NOT DESIGNATED FOR PUBLICATION

No. 126,974

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of M.C. and J.M.,
Minor Children.

MEMORANDUM OPINION

Appeal from Johnson District Court; KATHLEEN SLOAN, judge. Submitted without oral argument. Opinion filed May 10, 2024. Affirmed.

Richard P. Klein, of Lenexa, for appellant natural father.

Maria C. Davies, assistant district attorney, and *Stephen M. Howe*, district attorney, for appellee.

Before ARNOLD-BURGER, C.J., CLINE and COBLE, JJ.

PER CURIAM: J.G.M. (Father) is the natural father of two minor children who were found to be in need of care in an uncontested proceeding. Two years later, both parents stipulated to unfitness, but the court took the foreseeability and best interests findings under advisement, permitting the parents additional time to address these issues. But at the final termination hearing eight months later, Father appeared only to provide a statement and then left, instructing his counsel to not object to the State's proffer of evidence. The district court terminated Father's parental rights based on the State's proffer and Father now appeals. He argues the district court violated his due process rights when it terminated his parental rights upon the State's proffer, rather than requiring the State to present clear and convincing evidence at the termination hearing. In this vein, he argues the statute permitting termination by proffer when a parent does not appear, K.S.A. 38-2248(f), is unconstitutional. We find Father's arguments unpersuasive and affirm the termination of his parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Father is the natural father of two minor children, M.C. and J.M. On November 24, 2020, the State filed child in need of care (CINC) petitions for both children, alleging emergency circumstances warranted the removal of the children from their parents' care. The petitions alleged a no-contact order barred Mother from caring for the children, and it made claims about Father's alcohol use and unstable housing. At the time the State initiated CINC proceedings, M.C. was two years old and J.M. was nearly one year old.

At the temporary custody hearing the same day, the district court appointed counsel for both parents, and each parent was represented by counsel at the hearing. The district court found probable cause to believe the allegations in the State's petitions were true, noting it had "[s]erious concerns of domestic violence, homelessness and substance abuse," and placed the children in the temporary custody of the Kansas Department for Children and Families (DCF).

A few months later, on January 7, 2021, both parents entered no-contest statements that the children were in need of care. The district court accepted their no-contest statements as made freely, voluntarily, and upon the advice of counsel. Based on their stipulations, the district court adjudicated the children as in need of care under K.S.A. 38-2202(d)(1); (d)(2); (d)(3); and (d)(11). It set the disposition goal for reintegration and offered the parents separate six-month reintegration plans. The district court ordered KVC Behavioral Healthcare, Inc. (KVC) to prepare reintegration plans and ordered the children remain in DCF custody.

In July and November 2021, the district court held review hearings, extending the parents' reintegration plans each time. On June 27, 2022, the State moved for a finding of unfitness and termination of both parents' rights. The State's motions are not included in the record on appeal.

The district court held its initial hearing on the State's motion over six months later, on January 13, 2023—two years after the initial CINC finding. Both parents appeared with counsel and agreed to stipulate to their unfitness under K.S.A. 38-2269(c)(3) (failure to carry out a reasonable plan approved by the court for the integration of the children into a parental home). After determining the parents provided their stipulations to unfitness willingly, voluntarily, and upon the advice of counsel, the district court accepted their stipulations under K.S.A. 38-2269(c)(3). But the issue of foreseeability—that is, whether the conditions of unfitness were likely to change in the foreseeable future under K.S.A. 38-2269(a)—was set over for a later hearing.

The district court set a review hearing for 90 days later and ordered the parents to complete certain tasks toward reintegration with the children during that time frame. As for Father, the district court ordered he attend individual therapy, anger management courses, address his substance abuse issues, and submit to urinalysis and blood analysis testing. Then, at the scheduled review hearing, the district court found the hearing "should be continued for good cause shown," and set a termination hearing for August 17, 2023.

At the start of the August termination hearing, Father's counsel informed the district court "the parents would like to make statements to the Court," and after a requested recess, counsel anticipated having a "proffer trial." Mother's counsel agreed with the suggested procedure, stating upon speaking with Father's counsel, "[Mother] understands she will be providing a statement. After her statement, she will leave and then the trial will continue with the State proffering its evidence."

Mother orally provided a statement to the district court, then Father gave his statement. At the end of Father's statement, his counsel was allowed to ask him two questions on the record—one regarding his probation and the other regarding his visitations.

After the parents finished their separate statements, the State requested the parents submit a "waiver of trial" before leaving court. Counsel for all parties discussed whether a waiver was necessary, but ultimately both Mother and Father confirmed they did not object to the State's proffer and orally waived their right to be present at the proffer hearing. The district court held a recess and, upon returning to the record, noted both parents had left the courthouse.

After the parents left, the State proceeded to proffer its evidence in support of terminating Mother's and Father's parental rights. As for Father, the State proffered he did not complete many of his reintegration tasks. Father had unstable housing, often reporting as homeless, throughout the proceedings. And despite stating to KVC he was employed, Father never offered proof. Father also did not have transportation. The State proffered that Father had continuing issues communicating with KVC in an inappropriate and incoherent manner, which displayed a concern for his mental health and overall stability. Father had been on probation, which he did not successfully complete, and he did not participate in the Batterer's Intervention course as ordered. In conclusion, the State argued its proffer showed that "despite the extra time that was granted by the Court . . . [the parents were] essentially in the same spot they were when they stipulated to unfitness in January of 2023." And the State proffered evidence that termination was in the best interests of the children, a position which the guardian ad litem supported. After asking counsel for each parent if there was "anything that [they] would like to add to the record today," each parent's counsel responded in the negative.

After reviewing the procedural history of the CINC action and summarizing the State's proffer, the district court found the State's proffer constituted clear and convincing evidence that Mother and Father continued to be unfit under K.S.A. 38-2269(b)(7), (b)(8), and (c)(3). The district court determined these conditions were unlikely to change in the foreseeable future. And it terminated the parental rights of both parents after finding it was in the children's best interests.

Father appeals, and the children's cases were consolidated for the purpose of appeal. According to the record, Mother also appealed the termination but is not a party to this appeal.

FATHER'S CONSTITUTIONAL CLAIMS ARE UNAVAILING

Father raises one claim on appeal, which he divides into two parts. First, he argues the district court violated his due process rights when it accepted a proffer of evidence in place of actual evidence. And second, Father contends K.S.A. 38-2248(f)—the statute permitting proceedings by proffer in termination proceedings—is unconstitutional as applied to him. In response, the State reasons this court should not consider Father's claims because they are not preserved for appellate review. Alternatively, the State suggests the district court did not violate Father's due process rights because he waived such rights, and the district court provided him opportunities to be heard. The State argues against Father's constitutionality claim on the same grounds.

Preservation

Father concedes he neither objected to the proceeding by proffer, nor did he lodge any sort of due process or constitutional objection before the district court. And generally, constitutional grounds asserted for the first time on appeal are not properly before us for review. *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014); *In re A.E.S.*, 48 Kan. App. 2d 761, 767, 298 P.3d 386 (2013).

Yet Father persuasively argues we could consider his constitutional claims for the first time on appeal because our consideration of the claims is necessary to serve the ends of justice or prevent a denial of fundamental rights. See *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008) (delineating three exceptions to the general rule

against raising new issues on appeal); Kansas Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) (requiring appellants to explain why an issue was not raised below).

Our Supreme Court has found a parent has a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution to determine the care, custody, and control of the parent's child. And a parent is entitled to due process of law before being deprived of such right. *In re P.R.*, 312 Kan. 767, 778, 480 P.3d 778 (2021); *In re Adoption of A.A.T.*, 287 Kan. 590, 600-01, 196 P.3d 1180 (2008); see *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). A previous panel of this court has considered unpreserved constitutional claims during CINC proceedings on this ground. See *In re A.E.S.*, 48 Kan. App. 2d at 767. We join our colleagues in considering Father's due process and constitutionality arguments, though we ultimately find them unconvincing.

The district court did not deny Father due process.

Our Supreme Court has considered due process violations during CINC proceedings and held the "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). As noted above, a parent's right to decide the care, custody, and control of his or her child is an established fundamental liberty interest protected by the Fourteenth Amendment. *In re P.R.*, 312 Kan. at 778. But even so, that right is not absolute. "The welfare of children is a matter of State concern." *In re J.D.C.*, 284 Kan. at 166. And 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).

As both parties recognize, the United States Supreme Court established a balancing test for reviewing procedural due process claims in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). And our Kansas Supreme Court employed the *Mathews* balancing test in an appeal from CINC proceedings, explaining:

> "A due process violation exists only when a claimant is able to establish that he or she was denied a specific procedural protection to which he or she was entitled. The type and quantity of procedural protection that must accompany a deprivation of a particular property right or liberty interest is determined by a balancing test, weighing: (1) the individual interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the State's interest in the procedures used, including the fiscal and administrative burdens that any additional or substitute procedures would entail." *In re J.D.C.*, 284 Kan. at 166-67 (citing *Mathews*, 424 U.S. at 335).

"Whether an individual's due process rights were violated is a question of law subject to de novo review." *In re Adoption of B.J.M.*, 42 Kan. App. 2d 77, 81, 209 P.3d 200 (2009).

Father does not ignore that multiple panels of this court have found contrary to his claim of error by the district court for proceeding with the termination by proffer. See *In re J.M.B.,* No. 112,578, 2015 WL 4460578, at *7 (Kan. App. 2015) (unpublished opinion); *In re K.M.*, No. 106,877, 2012 WL 2476996, at *5-8 (Kan. App. 2012) (unpublished opinion). Even so, he argues these cases were wrongly decided. To decide for ourselves, we must undertake an elemental analysis of Father's argument under *Mathews*.

1. *Father's liberty interest*

First, we acknowledge the initial *Mathews* factor does not require extensive analysis in this context, because we have already confirmed Father's constitutionally

protected liberty interest in the care, custody, and control of his minor children. As a result, he is entitled to due process of law before being deprived of this right. See *Troxel*, 530 U.S. at 65; *In re P.R.*, 312 Kan. at 778.

2. *The risk of erroneous deprivation of this interest through the procedures used and probable value of additional or substitute procedural safeguards*

Under the second *Mathews* factor, Father presents a few arguments. First, he claims it is impossible "to meet the clear and convincing standard from a proffer of evidence." The rules of civil procedure apply in all CINC proceedings under the Revised Kansas Code for Care of Children (the Code). See K.S.A. 38-2249(a). But this section of the Code directly follows the section allowing proffers as to parties not present in K.S.A. 38-2248(f). Accordingly, Father contends a proffer of evidence conflicts with or violates various evidentiary rules found in the Kansas Code of Civil Procedure, such as K.S.A. 60-401, K.S.A. 60-402, K.S.A. 60-460, and K.S.A. 60-462.

This dovetails with Father's second argument about the fundamental fairness of CINC hearings, contending witnesses at these hearings should be placed under oath "to ensure trials are dependable. And a proffer of evidence does not allow that to happen." In this vein, he describes the unreliability of hearsay and suggests a proffer of evidence does not support "an objective, evenhanded trial."

Father's third point speaks to the value of using additional or substitute safeguards rather than a proffer, arguing "it would be quick and simple" to hold an "actual evidentiary hearing" because the State's witnesses at evidentiary hearings are typically present anyway. He maintains that requiring such testimony would take "very little time" and impose a minimal burden on the State.

Despite his efforts, we find Father's arguments under *Mathews*' second factor unpersuasive. Contrary to his first argument contending a proffer cannot meet the statutory clear and convincing standard, a panel of this court has found a proffer is the proper procedure when a parent fails to appear at a termination hearing. See *In re K.H.*, 56 Kan. App. 2d 1135, 1140, 444 P.3d 354 (2019). In *In re K.H.*, the panel acknowledged the district court's statutory authority to proceed by proffer when a party does not appear:

> "[T]he Revised [Kansas Code for Care of Children] directs the district court how to proceed at a hearing on a motion to terminate parental rights when a parent fails to appear. K.S.A. 2018 Supp. 38-2248(f) provides that in evidentiary hearings for termination of parental rights, 'the case may proceed by proffer as to parties not present, unless they appear by counsel and have instructed counsel to object.' In other words, 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 parent." 56 Kan. App. 2d at 1140-41.

In *In re K.H.*, the mother claimed her due process rights were violated when the district court terminated her parental rights by default judgment. After defining the district court's authority to proceed on proffer, the panel agreed with Mother and found her due process rights were violated when the district court entered default judgment, rather than proceeding by proffer. The panel opined:

> "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." 56 Kan. App. 2d at 1141.

Another panel recently relied on *In re K.H.* to find a district court violated a mother's due process rights by granting default judgment rather than proceeding by proffer under K.S.A. 38-2248(f) when she failed to appear at the termination hearing. *In*

re K.R., No. 125,712, 2023 WL 4677010, at *2-4 (Kan. App. 2023) (unpublished opinion).

Father's arguments are largely policy arguments which ignore the clear direction of the Legislature giving courts the option to proceed by proffer if a parent does not appear. He conveniently overlooks those crucial elements that allow for a termination to proceed on the State's proffer—his own lack of presence at the evidentiary hearing and the permission he gave his attorney to not object to the State's proffer in his absence. Father argues proffers cannot establish clear and convincing evidence because "[a] proffer of evidence removes all of these characteristic qualities of an objective, evenhanded trial." But Father's own actions dissuaded the district court from holding a hearing where the State was required to present clear and convincing evidence. Not only did Father choose to leave the proceedings despite initially appearing, he also orally waived an evidentiary hearing and gave his counsel permission to not object to the State's proffer upon his absence. And when the State concluded its proffer—to which Father's counsel did not object—Father's counsel stated he had nothing else to add.

Put simply, Father unequivocally ceded his opportunity to do more at the evidentiary hearing when he chose to leave the court before the evidentiary portion of the hearing. The Kansas Supreme Court has found this factor weighed in favor of the State when a parent waives such opportunities to present evidence. See *In re J.D.C.*, 284 Kan. at 170. In *In re J.D.C.*, the mother argued her due process rights were violated by the judge's refusal to force the State to call her daughter to testify on direct examination. But the Kansas Supreme Court disagreed, finding Mother had a meaningful opportunity to confront her daughter but chose not to when presented with those opportunities:

> "[T]he district judge was prepared to summon J.D.C. to the courtroom for whatever cross-examination her mother's counsel saw fit to pursue. This had the potential to be broader and more searching than a cross-examination limited to the scope of a preceding

direct examination. Nevertheless, after consultation with his client, counsel declined the judge's invitation. While this was adequate to preserve J.D.C.'s mother's legal objection to proceeding in the suggested fashion, it did little to protect her case. She waived her opportunity to do more—to confront her daughter in court and challenge her accusations face-to-face." 284 Kan. at 170.

Like *In re J.D.C.*, here the district court provided Father an opportunity to do more. Instead, he chose to leave the courthouse and permitted his attorney to accept the State's proffer. The district court provided Father with a meaningful opportunity to be heard in a meaningful way, but Father waived that opportunity.

In one of the prior cases rejecting Father's argument, *In re K.M.*, the mother neither appeared at the proceedings nor did she instruct her counsel to object to the State's proffer under K.S.A. 38-2248(f). The panel found mother's argument was unpersuasive:

> "Mother clearly had the ability to attend and participate in the termination trial; it was her choice to abscond from the courthouse and then refuse to go into the courtroom after she returned to the courthouse. The record reflects that she was given an opportunity to object to the State's proffer of evidence against her, and the district court properly inquired as to whether she had left instructions for her attorney to object in her absence. Under K.S.A. 2011 Supp. 38-2248(f), the trial properly proceeded with the State's proffer, which the district court properly determined was clear and convincing evidence of Mother's unfitness and inability to change in the foreseeable future." *In re K.M.*, 2012 WL 2476996, at *7.

On top of waiving his chance to be heard by leaving the courthouse and instructing his attorney to not object to the State's proffer, Father was provided another opportunity. Despite immediately informing the court that he intended to leave during the evidentiary portion of the proceedings, the district court nevertheless permitted Father—at his request—to present a long statement to the court in which he claimed, among other things, that KVC improperly accused him of molesting his daughter and threatening to

kill KVC employees. And at the conclusion of his statement, the district court permitted Father's counsel to pose questions to Father that spoke to his probation and visitations with his children.

Quite simply, Father had the opportunity to do more to defend himself against the termination of his parental rights, yet he chose not to. Father, through counsel, could have objected to the State's proffer and required the State to present clear and convincing evidence. And he could have confronted the KVC employees through their testimony regarding the allegations they made against him. Instead, Father left the courthouse instructing his counsel not to object to the State's proffer.

Father's final argument under this factor suggests it is "quick and simple" to hold an evidentiary hearing because the State's witnesses at evidentiary hearings are often already present. But this argument conveniently ignores that such a procedural safeguard of requiring the State to present clear and convincing evidence already exists—Father needed only to object to the State's proffer for the safeguard to occur.

Our unlimited review of the record and caselaw convinces us there was no risk of an erroneous deprivation of Father's interest through the State's use of a proffer in these circumstances. Here, Father's own attorney (who incidentally also represents him here, on appeal) suggested the proffer procedure, without any objection by Father, and proceeded on this course in Father's agreed absence. See *State v. Willis*, 312 Kan. 127, 131, 475 P.3d 324 (2020) ("Under the invited error doctrine, a litigant may not invite error and then complain of that same error on appeal.").

3. *The State's interest in the procedures used*

Both parties agree the State has a significant interest in the proffer procedure under K.S.A. 38-2248(f). The Kansas Supreme Court has "'long recognized the State's

interest in protecting its children and assuring they receive proper care.'" *In re M.M.L.*, 258 Kan. 254, 267, 900 P.2d 813 (1995) (quoting *In re Woodard*, 231 Kan. 544, 551, 646 P.2d 1105 [1982]).

And as the State points out, its interest in protecting children extends to the requirement that all proceedings under the Code be concluded in an expedited manner. See K.S.A. 38-2201(b)(4); *In re J.A.H.*, 285 Kan. 375, 386, 172 P.3d 1 (2007) (quoting K.S.A. 38-1501 [Furse 2000], the predecessor to K.S.A. 38-2201) (interpreting K.S.A. 38-1551 [Furse 2000], the predecessor to K.S.A. 38-2246, and related statutes under the Code, to require "that all proceedings be disposed of without unnecessary delay and that Code provisions be 'liberally construed' to 'best serve the child's welfare'").

Our Supreme Court has consistently held Kansas courts "must strive to decide these cases in 'child time' rather than 'adult time.'" 285 Kan. at 386; see *In re M.S.*, 56 Kan. App. 2d 1247, 1263, 447 P.3d 994 (2019); *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").

Another panel of this court applied the *Mathews* balancing test to consider a parent's untimely appeal from prior orders of temporary custody. *In re L.B.*, 42 Kan. App. 2d 837, 843-44, 217 P.3d 1004 (2009). When it considered this final factor regarding the State's interest in the termination procedures, the panel found:

> "The Kansas statutes in place calling for the expedited resolution of these types of cases serve two functions. The first function is to protect the ongoing physical, mental, and emotional needs of the child by advancing the proceedings without unnecessary delay. K.S.A. 2008 Supp. 38-2201(b). However, the Kansas statutes, by expediting the

> underlying proceedings, recognize the cost to the State in these types of case[s] is considerable. In 1990, our Supreme Court noted 'in Kansas alone during 1989 there were 2,067 confirmed child abuse reports, 129 confirmed hospitalizations due to child abuse, and 8 confirmed child abuse deaths.' *In re S.M.Q.*, 247 Kan. [231,] 232, 796 P.2d 543 [(1990)]. The State expends considerable funds and other resources every day a child is in State custody." *In re L.B.*, 42 Kan. App. 2d at 843.

To both protect the welfare of children and lessen the cost to the State, expediting CINC claims is necessary. And as the State argues, preventing the use of proffers of evidence would create a significant burden on its ability to conclude CINC claims without unnecessary delay. For his part, Father acknowledges the State's interest in resolving the case quickly, but still suggests "there are minimal administrative or fiscal burdens of putting on evidence" in a termination hearing.

But as Father repeatedly mentions, the State bears the burden to prove a parent's unfitness by clear and convincing evidence. And depending on the case, this would surely require more than "30 or 60 minutes" to offer witness testimony, as Father suggests. As the State points out, without the option to proffer, the State would be required to have witnesses available for every termination hearing—even if the parent does not appear. This would result in the State—and its potential witnesses, including contracted agencies—unnecessarily spending time and expenses preparing for hearings in which parents do not intend to participate. By ignoring these potential costs to the State and our Legislature's mandate to expedite these cases, Father simultaneously requests more due process while denying how much due process would be needed. This approach is unpersuasive.

4. *The* Mathews *balancing test does not weigh in Father's favor.*

In conclusion, upon application of the *Mathews* balancing test, Father has not shown the district court violated his due process rights when it accepted the State's

proffer of evidence under K.S.A. 38-2248(f). While Father does have a significant interest in the care, custody, and control of his minor children, the other factors under the balancing test weigh heavily in favor of the State's use of a proffer when a parent does not appear. Father has not shown there was a risk of erroneous deprivation of his interest through the proffer procedure used because he was given a meaningful opportunity to be heard in a meaningful way—he simply chose not to pursue these options. And the State has an interest in disposing of CINC claims using a proffer because disposing of CINC claims without unnecessary delay is in the best interests of the State's children and avoids unnecessary expenditures when a parent does not appear and does not object to the State's proffer.

Father has not shown K.S.A. 38-2248(f) is unconstitutional as applied to him.

Father argues his success on his due process claim would require us to find K.S.A. 38-2248(f) unconstitutional. He claims this statute is unconstitutional as applied to him for the same arguments he presented on his due process claim, and because he was present throughout most of the proceedings here. Father maintains that "although there may be a place for the application of the statute for an absentee parent, . . . there is certainly a due process violation when a parent is present throughout the duration of the case and engages with case workers to attempt reintegration."

Whether a statute is constitutional raises a question of law over which this court has de novo review. *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1132, 442 P.3d 509 (2019); *In re K.M.H.*, 285 Kan. 53, 63, 169 P.3d 1025 (2007).

Appellate courts presume statutes are constitutional and must resolve all doubts in favor of a statute's validity. We must interpret a statute in a way that makes it constitutional if there is any reasonable construction that would maintain the Legislature's apparent intent. *Solomon v. State*, 303 Kan. 512, 523, 364 P.3d 536 (2015). Our Supreme

Court has explained this presumption when analyzing the constitutionality of a statute under the previous version of the family law code:

> """In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond substantial doubt." [Citations omitted]."' *In re K.M.H.,* 285 Kan. at 63.

More recently, though, the Kansas Supreme Court found the presumption of constitutionality does not apply to a statute dealing with "'fundamental interests'" protected by the Kansas Constitution. *Hilburn*, 309 Kan. at 1132-33; *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 673-74, 440 P.3d 461 (2019).

Regardless of whether we should presume the statute's validity, we are unconvinced K.S.A. 38-2248(f) is unconstitutional as applied to Father for two primary reasons. Most importantly, his due process arguments fail as analyzed above. Second, his suggestion that he should have been treated differently because of prior participation in the case—despite his lack of appearance for the termination hearing—is unavailing.

His argument is not altogether clear, but he claims K.S.A. 38-2248(f) is unconstitutional because it conflicts with other sections of the Code that "treat[] parents who engage in the case differently than absentee parents." As examples, he points to K.S.A. 38-2267(b)(3), which does not require additional service to a party "who could not be located by the exercise of due diligence in the initial notice of the filing," and K.S.A. 38-2271(a)(9), which allows a presumption of unfitness if a parent has been absent since their child's birth. Father suggests that—unlike parents who cannot be located or have made no efforts to connect with their child—because he was present throughout the case and engaged with caseworkers to attempt reintegration, the proffer procedure should not have applied to him.

Father's argument is unpersuasive. First, he did not support his conclusory factual contention that he was not an absentee parent. He claims a due process violation because he was present through the duration of the CINC case and engaged with caseworkers. But Father fails to designate a record, or allege any specific facts, to establish he was fully present and attempted reintegration. As the party asserting error, Father bears the burden of designating a record sufficient to present his points to the appellate court and to establish his claims. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013). The State's proffer was contrary to his assertion on appeal. And if the record contains any evidence to the contrary, Father did not provide citations to support those factual contentions.

Moreover, Father's legal argument—that the Code treats "parents who engage in the case differently"—is not supported by the Code's plain language. The statutes Father emphasizes for support of his claim show the Legislature treats parents who do not engage *at all* differently than others, but the Code does not make any specific provisions for those who do take part. Although the Code directly speaks to parents who do not participate in the proceedings—such as those who cannot be located or have not made efforts to connect with their child—it does not directly speak to parents who do engage in the proceedings. Father's claim that K.S.A. 38-2248(f) is unconstitutional impermissibly reads something into the statute that is not readily found in its words. *Montgomery v. Saleh*, 311 Kan. 649, 654-55, 466 P.3d 902 (2020).

In this vein, Father seems to assume any parent who engages in a CINC proceeding could not, or would not, choose to proceed by proffer at the time of termination. But his own behavior at the hearing belies his logic. A parent could participate in the proceedings for years and then change their mind at the evidentiary hearing—and the Code permits such a choice. Simply because the Code offers a choice does not make one of the alternatives unconstitutional.

In summary, we reject Father's arguments on the constitutionality of K.S.A. 38-2248(f). Father's due process claim failed, and he has not shown the proffer statute is unconstitutional as applied to him because the plain language of the Code simply does not support his claim.

Affirmed.