Chapter 12

Third Party Custody and Alternative Custodial Arrangements

§ 12.1 INTRODUCTION

Throughout history, parents have been unable to parent their children for a variety of reasons, including physical or mental incapacity, insufficient age and level of maturity, financial difficulties, chemical abuse and addiction, and abusive or neglectful behavior. Since Europeans first settled in the United States, institutions beyond the informal placement of children with immediate family and friends have arisen to address those situations where parents have been unable to parent their children. These institutions have come and gone throughout the history of this country, and they have included religious and charitable organizations, almshouses, houses of refuge, indentured servitude, orphanages, reform schools, foster care, and various penal institutions.[1]

As American society has become more complex and more legalistic, it has required the courts to intervene in these situations and provide the caretakers of such children with legal protection and the ability to provide for the children in their care. This has led to the rise of judicially supervised third-party custody proceedings. Most states now have third-party custody statutes and long lines of developed appellate case law in which the courts try to delicately balance the rights of parents to parent their children, to protect the best interests of the child, and to limit the involvement and intrusiveness of the state into these situations.

§ 12.2 UNITED STATES SUPREME COURT JURISPRUDENCE

What perhaps makes third-party custody proceedings unique from other family court custody disputes between the parents of a child is the long shadow cast over these proceedings by United States Supreme Court jurisprudence, the impact of which continues to this day. In effect, the United States Supreme Court's jurisprudence in this area has created a constitutionally protected liberty interest of parents to raise and educate their children, a doctrine which must be considered in any third-party custody case where a third party is seeking custody from one of the biological parents of the child.

In Myer v. Nebraska, 262 U.S. 390 (1923), the United States Supreme Court held that the "liberty" protected by the Due Process Clause of the United States Constitution includes the right of parents to establish a home and bring up children and to control the education of their own children. 262 U.S. at 401. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the United States Supreme Court held that the liberty rights of parents and guardians includes the right to direct the upbringing and education of children under their control. 268 U.S. at 534-35. In Prince v.

[1] See, e.g., Joseph F. Kett, *Rites of Passage: Adolescence in America*, 1792 to Present (1977); David J. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* (1980); David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Revised Edition, 1990).

Massachusetts, 321 U.S. 158 (1944), the United States Supreme Court held that there is a constitutional dimension to the right of parents to direct the upbringing of their children; custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. 321 U.S. at 166.

In an era closer to our own time, the United States Supreme Court continued to issue decisions that have ramifications for third-party custody proceedings. In Stanly v. Illinois, 405 U.S. 645 (1972), that Court stated that it is plain that the interest of a parent in the companionship, care, custody, and management of his or her children came to the United States Supreme Court with a momentum for respect lacking when appeal is made to liberties that derive merely from shifting economic arrangements. 405 U.S. at 651. In Wisconsin v. Yoder, 406 U.S. 232 (1972), the Supreme Court discussed the fact that the history and culture of western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children; the primary role of the parents in the upbringing of their children was found by the United States Supreme Court to be established beyond debate as an enduring American tradition. 406 U.S. at 242. In Quillion v. Walcott, 434 U.S. 246 (1978), the Supreme Court stated that it had long recognized on numerous occasions that the relationship between a parent and a child is constitutionally protected. 434 U.S. at 255. In Parham v. J.R., 442 U.S. 584 (1979), the Supreme Court stated that our jurisprudence historically has reflected western civilization concepts of the family as a unit with broad parental authority over minor children. 442 U.S. at 602. In Santosky v. Kramer, 455 U.S. 745 (1982), the Court discussed the fundamental liberty interest of biological parents in the care, custody, and management of their child. 455 U.S. at 753.

Within the last few years, the Supreme Court once again weighed in to this area of the constitutional dimension of parental rights in family court cases with the landmark case of Troxel et vir v. Granville, 530 U.S. 57 (2000). This case, which held that the Fourteenth Amendment's Due Process Clause has a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests, including a parent's fundamental right to make decisions concerning the care, custody, and control of their children. This case, more than any other in recent Supreme Court history, caused state legislators and state appellate courts across the country to reexamine not only their third-party custody statutes, but grandparent visitation statutes and statutes that allowed for relative and non-relative custody and access to children. Indeed, as shall be discussed below, this case was certainly in the background of the analysis of the Minnesota Supreme Court when it recently reviewed third party custody in this state.

Clearly, the current societal trends and demographics foretell an increased frequency of third-party custody cases in Minnesota courts. Ever greater numbers of parents are continuing to experience difficulty in parenting their children, especially with the increasing occurrence of serious chemical use and abuse issues, as most notably illustrated by the methamphetamine explosion, as well as the continued high numbers of child abuse and neglect cases. The growing need for third-party custodians to care for children, against this backdrop of constitutionally protected parental rights to raise and nurture their children, makes third-party custody an increasingly important aspect of family law jurisprudence.

§ 12.3 MINNESOTA DEVELOPMENTS

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 have frequently included grandparents or other biological relatives, and in some situations, stepparents or persons who are not biologically related to the child, but who had an important and usually long established relationship with the child. As summarized in Appendix A, appellate court decisions in Minnesota addressing third-party custody cases go back to the nineteenth century. As the chart indicates, many of the cases have been in the juvenile court child protection, dependency, and neglect context. Others have involved grandparents, aunts and uncles, and in some cases, stepparents.

Prior to the enactment of a new third-party custody statute for family court in 2002, two slightly different standards for third-party custody were developed through Minnesota appellate case law. These two standards have been cited and applied interchangeably over the years in both family court and juvenile court third-party custody and placement decisions. One of these standards was most recently articulated in Wallin v. Wallin, 290 Minn. 261, 187 N.W.2d 627 (1971). Here the Minnesota Supreme Court stated that a biological parent was entitled to custody unless it clearly appeared that the parent was unfit, had abandoned the child, or there was some other extraordinary circumstance 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 interest of the child. The language from Wallin developed from numerous cases prior to that time that had addressed the issue of third party custody.

In more recent years, the Minnesota Supreme Court again addressed third-party custody in Dirken v. Hinich, 442 N.W.2d 148 (Minn. 1989). In Dirken, 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 in Wallin. Here 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 interest 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 Dirken 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 that be unfitness, abandonment, extraordinary circumstances, or the grave and weighty reasons listed in Dirken, but also that the child's best interest was the ultimate and controlling factor. Thus, when family 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.

To add further complication to third-party custody matters, placements with persons other than biological parents were occurring in juvenile courts, and not just as foster care placements. In recent years, Minnesota's juvenile code has evolved in significant ways 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.[2] 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 either of the biological parents is not feasible, one of the preferred permanency options is the transfer of custody to a relative or other person with significant ties to the child. Minn. Stat. § 260C.201, subd. 11(d).

The Minnesota Supreme Court most recently waded substantively in to the area of third-party custody with its decision of In the Matter of the Custody of N.A.K., 649 N.W.2d 166 (Minn. 2002). While the case was decided at approximately the same time the new third-party custody statue went into effect, the case was commenced before the effective date of the statute, and hence decided under the common law then in effect and as discussed above. This case addressed the rights of a biological parent in a dispute with relatives as to the custody of the minor child. The case not only revisited and referred to Minnesota's legal standards for addressing such disputes, it also raised the constitutional dimensions of these disputes between biological parents and third parties as recently addressed by the United States Supreme Court in the Troxel case which was decided in 2000 and as discussed above. While the Minnesota Supreme Court did not rely extensively on the constitutional claims of biological parents in the N.A.K. 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 was stated in Troxel.

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 was in the best interest of the child. There needed to be something shown beyond the best interest 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 biological parent has been not been a model parent.

In N.A.K., the third-party custody petition was filed in family court under both Chapters 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 interest of the child, and apply the directives of Wallin and Dirken, while at the same time not lose sight of the Troxel reaffirmation of the constitutional rights of biological parents to parent their children. The 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.

Even though the case applied common law predating the new statute and did not consider the new statute at all, the N.A.K. decision is important in that it does clarify the common law approach to third-party custody, which will still have some relevance despite the existence of the new statute -- especially given the important constitutional dimensions of these cases. The court

[2] See the federal Adoption and Safe Families Act of 1997 and Minnesota's permanency statute found in Minn. Stat. § 260C

restated the fact that for an award of custody to third-party petitioners there are three preliminary bases, which shall be discussed below, and one of which must be established before the best interest analysis. It was not as helpful in discussing how and what best interest factors are to be applied. The decision itself recited the substantive law of both Wallin and Dirken and then, as those cases did, emphasized that the best interest of the child was the "umbrella" under which all third-party custody decisions are to be made. The case also restated the presumption from an earlier case that upon the death of a parent, the surviving parent is presumed to automatically receive custody unless that presumption is rebutted. *See*, In Re Hohmann's Petition, 95 N.W.2d 643 (1959).

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 this author feels this case will be most useful in the future, is how the court addressed that third catch-all factor. In situations where children have significant special needs, either physical or emotional, N.A.K. would support the placement with a third-party custodian rather then a biological parent even if the biological parent is neither unfit nor has abandoned the child. The 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 parent's shortcomings, may be of such an extraordinary nature that custody is appropriately placed with a third-party petitioner.

Until August of 2002, Minnesota statutory provisions regarding third-party custody were scattered about in two chapters, namely, 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 also had contradictory standards and factors to consider, and left many of the procedures to be determined by the long and complex line of rather incoherent appellate court decisions as set forth in Appendix A. For example, there had long been confusion in 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.

Chapter 257C of the Minnesota statutes, which went into effect in August 2002, and the Minnesota Supreme Court's N.A.K. decision, when taken together, has significantly clarified how third-party custody disputes and custody placements with children outside of their

biological family are to be handled, whether in juvenile court or family court. The proceedings still have inherent complexities, especially when considering the constitutional dimension and when juvenile court and family court jurisdictions come into place simultaneously. In general, however, 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 possible in these disputes to truly consider the best interest of the children while at the same time protecting the constitutionally protected rights of the biological parents.

§ 12.4 CHAPTER 257C OF THE MINNESOTA STATUTES

Chapter 257C is a comprehensive statute that explicitly states when a third-party custody petition may be filed, where it must be filed, and what it must contain. Under this statute, there are two classes of petitioners who may file petitions or motions: de facto custodians and interested third parties. De facto custodians are defined by Minn. Stat. §257C.01, subd. 2, as an individual who has been the primary caretaker for a child who has, within the 24 months immediately preceding the filing of the petition, resided with the individual without a parent present and without a lack of demonstrated consistent participation by a parent for a period of: (1) six months or more, which need not be consecutive, if the child is under three years of age; or (2) one year or more, which need not be consecutive, if the child is three years of age or older. Any period of time after a legal proceeding has been commenced and filed must not be included in determining whether the child has resided with the individual for the required minimum period.

Further, the term "lack of demonstrated consistent participation by a parent" means refusal or neglect to comply with the duties imposed upon the parent by the parent/child relationship, including, but not limited to, providing the child necessary food, clothing, shelter, health care, education, creating a nurturing and consistent relationship, and other care and control necessary for the child's physical, mental, or emotional health and development. A de facto custodian explicitly does not include an individual who has a child placed in that individual's care through a custody consent decree under Minn. Stat. §257C.07, through a court order or voluntary placement agreement under Chapter 260C, or for adoption under Chapter 259. A standby custody designation under Chapter 257B is not a designation of de facto custody unless that intent is indicated within the standby custody designation. Minn. Stat. §257.C01, subd. 2.

To establish that an individual is a de facto custodian, that individual must show by clear and convincing evidence that the individual satisfies the above provisions and must prove by a preponderance of the evidence that it is in the best interest of the child to be in the custody of the de facto custodian. The following factors must also be considered by the court in determining a parent's lack of demonstrated consistent participation for purposes this section: (1) the intent of the parent or parents in placing the child with the de facto custodian; (2) the amount of involvement the parent had with the child during the parent's absence; (3) the facts and circumstances of the parent's absence; (4) the parent's refusal to comply with conditions for retaining custody set forth in previous court orders; (5) whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence; and (6) whether a sibling of the child is already in the petitioner's care.

An interested third party is the other class of person who may file a third-party custody petition and is defined as an individual who is not a de facto custodian, but who can prove that at least one of the factors in Minn. Stat. §257C.03, subd. 7(a), is met. These factors include establishing by clear and convincing evidence that one of the following factors exist: (1) the parent has abandoned, neglected, or otherwise exhibited disregard for the child's well-being to the extent that the child will be harmed by living with that parent; (2) placement of the child with the individual takes priority over preserving the day-to-day parent/child relationship because of the presence of physical or emotional danger to the child, or both; or (3) other extraordinary circumstances. Furthermore, the petitioner must prove by a preponderance of the evidence that it is in the best interest of the child to be in the custody of the interested third party.

The court is specifically directed to consider the following factors in determining whether the petitioner is an interested third party: (1) the amount of involvement the interested third party had with the child during the parent's absence or during the child's lifetime; (2) the amount of involvement the parent had with the child during the parent's absence; (3) the presence or involvement of other interested third parties; (4) the facts and circumstances of the parent's absence; (5) the parent's refusal to comply with conditions for retaining custody set forth in previous court orders; (6) whether the parent now seeking custody was previously prevent from doing so as a result of domestic violence; (7) whether a sibling of the child is already in the care of the interested third party; and (8) the existence of a standby custody designation under Chapter 257(B).

The statute provides that an individual other then a parent may commence the action by filing either a petition or a motion in the county where the child is permanently a resident, the child is found, or an earlier order for custody has been entered. If the person is filing a motion in an already existing matter, a motion for intervention should also be brought, and if a new proceeding is initiated but there is an active matter involving custody, a motion for consolidation would be appropriate. *See* Minn. Stat. §257C.03, subd. 1.

A petition filed under Chapter 257C for custody must state and allege the following: (1) the name and address of the petitioner and any prior or other name used by the petitioner; (2) the name and, if known, the address and social security number of the respondent mother and father or guardian and any prior or other names used by the respondent(s) and known to the petitioner; (3) the name and date of birth of each child for whom custody is sought; (4) the relationship of the petitioner to each child for whom custody is sought; (5) the petitioner's basis for jurisdiction under Minn. Stat. §257C.01 subds. 2-3; (6) the current legal and physical custodial status of each child for whom custody is sought and a list of all prior orders of custody, if known to the petitioner; (7) whether any party is a member of the armed services; (8) the length of time each child has resided with the petitioner and has resided in the state of Minnesota; (9) whether a separate proceeding for dissolution, legal separation, or custody is pending in a court in this state or elsewhere; (10) whether a permanent or temporary standby custody designation has been executed or filed in a court in this state or elsewhere; (11) whether a permanent or temporary standby custody designee differs in identity from the de facto custodian and reasons why the proposed custodian should have custodial priority over a designated standby custodian; (12) whether parenting time should be granted to the respondent(s); (13) any temporary or permanent child support, attorney's fees, costs and disbursements; (14) whether an order for protection

under Chapter 518(B) or a similar law of another state that governs the parties or a party and a minor child of the parties is in effect and, if so, the district court or similar jurisdiction in which it was entered; and (15) that it is in the best interest of the child under Minn. Stat. §257C.04 that the petitioner have custody of the child.

It is important to note that if parents or guardians reside in other states, the Uniform Interstate Child Custody and Jurisdiction Enforcement Act (Chapter 518D) may be applicable. Furthermore, the statute specifically states that if the child involved in the proceeding is of Native American heritage, the Indian Child Welfare Act (United States Code, title 25, Sections 1901-1963) and the Minnesota Indian Family Preservation Act (Minn. Stat. §§260.751-260.835) will apply. Minn. Stat. §257C.02. Furthermore, nothing in Chapter 257C relieves a parent of a duty to support his or her child. A pre-existing child support order is not suspended or terminated when a third party takes custody of a child unless otherwise provided by court order. A third-party custodian has a cause of action against a parent for child support under Minn. Stat. §256.87, subd. 5, and the public authority has a cause of action against a parent for child support under Minn. Stat. §256.87, subd. 1. Minn. Stat. §257C.02(b). Nothing in Chapter 257C prohibits the establishment of parentage under Chapter 257.

Notice to the biological parents is critical in these proceedings. Persons required to receive notice are set forth in Minn. Stat §257C.03, subd. 3. According to that statute, written notice of a hearing on a petition or motion to establish third-party custody over a child must be given to the parent of the child if the person's name appears on the child's birth certificate as a parent; the person has substantially supported the child; the person either was married to the person designated on the birth certificate as the biological mother within 325 days before the child's birth or married that person within 10 days after the child's birth; the person is openly living with the child or the person designated on the birth certificate as the biological mother of the child, or both; that person has been adjudicated the child's parent; the person has filed a paternity action within 30 days after the child's birth and the action is still pending; or the person and the mother of the child sign a declaration of parentage under Minn. Stat. §257.34, before August 1, 1995, which has not been revoked, or a recognition of parentage under Minn. Stat. §257.75 which has not been revoked or vacated. These persons entitled to notice are the same persons who are considered presumed parents under the Parentage Act. Notice must also be given to a guardian or legal custodian, if any, and the child's tribe, if the child is an Indian child. Notice need not be given to a person whose parental rights have been terminated.

Notice must also be given to the public authority if either parent receives public assistance, the petitioner receives public assistance on behalf of the child, or either parent receives child support enforcement services from the public authority or applies for public assistance or child support enforcement services after a petition under this section is filed. Notice to the public authority must include a copy of the petition. Minn. Stat. §257C.03, subd. 3(c).

The best interest factors are set forth in Minn. Stat. §257C.04. These mirror the factors found in Chapter 518 actions involving custody in a divorce context, and in Chapter 257 actions that involve determining custody in a parentage action. Modifications to third-party custody

arrangements are governed by Minn. Stat §257C.06; these factors are the same as those considered in a modification of custody action brought under Minn. Stat. §518.18.

There are some troubling aspects of Chapter 257C. First, the best interest factors contain what this author considers to be a constitutionally unsound provision stating that "the court must not give preference to a party over the de facto custodian or interested third party solely because the party is a parent of the child." Minn. Stat. §257C.03, subd. 1(c). That is directly contrary to the long line of cases put forth by the United States Supreme Court and as cited above, and which have been adopted in Minnesota appellate court jurisprudence regarding third-party custody placements. Hence, this author expects at some point that if a trial court literally applies that statutory provision, a constitutional challenge would certainly be expected.

The statute also provides that a third party custody petition or motion cannot be brought when the person seeking custody has placement of the child under provisions of Chapter 260C. It is certainly understandable that the county attorneys across the state want to have control over who is involved in child protection cases, and indeed, there is a mechanism under the Juvenile Protection Procedural Rules and statutory provisions allowing parties to intervene and pursue various placement options under Chapter 260C, including transfer of custody to an important friend or relative. However, this author has certainly been involved in cases where a third-party custodial placement under Chapter 257C could obviate the very need to file a child protection petition in the first place. Or, if the child protection proceeding has already been commenced, it may provide an option for the juvenile court to dismiss the action and allow the matter to be resolved by a third-party custody placement in family court. Given the ever increasing numbers of cases in juvenile court dealing with child protection matters, it does seem rather peculiar that we would limit the use of private family court actions in these cases where it may be highly appropriate.

Last, there is a specific exclusion providing that third-party custody petitions and motions cannot be brought when the person seeking third-party custody has had placement of the child under provisions of Chapter 259. Presumably, this is referring to a direct placement adoption where a third-party custody petitioner had previously received a pre-adoptive custody order and for whatever reason the adoption could not be finalized -- usually because of a revocation of a consent to adopt or inability to terminate the biological parent's parental rights so as to free the child for adoption. In fact, this author believes that this exclusion in Chapter 257C arose as a result of Mize v. Kendall, 621 N.W. 2d 804 (Minn. Ct. App. 2001), *rev. denied* (Minn. March 27, 2001), where adoption petitioners sought third-party custody in family court after a consent was revoked and a pre-adoptive custody order vacated. It seems peculiar in the extreme to prohibit persons who had once been granted a pre-adoptive custody order based upon an anticipated filing of an adoption petition and review by a court of a valid adoption home study from filing a subsequent third-party custody petition; it is not clear why one would seemingly assume that such biological parents is those circumstances are automatically fit to parent. There seems to be no logical justification for this blanket exclusion.

Since Chapter 257C was enacted, there have been several Minnesota Court of Appeals decisions and one Minnesota Supreme Court decision that have interpreted the statute. These cases are as follows: In Re the Custody of Kirkwood , 2004 W.L. 557270 (Minn. Ct. App.

2004)(a case affirming the district court's award of custody to a deceased mother's sister); In re the Custody of A.V.A, 683 N.W.2d 325 (Minn. Ct. App 2004) *rev. denied* (Minn. September 29, 2004) (cousins were held not to be "interested third parties" who could seek third-party custody); Prez v. Cottrill, 2005 W.L. 701701 (Minn. Ct. App. 2005) (the appellate court remanded a grandparent custody case to the trial court to determine whether the court should have applied Chapter 257C); In Re Guardianship of T.E.,A.E., S.M., and H.M., 2005 WL 1869651 (Minn. Ct. App. 2005) (in this case the court of appeals affirmed the district court's award of custody of two sisters following the death of their mother to the stepfather rather than to the biological father, despite his being a fit parent; the decision was based on the strong public policy of keeping siblings together -- here it was sisters and half-sisters and their grief over the loss of their mother and a complete lack of relationship between the sisters and the biological father); Sackett v. Ehrnreiter, 2005 WL 2127904 (Minn. Ct. App. 2005), *rev. denied* (Minn. November 22, 2005) (Minnesota Court of Appeals affirms an award of custody to an interested third party rather then the mother; this case involved a consolidation of both a CHIPS proceeding and a custody action under Chapter 257C); C.B. v. M.M.C, 2006 W.L. 1229643 (Minn. Ct. App. 2006)(in a dispute between parents and paternal aunt and uncle, the court held that clear and convincing evidence supported the district court's findings that the aunt and uncle were *de facto* custodians and that the district court made sustainable findings under all of the statutory best interest factors; the appellate court declined to determine whether the N.A.K. standard still applied following the enactment of Chapter 257C because the district court's findings were sufficient to meet the standard of extraordinary circumstances of a grave and weighty nature).

The Minnesota Supreme Court recently interpreted Chapter 257C in Lewis-Miller v. Ross, 710 N.W.2d 565 (Minn. 2006). In a case focusing extensively on the procedural requirements of the statute, the supreme court held that the aunt was entitled to an evidentiary hearing to prove interested third-party custody status when she sought sole legal and sole physical custody of her late sister's children as against their father. Here, the court held that the aunt, who had commenced a third-party child custody proceedings by filing a valid petition and supporting affidavits, was entitled to an evidentiary hearing to prove interested third-party status as the allegations contained in her petition were personally verified, established by competent evidence, and if proven, would establish child endangerment criteria. The court declined to address on appeal the meaning of "competent evidence" under these circumstances. The matter was remanded for an evidentiary hearing and no further substantive discussions are found in the case.

§ 12.5 JUVENILE COURT PROCEEDINGS

Despite efforts under Chapter 257C to limit its application in 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.

It is clear that 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

that is to occur in juvenile court. However, the role of 257C and the applicability of Wallin, Dirken, and N.A.K. in these juvenile court proceedings are still open to rather significant discussion. *See*, Sackett v Ehrnreiter, 205 WL 2127904 (Minn. Ct. App. 2005).

The complicated interplay of Chapters 260C and 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 seeks 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, a jurisdictional 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 have concurrent jurisdiction and the court that ultimately has to rule on the third-party custody petition or the juvenile court placement will need to decide which procedures and best interest factors apply. The general rule has always been that juvenile court jurisdiction trumps family court jurisdiction; the juvenile court is usually permitted to make the preliminary dispositional determination. However, juvenile court jurisdiction usually ends upon the return of the child to the parents or upon a permanent placement disposition; it may be that the custodial arrangement prior to juvenile court being involved is restored or needs to be reconsidered. It is also true that when there is a transfer of legal custody as the juvenile court disposition, those matters are often then sent over to family court, a family court file is created, and the county attorney must continue to be notified of any subsequent modifications. This is true even if the juvenile court continues to retain jurisdiction.

It has been the author's experience that 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 such 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, whether they are being made in juvenile or family court.

§ 12.6 PRACTICE ISSUES

Attached as Appendix B are sample pleadings for a third-party custody proceeding. As these pleadings indicate, these cases can be quite complicated in terms of who the parties will be, negotiations within the family that may need to occur, the possible need for emergency motions depending on the precariousness of the custodial placement of the child, and the emergency situation that may or may not exist. It is also critical to obtain as much factual information from the parties as possible, so as to determine all of the relevant information regarding the child, siblings, parents, and legal guardians. This includes the existence of other court orders in family court or juvenile court that may affect the situation.

It is especially important to carefully explain to the petitioners that there are various alternative options to third-party custody. In addition to third-party custody, they may want to consider a custody consent decree,[3] a delegation of parental authority,[4] a standby custodianship,[5] a private CHIPS petition,[6] an adoption,[7] simple rights to visitation by unmarried persons,[8] or even a probate court guardianship over a minor in situations where the parents are both deceased.[9] All of these procedures have their advantages and disadvantages, and many may be procedurally difficult or unduly expensive and time consuming. Some may also not provide the amount of desired protection for the child. Indeed, it is often the case that the level of permanency that is being sought will determine which of these arrangements is chosen and pursued, as well as the cost of the various proceedings, or the willingness of the parents to resolve the matter through a negotiated settlement and thereby avoid expensive and time-consuming litigation. Ultimately, a decision needs to be made as to which option would best protect the interests of the child and meet the goals of the petitioners.

It will be critical to assess the legal situation based on the legal standing of the parties, who will need notice of the proceeding, the existence of custody and parental access rights, the willingness of other family members to support the proceeding, and the strengths and weaknesses of the parenting skills and living situations of the various parties.

You will need to have a frank discussion with your clients as to what they can afford financially, emotionally, and timewise. For courts, when considering a third-party custody petition, it will be critical to determine if the pleadings make out the prima facie case and meet the burdens of proof as set forth in Chapter 257C. It is this author's experience that it will indeed be a very rare case where it will be possible to dismiss the matter on the pleadings or even grant summary judgment after some discovery has occurred, assuming there is some pre-existing relationship between the petitioner and the child and either some special needs of the child or deficiency with the parent. The Minnesota Supreme Court in the Lewis-Miller case has said as much. These cases often require rather intense investigations and custodial evaluations, and it will often be critical to involve the services of either a family court services department, or to

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[3] Minn. Stat. § 257C.07.
[4] Minn. Stat. § 524.5-211.
[5] Chapter 257B.
[6] Minn. Stat. § 260C.141, subd. 1.
[7] Chapter 259.
[8] Chapter 257C has specific provisions addressing rights of access to children for various third parties who have some type of relationship with the child. The statute provides for such access in the following situations: if a parent is deceased (Minn. Stat. § 257C.08, subd. 1); where there has been a paternity, dissolution, custody, legal separation, annulment, or parentage action in family court , a parent or grandparent may seek access (subd. 2); if the child has resided with grandparents (subd. 3); if the child has resided with other persons and they can demonstrate an emotional tie to the child like a parent-child relationship (subd. 4); in such situations where there has been a stepparent adoption and the biological grandparent desires access to the child (subd. 6). The standard for all such requests for access is that the rights of access would be in the best interests of the child and such access would not interfere with the parent-child relationship. For a discussion of rights of access in same-sex relationships, see Suzanne Born's chapter in this book. For a recent discussion and application of this portion of Chapter 257C regarding access to a child by one party to a long-term same-sex relationship where one of the parties had adopted a child, *see* Soohoo v. Johnson, 2006 W.L.851808 (Minn. Ct. App. April 4, 2006) NOTE: as this chapter was going to print, the Minnesota Supreme Court granted certiorari on this case.
[9] Minn. Stat. § 524.5-201 and -301.

have the parties retain private experts with significant child development experience and some knowledge of the statutory factors to conduct an investigation.

It will be important for the attorneys representing the parties to develop a theme of the case and then plan strategies for settlement negotiations, figure out what discovery needs to be done and when, determine how evaluations and investigations will be structured and completed, plan which pleadings, including emergency pleadings, will need to be prepared, make appropriate venue considerations, and then plot a trial strategy. In these cases it is critical to always be planning for an eventual appeal, for as discussed above, the law in these cases is still somewhat unsettled and the constitutional issues are always ripe for appeal. It is critically important to preserve constitutional challenges throughout the trial court process if you have any hope to prevail at an appellate court level. The cases involve complex legal standards, complex evidentiary issues, critically important constitutional issues, and the inherent problems that go along with a relatively new and untested statute. Always remember, however, that the stakes in these cases are incredibly high; we are talking about the placement and raising of a child who is not a biological child of the petitioner. It is critically important to be realistic with potential petitioners about the cost and inherent difficulties of these cases. The attorney representing the petitioner should always have an exit strategy and various fall back plans.

APPENDIX A –

SUMMARY OF MAJOR MINNESOTA APPELLATE COURT DECISIONS REGRADING THIRD-PARTY CUSTODY

Summary of Major Minnesota Appellate Court Decisions Regarding Third-Party Custody

Minnesota Supreme Court Cases:

Case Caption	Parties	Rule of Law Applied	Decision
1. State ex rel. Larson v. Halverson, 127 Minn. 387, 149 N.W.2d 664 (1914)	Father and maternal grandparents	The parent's right to the care, custody, and control of his minor children is paramount to all other considerations, save the best interests of the child, and his ability and fitness being established, the custody and control follow as a matter of course. But in all controversies involving the custody of minor children, the welfare and best interests of the child are the chief consideration and prevail over the natural right of the parent. This is too well settled to require the citation of authorities.	The child suffered health problems; a physician testified it would be detrimental to the child's health and welfare to remove her from the maternal grandparents. Therefore, the interests of the 5 year old child would best be served by leaving her with the maternal grandparents and refusing to give her into the custody of her father.
2. Hervey v. Hervey, 180 Minn. 182 230 N.W. 479 (1930)	Mother and maternal aunt and uncle	A parent's right to the custody of a child is paramount to the claims of all others, all things being equal. However, the main and controlling consideration is the welfare and best interests of the child.	Based on the child having resided for a number of years with his maternal aunt and uncle, having become attached to them and they in turn to him, and taking everything into consideration, including the age and sex of the child, the conditions found in the mother's home, the stepfather's hostility towards the child, and the suitability of the aunt and uncle's home, the Supreme Court affirmed the trial court's placing of custody with the aunt and uncle.
3. State ex rel. Merritt v. Eldred, 225 Minn. 72, 29 N.W.2d 479 (1947)	Step-father and father	Natural parents have the first right to care and custody of their child unless the best interests of the child require that it be given into the hands of someone else.	Custody of the seven year old girl removed from step-father and placed with biological father with the Court finding that both men arc of good moral character, both are steadily employed with about the same income, but the step-father is a widower with three other children to support and living in a rented four room apartment which he himself stated was not satisfactory. The biological father was remarried, residing in a five room home. There was no showing that the biological father should be further denied custody as to his

Case Caption	Parties	Rule of Law Applied	Decision
			daughter.
4. State ex rel. Gravelle v. Rensch, 230 Minn. 160, 40 N.W.2d 881 (1950)	Father and the father's sister	The right of a parent to custody is not absolute, but must yield where it would best serve the welfare of a minor to grant custody to someone other than the parent.	The court left the minor child with the paternal aunt and then ruled that an order to show cause or motion in the original divorce proceeding was not the proper method of proceeding to determine the right of custody as between the father and the paternal aunt.
5. State ex rel. Nelson v. Whaley, 75 N.W.2d 786 (1956)	Biological mother and unrelated third parties	The welfare and best interests of a child and the legal and natural rights of parents must both be considered in a custody case, and in order to justify depriving a parent of custody in favor of third persons, there must be a grave reason growing out of neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish child with needed care.	The court ordered the child returned to the biological mother, finding that there was an inappropriate private placement of the infant by a physician with non-relatives without the assistance of established welfare or social agencies, of which the Supreme Court strongly disapproved.
6. In re Hohmann's Petition, 95 N.W.2d 643 (1959)	Biological father and step-father	Upon the death of a parent who has held custody of a minor child under a divorce decree, the right to custody automatically inures to surviving natural parent unless it be shown in an appropriate proceeding that he is unfit, that he has forfeited his custodial right as by abandonment, or that irrespective of his fitness, exceptional circumstances indicate that the best interests of child clearly require that the surviving parent be denied custody. Although a right of a parent to care and custody of this minor child is paramount and superior to the right of a third person, that right must always yield to the best interests of the child.	The Supreme Court affirmed the trial court's placement of the 15 year old and 13 year old children with their biological father, finding that the father had visited the children infrequently because he did not feel welcome in the home of the mother and her new husband, the father had provided a happy home life for the daughter by his second marriage, the step-father had only his deceased wife's parents to assist him, he did not own the farm upon which he lived and worked, and he did not have an enforceable right to stay on the farm. The Court transferred custody to the biological father even though the children stated that they wished to stay with their step-father.
7. In re Klugman, 97 N.W.2d 425 (Minn. 1959)	Biological parents and County Social	In order to justify depriving a parent of custody of a child in favor of a third person, there	Insufficient evidence in the record to support the trial court's commission of the children to the guardianship of the

Case Caption	Parties	Rule of Law Applied	Decision
	Welfare Unit	must be a grave reason growing out of neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish a child with needed care. It is also well-settled law in this state that natural parents have the first right to care and custody of their children unless the best interests of the child require it to be given into the hands of someone else.	State.
8. State ex rel. Waslie v. Waslie, 277 Minn. 446, 152 N.W.2d 755 (l967)	Paternal grandmother and biological parents	It is elementary that in determining a child's custody, the first and foremost consideration is the child's own welfare and best interests. If it can be shown that the best interests of the child are not served by parental custody, the court will place the child in the home of some other guardian.	Affirmed the trial court's decision to remove the child from the grandparent and return the child to the parents. The court noted that unlike other situations where courts have refused to return custody of a minor child to divorced parents or to broken homes, we have here a situation where the family life is in tact and the parents are asking that the child remain in a home where the environment is stable and the boy will have the advantage of growing up in a family with his parents and a brother and sister. Where family life holds a fair promise of favorable care and treatment of the child, the natural parent should be given an opportunity to fulfill their desire and obligation to rear and guide the child.
9. Wallin v. Wallin, 290 Minn. 261, 187 N.W.2d 627 (1971)	Biological mother and paternal grandparents	Courts base their decisions regarding third-party custody disputes on two basic doctrines. The first of these doctrines stands for the proposition that a mother is entitled to the custody of her children unless it clearly appears that she is unfit or has abandoned her right to custody, or unless there are some extraordinary circumstances which would require that she be deprived of custody. The second doctrine is the so-called best	The district court denied the mother's motion for the return of her child to her and the Supreme Court remanded the matter for a complete hearing where it appeared from the record that the mother had been denied custody merely on the ground that transfer of custody might be disruptive and the record was otherwise inadequate to permit the reviewing court to determine whether there had been an abuse of discretion.

Case Caption	Parties	Rule of Law Applied	Decision
		interests of the child concept, according to which the welfare and interests of the child is the primary test to be applied when awarding custody. The principle that the custody of a young child is ordinarily best vested in the mother, while vital and established as it may be, is distinctly subordinate to the controlling principle that the overriding consideration in custody proceedings is the child's welfare. Examples given by this court to establish the grave reasons to deprive a biological parent of custody in favor of a third person include neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care.	
10. Durkin v. Hinich, 442 N.W.2d 148 (Minn. 1989)	Biological mother and family friend (family friend filed both a private CHIPS petition and also a custody petition brought under the modification of custody statute, Minn. Stat. §518.18(b) (1986))	The natural parent is entitled, as a matter of law, to custody of a minor child unless there has been established on the parent's part neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care, or unless it has been established that such custody otherwise would not be in the best welfare and interest of the child. Although the presumption favors the parent, it may be overturned if there are grave and weighty reasons to separate a child from his or her natural parents.	Supreme Court affirmed the lowered court's determination that the child should remain with the family friend, finding that the child had been integrated into the friend's household with the initial consent of the mother, expert testimony indicated that the child was two years emotionally delayed, none of the experts testified custody should remain with the mother, and experts concluded that returning the child to her natural mother would be extremely detrimental and result in severe emotional and behavioral regression. Fm1hermore, the family friend was not a total stranger to the child and the family, but had been a long-time friend of the natural father and had taken the child into her home at the request of the natural father who was too ill to care for the child himself.
11. In the Matter of the Custody of N.A.K., 649 N.W.2d	Maternal aunt and uncle and biological father	Following the death of a custodial parent, a surviving ,non-custodial parent is	The trial court and Court of Appeals' decision awarding custody of the child to the maternal aunt and uncle was reversed

Case Caption	Parties	Rule of Law Applied	Decision
166 (Minn. 2002)		entitled to custody unless the presumption that the parent be awarded custody is overcome by extraordinary circumstances of a grave and weighty nature, indicating that the best interests of the child require that the surviving parent be denied custody.	and remanded because the trial court's findings and conclusions did not clearly reflect a proper incorporation of the parental presumption favoring non-custodial surviving parent into the court's analysis.

Minnesota Court of Appeals Cases:

Case Caption	Parties	Rule of Law Applied	Decision
1. Tubwon v. Weisberg, 394 N.W.2d 601 (Minn. App. 1986)	Biological mother and biological mother's long-term boyfriend	In determining custody disputes between the biological parent of a minor child and a third-party, courts have based their decision on two basic doctrines. The first of these doctrines stands for a proposition that a biological parent is entitled to the custody of their children unless it clearly appears that they are unfit or have abandoned their right to custody or unless there are some extraordinary circumstances which would require that they be deprived of custody. The second doctrine is the so-called best interests of the child concept, according to which the welfare and the interests of the child is the primary test to be applied in awarding custody. The trial court's consideration of the best interests factors found in Minn. Stat. §518.17 is appropriate. The best interests of the child is the second part of the Wallin standard and applies in determining custody between a biological parent and a third-party.	Affirms the trial court's decision to place custody of the child with the family friend rather than the biological mother. Not only was the biological mother found to be unfit, but the court found that the family friend has provided the child with supervision, stability and love, had established a parent/child bond with the child identical to the bond formed by biological parents with their children, he has been actively involved with school personnel, insures that homework is done and school attended, and assists the child's adjustment to school. The family friend's physical, emotional and psychological condition allow him to provide the care and guidance necessary to raise the child, he has lived in the same house, which he owns, for more than 10 years, and he has been continuously employed in the same field for the last 16 years.
2. In re the Custody of N.M.O., 399 N.W.2d 700 (Minn. App. 1987)	Natural father and step-father	When deciding custody disputes between a parent and third person, the Minnesota Supreme Court has employed two basic principles. The first is the rule of law in that a	The trial court's decision to transfer custody to the natural father simply because he was the natural father and without an evidentiary hearing

Case Caption	Parties	Rule of Law Applied	Decision
		parent is entitled to custody of her children, unless it clearly appears that she is unfit or has abandoned her right to right to custody, or unless there are some extraordinary circumstances which require that she be deprived of custody. The Minnesota Supreme Court 'has established with equal clarity a second and sometime conflicting principle governing custody disputes between a parent and a third person. The law requires that any custody determination be consistent with the best interests of the child. As between the two doctrines, the Minnesota Supreme Court has made it clear that one supersedes the other: the best interests of the child is always the overriding consideration in custody decisions.	considering the best interests of the child was reversed and remanded and the step-father was entitled to an evidentiary hearing on the best interests factors set out in Minn. Stat. §518.17. The court also noted factors that would support custody with the step-parent included that he had been the child's caretaker for the past six years, the child expressed a strong preference for the step-parent, and the psychologist working with the child recommended without qualification that the child remain with the step-parent.
3. Westphal v. Westphal, 457 N.W.2d 226 (Minn. App. 1990)	Paternal grandparents and biological mother (the paternal grandparents moved the court for permission to intervene in the on-going custody proceedings involving both parents)	The Court of Appeals affirmed the trial courts application of the custody modification and endangerment standard found in Minn. Stat. §518.l8 rather than Minn. Stat. §257.025, with the later applying in situations where there is no prior order establishing custody of the child. The court went on to find that the application of §518.18 harmonizes the case law concerning the custodial rights of non-parents as set forth in the Wallin decision. The first part of that test, that a non-parent may show the natural parent as unfit to have custody corresponds to the requirement in §518.18(d)(iii) that the court find that the current custody endangers the child, and second, that the Wallin court recognized that the overriding consideration deciding custody is the best interests of the child. This part of the analysis recognizes that certain extraordinary situations may exist in which the child's best	Affirmed the trial court decision that the grandparents were not entitled to an evidentiary hearing absent prima facia showing that the child's present care endangered her physical or emotional health and that the potential danger in a change of custody was outweighed by advantages of such a change.

Case Caption	Parties	Rule of Law Applied	Decision
		interests require placement with a non-parent, and it has been applied in situations in which the court legitimizes a de facto custody arrangement and allows the non-parent to retain custody. The court went on to state that §518(d)(ii) which allows modification in favor of a non-custodian where the child has been integrated into the movant's family with the consent of the custodial and also reflects these situations. Minn. Stat. §518.18 incorporates the Wallin strand into its required findings.	
4. LaChappelle v. Mitten, 607 N.W.2d 151 (Minn. App. 2000) rev. denied (Minn. May 16, 2000), cert. denied, 121 S. Ct. 565, 531 U.S. 1011, 148 L. Ed.2d 485 (2000)	Sperm donor, biological mother, biological mother's lesbian partner	When deciding custody disputes between a parent and a third party, a biological parent is entitled to custody of his or her own child unless it clearly appears that she is unfit or has abandoned her right to custody, or unless there are some extraordinary circumstances which would require that she be deprived of custody. However, the best interests of the child is the primary test to be applied in awarding custody.	Affirm the trial court's decree granting the biological mother sole physical custody of the child on condition that she move back to Minnesota from Michigan and granting the biological mother and her lesbian partner joint legal custody with the sperm donor to have the right to participate in important decisions affecting the child.
5. Mize v. Kendall, 621 N.W.2d 804 (Minn. App. 2001), rev. denied (March 27, 2001)	Prospective adoptive parents, biological father, biological mother	Biological parents are entitled to custody unless parental shortcomings exist, or unless such custody is not otherwise in the best interests of the child. Extraordinary circumstances may substitute for unfitness and abandonment; in any event, the overriding consideration is the child's best interests. In fact, the very notion of unfitness incorporates the thesis that the child's welfare demands and requires being left with third parties.	Trial court's placement of legal and physical custody of the child with the biological father did not constitute an abuse of the court's broad discretion.
6. D.W. v. C.M. and A.K.M., 627 N.W.2d 687 (Minn. App. 2001) rev. denied (Minn. Aug. 15, 2001)	Juvenile biological father and foster parents	The general rule that a natural parent is presumed fit to have custody of his child emerged from cases involving proof of unfitness in terminating parental rights. When deciding custody disputes	In this case, the district court addressed the statutory factors found in Minn. Stat. §518.17, subd. 1(a) finding all were considered and all supported the trial court's decision.

Case Caption	Parties	Rule of Law Applied	Decision
		between a parent and a third pat1y, the presumption that a natural parent is entitled to custody of his own child will not be ovel1umed unless it clearly appears that the parent is unfit or has abandoned the parent's right to custody, or unless there are some extraordinary circumstances which would require the parent to be deprived of custody. The best interests of the child is the primary test to be applied in awarding custody, including disputes between a natural parent and a third party.	

APPENDIX B

STATE OF MINNESOTA

COUNTY OF

_____

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

Court File No. _____

In the Matter of the Custody of:
_____, DOB: _____

_____ and _____,

Husband and wife,
and

SUMMONS

_____,

Respondent,
and

_____,

Respondent.

_____

TO:

YOU ARE HEREBY SUMMONED and required to serve upon the Petitioner's attorney a response to the Petition which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Petition.

WALLING, BERG & DEBELE, P.A.

Dated:_____

_____
Gary A. Debele (#187458)
121 South Eighth Street
Suite 1100
Minneapolis, MN 55402-2823
(612) 340-1150
Attorney for Petitioners

STATE OF MINNESOTA

COUNTY OF

_____

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

Court File No. _____

In the Matter of the Custody of:
_____, DOB: _____

_____ and _____,

Husband and wife,
and

_____,

PETITION FOR CUSTODY OF _____

Respondent,
and

_____,

Respondent.

_____

For the Petition for Custody, the Petitioners state and allege as follows:

1. The true and correct names, addresses, social security numbers and dates of birth of Petitioners and Respondents, as presently known to Petitioners are:

Petitioners: *****
*****
*****
DOB: *****
SSN: See Confidential Information Form

*****
*****
*****
DOB: *****
SSN: See Confidential Information Form

Respondents: *****
*****
*****
DOB: *****
SSN: See Confidential Information Form

*****
*****
*****
DOB: *****
SSN: See Confidential Information Form

2. Petitioners are represented in this proceeding by Gary A. Debele, Esq., 121 South Eighth Street, Suite 1100, Minneapolis, Minnesota 55402.

3. The minor child who is the subject matter of this Petition is , DOB: ____, now ___ months old. The minor child has resided in the State of Minnesota for the entirety of her life and has resided with Petitioners since she was born on _____.

4. Petitioner ____ is the maternal grandmother of the minor child. Petitioner _ is the husband of _____ and the step-grandfather of the minor child.

5. The current custodial status of the minor child is as follows: Respondent _____ is the biological mother of the minor child. Petitioners do not know if Respondent _____ signed a Recognition of Parentage form at the time of the minor child's birth, however, he is listed on the birth certificate. A paternity action was filed by Hennepin County Child Support Services to establish _____ as the biological father of the minor child (Court File No. _). To our knowledge, Respondent _____ has not had his paternity adjudicated, but child support has been set based on imputation of income. Respondent ___ has had physical custody of the minor child since she was born. Respondent ____ moved in with the Petitioners in January 2003. Petitioners have cared for the minor child since her birth on ___. To the best of Petitioners' knowledge, no prior or current court orders for custody exist.

6. Respondent _____ has submitted an Affidavit in full support of this Petition; in the event the Court does not grant the Petition, Respondent _____will raise the child on her own.

7. Pursuant to Minn. Stat. §257C.01, subd. 3 and Minn. Stat. §257C.03, subd. 7, Petitioners may bring a petition seeking custody of the minor child.

INTERESTED THIRD PARTIES

8. The basis for jurisdiction is that Petitioners qualify as interested third parties under Minn. Stat. § 257C.01, subd. 3(a). Pursuant to Minn. Stat. §257.03, subd. 7, Petitioners qualify as interested third parties based on clear and convincing evidence that extraordinary circumstances exist and by a preponderance of the evidence that it is in the best interests of the minor child to be in the custody of the Petitioners.

9. Petitioners have been involved on a daily basis in the day-to-day care of the minor child. Petitioners care for the minor child while Respondent _____ is working or attending school, and have repeatedly cared for the minor child when she was ill. Respondent ____ has moved out of the Petitioners' home and the minor child continues to reside with the Petitioners.

10. Respondent _____has had little contact with the minor child since March of 2004. During his visits with the minor child after March of 2004, Respondent ___ or Petitioners are always present and Respondent _____has never been alone with the minor child. No other individuals have been involved in the minor child's life that could be considered interested third parties.

11. The minor child presently resides with Petitioners in Hennepin County, and Minnesota is the proper forum for this matter under Minn. Stat. § 518D (Uniform Child Custody Jurisdiction and Enforcement Act).

12. No party to this action is a member of the armed services or in any way entitled to the relief of the Servicemembers Civil Relief Act of 2003, as amended.

13. Other than this action and the ongoing paternity action, Petitioners do not know of any other proceeding for the minor child's custody that has been commenced in this state or elsewhere.

14. No permanent or temporary standby custody designation has been executed or filed in a court in this state or elsewhere.

15. Liberal and frequent parenting time should be granted to Respondent _____ and supervised parenting time should be granted to Respondent _____.

16. The issue of child support should be reserved.

17. Each party should be responsible for attorney fees, costs and disbursements related to the filing of this action.

18. No Order for Protection under chapter 518B or a similar law of another state that governs the parties and the minor child is in effect and known to the Petitioners.

BEST INTERESTS OF THE CHILD

19. Minn. Stat. §257C.04 sets forth the custody factors to be considered and evaluated by the Court in determining the best interests of the child.

20. Respondent _____supports this Petition and agrees that Petitioners should be granted sole legal and sole physical custody of the minor child. To our knowledge, Respondent _ has not yet had his paternity adjudicated by the Court. The minor child is not of an age to express a preference.

21. The Petitioners have been the minor child's primary caretaker while Respondent _ has assisted them on a daily basis in the day-to-day care of the minor child.

22. Because the minor child has lived in Petitioners' home since her birth in __ 2003, Petitioners have developed a deeply intimate relationship with the minor child.

23. The minor child has had little interaction with Respondent _ since March of 2004. When Respondent _____ does visit with the minor child, Respondent _____ or Petitioners are always present; he has never been alone with the minor child.

24. The minor child has lived in the Petitioners home since her birth in _____ 2003. Petitioners home is a stable, satisfactory environment and both the Petitioners and Respondent __ are desirous of maintaining that continuity for the minor child. The minor child has become a permanent member of the Petitioner's family unit.

25. Petitioners have no history of physical or mental health problems. Respondent _____as voluntarily admitted to the Behavioral Health Unit at ___ for observation but was released after several hours into Petitioners' care and with the agreement that she would not harm herself in any way. Respondent _____has a long history of drug use and continues to use drugs to date. He has admitted to selling drugs to support his habit as well as admitted that he repeatedly lied to Respondent _____ that he has quit using drugs when in fact he had not.

26. Petitioners are fully capable of providing love, affection, and guidance to the minor child. There are no cultural or religious issues present in this matter.

27. Respondent _____ has been charged with a Gross Misdemeanor Interference with a 911 Call and Fifth Degree Domestic Violence against Respondent _____.

28. Pursuant to Minn. Stat. §257C.04, a placement of temporary sole legal and sole physical custody of the minor with the Petitioners, subject to parental access by Respondent ____ and supervised access by Respondent _____, is in the minor child's best interests.

WHEREFORE, your Petitioners allege and request a finding by this Court that the best interests of the minor child require that the Petitioners be awarded the temporary sole physical and sole legal custody of the minor child, subject to a right of parenting time by Respondent ____

and supervised parenting time by Respondent _____, pursuant to Minn. Stats. §257C.03 and 257C.04.

WALLING, BERG & DEBELE, P.A.

Dated: _____

_____
Gary A. Debele (#187458)
121 South Eighth Street, Suite 1100
Minneapolis, MN 55402
(612) 340-1150
Attorneys for Petitioner

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.21, subdivision 2, to the party against whom the allegations in this pleading are asserted.

_____
Gary A. Debele, Esq.

VERIFICATION

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

_____ being first duly sworn on oath, deposes and says that she is the Co-Petitioner in the above-entitled action, that she has read the foregoing Motion for Third Party Custody, knows the contents thereof and that the same is true and correct, except as to those matters therein stated on information and belief and as to those matters she believes them to be true.

_____
*****

Subscribed and sworn to before me
this___day of _____, 2004

_____
Notary Public or Court Administrator

VERIFICATION

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

_____, being first duly sworn on oath, deposes and says that he is the Co-Petitioner in the above-entitled action, that he has read the foregoing Motion for Third Party Custody, knows the contents thereof and that the same is true and correct, except as to those matters therein stated on information and belief and as to those matters he believes them to be true.

_____
*****

Subscribed and sworn to before me
this___day of _____, 2004.

_____
Notary Public or Court Administrator

STATE OF MINNESOTA

COUNTY OF

_____

In the Matter of the Custody of:
_____, DOB: _____

_____ and _____,

Husband and wife,
and

_____,

Respondent,
and

_____,

Respondent.

_____

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

Court File No. _____

NOTICE OF MOTION AND MOTION FOR TEMPORARY CUSTODY OF _____

TO:

PLEASE TAKE NOTICE that on the _____ day of _____, 2004, before of the assigned judge of the above-captioned District Court, at the Hennepin County Family Justice Center, 110 South Fourth Street, Minneapolis, Minnesota, Petitioners will move the above-named Court for an order as follows:

1. Granting temporary legal and physical custody of the minor child, _____, date of birth _____, to Petitioners _____ and _____, pursuant to Minn. Stat. §257C.03.

2. Granting Respondent _____ such parenting time with the minor child as she and the Petitioners deem is in the minor child's best interests, and granting Respondent _____ supervised parenting time as the Court deems is in the minor child's best interest.

3. Ordering Respondents _____ and _____ not to remove the child from the Petitioners' home or from the seven-county metro area pending the outcome of these proceedings.

4. Ordering the Hennepin County Sheriff, the Brooklyn Center Park Department, and all other appropriate police agencies to assist Petitioners in maintaining the child in their custody.

5. Directing Respondents _____ and _____, and their agents be enjoined and restrained from doing, or attempting to do any act injuring, maltreating, annoying, bothering, or restraining the personal liberty of any other party and of the minor child, either at the residence, place of employment, or other location of any other party, whether such acts or attempted acts are in person or by telephone.

6. Excluding Respondent _____ from the family home of the Petitioners.

7. Ordering a custody evaluation by Hennepin County Family Court Services (HCFCS), including mental health and chemical dependency evaluations as HCFCS deems appropriate.

8. Appointing of a Guardian ad Litem to advocate for the best interests of the child.

9. Setting the matter on for an evidentiary hearing after the evaluations have been completed if any party disputes the recommendation.

10. Providing such other and further relief as the Court deems just and equitable.

Petitioners' motion shall be based upon the Affidavits of _____, _____, and _____, Petition, any subsequently filed Memorandum of Law, the arguments of counsel, and upon all the files, records, and proceedings herein.

All responsive pleadings shall be served and mailed to or filed with the court administrator no later than five days prior to the scheduled hearing. The court may, in its discretion, disregard any responsive pleadings served or filed with the court administrator less than five days prior to such hearing in ruling on the motion or matter in question.

WALLING, BERG & DEBELE, P.A.

Dated: _____

_____
Gary A. Debele (#187458)
121 South Eighth Street, Suite 1100
Minneapolis, MN 55402
(612) 340-1150
Attorneys for Petitioner

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.21, subdivision 2, to the party against whom the allegations in this pleading are asserted.

_____
Gary A. Debele, Esq.

STATE OF MINNESOTA

COUNTY OF

_____

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

Court File No. _____

In the Matter of the Custody of:
_____, DOB: _____

_____ and _____,

Husband and wife,
and

_____,

Respondent,
and

_____,

Respondent.

AFFIDAVIT OF _____ REGARDING DEFAULT, NONMILITARY STATUS, AND REQUEST FOR RELIEF

_____

STATE OF MINNESOTA)
) ss
COUNTY OF _____)

_____ and _____ , after being first duly sworn upon oath, depose and state as follows:

1. That we are the Petitioners in the above-captioned third party custody proceeding involving our granddaughter, _____, born _____. We are submitting this affidavit in support of our motion for the entry of a default judgment granting us the relief requested in our custody petition dated _____.

2. A Summons and a copy of our Petition for Custody were served upon _____ father, _____, on _____. A copy of the Affidavit of Service is attached hereto.

3. Respondent _____ signed an Acknowledgment of Service indicating her receipt of the Summons and Petition. A copy of that document is also attached.

4. Under the terms of the Summons and Petition, the Respondents had 20 days in which to file an answer to the Petition. To date, neither we nor our attorney has received a written answer or any other response from Respondent ____. Our daughter, Respondent _____, has filed an affidavit in support of our Petition.

5. We appeared before the Court on _____, pursuant to motions for temporary relief. Respondent _____ was present at the hearing, while Respondent _____ did not appear at the hearing. The Court issued an order dated _____, granting us temporary legal and physical custody of _____ and granting Respondent _____ parenting time with the child as she and we mutually agreed was in the child's best interests. _____ parenting time was to be supervised by us with a time and frequency as we determined was in the best interests of the child, until such time as _____ appeared before the Court and had the issue of his parenting time reviewed following the submission of formal motion papers. We have not heard from _____ since he was served with the temporary order.

6. In that Order, the Court specifically indicated that in the event the Respondents wished to challenge the custody determination of this Court, they would need to notify the Court of that decision within 10 days from the date of the Order. The _____ Order was personally served upon Respondent _____ on _____. To date, neither we, our attorney, nor the Court has received any response from _____to the Temporary Order.

7. It is our belief that neither of the Respondents are currently or have been in the military service of the United States at any time relevant to this proceeding, and therefore, the Servicemembers' Civil Relief Act of 2003, as amended, does not prohibit this matter from going

forward at this time. We are asking that the Court enter a default determination as to permanent custody of our granddaughter, and our attorney will be submitting a proposed order for the Court to review.

FURTHER AFFIANTS SAYETH NOT

_____
******

Subscribed and sworn to before me
this ___ day of _____, 2004.

_____
Notary Public

_____
******

Subscribed and sworn to before me
this ___ day of _____, 2004.

_____
Notary Public

STATE OF MINNESOTA

COUNTY OF

_____

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

Court File No. _____

In the Matter of the Custody of:
_____, DOB: _____

_____ and _____,

Husband and wife,
and

_____,

AFFIDAVIT OF _____

Respondent,
and

_____,

Respondent.

_____

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

_____, being first duly sworn upon oath, deposes and states as follows:

1. My husband _____ and I are the Petitioners in the above-entitled matter and I make this Affidavit in support of our Petition and Motion for Custody of _____.

2. I am the biological mother of _____ (hereinafter "_____") who is named as a Respondent in this matter. My husband, ___, is _____ stepfather. In April 2002, _____ started dating _____ (hereinafter "_____"), also named as a Respondent in this matter. In ___ 2003, _____ found out she was pregnant. On _____, _____ gave birth to our granddaughter _____ who is now ___ months old. Our motion for custody of ___ is based on the fact that _____ has shown very little in being involved in _____ life and the fact that _____ has struggled to care for and support her daughter.

3. In _____ 2003, before she found out she was pregnant, _____ moved in with my husband and I after a fight with _____. She continued to live with us until _, 2004. Our granddaughter _____ has lived with us since she was born. My husband and I have done a significant amount of the daily care for _____since she was born. We are asking the Court to award us sole legal and physical custody of _____. _____ fully supports our petition for custody of _____.

4. _____ and _____ began dating in April 2002. They moved into an apartment with another friend in October 2002. At that time, _____ was unemployed and _____ was working at a _____ while attending an alternative school in _____.

5. On or about Thanksgiving 2003, _____ and _____ got into a severe altercation. _____ became violent and abusive towards _____. After screaming at _____ and throwing things around the apartment, _____ eventually left the apartment. However, on _____, 2003, _____ and _____ got into another fight and _____ ended up spending Christmas at a friend's house.

6. On _____, 2003, _____ decided to move home because they had been evicted from their apartment because _____ and _____ roommate _____ was fired from her job as a cleaning person for the apartment complex. Initially, _____ was allowed to live in the apartment complex because her rent was automatically deducted from her wages. Without her employment with the apartment complex, _____, _____ and _____ did not have the money to pay the rent or the credit references to continue to live in this apartment complex.

7. Prior to _____ moving home, I had several telephone conversations with _____. I had asked _____ to make sure all her things were packed and ready to be

moved prior to our arrival on _____, 2003. _____ had told me that she was feeling sick again and having a hard time getting her packing completed. She informed me, however, that __ would pack her things for her. When we arrived at the apartment to pick up _____ things, only one box was packed. _____ and I had to pack all of _____ things ourselves. ___ and __ _____ were also moving out of the apartment. _____ was planning to move back to his parent's home because he was unemployed and had no other place to live. _____ parents arrived to help _____ move his belongings home. Several days later, on _____, 2003, _____ found out she was pregnant.

8. _____has a criminal record. He was arrested and put in jail four times between April 30, 2002 and April 29, 2004. Three of the four times was for driving with a suspended license. _____ has also told me that _____ has a severe drug habit that includes the use of methamphetamine, cocaine, and marijuana. She told me that he sells drugs to support his habit and explained to me in detail how he purchases and sells the drugs. ___ has also been charged with a Gross Misdemeanor Interference with a 911 Call and Fifth Degree Domestic Violence against _____.

9. _____ does not have a reliable work history. _____ worked for a car detailing business for a short period of time before he was let go.

10. _____ was born on _____, 2003. _____ and _____ had several conflicts after _____ was born. I do not remember the exact dates of the conflicts.

11. On a weekend afternoon, _____ was trying to get ready for work while she and _____ were arguing. _____ approached me twice to ask me to come downstairs and tell _____ that he needed to leave. The first time I told _____ that she and _____ needed to work it out themselves. The second time I asked her what was happening and she told

me that _____was yelling and swearing at her in front of __. I went downstairs to see if I could help. _____ eventually left and _____ went to work. I stayed home to watch _____.

12. Another incident occurred when _____ was very sick and was up crying at all hours of the night. _____ was completely exhausted and frustrated. __ and I pitched in that night to help _____ with _____. The next day, _____ also got sick. _____ and I had to take care of _____ because _____ was unable to care for her. After a few days, I asked _____ if she would please call _____ to see if he could help out with _____ _____ because _____ and I were scheduled to work on Monday. _____ said he would come to help but on those rare occasions when he did come, he would come and leave immediately and do nothing to help. I had to take off work to care for ___ and _____ until they were better.

13. _____ and I have left work a countless number of times in order to get home to watch _____ so _____ could go to school or work because _____ never showed up when he said he would. I have also left work numerous times because _____ was stressed out after an argument with __ and she couldn't cope with _____. One time, _____ and _____got into an argument over _____ drug habit. I do not know what happened in the argument but _____ called me at work and was hysterical; she was crying and could not stop. I told her to hang up and call her doctor immediately. I was very worried about _____ because she did not sound right. I called _____, who worked closer to home, and asked him to get home as fast as he could to watch _____. _____ called the doctor who told her to go the emergency room. _____ drove _____ to the ER and then took _____ home with him. _____ called me from the hospital and told me they would not release her until I got there. When I arrived, the social worker explained to me that she felt that _____

needed some in-patient behavioral health treatment and transferred _____ to _____ Hospital. After several hours in the behavioral health unit, _____ decided she did not want to stay. They allowed _____ to go home after she stated she would not harm herself and I agreed I would watch her carefully.

14. In _____ 2003, _____ began attending a program called STEEP. It is a program that assists parents with coping and parenting skills. _____ continues to meet with the group regarding everything that has happened. They are also providing her with counseling regarding her options, namely adoption and a transfer of custody.

15. On or about _____, 2004, _____ called 911 because _____ was screaming at her uncontrollably. ___ and I were at work and _____, _____ and _____ were alone at the house. I _____ was talking on the phone with a friend and said he was going to kill _____. From the kitchen, _____ threw a large plastic dish-cleaning utensil at _____ while she was sitting in the living room on the couch with _ next to her. The utensil hit the window behind _____, bounced off the window and broke on the floor. When ___ tried to call 911, _____ grabbed the phone from her and threw it at the wall, eventually breaking it on the floor. _____ then picked up the kitchen phone and slammed it on the receiver until it too broke. While _____ was on another phone with the police, _____ left the house. He was later picked up by the police and arrested. An Order for Protection was obtained stating that __ could not call or contact ___ until the order was dropped. Despite the order, ___ and _____ continued calling each other. I tried to discourage the calls by reasoning with _____ and attempting to educate her but she continued calling and receiving calls from ____.

16. Shortly after this altercation, _____ called to discuss the incident with me. He wanted to explain what happened and tell his side of the story. ___ told me that he had a drug

problem but he was in the process of getting help. He said he felt ___ never got to know the "real him" because of his drug habit. He acknowledged that he told _____ many times that he had quit using but never actually did.

17. At that point, Hennepin County Child Protection became involved. An investigator came to our home to meet with us. See Report attached as **Exhibit A**.

18. On ___, 2004, against my advice not to do so, _____ brought _____ to see _____. Five minutes after ___ left _____ with ____, he called her to say he couldn't do it and wanted her to return. _____ told _____ that she did not want to stay while _____ visited with _____. _____ made inferences that he would hurt himself and possibly commit suicide. _ called one of _____ brothers because she was worried about what _____ would do. When _____ brother arrived, _____ left with _____ and came home very upset.

19. On _____, 2004, _____ took _____ to court for a hearing on the interfering with 911-call charge. ___ was worried that _____ would not go to the hearing if she did not take him.

20. In late _____ or early _____ 2004, the Order for Protection was lifted. _____ came to our house to visit with _____ and told us that he had been using drugs since he was 17-years old. After this visit, ___ decided that she wanted ____ and I to adopt _____. We talked with _____ at length about her decision and we went to see a counselor at the Health Partners Clinic in Brooklyn Center. The counselor supported _____ decision and made a family appointment with another therapist at a different location. After the second appointment, we began gathering information on how to proceed with the adoption. Since the OFP was lifted, ___ has failed to show up for scheduled visits with _____ and failed to show up for scheduled appointments and court hearings.

21. On ___, 2004, _____ arrived 45 minutes late for a scheduled visit with __. I passed on a message from _____ to _____ that he could go to Wal-Mart after his visit to purchase _____ a new phone to replace the one he broke. The Court had ordered ____ to replace _____ phone. _____ refused and told me that he would have to talk to ____ first. At 8:00 p.m. that evening, _____ left and sat in his car in front of our house until ____ got home at 9:00 p.m. When _____ got home, she agreed to go to Wal-Mart with _____. Later that evening, _____ came home extremely upset because _____ refused to purchase her a new phone. Apparently, ____ wanted to buy _____ a phone exactly like the one he broke because he wanted to put the broken phone in the new box and return it so he wouldn't have to spend money replacing the phone.

22. In ____ 2004, a paternity case was filed by Hennepin County Child Support Services. On _____, 2004, _____ did not appear for a child support hearing and has yet to make any appearance on this matter. Copies of some of the pleadings and orders for this paternity action are attached as **Exhibit B**.

23. On _____, 2004, _____ did not appear for a scheduled meeting with our attorney Gary Debele regarding the possible adoption. _____ informed me that he had been picked up on a bench warrant for driving without a license.

24. Several weeks later, on _____, 2004, _____ called me at home. He was angry, disrespectful and pushy. He was upset because he could not see _____ because she was sick. He did not believe me when I told him she was sick and informed me that it was very convenient. _____ was sick that entire weekend through Monday.

25. On _____, 2004, _____ failed to appear for the second time to a court hearing to establish child support. To date, _____ has shown very little interest in caring for

or supporting his daughter. He has a severe drug habit and cannot be relied on for anything. In addition, _____ has struggled with raising ___ while at the same time attempting to support herself and get an education. My husband and I have done most of the care giving for ___ since she was born. _____ does not want to consent to _____ and I adopting _____. However, he has shown little interest in being a father to her.

26. Based on the foregoing, I believe it is in the best interests of _____ if my husband _____ and I were granted sole legal and sole physical custody of _ with reasonable and liberal parenting time to ____ and supervised parenting time with _____. We are also asking that a custody evaluation be completed and a Guardian ad Litem be appointed.

_____
****

Subscribed and sworn to before me
this ___ day of _____, 2004.

_____
Notary Public

STATE OF MINNESOTA

COUNTY OF

_____

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

Court File No. _____

In the Matter of the Custody of:
_____, DOB: _____

_____ and _____,

Husband and wife,
and

_____,

AFFIDAVIT OF _____

Respondent,
and

_____,

Respondent.

_____

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

_____, being first duly sworn upon oath, deposes and states as follows:

1. I am the biological mother of _____, DOB: _____ who is currently ____ months old, and I submit this Affidavit in support of the Petition and Motion for Custody by my parents _____and _____, Petitioners herein.

2. Respondent _____ (hereinafter "_____") and I began dating in _____ and I found out I was pregnant in _____. _____ and I were never married and we are no longer dating.

3. Since the 911 incident, the few visits that ___ has had with _____ were in my presence or with my parents present. While a paternity action was started in Hennepin County, _ has not yet been adjudicated the father of ___. In fact, _____ has failed to appear at several of the

court dates that were set in the paternity matter. When ____ failed to appear at the first court date, the Court issued a warrant for his arrest. He also failed to appear at the second hearing in the paternity action, and another warrant was issued for his arrest.

4. I have reviewed the Affidavit of ____ and acknowledge that all of the facts therein are correct. I agree with the Petitioners that it is in the best interest of ____ that the Court grant sole legal and sole physical custody to the Petitioners. If the Court does not grant the Petitioners' request, I believe it is in the best interest of _____ that she be raised by me.

_____
******

Subscribed and sworn to before me
this _____ day of _____, 2004

_____
Notary Public

STATE OF MINNESOTA

COUNTY OF

_____

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
FAMILY COURT DIVISION

Court File No. _____

In the Matter of the Custody of:
_____, DOB: _____

_____ and _____,

Husband and wife,
and
_____,

AFFIDAVIT OF _____

Respondent,
and

_____,

Respondent.

_____

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

_____, being first duly sworn upon oath, deposes and states as follows:

27. My wife _____ and I are the Petitioners in the above-entitled matter and I make this Affidavit in support of our Petition and Motion for Custody of _____.

28. My wife _____ is the biological mother of __ (hereinafter "_____") who is named as a Respondent in this matter. I am _____ stepfather. In _____, _____ started dating _____ (hereinafter "___"), also named as a Respondent in this matter. In _____, _____ found out she was pregnant. On _____, _____ gave birth to our granddaughter ____ who is now __ months old. Our motion for custody of ____ is based on the fact that _____ has shown very little in being involved in _____ life and the fact that _____ has struggled to care for and support her daughter.

29. In _____, before she found out she was pregnant, ___ moved in with my wife and me after a fight with _____. She continued to live with us until _. Our granddaughter _____ has lived with us since she was born. My wife and I have done a significant amount of the daily care for _____ since she was born. We are asking the court to award us sole legal and physical custody of ___. _____ fully supports our petition for custody of _____.

30. I have reviewed the Affidavit of _____ and to the best of my knowledge all of the facts are true. In addition, I agree with all of the information contained therein.

31. I believe it is in the best interests of ____ if my wife _____ and I be granted sole legal and sole physical custody of _____ with supervised parenting time to both ____ and _____.

_____
*****

Subscribed and sworn to before me
this ___ day of _____, 2004.

_____
Notary Public

STATE OF MINNESOTA

COUNTY OF

_____

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Court File Number:

In the Matter of the Custody of:
_____, DOB: _____
_____ and _____,

Husband and wife,

and

_____,

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CUSTODY AND CHILD SUPPORT OF

_____

Respondent,

and

_____,

Respondent.

_____

The above-entitled matter came before the undersigned judicial officer of the above-referenced Court pursuant to a motion by Petitioners _____ and _____ asking this Court to enter a default order as to the custody of their granddaughter and other requested relief as set forth in their petition for custody dated August 25, 2004. Present at this hearing were Petitioners _____ and _____, their attorney of record, Gary A. Debele, Esq., Walling, Berg & Debele, P.A., 121 South Eighth Street, Suite 1100, Minneapolis, MN 55402. Neither Respondent _____ nor _____ appeared, despite having received notice of the hearing. Hennepin County was notified of this hearing, and Assistant Hennepin County Attorney _____ advised counsel for the Petitioners that she would not be attending the hearing and that Hennepin County had no objection to the relief being sought by the Petitioners.

Based upon the motion of the Petitioners, the argument of counsel, and the proceedings and files herein, the Court enters the following as its:

FINDINGS OF FACT

29. The true and correct names, addresses, social security numbers and dates of birth of Petitioners and Respondents, as presently known to Petitioners are:

Petitioners: *****
*****
*****
DOB: *****
SSN: See Confidential Information Form

*****
*****
*****
DOB: *****
SSN: See Confidential Information Form

Respondents: *****
*****
*****
DOB: *****
SSN: See Confidential Information Form

*****
*****
*****
DOB: *****
SSN: See Confidential Information Form

30. Petitioners are represented in this proceeding by Gary A. Debele, Esq., 121 South Eighth Street, Suite 1100, Minneapolis, Minnesota 55402. Respondent _____ has appeared in these proceedings pro se. Respondent _____ has not appeared either by written submission or by personal appearance in this proceeding.

31. The minor child who is the subject of this Petition is _____, DOB: _____, is now _____ months old. The minor child has resided in the State of Minnesota for the entirety of her life and has resided with Petitioners since she was born on _____.

32. Petitioner _____ is the maternal grandmother of the minor child. Petitioner _____ is the husband of _____ and the step-grandfather of the minor child.

33. Respondent _____ is the biological mother of the minor child. Respondent __ is listed on the child's birth certificate as the child's father. A paternity action is currently underway in Hennepin County that was initiated by Hennepin County Child Support Services, Court File No. _____. The Hennepin County Attorneys Office and Hennepin County Support and Collections have been notified of this proceeding.

34. Both Respondent _____ and Respondent ____ were personally served with the Summons and Petition in this matter, with Respondent _____ being personally served on _____, and Respondent _____ signing an Acknowledgement of Service on _____.

35. It appears that child support has been set by this Court in the paternity file, and that child support has been set based on an imputation of income. Assistant Hennepin County Attorney _____ has advised counsel for the Petitioners that Hennepin County has no objection to the Court directing child support paid by Respondent _____ over and above what is due to Hennepin County for reimbursement to the Petitioners.

36. Respondent _____ has had physical custody of the minor child since she was born. Respondent _____ moved in with the Petitioners in _____. The Petitioners have cared for the minor child since her birth on _____. No prior or current Court orders for custody as to this child exist.

37. Respondent _____ has submitted an affidavit in this proceeding indicating her full support of the Petitioners' Petition. She has indicated that in the event the Court did not grant the Petitioners' request, she would then raise the child on her own. She further has advised the Court through her affidavit that she supports her mother and step-father raising her child, she supports custody being placed with them, and she also agrees that she can work out her parental access to the child as she and the Petitioners mutually agree.

38. This Court finds these Petitioners qualify as interested third parties under Minn. Stat. §257C.01, subd. 3(a) and that this status has been established based on clear and convincing evidence that extraordinary circumstances existed and by a preponderance of the evidence that it is in the best interests of the minor child that custody be placed with the Petitioners.

39. These Petitioners have been involved on a daily basis in the day-to-day care of the minor child who is the subject of this proceeding. The Petitioners have cared for the minor child while Respondent _____ was working or attending school, and they have repeatedly cared for the minor child when she was ill. Respondent _____ has now moved out of the Petitioners' home and the minor child continues to reside with the Petitioners.

40. Respondent _____ has had little contact with the minor child since March of 2004. During his visits with the minor child after March of 2004, Respondent _____ or the Petitioners have always been present and Respondent _____ has never been alone with the minor child.

41. No other individuals have been involved in the minor child's life that could be considered interested third parties.

42. The minor child presently resides with the Petitioners in Hennepin County, and Minnesota is the proper forum for this matter under Minn. Stat. §518D (Uniform Child Custody Jurisdiction and Enforcement Act).

43. No party to this action is a member of the Armed Services or in any way entitled to the relief of the Servicemembers' Civil Relief Act of 2003, as amended.

44. Other than this action and the ongoing paternity action, the Petitioners do not know of any other proceeding involving the minor child's custody that has been commenced in this state or elsewhere.

45. No permanent or temporary standby custody designation has been executed or filed in a court in this state or elsewhere.

46. The Court finds that liberal and frequent parenting time should be granted to Respondent _____ as mutually agreed between _____ and the Petitioners, and that supervised parenting time should be granted to Respondent _____ of an amount and duration to be set at the discretion of the Petitioners.

47. This Court finds it appropriate that in the event child support for Respondent ____ has been set in the paternity proceeding, after Hennepin County has been reimbursed for any monies for which it is owed for the support of this child, child support as ordered for Respondent _____ shall then be made payable to the Petitioners.

48. The Petitioners have been the minor child's primary caretaker while Respondent _ has assisted them on a daily basis in the day-to-day care of the minor child.

49. Because the minor child has lived in Petitioners' home since her birth in _____, Petitioners have developed a deeply intimate relationship with the minor child.

50. Petitioners' home is a stable, satisfactory environment, and both Petitioners and Respondent _____ are desirous of maintaining that continuity for the minor child.

51. The minor child has become a permanent member of the Petitioners' family unit.

52. The Petitioners have no history of physical or mental health problems.

53. The Petitioners are fully capable of providing love, affection, and guidance to the minor child.

54. There are no cultural or religious issues present in this matter.

55. Respondent _____ has a long history of drug use and, upon Petitioners information and belief, he continues to use drugs to date. Respondent _____ has admitted to selling drugs to support his drug habit, as well as admitted that he repeatedly lied to Respondent _____ that he had quit using drugs when in fact he had not. Respondent _____ has been charged with a gross misdemeanor interference with a 911 call and 5th degree domestic violence against Respondent _____.

56. To date, Respondent _____ has not filed an answer to the Petition, and as a result, this Court finds him in default pursuant to Rule 306.01 of the Minnesota rules of Practice for the District Courts.

57. Respondent _____ did not appear at the temporary hearing in this matter that occurred on _____. A copy of that order was personally served upon him on October 4th, and he was given notice of the terms of that order in which he had 10 days to notify the Court that he was contesting custody. To date, the Court has received no notification, either orally or in writing, of his desire to contest custody. This further supports the Court's determination that Respondent _____ is in default and that the Court may enter these findings and this order.

58. The parties have agreed to reserve the issue of Respondents' daycare contributions for the minor child.

59. The Petitioners have medical insurance available for the minor child and will provide medical insurance coverage for her. The Court finds it appropriate to reserve the issue of the Respondents' contributions to uninsured medical expenses for the minor child.

Based upon the above Findings of Fact, the Court enters the following as its:

ORDER

1. Petitioners _____ and _____ are hereby granted sole legal and sole physical custody of _____, date of birth _____.

2. Respondent _____ is granted reasonable and liberal parental access to the minor child as she and the Petitioners mutually agree.

3. Respondent _____ shall be entitled to supervised visitation with all terms and conditions of said access as the Petitioners deem appropriate.

4. To the extent Respondent _____ is assessed child support for the support of this minor child in the Hennepin County Court File No. PA _____, and after Hennepin County has been reimbursed for any expenses incurred by it for this child, any remaining and on-going child support ordered to be paid by Respondent _____, shall be assigned and paid to the Petitioners. Respondent _____ child support obligation is reserved.

5. The issue of Respondent _____ and Respondent _____ contributions for daycare for the minor child is hereby reserved.

6. The Petitioners shall provide medical and dental insurance for the minor child, and to the extent there are uninsured medical or dental expenses for the minor child, the Respondents' contributions for those expenses are hereby reserved.

7. A copy of these Findings of Fact and this Order may be served upon the parties either at their attorneys' address or at the last known address of the parties by United States mail, and such service shall be deemed good and proper service.

BY THE COURT

Dated: _____

_____
The Honorable _____
Judge of District Court