SC101121

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF THE CUSTODY OF S.H.P. and A.L.P., Minors:

ALICIA SMITH,

Respondent,

vs.

LORA MARTINEZ,

Appellant.

On Appeal from the Circuit Court of Jackson County
Honorable Kenneth R. Garrett III, Circuit Judge
Case No. 2116-FC08728
Honorable Sherrill L. Rosen, Family Court Commissioner
Case No. 2116-FC08728-01

SUBSTITUTE BRIEF OF THE APPELLANT

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Table of Contents

Table of Authorities

Cases

Constitution of Missouri

Revised Statutes of Missouri

Missouri Supreme Court Rules

Other authorities

Jurisdictional Statement

This is a consolidated appeal from a judgment of the Circuit Court of Jackson County in an action for third-party custody or visitation and a subsequent judgment for family access enforcing that first judgment.

This case does not fall within this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3. So, the appellant timely appealed to the Missouri Court of Appeals, Western District. This case arose in Jackson County. Under § 477.070, R.S.Mo., venue lay within that district of the Court of Appeals.

After the Court of Appeals issued an opinion affirming the trial court's judgment, the appellant filed a timely application for transfer in this Court under Rule 83.04. The Court sustained that application and transferred this case.

Therefore, under Mo. Const. art. V, § 10, which authorizes this Court to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," this Court has jurisdiction.

Statement of Facts

A. Overview

Mother and Ms. Smith acted as co-guardians for two children for nearly a decade (D2 p. 1; D3 p. 1). Each then petitioned to adopt the children in a contested adoption (D2 p. 1; D3 p. 1). After a trial, Mother prevailed and adopted the children (D2 p. 1; D3 p. 1). Ms. Smith appealed, and the Court of Appeals affirmed. *See In re S.H.P*, 638 S.W.3d 524 (Mo. App. 2021).

Ms. Smith then filed an action citing § 452.375.5(5), R.S.Mo., requesting third-party custody or visitation of the children (D2; D7), which Mother opposed (D3; D5). A day before trial was set, the guardian ad litem reported the parties had reached a settlement but she and Mother had not reviewed or approved Ms. Smith's proposed judgment (D27 p. 6; App. A33). The next day, Ms. Smith's counsel sent the court a proposed judgment awarding her third-party visitation (D27 p. 5; App. A32). Mother stated she did not agree to it (D27 p. 4; App. A31). Ms. Smith's counsel acknowledged Mother did not agree but requested the court enter it anyway (D27 p. 2; App. A29). The court entered it as a "consent judgment" (D24; App. A1).

Mother then moved the court to amend its judgment and dismiss the case, arguing Ms. Smith lacked standing (D25 pp. 2-11), or to order a new trial because she did not consent to the judgment (D25 pp. 12-13). The court did not rule on Mother's motion within 90 days (D1 p. 17). Ms. Smith filed a family access motion to enforce the judgment for third-party visitation with a family access motion (WD87522 D2) which the court granted (WD87522 D4).

Mother now appeals both judgments (D34) (WD87522 D5).

B. Mother's adoption of the Children

Lora Martinez ("Mother") and Alicia Smith ("Ms. Smith") were co-guardians of two children, A.L.P. and S.H.P. (collectively "the Children") (D2 p. 1; D3 pp. 1, 3). After the parties had served as co-guardians for eight years, Ms. Smith filed a petition in the Circuit Court of Jackson County to adopt the Children (D3 pp. 1, 3). Two months later, Mother filed her own petition to adopt the Children (D2 p. 1; D3 p. 1). The court held a five-day trial on the contested adoption (D2 p. 1; D6 p. 4), after which it allowed Mother to adopt the Children and dismissed Ms. Smith's petition (D2 p. 2).

Ms. Smith appealed the adoption decision to the Court of Appeals, Western District (D2 p. 2). The Court of Appeals affirmed the adoption judgment. *S.H.P*, 638 S.W.3d at 534. In a footnote, the Court of Appeals stated, "Once the adoption is complete, a person may seek to obtain third-party child custody and visitation determinations authorized by law." 638 S.W.3d 524, 532 n.8 (Mo. App. 2021).

After the adoption judgment was affirmed, the guardianship court dismissed the Children's cases (D23 p. 3).

C. Proceedings below

1. Ms. Smith's petition for third-party custody or visitation

A year after Mother adopted the Children, and while her appeal from the adoption judgment was still pending, Ms. Smith filed a petition in the Circuit Court of Jackson County requesting third-party custody of the Children under § 452.375.5(5), R.S.Mo. (D2; D7). She argued third-party custody was necessary because since the adoption judgment, Mother had limited her time with the Children (D2 p. 2, 4). She argued Mother was

"unfit, unsuitable, and/or unable to care for the minor children and the welfare of the children so require custody to be vested with [Ms. Smith]," and made factual allegations for this (D2 pp. 3-5).

Ms. Smith then asked the trial court to:

> award her third-party custody pursuant to § 452.375.5 or in the alternative Third Party Visitation pursuant to § 452.375.5; immediately place the minor children in [Ms. Smith's] care; approve and adopt [Ms. Smith's] Proposed Parenting Plan; and find said Parenting Plan to be in the best interest of the minor children; designate [Ms. Smith's] address as the minor children's address for mailing and educational purposes; and for such further relief as this court deems just and proper.

(D2 p. 6).

In her answer, Mother denied Ms. Smith ever fulfilled the role of a natural parent or mother to the Children, denied most of her factual allegations, and asked the court to deny her request for third-party custody or visitation (D3 pp. 3-10).

Two months later, Ms. Smith asked the court to appoint a guardian ad litem (D4). In her response, Mother argued Ms. Smith did not have standing to pursue a third-party custody claim because her petition for adoption had been denied, which by this point the Court of Appeals had affirmed (D5 p. 1).

Mother then moved the court to dismiss Ms. Smith's petition (D6). She argued Ms. Smith lacked standing to pursue a petition for third-party custody or visitation because she was not related to the Children by consanguinity or affinity (D6 p. 3). She also argued *res judicata* barred Ms. Smith's petition because the adoption had determined that Mother was fit and Mother's parentage and custody would be in the best interest of the

Children, and Ms. Smith could not circumvent the authority of another court by seeking third-party custody (D6 p. 4).

Ms. Smith moved to strike Mother's motion to dismiss, arguing the court could not evaluate it on extrinsic pleadings like the adoption matter (D11 p. 7-14). The court denied Mother's motion to dismiss (D12 p. 2) but it also denied Ms. Smith's motion to strike (D12 p. 2).

Later, the court appointed Kelle Gilmore as guardian ad litem for the Children (D13 p. 1). The court reset the case for trial on February 7, 2024 (D17 p. 1). Mother had been represented by counsel, but her counsel withdrew in January 2023, and she proceeded *pro se* (D1 p. 11).

2. Proceedings leading to judgment

a. Joint stipulation for visitation

On February 6, 2024, the day before trial was set to begin, the guardian ad litem filed a joint stipulation for visitation verified with notarized signatures of the guardian ad litem, Mother, and Ms. Smith (D20 pp. 4-6; App. A18-20). Mother's signature was dated February 2, 2024 (D20 p. 5; App. A19). A copy of the joint stipulation is in the appendix to this brief (App. A16-20).

The document stated the parties had reached an "agreement regarding contact and visitation between [Ms. Smith] and the minor children" and then set out the terms of that contact (D20 p. 2; App. A16). Ms. Smith would receive visitation with the Children Monday afternoons, every other weekend, five hours "on Christmas Eve and or Christmas Day," and seven consecutive nights in the summer including one of her weekends (D20 pp. 2-3; App. A16-17). Mother would also keep Ms. Smith apprised of the

Children's medical and educational statuses (D20 p. 3; App. A17). The document also stated, "All parties understand and stipulate that these provisions are best for [the Children]" (D20 p. 3; App. A17).

b. Affidavit requesting entry of judgment

The same day as she filed the joint stipulation, the guardian ad litem also filed a joint affidavit requesting a judgment for third-party visitation (D23; App. A21). The affidavit also contained notarized signatures for the guardian ad litem, Mother, and Ms. Smith (D23 pp. 6-8; App. A25-27). Mother's signature was dated February 6, 2024 (D23 p. 7). A copy of the affidavit is also in the appendix to this brief (App. A21-27).

The affidavit first recited the case's procedural history (D23 pp. 1-4; App. A21-23). It then said that "[o]n February 2, 2024, the parties entered into the following stipulation, which the Court finds is in the best interest of the minor children," but did not say what that stipulation was (D23 p. 4; App. A23). It then recited the parties' status, counsel, employment, and military status, stated they would pay their own attorney fees, and they waived further discovery (D23 pp. 4-5; App. A23-24). It then said, "Each party understands that they have a right to proceed to trial upon this matter for which a different result may have occurred but have instead agreed upon entering the terms of the Judgment being submitted with this Affidavit" (D23 p. 5; App. A24). It then stated the parties "are unaware of any remaining genuine issues as to any material fact in this proceeding" and concluded with a request that "the [court] enter a Judgment of Visitation based upon the pleadings and affidavit filed herewith" (D23 pp. 5-6; App. A24-25).

c. Communications and judgment

But no proposed judgment was attached to the affidavit or filed along with it (D1 p. 15; D27 p. 6; App. A33). Instead, though the affidavit had referred to the parties having "agreed up entering the terms of the Judgment being submitted with this affidavit," the guardian ad litem e-mailed the court, stating:

> The Judgment has been drafted by [Ms. Smith's counsel], but I need just a little more time to review it and enter my GAL fees and I believe [Mother], pro se, needs to review it as well.
>
> Can we have until Friday (or before) to get the proposed Judgment submitted?

(D27 p. 6; App. A33).

The court granted the request for additional time to draft, review, and agree on a proposed judgment, and set the matter out for hearing in April 2024 (D1 p. 15; D27 pp. 5-6; App. A32-33).

The next day, February 7, Ms. Smith's counsel e-mailed the Court a Microsoft Word version of a proposed judgment (D27 p. 5; App. A32). The court requested the parties confirm the proposed judgment was the "final product" for it to sign (D27 p. 4; App. A31). Mother responded, stating:

> There were some conflicting calendar issues regarding the visitation schedule on the judgment that I brought up in an email as the Respondent, Pro se,. Unfortunately, I have not received a response to my pleas for suggested changes. Past practice would be for the GAL, Kelle Gilmore, to mediate those changes, however, when I tried her office number it stated she will be out of the office until April 10th. Therefore, I will be respectfully asking the court time to change the joint stipulation agreement to allow the necessary verbiage.

> As Respondent Pro se, I have tried to find the form to change the joint agreement that was filed with the court to no avail. Hence, why it is not encouraged to partake in these proceedings without the guidance of an experienced attorney. In my defense, I did so to expedite the process for my girls. In return it appeared to only portray weakness or ignorance. For that I am truly sorry.
>
> To ensure this is the last time in the past 5 years that the girls will have to have anxiety about court, I pray the court will grant me the time necessary to ensure [the Children] get their voices heard. If allowed the grace from the court, I will seek counsel to attempt to set aside the joint stipulation.

(D27 p. 4; App. A31).

The court arranged for a teleconference so everyone could discuss the settlement (D27 p. 3; App. A30) (No record was made of the conference). Immediately after the conference, Ms. Smith's counsel e-mailed the court requesting that it enter the judgment she had sent, stating:

> I failed to mention this morning that we have a signed affidavit and a signed stipulation already on file in this matter. The judgment is attached in word format has been approved by myself as Attorney for Petition and the Guardian ad Litem. Given that we have an affidavit and stipulation signed by the parties and GAL, do we need to still file a motion to enforce the settlement agreement or send in a proposed judgment? Respondent is copied on this email as well, and she does not approve the judgment.

(D27 p. 2; App. A29). A copy of all this correspondence is in the appendix to this brief (App. A28-34).

That same day, the court signed the proposed judgment, which granted Ms. Smith third-party visitation with the Children (D24; App. A1). On the docket, the judgment is called a "Consent Judgment" (D1 p. 16).

The judgment stated it reached its findings and orders based on the "pleadings, affidavit, proposed judgment, and stipulation of the parties" and the visitation schedule was derived from the previously filed stipulation agreement (D24 pp. 1, 5-7; App. A1, A5-7).

The judgment copied the procedural history and the parties' status from the affidavit (D24 pp. 1-4; App. A1-4). Then, after stating, "On February 2, 2024, the parties entered into the following stipulation, which the Court finds is in the best interest of the minor children," it included language not in the joint stipulation or the affidavit, including:

- A statement about what § 452.375.5, R.S.Mo., allows (D24 p. 4; App. A4);
- "The Petitioner and the minor children have a significant familial bond" (D24 p. 4; App. A4);
- "The Court finds that it is in the welfare of the children that visitation be awarded to Petitioner" (D24 p. 5; App. A5); and
- Findings about the guardian ad litem, her fees, and how they should be paid (D24 p. 5; App. A5);

The judgment then stated "WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED" and set out the language from the joint stipulation for visitation (D24 pp. 5-7; App. A5-7). It then set out more provisions not in the joint stipulation or affidavit:

- A "dispute resolution" provision limiting mediation and apportioning costs (D24 p. 7; App. A7);

- A "miscellaneous" section concerning the parties' spouses, significant others, and other third parties, governing the parties' attitudes toward each other with the Children, and directing the parties to take no action that would demean the other, not to discuss the action with the Children, not to "advise or otherwise coerce the children to not tell the truth or keep secrets," and not to "post negative reviews, articles, and/or social media items or content regarding the other party, counsel, the Guardian ad Litem, or judicial officers and staff" (D24 pp. 7-8; App. A7-8);
- A relocation provision (D24 pp. 8-10; App. A8-10);
- A "non-compliance" provision (D24 pp. 10-11; App. A10-11);
- An "enforcement" provision (D24 p. 11; App. A11); and
- A provision called "Breach of Agreement," which stated, "If a breach of this stipulation results in the other party's being required to employ an attorney to enforce the terms of this Plan, then the party breaching this Judgment shall pay the reasonable attorney fees, costs, and damages incurred by the other party in enforcing same. No attorney's fees shall be recovered unless the party seeking enforcement shall have given the breaching party a written notice of the alleged failure to perform and said failure was not cured within five (5) days of receipt of said notice. Failure to comply with the Judgment may subject a party to the Court's contempt powers" (D24 p. 11; App. A11).

3. Post-judgment proceedings

Two days after the court entered the judgment, Mother e-mailed the court, stating:

> With all do [*sic*] respect, I was under duress when I signed the documents addressed by [Ms. Smith's] lawyer. I was emotionally distraught to the point of crying through the majority of the meeting and the GAL can attest to that. After reading what was going to be mandated, there's unrealistic expectations that are not the best interest of my children and what they are accustomed to. I'm being bullied to sign something in writing so if I at any point, I fall short of the agreement, I can be taken back to court to waste more money. That has been prove by [Ms. Smith] and the past 4 lawyers she's retained over the past 5 years. I'm a single Mom who has raised these girls on my own for almost 4 years in addition to the cost of Attorneys and even the cost of NOT having an attorney.
>
> For [Ms. Smith] to still be relentless about having something in "writing" when she's seen the girls regularly is an egregious waste of the courts time and my hard earned single income that should be going to the girls. I have proven over and over that the girls will have regular visits. This Adoption process is broken when you can have a non-biological person to the girls get mandated visitation because she believes she has a meaningful relationship with them.
>
> I'm sure I'm not the only one who hopes that everyone who has a meaningful relationship with adopted children don't get to drag the parent through the court system because that individual has a right to find an attorney to trash the case until it's clearly not about the best interest of the children.
>
> I can only pray that this [court] does its due diligence and dismisses this case so other adoptive parents don't have to watch their kids grow up in the court system.

(D27 pp. 1-2; App. A28-29).

Through undersigned counsel, Mother then timely moved the court to either amend the judgment so as to dismiss Ms. Smith's petition, or to set aside the judgment and order a new trial (D25).

First, Mother argued the court was required to dismiss the claim because Ms. Smith lacked standing to seek third-party visitation (D25 pp. 2-11). She argued third-party visitation does not apply after an adoption judgment (D25 pp. 2-7). She argued Ms. Smith's lack of standing could not be cured by the parties' alleged agreement, because standing cannot be waived or created by estoppel (D25 pp. 7-9). She argued that in any case, she did not consent to the judgment and could not be bound by it (D25 pp. 9-11).

Alternatively, Mother argued the court should set aside the judgment and order a new trial because it could not enter a consent judgment to which Mother did not actually consent (D25 pp. 12-13).

Ms. Smith opposed Mother's motion, arguing she had standing because her claim was an independent action brought after the adoption proceeding (D29 pp. 3-6). She also argued Mother was bound by the judgment because she had signed the joint affidavit and stipulation and so had consented to the judgment (D29 pp. 6-11).

Mother replied, arguing Ms. Smith's claim was not an authorized independent action, but instead was impermissibly brought after she lost her adoption case (D33 pp. 1-5). She argued the materials Ms. Smith offered to support her allegations that Mother consented to the judgment were not evidence, because they were unverified, and in any case were just Mother agreeing to the joint stipulation and affidavit, which she had (D33 pp. 5-6).

When the court did not rule on Mother's post-judgment motion (D1 pp. 16-17), Mother timely appealed to the Missouri Court of Appeals (D34).

4. Family access proceedings

Two months after the court entered the third-party visitation judgment, Ms. Smith filed a family access motion to enforce that judgment (WD87522 D2).[1] She alleged Mother had withheld the Children from visitation on eleven occasions over the preceding months (WD87522 D2 pp. 3-4). Mother, *pro se*, responded and opposed the motion (WD87522 D3).

A Family Court Commissioner held a 15-minute teleconference on the motion (WD87522 D1 p. 5). Afterward, the court entered a judgment granting Ms. Smith's family access motion, finding Mother had violated the judgment for third-party visitation without good cause by denying Ms. Smith visitation (WD87522 D4; App. A14). It awarded Ms. Smith compensatory visitation in the summer of 2025 and 2026 and ordered Mother to pay Ms. Smith $750.00 in attorney fees (WD87522 D4; App. A14).

Mother timely appealed that judgment, too (WD87522 D5). The Court of Appeals then consolidated both appeals and ultimately issued an opinion affirming both the consent judgment and the family access judgment. This Court then sustained Mother's application for transfer and transferred this consolidated appeal.

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[1] Mother's appeal from the family access motion was docketed as No. WD87522, and she separately filed her record on appeal there. The Court of Appeals then consolidated it with her earlier appeal. This brief refers to that record as "WD87522 DX," with "X" the document number from that legal file.

Points Relied On

I. The trial court erred in entering its judgment granting Ms. Smith's request for third-party visitation *because* this misapplied the law, as Ms. Smith lacked standing to seek third-party custody or visitation, for third parties who were unsuccessful parties to an adoption lack standing to seek visitation under § 452.375.5, R.S.Mo. with adopted children even in a separate action after the adoption, and arguments challenging standing cannot be waived, nor can standing be created by estoppel *in that* Ms. Smith was an unsuccessful party to the adoption case in which Mother adopted the Children, and when Ms. Smith filed her petition, Mother already had adopted the Children.

Hanson v. Carroll, 527 S.W.3d 849 (Mo. banc 2017)
In re J.D.S., 482 S.W.3d 431 (Mo. App. 2016)
White v. White, 293 S.W.3d 1, 8 (Mo. App. 2009)
In re Adoption of C.T.P., 452 S.W.3d 705 (Mo. App. 2014)
§ 452.375, R.S.Mo.

II. The trial court erred in not setting aside the third-party visitation judgment and granting a new trial *because* its finding that the judgment was entered by the parties' consent misapplied the law and therefore abused its discretion, as a consent judgment cannot be entered where there is no mutual agreement to enter that judgment *in that* Mother disputed that she agreed with the judgment Ms. Smith's counsel proposed every time it was presented to the court and Ms. Smith's counsel acknowledged Mother's disapproval, but the court nonetheless entered the judgment as a consent judgment anyway, rather than setting the matter for trial.

O'Neal v. O'Neal, 673 S.W.2d 126 (Mo. App. 1984)
Reynolds v. Reynolds, 109 S.W.3d 258 (Mo. App. 2003)
Wakili v. Wakili, 918 S.W.2d 332 (Mo. App. 1996)

III. The trial court erred in not setting aside the third-party visitation judgment and granting a new trial *because* its finding that Mother consented to the judgment lacked substantial evidence in its support, as a consent judgment must be based on a valid agreement in which there is a meeting of the minds as to the substance of the judgment *in that* viewing the record most favorably to the trial court's judgment, there is no evidence that Mother consented to the judgment Ms. Smith's counsel presented to the court, and instead the only evidence is that Mother did not consent to that judgment.

O'Neal v. O'Neal, 673 S.W.2d 126 (Mo. App. 1984)
Reynolds v. Reynolds, 109 S.W.3d 258 (Mo. App. 2003)
Wakili v. Wakili, 918 S.W.2d 332 (Mo. App. 1996)

IV. The trial court erred in granting Ms. Smith's family access motion *because* this misapplied the law, as a valid judgment is an indispensable prerequisite to enforcement of that judgment, and a judgment enforcing another fails when the underlying judgment is invalid *in that* the family access judgment was predicated on an invalid consent judgment for third-party visitation, as Ms. Smith lacked standing to bring the third-party visitation action and Mother did not consent to the judgment.

United States v. Brooks, 40 S.W.3d 411 (Mo. App. 2001)
Est. of Keathley, 934 S.W.2d 611 (Mo. App. 1996)
§ 452.400, R.S.Mo.

Argument

Standard of Review for All Points

In a judge-tried case, the standard of review from *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976), applies. *In re Marriage of Woodson*, 92 S.W.3d 780, 785 (Mo. banc 2003).

The trial court's judgment will be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy*, 536 S.W.2d at 32. This Court will "view the evidence and the reasonable inferences drawn from the evidence in the light most favorable to the judgment, disregard all evidence and inferences contrary to the judgment, and defer to the trial court's superior position to make credibility determinations." *Houston v. Crider*, 317 S.W.3d 178, 186 (Mo. App. 2010).

I. The trial court erred in entering its judgment granting Ms. Smith's request for third-party visitation *because* this misapplied the law, as Ms. Smith lacked standing to seek third-party custody or visitation, for third parties who were unsuccessful parties to an adoption lack standing to seek visitation under § 452.375.5, R.S.Mo. with adopted children even in a separate action after the adoption, and arguments challenging standing cannot be waived, nor can standing be created by estoppel *in that* Ms. Smith was an unsuccessful party to the adoption case in which Mother adopted the Children, and when Ms. Smith filed her petition, Mother already had adopted the Children.

Preservation Statement

Mother raised the argument in this point in her pretrial motion to dismiss (D6) in her post-judgment motion (D25 pp. 2-9). Therefore, it is preserved for appellate review. *See* Rule 78.07(b). And regardless, standing can be challenged at any time, even for the first time on appeal. *Schaberg v. Schaberg*, 637 S.W.3d 512, 519 (Mo. App. 2021).

Additional Standard of Review

Whether a party lacks standing is a question of the application of law reviewed *de novo*. *Mo. Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 137 (Mo. App. 2009). In determining it, this Court does not defer to the trial court. *Blue Cross & Blue Shield of Mo. v. Nixon*, 81 S.W.3d 546, 551 (Mo. App. 2002). A determination whether a party has standing is made "from a review of the allegations in the pleadings along with any other undisputed

facts revealed by the record." *In re Adoption of C.T.P.*, 452 S.W.3d 705, 713 (Mo. App. 2014).

* * *

The law of Missouri is that an action for third-party custody or visitation under § 452.375.5(5), R.S.Mo., is limited to a circumstance in which parentage and custody have not previously been decided. Therefore, a third party who was an unsuccessful party to an adoption case does not have standing to seek third-party visitation with the adopted children thereafter. Here, Ms. Smith unsuccessfully sought to adopt the Children, who Mother was allowed to adopt. She then filed her action to for third-party custody or visitation of those same children. Nonetheless, the trial court entered a judgment awarding Ms. Smith third-party visitation with the Children. This misapplied the law.

A. Ms. Smith lacked standing to seek third-party visitation under § 452.375.5, R.S.Mo., after losing the adoption case.

1. For a party to have a right to relief, she first must have standing to bring her suit.

A party must have standing to bring her suit in order to have a right to relief. *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002). Standing asks whether the party has both a "legally cognizable interest in the subject matter" and "a threatened or actual injury." *White v. White*, 293 S.W.3d 1, 8 (Mo. App. 2009) (quoting *E. Mo. Laborers Dist. Council v. St. Louis Cnty.*, 781 S.W.2d 43, 46 (Mo banc 1989)). "One interested in an action is one who is interested in the outcome or result thereof because he has a legal right which

will be directly affected thereby ...." *In re J.F.K.*, 853 S.W.2d 932, 935 (Mo. banc 1993).

Where a party's standing is questioned, "courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the *court must dismiss the case* because it does not have jurisdiction of the substantive issues presented." *Farmer*, 89 S.W.3d at 451 (emphasis added). That is regardless of the merits of a claim, as "without standing, the court cannot entertain the action." *Pace Constr. Co. v. Mo. Hwy. & Transp. Comm'n*, 759 S.W.2d 272, 274 (Mo. App. 1988) (citation omitted).

2. A party has standing to seek third-party custody or visitation only to the extent she has statutory authority to do so, and § 452.375.5 is limited to either an ongoing action or, perhaps, a circumstance where neither parentage nor custody has previously been determined.

a. The statute's plain language

Third parties "do not have a legally protectable right to visitation with [c]hildren at common law. Accordingly, only those rights granted to them by statute can support standing to litigate." *In re J.D.S.*, 482 S.W.3d 431, 438 (Mo. App. 2016) (citing *In re Adoption of R.S.*, 231 S.W.3d 826, 829 (Mo. App. 2007)) (internal citation omitted). "The same is true for [third parties] who seek visitation as an interested third-party." *Id.* (quoting *White*, 293 S.W.3d at 19-21).

Section 452.375.5(5), R.S.Mo., provides:

> *Prior to* awarding the appropriate custody arrangement in the best interest of the child, the court shall consider each of the following as follows: …

> (5) Third-party custody or visitation:
>
> (a) When the court finds that each parent is unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires, and it is in the best interests of the child, then custody, temporary custody or visitation may be awarded to a person related by consanguinity or affinity to the child. If no person related to the child by consanguinity or affinity is willing to accept custody, then the court may award custody to any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment for the child. Before the court awards custody, temporary custody or visitation to a third person under this subdivision, the court shall make that person a party to the action;
>
> (b) Under the provisions of this subsection, any person may petition the court to intervene as a party in interest at any time as provided by supreme court rule.

(Emphasis added). This subsection of § 452.375 was first enacted in 1988. *See* § 452.375.4(3), R.S.Mo. (1988); Mo. L.1988, H.B. Nos. 1272, 1273 & 1274, § A.

b. Decisions through to 2009 holding the statute does not provide an independent action for third-party custody

Both before and after the enactment of what today is § 452.375.5(5), it was long well-established

> that a third party's foundational standing to litigate custody or visitation [was] dependent upon the third party being a named party in an action brought by someone else (parent, Juvenile Officer) or being permitted to intervene in a pending action (dissolution) or in cases where the third party already has something other than *de facto* custody (decretal custody).

White, 293 S.W.3d at 21. For this reason, in *White*, the Court of Appeals rejected the ability of a parent's former paramour to bring an "independent"

action for third-party custody or visitation under § 452.375.5(5). 293 S.W.3d at 18-21.

In *White*, the Court of Appeals surveyed all the third-party decisions since 1973 (when Missouri enacted its modern dissolution and custody laws), which showed that third-party custody or visitation could only be sought by "intervention in pending litigation by third parties or the third parties being named as parties in the initial custody case." 293 S.W.3d at 18-21. This included:

- *Warman v. Warman*, 496 S.W.2d 286, 288-89 (Mo. App. 1973) (grandparents were named in modification action);
- *In re K.K.M.*, 647 S.W.2d 886, 888 (Mo. App. 1983) (grandparents were named in Mother's habeas corpus action);
- *In re Feemster*, 751 S.W.2d 772, 772 (Mo. App. 1988) (same);
- *C.M.W. v. C.W.*, 786 S.W.2d 623, 623 (Mo. App. 1990) (same);
- *In re Marriage of Carter*, 794 S.W.2d 321, 321-24 (Mo. App. 1990) (dissolution action in which grandparent was made a party);
- *In re Hill*, 937 S.W.2d 384, 385-86 (Mo. App. 1997) (juvenile court placed child in uncle and aunt's custody after birth, continued custody after father was identified and made a party);
- *Flathers v. Flathers*, 948 S.W.2d 463, 465 (Mo. App. 1997) (dissolution action where grandparents were permitted to intervene);
- *Jones v. Jones*, 10 S.W.3d 528, 531 (Mo. App. 1999) (modification action were grandparent was permitted to intervene);

- *Young v. Young*, 14 S.W.3d 261, 263 (Mo. App. 2000) (dissolution action where grandparents were permitted to intervene);
- *Scott v. Scott*, 147 S.W.3d 887 (Mo. App. 2004) (dissolution action that named the mother's former paramour).

The Court in *White* noted that conversely, whenever a third party independently had sought custody or visitation, as in *White* the Court of Appeals held the trial court was authority to grant it. *See, e.g.*, *McCoy v. Rivera*, 926 S.W.2d 78, 80-81 (Mo. App. 1996); *Chipman v. Counts*, 104 S.W.3d 441, 445-48 (Mo. App. 2003). The Court in *White* noted that the plain language of § 452.375.5 required these results, as it only allowed third-party custody or visitation as a consideration "*[p]rior to* awarding the appropriate custody arrangement in the best interest of the child," meaning in an ongoing action. 293 S.W.3d at 18-21.

c. *In re T.Q.L.*, 386 S.W.3d 135 (Mo. banc 2012)

Then, in *In re T.Q.L.*, 386 S.W.3d 135 (Mo. banc 2012), this Court allowed a putative father who had been dismissed from a paternity action when it turned out he was not the father to file his own action for third-party custody or visitation under § 452.375.5(5).

In *T.Q.L.*, a man filed a paternity action seeking a declaration of paternity, custody, and visitation, over the child of a woman with whom he previously had been in a romantic relationship. *Id.* at 137. When a DNA test revealed the man was not the child's biological father, the trial court dismissed his claim under the Uniform Parentage Act, *see* § 210.834.4, R.S.Mo., and refused to allow him to amend his petition to seek custody on grounds other than a biological relationship to the child. *Id.* at 137-38.

The man appealed, and the Court of Appeals held that though the man was not the child's biological father, he was entitled to amend his petition to assert "alternative theories of custody." *T.Q.L. v. L.L.*, 291 S.W.3d 258, 261 (Mo. App. 2009). It remanded the case to the trial court for further proceedings. *Id.*

On remand, the man filed an amended petition alleging that both of the child's parents were unfit and seeking to have custody awarded to him as a third party under § 452.375.5(5). *T.Q.L.*, 386 S.W.3d at 138-39. The trial court again dismissed "based upon [the man's] failure to put forth a theory under which Child's custody could be determined properly." *Id.*

This Court reversed and reinstated the man's petition on the basis that he had adequately alleged a claim for third-party custody under § 452.375.5(5)(a):

> Petitioner's third amended petition was sufficient to meet the requirements of section 452.375.5(5)(a) because it alleged the unfitness of Child's biological parents and that awarding Petitioner custody of Child would be in Child's best interest. In addition to Petitioner's sufficient allegations of Mother's and the unknown father's unfitness, his petition to transfer custody survives a motion to dismiss because he alleges facts that the "welfare of the child requires" that custody be vested in a third party pursuant to section 452.372.5(5)(a). This Court does not weigh the credibility and persuasiveness of the facts Petitioner alleged in his petition but acknowledges that those facts meet the elements of section 452.375.5(5)(a), and for that reason, the petition will be reinstated.

Id. at 140 (citation omitted).

d. Response to *T.Q.L.*

At the same time, the Court in *T.Q.L.* did not review or distinguish any of the prior authority that *White* discussed and that held that absent being named in an action or being permitted to intervene in it, a third party could not independently file an action for custody. *Id.*

Because of this, the decision in *T.Q.L.* puzzled many lower courts. Was this Court now holding that any party who could make allegations in § 452.375.5 could seek third-party custody of anyone's child? In a long footnote in *C.T.P.*, 452 S.W.3d at 713, in which the Court of Appeals held a party's former paramour could not intervene in an adoption to state a claim under § 452.375.5(5), it noted how curious *T.Q.L.* was, as this Court in *T.Q.L.*:

> did not expressly hold that section 452.375.5(5) generally authorizes a third-party to file an independent original proceeding to determine third-party custody rights. The prospect of reliance on section 452.375.5(5) to authorize the filing of an original proceeding to determine third-party custody was flatly rejected by this court in [*White*, 293 S.W.3d at 1]. In *White,* after an extensive discussion of the law with respect to when the assertion and/or determination of third-party custody rights is authorized, this court concluded that:
>
> > [A]t least since 1973, Missouri courts have recognized that a third party's foundational standing to litigate custody or visitation is dependent upon the third party being a named party in an action brought by someone else (parent, Juvenile Officer) or being permitted to intervene in a pending action (dissolution) or in cases where the third party already has something other than *de facto* custody (decretal custody).
>
> *Id.* at 21. We observed that:

> The fact that Missouri statutes and case law permit an award of custody to third parties where there are special or extraordinary reasons or circumstances rendering such custody to be in the best interests of the children, even when the parents are deemed fit and competent, does not end the analysis in this case. Neither our statutes nor our case law remotely suggest that any third party that comes along has standing to bring an action seeking custody of children.

Id. at 18 (emphasis added).

> *T.Q.L.* made no reference to the decision in *White*. *T.Q.L.* did not mention any of the earlier appellate and Supreme Court decisions discussed in *White* addressing the narrow circumstances wherein a trial court is authorized to determine third-party child custody and visitation rights. Nor did *T.Q.L.* engage in customary statutory construction analysis to assess whether the legislature intended section 452.375.5(5) to authorize original proceedings to determine third-party child custody and visitation rights.

452 S.W.3d at 722 n.33 (format of internal citations modified).

The next year, in *McGaw v. McGaw*, 468 S.W.3d 435, 444 (Mo. App. 2015), the Court of Appeals held *T.Q.L.* necessarily had overruled *White* and the prior decisions, because:

> the *T.Q.L.* petitioner's § 452.375.5(5) claim did not meet any of the scenarios identified in *White* in which a third party could assert custody or visitation rights: the petitioner in *T.Q.L.* was not "a named party in an action brought by someone else," nor was he "permitted to intervene in a pending action," nor was it a case in which the petitioner already had "something other than de facto custody." *White*, 293 S.W.3d at 21. Because it held that the petitioner could assert a § 452.375.5(5) claim in circumstances beyond those contemplated by *White*, *T.Q.L.* necessarily overruled White's construction of § 452.375.5(5).

Id. at 444. At the same time, the Court held that while it "acknowledge[d] the concerns expressed by *C.T.P.*, we are 'constitutionally bound to follow the most recent controlling decision of the Missouri Supreme Court.'" *Id.* at 445.

In the years since, the Court of Appeals and this Court have allowed other third parties to file independent third-party custody and visitation claims under § 452.375.5(5). Notably, however, none of these involved proceedings after a *prior* proceeding in which a parent was given custody, but instead all involved either (a) open questions of parentage, where there had been no previous litigation of parentage or custody or (b) ongoing custody proceedings:

- *D.S.K. ex rel. J.J.K. v. D.L.T.*, 428 S.W.3d 655, 660 (Mo. App. 2013) (request for third-party custody made by putative father in original paternity case); and
- *McGaw*, 468 S.W.3d at 442-48 (request for third-party custody made by party in original paternity case);
- *K.M.M. v. K.E.W.*, 539 S.W.3d 722 (Mo. App. 2017) (request for third-party custody with no prior court proceedings);
- *Conoyer v. Kuhl*, 562 S.W.3d 393 (Mo. App. 2018) (same);
- *Bowers v. Bowers*, 543 S.W.3d 608, 616 (Mo. banc 2018) (request for third-party custody made by husband in dissolution of marriage case).
- *A.A.B. v. A.D.L.*, 572 S.W.3d 562, 569-70 (Mo. App. 2019) (request for third-party custody made by putative father in original paternity case); and

- *K.T.L. v. A.G.*, 648 S.W.3d 110, 114 (Mo. App. 2021) (request for third-party custody made by claimant in original paternity case).[2]

So, including *T.Q.L.*, for the 13 years since *T.Q.L.* the only prior decisions in which a Missouri appellate court allowed a party to bring an independent claim for third-party custody under § 452.375.5(5) have been where there was no prior decision as to parentage or custody.

e. *Hanson* and other decisions after *T.Q.L.* holding there is no action for third-party custody or visitation where there had been a prior parentage or custody determination

At the same time, since *T.Q.L.* this Court and the Court of Appeals have held that when parentage or custody *had* been previously decided, no independent action for third-party custody lies under § 452.375.5(5).

In *Hanson v. Carroll*, 527 S.W.3d 849, 853-54 (Mo. banc 2017), this Court further clarified the contours of § 452.375.5(5)'s prefatory "prior to" clause. There, a couple was awarded guardianship over a child after the natural parents were deemed unfit. *Id.* at 850. One year later, the child's paternal grandparents filed a petition for visitation and custody under § 452.375.5(5) arguing both (1) the welfare of the child required third-party custody or visitation, and (2) the award was in the best interest of child. *Id.*

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[2] *Payne v. Nilsson*, 679 S.W.3d 543, 547-48 (Mo. App. 2023), is unlike these, as years after the parents' agreed paternity and custody judgment, the mother's mother sought to file an independent action under § 452.375.5(5) when they refused her visitation. On appeal, the parents argued the grandmother lacked standing to bring a § 452.375.5(5) action, as custody already had been decided in the paternity action. *Id.* The Court of Appeals expressly did not reach this issue, and instead reversed the judgment for lack of substantial evidence, holding the grandmother had not proven a valid claim under § 452.375.5(5) in any case. *Id.*

On the guardian couple's motion, the trial court dismissed the grandparents' petition for failure to state a claim because they could not maintain an original cause of action under § 452.375.5(5). *Id.* at 852.

This Court affirmed the dismissal of the petition. *Id.* at 854. It recognized that "child custody is one of the most common areas of law in which more than one court could properly have subject matter jurisdiction[,]" including courts in guardianship and paternity cases. *Id.* at 853. So, to preserve the balance between these courts of concurrent jurisdiction, "a circuit court legally errs when it enters a conflicting judgment or order with respect to a preexisting child custody order or judgment[.]" *Id.* at 853-54 (citing *Kelly v. Kelly*, 245 S.W.3d 308, 316 (Mo. App. 2008)). Because the grandparents in *Hanson* filed for third-party visitation after "letters of guardianship [were] issued and a custody award as to [the] child already" existed, their petition failed to state any claim upon which relief could be granted and had to be dismissed. *Id.* at 854.

In holding that after a guardianship, no § 452.375.5(5) action could lie, the Court noted that § 475.120.1, R.S.Mo., provides, "The guardian of the person of a minor shall be entitled to the custody and control of the ward," no third-party custody action could lie after a guardianship. *Hanson*, 527 S.W.3d at 853-54. So,

> [t]he language and context of section 452.375.5 shows that the legislature intended third-party custody or visitation referenced in subparagraph (5)(a) as an alternative consideration to parental custody. **But, in situations such as this, when letters of guardianship have been issued and a custody award as to a child already exists, parental custody is not at issue.**

Id. at 854 (emphasis added).

Like the guardianship statute in § 475.120.1, the adoption statute in § 453.090.3, R.S.Mo., equally provides that "[t]he parent or parents by adoption … if such child is a minor, shall be entitled to the … control and custody of such adopted child" (App. A45). So, perhaps unsurprisingly, because of this and the fact that an adoption does not itself *determine* custody, echoing *Hanson* ***every*** prior decision involving a party who attempted to bring a third-party custody claim under § 452.375.5 either during or – if successful in the adoption – after an adoption has held that this is not permissible. *See R.S.*, 231 S.W.3d at 829 (attempt to bring claim by intervening in adoption); *C.T.P.*, 452 S.W.3d at 713 (same); *In re Adoption of E.N.C.*, 458 S.W.3d 387, 402 (Mo. App. 2014) (same); *J.D.S.*, 482 S.W.3d at 438 (attempt to bring claim in separate action after adoption).

Therefore, every time someone has sought third-party visitation under § 452.375.5 in *or after* an adoption case, the appellate court has affirmed its denial or reversed the grant of it, because a third party lacks standing to bring such a claim in or as a result of an adoption action. *See id.* (reversing award of third-party visitation in adoption action); *C.T.P.*, 452 S.W.3d at 718 (Mo. App. 2016) (affirming denial of request to intervene in adoption to bring third-party claim); *R.S.*, 231 S.W.3d at 829-30 (reversing award of third-party visitation in adoption action); *J.D.S.*, 482 S.W.3d 439-40 (reversing award of third-party visitation in separate action the unsuccessful party in the adoption filed after the adoption and remanding with instructions to dismiss visitation petition).

It is well-established that because Chapter 453, governing adoptions, "does not itself authorize an award of custody or visitation rights and that no other statute authorized such an award in an adoption proceeding," therefore "Section 452.375.5 does not give a [third party] a right to [seek] visitation in an adoption proceeding commenced under Chapter 453." *C.T.P.*, 452 S.W.3d at 718 (quoting *R.S.*, 231 S.W.3d at 831). "[T]he precedent is clear that [a third party does] not have standing to bring [a] petition under … 452.375.5" in an adoption case. *J.D.S.*, 482 S.W.3d at 440 (citing *E.N.C.*, 458 S.W.3d at 400-05; *C.T.P.*, 425 S.W.3d at 718; *R.S.*, 231 S.W.3d at 831).

Still, though the adoption does not make an award of custody or visitation rights, just like a guardianship by statute it still entitles the adoptive parent to custody of the child. § 453.090.3.

Therefore, if a court in an adoption proceeding has granted a third-party visitation petition under § 452.375.5(5) with an adopted child, this Court must reverse it for lack of standing.

In *R.S.*, a paternal grandmother and step-grandfather sought visitation with their granddaughter who her maternal grandmother had adopted. 231 S.W.3d at 827. In the adoption proceedings, they requested third-party visitation under § 452.375.5. *Id.* at 829-30. After the adoption was granted, the trial court then granted the petitioners third-party visitation, finding it would be in the child's best interests, and the maternal grandparents appealed. *Id.* at 829.

The Court of Appeals reversed the grant of third-party visitation because the petitioners lacked standing. *Id.* at 829-31. It held § 452.375.5(5)

was not "intended to be used to grant a party a right to visitation in an 'adoption' case." *Id.* at 830. The statute speaks "of providing a 'custody arrangement' for a child," and "[w]hile an adoption entails the adoptive parents receiving both legal and physical custody of the child, it is different than just granting custody to a parent or a third party," as under § 453.090, R.S.Mo., "unlike in a proceeding awarding custody to a parent or a third party, the legal rights of a natural parent are completely abrogated." *Id.* at 830-31. "Therefore, Section 452.375.5 does not give a [third party] a statutory right to visitation in an adoption proceeding commenced under Chapter 453." *Id.* at 831.

In *C.T.P.*, a third party sought to intervene in an adoption to state a claim for custody or visitation under § 452.375.5(5), which the trial court denied. 452 S.W.3d at 708-09. The Court of Appeals affirmed, citing *R.S.*, because "Chapter 453 does not itself authorize an award of custody or visitation rights and that no other statute authorized such an award in an adoption proceeding." *Id.* at 718.

In *E.N.C.*, a mother and her husband, who was not the father of her child, petitioned to allow the husband to adopt the mother's child. 458 S.W.3d at 389-90. The child's paternal grandmother moved to intervene to state a claim for third-party custody under § 452.375.5(5). *Id.* After granting the adoption, the trial court allowed the grandmother to intervene and granted her petition. *Id.* The court granted the grandmother visitation with the child and the adoptive parents appealed. *Id.*

The Court of Appeals reversed the judgment granting visitation and remanded the case with instructions to dismiss the grandmother's § 452.375.5 claim for lack of standing. *Id*. at 401-04. Citing *R.S.*, the Court held "[s]ection 452.375.5 does not give a [third party] a statutory right to visitation in an adoption proceeding commenced under Chapter 453." *Id.* at 403. (quotation marks omitted). Therefore, "[b]ecause this was not a dissolution case and Grandmother did not have standing by virtue of previous custody or court-ordered visitation, we conclude that Grandmother had no interest that could support intervention." *Id*. at 404. To the contrary, "Grandmother did not have standing" to bring her claim. *Id*.

Finally, in *J.D.S.,* the Court of Appeals reversed a judgment granting a request for third-party visitation to an unsuccessful party to an adoption as an independent action in separate case **after** the adoption was granted. 482 S.W.3d at 443-44. There, a child's maternal grandparents and paternal grandmother filed a joint petition for adoption after the natural parent's rights were terminated. *Id*. at 434. At the adoption hearing, the paternal grandmother's adoption petition was dismissed and the maternal grandparents adopted the child. *Id*. Just as Ms. Smith did here, the paternal grandmother then filed a petition for third-party visitation under § 452.375.5(5) in a new case. *Id*. The maternal grandparents, who were the child's adoptive parents at that point, defaulted, and the trial court entered a judgment granting the paternal grandmother's requested visitation. *Id*. at 435. The maternal grandparents then appealed. *Id*.

The Court of Appeals reversed the default judgment, holding the paternal grandmother lacked standing to petition for third-party visitation in the first place. *Id.* at 443-44. Relying on *R.S.* and *E.N.C.*, it reiterated that a petition under § 452.375.5 was not "intended to be used to grant a party a right to visitation in an adoption case." *Id.* at 439 (quoting *R.S.*, 231 S.W.3d at 830). This is because the statute only applies to "a case in which custody is at issue … " *Id.* at 440 (quoting *E.N.C.*, 458 S.W.3d at 402).

f. Result: the Court either (1) should overrule *T.Q.L.* and clarify that by its plain language, § 452.375.5(5) does not provide an independent third-party custody action; or (2) should hold that the independent action is limited to cases where there has been no prior parentage or custody determination, including dissolution, paternity, guardianship, and adoption.

This history shows that the waters of § 452.375.5(5) are muddy and in need of clarification.

For 25 years after its enactment, and following prior law about third parties in custody actions dating back even earlier, from the plain language of § 452.375.5(5) Missouri courts uniformly held that it did not authorize an independent action for third-party custody or visitation. And it plainly does not. The statute only authorizes that as a consideration *prior to* awarding custody in the best interests of the child, necessarily meaning there first had to be an actual, ongoing custody action filed by a parent.

Then, this Court in *T.Q.L.* allowed a third party to file his own action for custody under the statute. But it did not address any of that prior law, let alone explain why any of it was wrong or how it was possible to construe the statute as allowing an independent cause of action to a third party.

Since then, however, in *Hanson* and the adoption cases, this Court and the Court of Appeals have clarified that whatever *T.Q.L.* means, § 452.375.5(5) does not allow a third party independently to seek custody or visitation action where a party already has been given custody, as in a guardianship or an adoption.

The most straightforward resolution would be for this Court to recognize that *T.Q.L.* was a mistake and cannot be reconciled with either the prior uniform law or the plain language of § 452.375.5. It should overrule *T.Q.L.* and hold that third-party custody or visitation only may be sought under the statute by "intervention in pending litigation by third parties or the third parties being named as parties in the initial custody case." 293 S.W.3d at 18-21.

Otherwise, to harmonize (a) on the one hand, *T.Q.L.* and the decisions following it to allow independent actions for third-party custody and (b) on the other, *Hanson* and the adoption cases, especially *J.D.S.*, disallowing it, the Court should hold that any independent third-party custody action is limited solely to a circumstance in which there has been no prior parentage or custody determination, including dissolution, paternity, guardianship, and adoption, per § 453.090.3. That is, if the Court were to recognize that despite its language, § 452.375.5(5) somehow allows an independent cause of action, as it held in *Hanson* that still would have to be "prior to" any award of custody. After a dissolution judgment, paternity judgment, guardianship letters, or – yes – an adoption judgment, by statute "a custody award as to a

child already exists, parental custody is not at issue," and no independent action can lie. *Hanson*, 527 S.W.3d at 854 (emphasis added).

Accordingly, this Court should now make explicit what *T.Q.L.* left ambiguous. Either it should reaffirm that § 452.375.5 does not create an independent cause of action at all, or it should clarify that any such action cannot survive once parentage or custody have already been judicially determined – as here, by a final adoption. Lower courts continue to struggle under the ambiguity *T.Q.L.* left, and this case presents the ideal opportunity for this Court definitively to resolve the confusion.

3. As § 452.375.5 did not give Ms. Smith a right to seek custody or visitation in or after the adoption case she lost, this Court must reverse the trial court's judgment and remand it with instructions to dismiss Ms. Smith's claim.

Whichever result, Ms. Smith lacked standing to bring a third-party custody action under § 452.375.5, because she was the unsuccessful party in the adoption, and Mother was given custody of the Children in the adoption.

At the outset, this case and *J.D.S.* are in exactly the same posture. Ms. Smith and Mother had competing petitions for adoption of the Children (D2 p. 1; D3 p. 1). Mother prevailed and adopted the Children, and Ms. Smith's petition was dismissed (D2 p. 2; D3 p. 1; D23 pp. 2-3). Only then did Ms. Smith purport to bring an independent third-party action under § 452.375.5 in a *separate* case *after* the adoption was over, in which she was awarded third-party visitation (D2; D7).

Although the paternal grandmother in *J.D.S.* brought her § 452.375.5 claim as a separate independent lawsuit, too, the Court of Appeals still held they had no standing to seek third-party visitation in the first place. *J.D.S.*,

482 S.W.3d at 443-44. The underlying action was an adoption case, and relying on *R.S.* and *E.N.C.*, the Court of Appeals held that a petition under § 452.375.5 was not "intended to be used to grant a party a right to visitation in an adoption case." *Id.* at 439 (quoting *R.S.*, 231 S.W.3d at 830).

Ms. Smith, as the former co-guardian, likewise had her rights to the Children terminated on their adoption (D23 p. 3). And this was plain by operation of statute. *See In re J.M.J.*, 404 S.W.3d 423, 431 (Mo. App. 2013), *overruled on other grounds by S.S.S. v. C.V.S.*, 529 S.W.3d 811 (Mo. banc 2017) (guardianship is "stop gap measure" that subsequent adoption terminates). Under § 453.090.3, Mother received custody of both Children on their adoption. Nor does it matter that Ms. Smith sought *custody or* visitation, and the grandparents in *J.D.S.* only sought visitation. In *Hanson*, this Court held that the same standard under § 452.375.5 applies to actions for third-party custody *or* visitation, as "the legislature intended *third-party custody or visitation* referenced in subparagraph (5)(a) as an alternative consideration to parental custody." 527 S.W.3d at 854 (emphasis added).

This makes Ms. Smith a third party just like the grandparents in *R.S.*, *E.N.C.*, and *J.D.S.*, or the other third party in *C.T.P.* – indeed, even more distant from the Children than blood grandparents would be. Under § 453.090, "unlike in a proceeding awarding custody to a parent or a third party," the adoption rendered her "legal rights … completely abrogated." *R.S.*, 231 S.W.3d at 830-31.

Therefore, to have standing to seek visitation with the Children, Ms. Smith must have some statutory right to do so. *J.D.S.*, 482 S.W.3d at 438.

She does not. The only statute Ms. Smith invoked in her petition seeking third-party custody of the Children in this adoption case was § 452.375.5(5)(D2). But "the precedent is clear that [a third party does] not have standing to bring [a] petition under … 452.375.5" in or after an adoption case. *J.D.S.*, 482 S.W.3d at 440.

Therefore, just as with the third parties in all the decisions above who lacked standing to bring a § 452.375.5(5) third-party visitation or custody claim in or after an adoption case, and particularly in *J.D.S.* in the same separate action as Ms. Smith filed, Ms. Smith lacked standing to bring hers, too. As in *J.D.S.*, this Court should reverse the trial court's judgment and remand the case with instructions to dismiss Ms. Smith's claim for lack of standing.

B. Even if there was an agreement between the parties before the judgment was entered, Ms. Smith's lack of standing cannot be cured by waiver or estoppel.

If Ms. Smith responds that an agreement existed between the parties before the judgment was entered, and so Mother is now estopped from challenging her standing, this would be incorrect.

"Standing cannot be waived, may be raised at any time by the parties, and may even be addressed *sua sponte* by the trial court or an appellate court." *Charles v. Oak Park Neighborhood Ass'n*, 685 S.W.3d 519, 529 (Mo. App. 2023) (citation omitted). The question of standing, "does not relate to the legal capacity to sue, a defense waived unless timely asserted…but to the interest of an adversary in the subject of the suit as an antecedent to the right to relief." *Pace Constr. Co.*, 759 S.W.2d at 274 (citation omitted).

In *Charles*, the defendant agreed to a judgment against it but then turned around and filed a post-judgment motion arguing the plaintiff lacked statutory standing to sue. 685 S.W.3d at 524 and 528. The Court of Appeals held the defendant's agreement to the judgment did not preclude it from arguing a lack of standing, because the defendant "could not…waive its argument that [the plaintiff] lacked standing," as "even if [the defendant] had never raised the issue, the trial court could have examined the issue of [the plaintiff]'s standing *sua sponte*." *Id*. at 528.

Nor could the doctrine of judicial estoppel preclude Mother from challenging standing, even if she had engaged in the third-party claim and negotiated a settlement. The doctrine of judicial estoppel is

> "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8 (2000).

Zedner v. United States, 547 U.S. 489, 504 (2006) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)) (format of internal citations modified).

In *J.D.S.*, the Court of Appeals equally rejected the idea that the adoptive parents' prior agreement to visitation by the third-party grandparent estopped the adoptive parents from challenging the third parties' standing to bring a claim under § 452.375.5. 482 S.W.3d at 441-43.

The Court of Appeals noted this was an issue of first impression in Missouri, and examined the law from other jurisdictions:

> The Eighth Circuit discussed the use of judicial estoppel to create standing in *Gray v. City of Valley Park, Mo.*, 567 F.3d 976 (8th Cir. 2009). In *Gray,* the appellant argued to the district court that she had standing to challenge an ordinance – alleging specific facts regarding imminent injury. *Id.* at 980. But, after losing her motion for summary judgment, on appeal Gray argued that she never had standing so the district court lacked subject matter jurisdiction. *Id.* Rather than apply judicial estoppel, the court conducted its own inquiry as to standing. *Id.* at 980-81. The court found that "[i]n the end we must have Article III jurisdiction to entertain *any* claim" and even though the tactics resulted in "extreme perversion of the judicial process" the court could "not forge ahead on blind principle without jurisdiction to do so." *Id.* at 982; *See also Grubb v. Pub. Utils. Comm'n of Ohio*, 281 U.S. 470, 475 (1930) (party entitled to raise question as to subject-matter jurisdiction "notwithstanding his prior inconsistent attitude"); *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227-28 (10th Cir. 2011) (decline to preclude ERISA standing under doctrine of judicial estoppel "by holding that a party may establish subject-matter jurisdiction based on complete preemption via judicial estoppel"); *Carey v. Lincoln Loan Co.*, 157 P.3d 775, 777 n. 2 (Or. 2007) (quoting *Wink v. Marshall*, 392 P.2d 768 (Or. 1964) ("Jurisdiction cannot be conferred by the parties by consent, nor can the want of jurisdiction be remedied by waiver, or by estoppel.")); *Stone v. Davis*, 148 Cal.App.4th 596 (2007) ("Subject matter jurisdiction cannot be conferred by estoppel").

Id. at 442-43 (format of internal citations modified).

The Court of Appeals in *J.D.S.* found this law "persuasive." *Id.* at 443. It held a "litigant cannot obtain standing to bring an action solely based on judicial estoppel. To do so would create a new avenue for a court to obtain jurisdiction and allow a court to rule in a proceeding without any currently

recognized constitutional authority to do so." *Id*. It also noted that standing by estoppel made no sense, as "even going to the extreme measure of recognizing a new avenue to standing in Missouri, the trial court could not afford [the petitioner] the relief she currently seeks" under § 452.375.5. *Id*. In other words, "judicial estoppel cannot be applied to grant jurisdiction over a claim that could not otherwise be brought." *Id*. at 442.

Ms. Smith simply lacked standing to request third-party visitation after the parties' adoption case in which she was unsuccessful, her guardianship was terminated, and Mother received custody of the Children by statute. Any inconsistent statements or action Mother may have made do not affect that necessary outcome.

Even if this Court reaffirms *T.Q.L.*, the outcome should be the same. Ms. Smith filed her action after the final adoption judgment, which by statute and precedent vested sole custodial rights in Mother. As this Court held in *Hanson*, once a prior custody determination exists, there is nothing left "prior to awarding the appropriate custody arrangement" on which § 452.375.5(5) can operate. Post-adoption, the statutory door is closed to Ms. Smith.

As a matter of law, the trial court had to dismiss Ms. Smith's petition. As in *J.D.S.*, this Court should reverse its judgment and remand the case with instructions to dismiss Ms. Smith's petition.

II. The trial court erred in not setting aside the third-party visitation judgment and granting a new trial *because* its finding that the judgment was entered by the parties' consent misapplied the law and therefore abused its discretion, as a consent judgment cannot be entered where there is no mutual agreement to enter that judgment *in that* Mother disputed that she agreed with the judgment Ms. Smith's counsel proposed every time it was presented to the court and Ms. Smith's counsel acknowledged Mother's disapproval, but the court nonetheless entered the judgment as a consent judgment anyway, rather than setting the matter for trial.[3]

Preservation Statement

Mother raised the argument in this point in her post-judgment motion (D25 pp. 9-13). Therefore, it is preserved for appellate review. *See* Rule 78.07(b).

Additional Standard of Review

Trial courts are vested with broad discretion when acting on a motion to set aside a judgment. *Burris v. Term. R.R. Ass'n*, 835 S.W.2d 535, 537-38 (Mo. App. 1992). The denial of a motion to set aside a judgment will be affirmed "unless the record convincingly demonstrates an abuse of

[3] This point and Point III, below, are alternatives to Point I, above. That is, even if Ms. Smith somehow had standing to bring her third-party custody or visitation claim, the trial court still erred in entering the consent judgment to which Mother did not consent, requiring a trial on Ms. Smith's claim. Point II argues this was a misapplication of law and Point III argues its finding that she consented lacked substantial evidence in its support. If the Court agrees Ms. Smith lacked standing, it need not reach Points II or III.

discretion." *Id.* "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. banc 1997). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.*

Even where review is for abuse of discretion, however, the trial court "can abuse its discretion … through the application of incorrect legal principles." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009). When a trial court's exercise of discretion is challenged on legal grounds, no deference is warranted, and this Court's review is *de novo*. *See id.*; *Bohrn v. Klick*, 276 S.W.3d 863, 865 (Mo. App. 2009). A court necessarily abuses its discretion when it bases an otherwise discretionary ruling on an erroneous legal conclusion. *Id.*

* * *

The law of Missouri is that for a settlement agreement to be enforceable, the parties must agree to all of the terms of the agreement when it is originally presented to the court. If a party disputes some of the terms when the agreement is presented to the court, the agreement is not enforceable. Mother made clear she did not consent to the judgment Ms. Smith's counsel presented, as even Ms. Smith's counsel acknowledged, and which contained numerous terms not in the parties' agreements. Nonetheless, the court entered that judgment. This misapplied the law.

A. A trial court cannot enforce a settlement agreement if its terms remain in dispute when the parties present the agreement to the trial court.

A settlement agreement is "enforceable if it is in writing or if it is an oral agreement entered into in open court by parties represented by counsel and sufficiently spread upon the record." *Freeland v. Freeland*, 256 S.W.3d 190, 193-94 (Mo. App. 2008). Additionally, for the settlement to be enforceable, "the parties *must be in agreement when it is presented to the trial court*." *Id*. at 194 (emphasis added). "If the parties are not in agreement at the time the [settlement] agreement is presented to the court, the trial court cannot approve it, and, thus, the [settlement] agreement was never enforceable." *Reynolds v. Reynolds*, 109 S.W.3d 258, 279 (Mo. App. 2003).

Therefore, the law of Missouri is that Mother cannot be bound by a settlement agreement between herself and Ms. Smith if it was not enforceable at the time the trial court entered its judgment. *See O'Neal v. O'Neal*, 673 S.W.2d 126, 127-28 (Mo. App. 1984).

In *O'Neal*, on the date a dissolution of marriage case was set for trial, the parties were present in the courthouse in separate rooms and negotiated for hours through their respective attorneys. *Id*. at 127. An apparent oral agreement was reached regarding maintenance and property division, of which the attorneys took some notes, but nothing was entered on the record at all. *Id*. The court asked counsel to let it know when they would like it to hear the case. *Id*. But the terms of the agreement were still not presented to the trial court. *Id*. Instead, the parties agreed the husband's attorney would put the terms of the oral agreement into writing for both parties to sign. *Id*.

Two days later, the wife told her lawyer she was not satisfied with the agreement they had discussed and would not sign it. *Id.* The trial court enforced the agreement anyway and entered the judgment the husband's lawyer proposed. *Id.*

The Court of Appeals reversed the entry of the husband's proposed judgment on the supposed agreement, holding in fact there was no "present agreement before the court," so the wife could not be bound by that agreement. *Id.* at 128. "At the time the separation agreement was first presented to the trial court, the parties were in dispute over its terms. We hold that without a present agreement before the court the trial judge had a duty to resolve the dispute, dispose of the property in accordance with § 452.330, R.S.Mo. Supp.1982, and determine whether a maintenance award was appropriate under § 452.335." *Id.*

In *Reynolds*, a husband and wife entered into a signed settlement agreement. 109 S.W.3d at 277-78. The husband sought to enforce the agreement, but the wife opposed this, arguing that "[a]fer reflection she did not believe the agreement fairly and equitably divided the parties' marital property and was onerous and unjust in the division of assets and property." *Id.* at 278 (internal quotation marks omitted). The trial court declined to enforce the agreement. *Id.* Nonetheless, at trial, the court granted the husband the right to pursue and recover on any claim he might have against the wife for breach of the agreement. *Id.* The Court of Appeals reversed, holding the parties were not in agreement when the settlement was first presented to the court, so it was never enforceable. *Id.* at 279. And as the

agreement was never enforceable, the husband did not have the right to pursue claims against wife for breach of the agreement. *Id*.

Similarly, in *Wakili v. Wakili*, the Court of Appeals held that a separation agreement between husband and wife in a dissolution case was never enforceable because the parties were not in agreement when the proposed settlement was presented to the trial court. 918 S.W.2d 332, 339 (Mo. App. 1996). Wife had written a letter to the trial court stating she wished to rescind the agreement before it was presented to the court. *Id*. This Court held that there was no question the parties did not "jointly, while in agreement, come before the court and present their proposed settlement for the court's approval." *Id*. Because the agreement was never enforceable, the trial court was not required to approve the proposed settlement. *Id*.

B. Mother did not consent to the judgment Ms. Smith's counsel provided, and there was no enforceable agreement to enter that judgment, requiring it to be set aside and a new trial ordered.

The same as in *O'Neal*, *Reynolds,* and *Wakili* is true here. There was no enforceable agreement to enter the judgment Ms. Smith's counsel proposed, so it must be reversed and a new trial ordered.

The parties' affidavit states that they "agreed upon entering the terms of the Judgment being submitted with this Affidavit" (D23 p. 5; App. A24). But no judgment was submitted along with the affidavit.

Instead, at the time Ms. Smith's counsel provided the trial court the proposed judgment, the parties were in dispute over its terms (D27 pp. 2-4; App. A29-31). The guardian ad litem specifically informed the trial court on February 6 that she and Mother still had not reviewed and approved the

proposed judgment (D27 p. 6; App. A33). The version Ms. Smith's counsel e-mailed to the trial court on February 7 still lacked Mother's approval (D27 p. 4; App. A31). And when the trial court requested confirmation that the proposed judgment was the final product, Mother emphatically objected and stated it was not (D27 p. 4; App. A31). In fact, Mother reported that she pleaded for suggested changes to the proposed judgment that had not been addressed (D27 p. 4; App. A31). And like the wife in *Wakili*, Mother respectfully requested the trial court allow her time to obtain counsel and seek to have the stipulation set aside entirely (D27 p. 4; App. A31).

Days later, after the parties had a conference with the court, counsel for Ms. Smith *acknowledged* that still then, only her client and the guardian ad litem had approved the proposed judgment (D27 p. 2; App. A29). She admitted to the court that Mother did not approve of the proposed judgment (D27 p. 2; App. A29). Yet, she requested it still be entered as a consent judgment (D27 p. 2; App. A29). So, despite the trial court's awareness that the parties were still in dispute over the terms of the agreement it was presented, it entered the disputed judgment anyway – stating it did so "based on the "pleadings, affidavit, proposed judgment, and stipulation of the parties" (D24 p. 1; App. A1).

And to be sure, there are numerous provisions of the judgment that do not appear in any of the prior stipulated affidavit:

- A statement about what § 452.375.5 allows (D24 p. 4; App. A4);
- "The Petitioner and the minor children have a significant familial bond" (D24 p. 4; App. A4);

- "The Court finds that it is in the welfare of the children that visitation be awarded to Petitioner" (D24 p. 5; App. A5); and
- Findings about the guardian ad litem, her fees, and how they should be paid (D24 p. 5; App. A5);
- A "dispute resolution" provision limiting mediation and apportioning costs (D24 p. 7; App. A7);
- A "miscellaneous" section concerning the parties' spouses, significant others, and other third parties, governing the parties' attitudes toward each other with the Children, and directing them to take no action that would demean the other, not to discuss the action with the Children, not to "advise or otherwise coerce the children to not tell the truth or keep secrets," and not to "post negative reviews, articles, and/or social media items or content regarding the other party, counsel, the Guardian ad Litem, or judicial officers and staff" (D24 pp. 7-8; App. A7-8);
- A relocation provision (D24 pp. 8-10; App. A8-10);
- A "non-compliance" provision (D24 pp. 10-11; App. A10-11);
- An "enforcement" provision (D24 p. 11; App. A11); and
- A provision called "Breach of Agreement," which stated, "If a breach of this stipulation results in the other party's being required to employ an attorney to enforce the terms of this Plan, then the party breaching this Judgment shall pay the reasonable attorney fees, costs, and damages incurred by the other party in enforcing same. No attorney's fees shall be recovered unless the party seeking enforcement shall have given the

> breaching party a written notice of the alleged failure to perform and said failure was not cured within five (5) days of receipt of said notice. Failure to comply with the Judgment may subject a party to the Court's contempt powers" (D24 p. 11; App. A11).

Certainly, Mother never agreed to any of this at any time.

Therefore, if Ms. Smith had standing to bring her claim under § 452.375.5, then, as in *O'Neal*, the trial court still erred in entering judgment by *agreement*, which is what it did, because a valid agreement did not exist. And if a valid agreement did not exist, then the trial court had a "duty to resolve the" remaining disputes. *O'Neal*, 673 S.W.2d at 128.

This therefore required the trial court to set the case for trial and determine whether Ms. Smith's claim met the requirements of § 452.375.5:

> In evaluating a third-party custody or visitation claim under Section 452.375.5, the court begins with the "rebuttable presumption that the natural parent is fit and suitable to make decisions consistent with the child's welfare and best interests." [*K.T.L.*, 648 S.W.3d at 114-15]. To rebut this presumption, the petitioner must demonstrate either that: (1) "each parent is until, unsuitable, or unable to be a custodian," or (2) "the welfare of the child requires it." § 452.375.5(5)(a). If the petitioner proves one of these grounds, the petitioner must then prove that third-party custody or visitation is in the child's best interests. *Id*. If the petitioner fails to prove either the fitness or welfare ground, "the question of the child's best interests is never reached." [*Jones*, 10 S.W.3d at 535-36].

Payne, 679 S.W.3d at 548 (format of internal citations modified) (holding petitioner grandmother failed to prove unfitness or welfare prongs of § 452.375.5 at trial, reversing third-party visitation judgment).

Accordingly, if Ms. Smith had standing, the trial court still had to set the purported "consent judgment" to which Mother did not consent aside and try the case on the merits. This Court should reverse the trial court's judgment and remand the case for trial.

III. The trial court erred in not setting aside the third-party visitation judgment and granting a new trial *because* its finding that Mother consented to the judgment lacked substantial evidence in its support, as a consent judgment must be based on a valid agreement in which there is a meeting of the minds as to the substance of the judgment *in that* viewing the record most favorably to the trial court's judgment, there is no evidence that Mother consented to the judgment Ms. Smith's counsel presented to the court, and instead the only evidence is that Mother did not consent to that judgment.[4]

Preservation Statement

Mother raised this argument in her post-judgment motion (D25 pp. 9-13). Therefore, it is preserved for appellate review. *See* Rule 78.07(b).

Additional Standard of Review

This Court "views the evidence and permissible inferences drawn from the evidence in the light most favorable to the judgment." *Ivie v. Smith*, 439 S.W.3d 189, 198-99 (Mo. banc 2014). "A trial court is free to disbelieve any, all, or none of th[e] evidence," and "this Court defers to the trial court's determination of credibility." *White v. Dir. of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010).

"When determining the sufficiency of the evidence" under the *Murphy v. Carron* standard, this Court "will accept as true the evidence and inferences from the evidence that are favorable to the trial court's [judgment] and disregard all contrary evidence." *Watson v. Mense*, 298 S.W.3d 521, 526

[4] This accompanies Point II, above, because it invokes a different *Murphy v. Carron* ground for reversal.

(Mo. banc 2009). "Whether evidence is substantial and whether any inferences drawn are reasonable is a question of law," reviewed *de novo*. *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 348 (Mo. App. 2012) (citation omitted). And when no findings of fact are requested, this Court "consider[s] all fact issues upon which no specific findings were made as having been found in accordance with the result reached per Rule 73.01(c)." *Hurricane Deck Holding Co. v. Spanburg Invs., LLC*, 548 S.W.3d 390, 395 (Mo. App. 2018) (citation omitted).

"Substantial evidence is evidence that, if believe, has some probative force on each fact that is necessary to sustain the circuit court's judgment." *Ivie*, 439 S.W.3d at 199. A successful substantial-evidence challenge requires an appellant to show "there is no evidence in the record tending to prove a fact" necessary to the court's judgment. *Id.* at 200.

* * *

The law of Missouri is that for a settlement agreement to be enforceable, the parties must agree to all of the terms of the agreement when it is originally presented to the court. If a party disputes some of the terms at the time the agreement is presented to the court, the agreement is not enforceable. Here, Mother made clear she did not consent to the judgment Ms. Smith's counsel presented, as even Ms. Smith's counsel acknowledged. Nonetheless, the trial court entered that judgment as a consent judgment. Its finding that Mother consented lacked substantial evidence in its support.

A. A court cannot enforce an invalid settlement agreement.

Besides the trial court's misapplication of the law in entering the proposed consent judgment, as explained in Point II, above, Mother is also

entitled to relief because the decision to enter the consent judgment lacked substantial evidence to support it, as it was not the product of a valid agreement when it was entered. (Mother incorporates her explanation from Point II, above at pp. 41-43, that an agreement is not enforceable when a party disputes the terms at the time it is presented to the court.)

B. The trial court's finding that the parties had come to a valid agreement for the court to enter the consent judgment, which is necessary to enter a consent judgment, lacked substantial evidence in its support, as there was no evidence Mother agreed to the entry of that judgment.

1. Challenged factual proposition necessary to support the judgment

In *Houston*, 317 S.W.3d at 186-87, the Court of Appeals laid out this required rubric for a not-supported-by-substantial-evidence challenge under *Murphy v. Carron* review:

> (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
>
> (2) identify all of the favorable evidence in the record supporting the existence of that proposition; and,
>
> (3) demonstrate why that favorable evidence, when considered along with the reasonable inferences drawn from that evidence, does not have probative force upon the proposition such that the trier of fact could not reasonably decide the existence of the proposition.[5]

[5] *Houston* was decided by the Court of Appeals, Southern District, in 2010, and set forth rubrics for the two *Murphy* evidentiary challenges. 317 S.W.3d at 178. In the years since, all three districts of the Court of Appeals have adopted its rubrics as expressly required frameworks for arguing these challenges and now penalize appellants when they are not expressly followed. *See, e.g.*, *Sprueill v. Lott*, 676 S.W.3d 472, 478 (Mo. App. 2023) (Southern

Here, the challenged factual proposition necessary to sustain the judgment is the trial court's finding that the judgment was a consent judgment entered "[u]pon … the settlement of the parties" (D24 p. 1; App. A1).

The trial court made plain that the factual proposition that a settlement for the entry of this judgment existed between the parties was the reason for entering its judgment for third-party visitation (D24 pp. 1, 5-7); App. A1, A5-7. The court found Mother and Ms. Smith "reached a stipulation and agreement" for entry of that judgment that was made "freely and voluntarily" (D24 pp. 6-7; App. A6-7).

Therefore, the issue here is whether the trial court's finding that its judgment was the product of a free and voluntary agreement between Mother

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District) ("In Appellants' brief, the "Argument" section for each point did not follow the required sequences for these two issues. Therefore, Appellants' argument concerning these issues has no analytical or persuasive value"); *Moore v. Moore*, 645 S.W.3d 705, 712 (Mo. App. 2022) (Western District) (party's failure to follow precise *Houston* rubric "requires that we reject her weight-of-the-evidence challenge"); *O'Gorman & Sandroni, P.C. v. Dodson*, 478 S.W.3d 539, 544 (Mo. App. 2015) (Eastern District) (failure to follow *Houston* framework means "the appellant's argument is analytically useless and provides no support for his or her challenge" (internal quotation marks omitted)). To date, this Court has never cited *Houston*. While Mother follows the *Houston* framework here, this Court should put a stop to the Court of Appeals treating the *Houston* decision as some kind of do-or-die required litany. Rule 84.04(e) governing argument sections in briefs does not require it, *Murphy* and its progeny from this Court do not require it, and unlike the format of points relied on plainly disclosed in Rule 84.04(d), litigants are on no notice that the *Houston* framework is required or else a point may be rejected for this reason alone. The Court should remind the Court of Appeals to stick to Rule 84.04 and the *Murphy* standard itself.

and Ms. Smith is supported by substantial evidence. The law of Missouri is that it is not.

2. The favorable evidence in the record supporting the existence of the challenged factual proposition: the stipulated agreement and joint affidavit

Under § 517.121, R.S.Mo., a "judgment by consent may be entered when there is consent by all parties made after the filing of the petition either in open court or by a written consent filed with the court and signed by each party or the attorney for such party."

In its judgment, the court stated it had "reviewed the settlement of the parties" before making its findings (D24 p. 1; App. A1). And in its review of the supposed agreement, the court assessed "the pleadings, affidavit, proposed judgment, and stipulation of the parties" (D24 p. 1; App. A1).

The trial court never heard this case, because on what would have been the day of trial, the guardian ad litem contacted the court and informed it that "the parties have reached a settlement" and that a proposed judgment had been drafted (D27 p. 6; App. A33). That same day, the guardian ad litem filed a joint stipulation for visitation (D20; App. A16) and a joint affidavit for entry of judgment (D21; App. A21). Both documents contained Mother's notarized signatures (D20 p. 5; D21 p. 6; App. A19, A25). The documents were similarly signed and notarized by both Ms. Smith and the guardian ad litem (D20 pp. 5, 7; D21 pp. 4, 6; App. A19, A21, A23, A25).

The affidavit stated, "Each party understands that they have a right to proceed to trial upon this matter for which a different result may have occurred but have instead agreed upon entering the terms of the Judgment

being submitted with this Affidavit" (D21 p. 4; App. A23). And it requested the court enter a judgment for third-party visitation based on the pleadings and the joint affidavit (D21 pp. 4-5; App. A23-24).

The joint stipulation contained a schedule for Ms. Smith to have visitation with the Children, which it states was "reached [by a] stipulation and agreement" of the parties (D20 p. 2; App. A16). The stipulation also stated it was "made freely and voluntarily, after consultation with counsel and after great consideration as to what is best for the minor children. All parties understand and stipulate that these provisions are best for [the Children]" (D20 p. 3; App. A17).

This is the only evidence in the record that legally is favorable to support the challenged factual proposition that the judgment for third-party visitation was a consent judgment based on a valid agreement between the parties (D24 p. 1, 7; App. A1, A7).

3. The favorable evidence does not have probative force upon the challenged factual proposition, and so the trial court could not reasonably find that proposition.

Therefore, the sole favorable evidence for the challenged factual proposition that the judgment was entered with the parties' consent by a valid agreement were the joint affidavit and joint stipulated agreement.

But as in *O'Neal*, *Reynolds,* and *Wakili*, that evidence does not make for an enforceable agreement to support the challenged factual proposition under these circumstances. For the judgment to be enforceable, all parties would have to be in agreement to all of its terms at the time the resulting judgment was presented to the court. *O'Neal*, 673 S.W.2d at 128. Here, there

is insufficient evidence to support the validity of the settlement – that is, the judgment itself – because there is no evidence that Mother agreed with the judgment when Ms. Smith's counsel presented it to the court.

The original trial date was canceled because the guardian ad litem filed a joint affidavit requesting a judgment for third-party visitation (D21; App. A21) and a joint stipulation for visitation (D20; App. A16). And both of these documents contained Mother's notarized signature (D20 p. 5; D21 p. 6; App. A19, A25). But despite the affidavit stating the parties "agreed upon entering the terms of the Judgment being submitted with this Affidavit" (D23 p. 5; App. A24), these documents were not accompanied by any proposed judgment (D1 p. 2). While the guardian ad litem did notify the court that Ms. Smith's counsel had drafted a proposed judgment, she went on to state that "I need just a little more time to review it and enter my GAL fees and I believe [Mother], pro se, needs to review it as well" (D27 p. 6; App. A33).

Therefore, the whole agreement was not being presented to the court when the affidavit and joint stipulation were filed, because the judgment that agreement contemplated still not been finalized into a proposed judgment for the court to review and sign, and there were no details in the affidavit as to exactly what that judgment would contain.

The court acknowledged the guardian ad litem's request for additional time for the parties to review and approve a final agreement by setting the matter for a hearing two months later (D27 p. 6; App. A33).

In that time, Ms. Smith's counsel forwarded a proposed judgment to the court (D27 p. 5; App. A32). But when the court asked if the proposed

judgment was the "final product" for it to sign and upload (D27 p. 4; App. A31), Mother voiced her dissent (D27 p. 4; App. A31). She stated that she had pleaded with Ms. Smith's counsel and the guardian for changes to the terms of the judgement, but those requests had gone unanswered (D27 p. 4; App. A31). And because of that, she informed the court that she would "be respectfully asking the court time to change the joint stipulation agreement" and went on to request additional time to "seek counsel to attempt to set aside the joint stipulation" (D27 p. 4; App. A31).

Because of Mother's disapproval, the court scheduled a teleconference for the parties to attend (D27 p. 3; App. A30). After this conference, Ms. Smith's counsel contacted the court and requested it enforce the settlement despite acknowledging Mother still disapproved, stating:

> I failed to mention this morning that we have a signed affidavit and signed stipulation already on file in this matter. The judgment is attached in word format has been approved by myself as Attorney for [Ms. Smith] and the Guardian ad Litem. Given that we have an affidavit and stipulation signed by the parties and GAL, do we need to still file a motion to enforce the settlement agreement or send in a proposed judgment?

(D27 p. 2; App. A29). She ended this communication by stating, "[Mother] is copied on this email as well, *and she does not approve the judgment*" (D27 p. 2; App. A29) (emphasis added).

In *Reynolds*, a husband and wife signed a settlement agreement that the husband sought to enforce. 109 S.W.3d at 277-78. But the wife opposed its enforcement. *Id*. at 278. She argued that after signing the agreement, she had time to reflect and came to the conclusion that it was unfair and

unjust. *Id.* And because the parties were not in agreement when the settlement was presented to the court, it was unenforceable. *Id.* at 279.

Mother's signatures on the joint stipulation (D20 p. 5; App. A19) and the joint affidavit (D21 p. 6; App. A25) are the same. Yes, Mother signed documents contemplating a final settlement agreement. But on further reflection after receiving her opponent's proposed judgment, Mother changed her mind and did not agree to the judgment.

And again, to be sure, there are numerous provisions in the judgment that are not in the parties' prior stipulation and affidavit:

- A statement about what § 452.375.5 allows (D24 p. 4; App. A4);
- "The Petitioner and the minor children have a significant familial bond" (D24 p. 4; App. A4);
- "The Court finds that it is in the welfare of the children that visitation be awarded to Petitioner" (D24 p. 5; App. A5); and
- Findings about the guardian ad litem, her fees, and how they should be paid (D24 p. 5; App. A5);
- A "dispute resolution" provision limiting mediation and apportioning costs (D24 p. 7; App. A7);
- A "miscellaneous" section concerning the parties' spouses, significant others, and other third parties, governing the parties' attitudes toward each other with the Children, and directing the parties to take no action that would demean the other, not to discuss the action with the Children, not to "advise or otherwise coerce the children to not tell the truth or keep secrets," and not to "post negative reviews, articles,

and/or social media items or content regarding the other party, counsel, the Guardian ad Litem, or judicial officers and staff" (D24 pp. 7-8; App. A7-8);

- A relocation provision (D24 pp. 8-10; App. A8-10);
- A "non-compliance" provision (D24 pp. 10-11; App. A10-11);
- An "enforcement" provision (D24 p. 11; App. A11); and
- A provision called "Breach of Agreement," which stated, "If a breach of this stipulation results in the other party's being required to employ an attorney to enforce the terms of this Plan, then the party breaching this Judgment shall pay the reasonable attorney fees, costs, and damages incurred by the other party in enforcing same. No attorney's fees shall be recovered unless the party seeking enforcement shall have given the breaching party a written notice of the alleged failure to perform and said failure was not cured within five (5) days of receipt of said notice. Failure to comply with the Judgment may subject a party to the Court's contempt powers" (D24 p. 11; App. A11).

At no point, for example, is there any evidence Mother agreed to an attorney fee-shifting provision, not to disparage Ms. Smith, or any of these other provisions.

Therefore, the trial court was not presented with an agreement when the joint affidavit and joint stipulation were initially filed because the guardian ad litem stated that she and Mother had yet to review and approve the proposed judgment (D27 p. 6; App. A33). So, the only time an "agreement" was presented to the court for review was when Ms. Smith's

counsel forwarded a proposed judgment to the court (D27 p. 5; App. A32). But at that time, Mother plainly disputed the terms (D27 p. 4; App. A31).

In *Wakili*, the Court of APpeals again upheld a person's ability to change her mind. 918 S.W.2d at 339. There, the wife wrote the court a letter stating she wished to rescind the terms of a settlement agreement. *Id*. The Court of Appeals held that since the parties were not in agreement when the proposed settlement was presented to the trial court, that settlement was never enforceable. *Id*.

Here, Mother did almost exactly the same thing. When the court received Ms. Smith's proposed judgment, it sent the parties an e-mail requesting confirmation that the proposed judgment was the final product (D27 p. 4; App. A31). Mother was the first to respond, voicing her disapproval and requesting the court allow her time to have the stipulated agreement changed or set aside (D27 p. 4; App. A31).

Just as the women in *Reynolds* and *Wakili*, Mother changed her mind after a period of reflection and then voiced opposition the settlement before any agreed judgment was presented to the court. Therefore, just as in *Wakili*, the parties did not jointly, while in agreement "come before the court and present their proposed settlement for the court's approval." *Id*. at 339.

Accordingly, the trial court's finding that the judgment was derived from the parties' consent (D24 p. 1; App. A1), on which it predicated its judgment, lacks substantial evidence in its support.

As the Court of Appeals did in *O'Neal*, this Court should reverse the trial court's judgment and remand this case for trial.

IV. The trial court erred in granting Ms. Smith's family access motion *because* this misapplied the law, as a valid judgment is an indispensable prerequisite to enforcement of that judgment, and a judgment enforcing another fails when the underlying judgment is invalid *in that* the family access judgment was predicated on an invalid consent judgment for third-party visitation, as Ms. Smith lacked standing to bring the third-party visitation action and Mother did not consent to the judgment.

Preservation Statement

This point argues Ms. Smith lacked standing, which "may be asserted for the first time on appeal." *Schaberg*, 637 S.W.3d at 519. Therefore, it is preserved for review.

* * *

The law of Missouri is that a valid judgment is an indispensable prerequisite to enforcement of that judgment. If a valid judgment does not exist, there is nothing to enforce, so any judgment purporting to enforce it is equally invalid. Here, as explained in Points I through III, above the trial court's third-party visitation judgment was invalid. Nonetheless, the trial court entered a family access judgment to enforce the visitation rights that first judgment granted Ms. Smith. This misapplied the law.

A. Family access judgments are an enforcement tool for an underlying judgment.

The law of Missouri is that "[a] trial court has inherent power to enforce its own judgments." *State ex rel. Cullen v. Harrell*, 567 S.W.3d 633, 639 (Mo. banc 2019). This extends to judgments concerning custody and

visitation determinations. *Schutter v. Seibold*, 632 S.W.3d 820, 832 (Mo App. 2021). One such tool of enforcement is a family access motion. *Id*. Section 452.400.3, R.S.Mo., governs family access motions and requires the trial court to "mandate compliance with its [previous judgment] by all parties to the action" (App. A42). To mandate compliance, it authorizes parties who have been denied custody or visitation to seek a judgment for family access. *Id*.

A family access motion is not independent requests to determine custody, but rather it "seeks to enforce an existing custody or visitation determination." *Schutter*, 632 S.W.3d at 832. Therefore, a "ruling on a family access motion does not provide for child custody or visitation but merely enforces an existing child custody determination." *Id*. And the term "child custody determination" includes "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." § 452.705(3), R.S.Mo.

Here, Ms. Smith obtained a judgment for third-party visitation (D24). She then sought to enforce that visitation by filing a family access motion (WD87522 D2). This resulted in a judgment for family access, which contained orders for compensatory periods of visitation and an award of attorney fees (WD87522 D4).

Because family access judgments are predicated on the existence of another judgment, Ms. Smith would not have been able to obtain the judgment for family access without her judgment for third-party visitation. This judgment for family access would not exist without the original judgment for third-party visitation.

B. As a family access judgment has nothing to enforce without a valid underlying custody or visitation judgment, and the underlying judgment here was invalid, the family access judgment fails too.

The law of Missouri is that a valid judgment is a prerequisite to enforcement. *United States v. Brooks*, 40 S.W.3d 411, 415-16 (Mo. App. 2001). Therefore, "if there is no underlying judgment in the main case, there can be no valid" action to support an enforcement proceeding, and the enforcement judgment fails, too. *Bellon Wrecking & Salvage Co. v. David Orf, Inc.*, 983 S.W.2d 541, 547 (Mo. App. 1998).

The failure of an enforcement judgment has often occurred in garnishment actions, because garnishments are an ancillary remedy. *Brooks*, 40 S.W.3d at 415. Without a valid underlying judgment, a valid garnishment cannot occur. *Id*. at 415-16. And because a final judgment is a prerequisite to obtaining a valid garnishment, this Court is able to review the validity of the judgment which supported the garnishment on appeal. *Metheney v. Metheney*, 589 S.W.3d 725, 729 (Mo. App. 2019).

In *Brooks*, a judgment creditor sought to collect from the bank accounts of the judgment debtors by a garnishment order. *Brooks*, 40 S.W.3d at 412. After the court issued a writ, one of the judgment debtors closed the accounts. *Id*. The creditor then moved for an order directing the bank to pay the equivalent amount to what the debtor had withdrawn. *Id*. The trial court denied the creditor's motion, which the Court of Appeals affirmed because a satisfaction of judgment previously filed had discharged and extinguished the underlying judgment. *Id* at 416-17. A satisfaction of judgment can forever discharge the underlying judgment, effectively extinguishing it. *Id*. at 416.

And without an underlying judgment, "there could no longer be a valid execution and, consequently, nothing to support any party of the garnishment proceeding." *Id.* at 417.

In *Est. of Keathley*, a garnishment was used in aid of the execution of a contempt order. 934 S.W.2d 611, 614 (Mo. App. 1996). But the order was not denominated a "judgment." *Id.* at 615. Therefore, there was never a valid final judgment. *Id.* The Court of Appeals held that because a contempt proceeding could not be used as a substitute for a hearing on the merits *and* because there was not a valid final judgment, "the writs of execution and the garnishments in aid thereof were also invalid." *Id.*

While this is not a garnishment action, a family access judgment is similarly an ancillary remedy, because without an underlying judgment, it has nothing to enforce. Therefore, it also necessarily requires a valid underlying judgment or else its invalid. Section 452.400.3 provides in relevant part, "The court shall mandate compliance *with its order* by all parties to the action, including parents, children and third parties" (App. A42) (emphasis added). The "order" to which this refers is "an order specifically detailing the visitation rights of the parent without physical custody rights to the child and any other children for whom such parent has custodial or visitation rights." § 452.400.1 (App. A40).

Here, Ms. Smith obtained a family access judgment to enforce her third-party visitation award (WD87522 D4). But as explained above in Point I, she never had standing to bring her action for third-party visitation. And without standing, the original judgment was invalid. *J.D.S.*, 482 S.W.3d at

439-40. Even if Ms. Smith somehow had standing, the judgment was still invalid because, as explained in Point II and III, Mother never consented to the consent judgment. This, too, would render the judgment invalid. *O'Neal*, 673 S.W.2d at 128. Accordingly, there was no valid original judgment for the family access motion to enforce.

The trial court erred in granting Ms. Smith's family access motion. This Court should reverse the family access judgment.

Conclusion

The Court should reverse the trial court's judgment granting Ms. Smith third-party visitation and remand this case with instructions to dismiss the action. Alternatively, the Court should reverse the third-party visitation judgment and remand this case for trial. And either way, the Court should reverse the trial court's family access judgment.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Rule 84.06(b), as this brief contains 19,127 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on July 19, 2025, I filed a true and accurate Adobe PDF copy of this substitute brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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