NOT DESIGNATED FOR PUBLICATION

No. 125,946

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Adoption of H.S.,
a Minor Child.

MEMORANDUM OPINION

Appeal from Pottawatomie District Court; JEFFREY R. ELDER, judge. Opinion filed August 11, 2023. Affirmed.

Lucas Renz, of Knopp & Biggs P.A., of Manhattan, for appellant natural mother.

Nicholas J. Heiman, of Heiman Law Office, of Americus, for appellee K.C.

Before COBLE, P.J., GARDNER and CLINE, JJ.

PER CURIAM: B.S. (Mother) appeals the district court's order terminating her parental rights to her son, H.S., in an adoption proceeding initiated by K.C., who is engaged to biological father (Father). Mother argues that the district court erred by finding that she failed or refused to assume parental duties for the two years right before K.C. petitioned to adopt. Mother challenges only the district court's factual findings, asserting that the district court failed to properly consider her parental efforts and K.C. and Father's interference with them. Based on our review of the somewhat limited record on appeal, we find no error and affirm.

Factual and Procedural Background

After getting married to Father, Mother became pregnant with H.S. During Mother's pregnancy, Mother crashed her car while intoxicated, was ejected from the car, and was admitted to the hospital. She gave birth to H.S. six weeks early, in September 2016. As a result, H.S. stayed in the neonatal intensive care unit for the first six weeks of his life. Doctors diagnosed him with fetal alcohol syndrome and cognitive impairment, and later diagnosed him as autistic. Throughout H.S.'s infancy, Mother continued to abuse alcohol.

Father filed for divorce in Dickinson County in May or June 2017. The district court awarded Father physical custody of H.S. and allowed Mother only phone call visits. Eventually Mother had some in-person visits but she never got unsupervised parenting time. In 2019, the district court ordered Mother's parenting time suspended until she got drug and alcohol abuse treatment and consistently gave clean urine analyses. Until then, Mother was allowed only phone calls with H.S. twice a week.

After the divorce, Father got engaged to K.C. Before this relationship, K.C.'s ex-husband had died in a helicopter crash while serving in the military, which entitled her to certain payments and benefits as a "Gold Star Widow." Under the current version of the relevant federal rules, K.C. believed she would lose those benefits if she remarried, so K.C. and Father planned to remain engaged until that rule changes.

In January 2022, K.C. petitioned to adopt H.S., alleging that she was H.S.'s "stepmother." She alleged that Mother had failed to have in-person contact with the child for more than two years, has had "sporadic" phone calls with the child, and provides financially for the child only through court order. Father, who filed his consent to the adoption the same day, identified K.C. as his fiancée rather than a stepmother. Mother

responded pro se, and the district court swiftly appointed her an attorney. The district court later transferred venue from Dickinson County to Pottawatomie County.

Mother's pretrial brief summarized her efforts to assume parental duties and maintain contact with H.S.

> "Respondent has maintained contact with the child since 2018. Mother has maintained constant contact with the biological father and stepmother since 2018, specifically through the talking parents application. From December 2018 through October 2022, Respondent has maintained constant contact with the child, and the Father and Step Mother. The Talking Parents application shows that over the last nearly four years, Mother has been messaging the biological father to set up phone/video calls with the minor child, reschedule phone/video calls with the minor child if one party was unavailable, and inquiring why she did not receive a phone/video call or why such call was cut short. Respondent has had countless phone/video calls with the child and there are countless instances where Mother has initiated the conversation to set up such calls.
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> "Respondent has followed her visitation schedule as ordered by the Dick[i]nson County District Court. Mother has shown that over the last 4 years she has maintained consistent contact with the child and the biological father. Respondent has been paying child support through a wage garnishment. Petitioner[']s claim that Respondent only provides financially for the child through Court order is of no significance. Child support is being withdrawn from Respondent's paycheck. Furthermore, Respondent has sent gifts to the child on numerous occasions. Petitioner has failed to prove, by clear and convincing evidence, that Respondent has failed or refused to assume the duties of a parent due to a lack of contact with the child."

Mother also accused K.C. and Father of alienating her by dodging her efforts to schedule and participate in phone visits, hanging up on her during her calls, and maliciously seeking modifications of her parenting time in the district court.

Mother testified and submitted several exhibits at the termination hearing. Her exhibits mainly included messages and logs of her attempted phone and video calls with

H.S. Mother's largest exhibit consisted of 400 pages of communications between the parties over a span of about four years (December 2018-October 2022).

In recounting her parenting efforts, Mother testified that she had:

- Persisted in her efforts to participate in regular phone visits with H.S.;
- Contacted and coordinated with K.C. and Father as needed;
- Stayed mostly current on her child support obligations, paying around 70 percent of the amount ordered by the district court;
- Sent H.S. Christmas, Easter, and birthday gifts;
- Completed outpatient drug and alcohol treatment and therapy sometime after January 2022; and
- Completed the court-ordered drug and alcohol evaluation in March 2022.

Mother also testified that she was homeless for around six months, from June to December 2021. She claimed that she could not afford substance abuse treatment, but she admitted that she had eventually completed free outpatient treatment. Mother also accused K.C. and Father of having prevented her from carrying out the limited parental duties allowed by court orders by consistently failing to facilitate her twice weekly calls with H.S. Mother noted that she was not represented by an attorney throughout her divorce and custody proceedings because she could not afford one.

Father's testimony highlighted Mother's history of and ongoing drug and alcohol abuse. Father also explained that the district court had suspended Mother's parenting time and limited her visitation to phone calls because of her addiction to drugs and alcohol. And despite the court's repeated orders for Mother to complete drug and alcohol treatment to allow in-person visits, Mother never complied with that task, so Mother had not seen H.S. in person since before June 25, 2019. Mother agreed on cross-examination

that although she had completed a drug and alcohol evaluation (about three months after K.C. filed to adopt) she had done so to increase her chance of getting bond in another case that charged her with felony drug offenses.

At K.C.'s request, the district court took judicial notice of the Dickinson County case, including the order that suspended Mother's parenting time in June 2019. That order required Mother to "enter into a drug and alcohol treatment program to address her alcohol/methamphetamine addiction and to provide proof . . . [of] consistent clean UAs in order to establish parenting time in any fashion." The district court also took judicial notice of a Norton County case, in which the State had convicted Mother of misdemeanor possession of drug paraphernalia. In that case, Mother stipulated to facts as part of a diversion to possession of methamphetamine.

Responding to Mother's allegations of interference, Father denied that he or K.C. had blocked any of Mother's calls. They did, however, allow then three-year-old H.S. to hang up on Mother and end these calls as he desired, which they believed was best for his mental health. K.C. also testified that she eventually told H.S. to call Mother by her first name instead of "mommy." K.C. also asked Mother to stop referring to herself as "mommy" to H.S. K.C. and Father stressed that as a child with special needs, H.S. requires a higher daily level of consistency.

K.C. and Father also presented testimony from H.S.'s kindergarten teacher and mental health caseworker. Both respectively testified that to their knowledge, Mother had never contacted H.S.'s school or mental health facility to ask about anything or to become more involved in those aspects of H.S.'s life.

At the end of the hearing, the district court took the case under advisement and then announced its decision at a hearing on November 10. But the transcript of that hearing is not a part of the record on appeal. Still, the journal entry states the court found

that Mother "failed or refused to assume the duties of a parent for two consecutive years immediately preceding the filing of the petition." It thus terminated Mother's parental rights.

Mother timely appeals.

Standard of Review and Basic Legal Principles

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides substantive protection for parents when they have assumed parental duties. But when parents have not accepted some measure of responsibility for their child's future, the Constitution will not protect the parents' mere biological relationship with the child. *In re Adoption of G.L.V.*, 286 Kan. 1034, 1060, 190 P.3d 245 (2008).

Kansas also generally disfavors nonconsensual adoptions, as 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. We thus strictly construe adoption statutes in favor of maintaining the rights of the natural parents where a statute is used to terminate the right of a natural parent without consent. The party seeking to terminate a parent's rights has the burden to prove by clear and convincing evidence that termination is appropriate under the statute. *In re Adoption of C.L.*, 308 Kan. 1268, 1278-79, 427 P.3d 951 (2018).

Still, a district court may terminate a person's parental rights in a contested adoption proceeding if it finds, by clear and convincing evidence, certain statutorily prescribed factors. K.S.A. 2022 Supp. 59-2136(h)(1); *In re Adoption of Baby Girl P.*, 291 Kan. 424, 431, 242 P.3d 1168 (2010). Under the relevant statute, K.S.A. 2022 Supp. 59-2136(h)(1)(G), a court may terminate a natural parent's parental rights if that parent "has failed or refused to assume the duties of a parent for two consecutive years immediately

preceding the filing of the petition." See also K.S.A. 2022 Supp. 59-2136(b) (stating any section applicable to father also applies to mother).

We review a trial court's factual finding that a parent has refused or failed to assume parental duties for two years before the filing of the petition to determine whether it is supported by substantial competent evidence. *In re Adoption of J.M.D.*, 293 Kan. 153, 171, 260 P.3d 1196 (2011). "'Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion.'" *Gannon v. State*, 298 Kan. 1107, 1175, 319 P.3d 1196 (2014). In determining whether substantial competent evidence supports the district court's findings, we must accept as true the evidence and all the reasonable inferences drawn from the evidence which support the district court's findings and must disregard any conflicting evidence or other inferences that might be drawn from it. *Gannon*, 298 Kan. at 1175-76 (citing *Unruh v. Purina Mills*, 289 Kan. 1185, 1195-96, 221 P.3d 1130 [2009]). We thus review the court's factual findings in the light most favorable to K.C. to see if the district court's fact-findings are highly probable. We cannot reweigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. *In re Adoption of C.L.*, 308 Kan. at 1278-79.

Sufficiency of Appellate Record

Before addressing Mother's arguments, we address a procedural matter. K.C. asserts that Mother failed to designate a sufficient record for us to review her appellate claim. K.C. correctly notes that the record includes none of the district court's specific findings supporting its decision to terminate Mother's parental rights—the district court announced its ruling at the November 10 hearing, yet Mother failed to include a transcript of that hearing in the record on appeal.

Mother has the duty to ensure this court has a sufficient record to consider her appellate arguments. See *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013) ("'It is well-settled that the burden is on a party to designate a record sufficient to present its points to the appellate court and to establish its claims.'"]). "If . . . an argument depends on facts, those facts must be in the record." *In re A.A.-F.*, 310 Kan. 125, 141-42, 444 P.3d 938 (2019). Without an adequate record, an appellant's claim of alleged error fails. *In re J.D.C.*, 35 Kan. App. 2d 908, 916, 136 P.3d 950 (2006) (citing *McCubbin v. Walker*, 256 Kan. 276, 295, 886 P.2d 790 [1994]), *aff'd* 284 Kan. 155, 159 P.3d 974 (2007).

We agree that our review is somewhat limited by Mother's failure to provide a transcript of the November 10 hearing. Yet the record includes the district court's journal entry of judgment which states the reason for the court's decision—that Mother "failed or refused to assume the duties of a parent for two consecutive years immediately preceding the filing of [K.C.'s] petition." The district court thus made a factual finding that clear and convincing evidence established that Mother's parental rights could be terminated under K.S.A. 2022 Supp. 59-2136(h)(1)(G). And Mother now challenges this finding as unsupported. We thus review the record we have for substantial competent evidence of a clear and convincing nature supporting the district court's finding that Mother failed to assume her parental rights from January 2020 to January 2022. *In re Adoption of J.M.D.*, 293 Kan. at 171.

No Error Established on Appeal

Mother first argues that the district court failed to properly consider that K.C. and Father tried to prevent her from assuming her parental duties. And she suggests that the district court ignored or gave too little weight to evidence that she regularly tried to have her twice-a-week calls with H.S., paid substantial child support, and sent H.S. gifts. Mother compares her efforts to those addressed in previous appeals. See, e.g., *In re*

Adoption of S.J.R., 37 Kan. App. 2d 28, 41-45, 149 P.3d 12 (2006) (affirming the judgment of the trial court granting the stepfather the right to adopt the children, when biological father had almost no contact with his children over the preceding two years, sent children a couple of gifts, but paid a substantial portion of his child support obligations).

K.C. concedes that throughout the relevant two-year period, Mother paid enough child support but argues that she did not maintain sufficient contact with H.S. Although K.C. tacitly concedes that Mother called H.S., K.C. argues her communication was "not consistent" and should be disregarded as incidental. K.C. also claims that H.S.'s specific needs create "unique circumstances," which require more effort than Mother provided. For example, K.C. argues that Mother never spoke with H.S.'s doctors or teachers and thus failed to properly involve herself in H.S.'s medical, educational, or emotional needs. K.C. also emphasizes that despite several reissuances of the district court's order that Mother complete drug and alcohol treatment, Mother never complied until January 2022, even though her failure to get treatment barred her from in-person visits with H.S.

When determining whether to terminate parental rights in an action under K.S.A. 2022 Supp. 59-2136(h), a district court must "consider all of the relevant surrounding circumstances." It is thus relevant that H.S. has significant and unique physical and emotional needs. K.C. testified that as a child with fetal alcohol syndrome and autism, H.S. finds it extremely difficult to deal with sudden change and must have daily consistency. K.C. also explained that Mother regularly skipped calls with H.S. or changed the scheduled time for those calls, which caused H.S. significant distress. And sometimes, H.S. responded to Mother's calls or failure to call by hurting himself physically.

The district court may also consider evidence of interference:

> "A district court faced with deciding whether a parent has failed to assume their parental duties may consider evidence that one parent interfered with the other parent's right to maintain contact with the child. *In re Adoption of P.N.S.*, No. 117,331, 2017 WL 4082293, at *5 (Kan. App. 2017) (unpublished opinion); see *In re Adoption of F.A.R.*, 242 Kan. 231, 237, 747 P.2d 145 (1987). But this court has noted that 'there is "a significant distinction between [a parent] being hindered in efforts to contact [another parent] and being unable to provide support."' *In re Adoption of C.S.*, 57 Kan. App. 2d 352, 365, 452 P.3d 858 (2019) (quoting *In re Adoption of M.D.K.*, 30 Kan. App. 2d 1176, 1181, 58 P.3d 745 [2002]). And 'there is a difference in being hindered while trying to set up visitation time and being unable to do so entirely.' *In re Adoption of E.S.*, No. 123,301, 2021 WL 2879149, at *5 (Kan. App. 2021) (unpublished opinion)." *In re Adoption of L.M.*, No. 125,070, 2023 WL 3143657, at *4 (Kan. App. 2023) (unpublished opinion).

The record shows that K.C. and Father may have hindered some of Mother's efforts to participate in her allotted twice-a-week phone calls with H.S. The evidence shows that Mother, K.C., and Father disagreed about specific times that Mother should call H.S. And K.C. and Father admitted that they allowed H.S. to independently end these calls when he wanted. This resulted in some of Mother's calls ending after a short time. Still, the record shows that K.C. and Father did not prevent Mother from calling or speaking to H.S. Instead, after coordinating with K.C. and Father, Mother talked to him somewhat regularly.

As for gifts, contradictory testimony was admitted. Mother testified that she sent H.S. several birthday, Easter, and Christmas gifts and stopped only when she was homeless. But K.C. testified that Mother never sent H.S. any gifts or cards and instead offered to send only one gift—a Halloween costume—but never followed through. We cannot resolve this credibility contest on appeal, but must read the record in the light most favorable to K.C.

The record shows that Mother made somewhat regular calls to H.S. When, as here, a parent has had communications with the child, the district court must consider whether

those contacts are incidental, as the court "may disregard incidental visitations, contacts, communications or contributions." K.S.A. 2022 Supp. 59-2136(h)(2)(B). Our Supreme Court defines "incidental" in this context as casual, of minor importance, insignificant, and of little consequence. *In re Adoption of McMullen*, 236 Kan. 348, Syl. ¶ 1, 691 P.2d 17 (1984). Contacts which "do not logically demonstrate that the parent has been assuming and performing the duties of a parent" are incidental. 236 Kan. at 351-52.

> "The obvious purpose of [this subsection] is to make clear that a court need not find total and absolute abandonment by a parent before the court may find that the consent of that parent is not necessary before an adoption may be permitted. It gives the adoption court discretion in determining only whether or not parental consent is necessary, particularly in those instances where there are some minor and insignificant contacts between parent and child, but not enough to demonstrate true parental interest, care and concern. It thus attempts to open the door for adoption and stable family life for the child where, without the legislative authorization of subsection (b), adoption may not have been possible. Such authorization furthers the prime objective of the adoption statutes—the best interests and well-being of the child." 236 Kan. at 352.

When evaluating whether contacts and communications between the parent and child are incidental, the court must consider the specific case at hand and ask whether the contacts are casual, of minor importance, insignificant, and of little consequence. *In re Adoption of S.J.R.*, 37 Kan. App. 2d at 42. It is thus not the frequency of the contacts, alone, that determines whether they are important rather than incidental. Contacts may be intentional and frequent, as were Mother's, yet still be incidental. We do not know from the record whether the district court disregarded some or all of Mother's calls as incidental, and we cannot find, on appeal, that they were. Yet we can and do find that the record supports a finding that Mother's calls, despite their frequency, were minor and of little consequence to her developing a relationship with her young autistic son and to her exercise of her parental duties.

We presume that the district court considered this evidence in making its decision. See K.S.A. 2022 Supp. 59-2136(h)(2) (requiring that a district court "consider all of the relevant surrounding circumstances" when applying K.S.A. 2022 Supp. 59-2136[h][1]). We cannot reweigh the evidence on appeal. See *In re Adoption of H.S.*, No. 124,583, 2022 WL 4587619, at *5 (Kan. App. 2022) (unpublished opinion) ("The determination of how many phone calls occurred and who was responsible for their brevity is a factual situation beyond our standard of review.").

We recognize that Mother's fairly regular calls with H.S. may show that she made more frequent efforts to stay in contact with H.S. than those found insufficient in recent appeals. See, e.g., *In re Adoption of L.M.*, 2023 WL 3143657, at *2 (affirming termination of mother's parental rights based on her failure to assume parental duties when she "'did not have visits with the child, did not attempt phone calls with the child, nor attempt to visit or speak to her child'"); *In re Adoption of H.S.*, 2022 WL 4587619, at *5 (finding Father did not rebut presumption of unfitness based on failure to pay child support by showing weekly phone calls; refusing to reweigh evidence of the number and length of the calls). Other cases that Mother cites do not apply here because they were decided before the Legislature adopted the current version of the relevant statutes. See L. 2018, ch. 118, § 19 (amending K.S.A. 59-2136, effective July 1, 2018, to no longer include a stepparent adoption section). We do agree with Mother that the facts here are at least somewhat distinguishable from other cases. But because termination cases are very fact-specific, we do not find comparisons to be very helpful.

We cannot look solely at the number of Mother's calls over the two-year period and find them sufficient due to their frequency. Rather, "a natural parent's right to raise his or her child is protected to the extent that the parent demonstrates a commitment to his or her parental responsibilities." *In re Adoption of G.L.V.*, 286 Kan. at 1059. In determining whether Mother has shown a commitment to her parental responsibilities, we cannot ignore what Mother could do and was court ordered to do yet failed to do. We

disagree with Mother's assertion that she exercised all the parental duties available to her. True, Mother was barred from having any personal contact with H.S. by a court order. But that order was for Mother to enter a drug and alcohol treatment program to address her alcohol/methamphetamine addiction and to provide proof of consistent clean UAs so she could get parenting time. Mother knew that she could get in-person visits with H.S. if she completed drug and alcohol treatment. Yet Mother admitted that she did not complete any treatment during the two years right before K.C. petitioned to adopt H.S. Nor does the record show that Mother tried but failed drug treatment at any time after the court ordered it. Mother never gave the district court proof of her clean UAs or other proof of sobriety or proof of drug and alcohol treatment.

Mother's last in-person contact with H.S. was in 2019. Mother claimed that she could not afford drug and alcohol treatment, but she managed to get that treatment for free when she untimely chose to do it. And she chose to get drug and alcohol treatment only after K.C. had petitioned to adopt, even though failure to get that treatment prevented her from seeing her son for years. And when Mother finally got her drug and alcohol treatment in 2022, Mother admitted that she did so to help make her eligible for bond in her new felony drug case—it was thus not so she could see H.S.

The evidence shows that nothing other than Mother's lack of commitment to her parental responsibilities kept her from seeing her son for years. Mother failed to exert any significant effort to restore her contact with H.S. during the two years before K.C. filed to adopt him. Yet Kansas law requires a parent to pursue "the opportunities and options which were available to carry out [her] duties to the best of [her] ability." *In re Adoption of Baby Boy W.*, 20 Kan. App. 2d 295, 299, 891 P.2d 457 (1994). Mother did not do so here.

Conclusion

We must decline Mother's invitation to reweigh the evidence. Mother also fails to show that the district court ignored evidence or made factual findings not supported by evidence. Based on our review of the record we have, and viewing the evidence in the light most favorable to K.C., we find substantial competent evidence supporting the district court's finding under K.S.A. 2022 Supp. 59-2136(h) that Mother failed to assume the duties of a parent for two straight years right before the filing of K.C.'s petition. We thus affirm its decision to grant K.C.'s adoption petition and terminate Mother's parental rights.

Affirmed.