



Missouri Court of Appeals
Southern District

Division One

IN THE INTEREST OF:)
J.A.R., D.K.R., and A.E.R.,)
children under seventeen years of age,)
)
GREENE COUNTY JUVENILE OFFICE,)
)
Respondent,)
)
vs.)
)
D.G.R.,)
)
Appellant.)

Nos. SD32444, 32445 & 32446
(consolidated)

FILED: August 20, 2013

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable William R. Hass, Senior Judge

AFFIRMED

D.G.R. (“Father”) appeals from judgments terminating his parental rights to his children, J.A.R., D.K.R., and A.E.R. (collectively the “Children”). The trial court concluded that Father abandoned and neglected the Children,¹ that he failed to

¹ See § 211.447.5(1) and (2). Statutory references are to RSMo Cum.Supp. (2011).

rectify conditions that led to the Children coming into care,² and that termination of Father’s parental rights was in the best interest of the Children. On appeal, Father challenges the sufficiency of the evidence to support these findings. Because at least one ground for termination and the best interest finding were supported by substantial evidence, we affirm.

Principles of Appellate Review

Appellate review of termination of parental rights (“TPR”) cases “is guided by established principles:

The trial court’s decision to terminate parental rights will be sustained on appeal unless there is no substantial evidence to support the judgment, it is against the weight of the evidence, or it erroneously declares or applies the law. In our review, we are mindful that the juvenile court was in a superior position to judge the credibility of the witnesses and that it was free to believe all, part, or none of the witnesses’ testimony. Furthermore, the standard of proof may be satisfied even though the trial court has contrary evidence before it or evidence in the record might support a different conclusion. In our review, we consider all facts and reasonable inferences therefrom in a light most favorable to the judgment below, and we will reverse only when we firmly believe that the judgment is wrong.”

In re L.R.S., 213 S.W.3d 161, 164 (Mo.App. 2007) (citation and some quotation marks omitted). *See also In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011).

Accordingly, we are not free to credit evidence or inferences that favor the terminated parent. To the contrary, we must ignore these. *In re B.J.K.*, 197 S.W.3d 237, 247 (Mo.App. 2006); *In re C.M.B.*, 55 S.W.3d 889, 895-96 (Mo.App.

² *See* § 211.447.5(3). This ground is referred to as “failure to rectify.” *C.V.E. v. Greene County Juv. Off.*, 330 S.W.3d 560, 566 n.3 (Mo.App. 2010).

2001). Further, when evidence “poses two reasonable but different inferences, this Court is obligated to defer to the trial court’s assessment of the evidence.” **C.M.B.R.**, 332 S.W.3d at 815.³

The gravity of TPR issues does not lessen, but actually heightens, appellate deference to the judge who actually heard and saw the witnesses. “Greater deference is granted to a trial court’s determinations in custody and adoption proceedings than in other cases.” **Id.** (quoting **In re S.L.N.**, 167 S.W.3d 736, 741 (Mo.App. 2005)).⁴

Background

We describe and summarize evidence as we must view it under the binding standards described above.

Father, a California resident, was having difficulty providing for the Children. In July 2010, he sent the Children to Missouri to live with a couple whom the

³ It seems obvious, from the results reached, that this trial court put little or no stock in various factual assertions and inferences cited in the dissent.

⁴ The dissent notes prior cases where this court considered TPR evidence both pro and con. Another example was **In re D.O.**, 315 S.W.3d 406, 408 (Mo.App. 2010), where we said:

While it is certainly true that “[a]ppellate courts should review conflicting evidence in the light most favorable to the judgment of the trial court [.]” **In re K.A.W.**, 133 S.W.3d 1, 11–12 (Mo. banc 2004), because our ultimate conclusion is that the evidence supporting the grounds pleaded for termination in these cases “simply does not ‘instantly tilt the scales in favor of termination when weighed against the evidence in opposition[.]’ ” **In re T.A.S.**, 62 S.W.3d 650, 661 (Mo.App. W.D.2001) (quoting **In re A.H.**, 9 S.W.3d 56, 59 (Mo.App. W.D.2000)), we will set forth evidence both favorable and unfavorable to the trial court’s judgments.

Then again, after our reweighing, we reiterated that the evidence “simply does not instantly tilt the scales in favor of termination when weighed against the evidence in opposition” and reversed the termination. **D.O.**, 315 S.W.3d at 423-24 (internal quotation marks removed). See also **In re T.A.L.**, 328 S.W.3d 238, 246 (Mo.App. 2010), which cited **D.O.** in stating that “we must consider evidence both favorable and unfavorable to the trial court’s judgment” in a TPR case.

But **C.M.B.R.** refocuses our review. Trial judges, better positioned to weigh witness credibility and evidence in the context of the whole record, decide whether the termination scales “instantly tilt.” Appellate review, as in other bench-tryed civil cases, follows principles under **Murphy v. Carron**, 536 S.W.2d 30 (Mo. banc 1976). **C.M.B.R.**, 332 S.W.3d at 815.

Children viewed as their maternal grandparents. Father said he intended to leave California and move to Missouri within a few weeks. In the months that followed, Father repeatedly promised to visit the Children but failed to follow through on his promises. Around November 2010, the Children began to live with their mother⁵ in Springfield.

In March 2011, the Children came to the attention of the Children's Division due to Mother's intoxication and failure to supervise the Children. An investigator contacted possible custodians, including Father, but he did not have suitable housing for the Children or the ability to get them from Missouri. The Children were taken into protective custody.

The Children remained in care and, consistent with the case goal of reunification, a treatment plan was prepared and ordered into effect for Father. Among other things, the court expected Father to obtain and maintain suitable housing.

Shortly after the Children came into care, Father advised the Children's caseworker that he had housing and was employed but provided no verification. He said he was coming to Missouri in the near future. At that time, the Children wanted to be reunited with Father in Missouri.

Father remained in contact with the Children's caseworker but made little progress on his treatment plan. The caseworker offered to initiate a request under the Interstate Compact for the Placement of Children ("ICPC") so that Father could get services in California, but Father declined, stating that he intended to move to

⁵ Mother's parental rights also were terminated. She is not a party to this appeal.

Missouri sometime between September and November 2011. Father could have, but did not, work his treatment plan while in California.⁶

Early on, Father maintained contact with the Children by telephone. The Children initially enjoyed and looked forward to those calls. During the calls, Father typically disparaged Mother and promised visits that never occurred. Each time Father broke a promise, the Children felt very disappointed and let down. As time progressed, the Children preferred not to talk to Father because they “didn’t even want to hear it any more.” Sometime prior to March 2012, the Children had lost trust in Father and the phone calls were discontinued at the Children’s request. At no point did the Children ever ask to call Father. Father was encouraged to write

⁶ A caseworker testified:

Q. And again, now does [Father] have appropriate housing?

A. No.

Q. Does he have employment?

A. No.

Q. How has his situation gotten better than it was when you took over this case over a year ago?

A. He's in the state of Missouri, and a treatment plan can be started. That's about it.

Q. Could a treatment plan been worked on in California?

A. Yes.

Q. Would that have required a service worker?

A. Yes.

Q. Did he request a service worker?

A. No.

Indeed, it was Father’s failure in this regard that prompted this caseworker’s “homeless in Missouri” comment cited by the dissent:

Q. Did you ever make the statement to [Father] that he would have a bigger better chance of getting the children back if he were homeless in Missouri than he would staying in California?

A. Yeah, I've said that.

Q. Is that your belief?

A. Yes.

Q. Why is that?

A. Because in California he wasn't working on a treatment plan.

letters to the Children but he typically failed to do so, sending only two letters the entire time the Children were in care.

Father provided financial support for the Children in 2010 and 2011, but not in 2012. He sent \$3,000 for the Children in July 2011, but Father took back \$450 five months later, then had another \$2,000 used to pay some of Father's fines. Father was capable of working and reported that he was working much of the time the Children were in care.

In March 2012, Father came to Missouri to attend a permanency hearing and to make preparations to move here that month or the next. Father arrived several days later than he said he would, then cut the trip short and skipped the hearing,⁷ after which the court changed the Children's case goal to adoption and found no exceptions to the statutorily required filing of TPR petitions. By the end of the next month, Father had not moved to Missouri and the Juvenile Office had filed the underlying cases.

⁷ Quoting the same caseworker as previously:

Q. And there was a court hearing that [Father] said he would specifically be here for, correct?

A. Yes.

Q. And we had worked around trying to get everybody to set up a meeting to meet with him while he was here?

A. Yeah, we scheduled a special FST so that he could be here.

Q. Did he appear for court?

A. No.

Q. Did he appear for the meeting?

A. No.

Q. Had he, in fact, indicated that he had left earlier that morning, that he had to get back?

A. Yes. I don't remember if it was in the morning, but he did have to leave early.

Q. So he got here intending to be here for the court hearing but then indicated he had to leave before the court hearing?

A. Yes.

In June 2012, Father announced that he intended to remain in California. Unbeknownst to the Children's caseworker, Father had signed a one-year lease for a residence in California, listing the residents as one adult and three children. The Children's caseworker requested an ICPC home study, which later was denied due to, among other reasons, Father's stated intent to move to Missouri.

In late September 2012, a few days prior to the TPR trial, Father abruptly moved to Missouri without any notice to the Children's caseworker. Father was unemployed and living in his vehicle.

At the TPR trial, the court heard evidence that the Children had not seen Father since July 2010. The Children, then 11, 12, and 13 years old, all felt neglected because Father never followed through on his promises and failed to put forth effort on their behalf. None of the Children wanted to see Father or be reunified with him. A.E.R. felt abandoned by Father and feared that Father would get back together with Mother and beat her again. D.K.R. was very vocal in his disappointment with Father and wanted nothing to do with him.

Reunification was not a possibility at the time of trial or in the near future because Father could not support the Children, Father had no suitable home for the Children, the Children did not want to be reunified with Father, and family therapy would be needed before even supervised visitation could be considered. The Children's caseworker, while sympathetic to Father, conceded that his situation was little improved and that reunification could take "a very long time" given Father's lack of progress.

The Children's Division and the Children's guardian ad litem (GAL) recommended termination of Father's parental rights. Father attended the TPR trial but elected not to testify.

The trial court found three grounds for TPR: abandonment, neglect, and failure to rectify. Noting the Children's antipathy to Father, the court also found and concluded that TPR would be in the Children's best interest. Father's parental rights were terminated and these appeals followed.

Neglect

Father challenges the sufficiency of the evidence to support all three TPR grounds found by the court. We first address Father's opposition to the finding of neglect, as our disposition of that point obviates the need to address his challenges to the findings of abandonment and failure to rectify.

Neglect is the "failure to provide, by those responsible for the care, custody, and control of the child, the proper or necessary support, education as required by law, nutrition or medical, surgical, or any other care necessary for the child's well-being." *In re J.M.T.*, 386 S.W.3d 152, 157 n.4 (Mo.App. 2012) (internal quotation and citation omitted); § 210.110(12). Neglect also has been defined as "the failure to perform the duty with which a parent is charged by law and conscience." *Id.*

Here, the evidence indicated that Father failed to provide for the Children's needs, including their need for a suitable home. The Children came into care in part due to Father's inability to meet their needs. The Children had been in care for a year and a half as of the TPR trial, yet Father was in no better position to provide for their needs than at the start of the case. He had not contributed to the Children's

care and support for at least nine months preceding the trial. Father's history of support payments in 2010 and 2011 show that Father knew he was obligated to support the Children and had the ability to do so. When given the opportunity to explain his actions or his situation at the TPR hearing, Father elected not to testify.⁸ The record and reasonable inferences support the court's finding that Father repeatedly or continuously failed to provide for the Children's needs. See § 211.447.5(2)(d).

The evidence also established that Father neglected his relationship with the Children to the point that the Children refused to speak to him. He had not visited the Children since he sent them to Missouri in 2010. He could have maintained contact with the Children by telephone or letter, but he typically failed to send letters and his failed promises made by phone may have caused more harm than good. Given this evidence, the court did not err in finding that, "The only thing the father seems to have been consistent in is telling the [Children] that he would be coming to visit and then failing to follow through."

Father's argument glosses over these key facts and focuses on contrary evidence that supports his position. Not only does this violate our standard of review, it ignores necessary steps in a not-supported-by-substantial-evidence

⁸ For the extent to which courts may consider a failure to testify, by a party not having the burden of proof, "in measuring the credibility or probative force of the evidence presented," see *Gregory v. Dir. of Revenue*, 172 S.W.3d 930, 931 n.2 (Mo.App. 2005). See also *State ex rel. Div. of Family Servs. v. Brown*, 897 S.W.2d 154, 158-59 (Mo.App. 1995); *Stringer v. Reed*, 544 S.W.2d 69, 74 (Mo.App. 1976). In a TPR context specifically, see *In re S.M.B., Jr.*, 254 S.W.3d 214, 220-21 (Mo.App. 2008) (citing *Stringer*).

challenge as set forth in *Houston v. Crider*, 317 S.W.3d 178, 187 (Mo.App. 2010).⁹ Although Father identifies a challenged proposition – the finding of neglect – he fails to identify favorable evidence in the record or explain why that evidence and its reasonable inferences are such that the court could not reasonably decide that Father neglected the Children. See *Houston*, 317 S.W.3d at 187. Without these steps, Father’s argument lacks analytical or persuasive value. *Id.* at 188-89.

The trial court’s finding of neglect is supported by substantial evidence on the record as we must view it. Point denied.

Given our disposition of this point, we need not address the abandonment and failure-to-rectify findings because one statutory ground is sufficient to sustain the judgment. *J.L.G.*, 399 S.W.3d at 63; *T.W.C. v. Children’s Div. of Div. of Soc. Services*, 316 S.W.3d 538, 540 (Mo.App. 2010).

Best Interest

Father also challenges the sufficiency of the evidence to support the trial court’s conclusion that TPR was in the Children’s best interest.

“In any termination of parental rights, the primary concern must be the best interest[] of the child.” *In re A.B.M.*, 17 S.W.3d 912, 915 (Mo.App. 2000). This is a subjective assessment based on the totality of the circumstances. *In re T.L.B.*, 376 S.W.3d at 13. “At the trial level, the standard of proof for this best-interest inquiry is a preponderance of the evidence; on appeal, the standard of review is abuse of discretion.” *C.M.B.R.*, 332 S.W.3d at 816.

⁹ Although *Houston* is not a TPR case, its steps and analysis have carried over into TPR appellate opinions. See, e.g., *In re I.G.P.*, 375 S.W.3d 112, 126-27 (Mo.App. 2012); *In re T.L.B.*, 376 S.W.3d 1, 11 (Mo.App. 2011); *In re K.M.W.*, 342 S.W.3d 353, 360-61 (Mo.App. 2011); *In re X.D.G.*, 340 S.W.3d 607, 617-18 (Mo.App. 2011); *In re K.L.C.*, 332 S.W.3d 330, 341 n.10 (Mo.App. 2011).

In her recommendation to the court, the GAL summarized some of the reasons why TPR was in the Children's best interest:

[Q]uite frankly, they have just given up. There's . . . nothing more they can lose than hope. And that is exactly what these kids have lost. They have gone -- they are miles ahead of us, you know, in this endeavor. They are already looking for closure. They are looking to get on with their new life because they have lost hope in their parents. They have listened repeatedly, repeatedly to promises.

. . . .

You know, we're no further than we were the day we started this case. Not one bit further other than the fact that the [C]hildren have become increasingly distant from their parents, and I can't imagine how many years of therapy it would take for these kids to agree to live with either one of these people again. We're not even at supervised visits.

Among the statutory best interest considerations,¹⁰ the court found that the Children did not want to have contact with Father (lack of emotional ties); that Father had not maintained regular contact with the Children; that Father failed to provide for the cost of the Children's care and maintenance, although able to do so; and that Father had demonstrated a disinterest in, or lack of commitment to, the Children. The court's findings on these factors are supported by the record as we must view it under our standard of review.

Father's argument on this point recites facts and inferences favorable to his position, yet ignores evidence favorable to the court's findings and conclusions. As with his previous argument, Father's failure to follow our standard of review and the

¹⁰ "Section 211.447.7 requires that the court make specific findings related to the best interest of the child if the court has previously found a statutory basis for the termination of parental rights." *In re L.J.D.*, 352 S.W.3d 658, 675 (Mo.App. 2011).

necessary steps in a not-supported-by-substantial-evidence challenge rob his argument of any analytical or persuasive value.

“Adults may set aside their books, hobbies, or other interests, and ignore them for months without consequence. Not so with their young children.” ***R.P.C. v. Wright County Juvenile Office***, 220 S.W.3d 390, 394 (Mo.App. 2007). The dissent sees the Children as too young to “know what is good for them,” but clearly they were “old enough to know and crave a filial bond.” ***Id.*** Yet, as the GAL noted at trial, it had “been two years since [Father] has seen his children. And quite frankly, they have just given up.” This and other substantial evidence support the best interest finding. See ***In re Z.L.R.***, 347 S.W.3d 601, 611 (Mo.App. 2011). Point denied.¹¹

¹¹ Without downplaying the dissent’s stated concern about the Children’s future, it was the trial court’s duty to weigh the evidence relating to best interest “and we will not reweigh that evidence.” ***In re H.N.S.***, 342 S.W.3d 344, 351 (Mo.App. 2011). The dissent’s rather bleak portrayal of the Children’s circumstances and future, which goes to best interest, ignores testimony that our standard of review compels us to credit: that all of the Children were “doing wonderful” with their “awesome, awesome” foster parents; that separate placements were “the best thing that’s happened to them” and why this was so; that the Children have kept in contact with each other; that the Children are not without any potential for adoption or permanent placement.

As the dissent notes, the Children’s views are in the record and appropriately so. Whether a case involves TPR, marriage dissolution, or adoption, judicial process seeks to determine and know the child’s feelings and wishes. See §§ 211.462.3, 452.423.3 & 453.025.4; Standard 13.0, Standards for Guardians ad Litem in Missouri (effective September 1, 2011) (GAL “must inform the court of the child’s wishes and preferences ...”). Thus, this GAL properly advised the trial court as to the Children’s wishes:

“[W]e’ve had a lot of emphasis today on what the kids want and what the kids say and what the kids think, and quite frankly it’s unusual as a guardian ad litem to have three boys that have strong opinions about the situation. And you know, on one hand what they have to say and why they feel what they feel is very important, ...”

but immediately, and significantly, the GAL explained that her termination recommendation was not based on the Children’s wishes alone:

“but a separate issue is whether or not [Father and Mother] have complied with their court ordered treatment plan, which they haven’t. They just, you know, they just have not in any substantial meaningful way.”

Conclusion

The trial court's findings on neglect and best interest are supported by evidence in the record. We affirm the judgments terminating Father's parental rights to J.A.R., D.K.R., and A.E.R.

DANIEL E. SCOTT, J. – OPINION AUTHOR

WILLIAM W. FRANCIS, JR., C.J. – CONCURS

NANCY STEFFEN RAHMEYER, P.J. – DISSENTS IN SEPARATE OPINION



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IN THE INTEREST OF:)
J.A.R, D.K.R., and A.E.R., children under)
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GREENE COUNTY JUVENILE OFFICE,)
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Petitioner-Respondent,)

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D.G.R.,)
)
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APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY

Honorable William R. Hass, Senior Judge

DISSENT

I respectfully dissent. What is missing from the majority’s analysis is the fact that three brothers, D.K.R., A.E.R., and J.A.R., who have birthdays which are, respectively, 7/12/1999, 10/10/2000, and 8/23/2001, making them fourteen, almost thirteen, and almost twelve years of age, are now orphans by decree of the State. The boys were raised together by their Mother and Father outside the State of Missouri; they are currently in separate foster homes, each having

already in the short eighteen months of State care been in multiple placements and with multiple counselors and Children's Division workers. There is no adoptive placement for all three boys and only a "possibility" of adoption for A.E.R. Two of the boys live in closer proximity to each other as to allow visits, but one does not. Father requested a continuance to comply with a "treatment plan" in Missouri, but the continuance was denied.

Admittedly, there is a dearth of information concerning Father in the record as he did not reside in Missouri until September 28, 2012, but what is known is not supportive of any ground for termination. It is not disputed that there have been no complaints of abuse by Father toward the boys at any time when they resided with him. There have been no allegations of current substance abuse or any chemical dependency. The drug and alcohol tests that Father took were negative. Father provided evidence of money orders which were sent while the children resided with their "grandparents" and provided gift cards to the children while they were in care. He did not pay money to the Children's Division while the children were in care but no child support order was entered. Father apparently worked as a landscaper in California. No services were offered to Father because he lived in California and an Interstate Compact on the Placement of Children ("ICPC") was not completed because Father intended to come to Missouri. One caseworker for the Children's Division even testified that she believed that Father's parental rights should not be terminated, and that he should be given an opportunity to prove himself.¹

Further, Father's psychological examination, done by the same therapist that is used by the Children's Division, which was not addressed in the majority opinion, could hardly be considered negative. The prognosis was:

We do think this man has the potential to care for children. We need to see if he has the ability to follow the basic rules and create a home/job/living

¹ I, personally, have not ever seen that happen. By letter, the Children's Division notified the court that the official position of the Children's Division was that Father's rights should be terminated.

environment that is suitable to make the courts and caseworkers happy. Intellectually and emotionally, he is able to meet minimum parenting standards. ***We need to see if he can achieve a stable income and living situation, and achieve minimum parenting standards via “Behavior” and “Consistency” and “Motivation.”*** What relatives or the children report about their dad, [sic] would be helpful in analyzing his suitability. We think what the kids can tell us about the father, [sic] would be important to consider.

(Emphasis in original.) Father maintained regular contact with the Children’s Division workers.

The majority opinion states, “In the first few months after the Children came into care, Father maintained contact with the Children’s caseworker.” The negative implication is that Father did not keep contact after the first few months. The testimony in the record refutes that implication.

The actual testimony was:

[Counsel for Juvenile Office]: I should have asked this earlier but I didn’t. Has [Father] kept in contact with you?

[Children’s Division worker]: Yes.

[Counsel for Juvenile Office]: And how has the majority of the contact that you have with each other, is that done by mail or is it by phone?

[Children’s Division worker]: Usually I try to do both every month. He calls regularly.

[Counsel for Juvenile Office]: Has he kept you informed of where he’s residing and how to get in touch with him?

[Children’s Division worker]: Yes.

....

[Counsel for Father]: He’s kept in regular contact with your agency; isn’t that correct?

[Children’s Division worker]: Yes.

And from another Children’s Division worker:

[Counsel for Juvenile Office]: Did you inform both the mother and father when you became the case worker?

[Children’s Division worker]: I did.

[Counsel for Juvenile Office]: Did they stay in contact with you?

[Children’s Division worker]: [Father] did, yes.

....

[Counsel for Juvenile Office]: Now, with regards to [Father], you said that he did keep in contact with you.

[Children's Division worker]: He did.

[Counsel for Juvenile Office]: And was that contact by mail or phone?

[Children's Division worker]: By phone mostly.

The majority opinion also states as a fact that Father "could have, but did not, work his treatment plan while in California." The majority opinion does not state what Father failed to do in California that was required by the treatment plan. As explained by a Children's Division worker:

[Counsel for Father]: Well, let me ask you some questions based on the treatment plan that was ordered. His drug tests have come up negative; is that correct?

[Children's Division worker]: Yes.

[Counsel for Father]: He's kept in regular contact with your agency; isn't that correct?

[Children's Division worker]: Yes.

[Counsel for Father]: He has albeit a matter of days ago completed a psychological evaluation, correct?

[Children's Division worker]: Yes.

[Counsel for Father]: He completed parenting classes, isn't that correct, out in California?

[Children's Division worker]: I don't know that they were the same kind that we require. I know he participated in a parenting class in California.

.....

[Counsel for Father]: Okay. He has written letters from time to time maybe infrequently but he has written letters nonetheless; is that correct?

[Children's Division worker]: Yes.

[Counsel for Father]: He has paid money for support albeit in different avenues maybe that [sic] in a perfect world he should have but he's paid some amount of support based on your testimony; is that correct?

[Children's Division worker]: Yes.

[Counsel for Father]: While in California he's been employed during that time, has he not?

[Children's Division worker]: I believe so.

[Counsel for Father]: He had a residence and provided you with proof of that in California; is that correct?

[Children's Division worker]: Yes.

[Counsel for Father]: And he solved his legal problems in California; isn't that correct?

[Children's Division worker]: Yes.

[Counsel for Father]: He's wanted – has he expressed – or strike that. He's expressed to you that he's wanted to have contact with his children; is that correct?

[Children's Division worker]: Yes.

[Counsel for Father]: And for the most part that's been denied because they did not want to have contact with him; is that correct?

[Children's Division worker]: Yes.

....

[Counsel for Father]: No, I'm asking based on the treatment plan as ordered is there anything else on that treatment plan that your agency would like to see completed?

....

[Children's Division worker]: I would say I would like for him to I guess address the housing issue. Mental health issues I usually go by what is recommended on psych evaluations. And as for the physical abuse issues, I would expect that he would address those as well.

Thus, Father completed parenting classes at his own expense and on his own initiative in California.² He voluntarily submitted to a psychological exam.

What the majority opinion and the trial court found significant enough to terminate the parental rights of Father is that “the Children felt very disappointed and let down.” In fact, the trial court placed much weight on the children's disappointment in their father. Prior to any decision to terminate Father's rights and supposedly in response to the children's disappointment, the State of Missouri allowed three children under the age of thirteen to determine that they did not want to receive phone calls from their father. The children made it clear that they were angry with their father for not coming to Missouri when he said he would. The therapists then determined that letter-writing was the only method that Father could use to

² The majority opinion states the court was free to disregard evidence favorable to Father. All of the evidence was provided by juvenile office witnesses.

communicate with his sons.³ Despite the impediments placed by the Children's Division to a healthy relationship between Father and his sons, the majority opinion uses that denial of contact as evidence that "Father has not maintained regular contact with the Children" and "Father has demonstrated a disinterest in, or lack of commitment to the Children."

This case gives lip service to the proposition that the right to raise a child is a fundamental liberty interest. I cannot find a case where termination was based upon the children's "disappointment" with a parent's failed promises. That has not and should not rise to the level of neglect necessary to terminate parental rights and, more importantly, to create orphans at the children's request. Children do not know what is good for them at that age and children change their minds. In fact, all three of these children initially wanted to be reunited with their father. Although they are treated as a group in these opinions, J.A.R., when asked if he wanted to have contact with his parents, responded to a Children's Division worker: "It's not word for word, but he says he doesn't know how he feels about his mom. He doesn't know how he feels about his dad. And he said that he doesn't want to see his mom and dad right now." The Children's Division worker also testified that, when asked an open-ended question about communication with his parents, A.E.R. replied:

And he told me that he's given lots of, and this isn't word for word but it's general idea, he said he's given lots of chances. He implied to me that he doesn't trust his parents any [sic] more. He doesn't trust them because he feels like he's been abandoned. He's been promised too many times by his dad that he would be here, and he said he's been waiting two years and he said two years. That's not me. That his dad would come to Missouri and he still hasn't made it. . . . No, he doesn't want to see them.

³ There is no evidence whether the children sent letters in response back to Father or any evidence whether text messages or emails were even allowed. I am not sure how many children have ever written a letter or how many parents write letters regularly to their children, but perhaps a more current method of communication, such as texts and emails, should be used to encourage parents and children to keep in contact.

As for D.K.R., the Children's Division worker further testified that he has regularly expressed not wanting "anything to do with either of his parents" and is "tired of being disappointed." Both D.K.R. and J.A.R. had to be moved from foster homes because of their behavior problems. I dare say almost all children are "disappointed" in their parents during their teenage years. Even in cases where the parents are divorced, where one parent "typically disparaged the [other parent]," the children are not allowed to make the decision to discontinue visitation with the other parent. It should not be easier for children in foster care to determine a visitation schedule with their parents.

Although it is clear that Father's indecisiveness in deciding whether to continue to reside in California or move to Missouri led to a delay and eventual dismissal of an ICPC home study,⁴ that alone does not provide the clear and convincing evidence that Father has abandoned the children, neglected the children, or failed to rectify the conditions that led to the children being taken into custody. Father has not been given the opportunity to rectify the conditions that brought the children into foster care. Keeping in mind that Father asked for a continuance in order to prove himself capable in Missouri of providing for his three teenage sons, the relatively positive psychological exam and the tenuous allegations of neglect against Father, substantial evidence is not present that the conditions leading to placement of the children continue to exist or conditions of a potentially dangerous condition existed at the time of trial. I would find that the State has failed in its burden on each of Father's points. Although the evidence that supposedly supports each ground is basically the same, that Father had no contact with the children and failed to support them, I will address the points raised by Father.

⁴ It is clear from the "grandmother's" testimony that the children pushed Father to leave California. The children like the schools here and living here. Father's job was in California.

In his first point, Father challenges the finding of abandonment, claiming that he maintained constant contact with the three caseworkers from the Children's Division, sent periodic correspondence to each child, sent financial support, and requested visitation.⁵ One month before the filing of the termination petition, Father traveled to Missouri and was not allowed to visit the children because the children were angry with him (for not coming sooner) and did not want to see him. To terminate under the statutory ground of abandonment, it must be proven that Father, without good cause, left the minor children without any provision for parental support and failed to make arrangements to visit or communicate with the minor children for a period of six months or longer. Section 211.447.5(1)(b).⁶ "Abandonment is defined as the voluntary and intentional relinquishment of custody of a child with the intention that the severance be of a permanent nature or as the intentional withholding by a parent of his care, love, protection and presence without just cause or excuse." *In re R.K.*, 982 S.W.2d 803, 806 (Mo. App. W.D. 1998).

Even if we accept the court's finding that Father failed to provide financial support, there is no question that Father at any time intentionally relinquished custody of the children with the intention that the severance be of a permanent nature or withheld his care, love, protection and presence. The testimony was undisputed and came from Children's Division workers that Father communicated constantly and frequently with the workers, that he attempted to have a visit with his children when he returned to Missouri, and that he kept in phone contact with the children up to the time when the Children's Division decided to terminate his contact with the children because "the children were disappointed" with him for his broken promises that he would come earlier to Missouri and his comments about their mother. He continued, although sporadically,

⁵ All of the testimony came from the Children's Division workers and the court obviously credited their testimony.

⁶ All references to statutes are to RSMo Cum.Supp. 2007, unless otherwise specified.

to send letters and cards to the children. His behavior does not constitute abandonment. Point I has merit.

The court also found that the children had been abused and/or neglected by Father, pursuant to 211.447.5(2)(a)-(d). Only the fourth condition of a “[r]epeated or continuous failure by the parent, although physically or financially able, to provide the child with adequate food, clothing, shelter, or education as defined by law, or other care and control necessary for the child’s physical, mental, or emotional health and development,” section 211.447.5(2)(d), was addressed by the court in the following manner:

Neither the mother nor the father have provided consistent financial or in kind support for the minor children despite both having means to do so.

The only thing the father seems to have been consistent in is telling the minor child[ren] that he would be coming to visit and then failing to follow through. The case worker, investigator, grandmother, child[ren’s] therapist, and the guardian ad litem all testified that the father repeatedly would repeatedly [sic] promise to come see the minor child[ren] and then fail to show up. The father offered evidence that he was limited in his ability to leave the state of California due to requirements of probation, however, the evidence was that despite knowing of this restriction he continued to repeatedly tell the minor child[ren] he would be coming to visit. The evidence was also that the father had completed his probation in late 2011 and still did not come to visit the minor child[ren]. The father did come to the state of Missouri in March 2012, but failed to contact the case worker prior to his arrival and then when the father arrived he failed to request a visit or contact with the child[ren]. The evidence was that since the father put the minor child[ren] on a plane to Missouri in July 2010 he has failed to provide for their physical, mental and emotional health and development.

In his second point, Father challenges the factual basis of the court’s finding regarding his failure to visit in March 2012, and his failure to support despite his ability to do so. The majority opinion states, “despite being in Missouri for nearly a week, he never visited the Children.” It was not his choice; Father was not allowed to visit the children. The transcript regarding the visit in March shows Father did want to visit in March:

[Father's Counsel]: Okay. And [Father] traveled approximately 1,500 miles from California to get to the state of Missouri, and it's your testimony he didn't want to see his kids?

[Children's Division worker]: No. Well, I think I did misword [sic] incorrectly earlier.

[Father's Counsel]: Could you clarify that for us, please?

[Children's Division worker]: We didn't go into great discussion as to whether he could see his kids when he was here. I believe he would have wanted to see his children.

[Father's Counsel]: Did he express to you that he wanted to see his children?

[Children's Division worker]: I don't remember the exact words, but I think he did.

[Father's Counsel]: Okay. And I know that's six, seven months ago?

[Children's Division worker]: I remember telling him that a visit wasn't going to be possible at that time.

[Father's Counsel]: Okay. But while you're not sure, you believe he asked for one; is that right?

[Children's Division worker]: He may have.

....

[Counsel for Juvenile Office]: If you had been – if he had asked and you had been given some notice, would you have been able to have had the children present for a visit with their father?

[Children's Division worker]: I remember now the boys had been moved and [D.K.R.] was living in Springfield, and I don't believe that [Father] would have had the opportunity to visit the boys if he had wanted to.

[Counsel for Juvenile Office]: And why is that?

[Children's Division worker]: Because I think between me and the team there were concerns about how it would affect the boys if we set up a visit and say he didn't show up or just knowing that he was in town might be upsetting for them.

As noted above, Father clearly did not abandon the children as he maintained contact with the caseworkers, requested visitation, and maintained weekly telephone contact when permitted. It was the Children's Division who determined that telephone contact would not be allowed based on the children's disappointment. Father traveled from California to Missouri and was not allowed a visit.

The second claim of neglect in the court’s decision is that Father did not pay child support. First, I note that a failure to pay child support or deficient financial skills, by themselves, do not warrant a termination of parental rights. *In re K.L.C.*, 332 S.W.3d 330, 341 (Mo. App. S.D. 2011). Next, “the circuit court failed to make adequate findings as to how [Father’s] failure to pay child support was predictive of a future failure to provide for [the children].” *In re Q.A.H.*, No. WD75786, 2013 WL 3661746, *12 (Mo. App. W.D. July 15, 2013).

I also note the trial court determined Father to be indigent and appointed counsel to represent him. There was no other evidence as to whether Father had the ability to pay further child support, nor was he ordered to pay child support. Father paid money to the “grandparents” and to the boys prior to the time that the “grandparents” became foster parents.⁷ Thus, he had sent \$1,200 in money orders to the children’s “grandparents” when the children were in their care. He sent cash cards for different occasions.⁸ This is not token support, but accepting the findings of the trial court as true, that Father had the ability to pay but did not, I do not think it is the law in Missouri that the failure to pay child support, standing alone, can provide the basis to terminate Father’s parental rights.⁹ Point II also has merit.

⁷ The “grandmother” testified that Father “did send me funds and sent the boys funds also. And personally, you know, he’d send them in D.K.R.’s name like \$90 and each get \$30. But really once I became a foster parent he did send some money for Christmas one time and then when we get to the other that was some of that.”

⁸ “Evidence that a parent has provided some contribution, even if not fully sufficient for support, demonstrates the parent’s intent to continue the parent-child relationship and militates against termination.” *In re S.M.H.*, 160 S.W.3d 355, 367 (Mo. banc 2005).

⁹ If parental rights *were* terminated for a failure to pay child support alone, the State of Missouri would have filed over 360,000 termination cases by June 2013. As of June 2013, there were 364,640 active child support cases in Missouri. <http://dss.mo.gov/mis/clcounter/> (last visited August 13, 2013). For Missouri’s fiscal year 2013 (the period extending from July 1, 2012, to June 30, 2013), child support collections totaled over \$668 million dollars, which was a 1.4 percent decrease in collections from the previous year. <http://dss.mo.gov/cse/collections.htm> (last visited August 13, 2013).

Finally, the trial court further found that the conditions that led to the assumption of jurisdiction continued to exist and there was little likelihood that those conditions could be remedied at an early date so that the children could be returned to Father in the near future. The conditions were identified as abandonment and continuing neglect. The specific factors were listed as:

i. . . . The evidence presented was that the mother and father were subject to treatment plans, but both failed to make substantial progress on the terms of their treatment plan. . . . [F]ather was unemployed and homeless with no plan for how he would care for the minor children. Neither parent was any better off than they had been 18 months earlier when the child[ren were] taken into custody.

ii. The success or failure of the efforts of the juvenile officer, the Children's Division, or any other agency to aid the parent on a continuing basis in adjusting the parent's circumstances or conduct to provide a proper home for the child: . . . As for the father, the evidence was that for the majority of the case he resided in another state and therefore the only way he could have a local service provider was for him to participate in an ICPC homestudy [sic] and referral, however, when asked if he would like to do so he repeatedly refused. The case worker was unable to refer specific services for the father as she was unfamiliar with what providers were available in father's home state. Now that the father has relocated to Missouri services can be referred for him, however the case worker testified that when she found out the father was residing in his vehicle she referred him to some housing resources and he refused to contact any of them saying he preferred to stay in his vehicle. The father was also offered the ability to write the minor child letters that would be processed in the child's therapy and again the father failed to participate. If a parent refuses to participate in services, additional referrals are unlikely to make any improvements.

Father challenges in his third point the findings that he failed to rectify the conditions that led to the assumption of jurisdiction by noting substantial compliance with the services plan. Specifically, he notes: all drug tests were negative, he kept regular contact with the Children's Division, he completed a psychological evaluation, he completed parenting classes, he communicated with his children until the communication was terminated by the Children's Division, he paid money to support the children, he maintained employment in the State of California and maintained a residence there. He also notes the testimony of one Children's

Division worker, “I’m just going to go ahead and say my conscience tells me to give [Father] a second chance and recommend that he not be terminated on today.” I believe Father’s third point also has merit.

Clear, cogent and convincing evidence “instantly tilts the scales in the affirmative when weighed against the evidence in opposition and the fact finder’s mind is left with an abiding conviction that the evidence is true.” *In re Interest of A.L.B.*, 743 S.W.2d 875, 879 (Mo. App. E.D. 1987). “It is only necessary to reverse or remand if this Court is left with a firm impression that the judgment is wrong.” *In re J.B.D.*, 151 S.W.3d 885, 887 (Mo. App. S.D. 2004). I am left with such a conviction. If Father’s only fault is that he disappointed his children by failing to keep his promises to come to Missouri, then these children have it better than many children where we determined that termination was not proven.

For instance, in *In re Z.L.R.*, 306 S.W.3d 632 (Mo. App. S.D. 2010), we reversed the termination of a father’s parental rights to a two-year-old child despite the fact that the father was in prison at the time of placement, during the entire placement, and would be imprisoned for two or three years longer. *Id.* at 638 n.9, 639. A termination was recommended by the guardian ad litem because of “an outdate that is two to three years away, keeping this case open and not having permanency for [Child] over the course of that period” and by the Children’s Division worker that “[Child]’s best interest are served by achieving some permanency[.]” *Id.* at 634. The trial court found that the father had not sent any support, financial or in kind, and there was no evidence of much of a bond, if any, between the child and the father. *Id.* This Court found the weight of the evidence, including the father sending cards for holidays, probably six or seven, sufficient to rebut a finding that the father had infrequent contact with the child. *Id.* at 636.¹⁰ We found it reasonable that the father in *Z.L.R.* paid no support out of his prison income, partly

¹⁰ All of these “facts” were contrary to the trial court judgment, yet were cited by this Court.

because the treatment plan was for the father to pay child support in an amount to be determined and no child support was ever ordered to be paid. *Id.* It was noted that the father spent money to send the child cards and his family gave the child clothing, toys and gifts on the father's behalf. *Id.* We duly noted that "[p]arental rights are a fundamental liberty interest, and statutes providing for their termination 'are strictly construed in favor of the parent and preservation of the natural parent-child relationship.'" *Id.* at 638 (quoting *In re A.S.W.*, 137 S.W.3d 448, 453 (Mo. banc 2004)).

In another case where the father was incarcerated and paid no support during his incarceration, we reversed the termination of the father's parental rights which had been based on abandonment and neglect. *In re G.T.M.*, 360 S.W.3d 318, 325 (Mo. App. S.D. 2012). In that case, the father learned of his paternity to the child only thirty days prior to the filing of the petition to terminate his parental rights. *Id.* at 320-21. In addition to the finding that the requisite six-month period had not been proven, we noted that upon learning his child was in the State's custody, the father persistently took steps to protect his parental rights. *Id.* at 323. Those efforts included continued contact with a case worker notifying her of his intent to have custody, completing programs in prison, and doing "everything" asked of him. *Id.*

Likewise, in *In re X.D.G.*, 341 S.W.3d 755 (Mo. App. S.D. 2011), we reversed the judgment terminating the father's parental rights and noted "[t]here must be a 'convincing link' between a parent's past acts and his predicted behavior in determining the likelihood of future harm." *Id.* at 760. The issue in *X.D.G.* was whether the past finding that the father either harmed or failed to protect a child from physical abuse supported a prediction that the father would likely either harm or fail to protect the child in the future. *Id.* at 761. We found no clear,

cogent and convincing evidence that supported the trial court's prediction. *Id.* In doing so, we cited facts that were contrary to the judgment.

In *In re C.J.G.*, 358 S.W.3d 549 (Mo. App. S.D. 2012), the father was imprisoned when C.J.G. was born. *Id.* at 552. While in prison, he “availed himself of the opportunity to better his life.” *Id.* Despite those actions and his constant effort to be a part of C.J.G.'s life, he was denied visitation and was never offered or provided any services by the Children's Division. *Id.* at 552-53. We found that there was no evidence of the father's current conduct supporting a claim of neglect. *Id.* at 556. We also noted:

it was totally within the prerogative of the Children's Division to foster a relationship between Father and the child; they did not do so. It would not be appropriate to hold against Father the fact that he did everything he could do to foster the relationship but did not have the power to unilaterally achieve it in the face of the Children's Division's power to deny it.

Id. at 558.

R.P.C. v. Wright County Juvenile Office, 220 S.W.3d 390 (Mo. App. S.D. 2007), cited by the majority opinion for the proposition that adults may not ignore their children for months, is not on point. Rather, it supports a reversal in this case. The child in *R.P.C.* was two years old when his parents took him to the hospital. *Id.* at 391. He was covered with feces and dog hair, tested positive for barbiturates, and was subsequently taken into custody. *Id.* at 391-92. For the first eight months, the parents visited the child and provided some gifts and support. *Id.* at 392. The parents voluntarily signed away their parental rights so that a grandmother could adopt the child; however, that plan was abandoned after the grandmother abused the child. *Id.* The child was returned to his original foster family, the order terminating parental rights was withdrawn, and the parents were notified they could start visiting the child again. *Id.* For the next fifteen

months, the parents never tried to visit, contact, or communicate whatsoever with the child. *Id.* There is nothing about that case that is similar to this one.

Here, we have a father who was not incarcerated, and has never been accused of abuse of the children or knowingly allowing abuse or neglect of the children. We have a father with no known chemical addictions. The period of time needed before Father and the children could reconcile is much less than two or three years. The guardian ad litem's time frame in her recommendation was that Father could not provide a home for the children in sixty days. Father attended a parenting class of his own volition, submitted to a psychological exam, had constant contact with the caseworkers, and attempted contact with his children. There simply is no clear, cogent and convincing evidence that Father will harm or fail to protect these children in the present or future; the significant issue was Father's physical presence in the State. Father moved to the State of Missouri in order to parent his sons.

It may be, if Father was given an opportunity to care for his sons, and if the Children's Division used good faith in encouraging a good relationship between Father and his sons, that Father would not be able to do so. But, because of the severe consequences to the children of being separated from the man who is their father and separated from their siblings, I have the firm conviction that the State has not proven any ground to terminate the parental relationship at this time.¹¹ I believe any action for termination is premature at best. It was the guardian ad litem who stated:

They may have a nice placement, nice foster parents, a beautiful home but they know they're foster children. They know it. They know it every single day and that's not good for kids. And the longer we carry this on the longer they're going to have to put up with being the foster kid.

¹¹ In a fourth point, Father also challenges the court's finding that it was in the best interest of the minor children to terminate his parental rights; however, I do not address that point as I find no statutory ground for termination.

Yet, knowing there is no possibility, at this time, for the boys to be adopted into permanent homes, she further recommended it was in the children's best interest to terminate Father's parental rights because the boys "are old enough and smart enough to know what lies ahead but they would rather step into that unknown than to be back with [Father]." ¹² If the past is a predictor of the future, then in the next 24 months (the time the children have already been in care) each child will have three different workers assigned to him, two different counselors, and be placed in at least three different homes. The reality is that these children are and will continue to be separated from their siblings; they will not grow up with the bonds of siblings in the same home. ¹³ I cannot affirm a judgment that countenances a condition that when these boys leave the foster care system, the State has taken the drastic step of dissolving any semblance of providing a real family for these boys, and in my opinion, without sufficient justification.

Pursuant to Rule 83.03, I certify this case to the Supreme Court of Missouri as the opinion is contrary to a previous appellate court decision.

Nancy Steffen Rahmeyer, P.J. – Dissenting Opinion Author

¹² I disagree that these children are old enough to know what lies ahead. It is a worthwhile goal not to have children flounder indefinitely in foster care, but termination should not be used as a punishment for any parent. I believe it has been used that way in this case because Father did not move to Missouri quickly enough. Father was told by one caseworker that he "would have a bigger better chance of getting the children back if he were homeless in Missouri than he would staying in California."

¹³ This is based on the testimony that there is no adoptive home ready to take the three siblings.