



No. A10-1348
STATE OF MINNESOTA
IN SUPREME COURT

In re the Matter of:
Kelli Rohmiller and Clayton Rohmiller
Petitioners
And
Andrew Hart,
Respondent,
And Jennifer Joseph
Guardian ad Litem

PETITIONER'S BRIEF AND APPENDIX

Debra D. Julius
Debra Daniels Julius Law Office Ltd
Attorney Id No. 0277319
14093 Commerce Avenue
Suite 200
Prior Lake, Minnesota 55372
(952) 440-2700
Attorney for Petitioners

Glenn P. Bruder
Mitchell, Bruder & Johnson
Attorney Id No. 0148878
5001 American Blvd West
Suite 670
Bloomington, Minnesota 55437
(952) 831-3174
Attorney for Respondents

Jennifer Joseph
1337 St. Clair Avenue
Suite 6
St. Paul, Minnesota 55106
(612) 730-4133
Guardian ad Litem

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).

TABLE OF CONTENTS

	Page
Table of Authorities.....	i,ii
Issues Presented.....	iii
Statement of Facts.....	1
Standard of Review.....	3
 Argument:	
I. Whether Minn. Stat. §257C.08 allows the court to grant visitation to relatives of a deceased parent other than parents and grandparents, or by the statute failing to address other classes of persons entitled to visitation, are those classes of individuals excluded by the doctrine of <i>expressio unius est exclusio alterius</i>	4
II. Does the court have the equitable power to grant visitation outside of the visitation statute?	8
III. The equitable power of the Court should not be limited because the legislature has not kept up with changing family structures.....	13
IV. The Court of Appeals substituted its own judgment for that of the trial court.....	15
V. It should not be easier to obtain third party custody than third party visitation....	16
 Conclusion.....	 18

Index to Appendix

TABLE OF AUTHORITIES

Statutes:

<i>Minn.Stat.</i> 257C.08 Subd (1) or (2)or (4).....	2,4
<i>Minn.Stat.</i> 257C.08 subd (4)	5
<i>Minn Stat.</i> 645.16 (2010).....	5
<i>Minn. Stat.</i> 645.17 (2010).....	7
<i>Minn. Stat.</i> 257C.08	8,11,12,13,16
<i>See Minn.Stat.</i> 257C.01,sud (2).....	17
<i>Minn.Stat.</i> 257C.07	17
<i>Minn.Stat.</i> 257C.03 Subd 7, (1) (iii)	17
<i>Minn.Stat.</i> 260C.212, Subd 5,(a)	17

Cases:

<i>Erickson v Erickson</i> , 434 N.W.2d 284, 286 (Minn.Ct.App.1989)	3
<i>City of Morris v Sax Invs.,Inc.</i> , 749 N.W.2d 1,5 (Minn.2008).....	3
<i>Rohmiller v Hart</i> _N.W.2d_ 2011 WL 1466413, (Minn.Ct.App. Apr.19, 2011)	3,15
<i>Premier Bank v Becker Dev., LLC</i> , 785 N.W.2d 753, 760 (Minn, 2010).....	4
<i>In re the Welfare of the Child of R.S.</i> , 793 N.W. 2d 752, 756 (Minn. App. 2011).....	4,5
<i>Premier Bank v. Becker Development, LLC</i> , 785 N.W. 2d 753, 760 (Minn. 2010).....	4
<i>N. Pac. Ry. v. City of Duluth</i> , 67 N.W. 2d 635, 638 (Minn. 1954).....	5
<i>Colquhoun v. Brooks</i> , 21 Q. B. D. 52 (1888).....	5
<i>Jackson v. Garland</i> , 622 A.2d 969, (Pa. Super. 1993).....	6
<i>Soofoo v. Johnson</i> , 731 N.W. 2d 815 (Minn. 2007).....	7,9,10
<i>Simmons v Simmons</i> , 486 N.W. 2d 788 (Minn. Ct. App. 1992).....	7,8

<i>Brekke v Thm Biomedical Inc</i> , 683 N.W.2d 771, 776((Minn 2004):.....	7
<i>New York Life Ins. Co. v. Bangs</i> , 103 U.S. 435, 438, 26 L. Ed. 580 (1880).....	8
<i>Troxel v Granville</i> , 530 U.S. 57, 120 S.Ct. 2054, (2000).....	9,12,13
<i>Johnston v Johnston</i> , 280 Minn.81,86,158 N.W.2d 249, 254, (1968)	10
<i>Mize v. Kendall</i> , 621 N.W. 2d 804 (Minn. Ct. App. 2001), <i>rev. denied</i> March 27, 2001..	11
<i>DeLa Rosa v. DeLa Rosa</i> , 309 N.W. 2d 755, (Minn.1981).....	11
<i>Flint v Flint</i> , 63 Minn. 187, 189, 90, 65 N.W. 272, 273 (Minn.1985).....	12
<i>Kimmel v Kimmel</i> , 392 N.W. 2d, 904, (Minn. App. 1986) <i>rev. denied</i> Oct. 29, 1986	12
<i>Holmberg v. Holmberg</i> , 588 N.W. 2d, 720, 725-26, (Minn.1999).....	13
<i>In re the Matter of the Adoption of Francisco A, v Vest, v State of New Mexico, ex rel</i> , 116 N.M. 708, 866 P. 2d 1176, (N.M. App. 1993).....	14,15
<i>In V.C. v M.J. B</i> , 163 N.J. 200, 748 A.2d 539, (April 6, 2000). Certiorari Denied October 10, 2000, 531 U.S. 926, 121 S.Ct. 302.	
<i>Holtzmann v Knott</i> , 193 Wis. 2d 649, 533 N.W. 2d 419 (1995).....	15
<i>Youmans v Ramos</i> , 429 Mass. 774, 711 N.E. 2d 165 (Mass. 1999)	15
<i>Stiff v. Associated Sewing Supply Company, et al</i> , 436 N.W.2d 777 (Minn.1989).....	16
<i>Wallin v. Wallin</i> , 290 Minn. 261, 187 N.W.2d 627.....	17

ISSUES

- I. Whether Minn. Stat. §257C.08 allows the court to grant visitation to relatives of a deceased parent other than parents and grandparents, or by the statute failing to address other classes of persons entitled to visitation, are those classes of individuals excluded by the doctrine of *expressio unius est exclusio alterius*?
- II. Whether Minn.Stat. 270C.08 is the sole authority upon which the Family Court or District Court may rely upon when granting visitation to persons other than parents of minor children, or does the court have the equitable power to grant visitation outside of the visitation statute?
- III. The equitable power of the Court should not be limited because the legislature has not kept up with a changing family structures.
- IV. The Court of Appeals substituted its own judgment for that of the trial court.
- V. It should not be easier to obtain third party custody rather than then third party visitation.

STATEMENT OF FACTS

The Petitioners are the maternal aunt and maternal grandfather of one minor child, BH, born July 15, 2003. Kelli Rohmiller, is the aunt of the child in this matter B.H. Kelli Rohmiller has had a regular and consistent relationship with the child since her birth. (Trial Court Order, para 56, page 10, hereinafter TCO). Kelli Rohmiller is the identical twin sister of the child's deceased mother.

The child's mother, Katie Rohmiller, was killed in a car accident on August 15, 2005. When the child's mother was killed, the child and mother were living with a maternal aunt in Iowa. Minnesota custody and parenting time case was pending. (Dakota County Court File No. 19-FA-05-090090) Upon the death of the mother, Kelli Rohmiller brought the child to visit in Minnesota with the Harts in September 2005. (Guardian ad litem's report, para 1 page 6, and A43) However, an Iowa custody proceeding commenced between Andrew Hart, and the child's maternal aunt, Laurie Lamb. This went on for over (2) years. The father was ultimately awarded custody of the child. This custody award however, was not without caution and concern of the Iowa Court. (See TCO, para 29, pg 5, A-19)

At the time of the mother's death, the father did not have contact with the child. The father had caused physical injury to the child when she was ten months old and pled guilty to Malicious Punishment of a Child. (See TCO, para, 21-26, pg 4, A018)

The Iowa court awarded the father physical custody BH, and he took custody of her in August of 2009. He then moved her to Minnesota where he presently resides with his mother and father and the child.

When the father took custody of the child, he cut off contact with the Petitioners. Up until that time, the maternal aunt had exercised regular and consistent contact with the child since her

birth. The Iowa court found that the maternal aunt's presence in this matter to be a positive presence and called her the only "bright spot" in the proceeding. (See TCO, para52, pg 9, A-23)

It is undisputed that the maternal aunt has had a regular and consistent relationship with the child. Because she did not reside with the child for two years she does not meet the statutory criteria for third party visitation. See *Minn.Stat.* 257C.08 Subd (1) or (2)or (4).

On or about November 14, 2009 the aunt and her father started an action in Dakota County District Court, seeking visitation with BH. (Andrew Hart was formally served on January 6, 2009)

In October 29, 2008, the father commenced a separate proceeding to remove the Iowa conservators from the child's trust account proceeds, resulting from the mother's estate dram shop action. (Dakota County Court File No. 19-HA-PR-08-556. The Petitioners then brought an action opposing Andrew Hart's request to be named conservator of the funds on or about November 12, 2008, (See Dakota County Court File No. 19-HA-PR-616.) The parties ultimately consolidated their actions and stipulated to the appointment of a neutral third party conservator. The order was entered May 7, 2009. (See A 53-55)

The visitation matter was tried before the Honorable Judge Michael Mayer February 23, 2010. On June 22, 2010, the court issued its order, awarding Kelli Rohmiller visitation with the minor child. The Trial Court made ninety-three findings supporting its award, finding it was not only in the best interests of the child, but that the child would be emotionally harmed were she not allowed to see her maternal aunt. (See TCO, para. 13, pg 19, A-33) The father appealed the order. The Court of Appeals entered its order, reversing the award to the aunt, on April 19, 2011. This Appeal results.

STANDARD OF REVIEW

The Court reviews an award of visitation, on a abuse of discretion basis. (See *Van Griffin v Van Griffin*, 267 N.W.2d 733 (Minn.1978) The Court reviews the trial courts findings and order, when there is no motion for a new trial, (as in this case) on the basis of whether the findings of fact are sufficient for the conclusions of law and the judgment. (See *Erickson v Erickson*, 434 N.W.2d 284, 286 (Minn.Ct.App.1989) The Court reviews statutory interpretation de novo. *City of Morris v Sax Invs.,Inc.*, 749 N.W.2d 1,5 (Minn.2008) as cited by the Court of Appeals in its opinion in this matter, on page 6. *Rohmiller v Hart* ___ N.W.2d ___ 2011 WL 1466413, (Minn.App. Apr.19, 2011) ___ N.W.2d ___ (Minn.Ct.App. 2011) A10-1348, pg 6).

ARGUMENT

Whether Minn. Stat. §257C.08 allows the court to grant visitation to relatives of a deceased parent other than parents and grandparents, or by the statute failing to address other classes of persons entitled to visitation, are those classes of individuals excluded by the doctrine of *expressio unius est exclusio alterius*

The Court of Appeals heavily relied upon the Latin canon *expressio unius est exclusio alterius* in interpreting *Minn. Stat. §257C.08*. The Court of Appeals held that *Minn. Stat. 257C.08* subd (1),(2) or (4) does not provide visitation rights to a sibling of a deceased parent unless the minor child resided with the sibling for at least two years. The Court found so because of the doctrine of *expressio unius est exclusio alterius*. (“the expression of one thing is the exclusion of another. *Rohmiller v Hart*, ___ N.W.2d ___ 2011 WL 1466413, (Minn.App. Apr.19, 2011)at pg 7, para (2), A-7, citing *Premier Bank v Becker Dev., LLC*, 785 N.W.2d 753, 760 (Minn, 2010). The holding was in error.

At issue is whether the statute in question is ambiguous. *In re the Welfare of the Child of R.S.*, 793 N.W. 2d 752, 756 (Minn. App. 2011). If the statute is clear, the court is then to apply the plain meaning. *Child of R.S.*, 793 N.W. 2d 756. If it is ambiguous, the court looks to the canons of statutory construction to determine legislative intent. *Id.* at 756. The court must determine whether the absence of certain language is a “failure of expression or an ambiguity of expression.” *Premier Bank v. Becker Development, LLC*, 785 N.W. 2d 753, 760 (Minn. 2010)

The court in *Child of R.S.*785 N.W. 2d 753 the Court found that the statute they were examining expressly stated that the court could transfer foster-care-placement and termination-of-parental-rights proceedings to tribal court, but that the statute was silent on whether the court could transfer pre-adoptive placement proceedings. *Id* 793 N.W. 2d at 756. The court held that

because the statute was silent as to pre-adoptive placement proceedings, that the statute was ambiguous on this point. The facts of this case are analogous. *Id.* In this case, the statute *Minn. Stat. 257C.08* subd (4) expressly provides for visitation for a narrow subset of persons who are not parents or grandparents. However, the statute is silent as to whether persons who are not included in that narrow class of people have the ability to petition for visitation. This creates ambiguity. The statute does not specifically exclude additional persons either.

If ambiguity exists, the court must attempt to decipher legislative intent. *Minn Stat. 645.16* (2010) states that the court may consider a variety of factors including:

- “(1) the occasion and necessity for the law;
- (2) the circumstances under which it was enacted;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (5) the former law, if any, including other laws upon the same or similar subjects;
- (6) the consequences of a particular interpretation;
- (7) the contemporaneous legislative history; and
- (8) legislative and administrative interpretations of the statute.”

The court must then determine whether to apply the canon *expressio unius est exclusio alterius*. The canon “is not of universal application, and great caution is needed in its application.” *N. Pac. Ry. v. City of Duluth*, 67 N.W. 2d 635, 638 (Minn. 1954). The maxim “serves only as an aid in discovering legislative intent when not otherwise manifest.” *N. Pac. Ry.*, 67 N.W. 2d at 638.

The maxim’s limitations were discovered centuries ago. An English case stated that “it is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.” *Colquhoun v. Brooks*, 21 Q. B. D. 52 (1888). In

this case, the denial of relief for the child and Kelli Rohmiller under the law would be an injustice. The child in this case, who has lost every significant adult in her short life, has the opportunity to know and love her mother's identical twin sister. Not only is Kelli Rohmiller the child's maternal twin aunt, she is the one adult that has remained a constant in this child's life. The trial court said "[T]his case is a very unique fact situation, in that the child's one consistent relationship since birth is the one with Petitioner Kelli, who is the identical twin of the child's mother." (TCO- para 11, pg 2, A-16)

In Pennsylvania, this doctrine was also applied by the Appellate Court, to a case similar to this case, in 1993. An absurd and draconian ruling resulted. (See *Jackson v. Garland*, 622 A.2d 969, (Pa. Super. 1993). In that case, the father had killed the mother. The child visited with the maternal aunt prior to the murder of her mother with her mother. After the murder, the child was placed with the paternal grandparents. The father retained legal rights even though incarcerated. Incredibly, as in this case, the father objected to the aunt visiting with the child. The doctrine of *expressio unius est exclusio alterius* was applied, as in this case. The Appellate Court, finding that because the visitation statute did not specifically name the aunt as a class of persons for visitation, held she had no standing to bring the visitation action. Thus, even though her sister was killed by the father, the father was able to block the aunt's attempt to maintain maternal ties with the child. When discussing the issue of the doctrine of exclusion, the Pennsylvania Appellate court noted that as an "intermediate appellate court" they could not make a "change in policy". The Pennsylvania Appellate court held they had to affirm an absurd result.

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? What about step-parents, step-grandparents, step-siblings, and cousins? What about mother's or father's

significant other? Whether that be in relationship between a man and a woman or a same-sex relationship. It is not uncommon for gay couples to have one person adopt a child. See *Soofoo v. Johnson*, 731 N.W. 2d 815 (Minn. 2007). What if Ms. Soohoo had only resided with one child for (18) months, would she then be allowed to see the oldest but not the youngest child? Is it now the law that unless the gay partner lives with the child for a specified number of years, that has no logical basis, that the child is then barred from maintaining a relationship with the other partner? The application of the exclusion doctrine does in fact lead to “inconsistency or injustice” *Id.* at 52.

In *Simmons v Simmons*, 486 N.W. 2d 788 (Minn. Ct. App. 1992) the Appellate Court upheld stipulated visitation with a stepparent who only lived with the child for (18) months, finding the common law doctrine of in loco parentis to apply. The Court in that case, found a common law right to access, in addition to the statutory right of access, directly contrary to its ruling in this case. Is the real test, whether a third party is “in loco parentis” and that the doctrine of *exclusio* only applies to equitable relief not common law relief? How is that fair or even reasonable?

In determining legislative intent, the court can presume that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable.” *Minn. Stat.* 645.17 (2010). It would produce an absurd result if the legislature intended to only allow those who lived with a minor child for a minimum of two years to petition for visitation. This number is arbitrary. There is no magic relationship that is formed at that threshold. It would also be absurd if the legislature intended to strip courts of their ability to act in the best interest of the child.

This court has said, in *Brekke v Thm Biomedical Inc*, 683 N.W.2d 771, 776((Minn 2004):

More significantly, we have repeatedly held that statutes will be presumed not to eliminate equitable remedies and are to be strictly construed so as to not supplant or

restrict “equity’s normal function as an aid to complete justice” *Swogger v. Taylor*, 243 Minn. 458, 465, 68 N.W.2d 376, 382 (1955). *See also In re Lakeland Dev. Corp. (Anderson v. Anderson)*, 277 Minn. 432, 441-45, 152 N.W.2d 758, 764-66 (1967) (stating that the court may look to equitable principles in applying a statute). *Id at 776.*

Does the court have the equitable power to grant visitation outside of the visitation statute?

Because court ordered third-party visitation did not exist at common law, the Father argues that *Minn. Stat. 257C.08* is the only controlling factor in determining who may be awarded visitation. However, unless the statute contains a clause “specifically repealing, restricting, or abridging” a common law right, then the statute must be construed to “extend or supplement the common-law rule.” *Simmons v. Simmons*, 486 N.W. 2d 788, 791 (Minn. App. 1992). It also stands to reason that unless the statute specifically so states that the court is limited to the specific categories therein, that the court’s equitable power, especially in family matters, is not wholly removed.

There may be no specific common law authority upon which the court may grant third parties visitation, but there is common law authority for the court to act in the best interest of the child. Family courts have long been not only courts in law, but courts of equity as well.(emphasis added) The courts have always exercised their equitable power in order to act in the best interest of the child. The public policy of *parens patriae* was established centuries ago.

The United States Supreme Court stated:

..the general authority of courts of equity over the persons and estates of infants . . . is not questioned. It may be exerted, upon proper application, for the protection of both. This jurisdiction in the English courts of chancery is supposed to have originated in the prerogative of the crown, arising from its general duty as *parens patriae* to protect persons who have no other rightful protector The jurisdiction possessed by the English courts of chancery from this supposed delegation of the authority of the crown as *parens patriae* is . . . exercised in this country by the courts of the States. . .” *New York Life Ins. Co. v. Bangs*, 103 U.S. 435, 438, 26 L. Ed. 580 (1880).

Now, with the United States Supreme Court ruling in *Troxel v Granville*, 530 U.S. 57, 120 S.Ct. 2054, (2000) there is a specific appreciation for a parent's due process rights as far as making decisions concerning their children, which this Court noted in *Soofoo v Johnson*, 731 N.W.2d 815, (Minn.2007) stating:

The U.S. Supreme Court has explained that the substantive due process rights provided by the Fourteenth Amendment afford "heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). A parent's right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right. ...

... We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with Justice KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care."

... 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 mere best-interest analysis in support of its decision to override the fit parent's wishes. *Soofoo*, 731 N.W. 2d 841

When examining the decision of the trial court in this matter, one can see that the trial court did use the (3) "guiding principles" in making its decision in this case as stated in *Soofoo*, 731 N.W. 2d 841. As applied in this case, the test becomes as follows;

1. Did the trial Court give special weight to the fit custodial parent's decision regarding visitation? In this case, at issue is whether the father is a "fit" father in regards to his decision to exclude the aunt from the child's life. The father has shown a remarkable lack of good judgment and poor parenting in the past. The father puts his views and rights ahead of the child's best interest and emotional well being. (TCO, para 50, pg 9, A-8-9, A22-23).

2. There can be no presumption in favor of awarding visitation.

In this matter, no such presumption existed. The trial court did not immediately award visitation. The trial court sought the advice of a guardian ad litem, then the services of a psychological examiner and held a full trial, before issuing its order. The father's objections and allegations were thoroughly vetted by the appointment of a guardian and psychologist.

3. The court must assert more than a mere best-interest analysis in support of its decision to override the fit parent's wishes.

The guardian ad litem testified the child would likely suffer long term emotional harm if the child was not allowed to continue to see the aunt. The guardian addressed the best interests of the child by stating how close and affectionate the child and the aunt are with each other. (Tran. Pg. 114, lines 14-24) The guardian noted that it is not fair for this child to lose "half her family" because of the death of her mother. (Trans page 115, lines 9-11) The guardian stated she would have fears for the child's well being if she were cut off from her grandfather and aunt. (Trans. Page 116 – 118 lines 10, pge 116 to lines 19, page 118)

"...there may be instances when the state may constitutionally intrude upon a fit parent's right to the care, custody and control of the parent's child and order visitation against the parent's wishes." *Soofoo*, 731 N.W. 2d 821.

Since the jurisdiction of the district court in divorce actions is equitable, relief may be awarded as the facts in each particular case and the ends of justice may require." *Johnston v Johnston*, 280 Minn.81,86,158 N.W.2d 249, 254, (1968)

“As the trial court recognized, each of the determinants in cases like these, is fact specific.” *Mize v. Kendall*, 621 N.W. 2d 804 (Minn. Ct. App. 2001), *rev. denied* March 27, 2001 (discussing third party custody determinations). Visitation is also fact specific.

The authority of the court to act in the best interest of the child was not abrogated by *Minn. Stat. §257C.08*. If it was, the court loses its ability to perform one of its most basic functions in protecting society’s most vulnerable citizens. The doors of justice would be shut on countless people simply because the legislature did not account for them in a narrowly tailored statute. The legislature cannot account for every unique fact pattern. The courts have the ability to close this gap. They can hear testimony, judge the credibility of witnesses, and make specific factual findings for each individual case. If the courts are not allowed to exercise its equitable powers, injustice is inevitable. The Appellate Court found no place for the exercise of the District Court’s equitable powers. The Appellate Court holding effectively, strips the court of its equitable powers. The result in this case cannot be what the legislature intended

A money award was equitably found in *DeLa Rosa v. DeLa Rosa*, 309 N.W. 2d 755, 758 (Minn.1981) that was not statutory. This Court stated specifically that just because a statute did not exist that granted the specific relief requested, that did not mean that the District Court was without the equitable powers, to grant the relief.

Petitioner argues that because there is an absence of a specific statute authorizing restitutionary relief incident to a dissolution, the trial court was without power to make the award in question. We disagree. ... The district court therefore has inherent power to grant equitable relief “as the facts in each particular case and the ends of justice may require.” See *Johnston v. Johnston*, 280 Minn. 81, 86, 158 N.W.2d 249, 254 (1968). *DeLa Rosa*, 309 N.W.2d 758.

The Court over a hundred years ago, upheld and affirmed the principal that Family Court is a court of equity, despite a statute at the time, ordering custody of minor children to their father. This Court held:

Now, while, under our statutes, the father is given the right to the custody of his minor children, yet this right is not an absolute legal right, beyond the control of the courts. The cardinal principle in such matters is to regard the benefit of the infant paramount to the claims of either parent. While the courts will not lightly interfere with what may be termed the “natural rights” of parents, yet the primary object of all courts, at least in America, is to secure the welfare of the child, and not the special claims of one or the other parent. Under the facts of this case, we cannot see that the trial court at all abused its judicial discretion in giving the custody of this infant to its mother, *Flint v Flint*, 63 Minn. 187, 189, 90, 65 N.W. 272, 273 (Minn.1985)

Such a holding continues today. The district court’s equitable powers were upheld when it went outside of a statute so as to serve the best interests of the child. (*See Kimmel v Kimmel*, 392 N.W. 2d, 904, (Minn. App. 1986) (rev denied Oct. 29, 1986)) The Court of Appeals, in that case stated:

In *Sweep v. Sweep*, 358 N.W.2d 451 (Minn.Ct.App.1984), we affirmed a custody award to a child's maternal grandparents pursuant to a domestic abuse proceeding under Minn.Stat. § 518B brought by the child's stepmother (her mother was deceased). The child's grandparents appeared at the hearing, without notice, and sought custody. The stepmother was not aware of the request. In explaining the decision, we stated, “The focus in any custody determination is, and must be, on the best interest of the child. Were we to do other than affirm the court's exercise of its discretion, we would be introducing more instability into Tracy's life * * *.” *Id.* at 453. *Kimmel*, 392 N.W. 2d, 908.

In this case, the Father’s position is that unless a grant of statutory authority is in place, the court has no powers of equity to grant visitation to a third party, even when the individual facts of that situation are compelling, as in this case.

The Court is not solely dependent upon the legislature for its power and authority as is urged by the Father. The Court has inherent equitable power. The Father and the Court of Appeals urge a position that unless a statutory grant of authority exists, the court has no authority

to order anything outside of a statute. That violates the very foundation of Family Court as a court of law and equity. In *Holmberg v. Holmberg*, 588 N.W. 2d, 720, 725-26, (Minn.1999) this Court held that: ...”family dissolution remedies, including remedies in child support decisions, rely on the district court's inherent equitable powers.” *Id* at 724. “The trial court has the equitable power to fashion remedies for children that are outside of a legislative grant of authority, by exercising its inherent equitable powers. *Id* 725-26 .

In this case the legislature has set forth in *Minn.Stat. 257C.08*, visitation for children with some third parties. The statute itself, does not state in any manner, shape or form that this is a sole grant of visitation authority, nor does it state that the Court does not have equitable power to grant relief around or differently from the statute. (emphasis added)

The equitable power of the Court should not be limited because the legislature has not kept up with changing family structures.

In *Troxel v. Granville*, 530 U.S. at 63-64, 120 S.Ct. 2054, 2059 (2000) Justice O’Conner, stated

[T]he demographic changes of the past century make it difficult to speak of an average American family. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single parent households. In 1996, children living with only one parent account for 28 percent of all children under age 18 in the United States. *Troxel*, 530 U.S. at 63-64, 120 S.Ct. 2054, 2059.

During the legislative session of 2010/2011, the Minnesota legislature debated same sex marriage. The State of New York, in June of 2011, became the largest state in the union to pass and acknowledge same sex marriage. Yet, in Minnesota, the law for visitation is narrow, contradictory, and confusing. The continued expansion of what is a family is continuing. Who

would have thought, when the visitation statute was enacted, that gay couples would be entitled to marry?

What about step- grandparents, who presumably are close to their step- grandchildren but, upon a death or divorce have no standing to petition the court for visitation? What about step- parents that resided with the “non-custodial” parent and not meeting the *in loco parentis* doctrine exception? What about step-grandparents that were grandma or grandpa when their child was married to the “non-custodial” parent? When the boundaries expand beyond the legislature, as they have in the 21st Century, it is up to the equitable powers of the court to find and protect the rights of the innocent and the most vulnerable.

Other states have addressed the issue and balance of equity and statutory authority of the District Courts when it comes to children, custody, and visitation. In New Mexico in 1993, the court allowed the trial court to grant a petition for adoption in the natural parents, but also award visitation to the foster parents based upon the court’s equitable powers, over the objections of both the natural parents, and the New Mexico Human Services Department. See the *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). In finding the family court had equitable powers, the Court stated:

“Additionally, this court has recognized that when dealing with children, the district court is exercising its equitable powers. See *In re Guardianship of Lupe C. 112, N.M. 116, 119, 812 P.2d 365, 368 (Ct.App.1991)* (stating that “our supreme court has held that the district court sitting as a court of equity has inherent power concerning issue of custody of minors.” *Id* at 713, 1180

The Court then noted:

The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of clear and valid legislative command. Unless a statute in so many words, or by

a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be upheld and applied. *Id* at 714, 1181

In New Jersey, in 2000, the state Supreme Court found "the exceptional circumstances doctrine" to be applicable to allow a former domestic partner visitation with children despite the fact that the domestic partner was not either the biological or adoptive parent. *In V.C. v M.J. B.*, 163 N.J. 200, 748 A.2d 539, (April 6, 2000). Certiorari Denied October 10, 2000, 531 U.S. 926, 121 S.Ct. 302.

In Wisconsin, the Supreme Court held, in *Holtzmann v Knott*, 193 Wis. 2d 649, 533 N.W. 2d 419 (1995) that their visitation statute was not exclusive and did not abrogate the trial court's right to exercise its inherent equitable powers in granting visitation

In Massachusetts, in *Youmans v Ramos*, 429 Mass. 774, 711 N.E. 2d 165 (Mass. 1999) the Superior Court again found an equitable right to visitation in an aunt who cared for a child for a decade while the father was in the armed forces for apparently (6) years and in the United States for (4) years, all the while, allowing the child to live with the child's maternal aunt.

The cases all find to one degree or another that the court has the equitable power to intrude upon the parent's wishes. In that period, the courts couple the intrusion with a finding that the third party is or was a *de facto* parent or psychological parent, or other such bond. . The case at issue does not hold the aunt was a *de facto* parent. Rather, the aunt is an important and closely bonded person to the child.

The Court of Appeals substituted its own judgment for that of the trial court.

In its opinion, the Appellate Court in made a finding of fact, on page (3) when it stated "[I]t is undisputed that B.H. is thriving with Appellant." *Rohmiller* ___N.W.2d___ (A-10-1348, page 3). The statement arises from the Guardian's report on page 14, first paragraph, when she says "[A]t this time, (emphasis added) Bailey is undeniably thriving." The weight the Court of

Appeals gave this statement is undeserved. The entire trial resulted in ninety-three findings (93) that find not only is in the child's best interests, she would be harmed if she was not allowed to continue seeing her mother's sister. (See TCO Conclusion of Law No. 13, 14, 15, 16 pages 19-21, A-33-35)

This Court has stated the Court of Appeals should not substitute its own judgment for that of the trial court.

The court of appeals reversed and remanded basically because, in its opinion, the trial court had failed to make certain findings it considered to be appropriate. In so doing, in our opinion, it usurped the function the law places in the trial court, and exceeded the proper scope of review that governs an appellate court when reviewing challenged trial court findings of fact. When additional findings are necessary to support a trial court's conclusion on a disputed issue, an appellate court, of course, may remand for additional findings. But, ordinarily, an appellate court's limited scope of review circumscribes additional fact finding by it, and, as well, remand for different fact findings supporting different conclusions. Yet, it appears to us that in this case that is what the court of appeals proceeded to do.

Findings of fact made by a trial court will not be set aside unless clearly erroneous. Furthermore, due regard will be given to the opportunity of the trial court to judge the credibility of the witnesses. Minn.R.Civ.P. 52.01. An appellate court's deference to the trial court's findings of fact is based on the judge having had the advantage of fully hearing the testimony, observing the demeanor of the witnesses as they testify, and acquiring a thorough familiarity with all of the circumstances of the case. *See, e.g., Sigurdson v. Isanti County*, 386 N.W.2d 715, 721 (Minn.1986). If the trial court's findings of fact are not clearly erroneous, they are to be affirmed. An appellate court exceeds its proper scope of review when it bases its conclusions on its own interpretation of the evidence and, in effect tries the issues anew...., *Stiff v. Associated Sewing Supply Company, et al*, 436 N.W.2d 777 (Minn.1989)

It should not be easier to obtain third party custody than third party visitation

Presently in Minnesota, by common law and by statute, third parties may petition the court for custody of children, without the narrow constrictions of the third party visitation statute (*Minn.Stat. 257C.08*).

Third party custody actions arise under various statutes. A *de facto custodian* is a person that resided with a child for twenty-four months (24) months prior to the petition being filed and

a parent did not exercise parental duties or abandoned the child. , (*See Minn.Stat. 257C.01*,sud
(2).

If not a *de facto custodian*, the law still allows for a transfer of by the parents' consent
(*See Minn.Stat. 257C.07* Custody Consent decree)

If not by consent a catch all exists by petitioning as an "interested third party" and either
fitting in to certain criteria or if the situation warrants, allege "extraordinary circumstances"
under *Minn.Stat. 257C.03* Subd 7, (1) (iii) Interested Third Party.

When the child has been harmed, as this child was when she was a baby, had the mother
not been alive then, the aunt would have been first on the list for placement. (*See Minn.Stat.*
260C.212, Subd 5,(a)) upon removal by the court, the social service agency must conduct a
relative search within 30 days of the child's removal, for placement of the CHIPS child with
relatives.

Our common law allowed for third party placement, after consideration of the specific
circumstances of the child, and after a finding that the parental preference for the biological
parent was overcome. See *Wallin v. Wallin*, 290 Minn. 261, 187 N.W.2d 627
(Minn 1971). Great deference was given to the trial court's findings and its exercise of
judgment. "We are well aware of our decisions in which we have held that in determining
matters of custody the trial court is vested with broad discretion,... We have no disagreement
with that approach, for in custody matters and in domestic relations cases generally, a high
regard must necessarily be given to the trial court's discretion." *Wallin*, 290 Minn. 267, 187
N.W.2d 631.

In this case, the trial court set out ninety-three (93) findings of fact that were very
particular and addressed in detail, why the aunt should continue with visiting the child.

Visitation is less intrusive upon the parental prerogative than is custody. Yet, we apparently have a bright line test for who may or may not have visitation with a child, regardless of the child's best interests, even with due deference given to the parent's wishes. The test for visitation is harsher and more mechanical than the test for depriving a parent of their right to physical custody. In this case, had Kelli Rohmiller actually stepped in at the time of her sister's death, and sought custody, in the Minnesota proceeding, she likely would have gained custody, given the factual circumstances of the father's lack of contact with the child and his criminal conviction related to his physical abuse of his child. Yet, she attempted to preserve the parental relationship and continues to visit with and maintain contact with the child, only to later have the father use a mechanical test to deprive the child of her maternal family. This clearly seems illogical and just plain wrong.

The Court properly exercised its inherent equitable authority. There should be a clear statement that the court retains its equitable powers, unless they are clearly and unequivocally eliminated

CONCLUSION

The Appellate decision should be reversed as to visitation with the child's aunt. The court properly exercised its inherent authority to protect the minor child's relationship with her mother's identical twin sister. The court properly weighed the wishes of the child's father and balances his fundamental right to parent his child, with the child's best interests.

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Attorney for Petitioner
Debra Julius
14093 Commerce Avenue
Prior Lake, Minnesota 55372
Attorney Id No. 277319
(952-440-2700)