

**SC93649**

**IN THE  
MISSOURI SUPREME COURT**

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**IN THE INTERESTS OF J.A.R., D.K.R. and A.E.R.**

**D.G.R.**

**Appellant,**

**v.**

**THE GREENE COUNTY JUVENILE OFFICE,**

**Respondent**

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Appeal from the Judgment and Order Terminating Parental Rights  
Circuit Court of Greene County  
For the 31<sup>st</sup> District of Missouri  
Juvenile Division

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**APPELLANT'S SUBSTITUTE BRIEF**

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### **JURISDICTIONAL STATEMENT**

This is an appeal from the Findings of Fact, Conclusions of Law, and Judgment and Order and Recommendations Terminating Parental Rights filed November 5, 2012, by the Juvenile Division of the Circuit Court of Greene County, Thirty-First Judicial Circuit of Missouri, the Honorable William R. Hass presiding. (Legal File at 124, 133, 142) Appellant filed his Notice of Appeal of the trial court's judgment on December 5, 2012. (L.F. 149, 151, 153)

The Missouri Court of Appeals, Southern District issued its opinion affirming the judgment of the trial court on August 20, 2013. Dissenting Justice Rahmeyer certified this matter to this Court pursuant to Supreme Court Rule 83.03.

## STATEMENT OF FACTS

On April 20, 2012, the Greene County Juvenile Office filed three Petitions to Terminate Parental Rights of Appellant on his children, [REDACTED] [REDACTED] and [REDACTED] (hereinafter "A.E.R." "D.K.R." and "J.A.R."). (L.F. 1, 6, 11). In its Petitions to Terminate Parental Rights, the Juvenile Office alleged that the children had been 1) abandoned, 2) abused and/or neglected, and 3) that the conditions that had led to the assumption of the jurisdiction still existed or that conditions of a potential harmful nature existed such that the children could not be returned to the parental home in an ascertainable period of time, and that the continuation of the parent/child relationship greatly diminished the children's prospects for early integration into a stable and permanent home. (L.F. 16-42).

A.E.R. (DOB 10/10/2000), D.K.R. (DOB 7/12/1999) and J.A.R. (DOB 8/23/2001) were born to Antoinette Rutschke (hereinafter referred to as Mother) and Daniel Rutschke (hereinafter referred to as Appellant). (L.F. 52-54).

At the outset of trial, Appellant called up for hearing and determination his Motion for Continuance alleging that additional time was needed for Appellant to prepare for trial and demonstrate stability in his living arrangements and employment after moving to Missouri just days prior. (L.F. 49-51) The Court denied the Motion. (Tr. 4)

Appellant Daniel Gerard Rutschke is the biological father of three minor children A.E.R., D.K.R. and J.A.R., who are the subject of this appeal. Protective custody of the minor children was taken by the Missouri Department of Social Services, Children's Division, in or around March 2011 due to allegations of lack of supervision, substance

abuse and physical abuse by the mother of the children, Antoinette Rutschke. (Tr. 28:11 – 30:12). At the time of protective custody, Appellant resided in the state of California. (Tr. 30:20-22). Upon being informed that his three children were in the custody of the state of Missouri, Appellant indicated to the Greene County Children's Division investigator that he desired to regain custody of his children. (Tr. 30:23-31:4).

On May 10, 2011 the Greene County Circuit Court Juvenile Division assumed jurisdiction over the minor children and ordered a Treatment Plan for Appellant. (L.F. at 84-86). The Greene County Children's Division case manager responsible for A.E.R., D.K.R. and J.A.R. at the time protective custody was taken in or around March 2011 until May 2011 was Danielle Michele. (Tr. 95:4-17 and 97:7-8). Ms. Michele testified that the case goal for the minor children when she handled the case was "reunification with a parent." (Tr. 95:20-21). Ms. Michele indicated that the things that needed to be worked on by the father in order to enable unification were gaining stable housing, physical abuse issues and mental health issues. (Tr. 95:22-96:2). During the period of time which Ms. Michele was responsible for these cases, Appellant resided in the state of California; however, there was never any discussion about doing an ICPC home study with him in his home state. (Tr. 96:18-97:2).

Ms. Michele did not recall if she was able to make any referrals for services for Appellant in California to aid in reunification. (Tr. 97:11-12). Ms. Michele could not recall whether or not she sent a copy of the Treatment Plan to Appellant. (tr. 97:17-19).

According to Ms. Michele, Appellant had phone contact with her "a couple times" while she had charge of the case. (Tr. 96:20-21). Appellant had telephone visitation with

the three children on a regular basis. (Tr. 98:20 – 99:1). With respect to financial support, Ms. Michele testified that Appellant did send money at least once. (Tr. 99:16-19). Appellant also kept the Children’s Division apprised of his living and employment situations. (Tr. 99:23-100:11). Appellant was unable to come to the state of Missouri due to unspecified conditions of his probation in the state of California. (Tr. 102:6-13).

The Greene County Children’s Division case manager who managed these cases for the majority of the time from protective custody until the termination of parental rights trial was Elizabeth Hwang. Ms. Hwang was the case manager from June 2011 through the completion of trial on October 2, 2012 except for the period of June 4, 2012 through August 13, 2012, when Ms. Hwang was on maternity leave. (Tr. 37:1-25; 104:4-16). She was the author of the Termination of Parental Rights Court Summary and Termination of Parental Rights Court Summary Addendum ordered to be prepared by the trial court pursuant to RSMo. § 211.455. (L.F. at 65-83). Ms. Hwang testified that she discussed the requirements of the court ordered Treatment Plan with Appellant. (Tr. 38:22-24). Because Appellant resided outside the state of Missouri an “out-of-state ICPC” was required in order to assign a case worker in the state of residence of the parent. (Tr. 38:25- 39:3). Ms. Hwang discussed the process of obtaining an ICPC with Appellant, however, because Appellant desired to move to Missouri, the process did not begin until the summer of 2012. (Tr. 39:5-15). During the pendency of this case, a case worker in California was never assigned to Appellant to assist him in obtaining services to complete his court ordered Treatment Plan, despite his express desire to comply therewith. (Tr. 39:16 – 41:3). Ms. Hwang testified that the ICPC was not approved

“because we were nearing termination.” (Tr. 40:23-25). In spite of the absence of state assistance in obtaining services for reunification, Appellant successfully completed parenting classes on August 4, 2012. (L.F. at 87-88).

Ms. Hwang testified that Appellant maintained weekly phone visitation with his children through Christmas of 2011. (Tr. 42:1-11). The children were disappointed that Appellant did not come to Missouri for a visit Christmas of 2011, and subsequently expressed desire to no longer have phone contact with their father. (Tr. 42:12-16; 66:3-8).

Appellant traveled to Greene County, Missouri in the spring of 2012 and met with Ms. Hwang. (Tr. 42:19-22). During that visit Appellant was informed by Ms. Hwang that he could not see his children despite his express desire to do so. (Tr. 67:12-23). Appellant was not permitted to have visitation with his children because of the children’s desire to not have contact with him at that time. (Tr. 66:6-8). Later, in September, 2012, just prior to the trial on the termination Petition, Appellant moved to Missouri for the purpose of being reunited with his children. (Tr. 50:19 – 51:25).

With respect to Appellant’s compliance with his court ordered Treatment Plan, Ms. Hwang testified on cross-examination that:

1. His drug tests were negative;
2. He kept in regular contact with the Children’s Division;
3. He completed a psychological evaluation;
4. He completed Parenting Classes;



5. He communicated with his children by writing letters from time to time;
6. He paid money for support of his children;
7. He maintained employment while living in the state of California;
8. He maintained an appropriate residence while living in the state of California;
9. He expressed the desire to have visitation with his children, although he was denied that opportunity.

(Tr. 64:6 - 66:8).

With respect to Ms. Hwang's recommendation concerning termination of Appellant's rights in and over his children Ms. Hwang testified as follows "I am just going to go ahead and say my conscience tells me to give Mr. Rutschke a second chance and recommend that he not be terminated on today." (Tr. 61:11-12) Due to Appellant's relocation to the state of Missouri, the Children's Division would be able to provide additional services to aid in the reunification of Appellant with his children. (Tr. 68:7-12).

Heather Radney was a Children's Division case manager who handled this case from June 4, 2012 through August 13, 2012, while Ms. Hwang was on maternity leave. (Tr. 104:4-16). Ms. Radney testified that Appellant maintained contact with her while she had the case and that she initiated an ICPC home study on his home in the state of California. (Tr. 106:2-24). The ICPC was submitted in the summer of 2012; however, it had not yet been approved as of the date of trial. (Tr. 103:25 – 107:2). The Children's

Division was reluctant to complete an ICPC home study if Appellant intended to move to Missouri; the application for the ICPC was only submitted upon Appellant's indication that he intended to remain in the state of California and desired for his children to live there with him. (Tr. 106:11-20). However, the Children's Division was also aware that Appellant would not be able to receive assistance in obtaining reunification services in the state of California without an ICPC being completed. (Tr. 39:16 – 40:14).

Appellant completed a psychological assessment with Dr. Mark Bradford on September 29, 2012. (L.F. at 55). Dr. Bradford's written report was admitted in lieu of live testimony. (L.F. at 55-64). Dr. Bradford's report indicates the following "We do think this man has the potential to care for children. We need to see if he has the ability to follow the basic rules and create and home/job/living environment that is suitable to make the Court and case workers happy. Intellectually and emotionally, he is able to meet minimum parenting standards. We need to see if he can achieve a stable income and living situation, and achieve minimum parenting standards via 'behavior' and 'consistency' and 'motivation.'" (L.F. 64)

Appellant presented evidence to the Court that he completed a parenting course on or about August 4, 2012 in the state of California. (L.F. at 87-88). Appellant offered a residential lease for his residence in Encinitas, California where he resided until just days prior to the trial on the termination petition. (L.F. at 89-90). Appellant also submitted numerous Money Gram receipts indicating financial support for the minor children. (L.F. at 91-103).

After the trial on October 2, 2012, the trial court took the case under advisement, issuing its Findings of Fact, Conclusions of Law, and Judgment and Order and Recommendations Terminating Parental Rights on November 5, 2012. (L.F. 116, 125, 134).

Appellant filed his notice of appeal of the judgment on December 5, 2012. (L.F. 149, 151, 153).

## **POINT 1**

**The trial court erred in its Judgment and Order Terminating Parental Rights of Appellant because the evidence was insufficient to support a finding that the evidence presented clearly, cogently and convincingly demonstrated that abandonment grounds existed for termination under RSMo 211.447.5(1) in that 1) there was insufficient competent evidence to show that the Father left the child without any provision for parental support, 2) there was insufficient evidence to show that the Father failed to make arrangements to visit or communicate with the child, although able to do so, 3) said findings were against the greater weight of the evidence and 4) said findings erroneously apply the law.**

In the Adoption of C.M.B.R., 332 S.W.3d 793 (Mo. Banc 2011)

In re C.J.G., 358 S.W.3d 66 (Mo.App. SD 2012)

Z.H. v. G.H., 5 S.W.3d 567 (Mo.App. WD 1999)

## **POINT 2**

**The trial court erred in its Judgment and Order Terminating Parental Rights of Appellant because the evidence was insufficient to support a finding that the evidence presented clearly, cogently and convincingly demonstrated that neglect grounds existed for termination under RSMo 211.447.5(2) in that 1) there was insufficient competent evidence to show that the Father left the child without any provision for parental support, 2) there was insufficient evidence to show that the Father failed to maintain contact with social workers, juvenile officers, the Guardian ad Litem, and the children, when permitted, and 3) said findings were against the greater weight of the evidence.**

In re K.A.W., 133 S.W.3d 1 (Mo. Banc 2004)

In re S.M.H., 160 S.W.3d 355 (Mo. Banc 2005)

In re W.C., 288 S.W.3d 787 (Mo.App.E.D. 2009)

In re C.A.L., 228 S.W.3d 66 (Mo.App 2007)

### POINT 3

The trial court erred in its Judgment and Order Terminating Parental Rights of Appellant because the evidence was insufficient to support a finding that the evidence presented clearly, cogently and convincingly demonstrated that failure to rectify grounds existed for termination of Father's parental rights pursuant to RSMo 211.447.5(3) in that 1) the evidence adduced at trial indicated Father was fully compliant with the terms of his treatment plan, 2) the Social Worker who was responsible for the case at the time of trial believed Father deserved more time to pursue reunification, 3) the psychological evaluation performed just days prior to trial favorably assessed Father's ability to parent, and 4) the finding of a failure to rectify was against the greater weight of the evidence.

In re K.A.W., 133 S.W.3d 1 (Mo. 2004)

In re X.D.G., 340 S.W.3d 607 (Mo.App SD 2011)

#### **POINT 4**

**The trial court erred in its Judgment and Order Terminating Parental Rights of Appellant because the evidence was insufficient to support a finding that it was in the best interest of the minor children to terminate the parental rights of Appellant in, to and over the minor children in that 1) Father consistently requested contact and visitation with the children, but was denied, 2) Father provided financial and in-kind support for the minor children, 3) the Social Worker assigned to the case at the time of trial believed additional services could bring about parental adjustment to enable reunification, 4) Father maintained contact with social workers, juvenile officers, the Guardian ad Litem, and the children, when permitted, 5) Father obtained services at his own expense while the ICPC homestudy was pending in the state of California, and 6) Father moved to the state of Missouri for the purpose of reunification with his children.**

In re the Adoption of C.M.B.R., 332 S.W.3d 793 (Mo. Banc 2011)

Section 211.447, RSMo 2008

## **ARGUMENT 1**

**The trial court erred in its Judgment and Order Terminating Parental Rights of Appellant because the evidence was insufficient to support a finding that the evidence presented clearly, cogently and convincingly demonstrated that abandonment grounds existed for termination under RSMo 211.447.5(1) in that 1) there was insufficient competent evidence to show that the Father left the child without any provision for parental support, 2) there was insufficient evidence to show that the Father failed to make arrangements to visit or communicate with the child, although able to do so, 3) said findings were against the greater weight of the evidence and 4) said findings erroneously apply the law.**

### **Standard of Review**

In the recent decision In re the Adoption of C.M.B.R., 332 S.W.3d 793 (Mo. Banc 2011), this Court set forth the applicable standard of review in matter involving the termination of parental rights pursuant to RSMo Chapter 211:

In terminating parental rights, “the trial court must find by clear, cogent, and convincing evidence that one or more grounds for termination exist under subsections 2, 3, or 4 of section 211.447, and 2) the trial court must find that termination is in the best interests of the [child].” In re P.L.O., 131 S.W.3d 782, 788 (Mo. banc 2004). “The clear, cogent, and convincing standard of proof is met when evidence ‘instantly tilt [s] 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.’ ”



In re Adoption of W.B.L., 681 S.W.2d 452, 454 (Mo. banc 1984).

This Court reviews whether clear, cogent, and convincing evidence was presented to support a statutory ground for terminating parental rights under Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). In re P.L.O., 131 S.W.3d at 788–789. Therefore, the trial court’s judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy, 536 S.W.2d at 32. The judgment will be reversed “only if we are left with a firm belief that the order is wrong.” In re S.M.H., 160 S.W.3d 355, 362 (Mo. banc 2005).

Conflicting evidence will be reviewed in the light most favorable to the trial court’s judgment. Id. at 362. Appellate courts will defer to the trial court’s credibility assessments. In re Adoption of W.B.L., 681 S.W.2d at 455. When the evidence poses two reasonable but different inferences, this Court is obligated to defer to the trial court’s assessment of the evidence. Washington v. Barnes Hosp., 897 S.W.2d 611, 615 (Mo. banc 1995).

“Greater deference is granted to a trial court’s determinations in custody and adoption proceedings than in other cases.” In re S.L.N., 167 S.W.3d at 741.

After this Court determines that one or more statutory ground has been proven by clear, convincing, and cogent evidence, this Court must ask whether termination of parental rights was in the best interest of the child.

In re P.L.O., 131 S.W.3d at 789. At the trial level, the standard of proof for this best-interest inquiry is a preponderance of the evidence; on appeal, the standard of review is abuse of discretion. Id.

The majority opinion of the Southern District below makes it readily clear that it did not consider Father's argument against the termination of his parental rights for the reason that it "lacks analytical or persuasive value." The majority found that Father's failure to perform the multi-step analysis for a "not-supported-by-substantial-evidence challenge" outlined in Houston v. Crider, 317 S.W.3d 178, 187 (Mo.App. SD 2010) prohibited the majority from considering the whole record in determining whether Respondent's evidentiary burden was sufficiently met. Father respectfully submits that Houston v. Crider is not mandatory authority in this Court and further that this Court should not ignore Father's arguments for three reasons.

First, in this Court's opinion In re Adoption of C.M.B.R., 332 S.W.3d 793 (Mo. Banc 2011), there appears no discussion of any required steps or analytical framework for a challenge to the sufficiency of the evidence supporting a statutory ground for termination of parental rights. Rather, this Court stated that "Conflicting evidence *will be reviewed* in the light most favorable to the trial court's judgment." Id. at 815 (emphasis added). It is incumbent upon the appellate courts to review conflicting evidence, albeit in a deferential manner, not simply ignore it.

Secondly, the majority below indicates that the analytical framework in Houston v. Crider, has "carried over" into TPR appellate opinions and that it was Father's failure to apply the Houston framework that "rob" his argument of any persuasive or analytical

value. However, while the Houston framework has carried over into some TPR opinions, it has not done so into all. Notably, In re C.J.G., 358 S.W.3d 549 (Mo.App. SD 2012) is a case in which termination was overturned due to insufficiency of the evidence. The 2012 opinion contains no reference to Houston v. Crider or its analytical framework and relies upon evidence favorable to the Appellant to reverse the TPR Judgment. *See, Id.* at 555-558.

Third, the undersigned counsel has included in this substitute brief, when appropriate, a summary of that evidence which this Court may assume to have been established at trial, which, nevertheless, fails to meet the burden of support for those propositions necessary to justify a termination of father's parental rights to his children.

### **Abandonment**

The Juvenile Office's Petitions allege, pursuant to RSMo § 211.447.5(1), that termination should occur because Appellant, although able, has failed to contact, visit, or provide support for the minor child within the six months next prior to the filing of the petition. The Judgments and Orders Terminating Parental Rights indicate that the trial court found that Appellant had abandoned his children. (L.F. at 117, 126, 135). This finding erroneously applies the law, is against the weight of the evidence and is unsupported by competent evidence.

Abandonment is defined as "a willful delivery of the child with intention that the severance be permanent [or] a voluntary and intentional relinquishment of the custody of the child to another with the intent to never again claim the rights of parent or perform the duties of a parent." In re C.M.B.R., 332 S.W.3d at 816. "Generally, a finding of

abandonment is not compatible with a finding that custody has ended involuntarily.” Z.H. v. G.H., 5 S.W.3d 567, 571 (Mo.App. WD 1999) (Quoting, Interest of B.C.H., 718 S.W.2d 158, 166 (Mo.App. 1986)). “The enforced separation of parent and child and placement of the child in a foster home operates to accomplish some estrangement and, without intervention by the juvenile officer to effect reconciliation, operates to create the very circumstances which destroy the parent-child relationship.” Id.

In this case, Appellant continuously sought to regain custody of his children, despite the physical and geographic distance. Testimony was that he maintained constant contact with the three Case Managers from the Children’s Division, sent periodic correspondence to each child, sent financial support and requested visitation. In fact, just one month prior to the filing of the Termination Petition, Appellant travelled to Missouri, met with Elizabeth Hwang and requested a visit with his children. (Tr. 67:12-19) He was denied this opportunity to visit. Moreover, telephone contact, which he maintained on at least a weekly basis, was also terminated because of the wishes of the children. (Tr. 66:3-8) Nevertheless, he continued to maintain contact with the Case Managers and worked, at his own expense, to complete parenting classes. (Tr. 65:2-13)

The trial court based its findings upon evidence that Father failed to write letters with sufficient frequency and that his financial contributions for the children were insufficient. (L.F. at 117, 126 and 135). Even if presumed to be true under this Court’s standard of review, this evidence cannot sustain a finding of abandonment pursuant to RSMo § 211.447 for the reason that no evidence was presented that would substantiate a finding that Appellant possessed an intent to abandon his children given his consistent

contact with the Children's Division and his specific request for visitation with his children.

This case is similar to the recent Southern District case In re C.J.G. wherein the Court stated

It was totally within the prerogative of the Children's Division to foster a relationship between Father and the child; they did not do so. It would not be appropriate to hold against the Father the fact that he did everything he could do to foster the relationship but did not have the power to unilaterally achieve it in the face of the Children's Division's power to deny it.

In re C.J.G., 358 S.W.3d at 558.

C.J.G. involved a father was alleged to have failed to communicate with or provide financially for his child while in state custody, the same allegations made against Father in this case. The Southern District reversed the Judgment of Termination noting that there was insufficient evidence to find that father had "failed to provide adequate food, clothing, shelter or education as defined by law," and further that father had made continuous and repeated requests for visitation. Id. at 552, 556. In that case there was a child support order with an arrearage of over \$12,000.00 which father had made only partial payment towards, primarily through income tax return intercepts. Id. at 556. In this case, there was no child support ordered or financial assistance requested from the State. As in C.J.G., Father in this case was determined to be indigent, a factor the Court

took into consideration when determining whether the paucity of financial contribution was sufficient to justify termination. Id. The Court determined that it was not. This result simply cannot be reconciled with the conclusion reached by the trial court and the majority below in this case.

Accordingly, the Judgment is in error and must be reversed and remanded to the trial court.

## **ARGUMENT 2**

**The trial court erred in its Judgment and Order Terminating Parental Rights of Appellant because the evidence was insufficient to support a finding that the evidence presented clearly, cogently and convincingly demonstrated that failure to rectify grounds existed for termination of Father's parental rights pursuant to RSMo 211.447.5(3) in that 1) the evidence adduced at trial indicated Father was fully compliant with the terms of his treatment plan, 2) the Social Worker who was responsible for the case at the time of trial believed Father deserved more time to pursue reunification, 3) the psychological evaluation performed just days prior to trial favorably assessed Father's ability to parent, and 4) the finding of a failure to rectify was against the greater weight of the evidence.**

### **Standard of Review**

The standard of review is the same as detailed in Point I, above.

### **Abuse and Neglect**

The language of Section 211.447.5(2) (2008) provides that termination of parental rights may occur when it appears by clear, cogent and convincing evidence that the child has been abused or neglected and the termination is in the best interests of the child. In determining whether to terminate parental rights pursuant to this subdivision, the court shall consider and make findings on the follow conditions or acts of the parent:

- (a) 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;

(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 or any child in the family by the parent, including an act of incest, or by another under circumstances that indicate that the parent knew or should have known that such acts were being committed toward the child or any child in the family; or

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

RSMo. 211.447.5(2)(a)-(d).

At least one of these four factors must be proven by clear, cogent and convincing evidence for grounds to exist to terminate Father's parental rights pursuant to RSMo 211.447.5(2). See, In the Interest of W.C., 288 S.W.3d 787, 795 (Mo.App E.D. 2009)

No evidence was presented that factors (a), (b) or (c) were relevant in this case with respect to Appellant. Instead, the Judgment focuses on (d) and finds that Appellant



failed to provide consistent financial support and failed to make arrangements to visit the children. (L.F. 119, 128, 137)

### Visitation

The Judgments make the following specific finding, “The father did come to the state of Missouri in March 2012, but failed to contact the case worker prior to his arrival and then when the father arrived he failed to request a visit or contact with child.” (L.F. 119, 128, 137) This finding is clearly erroneous and unsupported by the evidence at trial. On cross-examination of Elizabeth Hwang by Appellant’s trial counsel, the following exchange occurred:

Q: Okay. And he travelled approximately 1,500 miles from California to get to the state of Missouri, and it’s your testimony he didn’t want to see his kids?

A: No. Well, I think I did misword incorrectly earlier.

Q: Could you clarify that for us, please?

A: We didn’t go into great discussion as to whether he could see his kids when he was here. I believe he would have wanted to see his children.

Q: Did he express to you that he wanted to see his children?

A: I don’t remember the exact words, but I think he did.

(Tr. 67:12-19)

This testimony from the Petitioner’s witness establishes the opposite of what the trial court found to be true. No other evidence was offered regarding the issue of whether Father requested visitation in March, 2012. The finding that he failed to request visits is

unsupported by competent evidence. Indeed, the evidence at trial established that Appellant maintained contact with Case Managers throughout the pendency of the case, requested visitation with the children, wrote letters to the children, and maintained telephone contact with the children when permitted. (Tr. 65:14 – 66:8)

Assuming to be true the propositions that 1) the Father promised to visit the children, 2) he failed to do so, and 3) that said failure caused the children to be profoundly disappointed such that they no longer wanted contact with him, the trial court nevertheless erred in finding that these conditions rise to the level of neglect necessary to justify a termination of the Father's parental rights. This Court has held that the right to parent a child is a fundamental liberty interest. In re S.M.H., 160 S.W.3d 355, 362 (Mo. Banc 2005). A child's disappointment with a parent, based upon undersigned counsel's research, has never served as grounds for termination of parental rights, nor should it.

#### Financial Support

With respect to financial support, the Trial Court made the following finding, "Neither the mother nor the father have provided consistent financial or in kind support for the minor children despite both having means to do so." This conclusory finding is unsupported by the evidence and misapplies the law with respect to financial support.

"Contribution, no matter how minimal, demonstrates a parent's intent to continue the parent-child relationship." In re W.C., 288 S.W.3d 787 (Mo.App. ED 2009) Moreover, "[a] parent is not required to pay for all of a child's financial needs, but only as much as he or she reasonably can." Id. A failure to pay child support or deficient financial skills by themselves do not warrant termination of parental rights. In re K.L.C.,

332 S.W.3d 330, 341 (Mo. App. SD 2011). The trial court must find that the parent has failed to provide all of the support the parent could reasonably have been expected to provide. Id. “While parents must provide support for their children even when they are in DFS' custody and even if DFS has made no demand that the parent fulfill this duty, when DFS makes no demand for financial support, a reasonable person could believe that financial assistance was unnecessary.” In re Q.A.H., -- S.W.3d --, -- 2013 WL 3661746 \*10 (Mo.App. WD 2013). “Furthermore, a parent's failure to provide financial support for a child while he or she is in foster care must indicate that the parent would be unable to provide adequate food, clothing, or shelter to a child in parent's physical custody in the future.” In re C.A.L., 228 S.W.3d 66, 71 (Mo.App. SD 2007).

It is undisputed that Appellant was determined by the trial court to be indigent and was appointed counsel to represent him to contest the allegation of the Petitions to Terminate Parental Rights. (L.F. 1, 6, 11) The Court also received evidence that Appellant was maintaining a home in California at a cost of \$1,200.00 per month. (L.F. 89) Nevertheless, Appellant made financial contributions from time to time for the support of his children as evidenced by his Moneygram receipts and the testimony of the Case Managers. (L.F. 91-103, Tr. 65:17-20; 101:24-25)

Assuming to be true the proposition that Father failed to provide any support after July, 2011, the trial court nevertheless erred in finding that said failure rose to the level of neglect necessary to justify a termination of parental rights. Again, the failure to pay support, by itself cannot justify a termination. No additional conditions justifying termination were proven by the State. The Judgments and Orders Terminating Parental

Rights are silent as to whether Appellant's financial contributions were unreasonable, or that Appellant was able to provide additional funds but failed to do so. The record reveals no evidence that the Father had disposable income which he could have been expected to provide, but failed to so provide. The record is devoid of any evidence that the Children's Division made any demand for financial support or that any child support order was entered.

Two of the three Judgments in this matter state "A major part of why the minor child and his siblings were taken into protective custody was the mother's alcohol abuse." (L.F. 118, 127) There was no evidence presented at trial that the minor children came into protective custody because of a failure by the parents to provide adequate food, clothing, shelter or education. Nor was there any evidence presented that the Father would be unable to adequately provide for his children if they were returned to his custody.

Father urges this Court to consider that the trial court's findings with respect to neglect as grounds for termination pursuant to RSMo § 211.447.5(3) are erroneous when examined in light of this Court's ruling in In re K.A.W., 133 S.W.3d 1 (Mo. Banc 2004). This case is analyzed more fully below in Point III.

Because the Greene County Juvenile Office failed to bear its burden of proof pursuant to RSMo. 211.447.5 of establishing by clear, cogent and convincing evidence that Appellant abused or neglected his child, this case must be remanded to the Juvenile Court of Greene County, Missouri.

### **ARGUMENT 3**

**The trial court erred in its Judgment and Order Terminating Parental Rights of Appellant because the evidence was insufficient to support a finding that the evidence presented clearly, cogently and convincingly demonstrated that failure to rectify grounds existed for termination of Father's parental rights pursuant to RSMo 211.447.5(3) in that 1) the evidence adduced at trial indicated Father was fully compliant with the terms of his treatment plan, 2) the Social Worker who was responsible for the case at the time of trial believed Father deserved more time to pursue reunification, 3) the psychological evaluation performed just days prior to trial favorably assessed Father's ability to parent, and 4) the finding of a failure to rectify was against the greater weight of the evidence.**

#### **Standard of Review**

The standard of review is the same as in Points I and II above.

#### **Failure to Rectify**

The language of Section 211.447.5(3) provides that termination of parental rights may occur when it appears by clear, cogent and convincing evidence that the child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly

diminishes the child's prospects for an early integration into a stable and permanent home, and the termination is in the best interests of the child.

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

(a) The terms of a social service plan entered into by the parent and the division and the extent to which the parties have made progress in complying with those terms;

(b) The success or failure of the efforts of the juvenile officer, the division or other agency to aid the parent on a continuing basis in adjusting his circumstances or conduct to provide a proper home for the child;

(c) A mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to knowingly provide the child the necessary care, custody and control;

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

RSMo. 211.447.5 (3)(a)-(d)(2008).

With respect to termination of parental rights on the grounds of a failure to rectify, this Court, in In re K.A.W. held that:

An essential part of any determination whether to terminate parental rights is whether, considered at the time of the termination and looking to the future, the child would be harmed by a continued relationship with the parent. Past behavior can support grounds for termination, but only if it is convincingly linked to predicted future behavior. There must be some explicit consideration of whether the past acts provide an indication of the likelihood of future harm.

In re K.A.W., 133 S.W.3d 1, 9 (Mo. 2004).

The Juvenile Court of Greene County determined that the minor children had been under the jurisdiction of the juvenile court for a period in excess of one year, and the conditions that led to the assumption of jurisdiction by the court still persisted or conditions of a potentially harmful nature continued to exist, and that there was little likelihood that those conditions could be remedied at an early date so that the children could be returned to the parent in the near future or the continuation of the parent-child relationship greatly diminished the children's prospects for early integration into a stable and permanent home. (L.F. 40). Those conditions with respect to the Father include "abandonment... continuing neglect... and the inability of Father... to provide the child with appropriate care and parenting." (L.F. 120, 129, 138). This finding by the trial court is against the weight of the evidence.

The Trial Court made no findings with respect to Appellant regarding the provisions of RSMo § 211.447.5(3)(c) and (d). (L.F. 120-121, 13, 139).

### *The Treatment Plan*

The Trial Court's findings with respect to 211.447.5(3)(a) and (b) are inconsistent with the evidence adduced at trial, specifically, the testimony of Children's Division Case Manager Elizabeth Hwang. With respect to Appellant's compliance with the Treatment Plan, Ms. Hwang testified that Father was compliant in the following respects:

1. His drug tests were negative;
2. He kept in regular contact with the Children's Division;
3. He completed a psychological evaluation;
4. He completed Parenting Classes;
5. He communicated with his children by writing letters from time to time;
6. He paid money for support of his children;
7. He maintained employment while living in the state of California;
8. He maintained an appropriate residence while living in the state of California;
9. He expressed the desire to have visitation with his children, although he was denied that opportunity.

(Tr. 64:6 – 66:8).

Moreover, the Trial Court's findings ignore the fact that an ICPC homestudy was initiated after Appellant indicated he wanted to stay in California and be reunited with his children there. The totality of the testimony from Ms. Hwang and Radney was that the dispositive factor in determining whether to complete an ICPC was where Appellant desired to maintain his residence, not whether it would be possible for Father to obtain



reunification services in California without an ICPC. (Tr. 106:11-20) Nevertheless, Father completed portions of his treatment plan at his own expense without the aid of the Missouri Children's Division or an ICPC. (Tr. 65:2-12).

Finally, Ms. Hwang testified unequivocally that she believed additional time should be provided to Appellant to obtain services and work towards reunification<sup>1</sup>, stating, "I am just going to go ahead and say my conscience tells me to give Mr. Rutschke a second chance and recommend that he not be terminated on today." (Tr. 61:11-12). While it is true that Appellant had quit his job and left his home in California just days prior to the Termination Trial, there was no reason to believe that Appellant, if given a reasonable period of time, could not have secured appropriate housing and stable employment in Missouri. Appellant realized he needed additional time to prove his ability to provide a stable living environment in Missouri, however, such was denied by the trial court. The evidence adduced at trial indicates no other circumstances which Father failed to rectify.

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<sup>1</sup> The Children's Division submitted a post-trial brief disavowing the testimony of its employee, presumably on this point only. (L.F. at 113) Nevertheless, there was no testimony provided *under oath* from any representative of the State indicating that termination of parental rights was being recommended.

### *Considerations of In re K.A.W.*

Moreover, the evidence adduced by the Juvenile Office wholly fails to meet the test set forth by this Court in In re K.A.W., that, when viewed prospectively, the parent's past behavior must be convincingly linked to predicted future behavior, and that the child will be harmed by a continued relationship. Even assuming to be true all of the evidence which would support this finding: (i.e. 1) Father failed to write letters with sufficient frequency, 2) Father failed to provide financial contributions of sufficient amount and frequency, 3) Father disappointed his children by promising to visit but failing to show up, and 4) Father waited too long to move to Missouri from California) there simply is no convincing link that the Children would suffer harm by a continuation of the parent child relationship.

There is also ample evidence that, if given additional time, the parent child relationship could be healed. The assigned case manager for the majority of the case testified that she believed her conscience mandated he be given additional time to prove that reunification could occur. (Tr. 61:11-12) Furthermore, a psychological evaluation submitted at the request of the Juvenile Office favorably assessed the Father, noting "We do think this man has the potential to care for children. We need to see if he has the ability to follow the basic rules and create and home/job/living environment that is suitable to make the Court and case workers happy. Intellectually and emotionally, he is able to meet minimum parenting standards. We need to see if he can achieve a stable income and living situation, and achieve minimum parenting standards via 'behavior' and 'consistency' and 'motivation.'" (L.F. 64)

Father respectfully asks this Court to compare his circumstances to those of the mother in the recent decision In re X.D.G., 340 S.W.3d 607 (Mo.App. SD 2011). In that case the Southern District presumed to be true the fact that the mother intentionally inflicted bone fractures upon her 8 week old infant son. Id at 619. Relying on this Court's decision in In re K.A.W., the Southern District reversed the termination of her parental rights finding that the testimony of the Children's Division case manager and the psychological evaluator failed to meet the standard of clear cogent and convincing evidence of a likelihood of future harm to the child. Id at 620.

In this case, the Father's alleged neglect is far less severe. However, as in X.D.G., the testimony from the Juvenile Office's witnesses (Children's Division Case Manager Elizabeth Hwang, and Psychologist Mark Bradford) was favorable to the Father with respect to the likelihood of rehabilitation of the parent child relationship, and certainly did not prove by clear cogent and convincing evidence that there was a likelihood of future harm to the children. Father respectfully suggests that the holding in X.D.G. is irreconcilable with the opinion of the majority in the Southern District below.

Because the Greene County Juvenile Office failed to bear its burden of proof pursuant to RSMo. 211.447.5 of establishing by clear, cogent and convincing evidence that Father failed to rectify his circumstances, or that his actions indicate the likelihood of future harm, this case must be remanded to the Juvenile Court of Greene County, Missouri.

#### **ARGUMENT 4**

**The trial court erred in its Judgment and Order Terminating Parental Rights of Appellant because the evidence was insufficient to support a finding that it was in the best interest of the minor children to terminate the parental rights of Appellant in, to and over the minor children in that 1) Father consistently requested contact and visitation with the children, but was denied, 2) Father provided financial support for the minor children, 3) the Social Worker assigned to the case at the time of trial believed additional services could bring about parental adjustment to enable reunification, 4) Father maintained contact with social workers, juvenile officers, the Guardian ad Litem, and the children, when permitted, 5) Father obtained services at his own expense while the ICPC homestudy was pending in the state of California, and 6) Father moved to the state of Missouri for the purpose of reunification with his children.**

In addition to establishing a statutory basis for termination of parental rights, the Juvenile Office must also establish that a termination of parental rights is in the best interest of the child. RSMo. 211.447.6 (2008). In so considering, the trial court shall evaluate and make findings on the following factors, when appropriate and applicable to the case:

- (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 that the child is in the custody of the division or other child-placing agency;

(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 that the court finds is of such a nature that the child will be deprived of a stable home for a period of years; provided, however, that incarceration in and of itself shall not be grounds for termination of parental rights;

(7) Deliberate acts of the parent or acts of another of which the parent knew or should have known that subjects the child to a substantial risk of physical or mental harm.

### **Standard of Review**

The standard of review is set forth in Point I above. Best interest determinations are reviewed under an abuse of discretion standard.

### **Best Interests of the Child**

The trial court found that it was in best interests of the children for Father's parental rights to be terminated. (L.F. 123, 133, 142). In so finding, the trial court considered the factors set forth in RSMo. 211.447.7, and made certain findings tending to show that termination was in the children's best interest with respect to factors (1) - (5). (L.F. 121-122, 131-132, 140-141). The trial court made no findings tending to show that factors (6) or (7) weighed in favor of termination. (L.F. 122, 132, 141) Furthermore, for the reasons set forth below, the trial court abused its discretion in determining that it was in the children's best interest for Father's parental rights to be terminated.

The trial court's findings with respect to factors (1) – (5) are erroneous in that the evidence adduced at trial establishes that Appellant consistently requested contact and visitation with the children, but was denied, and provided financial support for the minor children. At all relevant times, Appellant maintained contact with social workers, juvenile officers, the Guardian ad Litem, and the children, when permitted. Appellant further demonstrated his commitment to his children by obtaining services at his own expense while the ICPC homestudy was pending in the state of California, and moving to the state of Missouri for the purpose of reunification with his children.

Furthermore, the Social Worker assigned to the case at the time of trial believed additional services could bring about parental adjustment to enable reunification, and she

specifically recommended against termination being in the children's best interest both in her live testimony and in her written report to the Court. (L.F. 77-83; Tr. 61:11-12)

Most importantly, these young men - ages 11, 11 and 13 as of the date of trial – have now been made orphans by the State by virtue of this Judgment. The brothers are placed in separate foster homes, only one of which might be a potential adoptive placement. (Tr. 52:12- 56:16) Visitation between the siblings can be “difficult” due to the physical separation. (Tr. 52:19-23) Father respectfully suggests that the trial court abused its discretion in determining that termination of Father's parental rights was in the children's best interests when 1) the Father expressed a desire to raise all three of the boys together, 2) he was favorably assessed by his psychological evaluator, and 3) when the social worker charged with handling this case testified that she believed her conscience mandated he be provided more time to achieve reunification. These young men may be very angry at their Father for not coming to be with them earlier than he did, however, it would only exacerbate the tragedy that has already occurred in their lives for them to be separated from each other forever while there still remains hope for reunification.

### CONCLUSION

For the reasons set forth above, Appellant prays that this Court reverse the trial court's judgment terminating Father's parental rights over his child, and for such other and further relief as the Court deems appropriate under the circumstances.

Respectfully Submitted,

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& SHERMAN, P.C.

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**Certificate of Compliance**

I, Kristoffer R. Barefield, hereby certify as follows:

To the best knowledge and belief of the undersigned attorney, Appellant's Brief complies with the limitations contained in special rule 1(d) and specifically, pursuant to the word processing system of Appellant's counsel, there are 8,896 words contained in Appellant's brief.

/s/ Kristoffer R. Barefield  
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**Certificate of Service**

This certifies that on November 18, 2013, a true and accurate copy of Appellant's Brief was filed with the Clerk of the Court by using the Missouri Courts eFiling System, which will send a notice of electronic filing to the following:

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