NOT DESIGNATED FOR PUBLICATION

No. 125,712

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of K.R., a Minor Child.

MEMORANDUM OPINION

Appeal from Reno District Court; PATRICIA MACKE DICK, judge. Opinion filed July 21, 2023. Reversed and remanded with directions.

Candace S. Bridgess, of Kansas Legal Services, Inc., for appellant natural mother.

S. Kyle Byfield, assistant district attorney, and *Thomas Stanton*, district attorney, for appellee.

Before BRUNS, P.J., GREEN and SCHROEDER, JJ.

PER CURIAM: N.A. (Mother) appeals the district court's termination of her parental rights. She argues that the district court did not afford her due process. The State argues that the district court correctly terminated parental rights through a default judgment because Mother failed to appear at the hearing, allowing the district court to take judicial notice of its file. Because the district court erroneously terminated Mother's parental rights without any evidence and in direct contradiction of a persuasive decision from this court, we reverse and remand to the district court for a new termination hearing in this case.

FACTS

In July 2021, the State filed a petition alleging that K.R. was a child in need of care (CINC). The petition named T.R. as the father of K.R., noting that he was

incarcerated. The father is not involved in this appeal. The petition alleged that Mother repeatedly dropped off K.R. at his grandmother's workplace before disappearing for an unknown period. The petition alleged concerns about Mother's usage of methamphetamine and heroin.

The district court scheduled a hearing on temporary custody. The guardian ad litem (GAL) stipulated that the claims in the State's petition were true. The district court placed K.R. in the temporary custody of the Kansas Department for Children and Families (DCF).

At the adjudication and disposition hearing, Mother did not stipulate that the State's petition was true as the GAL did. Instead, she entered a no-contest stipulation. The district court ordered that K.R. remain in DCF custody.

In July 2022, the district court held a permanency hearing and found that reintegration was no longer a viable goal. The State moved to terminate Mother's parental rights, alleging that Mother had failed to show stable housing and income and that she continued abusing drugs. The district court ordered a hearing on the motion, which the court scheduled for August 31, 2022.

On the day of the termination hearing, Mother's counsel appeared, but Mother did not appear. Instead, her boyfriend called to say that she was positive for COVID-19. The district court requested a test, and Mother arrived in court with a test showing that she was negative for COVID-19. The district court ordered her to have a urinalysis test at court services before the hearing. Mother left the courthouse, never went to court services, and did not return. The district court made no announcements in the record, and it did not hold a hearing on August 31, 2022. Thus, the record on appeal contains no transcript. The State, in its appellee brief, claims that the district court made findings on

August 31 and ordered Mother's parental rights terminated. But the record lacks support for the State's claims.

The district court, however, issued a written order terminating Mother's parental rights on September 19, 2022. Mother moved to set aside the default judgment. Both Mother and the State maintain in their appellate briefs that the district court held a hearing on October 11, 2022, and denied Mother's motion to set aside the default judgment. No transcript or other record of this hearing is of record. Instead, the court reporter filed a memo noting that there was no electronic recording in this case to transcribe.

Mother timely appeals.

ANALYSIS

Did the district court err in terminating Mother's parental rights?

On appeal, Mother claims that the district court violated her due process rights by terminating her parental rights through a default judgment. The State argues that Mother had an opportunity to be heard at a meaningful time and in a meaningful manner, but Mother decided not to appear in person.

A parent has a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution to make decisions regarding the care, custody, and control of the parent's child. Before a parent can be deprived of the right to the custody, care, and control of the child, the parent is entitled to due process of law. *In re P.R.*, 312 Kan. 767, 778, 480 P.3d 778 (2021). But this fundamental right to parent is not without limits. 312 Kan. at 778. Because child welfare is a matter of state concern,

the State may assert its interest "through state processes designed to protect children in need of care." *In re A.A.-F.*, 310 Kan. 125, 146, 444 P.3d 938 (2019).

Also, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *In re J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007). When considering whether there has been a due process violation, appellate courts apply an unlimited standard of review. *State v. Hall*, 287 Kan. 139, 143, 195 P.3d 220 (2008).

In 2019, this court gave instructions to the district courts on how to proceed with termination of parental rights in a factually and persuasive case of *In re K.H.*, 56 Kan. App. 2d 1135, 444 P.3d 354 (2019). In that case, the natural mother claimed that the district court erred, alleging that the default judgment violated her constitutional due process rights. This court held that the claim could be resolved through statutory analysis. 56 Kan. App. 2d at 1139-40. Interpretation of a statute is a question of law over which appellate courts have unlimited review. *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918, 349 P.3d 469 (2015).

We acknowledge that one Kansas Court of Appeals panel may freely disagree with a previous panel of the same court. *State v. Fleming*, 308 Kan. 689, 706, 423 P.3d 506 (2018). While conflicting opinions among panels of the Court of Appeals may constitute a valid ground for granting Supreme Court review, no authority exists for one panel to overrule or disapprove a decision of another panel. *In re Marriage of Cray*, 254 Kan. 376, 382, 867 P.2d 291 (1994). Given the factual similarities between this case and *In re K.H.*, which we find it to be a persuasive decision, it is difficult for us to say anything that has not already been considered and said in *In re K.H.*

K.S.A. 38-2248(f) provides that in "evidentiary hearings for termination of parental rights under this code, the case may proceed by proffer as to parties not present,

unless they appear by counsel and have instructed counsel to object." The language of the statute is unambiguous. Simply put, "when a parent fails to appear at the hearing on a motion to terminate parental rights, the State may proceed by proffering the evidence supporting the motion if there is no objection by counsel for the" absent parent. *In re K.H.*, 56 Kan. App. 2d at 1141.

Here, the district court did not follow the statutory procedure in terminating Mother's parental rights. Mother arrived late for the hearing and then left rather than take a urinalysis test. In short, she failed to appear in person. But she appeared at the hearing through her attorney. In such circumstances, *In re K.H*, the court concluded:

> "In this situation, at a minimum, the State should have proceeded by proffering the evidence in support of its motion to the district court. In the event of an objection to a proffer, the State should have proceeded to offer clear and convincing evidence to support its motion to terminate Mother's parental rights." *In re K.H.*, 56 Kan. App. 2d at 1141.

The State concedes that it did not proffer evidence, adding the following: "In this case the natural mother's counsel did not request the State proffer it's [*sic*] evidence or put on any evidence." Here, the State introduces an irrelevant argument in its assertion that Mother's counsel did not request the State to proffer its evidence. This contention is a red herring because K.S.A. 38-2248(f) does not require a natural mother's counsel to request that the State proffer evidence. As this court instructed in *In re K.H.*, the case may proceed without Mother being present, at the district court's discretion. But if the case does proceed, it must proceed first by proffer of evidence and then, if the absent parent's counsel objects, the State must present the evidence. *In re K.H.*, 56 Kan. App. 2d at 1141.

Instead of following the statutory procedure under K.S.A. 38-2248(f), the district court apparently canceled the proceedings. The district court then granted a default judgment without receiving any evidence. Indeed, the court found that Mother's attorney

could not "refute the allegations contained in the State's [m]otion." But the State's motion is not evidence, nor did any party ask the district court to consider the motion as evidence.

On appeal, the State notes that a court may take judicial notice of its own court file. While this is true, the State's argument contains two flaws. First, the State cites only to statutes and caselaw, but not to the record. Although it can easily be inferred, nothing in the record shows that the district court did in fact take judicial notice of its own court file. Second, and more importantly, the *In re K.H.* court discussed and rejected this argument: "[T]here are two separate files in any CINC case: the official file containing all the pleadings filed in district court and the social file containing reports and evaluations of the parties involved in the case." *In re K.H.*, 56 Kan. App. 2d at 1141 (citing K.S.A. 2018 Supp. 38-2211). The district court in *In re K.H.* announced that it had reviewed "the file" but failed to specify whether it had reviewed its official court file or the social file. 56 Kan. App. 2d at 1141. And no party requested that the district court take judicial notice of any file to serve as an evidentiary basis supporting the State's motion to terminate parental rights. The *In re K.H.* court rejected judicial notice of a file because the record was not sufficiently clear to determine which documents served as evidentiary support for terminating the mother's parental rights. 56 Kan. App. 2d at 1142. Here, the record is even less clear because there is no mention at all of taking judicial notice of any file and no transcript showing that any party asked for judicial notice of any document to serve as evidence.

The district court here later filed a journal entry terminating Mother's parental rights. The journal entry specified statutory grounds for finding Mother unfit under K.S.A. 38-2269(b)(3), (b)(7), and (b)(8). But the record shows that no party presented any evidence to the district court supporting these statutory factors. In a default judgment situation, the *In re K.H.* court held that the following should have occurred:

> "The State is not entitled to receive a default judgment against a parent who fails to appear in person at a termination hearing as long as the parent appears at the hearing through counsel. In that situation, the State must present evidence, or at least proffer evidence, supporting its motion to terminate parental rights before the district court can grant judgment on the motion." *In re K.H.*, 56 Kan. App. 2d at 1144.

Here, the district court terminated Mother's parental rights by default without the State proffering any evidence in support of its motion to terminate Mother's parental rights. Because no evidence was proffered, the district court erred in terminating Mother's parental rights.

From the record on appeal, we can see that the State alleged that reintegration was no longer viable. The State alleged that Mother failed to make progress towards complying with case plan activities and court orders. The record contains signed DCF reports which could support this allegation. The State alleged that Mother did not consistently maintain housing. Also, the State alleged that Mother did not consistently maintain employment. In addition, the State alleged that Mother did not complete mental health or drug and alcohol treatment services. The signed DCF reports could provide some support for those allegations. But the record is lacking for two reasons. First, as a practical matter, the information covered only part of the relevant period. The State moved to terminate parental rights in July 2023, but the DCF reports in the record only track events through January 2023. Nothing in the record covers the six months in between. Second, in terms of evidentiary value, the record contains no testimony, no affidavits, and no exhibits. No one has taken an oath under penalty of perjury. No one can be held accountable if any one of the allegations—or even if all the allegations—against Mother were later proved to be untrue. Thus, the district court terminated Mother's parental rights based on allegations unsupported by evidence.

As we have stated before, "the State presented *no evidence* supporting its motion to terminate Mother's parental rights." *In re K.H.*, 56 Kan. App. 2d at 1145. A district

court may terminate parental rights only when it finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future. K.S.A. 38-2269(a). When Mother failed to appear at the hearing on the motion to terminate her parental rights, the State, at a minimum, was statutorily required to proceed by proffering the evidence in support of its motion to terminate Mother's parental rights. As stated earlier, because no evidence was proffered to support terminating Mother's parental rights, the district court erred when it terminated Mother's parental rights.

Based on the record before us, the district court failed to afford Mother due process when it found that Mother was an unfit parent and that termination of her parental rights was in K.R.'s best interests. We remand to the district court for a new evidentiary hearing on termination of Mother's parental rights.

Reversed and remanded with directions.