

NOT DESIGNATED FOR PUBLICATION

No. 125,727

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of B.J., B.J., Z.B., and Z.B.,  
Minor Children.

MEMORANDUM OPINION

Appeal from Shawnee District Court; PENNY R. MOYLAN, judge. Opinion filed August 18, 2023.  
Affirmed.

*Jennifer Martin Smith*, of Alderson, Alderson, Conklin, Crow & Slinkard, L.L.C., of Topeka, for  
appellant natural mother.

*Morgan L. Hall*, deputy district attorney, for appellee.

Before MALONE, P.J., GARDNER and COBLE, JJ.

PER CURIAM: T.T.F.B. (Mother) appeals the district court's order terminating her parental rights to her four minor children. Mother claims the State failed to prove by clear and convincing evidence that she is unfit by reason of conduct or condition which renders her unable to care properly for the children and that the conduct or condition is unlikely to change in the foreseeable future. She also claims the district court abused its discretion in finding that termination of her parental rights is in the best interests of the children. Mother also claims for the first time on appeal that the performance of her trial counsel was constitutionally deficient and that she was prejudiced by the ineffective assistance of counsel. For reasons stated in this opinion, we affirm the district court's judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Mother is the natural mother of four minor children, By.J., Bz.J., Zd.B., and Zo.B. In March 2017, Mother was living in Topeka with her three children, and pregnant with her fourth. Around that time, a mandatory reporter informed the Department for Children and Families (DCF) that Mother was at risk of losing her home and the cancelation of her utilities. The reporter also stated Mother was 10 weeks pregnant, using drugs, failing to provide adequate supervision to the children, and living in unsanitary conditions.

Mother met with DCF and agreed to Family Preservation Services through KVC Behavioral Healthcare (KVC). During their meeting, Mother admitted using methamphetamine three to four times per week. A few weeks later, while four months pregnant, Mother admitted using methamphetamine, marijuana, and alcohol. She was then cleared to attend Valeo Detox.

When Mother gave birth to Zo.B. four months later, DCF received a report stating the baby's urine tested positive for amphetamines. Mother tested negative and denied use since March 2017. Family preservation services remained in place until February 2018, when Mother informed DCF that she no longer wanted services from KVC unless the services were court ordered.

About one month later, on March 28, 2018, the State filed a petition alleging the children were children in need of care (CINC) and requesting the children be removed from Mother's home. The district court subsequently placed the children in the protective custody of DCF, affirming the decision a few days later by ordering the children to remain in temporary custody of DCF.

On September 18, 2018, Mother submitted a stipulation of no contest to the petition and the district court found the children were without adequate parental care,

control, or subsistence, and the children were without the care or control necessary for their physical, mental, or emotional health. The district court ordered the children to remain in DCF custody. About one month later, the district court adopted the proposed permanency plan. At the same hearing, the district court ordered the children to remain in DCF custody but ordered placement with maternal grandmother.

Reintegration remained a viable goal until August 2019 when the district court changed the case plan goal to a dual goal of reintegration and adoption. On February 22, 2021, the district court found reintegration was no longer viable and changed the permanency goal to adoption after finding Mother's progress in achieving the permanency plan goals was not adequate. The journal entry notes: "Court doesn't believe Mother fully understood importance of today's hearing and her excuses are worrisome to the court. The case has been ongoing for three years."

About four months later, on June 11, 2021, the State moved for a finding of unfitness and termination of Mother's parental rights to all four children. The State alleged 12 statutory grounds for finding Mother unfit to parent her four children. See K.S.A. 38-2269(b)(1)-(5), (b)(7)-(9), (c)(1)-(4). Before the termination hearing, the district court terminated the rights of all named and putative fathers.

The district court held the termination hearing on May 18, 2022. Along with the six witnesses called by the State, Mother testified on her own behalf. During the one-day trial, the State presented evidence detailing DCF's concerns leading up to the case filing, including: Mother's use of methamphetamine, Mother's use of methamphetamine while pregnant, children without adequate supervision, the potential that Mother's parole was to be revoked, and unsanitary living conditions. There were also concerns that the children were not attending school and Mother refused family preservation services.

The State also presented evidence that over the course of the four years the children were in DCF custody, Mother's behavior did not change as she refused to sign medical releases, had 7 positive drug tests, and she no-showed for a urinary analysis (UA) request 57 times. Along with her no-shows for UAs, Mother also failed to complete nine court-ordered hair follicle tests. The State also presented evidence that Mother did not complete most of her case plan tasks, including her failure to maintain communication with KVC, to complete drug tests, to follow through on the recommendations of her mental health assessment, to maintain a stable home, and to maintain verifiable income. Two KVC witnesses recommended termination of Mother's parental rights based on multiple factors supporting unfitness for the foreseeable future. And they believed termination was in the best interests of the children.

A couple of months later, the district court issued a memorandum decision and order finding Mother unfit and terminating her parental rights to each child. The district court concluded Mother was unfit on six statutory grounds:

- Mother was unfit due to emotional illness, mental illness, mental deficiency, or physical disability, of such duration or nature as to render her unable to care for the ongoing physical, mental, and emotional needs of the children under K.S.A. 38-2269(b)(1).
- Mother was unfit due to her use of intoxicating liquors or narcotic or dangerous drugs of such a duration or nature as to render her unable to care for the ongoing physical, mental, or emotional needs of the children under K.S.A. 38-2269(b)(3).
- Mother was unfit due to failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family under K.S.A. 38-2269(b)(7).
- Mother was unfit due to a lack of effort in adjusting her circumstances, conduct, or conditions to meet the needs of the children under K.S.A. 38-2269(b)(8).
- Mother was unfit due to the children being in extended out-of-home placement attributable to Mother, and Mother had failed to carry out a reasonable plan

approved by the court directed toward the integration of the children into a parental home, under K.S.A. 38-2269(b)(9) and (c)(3).

The district court found Mother's unfitness was unlikely to change in the foreseeable future. The district court also found that termination was in the best interests of each child. Mother timely appealed the district court's judgment.

#### DID THE DISTRICT COURT ERR IN TERMINATING MOTHER'S PARENTAL RIGHTS?

Mother argues the State's evidence was insufficient to justify the termination of her parental rights. Put simply, she asserts the State's evidence was sufficient to prove she did not provide documentation of her compliance with mental health services and case plan tasks, but it was not sufficient to show she was unfit to parent her four children. The State argues it presented clear and convincing evidence that Mother was unfit by reason of conduct or conditions unlikely to change in the foreseeable future and termination of parental rights was in the children's best interests.

Parents have a constitutionally protected liberty interest in the relationship with their children. *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). Before terminating parental rights, Kansas law requires a district court to find the State has proved that the parent is unfit, that the conduct or condition that renders the parent unfit is unlikely to change in the foreseeable future, and that termination of parental rights is in the child's best interests. K.S.A. 38-2269(a), (g)(1).

When reviewing a finding of parental unfitness, an appellate court must determine, after reviewing all the evidence in a light most favorable to the State, whether a rational fact-finder could have found the determination to be highly probable, i.e., by clear and convincing evidence. See *In re B.D.-Y.*, 286 Kan. at 705-06; *In re K.P.*, 44 Kan. App. 2d

316, 318, 235 P.3d 1255 (2010). In making this determination, an appellate court cannot reweigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. *In re B.D.-Y.*, 286 Kan. at 705.

If a district court finds that a parent is unfit, the court must then determine whether the parent's unfitness is likely to change in the foreseeable future. K.S.A. 38-2269(a). A court evaluates the foreseeable future from a child's perspective because children have a different perception of time. *In re R.S.*, 50 Kan. App. 2d 1105, 1117, 336 P.3d 903 (2014). For a child, "a month or a year seem[s] considerably longer than it would for an adult." *In re M.S.*, 56 Kan. App. 2d 1247, 1263, 447 P.3d 994 (2019); see K.S.A. 38-2201(b)(4).

K.S.A. 38-2269(b) lists nine nonexclusive factors a district court must consider when determining parental fitness, and K.S.A. 38-2269(c) lists four factors the court must consider when a child is not in the physical custody of the parent. Here, as noted, the district court found Mother unfit based on six factors under K.S.A. 38-2269(b) and (c). The existence of any one of the statutory factors standing alone may, but does not necessarily, establish grounds for termination of parental rights. K.S.A. 38-2269(f).

*Mother's unfitness under K.S.A. 38-2269(b)(1)*

The district court first found Mother was unfit to parent her children due to emotional illness, mental illness, mental deficiency, or physical disability, of such duration or nature as to render her unable to care for the ongoing physical, mental, and emotional needs of the children. K.S.A. 38-2269(b)(1). Relying on the testimony of Dr. Steven Hazel, the licensed psychologist who conducted Mother's mental health assessment, the district court found Mother was diagnosed with depression and anxiety, with recommendations for individual therapy and medication management. But Mother ignored these recommendations. The district court found Mother's testimony to the

contrary—stating she had attended individual therapy and presently attends group therapy—was not credible.

The district court reasoned Mother's failure to address her mental health issues "directly impacts her ability to care for the ongoing physical, mental and emotional needs of her children." Given her children also suffer "from extensive mental health issues" that require individual therapy for each child, the district court found this factor "even more compelling." The district court reasoned:

"All four children are currently engaged in individual therapy for issues ranging from major depressive disorder, history of self-harm, poor self-esteem, anxiety, dysfunctional impulsivity, and emotional dysregulation. The Case Manager testified that according to his therapist, [Zo.B] will need life-long therapy to manage[] his anger and emotional outbursts. Clearly, Mother's inability to properly address her own mental health issues directly impacts her ability to care for the serious and ongoing mental health needs of her children; as well as their physical and emotional needs. See *In re Kerns*, 225 Kan. 746, 594 P.2d 187 (1979) (affirming trial court's severing of parental rights where Father had a history of mental illness and resisted all Agency's and Court's efforts to assist the family)."

On appeal, Mother concedes the record supports the district court's finding that Mother suffers from a mental illness, "but not that it rendered her unable to care for her children." She contends there was no testimony that her "emotional problems interfered with her parenting, other than she was a yeller."

Mother's argument ignores evidence, and as will become a theme, she improperly attempts to reweigh the evidence in her favor. See *In re B.D.-Y.*, 286 Kan. at 705. Contrary to Mother's argument, the State presented clear and convincing evidence to show Mother's mental health issues impacted her ability to care for the needs of her children throughout the pendency of the case.

The case began based on concerns for Mother's mental health and suicidal thoughts. A child protection specialist with DCF, Jaime Sturgeon, testified Mother's failure to take her mental health medication was a factor that led to filing the emergency CINC application. And according to Sturgeon, Mother was not taking her medication as early as February 2018—more than four years before termination.

Robin Upshaw, a case manager at KVC, testified Mother's "theme" of not taking her medication persisted while she worked with Mother from October 2018 to May 2019. Upshaw testified Mother said her medication was too expensive and indicated that KVC provided Mother with resources to help with her medicine management. The supervisor of Mother's case at KVC, Angela Webb, confirmed KVC's attempt to assist Mother with the cost of her medication. Upshaw testified Mothers' inability to manage her medications was concerning because it reflected her inability to follow through on the children's medical needs. Webb provided similar testimony, stating Mother's inability to follow through on tasks recommended to help her also raised concerns about her ability to follow through on tasks for the children's needs, such as education and medical appointments.

Mother's current case manager, Mary Stringfellow, testified to the current state of Mother's mental health issues. Stringfellow testified Mother completed a mental health assessment—including a psychological evaluation and a parental assessment—with Dr. Hazel at Responsive Centers for Psychology and Learning in March 2020. Upon completing the assessment, Dr. Hazel made recommendations which KVC incorporated into Mother's case plan tasks. These recommendations included that Mother participate in parenting classes, anger management services, and mental health services that included individual therapy and medication management.

Despite the recommendations becoming case plan tasks, Stringfellow testified Mother did not follow through on Dr. Hazel's recommendations. Stringfellow testified

that Mother allegedly attended services through Valeo and the YMCA, but Mother provided no documentation of these services. She also testified Mother stated she did not believe she needed mental health services.

Stringfellow found Mother's refusal to address her mental health issues troubling because the children have mental health issues that they must also address: "[Mother's] lack of recognition of the importance of mental health services, both for herself and how that impacts the children, as they have psychological needs of their own. As well as mother's inability to uphold regular appointments that would be necessary to provide care for the children." Stringfellow later testified to each of the children's mental health issues and corresponding treatment, stating each child currently requires frequent mental health services. She also testified that Zo.B. will likely need individual therapy, and occupation therapy, his entire life. "In fact, his therapist said that if these services are not successful, that he will not be able to succeed in the traditional education program."

The State also presented the testimony of Dr. Hazel, and his mental health assessment was admitted into evidence. In his report, Dr. Hazel stated he had multiple concerns about Mother's ability to parent her children based on her mental health issues, including her instability to function daily, her inability to manage stressful situations, and "personality issues" that affect her level of functioning. His report confirmed Mother's "affective problems, particularly her mood, may affect her level of functioning, her stability, and possibly her ability to care for her children. When depressed and anxious, she may lack the motivation and desire to interact with others, including her children."

Dr. Hazel briefly testified to his concerns at trial, but he could not say whether Mother addressed these concerns because he was employed solely to conduct the mental health assessment. Even so, Dr. Hazel testified that if a parent does not address his concerns and follow through on recommendations, "the likelihood they would—would improve in those skills is not good."

Mother admitted suffering from depression and anxiety, and admitted she was not taking her medications as prescribed because she believed her medication was the reason her UAs were positive. She also admitted her mental health issues affect her behavior, testifying her issues cause her to get irritated and agitated, and contending her medication makes her "a little spacey" and causes her to be late "[a]ll the time."

The State presented clear and convincing evidence to show Mother has suffered from a mental illness from this case's inception. And although Mother was aware of her mental health issues, she did not address these issues with individual therapy or medication management throughout the pendency of this case—including her admission that she refused to take her medication at the time of termination while also acknowledging her mental health issues affect her behavior. The State also presented clear and convincing evidence to show Mother's mental illness rendered her unfit to care for the children's needs because the record shows her mental health issues affect her ability to function daily. Mother's inability to follow through on her own mental health care, despite being aware of her issues and how it affects her, renders her unable to care properly for the same needs of her children. Thus, the district court did not err in finding Mother unfit to parent her children under K.S.A. 38-2269(b)(1).

*Mother's unfitness under K.S.A. 38-2269(b)(3)*

The district court also found Mother was unfit to parent her children due to her use of narcotic or dangerous drugs of such duration or nature as to render her unable to care for the ongoing physical, mental, or emotional needs of the children under K.S.A. 38-2269(b)(3). The district court found the State's evidence "demonstrates almost five years of drug use with no demonstrable period of sobriety or attempts to engage in a prolonged recovery system." The district court noted Mother did not dispute her drug use and found her testimony alleging compliance with drug testing and treatment was not credible: "[T]he Court does not find this testimony credible based on Mother's consistent failure,

over five years, to provide any documentation of the same, despite repeated requests from the Agency."

On appeal, Mother argues her drug use alone is not enough to terminate her parental rights under K.S.A. 38-2269(b)(3). In essence, Mother argues there is no causal connection between her drug use and her inability to care for the children's ongoing needs. She contends that "[w]hile there was evidence that mother may have had some concerns with drugs, none of the KVC workers testified that mother's parenting was inhibited by that alleged use other than the fact that the agency used it to limit her visits." The State contends Mother's argument is "disingenuous" and termination under this factor was supported by clear and convincing evidence.

The record shows Mother's drug use was a consistent concern throughout these proceedings. Sturgeon testified that multiple reports regarding Mother's drug use, and drug use while she was pregnant, lead to the submission of the CINC application. One of these reports stated Zo.B. tested positive for methamphetamine at birth. Sturgeon testified Mother declined multiple offers of assistance to address her drug addiction from various agencies after Zo.B. tested positive for methamphetamine. And as will become a theme for Mother, she refused to complete hair follicle testing after multiple UAs tested positive for methamphetamine.

The evidence supporting Mother's use of dangerous drugs is extensive. She tested positive for multiple substances, including methamphetamine, amphetamines, and phencyclidine throughout 2021. She began a treatment program in October 2021 but was discharged due to missing appointments. Mother tested positive for methamphetamine after leaving treatment—twice in December 2021 and once in February 2022.

Along with the positive UAs, Mother failed to complete many UAs and hair follicle tests. Mother testified that she knew a missed UA would be considered a positive

result, but Mother no-showed for a UA request 57 times. Considering these tests as a positive result, Mother had 64 positive drug screens at the time of termination. Along with her no-shows for UAs, Mother also failed to complete nine court-ordered hair follicle tests. This court has "inferred illegal drug use in termination cases based on a parent's deliberate and ongoing avoidance of drug testing." *In re P.L.*, No. 120,220, 2019 WL 2063874, at \*3 (Kan. App. 2019) (unpublished opinion).

Stringfellow testified Mother's failure to comply with drug testing was concerning because "[i]t demonstrates a lack of cooperation with the agency. A lack of progress in case plan tasks. Also, a lack in ability to verify sobriety." Despite being offered various services to address her substance abuse throughout the pendency of this case, Mother has not used these resources. Stringfellow testified it was important to have verification of Mother's sobriety in order to have demonstrable proof of sobriety. "[T]hey're demonstrating that they can maintain sobriety, and that they can also cooperate with the agency to demonstrate that they are motivated to maintain that sobriety."

Mother testified she complied with requested UAs by completing the test at another agency, but she admitted she did not provide documentation of her compliance. She testified she provided the paperwork consenting to release the information to her KVC caseworker, but the district court found Mother's explanations were not credible.

Mother acknowledged her home must be "free of any drugs or anything like that" in order to reintegrate the children. Even so, Mother's drug use impacted her progress in achieving such reintegration. Upshaw testified Mother's positive UA, or failing to complete a UA, affected her ability to see her children. Despite affecting reintegration with her children, Mother still consistently avoided requests for drug testing.

Mother relies on *In re S.B.*, No. 120,362, 2019 WL 2479456, at \*11 (Kan. App. 2019) (unpublished opinion), to argue the State must prove a connection between

Mother's drug use and the children's welfare. Put another way, she argues that "[j]ust because a parent uses drugs does not automatically mean the child is likely to sustain harm, or the home is contrary to the child's welfare." See 2019 WL 2479456, at \*11.

The mental health assessment conducted by Dr. Hazel stated Mother's "history of instability, particularly her substance abuse and difficulty providing a stable home environment, indicates significant concern regarding her ability to consistently meet her children's needs, both emotionally and physically, as well as her ability to place her children's needs above her own." He concluded "the only way [Mother] can be successful in parenting her children will be to refrain from any substance abuse now or in the future." And recommended she be "closely monitored and treated for substance use."

While Dr. Hazel could not testify to Mother's substance abuse and her ability to care for her children at the time of trial, he did testify that a parent's failure to address his recommendations would suggest the parent is unlikely to improve their skills. And given Mother tested positive for methamphetamine three and five months before the trial, Dr. Hazel's reported concerns were still present at the time of termination. Mother continued to use methamphetamine and her drug use has continued to render her unable to care for the needs of her children. The district court did not err in finding Mother unfit to parent her children under K.S.A. 38-2269(b)(3).

*Mother's unfitness under K.S.A. 38-2269(b)(7)*

The district court also found Mother was unfit based on the failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family under K.S.A. 38-2269(b)(7). The district court noted this case was started based on Mother's refusal to work with any type of service unless the services were ordered by the court. The district court found the State presented clear and convincing evidence that Mother was offered many services, but she either refused those services or failed to provide

verification of such services. Despite the reasonable efforts to rehabilitate the family, the district court found that "Mother is unable to provide a safe and stable environment for the care of her children."

On appeal, Mother contends the State's evidence "was basically that mother failed to provide documentation of services" and the evidence "does nothing to explain how the services were directed toward rehabilitation of the family." Mother complains KVC's efforts were not reasonable because the agency did not suggest family therapy until after the case plan was changed to adoption, and because KVC did not do more to help mother sign her consent releases. Panels of this court have found "[t]he 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 at 1257 (citing *In re L.C.P.*, No. 118,841, 2018 WL 4039170 at \*8-9 [Kan. App. 2018] [unpublished opinion]).

Mother's argument is not persuasive because she improperly reweighs the evidence and reassesses her own credibility to argue the efforts made by KVC were not reasonable to rehabilitate the family. See *In re B.D.-Y.*, 286 Kan. at 705. Mother's argument contends KVC did not make reasonable efforts, but the record supports the district court's finding to the contrary.

The record shows the agencies' efforts were reasonable as required by K.S.A. 38-2269(b)(7). As previously noted, Sturgeon testified DCF and family preservation services tried to assist Mother before this case, but Mother refused services unless those services were court ordered. JoVonka Marks testified that she worked with Mother in family preservation services before this case was filed and Mother refused to complete any services requested by KVC. Mother would not allow KVC to complete the initial assessments and hesitated to allow her children to speak with KVC employees one-on-one. And she continuously questioned KVC's presence at her home when they would attempt to work with Mother.

When Mother refused family preservation services, and the children were untimely placed in DCF custody, the case goal was reintegration. When Upshaw began working with Mother in 2018, Mother was refusing to sign releases and wasn't "providing much of anything to KVC." While working with Upshaw, Mother's visitations never progressed beyond unsupervised, and at one point they were moved out of Mother's home, because Mother lacked progress in her case plan tasks—specifically "[n]ot having releases of information to confirm what [M]other was telling KVC."

Mother's behavior continued throughout the proceedings. For example, Mother allegedly maintained stable housing, but she did not provide a lease to KVC. She also never provided proof of employment or disability payments. Mother claimed she attended substance abuse treatment, but she did not provide documentation or releases. Mother claimed she was in individual and group therapy, but she did not provide documentation or releases. And Mother claimed she was submitting clean UAs through other agencies, but she testified she did not provide documentation to KVC for most of the UAs: "I probably showed them, like, two or three of them. The rest of them, I just couldn't pull them together in time 'cause I had paperwork everywhere."

At trial, Upshaw testified Mother's refusal to work with KVC prevented rehabilitation of the family. For example, she testified that "without having consents to verify the work that [Mother] said she had done, just kind of left us with not a whole lot to work with towards reintegration without income verification and the drug tests." Stringfellow testified she approached Mother about needing to address her parenting skills, but Mother was not open to attending meaningful parenting classes. While Mother attended one, three-hour course, Stringfellow did not see any improvement in visitations after Mother attended the course. Stringfellow testified Mother told her she did not need parenting classes because she was already a mother of four "and did not forget the information that she had previously learned from classes taken prior to the children being

referred to the agency." But Stringfellow disagreed with Mother's position, testifying that she believes Mother still needs more parental education.

Stringfellow testified that she spoke with Mother about the importance of following through on these services—including the importance of accomplishing case plan tasks, as well as addressing the several concerns for her mental health described in the psychology report. Stringfellow testified verification of Mother's information, through consents, is important because the

"[p]arents like to put their best foot forward . . . [a]nd it is necessary that . . . a licensed person from the facility, or the substance abuse treatment, that verifies the parent is making progress, that parent has goals to achieve sobriety . . . that they're demonstrating that they can maintain sobriety, and that they can also cooperate with the agency to demonstrate that they are motivated to maintain sobriety."

Despite being offered many services, Webb testified Mother made little progress toward reintegration: "Based on the description of what was happening when the children came into custody, I haven't seen a great deal of change, meaningful change, that would help me know that the kids would be in a safe and stable environment."

Mother made no attempt to work with the reasonable efforts made by KVC to rehabilitate the family. Despite knowing that refusing to complete consents and UAs would impact her visitations, Mother did not complete any consents and many UAs. She did not try to prove her sobriety, nor prove she was attempting progress in her case plan to achieve reintegration. As a result, the district court did not err in finding Mother unfit to parent her children under K.S.A. 38-2269(b)(7).

*Mother's unfitness under K.S.A. 38-2269(b)(8), (b)(9) and (c)(3)*

Finally, the district court found Mother was unfit to parent her children because she lacked effort to adjust her circumstances, conduct, or conditions to meet the needs of her children under K.S.A. 38-2269(b)(8) and she failed to carry out a reasonable plan approved by the court directed toward reintegration of the children into Mother's home under K.S.A. 38-2269(b)(9) and (c)(3). The record reflects that the children were in out-of-home placements for more than 15 of the 22 months before the termination hearing. Relying on much of the same evidence as the previous factors, the district court found Mother "failed to accomplish any of her case plan tasks over a four-year period." And summarizing Mother's actions over the four-year case, the district court found that "Mother has failed to engage in any effort to adjust her circumstances, conduct or conditions to meet the needs of her children."

Mother's argument on appeal addressing these findings, again, improperly reweighs the evidence and reassesses her own credibility. See *In re B.D.-Y.*, 286 Kan. at 705. Contrary to Mother's arguments, the evidence shows the State presented clear and convincing evidence that Mother lacked effort in adjusting her circumstances, which was shown through failure to complete almost all her case plan tasks. And the district court found Mother's testimony attempting to excuse such failures was not credible.

A district court may find a parent unfit under K.S.A. 38-2269(b)(8) if the parent lacked effort to adjust their circumstances, conduct, or conditions to meet the needs of the child. Also, K.S.A. 38-2269(b)(9) and (c)(3) work together to permit a district court to find a parent unfit if the child has been in extended out-of-home placement as a result of the actions or inactions attributable to the parent by failing to carry out a reasonable plan approved by the court directed toward the reintegration of a child into the parental home.

The State presented clear and convincing evidence that the children had been in an extended out-of-home placement as a result of Mother's inaction in failing to carry out her case plan tasks. Stringfellow testified the children had been out of Mother's care for 50 months at the time of the termination hearing. This amount of time constitutes an extended out-of-home placement over the "15 of the most recent 22 months" required under K.S.A. 38-2269(b)(9).

The district court approved a case plan for Mother in October 2018, about one month after the children were adjudicated in need of care. Mother's case plan remained the same throughout the case, and Stringfellow testified to going over the case plan tasks with Mother. Even so, Mother did not complete most of her case plan tasks and Mother's lack of progress was a consistent concern for each witness.

Mother needed to maintain contact with KVC. Stringfellow testified that at the time of termination, Mother's contact with the agency had been "sporadic" because her contact information often changed, and she did not provide updated information to KVC contrary to the case plan tasks. "She usually will reach out once a month, once every two months, to ask for a gas card and check on the status of visits."

Mother also was required to maintain safe and stable housing. Mother maintained the same housing throughout the case, but Upshaw testified Mother never provided a lease. Stringfellow testified the housing was not appropriate for reintegration because the house was dirty, there were issues with the plumbing, and Mother did not appear to be living there by herself. Stringfellow testified an adult male appeared to be living at the house without KVC's approval, which concerned the children's safety. KVC employees similarly testified Mother's home often had unapproved guests show up during visitations. And when confronted, Mother would claim to not know the people.

Mother also was required to maintain verifiable and sufficient sources of income. Mother did not provide proof of income, despite claiming to work at an assisted living facility at the time of trial. Stringfellow requested such proof, but Mother did not provide any information to her. Before her current alleged position, Mother claimed she was applying for social security but was denied twice. Stringfellow testified she did not know "exactly how [Mother] pays for all the bills."

Mother also was required to complete various tasks related to her substance abuse, including testing and RADAC assessments. Upshaw and Stringfellow testified Mother agreed to comply with KVC's color code system for random UAs, but she was removed from the program after failing to complete 10 consecutive UAs. KVC employees testified Mother was aware of her obligations under the KVC color code system. Mother was dropped from the color code program two months before termination because she had 10 consecutive no-shows. And she had not returned to KVC to agree to a new color code contract at the time of termination. As detailed, Mother no-showed most of her requested, random UAs. And she provided no hair follicle tests, despite being court-ordered nine times. Mother's case plan required her to complete a RADAC assessment for each positive drug test. Mother completed one assessment in 2021, but she has not provided proof of another assessment after her positive tests or no-shows.

Mother also was required to complete a mental health assessment and follow recommendations. As noted, Mother completed this assessment with Dr. Hazel in April 2020. But even so, Mother did not meaningfully address most of his recommendations. For example, Mother allegedly attended one, three-hour parenting class but Stringfellow testified she did not know what the class entailed, and Mother refused to complete more substantial classes. And even though Mother completed the class, Stringfellow did not see improvement in Mother's parenting skills. Mother provided proof of completing an anger management course before the initiation of these proceedings, but she refused to complete additional courses in compliance with Dr. Hazel's recommendation in 2020. In

this vein, Dr. Hazel recommended Mother receive mental health services, such as individual therapy, but Mother did not provide proof of her attendance. And she downplayed the importance of receiving such services when she told Stringfellow that she "did not believe she had a disability, therefore, [she] did not need mental health services."

And finally, as detailed, Mother was required to sign releases with providers. The State presented ample evidence to support a finding that Mother did not accomplish this task. Both Upshaw and Stringfellow testified Mother consistently failed to sign releases when requested. And without Mother's release, KVC could not confirm Mother's sobriety or mental health services.

Despite being aware of her case plan tasks and the effect of failing to complete the tasks, Mother made no progress throughout the proceedings. Upshaw testified she saw no change in Mother's conduct or circumstances while she was working with her from 2018 to 2019. When asked what her "biggest concerns" were at the time of the hearing, Stringfellow included Mother's "lack of progress" in controlling substance abuse and failure to address her mental health. And Webb testified the same: "[M]om's inability to follow through on tasks that are set forth to help her regain her children are, in a big picture sense, a demonstration of her ability to follow through on other kinds of things." Webb also testified that "[b]ased on the description of what was happening when the children came into custody, I haven't seen a great deal of change, meaningful change, that would help me know that the kids would be in a safe and stable environment."

The State presented clear and convincing evidence to show Mother did not adjust her circumstances, conduct, or condition to meet the needs of her children. As shown through her case plan tasks and substance abuse, Mother made minimal effort to change her circumstances from those that existed when this case was initiated. At the time of termination, Mother had not changed the circumstances of her methamphetamine use, her

mental health issues, or her compliance with KVC's drug testing and request for medical releases. And evidence of Mother's lack of effort to change her circumstances was shown through her failure to carry out a reasonable plan approved by the court directed toward integrating the children into her home. The district court did not err in finding Mother unfit to parent her children under K.S.A. 38-2269(b)(8), (b)(9), and (c)(3).

*Mother's unfitness is unlikely to change in the foreseeable future.*

To reiterate, if a district court finds that a parent is unfit, the court must then determine whether the parent's unfitness is likely to change in the foreseeable future. K.S.A. 38-2269(a). A court evaluates the foreseeable future from a child's perspective because children have a different perception of time. *In re R.S.*, 50 Kan. App. 2d at 1117. For a child, "a month or a year seem[s] considerably longer than it would for an adult." *In re M.S.*, 56 Kan. App. 2d at 1263; see K.S.A. 38-2201(b)(4).

The district court found the State presented clear and convincing evidence that Mother's unfitness was unlikely to change in the foreseeable future because "the same underlying concerns present four years ago remain unaddressed today by Mother." The district court pointedly added:

"Simply put, Mother does not want to cooperate or follow through with requests aimed at addressing her well-being, and more importantly, the well-being of her children. Mother has had four years, assistance from the Agency, and warnings from the Court to change her conduct. Unfortunately, none of these factors have impacted Mother's conduct."

Mother's argument on appeal challenges the district court's foreseeable future finding on the grounds that her trial counsel was ineffective, and by reweighing the evidence in her favor. Mother's argument is not persuasive and the record supports the district court's holding.

As noted, Stringfellow testified the children had been out of Mother's care for 50 months at the time of termination. For two of the children, 50 months in DCF custody has been most of their life. Zd.B. came into DCF custody at 1 year old. And Zo.B. was placed in custody at infancy. The other children were placed in custody at 11 and 9 years old. In Stringfellow's opinion, 50 months in DCF custody is too long for children to wait to obtain permanency. She testified Mother cannot provide for the children's needs and she believes Mother would not change if given more time: "It's already been demonstrated in the past 50 months of this case that minimal progress has been demonstrated, and the children's needs just continue to get more and more."

Webb agreed with Stringfellow's opinion, testifying Mother would be unable to show her fitness has changed even if given more time:

"Because we have been here, in this posture, for quite some time now.

"The children have been in care for a little over four years, and just in the last several years, I know that mother has been admonished multiple times by the Court to get to work—start working harder.

"We've had multiple hearings, and I have not seen that change. I have not seen that demonstration from her yet.

"So I'm concerned that more time given to mom will just mean that the children will continue to languish in foster care and achieve permanency."

As the district court observed, Mother's "two main issues, substance abuse and mental health issues, have remained a constant concern that have gone unaddressed by Mother." The record shows Mother's conduct has not changed in four years; she continues to suffer from these two issues while refusing to seek the treatment recommended by KVC and Dr. Hazel. Mother's argument contending her unfitness was likely to change if given more time, or alternative counsel, is not supported by the record.

*The district court did not abuse its discretion in finding termination was in the best interests of the children.*

Finally, after making a finding of unfitness, "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). In making such a decision, courts must give primary consideration to the physical, mental, and emotional needs of the child. K.S.A. 38-2269(g)(1).

Appellate courts review a district court's best-interests determination for an abuse of discretion. *In re R.S.*, 50 Kan. App. 2d at 1116. A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018).

Most of Mother's argument challenges the district court's best-interests decision as arbitrary or unreasonable. But this argument is not persuasive. The State presented evidence to show each child has significant needs that are now being addressed outside of Mother's care.

Stringfellow testified Mother's oldest daughter, By.J. has a history of self-harm and was diagnosed with major depressive disorder. By.J. wanted to maintain mental health services. Stringfellow testified:

"[S]he wants to, in her own words, achieve emotional maturity and that includes her own ability to self-regulate her emotions rather than getting into physical altercations with her siblings or peers at school, which have been current concerns, as well as her ability to protect herself from any internalized aggression."

Stringfellow testified Mother's second child, Bz.J., "exhibits symptoms of very low self-esteem. So she needs a lot of encouragement and opportunities to have healthy peer relationships." Bz.J. requires bi-weekly individual therapy.

Mother's third child, Zd.B., handles social situations well, but he struggles with emotional management. Stringfellow stated: "He will have meltdowns nearly four times a week that continue throughout most of the evening and requires weekly individual therapy."

And as discussed above, Mother's youngest child, Zo.B., attends individual therapy and occupational therapy. Stringfellow testified his physiological health is progressing, but he must attend those services "at this time, as a three-year-old, just to learn how to manage his body, as he often reacts by hitting people, hitting himself, inappropriately touching peers, and due to his lack of ability to control his own body."

Webb testified termination of Mother's parental rights was in the best interests of the children so that permanency can be ensured through adoption. Stringfellow testified the same, stating the children will have no sense of permanency without termination and ultimately adoption. As established throughout the proceedings, Mother failed to show she could care for her own needs, much less the needs of the children. Thus, it was not unreasonable for the district court to find it was in the best interests of the children to terminate Mother's parental rights based on the children's significant needs.

#### DID MOTHER'S COUNSEL PROVIDE INEFFECTIVE ASSISTANCE?

For the first time on appeal, Mother argues that she received ineffective assistance of counsel. Mother contends her trial counsel was not prepared, failed to adequately cross-examine witnesses, and failed to use exhibits. In response, the State argues Mother

did not preserve this issue for appeal, or alternatively, Mother has not shown her counsel's representation was deficient.

In Kansas, courts are statutorily required to appoint lawyers for indigent persons facing the termination of parental rights who desire counsel under K.S.A. 38-2205(b)(1). And this court has acknowledged that a parent in termination proceedings has the right to competent legal representation. *In re Rushing*, 9 Kan. App. 2d 541, 545, 684 P.2d 445 (1984) ("[T]he parties take it for granted . . . [Father] was entitled to effective assistance of counsel. We agree."); see *In re J.A.*, No. 125,516, 2023 WL 3775096, at \*8-9 (Kan. App. 2023) (unpublished opinion); *In re L.B.*, No. 124,538, 2022 WL 2392681, at \*2 (Kan. App. 2022) (unpublished opinion); *In re A.B.*, No. 111,483, 2015 WL 249768, at \*6-8 (Kan. App. 2015) (unpublished opinion); *In re J.W.*, No. 106,561, 2012 WL 2621154, at \*6 (Kan. App. 2012) (unpublished opinion).

This court has applied *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) to claims of inadequate representation raised in termination proceedings. *In re F.G.*, No. 114,602, 2016 WL 4259928, at \*12 (Kan. App. 2016) (unpublished opinion) (applying *Strickland*); *In re B.J.C.*, No. 69,697, 1994 WL 17120335, at \*3-4 (Kan. App. 1994) (unpublished opinion) (applying *Strickland*). Under *Strickland*, Mother must satisfy two prongs. *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985) (adopting *Strickland*).

First, Mother must show her counsel's performance was deficient. To establish deficient performance, Mother must show her counsel's performance fell below an objective standard of reasonableness. But judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel must be highly deferential. *Khalil-Alsalaami v. State*, 313 Kan. 472, 485, 486 P.3d 1216 (2021). A court considering a claim of ineffective assistance of counsel must strongly presume that defense counsel's conduct fell within the wide range of reasonable professional assistance—Mother must overcome

the strong presumption that, under the circumstances, counsel's action might be considered sound trial strategy. *Khalil-Alsalaami*, 313 Kan. at 486.

Second, if Mother shows her counsel's performance was deficient, she must also show that her counsel's deficient performance was prejudicial. To establish prejudice, Mother must show with reasonable probability that the deficient performance affected the outcome of her proceedings, based on the totality of the evidence. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing a claim of ineffective assistance of counsel must consider the totality of the evidence before the judge or jury. *Khalil-Alsalaami*, 313 Kan. at 486.

As the State points out, appellate courts generally will not consider an allegation of ineffective assistance of counsel raised for the first time on appeal. *State v. Salary*, 309 Kan 479, 483, 437 P.3d 953 (2019). When typically applied in criminal cases, the factual aspects of a claim of ineffective assistance of counsel generally require that the matter be resolved through a K.S.A. 60-1507 motion or through a request for remand to the district court for an evidentiary hearing under *State v. Van Cleave*, 239 Kan. 117, 119-21, 716 P.2d 580 (1986). Appellate courts have considered ineffective assistance of counsel claims in criminal cases for the first time on appeal only when there are no factual issues that must be resolved and the two-prong ineffective assistance of counsel test—deficient performance and resulting prejudice—can be applied as a matter of law based on the appellate record. *Salary*, 309 Kan. at 483-84.

Mother's appellate counsel has not requested a remand for a *Van Cleave*-type hearing to develop the factual aspects of Mother's ineffective assistance of counsel claim. Instead, Mother's appellate counsel "believes that the [appellate] record contains sufficient information for this Court to address [M]other's ineffective assistance of counsel argument and requests this Court reverse the trial court's decision and remand for a new trial with effective counsel." We disagree that the appellate record contains

sufficient information for this court to address the ineffective assistance of counsel claim for the first time on appeal. Instead, the claim presents factual issues that can only be resolved with an evidentiary hearing in district court. For instance, one of Mother's biggest complaints is that her trial counsel failed to adequately cross-examine witnesses. But we observe that the extent of cross-examination of witnesses is a matter of trial strategy. Quite frankly, the testimony of most of the State's witnesses was so damaging to Mother that it may have been counsel's strategy to limit cross-examination to avoid dwelling on the highly prejudicial evidence. It is impossible for this court to address Mother's ineffective assistance of counsel claim without an evidentiary hearing including the testimony of both Mother and her trial counsel and without findings from the district court on both prongs of the ineffective assistance of counsel claim.

Alternately, Mother's appellate counsel asks this court to remand to the district court for a hearing on the ineffective assistance of counsel claim "should this Court feel the [appellate] record is not enough [to address the claim]." We deny this request because Mother has failed to make a sufficient showing of prejudice to justify a remand at this stage of the proceedings. The evidence supporting the district court's decision to terminate Mother's parental rights was overwhelming. The district court found Mother unfit on six statutory grounds. Only one would have been sufficient. Mother's unfitness is unlikely to change in the foreseeable future, as evidenced by the fact that the case was pending in district court for over four years. Mother has failed to make a sufficient showing that there is a reasonable probability that the outcome of her case would have been any different even if she could show that her trial counsel's performance was deficient. For these reasons, we decline to address Mother's ineffective assistance of counsel claim for the first time on appeal, and we find that Mother's request for a remand for an evidentiary hearing is not justified based on the record for our review.

Affirmed.