

NOT DESIGNATED FOR PUBLICATION

Nos. 124,641
124,642

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of G.D. and B.D.,
Minor Children.

MEMORANDUM OPINION

Appeal from Reno District Court; PATRICIA MACKE DICK, judge. Opinion filed February 24, 2023. Affirmed.

Austin Stout, of Kansas Legal Services, of Hutchinson, for appellant natural mother.

Brian Koch, assistant district attorney, and *Thomas Stanton*, district attorney, for appellee.

Before SCHROEDER, P.J., WARNER and CLINE, JJ.

PER CURIAM: The natural mother (Mother) of G.D. and B.D. (the children) timely appeals from the district court's findings of unfitness and termination of her parental rights. The natural father of the children is not a party to this appeal. After a careful review of the record, we find the district court properly determined Mother was unfit based on her past and ongoing issues with drug use and a failure of reasonable efforts by appropriate agencies to rehabilitate the family. The district court also concluded the conduct or condition resulting in Mother's unfitness was unlikely to change in the foreseeable future; thus, termination of Mother's parental rights was in the children's best interests. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2020, the State filed petitions alleging G.D. (born in 2014) and B.D. (born in 2016) were children in need of care (CINC). The petitions were filed after B.D. was hospitalized for serious unexplained injuries. The children were taken into temporary custody, at which time Mother tested positive for methamphetamine and marijuana. Mother entered no-contest statements to the allegations in the State's CINC petitions. The district court adjudicated the children CINC and placed them in the custody of the Kansas Department for Children and Families (DCF). Mother was referred to caseworkers from Saint Francis Ministries (SFM) to develop case plans and assist with reintegration efforts.

The reintegration plans did not go well. Mother obtained a parenting evaluation and a drug and alcohol evaluation. She also started participating in group and individual therapy. But Mother failed to consistently submit negative urinalysis (UA) tests as requested by her caseworkers and did not maintain regular contact with her caseworkers. Mother made some progress between October 2020 and early April 2021. However, by mid-April 2021, Mother stopped attending group and individual therapy, stopped meeting with her peer mentor, and stopped communicating with her caseworkers.

The district court held a review hearing on April 27, 2021, at which time the district court learned Mother had not had any visitation with the children since the beginning of the cases. The district court ordered SFM to contact the children's therapists regarding a visitation schedule. But Mother largely stopped communicating with SFM for several months thereafter. Mother's caseworkers attempted to complete a walk-through of her home in June 2021, but they could not reach her. Mother had some contact with her caseworkers in August 2021 but was jailed for an unrelated matter shortly thereafter.

In August 2021, the district court held a permanency hearing and found reintegration was no longer viable. The State filed motions to make findings of unfitness

and terminate Mother's parental rights. The matter proceeded to a joint termination hearing in November 2021. The district court heard testimony from Mother and her SFM caseworkers. Due to a recording failure, a transcript of the termination hearing could not be prepared for appeal. The district court held a hearing for the purpose of recreating the record pursuant to Supreme Court Rule 3.04(a) (2022 Kan. S. Ct. R. at 24).

Mother had seven positive UAs between October 8, 2020, and March 31, 2021. All seven UAs were positive for methamphetamine; six were also positive for THC, and one more was also positive for opiates and morphine. Shelby Geddes, a caseworker from SFM, testified Mother failed to maintain consistent contact with SFM after admitting she would test positive for methamphetamine on March 31, 2021. Geddes acknowledged Mother had completed some of her case plan tasks but testified Mother stopped attending required therapy and treatment sometime in March 2021. And Geddes was unaware whether Mother ever resumed treatment. Geddes indicated she was unable to complete a walk-through of Mother's home and Mother had not been allowed any visitations with the children throughout the cases.

Mother testified she was currently attending therapy and had attempted to set up a time for Geddes to do a walk-through of her home but had issues communicating with Geddes, which prevented it from happening.

The district court found Mother unfit based on:

- The use of intoxicating liquor or drugs of such duration or nature as to render her unable to care for the children—K.S.A. 38-2269(b)(3);
- A failure of reasonable efforts by appropriate public or private agencies to rehabilitate the family—K.S.A. 38-2269(b)(7); and
- Failure to maintain regular contact, visitation, or communication with the children—K.S.A. 38-2269(c)(2).

The district court found Mother's conduct or condition rendering her unfit was unlikely to change in the foreseeable future and termination of Mother's parental rights was in the children's best interests. Additional facts are set forth as necessary.

ANALYSIS

Standard of Review and Applicable Legal Principles

A parent has a constitutionally recognized fundamental right to a parental relationship with his or her child. See *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re B.D.-Y.*, 286 Kan. 686, 697-98, 187 P.3d 594 (2008). Accordingly, parental rights for a child may be terminated only upon clear and convincing proof of parental unfitness. K.S.A. 38-2269(a); *Santosky*, 455 U.S. at 769-70; *In re R.S.*, 50 Kan. App. 2d 1105, 1113, 336 P.3d 903 (2014). Clear and convincing evidence is evidence sufficient to establish that the truth of the facts asserted is highly probable. Clear and convincing evidence is an "intermediate standard of proof between a preponderance of the evidence and beyond a reasonable doubt." *In re Adoption of C.L.*, 308 Kan. 1268, 1278, 427 P.3d 951 (2018).

As provided in K.S.A. 38-2269(a), the district court must find "by clear and convincing evidence that the parent is unfit by reason of conduct or condition," making him or her "unable to care properly for a child" and the circumstances are "unlikely to change in the foreseeable future." In reviewing a district court's termination of parental rights, we view all evidence in the light most favorable to the prevailing party to determine whether a rational fact-finder could have found it highly probable by clear and convincing evidence that parental rights should be terminated. *In re K.W.*, 45 Kan. App. 2d 353, 354, 246 P.3d 1021 (2011). In making this determination, we do not "weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact." *In re B.D.-Y.*, 286 Kan. at 705.

Upon making a finding of unfitness of the parent, the district court must "consider whether termination of parental rights . . . is in the best interests of the child. In making the determination, the court shall give primary consideration to the physical, mental and emotional health of the child." K.S.A. 38-2269(g)(1). The district court makes the best-interests determination based on a preponderance of the evidence, which is essentially entrusting the district court to act within its sound judicial discretion. See *In re R.S.*, 50 Kan. App. 2d at 1115-16. We review a district court's best-interests determination for an abuse of discretion,

"which occurs when no reasonable person would agree with the district court or the district court premises its decision on a factual or legal error. In determining whether the district court has made a factual error, we review any additional factual findings made in the best-interests determination to see that substantial evidence supports them. [Citation omitted.]" 50 Kan. App. 2d at 1116.

The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013).

Mother Is Unfit

Mother's drug use

The district court found Mother's drug use rendered her unable to care for the children. This case began when B.D. was hospitalized for serious unexplained injuries. At that time, Mother tested positive for methamphetamine and marijuana. The children had previously been put in foster care in 2017 based on Mother's drug use. Mother had six positive UAs between October 2020 and December 2020. She completed a drug and alcohol evaluation and attended treatment for two months but relapsed. Mother completed another drug and alcohol evaluation but did not inquire about the results and

recommendations, which suggested inpatient treatment. Mother continued to have issues with drug use, admitting to her caseworkers she would test positive for methamphetamine on March 31, 2021. This coincided with a lack of communication with her caseworkers and Mother not attending group and individual therapy. The record does not reflect Mother submitted any UAs from April 2021 through August 2021, during which time she had no contact with her caseworkers.

Mother acknowledges she failed multiple UAs and stopped attending drug treatment in April 2021, but she argues there was no evidence of any drug use after March 2021. She also points to her own testimony she reentered drug treatment prior to the termination trial. She is essentially asking us to reweigh the evidence or resolve conflicts and ambiguities in the evidence, which we cannot do. *In re B.D.-Y.*, 286 Kan. at 705. The record reflects past issues with drug use resulted in the children being removed from Mother's home prior to this case and continuing issues with drug use throughout the pendency of this case. As another panel of our court held: "The State is not required to provide direct evidence that a parent's conduct is due to drug use if sufficient evidence shows that drug use impeded reintegration." *In re M.S.*, 56 Kan. App. 2d 1247, 1258, 447 P.3d 994 (2019). Here, sufficient evidence reflects Mother's drug use impeded reintegration.

Mother's past and ongoing issues with drug use resulted in the children being removed from her home twice. At the time of B.D.'s hospitalization in September 2020, Mother tested positive for methamphetamine and marijuana. SFM met with Mother on October 8, 2020, and outlined case plan objectives, which included submitting negative UAs when requested. That same day, Mother again tested positive for methamphetamine and marijuana. Mother tested positive for THC and methamphetamine on October 22, 2020. Then, on October 26, 2020, Mother tested positive for THC, methamphetamine, opiates, and morphine. As the State points out, this reflects Mother not only continued using marijuana and methamphetamine, but she also expanded her drug use to include

opiates and morphine. Mother also continued to test positive for THC and methamphetamine in November and December 2020.

While Mother made some progress in addressing her drug use between December 2020 and March 2021, her actions after admitting she would test positive for methamphetamine on March 31, 2021, reflect either a regression or, at best, a lack of further progress. Considering all the relevant evidence and circumstances, the district court reasonably found Mother's drug use was of such nature or duration as to render her unfit to care for the children. See K.S.A. 38-2269(b)(3).

Failure of reasonable efforts

The district court found reasonable efforts were made by appropriate public or private agencies, but those efforts failed to rehabilitate the family. In her brief, Mother argues:

"[T]he State did not present clear and convincing evidence that the efforts made by the agency failed to rehabilitate the family[.] . . . The court made a finding that reasonable efforts had failed to rehabilitate this family simply based on the information on and before April 27, 2021, and the lack of contact between [Mother] and [SFM], rather than the progress reported by [Mother] at the termination trial."

We are unpersuaded by Mother's argument. Again, she is essentially asking us to reweigh the evidence, which we cannot do. *In re B.D.-Y.*, 286 Kan. at 705. The district court had the opportunity to consider the reasons offered by Mother for a lack of communication with her caseworkers, as well as Mother's assertion she resumed drug treatment prior to the termination hearing. The record explicitly notes as much. The district court was free to credit or reject Mother's claims based on its weighing of the evidence. We will not second-guess its resolution of those points simply because conflicting evidence might lead to differing conclusions. Mother provides no additional

meaningful argument on this point or evidentiary support from the treatment program she claimed to be attending; thus, she fails to establish error in the district court's ruling. See *Phillips v. Fisher*, 205 Kan. 559, 560, 470 P.2d 761 (1970) ("Error is never presumed, and when an appellant brings a case to this court the burden is upon [the appellant] to make it affirmatively appear that the judgment below is erroneous If [the appellant] fails in sustaining such burden the judgment must be affirmed.").

Lack of contact or communication with the children

The district court further found Mother unfit based on a lack of contact or communication with the children. See K.S.A. 38-2269(c)(2). On this point, the record is somewhat lacking. The evidence reflects Mother was ordered to have no contact with the children at the outset of this case based on a then-pending investigation about the cause of B.D.'s injuries. This order remained in effect until the April 2021 review hearing, at which time the district court ordered SFM to contact the children's therapist regarding visits with Mother because the investigation had concluded and Mother was not suspected of any further criminal charges in relation to B.D.'s injuries. The record is unclear what contact, if any, SFM had with the children's therapist and whether such contact, or lack thereof, impeded visitations. What is evident from the record, however, is that Mother did not communicate with her caseworkers between the April 2021 review hearing and the August 2021 permanency hearing.

Mother attributes her lack of visitation to SFM's belief she needed permission from the children's therapist to have visits. The record does not support her argument; it is ambiguous as to what transpired regarding visitation arrangements after the April 2021 review hearing. As the appellant, Mother has the burden to designate a sufficient record to show error on appeal. See *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013). While there is no transcript of the termination hearing, Mother had the opportunity to participate in recreating the record. In fact, the district

court noted it "[issued] this revised suggestion of the record filed by . . . [M]other's attorney No other party suggested changes to [Mother's attorney's] rendition of the record"

We decline to affirm the district court's finding on this point because the record reflects Mother was prohibited from visiting the children by court order prior to April 2021 and is generally silent as to what attempts were made by SFM to arrange visits thereafter. However, K.S.A. 38-2269(b)-(e) provides a list of nonexclusive factors the district court may rely on to determine a parent is unfit. Any one of those factors alone may be grounds to terminate parental rights. K.S.A. 38-2269(f).

Mother's lack of visitation alone does not support a finding of unfitness given the ambiguities in the record. However, Mother's actions from March through August of 2021—using methamphetamine, discontinuing therapy, not meeting with her peer mentor, and failing to remain in contact with SFM—all reflect no constructive action on Mother's part to obtain or make positive steps toward reintegration. In other words, the record does not establish Mother was unfit under K.S.A. 38-2269(c)(2). However, the relevant facts regarding Mother's actions—or failure to act—after the April 2021 review hearing were appropriate for the district court to consider in relation to the other statutory factors on which it relied.

Mother's Unfitness Was Likely to Continue for the Foreseeable Future

Mother argues the district court erred in finding her conduct or condition rendering her unfit was likely to continue for the foreseeable future. Specifically, she argues there was no evidence of any failed drug test after March 31, 2021, and SFM did not make any attempt to assess Mother's progress other than trying to conduct a walk-through of her home in June 2021. Accordingly, she argues the district court erred in terminating her parental rights.

In support of her argument, Mother relies on *In re K.V.*, No. 121,180, 2019 WL 6041460, at *1 (Kan. App. 2019) (unpublished opinion), in which another panel of our court reversed the termination of parental rights based on a lack of evidence K.V.'s mother's condition was unlikely to change.

In re K.V. is distinguishable because, there, the district court held a termination hearing where it found a statutory presumption of unfitness applied based on the amount of time K.V. had been out of the natural mother's home. But the district court did not terminate the mother's parental rights, finding there was no evidence her conduct was unlikely to change in the foreseeable future. Instead, the district court continued the matter to give the mother a chance to make additional progress. Approximately four months later, the district court held another hearing and found the mother's parental rights should be terminated based on a lack of action by the mother in the interim. The panel reversed, noting there was "*no* evidence in the record on appeal describing Mother's inactions in the months between the . . . hearings." 2019 WL 6041460, at *4.

Here, however, there was evidence of Mother's inaction following the April 2021 review hearing—namely, failing to stay in contact with her caseworkers or attempting to obtain visitation with her children. Mother's failure to maintain contact with her caseworkers resulted in SFM being unable to contact her; conduct a walk-through of Mother's home, which also denied any opportunities for the caseworkers to obtain any UAs from Mother after April 2021; or verify what Mother was doing to comply with her case plan. Mother's lack of communication demonstrates her failure to follow through on her case plan to foster reunification with her children.

The procedural posture here is also different from *In re K.V.* because the district court made no findings regarding Mother's unfitness at the April 2021 review hearing. Prior to the November 2021 termination hearing, the district court held a permanency hearing in August 2021 and determined reintegration was no longer a viable goal based

on Mother's lack of progress. In September 2021, Mother was jailed based on other legal issues. Mother's actions or inaction between the April 2021 review hearing and the November 2021 termination hearing reflect a significantly different factual landscape than what occurred during the continuance in *In re K.V.*

Although Mother testified she was attending therapy at the time of the termination hearing, her past conduct and actions reflected she was prone to regression after making some progress. In determining whether parental rights should be terminated, Kansas "courts may look to the parent's past conduct as an indicator of future behavior." *In re M.S.*, 56 Kan. App. 2d at 1264. Mother's drug issues affected the children as far back as 2017. The present proceedings lasted approximately 14 months, during which time Mother failed to communicate with her caseworkers between April and August of 2021, after admitting to methamphetamine use in March 2021. Mother's actions certainly did not facilitate reintegration efforts.

We view the foreseeable future using "'child time' as the measure. [Kansas law] recognizes that children experience the passage of time in a way that makes a month or a year seem considerably longer than it would for an adult, and that different perception typically points toward a prompt, permanent disposition. [Citation omitted.]" 56 Kan. App. 2d at 1263; see K.S.A. 38-2201(b)(4). Here, the district court properly determined Mother was unfit and her conduct was unlikely to change in the foreseeable future, given her inconsistent progress during the pendency of this case and past history of drug use affecting her ability to work the plan and provide for her children. Accordingly, we affirm the district court's decision to terminate Mother's parental rights based on K.S.A. 38-2269(b)(3) and (7) because it was supported by clear and convincing evidence and was a sound exercise of its discretion consistent with the children's best interests.

Affirmed.