IN THE
MISSOURI SUPREME COURT

Case No. SC96307

S.S.S., L.W.V, and M.T.S,

Respondents,

v.

C.V.S.,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS CITY
THE HONORABLE DAVID MASON

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On May 30, 2017 this Court sustained respondents' application for transfer of Eastern District Court of Appeals Case ED104249 to the Missouri Supreme Court pursuant to Missouri Constitution Article V Section 10 and Missouri Supreme Court Rule 83.04. Case ED104249 disposed of appellant's appeal from the trial court's "Findings of Fact and Conclusions of Law" entered in the Circuit Court of the City St. Louis, Missouri terminating the parental rights of appellant and granting respondents' petition for adoption. Because this Court sustained respondents' motion for transfer, jurisdiction now lies in the Missouri Supreme Court.

STATEMENT OF FACTS

Appellant, C.V.S., and respondent, M.T.S., are the biological parents of minor child, S.S.S., age 6. (L.F. 8, 223)[1]. S.S.S.'s biological parents were never married; however, C.V.S. is named as S.S.S.'s father on her birth certificate. (Id.). The birth parents resided in California at the time of the child's birth in 2009. (Tr. 88, 89). The child's parents resided together in California until M.T.S. moved with the child to St. Louis, Missouri in 2010. (Tr. 90, 158). C.V.S. continued to live in California. (Tr. 159).

Respondent L.W.V. is the step-father of the minor child. (Id.). L.W.V. and M.T.S. were married in 2013. (Tr. 66). L.W.V. is a citizen of the United Kingdom, presently living in the United States as a Conditional Permanent Resident, and that he is attempting to obtain Permanent Resident status. (Id.).

In December 2014, M.T.S. and L.W.V. filed a petition to terminate C.V.S.'s parental rights and to adopt the minor child in the Circuit Court of St. Louis City pursuant to Chapter 453 RSMo, alleging that C.V.S. had "…for a continuous period of at least six (6) months immediately prior to the filing hereof, willfully abandoned S.S.S.. In addition, any father has, for a continuous period of at least six (6) months immediately prior to the filing hereof, willfully, substantially and continuously neglected to provide S.S.S. with the necessary care and protection." (L.F. 9). Further, M.T.S. and L.W.V. alleged that the adoption will "promote the best interests and welfare of S.S.S..." (L.F.

[1] References to the legal file are designated (L.F.) and references to the transcript are designated (Tr.).

10).

The trial court appointed a guardian ad litem for the minor child. (L.F. 21).

C.V.S. denied the allegations and prayed the court to dismiss M.T.S. and L.W.V.'s petition for adoption. (L.F. 22-25; L.F. 26-29). In his responsive pleadings, C.V.S. averred that he had traveled to the St. Louis are at least twice in the six months prior to M.T.S. and L.W.V. filing their petition for adoption. (L.F. 22).

In December 2015 (during the pendency of the adoption case at issue in this appeal), C.V.S. filed a paternity petition in a separate case number in the Circuit Court of the City of St. Louis, praying the Court find him to be the biological father of S.S.S., and for an order awarding the parties the joint legal and physical custody of S.S.S.. (L.F. 35).

On December 17, 2015, the Honorable David Mason, Circuit Court Judge, conducted a one-day trial on petitioner's petition for adoption, with M.T.S., L.W.V. and C.V.S. and the child's guardian ad litem all present. (L.F. 34; Tr. 1, 8-9). Prior to the introduction of evidence, C.V.S.'s trial counsel attempted to submit a consent agreement between the parties that would have resolved all outstanding issues before the Court. (Tr. 9). The trial court refused to entertain the submission of said settlement and ordered the parties to conduct the trial. (Tr. 9).

M.T.S. and L.W.V. hired a company to perform a home study and the home study author testified that M.T.S. and L.W.V. were her clients and that L.W.V. adopting S.S.S. would be in S.S.S.'s best interest; however, the home study author did not verify any information about C.V.S. that she received from M.T.S. and L.W.V., nor did she speak with C.V.S. before recommending the adoption be granted. (Tr. 26, 21, 29). In addition,

the home study author testified that M.T.S. and L.W.V., should the court grant the adoption, would not cut C.V.S. out of S.S.S.'s life (both M.T.S. and L.W.V. testified to the same during the trial). (Tr. 25, 73, 126, 146-147).

A former roommate of M.T.S. and S.S.S., D.L., testified that in the two years the three of them lived together (or in the same building) after M.T.S. moved back to St. Louis from California in 2010, C.V.S. came to St. Louis "about half a dozen times" and "[s]ome of the stays were more extended than others." (Tr. 38). She testified that C.V.S. also exercised visitation during other periods after D.L. and M.T.S. no longer resided in the same building. (Tr. 47).

D.L. testified that after M.T.S. and her present husband, respondent L.S.V. married in 2013, C.V.S. became "…far more attentive and punctual but, I mean, it was more insistent at that point." (Tr. 41). C.V.S., she stated, has been present in S.S.S.'s life. (Tr. 46).

Prior to M.T.S. and L.W.V.'s marriage, C.V.S. was late to "several" visitations with S.S.S., (Tr. 42), according to D.L., and that she observed C.V.S. interacting with S.S.S. on ten to a dozen occasions, during which she opined that C.V.S. "wants to be [S.S.S.'s] best friend" and that he "doesn't have the authority required." (Tr. 43). D.L. also stated that C.V.S. was flippant, nonchalant and neglectful in his parenting of S.S.S., but when asked for a specific example of same, she could only state, "I've witnessed on several occasions him using vulgar language, elevated tone of voice, things of that nature that S.S.S.'s not generally exposed to." (Tr. 44).

In addition, D.L. testified under examination from M.T.S. and L.W.V.'s lawyer

that C.V.S.'s tardiness alone is, in her opinion, sufficient grounds to terminate C.V.S.'s parental rights and grant the adoption petition. (Tr. 49).

Tamara Heron, another friend of M.T.S., testified that she had no knowledge of C.V.S.'s parenting of S.S.S. over the past six years. (Tr. 62).

In fact, C.V.S. had visited with S.S.S. on three to four occasions in the six months prior to M.T.S. and L.W.V. filing the present petition, with the average visit being a weekend long, for three to five hours each weekend day. (Tr. 79-80, 82, 83, 84, 85). C.V.S.'s visits to St. Louis to see S.S.S. require him to expend the time and expense to arrange travel, lodging, and transportation. (Tr. 173).

M.T.S. testified that C.V.S. visited with S.S.S. in the six months prior to M.T.S. and L.W.V. filing their adoption petition, and that C.V.S. called S.S.S. approximately three times every week in the six months prior to M.T.S. and L.W.V. filing their adoption petition. (Tr. 156-57). In fact, since the time of her birth in 2010, C.V.S. has always maintained contact with S.S.S., except for a four month period approximately three years ago when neither he nor M.T.S. called each other. (Tr. 171-72, 246).

S.S.S. was excited to see C.V.S. and she enjoyed her time with him during his visits. (Tr. 176). C.V.S. has told S.S.S. that he loves her when they are together and she has told him the same. (Tr. 177). Further, C.V.S. testified that S.S.S. loves him. (Tr. 202).

C.V.S. expressed to M.T.S. his desire to spend more time with S.S.S. that what M.T.S. allows presently, but M.T.S. "did not like the subject, so [he] was forced to drop it." (Tr. 208). C.V.S. testified that he has developed a parental bond with S.S.S. and that

he would like to have more time with her. (Tr. 225).

C.V.S. testified to the fun he and S.S.S. have when they are together, including visits to the library and the park and she routinely tells C.V.S. that she loves him, both in person and on the telephone. (Tr. 202, 210).

During C.V.S.'s visits with S.S.S., M.T.S. and L.W.V. would not allow C.V.S. to spend time alone with S.S.S., and the visits always took place in a public place, with M.T.S. sitting at the same table as C.V.S. and S.S.S. during each visit. (Tr. 86, 101, 170-71). M.T.S. would dictate the time of the visits between C.V.S. and S.S.S. (Tr. 174-75).

In the six months prior to the filing date of the adoption petition, C.V.S. had almost daily contact with S.S.S. (Tr. 222).

M.T.S. testified that recently, she and L.W.V. offered to change their plans to allow C.V.S. to see S.S.S. if he would consent to the adoption. (Tr. 166-67). In addition, C.V.S. testified about M.T.S. needing C.V.S.'s consent for S.S.S. to travel overseas and that to induce him to give that consent, M.T.S. was overly nice and manipulative, telling him that they were going to work all of this [adoption issue] out and that he would continue to get to see S.S.S.. (Tr. 220).

M.T.S. admitted that following her marriage to L.W.V. in 2013, C.V.S. called S.S.S. more frequently, almost every day, and visited S.S.S. more frequently. (Tr. 66, 118). In fact, within the two to three months prior to trial, S.S.S. asked M.T.S. if she could call and speak with C.V.S. on the phone. (Tr. 124). C.V.S. testified that he attempts to call S.S.S. every other day, and between telephone calls and in-person visits he and S.S.S. have made contact with each other every week more than once during 2014

and 2015, and even years before that. (Tr. 210, 2011).

C.V.S. has expressed to M.T.S. that he wanted to be involved in S.S.S.'s life and since 2013, C.V.S. has become more interested and more involved in S.S.S.'s life. (Tr. 172, 177). M.T.S. has not been receptive to C.V.S.'s desire to have more visits with S.S.S. and expanding the visits that he has. (Tr. 168).

M.T.S. admitted that she has not encouraged S.S.S. to have a relationship with C.V.S., stating rather, that she has "attempted to allow the possibility" and that she herself has more rights to S.S.S. than C.V.S. (Tr. 162, 195).

In October 2015, C.V.S. arrived from California on short notice to see S.S.S.; nonetheless, M.T.S. would not allow C.V.S. to see her on a particular evening because it was "family movie night." (Tr. 190).

C.V.S. testified that he's had difficulty bonding with S.S.S. because of M.T.S.'s conduct and her supervising every visit. (Tr. 214). In addition, M.T.S. controls the timing of the visits such that C.V.S. will "sit in [his] hotel for a week at a time just to see her for one hour." (Tr. 216). C.V.S. had no friends and was doing nothing else in St. Louis except waiting to see his daughter. (Tr. 243). C.V.S. has consistently denied M.T.S.'s allegations that he is routinely 30 minutes late to visits and he denied missing visits altogether in the past three to four years. (Tr. 241).

C.V.S. testified that he always comes to St. Louis near S.S.S.'s birthday in April each year, even though he never gets to see her on her actual birthday. (Id.). In addition, C.V.S. traveled to St. Louis once only to discovery that M.T.S. and S.S.S. were overseas. (Id.).

In addition to more recently, from 2010 through 2013, M.T.S. traveled with S.S.S. to visit C.V.S.'s mother in California for seven to ten days each visit, and C.V.S. would visit with S.S.S. during those visits. (Tr. 158-59). In addition, during those years and continuing thereafter, C.V.S. would travel to St. Louis to visit S.S.S. (Tr. 159).

M.T.S. received $400.00 per month child support for S.S.S., although L.W.V. and M.T.S. testified that the amount is paid to M.T.S. by C.V.S.'s mother. (Tr. 82, 120, 170). M.T.S. stated that the only month she did not receive a child support check during the six months prior to filing her petition was August 2014. (Tr. 190-91). C.V.S. testified that the child support payments are paid from his own funds but are routed through his mother's account because she knows how to do electronic banking. (Tr. 199). C.V.S.'s funds are from his trust fund and he had paid his child support for four to five years. (Tr. 199-200). C.V.S. has regularly given the child birthday gifts and has given the child at least one Christmas gift. (Tr. 165).

Following the parties' evidence, and on the record, the court asked the guardian ad litem to file a written recommendation concerning petitioner's petition for adoption. (Tr. 257).

On February 2, 2016, the guardian ad litem filed her report and recommended that the trial court grant M.T.S. and L.W.V.'s petition, although the bulk of the guardian ad litem's report concerned her review of the facts as applied to Chapter 211 RSMo. (L.F. 30-33, 10).[2]

2 Chapter 211 RSMo "facilitates the care, protection and discipline of children who come

On February 29, 2016, the Court entered its "Findings of Fact and Conclusions of Law" that found and concluded, inter alia:

- C.V.S. was not a credible witness because, inter alia, he gave "false statements" in his answer and objection to petitioner's petition and in his motion to dismiss, he made "false and misleading statements" in his answers to petitioners' discovery requests and he "gave conflicting testimony" at trial about his employment and income. (L.F. 36-40).
- Both petitioners and all three of petitioners' witnesses were credible. (L.F. 36).
- Cited to multiple sections of Chapter 211, RSMo, and the grounds outlined therein for termination of parental rights.
- With respect to the issue of abandonment, the Court found, inter alia:

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within the jurisdiction of the juvenile court" and are removed from the control of their parents. In re Adoption E.N.C., 458 S.W.3d 387 at 394 (Mo. App. E.D. 2014). Chapter 211 is utilized primarily by state actors, that is, the division of children's services or the juvenile officer, to take children into protective custody and terminate parental rights. See In re J.F.K., 853 S.W.2d 932, 934 (Mo. banc 1993). Prospective parents seeking adoption, however, may seek to terminate parental rights based on chapter 211 provisions in an adoption petition. Section 211.447.6. In re: C.M.B.R., 332 S.W.3d 793, 806 (Mo. banc 2011). The present case is before the Court on petitioners' Chapter 453 petition. (L.F. 8-13).

- M.T.S. testified that on more than ten occasions, C.V.S. has told S.S.S. that he was coming to visit and then failed to show up, and that this continued during the last six months prior to the filing of this case. (L.F. 55).
- M.T.S. testified that on more than twenty occasions, C.V.S. has been more than thirty minutes late for scheduled plans to see S.S.S., and that this continued to occur during the last six months prior to the filing of this case. (Id.).
- M.T.S. and two additional witnesses testified that C.V.S. began to make more frequent efforts to contact S.S.S. and visit the child after M.T.S. and L.W.V. were engaged and subsequently married. (Id.).
- M.T.S. testified that C.V.S. does not interact appropriately with the minor child and does not make her a priority. (L.F. 56).
- C.V.S.'s "habitual lateness/failure to appear for scheduled visits demonstrate a willful abandonment of the Minor Child for at least six months prior pursuant to Section 450.040.7 [sic] for a period of at least six months prior to the filing of this action." (L.F. 57).
- "Despite having ample opportunities for visitation and communication with the child, the evidence adduced at trial and the GAL Report demonstrate a long term lack of interest in the minor child by [C.V.S.]. Despite having occasional contact with the child, [C.V.S.] does not have meaningful interactions with the Minor Child

and often arrives late or completely fails to appear for scheduled visits. As such, [C.V.S.'s] relationship with the Minor Child is superficial and tenuous and is insufficient to establish that he has not willfully abandoned the Minor Child." (L.F. 58).

- With respect to the issue of "financial support", the Court found, inter alia:
  - C.V.S.'s mother made five months of child support payments to M.T.S. in the six months prior to the filing of petitioners' petition in this matter. (L.F. 59).
  - C.V.S.'s failure to corroborate his oral testimony with documents showing the child support came from his trust account or his income and not from his mother, "[C.V.S.] willfully, substantially, and continuously neglected to support the Minor Child for a period of at least six months prior to the filing of this matter."
- The Court thereafter made "Conclusions of Law," including:
  - C.V.S.'s consent to the adoption is not necessary because he willfully abandoned the Minor Child for for a period of at least six months prior the commencement of this matter. (L.F. 63).
  - C.V.S. will has willfully, substantially and continuously neglected to provide the Minor Child with necessary care and protection for a period of at least six months prior to the commencement of this matter. (Id.).
  - Citing to Sections and sub-sections contained in Sections 211.447.5,

211.447.7 RSMo. (L.F. 63-64).

- Pursuant to RSMo Section 453.080.1(8), it is fit and proper that petitioners' adoption of the Minor Child should be made, since the welfare of the child so demands.

- The Court then stated: "Therefore, it is ordered and decreed that from the date of this Judgment…" (L.F. 64).
  - The parental rights of C.V.S. Sandler are hereby terminated with respect to the Minor Child. (L.F. 65).
  - The Minor Child shall for all legal intents and purposes be the child of Petitioners. (L.F. 65).

The court's February 29, 2016 Findings of Fact and Conclusions of Law was not denominated a "judgment" or "order." (L.F. 64). The docket entry for same was designated as "Order." (L.F. 6).

C.V.S.'s appeal of the circuit court's February 29, 2016 Findings of Fact and Conclusions of Law followed.

POINT RELIED ON I

THE TRIAL COURT ERRED IN ITS JUDGMENT IN TERMINATING FATHER'S PARENTAL RIGHTS BECAUSE IT WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT PETITIONERS FAILED TO PROVE BY CLEAR, COGENT AND CONVINCING EVIDENCE THAT FATHER WILLFULLY ABANDONDED S.S.S. FOR A PERIOD OF AT LEAST SIX MONTHS PRIOR TO PETITIONERS' FILING THEIR PETION FOR ADOPTION AS REQUIRED BY SECTION 453.040(7) RSMO IN THAT C.V.S. VISITED S.S.S. ON NUMEROUS OCCASSIONS, CALLED HER ALMOST EVERY DAY, AND COMMUNICATED TO THE CHILD'S MOTHER THAT HE WANTED TO SPEND MORE TIME WITH THE CHILD.

In re C.M.B.R., 332 S.W.3d 793 (Mo. banc 2011)

In re J.M.J., 404 S.W.3d 423 (Mo. App. W.D. 2013)

In re K.A.W., 133 S.W.3d 1 (Mo banc 2004)

In re T.S.D., 419 S.W.3d 887 (Mo. App. E.D. 2014)

§453.040 RSMo

POINT RELIED ON II

THE TRIAL COURT ERRED IN ITS JUDGMENT IN TERMINATING FATHER'S PARENTAL RIGHTS BECAUSE IT WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT PETITIONERS FAILED TO PROVE BY CLEAR, COGENT AND CONVINCING EVIDENCE THAT FATHER WILLFULLY,

SUBSTANTIALLY AND CONTINUALLY NEGLECTED TO PROVIDE THE NECESSARY CARE AND PROTECTION OF S.S.S. IN THE SIX MONTHS PRIOR TO PETITIONERS' FILING THEIR PETION FOR ADOPTION AS REQUIRED BY SECTION 453.040(7) IN THAT C.V.S. PROVIDED SUPPORT FOR S.S.S. THROUGH HIS MOTHER FOR FIVE OF SIX MONTHS PRIOR TO PETITIONERS' FILING.

E.K.L. v. A.L.B., 488 S.W.3d 764 (Mo. App. W.D. 2016)

In re C.M.B.R., 55 S.W.3d 889 (Mo. banc 2001)

In re M.S.R., 965 S.W.2d 444 (Mo. App. W.D. 1998)

In re T.S.D., 419 S.W.3d 887 (Mo. App. E.D. 2014)

§453.040 RSMo

ARGUMENT

Standard of Review

"A prerequisite to an adoption under Chapter 453 RSMo is the natural parents' consent or the involuntary termination of their parental rights. In re C.M.B.R., 332 S.W.3d 793, 819 (Mo. banc 2011). [An appellate court will] review whether there was clear, cogent, and convincing evidence to support a statutory ground for terminating parental rights under Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). Id. at 815.

Thus, [an appellate court] will affirm the circuit court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy, 536 S.W.2d at 32. [An appellate court will] view the evidence in the light most favorable to the [trial] court's judgment, deferring to its credibility determinations and resolutions of conflicts in the evidence. In re C.M.B.R., 332 S.W.3d at 815. 'Greater deference is granted to a trial court's determinations in custody and adoption proceedings than in other cases.'" Id. (citation omitted)." In re J.M.J., 404 S.W.3d 423, 432 (Mo. App. W.D. 2013), however, "[W]hen reviewing a trial court's termination of parental rights, appellate courts must examine the trial court's findings of fact and conclusions of law closely." In re K.A.W., 133 S.W.3d 1, 12 (Mo. banc 2004).

POINT RELIED ON I

THE TRIAL COURT ERRED IN ITS JUDGMENT IN TERMINATING FATHER'S PARENTAL RIGHTS BECAUSE IT WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT PETITIONERS FAILED TO PROVE BY CLEAR, COGENT AND CONVINCING EVIDENCE THAT FATHER WILLFULLY ABANDONDED S.S.S. FOR A PERIOD OF AT LEAST SIX MONTHS PRIOR TO PETITIONERS' FILING THEIR PETION FOR ADOPTION AS REQUIRED BY SECTION 453.040(7) RSMO IN THAT C.V.S. VISITED S.S.S. ON NUMEROUS OCCASSIONS, CALLED HER ALMOST EVERY DAY, AND COMMUNICATED TO THE CHILD'S MOTHER THAT HE WANTED TO SPEND MORE TIME WITH THE CHILD.

The prerequisite to any adoption is the consent of natural parents or involuntary termination of parental rights. In re J.F.K., 853 S.W.2d 932, 934 (Mo. banc 1993); see also Sections 453.030 and 453.040 RSMo.

"Section 453.040(7) [RSMo] provides, in pertinent part, that a parent's consent to an adoption of a child is not required where, for a period of at least six months immediately prior to the filing of an adoption petition, a parent willfully abandoned the child or willfully, substantially, and continuously neglected to provide the child with necessary care and protection." In re J.M.J., 404 S.W.3d 423, 432 (Mo. App. W.D. 2013).

Although Section 453.005 RSMo states that the chapter is to be construed "to promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home," the Missouri Supreme Court has noted that:

> "[Chapter 453] is to be liberally construed with a view to promoting the best interests of the child, but such liberal construction is obviously not to be extended to the question of when the natural parents may be divested of their rights to the end that all legal relationship between them and their child shall cease and determine[.]" In re C.M.B.R., 332 S.W.3d 793 at 807 (Mo. banc 2011) citing In re Adoption of R.A.B., 562 S.W.2d 356, 360 (Mo. banc 1978).

In a parental rights termination case, "substantial evidence," as the term is used in Murphy v. Carron, means "clear, cogent, and convincing evidence." In the Matter of O'Brien, 600 S.W.2d 695, 698 (Mo. App. W.D. 1980).

"The clear cogent and convincing standard of proof is met when the evidence 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." In re Adoption of H.M.C., 11 S.W.3d 81, 87 (Mo. App. W.D. 2000).

In Troxel v. Granville, the United States Supreme Court stated that "[t]he interest of parents in the care, custody and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court." As stated in In re T.A.L., "Denying a parent his or her right to their children is an "awesome power" that should not be exercised lightly." 328 S.W.3d 238, 246 (Mo. App. W.D. 2010). Further,

Missouri Supreme Court Judge Teitelman, stated, "[t]he fundamental liberty interest of natural parents in raising their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State." In re K.A.W., 133 S.W.3d 1, 12 (Mo banc 2004).

The clear, cogent and convincing burden of proof standard is simply a reflection and acknowledgement of a parent's fundamental liberty interest in their child remaining in the natural parent's custody and control.

With respect to respondents' application for transfer to the Missouri Supreme Court, respondents claim, inter alia, that the Missouri Court of Appeals Eastern District misapplied the law in this case by relying on language in a Chapter 211 RSMo termination of parental rights case, In re K.A.W., when the court stated, "….when reviewing a trial court's termination of parental rights, appellate courts must examine the trial court's findings of fact and conclusions of law closely." Id. at 12. To claim that termination of parental rights judgments are subject to different levels of appellate scrutiny depending on whether the termination was ordered pursuant to Chapter 211 or pursuant to Chapter 453 RSMo, is a distinction without a difference. As stated clearly and succinctly in K.A.W., 133 S.W.3d at 12:

> The constitutional implications of a termination of parental rights also inform the standard of appellate review. The bond between parent and child is a fundamental societal relationship. In re Parental Rights to Q.L.R., 118 Nev. 602, 54 P.3d 56, 58 (Nev.2002); see Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); see also Stanley v.

Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). A parent's right to raise her children is a fundamental liberty interest protected by the constitutional guarantee of due process. It is one of the oldest fundamental liberty interests recognized by the United States Supreme Court. Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The fundamental liberty interest of natural parents in raising their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State. Santosky v. Kramer, 455 U.S. at 753, 102 S.Ct. 1388; In the Interest of M.D.R., 124 S.W.3d 469, 472 (Mo. banc 2004). Those faced with forced dissolution of their parental rights have a more critical need for protections than do those resisting state intervention into ongoing family affairs. Id. The termination of parental rights has been characterized as tantamount to a "civil death penalty." In re N.R.C., 94 S.W.3d 799, 811 (Tex.App.-Houston [14th Dist.] 2002); In re Parental Rights as to K.D.L., 118 Nev. 737, 58 P.3d 181, 186 (2002). "It is a drastic intrusion into the sacred parent-child relationship." In the Interest of P.C., B.M., and C.M., 62 S.W.3d at 603.

Consequently, when reviewing a trial court's termination of parental rights, appellate courts must examine the trial court's findings of fact and conclusions of law closely. Id. Statutes that provide for the termination of parental rights are strictly construed in favor of the parent and preservation

of the natural parent-child relationship. In re Adoption of W.B.L., 681 S.W.2d 452, 455 (Mo. banc 1984); 43 C.J.S. Infants sec. 40(a) (2003).

Furthermore, respondents cite no case for the proposition that because the present case is a Chapter 453 termination case and not a Chapter 211 termination case that a different standard of appellate review applies. Finally, the close examination cited by the the K.A.W. court is not a holding of the Missouri Supreme Court, but rather the Missouri Supreme Court making plain that a termination case by its very nature requires the Court to be mindful of the constitutional implications present in every termination case.

The terms "abandonment" and "neglect" in this statute are used in the disjunctive; hence, "either ground, if supported by substantial evidence, will obviate the need for parental consent" to an adoption. Id. (citing In re K.L.C., 9 S.W.3d 768, 772 (Mo. App. S.D. 2000)).

"Abandonment is defined as the voluntary and intentional relinquishment of the custody of a child with the intent to never again claim the rights or duties of a parent." In re K.L.C., 9 S.W.3d 768 at 772-73. Abandonment is also defined as "the intentional withholding by the parent of his or her care, love, protection and presence, without just cause or excuse." Id. at 773.

As stated in In re T.S.D., 419 S.W.3d 887, 895 (Mo. App. E.D. 2014): "To determine whether abandonment or neglect has occurred requires an examination of the parent's intent." (citing In re Adoption of W.B.L., 681 S.W.2d 452, 454 (Mo. banc 1984)).

The parent's intent, an inferred fact, is determined by considering all of the evidence of the parent's conduct during, before, and after the statutory period. Id. However, the greatest weight is given to conduct during the statutory period and the least weight to conduct occurring after the petition was filed. In re T.S.D., 419 S.W.3d at 895 (citing Matter of A.L.H., 906 S.W.3d 373, 376 (Mo. App. E.D. 1995).

In In re T.S.D., 419 S.W.3d 887 (Mo. App. E.D. 2014), the Eastern District upheld a trial court's finding of abandonment as grounds for termination of parental rights where the mother had no contact whatsoever with the child in the six months prior to the filing of petitioners' petition, had only seen the child once in the six years the child was in the custody of petitioners and that was approximately five years prior to the filing of the petition, had made no requests or arrangements to see the child since that time, had only periodic and irregular phone contact with the child over the years, and at one point going two years without phone contact with the child. Id. at 896.

In In re J.M.J., 404 S.W.3d 423, 433 (Mo. App. W.D. 2013) citing In re P.G.M., 149 S.W.3d 507, 515 (Mo. App. S.D. 2004) (internal quotation marks and citations omitted) the Court upheld trial court's termination of parental rights where "… Mother's conduct over the course of the guardianship, e.g., the increasingly sporadic nature of her visits and her lack of interest in J.M.J. during those visits, her unwillingness to fully participate in J.M.J.'s therapy to improve their relationship, her lack of participation in J.M.J.'s medical care, her lack of interest and participation in J.M.J.'s school and activities, and her unwillingness to provide a safe home environment for J.M.J., indicated her intent to abdicate her parental duties to Grandparents. Any efforts Mother made were,

at best, token. 'Parents are not allowed to maintain only a superficial or tenuous relationship with their children in order to avoid a determination of abandonment.'."

In the above case, the Mother whose rights were terminated lived in the same part of the state as the child, but over time, visited the child less and less. Id. at 428. Further, the Court found abandonment in In re J.M.J. because, in addition to increasingly infrequent visits with the child, the mother failed to keep abreast of or attend the child's school events, extracurricular activities and church events. Id. at 428.

In addition, the mother in In re J.M.J. did not commit to improving her relationship with the child. Id. at 432.

The trial court in the present case committed error when it found that C.V.S. willfully abandoned S.S.S. for the six months prior to M.T.S. and L.W.V. filing their petition for adoption for several reasons. The language in In re J.M.J., 404 S.W.3d 423 at 433 is instructive: 'Parents are not allowed to maintain only a superficial or tenuous relationship with their children in order to avoid a determination of abandonment.'."

As basis for the above statement, the Court reasoned: "Even without considering her failure to provide any meaningful financial support, Mother's conduct over the course of the guardianship, e.g., the increasingly sporadic nature of her visits and her lack of interest in J.M.J. during those visits, her unwillingness to fully participate in J.M.J.'s therapy to improve their relationship, her lack of participation in J.M.J.'s medical care, her lack of interest and participation in J.M.J.'s school and activities, and her unwillingness to provide a safe home environment for J.M.J., indicated her intent to abdicate her parental duties to Grandparents.." Id. at 433.

None of the grounds present in the In re J.M.J. case exist in this case; however, there does exist the additional fact of the great distance between C.V.S. and the child. C.V.S. lives in California and therefore he does not have the ability to see S.S.S. frequently and certainly not on a daily or weekly basis, due to this distance.

There is no evidence in the record that the child had begun school or had participated in any extracurricular or church activities during the six months prior to petitioners filing their petition. Assuming, arguendo, that the child had begun school, or extracurricular activities or church activities, the most C.V.S. could due from such distance is plan trips around these matters and call to speak about them both before and after with both M.T.S. and S.S.S..

It was M.T.S.'s who moved herself and S.S.S. to Missouri in 2010. (Tr. 158). The distance between C.V.S. and S.S.S. must necessarily require the Court to view and judge C.V.S.'s conduct and contact with the statute and case law at issue with that distance in mind. The testimony of all parties and the facts are not in dispute: M.T.S. and L.W.V. filed their petition for termination of C.V.S.'s parental rights and adoption of S.S.S. in December 2014. (L.F. 1) and in the six months prior to that, and even beginning after M.T.S. and L.W.V. married in 2013, C.V.S. became "…far more attentive and punctual," according to D.L., who also stated that stated C.V.S. has been present in S.S.S.'s life. (Tr. 41, 46).

Everyone agreed that C.V.S. had visited with S.S.S. on three to four occasions in the six months prior to M.T.S. and L.W.V. filing the present petition, with the average

visit being a weekend long, for three to five hours each weekend day. (Tr. 79-80, 82, 83, 84, 85).

M.T.S. testified that C.V.S. visited with S.S.S. in the six months prior to M.T.S. and L.W.V. filing their adoption petition, and that C.V.S. called S.S.S. approximately three times every week in the six months prior to M.T.S. and L.W.V. filing their adoption petition. (Tr. 156-57).

M.T.S. admitted that following her marriage to L.W.V. in 2013, C.V.S. called S.S.S. more frequently, almost every day, and visited S.S.S. more frequently. (Tr. 66, 118). In fact, within the two to three months prior to trial, S.S.S. asked M.T.S. if she could call and speak with C.V.S. on the phone. (Tr. 124). C.V.S. testified that he attempts to call S.S.S. every other day, and between telephone calls and in-person visits he and S.S.S. have made contact with each other every week more than once during 2014 and 2015, and even years before that. (Tr. 210, 2011).

C.V.S. has expressed to M.T.S. that he wanted to be involved in S.S.S.'s life and since 2013, C.V.S. has become more interested and more involved in S.S.S.'s life. (Tr. 172, 177). He expressed to M.T.S. his desire to spend more time with S.S.S. that what M.T.S. allows presently, but M.T.S. "did not like the subject, so [he] was forced to drop it." (Tr. 208). C.V.S. testified that he has developed a parental bond with S.S.S. and that he would like to have more time with her. (Tr. 225).

In the six months prior to the filing date of the adoption petition, C.V.S. had almost daily contact with S.S.S. (Tr. 222).

During C.V.S.'s visits with S.S.S., M.T.S. and L.W.V. would not allow C.V.S. to

spend time alone with S.S.S., and the visits always took place in a public place, with M.T.S. sitting at the same table as C.V.S. and S.S.S. during each visit. (Tr. 86, 101, 170-71). M.T.S. would dictate the time of the visits between C.V.S. and S.S.S.. (Tr. 174-75).

M.T.S. testified that recently, she and L.W.V. offered to change their plans to allow C.V.S. to see S.S.S. if he would consent to the adoption. (Tr. 166-67).

In fact, since the time of her birth, C.V.S. has always maintained contact with S.S.S., except for a four month period approximately three years ago when neither he nor M.T.S. called each other. (Tr. 171-72, 246).

As the evidence clearly shows, even with C.V.S.'s faults as a father, he has maintained contact with S.S.S. since her birth, has done so more frequently as she has gotten older, has done so even as S.S.S. and M.T.S. live half a country away, and has done so more frequently since M.T.S. and L.W.V. married in 2013, and has attempted to have more time with S.S.S. since that time.

Based on the above and foregoing, petitioners failed to prove by clear, cogent and convincing evidence that C.V.S., for a period of at least six months immediately prior to the filing of an adoption petition, a parent willfully abandoned S.S.S.. The trial court committed reversible error in finding that petitioners met their burden and the judgment terminating C.V.S.'s parental rights and granting petitioners' petition for adoption must be reversed and remanded to the trial court for entry of a judgment denying petitioners' petition.

POINT RELIED ON II

THE TRIAL COURT ERRED IN ITS JUDGMENT IN TERMINATING FATHER'S PARENTAL RIGHTS BECAUSE IT WAS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT PETITIONERS FAILED TO PROVE BY CLEAR, COGENT AND CONVINCING EVIDENCE THAT FATHER WILLFULLY, SUBSTANTIALLY AND CONTINUALLY NEGLECTED TO PROVIDE THE NECESSARY CARE AND PROTECTION OF S.S.S. IN THE SIX MONTHS PRIOR TO PETITIONERS' FILING THEIR PETION FOR ADOPTION AS REQUIRED BY SECTION 453.040(7) IN THAT C.V.S. PROVIDED SUPPORT FOR S.S.S. THROUGH HIS MOTHER FOR FIVE OF SIX MONTHS PRIOR TO PETITIONERS' FILING.

Section 453.040(7) additionally permits a trial court to terminate parental rights of a parent who, "… 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 [a child] with necessary care and protection."

Neglect … "focuses on physical deprivation or harm, and has been characterized as 'a failure to perform the duty with which the parent is charged by the law and by conscience.' " In re J.M.J., 404 S.W.3d 423, 432 (Mo. App. W.D. 2013) citing In re C.M.B.R., 55 S.W.3d 889, 894 (Mo. banc 2001) (citation omitted). "'Neglect' is ultimately a question of an intent to forego 'parental duties,' which includes both an obligation to provide financial support for a minor child, as well as an obligation to maintain meaningful contact with the child." Id. "In both neglect and abandonment[,] the

issue turns on intent," which is inferred from the parent's conduct before, during, and after the six-month period preceding the filing of the adoption petition. Id.

Neglect "must be established by clear, cogent and convincing evidence that 'instantly tilt[s] the scales in the affirmative when weighed against the evidence in opposition'" and that the "fact finder's mind must be left with 'an abiding conviction that the evidence is true.'" In re T.S.D., 419 S.W.3d 887, 895 (Mo. App. E.D. 2014) (quoting In re Adoption of W.B.L., 681 S.W.2d 453 (Mo. banc 1984)).

As stated in In re M.S.R., 965 S.W.2d 444, 449 (Mo. App. W.D. 1998): "As to financial support by a parent, 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. Elliott v. Elliott, 920 S.W.2d 570, 578 (Mo. App. W.D. 1996); Dycus v. Cross, 869 S.W.2d 745, 750 (Mo. banc 1994); Oberg v. Oberg, 869 S.W.2d 235, 238 (Mo. App. W.D. 1993).

In In re T.S.D., 419 S.W.3d 887 (Mo. App. E.D. 2014), the Eastern District upheld a trial court's finding of neglect as grounds for termination of parental rights where the mother had sent only one $400.00 check to the child's guardians in the six years the child lived away from her mother. Id. at 896.

In In re J.M.J., 404 S.W.3d 423, 432 (Mo. App. W.D. 2013), the court found neglect where, aside from two birthday presents and some donated clothing on two occasions, the mother gave no financial support for her child during a six year guardianship.

In E.K.L. v. A.L.B., 488 S.W.3d 764 (Mo. App. W.D. 2016), the father was incarcerated for the entire time of the child's life and throughout his incarceration never

sent any money to the child's mother, his own mother testified that she never sent money to the child's mother, and in the six months prior to filing, she never sent any diapers or food. Id. at 767. The Court also stated that although the father contended that he requested his own mother provide support to the child's mother and that this met his obligation of support, there was no evidence presented that his own mother ever did so during the six months prior to the filing of the petition for adoption. Id.

In In re M.S.R., 965 S.W.2d 444, 449 (Mo. App. W.D. 1998), the trial court terminated a father's rights on the basis of neglect because father had provided no support for the child but instead claimed that the funds from a lawsuit for injuries sustained by the child which were used to care for the child met father's support obligation. (Emphasis added). The Court of Appeals did not agree with father's position that the use of those funds met father's obligation of support, rather pursuant to Slaughter v. Slaughter, 313 S.W.2d 193 (Mo. App. 1958), father would have met his duty of support had he set up a fund from his or her assets for the support of the child. Id.

M.T.S. received $400.00 per month child support for S.S.S., although L.W.V. and M.T.S. testified that the amount is paid to M.T.S. by C.V.S.'s mother while C.V.S. testified he directs his mother to make the payments on his behalf with his money. (Tr. 82, 120, 136-137, 170, 222). For the calendar year 2014, including the six months prior to respondents' filing their petitioner to terminate C.V.S.'s parental rights, M.T.S. stated that the only month she did not receive a child support check, until M.T.S. told C.V.S.'s mother to no longer send them, was August 2014. (Tr. 190-91). C.V.S. testified that the child support payments are paid from his funds but are routed through his mother because

she knows how to do electronic banking. (Tr. 199). The actual funds are from C.V.S.'s trust fund and he had paid his child support for four to five years. (Tr. 199-200).

In the present case, in the six months prior to the filing date of the adoption petition, C.V.S. has paid support to the child, through his mother. (Tr. 168, 200, 222).

In fact, the only months C.V.S. missed paying child support before M.T.S. told C.V.S.'s mother to no longer send the support checks (whether before the filing of the petition to terminate through the trial in this matter) were months he and his mother did not have M.T.S.'s new account number. (Tr. 136-137, 222).

C.V.S. has regularly given the child birthday gifts and has given the child at least one Christmas gift. (Tr. 165).

The above history of support, specifically within the six months prior to the filing of the petition for adoption, that C.V.S. has supported S.S.S.. There is no dispute that M.T.S. received support from C.V.S.'s mother, but rather the issue M.T.S. raised at trial was the fact that 0C.V.S.'s mother was the source of funds, no C.V.S., although she termed the the money she received "support" throughout the trial. (Tr. 120, 122, 127, 168, 170, 190, 191).

There was no evidence in this case that C.V.S.'s mother paid the support without C.V.S.'s direction and instruction and with C.V.S.'s funds and therefore, petitioners did not meet their burden by clear, cogent and convincing evidence that C.V.S. neglected to provide the necessary care and protection of S.S.S. in the six months prior to petitioners' filing their petition for adoption.

Based on the above and foregoing, petitioners failed to prove by clear, cogent and

convincing evidence that C.V.S., for a period of at least six months immediately prior to the filing of an adoption petition, C.V.S. willfully, substantially, and continuously neglected to provide S.S.S. with necessary care and protection.

The trial court committed reversible error in finding that petitioners met their burden and the judgment terminating C.V.S.'s parental rights and granting petitioners' petition for adoption must be reversed and remanded to the trial court for entry of a judgment denying petitioners' petition.

CONCLUSION

In view of the foregoing, the trial court erred in terminating C.V.S.'s parental rights by finding, by clear, cogent and convincing evidence, that C.V.S. failed willfully abandoned S.S.S. and that C.V.S. willfully, substantially and continually neglected S.S.S. and granting M.T.S. and L.W.V.'s petition for adoption in that the Court's Findings of Fact and Conclusions of Law was against the weight of the evidence and the trial court erred in misapplying the law in entering said provisions.

As such, appellant, C.V.S. Sandler, prays this Court enter an order finding reversible error on the part of the trial court, reversing the trial court's judgment and order terminating C.V.S.'s parental rights and granting petitioners' petition for adoption, for an order compelling the trial court to deny and dismiss respondents' petition for termination of parental rights and adoption, and for further proceedings consistent with this opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE & RULES 84.06(c) & (g) CERTIFICATES

I hereby certify that a true and correct copy of the above and foregoing document, was served on counsel for respondents, Mr. Jonathan Glassman, Esq. via the Court's e-filing system, as permitted by Rule this 19th day of June 2017.

In addition, I certify that the appellant's brief herein complies with the limitations contained in Rule 84.06(b) in that appellant's brief contains 7,456 words, exclusive of the cover, certificate of service, Rule 84.06(c) certificate, signature block, and appendix (if any), and was prepared using Microsoft Word 2013 in Times New Roman 13 point font.

By: _____