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All statutory references are to Revised Statutes of Missouri, 2001. References to the Legal File are denoted "LF". References to Respondent's Supplemental Legal File are denoted "RSLF." References to the Trial Transcript are denoted "T".

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Jurisdictional Statement

Appellant-Mother appeals from an Order of Commissioner Chester B. Hayes, Division 62 of the Family Court of St. Louis County, terminating her parental rights to her minor child.

This appeal does not involve the title to any State office or the construction of any Missouri revenue law. However, Appellant inaccurately states that the issues in her appeal do not involve the validity of a treaty or statute of the United States or the validity of a statute or provision of the Constitution of the State of Missouri. Appellant's Argument F states that Section 211.447.2(1) RSMo 2000 "violates the substantive due process guarantees of the federal constitution, U.S.C.A. Const. Amend. 14 and is therefore invalid and void." (Appellant's brief, pages 11 and 26-27). Appellant raised the federal constitutional issue at trial (T5) and in her motion to set aside the trial court's order. (LF129).

Respondent states that the court of appeals does have jurisdiction of this appeal. Generally, if a case involves the constitutional validity of a state statute, the supreme court has exclusive appellate jurisdiction. Constitution of Missouri, Article V, Section 3. However, raising a constitutional question does not of itself deprive the appellate court of power to hear an issue. In re G.P.C., 28 S.W.3d 357, 362 (Mo.App.E.D. 2000). Only where the constitutional claim is "substantial and real, as opposed to merely colorable," will the appellate court lack jurisdiction to determine it. Id. A claim is "merely colorable" when preliminary inquiry discloses the contention is obviously unsubstantial and inefficient, either in fact or

law, so as to be plainly without merit and a mere pretense. Hampton Foods v. Wetterau Finance, 831 S.W.2d 699 (Mo.App.E.D. 1992).

Appellant's four primary arguments on appeal involve the merits of this case. Appellant asks the court to find that evidence was insufficient to support termination of her parental rights under four subsections of Section 211.447. RSMo. The constitutional claim relates only to the fifth ground for termination. Preliminary inquiry reveals that the trial court found clear, cogent and convincing evidence to terminate Appellant's parental rights on five separate grounds. The existence of even one of these grounds is sufficient to support the trial court's determination. In re C.N.W., 26 S.W.3d 386, 394 (Mo.App.E.D. 2000). Therefore, the constitutional claim is unsubstantial, without merit and merely colorable, and the court of appeals has appellate jurisdiction in this case.

The Standard of Review and the Standard of Proof

The trial court's order will be affirmed unless no substantial evidence supports it, it is contrary to the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976); In re C.N.W., 26 S.W.3d 386, 393 (Mo.App.E.D. 2000). The facts and the reasonable inferences therefrom are viewed in the light most favorable to the judgment, and great deference is given to the trial court with respect to findings of fact and credibility of witnesses. In re C.N.W. at 386.

The trial court may terminate parental rights where one or more of the statutory grounds set forth in Section 211.447 is found by clear, cogent and convincing evidence and where termination is in the best interest of the child. Id. and Section 211.447.5 RSMo. The existence of even one statutory ground for termination is sufficient if termination is in the child's best interests. In re C.N.W. at 394. Clear, cogent and convincing evidence leaves the finder of fact "with an abiding conviction that the evidence is true." In Interest of F.N.M., 951 S.W.2d 702, 705 (Mo.App.E.D. 1997). This standard of proof may be met even though the court has contrary evidence before it. Id. The court of appeals defers to the trial court's ability to determine witnesses' credibility and to choose between conflicting evidence. In re C.N.W. at 394. The presence of evidence in the record that might support another conclusion does not necessarily establish the trial court's decision is against the weight of the evidence. Id. In reviewing a court-tried case to determine whether the court's judgment is grounded upon sufficient evidence, the court of appeals must act with caution and reverse only upon a firm belief that the judgment is wrong. In re C.N.W. at 393.

STATEMENT OF FACTS

Counsel for Respondent Juvenile Officer does not accept the facts as submitted by Appellant.

Appellant-Mother Eartha Brown appeals the termination of her parental rights to her minor child E.L.B., born April 24, 1999. (LF30 and RSLF133).

E.L.B. ("the child") came into the care of the Missouri Division of Family Services ("DFS") on October 4, 1999, when Appellant was arrested on an outstanding warrant at St. Louis City Family Court after proceedings for involuntary termination of her parental rights for another child, D.A.B. (LF8, RSLF9-12, 30, 125-130, T39). St. Louis City Family Court entered its Protective Custody Order on October 6, 1999, placing the child with DFS. (RSLF13) and the St. Louis City Juvenile Officer City filed the original petition for abuse and neglect pursuant to Section 211.031 RSMo. The petition alleged the child is without proper care, custody and support, in that Appellant was taken into custody by St. Louis City police and there were no appropriate relative resources available to care for the child. (LF10-11, RSLF37). Because Appellant and her child resided at 8845 Ramona in St. Louis County, St. Louis City court ordered proceedings to be transferred to St. Louis County. (LF10-11). On November 8, 1999, St. Louis County Family Court accepted transfer of jurisdiction (LF12) and entered its Protective Custody Order, again placing custody of the child with DFS. (RSLF22). David Porta was appointed Guardian ad Litem for the child on November 15, 1999. (RSLF25). On December 6, 1999, the St. Louis County Juvenile Officer amended the original petition to reflect that a suitable relative resource had been located. (LF13). In fact, the child was placed in the home of his maternal great aunt, Ethel Brice ("Brice"), on October 5, 1999. (RSLF30).

At a hearing on December 6, 1999, St. Louis County Family Court found the allegations of the petition as amended to be true based on submission of

exhibits. (LF14-16). Exhibit #2 (RSLF27-33), the December 1, 1999, report of DFS worker Mary Lincoln ("Lincoln"), indicates that DFS had been continuously involved with Appellant and her family since August 16, 1995. (RSLF27). The court found Exhibit #4, Lincoln's Affidavit dated December 3, 1999, (RSLF36-37) to be true (LF14). The Affidavit documents the following efforts to provide services to Appellant prior to the child's removal from her home:

a. home visits, phone calls and office visits
b. referrals for drug treatment at four centers
c. intensive in-home services (June 21 - July 30, 1999)
d. referrals to Family Support Program and Safe Crib Program
e. referrals for housing and utility assistance
f. referrals for individual counseling, drug treatment and parent counseling
g. resources for job training and employment. (RSLF36-37)

At the hearing December 6, 1999, the court took jurisdiction over the child (LF 15) and entered orders as follows:

a. legal custody of the child placed with DFS - current physical custody with Brice;
b. visitation granted to mother as approved and supervised by DFS;
c. DFS to submit a service plan for court approval within 45 days;
d. mother to participate in drug evaluation and drug screens as requested by DFS and follow recommended treatment. (LF15-16).

The Commissioner's order was adopted and confirmed as the judgment of the court on December 7, 1999. (LF16)

Appellant's Service Plan ("Plan") was filed with the court on January 13, 2000 (LF17-19), approved by Commissioner Hayes on January 21, 2000 (LF19), and amended on February 4, 2000, to strike the Deputy Juvenile Officer's signature on the line for "Parent" on the Plan, page 3. (LF20). Appellant-Mother

failed to sign the Service Plan herself. (LF19, T32). Lincoln's case record showed Appellant was informed of the contents and requirements of the Plan. Lincoln gave copies of the Plan to Appellant on January 27, 2000 (T18) and July 28, 2000 (T20-21) and she mailed copies to Appellant on April 12 and May 24, 2000 (T19-20), February 1, 2001 (T21). In addition, Lincoln spoke with Appellant and reviewed the Plan requirements on five occasions in 2000: January 27(T18); March 7(T18-19); May 23(T19); and July 24 and 28 (T20-21).

The Plan states that DFS gives St. Louis County Family Court a written plan to help parents obtain physical custody of children who are not presently living with them. (LF17). It further states:

> "It is the hope of the Division of Family Services that by doing all of the things in this plan, physical custody of your child will be returned to you. However, if you do not do all the things in this plan, or if this plan is not followed, you may lose your parental rights to your child permanently." (LF17)

For Appellant's requirements, the Service Plan states that [Mother] must:

1. visit the child twice a month, following DFS procedures;
2. make financial contributions toward support of the child,
3. obtain
    a. drug / alcohol evaluation / psychological / psychiatric evaluations approved by DFS,
    b. drug / alcohol screening within 2 days of DFS requests,
    c. and maintain housing meeting DFS minimum standards,
    d. daycare as approved by DFS (LF 17);
4. satisfactorily attend and participate in
    a. psychological / psychiatric counseling,
    b. support group for recovering chemical dependency,
    c. parenting / homemaker's skill training or class,
    d. job training classes,
    e. alcohol / drug abuse treatment program,
    f. any other recommended program, class or course of action

5. inform DFS worker about changes in address, telephone number, job and people living in mother's home;
6. cooperate with and utilize services offered / provided by DFS and/or the court;
7. comply with all Family Court orders;
8. sign release of information forms at DFS request;
9. provide DFS proof of attendance at or participation in required programs and classes. (LF18)

For DFS' part, the Service Plan states that the DFS worker must do the following:

A. arrange at least two visits each month with the child, at the parent's request; explain scheduling and visitation procedures to the parent;
B. provide the parent information and services, when requested, to help the parent comply with requirements of the Plan and with court orders;
C. explain to the parent her parental obligation to support the child;
D. inform the parent of significant events in the child's life;
E. comply with all Family Court orders currently in effect;
F. inform the parent of changes of DFS social worker assigned to her case. (LF18-19).

A permanency hearing was held June 15, 2000, at which Commissioner Hayes entered the following judgment and order, adopted and confirmed as the judgment of the court by Judge Susan Block (LF21-22): (1) the court continued jurisdiction over the child; (2) legal custody was continued with DFS and physical custody with Brice, supervised by DFS; (3) visitation was granted to mother, to be arranged and supervised by DFS; (4) Margaret Donnelly was appointed to represent Brice in guardianship proceedings; (5) DFS was ordered to assist Brice in pursuing guardianship. The permanency plan was guardianship. All prior orders remained in effect.

In the June 15 Order, the Court adopted the contents of the May 3, 2000, DFS report (Juvenile Officer's exhibit #1) (RSLF54-60) as the Court's findings of

fact pertaining to the child's placement. (LF21). That report, signed by Lincoln, stated that the child was meeting developmental milestones, appeared happy and healthy, and was "obviously bonded to Ms. Brice." (RSLF57). Lincoln's report, admitted into evidence, stated that on January 24, 2000, Appellant "stated that she knew that she needed to get back into drug treatment…" (RSLF58); that Appellant failed to attend a family support meeting at the DFS office on February 3, 2000 (RSLF58); that Appellant called Lincoln on March 27, 2000, to say she was incarcerated in the Macon County Jail in Decatur, Illinois, on a past charge of writing bad checks (RSLF58); that Appellant agreed to attend but failed to appear at a permanency planning review on April 11, 2000 (RSLF59); that Appellant had visited the child only twice since December, 1999, for a total of an hour (RSLF59); that Appellant arranged at least four visits between February and May but did not follow through (RSLF59); and that Appellant had not followed through with the terms of her Service Plan (RSLF60).

Following a Permanency Hearing on November 16, 2000, Commissioner Terry Wiese entered Findings / Recommendation, Order, Judgment and Decree, adopted and confirmed as the Judgment of the Court by Judge Block on November 17. (LF23-29). The Deputy Juvenile Officer's Permanency Report was adopted as the Court's findings of fact. (LF23). That Permanency Report noted that Appellant's "noncooperation with the court orders" was a possible barrier to reunification. (RSLF66). Evidence was presented that paternity testing excluded the named father of the child. (RSLF67). Lincoln's DFS report to the court dated

November 9, 2000 (RSLF68-75), and Lincoln's Affidavit, dated November 13, 2000 (RSLF76-77), were also admitted into evidence. Lincoln's report states that Appellant visited the child at the DFS office on July 28, 2000. (RSLF72). She further states "[t]his visit did not go well as Eddie did not know his mother and wanted to be with Ms. Brice." (RSLF72) At that meeting, Appellant told Lincoln that she was in drug treatment at New Beginnings. (RSLF72). On August 4, 2000, Appellant notified Lincoln that she was incarcerated at the St. Louis County Justice Center (RSLF72), and on August 28, 2000, Appellant telephoned Lincoln from the Macon County Jail in Illinois, where she had been transferred. (RSLF73). Lincoln's report states that Appellant missed a scheduled visit with the child on September 9, 2000 (RSLF73), and she had a two-hour unscheduled visit, including an overnight stay, at Brice's home on October 26, 2000. (RSLF73). Lincoln's Affidavit documented services available to Appellant since removal of the child from his home and further stated that Appellant had not complied with her Service Plan, had limited contact with the child, had kept one scheduled office appointment in the previous six months, had not maintained permanent housing (RSLF76), had entered drug treatment but had not obtained requested drug screens nor confirmation of counseling or psychological evaluations. (RSLF76).

The November 16, 2000, Order continued jurisdiction over the child and kept legal custody with DFS and physical custody with Brice. (LF26) The order shows the permanency plan as adoption (LF23), directs the juvenile officer to review the case for filing of a Petition to Terminate Parental Rights (LF25) and

relieves DFS of continuing reasonable efforts to reunite the parent and child. (LF24). Appellant was granted visitation with the child as arranged and supervised by DFS and ordered to participate in a DFS-approved substance abuse program. (LF26). All prior court orders remained in effect. (LF28).

In October or November, 2000, Appellant moved to Columbia, Missouri, to enter the McCambridge Center for drug treatment. (T27)

On January 9, 2001, Lincoln informed the court by letter (RSLF85-87) that Brice had taken the child to visit family in Minnesota (RSLF86). They moved to Minnesota in January when Brice secured better employment, and remained there through the date of the termination hearing (T23). Regarding Brice's move, Appellant told Lincoln she "felt comfortable" that her aunt and child were staying in Minnesota with Appellant's sister. (RSLF86). Lincoln's letter indicated she would initiate Interstate Compact proceedings with Minnesota. (RSLF87).

On April 19, 2001, the Juvenile Officer filed the Petition to Terminate Parental Rights. (LF30). The petition alleged that termination was sought for the following reasons:

a. The child has been abused or neglected. The abuse or neglect was adjudicated as true on December 6, 1999.

b. The child has been under the jurisdiction of the court for at least one year and (LF30)
    i. the conditions which led to assumption of jurisdiction still persist, or
    ii. conditions of a potentially harmful nature continue to exist such that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the mother in the near future, or

iii. the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home. (LF31).

c. The mother and the unknown father [not a party to this appeal] have without good cause and for a period of six months or longer immediately prior to the filing of this petition, abandoned the child, left the child without provision for parental support and without making arrangements to visit or communicate with the child although able to do so. (LF31)

d. The mother is unfit to be a party to the parent-child relationship because her parental rights were involuntarily terminated in cause number 59701161-J in St. Louis City Family Court on October 4, 2000. (LF31)

The initial hearing for termination of parental rights was set for April 25, 2001. (LF32). The DFS Investigative Report and Social Study (RSLF93-108) was filed with the court on April 19. (RSLF92). On April 25, counsel was appointed for Appellant, and the initial hearing was continued to May 22, to allow Appellant to consult with her attorney. (RSLF109). On May 22, Appellant requested a trial, and the initial hearing was continued to July 13. (RSLF113). Also on May 22, the court granted Appellant's motion to have DFS submit a homestudy through Boone County on Appellant's current situation. (LF35). The completed homestudy was sent to St. Louis County DFS in September. (T118, 120). The July 13 hearing was reset to July 24 because Appellant was incarcerated in Illinois. (RSLF114). On July 24, the court facility was without electric power (RSLF115), and the hearing was continued to September 25, at which time Appellant's counsel withdrew because of a conflict of interest. (RSLF118) Laura Sidel was appointed as

Appellant's new attorney (RSLF 116), and the hearing was continued to December 6, to allow preparation for trial. (RSLF119).

In the interim, on October 22, 2001, the Juvenile Officer filed the Second Amendment to Petition to Terminate Parental Rights to add a named and/or natural father and state that he was deceased. (LF33). [N.B. The court file does not refer to or contain any document titled "First Amendment to Petition."] On October 25, 2001, the Third Amendment to Petition to Terminate Parental Rights was filed, alleging that the child had been in foster care for at least fifteen of the most recent twenty-two months. (RSLF121).

The Petition to Terminate Parental Rights was called and partially heard December 6, 2001, with testimony concluded December 21, 2001. (RSLF123 and 132). Lynn Phoomsathan ("Phoomsathan"), a DFS adoption supervisor and also Mary Lincoln's supervisor, testified for DFS at the hearing. (T10). Phoomsathan assumed the case in July, 2001, following Mary Lincoln's death in June. (T11 and 14). The complete DFS narrative, compiled by Lincoln and Phoomsathan between November, 1999, and December, 2001, was admitted into evidence at the hearing. (T58). Phoomsathan testified that termination of Appellant's parental rights would be in the child's best interest. (T51). David Porta, the child's guardian ad litem, recommended to the Court that termination of Appellant's parental rights was in the child's best interests. (T238). On December 21, 2001, the cause was taken as heard and submitted. (RSLF132).

On February 6, 2002, Commissioner Hayes signed the Findings / Recommendation, Order, Judgment and Decree of Court (RSLF133-137). The Commissioner's Order was adopted and confirmed as Judgment of the Court by Judge Block on February 25, 2002. The Court found by clear, cogent and convincing evidence that all allegations of the Petition to Terminate Parental Rights, as amended by the Second and Third Amendments, were true (RSLF133-136), and that based on the evidence presented, it was in the best interests and welfare of the child that Appellant's parental rights be terminated. (RSLF136).

On March 11, 2002, Appellant's counsel filed a Motion to Set Aside Findings / Recommendation, Order, Judgment and Decree of Court and to Grant a Rehearing (RSLF138), denied by Judge Block on March 19, 2002. (RSLF138). This appeal followed.

ARGUMENTS

Argument I. The trial court properly found by clear, cogent and convincing evidence that grounds did exist to support the termination of Appellant's parental rights pursuant to Section 211.447.4(1) RSMo. 2001 and that said termination was in the best interests of the child.

The juvenile officer may file a petition to terminate the parental rights of a child's parent when it appears that …a child over the age of one year at the time of filing of the petition has been abandoned. Section 211.447.4(1) RSMo. The court shall find that the child has been abandoned if, for a period of six months or longer, 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. Section 447.4(1)(b).

The court may terminate the rights of a parent to a child upon a petition filed by the juvenile officer…if the court finds that the 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 4. Section 211.447.5 RSMo.

In addition, when considering whether to terminate the parent-child relationship under the abandonment grounds of Section 447.4(1)(b), the court must evaluate and make findings on the following factors:

> (1) the emotional ties to the birth parent;
>
> (2) the extent to which the parent has maintained regular visitation or other contact with the child;
>
> (3) the extent of payment by the parent for the cost of care and maintenance of the child when financially able to do so including the time the child is in the custody of DFS;
>
> (4) whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time;
>
> (5) the parent's disinterest in or lack of commitment to the child;
>
> (6) the conviction of the parent of a felony offense such that the child would be deprived of a stable home for a period of years; and
>
> (7) deliberate acts of the parent…that subject the child to a substantial risk of physical or mental harm.
>
> Section 211.447.6 RSMo.

The trial court found by clear, cogent and convincing evidence that Appellant had, indeed, left the child for a period of six months or longer without provision for parental support and without arranging visits or communication with the child, although able to do so. (RSLF133). The key time frame under the statute is the six months prior to the filing of the Petition to Terminate Parental Rights, in this case October 19, 2000 to April 19, 2001. As discussed below, during this crucial time period, Appellant failed to support her child; she saw him only once at a court hearing, and she did not communicate or schedule visits with the child.

Regarding financial support for the child, Phoomsathan of DFS testified that between October, 1999 and December, 2001, DFS provided Medicaid and paid Brice a monthly stipend of $204 for the child's care. (T28). Appellant paid no financial support and provided no clothing, toys, food or other items for the child. (T24, 28-29). Lincoln had reviewed with Appellant her parental requirement to support her child at least four times during 2000: January 27 (T18); March 7 (T19); May 23 (T19); and July 24 (T20). During that time, Appellant was employed part-time (T25, 216). Appellant testified she had been employed between October 1999 and December, 2001 at temporary jobs for Corporate Staffing and Snelling Temporary Service. (T216). She also admitted that she had provided no financial support, food, clothing or other necessities for the child. (T217). Appellant was financially able but failed to contribute any of her earnings to support her child. This was not the first time Appellant had faced the requirement to support a child. But, as she stated, "I was using, how could I make

contributions?" (T222). However, [e]ven a minimal contribution evinces the parent's intent to continue the parent-child relationship. In re C.M.D., 18 S.W.3d 556, 562 (Mo.App.W.D. 2000). Evidence of this intent is lacking when a parent fails to make any contribution, no matter how small the amount." Id. Appellant's failure to make any contribution to support her child demonstrates her lack of intent to continue this parent-child relationship.

Regarding communication and visits with the child, Phoomsathan testified that Appellant had no regular contact with the child. (T48). She visited him only four times after October, 1999, when he came into DFS custody at the age of six months. (T21-23). Appellant admitted she had only four visits with the child between October, 1999 and October, 2000. (T211). Appellant knew her child was placed with her own aunt; she clearly knew where her child lived and how to contact her aunt. (T22). Yet this mother did not visit or communicate with her infant child from October 4, 1999, until January 25, 2000, more than three months after he came into custody. Even then, she spent only thirty minutes with him. (T22). The second visit was February 5, 2000, and the third visit was not until July 28, 2000. (T22, 47). That visit lasted one hour, and Phoomsathan described the visit as "very difficult…[he] cried because he did not seem to be familiar with [Appellant]." (T22) The fourth visit was on October 14, 2000, and Appellant extended the visit from two hours to an overnight stay at Brice's home. (T23, 47). Appellant saw her child only once more, at the court hearing on March 12, 2001 (T23), a month before the termination petition was filed. Appellant did make three

requests for visits with the child in 2000: February 10 or 11 (T41); March 7 (T42); and for his first birthday, April 24 (T43-44). However, Appellant failed to show up for any of those visits. She admitted that "I was using on and off…during the time period I was scheduling visits." (T199) Thus, at a critical time in the life of this very young child, when he was between six months and two years old, Appellant spent only eighteen hours with him. (T47).

Appellant argues she was unable to visit the child because he was out of state. However, the child did not go to Minnesota until December, 2000. He was in St. Louis with Appellant's own aunt for fourteen months, and Appellant managed only four visits with him. Phoomsathan testified that Appellant did not inquire during 2001 about scheduling visits. (T101) Had she done so, DFS would have provided transportation and reimbursement of expenses (T103-104) even though the agency was relieved of reasonable efforts in November, 2000. (RSLF78). Appellant's argument is without merit.

Appellant also argues she has not abandoned the child because she has telephoned him regularly (T199-201) and sent him four outfits during 2001 (T219). However, "[a] parent's conduct after the filing of the termination petition cannot constitute the sole consideration of the trial court's decision." In re T.E., 35 S.W.3d 497, 504 (Mo.App.E.D. 2001). The statute provides that "the court may attach little or no weight to infrequent visitations, communications or contributions." Section 211.447.7 RSMo. The court properly found that any efforts

respondent-mother made to visit or communicate with the minor child were "token." (RSLF133). The court properly found Appellant abandoned her child.

Upon finding that a termination ground exists, the court must still find that termination is in the best interests of the child. Section 211.447.5 RSMo. "Although reunification of the family is the desired outcome of DFS involvement, the best interest of the child takes priority over reunification." In Interest of S.H., 915 S.W.2d 399, 405 (Mo.App.W.D. 1996). Under Section 211.447.6, when appropriate and applicable to the case, the court is required to evaluate and make findings on seven factors.

Section 211.447.6(1). The court found the child has no emotional ties to Appellant. (RSLF136). Phoomsathan testified she did not believe Eddie knew Appellant was his mother and he regards Brice as his mother. (T46). Appellant admitted Eddie was strongly bonded to Brice. (T226). Appellant's witness Angela Anderson, a Boone County DFS worker, testified that having had only five visits with the child, Appellant's bond with him "would be very limited." (T155). The court properly found that the child has no emotional ties to Appellant.

Section 211.447.6(2). The court found that Appellant failed to maintain regular visits or other contacts with the child. (RSLF136). As discussed above, Appellant visited the child only four times during the first year he was in DFS care, and she saw him a fifth time at a 2001 court hearing. The child was with Appellant's aunt; Appellant knew where he lived and how to contact both Lincoln and her aunt to arrange visits. Apart from short times of incarceration, Appellant did not show

that she was unable to visit her child. In the life of such a young child, this very limited contact does not begin to meet his parenting needs. The court properly found that Appellant failed to maintain regular contacts or visits with the child.

Section 211.447.6(3). The court found that although financially able, Appellant failed to contribute to the costs of care and maintenance for the child. (RSLF136). Appellant was employed at various times while the child was in DFS care. She had "minimum-wage type jobs" (T155), and she testified that between October, 1999, and December, 2001, she worked at temporary jobs for Corporate Staffing and Snelling Temporary Services (T216). There was also testimony that in 2001 while she was living in Columbia, she braided hair for $10 to $15 a client (T219) and received public assistance in the form of a $234 TANF grant and food stamps. (T158-159). However, Appellant did not contribute any of her earnings or grant money for the support of this child. A contribution of even a few dollars a month would have been evidence of some effort on Appellant's part to support her child. She gave nothing. The court properly found that Appellant failed, although financially able, to contribute to the costs of care and maintenance for the child.

Section 211.447.6(4). The court found that no additional services offered to Appellant would be likely to bring about reunification within an ascertainable period of time. (RSLF136). At the hearing, Phoomsathan testified that before November, 2000, and relief from making reasonable efforts for reunification, DFS had offered numerous services to help Appellant regain custody of her child. As discussed in the Statement of Facts, the many services offered to Appellant are

also documented in Lincoln's affidavits, admitted into evidence on December 6, 1999 (RSLF36) and November 16, 2000 (RSLF76). However, Appellant failed to avail herself of these services, including psychological and psychiatric counseling, chemical dependency support groups, parenting and homemaking skills classes, job training, and drug and alcohol treatment programs. (T35-36). Phoomsathan testified she believed that Appellant had been given "numerous services…many opportunities to work toward reunification" and that no additional services could be provided to allow reunification. (T49). The court properly found likewise.

Section 211.447.6(5). The court found that Appellant was disinterested in or lacked commitment to the child. Phoomsathan testified Appellant showed her disinterest and lack of commitment by her lack of visitation and support and her failure to follow through with the provisions of her service plan. (T49). This child came into DFS care immediately following a St. Louis City Court hearing at which Appellant's rights to another child were terminated. She had experienced the consequences of noncompliance. Mary Lincoln documented many meetings and conversations with Appellant when Lincoln discussed Appellant's responsibilities under the plan. (T18-21). Appellant said she did not want her rights terminated again (T19, 21), clearly an indication that she understood the consequences of her disinterest and lack of commitment to the child. (T38). The court properly entered findings that Appellant lacked interest in and commitment to her child.

Factors of 211.447.6(6) and (7) were inapplicable to Appellant. She had no felony conviction that would interfere with her care of the child (T49), although

she had been incarcerated three times between October, 1999 and December, 2001. (T50). There was no evidence that she had committed any deliberate acts of abuse which subjected the child to physical or mental harm.

In view of all this evidence, the court properly found that termination of Appellant's parental rights was in the best interests of this child. Further, the court properly found by clear, cogent and convincing evidence that abandonment grounds existed to terminate Appellant's parental rights under Section 211.447.4(1) RSMo. Counsel for Respondent respectfully asks that the Court of Appeals affirm the order of the trial court on this point.

Argument II. The trial court properly found by clear, cogent and convincing evidence that grounds did exist to support the termination of Appellant's parental rights pursuant to Section 211.447.4(2) RSMo. 2001 and that said termination was in the best interests of the child.

The juvenile officer may file a petition to terminate the parental rights of a child's parent when it appears that …the child has been abused or neglected. Section 211.447.4(2). In determining whether to terminate parental rights pursuant to this subdivision, the court shall consider and make findings on four conditions or acts of the parent:

a. a mental condition 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;

b. 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;

c. a severe act or recurrent acts of physical, emotional or sexual abuse toward the child by the parent; and

d. repeated or continuous failure by the parent, although physically or financially able, 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. Section 211.447.4(2)(a-d) RSMo.

The court may terminate the rights of a parent to a child upon the petition filed by the juvenile officer if the court finds that the termination is in the best interest of the child and when it appears by clear, cogent and convincing evidence that grounds for termination exist pursuant to Section 211.447.4(2). Section 211.447.5 RSMo. When considering whether to terminate the parent-child relationship pursuant to this subsection, the court is required to evaluate and make findings on the same seven factors enumerated and discussed in Argument I above. Section 211.447.6 RSMo.

Section 211.447(2) RSMo provides for the termination of parental rights when a child has been abused or neglected. "The ground of neglect as a basis for terminating parental rights is established by showing the child has been adjudicated neglected. It is not necessary to show the parents have been neglectful." In Interest of P.J.M., 926 S.W.2d 223, 224 (Mo.App. 1996). The initial petition in this case was filed in St. Louis City Court on October 8, 1999. (RSLF14), alleging "the Child is without proper care, custody or support, in that…

(1) Prior to the filing of this petition, the child was residing with Eartha Brown, his mother, at 8854 Ramona in St. Louis County; and;

(2) On or about October 4, 1999, Eartha Brown was taken into custody by the police of the City of St. Louis; and

(3) There are no appropriate relative resources to care for the child at this time. (LF8).

Following transfer of the case to St. Louis County, the Juvenile Officer filed a motion, granted by the court, to amend the petition to strike (3) because a suitable relative resource had been located. (LF13). The hearing on the Petition was held on December 6, 1999, and the court found that the allegations of the petition as amended were true based on submission of evidence. (LF14). This adjudication establishes that the child was neglected, and therefore, under Section 211.447.4(2), the abuse or neglect ground for termination is fully established.

To terminate parental rights once neglect is established, the court must make findings on four factors: (a) mental condition, (b) chemical dependency, (c) severe or recurrent acts of abuse, and (d) failure to provide the necessary food, clothing, shelter, care and control. Section 211.447.4(2). The court found only (b) and (d) applicable to Appellant. (RSLF134). As to (b), the court found

> "the competent evidence presented showed that Appellant suffers from a chemical dependency which prevents her from consistently providing the necessary care, custody and control for the child. The respondent-mother entered her current drug treatment program in October 2000. She had previously been enrolled in two other drug treatment programs. She has not completed her current treatment program and therefore her chemical dependency continues to prevent her from providing the necessary care, custody and control for the child." (RSLF134).

Appellant has a long history of substance abuse. Robin McCartney ("McCartney"), her therapist at McCambridge Center in Columbia testified that Appellant had used crack cocaine daily for ten years. (T66, 89). Appellant herself

admitted to a "serious cocaine addiction problem." (T176). She also admitted to unsuccessful prior participation in at least four drug treatment programs. (T177, 216). She stated she had been clean for ten months when she started using again in October, 1999, after this child came into DFS care. (T232-233). A year later, Appellant entered McCambridge Center for treatment. Appellant stated she had been sober fourteen months (T177) and that she had "never been clean this long before." (T233). McCartney testified that at McCambridge Center, Appellant had twenty-nine drug drops; however, only five were tested for results; all were negative. (T87). However, McCartney admitted that after July 23, 2001, no drug screen tests were done (T88-89), and she relied on Appellant's self-reports that she remained clean. (T83). Angela Anderson, Appellant's Boone County DFS worker, testified that Appellant's drug history was a problem because there was “always a chance of relapse.” (T142). Phoomsathan testified that without consistent drug drops, she could not be certain that Appellant was currently drug-free. (T29).

The court could reasonably have found that Appellant suffers from a chemical dependency which continues to prevent her from caring for her child. (RSLF134) "All grounds for termination must to some extent look to past conduct because the past provides vital clues to present and future conduct. In re T.E., 35 S.W.3d 497, 504 (Mo.App.E.D. 2001). Otherwise, the parent may argue that he or she has reformed since the filing of the termination petition; reformation having occurred while the child was away." Id. "A parent's conduct after the filing of the termination petition cannot constitute the sole consideration of the trial court's

decision." Id. "To allow only review of very recent events is both short sighted and dangerous." In Interest of J.M.L., 917 S.W.2d 193, 196 (Mo.App.W.D. 1996). The court was presented evidence of Appellant's long history of drug abuse, addiction and relapse. Appellant admitted she was using drugs during 2000; she emphasized her 14 months' sobriety, but stated it was the longest period she had ever been clean. There no evidence she was currently clean because there had been no drug screen test for four and a half months prior to the termination hearing. The court was free to judge the credibility of witnesses and to assess the weight to be given to evidence. The court properly found that ample and competent evidence showed Appellant suffers from a chemical dependency which prevents her from consistently providing care, custody and control for the child.

As to (d), the court found "[t]he competent evidence presented showed that respondent mother [E.E.B.] has repeatedly and continuously failed, although physically or financially able, 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." (RSLF134) Appellant admitted she had made no financial contributions for the child's care. (T213). She stated she had been employed in temporary jobs at Corporate Staffing and Snelling Personnel. (T 216). Therefore, Appellant was financially able to provide some support for the child. Appellant admitted, "I failed to provide him food, clothing, shelter on a regular basis in the past." (T 214). Her response at one point was "I was using--

how could I make contributions?" (T 222). The court properly entered its findings that Appellant failed to provide food, clothing, shelter and care.

The court found by clear, cogent and convincing evidence that grounds existed to terminate parental rights under Section 211.447.4(2). Findings were properly entered as to the four required conditions or acts of the parent. The court clearly had ample reason to find that termination of Appellant's parental rights was in the best interest of this child.

Section 211.447.6 requires the court to evaluate and make additional findings as to seven factors if the court terminates parental rights under Section 211.447.4(2). Please refer to the discussion of the seven findings as set out in Argument I above.

Considering all the evidence, the court properly found that termination of Appellant's parental rights was in the best interests of this child. The court also properly found by clear, cogent and convincing evidence that grounds existed to terminate Appellant's parental rights under Section 211.447.4(2) RSMo. Counsel for Respondent respectfully requests that the Court of Appeals affirm the trial court's order on this point.

Argument III. The trial court properly found by clear, cogent and convincing evidence that grounds did exist to support the termination of Appellant's parental rights pursuant to Section 211.447.4(3) RSMo. 2001 and that said termination was in the best interests of the child.

The juvenile officer may file a petition to terminate the parental rights of a child's parent when it appears that the child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds 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. Section 211.447.4(3) RSMo. In determining whether to terminate parental rights under this subdivision, commonly referred to as the "failure to rectify" provision, the court must consider and make findings on four factors:

a. the terms of a social service plan entered into by the parent and DFS 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 or DFS to aid the parent on a continuing basis in adjusting her 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; and

d. chemical dependency which prevents the parent from consistently providing the necessary care, custody and control over the child and which cannot be treated so as to enable the parent to consistently provide such care, custody and control. Section 211.447.4(3)(a-d) RSMo.

The court may terminate the rights of a parent to a child upon the petition filed by the juvenile officer if the court finds the termination is in the best interest of the child and when it appears by clear, cogent and convincing evidence that grounds for termination exist pursuant to Section 211.447.4(3). Section 211.447.5

RSMo. When considering whether to terminate the parent-child relationship pursuant to this subsection, the court is required to evaluate and make findings on the same seven factors enumerated and discussed in Arguments I and II above. Section 211.447.6 RSMo.

Under Section 211.447.4(3), the court found clear, cogent and convincing evidence that the ground commonly called "failure to rectify" existed. First, the court found that the child had been continuously under the jurisdiction of the court since December 6, 1999, a period over a year. Second, the court found that continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home. The child was two and a half years old; he had lived with Appellant for only six months and had lived with Brice for two years. He regarded Brice as his mother, her older son as his brother, and her niece's Minnesota family as his family. (T51). He was healthy, happy and closely bonded to Brice and her family. (RSLF57). Anderson, the Boone County DFS worker, testified that if the child and his siblings were all reunited in Appellant's home, there would "be chaos with all these kids…coming from all these different places…lots of chaos in that home." (T161). Termination of Appellant’s parental rights would provide permanency and stability for the child. The court certainly could and did find by clear, cogent and convincing evidence that grounds for termination under Section 211.447(3) existed.

Having found that grounds for termination of parental rights existed, the court was required to consider and make findings on (a) through (d) cited above.

Section 211.447(3)(a) pertains to the terms of a social service plan entered into by DFS and a parent and the degree of the parties' compliance with the plan's terms. Appellant's plan was filed with the court on January 13, 2000, (LF17-19) and approved by Commissioner Hayes on January 21. (LF19). Appellant-Mother failed to sign the Service Plan herself. (LF 19, T32). However, Lincoln's case record showed she gave copies of the Service Plan to Appellant on January 27 (T18) and July 28, 2000 (T20-21), and she sent copies to Appellant on April 12 and May 24, 2000 (T19-20), and February 1, 2001 (T21). In addition, Lincoln spoke with Appellant and reviewed the requirements of the Service Plan on five occasions in 2000: January 27(T18); March 7(T18-19); May 23(T19); and July 24 and 28 (T20-21). Each time, Lincoln discussed with Appellant her obligations to visit and support the child and the possibility of termination of parental rights if she failed to comply with the terms of the plan. Appellant showed she understood each discussion by stating that she didn't want her rights terminated but that legal guardianship with her aunt was acceptable. (T18-21). She also testified that she knew and understood all the requirements of her plan. (T220, 225). Furthermore, because Appellant's rights to another child had been terminated in October, 1999 (RSLF 125), Appellant was intimately familiar with the system, its requirements and the consequences of noncompliance.

For Appellant's part, the Service Plan requires Mother to:

1. visit the child at least two times each month, following DFS scheduling and visitation procedures;
2. make financial contributions toward the support of the child,

3. obtain
    a. drug / alcohol evaluation as approved by DFS,
    b. psychological / psychiatric evaluation approved by DFS,
    c. drug / alcohol screening within 2 days of a DFS request,
    d. and maintain housing meeting DFS minimum standards,
    e. daycare as approved by DFS (LF 17);
4. satisfactorily attend and participate in
    a. psychological / psychiatric counseling,
    b. support group for recovering chemical dependency,
    c. parenting / homemaker's skill training or class,
    d. job training classes,
    e. alcohol / drug abuse treatment program,
    f. any other program, class or course of action recommended as a result of evaluations in #3;
5. inform DFS worker about changes in address, telephone number, job and people living in mother's home;
6. cooperate with and utilize services offered / provided by DFS and/or the court;
7. comply with any and all Family Court orders;
8. sign release of information forms at DFS request;
9. provide DFS proof of attendance at or participation in required programs and classes. (LF18)

For DFS' part, the Service Plan states that the DFS worker must do the following:

1. arrange at least two visits each month with the child, at the request of the parent; explain scheduling and visitation procedures to the parent;
2. provide information and services to the parent, when requested, to help the parent comply with the requirements of the Service Plan and with Family Court orders;
3. explain to the parent her parental obligation to support the child;
4. inform the parent of significant events in the child's life;
5. comply with all Family Court orders currently in effect;
6. inform the parent of any change of DFS social worker assigned to her case. (LF18-19).

The court entered findings that Appellant failed to comply with the requirements of her plan between January 21, 2000, and December 21, 2001 in that she failed to verify that she obtained a psychological or psychiatric evaluation or participated in psychological or psychiatric counseling or job training. She

failed to visit or communicate with the child on a consistent basis. She failed to provide any financial support. She failed to obtain daycare. She failed to keep DFS informed of her current residences. Appellant did not enter drug treatment until October, 2000. To the minimal extent that respondent-mother did comply with the service plan, her efforts and those of the Missouri DFS proved unsuccessful in providing a continuing relationship between mother and child and reunifying mother and child. (T32-38, RSLF135)

The court found that DFS workers made reasonable efforts to fulfill their responsibilities under the plan. DFS was relieved of making reasonable efforts to reunite Appellant and child in the review hearing order dated November 16, 2000. (RSLF78) Lincoln's Affidavits (RSLF 37, 76) document the wide variety of services made available to Appellant, including home visits, phone calls and office visits; drug treatment referrals; in-home services; referrals for housing, utility assistance, individual counseling, job training and employment. (RSLF 36, 76). The court had ample evidence to find that Appellant had not adequately complied with the terms of her service plan.

As to Section 211.447.4(3)(b), success or failure in adjusting circumstances to provide a proper home for the child, Appellant's entire argument as to Section 211.447.4(3) is based on her situation at the time of the termination hearing. However, "[a] parent's conduct after the filing of the termination petition cannot constitute the sole consideration of the trial court's decision." In re T.E., 35 S.W.3d 497, 504 (Mo.App.E.D. 2001). "To allow only review of very recent

events is both short sighted and dangerous." In Interest of J.M.L., 917 S.W.2d 193, 196 (Mo.App.W.D. 1996). During the entire year DFS was required to make reasonable efforts, Appellant had failed to provide a proper home for her child. She moved from place to place; Lincoln's reports to the court document Appellant's moves (RSLF46, 68); Phoomsathan testified that there were times when DFS didn't know where Appellant was (T37); McCartney testified that Appellant was essentially homeless when she arrived at McCambridge Center. (T 66). By her own admission, Appellant was still using cocaine until October, 2000. (T 176-177) when she entered McCambridge Center. Clearly Appellant had not established any home, much less a proper home for her child.

While it appears from testimony by Appellant's witnesses that Appellant had made important strides in improving her life and had begun to address some of the requirements of her Service Plan, she was still "a work in progress," and the reports show signs of ongoing instability. Appellant had missed group and family therapy in September, 2001, and a group meeting in October after a trip to St. Louis. (T 80-82). Her telephone was disconnected on September 25. (T 81) While relatives had returned two of her daughters to Appellant's care, there was no DFS involvement or supervision of the family (T 72-73); in fact no DFS worker had seen Appellant's home since September, 2001, prior to the return of her second daughter. (T 152). Appellant testified that she was working with her community support worker "helping me out with more ways to make my home more stable than what I really think it needs to be." (T 183-184). Appellant could

not provide proof of negative drug screens. (T 88). Appellant testified that she had not yet taken the GED (T 181), and she did not have employment. (T 181). Her housing was provided to her free (T 29), and her sole income was TANF benefits and food stamps. (T 159). Based on all the evidence, the court could reasonably determine and enter findings that Appellant continued to be unable to provide her child with a proper home.

The court found that Section 211.447(3)(c) did not apply to Appellant.

Section 211.447(3)(d) pertains to chemical dependency which prevents the parent from consistently providing the necessary care, custody and control over the child. The court entered findings that competent evidence showed that Appellant suffers from such a chemical dependency that prevents her from consistently providing necessary care, custody and control of the child. (RSLF 135). Counsel for Appellant refers the Court to Argument II for discussion of Appellant's chemical dependency problem.

Having found that grounds for termination of parental rights existed under Section 211.447(3)(d) by clear, cogent and convincing evidence, the court considered the seven factors required in the determination of whether termination was in the child's best interests. Counsel for Appellant refers the court to the discussion of those factors in Arguments I and II above. The court determined that termination of Appellant’s parental rights was in the best interests of the child.

Considering all the evidence and factors relevant to Appellant’s “failure to rectify” (Section 211.447.4(3) RSMo) as grounds for termination, the court properly

found by clear, cogent and convincing evidence that those grounds existed, and that termination of Appellant's parental rights was in the best interests of this child. Counsel for Respondent respectfully requests that the Court of Appeals affirm the trial court's order on this point.

Argument IV. The trial court properly found by clear, cogent and convincing evidence that grounds did exist to support the termination of Appellant's parental rights pursuant to Section 211.447.4(6) RSMo. 2001 and that said termination was in the best interests of the child.

The juvenile officer may file a petition to terminate the parental rights of a child's parent when it appears that the parent is unfit to be a party to the parent and child relationship. Section 211.447.4(6). It is presumed that a parent is unfit to be a party to the parent-child relationship upon a showing that within a three-year period immediately prior to the termination adjudication, the parent's parental rights to another child were involuntarily terminated pursuant to Section 211.447.2 or Section 211.447.4(1, 2, 3 or 4) RSMo. Id.

The requirements to terminate Appellant's rights under Section 211.447(6) have been met. First, the juvenile officer filed the Petition to Terminate Parental Rights on April 19, 2001 (LF 30), alleging this ground for termination in paragraph 5e. (LF 31). Second, the presumption of parental unfitness was established by showing that Appellant's rights to her child D.A.B. were involuntarily terminated in Cause Number JU97-01161J / JU99-00392A by the St. Louis City Family Court on October 8, 1999 (RSLF 125 and T 39). A certified

copy of the St. Louis City Family Court Judgment and Decree Terminating Parental Rights was admitted into evidence at Appellant's hearing in this case on December 6, 2001. (T 8-9). The date of the St. Louis City termination lies within the three-year period immediately prior to the termination adjudication under appeal, signed by Judge Block on February 25, 2002. (RSLF 137). Third, the St. Louis City termination was an involuntary termination of parental rights pursuant to the language of Sections 211.447.2(1) (fifteen of twenty-two months) (RSLF 127) and 211.447.4(3) ("failure to rectify"). (RSLF 126-127). All requirements under this section of the termination statutes have been proved by clear, cogent and convincing evidence.

Having established the ground of parental unfitness, the court also found that termination of parental rights was in the best interests of this child. The St. Louis County trial court properly entered its order to terminate Appellant's parental rights to this child. Counsel for Respondent respectfully requests that the Court of Appeals affirm the trial court's order on this point.

Argument V. The trial court properly found by clear, cogent and convincing evidence that grounds did exist to support the termination of Appellant's parental rights pursuant to Section 211.447.2(1) RSMo. 2000 and termination of Appellant's parental rights was in the best interests of the child. Section 211.447.2(1) is a valid and constitutional statute.

The juvenile officer shall file a petition to terminate the parental rights of a child's parent when information establishes that the child has been in foster care

for at least fifteen of the most recent twenty-two months. Section 211.447.2(1) RSMo. This filing is mandatory, not permissive.

The juvenile court may terminate the rights of a parent to a child if the court finds that the 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 this subsection. Section 211.447.5 RSMo.

This child first came into protective custody on October 4, 1999, in St. Louis City. (RSLF 9). On October 8, 1999, that court ordered transfer of the proceedings to St. Louis County, residence of Appellant and the child, and further ordered that the child remain in the temporary care, custody and control of DFS for appropriate placement until transfer was effected and St. Louis County Family Court disposed of the matter. (RSLF 17-18). On November 8, 1999, the St. Louis County Family Court entered a protective custody order for the child to remain in protective custody at DFS for suitable placement. (RSLF 22). On December 6, 1999, St. Louis County Family Court took jurisdiction over the child and ordered legal custody with DFS and physical custody with Ethel Brice. (RSLF 39-40). The child remained with Ms. Brice and never returned to Appellant's care. (T16). Appellant admitted at trial that the child had been with her only six months out of two and a half years of life. (T215).

The juvenile officer filed the Petition to Terminate Parental Rights on April 19, 2001. (RSLF 89-90). At that time, the child had been out of Appellant's care and in DFS custody since October 4, 1999, a total of eighteen months. The Third

Amendment to the Petition, alleging that the child had been in foster care for at least fifteen of the most recent twenty-two months, was filed October 22, 2001. (RSLF 121). When that Amendment was filed, the child had been in foster care for two years. The record itself proves by clear, cogent and convincing evidence that the child had been in foster care for at least fifteen of the most recent twenty-two months when both the Petition and Amendment were filed. The court found that this ground for termination existed, and that termination was in the best interest of the child. (RSLF 136).

Appellant's Argument F states that section 211.447.4 (sic) is invalid and void because it violates the substantive due process guarantees of the Fourteenth Amendment of the federal constitution. However, the Missouri statute in question, Section 211.447.2(1), is not unconstitutional, Appellant's due process rights were protected at all times, and Appellant's Argument F is without merit.

Generally, as to Appellant's constitutional attack, statutes are presumed to be constitutional. Linton v. Missouri Veterinary Medical Board, 988 S.W.2d 513, 515 (Mo.banc 1999). Because of the presumption of constitutionality, the burden to prove a statute unconstitutional is upon the party bringing the challenge. In re: Marriage of Kohring, 999 S.W.2d 228, 231 (Mo.banc 1999).

One attacking the constitutionality of a statute "bears an extremely heavy burden." Linton at 515. A statute will not be held invalid "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution. In re Kohring at 231.

Appellant argues that she was denied due process by application of "the new ground of parental unfitness based upon the presumption that a parent is unfit if her child is in foster care for fifteen out of the most recent twenty-two months." (Appellant's Brief 26.) Appellant cites In re H.G., 757 N.E.2d 864 (Ill. 2001) in support of her argument.

Appellant misstates the Missouri statute, and, therefore, her argument is without merit and must fail. There is no ground of parental unfitness in the Missouri statute. There is no language contained in the Missouri statute which creates a presumption of parental unfitness based on the length of time her child is in foster care. The Missouri statute merely requires the juvenile officer to file a petition to terminate parental rights when a child has been in foster care for fifteen of the most recent twenty-two months. Section 211.447.2(1) RSMo.

In contrast, however, the ground of parental unfitness is one of two parts of the Illinois statute, Section 1(D)(m-1) of the Adoption Act and Section 2-13(4.5)(i) of the Juvenile Court Act. In re H.G. at 320-321. Like the Missouri statute, Illinois Section 2-13(4.5)(i) mirrors the language of the federal Adoption and Safe Families Act of 1997 and requires that a termination petition be filed when the time frame has been met. Id. However, Section 1(D)(m-1) of the Illinois Adoption Act goes one step further and creates a new ground of parental unfitness based upon the presumption that a parent is unfit if her child has been in foster care for fifteen months out of a twenty-two month period and requires the parent to prove fitness by a preponderance of the evidence. Id. The Illinois Supreme Court found

that the determination of unfitness in 'Section 1(D)(m-1) is not narrowly tailored to serve the compelling governmental interest of protecting the safety and well-being of the children of this state. (Underlining added for emphasis.) We hold, therefore, that section 1(D)(m-1) violates the substantive due process guarantees of the federal and state constitutions." Id. at 335. The Illinois court did not find that the fifteen of twenty-two month time frame of Section 2-13(4.5)(i) was violative of any constitutional protections. Therefore, the holding in In re H.G. does not support Appellant's argument. See also, Katherine A. Hort, Note: Is Twenty-two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights, 28 Fordham Urb. L.J. 1879 (August, 2001).

Clear, cogent and convincing evidence supports the trial court's findings and order for termination of Appellant's parental rights pursuant to Section 211.447(6), and termination is clearly in the best interests of this child. The trial court properly entered its order to terminate Appellant's parental rights.

CONCLUSION

As set forth in the arguments above, any one of the five grounds relied on to terminate mother's parental rights was sufficiently proven by clear, cogent and convincing evidence. A review of the record also demonstrates that it is in the best interests of this child to terminate mother's parental rights. Appellant's

arguments must fail. Therefore, the Juvenile Officer respectfully requests that the Findings / Recommendation, Order, Judgment and Decree of the St. Louis County Family Court be affirmed.

Respectfully submitted,

_____
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Certificate of Service

I hereby certify that on October 15, 2002, two copies of this Respondent's Brief were sent by first-class U.S. mail, postage prepaid, to the following:

(1) Laura Sidel, Attorney for Appellant, 7912 Bonhomme, Suite 204, St. Louis, MO 63105;
(2) David Porta, Guardian ad Litem, 144 West Lockwood, Suite 100, St. Louis, MO 63119.

Certificate of Compliance with Rules 84.06 and 360

I certify that, to the best of my knowledge, this brief complies with the requirements of Rule 84.06 and Rule 360, and the following is true: (a) the brief is 44 pages long; (b) the number of words in the brief totals 11,296.

I further certify that, to the best of my knowledge, the floppy disk filed with this brief conforms to the requirements of Rule 84.06. The disk is formatted in Microsoft Word. It has been scanned for viruses and is virus free.

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