WD77435

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

IN THE MATTER OF THE ADOPTION OF [redacted]
a minor,

and

[redacted]
Appellant,

vs.

[redacted] and [redacted]
Respondents.

On Appeal from the Circuit Court of Cole County
Honorable John E. Beetem, Circuit Judge
Case Nos. 12AC-JU00163 and 12AC-FC01219 (Consolidated)

BRIEF OF THE RESPONDENTS

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Cole County both dismissing Appellant's "Petition for Order of Child Custody" and denying her motion to intervene as of right in Respondents' stepparent adoption action.

Appellant's fourth Point Relied On purports to challenge the constitutional validity of applying "Missouri law" to her (Aplt.Br.27, n.4), presumably including several Missouri statutes. *Infra* at 44, 46-48. Ordinarily, an appeal involving the validity of a Missouri statute, whether "facially or as applied," falls within the Supreme Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3. *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 912 (Mo. banc 1997).

If a constitutional challenge is "merely colorable, as opposed to substantial," however, "jurisdiction remains in the Court of Appeals." *Kasch v. Dir. of Revenue*, 18 S.W.3d 97, 98 (Mo. App. 2000). Appellant failed to preserve her fourth point, which is also vague and facially meritless. *Infra* at 45-53. It therefore fails to confer jurisdiction in the Supreme Court. *State v. Miller*, 172 S.W.3d 838, 843-44 (Mo. App. 2005).

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

Statement of Facts

A. Background

In 2008, Respondent [redacted] ("Mother"), who was then unmarried, successfully underwent artificial insemination and, as a result, gave birth to a girl, [redacted] ("Daughter") (Legal File 17-18, 40). The source of the sperm Mother used to conceive Daughter was an anonymous donor whose identity is unknown, who has had no contact with Daughter, who has not attempted to seek parenting time with Daughter, and who has provided no financial support for Daughter (L.F.17).

Daughter has resided with Mother ever since she was born (L.F.18). Mother raised Daughter and has sole legal and physical custody of her (L.F.18). In 2011, Mother met Respondent [redacted] ("Husband") (L.F.17). Mother and Daughter began living with Husband in December 2011 (L.F.17). Ever since then, Daughter has been under the actual care and custody of both Mother and Husband (L.F.17). On August 31, 2012, Mother and Husband were married; they presently live together as husband and wife (L.F.17). Upon marriage, Mother took Husband's surname (L.F.16).

B. Proceedings Below

1. Mother's and Husband's Stepparent Adoption

After Husband joined Mother and Daughter as a family, both Mother and Husband wanted Husband to adopt Daughter so he could be her legal father (L.F.18). On September 21, 2012, Mother and Husband jointly filed a petition for Husband's adoption of Daughter in the Circuit Court of Cole County, to which Mother signed her consent (L.F.16,23). The case was assigned to the Honorable Jon Beetem (L.F.7). Mother and

Husband petition requested the court to declare Daughter adopted by Husband and for Daughter's surname to be changed to Mother's and Husband's (L.F.19).

In their petition, both Mother and Husband stated they want Husband to adopt Daughter in order to give her a legal father for the first time in her life (L.F.18). They believe this would be in Daughter's best interests (L.F.18). Mother and Husband have the ability properly to care for Daughter, as Mother has for Daughter's entire life and Mother and Husband presently do together (L.F.18).

2. Appellant files "Petition for Order of Child Custody."

At the time Mother and Husband filed their petition for adoption, they had not participated in any other litigation concerning Daughter's custody and were not aware of any pending custody proceedings concerning Daughter (L.F.18-19). On September 24, 2012, however, merely three days after Mother and Husband filed their petition, Appellant [redacted] filed a two-page "Petition for Order of Child Custody" in the Circuit Court of Cole County, naming Mother as respondent and requesting Appellant be awarded joint legal and physical custody of Daughter under "§ 452.375, R.S.Mo." (L.F.27-29; Respondents' Appendix ("Appx.") A1-3).

Appellant's petition also was assigned to Judge Beetem (L.F.1). She admitted in her petition that no court ever had granted her any legal rights over Daughter, nor had she ever previously participated in any litigation concerning Daughter's custody (L.F.28;Appx.A2). She also admitted she has no biological relationship to Daughter (L.F.27;Appx.A1). She admitted Mother both is Daughter's biological mother and also always had sole legal custody of Daughter (L.F.27;Appx.A1).

While Appellant's short, two-page petition alleged "it is in the best interests of [Daughter] that [Appellant] … be awarded joint physical and legal custody" of Daughter, it did not allege either that Mother or Husband are unfit, unsuitable, or unable to be a custodian, or that Daughter's welfare required Appellant to have custody of Daughter (L.F.27-28;Appx.A1-2). It merely alleged, without specificity, that:

- Appellant "has acknowledged by her actions and statements to third-parties that she is adoptive mother of" Daughter;
- Mother "has acknowledged by her actions and statements to third-parties that she is the biological mother of [Daughter] and her name appears on [Daughter]'s birth certificate;"
- "Both [Appellant] and [Mother] have acknowledged by their actions and statements to third-parties that they intend to raise [Daughter] as co-equal parents;" and
- Daughter "has been in [Appellant's] and [Mother's] joint physical and legal custody since her birth."

(L.F.27-28;Appx.A1-2).

Appellant attached to her petition a proposed parenting plan that would deprive Mother of physical custody of Daughter for half of each year, during which Mother only would be permitted phone calls with Daughter (L.F.31-38;Appx.A18-25). The parenting plan did not mention Husband or give him any custody of Daughter (L.F.31-38;Appx.A18-25).

Nowhere in her petition did Appellant either raise any constitutional claims or invoke any form of estoppel (L.F.27-28;Appx.A1-2). Nowhere did she allege she was Daughter's "equitable parent" or "de facto parent" (L.F.27-28;Appx.A1-2).

Mother quickly moved to dismiss Appellant's petition (L.F.39). She pointed out the uncontested facts that she and Appellant never were married in any jurisdiction, and that, despite Appellant's reference to herself as the "adoptive mother," Appellant never adopted Daughter (L.F.40). Mother explained Appellant lacked standing to assert a claim for third party custody under § 452.375.5(5) (L.F.42). She also cited *White v. White*, 293 S.W.3d 1 (Mo. App. 2009), to explain that, even if standing were found, the law of Missouri is Appellant has no valid claim for custody of Daughter (L.F.43-45).

3. Appellant moves to intervene in stepparent adoption.

The day after Mother filed her motion to dismiss, Appellant filed a five-page motion to intervene in Mother's and Husband's stepparent adoption (L.F.47;Appx.A5). Appellant claimed she was entitled to intervene either as a matter of right under Rule 52.12(a) or, alternatively, she should be permitted to intervene under Rule 52.12(b) (L.F.49-50;Appx.A7-8). The motion claimed it also was brought "pursuant to … R.S.Mo. Section 452.375.5(5)" (L.F.47;Appx.A5). For intervention as a matter of right, Appellant argued she "has an actual interest" in Daughter, "she would be legally barred from petitioning for [Daughter's] custody in the future" if the adoption went through, and neither Mother nor Husband represented Appellant's "interests" (L.F.49-50;Appx.A7-8). The motion to intervene was not verified (L.F.47-52;Appx.A5-11).

At the end of her motion to intervene, Appellant included a section containing a proposed "Petition for Joint Custody" to be her pleading if she were granted intervention (L.F.50-51;Appx.A8-9). Just as with her previous petition, she alleged it was in Daughter's "best interests" to award her joint legal and physical custody and to prevent Husband from becoming Daughter's legal father (L.F.50-51;Appx.A8-9). Once again, however, Appellant did not allege either that Mother or Husband were unfit parents or that Daughter's welfare required Appellant to have custody (L.F.47-51;Appx.A5-9).

Rather, just as in her previous petition, Appellant's proposed petition in her motion to intervene sought to allege, without specification, only that:

- Daughter "has been in the joint physical and legal custody of [Appellant] and [Mother] since her birth;"
- Appellant "quit her job to stay at home with [Daughter], and to serve as [Daughter's] primary caregiver for most of 2008 and 2009;" and
- "Both [Appellant] and [Mother] have acknowledged through their actions and their statements to third parties that [Appellant] is [Daughter]'s second parent."

(L.F.50-51;Appx.A8-9).

Appellant then attached to her motion copies of both Mother's and Husband's stepparent adoption petition and her proposed parenting plan previously attached to her "Petition for Order of Child Custody" (L.F.47-67;Appx.A5-25). Nowhere in her motion to intervene did she state any constitutional claims, nor did she invoke any form of estoppel (L.F.47-51;Appx.A5-9). She did not argue she was Daughter's "de facto parent" or "equitable parent" (L.F.47-51;Appx.A5-9).

In a section at the beginning of her motion to intervene titled "Background," Appellant made a number of factual claims that did not appear either in her previous "Petition for Order of Child Custody" or her proposed pleading at the end of her motion to intervene (L.F.47-49;Appx.A5-6). She claimed she and Mother began dating each other in a same-sex relationship in the winter of 2002 (L.F.47,75;Appx.A5,A26). She claimed Mother then began cohabitating with her in 2003 (L.F.47;Appx.A5). She claimed it was a "joint decision" between Mother and she "to try to conceive a child via artificial insemination," which resulted in Daughter's birth (L.F.47-48;Appx.A5-6). She claimed she and Mother "agreed that [Appellant] would adopt the baby," but that, due to "medical emergencies surrounding [the] birth, the adoption was put on hold," though she and Mother "jointly raised [Daughter], as co-parents, from the moment of her birth" (L.F.48;Appx.A6).

At the same time, Appellant conceded she never actually adopted Daughter and that, after Daughter's birth in 2008, she made no effort to seek any legal custody of daughter until she discovered in 2012 that Mother and Husband wished to united legally with Daughter as a family (L.F.48;Appx.A6).

Appellant also claimed Daughter "suffers from a number of severe medical problems," which require "a significant amount of specialized care" (L.F.48;Appx.A6). She claimed she participated in a medical malpractice suit involving Daughter, though not officially as a party (L.F.48;Appx.A6). She claimed she and Mother remained together until 2011, but they were not married to each other in any jurisdiction and never attempted legally to marry each other in any jurisdiction (L.F.47-48;Appx.A5-6).

Mother and Husband opposed Appellant's motion to intervene (L.F.90). They explained the law of Missouri is Appellant is merely an unrelated third-party to Daughter and, as a result, both had no right to intervene and should not be permitted to intervene (L.F.98). Appellant did not reply to Mother's and Husband's opposition (L.F.4-5).

4. Appellant opposes dismissal of her "Petition for Order of Child Custody."

Appellant then filed suggestions in opposition to Mother's motion to dismiss her "Petition for Order of Child Custody" (L.F.74;Appx.A26). There, she copied-and-pasted the new factual claims from the introduction to her motion to intervene, which, again, did not appear either in her original petition or in the proposed pleading at the end of her motion to intervene (L.F.74-77;Appx.A26-29).

She argued the court should not dismiss her case for lack of standing due to the "unique" issues involved (L.F.87;Appx.A39). She made no statement either that Mother or Husband were unfit parents, or that Daughter's welfare required her to have custody (L.F.74-87;Appx.A26-39). She raised no constitutional arguments, nor did she invoke any form of estoppel (L.F.74-87;Appx.A26-39). She did not argue she was either Daughter's "equitable parent" or "de facto parent" (L.F.74-87;Appx.A26-39).

5. Judgment and Appeal

On the parties' joint motion, the trial court consolidated for argument and decision Appellant's petition with her motion to intervene (L.F.68,70,72).

On February 13, 2014, the trial court entered an "Order and Judgment" in the consolidated case, denying Appellant's motion to intervene and dismissing her petition (L.F.118-19). The court held:

> While child custody cases are to be decided on the unique facts of every family, the Court is not allowed to look past the fundamental concept that a party must first have standing to seek relief from the court.
>
> At this point in time, the status of the law of the State of Missouri is that a "non-biological parent" has no rights to a child of their partner. *White v. White*, 293 S.W.3d 1 (Mo. Ct. App. 2009).

(L.F.118).

The court held that, while "other states" may "have taken a more 'aggressive' approach to this question … the Missouri legislature has not seen fit to [make] similar changes. Because there is no standing, the Court does not reach the issue of exceptional circumstances" (L.F.118-19).

Appellant did not file any post-judgment motion (L.F.5). Instead, she appealed to this Court (L.F.120).

Argument

Plain error review of Appellant's unpreserved Points I, II, and IV should be denied.

As explained *infra* at 15-18, 36-37, and 45-46, only one of Appellant's four Points Relied On – Point II – is preserved for appellate review. The other three were not raised below in any fashion and, therefore, are waived.

In a short preface to her argument, Appellant seems to recognize this, though without any elaboration (Appellant's Brief ("Aplt.Br.") 8-9). Addressing no specific point out of her four, she argues that, because Rule 84.13(c) allows for plain error review, she has not "waived the arguments made in the instant appeal" (Aplt.Br.8-9). No other portion of her brief, including the standard of review she seeks to apply to all her points (Aplt.Br.8), addresses plain error review at all, let alone addresses any of her points under that heightened burden.

Appellant's attempt to invoke plain error review ignores both its elements and the intensified, "highly deferential" scrutiny inherent in it. *Horner v. FedEx Ground Package Sys. Inc.*, 258 S.W.3d 532, 544 n.18 (Mo. App. 2008). She seems to conceive of plain error review as a guileful way around her failure to preserve issues for appeal that results in ordinary review of unpreserved points. As the Court knows well from denying plain error review in dozens of cases each year, it is anything but.

The well-known, well-worn rule in Anglo-American jurisprudence is

> [a]n issue that was never presented to or decided by the trial court is not preserved for appellate review. Because an appellate court is not a forum in which new points will be considered, but is merely a court of review to

> determine whether the rulings of the trial court, as there presented, were correct, a party seeking the correction of error must stand or fall on the record made in the trial court, thus it follows that only those objections or grounds of objection which were urged in the trial court, *without change and without addition*, will be considered on appeal.

State v. Davis, 348 S.W.3d 768, 770 (Mo. banc 2011) (citations omitted) (emphasis added). Any other potential objections or grounds of objection are waived. *Id.*

This is because this Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Appellant cannot bring a case under one theory (and only one, her Point II), but then, on appeal, Monday-morning-quarterback a variety of additional theories she never remotely addressed below.

Appellant's misconceived reference to plain error is not some crafty way around this. Rather, review for plain error is a tightly circumscribed exception to the rule of preservation under which "this Court, in its discretion, may review [an appellant's] claims for plain error." *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 808-09 (Mo. banc 2011). "In determining whether to exercise [this] discretion …, the appellate court looks to determine whether there facially appears substantial grounds for believing that the trial court committed error that is evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice." *Id.* at 809.

As a result, however, "Plain error review is rarely granted in civil cases." *Mayes v. St. Luke's Hosp. of Kan. City*, 430 S.W.3d 260, 269 (Mo. banc 2014). Where the

alleged error is the trial court following existing law that has not yet been overturned, "such an error is not evident, obvious or clear when the trial court followed" that law. *Id.*

Moreover, to obtain plain error review, at a minimum the appellant first must explain specifically: (1) what error was evident, obvious, and clear; and (2) how it resulted in a manifest injustice or miscarriage of justice. *State v. Massa*, 410 S.W.3d 645, 657 (Mo. App. 2013). Otherwise, the Court would be forced impermissibly "to become an advocate for" her and "scour the record and devise arguments on [her] behalf." *Id.*

Appellant totally fails this burden. She does not articulate the points she believes are not preserved for review and for which she requests plain error review or how any of them specifically meet either of the two prongs of plain error, nor does she cite any authority in which any similar allegation was held to be reversible plain error. This likely is because her unpreserved Points I, III, and IV palpably cannot be plain error. As Appellant admits throughout her brief, the trial court simply followed the binding, existing law of Missouri as announced by this Court and the Supreme Court. That cannot ever constitute "plain error." *Mayes*, 430 S.W.3d at 269.

Because Appellant does not explain what should be reviewed for plain error, or how or why, the Court should deny her amorphous plea for plain error review of any issue. *Massa*, 410 S.W.3d at 657. The Court rightly and properly should refuse to become Appellant's advocate. *Id.* Even if she seeks to make proper plain error arguments in her reply brief, this should be rejected, as Mother and Husband will "have no opportunity to address" them. *Berry v. State*, 908 S.W.2d 682, 684 (Mo. banc 1995).

Appellant has waived Points I, III, and IV. The Court should not reach them.

Standard of Review for Preserved Points Relied On

All of Appellant's four Points Relied On allege error both in dismissing a petition and in denying a motion to intervene as of right. As Points I, III, and IV are not preserved and therefore were waived, review should be denied. *Supra* at 10-12; *infra* at 15-18, 36-37, and 45-46. If any point is preserved, however, review would be *de novo*.

First, this Court reviews *de novo* whether a petition states a claim. *Fenlon v. Union Elec. Co.*, 266 S.W.3d 852, 854 (Mo. App. 2008). It "assume[s] the factual allegations contained in the petition are true and make[s] no attempt to weigh their credibility or persuasiveness." *Id.*

Second, while "*Murphy v. Carron*[, 536 S.W.2d 30, 32 (Mo. banc 1976),] is the standard of review in appeals from denial of a motion to intervene of right," "the application of this standard of review does not transform motions to intervene into substantive trials relative to the merits of intervention." *Allred v. Carnahan*, 372 S.W.3d 477, 482 (Mo. App. 2012). Rather, "it is still motion practice, and the applicable procedure is set forth in Rule 52.12(c)." *Id.* Thus, as "motions to intervene of right are decided on the basis of the motion, the pleadings, [and] argument of counsel," the trial court's "decision is one involving application of the law." *Id.* at 483.

Accordingly, "The trial court's judgment [denying a motion to intervene as of right] will be reversed if it erroneously declares or applies the law." *Id.* at 482 (citation omitted). This Court "review[s] questions of law *de novo*." *Hoit v. Rankin*, 320 S.W.3d 761, 765 (Mo. App. 2010).

I. The trial court did not err in dismissing Appellant's "Petition for Order of Child Custody" or denying her motion to intervene on the ground that she sufficiently alleged a claim of promissory estoppel.

(Response to Appellant's Point I)

In her first Point Relied On, Appellant argues the trial court erred in dismissing her "Petition for Order of Child Custody" and denying her motion to intervene because her allegations in both of those filings were "sufficient to establish a claim for promissory estoppel" (Aplt.Br.6,10).

This point is not preserved for appellate review and therefore is waived. The Court should deny it for this reason alone. A claim of promissory estoppel must specifically be raised below in order to be preserved. At no time below, however, did Appellant raise any claim that she had standing to seek custody of Daughter due to promissory estoppel.

Even if Appellant's Point I somehow were preserved, her argument is without merit. Promissory estoppel is the enforcement of a contractual promise as a matter of equity to avoid injustice. The longstanding law of Missouri is parents cannot contract rights of child custody to others, including to the other parent. Where a parent attempts to execute a contract giving custody rights over her child, that contract is void and unenforceable. Appellant's attempt to invoke "promissory estoppel" to achieve standing to seek custody of Daughter is without merit.

A. Appellant's Point I is not preserved for review, and is waived.

1. Promissory estoppel must specifically be raised below in order to be preserved for appellate review.

"Promissory estoppel is not a favored theory in Missouri courts. Consequently, each element of it must 'clearly appear and be proven by the party seeking its enforcement.'" *Courtney v. Roggy*, 302 S.W.3d 141, 148 (Mo. App. 2009) (quoting *Clevenger v. Oliver Ins. Agency, Inc.*, 237 S.W.3d 588, 590 (Mo. banc 2007)) (internal citation omitted). The four elements of promissory estoppel are:

> (1) a promise; (2) on which a party relies to his or her detriment; (3) in a way the promisor expected or should have expected; and (4) resulting in an injustice that only enforcement of the promise could cure. The promise giving rise to the cause of action must be definite, and the promise must be made in a contractual sense.

Clevenger, 237 S.W.3d at 590.

If promissory estoppel is sought as a cause of action, the plaintiff must specifically state so in her petition and must clearly state all four of its elements. *Zipper v. Health Midwest*, 978 S.W.2d 398, 411 (Mo. App. 1998). If one or more of the four elements do not clearly appear, the claim is not preserved for appeal and is waived. *Id.* at 411-12; *see also Howard Constr. Co. v. Jeff-Cole Quarries, Inc.*, 669 S.W.2d 221, 231 (Mo. App. 1983).

2. For a plaintiff's argument challenging the dismissal of her petition to be preserved, she must have raised it in opposition to the defendant's motion to dismiss.

Even if a claim is stated in a petition, in order to be raised as an argument on appeal as to why the petition should not have be dismissed, it still must be stated in opposition to the defendant's motion to dismiss. *Mayes*, 430 S.W.3d at 266-68. Otherwise, the claim is not preserved and is waived. *Id.*

In *Mayes*, the plaintiffs included in their petition a specific claim that a procedural statute violated several constitutional provisions. 430 S.W.3d at 266-67. When the defendants sought to dismiss the petition for violation of that statute, however, the plaintiffs "failed to raise their constitutional objections" in their suggestions in opposition. *Id.* at 267. As a result, the trial court "did not have the opportunity to consider" those arguments "when ruling on the defendants' motion to dismiss because the plaintiffs neglected to raise them." *Id.*

On appeal, however, the plaintiffs sought to attack the statute's constitutionality. The Supreme Court refused to reach those issues, because they were not preserved for appeal. *Id.* at 268. "By not asserting the claims [from their petition] in their response to the defendants' motion to dismiss, the plaintiffs failed to preserve [them] for appeal …." *Id.* Simply put, "issues not presented to the trial court, even if pleaded in the petition, are not preserved for appellate review." *Id.*

3. For a proposed intervenor's argument challenging the denial of her motion to intervene as of right to be preserved, she must have raised it in the motion to intervene.

Similarly, in order to raise an argument on appeal as to why a motion to intervene as a matter of right under Rule 52.12(a) should not have been denied, it first must have been stated in the motion to intervene as the basis for the alleged right to intervene. *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 129 (Mo. banc 2000). Otherwise, the claim is not preserved for appellate review and is waived. *Id.*

In *Nixon*, the State sued tobacco manufacturers to obtain damages and other relief in connection with the manufacturers' marketing and sales of products in Missouri. *Id.* at 125. A variety of entities and individuals sought to intervene as a matter of right, including the widow of a smoker allegedly killed by the manufacturers' products. *Id.* at 126, 129. The trial court denied intervention. *Id.* at 126. On appeal, the widow argued this was error because a specific statute gave her the right to intervene. *Id.* at 129.

The Supreme Court refused to reach the issue, holding it was not preserved for review. *Id.* The widow had raised the statute's application "for the first time on appeal. Nowhere in her motion to intervene did she argue an unconditional right to intervene based on th[at] statute." *Id.* "An issue that was never presented to or decided by the trial court is not preserved for appellate review." *Id.* Accordingly, the widow's argument was waived. *Id.*

4. Appellant did not raise promissory estoppel below at any time.

Under the above binding authority, Appellant's argument in her first Point Relied On is not preserved for review and is waived. Neither the elements of nor any argument for standing to seek custody of Daughter based on a theory of promissory estoppel "clearly appeared" in any of the only three substantive documents Appellant ever filed before the trial court: her petition (L.F.27-28;Appx.A1-2), her opposition to Mother's motion to dismiss (L.F.74-87;Appx.A26-39), or her motion to intervene (L.F.47-51;Appx.A5-9).

Neither the petition, nor the suggestions in opposition, nor the motion to intervene mentioned a claim for "promissory estoppel" or pled any of that cause's four elements (L.F.27-28,47-51,74-87;Appx.A1-2,5-9,26-39). None pled or argued Mother made Appellant any promise, let alone the required "definite" promise "in a contractual sense." *Clevenger*, 237 S.W.3d at 590. None even used the word "promise." None pled or argued Appellant relied on such a promise to her detriment. None pled or argued any such reliance was in a way Mother expected or should have expected. None pled or argued this resulted in an injustice that only enforcement of the promise can cure.

As a result, Appellant's argument that "promissory estoppel" made dismissal of her petition or denial of her motion to intervene error, raised for the first time on appeal, is not preserved for appeal and is waived. *Zipper*, 978 S.W.2d at 411; *Howard Constr.*, 669 S.W.2d at 231; *Mayes*, 430 S.W.3d at 266-68; *Nixon*, 34 S.W.3d at 129.

B. Even if Appellant's Point I somehow were preserved, the trial court could not have granted her relief due to "promissory estoppel."

The "promise" involved in a claim of "promissory estoppel" must be "a 'promise' in the contractual sense." *Mayer v. King Cola Mid-Am., Inc.*, 660 S.W.2d 746, 749 (Mo. App. 1983). It must be a mutual agreement in which one party agrees to do something (and then does it) in return for the other agreeing to do something. *Id.* It therefore requires "mutuality" of the familiar offer, acceptance, and consideration. *Id.* If such a promise would be unenforceable as an actual contract, however, it cannot become enforceable via promissory estoppel in equity. *Id.*

The law of Missouri is a parent cannot contract away custody of his or her child. "It is widely recognized in the State of Missouri that 'where the object of [a] contract … is to provide for the welfare of a child … no contract of the parties will be binding.'" *Sch. Dist. of Kan. City v. Mo. Bd. of Fund Comm'rs*, 384 S.W.3d 238, 260 (Mo. App. 2012) (quoting *Jenks v. Jenks*, 385 S.W.2d 370, 377 (Mo. App. 1965)). This includes "[e]fforts to contract as to child custody, support, or visitation …" *Id.* (citing *Williams v. Cole*, 590 S.W.2d 908, 911 (Mo. banc 1979)). Such an attempted agreement is "not an enforceable contract at the time of its execution." *Id.* This is "primarily a function of the trial court's obligation to 'protect the best interests' of the *non-party children*" under § 452.375, R.S.Mo., Missouri's well-known child custody statute. *Id.* (quoting *McCreary v. McCreary*, 954 S.W.2d 433, 452 (Mo. App. 1997)) (emphasis in the original).

Indeed, attempts to contract away the custody of children are absolutely barred and nullified by § 453.110.1, R.S.Mo., which provides:

> No person, agency, organization or institution shall surrender custody of a minor child, or transfer the custody of such a child to another … without first having filed a petition before the circuit court sitting as a juvenile court of the county where the child may be, praying that such surrender or transfer may be made, and having obtained such an order from such court approving or ordering transfer of custody ….

"In enacting [this section], the purpose of the legislature was to prohibit the indiscriminate transfer of children, the concept that a parent could pass them on like chattel." *In re S.J.S.*, 134 S.W.3d 673, 676 (Mo. App. 2004) (citing *In re Baby Girl*, 850 S.W.2d 64, 68 (Mo. banc 1993)). It "require[s] that the custody of a child [can]not be transferred at the whim of the individual in charge of the child, but rather the transfer of custody must have the sanction of a court given by order approving such a transfer." *Id.* at 676-77. Otherwise, "all acts" after such an unapproved agreement "regarding custody [are] void from any legal perspective." *Baby Girl*, 850 S.W.2d at 68.

The rule voiding custody contracts, especially to non-parents, long antedates this law. *See, e.g.*, *Weir v. Marley*, 12 S.W. 798, 801 (Mo. banc 1890) (natural parent "cannot, by contract other than such as are provided for by statute, confer upon another … a right to the custody of his minor child"); *Ex parte Ingenbohs*, 158 S.W. 878, 882 (Mo. App. 1913) (same); *Cox v. Carapella*, 246 S.W.3d 513, 516 (Mo. App. 1952); *Sherrill v. Bigler*, 276 S.W.2d 473, 477 (Mo. App. 1955). Even a child's *natural* parents cannot contract for custody between themselves. *Knepper v. Knepper*, 122 S.W. 1117, 1118 (Mo. App. 1909); *Barancik v. Meade*, 106 S.W.3d 582, 588 (Mo. App. 2003).

For this reason, Missouri courts long have rejected promissory estoppel as a permissible theory to give a non-parent standing to seek custody. In *Williams v. Williams*, a child's natural mother died, and the natural father sought a writ of habeas corpus to return the child to his custody from the child's former stepmother, the father's second wife. 205 S.W.2d 949, 950 (Mo. App. 1947). In her return to the petition, the stepmother alleged there was "an oral prenuptial agreement between her and the [father] that the child … should be and remain in their household as their common child, and that [she] had since performed the duties and services of a natural mother to the child with the same affection as if it were her own." *Id.*

This Court held such an agreement could not confer on the stepmother any standing to seek or have custody:

> [T]he petitioner is the natural father of the child, whose custody he seeks. The respondent is not the child's natural mother, but her stepmother. *No mere oral … agreement made by the petitioner to give to or vest in the respondent a valid claim to the legal custody of the petitioner's child as against his claim thereto could be binding on him.*

Id. at 953 (citing *Weir*, 12 S.W. at 798) (emphasis added).

Ultimately, the Court held the stepmother should retain custody because the evidence supported her other ground that the father was unfit and thus he only should have visitation. *Id.* at 342-43. But this echoes the law's present statutory framework for third party custody in § 452.375.5(5), under which a party other a natural parent can seek

custody or visitation only by showing the natural parent is unfit or the child's welfare requires her third-party custody or visitation. *Id.*; *infra* at 25-28.

As in *Williams*, regardless of what promise of custody a natural parent did or did not make to another, that statutory procedure is and always has been the only way a third party can seek custody of a child. A mere oral agreement that a third party can have custody is void and unenforceable in Missouri.

Appellant argues nonetheless that "a claim for estoppel can provide standing in child custody disputes" (Aplt.Br.10). For this proposition, she cites *S.E.M. v. D.M.M.*, 664 S.W.2d 665, 667 (Mo. App. 1984), and *L. v. L.*, 497 S.W.2d 840, 841-42 (Mo. App. 1973) (Aplt.Br.10-11). But neither decision remotely suggests a non-parent can have standing to seek custody via promissory estoppel. Both concerned third parties entering into express written agreements with the natural parent to provide ongoing monetary child support. *S.E.M.*, 664 S.W.2d at 667; *L.*, 497 S.W.2d at 840-42. In each, the Court held that, unlike a contract for custody, a third party's promise to support the child can be enforceable, and when the third party attempted not to pay the support on which the parent had relied, the parent was entitled to enforce the express contract. *S.E.M.*, 664 S.W.2d at 667; *L.*, 497 S.W.2d at 840-42. That has nothing to do with custody.

Children are not chattel. Their parents cannot contract for their custody. If attempted, such a contract is void *ab initio*. Therefore, even if Appellant sufficiently had stated a claim for promissory estoppel, the "contractual promise" she attempts to invoke on appeal would have been unlawful and unenforceable. The trial court could not have granted her any relief on that theory.

II. Neither Appellant's "Petition for Order of Child Custody" nor her motion to intervene stated a sufficient claim for third-party custody under § 452.375.5(5)(a), R.S.Mo., because Appellant, a non-parent, had no ability to intervene in an adoption, and neither her petition nor her intervention pleading made any allegation that Mother or Husband were unfit or that some special circumstance made Daughter's welfare require her custody.

(Response to Appellant's Point II)

Section 452.375.5(5)(a) gives a trial court authority to award "custody, temporary custody, or visitation" of a child to a third party who is not the child's natural parent when the third party shows "each parent is unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires" it, and the court then finds "it is in the best interests of the child" to do so. The third party can do this either by intervening in an action in which custody of the child is at issue, *id.* at (5)(b) – though not one in which custody is *not* at issue, *D.S.K. ex rel. J.J.K. v. D.L.T.*, 428 S.W.3d 655, 658-60 (Mo. App. 2013) – or by filing an independent action for third-party custody. *Id.* (citing *In re T.Q.L.*, 386 S.W.3d 135 (Mo. banc 2012)).

If the third party's basis is that "the welfare of the child requires" her custody, as opposed to parental unfitness, then merely alleging her custody is in the child's best interests is insufficient. *Jones v. Jones*, 10 S.W.3d 528, 536-37 (Mo. App. 1999). This is because "welfare" in the statute does not equate to "best interests." *Id.* Rather, she must plead "a special, or extraordinary, reason or circumstance" that the natural parent cannot alone meet. *K.S.H. ex rel. M.S.H. v. C.K.*, 355 S.W.3d 515, 521 (Mo. App. 2011).

In her second Point Relied On – the only point actually preserved for review – Appellant argues the trial court erred in dismissing her "Petition for Order of Child Custody" and denying her motion to intervene because, in both, she alleged facts "sufficient to establish a claim for third-party custody and/or visitation under" § 452.375.5(5)(a) (Aplt.Br.6,16). She argues this is because she cited that statute and her "pleadings alleged that [Daughter's] welfare required that [Appellant] be granted custody," rather than that Mother or Husband were unfit (Aplt.Br.16-17,19).

Nowhere in her four-page argument, though, does Appellant show specifically where in the record she believes she alleged this. Ultimately, citing no part of the record (in violation of Rule 84.04(e)), Appellant argues she alleged below that she "raised [Daughter] for the first four years of her life as her primary caregiver, with the consent and encouragement of [Mother]. To sever the parent-child bond and deny [her] custody of or visitation with [Daughter] would be detrimental to the child's welfare" (Aplt.Br.19).

Appellant's argument is without merit. At no point in either her petition or the proposed pleading contained in her motion to intervene did Appellant *ever* allege Daughter's "welfare" required Appellant be granted custody for any reason, let alone the allegation stated in her brief (L.F.27-28,47-51;Appx.A1-2,A5-9). Rather, both merely and conclusorily alleged it was in Daughter's "best interests" that Appellant have custody of Daughter (L.F.28,50-51;Appx.A2,A8-9). The law of Missouri is these conclusory allegations were wholly insufficient to state a claim under § 452.375.5(5).

The Court should affirm the trial court's judgment dismissing Appellant's petition and denying intervention.

A. For a third party to state a sufficient claim that "the welfare of the child requires" her custody or visitation, she must specifically allege this and show a "special or extraordinary reason or circumstance" requiring her custody that the natural parent cannot fulfill alone.

As Appellant concedes, the law of Missouri presumes a "parent has a superior right to custody of the child as opposed to the interests of third parties" (Aplt.Br.16) (quoting *In re K.K.M.*, 647 S.W.2d 886, 889 (Mo. App. 1983)). Appellant concedes (Aplt.Br.16) a third party seeking custody of a child only can rebut this presumption by meeting the terms of § 452.375.5(5), which provides:

> (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 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.

As the statute's plain language states, the third party must allege one or both of two things in order to state a sufficient claim under it. She must show either: (1) that

"each parent is unfit, unsuitable, or unable to be a custodian;" or (2) that "the welfare of the child requires" her to have custody or visitation. *Jones*, 10 S.W.3d at 535. "If either the fitness or the welfare basis is shown, the statute then requires the trial court determine whether it is in the best interests of the child to award custody" or visitation to the third party. *Id.* "As such, if the presumption is not rebutted by proof of either the fitness or welfare basis, the question of the child's best interests is never reached." *Id.* at 535-36.

There are two ways in which a third party can initiate such a claim. If custody has not yet been determined, and no present action is pending that will determine custody, the third person can initiate the proceedings herself by stating sufficient allegations to meet § 452.375.5(5)(a). *T.Q.L.*, 386 S.W.3d at 139-40; *D.S.K.*, 428 S.W.3d at 659-60. Conversely, if the custody determination is pending but has not yet been tried, the third party either can be named as a party by one of the existing parties, *Scott v. Scott*, 147 S.W.3d 887, 891 (Mo. App. 2004), or – if the portion of her motion containing the pleading she seeks intervention to file states sufficient allegations to meet § 452.375.5(5)(a) – activates intervention in subsection (b) of the statute. *T.W. ex rel. R.W. v. T.H.*, 393 S.W.3d 144, 150-51 (Mo. App. 2013).

Where the third party "does not plead" the natural parent "was 'unfit, unsuitable, or unable to be a custodian,'" but instead seeks to rely on the "welfare" basis in the statute, the term "welfare" is not "the equivalent of 'best interests.'" *Jones*, 10 S.W.3d at 536. Rather, "under § 452.375.5(5)(a), to rebut the parental presumption of the [natural parent] on the welfare basis, the [third party is] required to plead and prove 'special or

extraordinary circumstances, render[ing] it in [the child's] best interests that [the child's] custody be granted' to" the third party. *Id.* at 537.

Each of the only *three* reported Missouri appellate decisions not involving parental unfitness in which this actually occurred show the independent "special or extraordinary circumstance" specifically pleaded logically must be something the natural parent could not do absent the third party. *See:*

- *K.S.H.*, 355 S.W.3d at 521 (ten-year-old child's welfare required grandmother to have custody where natural father was absent, natural mother failed to provide stable, secure, and emotionally healthy home environment, failed to provide dental care for child resulting in severe dental problems, and was emotionally manipulative, and only grandmother was or ever had been a stable and loving influence in child's life);
- *Scott*, 147 S.W.3d at 895-97 (eight-year-old child's welfare required mother's former same-sex paramour to have custody where paramour was child's exclusive caregiver since age three, the child never had lived with either mother or father since then, child did not want to live with mother, child thought of paramour as his mother, and child had bonded with paramour to such degree that to remove him from paramour's custody would be detrimental to him); and
- *Jones*, 10 S.W.3d at 538-39 (twelve-year-old child's welfare required grandmother to have custody where father refused to give proper attention to child's mental condition, grandmother had cared for child and his mental condition his whole life and had bonded with child, and child considered grandmother to be his mother).

Conversely, where the third party does *not* allege either the unfitness or welfare bases of § 452.375.5(5)(a), she fails to state a claim for relief under that statute. *T.W.*, 393 S.W.3d at 150-151. The claim must be specifically pleaded as a request for third-party custody under the statute, must specifically allege either or both that the natural parents are unfit or that the child's welfare requires custody or visitation in the third party, and must state specific facts to support those allegations. *Id.*; *T.Q.L.*, 386 S.W.3d at 139-40. Making such allegations *outside* the pleadings is insufficient, because "pleadings serve 'the greatest utility in defining issues of a case,'" and, to comply with Rule 55.05's pleading requirements, "[a] party must state the facts entitling her to relief and asking the court for the remedy desired." *T.W.*, 393 S.W.3d at 151 (citation omitted).

Here, neither Appellant's "Petition for Order of Child Custody" nor her motion to intervene stated a sufficient claim for third-party custody under § 452.375.5(5)(a). Appellant's petition did not invoke third-party custody or the statute, did not allege Mother was unfit, and did not allege Daughter's welfare required Appellant's custody or visitation.

As to her motion to intervene, a party other than an established natural parent of a child cannot intervene in an adoption. Regardless, while Appellant's motion to intervene did invoke the third-party custody statute, the pleading contained in it did not allege either that Mother was unfit or that Daughter's welfare required Appellant's custody or visitation.

The trial court properly dismissed Appellant's petition and denied intervention.

B. Appellant, as a party other than Daughter's natural parent, could not intervene in Mother's and Husband's adoption action either to object to the adoption or to state a claim for third-party custody.

While, as explained above, a third party can intervene in an action determining a child's custody if her Rule 52.12(c) intervention pleading properly states a claim for third-party custody under § 452.375.5(5)(a), *T.W.*, 393 S.W.3d at 151, this only applies to actions in which custody is at issue, rather than just parentage. *D.S.K.*, 428 S.W.3d at 658-60. If the action solely will resolve the child's parentage, and not custody, the third party cannot intervene to state a claim for custody because she will neither gain nor lose by direct operation of the judgment. *Id.*

In *D.S.K.*, a husband discovered during a dissolution of marriage that three children he believed had been born of the marriage were, in fact, the product of an extramarital affair the wife had carried on. *Id.* at 656. The wife also filed a paternity action naming both the father and husband as putative fathers. *Id.* at 656-67. When DNA testing confirmed the husband was not the children's natural father, he was dismissed from the paternity action. *Id.* at 657. The husband then sought to intervene in the paternity action as of right to state a claim for third-party custody under § 452.375.5(5)(a), alleging the wife was an unfit parent and, due to his having raised the children as their father from their births, the children's welfare required his third-party custody. *Id.* The trial court denied intervention. *Id.*

This Court affirmed. *Id.* at 658-60. Because the wife had not sought an order determining custody in the paternity action, but only sought a determination of the

children's parentage, custody was not at issue. *Id.* Consequently, the husband's third-party custody request did "not afford him a 'direct claim' upon the subject matter of the paternity action, such that he [would] gain or lose by direct operation of the paternity judgment." *Id.* at 659. The husband only could bring his claim "in a separate action … for third party custody … under Section 452.375.5(5)(a)," an "independent cause of action" instead of via intervention. *Id.* at 659-60 (citing *T.Q.L.*, 386 S.W.3d at 135).

For this same reason, it is well-established that no one other than the natural parent of a child can intervene in the other natural parent's adoption action either to object or request custody. *In re Adoption of H.M.C.*, 11 S.W.3d 81, 90 (Mo. App. 2000). An adoption only determines a child's parentage, not its custody, § 453.090, R.S.Mo. The only parties who must consent to an adoption or who may have a say in it are the natural parents and those who have preexisting custodial rights over the children, such as the child's current adoptive parents. §§ 453.030.3 and 453.060.1, R.S.Mo. As a result, just like the husband in *D.S.K.*, a third party outside this rubric has "no legal rights … which will be directly enlarged or diminished by the adoption of" the child. *H.M.C.*, 11 S.W.3d at 90. Such a third party cannot intervene in an adoption because she has no "immediate or direct claim upon the very subject matter of the action that [she] will either gain or lose by the direct operation of the judgment …." *Id.*

This Court consistently has applied this rule to bar parties outside those specifically denominated as required adoption consenters or participants in §§ 453.030.3 and 453.060.1 from intervening in an adoption for any reason, including to state a claim for their own custody. *See, e.g.*, *H.M.C.*, 11 S.W.3d at 91 (child's paternal grandparents

had no right to intervene in adoption by couple after termination of natural father's parental rights); *In re D.M.H.*, 516 S.W.2d 785, 787-88 (Mo. App. 1974) (man who claimed to be father had no right to intervene in stepparent adoption by mother and new husband); *cf. Kambitch v. Ederle*, 642 S.W.2d 690, 691 (Mo. App. 1982) (natural father was permitted to intervene in stepparent adoption by mother and new husband).

As a result, Appellant had no right to intervene in Mother's and Husband's adoption action. The adoption was determining Daughter's parentage, not her custody. Appellant was neither a required consenter nor a required participant under §§ 453.030.3 and 453.060.1. Like the man claiming to be the father in *D.M.H.*, the not-the-father husband in *D.S.K.*, and the grandparents in *H.M.C.*, Appellant had "no legal rights … which [would] be directly enlarged or diminished by the adoption of" Daughter. *H.M.C.*, 11 S.W.3d at 90.

Therefore, under Rule 52.12(a), Appellant had no right to intervene in the adoption, as she had no "immediate or direct claim upon the very subject matter of the action that [she] will either gain or lose by the direct operation of the judgment …." *Id.* Even a cause of action for third-party custody under § 452.375.5(5)(a) could not provide such a claim. *D.S.K.*, 428 S.W.3d at 658-60. Appellant had to bring that cause of action, if at all, independently. *Id.* For this reason alone, the Court should affirm the trial court's judgment denying her motion to intervene.

C. Neither Appellant's "Petition for Order of Child Custody" nor her Rule 52.12(c) intervention pleading stated a sufficient claim that "the welfare of the child requires" her third-party custody.

Even if Appellant had standing to request to intervene in the adoption, neither her motion to intervene nor her "Petition for Order of Child Custody" stated a sufficient claim for third-party custody under § 452.375.5(5)(a).

Appellant expressly bases her argument on the statute's "welfare" basis, not "unfitness" (Aplt.Br.19). She argues she alleged facts "sufficient to establish a claim for third-party custody and/or visitation under" § 452.375.5(5) because she cited that statute and her "pleadings alleged [Daughter's] welfare required [Appellant] be granted custody" (Aplt.Br.6,16-17,19). She argues this because she alleged she "raised [Daughter] for the first four years of her life as her primary caregiver, with the consent and encouragement of [Mother]," and that "[t]o sever the parent-child bond and deny [Appellant] custody of or visitation with [Daughter] would be detrimental to the child's welfare" (Aplt.Br.19).

Appellant's argument is without merit. Her two-page petition did not state any claim for third-party custody (L.F.27-28;Appx.A1-2). It neither cited § 452.375.5(5) nor mentioned "third-party custody." It did not allege Daughter's welfare required Appellant's third-party custody. It did not mention "welfare." It did not mention "special circumstances." It *certainly* did not allege Appellant "raised [Daughter] for the first four years of her life as her primary caregiver, with the consent and encouragement of [Mother]," or that "[t]o sever the parent-child bond and deny [Appellant] custody of or visitation with [Daughter] would be detrimental to the child's welfare" (Aplt.Br.19).

Rather, *all* Appellant's petition *actually* said with regard to the propriety of custody is this single vague legal conclusion: "Pursuant to § 452.375 R.S.Mo., it is in the best interests of [Daughter] that [Appellant] and [Mother] be awarded joint physical and legal custody" (L.F.28;Appx.A2). But

> "legal conclusions cannot be pleaded as ultimate facts." "Missouri rules of civil procedure demand more than mere conclusions that the pleader alleges without supporting facts." A conclusion must be supported by factual allegations that provide the basis for that conclusion, that is, "facts that demonstrate how or why" the conclusion is reached."

Jordan v. Peet, 409 S.W.2d 553, 560 (Mo. App. 2013) (all citations omitted).

Even outside that deficiency, Appellant's invocation of "best interests" is patently insufficient to state a claim that "the welfare of the child requires" third-party custody under § 452.375.5(5)(a). "Best interests" do not equal "welfare." *Jones*, 10 S.W.3d at 536-37. Appellant had to allege *specific facts, not conclusions*, evincing "a special, or extraordinary, reason or circumstance" that Mother cannot alone meet and instead requires Appellant's custody or visitation. *K.S.H.*, 355 S.W.3d at 521; *T.Q.L.*, 386 S.W.3d at 139-40; *Scott*, 147 S.W.3d at 895-97; *Jones*, 10 S.W.3d at 538-39.

She did not. As a result, her petition failed to state a cause of action and had to be dismissed. *T.W.*, 393 S.W.3d at 150-151.

Appellant's motion to intervene in the adoption, while legally impermissible, *supra* at 29-31, nonetheless still also failed to state a sufficient claim under § 452.375.5(5)(a) that "the welfare of the child requires" her third-party custody. Under

Rule 52.12(c), a motion to intervene must include a proposed "pleading setting forth the claim or defense for which intervention is sought." *Id.* Just like an ordinary petition, the intervention pleading is sufficient only if it "contain[s] a short and plain statement of the facts showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims she is entitled." *T.W.*, 393 S.W.3d at 151.

Here, Appellant included her pleading, which she titled "Petition for Joint Custody," in the body of her motion to intervene (L.F.50-51;Appx.A8-9). Just as in her petition, though, besides actually citing § 452.375.5(5) in the heading of her motion (L.F.47;Appx.A5), her intervention pleading did not state a sufficient claim for third-party custody. Rather, after merely averring Appellant was a "joint care-giver" of Daughter and Daughter's "primary caregiver" in 2008 and 2009, *two years* before the proceedings below even were filed, *all* Appellant's intervention pleading *actually* said as to the propriety of custody was the same vague legal conclusion as her prior petition: "Pursuant to R.S.Mo. sec. 452.375, it is in the best interest of [Daughter] to be in the joint physical and legal custody of [Mother] and [Appellant]" (L.F.51;Appx.A9).

This is insufficient to state a claim that "the welfare of the child requires" third-party custody under § 452.375.5(5)(a). *Supra* at 25-28. Even if Appellant somehow even had standing to request to intervene in Mother's and Husband's adoption action, her Rule 52.12(c) intervention pleading failed to state a cause of action and had to be denied. *T.W.*, 393 S.W.3d at 150-151.

III. The trial court did not err in dismissing Appellant's "Petition for Order of Child Custody" or denying her motion to intervene on the ground that she sufficiently alleged she was Daughter's "equitable parent or de facto parent."

(Response to Appellant's Point III)

In her third Point Relied On, Appellant argues the trial court erred in dismissing both her "Petition for Order of Child Custody" and her motion to intervene because her allegations in both of those filings were "sufficient to establish [her] status as equitable parent or de facto parent" of Daughter (Aplt.Br.7,20).

This point is not preserved for appellate review and therefore is waived. The Court should deny it for this reason alone. At no time did Appellant raise any claim below that she was Daughter's "equitable parent" or "de facto parent."

Even if Appellant had preserved this argument, however, it would be without merit. Stating allegations sufficient to claim she was Daughter's "equitable parent" or "de facto parent" as defined in other states' laws would not have been sufficient to avoid dismissal of her "Petition for Order of Child Custody" denial of intervention. The binding law of Missouri, echoing numerous other states, does not recognize the status of "equitable parent" or "de facto parent." Even if Appellant had alleged she was Daughter's "equitable parent" or "de facto parent" as defined in the law of Massachusetts, New Jersey, Pennsylvania, Washington, Nebraska, Maine, or Wisconsin, this means nothing in Missouri.

A. Appellant's Point III is not preserved for review, and is waived.

Mother and Husband explained, *supra* at 16, that, for a plaintiff's argument challenging the dismissal of her petition to be preserved, she must have raised it in opposition to the defendant's motion to dismiss. They also explained that, for a proposed intervenor's argument challenging the denial of her motion to intervene as of right to be preserved, she must have raised it in the motion to intervene. *Supra* at 17. They incorporate those detailed explanations here.

Appellant's third point is unpreserved – and waived – for the same reason as her first point. Because, in the only three substantive filings she made before the trial court, she did not specifically argue her petition or motion to intervene were viable because she somehow was Daughter's "equitable parent" or "de facto parent," she cannot argue this for the first time on appeal.

Neither the terms "equitable parent" nor "de facto parent" appeared in Appellant's petition (L.F.27-28;Appx.A1-2), her opposition to Mother's motion to dismiss (L.F.47-51;Appx.A5-9), or her motion to intervene (L.F.74-87;Appx.A26-39). None claimed she was Daughter's "equitable parent" or "de facto parent." None even stated the supposed four elements of such a status that Appellant invokes from another state's law (Aplt.Br.25). Her opposition to Mother's motion to dismiss her petition did not argue that her supposed status as an "equitable parent" or "de facto parent" was a reason the petition should not be dismissed. As a result, her argument raised for the first time on appeal that this made dismissal of her petition or denial of intervention error is not preserved and is waived. *Mayes*, 430 S.W.3d at 266-68; *Nixon*, 34 S.W.3d at 129.

Tellingly, besides baldly claiming in her third point itself that "the allegations in the Petition along with the other non-contested facts accepted as true at the time the motion to dismiss was argued are sufficient to establish [her] status as an equitable parent and/or de facto parent" (Aplt.Br.7,20), nowhere in her argument (Aplt.Br.20-26) does Appellant explain how either her petition or her motion to intervene alleged this at all. Indeed, like her argument does not cite the record at all, in violation of Rule 84.04(e).

Appellant did not state any claim before the trial court that she was Daughter's "equitable parent" or "de facto parent." By failing to do so, her third Point Relied On is not preserved, is waived, and the Court should not reach it.

B. Even if Appellant's Point III somehow were preserved, the trial court could not have granted her relief on the basis of being an "equitable parent" or "de facto parent."

Citing cases from seven other states that apparently allow non-parents of children standing to seek custody as the child's "equitable parent" or "de facto parent," Appellant argues "Missouri courts have a history of recognizing the rights and obligations of intended parents," and "the time has come for Missouri courts to follow" those other states (Aplt.Br.20-25). She concedes, though, that this Court and the Supreme Court of Missouri previously have "declined to adopt equitable parent and/or de facto parent theory as a basis for establishing standing" to seek custody of a child (Aplt.Br.20).

Appellant's argument is without merit. This Court and the Supreme Court have not merely "declined" to adopt these theories from other states so as to give non-parents

standing to seek custody of children without proceeding as an authorized claim for third-party custody under § 452.375.5(5)(a). Rather, they have *refused* to do so.

And rightly so. Custody of a child is governed by statute, principally § 452.375, which treats the right to seek custody of a child the same for all non-parent Missourians, regardless of race, gender, marital status, or even sexual orientation. *Infra* at 40 and 49-53. As the General Assembly has not enacted any changes to our custody law affecting the rights of non-parents since the time of any of the recent decisions Appellant disparages, the foreign doctrines she invokes have no more merit in Missouri today than the last three times Missouri courts rejected them in 2009, 2004, or 1998.

As this Court observed when it last rejected them only five years ago:

> We are unaware of any Missouri appellate court decision adopting the concept or theory of an "equitable parent." In *Cotton v. Wise*, 977 S.W.2d 263 (Mo. banc 1998), the Missouri Supreme Court briefly discussed the "equitable parent" theory. It noted that "[w]hile the phrase sounds like a doctrine, its meaning and application are not well fixed nor widely accepted. No reported Missouri case has adopted the theory." *Id.* at 264. The Eastern District of this Court similarly declared that "Missouri has not adopted the 'equitable parent' theory." *Jefferson v. Jefferson*, 137 S.W.3d 510, 513 (Mo. App. 2004) (citing *Cotton*, 977 S.W.2d at 264). *Jefferson* went on to state that our Supreme Court refused "to recognize the 'equitable parent' theory in *Cotton*," and "our legislature has not chosen to enact legislation codifying this theory." *Jefferson*, 137 S.W.3d at 514.

> Nevertheless, [the appellant] asks us to adopt the equitable parent theory here. While we do not read *Cotton* as "refusing" to adopt the equitable parent theory, as *Jefferson* suggests, but merely finding it unnecessary to do so in that case, we are still confronted with the fact that *Cotton* did not adopt the theory in a case where doing so would have permitted it to affirm the trial court's decision without need for reversal and remand. Moreover, we are not unmindful of the fact that *Jefferson* was authored by Judge Mary R. Russell, who is now a judge of the Missouri Supreme Court. Accordingly, even if we were inclined to accept [the appellant]'s invitation, we would not feel entirely confident that our decision conforms with the most recent decisional authority of the Missouri Supreme Court. *See Schumann v. Missouri Highway & Transp. Comm'n*, 912 S.W.2d 548, 551 (Mo.App. W.D.1995); Mo. Const. art. V, § 2 (1945).

White v. White, 293 S.W.3d 1, 15 n.8 (Mo. App. 2009).

There is good reason for this restraint. As the Supreme Court noted when rejecting "equitable parentage," "[u]nless a statutory scheme is plainly inadequate under the circumstances where a court has a duty to act, there is no reason for a court to fashion a 'better' remedy than exists in the statutes." *Cotton*, 977 S.W.2d at 264.

Appellant makes no showing how Missouri's statutory child custody rubric, particularly § 452.375, is inadequate. She seems to insinuate it treats a natural parent's former homosexual non-parent paramour differently – and worse – than one from a heterosexual relationship. But the recent Missouri case law bears out exactly the

converse. Rather, regardless of a natural parent's former non-parent paramour's sexual orientation, such a person who claims a right to custody of a child is a third party and must proceed in an authorized claim for third-party custody under § 452.375.5(5)(a), as Appellant attempted to do (though without merit, *supra* at 32-34). If the person can meet the terms of the statute, he or she can seek to gain custody or visitation of the child he or she did not give birth to or father.

For example, in *Scott*, 147 S.W.3d at 895-97, this Court held it was appropriate for the child's mother's former homosexual non-parent paramour to receive *sole* custody, because she sufficiently pleaded and proved her claim under § 452.375.5(5)(a) that the child's welfare required it. These same statutory requirements apply to a man who is the natural mother's former heterosexual non-parent paramour. *T.Q.L.*, 386 S.W.3d at 139-40. They apply even when the third party was *legally married* to the natural parent, *In re B.W.D.*, 725 S.W.2d 138, 139 (Mo. App. 1987) (child's former stepmother), or even is *still* married to the natural parent. *D.S.K.*, 428 S.W.3d at 658-60 (husband who erroneously believed he was natural father). Missouri's third-party custody rubric treats all third parties equally, regardless of race, gender, marital status, or sexual orientation.

The fact is Appellant *could have had* standing to seek third-party custody of Daughter under § 452.375.5(5) had she been able to allege sufficient facts to meet its requirements. That she did not (and could not) do so does not equate to the statute itself being inadequate. To hold otherwise would allow, say, the State in a criminal case to argue that, because it could not indict on one of the required elements of the crime, the

case should be allowed to proceed anyway because *the statute* was inadequate to do what the State desired. Obviously, that would be lawless.

Simply put, in our state, our General Assembly has seen fit to prescribe that, regardless of whether he or she is male, female, married, unmarried, heterosexual, or homosexual, to have standing to seek custody of a child, any person who is not a child's natural parent must state sufficient allegations to show either that the natural parent is unfit or that the child's welfare requires the third party's custody. § 452.375.5(5)(a). As the recent cases above show, the statute has proven itself applicable to a plethora of different types of third-party custodians, including the former homosexual non-parent paramour in *Scott*. Appellant simply failed to meet its terms. The law of Missouri is Appellant is *not* Daughter's natural parent, and she *failed* to state a sufficient claim for third-party custody under § 452.375.5(5)(a). As with the hypothetical about the State, above, the law failed Appellant's aims, but the law itself is not a failure.

Appellant's appeal to "inevitability" – i.e., "the time has come" (Aplt.Br.20,25) – is equally meritless. The Supreme Court of Vermont, hardly an unreceptive forum for "LGBT" issue advocacy, *see, e.g., Baker v. State*, 744 A.2d 864, 886-89 (Vt. 1999) (requiring Vermont to create "civil unions" for same-sex couples), addressed that notion only four months ago while rejecting "equitable parent" and "de facto parent" as viable doctrines under the law of Vermont:

> The dissent repeatedly states that we depart from the modern trend toward judicially created de facto parenthood, but such a "trend" is not universally acknowledged. Even commentators advocating for the establishment or

> expansion of de facto parenthood recognize that courts around the country, including in recent decisions, are divided – indeed splintered – on this issue. … Several courts … have declined to judicially adopt de facto parenthood.

Moreau v. Sylvester, 2014 WL 1328176 at *6 n.13 (Vt. Apr. 4, 2014) (citing seven states' recent decisions, including *White*, which rejected these doctrines, along with two law review articles sympathetic to "de facto" or "equitable" parent status acknowledging nationwide splintering on this issue).

Ultimately, the Vermont court in *Moreau* joined this Court in *White* – and the Eastern District in *Jefferson* and the Supreme Court in *Cotton* – to hold it could not authorize "judicial invention of de facto parentage rights … where the Legislature has so far declined to extend it." 2014 WL 1328176 at *6. Appellant presents no reason for this Court to deviate from this well-established rule now. Moreover, as it held in *White*, the Court should decline to do so because to accept Appellant's invitation would fail to "confor[m] with the most recent decisional authority of the Missouri Supreme Court," in violation of Mo. Const. art. V, § 2. 293 S.W.3d at 15 n.8.

Appellant's argument belongs before the General Assembly, not this Court.

IV. The trial court did not err in dismissing Appellant's "Petition for Order of Child Custody" or denying her motion to intervene on the ground that doing so would violate "the Equal Protection and Due Process clauses of the United States and Missouri Constitutions."

(Response to Appellant's Point IV)

Additional Standard of Review

A statute's constitutionality is reviewed *de novo*. *State v. Wade*, 421 S.W.3d 429, 432 (Mo. banc 2013). "'Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision.' 'The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations.'" *Id.* (citations omitted). "'[I]f it is at all feasible to do so, statutes must be interpreted to be consistent with the constitutions.'" *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012) (citation omitted).

* * *

In her fourth point, Appellant argues the trial court's dismissal of her "Petition for Order of Child Custody" and denial of intervention "violat[ed her] rights under the Equal Protection and Due Process clauses of the United States and Missouri Constitutions" (Aplt.Br.7,26). She purports to "challeng[e] the unconstitutionality of Missouri law" she insists "excludes same-sex unmarried persons from having the right to maintain a relationship with their children to whom they are not biologically related" (Aplt.Br.27).

This point is not preserved for review. The Court should refuse to reach it. To raise a constitutional challenge, a party must do so at the first available opportunity and

preserve that challenge throughout the proceedings below. If not, the issue is waived. At no point below did Appellant ever raise any constitutional issue of any kind at any time. Her fourth point is waived.

Even if Appellant's fourth point somehow were preserved, it presents nothing for review. Appellant claims to be challenging "the unconstitutionality of Missouri law that excludes same-sex unmarried persons from having the right to maintain a relationship with their children to whom they are not biologically related" (Aplt.Br. 27), but never specifies exactly what law she is challenging on these grounds. She never says how any specific law denies "same-sex unmarried persons" Due Process or fails to afford them protection equal to "opposite-sex unmarried persons." Is she challenging the requirements for third-party custody in § 452.375.5(5)(a)? The prohibition on private contracts for child custody in § 453.110.1? The limitations on compelled or allowed parties in adoption actions in §§ 453.030.3 and 453.060.1? Appellant never says.

This is likely because, even if her point both were preserved and presented a real constitutional challenge to any of these statutes, it is facially apparent that *all* of those statutes treat all non-parent third parties *absolutely* equally, without regard to their gender, marital status, or even sexual orientation. All of a child's natural parent's former non-parent paramours, heterosexual or homosexual, have standing to seek third-party custody if they can meet the terms of § 452.375.5(5)(a), which provides all the process due. None has the right to intervene in an adoption. Like everyone else in Missouri, none has the ability to enter into private contracts for custody of a child. There is no Equal Protection violation, and Due Process is satisfied.

A. Appellant's Point IV is not preserved for review, and is waived.

It is well-established that,

> To raise a constitutional challenge properly, "[a] party must: (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review."

Mayes, 430 S.W.3d at 266 (citation omitted).

These "requirements … are in place 'to permit the trial court an opportunity to fairly identify and rule on the issue.'" *Id.* at 267 (citation omitted). Failure to meet them "constitutes a waiver of the objection." *Id.* This is especially true for arguments that a statute is unconstitutional: "'An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought … *on appeal*.'" *Id.* at 268 (citation omitted) (emphasis added).

Appellant's constitutional challenge in her Point IV fails these requirements. At no point in any of the only three substantive documents she filed below did she *ever* raise a constitutional issue of any kind (L.F.27-28,47-51,74-87;Appx.A1-2,A5-9,A26-39). There was no mention of or citation to any constitutional provision, let alone "explicit reference to the article and section or … quotation of the provision itself." *Mayes*, 430 S.W.3d at 266. Appellant never even used the terms "Equal Protection" or "Due

Process." She certainly did not state any "facts showing" a constitutional violation or "preserve the constitutional question throughout" the proceedings below "for appellate review." *Id.*

Simply put, Appellant did not give "'the trial court an opportunity to fairly identify and rule on'" her constitutional objection. *Id.* at 267 (citation omitted). As a result, the law of Missouri is she "waive[d] the objection." *Id.* Appellant's argument now is an impermissible "afterthought … on appeal.'" *Id.* at 268 (emphasis added). The Court should refuse to reach it.

Even in her brief, Appellant refers to "the Due Process and Equal Protection clauses of the United States and Missouri Constitutions," but never cites or quotes these provisions. One assumes Appellant refers to U.S. Const. Amend. XIV, § 1, and Mo. Const. art. I, §§ 2 and 10. No reported Missouri decision suggests, though, that the familiarity of a well-known constitutional provision obviates the need to cite or quote it. Indeed, the Supreme Court has denied a point on appeal for this deficiency in a brief alone. *See J.A.D. v. F.J.D.*, 978 S.W.2d 336, 339 (Mo. banc 1998). The Court should do so here.

B. Appellant's Point IV is an abstract statement of law presenting nothing for review.

Rule 84.04(d)(1)(B) requires that, in a Point Relied On, after identifying the trial court's challenged ruling, the appellant must "state concisely the legal reasons for the appellant's claim of reversible error." The appellant's argument section following the point must "substantially follow" it and be "limited" to it. Rule 84.04(e).

An allegation of constitutional error on appeal that merely states the lower court's action was "in violation of appellant's rights to due process of law and equal protection of the law as guaranteed by both the Missouri and United States Constitutions," without specifying any particular laws whose application allegedly is unconstitutional, fails these guidelines. *Hilke v. Firemen's Ret. Sys. of St. Louis*, 441 S.W.2d 730, 733 (Mo. App. 1969). It fails to "say how or in what manner [the appellant's] constitutional rights were denied …." *Id.* As a result, "it presents nothing for review." *Id.*

Such a point is merely an "abstract statement" of law and must be denied. *Id.* (denying point because it failed to say what law was being unconstitutionally applied or how); *see also Blue Ridge Bank v. State Banking Bd.*, 509 S.W.2d 763, 766 (Mo. App. 1974) (same); *Cribbs v. Keystone Am. Serv. Corp.*, 572 S.W.2d 637, 638 (Mo. App. 1978) (same).

> Such deficiencies command the point be denied because they
>
> force the appellate court to search the argument portion of the brief or the record itself to determine and clarify the appellant's assertions, thereby wasting judicial resources, and, worse yet, creat[e] the danger that the appellate court will interpret the appellant's contention differently than the appellant intended or his opponent understood.

In re S.I.G., 26 S.W.3d 616, 619 (Mo. App. 2000).

Appellant's fourth point argues the trial court's dismissal of her "Petition for Order of Child Custody" and denial of intervention "violat[ed her] rights under the Equal Protection and Due Process clauses of the United States and Missouri Constitutions"

(Aplt.Br.7,26). She says she "challenges the unconstitutionality of Missouri law" that "excludes same-sex unmarried persons from having the right to maintain a relationship with their children to whom they are not biologically related" (Aplt.Br.27).

Nowhere either in her Point Relied On or in the argument following it, however, does Appellant actually cite any such law she believes is being unconstitutionally applied to her. She attacks this Court's prior decision in *White*, 293 S.W.3d at 1. But *White* concerned a variety of statutes. *Id.* at 9-11 and 15-18. Appellant does not state which, if any, of these statutes are being applied to her unconstitutionally, or how so. Indeed, Appellant's fourth point does not cite any Missouri statutes or other laws *at all*.

As a result, the law of Missouri is Appellant's Point IV violates Rule 84.04(d) and (e) and fails to present anything for review. It fails to "say how or in what manner [her] constitutional rights were denied," and thus "presents nothing for review." *Hilke*, 441 S.W.2d at 733. It is merely an "abstract statement" of law, and for this reason alone must be denied. *Id.*

C. Appellant's Point IV is impermissibly multifarious.

A Point Relied On must only allege one legal reason for a claim of error. Rule 84.04(d)(1)(B). A point that alleges more than one legal basis is multifarious, presents nothing for review, and should be denied. *Ayler v. Dir. of Revenue*, 2014 WL 4065092 at *4 (Mo. App. slip op. Aug. 19, 2014) (allegation of error under two "distinct and different analytical frameworks" was impermissibly multifarious). Because Due Process and Equal Protection have different analytical frameworks and standards, a single point

claiming both Due Process and Equal Protection violations is impermissibly multifarious. *In the Matter of Waldron*, 910 S.W.2d 837, 839 (Mo. App. 1995).

As Appellant's Point IV alleges both Equal Protection and Due Process violations, it fails in this regard, too. *Id.* The Court should deny it for this reason as well.

D. Even if Appellant's Point IV were preserved and presented anything for review, there can be no Equal Protection or Due Process violation because Missouri's third-party custody process treats all non-parents the same and provides all the process due them.

Appellant entirely bases her Equal Protection and Due Process claims on the notion that "Missouri law" "excludes same-sex unmarried persons," presumably as opposed to heterosexual or married persons, seeking "to maintain a relationship" endorsed by law with "children to whom they are not biologically related" (Aplt.Br.27).

Appellant argues some unnamed Missouri law "completely bar[s] same-sex couples from any protections for their parent-child relationships" (Aplt.Br.27). She says that law "tells same-sex couples, and their children, that their relationships are 'less worthy' than the relationships of different sex couples" and "exclude[s] same-sex couples and their children from protections" (Aplt.Br.27,29). She argues this is akin to *United States v. Windsor*, 133 S.Ct. 2675 (2013), in which the U.S. Supreme Court struck down a federal law defining marriage as "the union of one man and one woman," despite states' own definitions allowing for same-sex marriages (Aplt.Br.27-28).

Even if Appellant had preserved this argument, it would be without merit. Before getting to levels of scrutiny, a person claiming an Equal Protection violation first must be

able to show she "has been intentionally treated differently from others similarly situated …." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The cardinal problem with Appellant's fuzzy argument is that the law of Missouri treats *all* persons seeking "to maintain a relationship" with "children to whom they are not biologically related" *exactly the same*, regardless of gender, "same-sex" orientation or "different sex" orientation, or whether they are or were lawfully married to the child's natural parent.

Missouri provides all such people the same mechanism for to seek custody of a child: an action for third-party custody under § 452.375.5(5)(a). *Supra* at 40. This Court and the Supreme Court have applied this procedure to a variety of people claiming parental rights over children to whom they did not give birth or did not father, and has allowed them all, male and female, married and unmarried, heterosexual and homosexual, to attempt to state such a claim. *Supra* at 40.

Appellant failed her burden to state a submissible claim for third-party custody. But Appellant wants *more*. She wants this Court to hold she *is* Daughter's "parent," Missouri's uniformly applied third-party custody statute be damned (Aplt.Br.31) (claiming the hitherto unknown status of a "same-sex non-biological parent"). Appellant fails to understand that, even accepting her perfunctory allegations in her petition and intervention pleading as true, she *is not* Daughter's "parent," just as the former homosexual paramour in *Scott*, the former heterosexual paramour in *T.Q.L.*, the former stepmother in *B.W.D.*, and the non-father husband in *D.S.K.* were not the subject children's "parents," and had to proceed under the third-party custody statute.

This has nothing to do with Appellant's sexual orientation, gender, or marital status. Regardless of what her alleged relationship with Mother was, Appellant neither gave birth to Daughter nor fathered Daughter. As a result, Appellant is not, cannot be, and never will be Daughter's "natural parent."

If anything, it is Appellant's requested conclusion that would violate *Mother's* right to Due Process under U.S. Const. Amend. XIV, § 1, and Mo. Const. art. I, § 10. Appellant desires the extra-statutory ability to seek Daughter's custody based solely on her supposed "emotional bonds" to Daughter (Aplt.Br.32), never pleaded below. In *Troxel v. Granville*, 530 U.S. 57, 66-67 (2000), the U.S. Supreme Court held this is insufficient to compel third-party custody even where a statute allowed it, *striking down* the statute as violating the child's *natural* parent's Due Process rights.

In *Troxel*, two children's paternal grandparents who had helped raise the children used a Washington statute, over the natural mother's objection, to obtain an order granting them visitation of the children after the parents separated and the natural father died. *Id.* at 60-61. Just like what Appellant wants this Court to compel, the statute allowed "'[a]ny person [to] petition the court for visitation rights at any time,'" and allowed "the court [to] grant such visitation rights whenever 'visitation may serve the best interest of the child." *Id.* at 67 (emphasis removed).

While cognizant it was "difficult to speak of an average American family," and "[t]he composition of families varies greatly from household to household," the U.S. Supreme Court struck down the statute. *Id.* at 63-70. It held "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions

concerning the care, custody, and control of their children," and the statute "unconstitutionally infring[ed] on that fundamental parental right." *Id.* at 66-67.

That is, the statute impermissibly "permit[ted] any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review," and allowed "a parent's decision that visitation would not be in the child's best interest [to be] accorded no deference." *Id.* at 67. What Washington could not do was "disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Id.*

But that is exactly what Appellant wants. Indeed, she wants *more* than the visitation the non-parents in *Troxel* unconstitutionally had received. She wants *joint custody* of Daughter. If the non-parents in *Troxel* had no right to seek visitation (of children to whom, at the very least, they were biologically related), the non-parent here (who concedes she has no biological relationship) certainly has no right to seek custody.

By expressly preconditioning third-party standing to seek custody or visitation on showing the "unfitness" of the parent, Missouri's third-party custody statute, § 452.375.5(5)(a), takes into account the U.S. Supreme Court's concerns in *Troxel*. It seeks to ensure no third-party, such as Appellant, will infringe on Mother's own fundamental constitutional rights absent a showing of unfitness.

Even § 452.375.5(5)(a) has been called into question as being "too broad" to satisfy *Troxel*, however, because it also allows a "welfare" basis for third-party custody – the basis on which Appellant relies (Aplt.Br.18-19) when the parent nonetheless is fit.

See Young v. Young, 59 S.W.3d 23, 27-28 (Mo. App. 2001); *Noakes v. Noakes*, 168 S.W.3d 589, 595 (Mo. App. 2005); *T.W.*, 393 S.W.3d at 150 n.3.

Mother and Husband agree. As Appellant concedes Mother is fit (Aplt.Br.19), if the Court somehow were to hold Appellant nonetheless has or can state a claim as to Daughter's custody anyway merely under § 452.375.5(5)(a)'s "welfare" basis and *without* a showing of unfitness, this would violate Mother's right to Due Process. *Troxel*, 530 U.S. at 67. The Court cannot apply "a statute in a manner that leads to an unconstitutional result." *Bateman v. Platte Cnty.*, 363 S.W.3d 39, 44 (Mo. banc 2012).

Appellant places great weight on *Windsor* and likely will respond that *Windsor* in some way negates *Troxel*. *Windsor*, though, has nothing to do with child custody. The Court in *Windsor* was careful to note its holding was "confined to those lawful marriages" recognized by states that had changed their marriage definition to allow for marriages between persons of the same gender. 133 S.Ct. at 2696. *Windsor* was about whether the federal government had to recognize state-sanctioned same-sex marriages as marriages, not whether states have to give child custody rights to supposed "non-biological parents" when the Court, only thirteen years earlier in *Troxel*, had precluded a right of non-parent visitation.

The law of Missouri treats all third parties equally for custody-seeking purposes. It provides all the process that the U.S. Supreme Court has held is due them – and perhaps unconstitutionally more.

Conclusion

The Court should affirm the trial court's judgment.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2013 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule XLI, and that this brief contains 13,945 words.

/s/Jonathan Sternberg
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Certificate of Service

I hereby certify that, on August 27, 2014, I filed a true and accurate Adobe PDF copy of this 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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