

CASE NO. A05-0537

State of Minnesota
In Supreme Court

Nancy SooHoo,

Petitioner-Respondent,

vs

Marilyn Johnson,

Appellant

RESPONDENT'S BRIEF AND APPENDIX

PERLMAN LAW OFFICE
Michael Perlman, #85212
10520 Wayzata Blvd.
Minnetonka, MN 55305
(952) 544-3400

For Respondent

M. SUE WILSON LAW OFFICE
M. Sue Wilson, # #0117742
Two Carlson Pkwy., Suite 150
Plymouth, MN 55447
(612) 340-1405

For Appellant

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STATEMENT OF THE LEGAL ISSUES

1. Whether Minn. Stat. §257C.08 is unconstitutional as applied?

The Minnesota Court of Appeals held that the statute is not unconstitutional as applied and affirmed the district court.

2. Whether Minn. Stat. §257C.08 is unconstitutional as written?

The Minnesota Court of Appeals held that the statute is not unconstitutional as written and affirmed the district court.

3. Whether the trial court abused its discretion when it awarded Respondent reasonable visitation commensurate with its findings that Respondent stands *in loco parentis* to the children created by the emotional ties that were established between Respondent and the children, and, therefore, such visitation is in the children's best interests?

The Court of Appeals affirmed the visitation granted by the trial court. Apposite Authority: Minn. Stat. §257C.08; Olson v. Olson, 534 N.W.2d 547 (Minn. 1995); Sefkow v. Sefkow, 427 N.W.2d 203 (Minn. 1988); Simmons v. Simmons, 486 N.W.2d 788 (Minn.App. 1992).

4. Whether the trial court abused its discretion when it had sufficient evidentiary support for the visitation schedule between Respondent and the children and was not required to have a separate hearing on Appellant's allegations of interference with the parent-child relationship in order to award Respondent visitation?

The Court of Appeals affirmed the district court's order that granted visitation with the children to Respondent without a separate hearing. Apposite Authority: Minn. Stat. §257C.08; State v. Corbin, 343 N.W.2d 874 (Minn. App. 1984); Foster on Behalf of J.B. v. Brooks, 546 N.W.2d 52 (Minn. App. 1996).

5. Whether the trial court lacked jurisdiction within Minn. Stat. Chapter 257C to order Appellant or the minor children to attend counseling or therapy?

The Court of Appeals affirmed the district court's order for counseling and found that it had jurisdiction to order therapy. Apposite Authority: Minn. Stat. §257C.02(a) (incorporates Minn. Stat. Chapter 518 within Chapter 257C proceedings); Minn. Stat. §518.131; Minn. Stat. §518.176; Korf v. Korf, 553 N.W.2d 706 (Minn. App. 1996).

STATEMENT OF THE CASE AND FACTS

Respondent submits the following as factual errors to Appellant's Brief, and Statement of the Case and Facts:

Cover Page: Appellant incorrectly captioned the title of this case as "Marilyn Johnson, Appellant, vs. Nancy SooHoo, Respondent". Ms. SooHoo was the petitioner in the district court, not Ms. Johnson. The correct caption of the case in the appellate courts is "Nancy SooHoo, Respondent, vs. Marilyn Johnson, Appellant".

Page 2:

(i) Erin is now 10 years old, not 8;

(ii) Jaime is now 6 years old, not 4;

(iii) Appellant states that "Nancy SooHoo (Respondent) was Appellant's partner until September 15, 2003 when she was barred from the family home by Court Order because she committed domestic abuse against Appellant." This is erroneous

On September 15, 2003, Respondent was barred from the family home by an Ex Parte Order for Protection obtained by Appellant. Resp. App. 1-3. The Ex Parte Order for Protection was based on Appellant's allegations of domestic abuse. Resp. App. 4-7 Following a hearing, the district court issued a Reciprocal Order for Protection (AA 12-17) which included a fact finding, par. 16, that " . . . it appears to the Court that both parties sustained physical harm and bodily injury which would not be consistent with either party acting in self-defense or unintentionally and therefore, the Court believes that on September 3, 2003 both parties committed domestic abuse against each other by becoming involved a physical fight." (sic) AA 14.

(iv) Appellant states, "Respondent has not adopted either of Appellant's daughters, nor has Appellant asked Respondent to become an adoptive parent to her children due to her concerns regarding Respondent's mental health and physical abuse." Appellant cites Transcript of hearings held March 12, 2004, p. 229. On page 229 of the transcript, however, there is no mention of "Respondent's mental health and physical abuse." Instead, on page 229, Appellant's counsel asked Appellant why she was uncomfortable with Respondent adopting the children at that time:

"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."

Id. Allegations of domestic abuse were made for the first time by Appellant in September, 2003. Resp. App. 4, et. seq. Appellant refused to allow Respondent to legally adopt the children in 2001. Transcript of Hearing, March 12, 2004, p. 229. There is no evidence that Appellant's decision to deny Respondent adoption of the children was predicated on concerns about Respondent's mental health or physical abuse.

(v) Appellant states, "On October 8, 2003, Respondent filed for sole legal and sole physical custody of Appellant's children and to have Appellant pay her child support." Respondent actually filed as follows: "Petitioner [Respondent herein] requests that the Court issue a Judgment and Decree as follows: . . . Granting to the petitioner the legal and physical custody of the minor children of the parties, *subject to liberal access with the respondent* [Appellant herein]." (Emphasis added). AA-21

(vi) Appellant says, "Extensive visitation has facilitated Respondent's interference with her relationship with her children." The characterization of the final visitation order as "extensive" is not factual. It is merely Appellant's opinion. The Court found no evidence whatsoever of interference.

Page 3:

(vii) Appellant states, "On February 26, 2004, the Court heard testimony from the parties and their respective witnesses on the specific issue of whether Respondent had the requisite standing to pursue custody as an "interested third party" and whether she had proved by clear and convincing evidence that extraordinary circumstances of a grave and weighty nature exist so as to overcome the parental presumption."

This is an error. The court's Memorandum Decision dated February 26, 2004 says, "The case is set for an evidentiary hearing today to address 'Petitioner's [Respondent herein] standing as an interested third party'." AA-34. There was no discussion on that day about whether "clear and convincing evidence that extraordinary circumstances of a grave and weighty nature exist." Transcript of Hearing, February 26, 2004. The Court heard arguments from counsel on the issue of extraordinary circumstances at the hearing on March 12, 2004. Transcript of Hearing, March 12, 2004, pp. 301-314.

Page 4:

(viii) Appellant states, "After completion of the custody evaluation the Court was to make a determination as to whether Respondent had proved by clear and

convincing evidence that extraordinary circumstances existed such that it would be in the best interest of the children that Appellant should be deprived of custody ”

This is an error. Depriving Appellant of custody was never an issue in the custody evaluation, because neither party wanted Respondent to have sole custody; Appellant was the only party who asked for sole custody. AA-49 Respondent stated to the custody evaluator that she preferred joint legal and joint physical custody between the parties. Id.

(ix) Appellant states, “On February 27, 2005, after one day of testimony, the trial court established a visitation schedule. . .” This is an error. The correct year is 2004. AA-36.

(x) Appellant states, “The custody evaluation conducted by HCFCS was also focused on whether Respondent should be awarded custody of Appellant's children and was not directed at determining what, if any, Court ordered visitation would constitute reasonable visitation...” This statement is in error for two reasons First, the HCFCS evaluation was not focused on whether Respondent should be awarded custody of Appellant's children because, as set forth above, Respondent asked for joint custody with Appellant. AA-49 Second, the HCFCS evaluation does recommend visitation. AA-62,63.

(xi) Appellant references a “Transcript of Hearing held October 25, 2005, p. 153-154.” This is an error. There was no hearing on that date. The hearing referred to was in 2004. See, Transcript of Hearing, October 25, 2004, p. 107.

(xii) Appellant states, "The HCFCS evaluation did not conduct an analysis under Minn. Stat. §257C.08, because the trial court had given Respondent standing as an equal parent." This is an error.

The district court has never given Respondent standing as an equal parent. The court found that Respondent occupied "*in loco parentis* status" and subsequently found that Respondent had standing as an "interested third party." AA-37,108.

Page 5:

(xiii) Appellant states, "The instances of interference ranged from exposing her children to unwanted media attention to attempting to take her children out of state without Appellant's permission." This is an error.

The children were not "exposed" to unwanted media attention. Following the first-stage hearing of the case in February and March, 2004, Respondent was contacted by several local television news reporters regarding the district court's ruling on the case. Respondent and her attorney conducted a news conference that evening in which questions were asked about how Respondent felt about the court's decision. Respondent never mentioned the names of the children, nor did she or her attorney show the names or photos of the girls to the reporters or the cameras.

In Summer, 2004, Respondent planned to take the children to California for a week, where they had made many trips before. AA-308,309. Appellant objected and asked the court to rule against it. AA-261. The court ordered that Respondent could go to California with the children, but only for three days. AA-305. Respondent decided not to go to California. Respondent never attempted to take Appellant's children out of

state without Appellant's permission even when she had the court's permission to do so

Page 6:

(xiv) Appellant states that "... Appellant provided additional examples of how the extensive visitation awarded to Respondent was interfering with her relationship with her children. ..." Appellant provided no documented evidence of these allegations, only her own self-serving statements.

Page 7:

(xv) Appellant states, "In the Order dated February 1, 2005, (hereinafter "Visitation Order"), the trial court awarded Respondent an extensive visitation schedule [citation omitted] The schedule granted Respondent access 37% of the time."

This is an error. The district court's order granted Respondent regular visitation with the children approximately 14% of the time, not 37%. AA-147-149. Appellant arrived at the 37% by counting any portion of a day as a full day on the grounds that the children's time sleeping, eating, being at school, etc., was not available to her either as parenting time. Appellant's Brief, p. 28, footnote.

Appellant continues by saying, "The schedule ... included alternating week-ends, two mid-week visits each week, alternating holidays..." This is an error.

The visitation schedule ordered on February 1, 2005, included one mid-week visit each week, not two. AA-149. The schedule also did not include alternating week-ends in the traditional sense. Instead, Respondent was awarded alternating Saturdays and part of every other Sunday, since the court gave Appellant a "Sunday morning

hiatus in order to allow the girls to attend church with [Appellant] or attend their religious instruction.” AA-148, 149.

(xvi) Appellant states, “On April 28, 2005, Appellant moved for a stay of the therapy and counseling portions of the Visitation Order as it related to Appellant and her children. The trial court issued a stay on May 26, 2005.” This is an error.

The trial court did not issue a stay of therapy on May 26, 2005. Instead, the trial court order filed May 26, 2005 provided that, “the two provisions of the February 1, 2005 visitation order which mandate therapy are stayed upon the posting of a \$5,000 supersedeas bond, after approval by the Court as to form and surety.” AA-203.

STANDARDS OF REVIEW

Trial courts have extensive discretion in deciding visitation questions and will not be reversed absent an abuse of discretion. Braith v. Fischer, 632 N.W.2d 716, 721 (Minn. App. 2001). That discretion has been upheld where exercised to refuse to hold an evidentiary hearing on the issue of visitation. Hunt v. Hunt, 381 N.W.2d 467, 470 (Minn. App. 1986). In reviewing a lower court for an abuse of discretion, the inquiry on appeal is limited to whether the trial court made findings unsupported by the evidence or by improperly applying the law. Lenz v. Lenz, 430 N.W.2d 168, 169 (Minn. 1988).

A district court’s findings of fact, on which a visitation decision is based, will be upheld unless they are clearly erroneous. Crosby v. Crosby, 587 N.W.2d 292, 295 (Minn. App. 1998) *review denied* (Feb. 18, 1999). When determining whether the district court’s findings are clearly erroneous, the evidence must be considered in a light

most favorable to the trial court's findings. Rinker v. Rinker, 358 N.W.2d 165, 167 (Minn. App. 1984) There must be a clearly erroneous conclusion that is against logic and the facts on the record before a trial court will be found to have abused its discretion. Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984). Appellate courts defer to the district court's credibility determinations. Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988).

ARGUMENT

I. MINN. STAT. § 257C.08, SUBD. 4, IS CONSTITUTIONAL AS APPLIED IN THIS CASE

Appellant challenges the constitutionality of the Minnesota third-party visitation statute that pertains to rights of visitation with a minor child when the child has resided with the petitioning party for two years or more. Minn. Stat. § 257C.08, Subd. 4. The statute provides that:

"257C.08 Rights of visitation to unmarried persons.

Subd. 4. If child has resided with other person. If an unmarried minor has resided in a household with a person, other than a foster parent, for two years or more and no longer resides with the person, the person may petition the district court for an order granting the person reasonable visitation rights to the child during the child's minority. The court shall grant the petition if it finds that: (1) visitation rights would be in the best interests of the child; (2) the petitioner and child had established emotional ties creating a parent and child relationship; and (3) visitation rights would not interfere with the relationship between the custodial parent and the child. The court shall consider the reasonable preference of the child, if the court considers the child to be of sufficient age to express a preference."

In reliance on her position, Appellant cites extensively *Troxel v. Granville*, 530 U.S. 57, 67, 120 S.Ct. 2054, 2061 (2000). Appellant's Brief, pp. 8-23. However, the facts in *Troxel* bear little resemblance to those in the case before this Court.

The United States Supreme Court, in *Troxel*, described Section 26.10.160(3) of the Revised Code of Washington as “breathtakingly broad” because it allowed “[a]ny person” to petition for visitation with a child “at any time”, and allowed the court to grant visitation whenever the court believed it would serve the best interests of the child. *Troxel*, 530 U.S. at 67, 120 S.Ct. at 2061 (2000). The Supreme Court stated that application of the Washington law to allow grandparents to have visitation with children over the objections of the children’s custodial mother violated the mother’s right to due process of law because the lower court judge based his conclusion on personal experience rather than an evidentiary hearing. Therein lay the deprivation of due process.

Shortly thereafter, in 2002, the Minnesota Legislature enacted Chapter 257C to address requests for custody and visitation made by certain nonparents. See 2002 Minn. Laws. Ch. 304 § 1-6, 13 (enacting Chapter 257C). In fact, the Court of Appeals noted that, “the enactment of Chapter 257C after the release of the *Troxel* decision was not a coincidence.” AA-338.

This case originated with a petition for custody, but it evolved into a dispute over visitation. In the visitation arena, the former statute was not modified but only renumbered. See, Minn. Stat. §257C.08 (formerly Minn. Stat. §257.022). Appellant’s reliance on *Troxel* in this case is grossly exaggerated. *Troxel*’s significance to Minnesota and other states is in the fact that the Washington state statute at issue in *Troxel* was overly broad and the Superior Court judge made a ruling based solely on his own personal experience. The *Troxel* Court stated:

“Considered together with the Superior Court’s reasons for awarding visitation to the Troxels, the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville’s fundamental right to make decisions concerning the care, custody, and control of her two daughters. The Washington Superior Court failed to accord the determination of Granville, a fit custodial parent, any material weight. In fact, the Superior Court made only two formal findings in support of its visitation order. First, the Troxels “are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music.” App. 70a. Second, “[t]he children would be benefitted from spending quality time with the [Troxels], provided that that time is balanced with time with the childrens’ *[sic]* nuclear family.” *Ibid.* These slender findings, in combination with the court’s announced presumption in favor of grandparent visitation and its failure to accord significant weight to Granville’s already having offered meaningful visitation to the Troxels, show that this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children’s best interests. The Superior Court’s announced reason for ordering one week of visitation in the summer demonstrates our conclusion well: “I look back on some personal experiences We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out.” Verbatim Report 220—221. As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a “better” decision could be made.”

Troxel, 530 U.S. at 72.

In this case, we have a non-parent in the strictly legal sense of the word who has been recognized by the district court as *in loco parentis*, and who is, by her actions and conduct, a parent figure to the two children, and she served in that role, willingly, from the time of the children’s adoptions in China to the time that this litigation commenced until the appellant unilaterally cut the children off from the respondent in September, 2003. Only after obtaining an order from the trial court granting visitation to the respondent did some semblance of the pre-September, 2003 relationship between the respondent and the children become partially restored, and that order was not arrived at arbitrarily. An extensive HCFCS was considered.

Appellant dwells on her self-perceived constitutional rights of due process as the sole legal parent of the minor children. However, she is misguided in two fundamental ways. The first is that she fails to recognize that children also have interests. The other is that she construes a statutory presumption to imply an incontrovertible conclusion when, in fact, it only serves to place burden of proof. What she fails to recognize, however, is that children also have constitutionally-protected rights with their own liberty and privacy interests. Children are "persons" within the meaning of the Fourteenth Amendment, *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969), with their own liberty and privacy interests. See, *In re Gault*, 387 U.S. 1 (1967); *Bellotti v. Baird*, 443 U.S. 622 (1979). The interests of children will sometimes override a parent's interests to make parental decisions affecting them *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

This mixture of rights means that, occasionally, state action that impedes parental decision-making will be tolerated when it furthers a child's independent constitutional rights. *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); See also, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The trial court found that the respondent was (and is) *in loco parentis* with regard to the minor children, but Appellant attempts to denigrate this status.¹ It literally means "in the place of a parent." *Geibe v. Geibe*, 571 N.W.2d 774, 781 (Minn.App. 1997). It refers to a person who has put him/herself in the situation of a lawful parent

¹ Appellant argues that "[t]he trial court also fails to establish how Minn. Stat. §257C 08, subd. 4, protects the rights of a fit parent from extensive interference by a third party with mere *in loco parentis* status, as in the case at bar." Appellant's Brief, p. 39.

by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption and embodies the two ideas of assuming the parental status and discharging the parental duties." *Id*; *Bearhart v. United States*, 8 F.Supp. 652, 655-66 (D.Minn. 1949).

This Court has recognized the common-law doctrine of *in loco parentis*. See, *Simmons v. Simmons*, 486 NW 2d 788, 791 (Minn.App. 1992). In *Simmons*, the Court of Appeals concluded, "...Simmons was *in loco parentis* to M.V. Because such a relationship existed, the trial court had authority to award visitation, even though Simmons did not meet the requirements of Minn. Stat. §257.022 subd. 2d."

We emphasize the Court's decision in that case to point out how powerful the standing of *in loco parentis* is. Simmons had not lived with M.V. for the statutory 24 months, yet the Court recognized and honored the parent-child bond that existed between them. In this case, the trial court established at the first juncture of the proceeding in early 2004 the following facts that contributed to the court's conclusion that Respondent was *in loco parentis* with the two children:

1. From 1981 until September 15, 2003 (22 years), the parties were domestic partners who jointly purchased a home in south Minneapolis;
2. The parties went to China together to adopt Erin, the older child, in September, 1997. The younger child, Jaime, was adopted from China in May, 2001.
3. The parties and the children resided together as a family unit from the time that each child was brought to Minnesota from China, until the parties' breakup in September, 2003.

4. When the older child, Erin, was brought to Minnesota, Respondent was granted a maternity leave of absence from her then employer, CBS, on September 15, 1997 so that she could stay home and care for Erin.²

5. Following a two-day evidentiary hearing in February and March, 2004, the trial court found that the respondent had conducted herself as a parent of the children. See, Appellant's App. 42-46.

There is a thread running through much of Appellant's argument regarding due process and the constitutionality of Minn. Stat. §257.08 subd. 4, that is based on a mistaken interpretation of *Troxel*. The *Troxel* opinion stated, "There is a presumption that fit parents act in the best interests of their children." That statement should be taken to mean that if a decision of a fit parent is questioned as to whether it is in the best interests of the child, the burden of proof lies in demonstrating that the decision is not in the child's best interest. Appellant is taking the position that it means that a fit parent's decisions cannot be challenged at all. From that fallacious position, she arrives at the conclusions that because the Court did not agree with her, the Court must be wrong, and because the Court used Minn. Stat. §257.08C subd. 4 as an authority, the statute must be unconstitutional. She uses this, "fit parent infallibility" argument to protest the Court's visitation order as well.

Appellant argues that she has not sought to entirely cut off Respondent's access to the children. Appellant's Brief, p. 19. This is not true. In her proposal for visitation submitted to the trial court on December 8, 2004, she stated:

² This fact was stipulated to by the appellant's attorney in a conference call with the Court, on February 17, 2004

“ . . . Therefore, petitioner (respondent herein) should not be awarded any court orderd (sic) visitation with respondent's (appellant herein) children ” AA-122

Appellant's conduct, allegedly grounded in the best interest of the children, is especially unfortunate, and even sad. Appellant's desire for no relationship between the children and Respondent, as stated in her submission to the court in December, 2004, was not deterred by the comments of Hennepin County Family Court Services psychologist, Susan DeVries, e.g.

“ . . . Erin apparently feels Ms. Soo-Hoo (sic) will abandon her again as earlier in the [parties'] separation. She responds to the fear with anger and rejection.”

• • •

“ . . . Ms. DeVries noted Erin knows her parents dislike each other and she believes Ms. Johnson does not want her to like Ms. Soo-Hoo (sic) nor go to her home.”

• • •

“ . . . Ms. DeVries thought that Erin perceived Ms. Soo-Hoo (sic) as disappearing from her life and that Erin feels this might happen again. . . .

• • •

“ . . . Ms. DeVries . . . predicted damage to [the children] without frequent and regular contact with Ms. Soo-Hoo (sic).”

Custody Study report, Appellant's App., pp. 57-58.

Appellant also argues that the trial court falsely stated in its February 27, 2004 Order that the parties agreed to a temporary regular and consistent visitation schedule between the respondent and the children. Appellant's Brief, p. 13. However, Appellant misquotes the trial court's order, which went on to say that:

“ . . . ***In the absence of a contrary agreement***, Petitioner's visitation schedule shall be as follows:

- a. Every Tuesday and Thursday from 5:00 p.m. to 7:00 p.m.;
- b. After two weeks of midweek visitation, every other weekend . . .
- c. After two Saturday overnights, every other weekend . . .
- d. 5:00 p.m. to 7:00 p.m. on Petitioner's birthday and Erin's birthday;
- e. 5:00 p.m. to 7:00 p.m. on the day after Jamie's birthday;
- f. Memorial Day weekend . . .
- g. Two, non-consecutive weeks of extended summer access, . . . ”

See, Appellant's App. 64-65. (Emphasis added)

II. MINN. STAT. § 257C.08, SUBD. 4, IS CONSTITUTIONAL AS WRITTEN.

Appellant also places extensive reliance on *Troxel* in support of her argument that the statute is unconstitutional as written. App. Brief, pp 25-27. This reliance is again misplaced. The Washington statute was found to be unconstitutional because it was overly broad. 530 U.S. at 63. Here, the district court correctly observed, and the Court of Appeals agreed, that “extensive reliance on *Troxel* [is] unwise because it [is] a plurality opinion that generated much disagreement among the Supreme Court justices.” Further, the analysis in *Troxel* is limited to a Washington visitation statute, as applied by the trial court . . . “ AA 338.

The Minnesota visitation statute looks nothing like its Washington counterpart in *Troxel*. It is far more restrictive, allowing only a limited class of persons who have established emotional ties creating a parent and child relationship to seek visitation, and, then, visitation will be granted only if the court finds that the visitation is in the child's best interest and does not interfere in the relationship between the child and its parent. Minn. Stat. §257C.08, Subd. 4 (1), (2), (3). See, also, *In re Kayachith*, 683 N.W.2d 325, 328 (Minn.App. 2004), *rev.den.* (Minn. 9/29/04).

III. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO AWARD RESPONDENT REASONABLE VISITATION WITH THE MINOR CHILDREN COMMENSURATE WITH THE ESTABLISHED EMOTIONAL TIES CREATING A PARENT-CHILD RELATIONSHIP BETWEEN THEM WHEN SUCH VISITATION IS IN THE BEST INTERESTS OF THE MINOR CHILDREN.

In Appellant's Statement of the Legal Issues (Appellant's Brief, p. 1), she posits her third legal issue as follows:

"3 Whether the trial court abused its discretion when it created a visitation schedule with the express purpose of giving Respondent, a non-parent, access and involvement with Appellant's children equal to that of a parent."

Appellant evidently hopes to formulate the question as a syllogism:

- (a) Respondent is a non-parent ;
- (b) A non-parent may not be given visitation rights to children over the objection of a parent;
- (c) Therefore, the trial court abused its discretion by "creating" a visitation schedule allowing Respondent to see the children over the appellant's objection

That formulation is fundamentally flawed. To begin, (b) is an instance of Appellant's "fit parent" infallibility doctrine. It is patently false.

A more trenchant conspectus would be:

"What is in a child's best interest when a parent who has perpetuated the propensity to sabotage the filial relationship between an adult and a child who have shared the emotional ties of a parent-child bond seeks to terminate the relationship between the adult and the child?"

What is conspicuously overlooked by Appellant is that the district court did not

“create” anything, including a visitation schedule allowing the respondent and the children to see each other. To the extent that the respondent has a parent-like relationship with the children, the relationship was not created by the court; it was established by the parties' former relationship with each other and the children, and their conduct, as two adults residing in the same household and raising two children together, which all happened years before this litigation started. The district court recognized this and ordered a visitation schedule commensurate with the established relationship that the respondent had with the children before the appellant sought to cut off that relationship, and the district court did this in line with the plain language of the visitation statute, Minn. Stat. §257C.08.

Appellant argues that it was an abuse of the trial court's discretion to interfere with Appellant's relationship with her children by awarding Respondent visitation commensurate with a non-custodial parent, with the express purpose of securing Respondent's parental role in the lives of Appellant's children. Appellant's Brief, P. 27. Appellant challenges the visitation schedule ordered by the district court on February 1, 2005. AA-145. Appellant seeks to put the burden of proof on Respondent, the party seeking the visitation, misplacing reliance on **Kulla v. McNulty**, 472 N.W.2d 175, 181 (Minn. App. 1991) *rev. den.* (Minn. Aug. 29, 1991). Appellant's Brief, p. 27. However, Minn. Stat. §257C.08, subdivision 7 states the opposite burden of proof:

“Subd. 7. Establishment of interference with parent and child relationship.

The court may not deny visitation rights under this section based on allegations that the visitation rights would interfere with the relationship between the custodial parent and the child unless after a hearing the court determines by a preponderance of the evidence that interference would occur.” [Emphasis added]

It is Appellant who bears the burden to prove that visitation between Respondent and the children would interfere with Appellant's parent-child relationship, not the Respondent's burden to show no interference.

A. The visitation schedule awarded to Respondent does not have the children under her care for one-third of their lives, nor does an extensive visitation schedule by definition interfere with Appellant's parent / child relationship with the two minor children.

Appellant argues that "it is of critical importance that any analysis of the visitation schedule take into account the parties' respective roles in the children's lives."

Appellant's Brief, p. 27, 28. However, Appellant relies instead only on the legal labels, rather than the *role* between Respondent and the children, which necessarily is that of a parent-child relationship as a requisite for visitation to be awarded under Minn. Stat §257C 08, subd. 4(2)(which requires that Respondent and the children had established emotional ties creating a parent / child relationship). Minn. Stat §257C 08 (2004)

Although Appellant is the only legal custodial parent, this does not diminish the right of an interested third party to have visitation with minor children, provided such visitation meets the requirements of Minn. Stat. §257C.08, subd. 4.

Appellant produced no legislative history to support her allegation that Minn. Stat. §257C.08, subd. 4 was "never intended to award such extensive visitation so as to allow a non-parent to maintain a parental role in the children's lives." Appellant's Brief, p. 28. However, in the instant case, Respondent's visitation schedule with the children

does not allow her to maintain a parental role, it merely grants time that she may spend with the children.

Appellant's assertion that the children spend 37% of the time with Respondent is flawed for several reasons. Appellant's Brief, p. 27-29.

First, Appellant is counting Friday visitations as a whole day, even though Respondent's Friday visitation does not commence until 5:30 p.m. AA-148, 149. Second, Appellant is counting mid-week visits as a whole day, even though these visits are only two hours in duration. AA-149. Third, Respondent's regular visitation is subject to holidays, special days, and extended summer weeks, so any additional days granted for these special access times are subject to Respondent missing regular visitation time, as well as the regular visitation time Respondent misses when Appellant has the children for certain holidays, special occasions, and extended summer weeks. AA-146-149.

Appellant's reliance on **Gray v. Hauschildt**, 528 N.W.2d 271 (Minn. App. 1995) for the proposition that the amount of visitation is a factor in determining whether visitation will interfere with the parent-child relationship is misplaced. The Gray case was one involving *grandparent* visitation, and the issue analyzed by the Court of Appeals was whether the district court erred in allowing grandparent visitation rights under Minn. Stat. §257.022, subd. 1. Gray, 528 N.W.2d at 273. The subdivision of the statute at issue in Gray is now codified under Minn. Stat. §257C.08, subdivision 1, if a parent is deceased. This is distinct from the subdivision under which Respondent was granted visitation (Minn. Stat. §257C.08, subd. 4). Id.

The visitation schedule granted to Respondent *should* stand in contrast to a more limited schedule appropriate in a grandparent case as described in Gray because part of the requisite finding for Respondent's visitation is that there were emotional ties creating a parent and child relationship between her and the children. Minn. Stat §257C.08, subd. 4 (2004).

Appellant incorrectly cites the trial court as acknowledging that the amount of time awarded to Respondent could interfere with Appellant's relationship with the children. Appellant's Brief, p. 29. The trial court actually stated, in its Memorandum portion of the February 1, 2005 Order:

"While this Court has found that an award of visitation rights would not interfere with [Appellant's] relationship with the girls, which is the precise section 257C.08, subdivision 4 operative standard, the Court understands that the amount of visitation, as distinct from mere award of some visitation, could have an impact on [Appellant's] relationship with the children."

(Emphasis added). AA-171.

Further, Appellant asserts that Respondent has the children up to 50% of the time by claiming that, "a visitation schedule that places the children under the influence of a non-parent for 30% to 50% of the time unquestionably interferes with the custodial parent's care, custody, and control of her children." Appellant's Brief, p. 29. Clearly, Respondent does not have the children anywhere remotely close to 50% of the time. Additionally, the inquiry remains whether visitation time would interfere with Appellant's parent-child relationship with the children, as distinct from her dislike of not being able to control every aspect of what the children do, see, and say during their visitation time with Respondent.

Whether or not Respondent has sought to have a “parental role” as Appellant asserts is not relevant to the issue on appeal, which is visitation, because Respondent’s custody petition was dismissed. AA-79. Further, Appellant’s references to any requests by Respondent that were denied by the trial court and were not appealed by Respondent are likewise irrelevant to determination of the visitation issue and Appellant’s attempt to deflect the focus of the legal inquiry involved in this case needs to be pursuant to the statute, viz., whether the visitation is in the best interests of the children, whether there was an emotional tie creating a parent-child relationship, and whether the visitation would interfere with Appellant’s relationship with the children. Appellant’s Brief, p. 29; See Minn. Stat. §257C.08, subd. 4 (2004). Any claim that Respondent’s visitation time was “interfering” with religious instruction has already been dealt with by the trial court and resolved in Appellant’s favor by allowing for a Sunday morning hiatus during Respondent’s time, to allow Appellant to take the children to religious instruction. AA-148, 149. Appellant’s claim that Respondent intends to “actively interfere in Appellant’s relationship” with the children is just the type of conclusory averment the trial court found permeated all of her attempts to claim interference with the parent-child relationship. AA-164-168. The district court was not convinced by these arguments of Appellant, and the Court of Appeals concurred in affirming the lower court’s findings, deferring to the district court’s credibility determinations. See Sefkow, 427 N.W.2d at 210.

B. The trial court did not abuse its discretion, did not violate Minn. Stat. §257C.08 in the creation of its visitation schedule, and did not establish a visitation schedule for the express purpose of maintaining Respondent as an “equal parent.”

Appellant misconstrued both the intent of the trial court and the legal reality of the procedural history of this case by claiming that the trial court based the visitation order on the parties being equal parents and for the purpose of maintaining Respondent's parental role in the lives of the children. Appellant's Brief, p. 32. Respondent never made a legal claim that she was an equal parent to the children in terms of being a second adoptive parent; rather, her petition for custody was based on qualifying as an “interested third party” under Minn. Stat. §257C.01. Since the “best interests of the child” is the ultimate inquiry in any proceeding involving visitation, there is no amount of visitation that is “normal” to a non-custodial parent as opposed to an interested third party who had established emotional ties creating a parent-child relationship. The facts and circumstances of each case must be individually examined to determine an appropriate schedule. Minn. Stat. §257C.08, subd. 4 does not establish that any particular visitation schedule is within the Court's jurisdiction, nor that any certain schedule would necessarily exceed its jurisdiction, as long as the schedule is “reasonable.” Minn. Stat. §257C.08 (2004). The trial court did not abuse its discretion in the visitation schedule that it ordered, which was amply supported by extensive evidence and multiple days of evidentiary hearings.

1. 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-child relationship, and is in the best interest of the children.

Appellant has requested that Respondent have no visitation with the minor children. See Appellant's Brief, p. 45, wherein reference is made to Appellant's visitation proposal of December 8, 2005. AA-122. Appellant attempts to rely on improper characterizations of the trial court's visitation order as giving Respondent a status of "equal parent" and that such visitation is to maintain Respondent's "parental" role with the children, in an attempt to overshadow that Appellant herself maintained throughout the proceedings that visitation with Respondent was in the children's best interests. AA-49, 161, 162, 169.

It was necessary for the trial court to find that emotional ties were established creating a parent-child relationship between the children and Respondent. See Minn. Stat. §257C.08, subd. 4 (2004). The trial court's extensive findings in this regard do not equate to the court finding Respondent an equal parent legally. It was appropriate and sufficient for the Court to recognize Respondent's nurturing relationship with the children when setting a visitation schedule that was in the children's best interests. AA-155, 156. It was also appropriate for the trial court to rely on *A Guide to Making Child Focused Parenting Time Decisions* because there were emotional ties creating a parent-child relationship and to usurp Respondent's continued role in the lives of these

children is not in their best interests. A limited visitation schedule such as may be appropriate in the case of grandparents or others who have had a more limited role in the lives of the children is not appropriate for the facts in this case.

The trial court, in its February 1, 2005 Memorandum Order made particular note of Appellant's admission that Respondent's visitation with the children was in their best interests:

"[Appellant] even acknowledged that continued visitation between [Respondent] and the girls would be consistent with their best interests when she explained on page 13 of her September 7, 2004 Memorandum that she, "has always maintained that some amount of parenting time with petitioner is in the best interest of the children." This admission was not equivocal. Rather, Respondent took the strong position that she has "always maintained" that visitation would advance the girls' best interests." AA-161, 162.

At the evidentiary hearing on February 26, 2004, Appellant testified that she was willing to work out a visitation schedule. Transcript of Hearing, February 26, 2004, p 143 At the evidentiary hearing on March 12, 2004, Appellant testified that she believes Respondent has a "special relationship" with the children, that Respondent "cares about them a lot" and that the children "care about her." Transcript of Hearing, March 12, 2004, p. 291-292.

Appellant's position during the custody and parenting time evaluation was also that visitation with Respondent was appropriate, including overnights. AA-49. The Custody and Parenting Time evaluation dated July 16, 2004, indicated "the wishes of the child(ren)'s parent or parents as to custody" as follows:

"Ms. Johnson ... specified two parenting time schedules for Ms. Soo-Hoo. She initially suggested alternating weekends from Friday night through Saturday night and Tuesday from 5:30 p.m. to 7:30 p.m. Later she changed her preference to one overnight every third weekend and one evening a week..."

AA-49. Rather than asserting no visitation was appropriate or that Respondent was interfering with the parent-child relationship, Appellant explained her decreased proposal for Respondent's visitation was because "she thought the girls were reacting negatively to Ms. Soo-Hoo" and "she said both children have complained about the amount of time they spend with Ms. Soo-Hoo and that the schedule interferes with other activities." Id.

The trial court also made note of Appellant's change of position in its February 1, 2005 Memorandum to the visitation order:

"[Appellant] was given ample opportunity to express her wishes during the HCFCS evaluation and she advised the evaluators that visitation, even including overnights, was consistent with the girls' best interests. Then, when custody was on the table and Respondent was trying to soften the impact of a potential custody determination in her favor, she advised the Court how she has always maintained that visitation would be consistent with the girls' best interest. Now that custody has been resolved in her favor and visitation has become the focus, Respondent is attempting to retract her prior admissions and argue that no visitation is appropriate."

AA-169.

In addition to Appellant's own acknowledgment that visitation with Respondent was in the best interests of the children, the trial court's visitation schedule was amply supported by the evidence in this case. The Minnesota Supreme Court has recognized the vital importance for children to have closure on visitation matters and where remand to the trial court for further proceedings would inevitably delay the resolution and would not likely change the outcome, remand is properly denied. **Olson v. Olson**, 534 N.W.2d 547, 550-51 (Minn. 1995). Continued litigation in this case would be especially detrimental to the two minor children involved. AA 61. The visitation schedule awarded to Respondent should be upheld because the district court did not abuse its discretion

in the amount of time awarded to Respondent, and Appellant was given ample opportunity, and failed to prove any alleged interference with her parent / child relationship as a result of Respondent's visitation.

2. **The trial court appropriately considered Appellant's allegations of interference with her parent / child relationship and found them to be devoid of merit.**

The trial court's memorandum to the order dated February 1, 2005, makes clear that the court gave Appellant ample opportunity to present her allegations of interference with the parent / child relationship and found her arguments to be totally devoid of merit. AA-162 to 168. Appellant was given the opportunity to present her position on visitation via testimony on the first day of evidentiary hearings in this case, reopening the record for that purpose prior to entering any visitation order Transcript of Hearing, February 26, 2004, P. 166 to 170. Appellant also presented multiple submissions on the issue of alleged interference with her parent / child relationship. AA-164 to 167. The trial court heard evidence regarding Appellant's argument that Respondent's "insistence that the children call her 'mommy'" interferes with Appellant's relationship with the children. AA-165. The court found this to be a mere conclusory averment, and that Appellant had failed to explain how Appellant's complaint actually interferes with her relationship with the children. AA-165. The court stated that the remainder of Appellant's September 7, 2004 affidavit:

"contains many allegations regarding Respondent's [Appellant herein] inability to dictate the details of Petitioner's [Respondent herein] time with the girls, her unhappiness at being placed in a position that requires her to converse with

Petitioner, and her feeling that the Court has interfered with her right to raise her children as she sees fit. ... but she points to **no facts** to suggest that her relationship with the children has yet been interfered with, or will be interfered with in the future if visitation continues ”

(Emphasis added) AA-165.

The court again failed to find merit in Appellant's November 15, 2004 Affidavit, indicating, “It contains a long list of complaints regarding Petitioner’s [Respondent herein] interference with Respondent’s [Appellant herein] ability to parent the children in the manner that she sees fit, but there are **no fact specific averments** regarding any interference with her relationship with the girls.” (Emphasis added). AA-166.

Appellant's Affidavit dated December 7, 2004, was no more persuasive to the trial court because it again “contains conclusory averments.” AA-167.

Appellant's desire to exert control over each and every aspect of the children's lives, even while they spend visitation time with Respondent, and her disapproval at having to do so, does not amount to interference with her parent / child relationship, as contemplated by Minn. Stat. §257C.08, subd. 4(3). See Minn. Stat. §257C.08 (2004). It was clear to the trial court, who can best assess the credibility of the parties, and had the extensive knowledge of the case, that no such interference had occurred or would be likely to occur with continued visitation to Respondent.

IV. THE TRIAL COURT HAD SUFFICIENT EVIDENTIARY SUPPORT FOR THE VISITATION SCHEDULE BETWEEN RESPONDENT AND THE CHILDREN AND WAS NOT REQUIRED TO HAVE A SEPARATE HEARING ON APPELLANT'S ALLEGATIONS OF INTERFERENCE WITH HER PARENT-CHILD RELATIONSHIP IN ORDER TO AWARD RESPONDENT VISITATION.

Appellant asserts that the trial court abused its discretion by failing to hold the necessary hearings to provide support for its visitation schedule, based on the parties' respective standing as parent and third-party, and argues that the trial court did not have the necessary evidentiary support for its visitation schedule. Appellant's Brief, p. 36. This argument fails for several reasons. The trial court had extensive evidentiary support for Respondent's visitation schedule with the minor children, consisting of 11 total witnesses, and five days of hearings resulting in over 500 pages of transcript. Transcript of Hearings, February 26, 2004; March 12, 2004; March 15, 2004; September 22, 2004; and October 25, 2004. Further, Minnesota law does not require a separate evidentiary hearing on the sole issue of alleged interference with the parent / child relationship to grant a visitation schedule to Respondent. Minn. Stat. §257C.08, subd. 7 (2004).

A. The trial court had sufficient evidentiary support for its visitation schedule and its order regarding Respondent's visitation with the minor children was not an abuse of discretion.

The trial court in this case conducted an evidentiary hearing on February 26, 2004, on the issue of Respondent's standing to seek custody as an interested third party under Minn. Stat. §257C.03, subd. 7. Transcript of Hearing, February 26, 2004. The evidentiary hearing continued on March 12, 2004, and again on March 15, 2004. The transcript of these evidentiary hearings was three hundred thirty six (336) pages long. Transcript of Hearings, March 12, 2004, and March 15, 2004.

The trial court also held a hearing on September 22, 2004 to allow Respondent the opportunity to cross-examine the Hennepin County Family Court Services

Evaluator, Gregg Kowalski. AA-78. This hearing was continued on October 25, 2004. This produced an additional one hundred seventy-two (172) pages of transcript Transcript of Hearing, October 25, 2004.

The Court's Memorandum in support of its temporary visitation schedule dated February 27, 2004, issued after the first day of evidentiary hearings found that, "there has been ample credible evidence from numerous witnesses that Petitioner [Respondent herein] and the two girls established emotional ties creating a parent and child relationship." AA-67. The Court went on to state, "At the same time, there is no credible evidence that renewed contact between Petitioner [Respondent herein] and the children would be inconsistent with their best interests." Id. Thus, even at the end of the first day of evidentiary hearings, the court was adducing evidence relevant to an inquiry under Minn. Stat. §257C.08, subd. 4 (1) (visitation rights would be in the best interests of the child) and (3) (the petitioner [Respondent herein] and child had established emotional ties creating a parent and child relationship). See Minn. Stat. §257C.08 (2004).

At the end of the first day of evidentiary hearings, the Court reopened the record to take testimony from Appellant as to her position on the visitation issue. AA-67, Transcript of Hearing, February 26, 2004, P. 166 to 170. The Court, even at this early stage of the proceeding, already indicated in its Memorandum of February 27, 2004, that it had the "benefit of significant testimony proffered by both sides which included a significant amount of evidence impacting the temporary visitation schedule." AA-67

After two additional days of evidentiary hearings, the Court issued a Memorandum Decision (which ordered a custody and parenting time evaluation and

found that Respondent had standing to pursue custody) dated March 22, 2004. AA-37. As part of that decision, the Court made fourteen (14) findings of fact relative to Respondent's relationship with the children, that are relevant to the inquiry under Minn. Stat. §257C.08, subd. 4 (1) and (3). AA-42, 43.

Appellant argues the trial court relied extensively on the Custody and Parenting Time Evaluation conducted by Gregg Kowalski of HCFCS for its contention that visitation would be in the best interests of the children and that Respondent has established a parent / child relationship with the children, but alleges this was inappropriate because Mr. Kowalski's evaluation was premised on the concept that Appellant and Respondent were equal parents. Appellant's Brief, P. 37. Mr. Kowalski's evaluation was premised on the directions that the Court gave for the performance of the custody and parenting time evaluation, contained in the court's Memorandum Decision dated March 22, 2004. AA-37. That order never established that the parties were equal parents, nor did any other order issued by the trial court in the extensive proceedings in this case. Id. The evaluation was ordered because the court found that Respondent had established by clear and convincing evidence that "extraordinary circumstances" exist under Minn. Stat. §257C.03, subd. 7 (a)(1)(iii), thus warranting the evaluation. Id. Subd. 7 of this statute pertains to the establishment of a person as an interested third party, not an equal parent under the law as Appellant erroneously asserts. See Minn. Stat. §257C.03 (2004).

Appellant argues that the evaluation was not conducted according to the factors set forth in Minn. Stat. §257C.04, but instead relied on Minn. Stat. §518.17, hence the evaluation did not provide the trial court with adequate information on which to

determine the reasonable visitation that should be awarded to Respondent. Appellant's Brief, P. 37. Minn. Stat. §257C.04 contains identical best interest factors as Minn. Stat. §518.17, except that Minn. Stat. §518.17 contains an additional factor set forth in subd. 1(a)(13). See Minn. Stat. §257C.04 (2004); Minn. Stat. §518.17 (2004). Therefore, even if Appellant were correct in her interpretation of the evaluation being conducted under Minn. §518.17, because of the labels assigned to the various best interest factors in the evaluation report, this merely means the evaluation was over inclusive, rather than Appellant's assertion that the court did not have enough information to make a visitation determination.

The trial court appropriately rejected Appellant's argument regarding the Custody and Parenting Time Evaluation in its Memorandum dated February 1, 2005 :

"Hennepin County Family Court Services ("HCFCS") performed an extensive custody and visitation evaluation and made specific recommendations regarding the amount of visitation that would advance the girls' best interests. . . Respondent [Appellant herein] finds fault with some of the new statutory factors that are unique to the custody portion of a Chapter 257C "interested third party" petition. Even though some of these unique factors were not isolated and explored under headings that track section 257C 03, subdivision 7(b), many of the concepts were nevertheless discussed in the evaluation under other headings. Even more important, the fact that certain custody-related factors may not have been addressed in the custody portion of the July 16, 2004 recommendations, does not detract from the merits of the visitation recommendations. There is no evidence that HCFCS failed to consider any best interest factor that arises in the context of a third-party visitation dispute."

[Emphasis in original]. AA-157.

Notably absent from Appellant's brief regarding the evidence the trial court considered in setting the visitation schedule was the recommendation from HCFCS in its July 16, 2004 report that, "Decreasing the girls' time with Ms. Soo-Hoo will create more problems for them in the future." AA-62. The HCFCS evaluation also included

input from the HCPCS child psychologist Susan DeVries who predicted damage to the children without frequent and regular contact with Respondent. AA-58. The trial court's order and memorandum dated February 1, 2005, setting forth the visitation schedule for Respondent and the children, evaluated all the required factors of Minn. Stat. §257C.08, subd. 4 based on the extensive evidence presented to the court. AA-145. Appellant's assertion that the trial court did not have adequate evidence to make a visitation schedule is simply not credible.

B. The trial court was not required to hold a separate evidentiary hearing on Appellant's claims of alleged interference with the parent / child relationship in order to grant Respondent a visitation schedule with the children, testimony on this issue was taken by the court, and Appellant was given ample opportunity to present evidence in support of her assertions regarding visitation.

Minnesota law does not require a separate evidentiary hearing on the alleged interference with the parent / child relationship in order to grant Respondent a visitation schedule with the children. See Minn. Stat. §257C.08 (2004). Minn. Stat. §257C.08, subd. 7 states that, "The court may not deny visitation rights under this section based on allegations that the visitation rights would interfere with the relationship between the custodial parent and the child unless after a hearing the court determines by a preponderance of the evidence that interference would occur." (Emphasis added). Id. at subd. 7. The trial court did not deny Respondent visitation rights, it granted such rights. The plain language of the statute indicates that a hearing is required only in the case of a denial of visitation rights. In construing a statute, the Court of Appeals

“cannot supply that which the legislature purposefully omits or inadvertently overlooks ”
State v. Corbin, 343 N.W.2d 874, 876 (Minn. App. 1984).

Additionally, case law articulates that it is sufficient for the district court to merely consider the issue of alleged interference with a parent / child relationship. See **Foster on Behalf of J.B. v. Brooks**, 546 N.W.2d 52 (Minn. App. 1996)(District court properly modified grandparent visitation without an evidentiary hearing provided that it considered the issue of interference with the parent / child relationship). Appellant was given ample opportunity to present her view of the alleged interference with the parent / child relationship. Appellant submitted an affidavit on September 7, 2004, detailing her position that the extensive visitation schedule was interfering with Appellant’s relationship with the children. AA-72. Appellant submitted another affidavit on November 15, 2004, again alleging interference. AA-113. Appellant also submitted a December 8, 2004, proposal along with a supporting Memorandum. AA-121. The trial court considered this information, but was not persuaded by it.

The trial court articulated in its Memorandum to the order dated February 1, 2005, that:

“Subdivision 4 [to Minn. Stat. §257C.08] focuses on the kind and degree of interference that would negatively impact Respondent’s [Appellant herein] relationship with the girls. This “relationship” interference is distinct from conduct by Petitioner [Respondent herein] that might ignore Respondent’s directives regarding the girls’ upbringing, or the fact that Petitioner and Respondent may have trouble communicating with each other.”

AA-162, 163.

The court was unconvinced that there was any interference with the parent / child relationship not only because the submissions and evidence presented by

Appellant lacked any specific facts to support her allegations, but because the neutral professionals involved in the custody evaluation failed to find any such interference. AA-164. The court's memorandum of February 1, 2005, describes this as follows: "...despite consideration of Respondent's [Appellant herein] long litany of complaints, both the child psychologist and the HCFCS evaluator found that Respondent still had the strongest bond with the children, which remained unfazed by the conduct attributed to Petitioner [Respondent herein]." AA-168.

Appellant was given ample opportunity to be heard, and present evidence, via both written submissions and testimony regarding any alleged interference of the parent / child relationship. The evidence did not support a finding that there was any interference with Appellant's parent / child relationship, and the court is not required by Minnesota law to conduct a separate evidentiary hearing based on such allegations except in situations regarding a denial, rather than award, of visitation rights. The trial court's visitation schedule for Respondent was not an abuse of discretion and should be upheld.

V. THE TRIAL COURT WAS WITHIN ITS JURISDICTION TO ORDER APPELLANT AND THE MINOR CHILDREN TO ATTEND COUNSELING OR THERAPY.

The trial court ordered Appellant to employ a counselor, or continue with existing counseling, to address her tension and anxiety related to Respondent's visitation. AA-149. The trial court also ordered Respondent to employ a therapist, with the therapist to determine whether either child or both need to accompany Respondent to therapy. AA-146. Additionally, the trial court ordered that "unless the therapist has already reported to the Court that further therapy is no longer necessary, Petitioner

[Respondent herein] shall provide to the Court and Respondent [Appellant herein] with a progress report from the therapist no later than August 1, 2005." Id. The trial court's visitation order dated February 1, 2005, contained these provision regarding therapy at the recommendation of HCFCS to advance the children's best interests and protect their emotional health and development. AA-204. The trial court articulated that its decision to follow the HCFCS recommendation regarding therapy represents, "a finding that the children's therapy needs represents an aspect of their health care that is unlikely to be met without court involvement." Id.

Appellant argues that Minn. Stat. §518.176 does not provide the trial court with jurisdiction to order therapy in a case where there is only one parent. Appellant's Brief, P. 40. However, Minn. Stat. §257C.02, which governs the application of other law in interested third-party cases, clearly indicates that Chapter 518 can be applied to proceedings involving an interested third-party. Minn. Stat. §257C.02 (2004). That statute provides in relevant part that, "(a) Chapters 256, 257, and 518 and section 525.201 to 525.317 apply to third-party and de facto custody proceedings unless otherwise specified in this chapter." Id.

The language of Minn. Stat. §518.176, under which the trial court articulated its authority for ordering therapy, provides in relevant part that,

"the parent with whom the child resides may determine the child's upbringing, including education, health care, and religious training, unless the court after hearing, finds, upon motion by the other parent, that in the absence of specific limitation of authority of the parent with whom the child resides, the child's physical or emotional health is likely to be endangered or the child's emotional development impaired."

Minn. Stat. §518.176 (2004).

Appellant claims that there was no motion made by Respondent and Respondent is not the other parent, so reliance on this statute is misplaced. Appellant's Brief, P. 41. However, Respondent was the person who petitioned for custody, and such petition contained a request that, "the Court grant such other and further relief as the Court determines is fair, just, reasonable, and necessary, as the Court, in its discretion, shall deem proper." AA-28. Additionally, Respondent's Trial Memorandum requested that the Court order a custody evaluation, and the therapy order of the court was issued at the recommendation of the HCFCS. A-15. The trial court's order regarding therapy, even in the absence of a formal motion regarding the same, is consistent with the interests of judicial economy in this case.

Appellant also claims that this statute does not authorize the trial court to order therapy because Respondent is not the other parent. Appellant's Brief, P. 41. However, the trial court found that although the parties had a non-traditional family, they both "functioned as parents." AA-157. The trial court had jurisdiction under Minn. Stat. §518.176 to order therapy in this case.

Further, the trial court had authority to order therapy pursuant to Minn. Stat. §518.131 which authorizes orders that require, "one or both parties to perform or to not perform such additional acts as will ... protect the ... children from ... emotional harm." Minn. Stat. §518.131 (2004). Appellant argues that this does not give authority to the trial court because it only applies to proceedings brought for custody, dissolution, legal separation, disposition of property, maintenance, or child support following the dissolution of either party. Appellant's Brief, P. 42. What this fails to realize, however, is that the visitation order resulted from a custody petition, is not distinct from it, such

that authority under this statute would end upon one party being granted custody when visitation rights had yet to be addressed. The trial court's interpretation that, "it is highly unlikely that the legislature would authorize the trial court to order therapy on a temporary basis in order to protect the children from emotional harm, but deny the trial court the authority to include the same protection in the final order" is more reasonable than Appellant's assertion that such an order is permissible only on a temporary basis, but not as part of a final order. AA 204, 205. See **Korf v. Korf**, 553 N.W.2d 706, 709 (Minn. App. 1996) (holding that although the trial court may have authority to review and revise provisions of a temporary order at the time of final hearing, it is not required to do so).

It was appropriate for the trial court to order therapy in this case, under either Minn. Stat. §518.131, or Minn. Stat. §518.176 because Minn. Stat. §257C.02 indicates Chapter 518 can be applied to proceedings involving an interested third-party and there was ample evidence to support the necessity for such therapy based on the HCFCS Custody and Parenting Time Evaluation.

CONCLUSION

The Minnesota Court of Appeals properly affirmed the district court in its determination that (a) Minn. Stat. §257C.08 is constitutional as applied and written; (b) the trial court did not abuse its discretion in the visitation schedule it granted to Respondent; the schedule was supported by extensive evidence including evidentiary hearings, a Custody and Parenting Time Evaluation, as well as voluminous written submissions of the parties; the schedule was reasonable pursuant to Minn. Stat. §257C.08; and the trial court was not required to hold an additional hearing on

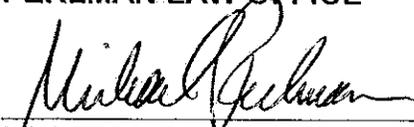
Appellant's allegations of interference with her parent-child relationship; and (c) the trial court had jurisdiction to order therapy.

It is respectfully requested, therefore, that the Minnesota Supreme Court affirm the Court of Appeals in all respects.

Dated: August 21, 2006.

Respectfully submitted,

PERLMAN LAW OFFICE



Michael L. Perlman, #85212
Woodside Office Park
10520 Wayzata Boulevard
Minnetonka, MN 55305
(952) 544-3400
Attorney for Respondent

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).