
Case No. A-25-0220

IN THE NEBRASKA COURT OF APPEALS

Jerome Biegler and Michelle Biegler, Appellees
vs.
Toi Sonthana, Appellant

ON APPEAL FROM THE DISTRICT COURT
FOR LANCASTER COUNTY, NEBRASKA

The Honorable Ryan S. Post, District Court Judge

BRIEF OF APPELLANT, TOI SONTANA

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STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to NEB. REV. STAT. § 25-1912 (2024 Cum. Supp.). The date of entry of the order sought to be reviewed is February 10, 2025. (T53) Following the filing of the court's order, post-trial motions were filed by the parties. (T62) (T65). The trial court's order on the post-trial motions was filed on February 26, 2025 (T68). On March 25, 2025, appellant filed her notice of appeal and deposited the docket fee and cost bond. (T71) The order sought to be reviewed adjudicates all claims between all parties.

STATEMENT OF THE CASE

A. Nature of the Case

This is a grandparent visitation case brought pursuant to NEB. REV. STAT. § 43-1801 et seq. (Reissue 2016), by paternal grandparents, Michelle and Jerome Biegler ("Michelle" and/or "Jerome" or "the grandparents") on May 16, 2024. (T1) At the time of filing, the grandparents filed a motion for "temporary parenting time." (T4) Appellant, Toi Sonthana ("Toi") objected to the request for temporary parenting time. (T7) The trial judge overruled the motion. (T25) On June 16, 2024, Toi filed her answer and affirmative defenses. (T10)

Following a three-day trial held January 27 – 29, 2025, the trial court rendered its decision. (T53) Both parties filed post-trial motions. (T62) (T65) On February 26, 2025, the trial court overruled the motions. (T68)

On March 25, 2025, Toi timely appealed. (T71)

B. Issues Actually Tried in Court Below

The issues tried in the court below were (1) whether the paternal grandparents had a significant beneficial relationship with the two minor children; and, if so, (2) whether it would be in the children's best interests that such relationship continue; (3) whether such relationship would adversely interfere with the children's relationship with their mother; (4) whether the presumption in favor of the decisions of a fit parent should be overridden by grandparent visitation orders; (5) whether the grandparents had met their burden of proof by clear and convincing evidence; and, (6) if visitation were

granted, what visitation schedule would be appropriate.

C. How the Issues Were Decided.

The trial court ruled that the grandmother (Michelle) had a significant beneficial relationship with the children, but the grandfather (Jerome) did not. (T55) (T56) The court found that it was in the best interests of the children that Michelle’s relationship with the children continue and that granting her visitation would not adversely interfere with the parent-child relationship. (T55) The court acknowledged the relationship between Michelle and Toi is strained. (T55) The court “denied and dismissed” Jerome’s request for grandparent visitation. (T56)

The trial court found “[t]he evidence was clear that [Toi] is a fit parent and wants what is in the best interests of her children.” (T55) Nonetheless, the court ordered grandparent visitation for Michelle. Michelle was granted visitation in the State of Nebraska for one full weekend per month during the months of March, June and October. (T58) Michelle was also granted visitation every other Thanksgiving for the children’s entire school holiday, and every other Christmas for five days. (T59)

Following the entry of the court’s order, both parties moved to alter or amend the order. (T62) (T65) Those motions were overruled. (T68)

D. Scope of the Appellate Court's Review

Determinations concerning grandparent visitation are initially entrusted to the discretion of the trial court, whose determinations on appeal will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. *Lindblad v. Lindblad*, 309 Neb. 776, 787 (2021). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Gatzemeyer v. Knihal*, 25 Neb. App. 897, 903-904 (2018).

ASSIGNMENTS OF ERROR

1. The trial court erred in finding that Michelle had a significant beneficial relationship with the two minor children.
2. The trial court erred in finding that it would be in the children's best interests for Michelle's relationship with the children to continue.
3. The trial court erred in finding that Michelle's relationship with the children would not adversely interfere with the children's relationship with their mother.
4. The trial court erred in failing to accord sufficient weight to the presumption in favor of a fit parent's decisions.
5. The trial court erred in finding Michelle had met her burden of proof by clear and convincing evidence.
6. The trial court erred in granting grandparent visitation to Michelle when the grandparents petitioned the court jointly and live together.
7. The trial court erred in entering a visitation order that does not sufficiently carry out the findings and orders of the court or sufficiently protect the children.
8. The trial court erred in entering the visitation schedule it did.

PROPOSITIONS OF LAW

1. A trial court's authority in grandparent visitation cases is derived solely from the grandparent visitation statutes. *Krejci v. Krejci*, 304 Neb. 302, 310 (2019); *Lindblad v. Lindblad*, 309 Neb. 776, 793 (2021).
2. Under common law, grandparents had no legal right to visitation or communication with their grandchildren if the parents forbid it. *Nelson v. Nelson*, 267 Neb. 362 (2004) (*McCormick, J. dissenting in part*).
3. Generally, statutes which effect a change in the common law are to be strictly construed. *Nelson v. Nelson*, supra; *ML Manager, LLC v. Jensen*, 287 Neb. 171 (2014).
4. Strict construction means "the common law will be

abrogated no further than expressly declared or than is required from the clear import of the language employed by the statute.” *Dykes v. Scotts Bluff Cnty. Agr. Soc., Inc.*, 260 Neb. 375 (2000).

5. Reasonable visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship. NEB. REV. STAT. § 43-1802(2) (Reissue 2016).

6. Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Nelson v. Nelson*, supra.

7. In the absence of such evidence of the statutory prerequisites set forth in § 43-1802(2), court-ordered grandparent visitation is an abuse of judicial discretion. *Nelson v. Nelson*, supra.

8. All three criteria found in NEB. REV. STAT. § 43-1802(2) must be proven by clear and convincing evidence, “which burden is higher than that in conventional civil cases.” *Hamit v. Hamit*, 271 Neb. 659 (2006); *Simms v. Friel*, 25 Neb. App. 640, 643 (2018).

9. The grandparents’ burden of proof is “steep and significant.” *Vrtatko v. Gibson*, 19 Neb. App. 83 (2011).

10. In Nebraska, there is a presumption that a fit parent acts in the best interests of her children. *Nelson v. Nelson*, supra.

11. In light of this presumption, a fit parent's decision concerning the denial of grandparent visitation must be accorded at least some special weight. *Hamit v. Hamit*, supra.

12. Fundamental liberty interests are implicated when grandparent visitation is sought. *Nelson v. Nelson*, supra; *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion); *Hamit v. Hamit*, supra; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

13. Grandparents must satisfy a substantial burden to demonstrate that their desire for court-ordered visitation should override a fit natural parent's reluctance to grant such visitation.

Vrtatko v. Gibson, 19 Neb. 83, 87 (2011).

14. The presumption in favor of fit parents is rebuttable under the appropriate circumstances. *Kane v. Kane*, 311 Neb. 657 (2022).

15. Any inquiry into the “significant beneficial relationship” requirement of § 43-1802(2) will necessarily be fact dependent. *Nelson v. Nelson*, 267 Neb. 362, 370 (2004); *Rosse v. Rosse*, 244 Neb. 967 (1994).

16. The grandparents’ burden of proof is not met where the evidence merely establishes the nature and frequency of the grandparents’ contacts with the children over the years but reveals nothing about the nature of the relationship which existed as a result of those contacts. *Nelson v. Nelson*, 267 Neb. 362, 370 (2004).

17. Evidence that a grandparent has provided day care and transportation for the minor children in the past “does little more than establish that [the grandparent] performed various housekeeping and transportation chores for the children.” *Nelson v. Nelson*, 267 Neb. 362, 370 (2004).

18. The grandparents’ burden of proof is not met where the evidence shows “an unremarkable, typical, healthy relationship” between the grandparents and the children which consisted of an average of two visits per month, occasional visits to a baseball game or a fireworks show, taking some walks or just playing with the children. *Eberspacher v. Hulme*, 248 Neb. 202 (1995).

19. An adverse relationship between the grandparents and the children’s parent, “and the resulting incidents,” are evidence that court-ordered visitation may not be in the children’s best interests. *Eberspacher v. Hulme*, 248 Neb. 202 (1995).

20. Persistent animosity and competition between the grandparents and the mother is unhealthy for the children, undermines the mother's parental authority, and adversely affects the parent-child relationship. *Morris v. Corzatt*, 255 Neb. 182 (1998).

21. The reasonableness of a visitation schedule is a separate issue from whether the grandparents have carried their burden of

showing that visitation would not adversely interfere with the parent-child relationship. *Lindblad v. Lindblad*, 309 Neb. 776, 793 (2021).

STATEMENT OF FACTS

Toi is the mother of two children, Owen, age 10, and Emma, age 8. (16:1-5) The children's father is Dustan Biegler (Dustan). (16:6-8) Dustan died in a plane crash on January 11, 2023. (38:15-17) (47:11-23) Dustan's parents are Michelle and Jerome. (16:9-4)

A. *Toi and Dustan.*

Toi and Dustan first met when Toi was a freshman in college. They maintained a relationship as friends for several years before the relationship became romantic. (39:3-14) She is a respiratory therapist and worked in her field until Dustan's death. (37:18-25; 38:1-14) Toi is Laotian and was raised in the Buddhist faith. (37:2-11)

Dustan and his business partner, Marcus Kuhlmann, started "Apple Roofing" in 2011. (445:8) By the time of Dustan's death, Apple Roofing was a conglomeration of many entities, and Dustan was a very wealthy man. (51:5-7) Dustan died intestate leaving a complicated estate. (51:8-16) (334:7-25; 335:1-13; 337:11-24; 338:4-25; 339:6-16; 343:2-23) His business partner described him as someone who "didn't really have a hobby. You know, he wasn't the fisherman, he wasn't the hunter, he wasn't the soccer guy, he wasn't the basketball player, he was -- he was the money guy." (448:14-17)

In 2018, Dustan and Toi moved to a 30-acre tract in Valparaiso, Nebraska and built a home for their family. (49:22-25; 50:1-3; 595:21) Prior to the Valparaiso home, Toi and Dustan lived together in the Fallbrook neighborhood in Lincoln. (185:5-6; 190:6-8) By all accounts, Toi and Dustan were very private people. (259:1-3; 429:4-6; 523:2-4; 554:2-18) They did not host company events at their home. (303:2-5) They hosted only one family gathering at their home in the years they lived together. (76:16-25; 77:1-6)

Prior to Dustan's death, Toi was the primary caregiver for the children. She handled their medical appointments, school enrollment and attendance, health and nutrition. She volunteered in their classrooms and did fundraising for their school. She assisted Owen's

soccer coach. (48:23-25; 49:1-21) Toi and Dustan raised their children to be “quiet . . . reserved, very polite, and kind.” (16:8-17) They developed a structured routine for their children, which Toi has maintained since Dustan’s death. This includes bedtime, mealtimes, brushing teeth, saying prayers, limited screen time, homework, extracurricular activities, and talking about the children’s days. (60:18-25; 61:1-25; 61:1-11; 557:7-25; 558:1-25; 559:1-14) If Dustan was not home when the children went to bed, he would check in with Toi by phone during the children’s nighttime routine. “. . . [T]hey were very good parents.” (569:1-4) Owen does not like long car rides, so Toi and Dustan limited long car rides. (610:15-20) Trips to the grandparents’ home in McCook require four hours of travel each way. (249:5-9) The children have never spent a holiday without Toi. (82:11-12) (207:20-25) The children are active in soccer, basketball, Kratos, tennis, golf, ninja, archery, gymnastics, volleyball, and swimming. They are active all year round. (62:16-25; 63:1-25; 64:1-25; 65:1-9) (E39, p. 36)

As a child, Dustan was raised a Catholic, but as an adult he rejected that faith for himself and he and Toi intentionally elected to not raise their children in either the Catholic faith or the Buddhist faith. (55:8-9; 79:19; 251:25; 252:1-23; 332:19-21; 404:4-7; 603:14-21) They elected to not get married. (39:17-25; 40:1-4) They elected to not have their children baptized. (40:1-9; 254:10-13) They elected to not pray before meals. (634:23) Prior to Dustan’s death, they made it clear to Michelle and Jerome that “Dustan is not practicing and [Toi is] not Catholic.” (167:7-8) Today, Toi is a Christian “growing in [her] faith daily.” (602:25; 603:1) She has elected to raise the children in the Christian faith. They attend Christ’s Place Church in Lincoln which she described as “non-denominational . . . pretty open and understanding . . . modern. I feel welcome there.” (603:2-13) She has raised the children to believe that their father is in heaven. (604:5-7)

Prior to Dustan’s death, Michelle and Jerome freely offered their judgment and disapproval of the decisions Toi and Dustan made, including those involving marriage, baptism, Toi working outside the home, and the children’s public school attendance. In response to a

question about whether she and Dustan were confronted by the Bieglers about baptizing Owen, Toi testified: “A. Yes, and getting married and making sure it’s in a church. . . . We were living in sin. We had a child out of wedlock. If we were going to get married in church, it had to be in a church or else Jerome couldn't go.” (40:5-17) (147:11-22) (587:9-19) (E39, p. 27) Michelle told another son, Michael Biegler, not to stay overnight at Toi and Dustan’s house because they were living together. (396:20-21; 397:1-13) During a conversation between Toi and Dustan’s sister about whether the sister planned to have more children, Michelle inserted herself into the conversation from across the room and said: “She is done when God says she is done.” (588:2-10) This is not a belief Toi shares. (588:9-10) Toi testified that when she and Dustan began living together, “[Michelle] sent me a message about how I couldn't live with Dustan.” (E39, p. 27) Not surprisingly, Dustan and Toi intentionally limited the children’s time with Jerome and Michelle. (E39, pp. 15-16) “We did not travel to McCook often and we barely saw them.” (E39, p. 15) They had less than five contacts per year with Jerome and Michelle. (E39, p. 15)

In the year before Dustan died, the children saw a 15-year-old half sister, Keely Schade (Keely), “probably once a month, every four or six weeks” when Dustan would exercise his parenting time. (53:11-21) Keely is Dustan’s child from a prior relationship. (101:2-7) She lives in Gibbon, Nebraska, with her mother, Heather Schade (Heather). (101:23-24) Toi believes it is important for her children to know Keely. (36:2-4) However, Toi does not know either Keely or her mother very well. She interacted with Keely somewhat during Dustan’s visits and has only spoken with Heather twice. (93:24-25; 94:1-6; 97:5-10) “I have not had time to get to know Heather. And at some point in time, when I do -- like, this past two or three months probably has been the most that I've talked to Heather. And it takes time to build that relationship. After losing Dustan, I did not have time to build a new relationship with a stranger . . .” (85:6-12) By the time of trial, Toi and Heather had arranged for Keely, Owen and Emma to talk on the phone twice a month at times that do not conflict with the children’s

schedules. (95:11-21)

When Toi went back to work after maternity leave, and when Toi and Dustan traveled, the children were primarily cared for by a Ukrainian couple who lived across the street from them in Fallbrook. When travel included overnights, the couple would stay at the children's home, first in Fallbrook, and then in Valparaiso. (25:1-11; 566:18-15; 567:1-25; 568:1-16)

Toi testified that historically the children had a good relationship with some of Dustan's siblings, and they saw their cousins "two or three times a year, probably." (21:1-4) (84:1-19) This typically included either a visit at Thanksgiving or Christmas (but not both), and always with Toi and Dustan present. (E39, p. 20) They also saw them at "Cousin Camp" twice in 10 years. (E39, p. 20) Following Dustan's death, Toi attempted to accommodate the entire Biegler family in their requests to see Owen and Emma. The Biegler family includes Jerome, Michelle, Dustan's seven siblings, the siblings' spouses, and 28 cousins. (29:2-5) (134:5-25; 135:1-5) (135:25; 136:1) All of Dustan's siblings are Catholic, as are their spouses. (251:25; 251:1-8) (253:16-18) Approximately a month after Dustan's death, Toi asked if she could attend a Catholic service with one of the Bieglers. "I wanted to see if I would feel anything in a Catholic church, and I didn't." (75:7-13) After Dustan's death, Toi provided Michelle with Owen's basketball schedule and some of the Bieglers showed up. (E39, p. 34) Toi also tried to accommodate a visit with Keely once per month. (E39, p. 37) (E39, p. 50)

In addition to accommodating the Biegler family since Dustan's death, Toi has been juggling a challenging schedule for herself and the children. She and the children have had to relocate from the Valparaiso home to a new home in Lincoln. (594:11-17) Toi testified: "I tried for a year to make that life work out on that acreage. It was a lot. It was a lot for a single woman with two young kids. . . . I wanted to simplify our lives. I wanted to downsize and find something more manageable for our children and me." (594:19-22) (595:17-19) The children have also had to change schools. They were in 1st and 2nd

grade at Valparaiso when Dustan died. After the move to Lincoln, Toi drove 1.5 hours round trip each morning and each afternoon to drop off and pick up the children. (596:5-25) They are now in 3rd and 4th grade in a public school in Lincoln. (596:25; 597:1-3)

Toi and the children are in grief counseling. (E39, pp. 40-43) (599:2) “I have good days, and I have bad days. And in the midst of it all, while I was trying to navigate through my grief, I also was trying to help my children navigate through theirs. Owen was having night terrors and Emma was having --acting out in school. Between my panic attacks, from how traumatic -- between my panic attacks, I was trying to make sure Owen and Emma were okay.” (598:14-21) Owen continues to have night terrors which require Toi’s calming presence. (600:4-23) (601:3-17) In the fall of 2023, Toi received the report from Dustan’s autopsy. “The autopsy was a very difficult day.” (601:21) Reading the report set Toi back in her grieving process and she began having trouble sleeping. (297:21-24) (308:24-25; 309:1-15) (602:3-9) Although she is not the personal representative of Dustan’s estate, she is the mother of two of the three minor heirs. She has been required to communicate with, and cooperate with, the personal representative (Jared Biegler) under extremely stressful circumstances. (602:20-23) (607:12-17) In the fall of 2023, one such occasion included several members of the Biegler family, including Jerome and Michelle, descending on Toi and the children in their home in Valparaiso for an entire weekend to go through the possessions in the home and stake their claims to personal property, even “flipping a coin” at times to decide possession. (88:6-17) (324:23-25; 325:1-5) (351:2-25; 352:1-25; 353:1-4) During the weekend, Toi was prohibited from going into her bedroom while Michelle and Keely and Jared Biegler went through Dustan’s drawers, closets, etc. choosing items they wanted. (605:3-17) Toi testified: “I understand that I did not own that home. But I lived there with my two children. It was a house. And a home is what you make of it. I truly felt violated that weekend. I really did.” (605:18-22) (606:1-6) Despite the challenges Toi has faced since Dustan’s death, the wellbeing of Owen and Emma is her top priority. (598:22-23)

In November 2023, Toi was under a great deal of stress and felt it was best that she take a break from the demands of the Biegler family. Michelle and Jerome last saw the children in November of 2023. (17:22-24) Toi testified, “The last communication I had, I said, the kids and I need a break, please respect that. . . . it was a really tough two years. It was a tough year. Any time I would say anything about making a decision, I would have two or three Bieglers calling me, texting me why I should do this, why I should do that, why I should let the kids go to cousin camp.” (19:10-22) (432:19-25; 433:1-22) “I’ve never been in probate. I’ve never planned a funeral. . . . I was so busy just trying to basically survive that year. And it was building up where I needed breathing room. . . . Time with my kids to talk to them about what they wanted, about what was best for the three of us. Not was -- not what was best for the whole Biegler clan. It was what was best for the three of us.” (20:4-23) “[T]here was a point where I had so many phone calls, it was suffocating, where I said, could you guys put me in a calling tree? I was getting two or three phone calls a week.” (29:14-17) (607:18-20) Toi has explained to the children that they are “taking a break from dad’s family for the moment. When you guys are ready, let me know.” (97:24-25; 98:1) The children have not asked to see the Bieglers. (24:16-25) (98:1)

Toi acknowledges that having a relationship with Jerome and Michelle “at some point in time” will be important for Owen and Emma. (26:25; 27:1-3) Following Dustan’s death, she expressed a desire for the children to maintain contact with Dustan’s family because “the kids enjoyed their cousins.” (27:16-25) Toi testified that when she asked for a break she meant she needed time to make decisions for herself and her children “without the influence of anyone. I needed time to figure out what was best for Owen and Emma.” (606:21-25; 607:1-7) Prior to being served with a lawsuit, Toi’s intention was to reach out to the Biegler family at the end of the children’s school year. “I was driving to and from Valparaiso twice a day to get them through school. I was busy trying to just, again, survive. They were almost done with school. I was waiting for them to

finish the school year. And by, what, June? I would have reached out. That drive every day was a lot. . . . I was shocked that I got a lawsuit. . . . I really thought they respected our boundaries and gave us that breathing room. (608:11-25; 609:1-15) (610:1-2)

At trial, Toi expressed her concerns about grandparent visitations being forced by the court. "I just -- I don't trust that they can respect our boundaries. I don't trust that they can keep their Catholic faith away from my children. I don't trust that they can guilt - - that they cannot guilt my children into what they want. At some point in time, I do see that happening. It's just not today." (16:15-25)

B. Michelle and Jerome

Prior to Dustan's death, Jerome and Michelle spent very little time with Owen and Emma. The time they did spend with them rarely included any one-on-one time. On two or three occasions in the 10 years since Owen's birth, Michelle (but not Jerome) watched the children in Toi and Dustan's home for four or five days. (25:6-25; 26:1-4) Due to their personal beliefs, Michelle and Jerome refused to stay the night in the home if Toi and Dustan were there. (E39, p. 18) Eight years prior to trial, Michelle came to the house one time after Emma was born. (26:8-10) Toi's sister, Taelo Harris (Taelo), testified she was present at most, or all, of Owen and Emma's birthday parties. She saw Michelle or Jerome there "once or twice." (555:19-25; 556:1) Taelo also attended the children's soccer and basketball games. She never saw the Bieglers there. (556:2-13) The visitation schedule proposed by the Bieglers at trial requested more time than they had ever spent with the children prior to Dustan's death. (611:15-22) (E32, pp. 1-2) The children have not asked to see Michelle or Jerome. (24:16-25) (591:23-24) (592:20-24)

Jerome admitted he did not have a close relationship with either Owen or Emma. When asked what his relationship with the children was like prior to November 2023, he stated: "I can't say I was really close with them, but when we were around them, we had fun." (460:12-15) He testified, "I didn't have a lot of chance to spend a lot of time with Owen and Emma." (521:12-13)

Michelle's testimony highlights just how infrequent her contacts with the children have been over the past 10 years. Michelle offered into evidence 31 pages of photographs purportedly depicting a significant beneficial relationship with the children. (E34, p. 1-31) Seven of the photographs were not received because Michelle could not lay the foundation for them. (224:16-23) The balance of the photos depict the children with family members, but rarely with Michelle or Jerome. Some are "group" photos of the entire Biegler family at events such as baptisms and weddings. Many of them simply depict different photos of the same event. Specifically, the photos depict the following:

a. Wedding/baptism weekend – the photo depicts the two children sitting on the laps of Toi and Dustan. Jerome is sitting in the same pew. (E34, p. 1) (178:20-24) There are other photos taken during the same weekend, but they do not depict Jerome or Michelle spending time with the children either. (208:17-25) (E34, p. 16)

b. First Communion – Owen is depicted in the photograph but not with Michelle or Jerome. (179:913) (E34, p. 1) This event was after Dustan's death. (179:23-25) Other photos in the exhibit depict the same event. (195:3-14) (E34, p. 3)

c. Owen's third birthday party – The only person Michelle identified in the photo was Dustan. (179:16-19) (E34, p. 1)

d. Cousin camp (South Dakota) (180:5-9) (E34, p. 2) Michelle did not explain who was in the photo, but neither Michelle nor Jerome are depicted. More photos of this event are found later in the exhibit but they are equally unenlightening. (182:1-2) (197:10-14) (204:7-13) (E34, p. 4) (183:9-11) (E34, p. 7) (E34, p. 12) (209:10-22) (E34, p. 18) (212:14-25) (E34, p. 21) (222:18-21) (E34, p. 30)

e. Another family baptism – The photo depicts Toi and Emma and "Joseph" and Owen. It does not depict Jerome or Michelle. (180:10-14) (E34, p. 2)

f. Christmas in McCook at Jerome and Michelle's house. (180:15-23) (E34, p. 2) The photo depicts Toi holding Emma who was "less than two." (180:23) Other photos depict the same event, but none of them depict Jerome or Michelle spending time with the children.

(213:7-11) (E34, p. 21) (E34, p. 23)

g. Cousin camp (Minnesota) – The photos depict Emma with family members (but not Jerome or Michelle). (181:8-13) (E34, p. 3) Other photos depict the same event, but only one photo depicts Michelle and Emma and Owen, and in that group photo she is holding another grandchild. (213:1-4) (E34, p. 21) (216:3-14) (E34, pp. 23-24) (219:12-21) (E34, p. 27)

h. A weekend in McCook – The photo depicts Emma at Melissa Biegler’s house, but not with Michelle or Jerome. (181:14-19) (E34, p. 3)

i. Dustan and Toi’s house – The photo depicts Emma and others, but not Michelle or Jerome. Michelle does not know if she was there. (181:22-25) (197:1-5)

j. Jerome is depicted holding Owen approximately nine years prior to trial. (182:13-21) (E34, p. 5)

k. Toi and Dustan’s home – The photo depicts Owen and Emma at a very young age but does not depict Michelle or Jerome. (182:22-25; 183:1) (E34, p. 5)

l. McCook – Owen as a toddler with John Biegler (but not Michelle or Jerome). (183:5-8) (E34, p. 7)

m. McCook – Emma and others, but not Jerome or Michelle. It is unknown whether this was the same trip to McCook that is depicted in other photos. (183:12-17) (192:8-13) (E34, p. 8) Other photos do depict the same event but they do not depict either Jerome or Michelle. (323:19-25) (E34, p. 30) (E34, p. 31)

n. Toi and Dustan’s home – The photo depicts Jerome with Dustan and Keely. There was no testimony that Owen and Emma were even there. (183:18-24) (E34, p. 8)

o. McCook – The photo depicts Jerome and Emma when Emma was a toddler. It is unclear whether this is the same visit to McCook as depicted in other photos. (184:16-17) (E34, p. 11)

p. Unknown location – The photo depicts Owen and “Max” at an unknown location at an unknown time. There was no testimony that either Jerome or Michelle were present. (184:17-18)

- q. Emma's first birthday – The photo depicts Jerome and Michelle with Emma seven years prior to trial. (184:24-25; 185:1-6) Other photos depict the same event. (209:8-9) (E34, p. 17)
- r. John's house – The photo depicts Michelle with Owen and Emma. (185:7-13) (E34, p. 12)
- s. McCook – The photo depicts Toi reading a book to children. "It might have been [] before Owen and Emma were born. I'm not sure." (186:14-25; 187:1-1) (E34, p. 19)
- t. Toi and Dustan's house – The photo depicts Michelle with Owen and Emma during a trip Toi and Dustan took to the Caribbean. (204:15-20) (E34, p. 13)
- u. Thanksgiving – The photo depicts the entire Biegler family including Toi and Dustan and the children. (207:6-18) (E34, p. 15) Other photos depict the same event but none of them depict Michelle or Jerome spending time with Owen or Emma. (208:4-16) (E34, p. 16) (212:1-10) (E34, p. 21) (219:22-25; 220:1-3) (E34, p. 28)
- v. Thanksgiving – The photo depicts Owen and Keely but not Michelle or Jerome. (210:2-7) (E34, p. 20)
- w. Unknown event prior to Emma's birth – The photo depicts the entire Biegler family (at that time) but Michelle recalled nothing of the event. (214:17-25; 215:1-13) (E34, p. 22)
- x. Owen as a baby – The photo depicts Michelle holding Owen approximately nine years prior to trial. (217:16-20) (E34, p. 25)
- y. Jerome's mother's 90th birthday – Toi took the children to South Dakota for this event after Dustan's death. Jerome and Michelle were there. There is a group photo of everyone present. (218:19-25; 219:1-9) (E34, p. 27)
- z. Dustan and Toi's house – The photo depicts Michelle and the children. Michelle remembers nothing about the photo. (224:6-13)
- Michelle testified that Owen and Emma came to McCook "Maybe about two or three times a year." (140:21-23) Jerome testified that in the year before Dustan died, he does not believe the children came to McCook at all. (502:8-12) When Michelle was asked how many times she saw Owen and Emma in Lincoln, she became vague. "Oh,

that -- like I said, that would depend on the year and what, you know, what was going on, so.” (140:22-25) She never provided definitive information on how frequently (or infrequently) she saw Owen or Emma on her visits to Lincoln.

During Michelle’s direct examination she struggled to put any descriptors on her relationship with Owen and Emma. She testified only that she felt she had a significant beneficial relationship with the children. She did not explain what made it significant or beneficial to Owen and Emma. (225:24-25; 226:1-2) On cross-examination, when Michelle was pushed to explain anything beneficial or significant about the relationship, she had a hard time conceptualizing anything specific. “Well, as the grandparents, like any grandparents, for one, you’re going to show them love, and you’re going to show them what family is about. You’re going to show them the love and connection. . . . Most grandparents love their children -- grandchildren.” (237:8-21) When asked again what significant benefit she and Jerome provide to Owen and Emma, she stated, “I guess I’m not sure what you’re asking, besides showing them the love, and the attention, and sharing family . . . and playing with them and just being with them.” When Michelle was asked if there was anything else she wanted to say about her significant beneficial relationship with the children, she said, “I believe that it’s in the best interest of the children to get to know their father’s side of the family and to continue being part of our family.” (243:19-25; 244:1-3) Other than those generalities, Michelle and Jerome both struggled to describe any one-on-one time with either Owen or Emma. Michelle did describe the following: “Well, when we -- when we’ve been together, you know, just even -- I’ve played tickle monster with them, you know? I chase them around, we -- they jump over the furniture, and we run around, do tag outside and just playing, just, you know.” (238:12-18) One time she helped them build a fort out of a box. (238:19-22) When asked if there was anything else she wanted to add, Michelle stated, “I can’t think of anything. I mean, we just do different activities together. Reading.” (238:24-25) When asked how she and Jerome were able to have a significant, beneficial relationship with Owen and

Emma when the children are with all of their cousins for cousin camp, Michelle testified: "That's kind of a tough question. Just being with the family, with Jerome and I present, playing with the kids, having activities together. You're building memories." (246:19-25; 247:1) Jerome testified he has never been to a cousin camp. (505:10-11) On redirect examination, Michelle's attorney attempted to build some substance into Michelle's relationship with the children by referring to photographs in Exhibit 34 that "*showed* cookies, and swimming, and Legos." (264:19-22) Notably, Michelle was not asked if she baked cookies, went swimming, or played Legos with Emma and Owen, and none of the referenced photos show anyone other than Emma or Owen with cousins or others. (E34, p. 3) (E34, p. 8) (E34, p. 21) (E34, p. 27) (E34, p. 30) When Jerome was asked what benefit he provides to Owen and Emma he testified that the children benefit from hearing other people talk, not *to* the children, but *around* the children, and the children "pick up on that" and emulate what they are hearing. (494:10-23) When asked if he could think of any other benefit besides this "modeling" behavior, Jerome testified, "If you're talking about just alone, I wouldn't -- I can't bring anything specific to mind right now." (504:7-14)

John Biegler, Dustan's brother, testified that based on his observances of the interactions over the years between Michelle and Owen and Emma, he would describe it as "the same as with any of her grandkids, I guess. There's nothing . . . nothing to note, I guess." (277:22-25; 278:1-14) He agreed it was a normal grandparent-grandchild relationship. (278:17-19) When asked about Jerome, John Biegler testified Jerome is playful and joking around kids generally and that Jerome likes to give all the grandkids licorice. (278:21-25; 279:1-4) He did not offer any specific observations of Jerome with Emma and Owen.

Jared Biegler, another of Dustan's brothers, was also asked about his observations of the grandparent-grandchild relationship. He stated only, "They love all their grandchildren very much." (314:6-12) When Dustan's brother, Michael Biegler, was asked the same question,

he said only that Michelle and Jerome *attempted* to have a positive relationship with all of their grandchildren, including Emma and Owen, and that Emma and Owen appeared to be “comfortable” and “safe” around Jerome and Michelle. (392:15-25; 393:1-20) Michael Biegler did not testify that Jerome and Michelle ever *had* a positive relationship with Owen and Emma, only that they had attempted to have one. He was not asked to describe the relationship or provide examples of any interactions.

Michelle and Toi have not had a smooth relationship. There has been tension in the relationship since the first time they met. (585:16-20) Toi has shared with Michael Biegler that Michelle is overbearing. (434:10-19) Michael agreed with Toi that Michelle could be overbearing. (434:23-24; 435:1-2) He stated that Michelle could be “outgoing,” “passionate” and “overbearing” about certain things like “Plexus” and her religion. (429:1-25; 430:1-25; 431:1-4) Michael Biegler described Toi and Michelle as having different personalities and different values. (399:3-9) Toi and Michelle have both “vented” to Michael Biegler about each other, to the point where Michael felt their differences were insurmountable. (399:10-18) (432:4-10) Toi described Michelle as overbearing, bold, and passive-aggressive. (587:7-24)

Michelle enjoys stirring the pot. On one occasion she told Keely’s mother that Toi was mistreating Keely during visits. (122:14-17) (241:12-25; 242:1-10) On another occasion after Dustan’s death, she talked Michael into accompanying her and Keely to the Valparaiso house unannounced. (436:1-10) When it appeared the house was empty, Michelle went to a stranger’s acreage nearby and spoke with the neighbor “about the wills and the inheritance.” (414:1-10) (578:4-9) (580:7-17-25) (581:1-16) Michelle’s statements were made in front of Keely. (582:2-14) Michael Biegler admitted Michelle’s communications with the neighbor were inappropriate. (416:4-2) On yet another occasion, Michelle confronted Toi’s sister who was attending one of Keely’s wrestling matches in the school gym. (551:2-9) In front of Keely and others, Michelle told Taeko that Toi had blocked Michelle’s calls and texts, that Michelle was afraid Toi was having a mental

breakdown, and that Toi had built a fence at her home to keep Michelle out. (551:9-25; 552:1-15) Michelle also brought up estate issues again. (553:16-25; 554:1) Toi has attempted to shield her children from adult issues and estate matters. She does not want Michelle discussing such matters in front of the children. (21:20-24) (99:8-22) The children do not know about the grandparents' lawsuit, the estate, or their inheritances. (590:18-23) Shortly after Dustan's death, during a car ride, Michelle told Toi her name should not be on Dustan's headstone because she was young and would likely get married again. This was very upsetting and was said in front of Owen and Emma. (58:21-25; 59:1-10) On Michelle's last visit with the children she attempted to make Owen feel bad for Toi's decision not to join the Biegler group for Christmas that year. When Owen told her they would not be coming for Christmas, Michelle's response was, "Owen, I hope that that's not true. I hope you guys can make it, because I know your cousins would really – are really going to miss you if you can't make it." (170:1-8) Michelle admitted she would try to make Toi feel guilty when arranging visits for Keely by telling Toi to "try to remember what Dustan would want." (169:11-21) On one occasion after Dustan's death, Michelle told Toi she wanted to take the children to a son's house in Lincoln so Keely, Owen and Emma could spend time together. When Toi went to pick her children up, she learned Michelle had dumped Owen off at another son's house and the three children had not spent time together. (588:17-25; 589:1-25; 590:1-11) During the pendency of this case, and in response to the grandparents' request for "temporary parenting time," the parties submitted affidavits to the court. After Toi submitted her affidavits, Michelle fed Toi's affidavit into an artificial intelligence application in order to develop a rebuttal affidavit. Michelle submitted the rebuttal affidavit to the court and swore under oath it was true and accurate. (239:6-25; 240:1-18) (281:7-21; 282:1-12) She attempted to minimize this behavior at trial, but even her son, John Biegler, admitted the AI affidavit was inaccurate. "Was I concerned? Yeah, I mean, I didn't think it was entirely accurate." (282:13-16)

Michelle's response to Toi's request for a break from the Biegler family was to erase Toi from Dustan's headstone, a headstone the children will visit for the rest of their lives. When Dustan died, Toi purchased two adjacent cemetery plots to accommodate one joint headstone for her and Dustan. (55:10-25; 56:1-23) After Toi took a break from the Biegler family, Michelle ordered a headstone that does not include mention of Toi. "When Toi decided not to talk to the family anymore and cut us all out, we decided that we did not need to basically continue to follow her wishes. So, yes, I changed that." (256:21-25; 257:1-14) (640:11-24) (654:2-17)

Michelle and Jerome are Catholic and raised their children in the Catholic faith. (251:25; 252:1-5) Jerome admitted at trial that it did matter to him that Toi and Dustan were not married. "We have a need to follow moral laws. If we don't, we suffer." (458:8-15) Jerome told Dustan this. (458:18-23) Jerome has also initiated conversations with Toi about Catholicism. "I probably precipitated them. And I -- this is part of my life. I will talk to people about the meaning of life, how we are to direct our lives in a way that gives thanks and praise to our creator." (466:8-22) Jerome attends Mass every day. (498:20-21) Jerome would not be comfortable with a court order that prohibits saying grace before meals. "You see, Shelley and I have to do it." He thinks maybe they could isolate the children while he and Michelle say grace. (473:4-10) Toi does not want her children to feel uncomfortable when the Bieglers say grace. (634:10-14) Jerome does not believe Dustan is in heaven and if the children ask him he will tell them so and explain purgatory to them. (499:20-25; 500:1-13) If Owen or Emma ever tell Jerome they are homosexual Jerome will tell them they have been "misled" and are "dead wrong." "It's going to ruin them." (500:14-23) "But we cannot empower them to go down a destructive path. We can't be enablers. We have to be there to help them go in the right direction, not go faster in the wrong direction." (501:18-21) Jerome has done a lot of research and he believes COVID was manipulated and then brought into the United States "to be able to influence the election in a huge way." (512:17-20) He believes there is a "power"

today that thinks “the world is ninety percent overpopulated, and they want to do away with that many people if they can, and they have a lot of power.” (512:21-24) Jerome and Michelle elected to remove their children from Catholic school in order to home school them because the teachers in the Catholic schools “are heavily influenced also by secular humanism.” (516:2-25; 517:1-2) As to public school attendance, they believe, “[t]he secular humanists have affected our public education system so deeply that anyone who goes through it is heavily influenced. And that’s just a fact.” (516:21-23) Jerome carries holy water with him always and uses it frequently because demons detest it and fly from areas where it is used. He blesses his automobile with it whenever he travels on the road. (533:19-25; 534:1-4) Jerome believes people should get over their grief in six weeks. (435:4-13) Jerome believes that Keely’s mother, Heather, is not as “well formed” as she should be. He can tell by her speech and her actions. (469:2-9) Jerome believes Heather is a “whore” because she is “[a] woman of loose morals who is too friendly with the men” but does not charge money. (470:8-21) When asked if he also believed Toi to be a whore, he said: “I’ve never made that connection, no.” (471:21-25; 472:1) Toi believes that Jerome’s definition of “whore” includes Toi. (44:22-24)

Jerome admits that he talks a lot about his beliefs. “Yes, I do. I do.” (537:21-25) When asked if Michelle shares all of his beliefs, Jerome said “yes.” (501:24-25; 502:1) Michelle acknowledged this. (655:2-4) Toi believes Jerome and Michelle’s form of Catholicism is “extreme” and she does not want her children exposed to it. She does not believe Jerome and Michelle are able to build a wall around their beliefs while they are with her children. (16:19-25) (603:14-25; 604:1-13)

SUMMARY OF THE ARGUMENT

This case demonstrates the need for grandparents to meet their steep and significant burden of proof before a court may impose forced grandparent visitation upon the children and their surviving parent. In this case, the grandparents’ evidence falls far short of the evidence our appellate courts have found to be necessary to succeed in a case

such as this.

This case also raises two issues of first impression in grandparent visitation cases in Nebraska. First, it highlights the constitutional implications of grandparent visitation where the main rubbing point between the parent and the grandparents is religious beliefs. Second, it raises the issue of whether visitation should be ordered where only one grandparent, married to and living with the other grandparent, is awarded visitation. In this case, the religious diversity undermines the mother's ability to determine the religious upbringing of her children without interference or influence by the grandparents. This is particularly true if Jerome, despite being legally denied grandparent visitation, is allowed access to the children through the grandmother. The court's orders that Michelle Biegler "not discuss adult issues, including those concerning financial or estate issues, with the minor children or encourage or allow others to do so" and that she not "discuss her religious beliefs with the minor children or encourage or allow others to do so" is not sufficient to protect the children or to preserve Toi's constitutionally-protected right to direct the children's religion. (T59-60) Such an order undermines the protections embedded in the grandparent visitation statutes and compromises the judicial integrity of the order itself.

ARGUMENT

I. *Michelle did not Meet her "Steep and Significant" Burden of Proof by Clear and Convincing Evidence.*

The burden of proof in grandparent visitation cases is set forth in NEB. REV. STAT. § 43-1802(2) (Reissue 2016):

Reasonable rights of visitation may be granted when the court determines by clear and convincing evidence that there is, or has been, a significant beneficial relationship between the grandparent and the child, that it is in the best interests of the child that such relationship continue, and that such visitation will not adversely interfere with the parent-child relationship.

Id.

Our appellate courts have addressed the grandparents' burden of proof in several cases. In *Nelson v. Nelson*, 267 Neb. 362 (2004) (McCormick, J. dissenting in part), a case in which the court denied grandparent visitation, the Nebraska Supreme Court reiterated that Nebraska's grandparent visitation statutes "clearly and significantly" place the burden of proof on the grandparents. *Id.* at 369. "Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. . . . In the absence of such evidence of the statutory prerequisites set forth in § 43-1802(2), court-ordered grandparent visitation is an abuse of judicial discretion." *Id.* at 369-370. In *Hamit v. Hamit*, 271 Neb. 659 (2006), a case in which the court granted grandparent visitation, the court pointed out that the three criteria found in NEB. REV. STAT. § 43-1802(2) must all be proven by clear and convincing evidence, "which burden is higher than that in conventional civil cases." *Hamit*, 271 Neb. at 676. In *Vrtatko v. Gibson*, 19 Neb. App. 83 (2011), a case in which the court denied grandparent visitation, the court characterized the grandparents' burden of proof as "substantial" emphasizing that such burden is "steep and significant." *Id.* at 87-88.

The evidence in this case shows only that Michelle (and sometimes Jerome) saw the children five times or less per year, and over the span of ten years rarely spent one-on-one time with them and never developed any kind of close or unique connection with them. (E39, p. 15) (21:1-4) (84:1-19) (140:21-23) This was a consequence of Toi and Dustan's intentional decision to limit the amount of time their children spent with Michelle and Jerome. (E39, pp. 15-16) Michelle's testimony and her photographs reinforce this. Michelle and Jerome's contact with the children has primarily been at "group" events with many other family members present, such as weddings, baptisms and "cousin camps," see e.g. the breakdown of the photographs on pp. 16-18 of this brief. Our appellate courts have required much more.

In *Nelson v. Nelson*, *supra*, both the maternal grandparents and the paternal grandmother sought grandparent visitation with the three grandchildren. The children's father was deceased. The evidence

showed that the paternal grandmother was the day care provider for the children on a daily basis for approximately two years. During the parents' divorce proceeding, she was no longer the day care provider but the children were at her house when the father exercised his parenting time and at other various times. The maternal grandmother testified that she and the grandfather lived on a farm in Iowa and that the children enjoyed coming to the farm and seeing the farm animals. She testified she felt it was important for the children to know relatives on the mother's side of the family. The mother testified she believed it was not in her children's best interests to have contact with their grandparents "at this time" because of the lack of a past relationship between the children and the grandparents and the grandparents' "negative feelings" toward her and her husband. *Id.* at 366. The trial court granted visitation and ordered the grandparents not to disparage the mother in the presence of the children. On appeal, the Nebraska Supreme Court reversed, finding that although the paternal grandmother's testimony established the nature and frequency of the contacts and her role as a day care provider, it did not establish whether the relationship was "congenial or acrimonious, affectionate or indifferent, trusting or deceitful, loving or simply custodial." *Id.* The court found the evidence produced by the maternal grandparents to be even less convincing. Noting that there was not much contact with the children, the court found there was no evidence of "affection, kindness, tenderness, or even civility." *Id.* at 371. The court contrasted the case to *Rosse v. Rosse*, 244 Neb. 967 (1994) where grandparent visitation had been granted on the basis of a close and loving relationship. In *Rosse*, the evidence showed the grandparents spoke lovingly to the child, read to her, played with her, and that the child called them special names, slept in their arms and kissed them. In the present case, there was evidence only that Michelle played tickle monster with Owen and Emma and that one time she built a box fort with them. (238:19-22) She provided day care once or twice for a few days while Toi and Dustan traveled. (204:15-20) (E34, p. 13) Notably absent is any evidence of loving words or gestures or affectionate

interchanges or kind words. There is no evidence at all of how the relationship impacted Owen and Emma, or what made it significant and beneficial to them.

In *Hamit v. Hamit*, 271 Neb. 659 (2006) the paternal grandparents petitioned for visitation with their two grandsons after the children's father died in a plane crash. The evidence at trial showed that the grandparents saw the children frequently and were "actively involved in the care and nurturing of their grandchildren." *Id.* at 661. Witnesses testified to a "close, affectionate, and loving relationship" between the boys and the grandparents. A clinical psychologist testified to observing a lot of physical contact, snuggling, helping with activities, and physical affection. The grandparents' home was set up for children with toys, beds and a crib. One of the children stated that he liked going to the grandparents' house. *Hamit*, 271 Neb. at 530. The Nebraska Supreme Court affirmed the trial court's grant of visitation. *Id.* at 682-683. In the case at bar, there is no evidence that Michelle or Jerome were ever actively involved in the care and nurturing of Owen and Emma. There is no evidence of a close, affectionate, or loving relationship. There is no evidence of snuggling, helping with activities or physical affection.

In *Eberspacher v. Hulme*, 248 Neb. 202 (1995), the Nebraska Supreme Court upheld the trial court's denial of visits. The evidence at trial showed that the grandparents visited the children about twice per month prior to the divorce and about once per month after the divorce. They took the children to baseball games, to see fireworks, on walks, or just played with them. The grandparents testified that visitation would allow the children to know their extended family. The Nebraska Supreme Court characterized the grandparents' relationship with the children as "an unremarkable, typical, healthy relationship." *Id.* at 209. In the case at bar, the contacts between Michelle and the children are substantially less than those in *Eberspacher*. Her own adult children described the relationship as "normal," "nothing of note," stating generally "They love all their grandchildren very much." (277:22-25; 278:1-19) (314:6-12)

In *Vrtatko v. Gibson*, 19 Neb. App. 83 (2011) paternal grandparents sought visitation with their granddaughter. The child's father was deceased. The trial court summarized the evidence and noted the grandparents had had approximately eight interactions with the child in the first two years of her life which the court described as "very limited" contact. *Id.* at 87. The court noted that the child does not ask about the grandparents or call them by any special names. *Id.* at 92. In upholding the denial of visitation, the Nebraska Court of Appeals characterized the grandparents' burden of proof as "steep and significant." *Id.* at 88.

In *Gatzemeyer v. Knihal*, 25 Neb. App. 897 (2018), the evidence showed the grandparents had a regular and consistent relationship with the grandchildren from the time they were born, in 2004 and 2006 respectively, until 2016, when the mother stopped allowing the children to spend time with them. During the parents' marriage, the children had regular visits with the grandparents. After the parents divorced, the grandparents continued to see the children during the weeks the father had custody. They stayed overnight with the grandparents every other week, the grandparents helped get the children to and from day care and were active in the children's lives. *Id.* After the father died in 2014, the grandparents continued to have regular contact with the children for the next two years. The children also continued to attend Sunday dinners with the grandparents and went on two trips with them. The grandparents would take the children to the museum, the zoo, or hockey games, or they would spend time together at home watching movies or playing card games, which the children loved. *Id.* The grandparents also attended the children's extracurricular activities. The grandmother and the granddaughter sewed together. *Id.* at 900. In addition to the amount of time the grandparents spent with the children, there was evidence of the quality of the relationship. *Id.* at 904-05. Of note, the children's mother *acknowledged* their strong affection for the grandparents. Not surprisingly, the court found there to be a significant beneficial relationship. Notably absent from the case at bar is evidence of the quality of the relationship between the

grandparents and the grandchildren. There was no testimony that Owen and Emma have affection for Michelle or Jerome, let alone a strong affection.

Given the steep burden of proof in grandparent visitation cases, and the decisional law outlining the strong evidence needed to meet that burden, the trial court in this case abused its discretion in awarding Michelle visitation with the children.

II. There was no Evidence That it Would be in the Children's best interests for Michelle's relationship to continue.

The trial judge found that “[a] plethora of individuals testified as to the close relationship they observed between the grandparents and the children. There was also ample evidence that continuing the children’s relationship with their extended family is in their best interests.” (T54-55) Except for these two findings, the court provided no basis for its ruling that Michelle had proven a significant beneficial relationship or that it was in the children’s best interests that the relationship continue. (T55)

Contrary to the judge’s findings, and as demonstrated in this brief, the witnesses actually described a pretty unremarkable “normal” relationship with “nothing of note.” (277:22-25; 278:1-19) Absent from the testimony was any description of the nature or quality of Michelle’s relationship with Owen and Emma. *No one* testified to how the relationship benefitted the children or what made it significant. No one described an affectionate, loving, or strong relationship. No one described the grandparents as actively involved in the children’s lives. The evidence supports some kind of relationship, perhaps that of acquaintances, but not a significant or beneficial relationship. The generalities expressed by Michelle fall short of the required evidence needed to meet her burden of proof. (225:24-25; 226:1-2) (237:8-21) (243:19-25; 244:1-3) (246:19-25; 247:1) Simply being a grandparent is not enough. Our appellate courts have required much more of the grandparents.

Further, in finding that it is in the children’s best interest that their relationship with “extended family” continue, the trial court

deviated from the statutory requirement that grandparents prove it is in the children's best interest that *their* relationship continue. Extended family members do not have legal rights to Toi's children. There was evidence that Toi had tried to accommodate the demands of extended family members after Dustan's death and that she found it to be overwhelming. Toi testified she intended to maintain the children's contact with extended family members but on a much scaled-back schedule so her children's needs were forefront. This is her prerogative as a fit parent. (21:1-4) (28:15-25; 29:1-17) (608:15-25; 609:1-15) The grandparents cannot hitchhike on the relationships of others. They must prove that their own relationships meet the strict standard set forth in NEB. REV. STAT. § 43-1802(2) before a court can impose forced visitation. The fact that it might (or might not be) in the children's best interests to maintain contact with people other than the grandparents was not the issue before the court. Those relationships are not relevant to whether the grandparents have a relationship with the children, and as such should not be the basis for a "best interest" finding relative to the *grandparents'* relationship. The grandparents' claim must rise or fall on its own. Michelle failed to meet her burden of proof.

III. *Michelle's Relationship with the Children Will Adversely Interfere with Their Relationship with Toi.*

An adverse relationship between the grandparents and the children's parent, "and the resulting incidents," are evidence that court-ordered visitation may not be in the children's best interests. *Eberspacher v. Hulme*, 248 Neb. 202 (1995). Persistent animosity and competition between the grandparents and the mother is unhealthy for the children, undermines the mother's parental authority, and adversely affects the parent-child relationship. *Morris v. Corzatt*, 255 Neb. 182 (1998).

Following Dustan's tragic death, Toi has shielded her children from estate matters, their inheritances, the grandparents' lawsuit, and adult matters in general. (21:20-24) (99:8-22) (590:18-23) She has elected to raise her children in the Christian faith and has brought the children up to believe their father is in heaven. She and Dustan have

taught the children to be quiet, reserved, polite and kind to others. (16:8-17) They elected to enroll the children in public schools and Toi supports women working outside the home. She supports a woman's right to decide when to stop having children. Toi and the children do not attend Mass or say grace before meals. (39:17-25; 40:1-9) (55:8-9) (79:19) (167:7-8) (251:25; 252:1-23) (254:10-13) (332:19-21) (404:4-7) (603:14-21) (634:23) (602:25; 603:1-13) (604:5-7) Michelle, on the other hand has been very vocal in her opposition to Toi and Dustan living together, having children out of wedlock, not baptizing the children, enrolling their children in public schools, and Toi working outside the home. She has been vocal in her opinion that a woman should only stop having children when God tells her to stop. She shares all of Jerome's religious beliefs, including disdain for homosexuals, public schools, human secularism, and Toi and Dustan's "sinful" lifestyle. (501:24-25; 502:1) (655:2-4) (40:5-17) (396:20-21; 397:1-13) (587:9-19) (588:2-10) (E39, p. 27) Michelle and Jerome believe the mother of another child of Dustan's is a whore, and by Jerome's definition have included Toi in that category as well. (470:8-21) (44:22-24) Michelle and Jerome go to Mass most days and pray before all of their meals. (498:20-21) (473:4-10) Jerome carries holy water on his person always and uses it frequently. (533:19-25; 534:1-4) They believe Dustan is in purgatory and Jerome will tell Owen and Emma that if asked. (499:20-25; 500:1-13) Toi is reserved, as are the children. (60:12-13) (429:4-6) (488:10-11) (523:5-7) Michelle is bold and overbearing. (434:10-25; 435:1-2) (429:1-25; 430:1-25; 431:1-4) (399:3-18) (587:7-24) Michelle does not appreciate that certain subjects are inappropriate for children. (582:2-14) (416:4-2) (551:9-25; 552:1-15) (553:16-25; 554:1) (58:21-25; 59:1-10) (170:1-8) She is vindictive in ways that harm not just Toi, but also the children. (55:10-25; 56:1-23) (256:21-25; 257:1-14) (640:11-24) (654:2-17) Although Michelle promised she would change her ways if granted visitation, her claim for grandparent visitation is fact-determinative and based upon past actions not future promises. (646:18-25) Her words and actions have caused a rift with Toi and are spilling over to the children. Her opinions about Toi and Dustan's lifestyle, their

religious beliefs, the choice of schools, wiping Toi off of Dustan's headstone, etc. do not just harm Toi, they harm two young, impressionable children. The relationship between Michelle and Toi is more than "strained." (T55) The evidence shows the primary rub between the parties in this case is their diverse religious and moral beliefs which raise significant constitutional issues that should have been acknowledged by the trial court.

To be fair, the religious diversity in this case presents a matter of first impression in Nebraska. Given the differing burdens of proof and statutory requirements found in grandparent visitation statutes across the country, it is difficult to "compare" outcomes from other forums on this issue in analyzing a potential outcome in Nebraska. Each state has its own unique statutory framework that drives outcomes. See e.g. *Clark v. Evans*, 778 S.W.2d 446, 449 (Tenn. Ct. App. 1989) (grandparents must prove that the grant of visitation rights would be in the best interests of the minor child); *In re Derzapf*, 219 S.W.3d 327, 328 (Tex. 2007) (grandparents must prove that a denial of visitation will significantly impair the child's physical health or emotional well-being); *Blakely v. Blakely*, 83 S.W.3d 537, 539 (Mo. 2002), as modified on denial of reh'g (Aug. 27, 2002) (grandparents must show unreasonable denial exceeding 90 days, and that visits would be in child's best interest and would not endanger child's physical or emotional health).

IV. *The Trial Court Failed to Accord Sufficient Weight to the Presumption in favor of Toi's Decisions as a Fit Parent.*

There is a presumption in Nebraska that a fit parent acts in the best interests of her children. This presumption was first discussed in the context of grandparent visitation in *Nelson v. Nelson*, 267 Neb. 362 (2004). In that case, the mother testified she believed it was not in her children's best interests to have contact with their grandparents "at this time" because of the lack of a past relationship between the children and the grandparents and the grandparents' "negative feelings" toward her and her new husband. *Id.*

The trial court granted grandparent visitation and ordered the grandparents to not disparage the mother in the presence of the children. In reversing the trial court, the Nebraska Supreme Court discussed prior decisions recognizing the fundamental liberty interests implicated when grandparent visitation is sought. Included in the court's discussion were *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion) (recognizing that court-ordered grandparent visitation raises the issue of fundamental liberty interests of parents in the care, custody, and control of their children); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding the liberty of parents includes right to direct upbringing and education of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding liberty includes right of parents to establish home, bring up children, and control their education). *Nelson*, 267 Neb. at 369. Another case of note is *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (recognizing the fundamental interest of parents to guide the religious future and education of their children). The court stated: "In the legitimate exercise of her parental rights, Deborah has concluded that the interests of her children would not be served by an ongoing relationship with their grandparents at the present time, given the generally strained familial relationship." *Nelson*, 267 Neb. at 372. The court held that the statutory requirement that grandparents present clear and convincing evidence of the three criteria found in § 43-1802(2) before a court may even consider ordering visitation "gives proper deference to the fundamental right of a fit parent to make decisions regarding their children's upbringing." *Nelson*, 267 Neb. at 372 – 373. In the case at bar, the trial court made no findings on why Toi's decisions as a fit parent should be ignored in favor of forced visitation, particularly where it found "[t]he evidence was clear that [Toi] is a fit parent and wants what is in the best interests of her children." (T55)

In *Hamit v. Hamit*, 271 Neb. 659 (2006) the court recognized the sanctity of the parent-child relationship.

Although the Nebraska grandparent visitation statutes allow court intrusion upon the parent-child relationship,

it is important to note that as part of its legislative findings, the Nebraska Legislature recognized that “[t]he state presumes the critical importance of the parent-child relationship and the child-parent relationship in the welfare and development of the minor child....” NEB. REV. STAT. § 43–2902 (Reissue 2004). So, too, with regard to the importance of the parent-child relationship, this court has stated that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion into that relationship. The importance of the parent-child relationship is reflected in the language of § 43-1802(2), which requires that a grant of grandparent visitation not adversely interfere with the parent-child relationship and that any such grant be proved by clear and convincing evidence, which burden is higher than that in conventional civil cases.

Hamit, 271 Neb. at 675-676, (internal quotations and citations omitted). See also, *Vrtatko v. Gibson*, 19 Neb. App. 83 (2011) (grandparents must satisfy a substantial burden to demonstrate that their desire for court-ordered visitation should override a fit natural parent's reluctance to grant such visitation); *Kane v. Kane*, 311 Neb. 657 (2022) (deciding the case on jurisdictional grounds but reiterating the guiding principles from *Troxel* and *Hamit* regarding the presumption in favor of a fit parent’s decisions).

Everyone agrees Toi is a fit parent and the children’s best interests have been at the forefront of her decision making. (240:20-24) (304:2) (427:17-25) Her decision to take a break from the Biegler family was done for the purpose of regrouping her family of three and allowing the children’s voices to be heard on how much contact they want with the Bieglers. (20:4-23) (606:21-25; 607:1-7) Toi strongly

expressed her concerns about the Bieglers imposing their religious and moral beliefs on her children. She opposes their intent to tell the children their father is not in heaven. She does not believe they can “wall off” their beliefs and morals while in the presence of Owen and Emma. (16:19-25) (603:14-25; 604:1-13) Despite finding “[t]he evidence was clear that [Toi] is a fit parent and wants what is in the best interests of her children,” the court ordered grandparent visitation for Michelle over Toi’s objections and her expressed intention to gradually ease the children back into contact with the family, but on a schedule conducive to the children’s well being. (T55-56) (608:11-25; 609:1-15) (610:1-2)

The trial court abused its discretion when it failed to accord sufficient weight to Toi’s decisions as a fit parent. This is especially true when Toi’s constitutionally protected right to direct the morals and religion of her children is in jeopardy.

V. The Grant of Visitation to a Grandparent Who is Married to and Living With the Other Grandparent who was Denied Visitation Creates an Untenable Situation.

This issue is closely connected to the issue of the court entering a visitation order that does not sufficiently carry out the findings and orders of the court concerning Jerome. The two issues will be argued together here.

Michelle and Jerome petitioned the court together alleging one, joint, relationship with the children. “A significant beneficial relationship exists between Plaintiffs and the minor children . . . and it is in the best interests of the minor children that such relationship continues.” (T1) They presented a joint case at trial. Michelle testified, “. . . it's not just about Jerome and I with the children. It's about the family . . .” (186:1-2) Yet the court found that while Michelle had met her burden of proof, Jerome had not. (T56-57) In “dismissing and denying” Jerome’s claim, the trial court found Jerome had not met the first statutory criteria (a substantial, beneficial relationship) and therefore did not discuss the second and third factors requiring a

showing of best interests and a showing that Jerome's relationship would not interfere with Toi's relationship with the children.

Jerome's only legal recourse to visitation with Owen and Emma is through the grandparent visitation statutes. He has no other right of access to Owen and Emma, particularly one that trumps Toi's constitutional right to decide who can visit her children and which morals, virtues or religious beliefs the children should be exposed to. A trial court's authority in grandparent visitation cases is derived solely from the grandparent visitation statutes. *Krejci v. Krejci*, 304 Neb. 302, 310 (2019); *Lindblad v. Lindblad*, 309 Neb. 776, 793 (2021). Under common law, grandparents had no legal right to visitation or communication with their grandchildren if the parents forbid it. *Nelson v. Nelson*, supra. Generally, statutes which effect a change in the common law are to be strictly construed. *Nelson v. Nelson*, supra; *ML Manager, LLC v. Jensen*, 287 Neb. 171 (2014). Strict construction means "the common law will be abrogated no further than expressly declared or than is required from the clear import of the language employed by the statute." *Dykes v. Scotts Bluff Cnty. Agr. Soc., Inc.*, 260 Neb. 375 (2000). Yet, the trial court's order in this case does not prohibit Jerome from participating in visits and it is clear that Michelle intends to include him as if he had successfully met his burden of proof. Her attorney argued as much at the post-trial hearing. (694:1-5) However, once Jerome failed in his quest for statutory visitation, the decisions of Toi, as a fit parent, take precedent as it pertains to whether Jerome can visit her children. Is there decisional law specifically stating this to be true? No. This is a case of first impression. But strict construction of the statutory framework in play, and the constitutional protections afforded fit parents, dictate this outcome. Otherwise, the court's order pertaining to Jerome is rendered meaningless and the integrity of the grandparent visitation statutes is undermined.

VI. The Trial Court's Visitation Order is Contrary to the Evidence and is Flawed.

The trial court found “that the relationship between Michelle and Toi is strained, but the evidence does not show that *visitation on the schedule the Court has established* will adversely interfere with the parent-child relationship.” (T55) The court reiterated this later in the order: “Said *visitation schedule* will not adversely interfere with the parent-child relationship . . .” (T56) The court’s focus on whether the *visitation schedule* would interfere with the parent-child relationship, rather than the *visitation itself*, is contrary to law and was an abuse of discretion. The reasonableness of a *visitation schedule* is a separate issue from whether the grandparents have carried their burden of showing that *visitation itself* would not adversely interfere with the parent-child relationship. *Lindblad v. Lindblad*, 309 Neb. 776, 793 (2021). In *Hamit v. Hamit*, 271 Neb. 659, 676 (2006), the Supreme Court reiterated that all three criteria found in NEB. REV. STAT. § 43-1802(2) must be proven by clear and convincing evidence, including that the *visitation itself* will not interfere with the parent-child relationship. See also *Simms v. Friel*, 25 Neb. App. 640, 643 (2018) (same).

In its order, the trial court stated that the *visitation schedule* “grants Michelle Biegler’s requested relief but also respects Toi Sonthana’s concerns.” (T56) The court then ordered: “Michelle Biegler shall not discuss adult issues, including those concerning financial or estate issues, with the minor children or encourage or allow others to do so. Michelle Biegler shall not discuss her religious beliefs with the minor children or encourage or allow others to do so.” (T59-60) The order falls short of addressing Toi’s concerns or protecting the children from the Bieglers’ extremism and bigotry. First, the order neither prohibits nor allows Jerome to be present for visits. Given that Jerome and Michelle live together one can assume Jerome will be present for visits. However, because Jerome’s claim was “denied and dismissed,” he is no longer subject to any of the court’s orders. He cannot be held in contempt. And while Michelle can be held in contempt for failing to

abide by the orders, the orders do not carry out the findings and intentions of the court. Read literally, Michelle is only prohibited from discussing adult issues (as interpreted by Michelle) or her religious beliefs *with* the children, she is free to discuss those matters *in front of or around* the children. She is free to allow others to do so. Indeed, Jerome believes this is how children are taught. Children “pick up on that” and emulate what they are hearing. (494:10-23) Further, Michelle is free to *practice* her religion with the children, she just cannot discuss it with them. She is not prohibited from taking the children to Mass, or saying grace with, or in front of, the children. She is not prohibited from praying in front of the children. Jerome is free to sprinkle holy water over the children, in the car, in the house, or wherever he pleases when the children are present. Jerome and Michelle can discuss their beliefs about homosexuals, whores, and secular humanism around the children. They can discuss “sinful living” in front of the children. They just cannot discuss these matters *with* the children. They can usurp Toi’s constitutional right to determine the nature and extent of the children’s contact with Jerome or other extended family members even though the court granted visits for Michelle alone and does not have statutory authority to grant visits to other parties. Finally, and on a different track, the order removes the children from their only surviving parent for the entire Thanksgiving holiday when the children have never spent a holiday away from their mother. The order also does not take into consideration Owen’s night terrors and the need for his mother’s comfort when they occur. (82:11-12) (207:20-25) (598:14-21) (600:4-23) (601:3-17) The order is fraught with internal inconsistencies and does not, as a practical matter, carry out the findings of the court. The visitation schedule is not in the children’s best interests and is an abuse of discretion.

CONCLUSION

Michelle failed to meet her steep and significant burden of proof in all respects. Toi’s decisions as a fit parent should have been given greater weight given the constitutional implications in this case, the challenges Toi and the children had to overcome after Dustan’s death,

and the grandparents' failure to rebut the presumption. The court's visitation order does not sufficiently carry out the findings and orders of the court, does not protect the children, and does not recognize Toi's constitutional rights.

This court is urged to find that the trial court abused its discretion in awarding Michelle grandparent visitation and is urged to reverse the orders of the trial court and remand the case with directions to dismiss it.

Respectfully Submitted,
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Certificate of Compliance

The undersigned attorney hereby certifies that this brief complies with the word count as required by NEB. CT. R. APP. P. Article 1, § 2-103(C)(4). The name and version of the word processing software used to prepare the brief is: Microsoft Word for Microsoft 365 MSO (Version 2505 Build 16.0.18827.20102) 64-bit. This brief complies with the typeface requirements of § 2-103. The total number of words in this brief (excluding the words in this Certificate) is: 13,143.

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Certificate of Service

I hereby certify that on Tuesday, June 24, 2025 I provided a true and correct copy of this *Brief of Appellant Sonthana* to the following:

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