

NOT DESIGNATED FOR PUBLICATION

No. 125,935

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of J.W.,  
a Minor Child.

MEMORANDUM OPINION

Appeal from Ottawa District Court; JASON PARKS, magistrate judge. Oral argument held September 19, 2023. Opinion filed December 8, 2023. Appeal dismissed.

*Charles Ault-Duell*, of CAD Law, LC, of Salina, for appellant natural father.

*Tisha S. Morrical* and *Parker Montgomery*, of Hampton & Royce, L.C., of Salina, for appellee natural mother.

*Richard A. Buck*, county attorney, for appellee.

Before BRUNS, P.J., PICKERING, J., and TIMOTHY G. LAHEY, S.J.

PICKERING, J.: In this child in need of care (CINC) case, Father appeals from the district court's permanency hearing ruling that reintegration with Father was no longer viable. Father contends that the district court abused its discretion in changing the permanency plan goal from reintegration to reintegration-no-longer-viable. The court's order, however, is not one from which an appeal may be taken under K.S.A. 38-2273(a). Thus, we lack jurisdiction and dismiss the appeal.

## FACTUAL AND PROCEDURAL BACKGROUND

This is the second CINC case involving the child, J.W. (born in 2013). The earlier CINC case was opened in 2019 and was closed in June 2021. In that case there were allegations of physical abuse from Father, sexual abuse in Mother's home, and substance abuse issues on behalf of both parents. Allegations of physical abuse from Father and drug abuse by Mother continued to be reported in this case.

On August 24, 2021, J.W., then seven years old, ran away from Father's house. He ran to a neighbor's house for help, telling the neighbor that his father hits him. The neighbor called law enforcement, and the police were dispatched. An officer went to Father's home and knocked on the door, but Father did not answer. Around two hours later, law enforcement was able to contact Father at his home. Father told officers that J.W. had slipped out of the house while Father was in the basement. He explained to the officers that he did not hear the officer's knocking earlier that evening because he was wearing headphones at the time.

Three days later, on August 27, 2021, a temporary custody hearing was held. The district court placed J.W. in the temporary custody of Mother, who was then residing at Helena Oxford House, a sober living home. At the time of hearing, the district court limited Father's visitation to supervised or therapeutic visits only. The visits could be expanded if the therapists and the guardian ad litem agreed.

A little over a month later, a second temporary custody hearing was held. The district court removed the child from Mother's care because of neglect. According to the State's application for ex parte order of protective custody, Mother had been quarantined in her room with J.W. for three days because she tested positive for COVID. During her quarantine, she relapsed into drinking and neglected to feed the child. Once the Oxford House staff discovered that Mother had been drinking on the premises, they removed

Mother from the facility. The district court placed J.W. into the custody of the Secretary of the Kansas Department for Children and Families (DCF).

The State filed a notice of adjudication and disposition hearing, which was set for November 30, 2021. Several days before the adjudication and disposition hearing, Father entered a no-contest statement to the State's petition that J.W. was a child in need of care. The district court's register of actions indicates at the disposition hearing, the court ordered reintegration as the case plan. The child remained in DCF custody. Neither party requested the transcript of the November 30, 2021 hearing, and the transcript is not part of the record on appeal.

Following the adjudication and disposition hearing, the district court held five review hearings between February 7, 2022, and October 24, 2022. At the February 7, 2022 hearing, the district court ordered both parents' visits to increase. At the March 15, 2022 review hearing, the district court granted Saint Francis Ministries (Saint Francis), the agency managing the case, discretion to increase the length and number of Father's visits with J.W. At the July 12, 2022 review hearing, the district court ordered visits to increase up to and including reintegration with Father. At the August 9, 2022 review hearing, Father notified the court that J.W. had been enrolled at school in Minneapolis, where Father resides. J.W. told the court, "I'm having a good time with my dad and I'm glad to be with him." The court's order to Saint Francis at that time was "to continue reintegration or maintain at home." At the September 13, 2022 review hearing, the district court learned that J.W. had reintegrated to Father's home and they were receiving aftercare services. Consequently, the court ordered that the plan be modified "from reintegration to maintain at home." The court, however, did not authorize J.W.'s release from DCF custody.

A week before the October 24, 2022 review hearing, there was a critical incident. J.W. refused to go home after school, telling teachers he was afraid of his father. Father later admitted that he "tapped [J.W.] on the head . . . [a]nd it scared him." J.W. was removed and put into DCF custody with a foster family that had been a resource for J.W. in the past. The district court ordered that J.W. "shall be maintained in out of home placement" and seen by his therapist twice before the next review hearing—to specifically focus on J.W.'s relationship with Father. The visitation between J.W. and both parents was left up to Saint Francis with input from J.W.'s therapist and his guardian ad litem.

At a review hearing held on November 22, 2022, Father contended that J.W.'s school placement should not have been unilaterally moved from Minneapolis to Cottonwood without the court's permission. He also reported that there had been no therapeutic visits between himself and his son since J.W. had been removed from his care and placed back in foster care. He requested that J.W. be moved back to the Minneapolis school and that the court order an in-person therapeutic visit between each parent and J.W. The child's therapist told the court that she could not recommend a therapeutic face-to-face visit with Father because J.W. was "not at a point where he wants to see his father." The court denied both of Father's requests. The district court made a finding that reintegration may not be a viable alternative for J.W. In light of this finding, the district court scheduled a permanency hearing for December 6, 2022.

Before the permanency hearing, two maternal relatives of J.W. filed for interested party status, and the district court granted those motions. Based on the finding made during the November hearing, the State filed a motion to terminate the parental rights of both Mother and Father.

At the permanency hearing, J.W.'s therapist testified that she had six sessions with J.W. since his most recent removal from his father's home. She said that until two weeks

prior, J.W. did not want any contact with Father, although he was open to receiving notes and voice recordings from Father. According to J.W.'s therapist, J.W.'s reaction to his father was "drastically different from other caregivers in his life." She related that in one of her first sessions with J.W., he told her that the people who make him feel safe are "[t]he people that keep me away from my dad."

J.W.'s case manager with Saint Francis testified that she had seen J.W. the day before and he had told her that he did not want to see or talk to his father.

The district court stated:

"We have reintegrated [J.W.] . . . three times. Once to his mother's home. And twice to his father's home. We have years now of experience and incidents that tell this court that the parents can't hold it together. . . . [W]hether or not there is a viable chance to pull . . . this together and keep this family intact, always my goal. I just don't believe it exists in this case anymore. I don't believe there is a viable chance."

The district court—aware that the State had filed a motion to terminate both parents' parental rights—set the next hearing for a review hearing.

On December 20, 2022, Father filed a motion to stay trial of the motion to terminate parental rights. In his motion, Father asked the district court to stay the parental termination trial "pending the outcome of Natural Father's appeal from the Court's permanency and dispositional orders." That same day, Father filed a notice of appeal, stating that he was appealing:

"each and every adverse ruling and order entered by the District Magistrate Judge Jason Parks during and pursuant to the dispositional/permanency hearings of December 6, 2022 and November 22, 2022, and the permanency journal entry documenting the same filed on December 12, 2022, all pursuant to K.S.A. 38-2273(a). See *In re NAC*, 49 Kan. App. 2d at 728, 316 P.3d 771 [2013] ('Nothing in the jurisdictional statute prevents an appeal from any dispositional orders entered after rehearing. See K.S.A. 2012 Supp. 38-2273[a]')."

## ANALYSIS

Preliminarily, we note Father's December 20, 2022 notice of appeal references *In re N.A.C.*, 49 Kan App 2d 699, 316 P.3d 771 (2013). We also note the Kansas Supreme Court had reversed this case and dismissed the appeal in 2014. *In re N.A.C.*, 299 Kan. 1100, 1106, 329 P.3d 458 (2014). In briefing, Father properly cites to the Kansas Supreme Court decision.

### *We Do Not Have Jurisdiction to Consider Father's Appeal*

"Appellate courts have only such jurisdiction as is provided by law." *In re N.A.C.*, 299 Kan. at 1106. Whether jurisdiction exists is a question of law subject to unlimited appellate review. *City of Wichita v. Trotter*, 316 Kan. 310, 312, 514 P.3d 1050 (2022). "Questions involving statutory interpretation are also questions of law subject to unlimited review." *In re N.A.C.*, 299 Kan. at 1106-07.

The revised Kansas Code for Care of Children (Code), K.S.A. 38-2201 et seq., has its own jurisdictional statute in K.S.A. 38-2273(a), which specifies five categories of appealable orders: "An appeal may be taken by any party or interested party from any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights." Thus, for us to have jurisdiction here, the order Father seeks to appeal must fit within one of those categories. "If the record reveals that jurisdiction does not

exist, the appeal must be dismissed." *In re I.A.*, 57 Kan. App. 2d 145, 148, 450 P.3d 347 (2019).

In this case, the State filed a notice of adjudication and disposition hearing, stating that the hearing was set for November 30, 2021. In addition to the adjudication hearing, the disposition hearing was held that same day. At that hearing the district court ruled that the permanency plan was reintegration with J.W.'s parents. Although the transcript of that hearing is not in the record, the district court's register of actions shows that a disposition hearing was held on that date and that reintegration was the permanency plan. Father did not appeal from that disposition hearing.

Close to a year later, a review hearing was held on November 22, 2022, and a permanency hearing was held on December 6, 2022. The notice prepared by the State for the December 6, 2022 hearing referred to the hearing as a "permanency hearing." Father does not specify whether the order on November 22, 2022, or the one on December 6, 2022, is the appealable order. The notice of appeal Father filed cites both dates.

Consequently, before briefing, we issued an order to the parties noting that Father challenges the district court's determination on reintegration, yet K.S.A. 38-2273(a) allows appeals only from "any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights." We noted that it was unclear whether the challenged district court's order qualified as a "disposition" and ordered the parties to respond. The State and Mother did not respond. Father responded that his appeal was taken from the rehearing of a dispositional order.

In this case, the district court's decision to change the permanency plan from reintegration to reintegration-not-viable was made first at a review hearing on November 22, 2022, and again at a permanency hearing on December 6, 2022. Father contends that the district court's findings from these two hearings are dispositional orders. He relies on

two cases, *In re N.A.C.*, 299 Kan. 1100, and *In re E.G.*, No. 98,187, 2007 WL 3085378 (Kan. App. 2007) (unpublished opinion), for the proposition that a reintegration-not-viable finding is an appealable dispositional order. Neither of those two cases support Father's argument that he may appeal the court's orders entered at the review hearing or the permanency hearing.

In *In re N.A.C.*, a child's maternal cousin and the cousin's husband (maternal cousins) appealed a post-termination hearing ruling made at a permanency hearing. The district court found that the state agency had not made reasonable efforts, removed the child from the state custody, directly placed the child with the foster parents, and approved the adoption. Another panel of this court reversed, and the foster parents petitioned for review by the Kansas Supreme Court. 299 Kan. at 1106. The Kansas Supreme Court granted the petition to consider whether, as a matter of first impression, a post-termination finding that a state agency has not made reasonable efforts and an order removing the child from state custody and directly placing the child with her foster parents with permission to adopt was an appealable order. The *In re N.A.C.* court held it was not. 299 Kan. at 1110.

In reaching this holding, our Supreme Court found: "The Revised Kansas Code for Care of Children creates a legislatively designated framework of sequential steps of judicial proceedings with each step occurring in a specific order leading toward permanency in the child's placement." 299 Kan. 1100, Syl. ¶ 5. The court reviewed the five orders that may be appealed as defined under K.S.A. 38-2273(a)—temporary custody, adjudication, disposition, finding of unfitness, and termination of parental rights—and explained: "The terms 'order of temporary custody,' 'adjudication,' and 'disposition' must be seen as terms of art, each with a particular meaning within the Revised Code that clearly establishes a sequence of court-supervised events all marching toward permanency." *In re N.A.C.*, 299 Kan. at 1116.

The court reviewed what occurs at both a temporary custody hearing and an adjudication hearing and whether orders issued after each hearing were appealable, then the court addressed dispositional orders. A dispositional order must be filed within 30 days after adjudication, "unless delayed for good cause shown." K.S.A. 38-2253(b); 299 Kan. at 1113.

The *In re N.A.C.* court then explained:

"The substance of the dispositional hearing and attendant order are addressed by K.S.A. 2012 Supp. 38-2253, which states:

'(a) At a dispositional hearing, the court shall receive testimony and other relevant information with regard to the safety and well being of the child and may enter orders regarding:

(1) Case planning which sets forth the responsibilities and timelines necessary to achieve permanency for the child; and

(2) custody of the child.'" *In re N.A.C.*, 299 Kan. at 1113.

The court then discussed the custody options a district court may take regarding placement of a child; it can either grant a parent custody of the child, or it can remove the child from the parent's custody. "If the latter, the court must make certain findings. For example, it must find probable cause that certain conditions exist, such as 'allowing the child to remain in [the] home is contrary to the welfare of the child.' K.S.A. 2012 Supp. 38-2255(c)(1)(B)." *In re N.A.C.*, 299 Kan. at 1113-14. And if the district court does make the required findings and places the child in state custody,

"it may award custody to: (1) a child's relative; (2) a person with whom the child has close emotional ties; (3) any other suitable person; (4) a shelter facility; (5) a youth residential facility; or (6) the Secretary. This custody order 'shall continue until further order of the court.' K.S.A. 2012 Supp. 38-2255(d)." *In re N.A.C.*, 299 Kan. at 1114.

And "if the person to whom custody is awarded is not a parent, a permanency plan that conforms to the requirements of K.S.A. 2012 Supp. 38-2264 (permanency hearing: purpose, procedure, time for hearing, and authorized orders) must be prepared. K.S.A. 2012 Supp. 38-2255(e)." *In re N.A.C.*, 299 Kan. at 1114.

The court went on to explain that because the last appealable order under K.S.A. 2012 Supp. 38-2273(a) is the termination of parental rights order, any post-termination order was not appealable. Thus, the court reasoned that a post-termination order was not a dispositional order but, rather, a permanency order made at the permanency hearing.

Additionally, the court indicated that caselaw "does not necessarily deny an appeal of a dispositional order issued after a rehearing." *In re N.A.C.*, 299 Kan. at 1120. Under the rehearing statute, K.S.A. 38-2256, "[a]fter the entry of any dispositional order, the court may rehear the matter on its own motion or the motion of a party or interested party."

In this case, Father seeks to appeal the finding—made at a review hearing and again at the permanency hearing—that reintegration was no longer viable. The orders Father is attempting to appeal can best be characterized as orders regarding a change in the permanency plan, but these orders are not one of the five appealable orders under K.S.A. 38-2273(a). Further, Father is not appealing a court's order from a disposition rehearing authorized under K.S.A. 38-2256.

The State correctly points out that the December 6, 2022 hearing was a permanency hearing, not a dispositional hearing. K.S.A. 38-2264 and K.S.A. 38-2265 govern permanency hearings. "A permanency hearing is a proceeding conducted by the court or by a citizen review board for the purpose of determining progress toward accomplishment of a permanency plan as established by K.S.A. 38-2263, and amendments thereto." K.S.A. 38-2264(a). Once the district court makes a finding—other

than at a permanency hearing—that reintegration is no longer viable, the court is obligated to hold a permanency hearing within 30 days of that finding. K.S.A. 38-2264(g). The requirement to hold a permanency hearing within 30 days of a reintegration-not-viable finding is to ensure that the case timely proceeds forward. See K.S.A. 38-2201(b)(4) (stating Revised Code be "liberally construed" to "acknowledge that the time perception of a child differs from that of an adult and to dispose of all proceedings under this code without unnecessary delay"). Here the district court held the permanency hearing on December 6, 2022—within 30 days of its November 22, 2022 finding that reintegration was no longer a viable option—to comply with K.S.A. 38-2264(g).

In the second case on which Father relies, *In re E.G.*, the mother appealed from a disposition order that found reintegration was no longer viable. The panel held that the finding was "encompassed" by the dispositional order at the disposition hearing and was therefore "an action concerning custody" that was appealable. 2007 WL 3085378, at \*3. We do not necessarily disagree with that statement but, rather, emphasize that the mother's appeal was based on the court's order entered at a disposition hearing. That is, the order was made in conformance with K.S.A. 38-2253 and made at the time of a disposition hearing.

While the Code does not define "dispositions," the *In re E.G.* panel found that "dispositions are 'apparently those actions concerning custody taken by the court following [an adjudication].' *In re S.C.*, 32 Kan. App. 2d at 518." *In re E.G.*, 2007 WL 3085378, at \*3. In fact, our Supreme Court recently confirmed: "Orders addressing the *custody* of a child that are entered during the dispositional phase of a CINC proceeding are dispositional orders—one of the five types of appealable orders under K.S.A. 38-2273(a)." *In re N.E.*, 316 Kan. 391, 405, 516 P.3d 586 (2022).

Unlike *In re E.G.*, the court's orders from the review and permanency hearings in this case were not included in an order arising from a disposition hearing under K.S.A. 38-2253 or a rehearing under K.S.A. 38-2256. Instead, this finding that reintegration was no longer viable was made at a review hearing and a subsequent permanency hearing. The ruling Father challenges does not constitute a dispositional order.

The district court's findings did not concern J.W.'s custody, as the child had remained with DCF since October 2021 and custody was not an issue at the permanency hearing. Because a permanency order is not one of the types of appealable orders enumerated in K.S.A. 38-2273(a), we are without jurisdiction. This appeal is therefore dismissed for lack of appellate jurisdiction.

Appeal dismissed.