No one contests that, in this case, the juvenile court crafted its dispositional order so as to serve Katrina's best interests. We therefore affirm.

AFFIRMED.

WRIGHT, J., not participating.

IN RE INTEREST OF D.I., ALLEGED TO BE A DANGEROUS SEX OFFENDER. D.I., APPELLANT, V. MENTAL HEALTH BOARD OF THE FOURTH JUDICIAL DISTRICT, APPELLEE.

799 N.W.2d 664

Filed July 15, 2011. No. S-10-717.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
2. **Statutes.** The interpretation of a statute is a question of law.
3. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
4. **Judgments: Appeal and Error.** In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
6. **Mental Health: Convicted Sex Offender.** The Sex Offender Commitment Act provides a separate legal standard for sex offenders, which allows dangerous sex offenders to meet the standards of a mentally ill, dangerous sex offender who would not meet the traditional standards of mentally ill and dangerous under the Nebraska Mental Health Commitment Act.
7. **Mental Health: Convicted Sex Offender: Appeal and Error.** While the Sex Offender Commitment Act and the Nebraska Mental Health Commitment Act have similar procedures for commitment and appeals, they represent two separate acts.
8. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed.
9. **Actions: Statutes.** Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action.

10. **Actions: Statutes: Words and Phrases.** An action is any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the statute and ending in a final judgment. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.
11. **Actions: Statutes.** Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding."
12. **Mental Health: Evidence: Proof.** Under the Nebraska Mental Health Commitment Act, the State bears the burden to show by clear and convincing evidence that an individual remains mentally ill and dangerous.
13. **Convicted Sex Offender: Proof: Rebuttal Evidence.** Once the subject of a petition seeking to have him or her adjudged to be a dangerous sex offender has exercised his or her right to a review hearing, the State is required to present clear and convincing evidence that a less restrictive treatment option is inappropriate. At that point, the subject may rebut the State's evidence.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Travis L. Wampler for appellant.

Jon Bruning, Attorney General, and Michael B. Guinan for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

D.I. appeals the decision of the Douglas County District Court affirming the order of the Mental Health Board of the Fourth Judicial District. The board found that D.I. remains a dangerous sex offender and that secure inpatient treatment remains the least restrictive treatment alternative. We affirm the judgment of the district court.

II. BACKGROUND

D.I. was convicted of sexual assault of a child in 2004 and was adjudged to be a dangerous sex offender. He was committed to secure inpatient treatment in 2006. According to a classification study, D.I. was alleged to have sexually

assaulted seven male children between the ages of 8 and 14 with whom he had had contact through his positions as counselor and director of a church-sponsored Bible camp. D.I. was diagnosed as having two mental illnesses: "pedophilia, sexually attracted to males, nonexclusive type," and "narcissistic personality disorder." We note that the record in this case contains very little information regarding the factual basis for D.I.'s original conviction. However, we take judicial notice of an unpublished memorandum opinion from the Nebraska Court of Appeals, in case No. A-04-711, filed February 11, 2005, which indicates that D.I. had been convicted after he administered bare-bottom spankings and back and buttocks massages to a child.

Pursuant to Neb. Rev. Stat. § 71-1219 (Reissue 2009), D.I. filed a motion for reconsideration before the mental health board on June 12, 2009, alleging that cause no longer existed to keep him in secure inpatient treatment. A hearing was held during which the State's psychiatrist and clinical director of the Norfolk Regional Center, Dr. Stephen J. O'Neill, testified. O'Neill has been D.I.'s psychiatrist since his commitment in 2006. O'Neill testified that the inpatient treatment program consists of three phases, with three levels per phase, and that D.I. had not yet completed the first level of the first phase. When asked why D.I. had not progressed, O'Neill stated that D.I. refused to admit that he had done anything wrong. D.I. also insisted that he would repeat problematic behavior such as bare-bottom spankings for children.

O'Neill stated that it was his medical opinion that D.I. had not successfully been treated and still remained a danger to the public. O'Neill also stated that there was not a less restrictive treatment option that would meet D.I.'s needs. D.I. scored in the medium- to high-risk category on the "Static-99," a test which measures the likelihood that someone will reoffend. O'Neill also stated that D.I. denied any wrongdoing, but that the treatment program generally required an admission of guilt in order for treatment to be considered successful.

At the hearing, D.I. argued that because he maintains he did nothing wrong, he cannot advance in the treatment program and should be released to an outpatient program. D.I. also

argues that inpatient treatment is solely punitive at this point. D.I. claimed there was not sufficient evidence of pedophilia, because there was no evidence that he engaged in these behaviors for purposes of sexual gratification. However, one of the board members pointed out that the basis for D.I.'s conviction had been sexual contact with a child under 14 years of age over the period of a year.

The mental health board denied D.I.'s motion for reconsideration, and he filed a petition in error with the Douglas County District Court. The district court denied D.I.'s petition in error and affirmed the order of the mental health board. D.I. has appealed from that order.

III. ASSIGNMENTS OF ERROR

D.I. assigns that the board erred in finding that (1) he is a dangerous sex offender as defined by Neb. Rev. Stat. § 83-174.01 (Reissue 2009) and (2) there was not a viable, less restrictive treatment other than secure inpatient treatment.

IV. STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which we independently decide.[1]

[2] The interpretation of a statute is a question of law.[2]

[3,4] The district court reviews the determination of a mental health board de novo on the record.[3] In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.[4]

V. ANALYSIS

1. Jurisdiction Over D.I.'s Appeal

[5] The State claims we do not have jurisdiction to hear D.I.'s appeal because the Sex Offender Commitment Act (SOCA)

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[1] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[2] *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010).

[3] *In re Interest of D.V.*, 277 Neb. 586, 763 N.W.2d 717 (2009).

[4] *Id.*

does not give D.I. the right to appeal from a denial of a motion for reconsideration. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5]

D.I. sought a review hearing under § 71-1219, which provides:

> (1) Upon the filing of a periodic report under section 71-1216, the subject, the subject's counsel, or the subject's legal guardian or conservator, if any, may request and shall be entitled to a review hearing by the mental health board and to seek from the board an order of discharge from commitment or a change in treatment ordered by the board. . . .
>
> (2) The board shall immediately discharge the subject or enter a new treatment order with respect to the subject whenever it is shown by any person or it appears upon the record of the periodic reports filed under section 71-1216 to the satisfaction of the board that (a) the subject's mental illness or personality disorder has been successfully treated or managed to the extent that the subject no longer poses a threat to the public or (b) a less restrictive treatment alternative exists for the subject which does not increase the risk that the subject will commit another sex offense. When discharge or a change in disposition is in issue, due process protections afforded under [SOCA] shall attach to the subject.

Neb. Rev. Stat. § 71-1209 (Reissue 2009) sets out the burden of proof required for a treatment order as well as the procedure for commitment, but makes no mention of an appeals process. Neb. Rev. Stat. § 71-1214 (Reissue 2009) provides that the subject of a petition has the right to appeal a treatment order of a mental health board.

[6,7] D.I. filed his petition in error before the district court pursuant to Neb. Rev. Stat. § 71-930 (Reissue 2009), which is part of the Nebraska Mental Health Commitment Act (MHCA). In his current appeal, however, D.I. alleged that we have jurisdiction over this appeal under § 71-1214 and Neb. Rev. Stat.

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[5] *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

§§ 25-1901 and 25-1902 (Reissue 2008). However, we note that the language of § 71-930 mirrors that of § 71-1214, and we address D.I.'s argument under § 71-1214. "SOCA provides a separate legal standard for sex offenders, which allows dangerous sex offenders to meet the standards of a mentally ill, dangerous sex offender who would not meet the traditional standards of mentally ill and dangerous under the [MHCA]."[6] And while SOCA and the MHCA have similar procedures for commitment and appeals, they represent two separate acts.

We agree with the State that SOCA does not explicitly provide for an appeal from § 71-1219. Section 71-1214 provides that a subject committed under SOCA may appeal to the district court from a treatment order entered under § 71-1209. Therefore, the question is whether the decision of the mental health board denying D.I.'s motion for reconsideration was a final, appealable order under §§ 25-1901 and 25-1902.

[8] Under § 25-1902,

> [a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

In *In re Interest of Michael U.*,[7] we previously addressed whether an order adjudicating someone as dangerous and mentally ill under the MHCA is a final, appealable order. We found that an order of commitment under the MHCA is a final, appealable order within the meaning of § 25-1902.

(a) Special Proceeding

[9-11] We first address whether this order was made in a special proceeding. Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action.[8] An action is any

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[6] *In re Interest of J.R.*, 277 Neb. 362, 369, 762 N.W.2d 305, 314 (2009).

[7] *In re Interest of Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007).

[8] *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the statute and ending in a final judgment. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.[9] Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term "special proceeding."[10]

Under § 71-1219(1), the subject of a commitment order may request, and shall be entitled to, a review hearing upon the filing of a periodic report. The hearing must be held no later than 14 calendar days after receipt of the request. At that time, the board must determine whether the subject's mental illness or personality disorder has been successfully treated or managed and whether a less restrictive treatment alternative exists. If the board determines that treatment has been successful or that a less restrictive treatment alternative exists, the subject is to be immediately discharged. Therefore, a hearing under § 71-1219(1) is a special proceeding within the ordinary meaning of the term.

(b) Substantial Right

Having determined that a hearing under § 71-1219(1) is a special proceeding, we next turn to the question of whether it affects a substantial right as understood under § 25-1902. We recognized in *In re Interest of Michael U.* that an order which deprived a subject of liberty for an indeterminate amount of time was an order affecting a substantial right.[11] And we also recognized that if a committed subject wanted to question the sufficiency of the board's findings in issuing an order, he had to appeal that order.[12]

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[9] *Id.*

[10] *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

[11] *In re Interest of Michael U., supra* note 7.

[12] *Id.*

The order in this case may have continued a previous treatment order which was entered under § 71-1209, but it also deprived D.I. of his liberty for an indeterminate period of time. Section 71-1219(2) requires that the mental health board make a determination as to whether the subject has been successfully treated or whether a less restrictive treatment alternative existed. Such a determination will result in either the subject's continued commitment or his or her release. We therefore find that denial of a motion for reconsideration under § 71-1219(1) is a final, appealable order and that this court has jurisdiction to address D.I.'s claims.

2. Mental Health Board Did Not Err When It Found D.I. Was Still Dangerous Sex Offender

Turning now to D.I.'s assignments of error, D.I. first argues that the board erred in determining that he was a dangerous sex offender. We have not yet made a determination regarding what standard of review is to be used for a motion for reconsideration under § 71-1219. Nor are there any cases addressing the burden of proof and who bears the burden to show that treatment has been successful or whether a less restrictive treatment alternative ought to be pursued.

[12] We previously stated in *In re Interest of Dickson*[13] that the State bears the burden to prove by clear and convincing evidence that the individual remains mentally ill and dangerous under the MHCA. Although that decision was made under the old MHCA, the same language is used in Neb. Rev. Stat. § 71-935 (Reissue 2009). And we note that § 71-1219 mirrors the language in § 71-935 of the MHCA. We stated in that case:

> When the State petitions to have an individual declared mentally ill and dangerous . . . it must prove by clear and convincing evidence that the individual poses a substantial risk of harm to others or to himself. It follows that upon review of the commitment . . . the State must also prove by clear and convincing evidence that the individual

[13] See *In re Interest of Dickson*, 238 Neb. 148, 469 N.W.2d 357 (1991).

> remains mentally ill and dangerous. We interpret the "any person" language [in the MHCA] to require the State to show cause why the subject of the petition should remain incarcerated under the act.[14]

Therefore, we agree that the State bears the burden to show by clear and convincing evidence that the subject remains mentally ill and dangerous. Although D.I. argues that the State had the burden to establish that he was *currently* dangerous and that a prior commitment has no bearing on a present diagnosis, we disagree. Section 71-1219(2) states:

> The board shall immediately discharge the subject or enter a new treatment order with respect to the subject whenever it is shown by any person or it appears upon the record of the periodic reports filed under section 71-1216 to the satisfaction of the board that (a) the subject's mental illness or personality disorder has been *successfully treated or managed* to the extent that the subject no longer poses a threat to the public or (b) a less restrictive treatment alternative exists for the subject which does not increase the risk that the subject will commit another sex offense.

(Emphasis supplied.)

Under the plain language of the statute, the board must determine whether the subject's mental illness or personality disorder has been "successfully treated or managed," which necessarily requires the board to review and rely upon the original reason for commitment.

The evidence at the hearing established that in 3 years, D.I. had made little progress in the treatment program. O'Neill testified that D.I. was still in the first level of the first phase of a three-phase program. While in treatment, D.I. maintained that if he were released, he would continue to engage in problematic behaviors, such as bare-bottom spankings for children, even after being challenged as to the appropriateness of that kind of discipline. D.I. also continued to claim he had done nothing wrong.

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[14] *Id.* at 150, 469 N.W.2d at 359.

O'Neill stated that it was his medical opinion that D.I. had not successfully been treated and that D.I. still remained a danger to the public. D.I. scored in the medium- to high-risk category on the Static-99 test. O'Neill also stated that D.I. denied any wrongdoing, but that the treatment program generally required an admission of guilt in order for treatment to be considered successful. And when D.I. claimed there was no longer any evidence to support a diagnosis of pedophilia, a board member responded that pedophilia "doesn't come and go." Clearly, the mental health board did not accept that D.I.'s condition had been successfully treated or managed, and we find no error in that conclusion.

The mental health board did not err when it determined that D.I.'s mental illness and personality disorder had not been successfully treated or managed.

3. Mental Health Board Did Not Err When It Determined There Was No Less Restrictive Treatment Alternative

[13] D.I.'s second assignment of error is that the board did not consider less restrictive treatment alternatives. As we have already noted, § 71-1219(2) requires that the subject, or another person, establish to the satisfaction of the board that a less restrictive treatment alternative exists. In keeping with our prior case law and the language of § 71-1219(2), we find that once the subject of a petition has exercised his or her right to a review hearing, and asserted that there are less restrictive treatment alternatives available, the State is required to present clear and convincing evidence that a less restrictive treatment alternative is inappropriate.[15] At that point, the subject may further rebut the State's evidence.

D.I. relies heavily on *In re Interest of O.S.*[16] in his contention that the State did not present sufficient evidence that secure inpatient treatment remains the least restrictive alternative. In that case, we determined that the State had not presented *any* evidence of alternative treatment options and noted that the

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[15] See *In re Interest of O.S.*, 277 Neb. 577, 763 N.W.2d 723 (2009).

[16] *Id.*

testifying psychiatrist had not been asked to give an opinion as to what other treatment options might be available.[17]

But in this case, O'Neill stated that "it [sic] would be hard pressed to find an outpatient provider wanting to work with [D.I.] when he's not in a stage of change." O'Neill also stated that to be considered as a candidate for outpatient treatment, D.I. would need to be "farther [sic] into the . . . change mode." He also stated that there was not a less restrictive treatment option that would meet D.I.'s needs. The mental health board found that secure inpatient treatment was the least restrictive alternative, although the board also invited D.I. and the Norfolk Regional Center to consider and present other treatment options. We therefore find that the State presented clear and convincing evidence that secure inpatient treatment remains the least restrictive treatment alternative and that D.I. presented no evidence beyond mere assertions to rebut the State's expert witness.

VI. CONCLUSION

Because the denial of a motion for reconsideration is a final, appealable order under § 25-1902, we have jurisdiction to hear D.I.'s appeal. We find, however, that the State presented clear and convincing evidence that D.I. remains a dangerous sex offender and that secure inpatient treatment remains the least restrictive treatment alternative.

AFFIRMED.

WRIGHT, J., not participating.

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[17] *Id.*