IN THE
SUPREME COURT OF MISSOURI

NO. SC91141

IN RE THE ADOPTION OF C.M.B.R., MINOR,

S.M. and M.M.,
Respondents,

v.

E.M.B.R.,
Appellant.

Appeal from the Circuit Court of Jasper County
Hon. David C. Dally

APPELLANT'S SUBSTITUTE REPLY BRIEF

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I. ***THRESHOLD ISSUE*:**

RESPONDENTS' ADMISSIONS MANDATE REVERSAL

Respondents do not dispute that "the written investigation and social study referenced in section 211.455 is mandatory." *In re C.W.*, 211 S.W.3d 93, 97 (Mo. banc 2007). Respondents also admit that the "mandatory" section 211.455 investigation was not completed. (RB. 46).[1] Respondents seek to excuse the failure to strictly and literally comply with section 211.455's mandate by asserting that it was "unnecessary" because "the trial court terminated Appellant's parental rights for abandonment under *both* § 211.447.2(2)(b) *and* § 453.040(7)." (RB. 46). But Respondents' concession that section 211.455 was not satisfied requires reversal of the Judgment's termination under Chapter 211, because "[f]ailure to strictly comply with section 211.455 is ***reversible error***." *In re C.W.*, 211 S.W.3d at 98.

Moreover, section 453.040(7) does not provide an independent ground for the termination of parental rights; rather, section 453.040(7) concerns only whether "consent to the adoption of a child" is required. In a private adoption proceeding, the "petition for termination may be filed as a count in an adoption petition" pursuant to section 453.040(8), *not* section 453.040(7). Importantly, section 453.040(8) expressly provides that termination may be for "any of the grounds set forth in section 211.447," and mandates that the termination comply with the "hearing and proof of such grounds as required by sections 211.442 to 211.487." Accordingly, Respondents' admission that

[1] Respondents' Brief is referenced herein as "(RB. [page])."

section 211.455 was not satisfied requires reversal, because any termination under Chapter 453 (*i.e.*, section 453.040(8), which invokes section 211.447) must comply with the requirements of "sections 211.442 to 211.487," including section 211.455.

Respondents also admit that the Juvenile Officer was not "a party here." (RB. 46). Section 211.447.2, however, mandates that when a "petition has been filed by another party, the juvenile officer or the division shall seek to be joined as a party to the petition." Respondents again seek to excuse the failure to strictly and literally comply with section 211.447.2's mandate by asserting that a "juvenile officer is not a party and does not participate in a Chapter 453 case." (RB. 95). But, in fact, the section requiring that a Juvenile Officer "***shall"*** be a party was added to Chapter 211 at the very same time that the legislature added section 453.040(8) to Chapter 453, which requires compliance with "sections 211.442 to 211.487," including the requirement that "the juvenile officer or the division shall seek to be joined as a party to the petition."[2] Respondents' admission that the Juvenile Officer was *not* a party to this case is an additional reason requiring reversal of the Judgment.

II. RESPONDENTS CONTRAVENE CONTROLLING PRECEDENT

Respondents repeatedly assert that Appellant "mixes apples and oranges," because allegedly "[t]he law is different with the transfer of custody and adoption statutes in Chapter 453" and supposedly "[t]he cases hold that these statutes require *substantial compliance*, not literal compliance or scrupulous adherence, with a view toward the best

[2] *See* 1998 legislation L.1998, S.B. No. 674, § B and L.1998, H.B. No. 1822, § A.

interests of the child." (RB. 22). Respectfully, Respondents are wrong for several reasons.

First, Respondents used Chapter 453 (via section 453.040(8), which invokes section 211.447) to terminate Appellant's parental rights. There can be no dispute that "Statutes that provide for the termination of parental rights are strictly construed in favor of the parent and preservation of the natural parent-child relationship." *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. banc 2004). The termination of a natural mother's parental rights cannot be *easier* to accomplish in a private adoption proceeding than a termination proceeding initiated by the State.

Second, numerous appellate decisions *post*-adoption of section 453.005 in 1985 also hold that "adoption statutes are ***strictly construed*** in favor of natural parents." *In re R.M*, 234, S.W.3d 619, 622 (Mo. App. 2007) (emphasis added); *see also In the Interest of Baby Girl P.*, 159 S.W.3d 862, 865 (Mo. App. 2005) ("Because adoption involves the destruction of the parent-child relationship, we strictly construe the adoption statutes in favor of the rights of the natural parents.); *In re K.L.C.*, 9 S.W.3d 768, 772 (Mo. App. 2000) ("Adoption statutes are strictly construed in favor of the natural parents."); *C.B.L. v. K.E.L.*, 937 S.W.2d 734, 737 (Mo. App. 1996) (same); *H.W.S. and J.C.S. v. C.T.*, 827 S.W.2d 237, 239 (Mo. App. 1992) (same); *In the Interest of A.R.M.*, 750 S.W.2d 86, 89 (Mo. App. 1988) (same); *accord In re Adoption of W.B.L.*, 681 S.W.2d 452, 455 (Mo. banc 1984) (same).

Third, although Respondents repeat often that this case concerns best interests,

Respondents ignore that this Court has held that "the notion of the welfare of the person sought to be adopted – the child – is informed by the fundamental proposition and presumption that maintaining the natural parent-child relationship is in the best interests of the child." *In re the Adoption of N.L.B.*, 212 S.W.3d 123, 128 (Mo. banc 2007); *see also In re A.S.W.*, 137 S.W.3d 448, 453 (Mo. banc 2004) ("Because parental rights are a fundamental liberty interest, statutes that provide for the termination of parental rights are ***strictly construed*** in favor of the parent and ***preservation*** of the natural parent-child relationship.").

Finally, even assuming *arguendo* that "substantial compliance" were sufficient, the Judgment should still be reversed because there was ***no*** compliance here with multiple statutory mandates. Among other failings, the Child was allegedly placed in contravention of section 453.014; the transfer of custody and "all acts thereafter regarding custody were void from any legal perspective" (*In re Baby Girl*, 850 S.W.2d 64, 68 (Mo. banc 1993)); none of the mandated reports or investigations were completed; and there is no clear, cogent, and convincing evidence of abandonment during the statutorily mandated 60-day period preceding the filing of the petition.[3]

[3] Respondents' reliance on *In re T.S. v. P.S.*, 797 S.W.2d 837 (Mo. App. 1990) and *In re B.R.M.*, 912 S.W.2d 86 (Mo. App. 1995), is misplaced, because the division of family services plainly has the authority to "remove" children from their homes. Neither of those cases discuss the salient issue here: who may "place" a minor in a private adoption. Moreover, in both *In re T.S.* and *In re B.R.M.* the natural parents had the ability to appeal

III. RESPONDENTS MANUFACTURE NEW THEORIES

A. Appellant Did *Not* Hide Her Identity Or Refuse Mail

Woven throughout their brief is Respondents' wild speculation that Appellant purportedly "tried to avoid acknowledging her true identity" (RB. 34) and allegedly "refused" mail (RB. 48) so that supposedly she could protect "her true identity." (RB. 84). Respondents' new theory is both repugnant and belied by the record.

First, and most importantly, the Plea Agreement evidences that immediately following the ICE raid at George's Processing, Inc. on May 22, 2007, Appellant informed government officials that "her true and complete name is Encarnacion Maria Bail-Romero." (LF. 96). There is zero evidence in the record (or anywhere else) demonstrating that Appellant chose (as opposed to the government) to be charged under the name Angelica Alvardo-Romero; rather, Appellant immediately admitted her true identity "[i]n a post Miranda interview." (LF. 96).

Second, there is no evidence whatsoever in the record proving by clear, cogent, and convincing evidence that Appellant (as opposed to the U.S. Postal Service) refused delivery and stamped the letters "Return to Sender." Indeed, it is absurd to suggest that

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the dispositional order under prior Missouri Supreme Court Rule 120.01. Here, the Custody Hearing was scheduled with only one day's notice and Appellant was not "appointed" counsel until December 3, 2007 — nearly two months after the Custody Hearing was held on October 18, 2007.

Appellant had in her possession *while incarcerated* a stamp to mark letters "Refused" and/or "Return to Sender."

Third, Respondents' assert that "Dominguez' correspondence of July 29, 2008, to "Encarnacion M. Bail Romero, a/k/a Angelica Alvarado-Romero, a/k/a Rachel Leal" was returned" (RB. 16), and that Appellant refused mail "for fear that her true identity would be exposed, making it harder to return to the United States yet again." (RB. 84). This Court should not fall victim to Respondents' rank conjecture, because the truth is far more simple: Appellant was transferred to the U.S. Penitentiary Hazelton in Bruceton Mills, West Virginia on July 21, 2008, so Mr. Dominquez sent his July 29, 2008 letter — which was addressed to the "Saint [sic] Clair County Jail" in Osceola (LF. 90, 107) — to the wrong prison!

B. Appellant Was *Not* "Surprised" That Her Sister Was Caring For Child

Respondents rely extensively on the supposedly key testimony that Ms. Davenport visited Appellant in jail on "September 19, 2007." (RB. 55). Respondents assert that Ms. Davenport testified that during that jail conversation supposedly "Appellant was 'quite surprised' to learn that her brother had not kept [the Child]." (RB. 13). Using Ms. Davenport's testimony (and only Ms. Davenport's testimony), Respondents extrapolate that Ms. Davenport's testimony proves willful abandonment because "Appellant clearly did not know [Child's] whereabouts." (RB. 55). But Respondents' portrayal of Ms. Davenport's testimony strains credibility.

Specifically, Respondents rely *exclusively* on the following testimony by Ms. Davenport as support for Respondents' new "quite surprised" theory:

> Q: What was the mother's response to where the child was?
>
> A: She was surprised that the baby had not stayed with her brother.

(2008Tr. 78:4-10, 84:6-7).

Ms. Davenport does ***not*** testify that Appellant believed, as of September 2007, that her son was with her brother. Nor does Ms. Davenport testify that Appellant did not know that her son was with her sister. Assuming *arguendo* that Ms. Davenport was actually trying to tell the truth in this exchange, Ms. Davenport's use of the word "surprised" is just as likely to have been intended by Ms. Davenport to capture Appellant's expressions of anger (which, of course, is captured in the *actual* recording of the jail conversation). That is, Ms. Davenport used the word "surprised" because Appellant was "surprised" by (or, in other words, angry about) her brother's decision not to continue helping.

In any event, Respondents' manipulation of Ms. Davenport's single sentence does not satisfy Respondents' heavy burden of proving willful abandonment by clear, cogent, and convincing evidence. Respondents admit that the Judgment was drafted by "the Respondents' counsel" (RB. 60), and Respondents admit that the Judgment their counsel drafted emphasizes the "quite surprised" testimony. (RB. 55-56). Given that

fundamental rights and the welfare of a child are at issue, this Court should be much more guarded against accepting Respondents' spin on Ms. Davenport's *less-than clear, cogent, and convincing* testimony.

C. The Jail Recording Belies Ms. Davenport's Testimony

Although unnecessary because the record itself does *not* prove willful abandonment by clear, cogent, and convincing evidence, if this Court chooses to review Appellant's proffer for her ineffective assistance of counsel argument (*i.e.*, Point XIV.B.) the *actual* recording of the September 19, 2007 jail conversation belies Ms. Davenport's testimony. In fact, the transcript of the jail conversation proves that Appellant knew that her Child was with her sister, because Appellant expresses concern about her sister being "tired of taking care of [Child]." (A244). Ms. Davenport responds that "Nobody's tired of taking care of your son. Your sister thinks it's hard." (A244). Appellant also tells Ms. Davenport that Appellant communicates with her sister on the phone "every weekend." (A245). And Appellant says that she "feel[s] bad because [she] know[s] [Child] cries ***with my sister*** here." (A247) (emphasis added).

Moreover, Appellant expresses anger about her brother's (and his wife, Teresa's) decision not to continue helping. Appellant is ***not*** "quite surprised" to learn that her brother was not caring for Child; rather, Appellant ***knew*** that Child was with her sister, and was angry at her brother. Specifically, the *actual* exchange with Ms. Davenport is as follows:

> Appellant: ***He used to stay with Teresa*** and I was

wondering what else Teresa says.

Davenport: Well, I don't do visits with Teresa, so I don't know. He wasn't with her very long. Teresa says she has three children, so she can't be responsible for your child. Yes, they just "threw him out."

Appellant: Well, God knows why He does what He does. You know, when I was pregnant, I used to go a watch her children. But if that's the decision she made, then that's between her and God.

Davenport: ***It could have been your brother***. You don't know that it was Teresa that didn't want the child.

Appellant: Well, I did a favor for them, so if they don't want to do a favor for me, God is just going to have to take care of that.

(A247) (emphasis added).

Respondents also assert that "Appellant indicated that there was a person in jail who could read the documents to her and translate them for her." (RB. 15). Respondents' assertion is (again) based *exclusively* on Ms. Davenport's testimony

concerning the September 19, 2007 jail conversation. (2008TR. 83:5-6, 13). Respondents rely extensively on this alleged "English reading" testimony to assert that Appellant supposedly understood the required notice of her right to counsel; knew the contact information for the Respondents and their counsel; was apprised of the contents of the Petition; reviewed but refused letters; and was aware of the proceedings in the Juvenile Court. But the *actual* recording of the jail conversation proves unequivocally that no part of the conversation whatsoever touched on any inmates' or jail personnel's English reading skills. (A239-251).

D. Appellant's So-Called "Appointed" Counsel Did *Not* Effectively Represent Appellant

Woven throughout their brief is Respondents' arrant supposition that Appellant allegedly received effective counsel at every turn, who supposedly "gave Appellant a fighting chance with nothing with which to work." (RB. 117). Respondents' new theory is negated by dispositive authority and belied by Respondents' own statements elsewhere.

First, as a threshold matter, Respondents do not dispute that Appellant had ***no*** counsel from October 5, 2007 (the date the Petition was filed) to December 3, 2007. (LF. 79). During that two-month lapse, a hearing was held and judgment was entered transferring legal custody of Child to the Respondents on October 18, 2007. (LF. 62). Appellant did not receive the required five days notice of that critical hearing, was not present at that critical hearing, and was not represented by counsel at that critical hearing. "At no time did the [Juvenile Court] make an inquiry or even an entry on the record

concerning [Appellant]'s lack of representation." *In the Interest of J.S.W.*, 295 S.W.3d 877, 881 (Mo. App. 2009). "Failure to appoint counsel to represent the natural parents or to obtain an affirmative waiver of that right has been held to be ***reversible error***." *In the Interest of J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. App. 1989).

Second, Respondents seek to excuse the failure to appoint counsel (or obtain an affirmative waiver) by blaming Appellant. Specifically, Respondents repeat often that "[s]he never requested an attorney." (RB. 15). But even assuming *arguendo* that Appellant was properly served with the statutorily-required notice of her right to counsel, the Judgment (albeit erroneously) states that she only received the mandated notice "on October 16, 2007" (LF. 120) — *i.e.*, only two day before the October 18, 2007 hearing. "To expect [Appellant] to defend herself two days after service of this [notice] would result in a due process violation." *B.L.E. v. Elmore*, 723 S.W.2d 917, 921 (Mo. App. 1987).

Third, even if Appellant did not request an attorney, "it was incumbent upon the *court* to either appoint counsel or obtain an affirmative waiver of her right to counsel." *In the Interest of J.S.W.*, S.W.3d at 881 (emphasis in original). "The court's failure to take either of these steps constitutes ***reversible error***." *B.L.E.*, 723 S.W.2d at 920.

Fourth, Respondents do not dispute that Mr. Calton did nothing for six months; instead, Respondents (again) blame Appellant. Specifically, Respondents surmise that, because Appellant supposedly "refused" mail "the court could have inferred a similar result with attorney James Calton's letters to her." (RB. 90). But Respondents that

"there were some ***problems*** with the biological mother's legal counsel. She was previously represented by Mr. Calton." (2008TR. 2:23-35).

Finally, after having no counsel for more than two months, and after Appellant's first-appointed counsel did nothing for an additional six months, the counsel hand-picked by Respondents (*i.e.*, Aldo Dominguez), then failed to even attempt contact with Appellant for yet another month. (LF. 85, 90). Mr. Dominquez also admits that he waited an additional month before his first actual contact with Appellant. (LF. 90). Put simply: Appellant had ***no*** counsel (effective or otherwise) for ten months.

IV. RESPONDENTS MANIPULATE THE EVIDENTIARY BURDENS AND STANDARDS OF REVIEW

Respondents' Brief is replete with assertions regarding purported "unpreserved" errors. As a threshold matter, Mr. Dominguez's failure to object to (or even question) the litany of statutory compliance failures and due process violations only highlights Mr. Dominguez's ineffectiveness.[4] Respondents' manipulation of the evidentiary burdens and standards of review is also without merit.

First, Respondents seek to excuse the several strict statutory compliance failures and multiple due process violations by asserting "best interests." (RB. 31). But the

[4] Similarly, Respondents assert that the Answer filed by Mr. Dominguez establishes that Child was supposedly "voluntary placed" with the Velazcos. (RB. 28). To the contrary, Mr. Dominguez's false Answer establishes that he failed to diligently protect Encarnacion's interests.

"[t]ermination of parental rights is a *two-step process*," which requires that first a "statutory basis must be proven by clear, cogent, and convincing evidence." *In the Interest of Z.L.R.*, 306 S.W.3d 632, 633 (Mo. App. 2010) (emphasis added). Only "[i]f a statutory basis for termination is proven, [then] the second step is to decide if termination is in the child's best interests." *Id.* Respondents repeatedly ask this Court to skip the first step, which requires that appellate courts review whether the grounds for termination were supported by "substantial" evidence. *See In re K.A.W.*, 133 S.W.3d at 12.

Second, Respondents ignore their heavy burden of proof. For example, in *Z.L.R.*, this Court reversed termination, holding insufficient evidence that parent "'didn't send any support or financial or in kind' and 'there is no evidence of much of a bond, if any.'" 306 S.W.3d at 633. Respondents' assertions here are strikingly similar, and are likewise insufficient.

Third, Respondents do not dispute that questions of law, including statutory interpretation, are reviewed de novo. *See Parktown Imports, Inc. v. Audi of America, Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). Nor do Respondents dispute that review of due process issues is de novo. *See Patrick v. City of Jennings*, 295 S.W.3d 921, 927 (Mo. App. 2009). Instead, Respondents repeat often that "Appellant did not complain below, and thus she waived the issue." (RB. 46). But even the authority on which Respondents rely holds that, "[p]ursuant to the Supreme Court's holding in *C.W.*," a strict compliance failure is "open and obvious error." *In re R.S.L.*, 241 S.W.3d 346, 351 (Mo. App. 2007).

Fourth, "[this] Court has clarified that it intended for the [plain error] rule to mean that [appellate courts] should first examine plain error 'facially.'" *Lasker v. Johnson*, 123 S.W.3d 283, 289 (Mo. App. 2003). And, where (as here) ineffective assistance of counsel has tainted the entire proceeding, "a plain error claim is not dispositive of the question whether counsel was ineffective in failing to preserve the issue as to which plain error was found." *Deck v. State*, 68 S.W.3d 418, 428 (Mo. Banc 2002).

Finally, and perhaps most importantly, Respondents ignore that neither Appellant nor any "appointed" counsel was present during the October 18, 2007 Custody Hearing. In fact, Appellant was not appointed counsel until December 3, 2007 (LF. 79), so Appellant had no opportunity to complain (or bring an interlocutory appeal) of the illegal placement and transfer.

V. RESPONDENTS DISTORT AND IGNORE THE MERITS

For brevity (and given the time restraints and word count limit), Appellant addresses below only Respondents' assertions that have not already been addressed above or in Appellant's suggestions in opposition to Respondents' Motion to Dismiss, Motion to Strike Appellant's Statement of Facts, and Motion to Strike the Appellant's Appendix.

POINT I

Respondents do not dispute that the Velazcos are *not* "clergyman" as required by section 453.014.1(4). Nor do Respondents dispute that the Velazcos are not the "clergyman of" Appellant as required by section 453.014.1(4). Instead, Respondents use

smoke and mirrors to obscure the failure to strictly and literally comply with the controlling statute.

First, Respondents seek to excuse the failure to strictly and literally comply with section 453.014.1(4) by asserting that the "Child had nowhere else to go." (RB. 29). Assuming *arguendo* that Appellant's sister left Child with the Velazcos for too long, then the proper step would have been to contact family services, not give away someone else's child. Respondents cannot circumvent the legislature's mandate by resorting to self-help. *See, e.g.*, *Davis v. Brady*, 285 S.W.2d 35, 36 (Mo. App. 1955) ("It appears quite obvious that it was the intention of the Legislature to lay down a rule whereby the custody of a child could not be transferred at the will or whim of an individual in charge of it, but, on the contrary, transfer of custody of a child must have the sanction of a court given by an order approving such transfer.").

Second, Respondents assert that "the juvenile court did not transfer custody based on the Velazcos' qualifications under § 453.014." (RB. 34). Not true. In fact, from the very beginning, Respondents worked hard to convince everyone, including the Juvenile Court, that this private adoption could proceed pursuant to the clergy exception. For example, in their Petition, Respondents allege that the "child is currently in the actual physical custody of Oswaldo and Jennifer [Velazco] … due to a voluntary placement…." (LF. 5). And the Judgment, which was drafted by Respondents' counsel, repeats the false story that "local clergy" placed Child with the Respondents. (LF. 118).

Third, relying on *In re S.J.S.*, 134 S.W.3d 673 (Mo. App. 2004), Respondents assert that "[b]y using the word 'include,' the legislature did not restrict the class of intermediaries." (RB. 36). But *In re S.J.S.* does not concern construction of § 453.014. And Respondents' expansive reading obliterates the legislature's intent "to prohibit the indiscriminate transfer of children." *In the Matter of Baby Girl Smith*, 339 S.W.2d 490, 492 (Mo. App. 1960). Respondents also ignore all of the statutory provisions and regulations that reference only the three specified categories of intermediaries — *i.e.*, "attorney," "physician," or "clergyman of the parents." *See* MO. REV. STAT. § 210.481; Mo. Code Regs. tit. 13 § 40-73.010; Mo. Code Regs. tit. 13 § 40-73.080.

POINT II

Respondents do not dispute that Sections 211.455, 453.026, 453.070, 453.077, 453.080, and 453.110 mandate certain investigations and reports. Respondents do not dispute that, except for Respondent's "assessment for the foster program" (2007TR. 6:14-15) and a purported "update" filed by the GAL, ***none*** of the mandated investigations and reports were completed here.

Respondents seek to excuse the multiple, undisputed failures to strictly and literally comply with statutory mandates, because "Appellant was not prejudiced." (RB. 43). In *In re C.W.*, however, the Missouri Supreme Court rejected the same assertion. *See* 211 S.W.3d at 97 ("That assertion is not consistent with section 211.455."). In fact, "the appealing parent [need not] show that some sort of prejudice resulted from a failure

to follow the literal requirements of the statute." *In the Interest of N.A.H.*, 247 S.W.2d at 159-160.

Respondents assert that this Court's holding *In re C.W.* concerns only section 211.455 and does not apply to "the absence of a § 453.026 report." (RB. 48). But under Respondents' twisted logic a private adoption proceeding supposedly would require *less-than-strict* and *less-than-literal* statutory compliance, and the termination of a natural mother's parental rights would be *easier* to accomplish in a private adoption proceeding than a termination proceeding initiated by the State.

Section 211.455

Respondents' concession that the "mandatory" section 211.455 investigation and report was not completed here is reversible error.

Section 453.026

Respondents seek to excuse the failure to strictly and literally comply with section 453.026's mandate by asserting that allegedly "there was no opportunity for a written report." (RB. 47). Section 453.026, however, provides that "the person ***placing*** the child for adoption, ***as authorized by section 453.014***, shall furnish to the court, the guardian ad litem and the prospective adoptive parent a written report ***regarding the child***." The persons purportedly "placing" the child here were the Velazcos. If Respondents' story that Child was supposedly "living" with the Velazcos for several months was true, then the Velazcos should have easily been able to prepare the required report "regarding the child."

Section 453.070

Respondents do not dispute that no section 453.070 investigation "***directed by the court***" or report prepared by a person "***appointed by the court***" was completed here. Respondents seek to excuse the failure to strictly and literally comply with section 453.070's mandate by asserting that their foster program assessment (which Respondents now conveniently label a "home study") and the GAL's purported "update" are sufficient. But the so-called "home study" was actually prepared on April 22, 2007 (*see* LF. 22) — *i.e.*, nearly six months ***before*** Respondents filed their Petition on October 5, 2007 — so the so-called "home study" could *not* have been "***directed by the court***" as mandated by section 453.070. *See, e.g.*, *In the Interest of A.H.*, 169 S.W.3d 152, 158 (Mo. App. 2005) ("[P]reparation of this report ***prior*** to the trial court's selection of the [appropriate] agency as the preparer and submitter is in conflict with the intent of section 211.455.").

Nor was the so-called "home study" prepared by a person "***appointed by the court***" as mandated by section 453.070. Indeed, Respondents admit that the so-called "home study" was prepared to assess their fitness to serve as foster parents (RB. 15), not for the adoption proceeding and not at the direction of the court or by a person appointed by the court. And Respondents concede that neither the so-called "home study" nor the GAL's purported "update" contains the "specific content" required by the applicable rules and regulations. Respondents (again) blame Appellant for such failings using Respondents' "hiding identity" theory. But Respondents' blame game misses the mark,

because the so-called "home study" was prepared months ***before*** the Respondents had any contact with Child, so satisfying the content requirements of the governing rules and regulations is a factual impossibility. In short, the so-called "home study" fails because it was prepared at the wrong time, by an unauthorized party, and without the direction of the court.

Section 453.077

Respondents do not dispute that the supposed post-placement assessment here (*i.e.*, the GAL's purported "update" to the so-called "home study") was not prepared by the "***person conducting the pre-placement assessment.***" Respondents seek to excuse the failure to strictly and literally comply with section 453.077's mandate by blaming Appellant. But again Respondents' blame game misses the mark, because there can be no dispute that the so-called "home study" was prepared by a different author than the GAL's purported "update" (nor was it prepared by a person "***appointed by the court***"), so complying with section 453.077's mandate is a factually impossibility.

Section 453.080

No post-placement assessment or recommendations of the "person placing the child" was completed here. Respondents attempt to excuse the failure to strictly and literally comply with section 453.080's mandate is without merit for the same reasons discussed above with regard to sections 453.026, 453.070, and 453.077.

POINT III

Respondents do not dispute that that Appellant did not receive the minimum five days notice of the custody hearing as required by Supreme Court Rule 44.01(d). Respondents also do not dispute that the Velazcos "transferred" and Respondents took "custody" of Child ***before*** entry of any court order. Instead, Respondents seek to excuse the failure to strictly and literally comply with the notice requirements and section 453.110 by asserting (again) that the Child had nowhere else to go and that there was supposedly no prejudice. Respondents' excuses ignore the purpose of the notice requirements and section 453.110.

"It is a cardinal principle, that whenever a party's rights are to be affected by a summary proceeding, or motion in court, that party should be notified, in order that he may appear for his own protection." *Wheatley v. State*, 559 S.W.2d 526, 527 (Mo. banc 1977).

Moreover, as Respondents admit (RB. 38-39), section 453.110 mandates that where "transfer is made without first obtaining such an order, such court ***shall*** … order and investigation and report as described in section 453.070 to be completed by the division of family services…." That investigation would have revealed that Child did, in fact, have somewhere else to go! But there is no dispute that the required investigation was not done here.

Respondents assert that there is "no authority for [Appellant's] argument that the judgment should be reversed because Respondents took custody '***before*** entry of any

court order.'" (RB. 37). Not true. This Court has expressly held that "[t]his is precisely the type of action that the legislature sought to avoid when it enacted § 453.110.1…. Because an appropriate order was not obtained, all acts thereafter regarding custody were void from any legal perspective. The transfer of custody of [Child] from [the Velazcos] to [Respondents] … was 'illegal from its inception.'" *In re Baby Girl*, 850 S.W.2d at 68; *see also In the Matter of Baby Girl Smith*, 339 S.W.2d at 492 ("the transfer made was illegal from its inception").[5]

Respondents also assert that "Appellant ignores the clear mandate of § 453.010.5." (RB. 41). But the portion of section 453.010.5 that Respondents do not quote reveals that that section 453.010 directs courts not to delay or deny placement "regardless of the approved family's residence or domicile." Section 453.010.5 does not eviscerate all of the other mandatory requirements in Chapter 453.

POINT IV

Respondents do not dispute that the relevant 60-day period under section 453.040(7) began on August 6, 2007, because Respondents filed their Petition on October 5, 2007. (LF. 5). Respondents do not dispute that Ms. Davenport testified that she "dropped out of the picture" when "[Child] was about eight or nine months old."

[5] Respondents' reliance on *In re Adoption of K.*, 417 S.W.2d 702 (Mo. App. 1967), is misplaced, because the issue here is not jurisdiction; rather, the issue is strict compliance with statutory mandates.

(2008TR. 80:12-17). Respondents do not dispute that Child would have been "eight or nine months old" in June/July 2007, which is ***before*** the critical time period began on August 6, 2007.

Respondents also do not dispute that M.M.'s testimony concerning the relevant 60-day period is double hearsay, because it is based on what she supposedly heard from the Velazcos, and the Velazcos' alleged statements to M.M. are based on what Appellant's family members supposedly told the Velazcos. (2008TR. 11:21-12:3).

Despite that all of the testimony concerning the critical 60-day period is hearsay testimony from individuals who admit they lacked personal knowledge, Respondents assert that Point IV should be denied because "Appellant did not preserve the issue" and the record contains "non-hearsay evidence." (RB. 54-55). Respondents are wrong for several reasons.

First, relying only on *State v. Newson*, 898 S.W.2d 710 (Mo. App. 1995), Respondents assert that "[i]t has been well-established in Missouri that the admission of hearsay evidence is not plain error…." (RB. 54). *Newson*, however, is a criminal case involving hearsay evidence considered by the jury. Missouri's appellate courts have repeatedly and consistently "elected to review for plain error" where (as here) the best interests of a child are involved. *See In re S.M. and A.M.*, 938 S.W.2d 910, 923 (Mo. App. 1997).

Second, Respondents assert that Ms. Davenport "testified about the chronology." (RB. 55). As discussed above, Ms. Davenport's testimony is demonstrably false. But

even if this Court overlooks Ms. Davenport's mendacity, Respondents admit that Ms. Davenport's personal knowledge extended from only "May through June or July 2007." (RB. 55). Accordingly, by Respondents' own admission, Ms. Davenport did *not* have personal knowledge of the critical 60-day period.

Third, Respondents assert that Appellant ignores key testimony that Ms. Davenport visited Appellant in jail on September 19, 2007 and that allegedly "[b]y then the child had lived with the Velazcos full time for well more than 60 days." (RB. 55). Respondents' assertion misses the mark because, even if true (which it is not), it is irrelevant whether Child allegedly "lived" with the Velazcos for more than 60 days. The issue is whether Respondents carried their heavy burden of proving by clear, cogent, and convincing evidence willful abandonment of at least 60 days "immediately prior to the filing of the petition for adoption." Mo. Rev. Stat. § 453.040(7). Respondents do not dispute that Ms. Davenport testified that, as of her jail visit on September 19, 2007, Child "was with [Appellant's] sister." (2008TR. 83:17-18). Accordingly, by Ms. Davenport's testimony, Appellant did *not* willfully abandon Child during the critical 60-day period.

Fourth, Respondents assert that Appellant's family did not participate in the trial to "avoid[] deportation" and "keep[] their identities clean for the next illegal entry." (RB. 57). As discussed above, Respondents' rank conjecture is repugnant, and there is no evidence in the record supporting Respondents' bald assertions.[6] Indeed, the absence of

[6] In fact, in the Rule 74 proceeding before the Juvenile Court, Encarnacion's family members submitted affidavits negating abandonment. *See* Legal File (in Case No.

any testimony by Appellant's family members further illustrates Appellant's ineffective assistance of counsel Point XIV.

Fifth, Respondents assert that "Respondents' testimony also offered first-hand proof of abandonment" because "[f]rom October 3, 2007, until the trial on October 7, 2008, Respondents received no request for visitation, had no contact from Appellant or her family, received no letters addressed to the Child …, and no money or items from anyone for his support." (RB. 56). Respondents, however, failed their burden of proving that Appellant actually had earned, or even had the ability to earn, any wages while incarcerated. *See In re Baby Girl W.*, 728 S.W.2d at 547. And Respondents ignore all of the evidence in the record, including the following:

- Appellant was making arrangements to secure a passport for Child as of "9/27/07." (LF. 71-73).
- A handwritten letter (filed by Mr. Walter) also states that "[Child] Aunt has been trying to find the baby" (LF. 69), which the Velazcos own "no longer contact us" letter confirms that someone was looking for Child. (LF. 74).
- On October 28, 2007, Appellant requested "visitation with my son." (LF. 70).
- Appellant also wrote that she did not want her son to be adopted and expressed her preference that Child be placed in foster care until she was released. (LF. 70).

SD30415) at 1004-1021. Respondents assert here that the "Court may take judicial notice of its own records in a related case." (RB. 112 n.15).

- On August 18, 2008, Appellant again communicated her opposition to adoption and expressly placed Child in the temporary care and custody of Corina Rodriquez. (LF. 108).
- Appellant "also sent a letter to both the [Respondents]' attorney and the Guardian ad Litem … in September 2008 objecting to the adoption." (LF. 121).

POINT V

Relying (again) on their new "quite surprised" theory, Respondents assert (again) that their heavy burden of proving willful abandonment by clear, cogent, and convincing evidence was satisfied because "in September 2007 Appellant [allegedly] thought that the Child was still with her brother." (RB. 61). Respondents' new "quite surprised" theory is without merit. In any event, whether Child was with Appellant's brother or sister does not constitute willful abandonment. *See In re A.S.W.*, 137 S.W.3d 448, 453 (Mo. banc 2004). ("Children are often raised with extensive help from … siblings").

Respondents also assert that Appellant has somehow mischaracterized Ms. Davenport's testimony. (RB. 62). Not true. As discussed above, Respondents admit that Ms. Davenport's personal knowledge extended from only "May through June or July 2007." (RB. 53). And Ms. Davenport testified that she told Appellant that Child "was with [Appellant's] sister" as of September 19, 2007 (2008TR. 83:17-18). Accordingly, Ms. Davenport's testimony concerning the critical 60-day period is either hearsay (and, thus, should be excluded as discussed in Point 4) or Ms. Davenport's testimony negates

any finding of abandonment because, according to Ms. Davenport, Child was with Appellant's sister as of September 19, 2007 — *i.e.*, only *17 days* before the Respondents filed their Petition on October 5, 2007.

Respondents assert that Appellant's several attempts to obtain a passport should be discounted because "the attempted repentance comes *after* the petition to terminate parental rights is filed." (RB. 64). Not true. The notation on the passport application is as of "9/27/07" — *i.e.*, eight days before the Respondents filed their Petition on October 5, 2007. (LF. 71-73). Respondents also assert that because Appellant *did* write to Respondents' attorney and the GAL that somehow such efforts "bespeaks abandonment." (RB. 62). Only in Respondents' warped world would Appellant's efforts to communicate with adults *who can read*, as opposed to a one-year old child *who cannot read*, demonstrate abandonment.

POINT VI

Appellant's Point VI concerns the Juvenile Court's erroneous findings of abandonment under section 211.447(2)(B). As discussed above, based Respondents' several admissions, the Judgment's termination under Chapter 211 must be reversed. In addition, the bulk of Respondents' response to Point VI is merely a rehashing of their "quite surprised," "hiding identity," and "English reading" theories. Accordingly, given the word count limit, Appellant addresses here only this new assertion: Respondents assert that Appellant has misstated M.M.'s testimony and the Judgment's reference to Appellant's care arrangements because it is inconceivable that Appellant could believe

that her brother would take care of her son in an emergency. (RB. at 66-67). But that is precisely how most families work.

POINT VII

Respondents assert that section 211.447.7 does not apply to a Chapter 453 termination and adoption. (RB. 73). But it cannot be the law that it is easier to terminate parental rights in a private adoption, without (as here) any State oversight, than in a termination proceeding initiated by the State. In any event, as discussed above, Respondents' several admissions require reversal of the Judgment's termination under Chapter 211.

POINT VIII

Respondents assert that "[t]here is no doubt that Appellant's illegal alien status holds potential for even more prison time." (RB. 82). But Respondents ignore that Appellant was set to be released from prison in "February of 2009" (LF. 115, 122) — *i.e.*, ***only four months*** after the combined termination and adoption hearing. Thus, there is no basis for the Judgment's findings that Child could not be returned to Appellant "within an ascertainable period of time" or that Child "would be deprived of a stable home for a period of years" (section 211.447.7(4)). This simply is ***not*** a case where the parent has committed a heinous crime and therefore will be incarcerated for several years, or a case where the parent has a long history of drug abuse, or a case where family services has found neglect or abuse.

Respondents' assertion that it is proper to consider "illegal alien status" is merely "a hyper-technical application of statutory criteria to achieve a result where the child would be 'better off' in someone else's care." *In re M.D.R.*, 124 S.W.3d 469, 476 (Mo. banc 2004).

POINT IX

Respondents do not dispute that Appellant did *not* receive the required notice of the Custody Hearing. Respondents do not dispute (and, in fact, admit) that the Petition moved for termination under a stale, obsolete version of section 211.447. Nor do Respondents dispute that Appellant did *not* receive the Petition or other pleadings in her native language. Instead, in addition to their preservation assertions and "hiding identity" theory (discussed above), Respondents assert a "sheriff's return is 'prima facie evidence of facts recited therein.'" (RB. 89). Respondents ignore that such a "presumption could be rebutted by evidence that (a) the mailing was not received by Plaintiffs, or (b) that it was not Plaintiffs' correct address." *Weidner v. Anderson*, 174 S.W.3d 672, 678 (Mo. App. 2005).[7]

Respondents also repeatedly tout Mr. Dominguez's supposed Spanish fluency. Yet Respondents viciously reject Appellant's desire to be able to read critical court

[7] Respondents rely on *In re Adoption of Fuller*, 544 S.W.2d 345, 349 (Mo. App. 1976), but the purported holding of *Fuller* cannot be reconciled with *In re Baby Girl*, where the Missouri Supreme Court held that all acts subsequent to an illegal transfer order are "void." 850 S.W.2d at 68.

documents for herself. Respondents' conspicuous silence on *United States v. Mosquera*, 816 F. Supp. 168 (E.D.N.Y. 1993), speaks volumes. There, the federal court rejected the same assertion Respondents advance here: "The suggestion that non-English speaking defendants can rely on inmates who speak their language to facilitate their understanding of documents is ***unacceptable***." *Id.* at 168. And, even assuming *arguendo* that Mr. Dominguez's Spanish fluency is relevant, Respondents did not select and hire Mr. Dominguez until June 2008, nearly eight months after the Petition was filed.

POINT X

Respondents do not dispute that they were intimately involved with the dismissal and selection of Appellant's counsel. In fact, Respondents brag *on the record* about their control over the process of selecting Appellant's counsel: "She was previously represented by Mr. Calton. And then after ***we realized*** that she probably needed counsel for this so ***we hired*** Mr. Dominguez to represent her today." (2008TR. 2:23-3:5). Appellant has located no authority sanctioning an opponent's selection of supposedly "court-appointed" counsel, and Respondents cite none, because no such authority exists.

Respondents seek to excuse the extraordinary breach of the adversarial system by asserting that their payment of Mr. Dominguez's fees is permitted (RB. 94). But statutory provisions that provide for the *possibility* of shifting fees do not also permit the selection of counsel by an adversary. Indeed, the random appointment of counsel *by a court* is a far cry from *an adversary* hand-picking and paying their opponent. The

Missouri Rules of Professional Conduct prohibit such transactions. *See* Mo. Supreme Court Rule 4-1.8(f).

POINT XI

As discussed above, Respondents' admission that the Juvenile Officer was not "a party here" (RB. 46) requires reversal.

Moreover, the GAL's conclusory statement in closing argument (2008TR 97:11-18) is cited by Respondents *four* times to demonstrate the GAL discharged *four* different statutory duties. But there is zero evidence in the record demonstrating that the GAL made even minimal efforts to locate or communicate with Appellant. Instead, the GAL swallowed whole the story presented to him by the Respondents' attorney. (2008TR. 48:10-49:3; 2008TR. 97:10-24), and prepared a purported "update" consisting of a total of seven sentences mainly about the Respondents' alleged fitness. (L.F. 86).

POINT XII

Appellant does ***not*** argue that concurrent termination and adoption proceedings are *per se* improper; rather, the mixing of the termination and adoption hearing here improperly interjected the issue of Respondents' purported fitness into the termination proceeding. Respondents do not dispute that a substantial portion of the short, 106-minute hearing was devoted to the Respondents' purported fitness. Respondents do not dispute that the GAL's examination focused exclusively on the Respondents' purported fitness. (2008TR 36:3-38:3, 62:5-63:15). Instead, Respondents recite the Judgment (written by Respondents' counsel), ignoring that the bulk of the hearing was spent

"proving the superiority of the home offered by the proponent." *In re M.O.*, 70 S.W.3d 579, 588 (Mo. App. 2002).

POINT XIII

Respondents do not dispute that the Judgment does not contain even a fleeting reference to S.M.'s serious criminal history and drug use or Bart Paden's "unresolved" sexual abuse. Instead, Respondents spin S.M.'s criminal history and serious drug use into a success story, and then make gross comparisons to Appellant's supposed crimes.

Respondents' tactic is clear: They seek to dehumanize Appellant. Respondents' (and the Judgment their counsel wrote) incessant focus on Appellant's immigration status panders to immigration phobia. But Appellant is a human being. There is nothing "illegal" about her. She lacked proper documentation ***to work***. Her defunct crime was one of status, not of violence, not of larceny, not of any crime involving moral turpitude. Being undocumented does not render her unfit to be a parent.

POINT XIV

Respondents do not dispute that the record contains zero evidence of *any* action by *any* counsel on behalf of Appellant from October 5, 2007 (the date of Petition) to August 12, 2008 (the date Mr. Dominguez supposedly contacted Appellant). Thus, for nearly a year, nothing was done to defend Appellant — that should end the inquiry.

Respondents assert that Mr. Dominguez was a zealous advocate. But the record demonstrates otherwise. Mr. Dominguez did not develop any evidence about Appellant or her family; he did not serve any discovery or depose anyone; he did not investigate

Ms. Davenport or the Velazcos; he did not make arrangements for Appellant to participate at the hearing or present her testimony in another form; he did not call any witnesses; and, except for a single document, he did not present any affirmative evidence.

Moreover, Respondents do not dispute or challenge the materials Appellant proffered to support her ineffective assistance of counsel Point. Instead, in addition to repeating their Dismissal/Strike Motion, Respondents assert that this appeal will open the "floodgates." (RB. 114). This Court need not speculate concerning Respondents' doomsday scenario because, as detailed in Appellant's Substitute Opening Brief, Missouri's courts have for years successfully handled ineffective assistance claims in criminal cases, and Missouri's sister courts have also successfully handled ineffective assistance claims, including submissions of materials "outside" the record, in termination cases.

RESPECTFULLY SUBMITTED this 9th day of November, 2010.

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CERTIFICATE REQUIRED BY SUPREME COURT RULE 84.06(c)

I hereby certify that the foregoing brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b)(1). The foregoing brief contains _____ words.

The undersigned further certifies that the disk simultaneously filed with this brief under Rule 84.05(g) has been scanned for viruses and is virus-free.

By:_____
R. Omar Riojas

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Appellant's Substitute Reply Brief, and a disk formatted in Microsoft Office Word 2003, were delivered via first class U.S. Mail, postage prepaid, on this 9th day of November, 2010, to the following, and a Word copy of this brief was also sent as an email attachment to the attorneys for Respondents.

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