

NOT DESIGNATED FOR PUBLICATION

No. 125,497

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of E.T.,
a Minor Child.

MEMORANDUM OPINION

Appeal from Reno District Court; PATRICIA MACKE DICK, judge. Opinion filed March 10, 2023.
Affirmed.

Gregory D. Bell, of Bell and Robinson LLC, of Hutchinson, for appellant natural father.

Brian Koch, assistant district attorney, and *Thomas Stanton*, district attorney, for appellee.

Before ISHERWOOD, P.J., MALONE and WARNER, JJ.

PER CURIAM: In this appeal under the revised Kansas Code for Care of Children (KCCC), K.S.A. 38-2201 et seq., Father appeals the termination of his parental rights over E.T. After thoroughly reviewing the record, we conclude the district court's findings were supported by clear and convincing evidence and affirm the district court's judgment.

FACTUAL AND PROCEDURAL HISTORY

E.T. was born on April 9, 2021. At the hospital, doctors discovered he was suffering withdrawal symptoms—including seizures—from drugs and medications taken by Mother during the pregnancy, including benzodiazepines, alprazolam, temazepam, buprenorphine, norbuprenorphine, and cannabinoids/THC. This discovery led the State to file a child in need of care (CINC) petition for E.T. on April 27, 2021. That same day, the

district court appointed a guardian ad litem (GAL) for E.T. The district court also ordered Mother and Father to appear at a temporary custody hearing two days later.

At the temporary custody hearing, the district court found probable cause to believe the allegations in the CINC petition were true and that E.T. was likely to sustain harm if not immediately placed in the custody of the Secretary of the Kansas Department for Children and Families (DCF). The district court ordered that any short-term kinship placement needed to be approved by the GAL and any long-term kinship placement required a completed kinship assessment and court approval. The district court also ordered all caregivers to complete hair follicle testing within seven days.

Mother and Father later submitted statements of no contest to the allegations in the CINC petition. As a result, on May 6, 2021, the district court entered an order adjudicating E.T. as a child in need of care and ordered him to remain in DCF custody. The district court also ordered all previous rulings to remain in effect.

The case progressed for about six months, with the district court issuing orders nearly monthly following Citizen Review Board hearings. Father attended all but the first of these hearings. Although the record lacks any document containing his entire case plan tasks, the record shows that on October 26, 2021, the district court ordered Father to "follow case plan i.e.,] SACK [substance abuse evaluation], Hair Follicle [test], and Psychological Eval[uation]," and to complete a mental health assessment with help from St. Francis Ministries (SFM).

The district court held a permanency hearing on April 7, 2022, and the court found that reintegration was no longer viable and changed the permanency goal to adoption because the parents had not made adequate progress toward reintegration. The district court also ordered Father to submit hair follicle testing within seven days.

On May 6, 2022, the State filed a motion for finding of unfitness and termination of parental rights. As to Father, the motion alleged he was unfit based on:

- Failure of reasonable efforts made by appropriate agencies to rehabilitate the family, K.S.A. 38-2269(b)(7);
- Lack of effort to adjust the circumstances, conduct, or conditions to meet the needs of the child, K.S.A. 38-2269(b)(8);
- Failure to maintain regular visitation, contact, or communication with the child or with the custodian of the child, K.S.A. 38-2269(c)(2); and
- Failure to carry out a reasonable plan approved by the court directed toward the reintegration of the child into a parental home, K.S.A. 38-2269(c)(3).

Mother voluntarily relinquished her parental rights before the termination hearing, which occurred on July 11, 2022. Two witnesses testified at the hearing: Father and Loree Harvester, the permanency specialist for the case. Harvester's testimony focused on Father's failure to comply with various aspects of the case plan. Highly summarized, Harvester criticized Father's compliance with the case plan in five areas: (1) housing issues including his failure to allow inspections; (2) inconsistent visitation with E.T.; (3) failure to complete hair follicle testing; (4) failure to complete a psychological evaluation; and (5) maintaining contact with Mother when she was using drugs.

Harvester testified that although Father had consistent housing throughout the case at his mother's home, she and other caseworkers had concerns about the living conditions and were not always able to verify whether those concerns were addressed. At visits in August 2021 and March 2022, Harvester noted a "[v]ery strong" cat urine or ammonia smell and advised Father. Harvester also noted after the March 2022 visit that there were no baby gates or covers on the electric outlets. At a follow-up for the August visit, Father would not allow Harvester to enter the home because his mother was working inside. Harvester said Father denied entry on another visit because the house was not ready and

denied entry into the basement because his mother had crafts downstairs. The March 2022 visit was the last before the termination hearing because nobody was home for a May 2022 visit. Father denied entry for a June 2022 meeting because they were cleaning.

Father admitted there were issues with the house, like having a lot of dogs inside and that the electrical needed some work. He claimed he denied entry because of renovations that made entry unsafe. He also said he did not want to let a caseworker into the basement at one visit because his mother kept birds in the basement, so he was concerned that the bird dander would aggravate an allergy. Father believed he had alleviated the smell in the home by the termination hearing. He also said he hoped to have his own residence within the next three to six months.

Harvester also testified about Father's inconsistency attending visits with E.T. She said of the 49 total visits, Father missed 17 and was late to 12. At one point after Father had missed several visits, SFM required him to sign a contract stating he would contact a family support worker by 5 p.m. the night before a visit and call two hours before the visit. Father did not follow this agreement. Father's last visit was July 6, 2022. Father believed he had only missed four scheduled visits and was late for five because he did not verify the appointments ahead of time as requested.

The district court had ordered Father to complete hair follicle testing within seven days twice during the case, once at the beginning in April 2021 and again a year later, but Father failed to timely complete that testing. Father completed the first hair follicle test in November 2021, which was negative. When asked about the delay, Father said he was having transportation issues because he had been involved in an accident. Yet when the district court pointed out that Father claimed the accident occurred in June, Father claimed the vehicle was "not in the greatest repair" to drive to Wichita. For the April 2022 hair follicle test, Father claimed he was not aware it had been ordered until a week

before the termination hearing. Harvester testified that she had texted Father about the hair follicle testing the same day as the district court ordered the test.

Similarly, the district court had ordered Father to complete a psychological evaluation in October 2021, but Father never did so. Harvester said Father preferred having a psychological evaluation done at Horizons because he thought his insurance would cover it, but when SFM sent a referral to Horizons for the evaluation, they sent an old evaluation Father had completed in 2001. Harvester said she told Father that SFM would have paid for the evaluation to be done at Wichita State University. Father did not tell SFM he was willing to go to WSU until June 13, 2022. Harvester tried to contact Father within two days of that date for an information release, but Father did not respond.

As to an ongoing relationship with Mother, Father gave inconsistent responses to Harvester. Harvester was concerned about their relationship because Mother was absent for several months of the case and regularly tested positive for drugs. In April 2021, Father told Harvester that he and Mother were "together for [E.T.]" and took part in visits together. But Harvester observed that Father was lying on Mother's bed during a visit to her home in June 2021. In August 2021, Father said he and Mother had not been together since December or January. But in December 2021, Father admitted that he had been communicating with Mother. And on March 24, 2022, Father said they were dating. Finally, on June 13, 2022, Father told Harvester they were not together.

After hearing the evidence, the district court found there was clear and convincing evidence that Father was unfit as a parent and that his unfitness was unlikely to change in the foreseeable future. The district court particularly noted there were issues with Father's credibility, given his inconsistent statements throughout the case. The district court also found it was in E.T.'s best interests for Father's parental rights to be terminated. The district court filed a journal entry terminating Father's parental rights on August 8, 2022. Father timely appealed the district court's judgment.

ANALYSIS

Father argues that the evidence was insufficient to justify termination of his parental rights. He asserts that his overall stability as a parent should be the primary consideration and points out that the evidence showed his stability on many of the case plan tasks, including employment and housing, as well as lack of negative drug tests. The State argues that it presented clear and convincing evidence that Father was unfit by reason of conduct or conditions unlikely to change in the foreseeable future and that termination of parental rights was in E.T.'s best interests.

Kansas law requires that a district court must find "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). When reviewing a finding of parental unfitness, an appellate court must determine, after reviewing all the evidence in a light most favorable to the State, whether a rational fact-finder could have found the determination to be highly probable, i.e., by clear and convincing evidence. See *In re B.D.-Y.*, 286 Kan. 686, 705-06, 187 P.3d 594 (2008); *In re K.P.*, 44 Kan. App. 2d 316, 318, 235 P.3d 1255 (2010). In making this determination, an appellate court cannot reweigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. *In re B.D.-Y.*, 286 Kan. at 705.

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").

The KCCC lists nine nonexclusive factors a district court must consider when determining parental unfitness. K.S.A. 38-2269(b). The district court found Father unfit based on failure of reasonable efforts made by appropriate agencies to rehabilitate the family, K.S.A. 38-2269(b)(7); lack of effort to adjust the circumstances, conduct, or conditions to meet the needs of the child, K.S.A. 38-2269(b)(8); failure to maintain regular visitation, contact, or communication with the child or with the custodian of the child, K.S.A. 38-2269(c)(2); and failure to carry out a reasonable plan approved by the court directed toward the reintegration of the child into a parental home, K.S.A. 38-2269(c)(3). 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).

The record reflects by clear and convincing evidence that Father was unfit.

Father contests the district court's findings of unfitness without specifically addressing any of the statutory factors identified in the district court's ruling. Although we could summarily affirm the court's parental unfitness findings based on his failure to adequately brief the issues, we choose to address this point on the merits because of the importance of the issues at stake. See *In re Marriage of Williams*, 307 Kan. 960, 977, 417 P.3d 1033 (2018) (we consider issues not adequately briefed to be waived or abandoned).

According to Father, our focus should be on whether the evidence presented shows a lack of parental stability. He asserts that the evidence showed he has "stable employment, stable housing, . . . was drug free[, and] had the support of his mother who was allowing him to share her home until he could obtain his own housing." As support, he points out his testimony included that he: (1) was gainfully employed for most of the case, except for a short period where he was incapacitated because of an automobile

accident; (2) lived in the same house with his mother throughout the case and that any safety concerns in the home had either been alleviated by the termination hearing or were easily remedied; (3) believed the home was safe and planned to have his own residence soon; and (4) never failed a drug test.

The problem with Father's argument is that he relies mostly on his own testimony for support and discards the other evidence presented at the hearing. But our standard of review requires us to consider the evidence in a light most favorable to the State and does not allow us to reweigh evidence or assess witness credibility. See *In re B.D.-Y.*, 286 Kan. at 705-06. To start, the district court found that Father's inconsistent explanations and justifications for failing to meet certain case plan tasks showed a lack of credibility on his part, a determination we cannot change. Moreover, there was ample evidence presented at the hearing to support the district court's findings of unfitness.

Father indeed lived in the same residence throughout the case, but Harvester testified that the same concerns—a strong cat urine or ammonia smell and lack of safety features—were present at the first and last recorded visits. Although Father claims he had remedied those issues as of the termination hearing, his consistent refusals to allow caseworkers into the home during visits made it impossible for them to verify his claims. The record also shows that Father repeatedly ignored orders from the court and requests by the caseworkers to complete case plan tasks like hair follicle testing and obtaining a psychological evaluation. Admittedly, Father did test negative on one hair follicle test, but the court did not rely on drug use to find Father unfit. See K.S.A. 38-2269(b)(3). Instead, the district court found Father was unfit for the somewhat related reasons that there was a failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family; there was a lack of effort by Father to adjust his circumstances, conduct, or conditions to meet E.T.'s needs; and there was a failure by Father to carry out a reasonable plan approved by the court directed toward the reintegration of E.T. into a

parental home. K.S.A. 38-2269(b)(7),(b)(8), and (c)(3). We conclude these findings are supported by clear and convincing evidence.

The district court also relied on Father's failure to maintain regular visitation with E.T. to find him unfit. See K.S.A. 38-2269(c)(2). Harvester's testimony was that Father failed to show up at 17 appointments without giving notice. He was late to 12 visits, meaning he fully attended only 20 of the 49 total visits over the course of about 15 months. Based on this evidence, we also conclude there was clear and convincing evidence to support a finding of parental unfitness under K.S.A. 38-2269(c)(2).

We also conclude based on "child time" that Father's unfitness was unlikely to change in the foreseeable future. E.T. has been in State custody for his entire life, which was just about 15 months as of the termination hearing. In that time, Father failed to demonstrate an ability to care properly for E.T. In Kansas, "our courts may look to the parent's past conduct as an indicator of future behavior." *In re M.S.*, 56 Kan. App. 2d 1247, 1264, 447 P.3d 994 (2019).

In sum, when viewed in the light most favorable to the State, we find that clear and convincing evidence supports the district court's findings of unfitness as to Father. Likewise, we find there was clear and convincing evidence to support the finding that Father's unfitness was unlikely to change within the foreseeable future.

The district court did not abuse its discretion by concluding that termination was in the best interests of the child.

After making 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." K.S.A. 38-2269(g)(1). In making such a decision, courts must give primary consideration to the physical, mental, and emotional needs of the child. K.S.A. 38-

2269(g)(1). We review a district court's best-interests determination for an abuse of discretion. *In re R.S.*, 50 Kan. App. 2d 1105, 1115-16, 336 P.3d 903 (2014).

Father does not challenge the district court's best-interests finding on appeal. But based on the record before us, we easily conclude that the district court correctly found that termination of Father's parental rights was in E.T.'s best interests. E.T. has been in State custody since birth and, in that time, Father has failed to demonstrate an ability to provide meaningful support to E.T. We are convinced that a reasonable person would take the district court's position and terminate Father's parental rights under these circumstances. Thus, the district court did not abuse its discretion in finding it was in E.T.'s best interests to terminate Father's parental rights.

Affirmed.