WD76789

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

[redacted] [redacted] and B.N.K,
by and through their next friend, [redacted]
Respondents,

vs.

[redacted]
Respondent,

[redacted]
Appellant,

and [redacted] [redacted] [redacted] and [redacted]
Respondents.

On Appeal from the Circuit Court of Platte County
Honorable Thomas C. Fincham, Associate Circuit Judge
Case No. 13AE-CV01451

BRIEF OF THE APPELLANT

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Preliminary Statement

Three children, now ages twelve, eight, and eight, were born to Wife during her marriage to Husband. Husband, believing the children were biologically his, raised them as his and Wife's own. Years later, when Husband sought dissolution of marriage, Wife revealed the children in fact had been born from her extramarital affair with another man, who by then was deceased. Wife then filed a paternity action against her dead paramour.

After DNA testing indicated Husband was not the children's biological father, the dissolution court refused to determine their custody. Husband then sought to intervene in the paternity action as a matter of right under Rule 52.12(a). He attached a proposed motion for third-party custody under § 452.375.5(5), R.S.Mo., alleging in detail facts showing Wife and the dead paramour were unfit, unsuitable, and unable to be custodians, the welfare of the children required, and it was in the children's best interests, for Husband to have third-party custody, and he was suitable and able to provide an adequate and stable environment. Wife denied the allegations and opposed his third-party claim. The paternity court denied Husband's motion to intervene. Husband appeals.

The court misapplied the law in denying Husband's motion to intervene. Husband had a right to intervene in the paternity action. He showed he had a legal interest in the subject matter of the proceedings, as he stated a sufficient cause of action for third-party custody. He also showed that, in his absence, his ability to protect that interest would be impaired or impeded, and the only other party opposed his interest.

This Court should reverse the trial court's order and remand for proceedings including Husband as an intervenor and allowing him to litigate his third-party claim.

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Jurisdictional Statement

This is an appeal from an order of the Circuit Court of Platte County denying Appellant [redacted]s motion to intervene in a paternity case as a matter of right under Rule 52.12(a). An order denying a motion to intervene as a matter of right is immediately final and appealable. *State ex rel. Reser v. Martin*, 576 S.W.2d 289, 291 (Mo. banc 1978) (following *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524 (1947)).

This case does not involve the validity of a Missouri statute or 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 appellate jurisdiction, and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Platte County. Pursuant to § 477.070, R.S.Mo., venue lies in the Western District.

Statement of Facts

A. Background and Dissolution of Marriage Proceedings

Appellant [redacted] ("Husband") and Respondent [redacted] ("Wife") were married in 1993 in Omaha, Nebraska (Legal File 6, 10-11, 23). They have lived in Platte County, Missouri, since 1998 (L.F. 6, 10). During the marriage, Wife gave birth to three children: [redacted] born in 2001, and twins [redacted] and [redacted] born in 2004 (collectively "the Children") (L.F. 6, 11, 23, 87-88). As Wife later acknowledged, Husband raised the Children as their father from their respective births (L.F. 165). Husband, Wife, and the Children all have the same surname (L.F. 6, 11, 23).

In October 2011, Husband and Wife separated and Wife moved in with her boyfriend (L.F. 6, 10-11, 45-46). On February 14, 2013, Husband filed a petition for dissolution of marriage in the Circuit Court of Platte County (L.F. 5). The case was assigned to the Hon. Thomas Fincham (L.F. 1). At the time, Husband was employed, but Wife was unemployed (L.F. 6, 10-12, 23). Additionally, Wife suffered from polycystic kidney disease, which caused end stage renal disease, and she was on the kidney transplant list (L.F. 11, 23).

In his petition, Husband stated "[t]here were three children born of" his marriage to Wife (L.F. 6). He named the Children as those children and stated their respective birth years and Social Security numbers (L.F. 6). He stated the Children presently resided with him at his and Wife's former address in Platte County, where the family had resided for the five years before the separation (L.F. 6). He requested the court to determine the custody and support of the Children and stated their best interests would be

served by awarding him and Wife joint physical and legal custody under a proposed parenting plan he would file later (L.F. 6).

In her answer, Wife denied these allegations (L.F. 10). Instead, in her counter-petition for dissolution, she stated all three of the Children were "born during the marriage but not of the marriage" (L.F. 11). She alleged Husband "is not the biological father of the minor children and," instead, "[Respondent [redacted] is in fact the biological father of the minor children" (L.F. 11). ([redacted] had died on July 9, 2012 (L.F. 87).) She denied that joint legal and physical custody would be in the Children's best interests (L.F. 10). She stated that, "[c]ontemporaneously" with her answer and counter-petition, she was filing a separate "Petition for Declaration of Paternity of the minor children in the Platte County Circuit Court," and that the Children's "biological father, [[redacted] had "claims to the custody of the minor children" (L.F. 12). Husband replied, denying the Children were not his biological children (L.F. 23).

B. Paternity Proceedings

The same day as Wife's answer, May 1, 2013, she filed a petition for declaration of paternity on behalf of the Children as a separate action in the Circuit Court of Platte County (L.F. 86). That case also was assigned to the Hon. Thomas Fincham, the same trial judge assigned to the parties' pending dissolution action (L.F. 80). Wife named [redacted] (who she admitted was deceased) as the respondent and Husband as a "third-party respondent" (L.F. 86-88).

She also named as "third-party respondents" [redacted] who was [redacted]s surviving widow, [redacted] and [redacted] who were children from a former marriage of [redacted]s, and [redacted]

who was [redacted]s grandmother (L.F. 86-88, 111). She stated that, although she was married to Husband at the time of the Children's respective births, and, thus, Husband was the Children's presumed father, [redacted] was the Children's biological father, as they were conceived through her extramarital sexual intercourse with [redacted] during her marriage to Husband (L.F. 88). She acknowledged Husband would claim rights to legal and physical custody or visitation with the Children (L.F. 88).

Simultaneously, Wife sought and obtained an appointment of a respondent ad litem for [redacted] as well as an appointment of herself as the Children's next friend, (L.F. 90-100). In each of their respective answers, the respondent ad litem, [redacted] and [redacted] denied all the allegations in Wife's paternity petition, stated she had failed to state a claim on which relief could be granted, and sought her petition dismissed (L.F. 101-03, 118-29). In his answer, Husband denied he was not the Children's biological father, denied [redacted] ever had made any custody or visitation claim as to the Children, stated the court did not have personal jurisdiction over any respondent except him, stated Wife had failed to state a claim on which relief could be granted, and also sought Wife's petition dismissed (L.F. 104-07).

Along with his answer, Husband moved the court to dismiss Wife's petition for failure to join a necessary party, to revoke the respondent ad litem's appointment, and to dismiss [redacted] and [redacted] from the case (L.F. 110). He argued that only the personal representative of [redacted]s estate, rather than a respondent ad litem, was a proper substitute party for [redacted] due to his death, and thus Wife had failed to join a necessary party to the action (L.F. 111). As a result, he argued the case should be dismissed, the

respondent ad litem's appointment was improper and should be revoked, and the other third-party respondents should be dismissed because they were not putative fathers (L.F. 112).

Also along with his answer and the above motion, Husband moved for the appointment of a guardian ad litem for the Children (L.F. 114-17). He argued he had acted as the Children's father in every respect since their births, it was not in the Children's best interests for a deceased person who never had a relationship with any of them to be declared their father to Husband's exclusion, and thus the Children's best interests conflicted with Wife's desires (L.F. 115). He argued this warranted appointment of a guardian ad litem (L.F. 115). He moved the same in the dissolution action (L.F. 32-35).

In the meantime, Wife moved the dissolution court to require Husband to participate in paternity testing as to the Children (L.F. 15-16). Husband opposed the motion, arguing it would be procedurally unsound, as he had not yet been served with the paternity petition, paternity was a separate action, paternity testing was only available in that separate action, and, regardless, [redacted] would have to be tested, too (L.F. 27-29). Over this objection, on May 21, 2013, the court ordered Husband to undergo DNA paternity testing within 30 days (L.F. 31).

At some point between May 21 and July 8, 2013, Husband underwent the DNA testing, the results of which showed he was not the Children's biological father (L.F. 131, 155).

C. Proceedings After DNA Testing

Husband responded to the revelation from the DNA testing in several ways in both the dissolution and paternity actions.

First, in the dissolution action, he sought temporary third-party visitation (L.F. 39). He argued he had been the only father the Children ever had known, he had been the Children's primary parent, and he had a substantial and continuing relationship with the Children (L.F. 41). He restated that [redacted] was deceased (L.F. 41). Finally, he recounted that Wife was allowing him alternate weekend parenting time with the Children on a voluntary basis but that, as there was no court order to that effect, she could discontinue this anytime she desired (L.F. 41). As a result, invoking § 452.375.5(5)(a), R.S.Mo., Husband argued the Children's welfare required, and it was in their best interests, that he be awarded temporary visitation with the Children (L.F. 41).

Second, also in the dissolution action, Husband moved the court to investigate the custodial arrangements of the Children and appoint a neutral therapist for them (L.F. 45-49). He again argued he had acted as the Children's father in every respect since their births, especially since he and Wife separated in October 2011 (L.F. 45-46). He argued Wife had allowed and encouraged him to be the Children's primary caretaker, despite the fact she now was insisting she always knew he was not the Children's biological father, and thus she wilfully and voluntarily had created the parent-child bond between him and the Children (L.F. 46).

He also explained that, after the October 2011 separation, Wife unilaterally and substantially had decreased his parenting time with the Children (L.F. 46). Similarly, he

explained that Wife unilaterally had directed the Children into therapy, refused to give him the name or contact information of the therapist, and he was concerned the therapy had a goal of undermining his relationship with the Children (L.F. 46-47). As a result, he asked the court to investigate the Children's custodial arrangements and appoint its own therapist for the Children (L.F. 47-48).

Third, also in the dissolution action, Husband moved for leave to file a first amended petition for dissolution (L.F. 36). Although no copy of the proposed petition is in the record, Husband later argued he desired to do this so as to state a claim for third-party custody and visitation under § 452.375.5(5)(a) (L.F. 36, 46, 54-72). He filed a trial brief arguing how and why he should be awarded third-party custody and visitation over the Children under § 452.375.5(5)(a) (L.F. 54-72).

Wife opposed all of these motions by Husband in the dissolution action (L.F. 52). She argued that, as the DNA testing showed the Children were "not children of the marriage," the court did not have jurisdiction their custody or support at all in the dissolution action (L.F. 52). On August 22, 2013, the trial court in the dissolution action denied all Husband's requests: (1) to amend his petition; (2) for temporary visitation; (3) for a custody investigation or appointment of a therapist; and (4) for appointment of a guardian ad litem (L.F. 75).

In the paternity action, Husband first moved to dismiss himself (L.F. 130). He explained this was because, although he would be moving to intervene in the paternity action, procedurally he first had to be dismissed as a respondent (L.F. 131).

At the same time, Husband moved to intervene in the paternity action (L.F. 135; Appendix A5). After recounting the proceedings until then, he invoked Rule 52.12(a), "Intervention of Right" (L.F. 136-37; Appx. A6-7). He explained that, as the ultimate judgment of the court in the paternity action would include provisions concerning the Children's custody and visitation, and he had a properly stated claim for third-party custody and visitation under § 452.375.5(5)(a), a copy of which was attached, the law of Missouri gave him the right to intervene in the action (L.F. 136-37; Appx. A6-7). He explained that, under the allegations in his attached motion for third-party custody and visitation, he had an interest relating to the custody of the Children that no other party to the paternity action adequately represented and that, in his absence, would be impaired or impeded (L.F. 137; Appx. A7).

In the motion for third-party custody and visitation he attached to his motion to intervene, Husband made numerous factual allegations under § 452.375.5(5)(a) (L.F. 142-48; Appx. A12-18). He alleged that, pursuant to that statute, it was "in the welfare of the minor children, and it is in the minor children's best interests, that [he] be awarded custody and visitation rights," because:

a. [Husband] has exercised the role of the minor children's father since birth, and no other party has exercised said role;

b. The presumed father (deceased) has never been involved with the minor children;

c. After the birth of the eldest child, [Wife] would go out almost every evening, leaving [Husband] alone to parent the eldest child; [Wife]

rarely even came home from work before going out for the evening; [Wife] would then sleep all day on Saturday and go· out on Saturday night leaving [Husband] to parent the eldest child;

d. When the eldest child attended daycare, [Husband] would do a vast majority of the pick-ups and drop-offs of the eldest child for the daycare, and take care of the eldest child each evening;

e. [Wife] was involved in little to no parenting of the eldest child until the birth of the twins on October 7, 2004;

f. While [Wife] was pregnant with the twins and at home, the eldest child continued to go to daycare; when home, the eldest child was cared for almost exclusively by [Husband];

g. After the birth of the twins, the eldest child was at school and the twins were enrolled in daycare three times per week, for three hours per day;

h. Upon return from work after the birth of the twins, [Husband] would be the parent who would make dinner, feed the children, wash the children, and put the children to bed; [Wife] would go out of the house three to four times a week after the birth of the twins;

i. In October 2011, [Wife] moved from the family residence to live with her current boyfriend at his home;

j. From October 2011 to the filing of the Petition for Dissolution of Marriage; [Wife] would watch the children after school, and [Husband] would pick up the children from the boyfriend's house when he got off

from work and parent them for the rest of the day through the morning when the children left for school from [Husband]'s house;

k. During this two year time period, the minor children rarely stayed overnight with [Wife];

l. During the time that [Husband] was unemployed (February 2012 to September 2012), [Wife] would not even watch the children after school – [Husband] would do all of the non-school time parenting of the minor children;

m. [Wife]'s boyfriend has recently called the eldest child a 'piece of shit' and told him to 'get the hell out of my house;'

n. [Husband] has been the constant parent in the minor children's lives and has been their primary parent in their lives;

o. The minor children have a strong bond with [Husband];

p. [Husband] has sufficient space in his home for the minor children, and it is unclear whether [Wife] has same in her home;

q. [Husband] is financially able to care for the children;

r. [Wife] is unemployed and to [Husband]'s knowledge has no source of income to provide for the minor children (the presumed father is deceased and cannot pay child support);

s. [Husband] is in good health and stable in the community;

t. The children have indicated they wish to reside with [Husband];

u. [Wife] allowed the father-child relationship to exist between [Husband] and the minor children, even though she claims that [Husband] was not the biological father;

v. The extraordinary circumstances of this case, which includes [Husband]'s primary role as the children's parent, the fact that the presumed father is deceased and cannot parent the children, and the significant bonding between [Husband] and the children, evidence that is in the children's welfare and their best interests for [Husband] to have third party custody and visitation with the minor children;

w. The minor children will be harmed if they no longer have contact with the only father they have ever known; and

x. [Husband] incorporates by reference the allegations set forth in paragraph 6 below.

(L.F. 143-46; Appx. A13-16).

In paragraph 6, Husband further alleged that, "due to [Wife]'s conduct and health issues," it also was "in the minor children's best interests that [he] be awarded custody and visitation in regard to the minor children," because:

a. [Wife] suffers from End Stage Renal Failure, requiring her to be on dialysis Tuesday, Thursday and Saturday morning of each week, for approximately three hours per session;

b. As a result of [Wife]'s health care condition, she is unable to actively parent the children on a continuing basis, has little energy, is drowsy and lethargic for long periods of time;

c. [Wife] suffers from MRSR, and the effects of this condition and the impact on the minor children are unknown at this time;

d. [Wife] has a history of domestic violence and other misconduct during the marriage, which has included:

   i. Continued domestic violence against [Husband] through the marriage;

   ii. Her arrest for domestic violence against [Husband] in the summer of 2012, filed in the [redacted]; resulting in her being placed on probation and ordered to attend anger management classes;

   iii. Her arrest for domestic violence in regard to her current live-in boyfriend;

   iv. Domestic violence against her own mother during the marriage;

   v. The filing of two petition for protective from stalking orders filed in the [redacted];

e. On more than one occasion, [Wife] while she had parenting time with the minor children contacted [Husband] to come to her boyfriend's home and pick-up a child because she could not control him;

f. [Wife] has told the minor children that 'she hates them' and that she 'wishes you were never born;'

g. [Husband] believes [Wife]'s household is volatile; that domestic violence continues between [Wife] and her boyfriend; and that both [Wife] and boyfriend unduly punish the children;

h. It is unclear why [Wife] seeks to remove the minor children from the only father they had ever known in order to name a deceased person as the children's father and her actions concerning same show a disregard for the best interests of the minor children; and

i. The surviving family of the deceased presumed father does not seek any relationship with the minor children, and thus it is unlikely that the minor children will be incorporated into a new family that would provide for their emotional and other needs.

(L.F. 146-48; A16-18).

Husband also alleged that, as the presumed father, [redacted] was deceased, he "thus by definition [was] unable to be a parent to the minor children" (L.F. 148; Appx. A18). He sought visitation with the Children during the pendency of the paternity action and an ultimate award of third-party custodial and visitation rights in regard to the Children pursuant to a proposed parenting plan he would file later (L.F. 148; Appx. A18).

Wife agreed Husband should be dismissed as a respondent in the case, but opposed his motion to intervene (L.F. 154-59). Her only argument in opposing

intervention was that "Missouri has not adopted a theory of 'equitable parentage'" (L.F. 157-58). She also opposed Husband's request for a guardian ad litem (L.F. 160, 163).

Also, despite the fact that Husband's motion to intervene had not been granted, Wife filed a response to his attached motion for third-party custody and visitation anyway (L.F. 165). She disputed most of his allegations (L.F. 165-67). She admitted, however, that Husband had raised the Children as their father since their births, including after the parties' separation (L.F. 165-66). She insisted that she "actively s[ought] to remove the children from the only father they have known" because she was doing "what she was legally required to do" or "obligated to do" "in that she was truthful as to the parentage of the children" (L.F. 167). She prayed the court to deny Husband's third-party custody claim entirely (L.F. 167).

On August 22, 2013, the same day as its orders in the dissolution action, the trial court in the paternity action dismissed Husband from the action but denied his motion to intervene (L.F. 170; Appx. A2). It also denied his requests to appoint a guardian ad litem, to dismiss for failure to join a necessary party, and to revoke the respondent ad litem's appointment (L.F. 170; Appx. A2). Finally, it dismissed [redacted] and [redacted] from the action (L.F. 170; Appx. A2).

Husband timely appealed the order denying his motion to intervene to this Court (L.F. 173). On September 11, 2013, this Court ordered the paternity action below stayed pending appeal, expedited the briefing schedule, and sealed the record of this appeal.

Point Relied On

The trial court erred in denying Husband's motion to intervene as a matter of right in Wife's paternity action so as to state his proffered claim for third-party custody and visitation under § 452.375.5(5), R.S.Mo., over the children whose custody was at issue *because* Rule 52.12(a) and § 452.375.5(5) give "any person" who states a legally sufficient claim for third-party custody and visitation of children whose custody is at issue the right to intervene in the action in which the children's custody is being determined *in that* the pleading Husband attached to his motion to intervene alleged sufficient facts to state a cause of action for his third-party custody and visitation, the only other active party opposed his claim, and, in his absence, Husband's claim could not be heard and would be destroyed.

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

Scott v. Scott, 147 S.W.3d 887 (Mo. App. 2004)

T.W. ex rel. R.W. [redacted]*H.*, 393 S.W.3d 144 (Mo. App. 2013)

In re K.K.M., 647 S.W.2d 886 (Mo. App. 1983)

§ 452.375, R.S.Mo.

Rule 52.12

Argument

The trial court erred in denying Husband's motion to intervene as a matter of right in Wife's paternity action so as to state his proffered claim for third-party custody and visitation under § 452.375.5(5), R.S.Mo., over the children whose custody was at issue *because* Rule 52.12(a) and § 452.375.5(5) give "any person" who states a legally sufficient claim for third-party custody and visitation of children whose custody is at issue the right to intervene in the action in which the children's custody is being determined *in that* the pleading Husband attached to his motion to intervene alleged sufficient facts to state a cause of action for his third-party custody and visitation, the only other active party opposed his claim, and, in his absence, Husband's claim could not be heard and would be destroyed.

Standard of Review

The standard of review for all aspects of this point is *de novo*.

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 will be reversed if it erroneously declares or applies the law." *Id.* at 482 (quoting *McDaniel v. Park Place Care Ctr., Inc.*, 861 S.W.2d 179, 180 (Mo. App. 1993)). This Court "review[s] questions of law *de novo*." *Hoit v. Rankin*, 320 S.W.3d 761, 765 (Mo. App. 2010). "Matters of statutory interpretation and the application of the statute to specific facts are also reviewed *de novo*." *Otte v. Edwards*, 370 S.W.3d 898, 900 (Mo. App. 2012). For this reason, this Court review *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.*

* * *

Under Rule 52.12(a), any person who otherwise would have a cause of action directly on the subject of an existing case that no existing party represents has a right to intervene in that case to litigate his claim. And regardless of biological relationship, any person has a cause of action for third-party custody of a child as long as he sufficiently alleges the required elements under § 452.375.5(5)(a), R.S.Mo. Husband sufficiently alleged the required elements to state a third-party custody claim, which Wife opposed, over the children Wife bore from an extramarital affair and he had raised as their father from birth. Nonetheless, the trial court denied his motion to intervene. Was this error?

"The facts of this case are, we must hope, extraordinary." *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989). [redacted] now twelve years old, and [redacted] and [redacted] twins now eight years old (collectively "the Children"), were born to Respondent [redacted]

("Wife") during her marriage to Appellant [redacted] ("Husband"). Husband, naturally believing the Children were biologically his, raised them as his and Wife's own.

Years later, however, when Husband sought dissolution of marriage, Wife revealed the Children had been born of an extramarital affair with another man, who by then was deceased. She filed a separate paternity action, which was assigned to the same judge as the pending dissolution. Court-ordered DNA testing then revealed the Children were not, in fact, Husband's biological children. The court held their custody would be adjudicated in the paternity action, rather than the dissolution, but dismissed Husband from the paternity action because he no longer was a presumed or putative natural father.

As a result, Husband sought to intervene in the paternity action as a matter of right under Rule 52.12(a), attaching a claim for third-party custody and visitation under § 452.375.5(5), R.S.Mo. Stating specific factual allegations, Husband alleged that, due to Wife's conduct and health, the natural father's death, and the Children's longstanding bond with him as the only father they ever had known, the welfare of the Children required, and it was in their best interests, that he be awarded custody and visitation.

Without comment, the trial court denied Husband's motion to intervene. This was error. Husband sufficiently alleged the elements necessary to have a cause of action for third-party custody and visitation. No existing party represented his interests. As a result, the law of Missouri is Husband had a right to intervene in the paternity action. While Husband's claim ultimately might be successful or not, the trial court could not lawfully deny him the right to litigate its merits. This Court should reverse the trial court's order and remand with instructions to uphold Husband's right to intervene.

A. Under Rule 52.12(a), any person who has a direct claim for relief on the subject of an existing case that no existing party represents and he cannot bring otherwise has a right to intervene in the case to litigate his claim.

Rule 52.12(a) provides, in relevant part:

> **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: … when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(Emphasis in the original) (Appendix A28).

This is the third-party analogue of compulsory joinder under Rule 52.04(a). *State ex rel. Webster Cnty. v. Hutcherson*, 199 S.W.3d 866, 872-73 (Mo. App. 2006). Mirroring Rule 52.12(a), Rule 52.04(a) states a person *must* be joined in an action if he "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may … as a practical matter impair or impede the person's ability to protect that interest." If such a "person has not been joined, the court shall order that the person be made a party." *Id.*

Thus, whereas joinder under Rule 52.04(a) is invoked by the court or an existing party to a case, intervention as of right is invoked by a non-party to come into the case. Either way, however, the person is a "necessary party." *Hutcherson*, 199 S.W.3d at 872-73; *State ex rel. Mayberry v. City of Rolla*, 970 S.W.2d 901, 909 (Mo. App. 1998).

The manner in which a person with a right to intervene requests such intervention is as follows: "A person desiring to intervene shall serve a motion upon all parties affected thereby. The motion shall state the grounds therefor, and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Rule 52.12(c). Just like an ordinary petition, the attached pleading is sufficient to meet Rule 52.12(a)'s requirements to have a right to intervene 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. ex rel. R.W.* [redacted] *H.*, 393 S.W.3d 144, 151 (Mo. App. 2013). In short, a "party must state the facts entitling her to relief and asking the court for the remedy desired." *Id.*

In essence, the party advancing a right to intervene must allege sufficient facts so as to show he has what otherwise would be a *bona fide* cause of action related to the subject-matter of the litigation, which no other existing party represents, and which, without his intervention, would be impaired or impeded. The Supreme Court has distilled this into "three elements" that the applicant seeking intervention must show:

> (1) an interest relating to the property or transaction which is the subject of the action; (2) that the applicant's ability to protect the interest is impaired or impeded; and (3) that the existing parties are inadequately representing the applicant's interest. The proposed intervenor carries the burden of establishing the presence of all three elements required for intervention as a matter of right. When an applicant satisfies these elements, however, the

> right to intervene is absolute and the motion to intervene may not be denied.

State ex rel. Nixon v. Am. Tobacco Co., 34 S.W.3d 122, 127 (Mo. banc 2000).

Just like pleading, ordinarily this is not difficult or onerous to establish. Indeed, "Intervention generally should 'be allowed with considerable liberality.'" *Johnson v. State*, 366 S.W.3d 11, 20 (Mo. banc 2012) (quoting *In re Liquidation of Prof'l Med. Ins. Co.*, 92 S.W.3d 775, 778 (Mo. banc 2003)).

The first element is "an interest relating to the property or transaction which is the subject of the action." *Nixon*, 34 S.W.3d at 127. "Generally, 'interest' means a concern, more than mere curiosity, or academic or sentimental desire." *Prof'l Med.*, 92 S.W.3d at 778 (citing *In the Matter of Trapp*, 593 S.W.2d 193, 204 (Mo. banc 1980)). Rather, "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 or a legal liability which will be directly enlarged or diminished by the judgment or decree in such action." *Trapp*, 593 S.W.2d at 204 (quoting *State ex rel. Farmers Mut. Auto. Ins. Co. v. Weber*, 273 S.W.2d 318, 321 (Mo. banc 1954)).

Accordingly, just like ordinary pleading, one has an "interest" in the subject matter of a case when he has what would amount to a cause of action related to it. As the Supreme Court further has explained,

> "[I]nterest" means a direct and immediate claim to, and having its origin in, the demand made or proceeds sought or prayed by one of the parties to the original action, but such "interest" does not include a mere consequential,

> remote or conjectural possibility of being in some manner affected by the result of the original action; to come within the [right to intervene], the "interest" must be such an immediate and direct claim upon the very subject matter of the action that intervener [*sic*] will either gain or lose by the Direct [*sic*] operation of the judgment that may be rendered therein.

Trapp, 593 S.W.2d at 204 (quoting *Farmers*, 273 S.W.2d at 321).

The second and third elements basically concern the same thing: that none of the existing parties to the action represents the intervention applicant's claim for relief, and in his absence he will not be able to obtain that relief. This is common sense. It goes without saying that, "When two parties are advocating the same position and one is already a party to the underlying suit, leave to intervene is not required," because "[o]ne party is adequate to represent both parties' interests." *Ring v. Metro. St. Louis Sewer Dist.*, 41 S.W.3d 487, 492 (Mo. App. 2000) (citing *State ex rel. Edel v. City of Springfield*, 935 S.W.2d 339, 343 (Mo. App. 1996)). Similarly, in that circumstances compulsory joinder also would not be required. Rule 52.04(a).

As such, under Rule 52.12(a), any person has a right to intervene in an existing case if he: (1) shows by an attached pleading to his motion to intervene (2) what otherwise would be an immediate and direct cause of action on the subject matter of an existing case, (3) which is not furthered by any of the existing parties to the case, and (4) in his absence his ability to obtain his desired relief would be impaired or impeded. If he states sufficient facts to make this showing, "the right to intervene is absolute and the motion to intervene may not be denied." *Nixon*, 34 S.W.3d at 127.

B. Regardless of biological relationship, any person has an authorized cause of action for third-party custody of a child – and thus a direct legal "interest" in the same under Rule 52.12(a) – as long as he sufficiently alleges the required elements under § 452.375.5(5)(a), R.S.Mo.

Section 452.375.5, R.S.Mo., provides that, "Prior to awarding the appropriate custody arrangement in the best interest of the child, the court shall consider each of the following," including:

> (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 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.

(Appx. A24-25).

This statute allows a nonparent to state a claim for child custody in any action in which such custody is being determined, including dissolution (and modification),

paternity, or even habeas corpus. *See, e.g.*, *Flathers v. Flathers*, 948 S.W.2d 463, 466 (Mo. App. 1997) (dissolution); *In re Marriage of Powell*, 943 S.W.2d 153, 157 (Mo. App. 1997) (modification); *L.T.C. ex rel. Collins v. Reed*, 168 S.W.3d 142, 146 (Mo. App. 2005) (paternity); *In re K.K.M.*, 647 S.W.2d 886, 890 (Mo. App. 1983) (habeas).

Indeed, the statute even allows the trial court in any such action to award custody to a third person *sua sponte*, even if contrary to the desires of both natural parents. *Burton v. Burton*, 874 S.W.2d 461, 463-64 (Mo. App. 1994) (*sua sponte*); *In re Marriage of Garner*, 651 S.W.2d 564, 566 (Mo. App. 1983) (contrary to requests of both parents). In such a case, however, both basic Due Process and the express terms of § 452.375.5(5)(a) require that the third person first be made "a party to the action" and with notice to the natural parent(s). *Burton*, 874 S.W.2d at 463-64.

While this statute most often is invoked by and on behalf of a child's nonparent blood relatives, such as the child's grandparents or aunts and uncles, its application is not limited to such biological relations. In various cases over the years, third persons not biologically related to a child have been awarded even *sole* legal and physical custody. *See, e.g.*, *In re B.W.D.*, 725 S.W.2d 138, 139 (Mo. App. 1987) (affirming award of sole legal and physical custody to child's former stepmother); *Scott v. Scott*, 147 S.W.3d 887, 896-97 (Mo. App. 2004) (affirming award of sole physical custody to wife's former same-sex partner); *cf. In re T.Q.L.*, 386 S.W.3d 135, 139-40 (Mo. banc 2012) (allowing mother's former paramour to litigate claim for third-party custody).

What is today § 452.375.5(5) originated in a 1983 amendment to the statute, which first had been enacted in 1973. *See* Senate Bill 94, 82nd Gen. Assem., Reg. Sess. (Mo.

1983). But the notion did not begin with this statute that a "natural parent has a superior right to custody of the child as opposed to the interests of third parties," which is "not absolute, but rather, … is a rebuttable presumption which may be overcome by evidence that" third-party custody is warranted. *K.K.M.*, 647 S.W.2d at 889-90. Rather, it has been enshrined in the law of Missouri for over 130 years. *Id.* (citing *In the Matter of Scarritt*, 76 Mo. 565, 582, 588 (banc 1882)).

Thus, when § 452.375.5(5) was amended into the statute in 1983, it simply reflected what by then had become the well-established law of Missouri that

> the presumption in favor of vesting custody in the natural parent may be rebutted not only by evidence of the parent's unfitness or incompetence to take charge of the child, but also when the welfare of the child for some special or extraordinary reason demands that custody be granted to one other than the natural parent.

K.K.M., 647 S.W.2d at 890-91 (citing *Scarritt*, 76 Mo. at 588; *State ex rel. Crockett v. Ellison*, 196 S.W. 1140, 1141-42 (Mo. banc 1917); *In re Richardet*, 280 S.W.2d 466, 471 (Mo. App. 1955); *Cox v. Carapella*, 246 S.W.2d 513, 514, 515 (Mo. App. 1952); *Daugherty v. Nelson*, 234 S.W.2d 353, 365 (Mo. App. 1950)).

Accordingly, and especially after the enactment of § 452.375.5(5), the law of Missouri "recognize[s] … a third party's foundational standing to litigate custody or visitation," but makes it "dependent upon the third party being a named party in an action brought by someone else … or … interven[ing] in a pending action …." *White v. White*, 293 S.W.3d 1, 21 (Mo. App. 2009). Thus, a case "involving third party custody" must

"involve intervention in pending litigation by third parties or the third parties being named as parties in the initial custody case." *Id.* at 18-19.

That is, if custody has not yet been determined at all, the third person can initiate the proceedings himself by stating sufficient allegations to meet § 452.375.5(5)(a). *T.Q.L.*, 386 S.W.3d at 139-40. If the custody determination is pending but has not yet been tried, the third person either can be named as a third party by one of the existing parties, *Scott*, 147 S.W.3d at 891, or – again if stating sufficient allegations to meet § 452.375.5(5)(a) – has a "right to intervene granted in" subsection (b) of the statute. *Hastings v. Van Black*, 831 S.W.2d 214, 215-16 (Mo. App. 1992); *see also T.W.*, 393 S.W.3d at 150-51. Only if the custody proceedings already have been finally adjudicated can the third person not belatedly bring his claim. *Hastings*, 831 S.W.2d at 215-16.

The Supreme Court recently has reconfirmed that, as long as sufficient allegations to meet its elements are stated, § 452.375.5(5) provides a third person with his own "cause of action for third-party custody." *T.Q.L.*, 386 S.W.3d at 139. That is, as long as the child's custody was not already the subject of previous or existing proceedings, the third person unilaterally can initiate litigation over the child's custody and further his third-party claim by sufficiently alleging "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" to award custody or visitation to him, and that he is "suitable and able to provide an adequate and stable environment for the child." *Id.* (quoting § 452.375.5(5)(a)).

In *T.Q.L.*, the mother and her paramour had a relationship, during which the mother gave birth to a child. *Id.* at 137. Although the paramour knew he was not the

child's father, he "acted as Child's father, taking an active role in his life." *Id.* The child's "biological father was a Brazilian man," and the mother "did not know the man's last name or how to locate him." *Id.* Four years after the child's birth, the paramour "decided to take legal action to determine his custodial rights" and "filed a petition for declaration of paternity, custody and visitation …." *Id.*

Ultimately, the paramour alleged with detailed facts that, under § 452.375.5(5)(a), the mother "and the unknown biological father were unfit parents" and/or that "the welfare of the child requires" third-party custody, and also that he "would be a suitable custodian and able to provide a stable environment for the child." *Id.* at 138-40. The mother moved to dismiss the paramour's petition, arguing "it failed to state a claim under the Uniform Parentage Act and that Missouri law did not support claims of equitable parentage." *Id.* at 138. The circuit court agreed and dismissed his petition.

Initially, this Court's Southern District affirmed. *In re T.Q.L.*, 2012 WL 457719 at *2-3 (Mo. App. slip op. Feb. 14, 2012) (transferred to Mo. banc May 29, 2012). It held that, while the law of Missouri allows for the litigation of third-party custody, it did not give the paramour, "a nonparent," a cause of action to state such a claim, and it "decline[d] to create a cause of action." *Id.* at *2. It held "there is currently no law permitting [the paramour] to seek custody …." *Id.* at *3.

On transfer, the Supreme Court disagreed and reversed the dismissal of the paramour's petition. *T.Q.L.*, 386 S.W.3d at 139-40. Instead, it reconfirmed § 452.375.5(5) *does* give a third person a legal right to state a cause of action for third-party custody. *Id.* Reviewing the paramour's petition by taking "the facts in [his] petition …

as true," "construe[ing them] liberally in [his] favor," and "grant[ing him] reasonable inferences based on those allegations," the Court held his "petition was sufficient to allege the elements required to meet a cause of action for third-party custody" under § 452.375.5(5)(a). *Id.* at 139.

That is, first, the paramour sufficiently had alleged the mother "was unfit to be a custodian." *Id.* This included that allegations of "suicide attempts, mental instability, conduct that would emotionally injure Child and the making of false hotline reports." *Id.* Second, the paramour sufficiently alleged the "unknown biological father was an unfit custodian" by alleging he never had "come forward to assert his rights as [Child]'s father," he "never established any parent/child bond, and "his whereabouts are unknown and unascertainable." *Id.*

Third, the paramour sufficiently alleged his third-party custody would "be in the best interests of the child" because he alleged "he has had extensive contact with Child, they have established a strong and substantial parent/child bond, spent significant amounts of time together, traveled together, celebrated holidays together, and [he] is the only father Child has ever known." *Id.* at 140. Fourth, the paramour sufficiently alleged "he would be a suitable custodian and able to provide a stable environment for Child" because he alleged he "is suitable and able to provide an adequate and stable home environment for [Child]" and he "can properly care for and raise [Child]." *Id.* Finally, the Supreme Court held that, in addition to unfitness, all these allegations also were sufficient to allege "that the 'welfare of the child requires'" that the paramour have third-party custody. *Id.* (quoting § 452.375.5(5)(a)).

Thus, under *T.Q.L.*, the law of Missouri is that, by stating sufficient allegations to meet the requirements of § 452.375.5(5)(a), a third person has an independent legal right to a cause of action for third-party custody over a child when litigation has not already commenced over the child's custody.[1] It necessarily follow that, if litigation in which the child's custody will be determined already has commenced, the third person who also sufficiently alleges facts to meet the statute's requirements has a direct "interest" under Rule 52.12(a) giving him a right to intervene in the pending action unless another party already furthers that interest. *T.W.*, 393 S.W.3d at 150-51. For, such a person plainly "has a legal right which will be directly affected [by the ultimate determination of the child's custody in] the judgment or decree in such action." *Trapp*, 593 S.W.2d at 204 (quoting *Farmers*, 273 S.W.2d at 321).

In this case, just as in *T.Q.L.*, Husband alleged sufficient facts, which, taken as true, construed liberally, and granting him all reasonable inferences, met the requirements of § 452.375.5(5)(a) to state a proper claim for third-party custody over the Children who Wife admits he had raised as their father from their respective births. The only other party remaining in the action, Wife, expressly opposed his claim. Husband thus had a right to intervene in the paternity action that will decide the Children's custody. The trial court erred in denying Husband's motion to intervene as of right.

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[1] *T.Q.L.* thus implicitly overruled this Court's prior decision in *Knight v. Fulton*, 773 S.W.2d 142 (Mo. App. 1989), which held this is not a cause of action but, instead, depended on a court already having made findings under § 452.375.5(5)(a).

C. As Husband sufficiently alleged the required elements to state a third-party custody claim over the Children and no existing party represented Husband's interests, he has a right to intervene in the paternity action that the trial court erred in denying.

For a third person to intervene in a pending custody determination case to seek third-party custody, he must attach to his motion to intervene "a pleading setting forth the claim" he seeks to bring, in the same manner as a petition. *T.W.*, 393 S.W.3d at 150-51 (quoting Rule 52.12(c)). The pleading must "contain a short and plain statement of the facts showing that the pleader is entitled to [the] relief [requested], and a demand for judgment for the relief to which [he] claims [he] is entitled," again in the manner of a petition. *Id.* at 151 (citing Rule 55.05). If, as in *T.Q.L.*, the person properly "pleads a claim for third-party custody or visitation pursuant to" § 452.375.5(5) that he "provides" with his motion "as required by Rule 52.12," he has a right to intervene in the action. *Id.*

In this case, Husband plainly had a right to intervene in the pending paternity case that would determine the Children's custody so as to litigate his third-party custody claim. He attached to his motion to intervene a pleading setting forth sufficient facts to allege an authorized claim for third-party custody and visitation under § 452.375.5(5) (L.F. 135, 141; Appx. A11). As Wife, the only other active party, expressly opposed Husband's claim (L.F. 156, 163, 170; Appx. A2), no other party to the litigation furthered his interest. As a result, Husband's "right to intervene [was] absolute and [his] motion to intervene [could] not be denied." *Nixon*, 34 S.W.3d at 127. Nonetheless, the trial court denied his right to intervene. This was error. It must be reversed.

1. Husband could bring raise his third-party custody claim only in the paternity action, where the Children's custody would be determined.

First, as the Children's custody only could be determined in the paternity action, it was proper for Husband to seek to litigate his third-party custody claim there. While Husband initially sought to litigate a third-party custody claim in the pending dissolution action between him and Wife, the trial court correctly ruled it would be improper (L.F. 36, 39, 45, 54, 73, 75). Husband originally claimed in his dissolution petition that the Children were "born of the marriage" (L.F. 6). Later, however, DNA testing ordered in the dissolution case revealed the Children, though born *during* the marriage, were not Husband's biological children (L.F. 131, 155).

As a result, the law of Missouri is that custody of the Children could not be determined in the dissolution action, but rather only could be litigated in the separately pending paternity proceedings. *In re Marriage of Said*, 26 S.W.3d 839, 843-44 (Mo. App. 2000). This is because, "When the evidence establishe[s] that [a husband is] not the father of [a] child born to [his wife] during the marriage, there [is] no custody issue between [the husband and wife] to be decided in [their] dissolution action," but only in "a separate action" for paternity. *Id.* Such a child is not "born of the marriage," and a "trial court in a divorce proceeding does not have jurisdiction to determine the custody of one party's child." *Warlop v. Warlop*, 254 S.W.3d 262, 263 (Mo. App. 2008).

In this case, once Husband was shown not to be the Children's natural father, the dissolution court lost jurisdiction to determine their custody. *Said*, 26 S.W.3d at 843-44. Only the paternity action could and would make that determination. *Id.*

2. Husband attached to his motion to intervene a claim for third-party custody that sufficiently stated facts to meet the requirements for such a cause of action under § 452.375.5(5)(a).

Husband plainly met the requirements of § 452.375.5(5)(a) to have a cause of action for third-party custody of the Children and, thus, a direct legal "interest" in the determination of their custody under Rule 52.12(a). Pursuant to Rule 52.12(c), he attached to his motion to intervene the motion for third-party custody and visitation he sought to intervene in order to litigate (L.F. 141-51). Just as in *T.Q.L.*, taking the allegations in Husband's proposed motion as true, construing them liberally, and granting him the benefit of all reasonable inferences, Husband's allegations readily met the requirements of § 452.375.5(5)(a) to state a sufficient claim for third-party custody.

First, Husband sufficiently alleged Wife "was unfit to be a custodian" and "the welfare of the child[ren] requires" third-party custody due to Wife's conduct. *T.Q.L.*, 386 S.W.3d at 139 and 140. This included that Wife was never an active parent to the Children, she and her live-in boyfriend were abusive to the Children, Wife's unemployment and terminal illness prevented her from being a suitable custodian, and Wife's attempts to tear the Children away from Husband were harmful to the Children:

> c. After the birth of the eldest child, [Wife] would go out almost every evening, leaving [Husband] alone to parent the eldest child; [Wife] rarely even came home from work before going out for the evening; [Wife] would then sleep all day on Saturday and go• out on Saturday night leaving [Husband] to parent the eldest child;

d. When the eldest child attended daycare, [Husband] would do a vast majority of the pick-ups and drop-offs of the eldest child for the daycare, and take care of the eldest child each evening;

e. [Wife] was involved in little to no parenting of the eldest child until the birth of the twins on October 7, 2004;

f. While [Wife] was pregnant with the twins and at home, the eldest child continued to go to daycare; when home, the eldest child was cared for almost exclusively by [Husband];

g. After the birth of the twins, the eldest child was at school and the twins were enrolled in daycare three times per week, for three hours per day;

h. Upon return from work after the birth of the twins, [Husband] would be the parent who would make dinner, feed the children, wash the children, and put the children to bed; [Wife] would go out of the house three to four times a week after the birth of the twins;

i. In October 2011, [Wife] moved from the family residence to live with her current boyfriend at his home;

j. From October 2011 to the filing of the Petition for Dissolution of Marriage; [Wife] would watch the children after school, and [Husband] would pick up the children from the boyfriend's house when he got off from work and parent them for the rest of the day

through the morning when the children left for school from [Husband]'s house;

k. During this two year time period, the minor children rarely stayed overnight with [Wife];

l. During the time that [Husband] was unemployed (February 2012 to September 2012), [Wife] would not even watch the children after school – [Husband] would do all of the non-school time parenting of the minor children;

m. [Wife]'s boyfriend has recently called the eldest child a 'piece of shit' and told him to 'get the hell out of my house;'

…

r. [Wife] is unemployed and to [Husband]'s knowledge has no source of income to provide for the minor children …

…

v. The extraordinary circumstances of this case, which includes [Husband]'s primary role as the children's parent, the fact that the presumed father is deceased and cannot parent the children, and the significant bonding between [Husband] and the children, evidence that is in the children's welfare and their best interests for [Husband] to have third party custody and visitation with the minor children;

w. The minor children will be harmed if they no longer have contact with the only father they have ever known;

…

a. [Wife] suffers from End Stage Renal Failure, requiring her to be on dialysis Tuesday, Thursday and Saturday morning of each week, for approximately three hours per session;

b. As a result of [Wife]'s health care condition, she is unable to actively parent the children on a continuing basis, has little energy, is drowsy and lethargic for long periods of time;

c. [Wife] suffers from MRSR, and the effects of this condition and the impact on the minor children are unknown at this time;

d. [Wife] has a history of domestic violence and other misconduct during the marriage, which has included:

   i. Continued domestic violence against [Husband] through the marriage;

   ii. Her arrest for domestic violence against [Husband] in the summer of 2012, filed in the [redacted] resulting in her being placed on probation and ordered to attend anger management classes;

   iii. Her arrest for domestic violence in regard to her current live-in boyfriend;

   iv. Domestic violence against her own mother during the marriage;

v. The filing of two petition for protective from stalking orders filed in the [redacted];

e. On more than one occasion, [Wife] while she had parenting time with the minor children contacted [Husband] to come to her boyfriend's home and pick-up a child because she could not control him;

f. [Wife] has told the minor children that 'she hates them' and that she 'wishes you were never born;'

g. [Husband] believes [Wife]'s household is volatile; that domestic violence continues between [Wife] and her boyfriend; and that both [Wife] and boyfriend unduly punish the children;

h. It is unclear why [Wife] seeks to remove the minor children from the only father they had ever known in order to name a deceased person as the children's father and her actions concerning same show a disregard for the best interests of the minor children; and

(L.F. 144-48; Appx. A14-18).

Second, Husband sufficiently alleged the Children's deceased "biological father was an unfit [and unable] custodian" and "the welfare of the child[ren] requires" third-party custody due to factors related to the biological father. *T.Q.L.*, 386 S.W.3d at 139 and 140. He alleged:

b. The presumed father (deceased) has never been involved with the minor children;

…

r. … the presumed father is deceased and cannot pay child support …

…

v. … the presumed father is deceased and cannot parent the children …

…

h. It is unclear why [Wife] seeks to remove the minor children from the only father they had ever known in order to name a deceased person as the children's father and her actions concerning same show a disregard for the best interests of the minor children; and

i. The surviving family of the deceased presumed father does not seek any relationship with the minor children, and thus it is unlikely that the minor children will be incorporated into a new family that would provide for their emotional and other needs.

(L.F. 143, 146, 148; Appx. A13, A16, A18).

Third, Husband sufficiently alleged his third-party custody would "be in the best interests of the child …." *T.Q.L.*, 386 S.W.3d at 140. Just as the paramour in *T.Q.L.*, and in addition to Husband's recounting, quoted above, of his having always been the Children's primary parent, rather than Wife, he alleged:

a. [Husband] has exercised the role of the minor children's father since birth, and no other party has exercised said role;

…

n. [Husband] has been the constant parent in the minor children's lives and has been their primary parent in their lives;

o. The minor children have a strong bond with [Husband];

…

t. The children have indicated they wish to reside with [Husband];

…

w. The minor children will be harmed if they no longer have contact with the only father they have ever known;

(L.F. 143, 145-46; Appx. A13, 15-16).

Fourth, Husband sufficiently alleged "he would be a suitable custodian and able to provide a stable environment for" the Children. *T.Q.L.*, 386 S.W.3d at 140. In addition to all the allegations, quoted above, regarding Husband's substantial parent/child bond with the Children, the amount of time he and the Children had spent together, his proven ability suitably to parent the Children as he had done throughout their lives, and the fact that he was the only father the Children ever had known, he also alleged:

p. [Husband] has sufficient space in his home for the minor children, and it is unclear whether [Wife] has same in her home;

q. [Husband] is financially able to care for the children;

…

s. [Husband] is in good health and stable in the community;

(L.F. 145; Appx. A15).

"While this Court makes no determination as to the truth of [Husband]'s allegations, when viewing [his] averments as true, this Court liberally must grant him the reasonable inferences" that Wife and the deceased father are unfit and unable to be proper custodians, his third-party custody would be in the best interests of the Children and the Children's welfare required it, and "he would be a suitable custodian and able to provide a stable environment for" the Children. *T.Q.L.*, 386 S.W.3d at 139-40.

As a result, and just as in *T.Q.L.*, Husband "sufficiently alleged [Wife]'s and the [deceased] father's unfitness and that" "the 'welfare of the [Children] requires" "granting custody to [Husband] would be in [the Children]'s best interest." *Id.* at 140 (quoting § 452.375.5(5)(a)). Accordingly, Husband "alleged the statutory elements for third-party custody," and thus the allegations in his proposed motion "were sufficient to allege the elements required to meet a cause of action for third-party custody." *Id.* at 139 and 140.

Therefore, the law of Missouri is that, as Husband has shown he has a cause of action for third-party custody of the Children, he equally has shown a direct legal "interest" in the subject matter of the pending paternity case – the custody of the Children – which the judgment ultimately will determine. *T.W.*, 393 S.W.3d at 150-51. He "has a legal right which will be directly affected [by the ultimate determination of the Children's custody in] the judgment …" *Trapp*, 593 S.W.2d at 204 (quoting *Farmers*, 273 S.W.2d at 321). As no other party represents Husband's interest in any way, the law of Missouri is that he had a right to intervene in the paternity proceedings to bring his claim. The trial court erred in holding otherwise.

3. Wife, the only remaining, active party to the paternity proceedings, opposed Husband's third-party custody claim, and, absent Husband's intervention, his ability to protect his interest in that claim will be impaired or impeded.

Rule 52.12(a) allows a person with a legal interest in the subject of a suit the right to intervene "unless the applicant's interest is adequately represented by existing parties" (Appx. A28). He must show his "ability to protect the interest is impaired or impeded" in his absence and "that the existing parties are inadequately representing th[at] interest." *Nixon*, 34 S.W.3d at 127. These factors work in tandem, however, because, "When two parties are advocating the same position and one is already a party to the underlying suit, leave to intervene is not required," as "[o]ne party is adequate to represent both parties' interests." *Ring*, 41 S.W.3d at 492.

In this case, Wife, expressly opposed Husband's third-party custody claim (L.F. 163). Ostensibly responding to the proposed motion Husband attached to his motion to intervene, she disputed nearly all of his factual allegations and concluded by praying the trial court to "deny [Husband]'s motion for custody and visitation" (L.F. 163-67). But Wife now is the only remaining, active party below (L.F. 170; Appx. A2). The trial court dismissed the other third-party respondents, and [redacted]s respondent ad litem opposes any paternity proceedings at all (L.F. 170; Appx. A2).

As a result, Husband has a legal interest in the subject the proceedings will determine that no other party represents, and the only remaining party opposes. As a result, without his intervention, his ability to protect his legal interest will be destroyed.

Indeed, in order for the court to hear Husband's claim, he *must* be made a party. § 452.375.5(5)(a); *Burton*, 874 S.W.2d at 463-64.

Husband plainly met all the requirements to show his right to intervene in Wife's paternity proceedings below. By the pleading attached to his motion to intervene, he showed he had a valid, immediate, and direct interest in a cause of action for third-party custody of the Children whose custody ultimately will be determined in the proceedings. He showed that, in his absence, he cannot protect that interest. He showed the only remaining party does not represent his interest, but rather opposes it entirely.

Therefore, Husband met his "burden of establishing the presence of all three elements required for intervention as a matter of right." *Nixon*, 34 S.W.3d at 127. As a result, his "right to intervene is absolute and the motion to intervene may not be denied." *Id.* The trial court misapplied the law in denying Husband's motion to intervene.

Husband may or may not ultimately succeed on his properly stated claim for third-party custody and visitation. That will be for further litigation to determine. At this stage, Husband only asks for, and must be granted, the *ability* to litigate that claim – the right meaningfully to enter through the courthouse doors and have the merits of his claim determined.

For, the law of Missouri is that he has this right. This Court should uphold that right. It should reverse the trial court's order denying Husband's motion to intervene and should remand this case with instructions to grant that motion and for further proceedings on the merits of Husband's third-party custody claim.

Conclusion

The Court should reverse the trial court's order denying Appellant [redacted]s motion to intervene as a matter of right and should remand this case with instructions to grant that motion and for further proceedings.

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 10,885 words.

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Certificate of Service

I hereby certify that, on September 18, 2013, 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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