

Termination of Parental Rights: Update and Preparation For Trial

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Termination of Parental Rights: The Art of Pleading and Preparation for Trial

- The Art of Pleading
- Court Appointed Attorneys
- Hearings to be held prior to trial
 - 211.455, RSMo.
 - 211.459, RSMo.
 - TPR Study vs. Notice of Availability
- Continuances
 - Making a Good Record
- Trial
 - Evidence
 - Best Interests
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The Art of Pleading

- Remember that every single statement that you make in your petition must be proven with evidence at trial.
- *In the Interest of T.M.P.*, No. ED109843

The Art of Pleading: Failure to Rectify 211.447.5(3), RSMo.

- **COUNT 1: The juvenile has been under the jurisdiction of the juvenile court for a period of one year or longer in that on September 19, 2017, the Court assumed jurisdiction over the juvenile under Section 211.031.1 (1), RSMo, after finding that the juvenile is without proper care, custody and support in that** the mother is unable to provide a safe environment for the juvenile due to her use of controlled substances. To wit, the juvenile was born on August 19, 2017 and the mother submitted to a urinalysis drug screen, while pregnant, on May 30, 2017, which the results indicated a positive result for methamphetamine. Further, the mother has only complied with two requested random drug screens and on both occasions the results were positive for methamphetamine. Despite services being offered by Children's Division the mother currently has five other children under the jurisdiction of the Juvenile Court and the permanency plan for four of the children is a concurrent plan of guardianship and termination of parental rights and adoption and the plan for the fifth child is reunification with father. The mother has failed to complete services and random drug screens to verify her sobriety throughout the duration of the pending sibling cases and the mother is only allowed one hour per week supervised visitation with the juvenile's siblings. At that time, the mother had upcoming probation violation hearings regarding the underlying charges of Possession of a Controlled Substance, a class C felony, and Possession of Methamphetamine Precursor Drug with Intent to Manufacture, a class D felony, and had a pending criminal case for Possession of a Controlled Substance, a class C felony. Further, the putative father did not have legal rights of custody and the father has another child that is under the jurisdiction of the Juvenile Court.
- **The conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist and there is little likelihood that these conditions will be remedied so that the child can be returned to the parent in the near future. Since the Court assumed jurisdiction herein,** the mother has completed a drug and alcohol assessment, but has failed to consistently participate in and/or successfully complete substance abuse treatment; has failed to verify her sobriety by complying with requested drug screens and/or testing positive for controlled substances on drug screens; has failed to participate in or successfully complete individual therapy; has failed to complete a psychological and psychiatric evaluation and follow all recommendations; has failed to complete parenting classes; has failed to provide monetary support for the juvenile; has failed to provide verification of a stable income and appropriate home; has failed to abide by state laws and/or ordinances throughout the pendency of the juvenile case; and has failed to maintain consistent contact with Children's Division.

The Art of Pleading: Failure to Rectify

211.447.5(3), RSMo.

- **COUNT 1:** The juvenile has been under the jurisdiction of the juvenile court for a period of one year or longer and the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist and there is little likelihood that these conditions will be remedied so that the child can be returned to the parent in the near future, in that on or about April 7, 2011, the juvenile was removed from the care of the mother due to the mother and custodian neglecting to provide for the child's medical and educational needs. Further, the mother had past mental health diagnoses including Schizophrenia and Personality Disorder, and was not participating in mental health treatment. Despite services being offered by Children's Division since September of 2009, including Intensive In Home Services and in-home therapy, the juvenile's medical and educational needs remained an on-going concern. The juvenile's biological father was unknown at that time.
- Since that time, the efforts provided by the Children's Division and/or the contracted agency to aid the mother on a continuing basis in adjusting her circumstances or conduct to provide a proper home for the child have not been successful. Despite the mother participating in services, she has not shown verification of recent mental health treatment or individual counseling, was incarcerated due to a probation violation, and was evicted from her apartment in January of 2014 and is currently homeless. The mother has failed to complete random drug screens to verify sobriety, has failed to complete behavioral parenting classes, has failed to provide monetary support for the child, has failed to maintain a stable living environment, and has failed to maintain consistent contact with the Case Manager.

The Art of Pleading: Presumption 211.447.5 (5), RSMo.

- **COUNT 1:** The parent is unfit to be a party to the parent and child relationship because of specific conditions directly relating to the parent and child relationship and is of a nature that renders the parent unfit or unable, for the reasonably foreseeable future, to care appropriately for the ongoing physical, mental, or emotional needs of the child. To wit, the juvenile was born on September 30, 2019 and at the time of the child's birth, the child tested positive for amphetamines, a controlled substance as defined in 195.010 RSMo., and the birth mother is the biological mother of another child that has been adjudicated an abused or neglected juvenile by the mother, due in part, to the mother's use of controlled substances.

The Art of Pleading: Abuse/Neglect

211.447.5(2), RSMo

- **COUNT 1:** The juvenile has been abused or neglected for the reason that the mother and father, acting together, committed one or more severe acts of physical abuse towards the juvenile and one of his siblings. To wit, on or between January 1, 2017 and January 23, 2018 the mother and father, acting together, repeatedly physically abused the juvenile and one of his siblings by striking them with a wooden stick multiple times as a form of punishment, including one incident where the juvenile may have been struck more than two hundred times in one day. Due to the mother and father, acting together, repeatedly striking him with a wooden stick, the juvenile had received wounds to his person, including a large open wound on his buttocks for which medical treatment was not sought by the parents. The mother and father, acting together, continued to strike the juvenile with the stick while he had the wound to his buttocks causing the wound to reopen.

The Art of Pleading: Unfitness 211.447.5(5), RSMo.

- **COUNT 2:** The parent is unfit to be a party to the parent and child relationship because of a consistent pattern of committing a specific abuse, but not limited to, specific conditions directly relating to the parent and child relationship which is of a duration or nature that renders the parent unfit or unable for the reasonably foreseeable future to care appropriately for the ongoing physical, mental or emotional needs of the child. To wit, on or between January 1, 2017 and January 23, 2018 the mother and father, acting together, repeatedly physically abused the juvenile and one of his siblings by striking them with a wooden stick multiple times as a form of punishment, including one incident where the juvenile may have been struck more than two hundred times in one day. Due to the mother and father, acting together, repeatedly striking him with a wooden stick, the juvenile had received wounds to his person, including a large open wound on his buttocks for which medical treatment was not sought by the parents. The mother and father, acting together, continued to strike the juvenile with the stick while he had the wound to his buttocks causing the wound to reopen.

Court Appointed Attorneys

Rule 115.01 Right to Counsel

- A party is entitled to be represented by counsel in all proceedings.

Court Appointed Attorneys, cont.

Section 211.211 RSMo. and Rule 115.03

- The court shall appoint counsel if it finds:
 - indigent;
 - desires/requests appointment; and
 - a full and fair hearing requires appointment of counsel.
- Allowed a reasonable time in which to prepare
- Serve for all stages of the proceedings, including appeal, unless relieved by the court for good cause shown
- If no appeal, then counsel is terminated after the entry of an order of disposition

Court Appointed Attorneys, cont.

211.462, RSMo. (TPR)

- notified of the right to have counsel
- if request counsel and are financially unable to employ counsel, then counsel shall be appointed by the court
- notice of this shall be contained in the summons
- Automatic appointment if court appointed in underlying cause

Court Appointed Attorneys, cont.

Advice of Right to Counsel for Juvenile Cases

- Do you understand that you have the right to have an attorney present at any of these proceedings? Do you understand if you feel you need an attorney and you cannot afford one that you can apply for a court appointed attorney? If you did that, I would review your application to determine if you qualify. If I found you qualified, then I would appoint an attorney to represent you. If I found you did not qualify, you have the same rights you have always had to hire your own attorney. Do you understand that? Do you knowingly and voluntarily waive your right to an attorney for this hearing only?

Court Appointed Attorneys, cont.

- Department of Health and Human Services-Federal Poverty Level
- Case law

Court Appointed Attorney Application

Application for Court Appointed Attorney (for use in Abuse/Neglect Cases)

Name of Child/Children: _____ Case Number(s): _____

Parent's Name: _____ Date: _____
Address: _____
Phone Number: _____ Social Security Number: _____
Names and ages of other children in household: _____
Other persons in household and their relationship to you: _____

Name and Address of Employer: _____

Total Monthly Income (before taxes): _____

Source(s) of Income: Salary \$ _____ (per hour/per week/biweekly/monthly)
 TANF \$ _____
 Social Security \$ _____
 Child Support \$ _____
 Food Stamps \$ _____
 Other \$ _____

Total income received by you last year: \$ _____

Income from anyone else in your household (including spouse, parents, boyfriend, girlfriend, child, etc.): Name and relationship of person receiving income: _____
Amount of Income: \$ _____

Monthly Expenses: Rent/House Payment \$ _____
Groceries \$ _____
Utilities \$ _____
Car Payment \$ _____
Gasoline \$ _____
Medical Expense \$ _____
Loan Payments \$ _____
Insurance \$ _____
TOTAL \$ _____

Assets: Checking Account Balance \$ _____
Savings Account Balance \$ _____

Automobile: Year/Make/Model _____ Value \$ _____

Do you own or are you buying your home? Yes No
Value: \$ _____

I do solemnly swear that the above information is true and correct and I further understand that attorney's fees, in part or in full, could be assessed against me at a later date if it is determined by the Court that I have sufficient assets to pay these fees.

Signed: _____

Hearings to be Held Prior to Trial

- 211.455, RSMo.
- 211.459, RSMo.

211.455, RSMo.

- Requirements
- Strict Compliance Necessary
 - Grounds for reversal
- Amending 211 Hearing Order
- In the Interest of L.F, 635 S.W.3d 618

211.455, RSMo. Requirements

- Must be completed within **30 days** of the filing of the petition
- Juvenile Officer **shall** meet with the court
- In order to:
 - Determine that all parties have been served with a summons AND
 - To request that the court order the investigation and social study
- Social study **shall** be made by:
 - Juvenile Officer, Children's Division, public/private agency authorized or licensed to care for children, or any other competent person
 - **Rule 118.01**
 - the order shall specify the submission date to the court
- Written report **shall** be made to the court to aid the court in determining best interests
- Reports **shall** be made available to parties and attorneys or guardians ad litem or volunteer advocates representing them before the court at least **15 days** prior to any dispositional hearing

211.455, RSMo. Requirements, cont.

- TPR Study vs. Notice of Availability
 - What is the practice in your county?
- Rule 118.01
 - “The social study shall not be considered by the court prior to a determination that the allegations of the petition or motion to modify have been established.”
 - This Rule 118.01 makes clear that the court may use the social study only in connection with the dispositional hearing, and may neither read nor consider the social study until finding that the allegations of the petition or motion to modify have been established.”
 - Judge review prior to admission

211.455, RSMo. Requirements, cont.

- Failure to strictly comply with 211.455, RSMo., is reversible error.
 - In the Interest of C.W., 211.S.W.3d 93, 98 (Mo. 2007)
- In the Interest of L.F 635 S.W.3d 618
 - 211 hearing held pursuant to the requirements of 211.455
 - First juvenile—Children’s Division ordered to complete
 - Second juvenile—Independent agency ordered to complete at request of attorney for father
 - JO filed motion, which was granted, for both studies to be completed by independent agency
 - CD then filed a motion, which was granted, for both studies to be completed by Children’s Division, due to the Division being in a better position to complete the study
 - JO agreed
 - No hearing held
 - No parties requested a hearing or for the motion to be set aside
 - Objection made day prior to trial despite the order being entered for 6 months

211.455, RSMo. Requirements, cont.

- Appellant argued:
 - Requirement to have multiple 211 hearings, if court is going to amend who completes the study
 - 211 hearing is a one time event
 - Statute does not state that the order regarding the agency to complete the study can never be amended by the court
 - Court can exercise its discretion when determining a person or entity to conduct the study
 - Issue with first trial setting—Children’s Division completed both studies
 - Harmless error—studies never entered into evidence or relied upon by court
 - In *C.G. v. Date County Juvenile Office*, 212 S.W.3d 218 (Mo. App. S.D. 2007)
 - Error due to Children’s Division completing the social study/Bias
 - Children’s Division allowed to complete study by statute
 - No evidence of bias
 - Relied on *In the Interest of C.W.* 211 S.W.3d 93 (Mo. 2007)
 - Issue was not that Children’s Division completed the study, which is allowed by statute, but that the study was completed PRIOR TO it being ordered during the 211 hearing and even prior to a TPR petition being filed

211.459, RSMo.

- Within **thirty days** after the juvenile officer and the court have met pursuant to section 211.455, the court **shall** hold the dispositional hearing where the juvenile officer and any person on whom summons and the petition were served **shall** have the right and power to subpoena witnesses and present evidence.
- “The above cause is currently set for dispositional hearing pursuant to Missouri Revised Statute 211.459 on May 18, 2022 at 11:00 a.m.”

Continuances

- **Rule 125.03 and 211.455, RSMo.**
- if all parties have not been served, then the court has discretion to extend the time for service and 211.455, RSMo. adds “if the court finds that service may be forthcoming and that the best interests of the child would be served thereby.”
- Rule 125.03.a(4) “unless continued for good cause, the court shall hold the dispositional hearing within 30 days after the juvenile officer and the court have met to determine whether all parties have been served with summons”
- Making a Good Record

Trial: Evidence

- **Business Records Admissible with Affidavit:**

- Any records or copies of records reproduced in the ordinary course of business by any photographic, photo static, microfilm, micro card, miniature photographic, optical disk imaging, or other process which accurately reproduces or forms a durable medium for so reproducing the original that would be admissible under section 490.660 to 490.690 **shall be admissible as a business record, subject to other substantive or procedural objections, in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites** of sections 490.660 to 490.690, that the records attached to the affidavit were kept as required by section 490.680.

- Cannon v. Director of Revenue, State of Missouri (895 S.W. 2d 302)

- 490.680 is a statutory exception to the hearsay rule and upon qualification, allows admission of business records for the truth of the matter asserted
- 490.692 expands upon this requirement and permits the requisite foundation to be laid by affidavit rather than direct testimony
- 490.692 provides a practical way to avoid the necessity of a personal appearance by a records custodian, as mandated by 490.680
- Upon compliance with both sections, business records may be admitted into evidence without any additional direct testimony
- Right to confrontation is not a valid objection
- Confrontation clause is applicable in criminal cases only

- Business Records Affidavit—Drug Screens

- Litigation Packets
- Testimony of Collectors

Trial: Evidence, cont.

- Certified Copies 490.130, RSMo.
 - The records of judicial proceedings of any court of the United States, or of any state, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, and certified by the judge, chief justice or presiding associate circuit judge of the court to be attested in due form, shall have such faith and credit given to them in this state as they would have at the place whence the said records come.
 - Copies from the record of proceedings of any court of this state, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, or if there be no seal, with the private seal of the clerk, shall be received as evidence of the acts or proceedings of such court in any court of this state.
 - Records of proceedings of any court of this state contained within any statewide court automated record-keeping system established by the supreme court shall be received as evidence of the acts or proceedings in any court of this state without further certification of the clerk, provided that the location from which such records are obtained is disclosed to the opposing party.
- Certified copy of a sibling juvenile case admissible
 - In re D.L.W., 530 S.W.2d 388
 - The courts of Missouri have long admitted evidence of past conduct on the part of parents in determining the suitability of the parents to custody of their children.
 - Evidence of mistreatment of other children has been held admissible in considering the welfare of another child
 - Evidence of juvenile file of another child is admissible in both the adjudication and disposition

Trial: Evidence, cont.

- Refresh Recollection
 - Can you recall specific dates and wording?
 - Is there anything ,that would refresh your recollection regarding exact dates/words used?
 - Did you prepare notes?
 - Why do you keep notes?
 - Do you keep the notes through the course of your employment?
- Credibility of Witnesses

Trial Evidence, cont.

- 211.447.5, RSMo.
- Mental Condition and Chemical Dependency
 - Need an Expert
 - Mental Condition: “...which is shown by competent evidence either to be **permanent** or such that there is no reasonable likelihood that the condition can be **reversed** and which renders the parent unable to knowingly provide the child the necessary care, custody and control.”
 - Chemical Dependency: “...which prevents the parent from consistently providing the necessary care, custody and control of the child and which **cannot be treated** so as to enable the parent to consistently provide such care, custody and control.”

Best Interests

- 211.447.7, RSMo., Supreme Court Rule 125.03 (preponderance of the evidence)
 - Emotional Ties
 - Bond/Relationship with Parents and Placement Providers
 - “Mother” and “Father”
 - Who the children consider a caregiver(s)
 - K.D.P. v. Juvenile Officer (In re I.G.P.), WD 74598 (Mo. App. 2012)
 - Maintained Regular Visitation or Other Contact with Child
 - Monetary Support
 - Garnishment is not parental support

Best Interests, cont.

- Services
 - Despite the services already offered to Parent, can you think of any other services that would enable the juvenile to be returned to her within an ascertainable amount of time?
- Lack of Commitment to the Child
- Criminal Convictions
 - To your knowledge, has Parent been convicted of any felony offense that would deprive juvenile of a stable home for a period of years for that reason only?
- Physical or Mental Harm
 - To your knowledge, has Mr. Parent committed any deliberate act that they knew or should have known subjected the juvenile to a substantial risk of physical or mental harm?

Judgments

- Include All Required Findings
 - Grounds and Best Interests
 - 211.447.5(2), (3)
 - Each has 4 factors the court **shall** consider
 - Faraone mistake
- Specific Evidence and Testimony
- Judge's Comments/Rulings
 - Pre-Trial Motions
 - Credibility of witnesses
 - Objections
 - Closing
- Reference All Exhibits Entered

#1 Rule

- *Always err on the side of caution!*

Questions?

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