.

Visitation between D.A.J.D and Father continued until April 16, 2011. On that date, Father had D.A.J.D for visitation over the weekend. (R. I, 110).

Michael B. Ade, officer with the Abilene Police Department, was called on April 16, 2011, to investigate a possible burglary at Green Ford in Abilene, Kansas. (R. II, 7, lines 7-25). Ade’s partner made contact and arrested Father. (R. II, 8, lines 9-25). Father did not inform Officer Ade that D.A.J.D. was in a hotel room. (R. II, 9, lines-9-25). It was 37degrees outside. D.A.J.D. was found by an open window with the screen pushed out. (R. II, 10, lines 1-22). Drugs were found in the hotel room. *See Stepfather’s Exhibit 6.*

Father left D.A.J.D in a 2<sup>nd</sup> floor hotel room in Abilene unattended. When law enforcement arrived at the hotel room, they could hear D.A.J.D crying. D.A.J.D was 17 months of age at the time of this incident. (R. IV, 54, lines 7-9). *See Stepfather’s Exhibit 6.* A juvenile intake officer contacted Mother and returned D.A.J.D to her. (R. I, 110).

As a result of the April 16, 2011, investigation, Father was arrested and charged with possession of illegal drugs and obstructing legal process in Dickinson County Case Number 11 CR 63. The Dickinson County Attorney filed a Child in Need of Care Case

Number 11 JC 37. (R. I, 110). On April 29, 2011, Mother filed a paternity action against Father in Saline County, Kansas, Case Number 11 DM 408. (R. I, 110).

The Dickinson County Child in Need of Care case was subsequently dismissed upon the filing of the Saline County Paternity case. On May 5, 2011, Father was served in the paternity case while being held in the Dickinson County Jail. (R. I, 110). Father neither appeared, nor filed an Answer in the paternity case. Father was not represented by counsel and was incarcerated at the time of the final hearing in that matter. (R. I, 111).

The Saline County District Court determined Father to be D.A.J.D's biological father and Mother received sole custody. The Journal Entry included an order for child support in the amount of \$177 a month, effective May 1, 2011. (R. I, 111).

Although the Court ordered that Father have no contact with D.A.J.D, he continued to request and Mother allowed parenting time with D.A.J.D. (R. I, 111).

Sometime in September 2011, at Mother's request, Father agreed to "look into" the Income Withholding Order from Grain Belt Supply, his employer. Father was aware of the child support order. (R. I, 111).

Subsequent to the paternity case, Father received parenting time supervised by her and at Mother's discretion. The visits occurred at the park, the mall, McDonalds, and at a relative's home. According to Mother, she was not concerned with D.A.J.D's safety during visitation when she was present. Father would text Mother asking to see D.A.J.D and Mother would text back with the date and location to meet. Father was allowed supervised visitation with D.A.J.D on the following dates in 2011: July 26, August 3 and

12, September 2 and 21, October 3, 7, 18, 26, November 9 and 12, December 7 and 14.

He was also allowed visitation on January 4, 2012. (R. I, 111-112).

During the period Father was allowed to visit D.A.J.D, Father gave D.A.J.D 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. (R. I, 112).

On January 4, 2012, Mother learned that Father's girlfriend (current wife), was pregnant. (R. I, 112). Father's last supervised visit with D.A.J.D. was January 4, 2012. (R. IV, 23, lines 5-12). D.A.J.D received no presents, cards, telephone calls, after January 4, 2012. (R. IV, 23, lines 5- 25; R. IV, 24, lines 1-7).

On January 2, 2012, Father texted Mother asking to see D.A.J.D because he missed him. Mother responded "I will let u know tmrw." The text conversation is silent until January 11, 2012, when Father texts stating "you not talking to me now." Mother responds, "I will contact you when D.A.J.D and I are available." On January 17, 2012, Mother responded to Father and the following text exchange occurred:

- a. Mother: "I hate to keep you wondering when u will see D.A.J.D. 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 D.A.J.D. holidays and birthdays."
- b. Father: "no im none of those I don't' know what to say I don't want to fight with you and I love D.A.J.D. so much and I will do anything to prove it"
- c. Mother: "U have already shown that.... I don't want to fight either but my job, life and concern is D.A.J.D!!!! I don't want to confuse him and he is soooo happy!!
- d. Mother: "U need to move on!!!!"
- e. Father: "Ill never move on from him you'll see"
- f. Mother: "No ur choice"

(R. I, 112-113).

Father texted Mother and asked to see D.A.J.D. or inquire regarding his well being on the following dates in 2012: January 27, February 14 and 19, March 6, April 7,

May 13, June 16 and 19, August 2, October 16, November 3, 6, 9, and 14 and December 11<sup>th</sup>. (R. I, 113-114).

From January 27, 2012 through December 11, 2012, Father sent Mother approximately 91 text messages in 15 days. Of those 91 texts, Father asked for and received 25 photographs of D.A.J.D. (R. I, 114). *See Father's Exhibit B.* Father specifically asked to see or visit D.A.J.D. in 12 of the texts. Father asked if there was anything he could do or provide for D.A.J.D. in 3 of the texts, including his offer to purchase gifts for D.A.J.D.'s birthday and for Christmas. On June 19, 2012, Father texted Mother regarding D.A.J.D.'s well-being because he heard D.A.J.D. was in the hospital. *See Father's Exhibit B.*

In early November 2012, Father was again expressing his love for D.A.J.D. and desire to see him in this series of texts:

- a. Father: "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 every time anyone asks me about him or how he is and i cannot answer them."
- b. Father: [Mother does not respond directly to the above text and on November 6, 2012 Father text Mother} "Is D.A.J.D. getting excited about turning 3"
- c. Mother: "Yes! He says my birthday coming!"
- d. Father: "What does he want for his birthday"
- e. Mother: "He is happy with what he has. He is too young to even know what he wants he is not picky."
- f. Father: "Can I still see him on his birthday like you said I'd love to see and hold again."
- g. Mother: "Father.....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 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 D.A.J.D. I'm getting angry talking about it. Please respect my decision."

- h. Father: "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. Mother: "K. Thanks for respecting my decision."

(R. I, 114-115).

Father and Mother's last text exchange occurred on December 11, 2012. See Father's Exhibit B texts #81-#91. Father's last text to Mother was January 1, 2013, when he texted her "HAPPY NEW YEARS." See *Father's Exhibit B text #92*. (R. II, 35, lines 1-18). (R. II, 116, lines 15-21).

On October 7, 2013, Father made his first child support payment in the paternity case. (R. I, 116).

Mother testified that she denied father opportunities to meet with D.A.J.D. and to give him presents. Mother believed that D.A.J.D. "deserved something better." Mother believes her current husband will be a better father. (R. I, 115).

C.B. and Mother resided together continuously since April 2011. According to Mother and C.B., D.A.J.D. believes C.B. is his father and "doesn't have a clue who Father is." (R. I, 116). On January 14, 2014, Father testified that it's been two years since he's seen D.A.J.D face to face. (R. II, 122, lines 2-6).

D.A.J.D. is on C.B.'s health insurance plan. C.B. and Mother provide for D.A.J.D. financially. C.B. is employed as a pilot for Blue Beacon. C.B. has worked for Blue Beacon for the past 10 years and has a good reputation in the community. C.B. desires to be D.A.J.D.'s father. C.B. has 3 other children from a previous relationship. (R. I, 116) (R. IV, 45, lines 10-13).

On January 26, 2013, Mother began communicating with M.D., Father's current wife, about Father. Mother became fearful when she learned about Father's drug use through M.D. (R. I, 115). *See Stepfather's Exhibit 11.*

Mother and M.D. exchanged texts between January 26, 2013 and August 31, 2013.

On January 26, 2013 at 10:35 A.M.

- a. Mother: "How does he get to work? Just curious bc on my way to work I have to pass his work."
- b. M.D.: "Not sure how he is now today was the first day I seen him since Wednesday"
- c. Mother: "Oh. Do you think he was high today?"
- d. M.D.: "I know he was"
- e. M.D.: "I can tell over the phone if he is"
- f. M.D.: "He went from To" [two pictures attached to text]
- g. M.D.: "He really wanted to do good but got sucked back in I think that's what makes this so hard knowing its drugs thsts deciding our future"
- h. Mother: "It was the same with me....drugs will always win. He will say he will stop I couldn't let him bring me down with him."
- i. M.D.: "I've never seen it take someone over like this its awful"
- j. Mother: "I know. He goes off in his own world."
- k. M.D.: "He doesn't even make sense byt then blames me (his favorite line I don't know what you are fucking tAlking about). I wish I could bring him back but I have to give up its not fAir to my kids"

On January 27, 2103 at 10:43 A.M.

- a. M.D.: "How did you get him to quit being so mean he was always so polite when I seem him talk to you"
- b. Mother: "Idk. I always tried listening to him even tho I know he was messed up which was hard to do. The worse thing he ever did to me in violence was I asked to see his phone he threw it at me and said fuck you. Do you know what he's taking?"
- c. M.D.: "Meth"
- d. M.D.: "The last couple months he started hanging out with Shane and that's when he changed"
- e. M.D.: "And I took his phone and he said fuck you and pushed me down and stole my car and left"

On January 27, 2013 at 11:12 A.M.

- a. M.D.: "My mom Just called someone stole their quad"
- b. Mother: "Hmmm. Does he still have his?"
- c. M.D.: "He gave it to me for bailing him out they were together but I moved his"
- d. Mother: "You moved his to your parents???"
- e. M.D.: "He admitted he took it I should just get the police involved cause That's the third thing he's taken"

- f. Mother: "I think you should before he goes farther. If you don't worse things could happen. It's hard but its best for you and kids!!"

On January 28, 2013 at 12:59 P.M.

- a. M.D.: "If he tries taking me to court to see Bryce will u be on my side I do not trust him with him by himself only if I am there I'm so scared"
- b. Mother: "ABSOLUTELY !!!! I feel the same!!"
- c. M.D.: "Who knows what he would do with him by himself and the people he would have around him"
- d. M.D.: "What if he try's to take him from me"

On February 4, 2013 at 5:40 P.M.

- a. M.D.: "This might seem weird but if u have any of drakes baby clothes I could use them Brian says he doesn't want to pay me if he can't see him and all j asked for was a couple of months with hkm away from me I even let him borrow my car with those conditions. I could give you some money garage sale style"
- b. Mother: "What size is he wear now?"
- c. Mother: "Was he pissed about 4 wheeler?"
- d. M.D.: "He's 3-6 6-9 and has some 12 month that fit...I kinda felt weird asking but I haven't been this broke since I was 16"

On February 5, 2013 at 7:45 A.M.

- a. M.D.: "That would be great, Brian is the sickest person I have ever met he was on Skype and I said what are y going to do what I want or do I need to go get pfa and talk to child support inforcement he put something in his mouth I asked what is that he said shot gun look what you've done"
- b. Mother: "Omg!! Is that why you called last night? If your driving to work you can call"
- c. M.D.: "U know what he told me once he was going to keep having babies until he found someone fucked up enough to give him one this was before we were together I thought he was just playing"
- d. Mother: "Wow....that is crazy!! I had a nightmare last night that he tried to take drake so I ended up sleeping with drake."

On February 13, 2103 8:47 P.M.

- a. M.D.: "How did you keep him out of your life"
- b. Mother: "It was hard a t first bc I felt bad for drake. I just stopped responding to him. Did u give the truck back to him?"
- c. M.D.: "No but I let him use it and tonight he was riding with me and jumped out of the car driving down old 40 I have the truck sold"

On March 4, 2013 at 12:57 P.M.

- a. M.D.: "He was staying with his mom and we were trying but then Monday we went riding and cop wa at house when we got home and they arrested hkm so I bail hkm out 2000 and the next morning j seen his phone he had been texting someone after I went to sleep"
- b. Mother: "What did he get arrested for? Now what?"
- c. M.D.: "Not goin to probation"

The text messages indicated his girlfriend was enduring the same tragic cycle of drug addiction, neglect, abusive type behavior that Mother has previously endured. His girlfriend was looking for support. Mother was aware of the same cycle and the danger that would pose to D.A.J.D. (R. I, 38). (R. II, 117, lines 11-24).

From January 1, 2011 until July 26, 2013, the filing of the original petition, Father spent 171 days in jail. In December 2011, Father gave Mother \$100. (R. I, 116).

Between March 2012 and March 2014, Father spent the following dates in jail:

- a. February 25, 2013 (released the same day)
- b. March 20, 2013 through May 19, 2013 (R. I, 117).

(R. II, 118, lines 11-20).

Father's probation was revoked for a dirty U.A. and was in jail from March 20, 2013 through May 19, 2013. (R. IV, 51, lines 21-25). During Father's incarceration, he participated in the work release program. (R. II, 102, lines 8-10).

After Father was released from jail on May 19, 2013, he did not pay child support nor pursue any legal options available to see D.A.J.D. (R. II, 118, lines 5-10). Father testified Mother did not prevent Father from paying child support or retaining counsel in the paternity case. (R. IV, 54, lines 21-23). Father testified that he has been willing to let Stepfather and Mother support and care for D.A.J.D. (R.IV, 54, lines 10-20).

Father further testified that it had been two years since he had seen D.A.J.D. face to face and that it had been his choice not to pursue the options and opportunities available to him to change that. (R. II, 122, lines 2-10).

On October 4, 2013, Respondent's counsel entered an appearance in the Step-parent Adoption. (R. I, 8). On October 17, 2013, Respondent filed a Motion to Modify Custody and Establish Parenting time in the paternity case, Saline County District Court

Case No. 11 DM 408. (R. I, 117).

Father made the following court-ordered child support payments for a total of \$1,362 during the two years preceding filing the Amended Petition: \$227-October 2013; \$227-November 2013; \$227-December 2013; \$227-January 2014; \$227-February 2014; \$227-March 2014 (R. I, 116).

Father's tax returns reflect that he had the option or capability of providing support. (R. I, 38). Father testified that he was gainfully employed in 2011, 2012, and 2013. (R. IV, 56, lines 1-5). Father testified that his income was \$16,839 in 2011. (R. I, 137, line 2). Father testified that his 2012 income was \$33,944 and his 2013 income was \$31,000. (R. IV, 56, lines 6-10).

Father is currently employed by a construction company in Salina. He is married to M.D. and they have one male child together, YOB: 2012. M.D. has one or more children from a previous relationship that resides in their home. (R. I, 116-117) (R. II, 121, lines 8-20). Father has an eleven year old son who lives with his maternal grandmother in Kansas City. (R. IV. 12, lines 21-25; 13, lines 1-10). Father's current household includes his wife, M.D., their son, a stepdaughter and a nine-year old stepson. (R. II, 113, lines 24-25 and 114, lines 1-25). (R. II, 121, lines 10-20). (R. IV, 45, lines 10-13; 56, lines 19-25). Father supports his current wife, their son, and his two stepchildren. M.D. receives no support from the older children's father. (R. IV, 57, lines 1-5). Father also testified that he had a truck payment of \$350 per month. (R. II, 121, lines 21-23).

Father 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. (R. I, 117).

Father tested positive to methamphetamine on March 20, 2013, thereafter, Father tested negative for any illegal substances or alcohol. (R. I, 117).

Since March 2013, Father reported to all probation appointments, obtained a drug and alcohol evaluation, and began counseling through Sandstone Bridge Center of Salina, KS. (R. I, 117).

On May 15, 2014, Father testified that approximately March 2014, while on probation, he was in a Salina Bar and shared some beers with C.B., Mother, and M.D. Father further testified that he did not self-report to his probation officer. (R. IV, 57, lines 6-25; 58, lines 1-5).

Father currently has a case pending in Salina Municipal Court for Disorderly Conduct and Battery. (R. I, 117). On May 15, 2014, Father testified that at the hearing January 14, 2014, he did not inform the court of his pending municipal court charges for disorderly conduct and battery for events that occurred on December 14, 2013. (R. IV, 58, lines 6-12).

The first trial in this matter occurred on January 14, 2014. After presentation of evidence, this Court denied C.B.'s stepparent adoption. Thereafter, C.B.'s counsel filed a Motion to Alter or Amend Judgment and a Motion for Leave to Amend the Adoption Petition. C.B. acknowledged that K.S.A. 59-2136(d) does not apply and reference thereto in the original Petition was in error. Father 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. The Court denied C.B.'s Motion to Alter or Amend Judgment but granted the Motion for Leave to Amend the Petition. The Court denied C.B.'s request for the Amended Petition to relate back. Therefore, the two year window is now March 14, 2012 to March 14, 2014. (R. I, 118).

### **Arguments and Authorities**

**Issue I: The District Court misinterpreted and misapplied K.S.A. 2013 Supp. 59-2136 in denying the stepparent adoption.**

#### **Standard of Review**

Because this issue involves the interpretation and application of K.S.A. 2013 Supp. 59-2136, this is a legal question over which appellate courts exercise unlimited review. *In the Matter of the Adoption of J.M.D.*, 293 Kan. 153, 158, 260 P.3d 1196 (2011).

Statutory interpretation is a legal question over which appellate courts exercise unlimited review, unfettered by the trial court's interpretation. *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006). *In re J.M.D. at 158*. *In re P.Z.K.*, 332 P.3d 187 (2014) *Kan. App. LEXIS 51*.

The goal of statutory interpretation is to ascertain the intent of the legislature. See *In re Adoption of S.J.R.*, 37 Kan. App. 2d 28, 33, 149 P.3d 12 (2006). Words must be given their plain meaning and language found in the statute cannot be excluded. 37 Kan. App. 2d at 33. Moreover, the legislature's express inclusion of one thing generally means it intended to exclude others. See *Degollado v. Gallegos*, 260 Kan. 169, 172, 917 P.2d 823 (1996).

*In Re C.A.T.*, 47 Kan. App. 2d 257, 263; 273 P.3d 813 (2012).

## Analysis

The Court must first look at the legal framework for analyzing whether the District Court misapplied and misinterpreted K.S.A. 2013 Supp. 59-2136.

On June 20, 2014, after evidentiary hearings on January 14, 2014, and May 15, 2014, the District Court announced its ruling by issuing a *Memorandum Decision and Order*. The District Court found that Stepfather, had failed to prove, by clear and convincing evidence, each of his grounds for termination of Father's parental rights. Accordingly, the District Court refused to terminate Father's parental rights and denied the stepparent adoption.

Stepfather appeals and challenges the manner in which the District Court interpreted and applied K.S.A. 2013 Supp. 59-2136. Specifically, Stepfather claims the District Court misinterpreted and misapplied K.S.A. 2013 Supp. 59-2136(d) and (h)(1)(B), (C), (G), (2), and (3).

Our obvious starting point when considering how a statutory procedure is supposed to operate is to look at the applicable statutes. Generally, Article 21 of Chapter 59 of the Kansas Statutes Annotated governs adoptions. Specifically, *K.S.A. 2010 Supp. 59-2136* applies where a relinquishment or consent to an adoption has not been obtained from a natural parent, and the court is permitted to determine the necessity of such a relinquishment or consent. *K.S.A. 2010 Supp. 59-2136(a)....In re J.M.D., at 158-159.*

### **K.S.A. 2013 Supp. 59-2136(h)(1)(B),(C),(G), (2) (A) and (B), and (3):**

...(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. If a father desires but is financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, 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;

(C) the father has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth;...or

- (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. (Emphasis added.) *K.S.A. 2010 Supp. 59-2136(h)*.

*In re JMD at 160-161.*

The District Court correctly found that K.S.A. 2013 Supp. 59-2136(d) does not apply in this matter because Father is D.A.J.D.'s presumed father pursuant to K.S.A. 2013 Supp. 23-2208(a)(4) and (6). However, in determining whether Father had failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition, the Court incorrectly relied on the two-prong ledger test found only in K.S.A. 59-2136(d) rather than any one of the seven factors found in K.S.A. 59-2136(h)(1).

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 JMD.*, 293 Kan. 153 (2011). See (*R. I, 119*), *Court's Memorandum Decision and Order*.

Our Supreme Court has established that a parent's duties under *K.S.A. 2007 Supp. 59-2136(d)* include not only the duty of financial support, but also the duty to show affection, care, and interest toward his or her child. These duties constitute two sides of a

ledger, and a parent must fail the duties on both sides before an adoption can be granted without the parent's consent. *In re B.M.W.*, 268 Kan. at 881; see *In re Adoption of K.J.B.*, 265 Kan. 90, 101-02, 959 P.2d 853 (1998). *In the Matter of the Adoption of R.J.M.*, 189 P.3d 1187; 2008 Kan. App. Unpub. LEXIS 558.

Unlike the parents of D.A.J.D., the natural parents had been married in *S.L.P.*, *F.A.R.*, *J.M.D.*, *B.M.W.*, *K.J.B.*, and *R.J.M.* In those cases, pursuant to K.S.A. 59-2136(d), the two-fold duty to provide financial support as well as affection, care, and interest, commonly known as emotional support, applied.

In deciding whether a father's consent is necessary, the district court should consider "all the surrounding circumstances." *B.M.W.*, 268 Kan. at 882. At the same time, parental duties have been treated as a two-sided "ledger." "[I]f parental duties as outlined in K.S.A. 59-2136(d) can be charted on a 'ledger,' 'visitations, contacts, communications, or contributions' occupy one side, and 'child support as required by judicial decree' occupies the other." 268 Kan. at 882. A parent must fail at both sides of the ledger for a court to judicially sever parental rights and grant the stepparent adoption. 268 Kan. at 875. The two sides of the ledger are sometimes referred to as the "emotional side" and the "financial side."

*In re S.M.M.* 240 P.3d 626; 2010 Kan. App. Unpub. LEXIS 742.

Here, the two-prong ledger test does is not applicable.

Our legislature chose different statutory language for the factors that a district court is to consider when addressing stepparent and nonstepparent adoption proceedings. K.S.A. 2009 Supp. 59-2136(h) is more specific in terms of setting out factors for termination than K.S.A. 2009 Supp. 59-2136(d). Unlike K.S.A. 2009 Supp. 59-2136(d), which speaks generally to failure "to assume the duties of a parent," K.S.A. 2009 Supp. 59-2136(h)(1)(C) allows for termination if the father fails to make reasonable efforts "to support or communicate with the child." (Emphasis added.) The disjunctive "or" used in this part of the statute demonstrates a legislative intent that failure to provide either component--financial or emotional support--may suffice in itself to warrant terminating parental rights. We therefore decline to extend the ledger test to nonstepparent adoption proceedings.

*In re Baby Girl P.*, 291 Kan. 424, 432, 242 P.3d 1168 (2010).

Stepfather argues that the plain language of K.S.A. 2013 Supp. 59-2136(h)(1)(G) does not require that the father fail both the emotional and financial prongs of the two-prong test. Rather, the statute requires that the father, not fail or refuse to assume the duties of a parent for two consecutive years next preceding the filing of the petition.

When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and would 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. *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 271-72, 202 P.3d 7 (2009).

The clearly stated intent was to treat the parental rights termination of natural or presumed fathers differently in stepparent adoptions than in other types of adoptions. That stated intent contradicts any implication that the legislature intended to incorporate the parental termination provisions of *subsection (h)* into the stepparent adoption provisions of *subsection (d)*.

*In re J.M.D.*, at 162.

The District Court incorrectly applied the requirement found in K.S.A. 2013 Supp. 59-2136(d) that Father must fail both prongs of the two-prong test rather than applying subsection (h)(1) where any one of seven factors would warrant the termination of the Father's parental rights.

The District Court arbitrarily disregarded undisputed evidence in determining Stepfather had failed to prove by clear and convincing evidence that Father failed the K.S.A. 2013 Supp. 59-2136(h)(1) factors (B), (C) or (G).

Father provided gifts on a few occasions prior to the critical two-year period. Father's last supervised visit with D.A.J.D was January 4, 2012.

The following is a summary of undisputed evidence in the Record of Father's gifts, child support, and contact with D.A.J.D. during the critical two-year period from March 13, 2012, through March 14, 2014:

Father did not contact D.A.J.D. ;  
Father texted Mother a total of 11 days, from March, 2012 to December, 2012;  
Father's last text was December 11, 2012;  
Father did not provide cards, special gifts, or birthday gifts;  
Father retained counsel in the Adoption case on October 3, 2013;  
Father filed a Motion to Modify Custody and Establish Parenting time in the Paternity case in October 17, 2013; and  
Father paid \$1362 court-ordered child support from October 2013 -March 2014.

Stepfather next challenges the manner in which the District Court interpreted and applied K.S.A. 2013 Supp. 59-2136 (h)(1),(2), and (3).

Resolution of this issue requires interpretation of *K.S.A. 2007 Supp. 59-2136*. Interpretation of a statute is a question of law over which this court has unlimited review. An appellate court is not bound by the trial court's interpretation of a statute. *In re Adoption of S.J.R.*, 37 Kan. App. 2d 28, 32-33, 149 P.3d 12 (2006). *In re Adoption of D.D.H.*, 39 Kan. App. 2d 831,832; 184 P.3d 967 (2008).

The Court correctly found that, pursuant to K.S.A. 2013 Supp. 59-2136(h)(2)(B), the court may disregard all incidental contacts, including incidental communications or contributions, but must consider "all surrounding circumstances."

Accordingly, we now take the step which was justified by our analysis in *G.L.V.*; we put to rest the artificial constraints of the two-sided ledger approach and return to the historical approach of considering "all surrounding circumstances." See *G.L.V.*, 286 Kan. at 1044-46,1049, 1053.

Likewise, effect must be given to the plainly stated statutory 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. *K.S.A. 2010 Supp. 59-2136(d)*.

Of course, a natural father is still free to argue that the stepparent has failed to establish the conditions precedent to the presumption set forth in the statute, such as the father's financial ability to pay the judicially decreed child support amount. Or, a natural father might still argue that his "showering of affection" on the child or the performance of other parental duties has effectively rebutted the statutory presumption emanating from financial nonsupport.

Likewise, on the flip side, 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)*.

*In re J.M.D., at 167.*

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. *K.S.A. 2013 Supp. 59-2136 (h)(1)(3)*.

Whether a father's contacts with his children are sufficient to rebut a presumption raised by his failure to provide financial support is a question of statutory interpretation. *In re Adoption of D.R.B., 21 Kan. App. 2d 790, 794, 908 P.2d 198 (1995), rev. denied 259 Kan. 927 (1996)*. Statutory interpretation is a question of law over which an appellate court has unlimited review. This court is not bound by the trial court's interpretation. *LSF Franchise REO I v. Emporia Restaurants, Inc., 283 Kan. 13, 19, 152 P.3d 34 (2007)*.

*In the Matter of the Adoption of R.J.M., 189 P.3d 1187; 2008 Kan. App. Unpub. LEXIS 558.*

The District Court either found that Father paid enough child support so that the (h)(1)(C) presumption wasn't triggered or that Father's actions were enough to rebut the presumption. Neither rationale is supported by substantial competent evidence in the Record.

**Issue II: The District Court's decision to deny the Stepparent Adoption was not supported by substantial competent evidence.**

Standard of Review

The issue of whether a parent has refused or failed to assume parental duties under *K.S.A. 2007 Supp. 59-2136(d)* is a question of fact that will be reviewed on appeal only to determine if the decision is supported by substantial competent evidence. *In re Adoption of B.M.W., 268 Kan. 871, 882-83, 2 P.3d 159 (2000).*

When findings of fact are attacked for insufficiency of evidence or as being contrary to the evidence, the duty of the appellate court extends only to a search of the Record to determine whether substantial competent evidence exists to support the findings. An appellate court will not weight the evidence or pass upon the credibility of the witnesses. Under these circumstances the reviewing court must review the evidence in the light most favorable to the party prevailing below. *Aslin v. Seamon, 225 Kan. 77, 78, 587 P.2d 875 (1978).* *In re C.R.D., 21 Kan. App. 2d 94, 96, 897 P.2d 181 (1995).*

When an appellate court reviews a trial court's determination which is required to be based upon clear and convincing evidence, it considers whether, after review of all the evidence, viewed in the light most favorable to the prevailing party, it is

convinced that a rational factfinder could have found the determination to be highly probable. *In re B.D.-Y*, 286 Kan. 686, Syl. P 4, 187 P.3d 594 (2008).

Finding a party did not meet its burden of proof is a negative factual finding. Generally, an appellate court will not disturb a negative finding "absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. [Citation omitted.]" *General Building Contr., LLC v. Board of Shawnee County Comm'rs*, 275 Kan. 525, 541, 66 P.3d 873 (2003). *In re D.D.H.*, 39 Kan. App. 2d 831, 836, 184 P.3d 967 (2008).

Our Supreme Court has noted that "clear and convincing evidence is not a quantum of proof but, rather, a quality of proof. . . . It is clear if it is certain, unambiguous, and plain to the understanding. It is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it. [Citation omitted.]" *Ortega v. IBP, Inc.*, 255 Kan. 513, 528, 874 P.2d 1188 (1994); see PIK Civ. 3d 102.11. *In re D.D.H.*, at 837.

### Analysis

Stepfather asserts the evidence was not sufficient to support the District Court's findings and deny the Stepparent Adoption.

In finding that he failed to meet his burden of proof by clear and convincing evidence, Stepfather asserts the District Court arbitrarily disregarded undisputed evidence that Father was unfit pursuant to K.S.A. 59-2136 (h)(1)(B); that his efforts to support or communicate with D.A.J.D. were unreasonable pursuant to K.S.A. 59-2136(h)(1)(C); or that he failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition, pursuant to K.S.A. 59-2136(h)(1)(G); that Father

failed to provide a substantial portion of the child support as required by judicial decree pursuant to K.S.A. 59-2136(h)(3). Stepfather claims the District Court's findings contradicted facts that had been conclusively established by Father's testimony and his answers to Stepfather's Interrogatories.

The District Court's June 20, 2014, *Memorandum Decision and Order* provides the bases for the Court's decision to deny the stepparent adoption.

1. **STEPFATHER FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT FATHER IS UNFIT; AND**
2. **FATHER DID NOT NEGLECT D.A.J.D.**

**DISTRICT COURT'S REASON AND RATIONALE:**

The District 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). The events prior to and after March 2012 are relevant to understand Father's fitness, or lack thereof, as a parent.

K.S.A. 38-2269(b)(3) is relevant in that Father struggled with drugs, specifically methamphetamine. Father's struggle with drugs and/or alcohol has not rendered him unable to care for the ongoing physical, mental, or emotional needs of D.A.J.D.

K.S.A. 38-2269(b)(4) is relevant in that Father neglected D.A.J.D. in April 2011 by leaving him in the motel room. One could argue that Father neglected D.A.J.D. by acquiescing to Mother'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, Father did not neglect D.A.J.D.

K.S.A. 38-2269(b)(5) is relevant in that Father was convicted, is on probation, and spent time in jail as noted above. However, based on Father's progress thus far his time in jail did not render him unable to properly care for D.A.J.D. nor does it indicate conduct or a condition that is unlikely to change in the foreseeable future.

K.S.A. 38-2269(b)(8) is relevant and the facts demonstrate that Father attempted to reunite with D.A.J.D. by appeasing Mother 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 Father's failure to maintain regular visitation.

K.S.A. 38-2269(c)(2) is relevant in that Father did not have visitation with D.A.J.D. after January 2012 when Mother decided to discontinue contact. Despite the previous court order granting her sole custody and eliminating Father's visitation, Mother routinely allowed visitation after April 2011. Father did not fail in that regard. His failure lies in his decision to continually ask Mother for visitation instead of seeking judicial intervention sooner. Father 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 Mother interfered with Father's repeated requests to visit D.A.J.D. *See In re Adoption of F.A.R.*, 242 Kan. at 237.

Finally, **K.S.A. 38-2269(c)(4)** is relevant to the extent it applies, if at all, to Child support. As far as this court is aware Father provided financial support for D.A.J.D. 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, Father routinely made monthly child support payments including an amount applied to arrears. The petitioner failed to prove by clear and convincing evidence that Father 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, Father has been struggling financially and was battling to avoid foreclosure on his home.

Although the Court noted paragraphs in K.S.A. 38-2269 (b) 1, 2, 6, and 7, and (c) 1 and 3 were not relevant, by mentioning them at all, the Court may have improperly considered them.

#### **AUTHORITY AND UNDISPUTED EVIDENCE:**

The District Court's finding that Father is fit is not supported by the Record. K.S.A. 2012 Supp. 38-2269(b)(8) (formerly K.S.A. 38-1583(b)(8)) provides that a finding of unfitness may be appropriate when "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 *In re A.M.M.*, 310 P.3d 1078; 2013 Kan. App. Unpub. LEXIS 902.

Accordingly, we hold that a natural parent's unfitness will not obviate the need for his or her consent to a stepparent adoption, unless the district court finds that the unfitness has prevented the natural parent from assuming the duties of a parent for 2 consecutive years next preceding the filing of the petition for adoption. For instance, a father may be communicating with his children on more than an incidental basis quantitatively, but because of the father's unfitness the contacts might be deemed to be psychologically or emotionally abusive for the children. In such an event, the district court might find that the natural father has failed to assume his parental duty of safeguarding his children's physical, mental, or emotional health. See *K.S.A. 2010 Supp. 38-2202(d)* (definition of a child in need of care).

*In re J.M.D.*, at 169-170.

Parents who abandon the child, or neglect or refuse, when able so to do, to provide proper or necessary support and education required by law, or other care necessary for the child's well being are said to be unfit. Violence of temper or inability or indisposition to control unparental traits of character or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from other moral defects." 230 Kan. at 153. Citing *In Sheppard v. Sheppard*, 230 Kan. 146, 630 P.2d 1121 (1981).

*K.S.A. 38-1583(b)* provides a nonexhaustive list of eight factors the court shall consider in determining that 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.

*In re A.P.*, 26 Kan. App. 2d 210, 214, 982 P.2d 985 (1999).

There is substantial competent evidence of Father's lack of effort to adjust to meet the needs of D.A.J.D. in the Record. The first trial on the Adoption was January 14, 2014, over a year after Father discontinued texting Mother. It had been thirty-three (33) months since Father had been alone with D.A.J.D. and fourteen (14) months since his last supervised visit.

K.S.A. 38-2269 (b)(3): There is no substantial evidence to support the Court's finding that Father's struggle with drugs and/or alcohol has not rendered him unable to care for the ongoing physical, mental, or emotional needs of D.A.J.D. Father hasn't been with child alone since he was 17 months old. On May 15, 2014, Father admitted that he drank one or two beers in a Salina bar about "a month and-a-half ago, two months ago, I honestly don't know when it was." He further admitted that he did not report it to his probation officer.

K.S.A. 38-2269 (b)(4): There is substantial competent evidence in the Record to support the finding that during the critical two-year period, Father's lack of effort and conduct rose to the level of neglect and that his conduct is unlikely to change in the foreseeable future.

While proof of any one of these statutory grounds may be sufficient to terminate parental rights, the court should consider all applicable factors, giving primary consideration to the physical, mental, or emotional condition and needs of the child. *K.S.A. 2003 Supp. 38-1583(e)*.

*In re J.J.G., 32 Kan. App. 2d 448, 454, 83 P.3d 1264 (2004).*

K.S.A. 38-2269 (b)(5): Father testified that in December 2013, he and his wife had both been charged with disorderly conduct and battery in Salina Municipal Court. Father admitted he did not inform the court of the incident at the January 14, 2014, hearing. Mother and M.D., Father's wife, exchanged text messages between January 26, 2013 and March 4, 2013. The texts, admitted as *Stepfather's Exhibit 11*, indicated Father still struggled with drugs and alcohol. Based on this conduct, it is unreasonable to conclude that Father is in a position to properly care for D.A.J.D. nor does it indicate conduct or a condition that is likely to change in the foreseeable future.

K.S.A. 38-2269(c)(2): Substantial competent evidence exists in the Record to prove Mother was justified in discontinuing the supervised visits between D.A.J.D. and Father in January 2012. Father discontinued contact with Mother after 11 days-worth of texts from January 2012 through December 2012. His last text to her was December 11, 2012. Father did not avail himself of opportunities to have a relationship with D.A.J.D. According to the evidence, D.A.J.D. believes Stepfather is his father.

K.S.A. 38-2269 (c)(4): Father had a parental duty to pay \$177 per month, commencing May 1, 2011. His first payment was October, 2013. Further, he had a duty to pay as much of the judicially decreed amount as he was financially able to pay. Father testified that he had been fully employed prior to and during the critical two-year period and that he had income available to support D.A.J.D. Father admitted he was aware but had not helped Mother with D.A.J.D.'s medical bills/ hospitalization. He admitted that he supported other children and that he had a \$350 per month truck payment. Father further testified that he had missed some mortgage payments but foreclosure had not been filed and that he would be caught up in a month.

### **3. FATHER'S ACTIONS WERE NOT INCIDENTAL.**

#### **DISTRICT COURT'S REASON AND RATIONALE:**

Father demonstrated affection, care, and interest toward D.A.J.D as evidenced by his 1) repeated text messages to Mother from March through December 2012; 2) the fact that he retained counsel; 3) provided gifts on a few occasions; 4) by filing a motion to modify custody; and 5) offering support. These were not incidental or insignificant acts but, instead demonstrate a commitment to assuming the role of the father. *See In re Baby Girl P.*, 291 Kan. 424,434 (2010).

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 Father would have continued visits absent Mother's decision to discontinue contact.

**AUTHORITY AND UNDISPUTED EVIDENCE:**

The Court's finding that Father's efforts were more than "incidental" is not supported by substantial competent evidence.

The District Court may consider and weigh the best interests of the child and may disregard incidental visitations, contacts, communications, or contributions. *K.S.A. 2008 Supp. 59-2136(h)(2)(A) and (B)*. The burden is on the petitioner to prove grounds for termination of a father's parental rights under *K.S.A. 2008 Supp. 59-2136(h)*. *In re Adoption of D.D.H.*, 39 Kan. App. 2d 831, 837, 184 P.3d 967 (2008). *In the Matter of M.R.C.*, 42 Kan. App. 2d 772, 777, 217 P.3d 50 (2009).

Pursuant to *K.S.A. 2013 Supp. 59-2136(h)(2)(B)*, the court may disregard all incidental contacts, including incidental communications or contributions, but must consider "all surrounding circumstances."

The term "incidental" has been defined as "casual; of minor importance; insignificant; of little consequence." *In re Adoption of McMullen*, 236 Kan. 348, 351, 691 P.2d 17 (1984).

The following is a summary of undisputed evidence in the Record of Father's gifts, child support, and contact with D.A.J.D. during the critical two-year period from March 13, 2012, through March 14, 2014:

- Father did not contact D.A.J.D.;
- Father texted Mother a total of 11 days, from March, 2012 to December, 2012;
- Father's last text was December 11, 2012;
- Father did not provide cards, special gifts, or birthday gifts;
- Father retained counsel in the Adoption case on October 3, 2013;
- Father filed a Motion to Modify Custody and Establish Parenting time in the Paternity case on October 17, 2013; and
- Father paid \$1362 court-ordered child support from October 2013 -March 2014.

In finding Father's actions were not incidental, the Court relied on Father's text messages to Mother from March through December 2012, retention of counsel, provision of gifts on a few occasions, filing a motion to modify custody, and offering support. These findings, however, are not supported in the Record.

Texts:

The Court mischaracterized the evidence in the Record by crediting Father for "repeated requests for continued visitation" even though the 91 texts referred to occurred in 15 days from January 27<sup>th</sup> through December 11, 2012. Of the 91 texts, 68 occurred in 11 days during the critical two-year period. Even though the Record shows that Father discontinued texting Mother, the Court further excused Father by finding "the Court does not doubt that Father would have continued visits absent Mother's decision to discontinue contact." There is no evidence in the Record to support that finding. After his last text on December 11, 2012, Father did not pursue visits nor did he pursue the legal options available to see D.A.J.D.

A reasonable question would be with whom Father was attempting a relationship. Father's texts were clearly meant to communicate with Mother. D.A.J.D. was just two years old at the time. He couldn't read and didn't have a phone. Father did not adjust his conditions and conduct to meet the needs or assume the role of parent of a two year old.

*In HBSC*, the district court found the mother was justified in not reading or showing the letters to the child and concluded the father's correspondence to the child was nothing more than a thinly disguised ruse to keep in the good graces of the mother. *In re H.B.S.C.*, 28 Kan. App. 2d 191, 202, 12 P.3d 916 (2000).

Here, Father's communications were only with Mother. The Court concluded that Father did not "move on." "He clearly decided to pursue (sic) visitation with D.A.J.D. by appeasing Mother. He did so by communicating with her and asking to see D.A.J.D."

Retention of counsel: Father didn't retain counsel or file a Motion until 29 months after the Court's Orders in the paternity case and 19 months into the critical two-year period.

Gifts or assistance: Father testified that between July 26, 2011 and July 26, 2013, he bought D.A.J.D. clothes, diapers, a toy, cowboy hat, video game, a birthday present in 2011, a Christmas present in 2011, and a cash payment of \$100 in December 2011.

The Record shows that Father provided no gifts or assistance during the critical two-year period. In 2012, Father did not send D.A.J.D. an Easter card; there were no texts in July or September; no Halloween card, gift, phone call, or message; he texted Mother on D.A.J.D.'s 3<sup>rd</sup> birthday, but no birthday card or gift; no Thanksgiving card, phone call or message, no Christmas Card, gift, phone call, or message. The Court arbitrarily disregarded the evidence in the Record and Father's admission that, other than the 11 days of texts to Mother, he provided no cards, gifts, birthday or Christmas cards or presents to D.A.J.D. during the 719 remaining days during the critical two-year period.

Offer of support: The District Court found Father's offers of gifts or assistance, and "even making an offer to provide support" for D.A.J.D. persuasive.

The Record shows that Father was financially able to pay the court-ordered support and that all he had to do was pay it. Father's "offers" of support were empty at

best. Father testified that he did not believe there was anything D.A.J.D. needed that he was not receiving. He further testified that Mother had pretty much everything and she'd always say she didn't need anything. However, the Record is clear and Mother testified she raised the issue of support with the Father several times, including in person and in texts. As of the January hearing Father had paid 4 months child support in the amount of \$908. The Court apparently excused Father's paltry payments because he made offers that Mother refused.

Throughout the Court's *Memorandum Decision and Order*, the Court relied on *In Re Baby Girl P.* in finding that Father's acts were not incidental. The facts in this case, however, are distinguishable from *Baby Girl P. Devon*, *Baby Girl P's* Father, immediately stepped up to the plate and assumed the role of Father.

*Baby Girl P* was born on June 23, 2008. On July 10, 2008, a petition for adoption was filed in district court. In August 2008, *Baby Girl P's* father, Devon, upon learning that he had a child, immediately obtained counsel in an attempt to protect his parental rights. He immediately filed motions through counsel seeking visitation with his daughter. Without a court order he explicitly offered the custodial parents anything that they might need, told them that he understood it was his responsibility and duty to provide for her and that he was prepared to assume that responsibility. He eventually was permitted to visit the child on two occasions for 1 hour each time. Devon wrote to the prospective adopting couple thanking them for allowing him to visit his daughter and offering to provide support for her. Devon also provided her with gifts for her first Christmas. The Record and the district court's factual findings support the conclusion that Devon made reasonable efforts to engage with and support his daughter. All of this

happened within the first year of Baby Girl P's young life. *In re Baby Girl P*, 291 Kan. 424, 430, 242 P.3d 1168 (2010).

In overturning both the Trial Court and Court of Appeals rulings to terminate the paternal rights of Devon, the Kansas Supreme Court held:

We do not find in the statutory scheme a legislative call to make the assertion of paternal rights a Herculean task. 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. The statute requires simply that a father make "reasonable efforts" to support or communicate with his child. *K.S.A. 59-2136(h)(1)(C)*.

*In re Baby Girl P.*, at 433.

Here, Father's last face to face visit with D.A.J.D. was January 4, 2012. D.A.J.D. was 25 months old. Unlike Devon who immediately, upon learning of his daughter, contacted the custodians and filed legal documents, Father did not pay child support or pursue legal options available to him until October 2013; 29 months after the Court's orders in the paternity case and 19 months into the critical two-year period. D.A.J.D. celebrated his 4<sup>th</sup> birthday one month later. These are not the actions of a father who is attempting to maintain a relationship with his child. Father's actions were not reasonable. Unlike Devon's efforts, described by the Supreme Court as Herculean, one would be hard-pressed to describe D.A.J.D.'s Father's efforts Herculean.

There is substantial competent evidence in the Record that Father squandered any protected status and parental relationship he previously had with D.A.J.D. There was no relationship left to preserve or maintain.

**4. STEPFATHER FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT FATHER HAD THE "ABILITY TO PAY" ALL OF THE ORDERED CHILD SUPPORT;**

5. **STEPFATHER FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT FATHER WAS FINANCIALLY ABLE TO PROVIDE A SUBSTANTIAL PORTION OF CHILD SUPPORT; AND**
6. **FATHER'S PAYMENTS DID NOT TRIGGER THE REBUTTABLE PRESUMPTION IN K.S.A.59-2136(h)(3).**

**DISTRICT COURT'S REASON AND RATIONALE:**

It is clear that Father could have paid more, however, based on the financial information presented, Father has been struggling financially and was battling to avoid foreclosure on his home.

**AUTHORITY AND UNDISPUTED EVIDENCE:**

The Record contains sufficient evidence to support Stepfather's position that Father failed to make reasonable efforts to support D.A.J.D.

The Court's finding that Father's support of D.A.J.D. was reasonable because Stepfather did not prove by clear and convincing evidence that Father had the ability to pay "all" of the ordered child support is not supported by substantial competent evidence nor is it the test.

The term "support" does not include a requirement that the father provide total support for the mother; however, support that is incidental or inconsequential in nature is not sufficient. The support must be of some consequence and reasonable under all the circumstances. Mere general offers of support are not sufficient. *In re Adoption of M.D.K.*, 30 Kan. App. 2d 1176, 1178, 58 P.3d 745 (2002).

*In the Matter of M.R.C.*, 42 Kan. App. 2d 772,777, 217 P.3d 50 (2009).

Child support is a right belonging to the child and cannot be reduced or terminated by agreement between parents. Even when courts make deviations from the recommended amounts in the Kansas Child Support Guidelines, courts must show that such deviations serve the best interests of the children.

*In re Marriage of Vandervoort*, 39 Kan. App. 2d 724 Syll. 3, 185 P.3d 289 (2008).

K.S.A. 2013 Supp. 59-2136(h)(1)(C) requires Stepfather to prove by clear and convincing evidence that Father made no reasonable attempts to support D.A.J.D. or, pursuant to K.S.A 2013 Supp. 59-2136(h)(3) that Father 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.

How do the Kansas appellate courts define substantial portion?

We generally construe the term "substantial portion" as the term "substantial" is defined in Blacks Law Dictionary, 1428 (6th ed. 1990) that being: "Of real worth and importance; of considerable value; valuable." *In re Adoption of C.R.D.*, 21 Kan. App. 2d 94, 99, 897 P.2d 181 (1995).

We do *not* find that *any* valuable support or contact is sufficient. "Substantial" assumes something more than nominal or casual efforts. Cases will arise, as this one, which severely test the analytical abilities of the court to determine what constitutes "substantial" support or contact. *In re C.R.D. at 100.*

The District Court's findings contradicted facts that had been conclusively established by Father's testimony and his answers to Interrogatories.

Father's tax returns reflect that he had the option or capability of providing support. He testified that he was gainfully employed and that his income was \$16,839 in 2011; \$33,944 in 2012; and \$31,000 in 2013.

Father had a parental duty to pay \$177 per month, commencing May 1, 2011. His first payment was October, 2013. Further, he had a duty to pay as much of the judicially decreed amount as he was financially able to pay. At the time the first Adoption Petition was filed, July 26, 2013, Father had not paid any court-ordered child support and owed over \$4,000 in child support arrears. Father paid his first court-ordered child support payment in October 2013, three months after the Adoption Petition was filed.

The Court's finding that Father "routinely" made monthly child support payments including an amount applied to arrears" is not supported by the Record. Father made six (6) payments out of thirty (30) payments due. Each of his six payments each included \$50 toward arrears. During the critical two-year window, Father failed to provide seventy-eight percent of child support as required by judicial decree.

We concede that a substantial amount of the ordered child support was not paid. However, in the instant case, as a matter of law, it cannot be said that the \$ 1,100 and medical insurance coverage do not constitute substantial efforts and assumption of parental duties, incomplete and unsatisfactory though they may be.

*In re Adoption of C.R.D.*, 21 Kan. App. 2d 94, 99, 897 P.2d 181 (1995).

The provision of medical insurance coverage is the distinguishing factor between this case (*RWB*) and *C.R.D. In re R.W.B.*, 27. Kan. App.2d 549, 554, 7 P.3d 306 (2000).

Here, unlike the facts of *C.R.D.*, Father paid 22 percent of court-ordered child support but failed to furnish medical insurance. Father testified that he was aware of D.A.J.D.'s health issues but did not provide him with health insurance nor help Mother with his medical bills.

In determining whether a father has failed or refused to assume the duties of a parent, a rebuttable presumption arises when the father has failed to provide a substantial portion of the child support as required by judicial decree. *K.S.A. 2010 Supp. 59-2136(d)*, *(h)(1)(G)*, and *(h)(3)*. The District Court found that Father's payments were substantial and did not trigger the rebuttable presumption found in *K.S.A. Supp. 2013 59-2136(h)(3)*.

In overturning the Court of Appeals in *J.M.D.*, the Kansas Supreme Court answered the question of when the rebuttable presumption is triggered:

For the presumption to arise, the father's failure to provide a substantial portion of the judicially decreed child support must have been for the 2-year period immediately preceding the filing of the adoption petition. ...Where we part company with the Court of Appeals opinion is its declaration that "the statute does not require a parent to provide court-ordered child support *to the extent* to which the parent is financially able in order to establish such parent has assumed his or her duties under *K.S.A. 2008 Supp. 59-2136(d)*." *41 Kan. App. 2d at 167*. The panel suggests that if Father can establish that he was financially unable to pay a substantial portion of the premodification court-ordered amount of \$254 per month, then he had no duty as a parent to pay any amount of support. To the contrary, even if the statutory presumption is not in effect, a parent still has a duty to support his or her child to the extent to which the parent is financially able. See *State ex rel. Secretary of SRS v. Bohrer*, *286 Kan. 898, 906, 189 P.3d 1157 (2008)* ("Parents have a common-law duty to support their minor children, regardless of any statute imposing such an obligation.")...Father did not pay all that he could, and the evidence supports the district court's finding that child support payments were incidental and insufficient to establish an assumption of parental duty.

*In re J.M.D., at 172-173.*

Parents fail to rebut the presumption under *K.S.A. 59-2136(d)* when they (1) fail to pay more than 69 percent of their court-ordered child support during the relevant period; (2) totally fail in their obligation to provide court-ordered medical insurance coverage; and (3) neglect to show any love and affection, care, and interest in their children.

*In re R.W.B., 27. Kan. App.2d 549, Syll. No. 2, 7 P.3d 306 (2000).*

Did Father's conduct invoke the rebuttable presumption found in *K.S.A. 2013 Supp. 59-2136(h)(1)(C)*? There is substantial competent evidence in the Record to prove Father failed to assume the duties of a parent pursuant to *K.S.A. 59-2136(h)(3)*. In other words his six payments did not meet the statutory definition of "substantial" thus triggering the rebuttable presumption. There is further substantial competent evidence that because he did not meet his duty to show affection, care, and interest toward

D.A.J.D. he failed to rebut the presumption and thus he has failed or refused to assume the duties of a parent.

For the rebuttable presumption to apply, *K.S.A. 59-2136 (h)(3)* requires that Father had to knowingly fail to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, not whether Father had the “ability to pay all of the court-ordered child support.”

The court addressed incidental contacts and the rebuttable presumption in *In re P.D.V.*, where visits from September 1995 to November 1996 with P.D.V. were every other weekend. The length and frequency of these contacts are clearly more than incidental. *Cf. In re Adoption of D.R.B., 21 Kan. App. 2d 790, 908 P.2d 198 (1995), rev. denied 259 Kan. 927 (1996)*. Because Chris' contacts with P.D.V. were more than incidental, the question remains as to whether the contacts are sufficient to rebut the presumption of *K.S.A. 59-2136(d)*. Appellees rely on *In re Adoption of D.R.B.* to contend the presumption was not rebutted. *In In re Adoption of D.R.B.*, one panel of this court found that even though a father's contacts with his children were more than incidental, those contacts were not enough to rebut the presumption in light of the father's absolute failure to provide child support, even when financially capable of doing so. *21 Kan. App. 2d at 796-97*. The Supreme Court denied review in *In re Adoption of D.R.B.* in 1996.

*In re P.D.V., 1999 Kan. App. Unpub. LEXIS 82.*

The District Court arbitrarily disregarded undisputed evidence that Father 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. Father's paltry child support payments were sufficient to trigger *K.S.A. 2010 Supp. 59-2136(h)(1)(3)*'s rebuttable presumption of nonassumption of parental duties.

**7. MOTHER INTERFERED WITH FATHER'S REPEATED REQUESTS TO VISIT D.A.J.D.**

**DISTRICT COURT'S REASON AND RATIONALE:**

Stepfather focused on the fact that Father did not visit D.A.J.D during this 2 year period, however, that was due in part to Mother's decision to discontinue visitation. The fact that Mother initially led Father to believe that he would see D.A.J.D. 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 Father would have continued visits absent Mother's decision to discontinue contact.

Mother affirmatively prohibited Father from seeing D.A.J.D. She did not discontinue visitation because she was concerned with Father's possible drug use. She did not discontinue visitation because she was concerned with Father harming or neglecting D.A.J.D. She discontinued visitation when she learned Father's girlfriend, now wife, was pregnant. Mother discontinued visitation because she was angry that Father kept "popping out kids" and owed her more than \$4,000 in child support.

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.

**AUTHORITY AND UNDISPUTED EVIDENCE:**

The Court's finding that Father's efforts were reasonable and that Mother interfered with his relationship with D.A.J.D. is not supported by substantial competent evidence. Father testified Mother did not prevent him from paying child support or retaining counsel in the paternity case. Father testified that he has been willing to let Stepfather and Mother support and care for D.A.J.D.

The record contains support for the trial court's finding that the natural mother interfered with appellee's rights to keep in contact with his sons. However, the court also recognized the natural reluctance of the mother to take two small children to the prison to visit and was sympathetic to her. It does not appear that the trial judge's finding of fact on this point was a

principal factor in his ultimate decision in this case. It merely was one of the circumstances considered in the overall decision and was certainly not a controlling factor.

*In re F.A.R., 242 Kan. 231, 237, 747 P.2d 145 (1987).*

“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 Father’s conduct during the two-year period.” Unfortunately 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.

After Father and Mother’s final separation, and prior to the April 2011 criminal charges filed against Father, they had been handling the parenting time of D.A.J.D. informally. As a result of the April 2011 “incident” and the Dickinson County Attorney filing a Child in Need of Care case, Mother filed a Paternity Action in Saline County. D.A.J.D. was 17 months old. Due to the criminal charges pending against Father, Mother alleged that it was in the best interests of the child that she be granted sole custody and that the Defendant have no contact with the minor child. The Journal Entry of Paternity provides in part:

The allegations contained in Petitioner’s Petition are true and Petitioner is entitled to the relief requested. The parties are the parents of one minor child: D.A.J.D., YOB: 2009. Respondent is the minor child’s biological father. Father is on the minor child’s birth certificate. It is in the best interests of the child that sole custody be granted to Petitioner. Respondent shall have no contact with the minor child.

**K.S.A. 23-3206. Legal custodial arrangements. ...**(b) Sole legal custody. The court may order the sole legal custody of a child with one of the parties when the court finds that it is not in the best interests of the child that both of the parties have equal rights to make decisions

pertaining to the child. If the court does not order joint legal custody, the court shall include on the Record specific findings of fact upon which the order for sole legal custody is based. The award of sole legal custody to one parent shall not deprive the other parent of access to information regarding the child unless the court shall so order, stating the reasons for that determination.

History: L. 2011, ch. 26, § 23; July 1. (formerly K.S.A. 60-1610 (a)(4) 2005.)

The Record contains substantial competent evidence that Mother had many reasons to believe it was in D.A.J.D.'s best interest to limit and supervise Father's contact with D.A.J.D. There is substantial competent evidence in the Record that the Court arbitrarily disregarded its own findings and Mother's uncontroverted testimony from the January 14, 2014 hearing.

**In the 1-14-14 Journal Entry, the District Court found Mother decided it best for the child not to have contact with D.A.J.D. after January 4, 2012.**

Based on her understanding of the natural father's past, including his other children, other relationships, prior erratic behavior, drug use, etc., his behavior as it related to other children being adopted or taken away, Mother decided it was best for the child to not have contact with the natural father and discontinued his contact. (R. I, 37).

Mother and M.D exchanged texts between January 26, 2013 and March 4, 2013 and once on August 31, 2013. The text messages indicated his girlfriend was enduring the same tragic cycle of drug addiction, neglect, abusive type behavior that Mother has previously endured. His girlfriend was looking for support. Mother was aware of the same cycle and the danger that would pose to D.A.J.D. (R. I, 38). (R. II, 117, lines 11-24). *See and Stepfather's Exhibit 11.*

On January 26, 2013, Mother began communicating with M.D., Father's current wife, about Father. Mother became fearful when she learned about Father's drug use through M.D. *See Stepfather's Exhibit 11.*

By the second evidentiary hearing, May 15, 2014, the District Court arbitrarily disregarded the undisputed evidence and findings from the first hearing and found that Mother interfered with Father's "repeated" requests to visit D.A.J.D.

When the district court finds that "'a father's reasonable efforts to provide for his child's welfare failed because of interference by the mother, adoption agency, or adoptive parents, the statute should not operate to terminate his parental rights.' [Citation omitted.]" *In re Adoption of Baby Boy S.*, 22 Kan. App. 2d 119, 130, 912 P.2d 761, rev. denied 260 Kan. 993, cert. denied 519 U.S. 870, 117 S. Ct. 185, 136 L. Ed. 2d 123 (1996). However, a mother's failure to act upon a general offer of assistance by not contacting the father and telling him what she specifically needs does not amount to interference or a refusal of financial help. *In re M.D.K.*, 30 Kan. App. 2d at 1180. It is not unreasonable to require substantial efforts by an unwed father to maintain contact with the mother and participate in the pregnancy and birth. *In re Adoption of Baby Girl S.*, 29 Kan. App. 2d 664, 667, 29 P.3d 466 (2001), *aff'd* 273 Kan. 71, 41 P.3d 287 (2002).

*In re M.D.K.*, 30 Kan. App. 2d 1176, 1179-80, 58 P. 3d 745 (2002).

The District Court's findings were not supported by substantial competent evidence. The District Court failed to consider ALL of the surrounding circumstances, including events that occurred prior to the critical two-year period, and the uncontested evidence that Father had no contact with D.A.J.D. during the critical two-year period. Mother's decision to stop supervised visits in January, 2012, was within her discretion as sole custodial parent, reasonable, and in D.A.J.D.'s best interest. In response to Father's January 17, 2012 text, Mother stated that it is "my job is to protect him."

The Court excused Father's conduct or lack thereof by finding Mother interfered with Father's repeated requests to visit D.A.J.D. The Court misstated the evidence from the Record. Father testified his last text to mother was December 11, 2012.

When the district court finds that "'a father's reasonable efforts to provide for his child's welfare failed because of interference by the mother, adoption agency, or adoptive parents, the statute should not operate to terminate his parental rights.' [Citation omitted.]" *In re Adoption of Baby Boy S.*, 22 Kan. App. 2d 119, 130, 912 P.2d 761, rev. denied 260 Kan. 993, cert. denied 519 U.S. 870, 117 S. Ct. 185, 136 L. Ed. 2d 123 (1996). However, a mother's failure to act upon a general offer of assistance by not contacting the father and telling him what she specifically needs does

not amount to interference or a refusal of financial help. *In re M.D.K.*, 30 Kan. App. 2d at 1180.

*In the Matter of M.R.C.*, 42 Kan. App. 2d 772,777, 217 P.3d 50 (2009).

In 2002, in *M.D.K.*, the Court of Appeals addressed the issue of alleged interference and concluded Father's claim he was "thwarted" in his attempts to support the child had no legal merit. The Court held there was a significant distinction between Father being hindered in efforts to contact the child and being unable to provide support. "A father need only carry out an available option to the best of his ability to maintain his rights, but he must act affirmatively." The father had income and knew mother's address. The Court found that "a mother does not interfere with a father's ability to support by avoiding contact and not making specific requests for assistance in response to general offers of support." The opportunity to affirmatively support the child existed, but Father ignored this opportunity. *In re M.D.K.*, 30 Kan. App. 2d 1176, 1180-82, 58 P.3d 745 (2002).

Here Father was under a court order to pay child support. Like the Father in *M.D.K.*, D.A.J.D.'s Father had the financial ability to pay the child support, but chose not to do so. The opportunity to affirmatively support D.A.J.D. existed, but Father ignored this opportunity.

The mother in *K.D.O.* was found to have interfered with Father because she refused his offers. *In re K.D.O.*, 20 Kan. App. 2d 559, (1995). However, Father in this case was already ordered to pay support and chose not to. There is no evidence in the Record that Mother would have refused to accept court-ordered child support payments from Father. In fact she accepted his six payments made from October 2013 through March 2013.

Like D.A.J.D.'s father, the father in *R.W.B.*, justified his failure to pay support by blaming the Mother. The Court of Appeals found, however, that father's attempts to justify his failure to pay child support by insisting that he did not pay because he was upset with problems relating to visitation with the children were not reasonable. The court found that it was not reasonable for the father to sit back and make no attempt to enforce his visitation rights if he felt they were being obstructed. The father had absolutely no personal contact with the children in the critical 2-year period, whether in person or via telephone. Nor did the father inquire as to the children's health, education, or activities. Moreover, the father did not personally send cards or gifts to the children. *In re R.W.B.*, 27 Kan. App.2d 549,555, 7 P.3d 306 (2000).

Here, the facts are similar to the facts in *R.W.B.* Father had absolutely no personal contact with D.A.J.D. in the critical two-year period. He made no attempt to enforce his visitation rights. After December 11, 2012, he stopped contacting Mother to inquire about D.A.J.D.'s well-being. He did not send cards or gifts to D.A.J.D. Father testified that he has been willing to let Stepfather and Mother support and care for D.A.J.D.

The facts in this case are also similar to *Baby Boy W.*, where, on a few occasions, father called mother after learning of the pregnancy and asked if she needed anything. The mother did not follow up on these offers. There was minimal contact between the parents after that. The mother made no specific requests for assistance. The father sent and mother accepted a \$50 check late in the pregnancy. The Court of Appeals affirmed the trial court's decision that father had failed to support mother without reasonable cause. *In re Baby Boy W.*, 20 Kan. App. 2d 295, 296-300, 891 P.2d 457 (1994). As with

*M.D.K., Baby Boy W., and R.W.B.*, Father failed without reasonable cause to support

D.A.J.D.

In 2010, Justice Beier addressed the issue of alleged interference and the burden of proof in *B.B.M.*

If the alleged ground for termination is *K.S.A. 2009 Supp. 59-2136(h)(1)(D)*--that the father "failed without reasonable cause to provide support" for the mother during the last 6 months of her pregnancy--then the burden includes meeting the unsurprising possibility that a father may argue that any failure on his part was justified by a mother's interference. This process does not require a petitioner to demonstrate irrefutably an impossible negative; it requires only that the petitioner do what is ordinary for a party who bears a clear and convincing burden of proof, *i.e.*, show that his or her version of the facts is highly probable. See *In re B.D.-Y.*, 286 Kan. 686, 690-98, 187 P.3d 594 (2008). This showing, to be successful, often must anticipate the argument of the opponent and undercut it with contrary evidence. This certainly is not asking too much of a party who wishes to terminate what may ripen into a natural father's fundamental right to care, custody, and control of his child. See *A.A.T.*, 287 Kan. at 600-12; *In re Adoption of B.M.W.*, 268 Kan. 871, 881, 2 P.3d 159 (2000).

*In the Matter of the Adoption of B.B.M.*, 290 Kan. 236, 243, 224 P.3d 1168 (2010).

**8. IT IS NOT IN D.A.J.D.'S BEST INTEREST TO TERMINATE FATHER'S PARENTAL RIGHTS.**

**DISTRICT COURT'S REASON AND RATIONALE:**

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

## **AUTHORITY AND UNDISPUTED EVIDENCE:**

The Court's finding that the adoption is not in D.A.J.D.'s best interest is not supported by substantial competent evidence.

On January 14, 2014, Father testified that it had been two years since he had seen D.A.J.D. face to face and that it had been his choice not to pursue the options and opportunities available to him to change that. Adoption is in D.A.J.D.'s best interest.

### **Conclusion**

The District Court misinterpreted K.S.A. 2013 Supp. 59-2136. The Court arbitrarily disregarded undisputed evidence in determining Stepfather had failed to prove by clear and convincing evidence any of the 59-2136(h)(1) factors.

The Court failed to consider and weigh all the relevant circumstances bearing upon the issues of the proposed termination of Father's parental rights and the proposed adoption. The Court was persuaded by Father's wish to be involved in D.A.J.D.'s life and gave Father the benefit of the doubt without the benefit of substantial competent evidence. There is no substantial competent evidence in the Record that Mother interfered with Father's decisions. The Record and the District Court's factual findings support the conclusion that Father did not make reasonable efforts to engage with and support D.A.J.D. since at least, January 4, 2012. It is uncontested that Father had no contact with D.A.J.D. during the critical two-year period. His failure to pay seventy-eight percent of court-ordered child support is significant to trigger the rebuttable presumption in K.S.A. 2013 Supp. 59-2136(h)(3).

Therefore, for all of the above reasons, Stepfather respectfully requests the Appellate Court find the District Court misinterpreted and misapplied K.S.A. 2013 Supp. 59-2136 in denying the stepparent adoption and further find that the District Court's decision to deny the stepparent adoption was not supported by substantial competent evidence.

Respectfully Submitted,



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**Certificate of Service**

The undersigned hereby certifies that on November 26, 2014, service of the above and foregoing Brief of Appellant was made by hand-delivering two (2) copies properly addressed to Russel B. Prophet, of Hampton and Royce, 119 West Iron, 9<sup>th</sup> Floor, Salina, KS 67401. On the same date, sixteen (16) copies were hand-delivered to Heather L. Smith, Clerk of the Appellate Courts, Kansas Judicial Center, 301 S.W. 10<sup>th</sup> Avenue, Topeka, Kansas 66612.



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