CHAPTER 8
Standards and Scope of Appellate Review

I. INTRODUCTION

§ 8.1 Preliminary Matters

Following an appellate court's determination that it has jurisdiction over an appeal, the next inquiry is the proper standard of review to be applied to each issue.

§ 8.2 Standard of Review – Definition

The appellate court's true standard of review "focuses on the deference due to a lower court, jury, or agency, and on the materials the reviewer can look to in performing that oversight function. It broadly defines the freedom or handcuffs the appellate court carries in passing on the prior decision makers within the judicial process." 1 Childress & Davis, *Federal Standards of Review* §1.03, p. 1-18 (4th ed. 2010). "In other words, the standard of review establishes the 'framework by which a reviewing court determines whether the trial court erred. [Citation omitted.]'" *State v. Williams*, 295 Kan. 506, 510, 286 P.3d 195 (2012).

The standard of review is a concept distinct from the test for reversibility. See *State v. Plummer*, 295 Kan. 156, 160, 283 P.3d 202 (2012).

§ 8.3 Requirements for Appellate Briefs

Under the Kansas Supreme Court Rules, an appellant must begin each issue with a citation to the appropriate standard of review and a reference to the specific location in the record on appeal where the issue was raised and ruled upon. Rule 6.02(a)(5). An appellee also has a duty to cite to the appropriate standard of review and must either concur in the appellant's citation to the standard of review or offer additional authority. Rule 6.03(a)(4).

§ 8.4 Issues Must be Preserved for Appeal

In an appeal, the record is everything. Any potential error must be preserved for the record on appeal. The "central premise of error preservation is simple but of great consequence: if it's not in the record developed in the trial court, it did not happen for the purposes of appeal." Bratvold and Penny, *The Importance of Error Preservation*, 53 No. 3 DRI For the Defense 8 (March 2011). Rule 6.02(a)(5) requires that an appellant's brief contain a reference to the specific location in the record on appeal where each issue on appeal was raised and ruled upon. This requirement is consistent with the general rule that an appellant cannot raise an issue on appeal that was not raised below. See *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009) (civil); *State v. Leshay*, 289 Kan. 546, 553, 213 P.3d 1071 (2009) (criminal).

The rationale for this rule is simple: a trial court cannot wrongly decide an issue that was never before it. See *State v. Williams*, 275 Kan. 284, 288, 64 P.3d 353 (2003). There are several exceptions to the rule that a new legal theory cannot be raised for the first time on appeal. The appellate courts may consider an issue that was not properly preserved when: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason. See *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008), *cert. denied* 555 U.S. 1178 (2009) (civil); *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010) (criminal).

§ 8.5 Determining the Appropriate Standard of Review

"Traditionally, decisions by judges are divided into three categories: questions of law (reviewable de novo), questions of fact (reviewable for clear error), and discretionary matters (reviewable for abuse of discretion)." Levy, *How to Handle an Appeal*, §6:5.2, p. 6-20 (4th ed. 2009). In practice, the lines between these categories can blur, leading to the application of several layers of review on a single issue or a case where it is unclear whether the appellate court is reviewing a question of law or a question of fact. This fluidity requires the practitioner to make strategic decisions about how to frame the standard of review.

To assist in understanding the distinctions among various standards of review, further explanation and examples are provided in §§ 8.7-8.22.

§ 8.6 Practical Considerations

The standard of review is the "single most important factor in the decision to affirm or reverse in the face of a claim of error that has been preserved." Wisotsky, *Professional Judgment on Appeal: Bringing and Opposing Appeals*, § 8.02 (2002). The structure of the court system allows the trial court's decision to come to the appellate court with a "strong presumption of correctness" in all issues except for questions of law.

For that reason, determining the appropriate standard of review can be helpful when considering whether to pursue an appeal. Counsel for the appellant is in the best position when he or she can focus an argument on a question of law, which affords de novo review. And both counsel and client should know that the deference given the trial court on discretionary matters means that an appeal based solely on those grounds is unlikely to succeed. Bentele & Cary, *Appellate Advocacy Principles and Practice*, pp. 119-120 (4th ed. 2004). Conversely, counsel for the appellee should always frame an issue in a way that affords the greatest amount of possible deference to the trial court.

When examining a record for potentially reversible errors, counsel should take care not to base an appeal around harmless error. Appellate courts will disregard merely "technical errors" that do not appear to have prejudicially affected the substantial rights of the party complaining if the record as a whole reflects that "substantial justice" has been done by the judgment. *State v. Gilliland*, 294 Kan. 519, 541, 276 P.3d 165 (2012).

The degree of certainty required to persuade the court that the error did not affect the outcome of the trial will vary depending on whether the error implicates a constitutional right and whether the error was cured or mitigated by an instruction or admonition. *State v. Ward*, 292 Kan. 541, 565, 569-70, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

II. DISCUSSION AND EXAMPLES

§ 8.7 Discretionary Issues

The amount and degree of judicial discretion varies depending on the character of the question presented for determination. In general, when a discretionary decision is made within the legal standards and takes the proper factors into account in the proper way, the trial court's decision will be protected even if it is not wise. Abuse is found when the trial court goes outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by higher courts to guide a discretionary determination. *In re Adoption of B.G.J.*, 281 Kan. 552, 563-64, 133 P.3d 1 (2006).

A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Critchfield Physical Therapy v. The Taranto Group, Inc.*, 293 Kan. 285, 292, 263 P.3d 767 (2011) (civil); *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012) (criminal).

One way to determine whether a judicial act is discretionary is to look at the language of the applicable statute. Statutes typically use the word "may" to indicate that the decision is discretionary. The following are examples of statutes granting discretionary authority. "[T]he court may: (1) Join for hearing any or all matters at issue . . . ." K.S.A. 60-242(a). "The court may, on motion, grant a new trial . . . ." K.S.A. 60-259(a). "Attorney fees and related expenses may be awarded . . . ." K.S.A. 79-3268(f).

§ 8.8 Factual Issues When Appellant Did Not Have Burden of Proof

If the appellant was not the party who had the burden of proof on the issue, the appellate court will apply either the substantial competent evidence or the sufficiency of evidence standard. Which of these standards is appropriate depends on whether factual determinations were made by the trial court or by a jury.

§ 8.9 Substantial Competent Evidence

K.S.A. 60-252(a) mandates that, in cases where the trial court enters judgment without a jury - such as in a bench trial or upon a summary judgment motion - the court must "find the facts specially and state its conclusions of law separately." The standard of review applied to such findings of fact is the substantial competent evidence standard. *Schoenholz v. Hinzman*, 295 Kan. 786, 792, 289 P.3d 1155 (2012).

"Substantial competent evidence" is both relevant and substantial and provides a substantial basis of fact from which the issues can reasonably be resolved. In other words, it is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. *Venters v. Sellers*, 293 Kan. 87, 93, 261 P.3d 538 (2011). When reviewing a trial court, the appellate courts may not weigh conflicting evidence or pass on the credibility of witnesses or redetermine questions of fact. *Mitchell v. Kansas Dept. of Revenue*, 32 Kan. App. 2d 298, 301, 81 P.3d 1258 (2004).

For example, the appellate courts review a district court's determination to suspend a driver's license for substantial competent evidence. *Smith v. Kansas Dept. of Revenue*, 291 Kan. 510, 514, 242 P.3d 1179 (2010). Similarly, the standard is used when reviewing whether a trial court properly denied a criminal defendant's motion to suppress a confession, *State v. Sharp*, 289 Kan. 72, 80, 210 P.3d 590 (2009), and when deciding whether the Workers Compensation Board of Review's factual findings were correct. See K.S.A. 77-621(c)(7).

Often, issues of substantial competent evidence are mixed in with questions of law. In fact, the question of whether substantial competent evidence even exists is itself a question of law. *Redd v. Kansas Truck Center*, 291 Kan. 176, 182, 239 P.3d 66 (2010). When questions of fact and law intersect, the substantial competent evidence standard is used to review the

trial court's factual determinations and any legal conclusions are reviewed under a de novo standard. When faced with such decisions, practitioners should pay attention to the precise issue being reviewed within the mixed question, in order to apply the most advantageous standard of review.

§ 8.10 Sufficiency of the Evidence

The sufficiency of the evidence standard is applied in cases resolved by a jury trial where factual findings are not made. The standard is stated differently for civil and criminal cases.

Civil case: "When a verdict is challenged as being contrary to the evidence, an appellate court does not reweigh the evidence or pass on the credibility of the witnesses. If the evidence, when considered in the light most favorable to the prevailing party, supports the verdict, the appellate court should not intervene." *Unruh v. Purina Mills*, 289 Kan. 1185, 1195, 221 P.3d 1130 (2009).

Criminal case: When the sufficiency of evidence is challenged in a criminal case, the appellate court reviews such claims "by looking at all the evidence in a light most favorable to the prosecution and determining whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Frye*, 294 Kan. 364, 374-75, 277 P.3d 1091 (2012).

This standard also applies to juvenile offender adjudications, *In re B.M.B.*, 264 Kan. 417, 433, 955 P.2d 1302 (1998), and civil commitment proceedings, *In re Care & Treatment of Ward*, 35 Kan. App. 2d 356, 370, 131 P.3d 540, *rev. denied* 282 Kan. 789 (2006).

§ 8.11 Factual Issues When Appellant Had Burden of Proof

The finding that a party did not meet its burden of proof is a negative factual finding. The appellate court's standard of review for a negative finding of fact is that "the party challenging the finding must prove arbitrary disregard of undisputed evidence or must prove some extrinsic consideration such as bias, passion, or prejudice. [Citation omitted.]" *Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 781, 189 P.3d 508 (2008).

Examples of cases where a negative finding was used include: a finding that the appellant did not prove that he was "incapacitated" under the workers compensation statutes, *Kincade v. Cargill, Inc.*, 27 Kan. App.

2d 798, 801, 11 P.3d 63, *rev. denied* 270 Kan. 898 (2000); a finding that a party did not prove it was entitled to attorney fees following trial, *Midwest Asphalt Coating v. Chelsea Plaza Homes*, 45 Kan. App. 2d 119, 125, 243 P.3d 1106 (2010), *rev. denied* 292 Kan. 965 (2011); and a finding that the State failed to prove that certain evidence was derived from a legitimate source in the face of use and derivative use immunity, *State v. Carapezza*, 293 Kan. 1071, 1080, 272 P.3d 10 (2012).

§ 8.12 Factual Evidence Undisputed or Based Solely Upon Documents

In cases decided on the basis of documents and stipulated facts, the appellate courts have de novo review. *Ward v. Ward*, 272 Kan. 12, 19, 30 P.3d 1001 (2001).

"Where the controlling facts are based upon written or documentary evidence by way of pleadings, admissions, depositions, and stipulations, the trial court has no peculiar opportunity to evaluate the credibility of witnesses. In such situation, [an appellate court] has as good an opportunity to examine and consider the evidence as did the court below, and to determine de novo what the facts establish." *Heiman v. Parrish*, 262 Kan. 926, 927, 942 P.2d 631 (1997).

In *In re Adoption of Baby Boy B.*, 254 Kan. 454, Syl. ¶ 2, 866 P.2d 1029 (1994), the Kansas Supreme Court clarified that where there is "conflicting written testimony and the [appellate] court is called upon to disregard the testimony of one witness and accept as true the testimony of the other," the standard of review is "whether the findings of the district court are supported by substantial competent evidence." This standard of review only applies to cases where the documentary evidence is uncontroverted.

§ 8.13 Legal Issues

The scope of review for questions of law is unlimited. See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009). This may also be referred to as "de novo" or "plenary" review. Examples of cases where de novo review was used include:

Contract interpretation: "The legal effect of a written instrument is a question of law. It may be construed and its legal effect determined by the appellate court regardless of the construction made by the district

court. [Citation omitted.]" *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011).

Existence of a duty: "The existence of a legal duty is a question of law to be determined by the court. Appellate courts have unlimited review of questions of law." *D.W. v. Bliss*, 279 Kan. 726, Syl. ¶ 2, 112 P.3d 232 (2005).

Jurisdiction: Whether jurisdiction exists is a question of law over which the appellate court's scope of review is unlimited. *Associated Wholesale Grocers, Inc. v. Americold Corporation*, 293 Kan. 633, 637, 270 P.3d 1074 (2011) (civil); *State v. Ellmaker*, 289 Kan. 1132, 1147, 221 P.3d 1105 (2009), *cert. denied* 130 S. Ct. 3410 (2010) (criminal).

Legal Conclusions: An appellate court has de novo review of legal conclusions upon which a trial court's decision is based. The trial court's factual findings must be supported by substantial competent evidence and must be sufficient to support the legal conclusions dependent upon them. *Venters v. Sellers*, 293 Kan. 87, Syl. ¶ 1, 261 P.3d 538 (2011).

Statutory interpretation: Interpretation of a statute is a question of law over which appellate courts have unlimited review. *Unruh v. Purina* Mills, 289 Kan. 1185, 1193, 221 P.3d 1130 (2009) (civil); *State v. Dale*, 293 Kan. 660, 662, 267 P.3d 743 (2011) (criminal).

III. PARTICULAR TOPICS OR AREAS OF LAW

§ 8.14 Administrative Actions – State Agencies

Judicial review of a state administrative agency action is defined by the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.* It is important to note that there were extensive amendments to the KJRA in 2009. Read carefully if citing an appellate case from before the amendments were effective. It is also important to note that the 2009 statutory changes do not apply retroactively. They should be used only for agency actions arising on or after July 1, 2009. K.S.A. 77-621(a)(2); *Redd v. Kansas Truck Center*, 291 Kan. 176, ¶ Syl. 1, 239 P.3d 66 (2010).

The KJRA defines eight issues that a court can review. K.S.A. 77-621(c). The burden of proving the invalidity of agency action is on the party asserting invalidity. K.S.A. 77-621(a)(1).

Appellate courts exercise the same statutorily limited review of the agency's action as does the district court, as though the appeal had been made directly to the appellate court. *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010).

Appellate courts review an agency's factual findings to determine whether they are supported by substantial competent evidence in light of the record as a whole. K.S.A. 77-621(c)(7). The 2009 amendments to the KJRA alter that analysis in three ways. First, the appellate court must review the evidence both supporting and contradicting the agency's findings. Second, the court must consider the presiding officer's determination of witness credibility. And third, the court must review the agency's explanation of why the evidence supports its findings. Despite these changes, the appellate court is still precluded from reweighing the evidence or engaging in de novo review. K.S.A. 77-621(d); *Gustin v. Payless Shoesource, Inc.*, 46 Kan. App. 2d 87, 92, 257 P.3d 1277 (2011).

Appellate court review of an agency's interpretation of a statute that the agency administers has also changed. Historically, the courts have given substantial deference to the agency's statutory interpretation -- this was sometimes referred to as the "doctrine of operative construction." More recently, the Kansas Supreme Court has indicated an unwillingness to extend any deference to an agency's statutory interpretation, instead preferring to exercise de novo review. *In re Tax Appeal of LaFarge Midwest*, 293 Kan. 1039, 1044, 271 P.3d 732 (2012). Appellate cases citing the doctrine of operative construction should no longer be cited for issues involving statutory interpretation in administrative cases.

§ 8.15 Administrative Actions – Non-state Agencies

If the administrative decision was made by a non-state agency, the appropriate standard of review depends on whether the agency is acting in a legislative or quasi-judicial capacity. K.S.A. 60-2101(d) authorizes an appeal to the district court from any "judgment rendered or final order made by a political or taxing subdivision, or any agency thereof, exercising judicial or quasi-judicial functions."

Judicial review of judicial or quasi-judicial functions is limited to determining whether the government body acted within the scope of its authority, whether the decision was substantially supported by evidence, or whether the decision was fraudulent, arbitrary, or capricious. *Robinson*

v. City of Wichita Retirement Bd. of Trustees, 291 Kan. 266, 270, 241 P.3d 15 (2010).

If the non-state agency was acting in a legislative capacity, the review by the district and the appellate court is limited to determining whether the agency had the statutory authority to issue the order that it made. *Cedar Creek Properties, Inc. v. Board of Johnson County Comm'rs*, 249 Kan. 149, 156, 815 P.2d 492 (1991).

However, the standard of review in zoning cases is slightly different. See *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 274 Kan. 303, 304-05, 40 P.3d 522 (2002).

§ 8.16 Cumulative Error

Cumulative trial errors, when considered collectively, may require reversal of a defendant's conviction when the totality of the circumstances substantially prejudiced the defendant and denied him a fair trial. If the evidence is overwhelming against the defendant, however, no prejudicial error may be found based upon the cumulative error rule. *Thompson v. State*, 293 Kan. 704, 721, 270 P.3d 1089 (2011).

§ 8.17 Ineffective Assistance of Counsel

"A claim of ineffective assistance of counsel presents mixed questions of law and fact requiring de novo review. [Citation omitted.]" *Thompson v. State*, 293 Kan. 704, 715, 270 P.3d 1089 (2011). The appellate court "reviews the underlying factual findings for substantial competent evidence and the legal conclusions based on those facts de novo. [Citation omitted.]" *Boldridge v. State*, 289 Kan. 618, 622, 215 P.3d 585 (2009).

§ 8.18 Jury Instructions

The standard of review for an issue involving jury instructions varies depending on whether the instruction in question was either requested or objected to during trial. There are also slight differences depending on whether the case is civil or criminal.

CIVIL INSTRUCTION RAISED TO TRIAL COURT

The trial court must properly instruct the jury on a party's theory of the case. Errors regarding jury instructions will not require reversal unless they result in prejudice to the appealing party. Instructions must

be considered together and read as a whole, and where they fairly instruct the jury on the law governing the case, error in an isolated instruction may be disregarded as harmless. If the instructions are substantially correct and the jury could not reasonably have been misled by them, the instructions will be approved on appeal. *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 81, 274 P.3d 609 (2012).

CRIMINAL INSTRUCTION RAISED TO TRIAL COURT

When a party has objected to an instruction at trial, the appellate court will examine the instruction to determine if it properly and fairly states the law as applied to the facts of the case and could not have reasonably misled the jury. In making this determination, the appellate court must consider the instructions as a whole and not isolate any one instruction. *State v. Appleby*, 289 Kan. 1017, 1059, 221 P.3d 525 (2009).

When a party has requested an instruction at trial and that request has been denied, the appellate court will first determine whether the requested instruction was legally and factually appropriate. If the instruction was legally and factually appropriate, the appellate court will find error, but will then review the record to determine whether the failure to give the instruction was harmless. *State v. Plummer*, 295 Kan. 156, 160-63, 283 P.3d 202 (2012).

CIVIL INSTRUCTION NOT RAISED TO TRIAL COURT

The failure to object to a jury instruction invokes a clearly erroneous standard of review. To reverse, the appellate court must be able to find a real possibility exists that the jury would have returned a different verdict had the trial error not occurred. *Unruh v. Purina Mills*, 289 Kan. 1185, 1197, 221 P.3d 1130 (2009).

CRIMINAL INSTRUCTION NOT RAISED TO TRIAL COURT

When reviewing a jury instruction in this context, the appellate court must first determine whether there is error. In other words, the appellate court must perform a merits review of the issue. This review for error presents a legal question subject to de novo review. *State v. Williams*, 295 Kan. 506, 515-16, 286 P.3d 195 (2012) (discussing "clearly erroneous" standard set out in K.S.A. 22-3414[3]).

Only after the appellate court determines that the trial court erred by giving or failing to give a particular instruction does the court inquire into reversibility. The test for clear error requiring reversal is whether the reviewing court is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. This assessment involves a review of the entire record and de novo review. The defendant bears the burden of proving clear error. *State v. Williams*, 295 Kan. at 516.

§ 8.19 Motions to Dismiss – Civil

The granting of a motion to dismiss is not favored by courts. When reviewing a trial court's decision granting a motion to dismiss, the appellate court must assume that the facts alleged by the plaintiff are true and make any reasonable inferences to be drawn from those facts. Additionally, the court is required to determine whether those pleaded facts and inferences state a claim, not only on the theory espoused by the plaintiff, but on any possible theory that can be ascertained. Dismissal is justified only when the allegations in the petition clearly show plaintiff has not stated a claim. *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001). The standard of review is different when the decision is entered during a bench trial prior to the conclusion of trial. When a trial court has ruled on a motion for judgment on partial findings under K.S.A. 60-252(c), the appellate court determines whether the trial court's findings of fact are supported by substantial competent evidence and are sufficient to support its conclusions of law. *Lyons v. Holder*, 38 Kan. App. 2d 131, 134-35, 163 P.3d 343 (2007).

§ 8.20 Motions to Dismiss – Criminal

The test used to evaluate the sufficiency of a charging document depends upon whether the issue was raised before the trial court. If the issue was raised to the trial court, via the filing of a motion for arrest of judgment, the appellate court considers whether the complaint or information omits an essential element of the crime. If so, it is fatally defective, and the conviction must be reversed for lack of jurisdiction. *State v. Shirley*, 277 Kan. 659, 661-62, 89 P.3d 649 (2004). If the issue is being raised for the first time on appeal, the appellate court applies a "common-sense rule under which a charging document is sufficient if it would be fair to require the defendant to defend on the stated charge,

even if an essential element is missing from the document. [Citation omitted.]" In making such a determination, the reviewing court looks at the entire record. *State v. Edwards*, 39 Kan. App. 2d 300, 308, 179 P.3d 472, *rev. denied* 286 Kan. 1181 (2008).

§ 8.21 Prosecutorial Misconduct

Appellate review of an allegation of prosecutorial misconduct involving improper comments to the jury requires a two-step analysis. First, the court determines whether the prosecutor's comments were outside the wide latitude that a prosecutor is allowed in discussing the evidence. Second, if misconduct is found, the appellate court must determine whether the improper comments prejudiced the jury against the defendant and denied him or her a fair trial. *State v. Bridges*, 297 Kan. 989, 306 P.3d 244, 260 (2013); *State v. Marshall*, 294 Kan. 850, 856, 281 P.3d 1112 (2012).

In the second step of the analysis, the appellate court considers whether the misconduct was gross and flagrant, whether it was motivated by prosecutorial ill will, and whether the evidence was of such an overwhelming nature that the misconduct would likely have had little weight in the minds of jurors. None of these three factors is individually controlling. *State v. Marshall*, 294 Kan. at 857. The ultimate question in the second part of the analysis is whether the prosecutorial misconduct was harmless under the standards of both K.S.A. 60-261 (statutory harmless error) and *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 (1967) (constitutional harmless error). See *State v. Bridges*, 2013 WL 4039431, at *17, 19.

A claim of prosecutorial misconduct based on comments made during voir dire or opening or closing statements may be reviewed on appeal even in the absence of a contemporaneous objection. In contrast, a contemporaneous objection must be made to all evidentiary claims -- including questions posed by a prosecutor -- to preserve the issue for appellate review. *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009).

> **PRACTICE NOTE:** Although a contemporaneous objection is not necessary to preserve a claim of prosecutorial misconduct during voir dire, opening statements, or closing arguments, the failure to object may impair the appellant's ability to argue on appeal that the misconduct constituted reversible error.

§ 8.22 Summary Judgment

"'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.' [Citation omitted.]" *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 330, 277 P.3d 1062 (2012).

On appeal, the same rules apply; summary judgment must be denied if reasonable minds could differ as to the conclusions drawn from the evidence. Where there is no factual dispute, appellate review of an order regarding summary judgment is de novo. *David v. Hett*, 293 Kan. 679, 682, 270 P.3d 1102 (2011).

§ 8.23 Termination of Parental Rights

The State must prove by "clear and convincing evidence" that a child is a child in need of care. K.S.A. 38-2250. "Clear and convincing evidence" is an intermediate standard of proof between a preponderance of the evidence and beyond a reasonable doubt. *In re B.D.-Y.*, 286 Kan. 686, 691, 187 P.3d 594 (2008). "Clear and convincing evidence is evidence which shows that the truth of the facts asserted is highly probable." *In re B.D.-Y.*, 286 Kan. 686, Syl. ¶ 3.

IV. NO APPELLATE REVIEW

§ 8.24 Acquiescence

Acquiescence to a judgment cuts off the right of appellate review. Acquiescence occurs when a party voluntarily complies with a judgment by assuming the burdens or accepting the benefits of the judgment contested on appeal. A party that voluntarily complies with a judgment should not be permitted to take an inconsistent position by appealing

that judgment. With that in mind, the question of whether a party has acquiesced to a judgment is a matter of jurisdiction. Accordingly, that question is reviewed de novo. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1271, 136 P.3d 457 (2006).

§ 8.25 Invited Error

A party may not invite and lead a trial court into error and then complain of the trial court's error on appeal. *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003) (civil); *State v. Divine*, 291 Kan. 738, 742, 246 P.3d 692 (2011) (criminal).

Because issue of jurisdiction may be raised by an appellate court at any time and upon the court's own motion, the invited error rule does not apply to issues of jurisdiction. *In re Tax Appeal of Professional Engineering Consultants*, 281 Kan. 633, 639, 134 P.3d 661 (2006). Similarly, where a defendant challenges an illegal sentence on the ground that the sentencing court lacked jurisdiction, the invited error rule does not apply. *State v. McCarley*, 287 Kan. 167, 174-76, 195 P.3d 230 (2008).

§ 8.26 Moot Issues

The general rule is appellate courts do not decide moot questions or render advisory opinions. *Smith v. Martens*, 279 Kan. 242, 244, 106 P.3d 28 (2005) (civil); *State v. Torres*, 293 Kan. 790, 792, 268 P.3d 1197 (2012) (criminal).

§ 8.27 Correct Ruling for Erroneous Reason

If a trial court reaches the correct result, its decision will be upheld even though it relied upon the wrong ground or assigned erroneous reasons for its decision. *Hockett v. The Trees Oil Co.*, 292 Kan. 213, 218, 251 P.3d 65 (2011) (civil); *State v. May*, 293 Kan. 858, 870, 269 P.3d 1260 (2012) (criminal).

§ 8.28 Abandoned Points

An issue not briefed by the appellant is deemed waived and abandoned. *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011) (civil); *State v. McCaslin*, 291 Kan. 697, 709, 245 P.3d 1030 (2011) (criminal). This rule encompasses an issue which is raised incidentally in a brief but

not fully argued. *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 71, 274 P.3d 609 (2012) (civil); *State v. Anderson*, 291 Kan. 849, 858, 249 P.3d 425 (2011) (criminal).

§ 8.29 Failure to Designate a Record

The burden is on the party making a claim to designate facts in the record to support that claim; without such a record, the claim of error fails. *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 283, 225 P.3d 707 (2010) (civil); *State v. McCullough*, 293 Kan. 970, 999, 270 P.3d 1142 (2012) (criminal).

V. SUMMARY

The above standards of review are not an exhaustive list but should assist the parties in deciding how to address an issue. The parties should research the applicable area of law to determine if a different standard can be used for an issue, based upon the particular facts of the case. In many instances, there are exceptions to the above rules.

In conclusion, the appellant should choose an issue that shows the alleged error warrants reversal of the case and cite to the record where the error was raised to the trial court. Thereafter, the parties should state the proper standard of review and weave it into their arguments. By doing so, the parties' arguments and the appellate court's review of the case will be properly focused on how the appellate court can grant/deny relief within the limitations of its authority.