

NOT DESIGNATED FOR PUBLICATION

No. 126,280

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of S.T., a Minor Child.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; J. PATRICK WALTERS, judge. Submitted without oral argument. Opinion filed October 20, 2023. Reversed and remanded with directions.

Jordan E. Kieffer, of Jordan Kieffer, P.A., of Bel Aire, for appellant natural father.

Kristi D. Allen, assistant district attorney, and *Marc Bennett*, district attorney, for appellee.

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

PER CURIAM: In 2019, the district court terminated J.T. (Father)'s parental rights to S.T., his minor son who had been in State custody practically since his birth in 2017. On appeal, another panel of our court reversed this first termination concluding the evidence did not support the finding that the conditions of unfitness were unlikely to change in the foreseeable future. Then, on remand, the district court again terminated Father's parental rights, leading to this second appeal. After careful review, we find only one of the factors upon which the district court found termination appropriate was pled in the State's motion for termination—that is, Father's conviction of a felony and imprisonment. And on that single factor, Father's condition has changed, and no evidence supports his continuing unfitness. As unfortunate a situation as it presents for this child's permanency, we again reverse the district court's termination of Father's parental rights and remand the case for further proceedings as outlined below.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2017, five days after his birth, S.T. was placed into protective custody due to being a newborn exposed to methamphetamine in utero and his mother having additional children who were not in her care. See *In re S.T.*, No. 121,376, 2019 WL 6795836, at *1 (Kan. App. 2019) (unpublished opinion). At the time, Father was reportedly homeless, unemployed, and could not provide appropriate care for S.T. Mother eventually relinquished her parental rights to S.T. and does not participate in this appeal.

Father's attempts to engage with his son were hampered by his criminal behavior. First, in June 2017, Father was arrested on felony assault and firearms charges. After entering a plea, he was sentenced to prison but placed on probation. By September 2017, Father began supervised visits with S.T. and started working on his reunification plan. S.T. remained in an out-of-home placement.

But Father's efforts did not last. In August 2018, Father was charged with misdemeanor domestic battery, which prompted the revocation of his probation and imposition of a 23-month imprisonment. In his prior appeal, our court noted the troubling nature of Father's criminal history prior to S.T.'s birth, which included three convictions for the battery or domestic battery of three different women between 2007 and 2010 and "a number of other cases" which the district court judicially noticed. 2019 WL 6795836, at *4.

While in prison, Father had no contact with S.T. Testimony in the 2019 hearing indicated this lack of contact while incarcerated is not uncommon and phone contact would have been impractical given S.T.'s age at the time.

It is important to note at this juncture that S.T. was placed in a kinship placement in September 2018 in the state of Alabama. This placement was the same family who had previously adopted S.T.'s half-sibling. Prior to that, S.T. was in three foster placements, equating to a total of 4 placements in 17 months—the entirety of his young life.

The State moved to terminate Father's parental rights, and ultimately, the district court did so in January 2019. There, the district court found Father was unfit due to conviction of a felony and imprisonment and failure to maintain regular visitation, contact, or communication with the child, that the conditions creating Father's unfitness were unlikely to change in the foreseeable future, and it was in S.T.'s best interests to terminate Father's parental rights. At that time, the district court calculated Father would be released from prison in approximately six months.

Father appealed. Ultimately, another panel of our court reversed the termination of Father's parental rights, holding there was insufficient evidence that Father's unfitness would be unlikely to change in the foreseeable future. 2019 WL 6795836, at *4. The panel elaborated: "The two bases on which the district court found [Father] to be unfit would have been substantially mitigated within six months of the termination hearing assuming [Father] were released from prison in July 2019." 2019 WL 6795836, at *4. However, at the time the panel heard the appeal in November 2019, Father's custodial status was unclear.

The panel instructed the district court that, on remand, S.T. would remain a child in need of care and in the custody of the Kansas Department for Children and Families (DCF), but the court must assess whether S.T. continued to be in need of care and then consider either a revised family unification plan or a new termination hearing. 2019 WL 6795836, at *4.

Following remand, the district court scheduled a permanency hearing in March 2020 but, because of the COVID-19 pandemic, this hearing was repeatedly continued. But after remand and prior to the permanency hearing, Father began cooperating with the agency right away. In March 2020, Father was communicating with the case team and had provided copies of his lease and paystubs. By May 2020, Father had nearly finished a batterers intervention program and was asked to again complete any court orders that had been performed more than a year before. His new partner was asked to execute the same case plan tasks, after completing her background check. Visits with S.T. were on hold until the case team received "therapeutic input" because it had been over a year since Father had visits with S.T.

In July 2020, Father produced certificates of completion for anger management and substance abuse treatment programs that he completed while in prison. At that time, S.T.'s therapist, Angela Mains, reported S.T.'s best interests would not be served by visits with Father until "more [was] known about the plan for [S.T.'s] permanent care moving forward." According to Mains' report to the case team, "visits with Father could bring up uncomfortable feelings tied to [S.T.'s] implicit memories." The therapist continued that "these uncomfortable, implicit memories could be why visits with Paternal Grandmother are difficult for [S.T.]" During those visits, S.T. showed signs of dysregulation.

Later that same July, a permanency hearing was held. At that hearing, reintegration was set as the goal and S.T. remained in his out-of-state placement. Saint Francis Ministries (SFM) was ordered to prepare a written assessment in accordance with this court's remand to address whether a revised family reunification plan or termination hearing was appropriate. Father was also ordered to submit to a psychological evaluation.

In Father's clinical interview in July 2020, he denied growing up in an abusive household, although a prior assessment evidenced otherwise. The clinical interviewer concluded that Father was unfamiliar with the impact of drug exposure on children and

how to engage a child in bonding activities. Even after the interviewer explained the concern for S.T.'s emotional needs after having had no contact with Father for such an extended period, Father was essentially of the opinion that because he "won the appeal" and S.T. was his child, S.T. should live with Father. The interviewer recommended Father review the recommendations from S.T.'s therapist and follow them, contact a practitioner certified in Trust Based Relational Interventions to learn about ways to best parent a child from a traumatic background, and use this information to build a relationship with S.T. during future visits.

By August 2020, S.T.'s therapist still advised against visits with Father while Father continued to follow agency recommendations. In October 2020, both Father and his partner completed the recommended Trust Based Relational Intervention class.

In January 2021, Mains submitted another report stating it was not in S.T.'s best interests for reintegration to occur because his current kinship placements were "the only parents [he] knows" and S.T.'s mental health could not sustain it. Mains believed reintegration would "drastically" increase S.T.'s likelihood of reentering the foster system in the future. The therapist opined that based on Father's history as a violent offender and S.T.'s parenting needs, Father needed long-term therapy to properly parent S.T.

Also in January 2021, Rhiannon Holmes, the SFM permanency specialist, contacted S.T.'s therapist to inquire how best to initiate therapeutic visits between S.T. and Father. Mains inquired about the purpose of the visits because that would influence her recommendation as to how the visits should be initiated. Holmes reported to Mains that the case team continued to work toward reintegration, but that the case plan goal of adoption had not changed. Holmes told Mains Father wanted visits with S.T., but there was no guarantee that S.T. would reintegrate; the visits were an effort to determine the dynamic between S.T. and Father. As of Holmes' report to the court, S.T.'s therapist had provided no recommendations for how visits should proceed.

Meanwhile, Father continued to meet with the case team and maintain employment and housing while persisting in seeking visits with S.T. In February 2021, Father filed a motion for finding a lack of reasonable efforts and for a court order directing therapeutic visits to begin. Yet in March 2021, at a permanency hearing, the district court found that reintegration was no longer a viable option. A transcript of that hearing is not in the record on appeal, so the district court's precise reasoning is unknown. The district court record reveals no ruling on Father's motion.

In May 2021, the State moved to terminate Father's parental rights to S.T. The State alleged Father was unfit due to a conviction of a felony and imprisonment and the failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family.

The district court held a two-day hearing in March 2022 and June 2022. On the first day of the hearing, the district court heard testimony from Father, the child's foster mother (A.B.), and Mains, S.T.'s therapist in Alabama. Father testified regarding his efforts to stay clean, sober, and law-abiding, and to comply with agency requirements to obtain visits with S.T. Although Father generally agreed that both he and S.T. would "need guidance and counsel . . . to have visitations," he testified, "Whatever it would take, I would do." While concerned about the negative impact visitation could have on S.T., Father said the potential for such impact simply involved "a lot of opinions." Father admitted that since his release from prison, he could not recall sending S.T. any gifts or cards. He also admitted he had not had contact with Mains, S.T.'s therapist, and his testimony reflects he did not fully understand S.T.'s struggles.

A.B. testified that she, her husband, and their adopted son (S.T.'s half-brother) live in Alabama, and S.T. had lived with them since he was 17 months old. At the time of the hearing in 2022, S.T.'s time in their home totaled approximately three and a half years. A.B. testified regarding problems with S.T.'s emotional development and his difficulty

regulating his emotions, noting his reactions to events are "more escalated than the situation calls for." She described his emotional maturity of more like "two-and-a-half, three-year-old behavior" rather than a typical four-year-old. Because of this, parenting S.T. "requires a ton of patience" and understanding that a lot of his behaviors come from his prenatal trauma. He requires "high structure and high nurturance." A.B. attempted to explain S.T.'s biological parentage with age-appropriate books but was unsure of S.T.'s ability to comprehend the topic.

Mains, S.T.'s therapist in Alabama, also testified. She was privately retained by A.B. in 2019 to help transition S.T. from his prior placement to their home. Mains described S.T.'s behavioral concerns to be his meltdowns and his inability to reestablish a sense of calm after things do not go the way he wants them to. His behavioral difficulties require adults around him to be "very well regulated." She testified if S.T. had a caregiver with a history of lack of patience or ability to regulate his or her behavior it would make it much more difficult for S.T. to learn to regulate himself. Mains also testified about the long-term impact of in utero methamphetamine exposure, including visual-motor difficulties, aggression, and cognitive impairments. Because of these current and possible future struggles, it was Mains' opinion that S.T. needed a caregiver that is calm and patient, and a caregiver who will get him the resources he needed.

During therapy, Mains worked with S.T. to explain his story, using the same book that his placement, A.B., used. At first, he was very receptive and curious, but as the topic continued to be addressed in therapy, S.T. became "very dysregulated" and started to growl. Mains had strong concerns about S.T. being reintegrated with Father. She testified a move from S.T.'s placement would be "catastrophic" to his mental health, because "he would not only be having a massive transition, but he would no longer have access to the people that have helped him make sense of his world to this point." Mains was very concerned with Father's ability to parent S.T. given S.T.'s needs and Father's

long history of violence and his general lack of awareness of his and S.T.'s emotional needs.

Because of all these factors, Mains' recommendation from the outset of her involvement in the case was that S.T. was not emotionally prepared to meet Father. Mains sympathized with Father and applauded his work but testified that the "unfortunate reality is that for this child in this case, the time for him to have been doing all of this work would have been when he found out his girlfriend was pregnant or before he ended up in jail." She believed reintegration would cause "irreparable harm" to S.T. She also theorized that Father would never be an appropriate parent for S.T. because of S.T.'s special needs and that Father had never engaged in deep therapeutic work to gain insight into his own history and behavior.

Mains testified that if she had been directed by the court or the agency to begin to facilitate reintegration, while her professional recommendation would not change, she would have attempted to come up with a plan that would have helped accommodate her recommendations while trying to minimize the harm to S.T.

Three months later, the second day of the hearing took place in June 2022. S.T.'s placement had hired another therapist—Sonia Martin—to do a bonding assessment in the summer of 2020. She revisited the family in August 2021. That therapist testified she reached out to Father's attorney to facilitate Father's participation in the assessment. She spoke with Father on the phone and reached out to Father via text messages, but Father never contacted her back. Participation in the bonding assessment was not a required task from the agency.

Martin testified what concerned her was that Father had not appeared to have a meaningful investment in S.T.'s life even though "[a]bsent any direct contact with the foster parents, [Father] still has enumerable ways that he could be vesting himself in the

life of his son." She gave some examples of inquiring with S.T.'s therapist about big picture things, like his progress, his schedule, what he would be doing to prepare himself to meet S.T.'s needs and about smaller details like his favorite sippy cup or favorite food. She also testified that although there was a process for S.T. to receive gifts from biological family, Father had not availed himself of that process. She noted each person seeking to parent S.T. should "really purposely, intentionally pursue this child," and that was not happening in this case. Martin estimated it would take Father and S.T. a minimum of nine months to form a bond, once visits could begin.

Finally, Holmes, the permanency specialist with SFM, testified. Holmes was the prior caseworker on Father's case, and then was reassigned to it after the case was remanded. Holmes testified that she provided Father resources to complete the court orders in the case and the two met monthly. During these meetings Father would ask only "very general" questions about S.T., like "how is [S.T.] doing."

Holmes discussed that she opted to follow Mains' recommendation of no visits. She stated that the agency was in support of Mains' recommendations because of the potential for trauma Mains outlined in her reports and in their conversations. Father regularly asked for visits with S.T., but Holmes stated they typically follow the therapist's recommendations. This pushback on visitations frustrated Father. In August 2021, Holmes was in Father's house, attempting to explain her role as a neutral party, when Father became very angry, yelling at Holmes, "The hell you are neutral." He then proceeded "to kick [her] out of his home." Father denied this altercation with Holmes but admitted asking her to leave.

Holmes testified that she encouraged Father to reach out to S.T.'s therapist, Mains, to discuss her recommendations, and she testified that Father told her he had, but that he had never gotten a call back. Yet, Father testified he never reached out to Mains, as he believed it was her job to contact him.

Holmes did recall mailing a stuffed dinosaur to S.T. on Father's behalf in February 2020, but nothing else was sent. Holmes noted that not every parent has the financial means to regularly send gifts, but Father also did not send any cards.

Holmes discussed Father's assigned psychological evaluation. It took Father well over a year to complete the evaluation after it was ordered, and it could not be interpreted because Father was not forthcoming or cooperative in the evaluation. From Holmes' perspective, Father was not concerned with S.T.'s needs or interested in the visitation or reintegration process but was more concerned about his needs and desires, and that "because he needs [S.T.], [S.T.] needs him." When asked what Holmes could do at this point to move the case forward and achieve reintegration, Holmes responded that she did not know of anything that could be done. Although Father had complied with the agency's requests, he was not emotionally fit to parent S.T. Ultimately, Holmes testified Father made no secondary change.

At the conclusion of evidence, the district court took the matter under advisement and requested proposed findings of fact and conclusions of law from the parties. Then, following its consideration of the evidence and the parties' submissions, the district court entered an order terminating Father's parental rights to S.T.

In that order, the district court held that clear and convincing evidence supported a finding that Father was presently unfit due to statutory factors listed in K.S.A. 38-2269(b) and other factors not listed, which included:

- His lengthy criminal history and history of dysregulation;
- His conviction of a felony and imprisonment;

- S.T.'s lack of bond with Father and the "irreparable emotional and psychological damage" to S.T. that would result from further attempts to place S.T. with Father; and
- Father's failure to adjust his circumstances to meet S.T.'s needs and his failure to make secondary change.

The district court found that this unfitness was unlikely to change for the foreseeable future. Specifically, the district court held that, in child's time, Father was not able to meet S.T.'s needs for the foreseeable future. The court elaborated that S.T. had been in foster care his entire life and had no bond with Father. At a minimum, it would take Father and S.T. nine months of visitation to bond before reintegration, but that visitation could not begin until Father began individual therapy, which he had not done.

Finally, the district court held that it was in the best interests of S.T. to terminate Father's parental rights. The district court held: "Not only is there a lack of any evidence that termination of [Father's] parental rights would cause trauma for [S.T.], . . . the exact opposite is true in this case; failure to terminate [Father's] parental rights will likely cause permanent, irreparable psychological and emotional damage to [S.T.]."

Father now appeals the termination of his parental rights.

DID THE DISTRICT COURT PROPERLY TERMINATE FATHER'S PARENTAL RIGHTS?

On appeal, Father does not challenge the district court's finding on his present unfitness. Rather, his argument is that there was not clear and convincing evidence on remand to support the district court's finding that he was unfit for the foreseeable future or that termination was in S.T.'s best interests. As such, we do not review the district court's unfitness determination. See *In re Adoption of Baby Girl G.*, 311 Kan. 798, 803, 466 P.3d 1207 (2020) (an issue not briefed is deemed waived or abandoned).

Before we begin our review, we must note another disturbing flaw with Father's brief. A review of the record indicates that the district court found Father unfit for reasons that were not pled in the State's motion to terminate his parental rights. Such a discrepancy violates Father's due process rights. See *In re E.K.*, No. 125,688, 2023 WL 4677009, at *5-6 (Kan. App. 2023) (unpublished opinion) (holding "a parent must be apprised of *what* the State intends to prove by that standard in establishing unfitness"); see also *In re D.G.*, No. 125,366, 2023 WL 2194320, at *3 (Kan. App. 2023) (unpublished opinion) (panel declines to consider district court's findings of unfitness based on statutory grounds not raised in motion to terminate); 2023 WL 2194320, at *7 (Atcheson, J., dissenting) (majority correctly declines to consider grounds not raised in motion because parent "lacked fair notice" and reliance "likely would" result in due process violation); *In re B.C.*, No. 125,199, 2022 WL 18046481, at *3 (Kan. App. 2022) (unpublished opinion) (district court "almost certainly" would deprive parent of fair notice and violate constitutional due process protections to find unfitness on statutory ground not identified in motion to terminate), *rev. denied* 317 Kan. ____ (March 28, 2023); *In re A.J.*, No. 124,854, 2022 WL 15549863, at *5 (Kan. App. 2022) (unpublished opinion) (State concedes error when district court finds unfitness on statutory ground not included in motion to terminate); *In re K.H.*, No. 121,364, 2020 WL 2781685, at *7 (Kan. App. 2020) (unpublished opinion) (parent denied constitutional due process when district court relied on ground of unfitness not alleged in motion to terminate); *cf. In re M.G.*, No. 115,007, 2016 WL 4159902, *8-9 (Kan. App. 2016) (unpublished opinion) (listing all statutory factors for unfitness in K.S.A. 38-2269 in termination motion and identifying only cursory factual support deprived parent of constitutional due process).

Yet Father made no mention of this due process violation in his brief. To avoid repeating this due process violation, we only review if there was proper evidentiary support that the two factors of unfitness for which Father did have proper notice were unlikely to change for the foreseeable future—unfitness due to a conviction of a felony

and imprisonment and the failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family. See K.S.A. 38-2269(b)(5), (b)(7).

Applicable Legal Standards

A parent has a fundamental constitutionally protected liberty interest in the relationship with his or her child. See *Santosky v. Kramer*, 455 U.S. 745, 753, 759-60, 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). Because parental rights are fundamental, the State may extinguish the legal bonds between parent and child only upon clear and convincing proof of parental unfitness. K.S.A. 38-2269(a); *In re R.S.*, 50 Kan. App. 2d 1105, Syl. ¶ 1, 336 P.3d 903 (2014). To terminate parental rights, the court must find "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." K.S.A. 38-2269(a). When considering unfitness, the district court may consider a nonexclusive list of nine conditions that singularly or in combination would amount to unfitness. K.S.A. 38-2269(b), (f). The court must also find that the conduct or condition causing the unfitness is "unlikely to change in the foreseeable future." K.S.A. 38-2269(a).

An appellate court reviews a district court's termination of parental rights in the light most favorable to the State to determine if we are "'convinced that a rational factfinder could have found it highly probable, *i.e.*, by clear and convincing evidence, that the parents' right should be terminated.'" *In re K.H.*, 56 Kan. App. 2d 1135, 1139, 444 P.3d 354 (2019). In our review, we will not "weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact." *In re B.D.-Y.*, 286 Kan. at 705.

Analysis

As discussed, to prevent continuation of a due process error on appeal, we must square the grounds on which the State notified Father it would be pursuing termination with the grounds on which the district court found unfitness. Because Father does not challenge the unfitness finding we will only review to see if the pleaded condition rendering Father unfit was unlikely to change for the foreseeable future.

Here, the State's motion alleged Father was unfit due to a conviction of a felony and imprisonment and the failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family under K.S.A. 38-2269(b)(5) and (7). In its journal entry, the district court found Father unfit due to: his lengthy criminal history and history of dysregulation; his conviction of a felony and imprisonment; S.T.'s lack of bond with Father and the "irreparable emotional and psychological damage" to S.T. that would result from further attempts to place S.T. with Father; and Father's failure to adjust his circumstances to meet S.T.'s needs and his failure to make secondary change.

Comparing the State's motion with the district court's order, then, we find only one overlapping ground of unfitness: Father's conviction of a felony and imprisonment. See K.S.A. 38-2269(b)(5).

When considering whether a condition of unfitness is unlikely to change in the foreseeable future, courts can consider a parent's past conduct as evidence regarding the reasonable likelihood of any future change in parental fitness. See *In re M.S.*, 56 Kan. App. 2d 1247, 1264, 447 P.3d 994 (2019); *In re Price*, 7 Kan. App. 2d 477, 483, 644 P.2d 467 (1982). The consideration of "foreseeable future" is based "from the child's perspective, not the parent[']s, as time perception of a child differs from that of an adult." *In re S.D.*, 41 Kan. App. 2d 780, Syl. ¶ 9, 204 P.3d 1182 (2009); see K.S.A. 38-2201(b)(4).

Here, the district court's entire ruling on the likeliness of Father's unfitness resolving in the foreseeable future included a discussion of "child time" and that the court may look to a parent's past conduct as a predictor of future behavior. But the district court's analysis of Father's unfitness in the future is condensed to the following paragraph:

"In the instant case, taking child time into consideration, [Father] will not be in a position to meet the physical, mental or emotional needs of [S.T.] for the foreseeable future. [S.T.] has now been in foster care and without permanency for over five years, the entirety of his life. He currently has no bond with [Father] and very little understanding of who [Father] is beyond being his 'tummy daddy.' Sonia Martin, the bonding expert, testified it would take, at a minimum, nine months of visitation between [S.T.] and [Father] before reintegration could occur. However, [S.T.'s] therapist continues to recommend that visitation not occur. In fact, Angela Mains noted that during a recent therapy session when she brought up the topic of birth parents with [S.T.] he came dysregulated and begin to growl. Ms. Mains has no timetable for when it would be appropriate for [S.T.] to start visits, but did testify that this decision needs to be made on [S.T.'s] terms. Additionally, [Father] still has not started individual therapy that, by his own admission, would be a necessary component of any plan to reintegrate [S.T.] with him. At this point in time, there is no path available for moving this case forward. [S.T.] is entitled to permanency without any further delays."

The looming problem here is that the only condition on which we may consider Father's unfitness *has* changed and was glaringly missing from the district court's analysis. That is, Father is no longer incarcerated. K.S.A. 38-2269(b)(5) requires an active incarceration. *In re M.H.*, 50 Kan. App. 2d 1162, 1164, 1172, 337 P.3d 711 (2014) (parent unfit due to current felony incarceration and was still serving a 16-month sentence at time of trial); see also *In re S.T.*, 2019 WL 6795836, at *3 ("The ground, however, rests on an actual conviction and present incarceration rather than on a prediction of miscreancy—no matter how sound the prognostication might seem."); *In re A.D.C.*, No. 98,206, 2008 WL 360717, at *3 (Kan. App. 2008) (unpublished opinion)

(parent unfit due to current felony incarceration and unfitness would not change as he would be incarcerated for approximately eight more years).

Just as the prior panel of this court opined could become the reality on remand, the factor upon which the district court deemed Father unfit was mitigated—he was released from prison, and Father was able to fully engage in all plan tasks, except for visitation. Turning back to the current appeal, a careful review of the district court's foreseeable future analysis does not even discuss whether this factor of unfitness was likely to resolve. Not only is the foreseeability determination lacking support from clear and convincing evidence that Father's unfitness is unlikely to change in the foreseeable future, but there is *no* evidence that it is unlikely to change in the foreseeable future because the condition has already resolved. This is not to say that there was not sufficient evidence to support such a finding on other grounds for termination, but those grounds were not plead by the State in its termination motion and, therefore, for this panel to consider lasting unfitness on those grounds would extend the violation of Father's due process rights.

We do not take this decision lightly. Properly pleaded by motion and considered by a trial court, there may be ample evidence in the record that would support termination, and we recognize that S.T. is entitled to—and craves—permanency. See *In re H.C.*, No. 123,502, 2021 WL 2171584, at *10 (Kan. App. 2021) (unpublished opinion). However, as discussed, Father has a fundamental constitutionally protected liberty interest in his relationship with S.T. See *Santosky*, 455 U.S. at 753. And that relationship simply cannot be severed unless the proper procedures are followed, and the holdings are sufficiently supported. See K.S.A. 38-2269(a). Because only one factor—incarceration—was both pleaded by the State's motion and considered by the district court, to afford Father the appropriate due process protections, we may only consider that factor. And, there was no evidence that Father's incarceration was unlikely to change in the foreseeable future because it had already resolved. So, we are left with little choice—we must reverse the district court's decision and remand for further proceedings.

On remand, the district court must promptly and expediently hear evidence during a permanency hearing as contemplated by K.S.A. 38-2264. The district court must determine whether a revised family unification plan with the goal of reintegration is appropriate, or if reintegration is no longer a feasible option. If the district court finds that reintegration is a viable goal, all parties—including the agency and the court—must work urgently toward that goal. If the district court finds that reintegration is no longer achievable, it should swiftly proceed with a new termination hearing, bearing in mind that Father must be explicitly notified in the State's motion of any statutory or non-statutory grounds on which the State seeks termination and on which the district court makes its eventual decision. Until and through such process is complete, S.T. should remain in the legal custody of the DCF.

Both the State and the district court must approach this third pass with the utmost caution and attention to detail. At this point, failures in the process at multiple steps have led to a regrettable lack of permanency in S.T.'s young life.

Because the foreseeability of continuing unfitness was unsupported by clear and convincing evidence, we need not review whether termination was in the best interests of S.T.

Reversed and remanded with directions.