NOT DESIGNATED FOR PUBLICATION

Nos. 124,563
124,564
124,565

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF D.S. JR., D.S., and D.S.,
MINOR CHILDREN.

MEMORANDUM OPINION

Appeal from Geary District Court; COURTNEY D. BOEHM, judge. Opinion filed October 21, 2022. Affirmed.

Anna M. Jumpponen, of AJ Law, L.L.C., of Wichita, for appellant natural father.

Sam S. Kepfield, of Hutchinson, for appellant natural mother.

Jason B. Oxford, assistant county attorney, and *Krista Blaisdell*, county attorney, for appellees.

Before ISHERWOOD, P.J., SCHROEDER and WARNER, JJ.

PER CURIAM: Mother and Father appeal the termination of their parental rights to their three children, all of whom share the initials D.S. Mother claims the district court erred when it moved forward with the termination hearing rather than continue the matter indefinitely to await her psychological stabilization following her involuntary commitment to Osawatomie State Hospital. Mother and Father mutually contend that the evidence before the district court was not sufficient to establish their parental unfitness and that the district court abused its discretion by terminating their rights rather than giving them more time to work toward reintegration with the children.

But a continuance may be granted only when it is in the best interests of the children to do so, and termination cases must be resolved in "child time" not "adult time." Moreover, a presumption of unfitness manifests when a parent's child has been in an out-of-home placement under a 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. Here, the children were not in the parent's custody or under their care for nearly two years. During that time, neither parent made meaningful progress in their respective reintegration plans.

We recognize a parent has a fundamental liberty interest in making decisions regarding the care, custody, and control of their children and that the seriousness of terminating one's parental rights cannot be overstated. Following a thorough review of the record, we find the district court did not err in denying Mother's request for a continuance. We further find evidence to support the district court's findings that the parents were presumptively unfit and that the conditions leading to that finding were unlikely to change in the foreseeable future. Finally, we find no abuse of discretion in the district court's decision to terminate Mother's and Father's parental rights and affirm its judgment.

FACTUAL AND PROCEDURAL BACKGROUND

D.S. (Y.O.B. 2010), D.S. (Y.O.B. 2012) and D.S. (Y.O.B. 2013) are the natural children of Mother and Father. They have endured a great deal of tumult in their young lives. The documented difficulties appear to have started in 2017. In July of that year, the Kansas Department for Children and Families (DCF) briefly took custody of the children following Mother's involuntary commitment to Osawatomie. While a comprehensive list of Mother's varied disorders is not available, the record reveals Mother suffers from PTSD and is plagued by hallucinations and memory issues when not taking her prescribed medication. In December 2017, DCF opened an investigation following an

allegation of physical neglect and after Mother made "significant improvement[s]" to their living conditions, the case was closed.

Similar issues disrupted their lives in 2018. In January of that year, Mother was again briefly involuntarily committed at Osawatomie, so DCF placed the children with Father. Osawatomie discharged Mother in February and Father unilaterally decided to return the children to her care soon after.

The family continued to suffer instability in 2019. In May, DCF again removed the children from Mother's care and placed them with Father when it learned that Mother allowed her brother to babysit the children even though his own children were in DCF custody. That same month, Mother returned to Osawatomie under another involuntary commitment, but the hospital released her almost immediately. Unfortunately, a day later, officers found Mother "walking in the middle of the street with her arms up yelling gibberish." A month later, DCF received a report that another of Mother's brothers sexually abused all three children roughly two years earlier. Further investigation into the claim revealed that Mother continued to use that sibling as a babysitter even after the children disclosed the abuse to her. DCF intended for the children to remain in Father's care during the sexual abuse investigation, but in July, the agency became aware that he again independently decided to return the children to Mother's residence.

The State filed petitions on July 25, 2019, based on the preceding information, seeking to have the district court declare the three children as children in need of care (CINC). Mother and Father stipulated to the three reasons advanced by the State in support of its request: (1) Mother and Father did not provide the children with adequate parental care despite their ability to do so as stated under K.S.A. 38-2202(d)(1); (2) Mother and Father did not provide the children adequate care for their specific physical, mental, and emotional health as stated under K.S.A. 38-2202(d)(2); (3) the children suffered physical, mental, emotional, or sexual abuse as stated under K.S.A. 38-

2202(d)(3); and (4) the children resided with siblings who had been physically, mentally, emotionally, or sexually abused as stated under K.S.A. 38- 2202(d)(11). On October 23, 2019, the court followed the State's recommendation, designated the children as children in need of care, and ordered they remain in DCF custody. It directed Father to complete an Interstate Compact on the Placement of Children (ICPC) since he lived in Kansas City, Missouri, and adopted a permanency plan for each of the children.

In January 2020, the district court held a review hearing on the children's CINC cases and learned that neither Mother nor Father complied with their reintegration case plan. Father had not communicated with caseworkers from Saint Francis Community Services (SFCS), and it was questionable whether Mother attended mental health treatment as required. The district court ordered the children to remain in DCF custody, but allowed Mother and Father supervised visits. It also ordered that Mother's visitation with the children be dependent upon her production of documentation evidencing receipt of mental health services. Another review hearing was held three months later, and the district court's orders largely remained the same.

The court conducted a permanency hearing on July 1, 2020, and the State requested the district court find that the children's reintegration with Mother and Father was no longer a viable option. In making its request, the State largely relied on the testimony of April Palya, a reintegration permanency specialist at Saint Francis Community Services (SFCS), who worked with the family. Palya told the district court that neither Mother nor Father "completed a single case plan task." Moreover, Mother's contact with SFCS since the review hearing four months earlier was inconsistent while Father's was nonexistent. The district court ultimately concluded that attaining reintegration was growing increasingly questionable.

Nearly one year later, the State moved to terminate Mother's and Father's parental rights, citing the following factors as evidence of their unfitness to parent the children:

- (1) because of an emotional illness, mental deficiency, or physical disability as stated under K.S.A. 38-2269(b)(1);
- (2) reasonable efforts by public or private agencies failed to rehabilitate the family as stated under K.S.A. 38-2269(b)(7);
- (3) Mother and Father refused to adjust their circumstances to meet the children's needs as stated under K.S.A. 38-2269(b)(8);
- (4) Mother and Father failed to maintain regular contact with the children although the children were not in their physical custody as stated under K.S.A. 38-2269(c)(2); and
- (5) Mother and Father failed to carry out a reasonable case plan directed toward the reintegration of the children although the children were not in their physical custody as stated under K.S.A. 38-2269(c)(3).

The State also included as a basis the presumption set forth under K.S.A. 38-2271(a)(5), which provides that a parent is presumptively unfit if that parent's "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." Neither Mother nor Father filed a written response to the State's motion.

Mother returned to Osawatomie under an involuntary commitment roughly two weeks before the termination hearing. She was briefly released to the county jail to address a pending charge for possession of marijuana but returned to Osawatomie immediately thereafter because her unhealthy frame of mind persisted. Of note, she crafted a narrative for her attorney in which she was married to a soldier and, while she was a stepparent to some children, she did not have any children of her own. Mother eventually stabilized after adhering to a medication regimen under Osawatomie's care and

was released. Her ability to function was short-lived, however, and she was involuntarily committed once more just a matter of days before the termination hearing.

Two days before the termination hearing, Mother's attorney moved for a continuance. At a hearing on the motion the next day Mother's counsel explained that Mother's current condition, i.e. her involuntary commitment, rendered her unable to attend the scheduled TPR hearing. He asserted that Mother was not well and denied even having any children. He then offered the following brief argument in support of his request:

> ". . . when I talked to her on the phone, I did not believe she was operating under capacities. I have talked to her in the past when she was doing very well, so I think I recognize how she is when she's doing well. And while there's no guarantees that she will get back on her meds and do well, there's no guarantee that she won't. So, I filed my motion."

The State objected to the continuance and emphasized that given Mother's long mental health issues, there was no guarantee she would be well enough in the foreseeable future to attend her TPR hearing. It highlighted the fact that the children's CINC cases were civil, thus Mother's competency issues did not prevent the district court from proceeding with the hearing. Finally, the State asserted that going forward with the hearing as scheduled was in the children's best interests because they were entitled to finality. The court ultimately declined to continue the proceeding, finding it was in the best interest of the children to move forward.

The parties reconvened the following day as scheduled. Mother's attorney renewed his objection to the hearing and offered no evidence on her behalf. In support of its motion the State presented evidence that Mother's and Father's court-approved reintegration case plan tasks remained consistent throughout the nearly two-year life span of the case, but to date, neither of them had made any appreciable progress toward

completion of their plans. Mother failed to secure stable housing and employment, but the most critical deficiency was her failure to complete her court-ordered parenting psychological examination and mental health treatment. According to the State's witnesses these factors were of the utmost importance because Mother's mental health issues posed the primary challenge throughout the children's case. When Mother diligently adhered to her medication and therapy regimen, she could stably function. But when she veered off course, as she often did, her circumstances rapidly spiraled out of control. For example, the evidence reflected that Mother stopped attending appointments with her treatment provider over a year before the termination hearing.

The State also presented evidence regarding Father's actions. The most crucial of all the shortcomings was Father's neglect of his obligation to secure satisfactory mental health services to address the children's substantial therapeutic needs. In particular, Father failed to take any steps to gain a true understanding of and locate a qualified treatment provider for his children's psychological challenges. Father claimed to have a secure, well-paying job but he never notified SFCS of such employment or provided documentation of the same. He also acknowledged that previous statements he made about his housing situation were deceitful. Specifically, he claimed to live with his mother when in actuality, he shared an apartment with his girlfriend, which did not offer a suitable arrangement for the children.

To the extent that either parent fulfilled any of their reintegration obligations, they did not do so until a few short months before the termination hearing, essentially 16 months after those tasks were first assigned. Finally, neither parent had shared a visit with the children for roughly a year before the termination hearing. While both requested visits a few months before the hearing, the children's therapist advised too much time had passed between visits and the children were too traumatized.

Palya, the State's primary witness, informed the court that the children experienced substantial emotional and psychological improvements since entering DCF's custody and it was their wish to be adopted. Of particular significance, the oldest son expressed the specific desire to never again be linked to either of his parents. Palya testified that the parents' failure to satisfy their reintegration case plan established their present unfitness to parent the children and further reflected they were unlikely to become fit in the foreseeable future.

At the conclusion of the proceeding, the court took judicial notice of the children's two prior CINC cases and Mother's five prior care and treatment cases. It found that when Mother was "off her medication and not taking advantage of services," she abused and neglected the children. It also noted the dishonest statements Father made to SFCS about his residential status. Finally, it stressed the extent of the mental health and behavioral issues the children labored under when they entered DCF custody and that they endured varied traumas which demanded long-term services.

The court held that given the children had been in an out-of-home placement for well over a year and the parents substantially neglected or willfully refused to carry out a reintegration plan, the presumption of unfitness under K.S.A. 38-2271(a)(5) was satisfied. Thus, it was in the best interest of the children for the parent's rights to be terminated.

Mother and Father timely bring the matter before us to analyze whether the district court erred in its rulings.

ANALYSIS

I. *The district court did not err in declining to grant Mother's request for a continuance of the TPR hearing or in concluding that clear and convincing evidence established the parents were presumptively unfit and it was in the children's best interests to terminate their parental rights.*

At the outset, we must identify the standards of review that guide our analysis of the issues raised in this consolidated appeal. Mother and Father have collectively presented three claims of error for our review. Mother first challenges the district court's denial of her request to continue the hearing until she was mentally stable enough to attend. Second, the parents challenge the district court's finding they were presumptively unfit, and that such unfitness was unlikely to change in the foreseeable future. And third, they take issue with the court's assessment that it was in the best interest of the children to terminate Mother's and Father's parental rights.

The first issue essentially involves a combination of two claims: whether the district court violated Mother's right to due process in proceeding with the termination hearing in her absence, and whether it abused its discretion in denying her request for a continuance. Thus, our review of the matter involves two corresponding standards. "Whether an individual's due process rights were violated is a question of law subject to de novo review." *In re Adoption of B.J.M.*, 42 Kan. App. 2d 77, 81, 209 P.3d 200 (2009). Additionally, apart from that due process review, this court reviews a district court's denial of a motion for continuance for an abuse of discretion. *In re Adoption of J.A.B.,* 26 Kan. App. 2d 959, 964, 997 P.2d 98 (2000). A judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the trial court; (2) it is based on an error of law; or (3) it is based on an error of fact. See *State v. Ibarra*, 307 Kan. 431, 433-34, 411 P.3d 318 (2018).

The second and third claims involve the district court's findings about the parents' fitness and its ultimate conclusion regarding termination. These issues challenge the district court's determinations that the State proved Mother's and Father's unfitness by clear and convincing evidence. See K.S.A. 38-2269(a). Thus, we are tasked with assessing whether, when the evidence is viewed in the light most favorable to the State, it could persuade a reasonable factfinder that it was highly probable the parents were unfit and that the best interests of the children required termination. While conducting such a review, we do not "weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact." *In re K.H.*, 56 Kan. App. 2d 1135, 1139, 444 P.3d 354 (2019).

A. *The district court did not compromise Mother's right to due process when it denied her request to continue the TPR hearing indefinitely and terminated her parental rights in her absence.*

We turn first to Mother's argument that the district court should have granted her request for a continuance. When Mother made this request before the district court, her attorney informed the court that he spoke with Mother and "did not believe she was operating under capacities" because he has "talked to her in the past when she was doing very well" so he is familiar with her disposition, "[a]nd while there's no guarantees that she will get back on her meds and do well, there's no guarantee that she won't" so he believed the motion was necessary. Now, for the first time on appeal, Mother claims that the denial of her continuance request violated her right to due process, as she was not able to attend or meaningfully participate in the termination hearing.

When endeavoring to raise an issue for the first time on appeal, even those which are grounded in claims of a constitutional violation, Mother must first acknowledge the unpreserved status of her issue, then explain why consideration is warranted and possible without a record. *State v. Keys*, 315 Kan. 690, 696, 510 P.3d 706 (2022); Kansas Supreme Court Rule 6.02(a)(5) (2022 Kan. S. Ct. R. at 36). A party who ignores this

requirement is considered to have waived and abandoned any exception to the preservation rule. See *State v. Meredith*, 306 Kan. 906, 909, 399 P.3d 859 (2017). Mother offers us little more than a conclusory statement that a parent's right to make decisions regarding her children is a fundamental right. She offers no record citation reflecting where she advanced the due process challenge before the district court and has not briefed any of the exceptions to the preservation rule on appeal. See *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3dd 1068 (2015) ("an exception must be invoked by the party asserting the claim for the first time on appeal"). Thus, Mother arguably waived and abandoned any due process driven challenge to the court's denial of her continuance request. See *State v. Farmer*, 312 Kan. 761, 766, 480 P.3d 155 (2021) (issue treated as waived and abandoned where appellant disregarded Supreme Court Rule 6.02).

The analysis of due process claims in this context demands a weighing of various interests to determine whether the court should have proceeded with the hearing. See *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Because Mother never presented a due process argument to the district court, that court never had the opportunity to engage in this assessment, which makes our review of the claim quite difficult, if not impossible. That difficulty is then compounded by the fact that Mother's brief also does not offer a thorough analysis of her due process claim, filtered through the *Eldridge* factors.

When evaluating a due process claim, a determination must first be made whether a fundamental liberty or property interest is implicated. If so, we must then determine the nature and extent of the process that is due. See *Winston v. Kansas Dept. of SRS*, 274 Kan. 396, 409, 49 P.3d 1274, *cert. denied* 537 U.S. 1088, 123 S. Ct. 700, 154 L. Ed. 2d 632 (2002). "Whether an individual's due process rights were violated is a question of law subject to de novo review." *In re Adoption of B.J.M.*, 42 Kan. App. 2d at 81.

It is well established that parents have a fundamental liberty interest in deciding on the care, custody, and control of their children. See *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *In re B.D.-Y.*, 286 Kan. 686, 697-98, 187 P.3d 594 (2008). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *In re J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007). In a case such as this, the potential loss that Mother would be condemned to suffer, the permanent termination of her parental rights, is one of constitutional dimension. See *In re S.M.*, 12 Kan. App. 2d 255, 256, 738 P.2d 883 (1987). As a result, before the district court could sever Mother's right to parent her children, she must be afforded a measure of due process. See *In re Adoption of A.A.T.*, 287 Kan. 590, 600-01, 196 P.3d 1180 (2008). That right, however, is not absolute. Rather, the welfare of children remains a matter of State concern. *Sheppard v. Sheppard*, 230 Kan. 146, Syl. ¶ 2, 630 P.2d 1121 (1981). Thus, the specific circumstance at issue directs what process is due. *In re J.L.D.*, 14 Kan. App. 2d 487, 490, 794 P.2d 319 (1990), *disapproved of on other grounds by In re Adoption of B.J.M.*, 42 Kan. App. 2d 77. In considering whether a claimant was afforded the procedural protection required in the present context, this court uses the three-factor balancing test explained by the United States Supreme Court in *Eldridge*:

> "(1) the individual interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the State's interest in the procedures used, including the fiscal and administrative burdens that any additional or substitute procedures would entail." *In re J.D.C.*, 284 Kan. at 166-67.

To the extent the record permits our review, we find the district court did not abuse its discretion in denying the continuance. Given the traumatic history of this case we are unable to conclude the district court's decision was unreasonable.

Mother's entire substantive argument on appeal in opposition to the district court's action consists of the following:

> "There is no record of the court, having found it inadvisable to have Mother transported to court, considering having her appear via Zoom or other media. And while, in a civil case, there is no competency requirement as in criminal cases, being at [Osawatomie] and presumably on her medications would, as testimony indicated, permit the Mother to understand the proceedings and to contribute to them should she have desired to do so."

In part, Mother's argument contemplates a distinctly different landscape than what the record reflects. Mother seemingly argues that the only issue before the district court was whether to secure Mother's presence at the hearing either physically or virtually, and it failed in its duty to ensure she had access to the proceeding. In essence, Mother is asking us to pass judgment on the propriety of action taken by the district court that impacted her due process rights, the denial of a continuance, but offers the use of an alternative set of facts as part of the equation, which is the court's alleged failure to explore other avenues that would allow Mother to attend.

The record demonstrates that as the termination hearing approached, Mother had yet to stabilize from the psychological crisis which prompted her most recent involuntary commitment at Osawatomie and it remained unclear when such stabilization might occur. Because Mother did not make her written continuance motion part of the record on appeal, our perception of this issue is informed solely by the limited dialogue exchanged between Mother's counsel and the district court at the hearing on Mother's motion. Mother's counsel informed the court that when he spoke with Mother, she was not of sound mind. He specifically stated, "I have talked to her in the past when she was doing very well so I think I recognize how she is when she's doing well." It is clear from counsel's representations to the court that mother was not psychologically equipped to attend the hearing in any capacity, thus his request that it be continued. So how to transport her for the hearing or provide her a Zoom forum at the hospital for the

proceeding, as Mother's brief now frames the question, were not issues presented to the district court for consideration. We decline to offer any opinion on matters the district court was not asked to resolve. See *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019) (Generally parties may not raise an issue on appeal that they did not raise before the district court.).

While Mother's factual and legal deficiencies significantly hamper our ability to thoroughly examine the merits of her claim, we will nevertheless attempt to delve into the issue before us. Mother contends the district court could have safeguarded her procedural due process right by granting her continuance request. While that is an accurate statement in some legal contexts, it did not offer a reasonable option here. In termination proceedings, continuances may be granted only when it is in the best interests of the children to do so. K.S.A. 38-2267(a). See also K.S.A. 38-2246 ("All proceedings under this code shall be disposed of without unnecessary delay. Continuances shall not be granted unless good cause is shown.") The transcript of the continuance hearing bears out that Mother's counsel did not proffer any witness testimony, or affidavits of any kind from Mother's treating physician attesting to her current state of mind and when, in their professional medical opinion, such stabilization might be expected to occur. That is, counsel provided the district court with no indication when, or even whether, Mother might be of sound enough mind to participate in a hearing down the road. Such a measure falls far afield of the children's best interests. After two years of instability and, an even greater period, when the two prior CINC proceedings are added into the equation, the children deserved and were entitled to meaningful steps toward permanency.

Mother's case, while rare, is not wholly anomalous. Analogous situations have emerged involving an incarcerated parent. In one of the first of these, *In re S.M.*, 12 Kan. App. 2d 255, the district court denied the incarcerated father's request to be released from prison to attend the termination hearing. A panel of this court reversed the district court's decision to sever the father's parental rights in his absence, finding that the father was

denied the opportunity to present any testimony in defense of the allegations of unfitness and his interest in the care and custody of his child "far outweigh[ed] the State's interest in summary adjudication." 12 Kan. App. 2d at 256.

Our court revisited the issue not long after in *In re J.L.D.*, 14 Kan. App. 2d 487. In that case, we upheld a district court's decision to terminate an imprisoned father's rights despite his inability to personally attend the hearing. The court noted that diligent efforts were made to secure father's transport, but they ultimately proved unsuccessful. And where father was serving an extended time in prison the child's right to a prompt judicial determination of the matter outweighed father's interests. 14 Kan. App. 2d at 491.

Several years later, this court decided *In re Adoption of J.M.D.*, 41 Kan. App. 2d 157, 202 P.3d 27 (2009). There, the father was incarcerated in Missouri and sought to continue a stepparent adoption until he was released from prison because he had a right to be personally present. The district court denied the request and a panel of this court affirmed. 41 Kan. App. 2d at 170-71. In support of its conclusion, the court found that the stepfather diligently attempted to obtain the father's presence and the father was ultimately able to participate in the hearing via telephone. Thus, the father's due process rights received adequate protection. 41 Kan. App. 2d at 171.

In each of these cases, the court readily conformed to the rule in Kansas that due process "is not a static concept; rather, its requirements vary to assure the basic fairness of each particular action according to its circumstances." *In re J.L.D.*, 14 Kan. App. 2d at 490. Mindful of this principle, we now turn to whether due process required the district court to continue the termination hearing until such time as Mother was psychologically stable enough to attend. While Mother neglected to filter her due process claim through the three-factor *Eldridge* test, we opt to conduct that analysis given the unique facts before us. Again, that test employs three distinct inquiries: first, the private interest which is affected; second, the risk of an erroneous deprivation of such interest as a product of

the procedures used, as well as the value of any additional or substitute procedural safeguards; and third, the government's interest, including any burdens stemming from implementation of any extra or substitute procedures. *In re J.L.*, 20 Kan. App. 2d 665, 669, 891 P.2d 1125 (1995).

1. *The individual interest at stake*

It is clear under our decisions and those of the United States Supreme Court that basic parental rights are fundamental rights protected by the Fourteenth Amendment to the Constitution of the United States, which cannot be abrogated except for compelling reasons. *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511, 98 S. Ct. 1477, 55 L. Ed. 2d 511 (1978); *In re M.M.L.*, 258 Kan. 254, 264, 900 P.2d 813 (1995). Accordingly, this factor weighs in Mother's favor.

2. *The risk of erroneous deprivation of the interest through the procedures used and the probable value of additional or substitute procedural safeguards*

The procedure under scrutiny here is the district court's decision to allow the hearing to go forward without Mother present due to her involuntary commitment to Osawatomie. The point of concern with this factor is whether the nature of the proceeding gave rise to a result that is legally unsound.

The reality for these children is that this was not their first removal from Mother's custody as children in need of care. Mother did not contest the State's CINC petitions, did not actively pursue reintegration measures, and did not file a response when the State moved to terminate her parental rights. Mother suffered multiple involuntary commitments throughout this case due to her significant mental illness but, unfortunately, did not experience any corresponding longevity in the stability that allowed for her discharge each time. Rather, following each release from the hospital, she neglected to

adhere to her necessary therapy and medication regimens and rapidly spiraled downward as a result. To compound the matter, Mother was either unable or unwilling to accomplish her reintegration plan tasks and, as of the date of the hearing, the children had not seen their Mother in 11 months. Thus, the termination hearing marked the final leg of 22 months of tumult the children endured in this matter.

The factor the court ultimately relied on in ordering termination was the presumption of unfitness which arises when the child has been in an out-of-home placement, under court order for a cumulative 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. K.S.A. 38-2271(a)(5). Thus, we must ask ourselves, given the extent of the troubling facts here, did the lack of a continuance adversely affect Mother's ability to impact the case in a meaningful way, such that the district court would have ordered her to persist with reintegration efforts rather than terminate her rights. At the time of his request, Mother's counsel did not offer any indication what arguments Mother might present to prove that further efforts at reintegration were warranted, nor have such arguments been presented to us for consideration. Accordingly, under the circumstances we conclude it is improbable that, had the continuance been granted, Mother could have sustained her burden to rebut the presumption of unfitness or otherwise challenged the State's evidence of her unfitness and established that she was not unfit. See K.S.A. 38-2271(b); *In re Adoption of B.J.M.*, 42 Kan. App. 2d at 85-86. The second *Eldridge* factor favors the State.

3. *The State's interest in the procedures used, including the fiscal and administrative burdens that any additional or substitute procedures would entail*

The final factor in the *Eldridge* analysis contemplates an inquiry into the State's interest in the procedures used. This court has explained that the State has a heightened

interest in resolving CINC cases quickly so the child may settle in a stable home. *In re M.S.*, 56 Kan. App. 2d 1247, 1253, 447 P.3d 994 (2019). This holding is consistent with the directive articulated by the Kansas Code of Care for Children that the code "shall be liberally construed to carry out the policies of the state which are to: (1) Consider the safety and welfare of a child to be paramount in all proceedings under the code." K.S.A. 38-2201(b)(1).

Here, after 22 months of waiting, Mother essentially requested that they continue to wait. Historically, that is not the way these cases are resolved. Rather, "[w]hen 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.S.*, 56 Kan. App. 2d at 1263. Under the very unique and particularized facts of this case, the State was justified in moving forward with the termination proceeding. The third *Eldridge* factor favors the State.

When the three *Eldridge* factors are weighed together here, it reveals that the State's interest in finding permanency for the children outweighed Mother's interest in continuing her termination hearing.

B. *The court properly concluded that both parents are presumptively unfit as contemplated by K.S.A. 38-2271(a)(5) and that the children's best interests required termination of their parental rights.*

Mother and Father alike next contend that the district court erred in concluding that the State proved the presumption of unfitness for both parents by clear and convincing evidence and terminating their parental rights.

We begin with Mother's case. While her brief to us includes a summary of the legal principles that guide courts in their resolution of claims pertaining to a parent's fitness or the propriety of termination decisions, she neglects to offer any argument for either claim tailored specifically to her case. That is, while she alleges the court erred in finding the presumption of unfitness satisfied and terminating her parental rights, she does not offer any analysis of her contentions. A point only incidentally mentioned and not adequately briefed is considered waived and abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021).

But our review of the record reveals there was ample evidence to support the district court's termination decision. The children were out of the home for the greater part of two years. In that time, Mother fulfilled only two of her reintegration tasks. It is highly probable Mother is unfit to properly care for the children and that condition is unlikely to improve in the foreseeable future. Mother also had not visited with the children in roughly a year. She was unable to consistently manage the extraordinarily serious mental health issues that robbed her of the ability to care for the children, required their removal from the home on more than one occasion, and left the children significantly traumatized. Under these circumstances, the district court did not abuse its discretion when it found it was in the children's best interests to terminate Mother's parental rights.

As somewhat of a companion claim to this issue, Mother contends the district court's journal entry is inadequate because it failed to identify which statutory provisions and corresponding factual bases it relied on in support of its conclusion. Mother asserts this purported deficiency requires a remand to the district court for clarification of its legal foundation for terminating her parental rights. But Mother never objected to the district court's journal entry as inadequate while still before the district court. When no objection is made to the adequacy of the lower court's findings of fact or conclusions of law, an appellate court presumes the district court found all facts necessary to support its

judgment. *O'Brien v. Leegin Creative Leather Products*, Inc., 294 Kan. 318, 361, 277 P.3d 1062 (2012). Mother has failed to demonstrate that the district court erred in denying her request for a continuance and that its misdirection resulted in a due process violation.

Father likewise argues the court's conclusions lacked the required evidentiary foundation to be upheld. As noted throughout our opinion the district court concluded that, as with Mother, the statutory presumption of unfitness found at K.S.A. 38-2271(a)(5) was similarly satisfied as to Father, and thereby established that he was unfit to parent the children and it was in their best interest for Fathers parental rights to be terminated. Father concedes that the children were out of his custody for more than one year when the district court terminated his parental rights. But he stresses the absence of any evidence offered by the State to show that he substantially neglected or willfully refused to carry out his assigned reintegration case plan. He readily acknowledges his failure, but he claims that he made progress that should not be cast aside. In support of this assertion, Father highlights the completion of his parenting class, mental health intake evaluation, and a drug and alcohol evaluation.

Our review of the record shows the state presented evidence that Father only started receiving drug and alcohol treatment services two months before the termination hearing. Unfortunately, what Father accomplished pales in comparison to what he did not. That is, in two years' time he neglected to verify both his employment and residential status with SFCS.

Perhaps more disconcerting is the pattern of deceit Father acknowledged he engaged in with respect to his residential status. Throughout the court ordered ICPC process Father consistently attested to the fact that he resided with his Mother when in reality he lived with his girlfriend for a considerable period of that time. Notably, despite

dating the woman for over a year, Father did not mention her to SFCS, nor did he inquire how she might be incorporated into or otherwise impact the reintegration process.

Further, the district court tasked Father with the responsibility of securing appropriate mental health services for his children. Yet Father never invested the time to better understand the psychological challenges faced by each of his three children. Thus, it was nearly impossible for him to home in on providers who were skilled in addressing those precise needs. Finally, at the time of the termination hearing, Father had shared no visits with the children for several months. Taking these significant derelictions along with the numerous other case plan tasks that Father also took no initiative to fulfill in two years, we have no hesitancy in concluding that the court's conclusions about the Father's unfitness and the termination of his parental rights were proven by clear and convincing evidence.

Father believes that even if the State successfully sustained its burden to establish applicability of the presumption, he was equally successful in rebutting that presumption by a preponderance of the evidence. In support of this rather bold assertion Father again directs our attention to his attendance at level 2 outpatient treatment and stable housing to support this contention. But the district court did not find these arguments persuasive, and there is evidence in the record to support that assessment.

Father also asserts that his acquisition of full-time employment should be afforded greater weight. But while Father claimed to have stable employment, he never verified his employment with SFCS. Most importantly, these arguments go to the weight of the evidence presented, and appellate courts do not reweigh evidence or reassess witnesses' credibility. We do not find Father's arguments that he rebutted the presumption persuasive and affirm the district court's termination of Father's parental rights over the children.

As a final note, in his last argument, Father points out that the district court did not terminate his rights under any provision set forth under K.S.A. 38-2269. Perhaps in response to Mother's errant argument about the district court filing an inadequate journal entry, Father emphasizes that the district court's sole reason for terminating his parental rights was his substantial neglect or willful refusal to carry out a court-approved reasonable case plan. Regardless of his reasoning, Father's argument related to K.S.A. 38-2269 is irrelevant. Because the district court properly terminated Father's rights in accordance with the presumption at K.S.A. 38-2271(a)(5), it had no obligation to also enter findings under K.S.A. 38-2269 when terminating his parental rights.

The record supports the district court's finding that the State proved both parents' unfitness by clear and convincing evidence, and the court did not err in concluding that termination of Mother's and Father's parental rights was in the children's best interests. We therefore affirm the district court's judgment.

Affirmed.

* * *

SCHROEDER, J., concurring: I concur in the result based on the arguments advanced by Mother on appeal and before the district court. However, I write separately because I cannot overlook the troubling path which led to this result. Here, we are essentially upholding the denial of one due process right—Mother not being present at the termination hearing—based on the failure of another—Mother's counsel did not provide sufficient evidentiary support for her continuance motion and Mother's appellate counsel has not properly designated the record or framed the argument for appeal.

As other panels of this court have recognized, there is a right to the assistance of counsel in a termination proceeding; where there is a right to counsel, there is a right to

effective assistance of counsel. See *In re Rushing*, 9 Kan. App. 2d 541, 545, 684 P.2d 445 (1984). Here, Mother's trial counsel requested a continuance without specifying how long and did not provide the district court any evidence demonstrating if or when Mother would be able to participate in the proceedings. While I disagree with the majority's characterization of this as a request for an indefinite continuance, it seems far likelier the district court may have been receptive to a continuance if a specific and reasonable time period had been proposed. Here, Mother's trial counsel, in support of her continuance request, should have: (1) presented evidence in the form of testimony or affidavit from Mother's treatment providers regarding her present condition and prognosis/timeline for recovery; or (2) requested a brief continuance for a status hearing so the medical evidence could be obtained and presented. With this additional information, the district court would have been better equipped to determine whether further continuance of the termination trial should be allowed for Mother to attend and participate.

In my view, we reach the result in this case by implicitly faulting Mother for the actions—or more pertinently, inaction—of her attorney on whom she was entirely dependent given she was involuntarily committed for treatment. And this problem could have been largely avoided had the district court, in its role as gatekeeper to assure a fair proceeding, sufficiently inquired as to the prognosis for Mother's recovery. At the very least, the district court should have asked whether Mother's counsel had any additional information before proceeding with the termination trial the following day.

As to Mother's arguments on appeal, I do not find it significant her written continuance motion is not included in the record on appeal. Although more detail could be helpful, the thrust of her arguments and the basis for the district court's ruling is clear enough from the on-record discussions. The panel in *In re S.M.*, 12 Kan. App. 2d 255, 255, 738 P.2d 883 (1987), similarly noted the grounds on which one of the natural father's motions was denied were not evident in the record. But this did not preclude review of the issue because it was clear what was requested (a continuance of the

hearing), why it was requested (so the natural father could be present), and how the request was handled (it was denied). 12 Kan. App. 2d at 255. Here, it is clear that Mother requested a continuance because she was involuntarily committed to Osawatomie and presently unable to attend or participate in the hearing, and the district court denied her request.

The bigger problem on appeal is the argument Mother advances about the district court not considering an alternative such as allowing her to participate via Zoom. The majority correctly notes this is an alternative version of the facts and generally contrary to Mother's trial counsel's statements that she was presently not of sound mind. Given the misplaced reasoning of Mother's appellate argument, as well as the various briefing errors and concerns with her failure to designate the record, it seems both Mother's trial and appellate counsel performed deficiently. I cannot ignore how incredibly concerning it is that the denial of one due process right—effective assistance of counsel—has led or may lead to the denial of another due process right—being present at the termination hearing. See *In re S.M.*, 12 Kan. App. 2d at 256-57 (due process requires parent have opportunity to be present at termination hearing); *In re Rushing*, 9 Kan. App. 2d at 545 (due process requires effective assistance of counsel in termination proceedings).

However, Mother's briefing does not question the effectiveness of her trial counsel, nor does her appellate counsel take issue with his own advocacy. Accordingly, I concur in the result despite my considerable apprehension as to how we have arrived here.