

NOT DESIGNATED FOR PUBLICATION

No. 126,533

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of S.H., A.H., J.T., and M.T.,
Minor Children.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; RICHARD A. MACIAS, judge. Submitted without oral argument. Opinion filed December 29, 2023. Affirmed.

Jordan E. Kieffer, of Jordan Kieffer, P.A., of Bel Aire, for appellant.

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

Before ARNOLD-BURGER, C.J., COBLE and PICKERING, JJ.

PER CURIAM: M.C. (Mother), the mother of S.H., A.H., J.T., and M.T., appeals the decision to terminate her parental rights to her children. Mother contends that the district court lacked clear and convincing evidence of present and future parental unfitness. She also contends that the district court abused its discretion in concluding that termination of parental rights was in the best interests of the children. After thoroughly reviewing the record, we affirm the district court's decision.

FACTUAL AND PROCEDURAL HISTORY

In May 2018, the Kansas Department for Children and Families (DCF) received a report alleging that S.H. and A.H. lacked adequate parental supervision at a motel, where the children were living with Mother. At the time these were the only children living with

her. The reporting party stated the children were frequently screaming, were permitted to play outside at all hours of the night, were infested with lice, and were never sent to school. Six months later, DCF received a report of emotional abuse, physical neglect, and educational neglect of S.H. and A.H. by Mother and her live-in boyfriend. This report alleged that the living space of the children was infested with cockroaches and that some of the children had cockroaches in their ears. The report also alleged that the children were receiving insufficient food; S.H. was malnourished and had rotting teeth. The report further alleged that Mother claimed to be homeschooling the children, but there was no evidence of education. Mother signed a safety plan with DCF, but she failed to comply with the plan. DCF could not pursue the matter because Mother could not be located. The case file remained open.

It was a year later before DCF caught up with Mother again, when hospital staff reported that Mother and her newborn infant, J.T., tested positive for methamphetamine during a urine test. The urinalysis was prompted by J.T.'s behavior as a newborn. The hospital submitted a cord stat test but had not received the results of that test when DCF interviewed the hospital staff.

When DCF visited Mother at the hospital, Mother denied using methamphetamine. She admitted to smoking marijuana occasionally during the pregnancy for nausea. Mother admitted to using methamphetamine in the past but claimed the last time she used it was when she realized she was pregnant. She alleged that perhaps her live-in boyfriend—who was J.T.'s father (Father)—gave her meth without her knowledge. Mother claimed that she was physically abused by Father and that the beating precipitated her labor. Mother admitted that the abuse occurred in front of S.H. and A.H. S.H. confirmed that he had witnessed physical abuse of Mother. Mother claimed to want to leave Father but feared for her safety because Father was well connected in Wichita. Hospital staff offered to implement security protocols to prevent Father from visiting Mother in the hospital, but Mother declined. DCF suggested that Mother obtain a

protection-from-abuse (PFA) order against Father, but Mother failed to see the value of the order.

Although Mother was personally discharged from hospital care, she remained at the hospital with J.T. At one point, Mother appeared to be suffering from drug withdrawal. Father visited her at the hospital, and they went for a walk. When they returned, Mother's withdrawal symptoms had eased.

Based on J.T.'s prenatal exposure to methamphetamine and Mother's allegations of abuse, DCF believed S.H., A.H., and J.T. could not receive adequate care in Mother's physical custody. DCF placed the children in police protective custody. When DCF social workers spoke to S.H. in foster care, he confirmed that, when he lived in the motel with Mother, he had little to eat, and the motel room was "trashed." He reported that Mother left the children alone occasionally. He reported not feeling safe when Father was around.

Without objection, Mother's three children are found to be children in need of care.

Mother did not contest the Child-in-Need-of-Care (CINC) petition, that was subsequently filed by the State and granted by the district court. Nor did she challenge placement of all three children in DCF custody and subsequently in foster homes. All the while, Mother continued to either test positive for methamphetamine and amphetamine or refuse to submit to tests.

Mother was ordered to engaged in eight case plan tasks: (1) obtain a clinical mental health assessment; (2) abstain from illegal drugs and substances, which she would demonstrate through random drug testing; (3) obtain and maintain full-time employment, which she would demonstrate by providing Saint Francis Ministries (SFM) with proof of job search, verification of disability status, or proof of employment; (4) obtain and maintain stable housing with proof of ownership or rent; (5) complete a domestic

violence or anger management program with verification of its completion; (6) complete a budgeting and nutrition course; (7) complete a parenting class with verification of completion; and (8) obtain a substance abuse evaluation and follow its recommendations.

Mother gives birth to a fourth child.

About 15 months after children were removed and placed in foster homes, Mother and Father had another baby, M.T. The State filed another CINC petition based on concerns stemming from the social workers' inability to contact Mother and Mother's failure to participate in the case plan tasks already in existence related to her other three children. DCF did not know where to find M.T. Mother failed to appear for the temporary custody hearing, except by counsel. The court ordered M.T. to be placed in the custody of DCF with placement in foster care. Subsequently, Mother failed to appear for the CINC hearing, except by appointed counsel. The court found M.T. a child in need of care and continued the temporary custody orders.

Mother's efforts to comply with case plans in order to obtain custody of her children were woefully inadequate.

Although Mother completed many of the case plan tasks assigned to her, her progress was not rapid. Many of the tasks were completed after termination proceedings had begun. She admitted at the termination hearing that, as of the birth of M.T., she had not made good progress on her case plan.

Mother completed the following:

- Attended Strengthening Families parenting program.
- Completed an alcohol and drug evaluation.

- Attended one-day drug and alcohol class as recommended in her evaluation.
- Attended a domestic violence or anger management class.
- Attended a budgeting and nutrition class.
- Generally, appropriately cared for J.T. and M.T. during the one-hour supervised visits that she attended. She frequently fed the children and changed their diapers within a one-hour visit.
- Maintained employment. For much of the case, Mother had no employment and relied on Father for financial support. After the State filed its motion to terminate parental rights, Mother obtained full-time employment with NoMar storage facility in August 2021. She maintained this employment throughout the remainder of the case.

Mother failed to complete the following:

- A mental health clinical assessment, though she informed her social workers that she had.
- Weekly supervised visits—attending only sporadically with the three older children beginning in October 2019. When the social worker noted bruising on Mother's face at her visit on December 18, 2019, Mother stopped attending visits altogether. With the exception of one call each to S.H. and A.H. in April 2020 for the children's birthdays, Mother did not contact SFM or request visits with her children between December 18, 2019, and June 2020.
- Family therapy sessions. By the time of the termination hearings, Mother had not seen S.H. and A.H. in over a year.

- Notify anyone of her whereabouts for nine months after she gave birth to M.T. During this time, Mother left M.T. with a friend for about six months, visiting two or three times per week.
- Know whereabouts of M.T., for about three weeks; she assumed, without confirmation, that M.T. was with Father.
- Have any visitation with any of her three older children from August 2020 until September 2021, and had no contact with her newborn, M.T., from May 2021 to September 2021.
- Remain drug free or present proof thereof.
- Protect herself and her children from an abusive relationship with Father.
- To obtain suitable housing for her children. Much of the case, by her own admission, Mother remained homeless.

The State initiates termination proceedings

By August 2021, the State had filed motions to terminate Mother's parental rights to S.H., A.H., J.T., and M.T. The State alleged that Mother was unfit for the following statutory reasons:

(1) K.S.A. 38-2269(b)(3): the use of drugs for such duration or nature rendered Mother unable to care for the ongoing physical, mental, or emotional needs of her children;

(2) K.S.A. 38-2269(b)(7): reasonable efforts by the appropriate agencies failed to rehabilitate the family;

(3) K.S.A. 38-2269(b)(8): Mother failed to make an effort to adjust her circumstances, conduct, or condition to meet the needs of her children;

(4) K.S.A. 38-2269(c)(2): Mother failed to maintain regular visitation, contact, or communication with her children or with the custodian of her children;

(5) K.S.A. 38-2269(c)(3): Mother failed to carry out a reasonable plan approved by the court to reintegrate the children into Mother's home.

The termination hearings were held on four separate dates and at the conclusion of the evidence, the district court found Mother unfit to parent all four children because of the statutory factors alleged in the State's motion. The court further found that Mother's unfitness was unlikely to change in the foreseeable future. The district court concluded that it was in the best interests of the children to terminate Mother's parental rights.

Mother timely appeals the district court's rulings.

When a parent challenges the sufficiency of the evidence supporting a finding of parental unfitness, an appellate court will uphold the decision only if, after reviewing the record in a light most favorable to the prevailing party, the district court's findings are supported by clear and convincing evidence. Stated differently, the government must persuade the appellate court that a rational factfinder could have found it highly probable that the circumstances support the finding of unfitness. Clear and convincing evidence is evidence that shows the truth of the facts asserted is highly probable. *In re B.D.-Y.*, 286 Kan. 686, Syl. ¶ 3, 187 P.3d 594 (2008). It is an intermediate standard of proof between a preponderance of the evidence and beyond a reasonable doubt. 286 Kan. 686, Syl. ¶ 2. Preponderance of the evidence is evidence which shows that the truth of the facts asserted is more probable than not. 286 Kan. 686, Syl. ¶ 1.

In evaluating the evidence, the appellate court does not weigh conflicting evidence, pass on the credibility of witnesses, or determine factual questions. *In re*

Adoption of B.B.M., 290 Kan. 236, 244, 224 P.3d 1168 (2010); *In re M.H.*, 50 Kan. App. 2d 1162, 1170, 337 P.3d 711 (2014).

In considering a parent's unfitness, the district court is statutorily required to consider several factors but is not limited to consideration of only those factors. K.S.A. 38-2269(b). A single factor may establish a parent's unfitness, but the presence of a factor does not automatically establish unfitness. K.S.A. 38-2269(f). In concluding that Mother was unfit, the district court relied on five statutory factors—the same statutory factors cited by the State in its motion to terminate parental rights. We will examine each under the standard outlined.

EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDING THAT MOTHER WAS UNFIT TO
PARENT HER CHILDREN

Use of Dangerous Drugs—K.S.A. 38-2269(b)(3)

In concluding a parent is unfit by reason of drug use, a court must find more than that a parent used illicit drugs. The court must find that the use of drugs caused the parent to be unable to care for the ongoing, physical, mental, or emotional needs of the children. K.S.A. 38-2269(b)(3).

When the three children were taken into protective custody, J.T., a newborn baby, tested positive for methamphetamine. Mother consistently denied drug usage, but she consistently refused to comply with SFM's or the court's requests for drug testing. Mother submitted one clean UA on July 1, 2020. Thereafter, SFM could not request random drug testing because Mother did not provide the agency with a working phone number.

When M.T. was brought into state custody in May 2021, he also tested positive for methamphetamine.

Once Mother began visitation with J.T. and M.T. in September 2021, SFM again asked for drug testing. Mother failed to comply.

At trial, Mother denied that she took drugs and denied that she was taking drugs when J.T. and M.T. were born. Mother also testified that she never refused a drug test when she was contacted and asked to take one. Despite missing so many random drug tests throughout the case, Mother testified that she understood the importance of submitting to every drug test without excuse.

Even during the termination hearing, when the stakes for Mother were at the highest, Mother failed to provide a urine sample for testing to establish that she was not currently taking drugs. Despite the recognized consequences of continuing to use drugs, Mother continued to avoid drug tests ordered by the court.

The consistent avoidance of drug testing is circumstantial evidence, from which the court may infer Mother's knowledge that she would produce a positive test result. See *Forrest v. Kansas Dept. of Revenue*, 56 Kan. App. 2d 121, 128, 425 P.3d 624 (2018) (in context of DUI, refusal to submit to preliminary breath test may support inference of test failure).

When considering whether a condition of unfitness is likely to change in the foreseeable future, a court may consider a parent's past conduct. *In re M.S.*, 56 Kan. App. 2d 1247, 1264, 447 P.3d 994 (2019). Given Mother's persistent denial of drug use, despite objective evidence to the contrary, and her unwillingness to submit to drug testing throughout the case, a court may properly project her attitude into the foreseeable future.

There can be no doubt that Mother's drug use prevented her from caring properly for her children. Her youngest children were brought into State custody with methamphetamine in their system. Remaining drug free was a condition of maintaining

contact with her children. Her refusal to do so or present proof that she was drug free, prevented reintegration. That was a choice Mother made. Drug use was clearly more important than maintaining custody of her children. The record substantially supports this finding by clear and convincing evidence.

Failure of Reasonable Efforts to Rehabilitate the Family

The court also found that Mother failed SFM's reasonable plan for reintegration, primarily because she failed to maintain contact with SFM. The record substantially supports this finding.

Mother points to her completion of several of the case plan tasks. Most of these tasks were completed after the terminating proceedings had begun. Mother simply benefitted from a court schedule that prevented the evidence from being entirely presented on August 10. If the termination hearing had concluded on that date, Mother would not have substantially completed most of the case plan tasks.

Moreover, the case plan tasks that Mother completed, such as parenting classes and substance abuse evaluations, were preliminary objectives to assist Mother to reform her conduct to meet her children's needs. Finishing these preliminary objectives over two years into the case plan does not establish reasonable progress toward reintegration. Completion of these case plan tasks demonstrates minimal primary change, not secondary change.

The weight of evidence establishes that, through most of the case plan, Mother failed to cooperate with SFM. Her social workers could not contact Mother, even though SFM provided her with two phones. Mother made negligible progress on the case plan tasks for the majority of the time the children were out of her custody. And, when M.T. was born, Mother essentially absconded with the baby. Since SFM could not contact

Mother, it was not permitted to expend efforts to help Mother complete the tasks needed to reintegrate her family.

Reasonable efforts, by definition, must be reasonable within the context. The requirement does not impose a duty on social service agencies to expend "herculean effort[s] to lead the parent through the responsibilities of the reintegration plan." *In re B.T.*, No. 112,137, 2015 WL 1125289, at *8 (Kan. App. 2015) (unpublished opinion). The legislative intent behind the reasonable efforts requirement is to provide a parent the opportunity to succeed. The parent must also exert some effort to succeed. *In re M.S.*, 56 Kan. App. 2d at 1257. Cutting off communication with the supervising social service agency prevents the social service agency from offering advice and instruction in completing the court tasks and preparing to reintegrate the children into the household.

While SFM could have done more to establish visitation with the older children in September 2021 when Mother began having visits with the two younger children, this lack of reasonable efforts does not undermine the district court's finding of unfitness. SFM could not contact Mother for over a year. Termination proceedings had started before Mother made herself available for visits in an acceptable environment. Even then, Mother merely took advantage of visits scheduled for Father. She did not communicate with SFM to establish her own visits with her children. Mother's visits with J.T. and M.T. were generally acceptable, but Mother's efforts were too late and too insignificant to warrant extending the case.

Lack of Effort to Adjust Circumstances, Conduct, or Condition

Next, the district court found that Mother had failed to adjust her circumstances, conduct, or condition to meet the needs of her children. The record supports this finding.

The children entered protective custody based on deplorable living conditions, attributed to the parents' drug abuse and because of allegations of domestic abuse by Father against Mother. Mother's nonchalant attitude toward her drug addiction has already been discussed. She essentially made no effort to establish that she was free of illegal substances that would hamper her reunification with her children. Furthermore, she cut off communication with SFM, which essentially derailed the agency's ability to supervise Mother's progress toward reintegration.

The two most troubling aspects of Mother's circumstances, however, are her inability to obtain and maintain stable housing for her children and her continued return to a toxic relationship with Father. Every time Mother left Father throughout the history of this case, she has lost suitable housing. Even though she continued to work at a job she claimed was sufficient to provide for the needs of herself and her children, she chose to stay with friends or in her car when she moved away from Father. During one of these periods away from Father, Mother gave M.T. to a friend. Mother claimed to visit two or three times a week, but Mother acknowledged a three-week period in which she did not know where M.T. was. Even though Mother was caring for only one of her children, she had to rely on a friend to care for the child because she was homeless and living in her car. Mother only obtained consistent employment toward the end of the case, and, even with employment, Mother chose to become homeless when she was not living with Father, rather than to find suitable housing for herself and her children.

Instead of seeking help from the social service agencies designed to assist her, Mother kept returning to her relationship with Father, even though she continued to report abuse by him and exhibit physical signs of that abuse. As of November 2021, when the second termination hearing was occurring, Mother was living with Father. She then left him, essentially becoming homeless, until January 2022, the day before the final termination hearing. Mother purportedly had obtained housing for herself and her

children right before the January hearing. At that point in the case, there was no time to determine the suitability of the housing.

Based on Mother's repeated practice of returning to her relationship with Father and then separating from him, the court properly concluded that Mother's circumstances, conduct, or condition were unlikely to change for the good in the foreseeable future.

Failure to Maintain Visitation or Communication

The district court's fourth basis for finding Mother unfit was her lack of communication and visitation with her children throughout the case. At trial, Mother objected to this insinuation, complaining that SFM failed to provide her contact with S.H.'s and A.H.'s new therapist. But the argument rings hollow. SFM failed to apprise Mother of the therapist in large part because Mother failed to check in with her social workers. When the social workers tried to communicate with Mother, they discovered that they lacked a working phone number. Again, SFM may have been able to devise other ways of communicating with Mother, but Mother knew the case task plans. She knew that she needed to contact the children's therapist to schedule visits. She did nothing to establish visits, apparently expecting SFM to do all the work.

SFM eventually established visits between Mother and J.T. and M.T. toward the end of the case. But Mother did nothing to establish these visits. SFM had scheduled the visits with Father. SFM simply continued visitation with Mother after she moved into the apartment with Father.

Taking the record in a light most favorable to the State, Mother expended very little effort to connect with her children during the case. She waited months before establishing visits with S.H. and A.H. After a couple of visits, the therapist chose to postpone further visits until after Mother gave birth to M.T. This delay is not fault

attributable to Mother. But, once she gave birth to M.T., Mother stopped communicating with SFM. The agency, therefore, could not schedule further visits with the children. Even if SFM failed to connect Mother with S.H. and A.H. after she began having visits with J.T. and M.T., the missed opportunities for visits was a small portion of the entire case. Mother substantially failed to pursue visits with her children when she had the opportunity.

Failure to Carry Out a Reasonable Plan

Finally, the court found that Mother was unfit by virtue of her inability to carry out a reasonable plan of reintegration. Without belaboring the point, the evidence establishes that Mother failed in the most basic obligations of the case plan. She failed to provide a suitable home for her children. Either she was living with an abusive partner, or she was essentially homeless. She failed to establish that she had overcome her substance abuse problems that contributed to the neglect of the children. She failed to remain in contact with her social workers so that they could evaluate her progress and increase her parental responsibilities.

In conclusion, the district court's findings of Mother's unfitness were supported by clear and convincing evidence.

EVIDENCE SUPPORTS THE DISTRICT COURT'S FINDING THAT TERMINATION OF MOTHER'S PARENTAL RIGHTS IS IN THE BEST INTERESTS OF THE CHILDREN

Once a court concludes that a parent is unfit, the court must then consider whether termination of parental rights is in the best interests of the child. In considering a child's best interests, the court should place the most weight on the physical, mental, and emotional health of the child. K.S.A. 38-2269(g).

"If the court makes a finding of unfitness, the court shall consider whether termination of parental rights as requested in the petition or motion is in the best interests of the child. In making the determination, the court shall give primary consideration to the physical, mental and emotional health of the child. If the physical, mental or emotional needs of the child would best be served by termination of parental rights, the court shall so order." K.S.A. 38-2269(g)(1).

Because a parent's fundamental right to a relationship with a child is no longer a consideration after the court finds them unfit to parent, the burden of proof is on the parent to rebut the presumption of unfitness by merely a preponderance of the evidence. K.S.A. 38-2271(b); *Santosky v. Kramer*, 455 U.S. 745, 760, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). At this dispositional stage, the district court is given broad discretion to determine the best disposition for the child or children. See *In re R.S.*, 50 Kan. App. 2d 1105, 1115-16, 336 P. 3d 903 (2014). An appellate court, therefore, reviews the dispositional decision for an abuse of judicial discretion, which may encompass an erroneous legal ruling, unsupported fact findings, or otherwise unreasonable decisions. See *State ex rel. Secretary of DCF v. Smith*, 306 Kan. 40, 60, 392 P.3d 68 (2017). The party claiming an abuse of discretion bears the burden of establishing such abuse. *In re K.E.*, 294 Kan. 17, 23, 272 P.3d 28 (2012); *In re P.J.*, 56 Kan. App. 2d 461, 466, 430 P.3d 988 (2018).

Mother has not had significant contact with S.H. and A.H. for over two years. Mother may blame the lack of this contact on SFM. SFM's assistance in arranging visits with S.H. and A.H. was deficient, particularly when Mother was living with Father. At the dispositional stage of a termination proceeding, however, attributing fault for a parents' failure is less important than the effect of that failure on the child or children. A best-interests determination does not examine fault for the children's condition. *In re S.I.*, No. 118,597, 2018 WL 2451937, at *4 (Kan. App. 2018) (unpublished opinion); *In re A.L.E.A.*, No. 1116,276, 2017 WL 2617142, at *6 (Kan. App. 2017) (unpublished opinion). The material consideration is whether termination of parental rights would best

serve the children's physical, mental, or emotional needs. K.S.A. 38-2269(g). Because of the lack of visits between Mother and S.H. and A.H., the children likely do not have a strong emotional bond with Mother. S.H. was six years old when he was removed from Mother's care. The other children were younger still.

According to the therapist of S.H. and A.H., the children have been traumatized because of their exposure to domestic violence. The evidence suggested that Father physically abused Mother even while the termination proceedings were occurring. While Mother moved away from Father, she has demonstrated a consistent pattern of returning to that relationship. S.H.'s and A.H.'s therapist also noted that parental drug use is concerning because a parent who is under the influence of drugs may pose a danger to the children through unintentional exposure to the drugs or inability to properly supervise the children. The therapist acknowledged a difference between former drug abuse and current drug abuse. Mother, however, has not demonstrated that her drug abuse problems are in the past.

The therapist also commented generally on the children's need for stability. They need a caregiver who is consistent, loving, and able to meet the children's needs of education, clothing, housing, and safety. Mother has consistently demonstrated throughout the case a lack of housing stability. She has bounced between living in a volatile, abusive home environment and homelessness. During those short periods in which Mother has obtained her own housing, the housing has not been demonstrably suitable for the children.

Furthermore, the lack of Mother's contact with the children has had an observable, positive impact on the older children's behavior. Since visits with Mother ended, S.H. and A.H. have settled better into their foster care. Their negative behaviors have reduced. If the case plan remained reintegration at some point, the disruption to S.H. and A.H. caused by continued visitation would be a necessary component of the attempts toward

reintegration. But, if the district court's finding of unfitness is upheld, that court has already determined that reintegration is not a viable option. No useful purpose is served, therefore, by maintaining the legal connection between S.H. and A.H. Although the foster-care system is the life the children have primarily known, it is not in their best interests to continue in the system indefinitely.

As to J.T. and M.T., although they have had recent visitation with Mother, issues regarding Mother's stability and sobriety remain. Her continued pattern of entering abusive relationships is also concerning. After two years, Mother has not demonstrated significant progress in any of these areas of concern. The social workers testifying during the hearing spoke to the children's need for permanency. This permanency can best be achieved if the children are adopted into a loving home. Legal adoption cannot occur while the parents retain their rights to the children. Accordingly, the district court did not abuse its discretion in terminating Mother's parental rights after finding her unfit to parent.

Affirmed.