

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 REPLY BRIEF

Debra Julius
Julius Law Offices, Ltd.
Attorney ID No. 277319
14093 Commerce Avenue
Suite 200
Prior Lake, MN 55372
(952) 440-2700

Attorney for Respondent

Jennifer Joseph
Guardian ad Litem
Dakota County Judicial Center
1560 Highway 55
Hastings, MN 55033

Guardian ad Litem

Glenn P. Bruder
Mitchell, Bruder & Johnson
Attorney ID No. 148878
5001 American Boulevard West
Suite 670
Bloomington, MN 55437
(952) 831-3174

Attorney for Appellant

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STATEMENT OF FACTS

In their brief, Respondents Kelli Rohmiller and Clayton Rohmiller (“Respondents” or “Rohmillers”) make numerous factual assertions which are either unsupported or belied by the trial record. These assertions either disparage Appellant Andrew Hart (“Appellant” or “Hart”) or assert that his daughter is living a life of deprivation and disappointment in her father’s care. Some fact shading can be expected in an adversary process. Similarly, parties can differ in their interpretation of particular facts. By the same token, a number of factual assertions made by Respondents stray so far from the existing record that the only discernable purpose appears to be creating an unfavorable negative impression of Appellant.

Among these unsupported, undocumented, or false assertions concerning Appellant are the following:

- *Appellant struck the minor child causing injury and hospitalization (Respondent’s Brief, p. 1)*

Six years earlier, when Bailee was ten months old, Appellant was charged with malicious punishment of a child for slapping and bruising Bailee when she was in his care (Appellant’s Brief, A. 28)¹. There is no question this behavior was inappropriate. This was recognized by Appellant who “engaged in individual counseling with his pastor, and completed a 26 week anger management program through the Resource Center for Fathers and Families, as well as [a] parenting education course” (A. 28). He also suffered significant remorse (A. 28). This unfortunate and unflattering event does not give Respondents license to exaggerate or embellish Appellant’s conduct. There is not one shred of evidence in the record suggesting that Bailee was hospitalized as a result of this incident. The only detailed description of the June 2004 incident in the trial record is contained in the Guardian ad Litem’s report. According to that report, Bailee

¹ Unless otherwise indicated, all future appendix references in this brief refer to the appendix accompanying Appellant’s principal brief.

was never hospitalized, but had a previously scheduled doctor's appointment the day following the June 3, 2004 incident. At that appointment "the doctor immediately surmised what had happened" resulting in the criminal charges against Appellant (A. 28).

- *Appellant made no effort to see his daughter until after her mother's death.*

According to Respondent's Brief "after the mother was killed in August of 2005, the Appellant sought to see the child..." (Respondent's Brief, p. 1). In reality, before Katie Rohmiller died, a paternity action was underway in Minnesota. Rohmillers were aware of this proceeding—Kelli knew that her sister, Katie, provided a blood sample for paternity testing (Tr. 58) and knew that Katie was apparently represented in the paternity litigation by the Rohmillers' current attorney (Tr. 57). Accordingly it is, to say the least, misleading to suggest that Hart had no interest in his daughter prior to her mother's death.

- *Appellant refused to permit any contact between his daughter and the Rohmiller family (Appellant's Brief, p. 2)*

According to Respondents "after Appellant gained custody of the child in Iowa, he cut off all contact between the child and her maternal family. Appellant maintained that position throughout the proceedings in District Court" (Appellant's Brief, p. 2). In reality, Appellant did not object to visitation between Bailee and the Rohmillers. Instead, Appellant argued that any visitation should be awarded to Clayton Rohmiller, and that contact between Bailee and her maternal aunt, Kelli Rohmiller, should be derivative of that relationship. This was clearly set forth by Appellant's counsel at the outset of the trial when he explained:

...there is no question that Mr. Rohmiller is entitled to visitation with his granddaughter.

Then the question for you to decide your Honor, is: how much time does Mr. Rohmiller spend, and where does he spend it?

(Tr. 8). Further, the record is bereft of any instance in which Hart “cut off” contact between Clayton Rohmiller and his granddaughter. Instead, the undisputed evidence is that Clayton Rohmiller never sought contact with Bailee before Rohmillers began this action (Tr. 39, 90).

- *Appellant had no contact with his daughter for more than three years due to his physical abuse of Bailee (Respondent’s Brief, p. 11).*

Respondents also assert that Bailee had no contact with her father for more than three years “due to him inflicting physical abuse upon her when she was ten months old...” (Respondent’s Brief, p. 11). Although the June 2004 incident certainly affected Appellant’s relationship with Bailee, this particular assertion is blatantly inaccurate in several respects. First, the legal barriers to contact between Bailee and her father were removed before Katie’s death. Following Katie’s death, the primary impediment to a relationship between Bailee and her father was the adamant resistance of the Rohmiller clan, which led to a protracted custody proceeding in Iowa. Second, while the Iowa custody action was not resolved for approximately three years, Appellant was not denied contact with his daughter throughout this period. Instead, Appellant obtained parental access to Bailee through a series of Iowa court orders culminating in a custody award.

Appellant also disputes the characterizations by Rohmillers’ attorney that Bailee is subjected to harm or emotional abuse in her father’s household. Since these assertions are more “opinion” than “fact” they will be addressed in the argument portion of this reply brief.

ARGUMENT

I. MINNESOTA COURTS HAVE NEVER RECOGNIZED THAT AUNTS, UNCLAS, OR OTHER FAMILY MEMBERS HAVE AN INHERENT RIGHT TO VISITATION WITH MINOR CHILDREN.

Citing *Simmons v. Simmons*² and *Wallin v. Wallin*,³ Respondents argue that Minnesota

² *Simmons v. Simmons*, 486 N.W. 2d 788 (Minn. App. 1992)

courts have created common law visitation rights for non parents and that third party visitation can be freely awarded “anytime...a petition” is filed (Respondent’s Brief, p. 5). No context is given to either ruling and, upon examination, the holdings in each case are neither accurately described, nor relevant to this proceeding.

At the outset, Respondents seemingly have no concept of the historic autonomy given to parents by the common law, or the evolution of grandparent visitation statutes. Indeed, Respondents blithely assert that a family court has “equitable powers to act in a child’s best interest...” under virtually any circumstance involving child custody or visitation (Respondent’s Brief, p. 4). In reality, under traditional common law notions, a parent’s right to control access to his or her child was unfettered. This was, as recognized by the Minnesota Supreme Court, the impetus for grandparent visitation statutes:

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 relationships 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) ⁴.

Respondents essentially argue that *Simmons* and *Wallin* have turned this longstanding deference to parental rights on its head. On examination, Respondents’ assessment of each decision is sorely misguided. Contrary to Respondents’ claims, *Simmons* did nothing to create a general common law visitation right on the part of nonparents. *Simmons* involved a marriage dissolution with a blended family. 486 N.W. 2d at 790. The stepfather sought parental access to all of the children, including his stepson born from the mother’s prior relationship. The mother

³ *Wallin v. Wallin*, 290 Minn. 161, 187 N.W. 2d 627 (Minn. 1971)

⁴ This citation appeared originally at Appellant’s Brief, pps. 6-7.

objected, contending that her former spouse had no statutory entitlement to visitation. The Court of Appeals disagreed, holding that a third party “who is in loco parentis to the child” could assert “a common law right to visitation”. Id. at 790.

It appears that Respondents have little understanding of what is meant by acting “in loco parentis”. They seem to believe that this doctrine means that courts may exercise a quasi parental role, and can substitute a magistrate’s judgment whenever a child is involved in a custody or visitation dispute. In reality, “in loco parentis” focuses on the relationship between a child and the person asserting the visitation right:

The term ‘in loco parentis’ according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent, by assuming the obligation incident to the parental relation without going through the formalities necessary for legal adoption, and embodies the two ideas of assuming the parental status, and discharging the parental duties.

London Guar. And Acc. Co. v. Smith, 232 Minn. 211, 64 N.W. 2d 781, 785 (1954). See also, *Geibe v. Geibe*, 571 N.W. 2d 774, 781 (Minn. App. 1997). In *Simmons*, the Court of Appeals granted visitation to the stepfather because he had assumed these parental duties during the parties’ marriage. Absent this specific relationship, *Simmons* created no general entitlement to third party visitation. Because there is no evidence that Kelli Rohmiller stood in loco parentis to Bailee—nor does she make this assertion—Respondents’ reliance on *Simmons* is misplaced.

Similarly, Respondents assert that *Wallin v. Wallin* allows the court “at any time” to use its “inherent equitable powers” to entertain a request for third party contact. Once again, Respondents err by ignoring the context of the *Wallin* decision. *Wallin* had nothing to do with visitation between a child and his or her aunts, uncles, or third parties. It involved a custody battle between grandparents who had, by stipulation, acquired guardianship of a minor child in a probate proceeding and the child’s mother. 187 N.W. 2d at 628-629. The dispute also involved

child custody, not visitation. *Id.* at 629. If anything, the *Wallin* court's holding favors Appellant, declaring it:

...to be a fundamental rule of law that, all things being equal, as against a third person, a natural mother would be entitled to custody of her minor child unless there has been established on the mother's part, neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish a child with needed care.

Id. at 630⁵.

An unfortunate aspect of Respondent's Brief is that Respondents repeatedly employ decisions from grossly dissimilar situations involving different legal issues, without any effort at contextualization. The danger this creates is that the decision making framework is vastly different where disputes involve custody, visitation, marriage dissolution, disputes between unmarried parents, or claims for third party access. This distinction is particularly critical here, where much of this litigation centered on whether third party family members had a common law right to visitation with minor children. By utilizing decisions from other areas of family law to support their claims Respondents, either intentionally or unintentionally, obscure the fundamental defect in their argument. Minnesota courts have routinely rejected claims that parties have a common law right 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.

⁵ According to Respondent's Brief, *Wallin* held "under our statute and pursuant to its inherent power, the trial court may at any time entertain a petition (citation omitted) finding and setting forth a standard for an equitable award of third party custody" (Respondent's Brief, p. 5). This quotation is a blatant distortion of the court's commentary. First, this language does not appear in *Wallin* at the page cited in Respondent's Brief. Second, it is dicta and not part of the court's holding. Third, the quote, in its entirety, clearly had nothing whatsoever to do with third party visitation claims. What the court actually said was:

Under our statute and pursuant to its inherent equitable powers, the trial court may at any time entertain a petition to amend a decree affecting the custody of a child based on a substantial change in circumstances of either a party or the child.

Id. at 631. This was clearly a reference to the existing child custody modification statute. This comment related to modification of child custody in the context of a dissolution proceeding and has little, if anything, to do with this litigation.

II. IN THE ABSENCE OF AN EXISTING COMMON LAW VISITATION RIGHT, COURTS CANNOT EXPAND THE LANGUAGE OF MINN. STAT. §257C.08 TO CREATE SUCH AN ENTITLEMENT.

Without an existing common law visitation right, courts cannot ignore the limiting language of Minn. Stat. §257C.08 to create the right on the part of a maternal aunt. Respondents argue that the trial court could freely expand Kelli Rohmiller's rights because "if the statute was to be the sole authority for such visitation, then it would so state that it was the sole authority" (Respondent's Brief, p. 4). Interestingly, Respondents site no authority for this proposition. This is most likely because existing Minnesota law is expressly contrary to Respondents' position. In *Kulla v. McNulty*, this court observed:

When a statute speaks with clarity, in limiting its application to specifically enumerated subjects, its application shall not be extended to other subjects by process of construction.

472 N.W. 2d at 182. Clearly, the only enumerated subjects in §257C.08, relevant here, are grandparents. This does not include the child's maternal aunt. Moreover, in *Simmons v. Simmons*, this court noted that "ordinarily, statutes are presumed not to alter or modify the common law unless they expressly so provide" *486 N.W. 2d at 791.* Plainly, when enacted, the predecessor to §257C.08 altered the common law, but only by providing for visitation between grandparents and minor children. To more expansively confer visitation rights on third parties not only ignores this precept of statutory construction, but also poses a constitutional dilemma discussed in the following section of this reply brief.

III. APPELLANT HAS A CONSTITUTIONAL RIGHT TO MAKE DECISIONS CONCERNING HIS DAUGHTER'S UPBRINGING WITHOUT THE CONTINUOUS SPECTER OF JUDICIAL SCRUTINY.

There is no question that the U.S. Supreme Court, in *Troxel v. Granville*, *530 U.S. 57 (2000)* circumscribed a state's authority to intervene in the parent-child relationship by requiring contact between minor children and third parties. Respondents argue that "neither the Supreme

Court of the United States or the Minnesota courts have ever held that a parent's decision that would harm and emotionally endanger the children is constitutionally protected" (Respondent's Brief, p. 7). Of course, Appellant did not make this argument. Instead, relying on *Troxel*, Appellant simply asserted that "the due process clause does not permit a state to infringe on the fundamental right of a parent to make child rearing decisions simply because a state judge believes that a 'better' decision could be made." 530 U.S. at 72. That is exactly what occurred here.

Respondents assert that Bailee will "suffer emotional endangerment if she were not allowed to see [Respondents]" (Respondent's Brief, p. 7). The problem with this argument is twofold. First, Appellant never refused the child access to her maternal grandfather. He simply argued that any contact between the child and her maternal aunt should be derivative of the visitation awarded to the grandfather. As a consequence, the real issue is whether there was any evidence presented to the trial court warranting the conclusion that Bailee will suffer emotional harm or trauma if Kelli Rohmiller's contact with Bailee was exercised only in conjunction with her father's visitation.

Second, despite Respondent's histrionic assertion that Appellant is "unfit" because he does not want Kelli Rohmiller to exercise independent visitation with Bailee (Respondent's Brief, p. 7) there is simply not a scintilla of evidence supporting this proposition. According to the Guardian ad Litem's report, Bailee has thrived in her father's custody. The Guardian ad Litem described Bailee as "very bright, outgoing, engaging and well mannered" (A. 32). She was "curious and interacted easily" (A. 32). Her home environment appeared healthy and almost idyllic. According to the Guardian ad Litem, Bailee lived with her extended paternal family (A. 32) and:

Bailee⁶ has her own room upstairs which is filled with a large number of age appropriate toys and books. In addition, there are toys and games in other parts of the home. Bailee explained that she very much enjoys making arts and crafts and pointed out a child sized easel in the dining room and an organizer filled with craft supplies.

(A. 32).

Based on the Guardian ad Litem's observations, Bailee did not appear to be emotionally or physically in danger from her father. According to the report:

...the interactions between Andrew and Bailee appear to be warm and loving. Andrew was very patient as he explained the rules [of a children's game] to Bailee, even after she repeatedly tried to bend them. Andrew was firm in his expectation that Bailee play the game properly, but remained very calm and showed no frustration as Bailee started to get silly...Bailee seemed very comfortable and at ease throughout the visit, and her interactions with Andrew appeared to be very natural and unrehearsed.

(A. 33).

Third parties also confirmed Bailee's excellent adjustment to life with her father. According to Bailee's kindergarten teacher, she was "a pleasant and outgoing child, who is academically on track" (A. 34). Bailee had good peer relationships and seemed open when describing her mother's death (A. 34). She applauded Appellant and his parents as "very consistent" assisting Bailee with her homework and other academic needs (A. 34). Bailee's first grade teacher was even more effusive. She reported that Bailee was academically "significantly above average" and that Bailee "loves school" and was "a very enthusiastic learner" (A. 35). She felt Bailee's social interactions were appropriate and she "gets along with everyone" and was "well liked by other students" (A. 35). It is noteworthy that each of these observations occurred at a time when Bailee's contact with her maternal aunt was circumscribed. In her trial testimony, the Guardian ad Litem described Appellant as a "very good father" (Tr. 120).

Clearly, the trial court felt that it was "better" for Bailee to have a relationship with her grandfather and maternal aunt—even if the relationship with the maternal aunt was independent

⁶ Misspelling of the child's name in other documents are corrected in this brief.

of the grandfathers. The trial court gave little thought to Appellant's objections or his reasoning. As noted in Appellant's Brief, that is not a constitutionally accepted framework for granting visitation (Appellant's Brief, pp. 10-16). Parents routinely make decisions for their children, encouraging or limiting their relationships with third parties. Sometimes these choices are wise. Sometimes they are misguided. Absent clear evidence these decisions will endanger a child, they must be respected. Unfortunately, that was a concept which neither Respondents, their attorney, nor the trial court judge fully understood.

IV. APPELLANT'S POSITION WOULD NOT YIELD A FUNDAMENTAL INCONSISTENCY BETWEEN THIRD PARTY RIGHTS TO VISITATION AND CUSTODY.

Respondents also assert "it would be an absurd result if a district court is more limited in awarding third party visitation than it is in awarding third party custody" (Respondent's Brief, p. 8). In essence, Respondents argue that the constitutional rights conferred on Defendant by *Troxel* result in a situation in which third parties have a greater opportunity to petition for child custody, as opposed to visitation, in Minnesota. Respondents apparently ground their argument on the fact that Minn. Stat. §257C.03 Subd. 1(a) directs that "a defacto or third party child custody proceeding may be brought by an individual other than a parent by filing a petition..." Because §257C.03 Subd. 1(a) does not contain familial or relational restrictions similar limitation to §257C.08, Respondents appear to feel that third party custody rights are broader than third party visitation rights.

This argument ignores the fundamental nature of each proceeding, as well as the safeguards contained in Minn. Stat. §257C.03 Subd. 7. While any individual can apparently file a custody petition, the petition will be granted only if the petitioner is able to:

- (1) Show by clear and convincing evidence that one of the following factors exist:

- (i) The parent has abandoned, neglected or otherwise exhibited disregard for the child's wellbeing to the extent that the child will be harmed by living with the parent;
- (ii) Placement of the child with the individual takes priority over preserving the day to day parent child relationship because of the presence of physical or emotional danger to the child or both; or
- (iii) Other extraordinary circumstances.

As a result of these protections, a third party custody petition is likely to be granted only on rare occasions. In contrast, §257C.08 permits visitation between grandparents under a broader "best interests" standard. Although more limited in character, visitation between a grandparent and a grandchild is likely to be granted with greater frequency.

The outcomes are plainly not incongruous. It should also not be overlooked that, in this instance, Appellant did not oppose visitation between his daughter and her grandfather. He objected to a court directing that he grant independent visitation to Bailee's maternal aunt both because this was outside the parameters of the statute and because it added an element of impermissible judicial scrutiny to his parenting decisions.

Similarly, Respondents' suggestion they could have successfully filed a custody petition is mistaken. There is simply no evidence of the type of abuse or neglect necessary to alter Bailee's custody. Moreover, in other situations where there is abuse or neglect, it makes sense to allow a broader class of persons to intervene to protect a child. There is nothing absurd or irrational in the position taken by Appellant in this litigation or, the different outcomes which might be yielded by Appellant's position.

CONCLUSION

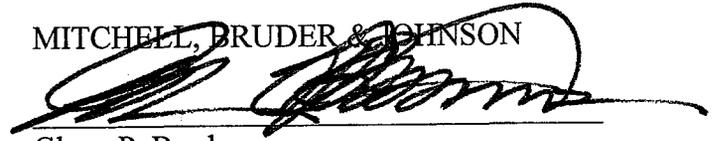
For the above stated reasons, Appellant continues to believe the District Court's decision

should be reversed.

Dated:

12/28/2010

MITCHELL, BRUDER & JOHNSON



Glenn P. Bruder

Attorney for Appellant

Attorney ID# 148878

5001 American Boulevard West

Suite 670

Bloomington, MN 55437

(952) 831-3174

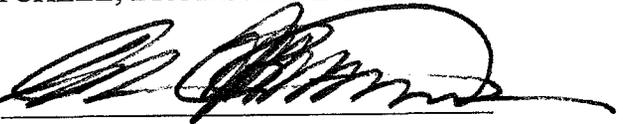
CERTIFICATION OF BRIEF LENGTH

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.

12/24/2020
Dated

MITCHELL, BRUDER AND JOHNSON

By: 

Glenn P. Bruder
Attorney for Appellant
Attorney ID#: 148878
5001 American Boulevard West
Suite 670
Bloomington, MN 55437
(952) 831-3174