NOT DESIGNATED FOR PUBLICATION

Nos. 126,365
126,367

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of L.S. and R.S.,
Minor Children.

MEMORANDUM OPINION

Appeal from Ellis District Court; GLENN R. BRAUN, judge. Submitted without oral argument. Opinion filed December 1, 2023. Affirmed.

Brady L. Tien, of Glassman, Bird Powell, L.L.P., of Hays, for appellant father.

Carol M. Park, of Schwartz & Park, L.L.P., of Hays, for appellant mother.

Brenda L. Basgall, assistant county attorney, for appellee.

Before ARNOLD-BURGER, C.J., SCHROEDER and WARNER, JJ.

PER CURIAM: L.S. and R.S. were removed from Mother and Father's custody in late 2020. Over two years later, after a full evidentiary hearing, the district court terminated the parental rights of both parents. Because we find that there was clear and convincing evidence to support the district court's decision, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In November 2020, the State petitioned to have L.S. and R.S. declared children in need of care. The petitions alleged that the children were without adequate parental care, that they had been subject to abuse or neglect, and that they had been residing in the same

residence as a sibling who had been subject to abuse or neglect. The cases began after the Department of Children and Families (DCF) received a report that Father had recently slapped L.S. and that the slap left a mark. The report also stated that Father "'goes after'" Mother to hurt her, even when she had 3-month-old R.S. in her arms. L.S. witnessed other acts of violence by Father against Mother and the family pet. The allegation was that Mother was aware of the risk of harm to the children yet continued to allow Father access. L.S. was having behavioral problems at school and had expressed some suicidal ideation. At the time Father was on probation for three counts of battery with a pending warrant for his arrest. Father has 10-20 guns in the home and L.S. indicated Father has pointed a Luger at Mother and L.S. in the past.

This was the second CINC case related to the family. A year earlier, before the birth of R.S., L.S. had been removed from Mother and Father's care when Mother "'evicted'" seven-year-old L.S. from their home and refused to provide him with his belongings. Father took L.S. to the paternal grandmother's home but did not personally tend to his care. Father spoke to L.S. in an inappropriate manner. Although parents did not participate in counseling, L.S. was released from DCF custody and placed in Mother's care. All visitation with Father was to be supervised. The current action commenced eight months later, shortly after the birth of R.S.

The district court granted a temporary order for protective custody and placed the children in DCF custody where they have remained ever since. At the next hearing, the court continued the custody arrangement and ordered that if Mother and Father wanted to have any visitation with the children, they were required to submit three consecutive negative drug tests.

So began two years of working with Mother and Father in an effort to return their children to them. Father was supposed to be living away from Mother and children due to their fighting and his behavior, but she continued to allow him back in the home or in a

garage next to the home. During this time their oldest child, L.S., started reacting violently to Mother during supervised visits and displayed violence toward his classmates. After making serious threats to classmates, he spent some time in Kaw Valley Center.

Additional facts will be provided as they relate to the district court's finding of unfitness.

ANALYSIS

On appeal, both parents argue that there was insufficient evidence to support the district court's determination that they were unfit parents. In addition, Mother argues that the district court abused its discretion by finding that termination was in the children's best interests.

I. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT MOTHER AND FATHER WERE UNFIT PARENTS

A. *Our standard of review is clear and convincing evidence.*

> "Termination of parental rights will be upheld on appeal if, after reviewing all the evidence in the light most favorable to the prevailing party, the district judge's fact-findings are deemed highly probable, i.e., supported by clear and convincing evidence. Appellate courts do not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. [Citation omitted.]" *In re Adoption of Baby Girl G.*, 311 Kan. 798, 806, 466 P.3d 1207 (2020), *cert. denied* 141 S. Ct. 1464 (2021).

B. *Kansas statutes dictate the bases upon which a court may terminate a parent*'s *parental rights.*

The Revised Kansas Code for Care of Children provides that the court may terminate parental rights when a child has been adjudicated a child in need of care. K.S.A. 38-2269(a).

> "When the child has been adjudicated to be a child in need of care, the court may terminate parental rights or appoint a permanent custodian when the court 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).

The statute lists nonexclusive factors the court shall consider in deciding unfitness. K.S.A. 38-2269(b). The court must also consider a separate list of nonexclusive factors when a child is not in the parent's physical custody. K.S.A. 38-2269(c). Any one of the factors in K.S.A. 38-2269(b) or (c) may, but does not necessarily, establish grounds for termination of parental rights. K.S.A. 38-2269(f).

When determining whether a parent will remain unfit for the foreseeable future, courts consider the term "from the perspective of a child" because children and adults have different perceptions of time. *In re K.L.B.*, 56 Kan. App. 2d 429, 446-47, 431 P.3d 883 (2018).

While the parties' cases have been consolidated on appeal, the facts and circumstances surrounding each parent are different, thus, the analysis of each parent's arguments will be addressed separately.

C. *There was clear and convincing evidence to support the district court's finding that Mother was unfit and would remain that way for the foreseeable future.*

The court found that Mother was an unfit parent and was likely to remain unfit for the foreseeable future under four different statutory factors. Any one of these factors may establish grounds for termination of parental rights. We will examine each in turn. But before we do, we note that this case was very fact intensive. The parties are well aware of those facts, so we will only refer to them generally as needed.

1. K.S.A. 38-2269(b)(1) – Emotional illness, mental illness, mental deficiency, or physical disability of the parent

Under K.S.A. 38-2269(b)(1), the district court may find that a parent is unfit if the court finds there is "[e]motional 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."

Mother acknowledges that she was diagnosed with adjustment disorder with mixed anxiety and depressed mood, but she argues that there was no evidence that the diagnosis rendered her unable to care for the children. Mother's therapist testified that Mother engaged appropriately during therapy sessions and that she was managing her situation "pretty well." After a full review of the record, we agree with Mother that K.S.A. 38-3369(b)(1) is related to the mental health of the parent, and although Mother has a mental health diagnosis, there was not clear and convincing evidence that this diagnosis rendered her unable to care for her children. Accordingly, there was insufficient evidence to support the district court's finding.

2. K.S.A. 38-2269(b)(2) – Conduct toward a child that is physically, emotionally, or sexually cruel or abusive

Under K.S.A. 38-2269(b)(2), the district court can terminate a parent's parental rights after finding that the parent exhibited "conduct toward a child of a physically, emotionally or sexually cruel or abusive nature."

In this case, the district court found that K.S.A. 38-2269(b)(2) applied given Mother and Father's arguments and fights with each other in front of the children, L.S.'s statements that he did not feel safe with Mother, L.S.'s statements that his maternal uncle exposed him to pornography, and Mother's apparent indifference to that exposure.

Mother argues that K.S.A. 38-2269(b)(2) requires some affirmative action on the part of the parent and that the State did not prove that she took any affirmative action that would qualify as physically, emotionally, or sexually cruel or abusive. But when examining the record, in a light most favorable to the State, there is clear and convincing evidence that Mother's conduct toward both children was abusive.

As to physical abuse, at a very minimum, L.S. testified that his Mother had pulled his hair. Mother discounts this testimony, but her argument essentially asks this court to reweigh the evidence, which this court cannot do. Moreover, there is nothing in the statute that requires some affirmative action from Mother, a lack of action can be cruel or abusive in its own way.

The evidence of emotional abuse was substantial. The evidence was that Mother largely ignored L.S. during visitations and that she focused on R.S. instead. She did not hug L.S. or outwardly demonstrate positive emotions toward him. Visitations between L.S. and Mother often resulted in increased outbursts from L.S. in the following days.

And Mother failed to recognize that her brother showing L.S. pornography was inappropriate and unacceptable.

L.S. stated repeatedly that Mother made him feel unsafe. At one point Mother showed up unexpectedly at L.S.'s individual therapy session which greatly upset L.S. According to his principal, L.S. started acting out at school shortly after the visit. A few days later, L.S. wrote a letter to the district court and asked to move to his aunt and uncle's house in Missouri because he did not want to stay with Mother and Father. This scared L.S. and he believed people were watching him and he did not feel safe. Mother's conduct toward L.S. was so traumatic that L.S. had his foster parents purchase blackout curtains which he weighed down with shoes because he was scared Mother would watch him through his window.

The situation with R.S. is similar, although the abuse is harder to see given R.S.'s young age. Mother consistently failed to engage appropriately with R.S. Mother would hold R.S. and not interact with her. She would not let R.S. move around when R.S. clearly wanted to. She did not bring appropriate snacks or toys for R.S., even after case workers provided Mother with directions to do so. R.S. required physical therapy while still an infant because her muscles were not developing appropriately. Mother failed to attend more than two physical therapy appointments.

In addition, Mother continued to live, for a majority of the case, with Father. There was evidence that Mother and Father yelled at each other in front of the children and that Father was physically abusive toward L.S. Mother eventually forced Father to move out of the house, but then let him live in her garage for a time. She did not get a protection from abuse order against Father until well into the life of the case and even with the order in place, continued to see Father. L.S. shared with a school counselor that he did not believe Mother loved him because "'she let Dad in our house and she wasn't supposed to.'"

In its written decision, the district court noted that the abuse in this case, unlike many CINC cases, is hard to see. As the court put it, there was not "the direct evidence of harm to the children often seen" in CINC cases. But "[w]hat is presented in the testimony and exhibits is a long history of behaviors exhibited by [L.S.] which lead to the inevitable conclusion that something was seriously amiss in his parents' home." The record on appeal supports the district court's conclusion. There was sufficient evidence to support the court's finding that Mother was an unfit parent under K.S.A. 38-2269(b)(2) and would remain that way for the foreseeable future.

3. K.S.A. 38-2269(b)(7) – Failure of reasonable efforts by appropriate agencies to rehabilitate the family

Mother next challenges the reasonableness of the efforts made to rehabilitate the family. In her brief, she essentially argues that the efforts made by Saint Francis Ministries (SFM) and other agencies involved in the case were not reasonable. She points out reintegration did not occur even though she completed many of her case plan tasks, such as maintaining employment, attending therapy, and planning age-appropriate activities for the days she had visitation with the children.

This court has previously held that K.S.A. 38-2269(b)(7) merely requires reasonable efforts, not effective efforts, to be made by the agencies involved in a CINC case. *In re M.S.*, 56 Kan. App. 2d 1247, 1257, 447 P.3d 994 (2019). And the efforts made by SFM and any other related agency in this case were reasonable under the circumstances. Mother had nearly two years between the beginning of the case and the termination trial to show that she was fit to parent the children and she failed to do so. While she did make strides in her case plan tasks, completing those tasks alone were insufficient to show that she was fit to parent L.S. and R.S. when she continued to display the same problematic behavior throughout the life of the case.

The tasks assigned to Mother were not just boxes needing to be checked before she could regain custody of the children. Instead, they were activities and goals which were meant to guide her into being a fit parent. But even after completing the goals, she continued to behave in the same manner that she did prior to the start of the case. For example, the SFM case worker testified that one of Mother's primary issues at the start of the case was recognizing there was a strain in her relationship with L.S. and how that strain was impacting L.S. But even after two years of individual and, intermittent, family therapy, Mother failed to recognize that there was a problem in her relationship with L.S. Instead, she would just report that it was good and that there were no causes for concern in his behavior when he was with her. In reality, the SFM case worker reported seeing very extreme behavior from L.S. when he was with Mother, including very expressive behavior of him trying to get away from her.

The efforts made by the agencies involved in this case were reasonable. Mother was provided tasks which were designed to move her towards being a fit parent for the children. Mother checked the box on many of the tasks, but making an actual change requires more than checking the box. There was sufficient evidence to support the district court's finding that Mother was unfit under K.S.A. 38-2269(b)(7) and would remain that way for the foreseeable future.

4. K.S.A. 38-2269(b)(8) – Lack of effort on Mother's part to adjust her circumstances, conduct, or conditions to meet the children's needs

Under K.S.A. 38-2269(b)(8), a parent may be declared unfit if the court finds that there was 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." There was sufficient evidence to support the district court's decision that Mother was unfit under K.S.A. 38-2269(b)(8) in this case.

Much of the evidence discussed above also applies here. In essence, Mother had nearly two years to make the changes necessary to show that she could be a fit parent for L.S. and R.S. and she failed to do so.

Mother continued to live with Father for much of the case, even though they got into frequent shouting matches and Father continued to use illegal drugs. Even at supervised visits, Mother and Father argued. Her relationship with L.S. remained strained, even after several individual and family therapy sessions. She refused to acknowledge the severe problems with her relationship with L.S. During therapy visits Mother would not engage with L.S. L.S.'s extreme behavior and suicidal ideation resulted in three different immediate referrals for inpatient mental health treatment or KVC behavioral healthcare. Yet Mother expressed several times that she did not believe L.S. required medication and would likely stop medication and therapy if the decision were hers. Mother did not believe that L.S. needed an individualized specialized learning plan at school. She also denied—contrary to detailed reports from case workers who were present—that L.S. had exhibited any aggression during visits.

As to R.S., Mother did not provide age-appropriate activities for R.S., instead, she held her for too long when it was clear R.S. wanted to crawl around and when R.S. was older Mother did not bring age-appropriate snacks even after SFM case workers told her what to bring. Mother participated in therapy, but as stated above, Mother only attended two of R.S.'s physical therapy sessions, informing the case team that she did not feel she needed to participate. She also failed to attend her well baby checkup.

A walk through of Mother's home late in the case showed significant clutter and the dogs using L.S.'s bed as a bathroom area. Although Mother did not have to pay for rent, as her mother owned the house, and she did maintain part-time employment, she still had trouble maintaining a budget.

Mother had nearly two years to show that she could change her conduct and circumstances so that she was fit to meet the needs of the children and she failed to do so. There was sufficient evidence to support the district court's decision that she was unfit under K.S.A. 38-2269(b)(8) and would remain that way for the foreseeable future.

D. *There was clear and convincing evidence to support the district court's finding that Father was unfit and would remain that way for the foreseeable future.*

1. K.S.A. 38-2269(b)(2) - Conduct toward a child that is physically, emotionally, or sexually cruel or abusive

When considering the evidence in a light most favorable to the State, there was clear and convincing evidence to support the district court's finding that Father was unfit under K.S.A. 38-2269(b)(2). In his brief, Father acknowledges that L.S. testified that Father had '"been physical"' with him at least five times. But Father argues there was no detail about the events and there was other testimony that L.S.'s version of events was often different from reality. Father's argument asks this court to reweigh the evidence, which this court cannot do.

When considering the evidence in a light most favorable to the State, the evidence showed that Father had been physical with L.S. on multiple occasions, that Father and Mother argued and yelled at each other in front of the children, and that L.S. did not feel safe with Father. He had pointed a gun at L.S. and Mother in the past and even though L.S. had repeatedly indicated he did not feel safe around Father, Father did nothing to allay L.S.'s fear. In fact, several months into the case, Father and Mother attended L.S.'s soccer game. Mother sat in her car the entire game, visibly upset. After the game Father asked L.S. to follow him to his car. Father took out a gun to show L.S. L.S. took a few steps back and asked Father why he had brought a gun to his soccer game. Father stated he just wanted to show it to L.S. L.S. reported that when his Father used drugs '"he get

mad'" and "'When he's upset, I don't want to be around him.'" After an incident at school where L.S. threatened to kill three students and grabbed a pair of scissors, L.S. expressed frustration that Father was in jail and loved drugs more than he loved L.S.

Although Father did make calls to L.S. while he was in in-patient alcohol and drug treatment, he made derogatory comments about L.S.'s hair and sexual orientation.

While L.S. was placed with his paternal grandparents, Father would show up unexpectedly. This scared L.S., he believed people were watching him and he did not feel safe. Under the circumstances, and keeping this court's standard of review in mind, there was sufficient evidence to support the district court's conclusion that Father was unfit under K.S.A. 38-2269(b)(2) and would remain that way for the foreseeable future.

2. K.S.A. 38-2269(b)(3) – Use of intoxicating liquors or narcotic or dangerous drugs of such duration or nature as to render the parent unable to care for the needs of the child

Under K.S.A. 38-2269(b)(3), a parent can be found unfit if he or she is found to be unable to care for the ongoing needs of the child because of "the use of intoxicating liquors or narcotic or dangerous drugs." When viewed in a light most favorable to the State, there was sufficient evidence to support the district court's determination that Father was an unfit parent due to his use of methamphetamine.

In his brief, Father acknowledges his continued struggle with methamphetamine. He also notes that he would attend treatment after a relapse which, as he puts it, displayed that he could maintain sobriety.

But the children in this case deserve more than a parent that can maintain sobriety for a few months before relapsing and attending treatment just to start the cycle over.

Father had nearly two years to show that he could maintain sobriety and he failed to do so. While it is commendable that he was able to abstain from the use of methamphetamine for several months, that is not enough to undermine the district court's finding that he was an unfit parent under K.S.A. 38-2269(b)(3). The record shows that Father continued to use methamphetamine throughout the case, despite periods of sobriety. He continued to use methamphetamine even though he knew that a positive test would foreclose his ability to visit his children until he had three clean tests. L.S. expressed frustration that Father was in jail and loved drugs more than he loved L.S.

When viewed in a light most favorable to the State, there was sufficient evidence to support the district court's determination that Father was an unfit parent under K.S.A. 38-2269(b)(3) and would remain that way for the foreseeable future.

3. K.S.A. 38-2269(b)(5) – Conviction of a felony and imprisonment

Under K.S.A. 38-2269(b)(5), the district court may find a parent unfit if the parent has been convicted of a felony and imprisoned. The record supports the district court's finding that Father was convicted of a felony and imprisoned.

Father had many encounters with police during this case. He was arrested at the outset for a probation violation warrant and, during the case, he had protection from abuse orders entered against him related to Mother which he repeatedly violated. He broke into Mother's bedroom door and was arrested for destruction of property. At one point he barricaded himself in Mother's garage resulting in a violent standoff with police.

In June 2022, Father was convicted, in part, of aggravated sexual battery, a severity level five-person felony, the victim being his stepsister. The district court in his criminal case offered Father a chance at probation and gave him an underlying 128-

month prison term. A short time later, Father used methamphetamine and his probation was revoked as a result. He was ordered to serve a modified 72-month sentence in prison.

Father recognizes that his prison sentence is, at the least, problematic to his ability to parent L.S. and R.S. He cites *In re T.H.*, 60 Kan. App. 2d 536, 494 P.3d 851 (2021), for support of his argument that imprisonment alone is not enough to render him an unfit parent.

In *In re T.H.*, 60 Kan. App. 2d at 548-53, this court addressed a case where the father was imprisoned for several years. The father in *In re T.H.* was not a regular drug user, financially supported his child before and during his incarceration, and had a plan in place for custody arrangement of his child while he was incarcerated. Moreover, the father and child had a close relationship and communicated as much as possible given COVID-19 protocols in prisons at the time.

The same cannot be said here. There was no evidence that Father provided support to L.S. or R.S. His visits were terminated due to his drug use. And the only child who could testify to the state of the relationship with Father did not even feel safe with him. The record on appeal does not even begin to suggest that Father took the steps necessary to remain a fit parent while he was incarcerated. When examining the record in a light most favorable to the State, there was sufficient evidence to support the district court's decision that Father was an unfit parent.

4. K.S.A. 38-2269(b)(7) – Failure of reasonable efforts by appropriate agencies to rehabilitate the family

Father's final argument on appeal is that there was insufficient evidence to support the district court's conclusion that he was unfit under K.S.A. 38-2269(b)(7). Father argues

SFM's efforts were not reasonable because he was extremely limited in his ability to visit the children, especially with the implementation of the three clean drug test rule.

But Father fails to address the fact that he was given nearly two years to address his inability to be a fit parent. And in those nearly two years, he did not make significant progress and in many respects he regressed. He continued using drugs, which rendered him unable to visit his children. He was inconsistent in his contact with SFM. He attempted to make unsupervised and unauthorized visits with the children. He committed crimes and ultimately found himself imprisoned.

Father had almost two years to put his life on the right track so that he could be a fit parent for L.S. and R.S. and he failed to do so. SFM's efforts to rehabilitate Father with the children were reasonable under the circumstances.

After reviewing the evidence in a light most favorable to the State, it is clear that there was clear and convincing evidence to support the district court's decision that Mother and Father were unfit parents and would remain that way for the foreseeable future.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DETERMINING THAT IT WAS IN THE BEST INTERESTS OF THE CHILDREN TO TERMINATE MOTHER'S PARENTAL RIGHTS

After the district court determines that a parent is unfit, the court "shall consider whether termination of parental rights as requested . . . is in the best interests of the child." K.S.A. 38-2269(g)(1). The determination must be supported by a preponderance of the evidence and this court reviews the district court's decision for an abuse of discretion. An abuse of discretion occurs when no reasonable person would agree with the district court's decision or if the decision was based on a factual or legal error. *In re*

R.S., 50 Kan. App. 2d 1105, 1115-16, 336 P.3d 903 (2014). The party asserting an abuse of discretion bears the burden of showing such abuse. *In re M.R.*, 36 Kan. App. 2d 837, 839, 146 P.3d 229 (2006).

Here, only Mother argues that termination of parental rights was not in the best interests of her children. But she fails to meet her burden to show that the district court's decision was an abuse of discretion in this case. When, and for a period of time after, L.S. visited Mother, L.S.'s behavior noticeably worsened. On multiple occasions his behavior got bad enough that he had to be hospitalized. When visitation stopped, L.S.'s behavior improved. L.S. was so scared of his Mother that he put up blackout curtains in his bedroom and weighed them down with shoes. He clearly expressed his desire to not see Mother again. Continued contact with Mother would not serve L.S.'s physical, mental, and emotional health—the primary considerations set out by statute. See K.S.A. 38-2269(g)(1).

In the short time R.S. was with Mother she faced developmental delays. Once removed from the home, Mother continued to interact with R.S. in a manner that was inappropriate for R.S.'s age. Once R.S. was removed from Mother's custody she began to develop at an appropriate pace.

Mother fails to establish that no reasonable person would agree with the district court's decision to find that termination of her parental rights was in the best interests of the children. The decision to terminate Mother's parental rights was reasonable under the circumstances.

III. CONCLUSION

K.S.A. 38-2269(g) requires that "[i]f the court makes 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." Here, the district court found that "the children's physical, mental and emotional needs would best be served by a termination of parental rights and that it is in [L.S.] and [R.S.]'s best interests to terminate the parental rights [of Father and Mother]." We find no error in this determination and thus affirm the district court as to termination of the parental rights of both parents.

Affirmed.