NOT DESIGNATED FOR PUBLICATION

No. 126,128

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of C.M. and S.M.,
Minor Children.

MEMORANDUM OPINION

Appeal from Pratt District Court; CANDACE R. LATTIN, magistrate judge. Opinion filed September 29, 2023. Affirmed.

Daniel O. Lynch, of Johnston, Eisenhauer, Eisenhauer & Lynch, LLC, of Pratt, for appellant.

Tracey T. Beverlin, county attorney, for appellee, and *Mandi J. Stephenson*, guardian ad litem.

Before MALONE, P.J., GARDNER and COBLE, JJ.

PER CURIAM: C.I. (Mother) appeals the district court's order terminating her parental rights to C.M. and S.M., her minor children. Mother claims there was insufficient evidence to support the court's findings that she was unfit to parent and that her unfitness was unlikely to change in the foreseeable future. She also claims the district court abused its discretion by finding that the termination of her parental rights was in the best interests of the children. For reasons explained below, we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 5, 2021, Mother took C.M., who was four days old, and S.M., who was around two years old, with her to the doctor to receive postdelivery care following the birth of C.M. Mother informed the doctor that C.M. had a large bruise on her hip and

explained that S.M. had pinched C.M. to cause the bruise. During the visit, nursing staff saw Mother grab S.M. while he was screaming and drag him into the examination room. S.M. did not have any shoes on. The doctor's office contacted the Kansas Department for Children and Families (DCF), which requested a welfare check for C.M.

Police officers conducted a welfare check on the same day. The officers observed a "very large area of blue bruising" on C.M.'s hip that extended down to the middle of her leg. Mother explained that she did not know what caused the bruises but suggested that C.M.'s father put her diaper on too tight or that S.M. had pinched her. After concluding the welfare check, the officers took C.M. and S.M. into temporary protective custody.

On July 6, 2021, the State petitioned to find S.M. and C.M. children in need of care. The district court held a hearing the next day and Mother appeared in person. As a result of the hearing, the district court placed S.M. and C.M. into temporary custody with DCF. The district court held an adjudication hearing on August 2, 2021. Mother appeared in person, was represented by counsel, and entered a statement of no contest to the petition. The district court found both children in need of care for lacking adequate care, control, or sustenance that is not due solely to a lack of financial means; for lacking the care or control necessary for the children's physical, mental, or emotional health; and in S.M.'s case, for residing in the same residence with a sibling who has been physically, mentally, or emotionally abused. The court ordered that Mother only have supervised visitation.

The district court held a disposition hearing on August 18, 2021, where Mother again appeared in person and with counsel. After the hearing, the district court approved and adopted the State's proposed permanency plan. The permanency plan required that Mother complete a mental health evaluation and a drug and alcohol evaluation and to follow all recommendations resulting from those evaluations.

A report from TFI Family Services (TFI) to the district court filed on January 24, 2022, described how Mother had completed a drug and alcohol evaluation that resulted in a recommendation that Mother receive inpatient treatment. But Mother opted not to receive inpatient treatment and instead tried to find another provider for a second evaluation. Another report from TFI filed on March 21, 2022, described how Mother struggled to engage with both C.M. and S.M. at the same time throughout her visits. Mother typically paid attention to S.M. while handing C.M. to the support worker. During the most recent visit before that report, Mother was observed not paying any attention to C.M. at all, including not checking her diaper, not holding or engaging with her, and leaving C.M. unattended and unbuckled in an infant carrier placed on a table while she played with S.M. Mother also never checked S.M.'s diaper.

The same report also described how Mother had completed a mental health intake, but not a mental health evaluation as the permanency plan required. TFI contacted the mental health services provider, Horizons Mental Health Center (Horizons), and "was informed that an evaluation was never completed due to [Mother] telling the provider she didn't feel she needed therapy services and was only there because TFI/DCF ordered her to do it." The only documentation that TFI received from Horizons was a brief letter which began: "[Mother] was seen on 08/12/21 for a mental health intake." The letter stated that Mother was diagnosed with adjustment disorder with anxiety and had refused any other treatment. The letter did not address recommendations at all.

The January 24, 2022 report from TFI also described how Mother did not attend inpatient drug and alcohol treatment and instead completed a second drug and alcohol evaluation with a new provider, which did not recommend inpatient treatment. The TFI report ended with a recommendation that the district court find that reunification was no longer viable, and to schedule a termination hearing. On August 2, 2022, the district court found that Mother was not making adequate progress on achieving the permanency plan and that reintegration was no longer viable.

The State moved to terminate Mother's parental rights on September 12, 2022. In the motion, the State sought to terminate Mother's parental rights under K.S.A. 38-2269(b)(1), (3), (7), and (8), along with K.S.A. 38-2269(c)(3) and K.S.A. 38-2271(a)(5). A termination hearing was held on November 9, 2022, and November 17, 2022.

At the termination hearing, Heather Pelkey, a case manager for TFI, testified for the State. Pelkey testified that Mother had confided in her that she had relapsed on an unspecified substance just prior to C.M.'s birth. Pelkey reiterated that Mother had taken two drug and alcohol evaluations and that the first resulted in a recommendation for inpatient treatment and the second did not. The provider who administered the second evaluation had contacted Pelkey with concerns. Pelkey informed the provider that some of the information that Mother had given during the second evaluation did not match the information given in the first evaluation or to TFI. For that reason, Pelkey was concerned that the second evaluation "was not based upon the true nature of the case."

Pelkey also testified that TFI had identified that Mother had a history of trauma, including C.M.'s conception being the result of rape. Mother had made statements to Pelkey that she felt relief when her visits with C.M. ended because she no longer had to see her rapist's face in C.M.'s. Mother did not feel a bond with C.M. Even though TFI had received a mental health intake for Mother, Pelkey was informed by the mental health service provider that Mother had refused additional services, which included the mental health evaluation required by the permanency plan. Even so, the intake included a diagnosis of adjustment disorder with anxiety. Mother provided no other mental health documentation to TFI aside from the intake letter. After receiving the letter, TFI staff "had many conversations with [Mother] about getting an actual evaluation completed."

Along with not completing a mental health evaluation, Pelkey was concerned about Mother's lack of progression regarding her visits with the children. Throughout the case, Mother remained on two-hour supervised visits and only progressed to two

monitored visits with S.M. and C.M. During Mother's second monitored visit at a hotel pool, Mother invited her brother who she was specifically told was not allowed to have contact with the children. When a caseworker checked in on the visit, Mother handed C.M. to her brother, who the caseworker did not know. Mother then lied that her brother was a stranger who had agreed to hold C.M. while Mother opened a door. Afterward, Mother was returned to supervised visitation for the rest of the case.

The State then called Jennifer Duvall, a permanency support worker for TFI. Duvall corroborated Pelkey's testimony about the monitored pool visit and expressed concern that Mother seemed panicked at the prospect of planning her two monitored visits by herself. Duvall also acknowledged that she had safety concerns for the children, given that the case began because of bruising on C.M.'s hip and leg. She testified that Mother did not pay enough attention and was not responsive enough to the children. At times, Mother would grab and pick up S.M. by the arm. Duvall did not see that Mother could manage both children at the same time.

D.H., Mother's half-sister and the children's placement, testified next. D.H. testified that S.M. initially struggled to recognize positive reinforcement and attention. After visits with Mother, S.M. became difficult and would not eat or listen to D.H.'s directions. D.H. described a cycle where S.M. would regress after visits and would get "back on track" throughout the week until the next visit started the cycle anew.

D.H. also expressed concern with Mother's ability to handle both children at once. D.H. explained that Mother had a tendency during visits to get frustrated with S.M., sometimes ignoring and abandoning him and C.M. D.H. recalled a specific incident at a restaurant where Mother got frustrated and walked away from the table, S.M., and C.M. without comment. S.M. got up to follow Mother, who then made no attempt to go back for C.M. and instead "just left her at the table by herself." D.H. reiterated that Mother had never formed a bond with C.M.

In her care, D.H. testified that C.M. laughs, talks, and crawls around her home. At the time of the termination hearing, C.M. was 16 months old and was not walking. When asked why she could not walk, D.H. responded that C.M.'s pediatrician thought that the hip injury that led to this case's inception may have been more extensive than originally perceived. She described S.M. as "very bright" and that his behavior had improved in her care. S.M. regularly attends therapy, daycare, and preschool.

Mother testified on her own behalf. Mother agreed that "[t]he bond is not there" with C.M. but suggested that a bond could form with more time. Mother also admitted to inviting her brother to the pool with the children and expressed regret that it returned her to supervised visits. Mother testified that she would be willing to get a mental health evaluation but was hesitant on whether she would follow through with therapy or any other recommendations. Mother also testified to her reluctance to receive drug and alcohol treatment because she felt as though she could "put [substances] down whenever [she] want[ed] to and start [using substances] whenever [she] want[ed] to."

After hearing the evidence, the district court took the matter under advisement and entered a memorandum decision on January 17, 2023. There, the district court found Mother unfit to parent under K.S.A. 38-2269(b)(1), (2), (4), (6), (7), and (8); K.S.A. 38-2269(c)(3); and K.S.A. 38-2271(a)(5). The district court also found that Mother's unfitness was unlikely to change in the foreseeable future and that termination of Mother's parental rights was in the best interests of the children. The district court terminated Mother's parental rights to both children. Mother timely appealed.

UNFITNESS FINDINGS

The district court found Mother unfit to parent under K.S.A. 38-2269(b)(1), (2), (4), (6), (7), and (8); K.S.A. 38-2269(c)(3); and K.S.A. 38-2271(a)(5). Mother claims these findings were not supported by clear and convincing evidence. The State disagrees.

Before addressing the merits of Mother's claims, the record reveals that the district court found Mother unfit under K.S.A. 38-2269(b)(2), (b)(4), and (b)(6), even though those factors were not alleged in the State's motion to terminate parental rights. Although neither party addresses this discrepancy on appeal, the termination of parental rights must satisfy procedural due process. *In re K.R.*, 43 Kan. App. 2d 891, 898, 233 P.3d 746 (2010); *In re E.K.*, No. 125,688, 2023 WL 4677009, at *5-6 (Kan. App. 2023) (unpublished opinion) (holding a parent must be apprised of what the State intends to prove in establishing unfitness); *In re D.G.*, No. 125,366, 2023 WL 2194320, at *3 (Kan. App. 2023) (unpublished opinion) (panel declines to consider district court's findings of unfitness based on statutory grounds not raised in motion to terminate). To avoid repeating this due process violation, we will only review the district court's unfitness findings under the statutory grounds alleged in the termination motion.

Termination of parental rights is governed by the Revised Kansas Code for Care of Children (Code), K.S.A. 38-2201 et seq. Under the Code, when a child has been adjudicated to be a child in need of care, the district court may terminate parental rights when it 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).

> "Termination of parental rights will be upheld on appeal if, after reviewing all the evidence in the light most favorable to the prevailing party, the district judge's fact-findings are deemed highly probable, i.e., supported by clear and convincing evidence. Appellate courts do not reweigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. [Citation omitted.]" *In re Adoption of Baby Girl G.*, 311 Kan. 798, 806, 466 P.3d 1207 (2020), *cert. denied* 141 S. Ct. 1464 (2021).

K.S.A. 38-2269(b) provides a nonexclusive list of nine factors for a district court to consider when determining a parent's fitness. K.S.A. 38-2269(c) provides another four factors a district court may consider when a child is not in the physical custody of a

parent. The existence of any one of the statutory factors standing alone may, but does not necessarily, establish grounds for termination of parental rights. K.S.A. 38-2269(f).

K.S.A. 38-2271(a)(5) and K.S.A. 38-2269(c)(3)

We will begin our analysis with the district court's finding of unfitness under K.S.A. 38-2271(a)(5) and K.S.A. 38-2269(c)(3). K.S.A. 38-2271(a)(5) creates a presumption of unfitness if the State proves by clear and convincing evidence that the children have "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." A court may find a parent unfit under K.S.A. 38-2269(c)(3) when the child is not in the physical custody of a parent and the court finds there has been a "failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home."

Mother does not dispute that, at the time of the termination hearing, both children had been in an out-of-home placement under court order for longer than a year. Indeed, the children were placed with D.H. for about 16 months. Mother also does not contest the reasonableness of the permanency plan. Mother instead contests whether she substantially neglected, willfully refused, or otherwise failed to carry out a reasonable plan toward reintegration. The State argues that Mother did not complete a mental health evaluation. Mother contests, without further argument, that she did complete a mental health evaluation. The district court found that Mother had willfully refused to complete a mental health evaluation, and only completed a mental health intake. We agree.

The parties' contention boils down to whether the letter from Horizons evidenced that Mother had completed a mental health evaluation. In the light most favorable to the State, it does not. Indeed, the letter begins with a clear statement that Mother was seen for

an "intake." The letter also does not address recommendations. The TFI reports show that TFI contacted Horizons for more information. Horizons then informed TFI staff that no evaluation was completed because Mother had refused further treatment. Pelkey similarly testified that Mother had completed an intake, but not the evaluation that was required.

The evidence also shows that TFI communicated many times with Mother that the intake she had completed was not sufficient and that she would need to complete "an actual evaluation." Pelkey testified that TFI staff had discussed with Mother that TFI could provide financial aid for mental health services—Mother simply had to schedule the appointment. But Mother scheduled no other mental health evaluations or services because "[s]he continue[d] to say that she doesn't feel she needs therapeutic services." Mother conceded that she denied additional mental health services. When asked whether she would be willing to get a mental health evaluation and follow-up therapy for the sake of her children, Mother agreed, but was hesitant.

Mother asserts that she "completed a mental health evaluation but did not proceed with a follow-up treatment." But Mother does not support her assertion with any other argument. Mother does cite the record to support her assertion, but the portion of the record that she cites to does not pertain to mental health services at all.

In the light most favorable to the State, and without weighing conflicting evidence, the record contains clear and convincing evidence that Mother had begun the mental health evaluation process by completing some form of initial mental health intake, but she had not completed a mental health evaluation due to her refusal to proceed with additional services. The evidence also shows that Mother was made aware many times of the need to complete a full evaluation and needed only to schedule the appointment with a nearby provider, but she did not do so. The mental health intake was dated March 15, 2022, and the termination hearing began on November 9, 2022, which shows that Mother had about six months to schedule another appointment for a mental health evaluation but

did not do so. These facts clearly and convincingly support a finding that Mother substantially neglected or willfully refused to get a mental health evaluation.

Along with not completing a mental health evaluation, the district court found that Mother had not complied with the recommendations of her first drug and alcohol evaluation. Mother's first evaluation resulted in a recommendation that Mother complete inpatient drug and alcohol treatment, but Mother instead completed a second evaluation that did not recommend treatment. But the district court found that the second evaluation was never admitted into evidence or placed in the court record. Neither party points out the second evaluation in the record.

The district court also heard evidence that Mother's caseworkers were concerned about the accuracy of the second evaluation because it was based on different information than what Mother had told TFI staff and provided in the first evaluation. Mother also testified to her reluctance to receive drug and alcohol treatment because she felt as though she could "put [substances] down whenever [she] want[ed] to and start [using substances] whenever [she] want[ed] to." Mother does not address why the second evaluation is valid or should supersede the first. Instead, she merely states without further argument that "[she] completed two drug and alcohol evaluations . . . ." Considering the facts undermining the validity of the second evaluation, clear and convincing evidence supports the district court's finding that Mother did not follow the recommendations in the first drug and alcohol evaluation that she needed to follow.

In sum, clear and convincing evidence supports the district court's finding that Mother substantially neglected or willfully refused to complete a reasonable plan towards reintegration under K.S.A. 38-2271(a)(5) for her failure to complete a mental health evaluation and seek inpatient drug and alcohol treatment. For the same reasons, clear and convincing evidence supports the district court's finding under K.S.A. 38-2269(c)(3) that Mother failed to carry out a reasonable plan towards reintegration. Although we could

end our analysis on Mother's unfitness to parent here, we also will address some of the district court's other findings on Mother's unfitness to parent her children.

K.S.A. 38-2269(b)(7) and (8)

The district court also found Mother unfit under K.S.A. 38-2269(b)(7) and (b)(8). K.S.A. 38-2269(b)(7) considers the "failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family"; and K.S.A. 38-2269(b)(8) considers a "lack of effort on the part of the parent to adjust the parent's circumstances, conduct or conditions to meet the needs of the child."

These factors share much of the same supporting evidence described above that we need not repeat at length. In sum, even knowing that financial aid was available, Mother failed to complete a mental health evaluation. In the light most favorable to the State, Mother also failed to follow the recommendations of her drug and alcohol evaluation, instead attempting to evade compliance by seeking another evaluation and altering her answers from what she had reported to TFI and in the first evaluation. All the while, Mother maintained an attitude that she did not need and would not seek aid or treatment regardless of the permanency plan's requirements, her caseworker's concerns, or health service providers' recommendations.

Beyond Mother's failure to complete a mental health evaluation and follow the recommendations in her first drug and alcohol evaluation, the district court heard ample evidence of Mother's inability to progress her visitation schedule and appropriately interact with the children. For example, during visits Mother struggled to discipline S.M. and did not make consistent progress in improving her discipline techniques through the duration of the case. Mother showed little interest in C.M. during visits and admitted that she had not formed a bond with the child. There was concern that Mother was unable to safely handle both children at the same time. Mother's visitation did not progress past

supervised visits except for a two-week period of monitored visits. Mother was quickly returned to supervised visits after she ignored TFI instructions not to allow her brother to have contact with the children. Mother instead snuck him into the visit and tried to conceal his presence after being discovered.

Mother does not contest the reasonableness of the State's efforts or the above evidence that she lacked effort to adjust her circumstances. Instead, Mother asks us to inappropriately weigh conflicting evidence by pointing out evidence that she put forth adequate effort to change her circumstances and that she had satisfied the reasonable efforts made the by State. We will not weigh conflicting evidence. *In re Adoption of Baby Girl G.*, 311 Kan. at 806. The above evidence clearly and convincingly supports a finding that the State's reasonable efforts failed due to Mother's inability or unwillingness to complete the permanency plan, seek appropriate treatment, adjust her parenting techniques, or otherwise benefit from the aid that TFI offered. For the same reason, the evidence also clearly and convincingly shows that Mother failed to adjust her circumstances, conduct, or condition to meet the needs of the children.

K.S.A. 38-2269(b)(1)

Under K.S.A. 38-2269(b)(1), a parent may be found unfit if "[e]motional illness, mental illness, mental deficiency or physical disability of the parent, of such duration or nature as to render the parent unable to care for the ongoing physical, mental and emotional needs of the child." Mother argues that there was no evidence presented that a mental, emotional, or physical illness or disability rendered her unable to parent. The State points to evidence that Mother was regularly overwhelmed during visits with the children, that she regretted the circumstances of C.M.'s conception, and that her refusal to complete a mental health evaluation support this factor.

But even in the light most favorable to the State, the evidence does not show clearly and convincingly that Mother was unfit to parent by some identifiable mental, emotional, or physical ailment. The only relevant diagnosis in the record comes from the Horizons letter, which diagnosed Mother with adjustment disorder with anxiety. But neither the State nor the district court cites evidence that this diagnosis, or any other diagnosis, contributed to Mother's inability to parent. In other words, no evidence connects any verifiable mental, emotional, or physical condition to Mother's lack of a bond with C.M. or difficulties disciplining S.M., for example. Indeed, Mother's resistance to receiving a full mental health evaluation and additional treatment was a major point of contention, and it precluded Mother's caseworkers from understanding her complete mental and emotional state. And neither the district court nor the State allege that Mother was affected by any physical condition. There is therefore insufficient evidence in the record to show that some identifiable condition rendered Mother unfit to parent. This factor is not supported by clear and convincing evidence. But as stated earlier, the existence of any statutory factor standing alone may establish grounds for termination of parental rights. K.S.A. 38-2269(f).

Whether Mother's unfitness was unlikely to change in the foreseeable future

When gauging the likelihood of change in the foreseeable future under K.S.A. 38-2269(a), courts should use "child time" as the measure. Children experience the passage of time in a way that makes a month or a year seem far longer than it would for an adult, and that difference in perception typically tilts toward a prompt, permanent disposition. K.S.A. 38-2201(b)(4); *In re M.B.*, 39 Kan. App. 2d 31, 45, 176 P.3d 977 (2008); *In re G.A.Y.*, No. 109,605, 2013 WL 5507639, at *1 (Kan. App. 2013) (unpublished opinion) ("'child time'" differs from "'adult time'" in termination of parental rights proceedings "in the sense that a year . . . reflects a much longer portion of a minor's life than an adult's"). A court may look to a parent's past conduct as an indication of future conduct. *In re M.S.*, 56 Kan. App. 2d 1247, 1264, 447 P.3d 994 (2019).

Mother claims that "[her] behavior during these cases shows that she is willing to change her circumstances, conduct and conditions so that she can meet the needs of her children and continue to be a part of their lives." In support of that claim, Mother again points to evidence that conflicts with the district court's judgment and shows some likelihood of change in the future. For example, Mother relies on Pelkey's testimony that Mother had made some attempt to work on appropriate parenting techniques with S.M. in order to show that there is a likelihood of change. Mother also relies on her own testimony that she had a positive relationship with both children. But Mother's arguments require that we weigh conflicting evidence, which we will not do. *In re Adoption of Baby Girl G.*, 311 Kan. at 806.

Over 16 months—essentially C.M.'s entire life and a significant portion of S.M.'s—Mother made little progress in terms of diagnosing and treating her mental health and addressing her history of drug use. Even though Mother took a drug and alcohol evaluation, she did not follow the resulting recommendation to complete inpatient treatment. Instead, she sought a second evaluation and, in the light most favorable to the State, altered her answers in an ostensible attempt to avoid inpatient treatment. Indeed, Mother testified to her belief that she could stop substance abuse at any time, and, alarmingly, "start it whenever I want to."

Mother also received a mental health intake, but TFI staff contacted the service provider who informed them that Mother had not completed an evaluation because she refused additional services. When confronted with the need to complete a full mental health evaluation, Mother did not act even when she could have received financial assistance. Mother remained adamant that she did not need mental health services or drug and alcohol treatment. This evidence clearly and convincingly shows not only that Mother failed to act over a substantial period of time, but that her attitude was still not conducive to change even at the termination hearing. Clear and convincing evidence

supports the district court's finding that Mother's unfitness was unlikely to change in the foreseeable future.

BEST INTERESTS FINDING

We review a district court's findings on the best interests of the children for an abuse of discretion. *In re P.J.*, 56 Kan. App. 2d 461, 465, 430 P.3d 988 (2018). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 462 (2017). "In making the determination, the court shall give primary consideration to the physical, mental and emotional health of the child." K.S.A. 38-2269(g)(1).

Mother argues that the evidence shows that she had a strong bond with S.M. and was working on completing the permanency plan. Mother also claims that her bond with C.M. would grow if given more time. We have addressed the conflicting evidence at length above. The district court heard testimony that the children are happy, healthy, and are receiving appropriate care with D.H. Although Mother made some progress on completing parts of the permanency plan, she spent 16 months stagnating on others. In that time, Mother did not show that she would address her own well-being, that she could safely handle both children, and that she had any emotional bond with C.M. Under these facts, the district court's finding that termination of Mother's parental rights was in the children's best interests was not arbitrary, fanciful, or unreasonable and was not based on an error of fact or law.

Affirmed.