NOT DESIGNATED FOR PUBLICATION

No. 125,688

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of E.K. and W.K.,
Minor Children.

MEMORANDUM OPINION

Appeal from Elk District Court; JOE E. LEE, magistrate judge. Opinion filed July 21, 2023. Reversed and remanded with directions.

Grant A. Brazill, of Morris Laing Law Firm, of Wichita, for appellant natural mother.

Jill R. Gillett, county attorney, for appellee.

Stephany L. Hughes, of Stephany L. Hughes LLC, of El Dorado, guardian ad litem.

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

PER CURIAM: The Elk County District Court erred in terminating S.K.'s right to parent her daughters E.K. and W.K.-B. We reverse the termination order and remand for further proceedings tailored to the children's continuing need for care and S.K.'s apparent inability to provide that care at least at the time of the termination hearing. Our analysis has been hampered by a record plagued with vague and cursory descriptions of the reasons S.K. may be an unfit parent—a central issue in the proceedings—in both the State's motions to terminate and in the district court's resulting orders. We have also been stymied by the apparent lack of attention the social service agency charged with facilitating family reunification has given two key impediments to reuniting mother with her daughters.

From the appellate record, a reasonable fact-finder could not clearly and convincingly conclude the grounds of S.K.'s unfitness properly presented to and accepted by the district court would persist for the foreseeable future, rendering the termination order legally unsound. We reverse and remand with directions.

FACTUAL AND PROCEDURAL HISTORY

S.K. was born and raised in an emotionally and physically abusive home. In 2016, when she was about 14 years old, S.K. gave birth to E.K. Although E.K.'s paternity has not been established for purposes of these proceedings, S.K. believes her stepbrother is the child's father. E.K. is profoundly autistic. As of the termination hearing in July 2022, she was nonverbal, continued to wear diapers, and was otherwise developmentally impaired.

S.K. gave birth to W.K.-B. in 2018. Her father is H.B., who has had a comparatively limited association with the child. He is not E.K.'s father; so the girls are half-sisters. H.B. relinquished his parental rights and is not a party to this appeal. But H.B.'s parents have been the principal foster placement for both E.K. and W.K.-B. throughout these proceedings and remained so in July 2022.

The State took E.K. and W.K.-B. into emergency custody in September 2020 after learning of their squalid home environment and poor physical condition. At the time, S.K. was living with L.R., who goes by the nickname Jimmy. As we explain, Jimmy remains an enigmatic and troubling presence in S.K.'s life and, as a result, in these proceedings. Both S.K. and Jimmy admitted to a representative of the Kansas Department for Children and Families they were regularly using methamphetamine and marijuana. When taken into state custody, the children were neither verbal nor otherwise socialized. A caseworker described them as "feral." Both girls were unkempt and had uncontrolled infestations of head lice with open and healing bites, indicating a long-term problem.

E.K. had physical injuries that likely were self-inflicted during tantrums associated with her autism and had severe dental neglect requiring that many of her teeth be capped or extracted.

Early on in their foster placement, the girls would hoard food or gorge themselves to the point of vomiting. They engaged in unusually sexualized behavior. E.K.'s conduct was particularly pronounced. W.K.-B. also became upset if any man approached her. Those negative behaviors dissipated over time and largely ended.

Because of her profound autism, E.K. can have emotional and sometimes violent outbursts. She has slammed her head into walls or other fixed objects or pulled out her own hair. Other times, she has attacked the people around her, striking them or pulling their hair. Those incidents have lessened as her foster placements have become more adept at soothing E.K. and providing her with a regulated environment familiar to her. Although E.K. remains profoundly autistic, she has begun to communicate in a rudimentary way with her foster placements using a combination of grunts and hand gestures. The record indicates W.K.-B. is largely hitting developmental milestones for a child her age.

The Department outsourced the development and implementation of a family reunification plan to TFI Family Services, a nonprofit social service agency. Early on, S.K. arguably was slow to undertake the tasks set out in the plan. And she was permitted no visits with the children until she demonstrated a break in her drug dependency. During that time, S.K. initially was in jail, then in drug treatment, and later in a "sober living" residence. During the spring of 2021, S.K. began to directly address the reunification plan. She participated in substance abuse aftercare and in mental health counseling. From then through the termination hearing, S.K. tested negative for illicit drugs. She had stable employment during that time and obtained a physically suitable residence for reunification with E.K. and W.K.-B.

Also during that period, S.K. had monitored visits with the children. Caseworkers reported S.K. interacted well with W.K.-B. and appeared to have a genuine bond with the child. She fared less well with E.K., due at least in part to autism-related barriers. The record suggests a caseworker or a foster placement sometimes had to intervene to help regulate E.K.'s behavior. But the record also indicates the social service agency never assisted S.K. in getting information or training on living with a profoundly autistic child. At the termination hearing, S.K. testified she had been looking for that sort of help on her own.

In July 2021, S.K. confirmed to her caseworkers that she was pregnant with twin boys and that Jimmy was the father. The caseworkers were unaware that S.K. had maintained a relationship with Jimmy. It is unclear if S.K. and Jimmy separated for a time after E.K. and W.K.-B. were taken into state custody and then reunited or if they had remained a couple. The district court concluded S.K. had been less than forthcoming with the caseworkers about her relationship with Jimmy.

The social service agency reconfigured the reunification plan by assigning tasks to Jimmy and including him in visits with the children, apparently on the assumption he would be part of the family unit. Jimmy undertook none of his assigned tasks except for getting a mental health evaluation shortly before the termination hearing. At the hearing, S.K. testified that she had given birth to the twins and she and Jimmy were engaged to be married. S.K.'s parental relationship with the twins was not directly at issue in the district court; nor is it in this appeal.

E.K. and W.K.-B. reacted negatively following visits in which Jimmy participated. E.K. acted out more frequently and with heightened agitation, including violent outbursts that one of the foster placements described as being as bad as any of the early episodes. E.K. also resumed the sexualized behavior she displayed after first being placed in state custody. Following the visits, W.K.-B. would withdraw socially and become unusually

quiet. The record shows W.K.-B. separately told her placement and a caseworker, "No more Jimmy." Based on those reports, the social service agency precluded Jimmy from further visits with the children but did not otherwise adjust the reintegration plan. Nothing in the record indicates the caseworkers or the girls' therapists tried to find out why E.K. and W.K.-B. reacted so adversely to being around Jimmy.

The State filed motions to terminate parental rights to E.K. and W.K.-B. on June 30, 2022, and the district court held a joint termination hearing 18 days later. Each motion alleges S.K. to be an unfit parent because "[t]he child" came into state custody when S.K. was arrested for using methamphetamine and marijuana and because "[t]he conditions of the child are such that the parents cannot care for the child." The motions recited nothing more and do not identify any statutory grounds for unfitness outlined in the Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq. Accompanying each motion was an identical 17-page report prepared by a TFI Family Services manager entitled "Points of Severance" reciting circumstances apparently drawn from the agency's records and possibly other sources. The report grouped entries, often outlined in chronological order, under several headings corresponding to language used in the Kansas Code to describe grounds of parental unfitness: (1) using dangerous drugs rendering a parent unfit, listed in K.S.A. 38-2269(b)(3); (2) failing to maintain regular contact or communication with a child who has been out of the home, listed in K.S.A. 38-2269(c)(2); (3) failing to carry out a reasonable plan of reintegration for a child in an out-of-home placement, listed in K.S.A. 38-2269(c)(3); and (4) a presumption of unfitness under K.S.A. 38-2271(a)(9) based on a parent's lack of communication with a child despite having knowledge of child's birth. The report also contains a short narrative on the best interests of the children favoring termination of parental rights.

During the one-day termination hearing, the district court received documentary evidence and heard from nine witnesses, including S.K., the girls' foster placement, a caseworker from TFI Family Services, a case manager from that agency, and a social

worker with the Department. The district court issued mirror-image orders in early October 2022 terminating S.K.'s rights, finding she was an unfit parent, the unfitness was unlikely to change in the foreseeable future, and the best interests of E.K. and W.K.-B. warranted termination.

Without citing any statutory provisions of the Kansas Code, the district court concluded S.K. was unfit "by reason of conduct or condition . . . to care properly for" E.K. and W.K.-B., parroting the general language in K.S.A. 38-2269(a) outlining when termination may be appropriate. The district court then listed facts it considered sufficient to establish S.K.'s unfitness at the time of the termination hearing and the unlikelihood her unfitness would change in the foreseeable future:

—S.K. "did very little" to fulfill the reunification plan for an extended time.

—E.K. and W.K.-B were traumatized by S.K. and Jimmy.

—S.K. "has been unstable."

—S.K. continued her relationship with Jimmy and failed to disclose that circumstance to the Department or TFI Family Services until well into the reintegration process. S.K. "has chosen" Jimmy "over the children."

—The children were in poor physical condition and displayed physically and psychologically debilitating behaviors when taken into state custody and some of those behaviors reemerged following scheduled visits with S.K. and Jimmy.

S.K. has appealed the termination of her parental rights to both children.

LEGAL ANALYSIS

On appeal, S.K. has attacked the district court's determination on multiple fronts. S.K. contends the evidence admitted at the July 18 hearing did not support termination on the grounds the State alleged, so the district court's order should be reversed under the

Kansas Code. Although the contention may be well-taken and would likely support reversal of the termination order, we ultimately reverse because the State failed to establish that any ostensible unfitness the district court identified would persist for the foreseeable future. For her other points, S.K. says the district court misapplied the Indian Child Welfare Act, 25 U.S.C. § 1901 (2018) et seq., a pertinent federal law; erred in denying her request for a continuance of the termination hearing; and could not have found termination to be in the children's best interests. As we explain, we need not and do not reach the merits of those additional arguments.

We first outline pertinent legal principles governing child in need of care proceedings and the concomitant termination of parental rights. We then apply those principles to the circumstances of this case and outline the appropriate remedy, given the failure of proof supporting termination.

Legal Principles

A person has a fundamental right to a parental relationship with his or her child. See *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re B.D.-Y.*, 286 Kan. 686, 697-98, 187 P.3d 594 (2008) (citing *Santosky*). The right is a liberty interest protected in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (substantive liberty interest); *Pierce v. Society of the Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control"). Accordingly, the State may extinguish the legal bond between a parent and child only upon clear and convincing proof of parental unfitness. K.S.A. 38-2269(a); *Santosky*, 455 U.S. at 769-70; *In re R.S.*, 50 Kan. App. 2d 1105, Syl. ¶ 1, 336 P.3d 903 (2014). The Legislature has enacted the Revised Kansas Code for Care of

Children to codify processes for finding children in need of care, for fostering family reunification, and for terminating parental rights if those efforts fail.

After a child has been adjudicated in need of care, a district court may terminate parental rights "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). In considering a parent's unfitness, the district court may apply the factors outlined in K.S.A. 38-2269(b) and, when the child has been removed from the home, the additional factors in K.S.A. 38-2269(c). A single factor may be sufficient to establish unfitness. K.S.A. 38-2269(f). Likewise, the statutory factors are illustrative of but do not exclusively define grounds of unfitness. A district court may find a parent unfit for other reasons. See K.S.A. 38-2269(b) (district court "'not limited to'" statutory factors in considering unfitness); *In re M.P.*, No. 119,444, 2019 WL 2398034, at *4 (Kan. App. 2019) (unpublished opinion) (district court may rely on general statutory standard in K.S.A. 38-2269[a] or "nonstatutory circumstances demonstrating parental unfitness"). In addition, a parent may be unfit based on one or more of 13 statutory presumptions detailed in K.S.A. 38-2271.

In gauging the likelihood of change in the foreseeable future under K.S.A. 38-2269(a), the courts should use "child time" as the measure. As the Kansas Code recognizes, children experience the passage of time in a way that makes a month or a year seem considerably longer than it would for an adult, and that difference in perception typically tilts toward a prompt, permanent disposition. K.S.A. 38-2201(b)(4); *In re M.B.*, 39 Kan. App. 2d 31, 45, 176 P.3d 977 (2008); *In re G.A.Y.*, No. 109,605, 2013 WL 5507639, at *1 (Kan. App. 2013) (unpublished opinion) ("'child time'" differs from "'adult time'" in termination of parental rights proceedings "in the sense that a year . . . reflects a much longer portion of a minor's life than an adult's").

When the sufficiency of the evidence supporting a decision to terminate parental rights is challenged, an appellate court will uphold the decision if, after reviewing the record evidence in a light most favorable to the State as the prevailing party, the district court's findings on unfitness and foreseeability of change are supported by clear and convincing evidence. Stated another way, the appellate court must be persuaded that a rational fact-finder could have found it highly probable that the circumstances warrant the termination of parental rights. *In re B.D.-Y.*, 286 Kan. at 705. In evaluating the record, the appellate court does not weigh conflicting evidence, assess the credibility of witnesses, or determine factual questions. *In re Adoption of B.B.M.*, 290 Kan. 236, 244, 224 P.3d 1168 (2010); *In re M.H.*, 50 Kan. App. 2d 1162, 1170, 337 P.3d 711 (2014).

The district court's best interests determination is governed by a less stringent standard. As directed by K.S.A. 38-2269(g)(1), the district court should give "primary consideration to the physical, mental[,] and emotional health of the child" in making a best interests finding. A district court decides best interests based on a preponderance of the evidence. See *In re R.S.*, 50 Kan. App. 2d at 1115-16. The decision essentially rests in the district court's sound judicial discretion. 50 Kan. App. 2d at 1116. An appellate court reviews those sorts of conclusions for abuse of discretion. As we have said: "A district court exceeds that broad latitude if it rules in a way no reasonable judicial officer would under the circumstances, if it ignores controlling facts or relies on unproven factual representations, or if it acts outside the legal framework appropriate to the issue." *In re M.S.*, 56 Kan. App. 2d 1247, 1264, 447 P.3d 994 (2019); see *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013).

Because S.K. is an enrolled member of the Ottawa Tribe of Oklahoma, she and the children are covered under the Indian Child Welfare Act. The ICWA aims to curtail what had been a widespread practice of removing Native American children from their immediate and extended families and their tribes to be placed in institutional or family settings in which they would be cut off from any exposure to their tribal heritage and

culture. The statutory scheme and the related federal regulations create multiple procedural and substantive protections for Native American children designed to preserve their familial and trial relationships. The United States Supreme Court recently turned aside a sweeping constitutional challenge to the ICWA. *Haaland v. Brakeen*, 599 U.S. ___, 143 S. Ct. 1609, 1633 (2023). Here, the district court recognized that the ICWA applies and checked appropriate boxes on the form termination orders to acknowledge the statutory requirements. In conformity with the ICWA, the Ottawa Tribe designated a tribal expert who testified at the termination hearing.

S.K. has invoked two heightened standards imposed in the ICWA before a state court may terminate the parental rights of a covered individual: (1) Termination may not be ordered unless "active efforts" have been made to provide remedial and rehabilitative services and programs to preserve the family; and (2) termination requires evidence, including expert testimony, establishing beyond a reasonable doubt that the parent's continued custody of the child "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(d), (f) (2018). Because we have found the district court erroneously terminated S.K.'s parental rights applying the less stringent requirements of the Kansas Code, we need not reach and do not decide the ICWA challenges S.K. has raised. The claims of error under the ICWA simply augment what we have found to be S.K.'s successful attack on the termination order based on Kansas law and would afford her no additional relief at this juncture. So those claims are effectively moot, and our determination of them would be no more than an extraneous advisory ruling construing federal law. See *State v. Kurtz*, 51 Kan. App. 2d 50, 52, 340 P.3d 509 (2014) (outlining prudential considerations in declining to decide issue having no legal effect on parties).

Principles Applied

In framing her sufficiency challenge under the Kansas Code, S.K. invokes a due process right to fair notice of the reasons the State contends she is an unfit parent.

Individuals facing termination of their parental rights have procedural due process protections under the Fourteenth Amendment commensurate with the fundamental liberty interest at stake. *Santosky*, 455 U.S. at 747-48; *In re A.A.-F.*, 310 Kan. 125, 146, 444 P.3d 938 (2019); *In re C.T.*, 61 Kan. App. 2d 218, 228, 501 P.3d 899 (2021). Broadly stated, constitutional procedural due process affords a person the opportunity to be heard in a way meaningfully calculated to avert an erroneous or wrongful governmental deprivation of a recognized property right or liberty interest. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (The Due Process Clause "at a minimum" requires that "deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); *Taylor v. Kansas Dept. of Health & Environment*, 49 Kan. App. 2d 233, Syl. ¶ 4, 305 P.3d 729 (2013). But "[c]onstitutional due process is an especially elastic concept in that the protections required vary depending upon the importance of the specific property right or liberty interest at stake." *State v. Gonzalez*, 57 Kan. App. 2d 618, Syl. ¶ 2, 457 P.3d 938 (2019).

The due process requirement that the State prove its case for termination of parental rights by clear and convincing evidence underscores the fundamental importance of the interest and the need for exacting protections against a wrongful deprivation. See *Santosky*, 455 U.S. at 758, 769-70. The Court observed that consistent with due process rights "the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, [and] the standard of proof necessarily must be calibrated in advance." 455 U.S. at 757. Hand in hand with knowing the standard the State must satisfy to prove the case for termination, a parent must be apprised of *what* the State intends to prove by that standard in establishing unfitness. One without the other offers a veneer of due process with only a flimsy underlying protection against an erroneous outcome. See *In re M.G.*, No. 115,007, 2016 WL 4159902, at *8-9 (Kan. App.

2016) (unpublished opinion) (multiple statutory grounds cited in motion to terminate with only cursory factual representations denies parent constitutional due process).

The need for this sort of particularized fair notice has been recognized in a host of leading due process cases. *Wolff v. McDonnell*, 418 U.S. 539, 563, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (due process requires inmate facing discipline for violating prison rules be afforded hearing accompanied by "advance written notice of claimed violation"); *Morrissey v. Brewer*, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (in parole revocation hearing, due process requires parolee receive "written notice of the claimed violations"); *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (in proceeding to terminate public assistance, recipient entitled to due process including "timely and adequate notice detailing the reasons for a proposed termination"); *In re Ruffalo*, 390 U.S. 544, 552, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) (in lawyer disciplinary proceeding, "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived [lawyer] of procedural due process"). The cases are striking for the breadth of adjudicatory proceedings constitutionally triggering a right to advance notice of the grounds on which the government seeks to extinguish a property right or liberty interest. The Kansas appellate courts have, not surprisingly, acknowledged the need for such fair notice as a component of constitutional due process. *State v. Hurley*, 303 Kan. 575, 582-83, 363 P.3d 1095 (2016) (probation revocation); *State v. Amador*, No. 123,584, 2022 WL 655851, at *4 (Kan. App. 2022) (unpublished opinion) (due process precludes revoking probation for violation not alleged in revocation warrant).

We have extended this concept of fair notice to proceedings to terminate parental rights and have acknowledged a district court should not rely on statutory grounds of unfitness in K.S.A. 38-2269 or presumptions of unfitness in K.S.A. 38-2271 that the State has not identified in the motion to terminate. *In re D.G.*, No. 125,366, 2023 WL 2194320, at *3 (Kan. App. 2023) (unpublished opinion) (panel declines to consider district court's

findings of unfitness based on statutory grounds not raised in motion to terminate); 2023 WL 2194320, at *7 (Atcheson, J., dissenting) (majority correctly declines to consider grounds not raised in motion because parent "lacked fair notice" and reliance "likely would" result in due process violation); *In re B.C.*, No. 125,199, 2022 WL 18046481, at *3 (Kan. App. 2022) (unpublished opinion) (district court "almost certainly" would deprive parent of fair notice and violate constitutional due process protections to find unfitness on statutory ground not identified in motion to terminate); *In re A.J.*, No. 124,854, 2022 WL 15549863, at *5 (Kan. App. 2022) (unpublished opinion) (State concedes error when district court finds unfitness on statutory ground not included in motion to terminate); *In re K.H.*, No. 121,364, 2020 WL 2781685, at *7 (Kan. App. 2020) (unpublished opinion) (parent denied constitutional due process when district court relied on ground of unfitness not alleged in motion to terminate); cf. *In re M.G.*, 2016 WL 4159902, at *8-9 (listing all statutory factors for unfitness in K.S.A. 38-2269 in termination motion and identifying only cursory factual support deprived parent of constitutional due process). Congruently, if the State intends to rely on nonstatuory reasons, those should be particularly described in the motion to terminate. In addition, the motion must outline the factual bases for the alleged unfitness. K.S.A. 38-2266(b).

We endorse the suggestion that constitutional fair notice requires parents be apprised of the ways the State intends to prove they are unfit, especially given the fundamental liberty interest at stake in a termination hearing. In turn, a district court cannot find a parent unfit and, thus, terminate his or her rights on grounds not fairly outlined in the State's motion. Nonetheless, a procedural due process violation may amount to harmless error, so a termination order adequately anchored in statutory grounds of unfitness disclosed in the State's motion and fully supported in the evidence should not be reversed because it further relies on a ground plucked from outside the motion. See *In re Henderson*, 306 Kan. 62, 76-77, 392 P.3d 56 (2017) (procedural due process claims subject to harmless error analysis).

The statutory requirement that a motion to terminate describe facts tending to show unfitness does not itself satisfy constitutional fair notice requirements. The descriptive account should be channeled to identified statutory or nonstatutory conditions of unfitness rendering the parent unable to care for his or her child. The reliance on a factual narrative alone would be loosely akin to permitting criminal defendants to be charged in complaints stating they face felonies and reciting an account of the alleged wrongful actions without citing the particular crimes the State intends to prosecute. That sort of pleading doesn't permit an informed response in the form of a tailored defense. A narrative-alone approach effectively creates a roving commission—another vice thwarting fair notice—permitting the district court to identify and rely on a ground of unfitness for the first time at the close of the termination hearing, so long as the evidence may support it. See *Gojack v. United States*, 384 U.S. 702, 714, 86 S. Ct. 1689; 16 L. Ed. 2d 870 (1966); *Wright v. Kansas State Board of Education*, 46 Kan. App. 2d 1046, 1071, 268 P.3d 1231 (2012) (Atcheson, J., concurring) ("The Board has granted itself a roving commission—authority exercised without defined limitations or standards[.]"); *Fry v. Jay Hatfield Mobility, LLC*, No. 114,266, 2016 WL 3856195, at *9 (Kan. App. 2016) (unpublished opinion) (amorphous instruction on fault and liability creates roving commission "'allow[ing] the jury to roam freely through the evidence and choose any facts which suit its fancy or its perception of logic to impose liability'") (quoting *McNeil v. City of Kansas City*, 372 S.W.3d 906, 910 [Mo. Ct. App. 2012]).

Against that due process backdrop, we turn to the grounds for unfitness the State advanced in the motions to terminate S.K.'s parental rights. As we have explained, the motions themselves identify only two reasons S.K. should be considered unfit. First was her use of methamphetamine and marijuana when the children were taken into custody. S.K.'s drug abuse certainly rendered the children in need of care in September 2020 and rendered her unfit at the outset of these proceedings. See K.S.A. 38-2202(d)(1), (2) (defining child in need of care); K.S.A. 38-2269(b)(3) (abuse of "dangerous drugs" may render parent unfit to meet needs of child). But S.K. successfully completed a substance

abuse treatment program and remained in aftercare through the termination hearing. She repeatedly tested negative for illegal drugs for months leading up to the hearing. In short, the evidence failed to show S.K. to be presently unfit for that reason in July 2022. The district court did not directly account for that history in its occasionally elliptical termination orders.

The State also asserted S.K. was unable to care for E.K. and W.K.-B. because of their "conditions." The allegation of unfitness doesn't really correspond to any of the statutory grounds in K.S.A. 38-2269 and is vague enough to imperil fair notice. With respect to E.K., it could refer to S.K.'s apparent inability to cope with the child's outbursts and other manifestations of her profound autism. As to both children, the State may be considering their demonstrably negative reactions to family visits that included Jimmy. But the assertion is exceptionally oblique if that's the intended purpose. We doubt the allegation passes constitutional muster, but we do not rest our decision on this concern.

The record shows TFI Family Services did not arrange any sort of education or training for S.K. addressing how to assist a profoundly autistic child. With that help, S.K. may have been able to parent E.K., so the unfitness might not have persisted for the foreseeable future. Similarly, as we explain later, the record fails to show why the children reacted negatively to Jimmy and whether their demonstrable unease could have been alleviated in a reasonable time. We, of course, are in no position to resolve hypotheticals about the future predicated on things that have not happened.

The grounds identified in the points of severance accompanying the motion fare no better. The point based on S.K.'s abuse of drugs has not been supported in the evidence, as we have already explained in discussing the motions to terminate themselves. The two points based on lack of communication with the children simply do not apply to S.K. under the facts. Although S.K. had limited interactions with E.K. and W.K.-B. while she was in drug rehabilitation, she had regular visits with them pursuant to

the reintegration plan during the latter part of these proceedings. We presume the lack of communication was directed at the putative father of E.K. and at H.B.

The content of the severance document mostly consists of repetitive notes from caseworkers documenting their failed attempts to contact the fathers and H.B.'s lack of attentiveness to the family reintegration process. The document offers little in the way of a cohesive narrative of S.K.'s purported difficulties or present unfitness. On balance, we wonder about the utility and wisdom of delegating to case managers the obligation to identify legally appropriate grounds of unfitness and to assemble a factual account tied to those legal determinations. Cf. *In re C.H.W.*, 26 Kan. App. 2d 413, 418-19, 988 P.2d 276 (1999) (questioning practice of incorporating social service reports by reference into motions to terminate as likely violating due process and suggesting "specific allegations" should be included in motion).

The remaining point of severance rests on the parents' failure to carry out a reasonable reintegration plan. The supporting narrative focuses on S.K.'s early lack of interaction with the children because she was in drug treatment and the unsuccessful efforts to engage either H.B. or E.K.'s putative father in the reunification process. On the whole, the points of severance do not outline ways supported in the evidence that S.K. was unfit at the time of the termination hearing.

We similarly find the grounds identified in the district court's orders to be lacking sufficient evidentiary support in the record to warrant termination of S.K.'s rights. First, the district court chided S.K. for failing to accomplish much on the reunification plan for some time. And that's true considering the numerical components of the plan. But S.K. appears to have devoted considerable time early in these proceedings to overcoming her substance abuse problem. Chronic substance abuse carries with it all sorts of collateral consequences that create looming barriers to family reunification—spotty employment and continuing exposure to criminal prosecution being among the most significant.

Moreover, S.K. later successfully undertook the bulk of the required tasks leading up to the termination hearing.

The district court found S.K. "has been unstable" without offering any additional explanation. We can't make any meaningful read of this finding absent some hint at the nature of the instability. People may be characterized as mentally or emotionally unstable if they have illnesses that make them volatile, eccentric, or less than rational. Similarly, someone might be labeled unstable if he or she can't or won't hold a steady job or acquire a fixed residence. But none of those conditions beset S.K. We decline to guess about the finding and consider it unsupported in the evidence.

As we have said, the district court recounted the poor physical and emotional condition of the children when they were removed from S.K. and Jimmy and placed in state custody. The children were indisputably in deplorable shape. They were in need of care under the Kansas Code, and S.K. plainly was unfit to parent them then. But the legal decision to terminate parental rights does not rest on a backward-looking determination of past unfitness; rather, it requires a finding of present unfitness coupled with the unlikelihood of change in the comparatively near future. So the district court's findings keyed to conditions as they were in September 2020 did not in and of themselves support termination of S.K.'s rights in July 2022.

The remaining findings of the district court revolve around S.K.'s ongoing relationship with Jimmy and the girls' markedly adverse responses to interacting with him during visits that were part of the reintegration plan. This presents a more intricate circumstance than the other findings. Initially, however, we recognize the dynamic among S.K., Jimmy, and the girls does not directly correspond to any ground of unfitness in the termination motion or the points of severance. And S.K. has not failed to carry out a task in the reunification plan directly tied to her continuing association with Jimmy.

In other cases, we have recognized that a parent's ongoing relationship with another adult considered detrimental to the children and contrary to an approved reintegration plan may support a termination order. See *In re W.R.*, No. 123,202, 2021 WL 1150179, at *7-8 (Kan. App. 2021) (unpublished opinion); *In re D.C.-R.*, No. 118,218, 2018 WL 1659794, at *4 (Kan. App. 2018) (unpublished opinion); *In re C.K.*, No. 115,755, 2017 WL 1197708, at *8 (Kan. App. 2017) (unpublished opinion); *In re C.W.*, No. 113,547, 2015 WL 5311260, at *18-19 (Kan. App. 2015) (unpublished opinion). We have viewed the parent's unwillingness to disengage from the problematic association as a failure to adjust his or her circumstances to meet the needs of the child—a form of unfitness under K.S.A. 38-2269(b)(8). See *In re A.T.*, No. 125,654, 2023 WL 3667581, at *6 (Kan. App. 2023) (unpublished opinion); *In re D.C.-R.*, 2018 WL 1659794, at *4.

Here, however, the reunification plan did not require S.K. to separate from Jimmy. Such a requirement understandably would have presented her with a distinctly difficult choice. We would be hard pressed to say S.K. could be found unfit for failing to take such a step absent its reasonable inclusion in the reunification plan, even if the State had sought to terminate based on K.S.A. 38-2269(b)(8).

Along the same lines, the district court's findings recognized that both E.K. and W.K.-B. reacted badly to being in Jimmy's presence (to understate matters). The children displayed strongly negative emotional responses, and E.K. acted out with physically self-destructive behavior consistent with her profound autism. With Jimmy in the residence, S.K. could not provide adequate housing for the children at the time of the termination hearing and fairly might be considered unfit for that reason because a safe, secure residence is an integral component of minimally adequate care. See *In re A.T.*, 2023 WL 3667581, at *6 (mother unfit because she refused to evict adult son from home despite his violent tendencies and his minor half-siblings deep-seated fear of him, rendering residence unsafe and, therefore, unsuitable); *In re B.C.*, 2022 WL 18046481, at *4-5

(father unfit while serving prison term because unable to provide suitable home for minor child and other "fundamental components" of reasonable reunification plan).

Even if we credit the district court's finding as to Jimmy and the effect his presence has had on the girls during visits as establishing S.K.'s present unfitness, the record fails to support the conclusion that the circumstances would be unlikely to change in the foreseeable future, thereby permitting termination. The record is bereft of evidence exploring, let alone attempting to explain, why the girls reacted to Jimmy as they have. Presumably, the caseworkers and the girls' therapists should have tried to discern the psychological foundations for their reactions. In turn, that reconnaissance presumably would guide formulation of a reasonable reunification plan. The plan could go in one direction if the girls' fears and anxieties could be alleviated in due course through counseling, with Jimmy remaining in the home, and quite another if the expert assessment concluded Jimmy posed a continuing threat to the girls' safety. The district court apparently did not receive any clinical evaluations of the historical and ongoing relationship between Jimmy and the girls, and we see nothing resembling that kind of information in the appellate record.

Likewise, the record contains no anecdotal evidence apart from what we have outlined bearing the relationships. Given that void, we cannot say the State sufficiently proved the turmoil E.K. and W.K.-B. experienced following the visits with Jimmy would have persisted indefinitely or that Jimmy posed an irremediable threat or danger to the children. That uncertainty remains an overarching impediment to family reunification. The other key impediment is S.K.'s apparent inability to mitigate E.K.'s emotionally and physically turbulent behaviors derivative of her profound autism. Again, nothing in the record suggests that deficiency could not be overcome through focused education and training for S.K.—much as E.K.'s foster placements have dealt with her condition. And that circumstance would not preclude reunification with W.K.-B. alone.

Those appear to have been the twin impediments to full and prompt family reintegration at the time of the termination hearing. But the State failed to establish they likely would thwart reintegration for the foreseeable future.

We, therefore, reverse the district court's conclusion that the State presented sufficient evidence S.K. was unfit and her unfitness was unlikely to change in the foreseeable future. The evidence fell short of establishing the statutory requirements for termination of parental rights in K.S.A. 38-2269(a), and the district court did not appear to rely on any presumptions of unfitness in K.S.A. 38-2271(a).

Legally proper findings of unfitness and unlikelihood of change operate in tandem as a necessary condition for a district court to then consider whether termination is in a child's best interests under K.S.A. 38-2269(g)(1). Because we have concluded the district court's unfitness finding to be insufficient, we also reverse the best interests finding on prudential grounds. The district court's ruling on best interests was premature, and the issue was not ripe for consideration. See *State v. Lumry*, 305 Kan. 545, 568-69, 385 P.3d 479 (2016); *Wilson v. State*, No. 116,318, 2017 WL 3669061, at *2 (Kan. App. 2017) (unpublished opinion) (premature consideration of claim implicates ripeness).

In closing out our review of the issues, we turn briefly to S.K.'s claim the district court erred in denying her request for a new lawyer and a continuance of the termination hearing. S.K. made the request the morning the hearing was to begin when she told the district court there had been a complete breakdown in communications with her lawyer, who she had retained partway through the proceedings. According to S.K., she wanted to call as witnesses at least a couple of caseworkers the State apparently did not intend to present at the hearing; but her lawyer had not taken steps to secure their testimony. The district court denied S.K.'s request to change lawyers and for a continuance of the termination hearing. S.K. has raised the denial as a claim of error. We need not reach the merits. Even if S.K. were correct—and we do not mean to imply she may be—the relief

would require setting aside the termination orders and remanding for further proceedings. As we explain, S.K. has otherwise obtained precisely that remedy, so our consideration of the denial of her request would be superfluous. We, therefore, decline the exercise.

The Remedy

We have reversed the district court's orders terminating S.K.'s right to parent E.K. and W.K.-B. Assuming our decision remains intact, the cases will be returned to the district court for further proceedings. More than a year will have elapsed since the termination hearing. We are confined to reviewing the appellate record and have no idea how S.K. or her daughters may have fared in that time.

Although we have set aside the district court's orders because the State failed to present sufficient evidence to support the motions to terminate, E.K. and W.K.-B. remain children in need of care under the Kansas Code, and our ruling does not alter their adjudication. See *In re R.F.*, No. 120,415, 2019 WL 2399448, at *5 (Kan. App. 2019) (unpublished opinion) (child remains adjudicated in need of care notwithstanding reversal of district court's termination order). As K.S.A. 38-2269(a) makes clear, the adjudication of a child as being in need of care is a legal prerequisite to seeking termination of a parent's rights. And denial of a motion to terminate neither undoes the adjudication nor requires dismissal of the case. Conversely, the Legislature has expressly provided that if a district court finds a child is not in need of care at the adjudication hearing, the case must be dismissed. K.S.A. 38-2251(a).

Moreover, E.K. and W.K.-B. continue to be children in need of care under the definition in K.S.A. 38-2202(d)(3) that the person needing care "has been physically, mentally[,] or emotionally abused or sexually abused" and is less than 18 years old when the petition is filed. They still satisfy that definition, since the subsection covers circumstances that have occurred before the adjudication hearing regardless of the child's

condition at some later time in the court proceedings. See *In re F.C.*, 313 Kan. 31, 40-41, 482 P.3d 1137 (2021).

Our decision, then, resets both cases to a procedural point in the district court after E.K. and W.K.-B. were adjudicated in need of care and before the State filed motions to terminate S.K.'s parental rights. On remand, the district court should examine the best path forward from that juncture, especially given the passage of time. Presumably, the examination would include a permanency hearing under K.S.A. 38-2264 to recalibrate the permanency plan to meet the statutory objectives balancing family reunification with the State's interests in protecting the well-being of its resident children. The permanency determination calls for an assessment of widely varied outcomes, as indicated in K.S.A. 38-2264(b), including prompt reunification, continued efforts toward reunification through an appropriate plan, or placement for adoption with termination of parental rights. We, of course, cannot and do not suggest a particular course going forward in the district court.

Conclusion

We reverse the district court's orders terminating the parental rights of S.K. to her daughters E.K. and W.K.-B. because the State failed to present clear and convincing evidence to persuade a reasonable fact-finder to a high probability that any possible grounds of unfitness on her part identified in the orders likely would persist for the foreseeable future. The unfitness findings focused on the presence of S.K.'s significant other in the household and her daughters' exceedingly negative reaction to him. But the evidence failed to establish the ostensible unfitness would persist for the foreseeable future.

Having set aside the district court's conclusion that S.K.'s parental rights properly could have been terminated, we reverse its assessment that the best interests of E.K. and

W.K.-B. favored termination. The best-interests issue was not ripe absent proper findings of unfitness and unlikelihood of foreseeable change and, thus, was prematurely addressed and decided.

S.K.'s challenge to the district court's termination finding under the ICWA is moot because we have otherwise reversed the determination based on Kansas law. Likewise, we do not consider S.K.'s point on appeal based on the denial of her request for a new lawyer and a continuance at the start of the termination hearing. The appropriate remedy on either of those points would be a reversal of the termination orders and remand for further proceedings—relief we have otherwise afforded S.K.

Reversed and remanded for further proceedings consistent with this opinion.