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JURISDICTIONAL STATEMENT

For the reasons explained in Respondents' Motion to Dismiss Appeal For Failure to File A Timely Notice of Appeal and the supporting suggestions, this Court has no appellate jurisdiction and no power to decide this case. For convenience, the motion and suggestions are reproduced in the Appendix to this brief.

STATEMENT OF FACTS

As explained in Respondent's Motion to Strike, Appellant's Statement of Facts is not written in the light most favorable to the judgment. In fact, it does not mention *any* facts favorable to the judgment.

A. *Appellant and the Child.*

Appellant is Guatemalan. L.F. 96, 113. She is in the United States illegally for the second time. L.F. 96. She was deported in 2005 under the name "Angelica Alvarado-Romero." L.F. 96, 114. Less than a year later she came back, leaving at least one child in Guatemala, and later took a job at a poultry plant as "Rachel Leal." 2008Tr. 52:25-53:2, 75:3-6; L.F. 96, 114-15.

The little boy who is the subject of this adoption (the "Child") was born October 17, 2006. L.F. 12. It is unclear whether Appellant was pregnant when she entered the United States illegally again in late 2005 or early 2006.[1]

According to the Child's birth certificate, Appellant's name is "Encarnacion M. Bail Romero." L.F. 12. During her post-*Miranda* interview, Appellant said that her real name is Encarnacion Maria Bail-Romero and that she was born March 26, 1975. L.F. 96.

Appellant was arrested working as "Rachel Leal." L.F. 96, 114. She used a false

[1]Assuming a normal gestation period, conception occurred in mid-January, 2006. Her guilty plea to identity theft says that she reentered the country around May 10, 2006. L.F. 96. She would have been four months pregnant. Yet her affidavit outside the record says that she became pregnant while living in Monett. A109, ¶ 4.

Social Security number and birth date. L.F. 95-96. When jailed, and at various other times, she claimed that she was "Angelica Alvarado" or something similar. Federal charges were filed against her, and she was known, as "Angelica Alvarado-Romero." L.F. 95, 109. She also called herself both "Angelica Alvarado" and "Maria Bail Encarnacion Romero" in a letter to the guardian ad litem, but she signed her signature as "Encarnacion Maria Bail Romero." L.F. 111. In a letter to Respondents' attorney, she called herself "Angelica Alvarado." 2008Tr. 68:9-71:3, Pet. Ex. 14.

Appellant's birth date and age are unknown. Identification papers in the juvenile court file say that she was born March 26, 1976. L.F. 75. The Child's birth certificate says that she was 30 years old at the time of birth. L.F. 12. In her plea agreement she said that she was born March 26, 1975. L.F. 96. Her fake identification lists her birth date as January 8, 1980. L.F. 96.

Appellant was charged with multiple federal criminal offenses, including Reentry of a Removed Alien, False Personation of a Citizen of the United States, False Statement of Citizenship to obtain Federal or State Benefits or employment, Aggravated Identity Theft, and Misuse of a Social Security Account Number. L.F. 98. She pled guilty in October 2007 to Aggravated Identity Theft. L.F. 95-106.

B. ***Circumstances before the arrest.***

Laura Davenport, a Parents As Teachers parent educator who speaks Spanish, first met Appellant shortly before the Child's birth. 2008Tr. 71:25, 72:12-14, 24. Appellant lived with "a couple of guys" in a Carthage apartment both before and after the birth. 2008Tr. 72:20-21; 73:21-25, 74:3-5. She had no prenatal care. 2008Tr. 85:18-19.

Davenport told her about services available to help her raise the Child. 2008Tr. 91:22-25.

Davenport visited Appellant and the Child at that apartment seven days after the birth. 2008Tr. 73:6. The conditions there were "very poor." 2008Tr. 85:8-11. Appellant had no bed for herself and no crib for the Child, so she slept on the floor with him. 2008Tr. 73:8-9, 11. Davenport got her a crib. 2008Tr. 73:6.

Appellant's brother and sister, also illegal aliens, live in Carthage. 2007Tr. 4:20-5:3; 2008Tr. 76:6, 78:12. Her brother had three children, and her sister had two, one "about the same age" as the Child. 2008Tr. 76:6-7, 78:21-23.

Davenport next saw the Child after Appellant moved in with her brother's family, whom Davenport visited in the PAT program. 2008Tr. 76:6-12. Those home conditions were also poor. 2008Tr. 86:4. The Child seemed week and developmentally delayed. 2008Tr. 76:18-20. Appellant had not obtained governmental services such as WIC, and so the Child, some 2-3 months old, was not getting proper nutrition through formula because she gave him "milk—plain, whole milk." 2008Tr. 77:4-17, 19, 21-23; 87:13-14; L.F. 12. He was behind on immunizations, was slow both to sit up and to crawl for his age, had trouble supporting his head, and had underdeveloped muscles. 2008Tr. 80:25-81:1, 81:6-7, 86:14-15.

Appellant was arrested May 22, 2007. 2008Tr. 78:6-7; L.F. 96. The Child stayed with Appellant's brother only a few days before the brother, who could not care for him, took the Child to live with Appellant's sister. 2008Tr. 76:6-7, 78:4-18; 79:8-11. The Child lived with the sister by late May. 2008Tr. 78:4-10. Davenport therefore saw the

Child again, this time in the one-bedroom apartment that housed Appellant's sister's family. 2008Tr. 78:12, 24-25. Those conditions were "a little better" than at the previous two apartments. 2008Tr. 87:6.

At the sister's request, initially the Velazcos provided daytime childcare, but that lasted only a couple of weeks. 2008Tr. 79:16-19; 90:17-23. The sister then left the Child to sleep at the Velazcos' home, and her husband would get him on Friday for the weekend. 2008Tr. 90:24-91:2. Then it became "less and less where he would pick him up maybe just on Sunday for a couple of hours or maybe less." 2008Tr. 90:24-91:4. The Velazcos soon became essentially a full-time placement. 2008Tr. 80:8-11. By then, Appellant was "no longer in the picture." 2008Tr. 86:24-87:1.

Davenport last saw Appellant on September 9, 2007, in the St. Clair County Jail. 2008Tr. 84:17-19. She visited the jail to ask whether Appellant would consent to termination of her parental rights and adoption of the Child. 2008Tr. 81:21-24. Although the Child had not been with the brother for over three months, Appellant was "quite surprised" to learn that her brother had not kept him. 2008Tr. 78:4-10, 84:6-7. Appellant claimed not to know that her sister had given the Child to the Velazcos. 2008Tr. 100:2-3.

No father appears on the birth certificate, and no man claimed paternity. L.F. 12. Appellant would not identify the biological father because "he was not in the picture" and "it was just as well that he wasn't." 2008Tr. 73:15-20; L.F. 115.

C. *The petition, service on Appellant, and appointment of counsel.*

The Velazcos contacted M.M. and her husband, S.M., on September 24, 2007,

about adopting the Child because he "needed a permanent home." 2007Tr. 5:21-22; 2008Tr. 8:14-16. Respondents visited the Child in the Velazcos' home for some two weeks. 2008Tr. 10:9-15. The Child's first overnight visit at Respondents' home on October 3 went so well that he also stayed the next night, and he came to live with Reespondents "full time" October 5. 2008Tr. 10:15-22.

That same day, Respondents filed their petition for termination of parental rights and adoption. L.F. 5. Appellant was jailed in St. Clair County, apparently using the name "Angelica Alverado." L.F. 68, 95, 109, 111. She was served October 16. L.F. 68.

Respondents did not request confidentiality under § 453.060. 2008Tr. 51:23-25. The petition listed their names and address and also showed their attorney's complete identifying information. L.F. 5, 11; 2008Tr. 52:7-10. On its face, the summons stated:

> Note: You have the right to have an attorney present to assist you at all Juvenile Court hearings or you may waive your right to an attorney. If you desire to be represented, you should begin now to obtain an attorney's services. If you cannot afford to pay an attorney and you wish to have an attorney represent you, the Court will appoint an attorney for you without charge. You should make known to the Court your desire to have an attorney appointed.

L.F. 68.

Appellant acknowledged that there was a person in jail who could read the documents to her and translate them for her. 2008Tr. 83:5-6, 13; *See also* L.F. 70, 108. She never requested an attorney, but nevertheless the court, *sua sponte,* appointed

attorney James Calton to represent her on December 3, 2007. L.F. 2, 80. The notice of his appointment, addressed and mailed to "Encarnacion Bail Romero," was refused. L.F. 81.

The court appointed another attorney, Aldo Dominguez, on June 13, 2008. L.F. 85. Respondents' attorney contacted Dominguez, who speaks Spanish fluently, to represent Appellant. 2008Tr 3:4; 44:18-19; 71:1-2; 95:16. Dominguez' correspondence of July 29, 2008, to "Encarnacion M. Bail Romero, a/k/a Angelica Alvarado-Romero, a/k/a Rachel Leal" was returned. L.F. 90, 107. While the case was pending, Appellant was transferred to a West Virginia federal penitentiary. L.F. 90, 109.

D. *The proceedings for transfer of custody and adoption.*

The transfer of custody hearing was October 18, 2007. L.F. 62. Both Respondents testified, explaining the circumstances and the manner in which the Child became part of their lives and came to live in their home. 2007Tr. 2:23 – 5:25.

Respondents, who cannot have children, chose to adopt a bi-racial child because they perceived that need in Carthage. 2008Tr. 16:20-17:4. Since they had already applied to serve as foster parents when they learned about the Child, they presented an extensive home study prepared to assess their fitness to serve. 2007Tr. 6:5-11, 14-25; 2008Tr. 9:1-3; L.F. 22-61. The home study addressed Respondents' strengths and their backgrounds, both good and bad.

S.M. explained his criminal history at both the 2007 and 2008 hearings. 2007Tr. 9:21-10:1-13; 2008Tr. 57:16-59:20; 64:8-65:21. He stole a car, was involved in a high-speed chase, and was charged with possession of stolen property in 1996, when he 16

years old.[2] 2007Tr. 10:3-6; 2008Tr. 64:14-21. He pled guilty when he turned 17, spent 180 days in jail, and served seven years' probation. 2007Tr. 10:3-6; 2008Tr. 58:5-6. He was arrested for shoplifting and assault in 1998, but the charges were dismissed. 2008Tr. 65:11-21. He used marijuana from ages 16-21, experimented with LSD around age 16 or 17, and tried cocaine and speed before going to jail and a few times after his release. L.F. 28. He stopped using drugs, though, before he married M.M. L.F. 28. Dominguez cross-examined him about all of that at the 2008 adoption hearing. 2008Tr. 63:22-65:21.

The home study also discussed that M.M.'s brother sexually abused her between ages 3-7. L.F. 32-33. Dominguez also cross-examined her about that at the adoption hearing. 2008Tr. 39:19-41:3.

The guardian ad litem recommended that the court transfer custody to Respondents in 2007, explaining that "there was an emergency situation in that nobody had the ability to care for this child, you know, so maybe with this transfer of custody [Respondents will] be able to take this kid to the doctor or get him his needed shots or checkups. I would recommend the transfer of custody." 2007Tr. 11:15-20.

The court ordered an interlocutory transfer of custody:

> Very good. Well, certainly there needs to be someone who has the actual care and custody of this child and the actual legal custody of this child, and so the Court finds that [Respondents] are those appropriate persons and I

[2]S.M. was 30 years old at the time of the adoption hearing on October 7, 2008. 2008Tr. 59:17.

have granted the care and custody of the child to you pending further proceedings.

2007Tr. 11:22–12:3.

Attempts were made to contact Appellant. Respondents' attorney's letters addressed to "Encarnacion Maria Bail" and postmarked November 27, 2007, was marked "REF," "REFUSED," and "Return to Sender." L.F. 83; 2008Tr. 92:7-25, 93:1-4; Pet. Ex. 15. The Jasper County Juvenile Office's letter addressed to "Encarnacion Bail Romero" and postmarked December 4, 2007, advising of Calton's appointment to represent her, was returned the same way. L.F. 80-81. Dominguez's letter addressed to the attention of "Inmate Encarnacion M. Bail-Romer [*sic*] a/k/a Angélica Alvarado-Romero a/k/a Rachel Leal" and postmarked July 29, 2008, was marked "Ref" and "RETURN TO SENDER." L.F. 107.

The Child had only two sets of clothes, but no crib, toys, or belongings, when he came to live with Respondents. 2008Tr. 11:3-4. He bonded with them quickly. 2008Tr. 11:5-7. M.M. reduced her work schedule by almost half. 2008Tr. 16:1-6.

From when Respondents first saw the Child to the day of trial, the back of his head had a flattened profile possibly resulting from lying or being left on his back for extended periods as an infant. 2008Tr. 13:24-14:15; 37:4-6. Respondents took him to a pediatrician. 2008Tr. 13:24-25; 14:1, 16-18. He also suffered seizures, and Respondents had doctors run extensive tests to rule out a seizure disorder. 2008Tr. 15:3-10. Respondents paid the doctors out of their own pocket, and Medicaid paid the hospital because Respondents' health insurer would not do so until the adoption was finalized.

2008Tr. 15:15-19.

Respondents took the Child with them on family trips camping, to the lake, to Minnesota to meet S.M.'s family, and to Silver Dollar City. 2008Tr. 17:19-20; 20:17-25; 21:1-13; 23:14-18; 26:21-27:10. He celebrated his first birthday with them and their family. 2008Tr. 19:9-10, 18-25.

Respondents intend to assimilate the Child into the Carthage Hispanic culture through exposure to their many friends of Hispanic heritage. 2008Tr. 32:3-13. M.M. explained that they did not hide the Child or avoid either Appellant's family or the Hispanic community: They told the Velazcos to give their names and address to anyone who asked, and they openly took the Child to restaurants and shopping establishments such as Wal-Mart. 2008Tr. 12:4-19.

Appellant did not try to contact either Respondents or the Velazcos before the week of the custody transfer hearing. 2007Tr. 7:19-23. She sent the Child no gifts or money. 2007Tr. 8:5-7. From October 3, 2007, until the trial on October 7, 2008, Respondents received no visitation request—and in fact had no contact from either Appellant or her family. 2008Tr. 12:20-23; 13:5-7; 30:23-25. They received no letters to the Child or to them about him, and they received no money or support items from anyone. 2008Tr. 12:20-13:18; 84:20-25. Appellant filed no motion between October 18, 2007, and October 7, 2008, to seek return of the Child to her, her family, any other third party, or any government agency or consulate. L.F. 1-3.

There was no evidence at trial that Appellant had previously worked in Guatemala or could be employed there in the future. There was neither evidence of where or how

she would live nor evidence of how, when she had failed to do so in the past, she could provide adequate food, clothing, or shelter to a child in her physical custody in the future. 2008Tr. 52:15-53:6.

Appellant did, however, send letters to both the guardian ad litem and Respondents' attorney. 2008Tr. 69:9-70:1; L.F. 111. Her letter to the guardian ad litem, in Spanish, began "*Mi nombre es Angelica Alvarado*"—in English, "My name is Angelica Alvarado—but was signed both as "Maria Bail Encarnicon Romero" and "Encarnacion Maria Bail Romero." L.F. 118.

Respondents' attorney argued that Appellant had abandoned the Child because she had no contact with him either (a) for 60 days before Respondents filed their petition or (b) for nearly six months, as would have been required for an older child. 2008Tr. 95:5-12. The guardian ad litem agreed that Appellant had abandoned the Child:

> I would definitely concur with Mr. Hensley's abandonment issues. I did speak with some members early on, I believe from the church in regards to this. Her family members also indicated that they weren't willing to care for the child, that's why child was passed along in the chain of custody that was demonstrated today in testimony.

2008Tr. 97:10-18. Thus, the guardian ad litem recommended adoption. 2008Tr. 97:23-24.

Dominguez argued against termination of parental rights because Appellant "did not leave the child out of her own volition" but instead "it was something that happened as a result of she was working in this country," although "she did use illegal methods to

that." 2008Tr. 99:1-16. He argued that she could not know where the Child was because she was incarcerated, that the documents sent to Appellant were in English rather than Spanish, that it was difficult for Appellant to understand the gravity of the situation, and that "incarceration is not, in and of itself, grounds for termination of parental rights." 2008Tr. 99:25-100:22.

The trial court found that "the mother appeared to put forth no effort to locate the child and, in fact, should have known where the child was." 2008Tr. 101:3-5. Accordingly, "based upon the allegations in the petition and the proof presented," it stated that it would terminate Appellant's parental rights. 2008Tr. 101:6-10.

ARGUMENT

I

(*Responding to Appellant's Points I and III*)

A. *Introduction.*

The Southern District decided only Appellant's first point—that because the Velazcos placed the Child with Respondents, and that although they were ministers they were not Appellant's clergy and thus not specifically named as intermediaries under § 453.014, the subsequent transfer of custody, termination of Appellant's parental rights, and adoption were all void. Slip op. at 1-2.

The key to Appellant's and the Southern District's misinterpretation and misapplication of the law is best explained in the first sentence of Appellant's argument: "The statutes governing the *termination of parental rights* must be strictly and literally complied with." App. Sub. Br. at 35 (emphasis added).

That general principle of law is beside the point. All of Appellant's citations in Points I-III, calling for strict and literal compliance, deal *exclusively* with termination of parental rights statutes. Both *In re C.W.*, 211 S.W.3d 93 (Mo. banc 2007), and *In re K.A.W.*, 133 S.W.3d 1 (Mo. banc 2004), dealt with Chapter 211, a separate code, and involved only the state's attempt to terminate parental rights. Likewise, *In re G.K.D.*, 332 S.W.2d 62 (Mo. App. 1960), which the Southern District cited three times as the lynchpin for its decision dismissing Respondents' *adoption* petition as well as reversing termination of Appellant's parental rights based on a perceived problem with *placement*

of the child, deals only with the termination of parental rights statutes.[3] *Every* case that has cited *G.K.D.*, except for the Southern District's opinion in this case, did so for the proposition that adoption statutes providing for *termination of parental rights* must be strictly construed.

The law is different with the transfer of custody and adoption statutes in Chapter 453. The cases hold that these statutes require *substantial compliance*, not literal compliance or scrupulous adherence, with a view toward the best interests of the child. That is because the "welfare of the child is the chief concern in a proceeding for its adoption. Its welfare is paramount over all other considerations." *State ex rel. M.L.H. v. Carroll*, 343 S.W.2d 622, 625 (Mo. App. 1961). Thus, literal compliance with the terms of the adoption statute is unnecessary. *Id.* "It is sufficient if there is a substantial compliance and the statute should not be so narrowly construed as to defeat the manifest intent of the law." *Id.* at 625-26. *See also Rochford v. Bailey,* 322 Mo. 1155, 17 S.W.2d 941, 943 (banc 1929); *In re C.,* 380 S.W.2d 510, 514 (Mo. App. 1964). As this Court has explained:

> The adoption statute 'is humane and salutary.' It was enacted 'for the purpose of providing homes and proper nurture, education, and training for

[3] Appellant did not cite *G.K.D.* or its progeny to the Southern District and does not do so in her substitute brief here. She also does not argue that there was no strict compliance with the statutes governing termination of parental rights but complains only about the evidence as it relates to them. *See* App. Sub. Br. at 46-65 (Points 4-7).

> children who have lost their parents or children whose parents, because of misfortune or improvidence, are unable to properly rear and educate them, and should be so construed, if it can be done without doing violence to the terms of the statute, as to encourage the adoption of such children by persons who can properly rear and educate them.

Shepherd v. Murphy, 332 Mo. 1176, 61 S.W.2d 746, 749 (1933).

Chapter 453 provides its own canon of construction, which the Southern District failed to apply—that the "provisions of sections 453.005 to 453.400 *shall* be construed so as to promote *the best interests and welfare of the child* in recognition of the *entitlement of the child to a permanent and stable home*." § 453.005.1 (emphasis added). "All canons of statutory interpretation are subordinate to the requirement that the Court ascertain the intent of the legislature from the language used and give effect to that intent, if possible, and to consider the words used in their plain and ordinary meaning." *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995). When, as here, the legislature has taken special pains to express its intent, specifying in plain language how the adoption code should be read, the courts should follow it.

Yet that is precisely what the Southern District did *not* do. It construed § 453.014 "strictly . . . in favor of the natural parent"—*not* in favor of the best interests and welfare of the child or his entitlement to the "permanent and stable home" that Respondents, the only parents he knows, have now provided for more than three years. Slip op. at 11. It gutted the legislative directive by applying contrary strict construction language from cases that all predate adoption of § 453.005. *Id.* While it did so because "destruction of

the parent-child relationship is at issue," *id.* at 9, it did not acknowledge that § 453.005.1 covers § 453.040, which authorizes termination of parental rights in connection with a Chapter 453 adoption.

The Southern District fundamentally erred by commingling related but distinct concepts of placement, transfer of custody, adoption, and termination of parental rights, which have disparate compliance standards and do not always go hand in hand.

This mishmash led to a devastating, heartbreaking result—undoing this adoption and wresting this innocent Child, who at 4 years old can sense and fear but cannot comprehend, from the only parents and home he has ever known. It also legislated where the legislature did not, with ill effect: Requiring strict compliance with adoption statutes would render most newborn adoptions impossible, since a home study takes several weeks or months to complete, and would render many children, such as the Child here, unadoptable because lack of background information prevents preparation of reports, in whole or in part.

While some of the statutes may overlap,[4] there is little, if any, connection between

[4] Granted, in some ways the statutes can overlap: (a) all adoptions require termination of parental rights, unless the parents are dead; (b) termination is often, though not necessarily, followed by adoption; and (c) transfer of legal custody is often a prerequisite to adoption, although this Court and every Court of Appeals district has held that transfer of legal custody is not the only way to obtain requisite lawful custody for six months before adoption.

transfer of custody and termination of parental rights. Custody transfers happen routinely, as here, without terminating parental rights. More importantly, a judgment transferring legal custody is not even necessary in an adoption or termination of parental rights. It is not a final order, and hence it is not appealable unless transfer is denied. *Marsch v. Williams*, 575 S.W.2d 897, 898 (Mo. App. 1978). It does not terminate parental rights, "sever a parent-child relationship," or have any permanent effect on parental rights. It is interlocutory and can be reexamined, and set aside, at any time upon request.

"Placement" and "lawful custody" for adoption purposes may occur outside of a Chapter 453 case several ways. These include guardianship, *In re K.N.H.*, 118 S.W.3d 317, 322 (Mo. App. 2003); placement by a Juvenile Court in a Chapter 211 abuse or neglect case, *In re Adoption of K.*, 417 S.W.2d 702, 708 (Mo. App.1967); *mere proximity* to the child through a relative's custody decree, *In re Adoption of Fuller*, 544 S.W.2d 345, 349 (Mo. App. 1976); petitioning only to transfer custody, *State ex rel. M.L.H. v. Carroll*, 343 S.W.2d 622, 625-28 (Mo. App. 1961); and placement by the child's legal custodian in a home for parental care, *State ex rel. Dorsey v. Kelly*, 327 S.W.2d 160, 165 (Mo. banc 1959).

If "placement" is unnecessary for a valid adoption because the prospective adoptive parents can obtain "lawful custody" for the requisite period in other ways, an allegedly invalid placement cannot deprive a court of *jurisdiction* to terminate parental rights or finalize the adoption. Similarly, if "transfer of legal custody" is not prerequisite to "lawful custody" and a valid adoption, termination of parental rights cannot be

reversed because of a perceived flaw in an unrelated, non-essential step.

Thus, it was fundamentally unsound for the Southern District to reverse the termination of Appellant's parental rights and this adoption "because the Velazco family was not authorized to place Child with Respondents." Slip op. at 9. This is not the law. Terminating Appellant's parental rights for failure to "scrupulously adhere" to an adoption code provision dealing with placement of a child, §453.014, or transfer of custody, §453.110, mixes apples and oranges. Yet the Southern District's decision rested *solely* on its application of *G.K.D.'s* strict compliance language to § 453.014, the placement statute that has *nothing* to do with termination of Appellant's parental rights, leading the court to conclude that the trial court had no *jurisdiction* and no "statutory authority" to act. Slip op. at 9, 16.

The Child's welfare demands consistency with existing law. By misapplying the law—requiring strict construction of an adoption statute unrelated to termination of parental rights, and requiring strict adherence to the adoption statutes when substantial compliance is sufficient—the Southern District undid an adoption begun more than three years ago. It did so despite its lack of appellate jurisdiction, deferring to an imaginary writ that this Court refused to issue. It did so because of a perceived unlawful placement that, in reality, had nothing at all to do with termination of Appellant's parental rights—a placement about which Appellant never complained until she brought this appeal eight months out of time and nearly a year after the adoption was final.

With those important distinctions in mind, Respondents turn to Appellant's first three points. Respondents address Points I and III together because Appellant's

arguments under both boil down to this: The termination of Appellant's parental rights and the adoption must be set aside because the placement, and hence the subsequent legal custody order, were flawed.[5]

B. *Standard of Review.*

None of Appellant's procedural points, Points I-III, was raised or preserved below. Consequently, they fall under plain error review.

In deciding whether to review for plain error, appellate courts determine whether facially there appear substantial grounds for believing that the trial court committed error that is evident, obvious, and clear and that resulted in manifest injustice or a miscarriage of justice. Rule 84.13(c). Error that might be reversible if preserved nevertheless may not amount to manifest injustice or a miscarriage of justice. *In re R.S.L.*, 241 S.W.3d 346, 351-52 (Mo. App. 2007).

"A party should not be entitled on appeal to claim error on the part of the trial court when the party did not call attention to the error at trial and did not give the court the opportunity to rule on the question." *In re S.R.J.*, 250 S.W.3d 402, 405 n.2 (Mo. App. 2008). "Plain error is not a doctrine available to revive issues already abandoned by selection of trial strategy or by oversight." *Id.*

C. *Appellant failed to raise and preserve the issues below.*

[5] In Point III, Appellant also claims, among other things, that she received inadequate notice and was not appointed counsel before the transfer hearing. She repeats these arguments in Points IX and X, and they will be addressed under those points.

Appellant argues that the absence of other placement options is irrelevant—that failure to follow the statute at the transfer of custody stage is necessarily fatal to the adoption judgment entered a year later. But Appellant neither objected to the Child living with Respondents nor offered any realistic alternative.

Appellant admits that she knew while she was in jail that the Child moved to Respondents' home—and claims that she attempted to call the Velazcos and Ms. Davenport from the jail between October 10 and October 13, 2007. App. Sub. Br. at 98-99.

With slight of hand, Appellant did not include her answer in the Legal File, even though she included her simultaneous motion for extension of time to file it. L.F. iii, 2-3, 89-109. In the answer, Appellant *admitted* Paragraph 3 of the petition, which stated that the Child was "currently in the actual physical custody of [the Velazcos] in Carthage, Missouri due to a voluntary placement by biological mother's sibling who had custody due to a voluntary placement by the biological mother." Supp. L.F. 2. Thus, Appellant admitted both that the Velazcos were not mere babysitters and that no one perniciously took the Child. As discussed under Points IV-VI, this proves that Appellant lacked a basic understanding of where the Child was.

Respondents did not seek a confidentiality order. 2008Tr. 51:23-25. Their full names and address were on the first page of the petition, and their attorney's identifying information was on every pleading. L.F. 5, 11, 14, 16, 17; 2008Tr. 52:7-10. Appellant also apparently got a copy of Respondents' home study, which included not only their address but five working telephone numbers. 2008Tr. 48:7-8; 52:6. They did not try to

hide the Child or avoid Appellant's family or the local Hispanic community. 2008Tr. 12:4-19.

Yet between service of process and the entry of judgment a year later, Appellant neither complained about placement of the Child with the Respondents nor requested alternative placement. She ignored both—even though she had two attorneys, filed a motion for additional time to answer, filed the answer itself, wrote letters, and supposedly made frantic telephone calls. She filed no motion asking that the Child be returned to her, her family, or anyone else. 2007Tr. 7:19-8:7; 2008Tr. 12:20-13:18, 23-25. She ignored everything else, too: Respondents received no visitation request and had no contact from Appellant or her family. 2008Tr. 12:20-23; 13:5-7; 30:23-25. They received no letters addressed either to the Child or to them about the Child and no support money or items from anyone. 2007Tr. 7:19-8:7; 2008Tr. 12:20-13:18; 84:20-25. Not a single social worker, police officer, FBI agent, or foreign consulate ever contacted Respondents about the Child.

The reason for all of this is simple and important: *The Child had nowhere else to go.* Appellant offered no alternatives until the trial, when she suggested placement with another person who did not, however, testify. 2008Tr. 93:19-94:11; Ex. A. In reality, had Appellant objected, the juvenile court would have faced putting the Child back into a substandard home with other illegal aliens who did not want him and had already abandoned him. That was no alternative. The court recognized what the Child's best interests demanded and transferred custody to loving people who *want* to care for the Child and are *willing to do so*. Like all parents, they changed their lifestyles to

accommodate the Child, and they nursed him back to health. 2008Tr. 15:23-16:6, 36:23-37:6.

Respondents delayed the final adoption six months longer than necessary to make sure the Appellant was represented and could file whatever motions, develop whatever defenses, and call whatever witnesses she wished. *See* § 453.080.1(1). Appellant did nothing but object to the adoption itself. She never asked to see the Child or that he be removed from Respondents' home.

Thus, even if Appellant's interpretation of §§ 453.014 and 453.110 were correct, Appellant should have raised it in the *twelve months* before the hearing. The issue is not preserved. *State ex rel. Nixon v. American Tobacco Co.,* 34 S.W.3d 122, 129 (Mo. banc 2000). "[W]e have searched the record in vain for any objection to the trial court's mode of procedure before this appeal was taken," and since Appellant did not complain, "an appellate court will not, on review, convict a lower court of error on an issue which was not put before it to be decided." *Young v. Smith*, 648 S.W.2d 916, 919 (Mo. App. 1984). This case is no different from other cases involving termination of parental rights in which Missouri courts have refused to consider procedural issues raised for the first time on appeal. *E.g., R.S.L.,* 241 S.W.3d at 350-51 (even "objections that a juvenile officer or court failed to comply with mandatory requirements . . . must be properly preserved") (citing multiple other termination of parental rights cases).

Two cases on point directly contradict Appellant's argument. In the first, *In re T.S. v. P.S.*, 797 S.W.2d 837 (Mo. App. 1990), the court terminated the mother's parental rights a year after the children came into DFS custody, although the custody order did not

comply with § 211.183.5. The father objected at trial, but the mother did not. Like Appellant here, the mother argued on appeal "that such a procedural error taints this subsequent termination action, and amounts to a denial of due process," and she effectively asked "that these termination proceedings and the prior custody action . . . be set aside." *Id.* at 841.

The Court of Appeals disagreed. Even if due process were denied, it said, "'constitutional questions must be raised at the first opportunity consistent with orderly procedure.'" *Id.* Since the mother "did not raise this issue for the first time until the appeal," and since this Court and the Court of Appeals "have regularly 'rejected consideration of a constitutional question when raised for the first time on appeal,'" the court denied the claim. *Id.*

But the court went further: It also declined "to rule favorably on the mother's procedural issue *because she further failed to file timely notice of appeal of the* [*custody*] *order*." *Id.* (emphasis added). In language particularly apropos here, the court noted that the mother "raises this procedural issue for the first time nearly two years after her time for appeal expired." *Id.* She did not timely appeal, it said, because her appeal "was filed *after* the termination judgment became final." *Id.* at 842.

Finally, also apropos to this case, the court gratuitously granted plain error review and concluded that the failure to follow the applicable statute "does not amount to a miscarriage of justice or result in a manifest injustice.". *Id.*

The second case is *In re B.R.M.*, 912 S.W.2d 86 (Mo. App. 1995), in which the mother made the same argument—that the court should reverse the termination of her

parental rights because the order granting DFS custody did not comply with §211.183.5. She argued the Juvenile Court lacked jurisdiction to terminate her parental rights because the custody order was flawed. *Id.* at 88. The court agreed that there was no compliance with the statute under which the child was removed and placed in DFS custody, which ultimately resulted in termination of her parental rights. Yet that did not end the inquiry. Citing *T.S.*, the court held that the mother's appeal came "too late to allow her to raise deficiencies in the initial orders governing disposition issued two years earlier." *Id.* at 89.

The mother also argued that the court lacked authority because of the improper custody order. She argued the juvenile court's failure to make required statutory findings in its original dispositional order deprived it of subject matter jurisdiction over the children, so that the subsequent order terminating her parental rights was invalid. *Id.* at 90. The court disagreed, holding that the failure was *not* a "jurisdictional defect which deprived the juvenile court of subject matter jurisdiction to later declare the termination of parental rights as now argued by Mother." *Id.*

The court further held that even "assuming that the [custody] orders did not go on to discuss the factors set out in Section 211.183.5 in sufficient detail to satisfy the statute," it was up to Mother to timely raise this issue. *Id.* at 91. "Had she done so, this Court would have the authority to review the orders to see if they complied with Section 211.183.5 and, if not, to remand for further findings." *Id.* But because she did not, she "waived any defects in that order. She cannot now rely on any such defects, years after they occurred, in order to attack the jurisdiction of the juvenile court to terminate her parental rights." *Id.*

Other cases are noteworthy because, even though they were Chapter 211 cases involving termination of parental rights in which Appellant's claim of "strict compliance" would apply, the courts nevertheless upheld terminations even absent strict compliance with termination statutes when, as here, the issue was not preserved at trial but was raised for the first time on appeal. *E.g. R.S.L.*, 241 S.W.3d at 350-52; *D.D.C. v. D.C.*, 817 S.W.2d 940, 944 (Mo. App. 1991) (same). *See also In re H.J.P.*, 669 S.W.2d 264, 271 (Mo. App. 1984) (court declined plain error review when record did not show manifest injustice). These are cases in which there was noncompliance with *termination of parental rights* statutes, not adoption statutes. This, of course, begs the question: If reviewing courts do not find manifest injustice in cases in which the failure to comply strictly with the statutes results in *the termination of parental rights*, how can manifest injustice result in this case from an alleged improper *placement,* which had nothing to do with termination of Appellant's parental rights, when the Child came into Respondents' home after his family bounced him from pillar to post?

D. *Appellant has not demonstrated prejudice.*

Appellant also fails to show prejudice. Even if her Points Relied On were "legally sound," reversal is unnecessary because she lodges no claim of prejudice. *Burk v. Burk,* 936 S.W.2d 144, 146 (Mo. App. 1996). Questions not presented in the points "will be considered abandoned on appeal no longer an issue in the case." *Id.*

It is not enough to say that prejudice inheres in the adoption itself. Appellant's complaint is *how* the Child ended up where he did. She has never argued that he should have gone elsewhere, because he had to go somewhere. He was an infant who required

total care, which Appellant obviously could not provide in jail and which her brother and sister either could not or would not provide. Foster care, on the surface, may seem like a possibility. But given that Appellant assiduously tried to avoid acknowledging her true identity, termination and adoption would have occurred even quicker if the child had been in a pre-adoptive placement through Children's Division, which looks foremost to realistic possibilities for permanency.

Absent a showing of prejudice, there is no basis for reversal. *In re F.C.,* 274 S.W.3d 478, 486 (Mo. App. 2008).

E. *Substantively, Appellant's claims fail.*

1. Introduction.

The juvenile court did not transfer custody based on the Velazscos' qualifications as clergy under § 453.014. The judgment mentions that they are "local clergy of a Hispanic church in Carthage," an undisputed fact. 2008Tr. 22-23; L.F. 118. But that was raised only at the final hearing, not at the transfer of custody hearing or in the order transferring custody. The transfer arose out of necessity for the best interests of the Child, as both the guardian ad litem and the juvenile court recognized.

The guardian ad litem visited Respondents' home several times when the Child was there, both before and after the transfer of custody hearing, and knew of the Child's condition. 2007Tr. 8:12-13; 2008Tr. 36:10-16, 36:23-37:6. At the hearing, his questions to S.M. recognized that there was an "urgent need" for Respondents "to have this legal transfer of custody . . . because nobody has the ability to take this child to the doctor . . . in the event something does happen." 2007Tr. 8:12-24. The guardian ad litem

recommended transfer. There was "an emergency situation in that nobody had the ability to care for this child," he said, "so maybe with this transfer of custody [Respondents will] be able to take this kid to the doctor or get him his needed shots or checkups. I would recommend the transfer of custody." 2007Tr. 11:15-20.

The trial court observed that someone had to have physical and legal custody. 2007Tr. 11:22-12:3. It noted in its order that at "the present time, no other person has legal custody of the child. The mother is incarcerated and left the child without any provisions for alternative custody or guardianship." L.F. 63.

The guardian ad litem's comment and the trial judge's order transferring custody was blessedly prophetic, as the child did need emergency medical care due to a seizure while he was in Respondents' care. Query as to what might have happened had the trial judge not transferred custody.

2. The statutes.

a. § 453.014.

Section 453.014 states, in pertinent part:

> 1. The following persons may place a minor for adoption:
>
> ***
>
> (4) An intermediary, which shall *include* an attorney licensed pursuant to chapter 484, RSMo; a physician licensed pursuant to chapter 334, RS.M.o; or a clergyman of the parents.

§ 453.014.1(4) (emphasis added).

Appellant and the Southern District say that this statute means that only a person who is specifically listed as a possible intermediary may place a child for adoption. That fundamentally misreads the statute. By using the word "include," the legislature did not restrict the class of intermediaries to only attorneys, physicians, and clergy of the parents. The word "include" is not "a word of limitation, but rather of enlargement. . . . When used in conjunction with a number of specified objects, it implies that there may be others that are not mentioned." *In re S.J.S.,* 134 S.W.3d 673, 677 (Mo. App. 2004). "Thus, the legislature did not intend" that only the three named classes of people may be intermediaries, because had it "so intended, it would have expressly stated so in the statute." *Id.*

In the unusual circumstances of this case, the Velazcos certainly fit the mold of intermediaries, and as clergy they substantially comply with the statute. By default the Child remained with Appellant's brother, who almost immediately turned him over to Appellant's sister. The daytime child care for which the sister first used the Velazcos morphed in rapid succession into sleep-overs, then week-long stays, and then a virtually full-time placement as Appellant's family shed responsibility for the Child. 2008Tr. 80:8-11, 90:17-91:4. This dilemma, which the Velazcos did not seek, thrust them into the intermediary role. Knowing that the Child needed a permanent home, they contacted Respondents about adoption. 2007Tr. 5:21-22; 2008Tr. 8:14-16.

Whether the Velazcos were intermediaries, though, is beside the point. Lawful

custody is not contingent upon placement under § 453.014.[6] The juvenile court had both subject matter and personal jurisdiction to enter the order transferring custody. *See Webb v. Wyciskalla*, 275 S.W.3d 249, 252-54 (Mo. banc 2009). Nothing in § 453.014 requires the draconian result that Appellant urges—reversing the termination of parental rights, an entirely unrelated concept, and undoing the adoption—if one of the three specified classes of intermediaries does not place the child. It is enough that there was substantial compliance with § 453.014, that the juvenile court transferred legal custody, and that under § 453.080 the placement was actual and lawful for the requisite period, *Dorsey*, 327 S.W.2d at 165.

b. § 453.110.

Appellant cites no authority for her argument that the judgment should be reversed because Respondents took custody "*before* entry of any court order" and thus "failed to strictly comply with the controlling statute." App. Sub. Br. at 44. To this extent, then, she has also abandoned this point. *F.C.,* 274 S.W.3d at 486.

Section 453.110 is also not a statute that deprives a trial court of jurisdiction and therefore does not limit a court's power to transfer custody if a child lives with the potential adoptive parents before the court enters the order. *K.,* 417 S.W.2d at 707-08. To the contrary, §453.110.2 contemplates that placements may occur before a transfer of

[6]Placement is irrelevant because, under § 453.060(5), "the final determination of the propriety of the adoption of such children shall be within the sole discretion of the court." *See In re* C.D.G., 108 S.W.3d 669, 676 (Mo. App. 2002).

custody hearing and provides a procedure for review of the placement *if someone raises the issue.* In this case, no one except Respondents, as interested parties, brought the matter to the trial Court's attention at both hearings and explained the situation, allowing the trial court to "make sure order as to the custody of such child in the best interest of such child." § 453.110.2. If the statute contemplates what happened here, it cannot rob the trial court of jurisdiction.

The case of *In re Adoption of Davis*, 285 S.W.2d 35 (Mo. App. 1955) is directly on point. There the trial court denied an adoption petition because there was no prior court order transferring legal custody to the Petitioners.[7] The court, however, remanded the case because it appeared

> that the court overlooked [§453.110.2], which provides: 'If any such surrender or transfer is made without first obtaining such an order, such court shall have the right on petition of any public official or interested person, agency, organization, or institution, to inquire into the facts and to make such order as to the custody of such child as may be for the best interests thereof.' The matter of the custody of a child is an inherent part of any adoption proceeding. While the petition seeks only to adopt Christine Davis, the petitioners who had her actual custody were certainly interested in obtaining legal custody of the child. *The matter of legal custody of the*

[7] This Court subsequently overruled this portion of the *Davis* opinion, for the most part, by its criticism in State *ex rel.* Dorsey v. Kelly, 327 S.W.2d 160 (Mo. banc 1959).

> *child was therefore brought to the attention of the court by an interested party in a manner sufficient to invoke the quoted portion of the statute. The court should have made an order respecting the transfer of custody after having determined that the surrender and transfer previously made was done without an order of the court*. If in the opinion of the court the petitioners were proper custodians of the child, the court should have granted them custody and held in abeyance any action upon the petition to adopt until the lapse of the required nine months. For this reason the petition should be reinstated so that the court may make a proper order in respect to the custody of the child and the consideration of the adoption should be deferred.

Id. at 37-38 (emphasis added).

In re K. is also on point. There the mother left the child, one of two, with the grandmother, who in turn periodically left her with the great-grandmother. *K.,* 417 S.W.2d at 709. When the great-grandmother died, the grandmother could not care for both children, so she gave the child over to an aunt. *Id.* The juvenile court initially placed the child with the grandmother because of the mother's neglect, but later that court learned that the aunt had the child and recognized that fact in its order, thus placing the child with the aunt. *Id.* at 705, 708-09.

The juvenile court denied the aunt custody for purposes of adoption when it learned of the neglect proceeding. *Id.* at 706. The aunt petitioned another county's circuit court for permission to adopt but, saliently it applies to this case, "failed to obtain

an order of the juvenile court . . . transferring custody of the child to her for adoption" pursuant to § 453.110. *Id.* at 707. The Jasper County court subsequently entered a decree allowing the aunt to adopt the child. The mother, who said that she had repeatedly rejected the aunt's adoption requests and vigorously denied that she ever consented to the adoption, appealed. *Id.* at 701, 706.

The court rejected the mother's argument that the circuit court lacked jurisdiction to decree the adoption because it had made no previous transfer order under § 453.110. *Id.* at 707-08. The child had lived with the aunt for as long as the child could remember, without objection by the mother, and the aunt had supported and cared for the child without any contribution for the mother for some four years. *Id.* at 706. Using language particularly apropos to this case, the court said there was *no substance* to the argument that the aunt

> could not have had the actual and lawful custody of the adoptee for at least nine months prior to the entry of the decree, as required by [statute], because no preliminary order transferring custody had been made by the court in which the decree of adoption was entered.

Id. at 708. The court held that an order of transfer of custody under §453.110 is not a prerequisite to lawful adoption. "[T]he custodial question presented to the court in decreeing adoption ... is not whether there has been an order of a court of competent jurisdiction awarding custody of the child to petitioners during the minimum . . . period, *but rather is it whether custody of the child has been lawful and actual in the petitioners during that period*." *Id.* at 708 (emphasis added). Because the aunt had custody under

the juvenile court's order in the neglect proceeding, her "custody of the adoptee, albeit for limited purposes, had been lawful and actual" when the circuit court entered the adoption decree—"and that," the Court said, "is all Section 453.080 requires." *Id.*

This case also bears striking similarities to *In re J.H.H.*, 662 S.W.2d 893 (Mo. App. 1983). There the mother had three children, all of whom had been "parceled out to various family members to raise." *Id.* at 895. She placed one child with a great aunt. *Id.* The father was unknown. *Id.* at 895 n.2. The mother contested termination of her parental rights based on abandonment, as well as the court's best interest analysis. With regard to best interests, the court held that "in the context of termination of parental rights proceedings it connotes the *parens patriae* interest in providing the child with a permanent home. . . . It includes the child's need for a 'home in which the child will be housed, fed, clothed and educated, at least according to acceptable community standards.'" *Id.* at 897. In language that applies equally here, the court said that the child

> had been abandoned by his mother and left with a great-aunt who eventually could neither handle him nor financially afford the special treatment he needs. The options before the juvenile court were clear-cut. The status quo-maintaining the child in the limbo of foster care-was untenable. Mother's eleventh hour plan to take the child to [her home] and somehow properly care for him there rests more on fantasy than reality and, all things considered, was equally untenable. The third option ... adoptive placement in a unique family setting in which this boy will receive proper treatment and care ... has the possibility of repairing the damage

> that has been done to this child. *Since the adoptive placement was the only viable option which would provide the child with a permanent home, the termination was in the best interest of the child*."

Id. at 897 (emphasis added).

In this case, the juvenile court expressly transferred custody to Respondents on October 18, 2007. L.F. 62-63. It had jurisdiction to do so. Respondents certainly obtained "lawful and actual" custody once the court entered the transfer order—and that is all § 453.080 requires. *K.*, 417 S.W.2d at 708. Section 453.110 thus does not require the draconian result that Appellant urges if a child lives with the potential adoptive parents before a court transfers custody. Again, appellant cites no contrary authority other than the "strict compliance" cases discussing termination of parental rights, which is the wrong standard for transfer of legal custody.

c. § 453.010.

Appellant ignores the clear mandate of § 453.010.5, which eviscerates her arguments in Points I and III. That section states that a court "shall not deny or delay the placement of a child for adoption when an approved family is available."

The transfer order was interlocutory, "pending further proceedings," and could have been reexamined any time upon request. 2007Tr. 12:3. The way in which Respondents came to care for the Child was discussed openly at length at *both* the custody transfer hearing and the adoption hearing, and Appellant's attorney cross examined Respondents regarding the facts and circumstances. 2007Tr. 2:23-5:25, 7:19-8:6; 2008Tr. 7:25-13:18, 41:15-43:23, 46:19-47:10, 76:3-7; 78:4-81:11; 84:4-13; 86:22-

25; 87:4; 90:1-91:11; 97:11-18. The transfer order, particularly when the actions of Appellant and her family left the trial court no other option, cured the alleged defects in the placement of which Appellant belatedly complains. Unquestionably Respondents had lawful and actual custody of the Child at the latest beginning October 18, 2007, and hence the trial court had authority to decree the adoption. Section 453.010.5, which Appellant ignores, was the mandate for it to do so.

II

(*Responding to Appellant's Point II*)

There is no merit to Appellant's argument that the trial court erred by failing to comply with a litany of statutes. Her claims of error are not preserved. Furthermore, the record shows that the trial court was properly advised under the circumstances of this case. Should the Court nevertheless review Appellant's claims, Respondents address the statutes separately.

Notably, however, the undisputed facts of this case made "strict statutory compliance" impossible, and if "strict compliance," rather than "substantial compliance," were required in these cases, it will have a chilling effect on adoptions by making it impossible for petitioners to have certainty in their adoption judgments when a biological parent has abandoned a child.

Adoption cases must be judged on their own unique facts. *In re P.G.M.*, 149 S.W.3d 507, 514 (Mo. App. 2004). In this case, because the Child was abandoned, Respondents did not, and could not, know much about him before he began living with them. It was also impossible to obtain information about Appellant and the biological father, which would have been included in some reports, because of Appellant's own deceptive conduct. She hid her true identity by changing her name at least twice, which had either the calculated or disregarded consequence of severing any connection with the Child during the very time that she now says Respondents should have obtained a report. Consequently, mail sent to her under her claimed "actual" name—and even mail sent to her with three names, L.F. 107—was refused. Appellant refused to identify the Child's

biological father.

Appellant completely ignores her hand in this and never discusses her false identities,[8] namely her use in prison of "Angelica Alvarado" after being arrested as "Rachel Leal," and the lengths to which she went to distance herself from the Child. This is important because it not only explains the reason why Appellant did not know where the Child was but also why letters from the court and attorneys did not reach her and were returned "refused." It explains why a § 453.026 report could not have been prepared, because, *by Appellant's own design*, there was a complete absence of information about both her and the biological father. To admit who she really was would have threatened to undo the "Angelica Alvarado" ruse, potentially compromising any plans that she may have had for reentering the United States illegally yet a third time following her deportation.

A. *Standard of review.*

Again, these issues were not raised below and therefore are not preserved. Appellate courts will not convict a trial court of error on matters not presented to it. *Young,* 648 S.W.2d at 919. Should the Court nevertheless review these claims, review would be for plain error.

[8]The names "Angelica Alvarado" and "Rachel Leal," while discussed predominantly at the termination hearing and in the trial court's termination judgment, are conspicuously absent from Appellant's Substitute Brief.

B. *§ 211.455.*

For three reasons, there is no error with respect to the report mentioned in § 211.455.

First, that report was unnecessary because the trial court terminated Appellant's parental rights for abandonment under *both* §211.447.2(2)(b) *and* §453.040(7). If multiple grounds for termination exist, any one ground is sufficient to sustain the judgment. *In re E.L.B.,* 103 S.W.3d 774, 776 (Mo. banc 2003). So, even assuming that the reporting requirement of § 211.455 applies in a Chapter 453 adoption, Appellant was not prejudiced. The court's finding under § 453.040(7), to which the requirements of Chapter 211 do not apply, is enough. *S.L.M. v. D.L.N.*, 167 S.W.3d 736, 740-41 (Mo. App. 2005).

Second, Appellant did not complain below, and thus she waived the issue. *R.S.L.* 241 S.W.3d at 352. Given the finding of abandonment under §453.040(7), there was no manifest injustice or miscarriage of justice here. Plain error review extends to only exceptional cases in which manifest injustice has occurred, and a party may not use it to excuse mere failure to make a timely and proper objection. *Id.*

Finally, the first sentence of the statute itself explains why § 211.455 reports are neither required nor expected in a Chapter 453 adoption. Section 211.455 requires the juvenile officer to meet with the court to determine whether all parties have been served and to ask the court to order the investigation and social summary. *Juvenile officers are not parties to a Chapter 453 adoption,* and none was a party here. *See infra* Point XI.

The cases on which Appellant relies are inapposite because they all involve

termination of parental rights by the state under Chapter 211, not termination incidental to a private adoption under Chapter 453.

C. *§ 453.026.*

Section 453.026 exists to benefit adoption petitioners, the trial court, and the guardian ad litem. Biological parents are not entitled to a copy of the report that it mentions. § 453.026.1.

Because the Child was abandoned and came to Respondents on an essentially emergency basis, there was no opportunity for a written report before they got the Child. The application of § 453.026 to cases such as this is also problematic. Because the Child was abandoned, Respondents could not know much about him before he began living with them. As discussed above, it was also impossible to obtain information about Appellant and the biological father, which would have been included in the report, because of Appellant's own deceptive conduct. Thus, the content of a §453.026 pre-placement report in cases such as this, involving *abandoned* infants, will be virtually non-existent. If the report must be completed "prior to adoptive placement," then this is an impossible requirement upon petitioners who seek to adopt an abandoned child.[9]

Appellant also cites no authority that the absence of a § 453.026 report requires reversal of the termination of her parental rights, the transfer of custody order, or the

[9]Many examples come to mind. One real and not uncommon example is the mother with no prenatal care who comes to the hospital in labor, gives birth, and subsequently leaves the hospital, abandoning the child, intending never to be found.

adoption judgment. She has abandoned this claim. *F.C.*, 274 S.W.3d at 486. She likewise does not complain of prejudice, for there was none since, by statute, she would not have received a copy of the report anyway. There was substantial compliance because the trial court heard the available content of a § 453.026 report in testimony at a hearing under § 453.110. A judgment "is not to be reversed unless the complainant suffered injury or prejudice." *Id.* at 486.

D. *§ 453.070.*

Appellant correctly says that an adoption requires a home study under § 453.070. It is a tool for the trial court, but it does not decide the case. *In re K.K.J.*, 984 S.W.2d 548, 554 (Mo. App. 1999).

In this case, the trial court received an extensive home study, and the guardian ad litem later filed an update. L.F. 22-55; 86-88. Appellant complains that the home study was not prepared at the court's direction because it predated her abandonment of the Child. App. Sub. Br. at 40. She also complains that the report does not contain required "specific content," but the only content she mentions relates to herself and the Child. *Id.* Again, though, she used an alias, refused correspondence and thus did not acknowledge herself as the Child's biological mother, and abandoned the Child. Thus, evidence about her and the Child's backgrounds and medical history was unavailable.

This Court ruled on this issue in *State ex rel. Dorsey v. Kelly*, 327 S.W.2d 160 (Mo. banc 1959). In that case, the Appellant argued that the § 453.070 report was not competed before placement and that the petitioners could have never acquired *legal,* as opposed to lawful and actual, custody of the child. This Court disagreed:

> We are of the opinion, however, that when section 453.070 is read *in pari materia* with section 453.080 (requiring lawful and actual custody of the child as a prerequisite to entry of a decree of adoption) and Par. 2 of section 453.110 (making lawful a conditional transfer of custody to the extent shown in the instant case) it is clear that its provisions are directed solely against any decree of adoption or any transfer of *legal* custody such as would bring about any **permanent** change in the legal status or rights of the child or would vest any person with any *legal* right of its custody beyond that expressly authorized under Par. 1 of section 453.110 or would divest the parent or other *legal* custodian of any duty imposed by law to support or care for the child, until the investigation thereon required has been made, reported to and approved by the court.

Id. at 164 (boldface emphasis added).

Similarly, in *In re Mayernik*, 292 S.W.2d 562 (Mo. 1956), appellant attacked the adoption decree because there was no statutorily-required written report. This Court found extensive references in the transcript to interviews and inquiries by the appropriate agency signifying that the requirement for investigation had been conscientiously fulfilled. The decree was affirmed. *Id.* at 571.

In *In re Drew*, 637 S.W.2d 772 (Mo. App. 1982), the court held that failure to submit an admissible § 453.070 report was not reversible error. "Even were the report in this case to have been admitted in evidence despite the content of hearsay or, alternatively, were it to be argued that the decision of the court was influenced by the

report filed but not received in evidence, the judgment must be sustained. *The result is supported by substantial, competent evidence apart from the report*, and any procedural defect as to rejection or receipt of the report in evidence is not of a dimension to warrant reversal of that result." *Id.* at 775 (emphasis added).

E. *§ 453.077.*

This section requires a post-placement assessment. The guardian ad litem filed one two months before the final hearing. L.F. 87-88.

The answer to Appellant's complaints about the home study applies here as well. Appellant ignores her almost total unwillingness to acknowledge the proceedings and those attempting to assist her. Her reluctance to acknowledge either the proceedings or her own identity negates her attempt now to undo an adoption because of alleged deficiencies that she had a hand in causing.

The guardian ad litem's report, based on his personal observations, accomplished its purpose. It complied by updating the court and discussed the Child's then-current situation so that the court was well informed.

"The welfare of the child is the chief concern in a proceeding for its adoption. Its welfare is paramount over all other considerations." *M.L.H.*, 343 S.W.2d at 625. Thus, literal compliance with the terms of the adoption statute is unnecessary. *Id.* "It is sufficient if there is a substantial compliance and the statute should not be so narrowly construed as to defeat the manifest intent of the law." *Id.* at 625-26. That is particularly true when, as here, review is for plain error.

F. *§ 453.080.*

Appellant mentions that § 453.080 requires the trial court to receive the guardian ad litem's recommendation and review the reports before finalizing an adoption. The trial court received the recommendation of the guardian ad litem and the guardian ad litem's post-placement report. 2008Tr. 97:8-24; L.F. 88. The court ordered transfer of custody on October 18, 2007, in the absence of any other options. It heard the evidence in the transfer of custody hearing and subsequently heard the evidence, including active cross-examination by Appellant's attorney, in the final adoption hearing. The court had sufficient information before it to determine whether to grant the adoption. Certainly there was substantial compliance with the statute, and hence there was no plain error.

G. *§ 453.110.*

Appellant mentions § 453.110 in Point II but develops no argument about it. "Arguments raised in the points relied on which are not supported by argument in the argument portion of the brief are deemed abandoned and present nothing for appellate review." *In re Marriage of Fritz,* 243 S.W.3d 484, 484 (Mo. App. 2007).

H. *Conclusion.*

There is manifest irony in Appellant's arguments. She claims that this Court should ignore the lack of appellate jurisdiction because she "allegedly fail[ed] to properly file a piece of paper labeled 'notice of appeal.'" App. Sub. Br. at 2. Yet she argues here that Respondents' alleged failure to file pieces of paper should doom the adoption and the termination of her parental rights. Nowhere does she attempt to explain why one piece of paper is more important than another, and for good reason: Although substantial compliance with the adoption statutes is sufficient, the timely filed "piece of paper

labeled 'notice of appeal'" is "the vital step for perfecting an appeal and is an indispensable prerequisite to appellate jurisdiction." *Fagan v. Hamilton Bank,* 327 S.W.2d 201, 202 (Mo. 1959).

In *In re Baby Girl Smith*, 339 S.W.2d 490 (Mo. App. 1960), appellant raised an objection about the § 453.070 report for the first time on appeal. The court summarily rejected the argument because the evidence supported the decree: "Regardless of what the report contained the evidence heard clearly supported the decree of the court." *Id.* at 492. The same thing is true here, and there is no reason either to reverse the termination of Appellant's parental rights or to undo the adoption.

III

(*Responding to Appellant's Point IV*)

Appellant's Points IV, V, and VI share a common theme: that there was no clear and convincing evidence to support a finding of abandonment under either § 453.040(7) or § 211.447.2(2)(b).

With regard to Point IV, the record contains much more than hearsay and therefore amply supports the judgment.

A. *Standard of review.*

Appellant concedes that the standard of review is plain error. App. Sub. Br. at 47.

B. *The bases for the findings of abandonment.*

Respondents specifically pled abandonment under §453.040(7) and §211.447.2(2)(b). L.F. 7, 8. The trial court ultimately found that statutory grounds for termination of Appellant's parental rights existed under *both* statutes. L.F. 117-20.

Section 453.040(7) provides for termination of parental rights if a parent "has for a period of . . . at least sixty days, for a child under one year of age, immediately prior to the filing of the petition for adoption, willfully abandoned the child or . . . immediately prior to the filing of the petition for adoption, willfully, substantially and continuously neglected to provide him with necessary care and protection." Section 211.447.2(2)(b) provides for termination if a parent "has, without good cause, left the child without any provision for parental support and without making arrangements to visit or communicate with the child, although able to do so." While §453.040(7) requires a 60 day period of

abandonment, §211.447.2(2)(b) does not for children under one year old.

Thus, "Chapters 211 and 453 provide two separate means by which a parent's rights may be involuntarily terminated." *S.L.M.*, 167 S.W.3d at 738. A finding of abandonment under § 453.040(7) does not require the same findings as one under § 211.447.2(2)(b). *Id.* at 740. Neither statute references the other. *Id.* In a termination of parental rights proceeding, any *one* ground for termination, if proven, is sufficient. *In re S.T.W.*, 39 S.W.3d at 518.

C. *Appellant did not preserve the issue, and there is no plain error.*

In *In re I.B.*, 48 S.W.3d 91 (Mo. App. 2001), the father sought to reverse the termination of his parental rights on the ground that certain testimony was hearsay. The Western District rejected the claim. Because he "did not object when the trial court allegedly considered the inadmissible evidence," it said, he "failed to preserve the issue for appellate review." *Id.* at 100.

Recognizing that, Appellant seeks plain error review. But that claim likewise fails. "It has been well-established in Missouri that the admission of hearsay evidence is not plain error when the defendant fails to properly object. . . . 'Inadmissible hearsay which goes in the record may be considered by the [judge].'" *State v. Newson,* 898 S.W.2d 710, 715 (Mo. App. 1995).

D. *The record belies Appellant's argument.*

The argument also fails on the merits. Appellant again omits substantial trial court findings, her own admissions, and non-hearsay evidence supporting the judgment that Appellant "had not offered any support to the child, even a small or token amount." L.F.

118.

Davenport met Appellant before the Child was born, and, after Appellant went to jail, she referred her sister to the Velazcos. She personally knew the events from May through June or July 2007. 2008Tr. 79:20-22, 80:12-17. She testified about the chronology from well before Appellant's arrest until well after the Child went to live with the Velazcos. She also testified about her jail visit with Appellant September 19, 2007. 2008Tr. 76-100. By then the Child had lived with the Velazcos full time for well more than 60 days. Appellant was "quite surprised" to learn that her brother had not kept the Child, even though the brother had given him to the sister more than three months before. 2008Tr. 78:4-10, 84:6-7. Appellant likewise did not know that her sister had placed the Child with the Velazcos. 2008Tr. 100:2-3.

This conversation occurred nearly four months after Appellant was arrested. Whether the Child was with Appellant's brother, sister, or someone else, then, Appellant clearly did not know his whereabouts for *double* the time necessary for abandonment purposes. The trial court observed that Appellant "appeared to put forth no effort to locate the child and, in fact, should have known where the child was." 2008Tr. 101:3-5. It emphasized that in the judgment:

> Laura Davenport testified that the biological mother was 'quite surprised' that the brother had not kept the child and taken care of him," it said, concluding that Appellant "made no attempts in the sixty days preceding the filing of the petition on October 6th 2007 to see the child. In fact, there had been no attempts all the way back to May 22, 2007, a period of over

> four months and over double the time necessary to establish abandonment."

L.F. 118-19.

Respondents' testimony also offered first-hand proof of abandonment and failure to repent by providing support or attempting to communicate with or visit the Child. From October 3, 2007, until the trial on October 7, 2008, Respondents received no request for visitation, had no contact from Appellant or her family, and received no letters addressed to the Child, or to them about the Child, and no support money or items from anyone. 2008Tr. 12:20; 13:18; 30:23-25; 84:20-25.

Appellant argues that "the parties who were involved in the care arrangements, including [Appellant] and her family members, were not present at the hearing *and did not have the opportunity to present evidence regarding the arrangements that were actually made.*" App. Sub. Br. at 49 (emphasis added). Respondents did nothing to keep them away, so inferentially they stayed away as a matter of strategy. Their testimony might have underscored the abandonment. Furthermore, since Appellant has repeatedly claimed that she "came to the United States to make a better life for her family," their testimony likely would have rebutted her claim that adoption was not in the Child's best interest: Since she came to the United States illegally, was deported, returned illegally, was scheduled for a second deportation, and presumably intended to take the Child with her, her track record certainly suggests that she might well leave the Child in Guatemala, with whoever might take him, so that she could return to the United States illegally a third time, using one of her aliases to avoid detection. Regardless, nothing prevented

Appellant's family members from testifying live or prevented her from testifying by deposition.[10]

This point emphasizes Respondents' fundamental hurdle in this case. It was not, as one might expect, a problem of Appellant or her family trying to get the Child back, trying to see him, or otherwise repent of a prior abandonment. Quite the contrary. by Appellant's design, Respondents faced a vacuum of information regarding Appellant and her family. None of them appeared at trial, because their priorities lay elsewhere, such as avoiding deportation or keeping their identities clean for the next illegal entry into the country. Respondents largely had to *prove negatives*, which courts have recognized is difficult to do. *In re Marriage of Summers,* 640 S.W.2d 205, 208 (Mo. App. 1983). Because of that difficulty, Missouri courts have held parol evidence "admissible to prove a negative fact." *Boyer v. City of Potosi*, 77 S.W.3d 62, 69 (Mo. App. 2002). Parol evidence is not necessarily hearsay, but the principle of admitting it under such circumstances is analogous, particularly since the question here involves asserted plain error. Thus, even if Respondents relied on only hearsay evidence, it would not be improper under the circumstances of this case.

And, of course, contrary to Appellant's contention, Respondents were not required to negate every possible excuse for Appellant's failure to support and maintain contact with the Child. *In re C.R.*, 758 S.W.2d 511, 514 (Mo. App. 1988).

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[10]Appellant ignores Respondents' gratuitous acquiescence in her hearsay evidence. 2008Tr. 93:19-94:11.

Read in the light most favorable to the judgment—which Appellant has not done—the record amply supports the trial court's finding of abandonment.

IV

(*Responding to Appellant's Point V*)

The evidence discussed under Point III above refutes Appellant's Point V, where Appellant makes a number of multifarious arguments attacking the court's findings under § 453.040(7). The trial court terminated Appellant's parental rights for abandonment under both § 211.447.2(2)(b) *and* § 453.040(7). If multiple grounds for termination exist, any one ground is sufficient to sustain the judgment. *E.L.B.*, 103 S.W.3d at 776.

A. *Standard of review.*

This Court must affirm the judgment unless it unsupported by the evidence or against the weight of the evidence or unless the trial court erroneously declared or applied the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The burden of proof is clear, cogent, and convincing. *In re Adoption of W.B.L.*, 681 S.W.2d 452, 454 (Mo. banc 1984).

The paramount goal in an adoption proceeding is the child's best interests. *In re C.D.G.*, 108 S.W.3d at 674. The wishes of the biological and adoptive parents are subservient. *In re Neusche*, 398 S.W.2d 453, 457 (Mo. App. 1965). The trial court shoulders "a greater burden . . . than simply according all parties a fair trial," *C.D.G.*, 108 S.W.3d at 674, so an appellate court presumes that it "was motivated by what the judge believed was best for the child," *In re Williams*, 672 S.W.2d 394, 395 (Mo. App. 1984), and defers to its broad discretion more in custody and adoption matters than in other cases, *In re P.G.M.*, 149 S.W.3d at 511. This reflects the trial court's "extreme advantage over a reviewing court" in observing trial intangibles that "in no way can ever be

reflected in the cold printed record." *Neusche*, 398 S.W.2d at 457.

On the facts, then, an appellate court will not disturb the judgment unless the child's welfare requires another disposition. *C.D.G.*, 108 S.W.3d at 674. Abuse of discretion exists only if the judgment "is clearly against the logic of the circumstances" and "is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* Courts exercise the power to set aside a decree only with great caution and a firm belief that it is wrong. *In re E.B.S.*, 876 S.W.2d 8, 10 (Mo. App. 1994).

Appellant is wrong that the standard of review changes because Respondents' attorney drafted the judgment. *See* App. Sub. Br. at 34 n. 5. The "trial court's findings bear no different weight regardless of whether the judgment entry is prepared by the trial court or by one of the parties." *Engeman v. Engeman*, 123 S.W.3d 227, 234 (Mo. App. 2003). Since the judicial act is rendition of the judgment, who prepares the actual document is irrelevant. *Lemon v. Lemon*, 819 S.W.2d 94, 95 (Mo. App. 1991).

B. *The evidence supports the judgment.*

In her previous brief (but not this one), Appellant chastised the court for announcing its ruling at the close of evidence "without taking the time to weigh or consider the evidence for even a second." Ironically, Appellant's insult both disproves her point and underscores why the decision should be affirmed.

The clear, cogent, and convincing standard of proof, which applies in cases involving termination of parental rights, is met when the evidence and the reasonable inferences from it, weighed against the opposing evidence, instantly tilt the scales in

favor of termination and the court is left with the abiding conviction that the evidence is true. *W.B.L.*, 681 S.W.2d AT 454. Though Appellant criticizes it, the judge's oral pronouncement strikingly shows how "instantly convinced" the court was that in September 2007 Appellant thought that the Child was still with her brother—when he had not been there since May. The Court needed no more time for deliberation on that issue.

This case, like all adoption cases, must be judged on its own unique facts. *In re P.G.M.*, 149 S.W.3d at 514. The issue of abandonment turns on intent, which generally appears from the biological parent's conduct before, within, and after the statutory period. *Id.* Thus, whether Appellant abandoned the child must be judged by what *the record* reveals she did from May 22, 2007, until October 7, 2008, rather than by what she says. *K.*, 417 S.W.2d at 705.

Appellant was arrested May 22, 2007. 2008Tr. 78:6-7; L.F. 96. She made no arrangements for the Child—the prison bus did not stop in Carthage on the way to Oceola. Instead, the Child was in Appellant's brother's home by default, since Appellant had no home of her own. 2008Tr. 76:6-7. Davenport testified that Appellant admitted *assuming* that her brother would take care of him. L.F. 118; 2008Tr. 84:6-10. The trial court thus correctly found Appellant "made no provisions for the care of her child, but assumed her brother would take care of the child." L.F. 118.

Since Davenport's told Appellant in September 2007 that the Child was "with her sister," Appellant argues that "satisfying the required 60-day period" for abandonment under § 453.040(7) "is a legal impossibility" because Respondents filed the adoption

petition October 5. App. Sub. Br. at 64. But *Appellant* did not leave the Child with her sister—her *brother* did. 2008Tr. 78:13-18. *Appellant did not know where the Child was.* She was "surprised" *in September* to learn the Child was not with the brother, where he was when she went to jail *in May*. 2008Tr. 84:6-7. The trial court commented on this at the close of evidence and in its written findings. 2008Tr. 100:24-101:5; L.F. 118.

The Child was with Appellant's sister by the end of May 2007. 2008Tr. 78:4-18; 79:8-11. After "a couple of weeks," he began sleeping at the Velazcos' home, and eventually Appellant's brother-in-law would "pick him up maybe just on Sunday for a couple of hours or maybe less." 2008Tr. 90:17-91:4. The Velazcos' home became the child's full-time placement. 2008Tr 80:8-11. But by then Appellant was "no longer in the picture." 2008Tr. 86:24-87:1.

Using revisionist history, Appellant skips several pages of Davenport's testimony to make it *appear* that Davenport could not substantiate a 60-day abandonment period. She omits Davenport's salient testimony that the Velazcos' childcare morphed into a living arrangement:

> Q And at some point did that helping with child care turn into pretty much a full-time placement?
>
> A Yes.

2008Tr. 80:8-11. Davenport explained this on cross-examination by Appellant's attorney:

> A In the beginning, when the Velasco's were providing child care, Jennifer—both the aunt and uncle worked, so Jennifer would drive over

every morning and pick up Carlos. And then the uncle would drive over in the evening and bring him back home. That lasted, as well as I can remember, a couple of weeks.

And then because of the shuffling back and forth he started sleeping over at the Velasco home and they would pick him up—the uncle would pick him up on a Friday. And then became less and less where he would pick him up maybe just on Sunday for a couple of hours or maybe less.

2008Tr. 90:17-91:4.

It is unnecessary to recount other evidence, which appears in the argument under Point III. For brevity, Respondents incorporate that discussion here. Because the evidence sufficiently established the 60-day abandonment period, the court did not err by terminating Appellant's parental rights under § 453.040(7).

C. *Appellant improperly relies on matters outside the record.*

Appellant cites two letters in the juvenile court file as proof that she tried to obtain a passport for the child and that "someone"—she does not claim it was her—was looking for the Child. App. Br. at 53. Both are outside the record, and both are hearsay, which Appellant elsewhere decries. L.F. 69, 74. These letters were not introduced into evidence, or even discussed, at trial. Hence this Court cannot consider them, for "appellate courts will not consider evidence outside of the record on appeal." *8182 Maryland Assocs., Ltd. Partnership v. Sheehan,* 14 S.W.3d 576, 587 (Mo. banc 2000). Documents are not evidence just because they are filed with the court. *Besham v. Williams*, 239 S.W.3d 717, 726 (Mo. App. 2007); *Love v. Love*, 72 S.W.3d 167, 172 (Mo.

App. 2002). Respondents have, of course, moved to strike these and other matters that Appellant raises outside the record.

Beyond that, the asserted attempt to obtain a passport does not evidence repentance for Appellant's earlier abandonment of the Child. Many cases hold that token acts do not establish repentence. *E.g., In re H.M.C.*, 11 S.W.3d 81, 88 (Mo. App. 2000). This is particularly true when the attempted repentance comes *after* the petition to terminate parental rights is filed. *E.g., In re E.F.B.D.*, 245 S.W.3d 316, 326 n.10 (Mo. App. 2008). Even assuming that the court considered this, it could have found that it "'developed at or after the time of the filing of the [first] adoption petition. *This is not consistent with the desire of a parent to establish a relationship with* [the] *child*.'" *In re D.R.M.*, 780 S.W.2d 145, 147 (Mo. App. 1989) (emphasis added).

Appellant did, however, write Respondents' attorney and the guardian ad litem, postage prepaid, to object to the adoption. 2008Tr. 69:9-70:10; L.F. 111. Her own actions, then, show that she could send cards or letters and "was capable of contacting [the Child] while incarcerated." *In re M.L.K.*, 804 S.W.2d 398, 403 (Mo. App. 1991). That she chose not to bespeaks abandonment.

D. *The judgment should be affirmed.*

Appellant's argument under Point V amounts to fewer than 3 pages. She points to one isolated passage from Laura Davenport's testimony and two documents never before the court. She

> simply sets forth isolated pieces of evidence from the record viewed in the light most favorable to her position and, without any consideration of the

> trial court's obligation to determine credibility, then concludes, without any citation to relevant legal authority, that because of the existence of these isolated facts no abandonment occurred.

In re C.A.M., 282 S.W.3d 398, 406 (Mo. App. 2009). The trial court made the right decision, and the judgment should be affirmed.

V

(*Responding to Appellant's Point VI*)

Appellant makes a number of multifarious arguments in Point VI attacking the court's findings under § 211.447.2(2)(b). Again, though, the court terminated Appellant's parental rights for abandonment under both § 211.447.2(2)(b) *and* § 453.040(7), and any one ground will sustain the judgment. *E.L.B.,* 103 S.W.3d at 776.

A. *Standard of Review*

This Court must affirm the judgment unless it unsupported by the evidence or against the weight of the evidence or unless the trial court erroneously declared or applied the law. *Murphy*, 536 S.W.2d at 32.

B. *Appellant grossly misstates the record.*

Point VI boldly proclaims that "**EVEN RESPONDENTS ADMIT THAT [APPELANT] LEFT [THE CHILD] IN HER FAMILY'S CARE**." App. Sub. Br. at 53-54. Appellant makes that claim through selective testimony, without context, and without even a nod toward the standard of review. She modified the text of her argument under Point VI in her Substitute Brief, removing that language that appeared in the argument in her original brief, but she nevertheless continues to assert it in Point VI itself. The testimony that she cited in her original brief to support this statement, which she now cites for something else, is this:

> Q Okay. Did you know anything to all about the biological family, in other words, any extended family in this area?

A When they first contacted us they told us that there was a biological aunt that also lived in Carthage that had cared for him just a couple of days and then had asked Jennifer and Oswaldo to care for him because they were unable.

2008Tr. 11:21-12:3. Appellant does not explain how she derives any such admission from this.

Next, Appellant mischaracterizes the Judgment. She says that it "recites that [Appellant] believed Child would be adequately cared and provided for until she was released from prison. (L.F. 118)" App. Sub. Br. at 54-55. The judgment *really* says that Appellant "went to prison on May 22, 2007. *She had made no provisions for the care of her child,* but *assumed* her brother would take care of the child." L.F. 118 (emphasis added). Appellant's rank redrafting of the judgment to suit her argument transcends zealous advocacy.

Appellant claims "the record plainly evidences that Mother has been fighting for the return of her son. (LF. 70, 94, 108, 111, 121)." App. Sub. Br. at 57. A review of this "record" is instructive.

- L.F. 70 is a letter written in English and Spanish and sent to the juvenile court on October 28, 2007, twelve days after Appellant was served, stating she does not want her child adopted,[11] that she prefers that he be placed in

[11]Appellant does not explain why she sent this letter in light of her claim she was not served.

foster care (notably not with her siblings, who she said were frantically trying to help her locate the child), and that she requests visitation with the child. It is signed "Encarnacion Maria Bail."

- L.F. 94 is a duplicate of that letter.
- LF 108 is a letter dated August 19, 2008, in which Appellant gives temporary custody to Corina Rodriguez in Monett, Missouri. It is signed "Encarnacion Maria."
- LF 111 is a letter in Spanish to the guardian ad litem dated from "Angelica Alvarado" ("*mi nombre es Angelica Alvarado*") but signed both "Maria Bail Encarnacion Romero" and "Encarnacion Maria Bail Romero." It is undated but stamped filed September 26, 2008.
- LF 121 is page 10 of the judgment, which lists several factors showing that termination of parental rights is in the child's best interests.

Given the paucity of this "evidence," showing the length to which Appellant will go to justify her assertion that she fought for the Child, one would think she would put on a pedestal any evidence negating abandonment before October 2007, when Respondents filed the adoption petition. Yet there is nothing. "Angelica Alvarado" had other, bigger problems than what was happening with her Child.

C. *Appellant's arguments are unavailing.*

Appellant is right that a parent may temporarily leave a child in the care of a third party without abandoning it. But the case that Appellant cites, *In re A.R.*, 52 S.W.3d 625, 635 (Mo. App. 2001), far from establishes that Appellant's imprisonment for a crime she

admittedly committed *after* the Child's birth, and to which she voluntarily *pled guilty*, is such a situation. The man in *A.R.* was not incarcerated. He left Missouri for two months to salvage his relationship with his fianceé and stepchildren, and he immediately returned when he was unsuccessful. *Id.* at 635 n.4.

Appellant also ignores the fact that the temporary situation rule "is limited to cases where, once the temporary placement is made, the parent continues to show parental interest and concern for the child." *In re C.M.D.*, 18 S.W.3d 556, 562 (Mo. App. 2000). As discussed at length above, Appellant's ignorance about her Child's whereabouts for four months does not evince continued "parental interest and concern."

Appellant's argument resembles one in *In re H.D.,* 629 S.W.2d 655, 657-58 (Mo. App.1982), in which a mother left her child in another's care indefinitely. Affirming the termination of her parental rights, the court rejected her argument that she provided support by securing the custodian's gratuitous promise to care for the child. *Id.* at 658. Similarly, in *J.H.H.,* 662 S.W.2d at 896, the mother "parceled out to various family members" her three children because she and her husband were unemployed. She argued that she supported a child by placing him with a relative who assumed her support obligation. The court rejected that, concluding that the gratuitous promise to care for a child indefinitely "is best seen as token support by the mother which the court properly ignored." *Id.*

While incarceration does not alone constitute abandonment, "a majority of the decisions hold that under appropriate circumstances imprisonment may constitute abandonment." *In re A.R.M.*, 750 S.W.2d 86, 89 (Mo. App. 1988). *See also In re*

Adoption of M.D.L., 682 S.W.2d 886, 889 (Mo. App. 1984) (evidence that father failed to follow DFS recommendations regarding sending letters, cards, and gifts while incarcerated and had no contact with child was sufficient to support finding of abandonment).

Furthermore, the time and nature of the incarceration can be significant. Ccriminal acts occurring after the birth of the child, with knowledge that they may cause a separation, are accorded more weight. *In re Z.L.R.,* 306 S.W.3d 632, 636 (Mo. App. 2010) (distinguishing "parents who commit bad acts *after* they have children and should realize such acts have consequences harmful to those children" from "getting in trouble *before*" knowing about a child). Here Appellant likely knew about the Child when she reentered the country illegally; assuming normal gestation, she would have become pregnant in mid-January 2006 but did not reenter the country until around May 10. L.F. 96. But assuredly she cannot feign ignorance that her continued illegal presence and her identity theft crime would have consequences for the Child. Still she used false identities—the one she stole and others—and did nothing to legalize her residence in this country.

Appellant next argues that the nonsupport finding cannot stand because there was no evidence that she could financially support the Child. But the burden is on Appellant, not Respondents. Respondents were "not required in the first instance to negate every possible excuse or reason for [Appellant's] failure to support and to maintain contact with [her] child." *H.M.*, 770 S.W.2d at 445.

The "substantially reduced wages received by incarcerated parents do not excuse their obligation under § 211.447 to make monetary contributions towards support of their children." *M.L.K.,* 804 S.W.2d at 402. While an incarcerated parent's contribution will not significantly help provide a child with essentials, even a minimal contribution evinces the parent's intent to continue the parent-child relationship. *Id.* Furthermore, a parent who lacks the ability to support a child fully still has a duty to make minimal support contributions. *In re T.G.,* 965 S.W.2d 326, 335 (Mo. App. 1998).

Of course, as previously discussed, Appellant's incarceration and her failure to participate in this case under her real name complicates such matters of proof. The Court of Appeals has recognized these practical difficulties. "Proof of just cause or excuse is [Appellant's] burden, not [Respondents']. Requiring [Respondents] to prove the absence of justification would 'place[ ] an unfair burden on them' and 'would be akin to requiring them to prove a negative. The burden is on [Appellant] 'to at least go forward with evidence showing the failure was not willful.'" *In re Marriage of A.S.A.*, 931 S.W.2d 218, 223 (Mo. App. 1996).

Appellant next argues that there was no evidence demonstrating her ability to visit the Child. She does *not* argue that she maintained a relationship with the Child. Nor does she argue that she could not do so. An incarcerated parent can maintain the relationship in ways other than physically visiting the child. Incarceration does not discharge a parent's statutory obligation to provide a child with a continuing relationship through *communication* and visitation. *M.L.K.,* 804 S.W.2d at 402. Furthermore, a parent may not avoid abandonment by maintaining only a superficial or tenuous

relationship with a child. *In re M.N.M.,* 906 S.W.2d 876, 979 (Mo. App. 1995). Under § 211.447.7, a court may attach little or no weight to infrequent visitations, *communications, or contributions*. *Id*. Appellant never asked Respondents to bring the Child to her, presumably because it would have blown her "cover." Yet a request would at least have demonstrated her desire and intent to establish and maintain a parent-child relationship. *E.g. P.G.M.*, 149 S.W.3d at 514 n.10; *M.L.K.*, 804 S.W.2d at 402.[12]

Furthermore, there *was* evidence that Appellant could communicate. As discussed under Point IV, Appellant sent letters to the court, Respondents' attorney, and the guardian ad litem. They show Appellant at least had the ability to write and money to buy stamps. It makes no difference that a small child cannot read, for "even small children appreciate hearing a parent's letter read to them by another adult." *In re H.M.*, 770 S.W.2d 442, 444-45 (Mo. App. 1989).

Appellant's final two arguments focus on "several" letters she claims she wrote but that the trial court ignored both as communications and an attempt to repent of her prior abandonment. "Several" to Appellant means but four letters, none of which she directed to the Child. App. Sub. Br. at 56. Only the two introduced into evidence are properly before this Court. In them, Appellant opposed adoption but neither complained

[12]Of course, if Appellant's family had been caring for the Child, particularly on the weekends, and if Appellant was in regular contact with them, as she claims, query why the family could not make the short trip to Osceola for visitation.

about the Child's residence nor requested an attorney, and she asked that the Child be placed in foster care or with a woman who never appeared at trial.

Appellant ignores the fact that she sent *none* of these letters during the 60-day period before Respondents filed the adoption petition. This was correspondence 'developed at or after the time of the filing of the . . . petition. *This is not consistent with the desire of* [*Appellant*] *to establish a relationship with* [*her*] *child*.'" *D.R.M.*, 780 S.W.2d at 147 (emphasis added).

VI

(*Responding to Appellant's Point VII*)

Appellant's complaint in Point VII is that the court's best interests findings under § 211.447.7 are not supported by "clear, cogent and convincing evidence." That is not the proper standard.

A. *Standard of Review*

Section 211.447 authorizes a two step process for termination of parental rights: (1) proving one of the grounds for termination under § 211.447, and (2) determining whether termination is in the child's best interests. *In re D.L.W.*, 133 S.W.3d 582, 583 (Mo. App. 2004). The clear, cogent, and convincing standard does *not* apply to the court's determination of the best interests of the child. *In re W.S.M.*, 845 S.W.2d 147, 151 (Mo. App. 1993). This is a "subjective assessment of the evidence that is not reweighed by appellate review." *D.L.W.*, 133 S.W.3d at 585.

Thus, appellate courts review for abuse of discretion a trial court's finding that termination of parental rights is in the child's best interests. *Id.* The Court will reverse the order only when it firmly believes that the judgment is wrong. *E.B.S.*, 876 S.W.2d at 10. In any termination of parental rights proceeding, the primary concern must be the best interests of the child. *M.N.M.*, 906 S.W.2d at 878.

B. *Appellant has preserved nothing for review.*

Though multifarious, Point VII suffers from an even greater *and fatal* defect. In neither her Point Relied On nor her argument does Appellant claim that the trial court's decision was not supported by the totality of the evidence. When an appellant neither

addresses nor challenges "that the court's ultimate best interests conclusion was unproven by the *totality of the evidence* presented . . . she has not preserved a claim that the juvenile court made an error that materially affected 'the merits of the action.'" *In re A.Y.M.*, 154 S.W.3d 412, 417 (Mo. App. 2004).

C. *No specific best interests determinations were necessary.*

The trial court did not have to make best interests findings under the seven factors. As discussed previously, the court found statutory grounds for termination under § 453.040(7) as well. That statute does not require the findings that a termination under § 211.447.2(2)(b) requires. *S.L.M.*, 167 S.W.3d at 741. Furthermore, § 211.447.7 states that the factors need only be considered "when appropriate and applicable to the case." Thus, there is

> no requirement, statutory or otherwise, that all seven of these factors must be negated before termination can take place; likewise, there is no minimum number of negative factors necessary for termination. Rather, a finding that termination is in the child's best interest is a subjective assessment based on the totality of the circumstances.

C.A.M., 282 S.W.3d at 409. Moreover, § 211.477.7 findings "are not the only best interest considerations. This follows because 'best interests' is 'an ultimate conclusion based on the totality of the evidence presented.'" *A.Y.M.*, 154 S.W.3d at 417.

D. *The trial court's specific findings.*[13]

1. § 211.447.7(1)

The court found that the Child had no emotional bond with Appellant. Appellant claims reversible error because an expert did not testify. But expert testimony on best interests factors are not required. "[I]t appears Mother believes that a judgment terminating parental rights must be reversed unless there is 'expert witness' testimony that termination will be in the child's best interests. That simply is not the law, either via statute or by case law." *A.Y.M.*, 154 S.W.3d at 416.

The trial court could believe part, all, or none of the testimony of any witness and could make reasonable inferences from the evidence. Deference to the trial court's assessment of testimony includes deference to its conclusions regarding issues of fact. *K.K.J.*, 984 S.W.2d at 552. The Child was seven months old and developmentally delayed when Appellant went to jail. By the time of trial, he was a few days away from his second birthday. He had not seen Appellant for 16 months, and he had not heard her voice. The trial court's finding is a reasonable inference based on the evidence.

[13]In *In re A.D.R.*, 26 S.W.3d 364, 367 (Mo. App. 2002), the court reproduced the trial court's "meticulous findings on the multitudinous factors specified in § 211.447." The court's findings in this case are much more detailed than those in *A.D.R.*.

2. § 211.447.7(2)

The trial judge found that Appellant abandoned the Child. She had no idea where he was in September 2007, four months after her arrest. This Court should not allow Appellant to manipulate the record. She had Respondents' address, five of their telephone numbers, and their attorney's identifying information. She wrote and mailed letters after Respondents filed the petition. Had her priority had been to the Child, she would have called *at least once*. She would have sent a letter or card *at least once.* She would have sent even a small amount of support *at least once.*

Appellant now insinuates that *Respondents* kept her from seeing the Child. Yet even the letters not in evidence, those from October 2007 and August 2008, were not addressed to Respondents. Respondents had absolutely no contact from Appellant or her family. 2008Tr. 13:5-7; 30:23-25. They received no letters addressed to the Child or to them about the Child, and they received no support money or items from anyone. 2008Tr. 12:24-13:18; 84:20-25.

Appellant also attempts to argue that she was not served with the petition. The record shows that the summons and petition were sent to the St. Clair County sheriff's department—where Appellant was in jail—and that the St. Clair County sheriff successfully served the process and mailed the return to Jasper County. L.F. 1. The sheriff's return shows personal service. L.F. 68. The return is "prima facie evidence of facts recited therein." *State ex rel. DFS v. Sutherland,* 916 S.W.2d 818, 820 (Mo. App. 1995).

As for Appellant's complaint that nothing shows that she "received the Petition or any other pleadings in her native language," App. Sub. Br. at 14, it is enough to say that since she chose to come to Missouri, albeit clandestinely and illegally, she must abide Missouri law, which provides that "English shall be the language of all official proceedings in this state," MO. CONST. art. I, § 34, and that all "writs, process, proceedings and records in any court, and in all inferior tribunals established by law, shall be in the English language," § 476.050.

3. § 211.447.7(3)

Courts routinely recognize "that incarcerated parents receive only minimal wages." *M.L.K.,* 804 S.W.2d at 402. Respondents had no burden to prove Appellant's ability to pay. Appellant had the wherewithal to buy stamps, as shown by her letters to Respondents' attorney and the guardian ad litem less than a month before trial. The judge made a reasonable inference.

4. § 211.447.7(4)

While Appellant correctly says that no services were being offered, that, too, is beside the point, for this was no underlying abuse or neglect case, and services were not required. This finding thus was not required under either § 453.040(7) or § 211.447.2(2)(b), because this was not "applicable to the case." Appellant also ignores the trial judge's findings that services would be fruitless because Appellant was to be deported after serving her sentence and cannot return to the United States. L.F. 121.

5. § 211.447.7(5)

The trial court gauged Appellant's disinterest by her lack of effort to maintain contact with the Child and prevent the adoption. Appellant had almost five months before the petition was filed, and another year afterward, to contact the Child, write letters, and provide support. She did absolutely nothing. The court also noted her lack of advance planning for the Child before she went to prison. L.F. 121. The record adequately supports this finding.

6. § 211.447.7(6)

"As a threshold matter," the court's finding here does not conflict with *K.A.W.* That case involved an observation, in dicta, that welfare fraud is not one of the felonies contemplated by §211.447.4(4) (now § 211.447.5(4)). That statute involves grounds for termination (not a best interest determination) when several violent felonies against people or children are implicated. With respect to §211.447.7(6), Appellant fails to mention that the parent's penalty for welfare fraud in *K.A.W.* was *restitution*, not incarceration. *K.A.W.,* 133 S.W.3d at 26 (Price, J., dissenting). As such, the facts of *K.A.W.* involve neither a felony nor incarceration. This case, on the other hand, involved Appellant's guilty plea to felonious theft of another's name and Social Security number, with an unchallenged two-year sentence and subsequent deportation. This was not a § 211.447.5(4) case.

The trial court may reasonably have inferred that Appellant's conviction, which would lead to her deportation, was not predisposed to result in a quick fix. There was no evidence, particularly in light of the court's legal custody order to which Appellant never objected, that it was even possible that the Child could leave with the Appellant upon her

deportation. Given her treatment of the Child up to that time and her continuing effort to use an alias, as well as the court's awareness that she had left *at least* one other child in Guatemala, the court quite easily could have inferred she did not *want* the Child to come with her.

VII

(*Responding to Appellant's Point VIII*)

Point VIII represents what might best be characterized as a shotgun approach, intermingling issues of law with issues of fact in no particularly logical way. At base, the issue here is one of the weight of the evidence as to the court's best interests findings. The evidence amply supports the trial court's conclusion.

A. *Standard of Review*

The standard of review is the same as the standard for Point VII, which is incorporated here by reference.

B. *Point VIII likewise preserves nothing for review.*

Point VIII suffers from the same fatal defects as Point VII. In neither her Point Relied On nor her argument does Appellant claim that the trial court's decision was not supported by the totality of the evidence. The discussion under Point VI(B) above is incorporated here by reference.

C. *The best interests determination.*

The best interests determination involves "imprecise substantive standards that leave determinations unusually open to the subjective values of the judge," and it "includes the child's need for a 'home in which the child will be housed, fed, clothed and

educated, at least according to acceptable community standards.'" *J.H.H.*, 662 S.W.2d at 897.

Appellant argues that § 211.443 "must be considered" and that the court considered only factor (3). If Appellant argues there were no written § 211.443 findings, she cites absolutely no authority requiring them. The statute certainly does not. The case she cites, *In re D.F.P.*, 981 S.W.2d 663 (Mo. App. 1998), does not even mention § 211.443. Furthermore, her argument cites no record evidence explaining her point. To this extent, then, the point must be deemed abandoned, because Appellant has not developed it in the argument, and it is too unclear to permit a meaningful response. *Christomos v. Holiday Inn Branson,* 26 S.W.3d 485, 487 (Mo. App. 2000).

Appellant cites no Missouri authority prohibiting consideration of immigration status in the best interest analysis. While Missouri apparently has not addressed the issue, courts in other states have concluded that immigration status is a factor that may properly be considered when it potentially affects the child's welfare. *E.g., Dinora G. v. Arizona Dep't of Economic Sec.*, 2008 WL 4643992, at * 3 (Ariz. Ct. App. Mar. 7, 2008); *Marina P. v. Arizona Dep't of Economic Sec.,* 214 Ariz. 326, 152 P.3d 1209, 1216 (Ct. App. 2007); *In re R.H.,* 240 Ga. App. 551, 524 S.E.2d 257, 258-59 (1999); *Adoption of Leilani,* 76 Mass. App. Ct. 1118, 2010 WL 889941, at *2 (Mar. 15, 2010). *See also Carballo v. Commonwealth,* 2007 WL 29521, at * 1 (Ky. Ct. App. Jan. 5, 2007); *In re Hernandez,* 441 Mich. 867, 494 N.W.2d 744, 744 (1992).

Appellant's argument also runs counter to the policy ensconced in § 211.447.7(6), which requires consideration of 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," although "incarceration in and of itself shall not be grounds for termination of parental rights." In other words, while incarceration alone is not enough, the *effect* of the incarceration on the child may be. That is simple, common sense.

As a rather extreme example, courts have gone so far as to say that a biological parent's probation for *misdemeanor marijuana possession* was relevant and admissible in proceeding to terminate father's parental rights in order to help determine whether termination was in best interest of child. *In re B_M_P_*, 704 S.W.2d 237, 250 (Mo. App. 1986). That court realized that, considering the issues that must be weighed in a termination case, "it would be *absurd* to deny a trial court such information." *Id.* Appellant claims, however, that her crimes of deceit and *felony* conviction should not be considered. But § 211.447.6(6) *requires* that the juvenile court consider incarceration in making its decision. *In re A.P.S.*, 90 S.W.3d 232, 235 (Mo. App. 2002)

There is no doubt that Appellant's illegal alien status holds potential for even more prison time. Her first illegal entry into the United States was a crime before she was deported in 2005. It was a crime when she reentered in 2006. 8 U.S.C. § 1325. Her *mere presence* in the United States after reentering illegally in 2006, considering she was deported before, is also a crime. *Id.* § 1326. Of course, Appellant was in prison throughout the adoption proceedings while the Child was left at the mercy of family members who bounced him pillar to post. Yet, astoundingly, Appellant argues that the trial court cannot consider the commission of a continuing crime, one that could result in imprisonment or immediate deportation, in its best interest determination. That is not the

law. *E.g.*, *In re N.J.S.*, 276 S.W.3d 397, 402 (Mo. App. 2009); *In re R.K.*, 982 S.W.2d 803, 807 (Mo. App. 1998).

Appellant's reliance on *In re Angelica L.*, 767 N.W.2d 74 (Neb. 2009), is misplaced. The first sentence of the opinion shows that it involved "the State's duty to protect [appellant's] children." It thus was the equivalent of a Missouri Chapter 211 termination of parental rights with an underlying abuse/neglect case. The petition was based on the children residing in foster care 15 of 22 months.

The biological mother in that case did not abandon either her children or her identity. In fact, she did something infinitely more responsible: She worked the State's reunification plan, to the extent she was able, from Guatemala. She "maintained contact with [the Nebraska social worker] and her children." She had one 7-year-old child in foster care at the time of removal, and the youngest child was 15 months old. The mother was deported to Guatemala and actually established a home near a hospital and a school. She had strong ties to and was respected in her community. She presented two favorable home studies at trial, and she produced evidence of where her children could live, how she could work, and other factors. She paid child support to her children. In other words, she did things one expects a parent, regardless of race or nationality, to do.

Appellant is the antithesis of the mother in *Angelica L.* She entered the United States illegally not once, but twice, assuming multiple false identities. There was evidence of her substandard care for the Child before her arrest. After her arrest, she took another alias. She continues to live in the United States with family members who are also illegal aliens. She offered no proof of how she could take care of the Child, but

instead abandoned her parental obligation for fear that her true identity would be exposed, making it harder to return to the United States yet again.

It was not Appellant's attorneys' responsibilities to make Appellant keep contact with the Child, send him support, or at the very least check on his well being. These fundamental expectations of any parent, regardless of nationality, require no legal advice.

Appellant claims that there is no evidence that she cannot provide basic living conditions for the child. The court, however, found that "none of [her] deficiencies in this case are in her distant past." L.F. 122. It recognized she was incarcerated and would be for at least another four months, at which time she would be deported, unable to return legally. L.F. 122. It heard grim eyewitness testimony from Laura Davenport about the living conditions and lack of nutrition, with the resulting physical and developmental delays that the Child suffered early on. It heard evidence that Appellant turned her back on her child after going to jail, wrongly assuming that her family would take over, perhaps as they did in the past with her other child or children left behind in Guatemala. Appellant ignores all of this.

Furthermore, Respondents cannot prove a negative. At trial they could prove only how she took care of the Child before she went to prison and her lack of attention to him after she left. Appellant bore the burden of showing that she could turn her life around. *H.M.*, 770 S.W.2d at 445; *C.R.,* 758 S.W.2d at 514. Proving herself to be a fit mother was not on "Angelica Alvarado's" list of priorities. *See In re B.A.F.*, 783 S.W.2d 932, 934 (Mo. App. 1989).

Fourth, Appellant claims "the Juvenile Court's findings are centered entirely on Respondents' purported fitness. (L.F. 124-125)." App. Sub. Br. at 80. Appellant ignores the other 14 pages of the judgment, and particularly L.F. 117-23, examining the legal precedent of protections and allowances for similarly situated incarcerated parents and how they applied to the evidence presented. The court also considered Appellant's current conditions and the possibilities for her future behavior. At the time of the hearing, there could be no serious suggestion that her track record was good.

Appellant's point ignores *In re H.J.P.,* 669 S.W.2d 264 (Mo. App.1984). In that case, the mother also complained of a "dearth" of evidence relative to best interests for termination, *after* the court had just found evidence sufficient for termination of parental rights. She argued that the same evidence could not be used for both. This court disagreed, holding that "evidence relevant to one of the particular grounds is necessarily relevant, albeit indirectly, to whether or not termination is in the best interest of the child." *Id.* at 272.

Fifth, the trial court had to make *two* best interests determinations: (1) whether termination of parental rights was in the Child's best interests, and (2) whether the adoption was. Whether the findings appeared in the same judgment, on the same page, or in the same paragraph is irrelevant. Furthermore, a judge may properly consider what other options exist when considering the best interest analysis for adoption. In *D.R.M.*, the issue following termination of parental rights was whether adoption by the child's grandparents was in the child's best interest. "*Compared to the alternative,*" the court

said, "the finding of the trial court that adoption would be in the best interest of the child was not an abuse of discretion." *D.R.M.*, 780 S.W.2d at 148 (emphasis added).

Sixth, Appellant isolates one factor of the § 211.447.7 best interest analysis and argues a negative inference that the standard was not met because no one deliberately tried to hurt the child. That, though, was but one of several factors, and in any event no finding was necessary on Chapter 211 grounds. *C.A.M.*, 282 S.W.3d at 409. It cannot, then, be required with respect to a termination under Chapter 453.

Appellant again tries to bend testimony to suit her purpose. She claims that M.M. admitted that Appellant "was (and is) a fit parent." App. Sub. Br. at 69. The testimony that Appellant cites in support of her claim is this:

> Q I'm just asking for your personal opinion, based upon what you've heard today, is there anything out there that you believe would not make her a fit mom with regards to Jameson?
>
> A No.

2008Tr. 50:7-11. That testimony hardly supports the claim that M.M. admitted that Appellant "was (and is) a fit parent." It was mere supposition. M.M. was the first witness, so what she had "heard" could have been nothing other than her own previous testimony. Yet she had never met Appellant. In context, her testimony two pages later was hardly complimentary. *See* 2008Tr. 52:15-53:6. More importantly, the trial court cited the *eyewitness* testimony of Laura Davenport, the third witness to testify, Appellant's care of the Child in its decision. *See, e.g.,* L.F. 113, 114 ¶ 6, 118.

Seventh, whether Appellant left the child with her family intentionally or by default has been thoroughly discussed in the briefs. The trial court specifically found Appellant "had made no provisions for the care of her child." L.F. 118. Deferring to the trial court's credibility determinations, appellate courts consider all the evidence and reasonable inferences from it in the light most favorable to the judgment. *P.G.M.*, 149 S.W.3d at 511.

Finally, Appellant argues that the court "placed undue reliance on the child's attachment to the would-be adoptive parents and the child's supposed lack of recollection of [Appellant] as his parent." App. Sub. Br. 70. Her Point Relied On claims that the trial court erred because it placed "**UNDUE RELIANCE ON ALLEGED BONDING**." *Id.* at 65. She cites no authority for that. This point is nonsensical, as is Appellant's claim that the finding that Respondents have developed a strong bond with the Child is unsupported by clear, cogent, and convincing evidence—the wrong standard for the best interest determination—and has little relevance.

A discussion of all of Respondents' evidence on this issue is more than this argument needs. Suffice to say the court heard stories and anecdotes about the Child, his favorite television shows, and his favorite stuffed animals. 2008Tr. 26. It heard how he had bonded with Respondents and their family as they "took to each other pretty quick." 2008Tr. 11. The court had photos of family trips, birthday parties, family visits, holidays, church events, and playing outside with nieces and nephews. 2008Tr. 17-33. This does not exhaust the evidence on this point.

Thus, Appellant grossly mischaracterizes the evidence when she claims that the only evidence of Respondents' bond with the Child was their testimony that he calls them "Mommy" and "Daddy." App. Sub. Br. at 83. Once again, this transcends zealous advocacy. It contradicts the standard of review and contravenes the duty of candor to the Court.

VIII

(*Responding to Appellants' Point IX*)

Appellant's Point IX contains four new claims that rely in part on matters outside the record. Procedurally they are not preserved for review, and as matters of plain error they do not show manifest injustice or a miscarriage of justice. Substantively there is nothing to them, and they do not justify, much less require, reversal.

A. *Standard of Review.*

Appellant did not raise below any of the issues that she raises under Point IX. Consequently, none is preserved for appellate review. *R.S.L*, 241 S.W.3d at 350. Should the Court choose to review this point, review necessarily must be for plain error.

B. *Appellant was served.*

Appellant's service argument is twofold: She argues that she was not served with the petition, but that if she was served, it was not before the custody transfer hearing. App. Sub. Br. at 73.

There is no question that she was served. The sheriff's return shows personal service of the summons and petition on her October 16, 2007. L.F. 68. A sheriff's return of service is "prima facie evidence of facts recited therein." *Sutherland,* 916 S.W.2d at 820. The return is subject to impeachment only by clear and convincing evidence. *Id.* Appellant produced no evidence at all—much less clear and convincing evidence—because she did not raise the issue.

In any event, Appellant waived the issue anyway. The defenses of insufficiency of process and insufficiency of service of process must be raised in the responsive

pleading or in a separate motion within the time allowed for responsive pleading. Rule 55.27(a). Otherwise they are waived. Rule 55.27(g); *Crouch v. Crouch*, 641 S.W.2d 86, 90 n.4 (Mo. banc 1982).

Even assuming that Appellant did not receive notice of the custody transfer hearing, she alleges no prejudice, and there was none. This is true for two reasons:

First, when the court appointed her counsel, *sua sponte,* it sent her notice, addressed to "Encarnacion Bail Romero," at the St. Clair County jail. L.F. 79-81. But Appellant was using another old alias, "Angelica Alvarado-Romero." L.F. 109, 95-106, 111. Hence the notice was returned "REFUSED." L.F. 81. Similarly, correspondence from Respondent's attorney was returned "REFUSED." L.F. 83; 2008Tr. 92:14-17; Pet.Ex. 15. Based on the testimony, the court could have inferred a similar result with attorney James Calton's letters to her. So whether the court sent her notice before the hearing is a moot question, because, by refusing all mail to "Encarnacion Bail Romero," she would not have received it anyway. L.F. 81. Accepting the mail would have revealed her true identity. She should not be rewarded for refusing to accept notice, for misrepresenting her identity, and for failing to raise this issue before now.

Second, as discussed in the first three points, Appellant's rights were not terminated at the transfer of custody hearing. The order was interlocutory. Appellant raised no complaint about service or notice that would have given the trial court an opportunity to address it, despite having a year to do it. Her "failure to raise the issue at trial is important because, had she objected . . . the trial court would have had an opportunity to make a record." *R.S.L.*, 241 S.W.3d at 351. Since she did not raise the

issue below, it is not preserved for review. *Gibson v. White,* 904 S.W.2d 22, 26 (Mo. App. 1995). Furthermore, even if the transfer order were invalid, that fact would "not necessitate a reversal of the adoption decree." *Fuller*, 544 S.W.2d at 349.

D. *Appellant cannot now assert a problem with the petition.*

In 2007, effective 38 days before Respondents filed their petition, the legislature amended § 211.447 by adding a new subsection 3, resulting in the renumbering of subsequent subsections. Thus, the grounds for termination previously enumerated as § 211.447.4 now appear in § 211.447.5. *In re M.N.*, 277 S.W.3d 843, 845 n.3 (Mo. App. 2009). Similarly, the seven best interest factors in § 211.447.6 changed to § 211.447.7.

The petition correctly cited the two statutory provisions that the court used to terminate Appellant's parental rights, §§ 453.040(7) and 211.447.2(2)(b).

E. *There was no substantial language barrier.*

Finally, Appellant claims that she was denied due process because "she did not receive the Petition or other pleadings in Spanish, her native language." App. Sub. Br. at 74. She essentially claims Respondents and the juvenile court should have racially profiled her based on one or more of her many names.

Appellant chose to come to Missouri, albeit clandestinely and illegally. As such, she must abide the state's law. The Missouri Constitution declares that "English shall be the language of all official proceedings in this state." MO. CONST. art. I, § 34. Specifically with respect to legal proceedings, it provides that all "writs, process, proceedings and records in any court, and in all inferior tribunals established by law, shall be in the English language." § 476.050. There is no merit to Appellant's suggestion that

she should have been served pleadings in Spanish rather than in English. Regardless what other states may do, *see* App. Sub. Br. at 74-75, other states' practices do not supplant the Missouri Constitution and statutes. Moreover, the out-of-state cases on which Appellant relies are irrelevant because they involve the appointment of translators for spoken proceedings.

There was no substantial language barrier here anyway. Appellant both admitted and demonstrated that someone in jail read the documents to her and translated them for her. 2008Tr. 83:5-6, 13; L.F. 70, 108. Indeed, someone helped her write at least one letter from prison in English. L.F. 108. Second, Appellant's attorney, Aldo Dominguez, is fluent in Spanish. 2008Tr. 71:1-2, L.F. 89.

There was no error, then, and certainly no manifest injustice or miscarriage of justice.

IX

(Responding to Appellant's Point X)

Appellant complains in Point X that she was not appointed an attorney fast enough and that Respondents' arranging for an attorney for her somehow *denied* her due process. She never asked for a lawyer, however, and then refused notice that the court had appointed one for her anyway.

A. *Standard of review.*

Appellant did not raise this issue in the trial court, depriving the court an opportunity to address it. *See R.S.L.*, 241 S.W.3d at 351. It is not preserved. Any review, then, must be for plain error.

B. *There was no error.*

Despite the notice of her right to counsel—indeed, her right to *appointed* counsel—on the face of the summons, *Appellant never asked for an attorney.*

Section 211.462.2 "does not establish an absolute right to counsel. Instead, it requires the court to appoint counsel *only* when: (1) *the parent requests court-appointed counsel;* and (2) the parent demonstrates that he or she is indigent and therefore is financially unable to employ counsel." *I.B.*, 48 S.W.3d at 97 (emphasis added). Appellant had an obligation to request counsel, but never did.

Appellant's argument that having Respondents involved with selecting counsel ignores the pertinent statutes. Both Chapter 211 and Chapter 453 provide for appointment of counsel for a biological parent and allow the court to order the petitioners

to pay the fee.[14] §§ 211.462.4; 453.030.13. *See also A.M.G. v. Missouri Division of Family Servs.*, 660 S.W.2d 370, 371 (Mo. App. 1983); *L.R.R. v. Christian Family Servs., Inc.*, 620 S.W.2d 14 (Mo. App. 1981). Appellant points to nothing in the record that remotely suggests that her attorney, Aldo Dominguez, showed any loyalty to Respondents. His cross-examination of them and his argument in opposition to the adoption prove otherwise. And indeed Dominguez had an ethical responsibility to represent Appellant, even if a third party paid his fees. The record fully demonstrates that he carried out his ethical duties both properly and well.

[14]Both also require the minimum act of requesting counsel. §§ 211.462.2, 453.030.12(1).

X

(*Responding to Appellant's Point XI)*

Appellant advances two arguments in Point XI: (1) that the guardian ad litem ("GAL") failed to discharge his duties under § 211.462.3, and (2) that the Jasper County Juvenile Office failed to do things the Appellant believes the juvenile officer should have done.

A. *Standard of review.*

Appellant did not raise below any of the issues that she raises under Point XI. Consequently, none is preserved for appellate review. *R.S.L*, 241 S.W.3d at 350. Should the Court choose to review this point, review necessarily must be for plain error.

B. *The juvenile officer is not a party in a Chapter 453 adoption.*

Appellant again confuses a Chapter 211 termination case with a Chapter 453 adoption. A juvenile officer is not a party and does not participate in a Chapter 453 case. As a courtesy to the court, the chief juvenile officer or the Juvenile Office attorney in many counties, including Jasper County, assists the court even on private adoptions. In this case the Juvenile Office Attorney, Belinda Elliston, directed the trial court quickly to the updated home study in the court's file. 2008Tr. 54:3-11. But the Juvenile Office is not required to be a party in a Chapter 453 adoption.

Sections 211.447.2(1-3) do not apply. The Child had not been in foster care under §211.447.2(1), had not been adjudicated abandoned under §211.447.2(2), and none of the §211.447.2(3) crimes applied. Appellant cites two Chapter 211 termination cases as

support, *M.D.R.* and *K.A.W.* Both involved Chapter 211 petitions filed by the state, and neither supports her contention here.

C. *Guardian ad Litem*

First, Appellant did not move to disqualify or remove the guardian ad litem or strike his testimony. Complaints regarding his participation, what he did or did not do, were not raised in the trial court, and so Appellant waived them and cannot raise them for the first time here. *Young*, 648 S.W.2d at 919.

Appellant suggests the GAL's duties are controlled by § 211.462.3. Chapter 453 has its own section for the appointment of a GAL, §453.025.4. The standards are similar, so both will be addressed. Under either the Chapter 211 standard, which Appellant chooses as her benchmark to measure the GAL's performance, or the proper Chapter 453 standard, the GAL fulfilled his duties. A summary of his participation in the case is essential.

Early in the case, before the transfer of custody hearing, the GAL met with Respondents at their home. 2007Tr. 8:12-24. The GAL explained at the final hearing, "I did speak with some members early on, I believe from the church in regards to this. Her family members also indicated that they weren't willing to care for the child, that why child was passed along in the chain of custody that was demonstrated today in testimony." 2008Tr. 97:11-18.

The GAL continued his visits "on multiple occasions" after the transfer of custody hearing to check on how the Child was doing in the home. 2008Tr. 36:10-14. He observed the interaction between the Child and Respondents. 2008Tr. 36:15-20. He

observed his development and progress from the Child's initial delays when he came to live with Respondents. 2008Tr. 36:21-37:6; L.F. 86. He inquired about educational opportunities for the Child and the social history of the family. 2008Tr. 37:7-23.

In short, he questioned every witness. §§ 211.462.3(1), 453.025.4(1); 2007Tr. 8; 2008Tr. 36-38, 62-63, 85-88, 91-92. He offered testimony and recommendations. §§ 211.462.3(1), 453.025.4(1); 2007Tr. 11; 2008Tr. 97. He did not initiate an appeal, presumably because the trial court reached the same conclusion that he did with respect to transfer of custody, termination of parental rights, and finalization of the adoption. §§ 211.462.3(1), 453.025.4(2). He met with the Child many times. §§ 211.462.3(2), 453.025.4(3); 2008Tr. 36:10-14. Because of the Child's age, he could not discuss the Child's wishes, but he observed the interaction of the Child in the home and discussed the transfer of custody with others in the case. §§ 211.462.3(2), 453.025.4(3); 2008Tr. 97:11-18. The GAL clearly met his duties under the statute.

Appellant argues that three of the Missouri Supreme Court Standards for Guardians ad Litem were not followed in this case. The GAL's actions discussed above disprove that claim. Furthermore, the standards were not mandatory at the time of this hearing. "Under § 484.302 each circuit court has until July 1, 2011 to fully implement them. H.B. 1570, 94th. Gen. Assem., 2d Reg. Sess. (Mo. 2008). No evidence was presented that the circuit containing Jasper County has adopted the Standards." *F.C.*, 274 S.W.3d at 486 n.8.

Appellant complains, with the benefit of hindsight as well as alleged facts developed after the record closed, about what the GAL did not do. She claims there is no

evidence that he conducted a "diligent and independent investigation." To the extent he had this duty, the GAL testified he did investigate the issues at the beginning of the case. 2008Tr. 97:11-18; L.F. 86. Appellant complains that he did not contact her, despite her failure to notify anyone in the case, including the court, of her whereabouts or accept mail in her legal name. In fact, Appellant contacted the GAL under the name "Angelica Alvarado." L.F. 111.

Finally, Appellant complains the GAL was "beholden to the Respondents." This is the real crux of Appellant's argument: His recommendation was not favorable to her. However, the GAL was not required by law to be "objective and neutral." *F.C.*, 274 S.W.3d at 486. Instead, the GAL must be "the legal advocate for the best interest of the party he is appointed to represent. . . . Advocacy is not neutrality. In fact . . . a Guardian ad Litem's duty is to 'jealously guard[ ] the rights of infants." *Id.*

Appellant's argument is similar to that in *Guier v. Guier*, 918 S.W.2d 940 (Mo. App. 1996). In *Guier*, a father sought to remove the guardian ad litem, alleging that the guardian was biased and prejudiced against him, failed to interview him or his wife in violation of § 452.423.2(2), and was not qualified under § 210.160.6. *Id.* at 949. The appellate court affirmed the denial of his motion, noting, in words appropriate here, that the GAL's function

> is to advocate what he believes to be the best interests of the children. Obviously, this will likely be contrary to the position taken by one of the [parties]. . . . Father's complaints boil down to the fact that he was upset because the guardian did not necessarily agree with Father's positions.

Id.

In the end, the GAL's recommendation was self-evident. The child had been abandoned on multiple occasions, was not doing well developmentally, and no one else stepped forward to take care of him. A safe, loving *mother and father*, who *wanted* to take care of this child, was clearly in the child's best interests. The trial court did not need an "independent investigation" for this conclusion.

XI

(*Responding to Appellant's Point XII*)

Appellant's next complaint is that the termination and adoption proceedings should not have been heard together.

A. *Standard of review.*

The question is essentially one of law, so review is *de novo.*

B. *The interplay between the statutes.*

Appellant's argument contradicts Missouri law. Unless the parents are deceased, an adoption almost always includes termination of parental rights. *Schleisman v. Schleisman*, 989 S.W.2d 664, 671 (Mo. App. 1999). Under Chapter 453, "prospective adoptive parents may request termination of parental rights incident to an adoption action." *S.L.M.*, 167 S.W.3d at 738.

Appellant confuses the interplay and distinction between Chapter 211 and Chapter 453 throughout her brief. In summary, § 453.040(8) allows a party filing an adoption petition under Chapter 453 to include a count seeking termination of parental rights on any of the grounds enumerated in § 211.447. Furthermore, § 211.447.6 allows termination under a Chapter 211 petition by a prospective adoptive parent.

This Court has already addressed Point XII. In *State ex rel. Womack v. Rolf*, 173 S.W.3d 634 (Mo. banc 2005), the Court held that adopting petitioners could pursue an adoption under Chapter 453 while a Chapter 211 case was pending, finding "no inconsistency in permitting an adoption action [under Chapter 453] to be filed during the pendency of a chapter 211 [i.e. termination of parental rights] proceeding." *Id.* at 635.

Chapter 211 statutes "clearly contemplate that adoption proceedings may be *filed* and may proceed before the judge before whom the chapter 211 proceedings are pending . . . so long as no inconsistent order is entered by the judge." *Id.* The Court reasoned that permitting concurrent termination and adoption proceedings "minimizes the time children 'must remain in limbo while the judicial system runs its course.'" *Id.* at 638. Obviously, termination of parental rights and a subsequent adoption are not inconsistent. *Schleisman*, 989 S.W.2d at 671.

Furthermore, this is consistent with the expressed legislative directive to expedite determination of contested termination of parental rights and adoption cases. *Id.*; § 453.011.3. For this reason, bifurcated trials are not required. *In re Adoption of K.L.G.*, 639 S.W.2d 619, 621 (Mo. App. 1982).

The court ultimately found that statutory grounds for termination of Appellant's parental rights existed under both §453.040(7) and §211.447(2)(B). L.F. 117-120. Any *one* ground for termination, if adequately pleaded and proved, is sufficient. *S.T.W.*, 39 S.W.3d at 518.

The next step is the trial court's decision regarding the best interest of the child for termination of parental rights. Typically, in severing parental rights, the court must consider the availability of adoption. *In re M.O.*, 70 S.W.3d 579 (Mo. App. 2002). The third and *final* step was to determine whether adoption by Respondents would be in the Child's best interest. With regard to these two steps, the court could consider a number of factors. "The adoption statutes are to be construed 'so as to promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and

stable home.'" § 453.005.1. A best interests determination involves the consideration of "a myriad of factors, and no single factor is outcome-determinative." *In re M.F.*, 1 S.W.3d 524, 532 (Mo. App. 1999). Furthermore:

> The factors to be considered in determining what is in the best interests of the child are legion. They vary from case to case. It is impossible to catalogue all the factors that may be involved. It is virtually impossible to assign a degree of weight to specific favorable and unfavorable factors. With the exception of an extreme adverse factor, no single factor can be absolute. Each case must be considered upon its own facts.

Id.

Thus, this final step necessarily involved a look into the home study and facts surrounding Respondents' home, income, debts, etc. (a point Appellant ironically claims was *not thorough enough* in Point II). "Some of the factors to be considered by the court in determining the child's best interests are whether the adoptive parents will provide the child with good care and a stable home." *Id.*.

Appellant relies on four cases in support of her argument. *In re Trapp*, 593 S.W.2d 193 (Mo. banc 1980), decided before the amendment to § 453.080 adding subsection (8), was neither an adoption nor termination of parental rights case. The issue in *Trapp* was whether the foster parents could intervene in a *neglect* proceeding and bears no resemblance to this case.

In re J.F.K., 853 S.W.2d 932, 933 (Mo. banc 1993), is another Chapter 211 neglect case in which the Children's Division retained legal and physical custody of the

child in a foster home placement. The foster parents then, apparently on their own, filed a Chapter 453 adoption proceeding and attempted to intervene in the underlying Chapter 211 *neglect* action. *Id.* at 933-34. The court noted that transferring custody to the foster parents would be inconsistent with the Chapter 211 case and run afoul of the mandate of § 211.093 that Chapter 211 cases take precedence over all other cases, including Chapter 453 adoptions, to the extent they are inconsistent. *Id.* at 935. Issues of inconsistency with Chapter 211 neglect cases are not present here.

Appellant next cites *D_L_C_*, 834 S.W.2d 760 (Mo. App. 1992). "Here . . .we have an action by a public official to terminate a parent's right to a child." *Id.* at 768. The issue involved foster parents' intervention in a Chapter 211 state filed proceeding, not a Chapter 453 adoption.

Finally, Appellant cites *In re M.O.*, 70 S.W.3d 579 (Mo. App. 2002). The trial court in *M.O.* denied a petition for termination of a parental rights and adoption. This left the foster parents in a quagmire, as the court terminated the parental rights of the biological father, but not the biological mother, and ordered Children's Division to continue reunification efforts between the biological mother and child. *Id.* at 580. The *petitioners* complained that "before the court even reached the issue of termination," it determined "that the age of Petitioners precluded the possibility that adoption by Petitioners could be in Daughter's best interest." The trial court had considered their age in making the determination that it was not in the child's best interest to be adopted. *Id.* at 587. Though not reversing on this point, the appellate court agreed "that the [trial] court, in its findings, jumped to the matter of the Petitioners' ages (which relates to their

suitability to adopt) before the court had addressed the issue of whether parental rights should properly be terminated. The issue as to the Petitioner's ages was irrelevant until such time as the adoption became relevant." *Id.* at 589.

In this case, the court found statutory grounds for termination *and* that termination of parental rights was in the child's best interests. At that point, the judge examined the facts relevant to the best interest analysis relative to the child's adoption by Respondents.

Appellant points to one sentence in the Judgment in which the trial court, by way of example, explained why the best interests of the child would be favored by the adoption: "This is contrasted with the biological mother and her family." App. Sub. Br. at 103. Before that sentence, however, the court went through the seven factor best interest analysis of § 211.447.7. L.F. 120-122. It attempted, to the extent it could, to consider not only the past facts of Appellant's behavior, but her current conditions. L.F. 122-123. It found that, looking toward the future, the child would be harmed by a continued relationship with Appellant. L.F. 123. The court found that Appellant twice entered the country illegally and was caught both times while committing crimes in this country. It found that such a lifestyle could provide neither stability for the child nor an opportunity for an education. L.F. 123. All of these findings are relevant to the court's best interest determination, and involve no mention of Respondents.

The court then conducted a best interest analysis relative to the adoption of the child by Respondents. L.F. 124-125. Finally, the court made findings regarding the finalization of the adoption. L.F. 125-127. Though it is impossible to determine in what

order the trial court came to these conclusions, the chronology in the Judgment suggests it was correct.

Comparison between Appellant and Respondents was not error with reference to the issue of best interest for adoption. "*Compared to the alternative*, the finding of the trial court that adoption would be in the best interest of the child was not an abuse of discretion." *D.R.M.*, 780 S.W.2d at 148 (emphasis added). See also *J.H.H.*, 662 S.W.2d at 897. "Since the adoptive placement was the only viable option which would provide the child with a permanent home, the termination was in the best interest of the child."

XII

(Responding to Appellant's Point XIII)

Appellant next complains again that the court improperly considered Appellant's illegal status but did not consider evidence relative to Respondents' history.

A. *Standard of Review.*

The issue here is the facts. Hence the principles governing review of the trial court's factual determination, which are set out in the Standard of Review discussion above, govern review.

B. *Criminal History and Molestation.*

The home study contained a lengthy discussion of S.M.'s conviction. L.F. 29-30. S.M.'s criminal history was also discussed at length *in both* hearings. 2007Tr. 9:21-10:1-13; 2008Tr. 57:16-59:20; 64:8-65:21. Likewise, his prior drug use was discussed in the home study and at trial, and he stopped using any drug before marrying M.M.. L.F. 28; 2008Tr. 63:22-64:7.

S.M. was 30 years old at the time of the final hearing on October 7, 2008. L.F. 22. He had not touched an illegal drug in over a decade, and the criminal act was 14 years in his past. L.F. 28. The home study author observed no overt signs of substance abuse. L.F. 28.

Over twenty years ago M.M. was sexually abused by her brother. She was between ages 3 and 7. L.F. 32-33. This was explained in painstaking detail in the home

study and also addressed in her testimony. 2008Tr. 39:19-41:3. M.M. was 29 at the time of the Court's final hearing. L.F. 22.

The attorney whom Appellant claims was ineffective brought out S.M.'s youthful transgressions. 2008Tr. 63:22-65:21. Appellant quotes from the testimony that her "ineffective" attorney elicited. App. Sub. Br. at 86. He also cross-examined M.M. on the sensitive subject of the sexual molestation. 2008Tr. 40:19-41:3. As mentioned in Point XIII below, Appellant uses the evidence garnered from her "ineffective" attorney as a ground for this appeal.

Even without the reports, the trial court interjected to clarify one of S.M.'s answers, so the trial court considered this evidence. 2008Tr. 58:20-59:2. This Court is to "give deference to the court's ability and opportunity to judge the credibility of the witnesses[.]" *C.A.M.*, 282 S.W.3d at 409. In the court's discretion, likely because of the extraordinary length of time coupled with successful resolution, it decided that these factors did not undo Respondents in the best interest analysis. Its purpose here is simply to embarrass Respodents.

C. *Illegal Status.*

S.M.'s brief criminal history, coupled with his lack of recidivism, is a success story. Appellant did not have the same epiphany from the consequences of her criminal activity. She was originally caught as an illegal alien in 2005. L.F. 96, 114. She was deported under an alias, "Angelica Alvarado-Romero." L.F. 96. Undaunted, she

returned, leaving at least one child in Guatemala. 2008Tr. 75:3-6, 52:25-53:2. Appellant's stories conflict as to when she returned. Even while incarcerated, she attempted the charade of a second false identity, one that she must have known was nowhere listed on any document that would tie her to her child. L.F. 95, 109, 111.

Appellant claims the court "improperly fixated" on her illegal status and deportation and incorrectly looked to her past acts as a predictor of future behavior. This issue was fully briefed in Respondents' Point VII (responding to Appellant's Point VIII). It need not be repeated here.

Appellant attempts to use *K.A.W.*, but this is yet another case involving a state initiated termination of parental rights under Chapter 211, where there was an underlying Chapter 211 abuse/neglect case pending. Regarding the finding of future harm, the Court noted, "Obviously, it is difficult to predict the future. Section 211.447 provides for detailed consideration of the parent's past conduct as well as the parent's conduct *following the trial court's assumption of jurisdiction* as good evidence of future behavior." *K.A.W.*, 133 S.W.3d at 9 (emphasis added). The "assumption of jurisdiction" the Court mentions is what occurs at the adjudication hearing in a § 211.031 abuse/neglect case.

This case is two steps removed: It was filed as a Chapter 453 adoption with no underlying abuse and neglect case pending under Chapter 211. The trial court's mention of Appellant's past acts and predicted future behavior was not mandatory, but

nevertheless it supports the best interest analysis for the termination of parental rights.

Second, the Court did not terminate Appellant's parental rights because she was an illegal alien or because she was incarcerated. The trial court discussed the incarceration issue at length and allowed for it. L.F. 6-8. It was her actions while incarcerated (that is, claiming to be someone other than the child's mother), and most importantly her lack of action with respect to the Child (that is, anything, such as support, contact, or even a knowledge of where he was), that merited the result.

Further, the trial court could have *properly* considered the circumstances of the Appellant's incarceration in terms of the abandonment. There is no dispute that she continued her course of criminal activity even after she had the child and thus "should realize such acts have consequences harmful to those children." *See, e.g., A.P.S.,* 90 S.W.3d at 235; *Z.L.R.*, 306 S.W.3d at 636.

Furthermore, there is not a *single* mention made in the court's abandonment findings that the mother is an illegal alien. Those facts *are* discussed in the termination judgment's best interests section, as they must have been. The court realized that Appellant will be deported and will not be able to legally return to this country. Sec 211.447.7(4). Further, the court noted that Appellant has a felony conviction that would deprive the child of a stable home. § 211.447.7(6). The court noted that her acts of crossing the border illegally was a "lifestyle" not conducive to raising a child. The circumstances of this case prove that.

"While § 211.447.6(6) prohibits termination of parental rights based *solely* upon a parent's incarceration, it also *requires* that the juvenile court consider that incarceration in making its decision." *A.P.S.*, 90 S.W.3d at 235. "[I]t would be absurd to deny a trial court such information." *B_M_P_*, 704 S.W.2d at 250.

The trial court was required to look at all of the facts and circumstances of the case in its best interests analysis for termination under § 453.040(7). "Each adoption case is judged on its own unique set of facts." *P.G.M.*, 149 S.W.3d at 514. "The trial court is to apply its foremost sound judgment, taking into account all relevant factors in deciding what is best for this little [child]. The dominant concern is the welfare of the child." *M.O.*, 70 S.W.3d at 589.

In short, Appellant claims that it was reversible error to consider her incarceration and illegal status in the best interest analysis. More accurately, it would have been error had the court *not* considered these facts, as they were required under § 211.447.7 and appropriate under the best interest analysis required by § 453.040(7).

Appellant next argues that the termination of her parental rights was caused by her incarceration. This is incorrect, as discussed above. Appellant speculates, starting in the *Statement of Facts*, that the United States Supreme Court's decision in *Flores-Figueroa v. United States,* 129 S. Ct. 1886 (2009) would have changed the result of her sentence if decided today. App. Br. at 9 & 9-10 n.2; 106. A detailed discussion of the *Flores-Figueroa* case is beyond the scope of this brief, but Appellant's conclusions that the facts

of her crime of identity theft, and the evidence the state had against her on that and other charged crimes, does not necessarily lead to Appellant's alternate happy ending. This argument is a diversion anyway, because Appellant pleaded guilty and could not then challenge her conviction—so she could not raise the constitutional aissue that *Flores-Figueroa* decided. She was also charged with other crimes the government could have pursued. Furthermore, nothing in the law before or after *Flores-Figueroa* kept Appellant from sending support or letters to the Child or staying apprised of his location and condition.

Appellant's final complaint is that the Juvenile court improperly took judicial notice of her criminal case. As the trial court noted, the plea agreement from the case was already in the court's file, provided by the Appellant's attorney. 2008Tr. 3:16-4:9; L.F. 95-106. This was presumably a matter of trial strategy, as it was filed as an exhibit in support of her Motion to File Answer Out of Time. If there is any error, then, Appellant invited it and cannot complain of it now.

XIII

(*Responding to Appellant's Point XIV)*

Appellant's final point alleges she was not afforded effective assistance of counsel.

A. *Standard of Review.*

"In Missouri, the test is whether the attorney was effective in providing his client with a meaningful hearing based on the record." *In re J.M.B.*, 939 S.W.2d 53, 56 (Mo. App. 1997).

Appellant has acknowledged this but then has vacillated on it. In the Application For Transfer that she filed in this Court following the Southern District's denial of her motion for a special order to file a late notice of appeal, Appellant acknowledged that "claims for ineffective assistance of counsel must be evaluated *by reviewing the record.*" Appellant's App. For Trans. at 8, *In re Adoption of C.M.B.R.*, No. SC90230 (application filed June 22, 2009) (emphasis added).[15] Now, however, she argues that this Court should consider matters far outside the record, including affidavits made specifically for the purposes of this action, in order to determine her claims of ineffective assistance of counsel.

[15] The Court may take judicial notice of its own records in a related case. *Perkel v. Stringfellow*, 19 S.W.3d 141, 149 & n.3 (Mo. App. 2000).

Her inconsistency undoubtedly flows from a belated recognition that the record does not support her ineffective assistance claim and the concern that she must manufacture facts in order to sustain it. But all three districts of the Court of Appeals agree that the *record* must demonstrate ineffective assistance: *E.g., In re W.J.S.M.*, 231 S.W.3d 278, 283-84 (Mo. App. 2007); *I.B.*, 48 S.W.3d at 99; *In re S.T.W.*, 39 S.W.3d at 518 (Mo. App. 2000).

This is only logical, for otherwise an appeal could rest on the asserted verity of claims untested by cross-examination and unassessed by a neutral fact finder. In cases like this, there is no mechanism for an evidentiary hearing, such as a Rule 29.15 proceeding ancillary to a criminal case, for a fact finder to decide. So Appellant's analogy to ineffective assistance claims in the criminal context is misplaced, and so is her so-called offer of proof. Appellant would have this Court decide the *facts* on the basis of her affidavit—the affidavit of an admitted felon who has used several aliases, falsified her birth date, and stolen another person's Social Security number. Whatever other states might say, Missouri courts have long displayed more common sense.

B. *Counsel was not ineffective*

Appellant's Point XIV depends almost entirely on matters outside the record. Indeed, the final 31 pages of her brief is a wholly improper "Proffer" requiring an examination of "evidence" not in the record. It flouts the standard of review. To allow a party to go all the way through a termination of parental rights case, see the evidence, and

then carefully craft more "evidence" to bolster his or her legal arguments, woven perhaps out of whole cloth, will open the floodgates to claims for a trial *de novo* on ineffective assistance of counsel claims in the appellate courts. Every person whose parental rights are at stake in a termination case, or any other civil case, can request an attorney to represent his or her interest, then allege on appeal that the result might have been different had that attorney just done the job. The only way for petitioners to defend against such a claim would be to generate countervailing evidence outside the record. The potential for abuse is manifest. All the while the fate of innocent children hangs in the balance.

A standard of review based *on the record* prevents this while preserving the integrity of the judicial process. The problem will persist if the Court accepts Appellant's invitation to look outside the record to determine her ineffective assistance claim.

Appellant derides Dominguez, her second appointed attorney, as not "[m]inimally competent." App. Sub. Br. at 121. While "Angelica Alvarado" sat in a West Virginia prison awaiting another deportation for admitted crimes of deceit, and while others cared for her children in other parts of the world, she characterized Dominguez as a "passive, potted plant" loyal to Respondents. App. Sub. Br. at 77. She did not ask for his help—but ironically now uses evidence that he produced as grounds in this appeal. *See, e.g.*, Point XIII.

Other appellants have tried this tactic unsuccessfully. In *In re K.L.*, 972 S.W.2d

456 (Mo. App. 1998), the appellant complained that his attorney failed to call three fact witnesses. The court said, though, that he "actively participated in the hearing, cross-examined witnesses, objected to testimony, and called as a witness the father's mother." *Id.* at 461. Hence the "*record*," it said, "suggests that the lawyer's assistance provided the father with a meaningful hearing." *Id.* (emphasis added). *See also I.B.*, 48 S.W.3d at 99.

While Appellant argues that Dominguez was "passive," App. Br. at 77, he was far from it. He filed motions and an Answer[16] on her behalf. L.F. 89-109. He cross-examined all of Respondents' witnesses and challenged all of their testimony. 2008Tr. 38-51, 63-69, 88-91. He brought out key issues regarding the S.M.'s criminal background and drug abuse as a teenager, and he questioned M.M. on the sensitive subject of sexual molestation when she was a young girl. 2008Tr. 40:19-41:3. He put into evidence a letter stating that Appellant had a person who was willing to care for the Child. 2008Tr. 93:19-25, 94:1-3. He objected as appropriate. 2008Tr. 62:11-12, 74:17-19, 82:22-23, 83:7-8. He gave a persuasive closing argument, emphasizing that Appellant's incarceration cannot be considered justification for a finding of abandonment and that the court documents were not translated into Spanish. 2008Tr. 98:2-100:22.

[16]In addition to the admission revealed by the Answer, this point presents another reason why Appellant tried to conceal her Answer, filed September 3, 2008, from the Legal File on appeal. L.F. 3.

The result is not Dominguez's fault. Appellant's priority as a second-time illegal alien using several aliases assured that there would be little information about her. What was there was bad. Deported once, she faced deportation again. Whatever was waiting for her in Guatemala, besides at least one of her children, she apparently did not want—for she reentered the United States illegally again less than a year later. 2008Tr. 75:3-6, 52:25-53:2; L.F. 96, 114, 115. Her priorities were on returning here, not on being "Encarnacion Maria Bail Romero," the Child's biological mother, or taking on her parental responsibilities for her children.

Although Appellant claims that Dominguez should have "ferreted out" Linda Davenport's "violations of law," there were no violations. Although she claims that he should have offered evidence that she left the Child with family, she did no such thing. Although she claims that he should have challenged service of process, she was served, as the return shows. Although she claims that he could have "easily" demonstrated that the Child was criminally placed, nothing was criminal, and she has not shown that herself.

In re J.C., 781 S.W.2d 226 (Mo. App. 1989), on which Appellant relies, is one of only two cases that research has disclosed a Missouri appellate court has reversed a termination of parental rights for ineffective assistance of counsel. There the attorney was "entirely passive." *Id.* at 228. There was no testimony, and the attorney cross-examined no witnesses to any of the reports. He effectively gave up, saying that

termination was a forgone conclusion. *Id.* at 228-29. He basically gave his clients two choices: lose in an open adoption, or just lose.

The bulk of the cases have distinguished *J.C.* and have denied ineffective assistance claims, focusing on lawyers' actions in cross-examining witnesses, making objections, and advocating for the client in closing argument. *E.g., In re S.T.W.*, 39 S.W.3d at 520; *In re A.H.*, 963 S.W.2d 374, 380 (Mo. App. 1998); *In re F.N.M.*, 951 S.W.2d 702, 707 (Mo. App. 1997).

Dominguez gave Appellant a fighting chance with nothing with which to work. Apart from two letters saying that she did not want the adoption to occur, Appellant did nothing during the year this case was pending to give Dominguez favorable, independent evidence. She was jailed. She sent no cards or letters to the Child, although she wrote to others. She sent no support.

Appellant wants a remand for a new hearing that affords her due process. *Due process was foisted upon her at every turn.* She was appointed two free attorneys that she never requested under § 210.462. *Compare I.B.*, 48 S.W.3d at 97*; B_M_P_*, 704 S.W.2d at 247. Dominguez was appointed because of his fluency in Spanish. 2008Tr. 71:1-2. Respondents waited twice the required six-month period before proceeding to a final hearing to avoid the very arguments they face now. Appellant paid for nothing, up to and including the present case, and she has received more due process than American citizens usually receive.

Ironically, Dominguez's performance forms the basis of Appellant's argument in various sections of this brief. His closing argument reverberates throughout her brief. Information that he elicited on cross-examination makes up most of Appellant's Point XIV. So was he ineffective? In *W.S.M.*, 845 S.W.2d at 153-54, the court noted that the parents' attorney "was effective in providing evidence favorable to [the natural parents]—notably evidence which permitted him to argue in this appeal." The court concluded that there was not a sufficient basis for holding that counsel was ineffective. *Id.* at 154.

CONCLUSION

Appellant has not yet breathed a word about the best interests of the Child. All of the arguments have been about *her*. None of them has any merit—but acceding to them holds great potential for harm to the Child.

The Child is now four years old and knows no parents other than Respondents. He does not know Appellant, whom he last saw when he was but 7 months old. He speaks English, not Spanish, but Appellant speaks Spanish, not English. The Child has never lived anywhere but Southwest Missouri, but he faces involuntary deportation to Guatemala if this adoption is undone and he is forced to follow Appellant when her deportation occurs. The potential for trauma for this innocent little boy is immense. As this Court has sagely observed in an opinion by Judge Teitelman, "[c]ountless psychological and child development studies have shown that children—especially infants and young children under the age of five—who are needlessly separated from their familiar parent suffer resulting deficits in their emotional and intellectual development." *K.A.W.*, 133 S.W.3d at 21.

Such a heartbreaking result would be exponentially worse if this adoption is undone in a proceeding that should never have occurred. As explained in Respondents' motion to dismiss, the Court improvidently granted Appellant's motion for a special order to file a late notice of appeal, because her motion—her application for transfer treated as such—was filed more than six months after the judgment became final, and her

notice of appeal was similarly untimely. As a result, respectfully, this Court has no appellate jurisdiction and no power to hear this case.

Judge Wolff's words are appropriate here:

> Every child in our society deserves to grow up in a family that is loving, supportive, and attending to his or her needs. Our court system emphasizes the importance of permanency planning for children—no one wants to see children shifted from home to home for years on end. Those who provide services to these children, including judges and court personnel, understand the importance of making such decisions promptly . . . . When an adoption proceeding is completed, legally the child and the adoptive parents have a parent-child relationship that is in every respect the same as that of biological child to the biological parent.

Hon. Michael A. Wolff, *Adoptive parents deserve recognition for lifelong commitment of love*, LAW MATTERS (Nov. 2006).

This appeal should be dismissed. Alternatively, the judgment should be affirmed.

Respectfully submitted,

NEALE & NEWMAN, L.L.P.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I certify the following:

1. The foregoing Brief complies with the type and volume limitation of Rule 84.06. The typefaces are Times New Roman and Arial.

2. The signature block of the foregoing Brief contains the information required by Rule 55.03(a). To the extent that Rule 84.06(c)(1) may require inclusion of the representations appearing in Rule 55.03(b), those representations are incorporated herein by reference.

3. The foregoing Brief, excluding the cover, certificate of service, this certificate, and the signature block, contains 27,801 words as counted by Microsoft Word 2010.

4. This Brief has been prepared using Microsoft Word 2010.

5. The disk submitted herewith as required by Rule 84.06(g) has been scanned for viruses and is virus free.

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Richard L. Schnake

CERTIFICATE OF SERVICE

I certify that I served the following persons by mailing them copies by first class mail, postage prepaid, on November 5, 2010, and that, as a matter of courtesy, I transmitted copies to counsel for Appellant by electronic mail on November 5, 2010:

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