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20-5180

No.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
MATTHEW J. FRAWLEY— PETITIONER

VS.

VICTORIA L. FRAWLEY— RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

Missouri Western District Court of Appeals, and  
Missouri Supreme Court denial of Writ of Certiorari

**PETITION FOR WRIT OF CERTIORARI**

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SUPREME COURT, U.S.

## **QUESTIONS PRESENTED**

- I. Whether the Missouri Western District Court of Appeals committed err by not finding Petitioner's 14<sup>th</sup> Amendment due process rights were violated by the trial court judge's refusal to recuse herself as required by Missouri Supreme Court Rule 2-2.11 after Petitioner moved to recuse the trial court judge and stated facts that reasonably called the trial court judge's impartiality into question.
- II. Whether the Missouri Western District Court of Appeals committed err by not finding that, as applied to Petitioner, sections 452.375.2 and 452.400.2 of the Revised Statutes of Missouri violated Petitioner's 14<sup>th</sup> Amendment rights by granting the trial court broad discretion to infringe upon Petitioner's fundamental liberty interest in raising his children and denying Petitioner equal protection of the law on the basis of Petitioner's disability.

## **ALL PARTIES**

All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS

|   |     |
|---|-----|
| OPINIONS BELOW.....   | 5   |
| JURISDICTION.....   | 5   |
| CONSTITUTIONAL AND STATUTORY PROVISIONS<br>INVOLVED .....                               | 6   |
| STATEMENT OF THE CASE .....   | 6   |
| ARGUMENT .....  | 16  |
| CONCLUSION.....   | 28  |
| INDEX TO APPENDICES   |     |
| APPENDIX A Missouri Western District Court of Appeals<br>decided February 11, 2020..... | 33  |
| APPENDIX B State Trial Court Decision, decided<br>January 3, 2020.....                  | 80  |
| APPENDIX C Missouri Supreme Court Denial of<br>Application to Transfer.....             | 151 |

## TABLE OF AUTHORITIES CITED

| CASES   | PAGE NUMBER |
|---|-------------|
| Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 65<br>L.Ed. 481<br>(1921).....          | 18, 19      |
| City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432,<br>446 105 S. Ct. 3249 (1985) ..... | 17, 23-24   |
| Jetz Service Co., Inc. v. Chamberlain, 812 S.W.2d 946<br>(Mo. App. 1991) .....              | 17          |
| Lapee v. Snyder, 198 S.W.3d 172, 182 2006 Mo. App.<br>LEXIS 1203 .....                      | 17, 19      |
| Tyler v. Mitchell, 853 S.W.2d 338, 341 (Mo. App.<br>1993).....                              | 23          |
| Troxel et vir. v Granville, 530 U.S. 57, 120 S.Ct. 2054, 147<br>L.Ed.2d 49 (2000) .....     | 25-27       |

### STATUTES AND RULES:

U.S. Const., amend. XIV

452.375.2 of the Revised Statutes of Missouri

452.400.2 of the Revised Statutes of Missouri

2-2.11 Mo. Sup. Ct. Rule

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix "A" to the petition and is not reported.

**JURISDICTION**

For cases from **state courts**:

The date on which the highest state court decided my case was February 11, 2020. A copy of that decision appears at Appendix A.

The date the lowest state court decided my case was January 3, 2019. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date:

April 28, 2020, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV

452.375 RSMo

452.400 RSMo

Mo. Sup. Ct. Rule 2-2.11

## **STATEMENT OF THE CASE**

On March 7, 2013, the trial court for the 6<sup>th</sup> Judicial Circuit of the State of Missouri entered a Judgment of Dissolution (here after “Judgment”), dissolving the marriage of Petitioner and Respondent. The Judgment was entered after trial in which Petitioner did not appear. The Judgment granted Respondent sole legal and physical custody of two minor children, CF and JF. Petitioner was granted reasonable periods of visitation at the discretion of Respondent.

On May 3, 2013, Petitioner was declared incapacitated and disabled by the 6<sup>th</sup> Judicial Circuit of the State of Missouri. Shortly after such declaration, Petitioner was diagnosed with bipolar and ADHD. Once Petitioner received treatment, his condition drastically improved. On March 6, 2015, Petitioner was restored to capacity by the 6<sup>th</sup> Judicial Circuit of the State of Missouri.

Petitioner was an active participant in CF and JF’s lives. Beginning April of 2015, Respondent voluntarily permitted overnight visitation with CF and JF three nights per week.

On June 10, 2016, Petitioner filed a motion to modify the Judgment based on Respondent’s liberal visitation and the Judgement’s impermissible grant of unfettered discretion to Respondent as to Petitioner’s custody time with CF and JF. In response, Respondent filed a motion

for appointment of a guardian ad litem and a motion that Petitioner undergo a psychological evaluation.

The trial court litigation spanned thirty months in total. Actual trial did not commence until eighteen months after the litigation first commenced. The trial itself spanned six trial dates over a twelve-month period. Several trial dates were scheduled, cancelled, and rescheduled at the request of the guardian ad litem and trial court judge for nonpayment of guardian ad litem fees, which is expressly prohibited under 514.040.5 of the Revised Statutes of Missouri.

Prior to trial, Respondents prelitigation strategies (e.g. requesting the appointment of a guardian ad litem, requesting Petitioner undergo a psychological evaluation, extensive discovery and motions, threats to withhold custody time, and refusal to try mediation) caused Petitioner to incur \$20,000.00 in legal fees prior to trial.

The trial court entered an order for psychological evaluation on or about November 11, 2016. The appointed psychologist cancelled several scheduled appointments following her appointment. The evaluation was conducted on or about February 11, 2017.

On April 14, 2017, Respondent unilaterally withheld all custody time from Petitioner. Petitioner moved for temporary custody. The trial court judge denied the motion.

Prior to trial, Petitioner filed a motion requesting an order granting Petitioner attorney fees because Petitioner, who earned \$16.00 per hour, could not proceed with counsel absent such order (after incurring \$20,000.00 in legal fees due to Respondent's pre-trial litigation tactics). The trial court denied the motion and permitted Petitioner's attorney leave to withdraw. Petitioner requested mediation. After Respondent informed the trial court that mediation would be "an exercise in futility" and the trial court judge warned Petitioner that he may be ordered to pay for mediation, Petitioner withdrew his request.

On or about July 21, 2017, after persistent requests by Petitioner, the psychologist submitted an evaluation to Respondent's counsel and the guardian ad litem. On August 16, 2017, the trial court judge refused Petitioner's request for a copy of the evaluation. The trial court judge stated that the trial court judge could not give Petitioner a copy of Petitioner's evaluation because giving a copy of the evaluation to Petitioner posed a risk of third-party dissemination. At trial, the trial judge stated the reason Petitioner could not have a copy of Petitioner's evaluation was to protect the psychologist. After hearing, the trial court judge permitted Petitioner to view the evaluation at the office of the guardian ad litem. However, the trial court judge held Petitioner could not take notes of the evaluation verbatim.

On August 16, 2017, Petitioner applied to proceed without costs because Petitioner had recently been relieved of his

position with the State of Missouri after Respondent's attorney contacted Petitioner's employer to inquire into the employer's position regarding outside employment. Respondent's counsel contacted Petitioner's employer after Petitioner sought to disqualify Respondent's counsel as a necessary witness. The trial court judge denied Petitioner's application on the basis that Petitioner's wife could support Petitioner (without any evidence to support such assertion).

On December 7, 2017, the trial court judge took up Petitioner's motion to exclude the admission of the before mentioned as a business record. The trial court judge held the evaluation admissible as a business record despite the fact that such record does not qualify as a business record under 490.690 and 490.692 of the revised statutes of Missouri, contains hearsay within hearsay, and a copy of the evaluation was not served upon Petitioner as required by 490.690 and 490.692 of the revised statutes of Missouri. The trial court judge refused to hear argument as to why the evaluation did not satisfy the Frye test for purposes of admissibility.

The evaluation was not reasonably relied on in the field of psychology (i.e. the evaluation took five plus months to complete). The evaluation is also not reasonably relied on in the field of psychology because the methodology and facts and data are not reasonably relied on in the field. Petitioner answered a set of 15 questions (out of 567 questions) in the affirmative. Affirmative answers to that 15-question set may indicate a party answering the

questions is not giving an honest response. Based on the Petitioner's answers to the 15-question set, the psychologist inferred Petitioner did not give honest responses. Therefore, the psychologist nullified the test results which otherwise reveal Petitioner presented with no issues. As such, the psychologist concluded Petitioner was a danger to CE and JE because Petitioner was diagnosed bipolar.

At trial, the evaluation (and business record affidavit) were admitted into evidence over Petitioner's objection.

At trial, Petitioner offered the evaluation of his treating psychiatrist with attached business record affidavit. The guardian ad litem notably objected to the evaluation's admission. The trial court judge ruled Petitioner's evaluation inadmissible as a business record. The ruling clearly contradicted to the trial court judge's previous rationale for admission of the evaluation prepared by the psychologist. Notably, however, Petitioner evaluation established the psychiatrist's qualification and her personal observations of Petitioner which Respondent's evaluation did not. Petitioner's evaluation stated Petitioner has excellent insight into his mental health diagnosis, effectively monitors his symptoms, and is compliant with her recommendations.

Prior to and during trial, the trial court judge threatened to enter an order requiring Petitioner pay Respondent her attorney fees for requesting the before mentioned motions be heard. Petitioner filed such motions because he had

been denied the right to counsel, the right to contest allegation made against him, and the right to a fair and impartial trier of fact. Petitioner raised the issues of due process violations and denial of equal protection during the before mentioned motions and at trial. Trial transcript pages 70, 86, 1,135, 1,510, 1,619.

At trial, Petitioner presented seven witnesses, including himself. Larry Altman, an expert in Title IX discrimination, testified to his observations of Petitioner. In additional to the evaluation prepared by his psychiatrist, Petitioner presented the business records of a supervised visitation facility that personally observed Petitioner with CF and JF. At trial, Respondent presented no witness other than herself.

On the second day of trial, Petitioner offered an audio recording of CF and JF at a baseball game in which Petitioner attended and recorded. Such audio recording directly contradicted statements made by Respondent to the psychologist (who conducted the evaluation), the statements of which were included in the evaluation and presumably impacted the psychologist's recommendation. Petitioner testified to the audio recording's chain of custody, that the recording had not been edited, the reliability of the recording device, and the reliability of the recording process. The trial court judge denied admission of the audio recording and failed to state the specific reason for denial. Petitioner requested he be given an opportunity to reopen evidence and offer the audio recording at the beginning of the next court date.

At the beginning of the next court date, Petitioner sought admission of the audio recording. The trial court hostilely refused and denied an offer of proof. The guardian ad litem subtly objected to the offer of proof as well.

The audio recording was material to Respondent's credibility because Respondent made several statements to the psychologist (which were included in the evaluation) and the audio recording word for word contradicted Respondent's statements. Respondent's statements to the psychologist depicted Petitioner as erratic and unstable. The audio recording was material to whether Respondent lied and deceived the psychologist.

The audio recording was also material to the guardian ad litem's credibility. At trial, the guardian ad litem deceived the trial court by denying there were issues that call the evaluation's reliability into question. The audio recording clearly called the evaluation's reliability into question. The audio recording also revealed that CF and JF were emotionally upset after Respondent withheld visitation, Respondent demeaned Petitioner in the presence of the children (by indicating Petitioner was not mentally well), and CF and JF expressed their wishes to spend time with Petitioner.

At trial, the trial court judge impermissibly allowed the guardian ad litem to cause Petitioner unfair surprise by asking questions regarding Petitioner's mental health records that predate the Judgment and without

previously providing Petitioner with a copy of said medical records as required by 490.692 of the revised statutes of Missouri. The guardian ad litem also mischaracterized those same records and falsely claimed that two of Petitioner's previous medical professional stated that the medication prescribed by Petitioner's current psychiatrist, Adderall (to treat his diagnosis of ADHD), should not be prescribed.

Its noticeable that once the reliability of the evaluation was legitimately called into question, Respondent and the guardian ad litem falsely claimed Petitioner was taking a medication he should not be taking as a basis for why Petitioner is a danger to CF and JF (with no expert opinion to support such assertion). Notably, the guardian ad litem could not answer why Petitioner is a danger to CF and JF but not AF (Petitioner's daughter who is in Petitioner's custody full time).

On the second day of trial, the trial court judge stated that the third day of trial would be the final day of trial. At the conclusion of the third day of trial, the trial court judge scheduled three additional consecutive trial dates in August of 2019 (five months after the third day of trial). Notably, the first date of trial was December 11, 2017, the second date of trial was February 15, 2018 (two months later), and the third date of trial was March 7, 2019 (approximately a month after the second date of trial).

On the fourth day of trial, Petitioner sought to remove the guardian ad litem for failure to faithfully execute her

duties (as required by Missouri statute) after the guardian ad litem sought to postpone trial unless the guardian ad litem was paid additional fees (which is prohibited by Missouri Supreme Court rule regarding guardian ad litem duties). The trial court judge responded hostilely to Petitioner's motion, stating she (the trial court judge) makes sure her guardian ad litems get paid, and warned Petitioner to tread lightly. The trial court judge refused to remove the guardian ad litem despite clear deficiencies and failure to execute Missouri Supreme Court mandated duties.

Petitioner sought to disqualify the trial court judge on the fourth day of trial because the trial court judge had objectively demonstrated bias against Petitioner and deprived Petitioner due process rights. Petitioner highlighted the disparity in treatment between Petitioner and Respondent by the trial court judge.

The trial court judge refused to recuse herself on the basis she did not believe she was bias against Petitioner and her recusal was not in Petitioner's best interest. Such rationale is not the standard for recusal under Missouri Supreme Court Rule 2-2.11. After the fourth day of trial, the trial court judge cancelled the next two court dates causing a two months gap between the fourth and fifth trial dates.

The Modification Judgment entered on January 3, 2019, granted Respondent sole legal and sole physical custody of CF and JF, restricted Petitioner visitation with CF and

JF to six hours of supervised visitation, and ordered Petitioner to pay Respondent's attorney fees and 2/3rds of the guardian ad litem fee (despite the fact that Respondent earns two to three times what Petitioner earns per annum).

Petitioner timely appealed to the Western District Court of Appeals. On June 20, 2019, Petitioner petitioned the appellate court to file a brief in excess of Local Court rule word count limit (15,500), but remain within the Missouri Supreme Court Rule word count limit (27,900) since the litigation spanned thirty months, consisted of six trial dates, the transcript contained 1,646 pages, and Petitioner alleged that the trial court judge committed fourteen points of error. Petitioner's last point focused on the due process violations and equal protection issues.

Petitioner attached his proposed brief to the motion to file brief in excess of Local Court rule word count limit. Such motions are routinely granted by Missouri appellate courts. On June 25, 2019, the Western District Court of Appeals denied Petitioner's motion without stating a basis for such denial. Such denial limited Petitioner's ability to fully develop his point of error on the due process and equal protection violations.

On June 27, 2019, Petitioner was forced to file an abbreviated version of his Appellant brief. Respondent was required to file her Reply brief within 30 days because Local Court rule expedites appeals addressing issues of child custody. Respondent filed her Reply brief

on September 24, 2019, approximately 60 days after her Reply brief was due. The Western District Court of Appeals scheduled oral argument 60 days after Respondent filed her Reply brief. On February 11, 2020, the Western District Court of Appeals issued a signed majority opinion approximately 60 days after oral argument (13 months after the Modification Judgment was entered).

On February 12, 2020, Petitioner filed a motion for rehearing and application for transfer to the Missouri Supreme Court. On March 3, 2020, both motions were denied. On March 5, 2020, Petitioner filed his Application for Certiorari to the Missouri Supreme Court. On April 29, 2020, the Missouri Supreme Court denied Certiorari.

The Western District Court of Appeals held that there was substantial evidence to support the trial court's finding that unsupervised visitation with Petitioner would endanger the children's physical health or impair their emotional development. The court cited to the trial court's findings that the trial court observed Petitioner's erratic filing of motions, Petitioner's direct and indirect threats against the court and opposing counsel, and Petitioner's hostile and disagreeable attitude, all indicating a lack of stability.

The Western District Court of Appeals cited to Respondent's testimony but failed to find the trial court judge committed prejudicial error in refusing to admit the audio recording when the audio recording materially

contradicts Respondent's statements and raises a substantial question as to Respondent's credibility.

The Western District Court of Appeals cited to the statement made by the guardian ad litem which mischaracterized Petitioner's medical records predating the Judgement that falsely claimed Petitioner is a danger to CF and JF for taking Adderall, which Petitioner is prescribed by Petitioner's current psychiatrist to treat ADHD.

The Western District Court of Appeals also upheld the trial court judge's refusal to recuse herself which conflicts with United States Supreme Court precedent, the plain and ordinary meaning of Missouri Supreme Court rule 2-2.11, and Missouri case law.

Lastly, the Western District Court of Appeals upheld the trial court judge's use of sections 452.375 and 452.400 of the revised statutes of Missouri to infringe upon Petitioner's fundamental right to raise CF and JF, and declined to take up the issue of the trial court judge's mischaracterization of the record, denial of due process, and discrimination against Petitioner on the basis of his disability.

#### **ARGUMENT SUPPORTING ALLOWANCE OF WRIT**

##### **I. Whether the Missouri Western District Court of Appeals committed err by not finding**

Petitioner's 14<sup>th</sup> Amendment due process rights were violated by the trial court judge's refusal to recuse herself as required by Missouri Supreme Court Rule 2-2.11 after Petitioner moved to recuse the trial court judge and stated facts that reasonably called the trial court judge's impartiality into question.

Petitioner requests Writ be issued to address the important issue as to whether a trial court judge violates a party's 14<sup>th</sup> Amendment due process rights by denying a party a fair and impartial trier of fact when a trial court judge refuses to recuse him or herself after a party has stated facts showing there is a reasonable question as to trial court judge's impartiality.

The Western District Court of appeals erred in finding Petitioner was not denied due process under the 14<sup>th</sup> Amendment when the trial court judge refused to recuse herself after Petitioner pleaded and orally argued objective facts that reasonably called the trial court judge impartiality into question.

Missouri Supreme Court Rule 2-2.11 states, "A judge shall recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer. Mo. Sup. Ct. Rule 2-2.11. The plain and ordinary meaning of the statute mandates that once a trial court judge's impartiality "might be

reasonably questioned", the trial court judge is required to recuse herself.

Missouri courts hold that the test for recusal is "whether a reasonable person would have a factual basis to find an appearance of impropriety and thereby doubt the impartiality of the court." Lapee v. Snyder, 198 S.W.3d 172, 176 (Mo. App. 2006). Missouri courts also hold that mandatory recusal is concerned, "not only with the judge's actual impartiality but also the public's perception of the judge's impartiality." Jetz Service Co., Inc. v. Chamberlain, 812 S.W.2d 946, 948 (Mo. App. 1991).

This Court, interpreting a similar federal statute, held that, "the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment." Berger v. United States, 255 U.S. 22, 36, 41 S.Ct. 230, 65 L.Ed. 481 (1921)

This Court specifically held (under a similar federal statute) that once a party has stated facts that allege bias or prejudice, a trial court judge must disqualify themselves. *Id.* The rationale for immediate disqualification of a trial court judge rather than leaving disqualification up to the discretion of the trial court judge (and/or the appellate court) was aptly stated by this Court as follows:

“To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.” Id.

The Western District Court of appeals erred in finding that the trial court judge did not violate Petitioner’s due process rights by refusing to recuse herself. The record is replete with examples in which the trial court judge demonstrated bias against Petitioner. Petitioner, as a pro se, attorney, filed a motion and made oral argument that objectively demonstrated the trial court judge was biased against Petitioner and acted in a manner inconsistent with due process.

The trial court judge refused Petitioner’s motion to proceed *informa pauperis* after permitting Petitioner’s attorney to withdraw. At the same time, the trial court judge refused to provide Petitioner with a copy of the evaluation that was being used against him, permitted the evaluation to be admitted as a business record, and denied Petitioner with the ability to contest the unreliability of the evaluation itself. The trial court judge manipulated the record to exclude material evidence stating a basis for such exclusion that defied logic and contradicted her previous rulings. Lastly, the trial court

judge threatened Petitioner with being ordered to pay Respondent's attorney fees and expressed her hostility each time Petitioner sought to secure his rights, fight the denial of his due process, and expose unethical behavior by Respondent's attorney and the guardian ad litem.

As such, under the plain and ordinary meaning of Missouri Supreme Court Rule 2-2.11 and Missouri case law, the Western District Court of Appeals erred in finding that the trial court judge was not required to recuse herself because Petitioner stated objective facts that show the trial court judge's impartiality was reasonably called into question. Mo. Sup. Ct. Rule 2-2.11, Lapee at 176, Chamberlain at 948.

Additionally, as this Court held regarding a similar federal statute, it is err to commit to the trial court judge, or appellate court, the decision as to whether a trial court judge is required to disqualify themselves because the evil against Petitioner has been accomplished as is evident in the trial court judge's retaliatory Modification Judgement and the Western District Court of Appeals unwillingness to commit the trial court judge to err. Berger at 36.

Therefore, Petitioner requests Writ be issued to address the important issue as to whether a trial court judge violates a party's 14<sup>th</sup> Amendment due process rights by denying a party a fair and impartial trier of fact when the trial court judge refuses to recuse him or herself after a party has stated facts showing there is a reasonable question as to trial court judge's impartiality.

II. Whether the Missouri Western District Court of Appeals committed error by not finding that, as applied to Petitioner, sections 452.375.2 and 452.400.2 of the Revised Statutes of Missouri violated Petitioner's 14<sup>th</sup> Amendment rights by granting the trial court broad discretion to infringe upon Petitioner's fundamental liberty interest in raising his children and denying Petitioner equal protection of the law on the basis of Petitioner's disability.

Petitioner requests Writ be issued to address the important issue as to whether sections 452.375.2 and 452.400.2 were unconstitutionally applied to Petitioner to deprive Petitioner of his fundamental right to raise CF and JF and deny Petitioner equal protection of laws, both of which are guaranteed under the 14 Amendment to the United States Constitution.

Section 452.375.2 of the Revised Statutes of Missouri states:

"The court shall determine custody in accordance with the best interests of the child. When the parties have not reached an agreement on all issues related to custody, the court shall consider all relevant factors and enter written findings of fact and conclusions of law, including, but not limited to, the following:

- (1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;
- (2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;
- (3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;
- (4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;
- (5) The child's adjustment to the child's home, school, and community;
- (6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved. If the court finds that a pattern of domestic violence as defined in section 455.010 has occurred, and, if the court also finds that awarding custody to the abusive parent is in the best interest of the child, then the court shall enter written findings of fact and conclusions of law. Custody and visitation rights

shall be ordered in a manner that best protects the child and any other child or children for whom the parent has custodial or visitation rights, and the parent or other family or household member who is the victim of domestic violence from any further harm;

(7) The intention of either parent to relocate the principal residence of the child; and

(8) The wishes of a child as to the child's custodian. The fact that a parent sends his or her child or children to a home school, as defined in section 167.031, shall not be the sole factor that a court considers in determining custody of such child or children.”

452.375.2 RSMo.

Section 452.400.2 of the Revised Statutes of Missouri states:

“2. (1) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child, but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical health or impair his or her emotional development.”

452.400.2 RSMo.

The Western District Court of Appeals held that there was substantial evidence to support the trial court's finding that unsupervised visitation with Petitioner would endanger the children's physical health or impair their emotion development (under 452.400.2 RSMo). The court cited to the trial court's findings that the trial court observed Petitioner's erratic filing of motions, Petitioner's direct and indirect threats against the court and opposing counsel, and Petitioner's hostile and disagreeable attitude, all indicating a lack of stability.

The Western District Court of Appeals also cited to the false statement made by the guardian ad litem which mischaracterized Petitioner's medical records predating the Judgement to falsely claim Petitioner a danger to CF and JF (under 452.400.2 RSMo) for taking Adderall, which Petitioner is currently prescribed by Petitioner's treating psychiatrist to treat ADHD.

In sumary, the substantial evidence the Western District Court of Appeals cited to uphold restricting Petitioner's custody with CF and JF (and denying Petitioner the ability to share in how CF and JF are raised), is based on the fact that Petitioner has a diagnosis of bipolar and ADHD. As applied to Petitioner, 452.375.2(6) permitted the trial court to deprive Petitioner of his fundamental right to raise his children by granting the trial court judge authority to decide custody on the basis of, "The mental and physical health of all individuals involved, including any history of abuse of any individuals involved". 452.375.2(6).

“The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government. It does not reject the government's ability to classify persons or ‘draw lines’ in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals”. Tyler v. Mitchell, 853 S.W.2d 338, 341 (Mo. App. 1993) “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational”. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 105 S. Ct. 3249 (1985)

The trial court synonymously used, “direct and indirect threats against the court and opposing counsel, and Petitioner’s hostile and disagreeable attitude, all indicating a lack of stability” as a subtle but inartful way of stating Petitioner is a danger to CF and JF because Petitioner has a diagnosis of bipolar and ADHD. Aside from the fact that such “threats” and “disagreeable attitude” were a justified response to the trial court judge’s discrimination and denial of Petitioner’s due process, the guardian ad litem’s failure to execute her Supreme Court mandated duties, and Respondent’s counsel’s unethical behavior, section 452.375.2(6) of the revised statutes of Missouri, as applied to Petitioner, permitted the trial court to deny Petitioner equal protection of laws by arbitrarily discriminating against Petitioner on the basis of a mental health diagnosis that is not substantially and/or rationally related or necessary

to the State's legitimate interest in protecting minor children. Mitchell at 341, City of Cleburrne at 446.

Put another way, the trial court judge failed to state how Petitioner's alleged actions make supervised visitation and/or a denial of his parental rights necessary to protect CF and JF under sections 452.375.2 and 452.400.2 of the revised statutes of Missouri.

The trial court judge synonymously used the guardian ad litem's mischaracterization of medical records predating the Judgment as a subtle and inartful way of stating Petitioner is a danger to CF and JF because Petitioner has a diagnosis of bipolar and ADHD. Aside from the fact that Adderall is prescribed by Petitioner's treating psychiatrist and there was no expert testimony establishing Petitioner taking Adderall poses a danger to CF and JF, sections 452.375.2(6) and 452.400.2 of the revised statutes of Missouri, as applied to Petitioner, permitted the trial court to deny Petitioner equal protection of laws by arbitrarily discriminating against Petitioner on the basis of his mental health diagnosis when such mental health diagnosis is not substantially and/or rationally related to the State's legitimate interest in protecting minor children, but rather. Mitchell at 341, City of Cleburrne at 446.

Put another way, the trial court judge had broad unchecked authority to require supervised visitation and/or deny Petitioner of his parental rights when the evidence to support such finding (i.e. Petitioner is a

danger to CF and JF because he is prescribed Adderall) is based on Petitioner's mental health diagnosis and is not supported by expert testimony under sections 452.375.2 and 452.400.2 of the revised statutes of Missouri.

The 14<sup>th</sup> Amendment "provides heightened protection against government interference with certain fundamental rights and liberty interests" *Troxel et vir. v Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The Court should apply, "strict scrutiny is the appropriate standard of review to apply to infringements of fundamental rights." *Id.* This Court held that, "the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.*

This Court has stated:

"The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made...The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations...It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent. To say the least...parental choice in such matters

is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances."

*Id.* at 79.

Petitioner has a fundamental interest in raising CF and JF. *Id.* The 14<sup>th</sup> Amendment guarantees that Petitioner's fundamental interest in raising CF and JF cannot be infringed absent a showing that such infringement is necessary to a compelling state interest. *Id.* at 80.

As previously mentioned, the trial court judge unconstitutionally applied Sections 452.375.2 and 452.400.2 of the revised statutes of Missouri arbitrarily to Petitioner on the basis of Petitioner's mental health diagnosis. In substance, the trial court judge's infringement of Petitioner's fundamental interest in raising CF and JF consisted of a mere disagreement with the trial court judge as to who should have custody of CF and JF.

In the *Troxel* case, this Court held that Washington's grandparent visitation statute was unconstitutionally applied because the trial court decision represented a mere disagreement between who the trial court judge thought should have custody or visitation of the minor children. *Id.* Specifically, this Court in *Troxel* cited to *Chicago v. Morales* for the proposition that every application of a statute that represents an exercise of

unlimited discretion is an invalid application of the statute. *Id.* at FN 3.

Sections 452.375.2 and 452.400.2 of the revised statutes of Missouri grants a trial court judge broad discretion to decide custody based on the best interests of a child and/or when to restrict a parent's custody because the trial court judge has unfettered discretion to restrict a parent's fundamental liberty interest with little parameters or restrains imposed by Sections 452.375.2 and 452.400.2 of the revised statutes of Missouri or the appellate courts. *Id.* At 72.

Sections 452.375.2 and 452.400.2 of the revised statutes of Missouri are unconstitutionally overbroad and unconstitutional in their application to Petitioner because the record reflects that the "substantial evidence" cited by the Western District Court of Appeals to support restricting Petitioner's visitation of CF and JF is based on an arbitrary classification regarding Petitioner's mental health diagnosis. *Id.* The trial court judge did not provide a substantial reason why the cited facts show it is not in the best interest of CF and JF and/or a danger to CF and JF for Petitioner to share in the care, custody, and control of CF and JF, and/or why supervised visitation is necessary to protect CF and JF from risk of harm. *Id.*

As such, the trial court judge's determination represents an overbroad and unconstitutional grant of discretion under 452.375.2 and 452.400.2 of the revised statutes of Missouri as applied to Petitioner, and represents the trial

court judge's mere substitution of who she feels is a better parent to that of Petitioner. *Id.* at 72.

Therefore, Petitioner requests Writ be issued to address the important issue as to whether sections 452.375.2 and 452.400.2 of the revised statutes of Missouri were unconstitutionally applied to Petitioner to deprive Petitioner of his fundamental right to raise CF and JF and deny Petitioner equal protection of laws, both of which are guaranteed under the 14 Amendment to the United States Constitution.

## CONCLUSION

Petitioner respectfully submits the Petition for Writ of Certiorari be granted. The Court may wish to consider summary reversal of the decision of the Western District Court of Appeals.

Respectfully submitted,

/s/ Matthew J. Frawley

Date: 4<sup>th</sup> of July, 2020