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

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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. 09-102574-A

IN THE COURT OF APPEALS

OF THE

STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

BRENT NELSON,

Petitioner/Appellant

and

TAMMY L. NELSON

Respondent/Appellee,

BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
The Honorable Eric Commer
Judge of the District Court
District Court Case No. 06 DM 8515

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Case No. 09-102574-A

IN THE COURT OF APPEALS
OF THE
STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF
BRENT NELSON,
Petitioner/Appellant
and
TAMMY L. NELSON
Respondent/Appellee,

I.

NATURE OF THE CASE

This is an appeal of a finding of the district court judge regarding an enforcement motion by the Respondent in a domestic case regarding the purchase of a residence for the Respondent by the Petitioner. The district court converted the purchase agreement from the Journal Entry and Decree of Divorce into a cash judgment, with interest, in an amount $32,000.00 more than that even requested by the Respondent.

II.

ISSUES ON APPEAL

A. The district court erred in converting a property settlement into a cash judgment in that it lacked jurisdiction to do so.

B. The district court erred in awarding a cash judgment in excess of $32,000 more than that requested by Respondent.

III.

FACTS OF THE CASE

In November 2006, Mr. Nelson filed a petition for divorce from the Respondent and a request for settlement of child custody and an equitable division of assets and debts and other relief as deemed equitable by the court. (R. I, 16-17).

The Respondent never filed a response to the petition, never filed a request for change of the temporary orders and never filed a Domestic Relations Affidavit. Id. at 42.

In February 2007, the parties came before the court, Mr. Nelson appearing in person and with counsel and the Respondent appearing *pro se*. Id. at 41. The Court found that the divorce should be granted and that the property settlement as incorporated in the Journal Entry of Judgment and Decree of Divorce was a fair and equitable division of property. Id. at 50.

In the Journal Entry, under the sections regarding the division of property, debt and real estate, the disposition of the current and future residence of the Respondent were spelled out. Upon the sale of the Respondents current residence, with the proceeds to be given to the Petitioner, Paragraph 6 of Section 15 of the Journal Entry of Judgment and Decree of Divorce, filed on February 20, 2009, stated: "Petitioner will purchase a home for the Respondent and their minor children with purchase price not to exceed an amount of one hundred and ten-thousand dollars ($110,000.00). The Petitioner and Respondent must agree on said residence. Respondent will be (sic.) pay the insurance and taxes on said new resident until residence is paid for in full." Id. at 48.

Section 16 of the Journal Entry states: "Upon the purchase of the new residence for the Respondent, said residence cannot be refinanced or used as collateral unless it is to lower the payment or interest rate. No additional money is to be borrowed on said residence by either party. Upon the final payment of said residence it will be deeded to the Respondent and she will then be responsible for all insurance and tax payments on said residence. After said residence is paid in full, upon resale of residence all proceeds will go to the Respondent." Id. at 49.

In November 2007, Respondent file a motion for an order compelling Mr. Nelson to pay Respondent the sum of $78,000 representing the purchase price for the residence commonly known as 14118 E. 63rd South, Derby, Kansas. Id. at 87.

The matter was heard before Judge Commer on March 3, 2009. At that hearing, Respondent's counsel told the court that they were seeking a judgment of $78,000 so that Respondent could purchase a house that was owned by her parents. Respondent's counsel told the court that this was as better deal than the journal entry anticipated in that it was $32,000 less than what the total cost of a residence would be that was allowed. (R. III, 4). Respondent's counsel represented that there had been negotiations regarding the purchase of the house, that the parties had agreed upon the house but that the issue was how to finance the purchase. Mr. Nelson wanted to get a loan and a mortgage on the property in order to finance the purchase and the Respondent, and for some reason, her parents, objected to Mr. Nelson purchasing the home in that manner. Id. at 6-7. Respondent's counsel stated that Mr. Nelson wished to have an evidentiary hearing on the matter but that such a hearing would be a violation of the parol evidence rule, unless the clause were found to be ambiguous. Counsel then went on to state that if the clause were ambiguous, the court must find against Mr. Nelson as the drafter of the journal entry and there was then no need for a hearing. Id. at 8-9. Respondent' s counsel, mystifyingly argues that because the specific term "mortgage" was not stated in the journal entry, that Mr. Nelson had no right to purchase a home in such a manner and that, somehow, allowed the court to impose a cash judgment. Id. at 9.

Mr. Nelson argued that there were no terms that specified the manner in which the house could be purchased and that the request for a payment of cash for the house was not feasible and could not be enforced. Id. at 16. Mr. Nelson also informed the court that he had attempted to pursue the acquisition of a mortgage on the property but that Respondent's parents would not allow an appraiser into the property. Id. at 22.

Respondent's counsel admitted that it was a nonmodifiable division of property. Id. at 25.

Judge Commer found that the journal entry was a nonmodifiable division of property. The judge found that Mr. Nelson had an obligation to purchase a house for the Respondent with a purchase price not to exceed $110,000. The court found there had been no disagreement over the selection of the residence. Judge Commer then stated that he believed the was to deal with it was to construe the journal entry as an order for a judgment of $110,000. The court acknowledged that was not even what the Respondent had requested, but that he was going to make it a $110,000 judgment against the petitioner. Id. at 25-26.

Mr. Nelson filed a timely Motion for Amendment and/or Reconsideration regarding the court's modification of the purchase of real estate into a cash judgment of $110,000. (R. II, 10). In the motion, Mr. Nelson noted that the language of the Journal Entry and Decree of Divorce specifically contemplated that the home would be purchased by way of a mortgage or a loan, in that Section 16 of the Journal Entry states: "Upon the purchase of the new residence for the Respondent, said residence cannot be refinanced or used as collateral unless it is to lower the payment or interest rate. No additional money is to be borrowed on said residence by either party. Upon the final payment of said residence it will be deeded to the Respondent and she will then be responsible for all insurance and tax payments on said residence. After said residence is paid in full, upon resale of residence all proceeds will go to the Respondent." Id. at 10-11. Further, as had been noted by Respondent' s counsel in the March 3, 2009 hearing, the parties had agreed on the residence, the purchase price and the only reason the sale was not completed was because Respondent's parents would not agree to a mortgage. Id. at 11; 18.

Mr. Nelson argued that the district court had modified the settlement agreement/division of property contained within the final journal entry from the purchase of a home into a cash judgment and that the court was without jurisdiction to take such action based upon the statutes and laws of Kansas. Id. at 11-12.

Mr. Nelson argued that the court was required to construe the journal entry of judgment and the

division of property to give effect to the agreement as written. The language of the journal entry required the parties to agree upon the residence to be purchased and language was included that contemplated the purchase of the residence by a mortgage and by financing obtained by Mr. Nelson. Id. at 13-14. Mr. Nelson argued that it was an abuse of discretion to make such a modification absent an evidentiary hearing and that it was an abuse of discretion to increase the award requested by the Respondent by $32,000.00. Id. at 15.

At the hearing on the reconsideration motion, Judge Commer asked if there was specific language in the journal entry that said a mortgage could be used to purchase the residence for the Respondent. Mr. Nelson stated no, but that the language in section 16 of the journal entry did specifically relate to refinancing the purchase and for taking no additional loans upon the residence. (R. IV, 10-11).

Judge Commer found that in the section of the journal entry referencing debts, that Mr. Nelson would purchase a residence for Respondent and the minor children. The judge found that for the court to have approved the journal entry that the court had to have made a finding that this was a fair and equitable division of property and debts. The judge found that the purchase of a residence up to a value of $110,000.00 was a fair division of assets. Id. at 40-41. The judge found that this was not an agreement but a default judgment and that the terms of sections 15 and 16 were ambiguous and that the case law throughout the U.S. is that ambiguity in a document is to be construed against the drafter. Id. at 41-42. The judge found that nowhere in the decree does it indicate that the purchase of the residence was contingent upon Mr. Nelson being able to afford the purchase of the home. The judge found that the only amount given to the court was $110,000 and that there may have been communication between the parties through counsel as to other amounts to settle the case, as those were negotiations and the court could not consider such information. The judge found that the only was to enforce the provision of the judgement was to determine that Mr. Nelson owed the Respondent $110,000.00 as of February 20, 2007 to make this a fair, just and equitable journal entry and division of property. Id. at 42-43.

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

IV.

ARGUMENTS AND AUTHORITIES

A. The district court erred in converting a property settlement into a cash judgment in that it lacked jurisdiction to do so.

1. Standard of review.

Whether the district court has jurisdiction is a question of law over which this court has unlimited review. In re Marriage of Boldridge, 29 Kan.App.2d 581, 582, 29 P.3d 454, *rev. denied* 212 Kan. 1418 (2001).

2. The district court lacked jurisdiction to alter the division of property as incorporated within the Journal Entry of Judgment and Decree of Divorce.

"[A] court has no continuing jurisdiction to change or modify the division of property after entering an original divorce decree." Boldridge, 29 Kan.App.2d at 582.

In November 2007, Respondent file a motion for an order compelling Mr. Nelson to pay Respondent the sum of $78,000 representing the purchase price for the residence commonly known as 14118 E. 63rd South, Derby, Kansas. (R. I, 87).

Judge Commer found that the purchase of a residence up to a value of $110,000.00 was a fair division of assets. Id. at 40-41. The judge found that this was not an agreement but a default judgment and that the terms of sections 15 and 16 were ambiguous and that the case law throughout the U.S. is that ambiguity in a document is to be construed against the drafter. Id. at 41-42. The judge found that nowhere in the decree does it indicate that the purchase of the residence was contingent upon Mr. Nelson being able to afford the purchase of the home. The judge found that the only amount given to the court was $110,000 and that there may have been communication between the parties through counsel as to other amounts to settle the case, as those were negotiations and the court could not consider such information. The judge found that the only way to enforce the provision of the judgement was to determine that Mr. Nelson owed the Respondent $110,000.00 as of February 20,

2007 to make this a fair, just and equitable journal entry and division of property. Id. at 42-43.

Thus, the judge converted the agreement for the purchase of a residence, to be agreed upon by the parties, into a cash judgment of $110,000.00, plus interest dating back to the time of the filing of the original journal entry.

Although the language of motion was for enforcement of the purchase of a home and a specific request for an amount of $78,000.00, the judge ignored the request of the Respondent and made a cash award of $110,000.00.

The arguments and evidence placed before the court were that the parties had agreed upon the residence to be purchased, a home belonging to Respondent's parents. The judge was informed that there had been an agreed upon value of the home, that of $78,000.00, which was even the amount requested in Respondent's motion.

The court was even informed that Mr. Nelson could purchase the home and was willing to purchase the home, but that he would need to do so in the manner in which 99% of the homes in America are purchased, by getting a mortgage.

Instead of allowing the purchase to occur, the judge found that there was no specific mention in the journal entry of Mr. Nelson being able to utilize a mortgage in the acquisition of the residence and, thereby, created a cash judgment, with interest, against Mr. Nelson, in an amount in excess of the requested price of the Respondent by $32,000.00.

This was not enforcement of the journal entry. This was an alteration of the agreement and the terms of the division of property between the parties.

The judge specifically quoted section 16 of the division of property specifically addressed the financing of the purchase of the house by stating: "Upon the purchase of the new residence for the Respondent, said residence cannot be refinanced or used as collateral unless it is to lower the payment or interest rate. No additional money is to be borrowed on said residence by either party." (R. IV, 41). And the judge found this language to be ambiguous. The court found that the document must be

construed against the drafter of the document and, thereby, entered a judgment, with interest, of $110,000.00

This truly defies logic. It also defies the law of the State of Kansas. "A contract between the parties to a divorce action that is approved by the trial court and merged into the judgment also retains its contractual characteristics." Dozier v. Dozier, 252 Kan. 1035, Syl. ¶ 2, 850 P.2d 789 (1993). Generally, if a written instrument has clear language and can be carried out as written, the rules of construction are not necessary. Decatur County Feed Yard, Inc. v. Fahey, 266 Kan. 999, 1005, 974 P.2d 569 (1999).

In the instant case, it matters not that the journal entry was entered into based upon a finding of default. By her failure to file an answer or any other documentation, the Respondent acquiesced to the findings of the court and the Journal Entry of Judgment and Decree of Divorce. She was bound by that document in the same way as if it had been a negotiated settlement. The record shows that Respondent was present before the district court when it entered its rulings regarding the granting of the divorce and the division of property. (R. I, 41). No objections were made or filed by the Respondent.

Further, the Journal Entry of Judgment was not some ambiguous document created out of whole cloth with no consideration of the Respondent, it was a journal entry that encapsulated the findings of the district court. There was no ambiguity to be assigned to Mr. Nelson. The journal entry was the finding of Judge Powell. And the language of the document does not specify the manner in which the residence could be purchased, but did, specifically, contemplate a loan and a mortgage being required in order to effectuate the purchase. "Upon the final payment of said residence it will be deeded to the Respondent and she will then be responsible for all insurance and tax payments on said residence." (R. I, 49).

The language of Section 16 states that the payments to be made upon the house will be made by Mr. Nelson and that when he makes the final payment on the residence, the residence will be deeded to the Respondent. What is ambiguous about that? Does the lack of the word "mortgage" create some

other, amorphous means of financing the purchase of a house while the deed and title remain in the name of the purchaser until the last payment is made and then, at that time, the residence is to be deeded to the Respondent? What was ambiguous about that?

Further, the language of the journal entry did not meet any legal definition of ambiguity. "An interpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing and considering the entire instrument from its four corners. The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided. [Citation omitted.]" Johnson County Bank v. Ross, 28 Kan.App.2d 8, 10-11, 13 P.3d 351 (2000). "The interpretation and legal effect of written instruments are matters of law, and an appellate court exercises unlimited review. Regardless of the construction given a written contract by the trial court, an appellate court may construe a written contract and determine its legal effect. [Citation omitted.]" Unrau v. Kidron Bethel Retirement Services, Inc., 271 Kan. 743, 763, 27 P.3d 1 (2001). If the terms of a contract are clear and unambiguous, the contract must be given its plain and ordinary meaning. First Financial Ins. Co. v. Bugg, 265 Kan. 690, 694, 962 P.2d 515 (1998). The fundamental rule of construction is that courts will not rewrite a contract by construction if it is clear and unambiguous. Thomas v. Thomas, 250 Kan. 235, 244, 824 P.2d 971 (1992).

In the instant case, there was no uncertainty as to the meaning of the division of property and how the terms were to be applied. A fair, reasonable and practical construction of the terms of the journal entry were that Mr. Nelson could purchase the house by means of a mortgage and, when it was paid off, the residence would then be deeded to Respondent.

Mr. Nelson was to purchase the house and could do so in a manner whereby it would be deeded in his name until all the payments were made and then he would deed it to the Respondent when it was paid off. And that is exactly what Mr. Nelson wanted to do, on an agreed property, at an agreed price of $78,000 and Judge Commer failed to grasp the language of the journal entry and ordered a $110,000.00

judgment, plus two years of interest in violation of Kansas law.

The judge's actions were not an enforcement of the journal entry. The judge's actions were a violation of a valid order and finding by a different judge that contemplated the purchase of a home through the use of a loan and a mortgage. By turning that prior court's order into a cash judgment, the judge stepped beyond the bounds of his jurisdiction in contravention of statute and case law. A settlement agreement incorporated into a divorce decree is a judgment of the court and as such the district court has an obligation to enforce the terms of the agreement. See Dozier v. Dozier, 252 Kan. 1035, 1039, 850 P.2d 789 (1993).

Kansas law is clear that a property settlement, once accepted by the court and incorporated into the divorce decree, may not generally be modified by the court except as prescribed by the agreement or subsequent consent by the parties. Miller v. Miller, 6 Kan.App.2d 193, 194-95, 627 P.2d 365 (1981). 60-1610(b)(3) explains as follows: If the parties have entered into a separation agreement which the court finds to be valid, just and equitable, the agreement shall be incorporated in the decree. The provisions of the agreement on all matters settled by it shall be confirmed in the decree *except that any provisions for the custody, support or education of the minor children* shall be subject to the control of the court in accordance with all other provisions of this article. Matters settled by an agreement incorporated in the decree, *other than matters pertaining to the custody, support or education of the minor children,* shall not be subject to subsequent modification by the court except: (A) As prescribed by the agreement or (B) as subsequently consented to by the parties." (Emphasis added.)

"When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be." Martindale v. Tenny, 250 Kan. 621, Syl. ¶ 2, 829 P.2d 561 (1992). In Bair v. Bair, 242 Kan. 629, 634, 750 P.2d 994 (1988), our Supreme Court stated: " 'A party who seeks and obtains from a trial court its approval of a separation agreement and the incorporation thereof in a decree of divorce and thereafter accepts the benefits of the decree cannot avoid its disadvantages by a motion to modify *except as to those matters*

over which the court has continuing jurisdiction.' " (Emphasis added.) (Quoting Spaulding v. Spaulding, 221 Kan. 574, Syl. ¶ 1, 561 P.2d 420 [1977])." Matter of Marriage of Patterson, 22 Kan.App.2d 522, 531-532, 920 P.2d 450, 457 - 458 (1996). Thus, the court lacked subject matter jurisdiction to modify the terms of the settlement agreement.

This court should find that the judge acted without jurisdiction and remand the matter to the district court with instructions to make an appropriate ruling under the laws of our State.

B. The district court erred in awarding a cash judgment in excess of $32,000 more than that requested by Respondent.

1. Standard of review.

Appellate courts apply an abuse of discretion standard in a divorce action when reviewing a trial court's determination of issues, including maintenance, settled by an agreement that has been incorporated into the decree. See In re Marriage of Bowers, 23 Kan.App.2d 641, 643, 933 P.2d 176 (1997). Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. Varney Business Services, Inc. v. Pottroff, 275 Kan. 20, 44, 59 P.3d 1003 (2002).

2. The district court made factual and legal errors in finding it was required to assess $110,000.00 as the only amount presented for collection.

In the event this Court finds that the district judge did not step beyond his jurisdiction by altering the division of property and considers the actions taken by the court on the merits, then the district judge based his decision on errors of fact and law and thoroughly abused his discretion in his ruling.

As noted above, the judge found that the only number he had to rely on for value was the $110,000.00 in the journal entry and that any other number relied upon was from negotiations of the parties and that he could not consider any other cash amount. (R. IV, 42). This was a wrongful statement of the law; a wrongful statement of the facts and the finding and order of the court was an abuse of discretion.

The judge disregarded the Respondent's motion which had specifically requested $78,000.00 in

its request for "enforcement" of the purchase of the residence. In fact, the Respondent in her motion for a cash judgment specifically noted that the request was reasonable because it was $32,000.00 less than the purchase price maximum obligation imposed by the divorce decree. (R. I, 87).

Thus, the judge's finding that there had been presented no evidence or request for anything less than $110,000.00 was erroneous. The judge's finding that any other numbers were merely raised as part of negotiations and could not be considered was erroneous.

The judge did not pay attention to the arguments of Respondent's counsel as to the requested purchase price nor to the request made by Respondent in her motion.

Further, since the court never made a finding that Mr. Nelson was at fault, nor in contempt, nor refusing to make the purchase of the residence, the court's findings were erroneous. The fact of the matter, as presented by Respondent's counsel at the March hearing and by the attachment and argument of Mr. Nelson at the motion hearing, the only issue about the purchase of the house was the refusal of the Respondent's parents to allow a mortgage and their refusal to allow an appraiser to enter the premises. (R. I, 18; R. VI, 6). Mr. Nelson was not in violation of the journal entry. He had agreed to the residence to be purchased. He agreed to the price to be paid and he agreed to make the purchase. The Respondent and her parents were the ones that had prevented the execution of the division of property by their unreasonable demands and the district judge's failure to assess and understand any of these issues was an abuse of discretion.

The judge also made a finding that the assessment of an inflated $110,000.00 judgment with two years of interest tacked on was not based upon Mr. Nelson's ability to pay, he just had to pay the whole amount. (R. IV, 42). The problem with the judge's finding was that Mr. Nelson was not attempting to avoid purchasing the residence for the Respondent. Mr. Nelson's financial condition was raised to the court because it was unreasonable for the judge to make a finding that no mortgage was allowed under the division of property in that it was an unreasonable interpretation of the court to require a cash purchase only by Mr. Nelson. The fact of the matter is that the converse of the judge's

findings was true, it did not specifically state that the purchase of the residence could only be done with cash or a full payment up front. The holding of the court was an unreasonable abuse of discretion.

No reasonable person could have made the findings that were made by the district court and no reasonable person could have adopted the views and rulings adopted by the district court.

The finding of "ambiguity" in paragraph six of section 15 that Mr. Nelson would purchase a house for Respondent was isolated and not considered within the context of the rest of the document which allowed for Mr. Nelson to purchase the home and make payments and to deed the residence to Respondent when all of the payments had been made. (R. I, 49).

No reasonable person could have made the findings that were made by the district court and no reasonable person could have adopted the views and rulings adopted by the district court.

For all of these reasons, the matter should be remanded to the district court with directions to withdraw the orders made and to allow the purchase of the home in the manner originally proposed by Mr. Nelson.

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 was placed in the U.S. Mails, postage prepaid to the following:

David Johnson
940 N. Main
Wichita, KS 67203

James W. Wilson
404 E. Central
Wichita, KS 67202

this ____ of November, 2009.

_____
Michael P. Whalen

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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