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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Case No. 09-102332-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

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Case No. 10-104684-A

IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

IN THE MATTER OF PATERNITY OF
ADELINE JADE LANK, A MINOR, BY LESA LANK, NATURAL MOTHER AND NEXT FRIEND,
Petitioner/Appellee,

and

PANTALEON FLOREZ, JR.

Respondent/Appellant.

BRIEF OF APPELLEE

Appeal from the District Court of Sedgwick County, Kansas
The Honorable J. Patrick Walters
Judge of the District Court
District Court Case No. 08 D 6596

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Case No. 10-104684-A

IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

IN THE MATTER OF PATERNITY OF
ADELINE JADE LANK, A MINOR, BY LESA LANK, NATURAL MOTHER AND NEXT FRIEND,

Petitioner/Appellee,

and

PANTALEON FLOREZ, JR.

Respondent/Appellant.

BRIEF OF APPELLEE

I.

ISSUES ON APPEAL

A. The district court did not err in its findings regarding visitation and the issue of visitation is moot as the matter is now in case management.

B. The district court did not err in its assessment of child support.

C. The district court properly awarded attorney fees to Ms. Lank.

D. The district court did not err in its holdings regarding Respondent's second motion to alter or amend.

II.

FACTS OF THE CASE

Ms. Lank would acknowledge that the facts presented in the Appellant's brief are generally correct. Additional facts will be supplemented as necessary within the body of the brief.

III.

ARGUMENTS AND AUTHORITIES

A. The district court did not err in its findings regarding visitation and the issue of visitation is moot as the matter is now in case management.

1. Standard of Review

The first issue is the reasonableness of the district court's visitation schedule. The standard of review on the separate issue of the reasonableness of the visitation schedule is the abuse of discretion standard. See In re Marriage of Kimbrell, 34 Kan.App.2d 413, 419, 119 P.3d 684 (2005). To establish an abuse of discretion, Respondent must show that the district court's schedule is so arbitrary, fanciful, or unreasonable that no reasonable person could have arrived at such a schedule. See In re Marriage of Bradley, 282 Kan. 1, 7, 137 P.3d 1030 (2006).

In the instant case, Respondent was denied visitation because of his testimony that he would not honor a court order to prevent cigarette smoking around his infant child. As the court made findings of fact and conclusions of law regarding a temporary ban of visitation, the proper standard is an abuse of discretion. The district court also noted that a prior order had been issued regarding cigarette smoking around the infant and that order had not been complied with by the Respondent.

2. The failure of Respondent to provide the infant a smoke-free environment and prior violation of court orders supported an initial denial of visitation.

The district court had a basis to find that second hand smoke could be dangerous to the child.

The Kansas Legislature has found that cigarette smoke is a toxic substance. K.S.A. 21-4010. "Same; smoking in public places prohibited; exceptions; designated smoking areas. (a) No person shall smoke in a public place or at a public meeting except in designated smoking areas. (b) Smoking areas

may be designated by proprietors or other persons in charge of public places, except in passenger elevators, school buses, public means of mass transportation and any other place in which smoking is prohibited by the fire marshal or by other law, ordinance or regulation. (c) where smoking areas are designated, existing physical barriers and ventilation systems shall be used *to minimize the toxic effect of smoke* in adjacent nonsmoking areas (emphasis added)".

The harmful effects of second-hand cigarette smoke were recognized by the Kansas Legislature earlier this year by the enaction of the Kansas Indoor Clean Air Act. See K.S.A. 21-6115.

Further, Ms. Lank testified that she believed that a smoking environment would be detrimental to her baby's health in light of a long family history of respiratory and cancer medical issues within her family. (R. V, 108-109).

The evidence before the court was undisputed that the Respondent's wife smoked in their residence and that she would smoke in the residence while the infant was present. Further, Respondent testified that he did not feel he had a right to tell his wife where and when she could smoke cigarettes. (R. V, 87-89; 159-160).

The district court recognized that Respondent's testimony was such that the court did not believe Respondent would comply with a court order to keep the infant in a smoke-free environment. (R. V, 175). Such was also specifically found and made a part of the journal entry. (R. I, 73). "We may not reweigh the evidence, substitute our evaluation of the evidence for that of the trial court, or pass upon the credibility of the witnesses." In re S.M.Q., 247 Kan. 231, 234, 796 P.2d 543 (1990)

The clear intent of K.S.A.2004 Supp. 60-1616(a) is to create a rebuttable presumption that a parent is entitled to reasonable parenting time and visitation. This presumption may be rebutted if, after a hearing, the trial court finds "that the exercise of parenting time would seriously endanger the child's physical, mental, moral or emotional health." K.S.A.2004 Supp. 60-1616(a); see In re Marriage of Kiister, 245 Kan. 199, 201, 777 P.2d 272 (1989).

There appears to be no dispute that cigarette smoke is toxic and that it has a harmful effect on the health of all who come in contact with it. The Respondent's position was that there was no basis for the court to deny visitation based upon the evidence presented at the hearing.

However, Respondent never contested the effect of second-hand smoke on health and asserted his right to expose a baby to toxic fumes. The district court reasonably found that the health of the child was endangered by Respondent's position and the court found that even if it did order a non-smoking environment for the baby, that Respondent would not take the necessary steps to provide such an environment for his child.

Respondent claims there was no factual basis for the court to rule as it did because there was no expert testimony about the harms of second hand smoke. Expert testimony is unnecessary if the normal experience and qualifications of jurors permit them to draw proper conclusions from the given facts and circumstances. State v. Cooperwood, 282 Kan. 572, 578-79, 147 P.3d 125 (2006). As it is universally accepted and recognized by our Legislature that cigarette smoke is harmful, the testimony of the harm and endangerment to the baby was not necessary. Further, Respondent never disputed the effects of cigarette smoke.

Although parents have a fundamental right under the Fourteenth Amendment to the United States Constitution to make decisions concerning the care, custody, and control of their children, the State has an interest in protecting children; thus, parental rights concerning such matters are not absolute. In re J.D.C., 284 Kan. 155, 166, 159 P.3d 974 (2007). K.S.A. 60-1616(a) creates a statutory presumption that the parent who is not granted custody or residence will receive reasonable visitation. However, that presumption may be overcome if, after a hearing, the trial judge finds "that visitation would endanger seriously the child's physical, mental, moral or emotional health." Section (c) provides: "The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child." In the instant case, the court specifically found that visitation,

based on Respondent's prior failure to comply with the court's orders regarding smoking around the infant combined with Respondent's testimony, would endanger the health of the infant. Substantial evidence supported the court's finding and there was no abuse of discretion.

The district court was justified in making its findings and denying visitation under the evidence presented. The court heard the testimony of the Respondent and found that he would not take steps to protect his baby's environment. As such, visitation was temporarily suspended. This Court does not reweigh evidence. The district court made a finding that could have been reached as a reasonable finding. Thus, the district court's ruling was legal and valid.

3. The issue of visitation in the instant case is moot and does not necessitate review.

"The general rule is that this court does not decide moot questions or render advisory opinions. The mootness doctrine is one of court policy which recognizes that it is the function of a judicial tribunal to determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case properly brought before it and to adjudicate those rights in such manner that the determination will be operative, final, and conclusive." Board of Johnson County Comm'rs v. Duffy, 259 Kan. 500, 504, 912 P.2d 716 (1996).

As noted in the appellate record, the district court has modified its orders and allowed visitation by the Respondent since May 18, 2010, long before Respondent filed his Notice of Appeal. (R. III, 36). Further, on May 18, 2010, at the request of the Respondent, the case has been ordered to case management and further issues of visitation will be resolved thereunder. (R. III, 32). The question of the original order of the district court regarding visitation is no longer ripe for review as the circumstances have changed.

Kansas courts are vested with continuing jurisdiction to modify custody and visitation orders. Hoffman v. Hoffman, 228 Kan. 290, 613 P.2d 1356 (1980). K.S.A. 60-1610(a)(2)(A) authorizes the court to "change or modify any prior order of custody, residency, visitation and parenting time, when a

material change of circumstances is shown." K.S.A. 60-1616(c) provides that the court can modify parenting time "whenever modification would serve the best interests of the child." As changes have been made to visitation and Respondent has had his rights restored, the question raised on appeal is now moot.

It should be noted that the modification of the visitation orders were completed prior to the filing of the Respondent's brief and the more recent actions of the district court related to visitation have not been challenged by Respondent.

B. The district court did not err in its assessment of child support.

1. Standard of review.

"The standard of review of a district court's order determining the amount of child support is whether the district court abused its discretion, while interpretation of the [Kansas Child Support Guidelines] is subject to unlimited review. [Citation omitted.]" In re Marriage of Karst, 29 Kan.App.2d 1000, 1001, 34 P.3d 1131 (2001), *rev. denied* 273 Kan. 1035 (2002).

2. Respondent failed to present the district court with evidence of his income.

Exhibit 19, attached hereto and to be added to the record pursuant to Rule 3.02, shows the numerous times that Ms. Lank was required to file motions and attend court in an effort to enforce the order for the discovery of Respondent's financial information. For over a year, Respondent failed to provide income information and tax information to Ms. Lank.

As of the time of the evidentiary hearing, Respondent had only provided Ms. Lank's counsel with a copy of his 2006 tax returns the evening before trial, by faxing it to her office. (R. V, 60).

Respondent did not have his financial information or tax returns for 2007 or 2008. The only evidence placed before the court by Respondent was his own, self-serving testimony about his income and an incomprehensible ledger that supposedly was related to his law practice in 2008. (R. V,

153).

Ms. Lank presented the testimony and a report of Mr. James, a former employee of Respondent who was familiar with Respondent's practice and income. (R. V, 70). Mr. Kurk also testified as to his understanding of the usual costs and income for a law practice in Shawnee County and informed the court as to what he believed, in his experience and knowledge of Respondent's practice, should be the amount of income Respondent should be generating. This testimony was codified in Mr. James' report, which was admitted as Exhibit 7, which is attached hereto and to be added to the record based upon Supreme Court Rule 3.02.

The court had the discretion to determine, based upon the little substantiated evidence presented by Respondent and the testimony of the expert in assigning a reasonable income for the Respondent's law practice.

While the court stated it "imputed" the income level it did, that was not accurate. The court arrived at a reasonable belief, based upon the evidence, as to the income Respondent was able to generate. There was no abuse of discretion in the court's assignment of income to Respondent.

But, even if imputed, the district court acted appropriately. The trial court found that Respondent's claimed income was very low. "The trial court did not abuse its discretion in finding that "appropriate circumstances" existed to impute income to Renee as a custodial parent. See In re Marriage of McNeely, 15 Kan.App.2d 762, 766-67, 815 P.2d 1125, *rev. denied* 249 Kan. 776 (1991) (noncustodial father was about to enter law school and reduce his income, but the Court of Appeals held the trial court could properly impute his prior income to him because, as parent of child of tender years, the father might have to sacrifice and delay law school until the children's mother had received her undergraduate degree or at least support the children as if he was delaying law school)." Matter of Marriage of Scott, 263 Kan. 638, 647, 952 P.2d 1318, 1325 (1998).

"1. Income may be imputed to the noncustodial parent in appropriate circumstances including

the following: ...b. When a parent is deliberately unemployed, although capable of working full time, employment potential and probable earnings may be based on the parent's recent work history, occupational skills, and the prevailing job opportunities in the community." Kansas Child Support Guidelines, Supreme Court Administrative Order No. 128 § II.E.1.b (2001 Kan. Ct. R. Annot. 99). In the instant case, Respondent was employed. However, as a practicing attorney claiming to have a taxable income of $15,000.00 for 2008 is a ludicrous assertion. It was also an assertion that could not have been assessed by the court due to the failure of Respondent to provide any evidence to support his claim.

There are several areas in which the Guidelines explicitly give discretion to the district court. For example, the Guidelines say that the district court "has the discretion to determine whether the proposed insurance cost is reasonable" before including it in the child-support worksheet. Guidelines § IV.D.4.a. (2007 Kan. Ct. R. Annot. 118). And the Guidelines provide that the district court "may" impute income in certain circumstances but does not explicitly require imputation. Guidelines § II.F.1 (2007 Kan. Ct. R. Annot. 110). In cases like these in which some decision is entrusted to the discretion of the district court, this Court should review for abuse of discretion.

Further, Respondent repeatedly failed to comply with the court's orders to provide financial information through discovery and Respondent was still not in compliance with the orders of the court in that he could not produce valid evidence of his income at the hearing. Therefore, the court had the discretion to apply sanctions and to limit its consideration of the evidence and to not allow Respondent to benefit from his utter failure to comply with the orders of the court and the failure to present legitimate evidence of income at the hearing.

"Further, K.S.A.1997 Supp. 60-237 sets out the sanctions which may be imposed for failure to allow discovery or for failure to obey a trial court's discovery order, and provides, in relevant part: "(b) ... (2) *Sanctions by court in which action is pending.* If a party ... fails to obey an order to provide

or permit discovery, including [an order compelling disclosure or an order imposing sanctions], the judge before whom the action is pending may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such disobedient party from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination; ... "In lieu of any of the foregoing orders or in addition thereto, the judge shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the judge finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Shay v. State, Dept. of Transp., 265 Kan. 191, 195-196, 959 P.2d 849, 851 - 852 (1998). "It is well established that the imposition of sanctions for failure to comply with discovery orders is a matter within the discretion of the trial court and that the decision to impose sanctions will not be overturned unless that discretion has been abused. Lorson v. Falcon Coach, Inc., 214 Kan. 670, Syl. ¶ 3, 522 P.2d 449 (1974). Under the circumstances created by Respondent, the district court acted reasonably and there is no basis for undermining the findings of the district court.

Respondent cannot claim that the district court erred in assessing his income for the purposes of calculating child support because he, himself, caused the court and Ms. Lank, to be denied of any meaningful proof or evidence of his income. In fact, even if the court erred in the assessment of Respondent's income, it was invited error due to Respondent's repeated and knowing refusal to provide

the court and Ms. Lank with any meaningful information regarding his income and his business practice. "[a] party may not invite error and then complain of that error on appeal." Butler County R.W.D. No. 8 v. Yates, 275 Kan. 291, 296, 64 P.3d 357 (2003), see State v. Kirtdoll, 281 Kan. 1138, 1150, 136 P.3d 417 (2006).

The district court's findings were supported by the evidence, by the law, and were not an abuse of discretion.

C. The district court properly awarded attorney fees to Ms. Lank.

1. Standard of review.

""The assessment of costs and attorney fees lies within the sound discretion of the trial court, and its determination will not be reversed on appeal absent a showing of an abuse of discretion. If any reasonable person would agree with the trial court's decision, appellate courts will not disturb the trial court's decision. [Citation omitted.]" ' Fletcher v. Anderson, 29 Kan.App.2d 784, 786, 31 P.3d 313 (2001) (quoting In re Estate of Mater, 27 Kan.App.2d 700, 711, 8 P.3d 1274, *rev. denied* 270 Kan. 898 [2000]).

2. The assessment of fees was justifiable under both caselaw and statute.

K.S.A. 60-237 states: "In lieu of any of the foregoing orders or in addition thereto, the judge shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the judge finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

Since the majority of the actions involved in the instant case were attempts to get Respondent to comply with numerous orders for discovery, the district court was obligated to assess related attorney fees and costs related to the failure of Respondent to fulfill his legal obligations. Thus, the assessment of fees and costs were mandated.

Furthermore, K.S.A. 38-1122 specifically allows the court in paternity actions to assess costs and attorney fees. Thus, by statute, the proportion of attorney fees awarded is at the discretion of the trial court, as long as the fees are reasonable.

In Davis v. Miller, 269 Kan. 732, 7 P.3d 1223 (2000), the court stated: "The amount of an attorney fee award is within the sound discretion of the district court and will not be disturbed on appeal absent a showing that the district court abused that discretion. The district court itself is an expert in the area of attorney fees and can draw on and apply its own knowledge and expertise in evaluating their worth." 269 Kan. 732, Syl. ¶ 6, 7 P.3d 1223.

Thus, the court was allowed to review the requested fees submitted by Ms. Lank and rely on its own expertise as to the value of services provided and make an appropriate ruling on the amount for which Respondent was responsible.

As the party who asserts that the trial court abused its discretion, Respondent bears the burden of showing such an abuse of discretion. State v. Harris, 262 Kan. 778, Syl. ¶ 5, 942 P.2d 31 (1997). This burden was not carried by Respondent.

D. The district court did not err in its holdings regarding Respondent's second motion to alter or amend.

1. Standard of review. This Court's standard of review of motions to alter and amend judgments under K.S.A. 60-259(f) is abuse of discretion. Exploration Place, Inc. v. Midwest Drywall Co., 277 Kan. 898, 900, 89 P.3d 536 (2004).

2. The district court had previously considered and ruled upon Respondent's first motion to amend.

In his brief, Respondent stated that "the lower court believed it had previously denied Respondent's motion to alter or amend..." and proceeds to assert that no such ruling ever occurred. (Respondent's Brief, 37).

This is patently untrue. Respondent first filed a Motion to Amend or Alter on November 12, 2009. (R. II, 39). This motion was in compliance with local rules as it did have a notice of hearing and certificate of service when filed. The district court heard the evidence and ruled on the motion on November 17, 2009. Id. at 68.

On March 4, 2010, Respondent filed a nearly identical motion, raising the exact same arguments as had been previously addressed. Id. at 83. This motion did not contain a notice of hearing as a part of the document.

Ms. Lank filed a response to this second motion and referenced the fact that the prior motion was resolved before Judge Walters on November 17, 2009. Because the same issues were being raised as previously decided by the court, Ms. Lank requested attorney fees. (R. III, 1-2).

On April 27, 2010, the court heard the motions and found that the issues raised by Respondent had been previously ruled upon. The court also noted that several of the paragraphs raised in the motion misstated the record of the case. The court found that Local Court Rule 406 requires all motions to be filed with a notice of hearing and that because of the noncompliance with the rule, the court found the motion to be untimely. The court further ordered Respondent to pay Ms. Lank's attorney fees. Id. at 37-38.

Thus, Respondent's assertion that the issues raised in his first motion to amend were never heard was erroneous. Respondent, in fact, appeared at the hearing on his motion and represented himself. The court's finding that the issues had been previously raised and addressed was correct.

3. The district court did not err in finding the second motion to amend to be untimely.

Respondent asserts in his brief that Sedgwick County Local Rule 406 does not state when a notice of hearing on a motion is to be served. (Respondent's Brief, 36).

Sedgwick County Court Local Rule 406(5) states as follows: "**Notice requirements**: All

motions shall be noticed for hearing in the Family Law Department, 4th Floor, Sedgwick County Courthouse, 525 N. Main, Wichita, Kansas. The moving party shall be responsible for providing notice of the time and date of the hearing to the non-moving party, and the motion shall include a certificate of service. The Court Trustee or SRS shall be given notice of all motions to modify child support in cases which they have entered appearances. All motions shall be served according to the time requirements of K.S.A. 60-206, unless the Presiding Judge approves an expedited hearing."

Thus, the notice requirement is that the notice must be given along with the certificate of service when the motion is filed.

However, it is significant that Respondent argued about the rules of service of the notice of hearing yet failed to note the fact that he *never* served a notice of hearing on opposing counsel. In Ms. Lank's response to the motion to amend and motion for attorney fee's, counsel notified Respondent that the motion for attorney fees would be heard on April 27, 2010. (R. III, 2).

Respondent never filed nor served a notice of hearing on his second motion to amend or alter.

Respondent also asserts in his brief that Rule 406 require that the party give notice in accord with K.S.A. 60-206. (Respondent's Brief, 36). However, Rule 406 does not reference K.S.A. 60-206 regarding the notice of hearing, but relates only to the time requirements of service of motions. Respondent's assertion is incorrect.

The district court, at its discretion, had the ability to find Respondent's motion to be untimely or take any other lawful action, as Sedgwick County Local Court Rule 707 states: "The Court may enter any order authorized by law for the failure to follow these local rules."

Thus, the district court acted in a lawful and legal manner regarding Respondent's successive motion and did not abuse its discretion in so ruling.

4. As the district court's finding that Respondent's K.S.A. 60-259 motion was

untimely, this Court loses jurisdiction to consider the issues raised in Respondent's appeal.

Because an appellate court cannot ignore statutory requirements, this Court does not have jurisdiction to entertain an appeal that does not comply with the time limitations in K.S.A. 60-2103(a). Under K.S.A. 60-2103(a), Respondent had 30 days to file his notice of appeal from the entry of judgment, but a timely K.S.A. 60-259(f) motion terminates the 30-day time limit to file an appeal. K.S.A. 60-2103(a). The full 30-day time limit starts again when the district court enters its order concerning a timely K.S.A. 60-259(f) motion. K.S.A. 60-2103(a).

Since Respondent's 60-259(f) motion was held to be untimely, then the time for the filing of the notice of appeal was not tolled and it had expired under the law. Respondent's notice of appeal was filed outside the time allowed for a review of the results of the November 17, 2009 hearing and journal entry filed on February 22, 2010, and, therefore, this Court does not have jurisdiction to consider the issues raised by Respondent in this appeal. See Butler County R.W.D. No. 8 v. Yates, 275 Kan. 291, 299, 64 P.3d 357 (2003).

The filing of a motion to reconsider may toll the time in which a notice of appeal may be filed. K.S.A. 60-2103(a). Motions to reconsider are treated as motions to alter or amend a judgment pursuant to K.S.A. 60-259(f). See Exploration Place, Inc. v. Midwest Drywall Co., 277 Kan. 898, 900, 89 P.3d 536 (2004). However, only a timely post-trial motion will stop the appeal time from running. Respondent's successive motion to reconsider was filed well outside of the 10 days provided for by statute. The late filing divested the district court of jurisdiction to consider the merits of Respondent's complaints. Where the district court lacks jurisdiction, this court cannot acquire jurisdiction over the subject matter on appeal. See Friedman v. Kansas State Bd. of Healing Arts, 287 Kan. 749, 752, 199 P.3d 781 (2009).

Based upon the law and statutes of the State of Kansas, this Court is divested of jurisdiction to

consider the instant appeal.

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:

Pantaleon Flores
Attorney for Appellee
933 S. Kansas Ave.
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and

Elaine Reddick
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this ___ of November, 2010.

_____

Michael P. Whalen

ATTACHMENTS

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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