NOT DESIGNATED FOR PUBLICATION

No. 125,707

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

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

MEMORANDUM OPINION

Appeal from Sedgwick District Court; MICHAEL J. HOELSCHER, judge. Opinion filed April 21, 2023. Affirmed.

Laura E. Poschen, of Law Office of Laura E. Poschen, of Wichita, for appellant natural father.

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

Before CLINE, P.J., MALONE and ATCHESON, JJ.

PER CURIAM: In this appeal arising under the revised Kansas Code for Care of Children (KCCC), K.S.A. 38-2201 et seq., Father appeals the termination of his parental rights over his son, Z.S. He argues a due process violation occurred because he lacked notice that the State would rely on his criminal history and incarceration to argue he was an unfit parent. After reviewing the record, we disagree and affirm the district court's ruling.

FACTUAL AND PROCEDURAL HISTORY

Z.S. was taken into police protective custody on August 3, 2020, after he tested positive at birth for opioids and exhibited withdrawal symptoms, including jitteriness and being difficult to console. Mother also previously tested positive for opioids and methamphetamine, however she reportedly had been prescribed Tylenol 3—which contains codeine—for her methadone withdrawal symptoms. At the time, both Mother

and Father were incarcerated in the Sedgwick County Jail. Father had been there for about nine months and did not know when he would be released from custody. These circumstances led to the State filing a child in need of care (CINC) petition pertaining to Z.S. on August 5, 2020.

Father acknowledged paternity and waived his right to an evidentiary hearing the next day. As to both parents, the district court found probable cause to believe the allegations in the CINC petition were true and that Z.S. was likely to sustain harm if not immediately placed in the custody of the Secretary of the Department for Children and Families (DCF). The court gave the Secretary discretion for placement with either parent with 10 days' notice to all parties.

In September 2020, Father submitted a statement of no contest to the allegations in the CINC petition and the district court entered an order adjudicating Z.S. as a child in need of care as to Father and ordered Z.S. to remain in DCF custody. In October 2020, the court adjudicated Z.S. as a child in need of care as to Mother as well and ordered Z.S. to remain in DCF custody with the authority for him to be placed with a parent with 10 days' notice to all parties.

After a permanency hearing in May 2021—about nine months after the case began—the district court found reintegration was no longer a viable goal and ordered the case plan changed to adoption because the parents had not made adequate progress toward reintegration. Father appeared at this hearing remotely by video conference because he was incarcerated in the Sedgwick County Jail at the time.

The State filed a motion for a finding of unfitness and termination of parental rights a month later. As to Father, the State expressed concerns related to his inability to provide a safe and stable environment for Z.S. because of his continued incarceration and

criminal history. In particular, the State asked the district court to find Father unfit based on:

- Use of dangerous drugs of such duration or nature as to render the parent unable to care for the ongoing physical, mental, or emotional needs of the child, K.S.A. 38-2269(b)(3);
- Physical, mental, or emotional abuse or neglect of a child, K.S.A. 38-2269(b)(4);
- Failure of reasonable efforts made by appropriate agencies to rehabilitate the family, K.S.A. 38-2269(b)(7);
- Lack of effort to adjust the circumstances, conduct, or conditions to meet the child's needs, K.S.A. 38-2269(b)(8);
- Failure to maintain regular visitation, contact, or communication with the child or with the custodian of the child, K.S.A. 38-2269(c)(2); and
- Failure to carry out a reasonable plan approved by the court directed toward the reintegration of the child into a parental home, K.S.A. 38-2269(c)(3).

The district court held a termination hearing in September 2021, which Father appeared at remotely by video conference because he was incarcerated at a jail in Texas at the time. Mother did not appear, so the district court found her in default and terminated her parental rights. Father requested an evidentiary hearing on the motion, so the court continued the case as to Father.

At the evidentiary hearing held in November 2021, Father advised the district court that he wished to relinquish his parental rights. After questioning, the district court determined Father was freely and voluntarily relinquishing his parental rights with a full understanding of the resulting legal effects and accepted the relinquishment. The court set the matter for a post-termination permanency hearing in March 2022. Father completed

the relinquishment forms and copies were e-mailed to the court. However, the court never received the original forms.

At the March 2022 hearing, the district court explained that DCF could not move forward with permanency because it had only received electronic copies of Father's signed relinquishment forms. However, after speaking with an attorney, Father—who was present at the hearing—decided he no longer wished to relinquish his parental rights. The court scheduled a termination hearing to occur in April 2022, which the parties later agreed to reschedule for June 2022.

At the June 13, 2022 hearing, a deputy with the Sedgwick County Sheriff's Office testified that Father—who was incarcerated in the Sedgwick County Jail—refused to come to court for the hearing. The deputy tried asking Father to comply, but Father became agitated and verbally abusive, repeatedly stating he did not want to go to court and using curse words directed at the deputy. To defuse the situation, the deputy allowed Father to return to his cell.

The only other witness to testify at the hearing was Mallory Zimmerman, a Saint Francis Ministries (SFM) reintegration supervisor assigned to the case. Zimmerman testified that Father was incarcerated throughout most of the case, which limited his ability to complete case plan tasks. During the time he was out of custody, the only court orders that Father complied with were that he completed two requested urinalysis tests and two hair follicle tests. Father failed both hair follicle tests, testing positive for amphetamines and cocaine in February 2021 and positive for methamphetamine in June 2021. Zimmerman sent Father monthly letters when he was in jail, but he did not respond to those letters. Although Father had some supervised visits with Z.S. when he was not incarcerated, Zimmerman said the last visit as of the termination hearing would have been more than a year ago since he had been incarcerated for a year at that point. Father had no contact with Z.S. while he was in jail.

Zimmerman said Father would need to be released from jail, complete all court orders, comply with drug testing, and have negative drug test results before she could recommend reintegration. She believed the district court should terminate Father's parental rights because Z.S. could not live with Father while he was incarcerated and due to his failure to complete court orders or demonstrate stability. Zimmerman also believed Father's drug use was a concern based on his failed hair follicle tests and noncompliance with other testing.

At a hearing three days later, the district court announced it was terminating Father's parental rights based on the evidence presented. In making its factual findings, the district court noted Father had been incarcerated for most of the case and was currently in prison after having been recently sentenced to serve 22 months for possession of methamphetamine and two counts of misdemeanor theft. The court pointed out that the only court order Father completed during the entire pendency of the case was submitting to two urinalysis tests and two hair tests, and the results of the hair tests were positive—one for cocaine and amphetamines, and the other for methamphetamine. Additionally, the only contact Father had with Z.S. during the child's life was a few supervised visits during the brief time Father was not incarcerated. Father had no contact with Z.S. for the previous year due to his incarceration, and the court found there was no "appreciable relationship" between father and Z.S. It noted Z.S. was approaching his second birthday and he has been in the custody of DCF in out-of-home placement his entire life.

The district court found Zimmerman's testimony from the hearing credible and found there was clear and convincing evidence to find Father unfit as a parent and that his unfitness was unlikely to change in the foreseeable future. Specifically, the court found the following statutory factors applied to Father: K.S.A. 38-2269(b)(3); K.S.A. 38-2269(b)(4); K.S.A. 38-2269(b)(7); K.S.A. 38-2269(b)(8); K.S.A. 38-2269(c)(2); and K.S.A. 38-2268(c)(3). The court also found it was in Z.S.'s best interests for Father's

parental rights to be terminated. The court memorialized its findings in a journal entry following the hearing.

Father timely appealed.

ANALYSIS

A parent has a constitutionally protected liberty interest in the relationship with their children. *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re B.D.-Y.*, 286 Kan. 686, 697-98, 187 P.3d 594 (2008). Before terminating parental rights, Kansas law requires a district court to find the State has proved that the parent is unfit, that the conduct or condition that renders the parent unfit is unlikely to change in the foreseeable future, and that termination of parental rights is in the child's best interests. K.S.A. 38-2269(a), (g)(1). Because of the fundamental nature of this right, any findings relating to a parent's unfitness must be proved by clear and convincing evidence. K.S.A. 38-2269(a); *In re R.S.*, 50 Kan. App. 2d 1105, Syl. ¶ 1, 336 P.3d 903 (2014).

When reviewing a finding of parental unfitness, this court must determine, after considering all the evidence in a light favoring the State, whether the evidence is sufficient to support the court's decision—that is, whether a rational fact-finder could have found it highly probable that the parent was unfit. *In re B.D.-Y.*, 286 Kan. 686, Syl. ¶ 4. Appellate courts do not reweigh conflicting evidence, pass on the credibility of witnesses, or otherwise independently decide disputed questions of fact. 286 Kan. at 705. If a district court finds that a parent is unfit, the court must then determine whether the parent's unfitness is likely to change in the foreseeable future. K.S.A. 38-2269(a). A court evaluates the foreseeable future from a child's perspective because children have a different perception of time. *In re R.S.*, 50 Kan. App. 2d at 1117. For a child, "a month or a year seem[s] considerably longer than it would for an adult." *In re M.S.*, 56 Kan. App. 2d 1247, 1263, 447 P.3d 994 (2019); see K.S.A. 38-2201(b)(4).

Father asserts his due process rights were violated because he lacked adequate notice that the State would use his criminal history and incarceration to argue his parental unfitness. This claim appears to stem from the State's omission of K.S.A. 38-2269(b)(5) from its motion to terminate his parental rights, which he claims prevented him from meaningfully responding to the allegations in the motion or participating in his defense.

The State acknowledges that the motion for termination did not include K.S.A. 38-2269(b)(5) as a statutory factor but asserts no due process violation occurred because the district court did not rely on subsection (b)(5) to find Father unfit. The State also contends the motion included sufficient information to put Father on notice that the State had alleged his incarceration affected his parental fitness under the other alleged statutory factors. The State also points out that Father specifically chose not to participate in the evidentiary hearing, thus defeating any suggestion he lacked a meaningful opportunity to be heard on the State's motion. We agree with the State and find there was no due process violation.

To begin, Father concedes he is making this argument for the first time on appeal and urges this court to consider it as a claim of constitutional error since it involves his fundamental parental rights. See Kansas Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) (requiring parties to explain why an issue not raised below is properly before the court). The State does not address Father's lack of preservation but given the importance of the issues at stake, we choose to address Father's claim on the merits.

A parent's right to decide about the care, custody, and control of their children is a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution. But because the State also has a competing interest in the welfare of children as a matter of state concern, a parent is entitled to due process of law before they can be deprived of this fundamental right. *In re J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007). The essence of due process is notice and the right to be heard at a meaningful

time and in a meaningful manner. See *In re C.H.W.*, 26 Kan. App. 2d 413, 419, 988 P.2d 276 (1999).

The crux of Father's argument is that the State needed to explicitly include K.S.A. 38-2269(b)(5) in its motion to terminate his parental rights to satisfy due process requirements. The only authority he cites to support this proposition is *In re B.C.*, No. 125,199, 2022 WL 18046481 (Kan. App. 2022) (unpublished opinion), *rev. denied* 317 Kan. ___ (March 28, 2023), a similar case in which the State likewise omitted K.S.A. 38-2269(b)(5) from its motion for termination of parental rights despite the panel's belief that the factual record clearly supported such a finding. The panel briefly noted that relying on K.S.A. 38-2269(b)(5) despite the State's omission "almost certainly" would have violated due process. 2022 WL 18046481, at *3. Yet, the panel also observed that "[t]he statutory bases for parental unfitness tend to overlap in many respects and often weigh rather similar circumstances," and then upheld the termination of parental rights because there was sufficient evidence to support the factors the district court relied on. 2022 WL 18046481, at *4-6. Likewise, we see no reason why the State's omission of K.S.A. 38-2269(b)(5) from its motion to terminate parental rights should result in a wholesale reversal of the district court's ruling in this case.

Moreover, although Father does not mention it in his brief, K.S.A. 38-2266(b) states that "[w]henever a pleading is filed requesting termination of parental rights . . . the pleading shall contain a *statement of specific facts which are relied upon* to support the request, including dates, times and locations to the extent known." (Emphasis added.) Examining the State's motion, we note that the State immediately mentions Father's incarceration as a reason Z.S. was taken into police custody. The State further alleged concerns about placement with Father due to his incarceration and mentioned his incarceration status several times when detailing the information submitted in court reports and findings made by the court throughout the case. We fail to see how Father was not put on notice that the State would present evidence related to Father's

incarceration at the evidentiary hearing. See *In re K.H.*, No. 106,322, 2012 WL 687975, at *7 (Kan. App. 2012) (unpublished opinion) ("A motion for the termination of parental rights may sufficiently meet a parent's due process rights if the motion gives the parent adequate notice and an opportunity to be heard to defend against the State's claims.").

As a final point, we must note that Father makes no attempt to challenge the district court's unfitness determination by contesting any of the specific statutory factors in the court's ruling. Nor does he contest the determination that termination of his parental rights was in Z.S.'s best interests. Issues not briefed are considered waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). Accordingly, we find Father has waived and abandoned any argument related to the sufficiency of the evidence to support termination of his parental rights under K.S.A. 38-2269.

But even if Father did not waive or abandon this argument, our decision would be the same. Having considered all the evidence in the light most favorable to the State, we find clear and convincing evidence that Father was unfit under K.S.A. 38-2269(b)(3), (b)(4), (b)(7), (b)(8), (c)(2), and (c)(3), and that the conditions or conduct rendering him unfit were unlikely to change in the foreseeable future. Likewise, we conclude that the district court correctly determined termination of Father's parental rights was in Z.S.'s best interests.

Over the course of the CINC case, Father had very little contact with Z.S., who had been taken into state custody at birth, and had no established or continuing parental relationship with the child. Likewise, Father had been unable and would be unable for at least the next 19 months (the amount remaining on his 22-month prison sentence at the time of the hearing) to establish continuing employment or other means of financially supporting a reunited family or to provide suitable housing for himself or the child—critical components of any reunification plan. During the time he had been released from jail, Father apparently could neither avoid committing additional crimes nor stop using

illegal drugs, as evidenced from his positive drug tests. The evidence presented at the termination hearing was sufficient to persuade a reasonable fact-finder that it was highly probable Father was presently unfit.

The district court also properly found Father's unfitness was unlikely to change in the foreseeable future, especially measured by "child time" for Z.S. The toddler was less than two years old at the time of the termination hearing, and Father faced ongoing incarceration for almost that same amount of time in the future. Even upon release, Father would have to secure and retain gainful employment, find suitable housing, and remain drug-free before reintegration would be possible. Given the lack of any parental bond between Father and Z.S. and Z.S.'s young age, such an extended potential reintegration period would be unreasonable.

Finally, the district court found the termination of Father's parental rights was in Z.S.'s best interests—a decision we review for abuse of judicial discretion, a standard that accords great deference to the ruling. Again, the circumstances show that Z.S. had no ongoing relationship with Father and Father displayed, at best, an indifference to cultivating such a relationship. Moreover, Father displayed no disposition to become law-abiding or to refrain from abusing drugs. And little suggested Father would be a capable parent able to provide for Z.S. within any reasonably measurable time after his release from prison. Given the evidence, we find no abuse of discretion in the district court's best interests determination.

Affirmed.