No. SC91584

IN THE
SUPREME COURT OF MISSOURI

IN THE INTEREST OF: B.T.H.,
a minor.

MARY A. MARQUEZ, Juvenile Officer

Respondent
v.

M.H. (Natural Mother),

Appellant.

APPEAL FROM THE SIXTEENTH JUDICIAL CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
FAMILY COURT DIVISION
THE HONORABLE MARCO A. ROLDAN

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under Article V Section 3 of the Missouri Constitution as to Appellant's Point 1 since that Point involves the validity of a statute of this State. However, Points 2 and 3 do not arise under the exclusive appellate jurisdiction of this Court this Court may choose to transfer this case to the Court of Appeals for the Western District after resolution of Point 1. In the Interest of M.D.R., 124 S.W.3d 469, at 477 (Mo. 2004)

STATEMENT OF FACTS

Respondent submits these facts to supplement those provided by Appellant. As used herein, LF refers to the Legal File, SLF refers to the Supplemental Legal File, TR refers to the transcript and EX refers to exhibits.

A petition was filed for B.H. in the Jackson County Family Court on February 18, 2009. (SLF 1-2) The Appellant stipulated to the following allegations contained in the petition on April 13, 2009. (SLF 10-12) The petition stated that:

1. The child is without proper custody, support or care necessary for his well being and is subject to the jurisdiction of this Court pursuant to Section 211.031.1 RSMo., in that his mother neglects him.

2. Between the date of the child's birth and February 10, 2009 or thereabouts the child resided in the family home with his mother. During that time, the child was in the legal custody of his mother.

3. On or about February 10, 2009, the child's mother was arrested and incarcerated as a result of having solicited for prostitution via an ad on "Craig's List."

4. Further on or about February 10, 2009 the child's mother admitted to police officials that she regularly prostituted herself in the family home and that she locked the child in his bedroom while clients were present.

5. In addition the child's mother is a registered sex offender and was incarcerated from November 1998 until June of 2004 for two counts of statutory rape and one count of statutory sodomy.

6. The actions of the child's mother constitute a pattern of specific conditions directly and negatively impacting ht mother's ability to care for and parent the child, placing the child at risk of further harm or neglect absent the intervention of this court. (SLF 1-2)

The Court sustained the petition. (SLF 12). On April 28, 2009, the child remained placed in the custody of the Children's Division, where the child has been placed continuously since that date.

The case was reviewed on October 19, 2009 and the court ordered that the Appellant shall enjoy visitation as therapeutically supervised. (SLF 15) On November 3, 2009, the case was reviewed and the child remained in the custody of the Children's Division for appropriate placement to allow residential placement or foster care. The Appellant visitation was ordered to continue to be therapeutically supervised and to occur on a weekly basis for as much time as practical. Family therapy was authorized, if deemed appropriate. The Appellant was ordered to submit to a psychiatric evaluation and she was ordered to continue individual therapy at Samuel Rogers. (SLF 18) . On January 25, 2010, a case review was held and individual therapy was ordered for her. The child remained in the Children Division's care and custody. (SLF 21)

The case came on for a permanency hearing on June 3, 2010 and, after hearing on the matter, the visitation between the Appellant and child was suspended unless therapeutically supervised. The Children's Division was ordered to obtain an IEP for the child. The Appellant was ordered to continue in counseling and obtain a psychiatric evaluation. The goal for the case was changed to a concurrent goal of termination of

parental rights and adoption. (SLF 25) On June 9, 2010, a Petition for Termination of Parental Rights was filed. (LF 5)

The case was reviewed on September 2, 2010 and the goal remained termination of parental rights and adoption. It was ordered that the Appellant and the father have no visitation with the child unless recommended by the child's therapist. (SLF 27) A trial on the termination of parental rights case was held on December 20, and December 21, 2010. Judgment was entered on January 7, 2011. (LF 12-27) terminating the Appellant 's parental rights. The Court based the judgment of termination of parental rights; specifically on grounds of mental condition 211.447.5(2)(a) RSMo, failure to provide for the emotional and physical needs of the child 211.447.5(2)(d) RSMo, jurisdiction over a year with failure to rectify and harmful conditions and potentially dangerous 211.447.5(3) RSMo., and unfitness. 211.447.5(6) RSMo. (LF 15-20, 22-23) At the trial, substantial evidence was adduced in support of the each of the grounds and the best interests of the child.

A motion to Vacate, Reopen, Correct or Modify Judgment was filed by Appellant's attorney on January 31, 2011. (LF 28) A joint motion of the attorney for the Juvenile Officer and the Guardian ad Litem in response to the motion was filed on February 9, 2011. (LF 39). The court issued an order overruling the Motion to Vacate, Reopen, Correct or Modify on February 15, 2011. January (LF 46). The Appellant filed an appeal. (LF 72).

At the termination hearing, the evidence showed that the mother's parental rights to several other children had been terminated (TR 141) and that none of the children were

raised by her, although some of her adult children have re-established a relationship with her. (TR 165) The court took judicial notice of the mother's extensive involvement with the Children's Division dating back to 1985 and her prior termination cases with her other children. (TR 141) These were:

T.H. JV85-74331 and TR88-000107,

K.J. JV88-00448, TR93-000073,

W.C. JV89 000029 and TR90-000055

R.H. JV89-01434 and TR90-00056,

T.H. JV91-00159 and TR93-00073

H.H. JV92-01886 and TR95-00139

E.F. JV96-01964 and TR97-00014

The court also took judicial notice of this Child's underlying case under Chapter 211.031 RSMo in case number 0916-JU0000221. (TR 141)

The attorney for the Juvenile Officer introduced evidence of the Appellant's criminal conviction in Case No. CR97-03423 for Statutory Rape in the Second Degree, a Class C Felony, Statutory Sodomy in the Second Degree, a Class C Felony, and Statutory Sodomy in the Second Degree, a Class C Felony.(EX 19) The Appellant pleaded guilty to these crimes on November 24, 1998. The victim in these crimes was a juvenile who was 14 years old. (EX 19) The Appellant did not demonstrate remorse about having sex with the 14 year old child, justifying that action, because he had paid her. (TR34) (EX 6 p.3) The Appellant is on the sexual offender registry due to these crimes (EX 6).

In the parental assessment evaluation conducted by Cheryl Mann, the Appellant indicated that she had been arrested for prostitution 54 times. (TR 54) The Appellant was most recently charged with prostitution in 2009. (TR 139, EX 18) At the time of the termination trial, the Appellant had informed Roxie Lloyd, the counselor with Veronica's Voice, that she no longer engages in prostitution to pay her bills. (TR 47)

The Appellant indicated she had been a substance abuser for many years dating back to when she was thirteen years old. (TR 72) The Appellant was convicted of possession of marijuana and possession of drug paraphernalia in March 2005. (EX 16, 17) The mother admitted to Cheryl Mann that she lost her seven other children because she was on crack cocaine and couldn't take care of them. (TR 71) The Children's Division social worker testified that illegal drug usage was the primary reason for her loss of parental rights with four of her previous children (TR 129) . The worker testified that there was no evidence of current drug use by the Appellant. (TR 129) The Court did not find that the Appellant currently suffered from a chemical dependency. (LF 15, 20) The worker testified that many services had been provided to Appellant for many years since the 1980's but she had not learned from those services and had not been able to apply them appropriately to parenting a child with significant needs. (TR 127).

At trial, the Respondent introduced evidence to support the trial court's finding on mental condition. Mary Richardson, Ph.D., a psychologist conducted a psychological evaluation on Appellant and diagnosed her with mild mental retardation and antisocial personality disorder. She diagnosed Appellant as having post traumatic stress disorder, a prior history of poly-substance dependence and possible symptoms of bipolar or

cyclothymic disease. (TR 25) (EX 6) Mary Richardson also found that Appellant had moderate to severe problems with functioning on Axis V (TR 26). M.H's test results placed her with a Wechsler Adult Intelligence Scale full scale score of 69. (EX 6 p.5) Her scores showed she was functioning in the mildly retarded range of general intelligence and is on SSI. (EX 6 p.5). Her reading was on a second grade level and the psychology report stated that, "People with her scores are usually not able to parent independently [Appellant] herself may need a legal guardian, but would probably detest the idea."(EX 4 p.4)

Evidence was adduced regarding the Appellant's struggle with anger control problems. Appellant left several threatening phone messages for the social worker and had anger control problems. (Ex 5) Andrea Hathaway stated the mother had threatened her by saying that she would, "…come find me, bash my head in, fuck me up and kill me." (TR 116)(EX 5p.2). The social worker testified that Appellant spoke a lot about prophecies and that the prophecies were telling that the social worker was a horrible person. (TR 116) (Ex 5 p.2)

Evidence showed Appellant also had anger problems with persons outside of court. M.H. would tell stories to the child B.H. when Andrea Hatheway was present indicating that she had engaged in fistfights and had knocked down people's doors. (TR 130) Appellant was discharged from group therapy with Veronica's Voice due to an altercation with another client. (TR 46).

The child was initially committed to the custody of the Children's Division for placement in an appropriate licensed placement. (SLF 4) The child has remained out of

the mother's custody and in alternative care since his removal from her home in February 2009. (SLF 4-5). Although encouraged to obtain psychiatric treatment and ordered to obtain a psychiatric evaluation, Appellant failed to obtain psychiatric treatment (EX6 p6) (SLF 18, 25) (TR 91, 117)

The child had visits with Appellant for several months. Erica Enderle, social worker supervised many of the visits from July 2009 until October 2009. (TR 83) She testified that at many of the visits the child would refuse to get into the car. There were times when he was happy, but there were others when he would urinate or defecate on himself (TR 85) He had a lot of issues before and after and during visits when he would kick, scream, and hit Appellant. (TR 88)

Ms. Enderle indicated some of the visits were at the Appellant's home. The Appellant was unable to control the child's behavior and would not consistently implement the suggestions to control his behavior. (TR 87) Erica Enderle also testified that she saw some disturbing slides in a DVD picture slide show at the Appellant's home of pictures of the child in handcuffs. (TR 87) She stated she never recommended unsupervised visits with Appellant. (TR 88)

Cheryl Mann conducted a parenting evaluation of Appellant in September, 2009. During the visit between the child and Appellant, B.H., immediately crawled under a chair when he saw Appellant, and refused to come into the room. The worker had to pick the child up and physically carry him into the room with Appellant. (TR 73) He flailed about and repeatedly said he did not want to go into the room with Appellant. (TR 73) Cheryl Mann testified that this was an atypical reaction of a child to his parent in that he

seemed to try to get away from her and didn't want to interact with her. (TR 74) Cheryl Mann indicated there were several areas of concern based on her evaluation, Mainly, the mother's level of depression, her criminal history, her substance abuse history and the fact she had not parented her seven older children. (TR 78, 77). She noted the mother showed strengths on three constructs of the AAPI scale, the parent attachment, life stress scale and self esteem scale. (TR 77)

Kelly Spencer, a therapist, stated that when B.H. had visitation with Appellant, he experienced a difficult time getting to the visit and leaving the visits. (TR 36). B.H, would often defecate on himself, he would tantrum and scream and cry and it took several persons to get him to the visits. (36-37) He got his hand stuck in the worker's car door trying to open the door en route to a visit. (TR 36) The Appellant did not have consistent interaction with the child. (TR 37) Sometimes things would go smoothly and other times not.(TR 37) The transition to the visits were very difficult. (TR 37) The therapist recommended that visits with Appellant cease due to the child's behaviors and the threat of violence made by the Appellant against the worker. (TR 39)

Aileen Utley, a psychologist, performed an evaluation on the child on December 30, 2009 ad January 9, 2010. Her evaluation stated that Brandon displays high anxiety, fear and impulsiveness that pose risks to his safely (EX 7 p2) Brandon tested with a full scale IQ of 80 that was in the low average range of functioning . (EX 7 p8) Brandon had a lack of exposure to educational stimuli and his reading, spelling and arithmetic skills were delayed one to years. Dr. Utley found that Brandon's delays are a consequence of his history of neglect. (EX 7 p.6)

Her evaluation also found that B.H. showed evidence of an extremely high level of chronic anxiety with hyper-vigilance and episodic fear for his safety. (EX 7 p.6) B.H.'s focus on food, pica, and reluctance to relinquish anything in his possession was also result of his anxiety due to neglect. Dr. Utley found that B.H. exhibited symptoms of trauma and his anxiety and aversion to visits with Appellant reinforce the likelihood that abuse did occur. (EX 7 p.6.). The social workers testified that the child exhibited extreme behavior in eating inedible objects, in that he had eaten dirt and eaten other children's vomit on the dorm. (TR 125)

Venus Franklin, the child's current therapist from Spofford residential treatment center indicated that the child has a diagnosis of post traumatic stress disorder and oppositional defiant disorder. (TR 57) (EX 25) The child had been in nine different placements prior to his residential placement at Spofford. (TR 60)

B.H. exhibits aggressive and violent behaviors toward staff in his residential treatment center. (TR 58-59) B.H. talks negatively toward white males and will spit and hit them. (TR 61) Venus Franklin testified , "If he wakes up and you enter his bedroom, B.H. becomes physically violent. (TR 61). "The child will walk up from behind and hit you in the back of the head with objects," She testified that B.H. broke her foot with an adult sized chair. (TR 59)

The child has many sexual acting out behaviors and a very explicit vocabulary and asks other children to "suck my wee wee" and he tries to get into other children's beds at night. (TR 56) B.H. shows trauma when he is in the restroom and makes statements of someone touching him inappropriately.

Venus Franklin testified that B.H. after seeing pictures of Appellant indicated he was scared of her. (TR 58) He has also made statements that, “My mom puts her fingers in my butt.” (TR 61) The child appears afraid of Appellant and would make statements like, “She’s crazy. Will you hurt me like my mom?” (TR 65) B.H. doesn’t identify Appellant as “Mom” but refers to her as “Mary” (TR 66).Once visits with Appellant stopped, B.H. stopped defecating on himself. (TR 63)

Venus Franklin testified that once the child is released from the residential facility that the child would need a safe and structured environment.(TR 59) B.H. needs a nurturing environment. (TR 59) His behaviors would be difficult for someone with limited cognitive functioning because he attempts to push boundaries with individuals and it would be easy for someone to lose their temper with B.H due to his behaviors. (TR 58-59).

Shelia Moppin testified that she knew M.H. In her capacity as a director for a ministry from the neighborhood where she lived, and had known M.H. knew her for about three years. (TR 151-152) She saw B.H. at the soup kitchen with his mother in the neighborhood and never saw any unusual behavior with the mother and the child. (TR 154-155) She did note that the mother had spanked the child on occasion but she suggested another method of discipline for the mother to use and did not observe the mother to spank the child after that. (TR 155) Shelia Moppin testified that she assisted the mother in reading letters due to the mother’s problems with comprehension. (TR 159) She indicated that she was aware the mother was prostituting out of her home in the fall of 2008 (TR 161) but did not report that to the hotline. (TR 162)

A wide variety of services have been offered to Appellant in an effort to help her address her mental health problems and the child's problems. Appellant had parent child therapeutic visitation, services with Swope Health, Veronica's Voice, in-home child-parent visitation, parent-aide services, case management, individual therapy, hair testing for illegal substances, parenting assessments, intensive in-home services, psychological evaluation and anger management classes (TR 99) The Children's Division's efforts to engage Appellant in treatment services were sometimes impaired by the Appellant's extreme behaviors and her unwillingness to participate in services.(EX 5) (TR 46, 106). Appellant had several different parent aids due to her aggressive behaviors as well as the child's behaviors. The Appellant has received services since the 1980;s with her other children, yet Appellant has failed to make sufficient progress to be able to appropriately parent this child. (TR 105). The social workers testified that, despite all the services provided, there are several barriers to reunification with the mother. These include her mental instability, her low level of functioning, her poor parenting skills, her aggression, anger and inappropriate behaviors, and her unstable finances. (TR 105, 125) The social worker testified that the mother was unable to parent the child due to her inability to address her own issues and the child's significant behaviors. (TR 125)

No constitutional issues regarding the standard of proof for termination of parental rights statutes were raised by the mother before or during the trial (TR 9, 186-187)

ARGUMENT I

I. The trial court did not terminate Mary Hylton's parental rights based on a preponderance of evidence *because* the United States Supreme Court has only held that the clear, cogent, and convincing standard of proof is required as to that portion of a termination of parental rights case that is fact-finding in regards to the unfitness of the parent *in that* the trial court properly applied that standard to the grounds for termination in this case.

1. **Standard of review**

This court must affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or the trial court erroneously declared or applied the law. See Murphy v. Carron, 536 S.W.2d 30 (Mo banc. 1976).

Appellant is asking the court to invalidate Section 211.447 RSMo. Appellant states that section violates the Due Process Clause because it "permits termination of parental rights without requiring the State to establish each element of its case by at least clear and convincing evidence. As will be explained below, if Appellant's interpretation of the section is accepted by this court, that will be tantamount to an invalidation of the statute. A court "will not invalidate a statute [as unconstitutional] 'unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution. Lewis v. Gibbons, 80 S.W.3d 461 (Mo. 2002); In re Marriage of Kohring, 999 S.W.2d 228, 231 (Mo. 1999). To affirm, the appellate court must find that at least one of the termination grounds in Section 211.447 RSMo was

proven by clear, cogent, and convincing evidence. In re C.C., 32 S.W.3d 824, 826 (Mo.App.2000)**.** Clear, cogent, and convincing evidence is that which instantly tilts the scales in favor of termination when weighed against the evidence in opposition; and the finder of fact is left with the abiding conviction the evidence is true. See In re A.S.W., 137 S.W.3d 448, 453 (Mo. banc 2004). Where the trial court finds multiple grounds for termination, any one of those grounds is sufficient to sustain the judgment on appeal. See In re N.R.W., 112 S.W.3d 465, 469 (Mo.App. 2003). Conflicting evidence will be reviewed in the light most favorable to the trial court's judgment. See A.S.W., 137 S.W.3d at 452-53.

The determination of best interest of a child is a subjective assessment based on the totality of the circumstances and is reviewed for an abuse of discretion. See A.A.T.N., 181 S.W.3d 161 (Mo.App. 2005). Judicial discretion is abused only where a ruling is clearly against logic and is so arbitrary and unreasonable as to shock a sense of justice and indicate a lack of careful consideration. See State ex rel. Common v. Darnold, 120 S.W.3d 788 (Mo.App. 2003).

2. **Argument**

Appellant's Point one asserts that the trial court erred by applying the preponderance standard of proof to the "best interests" findings required by Section 211.447.6 RSMo, citing Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982). Appellant misreads Santosky. Section 211.447.6 RSMo states:

> 6. The juvenile court may terminate the rights of a parent to a child upon a petition filed by the juvenile officer or the division, or in adoption cases, by

> a prospective parent, if the court finds that the termination is in the best interest of the child and when it appears by clear, cogent and convincing evidence that grounds exist for termination pursuant to subsection 2, 4 or 5 of this section.

From the omission of the “clear, cogent and convincing” standard as to the best interest finding, it is reasonable to infer that the legislature intended that standard to only apply to the grounds for termination, and not to the best interests finding. A priori, that difference also suggests that the grounds for termination are intended to be regarded as separate and distinct from the best interests findings. Santosky clearly distinguished between the “factfinding” stage of a termination proceeding and the “dispositional’ stage.

> The State bifurcates its permanent neglect proceeding into "fact-finding" and "dispositional" hearings. Fam. Ct. Act 622, 623. At the factfinding stage, the State must prove that the child has been "permanently neglected," as defined by Fam. Ct. Act 614.1.(a)-(d) and Soc. Serv. Law 384-b.7.(a). See Fam. Ct. Act 622. The Family Court judge then determines at a subsequent dispositional hearing what placement would serve the child's best interests. 623, 631. (Santosky at 749)

Missouri courts have found the same bifurcation to be implied by the Missouri statute. “In deciding whether to terminate parental rights, a trial court must employ a two-step analysis.” “If the first step is satisfied, the trial court moves to the second step and determines whether the termination of parental rights is in the best interests of the child.” In re L.M., 212 S.W.3d 177 (Mo.App. 2007). “If the court finds that a statutory ground

for termination has been proven, the court must then find, pursuant to Section 211.447.6 that the best interests of the child would be served by termination." In re K.C.M., 85 S.W.3d 682, 923 (Mo.App. 2002).

The proper standard of evidence for the determination of best interests is a preponderance. "Unlike a finding that a proper *ground* exists for termination, a finding that termination is not in the child's best interests of the child does not require proof by clear and convincing evidence." In re A.S., 38 S.W.3d 478 (Mo.App. 2001). The only Missouri authority cited by Appellant that appears to support his position is dicta in Cannon v. Cannon, 280 S.W.3d 79 (Mo. 2009). That reliance is misplaced. Cannon was a divorce case and the issue presented was the effect of Section 452.375 RSMo on the father's visitation rights, in view of a conviction for a sexual offense. The cited dicta stated "The Supreme Court has held that because of the "final and irrevocable nature of a rights termination, the state must present clear, cogent and convincing evidence that termination is in the child's best interests." This language was merely used in Cannon in the course of a comparison of the standards of proof applicable to other types of cases. In any event, that language is not to be found in Santosky, at pages 769-770 or elsewhere.

Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982) dealt with a termination proceeding under the New York Family Court Act, which required only a preponderance of the evidence. The Supreme Court determined that the New York statute violated the Due Process Clause of the Fourteenth Amendment. In reaching its opinion, the Court relied heavily on the case of Mathews v. Eldridge, 424 U.S. 319 (1976). That case prescribed a three part balancing test: the private interests affected by the proceeding; the

risk of error created by the state's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. The critical distinction between that case and the present one is that the New York law permitted the preponderance standard for the "fact-finding" portion of the case. That is, the portion of the hearing that determined facts regarding parental unfitness. The Supreme Court properly found that the parent's interests should be balanced against those of the State during that part of the decision making process. But once the fact-finding hearing was completed, the court found that a fundamental change in the balancing of parties' interests occurred.

> At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge. See Fam. Ct. Act 631 (judge shall make his order "solely on the basis of the best interests of the child," and thus has no obligation to consider the natural parents' rights in selecting dispositional alternatives). (Santosky at 760)

Section 211.443 RSMo provides that the termination statutes shall be construed to include consideration of "The entitlement of every child to a permanent and stable home." By definition, once the court is focused on the interests of the child, the very nature of the inquiry must change. In fact, since, at that point, grounds to terminate the parent's parental rights have been shown to exist, the natural right of the child to a safe, stable and loving caretaker should very nearly require a

showing that termination is *not* in the best interests of the child, by clear cogent and convincing evidence, rather than the other way around.

This child's history and condition demonstrate that he was subjected to significant abuse and neglect by the Appellant. Appellant was afforded a full evidentiary hearing and had counsel. The trial court properly found that the grounds for termination of her parental rights were shown by clear, cogent and convincing evidence. Her constitutional rights were protected by the court and by the provisions of Section 211.447 RSMo. For her to now stand in the shoes of the child in order to claim a deprivation of her rights in the name of the child's best interests is, in a sense, unseemly. Point 1 should be denied.

II. The trial court's judgment did err in failing to identify the burden of proof as to certain grounds because the judgment as to those grounds did not specify the standard of proof but that error was not fatal in that the trial court did identify the standard of proof for a ground sufficient to support termination of parental rights.

1. **Standard of review**

This court must affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or the trial court erroneously declared or applied the law. See Murphy v. Carron, 536 S.W.2d 30 (Mo banc. 1976).

2. **Argument**

In its judgment, the trial court found that the following grounds for termination existed regarding the mother:

1. Section 211.447.5(2) (Abuse or neglect)

   The court found that this ground was supported by clear, cogent and convincing evidence in paragraph 14 (LF 14) and made findings regarding the Appellant as to that ground in paragraphs 15, 16 and 17 (L.F. 14-17).

2. Section 211.447.5(3) RSMo (jurisdiction over one year)

   The court made this finding in paragraph 19. (LF 17) The court did not specify the applicable standard of proof.

3. Section 211.447.5(6) (Unfit parent)

   The court made this finding in paragraph 22 (LF 22-23). The court did not specify the applicable standard of proof.

Appellant is correct that the trial court failed to specify the standard of proof it applied to Section 211.447.5(3) and 211.447.5(6) RSMo. However, satisfaction of one statutory ground for termination is sufficient to sustain the judgment. In re P.L.O., 131 S.W.3d 782,788 (Mo. 2004); In the Interest of M.D.R., 124 S.W.3d 469,476 (Mo. banc 2004). Section 211.447.5(2) provides:

> (2) The child has been abused or neglected. In determining whether to terminate parental rights pursuant to this subdivision, the court shall consider and make findings on the following conditions or acts of the parent:

Section 211.447.5 (2) RSMo then recites certain conditions of which the court must make findings:

> (a) A mental condition which is shown by competent evidence either to be permanent or such that there is no reasonable likelihood that the condition can be reversed and which renders the parent unable to knowingly provide the child the necessary care, custody and control;
>
> (b) Chemical dependency which prevents the parent from consistently providing the necessary care, custody and control of the child and which cannot be treated so as to enable the parent to consistently provide such care, custody and control;
>
> (c) A severe act or recurrent acts of physical, emotional or sexual abuse toward the child or any child in the family by the parent, including an act of incest, or by another under circumstances that indicate that the parent knew or should have known that such acts were being committed toward the child or any child in the family; or
>
> (d) Repeated or continuous failure by the parent, 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.

In paragraph 14 (L.F. 14), the trial court that stated that its finding regarding Section 211.447.5(2) RSMo was supported by clear, cogent and convincing evidence. In paragraphs 15 and 16 (L.F. 14-15), it recited its judicial notice of the underlying case and,

in paragraph 17 (L.F. 15-17), it stated "Pursuant to Section 211.447.5(2) the court *having* found the child to have been abused and neglected . . . " (emphasis added). (LF 15) It is clear that this language is a reference back to the courts statement in paragraph 15. The findings subsequently recited are required findings that may or may not support the ground in any particular case. It has been made clear in the case law that the required findings in this section are simply conditions or acts that the court must consider. They are not the ground on which the determination ultimately rests. "These four factors are simply categories of evidence to be considered along with other relevant evidence, rather than separate grounds for termination in and of themselves." In re K.M.C., 223 S.W.3d 916 (Mo.App. 2007) citing In re L.M., 212 S.W.3d 177, 182 (Mo.App. 2007).

The court's findings under subsections a-d included:

a) The court found that Appellant suffers from a permanent mental condition which impairs her ability to parent on a permanent basis in that the mother suffers from mental retardation and functions at a second grade level. (LF 15)

1) Her mild retardation prevents her from comprehending the child's problems; (LF 15)
2) She could not read and understand letters sent to her without assistance; (LF 15)
3) She has a learning disability; (LF 15)
4) Her mental issues prevent her from stimulating the child's education; (LF 15)
5) Her ability to reason is impaired by her mental issues; (LF 15)
6) Her psychological evaluation recommended that she have a guardian for herself.(LF 15)

The court also found that “the mental condition of the mother is of a permanent nature or such that there is no reasonable likelihood that the condition can be reversed and which renders the mother unable to knowingly provide the child the necessary care, custody and control.” (LF15-16)

b) The court found that the evidence did not support a finding of chemical addiction.(LF 16)

c) The court found that evidence established that the child suffered severe and recurrent acts of physical abuse by the mother or someone else, in that:

1) The child has extreme behavioral and emotional issues that are trauma related;(LF 16)
2) The child’s behaviors demonstrate extreme fear to Caucasian males; (LF 16)
3) The child exhibits behaviors that are attributed to sexual abuse, such as using sexual language that is not age appropriate and asking other children to touch his private areas; (LF 16)
4) The child exhibits actions of “humping” when sexually acting out; (LF 16)
5) The child has stated that the Appellant placed her fingers inside his anus; (LF 16)
6) The child has stated that other males placed their fingers inside his anus.(LF 16)

d) The trial court found that the evidence established that Appellant failed to provide “care and control necessary for the child’s mental or emotional health and development.

Evidence established that all the child's developmental delays were the cause of neglect, the child's behavioral and emotional issues were trauma related and the child's anxiety and aversion to visits with [Appellant] were attributed to abuse while in the mother's care and control." (LF 15-16)

These findings are more than sufficient to support the court's conclusion that the child was abused or neglected within the meaning of Section 211.447.5(2) RSMo, as stated in paragraph 14 of the court's judgment. The court's findings were also supported by more than sufficient evidence, as described in the response to Point 3 below. Appellant's Point 2 should be denied.

III. The trial court did not err in terminating Appellant's parental rights *because* while Missouri law requires that current circumstances and risk of future harm be considered in terminating parental rights, past conduct can and should also be considered, *in that* the trial court properly considered past and current circumstances in making its decisions as to whether risks of future harm existed.

1. **Standard of review**

This court must affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or the trial court erroneously declared or applied the law. See Murphy v. Carron, 536 S.W.2d 30 (Mo banc. 1976). The sufficiency of the evidence supporting the court's finding under Section 211.447.5(2) RSMo should be determined by a consideration of the evidence and the judgment as a whole. As discussed in our response to Point 2 above, the ground for

termination in 211.447.5(2) is “abuse or neglect”. The factors set forth in 211.447.5(2) are findings that the court must consider in making its determination. They are not intended to limit the facts the trial court can consider.

2. **Argument**

This Court, in In re K.A.W., 220 S.W.3d 310 (Mo. App. 2007) confronted a situation in which a mother, after two failed attempts to place her twins for adoption, decided to raise them herself. This court stated:

> After DFS gained jurisdiction of the twins, there is no evidence that any of Mother's conduct would indicate a likelihood of future problems. Instead, all of the evidence indicates that Mother remedied every potential problem noted by DFS. She complied fully with DFS's entire parenting plan, which had as its ostensible goal reunification . . . (K.A.W. at 7)

In spite of this, the trial court in that case had terminated the mother’s parental rights. In that context, this Court stated:

> An essential part of any determination whether to terminate parental rights is whether, considered at the time of the termination and looking to the future, the child would be harmed by a continued relationship with the parent. A prospective analysis is required to determine whether grounds exist and what is in the best interests of the child for the reasonably foreseeable future. Obviously, it is difficult to predict the future. Section 211.447 provides for detailed consideration of the parent's past conduct as well as the parent's conduct following the trial court's assumption of

jurisdiction as good evidence of future behavior. In the Interest of M.E.W., 729 S.W.2d 194, 196 (Mo. banc 1987) (K.A.W. at 14)

Applying this standard to the present case, considering the language contained in the trial court's findings that explicitly pointed to the future, and considering the evidence the court had before it, the difference between this case and K.A.W. is considerable.

Repetition of all the facts summarized in our Statement of Facts would be redundant. However, the following salient facts show, in part, how clear, cogent and convincing the evidence in this case was, both as to the past and as to the probable future.

The Appellant, a registered sex offender, had been incarcerated between November 1998 until June of 2004 for two counts of statutory rape and one count of statutory sodomy involving a fourteen year old child. (TR34)(EX 6 p.3) The evidence showed that the Appellant's parental rights to seven other children had been terminated. (TR 141). None of her other children were raised by her. (TR 165). The worker testified that many services had been provided to appellant for a number of years since the 1980's regarding her other children and this child but she had not learned from those services and had not been able to apply them appropriately to parenting a child with significant needs. (TR 127).

Mary Richardson, Ph.D., a psychologist, conducted a psychological evaluation on the Appellant and diagnosed the Appellant with mild mental retardation and antisocial personality disorder. She also diagnosed Appellant as having post traumatic stress disorder, a prior history of poly-substance dependence and possible symptoms of bipolar or cyclothymic disease. (TR 25) (EX 6) Ms. Richardson stated "People with her scores

are usually not able to parent independently [Appellant] herself may need a legal guardian, but would probably detest the idea."(EX 4 p.4)

The mother has repeatedly exhibited a tendency to have violent, and combative behaviors. She threatened her social worker, stating she would "…come find [her], bash [her] head in, fuck [her] up and kill [her]."(TR 116)(EX 5p.2) She reported a history of engaging in fistfights and knocking down doors. (TR 130) She was discharged from a woman's shelter for an altercation with another client.

The child suffers from post traumatic stress disorder and oppositional defiant disorder. (TR 57) (EX 25). He has special needs and his relationship with appellant seems far from nurturing. After seeing pictures of his mother he indicated he was scared of her. (TR 58.) He has also made statements that, "My mom puts her fingers in my butt." (TR 61). The child appears afraid of his mother and made statements like, "She's crazy. Will you hurt me like my mom?" (TR 65) B.H. doesn't identify Appellant as "Mom" but refers to her as "Mary" (TR 66) Once visits with Appellant stopped, B.H. stopped defecating on himself. (TR 63) At a visit in appellant's home, a caseworker observed a photograph in Appellant's home that depicted the child in handcuffs.

In February, 2009, the mother admitted that she was regularly prostituting herself in the home, and stated that she would lock the child in his room while she was with her clients.

Services offered to the mother by the Children's Division in an effort to reunite her with the child included child therapeutic visitation, services with Swope Health, Veronica's Voice, in-home child parent visitation, parent aide services, case

management, individual therapy hair testing for illegal substances, parenting assessments, intensive in home services, psychological evaluation and anger management classes. (TR 99) The mother had also received services since the 1980's in regards to her other children. (TR 105). However, due to her extreme and aggressive behaviors and her unwillingness to participate in services, her general level of functioning, and this child's special needs, the court in the underlying case had not been able to safely reunify the child with her.

In short, for a period spanning over twenty-five years Appellant has abused or neglected every one of her eight children. Her mental condition is incurable. When this condition is coupled with her antisocial personality disorder, she has, predictably, continued to be unable to benefit from services designed to reunify her with this child. She has continued to act in an aggressive and unlawful manner. This is not a case in which there is no evidence of serious prior neglect. This is not a case in which there has been a fundamental change in the Appellant's condition that is of a type that would now permit reunification. This is a case of a sad but real inability of Appellant to ever safely parent this child, or, perhaps more truthfully, any child. The court's findings were founded on reasonable inferences derived from abundant evidence. Appellant's Point 3 should be denied.

CONCLUSION

Appellant has correctly pointed to the failure of the judgment to specify the standard of proof as to some grounds. However, this court is not required to reverse the decision of the trial court as long as a basis for termination is properly stated as to at least one ground. That is the case here. The judgment of the trial court should be affirmed.

Respectfully submitted,

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No. SC91584

IN THE
SUPREME COURT OF MISSOURI

IN THE INTEREST OF: B.T.H.,
a minor.

MARY A. MARQUEZ, Juvenile Officer

Respondent
v.

M.H. (Natural Mother),

Appellant.

CERTIFICATE OF COMPLIANCE

This is to certify that a copy of this brief, as well as a copy of a compact disc has been presented to the Appellant in this action at the address listed below. This brief complies with the limitations contained in Rule 84.06(b), and has a total of 7,770 words and 643 lines.

Further, the compact disc provided has been prepared with Microsoft Word, has been scanned for viruses and is virus-free.

Respectfully submitted,

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I hereby certify that on _____ day of _____, 2011, a copy of the above and foregoing Respondent's Brief, was mailed, postage prepaid to the following:

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APPEAL FROM THE SIXTEENTH JUDICIAL CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
FAMILY COURT DIVISION
THE HONORABLE MARCO A. ROLDAN

APPENDIX

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Index to Appendix: