

NOT DESIGNATED FOR PUBLICATION

No. 125,674

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of  
Z.L., N.M., and E.M.,  
Minor Children.

MEMORANDUM OPINION

Appeal from Bourbon District Court; AMY L. HARTH, judge. Opinion filed March 24, 2023.  
Affirmed.

*Matthew R. Bonner*, of The Mazurek Law Office, LLC, of Pittsburg, for appellant natural mother.

*Brandon D. Cameron*, assistant county attorney, for appellee.

Before HURST, P.J., BRUNS and SCHROEDER, JJ.

PER CURIAM: In this termination of parental rights action, Mother appeals the district court's finding that she is unfit to parent her three minor children. Because the district court did not terminate Mother's parental rights, our review is limited to whether its finding of unfitness is supported by clear and convincing evidence. On appeal, Mother contends that the district court erred in finding that there was clear and convincing evidence presented by the State to establish that she was unfit to parent. Based on our review of the record on appeal, we find that district court's findings of fact and conclusions of law regarding Mother's unfitness to parent were based on clear and convincing evidence. Thus, we affirm.

## FACTS

On May 17, 2018, the district court entered an ex parte order of protective custody removing Z.L. (YOB 2018) from Mother's care. The ex parte order cited Z.L.'s safety and current medical condition in support of Z.L.'s removal from the home. The following day, the State filed a petition alleging that Z.L. was a child in need of care (CINC). The State alleged that Z.L. was in need of care because the child lacked adequate parental care; was without the care or control necessary for the child's physical, mental, or emotional health; and had been mentally, physically, or emotionally abused or neglected. In particular, the State alleged that Z.L. had been admitted to the hospital on May 15, 2018, for severe malnourishment and dehydration. Mother did not contest the allegations in the CINC petition.

At a hearing held on July 19, 2018, the district court adjudicated Z.L. as a CINC and ordered genetic testing to determine the child's paternity. The district court ordered KVC Kansas to prepare and submit reports to the district court in Z.L.'s case. Subsequently, Father was determined to be the biological father of Z.L. as well as Mother's other two children E.M (YOB 2016) and N.M. (YOB 2014). KVC Kansas prepared the initial case plan in Z.L.'s case, with the primary goal of reintegration, and both Mother and Father participated in person in creating the plan. According to reports prepared by the Kansas Department for Children and Families (DCF), neither Mother nor Father was honest with case workers about their relationship status. Sometimes, Mother and Father lived together and lived apart at other times.

On September 10, 2019, the district court also issued ex parte orders of protective custody for N.M. and E.M. The ex parte orders cited concerns about the conditions in which the children lived. The next day, the State filed CINC petitions for N.M. and E.M. In the CINC petitions, the State alleged that N.M. and E.M. lacked adequate parental care and were without the care or control necessary for their physical, mental, or emotional

health. The State pointed to reports from DCF that showed physical neglect, physical abuse, sexual abuse, medical neglect, and lack of supervision of the children.

Among other things, the reports from DCF included allegations that the children were dirty, wore unclean clothing, and appeared to have not been bathed for a significant period of time. Additionally, the State raised concerns about the instability in the relationship between Mother and Father. It was reported by DCF that at one point Mother moved the children into a home occupied by eight other people—six of whom were children.

On October 3, 2019, the district court held a hearing on the CINC petitions and found that N.M. and E.M. were also children in need of care. Specifically, the district court found that N.M. and E.M. were without the parental care or control necessary for their physical, mental, or emotional health. The district court ordered TFI Family Services to prepare and submit reports in N.M. and E.M.'s cases. TFI Family Services prepared the initial case plan in N.M. and E.M.'s cases, with the primary goal of reintegration, and both Mother and Father participated in person in creating the plans. TFI Family Services subsequently reviewed and updated the case plan tasks for Mother and Father in all three children's cases from 2019 through 2022.

On August 18, 2021, TFI Family Services prepared the most recent case plan tasks for Mother and Father in all the children's cases. Under the case plan, Mother was required to: (1) maintain stable housing; (2) work with the DCF work program and follow all recommendations; (3) maintain employment; (4) continue to attend to mental health and follow all recommendations; (5) not speak about Father to the children or to agencies involved in the case; (6) ensure that the children's needs are met while she has the children; (7) not rely on Father financially; and (8) complete an intensive parenting class. Father's case plan tasks included (1) ensuring his home was clean, free of clutter, free of bugs, and had appropriate beds for the children, (2) setting up a chore chart, (3)

being the primary caretaker of the children when the children are under his care, (4) using appropriate discipline, (5) not speaking about Mother to the children or to agencies involved in the case, and (6) ensuring the children's needs are met when he has the children.

On September 14, 2021, the State filed motions to terminate the parental rights of both parents as to all three minor children. Significant to this appeal, the State alleged that both parents were unfit due to:

"a. Physical, mental or emotional neglect of the child. K.S.A. 38-2269(b)(4).

"b. Reasonable efforts by appropriate public or private child caring agencies have been unable to rehabilitate the family. K.S.A. 38-2269(b)(7).

"c. 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).

"d. Failure to assure care of the child in the parental home when able to do so. K.S.A. 38-2269(c)(1).

"e. Failure to pay a reasonable portion of the cost of substitute physical care and maintenance based on the ability to pay. K.S.A. 38-2269(c)(4).

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

"g. Failure to maintain regular visitation, contact or communication with the child. K.S.A. 38-2269(c)(2)."

The State also alleged that there was a presumption of unfitness as to both parents under K.S.A. 38-2271(a)(6)(A)-(C) and K.S.A. 60-414(a). As the State pointed out, the three minor children had been in an out-of-home placement under court order for a cumulative total period of two years or longer.

Additionally, the State alleged that the parents had failed to carry out a reasonable parenting plan and there was a substantial probability that the parents would not carry out such plan in the near future.

The district court held a four-day evidentiary hearing on the State's motions for termination that commenced on November 18, 2021. During the hearing, the State presented the testimony of eight witnesses and proffered eight exhibits as evidence. Moreover, Mother testified on her own behalf but did not call any other witnesses or proffer any exhibits. Father presented three witnesses and did not proffer any exhibits. In addition, the district court took judicial notice of the official court files in all three cases.

On the first day of the hearing, the State advised the district court that all three children were in the care of the same foster family. The State further requested that the foster family be allowed to adopt the three children so that they could stay together. According to the State, reintegration was no longer a viable option. A review of the record reflects that Z.L. had been in the foster family's care since May 2018, while the other two children had been in their care since January 2020.

Jamie Tyler, a permanency supervisor with TFI Family Services who oversaw the children's cases, testified that all three children had been in the State's custody longer than two years. She also testified that Mother had failed to fully perform the tasks required in her case plan. Similarly, Karsyn Hensley, the TFI Family Services case manager for the parents testified that Mother had not completed the case plan tasks. Cayley Fenoughty, a director with TFI Family Services, also testified that Mother had not completed her case plan tasks.

During her testimony, Mother admitted that all three children had been outside of the home for a period greater than two years. She also testified that she was forced to leave Kansas and was living in Missouri because her eligibility under the Department of Housing and Urban Development's voucher program was being terminated. We note that

the Housing Director at SEK-CAP, who supervised the voucher program, testified that Mother had violated the rules of the program by failing to report her boyfriend's occupancy in her home. Mother testified that she had depression and that it was "not going to get any better" until her children were returned to live with her. She also testified that she was working as her mother's caretaker and was applying for another job.

On January 6, 2022, the district court found Mother to be unfit to parent based on the statutory presumption found in K.S.A. 38-2271(a)(6) and based on the application of statutory factors found in K.S.A. 38-2269. The district court expressly found that the State demonstrated by clear and convincing evidence that the three children had been in an out-of-home placement under court order for two years or longer. The district court also found that Mother had failed to carry out a reasonable reintegration plan as approved by the court, and that there was a substantial probability that she would not carry out such plan in the near future.

Furthermore, the district court found that the burden shifted to Mother pursuant to K.S.A. 38-2271(b) and K.S.A. 60-414(a). However, the district court determined that Mother had failed to overcome the presumption of unfitness by a preponderance of the evidence. Specifically, the district court found that although Mother met some of the tasks in her parenting plan, she had failed to complete other significant tasks such as seeking individual mental health treatment, finding stable housing, and maintaining employment.

The district court also found that Mother, her new boyfriend, and their baby had moved to Missouri to reside with Mother's family. The district court determined that Mother leaving the state of Kansas due to her untruthfulness relating to her housing situation, which led to her becoming ineligible under the HUD voucher program, "further complicated an already difficult situation." The district court judge concluded that

"[Mother's] actions in this case demonstrate to me that she has not been willing to change her circumstances to meet the most basic needs of these children—shelter and safety."

Although the district court found Mother unfit to be a parent, the district court declined to terminate Mother's parental rights because it determined that the children's Father was not an unfit parent. Instead, the district court ordered that the children would remain in the temporary custody of DCF and continue to live with the foster family they had been living with during the pendency of this case. The district court granted DCF the authority to make decisions regarding Mother's parenting time and found that any parenting time she had with the children would be supervised by DCF.

Thereafter, Mother timely appealed the district court's finding of unfitness under K.S.A. 38-2273(a).

## ANALYSIS

### *Issue Presented and Standard of Review*

The sole issue presented on appeal is whether the district court erred in finding that the State presented clear and convincing evidence that Mother was unfit. When reviewing a finding of parental unfitness, we must determine—based on a review of all the evidence in a light most favorable to the State as the prevailing party—whether "a rational fact-finder could have found that decision 'highly probable, i.e., [supported] by clear and convincing evidence.'" *In re M.S.*, 56 Kan. App. 2d 1247, 1255-56, 447 P.3d 994 (2019) (quoting *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 [2008]). Moreover, we are not to reweigh evidence, pass on the credibility of witnesses, or decide disputed questions of fact. Instead, we must resolve any conflicts of evidence in favor of the prevailing party—in this case, the State. *In re M.S.*, 56 Kan. App. 2d at 1256.

When assessing whether a parent's present unfitness will continue for the foreseeable future, courts may appropriately look to a parent's history. See *In re K.L.B.*, 56 Kan. App. 2d 429, 447, 431 P.3d 883 (2018). Moreover, courts measure the foreseeable future from the child's perspective—which often differs from an adult's perception of time—and this perspective typically calls for a prompt permanent disposition. K.S.A. 38-2201(b)(4); *In re R.S.*, 50 Kan. App. 2d 1105, 1117, 336 P.3d 903 (2014); see *In re M.B.*, 39 Kan. App. 2d 31, 45, 176 P.3d 977 (2008).

### *Statutory Presumptions and Factors*

A parent may be deemed to be "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). One of the ways in which a district court can arrive at an unfitness finding is through the application of statutory factors set out in K.S.A. 38-2269(b) and (c). Any one of these factors may constitute appropriate grounds for a finding of unfitness. K.S.A. 38-2269(f).

The nonexclusive list of factors that a district court may consider in determining whether a parent is unfit includes:

"(1) Emotional illness, mental illness, mental deficiency or physical disability of the parent, of such duration or nature as to render the parent unable to care for the ongoing physical, mental and emotional needs of the child;

"(2) conduct toward a child of a physically, emotionally or sexually cruel or abusive nature;

"(3) 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;



"(4) physical, mental or emotional abuse or neglect or sexual abuse of a child;

"(5) conviction of a felony and imprisonment;

"(6) unexplained injury or death of another child or stepchild of the parent or any child in the care of the parent at the time of injury or death;

"(7) failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family;

"(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

"(9) whether, as a result of the actions or inactions attributable to the parent and one or more of the factors listed in subsection (c) apply, the child has been in the custody of the secretary and placed with neither parent for 15 of the most recent 22 months beginning 60 days after the date on which a child in the secretary's custody was removed from the child's home." K.S.A. 38-2269(b).

If a child is not in the physical custody of a parent—as in the present case—a district court can also consider the following list of nonexclusive factors in determining unfitness:

"(1) Failure to assure care of the child in the parental home when able to do so;

"(2) failure to maintain regular visitation, contact or communication with the child or with the custodian of the child;

"(3) failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home; and

"(4) failure to pay a reasonable portion of the cost of substitute physical care and maintenance based on ability to pay." K.S.A. 38-2269(c).

Additionally, a district court may apply one or more of the statutory presumptions of unfitness under K.S.A. 38-2271. In this case, the district court applied the two-year presumption of unfitness. Under this presumption, a parent is presumed to be unfit if the State establishes by clear and convincing evidence that a child has been in out-of-home custody for a cumulative period of two years or longer, the parent has failed to complete a reasonable case plan toward reintegration, and there is a substantial probability that the parent will not complete such plan in the near future. K.S.A. 38-2271(a)(6)(A)-(C). If these factors are established, the parent has the burden of proof to rebut the presumption of unfitness by a preponderance of the evidence. K.S.A. 38-2271(b).

Here, it is undisputed that the three minor children have been in the custody of the State for more than two years. A review of the record shows that Z.L. has been in out-of-home placement since the child was just six weeks old. The record also shows that the district court issued ex parte orders of protective custody for Z.L. on May 17, 2018, and for N.M. and E.M. on September 10, 2019. These orders remain in effect. Moreover, Mother admitted during the evidentiary hearing that all three children had been outside of the home for longer than two years. Consequently, the record contains clear and convincing evidence that the children were in out-of-home custody for more than two years. This evidence also satisfies the statutory factor in K.S.A. 38-2269(b)(9), which allows the court to consider whether the child has been in out-of-home custody for 15 of the most recent 22 months beginning 60 days after the child was removed from the parental home. This factor alone is sufficient to justify the district court's finding of unfitness.

Further, the State presented evidence at the evidentiary hearing to establish that Mother has failed to complete her required tasks for reintegration under the case plan. In particular, the State presented evidence that Mother has failed to complete mental health treatment. Although Mother testified that she began mental health treatment and was discharged from therapy because of depression relating to the children's removal from her

home, the district court found that she "completely ignores any role [she] had in the children being removed or in . . . failing to have them returned." The district court found that Mother's testimony constituted "a deflection and blame shifting." Accordingly, viewed in a light most favorable to the State as the prevailing party below, we find that there is clear and convincing evidence in the record to support the district court's finding that Mother failed to complete mental health treatment in order to adequately address her continued depression.

The case plan also required Mother to maintain stable housing. However, Mother admitted that she purportedly failed to report that her boyfriend lived with her for one year in circumvention of the rules of HUD's voucher program. In turn, this led to her being no longer eligible to receive housing assistance. The State presented evidence that the reason Mother left her boyfriend off the occupancy list was because he was alleged to have committed three incidents of domestic battery in which Mother was the victim. Although Mother testified that these domestic violence incidents with her boyfriend were misunderstandings, this did not justify her intentionally violating the rules of the voucher program.

The district court found that Mother's testimony regarding her housing situation "attempted to shift the blame to her landlord, but at the end of the day she was responsible for completing this task." Additionally, the district court found that the domestic violence incidents involving the live-in boyfriend showed that Mother's mental health issues were not limited to the situation involving the removal of the children from her home and indicated that her housing was unstable. As discussed above, because of her housing situation, she was living with her mother in Missouri at the time of the evidentiary hearing. Based on our review of the evidence in the light most favorable to the State, we find that clear and convincing evidence supports the district court's finding that Mother had failed to maintain stable housing.

Regarding the case plan task of maintaining employment, the State presented evidence that Mother had around 20 different jobs since the children were removed from her home and the longest period that she held a job was about two months. At the time of the hearing, Mother was helping take care of her disabled mother and was evidently paid to do so by the state of Missouri. Mother also testified that she was interviewing for a job at a grocery store near her mother's home. Nevertheless, on cross-examination, Mother admitted that she had not maintained stable employment throughout this case. Once again, viewed in the light most favorable to the State, we find that there is clear and convincing evidence to support the district court's determination that Mother had not maintained stable employment as required by the case plan.

Even though the district court acknowledged that Mother had completed some of the tasks required by her case plan, it ultimately determined that Mother's conduct demonstrated "that she has not been willing to change her circumstances to meet the most basic needs of these children—shelter and safety." Based on our review of the evidence presented at the evidentiary hearing in the light most favorable to the State, we conclude that there is substantial competent evidence that is both clear and convincing to support the district court's determination that Mother was unfit.

In determining whether Mother's conduct was likely to change in the near future, this court considers the timeline "from the child's perspective, not the parent['s], as time perception of a child differs from that of an adult." *In re R.S.*, 50 Kan. App. 2d at 1117 (quoting *In re S.D.*, 41 Kan. App. 2d 780, Syl. ¶ 9, 204 P.3d 1182 [2009]). Here, the minor children have been in out-of-home placement for a significant portion of each of their young lives. The youngest child has been in out-of-home placement since the child was six weeks old, and the other two children have been out of the home for nearly four years at this point.

As the district court found, Mother's failure to take responsibility for her conduct, "coupled with the length of time these children have been out of home [and] the length of time [she] has had to take corrective action suggests [that] her conduct is unlikely to change in the foreseeable future." Likewise, Mother's move to Missouri on short notice to DCF demonstrates that she was unlikely to complete her case plan tasks in the near future. At the evidentiary hearing, Mother stated that she provided her case plan team with about 48 hours' notice that she intended to move to Missouri. In fact, a review of the record reveals that Mother's conduct throughout this case suggests that she has not prioritized communicating with DCF or completing her case plan.

The district court found that Mother's move made it "infinitely more difficult to [return] the children home" and "complicate[d] something that should be simple, in-home visits for these very young children." Also, Mother's testimony about being unable to address her mental health issues unless her children are returned to her demonstrates that she is unlikely to change her conduct in the near future. Thus, we conclude that there is clear and convincing evidence in the record—especially when viewing time from a child's perspective—to support the district court's finding that there is a substantial probability that Mother will not complete the steps required for reintegration in the near future.

In the absence of a presumption of unfitness, we "will affirm so long as clear and convincing evidence supports a finding of unfitness based on one of [the statutory] factors." *In re E.L.*, 61 Kan. App. 2d. 311, 323, 502 P.3d 1049 (2021). Here, the district court also relied on two statutory factors in concluding that Mother is unfit to parent. First, the district court applied K.S.A. 38-2269(b)(8) and found that Mother had failed to adjust her circumstances to care for the children. Second, the district court also applied K.S.A. 38-2269(c)(3) and found that Mother had failed to carry out a reasonable plan toward reintegration of her children into her home.

Clear and convincing evidence of either of the statutory factors found by the district court is sufficient for this court to affirm the district court's finding of unfitness. K.S.A. 38-2269(f). Regardless, we find clear and convincing evidence in the record to support both of the statutory factors relied on by the district court. As discussed above, the State presented clear and convincing evidence that Mother failed to adjust her circumstances to care for the children in various ways including her untruthfulness regarding her living conditions that led her to move out of Kansas. Likewise, the State presented clear and convincing evidence that Mother failed to carry out a case plan toward reintegration in several different ways including failure to complete mental health treatment, failure to maintain stable housing, and failure to maintain stable employment.

#### CONCLUSION

In summary, we find based on our review of the record on appeal in the light most favorable to the State that a rational fact-finder could have found by clear and convincing evidence that Mother is unfit to parent Z.L., N.M., and E.M. We also find that her unfitness is unlikely to change in the foreseeable future. Furthermore, it is important to recognize that any one of the statutory factors found by the district court standing alone may be sufficient to establish grounds for termination of parental rights. K.S.A. 38-2269(f). We, therefore, conclude that the district court did not err in finding that there was clear and convincing evidence to find Mother unfit.

Affirmed.