NOT DESIGNATED FOR PUBLICATION

No. 126,727

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of H.W., a Minor Child.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; GREGORY D. KEITH, judge. Submitted without oral argument. Opinion filed May 17, 2024. Affirmed.

Kaitlin M. Dixon, of Wichita, for appellant natural father.

Amanda M. Marino, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Wichita, for appellees.

Before ARNOLD-BURGER, C.J., CLINE and COBLE, JJ.

PER CURIAM: J.T. (Father) appeals the district court's termination of his parental rights. He argues that the district court did not afford him due process because it relied in part on a statutory factor not pled to terminate his parental rights, the evidence failed to show he was presently unfit and would remain unfit for the foreseeable future, and the district court erred in determining the best interests of the child. After a careful review of the record and the parties' arguments, we find clear and convincing evidence supports the district court's rulings. While we agree the district court improperly mentioned a nonpleaded basis for termination of Father's parental rights, we find clear and convincing evidence supports the pleaded bases on which the court relied, as well as its findings that termination was in H.W.'s best interests. We therefore affirm the termination decision.

FACTUAL AND PROCEDURAL BACKGROUND

Grandparents filed a petition alleging that H.W. was a child in need of care (CINC) in May 2021. The petition alleged domestic violence and that both parents suffered from substance abuse issues. The district court entered an ex parte order, placing H.W. in Grandparents' custody. H.W. has remained with Grandparents ever since.

Within days of the ex parte order, the district court held a temporary custody hearing. The district court placed H.W. in the temporary custody of the Kansas Department for Children and Families (DCF).

The district court then held a joint adjudication and disposition hearing in July 2021. Neither parent appeared for the hearing and the district court found them in default. The district court found that H.W. was a child in need of care.

Grandparents moved to terminate Father's parental rights in March 2022. Grandparents alleged that both parents continued to use drugs. They also alleged that H.W.'s parents failed to cooperate with St. Francis Ministries (St. Francis) in reasonable efforts to rehabilitate the family. And Grandparents alleged that H.W.'s parents failed to adjust their circumstances, conduct, and conditions to meet the needs of the child, citing Father's lack of proof of employment and Mother's shoplifting, among other incidents.

On the day of trial, Mother relinquished her parental rights to H.W. The district court denied Father's request for a continuance, finding that delay was not in the best interests of the child. The district court took judicial notice of Father's criminal case and an additional CINC case involving H.W.'s younger sibling who had been born drug affected.

The testimony at trial from the parents and St. Francis recounted both parents' continued struggles with drug use. For example, while Mother was pregnant and in inpatient drug treatment, Father admitted he supplied her with drugs. Mother said Father would hide drugs on the street, and she would pick them up when she and the other inpatient clients took their nightly walk.

At the time of trial, Father resided at the Sedgwick County Jail and had been incarcerated for six months including work release. He had been convicted of domestic battery against his wife (not Mother), for which he received probation. But his probation was revoked after he violated its terms. Among other violations, the State alleged Father tested positive for methamphetamine on January 10, 2022, and for methamphetamine, amphetamine, and fentanyl on July 19, 2022, in hair follicle tests and that he tested positive for amphetamine on January 11, 2022, and methamphetamine on January 27, 2022, in urinalysis tests. While Father acknowledged that he had admitted the violations, he claimed he had done so on the advice of his attorney. Father asserted that the reason his hair follicles tested positive for drug use was that he wore an old sweaty hat that he used to wear when he did drugs.

Mother testified Father told her that he was removed from work release and kept in jail because he used drugs and failed a urinalysis test. Father testified that he admitted drug use to a work-release employee because he thought that was what they wanted to hear. He also denied putting eight Percocet pills in a baggie in his rectum to smuggle into work release but admitted that he told the work-release program he did it, again stating he thought that was what they wanted to hear. And he testified that three out of four urinalysis tests administered during work release were positive for fentanyl, causing Father to be sent back to jail. Father testified that he has attempted treatment programs but provided conflicting testimony as to whether those efforts were successful.

Mother testified that during their relationship Father essentially had two residences. Some of the time, Father stayed at the house he owned with his wife and at other times he stayed with Mother at a house owned by Mother's brother. Father said he was not sure where he would live or work after his release from custody. He claimed he might go back to his house, where Mother and his wife were living together.

Although Mother testified St. Francis did a good job explaining what needed to be done to reintegrate H.W. with the family, Father claimed he was confused by the case plans to gain time with H.W. and that the achievement plans were unclear. He complained that no St. Francis employee visited him or sent a letter during his jail stay, but admitted he did not contact them, either. He testified that he felt it was Saint Francis' responsibility to maintain contact with him.

The St. Francis case workers who worked with the parents recounted their concerns about Father's failure to maintain his sobriety for any length of time. One testified Father was argumentative and often denied his positive drug testing results, giving alternate explanations for positive drug tests, based on which comb he used or something he wore. St. Francis followed up on Father's explanations, but professional interpretations of his test results did not support any of his theories. The case worker also recounted how Father would attempt to manipulate the drug test results, voluntarily submitting to tests when he was not asked but failing to provide urine samples when asked and taking tests after he bleached his hair. The case worker was concerned Father was taking drug tests when he knew he would be clean instead of submitting to random testing.

Both case workers testified they had explained to Father what he needed to do to progress on his case plan and that he never signified he did not understand the case plans. And while at times Father progressed to longer visitation times, his behaviors declined, particularly with drug testing compliance. One case worker testified she tried to visit

Father in jail twice but was denied by jail staff. She said she did send him two letters with St. Francis contact information.

Based on Father's performance, St. Francis recommended termination of parental rights even before learning Father was incarcerated again. Both case workers felt Father had not changed his circumstances or put himself in a position to parent H.W. now or in the near future. They did not think that Father could meet the emotional needs of H.W. because of his incarceration, mental health, and substance use. They also did not believe Father could successfully reintegrate with H.W. upon his release from jail in six months. They felt termination of parental rights was in H.W.'s best interests because permanence and stability in Grandparents' home was needed for H.W.'s mental and emotional needs.

The district court found that Father was unfit, citing the following reasons in its order terminating Father's parental rights: (1) The use of intoxicating liquors or narcotic or dangerous drugs was of such duration or nature to render Father unable to care for the needs of H.W., citing K.S.A. 38-2269(b)(3); (2) reasonable efforts made by appropriate public or private agencies failed to rehabilitate the family, citing K.S.A. 38-2269(b)(7); and (3) lack of effort on Father's part to adjust his circumstances, conduct, or conditions to meet H.W.'s needs, citing K.S.A. 38-2269(b)(8). The court found it was in H.W.'s best interests to terminate Father's parental rights and continue H.W.'s out-of-home placement. It ordered H.W. to remain in DCF custody and to proceed towards adoption.

Father timely appeals.

REVIEW OF FATHER'S APPELLATE CHALLENGES

Did the district court violate Father's due process rights by relying on a factor not pleaded?

Father first argues that the district court erred when it issued its oral ruling from the bench. The district court judge stated, "And—well, this isn't pled, but [K.S.A. 38-2269](b)(1), of the mental health, there had been testimony about [Father's] mental health issues, and he has not taken care of his mental health needs." Father notes that Grandparents' petition did not allege that Father's mental illness was of such duration or nature as to render Father unable to care for the ongoing physical, mental, and emotional needs of the child. K.S.A. 38-2269(b)(1). Father thus argues he had no notice the district court would apply that subsection and he could not meaningfully respond to that allegation. Father asserts that the district court violated due process when it raised this statutory factor sua sponte.

Standard of review

When a district court terminates parental rights based on factual findings made under K.S.A. 2023 Supp. 59-2136(h)(1), those factual findings will be reviewed on appeal to determine whether, after viewing all the evidence in the light most favorable to the prevailing party, the findings were supported by clear and convincing evidence. See *In re Adoption of Baby Girl G.*, 311 Kan. 798, 806, 466 P.3d 1207 (2020), *cert. denied sub nom. P.F. v. J.S.*, 141 S. Ct. 1464 (2021).

When determining whether factual findings are supported by clear and convincing evidence, an appellate court does not weigh conflicting evidence, pass on the witnesses' credibility, or redetermine questions of fact. *In re Adoption of Baby Girl G.*, 311 Kan. at 806.

Applicable legal standards

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. See *In re P.R.*, 312 Kan. 767, 778, 480 P.3d 778 (2021). But this fundamental right to parent is not without limits. 312 Kan. at 778. 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). The United States Constitution's Due Process Clause provides substantive protection for parents when they have assumed parental duties. Still, when parents have not accepted some measure of responsibility for their child's future, the Constitution will not protect the parent's mere biological relationship with the child. *In re Adoption of G.L.V.*, 286 Kan. 1034, 1060, 190 P.3d 245 (2008).

When a nonconsenting parent is incarcerated and therefore unable to fulfill the usual parental duties performed by unrestrained parents, the court must decide whether the parent has sought the opportunities and options that could be available to perform those duties to the best of the parent's abilities. *In re Adoption of S.E.B.*, 257 Kan. 266, 273, 891 P.2d 440 (1995). If an incarcerated parent has made reasonable efforts to contact and maintain a continuing relationship with the children, it is up to the district court to determine whether such efforts are sufficient. *In re Adoption of F.A.R.*, 242 Kan. 231, 236, 747 P.2d 145 (1987).

> "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 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). The statute lists nonexclusive factors the court shall consider in making a determination of 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).

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

The district court's error was harmless.

Father argues that the district court erred when it considered his mental health in determining his unfitness to parent because this factor was not pled in Grandparents' petition. But as Grandparents correctly point out, the district court relied on three other statutory bases to terminate his parental rights, which were all pleaded. We therefore find any error by the district court in its comments after trial was harmless.

In *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011), the Kansas Supreme Court held that to find an error harmless under the United States Constitution, a Kansas court must be able to declare the error "did not affect a party's substantial rights, meaning it will not or did not affect the trial's outcome." We find the error here is clearly harmless.

First, the district court did not include mental health issues under K.S.A. 38-2269(b)(1) in its written order terminating parental rights. The district court's statement

from the bench about mental health appears to be an aside rather than a finding. Second, the three other bases for finding unfitness are enough to terminate Father's parental rights without citing mental health under K.S.A. 38-2269(b)(1). In this sense, this case resembles *In re K.H.*, No. 121,364, 2020 WL 2781685, at *7 (Kan. App. 2020) (unpublished opinion). There, the district court also raised the issue of mental illness sua sponte, but we resolved the error by refusing to consider that basis for termination on appeal.

Similarly, we find the district court committed harmless error in discussing a basis not pleaded in Grandparents' petition for terminating Father's parental rights. We will not consider this basis for termination on appeal.

Did Grandparents meet their burden of clear and convincing evidence?

Father argues that Grandparents did not meet their burden of clear and convincing evidence showing that Father was unfit and would remain unfit for the foreseeable future. Grandparents argue that Father's past behavior reflected his future behavior and his repeated drug use during the case showed an inability to fulfill the orders of the court. Because clear and convincing evidence showed that Father was unfit and would remain unfit for the foreseeable future, we affirm.

A. *Use of intoxicating liquors or narcotic or dangerous drugs*

A district court may terminate a parent's rights to his or her child 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).

Father concedes that Grandparents entered evidence of Father's positive drug tests at trial. But he contends they failed to connect the drug use to his inability to meet H.W.'s needs. Father notes that there was no evidence that he ever harmed H.W. or that H.W. was likely to sustain harm.

This court has repeatedly agreed with Father's contention that the use of drugs alone is not enough to terminate parental rights, focusing instead on whether drug use impedes reintegration:

> "'Just because parents use drugs, or have been convicted of using drugs, or drink too much alcohol, does not automatically mean the child is likely to sustain harm, or the home is contrary to the child's welfare. If that were the test, then thousands of children would be removed from the home weekly.'" *In re L.C.W.*, 42 Kan. App. 2d 293, 301, 211 P.3d 829 (2009).

But Father's reliance on this language in *In re L.C.W.* does not help him. The district court held the State failed to prove the child in *In re L.C.W.* was in need of care because it found the State had failed to prove a connection between the parents' alleged—not proven—drug use and the child's welfare. "'The only evidence was that the child is healthy, was not left alone, and was not abused physically, mentally, or emotionally.'" 42 Kan. App. 2d at 301. In contrast, Grandparents offered clear and convincing evidence that Father used drugs while this case was pending. In *In re M.S.*, 56 Kan. App. 2d 1247, 1258-59, 447 P.3d 994 (2019), we held:

> "The State is not required to provide direct evidence that a parent's conduct is due to drug use if sufficient evidence shows that drug use impeded reintegration. Similarly, the State need not provide direct evidence that a parent's drug use is in and of itself harmful to a child where clear and convincing evidence shows that the parent's failure to acknowledge his drug issues creates a significant impediment towards reintegration. [Citations omitted.]"

Grandparents showed that drug use impeded reintegration by showing Father's "unwillingness or inability to modify his addictive behavior." *In re A.R.*, No. 121,298, 2020 WL 1969324, at *9 (Kan. App. 2020) (unpublished opinion). Father's drug use did not stop when Grandparents filed a CINC petition. His drug use continued after criminal charges, probation revocation, and the motion to terminate his parental rights. Even though Father knew that clean drug tests and treatment stood between him and H.W., he did not adjust his behavior. Instead, Father attempted to manipulate the drug test results or offered unsupported excuses for his positive drug tests. As a result, the district court did not err by relying on K.S.A. 38-2269(b)(3) when terminating Father's parental rights. Clear and convincing evidence supports its finding.

B. *Reasonable efforts by public or private agency have failed.*

Additionally, a district court may terminate a parent's rights to his or her child 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).

Father contends that St. Francis did not make reasonable efforts to rehabilitate the family. He points to the evidence showing what he considers failures by St. Francis to guide him, especially during his time in jail. Grandparents assert that St. Francis made reasonable efforts to rehabilitate the family, citing the actions St. Francis took and Mother's testimony about St. Francis' work on the case. The district court appropriately weighed the evidence, and reweighing that evidence falls outside this court's scope of review.

Father points to his own testimony that St. Francis was not transparent with him about what needed to be done to reintegrate with H.W. But Grandparents point to Mother's testimony that St. Francis adequately explained the case plan tasks and that she understood what was asked of her. Father argues no one from St. Francis visited him in

jail. Grandparents point out that Father wrote no letters to St. Francis, did not call, and had no one else contact St. Francis on his behalf. The district court weighed this evidence. The district court stated in its findings that it did not find Father credible, citing his nonresponsiveness, statements which were not believable, admissions of being less than honest, shifting attitude, and internal contradictions within his testimony. Mother and Father met with St. Francis and they both testified about how well—in their view—St. Francis explained the steps toward reintegration. This court cannot from a cold record put its thumb on the credibility scale giving less weight to Mother's testimony than to Father's.

C. *Lack of effort on part of parent to adjust circumstances*

A district court may terminate a parent's rights to his or her child if there is clear and convincing evidence that 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).

On this point, the district court stated the following:

> "With [K.S.A. 38-2269](b)(8), lack of effort, from doing this job, I know drug addiction is terrible and it can be all-consuming, encompassing, but, again, as I have said before, his—for his child, for his freedom, for his privileges of work release, he could not overcome and change—change his effort. I would note that [he] delivered drugs to Mom while she was pregnant and in treatment.
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> . . . .
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> "I would note that he could not change his behaviors, his efforts to follow court orders, case plans, achievement plans, and that—his present unfitness."

Father points to evidence in the record to support his argument that he maintained his parenting relationship with H.W. He attended 66 out of 66 visits before he was

incarcerated, which progressed from supervised to unsupervised. When H.W. visited Father's home, he had furniture, food, gas, electricity, and water. St. Francis employees testified that his visits were appropriate with no safety concerns. And Father had Mother leave the home when he found out she was using fentanyl.

But as Grandparents correctly point out, Father also failed in other aspects of the reintegration plan, including providing proof of employment. Father was removed from work release and placed back in jail. Father completed an anger management class, but then argued with drug testing facility employees and spit on the facility's window. Most importantly, Father never completed drug treatment and failed to consistently perform hair follicle and urinalysis testing—the crucial hurdles in this case. Despite indeterminate periods of sobriety, Father's drug use resulted in loss of work release, probation violations, and his remand to jail. Father's inability to comply with treatment and testing requirements kept the case in essentially the same place at the time of the termination hearing that it was at the beginning of the case. Although the reset from unsupervised visits back to supervised was not attributable to Father but to Mother's drug use, Father did not help the case progress toward reintegration after that point. Because clear and convincing evidence supports the district court's finding, it did not err by relying on K.S.A. 38-2269(b)(8) when terminating Father's parental rights.

Did the district court err in determining the best interests of the child?

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." K.S.A. 38-2269(g)(1). In making such a decision, the court shall give primary consideration to the physical, mental, and emotional needs 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. *In re R.S.*, 50 Kan. App. 2d 1105, 1115-16, 336 P.3d 903 (2014).

This court reviews the district court's decision for an abuse of discretion. 50 Kan. App. 2d at 1116. A district court exceeds its broad discretion latitude if its ruling is based on an error of law, an error of fact, or is arbitrary, fanciful, or unreasonable. *In re C.T.*, 61 Kan. App. 2d 218, 227, 501 P.3d 899 (2021). Since Father does not point to an error of law or fact, the question becomes whether no reasonable district court would come to the same conclusion. See *In re R.S.*, 50 Kan. App. 2d at 1116.

Father points to evidence that he had a loving, affectionate relationship with H.W., and they had good visits together. He also states that there were no safety concerns, and no evidence showed the visits made H.W. upset or that she had any negative behaviors after visits. Father asserts that no evidence shows that H.W.'s physical, mental, and emotional needs would be best served by termination. Grandparents counter that the evidence shows that Father could not meet his own needs, nor the physical, mental, and emotional needs of H.W. in the foreseeable future. Grandparents argue that clear and convincing evidence showed that it would be detrimental to H.W.'s physical, mental, and emotional health if permanency were delayed by a lack of permanent home placement.

It is readily apparent from the district court's written ruling and statements on the record that the court considered all the evidence carefully and weighed the factors appropriately. Father's argument is again an invitation for this court to reweigh the evidence and conclude that no reasonable district court would agree with the conclusion here. Father fails to carry his burden. The district court properly considered the physical, mental, and emotional needs of H.W. in determining H.W.'s best interests. Because clear and convincing evidence supports the district court's findings, we affirm the district court's conclusion that it was in H.W.'s best interests that Father's parental rights be terminated.

Affirmed.