

NOT DESIGNATED FOR PUBLICATION

Nos. 125,813
125,814

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of R.G. and K.R.,
Minor Children.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; DAN K. WILEY, judge. Opinion filed April 21, 2023.
Affirmed.

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

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

Before CLINE, P.J., MALONE and ATCHESON, JJ.

PER CURIAM: L.R. (Mother) appeals the district court's termination of her parental rights to R.G. and K.R. The district court found that Mother was unfit by reason of conduct or condition which rendered her unable to properly care for the children and the conduct or condition was unlikely to change in the foreseeable future. The district court also found that termination of Mother's parental rights was in the children's best interests. After thoroughly reviewing the record, we conclude the district court's findings were supported by clear and convincing evidence and affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Mother is the natural mother of R.G., born in 2018, and K.R., born in 2017. On June 27, 2019, the State filed a child in need of care (CINC) petition for both children. The petitions alleged generally that the children were without adequate parental care,

control, or subsistence that was not due solely to the lack of financial means of the parents; and that the children were without the care or control necessary for their physical, mental, or emotional health.

The district court held a temporary custody hearing on July 2, 2019, where Mother appeared pro se. At the hearing, the district court placed both children into the temporary custody of the Kansas Department for Children and Families (DCF) and made these findings in each case:

"Mother has had Family Preservation Services since September, 2018. Both Mother's children were the subject of previous child in need of care cases that just closed on May 14, 2019. The previous CINC cases were due to Mother leaving her children unattended with a man she knew was on drugs and due to this the three-month-old baby [R.G.] was admitted to the hospital with over thirty fractures. Now Mother is allowing her new boyfriend, who she also knows to be using drugs, around her children. There has been domestic violence between Mother and her new boyfriend in front of the children. Mother signed a safety plan that she would not allow him around her children, but has been violating it by allowing him to stay in her home."

The district court held an adjudication and disposition hearing on July 23, 2019, and Mother appeared with appointed counsel. The district court found that Mother had knowingly and voluntarily submitted a statement of no contest to the allegations in the CINC petitions. The district court found both children in need of care and continued placement with the DCF.

The district court adopted a reintegration plan to return the children into Mother's custody. The terms of the reintegration plan stated:

- "1. [Mother] will obtain and maintain safe and appropriate housing and make sure all bills are paid on time. [Mother] will notify KVC of everyone who is staying so KVC can run KBI and CANIS on anyone 10 years or older.

- "2. [Mother] will obtain and maintain legal employment and provide proof, so she will adequately provide for all of [the children's'] needs.
- "3. [Mother] will attend a Domestic Violence Intake and will follow all recommendation [*sic*].
- "4. [Mother] will sign all necessary releases to complete all appropriate paperwork.
- "5. [Mother] will attend all mental health appointments and will continue to take her prescribed medication.
- "6. [Mother] will maintain regular contact with KVC and meet face to face monthly and will provide KVC with current address and phone number.
- "7. [Mother] will attend all legal proceedings for [the children] and report to KVC and legal proceedings for [the children] and report to KVC [*sic*] any legal obligations/requirements they may have.
- "8. [Mother] will attend all of [the children's] medical and mental health appointments if appropriate in order to understand [their] needs."

The cases progressed for several months in district court with several review hearings where Mother appeared in person and with her attorney. The district court held a permanency hearing on June 23, 2020, where it found that the reintegration of both children was adequately proceeding and continued to be a viable goal. The district court also ordered Mother to complete weekly drug tests until otherwise instructed.

On October 16, 2020, Mother tested positive for fentanyl, and she tested positive for fentanyl and methamphetamine on October 20, 2020. Mother then regularly began missing drug tests starting on October 29, 2020. Mother reported that during this period "she is actively using and is unable to stop."

Mother completed a substance abuse assessment on February 3, 2021. The assessment led to a recommendation that Mother seek in-patient treatment for substance abuse and that she met the criteria for substance abuse disorder. Mother was originally scheduled to check into a rehabilitation facility on February 15, 2021, but later reported

that she rescheduled for February 22, 2021. Mother ultimately did not check into the facility on February 22, 2021.

Mother checked into a different rehabilitation facility on March 30, 2021. She completed her rehabilitation program around May 1, 2021. While in rehab, Mother also completed four group parenting classes. On May 10, 2021, Mother submitted one negative urinalysis (UA) sample. Otherwise, Mother continued to regularly miss her drug testing appointments after completing her rehabilitation program.

During Mother's extended drug use—about October 2020 to May 2021—Mother's caseworker reported that Mother had no visitation with the children and "did not have any interest in visitation with the children." After completing her rehabilitation program, Mother temporarily resumed visitation until August 2021, when visitation stopped after Mother attended a videoconference visit only partially clothed.

The State moved to terminate Mother's parental rights on November 29, 2021. The motions alleged that Mother was unfit to properly care for her children under several statutory bases: use of intoxicating liquors or dangerous drugs, K.S.A. 38-2269(b)(3); physical, mental, or emotional neglect of the children, K.S.A. 38-2269(b)(4); failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family, K.S.A. 38-2269(b)(7); lack of effort on Mother's part to adjust her circumstances, conduct, or conditions to meet the children's needs, K.S.A. 38-2269(b)(8); failure to carry out a reasonable plan approved by the court directed toward integrating the children into the parental home, K.S.A. 38-2269(c)(3); and failure to pay a reasonable portion of the cost of substitute physical care based on ability to pay, K.S.A. 38-2269(c)(4).

The district court held a termination hearing on February 15, 2022. At the hearing, Mother testified that she worked at a restaurant and that she submitted verification of her employment on the day of trial. She also testified that she was pregnant and that the

father of her then unborn child sometimes stayed at the apartment. Mother admitted that this man had been in prison for seven years, but that she did not know on what charges. She also admitted that in January 2022, the two had been involved in a domestic altercation which led to police intervention.

The State asked why Mother had missed every drug test from July 2021 until January 2022, and Mother responded that she had moved around and relapsed into renewed drug use. She specified that she typically used methamphetamine. At the time of trial, Mother asserted that she was no longer using methamphetamine and had submitted a single, negative UA before the hearing. Mother admitted that she had not been taking her mental health medication. She also admitted that she had not attended a domestic violence intake as the reintegration plan required but had called about one in February 2021. Mother admitted that she had not had a physical or virtual visit with the children since August 2021, that she relapsed in August 2021, and that she had never attended a medical, educational, or health appointment for either child since they had been in DCF custody. When asked what she had done to financially support the children during the time they were in DCF custody, Mother responded, "Not a whole lot of anything."

The State also called De'Antrea McGowin, Mother's most recent caseworker through Cornerstones of Care. McGowin summarized the history of the children's placement with DCF. McGowin testified that Mother did not have stable housing or employment around July 2021 and throughout her relapse. She also testified that she briefly lost contact with Mother around July 2021. McGowin confirmed that Mother had submitted a UA before the hearing, but that the next most recent submission was from over a year before. McGowin could not verify that Mother was taking her mental health medications or that she had completed her domestic violence intake. McGowin also reiterated that Mother had not visited with the children after August 2021 because she had not submitted two negative UAs.

After the hearing the evidence, the district court terminated Mother's parental rights to both children with these findings from the bench:

"[T]he Court finds that there is clear and convincing evidence that the mother engages in excessive 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 children pursuant to K.S.A. 38-2269(b)(3); that the mother has physically, mentally, and emotionally neglected the children pursuant to K.S.A. 38-2269(b)(4); that there ha[s] been a failure of reasonable efforts by appropriate public or private child caring agencies to rehabilitate the mother pursuant to K.S.A. 38-2269(b)(7); that the mother has demonstrated a lack of effort on the part of the mother to adjust her circumstances, conduct, or conditions to meet the needs of the children pursuant to K.S.A. 38-2269(b)(8); that [Mother] failed to carry out a reasonable plan, approved by the court, directed toward the reintegration or integration of the children into the parental home pursuant to K.S.A. 38-2269(c)(3); and that the mother has failed to pay a reasonable portion or any portion of the costs of substitute physical care and maintenance based upon ability to pay pursuant to K.S.A. 38-2269(c)([4])."

The district court also found that it "does not believe that this condition is likely to change in the foreseeable future based upon the history of this case and the relapses that we've had and the length of time that this case has been on file." Lastly, the district court found that "termination of the mother's rights is in the best interest of the minor children pursuant to K.S.A. 38-2269(g)."

The district court later filed a journal entry finding Mother unfit under K.S.A. 38-2269(b)(3);(b)(4);(b)(7);(b)(8);(c)(2) and (c)(3). Notably, the journal entry included a finding that Mother was unfit for failure to maintain regular visitation with the children under K.S.A. 38-2269(c)(2), even though the motion to terminate parental rights made no allegation as to Mother under subsection (c)(2) of the statute, and the district court made no such finding from the bench. And the journal entry did not include a finding that

Mother was unfit for failure to pay a reasonable portion of the costs under K.S.A. 38-2269(c)(4), even though the district court made this finding from the bench.

Mother filed a timely notice of appeal in each case. This court consolidated the cases on appeal.

ANALYSIS

Mother claims that the district court's findings that she was unfit to parent the children, that her unfitness was unlikely to change in the foreseeable future, and that termination was in the best interests of the children were all unsupported by sufficient evidence. The State responds that the district court's findings were supported by clear and convincing evidence and argues that the district court's judgment should be affirmed.

Termination of parental rights is governed by the Revised Kansas Code for Care of Children (Code), K.S.A. 38-2201 et seq. Under the Code, when a child has been adjudicated to be a child in need of care, the district court may terminate parental rights 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).

"Termination of parental rights will be upheld on appeal if, after reviewing all the evidence in the light most favorable to the prevailing party, the district judge's fact-findings are deemed highly probable, i.e., supported by clear and convincing evidence. Appellate courts do not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. [Citation omitted.]" *In re Adoption of Baby Girl G.*, 311 Kan. 798, 806, 466 P.3d 1207 (2020), *cert. denied* 141 S. Ct. 1464 (2021).

K.S.A. 38-2269(b) provides a non-exhaustive list of factors for a district court to consider when determining a parent's fitness. K.S.A. 38-2269(c) provides additional

factors a district court may consider when a child is not in the physical custody of a parent. 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).

The district court found that Mother was unfit to parent the children under K.S.A. 38-2269(b)(3), (b)(4), (b)(7), and (b)(8) along with K.S.A. 38-2269(c)(3) and (c)(4). Admittedly, the evidence to support these findings overlaps. The district court also found that Mother's unfitness was unlikely to change in the foreseeable future under K.S.A. 38-2269(a) and that the termination of Mother's parental rights was in the best interests of the children under K.S.A. 38-2269(g)(1). We will discuss each of these findings in turn.

K.S.A. 38-2269(b)(3)—the use of intoxicating liquors or dangerous drugs

Mother argues that because she was drug free at the termination hearing, the district court lacked sufficient evidence to find her unfit under this statutory subsection. Mother asserts that she "went to inpatient treatment, subsequently relapsed and then remained drug free following her recent pregnancy." She admits "there was a significant period where she did not provide [drug tests] to [her caseworker] and her testimony reflected issues with transportation and living arrangements along with her relapse."

Mother's argument ignores, in the light most favorable to the State, that at the time of the termination hearing, she had missed over a year's worth of weekly UAs, had admitted to using methamphetamine for much of the year before the hearing, and had not shown long-term recovery from her drug use beyond a single, negative UA submitted days before the hearing. Mother also admitted that during her methamphetamine use, she was homeless and jobless for a time. The evidence shows that Mother's drug use affected her life in a manner that she would have been unable to care for the children. Given Mother's recent history of relapse and admitted methamphetamine use, the district court's finding of unfitness under this factor was supported by clear and convincing evidence.

K.S.A. 38-2269(b)(4)—physical, mental, or emotional neglect of a child

Mother claims that the district court erred in finding this factor because there is no evidence that she neglected the children. Mother cites K.S.A. 38-2202(t), which provides a definition for neglect:

"Neglect' means acts or omissions by a parent, guardian or person responsible for the care of a child resulting in harm to a child, or presenting a likelihood of harm, and the acts or omissions are not due solely to the lack of financial means of the child's parents or other custodian."

The evidence shows that the children were involved in a prior CINC case after Mother left the children with R.G.'s father, who Mother knew to be using drugs and who inflicted serious injuries onto R.G. The current CINC case arose after Mother allowed a new boyfriend to be around the children even though she knew he was also using drugs and there had been instances of domestic violence between Mother and him. Allowing the new boyfriend near the children directly violated the safety plan Mother signed as part of the prior CINC case. This case began because Mother continued the same troubling pattern of behavior that placed the children at risk of harm. Even so, Mother argues that she is no longer in that relationship and so there is no likelihood of harm.

Mother testified at the termination hearing that she was pregnant and that the father of the child sometimes stayed at her apartment. Mother admitted that this man had been in prison for seven years, but she did not know on what charges. She also admitted that in January 2022, the two had been involved in a domestic altercation that led to police intervention. Although Mother testified that she was no longer in a relationship with this man, she admitted that he would stay at her apartment. In the light most favorable to the State, the evidence showed there was a high likelihood that this man would be around the children if they were released into Mother's custody. The evidence was clear and convincing that Mother had engaged in a pattern of allowing potentially

dangerous men near the children and that she would continue to do so if the children lived with her. This evidence satisfies the definition of "neglect" at K.S.A. 38-2202(t).

K.S.A. 38-2269(b)(7)—failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family

Mother does not allege that the State or any agency failed to put forth reasonable efforts toward reintegration. Indeed, Mother admits that her most recent caseworker "was well informed, had been in contact with Mother about resources and submitted her documentation to the file." Despite the over two years of failed reintegration efforts, Mother argues that her testimony at trial shows that she was making progress toward reintegration. The State responds that Mother had ample time to satisfy the State's and DCF's reasonable efforts but failed to do so. We agree.

Mother testified that she was no longer using methamphetamine but supported her testimony with a single negative UA submitted shortly before the hearing. In contrast, Mother admitted to using methamphetamine for much of the year before. Mother also failed to complete a domestic violence intake and attend a single health appointment for the children in the more than two years that she needed to do so. At the time of the termination hearing, Mother had not visited the children in person in over a year and had not seen them virtually in about six months. Mother would also lose contact with her caseworker for months at a time during her periods of methamphetamine use.

Mother argues that her testimony overcomes her failure to successfully reintegrate with the children. She testified that she thought she could complete the reintegration plan in two or three months. Mother expressed confidence that she would pay her own rent, attend school, complete a domestic violence intake, and finish outpatient treatment over the next six months. None of this testimony undercuts the fact that Mother failed to complete many steps in the reintegration plan over the course of over two years—a

period spanning about half the lifetimes of both children at the time of the termination hearing. And while Mother testified to taking renewed steps toward reintegration in the future, her testimony lacked other support to show that she would make sustainable and long-term progress towards reintegration. There was clear and convincing evidence that Mother was unfit under K.S.A. 38-2269(b)(7).

K.S.A. 38-2269(b)(8)—lack of effort to adjust circumstances, conduct, or conditions to meet the needs of the children

Mother argues "there was . . . substantial evidence of [her] attempts to adjust her circumstances while battling her addiction." The State disagrees and points to Mother's history of domestic violence and drug use. Mother is correct that she took some considerable steps to adjust some of her circumstances, such as attending in-patient rehabilitation and continuing to seek out-patient treatment for her methamphetamine addiction. Mother also testified that she intended to enroll in a six-week school course.

Although Mother did present evidence of her efforts to adjust some troubling circumstances for the better, she failed to show efforts in changing others. We have already addressed Mother's failure to overcome her drug addictions despite some efforts. And the record shows Mother's troubling pattern of allowing potentially dangerous men near the children, despite the severe injuries that R.G. had sustained from such an individual in the past. Little has changed on this issue. The State presented clear and convincing evidence that Mother was unfit under K.S.A. 38-2269(b)(8).

K.S.A. 38-2269(c)(3)—failure to carry out a reasonable plan approved by the district court directed toward the reintegration of the children into the parental home

Mother concedes that she did not attend a domestic violence intake or attend all—or any—of the children's health appointments as the reintegration plan required. Even so, Mother argues that she has substantially completed all other steps of the plan. We

disagree. For example, Mother failed to maintain safe housing over the course of the proceedings and admitted to being homeless for a time. McGowin also testified that, at least for a time, Mother failed to maintain stable housing and employment. Mother also admitted that she was not taking her mental health medication as required.

Evidence adduced at the termination hearing shows that Mother failed to complete more than half of the reintegration plan despite having more than two years to do so. Instead, Mother argues that she completed drug assessment testing and went to inpatient treatment for her methamphetamine use but concedes that those acts were not part of the reintegration plan. By Mother's own admissions, she has failed to complete much of the reintegration plan. Thus, clear and convincing evidence supports the district court's finding on this factor.

K.S.A. 38-2269(c)(4)—failure to pay a reasonable portion of the cost

When Mother was asked at the termination hearing what she had done to financially support the children during the time they were in DCF custody, she responded, "Not a whole lot of anything." The reintegration plan required Mother to financially provide for the children's needs based on her ability to pay. Mother offered no reason for making no effort to financially support the children. There was clear and convincing evidence that Mother was unfit under subsection K.S.A. 38-2269(c)(4).

K.S.A. 38-2269(a)—finding of unfitness unlikely to change in the foreseeable future

Beyond finding that Mother was unfit to parent the children under the foregoing factors, the district court also found that Mother's condition was unlikely to change in the foreseeable future. Mother argues that the district court "failed to give adequate weight to the recent efforts and profound changes in Mother's life that had occurred."

When gauging the likelihood of change in the foreseeable future under K.S.A. 38-2269(a), courts should use "child time" as the measure. Children experience the passage of time in a way that makes a month or a year seem far longer than it would for an adult, and that difference in perception typically tilts toward a prompt, permanent disposition. K.S.A. 38-2201(b)(4); *In re M.B.*, 39 Kan. App. 2d 31, 45, 176 P.3d 977 (2008); *In re G.A.Y.*, No. 109,605, 2013 WL 5507639, at *1 (Kan. App. 2013) (unpublished opinion) ("child time" differs from "adult time" in termination of parental rights proceedings "in the sense that a year . . . reflects a much longer portion of a minor's life than an adult's").

We need not repeat all the evidence. There was clear and convincing evidence that based on "child time," Mother's unfitness was unlikely to change in the foreseeable future. The children had been in DCF custody nearly half their lives at the time of the termination hearing. In that time, Mother failed to demonstrate an ability to properly care for them. In Kansas, "our 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).

K.S.A. 38-2269(g)(1)—best interests finding

Finally, Mother claims there was insufficient evidence for the district court to find that the termination of her parental rights was in the children's best interests. In making this determination, the district court shall give primary consideration to the physical, mental, and emotional health of the children. K.S.A. 38-2269(g)(1).

We review a district court's findings on the best interests of the children for an abuse of discretion. *In re P.J.*, 56 Kan. App. 2d 461, 465, 430 P.3d 988 (2018). 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). The party asserting the district court abused its

discretion bears the burden of showing such abuse of discretion. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 462 (2017).

Mother asserts that her recent negative drug test and "anticipated efforts over the next several months" shows that the termination of her parental rights was not in the children's best interests. The State responds that Mother's failure to progress towards reintegration shows otherwise. As explained above, at the time of the termination hearing, this case had been pending for over two years. During that time, Mother admitted to using methamphetamine and experiencing cycles of relapse, failed to complete the court-approved reintegration plan, and missed substantial visitation time with the children. She also continued her pattern of involvement with abusive men.

Mother also argues that because the children are young, their best interests would be served by reuniting with Mother. But Mother ignores her circumstances. And her intentions to act in the future do not absolve her failure to act over the years that the children have been in DCF custody. Giving primary consideration to the physical, mental, and emotional health of the children, the district court did not abuse its discretion in finding that termination of Mother's parental rights was in the children's best interests.

Affirmed.