

NOT DESIGNATED FOR PUBLICATION

No. 125,249

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of H.V.,  
a Minor Child.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; JANE A. WILSON, judge. Opinion filed July 21, 2023.  
Affirmed.

*Michael J. Nichols*, of Michael J. Nichols, P.A., of Kansas City, for appellant natural mother.

*Kayla Roehler*, deputy district attorney, and *Mark A. Dupree Sr.*, for appellee.

Before HURST, P.J., BRUNS and SCHROEDER, JJ.

PER CURIAM: Mother appeals from the district court's decision to terminate her parental rights to H.V., a minor child. She argues insufficient evidence existed to terminate her rights or that, alternatively, the district court abused its discretion by not appointing a permanent custodian rather than terminating Mother's rights. Finding no error, this court affirms the district court's decision to terminate Mother's parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Mother was initially referred to KVC Family Preservation Services related to this case in about August 2019 because it was reported that she was pregnant and using illegal substances. The child, H.V., was born of that pregnancy in September 2019. On November 12, 2019, a KVC worker e-mailed the Department for Children and Families (DCF) that Mother admitted to having used drugs while at work the week before while

H.V. was with a relative. Mother then missed her urinalysis (UA) appointment on November 18, 2019. A few days later, Mother's probation officer notified KVC that Mother had a UA, and she tested positive for amphetamine and THC. At that time Mother was on probation for a case alleging possession of opiates.

On December 21, 2019, Mother was arrested for "possession opiates/opium/narcotic drug and certain stimulants, and[ ]use/possession of paraphernalia with intent to use, while [H.V.] was in the car with her." Mother bonded out and planned to go to outpatient treatment. On January 3, 2020, it was reported that Mother had missed several recent appointments with KVC. A few days later, she tested negative for all substances and H.V. was with her and "appeared to be properly dressed and smiling during the visit." The next month, in February 2020, Mother tested negative for all substances in an at-home UA, but then subsequently failed to show for two random UAs. Her probation officer told KVC that Mother was no longer compliant with the terms of her probation. In March 2020, Mother again did not appear for a scheduled UA with KVC.

*Report to Department for Children and Families*

On June 3, 2020, DCF received a report with concerns for eight-month-old H.V. alleging that Mother did not complete her rehabilitation, was not stable, and continued to use drugs and surround herself with "the wrong people." On the day of the report, a Child Protective Services (CPS) worker and KVC supervisor called Mother to inquire about the reported allegations. Mother stated that she was not using drugs and had a stable place to live. The social services workers asked Mother to complete a UA that day, but Mother failed to comply with the request. Mother's probation officer reported that Mother had no longer been participating in probation and he was planning to file a motion to revoke due to "continued failure to engage in probation or substance abuse treatment."

After failing to complete requested UAs on Friday, June 5, Mother was supposed to attend a meeting with social service professionals on Monday, June 8, 2020, at 9 a.m., but she failed to show up. A KVC supervisor called Mother, who did not answer, but then returned the call at 11:42 a.m. stating that she overslept and had failed to provide the UA on June 5. Mother's aunt and cousin, with whom H.V. was staying, attended the team decision meeting. According to a report prepared by Cornerstones of Care, during that meeting Mother's aunt and cousin explained that H.V. stayed with them often and they provide for H.V.'s needs and Mother would visit and stay just 30 minutes to an hour. Mother's aunt and cousin also explained that they were concerned Mother would take H.V. to unsafe places like drug dealers' homes and that they believed Mother to be high during some of her visits with H.V.

On June 8, 2020, the State filed a petition in the District Court of Wyandotte County alleging that eight-month-old H.V. was a child in need of care (CINC). The court awarded the State temporary custody of H.V. because Mother had her parental rights terminated previously in case numbers 2016-JC-0326, 2016-JC-0327, and 2017-JC-0584; she allegedly was using drugs while pregnant with H.V.; she was arrested on new drug charges while H.V. was in her car; and she was facing revocation of probation from a previous criminal case. The district court determined H.V. to be a child in need of care in July 2020 after finding clear and convincing evidence that H.V. was "without adequate parental care, control or subsistence and the condition is not due solely to the lack of financial means of the child's parents or other custodian," and that he "is without the care or control necessary for the child's physical, mental or emotional health."

At that time, and throughout the process, the district court ordered Mother to complete several tasks to work toward reintegration with H.V., including:

- "c) That parents shall complete a bio-psychosocial assessment and follow all recommendations;

- "d) That the parents shall sign any necessary releases of information;
- "e) That the parents shall obtain and/or maintain stable income and provide verification;
- "f) That the parents shall obtain and/or maintain stable housing and provide verification;
- "g) That the parents shall contact the CSO once a month and/or prior to address or phone changes;
- "h) That the parents shall attend parenting education;
- "i) That the mother shall provide random, timely and negative UAs at the request of the CSO or Cornerstones of Care;
- "j) That the mother shall complete a substance abuse assessment and follow all recommendations;
- "k) That the mother shall address all legal matters;
- "l) That there shall be no contact between the natural mother and [her ex-boyfriend.]"

During the pendency of Mother's case, the district court received reports from Court Services Officer (CSO) K.G. and various workers from Cornerstones of Care regarding Mother's progress.

#### *Mother's Progress on Court Orders*

At the termination of parental rights hearing, CSO K.G. testified that she became involved in the case in July 2020 when H.V. was taken into state custody, and that her role was "to act as a liaison between court professionals and outside professionals." In addition, a Foster Care Case Management Specialist at Cornerstones of Care testified that she was assigned to Mother's case in July 2021—a year after the CINC determination. A Manager of Permanency Services at Cornerstones of Care testified that she was assigned to oversee the Foster Care Case Management Specialist's work on Mother's case. Mother also testified on her own behalf.

*Mother's Visits with H.V.*

H.V. entered state custody on July 30, 2020, and Mother testified at the termination hearing that her cousin allowed Mother to visit H.V. weekly. As of the date of the October 2020 Cornerstones of Care report, Mother had not missed any visits with H.V. The report indicated that H.V. would smile and recognize Mother during those weekly visits. Between the October 2020 and the January 2021 reports, Mother was incarcerated twice and spent several weeks in treatment and detox centers, and between those periods and the COVID-19 pandemic, Mother's visits with H.V. were inconsistent. When virtual visits did occur, H.V. would smile when he saw Mother and she interacted well with him.

The April 2021 Cornerstones of Care report covered February to April 2021 during the time Mother was in the Mirror, Inc. reintegration program and was incarcerated after testing positive for illegal substances. At the time of that report, Cornerstones of Care was working on scheduling weekly visits for Mother, but Mother arrived late to the most recent virtual visit which lasted just 11 minutes because Mother said she could not keep H.V.'s interest.

The August 2021 Cornerstones of Care report covered the period of May to August 2021 and stated that Mother had one in-person visit with H.V. in June prior to her being incarcerated again. At the hearing, the Cornerstones of Care worker testified that H.V.'s foster parent said Mother was unable to focus on H.V. during her visits. Similarly, a note in the June 2021 Cornerstones of Care report states that "prior case worker indicated they were shortening visits due to [Mother] struggling to pay attention to her child for the duration of the visit."

The Cornerstones of Care worker confirmed that she tried to set up a visit with Mother in July 2021, shortly after her incarceration, but the jail would not allow the visit

due to the COVID-19 pandemic. Mother testified that she tried to get visitation with H.V. between June and December 2021, after she had moved to the women's prison, but the prison staff member refused to arrange those visits directly with H.V.'s caregiver, explaining they would only speak to Cornerstones of Care workers to set up visitation. It was also confirmed that the lack of visitation while Mother was incarcerated did not stem from Mother intentionally neglecting visitation. Once Mother was moved to the Topeka Women's Facility, Mother restarted virtual visits with H.V. and had three virtual visits in December 2021. The report from Cornerstones of Care stated that H.V. struggled to pay attention during the December virtual visits due to his age.

At the hearing, Mother confirmed that she never refused a visit with H.V., that she had a bond with H.V., and that he knew who she was. She confirmed that her biggest concern was that she would not be able to see H.V. again because her cousin, H.V.'s caretaker, would not allow Mother to see H.V. based on the caretaker's personal animus toward Mother.

*Order "That the parents shall complete a bio-psychosocial assessment and follow all recommendations"*

Mother completed the biopsychosocial form. Based on Mother's responses, Cornerstones of Care recommended that Mother complete a mental health assessment because she had experienced a lot of traumas in her life. However, because the biopsychosocial report was received just a few weeks before the hearing Mother had not yet been told of the need for a mental health assessment. Although the Cornerstones of Care worker testified that she believed Mother could complete the mental health assessment while incarcerated, she admitted on cross-examination that this was an assumption she had not confirmed.

*Order "That the parents shall sign any necessary releases of information"*

Mother completed this requirement. The Court Services Officer testified that she believed Mother had signed all required releases per the court order which the Cornerstones of Care worker also confirmed.

*Order "That the parents shall obtain and/or maintain stable income and provide verification"*

Prior to her incarceration, Mother had gainful employment at a fast-food restaurant for about two months before her arrest in March 2021. Mother testified that during that time she also had an interview set up for a different job at a grocery store, and the grocery store supervisor said she could do the interview after her release. However, on cross-examination Mother confirmed that she had no verification from the grocery store demonstrating that she could work there after her release. Additionally, Mother failed to provide verification that she obtained or maintained stable employment.

*Order "That the parents shall obtain and/or maintain stable housing and provide verification"*

Mother failed to comply with this court order. According to the Cornerstones of Care reports, between July 2020 when H.V. was taken into custody and December 2020, Mother spent significant time in jail or in various detox programs. It is unclear where Mother lived when not in one of these facilities. After being arrested again in March 2021 and spending 45 days in jail Mother entered another inpatient program in April 2021. Mother testified that she then entered an Oxford House for sober living in May 2021. Mother again relapsed in June 2021 and was incarcerated where she remained at the time of the termination of parental rights hearing in January 2022.

The Cornerstones of Care worker testified that Mother planned to live with her sister for about three weeks after she was released and then she would go back to Oxford House, but that plan had not been verified with Mother's sister or the Oxford House.

Mother testified similarly that upon her release from prison, she planned to live with her younger sister who had never done drugs, but confirmed her sister was not there to testify and Mother had no evidence demonstrating that her sister agreed to this plan. Mother explained that she did not realize the hearing would occur that day. After living with her sister, Mother testified she "would be returning to the Oxford House . . . . I was never kicked out of there. I was—I left because I had relapsed and was incarcerated. I was not kicked out." On cross-examination, Mother confirmed that she had actually been at two different Oxford Houses during the pendency of this case and had relapsed and been taken into custody while living at each. She also stated that it is open to women who have children so that H.V. could live with her there.

*Order "That the parents shall contact the CSO once a month and/or prior to address or phone changes"*

When not incarcerated, Mother complied with this court order and called and maintained contact with her CSO.

*Order "That the parents shall attend parenting education"*

Mother failed to fully comply with this court order because she did not complete all of the parenting classes. Mother testified that she was attending parenting classes through the Wyandotte County T.R.A.C.K. program. However, at the time of her incarceration she was "two, maybe three classes shy of completing, but I was never told how many hours I needed to complete or anything like that." Mother confirmed that she had not completed the parenting course, but testified that she asked to attend parenting education classes while incarcerated, but that she was told they were unavailable.

*Order "That the mother shall provide random, timely and negative UAs at the request of the CSO or Cornerstones of Care"*

Mother failed to comply with this court order. Mother submitted UAs positive for illegal drugs including methamphetamine, THC, and benzodiazepines in July and September 2020. After being arrested, incarcerated, and sent to detox and rehabilitation programs, Mother was again incarcerated after a positive UA at drug court in March 2021. Cornerstones of Care reported that Mother's relapse came after 70 days of sobriety where she provided negative UAs three times per week for several weeks. Mother remained in jail until April 19, 2021, when she entered the First Steps Program. According to the May 2021 CSO report, this was believed to be Mother's third violation of her drug court probation.

According to a Cornerstones of Care report, Mother then failed to appear for UAs on May 5, May 11, May 17, May 27, June 4, June 9, June 15, and June 23, 2021. On June 21, 2021, Mother tested positive for drugs at court and was arrested. She stipulated to violating her probation in case numbers 17-CR-338 and 19-CR-1418. As a result, Mother's probation was revoked and she was sentenced to serve most of her 14-month sentence in case No. 19-CR-1418 plus a modified sentence of 5 months in case No. 17-CR-338, to run consecutively.

*Order "That the mother shall complete a substance abuse assessment and follow all recommendations"*

Mother partially complied with this court order by obtaining a substance abuse assessment. However, because Mother continued to violate her probation by abusing substances, she needed to complete a new assessment. Moreover, by continuing to abuse substances Mother clearly failed to follow its recommendations.

*Order "That the mother shall address all legal matters."*

Mother failed to comply with this requirement. Mother had three pending criminal matters—case Nos. 17-CR-338, 18-CR-415, and 19-CR-1418—each related to possession of opiates. By the time of the termination of parental rights hearing, Mother had violated her probation three times resulting in several months of incarceration on multiple occasions. Mother was incarcerated at the time of the hearing, and although she would be released a few months after the hearing she was subject to 12 months of postrelease supervision.

*Order "That there shall be no contact between the natural mother and [her ex-boyfriend]"*

The evidence shows that Mother complied with the court order to not have contact with her ex-boyfriend. Mother's ex-boyfriend had a felony drug conviction for possession of methamphetamine, and because they were both on felony probation they were prohibited from "having contact with each other, making living together and reintegrating with a minor child a violation of each probation." At the hearing, on cross-examination, Mother confirmed that she was no longer seeing her ex-boyfriend.

*Recommendation for Termination of Parental Rights*

At the hearing, both the CSO and Cornerstones of Care worker recommended that Mother's rights be terminated and the Cornerstones of Care report explained that "[a]t this time progress towards reintegration is poor the natural mother has no housing, income, and is incarcerated. The case team has concerns in regards to a pattern of behavior that emerged for the natural mother that include treatment, probation violation, and incarceration." On September 23, 2021, the State moved to terminate Mother's parental rights, alleging that she failed to comply with the court's order or alternatively failed to adjust her circumstances to meet H.V.'s needs.

On January 7, 2022, the district court held a termination hearing. The CSO confirmed that, prior to Mother's long-term incarceration, Mother was not making progress on her court orders because she was in and out of jail and treatment programs. The CSO explained that "[H.V.]'s been in custody and in [Mother's cousin's] home even prior to this case being open. That's who he knows. That's who has provided care. It also will take [Mother] quite an amount of time to get stabilized and be in a situation where she could successfully and safely parent [H.V.]." On cross-examination, the CSO did admit that to her knowledge upon Mother's release from prison all of her outstanding legal issues would be clear.

Despite believing that Mother might succeed in remaining drug free if she could change her circumstances, the Cornerstones of Care worker confirmed at the hearing that she also recommended Mother's parental rights to H.V. be terminated. Her supervisor also testified that she recommended termination of Mother's parental rights because of Mother's "history in regards to safety and termination for other children, lengthy substance use concerns, as well as at this time, she doesn't have the resources she needs to be able to care for [H.V.] . . . ." If the termination did not go forward, upon Mother's release from prison she would still be required to provide verification of stable housing and income, complete parenting education, submit to random UAs, complete a new substance abuse assessment, and participate in visits with H.V. at the Cornerstones of Care office. The supervisor stated that H.V. appeared to have no bond with Mother based on her observation of the virtual visits in December 2021. Mother's attorney challenged this statement by noting that prior reports from in-person visits state that H.V. smiled when he saw Mother and that they have a bond. The supervisor testified that she did not believe custodianship would make sense based on H.V.'s age. She stated that H.V. would benefit more from having adoptive parents because a custodianship could be challenged or dissolved and admitted that a custodian has fewer services available to meet the child's needs than does an adoptive parent.

Mother confirmed that she believed she would be able to maintain her sobriety once released from prison and explained that she had changed and been working on how to deal with her emotions and cope. Mother also explained that she was 10 months sober at the time of the hearing, and her longest period of sobriety had previously been 6 months in 2018 when she was in treatment and living with her father. At the hearing, Mother stated that she was providing for H.V. full-time prior to the hearing and denied that her cousin was essentially his caretaker.

The district court found that because Mother's rights had been terminated in previous cases, Mother bore the burden of rebutting the presumption of unfitness by a preponderance of the evidence. The district court found that Mother failed to rebut this presumption. First, the district court found Mother was unfit due to excessive use of intoxicating liquors, or narcotic or dangerous drugs for such a duration or nature as to render her unable to properly care for H.V.'s physical, mental, or emotional needs. The court doubted Mother's ability to maintain her sobriety outside of an environment where she had no access to drugs. Second, the court found that Mother had been convicted of and imprisoned for a felony. Third, the court noted that reasonable efforts by involved childcare agencies had been unable to rehabilitate the family, and changes to assigned workers were not detrimental to those services. Fourth, the court found there was a lack of effort on Mother's part to adjust her circumstances, conduct, or conditions to meet H.V.'s needs. Not only had Mother been to prison and jail for continued use of illegal substances, she did not complete her parenting education course, and failed to provide verification of her housing or income upon release from prison. The district court found that "[t]here's been no showing that she's presently fit to care for this child or will be in the foreseeable future. So from all that, I do find that [Mother is] unfit by clear and convincing evidence and that that condition is unlikely to change in the foreseeable future."

Mother appealed.

## DISCUSSION

On appeal, Mother claims simply that there was insufficient evidence upon which the district court could rely to terminate her parental rights, and that the court abused its discretion by finding that terminating her rights, rather than entering a custodianship, was in H.V.'s best interests.

In support of her claim, Mother argues that she had substantially completed the court's orders and that her main obstacle to completing more were her periods of intermittent incarceration. Mother claims she would be released soon, and thus be able to complete all of the court's orders.

Prior to terminating a parent's rights, the district court must find by clear and convincing evidence that (1) the parent is unfit, (2) the conduct or condition which renders the parent unfit is unlikely to change in the foreseeable future, and (3) by a preponderance of evidence that termination of parental rights is in the best interests of the child. K.S.A. 38-2269(a), (g)(1); *In re R.S.*, 50 Kan. App. 2d 1105, 1116, 336 P.3d 903 (2014).

*The district court did not err in finding Mother presently unfit and that her unfitness was unlikely to change in the foreseeable future.*

A parent has a constitutionally protected, fundamental liberty interest in the care, custody, and management of their child. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); see also *In re B.D.-Y.*, 286 Kan. 686, 697-98, 187 P.3d 594 (2008). Under the Revised Kansas Code for Care of Children (Code), when a child has been adjudicated to be a child in need of care, the district court may terminate parental rights only when it 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). Kansas statutes provide a nonexclusive list of factors that, singularly or in combination, the court may consider when determining whether the parent is unfit. K.S.A. 38-2269(b). In addition, the court may rely on factors which result in a statutory presumption of unfitness pursuant to K.S.A. 38-2271(a).

When reviewing the district court's finding of unfitness, the appellate court views the evidence in a light favoring the State to determine if its factual determinations 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 doing so, this court does not "weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact." *In re B.D.-Y.*, 286 Kan. at 705. The existence of a single statutory factor may, but does not necessarily, establish sufficient grounds to terminate parental rights. K.S.A. 38-2269(f).

If this court determines that the district court properly found Mother unfit, this court must determine whether there is also clear and convincing evidence supporting the district court's finding that the conduct or condition rendering Mother unfit is unlikely to change in the foreseeable future. K.S.A. 38-2269(a); *In re Adoption of Baby Girl G.*, 311 Kan. at 806. The appellate court examines the "'foreseeable future'" from the child's perspective given the child's age because a child has a right to permanency within a time frame that is reasonable to them. *In re K.L.B.*, 56 Kan. App. 2d 429, 446-47, 431 P.3d 883 (2018).

The district court found Mother unfit, and that such unfitness was not likely to change in the foreseeable future, under multiple statutory factors. See K.S.A. 38-2269(b)(3); (b)(5); (b)(7); (b)(8). The district court also found that Mother was presumed unfit under K.S.A. 38-2271(a)(1), in which the district court can find a parent is presumed unfit when clear and convincing evidence establishes that the parent has previously been found unfit. K.S.A. 38-2271(a)(1). Upon a finding of a statutory

presumption of unfitness, the burden of proof shifts to the parent "to rebut the presumption of unfitness by a preponderance of the evidence." K.S.A. 38-2271(b). If the parent is unable to rebut the presumption by showing "proof that the parent is presently fit and able to care for the child or that the parent will be fit and able to care for the child in the foreseeable future," the district court shall then continue with termination proceedings pursuant to K.S.A. 38-2266. K.S.A. 38-2271(b).

The district court heard uncontroverted testimony at the hearing that Mother's parental rights were terminated in three previous CINC cases. On appeal, Mother does not dispute the applicability of this presumption or her inability to rebut it. An issue not briefed is deemed waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). This court finds no evidence contradicting the district court's finding that Mother was presumed unfit pursuant to K.S.A. 38-2271(a)(1). Moreover, Mother has provided no argument that she presented evidence rebutting this presumption.

*Clear and convincing evidence supported the district court's determination that Mother engaged in excessive use of intoxicating liquors, narcotics, or dangerous drugs pursuant to K.S.A. 38-2269(b)(3).*

The district court properly found that clear and convincing evidence demonstrated Mother's excessive use of illegal drugs made her unfit to care for H.V. and that such condition was unlikely to change in the foreseeable future. There is significant evidence of Mother's excessive use of intoxicating, dangerous, illegal substances and her inability to stop such use. Mother was reported to CPS because someone alleged she was pregnant with H.V. and using illegal substances. A few months after H.V.'s birth, Mother was arrested for possession of opiates while H.V. was in the car with her. Shortly after H.V. was placed in state custody, and before he was determined to a child in need of care, Mother had a UA positive for methamphetamine, THC, and benzodiazepines.

In September 2020, after a week-long detox program in August 2020, Mother again had a UA positive for methamphetamine and THC and was arrested. She was released and admitted to a treatment center in October 2020, and on November 3, 2020, she was again arrested, jailed, and sent to a treatment center. Mother remained in a treatment center until March 5, 2021, when she again had a UA positive for drugs and was arrested. Between May and June 2021, Mother failed to appear for eight scheduled UAs. On June 21, 2021, at drug court, Mother again tested positive for illegal substances and was incarcerated.

During the pendency of this case, Mother was frequently jailed and spent time in detox and substance abuse treatment centers because of her repeated use of illegal, intoxicating substances. At the termination of parental rights hearing, while Mother was presently incarcerated, she testified that she was 10 months sober which was her longest period of sobriety since 2018, when she had 6 months of sobriety while in treatment and living with her father. Although Mother claimed she would be able to maintain her sobriety upon release from prison, the district court was presented with substantial, competent evidence to the contrary. The evidence viewed in the light favorable to the State demonstrates that a rational fact-finder could have found it highly probable that Mother was rendered unfit to care for H.V. as a result of her intoxicating, illegal drug use and that her condition was unlikely to change in the foreseeable future.

*Clear and convincing evidence supported the district court's determination that Mother had a felony conviction and was imprisoned during the pendency of the case pursuant to K.S.A. 38-2269(b)(5).*

In the pronouncement from the bench, the district court noted that it was "[t]aking judicial notice of the criminal cases that [the prosecutor] presented earlier today, I do find that [Mother] has been convicted of a felony and served a term of imprisonment under [K.S.A.] 38-2269[b][5]." On appeal, Mother does not dispute her criminal history or that she was incarcerated for a felony at the time of the termination of parental rights hearing.

Although a parent's incarceration may be a reason that certain court orders were not completed, as Mother notes, it can also be a negative factor that impedes the parental relationship and prevents the parent from providing necessary care and guidance. See, e.g., *In re M.H.*, 50 Kan. App. 2d 1162, 1172, 337 P.3d 711 (2014); *In re M.B.*, 39 Kan. App. 2d 31, Syl. ¶ 10, 176 P.3d 977 (2008). In such cases, the court must consider the extent to which the "imprisoned parent has made reasonable attempts to contact and maintain an ongoing relationship" with their child. 39 Kan. App. 2d 31, Syl. ¶ 10; see also *In re S.D.*, 41 Kan. App. 2d 780, 790, 204 P.3d 1182 (2009) (finding incarceration sufficient to support termination where parent's only effort to maintain contact was by requesting a picture of child).

Mother violated her probation at least three times during the pendency of this case. As a result, Mother was incarcerated from September 25 through October 2, 2020; November 3 through December 4, 2020; March 5 through April 19, 2021; and June 21, 2021, through the hearing. After her imprisonment in June 2021, Mother was unable to see H.V.—in person or virtually—until December 2021. When viewing the facts in the State's favor, a rational fact-finder could find that Mother's periods of incarceration negatively impacted H.V., contributing to a finding of present unfitness and that such was unlikely to change in the foreseeable future—particularly considering H.V.'s age.

Although Mother was set to be released less than two months after the hearing, she was subject to 12 months of postrelease supervision. If Mother were to violate the postrelease supervision, which had occurred numerous times during the pendency of this case, she would have to serve the rest of her sentence, which might have been less than 240 days.

At the time of the hearing, H.V. was two years and four months old and had been in state care for about 18 months, during which Mother had spent more than 9 months in jail or prison. Given the significant percentage of H.V.'s life that Mother has spent in

custody and her criminal history, a rational fact-finder could find it highly probable that Mother's incarceration contributed to her unfitness to parent H.V. and that conduct or condition was not likely to change in the foreseeable future.

*Clear and convincing evidence supported the district court's determination that reasonable efforts by childcare agencies have been unable to rehabilitate the family pursuant to K.S.A. 38-2269(b)(7).*

The district court also found that reasonable efforts by appropriate public or private agencies were unable to rehabilitate the family under K.S.A. 38-2269(b)(7). "The purpose of the reasonable efforts requirement is to provide a parent the opportunity to succeed, but to do so the parent must exert some effort." *In re M.S.*, 56 Kan. App. 2d 1247, 1257, 447 P.3d 994 (2019). On appeal, Mother has not specifically asserted that Cornerstones of Care failed to take reasonable efforts to rehabilitate the family.

In this case, it is unclear if the agencies involved provided Mother with service referrals or other resources, but it appears she was receiving assistance through drug court. Cornerstones of Care facilitated Mother's visitation with H.V., including while she was incarcerated, and provided flexibility by counting Mother's participation in parenting classes through the community corrections program toward the court's orders in this case. The Cornerstones of Care reports show that the workers had routine contact with Mother during this case, and that Mother had a case plan to work toward reintegration. Mother makes no argument that she was not provided resources or services that she required, or which would have helped her achieve reintegration.

When viewed in the light favoring the State, the evidence shows that a reasonable fact-finder could find it highly probable that social service agencies put forth reasonable efforts which were unable to rehabilitate the family.

*Clear and convincing evidence supported the district court's determination that Mother lacked effort in adjusting her circumstances, conduct, or conditions to meet the needs of H.V. pursuant to K.S.A. 38-2269(b)(8).*

Finally, the district court found that Mother put forth a lack of effort to adjust her circumstances, conduct, or condition to meet H.V.'s needs. On appeal, Mother argues there was undisputed testimony that, prior to her incarceration, she "had completed some of her court orders, primarily substance abuse treatment." She argues that being incarcerated on and off during this case impeded her ability to achieve more, but that she was set to be released soon after the hearing. She also argues that the case was pending only 18 months, and Mother should be afforded more time.

Mother did complete the biopsychosocial assessment, signed all releases of information she was asked for, maintained contact with her CSO, and stopped seeing her ex-boyfriend as directed by the district court. However, Mother failed to complete the remaining court orders. Although Mother initially had regular and productive visits with H.V., by January 2021, she had been incarcerated twice and spent several weeks in treatment or detox centers which resulted in inconsistent and less meaningful visits with H.V. Because of H.V.'s age, he was not able to stay focused during the virtual visits with Mother during her periods of incarceration. Additionally, Mother was unable to appropriately focus at times during her pre-incarceration visits.

Mother provided evidence of just two months of employment during the 18-month pendency of her case and provided no verification to support her testimony that she had a plan for employment after her release from incarceration. Similarly, Mother provided no verification for stable housing postrelease. Other than her frequent trips to detox, treatment, and jail, Mother provided no evidence of stable housing. Therefore, Mother failed to fulfill the court orders that she maintain stable income and housing, and provide verification of both.

The district court also ordered Mother to complete parenting education courses and provide random, timely negative UAs. At the hearing, Mother testified that she had been working on this court order but was two or three classes shy of completing the requirement when she was incarcerated. Just two weeks after Mother received her court orders, she submitted a UA positive for methamphetamine, THC, and benzodiazepines. Throughout this case, Mother had multiple positive UAs through drug court and failed to appear for numerous UAs requested by the social service agencies in this case. Mother failed to comply with the court order that she complete parenting classes and provide negative UAs.

Finally, the court ordered Mother to address all her legal matters. Although the court did not explain this order, it can be presumed that at the very least Mother was required to comply with her probation requirements and drug court. Mother had three pending criminal matters when this case began, and at the time of the hearing Mother had violated her probation three times. At the time of the hearing, Mother obviously had not addressed all her legal matters.

When viewed in the light favoring the State, the record establishes that Mother failed to complete several district court orders and thus lacked effort to adjust her circumstances, conduct, or conditions to meet H.V.'s needs. Considering Mother's continued struggle with addiction, a reasonable fact-finder could find it highly probable that Mother was unfit and that unfitness was unlikely to change in the foreseeable future.

Not only did Mother fail to rebut the presumption stemming from K.S.A. 38-2271(a)(1) that she was presently unfit and that unfitness was not likely to change in the foreseeable future, the district court did not err in finding her unfit for the separately identified reasons and that such unfitness was not likely to change in the foreseeable future.

*Mother failed to demonstrate that the district court abused its discretion in finding that termination of Mother's parental rights was in the best interests of H.V.*

After finding a parent unfit and that the conditions demonstrating that unfitness are unlikely to change in the foreseeable future, the district court must then determine whether a preponderance of the evidence demonstrates that termination of the parental rights is in the best interests of the child. K.S.A. 38-2269(g)(1); *In re R.S.*, 50 Kan. App. 2d at 1116. In making that determination, the court gives primary consideration to the physical, mental, and emotional needs of the child. K.S.A. 38-2269(g)(1).

The district court discussed H.V.'s need for permanency and the amount of time he spent in state custody relative to his age. The court explained that it was difficult to believe that H.V. had a bond with Mother because of his age and that he rarely lived with Mother. The district court explained the difficulty for H.V. at such a young age having to wait to see if Mother could "get her stuff together." As a result, the district court found that it was in H.V.'s best interests to terminate Mother's parental rights.

This court reviews the district court's best interests determination for an abuse of discretion. *Harrison v. Tauheed*, 292 Kan. 663, 672, 256 P.3d 851 (2011). A district court abuses its discretion when no reasonable person would agree with the district court, when a ruling is based on an error of law, or when substantial competent evidence does not support the district court's factual findings. *Cheney v. Poore*, 301 Kan. 120, 128, 339 P.3d 1220 (2014). As the party asserting the district court abused its discretion, Mother bears the burden of demonstrating an abuse of discretion occurred. See *In re L.A.M.*, 268 Kan. 441, 445, 996 P.2d 834 (2000).

On appeal, Mother first argues that the district court should have appointed a permanent custodian rather than terminate her parental rights. The State argues that because Mother failed to rebut the presumption of unfitness in K.S.A. 38-2271(a), the

district court was required to terminate Mother's parental rights pursuant to K.S.A 38-2271(b). However, the State's argument is oversimplified and inaccurate. As previously held by a panel of this court, when a parent fails to rebut the presumption of unfitness in K.S.A. 38-2271(b), the court must proceed "pursuant to" K.S.A. 38-2266 et seq. *In re K.P.*, 44 Kan. App. 2d 316, 321, 235 P.3d 1255 (2010).

"This means that when a presumption of unfitness is not successfully rebutted by the parent, the court must then proceed under the entire statutory scheme. Obviously, critical aspects of this statutory scheme are (1) the need to ascertain whether termination of parental rights is in the best interests of the child pursuant to K.S.A. 2009 Supp. 38-2269(g)(1); and (2) that the court *may* authorize appointment of a permanent custodian pursuant to K.S.A. 2009 Supp. 38-2269(g)(3) and 38-2272." *In re K.P.*, 44 Kan. App. 2d at 316.

The district court was not required to terminate Mother's rights but was required to proceed under the statutory scheme as it did here.

Thus, Mother must demonstrate that the district court abused its discretion in terminating her parental rights rather than appointing a permanent custodian. She argues there is little difference in the two from the child's perspective except that a permanent custodianship would leave Mother's rights intact and potentially allow for a continuing relationship. Mother also asserts that "DCF has a policy preference for younger children to be adopted versus appointing a permanent custodian and that played a bigger role than any evidence that was presented."

Mother has not identified any error of law or error of fact made by the district court in terminating Mother's parental rights. The record shows that Mother's substance abuse and addiction severely impacted her ability to complete the court's orders and reintegrate with H.V., despite the efforts of social services agencies. The statute provides that "the time perception of a child differs from that of an adult" and implores the courts

to "dispose of all proceedings under this code without unnecessary delay." K.S.A. 38-2201(b)(4). Because children experience time differently, "these cases should be considered in 'child time' rather than 'adult time.'" *In re M.S.*, 56 Kan. App. 2d at 1254. H.V. was removed from Mother's care at 9 months old, he was 28 months old at the hearing, and although Mother's earliest possible release date was fast approaching, the record demonstrated that she would not be able to care for H.V. immediately upon her release. She provided no verification of employment or housing, failed to complete parenting classes, failed to complete UAs as requested, and was arrested several times during the pendency of the case. H.V.'s age at the time he went into custody and the length of time he spent in custody increased the impact and importance of the timeliness of possible reintegration—and that potential time was not foreseeable. Under these circumstances, this court cannot say that no reasonable person would agree with the district court that termination of Mother's parental rights was in the best interests of H.V.

#### CONCLUSION

When viewing the evidence favorably to the State, a rational fact-finder could reasonably find that it was highly probable, i.e., by clear and convincing evidence, that Mother was unfit and that such unfitness was unlikely to change in the foreseeable future. Additionally, this court finds no abuse of discretion in the district court's finding that it was in H.V.'s best interests to terminate Mother's parental rights rather than appoint a permanent custodian.

Affirmed.