NOT DESIGNATED FOR PUBLICATION

No. 126,802

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Adoption of D.A., D.A., and Y.A.,
Minor Children.

MEMORANDUM OPINION

Appeal from Ford District Court; LAURA H. LEWIS, judge. Submitted without oral argument. Opinion filed February 2, 2024. Reversed and remanded with directions.

Clay A. Kuhns, of Meade, for appellant natural father.

David H. Snapp, of David H. Snapp, L.C., of Dodge City, for appellee.

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

PER CURIAM: In 2022, Stepfather filed a petition to adopt his three stepchildren. In his petition, Stepfather alleged that the consent of the natural father [Father] was unnecessary because he had failed or refused to assume the duties of a parent for more than two consecutive years immediately prior to its filing. In granting the adoption, the district court applied the presumption found in K.S.A. 2022 Supp. 59-2136(h)(3). On appeal, Father contends that the district court erred in applying the presumption in this case.

Based on our review of the record on appeal, we find that there was never a judicial decree entered requiring Father to pay child support. As a result, we conclude—based on the plain and unambiguous language of K.S.A. 2022 Supp. 59-2136(h)(3)—that the district court erred as a matter of law in applying the presumption in this case. Thus,

we reverse the district court's decision and remand this action for further proceedings to consider the evidence in the record without applying the statutory presumption.

FACTS

In light of the issue presented on appeal, it is unnecessary for us to discuss the underlying facts in detail. Rather, we will briefly summarize the facts. In doing so, we will focus on the events relating to the presumption relied upon by the district court in granting Stepfather's petition for adoption.

From June 7, 2013, to May 31, 2019, Father and Mother were married. During their marriage, three children were born. Each of the children is still a minor. At the time of their divorce, Father and Mother were awarded joint legal custody. In addition, Mother was granted residency of the children and Father was granted "liberal parenting time." Moreover, the district court did not order Father to pay a specific amount of child support.

In the Journal Entry and Decree of Divorce, the district court approved the agreement of the parties "to waive payment of cash child support" and to "share direct expenses as outlined in the Separation and Property Settlement Agreement dated May 31, 2019." In turn, the Separation and Property Settlement Agreement provided that "[t]he parties agree it is in the best interest of their children that no cash child support be paid." Instead, the parties agreed that they would share certain direct expenses:

> "2.9 Sharing Direct Expenses.
>
> "A. Each party shall pay for the clothing and related items for the children that will be used and kept at each party's respective residence.

"B. The parties agree that the children may be involved in extracurricular activities. They further agree that the cost of such agreed activity, including any uniforms or equipment, shall be [Mother's] responsibility.

"C. The parties shall each pay one-half of the following direct expenses of the children:

1. Any clothing needed for the children's special events, (which shall include, but not be limited to, prom tuxes, sports uniforms, scout uniforms) so long as the expenditure for such clothing is reasonable and discussed with the other party prior to the purchase thereof;
2. Any school-related expenses which are not included in the children's regular public school tuition and fees, as long as such expenses are reasonable and discussed with the other party prior to the expenditure thereof; and
3. Any direct expenses unrelated to school but relating to education, so long as such expenses are reasonable and discussed with the other party prior to the expenditure thereof.
4. The term 'direct expenses' as used herein includes only those items included in this paragraph, including any subparts. In the event that either of the parties wish to incur what they believe to be additional direct expenses of the children, they should follow the procedure for splitting the reasonable cost thereof with the other party by the method specified in paragraph D below.

"D. At the end of each quarter of the calendar, or at any time mutually agreed upon by the parties, the parties shall present to each other their respective expenditures for direct expenses of the children in the form of receipts for purchases thereof and cancelled checks or other form of payment. After totaling the amount of expenditures for each party, the party with the lower amount of expenditures shall reimburse the other party one-half of the difference within thirty (30) days. Failure of one party to submit any such direct expenses to the other party by use of this method for a period of one hundred twenty (120) days following the expenditure shall extinguish any right of reimbursement from the nonparticipating party in such expense.

"E. Failure of either party to pay their respective share of the child's direct expenses as they become due may be considered a basis for terminating the shared expense formula, awarding attorney fees, or other sanctions.

"F. This arrangement is deemed to be in the best interest of the minor children."

In October 2019, Mother and Stepfather married. Afterward, the three children have resided with Mother and Stepfather. At that point, Father continued to have regular parenting time with them. However, following Father's arrest on various charges in 2020, Mother filed a motion seeking sole legal custody of the children and terminating Father's parenting time.

On July 23, 2020, the district court entered an interlocutory order awarding Mother temporary sole legal custody of the children and prohibiting Father from having contact with them. The following month, the district court entered a journal entry in which it determined that the interlocutory order "shall continue to be the order of the Court." We pause to note that neither the interlocutory order nor the journal entry mentioned the payment of child support.

Subsequently, on August 12, 2022, Stepfather filed a petition for adoption of the minor children and Mother consented to the adoption. The sole ground asserted by Stepfather to support the termination of Fathers' parental rights was that he had failed or refused to assume the duties of a parent for the two years immediately preceding the filing of the petition. In response, Father filed an objection to the petition for adoption.

On June 30, 2023, the district court held an evidentiary hearing on the Stepfather's petition for adoption. Significant to the issues presented in this appeal, Mother testified that she was not claiming Father failed to provide court-ordered child support. She also confirmed that the district court had never entered an order requiring Father to pay a specific amount of child support.

At the conclusion of the hearing, the district court ruled from the bench that it was granting the Stepfather's petition for adoption. In reaching this conclusion, the district court acknowledged that no specific amount of child support had been ordered. Nevertheless, the district court found that Father made no attempt to provide for any of the needs of the children during the two years preceding the filing of the Stepfather's petition for adoption.

Although the district court indicated that it understood Father's argument that the children had not been under his care during the prior two years, it concluded:

> "[Y]ou don't just get off the hook by saying well, I didn't have the kids in my residence so I didn't have to buy them clothes. I didn't have to pay for their school. I didn't have to make sure they have all of these things that they need to have.
>
> "That's not what the law says. The law says that you have a duty to support your children, okay. That's what the law says.
>
> "And, when you were not providing those direct expenses for the children, because they weren't coming to your home, well the children still had to be clothed. They still had to go to school. They still had to—to do those things. So, you did not pay your part of the support."

Likewise, the district court applied "the presumption that [Father] had a duty to support and that he failed to . . . provide a substantial . . . portion" of that support. Based on these findings, the district court ultimately concluded that there was clear and convincing evidence to support that "there has been a failure to assume and to sustain the duties as a parent" and that it was in the children's best interests to terminate Father's parental rights as well as to grant the Stepfather's petition for adoption.

On July 13, 2023, the district court entered a Decree of Adoption in which it reiterated its findings and conclusions stated on the record at the evidentiary hearing. On

particular note, the district court found that "the presumption arises that [Father] has failed to assume the duties of a parent under K.S.A. 59-2136 (h)(3). Such presumption was not rebutted."

Thereafter, Father filed a timely notice of appeal.

ANALYSIS

In his brief, Father raises two issues on appeal. The first is whether the district court erred in applying the rebuttable presumption set forth in K.S.A. 2022 Supp. 59-2136(h)(3) in this case. The second is whether the district court erred in relying on a mistake of law to terminate his parental rights. Because we find that a resolution of the first issue requires that this case be remanded to the district court, we do not address the second issue in this opinion.

Father argues that the presumption is not applicable because no judicial decree was ever entered requiring him to pay child support. In response, Stepfather argues that "[i]t was not error to apply the presumption" because it "was and is not needed, and changed nothing . . . ." For the reasons set forth below, we find that it was error to apply the presumption under the circumstances presented in this case. We also find that the application of the presumption was significant because it improperly shifted the burden of proof from Stepfather to Father.

K.S.A. 2022 Supp. 59-2136(h) sets out the procedure and grounds for termination of parental rights when a natural parent declines to consent to the adoption of his or her minor child. To the extent that the issues on appeal require us to determine whether the district court accurately interpreted and applied the provisions of K.S.A. 2022 Supp. 59-2136(h), our review is unlimited. *In re N.E.*, 316 Kan. 391, 402, 516 P.3d 586 (2022). In interpreting a statute, the most fundamental rule of statutory construction is that the intent

of the Kansas Legislature controls. *Harsay v. University of Kansas*, 308 Kan. 1371, 1381, 430 P.3d 30 (2018). To determine legislative intent, we must first look to the statutory language enacted and give common words their ordinary meanings. *Central Kansas Medical Center v. Hatesohl*, 308 Kan. 992, 1002, 425 P.3d 1253 (2018).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the fundamental right of a natural parent to parent his or her children. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); see also *In re B.D.-Y.*, 286 Kan. 686, 697-98, 187 P.3d 594 (2008). As a result, judicial termination of parental rights requires proof by clear and convincing evidence. K.S.A. 2022 Supp. 59-2136(h)(l). In keeping with the importance of the liberty interest, our Supreme Court has recognized that the termination provisions of the Kansas Adoption and Relinquishment Act should be strictly construed in favor of maintaining a parent's rights. *In re Adoption of C.L.*, 308 Kan. 1268, 1279-80, 427 P.3d 951 (2018).

Kansas generally disfavors nonconsensual adoptions because public policy requires that a natural parent maintain their parental rights when possible. See *In re Adoption of G.L.V.*, 286 Kan. 1034, Syl. ¶ 6, 1060, 190 P.3d 245 (2008). However, the Constitution does not protect biological parents when it has been shown by clear and convincing evidence that they have failed to adequately accept responsibility and provide support for their child's well-being. *In re Adoption of G.L.V.*, 286 Kan. at 1060. Absent the application of a rebuttable presumption, the party seeking to terminate a natural parent's rights—in this case Stepfather—has the burden to prove that termination is appropriate. *In re Adoption of C.L.*, 308 Kan. at 1278.

The term "'stepparent adoption'" is defined in K.S.A. 2022 Supp. 59-2112(d) to mean "the adoption of a minor child by the spouse of a parent with the consent of that parent." In a stepparent adoption, "[t]he rights of only one of the natural parents need to be terminated." 1 Elrod, Kansas Law and Practice: Kansas Family Law § 6.3 (2022-2023

ed.). Although the current version of K.S.A. 2022 Supp. 59-2136 no longer expressly mentions stepparent adoptions, it remains applicable in cases "where a relinquishment or consent to an adoption has not been obtained from a [natural] parent. . . ." K.S.A. 2022 Supp. 59-2136(a).

In K.S.A. 2022 Supp. 59-2136(h)(l), the Kansas Legislature listed seven specific grounds permitting termination of a natural parent's rights in conjunction with a petition for adoption. If a petitioner proves one or more of the statutory grounds by clear and convincing evidence, the district court has the discretion to terminate the natural parent's rights and the natural parent's consent to the adoption is unnecessary. See K.S.A. 2022 Supp. 59-2136(h)(1) (district court "may order" termination after finding "any" of the listed grounds has been proved); see also *Hill v. Kansas Dept. of Labor*, 292 Kan. 17, 21, 248 P.3d 1287 (2011). In deciding whether to terminate a natural parent's rights and approve an adoption, the district court "[s]hall consider all of the relevant surrounding circumstances." K.S.A. 2022 Supp. 59-2136(h)(2)(A).

Here, the only statutory ground that Stepfather asserted in support of his contention that Father's parental rights should be terminated is found at K.S.A. 2022 Supp. 59-2136(h)(1)(G). Under this ground, Stepfather was required to prove by clear and convincing evidence that Father had "failed or refused to assume the duties of a parent for two consecutive years immediately preceding the filing of the petition." However, the district court relieved Stepfather from having to meet his burden of proof by applying the rebuttable presumption set forth in K.S.A. 2022 Supp. 59-2136(h)(3) in this case.

K.S.A. 2022 Supp. 59-2136(h)(3) provides:

> "In determining whether the father has failed or refused to assume the duties of a parent for two consecutive years immediately 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 immediately preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent." (Emphasis added.)

The impact of the application of the rebuttable presumption in a stepparent adoption case is considerable. This is because it shifts the burden of proof from a stepparent to the natural parent. Instead of a stepparent having the burden of proving the natural parent's unfitness by clear and convincing evidence, K.S.A. 2022 Supp. 59-2136(h)(3) requires the natural parent to come forward with evidence to overcome the presumption of unfitness.

In this case, it is undisputed that neither the divorce decree nor any other order issued by the district court required Father to pay a specific amount for child support. Rather, at the time of the divorce, the district court adopted the agreement of the parties to waive the payment of child support. In lieu of child support, Mother and Father were to share certain expenses of the children using a procedure set forth in the separation agreement. Because there was no "child support . . . required by judicial decree," we find that the rebuttable presumption is not applicable in this case.

This does not mean that Father had no duty to support the children in other ways and we take no position on the ultimate outcome of this action. It simply means that the burden of proof should remain with Stepfather to prove by clear and convincing evidence that termination of Father's parental rights is appropriate based on K.S.A. 2022 Supp. 59-2136(h)(l)(G). In other words, we find that the burden of proof should not be placed on Father to come forward with evidence to rebut the statutory presumption.

CONCLUSION

In summary, we conclude—based on the plain language of K.S.A. 2022 Supp. 59-2136(h)(3)—that the district court erred in applying the rebuttable presumption in this case. We also find that this conclusion is consistent with our duty to strictly construe the adoption statutes in favor of maintaining a natural parent's rights in cases in which it is alleged that consent to adoption is not required. See *In re Adoption of C.L.*, 308 Kan. at 1279-80. Furthermore, due to the important liberty interests involved in a case seeking to terminate the rights of a natural parent, we do not find the district court's error to be harmless. In addition, we note that Stepfather has not argued harmlessness.

We do not take a position on the ultimate outcome of Stepfather's petition for adoption. But we do find that it is appropriate to remand this matter to the district court to make new findings and conclusions—without applying the statutory presumption—based on the evidence already presented by the parties at the hearing held on June 30, 2023. Finally, in light of our holding on this issue, we find that it is unnecessary to address the second issue presented by Father on appeal.

Reversed and remanded with directions.