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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALMA M.,

Plaintiff and Respondent,

v.

KATRINA T.,

Defendant and Appellant.

G047558

(Super. Ct. No. 12FL000227)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, James L. Waltz, Judge. Affirmed.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Defendant and Appellant.

Law Offices of Milo F. DeArmey and Milo F. DeArmey for Plaintiff and Respondent.

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The trial court granted the petition of plaintiff and respondent Alma M. (grandmother) for grandparent visitation of now nine-year-old David A. (child) under Family Code section 3102.¹ Defendant and appellant Katrina T., child's mother (mother), appeals, claiming section 3102 is unconstitutional both facially and as applied, the court erred in failing to apply the presumption of parental fitness to decide the best interest of her child, and grandmother did not show by clear and convincing evidence denial of visitation would be detrimental to the child. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

Mother was married to grandmother's son (father) before he died in 2010. Mother and father had two children, the child and his younger sister, who was born approximately a year and a half before father's death.² Grandmother is married to David, the child's stepgrandfather (grandfather; collectively grandparents); they had been married 31 years at the time of the hearing.

Father had five children from a previous marriage and, according to grandmother's declaration, grandparents were "very instrumental in supporting [father] throughout his life and through his raising of" all his children. The entire family, including mother, father, and the child, had "a very close family relationship."

¹ All further statutory references are to this code.

² Grandmother admitted the relationship with the child's sister was not as close since she had been born only a year and a half before father's death. The court did not order visitation for her. The court ruled mother's refusal to allow contact between grandparents with the child's sister was not detrimental because of her young age and noted it believed any other ruling as to her would be an abuse of discretion. Grandmother did not appeal this ruling and our opinion will deal only with visitation with the child.

During father's life, he and mother, along with the child, regularly visited with grandparents, at least once a week and often more times. Mother, father, and the child each had a bedroom in grandparents' home. Often the child would stay with grandparents. Since father's death, although she told them they would be able to visit with the child, mother "cut off" grandparents' visitation with him. The parties agreed that except for some contact at Christmas there had been no visitation from 2010 until the date of the hearing.

Grandfather testified he was very close to father and had "an ongoing relationship" with the child; he was probably closer to the child than anyone except his parents. The child is named for him. For the past few years before father's death grandfather saw the child as many as four times a week. When the grandparents lived in Nevada, a few times the child would visit for a couple of weeks.

When they were together grandfather and the child went on outings to bookstores, because the child loved to read, movies, and swimming; they also played ball, and attended family gatherings. The child would wait for him at the door when grandfather was returning home from work, asking grandmother when he was going to be home.

One of father's adult daughters testified to grandfather's good relationship with the child and their frequent visits. An adult son testified he had lived with father and mother and helped care for the child. The child's interaction with the grandparents was "amazing." Another adult son testified the child had asked about grandparents three to five times within the past year, he had observed the child's interaction with grandparents and it was "pure delight"; he was "ecstatic" to be with them.

The child's former nanny of five years also testified to the good relationship between the child and the grandparents. He stated the child had looked forward to the visits with grandparents in Nevada. He never heard mother state any opposition to visits with the grandparents.

Grandmother testified to her close relationship with the child; she wanted to see him “more than anything.” He looked forward to seeing her. She was present in the delivery room when the child was born. She saw the child every week when she took him to swimming lessons she paid for. She does not have any problems with mother. At some point after father’s death mother moved and grandmother could not find her. Grandmother called perhaps 10 times trying to locate mother and finally found her.

Mother’s fiancée testified he never heard the child talk about or ask to see grandparents and they never sent cards or gifts. The child sails every day and also surfs. He gets good grades.

Sylvia is the mother of mother’s fiancée and grandmother’s cousin. She testified grandmother gave her the finger when they were at court on the date of the hearing.

Mother testified she had never denied visitation, claiming grandparents had not requested it. She stated grandmother stopped speaking to her and believed it was because mother was friendly with Sylvia. In addition, grandmother had told the child someone in mother’s family could not love him the way grandmother could and that had caused the child to wet the bed. She also testified father’s brother had a criminal record and unspecified sexual allegations, and her request to grandmother not to let the children have contact with him was disregarded. She further mentioned grandfather’s hostility toward her because she had not repaid money she and father had borrowed from him.

Yet she testified she did not oppose visitation under her supervision, only if it was court ordered, because of the family’s activities. And she stated she was concerned grandparents would say something negative about her and her family. It would be “ideal” if the court ordered grandparents not to make negative comments.

Mother argued she did not “want to be obligated to have to show up to a visitation. . . . [S]he just wants to raise her children as she sees fit and have them associate with who she thinks is best for her children.” She did not want to “put her life

on hold” because of a court order. The court expressed its sympathy for the fact mother did not want “highly-scheduled contact” but found if the decision was left to her there would be no visits.

Mother also wanted to be present during the visits. The court refused, noting she and grandmother did not like each other. The court acknowledged mother’s concern with having monitored visitation.

In ruling in favor of grandmother, the court first recognized the presumption “a fit parent will act in the best interest of [his or her] child” It found grandmother had rebutted that presumption with clear and convincing evidence. It also found that as to the best interests of the child as far as visitation with grandmother, mother was unfit. She had “a blind spot for the best interest of the child” and “ha[d] not been focused” on the child’s best interest. She harbors animosity toward grandmother and has improperly allowed this to influence her actions.

The child has a “deep and close relationship” with grandparents that has existed for many years, and it is in the child’s best interest to foster the bond with them. It noted the child was named for grandfather. There is “no evidence” a relationship with grandparents will harm the child, but mother’s conduct that “impeded[ed] the child’s contact, love and affection of his grandparents is detrimental and harmful.” Mother’s refusal to allow visitation cut the child off from the “care, comfort and society from his grandparents” and that is or will be harmful to him. In doing so she also “single[-]handedly cut off [the child’s] relationship with his half brothers and sisters.” In evaluating the evidence, the judge took into account mother’s refusal to let him interview the child, inferring the child would have said he wanted to see grandparents.

Before making its ruling the trial judge had asked the parties to confer to agree to a schedule themselves, stating he was “open to [mother’s] suggestions . . . and more than sympathetic to the fact that [she had her] own life to lead.” He merely asked that she be reasonable and he would “respect [her] and protect [her] and [her] status as

the parent, to control the activities of the child.” Grandmother proposed some alternatives that gave mother “latitude” that did not “interfere with her life,” as spelled out to the court, but mother again stated she was “opposed to any court-ordered visitation.” She did not completely rule out “the idea of [supervised] visitation at her discretion” but she did not want any obligation to allow visitation.

In the absence of an agreement, the court set up a schedule for unmonitored visitation quarterly, for eight hours on a Sunday, with six weeks’ advance notice. If it was inconvenient, mother had the option to postpone the visit until the next Sunday. Grandparents were to pick up and drop off the child. Grandmother was ordered not to speak ill of mother or her fiancée and was required to prevent other “adult[s] in the room” from doing so.

After the order was filed mother filed a petition for writ of supersedeas to stay enforcement of the visitation order pending appeal, which we denied.

DISCUSSION

1. Rules of Court Violation

Court rules require each argument be set out in a separate section with a heading summarizing the issue. (Cal. Rules of Court, rule 8.204(a)(1)(B).) Mother grossly violated this rule, by setting out cryptic headings and by failing to limit arguments to one section, repeating the same claims throughout her sometimes stream of consciousness and overly lengthy briefs. To the extent we can determine a claim we address it. Mother’s other arguments are forfeited. (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 59.)

2. *Unconstitutionality of Section 3102*

Section 3102, subdivision (a) provides that “[i]f either parent of an unemancipated minor child is deceased, the . . . grandparents of the deceased parent may be granted reasonable visitation with the child during the child’s minority upon a finding that the visitation would be in the best interest of the minor child.”

Mother first contends we should declare this section facially unconstitutional. It appears the basis for this argument is that the statute violates her right to privacy, which mother concedes has not previously been the basis for a constitutional challenge to section 3102.

The California Constitution provides that “[a]ll people are by nature free and independent and have inalienable rights,” including privacy. (Cal. Const., art. 1, § 1.) Mother cites language in the ballot pamphlet provided to voters in the election where the right to privacy was added to the constitution, which stated in part: “The right to privacy . . . protects . . . our freedom to associate with the people we choose.” (Voter Information Guide, Proposed Amends. to Cal. Const. with arguments to voters, Gen.Elec. (Nov. 7, 1972) p. 27.)

Mother points to *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 where the court overturned a statute requiring a minor girl to obtain consent from her parents or a judicial order allowing her to have an abortion. In so doing, it stated, “We conclude that, under the California constitutional privacy clause, a statute that impinges upon the fundamental autonomy privacy right of either a minor or an adult must be evaluated under the demanding ‘compelling interest’ test.” (*Id.* at p. 342.) But mother fails to make any analysis under this test, or any other for that matter. She essentially repeats the same conclusions that the court did not rely first on the presumption parents act in the best interests of their children and her parental rights were violated because there was no clear and convincing evidence of harm or the child’s best interest. This is not a viable privacy argument.

Mother relies heavily on *Von Eiff v. Azicri* (Fla. 1998) 720 So.2d 510 where the court overturned a Florida statute mandating grandparent visitation when a grandchild's parent dies, was divorced, or deserted the child so long as visitation was in the best interest of the child. (*Id.* at p. 511.) The court held the statute unconstitutional in violation of a parent's right of privacy because it did not require the grandparent to prove substantial harm to the child. (*Id.* at p. 514.) We decline to consider *Von Eiff*. It is not binding authority and its holding does not mandate the same result here just because, apparently like Florida's, California's constitutional right to privacy is broader than that contained in the federal Constitution.

Moreover, in California “[t]he constitutional right to privacy has never been absolute; it is subject to a balancing of interests.” (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 961.) And mother has not shown why her right of privacy makes section 3102 facially unconstitutional. In analyzing whether a statute is facially unconstitutional, “[w]e resolve all doubts in favor of its constitutionality, and we uphold it unless it is in clear and unquestionable conflict with the state or federal Constitutions. [Citation.]” [Citations.]” (*Punsly v. Ho* (2001) 87 Cal.App.4th 1099, 1103-1104.) “[T]he fact that the statute “might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid” [Citation.]” (*Sturgeon v. Bratton* (2009) 174 Cal.App.4th 1407, 1418.) In addition to the fact mother cited no California case that has found section 3102 facially unconstitutional, she has not convinced us it is. “A claimant who advances a facial challenge faces an ‘uphill battle.’ [Citation.]” (*Home Builders Assn. v. City of Napa* (2001) 90 Cal.App.4th 188, 194.) Mother has not scaled that hill.

3. *Right to Visitation*

Mother next contends section 3102 is unconstitutional as applied. We disagree. We review an order for grandparent visitation using the deferential abuse of

discretion standard viewing the evidence most favorably in support of the order. (*Rich v. Thatcher* (2011) 200 Cal.App.4th 1176, 1182 (*Rich*.) We do not reverse an order unless it would be unreasonable for any judge to decide the same way. (*Ibid.*) Mother has not shown the court abused its discretion.

“A fit parent has a federal due process constitutional right to make decisions concerning the care, custody, and control of his or her child. [Citing *Troxel v. Granville* (2000) 530 U.S. 57, 56, 58, 62 [120 S.Ct. 2054, 147 L.Ed.2d 49] (plur. opn. of O’Connor, J.) (*Troxel*).] This includes the right to limit visitation of the child by a third party, even a grandparent. But the right is not absolute. A family law court may order grandparent visitation upon a proper showing.” (*Rich, supra*, 200 Cal.App.4th at p. 1178.)

In analyzing whether grandparent visitation is proper under section 3102, subdivision (a), the court must start with the presumption a fit parent acts in the best interests of the child. *Troxel* is the seminal case setting out this presumption. In *Troxel* a plurality of the United States Supreme Court held a Washington state visitation statute, as applied, was unconstitutional because it infringed on the parent’s fundamental “interest . . . in the care, custody, and control of their children” (*Troxel, supra*, 530 U.S. at pp. 65, 67.) The basis of the finding was that the statute itself was “breathhtakingly broad,” giving “[a]ny person” a right to visit if it was in the best interest of the child. (*Id.* at p. 67, italics omitted.) The state court did not give any “special weight” to the parent’s decision about the children’s best interests. (*Id.* at p. 69.)

The state court relied on “slender findings” the grandchildren would benefit from spending time with the grandparents’ large family, including the grandchildren’s cousins, that loved the grandchildren and who would provide musical opportunities; and it would be beneficial for the grandchildren to spend “quality time” with the grandparents. (*Troxel, supra*, 530 U.S. at p. 72.) Further, the trial court acted on a presumption in favor of visitation by the grandparents. (*Ibid.*)

California cases routinely follow *Troxel* and begin their analysis with its holding that the court must start with and apply the presumption a fit parent will act in the child's best interest. (See, e.g., *Hoag v. Diedjomahor* (2011) 200 Cal.App.4th 1008, 1016 (*Hoag*); *Rich, supra*, 200 Cal.App.4th at p. 1180.) Given that presumption, a recent appellate court decision ruled, a grandparent must prove by clear and convincing evidence that denying visitation would not be in the child's best interest, that is, it would be detrimental to the child. (*Rich, supra*, 200 Cal.App.4th at p. 1180; see also *Ian J. v. Peter M.* (2013) 213 Cal.App.4th 189, 206 (*Ian J.*).

Mother argues the trial court here did not apply that presumption. She maintains the court focused on whether visitation would be detrimental to the child, in violation of *Troxel*. (*Troxel, supra*, 530 U.S. at p. 69.) She claims this ignores the presumption in favor of parental fitness and gave her the burden of proof instead of grandmother. This argument has several flaws.

First, mother misapprehends or misapplies the presumption. She argues the court's finding mother was unfit upended it. But the presumption states a *fit* parent acts in the child's best interest. The very finding of unfitness shows the court understood, analyzed, and applied the presumption.

Second, mother's claim is belied by language in the court's decision. In making its ruling, both at the hearing and in the written order, the court first stressed the presumption.

Third, there is sufficient evidence to support the court's finding grandmother rebutted the presumption. The court found mother unfit in connection with visitation because her refusal to allow the beneficial relationship with grandparents to continue was based on her selfish reasons without consideration of what was good for the child.

Further, the child had had a strong and loving relationship with grandparents since birth. This included regular visits. Grandfather, especially, spent a lot

of time with the child engaging in a variety of activities. The grandparents were an important and integral part of his family.

Two cases are instructive and support the trial court's decision. In *Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466 the surviving father objected to grandparent visitation on the ground he was a fit parent. But the grandparents put on evidence the father had imposed unreasonable conditions on visitation, limiting it to one hour every 10 weeks and requiring supervision by someone of the father's choice and payment in connection with supervision that cost over \$5.75 per minute.

“Although the fundamental right of parents to make decisions regarding the care, custody and control of their children requires the court to give the decisions of fit parents special weight, it does not necessarily preclude a court from ordering visitation over the parents' objection.” (*Fenn v. Sherriff, supra*, 109 Cal.App.4th at pp. 1470-1471.) “Giving the parent's determination ‘special weight’ is different than insulating the parent's determination from any court intervention whatsoever. *Troxel* does not support defendant's suggestion that a fit parent's decisions are immune from judicial review.” (*Id.* at p. 1479.) A parent's decision about grandparent's visitation “is entitled to ‘special weight’ under *Troxel*—assuming both are fit parents—but no more.” (*Fenn v. Sherriff, supra*, 109 Cal.App.4th at p. 1479, fn. omitted.) Thus, *Fenn* disposes of mother's argument her wishes as to visitation be given conclusive weight.

Similarly, in *Hoag, supra*, 200 Cal.App.4th 1008 the court affirmed an order granting grandparent visitation. In *Hoag* the grandmother was “‘like a third parent,’” having lived with the children since their birth. (*Id.* at p. 1011.) After her daughter, the mother of the children, died, the grandmother filed a petition for guardianship. The grandmother testified the father would not allow visitation; in the guardianship proceeding the court ordered a visitation schedule. The father later agreed to voluntary visitation but then objected because of the guardianship petition, stating the

grandmother had ““broke[n the] trust”” between them. (*Id.* at p. 1012.) He also raised spurious objections to the proposed schedule. (*Ibid.*)

The appellate court found the father’s objection to visitation was “a desire to retaliate against the grandmother for her attempt to take the children away from him.” (*Hoag, supra*, 199 Cal.App.4th at p. 1018.) Her desire for retaliation and her purported disrespect of him were not in the children’s best interest but punished them “for the sins of the grandmother.” (*Ibid.*) The court also pointed to the father’s admission in closing argument that visitation would be in the children’s best interest; only court-ordered visitation would be harmful.

The same is true here. Although mother noted there were substantive reasons that should prevent visitation, ultimately she admitted she did not object to visitation, only if it was court ordered.

Additionally, we are not persuaded by mother’s attempt to distinguish *Hoag*. She claims it is “disingenuous and not well[]reasoned.” (Boldface and underline omitted.) She also asserts the parents’ constitutional right was “denigrated and impugned by a statute and a request by a third party who happens to be a grandparent.” Finally, she maintains *Hoag* “has little to say” about the case before us and is “inconsistent” with other case law and the parental presumption.

These statements do not amount to a reasoned legal argument as to why *Hoag* should not apply. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) Rather they are merely bombast and show only that mother does not agree with *Hoag*’s result.

Mother points to several other cases to support her claim, but all are distinguishable. *Ian J., supra*, 213 Cal.App.4th 189 is substantially different, as mother acknowledges. There, the court reversed an order for unsupervised grandparent visitation. The father was concerned the grandfather may have molested the father’s deceased wife and may have engaged in inappropriate sexual conduct with his 9- and 13-

year-old granddaughters. In addition, the granddaughters preferred not to visit with him, and the court erred by not giving weight to the father's and the granddaughters' wishes. (*Id.* at pp. 202, 203, 208, 210, 211.) There are no comparable facts here.

In *Rich, supra*, 200 Cal.App.4th 1176, on which mother heavily relies for her argument "first means first," the court used this phrase to stress the presumption a fit parent has the constitutional right to make decisions concerning his or her child's care, including a limitation on grandparent visitation. (*Id.* at p. 1178.) But *Rich* also stated that right was not absolute, given a sufficient showing by the grandparent. (*Ibid.*) The court affirmed the trial court's decision to deny visitation because the grandparent did not make a sufficient showing of why visitation would be in the child's best interest. (*Id.* at p. 1182.) That is not the case here.

In *Punsly v. Ho, supra*, 87 Cal.App.4th 1099 the trial court did not apply the presumption of parental fitness to decide the best interest of the child vis-à-vis visitation (*id.* at p. 1109), dismissing the mother's concerns about the conduct of the visitation, including the grandparents' "inappropriate language" (*id.* at pp. 1109-1110, fn. omitted). Moreover the court did not take into consideration the mother's offer of visitation. (*Id.* at p. 1102.) Here, the court not only began with the presumption, it thoroughly considered mother's concerns about how visitation would proceed. Moreover, although the court sympathized with mother's opposition to scheduled visitation, it found that if visitation was at her discretion, "she would never find the time to allow" it.

Likewise in *Zasueta v. Zasueta* (2002) 102 Cal.App.4th 1242, an order allowing the grandparents visitation was reversed because the court failed to apply the presumption of parental fitness, discounting the mother's concern about language and alcohol use and the child's discomfort around the grandparents. (*Id.* at p. 1253.) Again, that is not what happened in the case before us.

Finally, in *Kyle O. v. Donald R.* (2000) 85 Cal.App.4th 848, the father, whom the court found was fit, was willing to allow visitation. He just did not want court-ordered visitation. He preferred a flexible schedule, which was what the child had with her other grandparents. The grandparents did not show the suggested unscheduled visitation was not in the child's best interest nor did they overcome the presumption the father would make decisions in the child's best interest. Their only evidence was the father's hostility toward them. But the hostility was due only to the grandparents' insistence on the schedule they preferred. (*Id.* at p. 864.)

Here, mother parroted the *Kyle O.* spontaneity argument, claiming she is willing to allow visitation and was only opposed to court-ordered visitation. She just wants it to be on her terms and flexible. In *Troxel, supra*, 530 U.S. 57, one basis for the ruling was that the parent had never completely denied visitation, but offered "meaningful visitation" limited to a schedule convenient to her. (*Id.* at pp. 71, 72.)

But the facts belie mother's claim. She had essentially cut off visitation with grandparents after father died. The court did not find credible her claim she would allow spontaneous visitation. Moreover, before the court made the order it asked mother for suggestions about a schedule, pointing out it sympathized with her desire to have unstructured visits. It made assurances it would "protect [her] and [her] status as the parent, to control the activities of the child." Yet mother refused to make any suggestions.

Mother argues she allows visitation by the child's other grandparents. Further the child is involved in activities and doing well. But that is not the standard by which a petition for grandparent visitation is evaluated.

Nor are we persuaded by mother's argument regarding the alleged hostility between her and grandmother or between Sylvia and grandmother. This evidence was disputed by grandmother and there was other testimony grandmother had not displayed

hostility toward mother. While the court acknowledged some hostility, it did not consider it significant enough to deny visitation.

Other cases have relied on hostility to deny visitation but they are not comparable. In *Ian J.*, *supra*, 213 Cal.App.4th 189, the hostility arose based on the father's fear of evidence of the grandfather's sexual misconduct. (*Id.* at p. 208.) In *Rich*, *supra*, 200 Cal.App.4th 1176, among other things the grandmother believed the mother "may have been responsible for [the father's] death." (*Id.* at p. 1178.) In *Kyle O. v. Donald R.*, *supra*, 85 Cal.App.4th 848 the only evidence the grandparents offered was the father's hostility, which was not sufficient to overcome the parental presumption of fitness. Moreover, the court discounted it because it was based on the grandparents' refusal to allow visitation. (*Id.* at p. 864.) But none of these persuade. And, in any event, the order challenged here prevented grandmother from making any derogatory statements about mother.

In finding mother's refusal to allow visitation was not in the child's best interest, the trial judge noted she would not allow him to interview the child. He inferred from this the child would have said he wanted to see grandparents. Mother argues that in no published case on third-party visitation has a child ever been interviewed. She continues that it is the parents' rights that control in visitation cases, not what the child wants. The parents' rights come first, it is true, but after taking those into account, the court then considers the best interests of the the child. In *Ian J.*, *supra*, 213 Cal.App.4th 189, the court relied in part on section 3042, which states that when a "a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child." Thus, it was perfectly reasonable for the court here to try to determine the child's preference by speaking to him.

In sum, there was sufficient evidence grandmother rebutted the parental presumption of fitness. (*Ian J.*, *supra*, 213 Cal.App.4th at p. 208.)

Taking another tack mother argues the fact *Rich, Punsly, Zasqueta* and *Kyle* determined there was no right to visitation while *Hoag* and *Fenn* allowed it somehow violates equal protection. Not so. “As a foundational matter, . . . all meritorious equal protection claims require a showing that ‘the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.’” (*People v. Wutzke* (2002) 28 Cal.4th 923, 943, italics omitted.) Mother has made no such showing. Further, “[t]here is . . . no requirement that persons in different circumstances must be treated as if their situations were similar.” (*People v. McCain* (1995) 36 Cal.App.4th 817, 819.)

A review of the cases discussed above shows the courts applied section 3102 to the specific facts before them. Even *Troxel* acknowledged that “much state-court adjudication in this context occurs on a case-by-case basis” and thus refused to hold nonparental visitation statutes per se violated due process. (*Troxel, supra*, 530 U.S. at p. 73.)

DISPOSITION

The order is affirmed. Grandparents are entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.