NOT DESIGNATED FOR PUBLICATION

No. 125,871

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of C.H., T.H., and D.H.,
Minor Children.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; J. PATRICK WALTERS, judge. Opinion filed August 4, 2023. Affirmed.

Laura E. Poschen, of Law Office of Laura E. Poschen, of Wichita, for appellant natural father.

Kristi D. Allen, assistant district attorney, and *Marc Bennett*, district attorney, for appellee.

Before HURST, P.J., ATCHESON and PICKERING, JJ.

PER CURIAM: Father appeals the termination of his parental rights to his three children, C.H. (born in 2012), T.H. (born in 2017), and D.H. (born in 2019). When the child in need of care case began, Father was serving a federal prison sentence. At the time of the termination hearing, Father had not seen his young children in over two years, and he would not be released for more than two years following the hearing. As such, he was unable to carry out a reasonable plan toward reintegration with his children. Even before he began his prison sentence, he had stopped making efforts to maintain a relationship with his children. The district court determined that Father was unfit, this unfitness was unlikely to change in the foreseeable future, and that termination was in the best interests of the three children. Having reviewed the record, we find no error and thereby affirm.

In March 2021, C.H., T.H., and D.H. were placed in police protective custody due to concerns that Mother was suffering from a mental illness and could not responsibly care for the children. Father was incarcerated at the time and throughout the entire course of this case. The district court issued an ex parte order placing the children in the custody of the Department for Children and Families (DCF). The next day, the State filed a child in need of care (CINC) petition. The district court ordered the children to remain in the temporary custody of DCF.

Father was ordered to obtain and maintain housing and employment; comply with requested drug testing; complete parenting, budgeting, and nutrition classes; and complete a clinical assessment.

The district court held hearings on this case, including a permanency hearing on November 9, 2021. At the time of that hearing, Father was held in federal custody and was about to enter a plea, which carried a possible sentence of 70-87 months. The district court found that reintegration with Father was no longer viable.

In December 2021, the State filed a motion to terminate parental rights. The State alleged Father was unfit for the following statutory reasons:

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

The State also alleged Father's incarceration impacted his ability to participate in rehabilitation efforts, adjust his circumstances and conduct to meet the needs of the children, maintain contact with his children, and complete case plan tasks directed toward integration.

Mother relinquished her parental rights. She is not involved in this appeal.

On July 25, 2022, the district court held a hearing on the State's motion to terminate Father's parental rights. At the hearing, Father testified remotely from Pollock Federal Penitentiary. In his testimony, he acknowledged that he had not seen his children since February 2020. He was arrested on federal drug conspiracy charges in September 2020. He accepted a plea offer and was sentenced to 87 months' incarceration. He believed, with good time credit and the First Step Act program, he would be released in "2.25 years." As such, his earliest release date was late 2024. He would then have to live in a halfway house for four to six months.

The district court took judicial notice of Father's criminal record, which included both federal convictions for drug conspiracy and firearms and state convictions for aggravated assault and aggravated battery. At the hearing, Father acknowledged that the longest period he was able to remain out of custody and criminal supervision was the seven-year period from 2001 to 2008.

At the time of the parental termination hearing, the children were nine, five, and three years old. While he was held in local county jails and in federal prison, Father had not attempted to write or otherwise contact his children. He was in custody for the first four years of C.H.'s life, the oldest child, born in October 2012. While the children had lived with Father while Mother was imprisoned between August 2017 and September 2018, when she was released, the children moved back with Mother. Afterwards, the children had limited contact with Father. Before he was arrested in September 2020,

Father had left the state of Kansas in February 2020. As such, Father had had very little contact with D.H., the youngest child, born in June 2019. On cross-examination, Father agreed that his children deserved a parent who was not in and out of custody.

Father's case manager from Saint Francis Ministries (SFM) testified to her efforts to remain in contact with Father during his incarceration. She wrote him letters every month, updating Father on how the children were doing, discussing upcoming hearings, and asking him to participate in any classes that he could, parenting classes specifically, although she did not know what classes the facility offered. She asked Father to write back or call and provided his attorney's name for this proceeding. Father testified, "I think I wrote her maybe twice." He only spoke with his case manager once or twice on the phone because, according to Father, the SFM system would not accept collect calls, nor would the jail allow him to make a three-way call.

Before arriving at Pollock Federal Penitentiary, Father completed a budgeting class while incarcerated in Harvey County. In federal prison, he enrolled in a parenting class and a Money Smart class. He was on a waiting list because the prison was in a "red zone" for COVID. He was also on a waiting list to speak with the psychology department about a drug treatment program.

Before his arrest, Father worked at Dollar General for 37 months. He testified he would have a job there upon his release, according to the store's regional manager. While in prison, he made T-shirts and helmets for the military.

Father's case manager recommended termination of Father's parental rights. Father had been sentenced to a significant time of 87 months in prison. In addition, he had not seen the children for over two years, including a lengthy period before his September 2020 arrest. He would need to demonstrate stability for a year after being released from prison before she could recommend reintegration. This lack of security and stability for

such a long time was detrimental to the children's physical and mental health. Father had not demonstrated secondary change to establish that he would no longer live a certain lifestyle. Nor had Father provided documentation that he had completed any classes at the prison. Last, the children did not ask about Father.

The district court found clear and convincing evidence that Father was unfit by reason of conduct or condition which rendered him unable to care properly for the children, and the conduct or condition was unlikely to change in the foreseeable future. The court relied on the four statutory factors listed in the State's termination motion: K.S.A. 38-2269(b)(7), (b)(8), (c)(2), and (c)(3).

The district court found Father had not maintained any relationship with his children. The children did not seem bonded to Father. Father had an extensive criminal history, and past behavior was a good indication of future behavior. The court considered child time and gave primary consideration to the physical, mental, and emotional health of the children. The court found the children's needs would be best served by terminating Father's parental rights.

Father appeals.

We Will Review Father's Due Process Claim

On appeal, Father first contends his due process rights were violated when the district court relied on his criminal history to terminate his parental rights, though the State had not specifically alleged Father's criminal history made him unfit to parent, nor did it reference K.S.A. 38-2269(b)(5) ("conviction of a felony and imprisonment") in its motion to terminate parental rights. He claims he was not on notice that his criminal history formed the basis of the unfitness allegation and thus could not meaningfully respond.

Father acknowledges this issue was not raised below.

Generally, issues not raised before the district court cannot be raised on appeal, including constitutional grounds for reversal. *In re Adoption of Baby Girl G.*, 311 Kan. 798, 801, 466 P.3d 1207 (2020); *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014). There are several exceptions to the general rule, including: "(1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights;" and (3) the district court was right for the wrong reason. *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008).

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 his fundamental rights as a parent "are implicated here" and thus relies on the second exception. He argues we can address this issue for the first time on appeal because his fundamental right to parent was implicated.

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 the child, the parent is entitled to due process of law. *In re P.R.*, 312 Kan. 767, 778, 480 P.3d 778 (2021).

We may review this due process claim because a parent's right to his or her child is a fundamental right. *In re X.D.*, 51 Kan. App. 2d 71, 75-76, 340 P.3d 1230 (2014); *In re K.H.*, No. 121,364, 2020 WL 2781685, at *7 (Kan. App. 2020) (unpublished opinion).

But we have no obligation to review an unpreserved claim. *In re Adoption of Baby Girl G.*, 311 Kan. at 805.

Father was not denied due process.

"'[W]hether due process was provided under specific circumstances raise[s] [an issue] of law'" subject to unlimited appellate review. *In re Care & Treatment of Ellison*, 305 Kan. 519, 533, 385 P.3d 15 (2016).

To establish a due process violation, Father must show he was "'both entitled to and denied a specific procedural protection.'" *In re P.R.*, 312 Kan. at 784. "If life, liberty, or property is at stake, procedural due process requires . . . notice of a potential deprivation of the interest and [a meaningful] opportunity to be heard regarding the deprivation." *In re Adoption of A.A.T.*, 287 Kan. 590, 600, 196 P.3d 1180 (2008).

In its motion the State did use Father's incarceration to explain why Father was unfit under the statutory factors it listed. However, the State contends no due process violation occurred because the district court did not use a statutory factor not pled in its termination motion to find Father unfit. Father was also provided notice that his incarceration could be used to support a finding of unfitness. Last, Father was provided an opportunity to be heard and meaningfully respond to the State's allegations.

The district court cannot rely on a statutory ground for finding a parent unfit that the State did not pursue in its motion to terminate. Doing so would deprive the parent of fair notice of the allegation of unfitness to meaningfully address the allegation at the termination hearing, which is a violation of due process. *In re B.C.*, No. 125,199, 2022 WL 18046481, at *3 (Kan. App. 2022) (unpublished opinion), *rev. denied* 317 Kan. ___ (2023); *In re K.H.*, 2020 WL 2781685, at *7.

But here the district court did not rely on K.S.A. 38-2269(b)(5) ("conviction of a felony and imprisonment") to find Father unfit. The district court found Father unfit based on the:

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

The district court explained the reason for Father's failure to adjust his circumstances to meet the needs of his children, maintain contact with the children, and carry out a reasonable plan directed toward integration of the children into the parental home was his criminal conduct that resulted in his incarceration. The State specifically alleged the same in its termination motion. Father had notice of the specific allegations the district court relied on to find him unfit. There was no due process violation here.

The District Court Did Not Err in Finding Father Unfit

Father next contends the State did not present sufficient evidence that Father was unfit based on K.S.A. 38-2269(b)(7), (b)(8), (c)(2), or (c)(3), and the unfitness would continue in the foreseeable future.

Once a child has been found to be a child in need of care, the court may terminate parental rights when it finds "by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a

child and the conduct or condition is unlikely to change in the foreseeable future." K.S.A. 38-2269(a). If, after reviewing all the evidence in the light most favorable to the State, we find the district court's fact-findings are deemed highly probable, that is, supported by clear and convincing evidence, we will uphold the termination of parental rights. We "do not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact." *In re Adoption of Baby Girl G.*, 311 Kan. at 806.

The statute lists nonexclusive factors the court shall consider in making a determination of unfitness. K.S.A. 38-2269(b)-(e). Any one of the factors may, but does not necessarily, establish grounds for termination of parental rights. K.S.A. 38-2269(f).

We first review two statutory factors relied upon by the district court judge, K.S.A. 38-2269(b)(7) and (c)(3).

Statutory factors for parental unfitness tend to overlap. Under K.S.A. 38-2269(b)(7), a parent may be unfit due to failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family. Under K.S.A. 38-2269(c)(3), a parent may be unfit when he or she does not complete substantial elements of a reasonable family reunification plan, including providing an appropriate home and financial support. See *In re B.C.*, 2022 WL 18046481, at *4.

The relevant agency involved in the case must expend reasonable efforts toward rehabilitation of the family. K.S.A. 38-2269(b)(7). Thus, the agency should attempt to help the parent accomplish case objectives. The purpose of the reasonable efforts' requirement is to provide the parent an opportunity to succeed, but the parent must exert some effort. Only "'reasonable efforts'" are required, not "'effective efforts.'" *In re M.S.*, 56 Kan. App. 2d 1247, 1257, 447 P.3d 994 (2019).

It is up to the district court to determine the effect of the parent's incarceration based on the facts of the case. Incarceration may be considered a significant negative factor where it has impeded the relationship between the parent and the child, where the parent has been incarcerated for the majority of the child's life and the child spent that time in DCF's custody, and where the incarceration would delay the proceedings and such delay is not in the child's best interests. *In re M.H.*, 50 Kan. App. 2d 1162, 1172, 337 P.3d 711 (2014).

Father contends that he received no guidance or assistance in completing his assigned tasks. Father's case manager, however, testified about her many efforts to assist Father. For instance, the case manager remained in contact with Father during his incarceration. She sent letters monthly to Father and encouraged him to respond. She also encouraged him to complete any classes he could. Father had minimal contact with his case manager—he thought he responded to her "maybe twice"—and did not send proof that he completed or was enrolled in any classes.

The State's evidence did show that the agency's efforts were limited due to Father's incarceration, not because the agency did not make reasonable efforts. While incarceration need not excuse failure to complete a reasonable reintegration plan, a convicted felon is incarcerated due to his or her own actions. See *In re B.C.*, 2022 WL 18046481, at *4-5.

Additionally, a parent may be properly found unfit because he or she cannot provide such essential components of a parent-child relationship. Here, Father did not complete the reunification plan and would not be able to for a few years due to his incarceration. Father is serving an extended prison sentence, which does not allow him to provide for the essentials required from a parent. And even after his release—over two years from the date of the termination hearing—he would have to secure adequate housing and employment and then demonstrate stability for approximately a year.

There was clear and convincing evidence that Father was unfit and the unfitness was unlikely to change in the foreseeable future due to the failure of reasonable efforts made by appropriate agencies to rehabilitate the family and the failure to carry out a reasonable plan directed toward integration of the children into the parental home. See K.S.A. 38-2269(b)(7); K.S.A. 38-2269(c)(3).

We next review the statutory factors under K.S.A. 38-2269(b)(8) and (c)(2). Under K.S.A. 38-2269(b)(8), a parent's unfitness may be found because of 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." And under K.S.A. 38-2269(c)(2), unfitness may also be found when there is a "failure to maintain regular visitation, contact or communication with the child or with the custodian of the child."

As noted above, the district court explained the reason for Father's failure to adjust his circumstances to meet the needs of his children. This included maintaining contact with the children and carrying out a reasonable plan directed toward integration of the children into the parental home. While Father was incarcerated, he did very little to adjust his circumstances, including any efforts to work with his case manager. For instance, throughout the course of this case, he only wrote to the case manager twice. He displayed little overall effort to communicate with her in terms of taking steps towards adjusting his circumstances.

Father argues that the case manager's lack of contact with Father "effectively prohibited Father from even the possibility of maintaining contact with the children." Yet Father never asked his case manager if he could send the children letters or inquired about visitation. He had made no effort to maintain any relationship with the children. The district court properly noted that Father "has not maintained a relationship with the children. He is not bonded with the children. He hasn't had any contact with the children since he's been in custody."

The evidence was sufficient to satisfy the clear and convincing standard that Father was unfit due to his lack of effort to adjust his circumstances, conduct, or conditions to meet the needs of the children and due to his failure to maintain regular visitation, contact, or communication with the children or with the custodian of the children. See K.S.A. 38-2269(b)(8); K.S.A. 38-2269(c)(2).

The District Court Correctly Ruled that Father's Unfitness Is Unlikely to Change in the Foreseeable Future

"[W]hen determining whether a parent's unfitness is 'unlikely to change in the foreseeable future,' a court may look to a parent's past conduct as an indication of the parent's future behavior." *In re E.L.*, 61 Kan. App. 2d 311, 328, 502 P.3d 1049 (2021), *rev. denied* 315 Kan. 968 (2022). Courts also use "'child time' when assessing the foreseeable future." 61 Kan. App. 2d at 328. Courts examine the foreseeable future from a child's perspective because children experience the passage of time differently than adults, "making a month or a year seem much longer than it would for an adult." 61 Kan. App. 2d at 328. Children have a right to permanency within a timeframe reasonable to them. This difference in perception is particularly significant "when a child is very young and lacks any real relationship with the parent." 61 Kan. App. 2d at 328-29.

The evidence was sufficient to satisfy the clear and convincing standard that Father was unfit and the unfitness was unlikely to change in the foreseeable future. Father will have been in prison for most of the children's lives by the time he is released in mid-2024, at the earliest. Meanwhile, the children have been in DCF custody for more than two years. Father's case manager testified they never inquired about or mentioned Father. The district court properly considered child time when determining Father's unfitness was unlikely to change in the foreseeable future.

In Terminating Father's Parental Rights, the District Court Appropriately Considered the Children's Best Interests

Upon making a finding of unfitness of the parent, "the 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).

As indicated above, Father effectively had no relationship with his children. For a large portion of their lives, he has been in prison or living away from the children. There is little to no evidence that Father made any efforts to start communicating with the children while he was in prison. As noted above, he did not seek out information for contacting the children either through letter correspondence or through visitation. Not surprisingly, without any relationship with their father—who had been away for most of their lives—the children did not inquire about or mention their father.

The three children have been in DCF custody for more than two years. The children's need for permanency was quite evident. With that in mind, we turn to Father's argument about his future release from prison.

Father argues that with good time credit, he would be released from prison in late 2024 or early 2025, followed by living in a halfway house for four to six months. At that time, he would be available to parent his children. But Father's release from prison along with the subsequent months to re-establish himself, remain law-abiding, *and* begin a relationship with his three children would not allow the children to achieve permanency in a timely manner.

The district court therefore gave primary consideration to the physical, mental, and emotional health of the children and found that terminating Father's parental rights was in the children's best interests. We find no error with this ruling.

Affirmed.