

IN THE SUPREME COURT OF MISSOURI

Appeal No. SC95602

IN THE INTEREST OF J.P.B.

M.R.S.

Appellant,

v.

THE GREENE COUNTY JUVENILE OFFICE,

Respondent

Appellant's Brief

On Appeal from the Circuit Court of Greene County

For the 31st Circuit of Missouri

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JURISDICTIONAL STATEMENT

This action involves the termination of parental rights of the natural father M.R.S. in, to and over the minor child J.P.B. pursuant to RSMo 211.447. This appeal involves, *inter alia*, a challenge to the trial court's finding of the existence of statutory grounds for termination of parental rights of M.R.S. in that he is an unfit parent pursuant to RSMo 211.447.5(6)(a) due to his incarceration in the Missouri Department of Corrections. Father argued to the trial court that RSMo 211.447.5(6)(a) is unconstitutionally vague as applied when read in conjunction with RSMo 211.447.7(6), which provides that "incarceration in and of itself shall not be grounds for termination of parental rights." Father argued that persons of reasonable intelligence cannot determine what conduct is prohibited by the challenged statutory provision or when and if the penalty of termination of parental rights can be imposed by the State, and that, therefore, the provision is unconstitutionally vague. Father further argued that the vagueness of RSMo 211.447.5(6)(a) deprived him of due process under the law under the 5th and 14th Amendments to the United States Constitution and Article 1 Section 10 of the Missouri Constitution. Accordingly, this appeal involves the validity of a Missouri statute, hence, jurisdiction is proper in this Court.

STATEMENT OF FACTS

J.P.B. (hereinafter “Child” or “the Child”) was born on February 19, 2014. (L.F. 15) He is the son of Michael R. Squires (hereinafter “Father”), the appellant in this case. (L.F. 1) The child came into the custody of the State of Missouri on May 2, 2014. (Id.) Parental rights of the Father to the Child were terminated by the Judgment of the trial court on February 5 , 2016, just two weeks shy of his second birthday. (L.F. 64)

Events Prior to Birth of J.P.B.

Father presently is incarcerated in the Missouri Department of Corrections and has been for the entirety of the child’s lifetime. At the time of trial he was serving time for five offenses charged in Greene County Case No. 1331-CR03785-01:

- 1) Class B Felony – DWI (chronic offender)
- 2) Class C Felony - Attempted Assault of Law Enforcement Officer
- 3) Class D Felony – Resisting Arrest
- 4) Class A Misdemeanor – Assault 3rd Degree
- 5) Class A Misdemeanor – Assault 3rd Degree

Father entered guilty pleas to the above charges on January 10, 2014. The events leading to the charges occurred on or about July 14, 2013. (TC Exhibit 7).

In addition to the offense for which he is presently incarcerated, evidence at trial also indicated the following criminal convictions and dates of pleas of guilt:

- 1) Greene County Case No. 0831-CR08518; Domestic Assault & Resisting Arrest; April 20, 2009 (TC Exhibit 10)

- 2) Greene County Case No. 1031-CR05833; DWI; May 24, 2012. (TC Exhibit 9)
- 3) Greene County Case No. 1131-CR04747-01; Possession of a Controlled Substance, Property Damage and Resisting Arrest; May 24, 2012. (TC Exhibit 6)

His current incarceration began in July, 2013 and continued uninterrupted through the date of trial.

Protective Custody and Determination of Paternity

The child came to the attention of the Juvenile Division of the Greene County Circuit Court in May, 2014 pursuant to a hotline investigation wherein it was alleged that the biological mother was attempting to sell the Child to a prospective adoptive family. At the time of the investigation and assumption of protective custody, the Mother had other children in State's custody due to allegations of abuse and neglect.¹

A Protective Custody Hearing was held on May 7, 2014. At that time an unidentified male, not Father, had presented himself at the Courthouse and claimed paternity of the child, a fact that was denied by the Mother. (Tr. I 11:17-23) The Court ordered paternity testing to be completed on the alleged biological father. (Id.)

An Adjudication Hearing was held on June 9, 2014. The Court was informed that the Mother had not been served, so the Court indicated that "We're just taking the baby right now." (Tr. I 15:18-24). The Court further proceeded to declare the Child an abandoned infant and ordered that a petition to terminate parental rights be filed. (Tr. I 16:5-7). The court expressed a desire that the termination be kept on track with mother's

¹ The Father here is not the father of Mother's other children in custody.

other children. (Tr. I 16:5-14). There was no discussion of paternity issues regarding the child at the June 9, 2014 hearing. (See Tr. I 14:1-18:16).

A Review Hearing was held on September 15, 2014. At this hearing the court was informed that paternity testing had been completed which indicated that Father was the biological father of the Child. (Tr. I 19:24-20:15). The Court set an Adjudication Hearing with respect to Father and the following colloquy between the Court, the Juvenile Officer and his attorney took place:

Court: So you'll need – you'll need to be – I'm assuming on the jurisdictional, it's basically the guy is in jail; right?

O'Brien: Yes.

Court: I mean, I can't imagine there's probably many allegations against this father who we just discovered.

O'Brien: Right. That he committed whatever it is that got him in jail.

Collins: Yeah.

Court: Right. I wonder if he committed it before or after the child was born?

O'Brien: But he didn't know he was the dad, so it doesn't really matter when he –

Court: Probably doesn't matter

O'Brien: - committed it. It's just the fact that he did commit something.

(Tr I 20:24-21:12)

The Court further addressed the issue of relative placement and opined that Father may want to voluntarily terminate his rights and have his mother seek adoption of the child. (Tr. I 24:12-22). Finally, at this hearing, the Child's foster mother stated she would be travelling from Missouri to Colorado with the Child. (Tr. I 20:20).

Further clarity regarding the circumstances surrounding the discovery of Father as the biological father of the Child came from testimony from Alyssa Ellsworth, the Children's Division Caseworker, at a hearing on Father's Motion for Placement with Paternal Grandmother held on November 6, 2015. Ms. Ellsworth testified that at the time the child came into care in May, 2014 the biological father was unknown. (Tr. I 170:19-25). A few weeks after the child came into care, Ms. Ellsworth received word from the father of one of mother's other children in care that he had had conversations with Father, while they were incarcerated together, which led to speculation that Father was the biological father of the Child at issue in this case. (Tr. I 171:6-11).

On June 2, 2014, Ms. Ellsworth was contacted by the paternal grandmother, who informed Ms. Ellsworth that her son might be the father of the Child. She was told that Children's Division would seek to do paternity testing after results were obtained from another alleged father. (Tr. I 171:12-22). Paternity testing showing that Father was the biological father was received by Children's Division nearly three months later, on August 28, 2014. (Tr. I 171:23-172:2). Ms. Ellsworth contacted the paternal grandmother on September 4, 2014 to notify her that she was the grandmother. (Tr. I 172:5) A homestudy and request for placement was requested by the grandmother on September 17, 2014. (Tr. 172:12)

Father's Compliance with Treatment Plan

An Adjudication Hearing with respect to Father was held on November 12, 2014. At that time, evidence was presented of Father's criminal convictions and his incarcerated status. (Tr. I 27:1-28:14). The Court also declared Father to be the biological father of the Child based upon the expert paternity testing presented. (Tr. I 29:12-14). An Incarcerated Parent Treatment Plan was ordered for Father. (Tr. I 31:22-32:14).

Father's treatment plan listed four responsibilities of the parent: 1) communicate with his case manager, 2) sign releases of information, 3) take advantage of services offered by the facility he is in, and 4) stay in contact with his child. (TC Exhibit 13).

At the trial on the Petition to Terminate Parental Rights, Ms. Ellsworth testified that Father maintained contact with her through phone calls and letters. (Tr. II 25:19-23). No evidence was adduced at trial that Father failed to sign any requested releases of information.

With respect to services offered in facility, Ms. Ellsworth testified that Father completed Pathways to Change and Inside/Out Dads and that Father reported to her that he was attending NA/AA meetings on a weekly basis. Ms. Ellsworth testified that she never talked with Father about why he attended NA/AA meetings. Nothing in the record suggests that Father was requested to complete a substance abuse evaluation, or that he was ever diagnosed with an untreatable chemical dependency by any health professional. Ms. Ellsworth did not indicate that Father had failed to take advantage of any service or class that was available to him. (Tr. II 39:20-23)

Father was ordered to pay child support in the amount of \$2.00 per month, based upon his monthly earnings of \$8.50 per month as an incarcerated inmate. At the time of trial he was current in his obligations. (Tr. II 33:7-11). Ms. Ellsworth stated that Children's Division is only allowed to accept money paid through child support orders and that any additional money sent would have to be returned. (Tr. 33:19-34:2).

Ms. Ellsworth testified that Father wrote letters to his son two to three times per month (Tr. II 25:24-26:3). She further testified, however, that there had never been any visitation between Father and the Child. (Tr. II 30:12-13). Accordingly, no bond existed between father and son at the time of trial. (Tr. II 30:14-19). Father requested visitation, and the same was discussed during Family Support Team Meetings. (Tr. II 37:6-8). Ms. Ellsworth testified that Children's Division, the Guardian ad Litem and Juvenile Officer all agreed to begin visitation, but that the lone objection came from the foster parents, who believed it would not be in the Child's best interests. (Tr. II 37:9-17). Father's requests to the Court for visitation were twice denied on the basis that it was too far to transport the child from Springfield, MO to St. Joseph, MO to see his Father. (L.F. at 34; L.F. at 8; Tr. I 48:2 - 51:6; 56:22 – 58:12).

Ms. Ellsworth testified that without visitation, she did not know how she could assist in the development of a bond between father and son, but, that if visitation had been allowed, it is possible that a bond could have been developed. (Tr. II 38:1-4; 39:13-19).

Placement with Relatives

Father consistently requested that his son should live with his grandmother or other relatives. (L.F. at 21; Tr. I 30:5-6; Tr. I 38:19-21; Tr I 48:10-17; L.F. at 36). Father filed a Motion for Placement with Paternal Grandmother on or about September 11, 2015, and a hearing was held on said motion on November 6th and 30th, 2015. (L.F. at 62).

Paternal grandmother first requested a homestudy on September 17, 2014. (L.F. 48) She withdrew that request in December, 2014 after another relative, a cousin, was identified as a possible placement. (Id.) The cousin's homestudy was approved, however that family had to withdraw because they moved out of state. (L.F. 49) Paternal grandmother then renewed her request for a homestudy in May, 2015 which was approved in August, 2015. (Id.) Meanwhile, Grandmother was progressing in her visitation, ultimately leading up to overnight visitation. (L.F. 48) The grandmother's homestudy indicated that she was willing and able to provide a home for the child and would follow any directives of the Children's Division should she be allowed to do so. (Natural Father's Exhibit 1 – 11/6/15). At the time of the hearing, the grandmother was providing full time care for another grandchild and had been appointed as that child's guardian through Orders of the Probate Division of the Greene County Circuit Court. (Intervenor's Exhibit 1 – 11/6/15).

The child's foster mother testified that she and her husband had provided the Child with a foster home since May, 2014 and that he was very bonded to them. (L.F. 47) The foster mother was a former employee of the Greene County Children's Division as a

child abuse investigator. (Tr. II 36:10-19). The foster mother indicated that it was her desire to adopt the child since placement was made in her home in June, 2014. (Id.)

The Children's Division joined in Father's request for placement with the paternal grandmother. (L.F. 50) The request was opposed by the Juvenile Office, the Guardian ad Litem and the foster family, who were permitted to present evidence and participate as parties in the hearing. (Id.)

The court prepared, upon Father's request, written Findings of Fact and Conclusions of Law. (L.F. at 47-53). Those findings recite the relevant facts surrounding the issue of placement and conclude that placement with the paternal grandmother was contrary to the child's best interests because it would sever the relationship the child had with the foster parents. (L.F. at 52). The trial court's findings do not indicate any deficiency with the paternal grandmother's home, nor does it identify any reason why she could not care and provide for the child's needs. (See L.F. at 47-53; Tr. II 8:9-10). Indeed, the trial court found that the grandmother was consistent and appropriate in her visits, that the child enjoyed them and referred to her as "grandma." (L.F. 48).

Termination of Parental Rights Procedural History

A Petition to Terminate Parental Rights with respect to the child was filed on June 9, 2014. (L.F. at 56) A First Amended Petition, naming Father as a party to the action, was not filed until July 2, 2015, more than one year later. (L.F. at 60). Following the filing of the First Amended Petition, the matter was set for a trial on September 3, 2015. (L.F. at 61). Father filed an Application for Writ of Habeas Corpus Ad Testificandum on

July 15, 2015 for Father's appearance at the September trial date. (L.F. at 61; L.F. at 89). Father's application was approved and the Court executed a Writ permitting Father to appear in person at trial. (L.F. at 61; 90). The trial date was subsequently continued to November 6, 2015 and then again to December 8, 2015. (L.F. at 62).

Father again filed an Application for Writ of Habeas Corpus Ad Testificandum for the December trial date on November 13, 2015. (L.F. at 63). In response to Father's Application, the trial court entered a Writ permitting Father to appear by video conference at trial. (L.F. at 63). Father filed Suggestions in Support and a Motion for Reconsideration of the Court's determination that Father would not be permitted to appear in person at trial, said motion was denied by the trial court. (L.F. at 63 and 93). At the hearing on Father's Motion for Reconsideration, the trial court opined that it was concerned about "protecting taxpayer's dollars and the time and expense involved in transporting an inmate." (Tr. I 166:5-6). Father subsequently sought Writs of Prohibition and Mandamus in the Southern District Court of Appeals and in this Court requiring the trial court to permit Father's personal appearance at trial, both of which were denied.

Father filed a Motion for Continuance of the December trial setting for the reason that the trial court's determination of the issue of placement of the minor child with paternal grandmother had not been made, and that the determination of that motion had significant bearing on the outcome of the termination trial. (L.F. at 63; 98). Father's Motion for Continuance was denied. (L.F. at 64). The Court permitted counsel for Father to have a ten minute recess to review the Court's previously unreleased ruling. (Tr. II 5:21-23)

Father filed a Motion for Change of Judicial Officer after reviewing the court's ruling on placement. (See L.F. at 101; Tr. II 6:6 – 9:6)². The motion was based upon the fact that the Court had ruled that moving the child from his foster home would be contrary to the child's best interests, a finding that indicated the trial court had predetermined the issue of best interests of the child vis-à-vis the Termination of Parental Rights Petition. (Tr. II 6:6-24). Said motion was denied. (Tr. II 8:22)

At trial, the Father restated his objection to proceeding with his participation being limited to video conference. (Tr. II 9:24- 10:9). On several occasions, the trial court permitted breaks during which the courtroom was cleared and counsel was permitted to converse with Father. Following one such break, a record was made that Father and counsel were not able to communicate confidentially due to the presence of guards and DOC personnel at Father's location, and Father reiterated his objection to conducting the trial via polycom. (Tr. II 40:23-41:5).

Before proceeding with evidence on the Petition, Father made a record of his objection to the constitutionality of RSMo 211.447.5(6)(a) on the grounds that said statute as applied in the current proceedings is unconstitutionally vague and violates Father's rights to due process under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Missouri Constitution. (Tr. II 10:11 – 12:22)

² Although this written motion was submitted in open court and is referenced in the Judgment and Order as well as in the Transcript, it does not appear to have ever been placed in the Court's file.

Trial was concluded on December 8, 2015. (L.F. at 64) The Judgment and Order Terminating Parental Rights was filed on February 5, 2016. (Id.) A Motion for New Trial was filed on March 7, 2016 and was heard on March 17, 2016. (Id.) The Motion for New Trial was denied, but Father was permitted to submit an exhibit listing his NA/AA attendance record as an offer of proof. (Id.) A Notice of Appeal was filed with the trial court on March 25, 2016. (L.F. at 65)

POINT 1

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis that Father is unfit to be a party to the parent-child relationship pursuant to RSMo 211.447.5(6)(a) because said statute is unconstitutionally vague as applied in the present case in that Father's alleged unfitness is inextricably tied to his incarceration and RSMo 211.447.7(6) explicitly provides that incarceration alone shall not be grounds for termination of parental rights.

Board of Education of St. Louis v. State, 47 S.W.3d 366 (Mo. 2001)

POINT 2

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis that Father is unfit to be a party to the parent-child relationship pursuant to RSMo 211.447.5(6)(a) because said conclusion is not supported by substantial evidence in that no evidence of any "specific abuse" committed by Father was presented.

In re the Adoption of C.M.B.R., 332 S.W.3d793 (Mo. Banc 2011)

J.A.R. v. D.G.R., 426 S.W.3d 624 (Mo. Banc 2014)

POINT 3

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis that Father is unfit to be a party to the parent-child relationship pursuant to RSMo 211.447.5(6)(a) because said conclusion is against the weight of the evidence in that Father suggested a relative who was fit, willing and able to provide necessary care, custody and control of the child during Father's incarceration and that the Children's Division recommended placement of the child with the child's relative, to whom the child was bonded.

In the interest of Z.L.R., 347 S.W.3d 601 (Mo.App. SD 2011)

POINT 4

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis that Father neglected the minor child pursuant to RSMo 211.447.5(2) because said conclusion is not supported by substantial evidence in that 1) evidence of criminal convictions for acts occurring prior to the birth of the minor child is insufficient to prove an untreatable chemical dependency that prevents Father from providing necessary care, custody and control of the minor child and no further evidence of a substance abuse evaluation or diagnosis of an untreatable chemical dependency was presented, and 2) no evidence was presented that Father failed to do anything within his physical or financial ability to provide the minor child with adequate food, clothing, shelter or education as defined by law, or other care and control necessary for the child's physical, mental or emotional health and development.

In the Interest of D.D.C., 351 S.W.3d 722 (Mo.App. WD 2011)

In the Interest of X.D.G., 341 S.W.3d 755 (Mo.App. SD 2011)

POINT 5

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis that Father neglected the minor child pursuant to RSMo 211.447.5(2) because said conclusion is against the weight of the evidence in that Father suggested a relative who was fit, willing and able to provide necessary care, custody and control of the child during Father's incarceration and that the Children's Division recommended placement of the child with the child's relative, to whom the child was bonded.

In the interest of Z.L.R., 347 S.W.3d 601 (Mo.App. SD 2011)

POINT 6

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis of a failure to rectify the conditions which led to the minor child coming into State custody pursuant to 211.447.5(3) because said conclusion is not supported by substantial evidence in that 1) evidence of criminal convictions for acts occurring prior to the birth of the minor child is insufficient to prove an untreatable chemical dependency that prevents Father from providing necessary care, custody and control of the minor child and no further evidence of a substance abuse evaluation or diagnosis of an untreatable chemical dependency was presented, and 2) no evidence was provided of any failure on the part of the Father to complete any aspect of his treatment plan.

In the Interest of D.D.C., 351 S.W.3d 722 (Mo.App. WD 2011)

In the Interest of X.D.G., 341 S.W.3d 755 (Mo.App. SD 2011)

POINT 7

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis of a failure to rectify the conditions which led to the minor child coming into State custody pursuant to 211.447.5(3) because said conclusion is against the weight of the evidence in that Father suggested a relative who was fit, willing and able to provide necessary care, custody and control of the minor child and that the Children's Division recommended placement of the child with the child's relative, to whom the child was bonded.

In the interest of Z.L.R., 347 S.W.3d 601 (Mo.App. SD 2011)

POINT 8

The trial court erred in terminating Father's parental rights because the trial court relies upon conduct of the Father which preceded the birth of the minor child and failed to explicitly address the likelihood of future harm to the child in that the trial court's findings on the issue merely restate the alleged statutory grounds for termination and do not reflect how said condition reflect a significant likelihood of future harm.

In the Interest of K.A.W., 133 S.W.3d 1 (Mo. 2004)

POINT 9

The trial court erred in denying Father's request for a Writ of Habeas Corpus Ad Testificandum permitting him to appear in person at trial because said denial deprives Father of due process of law in violation of the 5th and 14th Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution in that 1) Missouri law provides for a parent to personally appear at a Chapter 211 Termination of Parental Rights hearing if the parent is incarcerated in the Missouri Department of Corrections, 2) Father's right to effective assistance of counsel was compromised due to his inability to communicate with counsel in real-time during the presentation of evidence, and 3) Father was denied the ability to confidentially communicate with counsel via video conferencing due to the presence of Department of Corrections personnel at Father's location.

In re J.F., 113 AS.W.3d 198 (Mo.App. SD 2003)

POINT 10

The trial court erred in denying Father's written Motion for Continuance of the December 8, 2016 trial setting because said denial was an abuse of discretion in that counsel for Father was not made aware of the trial court's written decision on Father's Motion for Placement with Paternal Grandmother until the time of trial and counsel for father was given only a ten minute recess to review said decision which had substantial bearing upon issues in the Termination proceeding.

In the Interest of J.R., 347 S.W.3d 641 (Mo.App. ED 2011)

POINT 11

The trial court erred in denying Father's request for a change of judge because said denial misapplied the law in that Missouri law requires recusal when there is a question as to the impartiality of the judiciary.

Grissom v. Grissom, 886 S.W.3d 47 (Mo.App. WD 1994)

POINT 12

The trial court erred in concluding that termination of Father's parental rights was in the best interests of the minor child because said conclusion was an abuse of the trial court's discretion in that 1) Father was denied multiple requests to have visitation with the minor child in order to develop a bond, and 2) Father suggested a relative who was fit, willing and able to provide necessary care, custody and control of the minor child and Children's Division recommended placement of the child with the child's relative, to whom the child was bonded.

In the Interest of A.S., 38 S.W.3d 478 (Mo.App. SD 2001)

J.A.R. v. D.G.R., 38 S.W.3d 478 (Mo. Banc 2014)

ARGUMENT 1

The trial court erred in concluding that statutory grounds exist for termination of Father’s parental rights on the basis that Father is unfit to be a party to the parent-child relationship pursuant to RSMo 211.447.5(6)(a) because said statute is unconstitutionally vague as applied in the present case in that Father’s alleged unfitness is inextricably tied to his incarceration and RSMo 211.447.7(6) explicitly provides that incarceration alone shall not be grounds for termination of parental rights.

Standard of Review

This Court has stated that constitutionality challenges on the basis of vagueness are guided as follows:

A statute is presumed to be constitutional and will not be invalidated unless it “clearly and undoubtedly” violates some constitutional provision and “palpably affronts fundamental law embodied in the constitution.” The burden to prove a statute unconstitutional is upon the party bringing the challenge. The standard for determining whether a statute is void for vagueness is whether the terms or words used are of “common usage and are understandable by persons of ordinary intelligence.” “Where, however, the statutory terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, the statute is void.”

Board of Education of St. Louis v. State, 47 S.W.3d 366 (Mo. 2001)

Argument

Father contends that RSMo 211.447.5(6)(a) is unconstitutionally vague as applied to the present case in that the trial court's judgment seeks to establish grounds for termination of his parental rights based upon "parental unfitness" inextricably linked to Father's incarcerated status. However, RSMo 211.447.7(6) directly conflicts with the trial court's application of 211.447.5(6)(a) in that it states that incarceration alone shall not be grounds for termination of parental rights. Accordingly, to the extent that 211.447.5(6)(a) can be read to equate incarceration with parental unfitness, it is unconstitutionally vague and thus, void.

RSMo 211.447.5(6)(a) provides that parental rights may be terminated upon a showing that:

The parent is unfit to be a party to the parent and child relationship because of a consistent pattern of committing a specific abuse including, but not limited to, specific conditions directly relating to the parent and child relationship which are determined by the court to be of a duration or nature that renders the parent unable for the reasonably foreseeable future to care appropriately for the ongoing physical, mental, or emotional needs of the child.

RSMo 211.447.7(6) is one of the factors that the trial court must consider, if applicable, when determining whether termination of parental rights is in the best interests of the child. It provides that the trial court shall consider:

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

In this case, the trial court made findings with respect to 211.447.5(6)(a) as follows:

- 1) Father has been incarcerated all of the child's lifetime;
- 2) Father has not had any physical contact with the child;
- 3) Child does not know who the Father is;
- 4) Child does not have a bond with Father;
- 5) Father's volitional criminal activity caused him to be incarcerated;
- 6) Child calls his foster parents "Mom" and "Dad";
- 7) Creation of a bond between Child and Father would "take too long."

Father respectfully suggests that each and every of these factors are inextricably tied to his incarceration considering that Father's requests for visitation were denied due to the distance between the Child's foster home and Father's Department of Corrections institution. (L.F. at 34; Tr. I 48:2 – 51:6; 56:22 – 58:12)

The trial court's finding regarding 211.447.7(6) declares, "The Court shall not terminate the father's parental rights solely because the father is incarcerated." (L.F. 110) This unequivocal statement, however, is belied by the fact that the direct consequences of Father's incarceration are used to justify termination. The trial court appears to apply 211.447.5(6)(a) in such a manner as to essentially say that parental rights are not being

terminated because of Father's incarceration; rather, parental rights are being terminated because Father lives in an institution that he cannot leave, that has restrictive rules regarding contact with his child and is too far away from the child to justify even a single parent-child visit in 18 months. This incomprehensible attempt to harmonize 211.447.5(6)(a) with the remainder of 211.447 is only possible due to impermissibly vague drafting by the Legislature.

Father respectfully suggests that a person of reasonable intelligence cannot determine when and if the State can impose a termination of parental rights based upon parental unfitness in RSMo 211.447.6(a). The penalty that the State seeks to impose not only impedes, but forever severs, a relationship the preservation of which is considered to be a fundamental constitutional right, accordingly Father's right to due process of law pursuant to the 5th and 14th Amendments to the U.S. Constitution and Article I Section 10 of the Missouri Constitution is violated.

Conclusion

RSMo 211.447.5(6)(a) is unconstitutionally vague. Accordingly, the trial court's Judgment basing termination of parental rights upon such grounds should be reversed.

ARGUMENT 2

The trial court erred in concluding that statutory grounds exist for termination of Father’s parental rights on the basis that Father is unfit to be a party to the parent-child relationship pursuant to RSMo 211.447.5(6)(a) because said conclusion is not supported by substantial evidence in that no evidence of any “specific abuse” committed by Father was presented.

Standard of Review

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

In terminating parental rights, “the trial court must find by clear, cogent, and convincing evidence that one or more grounds for termination exist under subsections 2, 3, or 4 of section 211.447 and 2) the trial court must find that termination is in the best interests of the [child].” In re P.L.O., 131 S.W.3d 782, 788 (Mo. Banc 2004). “The clear, cogent, and convincing standard of proof is met when evidence ‘instantly tilts[s] the scales in the affirmative when weighed against the evidence in opposition and the fact finder’s mind is left with an abiding conviction that the evidence is true.’” In re Adoption of W.B.L., 681 S.W.2d 452, 454 (Mo. Banc 1984).

This Court reviews whether clear, cogent, and convincing evidence was presented to support a statutory ground for terminating parental rights

under Murphy v. Carron, 536 S.W.2d 30 (Mo. Banc 1976). In re P.L.O., 131 S.W.3d at 788-789. Therefore, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy, 536 S.W.2d at 32. The judgment will be reversed "only if we are left with a firm belief that the order is wrong." In re S.M.H., 160 S.W.3d 355, 362 (Mo. Banc 2005).

Conflicting evidence will be reviewed in the light most favorable to the trial court's judgment. Id. at 62. Appellate courts will defer to the trial court's credibility assessments. In re Adoption of W.B.L., 681 S.W.2d at 455. When the evidence poses two reasonable but different inferences, this Court is obligated to defer to the trial court's assessment of the evidence. Washington v. Barnes Hosp., 897 S.W.2d 611, 615 (Mo. Banc 1995). "Greater deference is granted to a trial court's determinations in custody and adoption proceedings than in other cases." In re S.L.N., 167 S.W.3d at 741.

After this Court determines that one or more statutory ground has been proven by clear, convincing, and cogent evidence, this Court must ask whether termination of parental rights was in the best interest of the child. In re P.L.O., 131 S.W.3d at 789. At the trial level, the standard of proof for this best-interest inquiry is a preponderance of the evidence; on appeal, the standard of review is abuse of discretion.

Lower courts in Missouri have suggested that a three-step process is required to demonstrate that a proposition is not supported by substantial evidence:

- 1) Identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
- 2) Identify all of the favorable evidence in the record supporting the existence of that proposition;
- 3) Demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, does not have probative force upon the proposition such that the trier of fact could not reasonably decide the existence of the proposition.

Houston v. Crider, 317 S.W.3d 178, 187 (Mo.App SD 2010).

While this analytical framework has never been explicitly adopted by this Court, Appellant herein will follow it for ease of analysis.

Argument

RSMo 211.447.5(6)(a) requires evidence of a “consistent pattern of committing a specific abuse.” The evidence in favor of this finding is that Father has been incarcerated for the Child’s entire lifetime and has not developed a bond or relationship with the Child.

Father respectfully submits that evidence of incarceration and the concomitant restrictions on contact between Father and Child does not rise to the level of abuse. RSMo 211.447.5(6)(a) specifically refers to abuse, not neglect. Missouri Courts,

including this Court, have historically found that parental absence equates to neglect of a child rather than abuse. See, J.A.R. v. D.G.R., 426 S.W.3d 624, 630 (Mo. Banc 2014) (Adopting usage of definition of neglect from RSMo 210.110(12)). Abuse is defined as “any physical injury, sexual abuse, or emotional abuse inflicted on a child other than by accidental means by those responsible for the child's care, custody, and control, except that discipline including spanking, administered in a reasonable manner, shall not be construed to be abuse.” RSMo 210.110(1). Neglect, a distinct concept, is defined as “failure to provide, by those responsible for the care, custody, and control of the child, the proper or necessary support, education as required by law, nutrition or medical, surgical, or any other care necessary for the child's well-being.”

In this case, Father has never been afforded the opportunity to meet his son, despite his repeated requests. To conclude that his separation from his son, enforced by the State, is an act of abuse is not supported by fact or logic.

Conclusion

The trial court's findings of parental unfitness are not supported by substantial evidence. Accordingly, the trial court's Judgment should be reversed.

ARGUMENT 3

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis that Father is unfit to be a party to the parent-child relationship pursuant to RSMo 211.447.5(6)(a) because said conclusion is against the weight of the evidence in that Father suggested a relative who was fit, willing and able to provide necessary care, custody and control of the child during Father's incarceration and that the Children's Division recommended placement of the child with the child's relative, to whom the child was bonded.

Standard of Review

The standard of review is the same as Point 2 above, except that a four-step process is used to challenge a finding of the trial court as being against the weight of the evidence:

- 1) Identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
- 2) Identify all of the favorable evidence in the record supporting the existence of that proposition;
- 3) Identify the evidence in the record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and,
- 4) Demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value,

when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition.

Houston v. Crider, 317 S.W.3d 178, 187 (Mo.App SD 2010).

Argument

To sustain the finding of parental unfitness the trial court must find that the parent is unable to care for the ongoing physical, mental and emotional needs of the child. The evidence favorable to this finding is the same as discussed in Point 2, that Father was incarcerated for the entirety of the Child's life and has no bond with the Child.

The contrary evidence in the record is the fact that Father had relatives who were fit, willing and able to provide for the Child during his period incarceration. This evidence was presented at the Termination trial and in the extensive evidentiary hearing on the placement issue also heard and decided by the trial court. Father respectfully suggests that there are no credibility determinations to resolve, in that he is relying here upon the trial court's own findings concerning the appropriateness of the Paternal Grandmother to provide care for the child. The trial court found that there was an approved homestudy for the grandmother and that the child was having overnight visitation with her by the time of the evidentiary hearing on Father's placement motion. (L.F. 48)

At trial, Respondent relied primarily upon the Southern District Court of Appeals decision In the Interest of Z.L.R., 347 S.W.3d 601 (Mo.App. SD 2011) for authority that RSMo 211.447.5(6)(a) provides appropriate grounds for termination of an incarcerated

parent's parental rights. While Father maintains that Z.L.R. was improperly decided for the same reasons as articulated in Point 1 and 2 above, further factual distinctions exist which justify deviation from the analysis therein. Specifically, in Z.L.R. the Father's suggested relatives were found by the court to be inappropriate for placement based upon "major health issues" that rendered the relative "unable to physically care for the child." Z.L.R., 347 S.W.3d at 604.

In this case, there was no such finding that paternal grandmother is unable to provide for the ongoing physical, mental and emotional needs of the Child during Father's absence due to incarceration. While the trial court may have found that it preferred the home of the foster placement rather than the biological family, the existence of appropriate relatives is highly probative to the determination of grounds for termination of Father's parental rights. The evidence at trial demonstrated that the paternal grandmother was providing extended periods of daycare for the Child during the week and had overnight visitation. Father repeatedly informed the Court that he desired for the Child to be placed with the Grandmother until his release. Father respectfully suggests that the provision of parental support via surrogates during his incarceration belies the finding that he is unfit.

Conclusion

The trial court's findings of parental unfitness are against the weight of the evidence. Accordingly, the trial court's Judgment should be reversed.

ARGUMENT 4

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis that Father neglected the minor child pursuant to RSMo 211.447.5(2) because said conclusion is not supported by substantial evidence in that 1) evidence of criminal convictions for acts occurring prior to the birth of the minor child is insufficient to prove an untreatable chemical dependency that prevents Father from providing necessary care, custody and control of the minor child and no further evidence of a substance abuse evaluation or diagnosis of an untreatable chemical dependency was presented, and 2) no evidence was presented that Father failed to do anything within his physical or financial ability to provide the minor child with adequate food, clothing, shelter or education as defined by law, or other care and control necessary for the child's physical, mental or emotional health and development.

Standard of Review

The standard of review is the same as that stated in Point 2.

Argument

To establish grounds for termination of parental rights under RSMo 211.447.5(2), clear, cogent and convincing evidence of at least one factor listed in subsection (a)-(d) must be presented to the trial court, and findings consistent with those factors must appear in the trial court's judgment. In this case, the trial court made findings with respect to Father that subsection (a) and (d) were applicable.

Untreatable Chemical Dependency

RSMo 211.447.5(2)(a) requires proof of the existence of an untreatable chemical dependency that impacts parenting. The favorable evidence presented at trial was that Father had numerous criminal convictions for alcohol and other substance related offenses and a reasonable inference that Father abused alcohol as recently as July, 2013. The trial court also found that it did not believe testimony provided by the Case Manager that Father had attended NA/AA meetings. Father respectfully suggests that this evidence alone is insufficient to support the requisite finding.

First, it is insufficient to merely demonstrate the existence of a chemical dependency, rather, the evidence must show that the chemical dependency is untreatable. In this case, no evidence was presented that Father was ever requested to undergo a substance abuse evaluation. Accordingly, no expert testimony regarding the existence of a chemical dependency was presented. No evidence was presented that Father was ever asked to attend substance abuse treatment.

Father suggests that the Western District Court of Appeals decision In the Interest of D.D.C., 351 S.W.3d 722, 731 (Mo.App. WD 2011) is persuasive authority here wherein it held, “Absent evidence of a service plan, a drug or alcohol assessment, a request or an attempt at treatment, the record lacks clear, cogent and convincing evidence that Father had a chemical dependency which cannot be treated.” In D.D.C., the Father tested positive for methamphetamine use within the 90 day period preceding trial. Id at 730. Nevertheless, the appellate court determined that the failure to present evidence of a

request for treatment precluded a finding of an untreatable chemical dependency. Id at 730-731.

In this case, the Children's Division Case Manager testified that she never talked with Father about why he was attending NA/AA meetings. The record is simply devoid of any evidence that Father's alleged chemical dependency was of such a severity, or that it was taken seriously by the Children's Division in developing its treatment plan, that it should serve as the basis for termination of his parental rights.

Furthermore, while the trial court was free to disregard some or all of any witnesses testimony, "disregarding evidence favorable to Father is not the equivalent of finding evidence against Father." In the Interest of X.D.G., 341 S.W.3d 755, 761 (Mo.App. SD 2011). In this case, the trial court attempts to do precisely that; find that Father failed to attend NA/AA meetings or otherwise seek treatment based upon a finding that it did not believe the testimony of the Case Manager. (L.F. 104). Again, there was no evidence of any request for treatment or assessment from the State.

Finally, all of the criminal convictions upon which the Court relies to establish an untreatable chemical dependency occurred months and years prior to the birth of the Child. No evidence was presented that the alleged chemical dependency prospectively impacted his ability to provide care, custody and control of the Child.³

Failure to Provide

RSMo 211.447.5(2)(d) requires a finding that there was a "continuous failure by the parent, although physically or financially able, to provide the child with adequate

³ See Point 8 *infra*.

food, clothing, shelter, or education as defined by law, or other care and control necessary for the child's physical, mental, or emotional health and development." As best as Father can read the trial court's Judgment on this issue, the favorable evidence presented at trial was that Father was incarcerated for the entirety of the child's lifetime and, accordingly, cannot provide suitable housing or sufficient financial support for the Child.

The evidence relied upon by the trial court on this issue is clearly insufficient in that it ignores the statutory requirement that any failure to provide must be predicated by a physical and financial ability to provide. If anything, the evidence presented at trial indicates that Father did everything within his limited physical and financial ability to provide for the Child. Stated alternatively, no evidence was presented that Father failed to do anything within his ability to provide.

Again, the trial court claims to find evidence against the Father by claiming that there was "no credible testimony or evidence that the father is capable of providing a stable, safe, appropriate residence for the child." (L.F. 105). This analysis ignores the burden of proof that rests upon the State to offer evidence that instantly tilts the scales in favor of termination.

Conclusion

The trial court's findings of neglect are not supported by substantial evidence. Accordingly, the trial court's Judgment should be reversed.

ARGUMENT 5

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis that Father neglected the minor child pursuant to RSMo 211.447.5(2) because said conclusion is against the weight of the evidence in that Father suggested a relative who was fit, willing and able to provide necessary care, custody and control of the child during Father's incarceration and that the Children's Division recommended placement of the child with the child's relative, to whom the child was bonded.

Standard of Review

The standard of review is the same as that stated in Point 3.

Argument

The argument and analysis is the same as that stated in Point 3 in that the allegations of neglect, just as the allegations of parental unfitness, are belied by the existence of fit and appropriate relatives or surrogates who can provide care, custody and control of the child during periods of parental incarceration.

Conclusion

The trial courts findings of neglect are against the weight of the evidence. Accordingly, the trial court's Judgment should be reversed.

ARGUMENT 6

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis of a failure to rectify the conditions which led to the minor child coming into State custody pursuant to 211.447.5(3) because said conclusion is not supported by substantial evidence in that 1) evidence of criminal convictions for acts occurring prior to the birth of the minor child is insufficient to prove an untreatable chemical dependency that prevents Father from providing necessary care, custody and control of the minor child and no further evidence of a substance abuse evaluation or diagnosis of an untreatable chemical dependency was presented, and 2) no evidence was provided of any failure on the part of the Father to complete any aspect of his treatment plan.

Standard of Review

The standard of review is the same as that stated in Point 2.

Argument

The trial court made findings that Father failed to rectify the conditions which led to the Child coming into State's custody. Specifically, the Court found that Father suffered from an untreatable chemical dependency. (L.F. at 107).

The analysis and argument on the issue of an untreatable chemical dependency is the same as that stated in Point 4. However, the Court's findings on this ground further highlight the deficiencies in the evidence presented at trial. Specifically, the Court makes a finding against the Mother that she failed to submit to a substance abuse evaluation and failed to submit to drug testing. (L.F. at 106-107). The trial court made no such findings

as to the Father because no such requests were made of him, nor were these activities included in his treatment plan. Simply stated, no evidence was presented that would establish that Father suffered from a chemical dependency that was 1) untreatable, or 2) that impacted his parenting abilities.

Furthermore, no evidence was presented that Father failed in any substantial way to complete any item on his treatment plan. Indeed, a reading of the trial court's findings on this issue in comparison to the trial court's findings regarding the same for Mother reveals that Father was in substantial compliance. (L.F. 106-107). The evidence is simply insufficient to establish that the Father suffered from an untreatable chemical dependency, or that he failed to rectify such an alleged dependency.

Conclusion

The trial court's findings of a failure to rectify the conditions that brought the Child into State custody was not supported by substantial evidence. Accordingly, the trial court's Judgment should be reversed.

ARGUMENT 7

The trial court erred in concluding that statutory grounds exist for termination of Father's parental rights on the basis of a failure to rectify the conditions which led to the minor child coming into State custody pursuant to 211.447.5(3) because said conclusion is against the weight of the evidence in that Father suggested a relative who was fit, willing and able to provide necessary care, custody and control of the minor child and that the Children's Division recommended placement of the child with the child's relative to whom the child was bonded.

Standard of Review

The standard of review is the same as that stated in Point 3.

Argument

To the extent that the trial court's findings rest upon the fact that the Child was brought into State's custody due to Father's inability to provide the Child with a home due to his incarceration and that the Father remains incarcerated at the time of the termination trial, Father suggests that such a finding is against the weight of the evidence in that he suggested relatives who were fit and willing to provide a home and parental support during his absence.

The argument and analysis is essentially the same as stated in Point 3. Evidence in favor of the finding is that Father is and was incarcerated. Contrary evidence, based upon the trial court's own findings in the companion case, is that the paternal grandmother's home was appropriate for the Child. Father respectfully suggests that he did what he was

able to do to provide that his son's needs would be met in his absence. Accordingly, a finding of a failure to rectify is inappropriate in the circumstances.

Conclusion

The trial court's finding of Father's failure to rectify the conditions which brought the Child into State custody was against the weight of the evidence. Accordingly, the trial court's Judgment should be reversed.

ARGUMENT 8

The trial court erred in terminating Father's parental rights because the trial court relies upon conduct of the Father which preceded the birth of the minor child and failed to explicitly address the likelihood of future harm to the child in that the trial court's findings on the issue merely restate the alleged statutory grounds for termination and do not reflect how said condition reflect a significant likelihood of future harm.

Standard of Review

The standard of review is the same as that stated in Point 2.

Argument

This Court's decision In the Interest of K.A.W. establishes that a trial court must find a likelihood of future harm to the child if parental rights are not terminated, specifically:

An essential part of any determination whether to terminate parental rights is whether, considered at the time of the termination and looking to the future, the child would be harmed by a continued relationship with the parent. Past behavior can support grounds for termination, but only if it is convincingly linked to predicted future behavior. 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.

However, it is insufficient merely to point to past acts, note that they resulted in abuse or neglect and then terminate parental rights. Past behavior can support grounds for termination, but only if it is convincingly linked to predicted future behavior. There must be some explicit consideration of whether the past acts provide an indication of the likelihood of future harm.

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

The trial court's findings on this issue are conclusory in nature and merely restate the alleged statutory grounds for termination. Specifically, they state as follows:

There is significant likelihood of future harm to the child if parental rights are not terminated because of the continuing abandonment by the mother, by the continuing neglect of the child by the mother and by the father, the mother's and father's failure to rectify the circumstances that caused the child to come into care, and the mother failure and the father's failure to demonstrate an ability or willingness to provide the child with appropriate care and parenting.

(L.F. at 107-108)

The trial court's judgment is devoid of any reference to conduct by the Father subsequent to the assumption of jurisdiction that would indicate a likelihood of future behavior that would be harmful to the Child. Indeed, the findings indicate that Father took steps to take classes and programs while incarcerated and suggested relatives who were determined to be safe and appropriate caregivers for the Child during Father's incarceration. Further, the trial court's decision to disregard favorable evidence concerning Father does not equate to a finding of evidence against the Father.

Finally, Father suggests that the trial court's reliance upon Father's criminal activity as the being the basis for termination of parental rights is belied by the Legislature's specific identification of crimes which, in and of themselves, shall serve as grounds for termination. *See*, RSMo 211.447.5(4), 211.447.5(5) and 211.447.5(6)(d). Father was not convicted of any of the crimes listed in these statutes.

Conclusion

No substantial evidence was presented that there is a likelihood of future harm to the Child if Father's parental rights were left intact. Accordingly, the trial court's Judgment should be reversed.

ARGUMENT 9

The trial court erred in denying Father’s request for a Writ of Habeas Corpus Ad Testificandum permitting him to appear in person at trial because said denial deprives Father of due process of law in violation of the 5th and 14th Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution in that 1) Missouri law provides for a parent to personally appear at a Chapter 211 Termination of Parental Rights hearing if the parent is incarcerated in the Missouri Department of Corrections, 2) Father’s right to effective assistance of counsel was compromised due to his inability to communicate with counsel in real-time during the presentation of evidence, and 3) Father was denied the ability to confidentially communicate with counsel via video conferencing due to the presence of Department of Corrections personnel at Father’s location.

Standard of Review

The standard of review is the same as that stated in Point 2.

Argument

Under Missouri law a parent has the right to be present at a termination of parental rights hearing. *In re J.F.*, 113 S.W.3d 698, 700 (Mo. App., 2003). The right of a parent to be present at a termination of parental rights hearing is recognized by Supreme Court Rules 110, 122, and 125. Rules 110.04(19) and (20) defines a “party” to include, among other things, a parent. Rules 125.03a(1), (2), and (3) require the issuance and service of summons upon the parties to proceed on a termination of parenteral rights. Rule 122.01j states “Any party entitled to summons shall have the right to attend all hearings to which

the summons relates unless specifically excluded pursuant to Rule 122.01g.” In this case, summons was issued for Father on July 5, 2015 (L.F. 60) (although it was recalled that same day), and no party was specifically excluded pursuant to Rule 122.01g.

The right of a parent to be present at a termination of parental rights hearing includes incarcerated parents, but an incarcerated parent is obligated to request to be present pursuant to RSMo. 491.230.2(1). In re J.F., 700. In this case Father made such a request – in fact he made the request three times, requesting to be present pursuant to a writ on July 15, 2015 (L.F. 89), November 13, 2015 (L.F. 90) and November 28, 2105 (L.F. 93). On July 15, 2015 Father filed a request to be present pursuant to a writ for a hearing then scheduled for September 3, 2015, which was granted by the Court on July 20, 2105 (L.F. 61).. On November 13, 2015 Father filed a request to be present pursuant to a writ for a hearing then scheduled for December 8, 2015. A writ was executed by the Court on November 25, 2015, but not for Father to attend in person, but rather to participate via video conference. On November 28, 2015 Father filed Suggestions in Support of his request to appear in person, rather than by video conference, which was denied by docket entry on December 1, 2015, with the trial court opining that his concerns regarding preservation of “taxpayer dollars” outweighed Father’s rights (L.F. 63; Tr I 166:5-6).

Counsel could not find any Missouri cases directly on point – instead two cases were found addressing the issue, but those cases did not involve a timely request for a writ. *See In re J.F.*, 113 S.W.3d 698, 700 (Mo. App., 2003) (No application for writ was made by the parent) and In the Interest of: C.M.D. and S.D., 18 S.W.3d 556 (Mo.

App.W.D., 2000) (The parent made their request for writ on the day prior to trial). There is, however, a Kansas case, decided on due process grounds, for which the logic, if not the holding, would apply to the case at hand. In In re S.M., 12 Kan. App.2d 255, 738 P.2d 883 (1987) the Kansas Court of Appeals considered a termination of parental rights involving an incarcerated parent who had made a request to be present for the trial and found the failure to produce the parent for the trial was a denial of due process.

Participating in a termination trial via video conference is not an adequate remedy. Missouri law recognized the right of a parent to appear *in person*. In re J.F., 113 S.W.3d 698, 700 (Mo. App., 2003). In this case, Father could not have private conversations with his attorney as there was always Department of Corrections personnel in the room with him. (Tr. 40-41). Father could not give real-time feedback to his counsel as testimony was being presented. Father's ability to perceive the hearing and the demeanor of witnesses was impacted as he was limited to the functioning of the audio and video equipment. The trial court's ability to judge Father's credibility and demeanor was diminished compared to live and in-person testimony. These concerns, which directly impact the trial court's responsibility to protect Father's due process rights, far outweigh any interest the trial court may have had concerning use of taxpayer dollars. (Tr. I 166:5-6).

Conclusion

No compelling reason existed for not allowing Father to be brought from the Department of Corrections for the trial and therefore a new trial should be granted.

ARGUMENT 10

The trial court erred in denying Father's written Motion for Continuance of the December 8, 2016 trial setting because said denial was an abuse of discretion in that counsel for Father was not made aware of the trial court's written decision on Father's Motion for Placement with Paternal Grandmother until the time of trial and counsel for father was given only a ten minute recess to review said decision which had substantial bearing upon issues in the Termination proceeding.

Standard of Review

“The termination of parental rights is an exercise of awesome power that we do not review lightly. We balance our respect for the magnitude of this type of proceeding with the standard of review of a motion for continuance, which is for abuse of discretion. The denial of a request for a continuance is rarely reversible error; however, the trial court does not have absolute discretion. We will find an abuse of discretion occurred when the court enters an order that is clearly against the logic of the circumstances and is so arbitrary or unreasonable as to shock the sense of justice.” In the Interest of J.R., 347 S.W.3d 641, 645 (Mo.App. ED 2011).

Argument

Father respectfully suggests that the trial court's denial of Father's Motion for Continuance, filed in compliance with Supreme Court Rule 65.03, was an abuse of discretion.

At the time of trial on December 8, 2016 at 1:30 pm, a ruling on Father's Motion for Placement with Paternal Grandmother had not been entered. A ruling on that motion

was probative of a number of critical issues related to the statutory grounds for termination pled in Petitioner's pleadings, including grounds for termination under RSMo 211.447.5(2)(d) and RSMo 211.447.5(6)(a). Without the benefit of knowing whether the child would be placed with the paternal grandmother, Father argued that effective trial preparation was impossible. (L.F. 99). Father was also not permitted the opportunity to appeal the decision regarding placement before evidence on the Termination Petition was heard. (Tr. II 3:5-14). Although Father's counsel was given a ten-minute recess to review the previously unreleased written order before proceeding with trial, such relief was insufficient to properly protect Father's due process rights.

Father appeared at trial by video conference. The testimony at trial consisted of one witness, the Case Manager assigned by the Department of Social Services. The trial in the case had previously been continued at the request of the Juvenile Office and again by joint request of the parties. (L.F. 59, 62). These factors weigh against any determination that a continuance of the trial would cause any undue hardship or delay to any party.

Conclusion

The trial court abused its discretion in denying Father's Motion for Continuance. Accordingly, the Judgment should be reversed and remanded for a new trial.

ARGUMENT 11

The trial court erred in denying Father’s request for a change of judge because said denial misapplied the law in that Missouri law requires recusal when there is a question as to the impartiality of the judiciary.

Standard of Review

The standard of review is the same as that stated in Point 10.

Argument

The rules applicable to a change or recusal of judge in a juvenile proceeding are contained in Rule 121. Rule 121.02 governs a change of judge without cause, and generally requires the filing of a motion within a particular five-day time period. Father does not assert that he was entitled to a change of judge under Rule 121.02.

Rule 121.01 governs recusal of the judicial officer in a juvenile proceeding and states “a judicial officer shall recuse when the judicial officer is interested, related to a party, has been counsel for a party in any proceeding, or is recused for any other reason.” Rule 2-1.2 states “a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” The test is not whether actual bias and prejudice exist, but whether a reasonable person would have a factual grounds to doubt the impartiality of the court. Grissom v. Grissom, 886 S.W.3d 47, 56 (Mo.App.W.D.1994).

In this case Father had significant reason to question the impartiality of the judge assigned to his trial on the termination of his parental rights. In particular, the judge had

found, at a hearing prior to the hearing on the termination of parental rights, that the paternal grandmother of the child was an otherwise acceptable placement for the child, except that removing the child from the foster family would not be in the best interests of the child. In other words, the Court had decided that removing the child from the foster family to *any* other suitable placement was not in the child's best interests.

The question as to whether termination of parental rights is in the child's best interests is an essential finding in any termination proceeding, as this finding is required for termination by RSMo. 211.447.7. Here, the judge announced just prior to the beginning of the trial that he had made findings adverse to Father concerning this essential element. The idea that the judge would change his mind in the following few hours seems improbable.

Conclusion

Because the judge announced his ruling concerning a fundamental issue at hand just prior to the hearing on the termination of Father's parental rights, a reasonable person would have factual grounds to doubt the impartiality of the court and the judge should have recused himself as requested by Father. Accordingly, the trial Court's Judgment should be reversed.

ARGUMENT 12

The trial court erred in concluding that termination of Father’s parental rights was in the best interests of the minor child because said conclusion was an abuse of the trial court’s discretion in that 1) Father was denied multiple requests to have visitation with the minor child in order to develop a bond, and 2) Father suggested a relative who was fit, willing and able to provide necessary care, custody and control of the minor child and Children’s Division recommended placement of the child with the child’s relative, to whom the child was bonded.

Standard of Review

“In any termination of parental rights, the primary concern must be the best interest of the child. At the trial level, the standard of proof for this best-interest inquiry is a preponderance of the evidence; on appeal, the standard of review is abuse of discretion.” J.A.R., 426 S.W.3d at 632. Judicial discretion is abused when a court’s ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. In re A.S., 38 S.W.3d 478, 486 (Mo. App. S.D. 2001).

Argument

The trial court made findings as required by RSMo 211.447.7(1)-(7). The trial court’s findings with respect to factors (2), (3) and (7) are favorable to Father. Father admits that the court’s findings with respect to factor (6) are not favorable. Father disputes the court’s findings respecting factors (1), (4) and (5).

Factor (1) - Emotional Ties

Father admits that he has never met his son and that his written communications were never likely, on their own, to forge a bond or emotional tie with his very young child. This is precisely why he repeatedly requested in-person visitation. His requests were denied because the Court determined that Father's facility was too far to transport the child. Accordingly, it is hardly appropriate to charge the Father with responsibility for failing to establish a relationship with his son when the State is responsible for placing the barriers that prevented establishment of the parent-child relationship.

Moreover, Father consistently and repeatedly requested that his son be placed with the paternal grandmother during his incarceration. The trial court's findings indicate that a relationship was forged between the child and his grandmother as evidenced by her regular overnight visitation with the child. Clearly, Father did everything he could do to ensure that his son was provided for, both physically and emotionally, in his absence.

Factor (4) – Additional Services

As argued above, Father repeatedly requested in-person visitation with his son. He respectfully suggests here that such visitation is an additional service that would have aided in reunification of Father and Child. The testimony of the Case Worker tends to support this assertion in that she testified that there is no way to establish a bond without visitation and that a bond possibly could have been created if visitation had occurred. (Tr. II 38:1-4; 39:13-19) Accordingly, the trial court's finding that the case manager testified that no additional services could be provided is patently untrue.

Factor (5) – Interest and Commitment

The trial court's findings on this factor indicate that Father has demonstrated an interest in the Child. It criticizes Father, however, for not focusing on the "real, permanent interests of the child" by disagreeing with the trial court that the child is better off living with his foster parents rather than his biological family. The findings on this factor are simply unsupported by any evidence that would indicate that Father has not remained fully committed to the preservation of his relationship with his Child since learning of his birth.

Conclusion

When considering the totality of the factors enumerated in RSMo 211.447.7, the trial court abused its discretion in determining that termination of Father's parental rights was in the Child's best interests. Accordingly, the Judgment of the trial court should be reversed.

CONCLUSION

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

Respectfully Submitted,

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Certificate of Compliance

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

To the best knowledge and belief of the undersigned attorney, Appellant's Brief complies with the limitations contained in special rule 1(d) and specifically, pursuant to the word processing system of Appellant's counsel, there are 12,953 words contained in Appellant's brief.

/s/ Kristoffer R. Barefield
Kristoffer R. Barefield

Certificate of Service

This certifies that on September 20, 2016, a true and accurate copy of Appellant's Brief was filed with the Clerk of the Court by using the Missouri Courts eFiling System, which will send a notice of electronic filing to the following:

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