

Summary of SC91141, *In re the Adoption of C.M.B.R., a minor. S.M. and M.M. v. E.M.B.R.*
Appeal from the Jasper County circuit court, Judge David C. Dally
Argued and submitted Nov. 9, 2010; opinion issued Jan. 25, 2011

Attorneys: The natural mother was represented by Christopher M. Huck of Peterson Young Putra PS in Seattle, (206) 624-6800; R. Omar Riojas of DLA Piper LLP in Seattle, (206) 839-4800; and William J. Fleischaker of Fleischaker & Williams LC in Joplin, (417) 623-2865.

The adoptive parents were represented by Richard L. Schnake of Neale & Newman LLP in Springfield, (417) 882-9090, and Joseph L. Hensley of Hensley & Nicholas LLC in Joplin, (417) 625-1215. The guardian ad litem representing the child's best interests was Mr. Jamey Garrity, and attorney in Joplin, (417) 782-0707. The Jasper County juvenile officer was represented by Brenda Elliston of the Elliston Law Offices in Webb City, (417) 673-2405.

There were a number of organizations filing briefs as friends of the Court:

- The consulate general of Guatemala was represented by John de Leon of Chaves & de Leon PA in South Miami, Fla., (305) 740-5347, and Gaylin Carver of Carver & Michael LLC in Jefferson City, (573) 636-4215.
- The ACLU of Eastern Missouri, the ACLU of Kansas & Western Missouri, and the Washington University Law School Civil Justice Clinic were represented by Anthony E. Rothert of the ACLU of Eastern Missouri in St. Louis, (314) 652-3114, Stephen Douglas Bonney of the ACLU of Kansas & Western Missouri in Kansas City, (816) 756-3113, and Annette R. Appell of Washington University Law School in St. Louis, (314) 935-6238.
- The Immigrant Child Advocacy Project at the University of Chicago was represented by Maria Woltjen and Jennifer Nagda of the project in Chicago, (773) 702-9560, and Anthony E. Rothert of the ACLU of Eastern Missouri in St. Louis, (314) 652-3114.
- Legal Momentum was represented by Angela J. Ferguson of Austin & Ferguson LLC in Kansas City, (816) 356-7100; and Shari Lahlou, Patricia Connally and Christine Sommer of Crowell & Moring LLP in Washington, D.C., (202) 624-2500.
- The Mexican American Legal Defense Fund was represented by Fernando Bermudez of Green Jacobson PC in Clayton, (314) 862-6800, and Cynthia V. Dixon and Alejandro Aixala of the legal defense fund in Chicago, (312) 427-0701.
- The Women's Refugee Commission was represented by John C. Holstein and James E. Meadows of Polsinelli Shughart PC in Springfield, (417) 869-3353; and Christopher W. Dysard, Linda Imes and Max C. Nicholas of Spears & Imes LLP in New York, (212) 213-6996.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A natural mother, who is a Guatemalan citizen, appeals the circuit court's judgment terminating her parental rights and granting the adoption of her son to a Carthage couple. In a 4-3 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the

portion of the judgment that also terminated the natural father's parental rights, as this portion was not challenged. As to the termination of the mother's parental rights, the circuit court failed to comply with investigation and reporting requirements mandated by state law. This failure resulted in manifest injustice requiring reversal of the termination of the mother's parental rights and the granting of the adoption. Because the adoptive parents offered sufficient evidence at trial to support their claim that the mother abandoned the child, the appropriate remedy is to remand (send back) the case to the circuit court for a new trial. This Court will not consider in this appeal materials the mother included in the appendix to her brief that were not offered as evidence before the circuit court; the law precludes it from doing so. On remand, the circuit court is ordered to comply with the statutory investigation and reporting requirements and to set the trial date no later than 90 days after it receives those reports. Also on remand, both the mother and the natural parents will have the opportunity to present any evidence they believe is relevant to the issues contained in the petition that pertain to the mother.

In an opinion concurring in part and dissenting in part, Judge Laura Denvir Stith agrees with the principal opinion that a new termination and adoption hearing are required due to the circuit court's plain error in failing to comply with mandatory statutory requirements. She would go further, however, and reverse the termination of the mother's parental rights and reverse approval of the child's adoption by the adoptive parents without requiring a new hearing. She would do so based on the lack of clear, cogent and convincing evidence of abandonment, the manifest injustice resulting from failure to give the mother notice of the custody hearing and the inherent conflict of the mother being represented by counsel hand-picked by the adoptive parents.

In an opinion concurring in part and dissenting in part, Judge Michael A. Wolff agrees with the portion of the principal opinion reversing the circuit court's judgment. He dissents, however, as to the principal opinion's remand of the case for a new termination and adoption hearing. He would hold there is no evidence the mother willfully, substantially and continuously neglected the child for six months prior to the filing of the petition for adoption.

Facts: A Guatemalan citizen entered the United States in 2006 when she was pregnant. The father has not been involved with the mother or child, and the mother has not revealed his identity. After the child was born, he and his mother first lived in an apartment with acquaintances and then with the mother's brother and his family. The mother received services from a Parents as Teachers educator in both locations. In May 2007, when the child was seven months old, his mother was arrested during a raid by federal immigration authorities on the Barry County poultry processing plant where she was working. As a result, the child was left in the care of the brother and his family. The brother later placed the child in the care of the mother's sister and her family. Because the sister and her husband worked full-time, they enlisted the babysitting services of a local clergy couple. At first, the clergy couple watched the child during the day. Later, they watched him all day and night during the week, and the sister watched the child on weekends. In September 2007, the clergy couple asked a married couple they knew whether they might be interested in adopting the child. That day, the adoptive parents began visiting with the child, and he had his first overnight visit with them about 10 days later.

In October 2007, the adoptive parents filed a petition in the circuit court seeking to transfer custody of the child to them, to terminate the mother's parental rights and to adopt the child. At the time, the child was 11 months old and his mother was being held in the St. Clair County jail. In mid-October, the mother was served – at the jail – with a copy of the petition and a summons to respond. The next day, the court set a hearing for the following day regarding the custody transfer. It issued notice of the hearing to the adoptive parents' counsel and the guardian ad litem (an attorney it had appointed to advocate for the child's best interests) but not to the mother. The hearing was held as scheduled, and the court granted the adoptive parents' request for legal custody of the child. The mother was not present at the hearing, and no attorney had been appointed to represent her. Ten days later, the mother sent a letter – in both her native Spanish and in English – to the adoptive parents' attorney informing him that she did not want her son to be adopted and that she wanted visitation with her son while she was incarcerated. At some point thereafter, the mother was transferred to a federal penitentiary in West Virginia, where she stayed until her release in February 2009.

In December 2007, the court appointed an attorney to represent the mother. He did not file an answer on her behalf. Several months later, the adoptive parents authorized their attorney to find a Spanish-speaking attorney to represent the mother and agreed to pay for that attorney's services (although the attorney ultimately represented the mother for free). In June 2008, the court appointed this second attorney to represent the mother. He sent her a letter in late July 2008 and first spoke with her by telephone in August 2008. He did not meet with her while she was in prison in West Virginia. The new attorney was granted leave to file an answer on the mother's behalf even though the deadline had passed. He represented her during the October 2008 trial regarding the termination of parental rights and the adoption; she was not present for the trial. Evidence was presented by the adoptive parents and the parent educator who had worked with the mother and child. The mother's attorney presented no witnesses of his own but did cross-examine the adoptive parents' witnesses. He also offered into evidence a letter stating that the mother had a person in Guatemala who was willing to care for the child.

At the conclusion of the trial, the court terminated both natural parents' rights and approved the adoption. In its judgment, the court found that the mother's consent to the adoption was not required because it found, pursuant to section 453.040(7), RSMo, that she willfully abandoned the child. It terminated her parental rights pursuant to section 211.447.2(2)(b), RSMo, which also requires a finding of abandonment. In addition, the court found it was in the child's best interests for his mother's parental rights to be terminated and for him to be adopted by the adoptive parents. The mother appeals.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) It is not improper for termination of parental rights hearings under chapter 211 and adoption hearings under chapter 453 to proceed simultaneously before the same judge. But the termination issue must be considered first to avoid confusing the quality of the adoptive home with the grounds for terminating parental rights. Here, this Court presumes that the circuit court considered and applied the evidence appropriately in adjudicating first the termination of parental rights and then the adoption.

(2) The prerequisite to any adoption is the consent of the natural parents or the involuntary termination of parental rights. It was under the second prerequisite that the adoptive parents pursued adoption. Ordinarily, an adoption under chapter 453, RSMo, does not require that the mandates of chapter 211, RSMo, be followed. But when a petition for adoption under chapter 453, such as the one here, pleads for termination of parental rights under chapter 211, then the statutory mandates of both chapters must be met. In construing the statutory provisions, chapter 453 requires a court to consider only the best interest of the child in the construction of its provisions, whereas chapter 211 requires a court to consider and protect both the best interest of the child and the constitutional rights of all parties.

(3) Because the judgment pertaining to termination of the natural father's rights is not challenged on appeal, all portions of the judgment pertaining to the natural father are affirmed.

(4) The mother does not challenge the custody transfer on the ground that it was done without judicial action or a court order; rather, she contends the proceedings to transfer custody contained deficiencies that render them void. Even if these proceedings and the resulting order were defective, they are not void. The mother failed to raise her claims regarding these proceedings until the appeal, which was not in a timely manner. In its discretion, however, this Court will review these claims for plain error to determine whether manifest injustice or a miscarriage of justice occurred.

(a) Here, the statutory errors are evident, obvious and clear from the record. The placement of the child with the adoptive parents was improper because, in violation of section 453.110.1, the child was surrendered and taken before a court order was obtained. Further, no investigation and report was ordered and completed as required by section 453.110.2 before the court transferred custody.

(b) The mother, however, has failed to show a manifest injustice or miscarriage of justice occurred as a result of these two errors. The evidence in the record shows – and the mother does not dispute – that the custody of the child needed to be transferred. At the time of the custody order, the child was in need of appropriate food, clothing, shelter and medical care, and there is no dispute that the adoptive parents provided appropriately for the child while he was in their custody. Although the record supports the mother's claim that the child's placement with the adoptive parents negatively impacted her relationship with the child, her delay in challenging the proceedings to transfer custody exacerbated that impact. This delay cannot be attributed solely to the mother's initial lack of counsel, her ineffective counsel or her failure to have notice of the hearing to transfer custody. Although sections 211.462 and 453.030 permit a parent facing termination of parental rights to request representation, no case requires an affirmative waiver of counsel for proceedings to transfer custody. Here, the mother never asserted her right, despite being informed of it in the summons she was served. Nonetheless, the court on its own accord ultimately appointed not one but two attorneys to represent her. Further, her letter sent to the adoptive parents' attorney shows that she knew about the proceeding and who was involved in it and that she was able to send correspondence despite her incarceration and language barriers.

(5) The mother is entitled to relief under plain-error review of the circuit court's failure to comply with the mandatory investigation and reporting requirements of sections 211.455, 453.070 and 453.077.

(a) The court plainly erred in terminating the mother's parental rights under section 211.447. Section 211.455 requires a court-ordered investigation and social study by an authorized official or agency regarding the natural parent's fitness and the child's condition "to aid the court in determining whether the termination is in the best interests of the child." Because the adoptive parents here sought to terminate the mother's parental rights under section 211.447, the court was required to order an investigation and study as mandated by section 211.455. Here, however, no written report was made to the court before it terminated the mother's parental rights. Without such a report, the trial court was not educated as to numerous facts about the mother's and child's circumstances that were pertinent to its determination. Because this finding is dispositive, the mother's other claims regarding compliance with section 211.447 are moot.

(b) The court plainly erred in granting the adoption. Section 453.070 requires that an investigation – which must include an assessment of the adoptive parents as well as a post-placement assessment – and written report be made before the court may enter an adoption decree. This requirement may be waived if one of the adoption petitioners is the child's natural parent or if the natural parents have consented to the adoption. Neither circumstance was present here; therefore, the requirement applied. Section 453.077 requires that a post-placement assessment be conducted six months after the child has been placed in the adoptive parents' custody. The purpose of the reports mandated by both of these statutes is to provide the court with adequate information to determine whether the child is suitable for adoption and whether it is in the child's best interest to finalize the adoption. The court cannot make an informed decision in their absence, and completion and review of these reports after a decree has been entered is futile. Here, the court was provided an extensive report about the adoptive parents' fitness to be foster parents, not adoptive parents, and one paragraph updating a home study furnished by the child's guardian ad litem. Neither document complies with section 453.070 nor 453.077, examines the child's suitability for adoption, indicates whether circumstances warrant termination of parental rights or adoption without the mother's consent, discusses the adoptive parents' fitness as adoptive parents, or evaluates the adoptive parents after the child was placed with them. The importance of this information is apparent from the legislature's express decree that no adoption decree be entered without complying with the statutes' investigation and reporting requirements. It was manifestly unjust for the court to enter its judgment without the essential information in these reports.

(6) The circuit court's failure to comply with the statutory mandates of chapters 211 and 453 requires reversal of the judgment terminating parental rights and granting the adoption, but it does not cause the court to lose jurisdiction over the child or render its proceedings void. Nor does it require an outright reversal (without a remand) unless the evidence is insufficient to support the judgment. In fact, a reversal and remand is preferred; on remand for a new trial, all issues are open to consideration, and pleadings may be amended and new evidence may be produced. Here, the adoptive parents presented sufficient evidence to make a submissible case

that the mother abandoned her child because the record before the court contains clear, cogent and convincing evidence of abandonment under section 211.447.2(2)(b) – the ground on which the court terminated the mother’s parental rights.

(a) To terminate parental rights, a court must find by clear, cogent and convincing evidence that at least one ground enumerated for termination exists and that termination is in the child’s best interests. This Court reviews whether the adoptive parents presented such evidence under *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), which requires a judgment to be affirmed unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law. Conflicting evidence must be viewed in the light most favorable to the judgment with deference to the trial court’s assessments of credibility and reasonable inferences from the evidence.

(b) A parent’s intent to abandon is determined by examining all the evidence of the parent’s conduct. Here, the evidence of such intent is sufficient on the record before the court. The mother’s incarceration alone does not constitute abandonment, and her arrest caused an involuntary end to her custody of her child. But after her arrest and incarceration, the evidence at trial showed no involvement by the mother in her child’s life. The parent educator who had provided services to the mother and child testified that the mother’s sister cared for the child for a short time before she sought the assistance of the clergy couple in caring for the child before ultimately turning the child’s care over to them completely. She testified that, since taking custody of the child, the adoptive parents have provided all care for him with no assistance or inquiries from the mother or her family members. The evidence before the court was that the mother took no action to show parental interest and concern in her child until after she was served with the petition to terminate her parental rights and for the adoption of her child. After that, she wrote one letter asking that her child not be adopted and that she be allowed to visit with him while she was incarcerated, but she made no further inquiries and took no further action to maintain a relationship with her child. As such, the court could construe this as a token gesture. Other evidence before the court showed, although the mother was incarcerated and does not speak English, that there was someone in her cell or area who could read English; that she took no action to contact her child, her sister or her brother in Spanish; and that she did not ask the parent educator, who is fluent in Spanish, to deliver any communication to the sister, brother or child. The parent educator also testified that, during her September 2007 visit with the mother in jail, the mother expressed surprise that her child was with her sister and not her brother, which shows she had not been in contact with either of them about her child. The record at trial supports a finding that the mother’s difficulties and reliance on her family to help care for her child do not excuse her from not trying to contact him in any manner or maintain some type of relationship with him. As such, the record shows the adoptive parents presented clear, cogent and convincing evidence of abandonment under section 211.447.

(7) There is also sufficient evidence to support the adoptive parents’ claim that, under section 453.040(7), the mother’s consent was not required for the adoption. Under this statute, the parent’s consent to an adoption of a child is not required when the parent has abandoned for six months a child one year of age or older or for 60 days a child younger than one year old. The

timing is triggered from the date the petition is filed. Here, because the petition was filed Oct. 5, 2007, when the child was not quite one year old, the relevant 60-day period began Aug. 5, 2007. To determine abandonment, the court considers all evidence of the parent's conduct both before and after the statutory period. The record before the court showed that, after her arrest, the mother made no effort to accommodate for her child's care and custody and made no effort during the 60-day period to contact her family or friends to inquire about her child. As such, the record shows the adoptive parents presented clear, cogent and convincing evidence that she abandoned the child within the statutory period, permitting them to seek adoption without the mother's consent.

(8) On appeal in this Court, the mother submitted, in her appendix, approximately 200 pages of information that was not offered as evidence at the trial and, therefore, is outside the record on appeal, to show that she did not abandon her child and that her counsel was ineffective. She asks this Court to review this information when considering the sufficiency of the adoptive parents' evidence of abandonment. Rule 84.04(h) does not authorize inclusion in the appendix evidence outside the record on appeal, and this Court will not consider it here. Because these materials were not offered into evidence at trial, the circuit court had no opportunity to consider their evidentiary foundation, decide their admissibility, or determine their credibility or weight. The materials also were not subject to cross-examination, and the parties have not stipulated that they be included in the record on appeal. For this Court to analyze this information outside the record in evaluating the sufficiency of the evidence of abandonment would be contrary to the law; this Court should not look beyond the record in examining sufficiency of evidence at trial. Further, the law imposes no duty on a trial court to go through documents filed in the court but not offered into evidence or otherwise brought to its attention by counsel.

(9) Because of the failure to comply with the statutory mandates as discussed in Paragraph 5 above, the entire judgment is reversed as to all findings pertaining to the mother, including the abandonment finding under section 453.040(7). But as there is sufficient evidence to support the adoptive parents' abandonment claim as discussed in Paragraph 6 above, remand is the required remedy. On remand, the investigations and reports required by sections 453.070 and 453.077 must be made prior to the new trial on all the petition's issues pertaining to the mother.

(10) A substantial portion of the outside information the mother included in her appendix is offered to substantiate her claim of ineffective assistance of counsel. This claim, however, is moot because the Court is reversing the circuit court's judgment and remanding for a new trial on all issues within the adoption petition. Because it is unnecessary, therefore, for this Court to consider the effectiveness of the mother's trial counsel, this Court need not determine a mechanism for determining how factual disputes about effectiveness of counsel in a case involving termination of parental rights should be resolved. On remand, the mother will be represented by the attorneys she has obtained since the trial, who have represented her competently in this Court. During the remand proceedings, she will have the opportunity to proffer the evidence she believes is relevant to her defense, which may contain the information outside the record that she submitted to this Court in her appendix. The adoptive parents likewise will have the opportunity to present the evidence they presented at the first trial as well as additional evidence they believe is relevant to the issues in their adoption petition.

(11) The mother's claim that she was denied due process by the failure of the guardian ad litem and the juvenile officer to act independently of the adoptive parents also is mooted by the reversal of the judgment against her on other grounds. Both the guardian ad litem and the juvenile officer will be required to participate in the proceedings on remand. It is in the child's best interests for his guardian ad litem to discharge his duties diligently and to advocate on the child's behalf during the termination of parental rights and adoption proceedings. In addition, if the adoptive parents continue to rely on chapter 211 as is pleaded in their petition below, then the juvenile officer will be required to seek to be joined as a party pursuant to section 211.447.2(2)(b). This statute requires the juvenile officer to be joined as a party to any proceeding when the petition to terminate parental rights is filed by someone other than the juvenile officer.

(12) The adoptive parents ask this Court to strike (reject) the statement of facts and appendix the mother submitted. Although her appellate brief does not comply with Rule 84.04(c), as the statement of facts is long and argumentative, it is not so deficient as to form the basis to dismiss her appeal. The motion to strike her brief or, alternatively, her statement of facts is overruled. The adoptive parents also ask this Court to dismiss the mother's appeal for failure to file it in a timely manner. This Court, however, previously allowed the mother to file her appeal out of time. That ruling is the law of the case and cannot be relitigated.

(13) Every member of this Court agrees that this case is a travesty of justice in its egregious procedural errors, its long duration, and its impact on the mother, the adoptive parents and, most importantly, the child. On remand, the mother and the adoptive parents shall be provided a full and fair trial that respects the mother's fundamental rights and the child's best interests. The circuit court is ordered to compel expeditious compliance with the investigation and reporting requirements of sections 211.455, 453.070 and 453.077. The circuit court further is ordered to set the trial date no more than 90 days after it receives the reports. Because the circuit court's termination of the putative father's parental rights under section 211.447.2(2)(b) was not the subject of the mother's appeal, that portion of the judgment is affirmed.

Opinion concurring in part and dissenting in part by Judge Stith: (1) The author would hold that the judgment terminating the mother's parental rights should be reversed outright for failure to show clear, cogent and convincing evidence of abandonment. The standard of review in termination of parental rights cases is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), under which a judgment shall be affirmed unless it is not supported by substantial evidence, is against the weight of the evidence, or misstates or misapplies the law. Here, "substantial evidence" required the presentation of clear, cogent and convincing evidence. The circuit court's judgment was not supported by such evidence.

(a) The mother did not abandon her son willfully or continuously. Prior to October 5, 2007, there is no evidence that the mother had an opportunity to contact her family to make arrangements for her son upon her arrest or that she had a better alternative than to leave him with her brother. Leaving her son with her brother does not support an inference of abandonment – in difficult situations, children often are raised with extensive help from grandparents, siblings and other family members. This is particularly

true here, where the mother was incarcerated in a foreign country and immersed in a language she did not speak.

(b) There was evidence on the record before the circuit court showing that the mother did attempt to communicate with her son as soon as she was told that he was no longer with family and that an attempt was being made to adopt him. The mother informed the adoptive parents' attorney in a letter that she did not want her son to be adopted and that she wanted visitation with her son while she was in prison. She received no response.

(c) The circuit court's finding that the babysitting family began caring for the child "only a few days after" the mother was arrested is without support. This finding is based only on the repetition of hearsay that flatly is contradicted by other direct evidence.

(2) Manifest injustice resulted from the failure to give the mother the statutory five-days notice of the custody hearing and to appoint her counsel until two months after the hearing transferring custody was held in violation of the applicable statute. Further, there was absolutely no evidence that the initial counsel tried to contact the mother or that the mother knew she had an attorney. There also was no evidence that the adoptive parents were licensed foster parents; therefore, they were not eligible to seek adoption. Moreover, the circuit court failed to comply with numerous other statutory requirements in addition to those set out by the principal opinion.

(3) Finally, the inherent conflict in the mother being represented by counsel who was hand-picked by the adoptive parents is manifest. Counsel for the adoptive parents not only hired the mother's counsel but actually chose what documents to send him, told him the purpose of the hiring was to be sure the mother could not attack the adoption later, gave him a script to use when communicating with the mother, asked to see copies of correspondence and suggested that counsel try to avoid visiting the mother in person to save the adoptive parents some money.

Opinion concurring in part and dissenting in part by Judge Wolff: The author would hold the judgment terminating the mother's parental rights should be reversed outright, with no remand for a new trial. He would find:

(1) The mother's due process rights were violated. She did not receive notice of the circuit court hearing transferring custody of her son to the adoptive parents, and the circuit court did not take note of the mother's letter asking that her son not be adopted.

(2) The adversarial system failed the mother as she was not provided counsel initially, the counsel the court finally appointed was grossly inadequate, and the counsel later hired by the adoptive parents to represent the mother resulted in a conflict of interest and an inadequacy of representation. This failure could have been remedied by applying the consular treaty or the United States Department of State's recommendations and by notifying the Guatemalan consulate of the proceeding against the mother.

(3) The court's findings are not supported by the record, as explained in Judge Stith's opinion.

(4) The courts failed to adjudicate the case in a timely manner, thereby straying from the statutory mandate that adoption cases be decided expeditiously.

(5) The principal opinion stretches to find evidence of neglect. The circuit court did not find the mother willfully, substantially and continuously neglected her son for six months prior to the filing of the petition for adoption, as required by statute. Further, the adoptive parents do not argue that such neglect occurred. Rather, the evidence shows the mother provided financial support for her son until her arrest, and the lack of resources she was able to provide did not warrant a transfer of his custody. A parent's fundamental right to raise her child does not allow the transfer of custody and termination of parental rights due to inadequate resources. Otherwise, an unfortunately large percentage of children could be taken from their parents. As the court found no evidence of any deliberate acts by the mother subjecting the child to a substantial risk of physical or mental harm and the adoptive parents do not argue that neglect occurred, there could be no finding of willful neglect; as a result, there should be no remand for a new trial.