

NOT DESIGNATED FOR PUBLICATION

No. 120,300

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of R.G.,
A Minor Child.

MEMORANDUM OPINION

Appeal from Shawnee District Court; MARY E. CHRISTOPHER, judge. Opinion filed May 10, 2019. Affirmed.

Rachel I. Hockenbarger, of Topeka, for appellant natural mother.

Morgan L. Hall, deputy district attorney, and *Michael F. Kagay*, district attorney, for appellee.

Before GARDNER, P.J., ATCHESON and SCHROEDER, JJ.

PER CURIAM: B.G. (Mother) appeals the district court's termination of her parental rights to her daughter, R.G. We find the record reflects clear and convincing evidence to support the district court's decision to terminate Mother's parental rights, and it was in R.G.'s best interests to terminate mother's parental rights. We affirm.

FACTS

On January 5, 2017, the State filed a child in need of care (CINC) petition alleging R.G., then age 12, was a CINC. The petition alleged R.G. was without adequate parental care, control or subsistence; was without the necessary care or control for her physical, mental, or emotional health; and had been physically, mentally, or emotionally abused or neglected or sexually abused. Specifically, the State alleged that Mother's live-in boyfriend, I.R., took R.G. to a "possible drug house" without Mother's knowledge or

permission, where he potentially sexually abused R.G. The State also alleged I.R. committed domestic violence against Mother in front of R.G., including threatening Mother with a gun.

Also on January 5, 2017, the district court entered mutual restraining orders preventing Mother and I.R. from contacting each other. On that same day, the district court held a temporary custody hearing and ordered R.G. to return home with Mother. The district court also ordered Mother to cooperate with supervision by court services and family preservation.

On March 27, 2017, the district court held another hearing and again ordered Mother to meet with court services. The district court also ordered Mother to provide a urinalysis (UA) before leaving the courthouse.

On April 25, 2017, the State filed a motion to remove R.G. from Mother's custody. The State alleged Mother tested positive for methamphetamine, amphetamine, and MDMA on March 27, 2017. The State also alleged Mother failed to meet with service providers as ordered. Finally, the State alleged Mother failed to inform court services of her address and R.G. had been tardy to school seven times in April 2017.

Following a hearing on the State's motion on April 27, 2017, the district court placed R.G. in the custody of the Department for Children and Families (DCF). On July 10, 2017, the district court adjudicated R.G. to be a child in need of care finding both Mother and R.G.'s father in default. On July 31, 2017, the district court approved a permanency plan with dual goals of reintegration and adoption.

On December 1, 2017, the State moved to terminate Mother's parental rights. The State alleged Mother was unfit for the following reasons:

"1. Failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family {K.S.A. 38-2269(b) (7)};

"2. Lack of effort on the part of the parent to adjust the parent's circumstances, conduct or condition to meet the needs of the child {K.S.A. 38-2269(b) (8)};

"3. Failure to maintain regular visitation, contact or communication with the child or with the custodian of the child {K.S.A. 38-2269(c) (2)};

"4. Failure to carry out a reasonable plan approved by the court directed toward the integration of the child into the parental home {K.S.A. 38-2269(c) (3)};

. . . .

"5. The use of intoxicating liquors or narcotic drugs of such duration or nature as to render the parent unable to care for the ongoing physical, mental or emotional needs of the child {K.S.A. 38-2269(b) (3)};

"6. Physical, mental or emotional abuse or neglect or sexual abuse of a child {K.S.A. 38-2269(b) (4)};

"7. Failure to assure care of the child in the parental home when able to do so {K.S.A. 38-2269(c) (1)}[.]"

The State further alleged Mother's unfitness was unlikely to change in the foreseeable future. In support of these claims, the State alleged Mother failed to carry out her reintegration plan, failed to obtain safe and stable housing and employment, failed to provide clean UAs, and failed to maintain contact with KVC Behavioral Healthcare (KVC).

The district court proceeded to trial on the State's motion to terminate Mother's parental rights. Levi Jenkins, a child protection supervisor with DCF, testified that in January 2017, DCF received a report R.G. was in police protective custody because of sexual abuse and physical neglect allegations. Soon thereafter DCF received a second report alleging emotional abuse. Jenkins testified both R.G. and Mother told him about incidents where R.G. witnessed I.R. commit domestic violence, including threatening Mother with a gun. He also testified Mother admitted to using marijuana and

methamphetamines. He admitted DCF found the reports of sexual abuse and physical neglect were unsubstantiated, but the emotional abuse was affirmed.

Next, Austin Solis, a former case coordinator at KVC, testified. He was the case manager from June 2017 until May 2018. During the summer of 2017, Mother met with Solis only once. After that meeting, Solis tried to make "at least monthly contact" with Mother but was unable to because her phone numbers "would change or be turned off." Mother also failed to provide KVC with an accurate address. According to Solis, Mother did not contact him again until December 2017 or January 2018.

With respect to case plan tasks, Solis testified as of March 13, 2018, Mother:

- Found housing at the Topeka Rescue Mission but then left the Mission and failed to provide KVC with a new address;
- Obtained employment and provided documentation to KVC;
- Had been coming in for UAs for about 4 months; with 18 out of 21 UAs testing clean and the remaining three being "no-shows";
- Failed to provide KVC with up-to-date contact information as required by the case plan;
- Failed to provide KVC with the necessary releases as required by the case plan;
- Submitted to a Regional Alcohol and Drug Assessment Center (RADAC) assessment on August 25, 2017, but failed to provide KVC with any documentation of her treatment;
- Failed to attend a parenting class as required by the case plan;
- Failed to participate in a battered women's program as required by the case plan; and
- Failed to participate in visitation with R.G. until January 2018.

Vicki Gerstner, a KVC family preservation therapist was assigned to the case from January 2017 to April 2017. She testified her job was to provide services to Mother and R.G. to keep the family intact. One of her biggest problems serving Mother was "Mother's failure to keep consistent contact and keep meetings." She also testified as of April 18, 2017, R.G. had 130 unexcused absences from school. Her testimony also reflects between March 8, 2017, and April 18, 2017, Mother and R.G. lived in three different places after Mother was evicted from her home.

Finally, Jose Acevedo testified for the State. He served as Mother's KVC caseworker from June 2018 until the termination hearing. He testified between April 17, 2018, and June 20, 2018, Mother failed to appear for 18 UAs. She also failed to appear for a hair test scheduled for April 13, 2018, and another one in June 2018. Mother told him during one of her June 2018 meetings she was still using drugs.

Acevedo also testified Mother:

- Moved to Kansas City and back to Topeka when a job did not work out;
- Could not find a new job in Topeka and worked at odd jobs to support herself;
- Failed to provide proof of employment;
- Failed to complete her mental health plan tasks beyond the RADAC assessment;
- Failed to complete a parenting class;
- Failed to complete a battered women's class; and
- Failed to show for 13 more UAs between June 2018 and the trial.

The State rested and Mother presented her case. Mother testified she missed many UAs because she "figured it was probably useless since [she] knew it was going to show up dirty." She testified with respect to the hair tests, "I don't remember two, I just

remember one and I cannot tell you why I didn't go." She initially claimed the only drug she used in the last year was marijuana. However, she later testified after losing custody of R.G., she used methamphetamine and marijuana; she quit using methamphetamine in December 2017. She further claimed she used marijuana because she did not have access to medication or therapy for her anxiety but would quit if she regained custody of R.G.

Mother testified:

- She went to Valeo Behavioral Care in December 2017 for about a week for inpatient treatment to detox;
- She attended intensive outpatient treatment but had to quit during the final stage of less-intensive outpatient treatment because she could not afford it;
- She was unable to get State assistance to pay for treatment;
- She had completed three months of drug treatment;
- Solis knew about her three months of completed treatment;
- She was hard to contact because of phone issues;
- She frequently gave her updated contact information to KVC workers who failed to pass it on to her specific caseworkers;
- She did not show up for meetings during the early part of the case because she "refused to cooperate";
- She called various agencies trying to find a parenting class; and
- She disputed prior testimony KVC told her about a teen parenting class.

The district court found Mother was unfit and her unfitness was unlikely to change in the foreseeable future. The district court cited the following factors as grounds for a finding of unfitness:

"The 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 child. K.S.A. § 38-2269 (b)(3)

"Physical, mental, or emotional abuse or neglect or sexual abuse of a child. 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 the part of the parent to adjust the parent's circumstances, conduct, or conditions to meet the needs of the child. K.S.A. § 38-2269 (b)(8)

. . . .

"Failure to assure care of the child in the parental home when able to do so. K.S.A. § 38-2269 (c)(1)

"Failure to maintain regular visitation, contact, or communication with the child or with the custodian of the child. K.S.A. § 38-2269 (c)(2)

"Failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home. K.S.A. § 38-2269 (c)(3)"

The district court next addressed the best interest of the child and found it was in R.G.'s best interests to terminate Mother's parental rights. The district court noted that "[i]t has been 19 months since the filing of the Petition in this matter. Mother was given many months to complete basic tasks, which she has not completed."

ANALYSIS

Mother is unfit and the unfitness is unlikely to change in the foreseeable future.

A parent has a fundamental liberty interest in his or her relationship with his or her child. *Santosky v. Kramer*, 455 U.S. 745, 753, 769-70, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Accordingly, the district court can only terminate a parent's legal right to his or her child upon a showing of clear and convincing proof of parental unfitness. *In re R.S.*, 50 Kan. App. 2d 1105, Syl. ¶ 1, 336 P.3d 903 (2014). When a parent appeals a district

court's determination of parental unfitness, this court considers "whether, after review of all the evidence, viewed in the light most favorable to the State, it is convinced that a rational factfinder could have found it highly probable, *i.e.*, by clear and convincing evidence" that the parent was unfit. *In re B.D.-Y.*, 286 Kan. 686, 705-06, 187 P.3d 594 (2008).

K.S.A. 2018 Supp. 38-2269(b) provides a nonexclusive list of factors a district court should consider to determine parental fitness. K.S.A. 2018 Supp. 38-2269(c) provides four more parental fitness factors applicable when, as here, the child is not in the parent's physical custody. "The existence of any one of the above factors standing alone may, but does not necessarily, establish grounds for termination of parental rights." K.S.A. 2018 Supp. 38-2269(f). Here, the district court found Mother was unfit on the basis of the following factors:

- K.S.A. 2018 Supp. 38-2269(b)(3): "the 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 child";
- K.S.A. 2018 Supp. 38-2269(b)(4): "physical, mental or emotional abuse or neglect or sexual abuse of a child";
- K.S.A. 2018 Supp. 38-2269(b)(7): "failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family";
- K.S.A. 2018 Supp. 38-2269(b)(8): "lack of effort on the part of the parent to adjust the parent's circumstances, conduct or conditions to meet the needs of the child";
- K.S.A. 2018 Supp. 38-2269(c)(1): "[f]ailure to assure care of the child in the parental home when able to do so";

- K.S.A. 2018 Supp. 38-2269(c)(2): "failure to maintain regular visitation, contact or communication with the child or with the custodian of the child"; and
- K.S.A. 2018 Supp. 38-2269(c)(3): "failure to maintain regular visitation, contact or communication with the child or with the custodian of the child."

On appeal, Mother argues "[t]he evidence does not support a finding of unfitness." She posits her parental rights were terminated simply because she failed to complete case plan tasks. She states, "[t]he evidence was not clear and convincing that mother's stumbles on the tasks had any relationship to the finding that she was unfit and that it was in the child's best interests to terminate parental rights." Mother does not persuade us. Mother failed to address the problems leading to DCF taking custody of R.G. in a meaningful way. We will address each of the district court's findings.

Drug use

Mother repeatedly tested positive for drug use. Mother testified she used marijuana and methamphetamine before claiming she "detoxed" in December 2017. Throughout the program designed to reunite her with her daughter, Mother continued to use drugs and missed multiple appointments, two of which were hair follicle tests. Mother testified she did not attend some UAs because she knew she would test positive for marijuana. When Mother failed to appear for the tests, her drug test is considered a failure.

Mother's claim she had "detoxed" is not persuasive. We cannot take her word she was not using drugs when she failed to appear to provide test samples. We presume they would be failures. Under our standard of review, this court must construe the evidence as found by the district court in favor of the State, not Mother. *In re B.D.-Y.*, 286 Kan. at

705. The testimony relayed above constitutes clear and convincing evidence Mother was unfit based on her admitted drug use and consistent refusal to take drug tests. Mother's failure to participate in drug testing prevented the State from accurately assessing the scope of her drug issues.

Finally, Mother claims each of the case managers gave different accounts on the number of UAs she failed to provide, and, therefore, the State's evidence was not clear and convincing. Mother's argument misrepresents the record. Each case manager testified about Mother's drug use and UA completion during the time they supervised Mother. They did not give conflicting versions of the same events, but instead testified only to the tests they were involved with whether the test was negative, positive, or a failure to provide.

Mental or emotional abuse or neglect

Mother now claims there is not clear and convincing evidence of mental or emotional abuse or neglect. She agrees there was emotional abuse "[i]n the early stages" of this case but says emotional abuse is no longer an issue. The emotional abuse to which she refers is harm inflicted when R.G. witnessed I.R. commit domestic violence against Mother. Mother claims, without citation to the record, I.R. "was long ago removed from the scene, and there is no evidence that mother had any further contact with him during the entire pendency" of the case.

This court has routinely held domestic abuse committed in front of a child can be grounds for parental unfitness. See *In re A.H.*, 50 Kan. App. 2d 945, 949-50, 334 P.3d 339 (2014) (affirming an infant's adjudication as a CINC because of ongoing domestic violence in the home, witnessed by her toddler-aged brother); *In re N.G.A.*, No. 115,035, 2016 WL 5030261, at *10 (Kan. App. 2016) (unpublished opinion) (affirming the district court's finding that both Mother and Father were unfit because of "Father's physical and

emotional abuse of Mother and Mother's inability or unwillingness over an extended period of time to remove herself from the situation").

Here, it is undisputed in the record R.G. witnessed I.R. abuse Mother more than once, including at least one incident where I.R. threatened Mother with a gun in front of R.G. It is also undisputed Mother failed to complete a battered women's class and a parenting class, despite the classes being a required part of her case plan. Mother nevertheless argues the record lacks "any description of how completion of these assigned classes would have advanced the preservation of this family unit." As with the drug use issue above, the record shows Mother failed to complete the required tasks to address one of the root causes for R.G.'s referral to DCF.

Mother claims her boyfriend was "long-gone," therefore, she did not need to complete domestic violence-related case plan tasks is not supported by the record. The record establishes I.R. was in jail in early 2017, and Mother sought a protection from abuse order against I.R. in 2016 that was dismissed after both Mother and I.R. failed to appear in court. The record also shows the district court entered mutual restraining orders between Mother and I.R. in this case, but the record does not explain whether the pair complied with the orders and if or when I.R. was released from jail. Additionally, Mother needed to complete the classes for her benefit and for R.G.'s benefit, but she failed to do so.

Remaining factors of unfitness

Mother addresses the next four parental fitness factors—failure of reasonable efforts to rehabilitate the family; lack of effort by mother to adjust her circumstances, conduct, or conditions to meet R.G.'s needs; failure to assure care of R.G. in the parental home when able to do so; and failure to carry out a reasonable reintegration plan—under one general argument. Mother openly admits she did not "adequately complete" some of

the relevant case plan tasks. Nevertheless, she argues "the evidence shows that the assignment of the tasks, and the measure in which mother was successful in completing them or not, had no relationship to the wellbeing of the child." Instead, she argues DCF failed "to set meaningful tasks and to provide meaningful support to the completion of those tasks in relevant ways."

Simply put, her claim is unconvincing. DCF took custody of R.G. because:

- R.G. was exposed to domestic violence;
- Mother tested positive for methamphetamine, amphetamines, and MDMA;
- Mother refused to cooperate with service providers; and
- R.G. was repeatedly late to or absent from school for a multitude of reasons.

In order to address these issues, Mother's case plan required her to:

- Participate in a battered women's program;
- Provide clean UAs;
- Complete treatment as recommended by RADAC;
- Take an age-appropriate parenting class; and
- Find stable housing.

Mother had 19 months from the start of the case and 16 months from when R.G. was taken from her custody to complete basic tasks related to the reasons for DCF intervention. Clear and convincing evidence supports the district court's conclusion Mother's failure to complete these basic tasks demonstrated her unfitness and unwillingness to learn or change for R.G.'s benefit.

Failure to maintain visitation and contact with R.G. and KVC

Finally, Mother takes issue with the district court's finding she failed to maintain visitation with R.G. and contact with KVC. She argues "the visits were treated as secondary at best, with all of the energy focused on a negatively-toned interaction that did not help advance the preservation of this family."

Once again we are called upon to review the record in a light most favorable to the State. The record reflects Mother failed to visit R.G. from April 2017 until December 2017, failed to contact KVC, and failed to provide KVC with accurate contact information so they could contact her. Mother admitted she "refused to cooperate" from January 2017 until December 2017. The record shows Mother consistently participated in once weekly visitation with R.G. from January 2018 until the termination trial in August 2018.

Given the evidence in the record about Mother's failure to maintain contact with KVC and failure to visit R.G. early in this case, there is clear and convincing evidence to support a finding of unfitness. We do acknowledge toward the end of the plan Mother was consistently contacting KVC and visiting R.G. during the last eight months before the termination trial. However, the district court here relied on more than just this factor to find Mother unfit. Mother's admitted drug use, failure to produce clean UAs, failure to take a parenting class, and failure to participate in a battered women's program provides clear and convincing evidence to affirm the district court's finding of unfitness even in light of Mother's improved visitation/communication with both R.G. and KVC. See K.S.A. 2018 Supp. 38-2269(f) (Any one of the factors listed in K.S.A. 2018 Supp. 38-2269(b) or (c) can sufficiently establish grounds for termination of parental rights.).

Unlikely to change in the foreseeable future

In her brief, Mother incidentally argues the district court erred by finding her unfitness was "unlikely to change in the foreseeable future." She does not substantively argue this point; rather, the crux of her argument seems to be there was not clear and convincing evidence she was unfit in the first place. A point raised incidentally in a brief but not argued therein is deemed abandoned. *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017). Accordingly, Mother has waived any argument challenging the district court's finding she would continue to be unfit in the foreseeable future.

Termination was in R.G.'s best interests

After considering all the factors listed above, the district court then moves to consider the child's best interests before terminating a parent's parental rights. K.S.A. 2018 Supp. 38-2269(g)(1). The district court must consider the child's physical, mental, and emotional needs when determining the child's best interests. K.S.A. 2018 Supp. 38-2269(g)(1). Here, the district court concluded termination of Mother's parental rights was in R.G.'s best interests. Mother argues this conclusion was error. This court reviews a district court's conclusion as to a child's best interests for abuse of discretion. *In re R.S.*, 50 Kan. App. 2d at 1116. A district court abuses its discretion if "no reasonable person would agree with the district court or the district court premises its decision on a factual or legal error." 50 Kan. App. 2d at 1116.

Mother cites to *In re L.B.*, 42 Kan. App. 2d 837, 842, 217 P.3d 1004 (2009), to argue the district court erred by concluding termination of her parental rights was in R.G.'s best interests without performing a "balancing test." She misrepresents the relevant holding of *In re L.B.* There, a panel of this court considered whether mother could untimely appeal a temporary placement order and the finding her child (L.B.) was a CINC. 42 Kan. App. 2d at 842-43. The panel stated: "we must balance mother's interest

in pursuing an untimely appeal of the temporary placement order and the finding L.B. was a child in need of care, with the State's and L.B.'s interest in concluding the proceeding without unnecessary delay in 'child time.'"42 Kan. App. 2d at 842. The panel concluded mother was not entitled to an untimely appeal of those issues. 42 Kan. App. 2d at 843-44. *In re L.B.* does not impose a rigid requirement for courts to perform an overt, on-the-record "balancing test" to determine a child's best interests.

Mother next argues:

"It is not in the best interest of children to separate them from their mother, especially when very young. In this case, with no evidentiary basis for doing so; and with a record that reflects a mother bonded to her child, working to strengthen her circumstances while maintaining visits with the child; it was an abuse of discretion to terminate parental rights, without any discussion about why that is in the best interest of this child."

Here, the district court discussed on the record why it found termination of Mother's parental rights was in R.G.'s best interests. The district court began its decision by stating: "[T]hese cases are always very difficult. In particular, when you have parents who love their daughter, and the daughter loves her parents. But I cannot get around facts of this case." The district court noted Mother's failure to complete a battered women's program, and stated: "The domestic violence has shown to be extremely hard on children even if they're not being abused, they're watching it, they're hearing it, it's terrifying." The district court also noted Mother's failure to develop structure in her life during the 19-month pendency of the case, and stated: "One of the things that children rely on parents for is that structure, and if you don't have it in your life, I don't know how you would provide that for your daughter." Additionally, the district court stated, "based on the Court's direction from the law, to view things in the child's time, not in parent's time, and I see a very good reason to try and find permanency for this little girl. She deserves permanency and I don't see it happening here."

Mother is correct a bond existed between her and R.G., however, it is not grounds to find the district court abused its discretion. As this court has frequently noted, children have a right to permanency within a time frame reasonable to them; children's perceptions of time differ from those of adults. *In re M.H.*, 50 Kan. App. 2d 1162, 1170, 337 P.3d 711 (2014). Here, the testimony at trial showed Mother failed for more than a year to address many of the underlying reasons causing her to lose custody of R.G., including drug use and domestic violence. Further, Mother's caseworker testified R.G., who was only 13 years old, asked her for her own copy of the case plan so that she could "get on" Mother about completing the necessary tasks. A rational fact-finder could conclude even though R.G. loved her mother and wanted to be with her, it was nevertheless in R.G.'s best interests to terminate Mother's parental rights. R.G., as a child, is entitled to permanency and stability within a reasonable time. As our Supreme Court noted in *In re J.A.H.*, 285 Kan. 375, 386, 172 P.3d 1 (2007), "[c]hildren should not be left languishing in [State] custody." The record supports the district court's decision to terminate Mother's parental rights was in R.G.'s best interests.

Affirmed.