

NOT DESIGNATED FOR PUBLICATION

No. 125,490

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of O.C.,
A Minor Child.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; JOAN M. LOWDON, judge. Opinion filed June 2, 2023.
Affirmed.

Chadler E. Colgan, of Colgan Law Firm, LLC, of Kansas City, for appellant natural father.

Ashley Hutton, assistant county attorney, and *Todd Thompson*, county attorney, for appellee.

Before GARDNER, P.J., HILL and PICKERING, JJ.

PER CURIAM: A.C. (Father) appeals the district court's decision terminating his parental rights to his biological child, O.C. Father challenges the sufficiency of the evidence supporting the district court's findings about his unfitness and the unlikeliness of that unfitness to change in the foreseeable future. Having reviewed the record, we find no reversible error and affirm.

Factual and Procedural Background

In June 2019, the State filed a child in need of care (CINC) petition for O.C.—born in 2017—alleging abuse, neglect, and exposure to domestic violence that T.R. (Mother) and Father committed against each other. The petition also explained that the State had been granted temporary custody of O.C. in 2017, when O.C. was 11 weeks old, because of Mother's and Father's drug use and O.C.'s testing positive for illegal

substances while in their care. O.C. was released back to Mother and Father in October 2018. But around March 2019, the Kansas Department for Children and Families (DCF) learned that Mother had begun using drugs again and reportedly locked O.C. in his room for several hours to avoid dealing with him. O.C. also had marks and bruises. Father continued to abuse Mother, failed to complete scheduled drug tests—which were thus considered positive—and tried to flee with O.C. from police. Both parents also continued to violate their safety plan to stay away from each other.

The district court granted the State an ex parte order of protective custody. It later granted DCF temporary custody of O.C. and ordered out-of-home placement.

The district court held an initial adjudication hearing in July 2019. Cary Henry, a case manager, provided the district court with a report of Mother's and Father's initial involvement in the CINC case. This report showed that O.C.'s parents had not yet met with Henry to complete initial paperwork and Father had not yet completed three negative drug tests, as ordered by the court. Father was thus not yet allowed to visit O.C. And although Henry had asked Father to take a drug test after the temporary custody hearing in June, Father refused, claiming he did not have enough time. Still, Henry noted that Father was testing negative for all substances when requested by his then corrections officer. But Henry was concerned about the validity of these "random" tests because Father said he was allowed to take them within 24 hours after he received the request for such testing in the mail.

Father submitted a no-contest statement at the adjudication hearing and the district court adjudicated O.C. a CINC. The district court also ordered Father to complete several tasks, including three consecutive negative drug tests, as a prerequisite to getting supervised visits with O.C. The district court also transferred venue of this case from Stafford County to Leavenworth County, where Mother and Father then lived.

CINC Review Hearings and Father's Progress Toward Reintegration

In September 2019, the district court adopted a reintegration plan for Father, which included many tasks. Later that month, the district court held a review hearing in which case manager Kayla Wright reported that:

- Father was complying with some of his case plan tasks and had submitted five negative drug tests;
- Father did not show up to one of his scheduled urinalysis (UA) tests; and
- Father was participating in regular visits with O.C.

A December 2019 report showed that Father started participating in weekly unsupervised visits with O.C. with no reported concerns. Father also continued to comply with his drug testing requirements and provided proof of his employment at a hardware store. Father still had not, however, provided proof of appropriate housing or completion of a mental health assessment, parenting training, or domestic violence evaluation, which were required by his reintegration plan.

Father did not personally appear at the June 2020 permanency hearing but appeared through his attorney. Another case manager, Cole Burns, reported to the court that Father participated in regular overnight weekend visits with O.C. from January to March 2020. The district court found that Father was making adequate progress in his case plan and that reintegration was still a viable goal. The district court held that if Father provided a clean drug test, DCF could return O.C. to Father's home at its discretion.

The district court held several additional hearings over the next several months. In September 2020, case manager Sara Ewing reported to the district court that O.C. had

been placed in Father's home on July 31, 2020. But Ewing was unable to get in touch with Father since that date and Father had not set up health or dental insurance for O.C.

In December 2020 and January 2021, the district court heard evidence showing that Father had still not completed an application for O.C. to receive medical insurance through KanCare. Father also first refused but eventually agreed to allow Mother to have video visitations with O.C. while she was incarcerated. Father was, however, cooperating with aftercare services. But the State reported that Father may have still not been meeting all O.C.'s needs.

Events Leading to Termination Proceedings

The trajectory of this case changed on January 27, 2021. On that date, DCF removed O.C. from Father's home after receiving a report that Father was dealing drugs in a different town. Around the time of the report, DCF workers were sometimes unable to properly communicate with Father, particularly when trying to make in-person visits to Father's home. Father may have been housing his girlfriend without giving proper notice.

D.C. (Grandmother) and Father's daughters reported that Father was no longer working at the hardware store or living in Leavenworth as he reported. Instead, Father allegedly spent most of his time in the town where Grandmother lived and returned to Leavenworth only at times. Father was also acting erratically and lying about his daughter babysitting O.C. One of Father's daughters also reported that she had seen a bag of needles and white powder in Father's car, next to O.C.'s car seat, yet she feared disclosing this information because she was afraid of how Father would react.

The district court in a review hearing in February 2021 ordered the State to develop a new reintegration plan for Father. The district court also authorized visits between Father and O.C. contingent on Father's providing negative drug test results.

During the next several review hearings, the district court heard evidence about Father's drug use and his visitation with O.C. Ewing reported that Father had completed and passed one unsupervised drug test. Yet when Ewing asked Father to complete a supervised drug test, Father was hostile and noncompliant. Burns reported that Father continued to act manic and erratic into April 2021. Burns thus recommended that visits with O.C. be virtual to ensure O.C.'s safety. Burns also reported that Father was not participating in his reintegration plan or cooperating with the agency. Case worker Nancy Junn reported that Father completed a hair follicle test but tested positive for amphetamine and methamphetamine. Father also notified Junn that he had moved to Seward.

At a permanency hearing in May 2021, Father asked the district court to transfer venue to Arkansas or Pratt County, Kansas. The district court denied this request and then held that reintegration was no longer a viable goal. So in July, the State moved to terminate Father's parental rights.

Termination Proceedings

The district court held the first of two hearings to consider the State's motion to terminate on November 9, 2021. The district court heard only some of the State's evidence at this hearing because technical difficulties forced the hearing to end prematurely. The district court continued the rest of the proceeding to November 18, 2021.

November 9 Termination Hearing

Father appeared at the November 9 termination hearing over Zoom video from Kiowa County, where he was incarcerated on charges in a separate criminal complaint. Father claimed that he would bond out of jail within the next day or two and thus asked

for a continuance to appear at the termination hearing in person. The State and guardian ad litem opposed this motion and the district court denied it. But the proceeding was bifurcated to another hearing on November 18, at which Father appeared in person.

The State first elicited testimony from case manager De'Antrea McGowin. McGowin started working on this case in July and since then he had spoken to Father only once—in September while Father was in jail after being charged with several offenses. They included possession of stolen property, drug paraphernalia, and a firearm; aggravated assault on a police officer and interference with law enforcement; fleeing and attempting to elude; criminal damage; reckless driving; driving while revoked as a habitual violator; and speeding. McGowin also testified that Father had not seen O.C. since March and had completed no reintegration tasks since the district court adopted a new reintegration plan in April.

McGowin testified that Father took a hair follicle test in March 2021 and tested positive for methamphetamine. And as of the termination hearing, McGowin had no knowledge that Father had suitable housing or employment.

On cross-examination, McGowin testified that even though O.C. "reintegrated" with Father when DCF placed O.C. in Father's home, Father never completed the tasks in his initial reintegration plan. McGowin explained that as shown in the reports and information relayed to him, Father never completed drug or domestic violence classes, tasks which generally must be completed before a child may reintegrate with a parent. But McGowin conceded that the lack of documentation of these tasks may have resulted from flawed recordkeeping or administrative error.

Ewing testified next. She worked as the case manager for O.C.'s CINC case from around September 2020 to February 2021. She first became concerned with Father's behavior in November or December 2020, when Father was driving O.C. to

Grandmother's house more often than he told her. Ewing was unable to visit Father's home for "at least December and January." Father also missed scheduled meetings with her, even though she met with him over Zoom whenever in-person meetings were not possible.

Ewing decided to remove O.C. from Father's care in January 2021. She did so because of Father's lack of communication with her, her inability to see O.C. in person, and her receipt of "hotlines" accusing Father of selling drugs and keeping drugs in his car.

November 18 Termination Hearing

Ewing continued her testimony at the November 18 hearing. Ewing recalled that O.C. was placed in Father's home from August 2020 to January 2021. During that time, Ewing had some concerns with Father's failure to complete simple tasks such as getting health insurance for O.C. through the state, despite her consistent reminders. Ewing was also concerned with Father's inconsistent communication generally. And although Ewing tried to make several in-person visits with O.C., Father would either give her excuses or not be home when she dropped by.

As for the hotline information, Ewing testified that she learned of several reports accusing Father of selling drugs in Hudson (where Grandmother lived) and keeping drugs in his vehicle. She had heard that Father was acting erratically and was easily angered, and that his daughters feared him, so she confirmed these allegations with Grandmother and the daughters. After speaking with them, Ewing believed there was a picture showing Father had drugs in his car next to O.C.'s car seat. Ewing also spoke with the Hudson sheriff, who was trying to track Father down because he believed Father was selling drugs.

Grandmother had told Ewing that Father and O.C. stayed in Hudson with her for at least one month. Father knew that any long distance and extended travel with O.C. had to be communicated to his case worker because he had been through this process previously, and O.C. was still in State custody. Yet Father failed to tell Ewing of his travels. Father also told Ewing that his adult daughter was babysitting O.C. in Leavenworth every day while he was at work. But Ewing spoke with this daughter—she denied babysitting O.C. and said that she lived in Hudson.

Then on January 27—within 48 hours of learning about the reports showing that Father was selling, possessing, or using drugs around O.C.—Ewing acted to remove O.C. from Father's home. She gathered some police officers and other DCF workers to assist her in this process. Although the officers knocked on Father's door and believed someone was home, Father did not answer, so the officers eventually left. Ewing and other DCF workers, however, stayed and called Father, asking him to release O.C. to them. When Father finally answered one of Ewing's calls, he claimed that he was not home and was instead in Tennessee. After Ewing reminded Father that he was not allowed to leave the state, he claimed that he was just a few hours away. Still, Ewing believed Father was home and asked him to come outside. Ewing was correct and Father eventually allowed Ewing and the other workers into his home and helped them get O.C. ready to leave.

Ewing testified that when she entered Father's home, she found it to be significantly dirtier than before. The condition of the home was not appropriate for a three-year-old. After leaving, Ewing took O.C. to his previous foster placement and made sure that he was safe and had something to eat. She reached out to Father the next day. Ewing described Father's behavior similar to what his daughters described, "[V]ery erratic, very angry, very loud." Father later sent Ewing several aggressive and threatening text messages stating Ewing would lose her job, she had kidnapped O.C., and he had done nothing wrong.

Summing up her testimony, Ewing explained that before November 2020, she did not have any concerns with O.C. reintegrating with Father and that he and O.C. were very bonded. But Ewing knew that she needed more home visits before she could recommend closing the case. And a few days before the hotline reports were made, Ewing told her manager that she "just [did not] feel right" and that something was off.

On cross-examination, Ewing admitted that she had asked Father to take a UA after she removed O.C. in January, and its result was negative. But she had also asked Father to complete a hair follicle test; Father did not complete it until March or April 2021 and its result was positive for amphetamine and methamphetamine.

Father also testified. Father first explained that he was currently released from jail on bond in two counties: Kiowa and Stafford. Father also admitted that he was charged with, among other crimes, possession of drug paraphernalia in each of those cases. Father testified that he entered a plea agreement and would be sentenced in January 2022 in the Kiowa County case. According to Father, the State agreed not to oppose a motion for a downward departure, and Father believed he would receive a probation sentence. Father was scheduled to attend his first appearance in the Stafford County case in November 2021. Although his attorney discouraged him from talking about the specifics of this case, Father claimed that he had "a solid alibi."

Father also testified that he had not seen O.C. since January but was in jail in Kiowa County for 73 days, which began sometime in July. As for the time between January and July, Father testified that he did not visit O.C. because O.C. had been removed from his home and he could not get in touch with his case worker. Father next explained that O.C. had been removed from his home two other times but he blamed Mother for that. Father stated his belief that this case was set to be closed eight days after DCF removed O.C. from his home. And Father stated that the call from his daughter

accusing him of selling and possessing drugs was false and was made only because she was mad at him.

Still, Father admitted that he had begun using drugs—methamphetamine and marijuana—again. Father was not clear about the date of his initial relapse, but it occurred after O.C. had been removed from his home and continued through July and August. Father admitted that he tried to avoid taking the hair follicle test that Ewing requested because he knew he would test positive for methamphetamine. Father was previously "self-medicating," but a week before the hearing he started seeing a therapist who gave him prescription medications to help him with his post-traumatic stress disorder (PTSD). Father did not plan to go to more drug treatment, but he would if he were asked to.

As for Father's uncompleted tasks, Father testified that by the removal date, he had completed them. Father claimed that he had obtained insurance for O.C. and had completed drug and alcohol treatment and parenting and domestic violence classes. He testified that he had given his case worker the necessary paperwork to show that he had completed these tasks, and they later told him that the paperwork was lost. Father said he had successfully completed each of the tasks in his reintegration plans twice and would complete them "ten times" if he needed to. Father asserted that he had found appropriate housing for himself and O.C. in Hutchinson and would allow a case worker to do a walkthrough.

The District Court's Decision and Father's Appeal

The district court's written order found Father unfit based on five K.S.A. 38-2269 factors: K.S.A. 38-2269(b)(3), (b)(7), (b)(8), (c)(2), and (c)(3). The district court also found that the presumption of unfitness under K.S.A. 38-2271(a)(5) applied, that Father's

unfitness was unlikely to change in the foreseeable future, and that termination was in O.C.'s best interests.

Father appeals.

Did the District Court Err by Terminating Father's Parental Rights?

A parent has a constitutionally recognized right to a parental relationship with his or her child. See *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59, 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). The right is a constitutionally protected liberty interest. See *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (fundamental liberty interest). As a result, the State may terminate the legal bond between a parent and child 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, Syl. ¶ 1, 336 P.3d 903 (2014).

When the district court adjudicates a child to be in need of care, the court may terminate parental rights if 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).

"When this court reviews a district court's termination of parental rights, we consider whether, after review of all the evidence, viewed in the light most favorable to the State, we are convinced that a rational factfinder could have found it highly probable, i.e., by clear and convincing evidence, that the parents' right should be terminated.' In making this determination, an appellate court does not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. [Citations omitted.]" *In re K.H.*, 56 Kan. App. 2d 1135, 1139, 444 P.3d 354 (2019).

The district court must also determine whether termination is in the child's best interests. See K.S.A. 38-2269(g)(1). This determination must be supported by a preponderance of the evidence, and this court reviews that determination for abuse of discretion. An abuse of discretion occurs when no reasonable person would agree with the district court or the district court premised its decision on a factual or legal error. *In re R.S.*, 50 Kan. App. 2d at 1115-16.

The Revised Kansas Code for Care of Children provides that a district court may terminate parental rights after the court adjudicates the child to be a CINC. K.S.A. 38-2269(a). The statute lists nonexclusive factors the court must consider in determining the parent's unfitness. K.S.A. 38-2269(b) and (c). Any one of the factors in K.S.A. 38-2269(b) or (c) may, but does not necessarily, establish grounds for termination of parental rights. K.S.A. 38-2269(f).

Upon making a finding of unfitness of the parent, "the court shall consider whether termination of parental rights as requested in the petition or motion is in the best interests of the child." K.S.A. 38-2269(g)(1). This remains so even if the district court relies on a statutory presumption. See *In re K.P.*, 44 Kan. App. 2d 316, 321, 235 P.3d 1255 (2010). In making its best interests decision, the court must focus its consideration on the physical, mental, and emotional needs of the child. K.S.A. 38-2269(g)(1).

Remaining Factors Supporting the District Court's Termination Decision

Father contends that the district court erred by finding him presumptively unfit under K.S.A. 38-2271(a)(5). We find it unnecessary to address that issue because the district court also found Father unfit under the following statutory provisions:

- K.S.A. 38-2269(b)(3)—The use of intoxicating liquors or narcotic or dangerous drugs of such duration or nature as to render the parent unable to care for the ongoing physical, mental, or emotional needs of the child;
- K.S.A. 38-2269(b)(7)—The failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family;
- K.S.A. 38-2269(b)(8)—A lack of effort on the part of the parent to adjust the parent's circumstances, conduct, or conditions to meet the needs of the child;
- K.S.A. 38-2269(c)(2)—When a child is not in the physical custody of a parent, the failure to maintain regular visitation, contact, or communication with the child or with the custodian of the child;
- K.S.A. 38-2269(c)(3)—When a child is not in the physical custody of a parent, the failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home.

Father briefly challenges the sufficiency of the evidence supporting each of these factors. Father contends that the evidence showed that he failed one hair follicle test but stayed sober for about seven years before relapsing after O.C. was removed from his home. Father also claims that he started receiving treatment from a therapist the week before the November 18 termination hearing, after he was released from jail. Father also claims that case workers lost the proof that he completed his reintegration tasks and that they ignored his efforts to get in contact with them after August 2021. Father then recounts the progress that he made in his reintegration tasks during the previous 2017-2018 CINC case and throughout the first portion of this case. Father then claims that he failed to progress toward reintegration only after relapsing. And finally, Father implies that his second reintegration plan was not reasonable because DCF workers allegedly lost his previous records.

These arguments are not convincing, and the record supports the district court's finding that Father was unfit at the time of the termination hearing. First, the State's

CINC petition alleged that Father was using drugs when this case started. Second, by January 2021, the district court received evidence that Father was using drugs again, started dealing drugs, and kept drugs near O.C.'s car seat. And even if the hotline allegations against Father were false, the State provided other evidence showing Father may have been using or dealing drugs before January 2021. Third, after Father's relapse in January 2021, he admitted that he continued to use drugs for months, in July and August. And fourth, Father refused to take a hair follicle test until March 2021 because he knew he would test positive for methamphetamine.

Although Father completed several reintegration tasks at first, he implicitly concedes that he failed to participate in any of his new case plan tasks after January 2021. And in July 2021, police arrested Father on charges related to his alleged possession of drug paraphernalia and other crimes. These issues precluded Father from visiting O.C. for nearly 11 months by the time this case reached termination proceedings.

We agree with the district court that clear and convincing evidence shows that Father was unfit as defined under K.S.A. 38-2269(b)(3) (drug use making him unable to care for the ongoing physical, mental, or emotional needs of the child) and K.S.A. 38-2269(c)(2) (failure to maintain regular visitation). Because evidence under any one of these subsections can warrant termination, we do not reach the other subsections the district court also discussed.

Foreseeable Future

Father argues that he is willing to complete reintegration tasks as many times as is necessary to maintain his parental rights to O.C., so the district court erred in finding his unfitness was unlikely to change in the foreseeable future. But Father's argument is conclusory. He also unconvincingly argues that the district court should have given

greater weight to his decision to seek therapy after he was released from jail, one week before the final termination hearing.

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 1247, 1264, 447 P.3d 994 (2019). The district court thus properly considered Father's past conduct and drug use as such an indicator here. Father's long history of drug abuse and the length of time that he continued to use drugs after his most recent admitted relapse shows that his decision to seek therapy and take prescribed medication for PTSD does not establish that he will change in the foreseeable future. Other panels of this court have rejected greater last-minute efforts than Father's as evidence of foreseeable change. See, e.g., *In re J.M.*, No. 125,103, 2022 WL 17545606, at *6 (Kan. App. 2022) (unpublished opinion) (rejecting argument that last minute decision to enter outpatient treatment showed Father was likely to change in foreseeable future where Father consistently tested positive for drugs throughout CINC case and admitted to using drugs shortly before termination hearing).

Courts use "child time" when assessing the foreseeable future. *In re M.S.*, 56 Kan. App. 2d at 1263. We examine the foreseeable future from the child's perspective because children have a different perception of time than adults and have a right to permanency within a time frame reasonable to them. *In re M.H.*, 50 Kan. App. 2d 1162, 1170-71, 337 P.3d 711 (2014). K.S.A. 38-2201(b)(4) acknowledges that children experience the passage of time differently than adults, making a month or a year seem much longer than it would for an adult. This difference in perception points to a prompt and permanent disposition. *In re M.S.*, 56 Kan. App. 2d at 1263.

O.C. was born in 2017 and was less than 11 weeks old when Mother and Father began using drugs around him and exposed him to illegal substances. O.C. was not yet two years old when the State filed its CINC petition, and he was only three years old

when DCF removed him from Father's care again in January 2021. Then, 11 months passed until the date of the termination hearing, yet Father never saw or contacted O.C. before then.

Father cites no cases to support his argument. After an independent review, we find *In re A.J.*, No. 124,854, 2022 WL 15549863, at *5 (Kan. App. 2022) (unpublished opinion) helpful. We briefly discuss this case because Father incorrectly suggests throughout his brief that the district court improperly relied on the criminal charges that he was facing at the time of the termination hearing to terminate his parental rights.

In *In re A.J.*, this court overturned an order terminating a father's parental rights based on the district court's lack of findings about the father's ability to change in the foreseeable future and its flawed focus on criminal charges that the father then faced. As here, the father in *In re A.J.* had an extensive criminal history, had criminal charges pending, and was incarcerated at the time of his termination hearing. A panel of this court found that these facts supported the district court's finding that the father was unfit but not necessarily that he was unlikely to change in the foreseeable future. Because the district court's ruling lacked any specific explanation in this regard, the panel reversed the termination decision and remanded for further proceedings. *In re A.J.*, 2022 WL 15549863, at *5-7.

Unlike that case, however, the district court here provided sufficient factual findings to support its foreseeable future finding. And it did not rely solely on the possibility of Father's going to prison in making this finding. Instead, the district court relied mainly on Father's consistent and continued drug abuse problems and the lack of contact Father had with O.C. since January 2021.

We find clear and convincing evidence that Father's unfitness was unlikely to change in the foreseeable future.

Best Interests

We next address whether the district court abused its discretion in finding that termination of Father's rights is in O.C.'s best interests. See *In re R.S.*, 50 Kan. App. 2d at 1116. In making this decision, the district court must mainly consider the child's physical, mental, or emotional health. K.S.A. 38-2269(g)(1).

Father argues that the district court made this finding erroneously because he "demonstrated a strong desire to regain custody of O.C., [provided] limited positive drug test results," and was merely charged, not convicted, with crimes by the date of the termination hearing. But these points fail to show an abuse of discretion, so we have no basis to set aside this finding. See *In re R.S.*, 50 Kan. App. 2d at 1115-16.

Conclusion

We hold that the district court properly terminated Father's parental rights based on K.S.A. 38-2269(b)(3) and K.S.A. 38-2269(c)(2) because the decision was supported by clear and convincing evidence. The district court's decision was also a sound exercise of the court's discretion and in O.C.'s best interests.

Affirmed.