NOT DESIGNATED FOR PUBLICATION

No. 125,366

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of D.G. and M.G.,
Minor Children.

MEMORANDUM OPINION

Appeal from Reno District Court; PATRICIA MACKE DICK, judge. Opinion filed February 24, 2023. Affirmed.

Shannon S. Crane, of Hutchinson, for appellant natural father.

Sierra M. Logan, assistant district attorney, and *Thomas Stanton*, district attorney, for appellee.

Before ATCHESON, P.J., SCHROEDER and GARDNER, JJ.

PER CURIAM: M.G. (born in 2019) was removed from her parents' home after a report of violence in the home and the responding officers determined the condition of the home was not fit for human habitability. M.G.'s brother, D.G. (born in 2021), was removed shortly after his birth for health-related concerns. The natural father (Father) of M.G. and D.G. timely appeals the district court's termination of his parental rights. Father argues the district court's finding of unfitness was not supported by clear and convincing evidence. Father also claims the district court abused its discretion in finding that terminating his parental rights was in the best interests of the children. As explained below, we find clear and convincing evidence supports the district court's finding that Father was unfit, and the district court did not abuse its discretion in finding termination of Father's parental rights was in the best interests of the children. We affirm.

FACTS

In February 2021, the State filed a petition to adjudicate M.G. a child in need of care (CINC). In the petition the State alleged M.G. was a CINC because the parents' home was deplorable and unfit for humans or animals, the parents fought, and Father threatened to kill himself and M.G. The district court found probable cause the State's allegations in its CINC petition were true and placed M.G. in the temporary custody of the Secretary of the Kansas Department for Children and Families (DCF). M.G. was adjudicated a CINC on March 4, 2021, based on the parents' stipulation and statement of no contest to the petition. M.G.'s out-of-home placement was continued in the custody of DCF.

The State filed a second CINC petition involving D.G. in December 2021, shortly after D.G.'s birth, alleging DCF received a report suggesting Mother and Father had been evicted from their residence in October 2021. Mother and Father temporarily found housing, which was filthy with dog feces, trash, old food, and dirty dishes throughout the house. Mother and Father were again evicted in November 2021, moved in with a friend, and were asked to leave the friend's house in the same month. The family was homeless, living in their car until they found their most recent house on March 20, 2022. Mother testified she had moved seven times during the pendency of the case.

The State also alleged D.G. was unbathed with severe cradle cap and clothing that smelled of spoiled milk. D.G. had recently been taken to the doctor because of a staph infection and had other health concerns, including a possible stomach hernia. The State further alleged DCF had received a report in December 2021 reflecting D.G.'s parents had given D.G. to a third party and intended to sign over guardianship of D.G. to that party. Mother confirmed as much with DCF.

On the same date the State filed its CINC petition related to D.G., it also filed an application for ex parte order of protective custody of D.G. The district court found probable cause the State's allegations in its CINC petition were true and placed D.G. in Reno County Intake and Assessment, a shelter facility, and then in the temporary custody of the Secretary of DCF.

On December 14, 2021, Father, Mother, and the children's guardian ad litem stipulated to the State's allegations in its CINC petition for D.G. The district court found D.G. was a CINC and continued his out-of-home placement with DCF.

In February 2022, the State filed a motion for finding of unfitness and termination of parental rights for each child, alleging Mother and Father were "unfit by reason of conduct or condition which renders the parents unable to care properly for the [children], and the conduct or condition is unlikely to change in the foreseeable future based upon the following allegations:"

- a lack of effort on the part of the parents to adjust the parents' circumstances, conduct, or condition to meet the needs of the children;
- the parents' failure to carry out a reasonable plan approved by the court directed toward the reintegration of the children into a parental home;
- failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family; and
- it was in the best interests of the children to terminate the parents' parental rights.

The district court held a two-day hearing on the State's motions for a finding of unfitness and termination of parental rights. The first day of the hearing started on April 12, 2022, but the record on appeal contains no transcript from the first day of the hearing because the recording equipment malfunctioned. When the hearing could not be

concluded on April 12, 2022, a second day was scheduled for May 17, 2022. At the start of the termination hearing, M.G. was 3 years old and had been out of the parents' home for 14 months; D.G. was about 9 months old and had been out of the parents' home for 4 months.

The district court found Mother and Father unfit and terminated their parental rights in the best interests of the children. The district court explained the parents' housing was unstable as they had been homeless from November 2021 until March 2022, one month before the start of the termination hearing; Father had a history of gaining employment for short periods of time; and neither parent followed through with the recommendations from their psychological evaluations. Father did attend two sessions of drug abuse treatment but was unsuccessfully discharged, and Mother attended drug therapy but continued to use drugs. The district court stated: "One of the biggest problems in this case is the lack of insight when it comes to parenting and what that entails."

Mother does not participate in this appeal. Additional facts are set forth as necessary.

ANALYSIS

The District Court Did Not Err in Finding Father Unfit

Father argues he had started to establish stability when his parental rights were terminated. Father contends he had maintained a job since December 2021—about five months before the conclusion of the termination hearing in May 2022—and had stable and clean housing appropriate for reintegration of the children. He also asserts he had a strong bond with the children, his recent visitations had gone well, and his drug abuse was minor as he had only tested positive for marijuana three times in 18 months.

A parent has a constitutionally recognized fundamental right to a parental relationship with his or her child. See *Santosky v. Kramer*, 455 U.S. 745, 753, 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). Accordingly, parental rights for a child may be terminated 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, 1113, 336 P.3d 903 (2014).

As provided in K.S.A. 38-2269(a), the district court must find "by clear and convincing evidence that the parent is unfit by reason of conduct or condition," making him or her "unable to care properly for a child" and the circumstances are "unlikely to change in the foreseeable future." In reviewing a district court's termination of parental rights, we view all evidence in the light most favorable to the prevailing party to determine whether a rational fact-finder could have found it highly probable by clear and convincing evidence that parental rights should be terminated. *In re K.W.*, 45 Kan. App. 2d 353, 354, 246 P.3d 1021 (2011). In making this determination, we do not "weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact." *In re B.D.-Y.*, 286 Kan. at 705.

K.S.A. 38-2269(b)-(e) provides a list of nonexclusive factors the district court may rely on to determine a parent is unfit. Any one of those factors alone may be grounds to terminate parental rights. K.S.A. 38-2269(f). Here, the State raised three statutory factors in its motions for finding of unfitness and termination of parental rights:

- K.S.A. 38-2269(b)(7)—"failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family;"
- 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;" and

- K.S.A. 38-2269(c)(3)—"failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home."

Together with the three statutory factors the State raised in its motions for finding of unfitness and termination of parental rights, the district court also applied other statutory factors. However, we decline to consider those additional factors because Father was not given notice they would be used for determining his unfitness and did not have an opportunity to prepare.

Father only marginally briefed his challenge to the three statutory factors the district court found to support its finding of unfitness, and we could consider those issues waived and abandoned on appeal. See *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018). However, even if Father properly briefed those issues, the district court did not err in finding Father unfit and terminating his parental rights in the best interests of the children.

Reasonable efforts by appropriate agencies

"'The purpose of the reasonable efforts requirement is to provide 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). Agencies must expend reasonable efforts toward reintegration, but the agencies need not make "'a herculean effort to lead the parent through the responsibilities of the reintegration plan.'" *In re H.M.*, No. 124,961, 2022 WL 12121175, at *6 (Kan. App. 2022) (unpublished opinion). The district court could have relied on this factor alone as grounds to find Father unfit. See K.S.A. 38-2269(f). We, therefore, could affirm the district court's ruling on this point alone.

The record on appeal is incomplete as only the second day's transcript from the termination hearing is provided and Father provided no case plan progress reports from

Saint Francis Ministries (SFM). After Father became aware the recording device on the first day of the hearing did not work, he failed to take advantage of Supreme Court Rule 3.04(a) (2022 Kan. S. Ct. R. at 24) to reconstruct the hearing testimony to be added to the record on appeal. Father bears the burden of designating a sufficient record on appeal to establish the claimed error. Without an adequate record, Father's claim of error must fail. We, therefore, cannot conclude the record lacks sufficient evidence to support the district court's findings. See *In re J.D.D.*, 21 Kan. App. 2d 871, 874, 908 P.2d 633 (1995). In any event, review of the scant record provided on appeal reflects clear and convincing evidence to support the district court's finding of unfitness. See *In re K.W.*, 45 Kan. App. 2d at 354.

Addressing the substance of Father's claim, Father asserts his SFM case manager and family support worker had both been in his new home and found it was clean and appropriate for reintegration. While SFM did find Father's new housing situation clean and appropriate, Father's case manager testified Father was to participate in outpatient substance abuse treatment, seek weekly individual and couple's therapy, and attend parenting classes. Father completed the parenting class but had not engaged in either individual or couple's therapy and was unsuccessfully discharged from outpatient drug treatment for failure to attend. Father's case manager also testified there were no other available services SFM could provide and, based on Father's history and lack of cooperation, he was unlikely to accomplish case plan goals in the foreseeable future. In fact, Father's case manager testified that during the year she worked with Father, he had not increased his fundamental knowledge and understanding on how to parent to the point reintegration could occur. Rather, Father made excuses and placed blame on other individuals as to why he could not accomplish certain case plan recommendations. Father also felt it was Mother's responsibility to care for the children and not his because he worked outside of the home, despite the fact Mother had disabilities and needed extra help with the children. Father's family support worker also testified Father's failure to follow his case plan limited his visitation with the children, which was initially one hour

per week and moved to one hour per month. This change in parenting time reflects Father was not progressing with the reintegration plan and was regressing.

SFM provided reasonable opportunities for Father to succeed, and he chose not to take advantage of programs provided. The district court noted in its finding the parents were referred to a homeless shelter in Hutchinson but would not give up their dogs for a place to stay. The limited record we have reflects Father provided limited participation in working the program for reintegration of his children to his home and did not obtain his current housing until a month after the motion was filed by the State seeking the termination of his parental rights.

There is clear and convincing evidence SFM provided reasonable efforts for Father to work toward reintegration with the children. SFM was not required to make "a herculean effort" to lead Father through the responsibilities of the reintegration plan. See *In re H.M.*, 2022 WL 12121175, at *6. And despite reasonable efforts by appropriate public or private agencies, Father failed to exert the necessary effort in completing evaluations and assessments. Though Father obtained employment and housing just before the start of the termination hearing, he presented the district court with an unstable history of maintaining employment and housing. Thus, we affirm the district court's finding of unfitness relating to this factor because there was clear and convincing evidence to support the finding Father's lack of involvement led to reintegration no longer being a viable option, despite reasonable efforts by appropriate agencies to assist Father. See K.S.A. 38-2269(b)(7).

Lack of effort by Father to adjust his circumstances and failure to carry out a reasonable plan toward reintegration

The record reflects the district court found Father unfit under K.S.A. 38-2269(b)(8) for lack of effort to adjust his circumstances, conduct, or condition to meet the

needs of the children. The district court also found Father unfit under K.S.A. 38-2269(c)(3) for failure to carry out a reasonable plan toward reintegration. Father is essentially asking us to reweigh the evidence—something we do not do. See *In re B.D.-Y.*, 286 Kan. at 705.

Father argues he began to establish stability, held a job for about five months, and had clean and appropriate housing to reintegrate his children. While testimony suggests Father did show some initiative to improve his circumstances, the record also reflects the district court took that into consideration but found his effort was too little and too late given Father's extended history of only maintaining employment for brief periods of time with unstable housing. The record also reflects part of Father's problem with unstable housing had to do with his dogs, which he rehomed as the case progressed, but Father decided to get a new puppy that was "in training" just before the termination hearing.

While testimony reflected Father completed his parenting class and improved his housing arrangements a month before the start of the termination hearing, he failed to engage in the recommended couple's therapy or individual therapy, he was unsuccessfully discharged from outpatient drug and alcohol treatment, and his parenting time had been reduced because of his actions. The district court found Father's failure to comply with the plan established by SFM reflected his continuing unwillingness to work and carry out the reasonable plan to allow reintegration of the children back into his home. Father claimed he scheduled a mental health appointment the day after the hearing, which the district court stated could have been done months earlier. The district court noted Father had made threats to kill himself and M.G. and voluntarily gave D.G. to a third party for guardianship when DCF was investigating the parents' home. The district court explained:

> "One of the biggest problems in this case is the lack of insight when it comes to parenting and what that entails. One cannot have a child and hand that baby off to a third party and

> then claim they are ready to parent months later when the most important tasks have not been completed. One cannot threaten to kill his child and himself and then not engage in therapy because it is not affordable. There is no easier time to complete case plan tasks than when there are no dependents relying on you for care, you only have yourselves to manage. Yet even in this situation these parents were unable to complete tasks."

Father's case manager explained Father often blamed others when he could not get something done. Father seemed to show as much when he testified Mother's family lied about their willingness to help with the children. The district court noted a lack of effort on Father's part throughout the case to adjust his circumstances or comply with the plan for reintegration for the benefit of the children. Father's past lack of cooperation and progress in understanding the duties and responsibilities of a parent during the 14 months M.G. was out of the home and the 4-month period D.G was out of the home before the termination hearing reflects past conduct we may consider as an indicator of his future conduct. See *In re Price*, 7 Kan. App. 2d 477, 483, 644 P.2d 467 (1982).

As another panel of this court said:

> "When assessing the foreseeable future, this court uses 'child time' as the measure. The Revised Kansas Code for Care of Children—[K.S.A. 38-2201 et seq.]—recognizes that 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 different perception typically points toward a prompt, permanent disposition." *In re M.S.*, 56 Kan. App. 2d at 1263.

Viewing the evidence in the light most favorable to the State, a rational fact-finder could determine, even though it appears to be a close call, it was highly probable by clear and convincing evidence Father was unfit to parent his children at the time of the termination hearing and his unfitness was unlikely to change in the foreseeable future.

The District Court Did Not Abuse Its Discretion in Finding Termination of Father's Parental Rights Was in the Best Interests of the Children

Father claims the termination of his parental rights was not in the best interests of the children because the children have a right to know and love their parents. Father also argues, contrary to his case worker's testimony, he had a strong bond with the children. We observe Father's arguments are conclusory and he fails to show how the district court abused its discretion.

Upon making a finding of unfitness of the parent, the district court "shall consider whether termination of parental rights . . . 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." K.S.A. 38-2269(g)(1). The district court makes the best-interests determination based on a preponderance of the evidence, which is essentially entrusting the district court to act within its sound judicial discretion. See *In re R.S.*, 50 Kan. App. 2d at 1115-16. We review a district court's best-interests determination for an abuse of discretion,

> "which occurs when no reasonable person would agree with the district court or the district court premises its decision on a factual or legal error. In determining whether the district court has made a factual error, we review any additional factual findings made in the best-interests determination to see that substantial evidence supports them. [Citation omitted.]" 50 Kan. App. 2d at 1116.

The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013). Father has not met that burden.

We observe clear and convincing evidence of the district court's finding that Father was unfit and his unfitness was unlikely to change in the foreseeable future under K.S.A. 38-2269(b)(7), (b)(8), and (c)(3). The district court properly considered the totality of the evidence and found it was in the children's best interests to terminate Father's parental rights.

Affirmed.

* * *

ATCHESON, J., dissenting: Less than a year after initiating child in need of care proceedings against Father, the State moved to terminate his right to parent his three-year-old daughter M.G. and his infant son D.G. The Reno County District Court obliged the State even though Father had established steady employment for about five months and had secured a residence that social service agency representatives considered suitable for the family on multiple inspections. So in a comparatively short time, Father had accomplished two of the cornerstone tasks for family reunification—gainful employment and adequate housing—that regularly defeat parents trying to regain custody of their children. Left undone were comparatively lesser requirements, including some that tilted toward the bureaucratic. Under the circumstances, the State failed to prove by clear and convincing evidence that Father's parental unfitness would persist for the foreseeable future at the time of the termination hearing. We, therefore, should reverse the district court's order terminating Father's parental rights and remand for further proceedings. Accordingly, I respectfully dissent from the majority's decision.

The State intervened in mid-February 2021 to remove M.G. from her parents' custody because of the deplorable condition of the home. Father and Mother kept several pet dogs; the residence was littered with dog feces, otherwise filthy, and plainly unhygienic for a toddler. The district court adjudicated M.G. to be in need of care and

ordered the Department for Children and Families to take custody of her, so she was in an out-of-home placement and a social service agency was assigned to develop a family reunification plan.

D.G. was born to Father and Mother in July 2021. For reasons that are neither readily apparent nor especially relevant, the State did not file a petition to have D.G. found in need of care until early December. Father and Mother were effectively homeless at that point, and D.G. had not been particularly well cared for. The district court properly adjudicated D.G. in need of care and placed him with the Department. Both parents were indisputably unfit in early December 2021. The separate cases for M.G. and D.G. were then functionally consolidated for further proceedings in the district court and have been joined on appeal.

After his son was taken into state custody, Father, who was then about 23 years old, set about making changes. He found a job that he continued to hold through the termination hearing in May 2022. Up to then, Father's employment fairly could be characterized as irregular. He got rid of the dogs. And by March 2022, he had the resources to obtain housing for the family that the social service agency considered appropriate.

The State filed a motion to terminate the parental rights of Father and Mother to both children the second week in February 2022—just short of a year after the first case had been filed. That is a comparatively short period for parents to achieve family reunification.

The district court held the first day of the termination hearing in mid-April and concluded the hearing on a second day about a month later. As outlined in the majority opinion, the State sought to terminate Father's parental rights on three statutory grounds ostensibly rendering him unfit: (1) the failure of reasonable efforts of the social service

agency to rehabilitate the family under K.S.A. 38-2269(b)(7); (2) failure of the parent to adjust his or her circumstances to meet the needs of the children under K.S.A. 38-2269(b)(8); and (3) the failure of a reasonable reintegration plan when the children have been in out-of-home placement for an extended time, under K.S.A. 38-2269(b)(9), incorporating K.S.A. 38-2269(c)(3). The third ground is legally inapplicable and should not be considered because M.G. and D.G. had not been in out-of-home placements for a sufficient time. See K.S.A. 38-2269(b)(9) (circumstances of unfitness in K.S.A. 38-2269[c] apply when child has been in out-of-home placement for at least 15 of preceding 22 months beginning 60 days after removal from home). But that basis for unfitness more or less replicates the one in K.S.A. 38-2269(b)(7).

The district court held that clear and convincing evidence established each of those grounds of unfitness and several others the State had not alleged in the termination motion. Why the district court overreached in that way isn't wholly obvious apart from an apparent desire to make sure the termination ruling stuck. As the majority correctly recognizes, we should not consider statutory bases for unfitness the State did not advance in the termination motion, since Father lacked fair notice. To rely on them likely would violate his constitutionally protected due process rights. *In re B.C.*, No. 125,199, 2022 WL 18046481, at *3 (Kan. App. 2022) (unpublished opinion); *In re K.H.*, No. 121,364, 2020 WL 2781685, at *7 (Kan. App. 2020) (unpublished opinion).

The record shows that as of the termination hearing, Father had made major steps toward family reunification by maintaining employment and acquiring suitable housing—two of the biggest roadblocks to reintegration in this and many other cases. Father's conduct demonstrated a willingness to improve and an ability to turn that spirit into reality. Some of the credit, of course, should be shared with the social service agency. In short, by May 2022, there had been a substantial measure of success—not failure—in moving toward family reintegration.

Nonetheless, I will concede Father likely remained presently unfit as a parent at the conclusion of the termination hearing. But present unfitness alone does not warrant termination of parental rights. The State must also prove the unfitness is unlikely to change in the foreseeable future. K.S.A. 38-2269(a). The district court and the majority falter in their respective assessments of that legal requirement.

Given what Father had accomplished in the five months immediately before the termination hearing, there was ample reason to conclude he would meet the remaining objectives for reunification. Or, couched in terms of our standard of review, to affirm termination, we must be persuaded that a rational fact-finder could have found it highly probable that the circumstances of unfitness would persist for the foreseeable future. *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008). Without reweighing the evidence, I am unconvinced the record shows a high probability Father would have failed to become fit within a reasonable time. See *In re M.H.*, 50 Kan. App. 2d 1162, 1170, 337 P.3d 711 (2014) (appellate court precluded from reweighing record evidence). In short, the district court erred in terminating Father's parental rights, and he should have been allowed additional time to become fit. The majority perpetuates the error.

We cannot lose sight of what is at stake in termination cases. Parents have a fundamental, constitutionally protected right to raise their children that may be terminated only in limited circumstances endangering the children's physical, mental, or emotional health. *Santosky v. Kramer*, 455 U.S. 745, 759-60, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Pierce v. Society of 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"); see K.S.A. 38-2202(d) (defining circumstances rendering child in need of care). The Kansas Supreme Court surveyed cases discussing unfitness in termination proceedings and indicated it entails unsuitability and incompetence, often coupled with some moral dereliction. *In re Brooks*, 228 Kan. 541, 546-47, 618 P.2d 814 (1980). This court has equated unfitness with the "'incapacity

to perform parental obligations.'" *In re A.N.P.*, 23 Kan. App. 2d 686, 692, 934 P.2d 995 (1997); see *In re Adoption of A.M.M.*, No. 109,247, 2013 WL 5507483, at *5 (Kan. App. 2013) (unpublished opinion). Unfitness warranting termination is more than simply being a below average or even a poor parent. *In re A.M.*, No. 116,391, 2017 WL 2022704, at *1 (Kan. App. 2017) (unpublished opinion) (poor parenting insufficient basis for termination; parents must "be irredeemably unfit to care for their children"); see also *In re B.B.*, No. 119,351, 2018 WL 5851582, at *3 (Kan. App. 2018) (unpublished opinion); *In re S.I.*, No. 118,597, 2018 WL 2451937, at *3 (Kan. App. 2018) (unpublished opinion). And, as I've said, the unfitness must be likely to persist into the foreseeable future. K.S.A. 38-2269(a).

In May 2022, Father still had work to do on the reunification plan when the district court terminated his parental rights. But the remaining tasks looked to be doable. Father had completed parenting classes, but there was some concern whether he had assimilated all of those lessons. The assigned social service agency is supposed to provide or coordinate such education, and it isn't asking too much for the agency to engage in some repetitive or remedial teaching if necessary. The agency, likewise, should have emphasized or reemphasized the importance of Father taking an active role in parenting the children rather his delegating those responsibilities mostly to Mother.

Father tested positive for marijuana three times while the cases were in the district court. And he had not successfully completed a drug counseling program. Sporadic marijuana use may be undesirable generally, since it is illegal, and most certainly ought to be avoided during child in need of care proceedings. Nonetheless, the record did not show Father to be a chronic abuser of drugs or alcohol. Nothing suggested he would not or could not refrain from using marijuana had the social service agency made that a principal objective for family reintegration.

Similarly, Father had not obtained a mental health screening and, thus, did not follow up on any suggested counseling. That was of some concern insofar as the petition filed in M.G.'s case alleged that during an argument with Mother, Father had threatened to kill himself and the child. At the very least, Father's alleged conduct entailed a destructive way of dealing with marital stress and disagreement. And I would assume that Father and Mother may have argued in emotionally unhealthy ways on other occasions. By the same token, however, the evidence does not suggest Father intended the threat literally or ever posed a danger to himself or others. The evidence, likewise, does not suggest Father engaged in physically abusive behavior or had chronic mental health issues.

In short, Father has some tasks to complete, and he should have been given some reasonable time to do so.

I close with two observations. Father has come in for criticism because he apparently acquired a single puppy leading up to the termination hearing. Responsible pet ownership probably should be viewed as a constructive endeavor. If Father appeared to be reverting to the sort of irresponsible pet ownership that figured prominently in the initiation of these proceedings, the social service agency could have stepped in and required him to give up the new dog. To turn acquisition of the puppy itself into a ground for unfitness seems to be more misplaced piling on.

Finally, the majority suggests Father could be defaulted in this appeal because he failed to provide an adequate record. The assertion is incorrect. While a transcript of the first day of the termination hearing could not be prepared, the fault was not Father's. The electronic recording equipment failed, so the legal burden of the failure rests with the State. Because the statutory scheme for terminating parental rights affords parents a right to appeal, that right encompasses access to a hearing transcript. The United States Supreme Court has held that an indigent person whose parental rights have been

terminated cannot be required to pay for a hearing transcript to effect a meaningful statutory appeal, consistent with the fundamental rights at stake and appropriate due process protections. *M.L.B. v. S.L.J.*, 519 U.S. 102, 108-09, 128, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996). Necessarily embedded in that right is the obligation of the State to furnish a hearing transcript if requested.

Here, Father did not waive his right to a record of the termination hearing. So the lack of a full transcript should be attributed to the State, even though the equipment failure presumably resulted from some sort of excusable oversight or inadvertence. The efficacy of Father's appeal cannot be diminished because the hearing transcript is incomplete. Contrary to the majority's suggestion, the State doesn't escape its constitutionally based obligation because Father failed to engage Supreme Court Rule 3.04(a) (2022 Kan. S. Ct. R. at 24) to attempt recreating the lost hearing evidence. The State could have (and should have) initiated the process, since it bore responsibility for the incomplete record. But Father has not sought any particularized relief on appeal based on the limited transcript. In turn, I offer no suggestion on an appropriate remedy. Cf. *State v. Holt*, 298 Kan. 531, 537-38, 314 P.3d 870 (2013) (in criminal case, material gaps in or lack of trial transcript precluding meaningful appellate review may require new trial to satisfy constitutional due process protections).

I would reverse and remand with directions to the district court to order implementation of a new family reunification plan and to afford Father a reasonable time to show that he is no longer an unfit parent.