NOT DESIGNATED FOR PUBLICATION

No. 126,694

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of K.B.,
a Minor Child.

MEMORANDUM OPINION

Appeal from Atchison District Court; GEOFFREY SONNTAG, judge. Submitted without oral argument. Opinion filed February 2, 2024. Affirmed.

Judd L. Herbster, of Herbster Law Firm, of Prairie Village, for appellant natural father.

Michelle Rioux, assistant county attorney, for appellee.

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

PER CURIAM: The Atchison County District Court terminated the right of T.C. to parent K.B., his young daughter, in May 2023 finding he was presently unfit, the unfitness was unlikely to change in the foreseeable future, and the child's best interests favored termination. T.C. contends insufficient evidence supported each of those conclusions. We disagree. The evidence established that T.C. chronically abused illegal drugs and had no concrete plans to secure employment or suitable housing for family reunification and that K.B.'s foster placement had adopted her older half-brother and was prepared to adopt her. Those circumstances amply support the district court's ultimate decision, and we affirm the termination order.

FACTUAL AND PROCEDURAL BACKGROUND

K.B. was about seven years old at the time of the termination hearing. She had been taken into State custody in late summer of 2020, when law enforcement officers found her wandering unattended and nearly struck her with their patrol vehicle. At the time, K.B. resided with her paternal grandmother and grandmother's spouse but apparently was under the immediate supervision of T.C. Those circumstances presented a legal challenge because when K.B. was born, her mother listed another man on her birth certificate as her father. T.C.'s paternity had not been legally determined or recognized. So neither T.C. nor K.B.'s grandmother had any legal authority to consent to medical care for the child, enroll her in school, or otherwise act for her. K.B.'s mother appears to have abdicated any tangible role in raising K.B. Accordingly, the State filed a petition in August 2020 to have K.B. declared a child in need of care. See K.S.A. 38-2202(d)(1) (child "in need of care" if "without adequate parental care [or] control").

The district court ordered paternity testing for T.C. in this case. Based on the results of a DNA test, the district court entered an order in August 2021 finding T.C. to be K.B.'s biological father and directed he be joined as an interested party. A caseworker with Cornerstones of Care, the private social service agency contracted to prepare a family reunification plan, spoke with T.C. by telephone at that time but had no further communication with him until the end of the year.

The district court formally adjudicated K.B. to be a child in need of care in early December 2021—a necessary step to implement a reunification plan. T.C. was presented with and signed the plan later that month. And K.B. was then temporarily placed with the family that had already adopted her half-brother. She remained in that placement through the time of termination hearing. In August 2022, the State filed its motion for finding of unfitness and termination of parental rights.

Based on the record evidence, Mother has apparently abandoned K.B. Although appointed a lawyer, she did not appear personally at many proceedings in this case, including the termination hearing. The district court terminated Mother's parental rights by proffer, and Mother is not a party to this appeal.

At the termination hearing, the State called the Cornerstones of Care caseworker assigned to this matter and K.B.'s foster placement. The State offered and admitted half a dozen exhibits that have not been made part of the record on appeal. T.C. testified in his own behalf and offered no exhibits. The record shows:

• At the time of the termination hearing in May 2023, T.C. was in the custody of the Kansas Department of Corrections serving a sentence for a felony computer crime he committed in October 2021. T.C. testified he was scheduled to be placed on conditional release from prison in early July 2023. He intended to find employment in the Atchison area and to reside with his mother and her spouse in Lancaster. T.C., who was then 34 years old, acknowledged being on probation or incarcerated for much of the preceding decade. He testified he could not recall the details of the computer crime because he was, in his words, "under the influence of drugs" when he committed the offense.

• T.C. also acknowledged he chronically abused illegal drugs during that 10-year period. He testified that his drug of choice had become methamphetamine. The record indicates T.C. entered an inpatient drug treatment program in Topeka around the first of 2022, apparently after being placed on probation for the computer crime. T.C. completed the program and moved to Wichita to reside in a "sober-living" facility while still on probation.

T.C. never reported to his assigned probation officer in Wichita and resumed using methamphetamine. He also was charged with possession of marijuana. We gather T.C. was taken into custody for violating the terms of his probation and returned to Atchison

County. In the criminal case, the district court then revoked T.C.'s probation and ordered him to serve his underlying sentence for the computer felony conviction. T.C. testified that he has remained sober while in the custody of the Department of Corrections, has participated in Narcotics Anonymous, and had become a coordinator of twice weekly NA meetings for fellow inmates. He said he would continue attending NA meetings if required as a condition of his release from prison or as part of an ongoing family reunification plan through Cornerstones of Care.

• The Cornerstones of Care caseworker testified she spoke with T.C. by telephone about a week after the district court entered the order declaring him to be K.B.'s biological father. But she had no further contact with T.C. leading up to his signing the family reunification plan in December 2021. They had limited communication while T.C. participated in the drug treatment program in Topeka. She told T.C. to contact her when he was situated in the sober-living residence in Wichita. He never did. The caseworker met with T.C. in late July 2022 in the Atchison County Jail, after he had been returned on the probation violation.

The caseworker testified that T.C.'s family reintegration plan consisted of 17 tasks or objectives he needed to accomplish to gain legal and physical custody of K.B. Among the tasks were securing suitable housing, obtaining and maintaining remunerative employment, and remaining drug-free and law-abiding. As of the termination hearing, T.C. had documented completion of none of the tasks, according to the caseworker. The caseworker presumed T.C. had undergone a substance abuse assessment as part of his prison intake evaluation. And she did not dispute T.C.'s testimony that he had been sober while in Department of Corrections' custody or had participated in counseling, including NA meetings. She likewise believed he had completed parenting skills classes, although she had not received any confirming documentation.

The caseworker testified—and T.C. confirmed—that he had no visits or other communication with K.B. after she was taken into protective custody. Those contacts would not have been allowed until T.C.'s paternity had been legally established. The protocols for the inpatient drug treatment program did not permit outside contacts. After that, however, the caseworker indicated that at least some video visits might have been arranged. But she said T.C. did not pursue such opportunities, and he did not otherwise communicate with K.B. by sending holiday or birthday cards or writing letters. T.C. had about 17 months from the time he signed the reintegration plan until the termination hearing to reach out to the caseworker and to K.B., as his circumstances might have permitted.

• K.B.'s foster placement testified that the child was doing well in the home and at school. K.B. had bonded with her 11-year-old half-brother, who the placement had already adopted, and with the placement's biological daughter. (K.B. and her half-sibling share a common mother.) The placement said she and her spouse were prepared to adopt K.B.

According to the placement, K.B. arrived with some socialization issues that have been resolved. K.B. has been diagnosed with ADHD and participates in a treatment regimen of group therapy and medication. The placement described K.B. as happy and well-adjusted. The caseworker confirmed that assessment and the willingness of the foster placement to adopt K.B.

On June 14, 2023, the district court filed a journal entry terminating both Mother's and T.C.'s parental rights. The journal entry generically describes T.C. as "unfit" without identifying any specific statutory ground in the Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq., and states without further explanation that the unfitness is unlikely to change and K.B.'s best interests would be served by terminating T.C.'s parental rights. The journal entry includes no specific or even general factual findings.

Standing alone, the journal entry arguably might preclude effective appellate review. See *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 361, 277 P.3d 1062 (2012) (remand appropriate when "the lack of specific findings" stymies appellate review). But the district court offered an extended bench ruling at the conclusion of the termination hearing. We may supplement the journal entry with the district court's consistent oral recitations. See *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 402, 77 P.3d 130 (2003); *In re J.K.*, No. 123,829, 2021 WL 4501860, at *4 (Kan. App. 2021) (unpublished opinion) ("[A]ppellate courts may consider oral findings made from the bench as supplementing a later, if abbreviated, written decision, as long as the two do not conflict."). In its bench ruling finding T.C. unfit, the district court cited multiple statutory grounds under K.S.A. 38-2269(b) and (c) and alluded to T.C.'s incarceration and his extended abuse of illegal drugs as factual circumstances supporting termination.

T.C. has appealed the termination order.

LEGAL ANALYSIS

On appeal, T.C. challenges the sufficiency of the evidence supporting each of the constituent components of the district court's termination order: parental unfitness; persistence of unfitness in the foreseeable future; and K.B.'s best interests. We begin with an outline of relevant legal principles and then apply those principles to the record evidence.

Governing Legal Principles Outlined

A person has a constitutionally recognized right to a parental relationship with his or her child. See *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re B.D.-Y.*, 286 Kan. 686, 697-98, 187 P.3d 594 (2008) (citing *Santosky*). The right is a constitutionally protected liberty interest. See *Troxel v.*

Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (substantive liberty interest); *Pierce v. Society of the Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control"). Accordingly, the State may extinguish the legal bond between a parent and child only upon clear and convincing proof of parental unfitness. K.S.A. 38-2269(a); *Santosky*, 455 U.S. at 769-70; *In re R.S.*, 50 Kan. App. 2d 1105, Syl. ¶ 1, 336 P.3d 903 (2014). The Legislature has enacted the Revised Kansas Code for Care of Children to establish processes for finding children in need of care, for fostering family reunification, and for terminating parental rights if those efforts fail.

After a child has been adjudicated in need of care, 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 the child and the conduct or condition is unlikely to change in the foreseeable future." K.S.A. 38-2269(a). In considering a parent's unfitness, the district court may apply the factors outlined in K.S.A. 38-2269(b) and, when the child has been removed from the home for an extended time, the additional factors in K.S.A. 38-2269(c). In this case, the district court drew from both of those sources to find T.C. unfit. A single factor may be sufficient to establish unfitness. See K.S.A. 38-2269(f).

In gauging the likelihood of change in the foreseeable future under K.S.A. 38-2269(a), the courts should use "child time" as the measure. As the Code recognizes, children experience the passage of time in a way that makes a month or a year seem considerably 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").

When the sufficiency of the evidence supporting a decision to terminate parental rights is challenged, an appellate court will uphold the decision if, after reviewing the record evidence in a light most favorable to the State as the prevailing party, the district court's findings on unfitness and foreseeability of change are supported by clear and convincing evidence. Stated another way, the appellate court must be persuaded that a rational fact-finder could have found it highly probable that the circumstances warrant the termination of parental rights. *In re B.D.-Y.*, 286 Kan. at 705. In evaluating the record, the appellate court does not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine 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).

The district court's best interests finding is governed by a less stringent standard. As directed by K.S.A. 38-2269(g)(1), the district court should give "primary consideration to the physical, mental[,] and emotional health of the child" in making a best interests finding. A district court decides best interests based on a preponderance of the evidence. See *In re R.S.*, 50 Kan. App. 2d at 1115-16. The decision essentially rests in the district court's sound judicial discretion. 50 Kan. App. 2d at 1116. An appellate court reviews those sorts of conclusions for abuse of discretion. A district court exceeds that broad latitude if it rules in a way no reasonable judicial officer would under the circumstances, if it ignores controlling facts or relies on unproven factual representations, or if it acts outside the legal framework appropriate to the issue. See *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013); *In re M.S.*, 56 Kan. App. 2d 1247, 1264, 447 P.3d 994 (2019).

Governing Legal Principles Applied

In light of those principles, we turn to an assessment of the district court's legal bases for finding T.C. presently unfit at the time of the termination hearing in May 2023

and concluding those grounds were unlikely to change in the foreseeable future. We recognize that some of the statutory grounds outlined in K.S.A. 38-2269 tend to overlap.

The district court found T.C. unfit because his use of illegal drugs rendered him unable to meet K.B.'s ongoing need for physical and emotional support under K.S.A. 38-2269(b)(3). The evidence established T.C. had an extended history of substance abuse and gravitated to methamphetamine—a particularly pernicious illegal drug—as his intoxicant of choice. Shortly after completing an inpatient treatment program in early 2022, T.C. relapsed and resumed using methamphetamine, triggering a sequence of legal repercussions culminating in his incarceration. Although T.C. engaged in drug counseling during his imprisonment, the district court was reasonably concerned that he would be unable to maintain sobriety upon his release, replicating his near immediate relapse after completing inpatient treatment in early 2022. T.C.'s extended history of substance abuse only fostered that concern, amply supporting a finding of present unfitness.

Moreover, before T.C. could have gained custody of K.B., he would have had to abstain from illegal drugs and other intoxicants for some measurable period after his release to demonstrate another relapse was unlikely. See *In re A.P.*, No. 121,537, 2020 WL 499816, at *4 (Kan. App. 2020) (unpublished opinion); *In re L.D.*, No. 119,613, 2019 WL 257979, at *4 (Kan. App. 2019) (unpublished opinion) ("The real test . . . lies in the parent's ability to avoid relapsing after treatment."). Given K.B.'s young age and the application of "child time," we find the district court properly concluded T.C. would be unable to show his unfitness would change in the foreseeable future after his release from prison. The district court, thus, correctly determined T.C.'s parental rights could be terminated under K.S.A. 38-2269(b)(3).

The district court found T.C. unfit under K.S.A. 38-2269(b)(4) based on his physical and emotional neglect of K.B. and under K.S.A. 38-2269(b)(8) based on his "lack of effort" to "adjust [his] circumstances, conduct[,] or conditions to meet the child's

needs." These grounds overlap here, so we consider them together. As to subsection (b)(4), the district court noted T.C.'s apparent neglect led to K.B. being unsupervised and nearly struck by the police vehicle, precipitating her being taken into protective custody. At the time, K.B. resided with T.C.'s mother. T.C.'s plan upon his release from prison was to again live with his mother. If K.B. were returned to his custody, that would replicate the living situation at the start of these proceedings. The district court also found T.C. to have neglected K.B.'s emotional needs by failing to communicate with her in any way after she had been placed in protective custody and then foster care—a period approaching three years and almost half K.B.'s life. More particularly, T.C. did not even attempt to contact K.B. in the 17 months between receiving a family reintegration plan and the termination hearing.

Similarly, T.C. failed to make changes to facilitate reunification with K.B. and, thus, to meet her needs. As of the termination hearing, T.C. had no plan to acquire suitable housing, and Cornerstones of Care had not approved his proposed living arrangement on his release from prison. T.C. had no concrete job prospects and, thus, no way to financially support K.B. in a reunified family. Suitable housing and gainful employment are "key components" of a family reunification plan. See *In re A.T.*, No. 125,654, 2023 WL 3667581, at *4 (Kan. App. 2023) (unpublished opinion). Moreover, before reunification can be completed, a parent must demonstrate some stability in providing sufficient housing and financial means of support. The district court properly found T.C. to be unfit in those respects and correctly perceived nothing in the evidence to suggest any material change in the foreseeable future, especially measured in child time.

T.C.'s ability to meet many components of the family reintegration plan were substantially inhibited because of his lengthy incarceration. But in child in need of care proceedings, parents are not excused or otherwise given dispensations from pursuing plan tasks because of their incarceration, and the process cannot be significantly extended to "accommodate" a parent's imprisonment. *In re B.C.*, No. 125,199, 2022 WL 18046481, at

*4 (Kan. App. 2022) (unpublished opinion); *In re K.O.*, No. 116,704, 2017 WL 2403304, at *4 (Kan. App. 2017) (unpublished opinion). So T.C. cannot fall back on his criminal conviction and incarceration to gain more time to complete a reasonable reintegration plan.

The district court found T.C. unfit under K.S.A. 38-2269(b)(7) based on the failure of "reasonable efforts" by Cornerstones of Care, as the assigned social service agency, "to rehabilitate the family." And the district court concluded the unfitness would persist. Much of what we have already described also supports those conclusions. T.C. never really engaged with the agency to pursue the tasks set out in the reunification plan and effectively did little to accomplish the central objectives, such as housing and employment. Again, as of the termination hearing, nothing suggested those tasks could have been completed in conformity with child time, even with the agency's direct involvement going forward.

In short, the record contains clear and convincing evidence to persuade a reasonable fact-finder to a high degree of probability that T.C. was unfit as described in those subsections of K.S.A. 38-2269(b) and the unfitness was unlikely to change in the foreseeable future measured in child time appropriate to K.B.'s young age. We affirm those aspects of the district court's determination and essentially put aside the other statutory grounds the district court cited.

The district court relied on K.S.A. 38-2269(b)(5) that permits a finding of unfitness based on a parent's conviction of a felony *and* imprisonment. The primary cause of the unfitness is not so much the conviction itself but an extended period of incarceration imposed as punishment. As this court has explained:

> "Not to put too fine a point on it, a person in prison typically cannot provide the physical supports associated with parenting a child, such as suitable housing, food, and

> clothing. Moreover, the parent is in no position to offer any sort of continuing moral or emotional direction for the child, let alone daily or otherwise routine positive interactions." *In re A.P.*, 2020 WL 499816, at *4.

Here, however, at the time of the termination hearing, the record evidence showed that T.C. was due to be released from prison in about six weeks. Accordingly, the specific unfitness defined in subsection (b)(5) arguably would not have persisted for the foreseeable future. Compare *In re A.L.E.A.*, No. 116,276, 2017 WL 2617142, at *4 (Kan. App. 2017) (unpublished opinion) (unfitness unlikely to change where father incarcerated on federal drug conviction for child's entire life would not be released from prison for another year followed by six months in halfway house). We recognize the evidence on this point came solely from T.C., but nothing in the appellate record calls into question his testimony about the release date.

The district court also relied on two grounds of unfitness outlined in K.S.A. 38-2269(c)(2) and (c)(3) based on a parent's lack of communication with the child and the failure to carry out a reasonable plan for family reintegration. The grounds in subsection (c) require that the child have been in an out-of-home placement for 15 of the 22 months preceding the termination hearing, not counting the first 60 days following removal from the home. K.S.A. 38-2269(b)(9).

Here, the district court otherwise measured the time imputed to T.C. in complying with the reintegration plan and other milestones in this case from the order of paternity and his resulting status as an interested party. Although it is hardly plain that the time frame in K.S.A. 38-2269(b)(9) should be measured that way or that the district court intended to do so, that complicates our determination of whether subsections (c)(2) and (c)(3) are legally applicable. Rather than engage in an extended (and needless) analysis, we simply do not rely on those grounds in affirming the district court's otherwise proper

determination that T.C. was unfit and his unfitness would continue for the foreseeable future.

We turn to the remaining issue: The district court's determination that K.B.'s best interests favored termination of T.C.'s parental rights. On this point, we apply an abuse of discretion standard and, therefore, give broad deference to the district court's conclusion. We see nothing suggesting the district court misconstrued the governing law or misunderstood the relevant facts. The district court, therefore, would have abused its discretion only if no one else reasonably could have come to the same conclusion. Framed that way, the resolution is remarkably straightforward.

The evidence showed that K.B. was in a foster placement with her older half-brother and had bonded with him. The foster placement had already adopted the boy and was prepared to adopt K.B. By all accounts, K.B. was happy and well-adjusted in that home environment. Weighed against those considerations, T.C. had no contact with K.B. for more than two-and-a-half years preceding the termination hearing. And he had no concrete plans for securing employment or a suitable place to live with her after his release from prison. We need not belabor this point. The district court acted well within its judicial discretion in concluding termination of T.C.'s parental rights was in K.B.'s best interests.

Affirmed.