

Approved by the Judicial Council December 3, 2010

**REPORT OF THE JUDICIAL COUNCIL
FAMILY LAW ADVISORY COMMITTEE ON
2010 SB 522**

(December 3, 2010)

In May, 2010, Senator Owens, chair of the Senate Judiciary Committee, asked the Judicial Council to study and make recommendations on 2010 SB 522. 2010 SB 522 would amend existing law concerning step-parent adoptions to require that, in a step-parent adoption, the father must give consent to the adoption unless the father is deemed to be unfit and the adoption is found to be in the best interests of the child. The Council assigned the study to the Family Law Advisory Committee.

COMMITTEE MEMBERS

Charles F. Harris, Chair, Wichita. Practicing attorney.

Sara S. Beezley, Girard. Practicing attorney.

Honorable Sam K. Bruner, Overland Park. Retired District Court Judge.

Dr. Sharon E. Cain, Overland Park. Director of Child and Adolescent Psychiatry at the University of Kansas Medical Center.

Jamie Corkhill, Topeka. Attorney with Kansas Department of Social and Rehabilitation Services.

Honorable William B. Elliott, Hill City. District Court Judge.

Honorable Robert J. Frederick, Garden City. District Court Judge.

Joyce Grover, Topeka. Legal Advocacy Coordinator for the Kansas Coalition Against Sexual and Domestic Violence.

Senator Janis Lee, Kensington. Kansas State Senator.

Professor Nancy Maxwell, Topeka. Professor of Law at the Washburn University School of Law.

Ronald W. Nelson, Shawnee Mission. Practicing attorney.

Ardith R. Smith-Woertz, Topeka. Practicing attorney.

Suzanne Valdez, Lawrence. Clinical Associate Professor at the University of Kansas School of Law.

BACKGROUND

In June, 2009, Representative Mike O’Neal forwarded to the Council, attorney Thomas Arnhold’s request to study the issue of step-parent adoption in light of the Kansas Court of Appeals decision in *In re Matter of J.M.D.*, 41 Kan. App. 2d 157, 202 P3d 27 (2009). The Council assigned the study to this committee. However, the case was granted a review by the Kansas Supreme Court shortly after the committee received the assignment. Therefore, the committee agreed to table the issue until the Court issued it’s ruling on the case. The case was scheduled for hearing on October 28, 2009.

In May, 2010, the committee was also assigned to study and make recommendations on the proposed language in 2010 SB 522 concerning step-parent adoptions. The committee met in August, 2010, and briefly discussed the bill. However, the committee thought it best to table the issue for an additional month to see if the Court’s opinion on the *In re J.M.D.* case would come down during that time. The committee was concerned that if it studied the issue and made any recommendations, those recommendations could be for naught depending on the Court’s ruling.

The committee met in October, 2010, and since the Court had not issued an opinion in the *In re J.M.D.* case, it reviewed the bill and written testimony provided to the legislature by

Martin W. Bauer, as well as the proposed balloon amendments in the testimony.

K.S.A. 59-2136(d) was amended in 2006 to provide that “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.” In addition, K.S.A. 59-2136(h)(2)(A) was amended to give the court discretion to consider and weigh the best interest of the child when making a finding whether parental rights shall be terminated. However, “Kansas case law uses a two-sided ledger for determining whether a parent has failed to perform his or her parental duties during the 2 years before an adoption petition is filed. On one side of the ledger is the ‘love and affection’ that a parent shows his or her child; on the other side is the financial support provided during that time. Under Kansas law, a parent must fail both sides of the ‘ledger’ to have parental rights terminated. *In re Adoption of G.L.V.*, 286 Kan 1034, 190 P3d 245 (2008).

In *In re G.L.V.* the district court and the court of appeals recognized that the addition of the language allowing the best interests of the child and the fitness of the nonconsenting parent to be considered in a step-parent adoption changed prior law. However, both courts had difficulty determining how the new considerations should be incorporated into the two-column ledger test already in use. “On the one hand, the statute provides that the father’s consent must be given to a step-parent adoption unless the father has failed to assume parental duties for the 2 years immediately preceding the filing of the petition. Typically, determining whether the father has failed here would involve the two-column ledger test. On the other hand, the court may now also consider the best interests of the child and the fitness of the nonconsenting parent in determining whether a step-parent adoption should be granted.” *Id* at 250.

Upon review, the Kansas Court of Appeals invited the legislature to clarify its intent with

regard to these provisions stating, “If the legislature intends that the natural parent's consent for a stepparent adoption is not required if the natural parent fails to provide either financial support or love and affection for 2 consecutive years immediately preceding the filing of the petition for adoption, this should be clearly stated. Likewise, if the legislature desires the best interests of the child to be the controlling factor in a stepparent adoption, it can easily say so. As long as the language remains unclear, however, courts shall continue to strictly construe the statute in favor of maintaining the rights of natural parents.” *Id* at 253.

The Kansas Supreme Court ultimately reconciled the provisions by finding, consistent with the court’s previous interpretations of the statute, that the legislature implicitly determined that the best interests of a child is to protect the child’s relationship with the child’s natural parent when that parent has embraced his or her parental responsibilities. *Id* at 265. Therefore, according to *In re G.L.V.*, while the best interests of the child and fitness of the parent may be considered, as long as the parent fulfills one side of the two-column ledger test, the adoption cannot be granted without the consent of the parent regardless of the best interests of the child or the fitness of the parent.

Before the legislature could work to clarify its intent and the statute, *In re Matter of J.M.D.*, 41 Kan. App. 2d 157, 202 P3d 27 (2009) was decided and confirmed the fears of some that *In re G.L.V.* would lead to a non-consenting parent using the case to assert legal rights of a parent over the best interests of the child. In *In re J.M.D.* the Kansas Court of Appeals again held that the best interests of the child and the fitness of the nonconsenting parent may only be considered if the court finds that the non-consenting parent failed to fulfill his or her parental duties on both sides of the two-column ledger. However, in this case the parental rights of the

father were preserved because his meager prison wages rendered him financially unable under the statute to pay the court-ordered child support obligation. Even though the court of appeals agreed that the district court had first applied the two-column ledger test, finding that the father had failed both sides of the two-column ledger, before determining that it was also in the best interests of the children to allow the adoption and that the father was in fact unfit to be a parent, it reversed the district court's ruling by relying on financial inability to meet the financial support requirements of the ledger. *Id* at 167. According to the court of appeals, since the father had not failed on both sides of the ledger, the best interests of the children and his fitness as a parent was irrelevant and his consent was therefore required for the adoption. This case was granted review by the Kansas Supreme Court and was heard on October 28, 2009.

DISCUSSION

As exemplified by the aforementioned cases, the committee is concerned that although this particular statute has been amended several times with the apparent goal of clarifying the statute and supporting the legislative intent, the appellate courts continue to interpret the amendments to the statute in such a manner as to retain the controlling nature of the two-column ledger test. The committee understands that the proposed amendments in SB 522 are intended to allow the best interests of the child to be considered under the totality of the circumstances and to bring the step-parent section in line with the nonstep-parent section with regard to allowing unfitness to be used to terminate a parent's rights and that the intent of the proposed amendments is not to make the best interests of the child controlling as this would raise constitutional issues. However, the committee agreed that neither the proposed amendments in

SB 522 nor the proposed balloon amendments in the written testimony would likely change the way the two-column ledger test is applied.

The committee believes that the proposed changes would actually result in a weaker position for step-parents than provided by current law. If the intent is to make step-parent adoptions more in line with what the legislative intent has been through the years, the committee does not believe that this legislation would be successful in doing so. It seems to add yet another layer of interpretation that would only serve to further muddy the waters.

The committee did recognize that there seems to be a double standard between child in need of care, step-parent adoption and 3rd party adoption with regard to the standards applied to determine fitness of a parent. There is not currently a definition of fitness in the adoption code however there is dicta in case law that directs one to look at the Revised Kansas Code for Care of Children (CINC Code) for that. The CINC Code provides in K.S.A. 38-2269 that the court may terminate parental rights when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to properly care for a child and follows with a non-limiting list of factors to consider when making such a determination. Subsection (f) of the statute provides that the existence of any one of the factors standing alone may, but does not necessarily, establish grounds for termination. In addition, subsection (g) provides that if the court makes a finding of unfitness, the court shall consider whether termination is in the best interests of the child.

The committee recommends that rather than making the amendments proposed in SB 522, the legislature should consider amending the statutes in order to provide consistency with regard to the standards used to determine fitness of a parent. The committee recommends

utilizing the CINC Code as a basis for the amendments.

In addition, the committee recognizes that an opinion has not yet been issued in the *J.M.D.* case. The committee expressed concern that depending on how the Kansas Supreme Court rules in this case, any proposed amendments to the statute could be rendered moot or further exacerbate the problem. Therefore, the committee also recommends delaying any significant amendments to the statute at least until the opinion is issued.

CONCLUSION

In light of the foregoing, the committee recommends against passage of SB 522 or a similar bill. The proposals in the bill do not appear to sufficiently address the issue and it is possible they could only exacerbate the problem should the Court attempt to clarify the issue in its opinion in the *J.M.D.* case. The committee remains is very interested in this issue and once the Court releases its decision, intends to discuss the matter further to determine whether legislation is necessary.