



APPLICATION OF (name) Andy Hosmer  
FOR CIRCUIT OR ASSOCIATE CIRCUIT JUDGE  
31<sup>st</sup> CIRCUIT JUDICIAL COMMISSION  
GREENE COUNTY, MISSOURI (as adopted June 8, 2009)

**RESPONSES TO THESE QUESTIONS WILL BE MADE PUBLIC IF THE APPLICANT IS NOMINATED.**

**NOTE – Please submit seven (7) paper copies with attachments.**

1. Present principal occupation and title: Attorney, Hosmer King & Royce, LLC
  
2. What is your age? 50
  
3. (a) How many years have you been a citizen of the United States? 50  
(b) How long have you been a Greene County resident? 15+  
(c) How many consecutive years immediately preceding your application have you been a qualified voter of Missouri? 22
  
4. State the date you were admitted to The Missouri Bar and whether your license is in good standing. If not, explain in detail. 1992, License is in good standing
  
5. List any other states, courts, or agencies in which you are licensed as an attorney.  
  
United States District Court, WD of Missouri
6. (a) State the name and address of all colleges and universities attended, other than law school, together with the dates and degrees received.  
  
See attachment.  
  
(b) List/describe any college or university activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision.  
  
See attachment.  
  
(c) Attach a certified copy of college, university and law school transcripts here, or have the institutions send transcripts direct to the contact person.  
  
See attachment.

7. (a) State the name and address of all law schools attended together with the dates and degrees received.

See attachment.

- (b) List/describe any law school activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision.

See attachment.

8. State, in chronological order (starting with the earliest employment) (a) significant non-law-related employment prior to law school and (b) all employment from the beginning of law school to the present. To the extent reasonably available to you, include the name and address of each employer and the dates of employment, and, for legal employment, describe the positions you have held, e.g., associate, partner, law clerk, general counsel.

See attachment.

9. If you were a student at any school from which you were suspended, placed on probation, or expelled by school authorities, for any reason, describe the circumstances.

N/A

10. Describe the nature of your experience in trial and appellate courts and explain how they demonstrate the quality of your legal work. *(You either may take as much space as you need here or attach your response on separate sheets)*. Include in your response:

- a) **Appellate Experience:** Please include a representative list of cases you have briefed and/or argued (if you are a judge, include representative cases from your practice prior to your judicial appointment) including, to the extent reasonably available to you, the style, date, and court and, if published, the citation; identify the client(s) you represented and opposing counsel; give a one-paragraph description of the case and your role.
- b) **Trial-Level Experience:** Please include a representative list of cases and/or administrative hearings you have handled (if you are a judge, include representative cases from your practice prior to your judicial appointment) including, to the extent reasonably available to you, the style, date, and court;

identify who you represented and opposing counsel; state whether the case was disposed of following a jury trial, bench trial or at what other stage; give a one-paragraph description of the case and your role.

- c) **Judicial Experience:** If you are a judge, commissioner, or are serving or have served in other judicial capacity, please describe the nature and extent of your judicial responsibilities, including the dates you have served as a judge at each level, the types of dockets you have handled, and any special expertise you have developed that you believe is relevant to your qualifications for the position for which you are applying.

See attachment.

11. (a) Describe any additional legal experience that you believe may be relevant to the commission's decision, including clients by category that you have represented.

See attached resume.

- (b) Describe any non-legal experience that you believe may be relevant to the commission's decision.

See attachment.

12. List all bar associations and other professional societies of which you are a member, with any offices held and dates.

Springfield Metropolitan Bar Association

Missouri Bar Association

13. (a) List any professional articles or books authored by you that have been published or any special recognition or award of a professional nature you have received.

N/A

- (b) List any other articles, reports, letters to the editor, editorial pieces, or other material authored by you that have been published within the last five (5) years.

See attachment.

14. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations in which you have significantly participated. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

See attachment.

15. Do you now hold or have you ever held an elective or an appointive public office or position? If yes, provide details.

I was elected to the Springfield R-XII Board of Education in 2006 and have been re-elected to two additional terms. I currently serve as Vice-President of the Board. I have previously served as Ward 4 Committeeman.

16. Please list any client(s) or organization(s) for which you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organization(s).

N/A

17. Provide the branches and dates of (a) military service or (b) other public service not otherwise disclosed in this application. If discharged from the military, state whether the discharge was other than honorable.

N/A

18. State whether you are able, with or without a reasonable accommodation, to perform the essential functions of being a trial judge.

I am able to perform the essential functions of being a trial judge.

19. Were you ever refused admission to the bar of Missouri or the bar of another state or the federal courts? If yes, provide details.

No

20. Have you ever been disciplined, admonished or cited for breach of ethics or professional conduct by the Supreme Court of Missouri or by any court or bar association or committee thereof? If yes, provide details.

No

21. If you are or were a member of the judiciary of the State of Missouri, please state:

- a) Whether an order of discipline ever has been entered against you by the Supreme Court of Missouri for breach of the Code of Judicial Conduct or the Canons of Judicial Conduct. If yes, provide details.

N/A

- b) Whether a reprimand or admonition ever has been entered against you by the Commission on Retirement, Removal and Discipline for any of the causes specified in Supreme Court Rule 12.07. If yes, provide details.

N/A

22. Have you have ever been held in contempt of court? If yes, provide details.

No

22. Have you ever been sued by a client or been a party to any other litigation, other than as guardian ad litem, plaintiff ad litem, or defendant ad litem?

If your answer is yes, state the style of the case, where it was filed, and explain in detail. If you are a judge and you have been sued in your judicial capacity, list only those cases where you are or were other than a nominal party.

See attachment.

23. Have you ever been convicted or received a suspended imposition of sentence for a felony or misdemeanor in state, federal or military court? (*Note that this question does not require that traffic offenses or other infractions be listed.*)

If your answer is yes, state the style of the case, where it was filed, and explain in detail.

No

24. Are you delinquent in the payment of any federal, state, county or city taxes? If yes, provide details.

No

25. You must attach to this application one writing sample of your choice. The only rule, limitation or instruction is that you must indicate whether it was edited by anyone else, and if so, to what degree.

See attachment. The sample was not edited by anyone else.

26. List/describe any additional honors or awards you have received, activities you have performed, or any other information not set out above that demonstrates the quality of your work as an attorney or that you otherwise believe is relevant to the commission's decision.

See attachment.

Please list the names of *five* persons whom you will ask to provide letters of reference for you with respect to your judicial qualifications. Do not list as a reference a judge of the court involved. As to each of the (5) references, **please provide name, title, mailing address, telephone and e-mail address.** *Please note that it is your responsibility to contact your references* and to see that they send the requested letters in a timely manner and in accordance with the Guidelines for References.

See attachment.

**Andy Hosmer**

**Supplemental answers to application**

**Question 6(a): Name and address of all colleges and universities attended**

North Arkansas Community College  
1515 Pioneer Drive  
Harrison, Arkansas 72601

Attended August 1982 to May 1983

University of Missouri-Columbia  
215 University Hall  
Columbia, Missouri 65211

Attended August 1983 to May 1986  
B.A. Psychology

**Question 6(b): College/University activities, achievements**

I went to North Arkansas Community College on a basketball scholarship. After one year, I decided to transfer to the University of Missouri-Columbia. My activities at North Arkansas primarily involved my studies and basketball. I left North Arkansas with a cumulative GPA of 3.73.

At the University of Missouri-Columbia, I was actively involved as a volunteer with the University YMCA/YWCA. On Saturday mornings, throughout my three years at MU, I taught swimming to children through the Y's swimming program.

On Wednesday evenings, I traveled with other volunteers to the Renz Correctional Center in Jefferson City (at the time, Renz was a correctional facility housing maximum security female and minimum security male inmates). At Renz, we would socialize, play sports, or otherwise interact with the residents for a couple of hours every Wednesday evening. I became the Director of the Renz program during my junior year and was responsible for recruiting volunteers and organizing activities.

On Thursday evenings, I would go with a different group of volunteers to Fulton, Missouri where we would visit the Fulton-Biggs State Hospital (maximum-security detention center for the criminally insane). This program, like the Renz program, was designed as a way for the residents to socialize with people on the outside.

The University Y also provided a Landlord/Tenant program which advised landlords and tenants (primarily college students) of their legal rights and responsibilities. During my junior and senior years, I worked five to ten hours a week at the Y's campus office answering questions from landlords and tenants. In addition, I distributed Landlord/Tenant brochures and gave talks to various student groups.

Just prior to my senior year at MU, I was asked by one of my Psychology professors to consider trying for Departmental Honors. This was a year-long process of developing, conducting, analyzing and writing up individual research in the field of psychology. My research focused on the relationship between fear during an event and later recall of that event. This required me to design and set up an experiment, recruit 50 undergraduates to participate in the experiment, collect and analyze the results, and then

write up the results of the research in an abstract. I successfully completed this and, as a result, graduated with Departmental Honors in Psychology.

At MU, I was on the Dean's List every semester and had a cumulative GPA of 3.88. I graduated Magna Cum Laude, was elected Phi Beta Kappa, received a General Honor's Certificate for completing 20 hours of Honors Level classwork, and, as discussed, graduated with Departmental Honors in Psychology.

**Question 6(c): Transcripts**

Transcripts for each school attended are attached.

**Question 7(a): Law School attended**

New York University School of Law  
40 Washington Square South  
New York, New York 10012

Attended August 1986 to May 1989  
Juris Doctor received May 1989

**Question 7(b): Law School activities**

While at NYU, I volunteered for the Harlem Moot Court Competition which was a program designed to give middle school students in Harlem a chance to see how the legal system operated. Once a week, I would travel to Harlem with 3-4 other law students. We were paired with a team of middle school students and we would spend the evenings teaching them about the legal process and preparing them for a Moot Court Competition.

I also volunteered at the Unemployment Action Center, which provided free legal representation to individuals trying to get unemployment compensation. Through this program I represented clients at unemployment compensation hearings in front of the New York Department of Labor.

Finally, I was Co-Director of the Student Lawyers Athletic Program (SLAP) during my third year at NYU. As Co-Director, I was responsible for organizing all intramural sports for the law school. This included putting together a budget that was submitted to the Administration, setting up schedules, reserving fields, putting together awards ceremonies and celebrations, and organizing two out of state tournaments - softball at the University of Virginia and basketball at Western New England School of Law.

**Question 8(a): Significant non-law-related employment prior to law school**

Summer 1984 – Camp counselor, University YMCA/YWCA, Columbia, Missouri - worked as camp counselor throughout the summer months.

School year 1985/1986 – Research Assistant to Dr. Walter C. Daniel, Vice Chancellor, University of Missouri-Columbia. I conducted research for Dr. Daniel that centered on his work regarding the historical significance of the writers and artists of the Harlem Renaissance.

Summers 1985 and 1986 – Schroff, Glass & Newberry, Springfield, Missouri – worked as a Runner/Investigator serving subpoenas, summarizing deposition transcripts, getting medical records, and filing documents in various courts.

**Question 8(b): All employment from the beginning of law school to the present**

**Summer 1987**

Center for Study of Responsive Law

Washington, D.C.

Summer Intern (through NYU's Public Interest Law grant)

**Summer 1988 (June, July)**

El Paso County District Attorney's Office

Colorado Springs, Colorado

Summer Intern (Rule 13 Attorney)

**Summer 1988 (July, August)**

Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill

Tampa, Florida

Summer Associate

**July 1996 to July 1998**

United States Peace Corps

Arad, Romania

Non-Governmental Organization (NGO) Consultant

In late 1995, I left the law firm I was working at in New York City and made the decision to follow in the footsteps of three of my older siblings by joining the Peace Corps. I chose a placement in Romania which, at the time, was only a few years removed from breaking away from the Soviet Union. After three months of intensive language training, I was sent to the West of Romania, near the Hungarian border, to work with non-profit organizations (referred to as NGOs) in the areas of program development, fundraising, grant writing, volunteer recruitment, and community outreach.

The primary NGO I worked with in Arad had been set up by the mother of a severely disabled young man who had been denied an education in the local public schools. At the time, Romania actively tried to hide any physically disabled or mentally disabled citizens (especially children) in orphanages or other institutions and did not provide them with an education. This woman had started a one-room school for disabled children and had begun advocating for the rights of the disabled through an NGO she had established. Over the course of two years I worked closely with her and her NGO. I provided advice and training on grant-writing, fundraising, advocacy, and volunteer recruitment, among other things. During my time in Arad, I also worked with a group of local doctors on a project to purchase, install and connect computers in their hospital to improve medical care at the hospital. I helped develop the program, coordinated the grant-writing for the program and oversaw the purchase and installation of the computers.

**All other employment is listed on my resume which is attached.**

**Question 10: Experience in trial and appellate courts and how it demonstrates quality of legal work**

I believe the diversity of my trial experience is one of the things that sets me apart from other candidates. I have handled cases in state, federal, and municipal courts, as well as cases in front of various administrative and state agencies. I have prosecuted murderers and defended those charged with murder. I have represented plaintiffs and defendants in civil matters. I have represented juveniles charged with crime and juveniles and children taken from their homes because of allegations of abuse and neglect by their parents. I have represented the interests of children in divorce and custody proceedings in family court and have represented parents in those same proceedings. I have represented the Department of Mental Health seeking guardianship over individuals and have represented individuals who were alleged to be in need of guardianship.

While not necessarily making me a better lawyer, this diversity of experience has made me a more understanding lawyer and a much more compassionate lawyer. Seeing both sides of all of these legal issues has given me an appreciation for how complex a seemingly simple matter can be. And it has brought home to me the fact that even though an individual's case may be one of a hundred similar cases on a judge's docket, it is a case that is incredibly important to that individual. I think a good judge understands and appreciates this.

**Question 10(a): Appellate Experience**

While my legal practice has never focused on appellate work, I have handled a federal criminal appeal in the 8<sup>th</sup> Circuit Court of Appeals; a state criminal appeal in the Southern District Court of Appeals; and a state civil appeal involving a family law matter – also in the Southern District Court of Appeals. In addition, I worked on a number of appellate cases and issues while practicing in Tampa, Florida and New York City.

**Representative appellate cases:**

*In the Matter of E.F.B.D., et al. v. S.B.*, 345 5.W.3d 316 (2008). I represented father/appellant who contested the termination of his parental rights in a case originating out of Lawrence County, Missouri. In addition to briefing the issues, I argued the case to the Southern District Court of Appeals. The Court of Appeals affirmed the termination. Opposing counsel: Amy L. Boxx; Randall, Boxx & Masri, P.C. Monett, Missouri; Scott R. Pettit; Pettit & Pettit, P.C. Monett, Missouri; and Roger Owensby, Children's Division, Springfield, Missouri.

*United States v William Baker, 8<sup>th</sup> Circ. Ct of Appeals, Case No 11-1948.* I was appointed to represent Mr. Baker who was charged in federal court with three counts of sexual exploitation of a minor. Mr. Baker entered a plea of guilty to one of those counts and was thereafter sentenced to 480 months in prison. On Mr. Baker's behalf, I filed an appeal to the 8<sup>th</sup> Circuit Court of Appeals arguing that the government had breached the plea agreement and, as a result, Mr. Baker's sentence was improper. The 8<sup>th</sup> Circuit affirmed the sentence and the United States Supreme Court denied Mr. Baker's Writ of Certiorari. Opposing counsel: James H. Kelleher, Assistant United States Attorney, Springfield, Missouri.

**Question 10(b): Trial-level Experience:**

I have a significant amount of trial experience beginning when I worked as a summer intern with the El Paso County District Attorney's office in Colorado Springs, Colorado, after my second year of law school. During that internship, I first-chaired two misdemeanor jury trials involving individuals charged with driving while intoxicated. Both jury trials resulted in guilty verdicts.

As an Assistant Public Defender in Springfield, Missouri from 1992 to 1993, I first-chaired approximately 8-10 jury trials and numerous bench trials. In addition, I acted as second-chair attorney in approximately 3-5 felony jury trials.

As an Assistant Attorney General from 1999 to 2006, I tried an additional ten jury trials across the state. In addition, I second-chaired two murder trials. I also tried a number of bench trials and tried cases to various administrative agencies.

In private practice (2006 to present), I have tried numerous trials in criminal, civil, family, juvenile, and probate courts. About 50% of my practice is devoted to criminal defense where I represent clients charged with everything from routine traffic offenses in municipal court to clients charged with bank fraud in federal court. About 20% of my practice entails representing children (as their Guardian Ad Litem) who have been removed from their homes because of abuse and/or neglect or are the subject of custody battles in family court. Another 20% of my practice is comprised of representing plaintiffs and defendants in civil litigation. Finally, a small but growing area of my practice is devoted to acting as a mediator in family court matters.

**Representative cases (Assistant Public Defender):**

*State v. Debra Lee (1993)*. Defendant charged in Greene County with felony possession of crack cocaine. I tried this case to a jury in front of the Hon. Miles Sweeney. Our defense was that the defendant did not knowingly possess the crack cocaine found in her purse because – as she testified – if she knew she had cocaine she would have smoked it immediately. Opposing counsel: Hon. Margaret Holden. Result: Defendant acquitted.

*State v. Randy Meyers (1993)*. Defendant charged in Greene County with approximately fifteen felony counts of stealing and one count of passing a bad check in connection with travel vacations he organized for members of the local Abou Ben Adhem shrine in Springfield. I tried this case in front of the Hon. Don Bonacker. Opposing counsel, Darrell Moore, Assistant Prosecuting Attorney. Result: Defendant acquitted on all counts.

**Representative cases (Assistant Attorney General):**

*State v. Daniel Stewart, 265 S.W.3d 309 (Mo. App. S.D. 2008)*. Defendant charged in Douglas County with second degree murder for killing his wife and disposing of her body along the banks of a nearby creek. Jury trial moved to Phelps County, Missouri as we were unable to seat a jury in either Douglas County or Wright County because of pre-trial publicity. I tried this case to a jury in front of the Hon.

John Moody. Opposing counsel: Dee Wampler and Joe Passanise, Springfield, Missouri. Result: Defendant convicted of second degree murder and sentenced to 25 years in prison.

*State v. Harvey E. Smith, 157 S.W.3d 687 (Mo. App. W.D. 2004)*. Defendant charged in Buchanan County, Missouri with the felony of manufacture of methamphetamine. I tried this case to a jury in front of the Hon. Patrick Robb in 2003. Result: Defendant convicted of attempted manufacturing and sentenced to 15 years in prison. Opposing counsel: Buchanan County Assistant Public Defender.

*State v. Eddie Taylor, 198 S.W.3d 636 (Mo. App. S.D. 2006)*. Defendant charged in Mississippi County with the class A felony of robbery and armed criminal action. I tried this case to a jury in front of the Hon. Lynn Brown in 2002. Opposing counsel: Bryan Keller, Mississippi County Assistant Public Defender. Result: Defendant convicted of both counts and sentenced to 10 years in prison.

*Carlos Greathouse v State of Missouri, 83 S.W.3d 554 (2002)*. Defendant was convicted of first degree murder for the killing of a 15 year old girl in Wright County, Missouri. Defendant filed a post-conviction motion to vacate his sentence of life without parole based on ineffective assistance of trial counsel. I represented the State of Missouri in the post-conviction proceeding and tried the case in front of the Hon. Ted Scott. Opposing counsel: Missouri State Public Defender. Result: Defendant's motion to vacate the sentence was denied and the ruling was upheld on appeal.

**Representative cases (Private practice):**

*State v. David Williams (Greene County, Missouri)*. I represented Mr. Williams who was charged with arson. The case was highly publicized as the fire led to the deaths of three young children who were asleep in the home. We were able to quickly bring in experts from out of state to conduct a thorough and objective investigation of the scene. Our investigation concluded that the initial determination that the fire had been intentionally set could not be scientifically corroborated. All charges were later dismissed against Mr. Williams.

*Violet Watson-Williams v. Richard and Nancy Preffitt (Greene County, Missouri)*. I represented Ms. Watson-Williams, the mother of the three children killed in the fire (discussed above) in a wrongful death action against the landlord of the property. The lawsuit alleged that the home was unsafe as it did not have functioning smoke detectors in violation of city code. The lawsuit was settled out of court with a payment of policy limits.

**Question 10(c): Judicial Experience: N/A**

**Question 11(b): Non-legal experience that is relevant**

I believe that my 8+ years of service on the Springfield R-XII Board of Education is relevant to this Commission's decision as we are tasked each day with making decisions that are in the best interests of our 25,000 students, 3000 employees (including 1800 teachers), and the community. I am responsible (along with my fellow board members) for developing - and approving - a budget of over \$230,000,000.00. Crafting a budget that meets the needs of our district is a time-consuming job that requires considering various scenarios and alternatives and making difficult decisions about how best to

spend a limited supply of money. This requires a careful weighing of the merits of specific budget expenditures. As a board member I have made these decisions during each and every budget process.

Last year the board also was faced with conducting a national search to find and hire a new Superintendent to lead our schools. This process also required the board to weigh the relative merits of the applicants and make a decision that was in the best interest of the district.

All of this experience is relevant to my qualifications to serve as an Associate Circuit Judge.

**Question 13(b): Other articles, reports, letters to the editor, et al.**

I have written a number of letters to the editor and/or to the Our Voices or Local Voice columns in the Springfield News-Leader and other papers in connection, primarily, with school-related issues.

*"Voucher Bill Is Bad News," Springfield News-Leader, March 7, 2007*

*"New School Should Be Viewed In Full Context," Springfield News-Leader, December 4, 2007*

*"Green Schools Benefit To Our Children," Springfield News-Leader, April 23, 2008*

*"Four Gaad Candidates For School Board Posts," Springfield News-Leader, April 2, 2009*

*"Climate Change Debate? Not Really," Springfield News-Leader, September 23, 2011*

*"Carparate Tax Evasion Hurts Schools," St. Louis Post-Dispatch, January 4, 2013*

**Question 14: Professional, charitable organizations**

In addition to my 8+ years of service on the Board of Education, I am also actively involved with the PTAs at my daughters' schools.

I am the current Vice-President of the Greene County 100 Club. The 100 Club is a 501(c)(3) organization founded to provide immediate financial assistance to the families of Greene County law enforcement officers and firefighters killed in the line of duty. I helped organize the 100 Club in 2007 and have been on the board since its inception. To date, the 100 Club has raised nearly \$250,000.00.

When the 100 Club formed in 2007, there had not been a death of a law enforcement officer or firefighter in Greene County in over 20 years. Almost immediately after receiving our tax exempt status, we provided financial assistance to the family of Dep. Gary McCormack, who was killed while responding to a fire. Less than a year later, we provided immediate financial assistance to the family of Dep. Monte Ruby who was killed by an inmate who was being treated at Cox Hospital. In each instance, the 100 Club was able to provide a \$5,000.00 check to the family within 24 hours of the death.

For the past four years I have served on the Missouri State University Diversity and Inclusion Advisory Council (DIAC). This group provides advice and assistance on a quarterly basis to the Director of Diversity and Inclusion at MSU, Dr. Ken Coopwood, in his work around diversity.

In 2012 and 2013, I served on the City of Springfield-Greene County, Missouri Stormwater Management Task Force. This group was tasked with becoming informed about the area's stormwater issues,

discussing the available options to address those issues, and making recommendations for how best to manage those issues.

In 2009, I served on the Governor's Home Building & Residential Energy Efficiency Advisory Panel. This group was asked to provide recommendations to the Governor around best practices for stimulating the home building sector while also encouraging energy efficient design.

In 2013, I was asked to serve on the board of FC Legacy, a soccer club in Springfield. I am currently Vice-President of that board.

I was a member – and past President - of the Commercial Club of Springfield. The Commercial Club is dedicated to the continued growth and vitality of the Commercial Street Historical District.

I am an active member of the Springfield Metropolitan Bar Association.

**Question 22: Party to litigation**

I have never been sued by a client. I was, however, sued (along with six or seven other individuals) by a defendant I prosecuted while with the Attorney General's office. As I was never served with the lawsuit, the Court dismissed me as a defendant. Additionally, I have been sued on three or four occasions in connection with my service as a member of the Springfield Board of Education.

I have been a plaintiff in three separate cases – all in Greene County, Missouri. Two of those cases involved me filing suit against Sears, Roebuck (*Douglas A. Hosmer v. Sears Roebuck*, 31302AC5143 and *Douglas A. Hosmer v Sears Roebuck*, 31305AC3682). Each of those cases dealt with the failure of Sears to properly credit payments in connection with the purchase of appliances. Each case was settled out of court in my favor. The other case (*Douglas A. Hosmer et ol v Cassandra Barth*, 1231-CV09843) involved a lawsuit filed by my car insurance carrier for property damage caused by Ms. Barth (an uninsured driver) - and paid for by my insurance carrier - after a motor vehicle accident.

**Question 26: Other relevant considerations**

I come from a large family (12 brothers and sisters) and a small town (Marshfield, Missouri). I have had a rich and varied life, having lived in places as diverse as Harrison, Arkansas and New York City. I spent two years as a Peace Corps volunteer working on behalf of disabled children in Romania and six years prosecuting criminals across the state of Missouri. I have represented Fortune 500 corporations and folks too poor to pay me. For the past 8+ years I have worked for the 25,000 students in our public schools.

In my nearly twenty-five years as an attorney, I have worked in big firms and small firms; in private practice and as a public servant; I have appeared in state court, federal court and in front of administrative agencies; I have practiced civil law (representing plaintiffs as well as defendants); criminal law (as prosecutor and defense attorney); juvenile law (as Guardian Ad Litem and defense attorney); and family law (as Guardian Ad Litem and Court-Appointed Mediator). All of these experiences have made me who I am and, I think, uniquely qualify me to be an effective Associate Circuit Judge.

## **WRITING SAMPLE – Andy Hosmer**

### **JURISDICTIONAL STATEMENT**

This appeal is taken from a Judgment of the Lawrence County Circuit Court, Juvenile Division, terminating the parental rights of SB (Father/Appellant) in, to and over the minor child, EFBD, and involves the interpretation of existing case law, statutes and rules. This appeal does not involve the validity of a treaty or statute of the United States or of a statute or the provision of the Constitution of Missouri, the construction of revenue laws of this state or any of those other areas exclusively reserved for the Missouri Supreme Court.

This appeal is within the jurisdiction of the Missouri Court of Appeals, Southern District, pursuant to Mo. Const. Art. V. Section 3 and Mo. Rev. Stat., Sections 512.020, 211.261 and 477.060.

## STATEMENT OF FACTS

EFBD was born June 18, 1993 to PC (Mother) and SB (Father/Appellant) (L.F. 99). Mother and Father have never been married. From the time of EFBD's birth until she was approximately fourteen months old, Father had alternate weekend custody of EFBD (Tr. 252:23-253:1). Mother testified at trial that Father knew of EFBD's birth and provided diapers, health insurance, and other support for EDBD until she was approximately fourteen months old (Tr. 254:9-20; 309:7-11). In or about August 1994, Father attempted to retain custody of EFBD after a routine visit to prevent EFBD's return to the poor conditions in which she was living with her mother (Tr. 253:7-25). A deputy sheriff and a Missouri Division of Family Services (DFS) caseworker came to Father's house and ordered him to turn over EFBD to them (Tr. 253:7-25). Immediately thereafter, Mother and EFBD left the area, and Father did not see EFBD again until he began visitation in the present proceeding (Tr. 254:1-2; 255:22-256:1).

Father testified that he made attempts to locate Mother and EFBD, without success (Tr. 257:1-5). He testified that he contemplated legal action, but did not have an address to have Mother served (Tr. 251:8-12). He testified that he repeatedly contacted DFS and the Division of Child Support Enforcement (DCSE) in Greene County and in Jefferson City in 1994, 1995, and 1996 regarding Mother's whereabouts yet received no assistance from either agency (Tr. 258:17-23; 259:4-8). There was no evidence rebutting Father's testimony regarding his efforts to locate Mother. Mother testified that she did not know Father's address

(Tr. 295:11-14). Mother testified that she kept in occasional contact with an alleged half-brother of Father regarding her whereabouts (Tr. 304:21-25). This person was not present at trial and there was no testimony concerning whether this person informed Father of Mother's whereabouts at any time from August 1994 until March 2001 when DFS took custody of EFBD in this case.

In 1996, DCSE and Mother filed a petition in the Circuit Court of Greene County to change EFBD's last name to the last name of Mother's late husband; to establish Father's paternity; and to establish a child support order (Tr. 306:7-12). Father testified that he received no notice of the Greene County action, and nothing in the record contradicted this testimony (Tr. 246:5-9; 265:23-25). Father testified that he first received notice of the Greene County action in March 2002, in conjunction with the present action (Tr. 266:25-267:13).

On March 21, 2001, the Lawrence County Juvenile Office filed a petition requesting that EFBD be placed in protective custody, and that temporary legal and physical custody of her be placed with the Lawrence County Division of Family Services due to a history of child abuse and neglect reports involving her and her siblings (L.F. 1-2). On that same date, the Circuit Court of Lawrence County, Juvenile Division, entered its order granting the relief requested in the petition and appointing Scott Pettit as Guardian Ad Litem for EFBD (L.F. 3-4). On March 23, 2001, the court held a hearing to determine temporary custody (L.F. 175). Father did not receive timely notice to appear (L.F. 175). This hearing was continued to March 28, 2001, and Father received no notice of the continuance

(L.F. 175). In April 2001, DFS placed temporary physical custody of EFBD with foster parents William and Karen Holland (the Hollands) (L.F. 100).

In April 2001, Father learned that he had been named as EFBD's father on her birth certificate. Father and his mother (Grandmother) then-traveled to Greene County, Missouri, where they received copies of the court records relating to EFBD and also talked with the court-appointed Guardian Ad Litem, Scott Pettit (Tr. 241:7-15). It was at this time that Father learned that EFBD had been placed in DFS custody. On April 30, 2001, Father and Grandmother traveled to Lawrence County to meet with EFBD's caseworker, Brandi (Henson) Parris and to request that custody of EFBD be placed with Father or Grandmother (L.F. 65; Tr. 84:1-5). Ms. Parris indicated in a report filed with the court on June 21, 2001, that she had requested a home study for both Grandmother and Father to determine whether EFBD could be placed in their custody (L.F. 65-66). Ms. Parris testified that she requested the home study on May 1, 2001 (Tr. 85:19-25).

Father traveled from Belton, Missouri to attend a DFS Family Support Meeting relating to EFBD on May 31, 2001 (L.F. 65; Tr. 90:4-10). There was one Family Support Meeting prior to this meeting but Ms. Parris did not know if Father was ever notified of that meeting (Tr. 112:5-8).

From April 2001, until the date of the court's judgment terminating Father's parental rights, Father and Grandmother undertook efforts to obtain custody of EFBD and her half-sister, to whom Father was not related so that EFBD and her half-sister would not have to be separated (Tr. 197:24-198:3;

241:19-22; 244:18-21; 251:13-18). Father sent gifts to both EFBD and her half-sister for as long as he was allowed to by DFS (Tr. 169:16-170:2; 249:18:23). DFS ordered Father to stop sending gifts to the half-sister (Tr. 169:16-170:2; 250:18-251:1). DFS also ordered Father to stop sending gifts to EFBD (Tr. 250:11-17). Father complied with both orders.

Ms. Parris, EFBD's caseworker from March 2001 until October 1, 2001, testified that Father wanted to visit EFBD and requested visits with her (Tr. 94:16-23; 97:18-21; 103:9-11). Amy Meriweather, EFBD's DFS-appointed counselor from May 2001 until summer 2002 testified that she would not say that Father had abandoned EFBD from the time Meriweather knew Father until she stopped working with EFBD (Tr. 5:22-7:5; 30:16-18). Father was allowed three visits with EFBD until visitation was suspended when, according to court testimony, EFBD reported to her psychologist that the way Father shook her hand made her feel uncomfortable (L.F. 96-97; Tr. 8:10-9:16; 104:13-105:7; 245:6-9). No other visits with EFBD were allowed by DFS and/or the court after EFBD made these statements (Tr. 149:12-24).

Father entered into a written service agreement with DFS in December of 2001 (Tr. 132:6-10). Sarah Wilson, EFBD's caseworker from October 2001 until October 2002, testified that Father substantially completed eight of the ten required elements of the written service agreement (Tr. 132:13-136:19). Moreover, Ms. Wilson testified that one of the uncompleted items, completion of a drug abuse evaluation, was never a concern for her as there was no indication

while she was EFBD's caseworker that Father had an alcohol or drug abuse problem (Tr. 144:14-21). According to the testimony of Sarah Wilson, Father made weekly contact with DFS, even though his written service agreement only required that he call every two weeks (Tr. 150:3-13).

In an attempt to complete portions of the written service agreement, Father began counseling and treatment with Dr. Caryln Saunders, a licensed psychologist in Kansas City (Tr. 204:21-205:17). Dr. Saunders testified that she performed a drug abuse evaluation on Father and sent her reports and conclusions to Ms. Parris (Tr. 206:21-207:4). Dr. Saunders testified that she found no need for any drug abuse counseling for Father (Tr. 207:24-208:3). Dr. Saunders also testified that she performed a psychological evaluation on Father and engaged in family counseling with his family for a period of approximately two years (Tr. 224:4-225:12). Dr. Saunders testified that Father had expressed his desire for a "continual, meaningful relationship with his daughter" (Tr. 216:8-12). Dr. Saunders opined that she knew of no concerns with having EFBD placed back in the custody of Father (Tr. 216:13-17).

Father fully satisfied the child support portion of his written service agreement with DFS (Tr. 133:9-17). At the time of the initial termination hearing in 2003, Father was paying \$40.00 a week in child support (Tr. 268:12-24). From the time EFBD was first taken into custody until the December 2006 termination

hearing, Father had paid almost \$13,000.00 in child support obligations for EFBD (Tr. Vol. III at 50:9-12; 51:10-13).<sup>1</sup>

On August 2, 2002, the Hollands filed a Petition for Termination of Parental Rights and Adoption (L.F. 99-103). Service of this petition to Father was twice made to the wrong address, once on August 19, 2002, and again on August 28, 2002, despite the fact that Father and his mother had been in contact with DFS regarding this matter since April 2001 (L.F. 188). DFS did not join in the petition until the first day of the initial termination trial on June 25, 2003 (Tr. 4:15-18).

In Count I of the petition, the Hollands requested termination of the parental rights of Father and Patricia Campbell. The petition states as follows:

It is in the best interest of the minor children that the parental rights of Patricia Campbell and Father be terminated, for the following reasons:

- a. The parents have abandoned the children for a period of at least six months and have failed to provide any support for the minor children for at least that length of time. Although Father has begun paying child support more recently, he is presently approximately \$17,000.00 in arrears on his child support obligation. Further, the said Father [sic] has been

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<sup>1</sup> The transcript from the December 20, 2006 termination hearing is designated herein as "Tr. Vol. III" to differentiate it from the two-volume transcript from the 2003 termination hearing which was previously filed with this Court and made a part of the record on appeal in this case.

absent from the child's life for some eight years prior to her coming into the custody of the Division of Family Services.

- b. The minor children and six siblings were removed from the mother's care by the Lawrence County Division of Family Services due to numerous allegations of child abuse and neglect, including allegations of sexual abuse, supervision by alleged sexual perpetrators, lack of supervision, unsanitary living conditions, head lice, medical neglect, exposing the children to illegal drugs and failure to thrive.
- c. The parental rights of the mother have been terminated with regard to two other children, who were removed from the care and custody of the mother by the Barton County Division of Family Services.
- d. The mother has had a Written Service Agreement with the Lawrence County Division of Family Services since 1999 but has made little to no effort to complete said agreement.
- e. Supervised visitation has ceased due to the behaviors of the children and lack of cooperation on the parents' part.

(L.F. 100-101).

On June 25, 2003, the trial court held its initial hearing on the termination petition. (L.F. 185; 190-191). The hearing continued on September 25, 2003. (L.F. 185-186; 191-192).

On October 9, 2003, the court terminated Father's parental rights – but did so on the ground that Father had neglected EFBD (L.F. 142). Father appealed that judgment and on July 8, 2004, this Court reversed the judgment and the case was remanded to the trial court. *In the Interest of EFBD*, 138 S.W.3d 145 (Mo.App. 2004). On July 14, 2004, before the mandate was issued, the trial court entered a judgment substituting abandonment for neglect as the ground for termination. This Court dismissed Father's appeal of that judgment, holding that the lower court had no jurisdiction to enter a judgment before the mandate was issued. *In the Interest of EFBD*, 166 S.W.3d 143 (Mo. App. 2005).

On December 20, 2006, the trial court held another hearing on the termination petition (L.F. Vol. III 10).<sup>2</sup> On January 26, 2007, the trial court entered its Amended Judgment and Order terminating Father's parental rights on the sole ground of abandonment (L.F. Vol. III 29).

Specifically with regard to Father, the court held:

The Court finds by clear and convincing evidence, specifically with respect to the natural father, Steve Barton, that:

The natural father has not consented to the termination of his parental rights to the child.

#### SECTION 211.447 FINDINGS

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<sup>2</sup> The legal file with respect to the hearing on December 20, 2006 is designated herein as "L.F. Vol III" to differentiate it from the two-volume legal file from the 2003 termination hearing which was previously filed with this Court and made a part of the record on appeal in this case.

Section 211.447.1 is not applicable.

Section 211.447.2 is not applicable.

Section 211.447.3 is not applicable.

Section 211.447.4. Grounds exist for the termination of father's parental rights under this section as follows:

(1)(a)(b) – The child has been abandoned by father. The father has repeatedly and continuously failed to provide the child with adequate support, although physically and financially able to do so and was over \$17,000.00 in arrears in his child support obligation at the time of the original trial of this matter. The father has not for a period of years and continues to fail to provide any current support for the child, although able to do so. At the time of the last hearing on this matter, the father testified that he was paying a monthly amount toward arrearage only. Patricia Campbell testified that, although her parental rights were terminated by this Court some three years ago, she is receiving child support from the father for the arrears owed. The record of child support payments were introduced into evidence and show that the only payments being made by the father are for the arrearages owed to Patricia Campbell and the father is not paying any current support for the benefit of EFBD. The father has failed to visit with the child from infancy until after the child came into the custody of the Missouri Children's Division; making mere token efforts to locate her in the interim. Patricia Campbell testified at the original hearing

that Father would have been aware of the child's whereabouts or could have easily determined the child's whereabouts, if he had desired to do so, as she was receiving child support payments from him from May of 1997 to October of 1997, although Father testified that he had not known of any child support order until 2002. The court finds the testimony of the father not credible.

(L.F. Vol. III 30-31).

On February 26, 2007, Father timely filed his Notice of Appeal in the Circuit Court of Lawrence County (L.F. Vol. III 34).

**POINTS RELIED ON**

**I. The trial court erred in terminating Father's parental rights on the ground of abandonment under section 211.447.4(1)(b), RSMo. 2004, because there was no clear, cogent and convincing evidence presented that Father, without good cause, both (1) left EFBD without any provision for parental support and (2) failed to make arrangements to visit or communicate with EFBD, although able to do so, in that there was no evidence presented regarding Father's ability to provide support during this time period and no substantial evidence presented that Father knew of EFBD's whereabouts during this time period such that arrangements could be made for visits and communication.**

*In the Interest of S.M.H.*, 160 S.W.3d 355 (Mo. banc 2005)

*In the Interest of M.D.R.*, 124 S.W.3d 469 (Mo. banc 2004)

*In the Interest of Baby Girl W.*, 728 S.W.2d 545 (Mo. App. 1987)

*In the Interest of K.A.W.*, 133 S.W.3d 1 (Mo. banc 2004)

## POINTS RELIED ON

**II. The trial court erred in terminating Father's parental rights on the ground of abandonment under section 211.447.4(1)(b), RSMo. 2004, because at the time of trial in December 2006, Father had repented of any abandonment of EFBD, in that he had asked to have EFBD placed with him or his mother, visited and communicated with EFBD as often as was allowed by the Division of Family Services and the court, provided support to EFBD as directed by the Division of Family Services and/or Division of Child Support Enforcement, and fought the termination of his parental rights at the trial court level and through two successful appeals to this Court.**

*In the Interest of A.R.*, 52 S.W.3d 625 (Mo.App. 2001)

*In the Interest of J.W.*, 11 S.W.3d 699 (Mo.App. 1999)

*J.H.H. v J.D.*, 662 S.W.2d 893 (Mo.App. 1983)

*In the Interest of M.L.K.*, 804 S.W.2d 398 (Mo.App. 1991)

**POINTS RELIED ON**

**III. The trial court erred in terminating Father's parental rights on the ground of abandonment under section 211.447.4(1)(b), RSMo. 2004, because the court's judgment failed to link Father's past behavior with his future behavior and there was no explicit consideration of whether Father's past behavior provided an indication of the likelihood of future harm to EFBD, in that the court based its decision to terminate Father's parental rights on Father's past conduct and not on his conduct at the time of termination.**

*In the Interest of K.A.W.*, 133 S.W.3d 1 (Mo. banc 2004)

## ARGUMENT

I. The trial court erred in terminating Father's parental rights on the ground of abandonment under section 211.447.4(1)(b), RSMo. 2004, because there was no clear, cogent and convincing evidence presented that Father, without good cause, both (1) left EFBD without any provision for parental support and (2) failed to make arrangements to visit or communicate with EFBD, although able to do so, in that there was no evidence presented regarding Father's ability to provide support during this time period and no substantial evidence presented that Father knew of EFBD's whereabouts during this time period such that arrangements could be made for visits and communication.

### Standard of Review

A trial court cannot terminate parental rights unless the grounds for termination are supported by clear, cogent, and convincing evidence. *In the Interest of S.M.H.*, 160 S.W.3d 355, 362 (Mo. banc 2005). Such evidence is "evidence that instantly tilts the scales in favor of termination when weighed against the evidence in opposition and the finder of fact is left with the abiding conviction that the evidence is true." *Id.*

The trial court's decision to terminate parental rights "will be affirmed unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law." *In the Interest of J.B.D.*, 151 S.W.3d 885, 887 (Mo. App. 2004). Evidence is viewed in

the light most favorable to the judgment and the appellate court will “defer to the trial court’s determinations regarding credibility of witnesses.” *Id.*

The best interests of the child are of utmost concern in parental rights cases. *S.M.H.*, 160 S.W.3d at 362. However, the “statutory exhortation to act in the child’s best interest should not be a pretext for a hyper-technical application of statutory criteria to achieve a result where the child would be ‘better off’ in someone else’s care. ‘[T]here is little doubt that the Due Process Clause would be offended [i]f a State were to attempt the breakup of a natural family, over the objections of the parents . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interests.’” *In the Interest of M.D.R.*, 124 S.W.3d 469, 476 (Mo. banc 2004), quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

“The termination of parental rights is an exercise of awesome power and strict and literal compliance with the statutory language is demanded.” *In the Interest of Baby Girl W.*, 728 S.W.2d 545, 547 (Mo. App. 1987). Moreover, the party seeking termination “must carry the full burden of proof.” *Baby Girl W.*, 728 S.W.2d at 547.

When reviewing a trial court’s termination of parental rights “appellate courts must examine the trial court’s findings of facts and conclusions of law closely.” *In the Interest of K.A.W.*, 133 S.W.3d 1, 12 (Mo. Banc 2004). “Statutes that provide for the termination of parental rights are strictly construed in favor of the parent and preservation of the natural parent-child relationship.” *Id.*

Respondents sought termination of Father's parental rights on the sole ground of abandonment (L.F. 100-101). To terminate under section 211.447.4(1)(b), the statutory ground for abandonment, two conditions must be met. It must be proven that for a period of six months or longer, the parent, without good cause, both (1) left the child without any provision for parental support and (2) failed to make arrangements to visit or communicate with the child, although able to do so. *In the Interest of J.M.S.*, 83 S.W.3d 76, 82 (Mo. App. 2002). This proof, of necessity, must include evidence showing the ability on the part of the parent to make a monetary contribution toward support of the child and there must be evidence which shows the accessibility of the child for purposes of visitation or communication. *Baby Girl W.*, 728 S.W.2d at 547; *In the Interest of C.J.G.*, 75 S.W.3d 794, 801 (Mo.App. 2002).

Abandonment is "generally not compatible with a case where custody of the child has been taken from the parent involuntarily." *Baby Girl W.*, 728 S.W.2d at 549. "This is so because the enforced separation of parent and child and placement of the child in a foster home operates to accomplish the estrangement and, without intervention by the juvenile officer to effect reconciliation, operates to create the very circumstances which destroy the parent-child relationship. The separation itself and placement of the child in a foster home therefore constitute no proof of abandonment in the face of resistance by the parent to the termination proceeding." *Id.*

Abandonment is defined as the “voluntary and intentional relinquishment of custody of a child with the intention that the severance be of a permanent nature or as the intentional withholding by a parent of his [or her] care, love, protection, and presence without just cause or excuse.” *In the Interest of J.B.D.*, 151 S.W.3d 885, 888 (Mo.App. 2004), quoting *In the Interest of J.M.S.*, 83 S.W.3d, 76, 82 (Mo.App. 2002).

Before having the authority to file a petition on the ground of abandonment there must be a six month period of no support and no visitation. However, even if this statutory period is met, the court, in determining whether abandonment has occurred, must consider “all the evidence of the parent’s conduct, both before and after the statutory period.” *J.M.S.*, 83 S.W.3d at 82.

The Petition for Termination in this case alleged that Father had failed for a period of at least six months to provide any support for EFBD, and noted that at the time the petition was filed he was “approximately \$17,000.00 in arrears on his child support obligation” (L.F. 100). The petition also alleged that Father had been “absent from the child’s life for some eight years prior to her coming into the custody of the Division of Family Services” (L.F. 100).

As pled, the statutory period of abandonment ran from approximately August 1994, the date Father last saw EFBD until March 2001, the date EFBD was taken into DFS custody. There is no allegation in the petition that Father abandoned EFBD for any six month period of time after she was taken into DFS custody and before the petition for termination was filed in August, 2002.

As such, it was Respondents' burden to present clear, cogent and convincing evidence, or evidence that "instantly tilts the scales in favor of termination," on both of the conditions necessary to demonstrate abandonment.

**1. No evidence was presented – clear, convincing or otherwise - regarding Father's ability to make a monetary contribution during the statutory period.**

Strictly construing the language of the statute in favor of Father, as is required, Respondents had the burden to show as to the first prong of the abandonment test, both an ability on the part of Father to make monetary contributions to his child during the statutory period, and the failure of Father to make such payments. *Baby Girl W.*, 728 S.W.2d at 547 (holding that strict and literal compliance with the statutory language is demanded and that the burden of proof requires evidence showing some ability on the part of the parent to make a monetary contribution toward support of the child not in the parent's custody).

There was no evidence presented that Father was able to provide support during the statutory period. No evidence was presented of any income Father earned between August 1994 and March 2001. Father was asked about his employment at the time of the 2003 hearing, but he was never asked how much he made at that employment (Tr. 266:5-15). There was no evidence presented that Father even had a job between August 1994 and March 2001 and no evidence that he earned any money during that time period. Absent such evidence, Respondents' failed in meeting their burden of proof and the court erred in terminating Father's parental rights. *Baby Girl W.*, 728 S.W.2d at 547.

**2. No substantial evidence was presented showing the accessibility of EFBD to Father for purposes of visitation and communication.**

The statutory period began in this case with the Mother actively concealing EFBD from Father after Father had attempted to retain custody of EFBD. Father testified – and Mother admitted it happened “like he said” – that in approximately August of 1994, DFS and a sheriff’s deputy came to his house and demanded that he return his daughter to Mother or face kidnapping charges (Tr. 253:7-25). He had kept his daughter after a visit to keep her from returning to the filth and poor living conditions the child endured with her mother. After this visit, Father testified that the child disappeared with her Mother (Tr. 256:21-25).

Father testified that he attempted to locate Mother and EFBD, without success (Tr. 257:1-5). Father testified that he repeatedly contacted DFS and the Division of Child Support Enforcement (DCSE) in Greene County and in Jefferson City in 1994, 1995 and 1996 regarding Mother’s whereabouts yet received no assistance from either agency (Tr. 258:17-23; 259:4-8). He testified that he contemplated filing legal action but had no way of having the Mother served (Tr. 257:8-16). There was no testimony rebutting Father’s testimony regarding his efforts to locate Mother and EFBD.

Father’s testimony of his active search is corroborated by his actions after learning that his daughter had been taken into DFS custody. Immediately upon learning that EFBD had been taken into custody, he contacted DFS and traveled to Lawrence County to meet with her caseworker. He hired local counsel to

represent his interests. He attempted to have EFBD placed with him or his mother. He attempted to visit with EFBD – and requested visits – although his visits were restricted by DFS and the court to only the three therapeutic visits.

Mother testified that she did not know Father's address (Tr. 295:11-14). Mother testified that she kept in occasional contact with an alleged half-brother of Father regarding her whereabouts (Tr. 304:21-25). This person was not present at trial and there was no testimony concerning whether this person informed Father of Mother's whereabouts at any time from August 1994 until March 2001 when DFS took custody of EFBD in this case.

In its finding that Father knew or should have known of his daughter's whereabouts, the court relied heavily – and almost exclusively - on the testimony of Mother and found Father's testimony not credible. In its judgment the trial court stated that Mother's testimony demonstrated that "Father would have been aware of the child's whereabouts or could have easily determined the child's whereabouts, if he had desired to do so" (L.F. Vol. III 31).

Far from testifying that her whereabouts could have been easily determined, Mother instead testified that she told "I guess it's his half-brother, and he – [h]is half-brother told me that he was in contact with Steve and he was telling Steve where I was living" (Tr. 294:22-25). Mother also testified about money she received from the Division of Child Support Enforcement from April 1997 to October 1997. Mother admitted that she received \$117.34 (it's not clear whether that was weekly, monthly or a one time payment) from April 1997 to October

1997 (Tr.309:7-24). When asked whether that money was coming from Father, Mother responded “[t]hat’s what name was on it, yes” (Tr. 309:25-310:1). Mother testified that when she called DCSE and asked why the checks stopped in October, she was told that “he wasn’t paying” (Tr. 310:5-9). That is the extent of Mother’s testimony – and is all the evidence presented by Respondents – as to whether Father was aware of his daughter’s whereabouts during this time period.

Father’s alleged half-brother, the man who supposedly told Father where Mother was living, did not testify. No one from the Division of Child Support Enforcement testified as to the payment of money to Mother from April 1997 to October 1997. No records from DCSE were admitted into evidence to document these payments or their source.

Moreover, Mother admitted that she never saw Father during this time period and never knew Father’s address. She was not asked and did not testify as to when the conversation with the alleged half-brother took place or if more than one conversation took place with this person.

Other testimony and evidence indicated that Mother could be elusive and difficult even for DFS to track down. Ms. Wilson testified that during the pendency of the juvenile proceedings, Mother was “in and out of places living” (Tr. 159:24-160:2). She testified that DFS had “several problems trying to locate her” (Tr. 139:18-25). Ms. Wilson also admitted that there were “extended periods of time” when even DFS didn’t know where Mother was at (Tr. 140:6-8).

The Investigative and Social Summary, dated March 6, 2001, is filled with evidence detailing Mother's various changes in residence, run-ins with DFS and law enforcement, and the general deplorable living conditions to which she subjected her children (L.F. 23-27). The Investigative and Social Summary details the problems law enforcement and DFS had in tracking Mother down over the years and details a woman not too keen on being discovered. All of which is additional evidence that Mother was elusive and difficult to find, even for professionals.

Although the court was free to disbelieve Father's testimony regarding his efforts to locate his daughter, it was still required to have before it substantial evidence to support its judgment. *In the Interest of C.J.G.*, 75 S.W.3d 794, 801-02 (Mo.App. 2002). In this case there was no substantial evidence supporting the court's judgment that Father "could have easily determined the child's whereabouts, if he had desired to do so."

The court seems to base its judgment on this point on the alleged child support payments coming from Father in 1997. As stated in the Amended Judgment:

Patricia Campbell testified at the original hearing that Father would have been aware of the child's whereabouts or could have easily determined the child's whereabouts, if he had desired to do so, as she was receiving child support payments from him from May of 1997 to October of 1997,

although Father testified that he had not known of any child support order until 2002. The court finds the testimony of the father not credible.

(L.F. Vol. III 31).

Again, there was no evidence from any DCSE record or any DCSE employee corroborating those payments or the source of those payments. More importantly, there was absolutely no evidence to support the court's assumption that having money garnished from your wages or otherwise taken by DCSE allows you to "easily" find the parent of your child. Common sense suggests that this is not the case but there was no evidence presented on this point – other than the testimony of Father flatly denying he got any help from DCSE - and thus no support for the court's judgment on this critical finding.

Further, demonstrating that Father could have known of his daughter's whereabouts during a period of time in which he was allegedly providing significant support to her defeats the "support prong" of abandonment. To terminate on the ground of abandonment, Respondents must prove no support and no contact or visitation during the statutory period. A strict construction of the statute in Father's favor does not allow Respondents to prove lack of visitation from April to October 1997 but lack of support during a different time period. Abandonment does not exist without both conditions (lack of support and lack of visitation) existing at the same time.

Respondents failed in their burden to present clear, cogent and convincing evidence that Father knew of his daughter's whereabouts during the statutory time

period such that his daughter was accessible to him for visits or communication. As a result, the court's decision to terminate his parental rights is in error.

**3. The court failed to consider all of the evidence of Father's conduct, both before and after the statutory period.**

Before having the authority to file a petition on the ground of abandonment there must be a six month period of no support and no visitation. However, even if this statutory period is met, the court, in determining whether abandonment has occurred, must consider "all the evidence of the parent's conduct, both before and after the statutory period." *J.M.S.*, 83 S.W.3d at 82.

Father's actions subsequent to learning that his daughter had been taken into custody until the date the termination petition was filed show no indication that he intended to abandon his daughter. In April 2001, only a month after she was taken into custody but immediately after he became aware that his daughter was in DFS custody, Father traveled to Lawrence County from Belton, Missouri, to meet with the DFS caseworker and to request custody of his daughter. In May 2001, Father again traveled to Lawrence County to attend a Family Support Meeting relating to his daughter (Tr. 90:4-10). Father and Grandmother even expressed an interest in obtaining custody of both his daughter and her half-sister so that the girls would not have to be separated. At DFS's request, Father entered into a written service agreement. He had as many visits with his daughter as he was allowed to have. Father sent gifts to EFBD for as long as he was allowed to by DFS.

Father, through his written service agreement, was asked to provide support for his daughter by contacting DCSE and cooperating with them. The trial court even tracked this requirement in its docket entry dated December 19, 2001 (L.F. Vol III 15). Father fully satisfied this portion of his service agreement. At the time of the initial termination hearing in June of 2003, Father was paying approximately \$40.00 a week in child support. From the time his daughter was taken into custody until the time of the last hearing in December of 2006, Father had paid a total of over \$10,000.00 in child support on the case initiated by Mother in 1996 (Tr. Vol. III 51:10-13). In addition, as of the December 2006 hearing date, Father had paid an additional \$2,383.51 in current child support obligations in connection with a case opened after his daughter came into care in March 2001 (Tr. Vol. III 50:9-12). At the hearing in December 2006, evidence from DCSE records was presented that as to the child support case opened by DCSE in 2001, Father owed no money in either current support obligations or in arrearages (Tr. Vol. III 50:6-8). And the infamous \$17,000.00 in arrearages that the petition and the court's Amended Judgment alluded to had, by the time of the hearing in December 2006, been whittled down to approximately \$3,800.00 (Tr. Vol. III 51:6-9).

While the Amended Judgment talks about the difference between current support owed and arrearages, the caseworker testified that Father had completely satisfied his child support obligations during the pendency of the juvenile proceeding. Ms. Parris testified that the written service agreement with DFS

required Father to “provide support for my children on a regular basis by notifying and cooperating with child support enforcement as well as providing in-kind gifts for my child” (Tr. 98:25 – 99:2). The December 2001 docket entry tracked that same language. Sarah Wilson who followed Ms. Parris as caseworker testified that Father satisfied the support portion of his service agreement (Tr. 133:9-13).

Father testified that he did what was asked of him with regard to payment of child support for his daughter and the provision of in-kind gifts. He contacted child support enforcement, as he was directed to do; he began making payments to child support enforcement as he was directed to do; he made additional payments to child support enforcement in September 2002 as he was directed to do; he quit making those payments in March 2003 as he was directed to do. He testified at the December 2006 hearing that he had no idea where the money was going and how the child support enforcement process worked (Tr. Vol. III 76:5-24). More importantly, his un rebutted testimony was that he was never told by anyone at DFS that the payments he was making to child support enforcement were not sufficient or that he needed to make additional payments to satisfy his support obligations (Tr. Vol. III 57:7-13).

As abandonment focuses on the intent of the parent, evidence that Father made support payments – even if some of them did go to arrearages – is evidence that he had no intent to abandon his daughter. *J.M.S.* 83 S.W.3d at 84 (even a “minimal financial contribution” demonstrates the “parent’s intent to continue the parent/child relationship.”)

The evidence of Father's actions after the statutory period demonstrate that he had no intent to voluntarily and intentionally relinquish custody of his daughter. Instead, the evidence demonstrated that he paid approximately \$13,000.00 in child support, provided gifts to his daughter, sought visitation and other means of communication and participated in each and every visit that DFS and/or the court allowed him.

In *J.M.S.*, a judgment terminating a father's parental rights was reversed, even though the father was incarcerated during the statutory period and sent no money to his child. *J.M.S.*, 83 S.W.2d 76 (Mo.App. 2002). In that case, the appellate court found that the father's communication with his child through letters, cards, poems, pictures and Christmas presents, "demonstrated his intent to continue the parent/child relationship" *Id.* at 84. The failure to send any money, the court went on, was "*de minimis* in light of the circumstances of this case and does not support a finding that Father left J.M.S. without parental support for a six-month period while he was incarcerated." *Id.*

Father's actions in this case mirror the actions of the father in *J.M.S.*, with the exception that in this case, subsequent to EFBD being taken into custody, Father provided nearly \$13,000.00 in child support for her.

The trial court erred in not considering the actions of Father after the statutory period as that evidence demonstrated that Father did not intend to abandon his daughter.

**II. The trial court erred in terminating Father's parental rights on the ground of abandonment under section 211.447.4(1)(b), RSMo. 2004, because at the time of trial in December 2006, Father had repented of any abandonment of EFBD, in that he had asked to have EFBD placed with him or his mother, visited and communicated with EFBD as often as was allowed by the Division of Family Services and the court, provided support to EFBD as directed by the Division of Family Services and/or Division of Child Support Enforcement, and fought the termination of his parental rights at the trial court level and through two successful appeals to this Court.**

Even if Father's actions during the statutory period were sufficient to support a finding of abandonment, the law "allows a parent to repent his or her abandonment of the child." *In the Interest of A.R.*, 52 S.W.3d 625, 636 (Mo.App. 2001). "The abandonment can be repented by an 'actual or attempted exercise of parental rights and duties following the abandonment.'" *Id.* quoting *In the Interest of J.W.*, 11 S.W.3d 699, 705 (Mo.App. 1999). "A parent may repent an abandonment by at least making a reasonable effort to assume parental responsibility and to perform parental duties, in which case the abandonment is no longer a ground for termination of parental rights." *J.H.H. v J.D.*, 662 S.W.2d 893, 896 (Mo.App. 1983). To determine if a repentance has occurred the court is required to examine the parent's intent by considering all of the evidence of the parent's conduct. *In the Interest of M.L.K.*, 804 S.W.2d 398, 403 (Mo.App. 1991).

The facts in this case are strikingly similar to the facts in the case of *A.R.*, 52 S.W.3d 625. In *A.R.*, as in this case, the father, upon discovering that his daughter was in DFS custody, made contact with DFS and expressed an interest in obtaining custody of her. The court in *A.R.* noted the father's other actions:

He quit his job and temporarily located to Kansas City in an effort to obtain custody. He participated in therapy sessions and visitation with A.R. over the next seven months, seeing her at least twelve times. He bought her food, clothing and gifts. He attended individual therapy sessions, court hearings, and the only family support meeting for which he was provided notice. All of these activities occurred prior to the filing of the petition to terminate his parental rights.

*A.R.*, 52 S.W.3d at 636.

The court in *A.R.* determined that these efforts "constituted a reasonable effort on his part to assume parental responsibility for A.R. and establish his intent to repent any prior abandonment." *Id.*

In this case, prior to the filing of the petition to terminate his parental rights, Father sent gifts and cards to his daughter until he was directed to stop doing so by DFS. He immediately requested visitation with his daughter, although that was not granted until nearly a year later. Once visitation was granted, he visited with his daughter as often as he was allowed to by DFS and/or the court. He completed a psychological evaluation and participated in counseling sessions and parenting classes. (Tr. 224:4-225:12). He contacted DCSE and began making support

payments. He contacted DFS on a weekly basis throughout the time his daughter was in DFS custody, even though he was only asked to contact them every two weeks.

Moreover, subsequent to the filing of the petition, Father's actions continued to demonstrate his intent to assume parental responsibilities and duties. He fought the termination. He hired an attorney and successfully appealed the 2003 judgment terminating his parental rights. He hired another attorney and successfully appealed the second attempted termination of his parental rights in 2004. He hired yet a third attorney to represent him during the December 2006 hearing and on this appeal. This too is evidence that Father never intended to abandon his daughter. *Baby Girl W.*, 728 S.W.2d at 549 (refusing to relinquish parental rights, seeking representation, appearing and testifying at the termination hearing and prosecuting an appeal of the termination was evidence that father had no intent to abandon his daughter).

After the first reversal, Father testified that he contacted DFS in an effort to rekindle his relationship with his daughter. At that time, he was told by DFS that he no longer had rights and that DFS wasn't interested in dealing with him anymore (Tr. Vol. III, at 54:9-21). Sarah Holbrook, EFBD's caseworker from October 20, 2006 through the December 2006 hearing, corroborated this during her testimony at the December 2006 hearing:

Q. And, in fact, it was your understanding – was Children’s Division’s understanding that after the termination in September of ’03, Children’s Division had no further obligation to provide service; isn’t that correct?

A. I believe so, yes.

(Tr. Vol. III, at 8:6-10). Ms. Holbrook even admitted that from 2003 until September 2006 there wasn’t even a caseworker assigned to the case (Tr. Vol. III, at 8:20 – 9:10).

The law does not require perfect parents and the fact that a child is placed in DFS custody is not in and of itself evidence of unfitness. “The fundamental liberty interest of natural parents in raising their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State.” *In the Interest of K.A.W.*, 133 S.W.3d 1, 12 (Mo. banc 2004).

Here, the lower court did what the Missouri Supreme Court in *M.D.R.* admonished against. It tried to do what it thought was in EFBD’s best interests without first being presented with clear, cogent and convincing evidence that her Father was unfit to be her parent. As noted in *M.D.R.*, “there is little doubt that the Due Process Clause would be offended” when there is an attempted breakup of the natural parent-child relationship – without some showing of unfitness on the part of the parent. *M.D.R.*, 124 S.W.3d at 476.

If Father abandoned EFBD during the statutory period, the evidence was clear that he repented of that abandonment thereafter. The trial court’s judgment

terminating his parental rights is, therefore, against the weight of the evidence and in error.

**III. The trial court erred in terminating Father's parental rights on the ground of abandonment under section 211.447.4(1)(b), RSMo. 2004, because the court's judgment failed to link Father's past behavior with his future behavior and there was no explicit consideration of whether Father's past behavior provided an indication of the likelihood of future harm to EFBD, in that the court based its decision to terminate Father's parental rights on Father's past conduct and not on his conduct at the time of termination.**

“An essential part of any determination whether to terminate parental rights is whether, considered at the time of the termination and looking to the future, the child would be harmed by a continued relationship with the parent.” *K.A.W.*, 133 S.W.3d 1, 9. While past behavior can support a ground for termination, it will do so “only if it is convincingly linked to predicted future behavior.” *Id.* “There must be some explicit consideration of whether the past acts provide an indication of the likelihood of future harm.” *Id.*

In this case there was virtually no testimony or evidence presented as to whether the past acts of Father provided an indication of the likelihood of future harm. The Amended Judgment, with few exceptions, is the same judgment entered by the court in 2003 and again in 2004 (when the court changed the ground from neglect to abandonment). The only additional evidence presented at the December 2006 hearing was testimony from the Mother that the child support she received in 1997 and continued to receive was for arrearages, testimony from

Sarah Holbrook, a caseworker that had worked on the case for two months and had signed a court report – although she had not completed that report (Tr. Vol III, at 6:23-7:2), and testimony from Kathy Alexander, the caseworker that had preceded Ms. Holbrook, and had served as caseworker from September 2006 until October 2006. The testimony of Ms. Holbrook and Ms. Alexander focused largely on whether Father had made current child support payments subsequent to the date his rights were first terminated by the court in 2003 and whether Father had contact with DFS subsequent to having his parental rights terminated (Tr. Vol. III, at 4:20-6:19; 32:8-36:9).

Ms. Holbrook admitted that she spent no time reviewing the file in terms of Father's actions (Tr. Vol. III, at 13:14-19). Her only in-depth review of the file was three hours spent looking for trial exhibit C which was the exhibit that consisted of DFS's records (Tr. Vol. III at 12:13-13:4). Similarly, Ms. Alexander's review of the file focused almost entirely on reviewing the case narratives to determine the contacts Father had made, or not made, with DFS since his parental rights were first terminated in 2003 (Tr. Vol. III at 36:13-24).

Further, Ms. Holbrook admitted that from 2003 until Ms. Alexander was assigned as a caseworker in September 2006, DFS had taken the position that it had no further obligation to provide services to Father (Tr. 8:6-10). She also admitted that during this time period no caseworker from DFS had been assigned to the case (Tr. 9:2-10).

There was no testimony and no evidence that Father's past behavior was linked to predicted future behavior. Further, there was no evidence and no "explicit consideration" by the trial court of whether Father's past acts "provided an indication of the likelihood of future harm." *K.A.W.*, 133 S.W.3d 1, 10.

For these reasons, the trial court's judgment must be reversed.

## CONCLUSION

For the reasons stated herein, SB, Father/Appellant, requests this Court reverse the trial court's decision terminating his parental rights; and for such other and further relief as the Court deems just.

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