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 Circuit Court of Jackson County, Family Court Division
The Honorable Judge Marco A. Roldan

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Respondent concedes that jurisdiction is appropriate in this Court for the reason that Point One challenges the constitutional validity of a state statute. Although Points Two and Three do not similarly invoke this Court's exclusive jurisdiction, this Court nonetheless has exclusive jurisdiction over the entire case and may decide Points Two and Three along with Point One. Moreover, "[u]nless justice otherwise requires, the court shall dispose finally of the case." Rule 84.14.

POINTS RELIED ON

I. *The trial court erred* in terminating the Mother's parental rights based on factual findings supported by a mere preponderance of evidence, *because* the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requires at least "clear and convincing" evidence to support termination of parental rights *in that* the trial court's application of a preponderance standard to the best interest and RSMo. § 211.447.5(2) and (3) findings resulted in the termination of the mother's parental rights without constitutionally-sufficient proof.

Cases and Provisions Relied on:

U.S. Const. amend. XIV.

Santosky v. Kramer, 455 U.S. 745, 758 (1982).

Cannon v. Cannon, 280 S.W.3d 79, 86 (Mo. 2009).

II. *The trial court erred* in failing to identify the burden of proof applied to other factual findings, *because* those factual findings are conclusory, *in that* Paragraphs 17, 19 and 22 of the Court's Judgment are not specific enough to allow a reviewing court to determine whether the trial court properly applied the correct standard of proof.

Cases and Provisions Relied on:

In re C.F.C., 156 S.W.3d 422 (Mo. App. E.D. 2005).

In re M.A., 185 S.W.3d 256 (Mo. App. W.D. 2006).

III. *The trial court erred* in terminating the Mother's parental rights, *because* Missouri law requires that past behavior can support the termination of parental rights only if the trial court explicitly considers whether that past behavior demonstrates a risk of future harm, *in that* the trial court's judgment fails to identify or address any link between her past behavior and any future risk of harm.

Cases and Provisions Relied on:

In the Interest of K.A.W., 133 S.W.3d 1, 9 (Mo. banc 2004).

In re S.M.H., 160 S.W.3d 355, 372 (Mo. 2005).

SUMMARY OF ARGUMENT

This case is about the law, not the facts. Respondent's Brief details some ten pages worth of supplemental facts, along with a supplemental legal file containing pleadings from a case underlying the termination of parental rights action that is actually the subject of this appeal. But the Mother does not ask this Court to revisit the factual findings made in the court below (or, indeed, in the neglect action preceding that). The sole questions presented to this Court are whether the burden of proof applied by the trial court is constitutional and whether the trial court's Judgment contained sufficient findings under Missouri law – not whether those findings were properly supported by the evidence.

This Court's focus should properly be on the text and application of Missouri's termination statute, RSMo. § 211.447. At the outset, the Mother must clarify her position in light of Respondent's Brief. The Mother argues not only that the clear, cogent and convincing standard should be applied to the best interests finding, but also that it must be applied to the Section 211.447.5(2) and (3) findings, all of which the trial court is *required* to consider *before* it may legally terminate parental rights. Under Missouri's statutory scheme, these determinations are part and parcel of the termination decision, and the Constitution therefore demands higher scrutiny of the evidence than that brought to bear by the trial court and required by Missouri statutes. Moreover, the Mother is not asking this Court to invalidate RSMo. § 211.447, but is asking this Court to interpret it in a constitutional manner by finding that the textual requirement of clear, cogent and

convincing evidence applies to all factual findings necessary to the termination (including the Section 211.447.5(2) and (3) findings), rather than just one element.

POINT ONE[1]

The trial court did err in terminating the Mother's parental rights based on factual findings supported by a mere preponderance of evidence, *because* the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States requires at least "clear and convincing" evidence to support termination of parental rights *in that* the trial court's application of a preponderance standard to the best interests findings and factors enumerated in RSMo. § 211.447.5(2) and (3) resulted in the termination of the mother's parental rights without constitutionally-sufficient proof.

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[1] In a single sentence tucked away at the end of its Statement of Facts, Respondent states that the Mother did not raise any constitutional issues before or during the trial. Resp.'s Br. at 15. Although this is true, it is irrelevant, because none of the issues raised in this appeal were yet apparent. The Mother could not be aware as to what standards the trial court would actually apply in its Judgment, and was not given an opportunity to comment on the same. The trial court did not state what standards it would apply before or during trial, nor immediately thereafter; no party, including the Respondent, argued for the application of a preponderance standard. *See generally* Tr. The Mother raised the issue at the earliest opportunity possible by a post-trial motion. To the extent that Respondent suggests that the Mother's Point One should not be heard, that suggestion should be rejected. Because the Respondent does not press the point, the Mother has not briefed it.

I. Standard of Review

Respondent suggests that this Court's review of Point I is guided by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc. 1976). In evaluating the constitutionality of a state statute, however, this Court's review is de novo. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008). Indeed, this Court has exclusive jurisdiction to decide the constitutional issue, and thus de novo review is not only appropriate, but is in fact the only conceivable standard of review.

The standards cited by Respondent at page 17 of its brief are those applicable to a challenge of the sufficiency of the evidence rather than the constitutionality of a state statute. *See, e.g., In re C.C.*, 32 S.W.3d 824, 826 (Mo. App. 2000) (challenging the sufficiency of the evidence); *In re A.S.W.*, 137 S.W.3d 448, 453 (Mo. banc 2004) ("Father argues that the findings of the trial court did not constitute clear, cogent and convincing evidence."); *In re N.R.W.*, 112 S.W.3d 465, 469 (Mo. App. 2003) (challenging the sufficiency of the evidence). Respondent mistakenly suggests that the Mother has challenged the sufficiency of the evidence. Each Point urged by the Mother relates to a discrete *legal* issue independent of any factual findings made by the trial court. *See* App.'s Br., at 5-6. The Mother's Point One, and argument in support thereof, is that the trial court applied a constitutionally-insufficient standard of proof, not that the evidence was sufficient to meet the standards actually applied. *Id.* Accordingly, this Court's review of Point One is de novo.

II. Analysis

Santosky does not make the desperate distinction – that differing burdens of proof are necessarily permitted at different phases in a termination of parental rights case – urged by Respondent. *See* Resp.'s Br., at 19. Moreover, even if *Santosky* did not apply to the best interest prong of New York's termination statute circa 1982, Missouri's statutory scheme pertaining to the termination of parental rights is fundamentally different with respect to the best interests determination. A careful reading of *Santosky* demonstrates that under New York law, trial courts conducted separate hearings at the unfitness and best interest stages, rather than a single hearing at which evidence was adduced as to both issues at the same time. *Santosky v. Kramer*, 455 U.S. 745, 748 (1982) ("The Family Court judge then determines *at a subsequent dispositional hearing* what placement would serve the child's best interests.") (emphasis added). *See* Section A, *infra.* Moreover, the New York statutory scheme did not mandate that its courts consider explicit factors before terminating parental rights, as Missouri's statute does. *Compare* RSMo. § 211.447.5(2)-(3) *with Santosky,* 455 U.S. at 748-49 (setting forth a synopsis of New York's procedures). Those factors enumerated by Section 211.447.5(2) and (3) were not required to be proven by clear, cogent and convincing evidence in this case, rendering the statute unconstitutional as applied. *See* Section B, *infra.* Finally, even under Respondent's suggested balancing approach, drawn from the *Matthews v. Eldridge* factors at issue in *Santosky,* it would be improper to deprive the child of a standard of proof sufficiently stringent to protect his fundamental rights under Missouri law and the federal Constitution even after a finding of "unfitness." *See* Section C, *infra.*

A. The Santosky "*distinction" urged by Respondent does not exist.*

At the outset, Respondent attempts to read *Santosky* to create a distinction without a difference, at least in the context of Missouri's statute. Respondent cites to a section of *Santosky* addressing the "fact-finding hearing" of New York's law. Resp.'s Br. at 18. Under Missouri's procedure, however, the legal fiction of a bifurcated process takes place in just one fact-finding hearing; there is no separate disposition hearing at which separate evidence is adduced. Admittedly, Missouri has deemed that the termination of a parental rights proceeding has two "phases," *see In re L.M.,* 212 S.W.3d 177, 180 (Mo. App. 2007), but these phases took place during one catch-all evidentiary hearing, after which the judge made findings on both issues despite having made no such functional distinction during the hearing.[2]

In fact, the "best interest" finding in this case consisted of a single boilerplate paragraph tacked on the end of the trial court's Judgment, and does not reflect a separate procedural outcome as it did in the New York law examined by *Santosky*. *See* L.F. at 25-26. This distinction alone would lead to a different result under *Santosky*, which focused on the risk of an erroneous decision. *See Santosky*, 455 U.S. at 769 ("The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.")

[2] Despite the capability of trial judges to separate the evidence and follow the law, asking trial courts to sift through emotional evidence as to termination and best interests findings and apply two separate, subjective standards, is a daunting task to say the least.

(quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)). The risk of an erroneous outcome would necessarily be different when two separate hearings (i.e., New York's process) are combined into one hearing at which all of the evidence is tossed into a melting pot together (i.e., Missouri's process).[3] *Cf. Santosky*, 455 U.S. at 762 (discussing the procedural protections in place in New York's fact-finding hearing), 780 (Rehnquist, J., dissenting) (discussing differences between fact-finding and dispositional hearings under New York law).

B. The findings required by RSMo. § 211.447.5(2) and (3) are factual findings resulting in termination, which must be supported by at least clear, cogent and convincing evidence under Santosky.

Missouri trial courts are required to make certain statutory findings before terminating parental rights. RSMo. § 211.447.5(2)-(3). Proof of one is sufficient to support termination, but all must be considered. *See, e.g., In re N.M.J.*, 24 S.W.3d 771, 778 (Mo. App. W.D. 2000), *In Interest of S.C.*, 914 S.W.2d 408, 412 (Mo. App. W.D. 1996). Respondent claims that these necessary findings enumerated under Section 211.447.5(2) and (3) are "not the ground on which the determination ultimately rests" and

[3] Indeed, bifurcated hearings (as opposed to bifurcated "decisions") are employed in other critical circumstances, such as death penalty cases and civil cases awarding punitive damages, at least partially because of the risk of prejudice if such bifurcation were not in place.

therefore implies that clear, cogent and convincing evidence should not be required. Resp.'s Br. at 24.

But Respondent misreads *In re K.M.C.*, 223 S.W.3d 916 (Mo. App. 2007), and related cases, which stand simply for the proposition that not *all* of the factors enumerated under Section 211.447.5(2) or (3) must be proven, but that a finding of just one such factor is sufficient to uphold a termination decision. *In re K.M.C,* 223 S.W.3d at 923. Respondent cites (and Mother can find) no Missouri case or authority that authorizes termination of parental rights in the absence of *any* Section 211.447.5(2) or (3) factor and, accordingly, those factors must be proven by clear and convincing evidence under *Santosky* because they serve as the basis for the termination decision itself.

A careful reading of *In re K.M.C.*, relied on by Respondent for the suggestion that the factors enumerated under Section 211.447.5(2) and (3) are not necessary to support a termination decision, *see* Resp.'s Br., at 24, belies any such assertion. In *K.M.C.*, the appellant complained that there was insufficient evidence to support a finding of severe or recurrent abuse under Section 211.447.4(2)(c).[4] *In re K.M.C.*, 223 S.W.3d 916, 923 (Mo. App. S.D. 2007). The Court of Appeals noted that the trial court had not relied on that specific factor, but instead "relied upon § 211.447.4(2)(d)." *Id.* at 925. The Court of Appeals then addressed her contention that the Section 211.447(2)(d) finding (that she

[4] The statutory provision at issue was renumbered, such that references to Section 211.447.4 can be read to discuss modern Section 211.447.5. *In re D.O.*, 315 S.W.3d 406, 414 (Mo. App. S.D. 2010).

failed to provide a stable and safe home) was not supported by the evidence. *Id.* at 925-26. The Court of Appeals found that the trial court's neglect finding was, in fact, supported by the evidence. *Id.* The Court of Appeals clearly held that one of the factors enumerated in Section 211.447.5(2) *must* be proven and found in order to support termination. *See generally id.* Respondent's position that the factors need not be proven is contradicted by its own authority.

In re L.M., 212 S.W.3d 177, 182 (Mo. App. 2007), cited both by the *In re K.M.C.* Court and Respondent, further supports that at least one of the factors enumerated in Section 211.447.5(2) or (3) must be proven to allow for termination of parental rights under those sections of the Missouri termination statute. As it did in *In re K.M.C.*, the Court of Appeals addressed a challenge to the sufficiency of the evidence. *Id.* at 181. The Court of Appeals painstakingly detailed the evidence supporting the specific Section 211.447.5(2) factors at issue in the case, and ultimately held that substantial evidence supported the trial court's determinations on those points. *Id.* at 181-86, 188. Again, the court recognized that proof of one factor would be "sufficient for termination." *Id.* at 182 (quoting *In re N.M.J.*, 24 S.W.3d 771, 778 (Mo. App. 2000)). If none of the Section 211.447.5(2) or (3) factors were required for the evidence to be "sufficient for termination," then the Court of Appeals would have said so – but such is not the law in the State of Missouri. Rather, at least one of those factors is necessary to support termination. *See id.*

Because those factors enumerated in Sections 211.447.5(2) and (3) provide the foundation of the termination decision, *Santosky* is clearly applicable even if

Respondent's misreading of the bifurcation issue is adopted. As such, the statute is unconstitutional as applied to the Mother in this case, because under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the necessary standard of proof was not required for each element of the State's case.

C. Even if Respondent's suggested balancing approach were appropriate, Santosky *would still require clear and convincing evidence.*

For both the parent and the child, allowing a lesser burden of proof for one element of a termination case reflects the "minimal concern" over the outcome with which *Santosky* was concerned. *Santosky*, 455 U.S. at 769 ("We hold that such a standard clearly conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process."). This is the case whether the focus is properly on the child or the parent, as *both* have important fundamental rights at issue, and neither should bear the risk of an erroneous determination guided by an insufficient standard of proof. On the contrary, the State should have a high burden reflecting the weighty concerns at issue, both when it moves to terminate a parent's rights and when it makes a determination of the child's best interests. Apparently it is the Respondent's position that once a statutory finding has been made, the risk of an erroneous determination for the child is irrelevant or mitigated.

But children also have reciprocal rights to their natural family. RSMo. § 211.443. Thus, even if the best interest standard were in fact made after a separate hearing, as it was in New York, this Court should require a standard of proof that adequately reflects the child's right, pursuant to Missouri's statute, to both "the recognition and protection of

the birth family relationship when possible and appropriate" *and* "the entitlement of every child to a permanent and stable home." RSMo. § 211.443. Contrary to the Respondent's suggestion, the determination of whether to terminate parental rights is not a zero-sum game; the birth family relationship is just as important a right to the child as it is to the parent. Indeed, the statute does not mandate recognition simply of "the parent's relationship with the child" but of the entire family relationship. The child's interest is just as significant as that of the parents.

Respondent's argument, that a lesser burden is appropriate because the parties' positions may change after a statutory finding, must fail. As noted in *Santosky*, the purpose of a higher standard is to reflect society's evaluation of the importance of the interests at issue and the degree to which an erroneous decision may impact the parties. *See Santosky*, 455 U.S. at 765. Even if the parent has a lesser interest after a theoretical "unfitness" hearing, which the Mother does not concede, the child's interests are not and cannot be diminished. The risk of a proper determination should fall on the State, which has vast resources at its disposal. Indeed, as recognized in *Santosky* and apparent from the record of this case,[5] the State has resources that simply cannot be matched by parents or

[5] For example, in this case the State had the benefit of a twenty-five year history of evidence collected by its investigators. Resp.'s Br., at 28. It had the benefit of multiple purported experts who testified as to the Mother's mental conditions and the son's mental challenges (though no testimony linked the son's mental challenges to any conduct of the Mother). *See* Resp.'s Br. at 11-14. It had attorneys skilled and experienced in the nuances

the child. *See Santosky*, 455 U.S. at 763 ("The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense.").

Under these circumstances, the only proper way to balance the risks of both parent and child is to require constitutionally-sufficient evidence. The Supreme Court recognized as much in *Santosky*, and this Court recognized *Santosky's* import when it discussed the issue in *Cannon v. Cannon*, 80 S.W.3d 79 (Mo. banc 2009). Respondent argues that *Cannon* represents nothing more than dicta. Resp'. Br., at 19. While admittedly not the central issue in the case, the Court's statement was correct: "the state must present clear, cogent and convincing evidence that termination is in the child's best interests." *Cannon*, 80 S.W.3d at 86. For all of the foregoing reasons, the Due Process

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of the applicable statutes, while the Mother had appointed counsel with no significant background in the area of family law, and no means by which she could obtain a more knowledgeable attorney. Moreover, as in the discussion in *Santosky*, the Mother is a minority, without education or resources, and on the margins of society. *Santosky*, 455 U.S. at 762-63 ("Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias."). One of the attacks on the Mother was that she frequently prostituted herself to earn money to support herself and her son. Resp.'s Br. at Truly, the Mother, also branded as a sex offender, is on the fringe of society to such a degree that the imbalance recognized by *Santosky* could be no more clearly highlighted than it is in this case.

Clause requires that the Missouri termination statute be construed in such a manner that clear, cogent and convincing evidence is required as to each factual finding made by the trial court in terminating parental rights.

POINT TWO

The trial court erred in failing to identify the burden of proof applied to other factual findings, *because* those factual findings are conclusory, *in that* Paragraphs 17, 19 and 22 of the Court's Judgment are not specific enough to allow a reviewing court to determine whether the trial court properly applied the correct standard of proof.

Respondent does not challenge the Mother's argument in Point Two, but argues that the finding for which the trial court did actually specify a burden of proof is sufficient to support the Judgment in its entirety. In other words, Respondent relies on the proposition that a single ground is sufficient to affirm the Judgment despite its other deficiencies. But even that single ground on which Respondent relies is flawed, as set forth in Points One and Three. Accordingly, the Mother's Point Two, conceded by Respondent, should be sustained for the reasons set forth more fully in Appellant's Brief and not repeated here. *See, e.g.*, App.'s Br., at 11-13.

POINT THREE

The trial court did err in terminating the Mother's parental rights, *because* Missouri law requires that past behavior can support the termination of parental rights only if the trial court explicitly considers whether that past behavior demonstrates a risk of future harm, *in that* the trial court's judgment fails to identify or address any link between her past behavior and any future risk of harm.

Respondent tries to challenge Point Three by substituting its own "explicit consideration" of the evidence for that which is absent from the trial court's Judgment. Indeed, nowhere in its response to Point Three does Respondent even cite to the trial court's Judgment. Resp.'s Br. at 27-30. The Respondent's inability to cite to the Judgment reveals its fatal flaw: even if everything cited by Respondent were a fact that the trial court found to be true, this Court cannot simply presume the existence of the rationale proffered by the Respondent. Assuming as much would wholly vitiate the requirement of an **explicit** consideration.

This Court and the Courts of Appeal have regularly warned trial courts that "it is insufficient merely to point to past acts, note that they resulted in abuse or neglect and then terminate parental rights." *In re K.A.W.*, 133 S.W.3d 1, 9 (Mo. banc 2004); *In re D.O.*, 315 S.W.3d at 416; *In re S.M.H.*, 160 S.W.3d 355, 372 (Mo. banc 2005). Although Respondent claims that "language contained in the trial court's findings . . . explicitly pointed to the future," there was no such language. On the contrary, the trial court's Judgment was entirely retrospective; it focused on the past wrongs and character flaws of the Mother, disregarded her progress since then, and failed to cite any expert or other testimony that indicated that the Mother's existing behaviors would likely result in future harm to B.T.H.. *See* L.F. at 14-20.

Ultimately, the trial court's findings were entirely conclusory on this issue. *See id.*, App.'s Br. at 14-16. For example, the Judgment stated that the Mother's mental issues left her unable to care for B.T.H. in the future, but failed to explain in what way B.T.H. might actually be harmed by his mother's mild mental retardation or any other disorder. L.F. at

15-16. In Paragraph 19 of the Judgment, the trial court states various findings as to the Mother's anger and other issues, but fails to explain what harm, if any, might result to B.T.H. in the future as a result of those issues. L.F. at 17-18. The Judgment further refers to the Mother's past sex offenses. L.F. at 19. As in *In re K.A.W.*, however, "it is insufficient merely to point to past acts, note that they resulted in abuse or neglect and then terminate parental rights." 133 S.W.3d at 9; *see also In re C.A.L.*, 228 S.W.3d 66, 72 (Mo. App. S.D. 2007) (reversing a termination of parental rights based in part on death threats made by the mother to the case worker).

Even to the extent that any of the trial court's findings could be said to exhibit the necessary explicit consideration of a future risk of harm, none is based on conduct "at the time of termination." *See id.* For example, the conviction involving the 14-year-old took place in 1998. Ex 6. The most recent termination of parental rights had occurred nearly thirteen years prior. L.F. at 22. The psychological evaluation discussed by the trial court took place in May 2009. Tr. at 19:8-12. There is simply nothing in the trial court's Judgment that reflects an *explicit consideration* of a link between conduct *at the time of termination* and any particular future harm. *See also In re S.M.H.*, 170 S.W.3d 524, 533 (Mo. App. E.D. 2005). Accordingly, the trial court's Judgment must be reversed and remanded with instructions that the trial court explicitly state what link it found, if any, between the Mother's past conduct and any future risk of harm to B.T.H.. Absent such an explicit consideration on the face of the trial court's Judgment, the Mother cannot meaningfully challenge whether the trial court's reasoning is supported by the record.

CONCLUSION

The rights of the Mother (and B.T.H.) were improperly cast aside when the trial court applied a constitutionally-insufficient burden of proof. This Court must reverse the trial court's decision and instruct it to apply a standard of proof that adequately conveys the level of subjective certainty required of its factual conclusions. Such a standard of proof is mandated by the Due Process Clause of the Fourteenth Amendment to be at least "clear and convincing."

Even if this Court finds that clear and convincing evidence is not mandated by the Constitution, Points Two and Three entitle the Mother to remand. Respondent concedes that all but one of the trial court's findings supporting termination improperly failed to identify an applicable burden of proof. With respect to the final finding supporting termination, the trial court's Judgment does not reflect the required explicit consideration of whether the Mother's past is predictive of future harm. Accordingly, Points Two and Three require remand, as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That this brief complies with the limitations of Missouri Supreme Court Rule 84.07 and contains 5,226 words, excluding the cover page, this certification, and the appendix, as determined by Microsoft Word 2007; and

2. That the compact disc filed with this brief, containing a copy of the same, has been scanned for viruses and is virus free; and

3. That a true and correct copy of the attached brief and a compact disc containing a copy of the same, were mailed this 2nd day of June, 2011, to:

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