IN THE SUPREME COURT OF MISSOURI

IN THE INTEREST OF:	)	
	)	
T.T.G. & S.S.G.	)	CASE NO. SC96153
	)	
K.S.G.	)	CIRCUIT 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 #
Circuit Court No. 1616-FC00267

BRIEF OF RESPONDENT JUVENILE OFFICER

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JURISDICTIONAL STATEMENT

Jackson County Family Court Division is within the Western District of Missouri Court of Appeals, pursuant to §477.070 RSMo. Appellant challenges the validity of §211.447.5(6)(b)(a) RSMo. under Article V, Section 3 of the Missouri Constitution, arguing that portion of the statute violates the due process clause of Article I, Section 10 of the Missouri Constitution. The Missouri Supreme Court has exclusive jurisdiction to hear challenges to the validity of a Missouri Statute, Article V, Section 3 of the Missouri Constitution.

STATEMENT OF THE FACTS

Respondent Juvenile Officer concurs with the statement of facts contained within Respondents' W.J.K. and C.A.C.K. and Respondent Guardian ad Litem's brief.

POINTS RELIED UPON

POINT 1

The presumption for parental unfitness under §211.447.5(6) RSMo. is Constitutional, because the statute requires the Court to determine whether the parent is currently unfit and the trial court heard evidence and made findings regarding parent's current unfitness.

POINT 2

The trial court did not err in terminating appellant's parental rights because the court made specific findings determining that there was clear, cogent and convincing evidence to support termination of appellant's parental rights under §211.447.5(2) RSMo., child abused or neglected; §211.447.5(3) RSMo., child under jurisdiction for a period of one year; §211.447.5(6)(a) RSMo., unfitness which renders parent unable to appropriately care for the child; and §211.447.5(6)(b)a RSMo., unfitness due to prior involuntary termination within three-year period.

POINT 3

The trial court did not err in applying §211.447.5(3) RSMo. and the court correctly applied the law in its findings.

ARGUMENT

POINT 1: The presumption for parental unfitness under §211.447.5(6) RSMo. is Constitutional, because the statute requires the Court to determine whether the parent is currently unfit and the trial court heard evidence and made findings regarding parent's current unfitness.

Standard of Review

When analyzing a statute's constitutionality, 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 that "the statute clearly and undoubtedly violates the constitution." *State v. Young*, 362 SW3d 386 (Mo. 2012). "The constitutional issue must be real and substantial, not merely colorable." *Wright v. Mo. Dept of Soc. Servs., Div. of Family Servs.*, 25 S.W.3d 525, at 528 (Mo. App. W.D. 2000), (quoting *Schumann v Mo. Highway & Transp Comm'n,* 912 S.W.2d 548, 551 (Mo.

App W.D. 1995))

Discussion

In both Federal law and Missouri law, "parental rights are a fundamental liberty interest." *In re Z.L.R.*, 306 S.W.3d 632, 638 (Mo. Ct. App. 2010). See also *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993), *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Fundamental rights are not absolute rights. *Herndon*, S.W.2d at 207. §211.447 RSMo. 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 Ct. App. 2010); *Santosky*, 455 US at 748.

In order to terminate parental rights, the trial court uses a two-step process. *In re S.J.H.*, 124 S.W.3d 63, 66 (Mo. App. 2004). First, the trial court must find by clear, cogent, and convincing evidence that one or more statutory grounds for termination exists. *In re P.L.O.*, 131 S.W.3d 782, 788 (Mo. banc 2004). "Clear, cogent, and convincing evidence is evidence that instantly tilts the scales in favor of termination when weighed against the evidence in opposition and the finder of fact is left with the abiding conviction that the evidence is true." *S.M.H.*, 160 S.W.3d 355, (Mo. banc 2005) at 362 (citing *In re A.S.W.*, 137 S.W.3d 448 (Mo. banc 2004) at 454). Such evidence may be found even though contrary evidence is before the court or the evidence might also support an alternative conclusion. *S.M.B.*, 254 S.W.3d 214 (Mo. App. 2008) at 218 (citing *In re A.K.F.*, 164 S.W.3d

149, 151 (Mo. App. 2005)). If the trial court finds at least one statutory ground for termination, it then moves to the second step and must determine, by a preponderance of the evidence, if termination of parental rights is in the child's best interest. *P.L.O.*, 131 S.W.3d at 789. This does not amount to merely determining that the child would be better off in another home, but rather that the child's best interest cannot be served by remaining with the natural parents. *S.J.H.*, 124 S.W.3d at 70.

The Courts in Missouri have consistently upheld the ground for termination of parental rights under §211.44q.q.harental unfitness due to a prior involuntary termination of parental rights within the previous three years. The statute allows for a rebuttable presumption of unfitness when the prior involuntary termination was based on one of the flowing grounds: as abandoned infant, conviction for murder, manslaughter or serious bodily injury to a child in the family (§211.447.2 RSMo.), abandonment (§211.447.5(1) RSMo.), abuse or neglect, including mental illness and chemical dependency (§211.447.5(2)RSMo.), jurisdiction of one year and existence of conditions of a harmful nature (§211.447.5(3) RSMo.) and conviction of a felony sexual assault against a child in the family (§211.447.5(4) RSMo.). "That presumption is rebuttable and can be overcome by evidence that the circumstances that led to the termination of the parent's parental rights in the other child no longer exist or that the parent is no longer unfit." *In the Interest of T.A.S.*, 32 S.W.3d 804, at 815 (Mo. App. W.D. 2000) and *In the Interest of C.C.*, 32 S.W.3d 824, at 830 (Mo. App. W.D. 2000) both quoting *In re A.H.*, 9 S.W.3d 56, at

61 (Mo. App W.D. 2000).[1] "Aside from any finding that the parent is presumed unfit, §211.447.2(6)[2] clearly requires the trial court to determine that that the parent is currently unfit." *T.A.S.*, at 815.

In the case of *In the Interest of D.M.B.*, 178 S.W.3d 683 (Mo. App 2005), the Greene County Juvenile Office included grounds for termination of parental rights based on a prior involuntary TPR within the previous three years. In that case, the prior involuntary TPR was less than two years before the appealed case. Mother challenged the presumption of unfitness under § 211.447.4(6)[3] and the Court denied that point of her appeal. *D.M.B. at 689.* In that case, as here, the petitioners did not simply rest on the prior involuntary termination; evidence was presented regarding the parent's current unfitness. In *D.M.B.*, the petitioners presented evidence that "[mother]'s situation had not changed appreciably from her situation as it existed at the time of the siblings' involuntary termination hearing." *Id*, at 689**,** which was a period of over a year and a half.

Appellant provides non-binding case law without significant precedential

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[1] Both TAS and CC were heard by the same panel of Judges and the opinions were authored by Judge Howard.

[2] §211.447.2(6) in 2000 read substantially the same as §211.447.5(6) as pleaded in this case.

[3] §211.447.4(6) in 2005 read substantially the same as §211.447.5(6) as pleaded in this case.

value. In the case supplied from West Virginia, *In re K.L.* 759 S.E.2d 778 (W. Va. 2014), the West Virginia Supreme Court found that shifting the burden of proof to parents in a termination of parent rights case is unconstitutional and that the burden of proof in a child neglect or abuse case remains upon the State Department of Health and Human Resources throughout. *Id*, at 780. That case involved an involuntary termination of parental rights against the parents in 2008, and a petition for child neglect in 2012 based on the prior involuntary termination of parental rights. *Id*, at 781-782. At the disposition hearing in 2013, after that child was removed from mother due to a domestic violence incident, that trial court *sua sponte* decided that the burden shifted to the parents to prove a substantial change in circumstance such that their parental rights should not be terminated. *Id*, at 782. It appears that the Department of Health and Human Services did not present any additional evidence regarding the parent's current unfitness; whereas the petitioners in this case presented significant evidence regarding mother's current unfitness and the trial court made specific findings that the evidence was of a clear, cogent and convincing nature to support a termination of parental rights.

The other non-binding case law that appellant presents, *Florida D.C.F. vs F.L.*, 880 So.2d 602 (Fla. 2004), the Florida Supreme Court upheld the constitutionality of the grounds for termination of parental rights based upon a prior involuntary termination of parental rights. There, the Florida Supreme Court held that in order to "support a termination order under *section 39.806(1)(i)* [Fla. Stat] DCF must prove by clear and convincing evidence that the parent's rights to a prior

child were terminated involuntarily, that the current child is at substantial risk of significant harm, and that termination of parental rights is the least restrictive means of protecting the child from harm. Interpreted in this light, *section 39.806(1)(i)* [Fla. Stat.] is constitutional. *D.C.F. vs F.L.*, at 610. "A very recent involuntary termination will tend to indicate a greater current risk. Finally, evidence of any change in circumstances since the prior involuntary termination will obviously be significant to a determination of risk to a current child." *Id* at 610.

In this case, the prior involuntary termination order was entered on August 31, 2016, a period of less than three months prior to this termination hearing. *TR at 10, 80.* Still, petitioners here presented evidence regarding mother's current unfitness and the lack of any appreciable change in mother's situation. Throughout the pendency of the children's underlying abuse and neglect case, and up to the siblings' termination of parental rights hearing, mother was visiting with the twin children separately, for less than two hours per visit, because mother was overwhelmed if she visited them together or for longer periods. *TR at 81-82.* Between the time of the termination hearing on the siblings and the termination hearing on these children, mother had regressed in her services. Mother had not been attending her mental health treatment at ReDiscover since July 2016, and stopped visiting these children starting in September 2016. *TR at 80, 81.* In the case of *In the Interest of E.D.M.*, 126 S.W.3d 488 (Mo. App. W.D. 2004), the court upheld a termination of parental rights based upon the prior involuntary termination

when "the records revealed that the same behaviors that led to termination of father's parental rights in E.D.M's other siblings were displayed by father with respect to E.D.M." *Id at 496*.

The trial court took judicial notice of its own order from the prior termination hearing, which this same judicial officer heard less than three months prior to this termination hearing *TR at 10*, and made a finding that "natural mother presents as being the same position she was in as of the time of the prior termination hearings, except that at the time of the previous termination hearing, the mother was still visiting with the two juveniles who are the subject of this case." *LF at 72.*

Petitioners in this case bore the burden of proof that there was a prior involuntary termination and that mother was currently unfit. The trial court heard evidence and made a finding regarding current unfitness. Because the statute requires additional evidence other than just resting on the presumption, the evidentiary effect is that there is no shifting of the burden of proof to a parent. Therefore, §211.447.5(6) RSMo. is constitutional on its face.

POINT 2: The trial court did not err in terminating appellant's parental rights because the court made specific findings determining that there was clear, cogent and convincing evidence to support termination of appellant's parental rights under §211.4475.(2) RSMo., child abused or neglected; §211.447.5(3) RSMo., child under jurisdiction for a period of one year; §211.447.5(6)(a) RSMo., unfitness

which renders parent unable to appropriately care for the child; and §211.447.5(6)(b)a RSMo., unfitness due to prior involuntary termination within three-year period.

Standard of Review

The scope and standard of review with regard to cases tried without a jury is specifically set forth by Missouri law. In such cases, the appellate court must affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or the trial court erroneously declared or applied the law. *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc. 1976). Further, the appellate court must view the facts in the light most favorable to the trial court's decision and must give deference to the trial court's superior ability to determine the credibility of the witnesses. *In the Interest of A.A.T.N.*, 181 S.W.3d 161, 166 (Mo. App. 2005). The appellate court must "….review the juvenile court's judgment to see whether it is supported by substantial evidence…If so, then [the appellate court] will affirm, even if the evidence would also have supported a contrary judgment…". *In re T.B.*, 963 S.W.2d 252, 257(Mo. App. W.D. 1997). Conflicting evidence will be reviewed in the light most favorable to the trial court's judgment. *In re S.M.H.*, 160 S.W.3d 355, 362 (Mo. banc 2005). Judicial discretion is abused only where a ruling is clearly against logic and is so arbitrary and unreasonable as to shock a sense of justice and indicate a lack of careful consideration. *State ex el. Common v. Darnold*, 120 S.W.3d 788 (Mo. App. 2003). 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, at 815 (Mo. banc 2011). The trial court's judgment will only be reversed if this Court is left with a firm conviction that the judgment is wrong. *Id*, at 815.

Discussion

Appellant challenges the court's findings of 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 because there may have been contradictory evidence before the court. As fact finders, trial courts are free to believe all, part or none of a witness's testimony. *In the Interest of Q.A.H.*, 426 S.W.3d 7 (Mo. banc 2014), at 13, quoting *In re Adoption of W.B.L.*, 681 S.W.2d, 452, at 455 (Mo. banc 1984). "Additionally, evidence in the record that would support a different conclusion does not necessarily mean the judgment was not supported by substantial evidence." *Q.A.H.* at 14.

Regarding mother's chemical dependency and mental health, the court reviewed records from mother's mental health treatment providers at ReDiscover, *Exhibit 1 and 13*, the 2012 Psychological evaluation by Dr. Gregory Sisk *Exh 3*, the 2015 Psychological evaluation by Dr. Mary Richardson *Exh 4*, the records of Truman Medical Center – Behavioral Health *Exh 6*, and drug test records from Heartland Health Labs *Exh 8*.

Regarding mother's drug use, the court made specific findings about

mother's positive test results, and made findings on the prospective harm mother's drug use would have on these children. *LF65* & *72*. The court specifically found that "natural mother has difficulty comprehending information due to her mental health conditions when she is sober the Court finds that no amount of drug use would be safe. The natural mother's continued use of marijuana and other illicit substance places the minor child at risk of abuse or neglect if in her care." *LF65 & 72.*

These children had been under the court's jurisdiction for over one year at the time of the termination and adoption petition was filed, with the children coming under the court's jurisdiction in April 2015, and the adoption trial held in November 2016. The conditions at the time of their removal included mother's untreated mental health issues and hospitalization at Truman Behavioral Health at the time of filing, which the court took judicial notice of in Case Numbers **1516-JU000411** and **1516-JU000412**. *LF10*. At the time of the termination hearing, those conditions continued to exist and conditions of a potentially harmful nature continued to exist. The court made specific findings that there was clear, cogent and convincing evidence regarding mother's mental health and made prospective findings about the risk of harm to these children. *LF61-64 & 67-71.*

Additionally, by the time of this termination hearing, mother had not made significant progress towards reunification of these two children. Mother had found housing, but had regressed in participation with her mental health treatment and other services, including using marijuana again in October 2016. *TR176, Exh*

13. In the year and a half that the case had been open, mother had never progressed to having more than two hours of supervised contact with the children, *TR172-173,* and even then, the visits were not with both children, mother visited the children separately. *TR24.* The court made a finding regarding mother's stability and lack of contact with these children with prospective consideration of the risk of future harm to these children when it found "mother indicated that she was not visiting with her children because she needed to find resources and assistance, leading the Court to believe that the mother would not be able to handle a set of twins full-time while supporting the family…The Court does not find this to be particularly stable." *LF67.*

Mother also failed to support the children under §211.447.2(d) RSMo., with mother having only made two payments to her child support order and only providing de minimis in-kind support for the children in the form of a few outfits of clothing and some food during visits. The trial court heard evidence regarding mother's ability to provide for the children through testimony from Pamela Cobbins *TR 29-30,* the case worker Karema Luster *TR 73 & 76,* foster mother C.A.C.K. *TR 147,* and mother's own testimony *TR 185.* The court made a finding about her failure to provide financial support and failure to provide necessities for the minor children's care. *LF 66.* The record discloses no evidence that mother was incapable of employment from the children's birth. "In the absence of such evidence, mother can be considered financially able to support her child." A.H., 9 S.W.3d 56, at 60 (Mo. App. W.D 2000) Without an income of her own, it is

unlikely that mother will be able to provide adequate food, clothing or shelter for the child in the future. *Q.A.H.*, 426 S.W.3d 7, at 20 (Mo. banc 2014)

POINT 3 The trial court did not err in applying §211.447.5(3) RSMo. and the trial court correctly applied the law in its findings.

Standard of Review

The scope and standard of review with regard to cases tried without a jury is specifically set forth by Missouri law. In such cases, the appellate court must affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or the trial court erroneously declared or applied the law. *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc. 1976). 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. *Missouri Supreme Court Rule 78.07(c)*. Judicial discretion is abused only where a ruling is clearly against logic and is so arbitrary and unreasonable as to shock a sense of justice and indicate a lack of careful consideration. *State ex el. Common v. Darnold*, 120 S.W.3d 788 (Mo. App. 2003). 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, at 815 (Mo. banc 2011). The trial court's judgment will only be reversed if this court is left with a firm

conviction that the judgment is wrong. *Id at 815*.

Discussion

Appellant is precluded from arguing error in the form of the court's judgment or misapplication of the law contained with the language of the court's judgment as she has failed to properly preserve the issue for appeal. *In re J.L.G.* 399 S.W.3d 48, at 59 (Mo. App. 2013). Here, mother failed to file any Motion to Amend, or Motion for New Trial to allow the court to address any perceived error in language or form of judgment, as required by Mo. Sup Ct. Rule 87.04(c). This failure to file post-trial motions also fails to preserve the issue for appeal.

§211.447.5(3) RSMo. requires the court to make certain required findings, which include alternate findings within: 1) that the child has been under the court's jurisdiction for a period of one year, 2) (a) that the conditions which led to the assumption of jurisdiction still persist, OR (b) that conditions of a potentially harmful nature continue to exist, and 3) (a) the there is little likelihood that those conditions will be remedied at an early date so that the child can be return to the parent in the near future, OR (b) the continuation of the parent-child relationship greatly diminished the child's prospects for early integration into a stable and permanent home. In this case, the court made findings regarding all three required elements, including the alternative elements contained within. In effect, the court made findings on all elements, as the alternate findings are not mutually exclusive. There is no indication that the trial court misapplied the law, nor has appellant properly preserved the issue for purposes of appeal. The court tracked the language

of the statute and made specific findings regarding each and every required element and subsection, as required by law. *LF 66-72*. The court's findings repeatedly consider the future risk of harm to the children.

CONCLUSION

The presumption of unfitness contained within §211.447.5(6) RSMo. is constitutional in that the law requires the petitioners to present evidence toward the parent's current unfitness, not merely resting on the prior involuntary termination. Because the petitioner must present evidence regarding the parent's current unfitness, the net effect does not produce any evidentiary shift in the burden to the parent and therefore does not violate the parent's rights to due process under Article 1, Section 10 of the Missouri Constitution. The trial court heard testimony and took evidence regarding the totality of the circumstances. This included the entire juvenile court history involving mother and all five of her children; the involuntary termination hearing on her three older children in which she was represented by counsel, including the same Guardian ad Litem; and evidence about any changes in mother's circumstances between the prior involuntary termination and this termination hearing held merely three months later.

The trial court made specific findings that were supported by clear, cogent and convincing evidence that mother's rights should be terminated under three separate grounds for abuse and neglect of a child under §211.447.5(2) RSMo.,

failure to rectify under §211.447.5(3) RSMo., and unfitness due to a prior involuntary termination under §211.447.5(6) RSMo. Although evidence may have been presented that would support a different conclusion, the trial court's judgment was supported by substantial evidence. When presented with live testimony, the trial court is free to believe none, part or some of a witness' testimony. As such, the trial court's findings are consistent with the evidence presented.

The Juvenile Officer respectfully requests that this Court uphold the trial Court's decision on all grounds and find that §211.447.5(6) is constitutional as written and as applied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered/faxed/ emailed/mailed and/or sent through the eFiling system to the following on 6/26/2017.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the above brief complies with Mo. Ct. Rule 84.06(b) and certifies that this brief contains 4533 words, excluding the covers, certificate of compliance, certificate of service, and signature blocks. I relied upon the word count in Microsoft Word 2013 to count the words as stated herein. Additionally, I hereby certify that the electronic copy of this brief filed with the Court is in compliance with Rules 84.06(a) and (b) and has been scanned for viruses and is virus-free.

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