IN THE SUPREME COURT OF MISSOURI

IN THE INTEREST OF:	)	
	)	
T.T.G. & S.S.G.	)	CASE NO. SC96153
	)	
K.S.G.	)	LOWER CASE NO. 1616-FC00267
Appellant,	)	
v.	)	
	)	
W.J.K., 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

BRIEF OF RESPONDENTS

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STATEMENT OF THE FACTS

Respondents' W.J.K. and C.A.C.K and Respondent Guardian ad Litem submit this statement of facts as a supplement to that provided by the Appellant.

T.T.G. and S.S.G. were born April 21, 2015. A126, EX2. A Petition was filed by the Jackson County Juvenile Officer on April 22, 2015, alleging that the children were without proper care, custody and support and at risk of harm or neglect absent the intervention of the Court. A413. The children were removed from Appellant's custody at birth pursuant to allegations of Appellant's untreated mental health concerns, the prior removal of the Appellant's older three children and Appellant's subsequent inability to reunify with those children and due to Appellant's hospitalization at the time of the children's birth. A413.

Respondents W.J.K. and C.A.C.K. received placement of the two minor children who are the subjects of this action in June of 2015. TR143. On June 19, 2015, the Court sustained the allegations against the mother and took jurisdiction over the children. A415. In April 2016, the Court changed the permanency goal for the children to termination of parental rights and adoption, finding it to be in the best interests of the children. A418.

Respondents filed their Petition for Adoption on January 12, 2016. TR146. The original petition included grounds for adoption under Chapter 453 RSMo., which were preserved in subsequent amended petitions. LF13. Respondents filed their First Amended Petition on May 11, 2016, giving notice to the parties that the Respondents intended to use the presumption of unfitness should mother be involuntarily terminated in

the older children's adoption case. LF10 Ultimately the Second Amended Petition for Termination of Parental Rights and Adoption was filed on March 29, 2017. LF15. Trial was held November 9th and 10th, 2016 and a Judgment was entered on December 8, 2016, finding that Appellant's consent to the adoption was not necessary in that she had neglected the minor children for the six months immediately preceding the filing of the Petition for Adoption under RSMo. 453.040 and that her rights could be terminated under RSMo. 211.447. LF58-77. This appeal followed. LF80.

Appellant has been involved with the Jackson County Family Court since 2012. A298. Appellant has three additional biological children, C.F., A.G. and E.G., who were under the jurisdiction of the Court, in cases 1216-JU000134, 1216-JU000135, and 1216-JU000136, respectively, when T.T.G. and S.S. G. were born.[1] A298-A392 . Those children were brought to the Court's attention due to the Appellant's untreated mental condition, failure to maintain a safe and sanitary home and for leaving medication within the children's reach. A389. The Court ordered the Children's Division to provide services for the children starting in 2012, and Children's Division has provided services for the mother since that time. A336, TR123-24. Despite the provision of services to the Appellant, the permanency goal for A.G. and E.G. changed to termination of parental rights and adoption in January 2013, and C.F.'s goal similarly changed in November 2013. A360, A323. In April 2016, the Court made findings that "mother's mental conditions and abilities and her lack of parenting capacity ability render reunification

[1] The trial court took judicial notice of these underlying files. TR 10.

with her unlikely in the next 60 to 90 days." A314. Appellant's parental rights were involuntarily terminated as to those three children in August, 2016. A092.

At the time of T.T.G. and S.S.G.'s birth, Appellant had been hospitalized at Truman Behavioral Health, a facility for psychiatric care. TR63,112. The children were delivered during her hospitalization, and they were placed in foster due to concerns for their well-being and the Appellant's mental health. TR63. Through the underlying case regarding T.T.G. and S.S.G, case numbers 1516-JU000412 and 1516-JU000411,[2] Children's Division provided services for the Appellant to help her achieve reunification with these children. A135, Ex2. Appellant had been offered services to include, psychological evaluations, urinalysis drug testing, parent aid services to include one on one and parenting skills training, therapeutic services, and supervised visitation. TR64.

Children's Division worker, Karema Luster, had been assigned to work with Appellant since October of 2013, prior to the birth of these children. TR60. In her testimony at trial, she did not believe that Appellant had progressed in services enough to be able to accomplish reunification. TR64. She testified that she did not believe reunification could occur within the reasonably foreseeable future. TR73

As part of her involvement with the Juvenile Court and with the Missouri Children's Division, including before T.T.G. and S.S.G. were born, Appellant received two psychological evaluations. EX3, 5. The first evaluation was conducted on June 24, 2012, by Dr. Gregory Sisk, which was received without objection by the Court as Exhibit

[2] The trial court took judicial notice of these cases. TR 10.

3. A81, EX3, TR 11. In his report, Dr. Sisk diagnosed Appellant with Neglect of Children, Schizoaffective Disorder, Adjustment Disorder with Disturbance of Conduct and Cannabis Abuse. A90, EX3. Per Dr. Sisk, "[t]he prognosis for this case is guarded because Schizoaffective Disorder is a serious and persistent mental illness which can worsen as a person matures." A90, E3. Dr. Mary Richardson evaluated mother for her second psychological evaluation on July 21, 2015. A92, EX5. Despite Appellant's lack of cooperation, she did complete her tests. A98, EX 5. Dr. Richardson reported diagnostic Impressions of "Mild intellectual disability. Bipolar disorder as per history. Rule out schizophrenia and schizoaffective disorder." A99, EX5. Dr. Richardson opined that Appellant, "may be a danger to herself, in addition to being a danger to her children, due to being to impaired to parent properly." A98, EX5. Dr. Richardson's report indicates that if Appellant were to cooperate, "she might benefit from a psychiatric evaluation." A99, EX5, TR 141. At no time did Dr. Richardson recommend additional psychological testing. A99, EX5. In fact, while receiving treatment at ReDiscover in August of 2016, it is reported that Appellant, "has a very good Neuro Psych work up by Greg Sisk PhD from about 2013 in the hard copy chart." EX13p21.

Following T.T.G. and S.S.G.'s birth, Appellant attended individual therapy with Donna Dixon to address ongoing mental health concerns. A134, EX14. Donna Dixon reported that Appellant, "understands that if she does not remain medication compliant and drug free that she can lose everything that she has worked for." A137, EX14. Dixon further reported, "it is questionable whether she can effectively care for them due to concerns related to her cognitive functions." A139, EX14. Dixon reflects that these

questions could be answered by a psychological evaluation, but makes not reference to having been aware that Appellant had already participated in two. A139, EX14. No evidence was presented to the trial court that Dixon was recommending a new or updated psychological evaluation or that given the nature of Appellant's condition one would be useful.

Beyond Mother's involvement in individual therapy, she received psychiatric care from both Truman Medical Center - Behavioral Health and ReDiscover. EX1, 6, 13, 18. The trial court received approximately 3300 pages of records from Truman Medical Center. EX6. These records document, among other things, Appellant's history of hospitalizations in the years prior to the trial in this matter. These records document that, Appellant had not been able to maintain safe living outside of the hospital, that she is not medication compliant outside of the hospital and does not communicate with outpatient providers. EX6, p651. These factors contributed to the decision to discharge Appellant to the Oaks in late April of 2015, after the birth of these children. EX6p651-655.

On April 28, 2011 Appellant was seen at Truman; Appellant had an intake appointment at ReDiscover the next day and was discharged. EX6 p1439-1440. It was recommended that Appellant stay away from street drugs and alcohol. EX6 p1441. Appellant was seen again on May 1, 2011. EX6 p1442. Appellant reported hearing voices and was responding to internal stimuli. EX6 p1442-1444. Appellant was voluntarily admitted at that time. EX6 p1445.

In September of 2014, while her older three children were in foster care, Appellant was brought in by police after a fight with her family in which she threated to hurt them

with a gun. EX6 p1455. She tested positive for marijuana and was encouraged to abstain from drugs. EX6 p1460. Appellant was seen again at Truman in November of 2014. Appellant was hospitalized on an involuntary hold from February 27, 2015 to March 13, 2015. She was hospitalized again from April 1, 2015 until April 13, 2015. And she was hospitalized again from April 14, 2015 to April 23, 2015. EX6 p398, 650. From approximately April of 2015 until July of 2016, Appellant resided at The Oaks. TR69.

Also before the trial court were ReDiscover records from approximately 2011 to 2016. EX1,13,18. In 2016, records establish that Appellant has difficulty finding and maintaining employment due to symptoms of her illness. EX13 p4. These records document that Appellant has a marijuana and cocaine substance use disorder. EX13 p5. Her diagnoses include, but are not limited to, Schizophrenia and Intellectual disability, Cannabis use disorder, Severe. EX13 p21, 24. Appellant has a "history of experiencing auditory and visual hallucinations, isolating from others, refusing to eat, becoming agitated and aggressive, spending recklessly, having speech that is unclear and illogical at times, and is unable to focus." EX13 p25 Further, her substance abuse creates, "limitations and barriers to treatment". EX13 p25

Sarah Mehrer, clinical case manager at ReDiscover, testified that she had worked with Appellant from April or March of 2016 until August 2016. TR154. Ms. Mehrer testified that Appellant had taken advantage of all the resources ReDiscover could offer and that she believed Appellant had maintained medication compliance and that Appellant had coping skills and the ability to keep progressing. TR156, 158. Appellant had been in the relapse prevention group with ReDiscover since she started with

ReDiscover as part of a dual diagnosis treatment. TR161 Appellant had not informed her, and Ms. Mehrer was not aware that, since leaving The Oaks in July 2016, Appellant had stopped visiting with the children, stopped attending individual therapy, had stopped participating in random urinalysis and had again used marijuana. TR162-163

While Appellant has been involved with Children's Division, she has struggled with illegal drug use. Specifically, while T.T.G. and S.S.G. were in care, Appellant used marijuana. EX 8. Appellant was drug testing with Heartland Health Lab. EX 8. The trial court received records from this Lab without objection. TR16. These records cover a time period between October of 2015 to June of 2016. Just looking at marijuana use alone, Appellant tested positive for marijuana on October 6th, 21st and 26th of 2015. EX8 p30 As well as May 3rd and 17th of 2016. EX8 p3. Furthermore, in October of 2016, when Appellant participated in a Substance Use Screening with ReDiscover, she reported her last use of marijuana to be October 15, 2016. EX13 p33. Appellant also indicated in her testimony that she had last smoked marijuana at the end of October in the weeks prior to the trial. TR191. Appellant was receiving drug treatment through ReDiscover, and she was attending drug treatment three days a week. TR195.

After discharge from Truman Behavioral Health in approximately May of 2015 until approximately July of 2016, Appellant had resided at The Oaks, a mental health facility similar to a group home. TR69. While living at The Oaks, Appellant was participating in services. She was medication compliant and participating in services consistently until approximately September of 2016 when she stopped. TR110.

While at The Oaks, Appellant was visiting with her children T.T.G. and S.S.G., separately, each visit lasting no more than two hours. TR20-21. Appellant did not ask for an increase in visitation, and, in fact, denied offers to increase visitation time. TR46, 81-82. 117-118. Mother also ended visits early on more than one occasion. TR 47,120, 126. On at least one occasion a visit was ended because Appellant was frustrated with the child's screaming. TR47 One parent aide had concerns that Appellant was hurting one of the children while attempting to style her hair and intervened; Appellant had no appreciation for the fact that the child was in pain. TR55.

Appellant worked with two parent aides during this case. EX11,4. Parent Aide Elisha Booker was initially assigned to the case and remained with Appellant until April or May 2016. TR84. Ms. Booker's reports were submitted at trial as Exhibit 11. TR17. Ms. Booker's reports were not internally consistent; some reports said that Appellant attended her entire visit at the top of the report, but the body of the report indicated that the mother did not attend full visits. TR117-118. Ms. Booker was taken off the case because her verbal reports did not match her written reports and because she was not spending enough time working with Appellant on parenting skills. TR120-121.

Pamela Cobbins was the next assigned as parent aide for Appellant. TR 91. She had worked with Appellant since April of 2016. TR19, 24. Appellant was inconsistent with visitation while working with Ms. Cobbins. TR21. Appellant had only one visit in September of 2016, no visits in October of 2016, and had not had any visits in November of 2016, as of the time of trial. TR22 Appellant struggled with the ability to appropriately interact and comfort the children. TR24-25 Appellant did not demonstrate appropriate

age expectations of the children, calling them spoiled and expecting them not to whine or cry. TR27-28. Both children's demeanor would change when around Appellant to become visibly withdrawn or upset. TR 28-29. Furthermore, Appellant was inconsistent in providing supplies for the children on visits. TR29-30 Cobbins would occasionally have to provide diapers for the children during visits as Appellant had not provided them. TR56 Appellant had provided Cobbins with a couple of outfits for the children's use in the foster home, but never provided any financial support. TR29-30. Neither Ms. Cobbins nor Children's Division recommended that Appellant visit with both children at the same time or that unsupervised visitation occur. TR29,73,81.

Appellant did not provide the children with meaningful support while T.T.G. and S.S.G. were in care. Specifically, Ms. Luster indicated that Appellant had not provided the agency with any gifts, cards, letters or necessities to include clothing, shoes, diapers, food for the children's care or use. TR73. Luster testified that in the six months immediately preceding the filing of the Petition for Adoption on January 12, 2016, that the Appellant failed to provide any material or financial support or necessities for the children. TR76. During visitation time, Appellant was inconsistent in providing supplies for the children. TR29-30. Occasionally, the parent aide would have to provide diapers for the children during visits because Appellant had not provided them. TR56. While Appellant provided parent aide Ms. Cobbins with a couple of outfits for the children's use in the foster home, but she had never provided any financial support. TR29-30. Petitioner C.A.C.K. testified that the children had been placed in her home since June of 2015. TR 143 She further testified that during the entire time the children had been in her

home, the Appellant had only sent three outfits a piece for the children. TR147 Appellant had not provide any financial support. TR147. Appellant had not provided any other necessities for the children. TR147. Appellant knew that there was a child support order in place for the children. TR 184. Appellant testified that she had paid support for the children two times. TR185. The trial court admitted Appellant's interrogatory responses as Exhibit 7. TR15. In response to inquiry 16 (sixteen), "Please list all amounts that you have contributed for the support of TG and SG since April 23, 2015, the person to who said support was contributed and the date on which said support was contributed," Appellant responded "None". EX7.

In approximately July of 2016, the Appellant obtained and moved into an apartment. TR69. Between the move in July of 2016 and the trial in November of 2016, the Appellant stopped participating in offered services to include, individual therapy, drug testing, visitation with the minor children, and parent aid services. TR133. Appellant claimed, however, that she was still taking her psychiatric medications. TR164. At trial, Appellant's testimony was disjointed and frequently nonresponsive to the question asked. TR 164-197.

The Court heard testimony from both Adoptive Petitioners. TR142-152. Respondent C.A.C.K. indicated that the children are a part of their family, TR143, and that they have the resources to provide for the children. TR 146.[3]

[3] Respondent W.K. indicated that he agreed with C.A.C.K.'s testimony. TR 151.

Children's Division recommended termination of parental rights for Appellant. TR76. The agency recommended that termination of parental rights and adoption would serve the children's best interest. TR78.

At the conclusion of the evidence in this matter, the Guardian ad Litem and the Attorney for the Juvenile Officer recommended termination of parental rights and adoption. LF 206, 207.

ARGUMENT

This matter is before the Court pursuant to a Second Amended Petition for Termination of Parental Rights and Adoption.[4] LF 15-20. Appellant did not consent to the adoption. Before entering an adoption without the consent of a natural parent the court must first determine whether or not the consent of a natural parent is required under Mo. Rev. Stat. 453.040. Consent of the parent is not necessary if the parents have "willfully abandoned the child" or "willfully, substantially and continuously neglected to provide him with necessary care and protection," or if there are grounds as set forth in 211.447 and whose rights are terminated after a hearing and proof in accordance with the law. Mo. Rev. Stat. 453.040(7), (8).

In this case, the trial court determined that the natural mother's consent to the adoption was not necessary pursuant to 453.040(7) in that, "the natural mother has for the six (6) 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 and, for the foregoing reasons, her consent to the adoption is not necessary." LF 60.

Additionally, in accordance with 453.040(8), the Court determined that Appellant's parental rights could be terminated pursuant to grounds under 211.447, and in fact, the

[4] Respondent initially pled grounds for termination under 453.040 in their petition filed January 2016, and they preserved those grounds with each amended petition. LF 16.

Court terminated Appellant's rights accordingly. LF61-74. To terminate under 211.447, the Court must follow a two-step process of, first. determining whether a ground for termination existed under §211.447; and then, if so, it must find that the termination was in the best interests of the children by evaluating the factors set forth in 211.447.7. *In the Interest of P.L.O.*, 131 S.W.3d 782, 788-789 (Mo. banc 2004). If one ground for termination is proven, then termination is sufficiently supported and should be upheld. *In the Interest of N.M.J.*, 24 S.W.3d 771, 777 (Mo. App.W.D. 2000). The Court underwent the required process and terminated Appellant's rights under 211.447, rendering Appellant's consent to the adoption unnecessary, under both 453.040(7) and (8).

Appellant fails to challenge the trial court's determination that her consent to the adoption was not necessary due to her neglect of the children pursuant to Mo. Rev. Stat.453.040(7) and further fails to challenge the court's findings that termination of the Appellant's parental rights was in the minor children's best interest.[5] All of the Appellant's Points Relied On are directed towards whether grounds for termination were

[5] Appellant does reference the Court's findings of best interest in a footnote to her second point on appeal. Such argument is outside the scope of her point relied on and as such shouldn't be considered by this Court pursuant to Missouri Supreme Court Rule 84.04(e) which specifically requires that, "The argument shall substantially follow the order of 'Points Relied On.' The point relied on shall be restated at the beginning of the section of the argument discussing that point. The argument shall be limited to those errors included in the 'Points Relied On.'"

established under 211.447. Even if this Court were to determine that the evidence to support termination under 211.447 was insufficient, the adoption of the minor children by W.J.K. and C.A.C.K. must stand under the trial courts findings under 453.040(7). Therefore, for these reasons and others, the trial court's decision should be upheld.

I. THE TRIAL COURT WAS CORRECT IN FINDING THAT THE PRESUMPTION OF UNFITNESS WAS CONSTITUTIONAL IN THAT MISSOURI'S STATUTORY SCHEME SUFFICIENTLY BALANCES THE NATURAL PARENT'S LIBERTY INTEREST AND THE STATE'S INTEREST IN PROTECTING CHILDREN SUCH THAT THERE WAS NO DUE PROCESS VIOLATION.

A. Standard of Review

In an analysis of the constitutionality of a statute the Court must begin with the presumption that the statute is constitutional. "[O]nly if the statute clearly contravenes a constitutional provision will it be found unconstitutional. *State v. Stokely*, 842 S.W.2d 77 (Mo. banc 1992); *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991); *State v. Young*, 695 S.W.2d 882 (Mo. banc 1985). A statute must be interpreted to be consistent with the Constitution of the United States if it is at all possible. *Young*, 695 S.W.2d at 885; *State Highway Comm'n v. Spainhower*, 504 S.W.2d 121, 125 (Mo.1973). Furthermore, any doubts concerning the constitutionality of a statute will be resolved in favor of validity. *Young*, 695 S.W.2d at 883; *State ex rel. McClellan v. Godfrey*, 519 S.W.2d 4, 8 (Mo. 1975)." *Herndon v. Tuhey*, 857 SW2d 203, 207 (Mo. 1993). The burden

is on Appellant to establish "the statute clearly and undoubtedly violates the constitution." *State v. Young*, 362 SW3d 386 (Mo. banc 1985).

Under both Missouri and federal law, "parental rights are a fundamental liberty interest." *In re Z.L.R.*, 306 S.W.3d 632, 638 (Mo. App. S.D. 2010). See also *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. banc 1993), *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). However, fundamental rights are not absolute rights. *Herndon, S.W.2d* at 207. Even a fundamental liberty interest may be infringed upon, so long as the infringement is both narrowly tailored and serves a compelling state interest. *Doe v. Phillips*, 194 SW3d 833, (Mo. banc 2006).

Missouri Revised Statute 211.447 governs when the Court can terminate a parent's rights to their child. Consistent with the requirements of *Santosky v. Kramer*, the party seeking to terminate the parent's rights must prove grounds for termination by clear, cogent and convincing evidence. *In re Z.L.R.*, 306 S.W.3d 632 (Mo. App. S.D. 2010); *Santosky*, 455 US at 748. Only one ground must be proven. *In the Interest of B.J.H., J.R. & M.R.H.*, 356 S.W.3d 816 (Mo. App. W.D. 2012). Once one or more grounds for termination has been proven by clear, cogent and convincing evidence, the Petitioner must prove by a preponderance of the evidence that the termination is in the child's best interest. *Id.* at 824.

One ground for termination requires proof that the "parent is unfit to be a party to the parent and child relationship."[6] Mo. Rev. Stat. 211.447.5(6)(a). The Missouri

[6] Mo. Rev. Stat. 211.447.5(6)(a): "The parent is unfit to be a party to the parent child relationship because of a consistent pattern of committing a specific abuse, including, but

legislature created a presumption of unfitness when "[w]ithin a three-year period immediately prior to the termination adjudication, the parent's parental rights to one or more other children were involuntarily terminated" according to specific enumerated sections of the law.[7] Mo. Rev. Stat. 211.447.5(6)(b)a. This presumption may be rebutted by a parent demonstrating that the conditions that led to the termination of the previous child's parental rights "no longer exist or that the parent is no longer unfit." *In re A.H.*, 9 S.W.3d 56, 61 (Mo. App. W.D.2000).

B. The Presumption is Well-Established in Missouri Law

The presumption of unfitness was established by the Missouri legislature as opposed to being judicially created. Because the presumption is statutory, it is dissimilar from the Florida presumption which was created by the Courts in Florida. See *Florida Dept. of Children and Families* and *In re K.L.*, 880 So.2d 602, 607 (Fl. 2004) (discussing a judicially created rebuttable presumption); *In re K.L.*, 759 S.E.2d 778, 782-85 (W. Va. 2014) (holding that the circuit court erred when it applied a presumption of fitness). In both cases, the

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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."

[7] Mo. Rev. Stat. 211.447.5(6)(b)a requires that the prior termination be done "pursuant to subsection 2 or 4 of this section or subdivision (1), (2), (3), or (4) of this subsection or similar laws of other states."

legislatures had only authorized or required the filing of termination petitions when a prior termination of parental rights to a sibling had occurred at some point in the past. Neither statute created a presumption nor enumerated the grounds on which the prior terminations could be based. *Florida Dept. of Children and Families* and *In re K.L. Fl. Dept. of Children and Families*, 880 So.2d at 607 (holding that Fl. Stat. 39.806(1)(i) (2002) authorizes the filing of a TPR petition); *In re K.L.*, 759 S.E.2d at 781 (W. Va. 2014) (referring to W. Va. Code 49-6-5b(a)(3) (2006)).

Missouri case law clearly establishes that this provision can and has been used to terminate the rights of parents. See *In re E.D.M.*, 126 S.W.3d 488 (Mo. Ct. App. 2004); *In re A.H.*, 9 S.W. 3d 56 (Mo. Ct. App. 2000); *In re T.A.S.*, 62 S.W.3d 650 (Mo. Ct. App. 2001). Furthermore, none of the other cases cited by Appellant from other jurisdictions dealt with the same statutory provisions that Missouri has enacted in creating the presumption of unfitness.

Appellant fails to cite any binding case law that the presumption created by section 211.447 is unconstitutional. Appellant's reliance on *In re Z.L.R.* is misplaced, because, in that case the lower Court found that the father was "presumptively unfit to be a party to the parent and child relationship due to specific conditions, *namely [Father's] incarceration resulting from his volitional activity*." 306 S.W.3d 632, 638 (Mo. Ct. App. 2010) (emphasis added). In that case, the Court found that the presumption was not triggered by incarceration, but could be triggered in other cases by 'a prior judicial determination that terminated the parental rights of the parent in another child because one or more of the

enumerated statutory grounds for termination in section 211.447 existed.'" *Id.* at 638, (citing *In re A.H.*, 9 S.W.3d 56, 61 (Mo. Ct. App. 2000)).

While Respondents finds no prior Missouri case law that specifically addresses the constitutionality of this statutory presumption, the presumption is narrowly tailored to protect parents' rights to parent their children.

C. The Statutory Presumption is Narrowly Tailored to Protect Parents' Fundamental Interests

Missouri's statutory presumption of unfitness is narrowly tailored to protect parents' interests because it limits the applicability of previous terminations both in time and in scope in that the previous termination must be based on the grounds under which the prior termination can have occurred. Mo. Rev. Stat. 211.447.5(6)(b)a. Other states permit application of the presumption based on fewer requirements.

Kansas has a broader statutory presumption of unfitness as a basis for termination of parental rights; it does not place time constraints on the recentness of the previous termination nor does it specify under which grounds the prior termination must have occurred. Even without a delineated time constraint, and even when it found a specific application of the presumption unconstitutional, the Kansas Court of Appeals declined to declare that the statute was unconstitutional. *In the Interest of J.L. and D.L.*, 891 P.2d 1125, 1133 (Ks. Ct. App. 1995). Specifically, the Kansas Court stated that "[o]ur decision that the statutory presumption as applied in this case was unconstitutional was largely based upon the fact that there is no time limitation stated in the statute." *Id.* at 1135. Furthermore, in that case, the only evidence that the State introduced as grounds for the current

termination was a certified copy of the previous termination order, from eight years prior, as grounds for termination. *Id.* at 1127. In this case, Petitioners are asking for the application of the presumption based on a judgment that was issued less than three months prior to the adoption trial, and Petitioners have, in addition to asking for judicial notice for a previous termination cases, provided an overwhelming amount of evidence to support the Appellant's current and continued unfitness.

Minnesota also has a statutory presumption of unfitness that its courts declined to strike down for violations of due process. Minn. Stat. 260.C.301; *In the Matter of the Child of P.T. and A.T., Parents*, 657 N.W.2d 580 (Minn. Ct. App. 2003). The Minnesota presumption, like the Kansas presumption, is broader than Missouri's presumption of unfitness, and yet, the Court found that the presumption comported with standards of due process and did not violate claims for equal protection under the law. *Id.* at 586-591.

The Missouri presumption is constitutional, both on its face and as applied in this case. On its face, the presumption is narrowly tailored to apply exclusively to specific prior terminations, where parents were terminated for specific reasons, which occurred within the last three years. As applied in this case, Mother was given ample notice of the use of the presumption both before and after the termination adjudication of her older children.[8]

[8] The natural mother was given ample notice of the intention to use the presumption both before and after the prior termination occurred. Petitioners filed their First Amended Petition on May 11, 2016, indicating that it was anticipated that the presumption would occur. The mother's rights were in fact involuntarily terminated by the Court on August

The prior terminations occurred less than three months prior to this termination adjudication and the prior terminations were ordered pursuant to subdivisions (1), (2) and (3) of Mo. Rev. Stat. 211.447.5 as required by 211.447.5(6)(b)a. Additionally, Petitioners presented thousands of pages of relevant medical records, parent aide reports, drug testing records, and psychological evaluations that showed the provision of services for over four years, which demonstrated that the conditions that led to the previous terminations still existed. Further, with the subject juveniles, the Appellant was given one and a half years to be able to remedy the circumstances that made her unsafe to independently parent to these children.

D. The Statutory Presumption Provides Sufficient Notice to Parents

Even beyond its narrow scope, Missouri's presumption of unfitness provides due process for parents because it provides "sufficient notice." *In re E.D.M.*, 126 S.W.3d at

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31, 2016 to her older three children, the same day this matter was originally set for trial. The Court granted the mother's continuance request in order to give her additional time to prepare to attempt to rebut the presumption. The Petitioners then filed their Second Amended Petition on September 6, 2016, specifically asserting that the natural mother was presumptively unfit. The natural mother filed her answer to the Second Amended Petition on or about September 14, 2016 denying said allegations. It should also be noted that a no time prior to the day of adjudication of this matter did the natural mother assert a constitutional challenge to the preemption of unfitness, but instead waited until the day of trial to make her claim.

495 The Court found in *E.D.M.* that the presumption of unfitness is constitutional and does not violate due process to a father whose rights were previously terminated using the presumption of unfitness because the statute provided "sufficient notice." Here, the Appellant was provided sufficient notice that a previous involuntary termination would create a rebuttable presumption because "[p]ersons are conclusively presumed to know the law." *In re E.D.M.*, 126 S.W. 3d at 495 (quoting *Mo. Highway & Transp. Comm'n v. Myers*, 785 S.W.2d 70, 75 (Mo. banc 1990)). Concerning the Appellant in this case, she had counsel and a guardian ad litem in the previous terminations to advise her of the repercussions of an involuntary termination. Furthermore, Appellant sat through a previous termination adjudication on August 3, 2016 and August 10, 2016, with full knowledge that Petitioners specifically pled that they anticipated using the presumption of unfitness on the basis of a termination case that was still pending at the time of the First Amended Petition's filing on May 11, 2016. The Court issued its Judgment terminating Appellant's rights to her older three children in 1516-FC04167 on August 31, 2016, the same date as the initial trial setting in this case. In fact, Appellant was granted a continuance in this action based upon the issuance of the Judgment which terminated the Appellant's rights thereby creating the presumption of unfitness. LF04.

E. The Presumption of Fitness Does Not Shift the Entire Burden of Termination to the Parents

The presumption of unfitness does not shift the whole burden of the termination to the parent. Even when Petitioners can prove by clear, cogent, and convincing evidence

that a parent's rights were terminated in the previous three years and that the rights were terminated under specifically enumerated provisions, the Petitioner still maintains the additional burden of proving that the termination is in the child's best interest.

II. THE TRIAL COURT WAS CORRECT IN TERMINATING APPELLANT'S PARENTAL RIGHTS OVER THE MINOR CHILDREN IN THAT THERE WAS CLEAR, COGENT AND CONVINCING EVIDENCE TO SUPPORT THE COURT'S FINDINGS REGARDING A MENTAL CONDITION, CHEMICAL DEPENDENCY, FAILURE TO SUPPORT, AND LACK OF PROGRESS.

A. Standard of Review

The Court of Appeals will affirm the trial court's judgment terminating parental rights unless it is not supported by substantial evidence, is against the weight of the evidence or erroneously applies the law. *In re Adoption of C.M.B.R.*, 332 S.W.3d 793 (Mo. banc 2011). The trial court is free to weigh the evidence and determine its persuasiveness. *In re Q.A.H.*, 426 S.W.3d 7 (Mo. banc 2014), *In re W.B.L.*, 681 S.W.2d 452 (Mo. banc 1984). A trial court's judgment may be supported by substantial evidence, even if there is contrary evidence before it. *QAH at 13.* On appeal, conflicts in evidence will be reviewed in a light favorable to the Judgment. *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, (Mo. banc 2011). The Court will consider all evidence and inferences in the light most favorable to the trial court's judgment and disregard all evidence to the contrary. *In Re J.D.*, 34 S.W.3d 432, 434 (Mo. Ct. App. 2000). Due

regard is given to the trial court's opportunity to judge the credibility of witnesses and greater deference is granted to a trial court's determination in adoption proceedings than in other types of cases. *In the Matter of I.D.*, 12 S.W.3d 375 (Mo. Ct. App. 2000). The trial court's judgment is only reversed if this Court is left with a firm conviction that the judgment is wrong. *C.M.B.R.*, 332 S.W.3d at 815. Additionally, if one of the grounds for termination is proven, then termination is sufficiently supported and should be upheld. *In the Interest of N.M.J.*, 24 S.W.3d 771, 777 (Mo. Ct. App. 2000).

B. Trial Court Properly Weighed the Evidence Before It

The only issue presented to the Court pursuant to Appellant's second point on appeal is whether or not there was substantial evidence to support the trial court's judgment. The trial court, however, is free to weigh the evidence and determine its persuasiveness, and the trial court's judgment may be supported by substantial evidence even when there is contrary evidence before it. *In re Q.A.H.*, 426 S.W.3d 7 (Mo. banc 2014), *In re W.B.L.*, 681 S.W.2d 452 (Mo. banc 1984). Appellant challenges the Court's ability to find clear, cogent and convincing evidence regarding the Appellant's mental condition, chemical dependency, lack of support and unfitness based upon the record before the Court in that she asserts that there was contradictory evidence before the Court. However, there was ample evidence to support the Court's findings as discussed below.

C. A. The Trial Court Relied on Ample Evidence to Determine that Mother's Mental Condition and Chemical Dependency Rendered Her Unable to Provide for Her Children

Mo. Rev. Stat. 211.447.5(2) and (3) require that when the Court make specific findings relating the parent's mental condition and chemical dependency when the Court is terminating a parent's rights due to abuse and neglect and when terminating rights due to the child remaining in the Court's jurisdiction for one year. Mo. Rev. Stat. 211.447.5 (2)(a) and (b); 211.447.5(3)(a) and (b).

The trial court's findings under both of the subsections support termination of parental rights. The overwhelming evidence before the Court was that Appellant suffers from long standing and severe mental health issues and illegal drug use. EX1, 2, 3, 4, 5, 6, 8. The Court received business records from ReDiscover, Truman Medical Center-Behavioral Health, Midtown Psychological, and Heartland Health Lab. TR11-15. Appellant has been diagnosed at ReDiscover with Schizophrenia and Intellectual disability, Cannabis use disorder, Severe. EX13 p21, 24 Dr. Sisk diagnosed Appellant with Neglect of Children, Schizoaffective Disorder, Adjustment Disorder with Disturbance of Conduct and Cannabis Abuse. A90, EX3 Dr. Richardson reported diagnostic Impressions of "Mild intellectual disability. Bipolar disorder as per history. Rule out schizophrenia and schizoaffective disorder." A99, EX5. Per Dr. Sisk, "[t]he prognosis for this case is guarded because Schizoaffective Disorder is a serious and persistent mental illness which an worsen as a person matures." A90, EX3.

There was no evidence to contradict the Court's finding of a mental condition, i.e. that Appellant does not have a mental condition. Likewise, there was no evidence to contradict the Court's findings regarding the Appellant's drug use. As to both subsections, rather, the issue before the Court was whether or not such conditions could be treated such that the Appellant could provide the children with proper care, custody and support. The issue of whether or not Appellant is able to care for children is not a "complex medical issue." *In re Q.A.H.*, 426 S.W.3d 7 at 13 (2014).

The evidence before the Court established a history that both Appellant's mental condition and her chemical dependency were long standing and had interfered with her ability to provide care for herself and her children. EX 1, 2, 3, 5, 6, A298-392. Appellant had participated in extensive services designed to address each. EX2. At the time of trial Appellant had recently left a structured living environment, where she had been residing and had achieved some level of stability for more than a year, and was attempting to live on her own. TR 69. However, once Appellant removed herself from that structured environment Appellant had stopped participating in services in the Children's Division case to include stopping her visitation with the minor children. TR133. Further, Appellant had relapsed and used marijuana at least one time that she acknowledged, but had stopped participating in drug testing such that there would be a record of her actual use or sobriety. TR133, 191. Both of which were consistent with Appellant's pattern of failing to maintain outpatient services when removed from a structured setting. EX6 p651-655, A392.

Appellant had still not progressed in visitation such that she could visit with both children together. TR20-21. In fact, at the time of trial she had stopped participating in visitation because she was overwhelmed. TR133, 188. The Court had the opportunity to observe Appellant's testimony which was disjointed and at times nonresponsive to the question posed to her. TR163-198. The Court specifically found that as to both the Appellant's mental condition and drug use that concerns for the children's safety continued. LF69, 72.

D. The Trial Court…Failure to Support

Appellant further argues in her second Point on appeal that her rights were unjustly terminated by the Court for her failure to consistently provide financial, material and emotional support to the minor children. It is well settled that every parent has an obligation to support his or her child as fully as his or her means will allow. *In the Matter of B.S.R.*, 965 S.W.2d 444 (Mo. Ct. App. 1989). This support obligation is so fundamental that even if there is no child support order, a birth parent is still required to provide financial support to her child and the obligation to provide support "is not dependent upon the state informing [her] of that obligation." *In the Interest of N.L.B.*, 145 S.W.3d 902, 908 (Mo. Ct. App. 2004). "To support a termination of parental rights based on a failure to adequately support a child, the parent's lack of financial support while the child is in foster care must indicate that the parent will be unable to provide adequate food, clothing, or shelter for the child in the future." *Q.A.H.*, 426 S.W.3d at 15.

The overwhelming evidence before the Court was that Appellant failed to make even de minimis contributions to support the children. Karema Luster, the case worker

for the agency, testified that Appellant had not provided the agency with any gifts, cards, letters or necessities to include clothing, shoes, diapers, food for the children's care or use. TR73. Further, Luster testified that in the six months immediately preceding the filing of the Petition for Adoption on January 12, 2016, that the Appellant failed to provide any material or financial support for the children. TR76. During that same period of time Appellant also failed to provide any necessities for the children. TR76.

Pamela Cobbins, the parent aid for Appellant, testified that Appellant was inconsistent in even providing supplies for the children on visits. TR29-30. Cobbins would occasionally provide diapers for the children for the parent-child visits because Appellant would come unprepared. TR56 Appellant had provided Cobbins with a couple of outfits for the children's use in the foster home, but she never provided any financial support. TR29-30.

Respondent CACK testified that the children had been placed in her home since June of 2015. TR 143 She further testified that during the entire time the children had been in her home, the Appellant had sent three outfits a piece for the children. TR147 Appellant had not provided any financial support or any other necessities for the children. TR147 Appellant's own testimony established that despite a child support order being in place, she only provided two payments for the children. TR185.

III. THE TRIAL COURT WAS CORRECT IN TERMINATING APPELLANT'S PARENTAL RIGHTS OVER THE MINOR CHILDREN, PURSUANT TO MO. REV. STAT. § 453.040(7) AND/OR §211.447.5(3), IN THAT THE COURT CORRECTLY APPLIED THE LAW.

A. Standard of Review

The Court of Appeals will affirm the trial court's judgment terminating parental rights unless it is not supported by substantial evidence, is against the weight of the evidence or erroneously applies the law. *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, (Mo. banc 2011). On review, the Court will consider all evidence and inferences in the light most favorable to the trial court's judgment and disregard all evidence to the contrary. *In Re J.D.*, 34 S.W.3d 432, 434 (Mo. App. W.D. 2000). Due regard is given to the trial court's opportunity to judge the credibility of witnesses and a greater deference is granted to a trial court's determination in adoption proceedings than in other types of cases. *In the Matter of I.D.*, 12 S.W.3d 375 (Mo. App. S.D. 2000). The trial court's judgment is only reversed if this Court is left with a firm conviction that the judgment is wrong. *C.M.B.R.*, 332 S.W.3d at 815. Additionally, if one of the grounds for termination is proven, then termination is sufficiently supported and should be upheld. *In the Interest of N.M.J.*, 24 S.W.3d 771, 777 (Mo. App. W.D. 2000).

B. Discussion

Appellant is precluded from arguing that her rights were erroneously terminated pursuant to §211.447.5(3) in that Appellant failed to properly preserve the issue for

appeal. *See In the Interest of J.L.G.*, 399 S.W.3d 48 (Mo. App. 2013). Missouri Supreme Court Rule 78.07(c) requires, "In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." In the present case, Appellant failed to file a Motion to Amend or Motion for New Trial to allow the Court to address Appellant's perceived error in the form or language of the Court's Judgment, thus failing to preserve the issue for appeal.

Further, there is no indication that the trial court misapplied the law. The trial court, in its judgment, tracked the language of the statute and made findings as to each subsection as required by law. LF 66-72. Further, the Court's findings clearly indicate the Court's consideration of future harm to the children which distinguishes the present case from *K.M.A.-B.* LF66-72. *In re K.M.A.-B,* 493 S.W.3d 457 (Mo. App. E.D. 2016). This case is further distinguishable in that, in the present case Appellant has a well-documented and significant history of adverse consequences, as a result of her substance abuse, as well as significant efforts at treatment. By all accounts Appellant was advised as to the risks and consequences of her drug use and continued to do so.

Rediscover records documents that her substance abuse creates, "limitations and barriers to treatment". EX13 p25. Truman Medical Center had advised her on at least two occasions to avoid using illegal drugs. EX6 p1441,1460. Donna Dixon reported that Appellant, "understands that if she does not remain medication compliant and drug free that she can lose everything that she has worked for." EX14. Despite this and despite her

participation in the dual diagnosis program at ReDiscover, Appellant continued to relapse. TR 161, 191, 195

In contrast, there was no indication that substance use by the father in the *K.M.A.-B* case had been impacted the same way as Appellant. The father in *K.M.A.-B* had at all relevant times maintained employment, a home, provided financial support for his child and maintained consistent visits. *Id* at 464, 466, 469, 470. Finally, there was no indication in *K.M.A.-B* that the natural father had a chemical dependency such that could not be treated as there was no evidence that father had been offered or recommended treatment or that he had ever participated in treatment. *Id* at 470

In that the Court appropriately followed and applied the law, the court's judgment should be upheld.

CONCLUSION

The trial court properly considered the evidence before it and determined that there was clear, cogent and convincing grounds, under multiple sections of the statute, to terminate Appellant's parental rights to the children. The trial court's determination that the termination of Appellant's parental rights was in the minor children's best interest is not before the Court on appeal. Further, the trial court's determination that Appellant's consent to the adoption was not necessary is not before the Court. As such to trial court did not err and the termination of parental rights and adoption of the minor children should stand.

Respectfully submitted,

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GUARDIAN AD LITEM

RULE 84.06 CERTIFICATION

I hereby certify that Respondent's Brief contains 8,827 words and 848 lines of non-monospaced type. In determining this count, I relied on Microsoft Word, which was used to prepare the brief. I further certify that Respondent's Brief complies with the limitations contained in Rule 84.06(b).

/s/ Sarah H.Ginther
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing BRIEF OF RESPODENTS was filed electronically with notification sent this 26th day of June, 2017 to:

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