NOT DESIGNATED FOR PUBLICATION

No. 118,188

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Guardianship and Conservatorship of

B.H., D.D., S.D., and V.D.,
Minor Children.

MEMORANDUM OPINION

Appeal from Wilson District Court; TOD MICHAEL DAVIS, judge. Opinion filed September 21, 2018. Reversed and remanded.

*John J. Gillett*, of Chanute, for appellants.

*G. Thomas Harris*, of Harris Law Office, of Fredonia, for appellees.

*Charles H. Apt III*, of Apt Law Offices, LLC, of Iola, guardian ad litem.

Before STANDRIDGE, P.J., HILL and BUSER, JJ.

BUSER, J.: This is an appeal of the district court's denial of a motion to terminate a guardianship and conservatorship. Mother and Father (collectively, parents) of B.H., born in 2000, D.D., born in 2001, S.D., born in 2004, and V.D., born in 2005 (collectively, children), jointly appeal the district court's ruling that extraordinary circumstances required the district court to continue the guardianship and conservatorship by M.B. and her husband G.B. (collectively, guardians). During the pendency of this appeal, B.H. turned 18 years of age and the district court "summarily closed" the guardianship and conservatorship as to him. As a result, this appeal only relates to D.D., S.D., and V.D.

On appeal, Mother and Father contend the district court committed reversible error when it denied their motion to terminate the guardianship and custodianship. They assert there is insufficient evidence to support the district court's judgment and that they are fit parents. Mother and Father also claim legal error because the district court failed to identify the extraordinary circumstances it found existed in this case and failed to apply the parental preference doctrine in its ruling. Upon our review, we reverse the district court's order denying the motion to terminate the guardianship and conservatorship. We remand the case to the district court with directions to terminate the guardianship and conservatorship in a reasonable and timely manner.

## FACTUAL AND PROCEDURAL BACKGROUND

After Mother and Father's arrest for possession and manufacture of methamphetamine, in September 2010, the Wilson County attorney filed four child in need of care (CINC) petitions relating to Mother and Father's children, B.H., D.D., S.D., and V.D. Father is the biological father of B.H., but Mother is not the biological mother. On the other hand, Mother is the biological mother of D.D., but Father is not the biological father. Father and Mother, however, are the biological parents of S.D. and V.D. All four children lived with Mother and Father at the time of the parents' arrest on drug charges.

The children were adjudicated CINC in October 2010. After that ruling, Mother and Father voluntarily consented to a guardianship and conservatorship. The district court granted the guardianship and conservatorship of the children to Father's cousin, M.B. and G.B. The district court then terminated the CINC proceedings. Of note, Mother and Father's parental rights were never terminated. The couple later divorced.

Mother served about four years in prison and was released from custody in December 2014. Upon her release, Mother lived with the guardians for four months, until

she moved nearby to Paola, Kansas. Father was incarcerated for about two and a half years and was released from custody in July 2013. Upon his release, Father moved back to Washington where he lives with his girlfriend, works as a commercial fisherman, and does odd jobs. Both parents successfully completed their paroles.

In July 2016, Mother and Father jointly filed a petition with the district court to terminate the guardianship and conservatorship. As of that date, the children had lived with the guardians for over five years. Both the guardians and the court-appointed guardian ad litem (GAL) for the children opposed the petition.

A hearing was held on the petition on November 18, 2016, and April 28, 2017. At the hearing, M.B. testified that each of the children have special needs and unique behavioral issues. For example, S.D. had "temper tantrums" and had numerous lying and stealing issues. On the other hand, D.D. and V.D. were withdrawn and quiet, and V.D. had severe speech problems and was far behind in his education. M.B. stated, however, that these problems had diminished over the years while the children were under the guardians' care. According to M.B., there was a close bond between the children and she feared that terminating the guardianship would separate the children due to their mixed parentage.

Mother testified that she currently lives in a two bedroom, one bathroom townhome with her boyfriend, and she works at a local grocery store and gas station. Although she lives fairly close to her children, Mother testified that her contact with them was limited because of the children's busy schedules and her impression that M.B. did not want them to "interact and bond" with her. In this regard, Mother noted that M.B. had previously told her she could not attend the children's school or sporting events unless one of the guardians was present.

Although Mother maintained she could financially support all four children, she had not prepared a budget, and she admitted that her emergency funds consisted of whatever money her boyfriend had in his wallet. But Mother assured the district court that her home could accommodate all four children. Mother testified that for $103 per month she could provide health insurance for the children. She also indicated that she had taken two parenting classes while in prison.

E.C., Mother's friend and fellow employee, testified that she had visited Mother's home on many occasions, and she described it as a nice, fully furnished home with beds, and desks for the children. D.J., Mother's boyfriend, testified that Mother had worked hard to prepare a nice home for the children.

Father testified that he is a commercial fisherman in Washington and also does various odd-jobs as an independent contractor. In 2016 he earned $52,000 for a half year of working as a commercial fisherman. Father acknowledged his contact with the children had been sporadic and his time to parent was limited because he spent more time in than out of prison between 1998 and 2013. While in prison, he had phone calls with the children and corresponded by letters. Father admitted that he frequently used methamphetamine when the children lived with Mother and Father, but he maintained that he had made positive changes in his life. Father testified that he obtained his GED and received specialized education and training in construction. He expressed a willingness to keep the children together by whatever means possible.

C.R., Father's girlfriend, said the couple lived in a three bedroom, single-wide trailer with a large yard and many animals. According to C.R., there are bedrooms to accommodate the children. If the children were to live with Father, an elementary and middle school are located nearby.

While Mother and Father were in prison, a monthly child support order was established for each parent ordering them to pay $407 per month. In part, due to their incarceration, the parents accrued child support arrearages. At the hearing, Father testified he was currently paying $529 every two weeks in child support, and he estimated that he owed nearly $25,000 in child support. Mother testified that she was currently paying $500 per month in child support. At the time of the hearing, Mother had reduced the amount she owed from $20,000 to $17,000.

Mother and Father proposed that the children would live with Mother during the school year while Father would care for the three youngest children on holidays, spring break, and in the summertime.

On July 18, 2017, the district court issued its order denying the motion to terminate the guardianship. In its findings of fact, the district court found that Mother and Father had maintained little meaningful contact with the children, that substantial support arrearages were due and owing, and that the parents have limited financial resources. The district court found that all of the children have special needs, although the nature and extent of those needs were not identified. The district court also determined that the children had developed close bonds with the guardians, and they were actively involved with school and community activities.

In its conclusions of law, the district court found that "when the parents are unfit, or extraordinary circumstances exist, then the best interest[s] of the children are to be considered." The district court found that extraordinary circumstances existed and that terminating the guardianship and conservatorship would be contrary to the best interests of the children. The district court also concluded that "having found extraordinary circumstances exist, this Court does not determine whether [Father] and [Mother] are fit parents." Finally, the district court found "clear and convincing evidence that the Guardianship and Conservatorship should not be terminated."

Mother and Father timely filed this appeal.

## ANALYSIS

On appeal, Mother and Father contend the district court erred in denying their motion to terminate the guardianship and custodianship.

Before delving into the analysis, a brief review of the basics of a guardianship and conservatorship is in order. The parents focus their arguments on the guardianship. A guardian is a court-appointed person acting on behalf of a ward with statutory duties and responsibilities. K.S.A. 2017 Supp. 59-3051(e). If the ward is a minor, these duties and responsibilities include: custody and control of the minor and provision for the minor's care, treatment, habitation, education, support, and maintenance. K.S.A. 2017 Supp. 59-3075(b)(1). "Guardianships give parents an opportunity to temporarily relieve themselves of the burdens involved in raising a child, thereby enabling parents to take those steps necessary to better their situation so they can resume custody of their child in the future." Elrod, Child Custody Practice and Procedure § 4:6, p. 429 (2018).

A guardianship, however, is neither permanent nor a "legal right" with the same legal standing as an adoption. See *In re Guardianship of Williams*, 254 Kan. 814, 828, 869 P.2d 661 (1994). Moreover, appointment of a guardian is not "'a de facto termination of parental rights.' [Citation omitted.]" *In re Guardianship of H.C.*, No. 105,357, 2012 WL 687074, at *4 (Kan. App. 2012) (unpublished opinion).

The process for terminating a guardianship and conservatorship is set forth in K.S.A. 59-3091. After the filing of a petition and a hearing, "if the court does not find, by clear and convincing evidence, that the ward or conservatee is in need of a guardian or conservator, or both, the court shall order that the guardianship or conservatorship, or both, be terminated." K.S.A. 59-3091(h). Thus, in a motion to terminate guardianship and

conservatorship, a district court must determine whether the ward is "in need of a guardian."

Under Kansas law, a person is "in need of a guardian" if "both an impairment and the lack of appropriate alternatives for meeting essential needs, requires the appointment of a guardian." K.S.A. 2017 Supp. 59-3051(f). This court has previously determined that a child's minority in and of itself is an impairment, leaving only the question of an "appropriate alternative" for cases involving minors. *In re H.C.*, 2012 WL 687074, at *5. An "appropriate alternative" is one that enables a person to "adequately meet essential needs for physical health, safety or welfare, or to reasonably manage such person's estate." K.S.A. 2017 Supp. 59-3051(b). The statute also defines "meet essential needs for physical health, safety or welfare" as "making those determinations and taking those actions which are reasonably necessary in order for a person to . . . be provided with shelter, sustenance, personal hygiene or health care, and without which serious illness or injury is likely to occur." K.S.A. 2017 Supp. 59-3051(i).

Applying these statutes to the facts of this case, the guardians were tasked with proving by clear and convincing evidence that Mother and Father could not meet the children's "essential needs for physical health, safety or welfare"—in other words, that they were unfit—or that extraordinary circumstances existed. See *In re Guardianship and Conservatorship of L.M.H.*, No. 108,297, 2013 WL 2395900, at *7-8 (Kan. App. 2013) (unpublished opinion); Elrod, Child Custody Practice and Procedure § 4:6, p. 429 (2018).

A brief summary of our standards of review applicable to this appeal is in order. First, a judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the trial court; (2) is based on an error of law; or (3) is based on an error of fact. *Wiles v. American Family Life Assurance Co.,* 302 Kan. 66, 74, 350 P.3d 1071 (2015). In particular, an abuse of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper

statutory limitations or legal standards. *Bereal v. Bajaj*, 52 Kan. App. 2d 574, 580, 371 P.3d 349 (2016); see *Matson v. Kansas Dept. of Corrections*, 301 Kan. 654, 656, 346 P.3d 327 (2015).

Second, on appellate review of the sufficiency of clear and convincing evidence, an appellate court asks whether considering all of the evidence in a light most favorable to the prevailing party it is convinced that a rational fact-finder could have determined the contested proposition to be highly probable. *In re B.D.-Y*, 286 Kan. 686, 705, 187 P.3d 594 (2008).

Turning our attention to the merits of this appeal, we first consider Mother and Father's parental fitness. The district court made findings of fact that Mother and Father had significant child support arrearages, limited financial resources, and infrequent meaningful contacts with their children. Despite these limited findings, however, the district court did *not* conclude the parents were unfit to meet their children's essential needs for physical health, safety, or welfare. Instead, the court concluded: "[T]his Court *does not determine* whether or not [Mother] and [Father] are fit parents." (Emphasis added.)

On appeal, Mother and Father point out that the district court did not find the parents were unfit. Mother and Father then argue: "The parents, in fact, showed they were very fit. They have jobs. They earn money and they have nice homes." The guardians respond that Mother and Father were presumptively unfit and highlight evidence favoring parental unfitness. The guardians ultimately conclude, however, that the "issue is moot for the reason that the Court need not find that [Mother and Father] were fit parents if its ruling is based on a finding of the existence of extraordinary circumstances." For his part, the GAL argues that, although the district court did not make a finding of unfitness, "had the Court sought to make a finding as to the continuing unfitness of the [parents], clear and convincing evidence was presented."

Upon our review of the district court's order denying termination it is apparent that while the court found Mother and Father had financial difficulties and limited contacts with their children, the court made no finding of parental unfitness. Supreme Court Rule 165(a) (2018 Kan. S. Ct. R. 215) imposes on the district court the primary duty to provide adequate findings of fact and conclusions of law on the record to explain the court's decision on contested matters. *Fischer v. State*, 296 Kan. 808, 825, 295 P.3d 560 (2013). In its order, the district court considered evidence of parental unfitness and concluded that such a finding was not appropriate.

On appeal the parents attempt to highlight evidence showing their fitness as parents, and the guardians and GAL either focus on evidence tending to show unfitness or point out that it was unnecessary for the district court to make a parental unfitness finding because the court found the existence of extraordinary circumstances to continue the guardianship and conservatorship. We agree that the district court's termination ruling was based solely on a finding of extraordinary circumstances, *not* on a finding of parental unfitness. We decline the litigants' invitation to review and determine for the first time on appeal the parental fitness of Mother and Father.

Next, we consider the district court's finding that "extraordinary circumstances exist in this case." Upon making that finding, the district court then determined that "terminating the Guardianship and Conservatorship would be contrary to the best interest[s] of the children." Of note, the district court made no findings regarding whether the parental preference doctrine was applicable to the facts and circumstances of this case.

In the oft-cited case of *In re Guardianship of Williams*, our Supreme Court articulated the interrelationship between the parental preference doctrine, parental unfitness, highly unusual or extraordinary circumstances, and the best interests of a child:

> "A natural parent's right to the custody of his or her children is a fundamental right protected by the Fourteenth Amendment to the Constitution of the United States which may not be disturbed by the State or by third persons absent a showing the natural parent is unfit." 254 Kan. 814, Syl. ¶ 1.

Moreover, our Supreme Court advised:

> "We adhere to the rule that absent highly unusual or extraordinary circumstances the parental preference doctrine is to be applied in a custody dispute over minor children when the dispute is between a natural parent who has not been found unfit and a nonparent. 254 Kan. at 828.

Finally, with regard to the best interests of the child test, our Supreme Court admonished:

> "The best interests of the child test is the proper rule to apply as between the natural parents of a minor child or children when their custody is at issue. However, absent highly unusual or extraordinary circumstances, the best interests of the child test has no application in determining whether a parent, not found to be unfit, is entitled to custody as against a third-party nonparent." 254 Kan. 814, Syl. ¶ 3.

Applying these legal principles to the case on appeal, it is apparent the district court grounded its judgment denying termination solely upon its finding that extraordinary circumstances existed which necessitated the continuation of the guardianship and conservatorship.

On appeal, Mother and Father complain that "[t]he trial court found there were extraordinary circumstances in this case but did not set out what these were." In response, the guardians do not contest the district court's failure to identify the extraordinary circumstances or the lack of factual findings to support its conclusion that extraordinary circumstances exist. Instead, the guardians list assorted facts which they contend

constitute not only extraordinary circumstances but conditions which are not in the best interests of the children. For example, the list includes, among other things, that all of the children have special needs, it is in the best interests of the children not to separate them, that the parents do not have the financial ability to care for the children, and the parents have had infrequent contact with them. The GAL also suggests certain evidence which he submits constitutes extraordinary circumstances.

Upon our review, it is apparent the district court did not identify or explain what extraordinary circumstances exist in this case. Moreover, on appeal the suggested extraordinary circumstances proffered by the guardians and GAL, in addition to being speculative, include matters that relate to ordinary parental unfitness, none of which exhibit the quality of being extraordinary. Considering all of the evidence in a light most favorable to the guardians, we are not convinced a rational fact-finder could have determined it was highly probable that extraordinary circumstances necessitated the continuation of the guardianship and conservatorship. See *In re B.D.-Y*, 286 Kan. at 705.

Finally, by confusing extraordinary circumstances with factors relating to the best interests of the children, the guardians have run afoul of *In re Guardianship of Williams*' teaching that "absent highly unusual or extraordinary circumstances, the best interests of the child test has no application in determining whether a parent, not found to be unfit, is entitled to custody as against a third-party nonparent." 254 Kan. 814, Syl. ¶ 3. In short, highly unusual or extraordinary circumstances must be shown *before* the court may consider the best interests of the child.

On this record, we are persuaded that the district court's failure to identify any particular extraordinary circumstances and evidence in support is not remedied by the guardians' speculation about what extraordinary circumstances the district court was referring to, or confusing factors of unfitness with assertions about the best interests of the children. The guardians have not shown by clear and convincing evidence that

extraordinary circumstances are present to require continuation of the guardianship and conservatorship.

The remainder of our analysis focuses on the effect the parental preference doctrine, as discussed in *In re Guardianship of Williams*, has in this case. The parental preference doctrine is well established in Kansas law. As our Supreme Court explained over two decades ago:

> "'Where, as here, the dispute is between strangers and a natural parent who is not unfit and who is able and willing to care for the children, the parent's right must prevail. This is so even though the trial court might feel that it would decide otherwise if free to consider only the "best interests" of the children, apart from the benefits to be derived from the love and care of the natural parent.'" *In re Guardianship of Williams*, 254 Kan. at 826-27 (quoting *In re Eden*, 216 Kan. 784, 786-87, 533 P.2d 1222 [1975]).

We pause to observe that our holding should not be viewed in any way as being critical of M.B. and G.B.'s parenting as guardians. Upon our review of the record, it is obvious that the guardians have provided the children with love and support during the years they have been their guardians. M.B. and G.B. have made a persuasive showing that their care, custody, and control of the children has provided these minors with significant benefits while they were growing up.

Still, as discussed earlier, given that the district court did not find either Mother or Father unfit, or identify extraordinary circumstances and clear and convincing evidence in support of such a finding, Mother and Father have a constitutional right to the custody of their children as guaranteed by the Fourteenth Amendment. *In re Guardianship of Williams*, 254 Kan. 814, Syl. ¶ 1. We conclude the parental preference doctrine should have been applied as a matter of law in this case. The district court's failure to apply the parental preference doctrine under the circumstances of this case was an error of law.

The district court's order denying the motion to terminate the guardianship and conservatorship is reversed. The case is remanded to the district court with directions to terminate the guardianship and conservatorship in a reasonable and timely manner.