NO. ED 88382

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

IN THE INTEREST OF:

A.S.W.,

A Juvenile.

APPEAL FROM THE JUVENILE AND PROBATE DIVISIONS
CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL CIRCUIT
HONORABLE DARRELL E. MISSEY

RESPONDENT'S BRIEF

William C. Dodson
Attorney for Patricia and Andrew Westermann, Respondents
P.O. Box 966
Imperial, MO 63052
636/461-2300
636/461-2300 (Facsimile)

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STATEMENT OF FACTS

Respondents Westermann adopt, with consent of Respondent Juvenile Office, the Statement of Facts included in Respondent Juvenile Office's Brief, and reprint it, in its entirety, herein for ease of reference.

Appellant appeals from the June 9, 2006, judgment of the Honorable Darrell E. Missey, Judge of the Juvenile Division of the Circuit Court of the Twenty-Third Judicial Circuit of Missouri, that denied Appellant's motion to modify the previous orders of disposition entered by the court in the juvenile matter and return legal and physical custody of A.S.W. to Appellant. (I L.F. 0102). Appellant also appeals from Judge Missey's judgment of that date, sitting as Judge of the Probate Division, appointing guardians of the person of A.S.W. (II L.F. 0018). Both of these judgments resulted from a trial held on May 24, 2006, which trial also dealt with the issue of permanency planning for the juvenile as required by Section 210.720, RSMo. (T. 3). By consent of the parties, Appellant's motion to modify, the permanency planning issue, and the petition for guardianship were heard as one evidentiary matter. (T. 2-3).

A.S.W. was born on February 16, 1998. (T. 25). On January 25, 2001, the Juvenile Officer filed a petition that alleged, in addition to certain statements about neglect by the child's mother that are not at issue herein, that the Appellant was "unsuitable for placement due to disability." (Respondent's Supp. L.F. 2). On May 21, 2001, the Juvenile Division entered its judgment that the aforesaid allegation

was true and that the court had jurisdiction over the juvenile under Section 211.031. 1. (1), RSMo by consent of Appellant and his appointed Guardian Ad Litem. The court entered an order of disposition placing the juvenile in the legal custody of the Children's Division for foster care. (Respondent's Supp. L.F 4-8). This judgment was not appealed.

On March 13, 2002, the Juvenile Officer filed a petition to terminate Appellant's parental rights to A.S.W., as well as those of A.S.W.'s mother. After hearing on October 22, 2002, the Juvenile Division, the Honorable Carol Kennedy Bader presiding, entered its judgment terminating parental rights of both parents. (I L.F. 0010-11). Subsequently on July 1, 2004, that judgment terminating parental rights was reversed by the Supreme Court of Missouri, as reported at 137 S.W.3d 448. Following such reversal, the Juvenile Division has taken numerous actions in the interest of A.S.W. At the trial which resulted in the judgments at issue here, the court took judicial notice of those acts. (T. 4). Specifically, on September 20, 2004, the court ordered that Appellant participate in a psychological evaluation and psychosexual evaluation at the cost of the Children's Division, and also ordered that counseling sessions were to immediately begin to address the issue of contact between the juvenile and Appellant, with first contact to occur before November 1, 2004, unless otherwise ordered. (Respondent's Supp. L.F. 9-10). On November 1, 2004, the court ordered that the juvenile continue in individual therapy with Kimberly Steinmann, the goal of such therapy being the initiation of contact between the juvenile and Appellant "as soon as possible, but in any event

prior to the review date of February 7, 2005." (Respondent's Supp. L.F. 11). On December 8, 2005, Appellant filed a motion in the juvenile court for Appellant to have Christmas visitation with A.S.W. with the juvenile court. (Respondent's Supp. L.F. 13). On December 21, 2005, the court denied visitation but directed that Appellant "have the opportunity to provide the juvenile with a gift and an appropriate card, to be signed 'Paul'." (Respondent's Supp. L.F. 14).

At trial on May 24, 2006, the Juvenile Officer introduced, as Petitioner's Exhibit 1, the transcript of the testimony presented at the termination of parental rights hearing on October 22, 2002. (T. 56).

Testimony from October 22, 2002 Hearing

On October 22, 2002, the Juvenile Officer first called Shirley Smith, a clinical coordinator with Restcare Premier, a clinic that specializes in rehabilitation of individuals with head injuries. (Petitioner's Exhibit 1, at 12). Ms. Smith testified that she was a certified and licensed occupational therapy assistant, was in the process of receiving a certificate as a brain injury specialist and clinical instructor, and had nine years of experience in the field. (Petitioner's Exhibit 1, at 13). The trial court found that Ms. Smith was “extensively qualified in her field.” (Petitioner's Exhibit 1, at 32). Ms. Smith testified that Appellant was a resident at Restcare for two years, from March 2000 until May 2002. (Petitioner's Exhibit 1, at 16-17). During that time, Appellant received occupational therapy, physical therapy, and speech therapy for a job-related head injury. (Petitioner's Exhibit 1, at 17). Appellant’s admitting problems in 2000 were poor memory, poor judgment,

poor insight, poor problem solving in managing day to day situations, and poor judgment with regard to personal safety. (Petitioner's Exhibit 1 at 18-20).

In June 2002, Appellant was discharged from Restcare “with supervision of a family member.” Restcare recommended that he have “intermittent supervision,” or someone within the household with him to oversee his care. (Petitioner's Exhibit 1 at 22). Restcare did not consider Appellant to be capable of living independently, (Petitioner's Exhibit 1 at 36), and believed that he needed someone with him “for his safety.” (Petitioner's Exhibit 1 at 37).

Upon his discharge, Restcare administered to Appellant the Mayo-Portland Adaptability Inventory-3, (Petitioner's Exhibit 1 at 25), a test commonly used in the rehabilitation field to assist a patient in determining quality of care. (Petitioner's Exhibit 1 at 22). With regard to his self-awareness, Appellant had a “severe problem” with “recognition of personal limitations and disabilities and how they interfere with every day activities.” (Petitioner's Exhibit 1 at 26). Appellant would have difficulty in relating with significant family relationships twenty-five to seventy-five percent of the time. (Petitioner's Exhibit 1 at 26-27).

In reference to his ability to rear a child, Appellant’s score on the Mayo-Portland Adaptability Test indicated that he would have a severe problem and would require supervision from others seventy-five percent of the time or more. (Petitioner's Exhibit 1 at 28).

On October 22, 2002, the Juvenile Officer also called Dr. James Powers, a clinical psychologist. (Petitioner's Exhibit 1 at 40). Dr. Powers testified that he

conducted a psychological evaluation of Appellant on August 29, 2002. (Petitioner's Exhibit 1 at 41). Dr. Powers administered the Wechsler Adult Intelligence Scale, Revised, the Rorschach Diagnostic Technique, the Thematic Apperception Test, the Incomplete Sentence Blank test, and conducted a clinical interview with Appellant. (Petitioner's Exhibit 1 at 42). From his testing and interview, Dr. Powers concluded that Appellant's thought process was concrete and immature, (Petitioner's Exhibit 1 at 44), that he would have difficulty in controlling his mood, and that he was likely to make errors in more complicated or difficult parenting areas. (Petitioner's Exhibit 1 at. 46-47). Dr. Powers stated that Appellant suffered from a "cognitive disorder," which he defined as another name for a "brain injury." (Petitioner's Exhibit 1 at 48). This condition was permanent. (Petitioner's Exhibit 1 at 51). In Dr. Powers' opinion, it was inappropriate for Appellant to independently care for a child. (Petitioner's Exhibit 1 at 49). If he were to do so, Dr. Powers concluded that Appellant could make errors, bad decisions, and exercise poor judgment and place the child in danger. (Petitioner's Exhibit 1 at 49-50). Dr. Powers testified that he had "serious questions" regarding the child's safety if Appellant had primary responsibility for the child. (Petitioner's Exhibit 1 at 50). Dr. Powers also testified that Appellant, if asked about a specific situation in child rearing, would likely be able to articulate an appropriate response. Appellant's difficulty would arise if called upon to carry out an appropriate response to an imminent parenting situation or need. (Petitioner's Exhibit 1 at 50).

Appellant testified on his own behalf on October 22, 2002. (Petitioner's Exhibit 1 at 80). Appellant testified that in January 2000, he suffered a fall at work and sustained a head injury. (Petitioner's Exhibit 1 at 83). From January 2000 until March 2000, Appellant was hospitalized. (Petitioner's Exhibit 1 at 84). In March 2000, Appellant moved into Restcare. (Petitioner's Exhibit 1 at 84). During the time that he was a patient at Restcare, Appellant testified that at some time he resided alone in an apartment, although Restcare personnel monitored him daily. (Petitioner's Exhibit 1 at 105). Appellant moved to his sister's home in June 2002. (Petitioner's Exhibit 1 at 81). Appellant stated that "as for now, I stay with my sister Donna," (Petitioner's Exhibit 1 at 80), although he expressed a wish to locate either to a residence on Compton in St. Louis or to a home to be built on acreage to be acquired near Salem, Missouri. (Petitioner's Exhibit 1 at 110, 115). Appellant testified that he was incapable of employment. (Petitioner's Exhibit 1 at 81).

In his sister's home, Appellant paid the rent, the utilities, and purchased all groceries for the household. (Petitioner's Exhibit 1 at 127-128). Appellant testified that he also cleaned the household, did laundry, fed and cared for a dog, and did the grocery shopping and cooking for the household. (Petitioner's Exhibit 1 at 82). Appellant testified that he was alone between 7:30 p.m. until 7:30 a.m., while his sister worked. (Petitioner's Exhibit 1 at 81). Appellant testified that he had been incarcerated for ten years for "sodomizing" his two nieces, who were eleven and fifteen at the time of the incidents. (Petitioner's Exhibit 1 at 121, 126).

When asked about what he learned in parenting classes, Appellant testified that he “learned that a child, before they can enter school, has to know their name, their ABCs, count from 1 to 10, know their address and telephone number." (Petitioner's Exhibit 1 at 88). Directly asked about nutrition, Appellant stated that he “studied nutrition, how to raise a child, to raise a child on formula, to feed the child properly that he can handle it; and then on, on, on get to where the child can handle food” (Petitioner's Exhibit 1 at 89).

Directly asked about child safety, Appellant testified that “Child safety? Make sure there’s plenty of food in the house for the child. Make sure there’s a nice bed for him to sleep in. Make sure he has plenty of clothes, plenty of vegetables, the nutrition that he is supposed to have.” (Petitioner's Exhibit 1 at 90). Directly asked what he would do if the child had a fever, Appellant stated that he would take the child to a doctor. (Petitioner's Exhibit 1 at 93). Directly asked how he would support the child, Appellant testified that:

> I was planning on supporting him by having his own toys, a swing set. I bought him a new swing set to put in the backyard. I got him a little swimming pool to put in there. And I’d gotten him a new bike. And first I had him on a tricycle with training wheels on it - - well, I’m sorry - - a tricycle, and then I bought him a bicycle with training wheels for when he was just two years old. And I’d just always have him play, and I would buy him toys for in the house and everything he wanted. (Petitioner's Exhibit 1 at 114).

Appellant testified about his financial ability to support A.S.W. with worker's compensation only upon prompting by his counsel. (Petitioner's Exhibit 1 at 115).

Appellant was asked on cross-examination whether he anticipated any problems with A.S.W. as the child matured. (Petitioner's Exhibit 1 at 131). Appellant responded that “it may come that he may not have a real high-paying job and bills may keep - - and he may have financial trouble.” (Petitioner's Exhibit 1 at 131). Asked whether he anticipated any problems as the child progressed toward adolescence, Appellant responded “No.” (Petitioner's Exhibit 1 at 131). Only when prompted did Appellant state that teenagers may have problems with “partying,” “going a little too far with the girl.” (Petitioner's Exhibit 1 at 132). Appellant testified that he did not anticipate having to deal with any such issues as a parent. (Petitioner's Exhibit 1 at 132).

Testimony on May 24, 2006

After offering the above testimony from the October 2002 trial regarding A.S.W., the Juvenile Officer called Kimberly Steinmann as his only live witness on May 24, 2006. (T. 6). Ms. Steinmann testified that she was a licensed counselor with a Master's decree in counseling/psychology, and that she had begun counseling with A.S.W. in August or September 2004. (T. 6), originally to assist him with nightmares and problems in his home, but also to determine how attached he was to his foster parents. (T. 9). In November 2004, at the direction of the juvenile court, Ms. Steinmann attempted to counsel with A.S.W. in reference

to his relationship and visitation with Appellant, his biological father. (T. 9). In beginning that therapy, Ms. Steinmann showed A.S.W. pictures of himself with his father; she testified that A.S.W. demonstrated no recollection of his father, or of being with him in the photographs. (T. 11, 13). Ms. Steinmann continued to work with A.S.W. on the concept that he had a biological father, talk with him about Appellant in that context, and prepare A.S.W. for a visit with Appellant to be held in January 2005. (T. 12). Ms. Steinmann testified that she observed that visit between Appellant and A.S.W. at a McDonald's in January 2005. (T. 13). At that visit, A.S.W. was quiet, and had to be coaxed to converse with Appellant. (T. 15). Following that visit, A.S.W. immediately started having nightmares, experienced sleep-walking, was fearful of having his doors or windows open, and started acting out at home and in school. (T. 17, 32). During counseling sessions following this visit, A.S.W. did not raise the subject of his biological father and when reminded of him in the context of preparing him for further contact around Christmas 2005, again had nightmares and behavioral problems. (T. 20). Such behavior ceased when A.S.W. was not reminded of Appellant. (T. 34). A.S.W. never spoke spontaneously of his father, and when he spoke of him in response to the issue being raised in counseling, referred to him as "that guy," would become extremely quiet, speak only in a whisper, and roll himself into a ball. (T. 30). On one occasion in counseling, A.S.W. referred to Appellant as "the guy that met me at McDonald's and tried take me away." (T. 53). In contrast, A.S.W. normally did not have nightmares when he met new people, had no difficulty in meeting new

people, and interacted well with them. (T. 49-50). In Ms. Steinmann's opinion, contact with Appellant caused A.S.W. anxiety that he would be taken away from his foster family, who were appointed his guardians in the proceedings now at issue, (T. 52), and that only his contact with Appellant was the source of his recurring nightmares. (T. 43-44).

In Ms. Steinmann's opinion, A.S.W. should remain in the home of his foster parents -now guardians - because he "sees them as his parents." (T. 31). She opined that any future contact between A.S.W. and Appellant would be detrimental to A.S.W. because "when we've even talked about him, it disrupts him, he starts having the nightmares again, starts having the sleepwalking again, he started having behavior problems, all of these negative behaviors, and he just becomes upset and cries." (T. 22).

The Juvenile Officer also offered the testimony of Dr. Harriet Landers, Ph.D., by deposition. (Petitioner's Exhibit 3). Dr. Landers testified that she was a clinical psychologist, licensed to practice in Missouri, and held a Ph.D. in psychology. (Petitioner's Exhibit 3, at 5). On September 3, 2004, Dr. Landers conducted a psychological evaluation of A.S.W. *Id*. at 8. Dr. Landers found that A.S.W. was a "very engaging child who was very cooperative with me." (Petitioner's Exhibit 3, at 20). In Dr. Landers' opinion, A.S.W. did not then have any clinical problem that required a psychological diagnosis. (Petitioner's Exhibit 3, at 26). She believed that he had a "strong and positive bond" with his foster parents, now guardians under the judgment at issue here, (Petitioner's Exhibit 3, at

26), and "clearly identified" them "as his mother and father and their extended family as his family." (Petitioner's Exhibit 3, at 20). Dr. Landers testified that A.S.W. did not have a bond with Appellant, his father, and did not remember him. (Petitioner's Exhibit 3, at 26). Dr. Landers recommended that A.S.W. continue to reside with his foster parents, as to remove him from that home would be "emotionally damaging for him in a serious way." (Petitioner's Exhibit 3, at 26, 30). With regard to contact with his biological father, Dr. Landers testified that "it would be very difficult for [A.S.W.] to have renewed visitation with his father," because "it would exacerbate his anxiety and make him insecure and worried about his future." (Petitioner's Exhibit 3, at 60).

The Juvenile Officer also offered into evidence Dr. Michael T. Armour's November 13, 2004, psychological report on Appellant. (Petitioner's Exhibit 2). According to Dr. Armour, the Children's Division requested the evaluation "for an assessment of [Appellant's] current level of emotional functioning, for an assessment of whether he poses a risk of sexual dangerousness toward his son, and for recommendations regarding supervision of visitation if appropriate." (Petitioner's Exhibit 2, at 1). According to Dr. Armour, Appellant's diagnoses were cognitive disorder as the result of head trauma sustained in 2000, which he defined as a mental defect under statute, sexual abuse of a child, and borderline intellectual functioning. (Petitioner's Exhibit 2, at 7-8). Dr. Armour stated that Appellant would have "significant problems caring for his son due to the aftereffects of his head trauma and subsequent cognitive deficits," and would need assistance in

caring for a child. (Petitioner's Exhibit 2, at 8). Appellant was "unrealistic and vague regarding how he would care for his son," likely as the result of his head trauma, although he posed a low risk of sexual dangerousness toward his son.

St. Louis City Circuit Court records offered into evidence indicated that Appellant pleaded guilty to two felony charges of Sexual Abuse and the felonies of Sodomy and Rape on March 6, 1986, with the victims of those offenses being five and six at the time of the incidents. (Petitioner's Exhibit 4). The transcript of those proceedings reflect that the prosecuting attorney, in open court, recited that the State could prove that Appellant touched the vagina of one victim who was five years old, touched the vagina of another victim, who was six years old, had oral intercourse with the five year old victim, and also had sexual intercourse with the six year old victim. The prosecuting attorney also indicated that the State could prove that Appellant was the victims' uncle. Asked by the court on that occasion whether the prosecutor's statement was true and correct, Appellant replied, "Yes, sir." (Petitioner's Exhibit 4, Transcript of Proceedings on Plea of Guilty, at 7-9).

Appellant testified on his own behalf. (T. 63). He stated that he was the biological father of A.S.W., who was born on February 16, 1998, and that he participated in A.S.W.'s daily care from birth until January 11, 2000. (T. 64-65). On January 11, 2000, Appellant suffered a fall from a second story height, which resulted in a severe head injury, hospitalization for several months, and thereafter respite care. (T. 67-69). While Appellant was in respite care, A.S.W. was removed from his mother, Appellant's wife. (T. 69). Thereafter, Appellant testified that he

visited with A.S.W., initially for one hour weekly, and that his visits progressed to two hours, and ultimately to weekend visitation under the supervision of Appellant's mother. (T. 74-78). In the course of a weekend visit, Appellant acknowledged that he showered with A.S.W. despite the requirement that his mother supervise his contact with the child. (T. 82-83). As a result of this, his visits were suspended with A.S.W. in January 2002. (T. 85). Appellant acknowledged that he showered with A.S.W. because the child implored him to do so, although he knew that his contact with the child was supposed to be supervised. (T. 134). Appellant testified that "after sitting down and thinking about it, after it did happen," he concluded that his judgment was poor on that occasion, and acknowledged that a parent has to react immediately on occasion, without time for reflection. (T. 146). Appellant's only visit with A.S.W. since January 2002 occurred in January 2005. (T. 98). Pursuant to court order, A.S.W. visited with Appellant, in the company of counselor Kimberly Steinmann, at a McDonalds. (T. 99). Appellant agreed with Ms. Steinmann's testimony that A.S.W. "appeared somewhat shy or somewhat reclusive" at that meeting. (T. 99), although he stated that he believed that A.S.W. wanted to "do something else because he slowly come up there and tried to whisper something," but Ms. Steinmann pulled him back. (T. 99). On cross-examination, Appellant testified that he did not believe that Ms. Steinmann was persuading A.S.W. not to talk with him. (T. 237). At this meeting, Appellant testified that he "kept telling him [A.S.W.] and telling him that I loved him, but he wouldn't pick his head up. He just kept looking down at the

ground for some reason." (T. 100).Appellant testified that A.S.W. never responded verbally to his repeated asking "I love you. . . Do you love Da-Da" but it appeared to Appellant that A.S.W. may have nodded his head. (T. 103). Other than this visit, Appellant's only other contact with A.S.W. since January 2002 occurred in December 2005, when the juvenile court authorized Appellant to send a holiday card to the child with the stipulation that he sign only his first name. (Supp. L.F. 14). Appellant acknowledged that he initially sent a card signed with his full name, and that this was an error in judgment. (T. 179-180).

Appellant testified that he had lived at his present residence for four years, with his sister Donna. (T. 87-88). He stated that he fulfilled his own needs, including obtaining prescriptions, (T. 93), that he did the cooking for himself and his sister, and also did the grocery shopping. (T. 88-89). Appellant testified that he paid $800.00 a month in rent for a large bedroom for himself and a small bedroom for A.S.W. (T. 119), and that he also paid part of the electric and phone bills, and part of the mobile home pad rent. (T. 125). Appellant testified that his sister's daughter and her children were staying in the home temporarily, that they were "in and out," and that the room he rented for Alex was now occupied by them. (T. 122- 123). Appellant stated that he planned to move to another house in the Troy, Missouri, area, but had not yet obtained one, and that he had previously testified in 2002 about imminent plans to move. (T. 138-139).

Appellant testified that he wanted "full custody" of A.S.W., after a period of visitation so that the child could "get adjusted" to him. (T. 117). Appellant

stated that he believed that A.S.W., as an eight year old child, would be in the fifth grade in school. (T. 127). He testified that an eight year old might experience problems requiring parental assistance such as "some of them might get into an argument with somebody at school, may get suspended from school," or may sometimes "stay out a little too late." (T. 129-130). Asked what he as custodian of A.S.W. would have to do to discipline the child, Appellant eventually replied "the first thing I would do is make sure he gets his shots, get him enrolled in school too, and then take him up to the school and he can be enrolled, and then naturally I'd buy him anything he needs or anything he wants." (T. 130-131). Asked what future problems he would expect to have with A.S.W. as the child matured, Appellant replied "I believed he'll maybe get up to -- I guess 12 years old, then he'll pretty well be on his own at doing things, but I would still like to know what's going on." (T. 132). On cross-examination by the Guardian ad Litem, Appellant was asked "What type of normal, typical childhood problems do you think that [A.S.W.] will have to deal with as he grows up?" Appellant replied "None." (T. 189).

Appellant acknowledged that he had pleaded guilty to "sexually abusing" two of his nieces; he could not remember how old they were at the time of the incidents, but agreed that they were under twelve years of age. (T. 140-141). Appellant testified that he was innocent of the offenses, and said that he pleaded guilty because he was afraid that the person who committed the offenses would kill his sister if he did not plead guilty. (T. 141-143).

As part of Appellant's case, a portion of the deposition of Dr. Edward Hogan was read into evidence. Dr. Hogan stated that he treated Appellant for epileptic seizures, and those seizures were under control. Dr. Hogan emphasized that he had not "evaluated [Appellant] in any other way for psychological stability to see his children or how he functions on an everyday basis." (T. 240).

Dr. David Easterday also testified for Appellant by deposition, and a portion of his deposition was read into the record. In his deposition, Dr. Easterday testified that he had seen Appellant since September 1, 2005, and answered "no" to the question of whether Appellant's history of a brain injury posed any "physical limitation" on his ability to care for a seven year old boy. (T. 243).

Appellant also offered into evidence a January 6, 2005, psychological evaluation performed on Appellant by Dr. James Powers, a clinical psychologist, as Appellant's Exhibit J. (T. 238). In that evaluation, Dr. Powers indicated that the results of his testing were similar to the results obtained in his 2002 evaluation of Appellant, and reiterated that the recommendations made at that time continued to be appropriate, i.e. that Appellant not have primary responsibility for A.S.W. (Exhibit J, at 6). In his 2005 report, Dr. Powers indicated that Appellant had told him that Appellant lived with his sister, and that his niece and his niece's two children were also living in the household. (Exhibit J, at 3). With reference to Appellant's past incarceration for sexual offenses involving two children, Dr. Powers indicated that "psychological testing does not allow one to conclude whether or not an individual is lying or telling the truth," although Dr. Powers was

"inclined to believe" that Appellant did not sexually abuse his nieces, without review of the criminal record. (Exhibit J, at 7).

Appellant's sister, Donna Warren Young, testified for Appellant. (T. 205). Ms. Young stated that she and Appellant had lived together since June 2002, and that Appellant kept the laundry done, did yard work, and cooked for the household, and that she believed he needed no assistance in meeting his own needs or assisting with household chores. (T. 206) Ms. Young stated that she worked between 11:00 p.m. and 7:30 a.m., at a location 23 miles from the home, and that Appellant was alone during this time. (T. 207).Ms. Young testified that Appellant paid rent to her of $800.00 a month, and that this included all utilities. (T. 213). Ms. Young stated that she had two granddaughters who stay with her each weekend, and that her daughter also stays in the home "once in a while." (T. 215). Ms. Young testified that "I think his [Appellant's] judgment with me would be good," (T. 216), and on further questioning reiterated her view that his judgment was good if "he's with me." (T. 217). Asked whether she "might be concerned with some of his judgment issues" if he were not with her, Ms. Young said "Yes." (T. 220). Ms. Young stated that she had never sought placement of A.S.W. with her. (T. 216).

Petitioner for Guardianship Patricia Westermann testified. (T. 258). She stated that she and her husband had received custody of A.S.W. in March 2002, and had cared for him for four years. (T. 259). At the time of trial, A.S.W. had just completed second grade, (T. 264) and was an A student who read on the third or

fourth grade level. (T. 262). When she and her husband first received A.S.W. into their home in 2002, they had difficulty in getting him into bed at night. He would awake screaming with a nightmare that a large owl was chasing him and trying to kill him. To sooth the child, all windows and doors had to be checked and locked ach night, all blinds closed, and lights left on. (T. 272-273). These nightmares subsided over time. (T. 274). In January 2005, Ms. Westermann and Kimberly Steinmann attempted to talk to A.S.W. about renewing contact with Appellant, in reference to the planned January 2005 McDonald's visit. A.S.W. "would just recoil into the back of the couch and just -- we have kind of a big, fluffy couch, and he would just -- the more she tried to explain, he would just continue to recoil, recoil, recoil, his voice would get softer and softer and softer, he got very quiet, very nervous." (T. 275). Following the January visit, A.S.W. started having "nightmares again that night," and started having behavior problems in school (T. 278).

On June 9, 2006, the Honorable Darrell E. Missey, as Judge of the Juvenile Division, entered a judgment denying Appellant's motion to regain legal and physical custody of A.S.W., and contemporaneously entered an order that the permanency plan for the juvenile in the juvenile matter would be guardianship. (I L.F. 0075). Also, on June 9, 2006, the Honorable Darrell E. Missey, sitting as Judge of the Probate Division in the guardianship matter pertaining to the juvenile, entered an order appointing Andrew and Patricia Westermann guardians of the juvenile. (II. L.F. 0018). After the overruling of post trial motions for a new trial or amendment of the judgment, (I.L.F. 0079-0087), this Appeal followed.

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS PATRICIA AND ANDREW WESTERMANN'S PETITION FOR GUARDIANSHIP OF THE MINOR CHILD, A.S.W., BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO FIND THAT THE NATURAL FATHER, APPELLANT PAUL WARREN, WAS UNFIT TO ASSUME THE DUTIES OF GUARDIANSHIP, IN THAT THE MINOR CHILD HAD BEEN UNDER THE CONTINUING JURISDICTION OF THE JUVENILE COURT FOR OVER 4 YEARS, THE FATHER HAD PREVIOUSLY PLED GUILTY TO SEXUAL ABUSE AND SODOMY OF HIS 5 YEAR OLD NIECE AND SEXUAL ABUSE AND RAPE OF HIS 6 YEAR OLD NIECE, THE FATHER HAD SUBSEQUENTLY SHOWERED WITH THE MINOR CHILD IN CONTRAVENTION OF THE ORDER OF THE JUVENILE COURT, THE FATHER HAD ANNOUNCED HIS INTENTION TO OBTAIN HIS OWN RESIDENCE AND LIVE ALONE DESPITE THE NEED FOR ASSISTANCE FROM OTHERS IN PARENTING, AND THE MINOR CHILD'S COUNSELOR AND EVALUATING PSYCHOLOGIST TESTIFIED THAT HIS REMOVAL FROM THE WESTERMANNS' HOME AND PLACEMENT WITH FATHER WOULD CAUSE SERIOUS EMOTIONAL DAMAGE.

Flynn v. Flynn, 34 S.W.3d 209 (Mo.App. E.D. 2000)

Williams v. Anders, 922 S.W.2d 422 (Mo.App.S.D. 1996)

In the Interest of Moreau, 18 S.W.3d 447 (Mo.App. S.D. 2000)

In the Interest of L.C.F., 987 S.W.2d 830 (Mo.App.W.D. 1999)

ARGUMENT

For response to Appellant's Points Relied On Numbers 1 through 3, which present Appellant's complaints of error regarding the Trial Court's rulings in the juvenile file, Respondents Westermann join in the Respondent's brief filed by Mr. Allen for the Juvenile Officer.

For response to Appellant's Point Relied On Number 4, Respondents Westermann join in the Respondent's brief filed by Mr. Allen for the Juvenile Officer, and offer the following additional argument.

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN GRANTING PETITIONERS PATRICIA AND ANDREW WESTERMANN'S PETITION FOR GUARDIANSHIP OF THE MINOR CHILD, A.S.W., BECAUSE THERE WAS SUFFICIENT SUBSTANTIAL EVIDENCE TO FIND THAT THE NATURAL FATHER, APPELLANT PAUL WARREN, WAS UNABLE AND/OR UNFIT TO ASSUME THE DUTIES OF GUARDIANSHIP, IN THAT THE MINOR CHILD HAD BEEN UNDER THE CONTINUING JURISDICTION OF THE JUVENILE COURT FOR OVER 4 YEARS, THE FATHER HAD PREVIOUSLY PLED GUILTY TO SEXUAL ABUSE AND SODOMY OF HIS 5 YEAR OLD NIECE AND SEXUAL ABUSE AND RAPE OF HIS 6 YEAR OLD NIECE, THE FATHER HAD

SUBSEQUENTLY SHOWERED WITH THE MINOR CHILD IN CONTRAVENTION OF THE ORDER OF THE JUVENILE COURT, THE FATHER HAD ANNOUNCED HIS INTENTION TO OBTAIN HIS OWN RESIDENCE AND LIVE ALONE DESPITE THE NEED FOR ASSISTANCE FROM OTHERS IN PARENTING, THE MINOR CHILD'S COUNSELOR AND EVALUATING PSYCHOLOGIST TESTIFIED THAT HIS REMOVAL FROM THE WESTERMANNS' HOME AND PLACEMENT WITH FATHER WOULD CAUSE SERIOUS EMOTIONAL DAMAGE.

This Court most recently reiterated the standard of review to be applied in appeals from decisions appointing guardians of minors in *Flynn vs. Flynn*, 34 S.W.3d 209 (Mo. App. E.D. 2000):

> We must affirm the trial court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, erroneously declares or misapplies the law. *Murphy vs. Carron*, 536 S.W. 2d 30, 32 (Mo. banc 1976).
>
> Three statutes govern appointing a guardian for a minor child. Section 475.025 RSMo 1994 states that a father and mother are the natural guardians of a minor child. Section 475.030 authorizes the granting of guardianship letters in three instances: (1) when a minor's parents are deceased; (2) "[w]here the parents or the sole surviving parent of a minor are unwilling, unable, or adjudged unfit to assume the duties of the guardianship", or (3) where the minor's parents' parental rights have been terminated. Section 475.045 gives the parents first priority in appointment as guardian or conservator of a minor, except as otherwise provided in section 475.030.

> Reading these statutes together, "letters of guardianship for a minor should not issue unless there is no parent available, willing or able to fulfill the parental role in caring for a guardian and providing for that child's needs as natural guardian." *Estate of Casteel v. Guardian ad Litem*, 17 S.W.3d 585, 588 (Mo.App. 2000) (citing *Reece v. Reece*, 890 S.W.2d 706, 710 (Mo.App. 1995)).
>
> Moreover, these statutes create a rebuttable assumption that a natural parent is the appropriate custodian for a minor child. *Cotton v. Wise*, 977 S.W.2d 263, 264 (Mo. banc 1998). This presumption may be overcome by evidence that parent is unwilling, unable or unfit to take charge of the child. *Id.*

Id. at 211 (footnote omitted).

An Appellate Court is to give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Williams vs. Anders*, 922 S.W.2d 422, 423 (Mo.App. S.D. 1996) (citing Rule 73.01(c)(2)). Additionally,

> "Credibility of the witnesses is generally a question for the trial court which may disbelieve testimony even when uncontradicted." *Citizens State Bank v. Klewson*, 822 S.W.2d 580, 581 (Mo. App. 1992). "The trial judge is in a better position than this court to determine the credibility of the parties, their sincerity, character and other trial and tangibles which may not be shown by the record." *Kelly v. Brock*, 825 S.W.2d 896, 897 (Mo. App. 1992).

Id.

A determination of unfitness is to be based not only on present circumstances but on the natural parent's history of dealing with the children. *Cotton v. Wise*, 977 S.W.2d 263, 265, (Mo. banc 1998), (citing *Reece vs. Reese*, 890 S.W.2d 706, 711, (Mo.App. 1995). The term "unfit" is given an expansive definition and courts are given ample discretion in applying that term. *In the*

Interest of L.C.F., 987 S.W.2d 830, 835 (Mo.App. W.D. 1999) (citing *Williams*, 922 S.W.2d at 425.)

The trial court awarded guardianship to the Westermanns based upon a finding that the natural mother's parental rights had been terminated pursuant to the unappealed order in the underlying juvenile case and that the natural father, Appellant Paul Warren, was unwilling, unable or unfit to care for the minor child. Although Appellant, in his brief, argues that the Westermanns put on no evidence regarding father's unfitness or inability to care for A.S.W., the transcript is clear that the court took judicial notice of the prior acts and proceedings, evidence adduced, testimony and contents of the underlying juvenile file. Additionally, the court received the family reassessment and home study that had been ordered by the court in the guardianship file, completed by Belinda McCluskey and dated May 11, 2006. This evidence, coupled with the testimony of the Westermanns at the guardianship hearing, was found by the trial court to be substantial evidence that the presumption in the father's favor was rebutted and that he was unwilling, unable, or unfit to take charge of the minor child.

Inquiry into the parent's fitness, ability and willingness must be done bearing in mind Missouri's Child Welfare policy, which is for the state to act in the best interest of the child as expressed in Section 1.092 RSMo. *In the Interest of L.C.F.*, 987 S.W.2d at 830.

In *Williams* and *In the Interest of Moreau*, 18 S.W.3d 447 (Mo.App. S.D. 2000), the Southern District Court of Appeals considered factors to be used in

determining if the parent is unfit to take custody of a child in the context of a guardianship case. The court found the following passage from *Uhing vs. Uhing*, 241 Neb. 368, 488 N.W.2d 366, 372 (1992), to be particularly instructive: "[p]arental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being." *Williams*, 922 S.W.2d at 425.

In the case at bar, father has a record of felony convictions for the rape and sodomization of two minor nieces[1], and when faced with an order providing him only supervised contact with his minor child, nonetheless showered with the minor child on one of his first supervised home visits following removal of the child pursuant to the juvenile court's order.[2]

Additionally, Father suffered a brain injury in 2000 that necessitated his residence in a rehabilitation facility for over 2 years. Upon his discharge from this facility, Father was directed to utilize the supervision of a family member in his

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[1] Father's testimony at trial in the case at bar denying responsibility for these acts contradicted his prior testimony at the plea hearing on the charges. The trial court was entitled to consider this contradiction in assessing Father's credibility as a witness.

[2] The Trial Court considered Father's convictions to trigger the application of Section 211.038 (prohibiting reunification or placement of a child in the home of a parent who had pled guilty to such offenses). Respondent Juvenile Officer has thoroughly briefed the applicability of Section 211.038 in this case.

However, even setting aside the applicability of that statute, it is apparent that father's convictions and subsequent showering with the child in direct contravention of a court order provide significant evidence of father's unfitness to care of the minor child. This view was taken by Judge Limbaugh in his dissent in the appeal of the prior adoption case, *In the Interest of A.S.W.*, 137 S.W.3d 448 (Mo. banc 2004), where he analyzed Father's psychological profile in the light of this history of sexual abuse and the shower incident. In conclusion, Judge Limbaugh wrote, "when I combine all these together, in my opinion it raises serious questions regarding his son's safety if [father] had primary responsibility of his son." *Id.* at 453. This opinion was joined by three other judges; the majority opinion did not consider the evidence of Father's prior convictions because appellate review in that case "was limited to the grounds for termination as found by the circuit court." *Id.* at 454, (footnote 6).

household to oversee his care. The facility's staff did not consider him capable of living independently. Father's score on the Mayo-Portland Adaptability Test indicated that in rearing a child he would have a severe problem and require supervision from others 75% of the time or more.

Father was assessed by a psychologist, Dr. James Powers, who issued reports in 2002 and 2005. In Dr. Powers' opinion, Father is unable to independently care for a child. If he were to do so, Dr. Powers concluded that Father could make erroneous and bad decisions, exercise poor judgment and place the child in danger. Dr. Powers testified that he had "serious questions" regarding the child's safety if Father had primary responsibility for the child. Dr. Powers further opined that although Father could likely articulate an appropriate response to specific questions about child rearing, difficulty would arise if he was called upon to carry out an appropriate response to an imminent parenting situation or need.

The trial court also received testimony from father's sister, Donna Young, with whom he currently resides, that Father's judgment was good, if "he's with me", and that she "might be concerned with some of his judgment issues" if he were not with her. This testimony contrasts with Ms. Young's prior testimony from trial in 2002 that she believed her brother had "no limitations at all" and that she did not provide supervision to him. Further, Father testified this year that he intended to move out of his sister's home and live independently.

When these facts are applied to the direction provided by the *Williams* court, as was done by the trial judge in his rulings, it is clear that the evidence supports a finding of Father's unfitness. Father's brain injury leaves him unable to parent independently because of the risk of poor judgment and safety risks. Father's showering with his son, in clear contravention of the court's order for supervised visits, demonstrates his poor judgment in the context of decision-making regarding care of his child. Further, despite the need for supervision regarding his own care as well as for that of A.S.W., Father's family members have demonstrated neither the inclination nor the ability to appropriately provide such supervision. Father and his family's misapprehension of the risks foreseen by Father's caregivers and evaluators are further magnified in light of Father's stated intention to obtain his own residence and live independently.

Pursuant to the analysis of the courts in *Williams*, *In the Interest of Moreau*, and *In the Interest of L.C.F.*, there was sufficient evidence for the court, as it did, to find that there was a lack of independent ability on the part of father to provide for the child despite his best intentions, even when that lack of ability was impacted by his physical injury and mental condition.

Additionally, consideration of the best interest of the minor child provides further support for the trial court's award of guardianship to the Westermanns. In this regard, the court received the testimony of counselor Kim Steinmann, who had counseling sessions with the minor child every week during the two years prior to the guardianship hearing. Ms. Steinman testified that A.S.W. suffered a

severe adverse reaction (including nightmares, sleeplessness and uncharacteristic misconduct) following his visit with Father in January 2005 (despite two months of counseling preparation for said visit) and continued to suffer similar adverse reactions upon each subsequent discussion about Father. These reactions led Ms. Steinman to recommend the cessation if A.S.W.'s visitation with Father.

The court also received the testimony of evaluating psychologist Dr. Harriet Landers that removal of the minor child from his foster family would be "emotional damaging in a serious way", and that renewed visitation with Father would "exacerbate [A.S.W.'s] anxiety and make him worried about his future." At trial, A.S.W.'s guardian ad litem presented evidence and consented to guardianship with the Westermanns. Application of the analytical tests articulated by the *Williams* and *Moreau* courts to the case at bar leads to the conclusion reached by the trial court: that A.S.W. will suffer greatly if removed from the Westermanns and that consideration of this aspect of his well-being is appropriate in rendering a decision on the Westermanns' Petition for Guardianship.

Accordingly, the decision of the trial court appointing Respondents Patricia and Andrew Westermann as guardians for the minor child should be affirmed.

CONCLUSION

For the foregoing reasons, Respondents Westermann pray that the judgment of the juvenile division denying Appellant's motion to modify be affirmed, and further that the judgment of the court, sitting as Judge of the Probate Division, also be affirmed.

Respectfully submitted,

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William C. Dodson, # 40279
Attorney for Respondents Westermann
P.O. Box 966
Imperial, MO 63052
636/461-2300
636/461-2300 (Fax)

CERTIFICATE OF SERVICE

Two copies of the foregoing Brief were mailed on this 15th day of December, 2006, to the following attorneys of record: Mr. Craig Kallen, III, Attorney at Law, 100 South Brentwood, Suite 400, Clayton, MO 63105, Mr. John Appelbaum, Attorney at Law, 4139 Jeffco Blvd., Arnold, MO 63010; Mr. Theodore Allen, Juvenile Office, Post Office Box 100, Hillsboro, 63050; Mr. Jeff Childress, Division of Legal Services, 111 North 7th St., Room 329, St. Louis, MO 63101; and Mr. Gary Gardner, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102.

_____

William C. Dodson, # 40279
Attorney for Respondents Westermann
P.O. Box 966
Imperial, MO 63052
636/461-2300
636/461-2300 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies on this 15th day of December, 2006, that this Brief includes the information required by MO. R. CIV. P. 55.03, and complies with the limitations contained in MO. R. CIV. P. 84.06(b), and further certifies that the disk containing this Brief filed with the Brief has been scanned for viruses and is virus-free. The number of words in this Brief is 7,503.

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William C. Dodson, # 40279