

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Circuit Court Cause Nos. JU301-0048-J10 & CV406-0054

Court of Appeals No. ED 88382

In the Interest of A.S.W.

BRIEF OF APPELLANT PAUL WARREN

Craig G. Kallen III, #38025
Hais, Hais & Kallen, P.C.
Attorneys for Appellant
100 S. Brentwood, Suite 400
Clayton, MO 63105
(314) 862-1300
(314)862-1366-fax

TABLE OF CONTENTS

Table of Cases and Statutory Authority 3

Jurisdictional Statement 5

Statement of Facts 6

Points Relied On10

Arguments15-37

Conclusion and Relief Sought 38

Certificate of Compliance 40

TABLE OF CASES, STATUTES AND OTHER AUTHORITY

Mo. Const. art.III, Section 29.....29

Mo. Const. art. V, Section 2.....15

Mo. Rev. Stat §211.031.....21

Mo. Rev. Stat §211.211.....11

Mo. Rev. Stat §211.477.....7

Mo. Rev. Stat §211.038.....29, 32

Mo. Rev. Stat §475.025.....32.

Mo. Rev. Stat §452.400.....28

Bruno v. Murdock, 406 S.W. 2d 294 (Mo. App. 1966).....18

Crabtree v. Bugby, 967 S.W. 2d 66 (Mo. App. 1998)..... 18

Flether v. Stillman, 934 S.W. 2d 597 (Mo. App. S.D. 1996).....18

In re A.S.O., 52 S.W. 3d 59 (Mo. App. W.D. 2001).....37

In the Interest of A.S.W., 137 S.W. 3d (Mo. banc 2004) (L.F. 33-42)....7, 15,
18, 20

In the Interest of D.L.M. 31 S.W. 3d 64 (Mo. App. E.D. 2000).....17, 19, 37

In the Interest of F.N.M., 951 S.W.2d 702, 703 (Mo.App. E.D.1997).....17,
19, 37

In the Interest of J.M.N., 134 S.W. 3d 58 (Mo. App. W.D. 2004).....25, 36

In re T.M.E. 169 S.W. 3d 581, 589 (Mo. App. W.D. 2005).....30

K.A.W., 133 S.W. 3d 1 (Mo. banc 2004).....28

Massman v. Massman, 784 S.W. 2d 848, 849 (Mo. App. E.D.1990).....28

Robinson v. Robinson, 128 S.W. 3d 543, 547 (Mo. App. 2003).....28

Rose v. Lundy, 455 U.S. 509, 520 (1982).....20

Santosky v. Kramer, 455 U.S. 745, 753 (1982)25

State v. Patterson, , 18 S.W. 3d 474 (Mo. App. S.D. 2000).....17

Walsh v. Walsh, 184 S.W. 3d 156 (Mo. App. E.D. 2006).....30, 33

JURISDICTIONAL STATEMENT

This appeal is within the jurisdiction of the Missouri Court of Appeals, Eastern District, in that the appeal arises out of an appealable judgment in a civil action in the Circuit Court of Jefferson County, and is within the general jurisdiction of the Missouri Court of Appeals, pursuant to Article V, Section 3 of the Constitution of the State of Missouri, as amended, 1982, and the appeal does not fall within the exclusive jurisdiction of the Missouri Supreme Court.

STATEMENT OF FACTS

Paul Stephen Warren (hereinafter Father) is the biological father of Alex Stephen Warren (hereinafter A.S.W.) born February 16, 1998.

This case has a long procedural history that begins on March 13, 2002, when the Juvenile Officer filed a Petition to Terminate Father's rights alleging that a significant brain injury rendered him incapable of taking care of his son. The Juvenile Officer's Petition alleged the following to wit: The child has been under the jurisdiction of the juvenile court for a period of one year or longer and the conditions which led the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, and there is little likelihood that these conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home to wit, *the father has a significant brain injury which renders him incapable of providing necessary care, custody and control of the juvenile (the remainder of the Count was stricken by stipulation)*-Emphasis added (L.F. I 54-55).

The trial court heard evidence on the termination, termination was ordered; and on July 1, 2004, the Supreme Court of Missouri reversed the

ruling of the trial court holding that its findings did not constitute clear, and convincing evidence supporting the termination of Father's rights. The Court held that the trial court failed to make findings that additional services would fail or be unavailable and that Father would be able to parent adequately a majority of the time. Further, the Court held that Father could and should be able to utilize assistance from his extended family to raise A.S.W. *In the Interest of A.S.W.*, 137 S.W. 3d (Mo. banc 2004) (L.F. I 33-42).

Following the reversal from the Supreme Court of Missouri, Father made applications to the Missouri Court of Appeals and the Supreme Court of Missouri, in habeas corpus, to release A.S.W. into his care, as the premise of jurisdiction of the juvenile court no longer existed; however, those applications were denied. (L.F. I 66-67).

On July 29, 2004, Father made a Petition for Enforcement of RSMo. 211.477.2 in the Form of a Writ of Habeas Corpus or in the Alternative to Modify the Legal and Physical Custody of A.S.W. to Biological Father (L.F. I 43-50). On August 4, 2004, Father filed an Amended Petition for Enforcement of RSMo. §211.477.2 in the Form of Habeas Corpus or in the Alternative a Motion to Modify the Legal and Physical Custody of A.S.W. for an Immediate Transfer of A.S.W.'s Custody to Biological Father (L.F. I

54-61). On August 4, 2004, the trial court denied Father's request for Habeas Corpus relief (L.F. I 64). On October 1, 2004, the Supreme Court of Missouri denied Father's Application for writ of habeas corpus (L.F. I 66).

Subsequent to the habeas corpus action, Father made requests to the trial court for access to his son. From the date of the reversal by the Supreme Court to now, Father had one (1), thirty (30) minute meeting with his son at a McDonald's restaurant. By all accounts, even the Juvenile Officer's witness, Ms. Steinmann, all agreed that the visit between Father and A.S.W. went very well. In fact, Father and A.S.W. exchanged statements of mutual affection for the other (Tr. 16, 45).

On January 26, 2006, the Westermanns filed a Petition for Appointment of Guardian and Change of Name (L.F. II 4-6).

Father's Motion to Modify the Legal and Physical Custody of A.S.W., and the Westermann's Petition for Guardianship were heard on May 24, 2006, and Judgments as to both matters were rendered June 9, 2006. The Judgments awarded Father no legal or physical custody rights as to A.S.W. (L.F. I 102-106; L.F. Vol. II 18-24)

Father filed his Motion for New Trial in regard to the Judgment relating to his Motion to Modify and as to the Guardianship on July 5, 2006

(L.F. 92-100; L.F. Vol. II 37-45). On July 6, 2006, without hearing, the trial court denied both Motions (L.F. 100; L.F. Vol. II 45).

The Notice of Appeal to this Court followed.

POINTS RELIED ON

POINT I

**THE TRIAL COURT ERRED IN DENYING FATHER'S MOTION
TO MODIFY PURSUANT TO ITS JUDGMENT AND ORDER
BECAUSE IT EXCEEDED ITS JURISDICTION AND MISAPPLIED
MISSOURI LAW IN THAT FATHER WAS NOT AWARDED LEGAL
OR PHYSICAL CUSTODY RIGHTS AS TO A.S.W. AND AS SUCH
THE TRIAL COURT FAILED TO FOLLOW THE MANDATE OF
THE SUPREME COURT OF MISSOURI IN CONTRAVENTION OF
ARTICLE V, SECTION 2, OF THE MISSOURI CONSTITUTION.**

Mo. Const. art. V, Section 2

In the Interest of A.S.W., 137 S.W. 3d (Mo. banc 2004)

In the Interest of F.N.M., 951 S.W.2d 702, 703 (Mo.App. E.D.1997)

State v. Patterson, , 18 S.W. 3d 474 (Mo. App. S.D. 2000)

Crabtree v. Bugby, 967 S.W. 2d 66 (Mo. App. 1998)

Flether v. Stillman, 934 S.W. 2d 597 (Mo. App. S.D. 1996)

Bruno v. Murdock, 406 S.W. 2d 294 (Mo. App. 1966)

In the Interest of D.L.M. 31 S.W. 3d 64 (Mo. App. E.D. 2000)

POINT II

THE TRIAL COURT ERRED IN DENYING FATHER’S MOTION TO MODIFY THE LEGAL AND PHYSICAL CUSTODY OF A.S.W. IN ITS JUDGMENT AND ORDER BECAUSE THE TRIAL COURT MISAPPLIED THE LAW INsofar AS THE BASIS FOR JURISDICTION OF THE JUVENILE COURT UNDER RSMO. §211.031, §211.211.021 AND §211.477 WAS NO LONGER PROPER IN THAT FATHER HAD FULLY RECOVERED FROM HIS BRAIN INJURY AND WHEN THERE WAS NO EVIDENCE THAT FATHER WOULD IMPAIR A.S.W.’S EMOTIONAL AND OR PHYSICAL DEVELOPMENT

Mo. Rev. Stat §211.031

Mo. Rev. Stat §211.211

Mo. Rev. Stat §211.477

Mo. Rev. State §452.400

Rose v. Lundy, 455 U.S. 509, 520 (1982)

K.A.W., 133 S.W. 3d 1 (Mo. banc 2004).

Massman v. Massman, 784 S.W. 2d 848, 849 (Mo. App. E.D. 1990).

Robinson v. Robinson, 128 S.W. 3d 543, 547 (Mo. App. 2003).

In the Interest of F.N.M., 951 S.W.2d 702, 703 (Mo.App. E.D.1997)

In the Interest of D.L.M. 31 S.W. 3d 64 (Mo. App. E.D. 2000)

In the Interest of J.M.N., 134 S.W. 3d 58 (Mo. App. W.D. 2004).

POINT III

**THE TRIAL ERRED IN ITS JUDGMENT AND ORDER
BECAUSE IT MISAPPLIED AND ERRONEOUSLY
DECLARED RSMO. §211.038 WHEN IT DENIED PLACING
THE CUSTODY OF A.S.W. WITH FATHER SOLELY BASED
ON THIS STATUTE IN THAT RSMO. §211.038 DID NOT
TAKE EFFECT UNTIL AUGUST 28, 2004 AND FATHER HAD
FILED HIS MOTION TO MODIFY ON AUGUST 4, 2004
PRIOR TO THE LAW TAKING EFFECT PURSUANT TO ART
III §29 OF THE MISSOURI CONSTITUTION**

Mo. Const. art.III, Section 29

Mo. Rev. Stat §211.038

Walsh v. Walsh, 184 S.W. 3d 156 (Mo. App. E.D. 2006)

In re T.M.E. 169 S.W. 3d 581, 589 (Mo. App. W.D. 2005)

POINT IV

THE TRIAL COURT ERRED IN GRANTING THE WESTERMANN'S PETITION FOR GUARDIANSHIP BECAUSE IT WAS AGAINST THE WEIGHT OF THE EVIDENCE, IT ERRONEOUSLY APPLIED AND DECLARED RSMO. §475.025 IN THAT THE EVIDENCE CLEARLY AND COGNETLY ESTABLISHED THAT FATHER WAS READY, WILLING AND ABLE TO EXERCISE THE CARE, CUSTODY AND CONTROL OF A.S.W. AND THERE WAS NO EVIDENCE THAT HE WAS UNFIT, UNWILLING OR UNABLE TO PROVIDE CARE TO A.S.W. OR THAT HE WOULD SUFFER EMOTIONAL AND OR PHYSICAL HARM IF PLACED WITH HIS FATHER

Mo. Rev. Stat §211.038

Mo. Rev. Stat §475.025

Walsh v. Walsh, 184 S.W. 3d 156 (Mo. App. E.D. 2006)

In the Interest of J.M.N., 134 S.W. 3d 58 (Mo. App. W.D. 2004)

In re A.S.O., 52 S.W. 3d 59 (Mo. App. W.D. 2001).

In the Interest of F.N.M., 951 S.W.2d 702, 703 (Mo.App._E.D.1997)

In the Interest of D.L.M. 31 S.W. 3d 64 (Mo. App. E.D. 2000).

POINT I

THE TRIAL COURT ERRED IN DENYING FATHER'S MOTION TO MODIFY PURSUANT TO ITS JUDGMENT AND ORDER BECAUSE IT EXCEEDED ITS JURISDICTION AND MISAPPLIED MISSOURI LAW IN THAT FATHER WAS NOT AWARDED LEGAL OR PHYSICAL CUSTODY RIGHTS AS TO A.S.W. AND AS SUCH THE TRIAL COURT FAILED TO FOLLOW THE MANDATE OF THE SUPREME COURT OF MISSOURI AS SET FORTH IN CONTRAVENTION OF ARTICLE V, SECTION 2, OF THE MISSOURI CONSTITUTION.

On July 1, 2004, the Supreme Court of Missouri reversed the ruling of the trial court that terminated Father's parental rights. The court ordered that Father be restored to all things which he had lost by reason of the Termination Judgment (L.F. I 42). Father has lost his son exceeding a period of four (4) years as the result of the Termination Judgment. The Court held that the trial court failed to make findings that additional services would fail or be unavailable and that Father would be able to parent adequately a majority of the time. Further, the Court held that Father could and should be able to utilize assistance from his extended family to raise A.S.W. *In the Interest of A.S.W.*, 137 S.W. 3d (Mo. banc 2004) (L.F. 33-42).

Following the reversal, Father attempted to divest the Juvenile Court of jurisdiction as the only ground for termination of his rights had been reversed **and there was no other action against him**. Father's Writ of Habeas Corpus and to Return Custody of A.S.W. to him was overruled by the trial court and affirmed by this and the Supreme Court. (L.F. I 66). So, Father proceeded to file a Motion to Modify the Legal and Physical Custody of A.S.W. in the trial court in yet another attempt to secure the car, custody and control of his son (L.F. I 54-61)

During the pendency of his Motion, Father attempted to secure from the trial court frequent and meaningful contact with his son. All of Father's efforts were thwarted; and from July 1, 2004 to the present day, Father has seen his son for thirty (30) minutes at a McDonald's restaurant. All accounts of Father's contact with his son that January 2005 day at McDonalds were favorable. During that encounter, Father and son (A.S.W.) exchanged words of love for the other (Tr. 16, 45). Even though there were no issues related to Father's contact with his son that day, no other contact was permitted by the trial court (L.F. 68, 96).

Father's Motion to see his son over the Christmas holiday was denied (L.F. 68, 96).

That the Judgments of June 9, 2006 constitute constructive termination of Father's parental rights as the Judgment awarded him **absolutely no legal or physical custody rights** to A.S.W.; and provided no mechanism for him to eventually attain any legal or physical custody rights with regard to his son.

The judgment of the trial court shall be affirmed unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *In the Interest of F.N.M.*, 951 S.W.2d 702, 703 (Mo.App. E.D.1997); *In the Interest of D.L.M.* 31 S.W. 3d 64 (Mo. App. E.D. 2000).

The Judgment erroneously applies the law because it effectively ignores and fails to follow the ruling of the Supreme Court of Missouri as set forth in *In the Interest of A.S.W.*, 137 S.W. 3d (Mo. banc 2004) (L.F. 33-42). Here, the trial court constructively denies Father any access to his child by failing to award him any physical or legal rights to him. This flies in the face of the holding made in *In the Interest of A.S.W.*, 137 S.W. 3d (Mo. banc 2004) (L.F. 33-42); and therefore, is in conflict with *Mo. Const. art. V, Section 2* which states in part that: "The supreme court shall be the highest court in the state. Its jurisdiction shall be coextensive with the state. **Its decisions shall be controlling in all other courts.**" (Emphasis Added).

The courts of Missouri are constitutionally bound to follow the most recent controlling decision of the Supreme Court. *State v. Patterson*, 18 S.W. 3d 474 (Mo. App. S.D. 2000). Once the Supreme Court by case law has resolved the elements of a cause of action, neither the trial court nor the court of appeals is free to redefine the elements in every case that comes before them. *Crabtree v. Bugby*, 967 S.W. 2d 66 (Mo. App. 1998). Missouri courts are constitutionally bound to follow controlling decisions of the Supreme Court of Missouri. *Flether v. Stillman*, 934 S.W. 2d 597 (Mo. App. S.D. 1996). Decisions of Supreme Court are binding upon lower courts and only Supreme Court has authority to alter it or render it less severe. *Bruno v. Murdock*, 406 S.W. 2d 294 (Mo. App. 1966).

The trial court, here, simply didn't care for the opinion of our Supreme Court, ignored it, and proceeded to make a judgment consistent with its Termination Judgment that it had entered prior to the reversal by Missouri's highest Court. It had no constitutional authority to do so under *Mo. Const. art. V, Section 2 and In the Interest of A.S.W.*, 137 S.W. 3d (Mo. banc 2004). The Judgment must be reversed.

POINT II

THE TRIAL COURT ERRED IN DENYING FATHER'S MOTION TO MODIFY THE LEGAL AND PHYSICAL CUSTODY OF A.S.W. IN ITS JUDGMENT AND ORDER BECAUSE THE TRIAL COURT MISAPPLIED THE LAW INsofar AS THE BASIS FOR JURISDICTION OF THE JUVENILE COURT UNDER RSMO. §211.031, §211.211.021 AND §211.477 WAS NO LONGER PROPER IN THAT FATHER HAD FULLY RECOVERED FROM HIS BRAIN INJURY AND WHEN THERE WAS NO EVIDENCE THAT FATHER WOULD IMPAIR A.S.W.'S EMOTIONAL AND OR PHYSICAL DEVELOPMENT

The judgment of the trial court shall be affirmed unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *In the Interest of F.N.M.*, 951 S.W.2d 702, 703 (Mo.App. E.D.1997); *In the Interest of D.L.M.* 31 S.W. 3d 64 (Mo. App. E.D. 2000). This court defers to the trial court's assessment of the credibility of the witnesses and examines all facts in the light most favorable to the trial court's judgment. *Id.*

The Juvenile Officer's Petition **giving rise to the jurisdiction of the Juvenile Court** alleged the following to wit: The child has been under the

jurisdiction of the juvenile court for a period of one year or longer and the conditions which led the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, and there is little likelihood that these conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home to wit, ***the father has a significant brain injury which renders him incapable of providing necessary care, custody and control of the juvenile (the remainder of the Court was stricken by stipulation)***-Emphasis added (L.F. I 54-55).

This allegation made by the Juvenile Officer, that initially gave rise to the jurisdiction of the court, was held to be insufficient by the Supreme Court of Missouri. The Court, there, found that Father was indeed capable of taking care of A.S.W. as long as he received assistance from his family. *In the Interest of A.S.W.*, 137 S.W. 3d (Mo. banc 2004).

Father's failure to immediately secure custody of A.S.W. pursuant to the Habeas Corpus action compelled the filing of his Motion to Modify in an effort to secure contact with his son; and in a continuing effort to exhaust any and all legal remedies to gain reunification and to exercise his legal rights (L.F. I 54-61; 66). *Rose v. Lundy*, 455 U.S. 509, 520 (1982). So,

Father had to, again, prove that he was capable of taking care of A.S.W under a motion to modify standard.; and indeed, he did.

The Juvenile Officer presented no medical evidence at trial that went to the question of whether or not Father had recovered from his brain injury. The only medical evidence adduced came from Father in the form of testimony from Dr. Easterday, and Dr. Hogan. Father entered into evidence clear and convincing testimony that his condition posed no impediment to him exercising periods of physical custody with his son. Father was able to prove by clear and convincing evidence (In fact there was no evidence to the contrary) that there had been a substantial and continuing change in circumstances as it related to his brain injury and his ability to care for A.S.W. so that the jurisdiction vested in the juvenile court no longer was proper.

The conditions that gave rise to the jurisdiction vesting in the juvenile court pursuant to *RSMo. §211.031.1*, as of May 24, 2006, no longer existed and was specifically and unequivocally refuted by Father. Father offered the following evidence that he had fully and completely recovered from the injuries that gave rise to the initial jurisdiction of the Juvenile Court.

A. Dr. Hogan, M.D.

Dr. Hogan treated Father in regard to his seizures following his head injury. Dr. Hogan testified as follows: “And the issues of his seizures are well controlled, and that part of his care which I’m responsible for, he’s done very well.” (Tr. 240).

B. Dr. Easterday, D.O.

Dr. Easterday, Mr. Warren’s primary physician, testified as follows (Tr. 243):

Mr. Kallen: I asked that he had sustained a brain injury in January 2000 that resulted in seizures that resulted in a diagnosis of epilepsy that interfered with his ability to care form him and his son. Sir, do you now believe within a reasonable degree of medical certainty that Mr. Warren is now free of seizures?

Dr. Easterday: In my understanding of his history and his clinical presentation, he gives no history or shows no evidence of seizures and certainly does not appear to exhibit a seizure problem that would interfere with him being able to take care of himself or a dependent.

Mr. Kallen: Now, within a degree of medical certainty, does Paul’s history of a brain injury pose any physical limitation on his ability to care for a seven year old boy?

Dr. Easterday: **No. (Emphasis Added)**

The only competent evidence before the court was the Psychological Evaluation performed by Dr. James Powers, PhD. on Father in January 2005 entered into evidence by Father (Father's Exhibit J). Pursuant to Dr. Powers' report, Father tested on the Adult Intelligence Scale with an IQ of 81 (low average), a Performance IQ of 91 (average) and a Full Scale IQ of 84 (low average)-Page Four of Dr. Powers' Evaluation. Dr. Powers further found that Father was able to understand social implications on the basis of visual cues and such ability was in the low average range. Dr. Powers found that Father's cognitive deficits were not severe, **and were not to the degree they would significantly impair his ability to care for his son. Finally, Dr. Powers concluded that he was inclined to believe that Father did not sexually abuse his nieces, and that Father would not be a danger to his son** (Father's Exhibit J-Pages 4-5-Emphasis Added).

Instead of relying on evidence by competent medical professionals, the trial court based its decision denying Father's Motion to Modify on the testimony of Dr. Harriet Landers who testified that Father was causing A.S.W. to have bad dreams. Appellant submits that by any measure, Dr. Landers failed to conduct adequate or appropriate testing of Father and his son.

Dr. Landers met with Mrs. Westermann (Foster Mother) and A.S.W. on one occasion in September 2004, and did not meet with them again (Tr. 244-245).

Dr. Landers never met Father, never met Father's family, and never witnessed the interaction between Father and A.S.W. (Tr. 244). Dr. Landers never conducted any testing on Father (Tr. 244). Dr. Landers never met Mr. Westermann (Foster Father) and she was hoping to have contact with all of the people involved (Tr. 245). Father had nothing to do with the fact that his appointment with Dr. Landers was cancelled (Tr. 246).

Dr. Landers testified that she could not say with any degree of medical professional certainty that the cause of A.S.W.'s bad dreams were related to Father to wit (Tr. 248):

Mr. Kallen: You can't say with any degree of medical professional certainty that the cause of Alex's (A.S.W.) bad dreams are related to Mr. Warren, can you?

Dr. Landers: No, I can't.

Mr. Kallen: I mean you say it three times in your report that Alex could be confusing the bad parents (foster parents prior to the Westermanns) with Mr. Warren (Father), right?

Dr. Landers: Yeah. I think it is unclear. And for a child his age, those things are probably not very clear, and children that age have memories that are pretty confused, vague and unclear.

Dr. Landers admitted that there was no connection or proximate relation of A.S.W.'s bad dreams to his Father (Tr. 248). Dr. Landers further admitted that A.S.W. could have been confusing Father with his previous set of foster parents as it related to his dreams (Tr. 248). Moreover, Patricia Westermann admitted that A.S.W. had never identified Father as the cause of his bad dreams (Tr. 283). The court's conclusion that somehow Alex's dreams were related to an anxiety that he would lose his family is without medical or psychological foundation and fails to meet the clear and cogent standard of proof required in this case. *In the Interest of J.M.N.*, 134 S.W. 3d 58 (Mo. App. W.D. 2004). Due process requires that the state support its allegations by clear and convincing evidence before they completely and irrevocably sever the rights of a parent. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

More troubling is that Dr. Landers was unable to point to any traumatic reactions that A.S.W. has had towards his Father as is clearly shown in the following dialogue (Tr. 250-251):

Mr. Kallen: What traumatic reactions has Alex had towards his father?

Dr. Landers: I don't know that, but there were obviously some traumatic reactions to previous mistreatment, whether it was from—I don't know who from, but they're there for him.

Mr. Kallen: It's certain that you don't know that that's attributable to Mr. Warren, do you?

Dr. Landers: I don't, but I do think that Alex harbors a lot of anxiety from past traumatic events.

Mr. Kallen: So what I gather from that is you don't know who that abuse is attributable to?

Dr. Landers: I don't.

It could not be said that the trial court even gave Father and A.S.W. a fighting chance to reunite. During the pendency of Father's Motion to Modify despite numerous requests, the court allowed only one (1) contact between A.S.W. and Father, and by all accounts, this visit went well. The trial court denied Father's *pendente lite* requests for access to his son; **even denying him a visitation period over the Christmas holiday.**

Moreover, and further compounding the tragedy in this case, the foster parents (Westermanns), admitted at trial that they told A.S.W. that Mr.

Warren was incapable of taking care of him and that he had not recovered from his brain injury (Tr. 284; 291-292).

The court's finding that Father's family could not assist him is unfounded. Donna Young, whom Father resides with, has consistently maintained that she would help in any way she could. The irony is; however, that Paul is so competent, **he takes care of her** for the most part cooking, cleaning, shopping, and maintaining the household on his own accord! The record is full of cogent proof that Father not only meets his needs independently, but those of this sister. It only follows that he could also meet the needs of A.S.W. (Tr. 205-214; 223).

There was no evidence adduced at the trial of May 24, 2006 that supported the constructive termination of Father's rights. To the contrary, the medical and psychiatric evidence from Dr. Easterday, Dr. Powers, and Dr. Hogan, supported Father's allegations that the injuries from his fall had improved and that his physical and mental condition posed no impediment to him exercising periods of physical custody with his son. Father was able to prove by clear and convincing evidence that there had been a substantial and continuing change in circumstances as it related to his brain injury and his ability to care for A.S.W. so that the jurisdiction vested in the juvenile court no longer served the best interests of A.S.W. and that his best interests

would be served by Father exercising legal and physical custody. The conditions that gave rise to the jurisdiction vesting in the juvenile court, as of May 24, 2006, no longer existed and were specifically and unequivocally refuted by Father.

As the trial court awarded father no contact with Father, it would have to have been shown that his involvement with Alex would impair his physical health and or his emotional development. See *RSMo. §452.400*. As illustrated above, neither Dr. Landers, nor any other witness could proximately relate A.S.W.'s dream anxiety to Father. The Juvenile Officer failed to meet his burden to show harm, or likely harm to A.S.W. that would limit Father's contact with him in any way. Without meeting this burden, the trial court was without the requisite evidence to limit Father's custody rights. *RSMo. §452.400*; *Massman v. Massman*, 784 S.W. 2d 848, 849 (Mo. App. E.D. 1990); and *Robinson v. Robinson*, 128 S.W. 3d 543, 547 (Mo. App. 2003).

All applicable statutes should be construed in favor of the parent and preservation of the natural parent-child relationship. *K.A.W.*, 133 S.W. 3d 1 (Mo. banc 2004).

POINT III

THE TRIAL ERRED IN ITS JUDGMENT AND ORDER
BECAUSE IT MISAPPLIED AND ERRONEOUSLY
DECLARED RSMO. §211.038 WHEN IT DENIED PLACING
THE CUSTODY OF A.S.W. WITH FATHER SOLELY BASED
ON THIS STATUTE IN THAT RSMO. §211.038 DID NOT
TAKE EFFECT UNTIL AUGUST 28, 2004 AND FATHER HAD
FILED HIS MOTION TO MODIFY ON AUGUST 4, 2004
PRIOR TO THE LAW TAKING EFFECT PURSUANT TO
ART. III §29 OF THE MISSOURI CONSTITUTION

The court seems to have based its judgment not on the facts in this case, but, instead on Father's past conviction under *RSMo. §566.060 and §566.100*. The trial court finds that it has no discretion under Missouri law to place A.S.W. with Father pursuant to *RSMo. §211.038*. The trial court's finding, and ruling based thereon, is a false declaration and application of Missouri law.

The Statute in question, *RSMo. §211.038*, did not take effect until August 28, 2004. See *Art. III §29*. **The statute in effect at the time a Petition commencing an action is filed is the applicable statute even if**

the case is tried after the effective date of an amended statute. *Walsh v. Walsh*, 184 S.W. 3d 156 (Mo. App. E.D. 2006). (Emphasis Added).

It is further unjust and unconstitutional to constructively terminate Father's relationship with his son based on this statutory scheme. Father's conviction predates the birth of A.S.W. Furthermore, there is no evidence that Father in any way ever abused A.S.W. In fact, Dr. Powers found that Father had no sexual ideation towards his son; and that **he believed that Father never committed the crime that he was accused of doing** (Father's Exhibit J).

The court cites *In re T.M.E.* 169 S.W. 3d 581, 589 (Mo. App. W.D. 2005) in support of its position. In this case, Mother was convicted of failing to protect the **child at issue** from harm from the father and was convicted of same. The undersigned fails to see the correlation with this case. Here, Father, was **never convicted or accused** of harm to A.S.W. The Juvenile Officer never sought to terminate Father's rights on those grounds nor did he plead Father's conviction as an affirmative defense to Father's Motion to Modify.

But for the wrongful termination that was brought and reversed no action would have ever taken place against Father as to his son as the result of his conviction.

The Judgment and Order should be reversed.

POINT IV

THE TRIAL COURT ERRED IN GRANTING THE WESTERMANN'S PETITION FOR GUARDIANSHIP BECAUSE IT WAS AGAINST THE WEIGHT OF THE EVIDENCE, IT ERRONEOUSLY APPLIED AND DECLARED RSMO. §475.025 IN THAT THE EVIDENCE CLEARLY AND COGNETLY ESTABLISHED THAT FATHER WAS READY, WILLING AND ABLE TO EXERCISE THE CARE, CUSTODY AND CONTROL OF A.S.W. AND THERE WAS NO EVIDENCE THAT HE WAS UNFIT, UNWILLING OR UNABLE TO PROVIDE CARE TO A.S.W. OR THAT HE WOULD SUFFER EMOTIONAL HARM IF PLACED WITH HIS FATHER

In its Judgment in Cause No. CV406-0054, the trial court named the Westermanns as Guardians of A.S.W. and that he would remain in their care, custody and control (L.F. II 19). The basis for this decision was three (3) fold: 1) That under *RSMo. §211.038* A.S.W. could not be placed with his father; 2) That Father was unable to care for A.S.W.; and 3) That A.S.W. suffered from emotional harm after contact with his Father. There was absolutely no evidence to support any of the three (3) prongs that served as a basis for the court's decision.

The first basis for granting the guardianship is specifically and unequivocally refuted pursuant to Point III above, and Appellant incorporates that argument here in its entirety by this reference. The trial court misapplies *RSMo. §211.038* as the Statute was not in effect until after Father had filed his Motion to Modify. Thus, the court misapplies *RSMo. §211.038* under *Walsh v. Walsh*, 184 S.W. 3d 156 (Mo. App. E.D. 2006).

The second basis for granting the guardianship is specifically and unequivocally refuted pursuant to Point II above, and Appellant incorporates that argument here in its entirety by this reference. The Petitioners presented no medical or competent psychological evidence that Appellant was, because of his physical and mental condition, not able to meet the needs of A.S.W. In fact, the **As stated in Point II, Dr. Easterday, Father's doctor, without equivocation testified that Father's physical condition posed no impediment to him exercising the care and custody of a seven year old boy** (Tr. 243).

Petitioners put on no evidence as to Father's mental condition.

The only competent evidence before the court was the Psychological Evaluation performed by Dr. James Powers, PhD. on Father in January 2005 entered into evidence by Father (Father's Exhibit J). Pursuant to Dr. Powers' report, Father tested on the Adult Intelligence Scale with an IQ of

81 (low average), a Performance IQ of 91 (average) and a Full Scale IQ of 84 (low average)-Page Four of Dr. Powers' Evaluation. Dr. Powers further found that Father was able to understand social implications on the basis of visual cues and such ability was in the low average range. Dr. Powers found that Father's cognitive deficits were not severe, **and were not to the degree they would significantly impair his ability to care for his son. Finally, Dr. Powers concluded that he was inclined to believe that Father did not sexually abuse his nieces, and that Father would not be a danger to his son** (Father's Exhibit J-Pages 4-5-Emphasis Added).

The third basis for the court's ruling was refuted by the Petitioners witness, Dr. Landers. As discussed infra, Dr. Landers' findings and conclusions are **far** from establishing that Father's involvement in his son's life would be detrimental. Dr. Landers testified that she could **not** say with any degree of medical professional certainty that the cause of A.S.W.'s bad dreams were related to Father to wit; and in fact, they could have been related to his previous foster parents (Tr. 248):

Mr. Kallen: You can't say with any degree of medical professional certainty that the cause of Alex's (A.S.W.) bad dreams are related to Mr. Warren, can you?

Dr. Landers: No, I can't.

Mr. Kallen: I mean you say it three times in your report that Alex could be confusing the bad parents (foster parents prior to the Westermanns) with Mr. Warren, right?

Dr. Landers: Yeah. I think it is unclear. And for a child his age, those things are probably not very clear, and children that age have memories that are pretty confused, vague and unclear.

More troubling is that Dr. Landers was unable to point to any traumatic reactions that A.S.W. has had towards his Father as is clearly shown in the following dialogue (Tr. 250-251):

Mr. Kallen: What traumatic reactions has Alex had towards his father?

Dr. Landers: I don't know that, but there were obviously some traumatic reactions to previous mistreatment, whether it was from—I don't know who from, but they're there for him.

Mr. Kallen: It's certain that you don't know that that's attributable to Mr. Warren, do you?

Dr. Landers: I don't, but I do think that Alex harbors a lot of anxiety from past traumatic events.

Mr. Kallen: So what I gather from that is you don't know who that abuse is attributable to?

Dr. Landers: I don't.

The court's conclusion that somehow Alex's dreams were related to an anxiety that he would lose his family, or would suffer emotional harm if placed with Father, is without medical or psychological foundation; and it fails to meet the clear and cogent standard of proof required in this case. *In the Interest of J.M.N.*, 134 S.W. 3d 58 (Mo. App. W.D. 2004).

Petitioners clearly failed to meet their burden that Father was unfit, unwilling and or unable to meet the needs of A.S.W. It is **Father** who is the natural guardian of A.S.W. The Probate Code as to Guardianship states in part as follows:

“In all cases not otherwise provided for by law, the father and mother, with equal powers rights and duties, while living, and in case of the death of either parent the survivor, or when there is no lawful father, then the mother, if living, is the natural guardian of their children, and has the custody and care of their persons and education.”(RSMo. §475.025).

The Westermanns put on no evidence as to any physical or mental incapacity that rendered Father unable to assume the care, custody and control of A.S.W. Strict and literal compliance with the statutory requirements is necessary when, as here, the order serves to terminate and or

limit the rights of the natural parent. *In re A.S.O.*, 52 S.W. 3d 59 (Mo. App. W.D. 2001). Taking the view of the evidence most favorable to the Westermanns, there were not clear, cogent and convincing facts that support that Father is unable and or unwilling to take care of his son; and or that Father's involvement with his son would impair his physical and or emotional development. In fact, the evidence from two (2) medical providers (Hogan and Easterday) and one psychologist (Powers) established that he could take care of his son. Therefore, the trial court's judgment is against the weight of the evidence and is a misapplication of the law; and must be reversed. *In the Interest of F.N.M.*, 951 S.W.2d 702, 703 (Mo.App. E.D.1997); *In the Interest of D.L.M.* 31 S.W. 3d 64 (Mo. App. E.D. 2000).

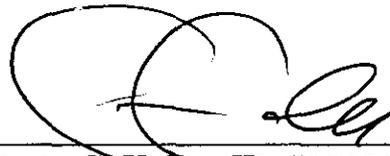
CONCLUSION AND RELIEF SOUGHT

The trial court constructively terminated Father's parental rights when it awarded him no legal or physical custody with his son, A.S.W. In the face of overwhelming evidence that Father had completely recovered from his injuries, and despite the fact when Father and son did meet they expressed love for each other, the trial court was bound and determined to sever Father's relationship with A.S.W. and award his care, custody and control to the Westermans. Due to no fault of Father, and directly related to the actions of the trial court, A.S.W. has not had a relationship with his dad for over four (4) years. So, in justifying its order, the trial court cites that now A.S.W. has bonded with the Westermans and that taking A.S.W. away from them would be harmful. Thus, the trial court's error in terminating his parental rights in the first instance serves as justification for constructively terminating them now? This is not justice, it is injustice.

Appellant respectfully requests that the court pursuant to Rule 84.14 reverse the ruling of the trial court and SUSTAIN Father's First Amended Petition and Motion to Modify and instruct the trial court to immediately enter an order awarding to Father the sole legal and physical custody of A.S.W.; and for an order returning A.S.W. to care, custody and control of his Father to the exclusion of all others. Further, Appellant respectfully

requests that this court pursuant to Rule 84.14 reverses the ruling of the trial court and DENIES the Westermanns Petition for Guardianship of A.S.W. and order them to immediately release A.S.W. into the care of his Father; and that A.S.W.'s name be restored to Alex Stephen Warren.

Respectfully Submitted:

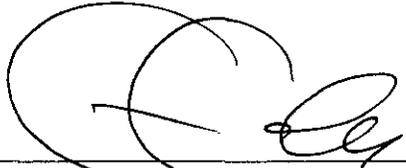
A handwritten signature in black ink, appearing to read "Craig G. Kallen III", written over a horizontal line.

Craig G. Kallen III, #38025
100 S. Brentwood, Suite 400
Clayton, MO 63105
(314) 862-1300
(314) 862-1366-Fax

CERTIFICATE OF COMPLIANCE AND SERVICE

I HEREBY CERTIFY THAT:

1. That the attached brief complies with the limitations contained in the Missouri Rules of Civil Procedure and the Local Rules of the Eastern District of Missouri and contains 6,331 words as determined by Microsoft Word Software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That the Appellant has reviewed the information in Rules 55.03 and 84.06 (b), 83.08 and 84.04 of the Missouri Rules of Civil Procedure and has complied with those Rules; and
4. That a true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed postage prepaid this 27th day of *October, 2006* to: Mr. Theodore Allen, Jr., P.O. Box 100, Hillsboro, MO 63050; and Mr. John S. Appelbaum, 4139 Jeffco Blvd., Arnold, MO 63010; and William C. Dodson, P.O. Box 966, Imperial, MO 63052.



Craig G. Kallen, III #38025

APPENDIX TABLE OF CONTENTS

Judgment (Motion to Modify)A1

Judgment (Guardianship) A5

Mo. Const., Art. V, Section 2 A8

Mo. Rev. State. §211.031 A9

Mo. Rev. State. §211.211 A12

Mo. Rev. State. §211.477 A14

Mo. Rev. State. §211.038 A16

Mo. Rev. State. §475.025 A18

Mo. Rev. State. §452.400 A19

Mo. Const., Art. III, Section 29..... A23

IN THE CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL CIRCUIT OF
MISSOURI AT HILLSBORO, JEFFERSON COUNTY, MISSOURI
DIVISION 10

IN THE INTEREST OF:

ALEX WARREN

CAUSE NO. JU301-048
(Reference Probate Cause No. CV406-54P)

DATE: June 9, 2006

JUDGMENT

BE IT REMEMBERED that the above referenced cause came on for hearing on May 24, 2006 on Natural Father's Motion to Modify, Permanency Planning Hearing, and Guardianship in cause number CV406-54P. Appearances by the Juvenile Office with their attorney, Theodore Allen; Natural Father Paul Warren with his attorney, Craig Kallen.; Guardian ad Litem, John Appelbaum; Foster Parents and Petitioners in the Guardianship action, Patricia and Andrew Westermann. With the consent of the parties, the Court proceeded first to receive evidence from the Juvenile Office for purposes of the Permanency Planning hearing in the event that the Court should retain Juvenile Court jurisdiction beyond this hearing. The Court then received evidence presented on behalf of the Natural Father Paul Warren on his Motion to Modify the Legal and Physical Custody, followed by evidence presented by Guardianship Petitioners.

The Court has taken judicial notice of all prior acts and proceedings herein. The Juvenile Court has ongoing jurisdiction by operation of the Consent Judgment, Order, and Finding of Jurisdiction, dated May 21, 2001. On November 19, 2002, Judge Carol Bader entered her order terminating the parental rights of Paul Warren and Judith Warren. Paul Warren appealed from that Judgment, which was ultimately reversed by the Supreme Court of Missouri on July 1, 2004. On August 4, 2004, Natural Father Paul Warren filed his "First Amended Petition for a Writ of Habeus Corpus or In the Alternative A Motion to Modify the Legal and Physical Custody of A.S.W. For An Immediate Transfer of A.S.W.'s Custody to Biological Father". On August 4, 2004, this Court denied the Writ of Habeus Corpus and set the Motion to Modify for Hearing on August 16, 2004. Prior to that next hearing, Father sought a Writ of Habeus Corpus from the Court of Appeals, which was denied on August 11, 2004. Father's Motion to Modify was heard before this Court and denied on August 16, 2004, but the matter was set for a prompt review hearing on September 20, 2004. On September 20 and November 3, 2004, this Court held Dispositional Review Hearings and subsequently entered orders designed to effectuate contact between Paul and Alex Warren. The Court entered a Permanency Plan in October 2005 of an alternative planned living arrangement (also known as another planned permanent living arrangement). On January 26, 2006, the foster parents, Patricia and Andrew Westermann filed their petition for guardianship. On

February 1, 2006, the Court set the Father's Motion to Modify Legal and Physical Placement and the Westermann's Petition for Guardianship for trial on May 24, 2006.

On May 24, 2006, evidence was adduced. WHEREFORE, the Court makes the following findings and orders:

1. The Natural Father's Motion to Modify Legal and Physical Custody of A.S.W. is denied, and as reason therefore states as follows:

- A. The Court finds that the juvenile herein, Alex Warren, remains in need of care, custody and support in that the lengthy separation from the natural father and the father's mental condition have combined to generate extraordinary circumstances whereby the juvenile cannot currently be returned to the natural father, as detailed hereafter.
- B. The Juvenile has been in lengthy counseling with Kim Steinmann with a view toward facilitating contact between the juvenile and his father. The Court finds that this effort has been unsuccessful. The Court has received credible evidence that the juvenile has a severe adverse reaction upon discussing the subject of his father, Paul Warren, and had an even more severe reaction to the one visit that took place in January 2005 following the order of this Court mandating that such a visit occur. These reactions include nightmares, sleeplessness, and misconduct not characteristic of this child. The Court received the testimony of counselor Kim Steinmann, who detailed these difficulties for the court. Specifically, the counselor reported the existence of a dream regarding an owl that comes to capture Alex, said dream recurring whenever the issue of Paul Warren is discussed.
- C. The Court received as evidence Petitioner's Exhibit 3, which was the deposition of Harriet Landers, PhD. In her assessment of Alex Warren and his situation, she testified that the ramifications of removal of Alex from his foster family would be "emotionally damaging in a serious way." (Deposition of Harriett Landers, page 30, lines 22 - 23.) In response to questioning regarding the owl dream, Dr. Landers declined to blame any prior care giver, but rather indicated, "I think the most likely source of his anxiety is any fear that he would lose this family ... or that his situation would be altered." (Deposition p. 47, lines 21 - 23). Dr. Landers acknowledged that she did not see or evaluate Paul Warren, and indicated that his Intelligence Quotient was not the basis of her recommendations. (Deposition p. 42, lines 12 - 23.)
- D. The Court finds that Paul Warren at this time is still not able to care for his son under the current circumstances. The Court has received the report of Dr. Powers dated January 6, 2005. Dr. Powers indicates that the results of his current evaluation are similar to the results obtained in 2002, and the recommendations made at that time continue to be appropriate. In his most recent report, Dr.

Powers indicates that he supports supervised visits, and that unsupervised visits would be appropriate at some point in the future. As Dr. Landers never evaluated Paul Warren, so Dr. Powers never evaluated Alex to understand his special needs or his reactions to his father. The Court has also received, however, the testimony of Dr. Powers in the transcript of the prior trial, which has been received by this Court herein as Petitioner's Exhibit 1. In that proceeding, Dr. Powers testified that it was inappropriate for Mr. Warren to independently care for a child. (Petitioner's Exhibit 1, Transcript p. 49, lines 11 and 12.). The implication is that he would need the help of his relatives. Though Mr. Warren is currently living with a sister, testimony has been received that she did not offer him the level of assistance expected of her by Mr. Warren's prior care providers. Further, Mr. Warren has announced his intention not to live with relatives any longer, but to obtain his own residence and live on his own. In addition, testimony was received that the home where Mr. Warren resides belongs to his sister, and that her daughter and grandchildren frequently stay there overnight, such that there would be a serious space shortage if Alex were to reside there. The Court further finds that during the testimony of Paul Warren, it was apparent that he is easily confused and has some level of difficulty receiving and conveying information. From the testimony that did come forth, however, it is clear to this Court that Mr. Warren is not currently equipped to raise Alex, particularly with the difficulties Alex will have if made to leave his current home.

- E. The Court has received into evidence Petitioner's Exhibit 4, which is the Certified Court Record of the Twenty-second Judicial Circuit, St. Louis Missouri, wherein the Defendant pled and was found guilty of violations under Sections 566.060 and 566.100 of the Revised Statutes of the State of Missouri, said exhibit including the transcript of Mr. Warren's admission of guilt for these crimes. Said plea and conviction results in the loss of this Court's discretion to place the juvenile into the custody of Mr. Warren pursuant to Section 211.038 of the Revised Statutes of the State of Missouri. Case law has interpreted this statute to remove a court's discretion to reunite a parent and child, in some cases leaving a court with no reasonable alternative but to terminate parental rights. In Re T.M.E., 169 SW3d 581, 589 (Mo. App. W.D. 2005).

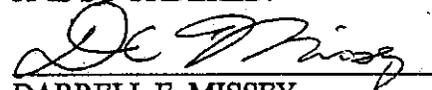
2. As this Court is unable to reunify the juvenile with his father pursuant to statute and the circumstances listed above, and is unable to allow for an adoption by the foster parents due to the ruling of the Supreme Court herein, therefore, it is the order of the Court that the Permanency Plan shall be guardianship with the current placement providers, and in support thereof states as follows:

- A. The Foster Parents herein previously filed a Petition for Adoption which could not be granted as a result of the ruling of the Supreme Court reversing the termination of parental rights. When a juvenile court fails to grant an adoption, the Court may order that a guardian be appointed. Section 453.101 RSMo.

- B. Since the Court is foreclosed from either reunification of the juvenile with a parent or adoption by the foster parents, guardianship is the only long term option available which would preserve rights for natural father Paul Warren while also providing permanency for the juvenile herein.
- C. Evidence has been adduced in these proceedings regarding the appropriateness of the current placement and the fact that the juvenile is thriving there. The Court finds that this placement is in the juvenile's best interest and that any other placement would be contrary to the juvenile's welfare.
- D. The Court has conducted a hearing on said guardianship. Taking into account all of the evidence received in this cause, the Court finds the juvenile to be in need of a guardian, and finds the natural father to be currently unfit and unable to act as guardian. The Court further acknowledges that the parental rights of the natural mother have been terminated. The Court finds that Patricia and Andrew Westermann are fit to serve as guardians.

WHEREFORE, it is the order of this Court that the Permanency Plan shall be guardianship with Patricia and Andrew Westermann, that the natural father Paul Warren's Motion to Modify is denied, that the Children's Division be relieved of legal custody, and that Juvenile Court Jurisdiction herein is terminated.

IT IS SO ORDERED.


DARRELL E. MISSEY
Associate Circuit Judge

6/9/06
Date

In the Circuit Court of the 23rd Judicial Circuit
Associate Circuit Court, Division 10
Hillsboro, MO 63050

IN THE INTEREST OF:)
)
ALEX STEPHEN WARREN) CV406-0054
) (Reference cause no. JU301-048)
)

JUDGMENT

BE IT REMEMBERED that this cause was called for trial on May 24, 2006 in conjunction with a Permanency Planning Hearing and Motion to Modify in the juvenile case In re Alex Warren, JU301-048. Petitioners appear with counsel, William Dodson. Natural father Paul Warren appeared in person and by counsel, Craig Kallen. Guardian ad litem John Appelbaum appeared. The Court proceeded to receive evidence relevant to the related juvenile cause, and followed up to receive evidence specifically relevant to this Petition for Appointment of Guardian, which contains a second count for change of name. Parties announced ready to proceed on all matters, and evidence was adduced on both the juvenile and probate matters.

The Court has taken judicial notice of all of the acts and proceedings in cause number JU301-048. The Court notes that prior to the entry of this Judgment, the court rendered its Judgment in the related Juvenile file wherein the Court found that the Permanency Plan in said Juvenile cause should be guardianship with the Petitioners herein, the Court denied the natural father's Motion to Modify, and Juvenile Court jurisdiction was terminated.

The Court finds as follows:

1. The Court makes all of the findings contained in the above referenced Judgment in Cause Number JU301-048, a copy of which is attached as Exhibit A, and said findings and orders are incorporated herein by reference as if fully set forth.
2. The Court finds that the parental rights of the natural mother were terminated in the above referenced juvenile file, and that said termination was not appealed, such that Paul Warren is the only remaining legal parent of the minor child, Alex Warren.
3. The Court finds that Paul Warren is unfit and unable to assume the duties of guardianship over the minor child, and further finds as follows:

A. The Court has made findings of fact in the above referenced Juvenile Court Judgment regarding the current condition and abilities of Mr. Paul Warren, and the circumstances of his son, Alex Warren, and the Court has incorporated all of those findings into this Judgment.

B. Pursuant to Section 211.038 of the Revised Statutes of the State of Missouri, the Juvenile Court had no discretion to place the minor child, Alex Warren with Paul Warren in that he pled guilty to and was found guilty of violations of Sections 566.060 and 566.100 RSMo. .

C. In paragraph 1.B of the above referenced Juvenile Court Judgment, the Court has made a finding regarding difficulties that Alex Warren has following contact with or discussion of his father. In paragraph 1.C. of said Judgment, the Court notes the testimony of Dr. Harriet Landers, PhD. indicating that removal of Alex from his foster family would be "emotionally damaging in a serious way." The Court finds that Alex Warren is deeply bonded to the Petitioners, that removal from their home would be a detriment to his well being, that he currently has a stable and healthy family life with the petitioners, and the current home environment with the Petitioners is appropriate. "Unfitness" is given a broad definition in the case law, and is by its very nature relative to the circumstances of a particular case. Estate of Williams, 922 S.W.2d 422, 425 (Mo. App. 1996). The term may refer to the degree of care which the parent, with the best intention in the world, is still incapable of fulfilling. Id. In the Williams case, this analysis included the good conditions of the child in his current placement and his bond to individuals living in that home. Id. at 424. The Court finds that emotional harm would come to this juvenile if he would be removed from his current home, and that Paul Warren's physical and mental condition renders him unable to address the specific needs of this child resulting from that emotional harm.

D. The Court has already found that Paul Warren is not currently able to care for his son as set forth in paragraph 1.D of the Juvenile Court Judgment, already incorporated herein by reference. In determining whether a parent is able to act as guardian for his child, the court may consider evidence of a lack of independent ability to provide for the child despite the parent's best intentions, even when that lack of ability is impacted by physical injury and mental condition. In re Moreau, 18 SW3d 447, 451 (Mo. App. 2000).

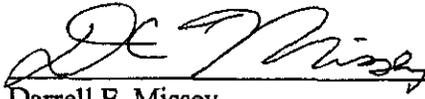
4. The Court finds that the Petitioners have cared for the minor child for years, that evidence was received in a related adoption file, but that said adoption could not be finalized due to the Supreme Court decision in the above referenced Juvenile cause, but that since that date, the juvenile has used the name Westermann and believes that is in fact his name. The Court finds that the change of the minor child's name to Westermann is in his best interest and will not be detrimental to any other person.

WHEREFORE, the Petitioners herein are named as Guardians of Alex Stephen Warren, said minor child shall remain in their custody, and Letters of Guardianship shall be issued herein. The Guardian ad Litem fee shall be applied and paid pursuant to an

A 6

order in the above referenced Juvenile File. Further, the name of the minor child shall be changed to Alex Stephen Westermann. Costs are taxed to Petitioners.

IT IS SO ORDERED.



Darrell E. Missey
Associate Circuit Judge, Division 10

6/9/06

Date

Missouri Constitution

Article V JUDICIAL DEPARTMENT Section 2

August 28, 2005

Supreme court--controlling decisions--number of judges--sessions.

Section 2. The supreme court shall be the highest court in the state. Its jurisdiction shall be coextensive with the state. Its decisions shall be controlling in all other courts. It shall be composed of seven judges, who shall hold their sessions in Jefferson City at times fixed by the court.

Source: Const. of 1875, Art. VI, §§ 2, 9; Amdt. of 1884, § 6; Amdt. of 1890, § 1.



Missouri General Assembly

Missouri Revised Statutes

Chapter 211 Juvenile Courts Section 211.031

August 28, 2005

Juvenile court to have exclusive jurisdiction, when--exceptions--home schooling, attendance violations, how treated.

211.031. 1. Except as otherwise provided in this chapter, the juvenile court or the family court in circuits that have a family court as provided in sections 487.010 to 487.190, RSMo, shall have exclusive original jurisdiction in proceedings:

(1) Involving any child or person seventeen years of age who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:

(a) The parents, or other persons legally responsible for the care and support of the child or person seventeen years of age, neglect or refuse to provide proper support, education which is required by law, medical, surgical or other care necessary for his or her well-being; except that reliance by a parent, guardian or custodian upon remedial treatment other than medical or surgical treatment for a child or person seventeen years of age shall not be construed as neglect when the treatment is recognized or permitted pursuant to the laws of this state;

(b) The child or person seventeen years of age is otherwise without proper care, custody or support; or

(c) The child or person seventeen years of age was living in a room, building or other structure at the time such dwelling was found by a court of competent jurisdiction to be a public nuisance pursuant to section 195.130, RSMo;

(d) The child or person seventeen years of age is a child in need of mental health services and the parent, guardian or custodian is unable to afford or access appropriate mental health treatment or care for the child;

(2) Involving any child who may be a resident of or found within the county and who is alleged to be in need of care and treatment because:

(a) The child while subject to compulsory school attendance is repeatedly and without justification absent from school; or

(b) The child disobeys the reasonable and lawful directions of his or her parents or other custodian and is beyond their control; or

(c) The child is habitually absent from his or her home without sufficient cause, permission, or justification; or

(d) The behavior or associations of the child are otherwise injurious to his or her welfare or to the welfare of others; or

(e) The child is charged with an offense not classified as criminal, or with an offense applicable only to children; except that, the juvenile court shall not have jurisdiction over any child fifteen and one-half years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony, or any child who is alleged to have violated a state or municipal ordinance or regulation prohibiting possession or use of any tobacco product;

(3) Involving any child who is alleged to have violated a state law or municipal ordinance, or any person who is alleged to have violated a state law or municipal ordinance prior to attaining the age of seventeen years, in which cases jurisdiction may be taken by the court of the circuit in which the child or person resides or may be found or in which the violation is alleged to have occurred; except that, the juvenile court shall not have jurisdiction over any child fifteen and one-half years of age who is alleged to have violated a state or municipal traffic ordinance or regulation, the violation of which does not constitute a felony, and except that the juvenile court shall have concurrent jurisdiction with the municipal court over any child who is alleged to have violated a municipal curfew ordinance, and except that the juvenile court shall have concurrent jurisdiction with the circuit court on any child who is alleged to have violated a state or municipal ordinance or regulation prohibiting possession or use of any tobacco product;

(4) For the adoption of a person;

(5) For the commitment of a child or person seventeen years of age to the guardianship of the department of social services as provided by law.

2. Transfer of a matter, proceeding, jurisdiction or supervision for a child or person seventeen years of age who resides in a county of this state shall be made as follows:

(1) Prior to the filing of a petition and upon request of any party or at the discretion of the juvenile officer, the matter in the interest of a child or person seventeen years of age may be transferred by the juvenile officer, with the prior consent of the juvenile officer of the receiving court, to the county of the child's residence or the residence of the person seventeen years of age for future action;

(2) Upon the motion of any party or on its own motion prior to final disposition on the pending matter, the court in which a proceeding is commenced may transfer the proceeding of a child or person seventeen years of age to the court located in the county of the child's residence or the residence of the person seventeen years of age, or the county in which the offense pursuant to subdivision (3) of subsection 1 of this section is alleged to have occurred for further action;

(3) Upon motion of any party or on its own motion, the court in which jurisdiction has been taken pursuant to subsection 1 of this section may at any time thereafter transfer jurisdiction of a child or person seventeen years of age to the court located in the county of the child's residence or the residence of the person seventeen years of age for further action with the prior consent of the receiving court;

(4) Upon motion of any party or upon its own motion at any time following a judgment of disposition or treatment pursuant to section 211.181, the court having jurisdiction of the cause may place the child or person seventeen years of age under the supervision of another juvenile court within or without the state pursuant to section 210.570, RSMo, with the consent of the receiving court;

(5) Upon motion of any child or person seventeen years of age or his or her parent, the court having jurisdiction shall grant one change of judge pursuant to Missouri Supreme Court Rules;

(6) Upon the transfer of any matter, proceeding, jurisdiction or supervision of a child or person seventeen years of age, certified copies of all legal and social documents and records pertaining to the case on file with the clerk of the transferring juvenile court shall accompany the transfer.

3. In any proceeding involving any child or person seventeen years of age taken into custody in a county other than the county of the child's residence or the residence of a person seventeen years of age, the juvenile court of the county of the child's residence or the residence of a person seventeen years of age shall be notified of such taking into custody within seventy-two hours.

4. When an investigation by a juvenile officer pursuant to this section reveals that the only basis for action involves an alleged violation of section 167.031, RSMo, involving a child who alleges to be home schooled, the juvenile officer shall contact a parent or parents of such child to verify that the child is being home schooled and not in violation of section 167.031, RSMo, before making a report of such a violation. Any report of a violation of section 167.031, RSMo, made by a juvenile officer regarding a child who is being home schooled shall be made to the prosecuting attorney of the county where the child legally resides.

(L. 1957 p. 642 § 211.030, A.L. 1976 S.B. 511, A.L. 1980 S.B. 512, A.L. 1983 S.B. 368, A.L. 1989 H.B. 502, et al., A.L. 1990 H.B. 1030, A.L. 1991 H.B. 202 & 364, A.L. 1993 H.B. 346, A.L. 1999 S.B. 1, et al., A.L. 2002 S.B. 923, et al., A.L. 2004 H.B. 1453 merged with S.B. 945 and S.B. 803 & 1257 merged with S.B. 1211, A.L. 2005 H.B. 353)

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Missouri General Assembly

Missouri Revised Statutes

Chapter 211 Juvenile Courts Section 211.211

August 28, 2005

Right to counsel--appointed, when--waiver.

- 211.211. 1. A party is entitled to be represented by counsel in all proceedings.
2. The court shall appoint counsel for a child prior to the filing of a petition if a request is made therefor to the court and the court finds that the child is the subject of a juvenile court proceeding and that the child making the request is indigent.
3. When a petition has been filed, the court shall appoint counsel for the child when necessary to assure a full and fair hearing.
4. When a petition has been filed and the child's custodian appears before the court without counsel, the court shall appoint counsel for the custodian if it finds:
 - (1) That the custodian is indigent; and
 - (2) That the custodian desires the appointment of counsel; and
 - (3) That a full and fair hearing requires appointment of counsel for the custodian.
5. Counsel shall be allowed a reasonable time in which to prepare to represent his client.
6. Counsel shall serve for all stages of the proceedings, including appeal, unless relieved by the court for good cause shown. If no appeal is taken, services of counsel are terminated following the entry of an order of disposition.
7. The child and his custodian may be represented by the same counsel except where a conflict of interest exists. Where it appears to the court that a conflict exists, it shall order that the child and his custodian be represented by separate counsel, and it shall appoint counsel if required by subsection 3 or 4 of this section.
8. When a petition has been filed, a child may waive his right to counsel only with the approval of the court.
9. Waiver of counsel by a child may be withdrawn at any stage of the proceeding, in which event the court shall appoint counsel for the child if required by subsection 3 of this section.

(L. 1957 p. 642 § 211.215, A.L. 1989 H.B. 502, et al.)

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Missouri Revised Statutes

Chapter 211 Juvenile Courts Section 211.477

August 28, 2005

Order of termination, when issued--transfer of legal custody, to whom--alternatives to termination--power of court--granting or denial of petition deemed final judgment.

211.477. 1. If, after the dispositional hearing, the court finds that one or more of the grounds set out in section 211.447 exists or that the parent has consented to the termination pursuant to section 211.444 and that it is in the best interests of the child, the court may terminate the rights of the parent in and to the child. After ordering termination and after consideration of the social study and report, the court shall transfer legal custody to:

- (1) The division of family services;
- (2) A private child-placing agency;
- (3) A foster parent, relative or other person participating in the proceedings pursuant to section 211.464; or
- (4) Any other person or agency the court deems suitable to care for the child.

2. If only one parent consents or if the conditions specified in section 211.447 are found to exist as to only one parent, the rights of only that parent with reference to the child may be terminated and the rights of the other parent shall not be affected.

3. The court may order termination whether or not the child is in adoptive placement or an adoptive placement is available for the child.

4. If, after the dispositional hearing, the court finds that one or more of the grounds set out in section 211.447 exists, but that termination is not in the best interests of the child because the court finds that the child would benefit from the continued parent-child relationship or because the child is fourteen or more years of age and objects to the termination, the court may:

- (1) Dismiss the petition and order that the child be returned to the custody of the parent;
- (2) Retain jurisdiction of the case and order that the child be placed in the legal custody of the parent, the division, a private child-caring or placing agency, a foster parent, relative or other suitable person who is able to provide long-term care for the child. Any order of the court under this subdivision shall designate the period of time it shall remain in effect, with mandatory review by the court no later than six months thereafter. The court shall also specify what residual rights and responsibilities remain with the parent. Any individual granted legal custody shall exercise the rights and responsibilities personally

unless otherwise authorized by the court; or

(3) Appoint a guardian under the provisions of chapter 475, RSMo.

5. Orders of the court issued pursuant to sections 211.442 to 211.487 shall recite the jurisdictional facts, factual findings on the existence of grounds for termination and that the best interests of the child are served by the disposition stated in the order.

6. The granting or denial of a petition for termination of parental rights shall be deemed a final judgment for purposes of appeal.

(L. 1978 H.B. 972 § 8, A.L. 1985 H.B. 366, et al., A.L. 1999 S.B. 1, et al., A.L. 2003 S.B. 63)

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Missouri Revised Statutes

Chapter 211 Juvenile Courts Section 211.038

August 28, 2005

Children not to be reunited with parents or placed in a home, when--discretion to return, when.

211.038. 1. A child under the jurisdiction of the juvenile court shall not be reunited with a parent or placed in a home in which the parent or any person residing in the home has been found guilty of, or pled guilty to, any of the following offenses when a child was the victim:

(1) A felony violation of section 566.030, 566.032, 566.040, 566.060, 566.062, 566.064, 566.067, 566.068, 566.070, 566.083, 566.090, 566.100, 566.111, 566.151, 566.203, 566.206, 566.209, 566.212, or 566.215, RSMo;

(2) A violation of section 568.020, RSMo;

(3) A violation of subdivision (2) of subsection 1 of section 568.060, RSMo;

(4) A violation of section 568.065, RSMo;

(5) A violation of section 568.080, RSMo;

(6) A violation of section 568.090, RSMo; or

(7) A violation of section 568.175, RSMo.

2. For all other violations of offenses in chapters 566 and 568, RSMo, not specifically listed in subsection 1 of this section or for a violation of an offense committed in another state when a child is the victim that would be a violation of chapter 566 or 568, RSMo, if committed in Missouri, the juvenile court may exercise its discretion regarding the placement of a child under the jurisdiction of the juvenile court in a home in which a parent or any person residing in the home has been found guilty of, or pled guilty to, any such offense.

3. If the juvenile court determines that a child has abused another child, such abusing child shall be prohibited from returning to or residing in any residence located within one thousand feet of the residence of the abused child, or any child care facility or school that the abused child attends, until the abused child reaches eighteen years of age. The prohibitions of this subsection shall not apply where the alleged abuse occurred between siblings or children living in the same home.

(L. 2004 H.B. 1453, A.L. 2005 H.B. 568 merged with S.B. 155 merged with S.B. 420 & 344, A.L. 2005 1st Ex. Sess. H.B. 2)

Effective 9-15-05

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Missouri General Assembly

Missouri Revised Statutes

Chapter 475 Probate Code--Guardianship Section 475.025

August 28, 2005

Rights of parents as natural guardians of minors.

475.025. In all cases not otherwise provided for by law, the father and mother, with equal powers, rights and duties, while living, and in case of the death of either parent the survivor, or when there is no lawful father, then the mother, if living, is the natural guardian of their children, and has the custody and care of their persons and education. When the estate of a minor is derived from a parent, the parent as natural guardian has all of the powers of a conservator appointed by a court, with respect to property derived from him, except that no court order or authorization is necessary to exercise these powers and the natural guardian may invest, sell and reinvest the estate of the minor in such property as is reasonable and prudent.

(RSMo 1939 § 375, A.L. 1955 p. 385 § 286, A.L. 1957 p. 829, A.L. 1983 S.B. 44 & 45)

Prior revisions: 1929 § 375; 1919 § 371; 1909 § 430

(1958) Where child's estate was derived solely from father, court did not err in dismissing father's petition for declaratory judgment stating his right as natural guardian of child under § 475.025, as it was before reenactment in 1957, since by its terms the section applied only to children's estates derived from both parents and in addition all questions as to father's powers and rights as natural guardian were moot at the date of judgment. *Dyer v. Union Electric Co. (A.)*, 318 S.W.2d 401.

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Missouri General Assembly

Missouri Revised Statutes

Chapter 452 Dissolution of Marriage, Divorce, Alimony and Separate Maintenance Section 452.400

August 28, 2005

Visitation rights, awarded when--history of domestic violence, consideration of--prohibited, when--modification of, when--supervised visitation defined--noncompliance with order, effect of--family access motions, procedure, penalty for violation--attorney fees and costs assessed, when.

452.400. 1. (1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger the child's physical health or impair his or her emotional development. The court shall enter an order specifically detailing the visitation rights of the parent without physical custody rights to the child and any other children for whom such parent has custodial or visitation rights. In determining the granting of visitation rights, the court shall consider evidence of domestic violence. If the court finds that domestic violence has occurred, the court may find that granting visitation to the abusive party is in the best interests of the child.

(2) (a) The court shall not grant visitation to the parent not granted custody if such parent or any person residing with such parent has been found guilty of or pled guilty to any of the following offenses when a child was the victim:

a. A felony violation of section 566.030, 566.032, 566.040, 566.060, 566.062, 566.064, 566.067, 566.068, 566.070, 566.083, 566.090, 566.100, 566.111, 566.151, 566.203, 566.206, 566.209, 566.212, or 566.215, RSMo;

b. A violation of section 568.020, RSMo;

c. A violation of subdivision (2) of subsection 1 of section 568.060, RSMo;

d. A violation of section 568.065, RSMo;

e. A violation of section 568.080, RSMo;

f. A violation of section 568.090, RSMo; or

g. A violation of section 568.175, RSMo.

(b) For all other violations of offenses in chapters 566 and 568, RSMo, not specifically listed in paragraph (a) of this subdivision or for a violation of an offense committed in another state when a child is the victim that would be a violation of chapter 566 or 568, RSMo, if committed in Missouri, the court may exercise its discretion in granting visitation to a parent not granted custody if such parent or any

person residing with such parent has been found guilty of, or pled guilty to, any such offense.

(3) The court shall consider the parent's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault on other persons and shall grant visitation in a manner that best protects the child and the parent or other family or household member who is the victim of domestic violence, and any other children for whom the parent has custodial or visitation rights from any further harm.

(4) The court, if requested by a party, shall make specific findings of fact to show that the visitation arrangements made by the court best protect the child or the parent or other family or household member who is the victim of domestic violence, or any other child for whom the parent has custodial or visitation rights from any further harm.

2. (1) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child, but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical health or impair his or her emotional development.

(2) (a) In any proceeding modifying visitation rights, the court shall not grant unsupervised visitation to a parent if the parent or any person residing with such parent has been found guilty of or pled guilty to any of the following offenses when a child was the victim:

a. A felony violation of section 566.030, 566.032, 566.040, 566.060, 566.062, 566.064, 566.067, 566.068, 566.070, 566.083, 566.090, 566.100, 566.111, 566.151, 566.203, 566.206, 566.209, 566.212, or 566.215, RSMo;

b. A violation of section 568.020, RSMo;

c. A violation of subdivision (2) of subsection 1 of section 568.060, RSMo;

d. A violation of section 568.065, RSMo;

e. A violation of section 568.080, RSMo;

f. A violation of section 568.090, RSMo; or

g. A violation of section 568.175, RSMo.

(b) For all other violations of offenses in chapters 566 and 568, RSMo, not specifically listed in paragraph (a) of this subdivision or for a violation of an offense committed in another state when a child is the victim that would be a violation of chapter 566 or 568, RSMo, if committed in Missouri, the division may exercise its discretion regarding the placement of a child taken into the custody of the state in which a parent or any person residing in the home has been found guilty of, or pled guilty to, any such offense.

(3) When a court restricts a parent's visitation rights or when a court orders supervised visitation because of allegations of abuse or domestic violence, a showing of proof of treatment and rehabilitation shall be made to the court before unsupervised visitation may be ordered. "Supervised visitation", as used in this section, is visitation which takes place in the presence of a responsible adult appointed by the court for the protection of the child.

3. The court shall mandate compliance with its order by all parties to the action, including parents, children and third parties. In the event of noncompliance, the aggrieved person may file a verified motion for contempt. If custody, visitation or third-party custody is denied or interfered with by a parent or third party without good cause, the aggrieved person may file a family access motion with the court stating the specific facts which constitute a violation of the judgment of dissolution or legal separation. The state courts administrator shall develop a simple form for pro se motions to the aggrieved person, which shall be provided to the person by the circuit clerk. Clerks, under the supervision of a circuit clerk, shall explain to aggrieved parties the procedures for filing the form. Notice of the fact that clerks will provide such assistance shall be conspicuously posted in the clerk's offices. The location of the office where the family access motion may be filed shall be conspicuously posted in the court building. The performance of duties described in this section shall not constitute the practice of law as defined in section 484.010, RSMo. Such form for pro se motions shall not require the assistance of legal counsel to prepare and file. The cost of filing the motion shall be the standard court costs otherwise due for instituting a civil action in the circuit court.

4. Within five court days after the filing of the family access motion pursuant to subsection 3 of this section, the clerk of the court shall issue a summons pursuant to applicable state law, and applicable local or supreme court rules. A copy of the motion shall be personally served upon the respondent by personal process server as provided by law or by any sheriff. Such service shall be served at the earliest time and shall take priority over service in other civil actions, except those of an emergency nature or those filed pursuant to chapter 455, RSMo. The motion shall contain the following statement in boldface type:

"PURSUANT TO SECTION 452.400, RSMO, YOU ARE REQUIRED TO RESPOND TO THE CIRCUIT CLERK WITHIN TEN DAYS OF THE DATE OF SERVICE. FAILURE TO RESPOND TO THE CIRCUIT CLERK MAY RESULT IN THE FOLLOWING:

(1) AN ORDER FOR A COMPENSATORY PERIOD OF CUSTODY, VISITATION OR THIRD-PARTY CUSTODY AT A TIME CONVENIENT FOR THE AGGRIEVED PARTY NOT LESS THAN THE PERIOD OF TIME DENIED;

(2) PARTICIPATION BY THE VIOLATOR IN COUNSELING TO EDUCATE THE VIOLATOR ABOUT THE IMPORTANCE OF PROVIDING THE CHILD WITH A CONTINUING AND MEANINGFUL RELATIONSHIP WITH BOTH PARENTS;

(3) ASSESSMENT OF A FINE OF UP TO FIVE HUNDRED DOLLARS AGAINST THE VIOLATOR;

(4) REQUIRING THE VIOLATOR TO POST BOND OR SECURITY TO ENSURE FUTURE COMPLIANCE WITH THE COURT'S ORDERS;

(5) ORDERING THE VIOLATOR TO PAY THE COST OF COUNSELING TO REESTABLISH THE PARENT-CHILD RELATIONSHIP BETWEEN THE AGGRIEVED PARTY AND THE CHILD; AND

(6) A JUDGMENT IN AN AMOUNT NOT LESS THAN THE REASONABLE EXPENSES, INCLUDING ATTORNEY'S FEES AND COURT COSTS ACTUALLY INCURRED BY THE AGGRIEVED PARTY AS A RESULT OF THE DENIAL OF CUSTODY, VISITATION OR THIRD-PARTY CUSTODY."

5. If an alternative dispute resolution program is available pursuant to section 452.372, the clerk shall also provide information to all parties on the availability of any such services, and within fourteen days of the date of service, the court may schedule alternative dispute resolution.

6. Upon a finding by the court pursuant to a motion for a family access order or a motion for contempt that its order for custody, visitation or third-party custody has not been complied with, without good cause, the court shall order a remedy, which may include, but not be limited to:

(1) A compensatory period of visitation, custody or third-party custody at a time convenient for the aggrieved party not less than the period of time denied;

(2) Participation by the violator in counseling to educate the violator about the importance of providing the child with a continuing and meaningful relationship with both parents;

(3) Assessment of a fine of up to five hundred dollars against the violator payable to the aggrieved party;

(4) Requiring the violator to post bond or security to ensure future compliance with the court's access orders; and

(5) Ordering the violator to pay the cost of counseling to reestablish the parent-child relationship between the aggrieved party and the child.

7. The reasonable expenses incurred as a result of denial or interference with custody or visitation, including attorney's fees and costs of a proceeding to enforce visitation rights, custody or third-party custody, shall be assessed, if requested and for good cause, against the parent or party who unreasonably denies or interferes with visitation, custody or third-party custody. In addition, the court may utilize any and all powers relating to contempt conferred on it by law or rule of the Missouri supreme court.

8. Final disposition of a motion for a family access order filed pursuant to this section shall take place not more than sixty days after the service of such motion, unless waived by the parties or determined to be in the best interest of the child. Final disposition shall not include appellate review.

9. Motions filed pursuant to this section shall not be deemed an independent civil action from the original action pursuant to which the judgment or order sought to be enforced was entered.

(L. 1973 H.B. 315 § 21, A.L. 1977 S.B. 430, A.L. 1982 S.B. 468, A.L. 1983 S.B. 94, A.L. 1988 H.B. 1272, et al., A.L. 1989 H.B. 422, A.L. 1993 S.B. 180, A.L. 1995 S.B. 174, A.L. 1998 S.B. 910, A.L. 1999 S.B. 1, et al., A.L. 2004 H.B. 1453, A.L. 2005 H.B. 568)

(1977) Where original decree is silent as to visitation rights no change of circumstance need be shown to authorize "modification" (really clarification) of visitation rights. Adoption of E.N. v. E.M.N. (A.), 559 S.W.2d 543.

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Missouri General Assembly

Missouri Constitution

Article III LEGISLATIVE DEPARTMENT Section 29

August 28, 2005

Effective date of laws--exceptions--procedure in emergencies and upon recess.

Section 29. No law passed by the general assembly, except an appropriation act, shall take effect until ninety days after the adjournment of the session in either odd-numbered or even-numbered years at which it was enacted. However, in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly by a two-thirds vote of the members elected to each house, taken by yeas and nays may otherwise direct; and further except that, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of the recess.

Source: Const. of 1875, Art. IV, § 36.

(Amended November 3, 1970)

(1952) words "laws previously passed and not effective" in last proviso includes those bills passed by both houses of the general assembly, and signed by the presiding officers thereof, prior to the beginning of a recess, even though such bills have not been approved by the governor prior to the recess. State ex rel. Moore v. Toberman, 363 Mo. 245, 250 S.W.2d 701.

(1991) "Later in time" rule of statutory construction does not apply when sections are passed in the same legislative session and neither has an emergency clause. Berdella v. Pender, 821 S.W.2d 846 (Mo.banc 1991).



Missouri General Assembly