MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE INTEREST OF: Q.A.H.,	)	
Plaintiff,	)	
JUVENILE OFFICER and C.W.M & C.D.M.,	)	
Respondents,	)	**Case No. WD75786**
v.	)	
M.H. (MOTHER),	)	
Appellant.	)	

Appeal from the Circuit Court of Jackson County, Missouri
Family Court Division
The Honorable Justine Del Muro

AMENDED APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

A natural mother has the right to appeal the termination of her parental rights pursuant to RSMo § 512.020. This case does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, general appellate jurisdiction lies with this Court. Mo. Const., Art. V, § 3; 512.020. This is an appeal from the Circuit Court of Jackson County, Missouri, Family Court Division. Therefore, venue is proper in the Western District Court of Appeals pursuant to RSMo § 477.050.

INTRODUCTION

M.H. ("Mother") never harmed her daughter. When the Missouri Children's Division removed Q.H. from Mother's custody in 2009, Q.H. was clean, well-fed, and happy. Q.H. was never in danger even during Mother's delusional episode because Mother took Q.H. to Children's Mercy Hospital. Less than one year later, Mother regained custody of Q.H. only to lose custody once again for not complying with the trial court's order regarding Father's visitations.

Q.H. never returned to Mother's custody. On September 28, 2012, the trial court terminated her parental rights. The trial court found Mother suffered from a mental health condition that prevented her from providing the proper care, custody, and control of Q.H. and that Mother failed to rectify the conditions that caused her to lose custody.

This decision is fatally flawed for three reasons. First, all termination decisions must be based on the facts existing at the time of the termination hearing. Here, the trial court decided to terminate Mother's parental rights more than one year prior to the hearing. Second, all termination decisions based on a parent's mental health must contain a finding that the child had been harmed or was in danger of harm in the future. The trial court did not make these required findings. Third, the trial court's decision was not based on clear, cogent, and convincing evidence. It ignored the direct evidence Mother can provide the necessary care, custody, and control of a child. It ignored the financial support that Mother provided to Q.H. It ignored the fact that Mother was no longer in a

relationship with J.N.'s father. It ignored the fact that Mother had found a stable living environment.

This is not a case where the child was physically abused, neglected, or found in a horrible condition in an unclean and unsafe home. Mother is not addicted to drugs. Mother is not an alcoholic. Mother never harmed Q.H. Mother took her daughter to the hospital. Her child was returned. She then failed to comply with a court order, and as a punishment, she received what this Court has called a "civil death penalty."

STATEMENT OF FACTS

Over one year before the hearing to determine M.H.'s ("Mother") parental rights to her daughter, Q.H., the trial court decided that Mother would never regain custody of her daughter. At the hearing to terminate the parental rights of Q.H.'s father, the trial court stated:

> [Father]: . . . But personal feelings aside, I feel that [the adoptive parents] have her best interest at heart for the most part, and that they do everything in their power to take care of her and that they unconditionally love her and she will be in a good environment.
>
> Commissioner Allen: I know, you know, ***this Court has pretty much ruled out ever sending [Q.H.] back to her mother***, but her rights have not been terminated, have they?
>
> . . .
>
> [Commissioner Allen]: So if for some reason the mother's rights could not be terminated, you understand your rights could still be terminated, although I would have the discretion to let you — to rescind this, but I wouldn't have to. So it's possible your rights could end up terminated and the mother's rights couldn't be. That's a theoretical possibility, even though ***that's not the Court's intention***. You understand that's possible?

(Emphasis added.) (Father's Termination Hearing Transcript 8:8-22, Appendix at A35.)

Q.H. was born on March 24, 2009, to Mother and R.J. ("Father"). On August 29, 2009, Mother suffered a delusional episode. She became very worried about her daughter and took Q.H. to Children's Mercy Hospital in Kansas City, Missouri. While there, Mother made a number of wild statements, such as telling hospital personnel that she and Q.H. had been sexually assaulted. (Trial Exhibit 4 at 2.)

Mother was sent to Truman Medical Center for a psychiatric evaluation. (*Id.*) The hospital examined Mother, but she was not hospitalized. (*Id.* at 3.) Mother immediately returned to Children's Mercy only to discover that Q.H. had been placed in the custody of the Children's Division. (*Id.* at 2-3.) At the termination hearing, Children's Division worker Theresa Fisher stated that the Division's only concern for Q.H. involved statements Mother made at the hospital. (Trial Transcript at 14:12-14.) Despite Mother's deteriorated mental state, Q.H. was clean, well-fed, healthy, and happy when she arrived at Children's Mercy. (Trial Tr. at 13:13-14:11.)

Mother sought treatment after the Children's Mercy incident. Within a month, she began individual therapy through Alter Services and began receiving counseling and psychiatric services from The Guidance Center. (Trial Exhibit 10 at 2.) Mother has been under the care of a psychiatrist since October 2009. (Findings and Recommendations ¶ 23; Legal File ("LF") at 00089.)

By April 2010, Mother's caseworker, Brian Alexander of the Children's Division, and her parent aide, Blair Funk of Alter Services, recommended that Mother reunite with Q.H. (Trial Exhibit 7, April 11, 2010 Report.) Mother had been given four goals: understanding the developmental nature of Q.H.; gain and maintain stable employment; provide for Q.H.; and obtain her own transportation. She accomplished each goal. (*Id.*) Q.H. was placed back in Mother's custody on or about May 4, 2010. (Trial Exhibit 3, Mother's Deposition Transcript, at 39:12-14.)

On June 2, 2010, the trial court approved Q.H. returning to Mother's custody. (Findings and Recommendations ¶ 30; LF at 91.) However, Mother was to comply with supervised visits between Q.H. and Father. This was a concern to Mother, who claimed to have suffered through a sexually violent relationship with Q.H.'s father. (Exhibit 3 at 59:14-60:20.) Mother claimed that although the trial court's order called for Father to have supervised visits, she was told that she had to take Q.H. to Father and that she had to supervise their visits. (*Id*. at 40:4-41:18.) When she called Father to schedule the visits, he began harassing her over the phone. (*Id.* at 41:2-8.) Mother said she was afraid to supervise the visits. (*Id.* at 42:3-10.)

The trial court, however, found that Mother's testimony regarding Father was "totally incredible." (Findings and Recommendations ¶ 39; LF at 00092 – 00093.) The trial court further concluded that Mother's belief about Father's sexually abusive behavior would "likely be communicated to [Q.H.] at some point" and that this

constitutes "a serious risk of emotion harm to [Q.H.]." (*Id.*) Notably, although the trial court found Mother's concerns about Father's sexual assaults to be "totally incredible," and it also admonished her for staying in a relationship with him for five months. (*Id.* ¶ 50; LF at 00095.)

Mother refused to cooperate with the trial court's order regarding Father's visits. Because of this failure, the trial court once again removed Q.H. from Mother's custody. (*Id.* ¶ 30; LF at 00091.) The only reason provided for this removal was that the Mother failed to comply with the Court's order.

The trial court's Findings and Recommendations focused extensively on the circumstances surrounding the Children's Mercy incident. It spent 12 paragraphs detailing Mother's delusional thoughts. (*Id.* ¶¶ 3, 5-16; LF 00086 – 00088.) It also placed great reliance on an October 2009 psychological evaluation conducted by psychiatrist William McDonnell. (*Id.* at ¶¶ 17, 20-22; LF 00088 – 00089.) Dr. McDonnell concluded that Mother "will benefit from additional adult support and guidance related to child-rearing and general support." (Trial Exhibit 5, Dr. McDonnell's Psychological Evaluation at 4.) Dr. McDonnell placed great emphasis on the fact that Mother needed to find an adult support network. (*Id.* at 1, 3-4.) He also concluded that Mother's condition could have been caused by post-partum depression. (*Id.* at 4.)

At the termination hearing, Mother presented the testimony of her psychiatrist, Dr. Stanley Golon, and her therapist, Kathy Kuykendall. They both testified that Mother was capable of caring for Q.H.

Dr. Golon graduated from Washington University Medical School in 1981. (Trial Exhibit 15, Dr. Golon's Deposition Transcript at 10:24-11:5.) After graduation, he worked as a chief resident and instructor for Washington University School of Medicine Department of Psychiatry in St. Louis, in private practice for ten years, and for Humana. (*Id.* at 11:10-21.) Since 1999, he has worked as an independent contractor psychiatrist for The Guidance Center and as a disability review specialist for the Social Security Administration. (*Id.* at 11:21-12:1.)

Dr. Golon testified that, at the time of the termination hearing, Mother suffered from posttraumatic stress disorder, generalized anxiety disorder, mild depression, and potentially a mild delusional disorder. (*Id.* at 23:18-23.) He defined a delusional disorder as:

> Delusional disorder is having some psychotic symptoms, usually of a paranoid nature, that are fixed – they won't go away, even with all kinds of psychotherapy and discussions – but you're usually able to function with them, and you don't meet the criteria for schizophrenia or a more severe illness.

> So basically it's just like having some occasional crazy thoughts that are fixed, and you can still function in spite of them.

(*Id.* at 24: 5-14.)

Dr. Golon further testified that Mother's symptoms would not interfere with her parenting ability. (*Id.* at 25:23-26:3; 37:20-23.) In fact, he found that Mother was perfectly capable of raising Q.H. (*Id.* at 35: 23-25; 36:13-16.) Although Mother may have been a danger for Q.H. at the time Mother arrived at Children's Mercy Hospital, Mother—due to her medications and treatment—no longer posed a threat to Q.H. (*Id.* at 46:2-5; 48: 1-9.)

In its Findings and Recommendations, the trial court concluded that Dr. Golon's testimony was "not particularly credible." It ruled that Dr. Golon had not spent a sufficient amount of time with Mother and did not read the "reports from service providers in Missouri and rarely read the assessments of diagnoses of therapists working with [Mother] at the facility where he works." (Findings and Recommendations ¶ 24; LF at 00089.)

Kuykendall, Mother's therapist, met with Mother regularly since June 2011, including the day prior the termination hearing. She testified that Mother had a very positive long term diagnosis. (Trial Tr. at 127:13-20; 136:15-19; 156:25-157:15.) The trial court did not believe Kuykendall was credible because she failed to "consider information from parent aides who have been supervising visits or from any other source

other than the self-report of [Mother]" and this lack of information "undercuts [Kuykendall's] testimony." (Findings and Recommendations ¶ 27; LF at 00090.)

The trial court listed the various diagnoses and assessments that had been made of Mother. These diagnoses included, in part, delusions of persecution, schizophrenic, paranoid type, peculiar behaviors, forming bizarre concept, and having a delusional disorder. (*Id.* ¶ 26; LF at 00090.) It found that Mother "has delusions that then become her reality. One of her therapists confirmed this. This clearly presents a danger to the child." (*Id.* ¶ 40; LF at 00093.)

The court also concluded Mother was not truthful, in part because she denied making certain statements to the service providers, and that Mother's "delusional behavior presents a clear risk to this child and that her credibility is minimal." (*Id.* ¶ 42; LF at 00093.) However, Dr. Golon testified that when people are in a psychotic state—as Mother was when she brought Q.H. to Children's Mercy—they "recall very little about it." (Exhibit 15, Dr. Golon's Deposition at 65:7-14.) He was not concerned about Mother's inability to remember or acknowledge her past statements. (*Id.* at 65:19-66-12; 72:24-73:14.)

In its Findings and Recommendations, the trial court discussed a statement made by Mother at the 2010 hearing where Q.H. was removed from her custody. According to the trial court, Mother told the court that if Father was allowed supervised visits she would "bring the child back." (Findings and Recommendations ¶ 30; LF at 00091.)

Mother later explained that she meant she would bring Q.H. back to the court so that somebody else would supervise visits with Father. (Exhibit 3 at 42:17-43:17.) At trial, she stated that she would comply with any court order regarding Father and that she understood that, if necessary, she would co-parent with Father. (Trial Tr. at 100:25-101:8.)

On September 25, 2011, Mother gave birth to J.N. (a boy) in Kansas. Because she had lost custody of Q.H., J.N. was immediately placed into the state's custody as a child in need of care. However, after Mother participated in the parenting services provided by Kansas, J.N. was returned to Mother's custody shortly after his birth. (Trial Exhibit 15, April 22, 2012, Court Report Review Hearing.) By the time of the termination hearing, Mother had cut her ties with J.N.'s father. (Trial Tr. at 113:3-7.)

Peggy Hitchcock, the Kansas CASA volunteer who worked with Mother, reported that she was very satisfied with Mother's behavior and that Mother was raising and happy, healthy boy. (Trial Exhibit 12, June 12, 2012, Report to Court.) By June 5, 2012, Hitchcock recommended that Kansas close its child in need of care case regarding J.N. (*Id.*)

Lindsay Johnson, an in-home therapist for KVC Behavioral Services, also met with Mother regularly throughout 2012. (Trial Tr. at 170:7-172:3.) Johnson testified that it was in J.N.'s best interest to remain with Mother because Mother "has continued to provide a nurturing, loving environment and has met all of his needs." (*Id.* at 173:24-

174:7.) At the time of the termination hearing, a Kansas court had awarded Mother full custody of J.N. (Findings and Recommendations ¶ 41; LF at 00093.)

While the trial court found that it "cannot second guess the Kansas Court's decision," it concluded the Kansas service providers "had not communicated with or received information from the service providers in Missouri" and therefore the "Kansas Court may well not have been provided access to the information from Missouri service providers in the case of [Q.H.]." (*Id*.) Mother had received psychiatric care from Dr. Golon, in-home therapy from Johnson, and regular visits from Hitchcock—all of whom provided these services in Kansas.

After the birth of J.N. and a few months prior to the termination hearing, Mother returned to Missouri to move in with a family friend, Bruce Birkinbine. Birkinbine testified that he has known Mother since Mother was born (although they fell out of touch for a long period of time) and wanted to help her get through a difficult period in her life. (Trial Tr. at 206:18-25.) Although Dr. McDonnell recommended that Mother would benefit from additional adult support and guidance related to child-rearing and general support (Trial Exhibit 5 at p. 4), the trial court found that Mother raised concerns about her dependency and truthfulness by moving in with Birkinbine. (Findings and Recommendations ¶ 54; LF at 00096.) Alexander, Mother's caseworker for the Missouri Children's Division, never visited Mother's new residence. (Trial Tr. at 26:8-18.)

The trial court further found that Mother willfully, substantially, and continually failed and neglected to provide Q.H. with the necessary care and support. (Findings and Recommendations ¶¶ 32-37; LF at 00091 – 00092.) Mother testified that she believed that she was not required to provide support for Q.H. (Exhibit 3 at 19: 21-21:4.) However, she regularly provided a number of small items to Q.H. during their visits. (*Id.* at 15:13-19:17.) The Missouri Department of Social Services wrote to her to tell her that it would not pursue child support payments. (Trial Exhibit 11, May 10, 2010, letter from Missouri Department of Social Services.) Nevertheless, Mother eventually attempted to pay child support, but her check was returned. (Trial Exhibit 11, August 17, 2011, letter from Family Support Payment Center.) At trial, Mother confirmed that her money was not accepted. (*Id.* at 24:13-18.) The trial court found that Mother's belief that she was not required to pay child support was not credible. (Finding and Recommendations ¶ 38; LF at 00092.)

On September 28, 2012—over one year after the trial court had "pretty much ruled out" returning Q.H. to Mother's custody—the trial court officially terminated Mother's parental rights. The trial court did not specifically cite the statutes it used as the basis for its decisions, but it apparently concluded that Mother's parental rights should be terminated for two reasons. First, the trial court noted that:

> The natural mother has abused or neglected the minor child in that she has 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 natural mother unable to knowingly provide the child the necessary care, custody and control. In addition, the natural mother has repeatedly or continuously failed, although physically and 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 Court notes that during approximately 75% of the trial the mother smiled, grinned or made exaggerated expressions, which affect is quite unusual in a termination of parental rights proceeding, but is consistent with the mental health diagnosis given by Dr. McDonnell.

(Findings and Recommendations ¶ 66; LF at 00098 – 00099.)

Second, the trial court noted:

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

> Additionally, the natural mother continues to place herself and her children at risk of harm due to her association with domestically violent men.

(*Id.* ¶ 67; LF at 00099.) Mother appeals.

POINTS RELIED ON

1. The trial court erred in terminating Mother's parental rights to Q.H. in finding that clear, cogent, and convincing evidence supported its determination that Mother has a mental condition which renders her unable to knowingly provide the child the necessary care, custody, and control, and that Mother failed to rectify the conditions leading to her daughter's removal from her custody because the underlying court relied on Mother's past behavior to justify its termination decision in that the underlying court did not consider Mother's conduct and functioning at the time of the termination hearing, and this failure supports a claim of reversible error.

RSMo § 211.447.5(3)(c);

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

In re K.W., 167 S.W.3d 206 (Mo. App. 2005).

2. The trial court erred in terminating Mother's parental rights to Q.H. in finding that clear, cogent, and convincing evidence supported its determination to terminate Mother's parental rights, because the underlying court relied on Mother's past behavior to justify its termination decision, in that the underlying

court's failure to explicitly consider whether Q.H. had suffered any harm due to Mother's actions and whether Mother had the potential to cause future harm to her child, this failure supports a claim of reversible error.

RSMo § 211.447.5

In re D.L.M., 31 S.W.3d 64, 69-70 (Mo. App. 2000);

In re D.O., 315 S.W.3d 406, 420 (Mo. App. 2010).

3. The trial court erred in terminating Mother's parental rights to Q.H. in finding that clear, cogent, and convincing evidence supported its determination, because the trial court's findings were not supported by substantial evidence, in that the underlying court's failure to support its determination by clear, cogent, and convincing evidence supports a claim of reversible error.

RSMo § 211.447.5

In re C.A.L., 228 S.W.3d 66, 71 (Mo. App. 2007);

C.V.E. v. Green County Juvenile Office, 330 S.W.3d 560, 567-68 (Mo. App. 2010).

APPELLANT'S BRIEF

I. STANDARD OF REVIEW

A two-step analysis is required to decide whether to terminate parental rights. First, this Court determines whether the grounds for termination were proven by "clear, cogent, and convincing evidence." *In the Interest of S.J.H. and C.A.H.*, 124 S.W.3d 63, 66 (Mo. App. 2004). "In this context, clear, cogent, and convincing evidence [that] instantly tilts the scales in favor of termination when weighed against the evidence in opposition and the finder of fact is left with the abiding conviction that the evidence is true." *In re K.A.W.*, 133 S.W.3d 1, 11 (Mo. banc 2004).

This Court defers to the trial court's judgment regarding credibility but will reverse a judgment that is not supported by clear, cogent, and convincing evidence, is contrary to the evidence, or the trial court erred in applying the law. *See In re L.J.D.*, 352 S.W.3d 658, 662 (Mo. App. 2011).

The second step inquires whether the termination decision was in the best interest of the child. On that question, the standard of review on appeal is abuse of discretion. "The juvenile division's discretion is abused when it is so clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." [Citations and quotations omitted.] *C.V.E. v. Green County Juvenile Office*, 330 S.W.3d 560, 568 (Mo. App. 2010).

This Court is tasked with the requirement to review a termination case "closely" because "terminating parental rights is an exercise of an awesome power that involves

fundamental liberty interests associated with family and child rearing . . . ." *Id.* "[A] parent's right to raise his or her children is a fundamental liberty interest protected by the constitutional guarantee of due process, [and] appellate courts must examine the [trial] court's findings of fact and conclusions of law closely." *In re W.C.*, 288 S.W.3d 787, 794-95 (Mo. App. 2009).

"The termination of parental rights has been characterized as tantamount to a 'civil death penalty.'" [Citations omitted.] *In re L.J.D.*, 352 S.W.3d 658, 662 (Mo. App. 2011). In order to avoid a wrongly-decided "civil death penalty," this Court must analyze the trial court's decision and ensure that it is correct.

II. ARGUMENT

Mother raises three points on appeal. First, the trial court failed to consider Mother's condition at the time of termination hearing. Second, the trial court failed to find evidence that Q.H. was harmed or would suffer harm in the future and failed to make an explicit consideration of whether Mother's past acts indicate potential future harm. Third, the termination decision was not supported by clear, cogent, and convincing evidence. For each of these reasons, reversal is appropriate.

A. The trial court erred in terminating Mother's parental rights to Q.H. in finding that clear, cogent, and convincing evidence supported its determination that Mother has a mental condition which renders her unable to knowingly provide the child the necessary care, custody, and control, and that Mother failed to rectify the conditions leading to her daughter's removal from her custody because the underlying court relied on Mother's past behavior to justify its termination decision in that the underlying court did not consider Mother's conduct and

functioning at the time of the termination hearing, and this failure supports a claim of reversible error.

1. The Trial Court Failed to Consider the Facts as they Existed at the Time of the Termination Hearing.

More than one year before Mother's termination hearing, the trial court clearly expressed its intention to terminate Mother's parental rights. It stated: "I know, you know, ***this Court has pretty much ruled out ever sending [Q.H.] back to her mother***, but her rights have not been terminated, have they?" (Emphasis added.) (Father's Termination Hearing Transcript 8:8-22, Appendix at A35.)

One year after making that statement, the trial court terminated Mother's parental rights by finding that she abused and neglected Q.H. due to her mental condition and due to her failure to rectify the conditions that led to her losing custody of Q.H. (Findings and Recommendations ¶¶ 66-67; LF 00098-00099.)

"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." *K.A.W.*, 133 S.W.3d at 9. "Evidence of abuse or neglect sufficient to support termination must 'be based on conduct at the time of termination, not just at the time jurisdiction was initially taken.'" (Emphasis added.) *In re C.A.L.*, 228 S.W.3d 66, 72 (Mo. App. 2007), *citing K.A.W.*, 133 S.W.3d at 10.

Likewise, a termination for failure to rectify "must be based on a determination that the potentially harmful conditions continue to exist at the time of termination, not

just that the conditions that led to jurisdiction persist." (Emphasis added.) *In re K.W.*, 167 S.W.3d 206, 214 (Mo. App. 2005.)

The trial court's Findings and Recommendations in 2012 ignored Mother's current condition. The trial court did not consider the fact that Mother capably raised a child in Kansas between September 2011 and the termination hearing. It did not consider testimony from Mother's current psychiatrist and therapist. It had placed no weight on the fact that a Kansas Court found Mother competent to raise J.N. Likewise, the trial court did not consider other facts existing at the time of termination, such as the fact that Mother found stable housing, ended her relationship with J.N.'s father, and found a proper support network. The trial court had made up its mind on Mother's capability to raise her daughter in 2011.

2. The Findings and Recommendations Ignore Mother's Current Condition.

The trial court described Mother's behavior on one day—August 22, 2009—in great detail. In fact, the trial court spent 12 paragraphs in its Findings and Recommendations explaining Mother's actions at Children's Mercy Hospital in 2009. (Findings and Recommendations ¶¶ 3, 5-16; LF 00086 - 00088.) The trial court ignores the fact that it returned Q.H. to Mother's custody in 2010, only to remove Q.H. only because of Mother's unwillingness to comply with a court order. The trial court explicitly refused to even consider testimony about Mother's current behavior and mental health.

a. Testimony from Mother's Current Psychiatrist was Discarded.

For example, Mother provided testimony from her psychiatrist, Dr. Stanley Golon. Dr. Golon, a graduate of Washington University who has practiced since 1981. Dr. Golon testified that Mother's symptoms would not interfere with her parenting ability. (Trial Exhibit 15 at 25:23-26:3; 37:20-23.) In fact, he found that Mother was perfectly capable of raising Q.H. (*Id.* at 35:23-25; 36:13-16.)

Nevertheless, the trial court found this testimony as "not particularly credible" because Dr. Golon had only met with Mother ten to 12 times and because his opinion was "based solely on the self-report of [Mother]." (Findings and Recommendations ¶ 24; LF at 000089.) No evidence was presented stating that Dr. Golon's therapy and diagnosis fell below the proper standard of care. No evidence was presented that "credible" psychiatric diagnoses must be based on a certain amount of visits with a patient or on information from specific source. Dr. Golon's expert medical opinion was not "credible" simply because it did not comport with the decision that trial court had already reached in 2011.

It is improper for a court to reject an expert medical opinion and to replace it with its own contrary medical opinion. *See Angus v. Second Injury Fund*, 328 S.W.3d 294, 299-303 (Mo. App. 2010). Although *Angus* is a workers' compensation claim, the Court of Appeals' analysis of expert testimony is instructive. There, the Labor and Industrial Relations Commission rejected the only expert medical opinion presented because it found the testimony "lacks credibility." *Id.* at 300. The Court of Appeals explained that

the problem with the Commission rejecting the doctor's uncontradicted opinion and replacing it with its own contrary medical opinion makes the trier of fact "the *de facto* medical expert . . ." *Id.* at 302. This "is troubling because . . . this conclusion is based on nothing more than 'logic and common sense' when the subject matter at hand is far too complicated for such simple reasoning." *Id.*

As in *Angus*, here the trial court was presented only with Dr. Golon's expert opinion regarding Mother's current condition. No evidence was presented that Dr. Golon's treatment of Mother was below the standard of care. Therefore, the trial court had no support for its decision to substitute its own medical opinion for Dr. Golon's.

The trial court also expressed concern that Mother did not remember making wild statements at Children's Mercy—and, in fact, she denied making those statements again at the trial. The trial court found that her denials showed her lack of credibility and candor. (Findings and Recommendations ¶ 42; LF at 00093.) However, Dr. Golon testified that when people are in a psychotic state—as Mother was when she brought Q.H. to Children's Mercy—they "recall very little about it." (Trial Exhibit 15 at 65:7-14.)

Even if Mother remembered making the statements, her failure to admit as such is still insufficient to support a termination of her parental rights. *See In re X.D.G.*, 340 S.W.3d 607, 622 (Mo. App. 2011) (Finding that a failure to explain or admit culpability for a child's injuries was not the equivalent of evidence of future dangerousness.)

b. Testimony from Mother's Current Therapist was Discarded.

Besides ignoring the testimony of Mother's current psychiatrist, the trial court summarily disregarded the testimony of Mother's current therapist, Kathy Kuykendall. Like Dr. Golon, Kuykendall, who had met with Mother regularly since June 23, 2011, testified that Mother had a very positive long term diagnosis. (Trial Tr. at 136:15-19; 156:25-157:15.)

Nevertheless, the court also found Kuykendall's testimony was "not credible" because she allegedly failed to consider information from the Missouri parent aides and because she obtained information directly from Mother. (Findings and Recommendations ¶ 27; LF at 00090.) No testimony was presented stating that Kuykendall's therapy and diagnosis fell below the proper standard of care. No testimony was presented stating that Kuykendall's diagnosis was flawed because she did not consider information from the parent aides.

3. Conclusion

Kuykendall and Dr. Golon each testified about Mother's current condition. They each testified that Mother was capable of raising Q.H. Their testimony was improperly discarded and ignored because it did not support the trial court's pre-determined conclusion.

Instead, the trial court looked for evidence that supported his conclusion, such as Dr. McDonnell's 2009 psychological evaluation. (Findings and Recommendations ¶¶ 17,

20-22; LF at 00088—00089.) However, Dr. McDonnell's evaluation did not prevent the Mother from regaining custody of Q.H. in 2010. Its prominent placement in the trial court's opinion is simply further evidence that the trial court did not base its decision on Mother's condition at the time of the termination hearing.

Because the trial court had already made up its mind—as indicated during Father's termination hearing in 2011—the trial court improperly failed to consider Mother's condition at the time of the termination hearing. This failure constitutes reversible error. *See C.A.L*, 228 S.W.3d at 77.

B. The trial court erred in terminating Mother's parental rights to Q.H. in finding that clear, cogent, and convincing evidence supported its determination to terminate Mother's parental rights, because the underlying court relied on Mother's past behavior to justify its termination decision, in that the underlying court's failure to explicitly consider whether Q.H. had suffered any harm due to Mother's actions and whether Mother had the potential to cause future harm to her child, this failure supports a claim of reversible error.

1. The Trial Court Failed to Explicitly Consider the Fact that Q.H. had Never Suffered Any Harm Due to Mother's Mental Condition

A simple diagnosis of mental illness does not, by itself, justify a finding of abuse or neglect. "Rather, in order to terminate a person's parental rights on the ground of 'mental illness,' it must be shown that the child was harmed or is likely to be harmed in the future." [Citations omitted.] *In re A.M.F.*, 140 S.W.3d 201, 207 (Mo. App. 2004). "Unlike neglect, abandonment, abuse, or nonsupport, the mental illness of a parent is not

per se harmful to a child." *In the Interest of C.P.B.*, 641 S.W.2d 456, 460 (Mo. App. 1982).

"Termination of parental rights should not be granted on account of mental illness unless it is shown by clear, cogent, and convincing evidence that [the child] is harmed or is likely to be harmed in the future." (Emphasis added.) *In re D.L.M.*, 31 S.W.3d 64, 69-70 (Mo. App. 2000).

The trial court is required to make these findings in order to avoid discriminating against persons with mental illness. The Missouri General Assembly was specifically concerned about prohibiting this type of discrimination. In July 2011, the General Assembly added Section 211.447.10, which states: "The disability or disease of a parent shall not constitute a basis for . . . the termination of parental rights without a specific showing that there is a causal relation between the disability or disease and harm to the child." (Emphasis added.)

2. Q.H. Has Never Been Harmed.

a. There is No Evidence Q.H. Suffered Harm Prior to Mother Losing Custody of Q.H.

Q.H. was never harmed by Mother. The trial court, in its Findings and Recommendations, made no findings that Q.H. was harmed by Mother. During Mother's one delusional episode, the worst thing she did was take her happy, clean, and healthy child to the hospital. Q.H. was not harmed in any way. In fact, she was perfectly healthy. Q.H. was perfectly safe and completely unharmed.

Instead of actual harm, the trial court mentioned the fact that, during Mother's visits with Q.H., Mother gave Q.H. strawberries when Q.H. may be allergic to them. (Findings and Recommendations ¶ 62; LF at 00097.) While there are disputed facts over whether Mother knew of Q.H.'s allergy—or whether Q.H. is even allergic to strawberries—the court never states that Q.H. was actually harmed.

As such, the trial court failed to show any evidence—much less clear, cogent, and convincing evidence—that Q.H. had suffered any harm as a result of Mother's mental condition.

b. The trial court did not explicitly link Mother's past actions to future harm to Q.H.

Likewise, the trial court did not link Mother's actions to the possibility that Mother would harm Q.H. in the future. "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." (Emphasis added.) *In re K.A.W.*, 133 S.W.3d 1, 9-10 (Mo. 2004). "The trial court must describe how past acts indicate a future risk of harm to the children." (Emphasis added.) *In re D.O.*, 315 S.W.3d 406, 420 (Mo. App. 2010).

The trial court failed to explicitly consider how Mother's past actions indicate that Q.H. would suffer future harm. The trial court made only two indirect statements relating to potential future harm. First, the court stated that Mother's delusions become her reality and this "presents a danger to this child. One of her therapists confirmed this." (Findings

and Recommendations ¶ 40; LF at 00093.) The trial court is unable to identify the medical expert who issued this opinion. Likewise, it is unable to state when the unnamed therapist reached this opinion. This nebulous, unsupported "fact" certainly cannot be the "explicit consideration" required by Missouri law

Second, the trial court determined that Mother's "delusional behavior presents a clear risk to this child and that her credibility is minimal." (*Id.* ¶ 42.) The trial court's Findings and Recommendations contain no other references at all to any potential future harm. The trial court did not "describe how [Mother's] past acts indicate a risk of future harm [to Q.H.]." *In re D.O.*, 315 S.W.3d at 420. It certainly did not make an "explicit consideration" as to how Mother's past acts indicate the likelihood of future harm.

"[C]ourts must cautiously consider the termination of a parent's rights on the basis of disability and take great care to identify a causal connection between the disability and harm to a child before terminating parental rights under Section 211.447." (Emphasis added.) *In re L.J.D.*, 352 S.W.3d at 665. Instead of taking "great care" to establish a causal connection, the trial court relies only on conclusory statements.

The failure to make such a finding is reversible error. For example, in *In re C.K.*, 221 S.W.3d 467 (Mo. App. 2007), this Court reversed a termination decision where the mother, who tested positive for methamphetamines, left her children unattended with access to a loaded gun and her five year old shot himself in the neck. The children were living in a hotel room that was dirty with trash and cat feces. *C.K.*, 221 S.W.3d at 471-

72. Nevertheless, this Court remanded the case because the underlying court failed to make explicit findings about mother's capacity to harm her children in the future. *Id.* at 473.

3. Q.H. was Never Harmed as a Result of Mother's Relationships

Despite Mother's concerns about Q.H.'s father, Q.H. never suffered any harm from her father. Likewise, the trial court's findings regarding Mother's relationship with Q.H.'s father did not take into account Mother's current situation. Mother believes that Father raped her repeatedly—in fact, this was one of the reasons Mother had difficulty complying with the trial court's visitation orders in 2010. The trial court determined that Father's denials of such behavior were credible. It further found that Mother's belief "would likely be communicated" to Q.H. and that such disclosure "constitutes a serious risk of emotional harm." (Findings and Recommendations ¶ 39; LF at 00092 – 00093.)

Of course, no testimony was presented supporting either fact. The trial court simply assumed that Mother would communicate her feelings to Q.H. The trial court also reached its own medical conclusion as to the effect those statements might have on Q.H. These speculative guesses are simply insufficient to support the "civil death penalty."

Oddly enough, the trial court's Findings and Recommendations later chastised Mother for staying in a relationship with Q.H.'s father. (*Id.* ¶ 50; LF at 00095.) Mother has no interest in beginning a new relationship with Q.H.'s father. As such, his allegedly

abusive relationship with Mother does not indicate Mother's current condition or experience.

The trial court also expressed concern about J.N.'s father. (*Id.* ¶ 67; LF at 00099.) However, at the time of the termination, Mother had cut her ties with J.N.'s father. (Trial Tr. at 113: 3-7.) Despite this, the trial court states that Mother "continues to place herself and her children at risk of harm due to her association with domestically violent men." (Findings and Recommendations ¶ 67; LF at 000099.) This finding is simply speculation. As shown above, neither Q.H. nor J.N. have ever suffered any harm or injuries. Mother had cut ties with both fathers, yet the trial court considered that her past relationships were proper evidence supporting the termination of Mother's rights.

At the time of the hearing, Mother had found a stable home with a family friend. Bruce Birkinbine had provided the adult support network Dr. McDonnell suggested. With Birkinbine's support Mother had created a more structured, settled life.

The findings by the trial court do not contain an explicit consideration as to how Mother's past actions or past relationships could harm Q.H. The trial court's findings are unsupported by substantial evidence and erroneously apply the law. Therefore, the termination of Mother's parental rights must be reversed. *See C.K.*, 221 S.W.3d at 473.

C. The trial court erred in terminating Mother's parental rights to Q.H. in finding that clear, cogent, and convincing evidence supported its determination, because the trial court's findings were not supported by substantial evidence, in that the underlying court's failure to support its determination by clear, cogent, and convincing evidence supports a claim of reversible error.

1. The Trial Court's Decision was not Based on Clear, Cogent, and Convincing Evidence.

a. Mother's Parenting of J.N. is Clear Evidence of Her Ability to Properly Care for a Child.

The trial court's decision was clearly against the weight of the evidence. Both reasons provided by the trial court—Mother's mental condition and her failure to rectify—require specific evidence of Mother's current condition to support a finding of termination.

At trial, Mother presented clear, cogent, and convincing evidence that she had rectified the concerns about her parenting and that her mental condition allowed her to care for a child. She presented evidence that, at the time of the termination hearing, she was caring for her son, J.N.

At the termination hearing, Lindsay Johnson, an intensive in-home therapist for KVC Behavioral Healthcare, testified on behalf of Mother. Johnson stated that Mother "has continued to prove a nurturing, loving environment and had met all of [her son's] needs." (Trial Tr. at 174:3-5.) She stated, in her professional opinion, that Mother was able to competently parent her son. (*Id.* at 175:23-25.) Peggy Hitchcock, who worked with Mother and her son through Kansas' CASA program, also testified. Hitchcock

observed Mother and her son's interactions three or four times a month from October 2011 until approximately two months before the trial. (*Id.* at 191:18-21.) Through these interactions, she has no concerns about their parent-child interactions. (*Id.* at 191:15-17.)

Put simply, the two case workers with the most direct, current experience with Mother testified that Mother was able to provide the appropriate care, custody, and control of her son. No evidence was presented to counter their testimony or that showed Mother had failed to be a competent parent to J.N. In fact, Brian Alexander, the Missouri case worker, never even visited Mother's new residence. (Trial Tr. at 26:8-18.)

The trial court, however, disregarded the current evidence showing how Mother had improved her life. In fact, one of the specific reasons provided by the court was the fact that the Kansas Court "may well not have been provided access to the information from Missouri service providers in the case of [Q.H.]" (Findings and Recommendations ¶ 41; LF at 00093.) In other words, the trial court found that the Kansas Court's ruling could be ignored because it "may well not" have been provided information about Mother's prior bad acts. The trial court has no evidence to support this assumption, it simply guesses as to why the Kansas Court's ruling contradicted its own predetermination of the case.

No better evidence could exist showing that Mother can care for Q.H. than the fact that she is currently caring for J.N. No evidence was presented that J.N. was in danger, was harmed, or that Mother could not provide adequate care for him. The trial court's

failure to consider this fact flies in the face of reason and logic. The fact that the court refutes this evidence by pointing to Mother's past acts indicates a clear lack of careful consideration. As such, the decision is not supported by substantial evidence and should be reversed by this Court.

b. The Trial Court Failed to Support its Findings Regarding Child Support Payments with Clear, Cogent, and Convincing Evidence.

The trial court faulted Mother for failing to provide the necessary care and support to Q.H. (Findings and Recommendations ¶ 32; LF at 00091.) The court noted that Mother testified that she could have paid $50 to $100 per month, but "elected not to do so." (*Id.* ¶ 35.) However, this point is insufficient to terminate a parent's rights.

The trial court ignored direct evidence that Mother was specifically told she not required to pay child support. (Trial Exhibit 11, May 10, 2010, letter.) The trial court ignored direct evidence that Mother still attempted to make a payment, but her check was returned. (Trial Exhibit 11, August 17, 2011, letter.)

Furthermore, even, *arguendo*, if Mother had made no attempts to pay child support, this would not support termination. "[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. 2007). Mother was providing financially for J.N. "The ability to support a child who is not in foster care supports the finding that the parent would be able to provide financially for the child in

foster care in the future." *In re C.J.G.*, 358 S.W.3d 549, 556 (Mo. App. 2012). Her ability to provide for J.N. is sufficient clear, cogent, and convincing evidence that she could financially provide for Q.H.

Furthermore, Mother presented evidence that she provided some contribution to Q.H., such as gifts and clothing, at her visits. (Mother's Deposition 15:13-19:17.) "Evidence that a parent has provided some contribution, even if not fully sufficient for support, demonstrates the parent's intent to continue the parent-child relationship and militates against termination." *In re D.O.*, 315 S.W.3d 406 (Mo. App. 2010). As in *D.O.*, Mother's contributions are sufficient to show her intent to maintain her relationship with Q.H.

Once again, the trial court's decision is against the weight of the law and the weight of the evidence. As such, reversal is appropriate.

III. CONCLUSION

The trial court's termination decision should be reversed for three reasons. It was not based on the facts that existed at the time of the termination hearing. It failed to consider that Q.H. had never been harmed and failed to contain an explicit consideration of how Mother's mental health or failure to rectify may harm Q.H. in the future. Finally, it is against the weight of evidence.

Mother's worst act—which occurred during her single delusional episode—was taking her daughter to the hospital. Mother had received therapy. She is on medication.

She is currently caring for a healthy baby boy. She should not be deprived of the companionship of her daughter simply because she did not follow an order from the trial court.

Therefore, she respectfully requests that this Court reverse the trial court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the above brief complies with Mo. Ct. Rule 84.06(b) and certifies that this brief contains 7,678 words, excluding the cover, table of contents, table of authorities, certificate of service, this certificate, and the signature blocks. I relied upon the word count in Microsoft Word 2010 to count the words as stated herein.

/s/ Casey P. Murray
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was emailed containing the same sent on this 28th day of March, 2013, to:

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