IN THE SUPREME COURT OF MISSOURI

SC95939

IN THE MATTER OF A.L.R.:

K.R., RESPONDENT

vs.

A.L.S., APPELLANT.

Appeal from the Circuit Court of Cooper County, Missouri
Eighteenth Judicial Circuit
Probate Division
Case No. 15CO-PR00038
The Honorable Keith M. Bail, Associate Judge

Missouri Court of Appeals, Western District

SUBSTITUTE BRIEF OF RESPONDENT

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STATEMENT OF FACTS

A.L.R. (Child) was born November 11, 2014 to Appellant (Mother). (L.F. 3, Tr. 6, 76). Mother was 16 years old at the time she gave birth. (Tr. 7, 94). Respondent (Grandfather) is paternal grandfather of Child. (L.F. 4, Tr. 6). Grandfather's son (Father) is father of Child. (L.F. 3-4, Tr. 7). Father was killed June 7, 2015. (L.F. 3, Tr. 7). After Father's death, Grandfather became concerned with Mother's ability and fitness to serve as natural guardian for Child and filed this minor guardianship action. (L.F. 3).

About February 2014, Mother moved into Grandfather's home, where Father was also residing. (Tr. 95). Mother and Father were in a romantic relationship. (Tr. 18, 76). Mother's move into Grandfather's home was necessitated by Mother and her mother, Heather Reynolds (Reynolds), no longer being welcome in the home of Reynolds' then paramour. (Tr. 18).

Mother and Child (after Child's birth) lived in Grandfather's home from February 2014 until June 13, 2015, shortly after Father was killed. (Tr. 8). Father was killed by Mr. Mackey, with whom Mother had sex while in a romantic relationship with Father and living with Father in Grandfather's home. (Tr. 95). Father's funeral service and burial were held June 11, 2015. (Tr. 32, 44).

In addition to Mr. Mackey, Mother also had sex with other men while residing with Father in Grandfather's home. (Tr. 18). Before Mother was asked to move from Grandfather's home, Grandfather assisted in securing a new residence for Mother and Child, the residence of Julie Kesler (Kesler). (Tr. 128). One of Kesler's daughters was

friends with Mother. (Tr. 41). Mother and Child resided with Kesler from June 13, 2015 through July 29, 2015. (Tr. 42).

While Mother and Child resided in Kesler's home, Kesler was troubled by Mother's lack of basic parenting skills and Mother's care of Child. Kesler's concerns include Mother's feeding of Child, Mother's inability to follow direction when given the same regarding the need for a feeding schedule, and Mother's failure to feed the Child enough food. (Tr. 43-44). Mother failed to bathe Child regularly or when needed. (Tr. 44). Mother slept with headphones thus rendering her unable to hear Child or address her needs when Child woke during the overnight hours. (Tr. 45). Mother had Child's ears pierced and then failed to provide the requisite care necessitated by the piercing. (Tr. 45). Mother failed to maintain a clean and safe living environment for Child despite several discussions regarding the need for the same. (Tr. 46-49, 59).

While attempting to minimize the concerns regarding the living environment by calling it "a little bit of a mess", Mother admitted that she struggled to maintain a clean and safe living environment for Child, and sometimes failed. (Tr. 108-109). This was true while she resided not only in Kesler's home, but also Grandfather's home. (Tr. 59, 108-109). Photographs were admitted into evidence showing the manner in which Mother maintained, or failed to maintain, the living space she shared with Child, including a full-sized bed covered with dirty clothes and trash (where Mother placed Child to sleep), trash and clutter covering the floor, a baby crib filled with trash bags and no room for Child to sleep, trash strewn about including a dirty diaper on the nightstand. (Tr. 34-36).

Mother was incapable of providing the necessary supplies for Child without assistance from others. (Tr. 104). Kesler was required to supply the diapers, wipes, formula, and baby food. (Tr. 49). Kesler was also required to provide support to and for Mother. (Tr. 50). Although Mother was enrolled in WIC, she was unable to meet the needs of Child. (Tr. 104).

Mother displayed poor decision making. Mother admitted drug use to Kesler, and admitted that she was uncertain if she could pass a drug test if given to her, since she could not recall the date she had last taken Vicodin or Xanax, medications not currently prescribed to or for her. (Tr. 53). Mother also engaged in an inappropriate relationship with Angel Morales (Morales), a 28 year old male incarcerated in the Department of Corrections, and provided Morales with photographs of Child. (Tr. 53-54). Mother made decisions based on her needs and wants, and not the needs and safety of Child, as evidenced by her earlier placement of 7 month old Child on a full size bed to sleep and then leaving the residence for hours without arranging for supervision or care of Child during her absence. (Tr. 23).

On July 29, 2015, having been unable to meet the reasonable requests of Kesler, Mother went to live with Joe and Tiffany Rhorer. (Tr. 55). Mother only temporarily resided with the Rhorer family and then moved to Reynolds' home. (Tr. 7).

On August 13, 2015, at the time of the hearing, Mother testified that she was residing with Reynolds, Reynolds' current significant other, and his children in Fulton, Missouri, although Mother did not intend to remain in that home. (Tr. 4-5, 80). Mother and Reynolds have a history of unstable housing and history of a tumultuous relationship

(Tr. 18, 96-98). Mother had an altercation with Reynolds in front of Father's casket on June 11, 2015. (Tr. 33, 103-104). Mother, on another occasion, explained that Reynolds was never a mom. (Tr. 51). In 2014, at the age of 16, Mother chose to no longer reside with Reynolds and moved into Grandfather's home with Father. (Tr. 96). Mother also used profanity and obscene names when addressing Reynolds. (Tr. 96). On August 13, 2015, however, Mother was once more residing with Reynolds and dependent upon Reynolds for help and guidance in caring for Child. (Tr. 4-5, 102).

The trial court appointed Joseph Rehmer and Holly Rehmer, husband and wife, Co-Guardians of the Person and Co-Conservators of the Estate of A.L.R. (L.F. 12, Tr. 132). Holly Rehmer is a first cousin to Father, and testified that she was supportive of the Mother/Child relationship and had no intention of cutting off contact between Mother and Child if appointed Co-Guardian. (Tr. 62, 65-66). Likewise, Joseph Rehmer testified that he supported continued contact and visitation between Mother and Child if appointed Co-Guardian. (T. 74).

The *Petition for Appointment of Co-Guardians & Co-Conservators* was filed July 2, 2015. (L.F. 2, Tr. 3). The matter was initially set for trial on July 27, 2015; and, on that date, the trial court granted a continuance upon oral motion by Mother's trial counsel — over objection of Grandfather. (Tr. 3, 137) All parties, including the court appointed Guardian ad Litem were personally present in the courtroom on July 27, 2015, when the new trial date of August 13, 2015 was announced by the trial court. (Tr. 3, 137).

On August 10, 2015, Mother filed a *Motion for Continuance*. (L.F. 6-7). The following day, August 11, 2015, Grandfather filed *Petitioner's Response and Objection*

to Motion for Continuance. (L.F. 8-9). Thereafter, on August 12, 2015, the Guardian Ad Litem filed his *Reply to Motion for Continuance.* (L.F. 10). Mother's *Motion for Continuance* was argued on August 13, 2015, and denied. (Tr. 2-3).

On August 13, 2015, after hearing testimony from eight witnesses, viewing sixteen photographs admitted into evidence, and considering the arguments of counsel, the trial court issued letters of guardianship of the person and letters of conservatorship of the estate. (Tr. 132). Thereafter, on September 8, 2015, Mother filed her *Motion for New Trial, or in the Alternative, Motion to Terminate Guardianship & Conservatorship* and arguments were heard October 26, 2015. (L.F. 13-16, Tr. 134-139). Both motions were summarily denied on that date. (L.F. 17, Tr. 137, 139).

Mother then filed an appeal in the Missouri Court of Appeals, Western District. On July 26, 2016, the Missouri Court of Appeals, Western District, determined the evidentiary standard in this case to be clear and convincing under a *de novo* review of the probate code through a due process analysis of parental rights, and held that facts in the Record on Appeal were insufficient to grant a minor guardianship over objection of Mother. *In re A.L.R.*, WD79123. The Western District reversed and vacated the trial court's judgment, and instructed the trial court to dismiss the petition with prejudice and to order Child immediately be placed in the physical custody of Mother — all without further hearing or detailed factual findings by the trial court. *Id.*

Grandfather filed an *Application for Transfer to the Supreme Court*. The transfer was ordered by this Court on November 1, 2016, and this appeal follows.

ARGUMENT

POINT I.

APPELLANT FAILED TO PRESERVE HER CONSTITUTIONAL ARGUMENT, BUT EVEN IF THE ARGUMENT WAS PRESERVED, PREPONDERANCE OF THE EVIDENCE IS THE CORRECT STANDARD OF PROOF IN A MINOR GUARDIANSHIP CASE.

Standard of Review

To properly raise a constitutional challenge, a party must: (1) raise the constitutional question at the first opportunity; (2) state with specificity the constitutional provision on which the challenge rests; (3) set forth facts showing the violation; and (4) preserve the question throughout the proceedings for appellate review. *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 266 (Mo. 2014).

In proceedings to appoint a guardian, review of the trial court's judgment is governed by the standards set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *In re C.S.S.*, 393 S.W.3d 105, 108 (Mo. App. W.D. 2013) (citing *In re Estate of A.T.*, 327 S.W.3d 1, 2 (Mo. App. 2010)). The trial court's judgment is to be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* The appellate court views the evidence and any reasonable inferences therefrom in the light most favorable to the trial court's decision and disregards all contrary evidence and inferences. *Id.* (citing *Pulley v. Sandgren*, 197 S.W.3d 162, 165 (Mo. App. 2006)).

Questions of law are reviewed *de novo*, but deference is given to the fact-finder when reviewing questions of fact. *Estate of L.G.T. v. N.R.*, 442 S.W.3d 96, 100 (Mo. App. S.D. 2014). "Appellate courts defer to the trial court on factual issues because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record. The appellate court's role is not to re-evaluate testimony through its own perspective." *Id.* (quoting *White v. Director of Revenue*, 321 S.W.3d 298, 308-09 (Mo. banc 2010) (internal citations and emphasis omitted)).

Analysis

A. Mother failed to make a constitutional challenge to Chapter 475 RSMo at trial or in her *Motion for New Trial*, therefore Mother failed to preserve the claim for appellate review.

"In Missouri, an issue which is not presented or expressly decided by a trial court is not preserved for appellate review. An appellate court will not, on review, convict a lower court of error on an issue which was not put before it to decide." *Estate of L.G.T. v. N.R.*, 442 S.W.3d 96, 108 (Mo. App. S.D. 2014); *see also In re S.M.*, 938 S.W.2d 910, 923 (Mo. App. W.D. 1997); *Peters v. Johns*, 489 S.W.3d 262, 269 (Mo. 2016). Mother did not present, and the trial Court did not hear, any argument regarding a constitutional challenge to the preponderance of evidence standard. Mother raised this claim for the first time on appeal. (Mother's Substitute Br. 14).

Mother first suggested using clear and convincing evidence as the burden of proof in her *Motion for New Trial*, writing: "Petitioner failed to meet the burden of showing the Natural Mother is unable or unfit to serve as a parent by the rigorous standard of clear and convincing evidence." (L.F. 14). No constitutional claims were raised at that time, or earlier. The *Motion for New Trial* was denied by the trial court without reference to the standard of proof or development of the constitutional issues. (L.F. 17, Tr. 137). In fact, the entire record is silent on the specific standard of proof used by the trial court.

To properly raise a constitutional challenge, a party must: (1) raise the constitutional question at the first opportunity; (2) state with specificity the constitutional provision on which the challenge rests; (3) set forth facts showing the violation; and (4) preserve the question throughout the proceedings for appellate review. *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 266 (Mo. 2014). This rule is intended to prevent surprise to the opposing party and to accord the circuit court an opportunity to fairly identify and rule on the issue. *Id*.

Because Mother failed to raise a constitutional challenge to the minor guardianship statute at the first opportunity, she failed to preserve the constitutional challenge to the legislatively designated burden of proof in minor guardianships. A trial court must be given the opportunity to hear argument, establish a factual record, and determine a fair and just outcome upon a constitutional challenge to a legislatively designed schema prior to an appellate constitutional analysis. That has not happened in this case. Mother's constitutional attack upon Chapter 475 RSMo is not ripe for appellate scrutiny, and must fail.

B. The General Assembly directs that the standard of proof in a minor guardianship is preponderance of the evidence.

The preponderance of evidence standard of proof in civil cases is "evidence which is of greater weight or more convincing than the evidence offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary, 6th Edition (1990). This standard requires the fact-finder to weigh conflicting evidence and to consider whether the greater weight of the evidence supports the relief sought. See *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 444 (Mo. 2007).

Grandfather is not required to meet the heightened standard of proof of clear and convincing evidence. The Southern District Court of Appeals discussed this specific issue in *Estate of L.G.T*, and observed that the usual standard of proof in civil cases – preponderance of the evidence – is the applicable standard in guardianship and conservatorship proceedings filed on the grounds of minority. *Id.* at 117.

The *L.G.T.* court's analysis is purely statutory. There is no burden of proof designated in Chapter 475 RSMo for guardianships except for adult guardianships involving, "incapacity, partial incapacity, disability, or partial disability." Section 475.075.7 RSMo. Since not specifically designated by the General Assembly, the minor guardianship must necessarily utilize the standard civil burden of proof of preponderance of the evidence. *Estate of L.G.T.* at 117.

In the present case, the guardianship/conservatorship petition was filed on the grounds of minority. (L.F. 3). Because the child was a minor, the trial court properly held Grandfather to a preponderance of the evidence standard of proof in showing that Mother was unable and unfit to serve as the natural guardian.

In discussing the legislatively designated standard of proof, it is important to recognize that the present case is not a State initiated termination of parental rights action pursuant to Section 211.447 RSMo, or the temporary assumption of jurisdiction over a child pursuant to Section 211.031 RSMo. Unlike the State's termination of parental rights pursuant to Section 211.447 RSMo, the rights of Mother in a minor guardianship are not forever severed; the trial court retains jurisdiction of the minor estate and the mother's parental rights are merely suspended. Also, unlike the State's temporary assumption of jurisdiction in an abuse and neglect action, the petitioner in a minor guardianship is a person, not the State.

This Court considered similar due process requirements in a sexually violent predator case of *In re Van Orden*, 271 S.W.3d 579, 585-86 (Mo. 2008). There, this Court stated, "In the usual civil litigation, the burden of proof is preponderance of the evidence because private interests predominate; therefore, the litigants share the risk of error equally." *Id*. at 585.

Statutorily, the non-custodial parent in a minor guardianship has the right (with participation of the guardian) to modify the guardianship at will; the non-custodial parent, may even – without joinder of the guardian – seek a modification or termination of the guardianship, every one hundred eighty days. Section 475.083.6 RSMo. Additionally,

since the court retains jurisdiction of the minor estate, the court can craft allocation of resources, visitation, and other matters deemed necessary by the court for the proper care and maintenance of the minor. A parent of a child under a minor guardianship maintains the possible future of unhindered parental rights. The legislatively determined standard of preponderance of the evidence is appropriate for the establishment of the minor guardianship by a civil petitioner.

The courts have long recognized that the General Assembly is the proper repository of the power to appoint a guardian. "The power to appoint guardians is purely statutory. It must be exercised in the manner prescribed and the application must be made in accordance with the statutes." *Black v. Black*, 824 S.W.2d 514, 515 (Mo. App. W.D. 1992), citing *In re Dugan*, 309 S.W.2d 145, 148–49 (Mo. App. 1957). The courts need not supplant that which the General Assembly has, in its sound deliberation, already provided.

The trial court followed the statutory procedure of Chapter 475 in this matter and provided notice, counsel, hearing and procedural due process, and — after a determination of the facts — designated proper co-guardians of Child in accordance with the statute. Moreover, in this case, the appointed Co-Guardians and Co-Conservators support continued contact and visitation between Mother and Child. (Tr. 65, 74).

As further elaborated in Points II. and III., the evidence at trial showed that Mother was, at the time of the hearing, unable and unfit to serve as natural guardian; such evidence met both burdens of non-persuasion: preponderance of the evidence and clear and convincing. Mother's Point I. must be denied.

C. Preponderance of the evidence is the legislatively applicable standard of proof for minor guardianships, which is sufficiently tailored to meet the need of children to be protected.

The preponderance of evidence standard of proof for minor guardianships is legislatively designated; Mother argues that a preponderance of evidence standard is insufficient to suspend the parent-child relationship. For historical reasons, Mother's argument must fail.

The risk of non-persuasion is greater for clear and convincing than preponderance of evidence: the gravity and seriousness of the parent-child relationship is posited by the Mother as the reason. (Mother's Substitute Br. 23-26). Argument by analogy to termination of parental rights statutes in Missouri and other states is cited by Mother as sufficient to allege a necessarily higher burden. *Id.* This is a false analogy.

Historically, clear and convincing evidence was utilized in cases in equity involving memory and proof of fraud. In addition, clear and convincing evidence is required when a claim is disfavored for social policy reasons such as the permanent termination of parental rights contemplated in Chapter 211 RSMo. The granting of a minor guardianship is not a disfavored claim necessitating a heightened standard of proof. Minor guardianships are not like other clear and convincing claims because they are transitory – based upon a legislative framework that is only as intrusive as necessary for the protection of the minor. Also, in Section 475.025 RSMo, the General Assembly has already statutorily provided the presumption in favor of natural parents as guardians.

The courts need not supplant substantive law on that which the General Assembly has already provided.

In Section 475.075.7 RSMo, the General Assembly tells us that guardianships involving adults in a contested adjudication regarding, "incapacity, partial incapacity, disability, or partial disability" shall be proved by clear and convincing evidence. This form of adult guardianship is of a wholly different character than the establishment of a minor guardianship. In an adult incapacitation guardianship, the General Assembly has rightly raised the standard of proof to provide deference to the presumed capacity of the adult ward. Conversely, in a minor guardianship, children are – by virtue of their minority – at risk without a guardian who is able and fit to care for and protect them.

The tenor of Mother's argument is that court interference in the parental relationship of *any sort* requires a heightened standard of proof. Although minor guardianships can be tailored to be as least intrusive as possible to provide for the care of a minor, and although a guardian may well work hand in hand with the parent of the minor, if the parent does not consent, Mother claims, the matter must support a heightened burden of proof. This is not so. The future care of the minor – in concert with the restoration of the parent's natural role – is the result of the Chapter 475 minor guardianship. The right of children to be protected if their parent is unable, unfit or unwilling to serve as natural guardian must surely weigh sufficiently to encourage intervention by their courts. The General Assembly has done this by assigning the preponderance of the evidence standard in Chapter 475 for minor guardianships. Mother's arguments to the contrary must fail.

POINT II.

THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE BECAUSE RESPONDENT PRESENTED EVIDENCE THAT HAS PROBATIVE FORCE SHOWING MOTHER TO BE UNABLE AND UNFIT TO SERVE AS THE NATURAL GUARDIAN.

Standard of Review

In proceedings to appoint a guardian, review of the trial court's judgment is governed by the standards set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *In re C.S.S*, 393 S.W.3d 105, 108 (Mo. App. W.D. 2013) (citing *In re Estate of A.T.*, 327 S.W.3d 1, 2 (Mo. App. 2010)). The trial court's judgment is to be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* The appellate court views the evidence and any reasonable inferences therefrom in the light most favorable to the trial court's decision and disregards all contrary evidence and inferences. *Id.* (citing *Pulley v. Sandgren*, 197 S.W.3d 162, 165 (Mo. App. 2006)).

Questions of law are reviewed *de novo*, but deference is given to the fact-finder when reviewing questions of fact. *Estate of L.G.T. v. N.R.*, 442 S.W.3d 96, 100 (Mo. App. S.D. 2014). "Appellate courts defer to the trial court on factual issues because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record. The appellate court's role is not to re-evaluate

testimony through its own perspective." *Id.* (quoting *White v. Director of Revenue*, 321 S.W.3d 298, 308-09 (Mo. banc 2010) (internal citations and emphasis omitted)).

Analysis

In order for Mother to succeed on Point II., she must demonstrate that there was no substantial evidence to support the trial court's judgment. *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 629 (Mo. 2014). Substantial evidence is defined as evidence that, if believed, has some probative force upon the issues. *In re K.A.W.*, 133 S.W.3d 1, 9 (Mo. 2004). Further, "[e]vidence has probative force if it has any tendency to make a material fact more or less likely." *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. 2014).

The appointment of a guardian for a minor child is governed by three statutes, Sections 475.025, 475.030, and 475.045 RSMo. *Estate of L.G.T.* at 100. "Reading these statutes together, letters of guardianship for a minor should not issue unless there is no parent available, willing or able to fulfill the parental role in caring for a child and providing for that child's need as natural guardian." *Id.*

The governing statutes create a rebuttable presumption that a natural parent is the appropriate custodian for a minor child; however, that presumption may be overcome by evidence that a parent is unwilling, unable or unfit to take charge of the child. *Id.* at 101. As a result, if there is sufficient evidence that mother is unfit, unwilling or unable to take charge of the child, then any presumption in favor of her is gone and the appointment of a guardian by the trial court is proper. *Id.*

In the guardianship context, case law has broadly defined the term 'unfit' and courts are given ample discretion in applying that term. *Id.* at 111. "[T]he fitness

determination properly includes inquiry into factors such as 'detriment to a child's well-being,' 'stability of the family life,' 'the amount of care the custodian will be able to provide,' the home environment, and the mental health or illness of the proposed custodian." *In re L.C.F.*, 987 S.W.2d 830, 835 (Mo. App. W.D. 1999). Other factors enter into the question of fitness, including whether a parent lacks an 'independent ability' to provide for the care, health and needs of the child. *L.G.T.* at 112 (citing *In re Moreau*, 18 S.W.3d 447, 453 (Mo. App. S.D. 2000). Parental unfitness has also been deemed to mean "a personal deficiency or incapacity which has prevented, or will probably prevent, performance or a reasonable parental obligation in child rearing and which has caused or probably will result in, detriment to a child's well-being. *Estate of L.G.T.* at 111.

As in *Estate of L.G.T.*, at issue in the present case is the fitness of natural mother to care for her minor child. As explained by the Southern District in that case, since this issue was contested, the trial court was free to disregard some or all of the mother's testimony. *Id.* at 111. Therefore, "any evidence unfavorable to the judgment is simply irrelevant in determining whether a judgment in favor of a party with the burden of proof is supported by substantial evidence." *Id.*

Although there was ample evidence from eight witnesses at trial, the trial court's judgment is concise in its written findings. The factual finding by the trial court under the probate statute is, "The court finds that the surviving parent, [Mother], is unable and unfit to properly care for [Child]. Further, because of the minor child's age and surrounding circumstances, she is in need of care and supervision and the appointment of a Guardian and Conservator is appropriate." (L.F. 12).

Unlike the trial court in *Ivie v. Smith*, 439 S.W. 3d 189 (Mo. 2014), the trial court in the present case was never requested by any party to produce detailed findings of fact pursuant Rule 73.01. As this Court observes in *Ivie*, Rule 73.01(c) provides that, "all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." *Id.*

Evidence in support of the trial court's judgment includes evidence that Mother did not have a permanent residence or stable housing for Child. Mother moved three times between June 7, 2015, the date Father was killed, and the hearing held on August 13, 2015. (Tr. 7). Further, Mother testified on August 13, 2015, she did not intend to remain in the home that she was then sharing with Reynolds, Reynold's current significant other, and his children, thus indicating yet another move. (Tr. 5). Moreover, Mother and Reynolds have a history of unstable housing. When Mother previously resided with Reynolds and Reynolds' then significant other (Sapp), Mother and Reynolds were forced to the leave that residence after Sapp was arrested for driving while intoxicated and threatened suicide, which resulted in Mother moving into Grandfather's home with Father. (Tr. 18). Mother was later asked by Father, shortly before his death, to move given the fact that Mother had sexual relations with other men while residing with him in Grandfather's home. (Tr. 18). The three subsequent moves followed Mother's departure from Grandfather's home.

Additional evidence in support of the trial court's judgment includes the testimony of Robert Rinacke (Uncle) and concerns regarding Mother's failure to properly feed Child and general lack of supervision. (Tr. 22, 25, 30). Uncle testified that Mother left

the residence while Child was sleeping and did not make any arrangements for Child's supervision or safekeeping during Mother's absence. (Tr. 23-24, 30).

Jean Young's (Aunt) testimony supports the trial court's judgment. For example, Aunt testified that Mother and her mother had an altercation at the cemetery, in front of Father's casket immediately following the June 11, 2015 service. (Tr. 32-33). Mother also made it clear to Aunt that she did not want her mother present. (Tr. 33). The lack of stability and tumultuous relationship between Mother and her mother, with whom she was residing at the time of the August 13, 2015 hearing, was also acknowledged in the subsequent testimony of Kesler, as well as Mother's own testimony. (Tr. 51-52, 96-97). This testimony supports the trial court's finding that Mother was unfit, because this testimony demonstrates a lack of stability in Mother's family life and home environment.

Aunt further provided evidence, through testimony and photographs, of the poor conditions under which Mother purported to care for Child. (Tr. 34-36). The photographs show the manner in which Mother maintained, or failed to maintain, the living space she shared with Child, including a full-sized bed covered with dirty clothes and trash (where Mother placed Child to sleep), trash and clutter covering the floor, a baby crib filled with trash bags and no room for Child to sleep, trash strewn about including a dirty diaper lying on the nightstand. (Tr. 34-36).

Kesler, with whom Mother and Child resided upon leaving Grandfather's residence, provided even further evidence in support of the trial court's judgment. Kesler testified regarding Mother's lack of awareness of Child's need for a feeding schedule,

Mother's failure to follow instruction regarding the same after specifically given to Mother, and her concern that Mother was not feeding Child enough food. (Tr. 43-44).

Kesler testified regarding Mother's failure to bathe Child, and concerns with Mother sleeping with headphones and not being able to hear Child crying at night and/or addressing Child's needs. (Tr. 44-45). Kesler also testified regarding Mother's failure to provide the necessary care for Child after Mother had Child's ears pierced, in that she failed to properly care for the piercing. (Tr. 45). Kesler further testified and shared photographs regarding Mother's inability to maintain a clean and safe living environment for Child. (Tr. 46-48, 59).

Kesler testified regarding Mother's inability to provide the necessary supplies for Child, including the essentials: diapers, wipes, formula and baby food. (Tr. 49. 56-57). It was also necessary for Kesler to provide support to and for Mother, as Mother was unable to do so herself. (Tr. 50). Mother admitted that she was unable to provide for Child without assistance from others. (Tr. 104). This testimony supports the trial court's finding that Mother was unfit, because this testimony reveals that Mother lacked an 'independent ability' to provide for Child.

The trial court heard testimony from Kesler regarding Mother's admission that she was uncertain if she could actually pass a drug test if given to her, since she could not recall the date she had last taken Vicodin or Xanax, medications not currently prescribed to or for her. (Tr. 53). Kesler further testified regarding her concern about Mother being able to care for Child, and her concern with Mother, a then 17 year old female, corresponding with Angel Morales, a 28 year old male in the Department of Corrections.

(Tr. 54). Among Kesler's concerns was the fact that Mother sent photos of Child to Morales in the Department of Corrections. (Tr. 55). Kesler concluded, having personally observed Mother while Mother was residing in her home, that Mother was currently incapable of appropriately caring for Child. (Tr. 58).

While there was no evidence at the time of trial that Mother's conduct had caused detriment to Child's well-being — due to constant intervention by and support from concerned individuals who protected and cared for the well-being of Child during the eight weeks that Mother served as sole-surviving parent prior to establishment of the minor guardianship — there was sufficient evidence that Mother's conduct was likely to cause detriment to Child's well-being in the future. There was also evidence regarding the lack of stability in Mother's family life, evidence of completely unstable housing and lack of a permanent residence, evidence of Mother's poor decision making and complete inability to understand consequences, and — by Mother's own admission — Mother's lack of an independent ability to provide for the care, health and needs of Child.

Finally, the trial court's judgment was supported by the Guardian ad Litem who stated to the trial courtt:

> Your Honor, I think certainly at some point I think [Mother] may well be in a position that she can provide the care for [Child]. However, I think there certainly is enough evidence to indicate that there were times when she did not do that. Really from the time she left [Kesler's] place, it's only been from the 29th to the 13th of August. I think that's insufficient time to establish that [Mother] can actually set up a stable situation to provide care.

> On that basis, I think probably a guardianship is appropriate. I think there's not much question that the Rehmers are suitable people to serve as guardians and conservators.

(Tr. 132).

A review of the record supports the trial court's judgment. There is substantial evidence — evidence that has probative force — that at the time of the hearing Mother was unable and unfit to serve as Child's natural guardian **—** the presence of which would allow the trial court to meet either the preponderance of the evidence standard of proof or the clear and convincing standard of proof. Mother's Point II. must be denied.

POINT III.

THE JUDGMENT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE IN THAT RESPONDENT PRESENTED SUFFICIENT EVIDENCE SHOWING MOTHER TO BE UNABLE AND UNFIT TO SERVE AS THE NATURAL GUARDIAN.

Standard of Review

In proceedings to appoint a guardian, review of the trial court's judgment is governed by the standards set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *In re C.S.S*, 393 S.W.3d 105, 108 (Mo. App. W.D. 2013) (citing *In re Estate of A.T.*, 327 S.W.3d 1, 2 (Mo. App. 2010)). The trial court's judgment is to be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* The appellate court views the evidence and any reasonable inferences therefrom in the light most favorable to the trial court's

decision and disregards all contrary evidence and inferences. *Id.* (citing *Pulley v. Sandgren*, 197 S.W.3d 162, 165 (Mo. App. 2006)).

Questions of law are reviewed *de novo*, but deference is given to the fact-finder when reviewing questions of fact. *Estate of L.G.T. v. N.R.*, 442 S.W.3d 96, 100 (Mo. App. S.D. 2014). "Appellate courts defer to the trial court on factual issues because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record. The appellate court's role is not to re-evaluate testimony through its own perspective." *Id.* (quoting *White v. Director of Revenue*, 321 S.W.3d 298, 308-09 (Mo. banc 2010) (internal citations and emphasis omitted)).

Analysis

"An against-the-weight-of-the-evidence challenge presupposes the threshold issue of the existence of substantial evidence supporting a proposition necessary to sustain a judgment, but, nevertheless, challenges the probative value of that evidence to induce belief in that proposition when viewed in the context of the entirety of the evidence before the trier of fact." *Estate of L.G.T.* at 109. Such a challenge "is not an opportunity for an Appellant to receive a new factual determination from a different court; *it is a review of whether the facts as found by the trial court are simply insufficient to induce belief in the challenged proposition.*" *Id.* at 116 (*emphasis added*).

To make a successful against-the-weight-of-the-evidence challenge, Mother is required to: (1) identify a challenged factual proposition; (2) identify all favorable evidence in the record supporting the factual proposition; (3) identify the evidence in the

record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and, (4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition. *Id.*

In the present case, Mother correctly identifies the factual proposition at issue — whether the facts demonstrated the she was unfit to be Child's natural guardian; however, she identifies only some of the evidence in the record that supports that proposition, which evidence is required for a proper analysis. Mother omits material evidence or misrepresents evidence favorable to the factual proposition. Mother omits evidence in her analysis that Mother moved three times between June 7, 2015 and the hearing held on August 13, 2015, and that Mother lacked a permanent residence or stable housing for Child. (Tr. 7).

Further, Mother asserts that Grandfather is responsible for Mother's lack of a permanent residence. (Mother's Substitute Br. at 51). Grandfather did ask Mother to move from his residence, the residence that she shared with Grandfather's son. He did so after his son was killed by the individual with whom Mother had sexual relations while in a relationship with his son and living in his home. (Tr. 95). Further, despite the foregoing, Grandfather helped secure a new residence for Mother and Child prior to Mother being asked to move from Grandfather's home. (Tr. 128). Grandfather is not responsible for Mother's lack of a permanent residence.

Mother omitted evidence that Mother left the residence for hours while Child was sleeping and did not make any arrangements for Child's supervision or safekeeping during Mother's absence. (Tr. 23-24, 30). Mother omitted evidence regarding the lack of stability in Mother's family life, including the strained and tumultuous relationship with her mother, Reynolds, with whom she was residing and the individual she considered her primary support at the August 13, 2015 hearing. (Tr. 32-33, 51). Mother omitted evidence regarding Mother's lack of awareness of Child's need for a feeding schedule, Mother's failure to follow instruction regarding a feeding schedule after instruction was specifically given to Mother, and concerns that Mother was not feeding Child enough food. (Tr. 43-44). Mother omitted evidence regarding Mother's failure to bathe Child. (Tr. 44). Mother omitted evidence regarding Mother's failure to provide the necessary care for Child after she had Child's ears pierced to prevent infection. (Tr. 45). Mother omitted evidence of Mother's inability to provide necessary supplies for Child, including diapers, wipes, formula and baby food. (Tr. 49. 56-57). Mother omitted evidence regarding her admission of drug use. (Tr. 14, 53). Mother omitted evidence regarding her poor decision making and inability to understand the potential harmful consequences as demonstrated, in part, by her decision to correspond with Morales and to send him photos of Child while he was incarcerated in the Department of Corrections. (Tr. 54-55).

Moreover, with respect to the required analysis under Mother's challenge, testimony lacking in credibility cannot be considered. *Estate of L.G.T.* at 116. In the present case, Mother fails to recognize the trial court's right to make credibility

determinations, whether explicit or implicit, and relies upon testimony lacking in credibility which cannot be considered.

Again, unlike the trial court in *Ivie v. Smith*, 439 S.W. 3d 189 (Mo. 2014), the trial court in the present case was never requested by any party to produce detailed findings of fact pursuant Rule 73.01. As this Court observes in *Ivie*, Rule 73.01(c) provides that, "all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." *Id.*

When all favorable evidence supporting the factual proposition is identified, and all contrary evidence is identified (after recognizing the trial court's right to make credibility determinations), Mother is unable to demonstrate that the facts as found by the trial court are simply insufficient to induce belief in the challenged proposition. To the contrary, upon completion of the analysis, the facts as found by the trial court are sufficient — under either the preponderance of the evidence standard of proof or the clear and convincing standard of proof — to induce belief that Mother is currently unfit to be Child's natural guardian. Mother's against the weight of the evidence challenge fails and Mother's Point III. must be denied.

POINT IV.

The trial court did not plainly err when it denied the Motion to Continue.

Standard of Review

In proceedings to appoint a guardian, review of the trial court's judgment is governed by the standards set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *In re C.S.S*, 393 S.W.3d 105, 108 (Mo. App. W.D. 2013) (citing *In re Estate of A.T.*, 327 S.W.3d 1, 2 (Mo. App. 2010)). The trial court's judgment is to be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* The appellate court views the evidence and any reasonable inferences therefrom in the light most favorable to the trial court's decision and disregards all contrary evidence and inferences. *Id.* (citing *Pulley v. Sandgren*, 197 S.W.3d 162, 165 (Mo. App. 2006)).

Questions of law are reviewed *de novo*, but deference is given to the fact-finder when reviewing questions of fact. *Estate of L.G.T. v. N.R.*, 442 S.W.3d 96, 100 (Mo. App. S.D. 2014). "Appellate courts defer to the trial court on factual issues because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record. The appellate court's role is not to re-evaluate testimony through its own perspective." *Id.* (quoting *White v. Director of Revenue*, 321 S.W.3d 298, 308-09 (Mo. banc 2010) (internal citations and emphasis omitted)).

Analysis

Mother contends that the trial court erred in denying the *Motion to Continue* filed by her on August 10, 2015. In support of her position, she argues on appeal that there had been an insufficient amount of time during which Mother had served as the sole surviving parent and that the Guardian ad Litem had not previously met with Mother before the hearing. (Mother's Substitute Br. 49).

At the August 13, 2015 hearing, in support of the *Motion to Continue*, trial counsel for Mother argued that his client was "still emotionally reeling" from the death of Father, specifically arguing, "It's prejudicial to my client to push her to hearing when she's coping with this two months following, you know, the father of her child's death." (Tr. 2). There was no argument at that time, or in Mother's *Motion for New Trial*, that there had been an insufficient amount of time during which Mother had served as the sole surviving parent. (Tr. 2, L.F. 13-14). In fact, in Mother's *Motion for New Trial*, when discussing the requested continuance, Mother specifically stated that she was inadequately prepared for the hearing because she was unable to secure witnesses. (L.F. 13). A corresponding argument regarding Mother's inability to call witnesses was made by Mother's counsel when arguing in support of the *Motion for New Trial*. (Tr. 135) The argument at the hearing on the *Motion to Continue* and the subsequent argument in the *Motion for New Trial* both differ from that which is set forth in Mother's Substitute Brief.

Additionally, for the first time on appeal, Mother raises her objection to the trial court proceeding on the hearing based on the fact that the Guardian ad Litem had not met

with her prior to the August 13, 2015 hearing. (Mother's Substitute Br. 49). While Grandfather acknowledges the fact that the Guardian ad Litem had not met with Mother prior to the scheduled hearing, the fact was not a sufficient basis for the trial court to grant the requested continuance. As argued at the August 13, 2015 hearing, Mother and the Guardian ad Litem sat in the courtroom together on July 27, 2015, at which time Mother was made aware of the August 13, 2015 hearing date and the need to meet with the Guardian ad Litem, and she failed to pursue the meeting. (Tr. 3). Moreover, when arguing the *Motion to Continue* on August 13, 2015, trial counsel for Mother did not object to proceeding with the hearing based on the investigation or lack of investigation conducted by the Guardian ad Litem. (Tr. 2). Similarly, trial counsel for Mother did not raise the issue in the *Motion for New Trial*, nor did Mother raise the issue when the *Motion for New Trial* was argued October 26, 2015. (L.F. 13-14, Tr. 135-136). Mother only raises her objection concerning the lack of meeting with the Guardian ad Litem on appeal. Mother failed to preserve the claim for appellate review.

Mother also argues that the denial of her second request for a continuance of the hearing was an abuse of discretion by the trial court (Mother's Substitute Br. 49). The granting or refusal of a continuance is a matter of judicial discretion. *Commerce Bank of Mexico, N.A. v Davidson*, 667 S.W.2d 474, 476 (Mo. App. E.D. 1984) (citing Rule 65.01). "This discretion necessarily is broad; on appeal the trial court's decision is given every possible intendment and will not be set aside unless shown to be abused by arbitrary or capricious exercise." *Id.* "Judicial discretion is abused when a court's ruling is clearly against the logic of the circumstances then before the court and so arbitrary and

unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *In re C.G.*, 212 S.W.3d 218, 224 (Mo. App. S.D. 2007).

In the present case, the trial court granted the first *Motion for Continuance* filed by Mother over Grandfather's objection. (Tr. 3). Before ruling on the second continuance requested by Mother, the trial court carefully considered the circumstances then before it and then denied the request. (Tr. 3). The denial was properly within the Court's discretion, and Point IV. must be denied.

CONCLUSION

For the reasons set forth above, Grandfather respectfully requests that this Court affirm the trial court's judgment in all respects and for whatever and further relief this Court deems just and appropriate in the premises.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE AND COMPLIANCE

I, Wendy L. Wooldridge, certify that a true copy of the foregoing *Substitute Brief of Respondent* has been served, on this 12th day of December, 2016, through the Missouri e-filing system on all registered users, including:

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Guardian Ad Litem

and that a true and correct copy of the foregoing *Substitute Brief of Respondent* has been served by U.S. First Class Mail, postage prepaid, on the same date to:

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The undersigned further certifies that this brief complies with Rule 84.06(b) and contains 8,319 words, and that the brief contains words in 13-point Times New Roman.

/s/*Wendy L. Wooldridge*
Wendy L. Wooldridge