NOT DESIGNATED FOR PUBLICATION

No. 125,841

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of M.B., A.B., A.B., A.B., and A.B.,
Minor Children.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; JANE A. WILSON, judge. Opinion filed August 11, 2023. Affirmed.

Christopher Cuevas, of Kansas City, for appellant natural mother.

Garett C. Relph, deputy district attorney, and *Mark A. Dupree Sr.*, district attorney, for appellee.

Before HURST, P.J., HILL and PICKERING, JJ.

PICKERING, J.: In this case, M.J. (Mother) appeals the termination of her parental rights to her five children. On appeal, Mother challenges the district court's rulings regarding her unfitness, future unfitness, and that termination of her parental rights is in the best interests of her five children. Having reviewed the record, we find no reversible error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2019, the State filed petitions alleging that Mother's children, M.B. (YOB 2011), An.B. (YOB 2013), Ak.B. (YOB 2015), Ay.B. (YOB 2016), and Aa.B. (YOB 2017), were children in need of care. The State explained that the children were in need of care because they lacked adequate parental care; were without the care or control

necessary for their physical, mental, or emotional health; and had been physically, mentally, or emotionally abused or neglected.

In particular, the State asserted that the children had been observed several times without adequate supervision. It was reported that while Mother was sleeping, the children would leave the house unsupervised looking for food. For instance, they were seen walking to a local pizza restaurant, stating they were hungry. The younger children were also observed wearing only diapers, smelling "musty," and appearing to be covered in dirt. A worker for the Kansas Department for Children and Families (DCF) noted that Ay.B., then age three, was naked and "appeared thin." Mother's home was cluttered, with "sticky" floors, dirty surfaces, feces on the floor beside the cats' litterbox, and having a "foul odor." The room where the children slept did not have any beds. An.B., age six at the time, reported not feeling safe in the home because their maternal grandmother and another adult would lock the children in the "stinky room" for times so long that the children had to urinate in a bowl or on the floor and defecate in the room.

On September 3, 2019, the district court entered an ex parte order of protective custody removing the children from Mother's care. Three days later the district court issued a temporary custody order, placing the children in the temporary custody of the Secretary of DCF.

At the adjudication and disposition hearing held in October 2019, Mother entered a statement of no contest to the petition, and the district court adjudicated each child individually as a child in need of care (CINC). The district court entered several orders directing Mother to: (1) contact her court services officer (CSO) once a month or whenever she had a change of address or phone number; (2) obtain and maintain stable housing and income and provide verification; (3) sign any necessary releases of information; (4) visit with the children at the discretion of Cornerstones of Care (Cornerstones); and (5) participate in an initial assessment through Cornerstones.

Our review of the record reveals that the district court steadily proceeded with this CINC case. There were review hearings in both January 2020 and July 2020. At each of those hearings, the court restated the orders from the October 2019 hearing (listed above), but, at the January 2020 review hearing, added orders that Mother participate in a parenting education course and provide proof of completion; obtain a mental health assessment and abide by the recommendations; and submit to random drug tests and, if a test was positive, complete a drug and alcohol assessment. At the August 2020 permanency hearing, reintegration was still the case plan goal. At the November 2020 review hearing, however, the court set the case for a termination of parental rights hearing for late March 2021.

Following the November 2020 hearing, the State moved to terminate Mother's parental rights in January 2021. The State's motion asserted Mother's parental rights should be terminated under K.S.A. 38-2269(b)(4), (b)(7), (b)(8), (b)(9), (c)(2), and (c)(3). The State also alleged that the presumption of unfitness established by K.S.A. 38-2271(a)(5) applied because the children had been in an out-of-home placement for more than one year and Mother had substantially neglected or willfully refused to carry out a reasonable plan, approved by the district court, directed toward reintegration of the children into the parental home.

Prior to the scheduled March 2021 termination hearing, the State advised that caseworkers had requested additional time for Mother to complete the court's orders. The district court granted the request and rescheduled the termination hearing for June 2021. At the June 2021 hearing, the State requested a continuance due to the unavailability of a witness, and the court set a September 2021 hearing date to hear the State's motion to terminate parental rights. The court also ordered that the case plan "shall be a dual one of reintegration and adoption." At the same hearing, the court made additional orders, including a specific order for Mother to participate in a psychological evaluation and abide by any recommendations. This order was recommended by Mother's therapist

because Mother, whose attendance at therapy was "sporadic," was not forthcoming when she did attend therapy. Mother also denied the historical reasons for why the State had filed its CINC petitions.

After the hearing, the State filed an amended motion to terminate Mother's parental rights. The motion stated that Mother was still staying in contact with her CSO, appeared to have signed the necessary releases, and had provided verification of her income and housing. But there were some concerns regarding Mother's housing, namely cockroach infestation and lack of electricity in the home. As for her visitations with her children, the State maintained concerns about Mother's inconsistent attendance; she was "often late to visits or does not show up." Cornerstones reported concerns of Mother's "ability to provide structure for and to manage the children, her allowing unpermitted individuals to attend visits, and the children's lack of engagement or shutting down during visits." Despite Mother successfully completing a parenting class, PMTO, the family's progress at visits had gradually declined. At the time of the amended motion's filing, Mother had mostly provided negative drug tests, having tested positive for THC in January 2020.

The State cited the same statutory factors supporting its request for termination in the amended motion with one statutory amendment. Due to the length of the case, which had started in September 2019, the State replaced the presumption in K.S.A. 38-2271(a)(5) with a statement that "[b]y the time of [the termination hearing]" Mother would be presumed unfit under K.S.A. 38-2271(a)(6). This presumption applies when a child has been in an out-of-home placement under court order for two years or longer, the parent has failed to carry out a reasonable plan directed toward reintegration of the child into the parental home, and there is a substantial probability that the parent will not carry out such a plan in the near future.

A September 2021 hearing on the State's amended parental rights termination motion was scheduled but continued because caseworkers requested additional time to work with Mother. The district court ultimately conducted the hearing in February 2022. The State's witnesses included a CSO, Cornerstones foster care permanency manager, and Cornerstones foster care case manager. At the time of the hearing, the five children had been in State custody for over 28 months.

Testimony from CSO

Mother's CSO testified she had worked with Mother since the beginning of the case. The CSO provided testimony about the several steps taken to reintegrate Mother with the children, beginning with an initial assessment. This assessment recommended that Mother participate in a mental health assessment and abide by the recommendations; participate in a parenting education course; participate in random drug testing, and if she tested positive, to undergo drug and alcohol evaluation and follow their recommendations; and follow a protective order between her and one of the children's fathers.

The CSO testified that Mother stayed in contact with her "for the most part." The CSO clarified that "[s]ometimes there would be several months that I wouldn't hear from her. But then she would re-engage and we'd discuss court orders." At the time of the February 10, 2022 hearing, she had not heard from Mother since January 13, 2022.

After Mother completed a mental health assessment, the recommendation was that Mother should participate in individual therapy. The mental health assessment diagnosed Mother with adjustment disorder-unspecified trauma and stressor disorder. Mother was not very engaged in therapy. As a result, the therapist recommended a psychological evaluation and closed Mother's case.

In light of the therapist's recommendation, at the June 2021 hearing, Mother was ordered to complete a psychological evaluation and parenting assessment. According to the CSO, while Mother had signed most of the releases of information, the CSO did not know if Mother had completed the psychological evaluation because Mother had not signed the release for the psychological evaluation that she had completed at Responsive Centers.

The CSO stated that since she had been reviewing orders with Mother during their monthly meetings, Mother should have known that she needed to sign a release. At the time of the February 2022 hearing, the CSO was not aware what efforts Mother was taking to address her mental health since her individual therapy had stopped.

As to Mother attending parenting classes, Mother had completed PMTO, a parenting education and family therapy program, through Cornerstones. The CSO said that Mother did not provide verification of completing parenting education classes through Keeler Women's Center, but Mother also worked with a behavior intervention support team at Cornerstones. For the court-ordered parenting assessment—ordered at the June 2021 hearing—Mother told caseworkers that she was working with Responsive Centers on a parenting assessment. Because Mother did not sign a release, her caseworkers were unable to verify her claim.

The CSO also suggested that Mother had contacted one of the children's fathers in violation of a protection order between the two. Her only evidence on this point was that "there may have been some money sent to the father [who was incarcerated] under one of the children's names," but it was unknown who sent the money.

Regarding verification of stable employment, the CSO testified that Mother should have been submitting paystubs to verify her employment on a monthly basis. Although

the CSO would request Mother's verification of employment when they spoke, the last paystub Mother provided to the CSO was dated July 2021.

Per the court order, Mother was randomly drug tested by Cornerstones. In the two months leading up to the termination hearing, she had tested positive for THC in late January 2022 and early February 2022. The positive tests occurred within two weeks of the hearing on Mother's parental rights. Earlier in the case, Cornerstones had not been drug testing Mother because it had not suspected drug use. Most of her drug tests had been negative. The agency became concerned when the children's placement reported that the children returned from a visit smelling like marijuana. While Mother was supposed to get a drug and alcohol assessment whenever she submitted a positive drug test, it remained unclear if Mother had undergone an assessment.

With respect to Mother's visitations with her five children, when the State filed its amended motion to terminate in June 2021, Mother had not yet progressed to overnight visits with the children. In December 2021, Cornerstones had granted Mother unsupervised visits with her two daughters. She was unable to have overnight visits with her three sons due to transportation problems and delays caused by COVID.

Due to prior reported incidents, the children had a safety plan in place. Part of the children's safety plan was that they were not to be around D., their 11-year-old cousin. Their cousin was "an alleged perpetrator of sexual abuse on the children." Additionally, M.B. had a history of looking at pornography, and the foster placement had advised that the girls had touched each other's genitals over their clothing. To ensure that the children would not "perpetrate on each other" or that M.B. would not look at pornography, as part of the safety plan—which Mother had reviewed—the children were to be continually supervised.

The CSO testified that Mother had six visits with her daughters, M.B. and Aa.B. Instead of caring for her girls during the unsupervised weekends, on at least two of the six weekend visits, Mother had sent the girls to a cousin's house for the entire weekend. At the cousin's home, the girls saw their cousin, D., which was in violation of the safety plan. M.B.—who was not to have any unsupervised time with electronics—had looked at pornography during these unsupervised visits. M.B. later disclosed to the placement that Mother had given her a different colored pill than the regular pill medication prescribed for her depression and anxiety. Mother did not ensure that her youngest child, Aa.B., who was born with a lazy eye, used her eye patch. Mother later testified that Aa.B. must wear her eye patch a few hours a day to help combat her lazy eye. Consequently, the unsupervised overnight visits with her daughters were short-lived. On February 2, 2022, the visits were moved back to supervised visits.

Testimony from Cornerstones permanency manager

The Cornerstones permanency manager was assigned as case manager in February 2020. The permanency manager testified that she believed that Mother had four unsupervised weekend visits with the girls. (The CSO had stated that there had been six unsupervised visits.) She also provided testimony of concerns about Mother's overnight unsupervised visits and her lack of supervision of the girls. According to M.B.'s foster placement, M.B. disclosed being left home alone and had not been given her proper medication. The permanency manager echoed the CSO's concern that Mother left M.B. with her cousin D. and D.'s mother. She could not recall whether this happened once or multiple times. The permanency manager was also worried about M.B. being afforded unrestricted access to technology due to concerns that she would access pornography.

The permanency manager stated that Cornerstones had received a report that Mother had COVID but did not report it to her case team because she did not want her visit to be cancelled. The children had COVID symptoms, but the permanency manager

could not recall whether they became symptomatic before or after the visit. Cornerstones had received most of the signed releases of information from Mother except for the releases for Mother's psychological evaluation and parenting assessment.

Testimony from Cornerstones case manager

The Cornerstones case manager had worked with Mother since September 2020. She testified that initially there was a termination hearing scheduled for September 2021, but caseworkers requested more time to work with Mother because she was participating in case plan tasks. She also testified of the concerns that Cornerstones had about Mother's unsupervised visitation and how Cornerstones had received reports from Mother's aunt, R.J.; Mother's oldest child, M.B.; and the girls' placement concerning Mother's behavior.

The case manager also testified about her recent telephone conversation with Mother regarding her visits with A.B. and Aa.B. When she attempted to explain why Cornerstones had decided to move Mother's unsupervised visits back to supervised visits, Mother hung up on her. When she spoke with Mother two weeks later, Mother claimed that her phone had been giving her problems. There was no testimony from Mother that she attempted to call the case manager back after she had hung up on her.

At the end of the three witnesses' testimony, each witness recommended terminating Mother's rights. The CSO recommended termination because of "recent concerns of leaving the children on her weekend visits with an alleged perpetrator." She was also concerned that Mother left the children alone during visits and permitted unsupervised phone time for the children. The Cornerstones permanency manager's recommendation was based on "significant safety concerns that have not been addressed" and the case had "been open a significant amount of time." The Cornerstones case manager believed termination was appropriate so that the children could have permanency.

Mother's testimony

Mother testified on her own behalf. She explained that she had not been working since December 2021 when she had lost her job at Amazon. She had been fired due to poor work performance; she had been upset about not being able to spend time with her children and was crying at her job, which led to her firing. Mother testified that throughout the course of this case she had held four jobs. These included working at Waffle House, Dollar Tree, Wendy's, and Amazon.

The CSO only had documentation of Mother's housing lease through December 2021. Later, during Mother's testimony, she was able to provide verification of a housing lease through October 2022. Mother had obtained a lease on a housing rental unit through government support, namely section 8 housing. She also received approximately $250 per month in housing assistance for utilities. Because she had been fired and was not currently working, she did not have to pay rent. Mother testified that she also received food stamps to purchase groceries.

Concerning her psychological evaluation at Responsive Centers, Mother testified that the person who conducted the evaluation wanted to observe her and her sons together. This worker emailed a Zoom link to Mother and the case manager so that she could observe the family. But the boys' visits with Mother were continually postponed due to transportation issues, so the evaluation did not occur. Mother detailed her multiple attempts to reschedule the evaluation with the worker, but each time the observation was cancelled because the boys were unable to attend. Mother testified that she had not signed a release with Responsive Centers.

Regarding the concerns and complaints about her overnight unsupervised visits, Mother denied a lot of the agencies' concerns. Mother did admit that on the first overnight visit, she did not make sure Aa.B. was using her eye patch, explaining that she

likely forgot about it. Otherwise, she denied the caseworkers' allegations. She said she did not smoke marijuana around the children—although she did admit to smoking marijuana due to stress. She also stated that she had given M.B. the correct medicine, she had not left the children alone, and there had been plenty of food for the children. Regarding the girls' contact with D., Mother said she was never told that she could not allow her children around D. The allegation that Mother was not supposed to allow her children around D. because of inappropriate sexual contact was new information to Mother.

As to the concern that M.B. was viewing pornography, Mother said that DCF contacted her about the concern and asked her to call them. After discussing this issue with Mother, DCF could not find any evidence to substantiate the claim and dropped the case. As far as Mother knew, there was no reason to believe that M.B. was looking at pornography.

Mother blamed her aunt, R.J., for sending most of the negative reports to her caseworkers. R.J. and Mother had lived together from March 2021 until January 2022. Mother became frustrated with R.J. for not helping her move, and, in response, she threw R.J.'s clothing away in the trash. According to Mother, in retribution R.J. told Mother that she was going to contact the State and convince them not to allow her to be reunited with her children. R.J. left a voicemail on Mother's phone at the end of January 2022 in which she made this threat. Mother played the message for the court, though a transcript of the message is not in the record. Mother's sister also testified that R.J. remarked that she would report Mother. According to the maternal grandmother, years earlier R.J. also had wanted to remove Mother and her sibling from the maternal grandmother's care. Notably, when this case began, the maternal grandmother was one of the caregivers who had locked the five children in the "stinky room."

Mother did acknowledge that she needed to find a job. When asked if she could take care of the five children, she said that she's "been ready." When next asked about her three children's medical and mental needs, she stated that she "never knew that they had any mental issues[.]"

Mother also discussed losing her driving privileges. Since 2012, Mother had a suspended driving license caused from outstanding speeding tickets. Years earlier, when she failed to appear in court for her speeding court dates, her license became suspended. As a result, she had to rely on Cornerstones to provide her with transportation to see her children. Mother also testified that she would have to pay $1,200 in fines and fees to reinstate her license. Despite this, Mother had recently driven with a suspended license.

There was also hearing testimony indicating that Mother had an outstanding warrant for her arrest due to driving with a suspended license. While Mother denied having an outstanding warrant, the maternal grandmother stated she knew that there has been a warrant for Mother's arrest since 2012 and that Mother has been driving without a valid driver's license.

At the conclusion of evidence, the district court heard closing arguments by the parties regarding Mother. To address the State's motion to terminate the children's fathers' parental rights, a second evidentiary hearing was conducted in April 2022. At the conclusion of the second hearing, the district court heard additional closing arguments by the parties, issued its ruling, and terminated Mother's parental rights.

District court ruling

Through a bench ruling, which was later journalized, the district court found by clear and convincing evidence that Mother was unfit by reason of conduct or condition that rendered her unable to care properly for her children and the conduct or condition

was unlikely to change in the foreseeable future. The district court also found it was in the children's best interests to terminate Mother's parental rights. The district court found Mother unfit under K.S.A. 38-2269(b)(7) (reasonable efforts by appropriate public or private agencies have been unable 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).

The district court also found that Mother was presumed to be unfit under K.S.A. 38-2271(a)(6) because the children were in an out-of-home placement, under court order, for a cumulative period of two or more years; Mother failed to carry out a reasonable plan, approved by the court, directed toward reintegration of the children into the parental home; and there was a substantial probability that Mother would not carry out such plan in the near future. The court concluded that Mother failed to rebut the presumption of unfitness under K.S.A. 60-414(a).

Mother appeals.

ANALYSIS

A district 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). The district court must consider certain nonexclusive factors in making a determination of unfitness. K.S.A. 38-2269(b). If a child is not in the parent's custody, the court must also consider a separate list of nonexclusive factors. K.S.A. 38-2269(c). Any one of the factors in K.S.A. 38-2269(b) or (c) "may, but does not necessarily, establish grounds for termination of parental rights." K.S.A. 38-2269(f). Upon making a finding of unfitness of the parent, the district court must also consider "whether termination of parental rights . . . is in the best

interests of the child. In making this determination, the court shall give primary consideration to the physical, mental and emotional health of the child." K.S.A. 38-2269(g)(1).

There Is Clear and Convincing Evidence Supporting the District Court's Findings that Mother Was Unfit

"When we review a finding of parental unfitness, this court must determine, after reviewing all the evidence in a light most favorable to the State, whether a rational fact-finder could have found the ultimate determination to be highly probable, i.e., by clear and convincing evidence." *In re T.H.*, 60 Kan. App. 2d 536, 547, 494 P.3d 851 (2021); see *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008). "When reviewing the evidence, we do not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine factual questions." *In re E.L.*, 61 Kan. App. 2d 311, 322, 502 P.3d 1049 (2021), *rev. denied* 315 Kan. 968 (2022).

On this point, the district court terminated Mother's parental rights on two related grounds, namely, that Mother was unfit under K.S.A. 38-2269(b)(7) and (b)(8). We will review each statutory factor.

K.S.A. 38-2269(b)(7)

A district court may find a parent unfit if there is clear and convincing evidence of "failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family." K.S.A. 38-2269(b)(7). This requirement provides "'a parent the opportunity to succeed, but to do so the parent must exert some effort.'" *In re M.S.*, 56 Kan. App. 2d 1247, 1257, 447 P.3d 994 (2019).

Mother argues that the State presented insufficient evidence of her unfitness related to the agencies' reasonable efforts. Specifically, she argues that the State's efforts to rehabilitate the family were not reasonable because the State never talked to her about the recent concerns. As noted above, due to several issues relating to Mother's lack of supervision and other concerns, the visits with the two girls reverted to supervised visits. Mother argues that the evidence of these recent concerns was too vague to be considered clear and convincing evidence of unfitness.

Mother's arguments are not convincing. There was evidence that the caseworker had attempted to speak to Mother about why her visits were reverting to supervised, but Mother hung up on her. There was no evidence that Mother attempted to get back in contact with the caseworker after she hung up on her. It was not until two weeks later that the caseworker was able to speak again with Mother.

More importantly, Mother's argument fails because the analysis under K.S.A. 38-2269(b)(7) looks at the State's efforts throughout the course of the time the children were in custody. "The language in K.S.A. 2019 Supp. 38-2269(b)(7) imposes an obligation upon the relevant social service agencies to expend reasonable efforts towards reintegrating the child with his or her parents." *In re A.P.*, No. 121,913, 2020 WL 3022868, at *10 (Kan. App. 2020) (unpublished opinion).

The State presented evidence of the case plan tasks that Mother needed to address, including her mental health, parenting skills, having a safety plan for the children, the facilitation of visits between Mother and her five children, ensuring a drug-free environment through drug testing and subsequent drug and alcohol evaluations, verifiable income, and housing.

As indicated, Court Services and Cornerstones attempted to work with Mother regarding her mental health. With the diagnosis of adjustment disorder-unspecified

trauma and stressor disorder, Mother was court-ordered to attend therapy, but she only attended sporadically.

Due to her denials and failures in addressing the stark facts of this case, the district court ordered Mother to complete the psychological evaluation. Yet at the time of the February 2022 hearing, the CSO could not say whether Mother was presently addressing her mental health due to Mother's inactions. There was also a dispute as to whether Mother had provided the parties with a release of information for the psychological evaluation and, if she had, to whom. More importantly, without knowing the findings of the psychological evaluation, Court Services and Cornerstones were unable to work with Mother on addressing her mental health.

In terms of efforts to work on Mother's parenting skills, there was evidence that Mother had attended PMTO parenting classes. Yet despite these efforts to enhance Mother's parenting skills, Mother's progress in parenting the children did not increase. By early 2022, there remained serious concerns about Mother adequately supervising the two girls when they were in her unsupervised care. There was also testimony of Cornerstones' concerns that Mother was not being truthful about her exposure to COVID when she visited her children.

More troubling, Mother seemed unaware or incapable of caring for her children's physical and mental health. She did not know that her three boys "had any mental issues." The boys had severe behavior and were diagnosed with reactive attachment disorder (RAD). While Mother admitted that she had forgotten to have Aa.B. wear an eye patch to treat her lazy eye, she denied giving M.B. incorrect medication and smoking marijuana in front of the girls. There also had been reports that the children were not properly fed.

Further, to ensure the children were safely reintegrated with Mother, the state agencies had a safety plan in place for the children. The children were not to have contact

with their cousin, D., M.B. was not to have exposure to devices with internet capability to prevent her from looking at porn, and the children were not to be alone to ensure that they did not inappropriately sexually touch each other. Despite the safety plan, Mother left M.B., age 10, and Aa.B, age 4, alone. This was noted by the district court in its ruling: "Historically, mom has left the kids alone, left them with individuals that were deemed unsafe. And despite a safety plan that was put into place—[M.B.] wasn't to have unsupervised access to technology, but mom still allowed that too."

The agencies also worked with Mother on her visits. Because Mother had a suspended driver's license, Cornerstones provided transportation to facilitate visits. Not surprisingly, in its ruling following the April 2022 parental termination hearing, the district court stated:

> "We're still at supervised visits for mom, or we were at [the February 2022] hearing. There was an opportunity at one point for mom to have unsupervised visits with two of the kids but that was pulled back based on safety concerns. The testimony was that Cornerstones of Care tried to discuss those concerns but mom did not want to address those. In fact, she hung up on a worker. So those visits were pulled back and are supervised."

As for providing safe and secure housing, Mother had secured a lease for section 8 housing. Mother presented into evidence her lease for government housing until October 2022. Yet despite her ability to secure government-funded housing for the next several months, Mother failed to keep steady employment. She admitted that she had not had a job for the prior two months. She also acknowledged that she needed to find a job and believed she could do that. With Mother receiving assistance for housing, utilities, and food stamps, it was unclear how Mother was supposed to support herself, let alone her five children.

In the light most favorable to the State, there is clear and convincing evidence supporting the district court's finding that Mother is unfit under K.S.A. 38-2269(b)(7).

K.S.A. 38-2269(b)(8)

A district court may find a parent unfit if there is clear and convincing evidence of "lack of effort on the part of the parent to adjust the parent's circumstances, conduct or conditions to meet the needs of the child." K.S.A. 38-2269(b)(8).

Mother asserts that she made great progress in completing court orders and moving toward reunification with her children. Mother said she did everything she had to do to satisfy the State's concerns—but the testimonial evidence disagrees with this assertion.

The State's case focused on Mother's lack of progress and instability for the 28-month period since the children had been removed in September 2019. Specifically, the State focused on the months leading up to the parental termination hearing. Mother was repeatedly advised of the many tasks she needed to complete, including providing documentation to show she had stable housing and a verifiable income. But Mother failed to work on several essential case plan tasks such as maintaining employment, attending to her mental health, progressing in visitations, remaining drug-free, and, as discussed below, having the capability to parent her five children through unsupervised visitations.

The evidence, when viewed in the light most favorable to the State, exposes several concerns about the weekend visits between Mother and the children. The State had concerns about Mother's continued lack of supervision for the two girls, the failure to follow a safety plan by allowing her relatives to supervise the girls, and the lack of visitation and care for the boys.

Mother also failed to properly address her mental health. Mother's therapist closed her file and ordered Mother to undergo a psychological evaluation. Mother also was unable to work on additional tasks to ensure that she could reintegrate with her five children and address the children's mental needs. Three of her children had been diagnosed with RAD—an important fact inexplicably unknown by Mother. In its ruling, the district court made a point to discuss Mother's drug usage:

> "We didn't have any drug—major drug concerns for mom in this case, but twice—in fact, just prior to the last setting she tested positive. And one—there was one report that mom was using drugs in front of the children. And shortly thereafter is when she tested positive. So it leads me to believe that that report is not false."

It cannot be overlooked that this case began when all five children went into State custody due to living in squalor and being unsupervised. Now, 28 months later, there are still reports of the children being unsupervised, their safety in jeopardy, not being properly fed, and receiving inappropriate care and medication.

Overall, the State presented evidence of Mother's lack of efforts to adjust her circumstances and conduct throughout the course of this case. In the light most favorable to the State, there is clear and convincing evidence supporting the district court's finding of the lack of effort on Mother's part to adjust her circumstances, conduct, or condition to meet the needs of her children and that Mother is unfit under K.S.A. 38-2269(b)(8).

There Is Clear and Convincing Evidence Supporting the District Court's Finding that Mother Was Unlikely to Change in the Foreseeable Future

"[W]hen determining whether a parent's unfitness is 'unlikely to change in the foreseeable future,' a court may look to a parent's past conduct as an indication of the parent's future behavior." *In re E.L.*, 61 Kan. App. 2d at 328.

The court must use "'child time' when assessing the foreseeable future." 61 Kan. App. 2d at 328. Courts examine the foreseeable future from a child's perspective because children experience the passage of time differently than adults, "making a month or a year seem much longer than it would for an adult." 61 Kan. App. 2d at 328. Children have a right to permanency within a time frame reasonable to them. This difference in perception is particularly significant "when a child is very young and lacks any real relationship with the parent." 61 Kan. App. 2d at 328-29*;* see K.S.A. 38-2201(b)(4).

The State's evidence on the issue of whether Mother's conduct was unlikely to change in the foreseeable future included several factors. To begin, the fact that the children had been in State custody for 28 months at the time of the termination hearing, representing 20-50 percent of each child's life, weighs heavily in the State's favor.

Mother was never able to achieve *and maintain* unsupervised visits with her five children. Within a short period of Mother's unsupervised visits, the agency had to move the visits back to supervised due to Mother's lack of supervision, feeding and safety concerns for the children, and Mother's overall inability to parent two of her five children. The district court referenced this in its ruling.

Overall, the district court was not presented with persuasive evidence showing or even suggesting that Mother would be capable of caring for her five children *completely unsupervised* in the foreseeable future. Rather, Mother denied a lot of the State's assertions about her ability to support herself and her children and her ability to supervise and care for the children. Concerns also remained of Mother's lack of steady employment and her failure to properly address her mental health. And Mother was not forthcoming in therapy regarding the reasons the children were placed in State custody.

In sum, there was clear and convincing evidence that Mother's unfitness was unlikely to change in the foreseeable future. We affirm the decision to terminate Mother's parental rights.

The District Court Did Not Err When It Found that Termination of Mother's Parental Rights Was in the Best Interests of the Children

The district court's best-interests finding is reviewed for an abuse of discretion. "A district court abuses its discretion if no reasonable person would agree with the district court, or the court premised its decision on a factual or legal error." *In re E.L.*, 61 Kan. App. 2d at 330.

The requirement that the district court consider whether termination of parental rights is in the best interests of children "requires the court to weigh the benefits of permanency for the children without the presence of their parent against the continued presence of the parent and the attendant issues created for the children's lives." *In re K.R.*, 43 Kan. App. 2d 891, Syl. ¶ 7, 233 P.3d 746 (2010). In making this determination, the court "must consider the nature and strength of the relationships between the children and parent and the emotional trauma that may be caused to the children by termination of the parental rights, weighing these considerations against a further delay in permanency for the children." 43 Kan. App. 2d 891, Syl. ¶ 7.

At the termination hearing, the State presented evidence on the lack of a parenting relationship between Mother and the children. Rather than demonstrate she could independently care for her two girls during the unsupervised visits, Mother chose to have her two girls supervised by family, not herself. During these visits when Mother could care for the two girls, there were reports of Mother neglecting to feed them. And present throughout the hearing was Mother's overall lack of knowledge of her own children's physical and mental well-being.

Mother does not argue that the district court made an error of law or fact. Thus, we can only reverse the district court's decision on this issue if we find that no reasonable person would agree with the position adopted by the district court. *In re E.L.*, 61 Kan. App. 2d at 330. We find that a reasonable person could agree with the district court's decision that termination is in the best interests of the children. The length of this case along with the heightened mental health needs of the children and Mother's problematic ability to parent her children support the conclusion that the children's best interests would be solved by permanency and termination of Mother's parental rights.

The District Court Did Not Err When It Found that Mother Had Failed to Rebut the Presumption of Unfitness

The district court had another basis for finding Mother unfit—the statutory presumption established by K.S.A. 38-2271(a)(6). In this case, the question becomes whether Mother rebutted the presumption of unfitness established by K.S.A. 38-2271(a)(6). "The burden of proof is on the parent to rebut the presumption of unfitness by a preponderance of the evidence." K.S.A. 38-2271(b). Because the district court found that Mother failed to meet her burden of proof, the district court made a negative factual finding. "Generally, an appellate court will not disturb a negative finding 'absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice. [Citation omitted.]'" *In re Adoption of D.D.H.*, 39 Kan. App. 2d 831, 836, 184 P.3d 967 (2008).

K.S.A. 38-2271(a)(6) provides:

> "(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:

. . . .

(6)(A) the child has been in an out-of-home placement, under court order for a cumulative total period of two years or longer; (B) the parent has failed to carry out a reasonable plan, approved by the court, directed toward reintegration of the child into the parental home; and (C) there is a substantial probability that the parent will not carry out such plan in the near future."

The district court found that K.S.A. 38-2271(a)(6) was a K.S.A. 60-414(a) presumption. A K.S.A. 60-414(a) presumption exists "if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact." K.S.A. 60-414(a). In cases where this presumption applies, "the burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption operates." K.S.A. 60-414(a).

In this case, the presumption applies. The presumption has three elements, and all three are present. First, the children were in an out-of-home placement for more than two years. See K.S.A. 38-2271(a)(6)(A). The second and third elements require very similar findings to the findings the district court made in determining that Mother was unfit under K.S.A. 38-2269(b)(7) and (8). For the reasons discussed above, the State did present clear and convincing evidence that Mother failed in carrying out a reasonable plan directed toward reintegration and that Mother's conduct was unlikely to change in the near future. See K.S.A. 38-2271(a)(6)(B)-(C).

We also find that Mother failed to rebut the presumption of unfitness. As the State's evidence has been found to be clear and convincing, to find in Mother's favor would require reweighing the evidence, which we cannot do. See *In re E.L.*, 61 Kan. App. 2d at 322. She does not point to any undisputed evidence that the district court arbitrarily disregarded. She also does not argue that the district court ruled based on some extrinsic consideration.

Finally, Mother asserts that it would be "fundamentally unfair to apply the presumption because the presumption was not specifically pled." She notes that the State's amended motion stated that "[b]y the time of [the termination hearing], the parents will be presumed unfit pursuant to K.S.A. 38-2271(a)(6)." This, she argues, was not sufficient to put her on notice that the State would be pursuing the presumption.

Statutory presumptions of unfitness "must be applied in a manner that comports with procedural due process." *In re K.R.*, 43 Kan. App. 2d at 898. "The better practice is for the court to conduct a pretrial conference and file a final pretrial order that clearly and unequivocally provides notice that a statutory presumption will be asserted against the parent." 43 Kan. App. 2d at 899. This is not a requirement, however, and we will not reverse unless a parent is "truly surprised by the assertion of the presumption." 43 Kan. App. 2d at 898.

For example, in *In re K.R.*, the district court applied the presumption of unfitness in K.S.A. 38-2271(a)(5) against a mother and terminated the mother's parental rights. The State did not dispute the mother's contention that she did not have notice of the presumption before trial. The only mention of the presumption by the State was a comment in response to the mother's directed verdict that "'in this case, we believe that K.S.A. 38-2271 applies.'" 43 Kan. App. 2d at 897. Though the panel found that the State failed to notify the mother that it would assert the presumption, the panel was unable to reverse on the issue because "we are not convinced that mother was truly surprised by the assertion of the presumption." 43 Kan. App. 2d at 898. The panel noted that the mother had some indication that the presumption would be asserted at the termination hearing because the district court had already made a decision on reintegration that was based on the fact that the children had been in an out-of-home placement for over a year. The panel also noted that the mother's attorney "failed to object, indicate surprise, or seek a continuance to prepare testimony in rebuttal of the presumption" when the State raised

the presumption in response to the mother's motion for directed verdict. 43 Kan. App. 2d at 898-99.

Here too, the record shows that Mother was not surprised by application of the presumption. The State indicated its intention to apply the presumption established by K.S.A. 38-2271(a)(5) in its initial motion to terminate parental rights. This presumption applies when a "child has been in an out-of-home placement, under court order for a cumulative total period of one year or longer and the parent has substantially neglected or willfully refused to carry out a reasonable plan, approved by the court, directed toward reintegration of the child into the parental home." K.S.A. 38-2271(a)(5). When the State filed the amended motion to terminate parental rights, it removed the reference to K.S.A. 38-2271(a)(5) and replaced it with a reference to K.S.A. 38-2271(a)(6). In fact, the State placed this amended language in bold font to put Mother even further on notice. The State noted that the presumption would apply to Mother by the time of the hearing. The State also included a statement explaining that the burden of proof would be on Mother to rebut the presumption of unfitness.

Under these facts, a reasonable person could not claim to be surprised by the application of the K.S.A. 38-2271(a)(6) presumption. The State clearly listed the statute as a basis for finding Mother unfit. Though the presumption could not be applied at the time the State filed its amended motion to terminate, because the children had not been in an out-of-home placement for at least two years as required by K.S.A. 38-2271(a)(6), it was obviously the State's intention to request application of the presumption at the termination hearing. Therefore, this issue does not present a basis for reversal of the district court's decision.

We Will Not Consider a Claim of Error Not First Raised in the District Court

Mother's final argument is that her due process rights were violated because her parental rights were terminated for reasons that were never discussed with her. The termination hearings were held in February 2022 and April 2022, after the State had filed an amended motion to terminate Mother's parental rights. As noted above, the State's motion listed the statutory bases and reasons for seeking the termination of Mother's parental rights. The district court's ruling was based on the arguments presented in the State's termination motion. Mother now asserts that she never received notice of the alleged concerns that arose during her overnight visits with her daughters and she did not have a reasonable chance to address them. Mother was present at both hearings; thus, she had the opportunity to raise this issue at either hearing but failed to do so.

Mother acknowledges that she failed to raise this issue in district court. Generally, constitutional grounds for reversal asserted for the first time on appeal are not properly before us for review. *State v. Keys*, 315 Kan. 690, 696, 510 P.3d 706 (2022). There are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal. These include whether the claim "'involves only a question of law arising on proved or admitted facts and is determinative of the case;'" whether "'consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights;'" and whether "'the district court is right for the wrong reason.'" *In re Adoption of Baby Girl G.*, 311 Kan. 798, 804, 466 P.3d 1207 (2020).

Mother relies on the exception that consideration of the issue is necessary to serve the ends of justice or to prevent the denial of a fundamental right.

An appellant is required to explain why an issue that was not raised below should be considered for the first time on appeal. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019); Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36). In attempting to

comply with this rule, Mother fails to persuasively advise why this claim was not raised at either the February 2022 hearing or when she appeared at the April 2022 hearing.

In this case, we decline to reach the issue. We stress that Mother's failure to raise this claim in district court—despite having two opportunities to do so—certainly impedes our ability to review the claim. As noted by our Supreme Court, "a 'decision to review an unpreserved claim under an exception is a prudential one.' Even if an exception may apply, we are under no obligation to review the claim. [Citation omitted.]" *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021). For these reasons, we decline to reach the merits of Mother's due process claim.

Affirmed.