
IN THE MISSOURI SUPREME COURT

—

In the Interest of:)	
)	Appeal No. SC86440
S.M.H., a minor child.)	

**APPEAL FROM THE TWENTY-SECOND JUDICIAL CIRCUIT,
SAINT LOUIS CITY
THE HONORABLE THOMAS J. FRAWLEY PRESIDING**

SUBSTITUTED BRIEF OF APPELLANT THOMAS G. HAEGELE

—

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JURISDICTIONAL STATEMENT

This appeal arises from a Judgment which terminated the parental rights of both the natural father and the natural mother of S.M.H. entered on January 28, 2004 by the Thomas J. Frawley, Circuit Judge of the Twenty-Second Judicial Circuit of St. Louis City, Missouri. Appellant, the natural father, is appealing the trial court's termination of his parental rights. The Missouri Court of Appeals reversed and remanded the case and then also transferred the case on November 9, 2004 to this Court under Missouri Supreme Court Rule 83.02 because the Court of Appeals believed that the case involved a question of general importance.

STATEMENT OF FACTS

Appellant Thomas G. Haegele (hereinafter “Father”) and Stephanie Farrar (hereinafter “Mother”) had one child during their relationship, the subject of this proceeding, S.M.H. born October 6, 2001. (L.F. 332) Mother and Father were raising S.M.H. when the Family Court became involved with their family in April, 2002. The Juvenile Officer filed a Petition with the trial court stating that the child was without proper care because Mother was manic depressive, suicidal and has threatened to kill the child and that upon contact Mother was “irrational and incoherent.” (L.F. 5) The allegations concerning Father were that he “is unconcerned about the said child’s mother’s threats against the child.” (L.F. 5) Mother and Father were notified of a Protective Custody Hearing that was to occur on May 2, 2002. (L.F. 7) Janet Thompson, a Division of Family Services caseworker, stated in her narrative describing the situation at that time, “Mother is threatening to kill her baby,” (L.F. 10) and that Father was an inappropriate placement because he “leaves the child with mother... failure to protect.” (L.F. 11) Ms. Thompson also stated that upon arrival at the residence of Mother and Father, “the baby looked fine” (L.F. 15) and that Father agreed not to go to work that day and to not leave the child alone with Mother. (L.F. 15) The child was subsequently taken into protective custody.

On May 3, 2002, the parties appeared before the trial court. (L.F. 25) The Court appointed counsel for Mother, Maribeth McMahan, and appointed counsel for Father for that hearing only, Sharon Esters-Thames. (L.F. 26) The Court held that the child should remain in protective custody and that Mother, Father and Division of Family Services should perform certain tasks. (L.F. 28-29) The Court then set the matter for trial on June

10, 2002. (L.F. 29) Father was ordered to have visitation no less frequently than semi-monthly under the supervision of Division of Family Services (L.F. 33) and to submit to a psychological evaluation. (L.F. 34)

Father obtained the services of private counsel, Edward Lander, and Mr. Lander entered his appearance on May 16, 2002. From April 26, 2002 until May 20, 2002, the minor child, who at that time was not a year old, resided with Kari Gladstone who was the adopted, estranged sister of Father. (L.F. 41) The child was characterized at that time as, “bright-eyed, cheerful and engages in age-appropriate play.” (L.F. 41) The child was then moved to a residential facility, Our Little Haven. (L.F. 41) At that time, the factors the Division listed that needed to be addressed for reunification were “mental health issues,” individual counseling and parenting classes for both parents. (L.F. 42) The end date for this to have occurred by was April 26, 2003. (L.F. 42) In July, 2002, the stated alternative permanency plan was for the child to reside with the estranged parents of Father, Thomas Farrar, Jr. (sic) and Deborah Farrar (sic). (L.F. 45). The child visited with both parents while at Our Little Haven, and was said to be “very cheerful and happy.” (L.F. 46)

The parties appeared in June, 2002 for a hearing. (L.F. 79) At that time the Court stated in its Order that date that “Tom Haegele is an appropriate placement and may take physical custody of the Juvenile on June 13, 2002 from Our Little Haven.” (L.F. 79) The Court further ordered Father to attend a family violence education class, parenting skills training, individual counseling for _____, submit to a psychological evaluation and a psychiatric evaluation with a psychosexual assessment, comply with any recommended

treatment. (L.F. 84)

In October, 2002, the parties again convened for a Review Hearing. At that time, it was decided by the Division, the Juvenile Officer and the Guardian at a Family Team meeting, that the child should be removed from Father's custody and placed in foster care. The Court held, in that Order, that "Father is an appropriate placement for the Juvenile" on page 4, however on page 6, the Court states, "temporary legal custody ... shall remain with the Division ... for appropriate placement which may or may not be the Father, which is to be determined by the Family Support Team." (L.F. 120-122) It was also ordered that day that Father was to receive two days of unsupervised visitation per week. (L.F. 123) No evidence was adduced at that time.

Father then hired his current attorneys, and on November 4, 2002, he filed a Motion to Modify the Review Order taking custody from Father. (L.F. 127) The matter was called for hearing in December, 2002, and by consent, the Review Order was then modified to place physical custody of the child, by this time 14 months old, back with Father "so long as he resides with the Deans." (L.F. 140)

A letter was filed with the Court in February, 2003 from Dr. Roger Gennari stating that, "I would say he (Father) is not in need of more treatment before he could have custody of his daughter or be considered an adequate parent." (L.F. 144) In February, 2003, the parties appeared for a review hearing. Division of Family Services Permanent Plan Summary stated that, "DFS recommends that the child return to the legal custody of Father." (L.F. 145) The Plan Summary further stated that Father had completed all tasks fully. (L.F.

147-148). The Court also held that “there has been substantial compliance with the court ordered service plan” (L.F. 154). The parties held a Family Support Team meeting on June 5, 2003. At that time, the Division, the Juvenile Officer, the Guardian and Father agreed that the Division would terminate legal custody and Father would have full custody of the child.

The Division filed its report in June, 2003 stating that Father was in full compliance with the Court Order and recommended that DFS return legal custody to Mother and Father. (L.F. 194) The Division further recommended that placement continue with Father and the court terminate jurisdiction. (L.F. 198) On June 25, 2003 the Court again removed the child from Father’s custody despite the recommendations of the Division, and stated that Father could have two supervised visits and then unsupervised visits with the minor child. (L.F. 200) The Court ordered the Division to file a guardianship petition within thirty days of the date of that Order. (L.F. 200)

The parties appeared again in this matter in August, 2003. At that time, the court again found that Father was an appropriate placement for the Juvenile and that the Division was still supposed to attempt reunification with Father. (L.F. 225) At this point, the Court also stated that there had been “partial compliance” by Father. (L.F. 227) In August, 2003, the Court also stated that the permanent plan that best served the minor child was termination of both parents rights and adoption. (L.F. 227) On September 8, 2003, the Division filed a Petition to Terminate Parental Rights. (L.F. 234) Among the allegations in the Petition, the Division alleged that Father and Mother had committed the same mistakes

except that Father “had failed to maintain herself (sic) free from the use of illicit drugs and/or alcohol.” (L.F. 236-237)

Also in September, 2003, Father filed his Motion to Terminate the Legal and Physical Custody of the Division. (L.F. 242) Father cited the June 25, 2003 Family Team Meeting goals of “terminating jurisdiction” and “returning legal custody to Father” as reasons for his Motion. (L.F. 247-248) During the interim period, Father attempted to subpoena the notes and/or information the CASA volunteer and the guardian ad litem possessed concerning the case so that he could properly defend against the guardian’s position as enumerated in several reports to the Court. (L.F. 109-110; 175-176; . The guardian ad litem filed a Motion to Quash said subpoena. (L.F. 231) The trial court sustained that Motion. (L.F. 256-257) The Court stated that because the guardian ad litem did not intend on calling the CASA volunteer as a witness, the Motion to Quash was sustained. (L.F. 256-257)

The parties appeared for Father’s Motion to Terminate the Division’s custody on September 22, 2003 and on October 8, 2003, the trial court entered its Findings, Conclusion and Judgment Terminating Parental Rights.¹ (L.F. 259) The trial court stated that in its opinion return of the legal and physical custody of the minor child to Father would not be in the child’s best interests. (L.F. 265)

On November 4, 2003, the parties appeared for a docket call, and the Division’s

¹ The title of this Judgment was an error that was raised at Father’s Motion for New Trial hearing however the Judgment’s title was never amended.

Termination Petition was set for trial on December 18, 2003. (L.F. 310) On November 10, 2003, Father filed his application for change of judicial officer pursuant to Missouri Supreme Court Rules 126.01 and 44.01. 2 (L.F. 312) Father's Motion was called, heard and overruled on November 26, 2003. (L.F. 317)

The Division's case was called on December 18, 2003 and concluded on January 9, 2004. (L.F. 321, 331) Father timely filed his Request for Findings of Fact and Conclusions of Law before evidence was adduced on December 18, 2003. (L.F. 322) Prior to the start of the trial, the Division's attorney requested that the Court take judicial notice of the juvenile file. (T. 7) Father's counsel objected as to the hearsay contained within the psychological reports of Drs. Emmenegger and Doss (sic). (T. 8) The Court overruled Father's objection as to both reports. (T. 8-9)

At trial, the trial court heard evidence from several witnesses who testified on behalf of Father. The first such witness was Dr. Roger Gennari. (T. 18) Dr. Gennari is a psychologist who holds a Ph.D. (T. 19) Dr. Gennari testified that Father came to see him as a result of a recommendation of Dr. Emmenegger who has previously performed a psychological evaluation of Father. (T. 19) Dr. Gennari was asked to evaluate whether or not Father was a sex offender. (T. 20) Dr. Gennari met with Father four times for diagnostic interviews and reviewed the psychological testing performed by Dr. Emmenegger. (T. 20) Dr. Gennari found Mr. Haegele to be very cooperative and

2 Rule 44.01 was cited because under Rule 126.01 the Motion was to be filed within 5 days, and Father filed his Motion within 5 days not including weekend days.

forthcoming. (T. 21) Dr. Gennari concluded that Father was not a pedophile nor a hebephile. (T. 22) He also stated that Father was “very responsible,” however he was suffering from some depression related to the loss of his family. (T. 23) Lastly, Dr. Gennari concluded that he does not pose any danger or harm to his daughter. (T. 23)

Dr. Gennari was cross-examined by the Division and questioned about whether he believed Father may show signs of narcissism. (T. 25) Dr. Gennari stated that he did see some strains of this in Father, and that it is usually the result of “very poor chronic nonnurturance from parental and other figures.” (T. 25) Dr. Gennari was also asked about whether Father intended to parent the child. (T. 27) Dr. Gennari stated that Father had told him that temporarily he was receiving help from a couple, and that when he got back on his feet financially, he was intending to remove her at some time. (T. 27)

The guardian ad litem also cross-examined Dr. Gennari. (T. 29) She questioned whether Dr. Gennari had ever met the child or saw Father interact with the child. (T. 30) On re-direct examination, Dr. Gennari testified concerning a second letter he wrote concerning this case. (T. 32) Dr. Gennari indicated that, “he is not in need of more treatment before he could have custody of his daughter or be considered an adequate parent.” (T. 32)

The Court questioned Dr. Gennari concerning Father and Mother’s relationship. (T. 36-37) Dr. Gennari stated that he did not believe Father was pursuing Mother as a sexual predator. (T. 37) Dr. Gennari further testified that Father was attempting to save this young girl who was running away and in need. (speaking of Mother). (T. 37) The Court further

inquired about what Dr. Gennari believed Father's plans were with regards to the care of the minor child. (T. 38-39) Dr. Gennari stated that he believed that Father would live elsewhere with the child at some point. (T. 39)

Father next called Stephen Anthony Franklin to testify. Mr. Franklin is employed with the Family Resource Center. (T. 40) He provides family therapy, and he is a licensed clinical social worker. (T. 41) Mr. Franklin testified that Father was referred to him to attempt to comply with his DFS service plan, and that he was to assess whether there were any psychological problems that would interfere with him being a good parent. (T. 42) Mr. Franklin reviewed a psychological report by Dr. Emmenegger and a letter from Dr. Gennari in connection with his work with Father. (T. 43) Mr. Franklin testified that he then met with Father on three occasions. (T. 43) Mr. Franklin believed that Father was cooperative and forthcoming. (T. 43)

Mr. Franklin testified that he concluded that Father was functioning at a "pretty high level." (T. 46) He further testified that Father had a "relational problem not otherwise specified" and that Father "doesn't seem to have the kind of intimacy that most people seek in their relationships." (T. 47) Mr. Franklin's conclusion was that "that he showed plenty of ability to certainly understand appropriate child care and interest and willingness in being able to do that for his daughter." (T. 49)

Mr. Franklin was cross-examined by the Division. (T. 49) The Division inquired whether Mr. Franklin had viewed the court file or interviewed any other witnesses in connection with Father's case, and he stated he had not. (T. 49-51) The Division questioned

Mr. Franklin concerning future testimony from Father's family. (T. 51) The Court stated, "I'm going to sort of rule in advance that you're going to be able to prove, Ms. Wolff, each of the things you say." (T. 52) Mr. Franklin was asked whether he would be significant to him if Father had been given a diagnosis or received psychiatric treatment when he was twenty. (T. 52) Mr. Franklin stated, "that would be sort of borderline." (T. 53) Lastly, the Division asked Mr. Franklin if Father's parents testified that Father had threatened to take a gun and go kill Mother, the child and all of Mother's family and himself, would that change Mr. Franklin's opinion. (T. 54) Mr. Franklin stated that "that would be a matter of great concern" and that he would be unable to stand by his conclusions if that was the case. (T. 54-55) The Guardian cross-examined Mr. Franklin inquiring whether he had observed Father with the minor child, and he stated he had not. (T. 55) The Juvenile Officer also cross-examined Mr. Franklin concerning his report, and his interviews with Father. (T. 62-64) Mr. Franklin was questioned about how he determines a person is being honest with him, and Mr. Franklin responded that he had to weigh a number of factors including a person's affect, the way they answer questions and consistency. (T. 63) The Division again cross-examined Mr. Franklin and asked him if Father was diagnosed with clinical narcissism if that would change his opinion. (T. 65-67) Mr. Franklin stated that may or may not affect his conclusions. (T. 67) Lastly, Mr. Franklin testified that he offered individual counseling services to Father, but that Father opted not to participate. (T. 71)

Father also called to testify a board-certified psychiatrist, Dr. Jo-Ellyn Ryall. (T. 75) Dr. Ryall specialized in general adult psychiatry. (T. 75) Dr. Ryall reviewed the report

Dr. Emmenegger had done concerning Father as well as Dr. Gennari's conclusions. (T. 77) She then interviewed Father for approximately an hour. (T. 77) In the midst of Dr. Ryall's testimony, the trial court interrupted and stated, "We've done all of this. Okay. I've heard all of this evidence. I don't need the doctor to recite what's in the report." (T. 79)

Dr. Ryall stated that she did not "find any evidence of any psychiatric disorder." (T. 80) She did observe some situational stress related to the Father's situation with DFS, however she did not find any other issues. (T. 81) Dr. Ryall stated that she had safeguards in place to confirm a person's veracity, and those included orientation, participation in the conversation and consistency. (T. 81) Dr. Ryall believed that Father was "functioning at a very good rate" and gave him a GAF score of 95%. (t. 82) Dr. Ryall's conclusion was that "there are no impediments to Mr. Haegele being a good parent to his infant daughter." (T. 83)

Dr. Ryall was questioned by the Juvenile Officer whether she had observed Father with the minor child, and she stated she had not. (T. 84) She was also asked if her opinion would be changed if Father had sought psychiatric treatment in the past. (T. 84) Dr. Ryall was questioned by the Division concerning several scenarios and whether those would impact upon her opinions: (T. 86-94) these included Mother having had an abortion at some point, Father having a "previous psychiatric history," Father threatening Mother, Father threatening suicide 20-30 times, if Father had no baby things for the minor child, Father's history of "acting out physically." Father's counsel objected at different times during these scenarios because they assumed facts not in evidence, however his objections were

overruled. (T. 91) The Division also asked Dr. Ryall if she would change her opinion if Dr. Gennari had testified that Father needed further therapy before he could parent. (T. 94-95) Father objected that the misstated Dr. Gennari's testimony, however his objection was overruled. (T. 95)

The Guardian questioned Dr. Ryall regarding day to day care of the minor child. (T. 96) She stated that she understood that Father was living with the child at someone else's home and that they were providing daycare for the child. (T. 96)

Shonetta Reed testified on behalf of the Division. (T. 99) Over Father's objection, Ms. Reed's file was admitted into evidence. The trial court indicated that because of res judicata the findings it made in October, 2003 related to Father's Motion to Terminate DFS' custody, the Court stated that both sides are stuck with any findings it made at that time. (T. 124) Ms. Reed stated that Father had provided his tax returns to them for their review and that she believed his income was \$26,788 in 2002. (T. 125) Ms. Reed also stated that she had evidence that Father had purchased a home recently. (T. 126) Ms. Reed testified that she had not examined this home. (T. 126) She also stated that he has completed his visitation requirements. (T. 127) Lastly, Ms. Reed testified on direct examination that she believed it was in the child's best interests that Father's rights be terminated because, "failure to comply with the Court Order and... his inability to property care for the child himself." (T. 128)

Ms. Reed admitted on cross-examination that she had not seen Father's home because "based on my schedule, there was no way within three days that I could rearrange

my schedule to go out and visit prior to the TPR hearing.” (T. 129) She further stated on cross-examination, “It was really an oversight.” (T. 139) When questioned about whether it was reasonable to have not returned Father’s phone calls, she stated that it was not. (T. 139) Ms. Reed testified that Father had failed to maintain housing, failed to provide documentation of employment and failed individual counseling. (T. 141-142) She testified that, “I can’t make a judgment. I never examined the home.” (T. 144) Ms. Reed testified that Father has stated throughout her involvement in the case that he did not want to care for the minor child. (T. 145-146) Father’s cross-examination of Ms. Reed was stopped, and the trial court stated, “You’ve got to wrap it up with her because basically I’ve heard all of your evidence and I’ve heard none of theirs.” (T. 149-150)

Ms. Reed testified that Father has never had issues maintaining visitation nor has he had problems with drugs and/or alcohol as alleged in the Petition to Terminate Parental Rights. (T. 153) Ms. Reed also testified that she had not received employment verification for 2003. (T. 158) She later admitted that it had not been requested. (T. 160) Ms. Reed testified that Father is not interested in raising Sabrina. (T. 163)

Father’s adoptive father, Thomas Haegele, Sr. also testified for the Division. Mr. Haegele testified that he and Father do not have a relationship because, “he won’t talk to me because I’m so perfect.” (T. 164) He further stated, “because I wasn’t him in getting Sabrina that he wouldn’t talk to me.” (T. 164) Father and Mr. Haegele saw one another “sporadically” prior to their estrangement. (T. 164) Mr. Haegele also testified that on one occasion Father had contacted him and told him that he was going to kill Mother and her

family. (T. 167) Mr. Haegele also testified that Father has been discussing killing himself “most of his life... since he completed high school.”

Mr. Haegele testified that he took Father to a psychiatrist, Dr. Painter, several years ago, when Father was 19 or 20 years of age. (T. 170-171) He stated that he saw Dr. Painter two or three times. (T. 175) Mr. Haegele testified that around that time, Father was prescribed medication which he refused to take. (T. 171) Mr. Haegele further testified that Father probably threatened suicide once or twice a year. (T. 173) Mr. Haegele also stated that he had witnessed Father get into a fight with his brother prior to seeing Dr. Painter. (T. 173) Mr. Haegele testified that ultimately he made Father leave his home around that time. (T. 174)

Mr. Haegele testified on cross-examination that he believed Father was using drugs during that timeframe. (T. 176) He also testified that the last time he saw Father with the minor child would have been in 2002. (T. 177)

The Division called Michelle Dean as their last witness. (T. 178) Ms. Dean was the foster mother of the minor child at the time of the trial, and was seeking to adopt the child once Father and Mother’s rights were terminated. (T. 179, 194) Ms. Dean testified that the minor child recognizes Father and she goes with him willingly for his visits. (T. 182-183) Ms. Dean also testified that Father had given her, since October, 2003, approximately \$500 for the support of the child. (T. 186) Father was also covering the child’s medical insurance. (T. 193)

Ms. Dean testified that the child did not call Father dada, but called him “daddy.” (T.

189) Ms. Dean also testified to having called Mother names to Father during the course of the case. (T. 191-192) She stated that she had called her irresponsible, maybe white trash and possibly stupid. (T. 192)

Mother presented no evidence. (T. 200) Father then testified. (T. 201) Father stated that he had never stated that he did not want to parent the minor child. (T. 202) Father stated he did not believe it was in the child's best interests that his rights be terminated to her. (T. 204) Father stated that, "I think I have a lot of enthusiasm and energy and commitment to parent my child, my daughter Sabrina. I think I have shown that throughout this whole time. I love my daughter." (T. 204)

Father was cross-examined by the Division. (T. 204) Father testified that he and Ms. Dean had discussed his daughter numerous times, and that she was pressuring him to allow her to legally have the child. (T. 206) Father testified that during his four-hour visits with the child since October, 2003 he has taken her to the mall, his home twice and to friend's homes. (T. 208-209)

Lastly, the guardian made a one-sentence recommendation, that is, that both Mother and Father's rights be terminated as to the minor child.

On January 28, 2004, the trial court issued its Findings, Conclusions and Judgment Terminating Parental Rights. (L.F. 332) The Court based most of its Findings concerning Father on testimony adduced at a Motion hearing that occurred on September 22, 2003. (L.F. 332-360; Paragraphs 19(b)(1-5), 20(d)(1-4), 20(e)(1-2), 22(a-d), 25(a-b), 27(a-f)) This appeal then ensued. The Court of Appeals took the case under submission on October

6, 2004 and on November 9, 2004 reversed and remanded the trial court's decision and transferred the case pursuant to Missouri Supreme Court Rule 83.02.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN FAILING TO RECUSE ITSELF WHEN FATHER FILED HIS APPLICATION FOR CHANGE OF JUDGE PURSUANT TO MISSOURI SUPREME COURT RULE 126.01(B) BECAUSE SAID RULE GRANTS ONE CHANGE OF JUDGE WITHIN FIVE DAYS AFTER A TRIAL HAS BEEN SET AND FATHER'S APPLICATION WAS TIMELY FILED.

State ex. rel. Brault v. Kyser, 562 S.W.2d 172 (Mo.App.K.C. 1978)

Stubblefield v. Bader, 66 S.W.3d 741 (Mo.banc 2002)

State ex. rel. L.B. v. Frawley, 136 S.W.3d 534 (Mo.App.E.D. 2004)

II.

THE TRIAL COURT ERRED IN TERMINATING FATHER'S PARENTAL RIGHTS BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED BY THE DIVISION CONCERNING THE STATUTORY TERMINATION GROUNDS IN THAT THESE MUST BE PROVEN BY CLEAR, COGENT AND CONVINCING EVIDENCE, AND THE DIVISION PRESENTED LITTLE TO NO EVIDENCE AS TO THE THREE GROUNDS THEY CITED IN THEIR PETITION.

In the interest of MDR, 124 S.W.3d 469 (Mo.banc 2004)

In re the interest of: A.S.W., 137 S.W.3d 448 (Mo.banc 2004)

In the interest of KAW and KAW, 133 S.W.3d 1 (Mo.banc 2004),

III.

THE TRIAL COURT ERRED IN TERMINATING FATHER'S PARENTAL RIGHTS TO SMH BECAUSE THERE WAS NO EVIDENCE PRESENTED BY THE DIVISION THAT TERMINATION WAS IN SMH'S BEST INTERESTS IN THAT THE DIVISION MUST ESTABLISH THAT TERMINATION OF FATHER'S RIGHTS WOULD BEST SERVE SMH'S INTERESTS, AND IT DID NOT PRESENT EVIDENCE AS TO THIS POINT.

In re the interest of JLM, 64 S.W.3d 924 (Mo.App.S.D. 2002)

In the interest of KAW and KAW, 133 S.W.2d. 1 (Mo. banc 2004).

IV.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE EXPERT WITNESS REPORTS OF DR. LISA EMMENEGER AND DR. JOSEPH DAUS IN LIEU OF THEIR TESTIMONY, OVER FATHER'S HEARSAY OBJECTION, BECAUSE THE FACT THAT THEY WERE ADMITTED INTO EVIDENCE IN A PREVIOUS HEARING ON FATHER'S MOTION TO TERMINATE THE LEGAL

**AND PHYSICAL CUSTODY OF THE DIVISION DOES NOT CONSTITUTE A
DEFACTO ADMISSION OF THE REPORTS IN THE DIVISION'S MOTION TO
TERMINATE PARENTAL RIGHTS, AN INDEPENDENT CAUSE OF ACTION.**

In the interest of R.L.L., 633 S.W.2d 409 (Mo.App. W.D. 1982).

In the interest of J.A.R., 968 S.W.2d. 748 (Mo.App. WD 1998).

V.

**THE TRIAL COURT ERRED IN OVERRULING FATHER'S OBJECTIONS WHEN THE
DIVISION QUESTIONED SEVERAL WITNESSES WITH HYPOTHETICAL
QUESTIONS ABOUT FACTS THAT WERE NOT ALREADY IN EVIDENCE, AND THAT
ULTIMATELY WERE NEVER IN EVIDENCE IN THAT THERE IS A GENERAL
REQUIREMENT OF FAIRNESS IN CROSS-EXAMINATION AND FATHER
PROPERLY OBJECTED, AND FATHER WAS PREJUDICED BY THE
INFLAMMATORY NATURE OF THESE HYPOTHETICAL QUESTIONS.**

State v. Floyd, 77 S.W.3d 98 (Mo.App.S.D. 2002)

ARGUMENT

I.

THE TRIAL COURT ERRED IN FAILING TO RECUSE ITSELF WHEN FATHER FILED HIS APPLICATION FOR CHANGE OF JUDGE PURSUANT TO MISSOURI SUPREME COURT RULE 126.01(B) BECAUSE SAID RULE GRANTS ONE CHANGE OF JUDGE WITHIN FIVE DAYS AFTER A TRIAL HAS BEEN SET IN THAT FATHER'S APPLICATION WAS TIMELY FILED.

The Courts of Appeal have stated, “termination of parental rights is one of the most serious acts courts are empowered to perform” and that a parent’s rights to parent their children should be terminated only when “grave and compelling reasons exist.” In the Interest of B.S.B. and B.A.B., 76 S.W.3d 318 (Mo.App.W.D. 2002). That Court further stated that, “the question before the court is not whether the children would be better off in another home.” Id. at 335. For a trial court to terminate a parent’s rights, it **must** have before it evidence that is clear, cogent and convincing. This Court will only sustain a termination of parental rights if the trial court’s decree was in the best interest of the children and if the termination was supported by clear, cogent and convincing evidence. Id. at 324. This Court, in a recent decision, held that the fundamental liberty interest of natural parents to raise their children does not “evaporate” simply because they have not been model parents. In the interest of KAW and KAW, 133 S.W.3d 1 at 11 (Mo.banc 2004) The Family Court first became involved with S.M.H. and her family in April, 2002. (L.F. 5) The

trial court held a hearing in June, 2002 and determined that S.M.H. could reside physically with her father, Tom Haegele, and that he was an appropriate placement. (L.F. 84) In October, 2002, the court allowed the Family Team to decide where S.M.H. should reside, and that Team chose to remove the child from her father's care, and place her in foster care. (L.F. 120-122) No hearing was held at that time, nor was any evidence adduced as to why Father was an inappropriate placement. In December, 2002, Father re-gained physical custody of the child. (L.F. 140) In June, 2003 the child was again removed from Father's custody without a hearing or evidence being adduced and the Division was ordered by the trial court to file a guardianship petition. (L.F. 200) Said Petition was never filed. In August, 2003 the court stated that the permanent plan for the child was to terminate both Mother's and Father's rights to the child. (L.F. 227)

In September, 2003 the Division filed its Petition to Terminate Parental Rights of both parents. (L.F. 234) In that same month, Father filed his Motion to Terminate the Division's Legal and Physical Custody of S.M.H. (L.F. 242) A hearing was held regarding Father's motion and the court overruled that Motion in October, 2003. On November 4, 2003, the trial court set the Division's Petition to Terminate Parental Rights for trial. (L.F. 310) On November 10, 2003³, Father filed his Application for Change of Judicial Officer pursuant to Missouri Supreme Court Rule 126.01 and 44.01. (L.F. 312) Father's Motion was called, heard and overruled on November 26, 2003. (L.F. 317)

Missouri Supreme Court Rule 126.01 states that a change of judicial officer "shall

³ The fifth day fell on a weekend day.

be ordered upon application of a party.” The Rule indicates that a change is allowable within five days after the trial date is set. The Division does not dispute that Father’s Motion was timely under these rules. Rule 126.01 is part of the Rules of Practice and Procedure in Juvenile Courts which begins with Rule 110.01.

The Court of Appeals in their opinion, cited to State ex.rel. Brault v. Kyser, a 1978 Kansas City Court of Appeals case. That case discusses at length the idea that a proceeding to terminate parental rights is an independent cause of action, and is distinct and separate from a neglect proceeding. 562 S.W.2d 172 (Mo.App.K.C. 1978). This case occurred long before Missouri Supreme Court Rule 126.01, however its holdings are still true and relevant today. In Brault, the juvenile officer filed a “neglect petition” in December, 1972, and the case was assigned a cause number. Id. at 173. More than two years later, the juvenile officer filed a petition in the same case, to terminate the parents’ rights. Id. The parents in that case appealed the termination of their rights, and the Court of Appeals reversed the termination judgment. In the interim, the parties sought and received a change of judge on their Motion to Set Aside Custody and Support Orders. More than three years after the first termination petition, the juvenile officer again filed a Petition to Terminate Parental Rights. The natural mother sought a change of judge and her motion was denied. She then applied for a writ of prohibition. Id.

The Court in that case, narrowed the scope of their inquiry to whether the termination proceeding under the same case number as the neglect proceeding was a separate and distinct proceeding which would allow for a change of judge. Id. at 174. The

Court's discussion of this issue is valuable for the case at bar. The Court cites the following factors: the test for termination is a much stronger test than for neglect proceedings, the statutes are marked off in entirely different sections and indeed the termination provisions are a "complete code within itself"⁴, the Petition raises new and distinct issues that required a unique hearing procedure. Id.

The Juvenile Officer attempted to argue in Brault that because the matters arose out of the same controversy and contained the same cause number, Mother did not have the right to a change of judge. Likewise in this case, the Division attempted to argue that a termination petition is somehow "supplemental" to the original proceeding that brought S.M.H. into care.

Several conflicts and difficulties exist with this theory. First, the Petition to Terminate Parental Rights contains different allegations than the original petition bringing the child into care. (L.F. 5-6, 234-239) Until September, 2003, Father had no way of knowing that the Division would seek to terminate his rights. The Division's official position, as postured in their Permanent Plan Summary in June, 2003 was that Father would have legal and physical custody of the minor child returned to him. (L.F. 194-198) If the goal of the neglect proceedings is to reunify the child with his or her parent (s), how can a Petition to sever completely and finally any rights a parent has to his or her child be

⁴ Several cases since the time of Brault have held this same idea of a "code within itself" including, In the interest of Kevin, 685 S.W.2d (Mo.App.S.D. 1985); In the Interest of: DJB, 718 S.W.2d 132 (Mo.App.S.D. 1986);

supplemental in nature?

The Courts of Appeal in this state have discussed the “awesome power” the trials court are vested with in termination of parental rights cases, and how with such power comes the duty to strictly adhere to the statutes related to termination. In the Interest of D.J.B., 718 S.W.2d 132, 140 (Mo.App.S.D. 1986) The ideas iterated in the concurring opinion by Judge Dowd regarding “one family, one judge” is an idea that should be superceded by a natural parent’s rights with regard to his or her child. While Father can appreciate the goals and ideals of “one family, one judge,” surely his rights outweigh the court’s needs for efficiency. As of yet, the idea has not been tested, and quite honestly, there is no objective proof that the policy helps children caught up in the system of the Juvenile Court. What is and remains apparent is that a natural parent faces several oppositions, including the Division, the Deputy Juvenile Officer and the guardian ad litem, all of whom often share the same building and the same ideas regarding the best interests of the children in the system. A natural parent is disadvantaged from the onset as being one against many.

Recently, this Court dealt with the issue at hand in State ex rel. Stubblefield v. Bader. In that case, Mother’s children were taken by Division of Family Services as well. 66 S.W.3d 741, 741 (Mo.banc 2002) Mother filed an application for change of judge the same day as the trial was set in her case. Id. There had been previous hearings regarding these children in front of this Judge. Id. Judge Carol K. Bader refused to recuse herself. Id. This Court made the writ of prohibition issued by this Court absolute. Id. at 743.

One of the hallmarks of our court systems is the right to request a change of judicial officer. The Courts of this State have always construed this rule liberally, favoring the right to disqualify. Id. at 742. In fact, the Courts of Appeal recently stated has stated that a “civil litigant has a virtually unfettered right to disqualify a judge without cause on one occasion.” State ex. rel. Couch v. Stovall-Reid, 144 S.W.3d 895, 897 (Mo.App.E.D. 2004)

In State ex rel. Cohen v. Riley, this Court had to struggle with what the term “trial” meant. Their conclusion was that a hearing where evidence was adduced is not the same as a trial on the merits. 994 S.W.2d 546, 548 (Mo.banc 1999) Evidence was adduced before the trial court in October, 2003 prior to the Division of Family Services’ Petition being set for trial. This fact, which was apparently persuasive to the trial court, does not preclude Father from requesting a change of judge, so long as he was within the time allotted by the Supreme Court Rules.

Most recently, in State ex. rel. L.B. v. Frawley, this same trial court as the one in the case at bar, denied natural Mother’s application for change of judge. The Court of Appeals made Mother’s preliminary writ of prohibition to prevent Judge Frawley from presiding over the case, absolute. 136 S.W.3d 534 (Mo.App.E.D. 2004) In that case, a protective custody hearing was held. After that time, but before a trial date had been set for the termination of parental rights trial, Mother filed her Motion for Change of Judge. Her motion was denied. Id. at 535. The Court cited the Stubblefield decision, which Appellant also cites, as reason why the trial court was without discretion to deny a change of judge. Id. at 536.

The trial court lacked jurisdiction to proceed on the Division's Petition to Terminate Parental Rights, and therefore its decision, which is the subject of this appeal is void and unenforceable.

ARGUMENT

II.

THE TRIAL COURT ERRED IN TERMINATING FATHER'S PARENTAL RIGHTS BECAUSE THERE WAS INSUFFICIENT EVIDENCE PRESENTED BY THE DIVISION CONCERNING THE STATUTORY TERMINATION GROUNDS IN THAT THESE MUST BE PROVEN BY CLEAR, COGENT AND CONVINCING EVIDENCE, AND THE DIVISION PRESENTED LITTLE TO NO EVIDENCE AS TO THE THREE GROUNDS THEY CITED IN THEIR PETITION.

As already elaborated upon previously, this Court looks upon terminating a natural parent's rights to his or her child in a very grave manner. The trial court must follow a two-step analysis in deciding whether to terminate parental rights. First, the court must consider whether the statutory termination grounds have been proven by the Division by "clear, cogent and convincing evidence." In the interest of SJH and CAH, 124 S.W.3d 63, 66 (Mo.App.W.D. 2004). "Evidence is clear, cogent and convincing when it instantly tilts the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." In re the interest of BCK and KSP, 103 S.W.3d 319, 321 (Mo.App.S.D. 2003) The trial court, in the instant

case, did not have sufficient evidence to find that the statutory termination grounds had been proven.

In its Petition to Terminate Father's rights, the Division cited the following statutory reasons in support of terminating Father's rights,

A. The child had been in foster care for at least fifteen of the most recent twenty-two months prior to the filing of the Petition.

B. The child had been abused and/or neglected as indicated by the Court on June 10, 2002.

C. The child had been under the jurisdiction of the court for a period of one year, and the conditions which led to the assumption of jurisdiction still existed. (L.F. 235-236)

No evidence or allegations of any other statutory grounds for termination were raised by the Division.

A. 15 of 22 months

As to the first allegation raised by the Division concerning foster care, this Court recently concluded that, "section 211.447.2(1) does not make foster-care custody for at least 15 of the previous 22 months a ground for terminating parental rights." In the interest of MDR, 124 S.W.3d 469, 470 (Mo.banc 2004) However, the facts of the instant case do not even support that SMH was in foster care for 15 of the past 22 months.

Approximately six weeks after SMH was taken into care, the trial court in June, 2002 gave physical placement of SMH to Father. (L.F. 84) In October, 2002, although

Father was deemed an appropriate placement, the child was removed from his custody and placed in foster care. (L.F. 120-122) Yet, in December, 2002 (less than two months later), Father again received physical placement of the minor child so long as he resided with the Dean family. (L.F. 140) So, at the time of the trial on this matter in December, 2003, Father had had the minor child, pursuant to the Court's orders, in his custody from June, 2002-October, 2002 and then from December, 2002 until June, 2003 when a dispute arose between the Dean family and himself. So of the months from April, 2002 when the child was taken into custody until the Division filed its Petition in September, 2003, Father had custody of the child a total of 12 months, and the Division and/or the Deans (as foster parents) had custody of the minor child a total of 6 months. The Court did not have evidence to support the Division's allegation concerning the 15 of 22 months ground for termination.

B. Abuse and/or Neglect

The second ground cited by the Division for termination was that the child had been abused and/or neglected by Mother and Father "as indicated by the court in its June 10, 2002 order." (L.F. 235) The trial court did not sign an Order on June 10, 2002. On June 11, 2002, the trial court held that Father was an appropriate placement for the child (L.F. 93), and the Court also entered another order on June 12, 2002 stating that Father "may take physical custody of the Juvenile on June 13, 2002 from Our Little Haven." (L.F. 79) The trial court did not find that Father had been abusive and/or neglected the child at that time as the Division suggests.

In fact, the only allegation made against Father relating to abuse or neglect was that he failed to protect the child from Mother when Mother was threatening to kill herself and/or the child. (L.F. 5) Although the Division, the CASA worker and the Guardian might have disliked Father for whatever reason, no one raised an issue concerning abuse or neglect during the entire time the case proceeded. Yet, the trial court held, “in the opinion of the Court, Mother and Father have abused and neglected the minor child.” (L.F. 340) There is absolutely no basis for this finding in the evidence presented at trial or in the record.

No one alleged in their testimony that Father had abused or neglected the child. The Division’s witness, Ms. Reed stated that the reasons for terminating Father’s rights were that he failed to follow through in individual counseling, he failed to provide documentation of employment and he failed to maintain housing. (T. 141-142) Of these allegations, none involve abusing or neglecting the child in any way. The trial court seemed to rely upon two reports to infer that Father had abused or neglected the child. (L.F. 341-342) The first was a psychological evaluation performed by Dr. Daus at the onset of this case in April, 2002. The second was a psychosexual evaluation performed by Dr. Lisa Emmenegger at the request of the Division. These reports, which will be discussed at greater length, do not allege that Father has ever abused or neglected SMH (or any child for that matter). These reports, which were admitted in evidence without testimony and objected to as hearsay by Father’s attorney, are not quoted in their entirety. In addition, Dr. Daus testified and his report was considered in June, 2002. The trial court, after hearing Dr. Daus’ persuasive

testimony, gave custody of the minor child to Father. (L.F. 79) In addition, Dr. Daus report was made almost two full years prior to the evidence presented to the trial court. To now use this report to terminate Father's rights is suspect at best.

Lastly the trial court relied upon Father's adopted father, Tom Haegele, Sr. to find that Father had abused or neglected the minor child. (L.F. 343) The trial court found two facts in its summation to be true that were never testified to. First, Mr. Haegele admitted he was estranged from his son at the time of trial because he would not support Father in obtaining custody of his child. (T. 164) The trial court found that Mr. Haegele and Father were in "regular contact" prior to this time (L.F. 343), however Mr. Haegele himself characterized his contact with Father as "sporadic." (T. 164) Mr. Haegele also admitted that he had not seen Father with the child since the summer of 2002. (T. 177) The trial court states that Mr. Haegele testified that Father had threatened to kill the minor child. However, Mr. Haegele's testimony was actually, "I don't remember mentioning the baby but he said her, her family and himself." (T. 167) Mr. Haegele and Father clearly had a rocky past, and the trial court admits that Mr. Haegele had kicked Father out of his home when he was a young man because he refused to see a psychiatrist and take medications. (L.F. 343) Again, Mr. Haegele never testified to having witnessed or having knowledge that Father abused and/or neglected the minor child.

In making its determination of whether to terminate parental rights for neglect, the trial court must consider and make findings on four factors, namely:

- (a) a mental condition shown to be either permanent or not reversible;

(b) a chemical dependency;

(c) a severe act or recurrent acts of physical, sexual or emotional abuse;

and (d) a repeated or continuous failure to provide the child with adequate food, clothing, shelter or education. In the interest of BCK and KSP, 103 S.W.3d 319, 327 (Mo.App.S.D. 2003) The trial court in the instant case did not have the evidence before it, as summarized previously, to establish the factors enumerated above. In the case cited above, Mother's rights were terminated, and this Court reversed in that case. Id. This Court stated that the trial court's decision could not stand because the conditions that led to the children being brought into foster care no longer existed. Id. at 330. The condition that brought SMH into care was that her mother was threatening suicide and to kill the child. Father and Mother no longer reside together. Father has been evaluated numerous times, by numerous experts. The condition, which was Mother's alleged mental illness, no longer exists. Father has an appropriate home, and is ready, willing and able to care for SMH.

C. Condition which will not be remedied

The final ground the trial court and the Division cite for termination is that, "The conditions which caused the Court to assume jurisdiction continue to exist, and will not be remedied at an early date to permit the return of the child." (L.F. 344)

Father called three experts to testify at the trial on his behalf. The first, Dr. Gennari testified that he did not believe Father presented a threat to the minor child. (L.F. 350) Dr. Gennari further stated, "I would say he (Father) is not in need of more treatment before he

could have custody of his daughter or be considered an adequate parent.” (L.F. 144) Dr. Gennari stated that Father was “very responsible.” (T. 23) Dr. Gennari testified that Father may show signs of clinical narcissism. (T. 25) Dr. Gennari’s opinion concerning this issue was that it was a result of “very poor chronic nonnurturance” from Father’s own parents. (T. 25) Finally, Dr. Gennari stated he did not believe Father was in need of more treatment before he could have custody of his daughter. (T. 32) The trial court found, contrary to Dr. Gennari’s testimony, that Dr. Gennari did state that Father needed further psychotherapy. (L.F. 351)

Steve Franklin, LCSW, also testified on behalf of Father. Father had been referred to Mr. Franklin by the Division. (T. 42) Mr. Franklin concluded that Father showed the ability to understand proper child care and the interest and willingness to do what he needed to do for his daughter. (T. 49)

Lastly, Father called Dr. Ryall to testify on his behalf at trial. At the request of the Division, Dr. Ryall had performed a psychiatric evaluation of Father some 9 months prior to the trial in this matter. (T. 75) Dr. Ryall reviewed the findings of both Dr. Gennari and Dr. Emmenegger when she evaluated Father. (T. 77) Dr. Ryall testified that she believed that Father was functioning at a very good rate, (T. 82) and that he did not have any psychological or personality disorders. (T. 82) She also testified that he was feeling some extreme stress as a result of the legal issues surrounding him. (T. 82) Dr. Ryall stated she believed he would be “very appropriate” in taking care of his daughter.” (T. 83) The Court seems to rely also upon Dr. Emmenegger’s report. Dr. Emmenegger did not appear before the court

to testify, however her report was admitted over the objection of Father at the outset of the trial in this matter. (T. 8) Dr. Emmenegger's only function in the case, as a whole, was to evaluate Father because of "psychosexual concerns" raised by Dr. Daus' report. (L.F. 282) Dr. Emmenegger concluded that "Tom's sexual behavior with a consenting teenager does not predict pedophilia, and therefore it is not possible for me to infer that his daughter would be at risk ... as a child or even a teen." (L.F. 286) Dr. Emmenegger referred Father to Dr. Gennari for further evaluation. (L.F. 286-287)

Father, during the almost 18 months this case was pending, was never diagnosed with a discernable psychological or psychiatric illness. His daughter came into the Division's care because of a threat the mother made to take her life and the life of the child. Yet, Father was evaluated by not one, not two or three, but four different experts. The Court gave Father custody after the first evaluation, and two of the three other evaluators testified on Father's behalf at trial. The Division did not call any experts at trial to testify that Father could not parent his child because of a mental disorder. The trial court did not have any evidence before it with which to make its determination.

The only witnesses the Division called, that the Court seemed to find persuasive as to Father's alleged mental condition was the Division's case worker, Shonetta Reed and Father's estranged, adoptive father.

As to Reed, in June, 2003, the Division filed its report with the Court for the hearing to take place that same day. (L.F. 194-198) In that report, the Division stated that Father had **fully complied** with the requirements of the Division. (L.F. 196-198) The Division

was recommending placement with Father on that date. (L.F. 196) The Division went through the litany of requirements that they had placed upon Father and found that he had fully complied with the Court's Order. (L.F. 196) In Ms. Reed's handwritten summary, she stated, "Father is fit, willing and able and has complied with the Court Order: DFS recommends that placement continue with Father and that the Court terminate jurisdiction." (L.F. 198)

At trial, Ms. Reed contended that Father had failed to comply with the Court's Order. She cited three areas in which Father had failed.

1. Housing. Father was required to maintain adequate housing. The Division testified that Father had provided them with a closing statement on a home in November, 2003. (T. 126) Ms. Reed testified that she did not visit Father's home to see if it was appropriate for the child because of her own scheduling issue. (T. 138) Therefore, she was without knowledge of whether Father had most recently complied with this provision of the Service Agreement.

2. Employment. Again, as of June, 2003, Ms. Reed stated that Father had complied with this provision. (L.F. 194-198) However at trial, she stated she did not have income verification from Father. (T. 141) On cross-examination, she admitted that she did have employment documentation. (T. 143)

3. Individual Counseling. Again, as of June, 2003, Ms. Reed stated that Father had complied with this provision. (L.F. 194-198) Admittedly, Father was not in individual counseling as of the trial in this matter. Dr. Ryall and Dr. Gennari both testified on Father's

behalf that he did not require further counseling to parent his child. Ms. Reed stated in her cross-examination that she was relying upon Mr. Franklin's assessment that Father could benefit from counseling. (T. 142) Even if Father fell short on this requirement, that fact alone is certainly not sufficient evidence to terminate his parental rights.

This Court recently addressed a termination of parental rights case and discussed possible abuse by a mother in relationship to her daughters. In the interest of KAW and KAW, 133 S.W.3d 1 (Mo. banc 2004), the Supreme Court held, "past behavior can support grounds for termination, but only if it is convincingly linked to an indication of the likelihood of future harm." In addition, this Court also stated that the trial court erred in that case by finding that mother's two adoptive placements were abuse. Id. at 2. The Division has contended that Father has stated he did not want to parent the child. (T. 144) However, in June, 2003, prior to the breakdown between himself and the potential adoptive mother, the Division was recommending that Father have physical custody of the child and the Court terminate jurisdiction. (L.F. 198) In fact, the guardian ad litem was also recommending that Father have placement and the jurisdiction of the court be terminated on June 5, 2003 at the Family Team meeting. (L.F. 248) Finally, Father himself testified that he indeed wanted to parent his daughter. He stated that he loved her and wanted to parent her. (T. 203-204) Father's testimony was disregarded.

In the interest of SJH and CAH, this Court's Western District held that "despite evidence that Mother did not complete all reunification service agreements," that there was not enough evidence to terminate her parental rights. 124 S.W.3d 63, 67 (Mo.App.W.D.

2004) In that case, Mother's rights were terminated under Missouri Statutes § 211.447.4(3), the same subsection the trial court used in the instant case. This Court reversed that decision. *Id.* at 63. Mother in that case was required to do a number of things under a written service agreement with the Division. *Id.* at 68. Likewise, Father in the instant case was ordered to perform several functions as part of a service plan, even though he had never been accused of abusing the child.

The Court did not discuss the portions of the Service Agreement Father did comply with. These included visitation, which the Division admitted Father exercised every time he was allowed (T. 153); parenting skills training; family violence counseling; psychological evaluation; psychiatric evaluation and psychosexual evaluation. (L.F. 196-197)

This Court has held that the primary concern in these cases is not whether the child would be better off somewhere else. *Id.* at 70. The Division and the Guardian agreed that Father should have placement of this child prior to the breakdown between Father and the potential adoptive mother. (L.F. 248) For their position to change so arbitrarily is not what is best for the child in this case, and the trial court did not have clear, cogent and/or convincing evidence that any of the statutory grounds for termination existed.

As somewhat of a sidenote, much credence appeared to be granted to the fact that Father allegedly did not want to raise his child. The Court of Appeals recently reversed a termination of parental rights when the Mother consented to said termination, but then withdrew her consent. In the interest of KLS, 119 S.W.3d 548 (Mo.App.E.D. 2003) Father

never consented to the termination of his rights to his young child, and in fact fought against it both legally and by attempting to meet or exceed every requirement he was given by the Division.

This Court recently reversed a termination of parental rights because the court's findings did not constitute clear, cogent and convincing evidence to support termination. The Court stated in one of its Findings that, "there is nothing in Section 211.447 that permits a court to terminate parental rights because a parent lacks the ability, without assistance, to care for the child." In re the interest of: A.S.W., 137 S.W.3d 448 (Mo.banc 2004). Ms. Dean has never testified that Father was not involved with the child. In fact, she testified that before he moved out in May-June, 2003, he spent an average of three hours per day, and that "he was around all day a lot on Fridays. That was like their day, a day with Daddy, that kind of thing." (Sept. T. 110) Father has to work full time to support S.M.H. Ms. Dean and her family assisted Father in taking care of S.M.H. This is not a ground to terminate Father's rights to his child. This Court further stated in A.S.W. that because a natural parent's rights to his or her child are a "fundamental liberty interest," the statutes are strictly construed "in favor of the parent and preservation of the natural parent-child relationship." The trial court, the Division and the guardian have decided that a non-relative's rights are paramount to a natural father's rights to S.M.H. As this Court stated, "Parenting is frequently a group effort." *Id.* at 453. The evidence of Ms. Dean's assistance with S.M.H. should not override Father's rights to his daughter. This was not the legislature's intent in enacting the termination of parental rights statutes, and this Court has

held that the trial court must consider “all evidence of parenting classes, treatment programs, counseling and assistance from caseworkers.” The record in this case establishes that Father leapt through hoop after hoop placed in his path to his daughter. These included two psychological evaluations, a psychosexual assessment, a psychiatric assessment, attendance at a Family Violence class, parenting education and individual counseling. (L.F. 196-197) Father called 2 of the assessors and the parenting education leader as witnesses at his trial. The Division failed to mount a case against Father and it failed to prove that it was in S.M.H.’s best interest for her Father’s rights to her to be terminated.

The trial court did not have clear, cogent and convincing evidence to support its findings regarding the statutory factors for termination. This Court should reverse the trial court’s termination of Father’s rights to SMH.

ARGUMENT

III.

THE TRIAL COURT ERRED IN TERMINATING FATHER’S PARENTAL RIGHTS TO SMH BECAUSE THERE WAS NO EVIDENCE PRESENTED BY THE DIVISION THAT TERMINATION WAS IN SMH’S BEST INTERESTS IN THAT THE DIVISION MUST ESTABLISH THAT TERMINATION OF FATHER’S RIGHTS WOULD BEST SERVE

SMH'S INTERESTS, AND IT DID NOT PRESENT EVIDENCE AS TO THIS POINT.

Once the Division has proven that one of the statutory grounds for termination exist, it must then prove that termination is in the best interests of the minor child. In re the interest of JLM, 64 S.W.3d at 924, 925 (Mo.App.S.D. 2002). Only after both inquiries are resolved in the affirmative may a parent's rights be terminated. Id. at 924. The only evidence adduced as to this point was the Division's testimony that was that the child needed permanency. (T. 127) Also "based upon ... his inability to properly care for the child himself." (T. 128) This was the only evidence presented in the Division's case to suggest that it was not in the child's best interests to return to Father. Again the horrendous inconsistencies that existed in the Division's case cannot be stressed too often. In February, 2003, the Division states that Father has fully complied with visitation (since the child was living with him); fully complied with his employment, housing, parenting skills training, individual counseling, family violence counseling, psychological evaluation, support payments and psychosexual evaluation. (L.F. 147-148) Then, in June, 2003 as already been addressed numerous times, the Division again held that he was in full compliance with all the above requirements. (L.F. 196-198) In August, 2003 Father was held to not be an appropriate placement because he had moved from the home of the Dean family, the family who was now seeking his rights to be terminated so that they could adopt the child. (L.F. 225) It was further found that now Father was in partial compliance with the Division's plan and court orders. (L.F. 227) The Division, at that hearing, was ordered to "engage in further reasonable efforts to effect the delivery of the Juvenile to Father." (L.F.

228) The Division offered no evidence as to its efforts from August, 2003 until the trial date, because the Division made no such efforts. The Division then filed its Petition to Terminate Father's Parental Rights on September 8, 2003. (L.F. 234)

The trial court indicated that it found credible testimony of the Division's social worker, Shonetta Reed, that Father had told her that he does not want to care for the minor child and that he cannot do so by himself. (L.F. 348-349) This is cited as one of the reasons why Father's rights to his child were terminated and encompassed a large amount of the testimony from Ms. Reed at trial. In a recent case in this Court, a mother's rights to her twin daughters had been terminated primarily because of her efforts to find an adoptive family for her twins. In the interest of KAW and KAW, 133 S.W.2d. 1 at 21 (Mo. banc 2004). This court stated emphatically that, "this cannot, without more, provide grounds for termination of parental rights." Id.

The Division did not meet its burden of proving that terminating Father's rights was in SMH's best interests, and therefore its Order should be reversed.

ARGUMENT

IV.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE EXPERT WITNESS REPORTS OF DR. LISA EMMENEGER AND DR. JOSEPH DAUS IN LIEU OF THEIR TESTIMONY, OVER FATHER'S

HEARSAY OBJECTION, BECAUSE THE FACT THAT THEY WERE ADMITTED INTO EVIDENCE IN A PREVIOUS HEARING ON FATHER'S MOTION TO TERMINATE THE LEGAL AND PHYSICAL CUSTODY OF THE DIVISION DOES NOT CONSTITUTE A DEFACTO ADMISSION OF THE REPORTS IN THE DIVISION'S MOTION TO TERMINATE PARENTAL RIGHTS, AN INDEPENDENT CAUSE OF ACTION.

It has long been established under Missouri law that the Division of Family Services' Motion to Terminate Parental Rights is an independent cause of action much like a Motion to Modify is to a Petition for Dissolution of Marriage. In the interest of R.L.L., 633 S.W.2d 409, 411 (Mo.App. W.D. 1982). In the interest of R.L.L. involved a dispute over whether allegations and proof presented at a hearing upon which the juvenile court took jurisdiction over the minor child at the beginning of the case, could later constitute proof substantial enough to terminate parental rights. Id.

The Missouri Court of Appeals concluded that it could not, "The reasons are obvious enough ... Where the requested relief was the assumption by the juvenile court of jurisdiction over the child, and perhaps a temporary removal from the mother's custody (as it was in the earlier hearing of June 4, 1979), she would not take the same measures to resist damaging testimony-either by objection to admission, by cross-examination, by contradiction or by appeal-as she would if the relief sought were the permanent termination of her parental rights (as it was in the later hearing)." Id. at 412. The

termination was reversed and remanded. Id.

In the interest of R.L.L. is very similar to this cause of action in that the reports of Drs. Emmenegger and Daus (hereinafter “the Reports”), were admitted into evidence in a previous hearing on Father’s Motion to Terminate the Legal and Physical Custody of the Division (hereinafter “Father’s Motion”). (L.F. 242-248, 274-282, 282-287). The requested relief in Father’s Motion was the termination of the legal and physical custody rights of the Division over the child. (L.F. 245). The requested relief in this matter was the permanent termination of Father’s parental rights. (L.F. 234-239). The Reports were admitted into evidence over Father’s hearsay objections on the basis that they were previously admitted into evidence in the hearing on Father’s Motion. (T. 7-9). As in the matter of In the interest of R.L.L., the stakes became higher in this cause of action and Father took appropriate caution to prevent the admission of the Reports without the live testimony of their authors so that Father may cross-exam them. The Division had this privilege with Father’s expert, Dr. Ryall. Dr. Ryall not only testified to the content and meaning of her report, she was subject to cross-examination by the Division, the Deputy Juvenile Officer and the Guardian ad Litem. (T. 75-99). Father was denied that opportunity for Drs. Emmenegger and Daus.

Reports containing hearsay have been allowed admitted into evidence as an aid to the court in determining what is in the best interest of a child. In the interest of J.A.R., 968 S.W.2d. 748 (Mo.App. WD 1998). At the trial of In the interest of J.A.R., the Juvenile Officer offered into evidence a termination of parental rights study

prepared by a social service worker for DFS. Id. at 750. Father’s counsel in that case objected on grounds that the report was hearsay. Id. The DFS report was admitted, and Father appealed stating that the Court relied on the DFS report to establish one of the statutory grounds for termination. Id. The appellate court agreed with Father that the DFS report could not be used to determine whether one of the statutory grounds of termination exists, “... it should be considered by the court only on the issue of whether termination is in the best interests of the child.” Id. at 751.

The court in this cause of action did rely on hearsay in determining whether one or more of the statutory grounds for termination existed under Mo. Rev. Stat. §211.447 .4. The Reports, having been admitted into evidence over Father’s hearsay objection, contain not only statements from third parties, but statements and conclusions of the authors who were not present in court to testify and be cross-examined. (L.F. 274-281, 282-287). These reports played an integral role in the court’s analysis of the statutory grounds for termination under Mo. Rev. Stat. §211.447.4. The court’s Findings, Conclusions and Judgment Terminating Parental Rights (hereinafter “the Judgment”), first finds that Father abused and neglected the child, citing Mo. Rev. Stat. §211.447.4 (2). In support of the court’s conclusion found in paragraph 19 of the Judgment, subparagraph (b) specifically states, “Father has a mental condition which is permanent or has no reasonable probability of reversal and, therefore, renders him unable to provide knowingly the necessary care, custody and control of the minor child, Section 211.447.4 (2) (a) R.S.M.o.” (L.F. 340-341). The court continues in five (5)

consecutive paragraphs repeatedly citing as well as quoting the statements and conclusions of Drs. Emmeneger and Daus contained in the Reports in support of its determination that the statutory ground of termination as set forth in Mo. Rev. Stat. §211.447.4 (2) (a) exists for Father. (L.F. 341-343). It is this analysis that In the Interest of J.A.R., citing In re S.P.W., 707 S.W.2d. 814 (Mo.App. 1986), states is improper for the court to undertake. Id.

Since Drs. Emmeneger and Daus did not appear to testify to their respective reports, the court should not have considered them in its determination of whether the statutory grounds for termination existed. Father's hearsay objection should have been sustained.

V.

ARGUMENT

THE TRIAL COURT ERRED IN OVERRULING FATHER'S OBJECTIONS WHEN THE DIVISION QUESTIONED SEVERAL WITNESSES WITH HYPOTHETICAL QUESTIONS ABOUT FACTS THAT WERE NOT ALREADY IN EVIDENCE, AND THAT ULTIMATELY WERE NEVER IN EVIDENCE IN THAT THERE IS A GENERAL REQUIREMENT OF FAIRNESS IN CROSS-EXAMINATION AND FATHER PROPERLY OBJECTED, AND FATHER WAS PREJUDICED BY THE INFLAMMATORY NATURE OF THESE HYPOTHETICAL

QUESTIONS.

During her cross-examination of Father's expert witnesses, the Division's attorney posed several hypothetical questions. (T. 51) Father objected to this line of questioning, and the Court overruled his objection, however the court stated, "all of Mr. Franklin's testimony will be – is stricken to the extent that whatever you ask him to assume as a fact, you do not prove up." (T. 51)

The Division proceeded to ask Mr. Franklin, "If I told you that Mr. Haegele's parents were going to testify." (T. 50) The Division called one member of Father's family, his adoptive Father, Mr. Haegele, Sr. No other member of Father's family testified. As discussed in an earlier point, Mr. Haegele and Father had an admittedly strained relationship from the beginning, and his credibility is questionable at best.

The Division also asked, "What about if Mr. Haegele's family stated to you that they had witnessed him physically fighting within the family ... fighting with his brothers?" The only testimony that supported this question was from Mr. Haegele, Sr., who testified that on one occasion "Tom, I believe was going as his brother with a baseball bat." (T. 173) Mr. Haegele could not recall any other incidents, nor did he testify to the time frame or to what had occurred to spark the incident. The Division did not support this question with adequate facts.

The Division also questioned Dr. Ryall, "Do you find the fact that he made threats to the mother at all significant to your evaluation?" (T. 91) Mother never testified at trial, nor

did the Division have anyone else testify that Father had threatened Mother directly with any physical harm. Again, the only testimony on this issue was a one-time event that Father's adoptive father stated.

The Division was aware that the only witness they could call was Father's adoptive father, whom he was estranged from at the time of trial. "There is a general requirement of fairness in cross-examination." State v. Floyd, 77 S.W.3d 98, 101 (Mo.App.S.D. 2002) If there is no basis in fact for a question, it should not be asked. The Division knew or should have known that Father's adoptive mother was deceased at the time of trial, and therefore could not testify. The questions posed by the Division were intended to prejudice the court against Father and were highly inflammatory.

CONCLUSION

Appellant, the natural Father, respectfully requests this Court reverse the Judgment of the trial court dated January 28, 2004 terminating his parental rights to his daughter, S.M.H.

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