NOT DESIGNATED FOR PUBLICATION

No. 125,400

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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

MEMORANDUM OPINION

Appeal from Sedgwick District Court; MICHAEL J. HOELSCHER, judge. Opinion filed March 10, 2023. Affirmed.

Anna Jumpponen, of Wichita, for appellant natural father.

Julie A. Koon, assistant district attorney, and *Marc Bennett*, district attorney, for appellee.

Before GREEN, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: C.M. (Father) appeals the termination of his parental rights over S.M. On appeal, Father argues that the district court's decision regarding his fitness is not supported by clear and convincing evidence. Father also argues that the district court erred in finding that termination was in S.M.'s best interests. Because Father had been homeless for eight years when S.M. was born, because he was incarcerated shortly after S.M.'s birth, because he remained incarcerated for almost the entire duration of this case, and because he did not communicate with his case team or make any progress towards correcting the conditions that led S.M. to be found a child in need of care, we affirm the termination of the Father's parental rights over S.M.

FACTS

Father and S.R. (Mother) are the natural parents of S.M. The district court terminated the parental rights of both parents. Mother appealed separately, and a panel of this court affirmed the termination of her rights in *In re S.M.*, No. 124,948, 2022 WL 17174500 (Kan. App. 2022) (unpublished opinion).

S.M. was born prematurely at a Wichita hospital in November 2020. The Kansas Department for Children and Families (DCF) received two intakes alleging that S.M. was without adequate care. The intakes alleged that Mother had a long history of mental illness and was not currently taking medication. She was homeless and delusional when she arrived at the hospital. She was belligerent with staff, refused to answer physician questions, threatened to leave the hospital, accused her physician of trying to kill her and S.M., and was suffering from delusions. Mother was placed on an involuntary psychiatric hold. S.M. was placed into protective custody.

A few days after S.M. was born, DCF child protective service worker Emily Daggett went to the hospital to investigate. Mother's psychiatrist reported that Mother had been experiencing extreme psychosis. He recommended that Daggett not enter Mother's room without security present. Daggett, accompanied by three security guards, did try to interview Mother but Mother was too delusional to provide Daggett with any information. Daggett also talked to Father. Like Mother, Father was homeless. They had been in a relationship for approximately one year. Father used a false name when he signed into the hospital, and when Daggett asked him why Father explained that he was "'kind of a celebrity on the streets'" and a lot of people did not like him. He was concerned that if he used his real name people would discover that he was at the hospital and try to hurt Mother. Father also reported having two active warrants for his arrest.

Both Mother and Father had lengthy criminal histories and significant contact with law enforcement. Father had been convicted of numerous crimes in the 23 years preceding S.M.'s birth, including but not limited to drug possession, voluntary manslaughter, and domestic battery. He was on probation in two separate cases—one stemming from a domestic battery conviction and the other from a drug possession conviction—when S.M. was born. Father also had two pending charges for domestic battery against Mother, one pending charge for burglary, and one pending charge for theft.

The State filed a petition alleging that S.M. was a child in need of care in December 2020. The district court conducted a temporary custody hearing shortly thereafter. Father did not appear at the hearing. Mother appeared but waived her right to an evidentiary hearing. The district court ordered S.M. to be placed in the temporary custody of DCF.

The parties next convened for an adjudication hearing in January 2021. Mother did not appear, so the district court found her in default. Accordingly, the district court adjudicated S.M. as being a child in need of care as to Mother and ordered S.M. to remain in DCF custody in an out-of-home placement. Father did not appear at the hearing either, but his attorney explained that it was because he was incarcerated in Sedgwick County. Because of this, the district court continued the adjudication. Father ultimately entered a statement of no contest to the petition, and the district court adjudicated S.M. to be a child in need of care as to Father.

The following month, the district court held a disposition hearing as to both parents. Father appeared from jail, but Mother did not appear. The State asked the district court to find that reintegration with the parents was not viable because Mother had not appeared in court since the temporary custody hearing and because Father was facing prison time for a probation violation. Mother's attorney objected and informed the court

that Mother had been hospitalized due to her mental illness issues. He asked the court for additional time for Mother to recover. Father's attorney also objected to the State's suggested disposition. She stated that Father had a court date scheduled to occur two weeks later for the probation violation and recommended waiting to see what happened with that. The guardian ad litem suggested rescheduling the hearing shortly after Father's court appearance. If Father was facing further incarceration, then the guardian ad litem did not believe reintegration was viable. The district court declined to find that reintegration was not viable. The district court encouraged Father to do anything he could do to improve his position regarding reintegration in the time before the next hearing.

Father was still incarcerated when the parties next met in April 2021. Mother did not appear. The State again asked the court to find that reintegration was not viable with either parent. As to Mother, the State alleged that her chronic mental illness rendered her unfit, because when she was not in a state psychiatric hospital, she was usually homeless. As to Father, the State said that Father's criminal matter was ongoing and would not be quickly resolved. The guardian ad litem joined the State's request. Mother's attorney had not been able to contact Mother and did not object. Father's attorney, on the other hand, asked for more time. She informed the court that Father said he received a plea offer that would result in him being released from custody within a couple months. The district court decided to give Mother and Father more time. But the district court judge warned that "[u]nless things look dramatically different with regard to one or both of the parents then I'm going to be making that finding that reintegration is not viable." The district court scheduled the next hearing for June 2021.

Mother called DCF in May 2021. She reported that she had been at Osawatomie State Hospital for the past four months after having some of her fingers amputated due to frostbite. She hoped to be released from the hospital within a few weeks and said she would contact the case team to begin completing her court orders at that time. Mother's case team later determined that Mother was admitted to Osawatomie State Hospital due

to her mental health. Mother did require amputation due to frostbite, but the primary reason for her stay was because she was acting manic and delusional and engaging in threatening behavior. Mother began to improve in May 2021 but was not discharged until July 2021.

Father's probation violations in case No. 19CR2548 and new offenses in case No. 20CR2335 were also dealt with in May 2021. Father did not contest the State's allegation that he violated the terms of his probation in his 2019 case for methamphetamine possession. His original underlying sentence in that case was 40 months' imprisonment. Nevertheless, when the district court revoked Father's probation it modified his sentence to be only 25 months in prison. At the same May 2021 hearing, the district court sentenced Father for his new offenses—burglary and theft. The district court granted Father a downward durational departure to 25 months' imprisonment for the burglary conviction and sentenced him to 6 months in jail for the theft. The district court ordered Father's sentences in both cases to run concurrent. The district court awarded Father 157 days of jail credit in 20CR2335 for a beginning sentence date of December 21, 2020. The district court awarded Father the same 157 days of jail credit in 19CR2548 along with an additional 69 days for a beginning sentence date of October 13, 2020.

The parties reconvened in June 2021 for a permanency hearing. Mother appeared via Zoom from the hospital. Father appeared via Zoom from jail. The State, joined by the guardian ad litem, renewed its request that the district court find that reintegration was not viable. Mother objected again, noting that the case had only gone on for six months and she had been in the hospital for four of those months. She believed she would be released from the hospital soon. Father also objected. His attorney informed the court that he entered a plea in an ongoing criminal matter, but it was not yet known what Father's earliest release date would be. The district court found that reintegration was not viable. The court told the parents, however, that there was still time to demonstrate that

reintegration was a possibility if they worked hard in the time leading up to the termination hearing.

The State prepared a motion to terminate parental rights. The State recommended termination of Father's rights based on several factors listed in K.S.A. 38-2269.

First, the State alleged that Father was unfit due to "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). In support, the State noted that Father had a history of substance abuse issues. When S.M. was born, Father was on probation in a drug possession case and stipulated to violating the terms of that probation by using methamphetamine, failing to attend inpatient drug treatment, and being unsuccessfully discharged from outpatient drug treatment.

Second, the State alleged that Father was unfit based on the factor listed in K.S.A. 38-2269(b)(5)—conviction of a felony and imprisonment. Father had several felony convictions, including:

- possession of opiates, opium, or narcotic drugs in case No. 97CR1600;
- criminal damage to property in case No. 00CR1649;
- voluntary manslaughter in case No. 03CR49;
- failure to register under the Kansas Offender Registration Act in case No. 11CR1650;
- possession of opiates, opium, narcotic drugs, or designated stimulants in case No. 19CR2548; and
- burglary in case No. 20CR2335.

The State also noted that in May 2021 Father was sentenced to 25 months' imprisonment in case No. 20CR2335 which would run concurrent with his prison sentences in case Nos. 19CR2548 and 19DV1634.

Third, the State alleged that there was a failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family under K.S.A. 38-2269(b)(7). The State said that Father was unable to complete his case plan tasks or act as a parent to S.M. because he was incarcerated. For similar reasons, the State also alleged that Father was unfit under K.S.A. 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) and K.S.A. 38-2269(c)(3) (failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home).

The termination of parental rights hearing occurred in December 2021, just over a year after the State initiated the case by filing the child in need of care petition. Father requested a continuance. His attorney stated that although it was originally anticipated that Father would be released from prison in April 2022, he now anticipated being released in one to two weeks. The State, noting that Father had a history of instability that went back decades, did not think that waiting another week or two would change its position that termination was appropriate. Mother also requested a continuance. She noted that she had been released from Osawatomie State Hospital several months earlier, she had been consistently working with COMCARE since her release from the hospital, and she had worked on her court orders. The district court denied the requested continuances and proceeded with the hearing.

At the time of the termination hearing, Mother had completed all her court orders. She obtained stable housing with Section 8 assistance. She paid for her housing and daily living needs with disability income. Mother intended to continue her relationship with Father when he was released from prison, though he could not live with her in Section 8

housing. She testified that she had been in a common-law marriage with Father for over a year before the case began. She was not worried about Father's criminal history because she thought "people learn from their mistakes."

The primary concern regarding Mother was her mental health. Exhibits in our record showed that Mother's hospitalization first occurred in May 2007. The State introduced numerous records into evidence demonstrating that Mother had a long history of paranoid delusions and aggressive behavior which led to her hospitalizations. Mother admitted that she had been delusional in the past when she was not on her medication, but she denied ever being violent with people. Mother said she had discontinued her medication on occasion in the past because it made her gain weight. She quit taking her medication when she became pregnant with S.M. because of the weight gain and because she thought the medicine might harm S.M., though she did not consult with a doctor. Overall, Mother testified that she did not believe her mental illness impacted her behavior or caused any problems in her life. She believed she behaved the same way regardless of whether she took her medication. When asked why she was hospitalized on so many occasions, Mother said it was likely due to her unstable living environment. She believed S.M. had been taken for the same reason—she and Father did not have a stable living situation when S.M. was born. Mother's case workers were concerned that Mother failed to understand the extent of her mental illness or why S.M. was in state custody.

The primary concerns with Father were his incarceration and history of instability. Father had been homeless for at least eight years before the termination hearing. He blamed this on his family being greedy, explaining that they sold his possessions while he was in prison for a 2003 conviction rendering him homeless when he was released in 2009. He started using methamphetamine while he was on the streets because it was too dangerous to sleep. He began living with Mother about a year before S.M. was born and he agreed with her characterization of their relationship as a common-law marriage.

Sometimes they would stay in hotels paid for with Mother's disability money, but when the money ran out they would stay on the outskirts of downtown Wichita.

Father acknowledged his long criminal history but said most of his arrests occurred when he was young (Father was 42 years old at the time of the hearing). He had only been to prison "maybe three or four" times since 2009. He criticized the assistant district attorney for asking him about his criminal history and said mistakes he made in the past should be left in the past.

Father began serving his 25-month sentence for burglary and theft in December 2020—one year before the termination hearing. The State presented evidence that Father's earliest possible release date from prison would be in April 2022. Father testified that this was incorrect and that he believed he would be released "within the next couple of days to the next two weeks." He said there was a journal entry from June 2, 2021, that "gave [him] seven and a half months," but the journal entry "never made it to [the Kansas Department of Corrections]."

Upon being released from prison, Father planned to get a job. He testified that he had several jobs lined up. He said he was a certified electrician and a carpenter. He was also willing to work in a fast-food restaurant or perform lawn care services. And he said he was thinking about going back to school for HVAC or business management. He planned to live with his brother in Wichita. Father also intended to maintain his relationship with Mother and raise S.M. with her. He believed reintegration could occur within six months.

Father did not think there was any reason for S.M. to have entered State custody in December 2020. He accused Daggett, the DCF child protective services worker who investigated at the hospital, of "twist[ing] everything." Father said it did not matter that he was homeless because he told the hospital that his family planned to help him.

Father was also unconcerned about Mother's mental illness. He said it was not problematic that Mother had to be restrained to a bed in the hospital due to her behavior. Father believed that Mother could provide a safe, stable, and nurturing home for S.M. When asked if he had observed Mother's delusions, Father replied, "I wouldn't call it delusional. I would call it imagination." When asked for some examples of times where Mother "was using her imagination" while they were living on the streets, Father answered, "Her lovable self. She is a sweet, lovable, outgoing person. I wouldn't change anything about her."

Father testified that while incarcerated he tried to stay informed about S.M.'s status. Nevertheless, he said he was not allowed many chances to ask about S.M. Other than an initial visit to the jail, Father said his case team did not correspond or communicate with him. Father also said that although visits with S.M. could have been accomplished from prison using Zoom, the State made no effort to set up visits between him and S.M. Father's incarceration hindered his ability to complete his case plan tasks. He started a parenting class while at the Sedgwick County Jail, but he was transferred to the Department of Corrections before he could finish the class. He did not complete any court orders.

Mallory Zimmerman, a permanency specialist at St. Francis Ministries (an agency that contracts with the state to oversee family reintegration in child in need of care cases), said that she did make efforts to reach out to Father in prison by sending him monthly letters. The letters updated Father on S.M. and informed Father of his next court date. Father also had the ability to contact Zimmerman. However, he only wrote her one letter in August 2021 reporting that he had completed a mental health evaluation and was starting a parenting class. Zimmerman never received any documentation from Father that he had completed the evaluation or parenting class.

Zimmerman also testified as to her experiences with Mother. She did not believe Mother was fit to parent S.M. due to her mental health issues and the instability they caused in Mother's life. Zimmerman was especially concerned about Mother's testimony that she did not think her behavior was different when she took her medication. If Mother did not understand the value of her medicine, then Mother may quit taking it which could lead to delusional thoughts and potentially more hospitalizations. Zimmerman was unsure whether Father would help Mother with her medication as she was off her medication when they were together during the pregnancy.

Zimmerman believed that Mother and Father each needed to demonstrate nine months to a year of stability before reintegration could be considered. But she thought it would be harmful to S.M. to keep him in State custody for another year. Ultimately, she thought adoption was in S.M.'s best interests.

Mattie-Kay Stewart, a supervisor at St. Francis Ministries, testified similarly to Zimmerman. Stewart testified that although Mother had completed her court orders, she had great concerns about Mother's ability to maintain her mental health for an extended period of time. She was concerned that Mother may stop taking her medication because Mother did not understand the need for it. Stewart did not think Father was fit because he was incarcerated. Stewart thought Mother and Father would need to demonstrate a year of stability before reintegration was possible. Granting Mother and Father additional time to demonstrate this stability would be harmful to S.M. by prolonging the instability in his life, and children who experience extended periods of instability are at greater risk for poor development. She believed it was in S.M.'s best interests to receive permanency through adoption.

Regarding visits between S.M. and Father, Stewart said she had not used Zoom to facilitate visits with infants. She admitted that "we could have looked into that a little bit harder on our end."

At the end of the termination hearing, the district court took the matter under advisement. The court issued a ruling the following month terminating both Mother's and Father's parental rights. Father was still incarcerated when the court made its ruling. The court found that much of Mother's and Father's testimony lacked credibility. Specific to Father, the court found that evidence supported termination of his parental rights under K.S.A. 38-2269(b)(5) (conviction of a felony and imprisonment); K.S.A. 38-2269(b)(7) (failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family); and K.S.A. 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). Additionally, the court found that the presumption of unfitness in K.S.A. 38-2271(a)(7) applied because Father was convicted of voluntary manslaughter in 2003.

Father appealed. Mother also appealed, and a panel of this court affirmed the district court's decision to terminate her parental rights in *In re S.M.*, 2022 WL 17174500.

ANALYSIS

Did Father successfully rebut the presumption of unfitness established by K.S.A. 38-2271(a)(7)?

Father argues that the district court erred in finding that he failed to rebut the presumption of unfitness in K.S.A. 38-2271(a)(7) by a preponderance of the evidence. He also challenges the district court's determination that he was unfit and that his unfitness was unlikely to change in the foreseeable future. Finally, he challenges the district court's holding that termination was in S.M.'s best interests.

"A parent has a fundamental liberty interest in his or her relationship with the child, so the allegations of conduct that form the basis for termination must be proved by clear and convincing evidence." *In re R.S.*, 50 Kan. App. 2d 1105, 1115, 336 P.3d 903 (2014) (citing *Santosky v. Kramer*, 455 U.S. 745, 769-70, 102 S. Ct. 1388, 71 L. Ed. 2d

599 [1982]). If a child has been adjudicated to be a child in need of care, then a court may terminate parental rights "when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future." K.S.A. 38-2269(a). After making a finding of unfitness, the court must consider whether the termination is in the best interests of the child. K.S.A. 38-2269(g)(1). In making this determination, the court must "give primary consideration to the physical, mental and emotional health of the child." K.S.A. 38-2269(g)(1).

When an appellate court reviews a district court's termination of parental rights, it will "'consider 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 parents' right should be terminated.'" *In re K.H.*, 56 Kan. App. 2d 1135, 1139, 444 P.3d 354 (2019). In reviewing a district court's decision based on any clear and convincing evidence standard, an "appellate court does not weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact." *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008).

Father's first argument is that the district court erred in finding that he failed to rebut the presumption of unfitness under K.S.A. 38-2271(a)(7).

K.S.A. 38-2271 provides statutory presumptions of unfitness. In relevant part, it states:

> "(a) It is presumed in the manner provided in K.S.A. 60-414, and amendments thereto, that a parent is unfit by reason of conduct or condition which renders the parent unable to fully care for a child, if the state establishes, by clear and convincing evidence, that:
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> . . . .
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> (7) a parent has been convicted of . . . voluntary manslaughter . . . .

> "(b) The burden of proof is on the parent to rebut the presumption of unfitness by a preponderance of the evidence. In the absence of proof that the parent is presently fit and able to care for the child or that the parent will be fit and able to care for the child in the foreseeable future, the court shall terminate parental rights in proceedings pursuant to K.S.A. 38-2266 et seq., and amendments thereto."

The statute's reference to K.S.A. 60-414 is important. K.S.A. 60-414 states:

> "Subject to K.S.A. 60-416, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption operates; (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved."

This court has held that "for the statutory presumption [in K.S.A. 38-2269] to be applied in a constitutional fashion, the district court must first determine whether it is a K.S.A. 60-414(a) or (b) presumption." *In re J.S.*, 42 Kan. App. 2d 113, 118, 208 P.3d 802 (2009) (citing *In re J.L.*, 20 Kan. App. 2d 665, 891 P.2d 1125 [1995]).

Here, the district court reviewed the court file for case No. 03CR49. This file shows that in 2003 the State charged Father with felony murder after alleging that Father beat someone to death during a cocaine sale. In exchange for Father's guilty plea, the State amended the charge to voluntary manslaughter. No one questions whether the presumption applies in this case, as a prior conviction for voluntary manslaughter clearly falls under K.S.A. 38-2271(a)(7). The questions are whether the presumption was a K.S.A. 60-414(a) or (b) presumption and whether Father rebutted the presumption.

The district court did not apply the presumption in a constitutional fashion because it did not specify whether the presumption was a K.S.A. 60-414(a) or (b) presumption. Nevertheless, such errors are not reversible unless the parent raises the issue at the district court level. See *In re K.R.*, 43 Kan. App. 2d 891, 900, 233 P.3d 746 (2010); *In re J.S.*, 42 Kan. App. 2d at 119. Here, Father does not mention this issue in his brief on appeal, and an issue not briefed is deemed waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). Out of an abundance of caution, we will review the merits of this issue.

"The determination of whether the presumption is a subsection (a) or subsection (b) presumption is a question of law on which there is unlimited appellate review." *In re J.L.*, 20 Kan. App. 2d at 681. The *In re J.L.* court has suggested several considerations when making such a determination. These include the passage of time between the earlier event and the current proceeding and whether the facts of the earlier event bear any resemblance to the current factual scenario. 20 Kan. App. 2d at 681.

This court explained the distinction between K.S.A. 60-416(a) and (b) in *In re J.L.* In that case, the district court terminated D.L.C.'s parental rights based on the statutory presumption found in K.S.A. 1994 Supp. 38-1585(a)(1) (now codified at K.S.A. 38-2271[a][1]). This provision established a presumption that a parent was unfit if the parent had previously been found unfit in termination of parental rights proceedings. 20 Kan. App. 2d at 668. The only evidence presented at the termination hearing, which occurred in 1994, was a certified copy of a 1986 order terminating D.L.C.'s rights to a different child. The district court made "no effort . . . to compare the 1986 facts with the 1994 facts." 20 Kan. App. 2d at 668. Based solely on this journal entry, the district court found that the presumption applied and shifted the burden of proof to D.L.C. to rebut the presumption. The court did not specify whether the presumption fell under K.S.A. 60-414(a) or (b). 20 Kan. App. 2d at 679-80.

This court reversed the district court's decision. It held that for the presumption of unfitness to be constitutionally applied, the district court needed to determine which subsection of K.S.A. 60-414 applied. The court described the impact of each subsection as follows:

> "If the presumption provided for by K.S.A. 1994 Supp. 38-1585 is employed in conjunction with K.S.A. 60-414, it can be applied in a manner consistent with due process. [K.S.A.] 60-414 provides for two presumptions. A subsection (a) presumption is derived from facts which have probative value as proof of the presumed facts. A subsection (a) presumption places the burden of proving the nonexistence of the presumed fact on the party against whom it operates. In this case, the presumption of unfitness was treated as a subsection (a) presumption, and the burden was placed upon D.L.C. to prove she was no longer unfit. Under the facts of this case, that presumption violated her procedural due process rights.
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> "A subsection (b) presumption arises from facts which have no probative value as evidence of the presumed fact. When *any evidence* of the nonexistence of the presumed fact is introduced, the subsection (b) presumption evaporates and the case proceeds as if it had never existed. In this case, for instance, if D.L.C. had taken the stand and given her uncorroborated testimony that she was no longer unfit, the presumption would have disappeared, and the burden of proving unfitness would have reverted to the State." *In re J.L.*, 20 Kan. App. 2d at 677-78.

The court believed that ignoring K.S.A. 60-414 created an "unacceptable risk that a parent judged unfit many years ago will erroneously be adjudged unfit today for no other reason than a presumption based on the result in a case which has become irrelevant." 20 Kan. App. 2d at 672-73. The court concluded by finding that the prior termination should have resulted in a K.S.A. 60-414(b) presumption and that D.L.C. rebutted the presumption. It warned that "[a] conclusory determination that unfit once means unfit always will not be accepted." 20 Kan. App. 2d at 682.

We determine that the presumption in this case should also be treated as a K.S.A. 60-414(b) presumption. Here, Father's voluntary manslaughter conviction is further removed in both time and probative value than D.L.C.'s previous termination of parental rights. Additionally, the district court in this case, as in *In re J.L.*, applied the presumption based on a very limited record. Here, there was no attempt to compare the facts of Father's voluntary manslaughter conviction to the facts in existence when the termination hearing was held. There was also no consideration given to the fact that 18 years had elapsed between Father's conviction and the termination hearing.

Having found that the presumption is a K.S.A. 60-414(b) presumption, we turn now to the decisive question: Did Father rebut the presumption? The district court did not explicitly find that Father had failed to rebut the presumption. Nevertheless, we believe such a finding is implicit with the inclusion of the presumption in the journal entry terminating Father's parental rights.

The State suggests that the district court's finding was a negative finding. "A negative finding means the party with the burden of proof failed to meet that burden." *In re Estate of Haneberg*, 270 Kan. 365, 374, 14 P.3d 1088 (2000). Generally, this court employs a special standard of review for negative factual findings. Under this standard, the party challenging the negative finding must prove that the district court arbitrarily disregarded undisputed evidence or relied upon some extrinsic consideration such as bias, passion, or prejudice to reach its decision. *State v. Douglas*, 309 Kan. 1000, 1002-03, 441 P.3d 1050 (2019). In his brief, we note that Father does not mention the negative finding standard.

Nevertheless, on this record, we decline to apply the negative finding standard to the question of whether a parent rebutted a presumption of unfitness arising from K.S.A. 38-2271 and K.S.A. 60-414(b). The negative finding standard is highly deferential. Kansas courts have previously refused to apply it "to undermine the de novo, independent

review of legal questions with which appellate courts are properly imbued." *State v. Marx*, 289 Kan. 657, 661, 215 P.3d 601 (2009). Applying the negative finding standard of review in this case would be inconsistent with this court's interpretation of K.S.A. 60-414(b). The question that arises under K.S.A. 60-414(b) is whether Father introduced any evidence, even if uncorroborated, that the presumed fact did not exist. The question that arises under the negative finding standard is different. In that scenario, the question generally would be whether the district court had disregarded undisputed evidence.

The question of whether Father rebutted the K.S.A. 60-414(b) presumption is a legal question over which this court can exercise unlimited review. The State asserts that this court must reweigh evidence to reverse the district court's decision, but that is not the case. This court must simply review the evidence presented at the termination hearing to determine whether "*any evidence* of the nonexistence of the presumed fact" is introduced, "including the uncorroborated testimony of the parent whose rights are under consideration." *In re J.L.*, 20 Kan. App. 2d 665, Syl. ¶ 10. This exercise is similar to the analysis applied when a district court grants a motion to dismiss for failure to state a claim. In those cases, this court exercises unlimited review to determine if the facts state any claim upon which relief can be granted. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019).

In reviewing the record, we determine that Father did rebut the presumption of unfitness by showing some evidence. Father was required to show that he was "presently fit and able to care for the child or that [he would] be fit and able to care for the child in the foreseeable future." K.S.A. 38-2271(b). Father testified that he would be released from prison within the week. Father said that he had a place to live arranged and that he would get a job upon his release from prison. He testified that he could provide S.M. with a safe, stable, and nurturing home. He promised not to reoffend or use drugs. Father further thought reintegration would be possible within six months. We conclude that his testimony is sufficient to rebut the presumption of unfitness.

Did the district court err in determining that Father was unfit and his unfitness was unlikely to change in the foreseeable future?

Father challenges all three of the statutory bases upon which the district court based its unfitness decision. Father also argues that the district court erred in finding that Father's unfitness was unlikely to change in the foreseeable future.

Did the evidence, when viewed in the light most favorable to the State, support the district court's finding that Father was unfit?

The district court found Father unfit under K.S.A. 38-2269(b)(7) which applies where there has been a failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family. Father argues that St. Francis "did not demonstrate reasonable efforts in this case whatsoever." Specifically, he argues that St. Francis' efforts were not reasonable because it failed to: (1) pursue a potential kinship placement with Father's niece, M.P.; (2) schedule visits between Father and S.M.; (3) visit Father; and (4) offer Father resources to prepare for reintegration with S.M. upon his release.

St. Francis worked with Father by providing him with a case plan and monthly letters. St. Francis was also available as a resource to Father. But St. Francis' ability to further aid Father in this case was limited by Father's incarceration and lack of communication. After providing Father with his case plan and an open line of communication, the responsibility was on Father to avail himself of the resources St. Francis had to offer for progress to be made. Under the circumstances presented in this case, St. Francis' efforts were reasonable.

St. Francis admitted it could have done more, like scheduling Zoom visits between S.M. and Father, but that does not mean its efforts were not reasonable. S.M. was an infant and would be unlikely to form a relationship with Father via video. And Father's lack of relationship with S.M. was not the reason why the district court found him unfit.

The district court was more concerned with Father's incarceration and history of instability.

Father also complains that St. Francis failed to exert reasonable efforts because it neglected to investigate his niece, M.P., as a potential kinship placement. Father recommended M.P. to Daggett when she interviewed him at the hospital. Mother, Father, and M.P. were all present at a team decision-making meeting held at the hospital with social workers. After this meeting, Daggett believed St. Francis would follow up with M.P. St. Francis, however, never received this information and failed to follow up with M.P. Rather than bring this issue to St. Francis' attention or inquire as to why M.P. was not being used as a kinship placement, Father remained silent. It was not unreasonable for St. Francis to fail to follow up on M.P. when it was unaware that Father's niece was a potential placement.

Finally, Father argues that St. Francis failed to exert reasonable efforts because no one from St. Francis visited him by Zoom, phone, or in-person. Similarly, he asserts that St. Francis should have given him more resources, especially as he neared his release date. This issue again reverts to Father's failure to communicate. St. Francis believed that Father's earliest release date was April 2022. He did not contact them to tell them of his belief that he would be released by the end of 2021. He did not ask for any assistance at all, and on appeal he does not identify any particular action St. Francis could have taken that would have rendered its efforts reasonable.

We note that similar efforts by state agencies, as in this case, were found reasonable in *In re M.H.*, 50 Kan. App. 2d 1162, 337 P.3d 711 (2014). The father in that case was also incarcerated. His case worker visited him on a monthly basis until he was transferred to another facility, at which time she sent him monthly letters. The father did not respond to the letters or even contact the agency to inform it of his release date. When the district court cited K.S.A. 2013 Supp. 38-2269(b)(7) as a basis for terminating the

father's parental rights, the father made arguments similar to those made in this case: The agency did not help him locate programs that he could complete while he was incarcerated, the agency did not facilitate visitation between him and his child while he was incarcerated, and the agency did not keep him up to date on developments with the child. This court rejected the father's argument, stating that "[t]hough the agency could perhaps have done more to help Father achieve his case-plan goals, we cannot find that Father's failure to take the initiative to complete them himself or to ask for help in completing them was the agency's fault." 50 Kan. App. 2d at 1173.

The district court also found Father unfit under K.S.A. 38-2269(b)(8), which applies where there is a 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. In response, Father here essentially makes a stasis dispute centering on quality. Stasis refers to the focal point of a dispute. Here, Father contends that he made a tremendous change in his behavior while he was incarcerated. For example, he stated that he had plans for employment and housing once he was released from prison. He further acknowledged that prison had changed him for the betterment as an individual. Also, he asserted that had St. Francis provided him with more resources, he could have demonstrated that he had adjusted his circumstances to meet the needs of S.M.

Returning to the category of stasis in a dispute, we note that stasis is progressive in determining the focal point of a dispute. When Father chose to center his dispute on quality (whether the act is justified), he implicitly conceded the focal points conjecture (whether the act occurred) and definition (what the act should be called) in this dispute. Here, the evidence supports the district court's finding that Father exhibited almost no effort in this case in trying to become a responsible parent for S.M. The district court further found that despite Father's incarceration, he could have communicated with his case team and worked to address the problems that rendered S.M. a child in need of care. Instead, the district court determined that there was no evidence that Father worked on

the problems that rendered S.M. a child in need of care. Indeed, when the termination hearing was conducted, Father had no better understanding of S.M.'s needs and no better ability to provide for himself or S.M. as he did when S.M. entered state custody. Thus, the evidence therefore supports the district court's findings on this factor.

Finally, the district court found Father unfit under K.S.A. 38-2269(b)(5), conviction of a felony and imprisonment. Father does not dispute that he was imprisoned for a felony at the time of the termination hearing. He only argues that the district court erred in finding that the condition was unlikely to change in the foreseeable future. This argument will be addressed in the next section.

Did the evidence, when viewed in the light most favorable to the State, support the district court's finding that Father's unfitness was unlikely to change in the foreseeable future?

Father argues that the district court erred when it held that his unfitness was unlikely to change in the foreseeable future. He premises his argument on the assertion that he was going to be released from prison shortly after the termination hearing.

But we must pause to ask this question: In the world of time, how should a child's time be measured when it is contrasted against that of an adult? And where is the boundary line between the two?

> "When assessing the foreseeable future, this court uses 'child time' as the measure. The Revised Kansas Code for Care of Children—K.S.A. 2018 Supp. 38-2201 et seq.—recognizes that children experience the passage of time in a way that makes a month or a year seem considerably longer than it would for an adult, and that different perception typically points toward a prompt, permanent disposition. K.S.A. 2018 Supp. 38-2201(b)(4); *In re M.B.*, 39 Kan. App. 2d 31, 45, 176 P.3d 977 (2008); *In re G.A.Y.*, No. 109,605, 2013 WL 5507639, at *1 (Kan. App. 2013) (unpublished opinion) ('"child time"' differs from '"adult time"' in care proceedings 'in the sense that a year . . . reflects a much

> longer portion of a minor's life than an adult's')." *In re M.S.*, 56 Kan. App. 2d 1247, 1263-64, 447 P.3d 994 (2019).

When children are very young and lack any real parental relationship, this "factor takes on particular significance." 56 Kan. App. 2d at 1264. The court may also "look to the parent's past conduct as an indicator of future behavior." 56 Kan. App. 2d at 1264.

There was disputed evidence as to when Father would be released from prison. Father believed that he would be released within a week of the December 2021 termination hearing. The State presented evidence that Father was serving a 25-month sentence that began in December 2020 and that his earliest possible release date was April 2022. Presumably the latest possible release date would be January 2023, or 25 months after Father began serving his sentence. The district court did not specify when it thought Father would be released from prison. The court, however, did state that Father's testimony generally lacked credibility.

Father was serving two concurrent 25-month sentences in case Nos. 19CR2548 and 20CR2335. He believed he would be released from prison early because he had just received a June 2021 journal entry which granted him seven-and-a-half months of jail credit. He said this journal entry had been missed by the Department of Corrections. The record does show that there was a June 2021 journal entry granting Father seven-and-a-half months of jail credit in case 19CR2548. Nevertheless, Father was serving a concurrent 25-month sentence in 20CR2335 so any reduction in the sentence for 19CR2548 would be irrelevant because the supposed reduction would not have lowered his sentence in 20CR2335.

When viewed in the light most favorable to the State, the evidence showed that Father would be released from prison anywhere between 5 and 13 months after the termination hearing. See *In re M.T.*, No. 125,230, 2022 WL 17545605, at *5 (Kan. App.

2022) (unpublished opinion) ("Father suggested that he would be released in April 2022—three months after the termination hearing. But the district court did not find his testimony credible—a finding this court cannot second-guess—and there is no other evidence showing an April release date. The journal entry for the conviction shows that he was eligible for 20 percent good-time credit, but even that time would seemingly bring his release date up to July or August 2022, or six to seven months after the termination hearing—not three. [Citation omitted.]").

Father asserts that *In re S.T.*, No. 121,376, 2019 WL 6795836 (Kan. App. 2019) (unpublished opinion), presented an analogous scenario. There, this court reversed a district court decision that a parent's unfitness was unlikely to change in the foreseeable future because, at the time of the termination hearing, the parent had at least 6 months left to serve on a 23-month prison sentence. But this case is distinguishable from Father's case.

In *In re S.T.*, father, J.T., was homeless and unemployed when his son S.T. was born in April 2017. The mother had drug abuse problems and ultimately relinquished her rights to S.T. J.T. began working on his family reunification plan which included regular supervised visits that social workers believed went well. In June 2017, however, J.T. was arrested on felony assault and firearm charges. He was in custody until September 2017 when he was granted probation. J.T. continued working the family reunification plan when he was released. The district court revoked J.T.'s probation in August 2018, though the reasons were not clear from the record, and ordered J.T. to serve his 23-month sentence. When this occurred, S.T. was nearly one-and-a-half years old. J.T. did not have further contact with S.T. A social worker testified that scheduling telephone calls between J.T. and S.T. would have been impractical given S.T.'s age. The State moved to terminate J.T.'s parental rights shortly afterwards, and a termination hearing occurred in January 2019.

At the hearing, J.T. testified that he would be released from prison in July 2019, even though his full sentence would not be completed until mid-2020. The district court did not dispute this testimony. Nevertheless, the district court found that J.T. was unfit under K.S.A. 2018 Supp. 38-2269(b)(5) due to his felony conviction and imprisonment and K.S.A. 2018 Supp. 38-2269(c)(2) due to his inability to maintain contact with S.T. while he was incarcerated. The court also found that J.T.'s unfitness was unlikely to change in the foreseeable future.

This court found no error in the district court's determination that J.T. was unfit at the time of the termination hearing due to his incarceration. 2019 WL 6795836, at *3. This court disagreed with the district court, however, as to whether the State had established that J.T.'s unfitness was unlikely to change in the foreseeable future. The court noted that "[t]he two bases on which the district court found J.T. to be unfit would have been substantially mitigated within six months of the termination hearing assuming J.T. were released from prison in July 2019." 2019 WL 6795836, at *4.

The most material difference between this case and *In re S.T.* is that in *In re S.T.* there was undisputed evidence that the only conditions rendering J.T. unfit would cease in six months. If the district court's sole basis for finding Father unfit in this case was Father's incarceration, then Father would have a better argument. But this is not the case. The district court also found Father unfit based on his conduct, notably, his long criminal history and his years of homelessness and unemployment. Social workers testified that Father would need at least nine months to a year after being released from prison to demonstrate the stability required to continue with reintegration. Whereas J.T. demonstrated appropriate parenting skills and worked on his case plan when he was not incarcerated, Father never demonstrated a willingness or ability to complete his case plan. There was no evidence of personal growth during his incarceration—Father was essentially the same person as when he entered prison.

Father's lack of understanding as to why S.M. was found to be a child in need of care also supports the district court's finding that Father was unlikely to change in the foreseeable future. He did not think it was right for the State to take custody of S.M. even though he was homeless, jobless, and completely unprepared to care for a child. Father also thought Mother would be a good caretaker despite her delusional and aggressive behavior. Father's plan to raise S.M. with Mother was rightfully concerning to the case workers as Father either could not understand or failed to acknowledge her serious mental illness. See *In re H.Q.*, No. 123,939, 2021 WL 5407781, at *11 (Kan. App. 2021) (unpublished opinion) (even where there were minimal concerns with Father's ability to parent or completion of court orders, termination was warranted because Father planned to leave children with Mother who was an unsuitable caretaker due to cognitive issues).

For these reasons, the district court's decision was sound. Father was unfit and his unfitness was unlikely to change in the foreseeable future.

Did the district court err in determining that termination of Father's parental rights was in S.M.'s best interests?

Father also challenges the district court's finding that termination of his parental rights was in S.M.'s best interests.

Once the district court finds that a parent is unfit, it must decide whether termination of parental rights "is in the best interests of the child." K.S.A. 38-2269(g)(1). In making this decision, the district court must "give primary consideration to the physical, mental and emotional health of the child." K.S.A. 38-2269(g)(1). The district court's decision should be based on a preponderance of the evidence. *In re M.S.*, 56 Kan. App. 2d at 1264. The best interests decision is entrusted to the sound judicial discretion of the district court and this court reviews its decision for abuse of discretion. "A district court exceeds that broad latitude if it rules in a way no reasonable judicial officer would

under the circumstances, if it ignores controlling facts or relies on unproven factual representations, or if it acts outside the legal framework appropriate to the issue." 56 Kan. App. 2d at 1264.

The district court's decision was not an abuse of discretion. A reasonable person could agree with the district court's decision, and the district court's conclusion was not based on a factual or legal error. There is no bond between S.M. and Father. Father failed to acknowledge why S.M. was in DCF custody. Similarly, he did not recognize Mother's problems and planned to raise S.M. with her. On appeal, Father continues to blame St. Francis for his lack of relationship with S.M. when the lack of relationship was really due to his extensive history of committing crimes, homelessness, and joblessness. Father's criminal history score is A which means he will face a presumptive prison sentence if he continues his pattern of reoffending. See K.S.A. 2022 Supp. 21-6804 (sentencing grid for nondrug crimes); K.S.A. 2022 Supp. 22-6805 (sentencing grid for drug crimes).

Stewart, a supervisor at St. Francis Ministries, explained why she thought termination was in S.M.'s best interests. She explained that children who experience long extended periods of instability are at greater risk for problems in their social and emotional development. Achieving permanency through adoption, Stewart explained, would offer S.M. a predictable, stable, and secure environment.

Father failed to demonstrate stability, and due to his incarceration and history of instability, it was unlikely that he would be able to do so in the foreseeable future. The district court did not find his assurances credible. S.M. spent his entire life away from Father and he deserved permanency. Accordingly, the district court's decision that termination was in S.M.'s best interests was not an abuse of discretion.

Affirmed.