

No. A10-1348

STATE OF MINNESOTA  
IN SUPREME COURT

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In Re the Matter of:

Kelli Rohmiller and Clayton Rohmiller

Petitioners

and

Andrew Hart,

Respondent,

and

Jennifer Joseph,

Guardian ad Litem.

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**RESPONDENT'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” or to persons with whom the “minor has resided...for two years or more...” can the statute reasonably be construed to confer visitation rights on third parties excluded from its parameters?

The trial court held: in the affirmative. The Court of Appeals held: in the negative.

- II. By finding that a maternal aunt, who had never acted *in loco parentis* with the minor child, had a common law right to visitation with her deceased sister’s child despite the objection of a fit custodial parent, did the trial court contravene Appellant’s due process rights?

The trial court held: in the negative. The Court of Appeals held: in the affirmative.

## STATEMENT OF FACTS

Petitioners seek review of a decision by the Minnesota Court of Appeals reversing a June 2010 District Court order granting Petitioner Kelli Rohmiller (“Kelli” or collectively “Petitioners”) visitation with Bailee Hart<sup>1</sup> independent from the visitation granted to Clayton Rohmiller (“Clayton” or collectively “Petitioners”). Clayton is Bailee’s maternal grandfather, and Kelli is his daughter, Bailee’s aunt. Bailee’s mother, Katie Rohmiller (“Katie”) met Andrew Hart<sup>2</sup> 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 Respondent was accused of maliciously punishing his daughter. It was alleged that Andrew 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; at the time, Katie and her daughter lived with Kelli in Bloomington (Tr. 56, Finding 16, A. 3). Approximately five weeks later, in

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<sup>1</sup> 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.

<sup>2</sup> Respondent Andrew Hart will be referred to in this brief, interchangeably, as “Respondent”, “Andrew” or “Hart”.

June 2005, Katie and Bailee returned to Le Mars to live with Clayton's sister, Laurie Lamb ("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 this timeframe, 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 Respondent of her death (Tr. 58)<sup>3</sup>. Instead, Katie's aunt, 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, Respondent 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 Respondent during the Iowa proceeding, he characterized this as a "Rohmiller family" plan, although the only family member named in the litigation was 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 Respondent'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).

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<sup>3</sup> Kelli testified 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 a petition in Dakota County to retain control over these funds (Tr. 96). The parties disputed Kelli's motivation. Respondent 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 never sought 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<sup>4</sup>, 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. Respondent stated that he did not oppose contact between Clayton and Bailee (Tr. 7, 142) but noted that, until filing this action, Clayton had never contacted Respondent to request visitation with Bailee (Tr. 35, 98). Andrew testified that even after filing the complaint, 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 (Tr. 149). Andrew argued that Kelli had no independent statutory

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<sup>4</sup> During the period of the contested Iowa custody proceeding initiated by Respondent's family member, Lamb.

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 of 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 Petitioners.<sup>5</sup> More importantly, the court awarded Kelli visitation with Bailee independent of her father (Order, Paragraph 5, A. 23). Many of the courts Findings were a one-sided barrage directed at Respondent. There were 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 District 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.

Respondent asked the Minnesota Court of Appeals to reverse the District Court's decision. He argued that the District Court lacked authority, under Minn. Stat. §257C.08 to extend visitation to a maternal aunt and that no common law right to visitation by the aunt, under these circumstances, existed in Minnesota law. Further, Respondent argued that extending visitation to Kelli flaunted the US Supreme Court's decision in *Troxel v. Granville*, 530 US 57 (2000). In an April 19, 2011 decision, the Court of Appeals agreed. It held that Minn. Stat.

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<sup>5</sup> For example, the Guardian ad Litem recommended visitation one weekend each month, following a gradual integration period. Petitioners 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).

§257C.08 did not include a specific grant of statutory authority for visitation by a maternal aunt under these circumstances. In reaching this decision, the District Court observed “a legitimate inference from the legislature’s specification of those whom visitation may be granted is visitation may not be granted to those not specified.” 799 N.W. 2d 612. Finding that Kelli was not included among any of the statutory classes authorized to seek visitation, the Court of Appeals concluded the trial court lacked statutory authority to afford her independent visitation rights with the minor child. The Court of Appeals also concluded that the District Court should not have altered Minnesota common law by extending a unique visitation right to Kelli.<sup>6</sup>

This court accepted review. Petitioners argue: (1) that Minn. Stat. §257C.08 permits the court to grant visitation to parties not included within the express language of the statute, and (2) more than 150 years of Minnesota common law should be set aside by extending, to a variety of third parties, the right to seek visitation with minor children, despite the wishes of the custodial parent. Implicitly conceding that such a right has never been recognized in Minnesota, Petitioners nonetheless suggest the court should do so in this instance to “keep up with changing family structures.” Within this framework, Petitioners either cavalierly disregard the rights of custodial parents, or treat this constitutional protection as an inconvenient annoyance.

### **STANDARD OF REVIEW**

Respondent contends the trial court incorrectly interpreted Minn. Stat. §257C.08 by extending visitation rights to a maternal aunt who is not among the class of persons specifically identified within the statute. Respondent also contends that the District Court, by extending independent visitation rights to Kelli Rohmiller, contravened Appellant’s due process rights. These two issues present questions of law, which are reviewed on a de novo basis in which this

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<sup>6</sup> However, the Court of Appeals affirmed the District Court’s decision to grant Clayton contact with Bailee which significantly exceeded the time Clayton spent with his granddaughter prior to Katie’s death.

court 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).

To the extent resolution of these issues present mixed questions of fact and law, the standard of review is somewhat different. In that context, the Minnesota Court of Appeals explained the requisite measure of scrutiny:

...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 fact and law, we correct erroneous applications where 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 to the District Court. *In Re Welfare of N.T.K.*, 619 N.W. 2d 209, 211 (Minn. App. 2000).

## ARGUMENT

### I. THE COURT OF APPEALS PROPERLY CONSTRUED MINN. STAT. §257C.08.

The scope of Minn. Stat. §257C.08 was a question presented to the Court of Appeals because the District Court was not particularly clear regarding its 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 relied on a Wisconsin case, *In Re Custody of D.M.M.*, 404 N.W. 2d 540 (Wis. 1987) to conclude that §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 reasoning encouraged the District Court judge to interpret the statute as allowing visitation to be independently exercised by Bailee’s aunt. In rejecting this analysis, the Court of Appeals concluded: (1) the Kelli failed to meet any of the explicit statutory requirements to voice a visitation claim, (2) that the Wisconsin case relied upon by Petitioners was unhelpful, and (3) that the legislature did not intend to grant visitation rights, under §257C.08, to persons not specifically included within the statutory language. In each instance, the Court of Appeals’ analysis was correct.

**A. Respondent Kelli Rohmiller is not among the class of persons conferred visitation rights by the express language of Minn. Stat. §257C.08.**

At the outset, there should be little question that Kelli Rohmiller is not among the classes of persons granted visitation rights by §257C.08. Minn. Stat. §257C.08 Subd. 1 declares:

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 interest of the child and would not interfere with the parent-child relationship.

(Emphasis supplied). This provision plainly includes Clayton. It does not include any party other than a parent or grandparent. Similarly, Minn. Stat. §257C.08 Subd. 2 and 3 give grandparents or great grandparents the right to seek visitation orders under specifically delineated circumstances. These provisions are narrowly tailored, and do not include any other classes.

The only portion of Minn. Stat. §257C.08 which addresses visitation with persons other than grandparents or great grandparents is Subd. 4. Minn. Stat. §257C.08 Subd. 4 states, in

relevant part: “*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...*” (emphasis supplied). In this case, Kelli estimated that she saw her niece roughly twice each month from Bailee’s birth until August 2005 (Tr. 50, 90). For approximately five weeks, in spring 2005, Katie and Kelli shared an apartment in Bloomington, Minnesota with Bailee (Tr. 56, Finding 16, A.3). The Court of Appeals correctly observed that Kelli did not meet any of the statutory criteria specified in Minn. Stat. §257C.08 Subd. 4.

**B. Minn. Stat. §257C.08 has never been interpreted to include third parties not specifically identified in the statute.**

Despite the absence of any statutory language including a maternal aunt who never lived with minor child, Petitioners continue to argue that Minn. Stat. §257C.08 should be broadly interpreted to confer visitation rights upon her. Initially, Kelli convinced the trial court judge to rely on two decisions, *State ex rel Maxwell and Burris v. Hiller*, and a Wisconsin case, *In Re Custody of D.M.M*<sup>7</sup> in support of the proposition that aunts and uncles have a historically recognized special and unique status. The Court of Appeals found this authority uninspiring. It observed that the petitioning aunt in *D.M.M.* had physical custody of the minor child for more than six years and, unlike Kelli, would have met the statutory requirements of Minn. Stat. §257C.08 Subd. 4 if she had been a Minnesota resident (A.58), 799 N.W. 2d at 616. The court found the *Hiller* case equally unpersuasive because it simply enforced a stipulation between the parties and was “distinguishable on several grounds” (A. 60), 799 N.W. 2d at 618. Apparently, Petitioners found the Court of Appeals analysis persuasive, since this claim is not repeated in its brief before this court, and Petitioners brief cites neither *D.M.M* or *Hiller*.

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<sup>7</sup> *State ex rel Maxwell and Burris v. Hiller*, 298 Minn. 491, 104 N.W. 2d 851 (1961), *In Re Custody of D.M.M.*, 401 N.W. 2d 530 (Wis. 1987).

Moreover, this court has already addressed this issue and construed the persons protected by Minn. Stat. §257C.08 to explicitly exclude Kelli. This court explained:

...§257C.08 Subd. 4 limits the class of individuals who may petition for visitation to those persons who have resided with the child for two years or more (excluding foster parents). In addition to that threshold requirement, the statute further narrows the class of those who may be awarded visitation to petitioners who have ‘established emotional ties creating a parent and child relationship’. Minn. Stat. §257C.08 Subd. 4(2). We read this requirement as mandating that the petitioner stand in loco parentis with the child.

*SooHoo v. Johnson*, 731 N.W. 2d 815, 822 (Minn. 2007). The Supreme Court further stated this status, as person acting *in loco parentis*, was limited 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.

Id. at 822, quoting *London Guar. and Accident Co. v Smith*, 242 Minn. 211, 64 N.W. 2d 781, 784 (1954).

**C. The Court of Appeals applied appropriate principles of statutory construction to determine that Minn. Stat. §257C.08 did not include Kelli Rohmiller.**

Abandoning their claim that Kelli should be included within the statutory framework solely because she was Bailee’s aunt, Petitioners now argue §257C.08 is ambiguous (Petitioner’s Brief, p. 4) and the Court of Appeals’ analysis led to “an absurd result” (Petitioner’s Brief, p. 7). This argument is both misguided and ignores the historic antecedents of the statute.

Traditionally, 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 raising 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*, 334 N.W. 2d 547, 549 (Minn. 1995). Accordingly, the third party visitation statute altered Minnesota common law and created a new statutory right for grandparents and persons sharing a common residency with minor children.

Not surprisingly, when called upon to extend visitation to third parties, other than grandparents, Minnesota courts have read §257C.08 in a restrictive manner. See *SooHoo v Johnson*, 731 N.W. 2d at 822. Prior appellate decisions have very narrowly interpreted §257C.08 Subd. 4 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.

Here, the Court of Appeals continued this tradition. The Court of Appeals held:

Minn. Stat. §257C.08 does not specifically provide for granting visitation to a sibling of deceased parents unless the child resided with the sibling for at least two years. See *Minn. Stat. §257C.08 Subd. 4*. ‘If the legislature fails to address a particular topic, our rules of construction forbid adding words or meaning to a statute that are purposely omitted or inadvertently overlooked’ *Premier Bank v. Becker Dev. LLC*, 785 N.W. 2d 753, 760 (Minn. 2010).

Moreover, a legitimate inference from the legislature’s specification of those to whom visitation may be granted is that visitation may not be granted to those not specified. Minnesota courts have relied on the canon of statutory construction ‘*expressio unius est exclusio alteris*’ meaning the expression of one thing is the exclusion of another (citation omitted).

(A.58), 799 N.W. 2d at 615-616. This approach displayed fidelity to the rule of statutory construction set forth in Minn. Stat. §645.16 which specifically directed:

When the words of a law and 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.

Both the language of this statute and its application are manifestly clear. The legislature intended to confer statutory visitation rights on a distinct group of individuals—grandparents and great grandparents or certain persons acting *in loco parentis* for a specified period of time. If the legislature wished to include others in this framework, it could have done so.

Petitioner’s initial reaction to this decision is to complain about this rule of statutory construction (Petitioner’s Brief, p. 5). Somewhat confusingly, Petitioners scorn the application of this doctrine by a Pennsylvania Appellate Court in a context that has little seeming relevance to this litigation (Petitioner’s Brief, p. 6). Petitioners eventually suggest, “surely the legislature in our state did not mean all other persons not named in the statute are excluded from maintaining contact with children in extraordinary cases? Kelli and Clayton believe the legislature did not deliberately exclude ‘step parents, step grandparents, step siblings and cousins’ or persons involved in heterosexual or homosexual cohabitation” (Petitioner’s Brief, pp. 6-7). Apparently Petitioners feel that the legislature could not have conceivably chosen to consciously exclude all of these classes from §257C.08, making the statute ambiguous and capable of judicial reformation to avoid what Petitioners perceive to be an “absurd result”.

The conceptual difficulties undermining Petitioner’s analysis are immense. First, it is far more rational to believe that the legislature was aware, when it first enacted the grandparent visitation statute, that it was altering longstanding principles of common law, and wished to act with caution. Consequently, the legislature included only narrowly tailored classes within the statute. Second, Petitioner’s stylistic criticism of the statute is misguided. It would be an unworkable and impossible burden for the legislature to specifically list all persons *not subject to*

the provisions of a statute. Instead, the drafters of §257C.08 sensibly chose to identify only those persons who benefit from the statute's protections. Third, Petitioner's argument invites courts, on an *ad hoc* basis, to interpret the statute according to each individual judge's whim and caprice, including, without any discernable guidance, those persons the magistrate thought the legislature either "meant" or "should have" included. This approach is inherently dangerous. It would invite individual judges to do whatever he or she felt to be "right" and create anarchy and wholesale unpredictability. Instead, the Court of Appeals interpreted the statute in a common sense fashion, consistent with longstanding judicial principles.

Minnesota's legislature, recognizing the inherent rights of parents to control their child's upbringing, chose to include only grandparents within the statute's purview. 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. Despite Petitioner's present claim that the statute is "ambiguous" the Court of Appeals at the time explicitly held that the "statute speaks with clarity in limiting its application to specifically innumerate its subjects [and] its application shall not be extended to other subjects by process of construction" 472 N.W. 2d 175, 182 (Minn. App. 1991) review denied; 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). This court took a similar approach in *SooHoo v Johnson*, 731 N.W. 2d at 822. This court should reaffirm that assessment.

## **II. EXTENDING NON STATUTORY VISITATION TO KELLI ROHMILLER WILL VIOLATE RESPONDENT'S DUE PROCESS RIGHTS.**

Petitioners argue that the Court of Appeals should not have overturned the trial court's decision to grant a maternal aunt visitation independent of the statutory visitation granted to the minor child's maternal grandfather. In support of this proposition, Petitioners turn to a variety of cases in which Minnesota or other jurisdictions granted non parents third parties visitation with

minor children. The decisions identified by Petitioners involve third parties acting *in loco parentis* and all were decided prior to the US Supreme Court's pivotal decision in *Troxel v. Granville*. Accordingly, the decisions cited by Petitioners do not bolster Kelli's position or support the dramatic change in common law urged by her counsel.

**A. Respondent did not contest grandparent visitation and Kelli Rohmiller remains free to visit her niece during these periods.**

At the outset, it might be useful to consider the precise nature of the dispute before this tribunal. As the Court of Appeals noted (A.57, 799 N.W. 2d at 615, Tr. 7, 142), Respondent never contested Clayton's right to press a statutory visitation claim or contended that awarding Clayton visitation with his granddaughter infringed on Respondent's constitutional rights.<sup>8</sup> The District Court ultimately decided to grant Clayton Rohmiller visitation with his granddaughter one weekend each month (A.57, 799 N.W. 2d at 615). Although Respondent felt this was unreasonable based on Clayton's prior involvement in Bailee's life, that issue is no longer before this court, and grandparent visitation will be unaltered regardless of the outcome of this proceeding.<sup>9</sup> Respondent objected to the provision of the District Court order which allowed Kelli to exercise this visitation independent of her father and made his presence unnecessary for visitation to occur. Respondent has never voiced an objection if Kelli—or any other member of the Rohmiller family—visits with his daughter during the periods when Clayton is exercising his grandparent visitation. He merely disputed conferring a unique visitation right on Kelli.

The longevity of this dispute is puzzling. If denied an independent visitation right by this court, Kelli will still be able to see her niece during the periods in which Clayton has visitation

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<sup>8</sup> It is unclear if the trial judge clearly absorbed Andrew's acknowledgement. In one instance, Judge Mayer found that Petitioner opposed visitation with the Rohmillers (Finding 36, A.6) only to find later that [Respondent] does not contest Clayton's right to have visitation (Finding 41, A.7).

<sup>9</sup> The Court of Appeals determined the visitation granted to Clayton Rohmiller was appropriate even though it substantially expanded the contact Clayton had with his granddaughter prior to Katie's death (A.57), 799 N.W. 2d at 615. This court declined to grant Respondent's cross petition to review this aspect of the Court of Appeals' decision.

with Bailee. Consequently, the issue for this court to decide is whether Petitioners have made a sufficient demonstration that granting Kelli visitation with her niece, independent of grandparent visitation, was factually warranted and constitutionally permissible.

**B. Parents have a constitutionally recognized due process right to oversee their children's upbringing free from unwarranted government interference.**

Nearly 40 years ago, Justice Douglas declared the US Supreme Court:

...has long recognized that freedom of personal choice in matters of...family life is one of the liberties protected by the due process clause of the Fourteenth Amendment.

*Cleveland Board of Education v. LaFluer*, 414 US 632, 639-640 (1973). This includes a parent's right to direct the upbringing of his or her children. *Washington v. Glucksberg*, 521 US 702, 720 (1997), see also *Meyer v. Nebraska*, 262 US 390, (1923); *Pierce v. Society of Sisters*, 268 US 510 (1925).

Intrinsic to these concepts is the notion, largely ignored by Petitioners, that parental decisions concerning their children must be respected. This was recognized by Justice Kennedy:

Choices about...family life and the upbringing of children are among associational rights this court has ranked as 'of basic importance in our society' (citation omitted) rights sheltered by the Fourteenth Amendment against the state's unwarranted usurpation, disregard, or disrespect.

*M.L.B v S.L.J.*, 519 US 102, 116 (1996). These pronouncements coalesced, in the area of third party visitation statutes, in *Troxel v. Granville*. In that case, the US Supreme Court confronted a Washington grandparent visitation statute. Initially, Justice O'Connor observed "recognition of an independent third party interest in a child can place a substantial burden on the traditional parent-child relationship." 530 US 57, 65 (2000). She added parents had a liberty interest in the care, custody and control of their children and deemed this "perhaps the oldest of the fundamental liberty interest recognized by this court." Id. at 65. Accordingly, the court needed to

provide “heightened protection against government interference with [this] fundamental right and liberty interest.” *Id.* at 65.

In *Troxel*, the court characterized Washington’s grandparent visitation statute as “breathtakingly broad” and felt that it violated these principles. The court did not make a blanket declaration that all grandparent visitation statutes were constitutionally infirm but, similarly, declined to endorse the concept of third party visitation in general. Instead, the court outlined certain principles to be followed by state courts. Initially, the court observed that third party visitation should be limited to unique and exceptional circumstances:

...so long as a parent adequately cares for his or her children (i.e. is fit) there will normally be no reason for the state to interject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.

*Id.* at 68-69. In addition, in the rare instance when a court chooses to intervene it must give “special weight” to the considerations of the custodial parent and employ “the traditional presumption that a fit parent will act in the best interest of his or her child.” *Id.* at 69-70.

The Supreme Court specifically 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 visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the superior court in the specific case required anything more.

*Id.* at 72-73.

Plainly, Petitioner’s dislike and disagree with these pronouncements. Respondent’s insistence that the due process rights explicitly guaranteed to him by *Troxel* be recognized are dismissively labeled “a mechanical test to deprive the child of her maternal family” (Petitioner’s Brief, p. 18). This illustration is, of course, laced with hyperbole. It also unmask Petitioner’s

underlying position that *Troxel*, and the historically rooted parental rights recognized by the US Supreme Court, are “illogical and just plain wrong” (Petitioner’s Brief, p. 18).

**C. Following *Troxel*, third party visitation awards must be limited and narrowly tailored to avoid trampling on a parent’s due process rights.**

Whatever a litigant’s personal feelings, pronouncements of the US Supreme Court cannot be disregarded by judicial tribunals as illogical or irrational. Following *Troxel*, state courts have been required to construe a variety of grandparent visitation statutes and non parent visitation awards in light of the principles articulated by the court. State tribunals adopted a variety of different tactics. Some state courts have engrafted constitutional safeguards into grandparent visitation statute in an effort to make them constitutionally acceptable. See *In Re Adoption of C.A., 137 P. 3d 118, 327 (Colo. 2006)*. Other states have noted the constitutional infirmities highlighted by *Troxel* and struck down existing grandparent visitation statutes. *Wurtts v. Iowa Dist. Court, Sioux County, 687 N.W. 2d 286, 296 (Iowa App. 2004)*. Other jurisdictions have not only struck down existing grandparent visitation statutes, but questioned whether the legislature can ever justify judicial awards of third party visitation in the face of parental objection. *Wickham v. Byrne, 199 Ill. 2d 309, 769 N.E. 2d 1 (2002)*<sup>10</sup>.

Minnesota began to address these concerns with this court’s opinion in *SooHoo v. Johnson, 731 N.W. 2d 815*. This decision essentially adopted a middle ground between the paths

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<sup>10</sup> In *Wickham*, the Illinois Supreme Court observed:

A fit parent’s constitutionally protected liberty interest to direct the care, custody and control of his or her children mandates that parents—not judges—should be the ones to decide with whom their children will and will not associate.

Later, citing *Wickham* Illinois courts held:

...state interference with fundamental parental child-rearing rights is justified only in limited instances to protect the health, safety and welfare of children...grandparent visitation does not involve a threat to the health, safety or welfare of children...therefore the state’s interference with fundamental parental child-rearing rights was not justified.

*In Re Marriage of Ross, 824 N.E. 2d 1108, 1115 (Ill. App. 5 Dist. 2005)*.

chosen in other jurisdictions. This court struck down a portion of Minn. Stat. §257C.08, while affirming the constitutional vitality of its remaining features. In *SooHoo v. Johnson*, this court also commented, more generally, on its understanding of the due process requirements set forth in *Troxel* for third party visitation awards:

In addition, the court 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 best interest analysis in support of its decision to override the fit parent's wishes.

*Id.* at 820-821. In *SooHoo v. Johnson*, this court addressed only visitation rights specifically conferred by §257C.08. It did not indicate, more broadly, whether third parties not encompassed in the statute had a right to seek visitation with minors, whether a visitation grant under those circumstances could be constitutionally permissible or, if so, whether these standards might apply in that context. Petitioners implicitly assume these criteria are applicable in this instance (Petitioner's Brief, pp. 9-10).

**D. If the guidelines outlined in *SooHoo v. Johnson* are applicable to non statutory visitation requests by third parties, the Court of Appeals properly determined the District Court exceeded its authority by awarding visitation to Kelli Rohmiller.**

In *SooHoo v. Johnson*, this court was addressing questions about the constitutional validity of a grandparent visitation statute which does not include Bailee's maternal aunt. It is unclear whether these principles, by extension, should be employed to determine whether a judicial officer can permissibly grant visitation to third parties not included within the statute's framework. However, even assuming that a maternal aunt may be granted visitation in the face of parental objection without infringing on Respondent's due process rights it is clear that the District Court's visitation award failed to honor the principles outlined in *SooHoo v. Johnson*. This defect was implicitly recognized by the Court of Appeals.

**1. The trial court failed to grant appropriate weight to Respondent's wishes.**

Although this court recognized, in *SooHoo v. Johnson*, that “some special weight” must be attached “to the fit custodial parent’s decision regarding visitation” it did not articulate, in detail, the characteristics entailed by this measure of deference.<sup>11</sup> Other jurisdictions have addressed this issue. One court explained:

...the court is to tip the scales in the parent’s favor by making that parent’s offer of visitation the starting point for the analysis and presuming it is to be in the child’s best interest. It is up to the party advocating for non parental visitation to rebut the presumption by presenting evidence that the offer is not in the child’s best interest.

*In Re Nicholas L.*, 2007 WI App. 37, 731 N.W. 2d 288,293 (Wis. App. 2007). Some courts have held this means giving the custodial parent’s wishes “greater weight” than any “other factors it considered.” *J.L.W. v E.O.J.*, 992 So. 2d 747, 733 (Ala. Civ. App. 2008).

The Court of Appeals recognized that the trial court failed in this respect and, instead, substituted its subjective estimation without due regard for Andrew’s preference. In this instance, Andrew agreed to grandparent visitation, but felt that Kelli’s contact with Bailee should be derivative of Clayton’s. Petitioners have never sought to articulate why limiting Kelli’s contact with Bailee to the periods when her father exercised his visitation rights is, in any fashion, inappropriate or harmful to the child. The focus of this dispute was the extent to which Clayton should have visitation and whether Kelli’s visitation should exist independently from her father’s. In essence, this converted the “visitation” question into a dispute between Kelli’s claim for independent visitation and Respondent’s denial of that demand. The District Court judge concluded that Kelli had a common law right to visit with her niece, and that Andrew’s objections should be discounted. The legal standard employed by the District Court in reaching

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<sup>11</sup> In *C.O. v Doe*, 2010 WL 4721531 (Minn. App. 2010) the Court of Appeals held that placing the burden of proof on a party seeking contact with a minor child under Minn. Stat. §259.58 gave the custodial parent’s wishes special weight as required by *SooHoo/Troxel* but did not further elaborate on this point.

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 for his reasoning, 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 trial court also paid scant attention to Respondent's concerns as a custodial parent. Rather than giving deference to Andrew's wishes, the trial court chose to either ignore or scorn them in its decision. For example, Respondent 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 the issue based on the record before the trial court. 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 Kelli recounted:

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). Later, Kelli's aunt reconsidered and sought to keep custody of Bailee.

This apparently led to an estrangement between Kelli and her aunt, Lamb, which was noted in the Iowa custody decision awarding Bailee's custody to her father. Further, while the Iowa court did, indeed, make a number of positive endorsements of Kelli, it 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 willing, but 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 Respondent 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 that she did not wish to adversely affect Andrew's relationship with his daughter.<sup>12</sup>

Moreover, Andrew also expressed concern about Clayton's alcohol use during the time he had custody of Bailee. Andrew asked merely that Clayton be ordered to abstain from using alcohol while Bailee was in his care. The court declined to impose this condition, and did not even mention the topic 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 "12" (Tr. 48). Respondent testified that he "definitely [didn't] think alcohol was something that should be around Bailee ever" (Tr. 147). When asked why he objected to Rohmiller family members drinking in Bailee's presence, Respondent testified that 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 would regard these worries as well founded. However, in blatant disregard for the custodial parent's

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<sup>12</sup> 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 custodial parent's rights, or to undermine the parent-child relationship. It is, at least, questionable whether this simple declaration, without more, satisfies the measure of proof on this issue required by *Schneider v State, Hennepin County Department of Human Services*, 2008 WL 2966985 (Minn. App. 2008).

wishes, the trial court felt this reservation was so insignificant, that it did not even deserve mention in its decision.

**2. It is unclear what presumption or burden of proof was employed by the trial court.**

In *SooHoo v. Johnson*, this court also warned that “there can be no presumption in favor of awarding visitation.” The court added that not only must there be a presumption against overriding the parent’s wishes but that “the standard of proof must be clear and convincing evidence.” 731 N.W. 2d at 823. The District Court’s decision fails to indicate what standard of proof was employed by the trial court. The phrase “clear and convincing evidence” never appears in Judge Mayer’s order. Similarly, it is unclear whether the Judge employed a presumption in favor of the father’s wishes or simply began with a “clean slate”.

Petitioners allege that the Court of Appeals effectively substituted its judgment for the trial court by observing that Bailee was “thriving with Appellant” (Petitioner’s Brief, pp. 15-16). In reality, this portion of the Court of Appeals opinion simply recited un rebutted information in the trial record which was omitted or overlooked in the District Court’s decision.<sup>13</sup> The District Court’s decision is unclear concerning the burden of proof the district judge placed on Kelli, the precise criteria which was used to determine how *independent* contact between Bailee and her

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<sup>13</sup> This also included the following comment in a forensic psychological examination of Respondent requested by the Guardian ad Litem. The examiner’s report concluded:

I am thoroughly impressed with [Respondent] as a man who has engaged in very thoughtful, intensive, self examination. He is an intelligent man and he was truthful and not defensive about his history of physically abusing his child...[H]e was direct about what his personal flaws were and how he has been able to rectify them with anger management therapy. I believe he is sincere in this transformation and he has become a dedicated child-centered parent...[T]here is no risk whatsoever [as] to his psychological abilities to continue to be competent and caring father.

(A. 56), 799 N.W. 2d at 614. This also rebuts Petitioners’ repeated factually and legally unsupported references to Respondent as an “unfit” parent, apparently solely because he disagreed with Kelli’s right to have independent visitation with his daughter.

aunt was in the minor child's best interest or how the absence of independent visitation endangered her.

It seems evident that the trial judge placed little, if any, burden on Kelli to overcome Andrew's wishes as Bailee's custodial parent. Judge Meyer seemed to deliberately discount any evidence demonstrating Bailee's resilience. For example, despite the fact that Bailee lived with her father for three years and, by all measures, had flourished under his guidance, Judge Meyer 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 even seemed to disparage the earlier custody 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 a visceral dislike for Andrew. Much of the trial court's decision seems 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 was 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 disdain for Respondent's attitude. This is amply illustrated by the trial court judge's selective and, ultimately misleading, references to the Iowa custody decision. Although the District Court judge repeated comments in the Iowa decree criticizing Respondent's attitude, he neglected to include statements critical of the Rohmiller family, or suggesting that Kelli might have difficulty 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 court judge noted Andrew's resentment of the court's involvement in his life, the Iowa custody decision 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). Disturbingly, while the trial judge showed little hesitancy in selectively reciting portions of the Iowa custody decree critical to Petitioner, he somehow overlooked this positive information which might have both given credence to Respondent's concerns regarding visitation with Kelli, and added the Appellate Court's ability to ascertain whether Kelli had presented clear and convincing evidence in support of independent visitation.<sup>14</sup>

**3. The Court of Appeals realized that it was unclear whether the trial court had employed anything more than a simple "best interests" analysis before deciding to grant Kelli Rohmiller independent visitation rights.**

The third constitutional mandate identified in *SooHoo v. Johnson* was that the trial 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 821. The Court of Appeals seemed concerned that the District Court had used nothing more than this evaluative tool when deciding to grant Kelli independent visitation with Bailee (A.59). 799 N.W. 2d at 617. This court did not specifically define what is meant by "more than a mere best interest analysis..." Courts in other jurisdictions have used a variety of approaches. Some have felt, much like the special weight to be given a custodial

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<sup>14</sup> Other courts have also required parents justify visitation by clear and convincing evidence as a means of affording the objective parent "heightened protection in the visitation rights context." *Levitt v. Levitt*, 142 Idaho 664, 132 P. 3d 421, 427 (Idaho 2006).

parent, this standard is to designed prevent judges from substituting their judgment for the parents and looking for a “better solution”. *Lubinski v. Lubinski*, 2008 WI. App. 151, 761 N.W. 2d 676, 681 (Wis. App. 2008). Other courts have construed this to require proof the child will suffer emotional damage in the absence of visitation. *Moriarty v Bradt*, 177 N.J. 84, A. 2d 203 (2003), cert. denied, 540 U.S. 1177, *Mizrahi v Cannon*, 375 N.J. Super. 221, 867 A. 2d 490, 497 (N.J. Super A.D. 2005).<sup>15</sup>

Using either standard, the trial court’s decision in this case was flawed. The court made findings the child “may” be emotionally traumatized if denied contact with her maternal family. This finding was entirely conjectural and without medical or physical support. It was also belied by the undisputed testimony that Bailee was succeeding academically and personally in her father’s home. More importantly, this finding also presumed a non existent choice. The District Court’s reasoning in this area seemed predicated on the assumption that if Kelli were forced to share time with Clayton during his visitation period, this would result in a complete severing of Bailee’s relationship with her maternal family (Conclusion 13, A.19-20). The option was not between granting Kelli independent visitation and prohibiting contact with the Rohmiller clan. It was between granting Kelli independent contact with Bailee or mandating she see Bailee together with the minor child’s grandfather and other family members. The District Court made no effort to show that denying this independent privilege to Kelli was either harmful to Bailee or against her best interest.

**4. The District Court’s decision could not survive the strict scrutiny required by *SooHoo v. Johnson*.**

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<sup>15</sup> In *Moriarty*, the New Jersey Supreme Court stressed “a dispute between a fit custodial parent and [a third party] is not a contest between equals...” and held that a third party seeking visitation with a minor child must demonstrate the visitation sought “is necessary to avoid harm to the child...” 827 A. 2d 203.

Moreover, in *Soohee v. Johnson*, this court made it clear that the appropriate standard for reviewing third party visitation awards is strict scrutiny. 731, N.W. 2d at 821. This is the “standard of review when fundamental rights are at issue and...a parent’s right to make decisions concerning the care, custody and control of his or her children is a protected fundamental right.”

The court then added:

In order to survive strict scrutiny, a law must advance a compelling state interest and must be narrowly tailored to further that interest.

Id. at 821. See also, *Kahn v. Griffin*, 701 N.W. 2d 815, 831 (Minn. 2005). This test creates two problems which Petitioners cannot overcome. First, Petitioners cannot identify any compelling state interest which requires granting maternal aunts, who have never acted in loco parentis, visitation with minor children independent of that enjoyed by the child’s grandparents. Second, to the extent the state has a compelling interest in encouraging a relationship with the maternal family, that can as easily be accomplished by requiring Kelli to exercise her visitation during the periods when Bailee is with her grandfather. In the absence of some type of estrangement or proof that Kelli will not be able to see Bailee when her father is employing his visitation, this order is overly broad and directly invades Respondent’s protected interest in controlling his daughter’s upbringing. This young girl should not have been treated as a pie to be sliced up among her mother’s surviving family.

**E. Since *Troxel*, no court has awarded a non grandparent third party, who did not act in loco parentis, visitation with a minor child when doing so will override the custodial parent’s wishes.**

Virtually every judicial decision, in Minnesota or elsewhere, granting third party visitation after *Troxel* involved requests by grandparents or third parties who, at one time, acted in loco parentis. To the extent Minnesota has recognized a common law right to visitation with

minor children, it has limited that right to individuals or step parents standing *in loco parentis*. *Kulla v McNulty* 472 N.W. 2d at 182, *Simmons v Simmons* 487 N.W. 2d 781, 791 (Minn. App. 1992). Any other visitation claim between third parties and minor children has been deemed exclusively statutory in character. *Kulla v McNulty*. Id. at 182.

The decisions from other jurisdictions cited in Petitioner's Brief do not support the proposition that this court can permissibly extend visitation rights to third parties whenever it wishes to do so. These decisions, appearing at pages 14-15 of Petitioner's Brief were either decided before the US Supreme Court issued its opinion in *Troxel*<sup>16</sup> or involve situations in which the petitioning party acted *in loco parentis*.<sup>17</sup>

Petitioners argue, at some length, that evolving family relationships require the court to exercise equitable power to grant visitation rights to third parties not specifically enumerated in §257C.08. Respondent does not question that Minnesota courts retain equitable power after *Troxel*. However, courts cannot use that equitable power in a manner that tramples upon the due process rights of custodial parents. Petitioners may feel that this court should expand common law visitation rights in a way which benefits many different classes of persons having some connection to a minor child under the theory that it takes a village to raise a child and there will be some ethereal benefit from doing so.

However, *Troxel* stands firmly for the proposition that neither a legislature nor a court can accomplish this result by emasculating a parent's time honored right to direct a child's upbringing. This tension has been recognized in other jurisdictions. For example, in *Ramsey v*

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<sup>16</sup> *V.C. v M.J.B.*, 163 N.J. 200, 748 A. 2d 539 cert. denied, 531 US 926 and *Youmans v Ramos* both involved petitioners acting *in loco parentis*.

<sup>17</sup> *In Re the Matter of the Adoption of Francisco A. v Vest v State of New Mexico ex rel* 116 N.M. 708, 866 P. 2d 1176 (N.M. App. 1993), *Holtzmann v. Knott*, 193 Wis. 2d 649, 533 N.W. 2d 419 (1995), *Youmans v Ramos*, 429 Mass. 774, 711 N.E. 2d 165 (Mass. 1999), and *V.C. v M.J.B.*, 163 N.J. 200, 748 A. 2d 539 (N.J. 2000), cert. denied 531 U.S. 926, were all decided before *Troxel*.

*Ramsey*, 863 N.E. 2d 1232, 1237 (Ind. App. 2007) an Indiana Appellate court found that third parties, including grandparents do not possess a constitutional liberty interest in visiting with minor children but “on the other hand, parents do have a constitutionally recognized fundamental right to control the upbringing, education and religious training of their children.”

Petitioners have failed to identify a single decision—in Minnesota or elsewhere—in which a court has extended third party visitation rights to family members under circumstances ever remotely analogous to this litigation. The constitutional danger posed from such an expansion was explained by one court as follows:

Obviously a child will hold in high esteem any person who looks after him/her, attends to his/her needs and lavished his/her with love, attention and affection. However, simply caring for a child is not enough to bestow upon a caregiver psychological parent status. Were this the law of the state, any person, from daycare providers and babysitters to school teachers and family friends, who cares for a child on a regular basis with whom the child has developed a relationship of trust, could claim to be the child’s psychological parent, seek an award of the child’s custody...

*Visitation and Custody of Senturi and S.B.*, 221 W. Va. 159, 652 S.E. 2d 490, 499 (W. Va. 2007).

Similarly, if this court were to extend visitation to a maternal aunt, whose father already enjoys visitation rights with the minor child, it would create a hornet’s nest of claims and open the doors of Minnesota courts to every third party claiming a position of trust and affection with a minor child. Doing so would also flaunt the clear and inescapable directives of the US Supreme Court in *Troxel*.<sup>18</sup>

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<sup>18</sup> Petitioners also contend the Court of Appeals’ interpretation of §257C.08 coupled with its refusal to envision a common law right to Kelli creates a situation where it is “easier to obtain third party custody than third party visitation.” (Petitioner’s Brief, p. 16). This is, once again, inflammatory hyperbole. Although Petitioners do not clearly articulate the basis for this argument, it appears Petitioners contend that the constitutional rights conferred 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. Petitioners apparently ground their argument on the fact that Minn. Stat. §257C.03 Subd. 1 (a) directs that “a defacto or third party 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 to §257C.08, Petitioners 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.

## CONCLUSION

Petitioner's Brief is a paean for blatant judicial activism. Feeling the Minnesota legislature has "not kept up" with changing social structures, Petitioners invite this court to judicially legislate a different outcome. This invitation, for individual judges to substitute their judgment for this state's legislature, cannot be accepted. This philosophical approach is particularly ill advised when doing so will require this court to disregard a clear countervailing directive from the highest judicial tribunal in this country, while simultaneously casting aside quintessential American notions of limited government and judicial non interference in parental decision making.

This is not a case about evolving societal norms or newly recognized familial relationships. Although Petitioners raise controversial social topics such as statutory recognition of gay marriage or children being raised by same sex couples, this case is far removed from the arena of homosexual rights or civil liberties. This case involves an important but more prosaic issue. Should this court spurn *Troxel v Granville*, turn away from its own holding in *SooHoo v Johnson* and become the first state in the nation to recognize third party visitation claims by non grandparents or persons not acting *in loco parentis*? Interestingly, if the court denies Petitioner's demand, it will likely have no effect on Bailee's relationship with her aunt, since Kelli may

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§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.

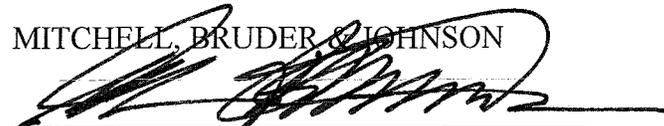
As a result of these protections, a third party custody petition is likely to be granted only on rare occasions.

continue to exercise visitation with Bailee during the maternal grandfather's custody period.

Consequently, the longevity of this case is perplexing. This court should seize the opportunity to end it by affirming the validity of *Troxel* in this jurisdiction.

Dated: 8/8/2011

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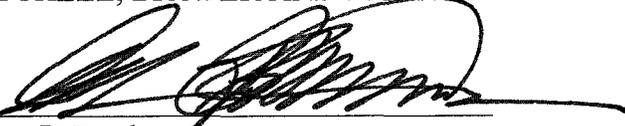
### CERTIFICATION OF BRIEF LENGTH

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.

Dated

8/8/2024

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