

No. A10-1348

STATE OF MINNESOTA  
IN SUPREME COURT

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In Re the Matter of:

Kelli Rohmiller and Clayton Rohmiller,

Appellants,

and

Andrew Hart,

Respondent,

and

Jennifer Joseph,

Guardian ad Litem.

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**APPELLANT'S REPLY BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## ARGUMENT

The sum of the additional issues raised by Respondent's arguments are:

1.) *Minn.Stat.257C.08 Subd 4* does not include Kelly Rohmiller, the maternal aunt as a person eligible and that there is no historical precedent for an award to an aunt, or anyone else, outside the statute;

2.) That the legislature purposefully omitted aunts from the statute;

3.) The only common law principal that may be used with third party visitation issues is that of *in loco parentis*;

4.) The District court has no equitable powers to go beyond a statute, as the United States Supreme Court case, *Troxel v Granville*, 530 U.W. 57, 65 (2000) is a bar to a court ordering third party visitation over the objection of a parent;

5.) Third party visitation, since *Troxel*, may only be awarded to grandparents or those in loco parentis;

6.) This court in *Soofoo v Johnson*, 731 N.W. 2d 815, (Minn. 2007) held that the court has no equitable power to award visitation;

7.) The level of proof required with visitation issues is clear and convincing evidence and the Rohmiller trial court did not meet the standard.

8.) The Aunt may see the child with the grandfather, so this entire case is unnecessary.

The arguments and their applications to the issues raised by Respondent's arguments are wrong.

**1. Does *Minn.Stat. 257C.08* include Appellant Aunt? No, the plain meaning of the statute lists certain classes of people and the Aunt is not in the listed class..**

**However, when Respondent asserts that Minnesota has never allowed a third party not enumerated in 257C.08 visitation, Respondent is wrong.**

The trial Court's decision in this case is not the first time a District Court used its equitable powers and common law principals to award third party visitation outside of the statute. Respondent states in his brief that "*Minn.Stat 257C.08 has never been interpreted to include third parties not specifically listed in the statute*" (See *Respondent's Brief, page 8 para B*).

In the case of *Simmons v Simmons, 486 N.W.2d 788 (Minn.Ct.App.788 1992)* the court did order third party visitation to a person, not enumerated by the statute. It used common law principals and its equitable powers to make the order. The Appellate Court upheld an order in 1992, for step-parent visitation. Holding that the statute for third party visitation (*numbered differently, but worded exactly same as Minn.Stat.257C.08 subd 4*) did in fact allow for the assertion of common law rights, beyond the wording of the statute. (emphasis added) The Appellate Court in *Simmons* said;

In view of our supreme court's recognition of the in loco parentis doctrine, we hold that a former step parent who was in loco parentis with the former step child may be entitled to visitation under common law. Because section 257.022, does not contain any clause specifically repealing, restricting, or abridging a non parents common-law visitation rights, we construe the statue to extend and supplement the law. (Emphasis added) *Simmons at 791*.....

Later in *Simmons*, the Court states that because of the common law, the court was justified in ordering visitation with a third party, not so named in the statute, stating;

Because such a relationship existed (in loco parentis) the trial court had authority to award visitation, even though Simmons did not meet the requirements of Minn.Stat. 257.022, subd 2b. (Emphasis added)

The third party visitation statute in this case is *Minn.Stat. 257C.08 subd (4)*. The third party statute in Simmons was *Minn.Stat. 252.022 subd (5)*. The two statutes are worded exactly the same.

There is no explanation as to why, now, the Appellate Court changed its position and took the opposite position, invoking the doctrine of *expressio unius est exclusio alterius*. As the trial court properly noted and the Court in Simmons noted, the statute does not preclude the court from using equitable powers and awarding someone outside the statute visitation.

**2. Respondent incorrectly claims the legislature knew it was excluding certain classes of third parties visitation when it crafted the statutes and thus the exclusion doctrine prohibits the Court from exercising its equitable authority.**

Respondent offers no authority for his assertion that the legislature knew it was excluding all other classes of third parties from visitation. He claims that it is a “far more rational” interpretation to apply the “plain meaning” rule and then interpret the statute and the legislature’s intent by stating that if others were to be included they would have been named. He ignores case history and common law. He cites no authority for his position, other than ridicule. (See Respondent’s Brief, Page 11)

The United States Supreme Court approaches the use of the exclusion doctrine with caution. The United States Supreme Court said about the exclusion doctrine in *Barnhart v Peabody Coal Co. et al.* , 123 S.Ct. 738, 760, 537 U.S. 149, 170 (2003) , as follows:

As we have held repeatedly, the cannon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping: it has force only when the items expressed are members of an “associated group or series,” justifying the inference that items not mentioned were excluded by deliberate choice no inadvertence. *United States v Vonn*, 533 U.S. 55, 63, 122 S.Ct.1043, 152 L.Ed.2d 90 (2002) We explained this point as recently as in last Term’s unanimous opinion in *Chevron U.S.A. Inc v Echazabal*, 536 U.S. 73, 81, 122 S.Ct. 2045, 153 L.Ed. 2d 82 (2002).

Just as statutory language suggesting exclusiveness is missing, so is that essential extra statutory ingredient of an expression-exclusion demonstration, the series of terms from which an omission bespeaks a negative implication. The canon depends upon identifying a series of two or more terms or things that should be understood to go hand in hand.... (citations omitted)

“(expressio unius ‘properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast that which is omitted that the contrast enforces the affirmative inference’)  
(quoting *State ex rel Curtis v De Corps*, 134 Ohio St. 295 299, 16 N.E. 2d 459, 462 (1938) *United States v Vonn*, *supra*”

There is no mandate for the use of the exclusion doctrine. The Appellate Court failed to explain or find an “affirmative inference” in *Minn.Stat. 257C.08*. The law does not include any terms that go “hand in hand” because there are none.

Respondent cites to *Kulla v McNulty*, 472 N.W.2d 175, 182 (*Minn.App.1991*) for his incorrect proposition that the Appellate Court “narrowly interpreted the predecessor to *Minn.Stat. 257C.08* and declined to extend third party visitation to a third parties” (Respondent’s Brief, page 12. Par. 2). Yet, he fails to explain how the Appellate Court in 1992, also cited to *Kulla* in the *Simmons* case, and said “Our prior decisions interpreting section 257.022 do not indicate that the statute precludes a nonparent from asserting common law visitation rights, if any. See *Kulla v McNulty*,...) “*Simmons at 791 Fn1*)

Appellant is wrong when he asserts that the exclusion doctrine precludes the exercise of the Court’s equitable powers.

**3. Respondent appears to be stating that the use of the common law doctrine of *in loco parentis* is an acceptable exception to the exclusion doctrine, his interpretation**

**of the plain meaning rule and his own position that the visitation statute only allows visitation for enumerated classes notwithstanding. (Respondent's Brief, pages 6-12)**

If the application of one common-law rule is an exception to the statute, in one instance, then why is the application of another common law exception (*in parens patriae*) it not appropriate in another?

The Trial Court applied the common law principle in *parens patriae*. (Trial Court order, Conclusions of Law No. 7 and 8, A-18)

“*Parens patriae* originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants. *Blacks Law Dictionary*, Abridged Sixth Edition, *Parens Patriae*, page 769.

Minnesota recognizes the common law doctrine of *parens patriae* in relation to visitation with children and recognizes the court may intrude upon parental prerogatives (See *Sooahoo v Johnson*, 731 N.W.2d 815 (Minn.2007). “the state as *parens patriae* may restrict the parents control... [T]he state has a wide range of power and limiting parental freedom and authority in things affecting the child's welfare. *Sooahoo at 822.*)

**4. Respondent appears to be stating the Family Court and/or any court, does not have the equitable power to rule outside of a statute. (Respondent's Brief, pages 6-12) That is incorrect.**

Respondent fails to account for the equitable powers of the Court. He has stated several different ways that the Court may not go beyond the confines of the statute, and if it does, then a “hornet's nest” of unknown proportions in third party visitation suits will follow. (Respondent's Brief page 27) Respondent has not addressed the fact that the Family Court has many, many times used its equitable powers to right wrongs and protect children.

*Dela Rosa v Dela Rosa*. 309 N.W.2d, 755, 756. (Minn.1981) “The trial court’s award was grounded in equity...”. “The District court has inherent equitable power to grant equitable relief.” *Johnston v Johnston*, 280 Minn. 81,86, 158 N.W.2d 249, 254 (1968)

The District Court has and always has had the power to make orders in the best interest of children.

**5. Respondent argues that since *Troxel v Granville* came down, the courts may only award third party visitation to grandparents or to one standing in *loco parentis* to the child. (See Respondent’s Brief page 25)**

The Respondent argues that *Troxel v Granville*, 530 U.S. 57, 530 U.S. 57, 120 S.Ct. 2052, (2000) and *Soohoo v Johnson*, 731 N.W. 2d 815, (Minn. 2007) requires the Court to give extra weight to the parent’s wishes in terms of governmental interference with those wishes. Neither case holds that the parent’s wishes may only be intruded upon only by grandparents or those standing *in loco parentis* to the child.

The *Troxel* Court did not hand down a due process shield from all governmental intrusion, except for statutes and the in loco parentis doctrine. Attached is a recent Alabama State Supreme Court case that is not cited yet, dealing with third party visitation without the in loco parentis aspect. (A-41)

Rather, *Troxel* stands for the principal that the State may not intrude in every day visitation disputes where just a best interest standard applies. Rather, the State has to meet certain tests and look at any “special circumstances” in the issue that take the visitation dispute out of a “mere visitation dispute.” (*Troxel* at 68, 2061)

The Court does not define “special circumstances” that warrant intrusion, but surely this case falls into that category.

“[The statute] allow[s] any person, at any time, to petition for visitation without

regard to relationship to the child, without regard to changed circumstances, and without regard to harm”); *id.*, at 20, 969 P.2d, at 30 (“[The statute] allow[s] ‘any person’ to petition for forced visitation of a child at ‘any time’ with the only requirement being that the visitation serve the best interest of the child”). Turning to the facts of this case, the record reveals that the Superior Court’s order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court’s order was not founded on any special factors that might justify the State’s interference with Granville’s fundamental right to make decisions concerning the rearing of her two daughters. *Troxel at 67, 68, 2061.*

This case is the factual opposite of *Troxel*. This is not an everyday garden variety case. This case is a special case. The *Troxel* court noted that:

The instant decision rests on Statute 26.10.160(3)’s sweeping breadth and its application here, there is no need to consider the question whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation or to decide the scope of the parental due process rights in the visitation context. *Troxel at 58, 2056*

The Respondent argues as if *Troxel* gave him a new ax to swing so as to keep the “emasculating” decision of the Rohmiller Trial Court away from him. (See Respondent’s Brief, page 26,) “*Troxel* stands firmly for the proposition that neither a legislature nor a court can accomplish this result by emasculating a parent’s time honored right to direct a child’s upbringing.”)

*Troxel* does note that a finding of harm or potential harm is a basis to intrude upon a parent’s parental rights. *Troxel at 58, 2056 Id* The Rohmiller Trial Court and the

Guardian Ad Litem both stated the child would likely suffer harm if she was not allowed to continue visitation with the Rohmillers. (See TR. Pages 116-117) (Trial Court Finding of Fact)

The Rohmiller Trial Court also found and acknowledged the uniqueness or “special factors” of the Rohmiller situation. (See Findings of Fact 72 -80, A-12-13) And, that despite Respondent’s denials, he is the one that refused contact with the Rohmillers; “Since the Respondent gained custody of the minor child; he has not allowed contact between the Petitioners and minor child. Respondent’s adamant refusal to allow contact with family members who were active in the child’s life is quite troubling.” (A-6)

The Trial Court protected Respondent’s rights well within the *Troxel* guidelines. The Respondent fails to admit that the case is a special circumstances case and that he contributed to the special circumstances The Respondent not only was charged with malicious punishment of a child, he pled guilty to the malicious punishment of his 10 month old child. (A-28 GAL report 4) The Respondent did not kill one cat as the psychologist mentioned; he killed kittens, plural, out of his stress. (See A-27 GAL report para 6) The Respondent’s self-serving statements contained in the Guardians report, and cited by her as statements from the examining psychologist’s report are unexamined hearsay and should not have been referenced in the Appellate decision as if they were fact. (*Rohmiller v Hart*. 799 N.W.2d 612, 613) (*Minn.Ct.App. 2011*)

The prior abuse of the child by Respondent is a striking special circumstance. Then add to the facts, the child’s mother died when she was (2). Then because of the father’s malicious punishment conviction, he could not even have contact with the child when the mother died and did not see his child for 18 months ( A-28 GAL report, par. 6)

The child instead lived for (3) years with her maternal aunt. At (5) years old, this child then left that primary caretaker and moved in with Respondent. Respondent, then promptly cut off ALL contact with the mother's family, which included the only constant in her life, her mother's twin sister, her Aunt Kelli Rohmiller. Surely this is a special circumstance case, if there ever was one.

**6. The Respondent claims the Soohoo Court set out a constitutional test for third party visitation and the Rohmiller Court failed the test.**

The Respondent argues that *Soohoo v Johnson*, 731, N.W. 2d 815 (Minn.2007) set out a (3) part test to determine the constitutionality of a third party visitation statute and by inference that test applies in this case. While conceding the award of visitation to Appellant Aunt is an equitable award, the Respondent argues the equitable award to Appellant Aunt fails the *Soohoo* test. (See Respondent's Brief, pages 12-24 para 2)

In *Soohoo*, this Court noted the three "guiding principles" of the Troxel court are:

- 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
- 3.) The court must assert more than a best interest test.

*Soohoo at 821.*

The Court in Rohmiller was very careful, cautious, and mindful of the father's wishes. The Court found, and it is true, that this situation is a unique and heartbreaking situation. This situation is not the average "general population" visitation case. This case is one that is special and unique. Not one person has ever argued that this child has not experienced significant trauma.

The issue is, may the father inflict even more trauma upon the child by cutting of the maternal family. Even the father admitted, the child did in fact, suffer trauma upon being wrenched from the mother's family. The father reported the child did not sleep through the night for nearly a year after coming to live with him. (A-30 para. 2). The father says the reason he does not obtain counseling for the child is that he cannot afford it due to this case, ignoring all the free counseling available through agencies and churches. (A-30 para. 3)

The child, according to the guardian's report, introduces herself in school as Hi, I'm Bailey. My Mom is dead." Or "I just have a Dad." (A-35 para. 3) According to one teacher she can be withdrawn and "different" (A-34 GAL report, para. 6). The child was abused by her father. The father did change his stories and facts throughout this case.

This child has lost every single important person in her life. The only opportunity for this child to see how her deceased mother looked physically, is to see her Aunt. This is a gift to any child with a deceased parent. This child has the one special unique opportunity to know and continue a relationship with her mother's identical twin sister. When this child looks at her aunt, she will know the look of her mother. That in and of itself is unique and special, yet in addition to that, she is close emotionally to her aunt, loves her aunt and is happy to see and be with her aunt. ( See GAL report A-33, para. 5- Bailee speaking to her Aunt during her first visit with her, at one point said " I just want to keep looking at you.")

The Court weighed the father's wishes in a full day trial, a guardian ad litem's report, a psychological examination of the persons seeking visitation, visitation observations and in 93 Findings of Fact.

The fact is, the Father speaks only of his rights and does not speak of the child's needs. The guardian noted the Father has had changing rationale for cutting of the Rohmillers from visitation. (A-29 para. 4) and the Court noted the same Finding of Fact 84 Trial Court Order A-14)

Rather than a one-sided barrage, the Court gave this father more than fsample special weight in making its decision.

There was no presumption in favor of visitation. How could there have been? The Appellant went through more hoops and tests than do many parents in custody disputes.

Rather, a great deal of weight was given to Respondent's concerns. The appointment of a guardian ad litem, psychological testing, visitation observations all were performed, so as to address his concerns.

There was a great deal of time between the commencement of this action in early 2009 and the decision in June of 2010. No temporary visitation was awarded, despite the request of Appellant. The fact is, Respondent is simply not correct in many of his statements of fact. (See A-30, A-34 last para., A-39 para. 3,4,5) and (Trial Court Findings 84, 85, 86 A-14),

The Court used more than a simple "best interest" test in making its decision. What more could the court say than it did? All of the ninety-three Findings of Fact, point to the sad, compelling and unique special circumstances of this case. (A1-16)

#### **6. Is the standard of Proof Clear and Convincing for third party visitation?**

Finally, the Respondent claims the "standard of proof" in this matter must be clear and convincing, citing *Soofoo at 821*.

This Court actually said that “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.” *Soofoo* 821

This Court said that the correct standard of review is “strict scrutiny” and that the “law must advance a compelling state interest and must be narrowly tailored to further that interest. (citations omitted) *Soofoo* at 821.

This Court recognized that in the “Supreme Court has long recognized that states may intrude on parental rights in order to the protect the ‘general interest in youths well-being.’” (citations omitted) *Soofoo* at 822.

This Court then went on to discuss the Court’s power and the doctrine of *parens patriae* that gives the Court the authority to act in relation to children, stating “[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.” *Soofoo* at 822

The ruling in this case addresses the compelling state interest of protection of our children from parental decisions that ignore a fundamental need of a child, which in this case, is to know her deceased mother’s identical twin sister. Respondent scoffs as the individual fact issues in this case, but it is the individual fact issues that create the compelling need in this child.

Therefore the question then arises, is the decision narrowly tailored to further a state interest? The answer is yes. This decision recognized the unique, special factual situation of the controversy. (A-1-2) and is limited to an exercise of the Court’s equitable power for the good of one little girl, so that she might see her deceased Mother’s identical twin sister. That is a narrow base.

Then the question arises, is the ruling based on more than best interests?

The District court held, in Conclusion of Law, No. 13 (A-19) that not only is it in the child's best interests to continue visitation with her maternal family. But that she would suffer harm if she was denied her mother's family.

But beyond that, mindful of the weight and deference given to a natural parent's decision, the court finds and agrees with the Guardian ad Litem in this matter, that the child would suffer emotional endangerment if she were not allowed to see Petitioners. While the Respondent testified he would allow a relationship with the family, the Court notes he has done nothing to promote that relationship since gaining custody in 2008. The child clearly has a bond with the maternal family as was evidenced by the observations between the child and her maternal aunt. (A-19 para 3)

#### **7. The Aunt may see the child with the Grandfather.**

Respondent now states he never opposed Grandparent visitation. However, he also never granted any, until order by the trial court to do so, in June of 2010. Respondent fails to explain why he never allowed the child to make even one telephone call or receive one card or letter from the Rohmillers.

More importantly, if something were to happen to the grandfather, given Respondent's past behavior, there is no certainty whatsoever that the child would be allowed to see her Aunt. If the Grandfather dies, or becomes disabled, again, the child will again lose not one, but two important people in her life. It is true that Kelli, the aunt could predecease the father, but not likely. There are a whole host of reasons in this particular case to grant the Aunt specific, individual visitation.

The trial court heard and saw the evidence heard and personally observed the parties and witnesses testify. The trial court is in the best position to make a decision such as this one, concerning a child.

**8. The Appellant disputes Respondent's construction of the facts.**

The substantive facts of this case are not the issue before this Court. However, a complete reply to Respondent's brief requires that Appellants object to Respondent's representations and characterization of the facts. This issue has been raised before regarding the timing of the filing of the Appellant's conservatorship Petition. (See Petitioner's Initial Brief, A-53, showing Appellant and Respondent stipulated to a third party conservator for the child's money) and Petitioner's Brief, Facts, page 2, pars 3 and 4) and Transcript page 101, all lines, testimony of Kelli Rohmiller, why she opposed Respondent's Petition to be appointed conservator.

The Respondent incorrectly stated that Appellant did not attempt to see the child until this proceeding was commenced. That is not true. Attached as page (A-42-A-47) are true and correct copies of emails between the Appellant's attorney and Respondent's attorney, seeking visitation and contact with the child through their attorney commencing October 9, 2008. ( See Respondent's Brief, page 3 para. 2 and 3)

The Respondent claims he was not notified of the death of Katie Rohmiller until he received a Petition seeking custody of the child. ( See Respondents' Brief page 2 para. 2). Yet at trial, the Aunt testified that she went to Respondent's work place to inform him of the death of her sister, the month following her death. ( See Tran. Page 99, lines 11-13, Kelli Rohmiller stating: " My sister died in August. I remember going into Andy's job and talking to Andy sometime in September)

The Respondent states in his brief that he was charged with malicious punishment of a child, but that he entered into a plea bargain, resolving the matter, as if the charge of malicious punishment was let go. It was not. (See Respondent's brief, page 1, para. 2) See Attached MNCIS listing for Respondent's guilty plea as well to malicious punishment. ( A-48-A-49)

The Respondent admitted to the psychologist to killing a cat, singular. The facts were that he killed four separate kittens and according to the child's mother and hit the child more than once, according to her. ( See A50-A-51)

The clear and unambiguous facts are that this child loves her Aunt and Grandfather. The only person to mistreat this child and to engage in behavior that is less than admirable has been the Respondent.

### **CONCLUSION**

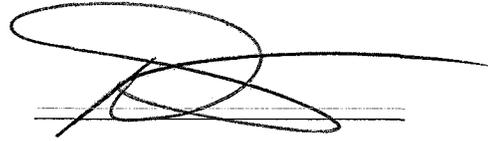
This case begs the question; why not let the Aunt see the child? Why not let the child continue her relationship? The trial Court saw the importance to the child. The trial court, with care, deliberation and caution found within its equitable power, that it is right, fair and just to over-ride the child's father, who at times has not shown the best judgment, and allow this child to know her maternal heritage.

This case is about whether or not the Family Court has the equitable power to award third party visitation to a child, in a unique and heart wrenching fact situation that falls outside the visitation statute. Despite all the arguments and insults leveled in this case by the Respondent, the conclusion is the same. The Court has the equitable power to act for the welfare of its most helpless citizens, so long as the Court gives due deference

to the parent's wishes. For all the reasons set forth in Appellant's briefs, the Trial Court acted lawfully and properly, and its Order should be upheld.

Respectfully submitted,

Dated: August 16 2011

A handwritten signature in black ink, appearing to read 'Debra D. Julius', written over a horizontal line.

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