NOT DESIGNATED FOR PUBLICATION

No. 125,534

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of A.S.,
a Minor Child.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; JOAN M. LOWDON, judge. Opinion filed June 9, 2023. Affirmed.

Chadler E. Colgan, of Colgan Law Firm, LLC, of Kansas City, for appellant natural father.

Ashley Hutton, assistant county attorney, and *Todd Thompson*, county attorney, for appellee.

Before GARDNER, P.J., HILL and PICKERING, JJ.

PER CURIAM: There are many joys that come with parenting a child. And of course, there are many parental responsibilities that come as well. It is in fulfilling these essential responsibilities that ensures a child is cared for. In this case, H.S. (Father) appeals the district court's order terminating his parental rights to his child, A.S., born in 2020. Father argues the district court's decision is not supported by clear and convincing evidence. He also argues for the first time on appeal that his constitutional rights were violated when the district court did not allow him to testify at the termination hearing. After a review of the record, we find clear and convincing evidence supports the district court's findings that Father was unfit, his unfitness was unlikely to change in the foreseeable future, and termination of Father's parental rights was in the best interests of A.S. Thus, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

R.A. (Mother) and Father are the natural parents of A.S. In September 2020, the Department for Children and Families (DCF) received a report that Mother, who was pregnant at the time, had tested positive for amphetamines, ecstasy, and benzodiazepines when she had reported to her probation officer. The following month, Mother gave birth to A.S., and both Mother and A.S. tested positive for amphetamines and benzodiazepines. Due to Mother's history of drug use, family preservation services were initiated in November 2020. Mother did not fully engage with family preservation services and continued to test positive for drug use. Because Mother is not a party to this appeal, we limit most of our discussion as it pertains to Father.

In March 2021, a decision meeting occurred to discuss Mother's drug use and lack of participation. At that meeting, the family preservation services provided Mother with a list of recommendations that would assist her. Later that month, Mother participated in a drug and alcohol assessment, but she was not forthcoming about her drug use or concerns about her positive drug tests. When confronted about the assessment, Mother became agitated and said she would rather go to jail than participate in inpatient treatment.

Later the same month, the State filed a petition alleging A.S. was a child in need of care (CINC) and an application for an ex parte order of protective custody. The district court granted the request for an order of protective custody and appointed a guardian ad litem (GAL) for A.S. Shortly thereafter, the district court held a temporary custody hearing. Father appeared at the hearing, and the district court gave him information regarding how to apply for appointed counsel. At the same hearing, the district court placed A.S. in temporary DCF custody and scheduled a first appearance for the following month. At that hearing, Father appeared and was appointed counsel.

The record reveals that the trial court proceeded step-by-step in presiding over this CINC case.

In June 2021, the district court held an adjudication hearing. Father did not appear, but his attorney did. The district court accepted the State's proffer concerning Father but took the matter under advisement. Mother entered a no-contest statement, which the district court accepted. As a result, the district court adjudicated A.S. as a CINC regarding Mother and ordered him to remain in DCF custody. The district court also ordered that a reintegration plan be developed regarding both parents and scheduled a disposition hearing for the following month. At the next hearing, Father again failed to appear, and the district court adjudicated A.S. as a CINC regarding Father.

In August 2021, the district court held a disposition hearing, and neither Mother nor Father appeared. At that hearing, the district court adopted the reintegration plan tasks as the permanency case plan. The case plan required Father to maintain safe and stable housing and provide verification to Cornerstones of Care (Cornerstones); provide monthly verification to Cornerstones of paid utilities; perform weekly drug tests for Cornerstones; sign all necessary releases and drug testing agreements; seek and maintain full-time employment and provide Cornerstones with verification of said employment; resolve all outstanding legal issues; complete a psychological assessment and follow all recommendations; complete an anger management course and provide Cornerstones with verification; obtain substance abuse counseling, follow all recommendations, and provide Cornerstones with verification; notify Cornerstones of any address changes and maintain contact with Cornerstones employees; attend all court hearings unless there was a valid reason to not attend; attend all case plan hearings; abide by Cornerstones' visitation guidelines; and have Cornerstones do background checks for anyone over the age of 10 who had contact with A.S.

In October 2021, the district court held a review hearing. Father appeared via Zoom from a drug rehab facility. During the hearing, the district court noted that threats made to any party would not be tolerated after it learned of allegations that Father had threatened Cornerstones and A.S.'s placement home. The district court also ordered A.S. to remain in DCF custody.

The following month, the district court held another review hearing, and Father did not appear. A court report filed before the hearing stated that Father had checked out of rehab since the prior hearing. The report stated that it was unknown whether Father successfully completed the program, but he had refused to complete an additional recommended 40- to 65-day stay at the facility. The report also stated that Father had not been in contact with his Cornerstones case manager and had not completed any drug tests for Cornerstones. A review hearing was also scheduled for January 2022.

At the January 2022 review hearing, Father again failed to appear. The district court ordered A.S. to remain in DCF custody and scheduled a permanency review hearing for March 2022. Father also failed to appear at the permanency review hearing. At that hearing, the district court found that reintegration was no longer a viable goal for either parent given their lack of progress on their respective case plan tasks.

In April 2022, the State filed a motion for finding of unfitness and termination of parental rights regarding both parents. The State alleged Father was unfit under K.S.A. 38-2269(b)(3), (b)(4), (b)(7), (b)(8), (c)(2), and (c)(3); he had failed to complete the assigned case plan tasks; and he had failed to engage with the agencies involved with the case. As a result, the State requested that Father's parental rights be terminated.

In May 2022, the district court held a joint termination hearing concerning both parents. Due to his incarceration in federal prison, Father appeared by Zoom.

Kristin McGlinn, a foster care case management specialist with Cornerstones, testified first. She was the first case manager assigned to the case and began working with the family sometime in April 2021. McGlinn testified that Father had been in and out of jail during her time as case manager, though most of the time he was not incarcerated until approximately three months before the termination hearing. Even so, McGlinn made monthly efforts to contact Father. When she could not reach him, McGlinn left voicemails, sent text messages, or sent letters.

Before Father went to jail, he had not provided McGlinn with any verification of income or proof of employment. Similarly, McGlinn never received any verification of his housing, so she did not know Father's living situation. McGlinn testified that the agency would not allow her to go to Father's home under any circumstances due to his prior threats to the agency and anyone involved in removing A.S.

McGlinn also testified that Father had entered rehab twice during the pendency of the case. Father did not complete the program the first time he attended, but he provided verbal confirmation that he had completed substance abuse therapy the second time he went. Father, however, never provided McGlinn with any accompanying documentation to verify his completion. Similarly, Father never provided McGlinn with any verification regarding a parenting class, anger management course, or mental health intake.

Part of Father's case plan also included requirements concerning drug testing. McGlinn said Father had been placed on Cornerstones' color code drug testing system shortly after A.S. was placed in DCF custody. But Father never completed any drug testing through Cornerstones. He did complete some testing through his parole because he had been given a sweat patch to wear, but McGlinn had not received any reports concerning the patch since December 2021. McGlinn knew the results of that report showed that Father had tested positive for methamphetamine. She also knew other previous reports had shown positive tests for methamphetamine. McGlinn said Father's

lack of drug testing and communication with Cornerstones also hindered other areas of the case. Because he never completed any drug tests, Father had not had any visits with A.S. since the case began. In McGlinn's opinion, Father's lack of participation was a consistent theme in the case. When asked to describe Father's participation when he was not in prison, McGlinn said it was "[n]onexistent."

McGlinn testified that A.S. had spent most of his life in DCF custody. At the time of the termination hearing, A.S. was in a relative placement. Except for one overnight stay at the beginning of the case, A.S. had been in that same relative placement for essentially the entire case. McGlinn said A.S. had bonded with his placement and had done very well there. A.S. did have some breathing issues, but he was otherwise a happy and healthy baby while in his placement's care. McGlinn believed this placement could be an adoptive resource in the future.

On cross-examination, McGlinn acknowledged that Father's lack of income verification did not mean he did not have a job. Similarly, McGlinn acknowledged the possibility Father had been truthful when he told McGlinn he had completed inpatient treatment, notwithstanding the lack of verification. That said, McGlinn knew that Father's case plan tasks required him to provide such verification. When asked about Father's drug testing, McGlinn said a few of his patch results came back negative, but she did not know how many.

Regarding the alleged threats Father made, McGlinn said the threats were not made directly to her or Cornerstones. Instead, Mother relayed those threats to A.S.'s placement, who then notified Cornerstones. After the threats were allegedly made, Cornerstones would not allow McGlinn to do a walk-through of Father's home, though this was the only task impacted by the alleged threats. Notwithstanding the alleged threats, McGlinn continued to try and contact Father but got very little response from him.

After McGlinn, Kristie Morgan—an intensive supervision officer with Leavenworth County Community Corrections—and Mother both testified. Their testimony concerned Mother's involvement in the case and is not pertinent to this appeal. Father did not testify at the hearing.

At the conclusion of the testimony, the State and Father both gave closing arguments. The State argued Father's parental rights should be terminated because he had essentially not participated in the case since the case began. Given Father's lack of participation, as well as A.S.'s age and need for permanency, the State believed the district court should terminate Father's parental rights. The GAL also believed Father's parental rights should be terminated and echoed the same concerns as the State. Father argued his parental rights should not be terminated because the agencies involved did not make reasonable efforts to assist with reintegrating A.S. Father also argued he would be released from prison soon, which would allow him to progress through the case. After hearing these arguments, the district court took the case under advisement.

The district court issued its ruling the month following the termination hearing. Regarding Father, the district court found that he failed to participate in the case. Given Father's lack of participation, including his failure to complete case plan tasks, the district court found Father unfit to parent A.S. The district court also concluded Father's unfitness was unlikely to change in the foreseeable future and that A.S.'s best interests would be served by terminating Father's parental rights.

Father appeals.

ANALYSIS

I. WE FIND NO ERROR IN THE DISTRICT COURT'S RULING TERMINATING FATHER'S PARENTAL RIGHTS

On appeal, Father argues the district court erred when it terminated his parental rights, asserting there was insufficient evidence to support the district court's decision.

A parent has a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution to make decisions regarding the care, custody, and control of the parent's child. Before a parent can be deprived of the right to the custody, care, and control of a child, a parent is entitled to due process of law. This fundamental right to parent, however, is not without limits. *In re P.R.*, 312 Kan. 767, 778, 480 P.3d 778 (2021). Because child welfare is a matter of state concern, the State may assert its interest "through state processes designed to protect children in need of care." *In re A.A.-F.*, 310 Kan. 125, 146, 444 P.3d 938 (2019).

When reviewing a finding of parental unfitness, we must determine, after reviewing all the evidence in a light most favorable to the State, whether "a rational factfinder could have found [the determination to be] highly probable, *i.e.*, by clear and convincing evidence." *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008); *In re K.P.*, 44 Kan. App. 2d 316, 318, 235 P.3d 1255 (2010). 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.

Under K.S.A. 38-2269(a), the State must prove a 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." The statute provides district courts with a nonexclusive list of factors to consider when determining unfitness.

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

A. *The district court did not err in finding Father unfit.*

Here, the district court found Father was unfit under K.S.A. 38-2269(b)(3), (b)(4), (b)(7), (b)(8), (c)(2), and (c)(3).

K.S.A. 38-2269(b)(3)

A district court may find a parent unfit if there is clear and convincing evidence of "the use of intoxicating liquors or narcotic or dangerous drugs of such duration or nature as to render the parent unable to care for the ongoing physical, mental or emotional needs of the child." K.S.A. 38-2269(b)(3).

On this point, the district court found that Father never provided a single drug test to Cornerstones throughout the course of this case. For the drug tests Father missed, the district court considered them positive. Relying on McGlinn's testimony, the district court also found that Father had an underlying drug problem. The district court noted that while Father completed an inpatient treatment program, he failed to complete any further treatment. Finally, the district court considered the fact that Father wore a sweat patch as part of his parole, but he also had tested positive for methamphetamine more than once while wearing the patch.

McGlinn testified that she placed Father on a drug color code testing system shortly after A.S. was placed in DCF custody. As noted above, Father never provided Cornerstones with any drug tests; the only tests he completed were part of his parole. The last test result McGlinn obtained prior to the termination hearing occurred in December

2021, and Father had tested positive for methamphetamine. According to McGlinn, this was not the first time Father had tested positive for methamphetamine during the case. And as a result of Father never providing Cornerstones with any drug tests, he did not have any visits with A.S.

Father acknowledges that the district court's findings have some support in the record. Even so, Father argues the district court's conclusion was not supported by clear and convincing evidence because the district court failed to recognize any conflicting evidence regarding his drug use.

Father's argument misconstrues the district court's findings. During the termination hearing, McGlinn testified that Father said he had completed an inpatient treatment program. Yet Father never provided McGlinn with any verification regarding such program. McGlinn also testified that Father tested negative for drugs a few times during the case through his parole, though she did not have any record available to verify exactly how many times he tested negative.

Even without any verification, the district court acknowledged that Father completed an inpatient treatment program. The district court also acknowledged that Father wore a sweat patch as part of his parole. And the fact that the district court did not specifically mention that Father had tested negative for drugs a few times does not mean the district court failed to consider that fact.

In sum, the district court's findings on this issue are supported by the record. Generally, Father continually failed to engage in the case. That included Father's failure to engage with the drug testing requirements of his case plan tasks, which hindered Father's ability to progress in other areas of the case. The district court did not err in finding Father unfit under K.S.A. 38-2269(b)(3).

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

Additionally, a district court may find a parent unfit if there is clear and convincing evidence that the reasonable efforts made by public or private agencies to rehabilitate the family have failed. K.S.A. 38-2269(b)(7). "The language in K.S.A. 2019 Supp. 38-2269(b)(7) imposes an obligation upon the relevant social service agencies to expend reasonable efforts toward reintegrating the child with his or her parents." *In re A.P.*, No. 121,913, 2020 WL 3022868, at *10 (Kan. App. 2020) (unpublished opinion). This requirement provides "'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).

Here, the district court concluded that Cornerstones and McGlinn exerted reasonable efforts toward reintegrating A.S. with Father. Despite these efforts, Father chose not to participate in the case.

Father disagrees with the district court's findings, arguing that McGlinn's efforts to communicate with Father were perfunctory. He also claims he never threatened anyone with Cornerstones, which meant that Cornerstones should have attempted to perform an in-home visit. The record refutes these assertions.

First, McGlinn's attempts to contact Father were not perfunctory. McGlinn testified that she made monthly efforts to contact Father regarding the case. If McGlinn could not reach Father, she would leave him a voicemail or send him a text message or letter. When someone answered Father's phone, McGlinn said it was usually an unidentified woman who would not allow her to talk with Father. Despite these efforts, Father failed to communicate with McGlinn and Cornerstones.

Second, McGlinn testified that Father's alleged threats only impacted her ability to do a walk-through of Father's home. It did not impact other areas of the case, including

her ability to assist Father with his case plan tasks. But Father never worked towards completing those tasks, aside from an inpatient drug treatment program. Given Father's limited involvement, Cornerstones could only do so much. As stated above, this subsection requires parents to exert some effort, and Father did not exert much effort during the case. See *In re. A.P.*, 2020 WL 3022868, at *10. The district court did not err in finding Father unfit under K.S.A. 38-2269(b)(7).

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

Additionally, a district court may find a parent unfit if there is clear and convincing evidence there is a "lack of effort on the part of the parent to adjust the parent's circumstances, conduct or conditions to meet the needs of the child." K.S.A. 38-2269(b)(8).

The district court concluded that Father's general lack of involvement and participation in the case supported termination under this subsection. Father disputes this conclusion, arguing that he successfully completed an inpatient drug treatment program, had some negative drug test results from the sweat patch he wore, and voluntarily reported to federal authorities to resolve his legal issues.

But Father's argument does not refute the district court's conclusion under this subsection. Though Father had limited success in some areas during the case, he still generally failed to participate in the case. As McGlinn testified, Father failed to provide Cornerstones with any income verification; failed to maintain communication with Cornerstones; failed to provide drug tests for Cornerstones; and failed to complete a parenting course, a mental health intake, and an anger management course. And even though Father allegedly completed an inpatient treatment program, he never provided Cornerstones with any verification. Similarly, his argument regarding the few negative drug test results is also undercut by the fact that other test results were positive for

methamphetamine. The district court did not err in finding Father unfit under K.S.A. 38-2269(b)(8).

K.S.A. 38-2269(c)(2)

A district court may also find a parent unfit if the child is not in the parent's physical custody and there is clear and convincing evidence the parent failed "to maintain regular visitation, contact or communication with the child or with the custodian of the child." K.S.A. 38-2269(c)(2).

On this point, the district court found that "Father has not had a single visit with [A.S.] since [A.S.] came into care in March 2021. Furthermore, Father has not had positive contact or communication with the custodian of [A.S.] since [A.S.] came into care." These findings are supported by the record.

As stated above, McGlinn testified that Father never had a single visit with A.S. during the entire case due to Father's lack of communication with Cornerstones and his lack of completed drug tests. Father also concedes that he did not have visitation with A.S. during the case.

Father argues, however, that his federal incarceration prevented him from having the opportunity to visit A.S. during the three months prior to the termination hearing. He also claims that he voluntarily surrendered to federal authorities so he could resolve his legal issues and be considered a placement for A.S. These arguments are unconvincing.

First, Father provides no argument concerning the portion of time he was not incarcerated during the case. Second, Father's arguments do not discount the district court's findings on this issue; they merely explain what prevented him from seeing A.S. for a period of three months.

Simply put, Father never did what was necessary to allow him to have visitation with A.S., which he acknowledges. As a result, the district court did not err in finding Father unfit under K.S.A. 38-2269(c)(2).

K.S.A. 38-2269(c)(3)

Further, a district court may find a parent unfit if the child is not in the parent's physical custody and there is clear and convincing evidence the parent failed "to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home." K.S.A. 38-2269(c)(3).

Under this subsection, the district court listed the case plan tasks assigned to Father in August 2021. The tasks required Father to participate in drug testing for Cornerstones, complete a parenting assessment, maintain safe and appropriate housing, demonstrate skills learned in parenting classes, provide Cornerstones with verification regarding paid utilities, provide Cornerstones with verification of a completed parenting class, provide Cornerstones with verification of therapy appointments, maintain contact with Cornerstones, and provide Cornerstones with income verification. The district court concluded that Father failed all these case plan tasks, aside from Father participating in inpatient rehab and the safe housing requirement. For the housing requirement, the district court noted that Father could not complete this task based on the threats he allegedly made to Cornerstones and A.S.'s placement.

Father does not directly dispute most of the district court's conclusions regarding the case plan tasks. That said, he believes the record demonstrates that he complied with the treatment requirement but Cornerstones failed to obtain verification of his completed inpatient treatment program. Father also asserts any alleged threats were unsubstantiated. Father's arguments fall short.

Father places the onus for obtaining verification regarding his inpatient drug treatment program on Cornerstones, but the case plan placed that responsibility on him. Father's argument regarding the threats he allegedly made is also unconvincing. Even assuming Father had completed this safe housing task, it would mean Father only completed, at most, two of the assigned case plan tasks. And the district court's conclusions regarding Father's other case plan tasks need not be addressed because Father does not dispute them. In short, the district court did not err in finding Father unfit under K.S.A. 38-2269(c)(3).

Last, Father argues that the district court erred by finding him unfit under K.S.A. 38-2269(b)(4). Because the district court found Father unfit under K.S.A. 38-2269(b)(3), (b)(7), (b)(8), (c)(2), and (c)(3), we find it unnecessary to address this issue.

We agree with the district court that clear and convincing evidence shows that Father was unfit under K.S.A. 38-2269(b)(3), (b)(7), (b)(8), (c)(2), and (c)(3).

B. *Father's conduct or condition is unlikely to change in the foreseeable future.*

In addition to determining whether a parent is presently unfit, a district court must also determine whether the conduct or condition is unlikely to change in the foreseeable future. K.S.A. 38-2269(a). In making this determination, the "'foreseeable future' should be viewed from the child's perspective, not the parents', as time perception of a child differs from that of an adult." *In re M.B*, 39 Kan. App. 2d 31, 45, 176 P.3d 977 (2008). Further, the Revised Kansas Code for Care of Children specifically acknowledges "that the time perception of a child differs from that of an adult . . . ." K.S.A. 38-2201(b)(4). As such, when evaluating the foreseeable future, we use "'child time'" as the measure. See *In re M.S.*, 56 Kan. App. 2d at 1264.

Father's brief devotes essentially no argument to this issue. He only claims that the evidence from the termination hearing was insufficient because his purported release date from federal incarceration was known at the time of the termination hearing.

"The best indicator of future performance is past performance. Accordingly, courts can consider a parent's past history as evidence regarding the reasonable likelihood of any change in parental fitness. See *In re Price*, 7 Kan. App. 2d 477, 483, 644 P.2d 467 (1982)." *In re S.A.*, No. 123,556, 2021 WL 4224894, at *9 (Kan. App. 2021) (unpublished opinion), *rev. denied* 315 Kan. 968 (2022). As described above, Father failed to progress throughout the case. Though he purportedly completed an inpatient rehab program, he failed to verify such completion and failed to complete other case plan tasks assigned to him. Further, Father was incarcerated for the time leading up to the parental termination trial.

Additionally, by this time A.S. had been in DCF custody for approximately 14 of his 19 months. Simply stated, at that point, he had spent nearly all his life in DCF custody. And because the "'foreseeable future'" is measured from the child's view, this passage of time would have been perceived to be considerably longer by A.S. than by Father. See *In re M.B.*, 39 Kan. App. 2d at 45; K.S.A. 38-2201(b)(4).

Given Father's inability to progress throughout the case, the district court properly determined Father's conduct or condition rendering Father unfit was unlikely to change in the foreseeable future.

C. *The district court did not abuse its discretion in concluding termination was in A.S.'s best interests.*

Upon making a finding of unfitness of the parent, "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." K.S.A. 38-2269(g)(1). This decision is within the sound discretion of the district court, and the district court makes that decision based on a preponderance of the evidence. See *In re R.S.*, 50 Kan. App. 2d 1105, 1116, 336 P.3d 903 (2014).

An appellate court reviews the district court's best-interests decision for an abuse of discretion. A district court exceeds its broad latitude if its ruling is based on an error of law, an error of fact, or is unreasonable. 50 Kan. App. 2d at 1116. Because Father does not point to an error of law or fact, the question becomes whether no reasonable person would come to the same conclusion. See 50 Kan. App. 2d at 1116.

Father's brief devotes essentially no argument to this issue. Father only argues the district court erred based on A.S.'s age at the time of the termination hearing and Father's purported scheduled release from federal incarceration.

To recap, A.S. was born in October 2020 and taken into DCF custody approximately five months later. A.S. has remained in DCF custody since that time and has essentially lived in the same relative placement during the entire case.

McGlinn testified that A.S. had bonded while in placement. McGlinn also testified that A.S.'s placement had taken good care of him and promptly attended to any medical needs he had. While in placement, A.S. had been healthy and developmentally on track. McGlinn also believed that A.S.'s relative placement would be a good adoptive resource given the way he had been treated while there.

In contrast, Father had approximately 14 months to work towards reintegrating A.S. In large part, he failed to do so. Father's lack of involvement is prevalent throughout this case. A.S. needs a parent who could properly care for him, and at no point has Father

taken responsibility for A.S.'s care—let alone visit the child. Father fails to establish the district court abused its discretion in terminating his parental rights.

We find no error of fact or law underlying the district court's decision, and this decision was reasonable in the light of this record. A reasonable fact-finder could conclude it was in the best interests of A.S.'s physical, mental, and emotional health that Father's parental rights be terminated. As a result, we find the district court did not abuse its discretion when it concluded that termination of Father's parental rights was in A.S.'s best interests.

II. WE WILL NOT CONSIDER A CLAIM OF ERROR NOT FIRST RAISED IN THE DISTRICT COURT

In his second issue on appeal, Father argues the district court violated his due process rights by not allowing him to testify via Zoom during the termination hearing. Father acknowledges he failed to raise this issue in district court.

Generally, constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review. *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014). There are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including:

> "'(1) [t]he newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason.'" *In re Adoption of Baby Girl G.*, 311 Kan. 798, 804, 466 P.3d 1207 (2020).

Father relies on the second exception.

An appellant is required to explain why an issue that was not raised below should be considered for the first time on appeal. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019); Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36). To comply with Rule 6.02(a)(5), Father asserts "that the issue of his in person appearance was well known and had been raised in the trial [c]ourt as evidenced by the extensive discussion on the record of Father's custody status and appearance."

The discussion Father references occurred near the beginning of the termination hearing, when the district court stated:

> "Really, quite frankly, . . . this is an in-person proceeding. I'd allowed for the Zoom link so [Father] could at least observe what he can from that vantage point. We're not really set up for bifurcated hearings, but it's also not really possible to bring him back from out of state for this proceeding, so at least he can kind of see and hear what's going on."

Father's counsel then informed the district court that Father was being held in Kansas but was in a federal facility. Father's counsel then said he did not know whether an order to transport could assist Father. The State responded by saying that it had attempted to have Father transported to the district court so he could be present for the hearing, but the federal facility would not allow Father to come. The district court then asked Father's counsel if he was prepared to proceed, and Father's counsel indicated he was. The district court also offered to allow Father to speak with his counsel separately, and Father's counsel indicated he and Father had spoken earlier in the day before the hearing started.

At no point did Father file any motions concerning his physical presence at the hearing prior to its occurrence. Father's counsel also never objected to the hearing proceeding without Father's physical presence. Nor did Father's counsel request a continuance so that Father could be released from federal prison before the termination

hearing proceeded. As explained above, Father's counsel essentially did the opposite. Given this context, Father's explanation regarding why the issue was not raised in district court does not comply with Rule 6.02(a)(5).

Our Supreme Court has warned that Rule 6.02(a)(5) would be strictly enforced, and litigants who failed to comply with this rule risked a ruling that the issue is improperly briefed and will be deemed waived or abandoned. *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014). As such, we decline to reach the issue because Father has not complied with Rule 6.02(a)(5).

Additionally, Father's failure to raise the claim in district court hampers our ability to review the claim, primarily because there is no indication in the record that Father—as an incarcerated parent—asked or even wanted to testify. Though the district court said it was not set up for bifurcated hearings, this statement falls short of the district court denying any request Father could have made. There is only a brief discussion concerning the efforts the State made to secure Father's physical presence at the hearing, and there is no discussion concerning the State's ability to procure a witness from a federal facility. A "'decision to review an unpreserved claim under an exception is a prudential one.' Even if an exception may apply, we are under no obligation to review the claim. [Citation omitted.]" *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021). For these reasons, we decline to reach the merits of Father's due process claim.

Affirmed.