ED81137

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

IN THE INTEREST OF: E.L.B., A MINOR
Respondent,

v.

E.E.B.
Appellant.

Appellant's Brief

LAURA E. SIDEL, #34523
7912 Bonhomme, Ste. 204
Clayton, Missouri 63105
(314) 727-5259 Fax - 6181

ATTORNEY FOR APPELLANT

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REFERENCE NOTE

ALL REFERENCE TO THE LEGAL FILE WILL BE DENOTED “LF”. ALL REFERENCES TO TRANSCRIPT WILL BE DENOTED “T”. ALL STATUTORY REFERENCES ARE TO THE REVISED STATUTES OF MISSOURI. ALL REFERENCES TO THE SUPPLEMENTAL TRANSCRIPT WILL BE DENOTED “SUPP T”.

I. JURISDICTIONAL STATEMENT

This matter involves an appeal from an Order of the Honorable Chester B. Hayes, Commissioner of the Family Court of St. Louis County, terminating the Appellant's parental rights to one of her minor children. The Appellant has challenged the sufficiency of the evidence presented to the trial court and that court's findings of facts and conclusions of law. This case does not involve the validity of a treaty or statute of the United States, or of a statute of provision of the Constitution of this State, or the construction of a revenue law, or the title to any State office. The Missouri Court of Appeals therefore has general appellate jurisdiction pursuant to Article V, Section Three of the Constitution of the State of Missouri.

II. STATEMENT OF FACTS

The Appellant in this case is E.E.B., a minor child born in Hennepin County Minnesota on April 24, 1999. LF 30. The child was removed from Appellant's custody and placed in foster care on October 4, 1999. LF8. The trial court assumed jurisdiction over the child on December 6, 1999. LF 14.

On April 19, 2001, a petition seeking the termination of Appellant's parental rights was filed by the Respondent. LF 30, 31. It was alleged that the termination of parental rights was warranted for the following reasons: The child had been under jurisdiction for a period of at least one year and conditions which led to assumption of jurisdiction still persisted or conditions of a potentially harmful nature existed or parent child relationship diminished the child's prospects for integration into a stable permanent home; The child was abandoned without good cause for six months immediately prior to the filing of the petition; The mother was unfit to be a party to the parent-child relationship because her rights were involuntarily terminated on October 4, 2000. LF 30,31. The petition was amended on October 22, 2001 to state that the named natural father was deceased as of December 27, 1999. LF 33.

The petition was amended on October 25, 2001 to add that the child had been in foster care for fifteen out of twenty two months. LF 34.

Petitioner's first attorney, who later withdrew because of a conflict of interest, filed a Motion for Home study which was granted on May 22, 2001. LF 35. The Court ordered Missouri Division of Family Services, hereafter DFS, to assign a Boone County worker to undertake a home study at her residence in Boone County, and submit it to the Court by the original trial date of July 13, 2001. LF 35.

The home study was completed by Boone County DFS caseworker Angela Anderson in September 2000. LF 111-115, T 120. It was sent to St. Louis County DFS on September 19, 2001. T120. Ms Anderson also sent the worker an informational letter regarding the school for Appellant's daughter, a child who lives with her at the time of the Home study. T

121. The home study recommendation was that the minor be placed in his mother's home under DFS supervision. LF 121. The home study was not presented to the Court until the new trial date in December 20010 The child was not placed back into the mother's physical custody. T16. The child came into custody in St. Louis City when Appellant was arrested and incarcerated upon appearing for a St. Louis City Family Court hearing on another of her children, because the child was without care and custody. T 26. The child was placed with appellant's aunt the next day and remained in her custody throughout this case. T 16. The child spent part of December 2000 in Minnesota. T 102. The child moved with the custodian to Minnesota in January 2001. T23.

A number of DFS caseworker's handled this case. The St. Louis City DFS caseworker transferred the case to Mary Lincoln of St. Louis County DFS in November of 1999, who had it until her death in June of 2001. Lynn Phoomsathan is the current St. Louis County DFS caseworker who has had the case since June 2001 and testified at trial. T 9,14. Ms. Phoomsathan testified regarding Mary Lincoln's contacts with Appellant from case files prepared by worker Mary Lincoln. T 14, 15. The records reflect a number of contacts between Appellant and Mary Lincoln. T 18,19,20. These contacts included letters, phone calls, and at least two meetings. Appellant was given a copy of her unsigned service plan. T 18,20,21. LF 17, 18.

During the time period from January 2001 to October 2001, Appellant admits to using crack cocaine. T 176 177. She visited her son in four visits recorded by DFS in the year 2000. T22, 33. An additional visit was canceled by DFS and Appellant was incarcerated during another planned visit. T 42,43. She also saw the child at a court hearing in March 2001. Appellant states she also saw her child through his aunt which were unreported visits. T 231,232.

Appellant provided no financial assistance, gifts or clothing during this time. Appellant did inform DFS of three different addresses changes. T 41, 43, 44, 46. She also called DFS from Macon County jail in Decatur Illinois to report incarceration on an old

1997 charge of writing bad checks and for failure to pay restitution as a condition of parole. T 42, 43. In August of 2000 she informed DFS she was incarcerated in St. Louis County on the same charge for failure to pay restitution. T 46. On October 24, 2000, Appellant traveled to Columbia Missouri to enter a drug treatment program to which she was referred by DFS, McCambridge Center. T32. The DFS St. Louis County caseworker testified that since that time Appellant continued to participate in outpatient treatment there. T 32.

Changes since beginning treatment at McCambridge Center include maintaining abstinence from drugs maintaining constant contact with this child, securing appropriate housing, study for the GED test, building community support network, showing ability to access resources, looking for employment, and taking back into her home two other children and appropriately parenting them.

Robin McCartney, primary therapist for Appellant at McCambridge Center, who was her counselor since admission to the programs, testified on her behalf. T 57,60,61. She stated that McCambridge is a state licensed facility which regularly received referrals from DFS. T60. Ms. McCartney's job required her to monitor all records pertaining to EB, including records of the community support worker and therapist assigned to family therapy. T 62. The organization provides referrals to service such as housing, GED programs and vocational rehabilitation as well as drug treatment. T 62. Ms. McCartney described the rigorous first level of the program, regarding seven say a week 8:30 am to 7:30 p.m. classes. T63,64. She also stated that clients have urinalysis, or drug drops, done regularly as part of the program. T 64. Twenty nine (29) drug drops were taken on EB randomly, although, because of budget constraints not all the drops were lab tested. T 86 87. Of the five drops which were tested all were tested negative. T88.

Ms. McCartney also testified that other assessment tools such as therapy sessions and group sessions to indicate drug usage. T 94. Ms. Anderson, Boone County DFS worker, stated that the child should be referred to Appellant with DFS supervision. LF 21, T144.

She considered all DFS information sent from St. Louis on Appellant's drug history and looked seriously at this issue. T125. Ms. Anderson had extensive experience at DFS with such drug evaluations. T143. She considered Appellant's attendance at McCambridge Center, group meetings, NA meetings, her sponsor, Harbor House, her church, cocaine anonymous, and a 24 hour hot line from Harbor House, as well as McCambridge House 24 hour a day Service. T128. She had been clean and sober at the time of trial on December 21, 2001 for one year and two months since she started McCambridge Center. T177. She stated that the extensive support group she could access through McCambridge made the difference to her. T 177, 178, 183. She stated that she had believed that all drug drops were lad tested. T183. She also stated the support system helped her handle the stress of reunification with her other two children and remain sober. T 198.

During redirect examination by Appellant's counsel of her witness, Ms. Anderson, the Court itself stated, "I repeat I know of no positive drug tests. I have no evidence before me that this lady has used any drugs while she's been in McCambridge House." T165, 166.

The St. Louis DFS worker started in January or February of 2001 to consistently send cards and letters to her child, then in Minnesota. T 23, 105, 105. Also called him by telephone on a regular basis, two to three times a month. T23 T24. The home study by DFS states that the mother made weekly phone contact with the child. LF 119. Appellant stated that she was calling her child by telephone since she first came to McCambridge. T199. She said she has called consistently once a week or more for 20 to 30 minutes since January 2001, and has sent cards to the child which were read to him. T199, 200, 201. The child addresses her as mom or Tina on the phone. T 201. The child also talks to his sisters who live with Appellant. T200.

Appellant states that she asked for a visit in January 2001. T203. She asked for a visit in January 2001. T203. She stated that she was told by St. Louis County DFS that they were not required to set up visits because paperwork was going into the Court regarding termination of parental rights and they were relieved of reasonable efforts. T 202. The St.

Louis County DFS worker said DFS did not deny visits or tell Appellant that. However, the DFS worker had no specific information on what Mary Lincoln, the caseworker testifying was not part of the conversation. T104.

Appellant has also secured housing, as related in the home study, which recommended placement of the child in this home. LF 117-121. The clean furnished home was large enough for the Appellant and all of her children, although only two lived with her at the time of trial, and one at the time of the home study. LF 117, T 132-134. The home was subsidized , rent free housing. T29. The DFS home study worker dimmed it a safe home and Appellant a safe, fit caretaker, T173, 174.

Testimony was also given that Appellant was studying for the GED test, which she began to study for in December 2000, according to her therapist Robin McCartney, and had continued to take classes since that time. T 65,66. Appellant indicated she was enrolled for GED classes and was scheduled to take the GED test roughly one months from the hearing, on Jan 19, 2001 at Tate Hall. T 180, 181.

Appellant's community support network is extensive. Angela Anderson in her testimony named McCambridge Center, group and individual meets, NA meetings, Harbor House, 24 hour hot lines, a 25 hour service availability at McCambridge, a sponsor, and Appellants church as resources. T126, 127, 128. Robin McCartney from McCambridge pointed out that Appellant also has a family therapist for her children, Kristen Coyle, who does individual counseling, supports her efforts to parent. T 67. Ms. Anderson concluded that Appellant could maintain herself, and properly parent the child when he was placed back in her home. T145.

A letter from Kristen Coyle, mother's exhibit C, LF 122, attests to mothers parenting skills progress, attendance at the family and individual therapy, and her understanding of haw her addiction has affected her children. as she also noted Appellant's improvement in disciplinary

skills and listening to her children. LF 122. Robin McCartney also testified to these increases in skill and understanding regarding parenting, accessing resources and parenting. T 75, 76.

Angela Anderson for her home study checked with the school regarding the child living with Appellant during the school year and found no problems with attendance, and the child was working up to potential. Ms. Anderson observed her with the child in September 2001 and found her ability to discipline and her interaction with her children to be appropriate, T130, 131, 132. Mother's ability to plan for her children's needs is also reflected in her having an oversized apartment so that all of her children could safely live with her.

III. POINTS RELIED UPON

A. The standard of review and the standard of proof.

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

2) In the Interest of M.H., 859 S.W. 2d 888

(Mo. App. 1993)

3) In the interest of J.M., 815 S.W. 2d 97
(Mo. App. 1992)

4) In the Interest of K.O. , 933 S.W. 2d 930
(Mo. App. 1996)

5) In the Interest of T.S. , 925 S.W.2d 486
(Mo. App. 1996)

6) In the Interest of K.D.H. , 871 S.W. 2d 651
(Mo. App. 1994)

7) In the Interest of N.D , 857 S.W. 2d 835
(Mo. App. 1993)

8) In the Interest of Lovehart, 762 S.W. 2d 32
(Mo. banc 1988)

9) M.J.S. v. K.E.S., 724 W.W. 2d 318
(Mo. App. 1987)

B. The trial court erred in terminating the parental rights of the Appellant in that there was insufficient clear, cogent and convincing evidence to support the findings made pursuant to Section 211.447.4(1)/

1) Section 211.447.4(1)

2) In the Interest of W.F.J., 648 S.W. 2d 210
` (Mo. App. 1983)

3) In Re A.R., 52 S.W. 3d 625
(Mo. App. W.D. 2001)

4) In Re B.S.B. , 76 S.W. 3d 318
(Mo. App. W.D. 2002)

C. The trial court erred in terminating the parental rights of the Appellant in that there was insufficient clear, cogent and convincing evidence to support the findings made pursuant to Section 211.447.4(2).

1) Section 211.447.4(2)

2) In Re A.A.R., 39 S.W.3d 847
(Mo. App. W.D. 2001)

3) In Re A.R., 52 S.W. 3d 625
(Mo. App. W.D. 2001)

4) In the Interest of W.J.F., 648 S.W.2d 210
(Mo. App. 1983)

D. The trial court erred in terminating the parental rights of the Appellant in that there was insufficient clear, cogent and convincing evidence to support the findings made pursuant to Section 211.447.4(3).

1) Section 211.447.4(3)

E. The trial court erred in terminating the parental rights of the Appellant in that there was insufficient clear, cogent and convincing evidence to support the findings made pursuant to Section 211.447.4(6).

1) Section 211.447.4(6)

2) In Re T.A.S., 32 S.W. 3d 804
(Mo. App. W.D. 2001)

F. The trial court erred in terminating the parental rights of Appellant under 211.447.2(1) as an independent ground for termination of parental rights as this section of the statute violates the substantive due process guarantees of the federal constitution, U.S.C.A. Const. Amend. 14 and is therefore invalid and void.

1) Section 211.447.2(1)

2) In Re H.G. , 757 N. E. 2d 864
(Ill.2001)

IV. ARGUMENT

A. The standard of review and the standard of proof.

The fourteenth Amendment to the United States Constitution and Article I, Section of the Missouri Constitution provide that no person may be deprived of any liberty interest which they might posses absent the provision and protection of due process of law. The

freedom to raise a family and enjoy the love, care and companionship of one's children free from unwarranted state intrusion and interference, oftentimes referred to as the right to familial integrity, has long been recognized as a fundamental liberty interest which is subject to both procedural and substantive due process protections. Santosy v. Kramer, 455 US 745,753, 734 n. 7 (1982); In the Interest of Lovehart, 762 SW 2d. 32,33 (Mo. banc 1988); MJS v. KES, 724 SW 2d 318, 319-320 (Mo. App. 1987).

The courts of this state have regularly noted the fundamental sanctity of the parent-child relationship and have held that any judicial termination of such relationship is an exercise of awesome power which must be tempered and controlled by strict and literal compliance with the statutes from which this power springs. In the interest of MH, 859 SW 2d 888, 896 (Mo APP 1993); In the interest of ND, 857 SW 2d 835, 840 (Mo APP 1993);

Regardless of the grounds relied upon by the trial court in terminating parental rights, the trial court must also find that termination of parental rights is in the child's best interest. The evidence offered in support of any such termination must be clear, cogent and convincing. In the interest of JM, 815 SW 2d 97, 101 (Mo APP 1992). This standard of proof is met only " when the evidence instantly tilts the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." Ibid; In the interest of KDH, 871 SW 2d 651, 656 (Mo APP 1994);

The trial court's findings and judgment should be sustained unless there is no credible evidence to support it, it is against the weight of the evidence and reasonable inferences therefrom are to be viewed in the light most favorable to the trial court's ruling.

In the interest of KO, 933 SW 2d 930, 934 (Mo APP 1996); In the interest of TS, 9259 SW 2d 486, 487 (Mo APP 1996);

B. The trial court erred in terminating the parental rights of the Appellant in that there was insufficient clear cogent and convincing evidence to support the findings made pursuant to section 211.447.4(1).

The trail court ruled that termination was warranted in that the mother had without good cause abandoned her child as defined in section 211.447.4 (1) (b). LF 149, This section of the statute allowed for termination when a child is over the age of one at the time of filing the petition and the parent has without good cause left the child for six months or longer without making provisions for support and without making arrangements to visit or communicate with the child although able to do so. The child here was over one year of age at the time of filing and had been our of Appellant's custody in excess of six months.

Appellant respectfully contends, however, that the remaining requirements of Section 211.447.4 (1) (b) have not been met. "Abandonment is the willful giving up of a child with the intention that the severance be permanent in nature" and " implies a willful positive act such as deserting the child" and " that there be a settled purpose to forego all parental duties and relinquish all parental claims. In the Interest WJF, 648 SW 2d 210, 215, (Mo App 1983) In order to withstand Appellate scrutiny there must be clear, cogent and convincing that Appellant let the child without any provision for parental support and without making arrangements to visit or communicate with them. Appellant's service plan required that she avail herself of job training, but did not require her to get employment. It required her to make financial contributions towards the support of her children, but stated

that if the support is not ordered by the Court you should make payment as directed by DFS. LF 17, 18. No order requiring child support was ever entered. Although Ms. Lincoln of DFS contacted Appellant regarding her service plan no directive for any specific payment of support is found in the file. Appellant did not hold a job but worked through a temporary agency and could find roughly one week a month of paid work. T 217. Appellant was hampered by intermittent incarcerations on a 1997 charge which required payment of restitution as a condition of parole. T 42,43, 46. She had no money for restitution. Under these circumstances she could not be said to be financially or physically able to pay financial support.

After enrollment in McCambridge Center, a drug treatment and support program, Appellant was unable to work and complete treatment as well. Appellant was in classes on the first level of the program seven days a week, 8:30 am to 7:30 p.m.. T 63, 64. Although Appellant worked up to the highest level of the program, required fewer hours spent on grounds, she participated in individual counseling as well as group counseling, NA, and family therapy and worked to access housing, which she found, and to study for her GED. T 65, 66, 128, 180, 181. All of these acts were in accordance with the edicts of her plan and were intended to make her employable. LF 17, 18. However, they limited her ability to secure employment. Appellant made a small amount of money braiding hair while at McCambridge Center, which she used to pay for cards and letters sent to her child, as well as clothing when requested by the custodian who is Appellant's aunt. T 200, 213. She also paid for telephone calls of 20 to 30 minutes weekly starting in January of 2001. T 212. Regarding communication with her child, Appellant visited her child on five occasions

which were recorded by DFS. T 22, 33. DFS canceled one visit and another visit failed to take place because on incarceration. T 22, 33, 42, 43. Appellant also stated she saw her child on visits with her aunt, the custodian, which were not reported to DFS, and do not reflected in their files.

Appellant had "good cause" for not visiting the child after January 2001, when custodian moved with the child to Minnesota. T 23. He was in Minnesota during a portion of December 2000 as well. T 102. After this point Appellant, who was fully participating in her treatment program in Columbia Missouri, had only telephone access to the child. In January, DFS admitted that Appellant began regular telephone contact with her child two to three times a month. T 23, 24. The home study stated this contact occurred weekly. LF 119. In addition, Appellant regularly sent cards and letters which were read to the child. T 23, 199-201. The child knew Appellant by these phone calls and called her mom, or sometimes a nickname, Tina. T 201. The mother also provided telephone visits between the child and his sisters once they came to live with her. T 200.

Appellant asked for a visit as early as January 2001. T 203. She says that DFS told her they were not required to set up visits because they would be filing for termination of her rights and were relieved of reasonable efforts in November of 2000, T 202. The St. Louis County worker denied this but had no specific information on what the caseworker at the time, Mary Lincoln, told Appellant. T 103, 104. The caseworker was not a part of this conversation. T 104. The mother clearly did not have the funds to visit the child on her own, and therefore had "good cause for failure to physically visit her child.

Mother's actions in regularly contacting her child and providing what she could in support form January 2001 forward indicate she did not have any intent to abandon. "When determining whether abandonment had occurred, the parents intent, an inferred fact, is determined by considering all the evidence of the parent's conduct, both before and after the statutory period. In Re AR 52 SW 3d 625, 634 (Mo App WD 2001) In addition, "to prove abandonment, there must be evidence which shows accessibility of the child for the purposes of visitation communication. In Re AR 52 SW 3d 637 (Mo App WD 2001) After January 2001, Appellant's child was in no way except by telephone or mail available to her.

In Re BSB, 76 SW 3d 318 (Mo App WD 2002) involves another case where the father held only temporary jobs, was arrested, and failed to comply with many parts of his service agreement. From April 1999 through September 2000 the father in the case failed to provide financial support. The children were sent to an out of town placement on October 2000. The father had no in person visits during this time but made frequent efforts to contact the children by telephone the Court stated that generally a finding of abandonment is not compatible with a finding that custody has ended involuntarily" In Re BSB, 76 SW 3d 365 (Mo App WD 2002) The Court noted that for no full period of six months did father fail to have some communication with his children, and ruled that the trial court failed to meet the burden of proving abandonment by clear cogent and convincing evidence. Id. at 328.

In the case as well Appellant never totally cut herself off from her child, and did everything within her power to maintain contact and support so as to refute any intent to abandon after she began regular contact in January.

If the Court should find an abandonment during the period prior to Appellant's entry into McCambridge Center, Appellant respectfully submits she repented of this, making every effort to maintain communication with the child placed in Minnesota. "Abandonment can be repented by the actual or attempted exercise of parental rights and duties following abandonment." In Re AR, 52 SW 3d 625,626 (Mo App WD 2001).

As stated previously, Appellant made consistent regular contact with the child and provided some support from January 2001 forwards. Her telephone contacts were substantial not nominal, and as her only means of contact clearly show she repented of any prior failings.

C. The trial court erred in terminating the parental rights of the Appellant in that there was insufficient clear, cogent and convincing evidence to support the findings made pursuant to Section 211.447.4(2).

The trial Court also invoked and relied upon section 211.447.4(2) in support of its terminating the parental rights of appellant in that there was insufficient clear cogent and convincing evidence to support the findings made pursuant to Section 211.447.4(2).

The trial court also relied upon Section 211.447.4(2) in support of its termination of Appellant's parental rights. LF 149, 150. Pursuant to this section the trial court could consider termination of parental rights with regard to any child that has been abused or neglected. The appellant has never physically abused any child. The trial court assumed jurisdiction over the child because, upon the mother's arrest, the child was without proper care and custody. T 26.

Even if a finding of neglect is correct the trial Court must go on to make findings upon another set of four statutory enumerated factors. The trial court made findings with regard to all these factors by found only subsections (b) and (d) applicable to Appellant. LF 150. The Court found that the mother had a chemical dependency which prevents her from constantly providing care custody and control. The Court based the on previous enrollment in two other drug treatment programs prior to entry into her current program in October 2000, The Court found that "she had not completed her current program and therefore her chemical dependency continues to prevent her from providing the necessary care, custody, and control for the child". LF 150. The Court also found that Appellant continuously failed to provide the child with adequate food, clothing, shelter or other care and control necessary for the child's physical, mental or emotional health and development. LF 150. With regard to considerations set forth in Section 211.447.4(2)(b), there is no question that Appellant had, in the past, been a substance abuser. This statutory ground for termination, which must be strictly construed and literally applied requires more than a proof of chemical dependency. Subsection (b) also requires clear cogent and convincing evidence that such chemical dependency cannot be treated so as to enable the parent to consistently provide for the child's needs.

The trial Court made no findings regarding whether the chemical dependency could be treated to allow the parent to provide such control. LF 150. "When terminating the parental rights of an individual pursuant to this Section, the Court is required to consider and make findings as to the four conditions specified in subparagraphs (a) through (d), even is only to state that this condition is irrelevant. This statutory mandate to make findings

may not be overlooked on appeal ." In Re AAR, 39 SW 3d 847, 852 (Mo App WD 2001). The lack of such finding requires the Court to reverse on this Point.

In addition, the finding that the mother continued to have a chemical dependency which prevented her from providing for her child was against the weight of the evidence. He participated in a drug treatment and support program which provided numerous services besides drug treatment does not correlate with continued drug addiction. The testimony from McCambridge Center's Robin McCartney, Appellants primary therapist, was that Appellant had not used drugs since starting treatment in October 2000. T 66. She pointed to numerous assessment tools used by the Center to indicate drug usage, as well the fact that all drug drops were negative. T 94, T88. Appellant stated that she had been clean and sober at the time of trial for one year and two months. The Boone County DFS worker who did the home study had vast experience with drug cases, and looked seriously at this issue. T 125, 143. She stated that the child should be returned to Appellant who was no longer using drugs and had not for roughly a year. LF 121. T 144.

At trial the Commissioner hearing the case sustained an objection from counsel for DFS by starting " I repeat, I know of no positive drug tests. I have no evidence before me that this lady had used any drugs while she's been in McCambridge House." T 165, 166. This statement was made after counsel for DFS had rested their case in chief, while Appellant's counsel conducted a redirect examination of her own witness. Although Appellant's counsel presented one more witness, the Appellant herself, no additional evidence came to light to show any drug usage by Appellant after October 2001.

As in the Case In Re AAR, 39 SW 3d 847, (Mo App WD 2001) the record contains no evidence that the mother currently abuses any substance, much less that her dependency cannot be treated so as to enable her to provide the necessary care, custody and control over the child. As that cause shows , past substance abuse alone is not enough evidence for a court to conclude current drug usage which cannot be treated exists.

The Court found the mother failed, although physically or financially able to provide the child with adequate food, clothing, shelter or other care necessary for the child's physical, mental or emotional health under Section 211.447.4(2) (d). This is against the weight of the evidence, as previously argued, since the Appellant cannot provide the child with these items because that state not only placed the child in foster care, but places the child in Minnesota in January 2001. The Court's assumption of jurisdiction placed the child outside of Appellant

s care. In Re AAR, 52 SW 3d 625, 640 (Mo App WD 2001) states that while a parent's support obligation is not dependent on the state informing him of the obligation, the fact that Respondent failed to inform the parent that their efforts were inadequate is a relevant consideration in determining whither his conduct rose to the level of neglect of the child. The Court noted that it is particularly difficult for parents to understand this obligation. Id. at 640. As stated previously no specific mandate for financial support of a specific amount is in the service plan or file. In addition, as stated previously Appellant di provide some visits when the child was in St. Louis, some clothes when requested by the custodian and card, letter and telephone calls when the child was in Minnesota. LF 119, T 23, 119-201, 213. A child's placement in foster care has been found to be generally incompatible with a

finding that the parent has willfully failed to provide for the child's needs. In the Interest of WJF, 648 SW 2d 210 (Mo App 1983)

An additional factor in this case is the mother's extensive participation in GED classes, support groups. and therapy for herself and her children, which while helping her get to a point of self sufficiency were time consuming. These steps were necessary to Appellant's future employability, but left little time for financially gainful immediate activity, In addition, compliance with her service plan required many of these programs be undertaken. If compliance with her service plan rendered her financially unable to immediately provide financial support, Appellant should not be found neglectful on this basis.

D. The Court erred in terminating the parental rights of the Appellant in that there was not sufficient clear, cogent, and convincing evidence to support the findings made pursuant to section 211.447.4 (3).

The Court found that termination was warranted because the child had been under jurisdiction continuously for more that one year, and continuation of the parent child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home. Under this section findings are required under four subsections.

The evidence in the case showed that Appellant had a stable, permanent home, and that she was caring for two of her children quite well in this home. DFS of Boone County found her home a suitable placement for her child and recommended he be placed with her. LF 114-121. The Boone County DFS worker who was the only DFS caseworker to visit

Appellant in the home, pointed out to the Court that she had subsidized housing which was fit, safe, and that Appellant was a fit safe, caretaker. 173, 174.

As stated in a previous section of this brief, improvements in Appellant's parenting skills and ability to handle stress, attested to by McCambridge Center's Robin McCartney and by the letter from child and family therapist Kristen Coyle, point to the stability and permanency of her home with her two other children in it. T66, 75, 76, 77. LF 122. Appellant also testified regarding her new ability to handle stress, maintain sobriety, as well as her new life, due to her extensive support network and new skills. T 177, 178, 183, 198. The evidence simply does not support a finding that she or her home were not stable at the time of trial. In its findings the Court avoided finding that there was little likelihood that the child could be returned to the home at a n early date or that any harmful conditions existed in Appellant's home, which could also be grounds for termination under 211.447.4 (3). The findings that Appellant failed to adjust her circumstances to provide a proper home are against the weight of the evidence given the Boone Bounty DFS Home Study's recommendations.

Appellant has already addressed in a previous section of this brief the finding by the Court that Appellant suffered a chemical dependency which prevented care custody and control from being provided.

E. The Trial Court Erred in terminating the parental rights of the Appellant in that there was insufficient clear cogent and convincing evidence to support the findings made pursuant to 211.447.4 (6).

The Court found that Appellant was unfit to be a party to the parent child relationship because the mother's rights were terminated involuntarily to another child on October 4, 2000. Appellant states that even if the involuntary termination of parental rights took place within a three year period, this is not enough to find unfitness. Unfitness is rebuttable and can be overcome by evidence that the circumstances that led to the termination of the parent's parental rights no longer exist or that the parent is no longer unfit. In Re TAS, 32 SW 3d 805, 815 (Mo App WD 2001). The trial court is clearly required to determine that the parent is currently unfit. Some testimony at trial was adduced that issues involving drug abuse were involved in the previous termination, as well as the instability resulting from this lifestyle. Appellant refers to previous sections of this brief, all of which contain references to Appellants freedom from drug usage, stability , and fitness, to refute that Appellant could be found currently unfit because of past drug abuse. No clear cogent, and convincing evidence showed any sign of drug abuse or the unstable lifestyle resulting from this in Appellant's current situation. The McCambridge Center therapist, the Boone County DFS worker who did the Home Study, and Appellant herself all gave ample testimony of the extensive support system, the sobriety, and the fitness of Appellant at the time of trial and since October 2000, when she started to attend McCambridge Center, as has been stated previously in this brief. The Home Study also references the fitness of Appellant as of September 2001, when it was completed. LF 111-121. The evidence adduced at trial simply does not support the assumption that the Appellant is currently an unfit parent to the two children in her home, or that she would be an unfit parent to this child , or that conditions

now exist which contributed to the prior termination of parental rights. Appellant has adequately rebutted the presumption and the findings were insufficient under the statute.

F. The trial court erred in terminating the parental rights of the Appellant under 211.447.4 because this section of the statute violated the substantive due process guarantees of the Federal Constitution US.CA Constitution Amendment 14 and is invalid and void.

The new ground of parental unfitness based upon the presumption that a parent if unfit is his or her child has been is foster care for fifteen of the most recent twenty- two months violated the substantive due process clause of the federal and Missouri Constitutions. Although this issue has not been decided by the Missouri Courts, the State of Illinois Supreme Court has spoken to this issue, in In Re HG, 757 NE 2d 864 (Ill 2001). The Illinois statute, like the Missouri statute, created a statutory "presumption of parental unfitness based upon a judicial finding that the parents child has been in foster care for "15 months out of any 22 month period. Id. At 871. The Court The Court stated that the statute could not survive strict scrutiny, and was not narrowly tailored to the compelling goal of identifying unfit parents because it fails to account for the fact that, in many cases, the length of the child's stay in foster care has nothing to do with the parent's ability or inability to safely care for the child but, instead is due to circumstances beyond the parents control, In Re HG at 872. The Court states that not all time frames in the Adoption and Safe Families Act are unconstitutional, but other time frames " measure some form of parental conduct in action or inability that related to competence or the care given to the child" Id. at 873. Although the State of Illinois argued it had compelling interest in permanency, the

Court pointed out that this permanency "comes only after a finding that a parent is unfit." Id. at 874. The Court stated that the statute was not narrowly tailored to serve a compelling state interest of protecting the safety and well-being of the children of this state. We hold therefore that section 1(D) (M-1) violates the substanitive due process guarantees of the federal and state constitutions." Id at 874.

Whole Appellant does not dispute that her child has been in foster care for fifteen out twenty-two months she avers that this Section of 211.447.4 is invalid and void because it violates the substantive due process clause of the Federal and the Missouri Constitutions.

V. CONCLUSION

The trail court's order terminating Appellant's parental rights under the facts of this case was not supported by clear cogent and convincing evidence. In addition, Appellant challenges the validity under the Constitution of the United States and the State of Missouri of the ground for termination of parental rights based solely on the length of time a child is in state custody, this being fifteen out of twenty two months. For all the reasons set forth above, Appellant respectfully prays that this Court reverse the trial Court's order terminating her parental rights.

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Laura E. Sidel # 34523
7912 Bonhomme Ste 204
Clayton MO 63105
314-727-5259
314-727-6181 fax
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two (2) true copies of this Brief were hand delivered or sent by first class mail to Kathleen Kiser, Attroney for Juvenile Officer, 501 S. Brentwood Ave. Clayton MO 63105; David Porta, Guardian Ad Litem, 144 W. Lockwood, Suite 100, St. Louis MO 63119, Lynn Phoomsathan and Monique Mitalovich at Missouri Division of Family Services, 9900 Page Blvd., St. Louis MO 63132

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