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 REPLY BRIEF

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I. THE TRIAL COURT'S FINDINGS UNDER SECTION 453.040(7) ARE INSUFFICIENT TO INDEPENDENTLY SUPPORT TERMINATION OF PARENTAL RIGHTS AND ADOPTION OF THE MINOR CHILDREN.

Respondents W.J.K. and C.A.C.K. and the Guardian Ad Litem for the children contend that even if the Court accepted Appellant's arguments, the judgment of the trial court should be affirmed because Appellant did not attack the trial court's determination that Appellant's consent to the adoption under Missouri Revised Statutes Section 453.040(7) was not required. Brief of Respondents W.J.K., C.A.C.K., and Guardian Ad Litem ("Brief of Respondents"), p. 21. Respondent's argument is incorrect as termination under Missouri Revised Statute Section 211.447 is required when asserted in a Chapter 453 petition and there was no waiver of Chapter 453 by Appellant.

A. Because Respondents Asserted a Chapter 211 Claim with a Chapter 453 Claim, All Elements of the Chapter 211 Claim Have To Be Established

In footnote 4 of Appellant's Brief, Appellant noted that Respondents had also asserted a claim under 453.040(7) and that because they asserted the claim in combination with their Chapter 211 claim, all requirements for the Chapter 211 claim must be met for Respondents to prevail, citing *In re Adoption of C.M.B.R.,* 332 S.W.3d 793 (Mo. banc 2011). In *C.M.B.R.* this Court grappled with the differences in Chapters 453 and 211 and how to apply the two when they are both asserted in a termination of parental rights and adoption case. The Court noted that the purpose of Chapter 453 is "to

promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home," while Chapter 211 contains similar goals with some critical additions – "the recognition and protection of the constitutional rights of all parties and the recognition and protection of the birth family relationship when possible." *C.M.B.R.,* 332 S.W.3d at 807. Ultimately, the Court concluded that if Chapter 211 is not asserted in a Chapter 453 petition, then the mandates of Chapter 211 are irrelevant to the analysis unless specifically cross-referenced and mandated by Chapter 453. *Id.* at 806. "However if the prospective parents plead termination of parental rights under Chapter 211 in a Chapter 453 petition, **all statutory requirements for chapter 211 must be met for each chapter 211 claim**." *Id.* at 807 (emphasis added). Such is the case here. If the Chapter 211 claim is reversed by this Court, a reversal of the trial court judgment is required.[1]

This requirement is only logical when you have both chapters asserted in a private termination and adoption. The factual findings are virtually identical, but with the additional constitutional considerations of Chapter 211. It is inconceivable how a party seeking termination of parental rights and adoption could fail on the termination of parental rights, yet still prevail on a claim that consent to the adoption was unnecessary

[1] In *C.M.B.R.*, the Court found that there was sufficient evidence to support the 453.040(7) claim, like Respondents claim here, but reversed and remanded due to failure in other elements of their claims. Because reversal is required as to the chapter 211 claim, the 453.040(7) finding cannot stand on its own. *Id.* at 824.

under Chapter 453. It is the termination of parental rights under Chapter 211 that renders consent unnecessary under Chapter 453. In fact, Respondents acknowledge this very point while making their wavier argument when they argued that, "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).**"[2] Brief of Respondents, p. 20 (emphasis added). Because the termination of Appellant's parental rights under Chapter 211 should be reversed, the Chapter 453.040(7) ruling must be reversed too.

B. Appellant Addressed the Trial Court's Findings Under Section 453.040(7)

Even if the Court were to agree with Respondent that they can prevail on their Chapter 453 claim even if the termination finding under Chapter 211 should be reversed, there was no waiver by Appellant. Appellant noted the Section 453.040(7) claim and any facts relevant to neglect, although not specifically cited by trial court to support its finding, were argued in the Appellant's Brief. Moreover, Appellant appealed the entire judgment of the trial court, not just Chapter 211.

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[2] Section 453.040(8) makes parental consent unnecessary if the parent's rights have been terminated under Section 211.447; therefore it does not provide an independent basis for termination of Appellant's parental rights. Further, the trial court did not reference 453.040(8) in its judgment. LF at 58-77.

The trial court did not make any specific factual findings on the 453.040(7) claim, and instead relied on the factual findings under Chapter 211. Appellant focused her arguments on those legal and factual findings because they are what the trial court ultimately concluded supported termination of the Appellant's parental rights and adoption in this case.

Section 453.040(7) states that a parent must, "for a period of at least six months immediately prior to the filing of the petition for adoption, willfully, substantially and continuously neglected to provide [the children] with necessary care and protection[.]" "Neglect is the intent to forego parental duties, which includes both the obligation to provide financial support for a minor child, as well as the obligation to maintain meaningful contact with the child." *In re T.S.D.*, 419 S.W.3d 887, 895 (Mo. App. E.D. 2014).

The only factual findings made by the trial court are set out under the Chapter 211 ruling. There is no basis for affirming the trial court's judgment based solely on the trial court's determination under Section 453.040(7) as the trial court's judgment fails to set forth an independent factual basis not addressed by Appellant for the 453.040(7) determination. In fact, the trial court's findings do not even address the relevant time period for review of the six month period. Similarly, Respondents' argument contains no factual discussion of the support for neglect under Section 453.040(7). Moreover, the one sentence in the judgment regarding Section 453.040(7) does not even indicate that the clear, cogent, and convincing standard of proof was applied. *See C.M.B.R.*, 332 S.W.3d at 819.

As discussed in detail in Appellant's statement of facts and second point on appeal, Appellant maintained meaningful contact with the children and provided what support she could, given her circumstances. Respondents make no attempt to explain how this Court could determine those facts fail to support termination of parental rights under Chapter 211, but support adoption under Section 453.040(7). Accordingly, Respondents' suggestion that Section 453.040(7) can provide an independent basis to affirm the judgment is not supported by the text of the judgment, or the relevant factual findings made by the trial court.

Because there was no independent factual basis to support the trial court's 453.040(7) findings, the Respondents were not deprived of the opportunity to argue that the facts support the trial court's findings. In fact, both briefs filed by Respondents address visitation and support, which are the facts relevant to Section 453.040(7). Therefore, any claim that the Appellant failed to raise Chapter 453 in her opening brief had no impact on the arguments regarding the factual basis for the trial court's decision as those facts were addressed solely under the trial court's Chapter 211 analysis.

As they did by seeking application of the presumption of parental unfitness in this case, Respondents are simply trying to take another shortcut to terminate Appellant's constitutionally protected rights. Appellant respectfully requests that the Court reject Respondents' attempt to terminate Appellant's constitutional rights without even meeting the requirements of Chapter 211.

C. The Court Can Review the Issue for Plain Error

Finally, the Court can review the trial court's determination under 453.040(7) for plain error, even if the Court agrees with Respondent. *C.M.B.R.*, 332 S.W.3d at 809 (noting the court has discretion to review an "error that is evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice." (citation omitted)). This Court is free to determine that allowing the judgment to stand under Section 453.040(7) is evident, obvious, and clear error which would result in the termination of Appellant's parental rights without sufficient evidence. Clearly, if the Court agrees that termination of her parental rights under Chapter 211 was improper, it would be plain error to allow that adoption to proceed under Section 453.040(7) for all the reasons set forth above. Given the rights and interests at stake, the Appellant contends affirming the judgment in this manner would result in a manifest injustice.

D. The Trial Court's Findings Regarding the Best Interest Are Irrelevant As Respondent Failed to Establish Grounds for Termination By Clear, Cogent, and Convincing Evidence

Respondents further assert that Appellant failed to challenge the finding that termination of parental rights was in the best interest of the minor children under 211.447.7. Termination of parental rights requires a two-step process. First, the "trial court must find by clear, cogent, and convincing evidence that one or more statutory ground for termination exists." *In re C.A.M.*, 282 S.W.3d 398, 405 (Mo. App. S.D. 2009). Second, the trial court must find "termination of parental rights is in the child's best interest" based on a preponderance of evidence. *Id.* The trial court should not have moved past step one of the process because the grounds for termination of Appellant's

parental rights had not been established by clear, cogent, and convincing evidence. The analysis of termination at the first step was skewed by an unconstitutional presumption, based on insufficient evidence of Appellant's mental condition and drug use, and generally not supported by the evidence presented at trial. Therefore, the judgment of the trial court must be reversed and the case remanded for reconsideration of the grounds for termination.

II. 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 CONSTITUTION AMENDMENT XIV AND MISSOURI CONSTITUTION ARTICLE I §10.

A. The Statutory Nature of the Presumption Does Not Render It Constitutional

Respondents argue that the Court should ignore the state Supreme Court decisions finding a presumption of unfitness unconstitutional because the decisions addressed judicial presumptions, not statutory presumptions. Respondents fail to explain how this distinction makes a difference. A legislature can violate a citizen's constitutional rights through legislation just as easily as a court can through precedent. *See Watts v. Lester E. Cox Med. Ctr.*, 376 S.W3d 633, (Mo. banc 2012) (discussing overturning erroneous precedent that impacts constitutional rights) (citing *Mountain Grove Bank v. Douglas Cnty.*, 47 S.W. 944, 947 (Mo. 1898)). While statutes are presumed to be constitutional, they can be found unconstitutional if the statute violates a constitutional provision. *See State v. Young*, 695 S.W.2d 882, 883 (Mo. banc 1985).

The Supreme Courts in Florida and West Virginia found that a presumption of unfitness based on a prior termination violates the Constitution. *See Florida Dept. of Children and Families v. F.L.*, 880 So.2d 602 (Fla. 2004); *In re K.L.*, 759 S.E.2d 778 (W.

Va. 2014). Respondents are correct that these decisions are not binding; however, these decisions provide persuasive authority for finding the presumption unconstitutional. Further, when reviewed in the context of the U.S. Supreme Court precedent, the presumption cannot survive.

Respondents next argue that the statutory presumption has been used to terminate rights of parents and applied by Missouri Appellate Courts. Appellant has not suggested the presumption has not been used; however, its application does not amount to an affirmative determination that the statute is constitutional. This is particularly true as there have been no prior challenges to the constitutionality of the statute. Despite the failure to review this particular statutory presumption, Missouri courts have recognized that extreme caution must be exercised when applying presumptions in termination of parental right proceedings. *See In re Z.L.R.*, 306 S.W.3d 632, 638 (Mo. App. S.D. 2010). While *Z.L.R* involved a presumption inferred by a court based on incarceration, as opposed to a statutory presumption based upon a prior termination, the appellate court's strong language is no less applicable to the statutory presumption here. The court stated: "[t]he erroneous presumption relieved Respondent of clearly, cogently, and convincingly proving Father's unfitness; improperly shifted to Father the burden of proving himself fit; skewed relevant findings and pretermitted others; and resulted in manifest injustice warranting reversal and remand of the § 211.447.5(6) parental unfitness findings for plain error." *Id.*

Here, the statutory presumption similarly relieved Respondents of their burden, shifted the burden to Appellant, and skewed and pretermitted relevant findings.

Respondents' argument that this case is not relevant because it addresses incarceration misses the point – one of our appellate courts has correctly recognized the danger presumptions can present when courts are adjudicating parental rights. That analysis is equally applicable to the presumption at issue here. Using a presumption based on incarceration is closely connected to using a presumption based on a prior termination as both rely on a prior judicial decision to shift the burden to a party to prove they are entitled to their constitutional rights. Quite simply, presumptions, whether created by a court or a legislature, cannot be used as a short cut to terminate a person's fundamental constitutional right to parent and raise their child.

B. The Cases Cited by Respondents Are Distinguishable And Do Not Support the Constitutionality of the Statutory Presumption

Respondents cited two appellate court decisions from Minnesota and Kansas to support the constitutionality of the presumption, but did not provided any decisions by state high courts upholding a similar presumption. Further, both cases cited by Respondents are distinguishable.

The Minnesota appellate court decision considered due process almost exclusively under Minnesota law, with little to no analysis of the issues under U.S. Supreme Court precedent. *See In re P.T.*, 657 N.W.2d 580, 586-89 (Minn. Ct. App. 2003). Moreover, the court recognized that the substantive due process argument was not even fully briefed by the appellant in that case. *Id.* at 588. Accordingly, the decision provides little assistance to the Court regarding application of the U.S. Supreme Court precedent cited by Appellant.

The Kansas appellate court decision relied on by Respondents does not support application of Missouri's statutory presumption, particularly to the facts in this case. The Kansas court was clearly troubled by the presumption of unfitness and ultimately held that it was unconstitutionally applied. *In re J.L.*, 891 P.2d 1125, 1135 (Kan. Ct. App. 1995). The court reasoned that one is not presumed to be guilty in a criminal case simply because they were convicted of a crime in the past and one is not presumed to be negligent simply because they were found negligent in the past. *Id.* at 1131. The court correctly asked, "Why should the issue of unfitness be treated any differently?" *Id.*[3]

Ultimately, in ruling that the statute may possibly be constitutionally applied, the Kansas court held that the trial court must determine if the presumption is a subsection (a) or (b) presumption under Kansas Statute 60-414. *Id.* at 1133-34. A subsection (a) presumption is derived from facts that are probative of the presumed facts and the burden is on party against whom it operates. *Id.* The court found that under the facts of the case, the application of a subsection (a) presumption was unconstitutional. *Id.* at 1134. A subsection (b) presumption arises from facts that have no probative value as evidence of the presumed fact and when *any evidence* of the nonexistence of the presumed fact is

[3] The court also acknowledged "all the rhetoric" regarding whether the presumption really shifted the burden of proof, like was argued by the Respondents here, and ruled that "as a practical matter it does." *Id.*

introduced, including the uncorroborated testimony of a parent, the presumption evaporates. *Id.*[4]

As Judge Pierron pointed out in his concurring opinion, for the presumption to be used as intended by the legislature, the party asking for application of the presumption "must prove the probative value of the previous findings by demonstrating, through a presentation of the underlying facts behind the judicial findings, the weight and relevance of the previous findings as they apply to the current case." *Id.* at 1136-37. Such a result, while constitutionally required, "completely eliminates any meaningful status as a presumption of earlier findings." *Id.* at 1137. "To avoid confusion," Judge Pierron would have simply ruled "this attempt to create a presumption out of evidence that may have little weight or relevance is violative of our due process protections." *Id.*

In this case, there was evidence that Appellant made progress during treatment, obtained independent housing, and was likely to continue to progress. *See, e.g.,* A-138; TR at 155-56, 158.[5] Therefore, the Kansas statutory presumption would likely have been rebutted in this case. The trial court in this case, however, found that "no credible evidence" was presented to rebut the presumption and Section 211.447.5(6)(b)(a) is silent as to what is required to rebut the presumption. At minimum, the Kansas decision

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[4] In considering which presumption should apply, Kansas trial courts are to consider a laundry list of factors. *Id.* at 1136.

[5] All Appendix citations refer to Appendix to Appellant's Brief.

demonstrates that the Missouri statute is not narrowly tailored to ensure a parent's rights are protected.

Further, given the U.S. Supreme Court's jurisprudence regarding parental rights and its disfavor of presumptions, there can be little question that the statutory presumption violates the due process rights of parents. The presumption exists to increase efficiency of such determinations. While efficiency is necessary in some instances, it cannot be pursued at the cost of a person's fundamental right. *See Stanley v. Illinois*, 405 U.S. 645, 657 (1972).

C. A Showing of Current Unfitness by the Moving Party Is Not Required

The Juvenile Officer suggests that the statutory presumption does not actually shift the burden to the parent because a moving party is still required to provide evidence regarding the parent's current fitness. Juvenile Officer's Brief, p. 13. While the court must make some finding regarding the parent's current unfitness, there is no requirement that the moving party (whether the state or potential adoptive parents) provide evidence to support a finding that the parent is currently unfit. *In re T.A.S.*, 32 S.W.3d 804, 815 (Mo. App. W.D. 2000) (the statute "clearly requires the *trial court* to determine that the parent is currently unfit."(emphasis added)). The burden is on the parent to provide evidence and overcome the presumption once it is applied. *In re D.M.B.*, 178 S.W.3d 683, 688 (Mo. Ct. App. 2005) ("[t]he parent has the burden of overcoming the presumption of unfitness by presenting evidence"). Accordingly, the statutory presumption alone, absent evidence presented by the parent, could support the first step of the termination process. The only remaining determination is whether a

preponderance of evidence demonstrates termination is in the best interest of the child. While the moving party would have the burden on the second step, there is no question the presumption removes the burden on the moving party to present evidence to support termination of the parental rights of the parent, and shifts the burden to the parent. This shifting of the burden violates a parent's fundamental right and is unconstitutional.

D. Appellant Has Not Argued She Was Not Given Notice

Respondents contend Appellant was given sufficient notice that the statutory presumption would be applied. Appellant has not argued she was given insufficient notice. Giving a parent notice that a party intends to place an unconstitutional evidentiary burden on the parent does not alleviate the burden or mitigate the damage caused by the violation of those rights. Thus, this argument is irrelevant to the issues and does not provide any reason for the Court to uphold the statutory presumption.

III. 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. Respondents Failed to Address the Lack of Evidence Regarding Appellant's Current Mental Condition

Respondents failed to directly address the deficiencies in the evidence presented regarding Appellant's current mental condition. Respondents did not address the age of the psychological evaluations – from 2012 and 2015. A-81-A-99. And Respondents did not address the questionable veracity of the evaluation conducted in 2015, as Appellant's condition was not stable enough for her to fully cooperate with the evaluation. A-94. Given the age of both evaluations and the potential for inaccuracy in the 2015 evaluation, there was insufficient evidence of Appellant's current mental condition and prognosis before the trial court. In addition, her individual therapist, Ms. Dixon, recommended an evaluation. A-139. As set out in Appellant's opening brief, this Court has held "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). The evidence presented to the trial court failed to establish Appellant's current mental health and failed to show how it impacts her present and future ability to parent. Respondents' briefing completely ignores the binding precedent from this Court on this crucial point. Because Appellant's mental health was the primary basis for the children being removed from her custody and for the termination of her rights, the lack of evidence to establish Appellant's current mental condition warrants reversal so that the trial court can consider termination on any ground with the benefit of current evidence regarding Appellant's mental health.

B. There Was Insufficient Evidence to Support the Trial Court's Finding Regarding Chemical Dependency

Respondents argue that Appellant's history of drug use from the records support the trial court's finding that chemical dependency prevented Appellant from caring for the children. However, the drug testing in the approximately one year prior to the trial showed only a couple of positive tests for marijuana. TR at 106-07, 111. Such a small number of positive tests over a number of months does not support the conclusion that Appellant's drug use prevented her from parenting her children. At best for Respondents, the evidence shows Appellant had made significant progress in addressing any chemical dependency issue she had in the past. The evidence presented simply failed to demonstrate Appellant had a chemical dependency issue that would prevent her from parenting her children. *See In re K.M.A.-B.*, 493 S.W.3d 457, 469 (Mo. App. E.D. 2016). Again, Respondents' briefing ignores the relevant case law cited by Appellant regarding

chemical dependency, and instead attempts to bolster the trial court's judgment by linking the argument to Appellant's mental health issues. However, as discussed above, there was insufficient evidence about Appellant's current mental health status. Thus, linking the two issues without sufficient evidentiary support for the findings on either issue does little to support the trial court's decision.

C. The Evidence Demonstrates Appellant Provided Financial Support to the Children

Because Respondents cannot argue Appellant did not provide financial support for the children, they attempt to minimize the support Appellant was able to provide. Appellant's income was limited to disability payments and other government support which prevented her from providing much financial support to the children. TR at 109-110, 113. Further, Appellant was particularly limited in her ability to provide financial support while she was living in the Oaks. TR at 167. Despite her limited financial resources, Appellant provided diapers and snacks to the children, provided some clothing, had begun paying her child support obligation, and was working to ready her apartment for the children, including providing furnishings. *See In re S.M.H.,* 160 S.W.3d 355, 367 (Mo. banc 2005) ("Evidence that a parent has provided some contribution, even if not fully sufficient for support, demonstrates the parent's intent to continue the parent-child relationship and militates against termination."). Given all the efforts of Appellant to provide support and a home for her children, Respondents' arguments that she failed to provide financial support are simply against the weight of the evidence.

In addition, the Juvenile Officer raised a factual issue that requires correction. The Juvenile Officer suggests there was no evidence that Appellant could not work, suggesting Appellant's lack of support was due to her voluntary failure to obtain employment. However, the fact that Appellant received disability and spent a year in a group home clearly suggests she was incapable of full-time employment at that time. Respondent then suggests Appellant does not have an income, and therefore cannot support the children. Again, the suggestion that she did not have any income is contrary to the evidence that she received disability payments.

D. Appellant Demonstrated She Was Making Progress Toward Reunification

Although not addressed in a separate point, Respondents generally contend Appellant had not made enough progress toward reunification to prevent termination of her parental rights. As noted in Appellant's Brief, the trial court and Respondents downplay the significant progress Appellant had made in the nineteen months between the birth of the twins and trial. Appellant had stabilized on medication, was consistently utilizing services at ReDiscover, had obtained appropriate housing, and was transitioning to living independently. *See*, *e.g.*, TR at 97; Ex. 17; TR at 155-56. Respondents provide no rationale for why that progress should be deemed irrelevant. There has been no discussion, either by the trial court or Respondents, regarding why Appellant should not be given additional time to reunify given the progress she has made. Instead, the trial court determined, without explanation, that postponing the trial to evaluate Appellant's mental health and to see how she was able to function in an independent living situation

was a delay tactic. LF at 63, 69. The factual findings underpinning the trial court's determination that grounds existed to terminate Appellant's parental rights are not supported by clear, cogent and convincing evidence, and remand is appropriate.

IV. 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. It Is Not Clear from the Trial Court's Factual Findings that the Law Was Correctly Applied

In addition to a lack of clear, cogent and convincing evidence to support termination under 211.447.5(3), Appellant also argued the trial court misapplied the law. Because the factual findings were not linked to the specific statutory requirements, it is not clear that the trial court properly applied the law to the facts.

Termination under Section 211.447.5(3) requires (1) the children have been under jurisdiction for one year; and (2) the condition(s) that led to removal persist or other harmful conditions exist; and (3) those conditions are unlikely to be remedied in the near future, or continuing the parent-child relationship will prevent the child from moving into a permanent home environment. *In re B.J.K. and J.R.K.*, 197 S.W.3d 237, 243 (Mo. App. W.D. 2006). The trial court 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. This suggests the law requires only factor one and any one of the additional three alternative factors to support termination. Thus, the trial misstated the statutory requirements for termination.

Further, the discussion of facts does not directly address the legal determinations necessary for termination on this ground. Instead, the trial court discusses the facts regarding Appellant's progress, efforts of the state, Appellant's mental condition, and Appellant's chemical dependency. The judgment does not clearly set forth what provisions of Section 211.447.5(3) the trial court found applicable, or whether, despite incorrectly setting forth the statutory language, the trial court correctly applied the law. When making a determination of this magnitude, the parties should not be left to guess as to what the trial court found. Therefore, the Court should reverse this ground for termination.

B. This Court Can Review for Plain Error

Respondents are correct that Appellant did not file a post-trial motion regarding this error. But even if the Court were to agree with Respondent that this amounts to a failure to preserve this error, the failure to preserve the issue for appeal does not prevent the Court from exercising its discretion to address the issue under a plain error review. *See In re Adoption of C.M.B.R.,* 332 S.W.3d at 809 (noting the court has discretion to review an "error that is evident, obvious and clear, which resulted in manifest injustice or

a miscarriage of justice." (citation omitted)). Further, as noted in Appellant's Brief, the Eastern District Court of Appeals reviewed the failure to make proper findings even though the issue had not been raised on appeal. *In re K.M.A.-B*, 493 S.W.3d 457, 473-474 (Mo. App. E.D. 2014). Given the seriousness of the issue and the fundamental nature of the right terminated, Appellant urges the Court to exercise its discretion to review the trial court's determination for plain error if it determines the issue was not properly preserved for appeal.

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 she is fit to be a parent. It further led the trial court to focus on the facts and evidence relevant to the prior termination, as opposed to Appellant's current situation, prognosis, and continued progress.

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 considerable evidence to the contrary, and (4) improperly ignored the significant progress Appellant had made in improving her life.

Finally, the trial court committed error by erroneously applying the law under Section 211.477.5(3) and 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 grounds for termination, 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.

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 6211 words per the Microsoft Word processing system used by the undersigned which does not exceed the 7,750 allowed for Appellant's Reply Brief.

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The undersigned hereby certifies that on this 12th day of July, Appellant's Reply Brief was e-filed and sent via the Court's E-filing system to:

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