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## **JURISDICTIONAL STATEMENT**

Article V, Section 3 of the Missouri Constitution provides that the Supreme Court of Missouri shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of law as of this state, the title to any state office, and in all cases where punishment imposed is death or imprisonment for life. The Missouri Court of Appeals shall have general appellate jurisdiction in all other cases.

The issue on appeal involves the validity of a statute of the State of Missouri and as such the jurisdiction for appeal is in the Supreme Court. The specific issue on appeal is whether the provision in Section 211.447.2(1) RSMo 1998 which allows the termination of parent right for the reason that a child has been in foster care for 15 of the most recent 22 violates the Due Process Clause of the 14<sup>th</sup> Amendment of the United States

## POINTS RELIED UPON

*I. The Court erred in finding that Section 211.447.2(1) which allows the termination of parental rights for the reason that a child has been in foster care for at least 15 of the most recent twenty-two months did not violate the Due process Clause of the 14 Amendment of the United States because under Section 211.447.2(1) permits termination of parental rights without a finding of unfitness in that the case of Santosky vs. Kramer, 455 U.S. 745 (1982) found that it was a violation of the Due Process Clause to terminate parental rights without a finding of unfitness.*

*Section 211.447.2(1) RSMo.*

*Due Process Clause of the United States Constitution Amendment 14*

*Missouri Constitution Article I Section 10*

Rule 73.01

MURPHY VS. CARRON, 536 S.W.2d 30 (Mo. banc. 1976)

H.D. vs. E.D., 629 S.W.2d 655 (E.D. Mo. 1982)

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In re J.A.H., 592 S.W.2d 888 (S.D. Mo. 1980)

In the Interest of M.N.M., 681 S.W.2d 457 (W.D. Mo. 1984).

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**D.G.K. vs. H.H.**, 719 S.W.2d 510 (W.D. Mo. 1986)

**In re W.F.J.**, 648 S.W.2d 210 (W.D. Mo. 1983)

**STATE VS. TAYLOR**, 323 S.W.2d 534, 537 (S.D. Mo. 1959)

**G. V. SAUNDER**, 308 S.W.2d 883 (S.D. Mo. 1957)

**STANLEY VS. ILLINOIS**, 405 U.S. 645, 31 LED.2d 557 (1975)

**In re Gault**, 387 U.S. 1; 18 L.Ed. 527 (1967)

**In ex rel. WILLIAMS VS. MARSH**, 626 S.W.2d 223, 230 (Mo. banc 1982)

**MAY VS. ANDERSON**, 345 U.S. 528, 533, 97 L.Ed. 1221 (1953)

**IN MEYER VS. NEBRASKA**, 262 U.S. 390, 399, 67 L.Ed. 1042 (1973)

***In re the interests of A.L.W.***, (773 S.W.2d 134).

***In re Monnig***, 638 S.W. 2<sup>d</sup> 782, 785 (W.D. Mo. 1982)

*Section 211.443 states:*

*Section 211.447.2(1)*

*Section 211.447.3*

*Section 211.447.5*

*Section 211.447.2(2)*

*Section 211.447.2(3)*

***K.C.M.*** 85 S.W. 3d 682(W.D. Mo 2002)

*Chapter 42. USC Section 675.5(E) which states:.*

**II. That the Court erred in terminating the mother's parental rights under Section**

**211.447.2(1) RSMo finding that termination was proper since the child had been in foster care for 15 months of the most recent 22 months because Section 211.447.2 is not a grounds for termination but establishes a time frame when the court should consider filing a Petition for Termination in that nowhere in Section 211.447.2(4) does the term grounds appear and was a scrivener's error contained in Section 211.447.3 and 211.447.5 which should have stated grounds in Section 211.447.2(2) and 211.447.2(3) and to hold otherwise would invalidate Section 211.447.2(1). The decision should be reversed as erroneously applying the law.**

Rule 73.01

**MURPHY VS. CARRON**, 536 S.W.2d 30 (Mo. banc. 1976)

**H.D. vs. E.D.**, 629 S.W.2d 655 (E.D. Mo. 1982)

**B.J.D.B. vs. J.B.G.**, 698 S.W.2d 328 (W.D. Mo. 1985).

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**In the Interest of M.E.W.**, 729 S.W.2d 194 (Mo. Banc. 1987)

**SANTOSKY VS. KRAMER**, 455 U.S. 745 (1982)

**J.D.K.**, 685 S.W.2d 876 (W.D. Mo. 1985)

**K.S. vs. M.N.W.**, 713 S.W.2d 858 (W.D. Mo. 1986).

**D.G.K. vs. H.H.**, 719 S.W.2d 510 (W.D. Mo. 1986)

**In re W.F.J.**, 648 S.W.2d 210 (W.D. Mo. 1983)

**STATE VS. TAYLOR**, 323 S.W.2d 534, 537 (S.D. Mo. 1959)

**G. V. SAUNDER**, 308 S.W.2d 883 (S.D. Mo. 1957)

**STANLEY VS. ILLINOIS**, 405 U.S. 645, 31 LED.2d 557 (1975)

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**In ex rel. WILLIAMS VS. MARSH**, 626 S.W.2d 223, 230 (Mo. banc 1982)

**MAY VS. ANDERSON**, 345 U.S. 528, 533, 97 L.Ed. 1221 (1953)

**IN MEYER VS. NEBRASKA**, 262 U.S. 390, 399, 67 L.Ed. 1042 (1973)

Section 211.447.2(1)

Section 211.447.3 RSMo

Section 211.447.3

Section 211.447.2(2)

Section 211.447.2(3)

Section 211.447.5

**HABJAN V. EARNEST**, 2 S.W. 3d 875, 881 (Mo. App. 1999)

**MISSOURI HOSPITAL ASSOCIATION VS AIR CONSERVATION COMMISION,**

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**STATE EX RE. BESS VS SCHULT**, 143, S.W. 2d 486 (S.D. Mo. 1940)

**DIEMEKE VS STATE HIGHWAY COM? M.** 444 S.W. 2d 389 (MO 1967). .

**LEDERER VS. DEPT OF SOCIAL SERVICES** 825. SW.2d 858 (W.D. Mo. 1992) **IN**

**RE COSTELLO? S ESTATE** 92 S.W. 2d 723 ( MO. En banc 1936)

Chapter 42 USC Section 675.5(E).

IV-D and IV-E of the Social Security Act for Children's Welfare

State of Mo. v. Bowen, 638 F.Supp. 37, 38 (W.D. Mo. 1986),

42 USC 675.5(E)

**III. The trial court erred in finding that the mother had abandoned her child under Section 211.447.4(1) since she had not visited the child nor provided for his financial needs because the evidence showed that the mother did not voluntarily abandon her child but was prevented from visiting with him in that she lived approximately 150 from where the child was, that the DFS was under the law to move the child closer to his mother and failed to so act and the DFS knowing that the mother lacked transportation to visit with her son failed to take the child to see her or assist her in visiting the child. The decision to terminate mother parental rights should be reversed as not supported by substantial evidence, against the weight of the evidence , and as erroneously applying the law.**

Rule 73.01

MURPHY VS. CARRON, 536 S.W.2d 30 (Mo. banc. 1976)

H.D. vs. E.D., 629 S.W.2d 655 (E.D. Mo. 1982)

B.J.D.B. vs. J.B.G., 698 S.W.2d 328 (W.D. Mo. 1985).

In re J.A.J., 652 S.W.2d 745 (E.D. Mo. 1983)

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In the Interest of M.N.M., 681 S.W.2d 457 (W.D. Mo. 1984).

In the Interest of M.E.W., 729 S.W.2d 194 (Mo. Banc. 1987)

**SANTOSKY VS. KRAMER**, 455 U.S. 745 (1982)

**J.D.K.**, 685 S.W.2d 876 (W.D. Mo. 1985)

**K.S. vs. M.N.W.**, 713 S.W.2d 858 (W.D. Mo. 1986).

**D.G.K. vs. H.H.**, 719 S.W.2d 510 (W.D. Mo. 1986)

**In re W.F.J.**, 648 S.W.2d 210 (W.D. Mo. 1983)

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**In re Gault**, 387 U.S. 1; 18 L.Ed. 527 (1967)

**In ex rel. WILLIAMS VS. MARSH**, 626 S.W.2d 223, 230 (Mo. banc 1982)

**MAY VS. ANDERSON**, 345 U.S. 528, 533, 97 L.Ed. 1221 (1953)

**IN MEYER VS. NEBRASKA**, 262 U.S. 390, 399, 67 L.Ed. 1042 (1973)

Section 211.447.4(1),

**In the Interest of Bay Girl W.**, 728 S.W. 2d 545 (W.D. Mo. 198)

**Johnston vs. Johnston** 573 S.W. 2d 406 (K.C. Mo. 1978)

**R.S.P., H.D.P., And C.M.P.** 619 S.W. 2d 863 (W.D. Mo. 1981)

**IV. The Court erred in terminating the mother's parental rights under Section 211.447.4(2) finding that there was a prior adjudication of neglect and that the mother had failed to provide for her child, while the child was in foster care under Section 211.447.4(2)(d) because there was never a prior adjudication of neglect as required by Section 211.447.4(2) and state failed with its burden to prove the mother**

had the financial ability to provide for her son while he was in foster care in that the child was made a ward of the court because his mother was in prison and not because of neglect and the evidence was that the mother had gross earnings of \$5868.00 for an 18 month period of time, owed back rent of \$800.00 and was about to be evicted. The decision of the trial court should be reversed since the decision is against the weight of the evidence since there is no substantial evidence to support the decision, the decision is against the weight of the evidence and the decision erroneously applied the law.

Rule 73.01

**MURPHY VS. CARRON**, 536 S.W.2d 30 (Mo. banc. 1976)

**H.D. vs. E.D.**, 629 S.W.2d 655 (E.D. Mo. 1982)

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**In re J.A.J.**, 652 S.W.2d 745 (E.D. Mo. 1983)

**In re J.A.H.**, 592 S.W.2d 888 (S.D. Mo. 1980).

**In the Interest of M.N.M.**, 681 S.W.2d 457 (W.D. 1984).

**In the Interest of M.E.W.**, 729 S.W.2d 194 (Mo. Banc. 1987)

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**In re J.A.J** 652 S.W. 2d (E.D. Mo. 1983)

**K.S. VS. M.N.W.**, 713 S.W.2d 858 (W.D. Mo. 1986).

**D.G.K. vs. H.H.**, 719 S.W.2d 510 (W.D. Mo. 1986)

**In re W.F.J.**, 648 S.W.2d 210 (W.D. Mo. 1983).

**STATE VS. TAYLOR**, 323 S.W.2d 534, 537 (S.D. Mo. 1959)

**G. V. SAUNDER**, 308 S.W.2d 883 (S.D. Mo. 1957).

**STANLEY VS. ILLINOIS**, 405 U.S. 645, 31 LED.2d 557 (1975).

In **IN RE GAULT**, 387 U.S. 1; 18 L.Ed. 527 (1967),

**IN EX REL. WILLIAMS VS. MARSH**, 626 S.W.2d 223, 230 (Mo. banc 1982)

**MAY VS. ANDERSON**, 345 U.S. 528, 533, 97 L.Ed. 1221 (1953).

**IN MEYER VS. NEBRASKA**, 262 U.S. 390, 399, 67 L.Ed. 1042 (1973)

Section 211.447.4(2).

**V. The Trial Court erred in terminating the mother's parental rights under Section 211.447.4(3) RSMo finding that the child has been under the jurisdiction of the court for a period of one year and that mother failed to rectify conditions which led to the assumption of jurisdiction, that the mother failed to meet the conditions of the Written Service Plan, and had the financial ability to support the child while in foster care because the fact that the mother was incarceration by itself is not sufficient for termination, that Section 211.447.4(3) requires the court to make a determine a determination of the progress of mother in Social Service Plan and the court looked at progress of the mother to a Written Service Agreement that was void when entered into and the Mother lacked the fiscal ability to provide for her child while he was in foster care in that the substantial evidence was that the fact the mother was incarceration had any effect on getting custody her child back since the**

**DFS was not providing her with any services and her parental rights had been terminated by this defacto action, that a review of the Social Service Plan showed that the DFS by there failure to move the child closer to the mother prevented her from carrying out her parental duties, that the Written Service Agreement was written 6 months after the agreement should have been entered into, that the agreement was void since the DFS could not perform the terms thereof, and that the mother lacked the financial abiliity to provide for her child while he was in foster care which was shown by her low earning and debt she owed. The judgment terminating the mother? s parental rights under Section 211.447.3 should be reversed since the judgment is not supported by substantial evidence is against the weight of the evidence and erroneously applied the law.**

Rule 73.01

**MURPHY VS. CARRON**, 536 S.W.2d 30 (Mo. banc. 1976)

**H.D. vs. E.D.**, 629 S.W.2d 655 (E.D. Mo. 1982)

**B.J.D.B. vs. J.B.G.**, 698 S.W.2d 328 (W.D. Mo. 1985).

**In re J.A.J.**, 652 S.W.2d 745 (E.D. Mo. 1983)

**In re J.A.H.**, 592 S.W.2d 888 (S.D. Mo. 1980)

**In the Interest of M.N.M.**, 681 S.W.2d 457 (W.D. Mo. 1984).

**In the Interest of M.E.W.**, 729 S.W.2d 194 (Mo. Banc. 1987)

**SANTOSKY VS. KRAMER**, 455 U.S. 745 (1982)

**J.D.K.**, 685 S.W.2d 876 (W.D. Mo. 1985)

**K.S. vs. M.N.W.**, 713 S.W.2d 858 (W.D. Mo. 1986).

**D.G.K. vs. H.H.**, 719 S.W.2d 510 (W.D. Mo. 1986)

**In re W.F.J.**, 648 S.W.2d 210 (W.D. Mo. 1983)

**STATE VS. TAYLOR**, 323 S.W.2d 534, 537 (S.D. Mo. 1959)

**G. V. SAUNDER**, 308 S.W.2d 883 (S.D. Mo. 1957)

**STANLEY VS. ILLINOIS**, 405 U.S. 645, 31 LED.2d 557 (1975)

**In re Gault**, 387 U.S. 1; 18 L.Ed. 527 (1967)

**In ex rel. WILLIAMS VS. MARSH**, 626 S.W.2d 223, 230 (Mo. banc 1982)

**MAY VS. ANDERSON**, 345 U.S. 528, 533, 97 L.Ed. 1221 (1953)

**IN MEYER VS. NEBRASKA**, 262 U.S. 390, 399, 67 L.Ed. 1042 (1973)

Section 211.447.4(3) RSMo

In **A. P.** 988 S.W. 2d 59, 60-61 (S.D. Mo. 1999)

**In the Interest of J.M.**, 789 S.W. 2d 818, 822 (W.D. Mo. 1990)

**T.A.S.**, 32 S.W. 3d 804, 810 (W.D. Mo. 2000).

**In the Interest of A.S.O.**, 52 S.W. 3d 59, 66(W.D. Mo. 2001)

**In the Interest of R.E.A.**, 971 S.W. 2d 865, 867 (W.D. Mo. 1998)

**In Interest of N.M.J.** , 24 S.W. 3d 771, 781 (Mo 2000)

Section 211. 183 RSMo

Section 210.001.1(1) which states:

42 USC Section 675 .5(A)

**State of Mo. v. Bowen**, 638 F.Supp. 37, 38 (W.D. Mo. 1986)

42 USC Section 675.4(A)

Section 211.447.4(3)(b)

Section 211.447.4(3)(a)

**VI. The Court erred in terminating the parental rights of Lisa to Marlin under Section 211.447.4 (6) for the reason that the Lisa's parental rights had been terminated on her other children because those judgments contain reversal error and the State failed to provide reunification services required by the law in that the judgment entered contained findings and not specific findings as required by case law and the state failed to provide Lisa's family help in obtaining housing which would have meant the return of her children and for that reason their can not be a presumption of unfitness by the fact Lisa's parental rights were terminated on her other children.**

Rule 73.01

**MURPHY VS. CARRON**, 536 S.W.2d 30 (Mo. banc. 1976)

**H.D. vs. E.D.**, 629 S.W.2d 655 (E.D. Mo. 1982)

**B.J.D.B. vs. J.B.G.**, 698 S.W.2d 328 (W.D. Mo. 1985).

**In re J.A.J.**, 652 S.W.2d 745 (E.D. Mo. 1983)

**In re J.A.H.**, 592 S.W.2d 888 (S.D. Mo. 1980)

**In the Interest of M.N.M.**, 681 S.W.2d 457 (W.D. Mo. 1984).

**In the Interest of M.E.W.**, 729 S.W.2d 194 (Mo. Banc. 1987)

**SANTOSKY VS. KRAMER**, 455 U.S. 745 (1982)

**J.D.K.**, 685 S.W.2d 876 (W.D. Mo. 1985)

**K.S. vs. M.N.W.**, 713 S.W.2d 858 (W.D. Mo. 1986).

**D.G.K. vs. H.H.**, 719 S.W.2d 510 (W.D. Mo. 1986)

**In re W.F.J.**, 648 S.W.2d 210 (W.D. Mo. 1983)

**STATE VS. TAYLOR**, 323 S.W.2d 534, 537 (S.D. Mo. 1959)

**G. V. SAUNDER**, 308 S.W.2d 883 (S.D. Mo. 1957)

**STANLEY VS. ILLINOIS**, 405 U.S. 645, 31 LED.2d 557 (1975)

**In re Gault**, 387 U.S. 1; 18 L.Ed. 527 (1967)

**In ex rel. WILLIAMS VS. MARSH**, 626 S.W.2d 223, 230 (Mo. banc 1982)

**MAY VS. ANDERSON**, 345 U.S. 528, 533, 97 L.Ed. 1221 (1953)

**IN MEYER VS. NEBRASKA**, 262 U.S. 390, 399, 67 L.Ed. 1042 (1973)

Section 211.183 states:

Sections 211.447.4(2) for neglect, 211.447.4(3) failure to rectify or a potential harmful r

Section 211.447.2(1)

Section 211.447.4(2)(d )

Section 211.447(3) the Court made the following findings:

Section 211.447.2(1)

**A. P.** 988 S.W. 2d 59, 60-61 (S.D. Mo 1999)

Section 211.447.4(2)

Section 211.447.4(3)

**In the Interest of J.M.**, 789 S.W. 2d 818, 822 W.D. Mo. 1990). **In the Interest of**

**A.S.O.**, 52 S.W. 3D 59, 66(W.D. Mo. 2001)

**In the Interest of R.E.A.**, 971 S.W. 2d 865, 867 (W.D. Mo. 1998)

**T.A.S.**, 32 S.W. 3d 804, 810 (W.D. Mo. 2000)

**In the Interest of N. M.J.**, 24 S.W. 771, 782, 783(W.D. Mo. 2000)

Section 211.447.4(3) (b)

Section 211.447.4(3)(d)

Section 211.447.3(3)

Section 211.183.

## **STATEMENT OF FACTS**

On February 25, 2003 the Juvenile Court of Audrain County, Missouri entered an order terminating the parental rights of Lisa Latasha Williams (hereinafter referred to as Lisa) and Marlin Mathew Robinson (hereinafter referred to as Robinson) to the child, Marlin Devonian Robinson (hereinafter referred to as Marlin). An appeal was filed with the Missouri Supreme Court since a constitution issue is raised.

Marlin was born on August 23, 2000 to Lisa and Robinson. At the time the child was born, Lisa was incarcerated at the Women's Eastern Reception and Diagnostic

Correctional Center (hereinafter referred to as WERDCC) which is located in Vandalia, Audrain County, Missouri. Before the birth of Marlin, Lisa had contacted the Audrain County Division of Family Services Office (hereinafter referred to as the Division) to terminate her rights and allow for the adoption of the child. The Division Caseworker, Lori Masek, testified, that she had visited four (4) times with Lisa to discuss adoption. After Marlin's birth, Lisa decided to keep the child. She had a discussion with the Division of possible placement. Lisa informed the Division that she did not want the child placed with her relatives and knew of no one that she wanted to have custody of the child. (TR52-55 LF 48-49). Lisa was in agreement that the child be placed with the Division for foster home care.

On August 25, 2000, an Order of Protective Custody was filed with the Juvenile Court of Audrain County and on August 28, 2000, a Temporary Protective Order was entered. On August 28, 2000 the Petition to make Marlin a ward of the Court was filed and Judgment was entered on November 21, 2000. The judgment states that Lisa Latasha Williams did not appear at the hearing due to her incarceration and the judgment states Lisa waived her right to counsel. The Court found the following:

A. Said infant's mother is incarcerated and unable to provide for his necessary care, custody, supervision and support, and she has requested Missouri Division of Family Services and Juvenile Court intervention to provide for her son's care.

B. Said infant's father is incarcerated and therefore unable to provide for his care, custody, support and supervision at this time.

...no family or kinship resources are available for said juvenile's care, and the Division is assisting said juvenile's mother toward eventual reunification by providing periodic visitation between said juvenile and his mother. The Court ...finds in his best interests that he is in need of care and treatment which can be furnished by making him a Ward of this Court and placing him in the custody of the Missouri Division of Family Services...

THEREFORE, IT IS ORDERED, that said juvenile...be made a Ward of this Court and placed in the legal custody of the Missouri Division of Family Services for appropriate placement...? (Judicial Notice of the Court).

Ms. Masek testified that she made arrangements to have the child brought to the prison for visitation once a week with the mother. (TR 56) Ms. Masek took the child to visit her mother on September 8, 2000 and September 14, 2000. The child was placed in the foster care of Irene Sulana and then Ms. Sulana brought the child to the prison to visit with his mother. The child remained in the custody of Ms. Sulana between August 27, 2000, through December 24, 2001. Ms. Sulana supervised visits with the mother which took place on September 24, 2000, October 1, 2000, October 8, 2000, October 15, 2000, November 12, 2000, November 19, 2000, November 26, 2000, December 3, 2000, December 10, 2000, December 24, 2000, January 7, 2001, January 14, 2001, January 21, 2001, January 28, 2001, and February 11, 2001. Each parental visit was limited to one hour. Visits for October 29, 2000 and November 3, 2000 did not take place since the mother was not at the prison on those days. Since Ms. Sulana had gone to the prison for such visits on those dates, visitation of the mother was stopped until Lisa informed the

Division that she was back at WERDCC. On November 5, 2000, Lisa wrote a letter requesting a visit. Visitation on December 17, 2000, did not occur due to bad weather. (LF 47-48, TR 56 60-61).

On February 1, 2001, Lisa informed Ms. Masek that she was going to be released from WERDCC on February 13, 2001 for placement at a Halfway house in St. Louis, and then live with her sister, Ladonna, in St. Louis City. Lisa gave Ms. Masek her sister's address. Lisa did not ask Ms. Masek to return Marlin to her care at that time. Ms. Masek indicated that she did speak to Lisa on several occasions in March but could not tell what they talked about since her notes which were kept on a disk had been destroyed.

On March 14, 2001 a meeting took place at the Division Office to draft the Children's Services Case Plan. The Plan stated at Section II that Marlin, had become a foster child because the mother was incarcerated and the mother did not want the child placed with a relative.

Section III states that Lisa asked that Marlin be put in foster care. Section IV in the instructions states: 1. State the type of placement; 2. Special needs of the child; 3. Child's adjustment to placement; 4. Why the placement meets the child's needs and best interests; 5. The least restrictive placement in a family-like setting; and 6. How the placement is in the closest proximity to the parents. The plan then states the placement of the child was with Irene Sulana in a foster home and that Ms. Sulana could provide home care to Marlin since she is not working and that her home was in close proximity to WERDCC and she was able to facilitate regular parent/child visitation.

Section V instructions state that the written agreement is to be attached and must meet Fed. Req. 5, 6, 7, 8, as well as: 1. Describe case goals and time frames listing who is to achieve the listed goals; 2. Specific services provided to child and parent to facilitate the return of the child to his home; 3. How services which are provided for in the case plan will facilitate reunification; and 4. Any additional services necessary in the new plan. As to goals, the plan provides the temporary alternative placement of Marlin with relatives until Lisa is released from incarceration and can establish a stable, safe and proper living environment. As to services to be provided, the plan listed the placement of the child within close proximity to Lisa in St. Louis to facilitate regular visitation and reasonable efforts.

Section VI states that the weekly visits have helped to maintain and nurture the parent/child relationship. Further, Section VI states that Lisa was released from WERDCC on February 13, 2001 and she contacted the Division twice in March, 2001, to ask about Marlin and how to proceed toward reunification.?

Section VII instructions required the description of : 1. The visitation plan, which lists frequency and location of visits; and 2. Whose responsibility is it for arranging visits. The Plan then describes the visits between Lisa and Marlin at WERDCC. It was reported that Lisa seemed reserved and uncomfortable during visits, which may have been caused by the presence of the case manager. That she did quickly demonstrate an increased comfort level and that Irene Sulana reported that parent/child interactions were positive overall, and that Lisa appropriately held and fed Marlin during visitations.

Section VIII states that no child support was ordered. (Exhibit B).

Section XI states that the plan has been discussed with the family and the parents agreed with the placement choice and with the case plan. It also states that neither parent attended the meeting. Section XI, states that arrangements had been made for the mother to participate by telephone, but her telephone was busy.

Section XII contains the recommendations for services for the next six months which according to the plan are required by Fed req. 10, 11, 12. Among the recommendations were that the Division, GAL, and Juvenile Officer, Bruce McKinnon, felt it is in Marlin's best interest to place him in a foster home in the St. Louis area in order to be in closer proximity to his mother, thus more easily facilitating visitation and other reasonable efforts. It was noted that attempts to place Marlin in a foster home with siblings had been unsuccessful. Among the other recommendations was that Lisa contact the Division to arrange visitation, that a written Service Agreement be entered into with DFS establishing tasks to be accomplished in order to reach reunification and that Audrain County DFS request that St. Louis City DFS assign a service worker to Lisa in order to provide direct contact and services. (Exhibit B)

Lisa called her two days after the March 14, 2001, meeting and explained that she had not participated in the meeting because she was interviewing for a job. Lisa also asked Ms. Masek what had taken place. Ms. Masek told Lisa of the recommendations and sent her a copy of the Plan. Ms. Masek testified that she had attempted to place Marlin in foster care closer to his mother by calling the foster homes that had his siblings, but those foster homes declined to take Marlin. Ms. Masek had called the caseworker in St. Louis by the

name of Kevin McQuinn without success and had called the Missouri Alliance in Jefferson City without success. (TR 66-68, Exhibit 10.)

Ms. Masek testified further that she did not hear further from Lisa until Ms. Masek called Lisa on June 12, 2001, to discuss with Lisa the fact that Marlin needed surgery. Lisa explained to Ms. Masek that Lisa had been in a car accident with her son, Markeal, in March, 2001 and that Lisa had been in hospital for six (6) weeks with a broken hip. Lisa further stated that she could not make a long distance call from the hospital. Ms. Masek and Lisa then had a discussion about Marlin. Ms. Masek felt that Lisa was concerned about Marlin's surgery. They spoke of the need for a service agreement and the need for visitation to take place. Lisa explained that she did not have any transportation to visit with Marlin in Mexico, Missouri, but that she would try to get her Aunt to drive her to Mexico. Ms. Masek explained to Lisa that Marlin would be placed in another foster home and that if Marlin was not returned to Lisa then this family would adopt him. (TR 69-70).

Ms. Masek explained that the Division was proceeding with a concurrent plan with a dual goal of either the return of custody to the mother or adoption. Ms. Masek would be working on both goals at the same time. If the return of custody to the mother did not work out, then the Division could quickly shift to adoption. Ms. Masek saw no conflict in her role. (TR 142-143, 147)

Ms. Masek further testified that she explained to Lisa that it was important for Lisa to visit with Marlin even if infrequently, that Lisa could make collect calls to the Division, and if Ms. Masek was not in the office to leave a message. As to the transportation

problem, Ms. Masek explained that the Division could provide a voucher for gas for any person that brought Lisa to the visitations. (TR 71-72).

After this conversation they played telephone tag in June, with Lisa finally reaching Ms. Masek on June 27, 2001, to talk to Ms. Masek about Marlin's surgery and that Lisa was trying to arrange transportation to be there. The surgery took place on June 29, 2001, but Lisa failed to be there for the surgery. (TR 73-75).

Notice was sent to Lisa that there would be another meeting on September 5, 2001. Lisa failed to appear at the September 5, 2001, meeting. The team recommended termination of parental rights.

On September 11, 2001, the Court held a Permanency Review Hearing. Lisa had been sent notice, but failed to appear. The court found that the Court had jurisdiction over the minor child pursuant to Chapter 211 (by checking the box); that Termination was required (by checking the box); that the child was abandoned (by checking the box) and did not check the box that the child had been in foster care for 15 of the most recent 22 months.

The court went on to check the box finding that the parents had not met with the Division to draft a written service agreement, that adoption was to take place with termination of parental rights, and that such act was in the best interest of the child. The court further found that the Division had provided reasonable efforts and had provided services for the return of the child to the mother by arranging regular visitation of the child with the mother while the mother was incarcerated, by offering to arrange visitation after

the mother was released, that the mother had not availed herself to services by not visiting the child for six (6) months. That during the mother's visit with the child she displayed no visible signs of emotional reaction toward the child, never was heard to say that she loved him, and held the child on her lap with him facing away from her. The Court ordered that the Division is not required to make any further reasonable efforts toward the return of the child to the mother. (Exhibit A 1-5)

Bruce McKinnon, the Audrain County Juvenile Officer, testified that at the time the Court entered the September 11, 2001, Judgment authorizing termination that Marlin had only been in the custody of the Division for 13 months. Mr. McKinnon viewed the order of September 11, 2001, as instructing Ms. McKinnon to file a Petition for termination of Lisa's parental rights.

The Petition for Termination of Parental Rights was filed in April 1, 2002, at that time Marlin had been in the custody of the Division for 19 months (TR 32). Ms. McKinnon stated that when the hearing took place on September 11, 2001, the mother had not provided the child with any support, not visited with the child for 6 months, did not show love to the child during visits she had at the prison which was shown by her seating the child on her lap facing away from her (TR 33-34). Mr. McKinnon stated that he was aware that there was a difference between the court order and Children Service Case Plan as to how Lisa acted toward the child during visits in prison. (TR 33-34)

Mr. McKinnon further stated that he was aware that the Plan called for the child to be moved closer to mother, but that the Division had been unable to find a placement and

that Mr. McKinnon had made suggestions on such placement. (TR 36-38).

Mr. McKinnon further stated that it was his understanding that once the Audrain County Juvenile Court entered an order stopping reasonable efforts at reunification, that the parents were no longer allowed to visit with the child. (TR 38-39). Mr. McKinnon stated that the child was made a ward due to the fact that the mother was in prison and unable to provide care for the child and there was no suitable placement with a relative. Mr. McKinnon stated that there had been no abuse or neglect (TR 39-41). Mr. McKinnon had not been aware of psychological testing done on the mother (TR 41). Mr. McKinnon had no knowledge that there was progress in Lisa's care for her other child, Markeal. (T42). The Juvenile Officer did have a telephone call from Robinson (the natural father of child) on March 29, 2002. Robinson asked to have visitation with his son and was told that neither he nor Lisa had visitation rights, and that their visitation rights ended when the Court entered its orders on September 11, 2002. (TR 23).

Ms. Masek indicated that she sat outside of Audrain County Juvenile Court on September 11, 2002 and did not know what had happened. (TR 78). She did not testify at the hearing on September 11, 2001. Ms. Masek did not know why there was a finding that Lisa had not acted appropriately with Marlin during visits at the prison when, in fact, the March 8, 2001, meeting notes from the Children's Services Case Plan, stated that Lisa provided appropriate care for Marlin during prison visits.

Ms. Masek failing to realize that the Judgment of September 11, 2001, released the Division from providing reasonable efforts, prepared a Written Service Agreement on

September 18, 2001 and forwarded same to Lisa. Ms. Masek testified that it was later, on September 18, 2001 Ms. Masek learned that the Division was released from providing reasonable efforts. The agreement was signed by Lisa and returned in early October, 2001. (TR 78 - 79 Exhibits 14 and 15.). Ms. Masek stated that the reason that she had not drafted the agreement before September 18, 2002 was that Ms. Masek wanted to meet with Lisa, in person, before drafting the agreement. (TR 153). Ms. Masek stated that she also sent a letter to Lisa with the Service Agreement informing Lisa that Lisa did not have to sign the agreement. Ms. Masek was not aware whether Lisa was represented by an attorney or not.

In the agreement Lisa was to contact Ms. Masek twice a month, there was no provision for Ms. Masek to contact Lisa. The only service required for the Division was to provide visitation. Lisa was expected to make arrangements to come to Mexico for the one (1) hour visit. ( TR 148 151).

After receipt of the agreement in October, 2001, Ms. Masek never had any contact with Lisa until a court hearing in May, 2002. Ms. Masek did not know if Lisa had access to a telephone as Lisa had not asked for help getting telephone access. (TR 151) Ms. Masek testified that the conditions in the Written Service Agreement were never met by Lisa. The Division put Marlin in a pre-adoptive placement on December 24, 2001.

Another Children's Services Case Plan meeting took place on March 24, 2002 with a letter and notice being sent to Lisa and Lisa failed to appear. (TR 80-84, Exhibit 16 and 17) . The recommendation of the team at the March 24, 2002, meeting was termination of parental rights. The notice and letter were returned indicating that the forwarding order on

Lisa had expired.(TR 85-89).

The Court trial on Termination of Parental Rights took place on May 14, 2002. Both parents were present. and both parents asked for the appointment of an attorney. At the trial, neither parent spoke to Ms. Masek.. Ms. Masek, the parents and the Juvenile Officer met after the hearing. At the end of that meeting Lisa asked the Juvenile Officer if Marlin was still with Irene, how the surgery went, and explained she had not visited with Marlin because she thought her parental rights had been terminated. (TR 89-91). Another Child Service Plan meeting was held in August, 2002 and another Court Permanency Hearing took place on September 24, 2002. The mother did appeal at either hearing. (TR 92-93).

Ms. Masek recalled that she had told Lisa that it was Lisa's responsibility to contact Ms. Masek, that Lisa could visit weekly and that they would develop a schedule.(TR 95). Lisa had contacted Ms. Masek only twice after Lisa's release in March, 2001, (June 12 and she had called on June 27) (TR 94). Ms. Masek stated that she had never received any child support payment from Lisa. Ms. Masek felt there were no emotional ties between Marlin and Lisa. Ms. Masek did not believe that Lisa was a fit mother to have Marlin since Lisa had not visited with the child, which showed Lisa was not interested in reunification, that Lisa had not attended surgery nor asked about the surgery for 11 months, and Lisa's parental rights were terminated to her other children in St. Louis, and that Lisa was back in prison.(TR 96, 99-100). Ms. Masek recommended termination so that Marlin could be adopted.

On cross examination, Ms. Masek stated that she had only taken Marlin twice to visit

with his mother at WERDCC which was located 35 miles from Ms. Masek's office. Ms. Masek explained that it was the practice of the Division that the foster parents supervise prison visits since the foster parents receive training for such supervision. Ms. Masek stated that such visits took up to four (4) to five (5) hours with travel to and from the prison, time waiting to be allowed to visit with the mother and the hour of the actual visit between Lisa and Marlin. Ms. Masek stated that the Division had contact with Lisa by telephone at Family Meetings, Children's Services Case Plan Meetings or when Ms. Masek went up to visit with other prisoners. Ms. Masek did not have any records showing dates of such contact since Ms. Masek's records, contained on a disk, had been destroyed. (TR 107-110)

Ms. Masek explained that once the Court entered its order of September 11, 2001 ordering termination of the mother's parental rights and releasing the Division from providing reasonable efforts, the mother's right to visitation ended. Ms. Masek stated that the terms contained in the Written Service Agreement dated September 18, 2001, came from the telephone conversation between herself and Lisa on June 12, 2001. The visitation provision in the Service Agreement was the standard visitation provision used by the Division. As to the gas voucher, Ms. Masek explained that the voucher was only good at one gas station in Mexico and if Lisa did get someone to bring her to Mexico, that person would have to pay for the gas and then get gas in Mexico. (TR 117 through 119). Ms. Masek stated that she had not been able to find a foster home in St. Louis as had been recommended in the Children's Services Case Plan of March 8, 2001 and Ms. Masek had spoken to Lisa about bringing the child to St. Louis to visit with Lisa once a month, but

since it was not in the agreement, it was not required. The Division had no rule which prevented Ms. Masek from taking the child to St. Louis. Ms. Masek's role was both as case manager and caseworker in Mexico. A caseworker provides services to the family, makes the child available for visits and helps families reach their goals for reunification. The role of caseworker was different when dealing with prisoners since services are offered by the prison and the only service done by the caseworker was to make the child available for visitation. (TR 123-124) Ms. Masek explained that when Lisa was released and moved to St. Louis City, that the St. Louis City DFS Office (hereinafter referred to as St. Louis) became the county to provide services to Lisa. Lisa already had a caseworker in St. Louis since her other children were in foster care in St. Louis.

Normally there is coordination between the caseworker and case manager, but St. Louis City is different. The St. Louis DFS Office is hard to work with. Ms. Masek had dealt with five different caseworkers in St. Louis and had no meeting with any of them to determine what services would be provided to Lisa. Ms. Masek could get information from St. Louis as to Lisa's whereabouts and things like that. Ms. Masek stated that it was not Ms. Masek's role to contact St. Louis and have that office make certain that Lisa was aware of meetings at the Division or to ask that St. Louis make its office telephone available to Lisa so that Lisa could call to participate in such meetings.

Ms. Masek indicated that Ms. Masek did not provide Lisa with reunification services, but focused on maintaining her relationship with Marlin.(TR 125-126) Ms. Masek explained that her office did provide reunification services to residents of Audrain

County, but these services were not available to Lisa since she lived in St. Louis City. The reunification services available in Audrain County consisted of Family Support team meetings which would have had meetings 30 days, 60 days, 90 days, and 120 days after the child had been taken into custody and then every 180 days. Ms. Masek stated that she did not know if such services existed in St. Louis. Ms. Masek had not referred Lisa for reunification services to St. Louis. (TR 151-152). Ms. Masek never obtained information about Lisa's education or Lisa's psychological functioning, and Ms. Masek was unaware that St. Louis City had obtained a psychological evaluation on Lisa. (TR 126-128, 139) As to services the Division offered in Audrain County, Ms. Masek said funds were provided to help with housing for rental deposit, utilities and for job training. (TR 130-131). Ms. Masek did not know what services were provided by St. Louis. (TR 131) Ms. Masek lacked personal knowledge as to whether Lisa had suitable housing for the child to live in since Ms. Masek had never visited Lisa's home. (TR 133). The Division worked on its case with Lisa and St. Louis worked on its case with Lisa (TR 140).

Ms. Masek did not learn that Lisa had been making progress for the return of Lisa's child in St. Louis until Ms. Masek received reports from St. Louis while Ms. Masek was preparing the required Social Summary for Termination. (TR 140). According to Ms. Masek, it was the standard procedure of her office for all parents whose children were in foster care to be referred to the Division of Child Support Enforcement for that agency to enter a support order. The Court took Judicial Notice of an administrative order of child support entered against Lisa by the Division of Child Support Enforcement which was sent

to 3309 Winnebago, St. Louis City, with a copy sent to Mr. Robinson at his prison address. No Form 14 is attached to the finding, only a sheet of paper that Lisa is to pay \$105.00 a month in child support.

Ms. Masek was aware that the Division had entered an order requiring Lisa to pay child support of \$105.00 a month. Ms. Masek's knowledge was that Lisa worked sporadically. Ms. Masek was aware that from April, 2001 through June, 2001 that Lisa worked at Denny's and Milestone earning a gross income for the quarter of \$1,461.00. For the quarter of July, 2001 through September, 2001, Lisa's gross income was \$525.00, for the quarter of October, 2001 through December, 2001 Lisa's gross income was \$2,038.00, and for the quarter of January, 2002 through March, 2002 Lisa's gross income was \$338.00 (Exhibit 4 page 4 and TR 136-137) Ms. Masek did not know what Lisa's income was after that. (TR 138) Ms. Felton testified that at the end of February, 2002 Lisa owed her landlord \$800.00. In addition to these earnings, Exhibit 1 showed that Lisa, while at WERDCC, had funds in her prison account from May 5, 2000 to her release of \$1,327.68. Of that amount \$94.00 was paid to the Victim's Compensation fund leaving her \$1,233.00. Thirty dollars was used for her bus fare to St. Louis leaving \$1,203.00 and \$300.00 was paid to Birdie Moore, the mother of Robinson, leaving her \$903.00 to spend over an 8 month period for food, clothing, and toiletries.

Ms. Masek indicated that she did not know why the fact findings in the Children's Case Service Plan of March 8, 2001 and the Court order of September 11, 2001 differed as to how Lisa cared for Marlin during Lisa's prison visits. Ms. Masek had not testified at the

hearing on September 11, 2001. It was Ms. Masek's understanding that the only documents provided to the Court were by the Juvenile Office. Ms. Masek did not know if Lisa understood the documents which were being sent to Lisa. (TR 145).

Ms. Barbara Felton testified that she worked for St. Louis City as a social service worker and she had brought the records on Markeal Moran Robinson to read to the court. Ms. Felton indicated that Lisa was Markeal's mother and that Lisa's parental rights to Markeal had been terminated on May 7, 2002. Lisa had been told that to get her child back she needed to obtain suitable housing and complete a parenting program. Lisa had obtained housing at 4359 Maffitt and had completed the Parents as Teachers program in prison, Lisa had a drug assessment in March, 2001, and Ms. Felton's records indicated Lisa had gotten out of prison on May 15, 2001, and Ms. Felton's records did not show how often the St. Louis caseworker met with Lisa. (TR 155-158). Ms. Felton was not aware of St. Louis attempting to help Lisa get housing.

Lisa did visit with Markeal twice in August, 2001, three times in September, 2001, once in October, 2001, three times in December, 2001, twice in January, 2002 and once in February, 2002. Her visits in December, 2001, January, 2002, and February, 2002, had been unsupervised. She had an overnight visit on February 6, 2002. After February, 2002, she no longer visited with her child. (TR 159-160). The St. Louis Plan required Lisa to visit her child at least once a month which was done from August, 2001 through February, 2002. Lisa had gone for drug testing as requested though it was a week late, which seemed to upset Ms. Felton as to whether it was accurate. Lisa was to obtain housing and Lisa had

rented a two bedroom apartment with her brother on December 5, 2001 at 3209 Nebraska, St. Louis City. Lisa was to complete a parenting program, which Lisa did. Lisa was to have psychological testing, which Lisa did. Lisa had not obtained family planning. In April, 2002, she owed \$800 in back rent and went back to prison on April 17, 2002. ( TR 161-162).

The psychological evaluation contained in Ms. Felton's records, recommended that the child be returned to the mother. Lisa was found to have on the Sechsler Adult Intelligence Scalle-III a Full Scale I.Q. of 70 and to be functioning at the low end of Borderline Intellectual Range/High end of Mental Retardation Range. Ms. Felton could not find any records in the file concerning the Audrain County case, or that the psychological evaluation had been shared with Audrain County. Ms. Felton, testified that there no special services were offered by St. Louis for persons with low IQs and there was no special training provided to case workers for providing services to persons with low IQs. (TR 166-167).

Ms. Felton questioned the recommendation that Markeal be returned to the mother since Ms. Felton felt that there was misinformation contained in the psychological evaluation. One such example of misinformation Ms. Felton cited, was that the evaluation listed the mother as having a broken hip whereas Lisa had a dislocated hip and fractured pelvis from the car accident, that Lisa was driving the car and not her brother, that Markeal had been thrown from the car and had a closed head injury and not just a fractured wrist, and Lisa did not visit each week with the child. (TR 163).

Ms. Felton testified that the services which St. Louis could have provided to Lisa were arranging visits, referrals for substance abuse treatment, parenting classes, listing of housing, employment referral, drug testing and psychological exams.(TR 165-166). Ms. Felton stated that St. Louis does offer reunification programs, but such services were not offered to Lisa since the intensive in home supervision program is only available if the parent has stable housing, which Lisa did not have. (TR 168) As to services for Lisa with her child in Audrain County, Lisa never asked for St. Louis for assistance in visiting her child. Audrain County never asked for services for Lisa, but did seek help in finding a foster placement. Ms. Felton testified that foster placement was not possible because they have a waiting list. (TR 169). Ms. Felton went on that there were no foster home placements available in either St. Louis City or St. Louis County for Marlin. There were emergency foster placements, but those placements were limited to 30 days with no guarantee that the child would be put in a foster home after that time ran out. Ms. Felton also explained that there were residential placements in the St. Louis area such as Salvation Army and Hope Center. One third of the children placed in residential placement have been abused, neglected or have special needs.( TR 170)

As to notes on Markeal, it was reported that when the child went to visit Lisa he was excited to see his mother, that the case worker left the child there and came back to find the child happy and playing. An overnight visit took place on February 6, 2002. The caseworker felt that the home was safe. Ms. Felton, who was not the caseworker on Markeal, disagreed, but did admit that other caseworkers might believe the home to be safe.

When Ms. Felton referred back to the notes, she read where the caseworker found Lisa to be a loving parent and that she had the child ready to leave at the end of the visit. The caseworker informed Lisa that due to progress that the child would be there for a weekend visitation.

The Guardian Ad Litem did not agree with the visitation schedule and contacted the Juvenile Court Judge. The Guardian Ad Litem was opposed to having the child in the mother's home because it was a bad neighborhood where there was a lot of travel indicating drug dealing and the Guardian Ad Litem felt that Lisa was a flight risk. The caseworker's notes show that the caseworker had no such concern. The St. Louis caseworker also indicated that, during his visits to the home, he did not feel that Lisa's home was a drug house and he had not seen high traffic at the house to cause him concern. The Court, acting only on the statement of the Guardian ad Litem, entered an ex parte order stopping visitation of the mother, but for supervised visits. Lisa's caseworker informed Lisa of the ex parte order action. Immediately thereafter Lisa ceased contacting the worker. (TR 173-179 189).

At a later court hearing scheduled, the Court entered an order allowing the mother 8 hours of unsupervised visits. Lisa did not attend the court hearing. (TR 179). The diction on the last contact Lisa had with the caseworker indicated that the caseworker had visited Lisa to tell her that she would not have the weekend visit and that her visits were changed to supervised. The caseworker explained the court order and what had happened. Lisa was upset. When the caseworker went back to Lisa's home on February 19, 2002 she did not

answer the door. (TR 188)

Ms. Felton indicated that the Division diction did not indicate the number of caseworkers assigned to Lisa. (TR180). Ms. Felton stated that St. Louis City no longer does PPR meetings. There were no records that there had ever been a Family Team Meeting on Markel. Ms. Felton testified that the diction was supposed to have any and all contacts between St. Louis and Lisa such as day to day occurrences, court actions and meetings. There were supposed to be meetings by caseworkers and parents whose children are in foster care, 24 hours after the child is taken into custody, followed by meetings 36 hours, 72 hours, 30 days, 60 days and the third month, and then every 6 months. (TR 186) Ms. Felton indicated that there was no mention of Lisa being contacted by the St. Louis office concerning the Audrain Case. (TR 187) The Petition of Termination was filed on April 1, 2002.(LF 57-64) The Summary Social Service Report was filed on May 14, 2002.(LF 37-44) Motion to Rule Section 211.447.2(1) unconstitutional filed on January 17, 2003. Hearing was held on January 30, 2003. Judgment was entered on February 25, 2003 over ruling Motion to Find Section 211.447.2(1) unconstitutional and terminating the parental rights of Lisa. Amended Judgment entered on March 3, 2003. (LF 30-36) March 27, 2003 Notice of Appeal filed.(LF 14-26) (LF 1-4)

## ARGUMENT

*I. The Court erred in finding that Section 211.447.2(1) which allows the termination of parental rights for the reason that a child has been in foster care for at least 15 of the most recent twenty-two months did not violate the Due process Clause of the 14 Amendment of the United States because under Section 211.447.2(1) permits termination of parental rights without a finding of unfitness in that the case of Santosky vs. Kramer, 455, U.S. 745 (1982) found that it was a violation of the Due Process Clause to terminate parental rights without a finding of unfitness.*

*Section 211.447.2(1) RSMo. is unconstitutional violating the Due Process Clause of the United States Constitution Amendment 14 and the Due Process Clause of the Missouri Constitution Article I Section 10 since said statute allows for the termination of parental rights for the reason that a child has been in foster care for 15 of the most recent 22 months without any requirement that the parent is unfit.*

### STANDARD OF REVIEW AND BURDEN OF PROOF

The standard of appellate review in termination proceedings is similar to other civil proceedings in that Rule 73.01 and MURPHY VS. CARRON, 536 S.W.2d 30 (Mo. banc. 1976) apply. The judgment entered by the trial court can only be reversed when it is shown that there is no substantial evidence to support the decision, when the decision is against the weight of the evidence, or where the court has erroneously applied the law. H.D. vs. E.D., 629 S.W.2d 655 (E.D. Mo. 1982), B.J.D.B. vs. J.B.G., 698 S.W.2d 328 (W.D. Mo. 1985).

Missouri courts have always held that the party seeking termination of parental rights has the burden of proof. **In re J.A.J.**, 652 S.W.2d 745 (E.D. Mo. 1983) and **In re J.A.H.**, 592 S.W.2d 888 (S.D. Mo. 1980). Substantial evidence which, if true, as a probative force, is required to meet the burden of proof. In re J.A.J., supra. **In the Interest of M.N.M.**, 681 S.W.2d 457 (W.D. 1984).

The quantum of proof required in termination cases is clear, cogent and convincing. **In the Interest of M.E.W.**, 729 S.W.2d 194 (Mo. Banc. 1987), **Santosky vs. Kramer**, 455 U.S. 745 (1982), **J.D.K.**, 685 S.W.2d 876 (W.D. Mo. 1985). The definition of clear, cogent and convincing evidence is that evidence which "instantly tilts the scales in the affirmative when weighted against evidence in opposition, evidence which clearly convinces the fact finder of the truth of the proposition to be proved." **In re J.A.J** 652 S.W. 2d (E.D. Mo. 1983) and **K.S. VS. M.N.W.**, 713 S.W.2d 858 (W.D. Mo. 1986).

Missouri case law has held the relationship of the parent and child is valuable to society and except in the most extraordinary of circumstances, will not be terminated. Accordingly, severance of the parent/child relationship is by an act of law and seen to be an exercise of awesome power which demands a strict and literal compliance of the statute. **D.G.K. vs. H.H.**, 719 S.W.2d 510 (W.D. Mo. 1986), **In re W.F.J.**, 648 S.W.2d 210 (W.D. Mo. 1983). Only grave acts justify the termination of parental rights. In the case of **STATE VS. TAYLOR**, 323 S.W.2d 534, 537 (S.D. Mo. 1959) the court said:

The attachment of mother and child is one of nature's oldest instincts. It is associated with the survival of the race. It is

held in tender regard by all religions and by the laws of almost all civilized nations. It is not to be lightly cast aside to make way for any paternalistic sociological theory. Statutes which set up procedures permitting the destruction of the parent-child relationship should be exactly complied with.

The courts of Missouri have always recognized that they must balance the purpose of the Juvenile Code that of protecting the welfare of the child and the constitutional rights of the parents. **G. V. SAUNDER**, 308 S.W.2d 883 (S.D. Mo. 1957). The right of a parent to the care, custody and companionship of the parent's child has been recognized as a fundamental right guaranteed by the United States Constitution. **STANLEY VS. ILLINOIS**, 405 U.S. 645, 31 LED.2d 557 (1975). In **IN RE GAULT**, 387 U.S. 1; 18 L.Ed. 527 (1967), the right of a parent to her child was found to be a property interest protected by the constitution. In **IN EX REL. WILLIAMS VS. MARSH**, 626 S.W.2d 223, 230 (Mo. banc 1982), the right of a mother to her child was found to be a liberty interest. The courts have found that the right to one's children has a unique place in our culture and is more precious than other property rights. **MAY VS. ANDERSON**, 345 U.S. 528, 533, 97 L.Ed. 1221 (1953). **IN MEYER VS. NEBRASKA**, 262 U.S. 390, 399, 67 L.Ed. 1042 (1973), the court deemed parental rights were essential to the ordinary pursuit of happiness by free men and that the parental right was more significant and priceless than other liberties which merely deprive one of economic gains. **Stanley vs. Illinois, supra**. In **Santosky vs. Kramer**, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed. 2d 599 1982, *the Supreme said:*

*? little doubt that the Due Process Clause would be offended [i]f a State were to attempt the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.?*

*The State of Missouri Courts have recognized that parental rights are a liberty due process right In re the interests of A.L.W., 773 S.W.2d 134). In Juvenile Court proceedings in Missouri the burden of proof falls upon the State. In re Monnig, 638 S.W. 2<sup>nd</sup> 782, 785 (W.D. Mo. 1982) the court said the risk of error and the burden of proof in juvenile cases does not fall on the parent to prove that the child has not been abused or neglected, but falls squarely on the State to prove by clear and convincing evidence that the abuse or neglect took place and the proposed placement of the child is in the best interest.*

*Section 211.443 states:*

*The provisions of sections 211.442 to 211.487 shall be construed so as to promote the best interest of and welfare of the child as determined by the juvenile Court in consideration of the following:*

*(1) The recognition and protection of the constitutional rights of all parties in the proceedings:*

*(2) The recognition and protection of the birth family relationship when possible and appropriate; and*

*(3) The entitlement of every child to a permanent and stable home.*

*Section 211.447.2(1) provides that a petition for termination may be filed if the child has been in foster care for fifteen (15) of the most recent twenty-two (22) months*

*Section 211.447.3 provides :*

*If grounds exist for termination of parental rights pursuant to subsection 2 of this section the juvenile officer or the division may, but is not required to, file a petition to terminate the parental rights of the child's parent or parents.*

*Section 211.447.5 states:*

*The Juvenile Court may terminate the rights of a parent to a child upon a petition filed ... if the Court finds that termination is in the best interest of the child and when it appears by clear, cogent, and convincing evidence that grounds exist for termination pursuant to subsection 2, 3, or 4 of this section.*

*What both 211.447.3 RSMo and 211.447.5 mean is that a Juvenile Court of Missouri may terminate the parental rights of a parent to their child for the reason that the child has been in foster care for fifteen (15) of the most recent twenty two (22) months and it is the best interest of the child without making any finding that the parent is unfit .*

*Clearly Sections 211.447.2(1) RSMo. violate the due process rights of Lisa since that statute deprives Lisa of her property and liberty right to her son, Marlin without the necessity of finding her to be an unfit parent. In Missouri the termination process requires two step, first there must be a finding that a grounds exist for termination and only does the court look to see if it is in the best interest of the child. K.C.M.,85 S.W. 3d 682, (W.D. Mo. 2002) The provision that a parents rights can be terminated when a*

*child is in foster care for 15 of the most recent 22 months is arbitrary. Why not make it if a child is in foster care 90 days, Why not provide that a parent's rights will be terminated if that person receives public welfare for over a year. The use of time frames without typing the termination of parental to unfitness leads to arbitrary practices with absurd results. There was no independent study done by the State of Missouri that placement of a child in foster care for the most recent 22 months meant the parent was unfit. Section 211.447.2 and Section 211.447.3 came into being because of the language contained in the Adoption and Safe Family Act which is codified in Chapter 42. USC Section 675.5(E) required that such language be adopted or the state would lose federal funds used to provide services families caught in the juvenile system. There was no discussion if the fact a child was in the foster system for 15 of 22 months had any effect upon him or her, the language was simply adopted. However in adopting the state law, by error the mere fact that a child was in foster care for 15 of the most recent 22 months became a grounds for termination, whereas in the federal law this fact was only a wake up call for the court that unless something was done termination would have to be presumed. 42 USC 675.5(E) states:*

*?In the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or , if a court of competent jurisdiction has determined a child to be an abandoned infant(as defined under State law) or has determined that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted,*

*attempted, conspired, or solicited to commit such a murder or such voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents ... and concurrently, to identify, recruit, process, and approve a qualified family for adoption, unless?*

*(i) at the option of the State, the child is being cared for by a relative;*

*(ii) a State agency has documented in the case plan(which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interest of the child; or...*

*The federal law did not make the fact that the child was in foster care 15 of the most recent 22 months a grounds for termination, but did make it a reason for the court to consider filing a termination state. This is in line with past federal laws which are attempting to stop the warehousing of children in state care and to get them in a permanent home setting..*

*Section 211.447.2(2) and 211.447.447(3) do provide grounds for termination of parental rights for abandonment of a child under one (1) year old and for crimes committed against the child. The lumping of Section 211. 447.2(1) with these other statutes as grounds for termination is over broad and makes Section 211.447.2(1) invalid. There one termination grounds which does use a time frame, but that statute requires in addition a finding of unfitness. Section 211.447.4(3) states:*

*?The child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of potentially harmful nature continue to exist...*

*Section 211.447.2(1) grounds for termination is only dependent on a finding of the exist of a time requirement which can be manuvered to come into existence beyond the control of the parent. The DFS office and/or Juvenile Office can put condition on the return of a child that would make it impossible for the parent to get the child back in 15 months or delay taking actions which cause 15 months to pass. In the present case, no movement took place in Lisa getting her child back. For there to be movement in the case the child had to be moved closer to Lisa since she did not have transportation to visit the child in Mexico, Missouri. Lisa needed reunification services from the St. Louis DFS to move toward the goal of getting her son out of foster care. No services were provided to her since St. Louis DFS did not provide such services to person lacking stable homes and there had been no request by the Division that the St. Louis DFS help Lisa. Unfortunately Lisa fell victim of a turf war between two DFS offices. The Missouri DFS offices failed to provide reasonable efforts as required by Section 211.183. The Court did nothing to the agencies for their lackluster efforts to help Lisa. The Division never made any referrals to counties in the greater Metro area of St. Louis for placement, called St. Louis once, did not take the child to visit with his mother though allowed to do so by law, refused to help the mother visit with her son by providing transportation to Mexico. Lisa parent rights were terminated under Section*

*211.447.2(1) because she was poor. It did not matter that the Division failed to care out its task, the child had been in foster care for 15 months and Lisa rights could be terminated under Section 211.447.2(1) for that reason.*

*As to the action of the Juvenile Officer, the Court authorized the filing of the Petition for Termination on September 11, 2001 when the child had been in foster care for less than 13 months and had not approved filing the Petition for termination under Section 211.447.2(1). The Petition was filed April 1, 2002, six (6) months after the authorization was given to the Juvenile Officer to file the Petition. As of April 1, 2002 the child had been in foster care for 18 months and the Petition did contain a request to terminate under Section 211.447.2(1)*

*Further, the evidence was that neither the Division nor St. Louis provided the mother with any services for reunification with her son, Marlin. St. Louis could not even find any diction that they did anything concerning the child, Marlin, except tell the Division that they had no foster homes available. Ms. Masek stated that the only service provided to Lisa was to arrange visitation. Ms. Masek's goal for Lisa and Marlin was to maintain, not reunite which is exactly what took place. It is not disputed in this case that Lisa has a full scale IQ of 70 and if there was to be progress in the return of the child to her that she would need the assistance of the caseworker. The State at any time during the most recent 22 months could have moved the status of the child from that of a foster child in a juvenile court proceeding to that of a ward in a guardianship proceeding ending the running of the time clock. No services were provided to the*

*mother for reunification though required under Section 211.183 RSMo. The Court found that the Division did provide reasonable efforts*

*Services provided to parents by DFS since the enactment of Section 211.447.2(1) have not been changed to speed up the process such as subsidies for housing, job training, day care, or residential group homes where parents live with their children under a supervised structure and have on-hands experience in caring for their children.*

*Section 211.447.2(1) should be found to violate the due process clause of the 14<sup>th</sup> Amendment of the United States Constitution and struck down as overbroad.*

**II. That the Court erred in terminating the mother's parental rights under Section 211.447.2(1) RSMo finding that termination was proper since the child had been in foster care for 15 months of the most recent 22 months because Section 211.447.2 is not a grounds for termination but establishes a time frame when the court should consider filing a Petition for Termination in that no where in Section 211.447.2(4) does the term grounds appear and was a scrivens error contained in Section 211.447.3 and 211.447.5 which should have stated grounds in Section 211.447.2(2) and 211.447.2(3) and to hold otherwise would invalidate Section 211.447.2(1). The decision should be reversed as erroneously applying the law.**

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proceedings in that Rule 73.01 and **MURPHY VS. CARRON**, 536 S.W.2d 30 (Mo. banc. 1976) apply. The judgment entered by the trial court can only be reversed when it is shown that there is no substantial evidence to support the decision, when the decision is against the weight of the evidence, or where the court has erroneously applied the law. **H.D. vs. E.D.**, 629 S.W.2d 655 (E.D. Mo. 1982), **B.J.D.B. vs. J.B.G.**, 698 S.W.2d 328 (W.D. Mo. 1985).

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exercise of awesome power which demands a strict and literal compliance of the statute.

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than other property rights. MAY VS. ANDERSON, 345 U.S. 528, 533, 97 L.Ed. 1221 (1953). IN MEYER VS. NEBRASKA, 262 U.S. 390, 399, 67 L.Ed. 1042 (1973), the court deemed parental rights were essential to the ordinary pursuit of happiness by free men and that the parental right was more significant and priceless than other liberties which merely deprive one of economic gains. Stanley vs. Illinois, supra.

The Court terminated the rights of Lisha to her child Marlin under Section 211.447.2(1) since he had been in foster care for 15 of the most recent 22 months. This act by the court was an error since it is clear that the Legislature never intended to make the passage of time without a finding of unfitness to be a grounds for termination. The scrivener in Section 211.447.3 RSMo and Section 211.447.3 wrongly listed all the sections of 211.447.2 as grounds for termination when it is clear that only Sections 211.447.2(2) and 211.447.2(3) are grounds for termination. For this reason the decision to terminate Lisa's parental rights under Section 211.447.2(1) should be reversed.

Section 211.447.2(1) states the following:

Except as provided for in subsection 3 of this section, a petition to terminate the parental rights of the child's parent or parents shall be filed by the juvenile officer... when:

(1) Information available to the Juvenile Officer or the division establishes that the child has been in foster care for at least fifteen of the most recent twenty two months: or...

The Court found that:

∴ that the child was born on August 24, 2000, and has been in foster care his entire life, which exceeds 15 of th last 22 months.

Section 211.447.3. states ?If grounds exist for termination of parental rights pursuant to subsection 2 of this section, the juvenile officer may, but is not required to, file the petition to terminate the parental rights of the child?s parent or parents.

The three statutes 211.447.2(1), Section 211.447.3 and Section 211.447.5, are in conflict since Section 211.447.2(1) sets out a procedure when a Petition for Termination of Parental Rights may be filed which is when a child has been in foster care for 15 of the most recent 22 months and not a grounds for termination where as Section 211.447.3 and Section 211.447.3 states if grounds exist under Section 211.447.2 a Petition for termination shall be filed . No where in Section 211.447.2(1) can the word ?grounds? be found. If the provision in Section 211.447.2(1) that a child has been in foster care for fifteen (15) of the most recent twenty two (22) months is a grounds for termination, then that statute would be unconstitutional and invalid since parental rights can only be terminated on grounds of unfitness and not the because of the passage of time while the child is in foster care. *In SANTOSKY V. KRAMER, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) the court held that:*

*?there is little doubt that the Due Process Clause would be offended [i]f a State were to attempt the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interests.?*

When there is a conflict in a statute, the court is required to first try to ascertain the intent of the legislature by use of the plain meaning of the language and when that does not

work then the court must use the rules of statutory construction. **HABJAN V. EARNEST**, 2 S.W. 3d 875, 881 (Mo. App. 1999) In construing statutes, the court must attempt to ascertain the intent of the General Assembly in enacting a statute by considering the whole act and its legislative history and by looking to circumstance for the statutes passage, harmonizing all provisions of the statute, if possible. **MISSOURI HOSPITAL ASSOCIATION VS AIR CONSERVATION COMMISION**, 874 S.W. 2d 380 ( W.D. Mo 1994). The law favors a reasonable construction consistent with the legislative purpose of the statute which is consistent with reason and tends to avoid unjust, absurd results. The legislative intent must be determined from the statute as a whole and all of its provisions harmonized if reasonably possible, and particular words may be given a broader or more restricted meaning than the dictionary definition and in extreme cases words may be stricken out of a statute in order to harmonize it since the reason of law prevails over the letter of the law **STATE EX RE. BESS VS SCHULT**, 143, S.W. 2d 486 (S.D. Mo. 1940) Verbal inaccuracies or clerical errors or misprints in a statute will be corrected by the court if necessary to effectuate the clear intent of the legislature **DIEMEKE VS STATE HIGHWAY COM? M.** 444 S.W. 2d 389 (MO 1967). Interpreting a statute disfavors a construction which leads to invalidity of the statute. **LEDERER VS. DEPT OF SOCIAL SERVICES** 825. SW.2d 858 (W.D. Mo. 1992) A fundamental rule of construction is that the court ascertain and give effect to the purpose of the Legislature as expressed in the Statute unless it is in conflict with a constitutional provision. **IN RE COSTELLO? S ESTATE** 92 S.W. 2d 723 ( MO. En banc 1936)

The intent of the legislature in adopting Section 211.447.2(1) is easy to determine. The Federal Government in 1997 passed the Adoption and Safe Family Act, which became codified at Chapter 42 USC Section 675.5(E). In that act the federal government required states which receive federal funds under IV-D and IV-E of the Social Security Act for Children's Welfare to adopt a procedure in their juvenile court proceedings which mandated the filing of a Petition for Termination of Parental Rights when a child had been in the foster care system for 15 of the most recent 22 months. Since Missouri is a participant in such programs, *State of Mo. v. Bowen*, 638 F.Supp. 37, 38 (W.D. Mo. 1986), and would lose federal funding, the Missouri Legislature enacted Section 211.447.2(1). Further, the Missouri Legislature attempted to put restrictions on this procedure so as not to waste the Juvenile Court's time in cases when termination was clearly inappropriate as permitted by federal law and adopted Section 211.447.3 for that purpose.

42 USC 675.5(E) states the following:

In the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has determined that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents ... and concurrently, to

identify, recruit, process, and approve a qualified family for adoption, unless?

(i) at the option of the State, the child is being cared for by a relative;

(ii) a State agency has documented in the case plan(which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interest of the child; or

(iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671(1) (15)

(B) (ii) of this title are not required to be made with respect to the child.?

No where in Section 211.447.2(1) is there any statement that the fact that a child is in foster care for 15 of the most recent 22 months is grounds to terminate. No where in

Section 211.447.2(1) does the word grounds for termination appear. Unfortunately, in

Section 211.447.3 the word ? grounds? appears when referring to Section 211.447.2

Similarly in Section 211.447.5 RSMo again the word grounds is used when referring to

Section 211.447.2(1) It appears there is a scrivener error in both Section 211.447.3 and

Section 211.447.5 and both statutes meant to refer to Sections **211.447.2(2) and**

**211.447.2(3)** which do set out grounds for termination. What is clear by looking at the

history of the reasons for the enactment of Section 211.447.2(1) and termination statute in

its entirety is that it was never the intent of the legislature to create Section 211.447.2(1)

as a grounds for termination. The provision mentioning 15 of the most recent 22 months

was done to comply with the requirements of the federal government that a petition for

termination be filed when the child had been in the foster care system for 15 months of the most recent 22 months in order to continue funding from the federal government.

If Section 211.447.2(1) is interpreted as establishing a new grounds for termination of parental rights, then an absurd result would happen since the statute would be invalid. The Court should find that Section 211.447.2(1) did not establish a grounds for termination and as such, the finding that Lisa's parental rights would be terminated because Marlin had been in the foster system for 15 of the most recent 22 months erroneously interprets the law and is reversed.

**III. The trial court erred in finding that the mother had abandoned her child under Section 211.447.4(1) since she had not visited the child nor provided for his financial needs because the evidence showed that the mother did not voluntarily abandon her child but was prevented from visiting with him in that she lived approximately 150 from where the child was, that the DFS was under the law to move the child closer to his mother and failed to so act and the DFS knowing that the mother lacked transportation to visit with her son failed to take the child to see her or assist her in visiting the child. The decision to terminate mother parental rights should be reversed as not supported by substantial evidence, against the weight of the evidence , and as erroneously applying the law.**

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(Mo. banc. 1976) apply. The judgment entered by the trial court can only be reversed when it is shown that there is no substantial evidence to support the decision, when the decision is against the weight of the evidence, or where the court has erroneously applied the law. **H.D. vs. E.D.**, 629 S.W.2d 655 (E.D. Mo. 1982), **B.J.D.B. vs. J.B.G.**, 698 S.W.2d 328 (W.D. Mo. 1985).

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Section 211.447.4(1) states the following:

“(1) The child has been abandoned. For purposes of this subdivision a “child” means any child over one year of age at the time of filing of the petition. The court shall find that the child has been abandoned, if for a period of six months or longer:

(a) ...

(b) The parent has without good cause, left the child without any provision for parental support and without making arrangements to visit or communicate with the child, although able to do so.

The Court found the following:

The Court finds that the mother ...have all abandoned the child, in that each of them has, without good cause, left the child without any provision for parental support and without making arrangements to visit or communciate with the child, although able to do so.

As to Mother-the Court finds she has provided no financial support, no gifts, no clothing, NOTHING. During much of the child’s life, mother has been incarcerated, but was living in St. Louis for a period of time and was employed-but even when employed, mother did not make even token attempts to provide for this child. However, Mother did send \$200 to the child’s alleged father while he was in prison. Mother has provided no care or control to

assist the child's physical, mental or emotional health and development

The definition used by the court as to what comprises abandonment is a willful act by the parent giving up of a child with the intention that the severance be of permanent nature. Such act has to be voluntary, intentional, and not caused by factors beyond the control of the parent. The parent may repent the abandonment, but not all action of repentance will stop termination once abandonment has taken place. In the **Interest of Bay Girl W.**, 728 S.W. 2d 545 (W.D. Mo. 1981)

In this case the facts are that the mother, while incarcerated, had the child, Marlin. Before the birth of the child she intended to give up her parental rights and was working with the Division to terminate her rights, but after the child was born, she changed her mind. She told the Division that she wanted to keep her child. The child was made a ward of the Juvenile Court of Audrain County with the Division give legal custody of the child. The child was put in foster care. The Division made arrangements for the foster parent to bring the child to visit with the mother. The mother was released from prison on February 13, 2001 and went home to the St. Louis area. She had seen the caseworker at the time the visitation began on August 7, 2000 and August 14, 2000. Thereafter, all visits and personal contact were with the foster parent. The caseworker believes that she saw Lisa when she visited other prisoners, but there were no records of such contact. There was no effort by the Caseworker to draft a written service agreement with Lisa before she was released. On March 8, 2001, at the meeting to establish the Children's Social Service Plan it was found that the visitation between the child and mother had kept their relationship in existence and

that Lisa had acted appropriately at the visit. It was that the child would be moved in near proximity of the mother to foster visitation and child/parent relationship. The caseworker was given this task and to obtain a caseworker for Lisa in St. Louis who would provide her with services which would help Lisa regain custody of the child. Lisa when she placed Marlin in the custody of the Division, made it clear that she did not want him placed with any of her relatives. Prior to the Children's Social Service Plan meeting the caseworker had tried to place Marlin with foster parents in St. Louis who were caring for his sibling and they refused. The case worker made two additional attempts to place Marlin in St. Louis by requesting such placement through St. Louis DFS and the Missouri Alliance in Jefferson City. No placement was made. XXXX requires that a child be placed in close proximity to his parents. There were no further attempts to place the child in the St. Louis Metro Area. Ms. Felton, a caseworker, indicated there was a waiting list for foster placement in St. Louis City DFS. She indicated that the child could have been placed in emergency foster care, but that such placement was time limited to 30 days and there was no guarantee that a foster home could be found for Marlin after thirty days. She also indicated that Marlin could have been placed in residential placement, which would be similar to an orphanage, if needed. There was no evidence that St. Louis City DFS maintained an active search for a foster home for Marlin and the Division, after being rejected by St. Louis City DFS, did anything to move the child closer to the mother for visitation. St. Louis City DFS did not provide a caseworker for Marlin's and that agency had no record that they ever did anything for Lisa so that she could get Marlin back in her home. The Division was aware that Lisa

lacked transportation to get to Mexico to visit with Marlin. The Division did offer to provide a voucher to any person Lisa could have bring her to Mexico, however the voucher was limited to one gas station in Mexico.

xxx does require the State of Missouri to take a foster child to visit his parent. Ms. Masek offered to bring the child to visit his mother once a month but never followed through.

Contact between Lisa and Ms. Masek was not happening often. When they did speak in June, Ms. Masek told Lisa that the plan was to move Marlin not to St. Louis but to another foster parent for possible adoption. Lisa after that telephone conversation did not speak to Ms. Masek again. Lisa never did visit Marlin in Mexico.

Lisa, while in St. Louis, was working to get her child, Markeal, back in her custody. She obtained employment and from April 2001 until September 2002 and her gross income from the employment for the 18 months was \$5,868.00 . Lisa attempted to comply with the St. Louis plan on Markeal by obtaining stable housing and made progress so that her visitation had been increased from supervised to unsupervised overnight. She did drug testing, obtained parenting training, had a psychological evaluation as required which found that she had a full scale IQ of 70 and indicated that she was functioning at higher borderline and low mild retardation. Since the Division and St. Louis City DFS rarely spoke, the Division never became aware of this evaluation until after the Petition for Termination was filed. The Division never knew that Lisa was making progress in getting her other child back again since St. Louis City DFS and the Division never shared information.

Lisa lacked transportation to attend Permanency Placement Hearing held on

September 11, 2001 and since Lisa had not been appointed an attorney was not represent at that hearing. At the court hearing, misinformation was provided to the Judge that the visitation between the Marlin and Lisa in the prison had not gone well. The Court was informed that Lisa not acting appropriately to Marlin though the foster parent who supervised such visits had found the visits went well and Lisa acted appropriate toward Marlin. The Court order of September 11, 2003 stated that termination would be sought with the child to be put up for adoption. The order further released the Division from providing reasonable efforts. In reality the Division was not providing reasonable efforts so the order had not effect. The case worker admitted that the only service being provided to Lisa was to arrange visitation when and if Lisa ever found a way to Mexico. Since Lisa did not come to Mexico, no services were provided. Lisa found herself in a catch-22 position. Since she was not living in Audrain county she was not entitled to reunification services from the Division. Among the services available in Audrain was help in getting housing and payment for utilities. She was also not eligible for reunification services in St. Louis City DFS since she did not have stable housing. She was left with no services from DFS to help her get her child, Marlin, returned to her.

At the same time she was getting conflicting documents from the Division and the Court. She received a copy of the Court order stating that her parental rights were to be terminated. She received a written service agreement from Ms. Masek telling her she could visit with Marlin. In reality the Service Agreement was void no services could be offered to her. When Robinson called up to arrange visitation he was told that his and Lisa's visitation

had been ended. Both Ms. Masek and the Juvenile Officer testified that once the order said termination would be sought that meant in Audrain County that the parents had no visitation rights. Ms. Masek indicated that she did not know if Lisa understood the written document sent to her and that she did not know about Lisa's low IQ. Ms. Felton indicated that in St. Louis her office did not provide any special services to parents like Lisa who had a low IQ and there was no special training provided to case workers to know what special needs a person with a low IQ required.

At the time this was going on Lisa was in dire financial circumstances. Her earnings were low, but she needed to get housing to get her children back. No help was being provided to her by the State in getting housing. She rented a place on Nebraska St. in St. Louis City with her brother in December and by February according to Ms. Felton owed the landlord over \$800.00. The State had no information as to Lisa's expenses. Ms. Masek said payment of support was never an issue. A support order was obtained against Lisa by the Division of Child Support Enforcement for \$105.00 instead of the Juvenile Court so that her efforts take money would not interfere with reunification efforts.

When she was served with the Petition for Termination she appeared in Court. She requested an attorney and appeared at the hearing. It was clear she never intended to give up her rights to Marlin. When she told the Juvenile Officer and Caseworker that she had not visited with her son, because she thought her rights had been terminated who can argue that may have been what she thought. She was sent a copy of the order of the court of September 11, 2001. That order says her rights are to be terminated. She has an IQ of 70

and is limited. When Robinson called in he was told that he and Lisa could not visit with Marlin. It is reasonable for her to believe her parental rights were terminated.

These facts do not show that she voluntarily abandoned her son, Marlin. What took place was that once she left prison to go to St. Louis her parental rights were terminated de facto by the State. She had no way to come to Mexico to visit her son unless the State moved Marlin closer to her. The State agreed to bring the child closer to her so she could visit, the state agreed to bring the child to visit with her once a month, and the state agreed to help her with visitation. The State never did anything promised to help Lisa visit with her child, Marlin. In this case the lack of income, mental limitation, and State inaction prevented visitation.

The facts are not that different than the case of **Johnston vs. Johnston** 573 S.W. 2d 406 (K.C. Mo. 1978) in which the Court in a divorce proceeding had allowed the father to take the children to Utah and the mother's visitation ceased because she lacked money to go to Utah to visit. The Court ordered the father to bring the child back for visits, but in this case nothing was done to make the child available to the mother. For Lisa to get to Mexico to visit her child was the same problem Ms. Johnston had in getting to Utah. In the case of **R.S.P., H.D.P., And C.M.P.** 619 S.W. 2d 863 (W.D. Mo. 1981) the court refused to terminate the paternal rights for failure to rectify the condition for the reason the Juvenile Office and DFS had formed an intent to terminate the parental rights and failed and hindered the parents efforts to get the child back. In this case there was no such plan. What happened, however, was that the services necessary to stop abandonment from happening

were not provided whether by indifference or the fact that Ms. Masek had too many. Since the trial court would not allow questions on this issue, we will never know.

The mother did not voluntarily abandon her son she was prevented from visiting with her child because of the failure of the state to provide her with services bringing the child closer to her or providing help in travel and her dire financial situation. She never agreed to give up her son with the intent to sever her relationship to him. The Judgment to terminate under Section 211.447.4(1) should be reversed as not supported by the evidence, against the weight of the evidence and as a misapplication of the law.

**IV. The Court erred in terminating the mother's parental rights under Section 211.447.4(2) finding that there was a prior adjudication of neglect and that the mother had failed to provide for her child, while the child was in foster care under Section 211.447.4(2)(d) because there was never a prior adjudication of neglect as required by Section 211.447.4(2) and state failed with its burden to prove the mother had the financial ability to provide for her son while he was in foster care in that the child was made a ward of the court because his mother was in prison and not because of neglect and the evidence was that the mother had gross earnings of \$5868.00 for an 18 month period of time, owed back rent of \$800.00 and was about to be evicted. The decision of the trial court should be reversed since the decision is against the weight of the evidence since there is no substantial evidence to support the decision,**

**the decision is against the weight of the evidence and the decision erroneously applied the law.**

#### STANDARD OF REVIEW AND BURDEN OF PROOF

The standard of appellate review in termination proceedings is similar to other civil proceedings in that Rule 73.01 and **MURPHY VS. CARRON**, 536 S.W.2d 30 (Mo. banc. 1976) apply. The judgment entered by the trial court can only be reversed when it is shown that there is no substantial evidence to support the decision, when the decision is against the weight of the evidence, or where the court has erroneously applied the law. **H.D. vs. E.D.**, 629 S.W.2d 655 (E.D. Mo. 1982), **B.J.D.B. vs. J.B.G.**, 698 S.W.2d 328 (W.D. Mo. 1985).

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The Juvenile Court in its Judgment and Order for Termination of February 25, 2003 found that the mother's rights could be terminated under Section 211.447.4(2) for neglect.

In the Court's decision the court recognized that findings were required under Section 211.447.4 (2) subdivisions a through d. The Court found there was no evidence to support any finding under subdivisions a, b, and c. The Court judgment as to Section 211.447.4(2) reads as follows:

?The child has been abused or neglected.

The Court adjudicated that the child had been abused or neglected on November 21, 2000 in Case number JU100-38J.

In determining whether to terminate parental rights pursuant to this subdivision, the court shall consider and make findings on the following conditions or acts of the parent:

(a)...

(b)...

(c)...

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

As to the Mother, the Court found she has provided no financial support, no gifts, no clothing, NOTHING. During much of the child's life, the mother has been incarcerated, but was living in St. Louis for a period of time and was employed, but even when employed, the mother did not make even token attempts to provide for this child. However, the Mother did send \$200 to the child's alleged father while he was in prison. Mother has provided no care or control to assist the child's physical, mental or emotional health and development.?

Section 211.447.4(2) states the child has been abused or neglected. There must be a finding as such that the child is abused or neglected. The court in Judgment of Termination refers to such finding in its Adjudication Order dated November 21, 2000 as finding that the child had been abused or neglected. In that order the court made Marlin a ward of the court and specifically found that:

? Said infant's mother is incarcerated and therefore unable to provide for his necessary care, custody, supervision and support, and she has requested Missouri Division of Family

Services and Juvenile Court intervention to provide for her son's care.?

The Court then made the child a ward of the court and placed the child with the Division. Nowhere in the order of November 21, 2000 is there a finding that the mother neglected the child or abused the child. Both the Juvenile Officer, Bruce McKinnon, and Division Caseworker, Ms. Masek, said the child was made a ward of the court for the reason that the mother requested such since she could not take care of the child due to being imprisoned.. Both also stated that the mother never neglected the child nor abused the child, before the court made the child a ward. The placement of child with a third party is not neglect, but was a responsible action by Lisa. The court in the termination order did use the phrase, *"The child has been abused or neglected,"* but had that phrase in italics to indicate that was what the Statute and not a finding. Since there is no finding by any court that the child was abused nor neglected, the parents' rights cannot be terminated under Section 211.447.4(2).

However, if there had been such finding, the rights of Lisa could not be terminated under Section 211.447.4(2) for the reason that she did not provide support or other items while the child was in foster care. First, the burden is upon the State to show that the mother had the financial ability to provide such support or physical ability to provide the care and loving needed by the child. Further, in this case there is an added burden upon the State. The psychological evaluation report on Lisa, Exhibit D, found that she had a Full Scale I.Q. of 70 which was explained to mean that she was functioning at the low end of Borderline Intellectual Range/high end of Mental Retardation Range. Due to the mother limited mental functioning, the State must show that Lisa understood her legal duties to

provide for the child while he was in the care of the State.

The evidence as to the mother's gross earning for the period between between April 2001 through September 2002 was \$5856.02 ( Exhibit 4). No evidence was presented as to her expenses. The only evidence presented as to her fiscal position was the testimony of Ms. Felton, the caseworker from St. Louis, that as of April, 2002 Lisa owed her landlord \$800.00. There is no argument that Lisa did pay to the mother of Robinson, Birdie Moore, the sum of \$300.00 from the \$1294.00 she had to support her needs while incarcerated (Exhibit 1). Further, there was a finding by the Division of Child Support Enforcement that Lisa was to pay \$105.00 a month in child support. No proof was presented that Lisa ever received notice of the finding, no the basis of such finding was explained, nor was a Form 14 attached. Ms. Masek did indicate that all Juvenile Cases were referred to the DCSE for a support order. The action of obtaining an order seems counter to the goals of reunification since the taking of the mother prevents the parents from obtaining housing, paying for utilities or being able to show care for the child by bringing gifts or buying clothing for the child while he is either in foster care or in the home. If there is to be a support order then such order should be obtained from Juvenile Court under Section 211.241 RSMo. 1957 since the court would be able determine what funds the parent may pay to the state with preventing reunification. Certainly, the early return of a child to her parents is more important than the State's claim for reimbursement.

The gross earning of the Lisa of or \$5,856.02 for 18 months averages to \$325.33 a month or for 15 months to be \$388.40. From that income, Lisa had to pay her rent,

utilities, expenses of travel to work and back, and other expenses. At the same time she is expected to establish a home for the return of her child. At times during these 18 months she did collect Food Stamps( Exhibit 4), but most months food was another expense she had. Also during much of this time she was attempting to get her son, Markeal returned to her custody and had expenses associated with that child. There is no substantial evidence to support the idea that she had money available to buy clothing, gifts, or other items for Marlin. There is no evidence that the Division ever ask for such support or thought that Lisa could buy such items. The facts were she lacked sufficient funds to go visit with Marlin.

There were statements by Ms. Masek that she told Lisa want her obligations were and Exhibit 8 a pamphlet was given to Lisa which explained that Lisa was to visit with her child and pay support, but the pamphlet also states that the State will provide reunification services. Why should Lisa take the pamphlet to be serious since the state never provided her with any services. Further Ms. Masek spoke to Lisa only a few times and Ms. Masek indicated she had doubts of the ability of Lisa to understand was sent her or told her.

There was no substantial evidence to support the courts finding that Lisa's parental rights should be terminated under Section 211.447.4(2) for abandonment and the judgment should be reversed.

**V. The Trial Court erred in terminating the mother's parental rights under Section 211.447.4(3) RSMo finding that the child has been under the jurisdiction of the court**

for a period of one year and that mother failed to rectify conditions which led to the assumption of jurisdiction, that the mother failed to meet the conditions of the Written Service Plan, and had the financial ability to support the child while in foster care because the fact that the mother was incarceration by itself is not sufficient for termination, that Section 211.447.4(3) requires the court to make a determine a determination of the progress of mother in Social Service Plan and the court looked at progress of the mother to a Written Service Agreement that was void when entered into and the Mother lacked the fiscal ability to provide for her child while he was in foster care in that the substantial evidence was that the fact the mother was incarceration had any effect on getting custody her child back since the DFS was not providing her with any services and her parental rights had been terminated by this defacto action, that a review of the Social Service Plan showed that the DFS by there failure to move the child closer to the mother prevented her from carrying out her parental duties, that the Written Service Agreement was written 6 months after the agreement should have been entered into, that the agreement was void since the DFS could not perform the terms thereof, and that the mother lacked the financial abiliity to provide for her child while he was in foster care which was shown by her low earning and debt she owed. The judgment terminating the mother? s parental rights under Section 211.447.3 should be reversed since the judgment is not supported by substantial evidence is against the weight of the evidence and erroneously applied the law.

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The attachment of mother and child is one of nature's oldest instincts. It is associated with the survival of the race. It is held in tender regard by all religions and by the laws of almost all civilized nations. It is not to be lightly cast aside to make way for any paternalistic sociological theory. Statutes which set up procedures permitting the destruction of the parent-child relationship should be exactly complied with.

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1982), the right of a mother to her child was found to be a liberty interest. The courts have found that the right to one's children has a unique place in our culture and is more precious than other property rights. MAY VS. ANDERSON, 345 U.S. 528, 533, 97 L.Ed. 1221 (1953). IN MEYER VS. NEBRASKA, 262 U.S. 390, 399, 67 L.Ed. 1042 (1973), the court deemed parental rights were essential to the ordinary pursuit of happiness by free men and that the parental right was more significant and priceless than other liberties which merely deprive one of economic gains. Stanley vs. Illinois, supra.

Section 211.447.4(3) RSMo states:

(3) The child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home.

The Court found the following:

? As to the mother, at the time the court assumed jurisdiction, mother was incarcerated by the Department of Corrections and therefore unable to provide for the child. The child has been under the court's jurisdiction since birth (8/24/00). Mother is once again a resident

of the Department of Corrections (DOC). Upon release from the DOC, mother moved to the St. Louis area. DFS unsuccessfully attempted to find a placement for child in the area. Mother offered the names of no relatives who might be considered as placement options. Mother has had no contact with DFS since June of 2002, has failed to notify DFS of her change of addresses and has not asked for a visit with the child in over one year (last request was February 11, 2002). Mother's demonstrated lack of interest in the child and current incarceration makes it clear that there is little likelihood that she will remedy her condition at an early date to make it possible to return the child to her in the near future. Continuing the parent-child relationship greatly diminishes the child's prospects for adoption in a suitable home.

Section 211.447.4(3) then requires the Court to determine whether four conditions exist and how those conditions effect the ability of the parent to care for the child.

- (a) The terms of a social service plan entered into by the parent and the division and the extent to which the parties have made progress in complying with those terms;
- (b) The success or failure of the efforts of the juvenile office, the division or other agency to aid the parent on a continuing basis in adjusting his circumstances or conduct to provide a proper home for the child;
- (c) A mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to

knowingly provide the child the necessary care, custody, and control.

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

The Court made the following determination as to conditions (a), (b), (c), and (d):

? As to the mother: upon release from prison , mother moved to the St. Louis area. She was to maintain contact with DFS and told she could call collect-she did not contact DFS twice per month as agreed. She did not notify DFS of address changes and did not abide by the terms of probation (this is obvious, since she has been returned to prison). She did not visit her child once a month and did not send cards or letters. She did not attend or participate in all DFS meetings and court hearings on this child.? As to condition (b) the Court made the following determination, ? As to both parents-the juvenile officer and DFS have failed to aid either parent on a continuing basis to adjust their circumstances or conduct to provide a proper home for the child. Mother is back in prison ...? The Court found that conditions (c) or (d) did not apply to the case.

As to the finding in the Judgment to terminate Lisa?'s parental rights under Section 211.447.4(3) there is no dispute that at the time the court heard the termination case that Marlin had been under the jurisdiction of the court for one year. Further, that the reason the child became a ward of the court was that the mother was incarcerated and unable to care for the child in prison and that at the time of the hearing on termination that the mother

was once again in prison, however when the Court on September 11, 2001 ordered that the termination proceeding be begun against the mother she was not in prison. The fact that the parent is incarcerated by itself does not support termination. ) There was no evidence as to how long the mother was to be in prison and how that was a negative fact. The facts is since the mother is back in Audrain County she should have visitation with the child again. The mother's lack of income and lack of a stable home hindered the return of the child to her not her incarceration. The states failure to provide reunification however was the biggest problem in the child not visiting with her mother and the lack of progress in getting the child back in her mother's home. Further, there were other options of long term placement other then termination, such as long term foster care or guardianship.. The burden was on the state to prove that termination and adoption was the only option available for the child and the state did not prove such.

The Court did attempt to make findings as to the four conditions listed in subdivisions a through d of Section 211.447.3, but failed to make the proper finding as to subparagraph a.

In **A. P.** 988 S.W. 2d 59, 60-61 (S.D. Mo. 1999) it was held that when terminating a parent's rights under Section 211.447.4(3) the trial court is required by the plain language of the statute to consider and make findings on all four of the factors set forth in that subsection. The Court is not in a position to overlook the clear statutory mandate that the court must make such findings. **In the Interest of J.M.**, 789 S.W. 2d 818, 822 (W.D. Mo. 1990) The trial court's failure to make such findings is sufficient for reversal. Statutory mandates to make findings may not be overlooked on appeal. **T.A.S.**, 32 S.W. 3d 804, 810

(W.D. Mo. 2000). **In the Interest of A.S.O.**, 52 S.W. 3d 59, 66(W.D. Mo. 2001) the court found that conclusionary statements were insufficient to meet the statutory requirements for findings. Lastly, the Courts have held that if one of these four factors is not relevant to the case, the trial court must still state why the particular factor is not relevant. **In the Interest of R.E.A.**, 971 S.W. 2d 865, 867 (W.D. Mo. 1998)

As to the factor contained in Section 211.447.4(3)(a) on Social Service Plans, the Court **In Interest of N.M.J.**, 24 S.W. 3d 771, 781 (Mo 2000) found that a finding under Section 211.447.4(3)(a) did not have to recite everything contained in the plan, but did have to identify each plan, the terms thereof and the extent to which the parent has failed or made progress in complying with the plan. The court went on to say that such findings were required to make certain that the juvenile court was aware of and properly considered whether all reasonable means were employed to help the parent remedy the adverse conditions causing the termination. In this case the trial court's findings were on the written service agreement of October, 2001. That agreement was void at the time it was written since Ms. Masek stated that her ability to arrange visitation of the child, Marlin, or provide reasonable efforts ceased when the Court entered its order of September 11, 2001.

At the time she drafted and sent the agreement she did not know of these facts. Further, it is not such agreements that the court is to comment on but the Social Service Plan which was the Children's Services Case Plan that was entered on March 8, 2001. Since the court failed to comment on the correct plan, the Court decision to terminate under Section 211.447.4(3)(a) must be reversed..

Had the Court considered the correct plan, the finding of the court should have made was that the Division had a duty under Section 211. 183 RSMo to provide services for reunification services to Lisa and failed to so act. The Service Case Plan required the Division to move the child closer proximity to the mother and the Division failed to do so.

The court should have gone on that the requirement of placing the child in close proximity to the mother was required by Section 210.001.1(1) which states:

1. The department of social services shall address the needs of homeless, dependent and neglected children in the supervision of custody of the Division of Family Services and to the families in conflict by:

(1) Serving children and families as a unit in the least restrictive setting available and in **close proximity to the family home**, consistent with the best interest and special needs of the child:(emphasis added)

(2) Insuring that appropriate social services are provided to the family unit both prior to the removal of the child from the home and after family reunification...?

Further, federal law requires that the State of Missouri move the child in close proximity of the parent under 42 USC Section 675 which is entitled Part E-Federal Payments for Foster care and adoption Assistance at subdivision 5 (A) states:

(A) Each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in **close proximity to the parent's home**, consistent with the best interest and special needs of the child..(emphasis added)

*The duty on the State of Missouri to follow such federal law under IV- D and IV- E of Social Security Act was established in the case of State of Mo. v. Bowen, 638 F.Supp. 37, 38 (W.D. Mo. 1986) In that case the federal court found that Missouri had been a participant in these programs continuously since their inception and as a participant had follow federal law.*

The court should have found from the facts that after the plan was entered into that the Division did not make a diligent effort to find foster placement closer to the mother's home in that only two contacts for such placement were made, two calls made to the Missouri Alliance in Jefferson City and St. Louis City. The court should have found that a diligent effort would have involved contacts to counties in the greater St. Louis Metro area or seek an emergency foster placement which was available in St. Louis City. The Court should also found that the state was aware that the mother lacked transportation to visit with Marlin in Mexico, and the state made no effort to take the child to visit with the mother or assist the mother to come to Mexico for such visits. 42 USC Section 675.4(A) states ? The term ? foster care maintenance payments? means payments to cover the costs of...reasonable travel to the child's home for visitation...

The failure of the State to either bring the child closer to the mother or to assist in travel for visits prevented the mother from arranging visits as required under the plan. The Division failed to enter into a written services agreement with the mother for 6 months after being required to by the Plan and that such delay hindered reunification. Further the lack of cooperation of the Division and St. Louis doomed reunification of the Marlin with

Lisa.

As to Section 211.447.4(3)(b) the only find possible by the Court was that no services had been provided to Lisa by either DFS office. Ms. Masek testified that the only service offered to Lisa was to arrange visitation. She went on that the Division does help residents of Audrain County with reunification services which includes help in putting a deposit on housing, help in paying rent and utilities, but that Lisa was living in St. Louis and not eligible for such assistance. Ms. Felton, the caseworker from St. Louis, testified that no services were offered to Lisa so that she could obtain Marlin back in her home since she did not have a local caseworker and that such services are provided to a parent who has stable housing.

Since the court made an erroneous finding under Section 211.447.4(3)(a) and the finding as to Section 211.447.4(3)(b) was not supported by the evidence, the Judgment for Termination under Section 211.447.4(3) should be reversed.

**VI. The Court erred in terminating the parental rights of Lisa to Marlin under Section 211.447.4 (6) for the reason that the Lisa's parental rights had been terminated on her other children because those judgments contain reversal error and the State failed to provide reunification services required by the law in that the judgment entered contained findings and not specific findings as required by case law and the state failed to provide Lisa's family help in obtaining housing which would have meant the return of her children and for that reason their can not be a**

**presumption of unfitness by the fact Lisa's parental rights were terminated on her other children.**

#### STANDARD OF REVIEW AND BURDEN OF PROOF

The standard of appellate review in termination proceedings is similar to other civil proceedings in that Rule 73.01 and **MURPHY VS. CARRON**, 536 S.W.2d 30 (Mo. banc. 1976) apply. The judgment entered by the trial court can only be reversed when it is shown that there is no substantial evidence to support the decision, when the decision is against the weight of the evidence, or where the court has erroneously applied the law. **H.D. vs. E.D.**, 629 S.W.2d 655 (E.D. Mo. 1982), **B.J.D.B. vs. J.B.G.**, 698 S.W.2d 328 (W.D. Mo. 1985).

Missouri courts have always held that the party seeking termination of parental rights has the burden of proof. **In re J.A.J.**, 652 S.W.2d 745 (E.D. Mo. 1983) and **In re J.A.H.**, 592 S.W.2d 888 (S.D. Mo. 1980). Substantial evidence which, if true, as a probative force, is required to meet the burden of proof. In re J.A.J., supra. **In the Interest of M.N.M.**, 681 S.W.2d 457 (W.D. 1984).

The quantum of proof required in termination cases is clear, cogent and convincing. **In the Interest of M.E.W.**, 729 S.W.2d 194 (Mo. Banc. 1987), **Santosky vs. Kramer**, 455 U.S. 745 (1982), **J.D.K.**, 685 S.W.2d 876 (W.D. Mo. 1985). The definition of clear, cogent and convincing evidence is that evidence which "instantly tilts the scales in the affirmative when weighted against evidence in opposition, evidence which clearly convinces the fact finder of the truth of the proposition to be proved." **In re J.A.J** 652 S.W. 2d (E.D.

Mo. 1983) and **K.S. VS. M.N.W.**, 713 S.W.2d 858 (W.D. Mo. 1986).

Missouri case law has held the relationship of the parent and child is valuable to society and except in the most extraordinary of circumstances, will not be terminated. Accordingly, severance of the parent/child relationship is by an act of law and seen to be an exercise of awesome power which demands a strict and literal compliance of the statute.

**D.G.K. vs. H.H.**, 719 S.W.2d 510 (W.D. Mo. 1986), **In re W.F.J.**, 648 S.W.2d 210 (W.D. Mo. 1983). Only grave acts justify the termination of parental rights. In the case of **STATE VS. TAYLOR**, 323 S.W.2d 534, 537 (S.D. Mo. 1959) the court said:

The attachment of mother and child is one of nature's oldest instincts. It is associated with the survival of the race. It is held in tender regard by all religions and by the laws of almost all civilized nations. It is not to be lightly cast aside to make way for any paternalistic sociological theory. Statutes which set up procedures permitting the destruction of the parent-child relationship should be exactly complied with.

The courts of Missouri have always recognized that they must balance the purpose of the Juvenile Code that of protecting the welfare of the child and the constitutional rights of the parents. **G. V. SAUNDER**, 308 S.W.2d 883 (S.D. Mo. 1957). The right of a parent to the care, custody and companionship of the parent's child has been recognized as a fundamental right guaranteed by the United States Constitution. **STANLEY VS. ILLINOIS**, 405 U.S. 645, 31 LED.2d 557 (1975). In **IN RE GAULT**, 387 U.S. 1; 18 L.Ed. 527

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There is no argument that the parental rights of Lisa to her children, Danisdha Misha Robinson, Jasmine Natasha Williams, Travion Jamal Robinson and Markeal Robinson have been terminated by legal proceeding, but also there can not be any argument that the Division of Family Services failed repeatedly to provide reunification services to Lisa as required by the law. The State has a duty to provide services to parents whose children are removed from their custody and placed in foster parents. Section 211.183 states:

1. In juvenile court proceedings regarding the removal of a child from his or her home, the court's order shall include a determination of whether the division of family services has made reasonable efforts.....
2. **? Reasonable efforts?** means the exercise of reasonable diligence and care by the division to utilize all available services related to meeting the needs of the juvenile and the family....

3. In support of its determination of whether reasonable efforts have been made, the court shall enter findings, including a brief description of... reunification efforts were made and why further efforts could or could not ...shortened the separation of the family. The division shall have the burden of demonstrating reasonable efforts.

....

8. If the court determines that reasonable efforts, as described in this section, are not required to be made by the division, the court shall hold a permanency hearing within thirty days after the court has made such determination.

The DFS under this statute is charged with providing services to parents whose children are in foster care that will reunite the family and to make a diligence effort in providing those services. The records provided on Danisdha Misha Robinson, Jasmine Natasha Williams, and Travion Jamal Robinson indicate that the children came into the juvenile system because the parents were homeless and living in their car. The parents needed help in obtaining housing and income in order to get their children back. In Audrain County the DFS office helps parents obtain housing by providing them with the deposit, rent, and payment of utility expenses. In St. Louis the DFS office according to Ms. Felton makes referral to the parents. What is done is to give a list to parents of telephone numbers and say good luck. In the case before the court we do not know if this was even done. The reasonable efforts provided to parents are by statute to be ? services related to meeting the needs of ... the family?. The needs of Lisa?'s family were housing and income. St. Louis DFS gave them a referral list. To St. Louis Lisa was just another statistic not a person. St.

Louis DFS did nothing to meet its state obligation, not even a telephone call to St. Louis Public Housing to see if units were available. The state statute requires that reunification services be provided to parents whose children are in foster care. According to Ms. Felton, St. Louis DFS provides reunification only to parents who have stable housing. St. Louis DFS have modified the state requirement to provide reunification services to all parents whose children are in foster to only parents who have stable housing. Ms. Felton explained in her testimony that since Lisa did not have stable housing she was not provided with reunification services. What St. Louis DFS did was warehouse these children in foster care while making the children available to Lisa for visitation. When Lisa did obtain housing and was getting increased visitation, her efforts were rewarded by having all her rights to visitation stopped by an ex parte order because she lived in the poor part of St. Louis.

The law also requires that the DFS is to provide reasonable diligence in determining what services are to be provided to the family. The psychological evaluation done on Lisa by St. Louis indicates she was functioning at a full range I.Q. of 70. Any one using diligence would have known that she was having a difficulty with her understanding of what was taking place. The evaluation took place in 2002 not in time for the in prior years when it might have been of some help in getting back her child and even after it was obtained there was no change in the services provided to Lisa by St. Louis DFS. The evaluation was done too late to stop the termination of Lisa's children, Danissha, Jasmine, Travion, and Markeal. The Court in all the St. Louis termination cases due to the limited mental capacity of Lisa should have appointed an attorney for her at the all the termination

hearings. St. Louis should have provided to Lisa special services under the American with Disabilities Act, but according to Ms. Felton did not. The caseworkers' s working with Lisa should have had special training as to person' s with Lisa' s mental limitation and again according to Ms. Felton no such training was provided by DFS.

The grounds for Lisa' s termination according to the orders on Danisdha, Jasmine, and Travion, were under Sections 211.447.4(2) for neglect, 211.447.4(3) failure to rectify or a potential harmful condition exist, and under Section 211.447.2(1). Under Section 211.447.4(2) the Court found that there was no proof as to conditions a, b, and c. As to condition (d) the court made the following finding:

(d)...Lisa ...have repeatedly or continuously failed, although physically or financially able, to provide the child with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for her physical, mental or emotional health and development.?

As to Section 211.447(3) the Court made the following findings:

(a) No social service plan was entered into...

(b) The juvenile officer and /or Division of Family Services and /or any other agency have been unsuccessful in aiding...Lisa ...on a continuing basis in adjusting their circumstances or conduct to provide a proper home for the child.

(c) ...no evidence

and made know finding as to condition (d).

As to Section 211.447.2(1) the court found that the children had been in ? care? for

fifteen (15) months out of the last twenty- two (22) months.

In **A. P.** 988 S.W. 2d 59, 60-61 (S.D. Mo 1999) the court held that when terminating a parent's right under either Section 211.447.4(2) or Section 211.447.4(3) the trial court is required by the plain language of the statute to consider and make findings on all four of the factors set forth in that subsection. The Court is not in a position to overlook the clear statutory mandate that the court must make such findings. **In the Interest of J.M.**, 789 S.W. 2d 818, 822 W.D. Mo. 1990) The trial court's failure to make such findings is sufficient for reversal. **In the Interest of A.S.O.**, 52 S.W. 3d 59, 66(W.D. Mo. 2001) the court held that conclusionary statements made as to finding in judgments to terminate parental rights were insufficient to meet the requirements of findings by law and there had to be specific findings Lastly, the Courts have held that if a factor is not relevant to the case, the trial court must state why the particular factor is not relevant. **In the Interest of R.E.A.**, 971 S.W. 2d 865, 867 (W.D. Mo. 1998) The trial courts failure to make such findings is sufficient for reversal. Statutory mandates to make finds may not be overlooked on appeal. **T.A.S.**, 32 S.W. 3d 804, 810 (W.D. Mo. 2000)

The rational why such finding are required are: First, that the termination of parental rights is an awesome act of government, Second, that due to the nature of such action, there must be a literal compliance of the law, and Third, that such specific findings are required so there can be a determination that the court, in making its decision to terminate, considered all factors of importance. **In the Interest of N. M.J.**, 24 S.W. 771, 782, 783(W.D. Mo. 2000)

The Judgments Termination on Danisdha, Jasmine, and Travion, Robinson on grounds 211.447.4(2)(d) made conclusionary statements that Lisa has repeatedly or continuously failed, although physically or financial able, to provide the child with adequate food, clothing shelter, or education as defined by law, or other care and control necessary for her physical, mental or emotional health and development. There are no specifics as to what the court was considering as income for Lisa, whether the court was aware that Lisa was in prison in Audrain County for several months which limited her ability to work or visit, whether the court was aware of her poor earning record is unknown, or ST. Louis DFS had provided little or no services to Lisa unknown. The use of conclusionary finding and not specific findings as required makes it impossible for Lisa to respond to that finding and argue against the presumption of unfitness..

As to the court's Judgment of Termination on grounds in 211.447.4(3) the finding as to condition (b) implies that the Juvenile Officer or DFS provided Lisa with reasonable service which is contra to the statement of Ms. Felton. Further the court failed to make a finding as to condition (d).

For the reasons cited the termination orders on Danisdha, Jasmine, and Travion would have been reversed for failing to make proper findings.

As to the findings that the children were in foster care for 15 months of the most recent 22 months. Section 211.447.3(3) states:

If ground exist for termination of parental rights pursuant to subsection 2 of this section the juvenile officer or the division may, but is not required to file a petition to

terminate the parental rights of the child's parent or parents if:

...

(3) The family of the child has not been provided such services as provided for in section 211.183.?

There should be no argument that Lisa never received the services required under Section 211.183 RSMo and the Petition for Termination seeking termination of Lisa's parental rights for that reason should not happened.

No argument is made concerning the termination of Markeal since there was no written documentation brought to the court concerning his termination only oral statements. The evidence is that ST. Louis DFS failed to prove services required under Section 211.183 RSMo.

For the above reasons stated that the state failed to provide needed services to Lisa to enable her to get her children back and the fact that the Judgment of terminations as to Danisdha, Jasmaine, and Travion contained reversalable errors, and there is no written Judgment as to Markel the court should find there is no presumption of unfitness of Lisa because her rights were terminated to Danisdha, Jasmaine, Travion, and Markeal.

**MID-MISSOURI LEGAL SERVICES**

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573/442-0116

IN THE MISSOURI SUPREME COURT

In the Interest of:

MARLIN DEVOINION ROBINSON

Supreme Court No. 85208  
Case No. JU102-8TC

LISA WILLIAMS,  
Appellant,

JUVENILE OFFICE OF AUDRAIN COUNTY,  
Respondent.

JAY NIXON in his official capacity of  
MISSOURI ATTORNEY GENERAL,  
Respondent,

MARLIN MATHEW ROBINSON (Father),  
Respondent

**CERTIFICATE OF COMPLIANCE**

COMES NOW, Edward Berg, attorney for appellant, and certifies that the brief being filed complies with the requirements of Rule 55.03 and the limitation as set forth in Rule 84.06(b) and 84.06(g).

1. That the word count for said brief is 25,,806 and line count is 2194 .
2. That the Disk upon which the Brief has been placed has been scanned for virus and is virus free.

**MID-MISSOURI LEGAL SERVICES**

By: \_\_\_\_\_

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Columbia, MO 65203

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Respondent,

MARLIN MATHEW ROBINSON (Father),  
Respondent

**CERTIFICATE OF MAILING COPY OF APPELLANT'S BRIEF TO OTHER PARTIES**

COMES NOW, Edward Berg, attorney for appellant, and notifies the court that all parties have been sent a copy of Appellant's Brief by depositing one copy of the Brief in the U.S. Mail, postage prepaid, addressed to the attorneys of record at their business addresses as set forth in the proof of service below.

**MID-MISSOURI LEGAL SERVICES**

BY: \_\_\_\_\_  
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**PROOF OF SERVICE**

The undersigned certifies that a complete copy of this instrument was served upon

Carla Tanzey  
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Helen Fenlon  
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Marlin Mathew Robinson  
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St. Louis, MO.

\_\_\_\_\_

by enclosing in an envelope addressed to said PARTIES at the business addresses as disclosed in the pleadings of record herein with first-class postage

fully prepaid and by depositing said envelopes in the  
U.S. Mail on the day of June, 2003

-----  
Edward Berg

IN THE MISSOURI SUPREME COURT

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APPENDIX



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