NOT DESIGNATED FOR PUBLICATION

Nos. 117,368
117,369
117,370
117,371
117,372

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of A.A.-F., M.A.-F., F.A.-F., B.C., and J.S.,
Minor Children.

MEMORANDUM OPINION

Appeal from Geary District Court; MARITZA SEGARRA, judge. Opinion filed December 29, 2017. Affirmed.

Andy Vinduska, of Manhattan, for appellant.

Michelle L. Brown, assistant county attorney, for appellee.

Before GARDNER, P.J., PIERRON and ATCHESON, JJ.

PER CURIAM: D.B.S. appeals the order of the Geary County District Court terminating her right to parent her five oldest children. On appeal, D.B.S. contends the district court lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, deprived her of constitutional due process by failing to hold a statutorily required permanency hearing, and ordered termination based on insufficient evidence. We find no reversible error and affirm the termination order.

FACTUAL AND PROCEDURAL HISTORY

The five children who are directly involved in these proceedings are A.A.-F., M.A.-F., F.A.-F., B.C., and J.S. D.B.S.'s youngest child, E.S., a daughter born in 2015, is not. To reduce the clutter of parties identified with initials, we refer to D.B.S. as Mother from here on.

After marrying A.F., Mother had A.A-F. on August 25, 2007, and M.A.-F. on September 20, 2008, in Kansas. According to Mother, her relationship with A.F. was abusive. In June 2009, Mother and A.F. had a physical altercation that resulted in A.F. choking Mother, while Mother held a pair of kitchen knives to A.F.'s throat. M.A.-F., a baby, was in the same room as his parents during this altercation and other instances of physical violence.

To avoid criminal prosecution and deportation for the physical abuse of Mother, A.F. fled to California and found itinerant agricultural work. Mother took the children out to California to see their father after receiving a promise they would have a place to stay. When Mother and the children ended up without a place to stay, they lived in a motel room until their money ran out. A.F. periodically stayed with Mother and the children, and Mother became pregnant with F.A.-F., who was born on February 25, 2010.

When her financial resources were exhausted, Mother took the children to live with her at the Union Rescue Mission in the Los Angeles area. The exact circumstances are unclear, but, while Mother was at the shelter, the children were removed from Mother's custody, apparently because Mother exhibited some mental health problems. She was briefly hospitalized for a psychiatric evaluation, which left the children without parental care. Accordingly, the State took custody of A.A.-F. and M.A.-F. on September 4, 2009. Approximately a month after she was born, F.A.-F. was also placed in state custody in California.

California initiated an Interstate Compact for the Placement of Children (ICPC) home study with the children's maternal grandmother in Kansas. The Kansas Department of Social and Rehabilitative Services sent its California counterpart, Department of Children and Family Services (DCFS), a letter indicating that the maternal grandmother was not a suitable placement because of her health issues and a history of sexual abuse within the family. The letter referenced an attached home study summary, but the summary was not included in the record.

A.F. was arrested in California for assault with a deadly weapon, sent to prison, and ultimately deported to Mexico. Mother stayed in California, visiting her children and attempting to comply with the case plan tasks. While the children were in state custody, Mother began dating D.S., and, after living on the streets for a time, they eventually resided together. B.C. was born of their relationship on September 7, 2011. D.S. and Mother married on August 10, 2013.

On January 5, 2012, a few months after she was born, B.C. was removed from parental custody on allegations of Mother's visual impairment (macular degeneration) and of her mental and emotional instability. At the termination hearing in this case, Mother and D.S. claimed that B.C. was removed from the home only for a week, but the California documentation in the record indicates that B.C. was in out-of-home placement for a couple of months, returning to Mother's custody on March 8, 2012. Even after B.C. was returned to Mother's physical custody, A.A.-F., M.A.-F., and F.A.-F. remained in foster care until September 2012, when the children were returned to Mother's physical custody while remaining under the legal custody and supervision of California DCFS. J.S. was born on June 24, 2013. On the recommendation of the social workers, the court terminated jurisdiction over the children on August 30, 2013.

While in California in July 2013, D.S. observed A.A.-F. and M.A.-F. engaging in sexual behavior with one another. D.S. and Mother reported the behavior to the police and to DCFS, alleging sexual abuse by the children's foster parents. After an investigation, state authorities dismissed the allegations against the foster parents as unfounded. With DCFS assistance, the parents engaged A.A.-F. and M.A.-F. in therapy, but the inappropriate sexual interactions continued with F.A.-F., B.C., and other children. Based on the continued reports of sexually inappropriate behavior and the physical condition of the home, the police took A.A.-F. and M.A.-F. into protective custody on March 12, 2014. Visits to the home by social workers following the detention of A.A.-F. and M.A.-F. led DCFS to recommend out-of-home placement for the remaining children. The court removed the children from Mother's custody on April 18, 2014. The court returned the children to Mother's physical custody on April 21, 2014, with legal custody remaining with DCFS.

Still in California, Mother and D.S. engaged in a heated argument about the children in October 2014 that devolved into a physical altercation. Mother allegedly fell onto J.S., and D.S. slapped her. D.S. called the police to report child endangerment, and Mother attempted to grab the phone to report abuse by D.S. During his interview with police, D.S. threatened to kill Mother if she were left with his children. D.S. was arrested.

Sometime between October 15 and October 22, 2014, while D.S. was in jail, Mother took the children with her to Kansas. She did not inform D.S. or DCFS. As a result, the California court revoked the children's placement with Mother on October 29, 2014.

Meanwhile, D.S. was released from jail in California, contacted Mother, and planned to meet her and the children in Kansas at the home of one of Mother's friends. At the meeting, on October 29, 2014, D.S. got into a physical confrontation with Mother's friends and made some threats, which caused him to be incarcerated again. The police

placed the children in protective custody based upon warrants issued by the California court. The children were transported back to California in mid-December 2014.

On June 24, 2015, the California court held a progress hearing and ordered the case transferred under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Cal. Fam. Code § 3400 et seq., to the Geary County District Court. A minute order from the hearing shows that Mother was represented by a lawyer but not whether she was personally present. The California court also ordered the children returned to Kansas. The Geary County District Court accepted jurisdiction and promptly ordered that the children remain in out-of-home placement.

The Kansas Department for Children and Families (DCF) conducted the first case plan meeting on July 28, 2015. The initial case plan's goal was reintegration of the family. The case plan identified concerns about appropriate supervision of the children and ordered assessments for both parents and mental health services for Mother. Mother was assigned three overarching tasks to accomplish toward reintegration: counseling and therapy to address the domestic violence issues, suitable housing, and reliable income. While the case plan was in effect, Mother did not complete any of the assigned tasks to the satisfaction of DCF.

When Mother brought the children to Kansas, she transferred her Section 8 housing voucher from California, and eventually rented a trailer home. On July 22, 2015, D.S. was again arrested for domestic violence and making a criminal threat against Mother. Because of these new criminal charges, D.S.'s probation in the earlier criminal threat case was revoked. D.S. remained in prison throughout the remainder of the child in need of care proceedings.

The evidence conflicts whether Mother needed additional financial assistance or whether she was merely lonely, but she invited her nephew and his girlfriend to live in

the trailer. The nephew was a convicted sex offender, and DCF refused to consider in-home visitation or reintegration into the home while he remained. Also, either because D.S., a convicted felon, was a signatory on the lease or because Mother failed to disclose the domestic violence incidents, Mother was notified of a hearing to determine the status of her Section 8 housing voucher. For some unreported reason, Mother did not attend the hearing and lost her Section 8 voucher. Mother was ultimately evicted from the trailer for failing to pay rent, and she went to live with her mother. Based on the ICPC report conducted for California and a home study conducted in a child in need of care case involving Mother's sister, the maternal grandmother's home was deemed an unsuitable placement for the children. In November 2016, Mother obtained a suitable apartment, but, by January 2017, she had again lost the apartment for failure to pay rent. Mother was back living with her mother when the district court terminated her parental rights.

Mother applied for a few jobs, but the evidence indicated that her attempts to find employment were sporadic until late in the process and that many of the jobs Mother obtained failed to provide reliable income. One Internet employer actually emptied Mother's bank account using the personal financial information she had provided. Mother never sought work before gainful employment became a case plan task and has never provided verification of her jobs to the assigned case managers. Mother applied for social security disability benefits. Her application was denied, and Mother appealed. The appeal had not been resolved at the time of the termination hearings.

On April 6, 2015, Mother began therapy with Ophelia Blackwell before the district court approved a case plan. D.S. also attended therapy at that time to obtain marital counseling related to the domestic violence. Their attendance was poor, missing all but two or three appointments. After D.S. was arrested, Mother continued attending individual therapy. Due to transportation issues, Mother was unable to attend some of her appointments, and Blackwell accommodated her by first providing in-home therapy sessions and later providing video sessions on the Internet. Blackwell worked with

Mother to improve her planning and organizational skills. Blackwell acknowledged that Mother was incapable of supporting and caring for six children on her own but believed that she could manage with hard work and the support network Mother had in her family. In a report submitted in October 2015, Blackwell acknowledged that Mother exhibited poor insight and poor judgment by focusing primarily on the problems in her relationship with D.S. rather than on her parenting. Blackwell testified at the termination hearing that she worked with Mother to refocus on the children and learn basic life skills. Blackwell also acknowledged that Mother is financially dependent on D.S. and that Mother provided no insight into the domestic violence problem, proposing to wait until D.S. stopped being abusive. Blackwell acknowledged that Mother exhibited poor judgment recently in applying for Internet employment that produced no income and in contracting for an apartment she couldn't afford.

On October 15, 2015, Mother attended a parenting and psychological evaluation with Dr. John Fajen. Fajen did not conduct normal psychological testing of Mother due to her vision impairment. Fajen substituted a four-hour clinical evaluation. In a report submitted to DCF, Fajen concluded that Mother genuinely wanted to reintegrate with her children but provided no clear picture of what she needed to do to accomplish that goal. Mother presented a sense of entitlement and refused to take any responsibility for the loss of her children. Fajen recommended continued attempts at reintegration, though he later admitted that he would seldom recommend the termination of parental rights on the basis of a parenting evaluation alone. He recommended gradual reintegration, believing that Mother would be overwhelmed with the responsibility of caring for six children simultaneously. He noted that the primary obstacle to Mother's ability to parent was her lack of independence and self-sufficiency. He opined that Mother was not currently competent to care for herself. Judging from Mother's history, Fajen harbored grave concerns that she was capable of managing even one child and believed it unlikely that she could manage six children on her own.

On November 4, 2015, based in part on Fajen's report, DCF recommended that the court find that reintegration was no longer viable and change the case plan goal to adoption. Following a hearing, the court adopted DCF's recommendation and found that reintegration was no longer feasible.

The State filed its motion to terminate the parental rights of Mother, A.F., and D.S. on January 28, 2016. The hearing on the motion was spread out over several months due to scheduling conflicts. The hearings were held on September 22, 2016, November 17, 2016, and January 12, 2017. Throughout the hearing, Mother retained custody of E.S., her youngest child. The hearing record contains sporadic references to E.S. and establishes Mother continued to care for her. The evidence suggests the county attorney had begun a child in need of care proceeding regarding E.S. But the record provides no details about that proceeding.

After the first day of evidence, D.S. moved to dismiss the case for lack of jurisdiction, arguing that the case was not properly transferred from California to Kansas under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Mother orally joined the motion at the hearing before the second day of evidence. The court denied the motion.

After the court heard the evidence, it took the matter under advisement, announcing its decision in open court on January 24, 2017. In the district court, the county attorney's office filed a separate case for each child. The district court, however, handled them jointly. The court memorialized its rulings terminating Mother's parental rights to A.A.-F., M.A.-F., F.A.-F., B.C., and J.S. in virtually identical journal entries filed on February 23, 2017. After Mother perfected appeals in each case, we consolidated them for disposition here. We also mention that D.S. has separately appealed the termination of his parental rights to B.C. and J.S. We have affirmed those termination orders in *In re B.C.*, No. 117,729 (this day decided).

LEGAL ANALYSIS

On appeal, as we have indicated, Mother raises three challenges to the termination of her parental rights: (1) the district court's lack of jurisdiction; (2) a denial of due process based on the failure to hold a permanency hearing; and (3) an insufficiency of evidence to support termination. Before taking up those issues in that order, we outline material legal principles governing termination proceedings under the Revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq.

Governing Legal Principles

A parent has a constitutionally protected liberty interest in the relationship with his or her child. See *Santosky v. Kramer*, 455 U.S. 745, 753, 759-60, 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). Given the inherent importance and unique character of that relationship, the right has been deemed fundamental. Accordingly, the State may extinguish the legal bonds between parent and child only upon clear and convincing proof of parental unfitness. K.S.A. 2016 Supp. 38-2269(a); *In re R.S.*, 50 Kan. App. 2d 1105, Syl. ¶ 1, 336 P.3d 903 (2014).

As provided in K.S.A. 2016 Supp. 38-2269(a), the State must prove the parent to be unfit "by reason of conduct or condition" making him or her "unable to care properly for a child" and that the circumstances are "unlikely to change in the foreseeable future." The statute contains a nonexclusive list of nine conditions that singularly or in combination would amount to unfitness. K.S.A. 2016 Supp. 38-2269(b). And the statute lists four other factors to be considered if a parent no longer has physical custody of a child. K.S.A. 2016 Supp. 38-2269(c). In addition, the State may rely on one or more of 13 statutory presumptions of unfitness outlined in K.S.A. 2016 Supp. 38-2271.

In reviewing a district court's determination of unfitness, an appellate court must be convinced, based on the full evidentiary record considered in a light favoring the State as the prevailing party, that a rational fact-finder could have found that decision "highly probable, *i.e.*, [supported] by clear and convincing evidence." *In re B.D.-Y.*, 286 Kan. at 705. The appellate court cannot weigh conflicting evidence, pass on the credibility of witnesses, or otherwise independently decide disputed questions of fact. 286 Kan. at 705. In short, any conflicts in evidence bearing on termination must be resolved to the State's benefit and against Mother.

Having found unfitness, the district court must then decide whether termination of parental rights is "in the best interests of the child." K.S.A. 2016 Supp. 38-2269(g). As directed by the language of K.S.A. 2016 Supp. 28-2269(g), the district court must accord "primary consideration to the physical, mental[,] and emotional health of the child." The district court makes that determination based on a preponderance of the evidence. *In re R.S.*, 50 Kan. App. 2d at 1115-16. The best-interests issue is essentially entrusted to the district court acting within its sound judicial discretion. 50 Kan. App. 2d at 1115-16. An appellate court reviews those sorts of decisions for abuse of discretion. A district court exceeds that broad latitude if it rules in a way no reasonable judicial officer would under the circumstances, if it ignores controlling facts or relies on unproven factual representations, or if it acts outside the legal framework appropriate to the issue. See *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013); *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011).

District Court's Jurisdiction

For her first issue on appeal, Mother contends the district court did not properly acquire jurisdiction under the UCCJEA, K.S.A. 2016 Supp. 23-37,101 et seq., to proceed with the child in need of care actions and, ultimately, to terminate her parental rights. The California court had initial jurisdiction under the UCCJEA by virtue of the orders it

issued in 2014 placing the children in state custody there. So jurisdiction had to migrate from the California court to the district court under the procedures outlined in the UCCJEA, which both states have adopted. During the termination hearing, D.S. objected to the district court's jurisdiction on the grounds the California court failed to follow the UCCJEA, and Mother joined in that objection. She again raises the issue here.

The UCCJEA limits the subject matter jurisdiction of the district courts to hear and decide child custody issues. *In re A.A.*, 51 Kan. App. 2d 794, 804-05, 354 P.3d 1205 (2015); *In re T.A.B.*, No. 113,609, 2015 WL 8590161, at *1 (Kan. App. 2015) (unpublished opinion). The UCCJEA's laudable purpose is to avoid having multiple states issue potentially conflicting custody orders for the same children and to keep parents battling each other over custody from forum-shopping among states to secure favorable orders. When a court in another UCCJEA state issues an initial order regarding the legal custody of a child, a Kansas court typically may not then address that child's custody unless jurisdiction has been transferred or otherwise lodged here in conformity with the Act. *In re A.A.*, 51 Kan. App. 2d at 806; *In re T.A.B.*, 2015 WL 8590161, at *3. The UCCJEA applies to child in need of care proceedings, including those leading to the termination of parental rights, since they affect custody. *In re A.A.*, 51 Kan. App. 2d at 806.

In June 2015, the California court sought to transfer jurisdiction to the district court presumably as the more convenient forum for continued adjudication of the children's custody through the child in need of care actions. As provided in Cal. Fam. Code § 3427, the California court could relinquish jurisdiction to the district court as a more convenient forum based on eight enumerated statutory criteria considered along with "all relevant factors." The statutory criteria are: (1) whether domestic violence has occurred and may continue and which state may better protect the parties and the child; (2) how long the child has resided outside the state (here, California); (3) the distance between the California court and the court that would assume jurisdiction; (4) the

financial burden on the parties in litigating in one court compared to the other; (5) any agreement by the parties as to which court should exercise jurisdiction; (6) the type and location of evidence, including the child's testimony, bearing on the litigation; (7) how expeditiously the issues could be decided in either state and the procedures governing presentation of evidence; and (8) the familiarity of each court with the facts and issues in the litigation. Cal. Fam. Code § 3427. In 2015, there was at least a modest argument that California remained the more convenient forum, since the children and much of the relevant evidence would have been there. That's no longer true, since the children have now been in Kansas for more than two years.

When considering a transfer under Cal. Fam. Code § 3427, the California court must allow the parties "to submit information" bearing on the proposed change in jurisdiction. The California court held a hearing on June 24 to address jurisdiction and issued a one-paragraph order the same day transferring jurisdiction to the district court and ordering the children transported from California to Kansas. The order cites the UCCJEA generally but does not identify a specific statutory basis for the transfer. We have presumed the transfer was based on the comparative convenience of California and Kansas as forums for continued custody proceedings, since that would be the most logical ground. The order also recites that the California judge consulted with Judge Maritza Segarra, the district court judge who has handled these cases. Under the UCCJEA, judges from different states may communicate with each other regarding potential jurisdictional issues or conflicts. See K.S.A. 2016 Supp. 23-37,110; Cal. Fam. Code § 3410. The parties may be allowed to participate in that communication. But if they do not, they must be informed of the communication and must be provided with a record of the exchange between the judges. K.S.A. 2016 Supp. 23-37,110; Cal. Fam. Code § 3410. The record fails to show the parties were afforded that opportunity in the California court.

As a general principle, a court without subject matter jurisdiction lacks the legal authority to consider the type of dispute the parties have presented. *Padron v. Lopez*, 289

Kan. 1089, 1106, 220 P.3d 345 (2009); *In re Estate of Heiman*, 44 Kan. App. 2d 764, Syl. ¶ 2, 241 P.3d 161 (2010). In that respect, subject matter jurisdiction is fixed rather than fluid—a court categorically either has the authority to act or it doesn't. See *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701-02, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982) (limits on subject matter jurisdiction of federal courts). Parties, therefore, cannot waive the lack of subject matter jurisdiction. Nor can they confer subject matter jurisdiction on the district court by agreement or acquiescence. And a court is obligated to question its subject matter jurisdiction even if the parties have not. See *Estate of Heiman*, 44 Kan. App. 2d at 766. The party seeking to invoke the district court's authority has the burden of proving subject matter jurisdiction. *Katz v. Donna Karan Co.*, 872 F.3d 114, 120 (2d Cir. 2017); *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143 (10th Cir. 2004); *In re P.J.B.*, No. 115,472, 2017 WL 945654, at *4 (Kan. App. 2017) (unpublished opinion) (applying UCCJEA). Perhaps most significantly for the litigants, if a district court lacks subject matter jurisdiction over a case, its orders and any judgment are void and have no legal effect. *In re Marriage of Hampshire*, 261 Kan. 854, 862, 934 P.2d 58 (1997); *Estate of Heiman*, 44 Kan. App. 2d at 766.

Those general principles mostly fit the UCCJEA statutory model for jurisdiction. So D.S. and Mother had the right to question the district court's jurisdiction under the UCCJEA at any time, including during the termination hearing. And the county attorney bore the burden of proving subject matter jurisdiction by a preponderance of evidence. See *Raymond Loubier Irrevocable Trust v. Loubier*, 858 F.3d 719, 725 (2d Cir. 2017) (subject matter jurisdiction proved by preponderance of evidence). The heightened clear and convincing standard applies to proof of the substantive components of parental unfitness. See K.S.A. 2016 Supp. 38-2269(a).

But the district court obviously had subject matter jurisdiction in the conventional sense to decide child custody matters generally and child in need of care proceedings in particular. The UCCJEA never erased that judicial authority. Rather, the UCCJEA

imposes specific conditions and limitations on when that authority may be exercised, typically in deference to a court of another UCCJEA state that has already entered a custody order affecting a specific child or children.

The California court, therefore, had to follow the requirements of the UCCJEA in this case to transfer jurisdiction over Mother's children to the district court. If it failed to do so correctly, the condition precedent necessary to trigger the district court's subject matter jurisdiction would not have been satisfied. That is the nub of Mother's argument. But the point ultimately is legally different from a contention the district court categorically and inevitably lacked subject matter jurisdiction over this kind of custody proceeding.

The record evidence bearing on the California court's decision to transfer jurisdiction is quite limited. What was provided to the district court and, in turn, what we have is the one-paragraph order from the California court and a two-page "minute order" for the June 24, 2015 hearing identifying the parties, the court personnel, the issues considered, and the disposition of those issues. The district court was not furnished with a transcript of the hearing, so we don't have one either.

Mother first complains that she was not personally present for the June 24 hearing, rendering it inadequate under the UCCJEA. The minute order seems to be ambiguous as to Mother's presence, although the ambiguity may be the result of our unfamiliarity with the standard practices for preparing those documents. The minute order, however, is clear that Mother's lawyer was present. The lawyer's appearance at the hearing was sufficient to advance and protect Mother's legal rights. Nothing in the UCCJEA required Mother's personal appearance.

Mother next contends the orders for the June 24 hearing fail to establish the California court complied with the UCCJEA in transferring jurisdiction to the district

court. We are constrained to agree. As we have already mentioned, the California court's order does not indicate the legal basis under the UCCJEA for transferring jurisdiction to the district court. If, as we suppose, the ruling were based on Kansas being the more convenient forum, the order should have at least cited Cal. Fam. Code § 3427 or identified convenience as the reason. We don't say the order had to contain a review of each statutory criterion or other specific factors underlying the ruling. But we believe an appropriate order has to identify the legal basis under the UCCJEA for conferring jurisdiction on the district court.

We may reasonably infer that at the June 24 hearing, the lawyers addressed transferring jurisdiction to Kansas and had the opportunity to present information to the California court on the reasons for and against transfer, satisfying that requirement of Cal. Fam. Code § 3427. But the California judge also recited in the transfer order that he had conferred with Judge Segarra. And as we have pointed out, nothing indicates Mother or her lawyer participated in that conference or were provided with a record of the judges' discussion. The UCCJEA requires the parties to be apprised of those judicial consultations. Cal. Fam. Code § 3410. The failure to allow party participation or to apprise the parties of those communications reflects a material deviation from the statutory requirements.

We, of course, can't say whether a transcript of the June 24 hearing would have shown the California court considered the criteria for transfer under Cal. Fam. Code § 3427 or provided the required participation or notification to the parties of the judges' consultation in conformity with Cal. Fam. Code § 3410. But the county attorney was obligated to establish subject matter jurisdiction in the district court and, thus, compliance with the UCCJEA in triggering the condition precedent permitting the district court to act in this case. The record in the district court and here on appeal falls short in demonstrating UCCJEA jurisdiction properly passed from the California court to the district court.

As we have indicated, if a court does not have subject matter jurisdiction in the conventional sense of the fundamental legal authority to hear a type of case or claim, it cannot somehow acquire it. So the case should be dismissed for lack of jurisdiction. See *Ryser v. State*, 295 Kan. 452, Syl. ¶ 1, 284 P.3d 337 (2012). But that's not true under the UCCJEA—what's missing here is a condition precedent unlocking the district court's extant subject matter jurisdiction. That difference would suggest a remand to the district court with directions either to secure a legally adequate transfer of jurisdiction under the UCCJEA or to dismiss the child in need of care case. See *In re T.A.B.*, 2015 WL 8590161, at *4.

Given the highly unusual circumstances of this case, that course is unnecessary because the result of the endeavor is a foregone conclusion. At this point, the children have resided in Kansas for more than two years. Mother and (as far as we are aware) D.S. still live here. Various social service agencies serving Geary County have compiled information on the children and their ongoing needs. In light of those undisputed facts, no reasonable court in California now considering the criteria for transferring jurisdiction from there to the district court would deny transfer. In short, the district court is obviously and conclusively the most convenient forum under the UCCJEA. Accordingly, there is no reason to go through that exercise to satisfy the condition precedent imposed by the UCCJEA. If there were a colorable argument for retaining jurisdiction in California now, the issue of transfer and convenient forum would have to go back to the California court for redetermination. But there isn't.

Although the district court lacked jurisdiction when it terminated Mother's parental rights, the orders properly should be viewed as unenforceable rather than void. That is, the limitation on the district court's jurisdictional authority imposed through the UCCJEA was a conditional one. Until the condition was satisfied through a transfer of jurisdiction from the California court, the district court's orders were legally ineffective, thereby

eliminating any potentially conflicting directives regarding the children's custody. But once the condition was satisfied and the district court's existing subject matter jurisdiction "activated," the orders became effective and enforceable. In short, they were dormant rather than void.

In taking this approach, we have not conferred subject matter jurisdiction on the district court to decide a type of case it otherwise could not. (We have no judicial authority to do so, even if we wanted to.) We have simply found that the condition precedent to the district court's exercise of its existing authority imposes no absolute legal impediment in this situation. Likewise, without that impediment, the district court entered legally valid orders—they otherwise fell within the district court's authority to act. Our determination advances the overarching objectives of the Revised Kansas Code for Care of Children in promptly deciding this kind of proceeding to secure the wellbeing of resident children while respecting the fundamental rights of their parents. See K.S.A. 2016 Supp. 38-2201(b)(2). The determination likewise meets the purposes of the UCCJEA in keeping courts of different states from issuing overlapping or conflicting child custody orders. See *In re A.A.*, 51 Kan. App. 2d at 804. We, therefore, find Mother's jurisdictional complaint does not require a remand for further proceedings.

We add an observation. In this case, there never were conflicting or overlapping orders from two courts. After the California court entered the transfer order in June 2015, it issued no more custody orders. And the district court did not act until it received the transfer order. We recognize that might not always be the case. For example, a court in State A could begin issuing custody orders without realizing a court in State B already had issued orders and had exclusive jurisdiction under the UCCJEA. Court A's orders would be unenforceable, as we have outlined, since it lacked UCCJEA subject matter jurisdiction. If, however, Court B later transferred jurisdiction to Court A as the more convenient forum, that would "animate" Court A's earlier orders. In that situation, the UCCJEA encourages the courts (with appropriate input from the parties) to confer in an

effort to resolve any conflict. See K.S.A. 2016 Supp. 23-37,110(a). An obvious solution, though not the only one, would have Court A vacate the orders it had issued before the transfer of jurisdiction from Court B. Absent an agreement, the UCCJEA contemplates primacy be given the orders of the court with initial jurisdiction until such time as jurisdiction has been transferred or otherwise lost. See K.S.A. 2016 Supp. 23-37,202(a).

Finally on this point, the county attorney has also suggested the jurisdictional objection, made for the first time during the termination hearing, partook of a procedural ambush. That's not a wholly unfair characterization, but subject matter jurisdiction lends itself to just that sort of laying-in-wait approach, since it can be raised at any time. See *Padron*, 289 Kan. at 1103. The perceived unfairness was, however, substantially mitigated in this case because the objection was raised during the first day of the hearing and the balance of the hearing had to be continued for other reasons to two additional days about two and four months later. So the county attorney had the opportunity to supplement the record in responding. Given our resolution of the jurisdictional challenge, we need not consider this secondary argument further.

Due Process Claim

Mother contends the district court violated her right to due process protected in the Fourteenth Amendment to the United States Constitution by failing to hold a permanency hearing within 30 days after determining family reintegration was no longer a viable option and substituting adoption as the preferred option for the children. Given the constitutional liberty interest at stake, Mother cannot show a denial of due process adversely affecting that interest.

As provided in K.S.A. 2016 Supp. 38-2264, the district court has to conduct periodic permanency hearings during the pendency of child in need of care proceedings to assess the status of the child and progress being made toward reintegration or some

other final custody arrangement. The permanency hearings offer a vehicle for regular review of a given case to make sure positive steps are being taken to promote appropriate care, security, and stability for the child. As Mother points out, K.S.A. 2016 Supp. 38-2264(f) requires a permanency hearing within 30 days should the district court approve a change in goal from reintegration to adoption or some other placement requiring termination of parental rights. The change also starts a short time period for the State's lawyer to file a motion to terminate parental rights.

Mother says the district court determined reintegration to be unworkable on November 4, 2015, and then did not convene a permanency hearing within 30 days. For purposes of addressing the claim, we assume that premise to be true.

Permanency hearings are required as a matter of statutory directive. But the government's failure to comply with its own rules, regulations, or statutes does not necessarily create a constitutional deprivation of due process. See *Taylor v. Kansas Dept. of Health & Environment*, 49 Kan. App. 2d 233, 242, 305 P.3d 729 (2013) ("[C]ourts have long recognized that not every breach or violation of state law by a government agent gives rise to a constitutional wrong."); *Trotter v. Regents of University of New Mexico*, 219 F.3d 1179, 1185 (10th Cir. 2000) (Even assuming a graduate school failed to follow its own regulations in dismissing a student for poor academic performance, that "failure would not, by itself, give rise to a constitutional claim under the Fourteenth Amendment."). This is such an instance.

As we have outlined, Mother's constitutionally protected right rests in her liberty interest in parenting her children. The Due Process Clause, therefore, requires that Mother be afforded a full and fair hearing before being deprived of that interest. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [Citation omitted.]"); *Mullane v. Central Hanover Tr. Co.*, 339 U.S.

306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (The Due Process Clause "at a minimum" requires that "deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). The Kansas Supreme Court similarly defines due process rights. *State v. King*, 288 Kan. 333, 354, 204 P.3d 585 (2009); *Winston v. Kansas Dept. of SRS*, 274 Kan. 396, 409-10, 49 P.3d 1274 (2002). Mother's due process rights were fully protected by the termination hearing itself—where she was represented by a lawyer, had the right to cross-examine the government's witnesses, and had the opportunity to present her own witnesses and other evidence and where the government had to prove its case for termination by clear and convincing evidence.

An untimely or nonexistent permanency hearing months earlier did not entail a due process violation bearing on or diminishing Mother's protected liberty interest. Her constitutional claim fails for that reason.

Sufficiency of the Evidence

The district court found Mother to be unfit based on three factors in K.S.A. 2016 Supp. 38-2269(b):

• The failure of reasonable efforts by social service agencies to rehabilitate and reintegrate the family, as provided in K.S.A. 2016 Supp. 38-2269(b)(7).

• Mother's lack of effort to adjust her "circumstances, conduct[,] or conditions to meet the needs" of the children, as provided in K.S.A. 2016 Supp. 38-2269(b)(8).

• The children had been in an extended out-of-home placement as the result of Mother's conduct, and Mother had failed to carry out a reasonable plan approved by the

court to reintegrate the family, as provided in K.S.A. 2016 Supp. 38-2269(b)(9) and incorporating K.S.A. 2016 Supp. 38-2269(c)(3).

The district court also relied on the presumption of unfitness in K.S.A. 2016 Supp. 38-2271(a)(6) based on the children being in an out-of-home placement for more than two years, Mother's failure to carry out the reintegration plan, and the "substantial probability" she would be unable to do so in the "near future." Given the material overlap between K.S.A. 2016 Supp. 38-2269(b)(9) and the presumptive condition of unfitness, we do not separately review the presumption in deference to the other grounds.

Applying the appropriate appellate filter to the facts taken favorably to the State, we recognize a reasonable fact-finder could conclude to a high degree of probability that Mother was unfit to parent A.A.-F., M.A.-F., F.A.-F., B.C., and J.S. in the manner the district court identified. The mental health clinicians treating and evaluating Mother found that she continually manifested poor judgment and a significant lack of insight into her circumstances, her relationship with D.S., and the obligations parenting those children demanded. Those problems are interrelated, and each exacerbates the others with a resulting constellation of pronounced parental unfitness. Moreover, Mother's conduct only reinforced the clinicians' assessments.

We do not comb through the record to pull out every instance supporting the district court's determination. Rather, we offer illustrative examples. Mother failed to recognize the abusive and highly combustible relationship she has with D.S., replicating in many respects her earlier relationship with A.F., and simply suggested things would work themselves out. That approach, however, had subjected the children to repeated episodes of verbally and physically combative arguments between Mother and D.S. Mother simply gave no indication she intended to affirmatively change her situation to alleviate that unwholesome environment. It appears E.S. was spared only because D.S. had been sent to prison.

Mother appeared to be unable to maintain gainful employment, opting for various Internet based jobs that offered no steady income. And in one instance, again illustrative of her poor judgment, she provided personal financial information to the ostensible employer, who then scammed her by using the information to drain her bank account. Mother was likewise unable to secure suitable housing for five children and offered no realistic plan to do so. In one instance, Mother rented an apartment she plainly could not afford.

The clinicians also suggested Mother had a difficult time simply managing her own life and didn't particularly see that improving over time. Mother was somewhat inconsistent in her attendance at therapy sessions, and her interaction with the children never progressed beyond limited, closely supervised visits. All of that indicates Mother would be hard pressed to parent six well-adjusted children. The record, of course, shows at least two of the children have significant emotional problems and were acting out with each other and some of their siblings in highly inappropriate sexual ways. The evidence strongly indicates, at least by negative implication, Mother would have little or no ability to deal effectively with those conditions. In turn, placing the children together in Mother's custody would be physically and emotionally harmful. Mother failed to make measurable progress that would allow her to parent her children and had not demonstrated sufficient effort to successfully reintegrate the family.

In some sense, E.S. represents a paradox in this case. She remained in Mother's physical custody and presumably fared reasonably well, insofar as the record in this case indicates. We do not, however, see the relationship between Mother and E.S. as a substantial counterbalance to the evidence of unfitness. The question presented to the district court was whether Mother could parent all five children in addition to E.S. The district court answered in the negative, and the evidence amply supports that

determination. The district court correctly found Mother to be presently unfit with respect to A.A.-F., M.A.-F., F.A.-F., B.C., and J.S.

The second component of the unfitness determination under K.S.A. 2016 Supp. 38-2269(a) looks at whether the unfitness will persist for the foreseeable future. Here, the evidence we have already recounted also supports the district court's call that Mother would be unable to parent A.A.-F., M.A.-F., F.A.-F., B.C., and J.S. at any point in the future. Mother's deficiencies as a parent extended back years to the time she and the children were in California. They persisted without real improvement leading up to the termination hearing. Nothing in the evidence suggested a realistic prospect for immediate or even long-term change for the better. Mother's problems were deep-seated and, given her lack of insight in even recognizing their character, perhaps intractable. The district court's assessment against the likelihood of any timely improvement was adequately supported in the record.

Finally, we look at the district court's determination that the best interests of A.A.-F., M.A.-F., F.A.-F., B.C., and J.S. favored the termination of Mother's parental rights and ask whether that determination amounted to an abuse of discretion. The district court understood both the governing legal standards and the substance of the evidentiary record, as reflected in the detailed orders. We, then, ask whether no other district court could reasonably come to the same conclusion based on that record. As we have indicated, we readily conclude the best interests ruling falls well within the broad range of judicial discretion. We need not repeat what we have already laid out in upholding the unfitness determination. Those reasons do double-duty here and fully support the finding that the best interests of A.A.-F., M.A.-F., F.A.-F., B.C., and J.S. would be served through an option other than reintegration.

Having considered all of the points Mother has raised, we find no legal or factual basis for reversing the district court's termination orders for A.A.-F., M.A.-F., F.A.-F., B.C., and J.S.

Affirmed.

* * *

GARDNER, J. concurring: I agree with the bulk of the majority's opinion, but write separately because I would find that the district court in Kansas properly exercised jurisdiction over the continued CINC proceedings and the termination of Mother's parental rights.

The UCCJEA contains a provision dealing with communication between courts on matters involving child custody. See K.S.A. 2016 Supp. 23-37,110. Although the court is not obligated to allow the parties to participate in the communication with another court, the parties must be given the opportunity to present facts and make legal arguments before the court makes a jurisdiction determination. K.S.A. 2016 Supp. 23-37,110(b). A record of the communication between the courts must be made, either by recording or transcription. See K.S.A. 2016 Supp. 23-37,110(c), (d), and (e).

This court possesses a limited record of the California proceedings in which that court relinquished jurisdiction under the UCCJEA to Kansas as a more appropriate forum. Bench notes from the California court indicate that the court held a hearing on June 24, 2015, and that Mother was represented by counsel at the hearing.

Mother argues that she had a right to be personally present but does not cite any authority in support of that conclusion, and independent research has revealed none.

Mother was statutorily and constitutionally entitled to the appointment of counsel and adequate notice of the hearing. She had both.

Mother also contends that the California court failed to consider all the relevant jurisdictional factors, see K.S.A. 2016 Supp. 23-37,207, but she does not argue in her appellate brief what factors the California court failed to consider that weighed in favor of retaining jurisdiction instead of transferring the case to Kansas. The California court's bench notes clearly indicate the presence of a court reporter for that hearing. But because Mother has not included a transcript from the hearing, we cannot determine what arguments, if any, were made on Mother's behalf. Mother has thus failed to show that the California court did not consider all relevant jurisdictional factors. In such instances, we presume the action of the court was proper. See *In re N.U.*, 52 Kan. App. 2d 561, 566-67, 369 P.3d 984 (2016) (finding father's failure to include in record on appeal transcript of UCCJEA hearing in district court that resulted in district court assuming emergency temporary jurisdiction over child and adjudication of child as child in need of care precluded appellate review of father's claim that evidence was insufficient to support same).

The burden is on the party making a claim of error to designate facts in the record to support that claim; without such a record, the claim of error fails. See Supreme Court Rule 6.02(a)(4) (2017 Kan. S. Ct. R. 34); *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644-45, 294 P.3d 287 (2013); *State v. Kleypas*, 305 Kan. 224, 344, 382 P.3d 373 (2016) (without a record affirmatively demonstrating error, an appellate court presumes the action of the court was proper); *In re Marriage of Arceneaux*, 51 Cal. 3d 1130, 1133-34 , 275 Cal. Rptr. 797, 800 P.2d 1227 (1990) (applying a presumption of correctness to judgments; prejudicial error must be affirmatively shown). Based upon the lack of objection to Kansas' acceptance of jurisdiction over the case until the termination hearing, it is reasonable to assume that Mother had no reason to object to Kansas' exercise of jurisdiction until the State moved to terminate her parental rights.

Although the California court's bench notes and subsequent journal entry do not articulate specific findings that Kansas is the more convenient forum for conducting the CINC case, this court may not presume error. Mother bears the burden to establish a record affirmatively establishing the claimed error. *Kleypas*, 305 Kan. at 344. Mother did not object below that the journal entry transferring jurisdiction to Kansas lacked sufficient findings to support its decision; thus, we ordinarily presume that the court made sufficient findings to support its decision. See *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009) (appellate court ordinarily presumes the trial court found all facts necessary to support its judgment); *Arceneaux*, 51 Cal. 3d at 1133-34 ("[Section 634] declares that if omissions or ambiguities in the statement are timely brought to the trial court's attention, the appellate court will not imply findings in favor of the prevailing party. The clear implication of this provision, of course, is that if a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment."). We should do so here.

Based on the record before the court, Mother has failed to establish that the California court's transfer of jurisdiction was improper under the UCCJEA. I would thus hold that the district court in Kansas properly exercised jurisdiction over the continued CINC proceedings and the termination of Mother's parental rights.