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Reference Note

All statutory references are to the Revised Statutes of Missouri, 2002.

References to the Legal File are denoted “L.F.,” to the Supplemental Legal File are denoted “A.S.L.F.” to the Transcript are denoted “T.” and to the Appendix as “A.”

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Jurisdictional Statement

This action involves the constitutionality of two state statutes in a termination of parental rights case. The first concerns the question of whether the State may use a time frame for which a child has been in foster care as a ground for termination of parental rights. Sec. 211.447.2(1). The second concerns the question of whether the trial court can find that someone has violated Sec. 453.110 when the Statute does not allow for any deference to be given to a parent's choice as to whom would adopt their children.

This Court has exclusive jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution because the case involves the validity of State Statutes.

Statement of Facts

Even before the birth of K.A.W. and K.A.W., Appellant had a life that almost anyone would find challenging. At the center of Appellant's world were her children and her struggle to care for and to provide for them as best she could. Although Appellant married Aaron Wecker (A.W.) in 1996 (T. 1431), they had an on-again-off-again relationship for approximately 10 years (T. 1432). Their union produced their daughter N.W. who was approximately three (3) years of age when the twins were born. (A.S.F.L. 53). Appellant has two (2) other children J.S. and J.G. who were 8 and 12 respectively at the time their youngest sisters were born. (A. 277). Although not the biological father, A.W. claimed Appellant's younger son, J.S., as his own until the date of trial.

Although two of her children J.S. and N.W. enjoyed relatively good health, J.G. did not. J.G. was born with a serious heart defect which required ongoing interventions and surgeries from health professionals (A. 274-76). Prior to Appellant's conception of K.A.W. and K.A.W., J.G. had required two heart surgeries. (A. 274-76). The surgeries were performed at St. Louis Children's Hospital. (T. 1435). The operations required J.G. to have extended stays in the hospital (T. 1438-39)(A276) and required follow-up and recovery care performed by Appellant. Each of J.G.'s three (3) surgeries were eight hours (8) surgeries. (T. 1439).

Appellant was the sole provider for her family as A.W. did not work much and even when he did, he never contributed financially to support the family (T.

1438, 1441, 1454). At the time of trial A.W. admitted being over \$7,000 (T. 754) behind in child support. Appellant has always thought it was her duty to work and support her children. Although minimally skilled she took work wherever and whenever she could find it. (T. 1443). Appellant worked for as many as three temporary agencies who sent her on jobs for as little as one day and sometime for up to a week at a time. (T. 1443, 1607-1610). On many occasions the need to provide care for J.G. after his operations required her to leave places of employment only to try and return at a later time. (T. 1438-1439).

The pregnancy which resulted in the birth of the twins was not planned. (T. 1433). At the time of the twin conception, Appellant and A.W. were separated. (T. 1433). Appellant was living in O'Fallon, Missouri. (T. 1433). She was working at Converges, a "temp" agency, in customer service (T. 1435) which was located in St. Charles, Missouri. (T. 1436). Although the places of employment fluctuated, the care of her children did not.

N.W. began attending St. Matthew's Lutheran School preschool in the City of St. Louis. (T.1435). This preschool was the same one which Appellant's older two (2) boys had attended. (T. 722-23). Appellant chose to travel the extra distance because she was familiar with the school and had good experiences with the quality of care it offered. The preschool director, Claudia Stallworth described Appellant as a very interested parent (T. 716) and indicated that Appellant gave more as a parent than many of the school's two parent families. (T. 717). The director testified that J.S. and J.G. had each attended the school for two (2) years,

the older boy having attended about nine (9) years ago. (T. 722-723). This witness made many favorable comments about Appellant as a parent. (T. 712-31).

Indeed, the fact that Appellant was interested in providing the best she could for her children educationally is evidenced by the fact that they were registered in and attending school in the Ladue school district. (T. 1442). The boys were registered from their maternal grandmother's home in Olivette at the time of the hearings. For convenience for the boys, they spent some of the school nights with their maternal grandmother (T. 1442-1443), but on the days that they did not stay with her, Appellant drove the boys to their bus stop in order for them to catch their school bus. (T. 1511). Appellant's commitment to furnish her children with the best opportunities in life are demonstrated by some of their extracurricular activities. At the time of her testimony, Appellant's children variously benefited from being members of the YMCA, participating in sports such as swim team, soccer, and gymnastics, participating in Webelos and Cub scouts, and going fishing and camping. (T. 1508).

When Appellant learned of her pregnancy, she informed her husband A.W. (T. 1436). A.W. told Appellant that the twins were her responsibility and he wanted nothing to do with them. (T. 1437). Appellant was not receiving child support from A.W. for N.W. or J.S., for whom A.W. had previously accepted financial responsibility (T. 1445-46). She recognized that her circumstances as a single parent prevented her from being able to raise the twins in the way she wanted. Appellant told Faith Norman that she wanted the twins “. . . to have a

better life than what she did.” (T. 1289) Adding to Appellants burden was the fact that during her first trimester, on February 24, 2000, J.S. underwent his third heart surgery (T. 1438)(A. 274). As before this required a stay by J.S. in the hospital and Appellant had to cut back in her employment and resorted to receiving AFDC (welfare) benefits (T. 1438).

Yet another problem in Appellant’s life during her pregnancy was that she was charged with the crime of stealing. According to her probation officer’s testimony, (A. 74) the circumstances of that charge arose from Appellant’s decision as an employee for a loan company to approve a loan for her estranged husband; Appellant’s probation officer stated: “Ultimately, that was against the rules. They fired her for that and charged her with stealing for that.” (T. 1292). The probation officer stated that Appellant completed her one year probation, her community service hours and her driving improvement class. (T. 1287). The probation officer noted that Appellant took full responsibility for her actions (T. 1288) and during her court case she had to leave as she was going into labor (T. 1290).

Of course Appellant wanted her babies but felt she would be doing the best for them by putting them up for adoption. However, she knew she wanted to maintain contact with her children and from the beginning of her adoption explorations, she sought an “open” adoption which would allow her to send letters and pictures; she wanted to see her girls and for them to know who she and their siblings were. (T. 1448). Above all else, Appellant, did not want to loose contact

with the twins. (T. 1166). On a daily basis she struggled with the decision of adoption because this 30 year old single mother of three (3) was faced with her pregnancy of twins being unplanned (T. 1433), she has a seriously ill 12 year old child undergoing his third major open heart operation requiring extended stays in the hospital and recovery (T. 1438) forcing her to quit her job and rely on state aid. She was receiving no support financially, physically or emotionally from her husband (T.1441). Trying to provide the best neighborhood, school and day care for her other children was requiring her to live in O'Fallon, Missouri (T. 1433), find temporary employment wherever she could, sometimes in St. Charles (T. 1433), and transporting her three (3) year old daughter to preschool in the City of St. Louis. (T. 1436).

In April 2000, while Appellant's son J.G. was *still* in the hospital (T. 1438) following his February surgery, she began searching for prospective adoptive parents for her unborn twins. She did this by contacting adoption agencies listed in the telephone book and calling 1-800 numbers (T. 1448) which she obtained in the course of her search. She developed a telephone relationship with Tina Johnson who was an adoption facilitator in California. (T. 1449).

The twin girls, K.A.W. and K.A.W., were born on June 26, 2000 (T. 1435). Like many sets of premature twins, they had very low birth weight. (T. 566). However at approximately two and one-half months, they each weighed over 6 pounds. (T. 570). After her premature twins were born, Appellant visited them in the hospital on a daily basis. (T. 1452). Appellant worked to express milk for the

twins during their stay at that hospital. (T. 1022). Appellant took a special care class to learn to care for twins after they left. (T. 1515). A nurse working in the Neonatology Intensive Care unit where the girls were cared for verified Appellant's frequent visitation. (T. 1281). This nurse was able to confirm that Appellant brought the babies breast milk, held them, talked to them, was affectionate. (T. 1281-1283). The nurse further indicated that she saw no problem with the babies going home. (T. 1281-1283) (A. 71-72).

During the two month period between the birth of the children and their homecoming, Appellant continued to work off and on, cared for her three other children and visited the newborn babies on a daily basis. (T. 1452-54). Although Appellant had the help of her mother to care for the older children, she did not live nearby. Every day it was necessary for Appellant to do a great deal of driving in order to get N.W. to and from day care, visit the twins, get to and from work, and if needed drive J.S. and J.G. to and from their bus stop. (T. 1446).

Although the time while the twins were in the hospital was difficult, she began to have to get up every hour all night long when the twins came home to care for them, providing their medicines and feeding them. (T.1446). Exactly one month after the birth of the twins, Appellant began a new job at Biomedical. (T.1452). The only thing that was easier after the babies came home was that she did not have to travel to visit them in the hospital. However, she did have to begin transporting them to daycare, so that she could work. (T. 1454). Appellant also had to transport N.W. to her preschool. Appellant was getting up at 4 o'clock in

the morning to start her day (T. 1455) and not arriving home with her children until 7:30 or 8:00 pm (T. 1457). It was, as she knew it would be, very difficult. By October 2000, Appellant found it necessary to move into the city of St. Louis to be nearer her support system and to save the time that she was losing out of her day due to rush hour traffic problems in various parts of the metropolitan area. (T. 1458). During this period, Appellant continued to explore her adoption options for the twins.

Through her contact with Tina Johnson, Appellant was provided with profiles of potential adoptive couples. (T. 1450). Appellant reviewed several and finally settled upon the Allens who lived in California. (T. 1459, 60). Appellant was happy to have found an adoptive mom who planned to stay home who was part of a bi-racial couple to adopt her bi-racial daughters. (T. 1460). She selected the Allens because she felt that they would provide the kind of home she wanted her children. Arrangements were made and then on October 11, 2000 for Appellant and the twins flew out to California to meet the Allens. (T. 1460).

Appellant spent ten (10) days with the Allens. (T. 1460). Appellant discovered that the Allens were adopting another child through the State of California and learned that they had been approved for that adoption from the California Division of Social Services social worker. (T. 1462-1463). Appellant felt resolved about the Allens adopting the children because she felt that she had developed a solid relationship with Mrs. Allen. There had been a few things about Mr. Allen which had bothered her during stay in California. After she had signed

papers for the adoption, (T. 1466), Mr. Allen began talking as if he was not in favor of her maintaining contact. (T. 1470). The other was that during a party for his nephew, he showed her some swords that he encouraged her to handle. (T. 1469). However, before she left California, Mrs. Allen made efforts to allay Appellant's fears and make up for the unease that Mr. Allen's behavior had caused. (T. 1471). After feeling comfortable that the Allens would follow through with the open adoption, Appellant returned to St. Louis, leaving K.A.W. and K.A.W. with the Allens. (T. 1472). The Allens assure Appellant that their attorney in Missouri was handling the legal work necessary to accomplish the adoption. (T. 1472, 73), Appellant had received correspondence from him. (Appellant's Exhibit T.W. 26, A. 249-57).

Upon her return to St. Louis, she frequently telephoned Mrs. Allen who continued to be friendly and amenable to maintaining contact with Appellant. The two spoke on the phone every day. (T. 1472-1473). However, during one conversation between the two women in mid November, Appellant received the distinct impression that Mrs. Allen was distancing herself and communicating that Appellant did not need to call all the time. (T. 1468, 1552, 1553). At this time, Appellant began to reconsider her choice of the Allens and discussed this with Tina Johnson. (T. 1473).

In addition, Ms. Johnson informed Appellant that the Kilshaws, another prospective couple whom she had previously considered, were still available. (T. 1474). Mr. Kilshaw was an attorney. (T. 1477). The Kilshaws agreed to an

“open” adoption. (T. 1476). The Kilshaws, who lived in Great Britain, were visiting the United States and still wanted to adopt Appellant’s twins. (T. 1475). Tina Johnson arranged for Appellant to travel to California and for the Kilshaws to be there at the same time. (T. 1477). At the end of November 2000 Appellant and her three year old daughter N.W. (who A.W. had declined to watch) and left for California. (T. 1475). On a pretext of taking the girls out for a farewell visit, Appellant reclaimed her children and took them back to her hotel.

Following a confrontation with the police who had been called by the Allens, (T. 1477) Appellant, her children, and the Kilshaws left on a cross country trip in a van driven by Mr. Kilshaw, a citizen of Great Britain. (T. 1478). This trip included a mistake or misunderstanding by Mr. Kilshaw of the appropriate route to Missouri. (T. 1479). This mistake caused them to take a southern route which significantly lengthened their trip and delayed their return to St. Louis. The Kilshaws were planning to complete the adoption in Arkansas. (T. 1480). The Kilshaws, like the Allens, had obtained counsel to do the legal work necessary to finalize the adoption. (T. 1480-81). Appellant got the name of the Kilshaw’s Arkansas attorney, Kim Van Noy, from the Kilshaw’s English social worker who told her to go to Arkansas. (T. 1480). Appellant and the twins left St. Louis and went to Arkansas so that the Kilshaws could finalize their adoption of the babies. Appellant was asked to sign an affidavit stating that she was a resident of Arkansas which she refused to do. (T. 1482). She did, however, provide the Arkansas address of her Aunt, who did reside in Arkansas. (T. 1482). Appellant

was assured by three lawyers and an English social worker that the adoption would be legally finalized in Arkansas. (T. 1481). She left Arkansas, returning to St. Louis. At this time, she could never have foreseen that the twins would be returning to St. Louis on April 18, a scant four months later.

Appellant missed her children. She was shocked to learn in January 2001, only one month after the Kilshaws had taken physical custody of the twins, that the British social services had removed the girls from the Kilshaw's care. (T. 1485). She was horrified by tabloid stories saying she had sold her twins on the internet (T. 1485) which she knew to be an utterly baseless accusation. It was at this point, when the children had been removed from the Kilshaws and false stories were being published, that Appellant determined that she wanted to get the kids back. (T. 1485, 1595).

Some things had changed for the better in her life. J.S.'s medical condition had improved, she was more steadily employed, and she had developed a positive and supportive relationship with a man. In addition, Appellant was recovered from the strain of the birth and the early months of being the sole provider for the twins. She resolved that when the babies came back to Missouri, she was going to try and regain custody of them.

Appellant was the only person besides the DFS worker who attended the first Family Support Team meeting on April 27, 2001 (Appellant's Exhibit, TW 14, A. 157) after the girls were returned to St. Louis on March 27, 2001. At that

April 27, 2001 Family Support Team meeting Appellant told Jessica Sippy (DFS worker) that she wanted the children returned to her.

Appellant cooperated with the DFS by stipulating that the children could be returned and placed in the legal and physical custody of DFS. (L.F. 38-41). DFS' initial assessment of the situation, Case Plan and Evaluation of April 27, 2001, found that Appellant did not follow Sec. 453.110 when she transferred custody to the adoptive couple. (Appellant's Exhibit TW 14, A. 143). In addition, DFS stated that Appellant's actions had caused the twins to be in numerous unstable and inappropriate placements, and that these placements had not been in the best interest of the children. (Appellant's Exhibit TW 14, A. 143).

Additionally, the DFS Case Plan and Evaluation clearly indicated that "reasonable efforts" were not documented in the court order. (Appellant's Exhibit TW 14, A. 143). It also indicated that relatives were not considered for placement of the children because of "media issues." (Appellant's Exhibit TW 14, A. 146). DFS listed "media" as being a special consideration of the case. (Appellant's Exhibit TW 14, A. 153).

Although DFS acknowledged through the testimony of Jessica Sippy that placement is usually the goal (T. 390), DFS never contacted any of Appellant's family members. (T. 393), nor did they look into Appellant's mother as an option. (T. 391-92).

When Appellant attended the DFS meeting on April 27, 2001, she learned what DFS required of her as she worked toward family reunification. (Appellant's

Exhibit TW 14, A. 149). Family reunification was clearly the DFS plan. The obstacle to reunification which was initially identified was the court's order. The requirements which were first identified were for Appellant to take a parenting class, visit the children regularly, financial support them and cooperated with determining paternity. (Appellant Exhibit TW 14, A. 149). At the recommendation of DFS, the trial court granted limited visitation in the amount of one hour per visit twice a month, supervised at Heritage House. (A.S.L.F. 15-19, A. 77). The visits began on April 21, 2001 and continued regularly through June 22, 2002. (T. 1895).

On May 23, 2001, DFS reconvened regarding Appellant's children. DFS added to its "Factors that must be achieved" before reunification could occur, that Appellant must complete a psychological evaluation. (Appellant's Exhibit TW 14, A. 146). DFS' expert that evaluated Appellant indicated that she should not have her rights terminated. (T. 1050-51). Again, DFS listed "media" as a special consideration and added that although "Reunification" was listed as a goal, "TPR" (termination of parental rights) "will be referred by March 27, 2002." (Appellant's Exhibit TW 14, A. 169).

Throughout the time DFS was having meetings regarding her children, Appellant was visiting and rekindling the bond between them. However, by Appellant's visits with her children were marred by the continued interference of the Heritage House principal, Barb Flory. (T. 1505). Appellant felt that Barb Flory attempted to distract the children with toys while Appellant was endeavoring

to reestablish her bond with the children after a four (4) month separation. (T. 1505). Eventually, the situation with the visits led Appellant to include a social worker/counselor of her choosing as an observer. (T. 1506). After this development, the visits were greatly improved. (T. 1506). While Barbara Flory was highly critical of Appellant, another observer found that the visits were going well and that Appellant was developing a stronger relationship with the girls. (Appellant's Exhibit TW 31, A 269-72).

Appellant perceived that the hostility of Barb Flory and Heritage House towards her continued. Barb Flory did cancel Appellant's visits with her daughters because Appellant allegedly owed Heritage House fifteen dollars. (Appellant's Exhibit TW 8, A. 130). Barbara Flory also sent Appellant a letter notifying her that "all services will be suspended" until the invoice which she attached to the letter for seven hundred and five dollars was paid. (Appellant's Exhibits TW 9, A. 131). Appellant sought to aid the trial court in figuring out how the visits were really going and if there was bonding between her and her children by asking the court to observe her with the children (A.S.L.F. 25-26). DFS does note that Appellant requested an extra visit with the children to celebrate their birthday. It was denied. (T. 1507).

Concurrently with visiting her children, Appellant accomplished each of the items DFS required before reunification could occur. Appellant attended a parenting class at the Salvation Army conducted by Laura Ellison who later appeared as a witness at one of the hearings. (T. 991-92). Ms. Ellison testified that

Appellant was the most involved and participatory class member in the class. (T. 993). This witness's testimony verified T.W.'s completion of the parenting class requirement. (T. 991-993). When the requirement for a psychological examination was added, she likewise complied with that by submitting to examination on July 25, 2001 and August 1, 2001. (L.F. 54-61). The DFS selected professional reported among her findings that there was no reason to terminate her parental rights. (L.F. 59, A. 279). In addition, Appellant financially supported the children. By the time of the hearings, she was completely up to date in her financial support obligations. (T. 500).

Although Appellant sought several times to have the visits increased and her requests were denied (L.F. 63, A.S.L.F. 24), she continued to cooperate with DFS. She obtained a drug screening test at DFS' request (T. 515) even though there had never been any reason to suggest any drug abuse. Despite her ongoing efforts, DFS continued to suggest that she voluntarily terminate her rights (Appellant Exhibit TW 20, A. 228-30). DFS recorded family reunification as the goal while at the same time indicating that no reunification services were being offered. On her own initiative, Appellant sought and obtained counseling for herself to assist her in improving her decision making skills and in going through the process of reunification with her children.

DFS's own witness at trial, Kim O'Brien, acknowledged in her testimony that Appellant had met every DFS reunification requirement. (T. 1367-1369), which were parent training, psychological examination, regular consistent

visitation, and financial support. This witness also clearly affirmed that just because a parent was able to “jump over every hurdle” to reunification, if *DFS workers* did not think it was in a child’s best interest, the child would not be returned (T. 1370) to his parent.

DFS never attempted to place the girls with relatives in contravention of their own policies. (T, 391-93) (Appellant Exhibit TW 2, A. 91-109). In fact, Appellant’s parents retained independent counsel and filed motions to intervene (L.F. 70-72, A.S.L.F. 27-29) and petitions for custody (L.F. 73-78, A.S.L.F. 30-34). The trial court denied these motions (L.F. 79). In spite of DFS’s official policy, acknowledged by it’s witnesses at trial, of recognizing cultural differences and particular features of African American families. (T. 1366)(Appellant Exhibit TW 2, A. 106-109). Efforts were made to portray Appellant as a floating member of a large group of disorganized fragmented people who are related.

Despite Appellant’s obvious efforts to reunify with her children, DFS continued its recommendation advocating the restricted contact of short bi-monthly visits . DFS decided to have the girls go to the psychiatrist. As infants generally do not go to the psychiatrist, there are not many psychiatrist who do psychiatric evaluations of babies. However, Dr. Luby of Washington University agreed to do an analysis of the children who were 13 months old at the time. (T. 7). Since they were premature, Dr. Luby adjusted their age to 11 months for purposes of they psychiatric evaluation. Although Dr. Luby did not identify how many 11 month old infants she had analyzed, she did indicate that she had

conducted at least 100 psychiatric evaluations of children under *five years* of age (T.12).

Dr. Luby conducted her evaluation over a period of four sessions. (T. 16). The first session was a fact gathering session with DFS providing the information. (T. 46-48). The second session was with the foster mother, the third was with the foster father and the final one was a “wrap-up” session to discuss her findings with DFS. (T. 22). Dr. Luby never met with Appellant, although she would have liked to do that. (T. 68). She stated at the hearing that DFS had told her the biological mother was not interested in retaining custody of the children. (T. 68-69).

Dr. Luby determined that the girls were suffering from the exact problem DFS had been concerned about: attachment problems (Appellant’s Exhibit TW 14, A. 146). She recommended treatment for the children. This recommendation that the girls be closely followed occurred in August 2001. Despite Dr. Luby’s diagnosis of a “major mental disorder,” at the time of trial the twins had not been seen or “treated” for the major mental disorder identified by Dr. Luby, (T. 530), nor did the adoptive parents ever hear of twins being diagnosed with any disorder. (T. 328).

Appellant obtained her own experts to evaluate her children. None of these experts agreed with Dr. Luby’s diagnosis. (T. 629, L.F. 133, 1098-99). Two of Appellants experts observed her with the children and both determined there was evidence of bonding, (T. 916), and no moderate reactive attachment disorder in remission. (L.F. 133).

During her termination of rights trial, DFS sought to portray Appellant as a person who exploited her children for personal gain (L.F. 64-69) despite her intention to simply find an appropriate adoptive home for her daughters. Despite an exhaustive investigation by DFS into whether she was guilty of trafficking her children, and hours of testimony regarding the investigation, no evidence was gathered to support the portrait of her which DFS has attempted to paint.

The trial court heard eight days of testimony in this case during which dozens of witnesses testified. Appellant presented witnesses that were relatives, state employees and professionals that provided independent analysis of the case on a pro bono basis. Appellant filed her appeal on January 15, 2003. Her efforts to pursue this appeal were and continue to be challenging above and beyond the normal appeal process. It has taken two writs from the Eastern District Court of Appeals to get the transcript and legal file. Subsequent to those writs, the challenges have continued. The transcript was delayed until approximately October 31, 2003 and multiple trips to the clerks office have yet to produce one of the amended petitions against Appellant for the revocation of her termination rights. Finally, a Writ was filed with this Court, SC085631, to rescind the final adoption that has been entered into despite this pending appeal.

Appellant appreciates this Court's consideration of her appeal and anxiously awaits this Court's decision.

Points Relied On with Authority

I. The Trial Court erred when it found that there were statutory grounds to terminate Appellant’s parental rights and when it severed her parent-child relationship because the evidence does not support such findings.

A. The trial court’s direct use of Sec. 211.447.2(1) and indirect use of Sec. 453.110 to terminate Appellant’s parental rights are unconstitutional.

1. By making the fact that a child has been in foster care for fifteen out of twenty-two months a grounds for termination of parental rights, Section 211.447.5 interferes with Appellant’s fundamental right to raise her children in violation of the substantive due process guarantees of the United States and Missouri Constitutions.

Blakely v. Blakey, 83 S.W.3d 537 (Mo. banc 2002)

In re H.G., 757 N.E.2d 864 (Ill. 2001)

Troxel v. Granville, 530 U.S. 57 (2000)

Santosky v. Kramer, 455 U.S. 745 (1982)

Missouri Revised Statute Section 211.447.2(1)

Missouri Revised Statute Section 453.110

i. The plain language of the statute shows that it is a ground used for termination of parental rights.

ii. The appellate courts of the State of Missouri utilize Sec. 211.447.2(1) as a ground to uphold the termination of parental rights.

iii. Section 211.447.2(1) was used as a ground to terminate Appellant's rights.

2. Section 453.110 violates Appellant's fundamental rights as a natural parent to care for and determine the custody, control and future care of her children because it is overbroad and places judicial discretion above a parent's right to choose.

In re Baby Girl, 850 S.W.2d 64 (Mo. 1993)

Pierce v. Society of Sister, 268 U.S. 510 (1925)

Troxel v. Granville, 530 U.S. 57 (2000)

Missouri Revised Statutes 453.110

II. The trial court erred when it found that there were statutory grounds for Appellant's parental rights to be terminated under Sec. 211.447.4 because the evidence does not support the judgment.

A. The evidence does not support the trial court's use of Sec. 211.447.4(2) as grounds to terminate Appellant's parental rights because it is against the weight of the evidence to find that placing a child up for adoption is adequate grounds to find that Appellant abused or neglected her children.

In re B.C.K., 103 S.W.3d 319 (Mo. App. S.D. 2003)

Missouri Revised Statutes Section 211.447

Missouri Revised Statutes Section 453.110

Citizens for Missouri's Children, Children's Trust Fund,
KIDS COUNT in Missouri 2002 Data Book, 36, (2003)

B. The evidence does not support the trial court's use of Sec. 211.447.4(3) as grounds to terminate Appellant's parental rights because the conditions which led to the assumption of jurisdiction no longer existed at the time of trial.

1. The trial court did not comply with the mandatory language of Sec. 211.447.4(3) because it did not make findings as to each of the subsections as are required by Statute.

State ex rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.2d 470 (Mo. banc 2002)

Sloan v. Bankers Life & Cas. Co., 1 S.W.3d 555 (Mo. App. W.D. 1999)

In the Interest of N.D., 64 S.W.3d 907 (Mo. App. S.D. 2002)

In the Interest of A.L.W., 773 S.W.2d 129 (Mo. App. W.D. 1989)

Missouri Revised Statutes Section 211.447

2. The trial court erred because the evidence does not support such a finding as stated in Section 211.447.4(3)

i. The finding that the children suffer from RAD is against the weight of the evidence.

Missouri Revised Statutes Section 211.447

ii. The conditions which lead to the assumption of jurisdiction *no longer exist*, likewise there are no conditions present that are potentially harmful in nature to the children.

In the Interest of B.C.K., 103 S.W.3d 319 (Mo. App. S.D. 2003)

C. The evidence does not support the trial court's use of Sec. 211.447.4(6) as grounds to terminate Appellant's parental rights because she is fit to parent.

Missouri Revised Statutes Section 211.447

1. Appellant was found to be unfit because she was found to have exploited the children because she accepted gifts unrelated to reasonable adoption expenses.

2. Appellant was found to be unfit because she claimed the children were in her care when they were not, in order to qualify for greater public assistance benefits.

Missouri Revised Statutes Section 211.447

3. Appellant was found unfit because she failed to take prescribed medication while pregnant to prevent pre-term labor.

Roe v. Wade, 410 U.S. 113 (1973)

Skinner v. Oklahoma, 316 U.S. 535 (1942)

Eisenstadt v. Baird, 405 U.S. 438 (1972)

Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988)

4. Appellant was found unfit because she failed to take the children to medical appointments as recommended by their physician.

5. Appellant was found to be unfit because she was overwhelmed and highly stressed with the birth of the twins.

III. The trial court abused its discretion when it found that it was in the best interest of Appellant's children to have their parent-child relationship severed with her because the court failed to make findings regarding subsections § 211.447.6(2)-(5) and the evidence does not support a finding in regards to § 211.447.6(1), (7).

A. The trial court erred when it failed to make findings as to subsections 211.447.6(2)-(5).

In re K.C.M., 85 S.W.3d 682 (Mo. App. W.D. 2002)

In re N.M.J., 24 S.W.3d 771 (Mo. App. W.D. 2000)

In re C.M.D., 18 S.W.3d 556 (Mo. App. W.D. 2000)

Missouri Revised Statutes Section 211.447

1. Subsection (2), the extent to which Appellant maintains regular visitation with the children is appropriate, applicable, and favors Appellant in her termination of parental rights case.

In re K.C.M., 85 S.W.3d 682 (Mo. App. W.D. 2002)

Missouri Revised Statute Section 211.447

2. Subsection (3), the extent of support Appellant provided her children is appropriate, applicable, and favors Appellant in her termination of parental rights case.

In re K.C.M., 85 S.W.3d 682 (Mo. App. W.D. 2002)

Missouri Revised Statute Section 211.447

3. Subsection (4), whether additional services would be likely to bring about lasting parental adjustment is appropriate, applicable, and favors Appellant in her termination of parental rights case.

Missouri Revised Statute Section 211.447

4. Subsection (5), Appellants interest in her children is appropriate, applicable and favors Appellant in her termination of parental rights case.

In re K.C.M., 85 S.W.3d 682 (Mo. App. W.D. 2002)

Missouri Revised Statute Section 211.447

B. The evidence does not support a finding of § 211.447.6(1), (7).

1. The evidence does not support a finding that the children have no emotional ties to Appellant.

2. The evidence does not support a finding that the placement of children up for adoption constitutes “severe and recurrent acts of emotional abuse toward” the children.

Argument

Standard of Review for Termination of Parental Rights' cases

The juvenile court's decision terminating parental rights will be affirmed unless, as here, it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *In re K.C.M.*, 85 S.W.3d 682, 689 (Mo. App. W.D. 2002). The evidence in the record is to be reviewed in the light most favorable to the judgment. *Id.*

Terminating a parent's rights is a two-step procedure. Initially, the court must find a statutory ground for termination. After a ground has been proven, the court must decide if it is in the best interest of the child to sever the parent-child relationship. *In re C.W.*, 64 S.W.3d 321, 326 (Mo. App. W.D. 2001); *In re T.A.S.*, 32 S.W.3d 804, 815 (Mo. App. W.D. 2000).

Before it may terminate parental rights, the juvenile court must find by clear, cogent, and convincing evidence that a statutory ground for termination exists. *K.C.M.*, 85 S.W.3d at 689. Whether statutory grounds have been proven by these standards is reviewed pursuant to *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). However, review of whether it is in the best interests of the child to terminate the parental relationship is reviewed under the abuse of discretion standard. *K.C.M.*, 85 S.W.3d at 689.

Initially, in her first point on appeal, Appellant argues the constitutionality of Missouri Revised Statute Sections 211.447.2(1) and 453.110. In her second point on appeal, Appellant contends the trial court erred when it found that there were statutory grounds to terminate her rights under Section 211.447.4. Finally, in her third point on appeal, Appellant contends the trial court erred when it found that there were grounds to sever the parent-child relationship pursuant to Section 211.447.6.

I. The Trial Court erred when it found that there were statutory grounds to terminate Appellant’s parental rights and when it severed her parent-child relationship because the evidence does not support such findings.

A. The trial court’s direct use of Sec. 211.447.2(1) and indirect use of Sec. 453.110 to terminate Appellant’s parental rights are unconstitutional.

The trial court utilized two statutes, one directly and one indirectly, to justify terminating Appellant’s parental rights. Appellant contends that the use of Sec. 211.447.2(1) (A. 61-62) as grounds to terminate her parental rights is unconstitutional on its face as well as how it was applied in Appellant’s case. In addition, the trial court incorporated in its Findings, Conclusions, and Judgment Terminating Parental Rights (L.F. 103- 111) earlier findings and conclusions (L.F. 112-21, 122-158) wherein the trial judge found that Appellant had violated Sec. 453.110. Appellant contends that Sec. 453.110 on its face is unconstitutional.

Standard of Review for Constitutional Issues

Statutory interpretation is an issue of law that this Court will review *de novo*. *Blakely v. Blakey*, 83 S.W.3d 537, 540 (Mo. banc 2002). Missouri courts start with the presumption that the statute is constitutional. *Id.* It will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the Constitution. *Id.*

1. By making the fact that a child has been in foster care for fifteen out of twenty-two months a grounds for termination of parental rights, Section 211.447.2(1) interferes with Appellant’s fundamental right to raise her children in violation of the substantive due process guarantees of the United States and Missouri Constitutions.

One of the statutory grounds invoked by the trial court to terminate Appellant’s parental rights was that her children had been in foster care for fifteen out of twenty-two months.

18. “The Twins” have been continually in the custody of the Missouri Division of Family Services since April 18, 2001 and, therefore, on the date of the evidentiary hearing, “The Twins” have been in foster care for at least fifteen (15) of the most recent twenty-two (22) months. Section 211.447.2(1), RSMo. (L.F. 107).

In fact, the juvenile officer delayed the proceeding so that the children would be in DFS custody for fifteen months before the trial court could issue its judgment.

(L.F. 82, A.S.F.L. 38, A. 90). By permitting a termination of parental rights to be based solely on the passage of time rather than any parental action or inaction, Sec. 211.447.2(1) on its face and as applied infringes on Appellant's fundamental liberty interest in having care, custody, and control of her own children.

Section 211.447.2(1) makes the fact that a child has been in foster care for fifteen out of the last twenty-two months a grounds for termination of parental rights. It authorizes termination if the court finds that the child's best interests are served by termination and if "it appears by clear, cogent and convincing evidence that **grounds exist for termination pursuant to subsection 2, 3 or 4** of this section." Mo. Rev. Stat. § 211.447.5 (emphasis added). The subsection 2 referred to in § 211.447.5 lists three circumstances that require the filing of a termination petition, one of which is when a "child has been in foster care for at least fifteen or the most recent twenty-two months." *Id.* at § 211.447.2. By transforming the subsection 2 filing trigger into "grounds" for termination, § 211.447.5 establishes fifteen months in foster care as a statutory basis for termination of parental rights.¹

The Illinois Supreme Court struck down a similar statute in that state as unconstitutional. Under the Illinois statutory scheme, fifteen months in foster care

¹ Section 211.447.3 also refers to subsection 2, § 211.447.2, as providing "grounds" for termination. Mo. Rev. Stat. § 211.447.3.

gave rise to a rebuttable presumption of parental unfitness. *In re H.G.*, 757 N.E.2d 864, 873 (Ill. 2001). Applying strict scrutiny, the court in *H.G.* held that the provision was not narrowly tailored to serve the state's interest in protecting children because it failed "to account for the fact that, in many cases, the length of a child's stay in foster care has nothing to do with the parent's ability or inability to care for the child but, instead, is due to circumstances beyond the parent's control." *Id.* at 872.

As the *H.G.* court acknowledged, a parent's right to raise her children is a fundamental liberty interest protected by the constitutional guarantee of due process. In fact, it is one of the oldest fundamental liberty interests recognized by the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). It includes the right of a parent to establish a home, bring up her children, and control their education, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); to nurture her children and direct their destiny; *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); and to make decisions concerning their care, custody and control, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Parents have these rights regardless of shifting economic arrangements. *Id.* "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." *Troxel*, 530 U.S. at 66.

This fundamental liberty interest of natural parents in raising their children does not evaporate simply because they have not been model parents or have lost

temporary custody of their children to the State. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. *Id.* If anything, persons faced with forced dissolution of their parental rights have a more critical need for protections than do those resisting state intervention into ongoing family affairs. *Id.* When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. *Id.* at 759. Because the termination of parental rights has been characterized as “tantamount to imposition of a civil death penalty,” *In the Matter of the Parental Rights as to J.L.N.; Diana L.N. v. State of Nevada, Dept. of Human Resources, Div. Of Child and Family Servics*, 55 P.3d 955, 958 (Nev. 2002), it must be accomplished in accordance with the requisites of the Due Process Clause. *Santosky*, 455 U.S. at 753.

Since the right of parents to raise their children is a fundamental liberty interest, those substantive due process requirements mean that any governmental interference with that right must be subjected to strict judicial scrutiny. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Lawrence v. Texas*, 123 S.Ct. 2472 (2003); *In Re the Marriage of Woodson*, 92 S.W.3d 780, 783 (Mo. banc 2003). To survive such scrutiny, a statute must be narrowly tailored to serve a compelling governmental interest.

Appellant does not dispute that Missouri has a compelling interest in protecting the children of this State from harm and in identifying parents who pose

a risk to the safety of their children. The constitutional problem with the language in § 211.447.2(1) making 15 months in foster care in and of itself a ground for parental rights termination is that it is not narrowly tailored to achieve the State's purpose. All of the other statutory grounds for termination listed in § 211.447 focus on the parent's conduct – parental actions or inactions that could affect the child's well-being. In contrast, the fifteen-month provision permits termination based on the sole statutory ground that fifteen months have passed -- regardless of whether the parent is fit and able to care safely for her children. See Stanley, 405 U.S. at 657 (statutory scheme to determine unfitness may not “foreclose the determinative issues of competence and care”).

As the Illinois Supreme Court recognized, establishing fifteen months in foster care as a grounds for termination or a presumption of unfitness is not narrowly tailored to the goal of protecting children from unfit parents because the time a child spends in foster care is often due to factors that parents cannot control. *In re H.G.*, 757 N.E.2d at 872. In addition, parents are frequently ordered to undergo substance abuse treatment or other counseling as a condition of regaining custody of a child. Given the realities of limited funding, waiting lists, and other placement delays, using the mere passage of fifteen months as a statutory ground will result in termination even when parents are trying to meet the conditions placed upon them by DFS. *Id.* at 873. **As in this case, the Juvenile filed a Motion for the extension of time and the trial judge granted it. (L.F. 82).**

Compliance with federal law also does not provide the State of Missouri with a compelling interest for making fifteen months in foster care a basis or ground for termination of parental rights. Congress made fifteen months a trigger for initiating termination proceedings, not a ground for ordering termination.

Congress began legislating in the area of foster care in 1980 when it enacted the Adoption Assistance and Child Welfare Act (AACWA), codified at 42 U.S.C. §§ 620-628, 670-679a. AACWA created a program in which the federal government reimburses states for certain expenses incurred in the administration of state foster care and adoption services. To qualify for these funds, states were required to make “reasonable efforts” to reunify children with their parents. 42 U.S.C. § 671(a)(15). However, it became apparent that the “reasonable efforts” requirement was leaving numerous children to “languish[] in foster care” and “remain[] in limbo as to their permanency” while the states attempted to rehabilitate their parents. C. Kim, *Putting Reason Back Into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. Ill. L.Rev. 287, 314 (1999). To remedy this and other problems with AACWA, Congress passed the Adoption and Safe Families Act of 1997 (ASFA), Pub.L. No. 105-89, 111 Stat. 2115.

In ASFA, Congress addressed the question of how long states must pursue the goal of family reunification under the “reasonable efforts” standard. ASFA provides that, to retain eligibility for federal funding, a state “shall file a petition to terminate the parental rights of [a] child’s parents” when the child “has been in

foster care under the responsibility of the State for 15 of the most recent 22 months.” 42 U.S.C. § 675(5)(E) (Supp. 1997). Nowhere in the text of ASFA or its legislative history is there a reference to the fifteen-month filing deadline as a ground for termination. To the contrary, the legislative history expressly refers to fifteen months in foster care as an “absolute trigger” for filing the termination petition and beginning permanency planning for the child. C. Kim, 1999 U. Ill. L.Rev. at 314. ASFA only requires that states initiate termination proceedings after fifteen months of foster care placement, not that they make the time period a substantive grounds for termination.

By making fifteen months in foster care a statutory ground for terminating parental rights, § 211.447.2(1) is not narrowly tailored to the State’s interest in protecting children and therefore violates the substantive due process guarantees of the federal and Missouri constitutions.

i. The plain language of the statute shows that it is a ground used for termination of parental rights.

The use of “or” at the end of (1) indicates that the subsection was meant to stand on its own as a ground to use for termination of rights. Under statutory construction rules, the choices that the legislatures make regarding language should be taken by their plain meanings.

ii. The appellate courts of the State of Missouri utilized Sec.

211.447.2(1) as a ground to uphold the termination of parental rights.

Each of the three Appellate District Courts treat “fifteen out of twenty-two” as a grounds for termination of parental rights. The main concern with this practice is that the merits of the parental terminations of rights cases are not reached because the courts, as a general rule, rely on the most straightforward ground for termination. *In re T.T.M.*, 2003 WL 22843583, (Mo. App. W.D. Dec. 2, 2003) (wherein the petition alleged three grounds, including “fifteen out of twenty-two.” The Western District found that “fifteen out of twenty-two” was established by the evidence. “Affirmed”). *In re B.A.S.*, 113 S.W.3d 680 (Mo. App. W.D. 2003) (wherein the statutory ground of “fifteen out of twenty-two” was affirmed.), *In re J.J.P.*, 113 S.W.3d 197 (Mo. App. S.D. 2003) (wherein the Southern District upheld the “fifteen out of twenty-two” “ground” for termination), and *In re J.W.H.*, 104 S.W.3d 438 (Mo. App. E.D. 2003) (wherein the Eastern District treated “fifteen out of twenty-two” as a “ground” for termination and Affirmed the trial court).

iii. Section 211.447.2(1) was used as a ground to terminate Appellant’s rights.

Regardless of the interpretation of the statutory language and the use by the appellate courts of the state, in Appellant’s case, the trial court utilized the fifteen out of twenty-two time frame as a grounds to terminate her rights. (L.F. 107). In

fact, the juvenile officer's motion (A.S.L.F. 38) delays the termination of parental rights filing so that the children would be in DFS custody for fifteen months **counting from twelve months prior the trial court's judgment of May 24, 2002 and three months afterwards.** (L.F. 83, 122-152, A. 90).

2. Section 453.110 violates Appellant's fundamental rights as a natural parent to care for and determine the custody, control and future care of her children because it is overbroad and places judicial discretion above a parent's right to choose.

The origins of this statute stem from the early 1900's with the most recent amendments occurring in 1997. (A. 63-64). Although no legislative intent was recorded regarding the purpose behind the statute, this Court has stated that: "The obvious purpose of the legislature in enacting Sec. 453.110.1 was to prohibit the indiscriminate transfer of children...whereby the custody of a child could not be transferred at the whim of an individual in charge of it, on the contrary, a transfer of custody of a child must have the sanction of a court given by order approving such transfer." *In re Baby Girl*, 850 S.W.2d 64, 68 (Mo. 1993).

While Appellant agrees with this Court in that protecting children from indiscriminate transfer is a reasonable goal of the State, Sec. 453.110 is overbroad and does not withstand a strict scrutiny analysis as is required when infringing upon parents fundamental rights.

The United States Supreme Court has established guidelines for courts to use when analyzing statutes which infringe upon a parent's rights. In *Troxel v. Granville*, the Supreme Court invalidated a Washington Statute which placed the best-interest-of-the-child determination solely in the hands of a judge². *Troxel*, 530 U.S. at 67. The Court found compelling that should the judge disagree with a parent's estimation of the child's best interests, the judge's view necessarily prevailed. *Id.* They found unconstitutional the fact that in the State of Washington a court can disregard and overturn any decision by a custodial parent concerning visitation based solely upon a judge's determination of the child's best interest. *Id.* at 67.

Like the Washington statute, Sec. 453.110 makes a fundamental decision for a Missouri child irrespective of a parent's wishes. The court is allowed to make these determination in lieu of the parent's wishes as if they are unfit to make them for themselves. The statute mandates that the State must intervene to determine what is in a child's best interest before there is any finding that a parent

² Section 26.10.160(3) of the Revised Code of Washington permits "[a]ny person" to petition a superior court for visitation rights "at any time," and authorizes that court to grant such visitation rights whenever "visitation may serve the best interest of the child." Petitioners filed a petition in Washington Superior Court for the right to visit their grandchildren. The parents opposed the petition. *Troxel*, 530 U.S. at 60.

is not acting in the child's best interest. This is in direct violation of the Supreme Court's finding that the parent, **by the natural parent-child relationship is deemed to act in the best interest of their children unless proven otherwise.** *Troxel*, 530 U.S. at 68.

According to the United States Supreme Court, Appellant has the right to direct the destiny of her children, *Pierce*, 268 U.S. 510 at 535. As long as a parent adequately cares for her children there will normally be no reason for the State to inject itself into the private realm of the family. *Troxel*, 530 U.S. at 68, 69. Central to this parental right to direct their children's destiny is the parents' right to determine privately, who shall be the ultimate caregivers of their children. *Pierce*, 268 U.S. 510 at 535 (parents have the right to control and direct the upbringing of their children). Statute 453.110 flies in the face of these rights.

According to Sec. 453.110, once the State intervenes, absolutely no deference is given to a parent's wishes to choose the adoptive parents. A parent cannot determine who will care for their children without first filing a petition, praying that the court grant such transfer, and waiting for the court to decide if the request is in the best interest of the child.³ Section 453.110.1.

³ Although subsection 5 allows for a parent to place their child in the temporary custody of a family member for care, the subsection is only valid if the parent retains the right to supervise and to resume custody of the child.

If the parent does not acknowledge the State's purported necessary intrusion into a very personal and fundamental decision, she *IS* guilty of a class D felony, subjects herself, her children and the chosen caregiver to an investigation, and is at the mercy of a judge to decide if it in the best interest of the child to stay with the chosen parties. Section 453.110.2-.4. The chosen parties themselves are burdened with the cost of such an investigation. Sec. 453.110.4. Once again, the parent, the chosen party and the children are subject to the discretion of the judge to make a determination to what is in the best interest of the child. Section 453.110.3 After the investigation is complete the judge has no obligation to defer to the parent's adoption wishes. *Id.*

Even if a parent complies with the statute, there is no guarantee that her wishes will be executed. The judge still has the sole discretion to decide if the transfer should take place. Section 453.110.6. The statute does not even guarantee that a hearing will be held to adequately take into account the parent's wishes. Section 453.110.7. As evidence of practical application of the decisional framework, Appellant offers the following testimony of the G.A.L.:

First, under the Chapter 453 aspect of this case, I believe that the law requires that if any person surrenders or transfers custody of a child, without first having filed a petition in the circuit court of the county and the state where that child resides, that the court is then bound to do an investigation and to make a determination after the investigation of what is in the child's best interest. **That determination is to be made solely on a**

cases by case basis and solely in the children's best interest without regard for the interest of any other parties, including the parents, or even public policy. (T. 1870)(emphasis added).

The decisional framework the statute employs directly contravenes the presumption that a parent will act in the best interest of her child. *Troxel*, 530 U.S. at 69. In reality, the statute takes away a parent's rights to make this decision because it implicitly says that a parent who wants to place their child up for adoption is thereby rendered unfit to determine her child's best interest. Furthermore, the court's process of taking over the decision making as to what is in the best interest of the child fails to provide for any protection of a parent's fundamental constitutional right to make decisions concerning the rearing of her own children. *Troxel*, 530 U.S. at 70.

Appellant agrees that there is a necessary role for the judicial system within the adoption framework. However, Sec. 453.110 allows for sole determination of what is in the best interest of the child by a judge with absolutely no deference given to a decision made by a parent. Since parents are in the best position to determine the destiny and future care for their children, and Section 453.110 is in direct violation of the standard set forth in *Troxel*, Appellant prays that this Court hold that Section 453.110 unconstitutional as it is written. After invalidating the statute, the *Troxel* Court found that it was up to the Washington legislature to more narrowly tailor their language and protect the fundamental rights of the parents to control the destiny of their child. *Troxel*, 530 U.S. at 73. Likewise, it is

up to the Missouri legislature to adjust the language of the statute to take into account the rights guaranteed a parent by the Constitution of the United States.

II. The trial court erred when it found that there were statutory grounds for Appellant's parental rights to be terminated under Sec. 211.447.4 because the evidence does not support the judgment.

A. The evidence does not support the trial court's use of Sec. 211.447.4(2) as grounds to terminate Appellant's parental rights because it is against the weight of the evidence to find that placing a child up for adoption is adequate grounds to find that Appellant abused or neglected her children.

Initially Appellant reminds the Court that the children were taken into custody because the juvenile officer thought Appellant violated Sec. 453.110, in essence she had possibly committed a crime. (L.F. 66). DFS' initial assessment forms do not state any concerns regarding abuse or indicate any observations of symptoms exhibited by the children which would indicate a showing of any abuse or neglect by Appellant. (Appellant's Exhibit T.W. 14, A. 141-227). It was only months later that there was a "theory" developed by DFS that Appellant had emotionally abused her children by placing them up for adoption. (L.F. 66).

The trial court found that Appellant had committed "severe and recurrent acts of emotional abuse" identified simply as "multiple, unstable, inappropriate, temporary placement." (L.F. 106, A. 4). In fact, Appellant was attempting to

achieve the goal of placing her children in an adoptive home. She could not have foreseen that there would be more than one placement. No evidence was introduced to suggest that Appellant was choosing or actively pursuing a goal of multiple placements. While Appellant admits that the placement of the children with more than one couple was not ideal⁴, it is neither abuse nor neglect⁵. At the time, Appellant, above everything else, wanted to maintain contact with the children throughout their lives by actively pursuing an open adoption. Because Appellant believed that Missouri law did not allow such an arrangement, she sought placement with an appropriate family out-of-state. (T. 1448, 1526-27).

During the course of deciding with whom to place her children, Appellant investigated several couples. (T. 1459). She received biographical information on

⁴ Appellant does not contest that she has placed the children with two different couples for the original purposes of adoption. However, there was no evidence to support the finding by the trial court of a placement in Arkansas. (L.F. 106. A. 4).

⁵ According to Missouri statistics there were 57,723 cases of child abuse and neglect reported to DFS during 2001. Citizens for Missouri's Children, Children's Trust Fund, *KIDS COUNT in Missouri 2002 Data Book*, 33, (2003). From these reports, 11,317 were confirmed as abused or neglected. *Id.* Not one of these cases stated that the reason for confirming the abuse or neglect was because the parent had considered adoption as an option for their children or had placed their children up for adoption.

several potential care givers. (T. 1459). During this time, Appellant relied upon the authorities of the State of California and adoption professionals to put her in contact with an appropriate family. (T. 1449-1459, 1462). She thought that she had found that in the Allens. Only after her confidence in her relationship with the Allens was shaken did she regain custody of the children as is allowed by law. (T. 1470, 1468, 1552-53). Her confidence was shaken in the Allens due to the cumulative effect of Mr. Allen's strange behavior regarding family heirlooms before she departed from California (T. 1469 – 70), and a conversation Appellant had with Ms. Allen wherein she felt that they were not going to follow through with the open adoption because the way she was being brushed aside by Ms. Allen. (T. 1468 – 1470, 1552-53).

After Appellant decided that the Allens were not the people to adopt her children, Appellant, through her adoption facilitator, was put in contact with the Kilshaws. (T. 1475- 76), a couple whom she had considered previously. Appellant, again relying upon professionals to finalize the “legal details” to adopt her children, retrieved the children from the Allens and traveled back to Missouri with the children and the Kilshaws. (T. 1479). The parties traveled to Arkansas to finalized the adoption on the advise of Kim Van Noy, an attorney in Arkansas. (T. 1480). Appellant left the children in the Kilshaws' custody with the understanding that a legal adoption was going to take place in Arkansas. The children were taken into custody by the High Court of Justice, Family Division, in

the United Kingdom in January 18, 2001 and placed into foster care based on allegations that the Kilshaws were unfit. (L.F. 116, A. 14). The trial court entered an order of protective care of the children on March 27, 2001 pursuant to which the children were returned from England and were placed in foster care in Missouri on April 18, 2001.

Appellant has found no other case in which a court held that multiple placements themselves constitute “severe and recurrent acts of emotional abuse.” To the contrary, in *In re B.C.K.*, the children there had experienced twelve or more placements due to their Mother’s diagnosed mental illness, life style choices, rehabilitation efforts, and foster family preference to go on vacation instead of taking care of her children. 103 S.W.3d 319, 323 (Mo. App. S.D. 2003). Neither the trial nor the appellate court, which reversed the trial court’s decision to terminate her rights, found that these multiple placements were per se abuse.

In fact, in almost all cases involving termination of parental rights result in multiple placements of the children while the issues are determined. According to the Citizens for Missouri’s Children, Kids Count in Missouri 2002 Data Book⁶,

⁶ The Children’s Trust Fund was established by state statute in 1983, Sec. 210.170, as a public-private partnership that is governed by a 21-member board of directors appointed by the Governor. The annual publication documents the status of children in all 115 Missouri counties and is used to brief members of the

Missouri reported that at the end of 2001 there were a total of 18,622 children in DFS custody and the average length of stay was 24.6 months. Citizens for Missouri's Children, Children's Trust Fund, *KIDS COUNT in Missouri 2002 Data Book*, 36, (2003). The State admits that children often move from one placement to another while they are in alternative care. *Id.* At the end of fiscal year 2001, the average number of placements for children in care was 3.14. *Id.* Which means that DFS itself, moves children from placement to placement on an average of 3.14 times per child. DFS has never been held to commit "severe and recurrent acts of emotional abuse" toward any of the children in its custody because they have been in multiple placements.

The ruling of the trial court would set the dangerous precedent that any parent, regardless of the situation, committed "severe and recurrent acts of emotional abuse" by placing his or her child up for adoption. This Court should find that the mere placement of children for adoption cannot constitute grounds of neglect under Sec. 211.447.4(2). Since the trial court made no other finding under Sec. 211.447.4(2) no other grounds under that provision can be used to terminate her rights.

legislature, to shape policy goals and as an integral part of training communities to undertake data-driven advocacy.

B. The evidence does not support the trial court’s use of Sec. 211.447.4(3) as grounds to terminate Appellant’s parental rights because the conditions which led to the assumption of jurisdiction no longer existed at the time of trial.

1. The trial court did not comply with the mandatory language of Sec. 211.447.4(3) because it did not make findings as to each of the subsections as required by the Statute.

According to the statute, Sec. 211.447.4(3), if the trial court uses this as a ground for terminating Appellant’s parental rights, the court “*shall* consider and make findings” on all four of the subsections.⁷ (emphasis added). This Court has

⁷ (a) The terms of a social services plan entered into by the parent and the division and the extent to which the parties have made progress in complying with those terms;

(b) The success or failure of the efforts of the juvenile officer, the division or other agency to aid the parent on a continuing basis in adjusting his circumstances or conduct to provide a proper home for the child;

(c) a mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to knowingly provide the child the necessary care, custody and control;

defined the term “shall” as mandatory. *State ex Rel. Vee-Jay Contracting Co. v. Neill*, 89 S.W.2d 470, 472 (Mo. banc 2002). Statutory construction is a matter of law, not a matter of discretion and as such, is reviewed *de novo*. *Sloan v. Bankers Life & Cas. Co.*, 1 S.W.3d 555, 561 (Mo. App. W.D. 1999).

The trial court made the following findings:

83. The Court further finds that the Missouri Division of Family Services has made reasonable efforts toward reunification and that no further efforts are warranted by the Missouri Division of Family Services.

85. The Court finds that the Missouri Division of Family Services conducted concurrent planning concerning permanency placement of the twins.

86. ...Therefore, the total circumstances negate any further reasonable efforts at reunification; in fact, any further efforts would be harmful to the emotional development of the twins and, thus, not in the best interests and welfare of the twins. It is clear that no further preventive or reunification efforts by the Missouri Division of Family Services could have prevented or shortened the separation of the twins from the family. (L.F. 148-150) (A. 46-48).

(d) Chemical dependency which prevents the parent from consistently providing the necessary care, custody and control over the child and which cannot be treated so as to enable the parent to consistently provide such care, custody and control;

In regards to finding # 83 (L.F. 148, A. 46), the trial court did not meet the statutory requirements. “In support of its determination of whether reasonable efforts have been made the court *shall* enter findings, including a brief description of what preventative or *reunification efforts* were made and *why* further efforts could not have prevented or shortened the separation of the family. (emphasis added). *In the Interest of N.D.*, 64 S.W.3d 907, 914-915 (Mo. App. S.D. 2002). Further explaining the statute the Southern District found that the findings of the trial court must be articulated and explained. *Id.* at 915, citing *In the Interest of A.L.W.* 773 S.W.2d 129, 133 (Mo. App. W.D. 1989). It is not enough for the court to enumerate a list, it must tell “**why**” further efforts could or could not have prevented the time the children were away from the parent. *Id.* at 915. This is applicable even if, as in Appellant’s case, jurisdiction was gained on an emergency basis. *Id.*

The trial court failed to make a finding that Appellant completed all elements of the social service plan entered into by she and DFS as is required by the statute. Not only did Appellant complete all elements of the social service plan (T. 378-381), testimony showed that she actively participated in all of her parenting classes and the instructor felt that she was participating more actively than the other parents in the class. (T. 993). Appellant on her own accord, attended additional counseling to prepare for reuniting her family and help her improve her decision making skills. (T. 1128-29). Appellant’s counselor provided a brief summary of their work together in a letter written on February 22, 2002,

introduced at trial as TW-10. (A 132). The trial court made no finds of her efforts or progress.

Despite statutory mandates, the court failed to make a finding regarding the juvenile officers' success or failure to aid the parent on a continuing basis. To the contrary, the trial court found that because of the multiple placements, DFS did not have to comply with this mandatory language of the statute. (L.F. 105, A. 3).

Despite statutory mandates, the court failed to make a finding that Appellant is free from any permanent mental condition which would prevent her from providing the necessary care, custody and control over her children.

Interestingly, the initial petition of the juvenile officer prayed that the court “consider and make findings” to whether Appellant had a mental condition without any basis for their concern. (L.F. 85). According to the psychological evaluation, commissioned by DFS, Appellant was found to be fit to parent, (L.F. 59), and non-psychotic. (L.F. 60, A. 279).

Despite the statutory mandates, the court failed to make a finding that Appellant was free from any chemical dependency that would render her unable to provide for the children. Appellant complied with the drug test commissioned by DFS, and she tested negative for drugs. (T. 514-516, 537). Further, testimony by Aaron Wecker indicated that Appellant was *never* known to use drugs. (T. 859).

Since the trial court did not comply with the mandatory language of the statute, it cannot be said that the trial court found “clear, cogent and convincing

evidence that grounds exist for termination,” Sec. 211.477.5, and therefore the trial court’s finding under this subsection is void.

2. The trial court erred because the evidence does not support such a finding as stated in Section 211.447.4(3)⁸

The evidence and the trial judge’s own judgment do not support a finding that **“the conditions which lead to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist.”** Sec.

211.447.4(3). The court, in making that finding relied on the opinion of Dr. Luby who evaluated the children in the Summer of 2001. The court stated that Dr. Luby diagnosed the children with Reactive Detachment (sic) Disorder in Partial

⁸ The child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which lead to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue exist, that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly diminishes the child’s prospects for early integration into a stable and permanent home. In determining whether to terminate parental rights under this subdivision, the court shall consider and make findings.

Remission. (L.F. 106). The validity of this diagnosis was contradicted by other experts, but even if it was a “valid” diagnosis when Dr. Luby first made it, conditions changed as of the date of trial.

i. The finding that the children suffer from RAD is against the weight of the evidence.

The trial court used the testimony of Dr. Luby to find that the children were suffering from Reactive Detachment (sic) Disorder (RAD). (L.F. 107, 119). Dr. Luby’s own testimony and the testimony of every other medical professional calls into question the validity of this diagnosis.

Although DFS did not list any behaviors or symptoms exhibited by the children (Appellant’s Exhibits TW 14, 141-227), DFS had the children evaluated by a child psychiatrist, Dr. Luby. (T. 7). Dr. Luby initially testified that the practice parameters to evaluate a child include an understanding of the child’s history and observations of the child and its caregivers over multiple visits, usually four. (T. 16, 17). Dr. Luby went on to say that her focus was that “we were not doing a custody evaluation and we were not doing an assessment of [the children’s] relationship with caregivers.” (T. 20). However, directly contrary to this statement, Dr. Luby diagnosed the children with RAD because of the children’s relationship to their caregivers.

The actual evaluation of the children consisted of one meeting with the social worker gathering the history of the child through the eyes of DFS (T. 46-48); two fifty (50) minute observation sessions with the children – the first with

the foster Appellant and the second with the foster father; and a fourth session to discuss the findings with the DFS social worker. (T. 22). Following these sessions, Dr. Luby diagnosed the children with Reactive Attachment Disorder, (T. 23), a major mental disorder (T. 25). Later Dr. Luby goes on the state that although the children suffer from this major mental disorder, they are in Remission. (T. 26).

Dr. Luby's entire diagnosis is flawed because her evaluation was based upon the children's reactions and interactions with the foster parents rather than Appellant, their mother. Dr. Luby testified that she would have been interested to see the children reacting to Appellant. (T. 30). Dr. Luby testified that she and her evaluation team, expressed to DFS an interest in seeing Appellant with her children. (T. 68). Dr. Luby agreed that seeing Appellant with the children would have given her more information and the more information they would have had, the better. (T. 69). However, Appellant was not allowed to participate in the evaluation with Dr. Luby and the children.

Calling further into question Dr. Luby's diagnosis is the fact that although Dr. Luby stated on several occasions that in no way were they "doing an assessment of [the children's] relationship with the caregivers," (T. 20), Dr. Luby's diagnosis of RAD hinged upon the children "showing selective attachment towards their caregivers" in that the attachment between the children and the foster parents was "not as well developed as [Dr. Luby] would have liked to have seen." (T. 28). Continuing, Dr. Luby stated that "for a healthy developed child, we

would see definite selective attachment toward the primary caregiver ... there may be hugs or holding the caregiver.” (T. 29). Appellant contends that the reason that the children have been diagnosed and are “suffering” from RAD in Remission is because they were evaluated with the wrong person in the room.

Dr. Luby acknowledged that RAD is difficult to diagnose. (T. 65). Additional evidence gathered at trial further calls into question the validity of the diagnosis. Dr. Luby acknowledged that the children did not exhibit the typical signs of RAD such as aggressiveness, low frustration tolerance, they were not withdrawn or aphetic or nor did they show indiscriminate and aggressive behaviors or hypervigilence. (T. 53, 54, 63, 96). Neither did Dr. Luby see signs of more extreme symptoms such as head banging, hand flapping, or rocking movements. (T. 53, 54). In fact, Dr. Luby admitted that **none of the specific criteria used to diagnose RAD as set forth in the DSM manual are listed in her report regarding the children.** (T. 100).

Dr. Luby’s report did state that the children were the Inhibited Type “as manifest[ed] by excessively inhibited behavior.” (T. 61). When pressed on cross-examination to give an example of how the children exhibited this behavior, Dr. Luby agreed that an example would be that the 13 month actual age, 11 month old adjusted age, children were distracted by a toy. (T. 62).

Dr. Luby also expressed the opinion that the children showed “minimal stranger anxiety,” and offered this observation as an additional reason for the RAD

diagnosis. (T. 74). On cross-examination, Dr. Luby admitted that “Minimal stranger anxiety” is not listed as a criteria used to diagnose RAD. (T. 74-75).

The nail in the coffin on this questionable diagnosis comes from DFS itself. Kim O’Brien, a DFS caseworker, testified that after Dr. Luby made her diagnosis of RAD, even with Dr. Luby’s recommendation for the children to be followed closely, nothing was ever done. (T. 528). **The children were never taken to a psychologist for the purpose of following up or treating the RAD.** (T. 528-529). Kim O’Brien agreed that since the children saw Dr. Luby in July of 2001, nothing has ever been done since then with regards to the RAD up to and including on the date of trial. (T. 530). **The foster father testified that he had never heard of RAD nor had DFS told him to provide the children with any therapy.** (T. 328, 314).

Three other experts, including two who observed the children with Appellant, disputed the RAD diagnosis. The trial court found that Jean Louis Fischer, a marriage and family therapist, was “well qualified to give her testimony concerning the Attachment Disorder evidence that she’s going to give in accordance with this case.” (T. 617). In fact, Ms. Fischer works with the founders of Attachment Disorders in the country. (T. 699). Ms. Fischer testified that the twins did not suffer from Reactive Attachment Disorder (T. 628 – 629, L.F. 133, A. 31), based upon her review of the DFS and Dr. Luby’s notes, the criteria set forth by the DSM, and over twenty visit reports from the Heritage House. (T. 669). Ms. Fischer indicated that the children may have displayed a symptom once or

twice, but that for Reactive Attachment Disorder to be diagnosed it has to be pervasive and persistent for a period of months. (T. 629).

Dr. Dean L. Rosen⁹, a practicing Clinical Psychologist, observed *the children interacting with Appellant* in February of 2002. (T. 914). The trial court acknowledged “Dr. Rosen testified that he observed no signs of Reactive Detachment (sic) Disorder in the twins and felt that there was no basis to believe that the twins would suffer any harm if returned to their Appellant.” (L.F. 133). At that time Appellant had been allowed consistent and ongoing, if restricted, contact with the children for almost a year - one hour every other week, according to the visitation schedule set by DFS and the trial court. (A.S.L.F. 15-19, A. 79).

Dr. Rosen testified that he found the children to be comfortable with Appellant. (T. 915). Dr. Rosen found that Appellant responded to the children’s desire to play, their needs regarding runny noses, desires for food and that the children were focused on Appellant and paid little or no attention to the other observers in the room. (T. 915-916). Dr. Rosen found a “good indication there was a bond with [their] mother,” (T. 916), and that Appellant demonstrated appropriate parenting skills. (T. 923). Dr. Rosen testified that he concurred with

⁹ Curriculum Vita was admitted as Appellant’s exhibit TW – 22 (T. 913)(A. 233-38) and documents his experience with the urban poor. He has completed psychological evaluations since 1988 for the St. Louis County Court and has been a contract provider for DFS in St. Louis County and Jefferson County.

Dr. Randich's report, DFS' expert, that there would be no harm in returning the children to Appellant. (T. 923).

Dr. Daniel J. Cuneo¹⁰, Clinical Psychologist also questioned the RAD diagnosis. Along with Dr. Rosen, he *observed the children with Appellant*. (T. 1078). Dr. Cuneo testified that when he saw the children, they did not show signs of RAD. (T. 1098-99, L.F. 133). Dr. Cuneo testified that he has done approximately **two hundred** evaluations by observing the children, interviewing the parents, and interviewing all collateral information, and when appropriate, making diagnosis. (T. 1095). He found that the children played with and appropriately modeled Appellant's behavior. (T. 1080). He found that the children were comfortable, that Appellant set limits for the children and showed affection toward them, in return the children showed affection toward her. (T. 1085-1086).

There were no indications of Reactive Attachment Disorder of Infancy in either [K.A.W.] or [K.A.W.]. . . It is highly unlikely that these twins ever had a Reactive Attachment Disorder of Infancy. This is a pervasive disturbance and is not something that could be cleared up in two and a half months of supportive foster care." (TW Exhibit 6, A. 128-29).

Every expert who observed the children in the spring of 2002 found that either the children showed no current or ongoing signs of RAD, or were

¹⁰ Curriculum Via admitted as TW – 5 (T. 1077) (A. 110-27) which documents his extensive experience in observing children under the age of two years of age.

functioning as normally as two premature children would be at this stage in their life. Some of the experts went so far as to question the original diagnosis of RAD in light of their significant improvement demonstrated by the children.

It cannot be said that the finding by the trial court, that the children were suffering from RAD in remission, is supported by the evidence and therefore it cannot be said that there was clear, cogent and convincing evidence to terminate Appellant's parental rights.

ii. The evidence shows that the conditions which lead to the assumption of jurisdiction *no longer exist*, and there are no conditions present that are potentially harmful in nature to the children.

Many conditions have changed since DFS assumed custody, for Appellant and for her children. In *B.C.K.*, the Court of Appeals overturned a termination of parental rights decision because the trial court failed to recognize that the conditions that led to jurisdiction initially had changed. *B.C.K.*, 103 S.W.3d 319 (Mo. App. S.D. 2003).

In *B.C.K.*, mother had multiple challenges to her parenting ability. Mother was diagnosed bipolar with a borderline personality disorder, she had self-proclaimed substance abuse problems, lived a chaotic lifestyle, and had an unstable and unsafe living arrangement for herself and her children. *B.C.K.*, 103 S.W.3d at 322. Mother's parental termination of rights case began after DFS took custody of her children when she entered a treatment program. *Id.* DFS noted that

mother had lived in numerous places such as mobile homes, several different apartments, a group home and was in and out of shelters and friend's homes. *Id.* at 324. The trial court accepted DFS's recommendation and terminated her rights. *Id.*

The appeals court disagreed. The Appellate Court found important that DFS had not investigated mother's current status as of the date of trial. *Id.* at 324. DFS had no current knowledge or information of mother's improvements in regards to her parenting skills, therapy and counseling sessions and her improvements in coping skills. *Id.* at 325. DFS had relied on old information from their past reports.

The Appellate Court found that the evidence did not support the trial court's findings. Current information showed that mother participated in all of DFS services, she initiated additional ones on her own, and the medical professionals found that she was capable to care for her children. *Id.* at 330. The Appellate Court stated that "the conditions which led to the children being brought into foster care no longer existed and substantial evidence [[did] not exist to support a finding that [m]other was incapable of caring for her children at the time of trial." *Id.* at 330.

In this case as well, the conditions no longer exist that originally warranted foster care and there is no substantive evidence to support a finding that at the time of trial Appellant was incapable of caring for her children. Initially, DFS hired Dr. Susan Rand Randich, Ph.D. to evaluate Appellant's level of emotional adjustment

and ability to provide for the care and supervision of her children. Dr. Randich's Report of Psychological Evaluation (L.F. 54-61) was admitted into evidence as TW-21. In the report, Dr. Randich's Conclusions and Recommendations stated that:

[Appellant]'s perception and thought appear to be conventional and there is no evidence of any significant emotional disorder...[she] is an immature individual with longstanding problems in adjustment that are likely to have an effect on her ability to cope with the everyday problems of life...She expects to work and support herself and her children and she wishes to be a good parent...She has demonstrated poor judgment in a number of situations...[Appellant]'s decision to place [the children] was no doubt brought about the very considerable stress of coping with two premature infants as a single parent, while at the same time attempting to keep a job...Although [Appellant] displayed immaturity and made poor decisions regarding the children, **the current evaluation gives no evidence that she is an unfit parent or that she is incapable to caring for her children...[Appellant]'s difficulties in parenting are not substantially different from those of many other single parents caring for large families...From a physiological perspective, she appears to be an adequate parent, and there is no evidence that her parental rights should be terminated.** (emphasis added) (L.F. 58-60, A. 279).

Appellant, like mother in *B.C.K.*, had numerous challenges which she had successfully addressed at the point of trial. Appellant was given four specific items that DFS required her to complete before being reunited with her children. (T. 379 – 381). Jessica Sippy, the DFS caseworker testified that Mother completed each of the items; parenting program (T. 379), psychological evaluation (T. 380), regular visitation with the children (T. 381), and financially support the children at \$70 a month. (T. 381).

In regards to the parenting program, Appellant completed the parenting program offered at the Salvation Army Hope Center for Children. (T. 991). Laura Ellison, the instructor for the course, testified that Appellant attended all eight sessions, covering six topics; child development, feelings, communications, self-esteem, parenting, discipline, health and safety, stress management, and future planning. (T. 991). Ms. Ellison also testified that Appellant was “much more active, much more involved” compared to the other parents in the class. (T. 993).

In regards to the visitation with her children, Appellant visited her children every opportunity given to her. According to the visitation schedule recommended by DFS and approved by the trial court, Appellant was granted visitation one hour, every other week. (A.S.L.F. 15-19, A. 79). Appellate participated with the children in a consistent manner from April 21, 2001 until her last visit June 22, 2002. (T. 1895). Appellant had requested additional visitation times through DFS (T. 406, 1385) and through the court (L.F. 63, A.S.F.L. 24),

none of her requests were granted. (T. 407). DFS objected to any request Appellant made for additional visits. (T. 1385).

In regards to Appellants support of the children financially, Appellant was up to date in her support payments at the time of trial. (T. 500, 1369). Testimony revealed that Appellant was actually paying in advance for their future support at the time of trial. (T. 500, 1369).

Like mother in *B.C.K.*, Appellant completed each and every item DFS listed as necessary before reunification with her children could occur. In addition, like mother in *B.C.K.* Appellant initiated on-going therapy on her own. Appellant had been in ongoing therapy with Tish Fontana for several months at the date of trial. (Appellant's Exhibits TW 10 and TW-31, A. 132, 269-72). Ms. Fontana had several opportunities to observe Appellant with her children at the Heritage House during her visitation times. (T. 1126). Ms. Fontana found Appellant to be very interactive with her children, playing with them and hugging them. (T. 1126).

Further comparison between Appellant and mother in *B.C.K.* shows that like mother, Appellant had shored up community and family support at the date of trial. Much of DFS concern regarding Appellant came from the fact that she did not have the support needed to deal with the stressful situation of raising the children on her own. (L.F. 67). Multiple family members testified that they are ready willing and able to assist Appellant in regards to the children. (T. 1004, 1007-1008, 1010). Some have offered as much as a place to live if needed, other offered support to watch the children if Appellant needs assistance. (T. 1230-31).

Clearly, the conditions surrounding Appellant have changed since the assumption of custody of her children.

Likewise, the children's conditions have changed. Since the diagnosis of the children by Dr. Luby in 2001, multiple experts have seen and evaluated the children.¹¹ The two clinical psychologists who observed the children in February 2002 found that with only limited visitation with her, the children had rekindled the bond with Appellant. (T. 916, 1085-86). Both Dr. Rosen and Dr. Cuneo saw appropriate interactions between children and Appellant. (T. 923, 1080). The children had progressed in their development, although they continued to experience some delays as a result of their premature birth. (T. 1081). Appellant responded to their needs appropriately by playing with them and assisting with their attempts at verbalizing. (T. 917). Those same experts found that the children either showed no current or ongoing signs of RAD or were functioning as normally as two premature children would be at this stage in their life.¹²

¹¹ Specifically the court made reference to the fact that "it should be noted that Dr. Luby observed the twins in the summer of 2001 ... the other witnesses did not observe the twins until early spring 2002." (L.F. 133). Therefore, by the trial court's own statement, the condition of the children at the time of trial was better known by witnesses other than Dr. Luby.

¹² In her testimony, Dr. Luby admitted that she had not seen the children since her evaluation was concluded, she has no idea what kind of condition they were in at

Appellant and children have progressed beyond the conditions which led to the assumption of jurisdiction. This Court should find that Appellant and her children may be reunited because the conditions under which the assumption of jurisdiction took place do not still exist and at the time of trial there were not conditions which were potentially harmful for the children.

C. The evidence does not support the trial court's use of Sec. 211.447.4(6) as a ground to terminate Appellant's parental rights because she is fit to parent.

The trial court found that Appellant was unfit. (L.F. 119-120). As with the rationale for terminating her rights under Sec. 211.447.4(2)(c), the trial court held that Appellant was unfit because committed act of "emotional harm" against her children because she placed the children up for adoption. (L.F. 134) As discussed

the time of trial. (T. 79). Dr. Luby stated that she agreed with the statement that "if the children were bonded with their biological mother, if, in fact, there are attached to the biological mother, [placing them with her] would not be as traumatic," as moving them to another foster family. (T. 57). Dr. Luby agreed that she could not say that placing the children with the biological mother would be harmful. (T. 80). Dr. Luby went on to state that the limited amount of time DFS and the trial court had allowed Appellant to see the children would "not help the kids develop an attachment to her," and she agreed their restrictions would harm whatever attachment they did have over time. (T. 72).

above, placing one's children up for adoption does not constitute emotional abuse. Appellant contests each of the additional grounds for being found unfit in turn because the evidence does not prove she is unfit by clear, cogent and convincing evidence.

1. Appellant was found to be unfit because she was found to have exploited the children because she accepted gifts unrelated to reasonable adoption expenses.

Although Appellant has little in the way of material wealth, Appellant has always held the needs of her children above her own. In her efforts to get to know the prospective adoptive parents, she was offered and gratefully accepted the basic life-sustaining items such as food, shelter, and clothing for her children while she was in their presence. In the course of getting to know the two couples, Appellant agreed to accept some small token from them - a pair of earrings and some toys and clothes for her other children for Christmas¹³. Appellant was fully aware that she could not accept money for the twins, and the trial court made a finding that she did not sell the children on the internet nor did she receive any money for the failed adoption. (L.F. 132). Appellant accepted these items in the spirit in which

¹³ Although all testimony regarding the ethnic hair braid was that Appellant paid for it herself, the trial court unsupportedly found that Appellant accepted it in return for her children. (L.F. 119)

they were give – as “gifts.” The gifts were not in any way a motivating factor for placing her children up for adoption as demonstrated by her removal of the children from the Allen’s home when she perceived they no longer were committed to an open adoption.

2. Appellant was found to be unfit because she claimed the children were in her care when they were not, in order to qualify for greater public assistance benefits.

The fact that Appellant was found guilty of the non-violent crime of improperly receiving welfare benefits is not a valid reason to terminate her rights. To the contrary, the statute itself provides that a parent’s felony conviction only comes into play if the court finds that the conviction is of such a nature that the child will be deprived of a stable home for a period of years. Sec. 211.447.6(7). The trial court was not presented with evidence, nor did it find, that Appellant’s conviction in anyway would deprive the children of a stable home for one day, let alone for a period of years.

3. Appellant was found unfit because she failed to take prescribed medication while pregnant to prevent pre-term labor.

Imposition of tort liability on Appellants for causing their children prenatal injury is an unacceptable intrusions into a woman’s rights to privacy, autonomy, and bodily integrity in procreation matters as recognized in *Roe v. Wade* and other

cases. *Roe v. Wade*, 410 U.S. 113 (1973); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to be free from unwanted sterilization) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to obtain and use contraceptives).

It would be illogical and inconsistent with a pregnant woman's constitutional privacy rights to permit the Appellant to make decisions regarding abortion, and at the same time impose on her a duty under the law to protect the fetus from harm short of death. Thomas M. Fleming, Annotation, *Right of Child to Action Against Mother for Infliction of Prenatal Injuries*, 78 A.L.R.4th 1082 (1990). Holding Appellant to be unfit, as the trial court does, sets a precedent that a woman is subject to government sanctions for all the decisions that she makes or does not make during the course of her pregnancy. The imposition of such liability would render her a guarantor of the child's condition at birth and the State an adjudicator for each and every act or omission from the moment of conception until birth. *Id.*; *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988).

4. Appellant was found unfit because she failed to take the children to medical appointments as recommended by their physician.

Evidence at trial showed that the twins were discharged from the hospital on August 25, 2000. (L.F. 137). Someone other than Appellant made an appointment for the twins to see their physician on September 10, 2000. Appellant rescheduled and attended an appointment for the children on September 17, 2000. Between these dates, registered nurses visited the children at

Appellant's house on five occasions - August 26, August 28, August 30, September 5 and September 6, 2000 - to make sure the children were doing well. (L.F. 137). Although Dr. Strashun testified that it was important to see the children at the September 10 well-baby visit, he acknowledged that many single parents have trouble making appointments, that on many occasions parents miss and reschedule appointments, and that the fact that Appellant missed this appointment should not be a reason to terminate her parental rights. (T. 575).

5. Appellant was found to be unfit because she was overwhelmed and highly stressed with the birth of the twins.

Appellant does not contest that she was overwhelmed with the birth of the twins because of the care that was needed for them, the lack of support from the father of the children, and the needs of her other children. Appellant would think the State or the trial court would be hard pressed to find any normal person, in Appellant's shoes or financially better off, who would not feel overwhelmed trying to tackle the daily tasks of raising her family. This natural feeling should not be used as a grounds to finding her unfit and terminating her rights.

DFS's own expert, Dr. Susan Randich, states in her report that Appellant's "difficulties in parenting are not substantially different from those of many other single parents caring for large families. From a psychological perspective, she appears to be an adequate parent, and there is no evidence that her parental rights should be terminated." (L.F. 59). In addition, Appellant brings to this Court's

attention that **she was awarded joint custody of her daughter Nala by the same trial court that a month later terminated her rights to her twin daughters.**

(A.S.L.F. 46-57).

Appellant acknowledges that during the time she was struggling with the decision to place the children up for adoption, she did not see many options because of her financial situation and the lack of support from the father of the children and her family. Since the time of the adjudication and dispositional hearings and certainly by the time the trial court formally severed her parental rights, Appellant had grown in her ability to care for the children through parenting classes and therapy sessions. The trial court heard from witnesses that she now has the support she needs to care for the children as her family is willing to assist with the living arrangements of the children and the support of Appellant.

There were no statutory grounds for the trial court's decision to terminate Appellant's parental rights. The grounds relied on by the trial court were either unconstitutional, not a permitted statutory ground for termination, conduct within acceptable range of parental behavior, or contrary to the testimony of the State's own expert witnesses. (L.F. 54-61). There was no clear, cogent and convincing finding that Appellant's rights should have been terminated.

III. The trial court abused its discretion when it found that it was in the best interest of Appellant’s children to have their parent-child relationship severed with her because the court failed to make findings regarding subsections § 211.447.6(2)-(5) and the evidence does not support a finding in regards to § 211.447.6(1), (7).

A. The trial court erred when it failed to make findings as to subsections 211.447.6(2)-(5).

Appellant acknowledges that to succeed on this claim, she has the burden of showing that factors (2) – (5) were appropriate and applicable to her termination proceeding. *K.C.M.*, 85 S.W.3d at 695. And in order to show resulting prejudice, as she must to succeed on her claim, she must also show that the factor would favor her in retaining her parental rights to K.A.W. and K.A.W. *Id.*

In *In re N.M.J.*, 24 S.W.3d 771, 783 (Mo. App. W.D. 2000), the appellate court held that:

If a factor enumerated in Sec. 211.447.6 is appropriate and applicable, in that there was evidence presented on it at trial that would arguably favor the parent, and the trial court fails to make a finding on that factor, then we are required to reverse and remand for the court to make the requisite finding of that factor and then determine whether to terminate in light thereof.

The court went on to explain its rationale, stating that since the court is exercising an awesome power when it determines termination of parental rights, strict compliance with the statute authorizing the use of that power is mandated. *Id.*; *In re C.M.D.*, 18 S.W.3d 556, 561 (Mo. App. W.D. 2000). In that regards, Sec. 211.447.6 requires a specific finding on any appropriate and applicable factor enumerated in the subsection. *K.C.M.*, 85 S.W.3d at 695.

1. Subsection (2), the extent to which Appellant has maintained regular visitation with the children, is appropriate, applicable, and favors Appellant in her termination of parental rights case.

It has been determined that regular, consistent, and ongoing visitation between parent and child is an appropriate and applicable factor for the trial court to consider in a termination of parental rights case. *K.C.M.*, 85 S.W.3d at 695.

Appellant's children were taken into DFS custody April 18, 2001. (L.F. 107). DFS recommended and the court adopted a visitation schedule for Appellant consisting of one hour, every other week. (A.S.L.F. 15-19). Appellant participated in visiting her children from April 21, 2001 until the last visit she was allowed on June 22, 2002. (T. 1895). For over fourteen months, Appellant consistently and actively participated in visiting her children. On numerous occasions, Appellant requested additional visits with children but was repeatedly denied by DFS and the trial court. (L.F. 63, A.S.L.F. 24).

Despite the refusal by DFS and the court to increase the visitation schedule, the children have continuously shown growth and increased attachment in their relationship toward Appellant and she has demonstrated her growth and attachment to her children. Testimony given by Dr. Rosen, Dr. Cuneo, and Ms. Fontana verified that Appellant and the children played appropriately together, that Appellant set boundaries for the children, attended to their needs, and offered and received affection from the children.

Despite Appellant's ongoing participation in the lives of her children, the trial court found Appellant's evidence on these matters to be "irrelevant" and stated that the court did not see its "applicability" to Appellant's parental termination rights case. (L.F. 109). This ruling by the trial court is in direct opposition to the standard set forth in *K.C.M.*, where the appellate court found that ongoing, consistent, and regular visitation by appellant should have been a factor that the trial court considered in its termination decision. *K.C.M.*, 85 S.W.3d at 695.

The trial court erred in failing to make a finding regarding Appellant's ongoing, consistent and continuous beneficial participation in the children's lives through the visitation opportunity she was allowed.

2. Subsection (3), the extent of support of Appellant's children, is appropriate, applicable, and favors Appellant in her termination of parental rights case.

For the first two months of their lives, the children remained in the hospital due to complications from their premature birth. (T. 1452). Appellant visited on an almost daily basis and went so far as to try to express milk for the children while they were in the hospital. After they were released, Appellant has always provided for the children's shelter, clothing, food, and other necessities.

After the children were taken into custody, Appellant was ordered to pay support for her children in the amount of \$70 a week. As of the date of trial, Appellant was found to be paid in full, in fact she had paid amounts for the future support of the children as well. (T. 500)

Despite Appellant's ongoing financial support and participation in the lives of her children, the trial court found her evidence on this matter to be "irrelevant" and stated the trial court did not see "its applicability" to Appellant's parental termination case. (L.F. 109). This ruling is also contrary to the standard set forth in *K.C.M.* wherein Appellant found that plaintiff's financial support of her child while in DFS custody was appropriate and applicable information that the trial court should have considered in its termination decisions. *K.C.M.*, 85 S.W.3d at 697.

The trial court erred in failing to make a finding regarding Appellant's financial support of her children while in foster care.

3. Subsection (4), whether additional services would be likely to bring about lasting parental adjustment, is appropriate, applicable, and favors Appellant in her termination of parental rights case.

The record shows that from the point the children were taken into DFS custody, concurrent planning was initiated by DFS. As is DFS protocol, one planned course of action was to return of the children to Appellant's custody, and the other was to make the children ready for adoption through the DFS foster system.

The initial plan, to reunify Appellant with the children, enumerated specific items for Appellant to accomplish before the return of the children could occur. DFS case workers acknowledged that Appellant had accomplished each of these requirements. (T. 1367-69). First, Appellant was to complete a parenting program. She did so by attending multiple classes offered by the Salvation Army Hope Center for Children. (T. 990-92) (A. 69-70). The second requirement was to submit to a psychological evaluation which Appellant accomplished when she was evaluated by Dr. Randich. (L.F. 54-61). The third was to visit the children regularly at the Heritage House which she did between the dates of April 21, 2003 and June 22, 2003. The last item was to financially support the children which she did. (T. 500). Persons that worked with Appellant during these reunification phases commented on her dedication, participation and completion of each phase. (T. 993). In addition to these services, Appellant, on her own initiative, attended additional counseling services. (T. 1502, 1620-21).

Appellant has remedied each and every deficiency DFS enumerated for her and has sought additional counseling on her own. She has the support from her family, community and professionals to care for the children when they are returned. **DFS and the trial court kept her from further bonding with the children and then used the weakness of that bond against her.** Although, Appellant contends that the additional visits that she had requested from the beginning of the children's stay in foster care would have even further strengthened their bond.

The trial court similarly found Appellant's evidence on this matter to be "irrelevant" and failed to see "its applicability" to Appellant's parental termination case. (L.F. 109). The trial court erred in refusing to consider the substantial evidence of Appellant's compliance with the reunification plan and her other improvements that would have been likely to bring about a lasting parental adjustment sufficient to enable a return of her children.

5. Subsection (5), Appellant's ongoing interest in her children, is appropriate, applicable and favors Appellant in her termination of parental rights case.

Given the nature of the evidence in the record that Appellant consistently and continuously participated in visitation with the children, that she provided financial support for the children while they were in foster care, and actively pursued to increase her relationship with the children during the course of the foster placement, the fact that the trial court found this evidence presented on

behalf of Appellant as “irrelevant” and “not applicable” (L.F. 109) is in direct opposition of the standard set in *K.C.M.*, 85 S.W.3d at 698. This evidence is appropriate, applicable and favors Appellant’s claim in her termination of parental rights case and the trial court should have made a finding to that extent. *Id.*

Appellant requests that this court hold that the trial court should have made a finding in regards to Appellant’s interest and commitment to the children.

B. The evidence does not support a finding of § 211.447.6(1), (7).

1. The evidence does not support a finding that the children have no emotional ties to Appellant.

Initially, Appellant would like to bring to the attention of this Court, that a motion was submitted by council for the trial court to observe on its own the bonding existed between the children and Appellant. Appellant knew that the children and she retained a bond. Likewise, Appellant knew that DFS had been trying to break the existing bond with their overly restrictive visitation schedule. Appellant was open for anyone and everyone to see the relationship the children and she shared, so much so, that trial counsel filed a Motion to Produce the Children on March 7, 2003. (A.S.F.L. 25-26, A. 86-87). It was Appellant’s desire that the trial court see for itself the bond, in chambers, during some point in the trial. The trial court denied this request.

Dr. Rosen, who observed the children interacting with Appellant in February of 2002, found that the children were comfortable with her. (T. 915). Dr. Rosen found that Appellant responded to the children's desire to play, their needs regarding runny noses, desires for food and that the children were focused on Appellant during the visit. (T. 915-916). Dr. Rosen found that there was "a good indication there was a bond with [their] mother." (T. 916). Dr. Cuneo, testified that he found that the children played appropriately with Appellant, she set boundaries for the children and they exchanged appropriate affection with one another. (T.1085-1086). Ms. Fontana placed in her report that the children played appropriately, exchanged affection and appeared to have a bond between them. (A. 132).

Appellant contends that a finding that there is no bond between Appellant and her children is not supported by the evidence and therefore Appellant prays that this Court reverse and remand for a hearing consistent with this Court's rulings.

2. The evidence does not support a finding that the placement of children up for adoption constitutes "severe and recurrent acts of emotional abuse toward" the children.

Appellant refers this Court to her argument made in section B. 1. of her brief.

Conclusion

Appellant prays that Court find that Sec. 211.447.2(1) and Sec. 453.110 be held unconstitutional. In addition Appellant prays that this Court find that the evidence does not support a find that any statutory ground was proven by clear, cogent and convincing evidence. Likewise, Appellant prays that this Court find that the trial court abused discretion when it held that Appellant and her children's legal bond should be permanently severed.

Respectfully submitted,

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Certification of Compliance

Comes now counsel for Relator and certifies that:

1. The brief complies with Rule 55.03 in that it is signed, not filed for an improper purpose, the claims are warranted by existing law, and the allegations are supported by evidentiary support,
2. The brief complies with Rule 84.06(b),
3. The number of words contained in the brief is approximately 18,221 as listed by the word processor the document was prepared on.

4. The disk has been scanned for viruses and it is virus-free.

Chris E Rollins, #44832