

WD80805

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE INTEREST OF [REDACTED] [REDACTED] and [REDACTED]

JUVENILE OFFICER OF JACKSON COUNTY,
Respondent,

vs.

[REDACTED]
Appellant.

On Appeal from the Circuit Court of Jackson County
Honorable David M. Byrn, Circuit Judge
Case Nos. 1616-JU000991, 1616-JU000992, and 1616-JU000993

BRIEF OF THE APPELLANT

JONATHAN STERNBERG, Mo. #59533
ASHLYN BUCK LEWIS, Mo. #65501
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLANT

[REDACTED]

Table of Contents

Table of Authorities	5
Jurisdictional Statement	7
Statement of Facts	8
A. Background.....	8
B. Mother’s disappearance	9
C. ■■■ and counseling	11
D. Abuse allegations	12
E. Events leading to proceedings below	12
F. Proceedings below	13
1. Initial proceedings	13
2. Interactions with Children’s Division.....	15
3. Supervised visitation	17
4. Father’s psychological evaluations and therapy	22
a. Psychological evaluations	22
b. Therapy	26
5. The Children’s psychological evaluations and therapy	28
a. Evaluations	28
b. Therapy	30
6. Parenting programs	31
7. Lead-up to termination proceedings	33
8. Termination proceedings	35
a. Parties at time of trial	36
b. Trial and judgment	37

Points Relied On	41
Point I (Error in finding grounds for termination due to mental disorder).....	41
Point II (Error in finding grounds for termination due to abuse or neglect)	42
Point III (Error in finding grounds for termination due to failure to make progress in complying with service plan)	43
Argument.....	44
Standard of Review for All Points.....	44
Point I (Error in finding grounds for termination due to mental disorder).....	45
Rule 84.04(e) Preservation Statement.....	45
Point II (Error in finding grounds for termination due to abuse or neglect)	54
Rule 84.04(e) Preservation Statement.....	54
Point III (Error in finding grounds for termination due to failure to make progress in complying with service plan)	60
Rule 84.04(e) Preservation Statement.....	60
A. There were no grounds for termination under § 211.447.5(3).....	60
B. The remedy is to reunify the Children and Father.	68
Conclusion	71
Certificate of Compliance	72
Certificate of Service.....	72
Appendix.....	(filed separately)

Nunc Pro Tunc Findings of Fact, Conclusions of Law and Judgment Terminating Parental Rights of █████ in Case No. 1616-JU000991 (May 30, 2017) (L.F. 107-26)	A1
Nunc Pro Tunc Findings of Fact, Conclusions of Law and Judgment Terminating Parental Rights of █████ in Case No. 1616-JU000992 (May 30, 2017) (L.F. 177-96)	A21
Nunc Pro Tunc Findings of Fact, Conclusions of Law and Judgment Terminating Parental Rights of █████ in Case No. 1616-JU000993 (May 30, 2017) (L.F. 241-60)	A41
Exhibit 312: Finding of “Unsubstantiated” in CA/N Investigation No. 20121720373 (Dec. 7, 2016).....	A61
§ 211.447, R.S.Mo. (2014)	A62
Excerpts from DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed.2013): pp. 10, 12, 645-46, 684, 733, 761-63, 770-74, 816	A68

Table of Authorities

Cases

<i>In re A.G.B.</i> , No. WD80534 (Mo. App. slip op. Oct. 10, 2017)	53
<i>In re A.M.F.</i> , 140 S.W.3d 201 (Mo. App. 2004)	51-52
<i>In re A.M.W.</i> , 448 S.W.3d 307 (Mo. App. 2014)	42-43, 62, 66, 69-70
<i>In re A.R.</i> , 52 S.W.3d 625 (Mo. App. 2001)	68
<i>In re A.S.W.</i> , 137 S.W.3d 448 (Mo. banc 2004)	44, 55
<i>In re B.C.K.</i> , 103 S.W.3d 319 (Mo. App. 2003)	59, 68
<i>In re B.S.B.</i> , 76 S.W.3d 318 (Mo. App. 2002)	68
<i>In re C.A.L.</i> , 228 S.W.3d 66 (Mo. App. 2007)	42, 53, 59, 63
<i>In re C.K.</i> , 221 S.W.3d 467 (Mo. App. 2007)	44
<i>In re C.M.D.</i> , 18 S.W.3d 556 (Mo. App. 2000)	44
<i>In re C.N.G.</i> , 109 S.W.3d 702 (Mo. App. 2003)	67
<i>In re D.L.M.</i> , 31 S.W.3d 64 (Mo. App. 2000)	41, 46, 53
<i>In re D.O.</i> , 315 S.W.3d 406 (Mo. App. 2010)	42, 58
<i>In re J.P.B.</i> , 509 S.W.3d 84 (Mo. banc 2017)	44
<i>In re K.A.W.</i> , 133 S.W.3d 1 (Mo. banc 2004)	57, 67
<i>In re K.M.</i> , 249 S.W.3d 265 (Mo. App. 2008)	41, 47, 50-51, 61
<i>In re K.M.A.-B.</i> , 493 S.W.3d 457 (Mo. App. 2016)	58, 66
<i>In re K.W.</i> , 167 S.W.3d 206 (Mo. App. 2005)	67
<i>In re L.J.D.</i> , 352 S.W.3d 658 (Mo. App. 2011)	41, 53, 66
<i>In re M.A.M.</i> , 500 S.W.3d 347 (Mo. App. 2016)	43, 50-51, 57-58, 62-63, 66
<i>In re M.N.</i> , 277 S.W.3d 843 (Mo. App. 2009)	47
<i>In re P.C.</i> , 62 S.W.3d 600 (Mo. App. 2001)	59

<i>In re P.J.</i> , 403 S.W.3d 672 (Mo. App. 2012).....	42, 57, 59
<i>In re Q.A.H.</i> , 426 S.W.3d 7 (Mo. banc 2014).....	51
<i>In re S.J.H.</i> , 124 S.W.3d 63 (Mo. App. 2004).....	67
<i>In re S.M.H.</i> , 160 S.W.3d 355 (Mo. banc 2005)	43, 46, 52-53, 61-62, 67
<i>In re T.A.L.</i> , 328 S.W.3d 238 (Mo. App. 2010).....	41, 49, 66
<i>In re X.D.G.</i> , 340 S.W.3d 607 (Mo. App. 2011)	43, 63-64
<i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. banc 1976)	44
<i>State v. Johnson</i> , 244 S.W.3d 144 (Mo. banc 2008).....	47
Constitution of Missouri	
Art. V, § 3	1
Revised Statutes of Missouri	
§ 211.447 (2014)	<i>passim</i>
§ 477.070.....	1
Missouri Supreme Court Rules	
Rule 78.07.....	45, 54, 60
Rule 84.04.....	45, 54, 60
Rule 84.06.....	72
Rules of the Missouri Court of Appeals, Western District	
Rule XLI	72
Other	
DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS	
(5th ed.2013).....	41, 47-48

Jurisdictional Statement

This is an appeal from three judgments of the Circuit Court of Jackson County terminating the appellant's parental rights.

This case does not involve the validity of a Missouri statute or constitutional provision or of a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction, and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Jackson County. Under § 477.070, R.S.Mo., venue lies in the Western District.

Statement of Facts

A. Background

Appellant ██████ (“Father”) and J.D. (“Mother”) were in a relationship (Tr.13,692-93). Three children (“the Children”) were born to them: daughter ██████ in October 2007, son ██████ in April 2009, and son ██████ in January 2014 (Tr.13-14;L.F.108,178,242;Appx.A2,A22,A42). In May 2011, Father and Mother attached paternity affidavits to ██████s and ██████ birth certificates (Tr.135-37;GAL.Ex.201,202). Father also had a child from a previous relationship (Tr.472,645,762).

Father said Mother had a drug addiction, anger management issues, and was diagnosed with bipolar disorder (Tr.693). She “would come and go all the time and I would never know when she would return. And she would often take the children” (Tr.693). In 2011, a court granted Father custody of ██████ and ██████ (Tr.693,721-22). But he and Mother “had gotten back together ... several times since then” (Tr.693).

Father owns an internet business, which he said brings in a few thousand dollars each month (Tr.772-73). Before 2000 he sold cars, but was convicted of odometer fraud and served 24 months in prison (Tr.749,772-74).

The only description of Father’s home was from ██████ ██████ a coordinator with the PAUSE Parenting Program, who said it is on substantial land for the Children to play outside and has three bedrooms (one for Father, one for ██████ and one ██████ and ██████ share) and a playroom, all of which are furnished well (Tr.505-06). At time of trial, Father said he still maintained the home ready for the Children to return (Tr.699).

Father said he never was violent with Mother, but rather she was violent with him (Tr.694). He said he sometimes had to put his arms up to block her from hitting him (Tr.694-95). He agreed “domestic violence happened”, but said he never initiated it (Tr.695,761). He said he never intentionally argued with Mother in front of the Children, but they may have witnessed arguing (Tr.694-96,761).

Father admitted Mother sought an order of protection against him, in which her sworn statement said, “If I don’t let him have the kids, he was going to kill me. He grabbed the kids very roughly and proceeded to take them downstairs. As I got up, his exes had the kids and pushed me out the door”, and Father had called her “a fat bitch, a loser, a bad mom, that she should kill herself, that the kid would be better off without her, a cunt, a loser, a miserable piece of shit” (Tr.769;GAL.Ex.204). Father disputed all of this and said Mother told him she had filed a false application against him (Tr.769-70).

B. Mother’s disappearance

██████████, the owner and manager of a daycare, said Father enrolled the Children there in July 2014, but then withdrew them in September 2014 (Tr.562).

Sometime in September 2014, Mother disappeared, unseen again by the time of trial (Tr.124). ██████████, a Jackson County Sheriff’s Department detective who investigated the disappearance, said Mother last was heard from September 5, 2014 (Tr.577,591).

Father stipulated Mother was last seen September 11, 2014, when [REDACTED] saw him push Mother (Tr.746-47;Supp.L.F.19,22). He said Mother never had been gone this long and he had not communicated with her since (Tr.781-82). He said the Children did not ask where she went (Tr.782). He also said he never told anyone she had died or was never coming back (Tr.785-87). Father said he had not assisted law enforcement in finding her (Tr.787). Detective [REDACTED] said Father sold Mother's car on September 20, 2014 (Tr.580-81).

Attached to [REDACTED] birth certificate was a witnessed paternity affidavit Mother purportedly signed on October 20, 2014 (Tr.135,138;GAL.Ex.203). [REDACTED] a Children's Division social worker, opined the signature's date and it being witnessed, not notarized, was significant because this was after Mother was last seen (Tr.141-42). She said she could not find the witnesses and their addresses did not exist (Tr.142). Detective [REDACTED] said police could not confirm or deny whether the signature was Mother's (Tr.593). Father said he did not sign or fill out the form, Mother gave it to him before she left so his name could be on [REDACTED] birth certificate for custody, and he used it to obtain [REDACTED] custody (Tr.748).

On October 21, 2014, Father also signed his own paternity affidavit that was attached to [REDACTED] birth certificate (Tr.135,138,749;GAL.Ex.203).

Ms. [REDACTED] said Father re-enrolled the Children in her daycare in November 2014 (Tr.562).

C. ■■■ and counseling

One allegation that put the Children into care was Father not wanting ■■■ to go to counseling regarding a bladder condition “that causes her to urinate frequently” (Tr.110-11,277).

Ms. ■■■ said Father thought ■■■ did not need counseling and did not obtain it “because she could talk to him” and “he could fix it” (Tr.122-23). She said the issue largely had gone away after ■■■ saw a urologist who put her on a diet and medication (Tr.110). She said Father had not admitted ■■■ had “some symptoms relating to trauma or other issues going on in her life,” and instead said “she needed to use the bathroom,” “the teacher wouldn’t let her, so she urinated on herself and was embarrassed” (Tr.122-23).

Father said when he picked ■■■ up from school one day in December 2014, her clothes were in a bag and she was crying, telling him “the teacher made her wet her pants” before the other students and would not let her use the bathroom (Tr.663-65). He said he told ■■■ it was not her fault and just to use the bathroom if she could not hold it (Tr.664-65,777).

Father said this made him upset, he called the teacher, who denied the incident, and the principal, who was not helpful (Tr.664-65,777). Father said nobody then knew ■■■ had any physical urinary issues (Tr.666). He said he was “trying not to blame and the school district and the public schools, and I’m trying to understand from everybody’s perspective,” and when he learned this in fact was a biological condition, it made sense (Tr.777).

D. Abuse allegations

Ms. ██████ said a statement provided to service providers said ██████ alleged “she was taken into the bedroom by her father and he touched her leg” (Tr.59,130). Ms. ██████ opined this “suggested maybe some inappropriate touching” (Tr.130). Father denied this (Tr.716-17). Ultimately, Ms. ██████ agreed “[t]here has never been any foundation as to any sexual abuse against, or by” Father of ██████ (Tr.61-62).

In 2012, Father was accused of “sexual maltreatment of a little girl” resulting in a preponderance of evidence finding by Children’s Division in case number 20121720373 (Tr.717). ██████ ██████ a psychologist who evaluated Father in 2015, said Children’s Division told him Father “did something to a neighbor’s kid” (Tr.358). But Father denied this and said he was told the allegation was not against him, he was never contacted about it, and he “didn’t meet the physical description” or location alleged (Tr.717-18).

Father said he and his counsel approached the Department of Social Services (“DSS”) in 2016, questioning the preponderance finding (Tr.375-77,718). In response, marked as Exhibit 312, DSS confirmed the previous preponderance finding was overturned, and it was unsubstantiated (Tr.65,359,378,717-19). While counsel never asked to admit Exhibit 312, a copy of that official finding – which the Court can retrieve itself from the CA/N registry – is in Father’s appendix (Appx. A61).

E. Events leading to proceedings below

Ms. ██████ said Father again withdrew the Children from daycare in January 2015 after ██████ told her “my dad said my mom is done and she’s

never coming back”, to which █████ told him “shush” (Tr.562,564-66). Ms. █████ said this concerned her because she had not seen Mother in a while (Tr.565). She said she spoke with Father about this and he said Mother “leaves periodically” (Tr.565-66).

Detective █████ said her agency first was requested to check on Mother in April 2015 (Tr.575,577). She said Father told responding officers Mother “had left,” “he had no idea where she was, and had not heard from her”, and her purse and car were gone (Tr.575-76,580). No one knew where Mother last was seen (Tr.576-77). She said Father declined a formal interview (Tr.583). She said she believes Mother is dead (Tr.578-79).

Detective █████ said she executed a search warrant at Father’s home (Tr.579-80). She said he told her he had disposed of all Mother’s things because Mother was never coming back (Tr.582). She said she found Mother’s birth certificate, Social Security card, and food stamp card in Father’s safe (Tr.584-85). She said Father told others Mother died in a car crash, but he told her he made that up (Tr.582). She said she came back for a second search of Father’s house with “search and rescue dogs”, which noted decomposition outside (Tr.586).

F. Proceedings below

1. Initial proceedings

On April 7 or 19, 2015, the Children were taken from Father’s custody (Tr.12,159,416,538,756). Ms. █████ said the reasons “were allegations of medical neglect” – Father refusing to get counseling for █████ – “and domestic

violence” (Tr.20,110-11). She agreed Father tested negative for drugs, and substance abuse never was an issue (Tr.21,89).

On April 17, 2015, the Juvenile Officer filed petitions to take the Children into care (Supp.L.F.11,155,171). In June 2015, Father stipulated the Juvenile Officer would be able to present sufficient evidence of allegations in an amended petition for the court to take jurisdiction (Supp.L.F.19). They were: (1) Mother “was last seen on or about September 11, 2014, when [REDACTED] witnessed [F]ather push” Mother; (2) “within the past few months, [REDACTED] has suddenly began to exhibit symptoms consistent with trauma such as personality changes, including ... stop[ing] talking and wet[ting] herself frequently,” and her “school contacted [F]ather in an attempt to offer counseling services” but he “refused”; and (3) the Children “are at risk of further harm or neglect” (Supp.L.F.22). Father said he only stipulated to the risk allegation because he thought the Children were coming home (Tr.756).

The Juvenile Court then took jurisdiction and ordered supervised visitation by Father at his home (Supp.L.F.25-26). DSS also ordered Father to make child support payments while the Children were in care, which he did the entire time (Tr.112-13,719-20;Res.Ex.307).

Father opined the Children coming into care was “just a big misunderstanding” (Tr.738). He said he believed it was because of “the Hotline calls,” to which Children’s Division added “this non-counseling thing ... in the prior year” (Tr.756). He said he did not believe it was from neglect, as he never neglected the Children, or domestic violence, because he was defending himself when he pushed Mother (Tr.738-39).

2. Interactions with Children's Division

Ms. [REDACTED] then began working with the Children as their social worker (Tr.12). She determined the necessary services were individual therapy and psychological evaluations for them and Father (Tr.20-21).

Ms. [REDACTED] said she met with the Children monthly, never with Father present (Tr.56-57). Father said she never saw him interact with the Children (Tr.686). She said she spoke with [REDACTED] about "if she wants to go home" and her thoughts on adoption (Tr.117). She said she also talked to the Children about Mother, but they did not tell her a lot about Mother and were reserved about it (Tr.143).

Ms. [REDACTED] opined Father did not seem to want to work with Children's Division, based on what she said were combative monthly visits, Father being hesitant to give information, unhelpful conversations, Father not listening to what they say, and Father telling them what to write in their notes (Tr.49). She said he displayed anger problems at meetings by raising his voice or yelling, which has caused her to end them early (Tr.127-29). Still, she acknowledged Father has called her following meetings to apologize for outbursts and promise to "work on working better together," or to "reiterate a demand", such as requesting a "new parent aide" (Tr.129-30).

Ms. [REDACTED] opined Father had not given "insight into the barriers of reunification" (Tr.49). She said this was because though she told him he needed to address anger and domestic violence issues, he said "there is no domestic violence," "he doesn't have an anger problem" and he only gets angry with Children's Division, he has only seen his original convictions

strengthen, and he neither showed a commitment to change nor changed at all (Tr.49-50,104,122). She said he had not taken responsibility for his domestic violence against Mother (Tr.122,127). She acknowledged he “gets upset if he doesn’t get to see his kids”, because he wants to see them (Tr.112).

Father disputed Ms. ██████ suggestion his anger and frustration with the situation were unusual; he said the caseworkers were inconsistent and unreliable “in imparting information” timely, which was frustrating (Tr.420). He said he never intentionally obstructed Children’s Division, threatened anyone from Children’s Division, tried to intimidate a caseworker, or been violent with one (Tr.668,670,683,701,776).

Father said he had argued with Children’s Division, but not how Ms. ██████ described (Tr.776). He said the communications between the caseworkers and him always were difficult, because they put him on the defensive, were unwilling to cooperate, “didn’t feel like I was a team player”, were unwilling to listen to what he had to say, and it felt “like they were just wasting time to try to run down the clock and terminate my rights”: “They weren’t documenting anything positive I was saying or doing, they were just trying to turn my words around against me” (Tr.670,681,705-06).

For example, parent-aide ██████ and her supervisor, ██████, performed two home inspections at Father’s home, to the second of which they arrived an hour late and came with Sheriff’s deputies (Tr.724-25). Ms. ██████ acknowledged three police officers went to the visit and this should not have been (Tr.103-04). Father also said a caseworker once asked why he had not given up because most parents gave up by then (Tr.728-29).

Father said he challenged caseworkers because he was not getting anywhere and he wanted to know what was going on so he could reunify with the Children (Tr.683). For example, family therapy is in the Child Welfare Manual and he requested it, but the caseworkers repeatedly refused (Tr.673).

Still, Father said he appreciated Children's Division discovered and addressed ██████'s urinary ailment (Tr.666,710). He said they also told him ██████ was diagnosed with ADHD and Tourette's Syndrome, which he was grateful to know (Tr.711). But while Ms. ██████ said he had "the right to know when his children are ill", he said he only ever found out either "from the children or after-the-fact", which frustrated him and made him feel Children's Division was "deliberately trying to withhold information" (Tr.222,420,689). Ms. ██████ said she knew Father was just "looking out for [the Children's] medical well-being" (Tr.264-65).

While Ms. ██████ and Ms. ██████ said Children's Division did not want Father to know the location of the Children's foster care or their school while in foster care, they reported "conversations had occurred, whether it was led by [Father] or the children had shared information" disclosing this (Tr.23-25,165-67,176). Ms. ██████ said she did not recall the Children giving Father this information (Tr.265).

3. Supervised visitation

Father did not see the Children again until mid-May 2015, over one month after they were taken (Tr.416). He was assigned Ms. ██████ to supervise his visits (Tr.28). Though the court initially ordered visitation at Father's home, it always was in the community due to what Ms. ██████ said

were safety concerns (Tr.50,161,167,215,219,206,260;Supp.L.F.26). She said this was because the Children’s therapists voiced concerns about their being traumatized by “what may or may not have gone on” at the home (Tr.50).

Ms. ██████ said Father was consistent with his visitation, usually was on time, and was prepared, bringing snacks, supplies, and toys (Tr.50,52,111-12,169,245,247). She said he would read to and play with the Children (Tr.51-52). She said he was unable to comply with and conform his behavior to the purposes of visitation (Tr.167). Ms. ██████ said she only observed Father with the Children for “a very small period of time” but told him this was when she needed to see him demonstrating self-control (Tr.224,287).

Ms. ██████ said she was concerned during many visits by Father not showing self-control, not “being able to respect the rules”, “[s]ome safety concerns with not monitoring the” Children, “[s]peaking in front of the” Children, his attitude toward Children’s Division, not having appropriate communication with the Children, and not being “able to show appropriate discipline” (Tr.177,180-81,208,214-15,260,267).

At the same time, Ms. ██████ acknowledged she never saw Father “ever hit or harm the” Children or show “physical aggression towards” them, and she never had any safety concerns for them (Tr.214,242). Her reports indicated the Children “enjoy their visits” (Tr.231).

Ms. ██████ said Father let ██████ and ██████ play video games (Tr.174,212-13,256). But she said this was the extent she saw him play with the Children, which concerned her because she was “not seeing the full effect of the parenting skills and [Father]’s interactions with the children”

(Tr.174,213). She said she “encouraged [Father] on several occasions to do different things with the kids” (Tr.174).

Ms. [REDACTED] specifically criticized Father’s “side conversations” with the Children when he would talk to them so she could not hear (Tr.163,271). She said she would address this as he was doing it and clearly and calmly ask him not to (Tr.163,271-72). She said he would comply because she would threaten to end the visit (Tr.163-64). She said he would react negatively by saying “[t]hese are my children” and argue with her (Tr.197,272). She said he told her he was recording the visits and he would stop if she would “work with him” (Tr.284). She described several incidents in which Father accused her and other Children’s Division workers of “trying to keep his children from him” and requested a different parent aide (Tr.183-84,186-88).

Ms. [REDACTED] said she also had concerns about Father telling the Children “he was the only one that can care for them”, “it is not their fault they’re being placed somewhere”, or criticizing their nutrition or dress (Tr.168). She said she heard him tell them they were in care because Children’s Division “is out to get him, is corrupt, and it is not their fault”, there was no reason why they were taken away, about her reports and documentations, she was being manipulated by Children’s Division, and he was going to get a law degree to fight Children’s Division (Tr.168-69,181,254-55). She said he always blamed the foster parents for his concerns with the Children (Tr.179).

Ms. [REDACTED] said Father tried to manipulate the Children by promising to give them things when they get home (Tr.181,206). She said they never asked when they were coming home, but he would tell them they could tell

Children's Division they wanted to go home (Tr.225,282).

Ms. [REDACTED] initially said "in a couple situations where [Father] has snapped and yelled" it made the Children nervous and they shut down or were terrified, describing some situations, many of which Father (and on one occasion Ms. [REDACTED] observing) disputed and described Ms. [REDACTED] as the one who upset the Children (Tr.97,172-74,182-83,193-97,210-12,225-34,255-56,269-70,273-79,283,285,391-95,399-405,516-17,533,541-42,551,553-55,729-34). Ms. [REDACTED] said once the Children leave they "are happy kids" (Tr.273). But she said she "never witnessed any of the kids getting out of control crying and getting upset" except when she ended the visit (Tr.234-35).

Father said he always gave the Children love, affection and reassurances (Tr.682). He said they normally raced to him excited, saying "Daddy, daddy" when they saw him, and he was excited to see them, too (Tr.385,408-09). He said he liked to split his time between them, but also tried to do things with all of them together (Tr.682).

Father said the "side conversations" were when Ms. [REDACTED] could not hear what he was saying to the Children, and if she asked what he said he always told her (Tr.677). He said he never argued or discussed issues in front of the Children about parenting skills, showed his anger to them during a visit, "attempted to intimidate" them or made promises to them (Tr.388,668,677-78,686-87,776). He said the Children initiate the conversations about coming home (Tr.388).

Father said he felt he had "been able to work or cooperate with Ms. [REDACTED] (Tr.372). He denied yelling at Ms. [REDACTED] but said he sometimes

talked loudly and passionately to get his point across, though never in an inappropriate way (Tr.386,699-700). He denied ever displaying anger issues with Ms. [REDACTED] intentionally intimidating Ms. [REDACTED] or making disparaging comments about the foster parents (Tr.688,700,772).

Father said he believed Ms. [REDACTED] was determined from the outset to terminate his rights and she did not explain to him any expectations for the visits (Tr.382-83). He said it was as if she made rules herself without ever looking “at the welfare manual” (Tr.405-06). He said he received some positive information from her, but felt she was biased against him personally, offending him with conversations about race where she, who was African-American, told him, “I think all white people will always be prejudiced against blacks” (Tr.383-84).

Father said while he always was on time for visits, Ms. [REDACTED] was habitually late and only on time twice (Tr.384,408,415). He said she canceled or rescheduled on average once each month (Tr.384). He said he often would be waiting for her at the visit location when she would cancel (Tr.417).

Father said Ms. [REDACTED] reported aspects of the visits inaccurately numerous times, and he recorded some visits as proof of her impropriety (Tr.677,700). He said he asked for a new parent-aide many times because Ms. [REDACTED] was unprofessional and an instigator (Tr.403). He said she admitted to him more than once “she could not handle three kids” (Tr.423).

4. Father's psychological evaluations and therapy

a. Psychological evaluations

Father had two psychological evaluations, the first with Mr. [REDACTED] in June 2014 (Tr.349,373). Mr. [REDACTED] said he is a “licensed psychologist,” though his curriculum vitae was not admitted and his report displays “M.A.” after his name, not “Ph.D.” (Tr.348;J.O.Ex.6).

Mr. [REDACTED] said Children's Division told him the Children were in care because there was a Hotline call and “allegations of domestic violence” and “sexual offenses” (Tr.350-51,357). He said his evaluation consisted of “a brief interview, brief intelligence test, reading test, a parenting skills inventory and a personality inventory”, the MMPI (Tr.85,349).

Mr. [REDACTED] said Father denied any allegations of abuse, domestic violence, or sexual misconduct (Tr.351,357,362,364). He said Father blamed the downfall of his and Mother's relationship on Mother “for using illegal drugs and breaking rules” (Tr.364). He said he did not think Father had “a lot of reaction to” Mother abandoning the family (Tr.365). He said he “recommended long-term individual therapy” for Father (Tr.350).

In his report the next day, Mr. [REDACTED] diagnosed Father “with Personality Disorder, NOS, possibly antisocial or narcissistic”: his “performance ... is consistent with the DSM classification of Personality Disorder NOS possibly antisocial or narcissistic, 301.9” (Tr.350,352,356;J.O.Ex.6;L.F.110,114;Appx.A4,A8).

Mr. [REDACTED] said he made this diagnosis because of “the difference between [Father's] report of his history and the summary I got from the state,

which indicated there were more than one substantiated allegations of abuse”, which Father denied (Tr.351). He said this “avoidance of problem areas” means “there is something going on that he doesn’t want to talk about” (Tr.352). He also said certain answers “on the personality testing” were “consistent with somebody that could get angry” (Tr.364). But Mr. McDonnell said he did not diagnose Father with actual antisocial or narcissistic personality disorder because of a lack of information (Tr.353,356). Still, he stated even these conditions would not prevent someone from parenting and “people do raise children regardless” (Tr.357,366).

As to Father specifically, Mr. ██████████ said, and his report confirmed, despite his diagnosis Father “knows how to take care of kids”, is “aware of child development levels”, “voices support for the child’s behavior, growth, and development”, “is aware of how to use discipline” and “does not rely on physical punishment”, “can be supportive of his children’s emotional and behavioral needs”, and “can identify appropriate roles for the children and adults in families” (Tr.350,353,359-61,361,363,366;J.O.Ex.6).

Father later hired clinical psychologist ██████████ for another evaluation (Tr.373-74). Dr. ██████████ has a Ph.D. in psychology, has practiced for more than 20 years, and is “routinely appointed to do evaluations in issues of custody” (Tr.595-96;Res.Ex.316).

Dr. ██████████ first evaluated Father in October 2015, meeting with him twice and performing additional testing on him besides Mr. ██████████ all of which came back normal (Tr.84,595,610-14,616-17,650;L.F.111;Appx.A5). He told her about the Hotline call, the 2012 allegations, ██████████’s school

counseling issue, and ■■■ reporting to her therapist he hit Mother, and gave her the Children's school reports, which showed they "were going to school" and "were social, performing adequately. There was no indication that they were troubled" or displayed any symptoms of trauma from Mother not being around (Tr.597-98,658-59,660). She described her conversations with Father in detail, positive and negative (Tr.598-99,600-01,606,615,640,642-46,648-49,659).

Dr. ■■■ said Father was "open and cooperative" and his "clinical scales fell within the normal range, which would tend to contraindicate any acute psychiatric disorder or anything ... such as a personality disorder" (Tr.610). In her report in November 2015, she determined Father was intelligent and goal-directed with reasonable judgment, and his personality would not hinder him from being able to raise the Children or need intervention (Tr.606-09;Res.Ex.300). She found no indications he had any psychiatric disorder, including a "personality disorder NOS", and said there was no basis in Mr. ■■■ report to diagnose Father with narcissistic personality disorder or anything to suggest Father was a narcissistic parent (Tr.616-17,622,625-26;Res.Ex.300). She said Father showed some anxiety, which was expected under the circumstances, and could be stubborn and headstrong but not to an unusual degree (Tr.606-08,612). She said there were no indications Father had problems with anger or was prone to emotional outburst or impulsive acting out (Res.Ex.300).

In November 2016, with termination proceedings ongoing, Father contacted Dr. ■■■ to update her previous report, which she said commonly

happens (Tr.654-55). She conducted her second evaluation in January 2017 and updated her report (Tr.373,617,640;Res.Ex.301). She “had additional records to review, also a collateral interview with his therapist, [Ms. ██████ and] another in detailed [*sic*] interview with” Father (Tr.617-18,621,651). She said Father told her he was frustrated with the canceled and late arrivals to visitation, the caseworkers implied he killed Mother, he did not hurt Mother, “everyone had a pre-existing bias against him” and labeled him paranoid, and he was concerned for the Children (Tr.618-21,638-43).

Dr. ██████ said the documents she received from Children’s Division alleged Mother was missing, ██████ saw Father hit Mother, and ██████ stated Father killed and buried Mother, though with no reference to where or whom he said that (Tr.619-20,632-33,635). She said the documents called Father paranoid, including for looking over his shoulder during a visit in public and for not using a Children’s Division therapist (Tr.622).

Dr. ██████ said this was concerning, because the “Children are at the age when they are easily influenced” and their “counselors and psychologists are not generally trained in forensic interviews” and “do not know the risk of questioning a child around the issues of abuse” (Tr.621-23,632-36). She believed “these things are being presented as factual” when they may not be, and Father concluding Children’s Division was “attempting to present him in the worst possible way and influencing other professionals” was reasonable (Tr.622-24). She said she saw considerable ongoing bias by Children’s Division, which would not be the first time (Tr.647-48).

Dr. █████ concluded nothing suggested Father could not raise the Children (Tr.623). She could not “find any indication” of any evidence in any records that Father perpetrated domestic violence or had associated personality characteristics, nor had Mr. █████ even found any (Tr.625). There remained no indication he had any psychiatric disorder or anything else “from a mental health standpoint” to “suggest he is impaired in terms of being a parent” (Tr.627).

b. Therapy

Ms. █████ said Father chose his own therapist because he did not trust the ones she referred and wanted to wait until after reunification for therapy (Tr.26,30-31). She said Father first saw █████ for eight months beginning July 2015 (Tr.29,31,33). She said she had only limited contact with Ms. █████ which caused her to be concerned whether “the appropriate issues were being addressed” (Tr.33).

Ms. █████ had no problem with immediate reunification (Tr.87). She said Father “did not display any signs of [being a] domestic abuser” and “may verbalize frustrations but never been threatening to fight” (Tr.86).

In May 2016, Father began seeing Ms. █████ a licensed clinical social worker who had worked for Children’s Division for 15 years (Tr.33,432,439,460,470). She said he told her about the Hotline call and the 2012 allegations, his relationship with Mother and the Children’s reaction to her disappearance, his difficulties with Children’s Division, and the court proceedings (Tr.435,443,455-56,464-68,471-73,476,478,486-87). She said she never experienced Father “shouting, over-talking, threatening and aggressive

language and behavior”, refusing to accept her intervention and advice, being “dishonest and invasive in addressing his circumstances and his prior history”, or being intimidating (Tr.466-68).

Ms. ██████ submitted a written report about Father’s treatment (Res.Ex.302). She described him as receptive to her and her concepts, having self-control and insight into “what’s going on around him”, intelligent, understanding communication, and able to verbalize appropriately, “conform his behavior to time, place, situation,” and “behave with appropriate decorum” (Tr.461-64). She said he is passionate and gets louder and talks rapidly when excited, but this was a quirk or characteristic, not an anger issue, and not something to prohibit him from raising the Children (Tr.435,444-45,482-83). While he has “a tendency to debate”, which could be construed as being argumentative, he was just trying to get his opinion across, not threatening (Tr.445-47). She said they worked on anger issues by slowing down and using a different tone (Tr.434,444,446,467-68). They also worked on understanding domestic violence, how it impacts children, and how to act differently and avoid it (Tr.442-44,447-49,476,485-86). Finally, they worked on parenting skills and structure (Tr.436-38,441,449).

Ms. ██████ concluded Father would not have anger issues with the children or others, understood how to avoid domestic violence or its appearance, did not still need to work on any parenting skills, did not pose a threat to the Children or anyone else, and should be allowed to reunify with them (Tr.434,436,441,448,450,464). She saw no indication “he is abusive or neglective [*sic*] to his children” (Tr.470).

5. The Children's psychological evaluations and therapy

a. Evaluations

In May 2015, psychologist ██████████ Ph.D., evaluated ██████████ (Tr.40,296,312;J.O.Ex.10). Children's Division told her ██████████ was in care due "to allegations of neglect of the children and sexual abuse for ██████████ by her father" (Tr.80;J.O.Ex.10). She said ██████████ "had some difficulties with both school and at home" and "some role modeling of inappropriate behaviors on the part of her parents, fighting and hitting one another" ██████████ "was able to recall and talk about", all of which concerned Dr. ██████████ (Tr.313-14).

Dr. ██████████ confirmed ██████████ said her parents never hit her or her brothers (Tr.314). She said ██████████ had "dreams about bad memories, but wouldn't talk about" them (Tr.317). She said ██████████ drew a picture of her family including her brothers and Father, but not Mother (Tr.317-18). She said ██████████ "[w]as able to talk about a lot of things, but nothing too personal about her parents" (Tr.313).

Dr. ██████████ said ██████████ was bright and intelligent with nothing "too terribly wrong", "maybe just an adjustment disorder" because she was separated from her parents, and her verbal comprehension was low (Tr.305-06,313,316). She said ██████████ had enuresis, a problem with urination (Tr.315,319). She recommended reunifying ██████████ with Father "following a psychological evaluation for the father to rule out" sexual misconduct (Tr.316-17).

In May 2015, psychologist ██████████ Ph.D., evaluated ██████████ (Tr.41-42,293;J.O.Ex.11). Children's Division also told her "a Hotline came" in

“alleging sexual abuse by [Father] to [REDACTED] (Tr.80;J.O.Ex.11). She described [REDACTED] as pleasant, cooperative, silly, goofy, talkative, and above average in intellectual ability, but hyperactive so as to interfere “with his ability to focus and maintain his attention” (Tr.291-94,302). She diagnosed him with ADHD (Tr.293-94).

Dr. [REDACTED] said [REDACTED] told her he would never see or talk to Mother again because she was dead, Father shot her by the ocean, wrapped up her body, and buried it in a cemetery in the woods (Tr.292-93). She did not know if [REDACTED] believed this and never followed up on it (Tr.296,302). She said [REDACTED] did not seem concerned or disturbed about it, because he said Mother was mean and the previous night Mother had pulled a gun on him and [REDACTED] and Father was protecting him (Tr.294,303-04).

In May 2016, Dr. [REDACTED] re-evaluated [REDACTED] (Tr.40-41,296,311;J.O.Ex.12). She said [REDACTED] told her “she can’t wait to see” Father and likes to see him, though the foster parents told her [REDACTED] sometimes was reluctant and anxious about visiting him (Tr.304-05). She described [REDACTED] as “cooperative” but “guarded” (Tr.297).

Dr. [REDACTED] said [REDACTED] responded to yes-or-no questions about Mother, including Mother was a good mother, she was never going to see or talk to Mother again, she knew [REDACTED] told Dr. [REDACTED] Father killed Mother, she did not know why [REDACTED] did so but [REDACTED] does not make up stories, she did not know what happened to Mother, she had a secret she was not supposed to tell about something bad happening to Mother, which Father told her not to tell

anyone (Tr.297-99,306-08). She said these disclosures could be a problem in the future (Tr.300,307).

Dr. ██████ said she diagnosed ██████ “with a mild mood disorder due to her guarded communications and nondisclosure” (Tr.300,307). She said she would recommend future psychiatric care for ██████ (Tr.300).

b. Therapy

The first therapist for ██████ and ██████ after they were taken into care was “licensed professional counselor” ██████ who provided reports to Ms. ██████ and continued as their therapist until January 2016 (Tr.35-38,332-33;J.O.Ex.9). ██████ was too young for individual therapy (Tr.35). Reports from two other therapists for ██████ and ██████ also were entered into evidence (Tr.38-39;J.O.Ex.7-8). Mr. ██████ said Children’s Division told him before beginning therapy there was a preponderance of evidence or it was substantiated that ██████ was sexually assaulted (Tr.71,73-76,333,341-42;J.O.Ex.9).

Mr. ██████ said when he first met ██████ and ██████ in June 2015, “their interactions were typically somewhat inappropriate. There were a lot of arguments” and he observed ██████ “rubbing his genitalia area up against” ██████ (Tr.322-24,330-31,344;J.O.Ex.9). He described them as “pretty closed off, ... which is not typical of children their age”, meaning they did not talk about their past, home life, or family life (Tr.324-25).

Mr. ██████ said the Children sometimes came to therapy after visiting Father, would not disclose anything and were “hesitant, scared, and closed off”, even not saying anything for a whole session (Tr.327). He said when

they came before their visitation, they would talk more about home issues (Tr.327). He said this made him concerned Father was coaching them not to “talk about things at home”, which he said both the Children and Ms. █████ confirmed (Tr.327-28,330).

Mr. █████ said █████ initially said she had secrets, but would not tell and would shut down when he asked because she could get in trouble with Father (Tr.329-30). He said in October 2015 she started to make disclosures about domestic violence, talking about an incident where she thought Father hit Mother, causing her to hide, and about arguments between Mother and Father that frightened her (Tr.325-26,328,330,338-39,346-47). He said █████ told him she never saw Mother again after Father and Mother had an argument in which there was yelling, and she missed Mother (Tr.328,347). He said she later told him she saw Father hit Mother “on multiple occasions” and Father was “physical with” Mother the night before she disappeared (Tr.346).

Still, Mr. █████ said the Children never told him that either parent hit them, nor did he ever hear any allegation of physical abuse toward them (Tr.334-35). But he nonetheless recommended to discontinue visitation and for Father to undergo anger management (Tr.334,338).

6. Parenting programs

In January 2016, the Juvenile Court ordered Father to complete a parenting program, listing the PAUSE Parenting Program by name (Tr.43,45,526). PAUSE is twelve weeks of classes and homework concerning “the ability to be empathetic to a child’s needs” (Tr.501-02).

Ms. [REDACTED] from PAUSE began working with Father in March 2016, and she reported he complied with her, he actively participated in the classes and homework, and her evaluation showed he grasped the information taught (Tr.501-03,509-10,525,546). She also observed six visits with the Children and visited Father's home (Tr.510,528-89). She conducted a child safety checklist for Father, she had no concerns, and his home was a safe environment (Tr.503-04,528;Res.Ex.304).

Ms. [REDACTED] said Father's in-class input showed "he had an understanding of expectations of parents in all categories" (Tr.503-05). She said Children's Division was reluctant to let her attend the visitation, and she never saw anything inappropriate occur during those she observed (Tr.510,514-15,517-19,528-29). She said the Children were happy to see Father and he them, they were not afraid of him, there was a bond between them, and Father was prepared and attentive and appropriate with them (Tr.506-08,513-15). She said Father related what he was learning and saying in class to the supervised visits (Tr.500-01). She said her experience with Father showed no support for termination, and in-home supervised visits would be appropriate if the Children wanted it (Tr.520-21).

Ms. [REDACTED] said she never received any reports from PAUSE (Tr.100). Ms. [REDACTED] said she was surprised to learn PAUSE was court-ordered, because it was Father who initiated contact with her, rather than Children's Division, and Children's Division was "reluctant to allow me to even do the one visit" (Tr.552). She said she understood why Father thought Children's Division was conspiring against him, because she found Children's Division

acted atypically (Tr.552-53). She said all Children's Division would tell her was the Children were not coming home because [REDACTED] would be traumatized and Father "would abscond with the children", though she saw no indication of that (Tr.521-11,530,555-56). She described being told to leave one of the supervised visits in August 2016 and not letting her return until October 2016, which Ms. [REDACTED] and Father confirmed, and said even then Father acted appropriately (Tr.243,511-13,544-45,735).

Father also took and passed an online court-approved program, including domestic violence and an anger management classes with tests, for both of which he also had certificates of completion and from which he described learning a lot (Tr.45,684,691-92,707;Res.Ex.306).

7. Lead-up to termination proceedings

After a review hearing in July 2015, the court continued the Children in care, with the goal reunification but the barriers to it being "Domestic Violence Issues and Parenting Issues" (Supp.L.F.29,157,177).

In November 2015, the court continued the Children in care with the goal reunification (Supp.L.F.50). It added "the father's intimidating and threatening actions with Children's Division" to the barriers (Supp.L.F.50).

In December 2015, Father moved the court to return the Children or at least expand his visits and place the case on an expedited track for reunification, all of which the Juvenile Officer and the Guardian ad Litem opposed (Supp.L.F.34,38,41,47). At the hearing in January 2016, Father said he chose not to testify and instead left the courtroom because he "was upset with" Ms. [REDACTED] being coached (Tr.42-43,751-54,789). Dr. [REDACTED] testified; she

said Father also told her his oldest child's mother testified and alleged Father was "emotionally abusive" and "abandoned that child" (Tr.652-53). Father said the mother also testified he threatened to kidnap the child, change the child's identity, never let her see the child again, and to kill her, and had tried to run her off the road, all of which was false (Tr.762-65).

In February 2016, the court denied Father's motion and kept the Children in care, with the goal reunification (Supp.L.F.60). It found the evidence did not demonstrate the barriers had been eliminated, specifically Father's "inability to control his anger", Father "has obstructed the ability of the Children's Division to provide appropriate services to" him, and Ms.

██████████ was not credible (Tr.52;Supp.L.F.60-61). It also found

the person named "██████████ in Children's Division investigation in 2012 of accusations of sexual abuse of a child is in fact [F]ather. [F]ather purports to deny any knowledge of the investigation: that he was mistakenly identified. However, in [F]ather's Psychological Evaluation he admits that the mother in the Children's Division investigation was his girlfriend at the time. [F]ather's explanation of mistaken identity does not make sense in light of the investigative reports and his admission that he was actually involved with the family. Further the investigative report indicates that the father was interviewed in 2011 regarding physical abuse of the same children. The Court is not making a determination of the credibility of the report's finding as it relates to the allegations of sexual abuse.

(Supp.L.F.61).

In April 2016, after Ms. ██████ recommended it, the court changed the permanency goal to “termination of parental rights/adoption” (Tr.17,26;J.O.Ex.1;L.F.16-27;Supp.L.F.88). It found Father had not demonstrated “he is capable of controlling his anger, nor has he demonstrated an understanding that his emotional outbursts of anger effect the wellbeing of the children”, which continued to be the “primary barrier to reunification” (Supp.L.F.87). It found termination was appropriate because the Children had been in care for twelve months, the conditions necessitating it have not been rectified, and there was no reasonable likelihood reunification could be accomplished in the foreseeable future (Supp.L.F.88).

8. Termination proceedings

In July 2016, the Juvenile Officer filed petitions to terminate Father’s and Mother’s rights over the Children (L.F.1,8,138,202). He stated three grounds against Father: (1) the Children had been abused or neglected (L.F.11-12,141-42,205-06); (2) the Children had been under the court’s jurisdiction for more than a year and both the conditions leading to it and harmful conditions still existed (L.F.12-14,142-44,206-08); and (3) Father is unfit (L.F.14,144,208).

Father answered, denying the allegations and requesting the court restore custody to him (L.F.28,146,210). Mother was served by publication but never answered or appeared, and in November 2016 the court terminated her rights (L.F.2-4,40,150,214).

a. Parties at time of trial

Ms. ██████ admitted the Children continued to “have emotional ties with their dad” (Tr.111). ██████ and ██████ told her they still viewed Father as their father and wanted to go home to him (Tr.53-55). She also admitted Father “does still have a bond with the” Children (Tr.100,111).

Father said he felt he had done everything in his “power to do everything that [Children’s Division] ask and finish every service that they require, complete every task”, and did so for the Children’s sake (Tr.372-73,672,684). He said he understood the issues that needed to be addressed, did so, and learned a lot (Tr.672-73,709).

Ms. ██████ said she could not recommend reunification because there remained concerns about Father’s anger, Children’s Division had “not really been able to assess what kind of progress he’s making in individual therapy”, Father’s answers to her questions were too general, his level of participation in court-ordered services was insufficient, and there were still safety concerns (Tr.47-48,53,115). She believed additional services would not result in reunification (Tr.148).

Ms. ██████ said Father still wanted to argue, made “comments about the kids coming back home,” and became upset when she spoke to him about this (Tr.210). She said he had not shown improved parenting skills, a change or commitment to change his behavior or parenting, or that he knew it was “his responsibility that the children are in” care (Tr.207-08).

b. Trial and judgment

The case was tried over four days in January and February 2017 (Tr.3-5). The court entered its judgments in April 2017, amended *nunc pro tunc* in May 2017, which terminated Father's parental rights.¹

The court found Father unfit under § 211.447.5(6), R.S.Mo., for three reasons (L.F.122;Appx.A16). First, it found under § 211.447.5(2) that the Children were abused or neglected as initially stipulated in June 2015 (L.F.109;Appx.A3).

Second, the court found under § 211.447.5(2)(a) that Father “suffers from a mental condition that is either permanent or such that there is no reasonable likelihood ... [it] can be reversed and which renders Father unable to knowingly provide the child with the necessary care, custody and control” (L.F.109-10,119;Appx.A3-4,A24). It found Mr. ██████████ diagnosis and recommended treatment credible and persuasive (L.F.110,114,119;Appx.A4,A8,A13). It found Father “in denial and minimizes the significance of his mental condition and behaviors”, and this and blaming others indicates “Father cannot or will not address his mental health diagnosis” (L.F.110,114;Appx.A4,A8). It found Father “demonstrates no insight into his mental condition nor willingness to address its role in causing the child to remain in care” and he refused to participate in recommended

¹ There are three judgments, one for each child (L.F.107,177,241;Appx.A1,A21,A42). Because the judgments are materially identical, for ease of reference this brief cites only the judgment about ██████████

therapy, instead hiring his own therapists to whom he did not disclose issues, making their testimony unconvincing (L.F.110-11,115;Appx.A4-5,A9).

The court found Dr. ██████ testimony not credible, dismissing her November 2015 conclusions as inconsistent with the Juvenile Court's previous findings and her January 2017 conclusions as based on Father's self-serving statements, holding this included Father saying the 2012 allegation was unsubstantiated and he was not the perpetrator when the juvenile court found the allegation was against him (L.F.111-12;Appx.A5-6).

But the court found under § 211.447.5(2)(b)-(d) there was no evidence: Father had a chemical dependency; other than the 2012 allegations, that Father "committed a severe or recurrent acts of physical, emotional or sexual abuse toward ... the children ... or circumstances exist" suggesting he "knew or should have known" such acts were being committed against them; or Father failed to provide "adequate food, clothing, shelter, education, or other care necessary for the child's physical, mental or emotional health and development" (L.F.113,122;Appx.A7,A16).

Finally, the court found under § 211.447.5(3) that the conditions why the Children were taken into care and harmful conditions "still persist" and "[t]here is little likelihood" they "will be remedied at an early date" (L.F.113-14;Appx.A7-8). It found this was because Father failed or refused to "sincerely participat[e] in ordered services to address domestic violence and neglect", "to rectify his parenting behaviors to ensure a safe home for the child and siblings in the future", and his continuing "to deny or minimize his

responsibility for domestic violence in the home” or “the neglect and mental and emotional harm he inflicted on the children” (L.F.113;Appx.A7).

The court found Father failed to make progress with his plan (L.F.114;Appx.A8). It found this was because he made “limited effort to participate in services offered to address his behaviors and mental conditions and his lack of sincere efforts toward reunification [that] make it unlikely he will make progress in the foreseeable future”, he “repeatedly directed blame to all other parties and service providers, failing to acknowledge his actions/inactions as it pertains to the child[ren]”, he testified “workers and services providers were ‘offended by my intellect’, that he ‘technically’ did not threaten or yell at workers, but that he did ‘talk loud’ and that workers and parent aides were ‘completely biased against me’”, he denied prohibited side-conversation and then changed his story to say it had not occurred, and he “did not express empathy for the children nor that he wanted them back for their well-being” and did not understand the children’s needs, because of his self-absorption and self-centeredness (L.F.114-15;Appx.A8-9).

The court found Father could not exhibit the emotional control Ms. ██████ attributed to him, he had not made progress in therapy, his certificates of completion of parenting classes had little value because he did not prove specific information on their substance, and Ms. ██████ saying his “home was clean and appropriate” was based on Father minimizing why the children were in care and her being “unaware of the nature and extent of the trauma the children experienced” (L.F.115-16;Appx.A9-10). It found

Father's statements and conduct contradict that he received a benefit from the PAUSE Program (L.F.116;Appx.A10).

The court found Ms. [REDACTED] reports credible and, based on them, Father made little progress "to demonstrate he can safely parent" (L.F.117;Appx.A11). It found he "attempted to manipulate and intimidate" her by violating rules, attempting to intimidate the Children to say they wanted reunification, having side-conversations, and being loud and aggressive (L.F.117;Appx.A11). It found the Children were affected by this because they were observed going "from talkative and happy to withdrawn and fearful" (L.F.117;Appx.A11). It found Father's "behavior and his failure to address and rectify his behaviors, [continues] to inflict emotional harm on" them (L.F.117;Appx.A11).

After finding Father unfit, the court found termination in the Children's best interests (L.F.123-24;Appx.A17-18). It found they have emotional ties with Father to an unknown extent, his conduct during visitation "was not conducive to" its success "and overall interaction with the children", he "has not made sufficient progress in any services", "[a]dditional services would not be likely to" enable reunification, and he had not shown an "interest in or a commitment to change" (L.F.123-24;Appx.A17-18). But it found "[t]here was no evidence of deliberate acts by any parent which the parents knew or should have known that subjects the child[ren] to a substantial risk of physical or mental harm" (L.F.124;Appx.A18).

Father timely moved the court to amend its judgment (L.F.6,81-106). When that was denied, he timely appealed (L.F.6-7,127,130).

Points Relied On

- I. The trial court erred in finding Father unfit due to a mental disorder *because* this misapplied the law that under §§ 211.447.5(2)(a) and 211.447.5(3)(c), R.S.Mo., to terminate parental rights for a mental condition, it must be (1) supported by competent evidence; (2) permanent or no reasonable likelihood it can be reversed; and (3) so severe as to render the parent unable to provide necessary care, custody, and control *in that* Mr. ██████████ is not a physician or doctor, psychiatry does not recognize “personality disorder NOS” and prohibits such a diagnosis, Mr. ██████████ only evaluation of Father was from 19 months before trial, there was no psychological evidence this supposed disorder continued in Father at the time of trial, Mr. ██████████ admitted it did not prevent Father from parenting and he was able to provide the Children necessary care, custody, and control, and the trial court found Father never abused the Children, committed any act he knew or should have known would subject them to physical or mental harm, or failed to provide for them.

In re L.J.D., 352 S.W.3d 658 (Mo. App. 2011)

In re T.A.L., 328 S.W.3d 238 (Mo. App. 2010)

In re K.M., 249 S.W.3d 265 (Mo. App. 2008)

In re D.L.M., 31 S.W.3d 64 (Mo. App. 2000)

DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS

(5th ed.2013)

II. The trial court erred in finding Father unfit due to abuse or neglect *because* this misapplied the law that under § 211.447.5(2) it could not use singular incidents of neglect in 2014/15, fail to find any further abuse or neglect since then, and then hold that sufficient to terminate Father's parental rights, when there was no evidence of any other abuse or neglect *in that* the only abuse or neglect finding in 2014/15 was that ■■■ had seen Father push Mother and Father had refused to provide ■■■ to counseling, but by the time of trial Mother had disappeared and ■■■ was in counseling, had been diagnosed with a medical issue, and Father approved of her treatment, the only other allegations of abuse were officially deemed unfounded and unsubstantiated, and the trial court found there was no evidence Father ever abused the Children, committed any act he knew or should have known would subject them to physical or mental harm, or failed to provide for them.

In re A.M.W., 448 S.W.3d 307 (Mo. App. 2014)

In re P.J., 403 S.W.3d 672 (Mo. App. 2012)

In re D.O., 315 S.W.3d 406 (Mo. App. 2010)

In re C.A.L., 228 S.W.3d 66 (Mo. App. 2007)

III. The Court erred in finding Father unfit due to his not making sufficient progress in complying with his plan and, for this reason, the juvenile officer's efforts at reunification had failed *because* this misapplied the law that under § 211.447.5(3) a parent's failure to comply with one or more parts of a plan does not, by itself, provide grounds for termination, and compliance need not be total or even substantial *in that* Father followed the plan's directives to undergo counseling, complete the PAUSE Program and other parenting courses, and test negative on a random drug test, his expressions of anger or frustration with Children's Division and the juvenile officer do not undo this, and there was no evidence of any specific harm Father posed to the children, especially where the trial court itself expressly found Father never abused the Children, committed any act he knew or should have known would subject them to physical or mental harm, or failed to provide for them.

In re M.A.M., 500 S.W.3d 347 (Mo. App. 2016)

In re A.M.W., 448 S.W.3d 307 (Mo. App. 2014)

In re X.D.G., 340 S.W.3d 607 (Mo. App. 2011)

In re S.M.H., 160 S.W.3d 355, 371 (Mo. banc 2005)

Argument

Standard of Review for All Points

“A trial court may terminate parental rights where it finds that it is in the best interest of the child and where it appears by clear, cogent, and convincing evidence that one of the grounds for termination under section 211.447 exists.” *In re C.M.D.*, 18 S.W.3d 556, 560 (Mo. App. 2000). “Clear, cogent and convincing evidence in an action for termination of parental rights is evidence that instantly tilts the scales in favor of termination when weighed against the evidence in opposition and the finder of fact is left with the abiding conviction that the evidence is true.” *Id.* (citation omitted).

A judgment terminating parental rights generally “will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.” *In re J.P.B.*, 509 S.W.3d 84, 90 (Mo. banc 2017) (citing *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976)).

Still, “[t]erminating parental rights is an exercise of an awesome power and should not be done lightly.” *In re C.K.*, 221 S.W.3d 467, 471 (Mo. App. 2007). The judgment must be reviewed “closely because termination of parental rights interferes with a basic liberty, freedom from governmental interference with family and child rearing.” *Id.* (citation omitted). And because of this “fundamental liberty interest, statutes” providing for termination “are strictly construed in favor of the parent and preservation of the natural parent-child relationship.” *In re A.S.W.*, 137 S.W.3d 448, 453 (Mo. banc 2004).

I. The trial court erred in finding Father unfit due to a mental disorder *because* this misapplied the law that under §§ 211.447.5(2)(a) and 211.447.5(3)(c), R.S.Mo., to terminate parental rights for a mental condition, it must be (1) supported by competent evidence; (2) permanent or no reasonable likelihood it can be reversed; and (3) so severe as to render the parent unable to provide necessary care, custody, and control *in that* Mr. ██████████ is not a physician or doctor, psychiatry does not recognize “personality disorder NOS” and prohibits such a diagnosis, Mr. ██████████ only evaluation of Father was from 19 months before trial, there was no psychological evidence this supposed disorder continued in Father at the time of trial, Mr. ██████████ admitted it did not prevent Father from parenting and he was able to provide the Children necessary care, custody, and control, and the trial court found Father never abused the Children, committed any act he knew or should have known would subject them to physical or mental harm, or failed to provide for them.

Rule 84.04(e) Preservation Statement

Father preserved this point under Rule 78.07(c) in his motion to amend the judgments (L.F.85-90).

* * *

Section 211.447.5(2)(a), R.S.Mo. (2014), allows termination when “the child has been abused or neglected” because the parent exhibits “[a] mental condition which is shown by competent evidence either to be permanent or ... there is no reasonable likelihood [it] can be reversed and which renders the

parent unable to knowingly provide the child the necessary care, custody and control” (Appx.A63-64). Similarly, in allowing termination when “[t]he child has been under the jurisdiction of the juvenile court for a period of one year, and ... the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist”, one of the permissible reasons is this same language. § 211.447.5(3)(c) (Appx.A64).

The trial court held Father’s rights should be terminated for this reason, holding Mr. [REDACTED] June 2015 diagnosis that Father had “Personality Disorder NOS, possibly antisocial or narcissistic” satisfied these statutes and rendered Father unfit under § 211.447.5(6) (L.F.109-10,114,119,122;Appx.A3-4,A8,A13,A16). This was error.

“Termination of parental rights should not be granted on account of mental illness unless it is shown by clear, cogent and convincing evidence that [the child] is harmed or is likely to be harmed in the future.” *In re D.L.M.*, 31 S.W.3d 64, 69-70 (Mo. App. 2000). Mental-illness termination under §§ 211.447.5(2)(a) or (3)(c) “requires a showing of more than merely the presence of mental or emotional instability or problems; **the incapacity must be so severe that it renders the parent incapable of providing *minimally acceptable care*** and the condition cannot be reversed or improved in a reasonable time.” *In re S.M.H.*, 160 S.W.3d 355, 371 (Mo. banc 2005) (emphasis added).

Under sections [211.447.5(2)(a)] and [(3)(c)], both of which allow termination of parental rights for mental condition, the court must analyze three aspects: “(1) documentation – whether the

condition is supported by competent evidence; (2) duration – whether the condition is permanent or such that there is no reasonable likelihood that it can be reversed; and (3) severity of effect – whether the condition is so severe as to render the parent unable to knowingly provide the child necessary care, custody and control.”

In re K.M., 249 S.W.3d 265, 271-72 (Mo. App. 2008) (citation omitted), *overruled on other grounds by In re M.N.*, 277 S.W.3d 843, 845 (Mo. App. 2009). If any one aspect is missing, termination for this reason is error. *Id.*

The trial court’s conclusion here fails all three required aspects.

First, Father’s supposed mental disorder of “Personality Disorder NOS” in June 2015 *is not* supported by competent evidence.

Mr. ██████████ diagnosed Father with “with Personality Disorder, NOS, possibly antisocial or narcissistic” (Tr.350,352,356;J.O.Ex.6). NOS means “not otherwise specified” (Tr.352). He reported Father’s “performance ... is consistent with the DSM classification of Personality Disorder NOS possibly antisocial or narcissistic, 301.9” (J.O.Ex.6). “DSM” is the American Psychiatric Association’s (“APA’s”) DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS, in its fifth edition since 2013 (“DSM-5”), which “is the standard classification of mental disorders used by mental health professionals in the United States.” *State v. Johnson*, 244 S.W.3d 144, 152 n.6 (Mo. banc 2008) (using DSM independently to determine whether, based on I.Q., criminal defendant was competent to stand trial).

Since 2013, however, the DSM has made plain that ***“personality disorder not otherwise specified” is not a recognized mental disorder.*** When revising the DSM, the APA was conscious many practitioners exhibited “an excessive use of and need to rely on ‘not otherwise specified’ (NOS) criteria ...” DSM-5, pp. 10, 733 (Appx.A68,A73). This was a “[s]tructural proble[m] rooted in the basic design of the previous DSM classification,” especially as “not otherwise specified diagnoses ... represent[ed] the majority of diagnoses in areas such as ... personality disorders ...” *Id.* at 12 (Appx.A69). Accordingly, the APA discarded “personality disorder not otherwise specified” from the recognized personality disorders. *Id.* at 645-46 (Appx.A70-71).

Instead, as of 2013 the DSM includes an “other specified personality disorder” category for situations when “the clinician chooses to communicate the specific reason that the presentation does not meet the criteria for any specific personality disorder.” *Id.* at 684 (Appx.A72). It also includes (under the same code Mr. ██████████ used, 301.9) an “unspecified personality disorder,” but states this is limited to situations “in which the clinician chooses not to specify the reason that the criteria are not met for a specific personality disorder, and includes presentations in which there is insufficient information to make a more specific diagnosis.” *Id.* As an alternative under its new Section III framework, the DSM also includes a diagnosis of “personality disorder – trait specified”, though with its own separate diagnostic framework independently determining whether the subject has a personality disorder in the first place. *Id.* at 816 (Appx.A82).

But Mr. ██████████ did not choose to communicate why Father did not meet the criteria for a specific personality disorder, to specify why criteria were not met for a specific personality disorder, or to analyze the framework for a trait-specified personality disorder. Instead, he did what the DSM does not recognize: mixing aspects of two “possible” personality disorders under the guise of a “not otherwise specified” diagnosis when by his own admission he lacked sufficient information to diagnose an actual disorder (Tr.353,356;J.O.Ex.6). Contrary to his report, there is not now, was not at time of trial, and was not in June 2015 any “DSM classification of Personality Disorder NOS possibly antisocial or narcissistic, 301.9” (J.O.Ex.6).

Mr. ██████████ diagnosis of Father was based on outdated, scientifically obsolete criteria, which is especially troubling given that Father’s parental rights were on the line. His report is not competent evidence that Father suffered from a medically-recognized mental disorder.

As there was no evidence Father suffered from a scientifically-recognized mental disorder, the first required aspect to terminate his rights for this reason is unmet as a matter of law, rendering termination error. *Cf. In re T.A.L.*, 328 S.W.3d 238, 252 (Mo. App. 2010) (termination reversed because, among other things, while psychiatrist concluded mother *possibly* had antisocial personality disorder, he could not say with present information, so no competent evidence mother “actually had” mental disorder).

Second, even if “personality disorder NOS” somehow were a recognized disorder, there is no evidence from any psychologist, psychiatrist,

or clinician that it continued in Father at time of trial. Mr. [REDACTED] evaluated Father only once, in June 2015, **19 months** before trial (Tr.349,373;J.O.Ex.6).

The law of Missouri is that this is insufficient to meet the second required aspect. In *K.M.*, this Court reversed a termination due to a supposed mental disorder finding for this reason alone, on nearly the same evidence: the clinician “evaluated Parents only once, in May 2005. He prepared his report at that time, nineteen months before the termination hearing.” 249 S.W.3d at 265. But because “abuse or neglect sufficient to support termination under” § 211.447.5(2) must “be based on conduct at the time of termination, not just at the time jurisdiction was initially taken,” this was insufficient. *Id.* (citation omitted).

This is especially true here where, while the trial court dismissed their testimony and reports, Father’s own evaluators – including Dr. [REDACTED] a Ph.D. clinical psychologist – performed their own evaluations closer in time to trial and found he did not suffer from any mental disorder and should be reunified (Tr.627;Res.Ex.301). And the same goes for the only evidence of the Children’s psychological condition, the only evidence of which the trial court cited were from “May 12, 2015, ... May 11, 2015, ... and ... May 13, 2015” (L.F.118;Appx.A12), **20 months** before trial.

But while facts supporting “the trial court’s initial assumption of jurisdiction over the Children are certainly relevant to the propriety of a subsequent termination, ... such evidence **must be updated** to reflect the conditions existing at the time of the termination trial in order to support the

difficult, but necessary, assessment of the potential of future harm.” *In re M.A.M.*, 500 S.W.3d 347, 357 (Mo. App. 2016) (emphasis added).

In *In re Q.A.H.*, the Supreme Court held a mother diagnosed with psychotic disorder long before trial and with no more recent evaluations still could have her rights terminated. 426 S.W.3d 7, 12-14 (Mo. banc 2014). But this was because she failed to provide any support for the children during care, was unemployed despite having a college degree, and continued to have psychotic delusions at trial, testifying “it was possible that she and Child were administered sedatives through the heating vents in their previous home, enabling them to be sexually assaulted without her knowledge.” *Id.* at 13.

Q.A.H. is distinguishable. It is undisputed that Father provided financial support the whole time the Children were in care, attended visitation consistently and timely, has the financial means to provide for the Children, and never was accused of some kind of psychotic break with reality, let alone one re-manifesting itself at trial (Tr.50,52,111-12,169,245,247,719-20;Res.Ex.307).

This case is like *K.M.*, not *Q.A.H.* Even if “personality disorder NOS” were a recognized mental disorder, there was no evidence Father continued to suffer from it at the time of trial, and the only evidence was to the contrary. The second aspect is not met, either.

Finally, none of the evidence on which the trial court relied provided a sufficient basis to find Father’s mental condition was so severe it rendered him incapable of providing minimally acceptable care. “[A] diagnosis of

mental illness does not per se render a parent unfit or justify, by itself, a judicial determination of neglect or abuse.” *In re A.M.F.*, 140 S.W.3d 201, 207 (Mo. App. 2004). Instead, clear, cogent, and convincing evidence must prove the illness “renders the parent incapable of providing minimally acceptable care ...” *S.M.H.*, 160 S.W.3d at 371.

Mr. ██████████ own testimony belies such a finding. Despite his diagnosis, he testified Father “knows how to take care of kids”, is “aware of child development levels”, “voices support for the child’s behavior, growth, and development”, “is aware of how to use discipline” and “does not rely on physical punishment”, “can be supportive of his children’s emotional and behavioral needs”, and “can identify appropriate roles for the children and adults in families” (Tr.350,353,359-61,361,363,366;J.O.Ex.6). He said even having narcissistic personality disorder, which he did not diagnose, would not prevent someone from parenting and “people do raise children regardless” of it (Tr.357,366).

Even the trial court found Father can provide at least minimally acceptable care. It found there was *no* evidence Father *ever* committed, knew of, or should have known of any act of abuse against any of the Children, **failed to provide the children with any necessity of any kind, be it physical, mental, or emotional**, or committed *any* act he knew or should have known would subject the children to physical or mental harm (L.F.113,124;Appx.Appx.A7,A18).

The third required aspect is not met, either, and the trial court's termination judgments must be reversed. Besides the decisions already addressed, *see, e.g.*:

- *In re A.G.B.*, No. WD80534 at *39-43 (Mo. App. slip op. Oct. 10, 2017) (parent's bipolar disorder required "considerable assistance" to provide adequate care, but insufficient for termination; termination reversed);
- *In re L.J.D.*, 352 S.W.3d 658, 666 (Mo. App. 2011) (where no evidence parent failed to provide minimally acceptable care, psychiatrists' finding she had mental disorder was insufficient to terminate parental rights; termination reversed);
- *In re C.A.L.*, 228 S.W.3d 66, 71 (Mo. App. 2007) (termination reversed where only evidence supporting mental disorder was two-year-old evaluation, and no evidence parent could not provide even minimally acceptable care);
- *S.M.H.*, 160 S.W.3d at 372 (same; narcissistic personality disorder insufficient to terminate parental rights; did not suggest "this manifested itself in any danger to S.M.H., but in Father's being unduly self-oriented"); and
- *D.L.M.*, 31 S.W.3d at 69-70 (no evidence schizophrenic parent could not provide minimally acceptable care; termination reversed).

Just as in all these cases, this Court should reverse the trial court's judgment terminating Father's rights over the Children. It should remand with instructions to release the Children back into Father's custody. *Infra* at 68-70.

II. The trial court erred in finding Father unfit due to abuse or neglect *because* this misapplied the law that under § 211.447.5(2) it could not use singular incidents of neglect in 2014/15, fail to find any further abuse or neglect since then, and then hold that sufficient to terminate Father’s parental rights, when there was no evidence of any other abuse or neglect *in that* the only abuse or neglect finding in 2014/15 was that ■■■ had seen Father push Mother and Father had refused to provide ■■■ to counseling, but by the time of trial Mother had disappeared and ■■■ was in counseling, had been diagnosed with a medical issue, and Father approved of her treatment, the only other allegations of abuse were officially deemed unfounded and unsubstantiated, and the trial court found there was no evidence Father ever abused the Children, committed any act he knew or should have known would subject them to physical or mental harm, or failed to provide for them.

Rule 84.04(e) Preservation Statement

Father preserved this point under Rule 78.07(c) in his motion to amend the judgments (L.F.90-94).

* * *

Section 211.447.5(2) allows termination when “the child has been abused or neglected,” but requires additional findings about how this has been so, by: (a) the parent’s “mental condition” per Point I, *supra*; (b) the parent’s “chemical dependency”; (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” or “by another under circumstances that indicate that the parent knew or should have known”; and (d) “failure ... 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” (Appx.A63-64).

Here, the court expressly found (b), (c), and (d) not present (L.F.113;Appx.A7). “There was no evidence presented that” Father (b) “has a chemical dependency,” (c) “[o]ther than the allegations and/or findings set forth above regarding sexual abuse in 2012”, addressed *infra* at 55-56, “committed a severe or recurrent acts of physical, emotional, or sexual abuse toward the child or a child in the family”, etc., or (d) “repeatedly and continuously failed, although physically and financially able, to provide” (L.F.113;Appx.A7).

Instead, the Court finds (a), the mental condition part, is its support, also holding Father was unfit under § 211.447.5(6) for this reason (L.F.109-110,122;Appx.A3-4,A16). As explained in Point I, *supra*, that was error.

So, what is the evidence of abuse or neglect? The court mentions “allegations and/or findings of sexual abuse in 2012” (L.F.113;Appx.A7). Little-to-no evidence was introduced regarding this allegation.² At one point,

² The only evidence was Father was alleged to have done “something to a neighbor’s kid” (Tr.358). But that would not be “toward the child or any child in the family,” as § 211.447.5(2)(c) requires. Construing the statute strictly in favor of keeping parental rights, *A.S.W.*, 137 S.W.3d at 453, the allegation would not satisfy the statute anyway.

the court recounts the January 2016 finding that the 2012 allegation *was* against Father (L.F.112;Supp.L.F.61;Appx.A6). But the Juvenile Court never adjudicated that allegation, and *specifically* noted it was “not making a determination” of it (Supp.L.F.61). And when DSS ultimately had to determine the allegation’s veracity, ***it officially determined it was unsubstantiated*** (Tr.65,359,718-19;Appx.A61). So, not only was this allegation not “evidence” of any abuse or neglect by Father, by the time of trial it already was disposed of in his favor.

The April 2015 Hotline call accusing Father of sexually abusing ██████ which the trial court does not mention, but which was initially responsible for the Children being taken away (Tr.80,350-51;J.O.Ex.11-12), also does not support the court’s conclusion because it was found unsubstantiated (Tr.597-98,668,726). Ms. ██████ herself agreed “[t]here has never been any foundation as to any sexual abuse against, or by” Father of ██████ (Tr.61-62).

Additionally, it was undisputed there was no indication Father ever had abused any of the Children, hit them, or showed them any physical aggression (Tr.214,242,314,334-35). Even Ms. ██████ whose reports were the most critical of Father and on which the court relied heavily, said she never had any safety concerns for the Children with Father (Tr.214,231,242).

Outside of § 211.447.5(2)(a)-(d), but still invoking § 211.447.5 generally, the court also recounted the June 2015 stipulated judgment that first brought the Children into care, which found Father “neglects the children and their mental health needs” because ██████ “witnessed her father push her mother” in September 2014 and by April 2015 had “begun to exhibit symptoms

consistent with trauma” but Father “refused to obtain recommended services for” her (L.F.109;Appx.A13).

But the court cited no evidence of any neglect by Father *after* April 2015, some 21 months before trial, because there was none. Indeed, it expressly *found* there was “no evidence” Father *ever in any way* abused the children, knew or should have known they were being abused, or failed to provide *any* care necessary for *any physical, mental, or emotional health and development* (L.F.113;Appx.A7).

The law of Missouri is that the mere findings that brought the children into care were insufficient to terminate Father’s parental rights, especially given its other findings as to factors (b)-(d), and the trial court misapplied the law in holding otherwise. “Facts that supported the trial court’s initial assumption of jurisdiction over the Children ... must be updated to reflect the conditions existing at the time of the termination trial in order to support the difficult, but necessary, assessment of the potential of future harm.” *M.A.M.*, 500 S.W.3d at 357.

Here, the “neglect finding fails per *K.A.W.* and its progeny” because the evidence the court used for its only “neglect” finding “exclusively dated back to [the children]’s initial entry into care. Such past behavior [i]s not ‘convincingly linked to predicted future behavior’ and” does not prove “the likelihood of future harm.” *In re P.J.*, 403 S.W.3d 672, 675 (Mo. App. 2012) (citation omitted). So, termination is error. *Id.*

Simply put, the trial court cannot use incidents of neglect in 2014/15, fail to find any further neglect since, and then hold this sufficient to

terminate Father's rights. There is no "presumption that [a parent] constitutes a continuing threat to the Children based upon ... past" incidents. *M.A.M.*, 500 S.W.3d at 357. There must be a real connection to the parent's inability to provide even minimally acceptable care for the children. *In re K.M.A.-B.*, 493 S.W.3d 457, 472 (Mo. App. 2016). That cannot be true here, where the court expressly **found** there is no evidence Father ever failed to provide minimally acceptable care or harmed the Children (L.F.113,124;Appx.A7,A18).

Even when, unlike here, a case concerns terrible physical abuse, past incidents are insufficient to provide the required nexus for future behavior. *See, e.g., In re A.M.W.*, 448 S.W.3d 307 (Mo. App. 2014) (mother whipping child with belt insufficient where no evidence abuse continued at time of trial and mother had engaged in at least some services; termination reversed); *In re D.O.*, 315 S.W.3d 406, 419-20 (Mo. App. 2010) (father pleading guilty to felony child abuse for incidents years before trial insufficient where no evidence abuse continued at time of trial; termination reversed).

The same is true here. Any neglect by pushing the Children's mother in 2014 or disagreeing █████ should go to counseling in 2015 are long past. There is no evidence of any neglect since mid-2015 when the children came into care. To the contrary, it was undisputed that Father long has agreed it is appropriate for █████ to go to counseling, he has undergone regular, timely supervised visitation, he participated in services (*infra* at Point III), and this whole time has continued to support the Children financially (Tr.666,710,719-20;Res.Ex.307;L.F.124;Appx.A18). And the trial court found

there was **no** evidence he **ever** committed, knew of, or should have known of any act of abuse against any of the Children, failed to provide them **any** necessity, or committed **any** act he knew or should have known would subject them to physical or mental harm (L.F.113,124;Appx.A7,A18).

The law of Missouri is that the “pushing” incident in 2014 or ██████’s lack of counseling in 2015 are insufficient to be a basis for termination, so the court’s holding otherwise was error. Besides the decisions already addressed, *see, e.g.:*

- *P.J.*, 403 S.W.3d at 672 (where court found no evidence child had been subjected to physical, emotional, or sexual abuse, or parent had failed to provide, and there was no proof mother had abused child as accused, evidence of neglect at time of child’s initial entry into care insufficient to terminate parental rights; termination reversed);
- *C.A.L.*, 228 S.W.3d at 71-72 (same);
- *In re B.C.K.*, 103 S.W.3d 319 (Mo. App. 2003) (“mere finding of previous neglect” insufficient to support termination, especially where “no instances where [parent] failed to provide”; termination reversed); and
- *In re P.C.*, 62 S.W.3d 600, 604 (Mo. App. 2001) (single, non-recurrent act of emotional abuse in past did not “constitute grounds in and of itself to support termination of parental rights”; termination reversed).

Just as in all these cases, the trial court erred in terminating Father’s parental rights. This Court should reverse the trial court’s judgment terminating Father’s rights over the Children. It should remand with instructions to release the Children back to Father’s custody. *Infra* at 68-70.

III. The Court erred in finding Father unfit due to his not making sufficient progress in complying with his plan and, for this reason, the juvenile officer's efforts at reunification had failed *because* this misapplied the law that under § 211.447.5(3) a parent's failure to comply with one or more parts of a plan does not, by itself, provide grounds for termination, and compliance need not be total or even substantial *in that* Father followed the plan's directives to undergo counseling, complete the PAUSE Program and other parenting courses, and test negative on a random drug test, his expressions of anger or frustration with Children's Division and the juvenile officer do not undo this, and there was no evidence of any specific harm Father posed to the children, especially where the trial court itself expressly found Father never abused the Children, committed any act he knew or should have known would subject them to physical or mental harm, or failed to provide for them.

Rule 84.04(e) Preservation Statement

Father preserved this point under Rule 78.07(c) in his motion to amend the judgments (L.F.95-103).

* * *

A. There were no grounds for termination under § 211.447.5(3).

Section 211.447.5(3) makes it a permissible ground for termination of parental rights when the "child has been under the jurisdiction of the juvenile court for" a year and "the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature

continue to exist, that there is little likelihood that those conditions will be remedied at an early date” for reunification (Appx.A64).

Still, in “determining whether to terminate parental rights” for this reason, the Court also must “consider and make findings on”: (a) the terms of the parent’s social service plan and the extent to which the parties have “made progress in complying” with them; (b) the success or failure of the efforts to aid the parent; (c) a mental condition, *supra* at Point I; and (d) the parent’s chemical dependency. *Id.* (Appx.A64).

The court ordered termination under this section, too, also finding Father unfit for this reason (L.F.114-22;Appx.A8-16). But the court found no chemical dependency (L.F.122;Appx.A16), and as explained *supra* at Point I, its mental-disorder finding (L.F.119-22;Appx.A13-16), cut-and-pasted from its § 211.447.5(2) finding (L.F.109-13;Appx.A3-7), was error. So, that leaves its findings that Father did not make sufficient progress in complying with his plan and, for this reason, efforts at reunification had failed (L.F.114-19;Appx.A8-13).

But “to avoid termination,” “a parent need not completely satisfy all aspects of a plan”, and his “failure to comply with one or more parts of a social service plan does not, by itself, constitute a ground for terminating a parent’s rights; rather, it is merely a factor to consider under” § 211.447.5(3). *K.M.*, 249 S.W.3d at 274 (citing *S.M.H.*, 160 S.W.3d at 368-69). “The issue is whether progress has been made in complying with the service agreements, not whether there has been full or substantial compliance.” *S.M.H.*, 160

S.W.3d at 369. This is because “the legislature does not mandate total, or even substantial, compliance.” *A.M.W.*, 448 S.W.3d at 315.

The trial court found Father “failed to make progress” in his plan by choosing to hire his own therapists instead of those Children’s Division provided, choosing some classes the court found did not have components ideally fitting those Mr. ██████ recommended 19 months before, scoring results on a test from PAUSE the court did not like, and expressing anger at Ms. ██████ all of which it said showed nothing had changed (L.F.114-19;Appx.A8-13).

The law of Missouri is that this is insufficient to meet § 211.447.5(3) as a ground for termination. **First**, when a service plan directs a parent to undergo counseling and Children’s Division offers the parent certain providers, the parent **does not** fail to comply by choosing his own counselors instead, and his doing so does not support “that a potentially dangerous condition exist[s] at the time of trial or establish a convincing link between [the parent]’s past conduct and any future ability to parent the Children.” *See, e.g., M.A.M.*, 500 S.W.3d at 356. Even the trial court ultimately was forced to concede Father choosing his own therapists was “his right” (L.F.119;Appx.A13). So, this was legally of no consequence. Father followed the directive to undergo counseling, and so made *progress with complying with* that part of the plan.

Second, the court itself found Father *did* comply with the plan. He saw *two* therapists and obtained *two* evaluations (L.F.114-16;Appx.A8-10). While the court disapproved of them, it was not Father’s burden to show

compliance, but rather the Juvenile Officer's burden to show *non*-compliance. The Juvenile Officer's contrary counseling testimony was merely Mr. [REDACTED] who only saw Father once 19 months before trial. *Supra* at Point I. By attending counseling consistently since summer 2015, Father complied with that directive in the plan, and the Juvenile Officer did not introduce evidence otherwise. *M.A.M.*, 500 S.W.3d at 356.

Beyond counseling, Father also participated "in online domestic violence and anger management classes" (L.F.116;Appx.A10). While the court disapproved of the specific classes, that also does not show noncompliance. Father also participated in the PAUSE Program as directed, and which resulted in positive findings, but the court did not like his test results (L.F.116;Appx.A10). Again, that is compliance with the plan, not non-compliance.

Third, the law of Missouri is that Father's expressions of anger at various social workers (L.F.117-19;Appx.A11-13) are irrelevant. *C.A.L.*, 228 S.W.3d at 71 (parent expressing anger at Children's Division and juvenile officer did not support termination). It is understandable that a parent of whom there is no evidence he ever abused or failed to provide for his children would be angry when the children are taken away and, despite his compliance with his plan, is facing termination. *Id.*

In *X.D.G.*, reversing a termination where suspected abuse was not proven and the court correctly found "the parents participated in a social services contract" but "did not take responsibility for or reasonably explain Child's injuries," this Court held this insufficient. 340 S.W.3d 607, 622 (Mo.

App. 2011). “While this finding [was] certainly supported by substantial evidence, it d[id] not amount to evidence that either Mother’s participation in services or her failure to take responsibility for having abused Child constitutes evidence of the likelihood of future harm.” *Id.* The “goal of these services” is not to induce a parent “to confess to harming Child; presumably they were designed to help the parents acquire skills that would allow them to provide Child with the proper care and protection ...” *Id.* Failing to confess is not “the equivalent of evidence of future dangerousness.” *Id.*

Here, whether Father admitted he had done something wrong was irrelevant. The question was whether he could provide minimally acceptable care. As the trial court repeatedly found, he provided far more, never actually abusing the children, subjecting them to mental or physical harm, or failing to provide them any necessity (L.F.113,124;Appx.A7,A18).

Finally, the trial court’s vague, amorphous assertions of potential harm to the Children throughout its judgments are insufficient. The only specific mention of any previous actual, adjudicated harm was Father allegedly pushing Mother in September 2014 and Father disagreeing in 2015 that ■■■ needed counseling (L.F.109;Appx.A3). It also mentions the Children becoming “withdrawn and fearful” when Father showed anger (L.F.117;Appx.A11), as likely any child would.

Beyond those few specific findings, the court makes only vague, broad, unspecified generalizations: “issues in the case” or “causing [the C]hildren to be in care”; “domestic violence and neglect”; “the children’s needs” and “barriers to reunification”; the lack of a “safe home for the” Children; “neglect

and mental and emotional harm [Father] inflicted on the children”, “trauma the children experienced in” Father’s care and “the mental and emotional impact” of his behavior, “the history the children report of living with their Father”, and “how [Father’s] behaviors have an immediate and direct impact on his children”; and Father’s “actions/inactions”, “inappropriate behaviors”, “behaviors and conduct”, “inappropriate parent/child relationship”, placing his “own wants and needs before the children”, being “willing to sacrifice the emotional well-being of his children to benefit himself”, and lack of “interest in or commitment to change to benefit the children” (L.F.111,113-24;Appx.A5,A7-18).

These buzzwords are meaningless. While the court mentions “domestic violence and neglect” in passing, the only specific allegations of domestic violence or neglect are from one-and-a-half-to-two years before trial, which all have been deemed unfounded or clearly are not occurring anymore. *Supra* at Point II.

And when pressed to say *specifically* how Father has harmed, is harming, or likely will harm the Children, the court cannot. Instead, it openly and repeatedly is forced to concede there was **no** evidence Father **ever** committed, knew of, or should have known of any act of abuse against any of the Children, failed to provide any necessity of any kind, physical, mental, or emotional, or committed **any** act he knew or should have known would subject the children to physical or mental harm (L.F.113,124;Appx.A7,A18).

So, buzzwords aside, the court cannot say how Father has caused, is causing, or will cause emotional harm to the Children. In lieu of specific

allegations, all of which it finds in Father's favor, the court resorts to vague generalizations that are merit and legally irrelevant. *M.A.M.*, 500 S.W.3d at 356 (trial court's conclusions "that conditions of a potentially harmful nature continued to exist" but without identifying those specific conditions, must be disregarded). To use its awesome power and terminate a parent's fundamental rights, the court must have more before it than Father's causing "issues," exhibiting "inappropriate" "behaviors," and risking "trauma".

The court's conclusion that any of this provides grounds for termination was error. Besides decisions already discussed, *see, e.g.*:

- *K.M.A.-B.*, 493 S.W.3d at 475 (parent failing and refusing to meet plan's goals and making "immature rationalizations for his behavior" not evidence of specific harm or that parent was incapable of providing even minimally acceptable level of care; termination reversed);
- *A.M.W.*, 448 S.W.3d at 315-18 (where no evidence mother had substance problems, engaged in criminal activity, or continued to abuse or neglect children, failure to comply with plan in multiple respects did not show requisite specific harm to children; termination reversed);
- *L.J.D.*, 352 S.W.3d at 671-72 (where parent substantially complied with most of plan, but trial court characterized it as "technical" or "superficial," this Court held this did not make for dangerous condition, as statutory factors are not "superfluous;" termination reversed);
- *T.A.L.*, 328 S.W.3d at 249 (where parent completed required evaluations and engaged in classes and group sessions on her own initiative, that she did not consistently see psychiatrist or regularly

attend team meetings did not create potential of harm to children;
termination reversed);

- *In re K.W.*, 167 S.W.3d 206, 216 (Mo. App. 2005) (vague findings “that additional time and services would not likely improve Mother’s ability to care for the children” and “that no additional services could be provided that would help Mother and that no plan could be formulated to allow for reunification” were insufficient; termination reversed);
- *S.M.H.*, 160 S.W.3d at 370 (where father engaged in all plan’s services, record did not support finding he failed to substantially comply with plan “or to adjust his circumstances and provide a proper home,” but rather showed “substantial compliance;” termination reversed);
- *K.A.W.*, 133 S.W.3d at 17-18 (where parent “fully complied with all aspects of the parenting plan,” had not abused or failed to provide for the children, and had no chemical dependency, compliance was “of paramount importance” and belied finding of harmful conditions continuing; termination reversed);
- *In re S.J.H.*, 124 S.W.3d 63, 67-69 (Mo. App. 2004) (where parent engaged in six of plan’s nine areas, completed all evaluations, had regular visitation, was employed, maintained stable residence, and was not involved in criminal activity or substance abuse, finding she “made ‘little progress’ in complying” was error; termination reversed);
- *In re C.N.G.*, 109 S.W.3d 702, 710 (Mo. App. 2003) (same);

- *B.C.K.*, 103 S.W.3d at 329-30 (alcoholic mother relapsing several times while engaging in plan did not support termination; termination reversed);
- *In re B.S.B.*, 76 S.W.3d 318, 334-35 (Mo. App. 2002) (“While Father certainly did not comply perfectly with all of the conditions of the Written Service Agreements, the record reflects that he made numerous attempts to comply with many of the Division’s demands”, which was enough; termination reversed); and
- *In re A.R.*, 52 S.W.3d 625, 642-43 (Mo. App. 2001) (father not attending all plan’s therapy sessions did not equate to noncompliance or support finding that he “made no effort to work towards reunification” or that the efforts to aid him failed; termination reversed).

Just as in all these cases, the Court erred in terminating Father’s parental rights. This Court should reverse the trial court’s judgment.

B. The remedy is to reunify the Children and Father.

All the trial court’s rationales for terminating Father’s parental rights were error. As the trial court repeatedly found, Father is more than capable of providing the children with minimally acceptable care, and has done so consistently (L.F.113,124;Appx.A7,A18). Even throughout the time since the Children have been taken from him, he maintained constant regular and timely visitation with them and supported them without fail.

Father has a stable job, a spacious, clean home, and is educated. He raised the children almost entirely alone. Per the trial court’s own findings, he never has abused or otherwise harmed the Children in any way or

knowingly allowed anyone else to do so, and has never failed to provide any necessity for them (L.F.113,124;Appx.A7,A18). He has the financial means to provide his children with an excellent life, has done so, and will continue to do so.

The remedy here therefore is not just reversing the termination of Father's rights, but returning the Children to his care and custody – while allowing them to remain in the Juvenile Court's jurisdiction for services.

This was exactly the remedy this Court prescribed in similar circumstances in *A.M.W.*, 448 S.W.3d at 318-19, when reversing a termination after allegations of abuse and neglect. Just as here, and paraphrasing that decision,

[T]he overwhelming weight of the evidence at trial was that stability and permanency was in the best interest of [the Children]. We do not believe that continuing [the Children] in foster care will contribute to permanency. The record as a whole does not demonstrate that [the Children are] in danger of abuse or neglect in [Father]'s custody, or that [Father] is unable to provide [the Children] with a stable or proper home. Thus, it is in the best interest of [the Children] to be returned to the custody of [Father] and to continue to receive in-home services. [The Children have] emotional ties to [Father]; [Father] maintained regular visitation with [the Children] ... prior to trial; ... and, other than the [2014-2015] incident[s] from which the juvenile court's jurisdiction stemmed, [Father] has not committed acts

subjecting [the Children] to a substantial risk of physical or mental harm. ... [I]n total, [Father] has not shown a disinterest or lack of commitment to the [Children]. ... The juvenile court shall retain jurisdiction over [the Children], and we reverse for the entry of an order in accordance with this opinion.

Id.

The Children deserve their father, and Father deserves his children. In reversing the judgment below, the Court should remand with instructions to release the Children back into Father's custody.

Conclusion

The Court should reverse the trial court's judgments and remand this case with instructions to order the Children released back into Father's custody.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg, Mo. #59533

Ashlyn Buck Lewis, Mo. #65501

2323 Grand Boulevard, Suite 1100

Kansas City, Missouri 64108

Telephone: (816) 292-7000 (Ext. 7020)

Facsimile: (816) 292-7050

jonathan@sternberg-law.com

ashlyn@sternberg-law.com

COUNSEL FOR APPELLANT



