NOT DESIGNATED FOR PUBLICATION

No. 125,838

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of J.W., a Minor Child.

MEMORANDUM OPINION

Appeal from Rice District Court; STEVEN E. JOHNSON, judge. Opinion filed July 28, 2023. Reversed and remanded with directions.

Bradley T. Steen, of Law Office of B. Truman Steen, LLC, of Ellsworth, for appellant natural father.

Remington S. Dalke, county attorney, for appellee.

Before BRUNS, P.J., GREEN and SCHROEDER, JJ.

PER CURIAM: Father appeals the termination of his parental rights to his daughter, J.W. He argues the district court violated his due process when it terminated his parental rights without proper notice. Because Father did not receive adequate notice of the termination hearing, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

Give the legal question raised by Father, the facts of this child in need of care (CINC) case are largely irrelevant and summarized mainly for context. J.W. was born in 2021, to Mother and Father. Because J.W. and Mother both tested positive for methamphetamine, hospital staff contacted law enforcement for assistance with an agency intake with the Kansas Department for Children and Families (DCF) per standard

protocol. When officers tried to speak with Father about the intake process, he became very agitated, started yelling, and then left the hospital. Father and Mother engaged in verbal argument that continued to the parking lot, where they continued to yell at each other in Father's car. Fearing for the child's safety, the officers decided to take J.W. into police protective custody. These circumstances led to the State filing a CINC petition pertaining to J.W. on January 27, 2021.

The district court promptly ordered placement of J.W. in the custody of DCF and ordered that both parents must test negative for illegal substances before visitation could begin. At a hearing the next month, the court adjudicated J.W. to be a child in need of care under K.S.A. 38-2202(d)(1) as to Mother based on a no-contest stipulation. Father, on the other hand, contested the adjudication and requested an evidentiary hearing. The court ordered both parents to "cooperate fully" with St. Francis Ministries (SFM) and obtain three clean drug tests before visitation could begin. The initial permanency plan proposed by SFM in February 2021 included tasks for each parent, including, but not limited to, completing a drug and alcohol evaluation, completing a mental health evaluation, communicating with SFM caseworkers in an appropriate manner, completing an approved parenting class, allowing random walkthroughs of the home, and completing initial paperwork.

The district court held an adjudication hearing on March 30, 2021, after which it entered an order finding J.W. to be a child in need of care as to Father based on clear and convincing evidence. The court approved the proposed permanency plan, noting further in its adjudication order that both parents needed to submit to drug testing and have three clean tests before visitation could occur. As to Father, the court also ordered him to submit to a mental health evaluation and comply with all SFM recommendations.

Following a permanency hearing in June 2021, the district court entered an order again requiring both parties to comply fully with SFM and for Father to submit to hair

follicle testing. The court also found Father to be in contempt of court for disruptive behavior at the hearing and remanded him to the county jail. He was released from jail a few days later.

As the case progressed, Mother and Father did very little to work toward reintegrating J.W. into their home. Relevant to this appeal, Father actively refused to work with SFM on completing any case plan tasks, often expressing distrust with the agency and meeting their efforts at progress with confrontation. To that end, at a permanency hearing in February 2022, the district court found reintegration with either parent was no longer viable and entered an order setting the case plan goal for adoption.

In March 2022, the State filed a motion for findings of unfitness and termination of parental rights. The State also filed a notice of intent to rely on a statutory presumption of unfitness, since J.W. had been in out-of-home placement for a cumulative period of one year or longer and Mother and Father had substantially neglected or willfully refused to carry out a reasonable reintegration plan. See K.S.A. 38-2271(a)(5).

The district court held a hearing on the State's motion for termination of parental rights on May 25, 2022. Because Mother had not been properly served and did not appear, the court found it lacked jurisdiction to consider termination of her parental rights. As to Father—who was present at the hearing and represented by counsel—the State called several caseworkers involved in the case as witnesses, who testified consistently about his deliberate refusal to work with SFM on completing case plan tasks throughout the entire case. Cary Henry, a social worker assigned to the case, stated that Father's repeated refusal to complete drug testing prevented him from ever having visitation with J.W., as that was one of the court's orders from the outset. Father completed an Indian Child Welfare Act affidavit while he was in custody on the contempt finding in June 2021—six months after the case initiated. Dawn Debolt, a family support worker assigned to the case, testified that when she met with Father in the jail, he refused

to sign any paperwork related to the case because it contained the words "'Reintegration, foster care, adoption.'" When caseworkers would attempt to meet with Father at his home, he would often yell at them to leave his property.

Father testified in his own defense at the hearing, explaining that he got very upset when the police came to speak with him in the hospital after J.W. was born and that he was not aware Mother had been using methamphetamine. Father repeatedly stated that he would work with DCF but "didn't want nothing to do with [SFM]." Father believed SFM had "kidnapp[ed]" his child. Despite Father's pattern of refusing to work with SFM, he still said he would be willing to cooperate with them on completing case plan tasks so that J.W. could come home with him.

Following the hearing, the district court on June 13, 2022, entered a memorandum decision and then filed a June 28, 2022 journal entry on the State's motion to terminate parental rights. As to Father, the court found the State was entitled to the presumption of unfitness under K.S.A. 38-2271(a)(5) and that Father had failed to rebut the presumption, explaining its finding as follows:

> "The State is entitled to the presumption contained in K.S.A. 38-2271(a)(5) wherein the child has been in out-of-home placement for one year or longer and the parent has substantially neglected or willfully refused to carry out a reasonable plan approved by the court directed towards reintegration of the child into the parents' home. This has been proved by clear and convincing evidence, including the admission of the father during his own testimony. The court has no doubt that the State has met its burden of proof to justify termination of the parental rights of the father through the presumption, which was proved to the court by clear and convincing evidence, and the father has failed to overcome this presumption with any evidence."

Nevertheless, the district court declined to terminate Father's parental rights at that time, explaining that Father "might be capable of caring for this child and it may not be in

the child's best interests for the father's parental rights to be terminated despite the State accomplishing its statutory burden to show the father unfit." The court noted that Father's refusal to work the reintegration plan was due to his "personal nature that makes him completely and totally uncooperative and distrusting of St. Francis and probably anyone in authority."

Addressing the likelihood that Father's unfitness was unlikely to change in the foreseeable future, the district court noted Father had testified at the termination hearing that he would make an effort to complete case plan tasks. Thus, the court explained Father would receive "one more opportunity" to show he could work toward reintegration, with some specific requirements. The court ordered Father to "give up marijuana, even when he visits legal jurisdictions," and comply with random drug testing. Father would either need to have three clean urinalysis (UA) test results before he could start visitation or a clean hair follicle "for everything except THC," followed by one clean UA.

The district court set a deadline of six months, explaining if Father had not substantially complied with the reintegration plan within that period,

> "the court will entertain a new motion for termination of parental rights on the issue of the best interests of the child and the likelihood of the father to adjust his circumstances to care for the child. This court intends to have a review hearing in this matter in three months and will set one coordinating it with the parties. Two things will concern the court. One, will the father demonstrate a sincere effort to comply as he promised, and two, has St. Francis demonstrated a sincere effort to assist the father to succeed. The State may reset the motion for termination of the mother's parental rights as it sees fit."

The district court held a review hearing on September 20, 2022, which Father appeared at in person. The court began by referring to an SFM court report submitted before the hearing, which indicated that SFM "had made reasonable efforts and basically

that [Father] has not." The report reflected that Father had provided one random mouth swab in June 2022, which was positive for methamphetamine. The report also reflected that after the May 2022 hearing, Father kept refusing to meet with SFM caseworkers or complete case plan tasks after multiple attempts at engagement on their part. Father's appointed counsel—who appeared by phone—explained that he had not been in regular contact with Father, so he had no additional comments to make.

The State explained that SFM had asked it to request the district court order Father to submit a hair follicle test and that the office would "again, file a motion to terminate parental rights." The State then wanted to know whether Father would need to be served again "since he's here and present and was served originally." The district judge responded: "I'm not even sure we need another hearing. My ruling has been pretty clear. But obviously I figured that's where the State would be heading." The guardian ad litem agreed that "this case needs to move to severance, termination." The district judge announced it would terminate Father's parental rights, explaining the following:

> "[T]he reason I set it for review in three months is if [Father] was going to be sincere about what he got on the stand and testified about . . . [a]nd we sure didn't need to wait longer than three months to find out if he was going to do that. It's clear from the report that he has not taken any of these steps.
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> "My original decision was that the State met their burden of proof by clear and convincing evidence in regards to everything except one issue. And that was whether or not—well, actually they probably met their burden of proof. But I decided to give one more chance as to whether it would change in the foreseeable future. [Father]'s acts over the last three months have indicated clearly it is not going to change in the foreseeable future.
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> "So therefore all elements that the Court has to find for the termination of the parental rights have been met. And I'm, therefore, terminating the father's parental rights based upon the evidence presented at the hearing and what we have found regarding his last opportunity. I guess I should note for the record that Judge Burgess gave him these same opportunities. And I still step[ped] forward and gave him one more chance.

> "But it's clear that obviously there's more things in his life than maintaining his parental rights with this child, as evidenced in the report. And if he wishes to make that choice, that is definitely a choice he has the right to make. But it leaves me with no choice but to terminate the parental rights, as the State has fully met its burden by clear and convincing evidence at the full evidentiary hearing that we conducted. And [Father] has not taken advantage of the one last chance that he had, which was clearly set out, exactly what he asked for in his testimony.
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> "So based on that the State may prepare an order of termination of parental rights."

Before concluding the hearing, Father's counsel inquired if the district court could advise Father of his right to appeal. The court said it could not do that because Father had left the courtroom, but it asked counsel to notify Father about his right to appeal.

Following the review hearing, the district court entered a journal entry terminating Father's parental rights. In the order, the court reiterated its verbal ruling about how it had found the State proved the K.S.A. 38-2271(a)(5) presumption by clear and convincing evidence and Father had failed to overcome that presumption at the May 25, 2022 hearing. The court added that it had taken the matters of the child's best interests and the likelihood of Father changing in the foreseeable future under advisement after deciding to grant Father "one last opportunity." The court concluded based on the court report prepared for the September 20, 2022 review hearing and statements of counsel that

> "1. The state agencies have made reasonable efforts to reintegrate the child with the father.
> "2. Father did not take advantage of his one last chance and has not made efforts to work reintegration.
> "3. The State has met all elements necessary, by clear and convincing evidence, to prove father is unfit by reason of conduct or condition which renders him unable to fully care for his child, this conduct or condition is unlikely to change in the foreseeable future, and it is in the best interests of the child to terminate father's parental rights."

Father timely appealed.

ANALYSIS

The central issue in Father's appeal is whether his due process was violated when the district court terminated his parental rights at the September 20, 2022 review hearing without notice that his parental rights could be terminated at that review hearing.

We note that Father is making this argument for the first time on appeal. Generally, issues not raised before the district court cannot be raised on appeal. *Gannon v. State*, 303 Kan. 682, 733, 368 P.3d 1024 (2016). And constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review. *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014). There are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including the following: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008).

Given the importance of the issue at stake, we will address his due process challenge on the merits because it involves the denial of a fundamental right. See 286 Kan. at 1082.

A parent has a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution to make decisions regarding the care, custody, and control of the parent's child. Before a parent can be deprived of the right to the custody, care, and control of the child, the parent is entitled to due process of law. But this fundamental right to parent is not without limits. *In re P.R.*, 312 Kan. 767, 778, 480

P.3d 778 (2021). Because child welfare is a matter of state concern, the State may assert its interest "through state processes designed to protect children in need of care." *In re A.A.-F.*, 310 Kan. 125, 146, 444 P.3d 938 (2019).

Father makes a telling point that the district court in its June 13, 2022 order gave him six months to substantially comply with the reintegration plan before the court would again consider a new motion to terminate his parental rights to J.W. Indeed, the order stated: "[I]f the father has not substantially complied within six months with the reintegration plan, the court will entertain a new motion for termination of parental rights on the issue of the best interests of the child and the likelihood of the father to adjust his circumstances to care for the child." The court's order also stated that a hearing would be set in about three months to review the Father's progress.

Absent from the June 13, 2022 order is any language that the district court could reconsider its previous termination ruling at the September 20, 2022 three-month review hearing. In the June 13, 2022 order, the court did not terminate Father's parental rights. Also, the June 13, 2022 order did not contain any language relieving the State from filing a new motion to terminate Father's parental rights if the court decided to terminate Father's parental rights during the September 20, 2022 three-month review hearing. Indeed, the district court's ruling terminating Father's parental rights following the September 20, 2022 review hearing completely ignores what the court had previously stated in its June 13, 2022 order. Again, it is unassailable that the termination decision is a result at variance with the conditions stated in the court's June 13, 2022 order. There, the court stated that if Father had not substantially complied with the reintegration plan within the six-month deadline, "the court will entertain a new motion for termination of parental rights on the issue of the best interests of the children and the likelihood of the father to adjust his circumstances to care for the child." Simply stated, the district court's September 20, 2022 termination ruling during the review hearing is contradictory to the court's conditions outlined in its June 13, 2022 order.

In reading the June 13, 2022 order, it reveals that Father did not receive any notice that his constitutional rights to parent J.W. could be terminated at the September 20, 2022 review hearing. We are guided by "[t]he 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). When considering whether there has been a due process violation, appellate courts apply an unlimited standard of review. *State v. Hall*, 287 Kan. 139, 143, 195 P.3d 220 (2008).

In Father's case, the State's motion to terminate his parental rights was filed and served before the district court conducted the termination hearing on May 25, 2022. As stated earlier, the court did not terminate Father's parental rights at that hearing. Thus, a new motion for termination of Father's parental rights would need to be filed before his parental rights could be terminated. Under the June 13, 2022 order, the State was to issue a new motion to terminate Father's parental rights to J.W. if Father had not substantially complied with the reintegration plan within the six-month deadline. The State never filed a new motion to terminate Father's parental rights to J.W. At the September 20, 2022 review hearing, the State then wanted to know whether Father would need to be served again "since he's here and present and was served originally." The district judge responded: "I'm not even sure we need another hearing. My ruling has been pretty clear. But obviously I figured that's where the State would be heading."

Despite this lack of certainty by the State and the district court on whether Father should be served with a new motion to terminate his parental rights, the court proceeded to terminate his parental rights to J.W. We are mindful that the court clearly declined to terminate Father's parental rights at the May 25, 2022 termination hearing. So, no new motion to terminate Father's parental rights was filed and served on Father before the review hearing was conducted on September 20, 2022. "Because a motion to terminate parental rights is akin to an original petition, the motion must be served on the parents in accordance with K.S.A. 38-1534 [recodified and essentially identical to K.S.A. 38-2237].

Jurisdiction over the person of the defendant can be acquired only by issuance and service of process in the method prescribed by statute *or by voluntary appearance*." (Emphasis added.) *In re H.C.*, 23 Kan. App. 2d 955, Syl. ¶ 5, 939 P.2d 937 (1997); see *In re H.L.*, No. 107,188, 2012 WL 3136788, at *2-3 (Kan. App. 2012) (unpublished opinion) (vacating termination of parental rights for lack of jurisdiction).

Although Father did not object like the appellant in *In re H.L.*, the lack of personal jurisdiction can be raised at any time and even on the appellate court's own motion. *Sandate v. Kansas Dept. of Revenue*, 58 Kan. App. 2d 450, 452, 471 P.3d 700 (2020); see also *In re Care & Treatment of Emerson*, 306 Kan. 30, 39, 392 P.3d 82 (2017) (If district court lacked jurisdiction to enter an order, an appellate court does not acquire jurisdiction on appeal.).

In *In re H.C.*, 23 Kan. App. 2d at 961, this court held that "[d]ue process also demands that interested parties be afforded an opportunity to present their objections, which includes a reasonable time to prepare a defense to the litigation." To satisfy this due process requirement, Father should have been served with a new motion to terminate his parental rights before the scheduled September 20, 2022 three-month review hearing. Also, the motion to terminate should have granted Father adequate time to prepare his defense against the termination. These service and notice failures were a departure from due process. Because Father received no notice that his parental rights could be terminated during the September 20, 2022 review hearing, we reverse the termination decision for lack of jurisdiction.

Reversed and remanded for further proceedings.