THE CURRENT STATE OF THIRD PARTY CUSTODY IN MINNESOTA

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Minnesota has a long and rich history of appellate court decisions addressing the custodial placement of children with persons other than a biological parent. These third party custodians frequently include grandparents or other biological relatives, and in some situations, step-parents or persons who are not biologically related to the child but who have an important and usually long established relationship with the child. Appellate court decisions in Minnesota addressing third-party custody cases go back to the nineteenth century. These early cases seem to suggest that such custodial placements were a fairly common private means of dealing with abuse, neglect, and abandonment of children in an era before an elaborate state-supported child protection system was implemented[i].

The Minnesota Legislature and its appellate courts now appear to be at a significant crossroad in their handling of custodial placements of children when biological parents are absent, or for whatever reason, are unable to parent their children. As of August 1, 2002, Minnesota now has a new and comprehensive third party custody statute applicable to requests for third party custody brought in family court. Third party custody issues also arise in juvenile court proceedings, and Minnesota's juvenile code has in recent years evolved through a combination of federal mandates and Minnesota's own statutory revisions seeking to move children more quickly out of the foster care system and into permanent custodial placements. Under Chapter 260C of the Juvenile Code, when a child has been removed from a biological parent's home and it has been determined that reunification with biological parents is not feasible, a preferred permanency option is the transfer of custody to a relative or other persons with significant ties to the child.[ii]

The Minnesota Supreme Court also waded into the area of third party custody with a recent decision issued in August of 2002 addressing the rights of a biological parent in a dispute with relatives as to the custody of the minor child.[iii] The case not only revisited and referred to Minnesota's legal standard for addressing such disputes, it also raised the constitutional dimensions of these disputes between biological parents and third parties recently addressed by the United States Supreme Court in the case of Troxel v. Granville[iv] which was decided in 2000.

Until August of 2002, Minnesota's statutory provisions regarding third party custody were scattered about in two chapters -- Chapter 518 which addresses divorce proceedings and Chapter 257 which addresses miscellaneous custody and access issues. The provisions were hardly a model of clarity and provided precious little guidance as to how and where to commence such proceedings. The statutes had contradictory standards and factors to consider, and left much of the procedures to be determined by a long and complex line of rather incoherent appellate court decisions. There had long been confusion in the family court proceedings as to whether a third party custody proceeding was to be decided based on a best interest standard, or the more burdensome "endangerment" standard applied in custody modification proceedings. Child protection proceedings in juvenile court long had a transfer of custody as a dispositional alternative when children could not be returned home, but as in family court, it was not clear in the juvenile court what pleadings were to be filed, where they should be filed, and what substantive criteria would be applied. In the event there also happened to be a family court third-party custody proceeding going on simultaneously, the courts found themselves in nothing short of a procedural quagmire.

The legislative enactments that went into effect on August of 2002 and the Minnesota Supreme Court's decision of In the Matter of the Custody of N.A.K.[v], when taken together, have

significantly clarified how third party custody disputes and custody placements with children outside of their biological families are to be handled, whether in juvenile court or family court. The proceedings still have inherent complexities, especially when juvenile court and family court jurisdictions come into play simultaneously, but in general, the current state of third party custody law in Minnesota is now much clearer than it has been in years. Perhaps it will now be more possible to truly consider the best interests of the children while at the same time protecting the constitutionally protected rights of biological parents in these disputes.

A. CONSITUTIONAL ISSUES

In discussing the current state of third party custody law in Minnesota, a logical starting point is the constitutional dimension of the proceedings. This issue was briefed and discussed at all levels of the N.A.K. case. While the Minnesota Supreme Court did not rely extensively on the constitutional claims of biological parents in that decision, the Court was clearly cognizant of the United States Supreme Court's views on the rights of biological parents to direct the raising of their children as stated in the recent Granville v. Troxel decision. In Troxel, the United States Supreme Court addressed a Washington statute which provided that any person may petition the court for visitation at any time, and that the court may order visitation rights for any person when visitation may serve the best interests of the child.[vi] The United States Supreme Court, in a plurality decision, held that the Washington visitation statute violated the substantive due process rights of the biological mother as applied when it permitted the paternal grandparents to obtain increased court-ordered visitation following the death of the children's father. The court-ordered visitation was in excess of what the mother thought appropriate[vii]. The district court's order was based solely on the court's disagreement with the mother as to whether children would benefit from such increased visitation.[viii] The United States Supreme Court's Troxel holding was based

in part on the fundamental right of parents to make decisions concerning the care, custody and control of their children.[ix]

While the Troxel case clearly deals with a visitation issue and concerns that parenting decisions that are contrary to a biological parents' fundamental right to parent a child must meet a higher threshold than the best interest standard used by the Washington statute and courts, and while the Troxel case itself spoke affirmatively of Minnesota's third party visitation statute[x], the case raised significant concerns for third party custody disputes. Troxel has served to direct critical attention as to how state legislatures and state courts go about balancing the rights of biological parents with third party custodians. The clear message from the Minnesota Supreme Court in N.A.K. was that it is not enough for a third party petitioner to simply prove that custody or placement with the petitioner is in the best interests of the child. There is to be something shown beyond the best interests of the child. The dissenting members of the Minnesota Supreme Court went back to an even earlier United States Supreme Court decision and stated that a biological parent has a fundamental liberty interest in the care, custody and management of his or her child, and this interest does not evaporate simply because the natural parent has not been a model parent.[xi]

B. APPELLATE COURT STANDARDS

Prior to the enactment of the new third party custody statute for family court proceedings, and prior to the changes in the juvenile code dealing with transfers of custody to third parties as a dispositional option, two slightly different standards for third party custody were developed in Minnesota case law. The two standards have been cited and applied interchangeably over the years in both family court and juvenile court third party custody and placement decisions, and both standards were discussed and refined by the majority decision in N.A.K. One of these

standards was most recently articulated in Wallin v. Wallin[xii]. Here the Minnesota Supreme Court stated that a biological parent was entitled to custody unless it clearly appeared the parent was unfit, had abandoned the child, or there was some other extraordinary circumstances requiring placement or custody with a third party. It also had to be shown that placement with the third party would be in the best interests of the child. The language in Wallin developed from numerous cases prior to that time that had addressed the issue of third party custody.

In the more recent Durkin v. Hinich[xiii] decision, the Minnesota Supreme Court addressed the standard for third party custody where there was both a family court petition for third party custody and a juvenile court child protection proceeding where placement with third parties was being considered. In Durkin, the Minnesota Supreme Court again articulated a standard which also was developed from earlier case law, but stated the standard in slightly different terms than the Wallin decision. The Supreme Court held that a strong presumption favors the biological parent unless grave and weighty reasons exist to separate the parent and the child. Grave and weighty reasons included neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to provide the child with needed care. As in Wallin, the court here also said that the best interests of the child had to be considered, and indeed, was to be the overriding consideration.

What has caused a significant amount of confusion in applying either the Wallin or Durkin standard in third party custody cases was the requirement of not only a showing of some significant shortcoming on the part of the biological parent – whether this be unfitness, abandonment, extraordinary circumstances, or the grave and weighty reasons listed in Durkin – but also that the child's best interests was the ultimate and controlling factor. Over the years, the Minnesota legislature has made it a practice to generate lists of factors courts are to consider

when determining the best interests of the child. A child's "best interests" is a concept whose components society is unable to agree upon and which has been the subject of countless appellate court decisions in divorce, paternity, or juvenile court proceedings. Thus, when trial courts were faced with third party custody disputes, there was always a certain amount of disagreement as to which list of best interest factors, if any, applied, and also disputes as to the weight to be given to the various factors.

In N.A.K., the third-party custody petition was filed in family court under both Chapter 257 and 518. A maternal aunt and uncle sought custody following the death of the biological mother, and the biological father also sought custody. The trial court had to determine how to factor in the best interests of the child, and apply the directives of Wallin and Durkin, while at the same time not losing sight of the Troxel reaffirmation of the constitutional rights of biological parents to parent their children. That trial court judge applied the best interest factors found in Minn. Stat. §518.17 and ruled in favor of the relatives. The Minnesota Supreme Court ultimately remanded that determination, concluding that the trial court placed too much weight on best interest factors at the expense of the presumption favoring the biological parent.

The N.A.K. decision is important in that it does clarify the three bases for an award of custody to third party petitioners that are preliminary to the best interests analysis. It is not as helpful in discussing how and what best interest factors are to be applied. The decision itself recites the substantive law of both Wallin and Durkin and then, as those cases did, emphasizes that the best interests of the child is the "umbrella" under which all third party custody decisions are to be made. The case also restates the presumption from an earlier case that upon the death of a parent, a surviving parent is presumed to automatically receive custody unless that presumption is rebutted.[xiv]

N.A.K. focuses on the three preliminary factors for third-party custody cited in Wallin, namely, unfitness of the parent, abandonment by the parent, or, the unusually ambiguous term of "other extraordinary circumstances." In this author's view, the single most important aspect of N.A.K. -- and where the author feels this case will be most useful in the future -- are situations where children have significant special needs, either physical or emotional, that would support the placement with a third party custodian rather than a biological parent. The N.A.K. decision in effect equates that "other extraordinary circumstances" factor to special needs of the child, and goes on to rather boldly state that this particular factor has nothing to do with the fitness or unfitness of the biological parent, but rather focuses solely on the needs of the child. While the case itself does not specifically define "special needs," it does clearly indicate that if this is the primary factor that the court is looking to for the basis of a transfer of custody to a third party petitioner, the court need not make a determination that the biological parent who may lose custody is in any way unfit to parent that child or that he or she has abandoned the child. Rather, the child's needs, irrespective of the biological parents' shortcomings, may be of such an extraordinary nature that custody is appropriately placed with the third party petitioner.

C. THE NEW LEGISLATION

While the N.A.K. decision does resolve the issue of how to determine best interests or indicate which list of best interest factors must be applied, the new third party custody statute in Chapter 257C that went into effect on August 1, 2002, contains a specific list of best interests factors that are to be considered in third party custody cases filed in family court. Thus, any third party custody case commenced after August 1, 2002, in family court will now need to consider the list of best interest factors found in Minn. Stat. § 257C.04. Furthermore, Chapter 257C is a very comprehensive statute that explicitly states who may file a third party custody

petition, where it must be filed, and what it must contain. The statute provides for two classes of petitioners – de facto custodians and interested third parties – with the classification dependent on the amount of time the child has been with the petitioner and the nature of their contacts. The statute generally seems to suggest that a de facto custodian will have an easier time establishing a basis for custody than will an interested third party.[xv]

The statute sets out burdens of proof and provides a list of best interest factors that the courts are to consider.[xvi] In effect, a careful reading of the statute indicates that the standards and burdens of proof for third party custody are largely identical to those set forth in the Wallin and Durkin decisions, but rather than procedural requirements being scattered throughout Chapter 518 and Chapter 257 and burdens of proof stated in numerous ways and in numerous appellate court decisions, they are now found in one comprehensive statute. There should also no longer be the difficulties experienced by trial courts in trying to determine how the best interests are to be analyzed. The constitutional requirements will most likely be met by the clear and convincing burdens of proof provided in the statute and by the required factual circumstances that a petitioner must meet in order to be either a de facto custodian or interested third party.

D. JUVENILE COURT PROCEEDINGS

There will still continue to be some significant complexities in those rather unusual cases that involve both a family court custody proceeding and a CHIPS proceeding under Chapter 260C. This will occur when a determination is made that a child cannot return home to the biological parents and a permanency hearing is held to determine a permanent placement pursuant to Minn. Stat. § 260C.210, subd. 11. The provisions of Minn. Stat. § 260C.201 are designed to provide a self-contained procedure for transfers of legal and physical custody to a relative or important person which is to occur in juvenile court. However, the role of Chapter

257C and the applicability of Wallin, Durkin, and N.A.K. in these juvenile court proceedings are still open to rather significant discussion. Chapter 257C did attempt to address this potential for overlap and interplay by stating that certain types of situations are specifically excluded from the applicability of 257C. These include situations where a person had placement of a child based on a pre-adoptive custody order pursuant to the adoption code (Chapter 259) or there is either a court-ordered or a voluntary placement under Chapter 260C. Both Chapter 259 and Chapter 260C proceedings occur in juvenile court. [xvii]

The complicated interplay of Chapter 260C with Chapter 257C and appellate case law may still arise in situations where a biological parent or other relative who may not be significantly involved in a juvenile court CHIPS proceeding seek to have custody of the children who are the subject of the CHIPS proceeding, and the juvenile court in a permanency proceeding is being asked to place the child with some other person under the dispositional provisions of 260C. If the family court proceedings pre-exist the CHIPS proceeding, the conflict may need to be addressed. It is certainly clear that provisions in Chapter 257C and revisions in Chapter 260C attempted to prevent these types of conflicts. It is not clear how effective those changes will be. Both juvenile court and family court could have concurrent jurisdiction and the court which ultimately has to rule on the third party custody issue or placement will need to decide which procedures and best interest factors to apply.[xviii]

The general rule has always been that juvenile court jurisdiction trumps family court jurisdiction, and the juvenile court is usually permitted to make the ultimate dispositional determination. After the juvenile court order is entered, Chapter 260C provides that the order then is to be docketed in family court for any future modification proceedings – although the juvenile court may retain jurisdiction.[xix] Most juvenile courts are willing to allow other

interested custody petitioners who may or may not have filed petitions in family court to bring intervention motions and obtain party status in the juvenile court proceedings. This should permit these requests for custody to then be considered at the permanency proceeding in juvenile court. Even in those juvenile court placement determinations, the trial courts are well advised to consider the constitutional ramifications of third party placement determinations.

CONCLUSION

While there have been significant recent changes in both statutory and case law developments affecting third party custody in Minnesota, third party custody remains a viable option for the placement of a child. However, whether it is a county social service agency, a grandparent, some other relative, or some completely unrelated person with a significant interest and relationship with a child who seeks placement or custody, they generally must make a strong showing to the court that the biological parent seeking custody is either an unfit parent, has abandoned the child, or that there are some other extraordinary circumstances not related to parental fitness that would justify placement or custody with a third party. The placement must also be in the child's best interests. Absent such a showing, a biological parent's constitutionally protected interest in custody and right to rear a biological child must be respected. These standards, while somewhat refined by recent legislative and judicial developments, have long been the law in this state. Only time will tell if the refinements to the law of third party custody will result in placements that truly are in the best interests of the child.

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[i] For a discussion of these early appellate court decisions in this area, see In re the Custody of N.M.O., 399 N.W.2d 700 (Minn. App. 1987).
[ii] Minn. Stat. § 260C.201, subd. 11(d).
[iii] In the Matter of the Custody of N.A.K., 649 N.W.2d 166 (Minn. 2002).
[iv] 530 U.S. 57 (2000).
[v] 649 N.W.2d 166 (Minn. 2002).
[vi] 530 U.S. at 61.
[vii] Id at 72-73.

[viii] Id. at 68-70.
[ix] Id. at 65-66.
[x] Minn. Stat. § 257C.08 (requires such third party visitation petitions to show more than best interests; they must have a pre-existing relationship as set forth in the statute and demonstrate that such visitation will not interfere with the relationships between the parent and custodial parent).
[xi] 649 N.W.2d at 178 (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)).
[xii] 290 Minn. 261, 187 N.W.2d 627 (1971).
[xiii] 442 N.W.2d 148 (Minn. 1989).
[xiv] In re Hohmann's Petition, 95 N.W.2d 643 (1959).
[xv] Minn. Stat. § 257C.03, subds. 6 and 7.
[xvi] Minn. Stat. § 257C.04.
[xvii] This rather unusual, and in the author's opinion, questionable, exclusion of persons who had pre-adoptive custody orders from seeking third-party custody under Chapter 257C had its genesis in a case where an adoption was not able to go forward because one of the birth parents refused to consent to the adoption and it was not possible to terminate parental rights. The proposed adoption petitioners, who had a pre-adoptive custody order pursuant to Chapter 259, then sought to obtain third party custody. Certain participants in that case advocated for this provision of Chapter 257C excluding any person who had had pre-adoptive custody in an adoption proceeding from petitioning for third party custody of the child whom they had attempted to adopt. The case giving rise to this provision is Mize v. Kendall, 621 N.W.2d 804 (Minn. App. 2001) rev. denied (Minn., March 27, 2001).
[xviii] As examples of cases that have specifically addressed the concurrent jurisdiction of juvenile and family court, see Durkin v. Hinich, 442 N.W.2d 148 (Minn. 1989), and In re Custody of E.A.Q.D., 405 N.W.2d 262 (Minn. App. 1987).
[xix] Minn. Stat. § 260C.201, subd. 11(d).