Appeal No. 2017AP1142 **Cir. Ct. No. 2010FA206**

WISCONSIN COURT OF APPEALS
DISTRICT III

IN THE MATTER OF THE GRANDPARENTAL VISITATION OF A. A. L.:

IN RE THE PATERNITY OF A. A. L.:

CACIE M. MICHELS,

PETITIONER-APPELLANT,

V.

KEATON L. LYONS,

RESPONDENT-APPELLANT,

JILL R. KELSEY,

PETITIONER-RESPONDENT.

FILED

May 8, 2018

Sheila T. Reiff
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Hruz, Seidl and Brash, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2015-16),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination. We certify this appeal for the supreme court to clarify the standard of proof required for a grandparent to overcome the presumption that parents' decisions regarding

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the scope and extent of their child's visitation with the grandparent is in the child's best interest.

BACKGROUND

Jill Kelsey filed a petition in the circuit court under WIS. STAT. § 767.43(3) to compel her son (Keaton Lyons) who is Ann's[2] father, and Ann's mother (Cacie Michels) to provide Kelsey with additional visitation time with Ann, including a one-week Florida vacation. Before the child started going to school, Kelsey had significant contact with the now seven-year-old Ann, including many overnight stays. After Ann started kindergarten, she made new friends and began participating in additional activities. Her parents reduced, but did not eliminate, her contact with Kelsey.

The relationship between Kelsey and Ann's parents deteriorated in December 2015, due to disagreements regarding Kelsey's planned Disney World vacation. Lyons was not able to accompany them, and Kelsey then asked Michels to join them. Michels declined. Kelsey suggested that Michels lie to Lyons about how the trip would be financed, a suggestion that angered both parents. Kelsey suggested taking Ann to Disney World with one of Kelsey's male friends. Michels responded "absolutely not." Kelsey left Michels a voicemail in which she called her selfish and threatened to sue her.

As the relationship between Kelsey and the parents further declined, neither parent was willing to commit to even a minimal level of Ann's contact with Kelsey. When Kelsey subsequently filed suit, they represented to the circuit

[2] We refer to A.A.L. as Ann for ease of reading.

court that they would allow Kelsey to see Ann if time could be worked out and if they thought it was good for Ann. The parents expressed concern that Kelsey allowed Ann to ride a horse without wearing a safety helmet despite the parents' explicit instructions otherwise, and that she gave then-four-year-old Ann a sip of alcohol. Both parents testified that any court-ordered visitation with Kelsey was not in Ann's best interest.

The circuit court granted Kelsey visitation one Sunday each month and for a seven-day period each summer, with no restriction on where Kelsey could take Ann. The court ordered Kelsey to provide the child with safety equipment (including a riding helmet when they rode horses), not to smoke in the same room or vehicle when the child was present, not to provide the child with alcohol, and not to drink in excess when the child was in her care.

The parents requested reconsideration of the visitation order, arguing the order pursuant to WIS. STAT. § 767.43(3) violated their substantive due process rights as applied. The circuit court denied the motion for reconsideration, relying on ***Roger D.H. v. Virginia O.***, 2002 WI App 35, ¶19, 250 Wis. 2d 747, 641 N.W.2d 440. The court concluded it could constitutionally overrule the parents' visitation decision as long as it applied a presumption in their favor and determined visitation was in the child's best interest.

DISCUSSION

A parent who has a substantial relationship with his or her child has a fundamental liberty interest in parenting the child. ***Monroe Cty. DHS v. Kelli B.***, 2004 WI 48, ¶23, 271 Wis. 2d 51, 678 N.W.2d 831. Any statute that infringes on a fundamental liberty interest is subject to strict scrutiny. ***Id.***, ¶24. Under strict scrutiny review, a statute must be narrowly tailored to advance a

compelling state interest that justifies interference with the fundamental liberty interest. ***Id.***, ¶25.

In ***Troxel v. Granville***, 530 U.S. 57 (2000), the Supreme Court imposed limits on the states' ability to interfere with parental decisions regarding grandparent visitation. The Court noted parents have a substantive due process interest in the care, custody and control of their children. ***Id.*** at 65. The Court applied a presumption that a fit parent would act in the child's best interest:

> Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Id. at 68-69. The Court noted with seeming approval the holdings of state courts that required a showing of harm to the child absent court interference with the parents' decision, or that created a rebuttal presumption that grandparent visitation is not in the child's best interest and required the grandparent to rebut by clear and convincing evidence the presumption that the parents' decision was reasonable. ***Id.*** at 70. The Court concluded a trial court must accord at least some special weight to the parents' own determination. The Court also observed that Granville, the mother in that case, never sought to end visitation entirely, noting again with apparent approval that many states expressly provide by statute that courts may not award visitation unless a parent has entirely denied visitation to the concerned third party. ***Id.*** at 71. However, the Court did not decide whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting grandparent visitation. ***Id.*** at 73.

The majority of states require a showing of harm to the child before the court can interfere with a fit parent's decision regarding grandparent visitation. ***Jones v. Jones***, 2013 UT App 174, 307 P.3d 598 (Utah App. 2013); ***Doe v. Doe***, 172 P.3d 1067 (Haw. 2007); ***Koshko v. Haining***, 921 A.2d 171 (Md. 2007); ***In re Parentage of C.A.M.A.***, 109 P.3d 405 (Wash. 2005); ***In re Howard***, 661 N.W.2d 183 (Iowa 2003); ***Moriarty v. Bradt***, 827 A.2d 203 (N.J. 2003); ***Glidden v. Conley***, 820 A.2d 197 (Vt. 2003); ***Roth v. Weston***, 789 A.2d 431 (Conn. 2002), *superseded by statute*, CONN. GEN. STAT. § 46b-59 (2018); ***Herbst v. Sayre***, 971 P.2d 395 (Okla. 1998); ***Williams v. Williams***, 501 S.E.2d 417 (Va. 1998); ***Beagle v. Beagle***, 678 So. 2d (Fla. 1996); ***Brooks v. Parkerson***, 454 S.E.2d 769 (Ga. 1995); ***Hawk v. Hawk***, 855 S.W.2d 573 (Tenn. 1993). A minority of states allow the court to overturn the parents' decision upon a showing by clear and convincing evidence that grandparent visitation is in the child's best interest. ***Walker v. Blair***, 382 S.W.3d 862 (Ky. 2012); ***N.F. v. R.A.***, 137 P.3d 318 (Colo. 2006); ***Polasek v. Omura***, 136 P.3d 519 (Mont. 2006); ***Camburn v. Smith***, 586 S.E.2d 565 (S.C. 2003).

In ***Roger D.H. v. Virginia O.***, 2002 WI App 35, 250 Wis. 2d 747, 641 N.W.2d 440, this court considered two issues: (1) whether the circuit court can order grandparent visitation absent a finding that the parent is unfit; and (2) whether WIS. STAT. § 767.245(3) (1997-98), was facially unconstitutional because it did not require courts to give presumptive weight to a fit parent's decision. This court concluded the statute does not require a showing of parental unfitness before the circuit court may override the parent's decision regarding grandparent visitation, noting that the ***Troxel*** Court's parental fitness discussion was in the context of explaining the presumption that a fit parent acts in the child's best interest. ***Roger D.H.***, 250 Wis. 2d 747, ¶12. This court also rejected the

challenge to the statute's facial validity, concluding the courts could read into the statute a requirement to give presumptive weight to the parent's decision. ***Id.***, ¶18. We held circuit courts must apply the presumption that a fit parent's decision regarding grandparent visitation is in the child's best interest, but "this is only a presumption and the circuit court is still obligated to make its own assessment of the best interest of the child." ***Id.***, ¶19. We noted, "[T]he Due Process Clause does not tolerate a court giving no 'special weight' to a fit parent's determination, but instead basing its decision on 'mere disagreement' with the parent." ***Id.***[3]

In ***Martin L. v. Julie R.L.***, 2007 WI App 37, 299 Wis. 2d 768, 731 N.W.2d 288, this court reviewed an order granting grandparents unsupervised visitation with their grandchildren. This court concluded "special weight" given to a parent's decision is not a separate element, and the circuit court's application of a rebuttable presumption in the parent's favor meets the "special weight" requirement set forth in ***Troxel***. ***Martin L.***, 299 Wis. 2d 768, ¶12. No Petition for Review was filed in that case.

Wisconsin courts have not yet determined the standard for what is required to overcome the presumption in favor of the parent's decision. While ***Roger D.H.*** rejected the argument that the parent must prevail in the absence of a finding of unfitness, it did not determine whether Wisconsin would join the majority of states that require a showing of harm to the child if the parent's wishes

[3] No Petition for Review was filed in ***Roger D.H. v. Virginia O.***, 2002 WI App 35, 250 Wis. 2d 747, 641 N.W.2d 440, but the Wisconsin Supreme Court cited it with approval in ***Meister v. Meister***, 2016 WI 22, ¶45, 367 Wis. 2d 447, 876 N.W.2d 746. In ***Meister***, the court reviewed WIS. STAT. § 767.43(1) (2013-14), but applied the court of appeals' reasoning from ***Roger D.H.***

are upheld. Wisconsin cases have also not determined whether the presumption favoring the parent must be overcome by clear and convincing evidence.

Michels and Lyons contend overcoming the presumption by merely a preponderance of the evidence would violate the holding of ***Troxel*** because that low standard of proof would allow a court to substitute its judgment for that of fit parents based on the court's mere disagreement with those parents. They contend a greater standard of proof is required because strict scrutiny applies to infringement of the parents' fundamental liberty interest. Indeed, Michels and Lyons persuasively argue that the ***Roger D.H.*** presumption, if understood as the circuit court did in this case did and as this court did in ***Nicholas L.***, is meaningless. This is so, they contend, because the burden of production is not shifted—as it always was with the grandparent under WIS. STAT. § 767.43(3)—and the burden of persuasion is not truly heightened. Rather, the presumption operates merely as "a clunky restatement of the best-interests-of-the-child standard," which is unconstitutional under ***Troxel***. ***Troxel***, 530 U.S. at 72-73.[4]

Kelsey notes that ***Troxel***, ***Roger D.H.*** and ***Meister v. Meister***, 2016 WI 22, ¶45, 367 Wis. 2d 447, 876 N.W.2d 746 do not impose any requirement that the circuit court must find harm to the child before overruling the parents' decision and those cases do not apply the clear and convincing evidence standard. She notes that ***Meister*** does not impose the strict scrutiny standard argued by the parents in this case. She also argues that no special consideration should be given

[4] In advancing their arguments, Lyons and Michaels note that certification of this case to the Wisconsin Supreme Court might be warranted.

to the fact that both parents agree in this case, unlike the vast majority of cases that consider grandparent visitation rights.

We submit that clarification of the standard of proof required for a grandparent to overcome the presumption favoring the parent's visitation decision is necessary.[5] To the extent the clarification may contradict or otherwise modify the holdings in ***Roger D.H.***, ***Meister*** and ***Martin L.***, this court lacks the authority to reach such a holding. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We anticipate numerous cases involving grandparent visitation rights. We believe circuit courts, parents and grandparents would greatly benefit from the Wisconsin Supreme Court's definitive clarification of the standard of proof on this important issue involving a fundamental right.

[5] We note that the National Association of Parents, Inc., had filed an amicus curiae brief in this appeal, generally advancing arguments aligned with Lyons and Michels.