WD86003

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ELAINE PAYNE,

Respondent,

vs.

LINDSEY NILSSON and JOSHUA PLATZ,

Appellants.

On Appeal from the Circuit Court of Adair County
Honorable Thomas P. Redington, Circuit Judge
Case No. 22AR-CV00291

BRIEF OF THE APPELLANTS

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Adair County on a petition by a child's grandmother for third-party visitation.

This case does not involve the validity of a Missouri statute or constitutional provision or a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, 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 Adair County. Under § 477.070, R.S.Mo., venue lies in the Western District.

Response to Court's Briefing Order

In a letter on March 8, 2023, this Court asked the parties to address in their briefs "how the entry of default judgment against Appellant Nilsson affects the present appeal." The trial court's judgment was not a default judgment, and even if it was a default judgment against Lindsey Nilsson ("Mother"), that would not affect this appeal.

A. The judgment against Mother was not a default judgment.

Rule 74.05(a) provides a trial court may enter a default judgment against a party who "has failed to plead *or otherwise defend*" the suit. Rule 74.05(b) permits a trial court to enter "an interlocutory order of default" against a party for the same reason. "In order to 'otherwise defend,' the defendant must take 'some affirmative action … which would operate as a bar to the satisfaction of the moving party's claim.'" *Heineck v. Katz*, 509 S.W.3d 116, 120 (Mo. App. 2016) (quoting *O'Neill v. O'Neill*, 460 S.W.3d 51, 57 (Mo. App. 2015)). When a party "'otherwise defended' a claim," the judgment is "on the merits," not one of default. *Id.* at 122.

Under this rule, the trial court's judgment against Mother was not a default judgment. It is true that Mother did not retain counsel or file a responsive pleading in the case (the latter is also true of Joshua Platz ("Father")), nor did she appear at the first trial setting in the case on September 8, 2022 (D1 p. 7; D4). After this failure to appear, the trial court entered an interlocutory order of default against her under Rule 74.05(b) (D4). But Mother did appear for trial on November 30, 2022 (Tr. 1, 3). There, the court told her, "You are in default," and Mother responded she was unable to afford an attorney (Tr. 3).

The law of Missouri is that Mother's appearance at trial qualified as "otherwise defend[ing]" the suit and precluded the final judgment against her being a default judgment under Rule 74.05(a). The record does not reflect that Mother was subpoenaed or in any way compelled to attend the trial date, but rather she attended because she was a party who wanted to oppose the petition filed against her. While the interlocutory order of default the court entered after her nonappearance at the trial setting was proper, Mother's appearance at the final trial was enough to satisfy the "otherwise defend" requirement of Rule 74.05(a) and precludes the entry of a final default judgment against her. *See A.D.D. v. PLE Enters., Inc.*, 412 S.W.3d 270, 275-76 (Mo. App. 2013) (holding default judgment against a party was proper when it did not file an answer *or* appear at default judgment hearing); *Detroit Tool & Eng'g Co. v. Martin*, 641 S.W.2d 177, 179 (Mo. App. 1982) (party appearing in court made judgment on the merits, not by default); *Hooks v. MHS Hosp. Grp., LLC*, 526 S.W.3d 136, 143 (Mo. App. 2017) (even when no answer was filed, defendant's appearance in court and proceeding as if one had been filed resulted in a judgment on the merits, not by default).

The trial court's interlocutory default order was rendered null when Mother appeared at trial and the court permitted her to testify over plaintiff's objection (Tr. 38-39). This appearance and testimony were enough to prevent a default judgment against her. *Hooks*, 526 S.W.3d at 143. Therefore, Mother was not in default and this Court has jurisdiction over her appeal.

B. Even if Mother was in default, it does not affect this appeal.

Even if this Court concluded Mother defaulted and it generally would have no jurisdiction over her appeal, the law of Missouri is that the merits of

the appeal are still properly before it. Father was never found in default and, as explained in Section B of the Statement of Facts below, Mother and Father share joint physical and joint legal custody over W.P. ("Child"). Therefore, reversing the judgment granting Elaine Payne ("Grandmother") third-party visitation, even if only on Father's appeal, necessarily will reverse it for Mother too. Regardless of whether the Court concludes Mother can prosecute this appeal, its merits will remain unaffected.

Moreover, Mother's and Father's Point I challenges Grandmother's standing to seek third-party visitation at all. If the Court agrees Grandmother lacked standing, the underlying case must be reversed and dismissed for lack of jurisdiction, regardless of any default by Mother. *In re J.D.S.*, 482 S.W.3d 431, 437 (Mo. App. 2016) (explaining when "a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented" (quoting *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002)); *see also AMG Franchises, Inc. v. Crack Team USA, Inc.*, 289 S.W.3d 655, 657 (Mo. App. 2009) ("appellate courts have the authority to consider a direct appeal from a default judgment when that appeal presents questions concerning the trial court's subject matter jurisdiction"). In *J.D.S.*, this Court reversed the trial court's judgment because the petitioner lacked standing, even though the appellants had defaulted, because this went to the trial court's jurisdiction. 482 S.W.3d at 443-44.

Accordingly, the trial court's statement that Mother was in default does not affect this appeal.

Statement of Facts

A. Overview

W.P. ("Child") was born to Lindsey Nilsson ("Mother") from a non-marriage relationship with Joshua Platz ("Father") (D31 p. 2; App. A6). In 2018, Joshua Platz ("Father") filed an action seeking a formal declaration of his paternity over Child as well as custody and child support (D21). Mother and Father settled the action within five months, agreeing to a declaration of Father's paternity, joint physical and joint legal custody over Child, and a physical custody schedule (D28; D29).

More than three years after the judgment in the paternity action, Elaine Payne, Child's maternal grandmother ("Grandmother"), filed a petition for third-party visitation with Child citing § 452.375.5(5), R.S.Mo. (D2). After trial in November 2022 (D1 p. 8), the court entered a judgment granting Grandmother visitation and issued a new parenting plan without reference to Mother and Father's prior agreement (D5; App. A1).

Mother and Father now appeal (D19).

B. Father's paternity action

Mother gave birth to Child in January 2017 (D31 p. 2). In October 2018, Father filed a paternity action in the Circuit Court of Adair County (D21). He asked the court to declare him Child's biological father, award the parties joint physical and joint legal custody over Child, and order Mother to pay him child support (D21 pp. 1-4). Mother did not dispute that Father was Child's biological father (D24 pp. 1-2), but requested sole physical and legal custody over Child and child support from Father (D25 pp. 3-5).

About three months after Mother's answer, the parties settled the case (D28). They agreed to joint physical and joint legal custody of Child (D29 pp. 1, 3). Mother and Father agreed W.P. would reside with Mother "at all times except every other weekend from 6:00 p.m. Friday to 8:00 a.m. on Monday and from 6:00 p.m. Wednesday to 6:00 p.m. Friday every week" (D29 p. 1). They also agreed to a summer custody schedule mirroring the schoolyear one, except Mother and Father were both entitled to "one (1) fourteen (14) day period during the summer school vacation period of June, July and August" (D29 p. 2).

The parenting plan also acknowledged "[t]he schedules and commitments of the parents and Child may require occasional changes to the physical custody schedule" (D29 p. 2). Mother and Father agreed to "communicate and cooperate with each other to attempt to honor any reasonable requests and agree on changes[,]" but the parent receiving any modification was entitled to make "the final decision on whether the change" would occur (D29 p. 2). Per the agreement, any requests to change the custody schedule had to be submitted to the other parent within at least "48 hours prior to the date of the requested change" (D29 p. 3).

The trial court issued a judgment in the paternity action the same day Mother and Father filed their joint parenting plan (D31; App. A5). The court found Child is "the result of a sexual relationship between" Mother and Father, and Father "is the biological father of" Child (D31 p. 2; App. A6). It awarded the parties joint physical and joint legal custody over Child, adopting their parenting plan in its entirety (D31 p. 5; D32; App. A9, A13).

C. Pretrial proceedings below

In May 2022, more than three years after the judgment in the paternity action, Grandmother, Child's maternal grandmother, filed a petition for third-party visitation, citing as its only authority § 452.375.5(5), R.S.Mo. (D2). The petition alleged that between Child's birth and January 2022, Grandmother "had regular and continuing contact with [Child] such that she has a special relationship with" him (D2 p. 1). The petition did not allege any facts supporting Grandmother's "special relationship" with Child (D2). It stated, "the welfare of [Child] requires that [Grandmother] be allowed to maintain a relationship with [Child] by having in-person visitation" (D2 p. 2). Grandmother further alleged the "denial of contact between [Grandmother] and [Child] has been arbitrary and capricious and in direct retaliation for [Grandmother]'s complaints that [Child]'s medical needs were not being addressed" (D2 p. 2). Grandmother's petition made no reference to Father's prior paternity action or the resulting judgment awarding Mother and Father joint legal and physical custody per their agreed parenting plan (D2).

Grandmother requested an award of third-party visitation with Child (D2 p. 2). She attached a proposed parenting plan requesting visitation one weekend each month, two weeks during the summer, and "six (6) days to extend weekends" (D3). Grandmother's parenting plan also did not refer to the preexisting custody schedule in the paternity judgment (D3).

Mother and Father were served a copy of the petition on May 26, 2022 (D1 p. 5). Counsel entered an appearance for Father on July 13, 2022, but did not file a responsive pleading for Father (D1 p. 6). Mother did not retain counsel or file a responsive pleading (D1 p. 6). The court held a trial setting

in September 2022, at which Father appeared by counsel and Mother did not appear (D1 p. 7; D4). Grandmother and Father made a joint oral motion to consolidate the visitation action with the prior paternity action, which the trial court granted (D4). After the hearing, the trial court also entered an interlocutory order of default against Mother (D4).

D. Trial

Grandmother's petition was tried in November 2022 (Tr. 1). Mother appeared in person and without counsel, whereas Father appeared in person and with counsel, but still had not filed a responsive pleading (Tr. 3; D1 p. 8). Grandmother testified as the only witness on her own behalf (Tr. 4-25). Both Father (Tr. 26-39) and Mother (Tr. 39-50) testified on Father's behalf.

1. Grandmother's testimony

Grandmother testified that after Child was born in 2017, Child and Mother lived in Kirksville with Father (Tr. 8). During that period, Grandmother visited as often as she could, typically at least once each month (Tr. 9). She stayed in Mother's and Father's home in Kirksville for periods of three-to-four days at a time (Tr. 9). Later, Mother and Father separated but Grandmother continued to visit Child with about the same frequency (Tr. 10). During the visits after Mother and Father's separation, Grandmother occasionally would spend time alone with Child so Mother could run errands or take care of other necessities (Tr. 11).

Sometimes, Mother brought Child to visit Grandmother's home in High Ridge, Missouri (Tr. 12). Mother would allow Grandmother to care for Child while she visited with friends there (Tr. 12). During a two-week period in

2021, Child stayed with Grandmother at her home without Mother or Father (Tr. 12-13).

Grandmother also explained the various activities in which she and Child would engage when Child visited her:

> [w]hen he's at my house, we go out in the yard. We see pictures in clouds. We play on the swings. We visit with the neighbors. We play with the cat. We build -- his favorite thing to do is build houses. I've been working on my house with construction. I have a lot of little, small pieces of wood. And he loves to take pieces of wood, pieces of cardboard, pieces of plastic. And I gather things that are interesting shapes. And he loves to build houses out of them. And he likes to take the Chewy boxes and stand them on the side and make them into an apartment, and then spring out at me, decorate the doors with colors and crayons, and then hide in them and say, you know, ask where I am. Can you find me? And then, he'd spring out of the doors. And he -- loves mama bear. As soon as he comes to my house, I have a huge bear that has leather teeth and a tongue. And as soon as he sees her, he picks her up and puts her on the couch next to him. And he shares his food with her. He loves to make Play-Doh sandwiches. I get him different Play-Doh kits, where you can make sandwiches and hot dogs and hamburgers. And he loves to just mess my house up with Play-Doh and building things. And we, like, cook things like small, simple things, making toast or whatever. And he's very imaginative. We just kind of spitball with ideas of things. Like, he says he's part cat-werewolf. And I'm like, wow, that must be exciting. And I ask him what it's like to be a cat-werewolf? And you know, I just try to never shut down whatever he's into. And we just -- we just play that way.

(Tr. 13-14). Grandmother further explained Child had a good relationship with her boyfriend and enjoyed going to the swimming pool at his house in St. Charles (Tr. 16). During visits with Grandmother, Child also was friendly with her neighbors (Tr. 17).

Grandmother testified she did not believe it was in Child's best interest for her visitations to take place in Child's hometown of Kirksville (Tr. 17). In Grandmother's opinion, this was because of the large number of family-friendly attractions in the St. Louis area near her High Ridge home (Tr. 18-19). Grandmother also explained her visitation with Child was in Child's best interest because "[Grandmother]'s house is special" due to various "strange things" she has at her home, including "cat masks[] and musical instruments" (Tr. 24).

Grandmother also stated that at the time of the November 2022 trial, she had not been permitted contact with Child since the previous Christmas Eve, the result of an argument she had with Mother (Tr. 20).

Grandmother acknowledged the existing court-ordered parenting plan from the prior paternity action (Tr. 6). She also testified that she believed Mother and Father to be "loving parents" and "real sweet with" Child (Tr. 9).

2. Father's and Mother's Testimony

Father was the first witness to testify on his behalf (Tr. 26). He explained that though he was not present for an incident between Mother and Grandmother on Christmas Eve 2021, he was aware Child had not seen Grandmother since then (Tr. 26-27). After Mother and Grandmother's relationship soured in the wake of the Christmas Eve argument, Father facilitated contact between Grandmother and Child through video calls (Tr. 35, 40). But these calls stopped after Grandmother reported Mother and Father to the Department of Social Services, claiming they were not addressing issues with Child's teeth (Tr. 35, 37, 40). The Department

responded to Mother's and Father's homes and determined no further investigation was necessary, and the issue with Child's teeth was addressed via surgery in August 2021 (Tr. 35, 37).

Father explained he wanted any re-establishment of Child's relationship with Grandmother to "start small[,]" with Grandmother visiting Child at home in Kirksville rather than the pair leaving town (Tr. 26, 28). Even then, he said both he and Mother were "very uncomfortable" about the thought of Grandmother spending time with Child (Tr. 26).

Father's hesitation to allow Grandmother to contact Child stemmed in part from the bad relationship between Mother and Grandmother and the "toxic" things Grandmother said to Mother (Tr. 27, 35-36). Although Father did not describe the specific content of the communication between Grandmother and Mother at trial, he considered things Grandmother told Mother to be "absolutely terrible" (Tr. 36).

Father also voiced specific concerns about Grandmother's ability adequately to care for Child (Tr. 28-30). He explained that after Child returned home from prior visits with Grandmother, Child had unexplained accidents Father referred to as being "unpotty-trained" (Tr. 28-29). Additionally, Grandmother would disturb Child's sleep schedule Father and Mother set for Child's schooling (Tr. 28-29). Lastly, Father had serious reservations about Grandmother transporting Child due to Grandmother's previous auto accidents (Tr. 29-30). Grandmother admitted she had been in six car accidents and was living off disability payments as a result (Tr. 7, 30).

Mother confirmed Child's contact with Grandmother stopped after Christmas Eve 2021 (Tr. 40). She testified she and Grandmother had a fight after which she did not want to speak with Grandmother again (Tr. 40). She asked Father to facilitate video calls between Child and Grandmother in the wake of the fight, but those stopped soon after Grandmother's call to Social Services and her filing of her visitation petition (Tr. 40).

Mother expressed some of the same reservations as Father about Grandmother's potential visitation with Child (Tr. 41-47). She explained that after Child's prior two-week stay with Grandmother, "[h]e came back home pooping his pants" even though he was "fully potty trained" when Mother dropped him off, and Child's sleep schedule had been disrupted after staying with Grandmother, too (Tr. 41-42, 46). Mother testified she shared Father's concerns about Grandmother's driving abilities (Tr. 43).

Mother elaborated further about her concerns, explaining Child "was absolutely wild" upon returning from Grandmother's care because Grandmother "lets [Child] do whatever he wants" (Tr. 42, 46). Mother, too, was concerned about Child staying in Grandmother's home because it was "a cluttered hoard" with "stacks upon stacks of things[,]" which Mother believed could be dangerous for Child (Tr. 42-43). Lastly, she testified Grandmother permitted Child to watch videos about demon possession when he was four years old, which concerned Mother (Tr. 42).

Like Father, Mother explained she did not want Child to visit with Grandmother alone in High Ridge (Tr. 47). Mother preferred any visitation be conducted in Kirksville so she could also be present to supervise (Tr. 47).

E. Judgment

In December 2022, the trial court issued a judgment in Grandmother's favor (D5; App. A1). Without making specific factual findings to support its decision, the court concluded "[i]t would be in the child's best interest to have regular contact with" Grandmother (D5 p. 1; App. A1). It further explained it was granting the visitation request because Mother and Father "presented no evidence that regular visits with [Grandmother] would be harmful to" Child (D5 pp. 1-2; App. A1-2).

The court attached a parenting plan to its judgment (D6; App. A3). The court ordered Grandmother be permitted one weekend of visitation with Child every other month "beginning Friday at 4:00 p.m. until Sunday at 1:00 p.m." (D6 p. 1; App. A3). It also awarded Grandmother one week of visitation with Child every summer (D6 p. 1; App. A3). It ordered Grandmother to pick Child up at Mother's home in Kirksville for each weekend visitation and return him to Mother's and Father's custody in the parking lot of a Home Depot in Columbia, Missouri (D6 p. 1; App. A3). For summer visitations, the court ordered Grandmother to provide all transportation of Child (D6 p. 2; App. A4).

Mother and Father then timely appealed to this Court (D19).

Points Relied On

I. The trial court erred in entering judgment for Grandmother *because* this misapplied the law, as grandparents have standing to seek third-party visitation only to the extent they have statutory authority to do so, and § 452.375.5, R.S.Mo., only gives a person standing to seek third-party custody "prior to" a final custody determination being issued, so grandmother lacked standing to pursue her claim *in that* Grandmother filed her petition for third-party visitation under § 452.375.5 more than three years after the paternity court's custody determination over child became final.

In re J.D.S., 482 S.W.3d 431 (Mo. App. 2016)

Hanson v. Carroll, 527 S.W.3d 849 (Mo. banc 2017)

In re Adoption of E.N.C., 458 S.W.3d 387 (Mo. App. 2014)

In re Adoption of R.S., 231 S.W.3d 826 (Mo. App. 2007)

§ 452.375, R.S.Mo.

II. The trial court plainly erred in entering judgment for Grandmother *because* this obviously misapplied the law, as § 452.375.5(5), R.S.Mo., only permits a court to grant third-party visitation "[p]rior to awarding the appropriate custody arrangements," so Grandmother's petition failed to state a claim on which relief can be granted, and effected a manifest injustice that violated Mother's and Father's due process right to oversee the care, custody, and control of Child guaranteed in U.S. Const. Amends. V and XIV and Mo. Const. Art. I, § 10 *in that* the paternity court entered its final judgment implementing a custody arrangement for Child more than three years before Grandmother's petition under § 452.375.5 to a different court.

Hanson v. Carroll, 527 S.W.3d 849 (Mo. banc 2017)
U.S. Const. Amend. V
U.S. Const. Amend. XIV
Mo. Const. art. I, § 10
§ 452.375, R.S.Mo.

III. The trial court erred in granting Grandmother third-party visitation *because* this lacked substantial evidence in its support, as parents have a due process right to oversee the care, custody, and control of their children guaranteed in U.S. Const. Amends. V and XIV and Mo. Const. Art. I, § 10, and § 452.375.5(5)(a), R.S.Mo., permits court-ordered visitation with a third party only when the parents are unfit or "the welfare of the child requires" it, meaning the child has a special or extraordinary bond with the third party *in that* no evidence indicated an extraordinary, parent-like bond between Child and Grandmother, so Grandmother failed to rebut the strong presumption that Mother and Father should maintain control over the Child's custody and visitation.

Troxel v. Granville, 530 U.S. 57 (2000)

K.M.M. v. K.E.W., 539 S.W.3d 722 (Mo. App. 2017)

Conoyer v. Kuhl, 562 S.W.3d 393 (Mo. App. 2018)

In re Marriage of Horinek, 41 S.W.3d 897 (Mo. App. 2001)

U.S. Const. Amend. V

U.S. Const. Amend. XIV

Mo. Const. Art. I, § 10

§ 452.375, R.S.Mo.

Argument

Standard of Review as to All Points

In a judge-tried case, the standard of review from *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976), applies. *In re Marriage of Woodson*, 92 S.W.3d 780, 785 (Mo. banc 2003). The judgment will be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy*, 536 S.W.2d at 32.

I. The trial court erred in entering judgment for Grandmother *because* this misapplied the law, as grandparents have standing to seek third-party visitation only to the extent they have statutory authority to do so, and § 452.375.5, R.S.Mo., only gives a person standing to seek third-party custody "prior to" a final custody determination being issued, so grandmother lacked standing to pursue her claim *in that* Grandmother filed her petition for third-party visitation under § 452.375.5 more than three years after the paternity court's custody determination over child became final.

Preservation Statement

This point argues the petitioner below lacked standing, which "may be asserted for the first time on appeal." *Schaberg v. Schaberg*, 637 S.W.3d 512, 519 (Mo. App. 2021). Therefore, it is preserved.

Additional Standard of Review

This Court determines *de novo* whether a party has standing to sue. *In re J.D.S.*, 482 S.W.3d 431, 437 (Mo. App. 2016).

* * *

Section 452.375.5, R.S.Mo., only grants third parties a right to petition for visitation with a child "*prior to*" issuance of a final custody determination (emphasis added). As this Court has held many times, this language means the statute only permits requests for third-party visitation "in a case in which custody is at issue[.]" *In re Adoption of E.N.C.*, 458 S.W.3d 387, 402 (Mo. App. 2014), *abrogated on other grounds by S.S.S. v. C.V.S.*, 529 S.W.3d 811 (Mo. banc 2017)). So, when a third party files a petition under this statute,

she lacks standing unless the request is made "in conjunction with an ongoing custody hearing." *J.D.S.*, 482 S.W.3d at 439.

Grandmother brought her third-party visitation request more than three years after the paternity court issued its final judgment setting Child's custody. Therefore, the law of Missouri is Grandmother's request was too late and she lacked standing to bring her case at all. Accordingly, the trial court lacked jurisdiction over her petition, and it should have been dismissed.

A. Grandparents have standing to seek third-party visitation only to the extent they are granted statutory authority to do so.

"Standing inquires into whether the persons seeking relief have a right to do so." *White v. White*, 293 S.W.3d 1, 8 (Mo. App. 2009) (quoting *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002)), *abrogated on other grounds by In re T.Q.L.*, 386 S.W.3d 135 (Mo. banc 2012). It asks whether the party has both a "legally cognizable interest in the subject matter" and "a threatened or actual injury." *White*, 293 S.W.3d at 8 (quoting *E. Mo. Laborers Dist. Council v. St. Louis Cnty.*, 781 S.W.2d 43, 46 (Mo. banc 1989)). "One interested in an action is one who is interested in the outcome or result thereof because he has a legal right which will be directly affected thereby …." *In re J.F.K.*, 853 S.W.2d 932, 935 (Mo. banc 1993).

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

B. Grandmother had no standing to petition for third-party visitation with Child because the paternity court made a final custody determination more than three years before her petition.

Grandmother filed her petition citing only § 452.375.5, R.S.Mo. (D2 p. 1), which permits a trial court to award a third-party visitation with a child, but only "*[p]rior to awarding*" custody (emphasis added). Courts repeatedly have interpreted this language to mean petitioners may seek third-party custody or visitation under § 452.375.5 only when "custody is at issue[.]" *E.N.C.*, 458 S.W.3d at 402. So, a petition under § 452.375.5 is appropriate only when made "in conjunction with an ongoing custody hearing." *J.D.S.*, 482 S.W.3d at 439.

In *J.D.S.*, in a strikingly similar situation to this case, this Court held that after a custody case is over, grandparents lacked standing to seek third-party custody under § 452.375.5. *Id.* at 443-44. There, a child's maternal grandparents and paternal grandmother filed a joint petition for adoption after the natural parents' rights were terminated. *Id.* at 434. At the adoption hearing, the paternal grandmother dismissed her adoption petition, and the maternal grandparents adopted the child. *Id.* The same day, after dismissing her adoption case, the paternal grandmother filed a petition for third-party visitation in a new case. *Id.* The maternal grandparents, at that point the child's adoptive parents, defaulted and the court entered judgment granting the paternal grandmother's requested visitation. *Id.* at 435.

On appeal, this Court reversed the default judgment, holding the paternal grandmother had no standing to petition for third-party visitation. *Id.* at 443-44. Relying on *R.S.*, the Court determined a petition under §

452.375.5 was not "intended to be used to grant a party a right to visitation in an adoption case." *Id.* at 439 (quoting *R.S.*, 231 S.W.3d at 830). This is because the statute only applies to "a case in which custody is at issue …." *Id.* at 440 (quoting *E.N.C.*, 458 S.W.3d at 402).

Here, too, Grandmother filed her petition as an independent action seeking third-party visitation with Child. And like the appellants in *J.D.S.*, Mother and Father challenge the petitioner's standing for the first time on appeal. While Grandmother may respond that *J.D.S.*, *R.S.*, and *E.N.C.* are distinguishable because they concern adoption, the material fact here is identical: no custody dispute existed when Grandmother filed her petition, as the paternity court had issued its final judgment more than three years beforehand (D2; D31; App. A5). So, just as the appellants successfully argued in *J.D.S.*, Grandmother lacked standing because § 452.375.5 "only allows third-party visitation to be considered in conjunction with an ongoing custody hearing." *Id.* at 439.

Grandmother's petition would have been proper only if brought during the paternity case, when Child's custody was directly at issue. But the paternity court's 2019 judgment granting joint physical and joint legal custody to Mother and Father means they had full "control over the custody of Child, which encompasses control over visitation by others like" Grandmother. *Hanson v. Carroll*, 527 S.W.3d 849, 854 (Mo. banc 2017).

Grandmother therefore had no legal right, statutory or otherwise, to petition for court-ordered visitation with Child. This Court should reverse the trial court's judgment outright, without remand.

II. The trial court plainly erred in entering judgment for Grandmother *because* this obviously misapplied the law, as § 452.375.5(5), R.S.Mo., only permits a court to grant third-party visitation "[p]rior to awarding the appropriate custody arrangements," so Grandmother's petition failed to state a claim on which relief can be granted, and effected a manifest injustice that violated Mother's and Father's due process right to oversee the care, custody, and control of Child guaranteed in U.S. Const. Amends. V and XIV and Mo. Const. Art. I, § 10 *in that* the paternity court entered its final judgment implementing a custody arrangement for Child more than three years before Grandmother's petition under § 452.375.5 to a different court.[1]

Preservation Statement and Standard of Review

This issue is not preserved for appellate review. Mother and Father request plain error review of it, as explained below at pp. 35-38.

This Court may grant relief on issues not preserved below if they are "[p]lain errors affecting substantial rights" and "manifest injustice or miscarriage of justice has resulted therefrom." Rule 84.13(c). It first must "determine whether the claimed error is, in fact 'plain error[ ] affecting substantial rights.'" *State v. Johnson*, 524 S.W.3d 505, 513 (Mo. banc 2017) (quoting *State v. Hunt*, 451 S.W.3d 251, 260 (Mo. banc 2014)). If this is found, "the Court determines whether the error actually did result in manifest injustice or a miscarriage of justice." *Id.*

[1] This is an alternative to Point I, above. If Grandmother somehow had standing, her petition still failed to state a lawful claim.

Plain errors are "those which are evident, obvious and clear." *State v. Reese*, 632 S.W.3d 365, 371 (Mo. App. 2021) (quoting *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009)). An appellant has the burden of establishing manifest injustice, a term that "is not easily defined" and "depends on the facts and circumstances of each particular case[.]" *State v. Stewart*, 997 S.W.2d 36, 39 (Mo. App. 1999).

Whether a petition states a claim is reviewable for plain error. A point on appeal arguing the petition below failed to state a claims is "no more than a claim of legal error subject to traditional appellate review." *Med. Plaza One, LLC v. Davis*, 552 S.W.3d 143, 155 (Mo. App. 2018). Today, a failure to state a claim is an affirmative defense, *Robertson v. Rosner*, 641 S.W.3d 436, 441-44 (Mo. App. 2022), and an affirmative defense raised for the first time on appeal is reviewable for plain error. *See City of Peculiar v. Effertz Bros Inc.*, 254 S.W.3d 51, 59-60 (Mo. App. 2008) (considering a defense of statutory omission for the first time under plain error review); *Ridell v. Bell*, 262 S.W.3d 301, 305 (Mo. App. 2008) (failure to mitigate damages); *Lundstrom v. Flavan*, 965 S.W.2d 861, 864-65 (Mo. App. 1998) (statute of limitation).

Determining whether a petition fails to state a claim weighs "solely the adequacy of" the petition. *Hanson*, 527 S.W.3d at 852. It asks whether the alleged facts "meet the elements of a recognized cause of action …." *Id.* (quoting *Avery Contracting, LLC v. Niehaus*, 492 S.W.3d 159, 161 (Mo. banc 2016)). "The facts alleged are assumed to be true and all inferences from those facts are construed broadly in favor of the plaintiff." *Avery Contracting*, 492 S.W.3d at 162.

* * *

The law of Missouri is that no court may entertain an action under § 452.375.5 requesting third-party custody or visitation of a child if a prior court already has entered a final judgment fully resolving the child's custody. This is because a court may consider such a request only "*[p]rior to awarding* [an] appropriate custody arrangement in the best interest of the child[.]" § 452.375.5 (emphasis added). So, petitions for third-party visitation are only permissible if "a custody award as to a child" does not "already exist[ ]" and "parental custody is not at issue." *Hanson*, 527 S.W.3d at 854. Otherwise, the petition fails to state a claim and must be dismissed. *Id.* (affirming such a dismissal).

Here, Grandmother filed her petition citing only § 452.375.5 more than three years after the court in Father's paternity action awarded Mother and Father joint custody over Child. Per § 452.375.5's prefatory clause, and as the Supreme Court held directly in *Hanson*, Grandmother's petition therefore obviously did not state any claim on which relief could be granted, and the trial court granting her petition was error. Moreover, this was a manifest injustice because it deprived Mother and Father of their fundamental constitutional right to oversee the care, custody, and control of Child. This Court should reverse the trial court's judgment outright, without remand.

A. A third party may petition for custody or visitation with a child only if there is no existing order for the child's custody.

Missouri law permits grandparents to petition as third parties for court-ordered visitation with a grandchild. § 452.375.5(5); *see also D.S.K. ex rel. J.J.K. v. D.L.T.*, 428 S.W.3d 355, 659-60 (Mo. App. 2013) (recognizing §

452.375.5(5) permits a petition for third party custody to be filed as an independent action). That statute says:

> 5. *Prior to* awarding the appropriate custody arrangement in the best interest of the child, the court shall *consider each of the following as follows*: …
>
> (5) Third-party custody or visitation: (a) When the court finds that each parent is unfit, unsuitable, or unable to be a custodian, or the welfare of the child requires, and it is in the best interests of the child[.]

(App. A23) (emphasis added).

In *Hanson*, the Supreme Court of Missouri clarified the contours of this subsection's prefatory clause. 527 S.W.3d at 853-54. There, a couple was awarded guardianship over a child after the natural parents were deemed unfit. *Id.* at 850. One year later, the child's paternal grandparents filed a petition for visitation and custody under § 452.375.5 arguing both (1) the welfare of the child required third-party custody or visitation, and (2) the award was in the best interest of child. *Id.* On the guardian couple's motion, the trial court dismissed the grandparents' petition for failure to state a claim because they could not maintain an original cause of action under § 452.375.5(5). *Id.* at 852.

The Supreme Court affirmed the dismissal of the petition. *Id.* at 854. The Court recognized "child custody is one of the most common areas of law in which more than one court could properly have subject matter jurisdiction[,]" including courts in guardianship and paternity cases. *Id.* at 853. So, to preserve the balance between these courts of concurrent jurisdiction, "a circuit court legally errs when it enters a conflicting judgment

or order with respect to a preexisting child custody order or judgment[.]" *Id.* at 853-54 (citing *Kelly v. Kelly*, 245 S.W.3d 308, 316 (Mo. App. 2008)). Because the grandparents in *Hanson* filed for third-party visitation after "letters of guardianship [were] issued and a custody award as to [the] child already" existed, their petition failed to state any claim upon which relief could be granted and had to be dismissed. *Id.* at 854.

This case is materially identical to *Hanson*. Grandmother filed her petition more than three years after the paternity court issued a final determination awarding Mother and Father joint physical and legal custody over Child (D2; D31). Just as in *Hanson*, this was far too late, as "a custody award as to [C]hild already exist[ed]" and "parental custody [was] not at issue." *Id.* at 854. So, taking all facts in Grandmother's petition as true, she failed to state a lawful claim because the paternity judgment's existence meant the threshold element of section 452.375.5 was not met – her petition simply "could not state a cause of action[.]" *Id.*

B. The trial court plainly erred in granting Grandmother relief on her petition despite it not stating a lawful claim.

Grandmother's petition specifically noted Child lived with Mother "under a joint custody order" from the paternity case (D2 p. 1). And the trial court clearly was aware of the paternity case. It ordered consolidation of that case and underlying case and referred to the paternity case in its final judgment (D4; D5 p. 1; App. A1). Moreover, the same judge presided over both cases (D1 p. 3; D20 pp. 3, 5). But the court entered judgment in Grandmother's favor anyway without acknowledging the conflict it created

with the three-year-old paternity judgment or Grandmother's failure to meet the threshold element of a third-party custody claim. This was plain error.

Missouri courts often have found plain error when a court enters judgment without legal authority. For example, in *State v. Liberty*, the Supreme Court found plain error where the trial court entered judgment against a defendant on seven counts of possession of child pornography. 370 S.W.3d 537, 555 (Mo. banc 2012). The Court explained plain error review was appropriate because "double jeopardy is a constitutional right that goes 'to the very power of the State to bring the defendant into court to answer the charge brought against him[.]'" *Id.* at 546 (quoting *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)).

Grandmother may argue this case is not analogous to the constitutionally erroneous entry of a conviction violating a criminal defendant's right to be free from double jeopardy. But the point of decisions like *Liberty* and *Blackledge* is that a court has no authority to enter judgment that plainly will violate a defendant's constitutional rights. The same logic applies here: the court had no authority to enter a judgment in this case conflicting with Mother's and Father's custody arrangement from the paternity case when the very statute Grandmother purported to invoke granted the trial court no legal authority to meddle with that custody award in the first place.

Two analogous examples in civil cases illuminate the court's error here. In *Cooper v. Chrysler Grp., LLC*, this Court reversed a trial court's entry of summary judgment under plain error review. 361 S.W.3d 60, 66-67 (Mo.

App. 2011). There, the plaintiff brought a negligence case against his employer after a workplace slip and fall. *Id.* at 61. The trial court granted summary judgment in favor of defendants, who argued the plaintiff's exclusive remedy was under the Workers' Compensation Law. *Id.* at 62. But that defense depended on whether the fall was accidental, a question of fact the Labor and Industrial Relations Commission, which had exclusive jurisdiction to decide that question, had not yet considered. *Id.* at 63-64. So, the trial court plainly erred by entering summary judgment for defendant when it lacked statutory power to do so, as a question of fact still needed to be decided by the administrative agency. *Id.* at 65-66.

More recently, this Court granted plain error review on a claim raised for the first time on appeal that the damages entered against a defendant exceed a statutory cap. *Washington v. Sioux Chief Mfg. Co., Inc.*, 662 S.W.3d 60, 76-80 (Mo. App. 2022). There, the defendant's pleadings had been stricken as a discovery sanction, and the court awarded the plaintiff damages in excess of the statutory cap. *Id.* at 77. This Court held that despite the pleadings being stricken, this was plain error, as the cap was a statutory limit the trial court erroneously disregarded. *Id.* at 79. This was appropriate because "a statutory requirement applies automatically as a matter of law, and that it should not be necessary to plead reliance on the unambiguous language of a statute in order for it to be implemented." *Id.* at 79 n.5 (citation omitted).

Like the trial court in *Cooper*, the court here had no authority to enter judgment in Grandmother's favor because a statutory prerequisite – here, the

lack of a preexisting custody arrangement – was not met. And like the trial court in *Washington*, a "statutory requirement," 662 S.W.3d at 79 n.5, limited the trial court's authority to enter a judgment for Grandmother because of Mother and Father's prior custody judgment. The trial court's judgment in the face of this statutory bar and Grandmother's facially deficient petition was accordingly "obvious, evident, and clear error, and" Mother's and Father's "substantial right[s]" to parent Child were "affected." *Cooper*, 361 S.W.3d at 66.

C. The trial court's erroneous judgment in Grandmother's favor resulted in the manifest injustice of an unconstitutional infringement on Mother's and Father's rights to parent Child.

"[T]he interest of parents in the care, custody, and control of their children … is perhaps the oldest of the fundamental liberty interests" in the right to due process the Constitution guarantees. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (citing U.S. Const. Amends. V and XIV); *see also* Mo. Const. Art. I, § 10. In *Troxel*, the Court struck down Washington's third-party visitation statute after a child's grandparents successfully petitioned for third-party visitation. *Id.* at 74-75. The Court explained "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made" by a third party. *Id.* at 72-73.

Like the third-party visitation award in *Troxel*, the trial court's error here infringed on Mother's and Father's parental rights, unjustly depriving them of the constitutional right to make decisions about whether and how

Child may associate with Grandmother. This was a manifest injustice warranting reversal under plain error review.

This Court has found on multiple occasions that error leading to termination of parental rights amounts to manifest injustice. *See, e.g.*, *In re Z.L.R.*, 306 S.W.3d 632, 638 (Mo. App. 2010) ("Parental rights are a fundamental liberty interest, and statutes providing for their termination are strictly construed in favor of the parent and preservation of the natural parent-child relationship"); *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 811 (Mo. banc 2011), *abrogated on other grounds by S.S.S.*, 529 S.W.3d 811 (finding manifest injustice resulted where trial court failed to order a report required by statute in termination proceedings). While granting third-party visitation certainly is not as severe as terminating parental rights altogether, it still constitutes an extreme intrusion on the fundamental parental rights the U.S. Supreme Court observed in *Troxel*.

Both Mother and Father testified they had serious reservations about the prospect of Grandmother's visitation with Child (Tr. 27-29, 35-36, 41-42, 46). Whatever their reasoning, it was well within their constitutional rights as Child's parents to exercise "control over visitation by others like" Grandmother. *Hanson*, 527 S.W.3d at 854. The trial court's judgment giving Grandmother visitation with Child unjustly and unfairly infringed on that sacred right, requiring outright reversal.

III. The trial court erred in granting Grandmother third-party visitation *because* this lacked substantial evidence in its support, as parents have a due process right to oversee the care, custody, and control of their children guaranteed in U.S. Const. Amends. V and XIV and Mo. Const. Art. I, § 10, and § 452.375.5(5)(a), R.S.Mo., permits court-ordered visitation with a third party only when the parents are unfit or "the welfare of the child requires" it, meaning the child has a special or extraordinary bond with the third party *in that* no evidence indicated an extraordinary, parent-like bond between Child and Grandmother, so Grandmother failed to rebut the strong presumption that Mother and Father should maintain control over the Child's custody and visitation.[2]

Preservation Statement

This point is preserved for appellate review. Under § 510.310.4, R.S.Mo., "[t]he question of the sufficiency of the evidence to support the judgment may be raised whether or not the question was raised in the trial court." Additionally, under Rules 73.01 and 78.07(c), a challenge to the sufficiency of the evidence in a judge-tried case does not require a specific objection at trial or in any post-judgment motion, and instead automatically is preserved for appeal. *In re Marriage of Harris*, 446 S.W.3d 320, 330-31 (Mo. App. 2014) (Rahmeyer, J., joined by Sheffield, J.).

[2] This point is an alternative to Points I and II, above. If Grandmother's claim somehow was lawful, she failed to prove it.

Additional Standard of Review

This Court views "the evidence in the light most favorable to the circuit court's judgment and defer[s] to the circuit court's credibility determinations." *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014). This Court must "accept as true the evidence and inferences from the evidence that are favorable to the trial court's [judgment] and disregard all contrary evidence." *Watson v. Mense*, 298 S.W.3d 521, 526 (Mo. banc 2009). "Whether evidence is substantial … is a question of law" reviewed *de novo*. *Love v. Hardee's Food Sys., Inc.*, 16 S.W.3d 739, 742 (Mo. App. 2002).

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

* * *

When a third party petitions for visitation with a child in Missouri but does not allege the natural parents are unfit, the third party must prove "the welfare of the child requires" the requested visitation. § 452.375.5(5)(a). This element requires proof of "special or extraordinary circumstances that make third-party custody or visitation in the child's best interest." *T.W. ex rel. R.W. v. T.H.*, 393 S.W.3d 144, 150 (Mo. App. 2013).

Here, the trial court concluded Grandmother met this formidable burden despite no evidence of any kind from which any extraordinary relationship between her and Child even could be inferred. Even taking all

Grandmother's testimony as true and according it all inferences in the trial court's favor, the relationship she had with Child amounted to nothing more than a typical grandparent-grandchild relationship, insufficient to permit interference with Mother's and Father's constitutional right to oversee "the care, custody, and control of" Child. *Troxel*, 530 U.S. at 65. The trial court's judgment otherwise was reversible error.

A. To successfully petition for third-party visitation under § 452.375.5's "welfare" prong, a plaintiff must plead and prove the existence of an extraordinary bond with the child in question.

Section 452.375.5, permits a non-parent third party to petition for court-ordered visitation with a child. The petitioner must first show *either* (1) "that each parent is unfit, unsuitable, or unable to be a custodian[;]" *or* (2) "the welfare of the child requires" the award. § 452.375.5(5)(a). If the petitioner meets either of these requirements, only then may the trial court proceed to consider whether third-party visitation "is in the best interests of the child," which it also must find. *Id.*

As to the "welfare of the child" requirement, third-party petitioners have a strenuous burden to meet, because parents' constitutional rights must be protected. *See Troxel*, 530 U.S. at 72 (recognizing parents' fundamental constitutional right "to make decisions concerning the care, custody, and control of" their children). Therefore, courts may not "treat the term 'welfare'" in § 452.375.5 "as the equivalent of 'best interests." *T.W.*, 393 S.W.3d at 150. To prove "the welfare of the child requires" third-party custody or visitation under § 452.375.5, a court must find that petitioner has proven "special or extraordinary circumstances that make third-party …

visitation in the child's best interest" before infringing on those parental rights. *T.W.*, 393 S.W.3d at 150.

So, a third party petitioning for custody or visitation must rebut the presumption "that the best interests of [a child] are best served by the vesting of custody in the parent," *In re K.K.M.*, 647 S.W.2d 886, 889 (Mo. App. 1983), by showing a "significant bonding familial custody relationship" with the child. *McGaw v. McGaw*, 468 S.W.3d 435, 443 (Mo. App. 2015). "Each case must turn on its own facts." *Flathers v. Flathers*, 948 S.W.2d 463, 470 (Mo. App. 1997).

Missouri courts consistently have held the extraordinary circumstances required by the "welfare" prong are shown only when the third party has a parent-like relationship with the child in question. As the Supreme Court of Missouri explained in *Bowers v. Bowers*, a relationship sufficient to rebut the constitutional presumption of parental custody exists when the third party was "specifically invited by the biological parent to act as a parent of the [child] at issue, and in fact acted in that capacity for an extended period of time." 543 S.W.3d 608, 616 (Mo. banc 2018) (quoting *McGaw*, 468 S.W.3d at 447-48).

In *Bowers*, the mother and father ended their relationship during mother's pregnancy and mother entered into a new relationship before giving birth. *Id.* at 610. The mother and her new boyfriend agreed to raise the child together, and the biological father consented; the couple signed a joint paternity affidavit and boyfriend was named as the child's father on his birth certificate. *Id.* Two years after the child was born, the mother and the

putative father married, but three years after that, the husband filed for divorce and claimed the child to be a child of the marriage. *Id.* at 610-11. The mother disputed his paternity, which led him to file a petition for third-party custody. *Id.* at 611-12.

After a bench trial, the dissolution court awarded the putative father sole custody over the child, which the Supreme Court affirmed. *Id.* at 612, 617. There was sufficient evidence to rebut the parental presumption because the child's therapist explained the child was "attached and bonded deeply to [the putative father] and considers him her primary parent" and breaking their bond "would be 'psychologically destructive' to [the child]'s emotional development and path to maturity." *Id.* at 617. So, there was strong evidence the child had a "significant bonding familial relationship with" the third-party, and therefore § 452.375.5's "welfare" prong was met. *Id.* (citation omitted).

Other decisions of this Court confirm evidence of a parent-like relationship is necessary to support a grant of third-party visitation:

- *A.A.B. v. A.D.L.*, 572 S.W.3d 562, 571 (Mo. App. 2019) (third-party custody award affirmed where "putative father was the only father the child knew for the first nine years of his life");
- *Conoyer v. Kuhl*, 562 S.W.3d 393, 396-97, 400 (Mo. App. 2018) (court's dismissal of third-party custody petition reversed because the petitioner pleaded, among other facts, that child "referred to [him] as 'dad,'" mother invited him to act as parent to the child, and the child

was emotionally distraught over lack of contact with him after he separated from mother);

- *K.M.M. v. K.E.W.*, 539 S.W.3d 722, 737 (Mo. App. 2017) (court erred in denying third-party custody to non-biological mother in a same-sex relationship where evidence showed she "treated [the c]hild as her own" and "shared in [the c]hild's daily care and nurturing," creating "a family under every reasonable definition aside from legal");
- *In re Hill*, 937 S.W.2d 384, 386 (Mo. App. 1997) (award of third-party custody to child's maternal uncle and aunt affirmed because they had "nurtured him [and] cared for his every need on a daily basis" for "virtually his entire life").

The common thread connecting these cases of valid claims of third-party custody or visitation is a prolonged, parent-like relationship between the child and the third-party. Put simply, the third party must rebut the parental presumption by proving that she, too, should be considered a parent of the child.

When the third party does not meet this burden, granting her claim for custody or visitation is reversible error. *In re Marriage of Horinek*, 41 S.W.3d 897, 908 (Mo. App. 2001). In *Horinek*, the trial court awarded the child's paternal grandparents sole legal custody under § 452.375.5. The child had lived in the grandparents' home for the majority of her life and the grandmother "was the closest thing to a parent this child" had. *Id.* at 907. Nonetheless, this Court reversed the custody award because an expert "testified that it was 'impossible' to say that [the child] would suffer any

damage if relocated" to the mother's home. *Id.* at 907. So, even a parent-like relationship is insufficient to warrant third-party visitation if there is no evidence the child will be harmed without it.

B. No substantial evidence showed the existence of a parent-like relationship between Grandmother and Child.[3]

The trial court here concluded "[i]t would be in [Child]'s best interest to have regular contact with" Grandmother and Mother and Father "presented no evidence that regular visits with [Grandmother] would be harmful to" Child (D5 pp. 1-2; App. A1-2). But the judgment makes no reference at all to § 452.375.5's "welfare" prong, nor does it acknowledge the constitutional presumption of parental custody. This clear misapplication of the law aside, there was no substantial evidence presented at trial supporting any finding of the special or extraordinary relationship the statute required Grandmother to prove in order to justify granting her claim for relief.

Grandmother testified she visited Child in Kirksville approximately once each month for three-to-four-day periods beginning shortly after he was born (Tr. 8-10). Mother occasionally brought Child to Grandmother's home in

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[3] The analysis here complies with the four-part rubric this Court announced for "lack of substantial evidence" challenges in *Houston v. Crider*, 317 S.W.3d 178, 187 (Mo. App. 2010). It specifies a fact necessary to the court's judgment being challenged on appeal, identifies all favorable evidence supporting it, and demonstrates why it "does not have probative force … such that the trier of fact could not reasonably decide the existence of the proposition." *Id.* Mother's and Father's analysis here assumes all testimony from Grandmother describing her bond with Child is true, but explains why it still is not enough to prove the special and extraordinary relationship necessary to support the trial court's judgment.

High Ridge, including a single visit in 2021 where Child stayed alone with Grandmother for two weeks (Tr. 12-13).

Grandmother explained she believed her relationship was special because Child enjoyed playing in Grandmother's yard, with Play-Doh, using Grandmother's boyfriend's pool, and playing other games with Grandmother (Tr. 13-14, 16). She also explained she needed court-ordered visitation with Child because there were more things to do near her home in High Ridge than near Child's home in Kirksville, such as a Six Flags amusement park (Tr. 18-19).

Taking all facts Grandmother testified to about her relationship with Child as true, "there is no evidence in the record tending to prove a" parent-like relationship between them. *Ivie*, 439 S.W.3d at 200. Rather, the evidence shows only that they had a typical grandparent-grandchild relationship, as she lived hours away from Child and the pair would visit one another occasionally throughout the year for three-to-four-day periods. This simply does not rise to the level the Constitution requires in order to justify interference with Mother's and Father's rights. The relationship between Grandmother and Child bears no resemblance to the parent-like relationships in *Bowers* or the related cases described above. And like the grandmother in *Horinek*, Grandmother failed to prove Child would be harmed in any way absent third-party visitation.

The trial court's third-party visitation award to Grandmother lacks substantial evidence in its support. The Court should reverse the judgment outright, without remand.

Conclusion

This Court should reverse the trial court's judgment outright, without remand.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41(A)(1), as this brief contains 9,480 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellants, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on May 19, 2023, I filed a true and accurate Adobe PDF copy of this brief of the appellants and its appendix via the Court's electronic filing system, which notified the following of that filing:

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