

characterized as "delusional" statements to CMH staff. Mother reported that she and Q.A.H. were raped "in their sleep." Mother later explained that this could have occurred without her knowing at the time because she and Q.A.H. may have been drugged by sedatives administered through the air vents of her home. Mother further reported to CMH staff that she thought someone had placed an electronic listening device in Q.A.H.'s vagina. While at CMH, Mother also requested that Q.A.H. be circumcised and that Q.A.H.'s vagina be sewn closed. Additionally, Mother told CMH staff that Q.A.H., at only five months old, could speak in full sentences. Following this incident, the court granted custody of Q.A.H. to the Jackson County Division of Family Services, and the child was eventually placed in a foster home.

In September 2009, Mother began participating in therapy and receiving psychiatric services at The Guidance Center in Leavenworth, Kansas. Since that time, at least three mental health professionals have reached differing diagnoses concerning Mother's mental condition, including:

- (1) On September 3, 2009, Patrick Nicholas, a pre-doctoral intern at The Guidance Center, conducted an initial clinical assessment of Mother and diagnosed her with "Adjustment Disorder with Mixed Anxiety and Depressed Mood." On March 2, 2010, Nicholas conducted another psychological evaluation of Mother and diagnosed her with Persecutory Type Delusional Disorder and Personality Disorder.
- (2) On October 7, 2009, William A. McDonnell, a licensed psychologist unaffiliated with The Guidance Center, conducted a court ordered psychological evaluation of Mother and diagnosed her with Psychotic Disorder and possibly Post Partum Psychosis.

(3) Dr. Stanley Golan, a psychiatrist at The Guidance Center who had seen Mother every two to three months since October 2009 for medication management, stated at his deposition in August 2012: "[Mother's] current diagnosis is posttraumatic stress disorder, perhaps a generalized anxiety disorder, a mild depression. I still think there's a possibility of a mild delusional disorder."

In September 2009, Mother began having weekly supervised visits with Q.A.H. The parent aide who supervised the visits between Q.A.H. and Mother set the following goals for Mother: (1) understand the developmental stages of a child; (2) gain and maintain stable employment; (3) provide for Q.A.H.; and (4) obtain her own transportation. By February 2010, Mother was allowed unsupervised visits with Q.A.H., which she arranged on her own with the foster family.

In February 2010, after Mother had made progress toward her goals, the parent aide reported that "[Mother] is ready to be there for [Q.A.H.] emotionally, mentally, and can support [Q.A.H.]." The parent aide recommended that Q.A.H. be reunited with Mother. In May 2010, Mother regained custody, but Q.A.H. was removed from the home again in July 2010 after Mother failed to comply with a court order regarding Father's visitation. On July 26, 2010, Q.A.H. was placed in the foster care of C.W.M. and C.D.M. ("Foster Parents").

In August 2010, Mother resumed supervised visits with Q.A.H. and continued to work on her parenting goals with the parent aide. Reports from the parent aide stated that the "visits overall do go well," but also noted periodic concerns about Mother's behavior.

The parent aide reported that Mother seemed less open to advice after Q.A.H. was returned to foster care in July 2010. The most significant situation in which Mother demonstrated a stubborn attitude involved a food allergy Q.A.H. was reported to have. Mother was informed that Foster Parents had to take Q.A.H. to the emergency room due to an allergic reaction to either strawberries or apricots. Despite this information, Mother fed Q.A.H. strawberries on three separate occasions, maintaining that she did not believe Q.A.H. was allergic to strawberries. The first two times, Q.A.H. did not suffer any allergic reaction. The third time, the parent aide reported that "[Q.A.H.] did end up having a few splotches on her face, but nothing more significant occurred." Mother subsequently agreed to stop feeding Q.A.H. strawberries.

The parent aide occasionally reported that Mother provided Q.A.H. with various items, such as a potty training kit and clothes. However, Foster Parents testified that the clothes Mother provided were too small for Q.A.H..

The parent aide reported that she could tell Mother had continued to work towards her goal of understanding Q.A.H.'s developmental stages when Q.A.H. was returned to her custody. However, the parent aide also noted some behavior indicating that Mother still had unrealistic developmental expectations for Q.A.H., such as expecting Q.A.H. to stay focused on one activity until complete. Additionally, in the months leading up to the termination hearing, Mother began talking to Q.A.H. about the case in a way in which the parent aide described as "adult conversations."

The parent aide also set a new goal for Mother to obtain psychiatric help and take any medication prescribed. The parent aide acknowledged that Mother was already under the care of Dr. Golan, but she felt that Mother was "still showing some

odd behavior." As an example of Mother's "odd behavior," the parent aide reported that, on November 1, 2010, Mother asked the parent aide if she thought it was possible for people to read minds and said that she "need[ed] to talk with someone that does have that ability so she can ask what the starting signs are so she can prepare herself and learn to control it." On November 14, 2010, Dr. Golan began prescribing mental health medications for Mother.

On September 25, 2011, Mother gave birth to her son, J.N., in Kansas.¹ J.N. was immediately placed into the custody of the State of Kansas due to the on-going Missouri proceedings concerning Q.A.H. Mother subsequently began participating in parenting services provided by Kansas. She received positive reports from the Kansas service providers, and J.N. was returned to her care and custody within a few months.

On September 9, 2011, Foster Parents filed a petition to adopt Q.A.H. Father executed a "Consent to Termination of Parental Rights and Consent to Adoption" for Q.A.H. On November 17, 2011, Foster Parents filed an amended petition to adopt Q.A.H. without Mother's consent under Section 453.040(7) and to terminate Mother's parental rights under Section 211.447.²

The case was assigned to a Family Court Commissioner for hearing on August 31, 2012. Prior to the hearing, the Commissioner and the parties agreed to bifurcate the proceeding, dealing first with the termination action and then the adoption. Thus, although evidence was submitted on both the termination and adoption issues, the

¹ J.N. and Q.A.H. have different fathers. J.N.'s father was physically violent towards Mother, and they are no longer in a relationship.

² All statutory references are to the Revised Statutes of Missouri 2000, as updated by the Cumulative Supplement 2012, unless otherwise noted.

Commissioner deferred ruling on the adoption "unless or until parental rights were in fact terminated and only after appeal on that decision was finally resolved."³

Following the hearing, the Commissioner made findings and recommended termination on grounds of abuse and neglect, Section 211.447.5(2); failure to rectify, Section 211.447.5(3); and parental unfitness, Section 211.447.5(6).⁴ The circuit court subsequently adopted the Commissioner's findings and recommendations and thereupon entered a judgment terminating Mother's parental rights to Q.A.H. Mother appeals.

STANDARD OF REVIEW

Section 211.447 authorizes the termination of parental rights if the trial court finds: (1) that at least one of the grounds for termination exists; and (2) that termination is in the best interests of the child. *In the Interest of C.F.C.*, 156 S.W.3d 422, 426 (Mo. App. 2005). The burden of proving grounds for termination rests on the petitioner. *In the Interest of Q.M.B. and Q.T.P.*, 85 S.W.3d 654, 658 (Mo. App. 2002). Where the trial court finds multiple grounds for termination, any one of those grounds is sufficient to sustain the judgment on appeal, so long as that ground was proven by clear, cogent, and convincing evidence. *In the Interest of M.W.S.*, 160 S.W.3d 435, 437 (Mo. App. 2005). Clear, cogent, and convincing evidence is that which instantly tilts the scales in favor of termination when weighed against the evidence in opposition; and the finder of fact is left with the abiding conviction the evidence is true. *In the Interest of A.S.W.*, 137

³ A judgment terminating parental rights under Section 211.447 is final and appealable, even while an adoption remains pending under Section 453.040. *In the Interest of G.M.T.*, 965 S.W.2d 200, 201-02 (Mo. App. 1998).

⁴ The circuit court did not cite to Chapter 211 in its judgment. However, the language used by the court tracks the bases for termination set out in Section 211.447.5(2), (3), and (6).

S.W.3d 448, 453 (Mo. banc 2004).

We will reverse the judgment only if we conclude that it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The facts and reasonable inferences are viewed in a light most favorable to the judgment, with due regard given to the trial court's determination of witness credibility. *In the Interest of B.S.B. and B.A.B.*, 76 S.W.3d 318, 324 (Mo. App. 2002).

The termination of parental rights interferes with "one of the oldest and most fundamental liberty interests guaranteed by the Constitution" — freedom from governmental interference with family and child rearing. *In the Interest of L.J.D.*, 352 S.W.3d 658, 662 (Mo. App. 2011) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). Consequently, "we closely review a trial court's findings of fact and conclusions of law and strictly construe statutes that provide for the termination of parental rights in favor of the preservation of natural parents and the parent-child relationship." *Id.*

ANALYSIS

In her three points on appeal, Mother contends the circuit court erred in terminating her parental rights because none of the statutory grounds for termination were supported by clear, cogent, and convincing evidence. The termination judgment was based on the court's findings on three statutory grounds:⁵ (1) abuse and neglect,

⁵ Our review of this case has been unnecessarily complicated by deficiencies in the trial court's judgment, which adopted the Commissioner's Findings and Recommendations. The judgment includes a listing of seventy-seven paragraphs of findings without reference to a specific statutory ground on which the findings may be relevant. At the end of the judgment, without actually citing to any statute regarding termination of parental rights, the court makes conclusory statements that track the language of subsections (2), (3), and (6) of Section 211.447.5. Better practice dictates that the court should separately identify the specific statutory grounds for termination and the facts that support the judgment with regard to each statutory ground.

Section 211.447.5(2); (2) failure to rectify the conditions that led to the assumption of jurisdiction, Section 211.447.5(3); and (3) parental unfitness due to a consistent pattern of abuse, Section 211.447.5(6). We must determine whether any of these statutory grounds for termination were supported by clear, cogent, and convincing evidence.

I. Abuse and Neglect, Section 211.447.5(2)

Section 211.447.5(2) provides for termination of parental rights for abuse and neglect based on proof of the following:

The child has been abused or neglected. In determining whether to terminate parental rights pursuant to this subdivision, the court shall consider and make findings on the following conditions or acts of the parent:

(a) 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;

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

(c) A severe act or recurrent acts of physical, emotional or sexual abuse toward the child or any child in the family by the parent, including an act of incest, or by another under circumstances that indicate that the parent knew or should have known that such acts were being committed toward the child or any child in the family; or

(d) Repeated or continuous failure by the parent, although physically or financially able, to provide the child with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for the child's physical, mental, or emotional health and development.

The four factors in subparagraphs (a) – (d) "are simply categories of evidence to be considered along with other relevant evidence, rather than separate grounds for termination in and of themselves." *In the Interest of S.M.B., Jr.*, 254 S.W.3d 214, 220 (Mo. App. 2008). "Nevertheless, proof of one such factor is sufficient to support termination on the statutory abuse or neglect ground." *Id.*

In the instant case, the circuit court found that factors (a) mental condition, and (d) failure to provide for child, supported termination of Mother's parental rights.

A. Mental Condition

In terminating Mother's parent rights for abuse and neglect, the circuit court found that Mother has a permanent mental condition that renders her "unable to knowingly provide [Q.A.H.] the necessary care, custody, and control." Specifically, the court found that Mother "has delusions that then become her reality." In reaching its conclusion regarding Mother's mental condition, the circuit court discussed the 2009 CMH incident at great length. Yet, the court ultimately concluded that the CMH incident was not an isolated event, rather it was merely when Mother's "delusional behavior . . . first came to light." The court went on to conclude that Mother's delusional behavior "clearly presents a danger to [Q.A.H.]."

Mother does not dispute that she was suffering from delusions on August 22, 2009, when she took Q.A.H. to CMH. She argues, however, that the court erred in failing to consider evidence regarding her mental condition as it existed at the time of termination in August 2012 and in failing to identify a causal link between Mother's mental condition and harm to Q.A.H. We agree.

In determining whether a mental condition warrants termination of a parent's rights, the trial court must analyze three factors:

(1) documentation — whether the condition is supported by competent evidence; (2) duration — whether the condition is permanent or such that there is no reasonable likelihood that it can be reversed; and (3) severity of effect — whether the condition is so severe as to render the parent unable to knowingly provide the child necessary care, custody or control.

K.A.W., 133 S.W.3d at 14. "A mere finding of even severe mental illness is insufficient. A termination of parental rights on grounds of mental illness requires substantial evidence that the incapacity is so severe that it renders the parent incapable of providing minimally acceptable care." *L.J.D.*, 352 S.W.3d at 664.

Additionally, "evidence of abuse or neglect sufficient to support termination must 'be based on conduct at the time of termination, not just at the time jurisdiction was initially taken.'" *In the Interest of C.A.L.*, 228 S.W.3d 66, 72 (Mo. App. 2007) (quoting *K.A.W.*, 133 S.W.3d 1 at 10). The evidence must "clearly establish Mother's *current* mental health status and how that status impacts her *present and future* ability to adequately parent [Q.A.H.]." *In the Interest of C.W.*, 211 S.W.3d 93, 100 (Mo. banc 2007) (emphasis added).

Here, the evidence cited by the court in terminating Mother's parental rights under Section 211.447.5(2)(a) failed to meet this standard. First, none of the testimony or medical documentation provided substantial evidence of Mother's mental condition *at the time of termination*. The court based its finding largely on the court ordered psychological evaluation conducted by McDonnell in October 2009. McDonnell's evaluation is not reliable evidence of Mother's mental condition at the time of termination, which occurred almost three years later. See *In the Interest of K.M. and*

J.M., 249 S.W.3d 265, 272 (Mo. App. 2008) (a psychologist's evaluation based on information learned nineteen months before the termination hearing was not clear, cogent, and convincing evidence of Parents' mental condition). This is especially true considering the various mental health services Mother has received since McDonnell's evaluation, including therapy and medication management.

Additionally, nothing in McDonnell's report indicates that Mother's condition was untreatable or permanent. In fact, McDonnell noted in his report that Mother would benefit from psychiatric follow-up and individual therapy and that "custody decisions should be evaluated based on [Mother's] progress and emotional stability." Such recommendations suggest that the severity of Mother's mental condition — at the time McDonnell evaluated her — had the potential for future improvement. See *Id.*

In its finding regarding Mother's mental condition, the court cited, in addition to McDonnell's evaluation, Mother's statement to the parent aide in November 2010, suggesting a belief that she was developing an ability to read minds. The court also cited several excerpts from Nicholas's March 2010 psychological evaluation of Mother. However, none of this evidence establishes Mother's current mental condition because it lacks the same temporal proximity to the 2012 termination hearing as McDonnell's evaluation.

The only information relied on by the court even remotely pertaining to Mother's condition at the time of termination was Mother's demeanor at the termination hearing. The court stated in its findings: "[D]uring approximately 75% of the trial the mother smiled, grinned or made exaggerated expressions, which affect is quite unusual in a termination of parental rights proceeding, but is consistent with the mental health

diagnosis given by Dr. McDonnell." This observation alone does not constitute reliable and substantial evidence on the critical question of Mother's present mental condition.

Second, none of the evidence relied on by the court provided a basis for the required finding that Mother's mental condition was so severe that it rendered her incapable of providing minimally acceptable care for Q.A.H. "[A] diagnosis of mental illness does not *per se* render a parent unfit or justify, by itself, a judicial determination of neglect or abuse." *In the Interest of A.M.F. and D.R.F.*, 140 S.W.3d 201, 207 (Mo. App. 2004). "Termination of parental rights should not be granted on account of mental illness unless it is shown by clear, cogent and convincing evidence that [the child] is harmed or is likely to be harmed in the future." *In the Interest of D.L.M.*, 31 S.W.3d 64, 69–70 (Mo. App. 2000).

There is no evidence in the record that Q.A.H. was harmed as a result of Mother's mental health issues. In fact, the child was reported to be "very clean and neat" and "healthy" in 2009 when Mother took her to CMH and made delusional statements that triggered the initial investigation of parental fitness. The Division's only concern at that time related to the nature of Mother's statements; there was no indication that Q.A.H. had been injured. While the statements were alarming, it is difficult to see how Q.A.H. was harmed by Mother's delusions, especially in light of the fact that the delusions only prompted Mother to seek care for Q.A.H.

Furthermore, seven months after McDonnell evaluated Mother, the circuit court approved Q.A.H.'s return to Mother's custody. Thus, we find it significant that in 2010 — when Mother temporarily regained custody of Q.A.H. — the court evidently concluded that the CMH incident and McDonnell's evaluation did not provide a basis for

finding that Mother's mental condition rendered her unfit to parent Q.A.H. See *In the Interest of S.M.H.*, 160 S.W.3d 355, 372 (Mo. banc 2005). The court later removed the child from Mother's custody due to her non-compliance with Father's court-ordered visitation and not any specific concern about her mental health.

Finally, the court failed to adequately address the implications of Mother's mental condition on the likelihood of future harm to Q.A.H. In order to support termination of parental rights, a trial court must conduct a "prospective analysis with some explicit consideration of whether past behaviors indicate future harm." *In the Interest of J.S.W.*, 341 S.W.3d 881, 886 (Mo. App. 2011) (quoting *C.W.*, 211 S.W.3d at 98–99). Here, the only arguable consideration of whether Mother's mental condition indicated a likelihood of future harm to Q.A.H. was with regard to Mother's belief that Father was sexually violent towards her. Mother claimed that she did not comply with the visitation order in 2010 out of fear. Mother alleged that Father raped her within four hours of when they first met and that the remainder of their five-month relationship was sexually violent. Mother claimed that she thought she was to supervise Father's visits with Q.A.H. — as opposed to a parent aide — and, therefore, she did not comply with the visitation order because she was afraid of Father.

In its judgment terminating Mother's parental rights to Q.A.H., the circuit court found Mother's allegations regarding Father's alleged abuse to be "totally incredible." The court went on to find that Mother's belief "would likely be communicated to the child at some point . . . , i.e. to be made to believe that she was conceived by rape when indeed she was not. Neither this child nor any child should have to bear the burden of

such false information about their biological parent."⁶ Such a finding is far too speculative to satisfy the legal standard of a clear, cogent, and convincing link between Mother's mental condition and the likelihood of future harm to Q.A.H. See *In the Interest of X.D.G.*, 340 S.W.3d 607, 618 (Mo. App. 2011) ("The termination of a fundamental right must be based on verifiable facts; it cannot be based on speculation.").

In sum, our review of the record reveals no substantial evidence that Mother's mental condition at the time of termination rendered her unable to provide for the necessary care of Q.A.H. Moreover, the court's findings are against the weight of the evidence which indicated that Mother's *current* mental health status did not render her unfit to parent Q.A.H..

At the termination hearing, through the testimony of Dr. Golan and Katherine Kuykendall, Mother presented evidence concerning her current mental condition and its implications on her ability to parent. At his deposition taken just four days before the hearing, Dr. Golan testified: "[Mother's] current diagnosis is posttraumatic stress disorder, perhaps a generalized anxiety disorder, a mild depression. I still think there's a possibility of a mild delusional disorder." Dr. Golan stated that, "to [his] knowledge" the CMH incident was an isolated event.

The court concluded that Dr. Golan was "wrong," finding that the CMH incident was not an isolated event, but was merely when Mother's "delusional behavior . . . first

⁶ The court also implied a concern for Mother's ability to properly manage her medical condition, finding: "[T]his case came under jurisdiction in August of 2009, however, per The Guidance Center records the natural mother was not willing to take recommended medication until November 2010." However, this finding fails to explicitly consider the potential for future harm. More importantly, as to this finding, the court mischaracterized the evidence. Dr. Golan testified that, before Mother began taking medication, he "gave her the *option if she felt* she would benefit." (Emphasis added). Dr. Golan further testified that he was completely comfortable with Mother's initial decision to not take any medication.

came to light." However, in making its own conclusion that Mother's delusional behavior extended beyond the CMH incident, the court ironically relied on Dr. Golan's testimony, stating: "[Mother] has delusions that then become her reality. One of her therapists confirmed this." Dr. Golan was the "therapist" to whom the court was referring, but the court's finding is a mischaracterization of Dr. Golan's testimony.

In explaining the general nature of a delusional disorder, Dr. Golan agreed that when a person suffers from a delusion, the delusion is usually "fixed;" the delusion becomes the person's reality. Thus, while Dr. Golan acknowledged that Mother might continue to believe the substance of the reports she made at CMH, his testimony did not provide a basis for the court's conclusion that Mother's delusions extend beyond those revealed at CMH. Dr. Golan clearly opined that the CMH incident was isolated in the sense that he was not aware that Mother suffered from any other delusions after 2009.

Dr. Golan also testified that, even though a person's delusions can be fixed, the person is "usually able to function with them" Dr. Golan acknowledged that a person suffering from all the disorders he diagnosed Mother as having could "[p]ositively" be a good parent. As to Mother specifically, Dr. Golan testified: "I think she's done very well. You know, you can have these diagnoses and be symptom free, and I think she is doing very well on her current therapy and medications." Dr. Golan opined that "[Mother]'s symptoms do not interfere with her parenting and that she is able to adequately care for Q.A.H."

Kuykendall, a therapist at The Guidance Center, testified that she had met with Mother regularly since June 23, 2011. Kuykendall's most recent session with Mother

occurred the day before the termination hearing. Kuykendall testified that Mother has a positive long term prognosis. Kuykendall stated that the CMH incident "seemed to be something episodic." Additionally, while Kuykendall was unwilling to conclude that Mother would not have any delusions in the future, she did state that Mother had not had any delusions while under her care for the past year.

Mother also presented evidence of her current care and custody of Q.A.H.'s half-sibling, J.N., through the testimony of service providers involved in J.N.'s case in Kansas. Peggy Hitchcock, J.N.'s court-appointed special advocate, testified that she had "constant[]" contact with Mother and J.N. beginning in October 2011 until approximately two months before the termination hearing. Hitchcock testified that, based on her observations of Mother and J.N., she had no concerns about their parent-child interactions.

Lindsay Johnson, an Intensive In-Home Therapist with KVC Behavior Healthcare, began meeting with Mother and J.N. in January 2012 when J.N. was returned to Mother's care. Johnson testified that she met with Mother and J.N. regularly, the most recent meeting occurring the day before the termination hearing. Johnson testified that Mother "has continued to prove a nurturing, loving environment and had met all of [J.N.'s] needs." Johnson also stated that, in her professional opinion, Mother was able to competently parent J.N. By the time of the termination hearing, Mother had been awarded full custody of J.N. and the Kansas case regarding J.N. had been closed.

Mother asserts that "[n]o better evidence could exist showing that Mother can care for [Q.A.H.] than the fact that she is currently caring for J.N." The circuit court

discounted the evidence concerning Mother's care and custody of J.N., reasoning that "the Kansas Court may well not have been provided access to the information from Missouri service providers in the case of [Q.A.H.]." While we would agree that the Kansas court's determination of Mother's parental fitness does not preclude a finding that she cannot care for Q.A.H., we do find Mother's current care and custody of J.N. probative of her ability to care for Q.A.H. See *K.A.W.*, 133 S.W.3d at 15. The evidence is particularly persuasive given the lack of proof to the contrary.

Under our standard of review, we must resolve conflicting evidence in favor of the trial court's judgment. "However, the standard of review also requires reversal unless the trial court's decision is supported by evidence that 'instantly tilts the scales in favor of termination *when weighed against the evidence in opposition*' and leaves the fact finder with the conviction that the evidence is true." *L.J.D.*, 352 S.W.3d at 666 (quoting *K.A.W.*, 133 S.W.3d at 12). Applying this standard, we weigh the evidence relied on by the circuit court, which wholly failed to sufficiently establish Mother's mental condition at the time of termination, against the contrary evidence set forth herein. Based on such review, and given the requirement that all statutes providing a basis for termination of parental rights be strictly construed in favor of preserving parental rights, we cannot conclude that there was substantial evidence that Mother has a permanent mental condition so severe as to render her incapable of providing Q.A.H. with minimally acceptable care. Accordingly, because there was insufficient evidence to support the statutory ground for termination set out in Section 211.447.5(2)(a), the circuit court erred in terminating Mother's parental rights on that basis.

B. Failure to Provide Support

The circuit court also found that Mother abused and neglected Q.A.H. by failing to provide support. Section 211.447.5(2)(d) allows for termination of parental rights when there has been "[r]epeated or continuous failure by the parent, although physically or financially able, to provide the child with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for the child's physical, mental, or emotional health and development."

Mother contends the evidence and the court's findings are insufficient to support termination of parental rights on this basis. The court's conclusion that Mother, although able to do so, "repeatedly or continuously" failed to provide for Q.A.H. was primarily centered on Mother's failure to pay child support. "A parent has the responsibility to provide financial support even while the child is in the custody of the Children's Division and even if no support has been ordered." *In the Interest of G.G.B., C.T.B., and T.J.B.*, 394 S.W.3d 457, 474 (Mo App. 2013). The record indicates that Mother attempted to make a child support payment once, but the check was returned due to "no response from payor."

At her deposition, Mother agreed that she was financially able to pay child support. Mother said she did not pay any support because her parent aide and the Department of Social Services instructed her not to do so. While the court did not find Mother's statement regarding *the parent aide* to be credible, a letter from Social Services was admitted into evidence at the hearing, which stated in pertinent part: "[Child Support Enforcement] will not be pursuing child support for [Q.A.H.] at this time. If at some point in the future Children's Division asks that we pursue for child support and medical support, [Child Support Enforcement] will again review your case and

proceed accordingly. Your case is now closed." Social Services sent Mother the letter during the brief period of time Q.A.H. was returned to Mother's custody in 2010. There was no evidence that Mother received correspondence from Social Services after Q.A.H. was removed from her custody the second time, instructing her to provide support.

"While parents must provide support for their children even when they are in DFS' custody and even if DFS has made no demand that the parent fulfill this duty, when DFS makes no demand for financial support, a reasonable person could believe that financial assistance was unnecessary" *In the Interest of P.C., B.M., and C.M.*, 62 S.W.3d 600, 605 (Mo. App 2001) (citation omitted). This is especially true in light of the letter Mother received from Social Services regarding the closure of her case on child support. While Mother's obligation to provide Q.A.H. support is not dependent on the state informing her of that obligation, *In the Interest of N.L.B.*, 145 S.W.3d 902, 908 (Mo. App. 2004), Social Services' letter to Mother and their subsequent failure to inform Mother that she needed to provide support are "relevant consideration[s] in determining the level of support that was provided by [Mother] and whether [her] conduct rose to the level of neglecting [Q.A.H.]." *In the Interest of A.R.*, 52 S.W.3d 625, 640 (Mo. App. 2001) (insufficient evidence to find that parent failed to provide for child when case plan, entered into by parent and the Division, specifically stated "[t]here is no financial support plan implemented at this time").

Additionally, a failure to pay child support does not by itself warrant a termination of parental rights. *In the Interest of K.L.C.*, 332 S.W.3d 330, 341 (Mo. App. 2011); see also *S.M.H.*, 160 S.W.3d at 366–67. Rather, "[t]ermination under this subdivision

requires a showing that 'the parent has not fulfilled the affirmative duty to support, communicate with and visit the child and show that the parent lacks a commitment to and interest in the child.'" *In the Interest of D.D.C.*, 351 S.W.3d 722, 731 (Mo. App. 2011) (quoting *In the Interest of J.M.N.*, 134 S.W.3d 58, 69 (Mo. App. 2004)).

Here, the circuit court found that "[Q.A.H.] was not [Mother's] priority" and that Mother had a "total lack of commitment to and concern for [Q.A.H.]." In reaching its finding, the court noted that Mother "maintained a cellular telephone service, internet service and an ADT security service during 2011." The court further stated that Mother "had belonged to a gym for three months costing approximately \$44 dollars per month while she failed to pay support or provide in kind support for the child." The court also concluded that Mother's "total lack of commitment" to Q.A.H. was reflected in a statement Mother made at an earlier hearing indicating that she would "bring the child back" if she was required to allow Father supervised visits.

When viewed in proper context, these facts are insufficient to support a finding that Mother lacks a commitment to and an interest in Q.A.H. We note that in 2011 Mother was caring for a newborn and obtaining her associates degree online. Given the circumstances, items and services such as a telephone, internet, and security system were arguably necessities, rather than evidence of a lack of commitment to Q.A.H. Furthermore, while it may not have been the wisest decision for Mother to obtain a gym membership considering her other financial obligations, "deficient financial skills" alone do not warrant termination of parental rights. *K.L.C.*, 332 S.W.3d at 341. Lastly, as to Mother's statement that she would "bring the child back" if Father was awarded supervised visitation, Mother explained at her deposition that her statement

was rooted in her fear of Father due to her claims that he was sexually violent towards her. At the termination hearing, Mother testified that she was willing to co-parent with Father and comply with any court order regarding Father. Yet, the court did not find Mother's representation of cooperation credible. Regardless of the court's interpretation of the statement Mother made at the earlier visitation hearing, however, the statement scarcely reflects a "*total lack of commitment*" to Q.A.H., especially when weighed against the other evidence of Mother's efforts to maintain a parenting relationship with the child. (Emphasis added).

Contrary to the court's finding, Mother did provide in-kind support for Q.A.H. The parent aide reported that Mother brought "toys, music, extra food, diapers, and wipes" to her visits. Mother also provided Q.A.H. with a potty training kit. In addition, the parent aide reported that Mother sent items to the foster parents, such as diapers, formula, food, some clothes, and a car seat. The court downplayed these contributions, reasoning that the food Mother provided during visits was "de minimis" and noting that some of the clothes Mother gave Q.A.H. "were not the proper size." We disagree with the circuit court's reasoning and find that Mother's contributions, "no matter how minimal, demonstrates [Mother]'s intent to continue the parent-child relationship." *In the Interest of R.P.C., M.C., and D.C.*, 220 S.W.3d 390, 393 (Mo. App. 2007); see also *C.F.C.*, 156 S.W.3d at 428 (holding the trial court's findings that "Mother failed to provide any financial support for child, [and] she often provided child inappropriate gifts and food" to be "wholly inadequate to support" termination); cf. *In the Interest of J.H.H.*, 662 S.W.2d 893, 896 (Mo. App. 1983) (finding Mother's contributions to be "token" in nature and insufficient to constitute support where, over the course of three and a half

years, Mother sent child one Christmas card, "usually" a birthday card, and one five dollar birthday gift). Moreover, Mother's strong interest in and commitment to Q.A.H. was further evidenced by Mother's consistent visitation and her attentiveness to Q.A.H. during the visits.

Finally, the circuit court failed to make adequate findings as to how Mother's failure to pay child support was predictive of a future failure to provide for Q.A.H. "[A] parent's failure to provide financial support for a child while he or she is in foster care must indicate that the parent would be unable to provide adequate food, clothing, or shelter to a child in parent's physical custody in the future." *C.A.L.*, 228 S.W.3d at 71. Here, the court found that "[i]t does not appear likely that [Mother] . . . will have the ability to support this child in the foreseeable future" because Mother "does not have a residence of her own" and is unemployed. However, nothing in Section 211.447 requires a parent to obtain their own residence and, in fact, this Court has reversed terminations of parental rights that were based on a finding of failure to provide for the child despite the fact that the parent was residing at someone else's residence. *E.g.*, *C.F.C.*, 156 S.W.3d at 429.

Mother was not working at the time of the termination hearing, but she testified that her unemployment was by choice because she was residing with a long-time family friend, Bruce Birkinbine,⁷ who provided her with financial support. Mother said she was capable of obtaining a job and had been employed during most of the time since the court assumed jurisdiction over Q.A.H.. Mother had also earned an associate's degree

⁷ Mother testified that Bruce Birkinbine was a good friend of her late father. Since birth, she has known him as "Uncle Bruce," and he had been a "father figure" to her.

by the time of the termination hearing and had plans to obtain a bachelor's degree. The record gives little reason to doubt Mother's *future* ability to obtain employment.

Moreover, while Mother does not currently earn income through employment, she has sufficient resources to provide for herself and her children. Mother testified that she receives child support for J.N., food stamps, and state medical insurance. Birkinbine assists Mother with the rest of her needs and testified that he intends to support Mother for as long as necessary. Nevertheless, Mother testified that should Birkinbine decide to suddenly cease providing assistance, she has already researched the "ample amount of services that provide assistance quickly" and has formulated a "very quick action plan."

The circuit court faulted Mother for her means of financial support, stating: "[Mother] appears content to live on various welfare benefits and [Birkinbine's] support." However, "nothing in section 211.447 requires a parent to show that he or she can raise a child by himself in order to avoid a termination of parental rights. To the contrary, children are frequently raised with help from others such as grandparents, siblings, aunts and uncles, neighbors, daycare, and babysitters." *S.M.H.*, 160 S.W.3d at 370. And, a parent's utilization of "community services such as social security and food stamps" can actually be an indicator of the parent's ability to provide support. *In the Interest of S.M.F.*, 393 S.W.3d 635, 646 (Mo. App. 2013). Finally, we note that Mother's ability to adequately provide for Q.A.H. in the future is further illustrated by her on-going efforts to provide for J.N. by utilizing the resources available to her. See *In the Interest of C.J.G.*, 358 S.W.3d 549, 556 (Mo. App. 2012) ("The ability to support a child who is

not in foster care supports the finding that the parent would be able to provide financially for the child in foster care in the future.").

Based on the foregoing, the circuit court's finding that Mother has continuously failed to provide for Q.A.H. and likely would be unable to do so in the future, is unsupported by clear, cogent, and convincing evidence and is against the weight of the evidence. Accordingly, the court erred in terminating Mother's parental rights based on the statutory ground of abuse and neglect, pursuant to Section 211.447.5(2).

II. Failure to Rectify, Section 211.447.5(3)

The circuit court relied upon Section 211.447.5(3) in terminating Mother's parental rights for failure to rectify the problems that led to Q.A.H. being placed in foster care. As relevant here, this statutory ground permits termination of parental rights if the court finds the child has been under the jurisdiction of the juvenile court for at least a year and the conditions that led to the assumption of jurisdiction exist or potentially harmful conditions currently exist, and there is little likelihood the conditions will be remedied. § 211.447.5(3).

In this case, the conditions that led to the court's assumption of jurisdiction relate solely to the CMH incident which resulted from Mother's delusional mental condition. As such, the termination of parental rights under Section 211.447.5(3) must meet the same standard as required under Section 211.447.5(2)(a) for a "permanent" mental condition that "renders the parent unable to provide the child the necessary care, custody, and control." The termination also must be "based upon a determination that conditions of a potentially harmful nature continued to exist *as of the termination.*" *C.W.*, 211 S.W.3d at 100 (emphasis added).

Given our holding that the circuit court erred in relying on Mother's mental condition as a basis for termination under Section 211.447.5(2), the same findings cannot justify termination under Section 211.447.5(3):

The insufficient findings with respect to abuse and neglect cannot be bootstrapped into a valid finding of failure to rectify. Without evidence of Mother's current mental health status and of her prognosis for continued recovery, there is not clear, cogent, and convincing evidence that Mother has failed to rectify the conditions leading to the assumption of jurisdiction.

Id. at 101.

Although not explicitly stated, the court's judgment also suggested that other conditions, in addition to Mother's mental health, of a potentially harmful nature continued to exist. The judgment made isolated references to Mother's "association with domestically violent men" and Mother's "inappropriate developmental expectations" for Q.A.H. While it is debatable whether these were "conditions that led to the assumption of jurisdiction," it is clear that the described behaviors would not justify termination of parental rights because they suffer from the same inadequacies that pervade the rest of the statutory grounds relied on by the court: there was no evidence establishing the existence of the conditions at the time of termination, and nor did the court conduct a prospective analysis of potential future harm based on the listed conditions. Accordingly, the court erred in terminating Mother's parental rights pursuant to Section 211.447.5(3) for failure to rectify.

III. Parental Unfitness, Section 211.447.5(6)

The circuit court terminated Mother's parental rights based on a finding of parental unfitness pursuant to Section 211.447.5(6), which provides:

The parent is unfit to be a party to the parent and child relationship because of a consistent pattern of committing a specific abuse, including but not limited to . . . specific conditions directly relating to the parent and child relationship . . . determined by the court to be of a duration or nature that renders the parent unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental or emotional needs of the child.

The court concluded that Mother's mental condition supported termination under Section 211.447.5(6), finding: "[Mother] is unfit to be a party to the parent child relationship because of conduct driven by her delusional behavior." However, similar to the other statutory grounds relied upon by the circuit court, Section 211.447.5(6) requires the court to "determine that the parent is *currently* unfit to be a party to the parent and child relationship, supported by findings as to acts or conditions that persist *at the time of termination.*" *In the Interest of W.C., W.M. and G.M.*, 288 S.W.3d 787, 801 (Mo. App. 2009) (emphasis added). Thus, for the same reasons the evidence regarding Mother's mental condition failed to provide a sufficient basis for termination under the other statutory grounds relied on by the court, it failed to provide a basis for termination under Section 211.447.5(6). Accordingly, the circuit court erred in terminating Mother's parental rights on this ground.

CONCLUSION

As a final matter, we note that the circuit court made many findings critical of Mother that are not addressed herein. As it would be tedious and futile to discuss all of Mother's faults to which the court referred, we summarily hold these findings insufficient to support termination of Mother's parental rights under any of the statutory grounds relied upon by the circuit court. "The law does not require parents to be perfect or be model parents. Poor conduct or character flaws are not relevant unless they could

actually result in future harm to the child." *S.M.H.*, 160 S.W.3d at 372. While the record demonstrates that Mother may not be a model parent, it utterly fails to establish that Q.A.H. would be harmed by a continued relationship with Mother.

Based on the foregoing, the grounds relied on by the circuit court in terminating Mother's parental rights are not supported by clear, cogent, and convincing evidence. We therefore reverse the judgment terminating Mother's parental rights and remand the cause to the circuit court, which retains jurisdiction over Q.A.H.



LISA WHITE HAROWITZ, JUDGE

All Concur.