Case No. 09-102275-A

IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

IN THE MATTER OF THE CONSERVATORSHIP

OF FLOYD BOGNER

BRIEF OF APPELLANT, RICHARD GREEVER

Appeal from the District Court of Harvey County, Kansas
The Honorable Joseph Dickinson
Judge of the District Court
District Court Case No. 01PR102

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IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

IN THE INTEREST OF KAT

BRIEF OF APPELLANT, NATURAL MOTHER

Appeal from the District Court of Sedgwick County, Kansas
The Honorable Daniel Brooks
Judge of the District Court
District Court Case No. 08JC24

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Case No. 09-102322-A

IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

IN THE INTEREST OF KAT

BRIEF OF APPELLANT, NATURAL MOTHER

Appeal from the District Court of Sedgwick County, Kansas
The Honorable Daniel Brooks
Judge of the District Court
District Court Case No. 08JC24

I.

ISSUES ON APPEAL

A. The district court erred in its findings of fact and conclusions of law in its termination of Mother's parental rights.

II.

FACTS OF THE CASE

In January, 2008, a Child in Need of Care Petition was filed by the State regarding KAT. (R. I, 11). The petition alleged that the child's welfare had been endangered due to unsafe housing condition, which included water and sewage in the basement and a lack of furniture and that Mother was on juvenile probation and was not compliant with her probation conditions. Id. at 12. Mother did not contest the adjudication and Mother was ordered to have a clinical assessment done, attend nutrition

classes and parenting classes. Id. at 41; 46. Mother was to finish her high school education through summer school. Id. at 60. In November 2008, SRS filed a Motion for Review and Termination alleging that assistance from SRS has not resulted in changes in Mother's circumstances and that mother has failed to make changes to facilitate reintegration, that Mother was not employed and did not complete school, had been jailed for a probation violation and had failed to show stability throughout the case. Id. at 65.

The trial on the matter was held on January 5, 2009.

Dannon Jones, a senior social worker at Hopenet, conducted the clinical assessment of Mother. (R. II, 5). Ms. Jones first recommendation was that a safety plan for visits would be put into place. Second, Ms. Jones recommended a routine for KAT, which would include meal times, activities and a bedtime routine. Mother was familiar with KAT's likes and dislikes and acted with KAT appropriately. Id. at 7-8. The third recommendation was that Mother complete her GED and gain employment. The final recommendation was that if Mother did not make significant progress by June 2009, that an alternative plan for permanency be explored and that a guardianship with a healthy adult would be appropriate. Id. at 9-10.

Mother testified that she had completed the budget and nutrition class. Id. at 30-31. Mother testified that she had been employed at WIS International for a month and a half at the time of the hearing and was working 48 hours per week. Id. Mother had also received her housing approval for Section 8 housing. Id. Mother testified that she would either live with her daughter at Ms. Rippatoe's house or in her new housing through Section 8. Id. at 32-33. Mother felt that another couple of months to keep her employment and to clear up her housing situation, she would be prepared for full integration. She stated that she wanted her child and that she needed her child in her life and that she could reintegrate immediately while staying with Ms. Rippatoe. Id. at 34. Mother admitted that she did not complete her schooling. Id. at 37. Mother had made arrangements for daycare for KAT and that she had arranged transportation for work. Id. at 41. Mother testified that her last visit with KAT

was 19 days earlier on December 15, 2008. She had been unable to have additional visits because her job required her to work on Mondays and those were the only days she could have visits. However, Mother testified that she had talked to her boss about changing her scheduling from Mondays and was waiting to hear about the final decision. Id. at 53-54.

Michala Taylor, one of Mother's case workers, testified that she had no concerns with the home that Mother had with Ms. Rippatoe. Id. at 60. Ms. Taylor testified that Mother had completed her plan goals of the clinical evaluation, the parenting class and the EFNEP. Three other concerns were applying for social security, obtaining employment and completing her GED. Id. at 69-70. The goal of "appropriate housing to be needed by February 1st of 09". Id. at 70. Ms. Taylor also testified that Mother had contacted social security but had been told that she didn't qualify. Id. at 71.

Tiffany Stephen, the other case manager, testified that she could tell that Mother and KAT had a good bond with each other, that they laughed and talked and played around and that Mother had provided toys at visits the KAT could take with her. Id. at 84.

Karen Nevins, Mother's aunt, testified that she had seen Mother and KAT together and that Mother took care of KAT. Id. at 93. She testified that she believed Mother could adequately provide food, housing and the economic concerns for her child. Id. at 95.

The court found that there was uncontradicted testimony that Mother had a bonded, loving relationship with KAT and that Mother parentented appropriately. Id. at 105-106. The court found that Mother had completed a number of the court orders including parenting classes, the clinical assessment and the nutrition classes. The court noted that during the same time mother was on juvenile probation and was ordered to complete her GED as a condition of probation and by the court's order in the instant case, but Mother did not follow through on the educational plan. As such, Mother had to serve jail time as a sanction for failing to meet her probation contract. Id. at 106. The court found that mother had been irregular in her visits for the prior few weeks or last couple of months. Id. at 107. The court found that Mother had been employed for the last six weeks. The court found the 12/1 visit had been

cancelled; Mother was late for the 12/8 visit and that on 12/15, Mother made no effort change her schedule to accommodate visitation and that it was only on 12/22 that mother contacted her case manager about her work conflict. Id.

The court found that Mother had friends and family but had not at any time demonstrated a relationship with them such that it would lead the court to believe that it made for stability for the child. Id. at 108. The court found that Mother did not have a place to stay, that she still didn't have a job and that she had not demonstrated the ability to stick to any plan that would enable her to have stability for her daughter. The court found there was no basis to believe that anything was going to change and that being employed for six weeks did not rebut that. Id. The court stated that "the few court orders that we have, there's not an indication that she is implementing any of those." Id.

The court found that it had considered the factors listed in K.S.A. 38-2269(b)(1)-(8) and found that there was clear and convincing evidence to sustain the lack of effort on the part of the mother to adjust her circumstances and her conduct and her condition to meet the needs of the child. The court found she failed maintaining regular visitation or communication with the child and with the custodian of the child and that Mother was not able to care for the child in her present state of immaturity and that she was unfit to care for the baby in her life as she now lives it and can't really change. Id. at 108-109. The court found that it was in the best interest of the child, the physical, mental and emotional needs of the child that mother's rights be terminated and the child be placed for adoption. Id. at 109.

A timely Notice of Appeal was filed and this brief follows.

III.

ARGUMENTS AND AUTHORITIES

A. The district court erred in its findings of fact and conclusions of law and that the termination of Mother's parental rights was justified.

1. Standard of review.

When an appellate court reviews a trial court's determination to terminate a parent's rights under

the clear and convincing evidence standard, "it should consider whether, after review of all the evidence, viewed in the light most favorable to the State, it is convinced that a rational factfinder could have found it highly probable, *i.e.,* by clear and convincing evidence," that the parent's rights should be terminated. In re B.D.-Y., 286 Kan. 686, 705, 187 P.3d 594 (2008).

2. The findings of the district court must be made based upon clear and convincing evidence.

In Kansas, a parent's right to custody and control of their children is a fundamental right and liberty interest protected by the Fourteenth Amendment to the U.S. Constitution. In re M.M.L., 258 Kan. 254, 264, 900 P2d 813 (1995).

Proof of unfitness must be by clear and convincing evidence. In re M.M., 19 Kan. App. 2d 600, 873 P.2d 1371 (1994). Kansas law makes clear that the term "unfitness" relates to "conduct or condition which renders the parent unable to care properly for a child." In re Bachelor, 211 Kan. 879, 508 P.2d 862 (1973). The substantial evidence must be more than some quantity of negative evidence about a parent but of a quality of evidence that shows clearly and convincingly not merely the existence of negative parental qualities, nor parental eccentricities, but current unfitness and an unlikelihood of sufficient change in the conduct or condition of the parent in the foreseeable future. In re Reed, 8 Kan. App. 2d 602, 635 P.2d 675 (1983).

In In re B.D.-Y., 286 Kan. 686, Syl. ¶ 2, 187 P.3d 594 (2008), the Supreme Court held that the "clear and convincing evidence" standard is an intermediate standard of proof between preponderance of the evidence and proof beyond a reasonable doubt.

Thus, the findings of the district court had to be based upon a higher evidentiary standard than that relied upon in normal, civil proceedings.

3. The district court made numerous erroneous findings of fact.

The district court found that Mother had started working on December 15, 2008 and that she made no arrangements to accommodate her work schedule with her visitation schedule. (R. I, 77).

This is erroneous for several reasons. First, Mother did have her visit on December 15, 2008. (R. II, 82). Second, Mother testified that she had spoken to her supervisor and was having her schedule adjusted to fit her visitation and it was her understanding that visits could only occur on Mondays. Id. at 53-54. Third, at the time of the hearing, Mother had only been working for six weeks and she had missed only two visits due to work. And the first visit that she missed because of work, she had contacted Ms. Stephens and let her know of the conflict. Id. at 82. Further, throughout the time of the unsupervised visits, Mother was consistent in her visitation for nearly eleven months. Id. at 83. It is also a bit presumptuous of the court to expect Mother to approach her new boss and tell him that she can't work on Mondays and could he please change her schedule prior to even beginning work.

In short, mother gained employment, was consistent with her visits and had a stable home. The evidence does not support other findings.

The court found that Mother had friends and family but had not at any time demonstrated a relationship with them such that it would lead the court to believe that it made for stability for the child. Id. at 108.

Again, this is an erroneous finding. Dannon Jones testified that Mother had good relationships with her mother and father. Id. at 16. Ms. Jones also testified that Mother was very connected with her grandparents. "They seemed to provide her with a lot of support, I would say probably both emotionally as well as financially and materialistic." Id. at 16-17. Mother testified that her grandmother would provide daycare and that she actually ran a daycare. Id. at 50. Further, Karen Nevins, Mother's aunt, testified that Mother was a good parent and that Mother was often at her house with KAT and that KAT would play with her cousins and that this occurred pretty regularly. Id. at 93.

So, stable and supportive family available for Mother.

The court found that Mother did not have a place to stay, that she still didn't have a job and that she had not demonstrated the ability to stick to any plan that would enable her to have stability for her daughter. The court found there was no basis to believe that anything was going to change and that

being employed for six weeks did not rebut that. Id. at 108.

Error. Mother had a place to stay. First, she was staying with Ms. Rippatoe and had been living there since the placement began a year earlier. Id. at 32-33. Second, Mother stated that she would be willing to begin reintegration at Ms. Rippatoe's and that was where the unsupervised visits had taken place. Id. at 54. Third, Michala Taylor, one of Mother's case workers, testified that she had no concerns with the home that Mother had with Ms. Rippatoe. Id. at 60. Fourth, it was one of Mother's case plan goals to seek independent housing and she had pursued, and received, her Section 8 housing approval. Id. at 70-71.

Thus, there was appropriate housing and Mother had achieved her plan goals in all aspects in regard to this situation, even though she was supposed to have until February to decide on her housing situation. Id. at 71.

Mother had employment. The court made a factual finding that Mother had been employed at WIS International for the past six weeks. Id. at 107. The job paid $7.00 per hour and Mother was working there 48 hours a week. This evidence and testimony was undisputed. Id. at 40; 47. Another mistake by the court, because this consistent work schedule was also a reasonable plan by which Mother could give stability to KAT. Mother already had plans for daycare and transportation to assist with her work schedule.

So, the only goal established that was not met by Mother was getting her GED. Granted, this was significant, especially in light of the fact that it was court ordered both as a part of the CINC case and the juvenile probation.

However, what seems to be flagrantly missing in this case was a psychological evaluation and/or any kind of assessment of Mother's intelligence and learning capabilities. If mothers failure to complete her GED was based on a learning disability or a lack of reading skills or some other treatable disorder, then the court's destruction of a family relationship would have been shortsighted and criminal.

Further, the court assumed facts not in evidence. The court stated: "in considering what's in the best interest of the child, the court considers that, by all the sociological numbers, that if this situation is left where it is, this child is going to grow up in poverty and without a stable home." Id. 109.

There are, again, a number of things wrong with this statement. First, if being poor was a reasonable and acceptable reason for terminating parental rights, then only the rich could be found to be proper parents. Second, there was no evidence presented of any sociological numbers, whatever that meant, that would show that KAT was doomed to a life of poverty and instability. Making up evidence and phrases as the basis for finding that termination is in the best interest of the child is erroneous, wrong-headed and wrong-hearted. It also means that the court's only finding regarding the best interest of the child was not supported by clear and convincing evidence because there was no such evidence to begin with.

4. The district court erred by not following the treatment recommendation of the only expert who testified.

Mother was required to complete a clinical assessment. Ms. Jones testified that she had six sessions with Mother and that goals and recommendations had been established for Mother in order to effect reintegration of KAT into the home. Ms. Jones first recommendation was that a safety plan for visits would be put into place. Second, Ms. Jones recommended a routine for KAT, which would include meal times, activities and a bedtime routine. Mother was familiar with KAT's likes and dislikes and acted with KAT appropriately. Id. at 7-8. The third recommendation was that Mother complete her GED and gain employment. The final recommendation was that if Mother did not make significant progress by June 2009, that an alternative plan for permanency be explored and that a guardianship with a healthy adult would be appropriate. Id. at 9-10.

Ms. Jones had met with Mother in the summer of 2008 and had basically given her a year to meet the goals and recommendations in the plan. At the time of the evidentiary hearing, Mother was employed, she was aware of the need for structure and had learned about healthy eating and budgeting.

Mother had a home and had taken the steps necessary to have the option of Section 8 housing. Mother had daycare and transportation covered. Mother had furniture for KAT.

And, Mother had been told by the only expert involved in the case that she had until June 2009 to make appropriate changes and only at that time should an alternative plan for permanency be explored.

The court chose to override not only the case plan laid out by the assessing social worker, but ignored her advice and recommendation even in the face of Mother's significant gains in the completion of her plan.

The recommendation of Ms. Jones and the advancements made by Mother directly reject any claim by the court that there was clear and convincing evidence that Mother would not and could not change her circumstances and adjust her life in order to meet the needs of KAT.

The court found that Mother was 20 years old, the case had been going for a year and that the ourt had no basis to believe that anything would change. And that being employed or saying she's employed since December 15th was insufficient to rebut that. And that the "few court orders that we have, there's not an indication that she is implementing any of those." Id. at 108. She did all of her nutrition and parenting classes, she got employed, she has obtained housing and has shown improved parenting skills and has a strong bond and loving relationship with her daughter. And she was advised by the counselor that she had until June 2009, five more months, in order to make significant changes and that only at that time would a change in permanency be considered.

The court jumped the gun. The court acted impetuously and without consideration of the actions by Mother, the changes she made and the best interest of KAT.

The court did not follow the advice and recommendation of the only expert to testify, Ms. Jones. The court made numerous errors in its findings of fact. The court relied on facts not in evidence. The court gave no credit to Mother for any of the things she achieved and that she got employment in the worst economy in eighty years.

The district court did not make findings based upon clear and convincing evidence and the court's decision to terminate parental rights must be reversed.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the above and foregoing brief were placed in the U.S. Mails, postage prepaid to the following:

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