

IN THE
SUPREME COURT OF MISSOURI

IN RE THE MATTER OF T.Q.L.,)	
a minor child,)	
)	
M.M.A.,)	
)	
Petitioner/Appellant,)	
)	
vs.)	Supreme Court No. SC92442
)	
L.L.,)	
)	
UNKNOWN NATURAL FATHER,)	
)	
and)	
)	
LINDA K. THOMAS, Guardian ad)	
Litem for T.Q.L.,)	
)	
Respondents/Respondents.)	

Appeal from the Circuit Court of Greene County
Thirty-First Judicial Circuit
Honorable Jeff Marquardt, Commissioner, and adopted by Honorable Dan Imhof

APPELLANT M.M.A.'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant M.M.A. appeals a judgment of the family court dismissing Appellant's Third Amended Petition, which asserted claims for custody of a child based on the doctrine of equitable estoppel, in its entirety despite a published opinion (*T.Q.L., by his next friend, M.M.A. and M.M.A., individually v. L.L.*, 291 S.W.3d 258 (Mo. App. S.D. 2009)) and mandate from the Court of Appeals reversing a prior judgment of dismissal rendered by the Circuit Court of Greene County and directing the Circuit Court to "reinstate the case and allow appellant to file his Second Amended Petition." (LF 217)¹. The judgment which is the subject of this appeal was entered on December 17, 2010, by the Circuit Court of Greene County, Missouri, the Honorable Dan Imhof. (LF 314-315). The trial court denied M.M.A.'s Motion for Rehearing on February 7, 2011. (LF 29). M.M.A. timely filed his Notice of Appeal in the Missouri Court of Appeals, Southern District, on February 16, 2011. (LF 328-334). Greene County lies within the geographic boundaries of the Missouri Court of Appeals, Southern District. MO. REV. STAT. § 477.060 (2010). Following opinion by the Missouri Court of Appeals, Southern District on February 14, 2012, affirming the dismissal, M.M.A. filed a Motion for

¹ In referencing the Record on Appeal, the Legal File is referred to as "LF," the Supplemental Legal File as "SLF," the Second Supplemental Legal File as "SSLF," the Transcript of the February 7, 2011, hearing on M.M.A.'s Motion for Rehearing as "TR," and the Appendix separately filed herewith as "Appendix."

Rehearing and an Application for Transfer to the Supreme Court in the court of appeals on February 29, 2012, which was denied March 7, 2012. M.M.A.'s Application for Transfer to the Missouri Supreme Court was filed with this Court on March 22, 2012. This Court granted transfer on May 29, 2012. This Court has jurisdiction pursuant to Missouri Constitution, Art. V, Section 10.

STATEMENT OF FACTS

T.Q.L. was born on July 29, 2003, to L.L. (LF 45, 253). L.L. asserted to Appellant M.M.A., T.Q.L., and the world that Appellant was T.Q.L.'s father. (LF 45-46, 48, 190, 253, 264, 267). L.L. and Appellant, although not married, had been involved in a romantic relationship for approximately three years at the time T.Q.L. was conceived and then born. (LF 75, 253). Appellant believed he was T.Q.L.'s father based upon his romantic relationship with L.L. and her oral and written assertions that he was T.Q.L.'s father. (LF 31-32, 67, 94, 264, 267-268). Even before T.Q.L.'s birth, on June 9, 2003, L.L. and M.M.A. negotiated and signed a lucrative Pre-birth Agreement. (LF 48, 75-86, 264). M.M.A. filed his original Petition for Declaration of Paternity, Custody, and Visitation as T.Q.L.'s putative father on January 11, 2007, over two-and-a-half years after T.Q.L. was born and after M.M.A. separated from L.L. (LF 1, 31-35). On March 14, 2007, L.L. signed a Parenting Plan which stated, "The parties hereby acknowledge that Mother and Father are in fact the biological parents of T.Q.L." (LF 48, 94, 265). In August 2007, L.L. informed M.M.A., for the first time, he may not be T.Q.L.'s father. (LF 48, 267-268). In June 2008, and as a result of a court ordered DNA test, M.M.A. discovered that he was not T.Q.L.'s biological father. (LF 173-176, 255).

Relationship between M.M.A. and T.Q.L.

Appellant M.M.A.'s relationship with T.Q.L. was that of father and son. (LF 45-46, 48-49, 266-267). Both Appellant and T.Q.L. believed M.M.A. was T.Q.L.'s father because L.L. repeatedly told M.M.A. and T.Q.L. that M.M.A. was T.Q.L.'s father. (LF 46, 190-191, 253-255). M.M.A. relied upon that information in fostering his relationship

with T.Q.L. (LF 48-49, 190, 253-274). T.Q.L. was only informed that M.M.A. was not his father after DNA testing was conducted. (LF 190-191). Even after T.Q.L. was informed that M.M.A. was not his biological father soon after the D.N.A. testing results became known, T.Q.L. continued his strong attachment to M.M.A. as his father, and told L.L. he wanted to have M.M.A. as his father. (LF 270).

M.M.A. and L.L. have always behaved like T.Q.L.'s parents. (LF 94-109, 190, 266). Although M.M.A. and L.L. never married, M.M.A. was a big fixture and an integral part of T.Q.L.'s life since birth. (LF 87, 94-109, 157, 253-274). M.M.A. had significant input into T.Q.L.'s life since birth. (LF 49, 87, 94-109, 255, 263-274). M.M.A. has had extensive contact and custody of T.Q.L. throughout his lifetime. (LF 49, 94-109, 157, 190-193, 255, 263-274). Consequently, M.M.A. and T.Q.L. have established a strong and substantial parent/child bond. (LF 88, 190-193, 254-255, 263-274). L.L. admits that T.Q.L. loves M.M.A and is "crazy" about him. (LF 88). M.M.A. is the only father that T.Q.L. has ever known. (LF 219, 254-255). Since birth, M.M.A. and L.L. consulted with one another with regard to all matters pertaining to T.Q.L.'s health and welfare. (LF 87, 94, 266).

M.M.A. provides financial support for T.Q.L. since birth

Appellant also provided financial benefits to L.L. and T.Q.L., both pursuant to and excess of the Pre-birth Agreement that was entered into by L.L. and M.M.A. on June 9, 2003, before T.Q.L.'s birth and based on L.L.'s representation to M.M.A. that he was T.Q.L.'s biological father. (LF 75-85, 48-49, 253, 263-264). Pursuant to the Agreement, M.M.A. agreed to pay ninety percent of the incidental costs of T.Q.L.'s

delivery not covered by L.L.'s insurance. (LF 75, 264). M.M.A. also agreed to pay child support into the "General Fund" in the initial amount of Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00) per month from August 1, 2003 through July 1, 2006, and reducing in amount over time until July 1, 2025. (LF 76, 264). M.M.A. paid, at a minimum, the delivery charges and child support amounts through January 2010. (LF 76, 264-270). Also pursuant to the Agreement, M.M.A. agreed to, and did lend L.L. One Hundred Thousand and 00/100 Dollars (\$100,000.00) toward the purchase of a lot and construction of a home. (LF 79, 264). In actuality, M.M.A. loaned L.L. in excess of Two Hundred Thousand and 00/100 Dollars (\$200,000.00). (LF 264). M.M.A. also agreed to secure, and did secure, a life insurance policy on his life benefiting T.Q.L. and L.L. in the amounts of One Hundred Thousand and 00/100 Dollars (\$100,000.00) and Four Hundred Thousand and 00/100 Dollars (\$400,000.00) respectively. (LF 83-84, 264). As of 2009, T.Q.L.'s trust was the beneficiary of insurance on M.M.A.'s life in the aggregate amount of approximately Nine Hundred Thousand and 00/100 Dollars (\$900,000.00). (LF 264). M.M.A. also established a 529 Plan for T.Q.L.'s college education. (LF 268).

DNA Testing concludes M.M.A. is not T.Q.L.'s father

After L.L. informed M.M.A. for the first time that he was potentially not T.Q.L.'s father in August 2007 after M.M.A. filed his paternity action, L.L. admitted that she never was going to reveal the fact that there was the possibility of another father until M.M.A. instituted the litigation to gain legal rights to T.Q.L. (LF 88, 267-268). L.L. informed M.M.A. that she had a single sexual encounter with a Brazilian man named Jack in New York City, and that she had no way to locate him, nor did she want to. (LF

88-89, 254). L.L. does not know “Jack’s” last name, his address or his occupation, and does not know how to reach him or any of his relatives. (LF 88, 254). In June, 2008, and as a result of the court ordered DNA test, M.M.A. discovered that he was not T.Q.L.’s biological father because they did not share certain genetic markers. (LF 176). T.Q.L.’s biological father has never met T.Q.L., has never provided support for T.Q.L., and has no bond, relationship, or contact with T.Q.L. whatsoever. (LF 254).

Second Amended Petition

After the DNA test confirmed that M.M.A. was not T.Q.L.’s father, on June 16, 2008, M.M.A. filed his Motion for Leave to file a Second Amended Petition for Declaration of Paternity to include “alternate theories of custody” including a claim for equitable estoppel. (LF 177-180). The guardian ad litem of T.Q.L, filed her Motion to Dismiss M.M.A.’s Petition, arguing that because M.M.A. was determined not to be the biological father of T.Q.L. by the paternity blood test, § 210.834 RSMo. required the dismissal of M.M.A.’s Petition related to a declaration of paternity. (LF 181-183). The trial court granted the guardian ad litem’s Motion to Dismiss Plaintiff’s Petition on July 28, 2008, and denied M.M.A.’s Motion for Leave to File his Second Amended Petition. (LF 15, 209). The first appeal between these parties ensued.

The First Appeal

Point Relied On IV in the first appeal (No. SD29293) that resulted in the reversal of the trial court’s judgment was stated as follows: “The trial court erred in sustaining the motion to dismiss and in failing to permit Dr. Anbari to file an amended petition because Dr. Anbari’s Amended Petition set forth a claim for relief under the doctrine of equitable

estoppel in that he had pleaded all the elements and the best interests of the child in continuing the only father-son relationship the child had ever known were not properly weighed or considered.” (SSLF 18). After considering the argument under Point IV in M.M.A.’s first Appellant’s Brief, the court of appeals held, “Allowing the amendment to the pleadings would permit Father to have an opportunity to present his claims to the trial court” and “the trial court should have granted Father’s request for leave to amend his petition.” (LF 307). The court of appeals issued its mandate to the Circuit Court of Greene County, Missouri on July 9, 2009, reversing and remanding the cause to the Circuit Court “with directions to reinstate the case and allow appellant to file his Second Amended Petition, all consistent with the opinion of this Court herein delivered.” (LF 217).

After First Appeal

The trial court, consistent with the mandate from the court of appeals, allowed M.M.A. to file his Second Amended Petition for Declaration of Paternity, Custody and Visitation, for Equitable Relief, or in the Alternative for Appointment of Guardian and Conservator² on February 10, 2010. (LF 218-247). In his Second Amended Petition,

² Appellant asserted his claim for appointment of a guardian and conservator for T.Q.L. in the probate case currently pending in the Greene County Probate Court, Case No. 0831-PR00485, filed in 2008, but briefly joined with the underlying case for purpose of discovery at the request of the trial court. Filed after this appeal was commenced, a juvenile case was filed in Greene County involving T.Q.L.’s custody, Case No. 1-GK-

M.M.A. asserted, among other claims, a claim based on equitable estoppel alleging that L.L. should be prevented from claiming T.Q.L. is not M.M.A.'s child. (LF 226-235).

On October 7, 2010, M.M.A. filed his Third Amended Petition stating essentially the same claims based on the doctrine of equitable estoppel. (LF 253-274). He also stated a claim for third party custody pursuant to § 452.375.5(5) RSMo., claiming that L.L. was unfit, unsuitable, or unable to remain as T.Q.L.'s custodian and that he is suitable and able to provide an adequate and stable home environment for T.Q.L. (LF 258-263).

Among other allegations of L.L.'s unfitness were those that she was mentally unbalanced having twice attempted suicide, she had been treated at a psychiatric facility, she had left T.Q.L. alone without adequate provision for his care, she traveled overseas to marry a man she met over the Internet who proved to be deceitful and dishonest, she made false reports of sexual abuse against M.M.A., she entered M.M.A.'s residence and destroyed property and was charged with burglary, a court had ordered removal of another child from a previous relationship from L.L.'s custody and placed with the natural father, and the Greene County Circuit Court, Juvenile Division, had removed T.Q.L. from L.L.'s custody. (LF 259-261).

L.L. filed her Motion to Dismiss Plaintiff's Third Amended Petition on November, 29, 2010, arguing, just as the Guardian ad Litem had in her Motion to Dismiss Plaintiff's

JU00120. While not consolidated, the two matters are assigned to the same Commissioner for disposition.

First Amended Petition, that § 210.834 RSMo. required dismissal of M.M.A.'s Third Amended Petition because the equitable doctrines (specifically arguing about equitable parentage) are not recognized under Missouri law, and that there was no "finding" that L.L. was unfit, unable, or unsuitable as required under § 452.375.5(5) to award third party custody of T.Q.L. to M.M.A. (LF 25, SLF 12-17). The trial court granted L.L.'s Motion to Dismiss on December 17, 2010, taking the position that the equitable theories "either do not exist or are not the proper procedure or cause of action to establish either paternity or custody of a child." (LF 314-315).

M.M.A. filed his Motion for Rehearing on January 3, 2011. (LF 28, 316-321). In his Motion and at the rehearing, M.M.A. argued that the relief that L.L. sought in her Motion to Dismiss was already decided against L.L. by the first court of appeals' opinion and mandate and dismissal was barred by the law of the case doctrine. (LF 316-321, TR 3). M.M.A. also argued that the doctrine of equitable estoppel is recognized under Missouri law. (LF 316-321, TR 3-5). The Guardian ad Litem admitted that M.M.A. does not have any other cause of action to pursue aside from a guardianship proceeding. (TR 9). The Guardian ad Litem also argued and believes that "there are situations, when you look at it purely from the child's perspective, that those relationships should be maintained and there should be some remedy for a situation where a child has developed an important relationship" (TR 10). Further, the Guardian ad Litem stated that M.M.A. was very involved with T.Q.L., that she met with T.Q.L. and he talked about M.M.A. (TR 10). The Guardian ad Litem also stated that "these equitable theories may

be appropriate to be pursued” because M.M.A. demonstrates an interest in T.Q.L. and T.Q.L. has no other father or option and no remedy at law. (TR 11).

Despite the argument and offers of proof presented at the hearing and the 2009 court of appeals’ opinion on these exact issues, the trial court denied M.M.A.’s Motion for Rehearing on February 7, 2011. (LF 29). M.M.A. timely filed his Notice of Appeal in this case on February 16, 2011. (LF 328-334). Following the opinion of the court of appeals on February 14, 2012 affirming the dismissal, the court of appeals denied post-opinion relief on March 7, 2012. Appellant filed an Application for Transfer to this Court, which was granted on May 29, 2012.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN DISMISSING M.M.A.'S THIRD AMENDED PETITION FOR FAILURE TO STATE A CAUSE OF ACTION, BECAUSE UNDER THE DOCTRINE OF LAW OF THE CASE IF AN APPELLATE COURT HAS PREVIOUSLY DETERMINED AN ISSUE ON APPEAL, THE PREVIOUS HOLDING CONSITUTES LAW OF THE CASE AND PRECLUDES RELITIGATION OF THAT ISSUE ON REMAND AND IN A SUBSEQUENT APPEAL, IN THAT UNDER SAID DOCTRINE, THE APPELLATE COURT'S HOLDING REMANDING THE CASE TO ALLOW THE FILING OF M.M.A.'S SECOND AMENDED PETITION RECOGNIZED THAT M.M.A. COULD STATE A CAUSE OF ACTION UNDER EQUITABLE PRINCIPLES FOR NON-PARENTAL CUSTODY AND VISITATION WHEN IT SERVES THE BEST INTEREST OF THE CHILD.

CASES

Manzer v. Sanchez, 29 S.W.3d 380 (Mo. App. E.D. 2000)

T.Q.L., by his next friend, M.M.A. and M.M.A. individually v. L.L., 291 S.W.3d 258 (Mo. App. S.D. 2009)

Walton v. City of Berkeley, 223 S.W.3d 126 (Mo. banc 2007)

STATUTES

Section 452.375 RSMo.

II.

THE TRIAL COURT ERRED IN DISMISSING M.M.A.'S THIRD AMENDED PETITION FOR FAILURE TO STATE A CAUSE OF ACTION, BECAUSE M.M.A.'S THIRD AMENDED PETITION SET FORTH A CLAIM FOR RELIEF UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL AND NON-PARENTAL CUSTODY UNDER SECTION 452.375.5(5) RSMO., IN THAT M.M.A.'S THIRD AMENDED PETITION PLED ALL THE NECESSARY ELEMENTS TO ASSERT A CLAIM OF EQUITABLE ESTOPPEL AND THE BEST INTERESTS OF THE CHILD IN CONTINUING THE ONLY FATHER-SON RELATIONSHIP T.Q.L. HAS EVER KNOWN AND THE UNFITNESS OF L.L. WERE NOT PROPERLY WEIGHED OR CONSIDERED AS REQUIRED UNDER SECTION 452.375.

CASES

Cotton v. Wise, 977 S.W.2d 263 (Mo. banc 1998)

In the Interest of C.L., 335 S.W.3d 19 (Mo. App. W.D. 2011)

State ex rel. Stone v. Ferriss, 369 S.W.2d 244 (Mo. banc 1963).

Stein v. Stein, 831 S.W.2d 684 (Mo. App. E.D. 1992)

STATUTES

Section 452.375 RSMo.

ARGUMENT

POINT RELIED ON I

THE TRIAL COURT ERRED IN DISMISSING M.M.A.'S THIRD AMENDED PETITION FOR FAILURE TO STATE A CAUSE OF ACTION, BECAUSE UNDER THE DOCTRINE OF LAW OF THE CASE IF AN APPELLATE COURT HAS PREVIOUSLY DETERMINED AN ISSUE ON APPEAL, THE PREVIOUS HOLDING CONSTITUTES LAW OF THE CASE AND PRECLUDES RELITIGATION OF THAT ISSUE ON REMAND AND IN A SUBSEQUENT APPEAL, IN THAT UNDER SAID DOCTRINE, THE APPELLATE COURT'S HOLDING REMANDING THE CASE TO ALLOW THE FILING OF M.M.A.'S SECOND AMENDED PETITION RECOGNIZED THAT M.M.A. COULD STATE A CAUSE OF ACTION UNDER EQUITABLE PRINCIPLES FOR NON-PARENTAL CUSTODY AND VISITATION WHEN IT SERVES THE BEST INTEREST OF THE CHILD.

Summary of Argument

The dismissal of M.M.A.'s Third Amended Petition by the trial court is error because the court of appeals already recognized in an earlier appeal of this case that M.M.A. could state a cause of action under equitable principles for non-parental custody and visitation when it serves the best interest of the child. In its opinion captioned *T.Q.L., by his next friend, M.M.A. and M.M.A. individually v. L.L.*, 291 S.W.3d 258 (Mo. App. S.D. 2009), the court of appeals held that the trial court erred in denying M.M.A.'s

motion to file his Second Amended Petition (a pleading containing virtually identical claims under the equitable theories of equitable parent and equitable estoppel, as well as a statutory claim for non-parental custody or visitation under § 452.375.5(5) RSMo. as were in the Third Amended Petition dismissed by the trial court). Specifically, the court of appeals stated, “Allowing the amendment to the pleadings would permit Father to have an opportunity to present his claims to the trial court [H]is amended pleading would serve to cure the deficiency pointed out in the GAL’s motion to dismiss, which is that Father could no longer bring a statutory claim, at least not under the Uniform Parentage Act [§§ 210.817 - 210.852 RSMo.], because he was not, in fact, the Child’s [T.Q.L.] biological father.” *Id.* at 238. (LF 307). Further, the court of appeals stated, “This Court sees no injustice to Mother in permitting the amendment to Father’s pleading and determines its allowance would not be contrary to the best interest of Child.” *Id.* (LF 307).

The decision as set forth by the court of appeals in the previous appeal of this case constitutes “law of the case” and precluded the trial court from dismissing M.M.A.’s Third Amended Petition without allowing M.M.A. the opportunity to present his equitable and statutory claims. Further, dismissal of M.M.A.’s Third Amended Petition contradicts the previous mandate issued by the court of appeals directing the trial court to reinstate the case and allow M.M.A. to file his Second Amended Petition, all consistent with the opinion of the appellate court. Had the court not found that M.M.A.’s Second Amended Petition “cured the defect” and presented viable equitable or statutory causes of

action, a reversal of the trial court's judgment and remand to allow M.M.A. to file his Second Amended Petition would have been an empty gesture.

Because the court of appeals previously ruled that M.M.A. should be allowed to present the equitable and statutory claims asserted by him in his Second Amended Petition, the trial court's judgment dismissing M.M.A.'s Third Amended Petition (asserting nearly identical equitable and statutory claims as his proposed Second Amended Petition) must be reversed.

A. *Standard of Review*

Review of a circuit court's order granting a motion to dismiss is de novo and an appellate court examines the pleadings to determine whether they invoke principles of substantive law entitling the plaintiffs to relief. *Allen v. City of Greenville, MO*, 336 S.W.3d 508, 511 (Mo. App. S.D. 2011) (citing *Weems v. Montgomery*, 126 S.W.3d 479, 484 (Mo. App. W.D. 2004), *Fenlon v. Union Elec. Co.*, 266 S.W.3d 852, 854 (Mo. App. E.D. 2008)). In an appeal from a motion to dismiss for failing to state a claim upon which relief can be granted, the following standard of review applies:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged

meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Allen, 336 S.W.3d at 511 (quoting *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. banc 2009) (quoting *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001)). The trial court's ruling on a motion to dismiss is ordinarily confined to the face of the petition, which must be given a liberal construction. *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). "If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim." *Id.* at 836.

B. *This court of appeals' opinion in T.Q.L., by his next friend, M.M.A. and M.M.A. individually v. L.L., 291 S.W.3d 258 (Mo. App. S.D. 2009) constitutes "law of the case" and thus, the trial court erred in dismissing M.M.A.'s Third Amended Petition.*

The previous mandate and opinion issued by the court of appeals directing the trial court to allow M.M.A. leave to file his Second Amended Petition either directly held or necessarily implied that the proposed Second Amended Petition stated a cause of action. "Law of the case" principles require the Court to reverse the dismissal in this same case if inconsistent with the opinion published at 291 S.W.3d 258 (Mo. App. S.D. 2009). The Third Amended Petition, dismissed by the trial court, stated identical causes of action to those in the proposed Second Amended Petition, which was before the first court of

appeals at the time it issued its first mandate and opinion.³ There is no real difference in the pleadings or issues before the court in the prior appeal, and those before the court in the present appeal. The only discernible difference in the two appeals is the identity of the judges on the court of appeals' panels.

In its first opinion, the court of appeals, both implicitly and explicitly, held that Appellant stated a cause of action under equitable theories by its reversal of the trial court's dismissal and remand to the trial court with an order to allow M.M.A. to file his Second Amended Petition, the proposal of which pleading was before the court of appeals at the time it issued its prior opinion. If the viability of the causes of action were not decided in the prior appeal, there could have been no abuse of discretion by the trial court in refusing to allow M.M.A. leave to file his Second Amended Petition, and therefore no basis for the court of appeals to reverse and remand the matter to the trial court directing it to allow M.M.A. to file his Second Amended Petition.

Missouri precedent holds if a state of fact exists that might entitle a party to prevail upon a proper theory, the case is remanded to allow an amended petition. *See Nelson v. Grice*, 411 S.W.2d 117, 126 (Mo. 1967). To hold that the earlier remand was

³ M.M.A.'s proposed Second Amended Petition was before the court of appeals in the first appeal of this matter, SD #29293, contained in Volume 2 of 2 of M.M.A.'s Legal File at pages 210-222. The proposed Second Amended Petition is at SSLF 1-13 in this appeal. Only minor changes were made to the Second Amended Petition actually filed by M.M.A. with the trial court upon remand, all in accordance with the court of appeals' mandate. SSLF 1-13, LF 218-247.

unnecessary because no cause of action was or could have been stated, flies in the face of logic. On the contrary, the only reasonable implication of the first remand was that Appellant's proposed Second Amended Petition stated a cause of action. And, an appellate decision becomes the law of the case in a subsequent proceeding in the same cause and precludes re-examination of issues decided by the appellate court's opinion "*either directly or by implication.*" *Fischer v. Brancato, et al.*, 174 S.W.3d 82, 86 (Mo. App. E.D. 2005) (emphasis added). *See also Walton v. City of Berkeley*, 223 S.W.3d 126, 128–29 (Mo. banc 2007). On remand, the trial court has no discretion but to follow the law of the case. *Ingram v. Rinehart*, 108 S.W.3d 783, 789 (Mo. App. W.D. 2003). Nonetheless, in this case and despite the court of appeals' clear mandate in the prior appeal, the trial court granted L.L.'s Motion to Dismiss for failure to state a cause of action. (LF 314-315).

The facts and issues presented in this case are identical to the facts and issues decided by the court of appeals in June, 2009. At that time, after hearing the facts and "given the circumstances of this case," the court of appeals determined that M.M.A. was entitled to file his Second Amended Petition, which stated causes of action against L.L. based on the common law theories of equitable estoppel and equitable parentage and also stated a claim for non-parental custody and visitation under § 452.375.5(5) RSMo. (SSLF 1-13, LF 218-247, 299-307). The court of appeals issued its opinion, *T.Q.L., by his next friend, M.M.A. and M.M.A., individually v. L.L.*, 291 S.W.3d 258 (Mo. App. S.D. 2009), on June 23, 2009, reversing the trial court's judgment and concluding that the trial court erred in denying M.M.A.'s motion to file his Second Amended Petition, rendering

the trial court's grant of the Guardian Ad Litem's motion to dismiss moot. 291 S.W.3d at 268. (LF 307). The court held, "the trial court's judgment is reversed and remanded to the trial court. The trial court is hereby ordered to reinstate the case and allow Father to file his Second Amended Petition." *Id.* (LF 307). The court issued its mandate on July 9, 2009, remanding the case back to the trial court and directing it to reinstate the case and allow M.M.A. to file his Second Amended Petition consistent with the court's opinion. (LF 217). The appellate court's holdings in the previous appeal are law of the case, and M.M.A.'s claims should now be reinstated by the trial court.

The doctrine of law of the case governs successive appeals involving substantially the same issues and facts, and applies appellate decisions to later proceedings in that case. *Williams v. Kimes*, 25 S.W.3d 150, 153 (Mo. banc 2000). Decisions of the Missouri Supreme Court and appellate courts are the law of the case. *Walton*, 223 S.W.3d at 128–29. The law of the case doctrine "provides that a previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal." *Id.*

Cases approving the doctrine of the law of the case in this state date back more than a century. An opinion, such as the opinion issued by the court of appeals in *In re T.Q.L., M.M.A. v. L.L.*, is the law of the case unless the pleadings have been amended so as to introduce new issues. *Davidson v. St. Louis-San Francisco Ry. Co.*, 256 S.W. 169, 170 (Mo. banc 1923). Where, on the second appeal, the facts and pleadings or issues are the same or substantially the same, the first decision constitutes law of the case. *Benton v. City of St. Louis*, 154 S.W. 473, 474 (Mo. 1913). On remand, the trial court has no

discretion to ignore the law of the case and the court of appeals' mandate. *Ingram*, 108 S.W.3d at 789. When the lower court receives the mandate of an appellate tribunal, it must follow the directions contained therein, and is without authority to go outside. *Rees v. McDaniels*, 33 S.W. 178, 178 (Mo. 1895).

In this case, initially, the trial court complied with this court's mandate. The trial court reinstated the case and M.M.A. filed his Second Amended Petition on February 10, 2010. (LF 21, 218-247). The action proceeded and M.M.A. was thereafter granted leave and filed his Third Amended Petition, asserting nearly identical, if not exactly the same, claims as those in the Second Amended Petition, on October 7, 2010. (LF 23, 218-247, 253-274, SSLF 1-13). On November 29, 2010, L.L. filed her Motion to Dismiss Plaintiff's Third Amended Petition for Declaration of Paternity, Custody and Visitation or, in the alternative, for Equitable Relief. (LF 25, SLF 12-17). L.L. argued in her Motion to Dismiss that (1) § 210.834 RSMo. (the Missouri Uniform Parentage Law) required dismissal of M.M.A.'s Third Amended Petition, (2) that the equitable doctrines (specifically arguing about equitable parentage) are not recognized under Missouri law, and (3) that there was no "finding" that she was unfit, unable, or unsuitable, as required under § 452.375.5(5), to award third party custody of T.Q.L. to M.M.A. (LF 25, SLF 12-17).

After hearing arguments, the trial court entered its Order of Dismissal on December 17, 2010 concluding that "under current Missouri law, these equitable theories (doctrine of an equitable parent, third party custody or the doctrine of equitable estoppel) either do not exist or are not the proper procedure or cause of action to establish either

paternity or custody of a child.” (LF 314-315). The trial court’s dismissal of M.M.A.’s Third Amended Petition is improper and cannot stand as it is in direct contradiction of the court of appeals’ holdings in *T.Q.L., by his next friend, M.M.A. and M.M.A., individually v. L.L.* and the trial court is obligated to follow the law propounded by the court of appeals as the court of appeals’ decision constitutes law of the case.

The Eastern District dealt with similar facts and issues as are present in this appeal in *Manzer v. Sanchez*, 29 S.W.3d 380 (Mo. App. E.D. 2000). In *Manzer*, the court, in analyzing whether a trial court abused its discretion in failing to allow appellants leave to amend and file their first amended petition, determined whether the proposed amended petition would cure the inadequacy of the original petition. *Manzer*, 29 S.W.3d at 384-85. In making the determination, the court found that each count in the proposed amended petition stated a cause of action. *Id.* Because, in the subsequent appeal addressing whether the trial court appropriately dismissed appellant’s amended petition for failure to state a claim, the causes of action had not changed and no new evidence was presented, the court determined that its holding that the first amended petition stated a cause of action was law of the case. *Id.*

Similar to *Manzer*, the court of appeals in M.M.A.’s first appeal determined that M.M.A.’s proposed Second Amended Petition would cure the inadequacy of the First Amended Petition. *T.Q.L., by his next friend, M.M.A. and M.M.A., individually*, 291 S.W.3d at 268. (LF 307). The opinion and mandate held and directed that M.M.A. be entitled to pursue his equitable causes of action against L.L. by filing his Second Amended Petition. *Id.* (LF 217, 307). Said holding is law of the case. As was

determined in *Manzer*, the first appeal determined that M.M.A. stated viable equitable causes of action and a claim for non-parental custody or visitation. *Id.* (LF 307). This successive appeal involves the same issues and facts as the first appeal, that is, whether M.M.A. stated viable causes of action for custody or visitation. Because M.M.A.'s Third Amended Petition was nearly identical to his proposed and filed Second Amended Petition, and does not introduce new issues, the court of appeals' previous determination that M.M.A. stated a cause of action in his Second Amended Petition is the law of this case. (SSLF 1-13, LF 218-247, 253-274). Specifically, the court of appeals previously stated that M.M.A.'s Second Amended Petition "would permit Father to have an opportunity to present his claims to the trial court" and "would serve to cure the deficiency pointed out in the GAL's motion to dismiss." *T.Q.L., by his next friend, M.M.A. and M.M.A., individually*, 291 S.W.3d at 268. (LF 307). The court of appeals further found that "the trial court should have granted Father's request for leave to amend his petition." *Id.* (LF 307). Had the court of appeals not determined that M.M.A. stated causes of action in his Second Amended Petition, it would not have reversed the trial court's judgment denying M.M.A. leave to file said Petition. As such, the trial court's judgment dismissing M.M.A.'s Third Amended Petition cannot stand and should be reversed.

POINT RELIED ON II

THE TRIAL COURT ERRED IN DISMISSING M.M.A.'S THIRD AMENDED PETITION FOR FAILURE TO STATE A CAUSE OF ACTION, BECAUSE M.M.A.'S THIRD AMENDED PETITION SET FORTH A CLAIM FOR RELIEF UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL AND NON-PARENTAL CUSTODY UNDER SECTION 452.375.5(5) RSMO., IN THAT M.M.A.'S THIRD AMENDED PETITION PLED ALL THE NECESSARY ELEMENTS TO ASSERT A CLAIM OF EQUITABLE ESTOPPEL AND THE BEST INTERESTS OF THE CHILD IN CONTINUING THE ONLY FATHER-SON RELATIONSHIP T.Q.L. HAS EVER KNOWN AND THE UNFITNESS OF L.L. WERE NOT PROPERLY WEIGHED OR CONSIDERED AS REQUIRED UNDER SECTION 452.375.

Summary of Argument

The dismissal of M.M.A.'s Third Amended Petition by the trial court is error because M.M.A. asserted a cause of action under the doctrine of equitable estoppel and a claim for non-parental custody under § 452.375.5(5) RSMo. M.M.A. pled all the necessary elements to assert a claim of equitable estoppel, and the trial court failed to weigh the fact that continuing the father-son relationship between T.Q.L. and M.M.A. was, without a doubt, in the best interest of the child.

A. *Standard of Review*

Review of a circuit court's order granting a motion to dismiss is *de novo* and an appellate court examines the pleadings to determine whether they invoke principles of substantive law entitling the plaintiffs to relief. *Allen*, 336 S.W.3d at 511 (citing *Weems*, 126 S.W.3d at 484, *Fenlon*, 266 S.W.3d at 854). In an appeal from a motion to dismiss for failing to state a claim upon which relief can be granted, the following standard of review applies:

[a] motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Allen, 336 S.W.3d at 511 (quoting *State ex rel. Henley*, 285 S.W.3d at 329 (quoting *Bosch*, 41 S.W.3d at 464)). The trial court's ruling on a motion to dismiss is ordinarily confined to the face of the petition, which must be given a liberal construction. *Lynch*, 260 S.W.3d at 836. "If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim." *Id.* at 836.

B. Section 452.375 RSMo. provides for non-parent third-party custody of a child.

The plain language of § 452.375 RSMo. establishes the right of a third-party, under specified circumstances, to seek custody of a child. To hold otherwise would be a mischaracterization of the Missouri statute regarding custody of a child, and in direct conflict with the plain text of § 452.375. In addition, such holding would be contrary to the overwhelming weight of Missouri precedent and well reasoned authorities from other states.

The text of § 452.375.2 RSMo. explicitly directs the court to consider all relevant factors when determining custody including: “(3) The interaction and interrelationship of the child with parents, siblings, and *any other person who may significantly affect the child’s best interests*...; (6) the mental and physical health of all individuals involved ...; and (8) the wishes of a child as to the child’s custodian.” MO. REV. STAT. § 452.375.2 (2003) (emphasis added). Section 452.375.5(5) directs the trial court to consider, when awarding the appropriate custody arrangement in the best interest of the child, the option of third-party custody. MO. REV. STAT. § 452.375.5 (2003).

Pursuant to § 452.375.5 RSMo., third-party custody should be considered 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.” *Id.* In that circumstance, custody “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.”

Id. Moreover, § 452.375.5(5)(b) RSMo., specifically anticipates that third-parties may petition the court for custody. *Id.* Clearly, when read as a whole, § 452.375 RSMo. provides for the remedy of third-party custody of children when the best interests of the child are at stake.

C. *M.M.A. pled a claim under the doctrine of equitable estoppel, thus, the trial court erred in dismissing M.M.A.’s Third Amended Petition.*

M.M.A.’s claims for custody of T.Q.L. based upon equitable theories are valid claims under Missouri statutory and case law. There are numerous Missouri cases supporting the use of equitable theories in child custody cases.

Relevant Missouri case law holds that the right and power to determine custody and maintenance of children is not born out of statute, but exists because of the “inherent power of courts exercising equitable jurisdiction to care for and provide for a minor child.” *State ex rel. Stone v. Ferriss*, 369 S.W.2d 244, 250 (Mo. banc 1963). *See also Urbanek v. Urbanek*, 503 S.W.2d 434, 441 (Mo. App. 1973). The best interest of the child is always the paramount factor in custody determinations. *Bull v. Bull*, 634 S.W.2d 228, 229 (Mo. App. E.D. 1982). Additionally, this Court, in *Cotton v. Wise*, left open the possibility that in custody determinations, where the statutory scheme for custody is inadequate and the court has a duty to act, the court may exercise its equitable powers to protect in the best interest of the child. 977 S.W.2d 263, 265 (Mo. banc 1998).

Relevant Missouri law holds that the doctrine of equitable estoppel does exist and applies to the parent-child relationship. *See Stein v. Stein*, 831 S.W.2d 684, 688 (Mo. App. E.D. 1992) (holding that a person who has openly held themselves out as a child’s

parent may be estopped from denying their parental status and obligations). *See also S.E.M. v. D.M.M.*, 664 S.W.2d 665, 667 (Mo. App. E.D. 1984) (holding that stepfather may be liable for support of his wife's biological children under theories of estoppel).

Well-reasoned authorities from other jurisdictions also recognize equitable claims for the custody of a child, including claims under equitable estoppel. *See Hinshaw v. Hinshaw*, 237 S.W.3d 170, 174-75 (Ky. 2007) (the common law principle of equitable estoppel is applicable to custody cases). *See also Pettinato v. Pettinato*, 582 A.2d 909, 912-13 (R.I. 1990); *In re Marriage of K.E.V.*, 883 P.2d 1246, 1251-53 (Mont. 1994) (doctrine of equitable estoppel was properly applied to the facts to prevent mother from contesting the father-child relationship between father and son when she led presumed father to believe he was the father and father acted upon that belief). The *Pettinato* court held, "The underlying rationale of the equitable estoppel doctrine is that 'under certain circumstances, a person might be estopped from challenging paternity where that person has, by her conduct, accepted a given person as father of the child.'" *Pettinato*, 582 A.2d at 912-13. That court further concluded that "[t]he law will not permit a person . . . to challenge the status which he has previously accepted [or created]." *Id.*

D. *The judicial exception: custody may be vested in a third party when in the best interest of the child.*

Further proof that Missouri courts recognize the award of custody to third-parties under their inherent equitable powers is evidenced in numerous cases applying a judicially created exception to the rule that awarding custody to natural parents serves the child's best interest. This exception to the presumption provides that in some special or

extraordinary circumstances, custody may be vested in third persons, *even if* the evidence does not establish the unfitness or incompetence of the natural parent. See *In the Interest of C.L.*, 335 S.W.3d 19, 26-27 (Mo. App. W.D. 2011) (emphasis added) (quoting *In the Interest of K.K.M.*, 647 S.W.2d 886, 890 (Mo. App. E.D. 1983)). See also *Cotton*, 977 S.W.2d at 265 (recognizing the judicially created exception, but concluding that it was not necessary to determine whether it would be applicable to the guardianship statute in § 475.030 RSMo. in that case given the facts and circumstances); *In the Matter of Scarritt*, 76 Mo. 565 (Mo. 1882) (holding that court should award custody of the child to the father unless unfit or incompetent, or “unless the welfare of the child, for some special or extraordinary reason, demands a different disposition of it, at the hands of the court.”).

The most recent appellate opinion recognizing the judicial exception where custody of the child was awarded to foster parents, while cited to the court of appeals in argument, was not discussed in the court’s opinion. *In the Interest of C.L.*, *supra*, recognized an exception to the presumption that granting custody to the natural parent will serve the best interest of the child even when there was no evidence under the claim for guardianship that the father was unwilling, unable, or unfit to take charge of the child. 335 S.W.3d at 26-27. The court reasoned that, under this exception, the presumption “must fall whenever the best interests of the child, for some special or extraordinary reason or circumstance, mandate that custody be vested in third persons, regardless of whether the evidence establishes the unfitness or incompetence of the natural parent.” *Id.* Relying on its equitable powers and keeping in mind the child welfare policy of this state (best interest of the child), the court vested custody in foster parents. *Id.*

The *C.L.* case, which became final after this case was pending on appeal, relied on the history of the “special and extraordinary” exception, citing to *In the Interest of K.K.M.*, 647 S.W.2d at 890 (holding that while the evidence may not have indicated that the mother was currently unfit, the evidence, considered along with the wishes of the child, warranted awarding legal custody to the child’s paternal grandparents). The *K.K.M.* court noted that “whenever a minor child is brought into the jurisdiction of a court for a determination of its custody, the inquiry is in the nature of an equitable proceeding and the claims of all parties, even in the case of the parents themselves, must be subordinated to the paramount concern for the child’s welfare.” *Id.* at 889. *See also In the Matter of Scarritt*, 76 Mo. at 582.

Appellant’s Third Amended Petition alleged the unfitness of L.L. It also asserted the numerous facts specific to this case that show that special or extraordinary circumstances mandate that custody be vested in Appellant, regardless of whether the evidence establishes the unfitness or incompetence of L.L. Appellant should not be denied any opportunity to show the trier of fact that awarding custody to Appellant is in the best interest of T.Q.L.

E. *The trial court had the authority to determine custody of T.Q.L. once it acquired jurisdiction.*

The trial court acquired jurisdiction over Appellant, L.L., and T.Q.L. by Appellant’s filing of the original Petition in this case seeking custody as the putative father of T.Q.L. in 2007. Missouri law is clear on this point: when a child is properly before the court for any purpose and his welfare is involved, he becomes the ward of that

court with regard to issues of that case and that court has the inherent jurisdiction to adjudicate custody as it deems will best preserve and protect the child's welfare. *Vangundy v. Vangundy*, 937 S.W.2d 228, 231 (Mo. App. W.D. 1996). A court with technical jurisdiction should act to determine custody of a child when the child's welfare might be jeopardized if the court failed to act. *Kennedy v. Carman*, 471 S.W.2d 275, 287-88 (Mo. App. 1971) (overruled on other grounds).

Here, instead of allowing M.M.A. to present evidence in support of his claims to the trial court, even to prove up the allegations of L.L.'s unfitness, the trial court dismissed the case. By doing so, it failed to make a determination of custody regarding the best interests of T.Q.L. when the factual allegations presented showed that T.Q.L.'s welfare might be jeopardized if the trial court failed to determine custody. Further, it is inexplicable how the trial court could lose jurisdiction of the custody issue once acquired.

F. *Count III of M.M.A.'s Third Amended Petition states a cause of action under the doctrine of equitable estoppel.*

The doctrine of equitable estoppel seeks to foreclose one from denying her own expressed or implied admission that has, in good faith and in pursuance of its purpose, been accepted and relied upon by another. *Farmland Industries, Inc. v. Bittner*, 920 S.W.2d 581, 583 (Mo. App. W.D. 1996). The required elements to assert a claim of equitable estoppel are as follows: (1) an admission, statement or act inconsistent with a claim afterwards asserted or sued upon; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. *Id.* See also

Peerless Supply Co. v. Industrial Plumbing and Heating Co., 460 S.W.2d 651, 665-66 (Mo. 1970). All necessary elements to state a claim were pled by M.M.A. in his Third Amended Petition.

1. ***M.M.A. pled, among other things, that L.L. admitted that M.M.A. was T.Q.L.'s father, informed T.Q.L. that M.M.A. was his father, fostered the father-child relationship, held M.M.A. out as T.Q.L.'s father to the entire world, including family and friends in order to reap the benefits of said admissions, statements, and acts, then informed him he was not T.Q.L.'s father.***

M.M.A. pled the necessary facts in his Third Amended Petition to satisfy the first element of a claim for equitable estoppel. He asserted that L.L. represented to M.M.A. that he was the biological father of T.Q.L. after becoming pregnant with T.Q.L. in 2002 (LF 253, 264). M.M.A. also pled that, because she asserted and promised that he was the biological father of T.Q.L., she negotiated a pre-birth agreement with him wherein M.M.A. agreed to pay ninety percent of her hospital delivery charges, child support equal to Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00) per month for three years and reducing over time, M.M.A. agreed to pay One Hundred Thousand and 00/100 Dollars (\$100,000.00) toward the purchase of a new home (actually loaning her in excess of Two Hundred Thousand and 00/100 Dollars (\$200,000.00), and M.M.A. agreed to secure and did secure a life insurance policy benefiting T.Q.L. and L.L. in the amounts of One Hundred Thousand and 00/100 Dollars (\$100,000.00) and Four Hundred Thousand and 00/100 Dollars (\$400,000.00) respectively. (LF 264).

M.M.A. further pled that L.L. promised that M.M.A. was the biological father of T.Q.L. and agreed to joint custody in 2005. (LF 265). Although it was apparently never filed with the trial court, M.M.A. pled that attorney Rebecca Tatlow prepared an Answer on behalf of L.L. admitting paragraph 5 of M.M.A.'s original petition, which alleged "That said Child, T.Q.L. is the biological child of Plaintiff, M.M.A." (LF 265). Additionally, M.M.A. pled that, on March 14, 2007, L.L. signed a parenting plan, prepared through full involvement of her attorney, which stated, "The parties hereby acknowledge that Mother [L.L.] and Father [M.M.A.] are in fact the biological parents of T.Q.L." (LF 265).

As if the above stated facts were not enough to satisfy the first element of a claim for equitable estoppel, M.M.A. pled additional paragraphs which represent the extent that L.L. represented the fact that T.Q.L. was M.M.A.'s son, all the while having reason to know that her assertions were false. M.M.A. pled that L.L. repeatedly and continuously, until August of 2007, represented to T.Q.L., friends, family, co-workers, and the general public that that M.M.A. was T.Q.L.'s father. (LF 267). Not only did L.L. make numerous assertions that M.M.A. was the biological father of T.Q.L., M.M.A. also pled that she "fostered, condoned, and promoted the relationship between M.M.A. and T.Q.L." (LF 267).

In addition, M.M.A. pled the fact that, even after L.L. raised the possibility that he was not T.Q.L.'s father in August 2007, she continued to represent to that he could continue to act as T.Q.L.'s father. (LF 267). M.M.A. also pled that she continued to refer to M.M.A. as father in front of T.Q.L., that she continued to accept substantial

financial support, and she allowed unfettered contact between T.Q.L. and M.M.A. as father and son until February 2008. (LF 267).

2. M.M.A. pled that he acted in several fashions on the faith of L.L.'s numerous admissions, statements, and acts that he was T.Q.L.'s biological father.

M.M.A. pled in his Third Amended Petition, that, as a result of and in reliance on L.L.'s representations that he was T.Q.L.'s father, he executed the lucrative Pre-birth Agreement, spent a significant amount of time with T.Q.L., established a strong and substantial parent/child bond with him, agreed to joint custody, took numerous trips together including to Disney World, Philadelphia, St. Louis, and Branson, both with and without L.L., celebrated almost every holiday together, and treated T.Q.L. as his son both emotionally and financially. (LF 264-268). M.M.A. also pled that, based on L.L.'s false admissions, statements and acts that he was T.Q.L.'s biological father, he executed a parenting plan in March 2007 which placed significant financial obligations on M.M.A., to which he performed, including establishing a trust for T.Q.L.'s benefit, obtaining life insurance, establishing a 529 account, continued paying child support and gave significant funds to L.L. for other purposes. (LF 268).

3. M.M.A. pled in his Third Amended Petition that he has been injured, and will continue to be injured, as a result of L.L. being allowed to contradict or repudiate the fact that he is his father and withholding the promise to continue to act as the father of T.Q.L. even though not the biological father.

M.M.A., without a doubt, pled in detail how not only he, but T.Q.L. has and will be injured if L.L. is not estopped from denying him to continue his father/son relationship

with T.Q.L. M.M.A. pled that such actions by L.L. have caused and continue to cause T.Q.L. and M.M.A. extreme emotional suffering and trauma due to their separation and L.L.'s alienation. (LF 269). M.M.A. also pled that, not only did L.L. cut off contact between T.Q.L. and M.M.A., she did so after a period of resumed contact between July 20, 2009 and January 26, 2010 where she allowed regular and extended contact between the two. (LF 270). Clearly, M.M.A. has pled sufficient facts to assert a cause of action for equitable estoppel in his Third Amended Petition and has satisfied all the elements for pleading such a claim.

As discussed *supra*, Missouri courts have recognized that the doctrine of equitable estoppel does exist and applies to decisions regarding parent-child relationships. In *Stein*, the Eastern District acknowledged that, on at least two occasions, our courts have recognized that a person who has openly held themselves out as a child's parent and assumed a parental role may be estopped from denying their parental status and obligations to the child, and one situation is based on an estoppel theory. 831 S.W.2d at 688. In addition, the Eastern District also held that a step-father may be liable for continued support of his wife's biological children under theories of estoppel. See *S.E.M.*, 664 S.W.2d at 667.

M.M.A.'s Third Amended Petition pled a cause of action for equitable estoppel against L.L. If any combination of the facts alleged in the petition would, upon proof, entitle M.M.A. to relief under the equitable estoppel theory, the trial court's judgment of dismissal must be reversed. *Rahm v. Missouri Public Service Co.*, 676 S.W.2d 906, 908 (Mo. App. W.D. 1984).

G. *The trial court failed to consider the best interest of the child by dismissing M.M.A.'s Third Amended Petition, including his claim for non-parental custody.*

By dismissing M.M.A.'s Third Amended Petition without allowing M.M.A. the right to an evidentiary hearing, the trial court failed to consider the best interest of T.Q.L. as asserted by M.M.A. in his claim for custody and visitation in Count II of his Third Amended Petition. M.M.A. pled a cause of action under § 452.375.5(5) RSMo. (LF 262).

In all areas of child custody and child visitation, the best interest of the child is always the paramount factor. *Bull*, 634 S.W.2d at 229; *see also*, MO. REV. STAT. § 452.375.2 (2010). "The court shall determine custody in accordance with the best interests of the child." MO. REV. STAT. § 452.375.2 (2010). Pursuant to Missouri law and as pled by M.M.A. in his Third Amended Petition, the trial court may award custody to a non-parent 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 interest 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." MO. REV. STAT. § 452.375.5(5) (2010). (LF 262).

M.M.A., in his Third Amended Petition, pled that L.L. was unfit, unsuitable, and unable to be a proper custodian for T.Q.L., and stated numerous reasons why L.L. is unfit, unsuitable, and unable to be a proper custodian, including, but not limited to, allegations that L.L. is mentally imbalanced and has attempted suicide on at least two

occasions (once being while minor children were present in the home), that she has been involuntarily committed to a psychiatric facility on at least one occasion, that she has travelled overseas without providing adequate care for T.Q.L. in her absence. (LF 259-263). In addition, M.M.A. pled that T.Q.L.'s biological father is not fit as he has never had a relationship with T.Q.L. and has never come forward to assert his rights. (LF 261). M.M.A. further pled that he can properly care for T.Q.L., and that the court has authority to award custody to a non-parental party. (LF 262-263). Moreover, subsequent to the dismissal of this case by the trial court, new relevant information as to L.L.'s competency and the custody of T.Q.L. arose in the pending juvenile proceeding involving T.Q.L.

The trial court, in its Order of Dismissal, without an evidentiary hearing on what the best interest of T.Q.L. would be, held that "these equitable theories [including the claim for non-parental custody under § 452.375.5(5) RSMo.] either do not exist or are not the proper procedure or cause of action to establish either paternity or custody of a child." (LF 314-315).

The Order of Dismissal does not assert as did the Motion to Dismiss that, under § 210.834 RSMo., dismissal of the Plaintiff's claim to visitation or custody is "made mandatory." (SLF 13, LF 314-315). Nothing in the language of the Uniform Parentage Act (UPA) suggests it was intended to displace the common law or other statutes on child custody. To the contrary, §§ 210.817 – 210.852 RSMo. repeatedly use the permissive "may" when referring how parentage "may" be determined (§ 210.819), who "may" bring the action (§ 210.826), and what evidence "may" be admitted (§ 210.836). Nothing in the UPA suggests it is the exclusive proceeding to establish visitation or custody of

children. By its own terms, only limited provisions of the UPA are applicable in other specified types of proceedings, i.e., those under the Uniform Reciprocal Enforcement of Support Law and the Uniform Interstate Family Support Act. MO. REV. STAT. § 210.844 (2011). To hold the UPA eliminates all other remedies for the custody and visitation of children would nullify the common law action for equitable estoppel and plain language of § 452.375.5(5) RSMo.

Rather, the UPA was intended to supplement, not displace other statutes and the common law. *See In the Matter of Nocita*, 914 S.W.2d 358, 359 (Mo. banc 1996) (holding, in the context of a probate proceeding, that the UPA is not the exclusive means to establish parentage); *In re Marriage of Fry*, 108 S.W.3d 132, 136 (Mo. App. S.D. 2003) (noting that the UPA is not the exclusive means to determine paternity); *State ex rel. State of Ill. v. Schaumann*, 918 S.W.2d 393, 397 (Mo. App. E.D. 1996) (“[I]t is now clear that the legislature no longer intends for the UPA to be the exclusive procedure for adjudication of paternity issues.”); *see also Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 235 (Mo. banc 2001); *State ex rel. Brown v. III Investments, Inc.*, 80 S.W.3d 855, 859-60 (Mo. App. W.D. 2002); *In re Estate of Parker*, 25 S.W.3d 611, 614 (Mo. App. W.D. 2000) (“[U]nless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid... [W]hen existing common law rights are affected, and if a close question exists, we weigh our decision in favor of retaining the common law.”).

The trial court, in violation of Missouri law and public policy, failed to weigh or consider the best interest of the child or the fitness of L.L. in dismissing M.M.A.'s Third Amended Petition and the judgment of dismissal should be reversed.

CONCLUSION

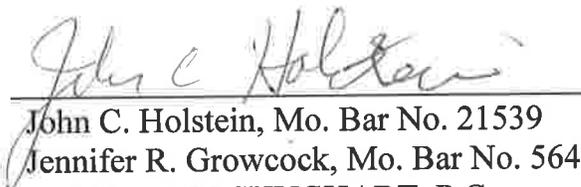
M.M.A. respectfully requests this Court reverse the trial court's dismissal of its Third Amended Petition and remand this case with an order that the trial court once again reinstate the matter and allow him to pursue his claims under equitable estoppel and Missouri's non-parental custody statute. This Court is bound by the court of appeals' previous holdings in *T.Q.L., by his next friend, M.M.A. and M.M.A., individually v. L.L.*, 291 S.W.3d 258 (Mo. App. S.D. 2009). Said holdings are law of the case and the trial court was required to follow the court of appeals' holdings. Because the court of appeals previously held that M.M.A. stated equitable causes of action and a claim for non-parental custody or visitation, the trial court's judgment dismissing M.M.A.'s Third Amended Petition cannot stand and should be reversed.

Moreover, M.M.A. did state a cause of action under the doctrine of equitable estoppel as well as a claim for non-parental custody under § 452.375.5(5) RSMo. Missouri statutes clearly provide for third-party custody of a child. In addition, Missouri has recognized a judicially created exception to the rule that awarding custody to natural parents wills serve the child's best interest and provides custody be vested in third persons even if the evidence does not establish the unfitness or incompetence of a natural parent. In addition, and in direct contravention of the very premise our statutes and case law purport to protect, by dismissing M.M.A.'s Third Amended Petition and refusing to give him the chance to present his claims at an evidentiary hearing, the trial court failed to weigh or consider the best interest of T.Q.L. or the fitness of L.L. In order to protect the best interest of the child, the facts making up this case demand that this Court reverse

the trial court's judgment of dismissal and remand this case for a trial on the merits of M.M.A.'s recognized claims.

Respectfully submitted,

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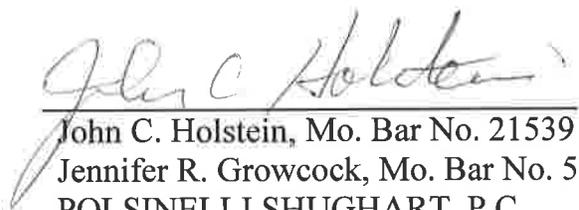
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RULE 84.06 CERTIFICATION

The undersigned certifies that the foregoing brief complies with Supreme Court Rule 84.06(b). According to the word count function of Microsoft Word by which it was prepared, it contains 10,380 words, exclusive of cover, Certificate of Service, the Certification and signature block.

The undersigned further certifies that the diskette filed herewith containing this brief in electronic form has been scanned for viruses and is virus-free.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant M.M.A.'s Substitute Brief and one diskette containing a copy of the Brief was served this 17th day of July, 2012 to:

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