NOT DESIGNATED FOR PUBLICATION

No. 125,525

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Adoption of R.H.,
A Minor Child.

MEMORANDUM OPINION

Appeal from Geary District Court; AMY C. COPPOLA, magistrate judge. Opinion filed August 18, 2023. Reversed and remanded with directions.

Richard A. Pinaire, of Hoover, Schermerhorn, Edwards, Pinaire & Rombold, of Junction City, for appellant.

Anita Settle Kemp, of Wichita, for appellee natural father.

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

ATCHESON, J.: The Geary County District Court denied a petition for a stepparent adoption because the boy's natural father opposed the action and had regularly paid child support, although he had not communicated with his son in more than four years. In so ruling, the district court construed the statutory grounds for termination of a natural parent's rights too narrowly and gave too much weight to the payment of support as a singular factor defeating the adoption request. We, therefore, reverse the district court's decision and remand for further proceedings that at a minimum require revised findings and conclusions comporting with the governing law and may include reopening the record to receive evidence on the parties' present circumstances.

FACTUAL AND PROCEDURAL HISTORY

In September 2021, K.C. filed a petition to adopt R.H., the son of his wife R.O. R.H. was born in late 2015, when R.O. was in a relationship with C.H., the child's biological father. R.O. joined in the petition and, not surprisingly, has consented to K.C. adopting R.H. Because C.H. declined to consent to the adoption, the petition included a request that the district court terminate C.H.'s parental rights to R.H.

The undisputed evidence shows that R.O. and C.H. had a fractious and sometimes violent relationship. C.H. was both verbally and physically abusive at times. They separated, and in 2017 R.O. obtained a protection from abuse order against C.H. In 2018, R.O. was granted sole legal custody of R.H. and had the protection from abuse order extended for C.H.'s life, apparently based on a charge or conviction of C.H. for a violent felony (possibly more than one) directed at R.O.

In its memorandum decision in this case, the district court alluded to an action R.O. brought to legally establish C.H.'s paternity of R.H. We infer the orders entered in the paternity action required C.H. to pay child support and granted him one hour of visitation a month with R.H. supervised through Sunflower Bridge Visitation Center. C.H. consistently paid child support. But he did not exercise his visitation rights or otherwise communicate with R.H.

The district court held an evidentiary hearing on K.C.'s petition for adoption of R.H. and the concomitant termination of C.H.'s parental rights in mid-December 2021. K.C., R.O., and C.H. testified during the hearing.

We pause to explain that our recitation of some of the circumstances is inferential or otherwise qualified because the record on appeal is elliptical. For example, the lawyer for K.C. introduced numerous documents during the adoption hearing, but none of them

appear in the appellate record. The district court took judicial notice of other cases; those files, however, are not included in the record. Leading up to and during the hearing, C.H. represented himself, likely because the district court failed to inform him of his right to an appointed lawyer if he could not afford one. See K.S.A. 2022 Supp. 59-2136(h)(1). Sometime after the hearing, the district court explained that right to C.H., determined he qualified for a lawyer, and appointed a lawyer to represent him. We gather the lawyer informed the district court that C.H. wished to go forward based on the hearing record compiled while he represented himself. That is, with the advice of his lawyer, C.H. did not want to present any additional testimony. We do not have that representation and waiver in our record.

After appointing a lawyer for C.H., the district court received additional briefing from the parties and information on C.H.'s regular payment of child support. The district court issued a memorandum decision in early August 2022 declining to terminate C.H.'s parental rights and denying the stepparent adoption in the absence of his consent. The district court largely relied on C.H.'s payment of child support in arriving at that decision.

We now circle back to outline relevant facts developed during the evidentiary hearing. C.H. had no visits or other communication with R.H. after separating from R.O.—a period of about four years. In August 2021, the month before K.C. filed the adoption petition, C.H. contacted Sunflower Bridge Visitation Center to set up supervised visits with R.H. The center put C.H. on some sort of a waiting list, and he had had no visits with R.H. before the hearing in December 2021.

R.H. has no recollections of C.H. and thinks of K.C. as his father. The child sometimes refers to K.C. as his dad.

At the hearing, C.H. testified that he has been diagnosed with bipolar disorder and he drank excessively during his relationship with R.O. He told the district court he now

well manages his mental health, no longer abuses alcohol, and is employed. C.H. testified that he has been in a relationship with another woman he described as his fiancée, and they have a two-year-old daughter. According to C.H., he is a good father to his daughter. And he attributed his lack of initiative in interacting with R.H. to his efforts to become a better person and a suitable parental figure. C.H.'s testimony about his present circumstances was neither directly corroborated nor directly contradicted during the hearing.

K.C. has appealed the denial of his adoption petition and the district court's refusal to terminate C.H.'s right to parent R.H.

LEGAL ANALYSIS

On appeal, K.C. essentially argues that the district court incorrectly construed the provisions of the Kansas Adoption and Relinquishment Act, K.S.A. 59-2111 et seq., governing the termination of a natural or biological parent's rights, when the parent declines to consent to the adoption of his or her child by another person, commonly the current spouse of the other biological parent. The procedure and grounds for termination are set out in K.S.A. 2022 Supp. 59-2136(h). Here, the district court found that K.C. had failed to establish a statutory basis for termination by clear and convincing evidence. See K.S.A. 2022 Supp. 59-2136(h)(1) (clear and convincing evidence required for termination; termination eliminates need for parental consent to adoption).

The Kansas Supreme Court has held appellate review of a decision to deny termination under K.S.A. 59-2136 should assess whether substantial competent evidence supports the relevant factual findings. *In re Adoption of J.M.D.*, 293 Kan. 153, 170-71, 260 P.3d 1196 (2011); see *Khalil-Alsalaami v. State*, 313 Kan. 472, 491-92, 486 P.3d 1216 (2021) (recognizing standard, citing and quoting *Adoption of J.M.D.*, 293 Kan. at 171, with favor). In making that determination, the appellate court does not reweigh the

evidence generally or independently decide witness credibility. We, therefore, must take the evidence in the light most favorable to C.H., as the party prevailing in the district court. See *Adoption of J.M.D.*, 293 Kan. at 171.

We needn't get mired in how we should look at the relevant historical facts. They are essentially undisputed and comparatively straightforward. C.H. paid child support for R.H. But he had no visits, communication, or other interaction with R.H. for roughly four years at the time of the adoption hearing, when the child was about six years old. The critical issue is whether the district court accurately surveyed the grounds for parental termination in K.S.A. 2022 Supp. 59-2136(h) and correctly applied the established facts to the statutory language. That frames a question of law we review without deference to the district court. *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020) (judicial reading of statutory language presents question of law); *In re Estate of Oroke*, 310 Kan. 305, 310, 445 P.3d 742 (2019) ("Application of legal principles to undisputed facts involves questions of law subject to de novo review.").

Before turning to the statutory grounds for termination, we recognize that C.H. has a constitutionally recognized liberty interest in parenting his children—a right deemed to be fundamental. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re B.D.-Y.*, 286 Kan. 686, 697-98, 187 P.3d 594 (2008). Judicial termination of the right, therefore, requires proof by clear and convincing evidence. K.S.A. 2022 Supp. 59-2136(h)(1); *Santosky*, 455 U.S. at 769-70. In keeping with the importance of the liberty interest, the Kansas Supreme Court has recognized that the termination provisions of the Kansas Adoption and Relinquishment Act should be strictly construed to be solicitous of the biological parent's right. *In re Adoption of C.L.*, 308 Kan. 1268, 1279-80, 427 P.3d 951 (2018).

In K.S.A. 2022 Supp. 59-2136(h)(1), the Legislature has identified seven specific grounds permitting termination of a biological parent's right in conjunction with an adoption request. The list appears to be exclusive rather than illustrative, meaning a district court cannot rely on some other reason to terminate. The grounds are not mutually exclusive; some factual scenarios, particularly involving lack of financial or emotional support of the child, could satisfy more than one. But even if a petitioner satisfactorily proves one or more of the statutory grounds, termination is permissive rather than mandatory. See K.S.A. 2022 Supp. 59-2136(h)(1) (district court "may order" termination after finding "any" of the listed grounds has been proved); see also *Hill v. Kansas Dept. of Labor*, 292 Kan. 17, 21, 248 P.3d 1287 (2011) (statutory "may" deemed permissive in contrast to mandatory "shall"); *Foster-Koch v. Shawnee County Health Dept.*, No. 125,088, 2023 WL 3909813, at *3 (Kan. App. 2023) (unpublished opinion).

In reaching a decision, the district court should "consider all of the relevant surrounding circumstances." K.S.A. 2022 Supp. 59-2136(h)(2)(A). Those circumstances include the best interests of the child. The statute used to explicitly identify the child's best interests without any reference to the overall circumstances of the case. In 2018, the Legislature replaced the "best interests" language with "surrounding circumstances"—an amendment we construe as expanding the scope of what the district court should assess, including (rather than rejecting) the child's welfare. See L. 2018, ch. 118, § 19. Plainly, the child's best interests would qualify as a relevant surrounding circumstance, among many others. A contrary reading of the language would require treating the child's welfare as an *irrelevant* circumstance—a conclusion that makes no sense. See *State v. James*, 301 Kan. 898, 903, 349 P.3d 457 (2015) ("We must, however, construe statutes to avoid unreasonable or absurd results.").

More generally, our overarching objective in reading a statute is to discern the legislative intent and purpose and to give effect to that intent and purpose. *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022); *James*, 301 Kan. at 903. Typically, we should

be guided by the common or usual meanings of the words the Legislature has used. *State v. O'Connor*, 299 Kan. 819, 822, 326 P.3d 1064 (2014). So any judicial reading should avoid adding something to the statutory language or negating something already there. *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 6, 154 P.3d 494 (2007).

With those principles in mind, we turn to the statutory grounds K.C. advanced for terminating C.H.'s parental rights and the district court's rulings he now challenges on appeal.

• K.C. alleged C.H.'s parental rights should be terminated under K.S.A. 2022 Supp. 59-2136(h)(1)(A). The subsection permits termination if a biological parent "abandoned or neglected the child after having knowledge of the child's birth." K.S.A. 2022 Supp. 59-2136(h)(1)(A). The district court rejected this ground because "there was no evidence at trial that [C.H.] ever abandoned the child at birth[.]" The undisputed evidence shows C.H. did not abandon R.H. when the child was born. C.H. continued to reside with R.O. and R.H. for some time afterward and has consistently supported R.H. financially. But the statute is not limited to abandonment at birth.

The statutory language permits termination if a parent either abandons *or* neglects a child knowing of the child's existence. So the statute does not permit termination when a parent is unaware of the child and, thus, does nothing. That would apply to biological fathers who had never learned of the mother's pregnancy or the child's birth. Biological mothers presumably would be aware of those circumstances except in convoluted and wholly artificial law school hypotheticals. But the statute does not require that the abandonment or neglect begin immediately upon a parent learning of the birth. Rather, the abandonment or neglect must take place at an indeterminate time after the parent knows about the child. In other words, a biological parent may be attentive to the child for a while and then abandon or neglect the child within the meaning of K.S.A. 2022 Supp. 59-2136(h)(1)(A). Either biological parent could do so. The district court's stated

reasoning is, thus, legally insufficient to reject K.C.'s claim under K.S.A. 2022 Supp. 59-2136(h)(1)(A).

Moreover, the district court's ruling is incomplete. Although a parent paying required periodic child support cannot reasonably be characterized as abandoning the child, it does not ineluctably follow that the parent could not have neglected the child. Abandonment entails giving up completely or forsaking someone or something. Webster's New World College Dictionary 1 (5th ed. 2018) (defining "abandon"). Neglect is not so absolute and would include limited though inadequate concern or attention. Webster's New World College Dictionary 978 (5th ed. 2018) (defining "neglect" as "to fail to care for or attend to sufficiently or properly"). A parent, therefore, could neglect a child without abandoning him or her. In this context, the Kansas Supreme Court has recognized that biological parents owe their children multiple duties. One of them is financial support; others require beneficial contacts "to provide for and nurture the child's mental and emotional health." *Adoption of J.M.D.*, 293 Kan. at 173.

A robust performance of either the financial duty of support or the noneconomic duties of nurturing without some reasonable effort to fulfill the other is insufficient to satisfy a biological parent's overall obligation to the child. 293 Kan. at 167. Relevant here, regularly paying child support is not categorically sufficient to establish a lack of neglect—a conclusion consistent with the statutory requirement that the district court consider all relevant circumstances. See 293 Kan. at 167. In deciding *Adoption of J.M.D.*, the court relied on *In re Adoption of G.L.V.*, 286 Kan. 1084, 1065, 190 P.3d 245 (2008), to the same effect. See 293 Kan. at 167-68. In *G.L.V.*, the court affirmed the district court's ruling denying a stepparent adoption because the biological father's regular payment of child support "was coupled with" his credited intention to have substantially increased contact with the children, complementing their ongoing relationship with their paternal grandparents and other members of father's family. 286 Kan. at 1065.

Both *J.M.D.* and *G.L.V.* considered a version of K.S.A. 59-2136 that included a subsection dealing specifically with stepparent adoptions. The Legislature has since eliminated that subsection, but the change has not significantly altered the requirements for termination that now apply in all adoption proceedings. See L. 2018, ch. 118, § 19. Those cases, therefore, remain sound authority on the application of the current iteration of K.S.A. 59-2136.

In sum, the district court failed to fully consider the grounds for termination outlined in K.S.A. 2022 Supp. 59-2136(h)(1)(A), and its findings tied only to abandonment of R.H. and C.H.'s payment of support alone were incomplete. In turn, they do not support the district court's conclusion rejecting K.S.A. 2022 Supp. 59-2136(h)(1)(A) as a basis for terminating C.H.'s parental rights. The truncated reasoning of the district court weighs in favor of remanding for additional (and legally complete) findings and conclusions. See *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 361, 277 P.3d 1062 (2012) (remand appropriate when "the lack of specific findings" stymies appellate review).

In closing out this part of our analysis, we recognize an appellate court may infer the district court has made the necessary factual findings to support its ruling even if some specific findings have not been explicitly stated. See *State v. Neighbors*, 299 Kan. 234, 240, 328 P.3d 1081 (2014). The inference is strengthened when neither party asks the district court for additional findings. But the assumption or presumption of sufficiency should not be reflexively applied. Here, for example, we are dealing with substantial rights, including the best interests of R.H., although the inference would benefit C.H. in preserving his parental rights.

The district court, however, expressly addressed only part of the statutory requirement for termination under K.S.A. 2022 Supp. 59-2136(h)(1)(A) and was silent on the balance of the requirement. Under the circumstances, we would be stretching to draw

a reasoned inference the district court actually analyzed every component of the statutory test for termination and resolved them adversely to K.C. but then chose to articulate only part of the analysis. That approach has the feel of an artificial cover for the district court's failure to consider the governing statutory provision in its entirety. The presumption of full findings drawn from an incomplete judicial recitation need not be applied if the record suggests the district court "did not engage in a rigorous analysis of the [required] factors," leaving the appellate court without a basis for "meaningful appellate review." *Dragon v. Vanguard Industries, Inc.*, 282 Kan. 349, 358, 144 P.3d 1249 (2006); see *Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 69, 341 P.3d 607 (2014) (presumption of necessary findings may be applied when record supports its use). We decline to fill in the omissions in the district court's ruling on this ground for termination.

• K.C. alleged C.H. "is unfit as a parent," as provided in K.S.A. 2022 Supp. 59-2136(h)(1)(B), so the adoption could proceed absent his consent. Without any detailed explanation, the district court found the evidence to be insufficient to support this statutory basis. We may be nearly as terse in disposing of this point on appeal. The statutory language considers the biological parent's fitness (or unfitness) at the time of the adoption hearing, consistent with the present tense verb form "is." Cf. *In re F.C.*, 313 Kan. 31, 38-39, 482 P.3d 1137 (2021) (comparable use of "is" in K.S.A. 2017 Supp. 38-2202[d][2] defining "child in need of care" in Revised Kansas Code for Care of Children refers to circumstances at time of adjudication hearing).

Although significant evidence suggested C.H. likely may have been unfit leading up to and for a measurable period after he separated from R.O., the same cannot be said of him in December 2021. Granted the evidence bearing on C.H.'s parental fitness then rested largely, if not exclusively, on his own testimony at the adoption hearing. That testimony, however self-serving, portrayed a capable parent and appears to have been uncontradicted. The district court credited C.H.'s evidence on his present fitness, as do we

under the applicable standard of review. The district court properly rejected K.C.'s claim based on K.S.A. 2022 Supp. 59-2136(h)(1)(B).

• K.C. alleged C.H.'s parental rights should be terminated under K.S.A. 2022 Supp. 59-2136(h)(1)(C) because he had "made no reasonable efforts to support or communicate with" R.H. "after having knowledge of [his] birth." The district court dismissed this claim based on C.H.'s regular payment of child support. We see no error in that conclusion.

Consistent with *Adoption of C.L.*, we strictly construe the statutory language to the benefit of the biological parent. So read, termination would be proper only if the parent had never done anything that could fairly be viewed as reasonably supporting the child *or* reasonably communicating with the child. Stated in the converse, either reasonable undertaking would be sufficient to defeat a request for termination on this ground. Here, the undisputed evidence established C.H. financially supported R.H. That's legally sufficient. Had the Legislature intended to require the biological parent to do both to avert termination, it would have used a conjunctive "and" rather than a disjunctive "or" to describe a necessary dual inaction—no reasonable support *and* no reasonable communication.

• K.C. alleged C.H. "failed or refused to assume the duties of a parent for two consecutive years" immediately before the petition to adopt R.H. was filed, permitting termination under K.S.A. 2022 Supp. 59-2136(h)(1)(G). The district court denied the claim based on C.H.'s consistent payment of child support. But the required analysis is more nuanced, and the district court's ruling, at best, overlooks material aspects of the statute. We are left with incomplete findings that do not support the district court's conclusion. So we are adrift in reviewing the point on appeal in the same way we are with the ruling denying K.C. relief under K.S.A. 2022 Supp. 59-2136(h)(1)(A).

First, the subsection requires a biological parent to undertake his or her *duties* to the child. As we have explained, those duties entail both financial support and noneconomic support. The uncontroverted evidence showed that C.H. had no contact with R.H. in the two years before K.C. filed the petition—actually for considerably longer. Without something more, we may assume C.H. provided no emotional or moral support to R.H. in that time. That alone erodes the district court's legal conclusion. But there may be more.

Was C.H. limited to the one-hour supervised visitation each month? Or could he have otherwise communicated with R.H., say, by letters, telephone, or video? The relevant orders from the paternity proceeding and R.O.'s protection from abuse action are not part of the appellate record, so we don't know. But we can say that C.H.'s contact with Sunflower Bridge Visitation Center to begin visits with R.H. the month before K.C. filed the adoption petition doesn't satisfy the statute. The language contemplates performance of the duties rather than steps preliminary to doing so.

Given the statutory directive to the district courts to assess "all relevant circumstances" before terminating the rights of a biological parent, the lack of noneconomic care for a child might be offset by the assiduous payment of financial support or vice versa in highly unusual or extenuating circumstances. Here, however, the district court apparently concluded the payment of child support to be categorically sufficient to defeat a request for termination.

Second, along those lines, C.H. explained his lack of effort to communicate with R.H. for years as a concession to his need to become a better person and parent. At the time of the hearing, C.H. professed to have been an able parent to his two-year-old daughter throughout her life. Yet he never reached out to R.H. to reestablish a parental relationship or to acquaint him with his half-sibling. Likewise, C.H. never sought to expand his court ordered visitation rights—something he could have done whether the

limitation was imposed in the paternity proceeding or in the protection from abuse action. See K.S.A. 2022 Supp. 23-3221(a) (court may modify order setting parenting time in paternity case to meet best interests of child); K.S.A. 2022 Supp. 60-3107(f) (court may amend protection from abuse order at any time upon motion of party). All of that likely would have some bearing on the overall circumstances and C.H.'s assumption of his parental duties (or his failure to assume them).

Finally, K.S.A. 2022 Supp. 59-2136(h)(3) establishes a rebuttable presumption that a biological parent who has not paid "a substantial portion" of court ordered child support for the two years before the filing of the petition to adopt has failed to assume the duties required under K.S.A. 2022 Supp. 59-2136(h)(1)(G). The presumption applies only to a biological parent who knows of the child and is financially able to pay support. The Legislature thus intended that deadbeat biological parents presumptively should be treated as failing in their parental duties even if they have provided some emotional or other noneconomic support to their children. Since C.H. indisputably paid child support, the factual predicate triggering the presumption does not exist. The presumption, therefore, does not come into play and is irrelevant. As a matter of completeness, the district court could have acknowledged the presumption's inapplicability in its memorandum decision and said no more. But the district court did say more, and that discussion casts a long shadow across its reasoning in rejecting this ground for termination.

After accurately paraphrasing the presumption in the memorandum decision, the district court declared: "Then the reverse is also controlling." And it went on to say: "If the father has faithfully provided support; as is the case here; then there would NOT be a presumption that he has failed to assume his duties." The district court's explanation is more elaborate and emphatic than simply dismissing the presumption as irrelevant. In a legal context, the word "controlling" intimates an outcome determinative rule. See Black's Law Dictionary 1056 (11th ed. 2019) (defining "controlling law" as that

"govern[ing] a disposition"). So the phrasing suggests the district court may have intuited something like a reverse presumption to erroneously lend undue weight to C.H.'s payment of financial support in considering whether he satisfied the noneconomic duties he owed R.H. The district court's short concluding disposition does not dispel the notion. The result is sufficiently muddy that we cannot reliably say the district court's findings and reasoning support its legal conclusion. A remand is, therefore, appropriate for the district court to more clearly explain its decision on this ground.

Overall, then, we are constrained to reverse the district court's denial of both K.C.'s request to terminate C.H.'s parental rights to R.H. and the petition to adopt. We remand for further proceedings. At a minimum, the district court must make additional findings and conclusions bearing on K.C.'s claim for termination under K.S.A. 2022 Supp. 59-2136(h)(1)(A) and K.S.A. 2022 Supp. 59-2136(h)(1)(G). The district court may invite input from the parties in the form of further argument, additional proposed findings and conclusions, or some other means.

Alternatively, given the passage of time from the termination hearing and the importance of the present circumstances of the interested parties to the decisive issue of termination, the district court may in its discretion and wisdom reopen the record to receive evidence focusing on relevant changes since December 2021. If the district court chooses this course, it should consider relevant evidence on all four statutory grounds for termination K.C. has alleged and make new findings of fact and conclusions of law on them. Based on materially changed circumstances, law of the case would not preclude reexamination of termination under K.S.A. 2022 Supp. 59-2136(h)(1)(B) and K.S.A. 2022 Supp. 59-2136(h)(1)(C), even though we have affirmed the district court's rulings rejecting those grounds. See *In re A.L.E.A.*, No. 116,276, 2017 WL 2617142, at *7 (Kan. App. 2017) (unpublished opinion) (law of case would not bind district court to ruling denying motion to terminate parental rights in considering second motion to terminate based on changed circumstances); see also *In re A.S.*, 12 Kan. App. 2d 594, Syl. ¶ 3, 752

P.2d 705 (1988) ("Once a change of circumstances has been shown, a second proceeding to terminate parental rights is not barred by principles of res judicata or collateral estoppel.").

Reversed and remanded with directions for further proceedings.

* * *

ATCHESON, J., concurring: The majority opinion correctly reverses and remands this adoption action to the Geary County District Court with directions for further proceedings. I fully join in the reasoning and result we reach (not surprisingly) and offer here a rejoinder to Judge Malone's dissent. My response addresses the points in the order they appear in the dissent.

• The majority opinion noted that some of the background facts are not readily apparent from the record on appeal. For example, everyone agrees a district court had granted C.H. supervised visitation with R.H. for one hour a month. But the record is sketchy at best as to what district court did that and in what proceeding. Likewise, it's less than clear whether C.H. had the right to communicate with R.H. apart from those visits.

Those gaps impeded our detailed understanding and recitation of the relationships among C.H., R.O., and R.H. and, by indirect extension, K.C. But the missing details were not outcome determinative and did not lead us to reverse and remand, contrary to the dissent's suggestion. In other words, K.C. furnished a sufficient record on appeal for us to conclude the district court too narrowly construed two of the statutory grounds for termination of parental rights in K.S.A. 2022 Supp. 59-2136(h)(1) and, therefore, misapplied the established facts to the law in rejecting his request to terminate C.H.'s right. We, of course, cannot and should not divine what the district court would say upon correctly applying the facts to the law, especially when the decision should take into

account "all of the relevant circumstances." K.S.A. 2022 Supp. 59-2136(h)(2)(A). Hence, we remand for precisely that purpose.

• The dissent invokes the "negative findings" rule to support the district court's decision to deny termination of C.H.'s rights. But the rule is inapposite here. The rule operates this way: When, in a bench trial, a district court finds the party bearing the burden of proof fails to satisfy that burden, the result is a negative finding that may be reversed on appeal only if the district court arbitrarily disregarded undisputed evidence to the contrary or otherwise ruled based on bias, passion, prejudice, or some similarly improper extrinsic consideration. *In re Tax Appeal of River Rock Energy Co.*, 313 Kan. 936, 959, 492 P.3d 1157 (2021); *Wiles v. American Family Assurance Co.*, 302 Kan. 66, 79-80, 350 P.3d 1071 (2015); *Lostutter v. Estate of Larkin*, 235 Kan. 154, 162-63, 679 P.2d 181 (1984). The rule turns on a district court's conclusion that a party has failed to prove the elements necessary to prevail on a legal claim—the failure being a "negative" finding. But the rule presupposes the district court has correctly identified the elements to be proved. So, for example, if the elements a petitioner must prove are A, B, and C *or* D, the district court's ruling that the proof fell short on element A would constitute a negative finding sufficient to defeat the claim. But a ruling of insufficient evidence on C alone without considering D would not be, since the petitioner could have prevailed by proving D, along with A and B. The ruling would reflect a plain legal error and could not properly be upheld as a negative finding.

Here, as the majority opinion outlines, the district court misconstrued the statutory requirements for termination under K.S.A. 2022 Supp. 59-2136(h)(1)(A) and (h)(1)(G) in a similar way by improperly constricting the elements sufficient to terminate C.H.'s rights. So the district court incorrectly found that C.H.'s consistent payment of child support was enough to rule against K.C. on those two grounds. But the statutory language would permit termination under either subsection even if a biological parent had regularly paid child support. The negative findings rule can't be used to prop up that kind of legal

mistake. In turn, an appellate court considers the district court's reading of the controlling statutory language without any deference, as we have done here. *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020).[1]

[1]Apart from its inapplicability to the legal deficiencies in the district court's decision here, the negative findings rule wallows in the illogic of reviewing so-called "negative" findings and "positive" findings differently and grows out of dubious origins, including a carelessly considered syllabus point in *American Housing & Investment Co. v. Stanley Furniture Co.*, 202 Kan. 344, Syl. ¶ 1, 449 P.2d 561 (1969), related to credibility findings in jury trials, and a bit of more than likely dicta in *In re Estate of Countryman*, 208 Kan. 816, 822, 494 P.2d 1163 (1972). The rule also conflicts with the statutory test for setting aside factual findings in bench trials in Chapter 60 actions. K.S.A. 2022 Supp. 60-252(a)(5) ("Findings of fact must not be set aside unless clearly erroneous[.]"). I have discussed the shortcomings of the negative findings rule in *Woodard v. Hendrix*, No. 123,900, 2022 WL 2286922, at *10-15 (Kan. App. 2022) (unpublished opinion) (Atcheson, J., concurring). Even assuming the rule to be intrinsically sound, it shouldn't be applied here to trowel over the district court's legal errors.

• The dissent points out that a district court need not terminate a biological parent's rights even if the petitioner has proved one or more of the requisite statutory grounds. K.S.A. 2022 Supp. 59-2136(h)(1) ("the court may order" termination upon proof of any listed statutory ground). The dissent seems to suggest the district court should be affirmed for that reason. But the district court explicitly based its decision on the ostensible failure of K.C. to prove any of the four statutory grounds for termination he asserted. The district court did not make an alternative ruling that even if K.C. had proved any of them, it would have exercised its discretionary authority to deny the request to terminate C.H.'s rights. Nor did the district court even hint at such a conclusion. We would overstep to impute that sort of rationale to the district court at this juncture and would, in effect, be making the discretionary call ourselves. Appellate courts shouldn't usurp a district court's judicial discretion that way. See *State v. Jackson*, No. 124,540, 2023 WL 176079, at *3 (Kan. App.) (unpublished opinion), *rev. denied* 317 Kan. ___ (May 5, 2023); *State v. Brown*, No. 117,795, 2018 WL 4039194, at *3 (Kan. App. 2018) (unpublished opinion).

• The dissent would similarly infer factual findings necessary to warrant denial of termination under K.S.A. 2022 Supp. 59-2136(h)(1)(A). The majority opinion has thoroughly explained why we should not do so here, especially given the competing interests at stake.

• The majority opinion recognized that the district court erred in finding C.H.'s regular payment of child support alone was categorically sufficient to avert termination under K.S.A. 2022 Supp. 59-2136(h)(1)(G), requiring biological parents to fulfill both economic and noneconomic duties owed their children. Secondarily, the majority characterized the district court's emphatic discussion of a statutory presumption favoring termination if a parent has provided insufficient economic support to be at the very least confusing and perhaps legally erroneous in crafting an inverse presumption against termination when a parent has paid child support.

We remanded so the district court could address all of the statutory criteria—that's the first consideration and the one the dissent doesn't question. We would have come to that conclusion even if the district court had simply mentioned the nonpayment presumption and noted that it was factually irrelevant.

The district court didn't stop there, however, as the majority opinion outlines. The dissent suggests we have read "way too much into the district court's language" discussing the presumption. Slip op. at 22. But words represent the medium of exchange in the marketplace of ideas that infuses the adjudicatory process. We impute value or worth to the ideas based on the words used to express them. Although appellate courts may extend a degree of charity to unscripted oral expressions offered in the give-and-take of litigation, we typically take written words at face value.[2]

[2] Thus, for example, in *State v. Charles*, 304 Kan. 158, 175, 372 P.3d 1109 (2016), the court found that the prosecutor's repeated use of the phrase "'I think'" in

closing argument amounted to a "verbal tic" to be avoided rather than a genuinely improper argument based on a deliberate expression of personal opinion about the evidence. Similarly, we discounted the significance of a passing misstatement in closing argument as reflecting "the spontaneous inelegance that often arises in the unscripted discourse of trial practice." *State v. Alexander*, No. 114,729, 2016 WL 5344569, at *6 (Kan. App. 2016) (unpublished opinion). Conversely, as the majority opinion states, we read statutes as they are written, giving the words their usual meanings. And in a civil proceeding, we rely on a district court's written decision over an earlier oral ruling on the same matter. *Valdez v. Emmis Communications*, 290 Kan. 472, 482, 229 P.3d 389 (2010); *Hildenbrand v. Avignon Villa Homes Community Assoc.*, No. 120,245, 2021 WL 137339, at *6 (Kan. App. 2021) (unpublished opinion).

We may (and should) assume district courts say what they mean and mean what they say in their written decisions. The words presumably are chosen and assembled with some care and deliberation to express with clarity and vigor the ideas the district court intends to convey. In reading the words about the legal presumption, however, we have been left in the dark as to just what the district court meant to impart. We have explained our confusion, so that the district court may be clearer on remand. But we would have remanded regardless of what the district court said or didn't say about the presumption.

Our paramount objective here (as in any appellate review) lies in seeing that the relevant facts have been properly applied to the governing legal standards, resulting in a decision that conforms to both the evidence and the law. Here, the district court's truncated analysis of the controlling statutory provisions on termination has thwarted that goal. As a result, we cannot confidently say the result is correct. In turn, we have remanded for the district court to clarify the bases for its conclusions and, if appropriate given the substantial interests at stake, to update the factual record. Whatever the ultimate outcome, it should be well anchored in both the evidence and the law. We seek nothing more, and the parties should receive nothing less.

* * *

MALONE, J., dissenting: I respectfully dissent and would affirm the district court's judgment that the petitioners, K.C. and R.O., failed to show by clear and convincing evidence that C.H.'s parental rights to R.H. should be terminated and that his consent to the stepparent adoption petition was unnecessary. The evidence shows that C.H. has exhibited many shortcomings as a father over the years. But he faithfully paid his child support obligation and in August 2021, after not visiting R.H. for about four years, C.H. contacted Sunflower Bridge Visitation Center to set up supervised visits with R.H. This attempt to reestablish visitation no doubt triggered the stepparent adoption petition that was filed the next month. C.H. testified and acknowledged many of his failures as a parent. But C.H. provided uncontroverted testimony that his previous mental health issues and alcohol abuse were being managed. He explained that he is in a stable relationship with another woman and is a good father to their two-year-old daughter. Based on the evidence, the district court could not find that C.H.'s parental rights should be terminated and denied the stepparent adoption in the absence of his consent.

The majority begins its opinion by observing that the record for our review is somewhat lacking and incomplete. In particular, K.C. introduced many exhibits at the hearing that are not included in the record, and the district court took judicial notice of other case files that are not included in the record. Any deficiency in the record presented for our review works against the appellant. The party claiming an error occurred has the burden of designating a record that affirmatively shows prejudicial error. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013).

When a district court finds that a party fails to meet the burden of proof, the district court has made a negative factual finding. *In re Adoption of D.D.H.*, 39 Kan. App. 2d 831, 836, 184 P.3d 967 (2008). The negative fact-finding standard of review means that this court must not reject the district court's decision unless the challenging party

shows that the district court arbitrarily disregarded undisputed evidence or relied on some extrinsic consideration such as bias, passion, or prejudice to reach its decision. *Cresto v. Cresto*, 302 Kan. 820, 845, 358 P.3d 831 (2015). At the very least, an appellate court must review the evidence in the best light for C.H., as the party prevailing in the district court. *In re Adoption of J.M.D.*, 293 Kan. 153, 171, 260 P.3d 1196 (2011).

The majority correctly notes that statutory interpretation involves a question of law subject to unlimited appellate review. *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020). But I do not think that the propriety of the district court's decision turns on its legal analysis or application of the controlling statute. The district court was aware that the petitioners sought to terminate C.H.'s parental rights under K.S.A. 2022 Supp. 59-2136(h)(1)(A), (h)(1)(B), (h)(1)(C), and (h)(1)(G), and it addressed each subsection in its ruling. As the majority opinion correctly states, even if a petitioner satisfactorily proves one or more of the statutory grounds for termination of parental rights, termination is permissive rather than mandatory. See K.S.A. 2022 Supp. 59-2136(h)(1) (district court "may order" termination after finding that any of the listed grounds has been proved).

The majority opinion points out that K.S.A. 2022 Supp. 59-2136(h)(1)(A) permits termination if a parent either abandons *or* neglects a child after having knowledge of the child's birth. The district court found there was no evidence at trial that C.H. abandoned R.H., but it failed to address whether the evidence was sufficient to show neglect under this statutory subjection. But I would not seize upon this failure as a basis to reverse the district court's judgment and remand for further findings. Generally, a party bears the responsibility to object to inadequate findings of fact and conclusions of law to give the district court a chance to correct any alleged inadequacies. See *In re Guardianship and Conservatorship of B.H.*, 309 Kan. 1097, 1107-08, 442 P.3d 457 (2019). The petitioners did not object to the district court's failure to make adequate findings of fact or conclusions of law under K.S.A. 2022 Supp. 59-2136(h)(1)(A). In fact, the petitioners do

not even argue on appeal that the district court made no findings about neglect under K.S.A. 2022 Supp. 59-2136(h)(1)(A), but the majority takes it upon itself to point out that the district court's findings under this subsection were tied only to abandonment and not to neglect.

The majority concedes that the district court sufficiently analyzed and applied K.S.A. 2022 Supp. 59-2136(h)(1)(B) and (h)(1)(C) but finds that the court incorrectly analyzed K.S.A. 2022 Supp. 59-2136(h)(1)(G) that permits termination when the father has failed or refused to assume the duties of a parent for two consecutive years before an adoption petition is filed. K.S.A. 2022 Supp. 59-2136(h)(3) establishes a rebuttable presumption that a parent who has not paid "a substantial portion" of court ordered child support for two years before an adoption petition is filed has failed to assume the duties required under K.S.A. 2022 Supp. 59-2136(h)(1)(G). After noting this presumption, the district court stated: "The reverse is then also controlling. If the father has faithfully provided support; as is the case here; then there would NOT be a presumption that he has failed to assume his duties." The majority finds that "the phrasing suggests the district court may have intuited something like a reverse presumption to erroneously lend undue weight to C.H.'s payment of financial support in considering whether he satisfied the noneconomic duties he owed R.H." Slip op. at 14.

The majority reads way too much into the district court's language. All the district court stated was that there is no presumption under K.S.A. 2022 Supp. 59-2136(h)(3) that applies here because C.H. has faithfully paid child support. The district court did not state that this fact created any presumption in C.H.'s favor under the statute.

C.H. has a constitutionally recognized liberty interest in parenting his child—a right deemed to be fundamental. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The district court recognized this fundamental right by holding the petitioners to the high burden of proving their claims by clear and convincing

evidence. This is not a case in which C.H. is relying only on his faithful child support payments to prevent termination of his parental rights. C.H. was reestablishing visitation with R.H. when he was served with the stepparent adoption petition. He testified about his current efforts to turn his life around and that he is fit to parent R.H. After weighing all the evidence, the district court found that the petitioners failed to prove by clear and convincing evidence that C.H.'s parental rights should be terminated, and the court would not allow the stepparent adoption without C.H.'s consent. The district court did not arbitrarily disregard undisputed evidence or rely on some extrinsic consideration such as bias, passion, or prejudice to reach its decision. We should not set aside the district court's judgment based on the record presented for our review.