

NO. A05-0537

State of Minnesota
In Supreme Court

In Re the Matter of:

Marilyn Johnson,

Appellant,

vs.

Nancy SooHoo,

Respondent.

APPELLANT'S BRIEF

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STATEMENT OF THE LEGAL ISSUES

1. Whether the trial court abused its discretion by failing to find that Minn. Stat. § 257C.08 was unconstitutional as applied.

The trial court ruled that awarding Respondent court ordered visitation was not a violation of Appellant's right to due process. Apposite Authority: Minn. Stat. § 257C.08; Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000); Kayachith v. Athakhanh, 683 N.W.2d 325 (Minn. Ct. App. 2004).

2. Whether the trial court abused its discretion by failing to find that Minn. Stat. § 257C.08 was unconstitutional as written.

The trial court ruled in the negative. Apposite Authority: Minn. Stat. § 257C.08; Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000); Kayachith v. Athakhanh, 683 N.W.2d 325 (Minn. Ct. App. 2004)

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

The trial court ruled that the visitation schedule was reasonable visitation within the meaning of Minn. Stat. § 257C.08 subd. 4. Apposite Authority: Minn. Stat. § 257C.08 subd. 4, In re the Matter of Welfare of R.A.N., 435 N.W.2d 71, 73 (Minn. Ct. App. 1989). Kulla v. McNulty, 472 N.W.2d 175, 181 (Minn. Ct. App.1991), *review denied* (Minn. Aug. 29, 1991).

4. Whether the trial court abused its discretion by ordering visitation without holding an evidentiary hearing of any kind on the issue of visitation and without holding a hearing after extensive evidence had been submitted concerning the numerous instances of interference by Respondent with Appellant's relationship with her children.

The trial court ruled in the negative. Apposite Authority: Minn. Stat. § 257C.08.

5. Whether the trial court lacked jurisdiction to order Appellant to attend counseling and Appellant's children to attend therapy with Respondent.

The trial court ruled that it had jurisdiction to order therapy. Apposite Authority: Minn. Stat. § 257C.08; Minn. Stat. § 518.131; Minn. Stat. § 518.176.

STATEMENT OF THE CASE AND FACTS

Marilyn Johnson (Appellant) is the adoptive parent of two children from China. Appellant adopted her daughter, Erin Johnson (born May 8, 1996, 8 years of age), on September 24, 1997. Appellant adopted her second daughter, Jaime (born June 6, 2000, 4 years of age), on May 15, 2001. Appellant's Appendix 1-2, hereinafter "AA." Nancy SooHoo (Respondent) was Appellant's partner until September 15, 2003, when she was barred from the family home by Court Order because she committed domestic abuse against Appellant. AA-15. Respondent has not adopted either of Appellant's daughters, nor has Appellant asked Respondent to become an adoptive parent to her children due to her concerns regarding Respondent's mental health and physical abuse. Transcript of hearings held March 12, 2004, p. 229. There was no dispute that adoption was an available option in Hennepin County in this situation had Appellant chosen it. Because Appellant is a fit parent and because extensive visitation has facilitated Respondent's interference with her relationship with her children, Appellant believes that no court ordered visitation is appropriate.

On October 8, 2003, Respondent filed for sole legal and sole physical custody of Appellant's children and to have Appellant pay her child support. AA-20. On December 19, 2003, Respondent amended her petition to include a request for visitation under the provisions of Minn. Stat. § 257C.08, subd. 4. AA-26. Appellant answered Respondent's amended petition for custody and visitation on January 21, 2004, by asking the Court to deny Respondent's request for custody, visitation and child support and seeking attorney's fees. AA-32.

On February 26, 2004, the Court heard testimony from the parties and their respective witnesses on the specific issue of whether Respondent had the requisite standing to pursue custody as an “interested third party” and whether she had proved by clear and convincing evidence that extraordinary circumstances of a grave and weighty nature exist so as to overcome the parental presumption. The trial court made it very clear that it was not going to hear testimony related to any best interest analysis by stating that: “[A]ny section 257C.04 best interests inquiry will be deferred until after any HCFCS evaluation.” AA-36. The Court held that such an inquiry would be premature before Respondent had met her burden under Minn. Stat. § 257C.03, subd. 7.

The hearings were “not designed to yield a qualitative decision regarding whether [Respondent] should enjoy custodial rights – only whether extraordinary circumstances dictate that she be given an opportunity to pursue such rights.” AA-46. Therefore, at the conclusion of the hearings held in February and March 2004, the trial court had only heard testimony related to whether Respondent had established extraordinary circumstances sufficient to advance the proceeding to a custody evaluation. The hearings held on February 26, 2004 and March 12 and 15, 2004 were not related to what, if any, visitation schedule would be appropriate for Respondent in the event that she was not awarded sole physical custody of Appellant’s children. Id.

After hearing the testimony presented by the parties, the Court held that Respondent had not necessarily met her burden of proving that extraordinary circumstances exist so as to remove custody from Appellant, but instead that Respondent had merely met her limited burden of proving extraordinary circumstances to support the

fact that she had standing to pursue her right to custody. Id. The trial court then ordered a custody evaluation to be conducted by Hennepin County Family Court Services (HCFCS). AA-47-63. After completion of the custody evaluation the Court was to make a determination as to whether Respondent had proved by clear and convincing evidence that extraordinary circumstances existed such that it would be in the best interest of the children that Appellant should be deprived of custody. AA-46.

On February 27, 2005, after one day of testimony, the trial court established a visitation schedule in which Respondent was awarded every Tuesday and Thursday from 5:00 p.m. to 7:00 p.m, every other weekend from 5:00 p.m. on Friday to 5:00 p.m. on Sunday and two non-consecutive weeks of extended summer access, provided that Respondent give Appellant 30 days advance written notice of the chosen weeks. AA-64-68.

As of the trial court's Order dated March 22, 2004, all testimony and other evidence considered by the trial court was focused on whether Respondent could establish extraordinary circumstances within the meaning of Minn. Stat. § 257C.03 subd. 7. AA-44. The custody evaluation conducted by HCFCS was also focused on whether Respondent should be awarded custody of Appellant's children and was not directed at determining what, if any, court ordered visitation would constitute reasonable visitation. Transcript of Hearing held October 25, 2005, p. 153-154. The HCFCS evaluation did not conduct an analysis under Minn. Stat. § 257C.08, because the trial court had given Respondent standing as an equal parent. Id.

On September 7, 2004, Appellant moved to dismiss Respondent's custody and

visitation petition on the grounds that (1) Minn. Stat. § 257C.03 and Minn. Stat. § 257C.08 were unconstitutional as written and as applied; (2) Respondent had not established by clear and convincing evidence that extraordinary circumstances exist within the meaning of Minnesota Statute § 257C.03, subd. 7(a)(1)(iii); and (3) because she had not met her burden to establish extraordinary circumstances, Respondent was not an interested third party within the meaning of Minn. Stat. § 257C.03, subd. 3. AA-69-71. In support of her motion to dismiss, Appellant provided an affidavit wherein she described the manner in which the extensive visitation awarded to Respondent was interfering with her relationship with her children. AA-72-77. The instances of interference ranged from exposing her children to unwanted media attention to attempting to take her children out of state without Appellant's permission. Id.

On September 22, 2004, and October 25, 2004, hearings were held to allow the parties to cross-examine Greg Kowalski, the HCFCFS custody and parenting time evaluator. No other witnesses were allowed. AA-78. The purpose of the hearing was to encourage the parties to settle the existing custody and parenting time disputes. AA-82.

After cross-examination of Mr. Kowalski on September 22, 2004, the trial court issued a memorandum in an attempt to clarify Respondent's burden in her motion to obtain custody of Appellant's children. AA-107-112. The trial court made it clear that Respondent was not a parent and that she occupied mere *in loco parentis* status. Therefore, according to the trial court, as of the hearings held on September 22, 2004, Respondent was not a parent on equal footing with Appellant. AA-108.

On November 19, 2004, the trial court found that Appellant was a fit custodial parent and dismissed the custody portion of Respondent's petition based on her failure to establish extraordinary circumstances of a grave and weighty nature as required by Minn. Stat. § 257C.03. The trial court then ordered the parties to submit their visitation proposals in writing. AA-80. On November 15, 2004, Appellant provided additional examples of how the extensive visitation awarded to Respondent was interfering with her relationship with her children. The additional instances of interference ranged from Respondent introducing herself as the children's mother in front of the children to forcing Appellant to sacrifice the children's time with their extended family to negatively impacting their religious upbringing because of the extensive amount of time awarded to Respondent. AA-113-120.

On December 8, 2004 Appellant submitted her visitation proposal in which she summarized twenty-four instances of interference. AA-125-128. On January 14, 2005 Appellant petitioned the trial court to allow her to supplement her pleadings under Minnesota Rule of Civil Procedure 15.04. In support of her request to supplement her pleadings, Appellant provided further instances of interference. These instances of interference involved failing to adhere to Appellant's instructions for the children's medical care while they had visitation with Respondent over New Year's to berating the children for confiding their health concerns to Appellant. AA-131-138. Appellant's visitation proposal was one weekend day per month with the possibility for overnights at Appellant's discretion. AA-129.

In the Order dated February 1, 2005 (hereinafter "Visitation Order"), the trial court awarded Respondent an extensive visitation schedule. AA-145-174. The schedule granted Respondent access 37% of the time, and included alternating week-ends, two mid-week visits each week, alternating holidays (including Christmas and Mother's Day) and two one-week vacations each year. The schedule also inexplicably limited Appellant's vacation time with her own children to two weeks per year. The precise schedule is found at AA-146-149.

In addition to the visitation schedule, the trial court ordered Respondent to attend counseling to address her differential treatment of Jaime over Erin. AA-145-146. The trial court authorized the therapist of Respondent's choice to involve Appellant's children in the therapy. The trial court did not provide Appellant with any input into the therapy between Respondent and Appellant's children. AA-145-146. The trial court also ordered Appellant to attend counseling to address her concerns related to Respondent's visitation with her children. AA-149. On April 28, 2005, Appellant moved for a stay of the therapy and counseling portions of the Visitation Order as it related to Appellant and her children. AA-175-177. The trial court issued a stay on May 26, 2005. AA-203-207.

STANDARD OF REVIEW

Determinations and enforcement of visitation rights are questions of law. Simmons v. Simmons, 486 N.W.2d 788, 790 (Minn. Ct. App. 1992). The district court has broad discretion in determining visitation matters. Manthei v. Manthei, 268 N.W.2d 45, 45 (Minn. 1978). Appellate review of a visitation determination is limited to whether the district court abused its discretion by making findings unsupported by the evidence or

by improperly applying the law. Courey v. Courey, 524 N.W.2d 469, 471-72 (Minn. Ct. App. 1994). Finally, district court findings are sustained unless they are clearly erroneous. Id. In order for a finding to be clearly erroneous, the reviewing court must be left with a “definite and firm conviction that a mistake has been made.” J.W. v. C.M., 627 N.W.2d 687, 692 (Minn. Ct. App. 2001), citing Vangsness v. Vangsness, 607 N.W.2d 468, 472 (Minn. Ct. App. 2000). The reviewing court views the record in the light most favorable to the findings and defers to a district court’s credibility determinations. Id.

ARGUMENT

I. **MINNESOTA STATUTE § 257C.08 SUBD. 4 IS UNCONSTITUTIONAL AS APPLIED BECAUSE THE TRIAL COURT HAS FAILED TO IDENTIFY A COMPELLING STATE INTEREST AND FAILED TO NARROWLY TAILOR THE APPLICATION OF MINN. STAT. § 257C.08 TO THE ALLEGED COMPELLING STATE INTEREST.**

The Due Process Clause of the Fourteenth Amendment protects the fundamental right of a fit parent to make decisions concerning the care, custody and control of her children. Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000). A statute will be unconstitutional *as applied* to custody and visitation decisions if a trial court fails to give proper deference to a fit parent’s fundamental right and instead awards custody or visitation “based solely on the judge’s determination of the child’s best interest.” Troxel at 67. In addition, in Troxel, as in the case at bar, the trial court’s presumption in favor of visitation combined with its failure to give special weight to a fit parent’s right to the upbringing of her children were significant indications that the trial court’s application of the visitation statute impermissibly infringed on the parent’s right to due process. Id.

A. Appellant has a fundamental due process right to raise her children without governmental interference.

There is a recognized substantive due process right to freedom from governmental interference in childrearing decisions. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (striking down zoning ordinance prohibiting grandmother from raising two grandsons of different parentage); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (allowing Amish to withdraw children from public school after completing eighth grade); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (striking down law prohibiting teaching foreign languages to schoolchildren). There is also a recognized substantive due process right for parents to make determinations regarding with whom their child associates: “[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children.” Troxel at 66. “The strength of a parent’s interest in controlling a child’s associates is as obvious as the influence of personal associations on the development of the child’s social and moral character.” Troxel at 78. “Logically, a parent’s constitutional rights should include the right to exercise reasonable control over a minor child’s activities and associations.” In re Santoro, 578 N.W.2d 369, 374, (Minn. Ct. App. 1998) *rev’d on other grounds*, In re Santoro, 594 N.W.2d 174 (Minn. Jun 03, 1999). Therefore, if a parent is fit “there will normally be no reason for the state to inject 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.”

Troxel at 66. A state impermissibly infringes on a parent's right to make child rearing decisions without government interference when it fails to afford any significant weight or due deference to the determination by the fit parent of what is in her daughter's best interest.¹ Id.

The deprivation of fundamental rights is subject to strict scrutiny and may only be upheld if justified by a compelling state interest. Lachapelle v. Mitten, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000). The right to be free from governmental intrusion into child rearing decisions is not absolute and must be balanced against the state's interest as *parens patriae*. See e.g. Wisconsin v. Yoder, 406 U.S. 205,233-34 (1972). The state's application of its *parens patriae* authority must be narrowly tailored to the compelling state interest so as to avoid an unconstitutional infringement on a parent's fundamental right to raise her children without state interference. See e.g. Moore v. City of East Cleveland, 431 U.S. 494 (1977). The state bears the burden of proving that deprivation of a fundamental right is narrowly tailored to the compelling state interest. Carey v. Population Servs. Int'l, 431 U.S. 678, 688, 97 S.Ct. 2010, 2018, 52 L.Ed.2d 675 (1977).

B. The state does not have a compelling interest in second guessing a fit parent's decision regarding visitation with third parties.

Consistent with strict scrutiny, the state may invoke its power as *parens patriae* to protect children "if it appears that parental decisions will jeopardize the health or safety

¹ There are also concerns regarding Appellant's equal protection rights related to the fact that she is the lesbian parent of two adopted children. It is hard to imagine that an unmarried male with barely two years of time with the younger child who had been involved in an act of domestic violence would be afforded visitation equivalent to a non-custodial parent, as Respondent has been awarded.

of the child, or have a potential for significant social burdens.” Wisconsin v. Yoder, 406 U.S. at 233-34, 92 S.Ct. at 1542. *See, e.g., In re P.T.*, 657 N.W.2d 577 (Minn. Ct. App. 2003) (state has a compelling interest in protecting children from abuse); Lundman v. McKown, 530 N.W.2d 807, (Minn. Ct. App. 1995) citing to *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn.Ct.App.1983) (state has compelling interest in chemotherapy for child over parents' religious objections), *appeal denied* (Tenn. Sept. 29, 1983); Murphy v. Murphy, 574 N.W.2d 77 (Minn. Ct. App. 1998) (state has a compelling interest in assuring parents provide primary support for their children); Jehovah's Witnesses v. King County Hosp. Unit No. 1 (Harborview), 278 F.Supp. 488, 508 (W.D.Wash.1967) (overriding religious belief in matters of health by appointing guardians for children to provide medical care consent), *aff'd per curiam*, 390 U.S. 598, 88 S.Ct. 1260, 20 L.Ed.2d 158 (1968).

These cases illustrate that the state's authority to invoke its *parens patriae* authority is generally limited to those instances that may result in serious harm to the child's health or safety (child abuse) or result in significant social burden (child support). The state's interest in the case at bar is protecting the best interest of the children by providing reasonable visitation with Respondent. AA-156. Specifically, the trial court and the Court of Appeals stated that the trial court's application of Minn. Stat. § 257C.08 was not “breathhtakingly broad” as it “merely permits someone who has significantly nurtured and directed the destiny of a child to remain in that child's life via reasonable visitation.” SooHoo v. Johnson, WL851808, (Minn. Ct. App. 2006) (attached to Appellant's appendix AA-332 pursuant to Minn. Stat. § 480A.08(3)).

Not every state interest is a compelling state interest. Certainly no one would argue that the state has authority as *parens patriae* to decide each and every aspect of a child's life simply because it believes it may be able to make better decisions than the parent. Troxel at 73. The Troxel Court clarified that constitutional protections in a nonparental visitation context are best "elaborated with care." Id. In his concurring opinion, Justice Thomas indicated he could not find a legitimate governmental interest, to say nothing of a compelling state interest, in second guessing a fit parent's decision regarding visitation with third parties. Troxel at 80. The trial court makes multiple references to the fact that Appellant offered Respondent visitation. Therefore, the question is not whether the state has a compelling interest in protecting the best interest of the child by providing visitation pursuant to Minn. Stat. § 257C.08 , but whether there is a compelling state interest in second guessing the decisions of a fit custodial parent regarding visitation decisions with third parties.

The Troxel court specifically stated that it was not defining the precise scope of the parental due process rights within the visitation context. Troxel at 73. While Minnesota courts have also not addressed the issue of a parent's due process rights in the visitation context, they have dealt with the issue of whether the best interest of a child is a compelling state interest justifying a restriction on a parent's fundamental right to travel. LaChapelle v. Mitten, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000). LaChapelle is informative because one of the problems the trial court had to address was the fact that the biological mother had cut off regular visitation with the biological father. Therefore, the trial court's need to protect the child's interest in LaChapelle was founded on the fact

that the biological mother had not acted in the child's best interest by depriving her of a parent. In the case at bar there is no such finding.

Pursuant to Troxel and LaChapelle, before the trial court can insert itself into the realm of the family there must be some indication that the children's needs are not being met by the custodial parent. The trial court made no finding that Appellant's determinations regarding visitation were insufficient or that the needs of the children would not be met by Appellant. The trial court simply decided that Respondent should have more time than Appellant was offering and that it should be court-ordered visitation. Respondent will no doubt argue that the children's needs were not being met as evidenced by the fact that she did not see the children (except for one Christmas time visit) from the time she was barred from the home in October 2003 until the trial court established a temporary visitation schedule in its order dated February 27, 2004. However, Respondent's argument is illusory because Appellant testified that Respondent never sought time with the children until the hearings held in February and March 2004. AA-118. Respondent has never disputed this contention. Respondent cannot credibly assert that Appellant ever attempted to cut her off from the children. The trial court's multiple references to Appellant's offers of visitation further contradict any contention by Respondent to the contrary.

When the state interferes with a fundamental due process right the state must balance the interest against the state's need to intrude on that interest. R.S. v. State, 459 N.W.2d 680, 689 (Minn. 1990). In the case at bar the trial court made no finding that the state had a need to override Appellant's determinations regarding Respondent's

visitation. While the state may have a compelling interest in protecting children, it does not have a compelling interest in second guessing the determinations of a fit parent as to what is in the best interest of her children.

C. The trial court's application of Minn. Stat. § 257C.08 was not narrowly tailored to a compelling state interest because no deference was given to the fit custodial parent's offer of meaningful visitation.

If it is determined that there was a compelling state interest, then the inquiry turns to whether the trial court's application of Minn. Stat. § 257C.08 has been narrowly tailored to the compelling state interest. Carey at 688. A combination of three factors led the United States Supreme Court to rule the Washington Statute unconstitutional as applied. First, there was no allegation nor was there any finding that the custodial parent was an unfit parent. Troxel at 68. Second, when the Washington Superior Court applied the statute, it gave no deference or special weight to the custodial mother's fundamental decision-making right concerning her children. Third and finally, there was no attempt by the custodial parent to cut off visitation from the grandparents who were seeking visitation. The custodial parent only sought to limit the amount of visitation. Taken together these factors "compel the conclusion that [the Washington Statute], as applied, exceeded the bounds of the due process clause." Troxel at 68. Using the same analysis here leads to the inevitable conclusion that Minnesota Statute § 257C.08 *as applied* is an unconstitutional infringement on Appellant's fundamental right as a parent to make decisions concerning the care, custody and control of her children.

1. The trial court failed to give special weight to the fact that Appellant is a fit custodial parent.

As in Troxel, Respondent has made no allegation that Appellant is unfit or lacking in any way as a parent to her children. In fact, the Court found that Appellant has not “failed as a parent in any respect” and that “the opposite conclusion would be warranted.” AA-42. After an extensive evaluation, the custody evaluator concluded that Appellant should maintain sole physical and sole legal custody of the children. AA-62. Therefore, as in Troxel, any determination of what constitutes reasonable visitation within the meaning of Minn. Stat. § 257C.08 must be based on the fundamental presumption that Appellant’s decisions are in the best interests of her children. Troxel at 68. Fitness as a parent was of critical importance in Troxel and is no less relevant in this case.

The trial court and the Court of Appeals relied on the fact that Appellant was able to express her wishes during the custody evaluation to show that it had given special weight to Appellant’s wishes. AA-169. However, the custody evaluation was premised on the fact that Appellant and Respondent were equal parents. Transcript of Hearing held October 25, 2005, p. 154. Therefore, by definition, the custody evaluation gave no special weight to Appellant’s wishes in comparison to Respondent’s wishes. In addition, because the custody evaluation presumed that the parties were equal parents, Appellant was put in the position of proving that she was acting in the best wishes of her children. By placing upon Appellant the burden of proving that she was acting in the best interests of her children the trial court “failed to provide any protection for [Appellant’s] fundamental constitutional right to make decisions regarding the rearing of her

daughters.” Troxel at 70.

The concept of special weight or due deference to a fit parent contemplates more than simply allowing Appellant to be heard. Appellant would be heard as part of any standard best interest analysis and the Troxel court made it very clear that a mere best interest analysis does not indicate that the wishes of a fit parent had been given any special weight. Troxel at 72. In addition, this Court has clearly indicated in a custody context that a trial court’s findings of fact must clearly take into account that the right of a parent to custody is paramount and superior to those of a third person. In re N.A.K., 649 N.W.2d 166, 177 (Minn. 2002). It would be contrary to the holding in Troxel if the same requirement did not exist in a visitation context. Other states have also found that failing to show due deference to a fit parent’s decision-making fails to meet the constitutional safeguards of the Fourteenth Amendment. *See e.g.* In re Paternity of Roger D.H., 250 Wis.2d 747, 641 N.W.2d 440 (Wis. Ct. App. 2002); Santi v. Santi, 633 N.W.2d 312, 320 (Iowa 2001); Harrold v. Collier, 836 N.E.2d 1165, 1172 (Ohio 2005). Therefore, the trial court’s reliance on the custody evaluation was insufficient to support its conclusion that Appellant’s wishes had been given special weight.

In addition, the trial court very clearly stated that Respondent had a nurturing role as a co-parent to Appellant and that the trial court’s definition of “reasonable visitation” would continue Respondent in her nurturing role. AA-156. If the trial court’s definition of “reasonable visitation” involves affording Respondent, a non-parent, the opportunity to continue to co-parent Appellant’s children then, by definition, the trial court is giving no deference to Appellant’s rights as the only parent to her children. The Court cannot

create a visitation schedule based on the supposed existence of *two* parents while at the same time provide proper protection for Appellant's fundamental decisions-making right as the *sole* legal parent.

2. The trial court failed to recognize Appellant's right as a fit parent to make decisions concerning the best interest of her children.

As a fit parent, Appellant should be free from outside interference with her decisions regarding the rearing of her children. Troxel at 68, 69. However, due to the significant amount of visitation awarded to Respondent, Appellant has found her right as a parent repeatedly questioned and interfered with by the state and by Respondent. If the trial court had given any deference to Appellant's right to determine what is in the best interest of her children, it would have afforded her some authority to prevent Respondent from involving her children in activities Appellant considered harmful. The current Visitation Order provides Appellant with no such authority. That the Visitation Order forces a fit parent to petition the court to enforce her determination of what is in her children's best interest is perhaps the strongest evidence of the Visitation Order's lack of deference to Appellant's right as a fit custodial parent.

This issue was first raised on August 26, 2004, when Respondent wanted to take Appellant's children to California as part of her one-week summer visitation. Respondent did not think it was in the children's best interests to be away from her and in another state for an entire week. AA-261. Because the Court did not give Appellant any parental control over the children during Respondent's time, Appellant was forced to petition the Court to keep the children in Minnesota. The main reason Appellant did not

want the children to go to California during Respondent's one-week summer visitation was due to her concerns about emotional harm to the children. Appellant raised this concern at the March 2004 hearing and was asked if a therapist had opined that the children suffered any emotional harm at the hands of Respondent. In support of her motion to keep the children in Minnesota, Appellant provided a letter from Erin's therapist, Dr. Ver Steeg Halbert, evidencing the emotional harm Erin would suffer if forced to go to California with Respondent. AA-303. Even with the very evidence the Court had requested, the Court still refused to defer to Appellant's assertion that it was in the best interest of her children to remain in Minnesota for the entire week. Instead, the Court supplanted Appellant's determination of what would be in the best interest of her children with its own version and issued an order allowing the girls to be taken to California for three days. AA-304-305.

In reference to this issue, the trial court took the position that it deferred to Appellant's wishes on this occasion and to a similar problem related to visitation on Halloween 2004. AA-105. What the trial court fails to recognize is that as a fit parent Appellant should not have to subject her determination of what is in the best interest of her children to the court's authority absent some showing that Appellant is not acting in the children's best interest. The fact that Appellant had the burden of proving that she was acting in her children's best interest is clear evidence that the trial court accorded her no deference as a fit parent. Troxel at 68. Should the same situation arise under the current Visitation Order, Appellant would again have to petition the trial court to protect her children from harm. Forcing Appellant to litigate in order to prove she is acting in

the best interest of her children is in itself damaging to Appellant's parent-child relationship. Troxel at 75.

3. The trial court failed to recognize that the fact that Appellant had offered Respondent meaningful visitation negated, not strengthened, the necessity for court-ordered visitation.

The third and final factor considered by the Troxel court was the fact that the custodial parent was not seeking to entirely cut off visitation from the third party. Troxel at 71. The custodial parent merely sought to limit the amount of visitation. The trial court in Troxel gave no weight to the custodial parent having assented to visitation, and instead inserted its own version of what visitation schedule would be in the best interest of the child. Id.

Similarly, in this case, Appellant has not sought to entirely cut off Respondent's access to the children. As a fit parent, Appellant does not believe the court should determine with whom her children associate. The trial court made no less than four references to the fact that Appellant had taken the position that Respondent should be awarded some visitation with Appellant's children. The trial court placed great emphasis on the fact that Appellant "took the strong position" that visitation was in the girl's best interest and that Appellant told the custody evaluator that visitation, including overnights was in the girl's best interest. AA-158-169.

The offer of meaningful visitation was a significant factor for the Troxel court. In Troxel, Granville, as the fit custodial parent, had made offers of visitation for the Troxels. The trial court rejected Granville's offer and instead settled on a middle ground. The trial court's rejection of the custodial parent's proposed visitation schedule was an indication

that the trial court gave no weight to the determinations of a fit custodial parent and was therefore an unconstitutional infringement on Granville's due process rights. The logic of that decision is clear. If Granville as a fit custodial parent is presumably acting in the children's best interest then any deviation from her determinations regarding visitation would not be in the children's best interest. A trial court's imposition of a visitation schedule that is not in the children's best interest most certainly is not narrowly tailored to a compelling state interest.

Similarly, here the trial court summarily rejected Appellant's offers of visitation and made its own determination as to what visitation schedule would be in the children's best interest. There can be no doubt that the compelling interest involved here is protection of the best interests of the children. Therefore, because the same presumption would apply to Appellant as it did to Granville in Troxel, it is evident that the trial court was applying Minn. Stat. § 257C.08 in a manner inconsistent with the best interests of the children. This alone would indicate that the trial court was applying its authority under Minn. Stat. § 257C.08 in an overly broad fashion, but the analysis does not end there.

The question must be asked why Appellant's assertions regarding reasonable visitation for Respondent did not satisfy the state compelling interest? The trial court obviously placed great emphasis on Appellant's assertions that Respondent should have visitation with Appellant's children. Why then were Appellant's assertions regarding providing meaningful visitation for Respondent sufficient to allow the trial court to infringe on Appellant's due process rights, but insufficient to protect Appellant's due process rights? The answer of course is that the trial court's visitation schedule was not

narrowly tailored to the state interest of allowing Respondent to remain in the children's lives, but instead was applied in an overly broad manner so as to allow Respondent to remain in the children's lives in a parental role.

Despite the strikingly similar factual elements between Troxel and the case at bar the trial court has adopted the position that "extensive reliance on Troxel is unwise because it is a plurality opinion that generated much disagreement among the Supreme Court justices." AA-153. The trial court's emphasis on the fact that there was disagreement amongst the justices on Troxel does not change the fact that Troxel is applicable law concerning due process rights within the context of a third-party visitation case. It also does not change the fact that Appellant's offer of meaningful visitation to Respondent negates the need for court ordered visitation. In addition, Troxel has been applied to third-party visitation cases in Minnesota. See, e.g. Kayachith v. Athakhanh, 683 N.W.2d 325 (Minn. Ct. App. 2004).

4. The trial court relied on faulty and misleading findings of fact to support its visitation schedule.

The final indication of the trial court's failure to give any deference to Appellant's due process right to the care, custody and control of her children is found in the trial court's reliance on false and misleading findings of fact to support its conclusion that Respondent should have visitation equivalent to a non-custodial parent. The first reliance on a false finding of fact can be found in the trial court's temporary visitation order dated February 27, 2004. In that order the trial court stated, "[E]ffective immediately, Respondent shall have temporary regular and consistent visitation with Erin and Jaime as

agreed upon by the parties after consulting *A Parental Guide to Making Child-Focused Visitation Decision.*” AA-64. Emphasis added.

This statement by the trial court is false for two reasons. First, Appellant was never directed by the trial court or anyone else to refer to *A Parental Guide to Making Child-Focused Visitation Decision* and so she never did. The second and more important problem with the trial court’s reliance on this finding is that the parties never agreed to any kind of visitation schedule with or without *A Parental Guide to Making Child-Focused Visitation Decision*. AA-75. This fact is significant due to the trial court’s continual emphasis on Appellant’s alleged agreement that Respondent should be awarded visitation.

The court also incorrectly stated that Appellant conceded that Respondent would be better able to advance the children’s understanding of their Chinese heritage. AA-163. In the memorandum referenced by the trial court Appellant acknowledged that the custody evaluator said that Respondent’s shared Chinese heritage would be a factor in a visitation decision. This statement was not a concession of any kind and was included to show that Respondent’s reliance on this factor to support her custody claim was misplaced. The trial court’s manipulation of this statement for its own purposes is disturbing for two reasons. First, the trial court says Appellant made a concession she never made relating to a significant best interest factor in order to advance the trial court’s position that Respondent be awarded a significant amount of visitation. Second, this statement is another indicator of how little weight the trial court gave to any evidence offered by Appellant and how much weight was placed on Respondent’s ethnic

background.

In contrast, Appellant provided testimony on how she involved the girls in two groups designed to advance their understanding of their Chinese heritage. She has joined Families with Children from China and the Chinese American Asian Association in order to educate the children about their Chinese heritage and provide them access to people of Chinese ancestry. Transcript of hearing dated February 26, 2004, pp. 267-268. In addition, Appellant takes the children to events with other children who have been adopted from China. *Id.* The trial court gave Appellant's efforts no consideration. Instead, the trial court determined that because Respondent was of Chinese descent (although born and raised in Sacramento, California) she was the only person who could provide the girls with an understanding of their Chinese heritage, despite the fact that she had provided little evidence that she had actually attempted to advance the girls' understanding of their ethnic heritage in any significant way. "Between parents and judges, 'the parents should be the ones to choose whether to expose their children to certain people and ideas.'" Troxel at 63.

D. The trial court's presumption in favor of awarding Respondent parental visitation indicates it failed to give Appellant's right as a fit custodial parent any special weight.

The trial court's presumption in favor of parental visitation on behalf of Respondent is indicated by its failure to make any significant modifications to the visitation schedule after ruling that Appellant was the only parent to her children. The February 1, 2005 Visitation Order shows that the trial court did not waver from its position that Respondent should have a parental role in the lives of Appellant's children

when it did not modify the visitation schedule to any significant degree from the temporary schedule it put in place on February 27, 2004. The temporary schedule provided Respondent with mid-week visitation on Tuesdays and Thursdays. The current schedule limits Respondent to one mid-week visitation alternating between Tuesday and Thursday on an every-other-week schedule. AA-149.

A significant change is that the final visitation schedule awards Respondent a holiday visitation schedule equivalent to what would normally be provided to a non-custodial parent, including every significant holiday along with two non-consecutive weeks of summer vacation. That the trial court actually increased Respondent's visitation after ruling she was not a parent is indicative that the trial court has maintained its presumption in favor of Respondent having a parental visitation schedule.

The trial court's presumption that Respondent should be awarded parental visitation can also be found in the sources relied on by the trial court to support the visitation schedule. The trial court relied on three sources for support of its award of extensive visitation to Respondent: the hearings held in February and March 2004; the Hennepin County Family Court Services custody and parenting time evaluation; and *A Guide to Making Child Focused Parenting Time Decisions*. The insufficiency of the trial court's evidentiary basis will be discussed in detail in section III below. However, as a preliminary matter, all three of the trial court's sources of evidentiary support are based on the impermissible premise that there are two equal parents.

Further evidence of Respondent receiving visitation equivalent to a non-custodial parent can be found in the trial court's extensive reliance on *A Parental Guide to Making*

Child-Focused Visitation Decisions, which is a guide for parents going through a dissolution. *A Parental Guide to Making Child-Focused Visitation Decisions* is not a guide for what would be an appropriate visitation schedule between a parent and a non-parent/third party. The trial court's reliance on *A Parental Guide to Making Child-Focused Visitation Decisions* during the custody portion of the case may have been reasonable, but once Respondent's custody petition was denied the analysis should have changed. Otherwise, there is no distinction whatsoever between visitation awarded to parents under Minn. Stat. § 518.17 and that awarded to third parties under Minn. Stat. § 257C.08.

II. MINNESOTA STATUTE § 257C.08, SUBD. 4, DOES NOT PROVIDE SUFFICIENT PROTECTION FOR A FIT PARENT'S FUNDAMENTAL RIGHT TO CONTROL VISITATION WITH HER CHILDREN AND IS THEREFORE UNCONSTITUTIONAL AS WRITTEN.

The fundamental constitutional flaw with Minn. Stat. § 257C.08, subd. 4, *as written* is that it contains no provision for a fit parent to control visitation between her children and third parties. There is no question that Appellant is a fit parent and that it is presumed that a fit parent acts in the best interest of her children. Troxel at 68. Therefore, in order to be constitutional as written, a statute must require more than a mere best interest analysis to protect the parent's fundamental right regarding visitation with her children. If a statute allows the court to force visitation on a fit parent based solely on the requirement that the visitation be in the best interests of the children, there is no protection for the presumption that a fit parent's decisions are already in the best interest of the children. Id.

The requirements of Minn. Stat. § 257C.08, subd. 4, do not address the presumption that a fit parent acts in the best interest of her children. The remaining requirements are directed at limiting who can petition for visitation, but they still provide no protection for a fit parent's fundamental right. Other than satisfying a best interest analysis, the moving party must have resided with the child for two years, developed a parent-child relationship and not interfered with the custodial parent's relationship. Once an individual has lived in the home the requisite two years and has established ties with the children, she could clearly be on an even playing field with the custodial parent.

The trial court states that Minn. Stat. § 257C.08, subd. 4, is not "breathtakingly broad" and therefore it is not unconstitutional as written. AA-152. However, the trial court fails to establish how Minn. Stat. § 257C.08, subd. 4, provides sufficient deference for the wishes of a fit custodial parent. The trial court also fails to establish how Minn. Stat. § 257C.08, subd. 4, protects the rights of a fit parent from extensive interference by a third party with mere *in loco parentis* status, as in the case at bar. To see how little protection is available to a fit parent, one need only examine what actions a fit parent must take in order to protect her right to raise her children. Under Minnesota Statute § 257C.08 subd. 4, any fit parent who decides to live with an individual must either prevent that person from forming a parent-child relationship with her children or remove that person from the home before the requisite two years. Otherwise, a fit parent risks losing control over the visitation decisions regarding her children, and even losing her children over one-third of the time. A fit parent should not lose a fundamental, due process right simply because she decides to form a relationship with someone. Minnesota Statute §

257C.08, subd. 4, is unconstitutional as written because it provides no protection to a fit parent's fundamental right to make decisions concerning the rearing of her children. Troxel at 70.²

III. IT WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION TO INTERFERE WITH APPELLANT'S RELATIONSHIP WITH HER CHILDREN BY AWARDED RESPONDENT VISITATION COMMENSURATE WITH A NON-CUSTODIAL PARENT, WITH THE EXPRESS PURPOSE OF SECURING RESPONDENT'S PARENTAL ROLE IN THE LIVES OF APPELLANT'S CHILDREN.

Minn. Stat. § 257C.08, subd. 4 allows for visitation by a third party as long as it does not interfere with the custodial parent's relationship with his or her child. The statutory requirement that visitation not interfere in the parent-child relationship was imposed in recognition of "the public policy reasons that support a denial of visitation to uphold the independence and decision-making integrity of the newly created family unit." In re the Matter of Welfare of R.A.N., 435 N.W.2d 71, 73 (Minn. Ct. App. 1989). The party seeking visitation bears a "heavy" burden of proof as to this factor. Kulla v. McNulty, 472 N.W.2d 175, 181 (Minn. Ct. App. 1991), *review denied* (Minn. Aug. 29, 1991).

- A. A visitation schedule which puts Appellant's children under the care, custody and control of a non-parent for one-third of their lives by definition interferes with Appellant's relationship with her children as their only parent.**

It is of critical importance that any analysis of the visitation schedule takes into

² The unconstitutionality of the statute is made more obvious if one imagines that Appellant would get involved with another person who would live with her and the children for two years. Would that person also get 37% of the children's time, leaving Appellant with the remaining 26%?

account the parties' respective roles in the children's lives. Under the trial court's rulings and every applicable Minnesota law, Appellant is the only parent to her children and therefore the only person who has any right, authority or ongoing duty to have a parental role in her children's lives. In contrast, Respondent is someone who is not a parent, is not an interested third party according to Minn. Stat. § 257C.03, and at most occupied *in loco parentis* status. AA-83. Therefore, the relationship that is fostered by the Visitation Order must be on par with that of a non-parent, and the amount of time that is awarded to Respondent must be commensurate with the reasonable amount necessary to allow a non-parent to have a non-parental relationship with Appellant's children. Minn. Stat. § 257C.08, subd. 4, was never intended to award such extensive visitation so as to allow a non-parent to maintain a parental role in the children's lives.

The trial court essentially awarded Respondent a visitation schedule equivalent to that which would be awarded to a non-custodial parent. An examination of the practical application of the visitation schedule for the years 2005 and 2006 shows that on average Respondent will have Appellant's children 37% of the time.³

2005		
Month	Days	Percentage
February	10	36%
March	10.5	34%
April	10	33%
May	10.5	34%
June	9	30%
July	16	52%
August	12	38%
September	10	33%

³ The schedule started in February 2005. Mid-week and Friday visitation counts as one day because it incorporates all the children's available time. Sundays are half days each.

October	10	32%
November	11	37%
December	16	52%
Average	11.4	37%

AA-208-219.

The amount of visitation is a factor in determining whether visitation will interfere with the parent/child relationship. Gray v. Hauschildt, 528 N.W.2d 271, 274 (Minn. Ct. App. 1995). In support of its finding that visitation would not interfere with the parent/child relationship in Gray the court relied on the fact that “[t]he amount of visitation is not great, two days per month with one overnight visit.” Gray at 274. Therefore the amount of time awarded to a non-parent, and implicitly the amount of time the children are away from the custodial parent, is a factor to be considered as to whether the visitation will interfere with the custodial parent’s parent/child relationship. The trial court also acknowledged that the amount of time awarded to Respondent could interfere with Appellant’s relationship with her children. AA-171.

A visitation schedule that places the children under the influence of a non-parent for 30% to 50% of the time unquestionably interferes with the custodial parent’s care, custody and control of her children. The visitation schedule awarded to Respondent in the case at bar stands in stark contrast to the limited schedule provided to the grandparents in Gray.

Respondent has made it abundantly clear that she believes she should have a parental role despite the fact that Appellant is the only legally recognized parent to her children. On March 1, 2005 and April 15, 2005 Respondent moved the trial court to reconsider or clarify the Visitation Order. AA-220-251. Respondent asked for an

increase in her already extensive visitation and also that she be allowed access to the children's school schedule, be allowed to attend parent-teacher conferences and be given access to the children's medical records, all of which are rights associated with legal custody. AA-220-221. Therefore, the analysis of the visitation schedule must not only take into account the parties' respective roles as parent and non-parent, but also the fact that Respondent, as a non-parent, has established that she intends to actively assert her belief that she is a parent to Appellant's children.

It is not only the amount of time that interferes with Appellant's parent/child relationship with her children. The actual days that Respondent has been awarded further erode Appellant's ability raise her children. During the summer, Respondent is allowed two non-consecutive weeks with the children during which time Appellant is only allowed telephone contact with her children. AA-146. The final unconscionable blow comes from an analysis of the holiday schedule. The threshold question is why a non-parent is being awarded visitation on significant major holidays at all. The visitation schedule awards holidays to the parties in a typical even-odd year rotation that is employed when dividing holidays between a custodial and a non-custodial parent. Except for Memorial Day, all the major holidays are accounted for including, and perhaps most disconcerting, Mother's Day. During even numbered years Appellant, the only parent, and by law the only mother to her children, has to give up her children for the majority of Mother's Day. The children in this matter are ages six and ten. At that young age it is impossible for them to understand that Appellant is their only parent when the state, by means of the visitation schedule, is telling them that Respondent is also their

Mother.

Equally disconcerting is the amount of time the children are away from Appellant during the Christmas holidays. Appellant's children were away from her for over 50% of the month of December 2005. AA-219. In fact, except for a brief window on the morning of December 31, 2005, Appellant's children were with Respondent from 4:00 p.m. Christmas Day 2005 until January 1, 2006, while the children are out of school. The trial court has recognized that this is a significant family holiday by including it as part of the visitation schedule, and has awarded this important and extensive family time to Respondent, a non-parent. In addition to awarding Respondent significant summer vacation time, the visitation schedule also places limits on Appellant's ability to take vacations with her children.

The visitation schedule interferes with Appellant's relationship with her children because it places her children with someone else for one-third of their lives and on significant holidays. It cannot be credibly asserted that the trial court gave due deference to Appellant's wishes when it essentially equally divided the holiday schedule as if there were two equal parents. The trial court went well beyond the visitation required to address the stated compelling interest of allowing Respondent to remain in the children's lives. Instead, the trial court's overly broad visitation schedule awards Respondent visitation commensurate with that of a non-custodial parent.

B. It is an abuse of discretion and a violation of Minn. Stat. § 257C.08 for trial court to create a visitation schedule for the express purpose of maintaining a parental role for Respondent in the lives of Appellant's children and in so doing the trial court interfered with Appellant's relationship with her children as their only parent.

By the express language in the Visitation Order, the trial court has used the Visitation Order to maintain Respondent's parental role in the lives of Appellant's children, despite the fact that Appellant is the only parent to her children. In addition, the trial court summarily dismissed twenty-four documented instances of interference. It is an abuse of discretion and outside the jurisdiction of Minn. Stat. § 257C.08, subd. 4, for the trial court to use the Visitation Order to award Respondent access normally associated with a non-custodial parent.

1. The trial court expressly stated that the purpose of the visitation schedule was to maintain Respondent's parental role in the lives of Appellant's children.

After finding that a parent/child relationship existed between Respondent and Appellant's children, the trial court went on to state how that finding impacted the visitation schedule:

At this juncture in the analysis it is perhaps helpful to revisit the reference to Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925) in the Troxel plurality opinion:

We explained in Pierce that '[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' ... Had the parties not become involved in a domestic altercation that forced them apart, [Respondent] would fit the Pierce description of someone who, because of her history in nurturing the girls, had the 'high duty to recognize and prepare [the girls] ... for additional obligations.' With that in mind, it does not seem too large a leap in logic to observe that merely affording [Respondent] the opportunity to continue her nurturing relationship with these children through reasonable visitation, might not amount to such offensive intermeddling by the State that it deprives Respondent of substantive due process.

AA-155-156. Emphasis added.

In simple terms, the trial court found that Respondent had a parent/child relationship with Appellant's children and that she should continue in that relationship by means of the visitation schedule. By creating a visitation schedule with the express purpose of "affording Respondent the opportunity to continue her nurturing relationship with these children" the trial court is, by its own admission, enforcing its belief that Respondent should continue to be a parent to Appellant's children. The concept of "reasonable visitation" within the meaning of Minn. Stat. § 257C.08, subd. 4, does not extend so far as to allow a non-parent to continue to have a parental role.

2. The trial court's summary dismissal of the numerous examples of interference in Appellant's relationship with her children indicates the trial court's continuing intention to give Respondent visitation equivalent to a non-custodial parent.

Appellant provided the trial court with twenty-four separate examples of how the extensive time provided to Respondent by means of the visitation schedule had interfered with her parent/child relationship with her children.⁴ AA-125-128. These acts of interference ranged from Respondent forcing the children, against their will, to refer to her as "Mom," to missing out on time with Appellant's extended family, to acts of actual physical interference. *Id.* In addition, in March 2004, the day after the trial court ruled Respondent had standing to pursue custody, Respondent held a press conference to publicize her version of the case. This caused the older child, Erin, extreme embarrassment at school and was certainly not done in either child's best interest. The

⁴ The acts of interference occurred under the Temporary Visitation Order dated February 27, 2004, which was adopted and expanded by the trial court in the Visitation Order dated February 1, 2005.

only interest served by Respondent's publicity was her own. AA-73. All of the instances cited by Appellant were where Respondent had failed to respect Appellant's right as a parent to make decisions concerning the upbringing of her daughters or where the current visitation schedule enabled Respondent to interfere with Appellant's ability to raise her children.

When a third party makes negative statements about the custodial parent she interferes with the parent/child relationship. Olson v. Olson, 534 N.W.2d 547, 550 (Minn. 1995). In the case at bar, respondent continually forces the children to refer to her as "Mom." AA-73 and AA-113. Respondent introduces herself as the children's mother and tells the children their last name is Johnson-SooHoo instead of simply Johnson. AA-113-114. Even after the trial court had ruled that Appellant had sole custody of her children, Respondent continued to assert that she was a parent by telling the children they had "two mothers." AA-252. When Respondent attempts to convince Appellant's children that she is their parent, Respondent is actively interfering with Appellant's parent/child relationship with her children as their only parent. Respondent is creating confusion in a six-year-old and a ten-year-old as to who is responsible for their care and guidance.

The trial court claimed that Appellant "provided no fact specific averments regarding any interference with her relationship with the girls." AA-166. To the contrary, Appellant provided numerous fact-specific examples of how the extensive visitation is forcing her to limit the children's time with their extended family of aunts, uncles, cousins, grandparents and godparents. AA-116-117. For example, Appellant

described how she would formerly visit her family near Rochester, Minnesota once or twice a month. AA-116. The trial court stated that an every-other weekend schedule would not prohibit Appellant from seeing her family once or twice a month. However, the trial court failed to recognize that the every-other-weekend schedule forces Appellant to choose between taking her children to see her extended family on the weekends or spending that quality time with her children. As a working parent, the weekends are the time when Appellant can focus on the children's care and upbringing. If the weekends are spent with the children's extended family it means less one-on-one time for Appellant to develop her relationship with her daughters. A fit custodial parent should not have to sacrifice her time with her children or her children's time with their extended family to a non-parent.

Perhaps the most audacious example of the trial court's desire to treat Respondent as a non-custodial parent can be found in the trial court's description of the incident that occurred on December 5th, 2004. The trial court describes the incident as follows:

On Sunday, December 5th, 2004 Respondent brought the children to the YWCA during the same time when I was there. When the girls saw me they started running towards me screaming "mommy!"

AA-167.

The trial court went on to state, "The events as described by [Appellant] do not suggest that her relationship with the girls has been interfered with one iota." AA-167. The trial court conveniently left out the rest of description of the event, which is as follows:

[Respondent] made Erin stop and go down stairs. I [Appellant] crouched down because Jaime came running towards me to give me a hug. When Jaime was almost to me [Respondent] stepped between us and prevented Jaime from hugging me. Jaime was smiling as she was running to me. When [Respondent] stepped between us her expression changed to a confused look because she didn't know what to do. I was appalled that [Respondent] would come between me and my daughter. I did not make a scene because I did not want to cause any stress for Jaime. It is unconscionable for [Respondent] to put a four year old girl in such a situation.

AA-252-253.

The trial court leaves out Respondent's act of physical interference between Appellant and her child, and actually uses this incident to show that there has been no interference. There can be no more graphic display of interference than Respondent jumping between Appellant and Jaime and preventing a mother from embracing her child.

IV. THE TRIAL COURT DID NOT HOLD HEARINGS THAT WOULD PROVIDE EVIDENTIARY SUPPORT FOR A VISITATION SCHEDULE BETWEEN A PARENT AND A THIRD PARTY AND DID NOT HOLD HEARINGS ON THE ISSUE OF RESPONDENT'S INTERFERENCE WITH APPELLANT'S RELATIONSHIP WITH HER CHILDREN IN VIOLATION OF MINN. STAT. § 257C.08, SUBD. 7.

Visitation can only be awarded to Respondent under Minn. Stat. § 257C.08 subd.

4, if the following three criteria are satisfied⁵:

- i. visitation would be in the best interest of the child;
- ii. the Respondent and child had established emotional ties creating a parent child relationship; and
- iii. visitation would not interfere with the relationship between the custodial parent and the child.

⁵ Appellant acknowledges that Respondent lived with the children for two or more years.

Minn. Stat. § 257C.08, subd. 4.

The hearings held in February and March 2004 were specifically limited by the trial court to the issue of whether Respondent had standing as an interested third party within the meaning of Minn. Stat. § 257C.01 sufficient to advance to a custody evaluation. By the trial court's own admission, those hearings were not a "qualitative inquiry that determines the relative merits of each party's case." AA-44. As of the time of the hearings held in February and March 2004, the trial court was operating under the premise that Appellant and Respondent were both equal parents. This led to the trial court's determination that "[U]nless the record takes a dramatic turn during the remainder of the standing hearing, the Court will most likely find that in the eyes of the children both parties are indeed their parents." AA-67.

The Court has relied extensively on the Custody and Parenting Time Evaluation conducted by Gregg Kowalski of Hennepin County Family Court Services (HCFCS) for its contention that visitation would be in the best interests of the children and that Respondent has established a parent/child relationship with the children. But as previously stated the evaluation conducted by Gregg Kowalski was based on the premise that Respondent and Appellants were *equal parents*. Mr. Kowalski stated that he did not do an analysis under Minn. Stat. § 257C.08, subd. 4, because the trial court had given Respondent equal standing. *Id.* In fact, Mr. Kowalski went on to say that the visitation schedule he proposed and later incorporated in large part in the Visitation Order was the "type of access one would see in a situation where there were two legal parents with equal standing under [Minn. Stat. § 518.17]." Transcript of Hearing held October 25,

2005, p. 154. In short, the HCFCS evaluation was premised on the existence of two equal parents and therefore did not provide sufficient evidentiary basis for a visitation schedule between a parent and a non-parent who has actively interfered with Appellant's relationship with her children.

The trial court specifically limited the examination of Mr. Kowlaski in the hope that "one or both parties would rethink their positions." AA-82. Therefore, the record is insufficient to support the conclusion that Respondent has met her burden of proving that the Court ordered visitation is in the best interests of the children or that the extensive visitation schedule does not interfere with Appellant's relationship with her children. There has, therefore, never been a hearing to examine the twenty-four allegations of overt interference alleged by Appellant. AA-125-128.

Minn. Stat. § 257C.08, subd. 7, states that:

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

Minn. Stat. § 257C.08, subd. 7. Emphasis added.

The trial court rightly noted that Minn. Stat. § 257C.08, subd. 7 seems to place the burden on Appellant to prove that interference would occur, which runs afoul of Troxel's prohibition against forcing the custodial parent to prove that visitation is not in the best interest of the child. AA-162-163.

With that decisional framework in mind the next logical step would have been to hold a hearing to establish if Respondent had interfered with Appellant's relationship

with her children due to the visitation schedule or any other reason. Instead, the trial court summarily held that Appellant had not met her burden of establishing that awarding Respondent extensive visitation would interfere with her relationship with her children. The trial court's failure to hold a hearing on the issue of interference is contrary to Minn. Stat. § 257C.08, subd. 7, which requires that there be a hearing to determine by a preponderance of the evidence whether interference had occurred. This failure is especially troubling in light of the fact that Appellant had alleged twenty-four separate instances of interference related to the visitation schedule, the details of which were not refuted by Respondent, and that the last incidents concerned a failure to follow Appellant's instructions for caring for the children's medical needs. AA-328. The trial court did not hold any hearings as required by Minn. Stat. § 257C.08, subd. 7, on the issue of interference and therefore the trial court did not have a sufficient evidentiary basis to determine that there was no interference.

V. THE TRIAL COURT DOES NOT HAVE JURISDICTION WITHIN MINNESOTA CHAPTER 257C TO ORDER APPELLANT OR APPELLANT'S CHILDREN TO ATTEND COUNSELING OR THERAPY.

In construing a statute, court cannot supply that which the legislature purposely omits or inadvertently overlooks. State v. Corbin, 343 N.W.2d 874 (Minn. Ct. App.1984). There is no provision within Minnesota Chapter 257C which allows a court to order Appellant or her children into therapy or counseling. The trial court's attempt to craft that authority out of Minnesota Chapter 518 is without merit and is another violation of Appellant's substantive due process rights.

Minn. Stat. § 257C.08, subd.4, states in pertinent part that a person meeting the

necessary criteria may “petition the court for an order granting the person reasonable visitation rights to a child during the child’s minority.” Minn. Stat. § 257C.08, subd.4. The trial court in the case at bar ordered Appellant to employ a counselor to address her tension and anxiety related to Respondent’s visitation. AA-149. The trial court also ordered Respondent to employ a therapist, and if that therapist found it necessary, that Appellant’s children would be involved in Respondent’s therapy. Because Appellant was required to report her progress and the children’s progress in therapy to the trial court there is also inherently a court-ordered waiver of confidentiality without any finding whatsoever that Appellant’s life needed such oversight by the trial court. Appellant was allowed no input, involvement or control over whether her children would attend therapy with Respondent. AA-146.

The trial court relied on Minn. Stat. § 518.176 and Minn. Stat. § 518.131 for the authority to order therapy. Neither statute provides the trial court with jurisdiction to order therapy within a third-party visitation matter in Minn. Stat. § 257C.08. Minn. Stat. § 257C.02 does state that Minnesota Chapter 518 applies to Minnesota Chapter 257C proceedings, but the trial court has expanded the authority of Minnesota Chapter 518 far beyond the scope of Minnesota Chapter 257C.

The trial court first relies on Minn. Stat. § 518.176 and the following language to support its therapy order:

the parent with whom the child resides may determine the child’s upbringing, including...health care...unless the court after hearing, finds... that in the absence of a specific limitation of the authority of the parent with whom the child resides, the child’s ... emotional health is likely to be endangered or the child’s emotional development impaired.

AA-204. Emphasis added.

However, the trial court used an ellipsis to omit important qualifying language in its cite to Minn. Stat. § 518.176. Minn. Stat. § 518.176 actually states that “unless the court after hearing, finds upon motion by the other parent...” Minn. Stat. § 518.176. Emphasis added. In this case there has been no motion made by Respondent for therapy and Respondent clearly is not the other parent. Minn. Stat. § 518.176 does not provide the trial court with jurisdiction to order therapy in a case where there is only one parent.

The trial court also relied on Minn. Stat. § 518.131 for the authority to order therapy, but again, the trial court has exceeded the scope of the statute. The trial court states the following:

Note also that section 518.131 allows the trial court to make any temporary order that requires ‘one or both parties to perform or to not perform such additional acts as will ... protect the ... children from ... emotional harm.’ It is highly unlikely that the legislature would authorize the trial court to order therapy on a temporary basis in order to protect the children from emotional harm, but deny the trial court the authority to include the same protection in the final order.

AA-204-205.

However, Minn. Stat. § 518.131 is designed to address temporary and restraining orders. A more reasonable interpretation of the application of Minn. Stat. § 518.131 application to Minn. Stat. § 257C.08 is that if the legislature had intended to provide that authority in a third-party visitation context it could very easily have included that language. The legislature did not include that language. The trial court’s extrapolation of the authority to order therapy in this manner from Chapter 518 was clearly not intended

by the legislature when it drafted Minnesota Chapter 257C.

In addition, the trial court once again uses ellipses to skip over a very critical piece of Minn. Stat. § 518.131. The trial court is quoting from Minn. Stat. § 518.131, subd.1(j), for the proposition that it has the authority to require one or both parties to perform or not perform certain acts. AA-205. Minn. Stat. § 518.131, subd.1, starts with the requirement that “[I]n a proceeding brought for custody, dissolution, or legal separation, or for disposition of property, maintenance or child support following the dissolution of either party...” Minn. Stat. § 518.131, subd.1. The custody portion of the case at bar ended on November 19, 2004 when Appellant assumed sole physical and legal custody of her children. There is no authority to apply authority granted within a temporary or restraining order in a custody proceeding to a third-party visitation proceeding.

In addition to the very clear procedural faults in the trial court’s reliance on Minn. Stat. § 518.176 and Minn. Stat. § 518.131 are the violations of Appellant’s fundamental due process rights as an individual and as a fit parent. There has been no finding by anyone that Appellant is anything but a fit custodial parent. The notion that a trial court has the authority to order a healthy individual into therapy unquestionably violates her due process rights as an individual. In addition, as a fit parent it is Appellant’s decision whether her children should be involved in therapy. That decision is not vested in the Respondent or the trial court. The fact that the trial court ordered therapy against Appellant’s wishes provides Appellant with no involvement much less control over the therapy and places the mental health of Appellant’s children in the hands of Respondent and her chosen therapist, clearly violating Appellant’s due process right to the care,

custody and control of her children. The trial court has impermissibly provided Respondent with a right associated with legal custody rather than third party visitation. This portion of the Visitation Order is consistent with the trial court's ultimate goal of giving Respondent, a non-parent, rights and access equal to that of a non-custodial parent.

Both the trial court and the Court of Appeals, in upholding the therapy provisions, relied on the fact that Respondent had asked the trial court to "grant such other and further relief as the Court determines is fair, just, reasonable and necessary, as the Court in its discretion, shall deem proper." SooHoo v. Johnson, WL 851808, (Minn. Ct. App. 2006). The concept that a trial court can create authority that does not exist anywhere in either Minnesota Chapter 518 or 257C within a general request for relief is unsupported by the law and essentially allows Respondent to bypass the plain language of the statute.

CONCLUSION

In order to avoid an unconstitutional infringement on Appellant's fundamental due process right to raise her children without governmental interference the trial court's application of Minn. Stat. § 257C.08 must be narrowly tailored to meet a compelling state interest. The state interest involved is to protect the best interest of the children by allowing Respondent to remain in their lives through reasonable visitation. If the statute is interpreted as the trial court has done it is unconstitutional as written. To avoid such a result any interpretation must be narrowly tailored. The trial court's application of Minn. Stat. § 257C.08 here is overly broad, and thus not narrowly applied if it fails to give due deference to the wishes of the fit custodial parent, particularly when she agreed that her children need some contact with Respondent. The trial court rejected Appellant's offer of

meaningful visitation and instead inserted its own determination of what constituted reasonable visitation without any finding that Appellant's offer was not in the best interest of the children. The state may have an interest in protecting the best interest of the children, but it does not have a compelling interest in second guessing the wishes of a fit parent regarding non-parent visitation decisions. The trial court's presumption in favor of parental-type visitation, while rejecting Appellant's offer of meaningful visitation, indicates that the wishes of the fit parent were given no deference.

While protecting the best interest of the children may be a compelling state interest, it does not give unfettered authority to the trial court. The state's interest in its role as *parens patriae* must be balanced against the fit parent's fundamental due process right to the care, custody and control of her children. Without any finding that Appellant was not acting in the best interest of her children, the trial court rejected Appellant's offer of meaningful visitation, summarily dismissed her documented claims regarding interference with her parent-child relationship and refused to hold hearings as mandated by Minn. Stat. § 257C.08 subd. 7. Further evidence of the trial court's overly broad application of its authority within Minn. Stat. § 257C.08 can be found in its orders regarding therapy.

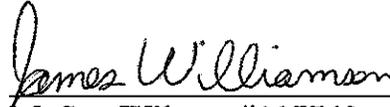
As a fit parent, Appellant has a fundamental right to raise her children without the State injecting itself into the private realm of her family. Because she has offered visitation, any court-imposed schedule is therefore a violation of Appellant's right to due process of law. Further, Respondent does not have the right to visitation equivalent to a non-custodial parent, even if Respondent had not actively interfered with Appellant's

relationship with her children. If the court finds that some form of visitation would be appropriate, it must be at a level commensurate with the reality that Respondent is not a parent and is not an interested third party, but instead occupies a much more limited role in the lives of Appellant's children. In that case, the issue should be remanded to the trial court for an order setting forth the visitation schedule proposed by Appellant in her December 8, 2005 visitation proposal. Such an order would insure that Respondent would have ongoing contact with the children, subject to additional time as Appellant deems in the best interest of her children. It would avoid the constitutional infringement of Appellant's right to parent her children as she sees fit.

Respectfully submitted,

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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) (with amendments effective July 1, 2007).