NOT DESIGNATED FOR PUBLICATION

No. 126,152

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of B.R., a Minor Child.

MEMORANDUM OPINION

Appeal from Douglas District Court; PAUL R. KLEPPER, judge pro tem. Opinion filed July 21, 2023. Affirmed.

Danielle N. Davey, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, LLC, of Lawrence, for appellant natural father.

Jon Simpson, senior assistant district attorney, for appellee.

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

PER CURIAM: Father appeals the termination of his parental rights to his minor son. During the pendency of this case, Father was incarcerated for the majority of the time. As a result, he was unable to visit with B.R. After Father was released from custody in early 2022, he made some progress toward reintegration with B.R. However, he was charged with a new crime and was reincarcerated a few months later. Although Father contends that the State did not make reasonable efforts to reintegrate the family, we find that there was clear and convincing evidence to support the district court's finding of unfitness and that the condition was unlikely to change in the foreseeable future. Moreover, we find that the district court did not err in finding that the termination of Father's parental rights is in the best interests of B.R. Thus, we affirm the district court's decision.

FACTS

In August 2020, the State filed a child in need of care petition seeking to have B.R. declared a child in need of care. At the time the petition was filed, B.R. was four years old and living with his Mother. Moreover, Father was incarcerated. The petition alleged that Mother was involved in criminal activity that had put B.R. at risk. According to the petition, Mother had taken B.R. to meet with her former boyfriend—who she had a no-contact order against—where she was assaulted. The petition also alleged that there were significant concerns about drug use and drugs being found in Mother's apartment. After reviewing the petition, the district court entered an ex parte order of protective custody.

The district court appointed Mother and Father counsel, placed B.R. in foster care, approved the initial Kansas Department for Children and Families case plan, and ordered the Secretary, through Kaw Valley Center (KVC), to complete necessary reports. Two years after the initial petition was filed, the State moved to terminate both Mother's and Father's parental rights. Prior to the hearing on the motion to terminate, Mother relinquished her parental rights to B.R. As a result, the termination hearing focused on Father's parental rights.

At the termination hearing held on January 19, 2023, the State presented several reports, many of which were authored by Emily Snider, who was the case manager for the case from September 2020 until June 2022. The reports—which advised the district court regarding Father's compliance with the case plan—were admitted into evidence and are part of the record on appeal. These reports outline the events that occurred between the time the petition was filed and the termination hearing was held. Accordingly, we will briefly summarize the reports.

The first report—dated October 12, 2020—listed the tasks that Father was required to perform under the case plan while he was incarcerated and indicated that the case manager was unable to determine whether Father had completed any of the tasks. In a December 2020 report, the case manager social worker indicated that she had still not been able to determine what tasks the Father may have completed under the case plan.

Further, in an April 2021 report, the case manager indicated that she continued to be unable to determine whether Father had participated in parenting classes while incarcerated. The case manager also indicated that she had arranged a video visit between Father and B.R. due to his incarceration. However, after the video visit, B.R. became upset "because 'his dad was in jail and bad people go to jail.'" As a result, B.R.'s therapist recommended that B.R. not have visits with his Father while he was incarcerated. The therapist also opined that B.R. had a diagnosis of post-traumatic stress disorder and separation anxiety disorder.

Subsequently, in August 2021, a report stated that Father was participating in parenting classes during his incarceration. However, the video visits between Father and B.R. had not been reinstated. The case manager reported that she would communicate with the therapist regarding the reinstatement of the visits with Father closer to his release date. The report also indicated that the foster family with whom B.R. was living had reported that he missed his mother but wanted to continue to live with them. Another report, prepared in November 2021, noted that Father was still incarcerated but was following the terms of the case plan.

Father was released from custody on January 18, 2022, and moved in with his mother. On January 25, 2022, Father submitted to a urinalysis (UA), and it was negative. In March 2022, the case manager stated in a report that although Father had been released from incarceration, the therapist continued to recommend that Father and B.R. not have visitation due to past trauma. The report also stated that Father intended to continue

living with family members until he could find a job. At the time the report was written, Father had not found employment.

The next report was prepared in July 2022 and stated that Father had failed to obtain safe and stable housing. Likewise, he had failed to obtain and maintain employment. In addition, the report indicated that he had not taken a required mental health assessment. However, the report explained that Father had participated in two family therapy sessions with B.R. Although Father was referred to a batterer intervention program (BIP) assessment, it had not yet been performed. The report also explained that Father had provided a urine sample that was rejected by KVC, but that a subsequent urine sample had tested negative for all substances.

Significantly, the State informed KVC that—as of June 16, 2022—Father was reincarcerated in the Douglas County Jail after being arrested on the charge of distribution of a controlled substance causing death. As of September 21, 2022, when the next report was submitted by the social worker, Father remained incarcerated in the Douglas County Jail awaiting trial on the new charge. In the report, it was stated that B.R.'s therapist continued to recommend that he not have visitation with Father. In the next report filed in mid-October 2022, the social worker stated that there had been no significant changes with regards to Father's status from the previous report. The final report prepared before the termination hearing was filed in early January 2023 and indicated that Father continued to be incarcerated.

At the termination hearing, Snider testified that Father was incarcerated during a significant portion of time this case was pending. Nevertheless, during the five months that he was not incarcerated in 2022, Father indicated that he was living at his grandmother's house and was employed at Pretzel, Inc. Likewise, he started some of the required assessments and evaluations but did not complete them before he was arrested again. Snider also testified about the UAs that Father took while he was out of custody,

including the one which was not acceptable for testing. However, she acknowledged that Father never submitted a positive UA to KVC.

Snider testified regarding her concerns that Father's most recent charges were drug related. She also testified that Father had moved in with his fiancée. As a result, if the district court ordered reintegration or in-home visitation, the fiancée would have to go through background checks, an inspection of her home would need to occur, and a baseline UA would need to be performed. KVC had not had an opportunity to do any of those things because Snider had not heard of Father's fiancée until the day of the hearing. Snider estimated that if Father's rights were not terminated, it would take at least six months for reintegration to occur but that a year was more likely given B.R.'s mental health needs.

B.R.'s therapist also testified at the termination hearing. The therapist explained that she began working with B.R. in September 2020, and that she had seen him the week prior to the hearing. In her opinion, B.R. was suffering from PTSD for children under the age of six based on her initial evaluation. According to the therapist, she arrived at this diagnosis based on the trauma B.R. had experienced in his life. She indicated that B.R. was terrified and suffered separation anxiety when separated from his foster home. Likewise, the therapist testified that she found B.R. to be "scared to death of bad guys."

According to the therapist, B.R. would often say that he loved his Mother but did not want to live with her. Furthermore, she testified that B.R. never spoke about his Father unless someone else brought him up. Also, she testified about her observations during the two family sessions at which both Father and B.R. were in attendance. She stated that while the first session went well, the second was awkward because B.R. wanted to play on his own instead of visit with his Father. In addition, she testified that B.R. associated jail with bad guys and connected these thoughts to the bad guys he had experienced while living with Mother. The therapist opined that B.R. did not feel safe

around bad guys and associated them with his Father. When asked whether Father should be able to have visits with B.R., the therapist testified that in her opinion, "[B.R.'s] PTSD will continue to get worse. It has been two years, and I think . . . it's time that he's safe where he's at, it's time to move forward."

Father's most recent case manager worker, Leilani Murawski, also testified at the termination hearing. She testified that she did not give Father paperwork for the evaluations he needed to complete and indicated that KVC typically sought to have parents fill out these documents at the office. Murawski also testified that she did not inquire as to whether she could go to the Douglas County Jail to help Father fill out the paperwork, nor did she consider whether it could be done over the phone.

In his defense, Father testified that he was able to bond out of jail the day before the hearing. He acknowledged that he was previously incarcerated in 2017 and 2018, in addition to August 2019 to January 2022. According to Father, he lived with Mother and B.R. at the time of his son's birth in 2016. He also testified that he was charged in June 2017 with aggravated intimidation of Mother, making criminal threats toward Mother, and violating a protective order.

Further, father testified that he lived with B.R. off and on between the time he was released in 2017 and the time he was reincarcerated in 2018. Although there was no formal custody arrangement, Father claimed that B.R. had spent about 50% of the time with him during this period. While Father was in the Douglas County Jail, he was evidently able to see B.R. on several occasions. However, after he was transferred to prison in July 2019, he did not see B.R. again until May 29, 2022, and again on June 10, 2022. At that time, he saw B.R. at two family therapy sessions.

Father admitted that the last time he had provided parental care to B.R. was around four years before the termination hearing. Additionally, Father testified that his driver's

license was suspended in February 2022, and that he had not yet secured employment. He explained that the last time he had been employed was prior to his arrest in June 2022. Nevertheless, Father expressed the belief that he could get his driver's license back, that he could find a job, and that he could have his residence stabilized by the end of February. Moreover, Father candidly acknowledged that he was largely unsuccessful in completing the tasks set forth in his case plan. In particular, he recognized that there were some evaluations he was supposed to get that were not completed.

Father explained that although he had started participating in a parenting class while he was in jail he did not complete the class. He also testified that he had participated in a substance abuse program while he was in prison and had spoken to representatives of KVC about once a month during the last six months of his incarceration in prison, which ended in January 2022. When asked about the felony charge that was pending against him at the time of the termination hearing, Father acknowledged that there was a possibility that he would be sent back to prison.

Father testified that he sought contact with B.R. during his custody but that he was not allowed to do so given B.R.'s PTSD diagnosis and the recommendation of B.R.'s therapist. Once Father was released in January 2022, he was able to visit B.R. and he believed that the visit went well. He had a second visit about a month later that he thought went even better than the first visit.

After reviewing the evidence and considering the arguments presented at the hearing, the district court terminated Father's parental rights. In doing so, the district court determined that the State had established a presumption of unfitness under K.S.A. 38-2271(a)(5) because B.R. had been in an out-of-home placement for longer than one year. Moreover, the district court found that Father had substantially neglected or willfully refused to carry out a reasonable case plan directed toward reintegration of B.R. into the parental home. The district court further found that Father had not shown that he

was presently fit and able to care for B.R.'s needs, nor had he shown that he would be fit and able to care for B.R.'s needs in the foreseeable future.

In addition, the district court determined that Father was unfit to properly care for B.R. under K.S.A. 38-2269(b)(7). Specifically, the district court found that Father had failed to take advantage of the reasonable efforts made by KVC to rehabilitate the family. Moreover, the district court found that Father was unfit under K.S.A. 38-2269(b)(8) for a lack of effort to adjust his circumstances, conduct, or condition to meet the needs of B.R.; under K.S.A. 38-2269(c)(2) for failing to maintain regular visitation, contact, or communication with B.R. or B.R.'s custodian; and under K.S.A. 38-2269(c)(3) for failing to carry out a reasonable plan directed toward integration of B.R. into the parental home.

Thereafter, Father timely filed a notice of appeal.

ANALYSIS

On appeal, Father raises three issues. First, Father contends that the State did not present sufficient evidence to support a finding that the conduct or condition that rendered him unfit to care for B.R. was unlikely to change in the foreseeable future. Second, he contends that the State did not present sufficient evidence to support the presumption that he was unfit to parent B.R. Finally, he contends that the district court abused its discretion by determining that terminating his parental rights was in B.R.'s best interests.

After a child has been adjudicated to be a child in need of care, a district court may terminate a parent's rights if it finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to properly care for the child and that the conduct or condition of unfitness is unlikely to change in the foreseeable future. K.S.A. 38-2269(a). On appeal, a district court's decision to terminate a

parent's rights will be upheld if—after reviewing all the evidence in the light most favorable to the prevailing party—we find that the district court's factual findings are supported by clear and convincing evidence. In reviewing the evidence, we are not to reweigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. *In re Adoption of Baby Girl G.*, 311 Kan. 798, 806, 466 P.3d 1207 (2020), *cert. denied* 141 S. Ct. 1464 (2021).

Here, the district court determined that Father was presumptively unfit under K.S.A. 38-2271(a)(5). This statute sets forth a presumption of unfitness if the State shows by clear and convincing evidence that

> "(5) the child has been in an out-of-home placement, under court order for a cumulative total period of one year or longer and the parent has substantially neglected or willfully refused to carry out a reasonable plan, approved by the court, directed toward reintegration of the child into the parental home."

The crux of the majority of Father's arguments on appeal is that he was unable to complete the tasks required by his case plan because he was incarcerated during a significant portion of time while this case was pending before the district court. In support of this position, Father points us to *In re T.H.*, 60 Kan. App. 2d 536, 548, 494 P.3d 851 (2021). In *T.H.*, a panel of this court held that "incarceration does not *necessarily* result in an automatic and exclusive basis for an unfitness finding." (Emphasis added.) 60 Kan. App. 2d at 548. In other words, incarceration does not—in and of itself—justify a finding of unfitness. Rather, it is one of the factors that may be considered in determining whether a parent is unfit.

In *T.H.*, the panel focused on a father's continued financial support and efforts to maintain his relationship with his minor child throughout his incarceration. Moreover, the panel noted the father's efforts to have the minor child reside with him before he was incarcerated. 60 Kan. App. 2d at 551-52. Significantly, the panel found that the State had

presented no evidence that showed the father's relationship with his minor child had significantly deteriorated as a result of his incarceration. 60 Kan. App. 2d at 553.

On the other hand, we find Father's situation in this case to be substantially different from that of the father in the *T.H.* case. Here, a review of the record on appeal shows that Father did little—if anything—to attempt to support B.R. while he was incarcerated. We also find no evidence in the record to suggest that Father took significant steps—other than for a brief period of time—to support B.R.'s care prior to his incarcerations. Rather, the record reveals that during the short period while Father lived with Mother and B.R. prior to being incarcerated, he was charged with and convicted of criminal threat against Mother as well as violation of a protective order. As discussed above, the record shows that after Father went to prison in 2019, he did not have any visits with B.R. until the two-family therapy sessions conducted several months after his release.

Unlike the father in *T.H.*, the record establishes by evidence that is both clear and convincing that Father did not maintain a relationship with or provide support to B.R. throughout his incarcerations. Although in-person or video visits were not conducted due to B.R.'s PTSD diagnosis, there is no evidence in the record to show that Father took any other steps to maintain a relationship with his son during these significant periods of incarceration. As the State points out in its brief, when "planning for permanency, the safety and well being of children shall be paramount." K.S.A. 38-2263(a).

A review of the record also shows that even when Father was not incarcerated, he failed to successfully complete several requirements of the case plan. We find it to be significant that although Father was released from custody in January 2022, he had not obtained safe and stable housing, had not obtained and maintained employment, had not submitted acceptable UAs as requested, and had not taken a mental health intake and assessment by July 2022. Furthermore, the record shows that Father was arrested again in

April 2022—this time for distribution of a controlled substance causing death—and remained in the Douglas County Jail until the day before the termination hearing. Unfortunately, Father has been unable to maintain a positive direction in his life and this has led to him not being able to take the appropriate steps necessary for reintegration.

Consequently, we find that there is clear and convincing evidence to establish to support the district court's finding that the presumption of unfitness applied to Father in this case and that Father has failed to overcome this presumption. At the time of the termination hearing, B.R. had not resided with his Father for a significant portion of his life. Much of that time Father has been incarcerated. Furthermore, under these circumstances, we find there is clear and convincing evidence in the record to support the district court's finding that Father was unfit by reason of conduct or condition which rendered him unable to care properly for B.R. and that the condition was unlikely to change in the foreseeable future.

In addition, Father argues that reasonable efforts were not made—as required by K.S.A. 38-2269(b)(7)—to rehabilitate the family. However, based on our review of the record, we find that the State established that KVC took reasonable steps toward reintegration while also considering B.R.'s well-being. While Father focuses on the few positive steps he took to complete the case plan, he downplays the significant evidence presented to the State to establish his unfitness as well as to establish that his unfitness is unlikely to resolve itself in the foreseeable future. As the record reveals, this case has been going on for nearly three years—which is about half of B.R.'s life. Thus, we agree with the district court that a permanent disposition of this case is warranted.

Based on a review of the record, the district court did not err in determining that Father did not make the required efforts to satisfy K.S.A. 38-2269(b)(8). While Father was able to make some progress on case plan tasks while in custody, he did not keep

himself out of jail when the opportunity arose. We also see no evidence in the record to suggest that Father provided financial support to B.R during the case.

The district court also found that Father was unfit because he failed to maintain regular visitation, contact, or communication with B.R. or B.R.'s custodian under K.S.A. 38-2269(c)(2). In its ruling, the district court focused on the fact that Father was unable to give particular details about B.R.'s life. For example, he was unable to give his teacher's name, nor did he have an understanding regarding the extent of B.R.'s special needs. While incarcerated, Father had the opportunity to contact the foster family with whom B.R. was residing to find out how his son was doing. Nevertheless, Father made no attempts to contact them, nor did he send B.R. any cards, letters, or gifts while he was incarcerated or in the few months when he was not in custody. Hence, we find that the district court did not err in finding that Father was unfit under K.S.A. 38-2269(c)(2).

The district court further found that Father was unfit under K.S.A. 38-2269(c)(3) because he failed to carry out a reasonable plan directed toward the reintegration of B.R. into the parental home. Although the district court did not elaborate on the finding, we find—based on our review of the record on appeal—that there was clear and convincing evidence presented by the State upon which a reasonable fact-finder could conclude that Father failed to carry out the required tasks under the case plan. As such, we conclude that the district court did not err in determining that Father is unfit under K.S.A. 38-2269(c)(3).

Turning to the issue of whether Father's unfitness is likely to change in the foreseeable future, a review of the record shows a history of conduct that suggests that he has not turned his life around. Likewise, we find that there is little—if anything—in the record to suggest that his conduct will change at any point in the foreseeable future. At the time of the termination hearing, Father had been out of jail for less than a day and had a significant felony charge pending against him. Further, at that point, B.R. had been in

out-of-home placement for three years of his six and a half years of life. Certainly, that is a substantial period of time, especially when viewed from a child's perspective of time.

Finally, Father contends that the district court abused its discretion that the termination of his parental rights was in B.R.'s best interests. A judicial action constitutes an abuse of discretion only 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—in this case Father—bears the burden of showing such abuse of discretion. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017). Here, because Father does not argue that the district court's decision was based on an error of law or an error of fact, we simply address whether the decision was arbitrary, fanciful, or unreasonable.

Under K.S.A. 38-2269(g)(1), after making a finding of unfitness, the district court "shall consider whether termination of parental rights . . . is in the best interests of the child." In doing so, "the court shall give primary consideration to the physical, mental and emotional health of the child." K.S.A. 38-2269(g)(1). Based on our review of the record on appeal, we conclude that the district court's finding that the termination of Father's parental rights was in B.R.'s best interests was reasonable and was not arbitrary, fanciful, or capricious.

In the case of *In re M.S.*, 56 Kan. App. 2d 1247, 1263-64, 447 P.3d 994 (2019), this court found:

> "When assessing the foreseeable future, this court uses 'child time' as the measure. The Revised Kansas Code for Care of Children—K.S.A. 2018 Supp. 38-2201 et seq.—recognizes that children experience the passage of time in a way that makes a month or a year seem considerably longer than it would for an adult, and that different perception typically points toward a prompt, permanent disposition. K.S.A. 2018 Supp. 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 care proceedings 'in the sense that a year . . . reflects a much longer portion of a minor's life than an adult's')."

As discussed above, B.R. has spent a substantial portion of his life in out-of-home placement. The record reveals that during this time, he has established a close relationship with the foster family with whom he has been residing. It was not unreasonable for the district court to conclude that B.R. is entitled to a chance at permanency. Unfortunately, this is something that neither his Father nor Mother has been able to provide throughout his life. Accordingly, we find that the district court did not abuse its discretion by finding that termination of Father's parental rights was in B.R.'s best interests.

CONCLUSION

Viewing the record on appeal in the light most favorable to the State as the prevailing party, we find clear and convincing evidence to support the district court's finding that Father is unfit because of conduct or condition which renders him unable to properly provide care to B.R. Likewise, we find clear and convincing evidence to support the district court's finding that the conduct or condition that makes Father unfit to properly provide care to B.R. is unlikely to change in the foreseeable future when viewed from the perspective of the child. Finally, we find that the district court did not abuse its discretion in ruling that termination of Father's parental rights was in B.R.'s best interests. Therefore, we affirm the district court's order terminating Father's parental rights.

Affirmed.