

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

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STATEMENT OF FACTS

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 degree 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.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO MODIFY ITS JUDGMENT AND ORDER OF DISPOSITION IN THAT THE COURT DID NOT EXCEED ITS JURISDICTION OR ERRONEOUSLY APPLY MISSOURI LAW BY DENYING TRANSFER OF LEGAL AND PHYSICAL CUSTODY OF A.S.W. TO APPELLANT, NOR DID THE TRIAL COURT FAIL TO FOLLOW THE MANDATE OF THE SUPREME COURT OF MISSOURI AS SET FORTH IN *IN INTEREST OF A.S.W.*, 137 S.W.3D 448 (MO. BANC 2004), IN CONTRAVENTION OF ARTICLE V, SECTION 2, OF THE CONSTITUTION OF THE STATE OF MISSOURI.

Section 211.031. 1. (1), RSMo.

Section 211.041, RSMo.

Section 211.051, RSMo.

Section 210.720, RSMo.

Delaney v. Gibson, 639 S.W.2d 601 (Mo. banc 1982).

Estate of Williams, 922 S.W.2d 422 (Mo. App. S.D. 1996).

In Interest of A.S.W., 137 S.W.3d 448 (Mo. banc 2004).

In Interest of J.M., 847 S.W.2d 911 (Mo. App. E.D. 1993).

II.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO MODIFY THE LEGAL AND PHYSICAL CUSTODY OF A.S.W. BECAUSE THE TRIAL COURT CORRECTLY APPLIED THE LAW AS TO THE COURT'S BASIS FOR

CONTINUED JURISDICTION IN THAT THE COURT HAD CONTINUED JURISDICTION OVER THE CHILD UNDER SECTION 211.031. 1. (1), RSMo, AND DENIAL OF PLACEMENT WITH APPELLANT WAS PROPER IN THAT THERE WAS SUBSTANTIAL EVIDENCE THAT APPELLANT STILL WAS COGNITIVELY INCAPABLE OF EXERCISING PRIMARY CUSTODY OF THE CHILD AND IT WAS NOT IN THE BEST INTERESTS OF THE CHILD TO BE PLACED WITH APPELLANT.

Section 211.031. 1. (1), RSMo

Estate of Williams, 922 S.W.2d 422 (Mo. App. S.D. 1996).

In Interest of C.L.M., 625 S.W.2d 613 (Mo. banc 1981).

In Interest of J.M., 847 S.W.2d 911 (Mo. App. E.D. 1993).

III.

THE TRIAL COURT DID NOT ERR IN ITS JUDGMENT AND ORDER DENYING APPELLANT'S MOTION TO MODIFY THAT A.S.W. BE PLACED IN APPELLANT'S CUSTODY IN THAT THE TRIAL COURT CORRECTLY APPLIED SECTION 211.038, RSMo, NOTWITHSTANDING THAT APPELLANT HAD FILED HIS MOTION TO MODIFY PRIOR TO THE EFFECTIVE DATE OF SAID SECTION.

Section 211.038, RSMo.

Section 475.083, RSMo.

Hoskins v. Box, 54 S.W.3d 736 (Mo. App. W.D. 2006).

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

In Re: W.D., 162 S.W.3d 517 (Mo. App. W.D., 2005).

IV.

THE TRIAL COURT DID NOT ERR IN GRANTING THE PETITION FOR GUARDIANSHIP IN THAT SAID JUDGMENT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE THE EVIDENCE DEMONSTRATED APPELLANT'S UNFITNESS AND INABILITY TO SERVE AS GUARDIAN AND THE TRIAL COURT, SITTING AS A JUVENILE COURT, WAS MANDATED BY STATUTE TO OBTAIN A PERMANENT PLACEMENT FOR THE JUVENILE.

Section 210.720, RSMo.

Section 475.030.4 (2), RSMo.

Estate of Williams, 922 S.W.2d 422 (Mo. App. S.D. 1996).

Ogle v. Blankenship, 113 S.W.3d 290 (Mo. App. E.D. 2003).

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO MODIFY ITS JUDGMENT AND ORDER OF DISPOSITION IN THAT THE COURT DID NOT EXCEED ITS JURISDICTION OR ERRONEOUSLY APPLY MISSOURI LAW BY DENYING TRANSFER OF LEGAL AND PHYSICAL CUSTODY OF A.S.W. TO APPELLANT, NOR DID THE TRIAL COURT FAIL TO FOLLOW THE MANDATE OF THE SUPREME COURT OF MISSOURI AS SET FORTH IN *IN INTEREST OF A.S.W.*, 137 S.W.3D 448 (MO. BANC 2004), IN CONTRAVENTION OF ARTICLE V, SECTION 2, OF THE CONSTITUTION OF THE STATE OF MISSOURI.

Preliminarily on this point and all following points of alleged error, the judgment of a trial court is presumed valid. Appellant bears the burden to demonstrate the incorrectness of the judgment. *See, e.g., Delaney v. Gibson*, 639 S.W.2d 601 (Mo. banc 1982).

This Court has held that appellate review of a juvenile court order denying a parent's motion to modify a prior order of disposition entered by the court is limited to determination of whether there is substantial evidence to support the order, the order is against the weight of the evidence, or the order erroneously declares or applies the applicable law. *In Interest of J.M.*, 847 S.W.2d 911, 913 (Mo. App. E.D. 1993). The facts and reasonable inferences from the facts should be reviewed on appeal in the light most favorable to the judgment of the trial court. *Id.* Moreover, deference should be given on appellate review of a court-tried case to the trial court's superior ability to hear the evidence and weigh the credibility of the witnesses, as the trial court is in a superior position to weigh the sincerity and character of the witnesses and other trial intangibles that may not appear on a transcript. *Estate of Williams*, 922 S.W.2d 422, 423 (Mo. App. S.D. 1996). Appellant's point primarily is that the juvenile court erroneously declared the applicable law.

Without question, the trial court in this proceeding was bound by the Supreme Court decision in *In Interest of A.S.W.*, 137 S.W.3d 448 (Mo. banc 2004). As Appellant notes in his Brief at 18, Missouri courts are constitutionally bound to follow controlling decisions of the Supreme Court. The issue is what the

Supreme Court held in the *A.S.W.* decision. Contrary to Appellant's assertion, the Supreme Court did not find as a matter of fact or law that Appellant was capable of parenting, nor did it state or imply that A.S.W.'s legal and physical custody should revert to Appellant, nor did it set aside the May 21, 2001, judgment that A.S.W. was subject to the jurisdiction of the juvenile court under Section 211.031.

1. (1), RSMo. Had it done so, Appellant's simple remedy would have been by mandamus, prohibition, or a writ of habeas corpus.

Rather, in *A.S.W.*, the Supreme Court dealt with an appeal from the juvenile court of a judgment terminating parental rights pursuant to a petition filed under Section 211.447, RSMo. In its decision, the Court held only that the juvenile court erred in terminating parental rights without considering and making findings on the required statutory factor of "the success or failure of the efforts of the juvenile officer, the division or other agency to aid the parent on a continuing basis in adjusting his circumstances or conduct to provide a proper home for the child." 137 S.W.3d at 454. The Court acknowledged that the trial court found that Appellant would "require assistance from others in parenting a majority of the time," but faulted the Court for failing to consider and determine whether such assistance was available. *Id.* Accordingly, the Court held that the "state failed to carry its burden to produce substantial evidence that additional services would not enable the return of A.S.W. to Father within an ascertainable period of time" and therefore, the findings of the termination order in 2002 "did not constitute clear,

cogent and convincing evidence that grounds existed to terminate parental rights." 137 S.W.3d at 454.

The *A.S.W.* decision did not affect the original finding that the juvenile was subject to the jurisdiction of the juvenile court under Section 211.031. 1. (1), RSMo. On May 21, 2001, that judgment was entered, with the consent of Appellant and his Guardian Ad Litem, on the grounds in part that Appellant - the child's father - was "unsuitable for placement due to disability." (Respondent's Supp. L.F. 2). This judgment was never appealed and remains in full force and effect. Accordingly, pursuant to Section 211.041, RSMo, the juvenile court had continuing jurisdiction over the child, including the authority to modify its prior orders of disposition under Section 211.251, and obligation to conduct permanency planning hearings under Section 210.720, RSMo. Thus, contrary to Appellant's assertion that there was no action against him other than the petition to terminate parental rights, there continued to exist juvenile court jurisdiction under Section 211.031. 1. (1), RSMo.

Also contrary to Appellant's assertion, the trial court's finding that Appellant remains unsuitable for placement is supported by substantial evidence, and is not against the weight of the evidence. First, the testimony of Dr. Edward Hogan, relied on by Appellant, is quite narrow and restricted. Dr. Hogan testified by deposition that he treated Appellant for epileptic seizures, and that the seizures were under control. Dr. Hogan emphasized that he had not "evaluated [Appellant] in any other way for psychological ability to see his children or how he functions

on an everyday basis. (T. 240). Moreover, the testimony of Dr. David Easterday is similarly confined. Dr. Easterday had treated Appellant as his primary physician since September 2005, and had seen him in office visits on September 1, 2005; October 31, 2005; and December 2, 2005. (Respondent's Exhibit L, at 20). Dr. Easterday responded "no" to Appellant's counsel's carefully crafted 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. (Emphasis added). Appellant's physical condition to care for A.S.W. has never been an issue in this matter; his mental or cognitive capability has always been the issue. From his own witness, Appellant did not delve into the issue of his mental capability of caring for A.S.W. Perhaps he was loath to do so.

At trial on May 24, 2006, the juvenile court received into evidence Dr. Michael Armour's psychological evaluation of Appellant done on November 13, 2004. (Petitioner's Exhibit 2). That report indicated that Appellant suffered from a cognitive disorder, which Dr. Armour defined as a mental defect, that Appellant had sexually abused a child, and that Appellant had 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 could care for his son." *Id.*

To similar effect, Appellant's own evidence - the report of Dr. James Powers, Ph.D. - done in January 2005, documents the trial court's finding that Appellant remains an unsuitable custodian for A.S.W. In that report, Dr. Powers diagnosed Appellant to have a cognitive disorder, and quoted his 2002 report "that it was inappropriate for him to have primary responsibility for his son," although Appellant's deficits would not prohibit him from visiting his son under supervision. (Exhibit J, at 6-7). As noted by the trial court, this evaluation did not consider A.S.W.'s relationship with Appellant. (L.F. 0077).

In 2002, Dr. Powers had also testified at trial in the termination of parental rights proceeding that Appellant suffered from a "cognitive disorder," which he defined as another term for "brain injury." (Petitioner's Exhibit 1, at 48). This condition was permanent. (Petitioner's Exhibit 1, at 50). If Appellant were to care for a child, which Dr. Powers thought inappropriate, Appellant would make errors, bad decisions, and exercise poor judgment and place the child in danger. (Petitioner's Exhibit 1, at 49-50). In 2002, Dr. Powers had "serious questions" regarding a child's safety if Appellant had primary care responsibilities. (Petitioner's Exhibit 1, at 50).

Appellant's own testimony demonstrates his continued unsuitability as a custodian for A.S.W. In Dr. Armour's words, Appellant was "unrealistic and vague regarding how he would care for his son." (Exhibit 2, at 8). Appellant testified that he believed that A.S.W., as an eight year old child, would be in the fifth grade. (T. 127). A.S.W. had, in fact, just completed second grade. (T. 264). He demonstrated

no comprehension of the demands placed on a parent by a maturing child. When asked what he would have to do as a custodian to discipline A.S.W., Appellant eventually and after struggle testified that "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. 129-130). Asked what future problems he could expect with A.S.W. as the child matured, Appellant replied "I believe 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). Asked by the Guardian ad Litem what "normal, typical childhood problems" he could expect with A.S.W., Appellant simply replied "None." (T. 189). From this testimony, together with Appellant's similar testimony in 2002, the trial court, with its superior ability to assess the credibility of witnesses which includes the demeanor of each witness in court, was justified in finding that Appellant "was easily confused," "has some level of difficulty receiving and conveying information," and was not "currently equipped" to raise A.S.W. (I. L.F. 0077).

Moreover, Appellant's sister, Donna Warren Young - with whom Appellant has lived since June 2002, (T. 206), testified that she thought that Appellant's "judgment with me would be good," (T. 220). When asked to clarify that response, Ms. Young reiterated that she "might be concerned with some of his judgment issues" if he were not with her. (T. 220). As is well known, the major failing of the earlier judgment entered by the Honorable Carol Kennedy Bader terminating

Appellant's parental rights was her failure to consider whether Appellant would have familial assistance if he remained A.S.W.'s parent. 137 S.W.3d at 453-454. On May 24, 2006, Appellant testified that he planned to move from his sister's residence, and that he had long planned to make that move. (T. 138-139). In the termination of parental rights trial in 2002, Appellant had similarly testified that he did not intend to remain with his sister. (Petitioner's Exhibit 1, at 110-115). And, Ms. Young testified that she had never asked for A.S.W. to be placed with her. (T. 216). Further, although Ms. Young testified that Appellant had been released to her care in 2002 on the condition that she provide supervision for him, she admitted that she had never provided that supervision. (T. 224.) This admission was made after Ms. Young initially denied failing to supervise Appellant; she withdrew her denial only after being presented with her testimony from the 2002 hearing. With this conflicting evidence, solely from Appellant and his witnesses, the trial court was justified in concluding that Appellant would not have consistent support in providing care for A.S.W. if A.S.W. was placed with him. (I. L.F. 0077).

Further, the trial court found that there would be a "serious space shortage" if A.S.W., speculatively or hypothetically, were placed with Appellant and his sister. (I.L.F. 0077). This finding is similarly supported by the evidence. Appellant told Dr. Powers that Appellant's niece and her two children were also living at the residence with him and Ms. Young. (Exhibit K, at). At trial, Appellant testified that his niece and her children were staying at the house temporarily, that they

were "in and out," and that the room he purportedly rented for A.S.W. was now occupied by them. (T. 122-123). Ms. Young testified that her two granddaughters stayed with her each weekend, and that her daughter also periodically stayed there. (T. 215).

II.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO MODIFY THE LEGAL AND PHYSICAL CUSTODY OF A.S.W. BECAUSE THE TRIAL COURT CORRECTLY APPLIED THE LAW AS TO THE COURT'S BASIS FOR CONTINUED JURISDICTION IN THAT THE COURT HAD CONTINUED JURISDICTION OVER THE CHILD UNDER SECTION 211.031. 1. (1), RSMo, AND DENIAL OF PLACEMENT WITH APPELLANT WAS PROPER IN THAT THERE WAS SUBSTANTIAL EVIDENCE THAT APPELLANT STILL WAS COGNITIVELY INCAPABLE OF EXERCISING PRIMARY CUSTODY OF THE CHILD AND IT WAS NOT IN THE BEST INTERESTS OF THE CHILD TO BE PLACED WITH APPELLANT.

Again, this Court has held that appellate review of a juvenile court order denying a parent's motion to modify a prior order of disposition entered by the court is limited to determination of whether there is substantial evidence to support the order, the order is against the weight of the evidence, or the order erroneously declares or applies the applicable law. *In Interest of J.M.*, 847 S.W.2d 911, 913 (Mo. App. E.D. 1993). On appeal, deference should be given to the trial court's assessment of the credibility of each witness and all facts and reasonable

inferences therefrom should be viewed in the light most favorable to the trial court's decision. *Id.* It has long been held that deference should be given on appellate review to the trial court's superior ability to hear the evidence and weigh the credibility of the witnesses. *Estate of Williams*, 922 S.W.2d 422 (Mo. App. S.D., 1996).

Appellant argues that the jurisdiction of the juvenile court over A.S.W. stemmed from the allegations of the Juvenile Officer's 2002 petition to terminate Appellant's parental rights, i.e. "the child has been under the jurisdiction of the juvenile court for a period of one year or longer and the conditions which led to 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 . . .***" Appellant's Brief at 20 (Emphasis in original). Appellant further argues that this allegation, which Appellant asserts gave rise to the jurisdiction of the juvenile court, was held untrue by the Supreme Court and that the Supreme Court also held as a matter of fact that Appellant was capable of caring for A.S.W. as long as he received assistance from his family. Appellant's assertion is simply not accurate.

Again, the Supreme Court dealt with an appeal from the juvenile court of a judgment terminating parental rights pursuant to a petition filed under Section 211.447, RSMo. In its decision, the Court held only that the juvenile court erred in terminating parental rights without considering and making findings on the required statutory factor of the "success or failure of the efforts of the juvenile officer, the division or other agency to aid the parent on a continuing basis in adjusting his circumstances or conduct to provide a proper home for the child." The Court held that the "state failed to carry its burden to produce substantial evidence that additional services would not enable the return of A.S.W. to Father within an ascertainable period of time" and therefore, the findings of the termination order in 2002 "did not constitute clear, cogent and convincing evidence that grounds existed to terminate parental rights." 137 S.W.3d at 454.

The jurisdiction of the juvenile court to consider and deny Appellant's motion that A.S.W. be remanded to his legal and physical custody did not arise from the 2002 proceeding to terminate parental rights that was reversed by the Supreme Court, but from the May 21, 2001, judgment that the child was subject to the jurisdiction of the court under Section 211.031. 1. (1), RSMo. (Respondent's Supp. L.F.4-8). That judgment, agreed to by Appellant and his Guardian Ad Litem, recited that Appellant was "unsuitable for placement due to disability." The A.S.W. decision by the Supreme Court did not divest the juvenile court of its jurisdiction over the child under that 2001 judgment, and accordingly, the juvenile

court had authority to entertain Appellant's motion to modify, as well as conduct the statutorily required permanency planning hearing.

Besides asserting that the juvenile court was divested of jurisdiction by the Supreme Court's 2004 *A.S.W* decision, Appellant argues first that the juvenile court, following the *A.S.W.* decision, did not attempt to reunite *A.S.W.* with Appellant, even in the arena of visitation. Appellant's Brief, at 26. The record does not support Appellant. On September 20, 2004, the juvenile court ordered "counseling sessions to immediately begin to address issue of contact between juvenile and father, with first contact to occur before Nov. 1 court date unless there is an order of this court to the contrary." (Respondent's Supp. L.F. 10). Again on November 1, 2004, the court ordered that the juvenile remain in counseling, with "a goal of such therapy being to initiate contact between the juvenile and his biological father as soon as possible, but in any event prior to the review date of February 7, 2005." (Respondent's Supp. L.F. 11). This therapy was done by *A.S.W.*'s counselor, Kimberly Steinmann. (T. 9).

Second, contrary to Appellant's assertion, the record is replete with expert evidence that Appellant continues to have the cognitive impairment that led to assumption of jurisdiction by the court in 2001, *i.e.* that he is still unsuitable for placement due to disability. At the risk of being redundant, the testimony of Dr. Edward Hogan and of Dr. David Easterday, relied on by Appellant, do not support Appellant's contention that his cognitive disorder due to head trauma is no longer an issue because he has fully recovered from it. Dr. Hogan testified by deposition

that he treated Appellant for epileptic seizures, and that the seizures were under control. Dr. Hogan emphasized that he had not "evaluated [Appellant] in any other way for psychological ability to see his children or how he functions on an everyday basis." (T. 240). Dr. Easterday had treated Appellant as his primary physician since September 2005, and had seen him in office visits on September 1, 2005; October 31, 2005; and December 2, 2005. (Respondent's Exhibit L, at 20). Dr. Easterday responded "no" to Appellant's counsel's carefully crafted 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. (Emphasis added). Appellant's physical condition to care for A.S.W. has never been an issue in this matter; his mental or cognitive capability has always been the issue.

Dr. Michael Armour's psychological evaluation of Appellant done on November 13, 2004 indicated that Appellant suffered from a cognitive disorder, which Dr. Armour defined as a mental defect, that Appellant had sexually abused a child, and that Appellant had 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 could care for his son." *Id.*

To similar effect, Appellant's own evidence - the report of Dr. James Powers, Ph.D. - done in January 2005, documents the trial court's finding that

Appellant remains an unsuitable custodian for A.S.W. In that report, Dr. Powers diagnosed Appellant to have a cognitive disorder, and quoted his 2002 report "that it was inappropriate for him to have primary responsibility for his son," although Appellant's deficits would not prohibit him from visiting his son under supervision. (Exhibit J, at 6). As noted by the trial court, this evaluation did not consider A.S.W.'s relationship with Appellant on the issue of whether visitation would be in the child's interest. (L.F. 0077).

Moreover, in 2002, Dr. Powers had also testified at trial in the termination of parental rights proceeding that Appellant suffered from a "cognitive disorder," which he defined as another term for "brain injury." (Petitioner's Exhibit 1, at 48). This condition was permanent. (Petitioner's Exhibit 1, at 50). If Appellant were to care for a child, which Dr. Powers thought inappropriate, Appellant would make errors, bad decisions, and exercise poor judgment and place the child in danger. (Petitioner's Exhibit 1, at 49-50). In 2002, Dr. Powers had "serious questions" regarding a child's safety if Appellant had primary care responsibilities. (Petitioner's Exhibit 1, at 50). Although Appellant complains emphatically that the Juvenile Officer offered no medical testimony of Appellant's continued and present cognitive impairment that would render him unsuitable for placement, Appellant cites no authority that medical, as opposed to psychological, evidence is required. Indeed, it is not. The Supreme Court has held that a juvenile court may consider and credit the opinion of a psychologist on a parent's mental condition, even when that opinion is different from that of a medical doctor offered in the

same proceeding. The trial court is to evaluate the basis of each expert's opinion, and give each opinion appropriate weight. *In Interest of C.L.M.*, 625 S.W.2d 613, 615 (Mo. banc 1981). As noted herein, Doctors Hogan and Easterday's opinions are far more confined and restricted than the evidence of psychologists Armour and Powers.

Appellant's own testimony demonstrates his continued unsuitability as a custodian for A.S.W. In Dr. Armour's words, Appellant was "unrealistic and vague regarding how he would care for his son." (Petitioner's Exhibit 2, at 8). Appellant testified that he believed that A.S.W., as an eight year old child, would be in the fifth grade. (T. 127). He demonstrated no comprehension of the demands placed on a parent by a maturing child. When asked what he would have to do as a custodian to discipline A.S.W., Appellant eventually and after struggle testified out of context that "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. 129-130). Asked what future problems he could expect with A.S.W. as the child matured, Appellant replied "I believe 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). Asked by the Guardian ad Litem what "normal, typical childhood problems" he could expect with A.S.W., Appellant simply replied "None." (T. 189). From this testimony, together with Appellant's similar testimony in 2002, the trial court, with its superior ability to assess the

credibility of witnesses which includes the demeanor of each witness in court, was justified in finding that Appellant "was easily confused," "has some level of difficulty receiving and conveying information," and was not "currently equipped" to raise A.S.W. (I. L.F. 0077). Moreover, as pointed out by the Guardian ad Litem at trial, Appellant had two opportunities since A.S.W. came under the jurisdiction of the juvenile court to exercise discretionary judgment with respect to the child. First, in January 2002, Appellant was allowed visitation with the child on the condition that he be supervised by his mother. Knowing this restriction was due to his history of sexual abuse of other children and his mental condition resulting from his head injury, Appellant nonetheless showered with the child. (T. 134). Appellant admitted that this was poor judgment, a conclusion he reached after "sitting down and thinking about it." (T. 146). In December 2005, Appellant was specifically directed by the court to send a holiday card to A.S.W., but sign only his first name, but sent a card signed with his full name. Again, Appellant acknowledged that this was poor judgment. (T. 179-180).

Appellant's sister, Donna Warren Young - with whom Appellant has lived since June 2002, (T. 206), testified that she thought that Appellant's "judgment with me would be good," (T. 220). When asked to clarify that response, Ms. Young reiterated that she "might be concerned with some of his judgment issues" if he were not with her. (T. 220). On May 24, 2006, Appellant testified that he planned to move from his sister's residence, and that he had long planned to make that move. (T. 138-139). In the termination of parental rights trial in 2002, Appellant

had similarly testified that he did not intend to remain with his sister. (Petitioner's Exhibit 1, at 110-115). And, Ms. Young testified that she had never asked for A.S.W. to be placed with her. (T. 216). Moreover, although Ms. Young testified that Appellant had been released to her care in 2002 on the condition that she provide supervision for him, she admitted that she had never provided that supervision. (T. 224.) This admission was made after Ms. Young initially denied failing to supervise Appellant; she withdrew her denial only after being presented with her testimony from the 2002 hearing. With this conflicting evidence, solely from Appellant and his witnesses, the trial court was justified in concluding that Appellant would not have consistent support in providing care for A.S.W. if A.S.W. was placed with him. (I. L.F. 0077).

Appellant also argued that the trial court, in making no order of visitation between Appellant and A.S.W., erred by failing to find that Appellant's involvement with A.S.W. would impair his physical health or his emotional development. For this argument, Appellant cites Section 452. 400, RSMo, a section found in the statutory chapter on dissolution of marriage, without citing any authority that the section is applicable to guardianship proceedings, as the sole order of custody affecting the child is now in guardianship following the termination of juvenile court jurisdiction as part of the court's judgment. Assuming *arguendo* that the court had the obligation to make a finding similar to that required under Section 452.400, the record amply supports the view that contact between Appellant and A.S.W. would impair the child's physical health or

emotional development. Dr. Harriet Landers, a psychologist who evaluated the child in September 2004, concluded that A.S.W. did not have a bond with Appellant, and did not remember him. (Petitioner's Exhibit 3, at 26). Dr. Landers believed that A.S.W. had "a strong and positive bond" with his now guardians, (Petitioner's Exhibit 3, at 26), and "clearly identified them" as "his mother and father and their extended family as his extended family as his family." (Petitioner's Exhibit 3, at 20). Dr. Landers testified that to remove A.S.W. from his current home would be "emotionally damaging for him in a serious way," (Petitioner's Exhibit 3 at 30), 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).

Kimberly Steinmann's testimony, totally ignored by Appellant, buttresses by real experience Dr. Landers' opinion obtained by testing and clinical interview, that contact between Appellant and A.S.W. would be detrimental to A.S.W. Pursuant to order of the juvenile court, Ms. Steinmann counseled with A.S.W. in the fall of 2004, in order to attempt to fulfill the court's goal of reestablishing contact between child and father. Ms. Steinmann worked with A.S.W. on the concept that he had a biological father, talked with him about Appellant in that context, and prepared him 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 to 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). Similarly to Ms. Steinmann, Dr. Landers had noted that A.S.W. "was a very engaging child who was very cooperative with me." (Petitioner's Exhibit 3, at 20). 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). Lest it be argued that this fear on A.S.W.'s part was due to Appellant's lack of contact with A.S.W. because of the judgment terminating his parental rights that was overturned, it should be recalled that Appellant's visitation with his child was

previously steadily increased (T. 74-78) until Appellant showered with the child in violation of the requirement that his visitation in his mother's home be supervised. (T. 82-83).

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). In sum, a child described by professionals as confident and outgoing upon meeting new people, only had sleep and behavioral disturbances when confronted with Appellant or with the mere idea of contact with Appellant. No wonder the trial court, with this evidence, found that A.S.W had a "severe adverse reaction" in connection with the subject of Appellant.:" (I.L.F. 0103).

III.

THE TRIAL COURT DID NOT ERR IN ITS JUDGMENT AND ORDER DENYING APPELLANT'S MOTION TO MODIFY THAT A.S.W. BE PLACED IN APPELLANT'S CUSTODY IN THAT THE TRIAL COURT CORRECTLY APPLIED SECTION 211.038, RSMo, NOTWITHSTANDING THAT APPELLANT HAD FILED HIS MOTION TO MODIFY PRIOR TO THE EFFECTIVE DATE OF SAID SECTION.

Section 211.038 was added to the Revised Statutes of Missouri, effective on August 28, 2004. That section provides in relevant part:

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:

(2) 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.

On March 6, 1986, Appellant was convicted on his plea of guilty to two felony offenses of sexual abuse and of sodomy and rape. The victims of those offenses were children, five and six years old respectively. (Petitioner's Exhibit 4). In its June 9, 2006, judgment denying Appellant's motion that A.S.W. be restored to Appellant's custody, the juvenile court found that Section 211.038, RSMo, removed the court's discretion to reunite A.S.W. with Appellant, relying on *In Re: T.M.E.*, 169 S.W.3d 581, 589 (Mo. App. W.D. 2005). (I. L.F. 0104). The court entered the same finding in its judgment granting guardianship of A.S.W. in the probate cause before the court. (II. L.F. 0023). Under the facts of *T.M.E.*, the court's reliance was well-placed. In that case, the mother of the child at issue had pleaded guilty to felony child endangerment of her own child well prior to the effective date of Section 211.038, RSMo. In affirming the trial court judgment

affirming termination of parental rights, the appellate court noted the trial court's finding that Section 211.038 showed a strong public policy against reuniting children with persons who inflict serious abuse on children. Appellant attempts to distinguish *T.M.E.* from this case by asserting that the parent in *T.M.E.* had abused her own child. Section 211.038 does not render grace to a person who abuses a child other than his own. The statute - in accord with common sense - provides that the juvenile court shall not reunite a child with a parent who has been convicted of certain felony offenses directed against any child, in this case, the sodomy and rape of a five year old and a six year old. Rape, sodomy, and sexual abuse of a child not the perpetrator's own is no less evil than rape, sodomy, or sexual abuse of the perpetrator's child.

Appellant claims that the court erred in retrospectively applying that statute, which became effective August 28, 2004, when Appellant's motion to modify requesting return of A.S.W.'s custody to him was filed on August 4, 2004. (I. L.F. 54). Appellant relies on *Walsh v. Walsh*, 184 S.W.3d 156 (Mo. App. 2005), to support this argument. In *Walsh*, a husband had filed a petition to dissolve a marriage in January 2002; trial was had on that petition in October 2004. After the petition was filed, but before it was heard, Section 452.375.3, RSMo, had been amended to add the provision that custody or unsupervised visitation could not be awarded to a parent if the parent resided with a person who had been convicted of, or pled guilty to certain criminal offenses, essentially of the same nature as found in Section 211.038. In reversing the judgment that applied

the amended statute to the factual situation of the mother residing with such an individual, this Court held that the statute in effect at the time a petition is filed governs. The Court also held that this is true even if the time the petition is heard occurs after the effective date of the new statute, relying on *Hoskins v. Box*, 54 S.W.3d 736 (Mo. App. W.D. 2001), and that neither of the two exceptions to this rule of prospective legislative applicability applied. In *Hoskins*, the Court noted that a statute could be deemed to apply retroactively if the legislature manifested its clear intent that the statute act retroactively. 54 S.W.3d at 739. In this case, the language does appear to so read. The statute reads simply and emphatically that 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 . . . has been found guilty of, or pled guilty to" rape, sodomy, and sexual abuse where the victim is a child, among other offenses. Two discovered cases, although not controlling on point, have disclosed references that the statute should be applied retroactively. As noted *infra* at 37, the court in *T.M.E.* averred that Section 211.038, RSMo, would preclude reunification of the child with the parent, although the parent's conviction of the relevant offense occurred prior to the effective date of the statute. Similarly, the Western District of the Court of Appeals, although reversing a decision denying parental visitation on procedural notice grounds, stated in dicta the belief that under Section 211.038, "it now appears that, in view of Mother's conviction, there can be no reunification with Mother as a matter of law." *In Re: W.D.*, 162 S.W.3d

517, 522 (Mo. App. W.D. 2005). The relevant conviction in *W.D.* occurred prior to the effective date of Section 211.038.

Even if the trial court erred in applying Section 211.038, RSMo, retroactively, reversal of the judgment denying Appellant's motion that custody of A.S.W. be returned to him is not required. Contrary to Appellant's assertion of error, the court did not solely or even primarily base its judgment denying the motion, or its judgment granting guardianship of A.S.W., on that statute. (I. L.F. 0076, II. L.F. 018-19). As set forth exhaustively in Points I and II, *infra.*, the court had significant and substantial evidence to justify its judgments based on Appellant's continued lack of cognitive ability to parent the child, without reference to Section 211.038..

Further, with reference to the issue of his past convictions of sexual abuse, rape, and sodomy, Appellant's testimony is not credible. Appellant testified that he was innocent of the crimes of which he was convicted, and that he only pleaded guilty to those offenses due to fear that the actual perpetrator would harm his sister. (T. 141-143). The transcript of those proceedings indicate that the prosecuting attorney, in Appellant's presence, recited that the State could prove that Appellant touched the vagina of one victim who was five years old, touched the vagina of a six-year old victim, had oral intercourse with the five year old victim, and had sexual intercourse with the six year old victim. When asked by the trial court on that occasion whether these statements were true, Appellant replied, "Yes, sir." (Petitioner's Exhibit 4, Transcript of Proceedings on Plea of Guilty, at

7-9). Appellant does not now claim that his 2000 head injury impaired his memory of that time; he affirmatively, under oath, denies the statements he made to the trial court on the day he entered his plea of guilty. Under such circumstances, his testimony is suspect at best.

Finally, contrary to Appellant's claim, Appellant's Brief 30, the trial court did not "constructively terminate" Appellant's parental rights. The court granted letters of guardianship under the probate code, which may be terminated on petition of a party under Section 475.083, RSMo. .

IV.

THE TRIAL COURT DID NOT ERR IN GRANTING THE PETITION FOR GUARDIANSHIP IN THAT SAID JUDGMENT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE THE EVIDENCE DEMONSTRATED APPELLANT'S UNFITNESS AND INABILITY TO SERVE AS GUARDIAN AND THE TRIAL COURT, SITTING AS A JUVENILE COURT, WAS MANDATED BY STATUTE TO OBTAIN A PERMANENT PLACEMENT FOR THE JUVENILE.

On appellate review, a judgment appointing a guardian of a minor is to be affirmed unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the judgment erroneously applies the law. *Estate of Williams*, 922 S.W.2d 422, 423 (Mo. App. S.D. 1996).

Appellant argues that the trial court erred by appointing guardians for the minor child, A.S.W., in that the court wrongly found that Appellant was unable to

care for the child, that Section 211.038, RSMo, precluded a placement with Appellant, and that the minor child's contact with his father caused the child emotional harm. Respondent Juvenile Officer believes that he has adequately addressed each of these arguments in Points I, II, and III, *infra*, and will not again address them here. As Appellant's motion to modify the order of disposition in the juvenile matter to restore custody to him and the guardianship were heard in one proceeding by consent, together with the issue of permanency planning, Appellant cannot say that petitioners for guardianship put on no evidence regarding Appellant's unfitness or inability to care for A.S.W. The evidence on that issue in the juvenile proceeding was available to the court. And, the trial court had authority to act in this manner as Section 475.035.1. (4), RSMo, provides that venue for appointment of a guardian of a minor lies in a court which has prior and continuing jurisdiction over a minor pursuant to subdivision (1) of subsection 1 of section 211.031, RSMo. *Ogle v. Blankenship*, 113 S.W.3d 290 (Mo. App. E.D. 2003), did not require termination of juvenile court jurisdiction prior to the court's consideration of the petition for appointment of a guardian because said petition was filed under Chapter 475, not under Chapters 452, 453, 454, or 455, as was the situation in *Ogle*.

Section 210.720, RSMo, supports the court in its decision, sitting as the Probate Division, to appoint a guardian of the person of A.S.W., a minor. As has been previously recited in these pages, A.S.W. has been under the jurisdiction of the juvenile court since a judgment was entered under Section 211.031. 1. (1),

RSMo, on May 21, 2001. (Respondent's Supp. L.F. 4-8). The child has been in the care of the foster parents, who were appointed his guardians, since March 2002, a period of four years at the time of trial herein. (T. 259). Section 210.720, RSMo, provides that the juvenile court must annually hold a permanency planning hearing to determine "in accordance with the best interests of the child a permanent plan for the placement of the child," including in its consideration whether a child should be returned to a parent, placed with a guardian or relative, or whether termination of parental rights proceedings should be initiated. At that permanency planning hearing, the court is to consider *inter alia* the interaction of the child with the foster parents, parents"; "the child's adjustment to the foster home, school and community"; and the "needs of the child for a continuing relationship with the child's parents and the ability and willingness of parents to actively perform their functions" as parents. *Id.* According to Dr. Harriet Landers, A.S.W. is well-adjusted to his guardians, formerly his foster parents. He has a "strong and positive bond" with them, (Exhibit 3, at 26), and "clearly identified" them "as his mother and father and their extended family as his family." (Exhibit 3, at 20). Similarly, Kimberly Steinmann, counselor for A.S.W., testified that the child should remain in the home of his guardians, because he "sees them as his parents." (T. 31). Dr. Landers testified that A.S.W. did not have a bond with Appellant, and that visitation with him "would exacerbate his anxiety and make him insecure and worried about his future." (Petitioner's Exhibit 3, at 60). The trial court ordered the provision of counseling to A.S.W. in an effort to establish a relationship between

him and Appellant. (Respondent's Supp. L.F. 9-11). Counselor Steinmann attempted to counsel with A.S.W. to restore a relationship between them, to no avail. When contact with Appellant was discussed or occurred, A.S.W. reacted adversely, with nightmares and behavioral problems. (T. 17, 20). Following a visit with Appellant, A.S.W. referred to Appellant as "the guy who met me at McDonald's and tried to take me away." (T. 53). According to Ms. Steinmann, contact with Appellant caused A.S.W. anxiety that he would be taken away from his now guardians, (T. 52), and that only his contact with Appellant was the cause of his recurring nightmares. (T. 43-44).

In sum, the judgment of the trial court appointing a guardian for A.S.W. is supported by substantial evidence and is not against the weight of the evidence as the evidence adduced demonstrates that Appellant is unfit and unable to provide care for the minor as defined by Section 475.030.4. (2), RSMo, and the best interests of the minor, and Section 210.720, require that a permanent placement for him be made.

CONCLUSION

For the foregoing reasons, Respondent Juvenile Officer prays that the judgment of the juvenile division denying Appellant's motion to modify the orders of disposition entered by the court and return legal and physical custody to Appellant 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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CERTIFICATE OF SERVICE

Two copies of the foregoing Brief were mailed on this ____ day of _____, 200__, 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. William C. Dodson, Attorney at Law, P.O. Box 966, Imperial, MO 63052; 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.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies on this ____ day of _____, 20__, 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 13, 207.

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