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applying either. Such a disposition is beyond the authority granted by statute.

CONCLUSION

Because the juvenile court lacked the statutory authority to simultaneously commit Emily to the care and custody of DHHS for in-home placement and place her on probation, we reverse the order of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GAYLE MANN, APPELLANT, V.
LAZELL RICH, APPELLEE.
794 N.W.2d 183

Filed January 18, 2011. No. A-10-171.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. ____: ____. Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
3. **Child Custody.** When deciding custody issues, the best interests of the minor children are the court's paramount concern.
4. ____. In determining the best interests of a child, a court can look to the relationship of the child with each parent; the general health, welfare, and social behavior of the child; the moral fitness of the parents; the respective environments each parent offers; the emotional relationship between the child and the parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the capacity of each parent to provide physical care and to satisfy the needs of the child.
5. ____. When determining the best interests of a child, a court must have an understanding of the parents' and the child's history, in addition to an awareness of their current circumstances.
6. **Modification of Decree: Child Custody: Evidence: Time.** As a general rule, evidence of a parent's behavior during the year or so prior to a hearing on a motion to modify is of more significance than the behavior prior to that time.

7. **Moot Question: Final Orders: Appeal and Error.** Generally, an appellate court cannot afford relief to a party from a court's ruling on a temporary order because any issue relating to the temporary order is moot after it is replaced by a more permanent order.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded with directions.

Stephen D. Stroh and Ryan D. Caldwell, of Bianco Stroh, L.L.C., for appellant.

Joan Watke Stacy for appellee.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

This appeal involves an ongoing custody dispute. The proceedings currently at issue were initiated by a customary application to modify. The salient issue in this appeal is whether a trial court must consider evidence from the time after the date an application to modify was filed. We answer this question in the affirmative, because the current environment that the parties would be providing to the children is essential to any custody determination.

II. BACKGROUND

This appeal involves the parties' continuing dispute over custody of their two minor children: a child born in October 1998 and a child born in November 2000. The custody proceedings have been ongoing since September 2003, when Gayle Mann filed a petition alleging that Lazell Rich is the biological father of the two children and requesting that the district court grant custody of the children to her and order Lazell to pay a reasonable sum of child support.

On August 21, 2006, a decree of paternity was entered. In the decree, the district court determined that Lazell is the father of the children; awarded custody of the children to Gayle, subject to Lazell's reasonable rights of visitation; and ordered Lazell to pay child support.

On December 11, 2006, just 3 months after the decree was entered, Lazell, proceeding pro se, filed an application

to modify the decree of paternity to award him custody of the children. After a hearing, the district court issued an order modifying the decree of paternity by awarding Lazell custody of the children, subject to Gayle's reasonable rights of visitation.

Gayle appealed the district court's order to this court. In *Mann v. Rich*, 16 Neb. App. 848, 755 N.W.2d 410 (2008), we found that Gayle was not afforded procedural due process because there was insufficient evidence to establish that she received notice of the hearing on Lazell's application to modify the decree of paternity. As a result of this finding, we reversed the order of the district court which modified the decree of paternity and remanded the case for a new hearing on the issue of custody of the parties' minor children. On December 23, 2008, the mandate of this court was issued.

On January 14, 2009, a month after the mandate was issued, a hearing was held concerning temporary custody of the children while a new hearing on Lazell's application to modify was pending. At the January 14 hearing, Gayle argued that, as a result of our opinion in *Mann v. Rich, supra*, the custody order in the original paternity decree was still in effect. That custody order awarded her custody of the children subject to Lazell's reasonable rights of visitation. In contrast, Lazell argued that he should be granted temporary custody of the children pending the rehearing because the children had been in his custody for the preceding 18 months while Gayle's appeal to this court was pending. Lazell asserted that it would not be in the children's best interests to change custody for the short period of time before the new hearing on his application to modify.

The district court granted Lazell temporary custody of the children pending the new hearing on his application to modify the paternity decree. The court indicated:

> I'm worried uprooting these kids at this time when they've been where they have been for the last 18 months is too traumatic of an event for them at this time based on what's occurred.
>
> . . . [I]t's in the best interest of these minor children to remain where they are . . . .

On October 19 and November 24, 2009, a new hearing was held on Lazell's application to modify the paternity decree. Prior to the start of this hearing, the district court informed the parties, "All I want to hear is evidence of things that occurred between the time the [original paternity] decree was entered in August of 2006 and the time [Lazell] filed [his] motion in December of 2006 that justifies a change in custody."

Based on the district court's instructions, the parties focused their presentation of evidence on events that had occurred between August and December 2006. Such evidence revealed that during this period of time, the parties did not get along with each other and struggled to communicate effectively. Lazell presented evidence to demonstrate that Gayle hindered his relationship with the children. Gayle presented evidence to demonstrate that she was afraid of Lazell and that the children felt more comfortable with her than with Lazell.

After the hearing, the district court entered an order modifying the original paternity decree such that Lazell was granted custody of the parties' children.

Gayle appeals from the district court's order here.

III. ASSIGNMENTS OF ERROR

On appeal, Gayle argues that the district court abused its discretion in granting temporary custody of the children to Lazell in January 2009, in finding a material change of circumstances had occurred since the entry of the paternity decree in August 2006, and in modifying the paternity decree to award Lazell custody.

IV. ANALYSIS

1. Standard of Review

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007).

2. Modification of Custody

We first address the district court's decision to modify the original paternity decree by awarding Lazell custody of the

parties' children. However, before we can address Gayle's assertion that the district court abused its discretion in modifying the decree, we must examine whether the evidence presented at the hearing in October and November 2009 was sufficient to make any determination about custody of the minor children.

[2,3] Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). When deciding custody issues, the best interests of the minor children are the court's paramount concern. See *Hassenstab v. Hassenstab*, 6 Neb. App. 13, 570 N.W.2d 368 (1997). The best interests inquiry has its foundation in both statutory and case law. *Walters v. Walters*, 12 Neb. App. 340, 673 N.W.2d 585 (2004). Statutory law directs courts to consider the best interests of the minor children in determining custody arrangements and time to be spent with each parent. See Neb. Rev. Stat. § 42-364(1) and (2) (Cum. Supp. 2010).

[4,5] In determining the best interests of a child, a court can look to the relationship of the child with each parent; the general health, welfare, and social behavior of the child; the moral fitness of the parents; the respective environments each parent offers; the emotional relationship between the child and the parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the capacity of each parent to provide physical care and to satisfy the needs of the child. See *McDougall v. McDougall*, 236 Neb. 873, 464 N.W.2d 189 (1991). Consideration of each of these factors requires an understanding of the parents' and the child's history, in addition to an awareness of their current circumstances.

As we discussed above, the district court limited the presentation of evidence at the hearing to events that occurred between the time the original paternity decree was entered in August 2006 and the time Lazell filed his application to

modify in December 2006. Specifically, the judge instructed the parties as follows:

> [The original] decree was entered August 21, 2006. [Lazell] filed . . . an application to modify . . . about three months later. What you have to show is that there was a material change in circumstances that occurred between the time that decree was entered and the time [the application was filed] that justifies a change in custody. It doesn't matter what's been going on since. You're stuck with what you filed back in '06, all right?

The judge reminded the parties of this admonition on multiple occasions during the hearing. As a result of this limitation on the presentation of evidence, our record reveals the parties' circumstances as they existed during the fall and winter of 2006, but does not provide an accurate portrayal of the parties' circumstances at the time of the hearing in October and November 2009.

[6] We first note that we cannot find any case law or other authority which suggests that a court is precluded from considering evidence from the time after the filing of an application to modify in determining whether a material change of circumstances has occurred or in determining the best interests of the children. Rather, our review of the case law in this area suggests that courts routinely consider evidence from the time after the filing of an application to modify to the time of the modification proceedings. In fact, the Nebraska Supreme Court has indicated that as a general rule, evidence of a parent's behavior during the year or so prior to a hearing on a motion to modify is of more significance than the behavior prior to that time. See *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

The district court clearly based its decision to modify the decree solely on the parties' history, without considering the parties' current circumstances. Because the court did not consider the parties' current circumstances, it did not consider the environment that the parties would be providing to the children at the time of the hearing.

The 300-page bill of exceptions contains a few scant lines about events that occurred after December 2006 and through

the time of the hearing in October and November 2009. This evidence that the parties did sporadically present, about the prohibited timeframe, revealed significant changes in the parties' circumstances. There was evidence to suggest that during this time period, Gayle had removed the children from Nebraska without Lazell's knowledge. Such evidence revealed that Gayle enrolled the children in an out-of-state school and that she intended to reside in this other state indefinitely. Although the record indicates Gayle returned the children to Nebraska at some point, the record does not reveal how long she was gone or other circumstances surrounding this incident.

Other evidence presented at the hearing revealed that during the time period between December 2006 and October 2009, Lazell was arrested for child abuse after hitting one of the parties' children. In addition, there was evidence that Lazell's current wife had been granted a protection order against Lazell in the months prior to the hearing. There is no evidence about the specifics of either of these incidents.

We conclude that the district court erred in limiting the presentation of evidence at the hearing and in basing its decision about custody of the children on the parties' circumstances as they existed 3 years prior to the hearing. We reverse the district court's decision to modify the original decree and remand the case with directions to hold a new hearing where the parties can present evidence of their current circumstances. Such evidence should demonstrate events that occurred after December 2006 up to the time of the new hearing.

3. Temporary Custody Order

We next consider the district court's decision to grant temporary custody of the children to Lazell in January 2009, prior to the modification hearing. On appeal, Gayle argues that the court abused its discretion in granting temporary custody to Lazell. Specifically, she argues that the court erred in granting temporary custody to Lazell without receiving sufficient evidence of the children's best interests.

[7] Generally, we cannot afford relief to a party from a court's ruling on a temporary order because any issue relating to the temporary order is moot after it is replaced by a more

permanent order. See *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009). However, in this case, we are reversing the permanent custody order issued by the district court. The January 2009 temporary custody order will remain in effect pending a new modification hearing, and such order is not moot. Accordingly, we address the district court's temporary custody order.

At the January 2009 hearing, the parties presented limited evidence. Gayle offered her own affidavit into evidence as well as affidavits from her pastor and from the children's childcare provider. Lazell offered his own affidavit into evidence. In addition, he attempted to offer the testimony of someone from the children's school; however, the court did not allow him to present such evidence. The content of the affidavits allowed into evidence is not clear because they are not included in our record.

In awarding temporary custody of the children to Lazell, the court indicated that it was concerned about "uprooting" the children and found that it would be in their best interests to remain with Lazell pending the rehearing. While the court indicated that it had considered the children's best interests in awarding temporary custody to Lazell, it appears that it limited its consideration to the effects of moving the children to a new home. There is no indication that the court considered the current circumstances of either of the parties.

As we discussed above, at the modification hearing, there was some suggestion that the parties' circumstances had significantly changed in the recent past, including Gayle's attempt to relocate to another state with the children, Lazell's arrest for child abuse, and the protection order granted against Lazell and in favor of his current wife. Given that these significant changes were apparently not considered by the court at the January 2009 hearing, we conclude that the district court had insufficient evidence to make a determination about custody, even if such determination was temporary in nature.

We reverse the district court's order awarding Lazell temporary custody of the children. We remand the case with directions to hold a new hearing to determine temporary custody of the children pending the new modification hearing. At the

temporary custody hearing, the parties should present evidence of their current circumstances.

V. CONCLUSION

Because the district court failed to consider evidence of the parties' current circumstances, we reverse the district court's decision to modify the original paternity decree and remand the case with directions to hold a new hearing where the parties can present evidence of their current circumstances. Such evidence should demonstrate events that occurred after December 2006 up to the time of the new hearing. The district court should also hold a new hearing to determine temporary custody of the children pending a new modification hearing.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF TEGAN V., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. MIKALLE S., APPELLEE.

794 N.W.2d 190

Filed January 18, 2011. No. A-10-735.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Jurisdiction: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case.
4. ____: ____. Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide.
5. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
6. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, so that effect is given to every provision.
7. **Child Custody: Jurisdiction.** The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the