No. A10-1348
STATE OF MINNESOTA
IN COURT OF APPEALS

In re the matter of:

Kelli Rohmiller and Clayton Rohmiller,

Respondent,

and

Andrew Hart,

Appellant,

and

Jennifer Joseph,

Guardian ad Litem.

APPELLANT'S BRIEF AND APPENDIX

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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).

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ISSUES PRESENTED

I. Although Minn. Stat. §257C.08 explicitly refers only to "the parents and grandparents of the deceased parent" can the statute reasonably be construed to confer visitation rights on third parties unnamed in the statute?

The trial court held: in the affirmative.

II. By finding that a maternal aunt had a common law right to visitation with her deceased sister's child, did the trial court contravene Appellant's due process rights?

The trial court held: in the negative.

III. Did the trial court properly apply Minn. Stat. §257C.08 by awarding the family of a deceased parent visitation which approximated a six-fold increase in their contact with the minor child from the period preceding the mother's death?

The trial court held: in the affirmative.

STATEMENT OF FACTS

This appeal is from a June 2010 district court decision granting Respondents, Clayton Rohmiller and his daughter, Kelli Rohmiller ("Clayton", "Kelli" and collectively "Respondents") visitation with Bailee Hart [1]. Clayton is Bailee's grandfather, and Kelli is her aunt. Bailee's mother, Katie Rohmiller ("Katie") met Andrew Hart [2] in approximately 2001 when they both were living in Iowa (A. 27). Katie and her twin sister Kelli are natives of Le Mars, Iowa (Tr. 48, 49). Katie and Andrew formed a relationship and eventually moved to the Minneapolis-St. Paul metropolitan area (Tr. 52). At some point, Kelli also moved to the Twin Cities to attend St. Thomas University (Tr. 52).

Katie became pregnant and Bailee was born on July 15, 2003 (Finding 1, A. 2). Katie and Andrew separated in June 2004 shortly before Bailee's first birthday (Finding 13, A. 3). The separation followed an incident in which Appellant was accused of maliciously punishing his daughter. It was alleged that Andrew had slapped and bruised Bailee when he was caring for her. Hart eventually reached a plea agreement with the prosecutor and successfully completed counseling (A. 28). Approximately thirty days after the separation, in July 2004, Katie returned to Iowa with Bailee (Finding 15, A. 3). Between July 2004 and May 2005, Katie lived with her cousin, Anna Rohmiller, in Le Mars, Iowa (Finding 15, A. 3). During this period, Kelli continued to attend school in Minnesota (Tr. 55).

Katie briefly returned to Minnesota in spring 2005; during this period, Katie and her daughter lived with Kelli in Bloomington (Tr. 56, Finding 16, A. 3). Approximately five weeks later, in June 2005, Katie and Bailee returned to Le Mars to live with Clayton's sister, Laurie

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[1] Bailee's name has been spelled various ways in documents prepared by the Iowa judge, the Guardian ad Litem and the Minnesota district court judge. The correct spelling is "Bailee". For the purposes of clarity, any misspelling in other documents will be corrected in this brief.

[2] Appellant Andrew Hart will be referred to in this brief, interchangeably, as "Appellant", "Andrew" or "Hart".

Lamb (Tr. 56, Finding 17, A. 3). While Katie lived in Iowa, Clayton testified that he saw his granddaughter approximately eight hours each month—including family celebrations and holidays (Tr. 18). Kelli estimated that she saw her niece roughly twice each month from Bailee's birth until August 2005 (Tr.50, 90). During the separation, Andrew commenced a paternity action to establish a parent-child relationship with Bailee.

On August 16, 2005, Katie was killed in a motor vehicle accident following an evening of drinking (Finding 8, A. 2, Tr. 13, 148). Katie's family decided not to inform Appellant of her death (Tr. 58) [3]. Instead, Katie's aunt, Laurie Lamb, filed a petition in Plymouth County Iowa seeking Bailee's custody (Tr. 57). Andrew became aware of Katie's death when he received notice of the custody petition. Not surprisingly, Appellant objected to the custody request. Hart perceived the petition as an accusation that he had abandoned his daughter (Tr. 165). Moreover, based on information gleaned by Appellant during the Iowa proceeding, he characterized this as a "Rohmiller family" plan, although the only family member named in the litigation was Laurie Lamb (Tr. 166).

Following a three year Iowa custody battle, Andrew was awarded Bailee's custody (Finding 31, A. 6). In August 2008, Bailee moved with her father to Minnesota and has resided with him since that time. Currently, Bailee and Andrew live with Appellant's parents in West St. Paul (Tr. 140). Andrew wakes Bailee each morning, makes her breakfast, takes his daughter to school and helps with homework (Tr. 140-142). Bailee is active in numerous activities including dance, swimming, soccer and T-ball (Tr. 140). Bailee has performed quite well in school (Tr. 140).

[3] Kelli testifies that telling Appellant that the mother of his daughter died "wasn't my biggest concern" (Tr. 98) and "I don't know why I would call and talk to him" (Tr. 58-59).

Because Katie was intoxicated at the time of her death, a Dram shop action was pursued on Bailee's behalf (Tr. 94). This resulted in a monetary award which is apparently payable in the form of an annuity (Tr. 94). Shortly after Bailee moved to Minnesota with her father, Kelli filed an action in Dakota County to retain control over these funds (Tr. 96). The parties disputed Kelli's motivation. Appellant suggested it was in retaliation for Andrew's success in the Iowa custody proceeding (Tr. 96). Kelli agreed she mistrusted Andrew, but suggested the timing was entirely coincidental and based on guidance from her Minnesota attorney (Tr. 96).

Clayton did not seek visitation with his granddaughter after she moved to Minnesota (Tr. 39, 90). Nonetheless, on December 4, 2008, approximately three months after the Iowa custody decision, Kelli and her father filed a complaint in Dakota County District Court seeking third party visitation with Bailee. The petition alleged that between 2005 and 2008 [4], Kelli and Clayton "had regular and consistent contact with the minor child..." and "developed a relationship with the minor child..." The complaint asserted that both were entitled to visitation with Bailee "pursuant to Minn. Stat. 257C.08 and all the laws and equities of the State of Minnesota".

The court appointed a Guardian ad Litem who conducted an extensive investigation. Eventually, an evidentiary hearing occurred before District Court Judge Michael J. Mayer in February 2010. Andrew agreed that Clayton had a statutory right to see his granddaughter. Appellant stated that he did not oppose contact between Clayton and Bailee (Tr. 7, 142) but noted that, until filing this action, Clayton had never sought visitation with Bailee (Tr. 35, 98). Andrew testified that even after filing the litigation, Clayton seemed to show only casual interest in seeing Bailee and that he believed Katie's sister, Kelli, was the driving force behind this action

[4] During the period of the contested Iowa custody proceeding initiated by Respondent's family member, Laurie Lamb.

(Tr. 149). Andrew argued that Kelli had no independent statutory or common law right to visitation with Bailee. While Andrew did not object to Kelli seeing Bailee when Clayton exercised visitation, he contended that Kelli's right was only derivative or visitation exercised by her father.

On June 22, 2010, Judge Mayer issued his decision. He granted Kelli and Clayton visitation with Bailee. The visitation ordered by Judge Mayer was not only more extensive than recommended by the Guardian ad Litem in her report, but appeared to be broader than the visitation sought by Respondents.[5] More importantly, the court awarded Kelli visitation with Bailee independent of her father (Order, Paragraph 5, A. 23). Interestingly, many of the courts Findings are a one-sided barrage directed at Appellant. There are no detailed Findings concerning Bailee's adjustment to Andrew's household, even though the Guardian ad Litem testified that Andrew was an exemplary father and Bailee was doing exceptionally well in his care (Tr. 107, 120). Instead, the court devoted no fewer than six Findings to Appellant's malicious punishment conviction which had occurred several years earlier and for which he had successfully completed both probation and therapy. Moreover, Judge Mayer's decision repeatedly faulted Andrew for his unwillingness to embrace the court's involvement in his parent-child relationship. This appeal followed.

STANDARD OF REVIEW

Appellant has presented three issues to this court for review. The first two issues are whether the trial court correctly interpreted Minn. Stat. 257C.08 or, by extending an independent common law visitation right to Kelli, contravened Appellant's due process rights. These issues present questions of law which are reviewed on a de novo basis in which this court

[5] For example, the Guardian ad Litem recommended visitation one weekend each month, following a gradual integration period. Respondents testified they felt this recommendation was "reasonable" (Tr. 84). Instead, Judge Mayer ordered the visitation immediately with no adjustment period (Order, Paragraph 1, A. 22).

applies its independent judgment to the lower court's decision. See *Danforth v. State, 761 N.W. 2d 493, 495 (Minn. 2009), State v. Krasky, 736 N.W. 2d 636, 640 (Minn 2007), In Re: PERA Police and Fire Plan line of duty disability benefits of Britain, 724 N.W. 2d 512 (Minn. 2006).*

The third question presented by Appellant concerns the specific visitation schedule allotted to Clayton. Appellant never questioned Clayton's statutory entitlement to visitation with his granddaughter. Here, Andrew challenges whether the district court either failed to make the requisite factual findings needed to support the visitation schedule or, alternatively, blithely ignored the facts presented at the evidentiary hearing. In that context, this court has explained:

> In an appeal from a bench trial, we do not reconcile conflicting evidence. We give the district court's factual findings great deference and do not set them aside unless clearly erroneous. However, we are not bound by and need not give deference to the district court's decision on a purely legal issue. When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.

Porch v. Gen. Motors Acceptance Corp., 642 N.W. 2d 473, 477 (Minn. App. 2002), see also *City of North Oaks v. Sarpal, 784 N.W. 2d 857, 863 (Minn. App. 2010).* If the appellate court believes the district court's findings are superficial or insufficient, the decision must be reversed and the case remanded with instructions for the district court to make additional findings on pertinent issues. *In Re: Welfare of N. T. K. 619, N.W. 2d 209, 211 (Minn. App. 2000).*

ARGUMENT

I. THE TRIAL COURT IMPROPERLY EMPLOYED MINN. STAT. §257C.08 TO CONFER VISITATION RIGHTS ON KELLI ROHMILLER.

The district court was not particularly clear regarding the basis for awarding independent visitation rights to the minor child's aunt. While the district court Judge mentioned his "inherent power to grant equitable relief" to find a common law right for the aunt to have visitation with Bailee, the trial court Judge also used a Wisconsin case *In Re: Custody of D.M.M 404 N.W. 2d*

530 (Wis. 1987) to conclude that Minn. Stat. § 257C.08 was sufficiently encompassing that it did not prohibit him from awarding visitation to Kelli. The district court Judge apparently did so by finding that §257C.08 included a "codification of case law...and was not meant to exclude other relatives" (Conclusion 4, A. 17). The district court Judge added "Minnesota courts have previously determined that aunts and uncles have certain rights with respect to visiting their nieces and nephews..." (A. 17). This framework apparently encouraged the district court judge to interpret the statute as allowing visitation to be independently exercised by Bailee's aunt. This reasoning is horribly misguided.

A. Minnesota courts have never held that Minn. Stat. §257C.08 includes third parties not specifically identified in the statute.

At the outset, Minnesota courts have repeatedly rejected claims that third parties have intrinsic rights, statutory or otherwise, to visitation with minor children. The decision cited by Judge Mayer in support of his proposition that aunts and uncles have a special statute is *State ex rel Maxwell and Burris v. Hiller.* That decision did not recognize any right for aunts and uncles to have visitation with minor children. It simply approved a *stipulation* between the parties conferring limited visitation rights for a two year period, *298 Minn. 491, 104 N.W. 2d 851, 858 (1961)*. More importantly, in *Hiller* the Supreme Court reaffirmed the primacy of a parent's right to control the upbringing of his or her children. Id. at 858. As a result, Minnesota courts have repeatedly rejected claims by third parties to visitation.

Historically, a parent's right to control access to his or her child was unfettered. This right went unchallenged until the final quarter of the twentieth century:

> Historically, grandparents had virtually no legal right to maintain a relationship with a grandchild independent of the wishes of the child's parent (citation omitted). Reluctance on the part of legislatures and courts to intervene in family relationship spurred from the notion that parental authority with regard to the raising of children shall be impacted by

> the State as little as possible. However, beginning in the 1970s, states started to address by statute the issue of grandparent visitation rights.

Olson v. Olson, 534 N.W. 2d 547, 549 (Minn. 1995). However, no Minnesota court had yet led Minnesota's current grandparent visitation right statute, Minn. Stat. §257C.08, to broadly confer any type of intrinsic visitation right on third parties. When called upon to extend visitation to third parties, other than grandparents, Minnesota courts have read §257C.08 in a restrictive manner.

Minn. Stat. §257C.08 Subd. 4 states; in pertinent measure:

> 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.[6]

Minnesota courts have very narrowly interpreted this statutory provision to require a "common residency" and have rejected claims for visitation by third parties based on episodic, albeit regular, contact. *Geibe v. Geibe, 571 N.W. 2d 774, 781 (Minn. App. 1997).* Indeed, Minnesota courts have routinely rejected claims that third parties have any inherent rights to visitation with minor children solely because of a close personal or family relationship. See *Weiler v. Lutz, 501 N.W. 2d 667, 670 (Minn. App. 1993), Kulla v. McNulty, 472 N.W. 2d 175, 182 (Minn. App. 1991),* review denied.

B. The trial court's ruling ignored basic precepts of statutory construction.

If the trial court construed Minn. Stat. §257C.08 to include visitation right by the minor child's aunt, it did so only by ignoring basic rules of statutory construction. At the outset, the only provision of Minn. Stat. §257C.08 relevant to Kelli's claim is §257C.08 Subd. 1. That provision states:

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[6] This statutory provision does not confer any rights on Kelli because she lived in a common residence with Bailee for only a five week period in 2005 (Tr. 56).

> If a parent of an unmarried minor child is deceased, the *parents and grandparents* of the deceased parent may be granted reasonable visitation rights to the unmarried minor child during minority by the district court upon finding that visitation rights would be in the best interests of the child, and would not interfere with the parent-child relationship.

(Emphasis supplied). On its face, the statute limits the rights conferred by it to grandparents and great grandparents. No other family member or third party is included in its language.

Since Minnesota case law has not extended inherent visitation rights to third parties, the district court plainly ignored basic rules of statutory construction by its expansive reading of this statute based on an isolated decision in another jurisdiction. Minn. Stat. §645.16 specifically directs:

> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing its spirit.

Here, the language of the statute and its application are manifestly clear. The legislature intended to confer statutory visitation rights on a district group of individuals—grandparents and great grandparents. If the legislature wished to include others in this framework, it could have done so.

However, Minnesota's legislature, presumably recognizing the inherent rights of parents to control their child's upbringing, declined to do so. In *Kulla v. McNulty,* the Minnesota Court of Appeals narrowly interpreted the predecessor to §257C.08 and declined to extend visitation to a third party. The court held that the "statute speaks with clarity in limiting its application to specifically enumerated subjects [and] its application shall not be extended to other subjects by process of construction." *472 N.W. 2d at 182,* see also *In Re: Welfare of R.A.M. 435, N.W. 2d 71, 73 (Minn. App. 1989), Martinco v. Hasting, 265 Minn. 490, 122 N.W. 2d 631, 637 (1963).* Consequently, by implicitly explaining the statutory rights conferred by §257C.08 to Kelli, the trial court impermissibly expanded the scope of this statute.

II. THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS BY CONFERRING VISITATION ON THE MINOR CHILD'S AUNT.

Although it is uncertain whether the court granted visitation to Kelli under the auspices of on Minn. Stat. §257C.08, it is clear that the court felt it had the "inherent power" to extend a common law right to Bailee's aunt (A. 17). The district court Judge asserted "parental rights are not absolute and are not to be unduly exalted..." (A. 18) and substituted his judgment for Appellant's. The district court Judge then went on to confer, on Kelli, a right to visitation independent of that exercised by her father. The breadth of this decision is astounding. Historically, only parents or step-parents standing in locoparentis, had a common law right to visitation with children. See *Kulla v. McNulty, 472 N.W. 2d at 182, Simmons v. Simmons, 486 N.W. 2d 788, 791 (Minn. App. 1992)*[7]. Any other visitation claim between third parties and minor children was statutory in character. *Kulla v. McNulty Id. at 182.* By concluding that Kelli had a common law right to visitation with her niece, the district court ignored traditional deference to parental decision making and ran afoul of the constitutional protections afforded Appellant.

A. Appellant's parent-child relationship with his minor daughter is constitutionally protected under the due process clause.

The U.S. Supreme Court has explicitly declared the sanctity of the parent-child relationship warrants constitutional protection. The court explained its rationale as follows:

> The Fourteenth Amendment provides that no State shall deprive any person of life, liberty or property without due process of law...the clause also included a substantive component that provides 'heightened protection against government interference with certain fundamental rights and liberty interests' (citation omitted). The liberty interest

[7] According to the Minnesota Court of Appeals:

> The term "in locoparentis" according to its generally accepted common law meaning refers to the person who has put himself in the situation of a lawful parent 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.

Geibe v. Geibe 571 N.W. 2d at 781 (quoting Bearhart v. United Sates, 82 F. Supp. 652, 655-656 (D. Minn. 1949)

> issue in this case—the interests of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this court...there is a constitutional dimension to the right of parents to direct the upbringing of their children...
>
> We have recognized the fundamental right of parents to make decisions concerning the care, custody and control of their children (citation omitted).

Troxel v. Granville, 530 U.S. 57, 65 (2000).

Realizing that many states had begun conferring statutory rights to third party visitation, Justice Kennedy observed:

> A state's recognition of an independent third party interest in a child can place a substantial burden on the traditional parent-child relationship...most statutes can present questions of constitutional import.

Id. at 64-65. In *Soohoo v. Johnson, 731 N.W. 2d 815 (Minn. 2007)* the Minnesota Supreme Court considered the constitutionality of Minn. Stat. §257.08 in light of *Troxel.* Although the Court determined that Minn. Stat. §257C.08 Subd. 7 was unconstitutional, it affirmed the validity of the remaining portions of the statute. As a consequence, Andrew never challenged Clayton's right to press a statutory visitation claim, or contended that awarding Clayton visitation with his granddaughter infringed on Appellant's constitutional rights [8]. This does not mean the district could create, by fiat, a similar entitlement on the part of other relatives.

B. The district court violated Appellant's due process rights by recognizing a common law visitation claim between a minor child and her aunt.

Although narrowly tailored statutes permitting visitation between minor children and grandparents, or others who have acted as parents may be constitutionally permissible, this does not mean that trial judges can extend similar entitlement on an ad hoc basis. In *Troxel*, the Supreme Court criticized the pertinent Washington statute as "breathtakingly broad" Id. at 67. In

[8] It is unclear if the trial judge truly absorbed Andrew's acknowledgment. In one instance, Judge Mayer found that Appellant opposed visitation with the Rohmillers (Finding 36, A. 6) only to find, later that "Appellant does not contest Clayton's right to have visitation" (Finding 41, A. 7).

particular, Justice Kennedy was disturbed by language that "any person may petition the court for visitation rights…" and concluded "that language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state court review" Id. at 67. That criticism is equally applicable here. If a common law visitation right is extended to aunts and uncles, then it can be just as easily extended to adult siblings, cousins, former step-parents, or anyone else. This widespread attack on a parent's right to manage his or her children's development intrinsically undermines to the parent-child relationship.

Moreover, this type of informal extension of a legal right presents other dangers forseen by the court in *Troxel.* Among the reasons the US Supreme Court stuck down the grandparent visitation statute in *Troxel* was its concern that both the statute and the lower courts "failed to accord the determination of…a fit custodial parent any material weight" *530 U.S. at 72*. The court cautioned:

> …the due process clause does not permit a state to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made. Neither the Washington non-parental statute generally—which places no limits on either the persons who may petition for visitation or the circumstance in which the petition may be granted—nor the superior court in this specific case required anything more.

Id. at 72-73.

An examination of the district court's ruling in this case illustrates the underpinnings of this concern. Appellant made no objection to grandparent visitation between Clayton and his granddaughter. The focus of this dispute was the extent to which Clayton should exercise visitation and whether Kelli's visitation should be exercised independently from her father. In essence this converted the "visitation" question to a dispute between Kelli's claim for independent visitation and Appellant's denial of that demand. The district court judge concluded

that Kelli should have a common law right to visit with her niece, and that Andrew's objections should be discounted. The legal standards employed by the district court in reaching this conclusion are unclear. Although the Judge talked at some length about Bailee's "best interests", much of his reasoning appears to be exactly the type of "second guessing" criticized by the Supreme Court in *Troxel*. For example, without any scientific basis, the trial court judge found that Kelli's situation was unique and that continuing contact with Bailee was vitally important because Kelli and Katie were identical twins (Finding 11, A. 2, Finding 72, A. 12, Finding 73, A. 12).

The court also paid scant attention to Appellant's concerns as a custodial parent. Rather than giving deference to Andrew's wishes, the trial court chose to either ignore or discount them in its decision. First, Appellant testified that he was concerned that Kelli may have difficulty maintaining appropriate boundaries with Bailee and, perhaps because of her status as Katie's twin, try to become a surrogate mother for Bailee. Andrew was concerned this would undermine his relationship with his daughter (Tr. 148). There certainly seemed to be a legitimate basis for raising this issue, based on the record before the trial court. On September 30, 2005 an attorney, acting on Kelli's behalf, sought to intervene in the Iowa custody litigation. In that intervention notice, the attorney reported that Kelli had "indicated to all family of her strong desire to become the guardian, conservator and caregiver of the minor child." He labeled this the "natural, logical and best choice" for Bailee. (A. 55). In her report, the Guardian ad Litem related a conversation with Kelli in which she discussed a Rohmiller family meeting which occurred shortly after Katie's death:

> As the family was talking, Kelli stated, 'everyone assumed Bailee would eventually come to live with me.' According to Kelli 'it made sense for Bailee to remain with Lamb initially, as that is where she had been living, but the whole family agreed that Bailee would eventually move to Minnesota with Kelli'

(A. 31). Eventually, Kelli's aunt reconsidered and sought to keep custody of Bailee.

This apparently led to an estrangement between Kelli and Lori Lamb which was noted in the Iowa custody decision. While the Iowa court did, indeed, place a number of positive endorsements of Kelli, the Iowa court also noted that Kelli seemed inclined to desire Bailee's custody at some point in the future:

> Kelli expresses concerns about Andrew's finances and his ability to provide for Bailee...Kelli did consider seeking to be appointed the guardian of Bailee...Kelli sends somewhat of a mixed message as to whether or not she was actively seeking to be appointed the guardian of Bailee. The court believes that Kelli is bulling that her circumstances are such that it is clear she might not be able to manage the care of Bailee without compromising her schooling or her employment situation.

(A. 49).

The Guardian ad Litem also expressed concern about Clayton and Kelli's ability to understand that Appellant had evolved as a parent (A. 38-39). The court discounted these concerns with a single sentence, apparently based solely on Kelli's testimony at trial, asserting she did not wish to undermine Andrew's relationship with his daughter [9].

Second, Andrew expressed alarm about Clayton's alcohol use during the time he had custody of Bailee. Andrew asked that Clayton be ordered to abstain from using alcohol. The court declined to impose this condition and did not even mention the dispute in its findings. Once again, there seemed to be merit in Andrew's concerns. During his testimony, Clayton admitted to drinking at least two or three beers every night (Tr. 31). He candidly acknowledged occasionally drinking to excess (Tr. 45-46) and, when asked how many beers he considered "too many" responded "twelve" (Tr. 48). Appellant testified that he "definitely don't think [alcohol] is something that should be around Bailee, ever" (Tr. 147). When asked why he objected to

[9] Any disinterested observer might ponder how much weight these denials should be afforded. It is inconceivable that any person with a normal IQ seeking visitation with a minor child would testify that his/her objective was to thwart the parent's custody rights, or undermine the parent-child relationship.

Rohmiller family members drinking alcohol in Bailee's presence, Appellant testified he believed "it's a poor example to have around Bailee whose mother...died because she was too drunk on the road." (Tr. 148). Any reasonable observer should regard these concerns as well founded. However, in blatant disregard of the custodial parent's wishes, the trial court felt this concern was so insignificant that it did not even deserve mention in its decision.

Similarly, it is unclear what burden of proof the district court judge placed on Kelli, or the precise criteria was utilized to determine how *independent* contact between Bailee and her aunt was in Bailee's best interest. It seems evident that the trial judge has placed little, if any value, on Andrew's status as Bailee's custodial parent. For example, despite the fact that Bailee had lived with her father for three years and, by all measures, had flourished under his guidance, Judge Mayer labeled her aunt, Kelli, (who Bailee saw an average of twice each month before August 2008) as the person having "a primary relationship" with Bailee (Finding 74, A. 12). The court plainly placed no weight on Appellant's position as custodial parent, and even seemed to disparage the judgment of the Iowa court, by contending that Bailee "lost contact with all persons who were significant in her life" upon the custody award to Andrew (Conclusion 16, A. 21).

Indeed, it appears the Judge's reasoning was largely grounded in sympathy for Kelli and visceral dislike for Andrew. Much of the trial courts' decision reads like a polemic attack on Andrew instead of dispassionate analysis. Andrew was criticized for failing to appreciate the court's involvement in his life and given the label "controlling" without any elucidation (Finding 42, A. 9). Not only is it unreasonable to fault Andrew for resenting a five year legal battle which effectively impoverished him (Tr. 152), many of the district court's criticisms of Andrew amount to no more than the judge's dislike to Appellant's attitude. This is amply illustrated by the trial

court judge's selective and ultimately misleading, references to the Iowa court's custody decision. Although the district court judge repeated comments in the Iowa decree criticizing Appellant's attitude, he neglected to include statements critical of the Rohmiller family, or suggesting that Kelli might have difficult reconciling with the concept that Andrew was to be Bailee's custodial parent.

Moreover, the trial judge also excised any positive comments the Iowa court made concerning Andrew. For example, the Iowa court noted that Bailee had become integrated into Andrew's family (A. 44). The Iowa judge also found that "Andrew interacts with Bailee very well, he spends time with her, reads with her and plays with her." (A. 44). Even though the Iowa judge noted Andrew's resentment of the courts involvement in his life, the Iowa custody decision he added "despite this, Andrew has complied with this court's prior requirements…" (A. 47). Notwithstanding his criticisms of Andrew, the Iowa judge did not hesitate in concluding "Bailee's long term best interest [is] that she be placed with her father permanently." (A. 50). Puzzlingly, while the district court judge showed little hesitancy in selectively reciting portions of the Iowa custody decision critical to Appellant, he somehow overlooked this positive information which might have bolstered the credibility of Appellant's concerns regarding visitation between Kelli, Clayton and Bailee.

This district court justice's emotional reaction yielded precisely the type of ruling Justice Kennedy warned about in *Troxel*. Judge Mayer awarded Kelli independent visitation without employing clear legal standards, utilizing an unarticulated burden of proof, and freely substituted his judgment for that of the custodial parent based, it appears, on his personal preference.

Even if a district court had the authority to extend a common law visitation right to Kelli, it is clear that these shortcomings make this particular decision constitutionally infirm. In *Soohoo v. Johnson,* the Minnesota Supreme Court explained that *Troxel:*

> Set out three guiding principles necessary for a third party visitation statute to survive a constitutional challenge: (1) the statute must give some special weight to the fit custodial parent's decision regarding visitation; (2) there can be no presumption in favor of awarding visitation; and (3) the court must assert more than a mere best interest analysis in support of its decision to override the fit parent's wishes.

731 N.W. 2d at 820-821. If the lower court's decision is subject to the same standards set forth by the Minnesota and US Supreme Courts, Judge Mayer's decision must be reversed because it is unclear whether he gave allegiance to any of these guiding principles [10]. Here, Judge Mayer: (1) paid scant, if any, deference to Andrew's wishes, (2) never discounted the burden of proof applied by the court in awarding independent visitation to Kelli, and (3) seemed to use only a "best interest analysis" in deciding to award Kelli independent visitation with Bailee.

III. THE VISITATION AWARDED BY THE TRIAL COURT WAS EXCESSIVE IN LIGHT OF APPLICABLE STATUTORY FACTORS.

Although Appellant does not dispute Clayton's statutory entitlement to visitation with Bailee, he believes the amount awarded to Clayton was excessive in light of *his* prior relationship with Bailee. Appellant does not contest the portions of the trial court's judgment awarding Clayton visitation with his granddaughter on holidays, or have the right to contact her by telephone. He concedes that Clayton should also see Bailee on a regular basis. However, in light of the grandfather's relationship with Bailee, prior to the institution of this action, he believes that guaranteeing Clayton one weekend each month and a week each summer is excessive.

[10] For example, the trial Judge commented that parental rights were "not absolute" and "not to be unduly exalted" and added "the law secures the parental right only so long as they shall promptly recognize and discharge their corresponding obligations". He then found the court "in its role as patriae" had the authority to step in and "protect children" from parental decisions that have "a potential" for social burdens (A.18). This smacks of the judicial legislating that is often criticized by social commentators. More importantly, by failing to give any weight to the parent's preference, it is clearly foreclosed by *Troxel.*

To ascertain the appropriate amount of grandparent visitation, Minn. Stat. §257C.08 Subd. 1 directs trial courts to "consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application." Here, the testimony was that Clayton saw Bailee most often at family holidays and celebrations. At the evidentiary hearing, Clayton did not know his granddaughter's age (Tr. 29). His contact with Bailee, including family holidays, averaged approximately eight hours each month (Tr. 18). However, the district court awarded Clayton more than 48 hours each month of visitation. Consequently, the current order expands Clayton's monthly contact with his granddaughter increased approximately six-fold from the time preceding her mother's death. Kelli saw Bailee once or twice each month and rarely overnight before August 2005 (Tr. 50, 90).

Plainly, the purpose of this statutory requirement is to assure that the amount of visitation between grandparents and their grandchildren is appropriate and consistent with past practice. It is meant to assure that grandparents are not unreasonably penalized, or awarded with additional time, following a family tragedy. Here the court, out of misguided sympathy, has substantially expanded the contact between Bailee and her grandfather. Moreover, the court failed to make any findings as to whether it was reasonable to require that Bailee be transported approximately four hours in each direction for visitation. For these reasons, this matter should be remanded to the trial court to determine the appropriate measure of visitation to be awarded to Clayton pursuant to this statutory command [11].

CONCLUSION

This case is awash with personal tragedy—much of it experienced by a seven year old girl. She first experienced the separation of her parents, followed by her mother's death in a

[11] Obviously, when Clayton exercises visitation his daughter, Kelli, can participate.

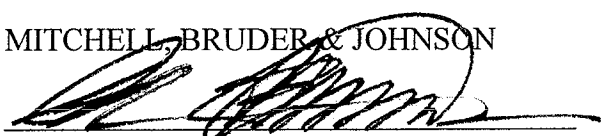
drunk driving accident. Then, rather than being brought together by this dire event, two families began years of contentious litigation in Iowa.

After Appellant secured his daughter's custody in Iowa this litigation, apparently prodded by legal advice, continued. Initially, Respondents petitioned the court to keep control of Bailee's dram shop proceeds and later sought a judicial decree conferring visitation rights not only on the child's grandfather, but an independent right on the aunt as well. Based on the parties' litigious history, Andrew saw this as yet another challenge to his parental status.

Overlooked by the trial court, was the single redeeming feature of this saga. Andrew, despite a rough start, has redeemed himself as a parent. He now juggles his work schedule to act as a single parent for his daughter who is, by all accounts, flourishing under Andrew's care. Andrew's efforts deserved to be acknowledged by the trial court, and to have his parental wishes afforded reasonable deference. Instead, the district court judge turned a blind eye to the limited statutory rights afforded Clayton, and either expanded the reach of Minn. Stat. §257C.08 beyond all logical definition or cavalierly conferred a common law right on Kelli in fragrant disregard of Appellant's constitutional rights. For these reasons, the district court's decision must be reversed and this matter remanded with instructions for the district court to issue a new grandparent visitation order consistent with Clayton Rohmiller's previous contact with his granddaughter.

Dated: 11/22/2010

MITCHELL, BRUDER & JOHNSON



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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01 Subd. 1 and 3 for a brief produced with a proportional font. The brief was prepared using Microsoft Word.

M 22/2010
Dated

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