

NOT DESIGNATED FOR PUBLICATION

Nos. 124,981  
124,982

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of D.M. and S.M.,  
Minor Children.

MEMORANDUM OPINION

Appeal from Lyon County District Court; MERLIN G. WHEELER, judge. Opinion filed July 14, 2023. Affirmed.

*James Bordonaro*, of Emporia, for appellant.

*Meghan K. Morgan*, assistant county attorney, and *Marc Goodman*, county attorney, for appellee.

Before GREEN, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Natural father (Father) of the minor children, D.M. and S.M., appeals from the district court's termination of his parental rights alleging that the court erred by failing to make specific findings regarding the children's best interests or supporting one of its findings supporting termination of Father's rights, not allowing Father to appear by phone, and by proceeding with the termination hearing by the State's proffer. Although the district court failed to articulate some specific findings, Father has failed to demonstrate any error requiring reversal and this court finds no error in the district court's decision to terminate Father's parental rights. The district court is affirmed.

## FACTUAL AND PROCEDURAL BACKGROUND

On May 5, 2020, the State filed two separate petitions to adjudicate siblings, D.M. and S.M., as children in need of care (CINC). The following day, the district court held a temporary custody hearing where the biological mother (Mother), Father, the children's guardian ad litem (GAL), a Department for Children and Families (DCF) employee, and other family members were present. The district court ordered both children to be placed under the temporary custody of DCF. The district court also ordered the parents to submit to a drug and alcohol test, which found Father positive for methamphetamines.

On May 27, 2020, the district court held another temporary custody hearing. Father appeared with counsel, stipulated to the children remaining in the temporary custody of DCF, and requested a continuance of the adjudication hearing. The district court granted the continuance and ordered that the children remain in the temporary custody of DCF.

At the adjudication hearing on June 24, 2020, both Mother and Father appeared by phone with their respective counsel appearing via Zoom and requested to proceed with trial that day. Father's mother (paternal grandmother) testified that on the day before the incident giving rise to the CINC case, she had taken S.M. to give Father a break but that D.M. remained in his care. The next day, on May 2, 2020, paternal grandmother went to Father's home at about 1:00 p.m. after receiving no answer to her calls or text. Paternal grandmother confirmed that, upon arriving at Father's house, she knocked on the door and windows but received no response. After knocking for several minutes, D.M.—then about two years old—came to the door and began talking to paternal grandmother through the door. Paternal grandmother asked D.M. to wake up Father, but given D.M.'s age she did not appear to understand. Rather than leave D.M. unattended, paternal grandmother broke a portion of the door and climbed through it to retrieve D.M. Paternal grandmother testified that D.M.'s diaper was extremely full and D.M. said she was

hungry. Paternal grandmother stated that after retrieving D.M. from the home, she went inside and saw Father sleeping, but that she purposely did not attempt to wake Father. She explained that Father did not awaken to her breaking into the house, but that he had a hearing deficiency which might have contributed to his inability to hear her. However, she did send him a text alerting him that she took D.M. from the house.

Father testified that after he realized that D.M. was taken from the home, he unsuccessfully attempted to contact his sister and mother, so he contacted the police. He testified that he was showering and did not hear his sister or mother knocking on the door or notice that he received phone calls or text messages. He admitted to using methamphetamine in the past and shortly before the hearing, and to having a beer the night before the CINC incident. Father testified that he goes to work sometimes and that his children were well cared for. He testified that there was a no-contact order in place between him and Mother due to a domestic violence incident that occurred earlier that year. A child protection specialist from the DCF testified that, a few months before this incident, she had contact with Father and Mother because of a domestic violence report. She testified that at the time of the domestic violence report, D.M. did not have any bruises that were out of the ordinary for a child of her age.

Officer William Kent with the Emporia Police Department testified that he reported to Father's home regarding a report of a missing child. Kent testified that when he arrived, Father was on the phone with paternal grandmother and told Kent that she had kicked in the door and taken D.M.

At the conclusion of the June 2020 hearing, the district court found that D.M. was without adequate parental care, control, or subsistence when paternal grandmother took her from the home, and that the circumstances constituted an emergency justifying D.M.'s removal from Father's home. The district court held that out-of-home placement for the children remained necessary and continued their temporary placement with DCF.

In July 2020, the district court held a disposition hearing where both Mother and Father appeared with counsel. Father testified that, rather than regular employment, he worked odd jobs he found online or through his stepdad. Because Father was not home several times when St. Francis Ministries attempted to conduct a home evaluation, the district court ordered Father to be at his home that afternoon for a drop-in visit. The court also ordered Father to submit to an evaluation and drug test at the Corner House, and to provide his attorney with income information for a child support order. The district court found that it was not appropriate to place the children with the parents because of "lack of approved residences, lack of cooperation in obtaining drug and alcohol evaluations, as well as continuation with drug testing." The district court placed the children in the custody of DCF with the authority for out-of-home placement. The district court ruled that a permanency plan would be established for the reintegration of the children with one or both parents, with requirements that the parents participate in the plan and complete the plan tasks assigned to them. The district court cautioned the parents that if they failed to make progress on their case tasks, it may change the case plan from reintegration to adoption and severance of their parental rights.

On December 22, 2020, the court held a permanency hearing via Zoom with the State's attorney, Mother and Father, both represented by counsel, and the GAL. The district court ordered Father to submit to a drug test later that day at the courthouse. Father failed to submit to the drug test. Father failed to appear at the next two permanency hearings. During one of the missed hearings, Father's counsel notified the court that she had trouble communicating with Father. In the second missed hearing, Father's counsel stated that Father was struggling with mental health issues. She told the court that Father would at times acknowledge her as his attorney, and sometimes he would say he does not have an attorney and never did for this case. The district court found that Father "has made little, if any, progress toward completing any of the case plan tasks provided for him," and found it appropriate for the State to initiate termination proceedings.

On October 22, 2021, the State moved for a finding that Father was unfit and to either terminate his parental rights or appoint a permanent custodian. The State alleged Father was unfit pursuant to K.S.A. 38-2269(b)(1), K.S.A. 38-2269(b)(3), K.S.A. 38-2269(b)(4), K.S.A. 38-2269(b)(7), K.S.A. 38-2269(b)(8), K.S.A. 38-2269(c)(1)-(4), and K.S.A. 38-2271(a)(5). The State alleged that termination of Father's parental rights was in the best interests of the children, giving primary consideration to their physical, emotional, and mental health.

At a permanency hearing in December 2021, Father failed to appear, and the State and GAL argued that the court should terminate his parental rights by default judgment. His counsel notified the court that Father called the court shortly before the hearing to request participation by telephone, but the district court denied his request. She argued that Father still wanted to work toward reintegration and was doing well with the visitations and asked the court to give Father a full hearing rather than terminate his parental rights by default. She later added that delaying termination would allow time for Father to consider relinquishing his rights instead.

The district court stated that Father did not provide a reasonable explanation for his failure to appear for the hearing. The court ultimately held a hearing by proffer and found by clear and convincing evidence that Father was unfit, and that unfitness was unlikely to change in the future, because his emotional or mental illness was of such duration as to render him unable to care for the children's needs, K.S.A. 38-2269(b)(1); his use of narcotics or dangerous drugs rendered him unable to care for the children, K.S.A. 38-2269(b)(3); and his lack of effort to adjust his circumstances, conduct, or conditions to meet the children's needs, K.S.A. 38-2269(b)(8). The district court further stated that Father failed to assure care for the children in his parental home, failed to maintain regular visitation with the children, failed to carry out any reasonable plan to reintegrate the children, and failed to make payments toward the substantive cost of the children's care. The district court terminated Father's parental rights. It stayed entry of the

order for 30 days to provide Father the opportunity to consider voluntary relinquishment of his parental rights as an alternative.

After the 30-day stay elapsed, the court entered its journal entry of the termination hearing which reiterated the reasons stated at the hearing for finding Father unfit and identified Father's "failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family; (K.S.A. 38-2269(b)(7))" as an additional reason. The journal entry also noted that termination of Father's parental rights was in the best interests of the children.

Father appeals.

#### DISCUSSION

On appeal, Father asserts that the district court erred by: (1) failing to find that termination of Father's parental rights was in the best interests of the children; (2) failing to make specific findings under K.S.A. 38-2269(b)(7); (3) not permitting Father to participate in the hearing by telephone; and (4) permitting the State to proceed by proffer and not granting Father's implicit request for a continuance.

A district court may terminate a person's parental rights after their child has been adjudicated a child in need of care only after 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 care properly for a child and the conduct or condition is unlikely to change in the foreseeable future." K.S.A. 38-2269(a). The statute contains a nonexclusive list of factors the district court shall consider in determining whether a parent is unfit. K.S.A. 38-2269(b). Additionally, when the child is not in the parent's physical custody, the district court shall consider the nonexclusive list of factors in K.S.A. 38-2269(c). The

district court may determine that any one of the factors in K.S.A. 38-2269(b) or (c) establishes grounds for termination of parental rights. K.S.A. 38-2269(f).

On appeal, this court reviews the evidence relied on by the district court in its decision to terminate parental rights in the light favoring the prevailing party to determine whether the district court's findings of fact are "supported by clear and convincing evidence." *In re Adoption of Baby Girl G.*, 311 Kan. 798, 806, 466 P.3d 1207 (2020), *cert. denied* 141 S. Ct. 1464 (2021). In reviewing a district court's decision based on any clear and convincing evidence standard, an "appellate court does not weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact." *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008).

*The district court erred by failing to make specific findings at the termination hearing or in its written order regarding Father's unfitness pursuant to K.S.A. 38-2269(b)(7).*

The district court identified four separate statutory sections—K.S.A. 38-2269(b)(1); 38-2269(b)(3); 38-2296(b)(7); and 38-2269(b)(8)—as reasons for terminating Father's parental rights in its Findings of Unfitness and Order Terminating Parental Rights or Appointing Permanent Custodian. Father does not argue that the district court erred in determining that he was unfit, and his unfitness was unlikely to change in the foreseeable future. Rather, Father argues only that the district court did not make appropriate factual findings to support its reliance on K.S.A. 38-2269(b)(7), which is "failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family," to support its determination that Father was unfit.

Father is correct that the district court's written order included a finding that Father was unfit pursuant to K.S.A. 38-2269(b)(7), but the court failed to make any factual findings supporting that conclusion either during the termination hearing or in its journal entry. The best practice for the district court is to expressly identify the specific statutory

citations along with the standard of proof and facts relied upon in making its findings of unfitness at the termination hearing and in its written order, but this best practice is not necessarily required if the record supports the court's determination. See *In re B.E.Y.*, 40 Kan. App. 2d 842, 844, 196 P.3d 439 (2008). Here, in its oral pronouncement, the district court articulated its findings of unfitness supported by K.S.A. 38-2269(b)(1), (3) and (8), by specifically citing the statutes and explaining its reasoning. However, the court did not specifically identify any conditions that would support a finding of unfitness pursuant to K.S.A. 38-2269(b)(7).

The district court's failure to make specific findings as to that single statutory section does not invalidate the court's order because any one of the other cited factors in K.S.A. 38-2269(b) or (c) may establish grounds for finding Father unfit. K.S.A. 38-2269(f). Although the district court failed to articulate its reasoning under subsection (b)(7), Father does not allege that the district court erred in its oral pronouncement and written order when it relied on K.S.A. 38-2269(b)(1), (3), and (8) for finding him unfit. The district court properly cited and addressed three statutory subsections supporting its finding of Father's unfitness, and Father does not challenge those findings. Thus, the district court's failure to support its reliance on subsection (b)(7) does not undermine its finding of unfitness, and this court proceeds to address Father's other claims.

*The district court properly considered and determined whether termination of Father's parental rights was in the children's best interests.*

Father claims that the district court failed to make a sufficient finding that termination of his parental rights was in the best interests of the children because it failed to make sufficient findings during its oral pronouncement from the bench. Father acknowledges that the district court's written journal entry and order state that it considered the children's best interests.

After making a finding of unfitness of the parent, the court must next consider whether the State's request to terminate parental rights "is in the best interests of the child." K.S.A. 38-2269(g)(1). In making such a decision, the court shall give primary consideration to the physical, mental, and emotional needs of the child. K.S.A. 38-2269(g)(1). The district court bases the best-interests determination on a preponderance of the evidence within its sound judicial discretion. *In re R.S.*, 50 Kan. App. 2d 1105, 1116, 336 P.3d 903 (2014).

On appeal, this court reviews a district court's determination of the best interests of the child for an abuse of discretion. *In re M.S.*, 56 Kan. App. 2d 1247, 1264, 447 P.3d 994 (2019). A district court abuses its discretion when "it rules in a way no reasonable judicial officer would under the circumstances, if it ignores controlling facts or relies on unproven factual representations, or if it acts outside the legal framework appropriate to the issue." *In re M.S.*, 56 Kan. App. 2d at 1264. 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).

The State concedes that the district court failed to specifically mention the best interests or the emotional and physical health of the children during its oral pronouncement. However, the district court's failure to use the statutory language in its oral pronouncement alone does not warrant reversal or mean that the district court abused its discretion if the record supports the court's finding. *In re A.W.*, No. 121,666, 2020 WL 4035078, at \*10 (Kan. App. 2020) (unpublished opinion). Moreover, the better practice is for the district court to expressly include the best interests language in its written journal entry, which the district court did in this case. *In re B.E.Y.*, 40 Kan. App. 2d at 844. In its journal entry of the termination hearing and its written order terminating Father's parental rights, the district court stated that it was in the children's best interests to terminate Father's paternal rights. The district court's inclusion of the standard and determination in

its journal entry demonstrates that the district court made sufficient findings that it considered the children's best interests in terminating Father's parental rights.

Further, reviewing the evidence in the light favorable to the State, the district court did not abuse its discretion when it found that termination was in the best interests of D.M. and S.M. The district court made specific findings that clear and convincing evidence showed Father was unfit under K.S.A. 38-2269(b)(1), (b)(3), and (b)(8). The district court also found that Father's unfitness was unlikely to change in the foreseeable future. The district court then adequately addressed the two core considerations when faced with the difficult decision of terminating a parental right. See *In re K.R.*, 43 Kan. App. 2d 891, 904, 233 P.3d 746 (2010). First, as discussed above, it considered the children's best interests in considering their physical, mental, and emotional needs as stated in the journal entry and termination order. Second, during its oral pronouncement, the district court considered the children's need for permanency by addressing the possibility of Mother reintegrating with the children when she is released from the Department of Corrections. The district court did not make an error of law or fact in its determination, and this court cannot say that no reasonable person would agree with its finding. Thus, the district court did not abuse its discretion in finding that the termination of Father's parental rights was in the best interests of the children.

*Father failed to establish that the district court erred by denying Father's request to participate via telephone and failing to continue the trial date.*

Father argues that the district court erred by denying his request to appear by telephone and then proceeding to terminate his rights by the State's proffer. Father argues that the court had previously allowed him to attend hearings by telephone, that he was not informed he would not be allowed to attend the termination hearing by phone, and that denying his request to appear by phone was an abuse of discretion. Father provides no legal argument why the abuse of discretion standard applies despite precedent to the

contrary and provides no relevant caselaw to support his argument on appeal. See *In re K.E.*, 294 Kan. 17, 22-26, 272 P.3d 28 (2012). By failing to support his point with pertinent argument and authority, Father has failed to brief the issue adequately, and it is deemed waived or abandoned. See *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018); *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017).

Similarly, Father has waived or abandoned any argument that the district court abused its discretion by failing to continue the trial date, although it appears he incidentally raises the issue on appeal. This court reviews a district court's denial of a motion for continuance for an abuse of discretion. *In re M.S.*, 56 Kan. App. 2d 1247, 1254, 447 P.3d 994 (2019). At the termination hearing, Father's counsel explained that "[e]arlier I had asked to give dad an opportunity to have a full trial, but also to see that—to talk to his attorney to see whether relinquishment would be appropriate." Although this explanation implied the need for the court to continue the trial date, there was no explicit written or oral request for a continuance. See *In re Marriage of Barnett*, No. 72,376, 1996 WL 35070079, at \*4 (Kan. App. 1996) (unpublished opinion) (finding the appellant failed to explicitly request a continuance and did not demonstrate the district court abused its discretion in denying her implied request). Even assuming the district court understood this explanation as a request for continuance of the hearing, Father provides no argument on appeal why the district court's denial was an abuse of discretion. Incidentally raising a point in a brief is insufficient, and results in waiver or abandonment of the issue. *Russell*, 306 Kan. at 1089.

*Father failed to establish that the district court erred in proceeding with a hearing by the State's proffer of evidence.*

Father next argues that the court was prohibited from proceeding by proffer pursuant to K.S.A. 38-2248(f). Father's entire argument is that "[p]roceeding by proffer is not permitted by K.S.A. 38-2248(f). Here, the father contends that he informed Ms.

*McDaniel to object or that such was implicit in his request to her that he be permitted to have a full evidentiary hearing on the State's motion for severance.*" (Emphasis added.) Father provides no analysis or legal authority supporting this claim.

Resolution of Father's claim requires statutory interpretation, which is a question of law over which this court exercises unlimited review. See *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1132, 442 P.3d 509 (2019). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. *Montgomery v. Saleh*, 311 Kan. 649, 654-55, 466 P.3d 902 (2020).

While Father contends that K.S.A. 38-2248(f) does not permit the State to proceed by proffer, that conclusion is contrary to the plain language of the statute which provides that in "evidentiary hearings for termination of parental rights under this code, the case may proceed by proffer as to parties not present, unless they appear by counsel and have instructed counsel to object." The language of the statute is unambiguous. Simply put, "when a parent fails to appear at the hearing on a motion to terminate parental rights, the State may proceed by proffering the evidence supporting the motion if there is no objection by counsel for the" absent parent. *In re K.H.*, 56 Kan. App. 2d 1135, 1141, 444 P.3d 354 (2019). However, "if the parent has instructed his or her counsel to object to a proffer, then the State should proceed by presenting evidence to the court in support of termination." 56 Kan. App. 2d at 1141.

While Father concludes that the State was not permitted to proceed by proffer—he provides no argument in support of that conclusion. K.S.A. 38-2248(f) only prohibits the State from proceeding by proffer when the absent party has instructed their counsel, who does appear at the hearing, to object. At the termination hearing, Father did not appear but was represented by counsel who stated that, "I believe he does still want to work reintegration and he is still having visits with the [children] . . . . And so we would ask

that—that he not be terminated by default and give him the opportunity to have a full hearing on that issue." (Emphasis added.) Later in the hearing, Father's counsel explained that "[e]arlier I had asked to give dad an opportunity to have a full trial, but also to see that—to talk to his attorney to see whether relinquishment would be appropriate." On appeal Father does not cite to any part of the record supporting his conclusion that the State was prohibited from proceeding by proffer, nor does he provide a citation to support the conclusion that he instructed his counsel to object to the State proceeding by proffer.

This court finds no part of the record where Father's counsel stated that Father instructed her to object to the State proceeding by proffer. Moreover, Father has made no legal or factual argument supporting his conclusory claim. Father has simply failed to develop or articulate any argument supporting his claim based on the record. Father has failed to demonstrate that the district court erred in allowing the State to proceed by proffer.

#### CONCLUSION

Although the district court failed to provide appropriate factual findings to support its reliance on K.S.A. 38-2269(b)(7) as a reason for finding Father unfit, the court provided sufficient support and reasoning for finding Father unfit and that such unfitness was unlikely to change in the foreseeable future under K.S.A. 38-2269(b)(1), (3), and (8). Additionally, the district court did not abuse its discretion in finding that termination of Father's parental rights was in the best interests of the children. Father waived his claim that the district court erred in denying his request to participate in the termination hearing by telephone or grant a continuance. Finally, Father failed to demonstrate that the district court erred in proceeding with a hearing by the State's proffer of evidence.

Affirmed.