NOT DESIGNATED FOR PUBLICATION

No. 125,516

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of J.A., J.B.A., and I.A.,
Minor Children.

MEMORANDUM OPINION

Appeal from Ford District Court; SIDNEY R. THOMAS, judge. Opinion filed June 2, 2023. Affirmed.

Megan Weddle, of Doll Law Firm, LLC, of Dodge City, for appellant natural father.

Kathleen Neff, deputy county attorney, and *Kevin Salzman*, county attorney, for appellee.

Before COBLE, P.J., HILL and ATCHESON, JJ.

HILL, J.: Parents who are struggling with drug usage and serious criminal charges do not have an easy path to return to a normal life. While they wrestle with their demons, their children must live in a state-created temporary world of foster care. As the parents' struggles continue, the question arises, "How long will the children have to wait before they can return home with their parents?" One year? Two? Ten? Often, the answers to those questions must be considered when a district court contemplates the termination of parental rights. This appeal presents such a decision.

B.A., a father of three to J.A., J.B.A., and I.A., appeals the termination of his parental rights to his children. We review the record, the findings of the court, and the legal authority the court relied on. Our review reveals no error and there is evidence supporting the court's findings. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The case history begins with drug usage and trouble with the law.

The three children were born about a year apart. J.A. was born in 2016; J.B.A. in 2017; and I.A. in 2018. Father and T.A., the Mother, are the natural parents of the children. We note that the district court eventually terminated the parental rights of both parents, but Mother is not part of this appeal.

J.A. and J.B.A. were the subject of a 2017 child in need of care case. At the time, J.B.A. had just been born and had, at birth, tested positive for methamphetamine and marijuana. Mother admitted to using both during her pregnancy. Both J.A. and J.B.A. were placed in the custody of the Kansas Department for Children and Families and were later adjudicated as children in need of care. After some time, Father completed his case plan tasks and the children were reintegrated with him in January 2018.

The State filed child in need of care petitions for all of the children after Father was arrested in January 2021 when J.A. alleged Father had sexually abused her. Mother was arrested later for an active warrant. That arrest left no one to care for the children.

At a temporary custody hearing, the children were placed in the Department's custody. Mother appeared at that hearing, but Father did not. The children were also not present, but they were represented by their appointed guardian ad litem. In April 2021, the parents were both assigned case plan tasks to complete so they could be reunited with the children.

About a month later, Father appeared at an adjudication hearing and requested that counsel be appointed for him. The court did so and continued the hearing. But in June 2021, Father tested positive for methamphetamine at an unrelated court hearing and was

put in jail for a bond violation. The month after that, the court held another adjudication hearing, and Father entered a no contest statement in all three child in need of care cases. With that stipulation, the court ruled that the children were in need of care and ordered them to remain in the Department's custody. The court also ordered a dual case plan for the reintegration of the children with both parents. The court conditioned parental visitation upon drug-free urinalysis tests and ordered Mother and Father to pay child support each month.

As the parents' circumstances deteriorated, the case goal shifted to termination.

In August 2021, both Mother and Father were arrested for possession of methamphetamine with intent to distribute, and both were eventually charged in separate criminal cases. When Father's case workers at Saint Francis Ministries heard he had been arrested, they asked him to submit to a drug test, but he refused to do so.

By the time of the court's review hearing in November 2021, Father had accomplished a few of his case plan tasks, but his progress had been hindered because of the time he had spent in jail. The court ordered the children to remain in the Department's custody and scheduled a permanency hearing. Following the permanency hearing, in which Father appeared by video, the district court found that reintegration was no longer workable and ordered a termination hearing for all three of the child in need of care cases.

Eventually, in March 2022, the State moved for a finding of unfitness and termination of parental rights for both Mother and Father to all three children. The children were six, five, and four years old.

At the severance hearing, the court heard evidence on the status of these children and what possibilities were in their futures.

The State offered two witnesses in support of its motion to terminate the parents' rights. Father testified and the guardian ad litem offered information to the court.

Santana Treto, a family support worker with Saint Francis Ministries, testified. Treto was assigned to the case in March 2021. When the case began, Treto said she had fairly consistent contact with Father, until around November 2021. At the hearing in November, the district court found that reintegration was no longer viable for Father and the children. Later, Father allegedly threatened Treto and was arrested for making the threat. Father was then not allowed to have contact with Treto, and he remained incarcerated since that time.

Treto also said Father never notified her about his other pending criminal charges, and she learned about them on her own. Father did complete a drug and alcohol assessment, but he did not follow the recommendations of that assessment. Likewise, Father failed to complete a parenting class, create a parenting plan, and follow the court orders in both the child in need of care case and the pending criminal case. Father did sign all the necessary forms for a complete mental health assessment, though Treto said he never followed the recommendations of that assessment.

Elizabeth Crosswhite, a permanency specialist with Saint Francis Ministries, testified. Crosswhite was assigned as permanency specialist in the case sometime in October or November 2021. At that time, Father was in jail and had not completed many case plan tasks. Crosswhite, who served as permanency specialist in the case for about three months, said she could not visit Father in jail because of the ongoing pandemic. Even so, Crosswhite called Father and sent him one letter each month. The letters asked

Father to contact her about the children, but Father never answered her phone calls nor responded to her letters. As a result, Crosswhite never had any contact with Father.

Father testified. He said he completed a mental health assessment, a drug and alcohol evaluation, and signed all necessary releases. As for Crosswhite, Father said he had never met her, though he had tried to contact her a couple of weeks before going to jail in November 2021. Father denied ever receiving any sort of correspondence from Crosswhite asking him to contact her. Similarly, Father said that jail staff never informed him that a Saint Francis Ministries employee had called the jail. The only thing he remembered receiving was a manila envelope telling him about the termination hearing. Father admitted he also never tried to contact Saint Francis Ministries while he was incarcerated.

He did offer that he wrote out what he believed to be a parenting plan and sent it to his counsel. In that plan, Father explained that he had found employment and outlined how he would get the children back. Father believed his counsel would then forward the parenting plan to the agency, which would allow him to move forward in the case. Father also believed that writing this letter would fulfill his obligation to prepare a parenting plan as one of his case plan tasks. He said no one at the agency ever told him that the case plan task would not be considered complete unless Mother also participated. This made little sense to Father, as he considered his and Mother's case plans separate since he had not been communicating with her.

While in jail, Father said he could not communicate with Mother then, either. Father also testified that he had limited opportunity to progress through the case plan while incarcerated because he could not visit the children. Father acknowledged the no-contact order with J.A. and said he never tried to violate that order. He also said that he wanted to be reintegrated with the children.

On cross-examination, Father admitted that he had three criminal cases pending. In January 2021, Father was charged with rape of a child, and J.A. was the alleged victim. A few months later, Father was charged with possession of methamphetamine with intent to distribute. And in the final case, Father was charged with aggravated criminal threat of Treto in November 2021. Since then, Father had remained incarcerated, though he hoped he might be released on bail soon if given a bond reduction.

If he posted bail, Father planned to implement the ideas described in the plan he had sent to his counsel. He said he planned to participate in outpatient treatment, though he acknowledged he did not make arrangements to do so. As for J.A., Father said the no-contact order would be lifted after he was acquitted in his criminal case, which was scheduled for December 2023. Father also suggested he could return to the job he had before being incarcerated—a food delivery driver. He estimated it would take about two months after posting bail before he could arrange suitable housing for the children.

Father based that estimate on the amount of money he made working as a food delivery driver. He worked that job from September to November 2021, until he was arrested again. Since being incarcerated, he had no income, which explained why he failed to pay child support. Before working for the food delivery service, Father had a job at Lariat Feedyard, which he held for about four or five years. The children were removed from Father's care around the time he lost that job, and Father said several months passed before he started working for the food delivery service.

After hearing the summation of the parties, the district court reiterated much of the witness testimony, specifically finding Crosswhite credible and Father not very credible. The district court then stressed that Father accomplished very few case plan tasks before being incarcerated, and he essentially stopped participating after incarceration. For the few tasks Father accomplished, he failed to follow through with the recommendations

given to him. For these reasons, the district court found Father unfit and terminated his parental rights to all three children.

ANALYSIS

Father raises two issues in this appeal. He contends that the court's finding of his unfitness is not supported by clear and convincing evidence and asks us to reverse and remand the case for a second try at parenting. In his second issue, Father contends he was hampered by ineffective assistance of his counsel and asks us to reverse and remand for a second trial. We will begin with the evidence of Father's unfitness to parent.

When we review such questions, we are required by law to review the evidence in a light most favorable to the State and decide whether a rational fact-finder could have found that the determination of unfitness to parent is highly probable—that is to say, supported by clear and convincing evidence. In making this determination, we will not weigh conflicting evidence, nor pass on the credibility of witnesses, nor redetermine questions of fact. See *In re B.D.-Y.*, 286 Kan. 686, 705-06, 187 P.3d 594 (2008).

According to K.S.A. 38-2269(a), the State must prove a 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." The statute provides district courts with a nonexclusive list of nine factors to consider when determining unfitness. K.S.A. 38-2269(b). Clear and convincing evidence of a single statutory factor under K.S.A. 38-2269(b) can be a sufficient basis for a district court's determination that a parent is unfit. K.S.A. 38-2269(f).

Here, the district court found that the evidence supported termination of Father's parental rights under several sections of the statute: K.S.A. 38-2269(b)(1), (b)(2), (b)(3),

(b)(4), (b)(7), (b)(8), (c)(3), and (c)(4). Our review of the record reveals that evidence supports the court's finding of unfitness in many sections of this law.

K.S.A. 38-2269(b)(2):

A district court may terminate a parent's rights to children if there is clear and convincing evidence of "conduct toward a child of a physically, emotionally or sexually cruel or abusive nature." K.S.A. 38-2269(b)(2).

The evidence that the district court relied on under this factor was Father's pending rape case in which J.A. was the alleged victim. The district court took judicial notice of Father's pending rape case, but there was no testimony at the termination hearing concerning Father's physical, emotional, or sexual abuse of the children.

K.S.A. 38-2269(b)(3):

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

Here, the district court found Father's drug use was a primary factor that prevented him from caring for his children. The evidence showed that Father's drug use hindered him from caring for the children. The district court also noted that Father had used a masking agent to try to conceal his drug use when being tested.

Father emphasizes that he had only one positive urinalysis test during the duration of the proceedings. But, in fact, Father's drug use presented an obstacle to succeeding in the case. From July 2021 through September 2021, Father passed one weekly drug test.

As Father acknowledged, he was arrested for possession of methamphetamine with intent to distribute in August 2021, just a few months after the case began. And when Father was asked to submit to a drug test after Saint Francis Ministries workers found out about his arrest, he refused to do so. Father's bond supervisor also reported to the agency that he had been caught using synthetic urine for his urinalysis bond checks. Father's inability to refrain from drug use also hindered progress in other areas of the case. As stated above, visitation was conditioned upon having clean urinalysis tests. Because of Father's drug use, as well as his time spent in jail based in part on that drug use, there were no visitations.

K.S.A. 38-2269(b)(4):

A district court may also terminate a parent's rights if there is clear and convincing evidence of "physical, mental or emotional abuse or neglect or sexual abuse of a child." K.S.A. 38-2269(b)(4).

Again, the only evidence that the district court relied on under this factor was the existence of Father's pending rape case in which J.A. was the alleged victim.

K.S.A. 38-2269(b)(7):

A district court may terminate a parent's rights 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).

Caselaw states that this law imposes an obligation upon the relevant social service agencies to expend reasonable efforts toward reintegrating the child with their parents. *In re A.P.*, No. 121,913, 2020 WL 3022868, at *10 (Kan. App. 2020) (unpublished opinion). This requirement provides a parent with an opportunity to succeed, but to do so requires

the parent to exert some effort. *In re. A.P.*, 2020 WL 3022868, at *10 (citing *In re M.S.*, 56 Kan. App. 2d 1247, 1257, 447 P.3d 994 [2019]).

Here, the district court found that Saint Francis Ministries made appropriate efforts in trying to reintegrate the family. This factor is supported by the record.

Treto testified that she had fairly consistent contact with Father from the beginning of the case until about November 2021. In April 2021, the parents were both given case plan tasks to complete to work towards reintegration with the children, and Father completed a few of his case plan tasks. But in late November 2021, Father threatened Treto and was eventually charged with aggravated criminal threat. Then Father was not allowed to have contact with Treto.

Crosswhite also testified about the efforts made concerning Father. She was assigned as the permanency specialist in the case in October or November 2021 and remained in that position for about three months. During that time, Father was incarcerated, and Crosswhite could not visit him in jail because of the ongoing pandemic. Even so, Crosswhite called Father and sent him one letter each month. The letters asked Father to contact the agency about the children, but Father never answered the phone calls or responded to the letters. As a result, Crosswhite never had any contact with Father.

Father argues that these actions should not be considered reasonable but at the same time, ignores his own actions in the case. For instance, he criticizes Crosswhite for only trying to contact him once per month, but he ignores the fact that he admitted he never tried to contact the agency while in jail. Father also fails to acknowledge that his own actions—threatening the case worker—caused him to be in jail. This made it harder for the agency to work with him to accomplish the case plan tasks.

K.S.A. 38-2269(b)(8):

A district court may terminate a parent's rights if there is clear and convincing evidence 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).

Here, the district court found that Father failed to make the necessary changes in his life so that the children could be reintegrated. This factor is also supported by the record.

Rather than try to create a home for his children, Father has been arrested three times since the case began, with his original arrest in January 2021 serving as the basis for the child in need of care petitions. Father was released on bail in February 2021, but he was again arrested in August 2021 and charged with possession of methamphetamine with intent to distribute. Father was released on bail again in September 2021, but he was again arrested and charged with aggravated criminal threat in November 2021. When we look at the evidence in the light most favorable to the State, as we are legally required to do, we see that a felonious threat allegedly made to one of the workers here is not the way to secure the return of your children. His actions created another roadblock to their return. Since then, Father has remained incarcerated, and he admitted he never reached out to the agency while in jail.

When Father was not in jail, he was unemployed for most of the time during the case. Though he did accomplish some of his case plan tasks, such as the mental health and drug and alcohol assessments, he failed to follow through with the recommendations of those assessments. Father also failed to notify Treto about his new criminal charges throughout the case, leaving her to find out on her own.

In short, Father failed to refrain from alleged criminal activity throughout the duration of the case. His time spent in jail hampered his ability to progress in other areas of the case. And even when he was not in jail, he still failed to make meaningful progress in other areas of the case. These actions are Father's own fault, and his inability to change his conduct during the case made it impossible for the children to reintegrate.

Of all the subsections of the statute that the district court relied on, the evidence here is the strongest. The record shows no adjustment or even an attempt at an adjustment by Father to meet the needs of his children. You cannot parent in jail.

K.S.A. 38-2269(c)(3):

A district court may also terminate a parent's rights if the child is not in the parent's physical custody and there is clear and convincing evidence the parent failed "to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home." K.S.A. 38-2269(c)(3).

The district court found that Father failed to accomplish many of the case plan tasks geared towards reintegrating the children back into his home. This factor is supported by the record.

Father had several case plan tasks to accomplish in April 2021. These included:

- complete a mental health assessment and follow its recommendations;
- complete a drug and alcohol assessment and follow its recommendations;
- complete a parenting class;
- create a parenting plan;
- follow all court orders from his child in need of care and criminal cases;
- do not incur more criminal charges;

- maintain contact with the agency;
- notify the agency of any phone number changes;
- sign all consent forms for the agency; and
- do not contact J.A.

Father contends he completed eight of these tasks, but his argument is unconvincing.

Father did complete a mental health assessment and a drug and alcohol assessment. He also signed all necessary consent forms for Saint Francis Ministries and had no contact with J.A. There was no testimony on Father's phone number ever changing. But those were the only tasks Father fully completed.

As Treto testified, Father did not follow the recommendations of either the mental health assessment or the drug and alcohol assessment. Father testified that he received some mental health services, but the district court questioned his credibility on the issue based on a lack of verification. Father signed up for a parenting class, but he failed to complete it because he was in jail. Father tried to create a parenting plan, but his plan did not comply with the agency's requirements. As evidenced by his arrests, Father failed to follow court orders and refrain from incurring more criminal charges. Finally, Father at first maintained contact with Saint Francis Ministries but stopped communicating around November 2021. For these reasons, Father failed to carry out a reasonable plan directed toward reintegration. See K.S.A. 38-2269(c)(3).

K.S.A. 38-2269(c)(4):

Finally, a district court may terminate a parent's rights if the child is not in the parent's physical custody and there is clear and convincing evidence the parent failed "to pay a reasonable portion of the cost of substitute physical care and maintenance based on ability to pay." K.S.A. 38-2269(c)(4).

Here, the district court relied on the fact that Father failed to pay child support when concluding this factor applied to his case. In July 2021, the district court ordered Father to pay $25 for each child per month in child support. During the termination hearing, Father acknowledged that he had not done so.

In sum, the record supports the district court's termination of Father's parental rights under several subsections of K.S.A. 38-2269(b) and (c). Clear and convincing evidence of a single statutory factor under K.S.A. 38-2269(b) can be a sufficient basis for a district court's determination that a parent is unfit. K.S.A. 38-2269(f).

We hold that the district court's finding of unfitness to parent is supported by clear and convincing evidence. We affirm the court's finding that Father is unfit to parent the children.

The law requires the court to forecast Father's future.

In the termination process, a court must not only decide whether a parent is unfit, but it must also determine whether the conduct or condition is unlikely to change in the foreseeable future. K.S.A. 38-2269(a).

When forecasting the foreseeable future, courts must measure time from the child's point of view. The Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq., recognizes that 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. That different perception typically impels a court toward a prompt, permanent disposition for the child. 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).

The questions are thus manifest. How long must the children remain in the temporary world of foster care? How long are Father's legal troubles going to last? If convicted, how long will his sentence or sentences be?

Father's primary contention about the foreseeable future is that he believed he would get a bond reduction in his criminal cases shortly after the termination hearing. If given the bond reduction, Father would be released on bail and start working to reintegrate the children. But Father's argument on this issue is more wishful than real.

During the termination hearing, he testified that he most likely would be unable to be released on bail without a reduction. Father also did not give any sort of timeline on the bond reduction, other than saying he expected it would occur soon. Father also overlooks the fact that, even if he was released on bail, he still could not have any contact with J.A. until the case in which she was the alleged victim was resolved. That case was scheduled for trial during December 2023, which was more than a year after the termination hearing.

Nor does Father acknowledge the status of his other unresolved criminal cases. For his possession of methamphetamine with intent to distribute case, Father had an arraignment scheduled for the month following the termination hearing. Father also had a preliminary hearing for his aggravated criminal threat case the same day. Thus, Father's three criminal cases remained unresolved as of the termination hearing. Father's purported plans to work towards reintegration hinged on the outcomes of those cases.

Father has made no progress throughout the case. Though he was able to complete some of the case plan tasks, he failed to complete others and failed to follow through with the recommendations for some tasks he did complete. This court has stated that "[t]he best indicator of future performance is past performance. Accordingly, courts can consider a parent's past history as evidence regarding the reasonable likelihood of any

change in parental fitness." *In re S.A.*, No. 123,556, 2021 WL 4224894, at *9 (Kan. App. 2021) (unpublished opinion) (citing *In re Price*, 7 Kan. App. 2d 477, 483, 644 P.2d 467 [1982]), *rev. denied* 315 Kan. 968 (2022). Given Father's inability to stay out of jail and consistently progress throughout the case, the district court did not err by concluding Father's conduct or condition would not change in the foreseeable future.

Best interests of the children

Father does not make any argument related to the children's best interests. See K.S.A. 38-2269(g)(1). Thus, we deem the issue waived or abandoned. See *In re Marriage of Williams*, 307 Kan. 960, 977, 417 P.3d 1033 (2018).

We decline to review Father's claim of ineffective assistance of counsel.

For the first time on appeal, Father argues he received ineffective assistance of counsel. He believes he received ineffective assistance because his trial counsel was not prepared for trial and failed to adequately cross-examine witnesses.

This court has also considered such claims in termination of parental rights cases. See, e.g., *In re Rushing*, 9 Kan. App. 2d 541, 545-47, 684 P.2d 445 (1984); *In re L.B.*, No. 124,538, 2022 WL 2392681, at *2 (Kan. App. 2022) (unpublished opinion). But appellate courts generally will not consider an allegation of ineffective assistance of counsel raised for the first time on appeal. See *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019).

There are factual aspects to a claim of ineffective assistance of counsel that must be resolved first. After all, the district court "observed [trial] counsel's performance and . . . is in a much better position to consider counsel's competence than an appellate court is in reviewing the issue for the first time from a cold record." *State v. Van Cleave*,

239 Kan. 117, 119, 716 P.2d 580 (1986). Because Father makes the argument for the first time now, the district court never held an evidentiary hearing on the issue.

In criminal cases this can be accomplished through a K.S.A. 60-1507 motion or through a request for remand to the district court so it can resolve the facts related to the claim. But the appellate court will only remand a case to the district court when the ineffective assistance of counsel claim shows merit. *Van Cleave*, 239 Kan. at 119-21.

In rare cases, an appellate court may consider a claim of ineffective assistance of counsel for the first time on appeal only when there are no factual issues that must be resolved and the two-prong ineffective assistance of counsel test—deficient performance and resulting prejudice—can be applied as a matter of law based on the appellate record. *Salary*, 309 Kan. at 483-84. But no court has ruled that the *Van Cleave* remand procedure applies in parental rights termination cases. And we will not so rule in this case.

We see no basis in the record for remanding the case to the district court on our own motion to order it to consider Father's ineffective assistance of counsel claim. Nor is there any reason for us to address the conclusory claims Father offers. See *In re L.B.*, 2022 WL 2392681, at *4. Nothing in the record supports his argument that counsel was unprepared for the termination hearing. And even though counsel at first had trouble admitting an exhibit during the termination hearing, the exhibit ultimately was admitted.

We decline to entertain this issue for the first time on appeal.

To sum up, we recognize the difficult decision for the district court here. Father wants to be a parent but cannot take any real steps to change his circumstances so he can provide a home for his young children. The court recognized the struggles Father was having with his drug usage and criminal prosecutions. Frankly, the district court did not

believe Father would or could change his conditions to the extent that he could provide a home and care for his children. The evidence supports that conclusion.

Affirmed.

* * *

ATCHESON, J., concurring: While I agree the Ford County District Court properly terminated Father's right to parent his three young children, that decision rests on considerably narrower grounds than the district court articulated in its order and that my colleagues seem to rely on in affirming the ruling. Moreover, I offer a fuller outline of how claims of ineffective legal representation ought to be addressed in termination of parental rights proceedings. But, like my colleagues, I conclude Father has not made a sufficient initial showing of ineffectiveness to warrant further consideration of the point.

TERMINATION OF FATHER'S PARENTAL RIGHTS

As to the first matter, the district court made a bench ruling at the conclusion of the termination hearing that was broader than the grounds for termination in the written order filed later. A signed order controls over a corresponding oral recitation in civil actions. *Steed v. McPherson Area Solid Waste Utility*, 43 Kan. App. 2d 75, 87, 221 P.3d 1157 (2010). We have consistently applied that principle to district court decisions under the Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq. *In re R.J.*, No. 122,230, 2021 WL 137346, at *10 (Kan. App. 2021) (unpublished opinion) (termination of parental rights); *In re I.G.*, No. 122,010, 2020 WL 2296918, at *2 (Kan. App. 2020) (unpublished opinion) (termination of parental rights); *In re N.M.*, No. 118,652, 2018 WL 2749803, at *8 (Kan. App. 2018) (unpublished opinion) (in need of care finding). I, therefore, confine myself to the grounds of unfitness the district court stated in its filed order of termination.

The district court applied K.S.A. 38-2269(b)(1) to find Father unfit because he was unable to meet the physical, mental, and emotional needs of the children as the result of his mental illness. The sole basis for the district court's conclusion seems to be Father's testimony at the termination hearing that he had been diagnosed with depression in a mental health evaluation done as part of the family reintegration plan. No lay or expert witness testified Father's depression impaired his capacity to care for the children. So any deficiencies in Father's parenting—and there were some—may have existed contemporaneously with his depression, but there was nothing establishing a causal link between the two. Cf. *Kuxhausen v. Tillman Partners*, 291 Kan. 314, 320-21, 241 P.3d 75 (2010) (characterizing expert opinion resting on *post hoc ergo propter hoc* causation as "nothing more than speculation" and, therefore, "totally lacking in a factual basis"). In short, there was insufficient evidence for us to say a reasonable fact-finder could have concluded it highly probable Father had a mental illness rendering him an unfit parent. See *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008) (setting out standard of appellate review for unfitness finding that requires proof by clear and convincing evidence in district court). The majority omits any discussion of this aspect of the district court's decision.

The majority discusses statutory unfitness under K.S.A. 38-2269(b)(2) and (b)(4) and suggests—but never directly says—those grounds were insufficiently supported in the evidence because the district court relied solely on judicial notice of the pending criminal case in which Father had been charged with raping his daughter. In its written order, the district court did not cite those subsections of K.S.A. 38-2269(b). They cannot be given any legal effect against Father for that reason, even though the district court may have mentioned them in speaking from the bench at the end of the termination hearing.

I would agree that an unresolved criminal case, i.e., one in which a finding of guilt had not yet been rendered, would not in and of itself establish the charged offense or the constituent factual allegations by clear and convincing evidence. To begin a criminal

case, the State need only present an information and charging affidavit to a district court showing probable cause to believe a crime has been committed and the named defendant has committed it. In the unusual prosecution begun by indictment, the grand jury would be governed by the same probable cause standard. See K.S.A. 22-2301(1). Probable cause entails a far lower quantum of proof than does the clear and convincing evidence standard governing termination proceedings. The criminal file alone, therefore, would not sufficiently support an unfitness finding.[*]

[*] In a proceeding under the Revised Kansas Code for Care of Children, the State could present witnesses and other evidence at a termination hearing to clearly and convincingly prove the facts underlying a pending criminal charge against a parent. If the district court so credited that evidence, it could then rely on the proved facts to support an unfitness finding. The State did not offer such evidence in this case.

The district court also relied on three grounds of unfitness described in K.S.A. 38-2269(c) that may be applied when the children have been out of the parental home for at least 15 of the preceding 22 months beginning 60 days after their removal and placement in state custody. K.S.A. 38-2269(b)(9). The record indicates the three children were taken into emergency custody in March 2021 and, thus, removed from the parental home at that time. Father was already subject to a no-contact order with his daughter issued in the criminal case. Compliance with that order would require that he no longer reside with his daughter, rather than the children being removed from the parental home. The district court held the termination hearing on July 5, 2022—less than the 15 months required in K.S.A. 38-2269(b)(9) taking account of the 60-day waiting period immediately following the removal of the children from the home. Accordingly, the grounds for unfitness in K.S.A. 38-2269(c) do not apply as a matter of law.

That leaves three statutory bases the district court cited in its order of termination:

- "[T]he 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);

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

- 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).

Those grounds often factually overlap and interlock in a given termination proceeding, as this case illustrates.

Father and the children's mother have both tested positive for methamphetamine. The couple was arrested and charged with possession of methamphetamine with intent to distribute during these proceedings. That charge came on top of the rape case. Although Father was eventually released on bond in those criminal cases, he was charged with felony criminal threat in November 2021 for statements he made to a caseworker. Father remained in pretrial detention from then through the termination hearing in July 2022. At the termination hearing, Father speculated—without any substantive support—that he might obtain a bond reduction in the three criminal cases. Absent that, Father testified the rape case had been scheduled for trial in December 2023. Father ventured that he would be found not guilty and would need, perhaps, six months to obtain employment and housing to reunite with the children.

In the meantime, Father has had no contact with his daughter and only limited contact with his sons. While in jail, Father did not communicate regularly or effectively with the social service agency. Father's extended incarceration, albeit as a pretrial detainee awaiting adjudication on several serious felonies, prevented him from fulfilling basic and, indeed, essential parental obligations by providing suitable housing and

financial support for his children. We have regularly recognized that an incarcerated parent typically cannot meet either the material or the emotional needs of his or her minor children and is, therefore, presently unfit. See *In re M.H.*, 50 Kan. App. 2d 1162, 1172, 337 P.3d 711 (2014); *In re S.D.*, 41 Kan. App. 2d 780, 790, 204 P.3d 1182 (2009); *In re M.D.S.*, 16 Kan. App. 2d 505, 509-10, 825 P.2d 1155 (1992); *In re B.C.*, No. 125,199, 2022 WL 18046481, at *4 (Kan. App. 2022) (unpublished opinion). One panel stated the consideration this way:

> "Not to put too fine a point on it, a person in prison typically cannot provide the physical supports associated with parenting a child, such as suitable housing, food, and clothing. Moreover, the parent is in no position to offer any sort of continuing moral or emotional direction for the child, let alone daily or otherwise routine positive interactions." *In re A.P.*, No. 121,537, 2020 WL 499816, at *4 (Kan. App. 2020) (unpublished opinion).

In those cases, the parents had been convicted of felonies and were often serving lengthy prison sentences. Here, as we have said, Father was incarcerated awaiting disposition of the three criminal cases lodged against him. His status as a pretrial detainee does not, however, affect his capacity (or lack of capacity) to parent the children. As we recently pointed out: "Ultimately, parental unfitness under the Code is not fault based but, rather, turns on a parent's ability to sufficiently care for his or her child." *In re B.C.*, 2022 WL 18046481, at *4; see also *In re M.P.*, No. 119,444, 2019 WL 2398034, at *4 (Kan. App. 2019) (unpublished opinion); *In re A.L.E.A.*, No. 116,276, 2017 WL 2617142, at *6 (Kan. App. 2017) (unpublished opinion). At the time of the termination hearing, Father was unfit.

The evidence showed that Father's continuing use of methamphetamine played a substantial part in his incarceration and his inability to parent his children. Likewise, the social service agency could do little to render Father presently fit as a parent, since he remained in jail despite those efforts. And Father exercised little to no initiative to

interact with the agency or to communicate with his sons. He continued to place himself in questionable circumstances lending themselves to criminal charges. Father, thus, displayed an inability to adjust his conduct to meet the needs of the children. Whether the remaining statutory grounds were viewed individually or as a constellation of factors, they depicted an unfit parent. See *In re M.P.*, 2019 WL 2398034, at *5 (parent correctly deemed unfit if he or she "unable to care properly for a child" under K.S.A. 38-2269[a] even if circumstances do not precisely fit within any category illustrative of unfitness in subsections [b] or [c]).

With a pretrial detainee, the salient inquiry would more commonly ask whether the condition of unfitness resulting from his or her incarceration may be likely to change in the foreseeable future. The disposition of the pending criminal charges might result in a comparatively short term of incarceration as punishment or a grant of probation from confinement. In that circumstance, the parent might be able to reunify with the children in a reasonable time. But reasonableness equating to the foreseeable future must be measured in "child time"—a recognition that children, particularly younger ones, experience the passage of time differently from adults, so that a year to them seems much longer than it would to an adult. 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"). I agree that here Father cannot show that his unfitness will materially change for the better in a reasonable time, especially measured against the young ages of his children, the time they have already been in state custody, and how temporally remote any prospect for family reunification would be. Crediting Father's estimate at the termination hearing, he would be ready to resume parenting in mid-2024—about two years later. Coupled with the duration of the proceedings to that point, the continued delay would undercut any fair notion of permanency or stability for the

children. See K.S.A. 38-2201(b)(9); *In re A.P.*, 2020 WL 3022868, at *14; *In re D.C.-R.*, No. 118,218, 2018 WL 1659794, at *4 (Kan. App. 2018) (unpublished opinion).

Finally, those considerations, particularly the duration of Father's separation from the children and his lack of strong preexisting relationships with them, support the district court's determination that the best interests of the children lay in termination of the parental relationship. The district court makes the best interests determination based on a preponderance of the evidence, and we review the decision for abuse of discretion, a notably relaxed standard. *In re R.S.*, 50 Kan. App. 2d 1105, 1115-16, 336 P.3d 903 (2014); see *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013) (outlining abuse of discretion standard). I agree there was no abuse.

INEFFECTIVE LEGAL REPRESENTATION

Represented by a new lawyer on appeal, Father contends he received materially deficient legal representation leading up to and during the termination hearing in the district court, so we should set aside the termination order. The majority essentially assumes there is a right to effective legal representation in child in need of care proceedings and finds Father has failed to show a violation of that assumed right. In his appellate brief, Father has made only generic assertions of ineffective legal representation in the district court. I agree a parent must do more to engage the issue for further consideration and, therefore, concur in rejecting Father's requested relief—reversal of the termination order and remand to permit additional time for family reintegration. But I see no reason to avert recognizing the right to effective legal representation in termination proceedings and discussing how to present a claim for violation of the right.

Substantive Standard for Assessing Ineffectiveness Claims

In analyzing this issue, we need to focus first on the nature of what is at stake in a termination hearing. Individuals have a fundamental right to parent their children recognized as a liberty interest protected in 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) (liberty interest); *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (fundamental right); *In re B.D.-Y.*, 286 Kan. at 697-98 (citing *Santosky*). A narrow majority of the United States Supreme Court held that parents have a conditional constitutional right to legal representation in a termination proceeding grounded in the Due Process Clause of the Fourteenth Amendment as a means of protecting the concomitant liberty interest in raising their children. See *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 31-32, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). So indigent parents constitutionally must be appointed lawyers in termination proceedings if the "complexity" of issues in a particular case combined with the "incapacity" of the "uncounseled parent" creates an "insupportably high" risk of an erroneous deprivation. 452 U.S. at 31. Four dissenting justices would have found a categorical constitutional right to legal representation in termination proceedings. 452 U.S. at 35 (Blackmun, J., dissenting, joined by Brennan, J., and Marshall, J.); 452 U.S. at 59 (Stevens, J., dissenting).

The distinctly amorphous constitutional standard for legal representation appropriates the one recognized in *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), for probation revocation proceedings. The approach suffers from a glaring practical problem: The district court must predict at the start of the proceedings their complexity and the parent's ability to self-represent in deciding whether to appoint a lawyer—a forward-looking determination assessing unknowns through no more than guesstimation. But a decision against appointing a lawyer will be reviewed on

appeal looking backward at an actual hearing record from which it may be obvious that the self-represented parent could not and did not manage the task.

In the typical case, the State, as the driving force, will be represented by a lawyer throughout the proceedings. The rules of evidence apply, and that evidence often entails testimony from social workers, mental health providers, and other skilled professionals. Navigating that terrain would pose a formidable challenge for almost anyone without legal training. The risk for a reversible error, therefore, runs high. Moreover, the parent's failure to marshal favorable evidence or to effectively rebut the State's evidence may be wholly inscrutable in the record, leaving in place the very sort of erroneous deprivation of a protected liberty or property interest the Due Process Clause is supposed to prevent. See *Lassiter*, 452 U.S. at 50-51 (Blackmun, J., dissenting); *In re T.M.*, 131 Haw. 419, 435-36, 319 P.3d 338 (2014); see also *State v. Gonzalez*, 57 Kan. App. 2d 618, 624, 457 P.3d 938 (2019) (recognizing substantial risk of reversal in probation revocation hearings if lawyers appointed for probationers on case-by-case basis).

Kansas has sidestepped the procedural problems with the ad hoc due process standard for legal representation by statutorily requiring the appointment of lawyers for indigent persons facing either the termination of parental rights or the revocation of probation. K.S.A. 2022 Supp. 22-3716(b)(2) (upon request, district court must appoint lawyer to represent indigent probationer facing revocation); K.S.A. 38-2205(b) (appointment of lawyer for parent in child in need of care proceedings). The Kansas appellate courts have routinely held that a lawyer statutorily appointed for an indigent litigant is obligated to provide competent representation. See *State v. Galaviz*, 296 Kan. 168, 177, 291 P.3d 62 (2012) (statutory right to lawyer in probation revocation, in turn, triggers constitutionally protected right to competent representation); *Brown v. State*, 278 Kan. 481, 483-84, 101 P.3d 1201 (2004) (lawyer appointed to represent movant in habeas corpus proceeding under K.S.A. 60-1507 had duty to provide competent representation); cf. *In re Care & Treatment of Ontiberos*, 295 Kan. 10, 20, 287 P.3d 855 (2012) ("[W]hen

there is a right to counsel there is necessarily a correlative right to effective counsel—regardless of whether the right derives from a statute or the constitution."). Indeed, the right to an appointed lawyer would be shrunk to little more than a pretense absent a concomitant duty of adequate representation. The lawyer's duty to the client presumably creates a constitutionally protected due process right, given the fundamental character of the parent-child relationship at stake in termination proceedings. See *Galaviz*, 296 Kan. at 177.

As the majority observes, our court has acknowledged that a parent in a termination proceeding has the right to competent legal representation. Nearly 40 years ago, the court accepted the parties' assumption that a parent's appointed lawyer in a termination proceeding owed the client a duty of effective representation. *In re Rushing*, 9 Kan. App. 2d 541, 545, 684 P.2d 445 (1984) ("[T]he parties take it for granted . . . [Father] was entitled to effective assistance of counsel. We agree."). The court analogized the right to the guarantee of legal representation afforded criminal defendants in the Sixth Amendment to the United States Constitution and drew heavily on *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)—companion cases decided a month earlier that have substantially shaped the standards governing a criminal defendant's constitutional right to effective counsel. In *Strickland*, the Court recognized an error and prejudice standard applicable to legal representation in the run of criminal cases. 466 U.S. at 688, 694. In *Cronic*, the Court held no showing of prejudice to be necessary in an exceptionally narrow set of cases in which a criminal defense lawyer has afforded his or her client the functional equivalent of no representation at all. 466 U.S. at 659-60.

In unpublished opinions, we have cited *In re Rushing* and noted a right to adequate legal representation in termination proceedings. See *In re L.B.*, No. 124,538, 2022 WL 2392681, at *2-3 (Kan. App. 2022) (unpublished opinion); *In re A.B.*, No. 111,483, 2015

WL 249768, at *6-8 (Kan. App. 2015) (unpublished opinion); *In re J.W.*, No. 106,561, 2012 WL 2621154, at *6 (Kan. App. 2012) (unpublished opinion) (assuming right without citing *In re Rushing* or other authority). But we have been far from clear about how a parent's claim for breach of the right should be handled. See *In re L.B.*, 2022 WL 2392681, at *2-3 (questioning whether ineffectiveness claim in termination proceeding may be brought for first time on appeal and whether case could be remanded to district court for hearing on ineffectiveness claim). Now would seem to be as good a time as any to lend some needed structure to what floats in our caselaw as more of a gossamer concept than a studied rule.

In *Strickland*, the Court laid out substantive principles that have become the foundation for assessing ineffective assistance claims in criminal cases in Kansas and elsewhere. 466 U.S. at 687-88, 694; *State v. Phillips*, 312 Kan. 643, 676, 479 P.3d 176 (2021); *Chamberlain v. State*, 236 Kan. 650, Syl. ¶¶ 3, 4, 694 P.2d 468 (1985) (adopting and stating *Strickland* test for ineffective assistance); see Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. Pa. L. Rev. 277, 288 (2020) (describing *Strickland* as "landmark case" in defining ineffective legal representation of criminal defendants under Sixth Amendment). There is, then, a well-developed body of law built on *Strickland*. See *A.R. v. D.R.*, 456 P.3d 1266, 1280 (Colo. 2020); *In re M.P.*, 126 A.3d 718, 726 (Me. 2015) (in opting for *Strickland* test for ineffective representation in termination proceedings, court points to widespread recognition of standard and ample case authority). Those principles are readily transferable to termination proceedings to assess whether a parent's lawyer has performed competently. And policy considerations favor doing so. First, of course, that avoids having to craft a new set of legal standards for competent representation in termination proceedings. Second, criminal prosecutions and termination of parental rights proceedings each put at risk a fundamental right belonging to an individual. See *Lassiter*, 452 U.S. at 27 ("A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one."); 452 U.S. at 42 (Blackmun, J., dissenting). As the *Lassiter* majority recognized,

"wise public policy" calls for appointing lawyers to represent indigent parents in termination proceedings, even if the Due Process Clause may not mandate that protection in every case. 452 U.S. at 33-34. Kansas has heeded that admonition and has exercised such wisdom to establish a broad right to legal assistance in termination proceedings and a concomitant duty on those lawyers to competently represent their clients.

There are, of course, differences between the fundamental rights at stake in criminal prosecutions, on the one hand, and proceedings to terminate parental rights, on the other. Criminal defendants face direct impositions on their physical liberty ranging from restrictive conditions of probation to imprisonment for periods that may be comparatively brief for misdemeanors to those measured in decades for some felonies. Key due process protections against a wrongful conviction and an erroneous deprivation of those interests lie in the exceptionally high burden of proof imposed upon the government to establish guilt beyond a reasonable doubt to the unanimous satisfaction of 12 impartial citizens composing a jury. The termination of parental rights does not inflict that sort of loss of freedom, but it severs the most profound and intimate of blood relationships. And it does so irrevocably. The State must prove its case to a district court judge by clear and convincing evidence—a more formidable hurdle than in typical civil cases, though not as exacting a standard as in criminal prosecutions.

The comparison suggests the *Strickland* test for the adequacy of legal representation developed in criminal cases may be appropriately transplanted to termination proceedings. In criminal cases, there are greater protections against erroneous convictions apart from the adequacy of a given defendant's legal representation commensurate with the especially harsh consequences that follow convictions for serious crimes. Indeed, a lengthy term of imprisonment necessarily corrodes the parent-child relationship and, in Kansas, may itself be grounds for unfitness supporting termination of that relationship. See K.S.A. 38-2269(b)(5); *In re B.C.*, 2022 WL 18046481, at *4-5. The measure for minimally acceptable legal representation in criminal cases, then, ought to be

sufficient for a termination process implicating the relinquishment of what society recognizes as an undeniably profound familial relationship, though arguably something of a lesser magnitude than an extended deprivation of personal liberty. That safeguard against an erroneous outcome is a robust one, even without the additional checks built into the criminal justice process.

As developed from *Strickland*, a party asserting ineffective legal representation must show his or her lawyer's work fell below an objective standard of reasonableness under the Sixth Amendment and resulted in actual prejudice measured as a reasonable probability that the outcome would have been more favorable with competent representation. *Strickland*, 466 U.S. at 687-88, 694; *Phillips*, 312 Kan. at 676. Reasonable representation entails that degree of "skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. A "reasonable probability" of a different outcome "undermine[s] confidence" in the result and marks the proceeding as fundamentally unfair. 466 U.S. at 694. But a reviewing court should afford considerable deference to a lawyer's studied strategic decisions in managing the case up to and through hearing or appeal to avoid imposing an unduly strict standard colored by an ultimate lack of success notwithstanding competent representation. See 466 U.S. at 689-91; *Holmes v. State*, 292 Kan. 271, 275, 252 P.3d 573 (2011). In short, the test does not create a form of strict liability for substandard legal representation. If the outcome would have been the same had the complaining party been competently represented, he or she should be afforded no relief.

In unpublished cases, we have applied *Strickland* to claims of inadequate legal representation raised in termination proceedings. *In re M.A.E.*, No. 115,690, 2017 WL 547965, at *8-10 (Kan. App. 2017) (unpublished opinion) (enunciating and applying *Strickland* test but seeming to question *Strickland* as appropriate precedent in termination proceedings); *In re F.G.*, No. 114,602, 2016 WL 4259928, at *12 (Kan. App. 2016) (unpublished opinion) (applying *Strickland*); *In re B.J.C.*, No. 69,697, 1994 WL

17120335, at *3-4 (Kan. App. 1994) (unpublished opinion) (applying *Strickland*). But we do not appear to have so held in a published and, thus, precedential opinion. Without citing *Strickland* or engaging in any extended discussion of the appropriate standard, we relied on deficient representation coupled with demonstrable prejudice, as drawn from criminal prosecutions, to deny an ineffectiveness claim in *In re D.H.*, 54 Kan. App. 2d 486, 498, 401 P.3d 163 (2017). There, we found no prejudice to mother based on her first lawyer's substandard representation at the start of a child in need of care action. 54 Kan. App. 2d at 500. The lawyer was replaced early in the case, and the substitute lawyers adequately represented mother during the rest of the proceedings, including the termination hearing.

In *In re Rushing*, the case commonly cited as recognizing ineffective assistance claims in termination cases, the court relied on *Cronic* rather than *Strickland* to reverse an order terminating parental rights, finding that the lawyer's performance was tantamount to no meaningful representation at all. 9 Kan. App. 2d at 547. There, the lawyer appeared at the termination hearing without his client, declined to cross-examine the State's witnesses, and left part way through the proceedings with the district court's permission. As I have said, under *Cronic*, if a criminal defense lawyer abdicates entirely his or her duty to test the government's evidence—the cornerstone of the adversarial process—and, thus, functionally provides no representation, the defendant must be afforded a new trial even without showing specific prejudice. 466 U.S. at 658-60. So *Cronic* deprivations are rare and inflict a form of structural error. See *United States v. Wilson*, 960 F.3d 136, 144 (3d Cir. 2020); *United State v. Ragin*, 820 F.3d 609, 618 (4th Cir. 2016) ("*Cronic* errors are structural, requiring automatic reversal"). A *Cronic* error, therefore, presents a ground for challenging the outcome of a termination proceeding distinct from *Strickland*'s dual requirements for substandard performance and resulting prejudice. See *A.R.*, 456 P.3d at 1281-82 (Colorado Supreme Court notes applicability of *Cronic* to termination proceedings, though "aris[ing] infrequently").

Appellate courts in a majority of states have recognized that parents in termination proceedings have the right to effective legal assistance. Only a handful of states have explicitly rejected the idea. See Annot. *Right to Effective Counsel at Termination of Parental Rights Proceeding and Standards of Review of Claim*, 23 A.L.R.7th 3 § 4 (identifying 26 states and District of Columbia as recognizing right); § 13 (identifying 5 states rejecting right). The legal foundation for the right varies from state to state—sometimes resting on a statutory grant, sometimes on constitutional protections, and sometimes on otherwise undefined precepts of fairness. See, e.g., *A.R.*, 456 P.3d at 1278 (effective legal assistance "necessary to protect parents' right to a fair proceeding"); *In re T.N.C.*, 375 N.C. 849, 854, 851 S.E.2d 29 (2020) (effective legal assistance in termination proceedings derivative of court's statutory duty to appoint lawyer for indigent parent); *In re T.P.*, 757 N.W.2d 267, 274 (Iowa App. 2008) (statutory requirement to appoint lawyer in termination proceedings triggers due process right to effective assistance). In the states recognizing the right, appellate courts have regularly relied on the *Strickland* test to outline what a parent must show to obtain relief for ineffective legal assistance in termination proceedings. See, e.g., *A.R.*, 456 P.3d at 1280; *In re M.P.*, 126 A.3d at 721; see also *In re Carrington H.*, 483 S.W.3d 507, 532 & n.30 (Tenn. 2016) ("A majority of jurisdictions have adopted an adaptation of the *Strickland*[] standard.").

But appellate courts in some states have opted for a "fundamental fairness" standard, often referred to as the *Geist* test, that also entails substantially deficient legal representation resulting in demonstrable prejudice. See *In re RGB*, 123 Haw. 1, 25, 229 P.3d 1066 (2010) ("[T]he proper inquiry when a claim of ineffectiveness of counsel is raised in a termination of parental rights case is whether the proceedings were fundamentally unfair as a result of counsel's incompetence."); *In re M.P.*, 126 A.3d at 726 (describing *Geist* test, while preferring *Strickland* and noting latter's prevalence). In *State ex rel. Juvenile Dept. of Multnomah County v. Geist*, 310 Or. 176, 191, 796 P.2d 1193 (1990), the Oregon Supreme Court described the analytical tool as requiring an aggrieved parent to show "trial counsel was inadequate" and the inadequacy "prejudiced [the] cause

to the extent that [he or] she was denied a fair trial, and, therefore, that the justice of the circuit court's decision is called into serious question." The court characterized "fundamental fairness" as a flexible concept, owing much to the particular circumstances, including the lawyer's broad latitude in making strategic decisions on how best to represent the client and the children's need for a comparatively expeditious determination of parental fitness and, thus, their permanent placement. 310 Or. at 186-87, 190-91.

In an abstract and largely academic way, there may be finespun differences between the tests in *Strickland* and *Geist*. Mostly though, they seem to swap-out interchangeable phrases that describe closely aligned, if not equivalent, standards rooted in demonstrably inadequate legal representation causing sufficient prejudice to call into question the outcome of proceedings resulting in the termination of parental rights. See *A.R.*, 456 P.3d at 1279 (rejecting premise *Strickland* and *Geist* "would, in practice, necessarily be materially different"); *N.J. Div. of Youth & Family Servs. v. B.R.*, 192 N.J. 301, 308, 929 A.2d 1034 (2007) (any difference between *Strickland* and *Geist* "inconsequential"). I don't see much daylight between *Strickland*'s showing of a "reasonable probability" that competent representation would have altered a judgment ordering termination and *Geist*'s requirement that the inadequate representation generate "serious question" about the termination ruling. 466 U.S. at 694; 310 Or. at 191. Thus, *Strickland* seeks to correct for a probability that "undermine[s] confidence in the outcome" and would, if uncorrected, leave reasonable observers to question whether the process produced an "unreliable" result, thereby rendering "the proceeding itself unfair." 466 U.S. at 694. That's awfully hard to meaningfully distinguish from *Geist*'s reliance on a failure to provide a "fundamentally fair" proceeding that necessarily "call[s] into serious question" the resulting judgment. 310 Or. at 191.

Moreover, in *Strickland*, the Court sought to vindicate two constitutional protections: A criminal defendant's Sixth Amendment right to counsel, incorporated through the Fourteenth Amendment and applicable in state criminal proceedings, and a

distinct right to a fair trial directly residing in the Due Process Clause of the Fourteenth Amendment. 466 U.S. at 684-85. The incorporated Sixth Amendment right does not apply here, since termination proceedings are civil rather than criminal. But the due process right to a fair trial does, and the Court found the error-and-prejudice standard adequately secured that protection. By close analogy, the standard ought to sufficiently secure the right to effective legal representation afforded parents in termination proceedings both as a statutory and due process protection.

In sum, the *Strickland* test for relief arising from ineffective legal representation offers a developed body of law balancing finality with the need for fair processes before depriving a person of a fundamental right. We should formally transplant *Strickland* to termination of parental rights proceedings, a decision we apparently have yet to make in a precedential ruling.

Contrary to Father's suggestion here, the appropriate remedy for ineffective legal representation in a termination hearing typically would call for a new hearing with a new lawyer. See *In re Rushing*, 9 Kan. App. 2d at 547. Any additional relief would depend on the evidence presented at that hearing. Reversal of a termination order for ineffective representation would not automatically require additional efforts at family reunification before the new hearing, although a district court presumably would have the latitude to proceed in that way if it were beneficial for the child or children and presumably could conduct a permanency hearing for that purpose. See K.S.A. 38-2264.

Procedural Vehicles for Raising Ineffectiveness Claims

Kansas appellate cases have not outlined in any cohesive fashion how parents may raise claims of ineffective legal assistance in termination proceedings. As I have indicated, the process needs to balance finality, as a prerequisite for permanent placement of the children, with a reasonable assurance the outcome has not been unfairly skewed

because a parent's lawyer failed to fulfill a duty of competent representation. To strike that balance appropriately, a parent must present a sufficiently detailed and supported claim of inadequate representation in the first instance to stave off summary denial of relief. Conclusory or generic assertions should not be enough to slow down the judicial process let alone secure a remedy.

The framework for ineffectiveness challenges to criminal convictions offers a point of departure in fashioning how comparable claims should be addressed in termination of parental rights proceedings. The exercise necessarily yields a different procedural model because components of the criminal justice process, most notably collateral attacks on convictions through habeas corpus, cannot be adapted to termination proceedings without undermining the public policy objective of promptly securing stable, nurturing environments for children found to be in need of such care—whether by reunifying the family or by extinguishing parental rights to facilitate alternative permanent placements. See K.S.A. 38-2201(b)(1)-(3), (b)(8)-(10) (outlining policies to be advanced in Revised Kansas Code for Care of Children).

Usually, a convicted defendant will raise a claim of ineffective legal assistance in a motion for habeas corpus relief under K.S.A. 60-1507 after the direct criminal case has run its course. Although denominated a motion, the filing is considered an independent civil action collaterally attacking the criminal conviction for constitutional defects, often including allegations of substandard legal representation violating the Sixth Amendment. A 60-1507 motion must state with specificity the grounds for relief and identify witnesses and documentary evidence supporting those grounds. See *Mundy v. State*, 307 Kan. 280, 304, 408 P.3d 965 (2018); *Skaggs v. State*, 59 Kan. App. 2d 121, 131, 479 P.3d 499 (2020). For example, if the convicted defendant alleges the lawyer handling the criminal trial was constitutionally inadequate for failing to call certain witnesses, the motion would have to: (1) identify those witnesses; (2) include an affidavit or some other evidentiary materials outlining what each witness would have testified to in the criminal

case; and (3) explain how that testimony likely would have resulted in a more favorable outcome. See *Bailey v. State*, No. 124,101, 2022 WL 2188031, at *2 (Kan. App. 2022) (unpublished opinion); *Smith v. State*, No. 119,884, 2020 WL 7409939, at *4 (Kan. App. 2020). If the motion fails to make that showing, the district court could summarily deny it because the allegations considered with the record in the criminal case would establish no legal basis for granting relief. Conversely, were the showing sufficient, the district court ought to set the motion for an evidentiary hearing and appoint a lawyer for an unrepresented movant.

There is no comparable vehicle in civil actions, such as termination proceedings, to collaterally attack final judgments after any direct appeals have been concluded or waived. And no good reason supports creating one for termination proceedings, even assuming the appellate courts have that authority. A collateral action of that kind would add another layer of appellate review and delay permanency for the children involved, especially if an able adoptive parent were simply waiting for the termination order to become final and unchallengeable. As I discuss later, K.S.A. 2022 Supp. 60-260(b)(6) does not furnish a procedural mechanism for attacking a termination order.

In direct appeals of criminal convictions, the appellate courts typically decline to consider defendants' claims of insufficient legal representation. That's because the record usually does not include any detailed explanation from a defendant's lawyer about the strategic decisions he or she has made (or failed to make) in shaping and presenting defenses to the charges. See *State v. Hilyard*, 316 Kan. 326, 339-40, 515 P.3d 267 (2022); *State v. Williams*, 299 Kan. 1039, 1047-50, 329 P.3d 420 (2014); *State v. Brashier*, No. 117,701, 2018 WL 6253405, at *1 (Kan. App. 2018) (unpublished opinion) (Courts typically do not consider ineffectiveness claims raised for first time on appeal "for the very practical reason that little in the record sheds much light on the strategic considerations, if any, a trial lawyer may have had for taking certain actions or for having not acted in other ways."). Under *Strickland*, a criminal defendant should not be afforded

relief if the lawyer undertook a competent investigation and deployed reasonable strategies, albeit unsuccessfully. The same is true in termination proceedings—many parents are unfit and properly will have their rights terminated despite being competently represented.

But the appellate courts cannot reject a parent's claim of ineffective representation simply because the record from the district court fails to establish what strategic decisions the lawyer made in representing the parent and the parent's complaints *might be* explained as tactical calls. If that were the rule, parents asserting ineffectiveness claims would face a catch-22: They would have to show the absence of strategic decision-making by their lawyers—to satisfy the first part of the *Strickland* test—from a record that never explored those circumstances; but they could not supplement the record through a collateral attack on the order terminating their rights that realistically might allow them to question the lawyer about his or her investigation and legal strategy.

This court whipsawed a parent in just that way in *In re A.B.*, 2015 WL 249768, at *7. The parent asserted on appeal the lawyer handling the termination hearing had been ineffective in multiple respects, including failing to call certain witnesses. The panel questioned whether ineffectiveness claims could be lodged for the first time on appeal *and* whether a case could be remanded for an evidentiary hearing probing a lawyer's strategic decision-making. The panel then concluded the failure to call the witnesses *might have been* a tactical decision, so the parent's ineffectiveness claim fell short in the absence of any evidence to the contrary. Other panels have questioned whether ineffectiveness claims initially raised on appeal may be remanded for further hearing. See, e.g., *In re L.B.*, 2022 WL 2392681, at *2-3. The law shouldn't be so obtuse.

A solution that opens the door to fair review in termination proceedings—without requiring extended consideration of anything and everything—adapts procedures for two exceptions permitting criminal defendants to challenge the adequacy of their legal

representation without waiting for the direct criminal prosecution to come to an end. The exceptions roughly replicate the procedural posture of termination proceedings, since there is no vehicle for collateral attacks on termination orders after all direct appeals have been exhausted. The first and more significant exception permits the ineffectiveness claim to be raised in the direct appeal through a request for what's known as a *Van Cleave* hearing. See *State v. Van Cleave*, 239 Kan. 117, 119-121, 716 P.2d 580 (1986). The second (and likely far less frequent) exception comes into play when represented parties craft their own motions to the district court complaining about the quality of their appointed lawyers.

In *Van Cleave*, the court recognized a limited exception to the general rule that claims for ineffective legal representation in criminal cases could not be raised on direct appeal and should be brought only through a 60-1507 motion—creating a bypass "avoid[ing] the delay and expense of a separate action and a separate appeal" when the circumstances suggest a well-grounded claim. 239 Kan. at 119-20. Upon due investigation, the lawyer handling the appeal may file a motion with the appellate court outlining "'with some specificity sufficient details of the evidence to be presented to the trial court in support'" of a claim of ineffective assistance that if proved would call for a new trial. 239 Kan. at 120 (quoting *State v. Shepherd*, 232 Kan. 614, 620, 657 P.2d 1112 [1983]); see also *Mundy*, 307 Kan. at 299. With that showing, the appellate court may stay the appeal and remand to the district court with directions to hold a hearing on the ineffectiveness claim, developing a record on the trial lawyer's strategic decision-making and any other factually grounded assertions of inadequate representation. The appellate courts have regularly, if infrequently, ordered *Van Cleave* hearings in criminal cases. See, e.g., *State v. Dinkel*, 311 Kan. 553, 561-62, 465 P.3d 166 (2020); *State v. Brown*, 59 Kan. App. 2d 418, 441, 486 P.3d 624 (2021).

Despite the vague trepidation we have expressed about applying *Van Cleave* to termination of parental rights cases, the process affords a sound way of addressing

ineffective representation claims. In most termination cases, parents will be appointed new lawyers for their appeals. Obviously, the lawyer who handled the termination hearing would, as a practical matter, be in no position to raise or appropriately argue his or her own potential ineffectiveness in the district court or on appeal. See *State v. Toney*, 39 Kan. App. 2d 1036, 1042, 187 P.3d 138 (2008) (conflict of interest if lawyer required to argue own ineffective representation to advance client's claim); *State v. Gray*, No. 123,730, 2022 WL 879744, at *3 (Kan. App. 2022) (unpublished opinion) ("We typically cannot and do not expect lawyers to argue their own incompetence—both the conscious and implicit pull of self-interest would predictably dull the razor's edge of constitutionally effective advocacy."). If the lawyer appointed for the parent's appeal were to determine the legal representation in the district court appeared substandard, he or she could then file a motion with our court comparable in scope and content to those initiating a 60-1507 proceeding and request a remand to the district court for a hearing on the claim. The process would replicate what's now used to obtain a *Van Cleave* hearing in criminal cases.

In reviewing a *Van Cleave* motion in a criminal case, the appellate court examines the allegations of the motion along with the supporting materials, any response from the State, and the district court record. If the review shows no basis on which relief could be granted, the appellate court should deny the motion. See *State v. Levy*, 292 Kan. 379, 389, 253 P.3d 341 (2011); *Van Cleave*, 239 Kan. at 120-21; *State v. Jones*, No. 124,699, 2023 WL 2723295, at *8 (Kan. App. 2023) (unpublished opinion). Conversely, the appellate court cannot assume the lawyer representing the defendant during the criminal trial made informed strategic decisions based on a silent record. *Rowland v. State*, 289 Kan. 1076, 1086-87, 219 P.3d 1212 (2009). And remand for a hearing would be proper if the motion and the related materials display "'valid grounds to expect'" the district court "'might'" order a new trial. *Van Cleave*, 239 Kan. at 120 (quoting *Shepherd*, 232 Kan. at 620); see *Macomber v. State*, No. 124,000, 2022 WL 2112636, at *12 (Kan. App. 2022) (unpublished opinion) (recognizing *Van Cleave* test for remand).

Adapting that process to termination proceedings, we would be able to assess some aspects of a specific claim of ineffective legal assistance but not others, even armed with ably crafted submission from both sides. For example, to return to the potential witness not called at the termination hearing, we would be unable to make any credibility determinations about the likely testimony proffered in an affidavit from the ostensible witness submitted in support of the *Van Cleave* motion. We would have to accept the substance of the proffer both on its face and to the extent it contradicted evidence submitted at the termination hearing. Likewise, we could not assume the lawyer handling the termination in the district court made a strategic decision against calling the individual as a witness. Those determinations would be for the district court to make in the first instance if the case were remanded for a *Van Cleave*-type hearing.

What we could do is gauge possible prejudice resulting from the claimed instances of substandard legal representation. So we would examine the omitted witness' proffered testimony as presented to us. If the testimony were on a peripheral matter or merely a minor variation on the admitted evidence, we could fairly conclude there was no reasonable probability it would have altered the outcome of the termination hearing. On that basis, we properly would deny the motion for failing to satisfy the prejudice component of the *Strickland* test without considering the deficient representation component, since both are necessary conditions for relief. *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). Appellate courts often affirm the summary denial of 60-1507 motions alleging ineffective legal representation for that reason. See, e.g., *Edgar v. State*, 294 Kan. 828, 843-44, 283 P.3d 152 (2012); *Bailey*, 2022 WL 2188031, at *2; *Warren v. State*, No. 123,547, 2022 WL 816313, at *2-3 (Kan. App. 2022) (unpublished opinion). That rationale would govern here, too, because a parent would be entitled to no relief if his or her rights would have been terminated even with competent representation.

In rare instances, we could conclude that an asserted ground of deficient representation reflected ineptitude so patent it could not have been the product of *any* reasoned tactical approach. See *State v. Cheatham*, 296 Kan. 417, 446, 292 P.3d 318 (2013); *State v. Hargrove*, 48 Kan. App. 2d 522, 556-57, 293 P.3d 787 (2013). And if that error were materially prejudicial to the parent, we would then order a new termination hearing without remanding for a *Van Cleave* hearing. Were the ineffectiveness claim that clear, the appellate lawyer for the parent could, of course, elect to forgo a motion for a *Van Cleave* hearing and simply brief the issue in due course based on the district court record. Similarly, a well-founded *Cronic* claim would not require a remand to resolve, since no legitimate strategy could justify abdicating any advocacy on the client's behalf. How best to proceed in a given case would rest in the sound professional judgment of the parent's appellate lawyer.

About 15 years ago, the New Jersey Supreme Court outlined how to handle claims of ineffective legal representation in termination of parental rights cases in what looks to have been a question of first impression there. *N.J. Div. of Youth & Family Servs.*, 192 N.J. at 304-05. The court surveyed other jurisdictions and considered the policies underlying New Jersey's role in termination proceedings that balance a parent's liberty interests with a child's need for a secure and stable home, implicating the State's *parens patriae* interests in its young people. 192 N.J. at 306. Those competing considerations parallel the elemental balancing of rights implicated in the Revised Kansas Code for Care of Children. See K.S.A. 38-2201(a) (proceedings under Code taken "pursuant to the parental power of the state"); K.S.A. 38-2201(b)(1) (policy of Code to consider "the safety and welfare of a child paramount"); *In re Adoption of A.A.T.*, 287 Kan. 590, 601, 196 P.3d 1180 (2008) (parental rights both fundamental and constitutionally protected).

Having surveyed the law from other jurisdictions, the New Jersey Supreme Court determined the *Strickland* test to be the best suited for substantively evaluating ineffectiveness claims. *N.J. Div. of Youth & Family Servs.*, 192 N.J. at 308-09 (*Strickland*

furnishes developed standard known to lawyers and judges and noting majority of states permitting ineffectiveness claims in termination proceedings use *Strickland*). The court concluded that in the vast majority of cases, ineffective assistance claims could be most efficiently addressed in the appellate process rather than through either motions directed to the trial court before an appeal or a form of collateral challenge following an appeal. The court held that the appellate lawyer would have to submit a detailed description of the purported ineffectiveness, commonly with an evidentiary proffer. 192 N.J. at 311. With those submissions, the appellate court could resolve many claims under the prejudice requirement of *Strickland*, while remanding others for an evidentiary hearing augmenting the existing record. 192 N.J. at 311-12. The framework outlined in *N.J. Div. of Youth & Family Servs.* continues to guide the New Jersey courts, demonstrating durability and at least suggesting reliability. See *N.J. Div. of Child Protection & Permanency v. E.B.* No. A-3581-20, 2022 WL 7215504, at *3 (N.J. Super. Ct. App. Div. 2022) (unpublished opinion); *N.J. Div. of Child Protection & Permanency v. K.C.*, No. A-3282-20, 2022 WL 2902774, at *7 (N.J. Super. Ct. App. Div. 2022) (unpublished opinion).

As I have indicated, in some circumstances, an ineffective representation claim might be presented to the district court. A parent personally could file a motion there asserting his or her lawyer's incompetence and requesting a new termination hearing. The district court would have various options in dealing with such a motion. If we clearly were to recognize those claims may be raised in the appellate courts and to fashion a procedural mechanism for doing so (as I have suggested here), the district court properly could deny a motion without considering its merits in deference to the point being pursued in the appeal. That would offer the advantage of interposing the appellate lawyer's examination of the issue, presumably averting further pursuit of a baseless allegation.

Alternatively, the district court could conduct a preliminary inquiry to get a greater sense of the parent's claim without appointing a substitute lawyer, mirroring the process for assessing a criminal defendant's expressed dissatisfaction with his or her trial counsel. See *State v. Brown*, 300 Kan. 565, 572, 575, 331 P.3d 797 (2014) (potential conflict of interest on part of defense counsel based on defendant's assertion of "'lack of performance'" and breakdown in communication triggers duty of district court to inquire); *Toney*, 39 Kan. App. 2d at 1042 (client's articulated claim of ineffective assistance may create conflict of interest with appointed lawyer). Based on that limited assessment, the district court could either deny the motion as plainly unfounded or appoint a new lawyer, stay the termination order, and conduct the equivalent of a *Van Cleave* hearing to address the merits of the ineffectiveness claim. The district court could dispense with a preliminary inquiry and simply appoint a new lawyer for the parent—a blunt instrument that would needlessly prolong patently unworthy claims and, in the long run, invite parents to file motions for the purpose of delay alone. On balance, the more efficient and, thus, the better course likely would call for ineffective representation claims to be lodged in the first instance with the appellate courts.

K.S.A. 60-260(b)(6) Considered and Rejected

Another possible way to raise an ineffectiveness claim might be a motion under K.S.A. 60-260(b)(6), a catchall permitting a party to set aside a judgment or order for a "reason that justifies relief" that does not fit within five specific grounds stated in the statute. The enumerated reasons do not encompass an ineffectiveness claim. There are, however, significant procedural obstacles to deploying K.S.A. 60-260(b)(6) to challenge termination orders.

First, a persuasive argument can be made that K.S.A. 60-260, as part of article 2 of the Code of Civil Procedure governing Chapter 60 actions, does not apply to child in need of care actions brought under Chapter 38. Two published opinions of this court have

split on the issue. In *Cosgrove v. Kansas Dept. of S.R.S.*, 14 Kan. App. 2d 217, 222, 786 P.2d 636 (1990), the court concluded without explanation that K.S.A. 60-260(b)(6) applies in a termination of parental rights proceeding and affirmed the denial of the parent's motion for relief. But in *In re H.R.B.*, 30 Kan. App. 2d 599, 601, 43 P.3d 887 (2002), another panel strongly suggested the Code of Civil Procedure generally and K.S.A. 60-260 in particular do not apply in Chapter 38 actions. The court, however, did not mention, let alone discuss, *Cosgrove*. The dichotomy between the two decisions apparently has gone without further judicial comment in the past 20 years.

On balance, *In re H.R.B.* stakes out the stronger legal position. Nothing in the Code of Civil Procedure expressly states it should apply to actions brought through the Revised Kansas Code for Care of Children. Under K.S.A. 2022 Supp. 60-201(b), the rules of civil procedure, meaning article 2 as a distinct subpart of the Code of Civil Procedure, apply to "civil actions" in the district court. In turn, the phrase "civil actions" seems to be confined to those filed under Chapter 60. See K.S.A. 2022 Supp. 60-202. And the Legislature knows how to explicitly incorporate the rules of civil procedure or the broader Code of Civil Procedure into other statutory schemes. See, e.g., K.S.A. 2022 Supp. 23-2103 (proceedings under family law code governed by Code of Civil Procedure except as otherwise specifically provided); K.S.A. 44-1020(c) (rules of civil procedure govern temporary orders for relief from unlawful housing discrimination under Kansas Acts Against Discrimination); K.S.A. 75-714 (attorney general authorized to bring ouster proceedings "in the manner provided in the code of civil procedure" against gubernatorial appointee without requisite qualifications for position); K.S.A. 77-522(a) (subpoenas, discovery orders, and protective orders under Kansas Administrative Procedure Act to be issued "in accordance with the rules of civil procedure").

The Legislature has not done so with the Revised Kansas Code for Care of Children. The Revised Code does expressly incorporate the rules of evidence (article 4) of the Code of Civil Procedure. K.S.A. 38-2249(a). The Revised Code also provides for

the consolidation of certain child support actions with child in need of care proceedings, as permitted under the Code of Civil Procedure. K.S.A. 38-2279(h). But the Revised Code does not otherwise adopt the rules of civil procedure, the Code of Civil Procedure, or K.S.A. 60-260. Compare K.S.A. 59-2213 (probate code expressly incorporates K.S.A. 60-260[b] as means for vacating or modifying orders, judgments, or decrees). Rather, the Revised Code includes numerous provisions setting out procedural rules for proceedings, including termination hearings. Those circumstances strongly support an argument against any legislative intent to permit motions under K.S.A. 60-260(b) in termination proceedings. See *In re W.H.*, 274 Kan. 813, 822, 57 P.3d 1 (2002) ("In the face of" a comprehensive statutory framework, "silence fails to imply the existence of an alternative not expressed."); see also *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 6, 154 P.3d 494 (2007) (judicial interpretation should avoid adding something to statutory language or negating something already there).

Even if K.S.A. 60-260 were applicable in Chapter 38 termination proceedings, it would seldom come into play because of another procedural impediment. The Kansas Supreme Court has held that the district court lacks jurisdiction to decide a K.S.A. 60-260(b) motion after an appeal has been docketed. *Wichita City Teachers Credit Union v. Rider*, 203 Kan. 552, 556, 456 P.2d 42 (1969); see also *Hernandez v. Pistotnik*, 60 Kan. App. 2d 393, Syl. ¶ 2, 494 P.3d 203 (2021) (district court lacks jurisdiction to modify judgment after appeal has been docketed, although retaining authority to decide certain collateral matters). The window, then, would be a narrow one, requiring prompt action from aggrieved parents acting on their own, since their lawyers could not be expected to file motions premised on their incompetence.

In theory, a new lawyer appointed to handle the appeal could file a motion in the district court under K.S.A. 60-260(b)(6) seeking relief because the parent had been incompetently represented leading up to and during the termination hearing and then request that this court remand the matter for the limited purpose of deciding the motion.

Functionally, that would be the same as filing a motion with this court seeking a *Van Cleave* hearing in the district court. Either way, the appellate court would have to decide if the parent had made a sufficiently colorable claim of ineffective assistance to go forward either by granting the district court limited authority to consider the K.S.A. 60-260(b)(6) motion or by directing the district court to conduct a *Van Cleave* hearing. Again, the better course would seem to require filing a motion with the appellate courts in the first instance, promoting a uniform practice and reducing delays.

Conclusion

In summary, then, the Kansas appellate courts should recognize a due process protection mandating effective legal representation in termination of parental rights cases. The *Strickland* test should be applied, requiring a complaining parent to show both inadequate representation and causally related prejudice reasonably calling into question the outcome of the proceedings. The parent's appellate lawyer should raise the claim either through a detailed motion filed with this court requesting a remand to the district court for the equivalent of a *Van Cleave* hearing or, alternatively, through the customary appellate briefing, if the claim plainly may be established from the initial record on appeal alone.