IN THE SUPREME COURT OF MISSOURI

IN THE INTEREST OF:	)	
	)	
T.T.G. & S.S.G	)	
	)	CASE NO. SC96153
K.S.G	)	
	)	
Appellant,	)	LOWER CASE NO. 1616-FC00267
	)	
v.	)	
	)	
WJK, *et al.*	)	
	)	
Respondents.	)	

Appeal to the Supreme Court of Missouri

from the Circuit Court of Jackson County, Missouri,
Sixteenth Judicial Circuit

The Honorable William R. Jackson, III, Circuit Court Commissioner, Division 40
and The Honorable David M. Byrn, Circuit Court Judge, Division 3
Circuit Court No. 1616-FC00267

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Appellant appeals the termination of her parental rights ("TPR") under Missouri Revised Statutes Section 211.447.5 on December 8, 2016, in the Family Court of Jackson County, Missouri. Jurisdiction is proper in this Court because Appellant challenges the validity of Section 211.447.5(6)(b)(a) RSMo. under Article V, Section 3 of the Missouri Constitution. The Missouri Supreme Court has exclusive jurisdiction to hear challenges to the validity of a Missouri Statute.

The statutory presumption in Section 211.447.5(6)(b)(a) RSMo., which sets forth a presumption of parental unfitness if a parent has had a previous involuntary termination of parental rights within the past three years, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 10 of the Missouri Constitution. Under both Federal and Missouri jurisprudence, a natural parent has a fundamental liberty interest in the care and upbringing of her children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *In re A.S.W.*, 137 S.W.3d 448, 453 (Mo. banc 2004) (noting "parental rights are a fundamental liberty interest").

The trial court summarily rejected Appellant's challenge to the constitutionality of the statute without analysis and applied the presumption in its final judgment, finding that Appellant failed "to rebut this presumption." LF at 72; A-15. Appellant's challenge raises a substantial question regarding the constitutionality of the statute as other states

have found similar presumptions to be unconstitutional. *See In re K.L.*, 759 S.E.2d 778 (W. Va. 2014) (finding that shifting the burden to parent due to prior termination violates due process); *New Jersey Div. of Youth & Family Servs. v. G.L.*, 926 A.2d 320, 325 (N.J. 2007) ("Presumptions of parental unfitness may not be used in proceedings challenging parental rights[.]" (alteration and quotation omitted)); *Florida Dept. of Children and Families v. F.L.*, 880 So.2d 602, 609 (Fla. 2004) (holding a presumption of unfitness violates constitutional requirements). In addition, this challenge is an issue of first impression as Appellant has not found any cases dealing with the constitutionality of the statute. *See Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 52 (Mo. banc 1999) ("One clear indication that a constitutional challenge is real and substantial and made in good faith is that the challenge is one of first impression with this Court.")[1]

This Court has exclusive jurisdiction to determine whether the presumption of parental unfitness created by Section 211.447.5(6)(b)(a) is constitutional, and to hear Appellant's other challenges regarding the insufficiency of evidence to support termination of the Appellant's parental rights by clear, cogent, and convincing evidence. *In re Estate of Wright*, 950 S.W.2d 530, 534 (Mo. App. W.D. 1997) ("The entire case

[1] Accordingly, Appellant's claim is substantial as it involves "fair doubt and reasonable room for controversy" as to whether the statute complies with due process requirements. *Kansas City Star Co. v. Shields*, 771 S.W.2d 101, 103 (Mo. App. W.D. 1989); *see also Glass v. First. Nat'l Bank of St. Louis, N.A.*, 186 S.W.3d 766, 766 (Mo. banc 2005).

must be transferred to the Supreme Court if any point on appeal involves" the validity of a statute).

Appellant timely filed the Notice of Appeal pursuant to Section 211.261 on January 6, 2017.

STATEMENT OF FACTS

Appellant is the biological mother of the two twins at issue in this matter: T.T.G., a girl born on April 21, 2015, and S.S.G, a girl born on April 21, 2015. LF at 59-60; A-2-A-3. Immediately following the birth of the twins, they were removed from Appellant while in the hospital by the Missouri Department of Social Services. TR at 61; A-3. The twins were removed because of concerns with Appellant's mental health and that she was not medically compliant with her mental health medication. TR at 83. Appellant had been previously diagnosed in 2012 with Schizoaffective Disorder. A-129. On June 3, 2015, the twins were placed in foster care with W.J.K and C.A.C.K ("Respondents"). TR at 63-64; A-133.

At the time Appellant gave birth to the twins, her three older children were under the jurisdiction of the court and in the care and custody of the Children's Division. A-126. The goal at that time for the three older children was adoption. *Id.* In case number 1516-FC04167, Commissioner William Jackson recommended that Appellant's parental rights be involuntarily terminated as to her three older children, and that recommendation was adopted and a Judgment was entered on August 31, 2016.[2] LF at 72; A-15; TR at 9. No appeal of that decision was filed.

[2] The trial court took judicial notice of several case files: 1216-JU000134, 1216-JU000135, 1216-JU000136, and 1516-FC4167 which related to the three older children, and 1516-JU000411, 1516-JU000412, which relate to the twins in this matter. LF at 59; A-2; TR at 9-10.

On January 12, 2016, W.J.K. and C.A.C.K. initiated a TPR and adoption action regarding the twins in case number 1616-FC00267. LF at 14. In their Second Amended Petition, Respondents sought termination of Appellant's parental rights and adoption of T.T.G. and S.S.G. LF at 15-20. The TPR grounds alleged against Appellant were abandonment under Section 211.447.5(1)(b)[3] abuse or neglect under Section 211.447.5(2)(a)(b)(d), failure to rectify under Section 211.447.5(3), parental unfitness under Section 211.447.5(6)(a), and a presumption of unfitness due to a prior involuntary termination of parental rights under Section 211.447.5(6)(b)(a).[4] LF at 17-19.

On July 15, 2016, Karema Luster, the Jackson County Children's Division children's service worker assigned to the family, submitted a termination of parental rights report ("TPR Report") on behalf of the Children's Division in which she recommended termination of the Appellant's parental rights to the twins. A-125-A-133. Ms. Luster indicated in her report that Appellant used less than the allotted time for her

[3] This claim was not addressed in the Findings of Fact and Conclusions of Law submitted by Commissioner Jackson.

[4] Respondents also alleged under Section 453.040(7) that Appellant had for the six months immediately preceding the filing of the Petition for Adoption willfully, substantially and continuously failed and neglected to provide the children with necessary care and protection. Because Respondents also asserted a termination of parental rights claim under chapter 211, all statutory requirements under chapter 211 must be met for the claim. *See In re Adoption of C.M.B.R.,* 332 S.W.3d 793, 807 (Mo. banc 2011).

visits with the twins and that she lacked the parenting skills to care for her children because of her mental health. A-132-A-133. Ultimately, Ms. Luster concluded that Appellant had "not made sufficient progress in regaining custody of the children nor is it feasible in the near future. [Appellant's] mental health is a barrier for reunification with her children." A-133.

A two-day bench trial was conducted on November 9 and 10, 2016 before The Honorable William R. Jackson, III.[5] TR at 2. Prior to the start of trial, Appellant filed a brief challenging the constitutionality of the presumption of unfitness pursuant to Section 211.447.5(6)(b)(a). LF at 30-36. The trial court allowed the parties to oppose Appellant's brief by November 21, 2016. TR at 208.

During the two-day trial, Respondents presented the testimony of Pamela Cobbins, a parent aide assigned to the family; Karema Luster; and C.A.C.K. and W.J.K., the Respondents. TR at 2. Appellant presented the testimony of Sarah Mehrer, a clinical case manager at ReDiscover Mental Health in Lee's Summit, Missouri who worked with Appellant; and Appellant. TR at 3.

The testimony and evidence revealed that following the removal of the twins in the hospital immediately after their birth, Appellant moved into the Oaks Residential

[5] Commissioner Jackson issued Findings and Recommendations on December 5, 2016. LF at 76; A-19. On December 6, 2016, Judge Byrn entered an Order and Judgment Adopting Commissioner's Findings and Recommendations. *Id.* Notice of Entry of Judgment was issued on December 8, 2016. *Id.*

facility to try to turn her life around and regain custody of her twin daughters. A-131; TR at 64-65, 69, 167-68. Appellant remained at the Oaks until July 2016 when she had progressed enough in her treatment to move into her own apartment. A-131, TR at 65, 69, 167-68.

While Appellant was living at the Oaks, she was assigned a parent aide by the name of Elisha Booker. TR at 84. Ms. Booker was the parent aide until April or May 2016 and she was charged with supervising the visits Appellant had with her twins. *Id.* Even though the TPR Report authored by Ms. Luster indicated that Appellant stayed less than the allotted times for her visits, Ms. Luster admitted during her testimony that the records of Ms. Booker indicated that Appellant always stayed for the entire visit. TR at 85-89; A-131. In fact, after reviewing the reports of Ms. Booker, Ms. Luster admitted that she failed to take into account the reports of Ms. Booker and that she based her conclusion in the TPR Report on some unsubstantiated conversation with Ms. Booker. TR at 89. The reports prepared by Ms. Booker demonstrate that the Appellant was affectionate with her children, she fed her children, and she cared for her children as you would expect a mother to do. TR at 85-90; A-20-A-80.

Ms. Booker was removed as the parent aide to Appellant in April or May 2016 and Pamela Cobbins assumed the responsibility as parent aide. TR at 84. The testimony of Ms. Cobbins and Ms. Luster revealed that Appellant and Ms. Cobbins got off to a difficult start. TR at 34-37. Ms. Cobbins believed that Appellant needed to show more affection to her children. TR at 37-38, 92-93. Ms. Cobbins worked with Appellant to

improve in this area, and in a matter of a few months Appellant was applying the techniques she had learned from Ms. Cobbins. TR at 38-43. In fact, Ms. Cobbins noted on multiple occasions in her testimony that Appellant was making progress with her children. TR at 41-43. Ms. Luster agreed that Ms. Cobbins reports demonstrated that Appellant had "improved dramatically" in her parenting of the twins. TR at 93-94. Ms. Luster, however, did not note Appellant's dramatic improvement in her TPR Report. TR at 95; A-131. Ms. Cobbins also noted Appellant never harmed the children. TR at 45.

Further, Ms. Cobbins stated Appellant provided food and clothing for the twins. TR at 45. Ms. Luster stated she was not aware of any financial or material support provided by Appellant in the six months preceding the commencement of the case. TR at 76. Ms. Luster was aware that Appellant had provided items to Ms. Cobbins. TR at 73-74. Appellant testified she was unable to provide financial support to the children while she was at the Oaks. TR at 167. Appellant testified that, although she is behind on child support, she had paid child support for the twins through the state. TR at 184-85.

Starting in August of 2016, Appellant had to miss some visits with her children because she was busy setting up her new services with her relocation to her apartment. TR at 171. In addition, Appellant was dealing with multiple court cases involving her children. A-108-A-112. Following the termination of her parental rights to her three older children, Appellant grew concerned about getting too close to the twins when she was afraid that she was only going to lose them too. LF at 73; A-16. Because of this,

Appellant did not visit the children as frequently as she had for the past year. *Id.* At all times, Appellant wanted to see and be with her twins. TR at 185.

As part of a psychological evaluation conducted by Dr. Sisk in 2012 Appellant was diagnosed with psychological problems and Schizoaffective Disorder because she showed signs of depression and Schizophrenia. LF at 61; A-4, A-81-A-91. Dr. Sisk recommended that Appellant start medication for her mental health issues, that she stay medication compliant, and that she establish a relationship with an individual therapist. TR at 96-97; A-91.

In July 2015, Appellant received a second psychological evaluation in which she was uncooperative. TR at 98; A-92-A-99. The evaluator recommended that she get another evaluation and therapy once she became medically compliant. TR at 98; A-99. While residing at the Oaks, Appellant began receiving medication for her mental health issues and stayed medication compliant from that point forward. TR at 97, 105. In addition, Appellant began seeing an individual therapist for her mental health issues. TR at 97-98.

After a year of medication and therapy, in July 2016, Appellant's therapist, Donna Dixon, authored a report in which she noted that Appellant was "not aggressive and is very cooperative and appropriate during therapeutic sessions." TR at 100; A-135. Ms. Dixon wrote that Appellant "is engaged in therapy and applies coping and life skills appropriately. [Appellant] stated that she understands that if she does not remain medication compliant and drug free, that she can lose everything she has worked for."

TR at 101; A-137. Ms. Dixon stated that Appellant had "progressed tremendously in therapy and has reached many milestones while seeing this writer. [Appellant] is motivated/determined to do whatever it takes to get her children back into her care and custody." TR at 101; A-138. Finally, Ms. Dixon recommended that Appellant have a psychological evaluation. TR at 102; A-139. Despite the recommendation for another evaluation, and demonstrated progress made by the Appellant from July 2015 to July 2016, no evaluation by any mental health professional was conducted of Appellant after the psychological evaluation in July 2015. TR at 104-05. Appellant has participated in all mental health services available to her and she has been medication compliant since approximately mid-2015. TR at 110.

In addition, Ms. Mehrer testified that Appellant "has taken steps to take control of her life." TR at 156. She noted that Appellant was proactive in setting up her apartment and arranging for transportation, and was able to pay bills and obtain food. TR at 155-56. Further, she stated that Appellant was regularly attending group sessions at ReDiscover. TR at 156. Ms. Mehrer noted Appellant was also proactive regarding drug testing, and that she had assisted Appellant in determining that drug testing in April 2016 had shown a false positive due to medication Appellant had been prescribed. TR at 157. Ms. Mehrer also expressed that continued progress was likely, noting Appellant "has all the coping skills, all the mental stability and positive effort to keep going forward." TR at 158.

Ms. Luster acknowledged that Appellant has been stable since July 2016 in her own apartment and that she has no concerns regarding the apartment or the living situation. TR at 74, 79, 105. Ms. Cobbins also noted that Appellant's apartment was always neat and clean. TR at 41. Further, while Ms. Luster noted Appellant's drug use was an issue, she also acknowledged that, during eleven months leading up to the hearing, Appellant had only two positive tests in May 2016. TR at 106-107, 111. Two drug tests in April 2016, which showed positive results for opiates, were determined to be false positives due to mediation Appellant was taking for a skin condition. TR at 107, 157-158.

After reviewing the evidence, the trial court found by clear, cogent, and convincing evidence that grounds for termination had been established for neglect under Section 211.447.5(2), failure to rectify under Section 211.447.5(3), parental unfitness under Section 211.447.5(6)(a), and the unrebutted presumption of unfitness due to a prior involuntary termination of parental rights under Section 211.447.5(6)(b)(a). LF at 61-72; A-4-A-15. In addition, the court found the first six factors of Section 211.447.7 were satisfied. LF at 73-74; A-16-A-17. Accordingly, the trial court terminated Appellant's parental rights and approved the adoption of T.T.G. and S.S.G. by C.A.C.K. and W.J.K. on December 8, 2016.

POINTS RELIED ON

Point One: The trial court erred in finding the statutory presumption of unfitness constitutional because the presumption improperly shifts the burden to Appellant, in that she must prove her fitness as a parent in violation of her right to due process under the United States and Missouri Constitutions.

Florida Dept. of Children & Families v. F.L., 880 So.2d 602 (Fla. 2004).

Santosky v. Kramer, 455 U.S. 745 (1982).

Stanley v. Illinois, 405 U.S. 645 (1972).

Troxel v. Granville, 530 U.S. 57 (2000).

Section 211.447.5(6)(b)(a).

U.S. Const. amend XIV.

Mo. Const. art. I, § 10.

Point Two: The trial court erred in determining there was clear, cogent, and convincing evidence to support termination of Appellant's parental rights under Section 211.447.5(2), (3), (6)(a), and (6)(b)(a) because there was insufficient evidence to support its findings, in that there was insufficient evidence of Appellant's current mental condition and the evidence failed to support the trial court's findings regarding chemical dependency, failure to support the children, and lack of progress toward reunification.

In re C.W., 211 S.W.3d 93 (Mo. banc 2007).

In re D.L.M., 31 S.W.3d 64 (Mo. App. E.D. 2000).

In re K.M.A.-B., 493 S.W.3d 457 (Mo. App. E.D. 2016).

In re S.T.C., 165 S.W.3d 505, 514 (Mo. App. S.D. 2005).

Section 211.447.5(2).

Section 211.447.5(3).

Section 211.447.5(6)(a).

Point Three: The trial court erred by erroneously declaring and applying Section 211.447.5(3) because it misstated the findings necessary to support termination under that subsection, in that it improperly read the statute as allowing alternative findings instead of three required findings.

In re B.J.K. and J.R.K., 197 S.W.3d 237 (Mo. App. W.D. 2006).

In re K.M.A.-B., 493 S.W.3d 457 (Mo. App. E.D. 2016).

Section 211.447.5(3)

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THE STATUTORY PRESUMPTION OF UNFITNESS CONSTITUTIONAL BECAUSE THE PRESUMPTION IMPROPERLY SHIFTS THE BURDEN TO APPELLANT, IN THAT SHE MUST PROVE HER FITNESS AS A PARENT IN VIOLATION OF HER RIGHT TO DUE PROCESS UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS.

A. Standard of Review

"Whether a statute is unconstitutional is a question of law, the review of which is *de novo*." *Jamison v. State, Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 404 (Mo. banc 2007). "Statutes are presumed to be constitutional and will be held otherwise only if they clearly contravene some constitutional provision." *State v. Young*, 695 S.W.2d 882, 883 (Mo. banc 1985). If possible, statutes must be construed as consistent with the Constitution, and doubts must be resolved in favor of validity. *Id.*

"Generally, protected substantive due process rights are those concerning marriage, family, procreation, and the right to bodily integrity." *Roe v. Replogle*, 408 S.W.3d 759, 767 (Mo. banc 2013). Substantive due process rights may not be infringed unless the infringement is narrowly tailored to serve a compelling state interest. *Replogle*, 408 S.W.3d at 767; *see also Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005) ("[C]ertain liberty interests are so fundamental that a State may not interfere with them, even with adequate procedural due process, unless the infringement is 'narrowly tailored

to serve a compelling state interest.'" (citing *Reno v. Flores*, 507 U.S. 292, 301–02, (1993)).

B. A Parent's Right to Raise His or Her Child is a Fundamental Right

"[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also In re Z.L.R.*, 306 S.W. 3d 632, 638 (Mo. App. S.D. 2010) ("Parental rights are a fundamental liberty interest"). Accordingly, parental rights are protected by the Due Process Clause of the Fourteenth Amendment. *Troxel*, 530 U.S. at 66. Traditionally, courts presume parents are the appropriate caregivers for their children, absent evidence to the contrary. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Therefore, in order to terminate parental rights, unfitness must be proven by clear and convincing evidence because "at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable." *Santosky v. Kramer*, 455 U.S. 745, 768 (1982).[6]

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[6] Under Missouri law, courts typically are required to follow a two-step process in order to terminate parental rights. *In re C.A.M.*, 282 S.W.3d 398, 405 (Mo. App. S.D. 2009). First, the "trial court must find by clear, cogent, and convincing evidence that one or more statutory ground for termination exists." *Id.* Second, the trial court must find "termination of parental rights is in the child's best interest" based on a preponderance of evidence. *Id.*

Section 211.447.5(6)(b)(a), however, removes the constitutionally guaranteed presumption of fitness and shifts the burden to the parent to prove that he or she is fit to be a parent. This shortcut places undue emphasis on past conduct as opposed to the parent's current situation. The state or petitioner is able to rest on the presumption of the status quo, while the parent is required to produce evidence sufficient to justify change. Given the nature of the right at issue – one of the oldest recognized by the Supreme Court – placing such a burden on a parent is not constitutionally permitted.

C. Statutory Presumptions of Parental Unfitness Are Often Rejected By The United States Supreme Court And State Supreme Courts

In a case similar to the case at bar, the United States Supreme Court invalidated an attempt by the State of Illinois to use a presumption to forego finding a parent unfit. *Stanley v. Illinois*, 405 U.S. 645 (1972). In *Stanley*, the Supreme Court found a state cannot presume unmarried fathers are unfit, even if the contention that "most unmarried fathers are unsuitable and neglectful parents" was accepted as true. *Id.* at 654, 657-58. Instead, there must be a hearing where evidence is presented to establish unfitness. *Id.* at 657-58. While a presumption may promote efficiency, the Supreme Court found that when a presumption "explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." *Id*. at 657.

Not surprisingly, following the Supreme Court's opinion in *Stanley*, other state supreme courts reviewing presumptions similar to the presumption of unfitness at issue

here have determined such burden-shifting is improper. *In re K.L.*, 759 S.E.2d 778 (W. Va. 2014) (finding that shifting the burden to parent due to prior termination violates due process); *New Jersey Div. of Youth & Family Servs. v. G.L.*, 926 A.2d 320, 325 (N.J. 2007) ("Presumptions of parental unfitness may not be used in proceedings challenging parental rights[.]" (alteration and quotation omitted)); *Florida Dept. of Children and Families v. F.L.*, 880 So.2d 602, 609 (Fla. 2004) (holding a presumption of unfitness violates constitutional requirements).

The Florida Supreme Court invalidated an evidentiary presumption identical to the statutory presumption petitioners seek to utilize here.[7] *F.L.*, 880 So.2d at 610-611. Because the presumption relieved the state of the burden of proving a substantial risk to the child, the presumption was rejected. *Id.* at 609. Moreover, the Florida Supreme Court "emphasize[d] that a parent is not required to show evidence of changed circumstances to avoid a termination of rights[.]" *Id.* at 610. Thus, the burden is clearly on the state and the focus of the determination is not simply that a prior termination occurred, but whether there is a current substantial risk to the child at issue.

Similarly, West Virginia's high court noted that such a presumption violates the requirement that at least clear and convincing evidence support termination as required by *Santosky*, and could allow removal of "children from fit parents who may be poor or uneducated and place them with fit parents who may be more affluent and or better

[7] In Florida, the presumption was judicially created in response to a statute that allowed the state to move terminate rights on the basis of a prior termination.

educated based on the State's belief that it knows what is best for a child." *In re K.L.*, 759 S.E.2d at 784-85.[8] As discussed below, that is exactly what happened here.

D. The Statutory Presumption of Unfitness Violated Appellant's Right to Due Process

Respondents were allowed to use the presumption to overcome *Santosky's* requirement of clear and convincing evidence to support termination. The trial court's evaluation of Appellant's argument is comprised of a single sentence without any substantive explanation for the determination. The trial court stated: "[t]he Court does not find the statute unconstitutional, as requested by the respondent." LF at 72; A-15. Even though the trial court ruling found for Respondents under other sections of 211.447, there can be little question that the presumption influenced the way the trial court viewed the evidence and that the burden placed on Respondents was far less than what is Constitutionally required. For example, when finding under 211.447.5(2) that the mother's mental condition prevented her from parenting her children, the court concluded that it had no information that the twins "would be any safer in the care of the natural mother than the oldest three were at the time they were removed from the home in 2012." LF at 62; A-5. That statement shows how the trial court shifted the burden to Appellant

[8] In addition to decisions from other states, the Missouri Court of Appeals found that a presumption of unfitness based on incarceration improperly shifted the burden to the parent "and resulted in manifest injustice warranting reversal and remand . . . for plain error." *In re Z.L.R.*, 306 S.W.3d at 638.

to prove she was fit instead of requiring Respondents to prove that she is currently unfit and that the condition is unlikely to change.

Further, in rejecting the Appellant's argument that evidence had not been presented to prove the severity of her mental condition at the time of trial or the impact of her condition on her ability to parenting in the future, the trial court effectively held that the mother should have sought out medical testing to prove that she was fit to parent. LF at 63; A-6.

The injection of the presumption worked to not only place Appellant's fundamental rights in jeopardy, but placed on her the burden to establish a sufficient change in her circumstances to persuade the Court she is a fit parent. Placing such a burden on Appellant's natural and fundamental rights is simply untenable. Even if the presumption is based on the idea that most parents with a prior involuntary termination in the past three years are unfit parents, the Court should not simply presume that to be true and place the burden on the parent to refute it. *See Stanley v. Illinois*, 405 U.S. at 654. The presumption of unfitness may well be efficient, but as contemplated by the U.S. Supreme Court, it runs "roughshod over the important interests of both" Appellant and her children. It therefore should not stand.

II. THE TRIAL COURT ERRED IN DETERMINING THERE WAS CLEAR, COGENT, AND CONVINCING EVIDENCE TO SUPPORT TERMINATION OF APPELLANT'S PARENTAL RIGHTS UNDER SECTION 211.447.5(2), (3), (6)(A), AND (6)(B)(A) BECAUSE THERE WAS

INSUFFICIENT EVIDENCE TO SUPPORT ITS FINDINGS, IN THAT THERE WAS INSUFFICIENT EVIDENCE OF APPELLANT'S CURRENT MENTAL CONDITION AND THE EVIDENCE FAILED TO SUPPORT THE TRIAL COURT'S FINDINGS REGARDING CHEMICAL DEPENDENCY, FAILURE TO SUPPORT THE CHILDREN, AND LACK OF PROGRESS TOWARD REUNIFICATION.

A. Standard of Review

As set out *infra*, "[a] parent's right to raise her children is a fundamental liberty interest protected by the constitutional guarantee of due process. It is one of the oldest fundamental liberty interests recognized by the United States Supreme Court." *In re K.A.W and K.A.W.*, 133 S.W.3d 1, 12 (Mo. banc 2004) (*citing, Troxel*, 530 U.S. at 65). Because of this, termination of parental rights has been referred to as a "civil death penalty." *Id.* "It is a drastic intrusion into the sacred parent-child relationship." *Id.* (citation omitted). "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." *Id.*

It is incumbent on appellate courts to review whether the termination is supported by "clear, cogent and convincing evidence." *Id.* Such evidence instantly tilts the scales in favor of termination and the finder of fact is left with the abiding conviction that the evidence is true. *Id.* A trial court's termination of parental rights is overturned if the "record contains no substantial evidence to support the decision, the decision is against

the weight of the evidence, or the trial court erroneously declares or applies the law." *In re S.M.H.*, 160 S.W.3d 355, 362 (Mo. banc 2005) (quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

B. The Trial Court Lacked Sufficient Medical Evidence to Support Its Findings Regarding Appellant's Mental Condition

Appellant's parental rights were terminated primarily because the trial court found that she suffers from a mental condition which is permanent or such that there is no reasonable likelihood that the condition can be reversed. Specifically, the court found that Appellant's mental condition justified termination of her parental rights pursuant to Sections 211.447.5(2)(a) and 211.447.5(3)(c)[9]. This finding was not supported by medical evidence clearly establishing the Appellant's current mental health status and how that status impacts her present and future ability to parent, and was against the great weight of the evidence.

In a case strikingly similar to the case at issue, this Court held that "it is crucial that the evidence clearly establish Mother's current mental health status and how that status impacts her present and future ability to parent." *In re C.W.*, 211 S.W.3d 93, 100 (Mo. banc 2007) (abrogated on other grounds). In that case, the child was removed from his mother when he was 5 days old. *Id.* at 96. The action was taken because there were concerns about whether the mother could care for the child given her bipolar disorder and

[9] It is unclear from the trial court's judgment which statutory ground of Section 211.447.5(3) the court applied.

cerebral palsy. *Id.* Following the removal in 2003, the mother was given a psychological examination in August 2003 and the psychologist concluded that the mother was not mature enough to care for the child. *Id.* Despite the mother's participation in mental health counseling and medication, the trial court terminated her parental rights two and a half years after her psychological evaluation. *Id.* at 100.

On appeal, this Court maintained that the trial court must "assess the extent to which past behavior is predictive of similar issues in the future." *Id.* at 98. "There must be a prospective analysis with some explicit consideration of whether past behaviors indicate future harm." *Id.* at 98-99. The Court then considered whether a psychological evaluation conducted before the Appellant received medication and treatment could support a finding terminating her parental rights.

Because the psychological evaluation did not "clearly establish" the mother's current health status and her future ability to parent, this Court held that the evidence was insufficient to support termination. *Id.* at 100. Without evidence of the mother's current mental health and no prospective analysis, the mother's "fundamental liberty interest in preserving the parent-child relationship [was] terminated on the basis of speculation instead of verifiable facts." *Id.* The outdated psychological evaluation could not be "bootstrapped into a valid finding of failure to rectify." *Id.* at 101. That is exactly what the trial court did in the case at bar.

Here, Appellant received a psychological evaluation in June 2012, approximately three years prior to T.T.G.'s and S.S.G.'s birth. A second evaluation was conducted in

July 2015 by Dr. Richardson. At that time, Appellant was not cooperative, and refused to complete the parenting assessment. A-98. Although Dr. Richardson noted that Appellant had a severe mental illness, another psychiatric evaluation was recommended once Appellant began receiving treatment and was medically compliant. A-99. At the time of this evaluation, Appellant had just begun residing in a group home, consistently taking her medication, and working with an individual therapist. TR at 97, 105. During the evaluation, Appellant denied all symptoms of mental illness, stated she did not want to participate in therapy, and stated she didn't care whether she got her children back or not. A-95-A-96. However, the evidence presented at trial demonstrated that Appellant's attitude changed dramatically from the time of her 2015 evaluation.

Appellant's parental aide, Ms. Cobbins, testified that after working with Appellant, Appellant was applying the child care techniques she had learned from Ms. Cobbins. TR at 38-43. In fact, Ms. Cobbins noted on multiple occasions in her testimony that Appellant was making progress with her children throughout 2016. TR at 41-43. Ms. Luster agreed that Ms. Cobbins reports demonstrated that Appellant had "improved dramatically" in her parenting of the twins. TR at 93-94.

Appellant remained in the group home setting for approximately one year before obtaining her own apartment in July 2016. TR at 69. Sarah Mehrer, Appellant's case manager at ReDiscover, noted Appellant was able to get her own apartment and set it up on her own. TR at 155-56. Ms. Luster acknowledged that Appellant had been stable since July 2016 in her own apartment, and that she had no concerns regarding the

apartment or the living situation. TR at 74, 79, 105. Ms. Cobbins also noted that Appellant's apartment was always neat and clean. TR at 41. Mehrer further noted that Appellant consistently attended group therapy a ReDiscover. TR at 156.

Appellant's individual therapist, Donna Dixon, noted that Appellant had "progressed tremendously" and "reached many milestones" during her treatment. TR at 101-102; A-138. Ms. Dixon also noted that Appellant was "not aggressive and is very cooperative and appropriate during therapeutic sessions." TR at 100; A-135. Ms. Dixon wrote that Appellant "is engaged in therapy and applies coping and life skills appropriately. [Appellant] stated that she understands that if she does not remain medication compliant and drug free, that she can lose everything she has worked for." TR at 101; A-137.

Critically, Ms. Luster agreed that, despite the progress Appellant had made since July 2015, and despite the fact that Appellant had participated in all mental health services available to her while at the same time staying medically compliant, there was no current mental health evaluation in the records to support a finding that Appellant's mental health condition was so severe that she was unable to parent. TR at 74, 79, 104-05. Not only was the psychological evaluation on which the TRP was based approximately 16 months old and conducted before much of Appellant's treatment, Appellant had not been cooperative at the time of the evaluation. All these factors rendered the evaluation unreliable as evidence of Appellant's current mental condition, much less her prognosis.

Not one medical professional testified on behalf of the Respondents. It was incumbent on Respondents to provide some evidence of the Appellant's current mental state. Moreover, no evidence was presented regarding how Appellant's current mental could lead to harm to the children. "Unlike neglect, abandonment, abuse, or nonsupport, the mental illness of a parent is not per se harmful to a child." *In re D.L.M.*, 31 S.W.3d 64, 69 (Mo. App. E.D. 2000) (citation omitted). "Termination of parental rights should not be granted on account of mental illness unless it is shown by clear, cogent and convincing evidence that [the child] is harmed or likely to be harmed in the future." *Id.* at 69-70. The record is completely devoid of any evidence of harm.

While the trial court noted that Ms. Dixon recommended another evaluation, the trial court found it was unclear whether Ms. Dixon had reviewed the prior evaluations. LF at 64; A-7. This was a huge leap in logic that is unsupported by the record. The trial court failed to note that Ms. Dixon and Dr. Richardson are both employed with Midtown Psychological Services, thus it is unlikely that Ms. Dixon would not have access to an evaluation prepared by a colleague regarding her client. Certainly, as the Appellant's therapist, Ms. Dixon had access to everything the trial court had access to, and the trial court had little difficulty reviewing and interpreting the prior evaluations. Further, the trial court emphasized that the 2012 and 2015 evaluations were consistent in order to suggest the evaluations are accurate. LF at 63; A-6. This conclusion assumes that the medication and treatment Appellant received, which had begun just prior to the 2015 evaluation, had no impact on Appellant's mental condition. Such a conclusion is not

supported by the overwhelming evidence that demonstrates Appellant had progressed with treatment. Moreover, the trial court maintained that it had "serious concerns about the natural mother's ability to take care of herself" on her own. LF at 62; A-5. Having "serious concerns" does not rise to the level of clear, cogent, and convincing evidence that Appellant's mental health condition renders her unable to knowingly provide necessary care, custody, and control.

Because the trial court lacked sufficient evidence of Appellant's current mental condition and her condition's impact on her ability to parent, her fundamental liberty interest was "terminated on the basis of speculation instead of verifiable facts." *In re C.W.*, 211 S.W. at 100. The trial court explicitly relied on Dr. Richardson's outdated and insufficient evaluation in making its findings under Section 211.447.5(2) and (3). Because the trial court's findings were based on this inadequate evidence of Appellant's mental condition, this Court should reverse the trial court's decision and remand the case to obtain evidence of Appellant's current mental condition.

C. The Trial Court's Determination That Appellant's Mental Condition Could Not Be Improved Was Not Supported by Clear, Cogent and Convincing Evidence

In addition to failing to obtain reliable medical evidence regarding Appellant's mental condition, the trial court made several findings that downplayed Appellant's progress in order to determine that Appellant would be unable to improve sufficiently to care for her daughters. Further, the trial court suggested that Appellant was attempting to

merely delay the termination of her parental rights.[10] Based on the progress Appellant had made, the trial court's failure to consider whether termination was premature was not supported by clear and convincing evidence.

Appellant became stable by staying in a group home for approximately one year and taking advantage of the mental health services and medication available to her. LF at 61; A-4, TR at 175. Appellant then obtained an apartment because the children could not live in the group home. LF at 61; A-4. While Appellant showed great progress by moving to an independent living situation, the trial court noted she was still new to living independently and expressed concern that she could care for herself. LF at 62; A-5. However, such concern supports allowing Appellant an opportunity to demonstrate she can transition appropriately. Instead, the trial court found Appellant's efforts to obtain housing where her children could reside suggested she was not stable enough for reunification. Under the trial court's reasoning, Appellant's rights would be terminated if she remained in a group home where the children could not reside, and her rights would be terminated if she moved out on her own because she was too new to independent living. Accordingly, the trial court's conclusions left Appellant in an impossible scenario where no action on her part would be sufficient to prevent termination of her rights.

[10] The trial court referred to her progress as "limited" and "commends her" for wanting to be independent and "provide housing where the children could be reunified." LF at 66, 68; A-9, A-11.

Ms. Mehrer testified that Appellant "has taken steps to take control of her life." TR at 156. Importantly, when asked whether Appellant can continue to progress, Ms. Mehrer responded, "I think she has all the coping skills, all the mental stability and positive effort to keep going forward." TR at 158.

The twins had been in foster care for approximately 19 months at the time of the hearing. While that is not an insignificant period of time, it is much less time than the approximately four years the older children had been in foster care prior to termination of parental rights. The trial court gave no explanation for its determination that Appellant's progress did not at least merit further evaluation before terminating her parental rights.

Because the trial court failed to consider the progress Appellant was making, the recommendation to terminate Appellant's parental rights and the ultimate decision to do so are not supported by clear and convincing evidence. Appellant demonstrated she was working to improve her situation and provide a home for her children. Appellant requests the Court remand this case for further consideration of the evidence of Appellant's progress.

D. The Trial Court Lacked Sufficient Evidence to Support Its Findings Regarding Appellant's Chemical Dependency

The trial court found that Appellant had a chemical dependency under Sections 211.447.5(2)(b) and 211.447.5(3)(d)[11] and that this dependency prevents her from

[11] It is unclear from the trial court's judgment which statutory ground of Section 211.447.5(3) the court applied.

providing the necessary care, custody, and control of the twins and it cannot be treated so as to enable the Appellant to consistently provide such care, custody and control. *See In re K.M.A.-B.,* 493 S.W.3d 457, 469 (Mo. App. E.D. 2016) (*citing*, *K.A.W.*, 133 S.W.3d at 11).

At trial, Respondent presented absolutely no testimony proving that the Appellant was dependent or addicted to any chemical. Simply using a substance does not equate to a conclusion of dependence. *Id.* Moreover, there was no direct evidence documenting what type of substance abuse treatment was provided to the Appellant, nor any evidence presented by any professional establishing that any such dependency was untreatable or of such a sufficient severity to support termination. *See In re S.T.C.*, 165 S.W.3d 505, 514 (Mo. App. S.D. 2005). In sum, the record is completely devoid of this required evidence.

The only evidence presented by Respondents to support termination was a handful of positive drug tests while Appellant was living at the Oaks. It is undisputed that the vast majority of these weekly tests came back negative for any chemical substance.[12] Ms. Luster testified that these few positive tests caused "ongoing concerns" regarding Appellant's ability to reunify with her children. TR at 74.

[12] Interestingly, Ms. Luster indicated in her TPR Report and her direct testimony that the last tests were on June 7, 2016. TR at 105-06. On cross examination she was made aware of the fact that there were three additional negative UAs in June 2016. *Id.*

Upon careful examination of the tests, however, it was revealed that Appellant only tested positive once or twice for marijuana after December 2015. TR at 106-07. In fact, after May 2016, Ms. Luster was not aware of any further positive tests. TR 111.[13] And the alleged positive tests for opiates in April 2016, were actually the result of an interaction between the Appellant's prescription medications, resulting in a false positive. TR at 156-58. Specifically, Ms. Mehrer testified that Appellant was "proactive about having the drug tests" and that Appellant was upset when she was told that she had tested positive. TR at 157. There had been a bed bug outbreak at the group home and Appellant received some cream to treat the marks on her skin. *Id*. The cream interacted with her medications that produced the false positive. *Id*. Ms. Mehrer ultimately confirmed this with the pharmacy and the doctor. *Id*.

The record demonstrates that Appellant had some positive tests in 2015 for opiates, amphetamines, and marijuana. A-130-A-131. But as Appellant continued to recover and take control of her life, the positive tests decreased dramatically. There were no positive tests for amphetamines or opiates in 2016, once the false positive results are excluded. *Id.* Appellant only tested positive for marijuana in May, and after May, there were no positive tests of any kind. TR at 111. The record is simply devoid of any evidence establishing a chemical dependency or addiction. Moreover, Respondents

[13] Ms. Luster also referenced a statement in an October 2016 record where Appellant allegedly admitted to using marijuana and alcohol. TR at 74-75. Again, this does not prove a chemical dependency or addiction or that such dependency was untreatable.

failed to produce any evidence that any such dependency was untreatable or of sufficient severity to support termination.

E. The Trial Court Lacked Sufficient Evidence to Support Its Finding That Appellant Failed To Provide Support to the Children

The trial court found that under Section 211.447.5(2)(d) Appellant failed, although physically and financially able, to provide the twins with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for the child's physical, mental, or emotional health and development. The trial court did not include any factual basis for this finding because there is simply no evidence to support it. In fact, the evidence demonstrates that Appellant did provide support for the twins.

The only evidence presented by Respondents on this point came from Ms. Luster. Ms. Luster testified that she was unaware of Appellant providing any type of support for the twins. TR at 76. Being unaware, however, does not equate to proof that Appellant failed to do so. Moreover, Respondents did not present any evidence showing that the Appellant was financially able to provide support while she was trying to turn her life around in the Oaks group home.

Appellant testified that she was financially incapable of supporting the twins early in her stay in at the Oaks. TR at 167. As Appellant started to turn her life around, she started providing for the twins. Ms. Cobbins testified on cross examination that more often than not, Appellant would provide food and clothing for the children. TR at 45. Moreover, Appellant testified that, although she was behind on child support, she had

paid child support for the twins through the state. TR at 184-85. Accordingly, the evidence demonstrates that Appellant was providing support for her children at the time of the hearing, and the trial court's findings are not supported by any evidence that was before the trial court.

F. The Trial Court Lacked Sufficient Evidence to Support Its Findings Under Section 211.447.5(3)(a) and (b)

The trial court determined that Appellant had made "limited progress in complying with the terms of the social service plan" and that the efforts of the agencies had failed to assist Appellant to make sufficient changes to allow the children to return to her custody. LF at 66-67; A-9-A-10. These findings do not reflect the evidence that was presented, and minimize the significant progress Appellant had made since the twins were born in April 2015. Since that time, Appellant lived in a group home, became medically compliant, worked with her individual therapist, Ms. Dixon, took advantage of services through ReDiscover, made progress in interacting with her daughters while working with her parenting aides, obtained and furnished an apartment, and worked to address her drug use. TR. at 93-94, 97-98, 105, 155-57. This progress, which occurred in just over a year and a half, is not "limited." Without question, Appellant demonstrated that she was making significant progress and working toward reunification with her daughters.

Further, Ms. Mehrer testified that she anticipated Appellant would continue to progress because she had obtained coping skills and was continuing to attend group

sessions. TR at 156, 158. Ms. Dixon similarly stated that Appellant had made tremendous progress and was applying coping and life skills. A-137. Ms. Luster noted that Appellant had accomplished the goals set forth in Dr. Sisk's 2012 psychological evaluations by becoming medically compliant and transitioning from a group home to an independent living situation. TR at 102. Thus, the trial court's determination that there was limited progress is against the greater weight of the evidence.

In addition, although Appellant had some difficulty maintaining visitation while she transitioned to her own apartment and after the termination of her rights to her older children, the evidence from Ms. Mehrer and Ms. Dixon suggested that Appellant would likely continue to progress with the services she was provided. Further, in its' findings under Section 211.447.5(3)(b), the trial court noted Appellant had been offered extensive services since 2012. LF at 67; A-10. However, the trial court failed to note that while Appellant had not been successful in utilizing the services offered to make significant changes prior to the birth of the twins, she had done so since their birth. The trial court ignored the evidence that Appellant had not only made significant progress, but was also actively utilizing the services provided to her. Instead, despite Appellant's progress and commitment to continued progress, the trial court determined that because Appellant was unable to be reunited with the children at the time of the hearing, her rights should be terminated.

The trial court's findings omitted critical evidence regarding Appellant's progress up to the time of the hearing, utilization of services offered to her, and the likelihood that

Appellant would continue to progress if she was given additional time. Because the trial failed to fully consider the evidence regarding Appellant's progress and prospects for continued progress with appropriate services, the findings are not supported by clear and convincing evidence in the record.

G. The Trial Court Relied on the Same Insufficient Evidence to Make Its Determination Under Section 211.447.5(6)(a) and (b)(a)

The trial court failed to make any independent factual findings to support termination under Section 211.447.5(6)(a) or (b)(a). LF at 72; A-15. Accordingly, the trial court's findings must be based on the insufficient evidence regarding Appellant's mental condition, chemical dependency, failure to provide support, and failure to progress. Because those findings are not supported by the evidence, there is insufficient evidence to support the trial court's that termination was appropriate on those grounds. Further, the evidence of Appellant's progress should have been sufficient to rebut the presumption that Appellant was unfit. Therefore, the Court must reverse the trial court and remand for further consideration as discussed above.[14]

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[14] After finding grounds for termination, the trial court found termination of Appellant's rights was in the best interest of the child by a preponderance of the evidence because (1) the children had no emotional ties to Appellant, (2) Appellant had failed to maintain visitation, (3) failed to provide support, (4) was not committed to the children, and (5) additional services were unlikely to enable the return of the children. LF at 73-74; A-16-17. As discussed in Point Two, the evidence showed Appellant was making progress

III. THE TRIAL COURT ERRED BY ERRONEOUSLY DECLARING AND APPLYING SECTION 211.447.5(3) BECAUSE IT MISSTATED THE FINDINGS NECESSARY TO SUPPORT TERMINATION UNDER THAT SUBSECTION, IN THAT IT IMPROPERLY READ THE STATUTE AS ALLOWING ALTERNATIVE FINDINGS INSTEAD OF THREE REQUIRED FINDINGS.

A. Standard of Review

A trial court's termination of parental rights is overturned if the "record contains no substantial evidence to support the decision, the decision is against the weight of the evidence, or *the trial court erroneously declares or applies the law*." *In re S.M.H.*, 160 S.W.3d at 362 (quoting *Murphy*, 536 S.W.2d at 32 (emphasis added)).

B. The Trial Court Erroneously Declared the Law Under Section 211.447.5(3)

To find the existence of the "failure to rectify" under Section 211.447.5(3), a court must find:

> (1) that the child has been under the jurisdiction of the juvenile court for a period of one year; (2) that the conditions which led to assumption of

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during her regular visits and developing emotional ties with the children, providing what support she could, and utilizing the services offered to make progress toward reunification. Accordingly, these findings are not supported by a preponderance of the evidence.

> jurisdiction still persist, or conditions of a potentially harmful nature continue to exist; **and** (3) that there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home.

In re B.J.K. and J.R.K., 197 S.W.3d 237, 243 (Mo. App. W.D. 2006) (emphasis added and internal marks omitted). This is a logical reading of the statutory scheme and is consistent with one of the essential considerations of any termination case, "namely the existence of a harmful condition presently or in the future." *In re K.M.A.-B.*, 493 S.W.3d at 473.

Here, in applying the statute to its findings, the trial court departed from the statutory scheme and held: (1) "that the minor children have been under the jurisdiction of the Juvenile Court for a period of one year **and**" (2) "the conditions which led to the assumption of jurisdiction still persist **or**" (3) "conditions or conditions [sic] of a potentially harmful nature continue to exist, **such that** there is little likelihood that those conditions will be remedied at an early date so that the children can be returned to the natural mother in the near future **or**" (4) the continuation of the parent/child relationship greatly diminishes the children's prospects for early integration in to a stable home. LF at 66 (emphasis added); A-9. By using the disjunctive following the initial requirement of one year under the jurisdiction of the Juvenile Court, it suggests that there were three

alternative bases for termination without indicating on which one the trial court actually relied. *See K.M.A.-B*, 493 S.W.3d at 474.

C. The Trial Court's Findings Do Not Establish Section 211.447.5(3) Was Properly Applied

Because the trial court misstated what must be found to determine termination is appropriate under Section 211.447.5(3), it is unclear whether the trial court properly determined termination was appropriate under that subsection. The trial court could have based its termination on the belief that the conditions which led to jurisdiction still exist without the required additional finding that those conditions will not be remedied at an early date so that the children can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly diminishes the children's prospects for early integration into a stable and permanent home. Likewise, the Appellants rights may have been terminated based only on a finding that continuing the relationship with the twins hindered their integration into a permanent home.

In *K.M.A.-B.*, the trial court made a similar error in its findings under subsection 211.447.5(3). Even though the error was not raised on appeal, the Eastern District Court of Appeals found that given the seriousness of the termination of parental rights, it can be reviewed for plain error. *Id.* at 473-474. Here, as in *K.M.A.-B.*, the trial court did not indicate which of the statutory grounds were applied to terminate the Appellant's rights. Accordingly, here, like in *K.M.A.-B.,* "[t]he error [] is plain and obvious, and termination

without clear, cogent and convincing evidence of a harmful condition would be a manifest injustice or miscarriage of justice." *Id.*

Further, given the fact that the children had resided with Respondents since June 2015, there is no evidence that the continuing relationship with Appellant would hinder the integration of the children into a permanent home. A-133. The trial court made no factual findings to support the need to terminate Appellant's parental rights immediately in order to ensure the children were in a stable environment or integrated into a permanent home. Indeed, no evidence was presented to support such a finding. Instead, the trial court determined that Appellant had not made sufficient progress, and Appellant's attempts to gain additional time to demonstrate she could live independently and continue to progress toward reunification were viewed as delay tactics. LF at 69; A-12.

Accordingly, the trial court erroneously declared and applied the law under Section 211.447.5(3). Thus, the trial court's decision regarding this ground for termination should be reversed and remanded for review under the proper legal standard.

CONCLUSION

The unconstitutional presumption of unfitness violated Appellant's right to due process in this case by placing the burden on her to present evidence that her circumstances had changed. It further led the trial court to focus on the facts and evidence relevant to the prior termination. In addition, the trial court's findings on each ground for termination were not supported by clear, cogent, and convincing evidence because the trial court (1) relied on an outdated and insufficient psychological evaluation of Appellant's mental condition to determine she was unable to parent at the time of the termination or in the near future, (2) ignored evidence that Appellant had provided financial support for the children, (3) determined Appellant's chemical dependency prevented reunification despite evidence to the contrary, and (4) improperly ignored the significant progress Appellant had made in improving her life. Finally, the trial court erroneously declared and applied the law under Section 211.477.5(3) by failing to properly set forth the findings needed to find termination was appropriate on that ground. Appellant respectfully requests the Court reverse the trial court's decision on all four grounds, and remand this case for reconsideration of all the evidence, without the presumption of unfitness, and order a new psychological evaluation of Appellant to determine her current mental condition and prognosis.

Counsels respectfully request oral argument on the matters in this appeal.

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(B) AND (C)

Pursuant to Rule 84.06(c), the undersigned certifies that Appellant has complied with Rule 55.03 and that the foregoing Appellant's Brief complies with the limitations contained in Rule 84.06(b) in that there are 10,865 words per the Microsoft Word word-processing system used by the undersigned which does not exceed the 31,000 allowed for Appellant's Brief.

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The undersigned hereby certifies that on this 25th day of May, Appellant's Brief was e-filed and sent via the Court's E-filing system to:

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