SC100136

IN THE MISSOURI SUPREME COURT,

IN THE INTEREST OF E.G

Appeal from the Jefferson County Circuit Court

Twenty-third Judicial Circuit

The Honorable Judge Edward Page

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The Missouri Supreme Court has appellate jurisdiction to hear the appeal from a final judgment from the Juvenile Court of the Circuit Court of Jefferson County, Missouri terminating the parental rights of the Appellant Father. This action is one that involves the question the constitutionality of whether certain convictions can be used as ground for the termination of parental rights under the US Constitution Due Process Clause. The Supreme Court of Missouri has jurisdiction to hear the appeal in that one of the issues raised questions the constitutionality of Missouri Statute Section 211.447 RSMo. Jurisdiction is based on the Missouri Constitution Article 5, Section 3.

STATEMENT OF FACTS

Appellant Father is the father of Child, a child currently Age old. Father parental rights were ordered severed by action of the Juvenile Court of Jefferson County (LF D7).

On September 29, 2022, the Juvenile Office of Jefferson County Missouri filed a Petition to Terminate Parental Rights. (LF D2) The petition was in two counts; the first one concerning the mother Mother and the second one concerning the father Father . (LF D2 P2). The Count against father was solely based on that he:

> [P]led guilty to two violations of Chapter 566, when a child was a victim. Specifically the father plead guilty to Child Molestation – 3rd Degree – Child Less than 14 years old (Felony C; RSMo 566.069) and Sexual Misconduct Involving a Child Under 15 [years of age] (Felony E RSMo 566.083), in which the victim of both violations was a child under the age of eighteen. (Id.)

The petition made no mention that either parent was "unfit."

Prior to hearing on the merits, the father caused to be filed a motion to dismiss on March 1, 2023. (LF 3). The gravamen of that motion was the father's belief that the statute Section 211.447.2(4) was unconstitutional in that it did not require the State to prove that the parent was unfit. (LF 3 P3 Paragraph 12), in that it created a conclusive presumption that anyone convict of certain offenses was unfit. (LF 3, p2 paragraph 8), That conclusive presumption is without factual support and is contradictory to the presumption of parental fitness. (LF 3, p3 para 13).

The motion was argued and then the court overruled the motion. (Tr p 11 line 14). Both the juvenile officer and the Guardian ad litem argued that Juvenile Court did not have the authority to declare a statute unconstitutional. (Tr. p.9 line 14 and Tr. P. 10 line 1).

An evidentiary hearing was held on March 22, 2024. During the hearing counsel for father made numerous objections to the introduction of any evidence other that the pleas of guilty the court sustained the objections and limited the evidence, as to father to the facts pled, namely the pleas of guilty and the child's birth certificate. (Tr 15, 17, 20, 22, 23, 24, 25, 26). The court granted the father's motion to exclude the prior acts and proceedings of the underlying juvenile file into evidence on relevance grounds. [1]Over objection the court permitted the witness to say Father was incarceration, the objection being that was his incarceration was not plead and irrelevant as to grounds. (Tr. 21). The Juvenile Officer rested and the motion to dismiss made by the father was overruled. (Tr 27). The Juvenile Court proceed to hear evidence on "best interests." (Tr 28). Closing arguments were heard by the court. (Tr. 37 and Tr. 41).

On May 30, 2023, the court entered a judgment terminating the parental rights of both Mother and Father. (LF 7, p 5). As to ground for termination the court found that the father had pled guilty to the offenses described in Count 2 of the Petition to Terminate Parental Rights and concluded that termination of parental rights "was justified under Section 211.447.2(4). (LF 7 p 4). There was no specific judicial finding that the father was unfit, other than the comment the termination was justified under the law.

[1] However, the court, in the judgment recited the reasons why the child was brought into care but that was not put into evidence on this issue of grounds. (LF 7 p 2-3 paragraph 12). Likewise, in paragraph 14 of the judgment the court recites that it took judicial notice of the underlying juvenile matter but he did that only as to Count I, the mothers count, but specifically sustained father's object to the admission of that evidence.

The Father timely filed a notice of appeal to the Missouri Supreme Court. (LF 6).

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN RULING THAT A FINDING OF GUILT FOR A FELONY OFFENSE UNDER CHAPTER 566 JUSTIFIED THE TERMINATION OF THE FATHER'S PARENTAL RIGHTS UNDER SECTION 411.447.2.4 WHEN SUCH IS NOT A "GROUND FOR THE TERMINATION OF PARENTAL RIGHTS" BUT IS INSTEAD A TRIGGER REQUIRING THE FILING OF A PETITION IN THAT IT IS NOT SPECIFICALLY DENOMINATED AS A "GROUND FOR TERMINATION" AND THAT CONDITION IS DISSIMILAR TO THE OTHER DENOMINATED "GROUND FOR TERMINATION" IN ITS BROAD EXPANSE AND LACK OF LIMITATIONS.

M.D.R., 124 S.W.3d 469, 475-6 (Mo banc 2004)

Troxel v. Granville, 530 U.S. 57, 67 (2000)

Section 211.447 RSMo (2021)

POINT II

THE TRIAL COURT ERRED IN OVERRULING THE FATHER'S MOTION TO DISMISS AND SUBSEQUENTLY TERMINATING THE FATHER'S PARENTAL RIGHTS IN THAT SECTION 411.447.2.4 SHOULD BE DECLARED UNCONSTITUIONAL BECAUSE THE CONDITON OF A FINDING OF GUILT ON A FELONY OFFENSE IN WHICH A CHILD IS A VICTIM DOES NOT HAVE AN ADEQUATE LOGICAL NEXUS TO THE REQUIRED PROOF OF PARENTAL UNFITNESS AND VIOLATES DUE PROCESS UNDER THE UNITED STATES CONSTITUTION.

Stanley v. Illinois, 405 U.S. 645 (1972).
Santosky v. Kramer, 455U.S. 455, 752-54 (1982)
K.A.W. and K.A.W., 133 S.W.3d 1, 12 (Mo. banc 2004)

POINT III

THE TRIAL COURT ERRED IN TERMINATING THE PARENTAL RIGHTS OF THE FATHER BECAUSE THERE WAS INSUFFICENT EVIDENCE THAT THE FATHER WAS UNFIT IN THAT, DESPITE THE PROOF OF A GROUND FOR TERMINATION, THE CONSTITUTION REQUIRES INDIVIDUALIZED CLEAR AND CONVINCING PROOF OF UNFITNESS AND THE CONVICTION OF A CRIME, WITHOUT MORE DOES NOT ESTABLISH UNFITNESS TO THE REQUISITE QUANTUM OF PROOF.

Stanley v. Illinois, 405 U.S. 645 (1972)
D. L.P., 638 S.W.3d 82 (Mo. App. 2021)
Re K.A.W., 133 S.W.3d 1, 10)

POINT ONE

THE TRIAL COURT ERRED IN RULING THAT A FINDING OF GUILT FOR A FELONY OFFENSE UNDER CHAPTER 566 JUSTIFIED THE TERMINATION OF THE FATHER'S PARENTAL RIGHTS UNDER SECTION 411.447.2.4 WHEN SUCH IS NOT A "GROUND FOR THE TERMINATION OF PARENTAL RIGHTS" BUT IS INSTEAD A TRIGGER REQUIRING THE FILING OF A PETITION IN THAT IT IS NOT SPECIFICALLY DENOMINATED AS A "GROUND FOR TERMINATION" AND THAT CONDITION IS DISSIMILAR TO THE OTHER DENOMINATED "GROUND FOR TERMINATION" IN ITS BROAD EXPANSE AND LACK OF LIMITATIONS.

Standard of Review for Termination of Parental Rights' cases

The juvenile court's decision terminating parental rights will 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. In re K.C.M., 85 S.W.3d 682, 689 (Mo. App. W.D. 2002). The evidence in the record is to be reviewed in the light most favorable to the judgment. Id.

Terminating a parent's rights is a two-step procedure. Initially, the court must find a statutory ground for termination. After a ground has been proven, the court must decide if it is in the best interest of the child to sever the parent-child relationship. In re C.W., 64 S.W.3d 321, 326 (Mo. App. W.D. 2001); In re T.A.S., 32 S.W.3d 804, 815 (Mo. App. W.D. 2000).

Before it may terminate parental rights, the juvenile court must find by clear, cogent, and convincing evidence that a statutory ground for termination exists. K.C.M., 85 S.W.3d at 689. Whether statutory grounds have been proven by

these standards is reviewed pursuant to Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). However, review of whether it is in the best interests of the child to terminate the parental relationship is reviewed under the abuse of discretion standard. K.C.M., 85 S.W.3d at 689.

ARGUMENT

The Juvenile Officer of Jefferson County, Missouri filed a petition to terminate the parental rights of the appellant. The sole ground in the petition, as it pertains to father, was that he pled guilty to a felony offense under Chapter 566 RSMo. This issue presented is whether felony plea to certain crimes is a "ground for termination" or merely a "ground that requires the juvenile officer to file the petition under certain circumstance[2]" and as such cannot be employed as substantive proof of unfitness.

Missouri's Statute §211.447 sets out the grounds for when a Termination of petition filing is mandatory filed (Section 211.447.2) and when a filing is permissive (Sections 211.447.4 and 211.447.5). The Federal Adoptions and Safe Families Act, 42 USCA § 675(5)(E) (herein after referred to as ASFA requires a filing of a TPR petition in cases where:

> 1. a child has been in foster care for 15 of the most recent 22 months;
>
> 2. a court has determined that the child is an abandoned infant (as defined by state law);

[2] Those exceptions are set forth in Section 211.447.4 and specifies that mandatory filing is not required when there is a relative placement, not in the child's best interest or there is a lack of services provided to the parents.

> 3. a court has determined that the parent has murdered, committed voluntary manslaughter, or aided, abetted, attempted, conspired, or solicited to commit such a murder or manslaughter on another of his children; or
>
> 4. a court has determined that the parent has committed a felony assault resulting in serious bodily injury to the child or another of his children (42 USCA § 675(5)(E)).

The federal statute mandates that each state follow the dictates of ASFA mandatory filing requirement as a condition of receiving federal funding for adoptions and foster care. In Re M.D.R., 124 S.W.3d 469, 475-6 (Mo banc 2004).

The current Missouri Statute parrots that same language[3] as set out in ASFA in subsection 2 of §211.447, but added an additional ground mandating the filing of a petition:

> 4. The parent has been found guilty of or pled guilty to a felony violation of chapters 566, 567, 568, or 573 when the child or any child was a victim. As used in this subdivision, a "child" means any person who was under eighteen years of age at the time of the offense. (Section 211.447.2(4) RSMo 2023). [4]

[3] The Missouri Statutes supplies a Missouri definition of "child abandonment" as ASFA leaves it to the state to define "child abandonment."

[4] Subdivision 211.447.2.4 will be sometimes hereafter be referred to a "Chapter 566 conviction" for reasons of clarity, even though the subdivision technically includes other chapters beside 566 and does not necessarily require a conviction but only a plea or finding of guilt.

Similar language was added when the statute was amended in 2018[5] with the passage of SB 800 and later expanded the grounds for mandatory filing by amendment in 2021 in HB 429, to read as recited above.

AT LEAST ONE OF THE CIRCUMSTANCES IN SUBSECTION 2 IS NOT A GROUND FOR TERMINATION

Subsection 211.447(2) does not label the above-mentioned circumstances as "ground for termination," in contrast to Subsection 5 of section 211.447 "rather, instead enumerates certain parental conduct, the existence of which requires a juvenile officer . . .to file a petition to terminate parental rights and explicitly does not labels these circumstances as "grounds for termination.'" In re M.D.R, 124 S.W.3d 469, 475 (Mo banc 2004). (italics in the original).

In M.D.R., the Supreme Court of Missouri ruled in 2004, that the ground requiring a filing of a petition as set forth in what is now §211.447.2(1), (being in care for at least fifteen of twenty two months) was not a grounds for termination because it does not demonstratively prove parental unfitness in that there may be reasons besides unfitness for a child to be in care for that duration, including the actions of the Division itself. *(In*

[5] The relevant section 211.447.2.4 RSMo (2018) read in part, " (4) The parent has been found guilty of or pled guilty to a felony violation of chapter 566 or 573 when the child or any child in the family was a victim, or a violation of section 568.020 or 568.065 when the child or any child in the family was a victim. As used in this subdivision, a "child" means any person who was under eighteen years of age at the time of the crime and who resided with such parent or was related within the third degree of consanguinity or affinity to such parent."

re M.D.R. id.) The Supreme court found that the references elsewhere in the statute to Subsection 2 as containing "grounds for termination" did not transform "the filing trigger of Section 211.447.2(1) into a statutory ground for termination of parental rights. (In Re M.D.R. at 475 At the time of the decision in 2004, subsection 4, concerning a plea or finding of guilty on a felony chapter 566, 567, 568, or 573 was not a part of the Missouri TPR statutory scheme.

The Supreme court in finding that the fifteen out of twenty two months, clearly, was not a "ground for termination, but merely a trigger to require filing of a petition examined the ASFA statute, which required the must file provision in light of the legislative purpose to require the states make reasonable efforts to avoid a child lingering in foster care. In Re M.D.R., id at 475-6. The court concluded that despite the language in §211.447.3 RSMo 2004 (If grounds exist for termination of parental rights pursuant to subsection 2 of this section . . .), and [6] §211.447.5[7] RSMo 2004 (The juvenile court may terminate the rights of a parent to a child only on a petition filed by the juvenile officer. . . if the court finds that the termination is in the best interest of the child and when it appears by clear, cogent and convincing evidence that grounds for termination exists pursuant to subsections 2, 3, and 4). [8] did not create or expand the grounds for

[6] In the2021 version of the statute the same language can be found in §211.447.4. RSMo 2021, renumbered because of subsequent amendments.
[7] Subsequent legislation renumbered subsection 5 to 6 in the current statute, at issue, in this appeal.
[8] Subsequent legislation renumbered subsection 4 to 5 in the current version of the statute and the statute relevant in this appeal.

termination of parental rights. The court remarked, "by considering the history and the circumstances of the enactment of the termination statute in its entirety, it is clear the legislature did not intend section 211.447.2(1) as a ground for termination. But rather a trigger for filing a termination petition. (Id at 476).

IF SUBSECTION 2(1) IS NOT A GROUND FOR TERMINATION ARE THE CIRCUMSTANCES DESCRIBED IN SUBSECTION 2(4) ALSO ARE NOT GROUNDS FOR TERMINATION.

Appellant argues that employing the same logic and analysis as this Court did in M.D.R., it stands to reason that it also applies to subsection 2(4) as well, therefore those conditions are not elevated to the status of ground for termination. Compliance with the statutes governing the procedures in juvenile court is mandatory, the failure to strictly of Chapter 211 is reversible error. Section 211.443 RSMo, requires the Court in construing provisions of Section 211.447 to consider (1) the recognition and protection of the constitutional rights of all parties in the proceeding and (2) The recognition and protection of the birth family relationship when possible and appropriate.

Seemingly under the logic of M.D.R. the juvenile court is required to look at the 4 conditions described in subsection 2 and determine which ones are triggers and which ones are both "triggers" and "grounds for termination" without the benefit of the statute specifically denominating them as "grounds for termination." Appellant believes that such a roving commission for a juvenile court determine what are "grounds for

termination" by implication is inconsistent with statutory interpretation and the constitutional rights of the parent.

The Supreme Court in M.D.R., in what appellant believes to be dicta, differentiated the 15/22 condition from the other conditions, specifically abandonment and the crimes of murder and manslaughter of the other parent or sibling of the child and any attempt, conspiracy or solicitation to commit such crimes. [9] It appears that the test for whether a circumstance is a trigger or both a trigger and a grounds for termination, is twofold, first whether it directly establishes the parent's inability to care for the child and is therefore a demonstration of parental unfitness and second whether the conditions are "are similar to the grounds in what is currently 211.447.5." (In re M.D.R. at 475). The condition of plea or finding of guilty to certain felonies, was not part of the statute in 2004 and thus was not addressed in M.D.R.

Appellant believes that condition described in subsection 2(4), does not correlate to parental fitness to the degree necessary in that it is not conclusive evidence of unfitness or ability to parent to the necessary quantum of clear and convincing evidence. To be clear finding of guilt for some to the crimes contained in Chapter 566, 567, 568 or 573 could be a strong inference of unfitness but does not necessarily rebut of the presumptions that parents are fit. In the Interest of A.H., 662 S.W.2d 317, 319 (Mo App ED 1983). This presumption of fitness stems from the "fundamental and constitutionally

[9] Interestingly, the attempt, conspiracy and solicitation to murder the child, himself or herself, is not a trigger for a mandatory filing of a TPR petition, but is certainly would be a permissive ground under subsection 5.

protected liberty interest" of the parent to care, control and manage their children without state intervention. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." Troxel v. Granville, 530 U.S. 57, 67 (2000).

The belief that the commission of a felony offense of Chapter 566, 567, 568 and 573 is overbroad. Included in those felonies is criminal non-support (Section 568.040), theoretically a parent who pled guilty to felony non-support, in the distant past and has since repaid the child support arrearage, successfully completed probation and otherwise has become an exemplary parent creates grounds for the TPR and allows the court to proceed directly to best interests without an opportunity to rebut the presumption.

Section 566.086 creates the felony offense of having sexual contact with a student. Under the statute, an adult age 18 years old adult who is am adult with a "school-aged-team" such as a softball team, perhaps acting as student manager or assistant coach, cannot have consensual sexual contact with a team-mate/girlfriend without committing a class E felony. Even though such an act would be lawful, but for the 17-year-old being a student and the 18-year-old adult being a member of a "school aged-team." This would be true even if the teammates were married to each other. Certainly, such an offense should not be allowed, without more, to sever a constitutional protected to maintain a

fundamental relationship between parent and child, to a child of the relationship or a child born several years or decades later.

Similarly, Section 568.045.1(3) Endangering the welfare of a child in the first degree makes it a Class D felony to knowingly encourage, aid or cause to a child less than seventeen to engage in any conduct which violates the provisions of chapter 579. One of the provisions of chapter 579 is the Class D misdemeanor of possession of drug paraphernalia. This creates a scenario where parental rights can be terminated because a clerk was convicted of selling rolling papers to a 17-year-old without any examination of parental unfitness.

These injustices are not obviated by the requirement to additionally find that TPR is in the best interest of the child because that determination is made with a preponderance of evidence standard not the clear, cogent and convincing standard required of the proof of parental unfitness and the requirement of strict scrutiny of limitations on fundamental rights. Further, in short, simply giving parents the opportunity to present evidence related to a child's best interest is very different than the constitutional mandate that the State must demonstrate a parent's current unfitness by clear and convincing evidence. To equate these two standards would eviscerate the holdings of Stanley[10], Santosky[11], and Quilloin[12]. (see Sankaran, Vivek, "Child Welfare's

[10] Stanley Illinois, 405 U.S. 645 (1972).
[11] Santosky v. Kramer, 455 U.S. 745 (1982).
[12] Quilloin v. Walcott, 434 U.S. 246 (1978).

Scarlet Letter: How a Prior Termination of Parental Rights can Permanently Brand a Parent as Unfit" N.Y.U. Law Rev. L & Soc Change 41, no. 4 (2017): 685, 702).

Subsection 2(4) is also overbroad in its application in this case. The appellant pled guilty to child molestation in the third-degree – Child less than 14 Years of Age and Sexual Misconduct Involving a Child Under 15. Thus, supposedly creating a conclusive presumption of unfitness Appellant was denied the opportunity to present evidence rebutting the presumption of parental fitness. In the Interest of K.A.W. and K.A.W., 133 S.W.3d 1, 10 (Mo banc 2004) the Missouri Supreme Court declared that it is insufficient merely to point to past acts that resulted in abuse and neglect and then terminate parental rights . . . There must be some explicit consideration of whether the past acts prove an indication of the likelihood of future harm. The court is required to review the totality of the circumstances and allow the father to rebut the presumption by demonstrating such factors as: treatment and rehabilitation or chemical castration as the court favors a determination based upon that the potential harmful nature continue to exist. Such factors as age, nature and frequency of the criminal act would aid the court in determining the likelihood of harm to the child. The affinity of the child victim to the perpetrator, age and gender of child victim would also provide information that the court should consider, a one-year old male son of the parent is less likely to be harmed if the child victim was a 17 year old female of no relation to the offender in what is commonly referred to as a "Romeo and Juliet affirmative defense." The age of the child should also be considered,

a child of older years has a less likelihood of harm if the offense was done to a much younger child.

Another consideration would be when in time the felony was perpetrated, in In re Z.L.R. v. Greene County Juvenile Office, 306 S.W.3d 632, 636 (Mo App SD 2010), the appeals court reversed a parental termination, in part by an examination of the volition of the father. The court distinguished between acts committed before the child was born and parents who commit bad acts after they have had a child and should have realized such acts would have consequences harmful to the child. Also a decades old 566 conviction would have not have as much probative value as to future harm as a more recent or repetitive conviction.

The United States Supreme Court has unequivocally decreed in Vlandis v. Kline, 412 U.S. 441, 46 (1973) that a statute creating a presumption which operates to deny a fair opportunity to rebut it is a violation of due process as guaranteed by the Fourteenth Amendment. (see Sankaran, Vivek, "Child Welfare's Scarlet Letter: How a Prior Termination of Parental Rights can Permanently Brand a Parent as Unfit" N.Y.U. Law Rev. L & Soc Change 41, no. 4 (2017): 685, 696).

The prior version of Subsection 2(4) limited the felony offenses to:

> a parent who was found guilty or plead guilty to a felony violation Chapters 566 (Sexual Offenses) or 573 (Pornography and Related Offenses) when the child or any child in the family was a victim, or a violation of section 568.020 (Incest) or 568.065 (Genital mutilation of a child) when the child or any child of the family was a victim. As

> used in this subdivision, a "child" means any person who was under eighteen year of age at the time of the crime and who resided with the parent or was related within a third degree of consanguinity. Section 211.447.2.4 (RSMo 2018).

. In essence the 2021 amendment expanded the number of different offenses that create the mandatory filing and removed the requirement for some familial relationship with the victim. Thus, weakening the accuracy of the inferred relationship between felony offense and parental unfitness. It is more likely that the revised statute will subject more parents to the risk of a TPR petition being filed and granted against them, even if they are fit parents. Notably Section 211.447.5.5(a) (RSMo) requires the court determine if the acts of sexual abuse are of a "duration or nature that renders the parent unable to reasonably foreseeable future to care appropriately for the ongoing, physical, mental and emotional needs of the child." That same determination is required under a 566 conviction by strict scrutiny but not found in the statute, inasmuch as the Missouri Legislature therein acknowledges that not all abuse rises to the level of abuse needed to establish unfitness and therefore permit or require termination of parental rights. The constitution requires the protection of parents against erroneous deprivations in light of the potential for error embodied in the entire severance process. The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody to the State; there is a more critical need for procedural protections that do those resisting the intervention into ongoing family matters. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky, at 753-4. The parent's interest in the accuracy and justice of the decision to terminate parental rights is a "commanding" one. (Santosky at 754). Termination of parental rights based on an unproven and tenuous inference that commission of certain crimes establish unfitness as a parent without ability to rebut the inference is overtly unfair, even if the crime is as loathsome as child molestation. As such, the commission of certain crimes does not rise to the level or clear and convincing proof of parental unfitness; clear and convincing proof is a burden of proof that is specifically calibrated to reduce the risk of erroneously finding unfitness. (Santosky at 757-8) Errors will occur if the court allows Subsection 2.4 to be held as a ground for termination, in and of itself. The State registers no gain towards it's declared goals when it separates children from the custody of fit parents. (Stanley at p. 652). The aphorism used by some judges is that only a grade F parent loses his parental right but a D minus parent can get his or her children returned to him. Conviction of a 566 felony does not always equate with being a failing parent.

The lack of a convincing rational relationship between the finding of guilt of certain offenses does not constitutionally allow the juvenile court swing from fact A (the felony plea) to fact B (clear, cogent and convincing proof of unfitness to be a parent). Even if it were rebuttable, which appellant contends it is not under Missouri law, the shift of the burden to the parent is an anathema to the burden for the state being required to present "convincing" proof. A statute creating a presumption that is arbitrary, or operates to deny a fair opportunity to repel it, violates due process clause of the Fourteenth

Amendment. Legislative fiat may not take the place of judicial determination of issues involving life, liberty, or property. Western & Atlantic R. Co. v. Henderson, 279 US 639, 642 (1929).

As the conviction for certain crimes, even child molestation, does not directly establishes the parent's inability to care for the child and a demonstration of parental unfitness and therefore under M.D.R. cannot be considered both a trigger and a ground for entering a termination of parental right. (In re M.D.R. at 475).

The second component of the M.D.R. analysis is whether the condition of a felony conviction is "conduct that demonstrates parental unfitness and is similar to the grounds in what is currently found in 211.447.5, the subsection that explicitly denominates what is a legal ground for termination. (In re M.D.R. at 475). The grounds under Section 211.447 can be depicted in the following table:

Statutory Grounds	**Denominated Purpose**	**Limitations**	**Separate Unfitness Component**	**Presumption**
211.447.2.(2)(a) In foster care for at least 15 months out of 22	Juvenile Officer required to file	None	None	Supreme Court declared it was not a ground for termination. In the interest of M.D.R.
211.447.2.(2)(b) Child less than 2 years old adjudicated abandoned.	Juvenile Officer required to file	Without good cause left the child without any provisions or communications for 60 days or more.	Without Good cause Willfully, substantially, and continuously.	Not described as a presumption and therefore assumed to be conclusive as to allow the court to proceed to "best interests" without further

				evidence on fitness
211.447.2.(3)(a) Murder adjudication	Juvenile Officer required to file	Murder of another child of the parent	None	Not described as a presumption and therefore assumed to be conclusive.
211.447.2.(3) (b) Voluntary Manslaughter adjudication	Juvenile Officer required to file	Voluntary Manslaughter of another child of the parent.	None	Not described as a presumption and therefore assumed to be conclusive.
211.447.2.(3) (c) Accessory liability, attempt or conspiracy to murder or involuntary manslaughter	Juvenile Officer required to file	Victim is the child or another child of the parent.	None	Not described as a presumption and therefore assumed to be conclusive
211.447.2.(3) d Pled or found guilty of a Chapter 566, 567, 568, or 573 felony involving a child	Juvenile Officer required to file	Any victim is under 18 years old.	None	Not described as a presumption and therefore assumed to be conclusive
211.447.2.(4) Grounds for termination pursuant to subsection 2 (above)	Juvenile Officer is permitted but not required to file to file	Not a relative placement, Compelling reason, lack of services provided.	Compelling reason not in the child's best interest.	Not described as a presumption and therefore assumed to be conclusive

211.447.5.(1) Child Abandoned [see 211.447.2.(2)(b)]	Specifically denominated as a ground for termination	Child under two abandoned for more than six months.	Willfully, substantially and continuously. But omits the "without good cause" as found in 211.447.2(2)(b)	Not described as a presumption and therefore assumed to be conclusive
211.447.5.(2) Child Abuse or Neglect	Specifically denominated as a ground for termination	(a) Irreversible or unlikely to be reversed mental condition (b) Chemical dependency which consistently prevents from providing necessary care AND condition cannot be treated. (c) Severe or recurrent acts of physical, emotional, sexual abuse or incest with the child or any child in the family. (d) Repeated and continuous failure to provide adequate food, clothing shelter or education.	(a) Irreversible or unlikely to be reversed (b) Cannot be treated. (c) Severe and recurrent (d) Must be physically or financially able to Provide.	Not described as a presumption and therefore assumed to be conclusive
211.447.5.(3) Child in care for one year and conditions that brought the child into care or conditions of a	Specifically denominated as a ground for termination	Little likelihood that the can be remedied in the near future or diminishes the prospect of permanency.	(a) Extent that the parent made progress on the social service plan	Not described as a presumption and therefore assumed to be conclusive

potentially harmful nature still exist			(b) Failure of efforts by juvenile officer, the division or other agency to aid the parent. (c) Mental condition can be reversed. (d) Chemical dependency which prevents a parent for providing care and cannot be treated	
211.447.5(4) Child conceived as a result of forcible rape or rape in the first degree.	Specifically denominated as a ground for termination	None	None	By law a conclusive evidence supporting a termination of parental rights
211.447.5.(a) Unfit because of a consistent pattern of specific abuse	Specifically denominated as a ground for termination	The abuse is of such a duration or nature	The parent is rendered unable for the foreseeable future to care appropriately.	Not described as a presumption and therefore assumed to be conclusive
211.447.5.(b)(a) Prior Involuntary Termination of Parental Rights within 3 years	Specifically denominated as a ground for termination.		Limited to prior terminations for grounds in subsection 2 , 4 or 5.(1), 5(2) or 5(3).	Specifically denominated a presumption of unfitness.
211.447.5.(b)(b) Mother tested positive for drugs or has a BAC of over .08 within 8 hours after birth.	Specifically denominated a ground for termination	Exception for medical treatment.	Previously had at least one child adjudicated abused or neglected or mother failed to complete treatment	Specifically denominated a presumption of unfitness.

			recommended by CD	
211.447.5.(b)(c) Newborn tested positive for drugs or alcohol within 8 hours of birth	Specifically denominated as a ground for termination	Exception for medical treatment	Previously had at least one child adjudicated abused or neglected or mother failed to complete treatment recommended by CD.	Specifically denominated a presumption of unfitness
211.447.5.(b)(d) Prior plea to or conviction to for possession, manufacture or distribution of cocaine, heroin or methamphetamine.	Specifically denominated as ground for termination.	Plea or Conviction must be within 3 years prior to the termination.	Previously had at least one child adjudicated abused or neglected or mother failed to complete treatment recommended by CD.	Specifically denominated a presumption of unfitness.
211.447.5.(b)(e) Child in Foster Care 15 out of 22 months	Specifically denominated as grounds for termination	None	None	Specifically denominated as a presumption of unfitness. Per 2021 amendment.

Upon scrutiny it appears that the conviction of a Chapter 556 (and other chapters) felony is markedly different from all the other grounds set forth in the statute and is more like the 15/22 triggering requirement in Subsection 2. The appellant has identified three factors that narrow a broad condition to certain factors, as required by strict scrutiny, such as one, stated limitation in the condition, such as familial relation to the victim; two required elements of some proof additional indication of unfitness and three whether or not the condition can be rebutted.

In looking at the finding of guilt on an offense there are five other "conditions" that are predicated on a felony finding – the three involving the killing or a related

inchoate offenses of killing a sibling or parent (Subdivision 2.3(a), (b), and (c)) and the conviction of certain drug offenses (Subdivision 5(b)(d) and the birth of the child due to rape of the mother (Subdivision 5. (4). All these can be differentiated from the felony 566 conviction ground to trigger filing. The three involving the killing of a sibling are limited to only one type of offense of a very egregious nature against the very life of a family member and not a whole slew of offenses that may be extrafamilial. The conviction of drug offenses has several limitations including a prior history of a child being removed and a lack of treatment – plus that the presumption may be rebutted. The rape of the mother is limited to instances that resulted in the birth of the child and again is egregious and would require the mother-victim to have continued contact and co-parent with her vile perpetrator.

It is notable the Missouri Legislature chose to place the felony 566 conviction subdivision in Subsection 2 and not repeat it in Subsection 5 as it did the with condition of 11/22 months in foster care. It must be presumed that the Legislature when enacting the 2021 amendment was aware that this court had ruled that 15/22 was not a "ground for termination" when it made such a ground under subdivision 211.447.5.(b). The failure of the legislature to include felony convictions under Chapter 566 in both locations is an expression that it, like 15/22 under M.D.R., was not a ground that can be consider a sufficient as a "grounds for termination.

The ground of felony 556 conviction does not meet the test developed in M.D.R. in that it is substantially different and broader than the grounds specifically denominated

as “ground for termination” under the “conduct that demonstrates parental unfitness and is similar to the grounds in what is currently 211.447.5” test. It is disturbing that the lack of precision and clarity in the Missouri Statue fails to provide the juvenile court with a clear understanding of what is a ground for termination and allows the court to consider other factors such as the nature of the offense and any rebutting circumstance. This creates a situation where the courts are left without guidance in the very important decision involving the fundamental right to parent.

This Court must find that the classification of the plea or finding of guilt of a felony offense under chapters 566, 567, 568, or 573 cannot be a ground for termination because of the placement in the statute in Subsection 2 instead of Subsection 5 and the broadness and dissimilarity to the other conditions clearly denominated as “grounds for termination.” Inasmuch as the Juvenile Office’s petition did not include an acceptable “grounds for termination” and the court misinterpreted the statute the judgment of Termination of Parental Rights must be set aside.

POINT II

THE TRIAL COURT ERRED IN OVERRULING THE FATHER'S MOTION TO DISMISS AND SUBSEQUENTLY TERMINATING THE FATHER'S PARENTAL RIGHTS IN THAT SECTION 411.447.2.4 SHOULD BE DECLARED UNCONSTITUIONAL BECAUSE THE CONDITON OF A FINDING OF GUILT ON A FELONY OFFENSE IN WHICH A CHILD IS A VICTIM DOES NOT HAVE AN ADEQUATE LOGICAL NEXUS TO THE REQUIRED PROOF OF PARENTAL UNFITNESS AND VIOLATES DUE PROCESS UNDER THE UNITED STATES CONSTITUTION.

STANDARD OF REVIEW

Statutory interpretation is an issue of law that this Court will review de novo. Blakely v. Blakey, 83 S.W.3d 537, 540 (Mo. banc 2002). Missouri courts start with the presumption that the statute is constitutional. Id. It will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the Constitution. Id.

ARGUMENT

PARENTING, A FUNDEMENTAL RIGHT PROTECTED BY STRICT SCRUTINY

The United States Constitution acknowledges that there is a fundamental liberty interest of natural parents in the care, custody, and management of their child, and such is protected by the Fourteenth Amendment, since it is "perhaps the of the fundamental

liberties recognized by the court." Troxel v. Granville, 530 U.S. 57, 65 (2000). The right does not evaporate simply because a parent has not been a model parent or has lost temporary custody of their child to the State. Santosky v. Kramer, 455U.S. 455, 752-54 (1982). The Due Process Clause also includes a substantive component that "provides heighten protection against government interference with [such] fundamental rights and liberty interests. Troxel at 65.

Due Process mandates that any governmental infringement upon a fundamental liberty interest must pass a strict scrutiny test. Troxel at 80 (Thomas, C., concurring). Strict scrutiny forbids the government infringing on personal matters unless that infringement is narrowly tailored to serve a compelling state interest, no matter what process is involved. Washington v. Glucksberg, 521 U.S. 702, 721 (1997). "Strict scrutiny is not strict in theory, but fatal in fact." (Grutter v. Bolinger, 539 U.S. 306, 326-7 (2003).

Examination of Missouri Statute 211.447.2.4 is required to be analyzed by strict scrutiny criterion. The first issue is whether the mandatory requirement of filing a Termination of Parental Rights Petition is warranted by the felony violation of certain chapters of the penal code, namely Chapters 566, 567, 569 and 573. By the 2017 and 2021 amendment to Section 211.447.2.4. the legislature expressly increased the grounds for the termination of parental rights, thusly, the issue is whether the legislature did so with the necessary precision and narrowness to protect parental rights and require a determination that the parent is unfit, as required by Santosky.

Subdivision 4 was placed in subsection 2 the part of the statute that mandates the filing of a Termination petition by the Juvenile Office of the Children's Division. Curiously, such a command to file a petition is not a required to obtain federal funding under the Adoptions and Safe Families Act, as is all the other conditions set forth in subsection 2. (15/22 months, abandonment of a child, under two years of age, murder or voluntary manslaughter). [13] Not only did the legislature add many additional crimes to the grounds for termination but made it conclusive presumption and removed the discretion of the juvenile officer to not file the petition. (Assuming that the placement in subsection 2 was a mandatory filing ground unlike 15/22 months which was held not to be a ground under M.D.R.). (See Point 1 of this brief).

The same amendment placed the 15/22 months condition as a rebuttable presumption in subsection 5 while leaving it in subsection 2 as well. Since the legislature choose to make 15/22 a presumption and by operation of "expressio unius exclusion alterius" clearly makes the felony conviction clause not rebuttable but conclusive presumption. In the same manner, since subdivisions 5(b) through 5(e) are stated as a presumption of unfitness instead of a statutory ground for termination – those condition not specifically declared as a presumption is a irrebuttable presumption, which of course, is not a presumption at all but a rule of law. There is no allowance for rebutting the connection between a felony conviction and unfitness as a parent or danger to the child.

[13] The amendments to subsection 2 did increase the age for abandonment from under one year of age to two years of age, thus expanding the required filing beyond the scope set forth in ASFA.

When determining the requisite due process adjudication procedures, the court must consider the "risk of wrongly depriving" the parent of a fundamental right to parent. Santosky at 747-8. The question becomes whether the conviction or plea to a felony conviction to Chapter 566, 567, 568 or 573 offenses conclusively establishes that the felon is unfit or that the felon presents a danger to the child to such extent that it mandates termination of parental rights.

Seemingly the nexus between the commission of certain felonies and parental fitness should be a matter to properly determined by input from social scientist and enacted only upon due study by legislative fact finders. Appellant is not aware that the Missouri Legislature undertook to, in a scholarly manner, investigate the scientific basis for the conclusion that felony convictions proves convincingly parental unfitness and danger to the child. [see Devins, Neal, "Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis" (2001), William & Mary Law School faculty publications http//scholarship.law.wm.edu/factpubs/360] The author argues that congressional standards, in the area of limiting governmental action is not reliable factfinding but little more than a recitation of special-interest preferences. Id at 1171. The Supreme Court has been willing to second-guess congressional factfinding as part and parcel of its power "to say what the law is;" particularly if the Court concludes that Congress has not demonstrated that the states have acted unconstitutionally, seen by the court, in cases of constitution rights, as interference with the Court's power to define the constitutional rights. Id at footnote 18 pps 1173-4.

The determination of parental fitness does not lend itself to neat categories.

> Deciding what constitutes abuse or neglect, or determining when a state has an interest strong enough to trump the rights of the parents, is admittedly not a simple matter, nor is it a matter about which moral principles yield clear-cut rules applicable to all cases. As Aristotle pointed out, morality is not like a mathematics where there is a clear and precise answer to every problem. While the political community ultimately has to decide where the line should be drawn, and there is room prudential judgment in the borderline cases, my argument gives reasons for drawing the line in a way that gives substantial deference to parental authority. Even in cases where that line has clearly been crossed, efforts should be made to alleviate the abuse or neglect with as little intervention as possible, only removing children from their parents' care in the most extreme cases where the child faces grave danger, or where less invasive means of intervention such as mandatory parenting classes or counseling sessions, supervision from social workers, etc. have proved effective. . . [O]verzealous intrusion harms children by breaking up the family unnecessarily, undermining parental authority and family intimacy, preventing parents from achieving their own good *qua* parents, and tearing children away from caregivers (however imperfect) to whom have formed attachments that are important for their psychological well-being.

To Whom Do Children Belong, Parental Rights, Civic Education and Children's Autonomy. Moschella, Melissa, Cambridge University Press (2016) pps 68-69.

Despite any inherent difficulties in determining what is "parental unfitness" a parent's fundamental right to the care and society of his or her child may not be terminated absent a finding that the parent is unfit. Stanley v. Illinois, 405 U.S. 645, 649 (1972). The issue in this case is whether a parent can have his rights terminated in the absence of an individualized determination of unfitness through operation of a statutory scheme that works much like a statutory conclusive presumption by the way it defines unfitness. Despite the legislature's determination that certain felonies make a person unfit to parent, that does not relieve the courts of the obligation to make an individualized

finding of unf The nature of a presumption is that if basic fact A is true (that a father has a conviction for sexual misconduct of a child), then the finder of fact must swing to presumed fact B (the father is unfit as a parent). There is a constitutional requirement that there is a rational connection between basic fact A and presumed fact B. The linkage between fact A and fact B is tenuous at best. In essence the logical connection makes the assumption that any the conviction for a crime of sexual abuse against any child swings (fact A) to that such a person has at least once committed such a crime the finder of fact must swing to such a person will do it again as a speculative prediction of prospective mistreatment (fact A.1); and then swing to that since a person is likely to do it again (fact A.1) that he would do it to his own child (fact A.2) and then make the final supposition that anyone would sexual abuse his own child is unfit as a parent (fact B). That the specific instance of misconduct swings to an inference that the actor acted in conformity to his character and therefore is a danger to commit misconduct in the future. The court's cannot predict who will be a bad "bad" parent.

Federal Rule of Evidence 404, declares the use of "evidence of a person's character or character trait is not admissible to prove on a particular occasion the person acted in accordance with character or trait." This rule of evidence is "well-established general rule" in Missouri. State v. Sladek, 835 S.W. 305, 314 (Mo. banc 1992) (J. Thomas concurring). Evidence of character and propensity is not allowed in civil cases as well as criminal cases. Cotner Prods. Inc. v. Snadon, 990 S.W.2d 92, 101 (Mo. App. SD 1999). In assessing whether or not evidence of uncharged crimes is admissible it is

essential that the primary rule of evidence governing the admission of propensity evidence must have "legitimate tendency to directly establish" the actor's complicity. (State v. Sladek, id at 312).

It is important to note the distinction between "propensity" evidence and "habit or custom" evidence. While character evidence is evidence of a person's propensity or tendency to act in a certain way, custom or habit involves a "consistent, semi-automatic response to a repeated situation." Bowen v. Ryan, 16 Cal. App. 4th 916, 926 (2008). Thusly, "habit or custom" evidence has greater probative value then "he just the type of person to do that" evidence.

In Missouri, the general rule is that relevance is a two-tiered: evidence must be relevant, both logically and legally. State v. Anderson, 76 S.W3d 275, 276 (Mo banc 2002). Logically relevant evidence is excluded if its prejudice outweighs its probative value, and therefore not legally relevant. State v. Williams, 411 S.W.3d 275, 281 (Mo.App SD 2013). Appellate contends that the linkage between a single act of sexual misconduct does not have, without more, a legitimate tendency to directly established parental unfitness and therefore fails to prove unfitness of a parent. fitness before it can proceed to best interest determination.

No matter how you slice and dice the statutory scheme used in the present case, nowhere can be found in the Juvenile Court's court judgment a finding of unfitness other than the finding that a statutory ground has been met. There are situations when one of the statutory grounds for termination are met but the problem is that the facts do not

justify a finding of parental unfitness. Parental unfitness must be established ty individualized proof. Stanley v. Illinois, 405 U.S. 645 (1972). "Procedure by presumption is always cheaper and easier that individualized determination. But when, as in there, the procedure forecloses the determinative issues of competence and care, when it explicitly distains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both the parent and the child. Id at 656-7. The State must show substantial risk of significant harm to the offspring and therefore must perform a risk analysis on all factors not just rely on a statutory finding of commission of a felony in which a child is a victim.

FACIAL UNCONSTITUTIONALITY

Appellant contends that the failure to include an individualized determination of unfitness makes subdivision 211.447.2.4 facially unconstitutional. Judicial review entails determining first whether the statute is authorized, second whether the means the government employs is necessary and proper. A successful facial challenge finds that the measure is unconstitutional per se. (Pilon, R., Facial v. As-Applied Challenges: Does it Matter? Cato Supreme Court Review. Vol 8 (2009) p. ix.)[14] Inasmuch as the United States Supreme Court has declared that the court must specifically find an individualize finding of parental fitness is required, in Santosky, the irrebuttable presumption that

[14] https://www.cato.org/supreme-court-review/2008-2009/facial-v-applied-challenges-does-it-matter

conviction of a felony against any child makes the Missouri statutory scheme facially unconstitutional.

` The Missouri Legislature's choice to require a filing of a Termination Petition by placing the condition in subsection 2 (mandatory) as opposed to subsection 5, (permissive) is unique to Missouri and under some circumstances grants requires the Juvenile Office nor the Courts the discretion to proceed with a termination that is on its face unconstitutional.[15]

LEAST RESTRICTIVE MEANS

The failure to denominate the condition of a certain felony finding as a rebuttable presumption is patently unconstitutional as prohibits the juvenile court from fully considering fitness to parent at all and is not the least restrictive means to limit the infringement of a fundamental right. State ex rel. Coker-Garcia v. Blunt, 849 S.W.2d 81 (Mo App WD 1993). Under sections 210.117 and 211.038 RSMo, already prohibits a child in the custody of the state to be reunited or placed in the home of a person with felony convictions for child abuse. The inability to reunite or place in the home of such a felon, takes away only part of the parental rights of a parent and does not create a civil equivalent of the death penalty. While the parent is denied placement, he or she would still retain the rights of visitation (likely supervised), the rights to the society with the

[15] Which under certain situations provides the Juvenile Officer a "Hobson's choice" of either violating Section 211.447.2 by not filing or violating Rule 4-3.1 for bringing a claim based upon the law and facts. Filing TPR for a clerk who provided drug paraphernalia would be a frivolous lawsuit.

child and retain some authority in the guidance and decision making for the child, and also the rights of inheritance and other right of parenthood. In addition, it maintains the fundamental and bedrock right to be a part of a family.

The inclusion of a number of felonies is unconstitutionally over broad and thus not narrowly defined. The statute seemingly makes a presumption that anyone convicted of certain offenses, in and of itself, is unfit to be a parent. The statute fails to be narrowly drawn in two aspects; one that every felony offense under chapter 566,567, 568, or 573 has some correlation to being an unfit parent and two that every felon, regardless of the circumstances, cannot be rehabilitated.

The felony crimes including in the stated chapters include failure to pay child support and having sexual contact with a student. A parent who plead guilty to not paying child support (Section 568.040) for another child perhaps decades ago is required under the statute to have his rights terminated to this child, despite fully supporting this child and having fully caught up on the arrearage for the earlier child while successfully completing probation. This is not consistent with the protection of a fundamental right of the father. It fails the strict scrutiny test.

Section 566.086 creates the felony offense of having sexual contact with a student. Under the statute, an adult age 18, who is a member of a "school-aged-team" such as a softball team, cannot have consensual sexual contact with a team-mate who is 17 years old without committing a class E felony. Even though such an act would be lawful, but for the 17-year-old being a student and the 18-year-old adult being a member of a "school

aged-team." This would be true even if the teammates were married to each other. Certainly, such an offense should not be allowed, without more, to sever a constitutional protected fundamental relationship between parent and child. The statute is unconstitutional in that it does not specifically require the movant to prove actual unfitness of the parent.

Further, the means to protect children and to properly and legally terminate parental rights already exists under Missouri prior to the addition of the condition of a felony conviction for certain offenses (the 2017 amendment), and therefore is excessively restrictive. The conduct described as a condition in Section 211.447.2.4 is much broader than the permissive grounds for termination under other sections of 211.447. Under Section 211.447.5(2)(c) the juvenile officer may file a motion to terminate for acts of abuse, including sexual abuse, to the child and the court may consider a severe act or recurrent acts of sexual abuse toward the child or any child in the family. Additionally, under Section 211.447.5(3) denominates as a ground for termination if conditions of a potentially harmful nature exist, and therefore the parent can rebut any presumption that a felony conviction may establish. Finally under Section 211.447.5(5)(a), "recurrent acts of specific abuse, including, but not limited to specific conditions directly related to the parent and child relationship are grounds if the court finds that the duration and nature renders the parent unable for the reasonably foreseeable future to care appropriately for the ongoing physical, mental and emotional needs of the child." And any acts of extrafamilial sexual abuse would be grounds for termination of parental rights the last two grounds. Under the last two grounds the Juvenile Office could have alleged in his

petition as well as the overly broad provisions about conviction of a felony. But the Juvenile Officer in this case chose only one ground and constitutionally used the short cut disesteemed by the U.S. Supreme Court when the court stated that:

> Procedures by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly distains present realities in deference to past formalities, it needlessly risks running roughshod over important interests of both parents and child. It therefore can not stand. (Stanley v. Illinois, supra at pps 656-7).

Thereby the Juvenile Office herein used the cheaper and easier way to establish unfitness by using the conclusive presumption in subdivision 4 instead of pleading other conditions that require a more individualized determination of unfitness under the other conditions found elsewhere in Section 211.447.

AS - APPLIED UNCONSTITUIONALITY

Appellant contends that the failure of subdivision 211.447.2.4 to require that court to make an actual finding of unfitness and of likelihood of harm to the child is unconstitutional as applied. In this case the father was found to have plead guilty to the offenses of child molestation in the third degree and sexual misconduct. While it is undisputed that a felony in which the victim is under the age of 18 creates an inference that the father is not quite like Ward Cleaver ('Leave it Beaver' television series) or John Walton ('The Waltons' television series), however it does not clearly, cogently and convincingly establish that under all circumstances the father is unfit, in that the conduct does not axiomatically place a father's child in danger or causes emotional or

psychological harm. Evidence of commission of a crime does not instantly tilt the scales in favor of termination and does not create an abiding conviction (no pun intended) of that the evidence supports a finding of unfitness. K.A.W. and K.A.W., 133 S.W.3d 1, 12 (Mo. banc 2004). Further, K.A.W. called a determination of whether the parent's acts are of sufficient severity as "essential." Id at 11.

In K.A.W. the Supreme Court held that it was "insufficient to merely to point to past acts, note that they resulted in abuse or neglect and then terminate parental rights. K.A.W. at 10.

The inclusion of numerous offenses where a child is under 18 years old creates without specific limitations creates more than a possibility of erroneously terminating a parent's rights. One only has to look at other states statutes to see the factors that may mitigate the risk of harm to a child.[16]

The most frequently employed limitation is that the victim of the offense must be the child, a sibling of the child or some child who is a member of the household. In essence the victim is interfamilial and not extrafamilial.[17]

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[16] The analysis of the various state statutes was obtained by a review of a compendium of grounds for termination found at the Child Welfare Information Gateway (https:/www.childwelfare.gov>groundstermin) the statutes were current July 2021. Appellant relied on the information being accurate and did not attempt to review every statute by examining the specific language of each individual statute and even if the statutes have been amended the point still remains that most states place factual or quantitative restrictions greater that the Missouri Statute.

[17] Hawaii (Rev. Stat. §§ 571-61(b); 587A-4), Idaho (Code § 16-2005), Indiana (Ann. Code §§ 31-34-21-5.6; 31-35-2-4.5), Iowa (Ann. Stat. §§ 232.102; 232.111; 232.116), Maine (Ann. Stat. Tit. 22, § 4055), Maryland (Family Law § 5-525.1), New Jersey (Ann.

Many states require an additional finding of unfitness.[18]

Other states require both a conviction and imprisonment for a set period of time. [19]

Kentucky requires evidence that establishes the offense is likely to reoccur. [6]

Florida and Montana, and Washington requires that the sexual abuse be "aggravated." Tennessee employs the term "severe" child sexual abuse.[7]

Michigan requires that the sexual abuse involve "penetration" [8]

Texas requires the abuse to be "continuous sexual abuse of a young child." [9]

New Mexico that there is "chronic abuse or sexual abuse."[10]

Under Oregon law, the grounds for termination is that the parent is unfit by a single or recurrent incident of "extreme" conduct toward any child. [11]

Stat. §§ 30:4C-11.3; 30:4C-15; 30:4C-15.1), New Mexico (Ann.Stat. 32A-4-28; 32A-4-2), New York (Soc. Serv. Law §§ 384-b(4); 358-a(3)(b), (12)), North Carolina (Gen. Stat. § 7B-1111), Ohio (,Rev. Stat. § 2151.414(E)), West Virginia (Ann. Code §§ 49-4-605; 49-4-604), and Wyoming Ann. Stat. § 14-2-309). Prior versions of the Missouri Statute required that the offense be interfamilial. 211.447.2.4 RSMo (2018 through 2021).

[18] Arizona Rev. Stat. § 8-533, Nevada Rev. Stat. §§ 128.105; 128.106; 128.109, Vermont Ann. Stat. Tit. 15A, § 3-504 and Utah Ann. Code §§ 80-4-301; 80-4-302 .

[19] New Hampshire Rev. Stat. §§ 169-C:24-a; 170-C:5; 170-C:5-a (2 years) Kansas Ann. Stat. §§ 38-2269; 38-2271 (5 years) and Iowa (5 years).

[6] Kentucky Rev. Stat 625.090. §§ 232.102; 232.111; 232.116

[7] Florida Ann. Stat. 39.806; Montana Ann.Code 41-3-423; 41-3-609; Washington Rev Code 13.34.132; 13.34.180

[8] Michigan Comp. Law 712A.29b

[9] Texas Fam Code 161.001; 161.002(B); 161.003; 161.007

[10] New Mexico Ann.Stat. 32A-4-28; 32A-4-2

[11] Oregon Rev Stat 419B.502; 419B.504; 419B-506; 419B.508; 419B.510

Sexual abuse of any child constitutes a prima facie evidence of unfitness under the Utah statute, thus allowing the parent to rebut the evidence and the finder of fact to weigh the evidence. [12]

Returning the syllogistic analysis of presumptions as discussed earlier, most states do not swing from conviction of a sexual offense (fact A) to the conclusion of unfitness (fact B) without and additional factor thus making a stronger case for the legitimate tendency to directly establish the presumed fact of unfitness.

In addition to legal restrictions there are facts that cannot be considered in Missouri that directly bear on the legitimate tendency to correlate or are in opposition to the postulate that sex crimes equate to unfit parenting. The courts should be allowed to consider the totality of the circumstance on the fitness phase and not consider all the circumstances at the "best interest phase."

The grounds for termination that exposes a parent to the threat of termination of parental rights should include an examination of the criminal offense itself instead of relying solely on its classification as a felony and the chapter number where it has been assigned

Recidivism rates for sexual offender to commit another sexual offense has been determined to be 12.7 % to 16.8 %. This suggests that risk a conviction for a sex offense is not a reliable indication of future harm statistically is less likely than not. Smallbone,

[12] Utah Ann. Code 80-4-301; 80-4-302

Stephen, William Marshall and Richard Wortley, Sexual Abuse: Evidence, Policy and Practice, Routledge Publishing, (2008) p.9. Sexual recidivism rates for convicted offenders is generally low and a relatively small group of chronic, serial offenders is disproportionally responsible for a large number of victimization incidents. Smallbone, Sexual Abuse: Evidence, Policy and Practice, Routledge Publishing, (2008) p. 19. According to a 2020 report by the Association for the Treatment of Sex Abusers, cites that restrictive legislation (such as sexual registry laws) is frequently a response to unusual and horrific cases and may be less effective, as they use a one-size-fits-all approach that does not recognize the heterogeneity of individuals convicted of sexual crimes or the difference in recidivism potential, thus shaping policies around exceptional outlier cases, not the rule. Eichelberger, Kiley, (2021) "Making Juveniles as Unfit to Parent: Terminating Parental Rights of Parents Registered as Predatory Offenders in Minnesota" Michell Hamline Law Journal of Public Policy and Practice, Vol. 42 Issue 2, Art 6 at p. 158. Well intentioned laws are based on the myths that individuals who commit sexual offenses are "repetitive, compulsive, predatory and potentially violent abusers of young children. Id at 160.

If one looks only at the conviction for a sexual offense, the accuracy of prediction future sexual abuse is the recidivism rate of approximately 16% making the measure inaccurate approximately four out of five times. This creates a harm to the family and children by creating a substantial risk of an unnecessary removal and family trauma.

There are multiple additional factors that can increase the reliability of the decision if the legislature permitted the matter to be a rebuttable presumption or include limitations such as those found in other state statutes and an examination of factors determined by scientific research to increase or the risk of child sexual abuse.

There exist peer-related and professional acceptable measurement tools to assess the risk to the children. Hanson and Morton-Bourgon (2009)[21] also found that, for assessing the likelihood of sexual recidivism, the best-supported instruments were the following:

- Static-99
- Static-2002
- MnSOST-R
- Risk Matrix-2000 Sex
- SVR-20, specifically using the mechanical approach of adding up the item.

For assessing the likelihood of violent (including sexual) recidivism, the best-supported instruments were the following:

- Violence Risk Appraisal Guide (VRAG)
- Sex Offender Risk Appraisal Guide (SORAG)
- Risk Matrix-2000 Combined

[21] Hanson, R. K., & Morton-Bourgon, K. E. (2009). The accuracy of recidivism risk assessments for sexual offenders: A meta-analysis of 118 prediction studies. *Psychological Assessment, 21*(1), 1–21. https://doi.org/10.1037/a0014421.

- Statistic Index of Recidivism (SIR)
- Level of Service Inventory-Revised (LSI-R) and its variants

> Baldwin, Kevin, Office of Sex Offender Sentencing and Monitoring, Apprehending, and Tracking (SMART). "Chapter 6: Sex Offender Risk Assessment." U.S. Department of Justice. (2015). p 2.

Another frequently used tool is the Child Abuse Potential Inventory. (CAPI). Research has shown strong internal consistency and strong validity, through the measure's usage across a wide variety of populations. Walker, C. A., & Davies, J. (2009). "A critical review of the psychometric evidence base of the Child Abuse Potential Inventory." Journal of Family Violence, 25, 215-227. The most widely used and strongly supported child maltreatment risk is the Child Abuse Potential Inventory (CAPI). J Clin Child Adolesc Psychol. 2010 Mar; 39(2) 208. Appellant argues that the CAPI or other measurement tools should be used in connection with the "grounds for termination" to support or rebut the presumption of parental unfitness.

Significant advancements in the science and practice of sex offender risk assessment have occurred over the past two decades. A number of reliable, valid approaches for assessing sex offender risk are now available. Rigorous scientific research has demonstrated that respectable levels of predictive accuracy have been obtained with purely actuarial risk assessment approaches, approaches using structured professional judgment, and the mechanical combination of items from structured risk schemes. "Sex Offender Risk Assessment," supra at 4.

Another factor is the age of the offender – evidence suggests that the risk of sexual recidivism for child sex abuse offenders declines substantially with age. Smallbone, p 8. Other factors include:

- Age of first sexual offense
- Sexual offender type (interfamilial, extrafamilial)
- Prior Sexual Offenses
- Number of victims
- Gender of victims
- Number of prior convictions or child protection history
- Sexually deviant life styles (use of pornography, duration and frequency of offenses, paraphilia).
- Sexual Compulsivity
- Degree of Planning
- Criminal Personality
- Cognitive Distortions
- Interpersonal Aggression
- Emotional Control
- Insight
- Substance Abuse
- Community Support
- Completion of Treatment

- Effective Relapse Planning
- Support System
- Degree of Surveillance or Supervision
- Impulsivity
- Compliance with Community Supervision
- Deviant Sexual Preference
- Intimacy Deficits – problems with age appropriate relationship and intimacy.

Goodman-Delahunty, Jane and Kate O'Brien, "Reoffense Risk in Interfamilial Child Sexual Offenders" Report to the Criminology Research Advisory Council. (January 2014) pps 20-22.

The point being there exists a myriad of factors in which could more narrowly establish grounds for termination, which, of course, must be utilized under strict scrutiny and least restrictive means tests. Determination of parental fitness must not be determined by fear and assumptions but should be done in a careful and precise manner looking at all relevant information and looking at the totality of the circumstances. The determination of unfitness needs to be based on reliable measures and not simply making people feel safer at the expense of others. There is a need to put families first by protecting children and parents by recognizing the power and sacredness of the bond between parent and child. Overcoming a parent's fundamental right to society with their child should be both legally and ethically difficult. (Making Juveniles Unfit as Parents, supra at 120).

CONCLUSION

The Missouri Statute 211.447.2.4, constitutionally fails to be narrowly tailored and reliable enough to pass strict scrutiny and therefore creates a substantial risk of riding roughshod over the rights of a parent when there exists means to assure a more accurate measure of potential harm to a child.

POINT III

THE TRIAL COURT ERRED IN TERMINATING THE PARENTAL RIGHTS OF THE FATHER BECAUSE THERE WAS INSUFFICENT EVIDENCE THAT THE FATHER WAS UNFIT IN THAT, DESPITE THE PROOF OF A GROUND FOR TERMINATION, THE CONSTITUTION REQUIRES INDIVIDUALIZED CLEAR AND CONVINCING PROOF OF UNFITNESS AND THE CONVICTION OF A CRIME, WITHOUT MORE DOES NOT ESTABLISH UNFITNESS TO THE REQUISITE QUANTUM OF PROOF.

STANDARD OF REVIEW:

The trial court's judgment terminating a party's parental rights will be affirmed 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. In re S.Y.B.G. , 443 S.W.3d 56, 59 (Mo. App. E.D. 2014) (citing In re C.J.G. , 75 S.W.3d 794, 797 (Mo. App. W.D. 2002)). The judgment will be reversed only if the court is left with a firm belief the judgment is wrong. Id. The evidence is viewed in the light most favorable to the trial court's judgment and we defer to the court's determination regarding credibility of witnesses. S.Y.B.G. , 443 S.W.3d 56, 59 (citing In re J.M.S. , 83 S.W.3d 76, 82 (Mo. App. W.D. 2002)). The party seeking termination bears the burden of proof in a termination of parental rights proceeding. Id. In re D. L.P., 638 S.W.3d 82 (Mo. App. 2021). The court is required to consider the evidence regarding the Appellant's current condition is clear, cogent and convincing evidence, instantly titling the scales in favor of termination of parental rights. In Re D.L.P. 638 S.W.3d 82. 93 (Mo.App. ED 2021).

ARGUMENT

In Stanley v. Illinois, 405 U.S. 645 (1972), the United States Supreme court reversed the termination of Peter Stanley's parental rights. The court finding that while the Illinois Statute allowed for the termination of parental rights under the grounds that he, as an unwed father was presumed to be an unfit parent, was violative of the Due Process Clause to the United States Constitution. Id at 651. The court agreed that it may be true that most unmarried fathers are unsuitable and neglectful parents some fathers are wholly suited to have custody of their children. Id at 654. The Court found that since there was no evidence in the record to indicate that Mr. Stanley is or has been a neglectful father who has not cared for his children the judgment must be reversed. Id at 655. The court said:

> Procedure by presumption is always cheaper and easier that individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly distains the present realities in deference to past formalities, it recklessly risks running roughshod over the important interests of both parents and child. It therefore, cannot stand. Id 656-7.

The appellant concedes that the conviction for offenses against a minor has some relevance and may create an inference of unfitness, but, it is not conclusive proof of unfitness. See the arguments in Point II and incorporated by reference hereby and not unnecessarily repeated herein. Like in Stanley, the sociological data justifying the assumption that a person with a felony finding of certain crimes against a child or the stigma is not so pervasive that it requires adoption by strangers and permanent termination of the subsisting relationship with the child's father. Id. at footnote 7. There are other factors under which a convicted felon may be an appropriate parent.

Under Missouri's Statutory scheme for termination of parental rights, it may be argued that conviction of a sex felony where any child is a victim is grounds for termination, the question of sufficiency of the evidence can not end there. The Constitution requires that the state prove the parent is unfit even in light of any condition

or presumption. Sufficient evidence must include evidence that a condition has been proven but also must provide evidence that demonstrates parental unfitness, even if the statute does not require such proof of unfitness.

> It is insufficient to merely point to past acts, note that they resulted in abuse or neglect and then terminate the parental rights. Past behavior supports grounds for termination, but only if convincingly linked to predicted future behavior. There must be some explicit consideration of whether the past acts provide and indication of the likelihood of future harm. (In Re K.A.W., 133 S.W.3d 1, 10).

In the absence of any individualized showing of unfitness the Juvenile Office has failed to present sufficient evidence that grounds for termination exist and therefore the judgment of the trial court must be reversed.

CONCLUSION

This brief presents a multifaceted, but interrelated, attack on the juvenile court's determination to terminate the parental rights of the father. Since the Juvenile Office chose to proceed only on the single condition of his plea of guilty to Chapter 566 felony involving a child less that eighteen instead of using other suitable grounds for termination explicitly declared by the statute to be "conditions for terminating parental rights" and approved by the courts explicitly, the appeal remains focused on whether said condition is truly a condition which permits termination or is only a condition that requires the filing of a petition. See Point 1. If the court finds that the conviction of a Chapter 566 felony with a child victim is an acceptable "condition for the termination of parental rights, the court must consider whether the use of such a condition is in line with the Constitutional requirement of an individualize determination of unfitness as opposed to the use of a presumption to mandate a finding of unfitness which allows the juvenile court to weigh best interest of the child without consideration of any risk to the child. Finally, if this court determines that such a conviction is in line with the constitution then the court must reach whether in the absence of pleading of unfitness and without presentation of evidence other than the conviction and the lack of a particularized finding of Father fitness whether there is sufficient evidence to support a support the ground for termination by clear, convincing evidence that immediately tilts toward a firm conviction that the daughter of Father is in danger of harm.

The appellant submits that all three points warrants that reversal of the judgment. Like the criminal death penalty, the civil equivalent of the death penalty should be done

with precision and exacting procedures not currently practiced in the State of Missouri. The appellant also acknowledges the appellate courts preference not to reach constitutional ground unnecessarily but the appellant believes that the lack of precision in the current statute, the methods of pleading and the proof of parental unfitness warrants the court to render guidance on how future cases should proceed for the benefit and protection of all Missouri families.

RULE 84.06(b) CERTIFICATE

I certify that his brief complies with Rule 84.06(b), as effective July 1, 2002, and that this brief contains 13471 or less words and 1702 or less lines according to the word processing system use to prepare it, exclusive of cover, Table of Contents, Table of Authorities, signature block and this and the next Certification and the Appendix. Further, I certify that this document has been scanned for viruses using Kasperky Threat Intelligence Portal Antivirus online and according to that software, is virus free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Appellant's brief was filed on the Missouri Case.net system and by that mode, served all attorneys of record including:
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