

NO. A05-0537

State of Minnesota
In Supreme Court

In Re the Matter of:

Marilyn Johnson,

Appellant,

vs.

Nancy SooHoo,

Respondent.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The constitutional protections that should be awarded a fit parent's decision making in a non-parent visitation context is a relatively undefined area of the law and one that should, as noted by the United States Supreme Court, be "elaborated with care." Troxel v. Granville, 530 U.S. 57, 73 120 S.Ct. 2054 (2000). Respondent has essentially taken the position that once the statutory requirements of Minn. Stat. § 257C.08 have been met, then there are no constraints on a trial court's discretion in awarding visitation to a non-parent. Appellant asserts that pursuant to Troxel and this Court's ruling in In re N.A.K., 649 N.W.2d 166, 177 (Minn. 2002), before a court invokes its powers as *parens patriae* there must be some deference given to the fit parent's due process right to make decisions regarding her children. If, as in the present case, no deference is given, then a trial court has impermissibly infringed on the fundamental right of a fit parent to make child rearing decisions simply because a state judge believes a better decision could be made. Troxel at 73.

ARGUMENT

I. Appellant has never sought to cut off Respondent's access to the children.

A fundamental flaw in Respondent's argument is her repeated assertion that Appellant sought to cut her off from the children. Respondent states that Appellant sought to "entirely cut off" Respondent's access to the children and that Appellant had "no desire for a relationship between the children and Respondent." (Please see Respondent's Brief, page 14.) As noted by Respondent, Appellant's position has always been that there should be no court-ordered visitation awarded to Respondent. AA-129. It

should also be noted that Appellant's visitation proposal included an alternative visitation schedule that would have provided Respondent visitation one weekend day per month. AA-129. Therefore, there is no credible basis for Respondent's claim that Appellant sought to cut her off from access to the children.

Despite Respondent's insistence that Appellant was seeking to deny her any visitation with the children, Respondent makes repeated references to Appellant's offers of meaningful visitation. Respondent took note of the following instances in which Appellant stated she would be agreeable to visitation for Respondent:

- February 26, 2004 – Appellant testified she was willing to work out a visitation schedule.
- March 12, 2004 – Appellant testified to Respondent's special relationship with the children.
- July 16, 2004 – Appellant indicated during the custody evaluation that she had proposed two different schedules to Respondent.
- September 4, 2004 – In a memorandum to the trial court Appellant indicated that she has always maintained that some amount of visitation with Respondent is in the best interest of the children.

(Please see Respondent's Brief, pages 25-26.)

It is completely contradictory for Respondent to argue that Appellant has a "propensity to sabotage the filial relationship" and has sought to cut off Respondent from access to the children and within the same brief make repeated references to Appellant's offers of meaningful visitation. Appellant's assertion that there should be no court-ordered visitation is simply not an attempt to cut Respondent off from access to the children. Appellant's belief that as a fit custodial parent she, not the trial court, is in the best position to determine the associations that are in her children's best interests is consistent with Troxel. The very reason an offer of visitation is relevant and important is

that it obviates the need for court-ordered visitation. In the case at bar, instead of understanding that Appellant's offer of visitation means there is no need for state interference, the trial court used the offer as a factor against Appellant in support of establishing a visitation schedule far exceeding anything Appellant considered appropriate and certainly far exceeding anything that could be considered reasonable for a non-parent.

Respondent argues that "the district court did not create anything, including a visitation schedule allowing Respondent and the children to see each other." (Please see Respondent's Brief, page 18.) However, since Appellant has made multiple offers of visitation, any schedule beyond what Appellant thinks is appropriate is a creation of the trial court, and is an overriding of Appellant's decision as to what is in the best interest of her children. The trial court's use of Appellant's own offer of meaningful visitation as a way to expand the proposed schedule to award Respondent visitation commensurate with that of a non-custodial parent shows that its award of visitation was not narrowly tailored to allow Respondent to remain in the children's lives, but was instead an overly broad order designed to allow Respondent to maintain her prior parental role.

II. The visitation schedule elevates Respondent to the level of equal parent to Appellant and thereby creates confusion and long lasting harm in the children as they struggle to maintain the relationship they have with their only parent, Appellant.

Respondent adopts the illogical position that although she was "a parent figure" to Appellant's children who should be awarded visitation "commensurate with that established relationship," the visitation schedule did not elevate Respondent to the status

of an equal parent. One need look no further than the schedule itself to see that short of giving her legal custody rights, Respondent has every right associated with a non-custodial parent. The parties alternate all major holidays, including Mother's Day. Appellant's right to take vacations with her children is limited to that of Respondent. It is hard to imagine how the children are to delineate between who is their parent and who is a third party when the visitation schedule places them in the care, custody and control of Respondent for extensive periods of time and during the major events in their lives.

Children do not comprehend the legalities of sole legal and sole physical custody. They understand that there is an adult who is directing their upbringing. For these two children that person is supposed to be Appellant. However, by virtue of the visitation schedule these children understand that two people are acting as their parent. The bonds that are created on birthdays, Mother's Days and Christmas mornings are split between two parties, one a parent and one a non-parent. Respondent may argue that the visitation schedule does not elevate her to the status of a non-custodial parent, but there is nothing in the visitation schedule that would provide any guidance to a ten and a six year old as to who is and who is not their parent. Coupled with Respondent's stated intention to continue in her perceived role as parent to the children, it is clear that the result of such an extensive visitation schedule is to erode the stability and security Appellant has provided them. Simply put, because of its breadth, the visitation schedule is harmful to the children.

III. Respondent fails to address the necessary constitutional issues involved and simply repeats her position that she was a parent and the visitation schedule should allow her to continue in that role.

Respondent relies on two principles in support of her position that Minn. Stat. § 257C.08 is constitutional as written and as applied. First, Respondent claims that Troxel does not apply to the case at bar even though Troxel expressly addresses the fundamental due process right of a parent in the context of visitation by non-parents. (Respondent's Brief, page 9.) Second, Respondent claims that the trial court's application of Minn. Stat. § 257C.08 was a permissible infringement on Appellant's due process rights because the trial court was advancing the constitutional rights of the children. (Respondent's Brief, page 12.)

Respondent states that Troxel is only significant for the premise that the Washington statute in Troxel was overly broad and was therefore a violation of the custodial parent's Fourteenth Amendment due process rights. (Respondent's Brief, page 10.) The significance Respondent is referring to relates to whether a statute is unconstitutional *as written*. However, the ruling in Troxel went on to establish why the Washington statute was unconstitutional *as applied*. Troxel at 67. Respondent fails to address the constitutional issues involved in the trial court's application of Minn. Stat. § 257C.08 to the case at bar and completely ignores the issues of whether the state had an identifiable compelling interest or whether the court's visitation schedule was narrowly tailored to address the alleged interest. Respondent merely argues that "the facts in Troxel bear little resemblance to those in the case before this Court." (Please see Respondent's Brief, Page 9, paragraph 3.)

There was a combination of three factors that led the United States Supreme Court to rule that the Washington Statute was unconstitutional as applied. First, there was no allegation nor was there any finding that the custodial parent was an unfit parent. Troxel at 68. Second, the Washington Superior Court applied the statute based on its presumption in favor of visitation giving no deference or special weight to the custodial mother's fundamental decision-making right concerning her children. Third and finally, there was no attempt by the custodial parent to cut off visitation from the grandparents who were seeking time with the children. The custodial parent only sought to limit the amount of visitation. Taken together these factors "compel the conclusion that [the Washington Statute], as applied, exceeded the bounds of the due process clause." Id.

In the present case, no one, including Respondent, has ever so much as hinted that there were any concerns regarding Appellant's fitness as a parent. Appellant is a fit parent. There is also no question that the trial court presumed that Respondent should be awarded extensive visitation. As noted by Respondent, after one day of testimony, the trial court was making determinations as to what would be the appropriate amount of visitation and established a visitation schedule that was very similar to the schedule that is currently in place. (Please see Respondent's Brief, page 30, paragraph 2.) In addition, by limiting Appellant's rights to be heard prior to rendering a decision on visitation, and by limiting Appellant's right to present witnesses other than Mr. Kowalski, the trial court was taking procedural steps to impose its own determination as to what amount of visitation would be in the children's best interest without considering Appellant's wishes on the matter. Finally, as in Troxel, Appellant did not seek to cut off Respondent, but

instead, as noted by Respondent, made repeated offers of meaningful visitation. (Please see Respondent's Brief, page 25,26.)

Respondent incorrectly characterizes Appellant's argument as a "fit parent infallibility" argument and that Appellant is arguing for an interpretation of Troxel that says a fit parent's decision-making cannot be challenged. That statement is simply incorrect. Appellant's position is that there is a presumption that she is acting in her children's best interest and that before a trial court can take control of every aspect of Appellant's decision making regarding visitation (including her own therapy) there should be an identifiable compelling state interest. Appellant also believes that the law requires that any infringement by the trial court be narrowly tailored to address the alleged compelling state interest. Appellant is not asserting infallibility, but simply requesting that she be afforded the same right as every other fit custodial parent in Minnesota.

Respondent asserts that the children's rights should override Appellant's interest in making decisions for her children. (Respondent's Brief, page 29, para. 3.) Implicit in this assertion is Respondent's acknowledgement that Appellant has a fundamental right to the care, custody and control of her children. Respondent relies on cases dealing with abortion (Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)), foster care (Smith v. Organization of Foster Families, 431 U.S. 816 (1977)) and a parent's right to determine the religious upbringing of their children (Wisconsin v. Yoder, 406 U.S. 205 (1972)) for the principle that the state can step in and override a fit custodial parent's right to determine the upbringing of her children. In fact, in Wisconsin

v. Yoder, the Court determined that the state did not have the right to force the children to attend public education until the age of 16 because it infringed on the parent's fundamental right to determine the care, custody and control of their children. Wisconsin at 229, 230. If public education of its citizens was not a sufficient compelling state interest to infringe on a parent's Fourteenth Amendment rights, then how can second guessing Appellant's visitation decisions rise to the level of a compelling state interest?

The question is not whether the state has *parens patriae* authority. Clearly it does. The question is first whether there is a basis for invoking the state's *parens patriae* authority and second whether the application of it's *parens patriae* authority is narrowly tailored to the alleged compelling state interest. The issue is one of balancing the state's interest with those of a parent's fundamental rights regarding the upbringing of their children. Wisconsin at 214. Certainly no one would argue that the trial court could have ordered a visitation schedule that had the children in Respondent's care 50% of the time. Clearly, that would indicate an overly broad application of the statutory authority. Therefore, there are limits to what amount of visitation is constitutional. While there could never be a bright line test that would be applicable in every case, Troxel presents a framework in which to consider what amount of visitation would achieve the appropriate balance between Appellant's constitutional rights as a fit custodial parent and the children's best interest. The trial court's refusal to apply Troxel indicates that it gave little weight to any constitutional safeguards or presumptions that should be have been afforded Appellant and simply reduced the decision to a best interests analysis.

IV. A visitation schedule designed to maintain a parent/child relationship with a non-parent will by definition interfere with the children's relationship with their only parent.

Respondent continues to assert her right to have a parental role in the lives of Appellant's children. Respondent states that "legal labels" are not important and that the role she had with the children should have been the focus of the visitation schedule. (Respondent's Brief, page 19.) The role that Respondent feels the visitation schedule should foster is that of a parent/child relationship. *Id.* Respondent goes on to state that although Appellant is the "legal custodian" that does not diminish her right as an "interested third party" to have visitation with the minor children. *Id.*

Appellant believes that the "legal labels" and the law that supports those labels should have some bearing on the visitation order. While Respondent may see Appellant's status as the only parent to her children as nothing more than a legal label, Appellant believes that when the United States Supreme Court establishes that she has a fundamental right as a fit custodial *parent* to raise her children without state interference, her due process right should carry some weight. *Troxel* at 72. Furthermore, Respondent does not have any visitation rights as an interested third party as she states in her brief. (Respondent's Brief, page 24.) Respondent's petition for custody was dismissed because she had failed to meet her burden of proving that she was an interested third party pursuant to Minn. Stat. § 257C.03 subd. (7). AA-79. Respondent's continued assertion that she should have a role in the children's lives commensurate with a parent/child relationship is at the core of the problem with the trial court's visitation order. These children have only one parent.

A. Respondent's attempt to minimize the extensive visitation schedule awarded to Respondent is contrary to Appellant's reality of a single parent working full time while raising her two children.

Respondent's calculations regarding the amount of time she has with the children fail to take into account the fact Appellant is a single parent with full time employment and therefore is not with the children during the weekdays. Respondent inappropriately attributes all of the weekday time to Appellant. Appellant, on the other hand, calculated the hours based on the time that the children were with each party which is evenings, weekends, holidays and vacations. (Appellant's Brief, pages 27-28.) Based on the time the children are actually with each party, the children are with Respondent, on average, 37% of every month. Id.

An argument could be made that Respondent has 50% of the quality time with the children every month. While the time in the evenings is important, a single parent such as Appellant is generally struggling to get home after work, get a meal on the table and then get the children cleaned up, bathed and put to bed at a decent time. This schedule does not leave much quality, one-on-one time for a single parent to spend with her children. The real, extended quality time in which a single-parent can guide and raise her children comes on the weekends and Respondent has 50% of that time.

Respondent does not believe that having the children away from her between 30% and 50% of the time will interfere with Appellant's relationship with her children. (Respondent's Brief, page 21.) Respondent tries to distinguish Gray v. Hauschildt, 528 N.W.2d 271, 274 (Minn. Ct. App. 1995) from the case at bar because Gray dealt with grandparent visitation. (Respondent's Brief, page 20.) The relevance of Gray to the case

at bar is that, as the trial court noted, when Appellant's children are not under her care and guidance for extensive periods of time that fact will by definition interfere with the Appellant's care, custody and control of her children. Time was a factor in whether the visitation schedule in favor of the grandparents in Gray would interfere with the custodial parent's relationship with her children. It is difficult to imagine the level of interference that results from a visitation schedule which places Appellant's children up to 50% of the time, including alternating Mother's Day, in the care of someone who stated that she thought it "important that her previous role of full-time mother continue for the girls." AA-49.

Respondent asserts that her attempt to have a parental role in the lives of Appellant's children is irrelevant because her custody petition was dismissed. The issue of interference did not go away simply because the trial court dismissed Respondent's custody petition. In fact, the issue of interference is even more relevant in a purely visitation context due to the fact that Respondent, as someone without any parental rights, is prohibited from interfering in Appellant's relationship with her children. Minn. Stat. § 257C.08. Respondent would like to sweep under the rug her attempts to wrestle legal custody rights from Appellant. However, it is hard to imagine anything more important to the analysis of whether the visitation schedule is interfering with Appellant's parent/child relationship than Respondent's documented attempts to undermine Appellant's rights as sole legal custodian. It is also highly disingenuous for Respondent to accuse Appellant of having a "propensity to sabotage the filial relationship" when Respondent is the one who brought a motion seeking legal custody rights after her

custody petition was dismissed and well after her time for appeal had passed.

B. Respondent's extensive focus on her role as a caregiver with a parent/child relationship illustrates the fact that the visitation schedule is designed to continue her in her role as a parent to Appellant's children.

Respondent asserts that the best interest of the child is the ultimate inquiry in any proceeding involving visitation. (Respondent's Brief, page 12, para 2.) However, Troxel very clearly establishes that it is presumed that a fit custodial parent acts in the best interest of the child. Troxel at 68. Therefore, any analysis of whether the current visitation schedule is reasonable must give Appellant's right to make decisions concerning her children proper weight. A visitation schedule designed to continue Respondent's parental role in the lives of Appellant's children does not give any weight to Appellant's due process right to raise her children without interference.

Respondent states that "the trial court's visitation schedule was appropriate for Respondent's position of an interested third party with whom the children have established emotional ties creating a parent and child relationship." (Respondent's Brief, page 24.) (emphasis added) As previously stated, Respondent is not an interested third party. Instead, because Respondent could not meet her burden of establishing herself as an interested third party, she occupies mere *in loco parentis* status.¹ Therefore, according to Respondent's logic, if the current visitation schedule is appropriate for an interested

¹ Respondent chastises Appellant for denigrating her status as *in loco parentis* by use of the word "mere." (Respondent's Brief, page 30, para 2.) The phrase "mere *in loco parentis* status" was used by the trial court. AA-87. Therefore, any concerns about denigration of her status should be addressed to the trial court.

third party, it is not appropriate for Respondent. In addition, the extensive focus on the emotional ties creating her alleged parent/child relationship further establishes that the visitation schedule is only appropriate for someone who is a parent and is therefore not appropriate for Respondent. In addition, Respondent's extensive emphasis on her *in loco parentis* status only further emphasizes that she intends to actively assert her perceived parental authority over the children, regardless of any interference that may result.

V. Evidence obtained while Respondent was pursuing custody as an interested third party does not provide evidentiary support for an award of visitation to a non-parent.

Respondent claims that the hearings held in February and March 2004 and the examination of Gregg Kowalski provide a sufficient evidentiary basis for the current visitation schedule. Respondent relies heavily on the trial court's reasoning in support of this position and, like the trial court, relies on evidence that did not address an appropriate visitation schedule for someone who occupied mere *in loco parentis* status. It was an abuse of discretion to rely on a custody evaluation conducted with the premise that the parties were both parents and therefore held equal status.

A. The hearings held in February and March 2004 did not address Respondent's limited role as someone who previously held mere *in loco parentis* status.

Respondent illogically claims that because she did not make a legal claim that she was an equal parent, the trial court did not consider her an equal parent. (Respondent's Brief, page 23, para. 1.) The procedural history in this matter is that hearings held in February and March 2004 were specifically limited to whether Respondent could establish extraordinary circumstances sufficient to advance her custody case to an

evaluation by HCFSC. AA – 44. Therefore, the testimony heard over those three days does not provide a sufficient evidentiary basis for the trial court to determine a visitation schedule between a parent and someone with *in loco parentis* status. Whatever the trial court was adducing after one day of testimony in February 2004, it was not the appropriate visitation for a non-parent because no evidence had been presented on that issue. In fact, no evidence was ever presented on that issue.

B. The evaluation conducted by HCFCS was based on two equal parents and did not address visitation with a non-parent.

After the hearings held in February and March 2004 the trial court determined that Respondent established a prima facie case of extraordinary circumstances within the meaning of Minn. Stat. § 257C.03 sufficient to proceed to a custody evaluation by HCFCS. Nowhere in the trial court's order for the custody evaluation did the trial court distinguish between Appellant and Respondent in terms of who was or was not a parent. AA- 37-46. In addition, Gregg Kowalski testified that he conducted the evaluation as instructed by the trial court based on the parties being equal parents. Transcript of Hearing held October 25, 2004 page 153-154. Therefore, the custody evaluation conducted by Mr. Kowlaski could not provide an evidentiary basis for determining the appropriate visitation schedule for a non-parent.

C. The trial court's failure to obtain the necessary evidence regarding Respondent's interference with Appellant's relationship with her children was an abuse of discretion.

Respondent acknowledges that the trial court did not hold any evidentiary hearings on the visitation schedule and that the trial court created the visitation schedule based on

evidence obtained prior to the dismissal of Respondent's custody petition. (Respondent's Brief, page 29-30.) Respondent also acknowledges that the trial court did not hold any hearings related to whether Respondent had interfered with Appellant's relationship with her children. Respondent claims that because the trial court did not deny Respondent any visitation the trial court was not required to hold hearings on the issue of interference. By Respondent's analysis of Minn. Stat. § 257C.08 as long as Respondent was awarded visitation it did not matter if there was interference with Appellant's relationship with her children. Obviously, such an interpretation defies logic and is merely an attempt to overlook the lack of an evidentiary basis for the current visitation schedule.

Respondent claims that Appellant was given ample opportunity to be heard regarding Respondent's interference with her relationship with her children. (Respondent's Brief, page 27.) This is a mischaracterization of the facts. Appellant submitted detailed accounts of over twenty-four different instances of interference that had occurred since the temporary visitation schedule went into effect. Her submissions were by affidavit, since no evidentiary hearing was allowed by the trial court. AA – 125-128. Respondent did not refute most of the allegations. Therefore, the only evidence presented on the issue indicated that Respondent had interfered with Appellant's relationship with her children. The trial court call the allegations conclusory, but each described specific times, dates, and incidents. By denying an evidentiary hearing the trial court prevented Appellant from proving the allegations.

Respondent also relies on the HCFCS finding that reduction in the girls' visitation with Respondent would result in problems for them in the future. AA – 62. However,

this recommendation by HCFCS was based on the premise that Respondent was an equal parent to Appellant. The harm that HCFCS may perceive as resulting from decreasing time with Respondent as a parent may not have existed had HCFCS considered Respondent's non-parental status.

In addition to not having any evidence from Respondent refuting Appellant's account of the instances of interference, the trial court did not hold any hearings to determine what effect the interference was having on the children. Had the trial court held such hearings it would have been able to determine the extent of the interference and its impact on the children. The trial court acknowledged, it had never seen circumstances such as those in the present case its eight years on the family court bench. AA – 42. Therefore, evidentiary hearings were necessary in order to provide the trial court with the necessary expertise on whether Respondent had satisfied all three criteria of Minn. Stat. § 257C.08 and what amount of visitation if any was appropriate based on the effects of the interference on the children.

VI. Respondent's reiteration of the trial court's faulty finding that it had jurisdiction to order Appellant and her children into therapy does not change the fact that the trial court abused its discretion.

In support of her belief that the trial court had jurisdiction to order Appellant and her children to attend therapy and counseling, Respondent essentially repeats the trial court's reasoning from its May 26, 2005 memorandum. AA-204-207. The trial court reasoned that it had authority under Minn. Stat. § 518.176, even though no parent moved for such an order as required by statute. The trial court also reasoned that it had jurisdiction under Minn. Stat. § 518.131 even though there was no custody litigation

pending that would have given the trial court jurisdiction.

Respondent creates the proverbial house of cards to try to bolster the trial court's faulty reliance on Minn. Stat. § 518.176. Respondent claims that her catch-all request for "such other and further relief as the [trial court] determines is fair, just, reasonable and necessary," along with her request for a custody evaluation and the HCFCS recommendation give the trial court jurisdiction within Minn. Stat. § 518.176 to order Appellant and her children into therapy. Respondent also claims that the fact that she is not a parent is irrelevant because the trial court found that she and Appellant both "functioned as parents." (Respondent's Brief, page 37.) By Respondent's logic her status as *in loco parentis* gave her the right to bring a motion as a parent under Minn. Stat. § 518.176. Even if this were true, it is irrelevant because Respondent never brought a motion within Minn. Stat. § 518.176 requesting that Appellant and her children attend therapy and counseling. There was nothing that occurred in the trial court proceedings that would have made Minn. Stat. § 518.176 applicable to the case at bar. Recognizing the futility of the trial court's reliance on Minn. Stat. § 518.176, Respondent falls back on judicial economy.

Minn. Stat. § 257C.02 does make Minnesota Chapter 518 applicable to Minnesota Chapter 257C proceedings. However, no one could argue that the reference to Minnesota Chapter 518 would give a trial court operating under Minn. Stat. § 257C.08 the authority to award spousal maintenance, or divide assets in the case at bar. Therefore, the mere reference to Minnesota Chapter 518 does not open the door to the trial court issuing such intrusive orders, *sua sponte*, without any motions being brought. The level of intrusion

goes so far that the trial court is invading the therapist-patient privilege by requiring Appellant's therapist to report directly to the trial court on the progress of her therapy. One would think that for a court to so invade the privacy of a fit parent whose only sin was to adopt two children from a foreign country, the trial court would need to have a statutory basis for doing so, since it certainly does not have a common law right to do so. The trial court's attempt to extrapolate an inapplicable statute to grant it jurisdiction to order Appellant and her children into therapy illustrates the extent of the trial court's infringement on Appellant's fundamental right to raise her children without state interference.

VII. Respondent's factual corrections contain a number of factual errors.

The majority of Respondent's Statement of the Case and Facts are nothing more than an attempt to put Respondent's spin on the facts and are not actual corrections. For example, Respondent states that the reason Appellant did not allow her to adopt either child was not due to Respondent's physical and emotional abuse, but because Appellant did not believe Respondent was bonding with either child. (Respondent's Brief, page 3, para. 1.) In support of this mischaracterization Respondent provides the following quote from the hearing held March 12, 2004.

Q. And why were you uncomfortable with proceeding down that road at that time?

A. Because of what I stated earlier, they weren't connecting emotionally, from what I could observe. And I had hoped to see a different relationship developing between them.

T. 229.

Respondent goes on to say that because there is no mention of physical or

emotional abuse on page 229 that Respondent's mental and physical health was not an issue in Appellant's decision not to allow her to adopt Appellant's children. Id. However, the "what I stated earlier" portion of the above quote refers to incidents of yelling and verbal abuse that were described in detail. T. 135-137. In fact, during cross-examination by Respondent's counsel, Appellant was asked if she thought Respondent's angry outbursts were "emotionally damaging" to the children to which she replied "yes." T. 136. Clearly, Respondent's mental abuse of the children was a factor in Appellant's decision not to allow Respondent to adopt the children.

Finally, Respondent states that the trial court did not order the Hennepin County Family Court Services evaluation to conduct the evaluation under the premise that the parties were equal parents. (Respondent's Brief, page 6, para. 1.) This is a mischaracterization of the facts for two reasons. First, at the time the HCFCS custody evaluation was ordered, Respondent's custody petition was still active and the evaluation was conducted as if the parties were equal parents. Second, Gregg Kowalski of HCFCS who conducted the evaluation testified that that the visitation schedule he proposed and which was later incorporated in large part in the permanent schedule was the "type of access one would see in a situation where there were two legal parents with equal standing under [Minn. Stat. § 518.17]." Transcript of Hearing held October 25, 2004, p. 154. Therefore, any notion that the HCFCS evaluation was not conducted based on the erroneous position of the parties having equal standing is patently false.

CONCLUSION

Undoubtedly, the trial court abused its discretion when it awarded visitation to a non-parent commensurate with that of a non-custodial parent. Respondent is not a parent to Appellant's children and a visitation schedule which has as its purpose and its result the continuance of Respondent's parental role in the lives of Appellant's children is clearly an infringement on Appellant's Fourteenth Amendment right to due process and is also an abuse of discretion. Respondent's continued assertion that the visitation schedule is appropriate because she was a parent only underscores that the visitation schedule is an abuse of discretion. The trial court's order that Appellant and her children attend therapy and waive therapist-patient privilege without having any jurisdiction for such an order also serves to underscore the extent to which the trial court was willing to infringe on Appellant's due process rights. The trial court abused its discretion and violated Appellant's fundamental right as a parent to the care, custody and control of her children when it used Minn. Stat. § 257C.08 to allow Respondent to continue her parental role in the lives of Appellant's children.

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