Approved: March 18, 2010
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Tim Owens at 9:35 a.m. on February 23, 2010, in Room 548-S of the Capitol.

All members were present except:
Senator Terry Bruce - excused

Committee staff present:
Doug Taylor, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Lauren Douglass, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the Committee:
Martin Bauer, Attorney, Martin, Pringle, Wallace & Bauer, L.L.P.
Ken McGovern, Sheriff, Douglas County
Joanne Long, Bourbon County Clerk, Kansas County Clerks' and Election Officials' Association

Others attending:
See attached list.

The Chairman opened the hearing on **SB 522 - Consent to adoption and termination of parental rights; factors to consider in weighing whether a parent must consent to a stepparent adoption; factors to consider when terminating a parent's right**. Jason Thompson, staff revisor, reviewed the bill including several technical corrections and areas in need of clarification.

Martin Bauer appeared in support stating legislation was passed in 2006 amending K.S.A. 59-2136 regarding step-parent adoptions. The joining of two bills resulted in an unanticipated interpretation and unintended consequence of the legislation. The final version gave the district courts discretion to weigh the best interests in terminating a parent's rights in a non-step parent adoption. **SB 522** would correct the misreading of the Legislature's intent and the statute, by linking termination to unfitness in a step parent adoption. This approach would be consistent with many other state's statutory approach of not making best interests a stand alone ground for termination by a consideration. (Attachment 1)

There being no further conferees, the hearing on **SB 522** was closed.

The Chairman opened the hearing on **SB 494 - Providing for the exercise of the functions of sheriff by the undersheriff of a county**. Jason Thompson, staff revisor, reviewed the bill.

Sheriff Ken McGovern testified in support indicating the bill is a result of concerns from what appears to be a conflict with the wording in K.S.A. 19-804 and K.S.A. 19-804a regarding the assignment of powers and duties whenever there is a vacancy in the office of sheriff. **SB 494** names the undersheriff as the first successor to an empty sheriff's office, with the county clerk succeeding only in the absence of both. The bill provides better policy language and removes confusion as to the issue of succession. (Attachment 2)

Joanne Long appeared in favor relating her experiences regarding the sheriff's office vacancy in November 2008. As a result, it became apparent, clarification in the statutes was warranted. (Attachment 3)

Written testimony in support of **SB 494** was submitted by:
Linda Buttron, Jefferson County Clerk & Election Officer (Attachment 4)

There being no further conferees, the hearing on **SB 494** was closed.

Senator Haley moved, Senator Schmidt seconded, to approve the minutes of February 1 and February 2 following a correction to Senator Schmidt's name on February 2. Motion carried.

The next meeting is scheduled for February 24, 2010.
The meeting was adjourned at 10:25 a.m.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: February 23, 2010

NAME	REPRESENTING
MARION W. BAUER	MARION, PRINGLE - REPRESENTED
DAVID HUTCHINGS	KBI
DAVID BURGER	JCSO
Bob Keller	JCSO
Ken McGovern	DGSO
Kevin Brown	KPBBA.
Helen Pedigo	KSC
Sarah Gillody	PPKM
Kirk Mosley	Kentucky & Assoc.
Joseph Mulin	KS Bar Assn
Mark Stock	KDWP
Carol Wells	Judicial Branch
Lynn Rose	KCSL
Kate Diggs	TFI
Steve Solomon	TFI Family Services
Jackson Lindsey	Hein Law
Doug Smith	KLPG
Dea Orear	WU School of Nursing Grad. Student

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Tues Feb 23, 2010

NAME	REPRESENTING
Sean Miller	Capitol Strategies
Barbara Hollingsworth	Capital-Journal

Senate Bill No. 522

Testimony of Martin W. Bauer
Martin, Pringle, Oliver, Wallace & Bauer, L.L.P.

February 23, 2010

In 2006, the Kansas Legislature amended K.S.A. 59-2136. Two different proposed amendments were before the Legislature. A last minute blending of those two bills has led to what I believe was an unanticipated interpretation and unintended consequences. The ultimate amendment added as the last sentence to K.S.A. § 59-2136(d) regarding step parent adoptions the following: "The Court may consider the best interests of the child and the fitness of the non-consenting parent in determining whether a step—parent adoption should be granted." The final version also gave the district courts discretion to weigh the best interests in terminating a parent's rights in a non-step parent adoption. K.S.A. 59-2136(h)(2)(A).

The Kansas Supreme Court concluded in In re Adoption of G.L.V., 286 Kan. 1034, 190 P3d 245 (2008) involving a step parent adoption that the requirement of a parental consent ("must be given") was difficult to reconcile with the discretionary language of "may consider" best interests and unfitness. The Court held that since in different sentences, best interests could not be considered unless the two-part ledger test that does not appear in the statute is proven -- that is the father failed at both emotional and financial support. If unfit but satisfying one of these factors, there could be no adoption. The Court concluded that the Legislature intended that the only way best interests could be considered was to **deny** the adoption because of the importance of retaining contact between a parent and child.

Senate Judiciary
2-23-10
Attachment 1

Having talked to Representative Mike O'Neal and reviewed the Legislative history, I understood the purpose of the amendments was to allow best interests of the child to be considered under the totality of the circumstances in all adoptions and conform the step parent section to non-step parent cases to allow unfitness to be used to terminate a parent's rights. K.S.A. 59-2136(h). The purpose was not to make best interests of the child controlling, which would raise constitutional issues. The essential holding in D.D.H., Case No. 98992 and ultimate holding in G.L.V. above was that best interests of the child cannot be considered by the court to grant an adoption.

The Kansas Supreme Court invited the Kansas Legislature to clarify its intent and the statute. The district courts and lawyers were very concerned with the dicta (non-essential language) in G.L.V. for fear the Supreme Court had misconstrued the Legislature's intent and a non-consenting parent would use the language to advocate parental rights over the best interests of the child. Unfortunately, the case validating the concerns arose before the Kansas Legislature considered the statute. In In re Matter of J.M.D., 41 Kan App 2d 157, 202 P3d 27 (2009) (copy attached), the Kansas Court of Appeals held that the lack of a grammatical link between the sentence on termination and the unfitness sentence in K.S.A. 59-2136(d) required them to not terminate the rights in the following situation:

> The birth father caused the death of a child in his sole care while his son was watching, denied his responsibility for the death causing or aggravating the son's post-traumatic stress syndrome and perpetrated his abuse by writing his children inappropriate letters from prison and failed to cause any of his military disability payments to be sent for the children's support.

While the case was granted review by the Kansas Supreme Court, no decision has been rendered. More importantly, G.L.V. and J.M.D. concluded the Kansas Legislature would place the importance of the parent's interests above those of a child and in fact force the child to continue in a relationship with the parent when not in the child's best interest.

Senate Bill No. 522 would correct the misreading of the Legislature's intent. It accomplishes linking termination to unfitness in a step parent adoption. However, it would potentially compound the issues of the two ledger test and leave unanswered the application of the "best interests" consideration. As drafted, the "and" before the best interests language is likely to be interpreted as requiring one element plus best interests to be proven rather than allowing a factor almost proven to be supported by the child's best interests. I would ask you to amend Senate Bill 522 to add the phrase "under the totality of the circumstances" after the word "unless" and modify the "and" to "or" before new subsection (4) and add the phrase "one of the foregoing factors is carried by consideration of" the best interests of the child. I would request a similar change on best interests be added to the end of K.S.A. 59-2136(h)(1)(H). A proposed version of the statute is attached. These amendments would overcome the G.L.V. and J.M.D. language, eliminate the two ledger test and shift to a totality of the circumstances standard, but still avoid best interests being the sole factor for termination.

This approach is consistent with many other state's statutory approach of not making best interests a stand alone ground for termination by a consideration. See Ala. Code 26-

10A-25, Alaska Stat. 25.23.120, Arkansas Code Ann § 9-9-214, Florida Stat. Ann. §63.125, Kentucky Rev. Stat. Ann. § 199.510, Neb. Rev. Stat. Ann. § 43-109, Nevada Rev. Stat. Ann. § 127.150, NM Stat. Ann. § 32A-5-2, Oklahoma Stat. 10-7501-1.2. See Also Determining Best Interests of the Child Summary of Laws, Child Information Gateway (www.childwelfare.gov).

Finally, I would agree with the fiscal note that Senate Bill 522 should not create cost. I would suggest however, that it will reduce costs. First, it should re-enforce the needs for non-custodial parents to support and communicate with their child while also conducting themselves within the law and with consideration of the stability of their child. Second, an adoption is not started without one parent or custodian signing a consent having decided adoption is in the child's best interests. Once granted, there should be fewer custody and child support court proceedings which are both expensive for the State. Third, if an adoption is denied leaving the child in an unstable setting, there is the potential for the child to be taken into foster care at the State's expense in both care and judicial proceedings.

I respectfully request the Judiciary Committee to forward Senate Bill 522 to the full Senate with the suggested amendments.

Thank you for your consideration.

Session of 2010

SENATE BILL No. 522

By Committee on Judiciary

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AN ACT concerning stepparent adoptions; relating to consent of a parent; amending K.S.A. 2009 Supp. 59-2136 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2009 Supp. 59-2136 is hereby amended to read as follows: 59-2136. (a) The provisions of this section shall apply where a relinquishment or consent to an adoption has not been obtained from a parent and K.S.A. 59-2124 and 59-2129, and amendments thereto, state that the necessity of a parent's relinquishment or consent can be determined under this section.

(b) Insofar as practicable, the provisions of this section applicable to the father also shall apply to the mother and those applicable to the mother also shall apply to the father.

(c) In stepparent adoptions under subsection (d), the court may appoint an attorney to represent any father who is unknown or whose whereabouts are unknown. In all other cases, the court shall appoint an attorney to represent any father who is unknown or whose whereabouts are unknown. If no person is identified as the father or a possible father, the court shall order publication notice of the hearing in such manner as the court deems appropriate.

(d) In a stepparent adoption, if a mother consents to the adoption of a child who has a presumed father under subsection (a)(1), (2) or (3) of K.S.A. 38-1114 and amendments thereto, or who has a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the consent of such father must be given to the adoption unless *(1)* such father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption ~~or~~*; (2) the father* is incapable of giving such consent*; or (3) the father is unfit under subsection (h);* ~~and~~ *(4)* ~~it is~~ *in the best interests of the child.* In determining whether a father's consent is required under this subsection, the court may disregard incidental visitations, contacts, communications or contributions. In determining whether the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for

under the totality of the circumstances

or one of the foregoing factors is carried by consideration of

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adoption, there shall be a rebuttable presumption that if the father, after having knowledge of the child's birth, has knowingly failed to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, for a period of two years next preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent. ~~The court may consider the best interests of the child and the fitness of the nonconsenting parent in determining whether a stepparent adoption should be granted.~~

(e) Except as provided in subsection (d), if a mother desires to relinquish or consents to the adoption of such mother's child, a petition shall be filed in the district court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court. The petition may be filed by the mother, the petitioner for adoption, the person or agency having custody of the child or the agency to which the child has been or is to be relinquished. Where appropriate, the request to terminate parental rights may be contained in a petition for adoption. If the request to terminate parental rights is not filed in connection with an adoption proceeding, venue shall be in the county in which the child, the mother or the presumed or alleged father resides or is found. In an effort to identify the father, the court shall determine by deposition, affidavit or hearing, the following:

(1) Whether there is a presumed father under K.S.A. 38-1114 and amendments thereto;

(2) whether there is a father whose relationship to the child has been determined by a court;

(3) whether there is a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction;

(4) whether the mother was cohabitating with a man at the time of conception or birth of the child;

(5) whether the mother has received support payments or promises of support with respect to the child or in connection with such mother's pregnancy; and

(6) whether any man has formally or informally acknowledged or declared such man's possible paternity of the child.If the father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subsection (f).

(f) Notice of the proceeding shall be given to every person identified as the father or a possible father by personal service, certified mail return receipt requested or in any other manner the court may direct. Proof of notice shall be filed with the court before the petition or request is heard.

(g) If, after the inquiry, the court is unable to identify the father or

any possible father and no person has appeared claiming to be the father and claiming custodial rights, the court shall enter an order terminating the unknown father's parental rights with reference to the child without regard to subsection (h). If any person identified as the father or possible father of the child fails to appear or, if appearing, fails to claim custodial rights, such person's parental rights with reference to the child shall be terminated without regard to subsection (h).

(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:

(A) The father abandoned or neglected the child after having knowledge of the child's birth;

(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;

(D) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;

(E) the father abandoned the mother after having knowledge of the pregnancy;

(F) the birth of the child was the result of rape of the mother; 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; ~~and~~ or one of the following factors is carried by consideration of

(H) ~~It is~~ in the best interest of the child.

(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.

(i) A termination of parental rights under this section shall not terminate the right of the child to inherit from or through the parent. Upon such termination, all the rights of birth parents to such child, including their right to inherit from or through such child, shall cease.

Sec. 2. K.S.A. 2009 Supp. 59-2136 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

27535-2

No. 99,687

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION TO ADOPT
J.M.D. AND K.N.D., MINOR CHILDREN.

SYLLABUS BY THE COURT

1.

Kansas courts use a two-column ledger approach in analyzing the requirements of K.S.A. 2008 Supp. 59-2136(d) to determine whether a parent's consent is required in a stepparent adoption. First, the adoption petitioner must show that the parent failed to demonstrate love and affection toward the child by failing to visit, contact, communicate with, or make contributions to the child for the 2 years preceding the filing of the adoption petition. Second, the adoption petitioner must show that the parent failed to support the child by failing to provide a substantial portion of child support as required by judicial decree, if financially able to do so, for the 2 years preceding the filing of the petition.

2.

Although a trial court may consider the best interests of the child and the fitness of

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the nonconsenting parent in a stepparent adoption case, the court can only grant the adoption without that parent's consent if the court first finds the non-consenting parent has failed to fulfill his or her parental duties under both sides of the two-column ledger.

3.

Determinations regarding the best interests of the child and the fitness of the nonconsenting parent do not permit a court to override the requirement in K.S.A. 2008 Supp. 59-2136(d) of mandatory consent when a parent has assumed his or her parental responsibilities.

4.

Whether a parent has refused or failed to assume parental duties for the 2 years prior to the filing of the adoption petition presents a question of fact. Thus, an appellate court reviews the decision to determine whether it is supported by substantial competent evidence presented at a hearing on the matter.

5.

Financial inability to meet court-ordered child support cannot be used as evidence that a parent has failed to assume the financial duties of a parent.

6.

A trial court may disregard incidental visitations, contacts, communications, or contributions in determining whether a parent has failed to demonstrate love and affection toward the child for the 2 years preceding the filing of the adoption petition. "Incidental" has been defined as casual, of minor importance, insignificant, and of little consequence.

7.

When a parent is incarcerated, the trial court must consider whether the incarcerated parent has made reasonable attempts, under all the circumstances, to maintain a close relationship with his or her child and whether those attempts are sufficient to require the parent's consent be given to an adoption.

Appeal from Sedgwick District Court; RICHARD T. BALLINGER, judge. Opinion filed February 20, 2009. Reversed.

Elizabeth Lea Henry, of Henry & Mathewson, P.A., of Wichita, for appellant natural father.

Martin W. Bauer, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Wichita, for appellee stepfather.

Before CAPLINGER, P.J., MARQUARDT and STANDRIDGE, JJ.

STANDRIDGE, J.: M.D. (Father) appeals the district court's order terminating parental rights to his children J.M.D. and K.N.D. and permitting the children's stepfather (Stepfather) to adopt them. We reverse the district court's decision.

Facts

Father and S.H. (Mother) were married in 1993 in Missouri. During the marriage, Father and Mother had two children: J.M.D. was born in 1996, and K.N.D. was born in 1998. In 1999, J.M.D. was diagnosed with cancer. As a result, J.M.D. underwent numerous hospitalizations, as well as a year of chemotherapy and radiation treatments.

In October 2001, Father and Mother were named managing conservators, or guardians, of Mother's 5-year-old stepsister (H.R.B.) and Mother's 3-year-old half-sister (L.H.D.).

During the summer of 2002, Father was unemployed and, as a result, became the primary caretaker for all four children at the family's home in Missouri. On July 18, 2002, Father called Mother at work to report that L.H.D. had been flown to the hospital as

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a result of serious physical injuries. L.H.D. ultimately died from these injuries. Social service workers removed the remaining three children from the home in order to investigate what role Father may have played in L.H.D.'s injuries and death.

On July 23, 2002, Father was charged with felony abuse of a child. More specifically, charges were lodged against Father for inflicting cruel and inhuman punishment on his 3-year-old ward by "beating, kicking, hitting, knocking to the ground and by throwing water on L.H.D." Father adamantly denied the physical abuse with which he was charged and was released on bond pending trial, a condition of which was to refrain from having any contact with the children.

Meanwhile, social service officials informed Mother that in order to regain custody of the three remaining children, she would have to divorce Father and refrain from any further contact with him. Mother was granted a default divorce on October 23, 2002. As part of the divorce, Mother was given sole custody of the children and Father was ordered to pay $254 per month in child support.

On December 8, 2002, Father's bond was revoked on grounds that he met with his children in violation of the court's order prohibiting contact with them. Although still maintaining his innocence, Father ultimately pled guilty to the charges against him. To

that end, Father stated that Mother requested he take the plea agreement, even though it involved a longer sentence than Father hoped, so the children would not have to testify.

In March 2003, Mother moved to Wichita with all three children. In September 2003, Father was sentenced to a term of 17 years in prison, with a mandatory release date of December 8, 2014.

In August 2004, Mother married Stepfather.

In June 2007, Stepfather filed a petition, with Mother's consent, to adopt J.M.D., and K.N.D. Counsel for Stepfather filed a petition for habeas corpus to bring Father from the Missouri South Central Correctional Center to Kansas to participate in the adoption trial. Because Missouri prison officials refused to honor the Kansas habeas corpus writ, the court ordered Father to participate in the trial by telephone. A trial was set for October 24, 2007.

Citing his right to due process, Father requested to delay the trial until he could appear in person. The court denied the motion, noting that Stepfather had made every effort to get Father to Kansas for trial. The court further noted that, although Father's earliest possible parole date for the 17-year sentence was July 2008, there was no

guarantee Father would be granted parole on that date or on any time prior to his mandatory release date of December 8, 2014. The district court specifically found that, given the children's interest in a timely decision and the demands of judicial economy, Father's ability to participate by telephone satisfied his right to due process.

The trial commenced on October 24, 2007, and was completed on November 1, 2007.

During trial, Stepfather presented the testimony of a school counselor and the children's treating psychologist concerning the impact of L.H.D.'s death and Father's incarceration on J.M.D. and K.N.D. The treating psychologist noted the children had experienced a number of additional stressors as well, including J.M.D.'s cancer, placement in foster care and separation from their mother for 3 months, and the illness and subsequent death of their grandmother from cancer. Both the counselor and the treating psychologist testified that the children suffered from anxiety and symptoms of posttraumatic stress disorder and would benefit from the closure and permanency offered by adoption.

Father's sister, Tina Riley, also testified. Tina stated that while Father was in prison, she remained in contact with Mother and the children through e-mail and personal

visits. Tina testified that at the beginning, Father would call and talk to the children during these visits, but then Mother asked Tina not to allow Father to call while the children were there. Tina stated she would buy $10 and $20 gift cards, at Father's request and expense, for the children. On behalf of Father, Tina also sent the children cards and money on their birthdays and for Christmas. Tina reported that Father directed his veterans disability check be sent to her in order to pay for the purchases of gifts and gift cards for the children.

Father testified via telephone. Father recalled spending time with the children when they were young and how much fun they had together just playing and going swimming, camping, and fishing. Father testified he helped with meals and baths, and, during the summer of 2002, he was a stay-at-home dad.

At the end of the hearing, the court made lengthy factual findings, which it incorporated into its subsequent journal entry. In its conclusions of law, the court held Father failed to assume the duties of a parent for 2 consecutive years prior to the filing of the adoption petition. The court also determined Father was unfit to be a parent and that adoption by Stepfather was in the best interests of the children. For these reasons, the district court terminated Father's parental rights and determined it was not necessary to have Father's consent in order to grant Stepfather's petition for adoption.

On appeal, Father contends: (1) The district court misinterpreted and misapplied the stepparent adoption statute by considering Father's fitness and the best interests of the children as overriding factors in granting Stepfather's petition for adoption; (2) there was insufficient evidence to support a finding that Father's consent to the adoption was not required; and (3) Father was denied due process when the court refused to continue the trial until he could be released from prison and attend the trial in person.

Analysis

1. K.S.A. 2008 Supp. 59-2136(d)

Father asserts the district court misinterpreted and misapplied the stepparent adoption statute, K.S.A. 2008 Supp. 59-2136(d). More specifically, Father argues that the court improperly considered Father's fitness and the best interests of the children as overriding factors in terminating his parental rights and granting Stepfather's petition for adoption. In so arguing, Father concedes the stepparent adoption statute was revised in 2006 to add "best interests of the child" and "fitness of the nonconsenting parent" as factors the court may consider to determine whether a petition for stepparent adoption should be granted. See L. 2006, ch. 22, sec. 1(d). Father argues, however, that these two factors may be considered only if the court independently decides, *without considering*

these two factors, that consent to the adoption by the biological father is not required. Father maintains that in order to decide his consent is not required, the court must find he failed to carry out his parental duties on both sides of the parental ledger–financial support and emotional support.

We agree with Father's interpretation of K.S.A. 2008 Supp. 59-2136(d). We disagree, however, with Father's contention that the district court misapplied the statute in considering Father's fitness and the best interests of the children without first making an independent finding that Father's consent to the adoption was not required.

a. Interpretation of the Statute

K.S.A. 2008 Supp. 59-2136(d) provides in relevant part:

"[A natural father's consent to an adoption is required] unless such father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption . . . . In determining whether a father's consent is required under this subsection, the court may disregard incidental visitations, contacts, communications or contributions. . . . [T]here shall be a rebuttable presumption that if the father . . . has knowingly failed to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, for a

period of two years next preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent. The court may consider the best interests of the child and the fitness of the nonconsenting parent in determining whether a stepparent adoption should be granted."

In the case of *In re Adoption of G.L.V.*, 286 Kan. 1034, 190 P.3d 245 (2008), our Supreme Court examined prior cases relating to this statute and concluded that "all surrounding circumstances are to be considered when determining whether a natural parent must consent to a stepparent adoption–that is, whether the natural parent has 'assume[d] the duties of a parent for two consecutive years next preceding the filing of the petition.' [Citations omitted.]" 286 Kan. at 1053-54.

To that end, the courts use a "two-column ledger" approach in analyzing the requirements of K.S.A. 2008 Supp. 59-2136(d). See 286 Kan. at 1054; *In re Adoption of B.M.W.*, 268 Kan. 871, 882, 2 P.3d 159 (2000). First, the adoption petitioner must show that the parent has failed to demonstrate love and affection toward the child by failing to visit, contact, communicate with, or make contributions to the child for the 2 years preceding the filing of the adoption petition. Second, the adoption petitioner must show that the parent has failed to support the child by failing to provide a substantial portion of child support "as required by judicial decree," if financially able to do so, for the 2 years

preceding the filing of the petition. K.S.A. 2008 Supp. 59-2136(d); see *In re Adoption of G.L.V.*, 286 Kan. at 1053-54. *G.L.V.* reaffirmed that these two elements are the *sine qua non* of a K.S.A. 2008 Supp. 59-2136(d) analysis because these duties are specifically contemplated by the statute. See 286 Kan. at 1054.

The "best interests of the child" and the "parental unfitness" factors were added to K.S.A. 2008 Supp. 59-2136(d) in 2006. The effect of the 2006 amendment with respect to the best interests of the child consideration, according to our Supreme Court, was to provide a trial court

> "with additional discretionary powers to consider the best interests of the child in denying the adoption–even where a natural parent has not assumed the duties of a parent as articulated by this court–for unique reasons. For example, a court may determine, based upon testimony of the child or other evidence, that the child desires to remain the son or daughter of the natural parent based upon the parent's promise of commitment to the child, based upon friction in the stepparent family, or a pattern of instability in the stepparent history." *In re Adoption of G.L.V.*, 286 Kan. at 1064.

Although the Supreme Court did not discuss the significance of the "parental unfitness" provision, the Court of Appeals majority in *G.L.V.* specifically stated:

"Simply put, the court may consider the best interests of the child and the fitness of the nonconsenting parent in a stepparent adoption case, but it can only grant the adoption without the natural parent's consent if [the court first finds] the natural parent has failed to fulfill his or her parental duties under the statute." *In re Adoption of G.L.V.*, 38 Kan. App. 2d 144, 152, 163 P.3d 334 (2007), *aff'd* 286 Kan. 1034, 190 P.3d 245 (2008).

Consistent with the plain language of the statute and relevant case law interpreting the statutory language, we conclude that determinations regarding the best interests of the child and the fitness of the nonconsenting parent do not "permit a court to override the requirement" in K.S.A. 2008 Supp. 59-2136(d) "of mandatory consent when a natural parent has assumed his or her parental responsibilities." *In re Adoption of G.L.V.*, 286 Kan. at 1064-65.

b. The District Court's Application of the Statute

There is no dispute that the district court determined Father was unfit to be a parent and that it was in the best interests of the children to grant Stepfather's petition for adoption. Instead, the dispute here is (1) whether the court erroneously considered these factors in conjunction with its determination that Father's consent to the adoption was not required or (2) whether the court resolved the consent issue before considering fitness and the best interests of the children as relevant factors to the overall question of whether the

Father's parental rights should be terminated and the petition for adoption should be granted. We find it was the latter.

To that end, the district court specifically found that "[Father] failed to assume the duties of a parent for two consecutive years next preceding the filing of the petition." The court concluded financial support provided by Father for the 2 years prior to the petition was incidental, did not satisfy the court order, and was not what Father could have contributed. The court further concluded that, due to his incarceration and overall physical absence from his family as the result of his own conduct, Father's contact with his children was only incidental.

These conclusions sufficiently establish that the court made the decision that Father's consent to the adoption was not required without taking into consideration Father's fitness to be a parent or the best interests of the children. It was only after making this preliminary decision regarding consent that the district court independently considered Father's fitness and the best interests of the children as relevant factors to the overall question of whether the petition for adoption should be granted. Regardless of whether, in the next section, we find sufficient evidence to support the district court's decision that Father's consent was not required, we do find the district court did not err in its application of the analysis required by the stepparent adoption statute.

2. Sufficiency of the Evidence

Even if the district court correctly applied the requisite statutory analysis, Father goes on to claim that, under this analysis, the district court erred in finding Father's consent was not required. More specifically, Father states there was insufficient evidence to find Father failed to assume his parental duties for the 2 years before the petition for adoption was filed. Here, the applicable 2-year period ran from June 2005 to June 2007.

Whether a parent has refused or failed to assume parental duties for the 2 years prior to the filing of the adoption petition presents a question of fact. Thus, an appellate court reviews the decision to determine whether it is supported by substantial competent evidence presented at a hearing on the matter. An appellate court does not reweigh the evidence or pass on the credibility of witnesses. Instead, an appellate court reviews the facts in the light most favorable to the prevailing party to determine whether the decision of the trial court is properly supported by the evidence. *In re Adoption of A.J.P.*, 24 Kan. App. 2d 891, 892-93, 953 P.2d 1387 (1998).

The duties of a parent under K.S.A. 2008 Supp. 59-2136(d) require not only financial support, but also love, affection, and interest toward the children. See *In re Adoption of K.J.B.*, 265 Kan. 90, Syl. ¶ 3, 959 P.2d 853 (1998), *modified in part by In re*

Adoption of G.L.V., 286 Kan. at 1058-61. The statute is to be strictly construed in favor of maintaining the rights of natural parents. 265 Kan. at 95. When determining whether a nonconsenting parent in an adoption proceeding has failed to assume parental duties for 2 consecutive years, all of the surrounding circumstances must be considered. *In re Adoption of F.A.R.*, 242 Kan. 231, 236, 747 P.2d 145 (1987).

We note that when a parent is incarcerated, as here, different standards must be applied than when the parent is free from such constraints. See *F.A.R.*, 242 Kan. at 236. "When a nonconsenting parent is incarcerated and unable to fulfill the customary parental duties required of an unrestrained parent, the court must determine whether such parent has pursued the opportunities and options which may be available to carry out such duties to the best of his or her ability." *In re Adoption of S.E.B.*, 257 Kan. 266, 273, 891 P.2d 440 (1995).

a. Financial Support

As part of the October 23, 2002, divorce decree, Father was ordered to pay $254 per month in child support. From June 2005 through June 2007, which is the 2-year period relevant to our analysis, Father earned prison wages of approximately $20 per month and received his veterans disability payments of approximately $105 per month.

During this time period, Father directed his veterans disability checks be sent to his sister so that she could pay for the purchase of gifts and gift cards for the children. Thus, although there is no dispute that the funds were used to buy gifts for the children, there also is no dispute that none of the $105 per month was directed to pay his child support obligation from June 2005 to June 2007.

In September 2006, Father was contacted by child support enforcement authorities regarding his failure to pay child support. Given his limited income, Father requested a reduction in his monthly obligation. The request was granted, and his monthly child support obligation was reduced from $254 to $5. Based on the arrearage, Father instructed child support payments in an amount of $8.50, which is 170% of the required amount, be withdrawn directly from his prison wages. Thus, Father was financially able to pay, and did pay, his $5 court-ordered child support obligation from September 2006 through June 2007.

Notwithstanding these facts, the district court found a rebuttable presumption under K.S.A. 2008 Supp. 59-2136(d) 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." Based on the undisputed evidence that Father satisfied in full his court-

ordered child support obligation for the 10 months immediately prior to Stepfather's filing of the petition for adoption, we find the district court's conclusion that Father failed to meet his financial obligations for the entire 2-year period at issue is not supported by substantial competent evidence.

Even if Father had failed to fully pay his child support for those 10 months, the district court's finding that Father failed to assume his financial parental duties for the full 2-year period would still be in error. Although Father failed to pay $254 per month in child support for the 14-month period from June 2005 through August 2006, Father's income ($20 per month in prison wages and $105 per month for veterans disability benefits) rendered him *financially unable* under the statute to pay his $254 court-ordered child support obligation during this 14-month period. See K.S.A. 2008 Supp. 59-2136(d) (specifically stating that a knowing failure to provide a substantial portion of court-ordered child support can be found *only when the parent at issue is financially able to pay* the amount ordered).

The fact that Father failed during this time period to request a reduction in child support or make partial payments of some sort does not render him financially able to pay the $254 per month. To that end, 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). Instead, the statute plainly states that financial inability to meet court-ordered child support cannot be used as evidence that such parent failed to assume the financial duties of a parent. See *In re Application to Adopt H.B.S.C.*, 28 Kan. App. 2d 191, 201, 12 P.3d 916 (2000) (when parent is incarcerated and unable to provide financially for child, the side of ledger dealing with financial support becomes irrelevant and focus of inquiry must shift to love and affection side of parenting). For these reasons, we find the district court's conclusion that–from June 2005 through August 2006–Father was financially able but failed to assume the financial duties of a parent pursuant to K.S.A. 2008 Supp. 59-2136(d) is not supported by substantial competent evidence.

b. Emotional Support

In order to support a determination terminating parental rights and, therefore, that the father's consent to a stepparent adoption is not required, "there must be a failure of both financial *and* emotional support." (Emphasis added.) *In re Application to Adopt H.B.S.C.*, 28 Kan. App. 2d at 201 (citing *In re Adoption of K.J.B.*, 265 Kan. at 101-02). In the preceding section, we found insufficient evidence to support the district court's finding that Father failed to provide financial support as required by the statute. We make a similar finding with regard to the district court's finding that Father failed to provide

emotional support.

To determine whether a father's consent is required with regard to the emotional side of the ledger, K.S.A. 2008 Supp. 59-2136(d) provides that "the court may disregard incidental visitations, contacts, communications or contributions." "'Incidental' has been defined as 'casual, of minor importance, insignificant, and of little consequence.' [Citation omitted.]" *In re Adoption of C.R.D.*, 21 Kan. App. 2d 94, 98, 897 P.2d 181 (1995), *modified in part by In re Adoption of G.L.V.*, 286 Kan. at 1058-61. The question of whether the contacts between the parent and the children are incidental such that the contact may be disregarded is reviewed on a case-by-case basis. *In re Adoption of A.J.P.*, 24 Kan. App. 2d at 892-93.

When a parent is in prison, "[t]he trial court must consider whether the [incarcerated] parent has made reasonable attempts, under all the circumstances, to maintain a close relationship with his or her child, and whether those attempts are sufficient to require the parent's consent be given to an adoption. [Citation omitted.]" *In re Adoption of A.J.P.*, 24 Kan. App. 2d at 893.

Here, the district court found Father failed the emotional support side of the ledger because his voluntary criminal acts removed him from his children. We find whether

Father was incarcerated as a result of his own conduct is immaterial to whether Father made reasonable attempts while incarcerated to maintain a close relationship with his children pursuant to K.S.A. 2008 Supp. 59-2136(d). Under the reasoning of the district court, no incarcerated parent could ever fulfill his parental duty of love and affection.

The district court further found Father failed the emotional support side of the ledger because any efforts he did make to contact or communicate with the children were minor and incidental. This court's review is limited to determining whether substantial competent evidence exists to support these findings. See *In re Adoption of A.J.P.*, 24 Kan. App. 2d at 892-94.

While Father was in prison, Mother facilitated phone contact between Father and the children. Mother also arranged for the children to visit their paternal aunt, during which time an estimated three or four telephone visits between Father and the children took place. On one occasion, Mother took the children to personally visit Father at the prison.

Father sent letters to his children every week. In addition, Father participated in a program that allowed him to tape record himself reading a book to the children. Father sent 14 books and recordings to his children through this program. Father also made sure

Christmas and birthday gifts were sent to the children each year.

Mother readily admitted Father wrote to the children on a weekly basis. Mother, however, stated that she became concerned about the letters when Father began making references to time Father and the children would spend together when Father was released from prison. Mother felt these references were misleading, in that the children were unable to realize the time frame involved.

In March 2006, Mother let lapse the lease on her post office box, the mail address to which Father sent letters to his children. Mother maintains she accidentally let the lease lapse, as she was occupied with her mother's cancer and her own miscarriage. In light of this lapse, Father obtained a calling card and thereafter called the children once a month.

Even if we review the facts presented above in a light most favorable to Stepfather, we conclude there simply is insufficient evidence to support the district court's finding that Father did not make reasonable efforts to contact or communicate with his children and that any such contact that did occur was minor and incidental. In so concluding, we have taken into account, as we are required to do, that by virtue of his incarceration, Father possessed limited control over his ability to contact and communicate with his

children. For example, he sent letters to his children every week until Mother let the post office box lapse. Even then, Father switched to monthly telephone calls instead of breaking off communication. And, although regularly spoke to his children when they went to visit his sister, Mother ultimately asked that his sister stop facilitating this communication. Given the constraints imposed upon him, we are not persuaded that Father failed to make reasonable efforts to maintain significant contact with his children.

Based on the discussion above, we find insufficient evidence to support the district court's finding that Father failed to assume his parental duties in the 2 years prior to the filing of the adoption petition and the termination of his parental rights. Accordingly, we conclude Father's consent to the adoption was required under K.S.A. 2008 Supp. 59-2136(d). In so concluding, we do not consider, and are prohibited from considering in this stepparent adoption proceeding, the events leading up to Father's incarceration or his fitness as a parent in light of the events that transpired.

Because Father's consent was required, the district court erred in relying on subsequent determinations regarding Father's fitness and the best interests of the children in granting Stepfather's petition for adoption. See *In re Adoption of G.L.V.*, 286 Kan. at 1064-65 (Determinations regarding the best interests of the child and the fitness of the nonconsenting parent do not "permit a court to override the requirement in K.S.A. 2007

Supp. 59-2136[d] of mandatory consent when a natural parent has assumed his or her parental responsibilities.").

3. Due Process

Father also complains on appeal that he was denied due process when the district court refused to continue the trial until after his possible release on parole in July 2008. Father renewed his objection to his requested delay at the beginning of the trial.

The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Whether due process under the Fourteenth Amendment to the United States Constitution has been protected in a particular case is a question of law. *In re J.D.*, 31 Kan. App. 2d 658, 666, 70 P.3d 700 (2003).

In this case, Stepfather took every reasonable action to permit Father's presence at the adoption hearing, even filing a petition for habeas corpus with Missouri prison officials. When that request was denied, Father was allowed to proceed via telephone, during which he heard all the testimony and was able to testify on his own behalf. Father also was allowed several breaks, which required everyone except Father's attorney to

leave the courtroom so the two could consult about the process of the hearing.

We find Father had both notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Given Father was provided with the appropriate level of due process to which he was entitled, we affirm the district court's decision to deny Father's request for an 8- to 12-month continuance based on the mere possibility that Father would be paroled. As noted in other contexts involving children and their need for permanency, time frames are viewed from the children's perspective, not the parent's, as the time perception of children differs from that of an adult. *In re M.B.*, 39 Kan. App. 2d 31, 45, 176 P.3d 977 (2008).

4. Attorney Fees

Appellate counsel was appointed by the district court to pursue this appeal on behalf of Father, who is indigent. Pursuant to this appointment, appellate counsel now seeks payment of costs and attorney fees incurred in conjunction with this appeal. Notably, Stepfather has not filed any opposition to this request for costs and fees.

This court may award attorney fees for services on appeal in any case where the district court had authority to award the fees. Supreme Court Rule 7.07(b) (2008 Kan. Ct.

R. Annot. 60). To that end, we note that the district court here did, in fact, award attorney fees to appointed trial counsel for Father in the proceeding below. We further note that the attorney fees were assessed, not against the county, but against Stepfather pursuant to a proposed journal entry to which both Stepfather and Father agreed. For the reasons stated below, we find the district court had full authority to approve the parties' jointly proposed journal entry ordering Stepfather to pay the fees for Father's court-appointed attorney.

In *In re Adoption of D.S.D.*, 28 Kan. App. 2d 686, 19 P.3d 204 (2001), also a step-parent adoption case, a panel of this court found the district court had authority to award attorney fees. In that case, the district court appointed counsel to represent the father in an adoption proceeding in which father's parental rights ultimately were terminated. Once the adoption was finalized, the district court assessed as costs a portion of the biological father's attorney fees against the adoptive parents. The adoptive parents appealed the district court's order.

In evaluating the adoptive parents' appeal, a panel of this court cited K.S.A. 59-2134(c), which states that the "'costs of the adoption proceedings *shall be paid by the petitioner* or as assessed by the court.'" (Emphasis added.) 28 Kan. App. 2d at 687. Although this particular statute does not specifically reference attorney fees, the *In re*

Adoption of D.S.D. court read this language in conjunction with K.S.A. 2000 Supp. 59-104(d), which specifically defined the word "costs" (as used in Chapter 59) to include attorney fees.

K.S.A. 2008 Supp. 59-104(d) states in relevant part:

> "(d) *Additional court costs*. Other fees and expenses to be assessed as additional court costs shall be approved by the court, unless specifically fixed by statute. *Other fees shall include . . . attorney fees . . . .* All additional court costs shall be taxed and billed against the parties or estate as directed by the court." (Emphasis added.)

The *In re Adoption of D.S.D.* court concluded that the legislature "intended that the fees of an attorney appointed to represent an indigent biological parent could be included as costs that may be assessed against a petitioner in an adoption proceeding." 28 Kan. App. 2d at 688. For this reason, the court ultimately held that the district court had authority to assess the attorney fees of the biological father's court-appointed attorney against the adoptive parents. 28 Kan. App. 2d at 689.

Applying *In re Adoption of D.S.D.* to this case, the district court below had the authority to assess the fees of Father's court-appointed trial counsel against Stepfather.

Therefore, we have discretionary authority to assess against Stepfather the attorney fees incurred by Father's court-appointed appellate attorney. See Supreme Court Rule 7.07(b). The question is whether we should exercise our discretion to do so.

While it may appear harsh to require a prospective adoptive parent to pay attorney fees for an attorney appointed to represent the parental rights of a indigent biological parent, this is precisely the result the legislature intended. To that end, our legislature did not create a provision in the Kansas Adoption and Relinquishment Act, K.S.A. 59-2111 *et seq.*, providing for payment of an indigent parent's court-appointed attorney *by the county*. Legislative intent for payment of attorney fees by the county in other matters are, however, expressly stated elsewhere in our code. For example, payment of certain attorney fees from the county's general fund is provided in the Kansas Parentage Act, K.S.A. 38-1122 (providing for payment of indigent party's portion of reasonable fees of counsel and child's guardian ad litem from county's general fund); the Kansas Juvenile Offenders Code, K.S.A. 2008 Supp. 38-1613(b) (providing for payment of court-appointed attorney fees from county's general fund in juvenile offender cases); and the Revised Kansas Code for Care of Children, K.S.A. 2008 Supp. 38-2205(e) and K.S.A. 2008 Supp. 38-2215(b) (providing for payment of fees for child's guardian ad litem or attorney appointed for parents from county's general fund). Simply put, the legislature did not specify that the attorney fees of an indigent parent are to be paid by the county

but, instead, expressly provided in K.S.A. 2008 Supp. 59-104(d) and K.S.A. 59-2134(c) that attorney fees may be assessed against prospective adoptive parents. Accordingly, we find assessing attorney fees against Stepfather (as the petitioner) is appropriate here.

Given this finding, we turn now to the reasonableness of the amount of fees requested. Counsel attaches to her motion an affidavit setting forth a detailed billing statement for a total of 47.6 hours of attorney time and $133.76 in total costs advanced to Father. The attorney fees set forth are predicated on a billing rate of $200 per hour. Counsel avers that this rate is based on fee rates customarily charged in Wichita, Kansas, and her experience and ability as an attorney with 29 years of practice.

Although we do not dispute that $200 per hour is the customary rate in Wichita for a case such as this with an attorney of counsel's experience and ability, we do not think assessing fees against Stepfather at such a rate is reasonable. To that end, we will use our discretion to award fees for appointed counsel's time on appeal at a rate of $80 per hour, which is the rate our legislature has designated to compensate court-appointed counsel for representing indigent defendants in criminal cases. See K.S.A. 22-4507(c) (requiring court-appointed attorneys to be compensated at rate of $80 per hour). Accordingly, appellate counsel's motion, which is unopposed, is granted and Father's appellate attorney fees and costs are hereby assessed against Stepfather in the amount of **$3,941.76** (47.6

hours at $80/hour plus $133.76 in costs).

Reversed.

MARQUARDT, J.: I respectfully dissent from the majority's interpretation of K.S.A. 2008 Supp. 59-2136(d) that Father's consent is absolutely required for a stepparent adoption unless he has failed or refused to financially and emotionally support his children for 2 consecutive years preceding the filing of Stepfather's petition for adoption.

Mother and Father had two children; J.D., born in 1996, and K.D., born in 1998. Mother and Father were appointed managing conservators (guardians) of Mother's 5-year-old stepsister, H.B.H., and Mother's 3-year-old half-sister, L.H.D. L.H.D. was fatally injured while in the sole care of Father on July 18, 2002. Father was arrested for the death of L.H.D. but was released on bond. He violated a condition of his bond and was incarcerated in December 2002. As a result of L:H.D.'s death, Father entered an *Alford* plea to felony abuse of a child, see *North Carolina v. Alford,* 400 U.S. 25, 38, 27 L. Ed. 2d 162, 91 S. Ct. 160 (1970), and in September 2003, he was sentenced to prison for 17 years.

The flaw in the majority's analysis is three-fold: (1) It found that Father has financially and emotionally supported his children in the 2 years preceding the filing of the petition for adoption; (2) it misconstrues the word "must" in the context of the statute as synonymous with the word "shall"; and, (3) it completely ignores the final sentence of K.S.A. 2008 Supp. 59-2136(d) which states: "The court may consider the best interests of the child and the fitness of the nonconsenting parent in determining whether a stepparent adoption should be

granted."

According to Black's Law Dictionary 1019 (6th ed. 1990), the word "must" is defined as follows:

> "This word, like the word 'shall,' is primarily of mandatory effect [citation omitted]; and in that sense is used in antithesis to 'may'. But this meaning of the word is not the only one, and it is often used in a merely directory sense, and consequently is a synonym for the word 'may' not only in a permissive sense of that word, but also in the mandatory sense which it sometimes has."

If the legislature intended that the district court should only consider the issue of Father's consent or lack thereof, there would be no purpose for including the last sentence of K.S.A. 2008 Supp. 59-2136(d).

The majority claim that Father was financially unable to support his children as ordered by the district court in 2002; however, he received his veterans disability payments of approximately $105 per month, which he sent to his sister. He did not designate any of that money as support for his children. It should also be noted that he did not voluntarily pay child support when he was in prison, it was only after he was contacted by child support enforcement authorities that the $5 per month child support was paid. K.S.A. 2008 Supp.

59-2136(d) states: "In determining whether a father's consent is required under this subsection, the court may disregard incidental visitations, contacts, communications or contributions." Father's payments can only be considered incidental because they were not voluntary; he had other assets that could have been used to support his children, and he chose not to do that. The district court was not in error in finding that Father had not financially provided substantial support to his children during the 2 years preceding the filing of Stepfather's petition for adoption.

Since L.H.D.'s death, K.D. and J.D. have been in therapy to help them deal with this issue. Dr. James L. Vincent has treated both children. He testified that K.D. experienced migraine headaches and sleep disruptions, and he diagnosed her with a generalized anxiety disorder with mild depression. Also, "she has a conflict of loyalties regarding whether or not, you know, can she love her father even though her father, you know, killed her younger sister." He stated that K.D. does not want to visit her father in prison. When she started in therapy, K.D. was emotionally and therapeutically rated a 2 or 3 on a scale of 10, with 1 being "bad" and 10 being "the best." She is now rated a 7 or an 8; however, she "continues to have unresolved issues related to the murder of her younger sister and her father who was sent to jail." Dr. Vincent also testified that the children have fears that Father may harm them when he gets out of prison. His treatment notes stated that "[K.D.] stated that she is happy about being adopted and stated that she worries that her biological father . . . will get out of

jail and 'kill her.'"

Dr. Vincent testified that J.D. has a history of cancer "which means that he is vulnerable to depression and anxiety in the first place." J.D. was 6 years old when L.H.D. was killed, and he was present when Father abused L.H.D. He felt he could have stopped it from happening and as a result has posttraumatic stress disorder. J.D. also has trichotillomania, wherein he habitually pulls out his eyelashes. According to Dr. Vincent, J.D. has a lot of the same issues as K.D. Dr. Vincent testified that it was in K.D.'s and J.D.'s best interests to be adopted by Stepfather. He also testified that if the adoption is not granted, both children are likely to have more emotional problems in the future.

There is a great deal of testimony in the record on appeal about the positive relationship these children have with their stepfather and, by the same token, evidence of the unfitness of their biological father.

The district court made all the required findings of fact and conclusions of law, and I would affirm Stepfather's adoption.

With regard to attorney fees, the majority find that the appellee in this case should pay $3,941.76 in attorney fees and $133.76 in costs toward Father's attorney fees and costs. I

disagree. Here, appellee offered to pay fees for Father's appointed trial counsel at the trial court level after the court granted the adoption. That agreement was incorporated in the journal entry. Appellee never agreed to pay Father's costs and fees for the appeal.

The majority ignores the fact that the decision at the district court level was in favor of the appellee (plaintiff). It was Father who brought this appeal. There are genuine issues raised in this appeal that has caused a split decision. In such a case, the parties should each bear their own costs and fees.

According to Kansas Supreme Court Rule 7.07 (2008 Kan. Ct. R. Annot. 60), the decision of whether to grant appellate fees and costs is discretionary with this court. Because I have dissented from the majority ruling regarding the adoption, I also believe that for all the reasons stated above, appellee should not be ordered to pay Father's attorney fees and costs.

I would deny all requests by Father for attorney fees and costs and affirm the district court.

OFFICE OF THE SHERIFF

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Ken Massey, Undersheriff
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KENNETH M. MCGOVERN
Sheriff

February 23, 2010

To: Chairperson Owens, Vice-Chairperson Schmidt, and distinguished members of the Senate Judiciary Committee.

Chairperson Owens and Committee Members,

I am Ken McGovern, Sheriff of Douglas County, and First Vice President of the Kansas Sheriff's Association. I take this opportunity to express my support, as both Sheriff of Douglas County and Executive Board member of the Kansas Sheriff's Association, for Senate Bill Number 494.

The Kansas County Clerks and Election Officials Association contacted the Kansas Sheriff's Association regarding concerns they had with Kansas Statute 19-804a, *Exercise of functions of sheriff by county clerk.* Upon review of the statute, the Sheriff's Association stands in agreement with the County Clerk's Association that SB 494 adequately addresses and corrects the concerns we have with the statute.

The concerns arise from what appears to be a conflict with the wording in KS 19-804 and KS 19-804a. KS 19-804 provides that whenever there is a vacancy in the office of sheriff, the undersheriff shall execute the office of sheriff. KS 19-804a provides that whenever there shall be no sheriff, it shall be the duty of the county clerk to exercise the powers and duties of sheriff. SB 494 names the undersheriff as the first successor to an empty sheriff's office, with the county clerk succeeding only in the absence of both sheriff and undersheriff. SB 494 is better policy language and hopefully removes any confusion about who fills a vacant sheriff's office.

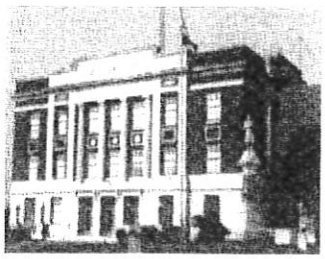
Not only is there the issue of succession, there is the issue of the complexity of the office of sheriff. There is much more to the office than law enforcement, which is complex enough in this age. The sheriff is charged with keeping the county jail, and must also attend upon the courts, serving and executing their process, writs, precepts, and orders. Depending on the population of the county, this can be a challenging responsibility. An undersheriff is most likely best qualified to take on this responsibility in the absence of a sheriff. County clerks have their own significant set of responsibilities and duties, which are quite different from those of the sheriff. To add the responsibilities of the sheriff's office, when not absolutely necessary, could be overwhelming.

For these reasons I and the Kansas Sheriff's Association support passage of SB 494, and urge this committee to do the same.

Sincerely,

Kenneth M. McGovern

Senate Judiciary
2-23-10
Attachment 2



BOURBON COUNTY CLERK
JOANNE LONG
Courthouse
210 S. National
Fort Scott, Kansas 66701-1304
(620) 223-3800

February 23, 2010

To: Senate Judiciary Committee

Re: Testimony on Senate Bill 494

From: Joanne Long, Bourbon County Clerk/Election Official
and Kansas County Clerks' and Election Officials' Association Treasurer

Honorable Chair and Members of the Committee:

Thank you for the opportunity to present testimony in support of Senate Bill 494. The Kansas County Clerks' and Election Officials' Association supports this legislation.

In November 2008, my current Sheriff, a Democrat, was elected County Commissioner. He wanted to retire from KPERS prior to taking office, so he resigned as Sheriff December 1, 2008, in order to be off payroll for the minimum 30 days required by KPERS. The current Under-Sheriff, a Republican, was elected Sheriff in the same election but would not take office until January 12, 2009. He spent December 8th through December 19th at mandatory New Sheriff School in Hutchinson. There had not been a party convention yet to fill the vacancy made by the resignation of the Sheriff.

In that time, there were personnel issues which needed immediate attention and commissary checks which needed signed, and as County Clerk, I assumed those duties as I understood the current law to read.

As the current law reads, it is unclear when the County Clerk assumes the duties of the Sheriff. I believe that Senate Bill 494 as presented will eliminate the question any future county clerk will have when faced with a situation like this.

The KCC&EOA urge the committee to report Senate Bill 494 favorably for passage. Thank you for your consideration.

Sincerely,

Joanne Long

Joanne Long
Bourbon County Clerk/Election Official
& KCC&EOA Treasurer

Senate Judiciary
2-23-10
Attachment 3

Jefferson County, Kansas

Linda M. Buttron, COUNTY CLERK
P.O. Box 321 • Oskaloosa, Kansas 66066
Phone: 785-863-2272 • Fax: 785-863-3135 • email: lbuttron@jfcountyks.com

COUNTY OFFICES

Commissioners
863-2272

Clerk
863-2272

Attorney
863-2251

Sheriff
863-2765

Register of Deeds
863-2243

Treasurer
863-2691

Clerk of the
District Court
863-2461

Road & Bridge
863-2211

Appraiser
863-2080

Auxiliary Services
863-2581

Emergency
Services
863-2278

Extension
863-2212

Planning & Zoning
863-2241

Health
Department
863-2447

GIS/IT
863-2173

911 Dispatch
863-2247

February 23, 2010

Honorable Senator Owens
Chairman-Senate Judiciary Committee
And Committee Members

RE: Senate Bill #494

-Written Testimony Only

Honorable Chairman Owens & Committee Members,

I am Linda M. Buttron, Jefferson County Clerk and current president of the Kansas County Clerk's and Election Officials Association. I am testifying on behalf of the association in support of favorable passage of this bill.

This bill contains language that will clarify the wording of K.S.A. 19-804a. There has been some confusion in counties as to who is to act as Sheriff when there is no sheriff in the County. If you only read K.S.A. 19-804 it would appear that the undersheriff assumes the responsibility whenever a vacancy occurs. If you read only K.S.A. 19-804a is would appear the County Clerk is to assume the duties. Changing the law to the proposed wording will remove any doubt about who is to serve in the case of vacancy of the Sheriff and make the meaning of both statutes clearer.

Thank you for your time,

Linda M Buttron

Linda M. Buttron
Jefferson County Clerk and Election Officer
President-Kansas County Clerk's and Election Officials Association

Senate Judiciary
2-23-10
Attachment 4