SC93649

IN THE MISSOURI SUPREME COURT

IN RE THE INTEREST OF:

A.E.R., D.K.R. and J.A.R.
CHILDREN UNDER SEVENTEEN YEARS OF AGE,

D.G.R., APPELLANT

VS.

GREENE COUNTY JUVENILE OFFICE, RESPONDENT

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a decision of the Juvenile Division of the Circuit Court of Greene County, Missouri, that was filed on or about November 5, 2012. On or about December 5, 2012, Appellant filed his Notice of Appeal of the Trial Court's Judgment with the Missouri Court of Appeals Southern District. On or about August 20, 2013, the Missouri Court of Appeals, Southern District issued its opinion affirming the judgment of the Trial Court. Justice Rahmeyer dissented from the majority opinion and certified this matter to this Court under Supreme Court Rule 83.03.

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STATEMENT OF FACTS

This is an appeal from orders of the Juvenile Court of Greene County Missouri ("Trial Court") dated November 5, 2012 in Case Numbers 12GK-JU00151, 12GK-JU00152, and 12GK-JU00153 terminating the parental rights of the father, Daniel Gerard Rutschke (hereinafter referred to as "Appellant" or "father") in, to, and over A.E.R. (hereinafter referred to as "A.R."), D.K.R (hereinafter referred to as "D.R.") and J.A.R. (hereinafter referred to as "J.R.") (hereinafter referred to collectively as "Minor Children") respectively (L.F. 116-142). The parental rights of the mother, Antoinette Rutschke (hereinafter referred to as "mother"), of A.R., D.R. and J.R., were also terminated, however the mother does not appeal the decision of the Trial Court.

In July 2010, the minor children came to live with the people they viewed as their maternal grandparents (they are their mother's former foster parents) because their mother was in jail and Appellant was having trouble providing for the children in California (TR. 115). In the fall of 2010 the child's mother moved to Springfield (TR. 116). Appellant never visited the minor children while they were residing with their "grandparents" despite repeatedly promising to do so (TR. 122). Sometime before Thanksgiving 2010 the mother had gotten a residence and the minor children went and lived with her (TR. 117).

In March 2011, the Children's Division (hereinafter referred to as "CD or "The Division") received a hotline alleging lack of supervision of the Minor Children by the mother (TR. 29). Tara Carter who was employed by the Division as an investigator was assigned the report after one of the children, J.R., was left at school and not been picked up at 5:00 pm (TR. 29). When Ms. Carter went to the home to enquire about the allegations she found the mother to be intoxicated with no idea of where the Minor Children were (TR. 30). Ms. Carter attempted to contact family members including the Minor Children's father, Appellant, but none of the contacted persons were able to take the children at that time (TR. 30). At that time the father was residing in California, but did not have stable housing and was unable to come to Missouri to get the children (TR. 31). Due to a lack of a suitable custodian law enforcement took custody of all three minor children (TR. 31).

Petitions were filed by the Juvenile Office alleging the Minor Children were subject to the Trial Court's jurisdiction as they had been abused and/or neglected by the parents (TR. 8). After custody was taken Ms. Carter spoke with the Minor Children and found they had not seen their father in several months (TR. 32). The children were placed at the Ozark Resource Center and a 72 hour meeting and protective custody hearing were set up. Neither parent was personally present for the meeting or hearing (TR. 32).

On or about April 26, 2011, First Amended Petitions were filed in each of the Minor Children's cases and on May 10, 2011, adjudication hearings were held, in which the Trial Court found that the allegations in the First Amended Petitions were true and that the Minor Children came under the jurisdiction of the Trial Court (Files 11GK-JU00254, 11GK-JU00255, 11GK-JU00256 offered for judicial notice TR. 8). The specific allegations that pertained to Appellant were that he resided in California, that he had engaged in domestic violence against the mother, was on probation for a conviction of having assaulted the mother, the father had custody of the Minor Children, but that he had sent them to reside with relatives in Missouri in September 2010 as he was too overwhelmed to care for them while the mother was incarcerated (TR. 8).

The first case worker on the cases was Danielle Michele who was assigned the cases in March 2011 (TR. 95). Ms. Michelle testified that the goal at the outset of the cases was reunification with a parent, but in order for that to occur the mother needed to work on her mental health and sobriety and the father needed to obtain stable housing, address his mental health issues and work on his physical abuse issues (TR. 96). Treatment plans were entered by the Trial Court in order to help guide the parents on how they could be reunified with the Minor Children (TR. 96).

Ms. Michele kept in contact with Appellant by phone, while she had the case as he was in California (TR.96). Appellant indicted to her that he intended to be in the state of Missouri in about ten weeks (TR. 97). In the two months that Ms. Michele was the case worker on the case Appellant had not yet come to Missouri to see the Minor Children (TR. 97). Ms. Michele sent Appellant a copy of his treatment plan and advised him on contacting his local Children's Division office to try and get a local case worker (TR. 97).

As he was in California, Appellant was unable to have visits with the Minor Children, but he did speak with them over the phone (TR. 98). At that time the Minor Children were residing with the maternal grandparents whom were comfortable receiving calls for the children directly from the father (TR. 99). Appellant provided information to Ms. Michele about how to contact him and whom he was employed by (TR. 99).

While Ms. Michele was the case worker, the Minor Children had indicated that they would like to live with Appellant and their view did not change while she had the case (TR. 101). Also, while Ms. Michele had the case Appellant did not send any letters to the children and provided support on one occasion (TR. 101). Appellant gave Ms. Michele the impression that he was able and willing to come to Missouri once he saved up some money to do so (TR. 102).

In June 2011 the case was assigned to Elizabeth Hwang as case worker (TR. 37). When she began working on the case the goal remained reunification (TR. 38). Appellant was still residing in California, but Ms. Hwang communicated with him regularly and in those conversations they would talk about Appellant's treatment plan (TR. 38). She offered several times to do an ICPC for Appellant so that a worker could be assigned to him in California, but Appellant was not interested as he intended to move to Missouri (TR. 39). Without an ICPC and homestudy being completed Ms. Hwang was unable to refer a local case worker to Appellant (TR. 39).

Appellant expressed an interest to Ms. Hwang about completing some of the items on his treatment plan and she explained that the Children's Division would be unable to pay for any services without the homestudy being done (TR. 40). A homestudy was done during the summer of 2012 and it was not approved (TR. 40).

Appellant indicated to Ms. Hwang that he would be moving to Missouri between September and November 2011 (TR. 41). At no time during that time period did Appellant come to Missouri (TR. 41). Appellant later told Ms. Hwang that he was unable to come to Missouri due to being on probation and that he needed to complete probation before he could leave California (TR. 41). Appellant completed his probation by paying his fines in November 2011 (TR. 41). Appellant

then told the Minor Children he would be in Missouri for Christmas (TR. 41). Appellant did not come for Christmas (TR. 42).

Appellant had regular phone contact with the Minor Children and the children enjoyed speaking with Appellant (TR. 42). When Appellant would tell the children he was coming and then not end up doing so the Minor Children were disappointed (TR. 42). The children's grandmother testified that the calls were often not appropriate in that Appellant would promise that he would be there for their birthdays and then never show up (TR. 121). Also, Appellant would try and talk to the children about the problems the mother had with alcohol and negative things she had done in the past (TR. 121).

In the spring of 2012, Appellant came to Missouri in preparation for a move (TR. 42). Appellant arrived several days late and missed the court date, but stayed in town for several days (TR. 43). While Appellant was in Missouri he met with Ms. Hwang and indicated he would be moving to the state in March or April (TR. 75). Once Appellant returned to California he changed his mind about moving and got a lease for a residence in California (TR. 76).

While Appellant was in Missouri he did not ask about the Minor Children and did not see any of them (TR. 43). The family support team had concerns about setting up a visit with the boys because in the past, Appellant had said he was coming and not shown up. It was unknown if this time he would actually come to

Missouri as promised (TR. 43). Appellant was asked to write letters to the children when he was in town and did not do so (TR. 49). At other times, Appellant sporadically wrote to the minor children, but when he was specifically asked to write letters to D.R. so that D.R. could process them with his therapist Appellant failed to do so (TR. 48, 77). Over the case he sent the children cards for their birthdays which were slightly inappropriate, but which were provided to the children (TR. 49). He wired some money to Wal-Mart for two of the children on one occasion and when the children resided with their grandparents he provided some additional financial support (TR. 48).

Appellant kept in contact with Ms. Hwang (TR. 44). He tested negative for controlled substances in a recent drug test and completed a psychological evaluation prior to the court hearing (TR. 64). Appellant represented that he had completed an 8 hour parenting class at his own expense (TR. 63).

At the time of trial Appellant had moved to Missouri a week previous, was residing in his car, and was unemployed (TR. 50). Ms. Hwang provided some referrals to Appellant for shelter, but he stated he would prefer to reside in his vehicle (TR. 51). Prior to moving to Missouri, Appellant had been employed and provided the name and contact information for his employer, but never provided any pay stubs (TR. 51, 69). Ms. Hwang testified that at the time of trial was

residing in an environment that was not appropriate for the children, he had no way to support the children and had just started his treatment plan (TR. 61).

The Minor Children were residing in three different foster homes (TR. 52). The children have contact with each other either in person or over the phone (TR. 52). Ms. Hwang spoke with the minor children about the contact they would like to have with Appellant (TR. 53). J.R. reported that he doesn't know how he feels about Appellant and did not want to see him at that time (TR. 54). A.R. reported Appellant made lots of promises to be there for him and he has been waiting two years and he doesn't want to see him (TR. 55). D.R. reported that he doesn't want anything to do with his parents; he is tired of being disappointed (TR. 57).

Ms. Hwang testified that before reunification could be achieved Appellant would need to engage in family therapy with the Minor Children and then move to supervised visits (TR. 57). Ms. Hwang said reunification in the near future was not possible (TR. 57). The minor children are not members of any Native American or Alaskan Eskimo tribes and are not related to the deputy juvenile officer (TR. 58).

For a period of time from June 4, 2012 through August 13, 2012, Heather Radney was the case worker on the case while Ms. Hwang was out on leave (TR. 104). While she was on the case Ms. Radney continued to work with the parents on reunification even though the case goal was adoption (TR. 104). She informed the parents that she was the temporary worker on the case and Appellant kept in

regular contact with her (TR. 105). Appellant was residing in California when Ms. Radney was on the case and at that time he told her he was going to stay in California and he would like the minor children to reside with him (TR. 106). At that point Ms. Radney initiated the process to have an ICPC homestudy done on Appellant (TR. 107).

For the time that Ms. Radney was working on the case the minor children were not having any contact with their parents at the children's request (TR. 107). She kept in contact with the minor children to see if they changed their mind about contact so that it could be restarted if one or more changed their mind (TR. 107).

From November 2011 through July 2012 the Minor Children participated in counseling with Gary Chadwick, licensed professional counselor (TR. 83-85). He met with the minor children both individually and together as a group (TR. 85). He worked primarily with the boys on anger management, family relationship dynamics, boundaries and communication (TR. 85-86). Mr. Chadwick requested correspondence from the parents, but doesn't remember ever receiving any from Appellant (TR. 87). Mr. Chadwick specifically formulated a plan with D.R. in which they asked Appellant to send weekly letters to show what Appellant was willing to do (TR. 93). Mr. Chadwick doesn't recall receiving any letters (TR. 94).

At first all of the minor children spoke fondly of Appellant, but that they were all surface things (TR. 90). They all also expressed that Appellant never

really made the effort (TR. 90). Both A.R. and D.R. had given up on Appellant being a part of their lives and D.R. to some extent tried to take on the roll of Appellant for his brothers (TR. 91). When asked in the summer of 2012 if D.R. would like to have contact or write to Appellant D.R. declined, that he didn't think he could do it (TR. 90). At other times all of the minor children expressed to Mr. Chadwick that they would not be comfortable with seeing Appellant (TR. 92). In Mr. Chadwick's professional opinion, the Minor Children's feelings were that due to Appellant's absence in their lives, that he wasn't interested (TR. 92). The minor children felt as though they have been neglected by Appellant (TR. 92).

D.R. then switched therapists and started working with Stacy Bober, who is licensed by the state of Missouri as an LCSW, she met with D.R. once a week at her office, The Center for Resolutions, for forty-five minutes to an hour (TR. 20-21). In those sessions D.R. brought up the subject of his father a couple times and indicated that he did not want to have contact with Appellant (TR. 22). At one point Appellant wrote a letter to D.R., but D.R. did not want to read the letter or have Ms. Bober read it to him (TR. 22). D.R. was given the option of taking the letter with him and he declined (TR. 22). Ms. Bober kept a copy of the letter in the child's file so that he could read it if he so desired (TR. 22). Ms. Bober also testified that the child has no special needs and does very well in school (TR. 24-25).

Appellant chose not to testify at trial. The Guardian Ad Litem made a recommendation that in her opinion it would be in all three children's best interest that the rights of the mother and father be terminated (TR. 134). The Trial Court asked that all parties submit written suggestions (TR. 134). On or about November 5, 2012, the Trial Court entered its order terminating the parental rights of both parents on all three children (L.F. 116, 125, 134). On December 5, 2012, Appellant filed his notices of appeal (L.F. 149, 151, 153).

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN TERMINATING THE PARENTAL RIGHTS OF APPELLANT BECAUSE THE JUVENILE OFFICE ESTABLISHED BY CLEAR, COGENT, AND CONVINCING EVIDENCE THAT APPELLANT HAD ABANDONNED THE MINOR CHILDREN.

Section 211.447.5 (1)-(6) RSMo.

In Re J.M.S., 83 S.W. 3d. 76 (Mo. App. 2002)

In Re J.W., 11S.W.3d. 699 (Mo. App. 1999)

In Re R.K., 982 S.W.2d 803 (Mo. App. 1998)

In Re T.R.W., 317 S.W.3d 167 (Mo. App. 2010)

II. THE TRIAL COURT DID NOT ERR IN TERMINATING THE PARENTAL RIGHTS OF APPELLANT BECAUSE THE JUVENILE OFFICE ESTABLISHED BY CLEAR, COGENT, AND CONVINCING EVIDENCE THAT APPELLANT HAD ABUSED AND/OR NEGLECTED THE MINOR CHILDREN.

Section 210.110 (12) RSMo.

Section 211.447 RSMo.

In Re D.R.W., 663 S.W.2d 426 (Mo. App. 1983)

In Re J.K., 38 S.W.3d 495 (Mo. App. 2001)

In Re K.M.C., 223 S.W.3d 916 (Mo. App. 2007)

In Re P.L.O., 131 S.W.3d 782 (Mo. Banc 2004)

III. THE TRIAL COURT DID NOT ERR IN TERMINATING THE PARENTAL RIGHTS OF APPELLANT BECAUSE THE JUVENILE OFFICE ESTABLISHED BY CLEAR, COGENT, AND CONVINCING EVIDENCE THAT THE MINOR CHILDREN HAVE BEEN UNDER THE COURT'S JURISDICTION FOR MORE THAN ONE YEAR AND APPELLANT HAD FAILED TO RECTIFY THE CONDITIONS THAT LED TO THE CHILDREN'S PLACEMENT IN CARE AND THAT CONDITIONS OF A POTENTIALLY HARMFUL NATURE EXISTED SUCH THAT THE CHILDREN COULD NOT BE RETURNED TO APPELLANT IN THE NEAR FUTURE.

Section 211.447 RSMo.

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

In Re S.A.J., 818 S.W.2d 690 (Mo. App. 1991)

In Re S.M.H., 106 S.W.3d 355 (Mo. Banc 2004)

IV. THE TRIAL COURT DID NOT ERR IN TERMINATING THE PARENTAL RIGHTS OF APPELLANT BECAUSE THE JUVENILE OFFICE PRESENTED SUFFICIENT EVIDENCE THAT TERMINATION OF APPELLANT'S PARENTAL RIGHTS WAS IN THE BEST INTERESTS OF THE MINOR CHILDREN.

Section 211.447, RSMo.

In Re A.S., 38 S.W.3d 478, 487 (Mo. App. 2001)

In Re C.A.M., 282 S.W.3d 398 (Mo. App. 2009)

In Re D.L.W., 133 S.W.3d 582 (Mo. App. 2004)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN TERMINATING THE PARENTAL RIGHTS OF APPELLANT BECAUSE THE JUVENILE OFFICE ESTABLISHED BY CLEAR, COGENT, AND CONVINCING EVIDENCE THAT APPELLANT HAD ABANDONNED THE MINOR CHILDREN.

The judgment in a termination of parental rights case will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence or unless it erroneously declares the law. **In Re A.M.C., 983 S.W. 2d 635, 637 (Mo. App. 1999); In Re D.C.H., 835 S.W.2d 533, 534 (Mo. App. 1992).** Deference is to be given the Trial Court's determinations regarding the credibility of the witnesses. **In Re J.B.D., 151 S.W.3d 885, 887 (Mo. App. 2004).** "It is only necessary to reverse or remand if this Court is left with a firm impression that the judgment is wrong." **Id.** In reviewing a case such as the case at bar, this Court should consider the facts and the reasonable inferences there from, in the light most favorable to the Trial Court's order. **In Re B.L.B., 834 S.W.2d 795, 799 (Mo. App. 1992)**.

The grounds for termination of parental rights must be shown by clear, cogent, and convincing evidence. Evidence is clear, cogent and convincing when it instantly tilts the scales in the affirmative when weighed against the evidence in

opposition and the fact finder's mind is left with an abiding conviction that the evidence is true. **In Re A.L.B., 743 S.W.2d 875, 879 (Mo. App. 1987)**. The clear, cogent, and convincing standard may be met "even though the court has contrary evidence before it or the evidence might support a different conclusion." **In Re K.M.C., 223 S.W.3d 916, 922 (Mo. App. 2001).**

To terminate parental rights there must be a strict and literal compliance with statutes and those seeking to terminate parental rights have the burden of proof. **In Re D.C.H., at 534**. The primary concern in any termination of parental rights case is the best interests of the children **In Re M.E.W., 729 S.W.2d 194, 195 (Mo. 1987)**. The Court may reach the best interest of the children, however, only after it has made a determination that one or more of the statutory grounds to terminate a parent's rights exist. **In Re M.H., 859 S.W. 2d 888, 896 (Mo. App. 1993)**.

Where multiple statutory grounds for termination of parental rights are found, the Court need only find that one of the statutory grounds was proven and that termination is in the best interests of the child to affirm the judgment. **In Re J.B.D., 151 S.W.3d 885, 887 (Mo. App. 2004).** When there is no contention in a point relied on or argument that the trial court erred in finding the termination was in the best interests of the child, it is only necessary to consider whether any one of

the statutory grounds is supported by evidence. **Id.** (*citing* **In Re S.L.J., 3 S.W.3d 902, 907 (Mo. App. 1999).**

Section 211.447.5 (1)-(6) RSMo., as amended to date, provides that the Court may terminate parental rights if it finds that one or more of the following statutory grounds exist: 1) Abandonment; 2) Abuse and/or neglect of the minor child; 3) Failure to rectify in that the minor child has been under the jurisdiction of the juvenile court for a period of one year; 4) the parent has been convicted of a felony of Chapter 566 RSMo. Or 568.020 RSMo.; and 5) The parent is presumptively unfit to be a party to the parent and child relationship due to prior involuntary terminations of parental rights or the commission of certain types of abuse to or before the minor children.

Appellant's first point alleges that the trial court erred in terminating his rights because there was not clear, cogent and convincing evidence to support a finding of abandonment. (Appellant's S. Br. p. 18). Appellant argues that he did not abandon the minor children because he sought to regain custody and never possessed intent to abandon his children (Appellant's S. Br. p. 19).

To terminate under the statutory ground of abandonment, it must be proven that Appellant, without good cause, left the Minor Children without any provision for parental support and failed to make arrangements to visit or communicate with

the Minor Child for a period of six months or longer. **Section 211.447.5(1)(b) RSMo.** *See also* **In Re J.B.D., 151 S.W.3d 885, 887 (Mo.App. 2004).**

"Abandonment is defined as the voluntary and intentional relinquishment of custody of a child with the intention that the severance be of a permanent nature or as the intentional withholding by a parent of his care, love, protection and presence without just cause or excuse." **In re R.K., 982 S.W.2d 803, 806 (Mo.App.1998).** In determining whether abandonment has occurred, the parent's intent, which may be inferred, is determined by considering all the evidence of the parent's conduct, both before and after the statutory period. **In Re J.M.S., 83 S.W. 3d. 76 (Mo. App. 2002)** (emphasis added).

In reviewing the definition of abandonment in 211.447.5 it is comprised of two parts: 1) the parent has failed to provide parental support for a period of time of more than six months and 2) the parent has failed to visit or otherwise communicate with the minor child for a period of time of more than six months. Examining each of these parts individually it is apparent Appellant has abandoned the minor children.

1. Parental Support

The evidence offered at trial was that although Appellant provided financial support for the Minor Children prior to them coming into custody in March 2011, once they were under the care of the state, Appellant ceased providing support on a

regular basis (TR. 48, 127, 130). Appellant offered evidence of having sent thirteen different money orders to the children and or their grandparents in an effort to help provide financially for their needs (TR. 110, Dad's Exhibits C, and D1-D12). The only testimony regarding the money orders was by the Minor Children's grandmother, Nancy Wyman. Ms. Wyman testified that the Minor Children resided with her from July 2010 through the fall of 2010, and then resided with her again after they came into custody in March 2011 (TR. 116). Ms. Wyman recalled the money orders that were offered, and she testified that she recalled those arriving prior to July 2011 (TR. 130).

The only other financial support Ms. Wyman recalled receiving from Appellant was in July 2011 when he sent her a check and asked that she use a portion of that for the Minor Children for Christmas presents, to use the majority of the check to pay his fines owed to the State of California, and that she then send the balance back to Appellant (TR. 126). The primary case worker Elizabeth Hwang testified that the only financial support she knew that Appellant provided to the Minor Children was the money orders he sent to Ms. Wyman and some money he wired to Wal-Mart for two of the children close to the trial date (TR. 48). That would mean that from July 2011 through September 2012, Appellant provided no financial support for the Minor Children, a period of time of approximately 14 months.

Appellant argues that his situation was similar to the appellant in **In re C.J.G., 358 S.W.3d 549 (Mo. App. 2012)**. That case is distinguishable from Appellant's situation in that, the father is **C.J.G.** was incarcerated for a portion of the case and prevented by the trial court to see or otherwise contact the minor child. Also, distinguishing the case is that the father in **C.J.G.** paid over $3000 in support and mother paid another $5000[1] **Id at 556**. Appellant was not incarcerated at any time that the minor children have been in custody and has been employed and healthy (TR. 65, L.F. 57) and yet he did not contribute **any** financial support for fourteen months.

Offering support, no matter how minimal, demonstrates a parent's intent to continue the parent-child relationship. **In Re J.M.L., 917 S.W.2d 193, 196 (Mo.App. 1996)**. A prisoner earning just $0.33 a day should send something…to show that the parent still cares. **In Re M.L.K., 804 S.W.2d 398, 402 (Mo.App. 1981).** One could argue that if a prisoner should be able to send something, a non-incarcerated parent that is employed should be even more able to send some kind of financial or other in-kind support to show that they care for their child.

[1] Mother and Father resided together and pooled their financial resources so the court found that contributions from her were also contributions from father's financial resources **Id at 556**.

In addition, Appellant did not take the necessary four-step process to make a viable against the weight of the evidence argument. To do so he would need to:

> "(1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
>
> (2) identify all of the favorable evidence in the record supporting the existence of that proposition;
>
> (3) identify the evidence in the record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and,
>
> (4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition." **Houston V. Crider, 317 S.W.3d 178, 187 (Mo.App. 2010).**

Appellant makes no argument in his brief of any additional financial support that the Trial Court neglected to take into account, he also does not identify all of the favorable evidence and he does not make much attempt to challenge the favorable evidence. He simply argues that the record does not support a finding that Appellant failed to support the Minor Children for a six month period.

2. Visits/Communication

Appellant by his own admission has not seen the minor children since August 2010, more than three years prior to trial and 19 months since the children were taken into protective custody (L.F. 56). There was testimony that Appellant may have been limited in his ability to travel to Missouri to see the Minor Children because of requirements of his probation in the State of California (TR. 41). However, the evidence was also that despite these possible terms of probation, Appellant promised the Minor Children repeatedly that he would come and visit them and repeatedly told the case workers that he was moving to Missouri (TR. 41, 42, 97, 102, 121, 122).

Again, Appellant does not detail the necessary four-step process to make a viable against the weight of the evidence argument to overcome the Trial Court's findings that Appellant had abandoned the Minor Children. He does argue that Appellant had phone contact with the children and that contact was ceased at the children's request so he should not be viewed as having abandoned them. This is a misstatement of the evidence.

The testimony at trial was that Appellant had regular calls with the children until sometime in early 2012 when they were stopped due to Appellant's inappropriate conversations with the Minor Children, in that he continued to make promises he didn't keep and he would disparage the children's mother (TR. 121,

122, 129). After the calls were stopped Appellant was encouraged to send letters and cards to the Minor Children (TR. 48). At one point in D.R.'s therapy with Gary Chadwick, Appellant was asked to send a letter once a week for D.R. to process in therapy and for Appellant to show commitment to his child (TR. 93). Appellant did not send any letters (TR. 94). Mr. Chadwick testified that in the time he worked with the Minor Children, November 2011 through July 2012, he did not receive a single letter from Appellant (TR. 87).

Ms. Hwang testified that Appellant sporadically sent letters or cards for the Minor Children, but she could only recall receiving two letters from Appellant, one each for two of the Minor Children, J.R. and D.R. for their birthdays (TR. 49). She also confirmed that Appellant was requested to send weekly letters so that they could be processed in the Minor Children's therapy, but Appellant failed to do so (TR. 48).

Again, there was no testimony or other evidence offered at trial that Appellant was in any way unable to send letters or cards. As previously noted Appellant described himself as being in good health, capable of work, and with no disabilities or handicaps (L.F. 57-59). So even though Appellant had no good cause not to do so, he at most sent one letter to each child in the nine months prior to trial. A Trial Court may attach little or no weight to infrequent visitations, communications or contributions as the Trial Court is free to regard such efforts as

token **In Re B.S.B., 76 S.W.3d 318, 326 (Mo. App. 2002)**. Nominal or token communication does not preclude a finding of abandonment **In Re J.W., 11S.W.3d. 699, 704 (Mo. App. 1999)**. Respondent argues that one letter to a child in 9 months should be considered token contact.

Appellant also argues that he had regular contact with the case worker and therefore has not abandoned the Minor Children. However, 211.447.5 in its definition of abandonment makes no discussion of communication with the case worker, it is if the parent has visited or communicated with **the minor child(ren)** for a period of time of more than six months (emphasis added). Courts have held that it is communication with the child(ren) that is what matters in terms of looking at abandonment, not communication with the case worker or other members of the family support team **In Re T.R.W., 317 S.W.3d 167, 172 (Mo. App. 2010)** Respondent contends that as in that case, Appellant has evidenced no intent to preserve the parent child relationship, the only contact he has made in the past nine months has been token and that Appellant has abandoned the Minor Children.

II. THE TRIAL COURT DID NOT ERR IN TERMINATING THE PARENTAL RIGHTS OF APPELLANT BECAUSE THE JUVENILE OFFICE ESTABLISHED BY CLEAR, COGENT, AND CONVINCING EVIDENCE THAT APPELLANT HAD ABUSED AND/OR NEGLECTED THE MINOR CHILDREN.

Appellant's second argument is that there was not sufficient evidence presented at trial that he had abused and/or neglected the Minor Children. Section **211.447.5(2)(a)-(d) RSMo**., as amended to date, requires the court to consider evidence and make findings on four conditions: a) mental condition; b) chemical dependency; c) severe or recurrent acts of abuse; and d) repeated or continuous failure by the parents, 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. The Trial Court made findings as to all four factors (L.F. 118-119, 127-129, 136-138).

These four factors are simply categories or evidence to be considered along with other relevant evidence, rather than separate grounds for termination in and of themselves… Nevertheless, proof of one such factor is sufficient to support termination on the statutory abuse or neglect ground. **In Re K.M.C., 223 S.W.3d 916, 923 (Mo. App. 2007)**.

Section **210.110 (12) RSMo**., as amended to date, defines neglect as failure to provide, by those responsible for the care, custody, and control of a child the proper or necessary support, education as required by law, nutrition, or medical or surgical care necessary for the child's wellbeing. See also **In Re D.R.W., 663 S.W.2d 426, 429 (Mo. App. 1983)**. Abuse refers to a willful act, while neglect is a general and a negative proposition meaning simply the failure to perform the duty with which a parent is charged by the law and by conscience. **In Re J.K., 38 S.W.3d 495 (Mo. App. 2001)**.

Appellant argues that he did not neglect the Minor Children because he called them, provided support, and sent some letters. As previously argued in Point I and reincorporated here by reference the evidence at trial was that Appellant had not done any of those things in more than six months before trial. The evidence at trial was that Appellant by his own admission had not seen any of the Minor Children since August 2010, after he sent them to live with their grandparents because he could not provide for their needs (TR. 115, L.F.56).

When allowed phone contact with the Minor Children, Appellant abused his privilege by discussed inappropriate things and by continuously making promises to the Minor Children that he was coming to see them and then never showing up (TR. 121, 122, 129). He then was urged to continue contact with the minor children by sending letters that the children would discuss with their therapist(s)

and with the exception of a birthday card or two, Appellant declined to do so (TR. 48, 87, 93, 94). When Appellant finally made it to Missouri for a few days in March 2012, he was several days late from his promised arrival date, resulting in his missing the court date and the family support team meeting that had been specifically scheduled to be held when Appellant was in town (TR. 43, 75). The case worker testified that when he was here Appellant did not ask for a visit with any of the children and he was asked to write them each a letter and he declined to do so (TR. 43, 49).

Appellant mentions a later part of Ms. Hwang's testimony in which when questioned by Appellant's attorney she seems to change her testimony and said that "I *believe* he would have wanted to see his children." (TR. 67). Then when asked if Appellant expressed a desire to see his children Ms. Hwang responded that she didn't remember, Appellant *may* have (TR. 67). She was then asked again she said he *may* have asked (TR. 67). Even if Appellant had expressed an interest in seeing his children when he was in Missouri, it doesn't change the facts that Appellant once again was not present when he promised he would be and when he was asked to write a letter to each of the children instead, he chose not to (TR. 49).

For the entirety of the time the Minor Children have been in custody Appellant has done little more than promise to be a great dad. He repeatedly promised the children, the case worker, and the other members of the family

support team that he was going to move to Missouri and do what was necessary to take care of his children and yet time and time again he failed to follow through (TR. 31, 39, 41, 42, 75, 97, 102, 121). The Minor Children have not been unaffected by Appellant's lack of follow through. The children's counselor Gary Chadwick testified that the boys felt like they had been neglected by Appellant (TR. 92). D.R. when making a time line of his life, failed to include his father (TR. 90).

If a parent fails to provide for a child's shelter, food, clothing and basic educational they have neglected that child. **In Re P.L.O., 131 S.W.3d 782, 790(Mo. Banc 2004)**. In the more than 18 months the Minor Children they have been in protective custody, at no time has Appellant provided for their needs. When the case started, Appellant told law enforcement and the Children's Division investigator that he did not have stable housing and could not afford to come get the children (TR. 31). On multiple occasions Appellant was asked if he would like an ICPC homestudy done on him so that he could get a case worker and be referred services in California and eventually be placement for the minor children, he refused saying time and time again that he was moving to Missouri (39, 107). At the time of trial Appellant was unemployed, living out of a truck and had no source of income so he had no way of providing for the children for the foreseeable future (TR. 51, 61, 81; L.F. 59).

Appellant argues that he should not be responsible for providing financial support for the minor children because he is indigent. Respondent argues that Appellant's indigence was self inflicted and therefore should not be able to be used as an excuse for failing to provide for his children. Less than thirty days before trial Appellant was employed, with stable housing that he paid $1200 a month for, in good health and had a vehicle. In fact the Court was concerned enough that at the August 13, 2012, hearing in the abuse and neglect cases the Trial Court ordered Appellant to provide his past two years tax returns to prove he still qualified for free counsel, Appellant never complied. Instead, he quit his job, left his housing (breaking his lease) and drove cross country with no plan on where he will live or how he will support himself let alone how he will provide for his children.

Respondent respectfully contends that when the evidence is considered in its entirety it was substantial enough to support the Trial Court's finding that Appellant had neglected the Minor Children and that the Trial Court's judgment was not against the weight of the evidence nor did the Court did erroneously declare the law.

III. THE TRIAL COURT DID NOT ERR IN TERMINATING THE PARENTAL RIGHTS OF APPELLANT BECAUSE THE JUVENILE OFFICE ESTABLISHED BY CLEAR, COGENT, AND CONVINCING EVIDENCE THAT THE MINOR CHILDREN HAD BEEN UNDER THE COURT'S JURISDICTION FOR MORE THAN ONE YEAR AND APPELLANT HAD FAILED TO RECTIFY THE CONDITIONS THAT LED TO THE CHILDREN'S PLACEMENT IN CARE AND THAT CONDITIONS OF A POTENTIALLY HARMFUL NATURE EXISTED SUCH THAT THE CHILDREN COULD NOT BE RETURNED TO APPELLANT IN THE NEAR FUTURE.

Appellant next argues that sufficient evidence was not presented supporting the Trial Court's findings that the Minor Children had been in care for more than one year and the conditions leading to the placement of the Minor Children continued to exist or that conditions of a potentially dangerous condition existed. There was no dispute that the Minor Children had been in care for more than one year, having been taken into care on March 2011 and remaining in care through trial in October 2012 (TR. 31, LF 16, 25, 34).

Respondent acknowledges that the parental rights of a parent cannot be terminated simply by the parent failing to complete each and every item of a treatment plan. The issue is whether the parent made substantial progress on their

treatment plan. **In Re S.J.H., 124 S.W.3d 63 (Mo. App. 2004) and In Re S.M.H., 106 S.W.3d 355 (Mo. Banc 2004)**. In making its findings on the ground of failure to rectify, the Trial Court made all of the required findings mandated by **211.447.5(3)(a)-(d) RSMo**., as amended to date (LF. 119-121, 129-130, 138-139).

Appellant was ordered a treatment plan at the jurisdictional hearing on May 10, 2011 (Files 11GK-JU00254, 11GK-JU00255, 11GK-JU00256 offered for judicial notice TR. 8). Appellant was not present at that hearing, but was represented by counsel and he was sent a copy of his treatment plan by the case worker (TR. 97). The issues that Appellant needed to address to be reunified with his children was that Appellant needed to decide if he was staying in California or moving to Missouri, he needed to secure housing that was appropriate for the children, and he needed to secure employment that would enable him to financially provide for the children (TR. 30, 80, 95). While Appellant may have made some progress on the terms of his treatment plan at the time of trial he was homeless and had no lawful means of income and he had no plan for the future. The lease that Appellant offered as an exhibit on his California residence until April 15, 2013, yet Appellant told the case worker that he did not plan on returning to California (TR. 51).

The First Amended Petition which the Trial Court found the allegations contained therein to be true alleged with regard to Appellant that he and the mother

had a history of domestic abuse, that the father sent the children to Missouri to reside with relatives because he could not provide for their needs and when the mother, whom he knew had an alcohol problem, moved to Missouri and had the children move in with her he took no action to remove them from her (Files 11GK-JU00254, 11GK-JU00255, 11GK-JU00256 offered for judicial notice TR. 8). Appellant was served with the amended petition and was ordered a treatment plan to address the issues.

As Appellant points out in his brief Appellant maintained regular contact with the Children's Division (Appellant's Br. p.30). Both the original and current case workers testified that they discussed Appellant's treatment plan with him and the fact he was expected to make progress on it, but unless an ICPC homestudy was done he would not have a service worker in California and they would be unable to pay for any of the services (TR. 38, 97). This is not a case where a parent does not know what they need to do to get custody of their children. Yet even with all of this information, Appellant continued to refuse to have the Children's Division do an ICPC homestudy until more than a year into the case, he failed to write to his children as they asked him to do, he refused to comply with the Trial Court's order to produce documents, and then a week before trial he quits his job, walks out on a lease, and drives to a state in which he has no job and no housing.

Courts have consistently held that a parent must demonstrate a commitment to change the course of their conduct **In Re S.A.J., 818 S.W.2d 690, 702 (Mo. App. 1991**). It is Respondent's contention that Appellant, through his actions or inaction has shown that he has no such commitment. Appellant argues that as in **In Re K.A.W., 133 S.W.3d 1(Mo. Banc 2004)** there is no convincing link between Appellant's past behavior and his likely future behavior.

In the former case, the mother gave the children up for adoption, the adoption failed, the children were returned and were immediately taken into custody. Once the children were in custody the mother decided that she no longer wanted the children to be adopted and she did everything on her treatment plan in an effort to be reunified with her children. In short the mother tried hard to rectify the conditions that led to the children coming into custody. That is not the situation in this case. Appellant's neglectful acts were not just prior to the minor children coming into custody, they have continued throughout the entire 19 months the children had been in custody. There is nothing in Appellant's past behavior that indicates any likelihood of change on his part. Less than a week before trial Appellant continued to see himself as the "non offending" parent (L.F. 63). He had no concept of how not seeing his children in two years and continuously breaking promises to them had impacted them so much so that Dr. Bradford who did his psychological evaluation found him to be a "charming narcissist" (L.F. 63).

Appellant also continued to refuse services, Ms. Hwang testified she referred Appellant to various homeless shelters and that he stated he would rather reside in his vehicle (TR. 51).

Respondent would respectfully contend that clear, cogent and convincing evidence was presented that Appellant has failed to rectify the conditions that led to the Minor Children coming into custody, that he has not made significant progress on the terms of his treatment plan and that conditions of a potentially dangerous condition continue to exist in Appellant's home in that he does not have a home or plan for obtaining one.

IV. THE TRIAL COURT DID NOT ERR IN TERMINATING THE PARENTAL RIGHTS OF APPELLANT BECAUSE THE JUVENILE OFFICE PRESENTED SUFFICIENT EVIDENCE THAT TERMINATION OF APPELLANT'S PARENTAL RIGHTS WAS IN THE BEST INTERESTS OF THE MINOR CHILDREN.

Appellant argues that termination of his parental rights was not in the best interests of the Minor Children. Satisfaction of one of the statutory grounds for termination is sufficient to terminate parental rights if termination is in the child's best interest. **In Re E.L.B., 103 S.W.3d 774, 776 (Mo. 2003).** The determination of what is in a child's best interest is an ultimate conclusion for the trial court based upon the totality of the circumstances. **In Re D.L.W., 133 S.W.3d 582, 585 (Mo. App. 2004); Section 211.447.6, RSMo.,** as amended to date. The Trial Court made findings on each of the seven factors set out in **Section 211. 447.7:**

(1) The emotional ties to the birth parents;

(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 the 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;

(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.

The trial court determined it was in the best interest of child for Appellant's paternal rights to be terminated. (L.F. 121-122, 131-132, 140-141).

"Determining a child's best interest is a subjective assessment based on the totality of the circumstances. **In Re C.A.M., 282 S.W.3d 398, 409 (Mo. App. 2009).** It is within the trial court's discretion to determine which of the seven factors are relevant. **In Re A.S., 38 S.W.3d 478, 487 (Mo. App. 2001)**. In this case, all three of the minor children do not want to have contact with Appellant let alone reside with him (TR. 22, 54-57, 91, 132-134).

Appellant may argue that he loves his children and he is committed to them, but his actions speak differently. Appellant put the children on a plane in July

2010 and then repeatedly promised he would come see them and never followed through (TR. 42, 116, 121). The Minor Children started off in care with the hope and desire to be reunified with their father, but over time, with the broken promises they felt the neglect of Appellant and have moved on (TR. 42, 90-92, 121).

Respondent would respectfully contend, that the evidence, when taken in its entirety clearly indicates that termination of Appellant's parental rights was in the best interests of the minor children.

CONCLUSION

For the reasons stated above, Respondent respectfully prays this Court to uphold the decision of the Juvenile Court of Greene County, Missouri, and for such other and further relief as the Court seems just and proper in the premises.

Respectfully Submitted,

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Certificate of Service

Comes Now, Brittany O'Brien, attorney for the Greene County Juvenile Office, of lawful age, having been duly sworn, states that the Substitute Brief of Respondent in response to Appellant's Substitute Brief filed by D.G.R. in the within cause was electronically filed and electronically mailed, to the following named persons at the addresses shown, all on the 26th day of November 2013.

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CERTIFICATE OF COMPLIANCE

The undersigned does, pursuant to Missouri Supreme Court Rule 84.06 (c) hereby certify as follows:

1. Said Brief is signed by Respondent's attorney, and does not require the signature of Respondent.
2. Said Brief complies with the limitations contained in Rule 84.06 (b); and
3. Said Brief contains 8849 words.
4. Respondent's Brief using Microsoft Word for Windows format converted to a pdf has been scanned for viruses and is virus free.

Brittany O'Brien