IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC95602

IN THE INTEREST OF J.P.B.

M.R.S., APPELLANT

VS.

GREENE COUNTY JUVENILE OFFICE, RESPONDENT

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the Juvenile Division of the Circuit Court of Greene County, Missouri, on or about February 5, 2016. The judgment terminated the parental rights of the Appellant in, to, and over his minor child. On or about March 25, 2015, the Appellant filed his Notice of Appeal of the Trial Court's judgment with the Supreme Court of Missouri. This appeal involves issues within the exclusive jurisdiction of the Supreme Court of Missouri, in that the Appellant is challenging the constitutional validity of Section 211.447.5 (6) (a), RSMo., as amended. Pursuant to Article V, Section 3, Constitution of Missouri, the Supreme Court of Missouri has exclusive jurisdiction.

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STATEMENT OF FACTS

This is an appeal from a judgment of the Circuit Court of Greene County Missouri, Juvenile Division ("Trial Court") dated February 5, 2016, in Case Number 14GK-JU00422 terminating the parental rights of the Appellant, M.R.S. (hereinafter referred to as "Appellant") in, to, and over J.P.B. (hereinafter referred to "Child") (L.F. 101).

On or about May 2, 2014, the Juvenile Division of the Circuit Court of Greene County, Missouri entered an Order to take the child into judicial custody (Judicial Notice of Case File 14GK-JU00324, TR II, 13; L.F. 1-2). At the time the child came into protective custody, the mother allegedly sold this child for approximately Three Thousand Dollars ($3,000.00) and the mother had five other children under juvenile court jurisdiction (Judicial Notice of Case File 14GK-JU00324, TR II., 13; Juvenile Office Exhibits "4" and "5", TR II., 16; TR. 28).

On or about August 28, 2014, expert paternity testing determined that the Appellant could not be excluded as the child's biological father (TR II., Juvenile Office Exhibit "2", 15; TR II., 32). On September 11, 2014, the Juvenile Office filed a First Supplemental Petition regarding the Appellant (L.F. 15-16).

On or about November 12, 2014, the Court conducted an adjudication hearing on the First Supplemental Petition as to the Appellant and found that as to the Appellant, the child is within the Court's jurisdiction under Section 211.031.1

(1) RSMo; that the allegations of the First Supplemental Petition are true; and, that the child is in need of the care, services, and protection of the Court (Judicial Notice of Case File 14GK-JU00324, TR. II., 13; L.F. 23-26). The Court found that removal of the child was necessary due in part to Appellant's incarceration, the Appellant's criminal history, and the Appellant's substance abuse issues (L.F. 23-26).

The Court entered an incarcerated treatment plan for the Appellant (Juvenile Office Exhibit "13", TR II., 16; TR II., 25). The Appellant was incarcerated at the time of the child's birth on February 19, 2014 (TR II. 50; Juvenile Office Exhibit "1", TR. II. 16).

The Appellant has been incarcerated since July of 2013 (TR II. 49-50). The Appellant will not be released from the Department of Corrections, until November 2018 (TR II. 28, 50; Juvenile Office Exhibit "3", TR II. 16). The Trial Court admitted the Appellant's four criminal docket sheets into evidence (Juvenile Office Exhibits "7", "8", "9" and "10", TR. II 16). The Appellant has never met the child (TR. II 30).

On or about September 11, 2015, the Appellant filed his Motion for Placement with the Paternal Grandmother (L.F. 8, 36-37). On or about November 6, 2015, the Appellant filed his Request for Written Findings of Fact and Conclusions of Law consistent with Section 210.565.4 RSMo. (L.F. 43). On or

about November 29, 2016, Appellant filed his Suggestions in Support of Father's Motion for Placement of with Paternal Grandmother (L.F. 44-44-46.

On November 6 and 30, 2015, the Court conducted an evidentiary hearing on the Appellant's motion (L.F. 10-11). On December 8, 2015, finding that placement of the child with the paternal grandmother was contrary to the child's best interests, the Trial Court denied the Appellant's motion, and entered Findings of Fact and Conclusions of Law (L.F. 47-53).

Also on December 8, 2015, the Court took up for hearing and determination the Respondent's First Amended Petition to Terminate Parental Rights (TR II. 2, 14; L.F. 78, 101). The Appellant appeared by Polycom and with his attorney (TR. II., 2, 9; L.F. 63). The Trial Court gave the Appellant opportunities to speak with his attorney privately before the hearing and during the hearing (TR. II, 9, 40, 47-48). The Appellant gave testimony at the trial of this action (TR. II., 49-53).

Prior to the hearing of evidence on the action to terminate parental rights, the Trial Court heard and ruled on Appellant's motion for continuance (TR. II. 2). The Appellant's attorney requested a continuance of the trial so that the Appellant could file an appeal to a higher court of the Trial Court's order denying the Appellant's Motion for Placement with Paternal Grandmother. (TR. II. 3-4; L.F. 47-53). The Trial Court denied the Appellant's motion for continuance (TR II. 4).

The Appellant's counsel opined that if the court found that the child's best interests would not be served by placing the child with the paternal grandmother, then the Trial Court had predetermined and prejudged the merits of the termination action and a motion for change of judge would be appropriate (TR. II. 5-6). The Appellant's attorney filed a prewritten motion for change of judge (TR. II. 7-8). The Trial Court denied Appellant's motion for change of judge (TR. II. 8).

Appellant's attorney further argued that proceeding with the trial without Appellant's personal appearance in the courtroom violates his right to due process under the law (TR. II. 10). The record does not contain any evidence that the Appellant gave notice to the Department of Corrections of his Applications for Writ of Habeas Corpus Ad Testificandum in July 2015 and November 2015(L.F. 61, 63, 91).

On December 8, 2015, the Trial Court proceeded with the trial of this action (TR. II. 12-13). Alyssa Ellsworth, the Greene County Children's Division case manager for the child since May 2, 2014 (TR. II. 17), prepared an incarcerated treatment plan for the Appellant (TR. II. 25). Ms. Ellsworth testified that she scheduled monthly telephone calls with the Appellant and that the Appellant usually sent two to three letters a month to the child (TR. II. 25-26).

Ms. Ellsworth testified that the Appellant pays Two Dollars ($2.00) per month for the support of the child and that the Appellant provided a toy for Christmas in 2014 (TR. 40, 45). Other than the Appellant providing a pillow case for the child, the Appellant had not provided any other support for the child (TR. II. 45).

Ms. Ellsworth testified that the Appellant completed Pathways to Change in February 2015, and that the Appellant is currently attending Inside Out Dads with an expected completion date of January 2016 (TR. II. 26). Ms. Ellsworth further testified that the Appellant reported to her that he attends NA/AA meetings weekly (TR. II, 26). Believing the Appellant is incarcerated for alcohol related offenses, Ms. Ellsworth testified that the Appellant had not provided written confirmation that he is addressing his substance abuse issues successfully (TR. II. 29).

Ms. Ellsworth testified that the child does not have any emotional ties to the Appellant (TR. II. 27, 31). Since the child came into alternative care, there have not been in-person visits between the child and the Appellant (TR. II. 27). The Appellant has never met the child (TR. II. 30). Ms. Ellsworth testified that she attempted to arrange visits between the child and the Appellant via Polycom; however, the prison denied her request (TR. II. 37).

Ms. Ellsworth testified that she could not think of any additional services that could be offered to the Appellant whereby he could change Appellant's circumstances to a point of having the child returned to him within an ascertainable period of time (TR. II. 28). Ms. Ellsworth did not know of any services which could be provided that might create a bond between the child and the Appellant (TR. 28-29, 31).

Ms. Ellsworth testified that the Appellant provided names of two relatives who could serve as a placement for the child: Debra Buckner, the paternal grandmother; and, LaDonna Weight, a cousin (TR. II. 34). The child was not placed with either relative (TR. 34). The paternal grandmother withdrew from the home study process (TR. II. 35) and the cousin moved out of state and did not contact Children's Division after March of 2015 (TR. II. 46).

Ms. Ellsworth testified that she had not discussed with the Appellant his plans for employment or housing after his release from the Department of Corrections (TR. II. 30). Ms. Ellsworth had not discussed with the Appellant his work history or housing situation before he was incarcerated (TR. II. 31). Ms. Ellsworth did not know if the Appellant could provide for the child if the Appellant were not incarcerated (TR. II. 47).

Ms. Ellsworth further testified that the child is placed in a traditional foster home (TR II. 30). The child has been placed in that home since May 2014 (TR. II. 30). Ms. Ellsworth testified that the child is doing well in this foster home placement (TR. II. 30). Ms. Ellsworth testified that the child views his foster mother and father as his parents and that he addresses them as mom and dad (TR. 30). This foster home is a potential adoptive home for the child (TR. II 36).

Ms. Ellsworth testified that the foster parents believed that the child visiting the Appellant at the prison would be more for the benefit of the Appellant than for the benefit of the child (TR. II 37). On September 14, 2015, the court denied the Appellant's motion for visitation, because the court did not want to subject a one-year-old child to a seven hour round trip car ride to and from the prison (TR. I. 53, 58).

Ms. Ellsworth recommended that it would be in the best interest of the child to terminate the Appellant's parental rights (TR. II. 45-46). Ms. Ellsworth's recommendation was based upon the following: the child does not have a bond with the father; the Appellant will not be able to provide shelter for the child for three years; and, the child deserves permanency (TR. II. 46).

The Appellant testified that he had been incarcerated since July of 2013; first at Cameron, Missouri; and, then at St. Joseph, Missouri (TR. II. 49-50). The

Appellant further testified that he will remain incarcerated, until November 2018 (TR. II. 50). The Appellant was incarcerated when the child was born (TR. II 50). The Appellant testified that he wanted the child placed with the paternal grand-mother 'so she can adopt him for me' (TR. II. 51).

The guardian ad litem recommended that the Trial Court terminate the parental rights of both parents in, to, and over the child (TR. II., 54). The Trial Court entered its judgment terminating Appellant's parental rights on or about February 5, 2016 (L.F. 101). In its judgment, the Trial Court ruled that the court shall not terminate the Appellant's parental rights solely because the Appellant is incarcerated (L.F. 110).

On or about March 7, 2016, Appellant filed a Motion for New Trial, which was denied on March 17, 2016 (L.F. 64). On or about March 25, 2016, the Appellant filed his notice of appeal (L.F. 65).

POINTS RELIED ON

POINT 1

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT STATUTORY GROUNDS EXIST FOR TERMINATION OF APPELLANT'S PARENTAL RIGHTS, BECAUSE SECTION 211.447.5(6)(a), RSMo IS NOT UNCONSTITUTIONALLY VAGUE; AND, THE TRIAL COURT DID NOT TERMINATE APPELLANT'S RIGHTS SOLEY ON THE GROUNDS OF APPELLANT'S INCARCERATION AS PROHIBITED BY SECTION 211.447.7(6).

In Re J.D.P, 406 S.W.3d 81 (Mo. App. 2013)

In Re Z.L.R., 347 S.W.3d 601 (Mo. App. 2011)

In the Interest of L.G., 764 S.W.2d 89 (Mo. banc 1989)

In the Interest of T.W.C. and D.K.C., 316 S.W.3d 538 (Mo. App. 2010)

POINT 2

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT STATUTORY GROUNDS EXIST FOR TERMINATING APPELLANT'S PARENTAL RIGHTS, BECAUSE THE JUVENILE OFFICE PRESENTED CLEAR, COGENT, AND CONVINCING EVIDENCE WHICH ESTABLISHED THAT SPECIFIC CONDITIONS DIRECTLY RELATING TO THE PARENT AND CHILD RELATIONSHIP WERE OF A DURATION AND NATURE THAT RENDERS THE APPELLANT UNABLE FOR THE REASONABLY FORSEEABLE FUTURE TO CARE APPROPRIATELY FOR THE ONGOING PHYSICAL, MENTAL, OR EMOTIONAL NEEDS OF THE CHILD.

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

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

In re P.L.O., 131 S.W.3d 782 (Mo. banc 2004)

J.A.R. v. D.G.R., 426 S.W.3d 624 (Mo. banc 2014)

POINT 3

THE TRIAL COURT DID NOT ERR IN TERMINATING THE APPELLANT'S PARENTAL RIGHTS AS BEING AGAINST THE WEIGHT OF THE EVIDENCE PURSUANT TO SECTION 211.447.5(6) (a), RSMo., BECAUSE THE TRIAL COURT FOUND UNDER THE TOTALITY OF THE CIRCUMSTANCES PURSUANT TO SECTION 211.447.7 RSMO THAT PLACEMENT OF THE CHILD WITH THE CHILD'S RELATIVE WAS CONTRARY TO THE BEST INTERESTS OF THE CHILD.

In re C.A.M., 282 S.W.3d 398 (Mo. App. S.D. 2009)

In re Q.A.H., 426 S.W.3d 7 (Mo. banc 2014)

In re Z.L.R., 347 S.W.3d 601 (Mo. App. 2011)

POINT 4

THE TRIAL COURT DID NOT ERR IN TERMINATING THE APPELLANT'S PARENTAL RIGHTS, BECAUSE THE JUVENILE OFFICE ESTABLISHED BY CLEAR, COGNENT, AND CONVINCING EVIDENCE THAT APPELLANT HAD NEGLECTED THE MINOR CHILD PURSUANT TO SECTION 211.447.5(2) RSMo., AND THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Section 211.447 RSMo.

In the Interest of M.L.R., 249 s.W.3d 864 (Mo. App. W.D. 2008)

POINT 5

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Flora v. Flora, 426 S.W. 3e 730 (Mo. App. S.D. 2014)

JAS Apartments, Inc. v. Naji, 354 S.W.3d 175 (Mo. banc 2011)

Mitchell v. Mitchell, 348 s.W.3d 816 (Mo. App. 2011)

Pearson v. Koster, 367 S.W.3d 36 (Mo. banc 2012)

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In Re A.P.S., 90 S.W.3d 232 (Mo. App. S.D. 2002)

In Re K.M.W., 342 S.W.3d 353 (Mo. Ct. App. 2011)

In re N.M.J., 24 S.W.3d 771 (Mo. App. W.D. 2000)

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Flora v. Flora, 426 S.W.3d 730 (Mo. App. S.D. 2014)

JAS Apartments, Inc. v. Naji, 354 S.W.3d 175 (Mo. banc 2011)

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THE TRIAL COURT DID NOT ERR IN TERMINATING APPELLANT'S PARENTAL RIGHTS, BECAUSE THE JUVENILE OFFICE PRESENTED CLEAR, COGENT, AND CONVINCING EVIDENCE OF LIKELY FUTURE HARM TO THE CHILD AND THE TRIAL COURT ADDRESSES THE LIKELIHOOD OF FUTURE HARM TO THE CHILD IF APPELLANT'S PARENTAL RIGHTS ARE NOT TERMINATED.

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

POINT 9

THE TRIAL COURT DID NOT DEPRIVE THE APPELLANT OF CONSTITUTIONAL RIGHTS BY DENYING APPELLANT'S MOTION TO BE PHYSICALLY PRESENT IN THE COURTROOM DURING THE TRIAL OF THIS ACTION, BECAUSE THE RECORD DOES NOT REFLECT THAT THE APPELLANT GAVE NOTICE OF THE APPLICATION TO THE DEPARTMENT OF CORRECTIONS; AND, THE APPELLANT HAD MEANINGFUL ACCESS TO THE COURT.

Call v. Heard, 923 S.W.2d 840 (Mo. banc 1996)

In re C.G., 954 N.E. 910 (Ind. 2011)

In re Maf ex Rel. Brandon, 232 S.W.3d 640 (Mo. App. 2007)

In the Interest of C.M.D. and S.D., 18 S.W.3d 556 (Mo. App. 2000)

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A.N.L. v. Maries County Juvenile Office, 484 S.W.3d 328 (Mo. App. S.D. 2016)

In the Interest of J.R., D.R., W.R. and K.R., 347 S.W.3d 641 (Mo. App. 2011)

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Grissom v. Grissom, 886 S.W.2d 47 (Mo. App. 1994)

State ex Rel. McCullough v. Drumm, 984 S.W.2d 555 (Mo. App. E.D. 1999)

State v. Nunley, 923 S.W.2d 911 (Mo. banc 1996)

Williams v. Reed, 6 S.W.2d 916 (Mo. App. W.D. 1999)

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In re B.H., 348 S.W.3d 770 (Mo. 2011)

In Re C.A.M., 282 S.W.3d 398 (Mo. App. 2009)

In re E.L.B., 103 S.W.3d 774 (Mo. 2003)

In re J.M.T., 386 S.W.3d 152 (Mo. App. S.D. 2012)

ARGUMENT

ARGUMENT 1

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT STATUTORY GROUNDS EXIST FOR TERMINATION OF APPELLANT'S PARENTAL RIGHTS, BECAUSE SECTION 211.447.5(6)(a) IS NOT UNCONSTITUTIONALLY VAGUE; AND, THE TRIAL COURT DID NOT TERMINATE APPELLANT'S PARENTAL RIGHTS SOLELY ON THE GROUNDS OF APPELLANT'S INCARCERATION AS PROHIBITED BY SECTION 211.447.7(6) RSMO.

A statute is presumed to be constitutional. **Rentschler v. Nixon, 311 S.W. 3d 783, 786 (Mo. banc 2010).** A statute is not unconstitutionally vague if its words are of common usage and understandable by persons of ordinary intelligence. **In the Interest of L.G., 764 S.W.2d 89, 94 (Mo. banc 1989).** The Court's role in interpreting a statute is to discern the intent of the legislature from the plain and ordinary meaning of the language used and to give effect to that intent. **Spradling v. SSM Health Care St. Louis, 313 S.W.3d 683, 686 (Mo. banc 2010).**

Section 211.447.5(6) (a), RSMo., provides:

"The parent is unfit to be a party to the parent and child relationship because of a consistent pattern of committing a specific abuse including, but not

limited to, specific conditions directly relating to the parent and child relationship which are determined by the court to be of a duration or nature that renders the parent unable for the reasonably foreseeable future to care appropriately for the ongoing physical, mental, or emotional needs of the child."

In affirming judgments terminating parental rights of incarcerated parents, the Missouri Court of Appeals has addressed specific conditions directly relating to the parent and child relationship when a parent is incarcerated, and when those specific conditions are of a duration or nature that renders the incarcerated parent unable for the reasonably foreseeable future to care appropriately for the ongoing mental, physical, or emotional needs of the child. The Court of Appeals has not had difficulty understanding the ordinary and plain language of the statute.

The Missouri Court of Appeals, Western District, affirmed a judgment terminating the parental rights on the ground of parental unfitness pursuant to Section 211.447.5(6). **In the Interest of T.W.C. and D.K.C., 316 S.W.3d 538 (Mo. Ct. App. 2010).** The Western District found that the father had not had any physical contact with the children since the children were four months old, and who were five years old at the time of trial; that the children had been placed with their foster parents since they were eighteen months old and closely bonded to their foster parents; and, that father's efforts to foster a bond with the children were

unsuccessful. **Id at 541.** The Western District determined that the father's absence from the children and the lack of bond between the father and the children rendered the father unable, for the reasonable future, to care appropriately for the children's needs. **Id at 541.**

The Missouri Court of Appeals, Southern District, affirmed a judgment terminating an incarcerated father's parental rights pursuant to Section 211.447.5(6). **In the Interest of Z.L.R., 347 S.W.3d 601 (Mo. App. 2011).** The Southern District emphasized that the father had been incarcerated for a majority of the child's life; father had never had physical contact with the child; the child was closely bonded to her foster parents whom she called "mom" and "dad"; there was not a bond between the child and the father; the child did not know who the father was; and, nurturing a bond, if such a bond could be achieved, would take too long. **Id at 608-609.**

The Missouri Court of Appeals, Eastern District, affirmed a judgment terminating the parental rights of an incarcerated father. **In re J.D.P., 406 S.W.3d 81 (Mo. Ct. App. 2013). In J.D.P,** the father argued that the trial court's finding that he was unfit was not supported by substantial evidence and that that the trial court erred in presuming that he was unfit due to his incarceration. Id. at 84.

The Eastern District determined that the father's incarceration was not in and of itself the grounds for terminating father's parental rights. **Id.** The Eastern

District held that absence of a bond between the incarcerated father combined with an inability to determine when such a bond could be established is substantial evidence supporting termination of the father's parental rights under Section 211.447.5(6). **Id at 85.**

The Appellant's incarceration in and of itself shall not be grounds for termination of parental rights. **Section 211.447.7 (6), RSMo.** The Trial Court did not terminate the Appellant's parental rights solely on the grounds that the Appellant is incarcerated (L.F. 110).

Based upon the foregoing, Respondent argues that Section 211.447.5 (6) (a), RSMo. is not unconstitutionally vague; and, prays the Court to affirm the Trial Court's judgment terminating Appellant's parental rights.

ARGUMENT 2

THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT STATUTORY GROUNDS EXIST FOR TERMINATING APPELLANT'S PARENTAL RIGHTS, BECAUSE THE JUVENILE OFFICE PRESENTED CLEAR, COGENT, AND CONVINCING EVIDENCE THAT SPECIFIC CONDITIONS DIRECTLY RELATING TO THE PARENT AND CHILD RELATIONSHIP EXISTED AND THOSE SPECIFIC CONDITIONS WERE DETERMINED BY THE TRIAL COURT TO BE OF A DURATION AND NATURE THAT RENDERS THE APPELLANT UNABLE FOR THE REASONABLY FORESEEABLE FUTURE TO CARE APPROPIRATELY FOR THE ONGOING PHYSICAL, MENTAL, OR EMOTIONAL NEEDS OF THE CHILD.

The judgment in a termination of parental rights case will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares the law. **In Re Adoption of C.M.B.R., 332 S.W.3d 793, 815 (Mo. banc 2011).** Deference is to be given the Trial Court's determinations regarding the credibility of the witnesses. **In Re K.A.W., 133 S.W.3d 1, 11-12 (Mo. banc 2004).**

The Trial Court is in a better position to judge the credibility of the witnesses, and to better judge the sincerity and character of the witnesses, and

other trial intangibles which may not be completely revealed by the record. **Pearson v. Koster, 367 S.W.3d 36, 44 (Mo. banc 2012).** In reviewing questions of fact, the appellate court is to recognize that the trial court is free to disbelieve any, all, or none of the evidence, and it is not the appellate court's role to evaluate the evidence through its own perspective. **Pearson v. Koster, 367 S.W.3d at 44.**

The Trial Court's judgment will be reversed only if the Appellate Court is left with a firm conviction that the judgment is wrong. **In Re S.M.H., 160 S.W.3D 355, 362 (Mo. banc 2005).** In reviewing a case such as the case at bar, the Appellate Court considers the evidence and reasonable inferences arising from the record in the light most favorable to the Trial Court's judgment. **J.A.R. v. D.G.R., 426 S.W.3d 624, 626 (Mo. banc 2014).**

The grounds for termination of parental rights must be shown by clear, cogent, and convincing evidence. Evidence is clear, cogent and convincing when it instantly tilts the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true. **In Re A.L.B., 743 S.W.2d 875, 879 (Mo. App. 1987)**. The clear, cogent, and convincing standard may be met "even though the court has contrary evidence before it or the evidence might support a different conclusion." **In Re K.M.C., 223 S.W.3d 916, 922 (Mo. App. 2001).**

To terminate parental rights there must be a strict and literal compliance with statutes and those seeking to terminate parental rights have the burden of proof. **In Re D.C.H., 835 S.W.2d 533, 534 (Mo. App. 1992).** The primary concern in any termination of parental rights case is the best interests of the child. **In Re M.E.W., 729 S.W.2d 194, 195 (Mo. 1987)**. The Court may reach the best interests of the child, however, only after it has made a determination that one or more of the statutory grounds to terminate a parent's rights exist. **In re B.H., 348 S.W. 3d 776, 777 (Mo. banc 2011)**.

Where multiple statutory grounds for termination of parental rights are found, the Court need only find that one of the statutory grounds was proven and that termination is in the best interests of the child to affirm the judgment. **In Re J.B.D., 151 S.W.3d 885, 887 (Mo. App. 2004).** One articulated statutory ground is sufficient to support termination of Appellant's parental rights if proved properly. **In re P.L.O., 131 S.W.3d 782, 789 (Mo. banc 2004).** The Appellant's incarceration in and of itself shall not be grounds for termination of his parental rights. **Section 211.447.7 (6) RSMo.**

Section 211.447.5 (1)-(6) RSMo., as amended to date, provides that the Court may terminate parental rights if it finds that one or more of the following statutory grounds exist: 1) Abandonment; 2) Abuse and/or neglect of the minor child; 3) Failure to rectify in that the minor child has been under the jurisdiction of

the juvenile court for a period of one year; 4) the parent has been convicted of a felony of Chapter 566 RSMo. or in 568.020 RSMo.; and 5) The parent is unfit to be a party to the parent and child relationship.

A claim that a judgment is against the weight of the evidence presupposes that there is sufficient evidence to support the judgment. **Pearson v. Koster, 367 S.W.3d at 51.** An against –the- weight- of the evidence argument challenges the probative value of that evidence to induce a belief in a particular proposition when viewed within the context of the entirety of the evidence before the Trial Court. **Flora v. Flora, 426 S.W.3d 730, 738 (Mo. App. S.D. 2014).**

When an against the weight of the evidence argument is made, the Appellate Court must defer to the Trial Court's determination of credibility and the Appellate Court will reverse the judgment only in rare cases, when the Appellate Court firmly believes the Trial Court's judgment is wrong. **Mitchell v. Mitchell, 348 S.W.3d 816, 818 (Mo. App. 2011).** Appellate courts act cautiously in exercising the power to set aside a judgment on the ground that the judgment is against the weight of the evidence. **JAS Apartments, Inc. v. Naji, 354 S.W.3d 175, 182 (Mo. banc 2011).**

The Appellant must take the necessary four-step process to make a viable against the weight of the evidence argument. To do so he would need to:

"(1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;

(2) identify all of the favorable evidence in the record supporting the existence of that proposition;

(3) identify the evidence in the record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and,

(4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition." **Houston V. Crider, 317 S.W.3d 178, 187 (Mo. App. 2010).**

Section **211.447.5(2)(a)-(d) RSMo**., as amended to date, requires the court to consider evidence and make findings on four conditions: a) mental condition; b) chemical dependency; c) severe or recurrent acts of abuse; and d) repeated or continuous failure by the parents, although physically or financially able, to provide the child with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for the child's physical, mental, or emotional health and development. The Trial Court made findings as to all four factors (L.F. 103-105).

These four factors are simply categories or evidence to be considered along with other relevant evidence, rather than separate grounds for termination in and of itself. Nevertheless, proof of one such factor is sufficient to support termination on the statutory abuse or neglect ground. **In Re K.M.C., 223 S.W.3d 916, 923 (Mo. App. 2007)**.

Section **210.110 (12) RSMo**., as amended to date, defines neglect as failure to provide, by those responsible for the care, custody, and control of a child the proper or necessary support, education as required by law, nutrition, or medical or surgical care necessary for the child's wellbeing. **J.A.R., S.W.3d at 630.**

Abuse refers to a willful act, while neglect is a general and a negative proposition meaning simply the failure to perform the duty with which a parent is charged by the law and by conscience. **In Re J.K., 38 S.W.3d 495 (Mo. App. 2001)**. If a parent fails to provide for a child's shelter, food, clothing and basic education they have neglected that child. **In Re P.L.O., 131 S.W.3d at 790.**

Section 211.447.5(6) (a), RSMo., provides:

"The parent is unfit to be a party to the parent and child relationship because of a consistent pattern of committing a specific abuse including, but not limited to, specific conditions directly relating to the parent and child relationship which are determined by the court to be of a duration or nature that renders the parent unable for the reasonably foreseeable future to care

appropriately for the ongoing physical, mental, or emotional needs of the child."

In affirming judgments terminating parental rights of incarcerated parents, the Missouri Court of Appeals has addressed specific conditions directly relating to the parent and child relationship when a parent is incarcerated, and when those specific conditions are of a duration or nature that renders the incarcerated parent unable for the reasonably foreseeable future to care appropriately for the ongoing mental, physical, or emotional needs of the child. The Court of Appeals has not had difficulty understanding the ordinary and plain language of the statute.

The Missouri Court of Appeals, Western District, affirmed a judgment terminating the parental rights on the ground of parental unfitness pursuant to Section 211.447.5(6). **In the Interest of T.W.C. and D.K.C., 316 S.W.3d 538 (Mo. Ct. App. 2010).** The Western District found that the father had not had any physical contact with the children since the children were four months old, and who were five years old at the time of trial; that the children had been placed with their foster parents since they were eighteen months old and closely bonded to their foster parents; and, that father's efforts to foster a bond with the children were unsuccessful. **Id at 541.** The Western District determined that the father's absence from the children and the lack of bond between the father and the children

rendered the father unable, for the reasonable future, to care appropriately for the children's needs. **Id at 541.**

The Missouri Court of Appeals, Southern District, affirmed a judgment terminating an incarcerated father's parental rights pursuant to Section 211.447.5(6). **In the Interest of Z.L.R., 347 S.W.3d 601 (Mo. App. 2010).** The Southern District emphasized that the father had been incarcerated for a majority of the child's life; father had never had physical contact with the child; the child was closely bonded to her foster parents whom she called "mom" and "dad"; there was not a bond between the child and the father; the child did not know who the father was; and, nurturing a bond, if such a bond could be achieved, would take too long. **Id at 608-609.** The Southern District further stressed that the trial court determined that placement of the child with the father's relatives was not in the child's best interest. **Id. at 610-611.**

The Missouri Court of Appeals, Eastern District, affirmed a judgment terminating the parental rights of an incarcerated father. **In re J.D.P., 406 S.W.3d 81 (Mo. Ct. App. 2013). In J.D.P,** the father argued that the trial court's finding that he was unfit was not supported by substantial evidence and that that the trial court erred in presuming that he was unfit due to his incarceration. Id. at 84.

The Eastern District determined that the father's incarceration was not in and of itself the grounds for terminating father's parental rights. **Id.** The Eastern

District held that absence of a bond between the incarcerated father combined with an inability to determine when such a bond could be established is substantial evidence supporting termination of the father's parental rights under Section 211.447.5(6). **Id at 85.**

The Appellant's incarceration in and of itself shall not be grounds for termination of parental rights. **Section 211.447.7 (6), RSMo.** The Trial Court did not terminate the Appellant's parental rights solely on the grounds that the Appellant is incarcerated (L.F. 110).

Ms. Ellsworth testified that the child does not have any emotional ties to the Appellant (TR. II 27, 31). Since the child came into alternative care, there have not been any in-person visits between the child and the Appellant (TR. II 27). The Appellant has never met the child (TR. II 30). Ms. Ellsworth did not know of any services which could be provided that might create a bond between the child and the Appellant (TR. II 28-29, 31). Ms. Ellsworth testified that the child views his foster parents as his mother and father and addresses them as mom and dad (TR. II 36).

Based upon the foregoing, Respondent submits respectfully that Section 211.447.5 (6) (a), RSMo. is not unconstitutionally vague and that the Trial Court did not err in finding the Appellant to be an unfit parent pursuant to the statute.

ARGUMENT 3

THE TRIAL COURT DID NOT ERR IN TERMINATING THE APPELLANT'S PARENTAL RIGHTS AS BEING AGAINST THE WEIGHT OF THE EVIDENCE PURSUANT TO SECTION 211.447.5(6) (a), RSMo. BECAUSE THE TRIAL COURT FOUND UNDER THE TOTALITY OF THE CIRCUMSTANCES PURSUANT TO 211.447.7 RSMo. THAT PLACEMENT OF THE CHILD WITH A RELATIVE WAS CONTRARY TO THE BEST INTERESTS OF THE CHILD.

An appellate court will affirm a trial court's judgment terminating parental rights, unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the trial court erroneously declares or applies the law. **In re Q.A.H., 426 S.W3d 7, 12 (Mo. banc 2014).** Appellate Courts view the evidence "in light most favorable to the trial court's judgment." **Id.**

When the trial court determined that termination of parental rights was in the child's best interest, appellate courts review for an abuse of discretion. **In re C.A.M., 282 S.W.3d 398, 405 (Mo. App. S.D. 2009).** The question is whether the child's best interest cannot be served by remaining with the natural parent. **Id.**

Appellant argues that the Trial Court's judgment terminating Appellant's parental rights pursuant to Section 211.447.5 (6) (a) is against the weight of the

evidence, because the Appellant suggested a relative with whom the child could be placed, and therefore, the Appellant is not unfit. Respondent contends respectfully that **In the Interest of Z.L.R.,** the Court of Appeals categorized placement of the child with a family member as being a circumstance under Section 211.447.7, which outlines the factors the trial courts utilize to determine best interests of the child, and not whether denial of placement with a relative makes a parent unfit pursuant to Section 211.447.5(6) (a).

In **Z.L.R.,** the Court of Appeals, Southern District, found that the father's arguments focused solely on his own actions and those of his family to have visits and obtain custody of the child as evidence that termination of his parental rights was not in the child's best interests. **In the Interest of Z.L.R., 347 S.W.3d 601, 610-611 (Mo. App. 2011).** The Court observed that nowhere in the father's appeal did the father discuss the potential impact of termination on the child or the impact his incarceration and resulting separation from the child has had on the child. **Id. at 610.** The **Z.L.R.** court stressed that the best interest of the child, as opposed to the best interest of the father, is what the trial court was charged with determining and what the Appellate Court must review. **Id.**

Based on the foregoing, Respondent submits respectfully that the Trial Court did not find Appellant unfit due to the child not being placed with a relative, but considered this circumstance as a factor in determining the child's best interests.

ARGUMENT 4

THE TRIAL COURT DID NOT ERR IN TERMINATING THE APPELLANT'S PARENTAL RIGHTS, BECAUSE THE JUVENILE OFFICE PRESENTED CLEAR, COGENT, AND CONVINCING EVIDENCE THAT APPELLANT NEGLECTED THE MINOR CHILD PURSUANT TO SECTION 211.447.5(2) RSMO., AND THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Respondent fully incorporates the standard of review and argument under Argument 2 as if fully set forth herein under Argument 4.

Section 211.447.5(2) (a)-(d), RSMo., requires the trial court to consider evidence and make findings on four conditions: a) mental condition; b) chemical dependency; c) severe or recurrent acts of abuse; and, d) repeated or continuous failure by the parents, although physically or financially able, to provide the child with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for the child's physical, mental, or emotional health and development. The Trial Court made findings as to all four factors (L.F. 103-105).

The Trial Court found that the Appellant has a significant history of having a chemical dependency to alcohol and controlled substances and Appellant is incarcerated due in part to a DWI, chronic offender, conviction (L.F. 103-104; Juvenile Office Exhibits "6", "7", "8", "9", "10", and "11", TR. II, 16).

Ms. Ellsworth testified that the Appellant had not provided written confirmation that he was addressing his substance abuse issues successfully (TR. II 29). The Appellant testified at the trial of this matter (TR. II, 49-53).

The Trial Court was free to believe or disbelieve the Appellant's testimony as to his ability or desire to become alcohol and drug free. **In the Interest of M.L.R., et al, 249 S.W.3d 864, 869 (Mo. App. W.D. 2008).** The Trial Court must examine the Appellant's conduct prior to and after the petition to terminate parental rights is filed. **Id. at 868.**

On July 2, 2015, the Juvenile Office filed its First Amended Petition to Terminate Parental Rights (L.F. 78). Prior to the filing of the First Amended Petition, the Appellant had completed one program and after the filing First Amended Petition, the Appellant anticipated completing another program in January 2016 (TR. II, 26). Ms. Ellsworth further testified that she had not discussed with the Appellant his housing history or work history before he was incarcerated (TR. II, 31). Ms. Ellsworth did not know if the Appellant could provide for the child's needs if the Appellant were not incarcerated (TR. II. 47).

Based upon the foregoing, Respondent prays the Court to affirm the judgment terminating Appellant's parental rights, because Appellant did not address his chemical dependency successfully; and, the Appellant is unable to provide stable, appropriate housing for the child.

ARGUMENT 5

THE TRIAL COURT DID NOT ERR IN TERMINATING THE APPELLANT'S PARENTAL RIGHTS PURSUANT TO SECTION 211.447.5(2) RSMO AS BEING AGAINST THE WEIGHT OF THE EVIDENCE, BECAUSE THE TRIAL COURT FOUND PREVIOUSLY THAT PLACEMENT OF THE CHILD WITH THE RELATIVE WAS CONTRARY TO THE BEST INTERESTS OF THE CHILD.

Respondent incorporates by reference the standard of review and argument in Argument 2 and Argument 4 as if fully set forth in Argument 5.

A claim that a judgment is against the weight of the evidence presupposes that there is sufficient evidence to support the judgment. **Pearson v. Koster, 367 S.W.3d at 51.** An against –the- weight- of the evidence argument challenges the probative value of that evidence to induce a belief in a particular proposition when viewed within the context of the entirety of the evidence before the Trial Court. **Flora v. Flora, 426 S.W.3d 730, 738 (Mo. App. S.D. 2014).**

When an against the weight of the evidence argument is made, the Appellate Court must defer to the Trial Court's determination of credibility and the Appellate Court will reverse the judgment only in rare cases, when the Appellate Court firmly believes the Trial Court's judgment is wrong. **Mitchell v. Mitchell, 348 S.W.3d 816, 818 (Mo. App. 2011).** Appellate courts act cautiously in exercising

the power to set aside a judgment on the ground that the judgment is against the weight of the evidence. **JAS Apartments, Inc. v. Naji, 354 S.W.3d 175, 182 (Mo. banc 2011).**

The Appellant failed take the necessary four-step process to make a viable against the weight of the evidence argument. To do so he would need to:

> "(1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
>
> (2) identify all of the favorable evidence in the record supporting the existence of that proposition;
>
> (3) identify the evidence in the record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and,
>
> (4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition." **Houston V. Crider, 317 S.W.3d 178, 187 (Mo. App. 2010).**

Section **211.447.5(2)(a)-(d) RSMo**., as amended to date, requires the court to consider evidence and make findings on four conditions: a) mental condition; b) chemical dependency; c) severe or recurrent acts of abuse; and d) repeated or

continuous failure by the parents, although physically or financially able, to provide the child with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for the child's physical, mental, or emotional health and development. The Trial Court made findings as to all four factors (L.F. 103-105). The Trial Court further found that the Appellant does not have a period of sobriety long enough to convince the court that the child would be safe if placed in the Appellant's care (L.F. 103). The Trial Court found previously that placing the child with the Appellant's relative was contrary to the best interests of the child (L.F. 47-53).

Based on the foregoing, Respondent prays the Court to affirm the Trial Court's judgment terminating Appellant's parental rights.

ARGUMENT 6

THE TRIAL COURT DID NOT ERR IN TERMINATING THE APPELLANT'S PARENTAL RIGHTS PURSUANT TO SECTION 211.447.5(3) RSMO, BECAUSE THE JUVENILE OFFICE ESTABLISHED BY CLEAR, COGENT, AND CONVINCING EVIDENCE THAT THE CHILD HAS BEEN UNDER THE COURT'S JURISDICTION FOR MORE THAN ONE YEAR AND APPELLANT HAD FAILED TO RECTIFY THE CONDITIONS WHICH LED TO THE CHILD'S PLACEMENT IN CARE; AND, THAT CONDITIONS OF A POTENTIALLY HARMFUL NATURE ESISTED SUCH THAT THE CHILD COULD NOT BE RETURNED TO APPELLANT IN THE NEAR FUTURE; AND, THE CONTINUATION OF THE PARENT-CHILD RELATIONSHIP GREATLY DIMINISHES THE CHILD'S PROSPECTS FOR EARLY INTEGRATION INTO A PERMANENT AND STABLE HOME.

Respondent fully incorporates the standard of review and argument under Argument 2 as if fully set forth herein under Argument 6.

Respondent acknowledges that the parental rights of a parent cannot be terminated simply by the parent failing to complete each and every item of a treatment plan. The issue is whether the parent made substantial progress on the goals of his treatment plan. **In Re S.J.H., 124 S.W.3d 63 (Mo. App. 2004) and In**

Re S.M.H., 106 S.W.3d 355 (Mo. banc 2004). A parent's partial compliance with a treatment plan does not prevent the trial court from terminating the parent's parental rights. **In re Q.D.D., 144 S.W. 3d 856, 861 (Mo. App. 2004).**

In making its findings on the ground of failure to rectify, the Trial Court made all of the required findings mandated by **211.447.5(3)(a)-(d) RSMo**., as amended to date (LF. 105-107).

The Court entered a Treatment Plan for an incarcerated parent for the Appellant (Juvenile Office Exhibit "13", TR. II 16). The Appellant did not provide written confirmation to the case manager that he was addressing his substance abuse issues successfully (TR. II 29). The Appellant had completed Pathways to Change in February 2015 and was anticipated completing Inside Out Dads in January 2016 (TR II 26). The Appellant had completed two programs in over two years of incarceration.

At the time of trial, Ms. Ellsworth testified that she had not discussed with the Appellant his plans for employment or housing after his release from the Department of Corrections (TR. II 30). Ms. Ellsworth did not know if the Appellant could provide for the needs of the child if the Appellant were not incarcerated (TR. II 47).

Ms. Ellsworth further testified that she could not think of any additional services that could be offered to the Appellant whereby he could change his

circumstance to a point of having the child returned to him within an ascertainable period of time (TR. II 28). Ms. Ellsworth did not know any services which could be provided that might create a bond between the child and the Appellant (TR. II 28-29, 31).

Ms. Ellsworth testified that it would be in the best interest of the child to terminate Appellant's parental rights (TR. II 45-46). Ms. Ellsworth based her recommendation on the following: the child does not have a bond with the father; the Appellant will not be able to provide shelter for the child for three years; and, the child deserves permanency (TR. II 46).

Courts have consistently held that a parent must demonstrate a commitment to change the course of their conduct **In Re S.A.J., 818 S.W.2d 690, 702 (Mo. App. 1991)**. Parents must make a commitment to change the course of their conduct which prevents the return of the child. **In the Interest of T.S., 797 S.W.2d 834, 843 (Mo. App. 1990).**

Appellant wants his mother to adopt the child for him (TR. II, 51). The Respondent contends that Appellant's desire for the adoption of the child does not demonstrate that he wants to change his course of conduct. Respondent further contends that Appellant's desire for his mother to adopt the child demonstrates the Appellant's inability to place the child's needs ahead of his own wants. **In Re K.M.W., 342 S.W.3d 353, 362-363 (Mo. Ct. App. 2011).**

Every child is entitled to a permanent and stable home. **In re Z.L.R., 347 S.W. 3d at 608 citing In re K.A.W., 133 S.W.3d 1, 9 (Mo. banc 2004).** A permanent and stable home is of paramount importance, because it is underscored in Section 211.447.5 (3) as to how long a parent has to create such a home for his children; specifically, one year. **In re Z.L.R., S.W.3d at 608.**

The Appellant's volitional, extensive criminal behavior prevented the Appellant from providing appropriate parenting to the child and has placed the Appellant in a position where he could not take advantage of treatment recommendations to assist him in parenting the child. **See In Re A.P.S., 90 S.W.3d 232, 234 (Mo. App. S.D. 2002).** The Appellant was not in a better position at the time of trial to parent the child than he was when the child came into alternative care. **In RE K.M.W., 342 S.W.3d at 363.**

Respondent submits that at the time of trial, the child had been care for over one and one-half years. The child can no longer wait for permanency and integration into a stable and permanent home to occur.

ARGUMENT 7

THE TRIAL COURT DID NOT ERR IN TERMINATING APPELLANT'S PARENTAL RIGHTS PURSUANT TO SECTION 211.447.5(3), BECAUSE THE JUDGMENT IS NOT AGAINST THE WEIGHT OF THE EVIDENCE, IN THAT THE TRIAL COURT FOUND PREVIOUSLY THAT PLACEMENT OF THE CHILD WITH THE RELATIVE WAS CONTRARY TO THE CHILD'S BEST INTERESTS

Respondent incorporates by reference herein as if fully set forth the standard of review and Argument 2 and Argument 6 in this Argument 7.

A claim that a judgment is against the weight of the evidence presupposes that there is sufficient evidence to support the judgment. **Pearson v. Koster, 367 S.W.3d at 51.** An against –the- weight- of the evidence argument challenges the probative value of that evidence to induce a belief in a particular proposition when viewed within the context of the entirety of the evidence before the Trial Court. **Flora v. Flora, 426 S.W.3d 730, 738 (Mo. App. S.D. 2014).**

When an against the weight of the evidence argument is made, the Appellate Court must defer to the Trial Court's determination of credibility and the Appellate Court will reverse the judgment only in rare cases, when the Appellate Court firmly believes the Trial Court's judgment is wrong. **Mitchell v. Mitchell, 348 S.W.3d 816, 818 (Mo. App. 2011).** Appellate courts act cautiously in exercising

the power to set aside a judgment on the ground that the judgment is against the weight of the evidence. **JAS Apartments, Inc. v. Naji, 354 S.W.3d 175, 182 (Mo. banc 2011).**

The Appellant failed to take the necessary four-step process to make a viable against the weight of the evidence argument. To do so he would need to:

> "(1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
>
> (2) identify all of the favorable evidence in the record supporting the existence of that proposition;
>
> (3) identify the evidence in the record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and,
>
> (4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from that evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce belief in that proposition." **Houston V. Crider, 317 S.W.3d 178, 187 (Mo. App. 2010).**

Section **211.447.5(3)(a)-(d) RSMo**., as amended to date, requires the court to consider evidence and make findings on four factors: a) a treatment plan ; b) the success or failure of efforts to help the parent provide a proper home for the child;

c) mental condition; and d) chemical dependency. The Trial Court made extensive findings on all four factors (L.F. 106-107).

Based upon the foregoing, Respondent contends that the Appellant failed to rectify the conditions which the led to the child coming into alternative care and the child, who has been in care for over one year and one-half, needs permanency.

ARGUMENT 8

THE TRIAL COURT DID NOT ERR IN TERMINATING APPELLANT'S PARENTAL RIGHTS, BECAUSE THE JUVENILE OFFICE PRESENTED CLEAR, COGENT, AND CONVINCING EVIDENCE OF LIKELY FUTURE HARM TO THE CHILD AND THE TRIAL COURT ADDRESSES THE LIKELIHOOD OF FUTURE HARM TO THE CHILD IF APPELLANT'S PARENTAL RIGHTS ARE NOT TERMINATED.

Respondent incorporates by reference as if fully set forth the standard of review and argument in Argument 2, Argument 5, and Argument 7 in this Argument 8.

As set forth previously, the Trial Court found that the child would not be safe if the child were to be placed with the Appellant, because the Trial Court was not convinced that the Appellant had achieved a long enough period of sobriety (L.F. 103). The Court further found that the father is not able to provide a proper and stable home for the child (L.F. 107). **See In Re K.A.W., 133 S.W.3d 1 (Mo. banc 2004).**

ARGUMENT 9

THE TRIAL COURT DID NOT DEPRIVE THE APPELLANT OF CONSTITUTIONAL RIGHTS BY DENYING APPELLANT'S APPLICATION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM, BECAUSE THE RECORD DOES NOT REFLECT THAT APPELLANT PROVIDED NOTICE OF THE APPLICATION TO THE DEPARTMENT OF CORRECTIONS; AND, THE APPELLANT HAD MEANINGFUL ACCESS TO THE COURTS.

Section 491.230.2(1), RSMo, provides in pertinent part that no person detained at a correctional facility of the department of corrections shall appear and attend or be caused to appear and attend any civil proceeding, except when the offender is a respondent in a Chapter 211 proceeding to terminate parental rights.

This section further provides that a trial judge may only issue a writ of habeas corpus ad testificandum to an offender after the department of corrections has been notified and allowed fifteen days to file a written objection to the application and be granted an opportunity to appear and make an oral presentation in opposition to the offender's appearance at the trial. **In the Interest of C.M.D. and S.D., 18 S.W.3d 556, 557 (Mo. App. 2000).**

A prisoner is not entitled to perfect access to the courts; an incarcerated person is entitled to meaningful access to the courts. **Call v. Heard, 923 S.W.2d**

840, 846 (Mo. banc. 1996). A prisoner's right of access to the courts does not include a right to personally appear at a civil trial. **Id.** Trial judges should make reasonable and practical efforts to accommodate the needs of prisoners for alternatives to live testimony. **Id.** The right of access is satisfied by the presence of sufficient alternatives to a personal appearance, especially when the prisoner makes a timely request. **Id at 847; In re Maf ex Rel. Brandon, 232 S.W.3d 640, 642 (Mo. App. 2007).**

After examining a number of other jurisdictions' cases, the Indiana Supreme Court held that an incarcerated parent does not have an absolute right to be physically present in a termination of parental rights hearing. **In re C.G., 954 N.E.2d 910, 921 (Ind. 2011).** The Indiana Supreme Court affirmed the trial court's judgment terminating parental rights where the incarcerated mother was permitted to participate in the hearing by telephone, the courtroom was cleared to allow the mother to talk with her attorney, and the trial was bifurcated to allow mother an opportunity to consult with her attorney regarding testimony. **Id.**

The Indiana Supreme Court held that whether to permit an incarcerated parent to be present physically at a termination of parental rights hearing is left to the sound discretion of the trial judge. **Id. at 922.** Among the eleven factors the trial court must consider in determining whether to permit an incarcerated parent to attend a termination of parental rights hearing include the cost of transporting the

incarcerated parent to the hearing. **Id at 922-923 citing State of West Virginia ex rel Jeanette H., 529 S.E.2d at 877 (W.VA. 2000).**

The Appellant cites **In re S.M., 12 Kan. App. 2d 255 (Kan. Ct. App. 1987)** to support his position that the Trial Court violated his rights of due process. Respondent suggests respectfully that **In re S.M.** is not on point, because the court denied the incarcerated parent the opportunity to participate in any manner in the hearing, and therefore, he could not present any of his testimony in defense of the allegations and assist his counsel at trial. **In re S.M. at 257.**

In the instant case, the record does not reflect whether the Appellant gave notice of his Application for Writ in July 2015 or notice of his Application for Writ in November 2015 to the department of corrections (L.F. 61, 63, 91) as required by Section 291.430.1 (2), RSMo.

On July 15, 2015, the Appellant filed his first Application for Writ (L.F. 61). On or about July 17, 2015, the Trial Court issued the Writ (L.F. 61). On November 13, 2015, the Appellant filed his second Application for Writ (L.F. 63). On November 25, 2015, the Trial Court issued a writ directing the department of corrections to make the Appellant available for trial by video conference (L.F. 63).

Absent Appellant providing the requisite notice to the Department of Corrections, the Trial Court could not grant the application and issue the writ requiring the Department of Corrections to transport the Appellant to the hearing.

It is suggested respectfully that the Appellant did not comply with the notice requirements of Section 291.430.1(2), and therefore, the Appellant cannot argue successfully that the Trial Court denied the Appellant due process.

The Trial Court permitted the Appellant to participate in the hearing by Polycom (TR. II., 2, 9). The Trial Court cleared the courtroom and gave the Appellant opportunities to speak with his attorney before and during the hearing (TR. II. 9, 40, 47-48). The Appellant gave testimony at the hearing (TR. II. 49-53).

Based upon the foregoing, the Respondent suggests respectfully that the Trial Court did not deprive the Appellant of due process. The Trial Court made reasonable and practical efforts to accommodate the needs of the Appellant to participate in the trial via video conference as an alternative to Appellant appearing physically in the courtroom for the trial.

ARGUMENT 10

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S WRITTEN MOTION FOR CONTINUANCE, BECAUSE THE TRIAL COURT'S ORDER DENYING RELATIVE PLACEMENT PURSUANT TO 210.565 RSMO IS NOT AN APPEALABLE ORDER.

The standard of review of a motion for continuance is abuse of discretion. **In the Interest of J.R., D.R., W.R., and K.R., 347 S.W.3d 641, 645 (Mo. Ct. App. 2011 citing In re R.M.K., 330 S.W.3d 602, 604 (Mo. App. E.D. 2011).** The denial of a motion for continuance rarely constitutes reversible error. **Id citing In re P.D., 144 S.W. 907, 911 (Mo. App. E.D. 2004).** An abuse of discretion occurs when the trial court enters an order which is clearly against the logic of the circumstances and is arbitrary or unreasonable as to shock the sense of justice. **Id.**

Appellant requested a continuance of the trial of this action in order to give the Appellant an opportunity to appeal the Trial Court's order denying relative placement of the child pursuant to Section 210.565 RSMo. (TR. II, 3-4). The Trial Court denied Appellant's motion for continuance. (TR. II, 4).

In **A.N.L. v. Maries County Juvenile Office, 484 S.W.3d 328, 330 (Mo. Ct. App. 2016),** the Court of Appeals, Southern District, dismissed a grandfather's appeal of an order denying him relative placement pursuant to Section 210.565

RSMo. The Southern District held that there is not a statute which authorizes an appeal from an order denying a Section 210.565 relative placement motion. The Southern District further determined that the trial court's ruling on the grandfather's Section 210.565 motion did not dispose of all parties and issues in the child's juvenile proceeding. **Id at 332.**

In **A.N.L.,** the Court of Appeals viewed an order denying relative placement as most analogous to an order denying placement of a child in a permanency hearing pursuant to Section 210.720, because there is not a statutory basis upon which to appeal a permanency hearing order. **Id. citing In re T.G.O., 360 S.W.3d 355, 356 (Mo. App. 2012).**

Based upon the foregoing, Respondent contends respectfully that the Trial Court did not abuse its discretion in denying Appellant's motion for continuance, because the order which the Appellant wished to appeal is not an appealable order.

ARGUMENT 11

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S REQUEST FOR A CHANGE OF JUDGE, BECAUSE THE RECORD REFLECTS THAT A REASONABLE PERSON WOULD NOT FIND THE JUDICIAL OFFICER TO BE PREJUDICIAL OR IMPARTIAL; AND RULINGS AGAINST A PARTY ARE NOT SUFFICIENT TO SHOW BIAS OR PREJUDICE.

The Appellate Courts review a denial for a change of judge for an abuse of discretion. **Williams v. Reed, 6 S.W.2d 916, 920 (Mo. App. W.D. 1999).** The test for abuse of discretion is whether, given the objective facts of the record, a reasonable and disinterested person, unacquainted with the integrity, personality, and dedication of the judge, would find an appearance of impropriety. **State ex rel. McCullough v. Drumm, 984 S.W.2d 555, 557 (Mo. App. E.D. 1999).**

A disqualifying prejudice and bias is one which has an extrajudicial source and results in an opinion on the merits on some basis other than what the judge learned from his participation in the case. **State v. Nunley, 923 S.W.2d 911, 919 (Mo. banc 1996) citing State v. Hunter, 40 S.W.2d 850, 866 (Mo. banc 1992).** Rulings against a party do not establish bias or prejudice on the part of the judge. **Grissom v. Grissom, 886 S.W.2d 47, 56 (Mo. Ct. App. 1994) citing In re Marriage of Maupin, 829 S.W.2d 125, 127 (Mo. App. 1992).**

The Appellant requested a change of judge after the Trial Court denied the Appellant's motion for relative placement of the child. Respondent argues that this ruling against the Appellant is not sufficient to demonstrate bias or prejudice on the part of the Trial Judge.

Respondent submits that the Appellant does not refer to one extrajudicial source upon which the Trial Court based its judgment terminating parental rights. In addition, Respondent submits that given the objective facts of the record, a reasonable and disinterested person would not find even the appearance of an impropriety.

Based on the foregoing, Respondent prays the Court to affirm the judgment terminating Appellant's parental rights.

ARGUMENT 12

THE TRIAL COURT DID NOT ERR IN TERMINATING THE PARENTAL RIGHTS OF THE APPELLANT, BECAUSE THE JUVENILE OFFICE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THAT TERMINATION OF APPELLANT'S PARENTAL RIGHTS WAS IN THE BEST INTERESTS OF THE CHILD.

An Appellate Court will affirm a trial court's judgment terminating parental rights, unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or the trial court erroneously declares or applies the law. **In re Q.A.H., 426 W.W.3d 7, 12 (Mo. banc 2014).** Appellate courts view the evidence "in light most favorable to the trial court's judgment." **Id.**

The standard of review for best interests of the child is a preponderance of the evidence. **In re B.H., 348 S.W.3d 770, 776 (Mo. 2011).** The best interest standard of review is not a constitutional protection for the parent. **Id.** Trial Courts determine and Appellate Courts review what is in the best interests of a child as opposed to what is in the best interest of a parent. **In re Z.L.R., 347 S.W.3d at 610.**

The question is whether the child's best interest cannot be served by remaining with the natural parent. **In re C.A.M. 282 S.W.3d 398, 405 (Mo. App.**

2009). Appellate courts will find an abuse of discretion only when a trial court's ruling is so "arbitrary, unreasonable, and against the logic of the circumstances that it shocks the sense of justice and indicates a lack of careful consideration." **In re F.C., 211 S.W. 3d 680, 684 (Mo. App. S.D. 2007); In the Interest of M.T.E.H., 468 S.W.3d 383, 397 (Mo. App. 2015).**

Satisfaction of one of the statutory grounds for termination is sufficient to terminate parental rights if termination is in the child's best interest. **In Re E.L.B., 103 S.W.3d 774, 776 (Mo. 2003).** The determination of what is in a child's best interest is an ultimate conclusion for the trial court based upon the totality of the circumstances. **In Re D.L.W., 133 S.W.3d 582, 585 (Mo. App. 2004)**.

The Trial Court made findings on each of the seven factors set out in **Section 211. 447.7:**

(1) The emotional ties to the birth parents;

(2) The extent to which the parent has maintained regular visitation or other contact with the child;

(3) The extent of payment by the parent for the cost of care and maintenance of the child when financially able to do so including the time that the child is in the custody of the division or other child-placing agency;

(4) Whether additional services would be likely to bring about lasting parental adjustment enabling the return of the child to the parent within an ascertainable period of time;

(5) The parent's disinterest in or lack of commitment to the child;

(6) The conviction of the parent of a felony offense that the court finds is of such a nature that the child will be deprived of a stable home for a period of years;

(7) Deliberate acts of the parent or acts of another of which the parent knew or should have known that subjects the child to a substantial risk of physical or mental harm.

The trial court determined it was in the best interest of children for Appellant's paternal rights to be terminated. (L.F. 108-110).

"Determining a child's best interest is a subjective assessment based on the totality of the circumstances. **In Re C.A.M., 282 S.W.3d at 409 (Mo. App. 2009).** It is within the trial court's discretion to determine which of the seven factors are relevant. **In Re A.S., 38 S.W.3d 478, 487 (Mo. App. 2001**). There is not a requirement that seven of these factors must negated before termination of a parent's parental rights can be ordered and there is not a minimum number of factors necessary for termination to occur. **In re J.M.T., 386 S.W.3d 152, 162-163 (Mo. App. S.D. 2012) citing C.A.M., 282 S.W.3d at 409.**

In this case, at the time of trial the child had been in care for approximately nineteen months. Every child is entitled to a stable and permanent home. **In re Z.L.R., 347 S.W.3d 601, 608 (Mo. App. 2011).**

A lack of bonding to a parent is substantial evidence supporting that termination is in the child's best interest. **In Re C.A.M. 282 S.W.3d at 408.** Ms. Ellsworth testified that the child does not have any emotional ties to the Appellant; and, that since the child came into alternative care, there have not been in-person visits between the child and the Appellant (TR. II 27, 31). Ms. Ellsworth could not know of any services which could be provided that might create a bond between the child and the Appellant (TR. 28-29, 31).

As discussed previously, the evidence established that placing the child with Appellant's relatives would not serve the best interest of the child. The record reflects that the Trial Court did not consider improperly the Appellant's incarceration.

Respondent would respectfully contend, that the evidence, when taken in its entirety, clearly indicates that termination of Appellant's parental rights was in the best interests of the minor child.

CONCLUSION

For the reasons stated above, Respondent respectfully prays this Court to affirm the judgment of the Juvenile Court of Greene County, Missouri, and for such other and further relief as the Court seems just and proper in the premises.

Respectfully submitted,

/s/ Paul Shackelford

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CERTIFICATE OF SERVICE

Comes Now, Paul Shackelford, attorney for the Respondent, Greene County Juvenile Office, and hereby certifies that the Respondent's Brief in response to Appellant's Brief filed by M.R.S. in the within cause was filed electronically with the Clerk of the Court by using the Missouri Courts e-Filing System, which will send notice of filing to the following named persons at the addresses shown, all on the 11th day of October, 2016.

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_____
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CERTIFICATE OF COMPLIANCE

The undersigned does, pursuant to Missouri Supreme Court Rule 84.06 (c) hereby certify as follows:

1. Said Brief is signed by Respondent's attorney, and does not require the signature of Respondent.
2. Said Brief complies with the limitations contained in Rule 84.06 (b); and
3. Said Brief contains 12,099 words.

/s/ Paul Shackelford

_____

Paul Shackelford