WISCONSIN COURT OF APPEALS
DISTRICT 3

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.

Appeal No.: 17-AP-1142
Circuit Court Case No.: 10-FA-206

KEATON L. LYONS,

Respondent-Appellant,

JILL R. KELSEY,

Petitioner-Respondent.

Appeal from the Circuit Court for Chippewa County
the Honorable James M. Isaacson, Presiding

BRIEF OF APPELLANTS, CACIE M. MICHELS AND KEATON L. LYONS

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TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUES.. 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION. 2

STATEMENT OF THE FACTS AND OF THE CASE. 3

STANDARD OF REVIEW. 9

ARGUMENT. 10

I. The Visitation Order Violates the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution. 10

A. Roger D.H. does not dictate the outcome of this case. 23

1. Roger D.H. is inconsistent with Wisconsin Supreme Court decisions.. 23

2. Roger D.H. is factually distinguishable in a way that dictates a different outcome in this case.. 26

B. Substantive due process requires that a party seeking visitation under Wis. Stat. § 767.43(3) show that not granting visitation would cause harm to the child.. 30

C. Under either the "harm" standard or the "clear and convincing evidence" standard, Kelsey's petition must be denied.. 36

D. If this court concludes Roger D.H. dictates the outcome of this case, it should certify the case to the Wisconsin Supreme Court. 39

II. Even If the Circuit Court's Decision Is Not Constitutionally Defective, the Court Erroneously Exercised its Discretion When it Granted Kelsey's Petition.. 40

CONCLUSION. 43

CERTIFICATION. 46

CERTIFICATE OF SERVICE. 47

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12). 48

CERTIFICATION OF APPENDIX. 49

TABLE OF AUTHORITIES

Page

Statutes

Wis Stat. § 767.245(3)(f). 20

Wis. Stat. § 767.243(3). 20

Wis. Stat. § 767.245(3). 20

Wis. Stat. § 767.43(1). 34

Wis. Stat. § 767.43(3). 1, 6, 10, 11, 20, 23-25, 27, 29, 30, 34, 36, 38, 40, 41, 43, 44

Wis. Stat. § 767.43(3)(d). 39-41

Cases

Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996). . . 19, 31

Brooks v. Parkerson, 265 Ga. 189, 454 S.E.2d 769, 772-74 (1995). 19, 31

Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565, 568 (2003) 19

Doe v. Doe, 116 Hawaii 323, 172 P.3d 1067, 1079-80 (2007) 19, 32

Employment Division, DHR of Oregon v. Smith, 494 U.S. 872, 881, 110 S.Ct. 1595 (1990).. 29

Glidden v. Conley, 175 Vt. 111, 820 A.2d 197, 204-05 (2003) 19

Hawk v. Hawk, 855 S.W.2d 573, 577 (Tenn. 1993). . . 19, 22, 32

In Interest of Baby Girl K., 113 Wis. 2d 429, 446-47, 335 N.W.2d 846 (1983). 23

In Interest of J.L.W., 102 Wis. 2d 118, 135, 306 N.W.2d 46 (1981). 23

In re Gwenevere T., 2011 WI 30, ¶ 52, 333 Wis. 2d 273, 797 N.W.2d 854.. . . . . 23-25, 30, 43

In re Herbst, 1998 OK 100, ¶ 16, 971 P.2d 395.. . . . . 19, 31

In re Parentage of C.A.M.A., 154 Wash.2d 52, 109 P.3d 405, 413 (2005).. 31

In re the Custody of H.S.H., 193 Wis.2d 649, 679-80, 533 N.W.2d 419 (1995). 27

In re the Custody of Smith, 137 Wash. 2d 1, 969 P.2d 21, 30-31 (1998). 15, 16, 31, 32

In re the Marriage of Howard, 661 N.W.2d 183, 189-91 (Iowa 2003). 18

In re the Marriage of Meister, 2016 WI 22, ¶ 40-45, 367 Wis. 2d 447, 876 N.W.2d 746. 24-26

In re the Paternity of Roger D.H., 2002 WI App 35, ¶ 19, 250 Wis. 2d 747, 641 N.W.2d 440. . . 8, 20-24, 26, 27, 30, 39-41, 43, 44

In re the Termination of Parental Rights to Zachary B., 2004 WI 48, ¶ 16, 271 Wis.2d 51, 678 N.W.2d 831. . . 9-11, 23, 24, 30

In the Interest of Nicholas L., 2007 WI App 37, ¶ 11-12, 299 Wis. 2d 768, 731 N.W.2d 288. 21-23

In the Matter of Grandparental Visitation of David R., 007 WI App 50, ¶ 7, 300 Wis.2d 532, 731 N.W.2d 347. 9

In the Matter of the Petition for Adoption of C.A., 137 P.3d 318, 327-28 (Colo. 2006). 19, 35

Johnson v. Cintas Corp. No. 2, 2012 WI 31, ¶ 22, 339 Wis. 2d 493, 811 N.W.2d 756. 40

Kenosha Cnty. DHS v. Jodie W., 2006 WI 93, ¶ 41, 293 Wis.2d 530, 716 N.W.2d 845. . . . . 10, 24, 25, 30, 43

Koshko v. Haining, 398 Md. 404, 921 A.2d 171, 192-93 (2007) 19

Kurtz v. City of Waukesha, 91 Wis. 2d 103, 117, 280 N.W.2d 757 (1979).. 10

Meyer v. Nebraska, 262 U.S. 390, 403, 43 S.Ct.625 (1923) 28

Monroe Cnty. DHS v. Kelli B., 2004 WI 48, ¶ 17, 271 Wis. 2d 413, 662 N.W.2d 360. 23

Moriarty v. Bradt, 177 N.J. 84, 827 A.2d 203, 222-23 (2003) 18, 30

Parental Rights to SueAnn A.M., 176 Wis. 2d 673, 686, 500 N.W.2d 649 (1993).. 23

Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S.Ct. 571 (1925). 28

Polasek v. Omura, 2006 MT 103, ¶ 15, 332 Mont. 157, 136 P.3d 519. 20

Roth v. Weston, 259 Conn. 202, 789 A.2d 431, 448-49 (2002) 17, 31, 33

Santosky v. Kramer, 455 U.S. 745, 755, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). 35

Soohoo v. Johnson, 731 N.W.2d 815, 823 (Minn. 2007). . 20, 35

State v. Wood, 2010 WI 17, ¶ 17, 323 Wis.2d 321, 780 N.W.2d 63. 10

Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000).. 11-15, 20-22, 26, 28, 32, 38

Walker v. Blair, 382 S.W.3d 862, 871 (Kent. 2012). 19

Williams v. Williams, 256 Va. 19, 501 S.E.2d 417, 418 (1998) 31

Wisconsin v. Yoder, 406 U.S. 205, 234-35, 92 S.Ct. 1526 (1972). 28, 29

STATEMENT OF THE ISSUES

I. Did the visitation order entered by the circuit court pursuant to Wis. Stat. § 767.43(3) violate the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution?

II. If not, did the circuit court nevertheless erroneously exercise its discretion by granting grandparent visitation rights?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This is a important case in that it involves the casual disregard of a fundamental liberty interest. It presents an opportunity for Wisconsin to do what many other states have already done, namely to interpret their grandparent visitation statutes in a manner consistent with parents' substantive due process rights. Given the importance of the issue, oral argument is appropriate and hereby requested. Publication is appropriate for the same reasons.

STATEMENT OF THE FACTS AND OF THE CASE

The facts are mostly undisputed. Avery L. is a 7 year-old girl. (R. 87, p. 58). Petitioner-Appellant Cacie M. Michels is Avery's mother. (R. 87, p. 58). Respondent-Appellant Keaton L. Lyons is her father. (R. 87, p. 58). Michels and Lyons were never married. (R. 87, p. 58). However, all parties agree they are fit parents, and the circuit court found them to be "good parents." (R. 88, p. 26) (A-Ap 35).

Michels and Lyons lived together with Avery until 2011, when they broke up. (R. 87, p. 58). Since that time, Michels has had primary custody of Avery. (R. 87, pp. 59-60). However, by informal agreement, Lyons has custody approximately every other weekend and on other occasions. (R. 87, p. 94). The circuit court commended Michels and Lyons for their ability to amicably share custody of Avery. (R. 87, pp. 125-26) (A-Ap 1-2).

Avery has a close relationship with her maternal grandparents because she and Michels lived with them for two and one-half years. (R. 87, p. 59). Petitioner-Respondent Jill R.

Kelsey is Avery's paternal grandmother. (R. 87, pp. 5-6). Avery never lived with Kelsey. (R. 87, pp. 58-60).

The exact nature and extent of Kelsey's contacts with Avery was disputed. However, all parties agree the most significant contacts were on Wednesday nights during the summers of 2013, 2014 and 2015. (R. 87, pp. 6-8, 31). On many such Wednesday nights, Michels took Avery to a rodeo event where Avery and Kelsey rode horses together. (R. 87, pp. 6-8, 31). Avery would then often spend the night at Kelsey's home. (R. 87, pp. 53-54). Kelsey had less regular contacts with Avery the remainder of the year. (R. 87, pp. 8-9); (R. 35).

In September 2015, Avery started kindergarten. (R. 87, p. 60). Shortly thereafter, "her life started filling up with other things, friends, she has a lot of family, school, extracurricular activities." (R. 87, p. 61). Michels initially tried to maintain the same level of grandparent visitation with both her parents and with Kelsey. (R. 87, p. 61). However, she observed that doing so was exhausting Avery and having a negative effect on her relationship with Lyons, who was sacrificing some of his time

with Avery to accommodate the grandparents. (R. 87, pp. 61, 64-65, 95-96).

Ultimately, in or around November 2015, Michels and Lyons began decreasing, but did not eliminate, Avery's visitation with Kelsey. (R. 87, pp. 21, 39); (R. 35). Shortly thereafter, Michels informed Kelsey she was no longer interested in going to Disney World with her and Avery, a trip Kelsey had previously proposed and had been planning. (R. 87, pp. 20-21, 65-66). Kelsey had asked Michels to lie to Lyons regarding how the trip would be funded. (R. 87, pp. 18, 78); (R. 65, p. 20). That strained Michels' relationship with Lyons. (R. 87, pp. 19, 21, 76, 78); (R. 65, p. 20).

On December 15, 2015, Kelsey proposed instead taking Avery to Disney World with one of her male friends. (R. 87, p. 65). Michels said "absolutely not." (R. 87, p. 65). In response, Kelsey left Michels a nasty voicemail in which she called her "selfish" and threatened to sue her and get court-ordered custody of Avery. (R. 87, p. 66); (R. 62).

Kelsey followed through with her threat on January 23, 2016 when she intervened in this 2010 paternity action. (R. 18).

She petitioned for visitation rights under Wis. Stat. § 767.43(3). (R. 18). That provision provides a court may grant reasonable visitation rights to a grandparent in a case like this one if:

> 1. The grandparent has maintained a relationship with the child or has attempted to maintain a relationship with the child but has been prevented from doing so by a parent who has legal custody of the child.;
>
> 2. The grandparent is not likely to act in a manner that is contrary to decisions that are made by a parent who has legal custody of the child and that are related to the child's physical, emotional, educational or spiritual welfare; and
>
> 3. The visitation is in the best interests of the child.
>
> Wis. Stat. § 767.43(3).

A court trial was held on January 27, 2017. (R. 87). Kelsey sought extensive visitation rights, including a 7-day period each summer, something she had never previously had and something Michels and Lyons strongly opposed. (R. 38); (R. 87, pp. 67, 95-96).

At trial, Michels and Lyons both unequivocally testified that any court-ordered visitation with Kelsey, much less any extended visitation with Kelsey, was ***not*** in Avery's best interests. (R. 87, pp. 67, 95-96). They noted that the strain on Avery's schedule was what caused them to decrease grandparent

visitation in the first place. (R. 87, pp. 61, 64-65, 95-96). A court order requiring regular visits would only reimpose and likely increase that strain. (R. 87, pp. 61, 64-65, 95-96). As Michels put it, they had already seen how spreading Avery "between three different places" had not been good for Avery. (R. 87, p. 65).

Michels and Lyons also expressed concerns regarding Kelsey's judgment. Kelsey concedes she gave Avery "a sip" of alcohol when Avery was only 4 years-old. (R. 87, p. 54). She concedes she allowed Avery to go horseback riding without a helmet, even after Michels and Lyons insisted Avery wear a helmet. (R. 65, p. 20). She concedes she asked Michels to lie to Lyons regarding the proposed Disney World trip. (R. 65, p. 20).

Over Michels' and Lyons' objections, the circuit court granted Kelsey's petition. (R. 65, pp. 125-30) (A-Ap 1-6); (R. 44) (A-Ap 9). It ordered Michels and Lyons to cede custody of Avery to Kelsey one Sunday each month and for a 7-day period each summer, with no restriction on where Kelsey could take Avery during that 7-day period. (R. 65, pp. 125-30) (A-Ap 1-6);

(R. 44) (A-Ap 9). Michels and Lyons sought reconsideration. (R. 64). They argued the court's order violated their constitutional right to make decisions regarding the care, custody and upbringing of their daughter. (R. 63).

The court denied the motion for reconsideration. (R. 88, pp. 14-16) (A-Ap 23-25); (R. 73) (A-Ap 37-38). Relying on In re the Paternity of Roger D.H., 2002 WI App 35, ¶ 19, 250 Wis. 2d 747, 641 N.W.2d 440, the court concluded it could constitutionally overrule Michels' and Lyons' visitation decision so long as: 1) it applied a presumption in their favor; and 2) nevertheless found greater visitation was in Avery's best interests. (R. 88, pp. 15-16) (A-Ap 23-25).

For the reasons set forth below, Michels and Lyons now respectfully request this court reverse the visitation order.

STANDARD OF REVIEW

Whether a statute, as applied, violates the constitutional right to substantive due process is a question of law this court reviews de novo. In re the Termination of Parental Rights to Zachary B., 2004 WI 48, ¶ 16, 271 Wis.2d 51, 678 N.W.2d 831. If the court finds the visitation order does not violate Michels' and Lyons' constitutional rights, then the visitation order is reviewed under the erroneous exercise of discretion standard. In the Matter of Grandparental Visitation of David R., 2007 WI App 50, ¶ 7, 300 Wis.2d 532, 731 N.W.2d 347.

ARGUMENT

I. The Visitation Order Violates the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution.[1]

Substantive due process rights are rooted in the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution. State v. Wood, 2010 WI 17, ¶ 17, 323 Wis.2d 321, 780 N.W.2d 63. Substantive due process addresses "what government may do to people under the guise of the law." Id. It is afforded only to fundamental liberty interests such as marriage, child-rearing, procreation and bodily integrity. Zachary B., 271 Wis.2d 51 at ¶ 19. A parent who has a substantial relationship with his or her child has a fundamental liberty interest in parenting the child. Id. at ¶ 23. Any statute that infringes on a fundamental liberty interest is subject to strict scrutiny review. Id. at ¶ 24; Kenosha Cnty. DHS v. Jodie W., 2006 WI 93, ¶ 41, 293 Wis.2d 530, 716 N.W.2d 845. Under strict scrutiny review, a statute must be narrowly tailored to advance a compelling state interest that

[1]Pursuant to Kurtz v. City of Waukesha, 91 Wis. 2d 103, 117, 280 N.W.2d 757 (1979), the Attorney General has been provided notice that the constitutionality of Wis. Stat. § 767.43(3), as applied in this case, is being challenged in this action. (A-Ap 39-40).

justifies interference with the fundamental liberty interest. Zachary B., 271 Wis.2d 51 at ¶ 25.

Section 767.43(3), as applied by the circuit court in this case, does not survive strict scrutiny review and must be found unconstitutional. The constitutional analysis should begin with the United States Supreme Court's decision in Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000). The case involved the children of unmarried parents. Id. at 60. The paternal grandparents had regular contact with the children until their son died. Id. at 60-61. Thereafter, the children's mother informed the grandparents their visitation would be drastically reduced to "one short visit per month." Id.

The grandparents filed suit under Washington's visitation statute. The trial court found it would be in the children's best interest to spend more time with the grandparents. Id. at 61. It ordered visitation one weekend per month and for one week during the summer. Id. After the Washington Supreme Court found the visitation order to be a violation of the parents' substantive due process rights, the grandparents sought review in the United States Supreme Court.

The court accepted review. In a plurality decision, it noted: "(T)he interest of parents in the care, custody, and control of their children is perhaps the oldest fundamental liberty interest recognized by this Court." Id. at 65. And:

> "(I)t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Id. at 66.
>
> "(S)o 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 (Parenthetical in Original).
>
> "In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance." Id. at 70.

The court ultimately concluded:

> "(T)he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." Id. at 72-73.

Yet, that is ***exactly*** what happened in this case. It is worth briefly noting the factual similarities and differences between this case and Troxel. As in Troxel, this case involves unmarried parents. As in Troxel, Kelsey complained that her visitation opportunities had been significantly reduced but not

eliminated all together. (R. 87, p. 39). (Kelsey complaining "I was turned down more than I was allowed when I would ask (to spend time with Avery)"); (R. 87, p. 36) (Kelsey admitting it is "very possible" Avery stayed at her house on January 21, 2016 and was scheduled to do the same on February 11, 2016); (R. 87, pp. 87-97) (Michels and Lyons provided Kelsey with schedules of extracurricular activities she could attend to see Avery); (R. 65, p. 21) (Kelsey admitting she was never "shut down" from seeing Avery). As in Troxel, the circuit court granted Kelsey's petition and ordered monthly visitation and visitation for one week each summer. (R. 44) (A-Ap 9). Unlike Troxel, both of Avery's parents are alive and ***both*** objected to Kelsey's petition. (R. 87, pp. 67, 95-96). Unlike Troxel, Lyons and Michels explained the strain court-ordered visitation would put on Avery and put forth specific concerns regarding Kelsey's judgment.

So how did the circuit court believe it had the power to second-guess the decision of two fit parents regarding the care, custody and upbringing of their child? It relied entirely on Roger D.H.. (R. 88, p. 15) (A-Ap 24). That reliance is

misplaced. Understanding why it is misplaced requires understanding the aftermath of Troxel.

At the time Troxel was decided, all fifty states had some form of visitation statute. Troxel, 530 U.S. at 99 (J. Kennedy, dissenting). Forty-nine of the fifty statutes imposed some variation of a best-interests-of-the-child standard. Id. Troxel made clear that, at least in some circumstances, applying only that minimal standard violates parents' substantive due process rights. Id. at 72-73. Unfortunately, the court did not say precisely what is required to protect those substantive due process rights. In fact, it explicitly dodged that all-important question:

> "(W)e do not consider the primary constitutional question passed on by the Washington Supreme Court – whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." Id. at 73.

As a result, state courts were left to figure out how to apply their visitation statutes in a constitutional manner. It has been a slow process in which nearly every state to have considered the issue has chosen one of two approaches: 1) imposing a "harm" standard on visitation statutes; or 2)

imposing a "clear and convincing evidence" standard on visitation statutes.

The Washington Supreme Court, in a case decided along with Troxel, concluded a visitation statute is constitutional only if it is limited to cases where the court finds that not granting visitation would cause harm to a child. In re the Custody of Smith, 137 Wash. 2d 1, 969 P.2d 21, 30-31 (1998). In doing so, the court noted there are two recognized sources of state power to intrude on family life. First, the state may, using its police powers, protect the interests of society as a whole and children generally by doing things such as requiring children be vaccinated and by regulating child labor. Id. at 28. Second, the state may exercise its *parens patriae* power to protect individual children "where a child has been harmed or where there is a threat of harm to a child." Id.

The court then concluded:

> "Both *parens patriae* power and police power provide the state with the authority to act to protect children lacking the guidance and protection of fit parents of their own, and although they may represent different perspectives, both contemplate harm to the child and, in practical terms, have been used nearly interchangeably in the fashioning of a threshold requirement of parental unfitness, harm or threatened harm...(T)he requirement of harm is the sole

> protection that parents have against pervasive state interference in the parenting process." Id. at 28, 30.

Under the harm standard, court-ordered visitation is constitutional only where a grandparent or other third party has had a "substantial relationship" with the child and where "arbitrarily depriving the child of the relationship could cause severe psychological harm." Id. In other words, it is the case where a parent dies, and the surviving parent arbitrarily cuts out in-laws who had a substantial relationship with a grandchild, or the case where a third party raises a child but is later arbitrarily cut off from contact when a parent returns. Only in those sorts of cases does the state have a sufficiently compelling interest to second-guess a fit parent's decision regarding the care, custody and upbringing of his or her children. Id.

The majority of state courts to have considered the issue have come to the same conclusion as Washington and have read the harm standard into their grandparent visitation statutes (or have simply struck down the statutes as unconstitutional). In doing so, they have noted:

> "We believe the (harm standard) is sounder because of the ease with which a petitioning party could otherwise intrude upon parental prerogative....(T)here is no real barrier to prevent a party, who has more time and money

than the child's parents, from petitioning the court for visitation rights. A parent who does not have the up-front out-of-pocket expense to defend against the petition may have to bow under the pressure even if the parent honestly believes it is not in the best interest of the child. (citation omitted). The prospect of competent parents potentially getting caught up in the crossfire of lawsuits by relatives and other interested parties demanding visitation is too real a threat to be tolerated in the absence of protection afforded through a stricter burden of proof. Therefore pursuant to this court's inherent supervisory powers...we determine that a nonparent petitioning for visitation pursuant to § 46b-59 must prove the requisite relationship and harm, as we have previously articulated, by clear and convincing evidence."[2] Roth v. Weston, 259 Conn. 202, 789 A.2d 431, 448-49 (2002).

"Because the Grandparent Visitation Statute is an incursion on a fundamental right...it is subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest. Our prior jurisprudence establishes clearly that the only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child. When no harm threatens a child's welfare, the State lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit...Although *Troxel* avoided confronting that issue directly, we are satisfied that prior United States Supreme Court decisions fully support our conclusion that interference with parental autonomy will be tolerated only to avoid harm to the health or welfare of a child. *Compare Yoder*, 406 *U.S.* at 230, 92 *S.Ct.* at 1540-41, 32 *L.Ed.*2d at 33-34 (noting that interference with childrearing was not justified because Amish children would not be physically or mentally *harmed* from receiving an Amish education as opposed to public education (emphasis added)); *Stanley, supra*, 405 *U.S.* at 649, 92 *S.Ct.* at 1211, 31 *L.Ed.*2d at 557

[2]This analysis is particularly apt in this case. Kelsey's voicemail threat clearly implies that because she has money and a lawyer she will get whatever visitation she wants and Michels will regret ever having said "no" to her. (R. 87, p. 66); (R. 62). Unfortunately, that has mostly proven true to this point. (R. 44) (A-Ap 9).

(requiring showing of parental *unfitness* with concomitant harm to child before terminating unwed father's parental rights (emphasis added)); *Pierce, supra*, 268 *U.S.* at 534, 45 *S.Ct.* at 573, 69 *L.Ed.* at 1078 (holding that state's interest was inadequate to justify interference in family life because children were not *harmed* by parents' decision to send their children to private schools as those schools fulfilled their obligations (emphasis added)); *Meyer*, 262 *U.S.* at 403, 43 *S.Ct.* at 628, 67 *L.Ed.* at 1046-47 (striking down state law that forbade children from learning foreign language because, among other things, such knowledge was not "so clearly *harmful* as to justify its inhibition with the consequent infringement of rights long freely enjoyed" (emphasis added)), *with Prince, supra*, 321 *U.S.* at 169-70, 64 *S.Ct.* at 444, 88 *L.Ed.* at 654 (upholding parent's conviction for violating state child labor laws because selling religious magazines to public could lead to emotional, psychological, or physical *injury* to child (emphasis added))." Moriarty v. Bradt, 177 N.J. 84, 827 A.2d 203, 222-23 (2003).

"(S)ome form of harm to a child has traditionally been necessary under the Due Process Clause to support interference by the state in this sensitive area. (citing Yoder and Pierce). Harm not only has been the prevailing standard of intervention, but is most suitable in analyzing a grandparent visitation statute. It is consistent with the essential presumption of fitness accorded a parent and is stringent enough to prevent states from meddling into a parental decision by simply making what it believes is a better decision. It also recognizes the challenges inherent in ordering grandparent visitation, including the tremendous burdens and strain placed on the parent-child relationship...There is no doubt, in a broad sense, that grandparent-grandchild relationships are beneficial and should be promoted. (citations omitted). Children deprived of the influence of a grandparent may lose important opportunities for positive growth and development. However, such a generalization falls short of establishing the type of harm that would justify state intervention into a parental decision denying contact. (citations omitted). If grandparent visitation is to be compelled by the state, there must be a showing of harm to the child beyond that derived from the loss of the helpful, beneficial influence of grandparents." In re the Marriage of Howard, 661 N.W.2d 183, 189-91 (Iowa 2003).

This is the majority view. Additional cases that follow it include: Beagle v. Beagle, 678 So. 2d 1271, 1276 (Fla. 1996); In re Herbst, 1998 OK 100, ¶ 16, 971 P.2d 395; Doe v. Doe, 116 Hawaii 323, 172 P.3d 1067, 1079-80 (2007); Brooks v. Parkerson, 265 Ga. 189, 454 S.E.2d 769, 772-74 (1995); Hawk v. Hawk, 855 S.W.2d 573, 577 (Tenn. 1993); Koshko v. Haining, 398 Md. 404, 921 A.2d 171, 192-93 (2007); Glidden v. Conley, 175 Vt. 111, 820 A.2d 197, 204-05 (2003); Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565, 568 (2003); Walker v. Blair, 382 S.W.3d 862, 871 (Kent. 2012).

On the other hand, a minority of courts to have considered the issue have taken a second approach. They still recognize that the best-interests-of-the-child standard is constitutionally insufficient but hold the state can constitutionally second-guess a fit parent's visitation decision if the grandparent shows *by clear and convincing evidence* that visitation is in the child's best interests. In their view, the higher standard of proof is sufficient to protect parents' liberty interest in the care, custody and upbringing of their children. Cases that take this view include In the Matter of the Petition for Adoption

of C.A., 137 P.3d 318, 327-28 (Colo. 2006); Polasek v. Omura, 2006 MT 103, ¶ 15, 332 Mont. 157, 136 P.3d 519; and Soohoo v. Johnson, 731 N.W.2d 815, 823 (Minn. 2007).

That brings us to Wisconsin and Roger D.H. Roger was a 15 year-old child when the case was decided. 250 Wis.2d 747 at ¶ 3. His mother had always been his primary guardian. Id. His father had no custody or visitation rights. Id. His paternal grandmother petitioned for a visitation order pursuant to Wis. Stat. § 767.245(3), which was later renumbered Wis. Stat. § 767.43(3). Id. at ¶ 5. The circuit court denied the petition because it mistakenly interpreted Troxel as requiring a showing that the custodial parent is unfit. Id. at ¶ 7.

In an attempt to sustain the circuit court's order, Roger's mother argued Troxel renders Wis. Stat. § 767.245(3) "facially unconstitutional." Id. at ¶ 1. The court rejected that argument. It held:

> "(W)e hold that when applying Wis. Stat. § 767.243(3), circuit court's must apply the presumption that a fit parent's decision regarding grandparent visitation is in the best interest of the child. At the same time, we observe that this is only a presumption and the circuit court is still obligated to make its own assessment of the best interest of the child. *See* § 767.245(3)(f). What the Due Process Clause does not tolerate is a court giving no 'special weight' to a fit parent's determination, but instead basing

> its decision on 'mere disagreement' with the parent." Id. at ¶ 19.

There is an obvious ambiguity in that holding. The court did not say *what is required to overcome the presumption that the parent's decision is in the best interest of the child*. Id. Is it: 1) showing that not granting visitation would harm the child?; 2) showing by clear and convincing evidence that visitation is in the child's best interests?; or 3) merely showing by a preponderance of the evidence that visitation is in the child's best interests?

The circuit court in this case plainly thought it was the third option. (R. 88, p. 15) (A-Ap 24). So did this court in In the Interest of Nicholas L., 2007 WI App 37, ¶ 11-12, 299 Wis. 2d 768, 731 N.W.2d 288, where it noted:

> "The due process clause, therefore, prevents a court from starting with a clean slate when assessing whether grandparent visitation is in the best interests of the child. Rather, within the best interests decisional framework, the court must afford a parent's decision 'special weight.' (citing Troxel and Roger D.H.). This 'special weight' given to a parent's decision is not a separate element in the court's assessment as Julie argues. Pursuant to *Troxel* and *Roger D.H.*, the court accords special weight by applying a rebuttable presumption that the fit 'parents decision regarding grandparent visitation is in the best interest of the child. (citing Troxel and Roger D.H.). In other words, as the grandparents aptly write, 'the rebuttable presumption is the legal means of giving the parent's decision 'special weight." Thus, the court is to tip the scales in the parent's favor by making that parent's offer

> of visitation the starting point for the analysis and presuming it is in the child's best interests. *It is up to the party advocating for nonparental visitation to rebut the presumption by presenting evidence that the offer is not in the child's best interests. The court is then to make its own assessment of the best interests of the child*. (citing Roger D.H.)" Id. at 11-12 (Emphasis Added).

That cannot be. If the presumption in favor of the parent can be overcome by showing by a preponderance of the evidence that visitation is in the child's best interests, then the presumption is meaningless. As the Tennessee Supreme Court aptly noted:

> "For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all. 'You may do whatever you choose, so long as it is what I would choose also' does not constitute a delegation of authority." Hawk, 855 S.W.2d at 580.

Put differently, a presumption that can be overcome by showing by the preponderance of the evidence that visitation is in the child's best interests *is just a clunky restatement of the best-interests-of-the-child standard*, which is exactly what the United States Supreme Court found unconstitutional in Troxel, where it held:

> "(T)he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." 530 U.S. at 72-73.

Yet, that is exactly what happened in this case and is exactly what Roger D.H. authorizes when it is interpreted as the circuit court did in this case and as this court did in Nicholas L.

A. Roger D.H. does not dictate the outcome of this case.

There are two reasons Roger D.H. does not dictate the outcome of this case: 1) it is inconsistent with decisions of the Wisconsin Supreme Court; and 2) it is factually distinguishable in a way that dictates a different outcome in this case.

1. Roger D.H. is inconsistent with Wisconsin Supreme Court decisions.

The Wisconsin Supreme Court has repeatedly held that a parent who has a substantial relationship with his or her child has a fundamental liberty interest in parenting the child. In Interest of J.L.W., 102 Wis. 2d 118, 135, 306 N.W.2d 46 (1981); In Interest of Baby Girl K., 113 Wis. 2d 429, 446-47, 335 N.W.2d 846 (1983); Parental Rights to SueAnn A.M., 176 Wis. 2d 673, 686, 500 N.W.2d 649 (1993); Zachary B., 271 Wis. 2d 51 at ¶ 23. As a result, any statute infringing on that liberty interest, as Wis. Stat. § 767.43(3) indisputably does, is subject to strict scrutiny review. Monroe Cnty. DHS v. Kelli B., 2004 WI 48, ¶ 17, 271 Wis. 2d 413, 662 N.W.2d 360; In re

Gwenevere T., 2011 WI 30, ¶ 52, 333 Wis. 2d 273, 797 N.W.2d 854. Under strict scrutiny review, a statute is constitutional only if it is narrowly tailored to advance a compelling state interest that justifies interference with the fundamental liberty interest. Id.

Roger D.H. did not subject Wis. Stat. § 767.43(3) to strict scrutiny review. 250 Wis.2d 747 at ¶ 13-19 Wisconsin Supreme Court precedent dictates it be subject to strict scrutiny review. Zachary B., 271 Wis.2d 51 at ¶ 24; Jodie W., 293 Wis.2d 530 at ¶ 41; Gwenevere T., 333 Wis. 2d 273 at ¶ 52. Roger D.H. is thus in direct conflict with Wisconsin Supreme Court precedent.

Admittedly, the Wisconsin Supreme Court did approvingly cite Roger D.H. in In re the Marriage of Meister, 2016 WI 22, ¶ 40-45, 367 Wis. 2d 447, 876 N.W.2d 746. An issue in that case was whether substantive due process required a grandparent seeking visitation under Wis. Stat. § 767.43(1) prove he or she had a parent-like relationship with the child. Id. at ¶ 40. The court, citing Roger D.H., concluded that was not required. Id. at ¶ 45. What the court did not do, however,

because the issue was not raised by the parties, is consider whether Wis. Stat. § 767.43 must be subject to strict scrutiny review.[3] Id. at ¶ 40-45. As noted above, Wisconsin Supreme Court precedent *indisputably* requires strict scrutiny review because Wis. Stat. § 767.43(3) infringes on a fundamental liberty interest. Zachary B., 271 Wis.2d 51 at ¶ 24; Jodie W., 293 Wis.2d 530 at ¶ 41; Gwenevere T., 333 Wis. 2d 273 at ¶ 52.

This court should therefore apply Wisconsin Supreme Court precedent and subject Wis. Stat. § 767.43(3) to strict scrutiny review. For the reasons set forth in Section I(B) and Section I(C) below, once the court does so, it becomes clear the statute, as applied in this case, violates Michels' and Lyons' fundamental liberty interest in the care, custody and upbringing of their child.

[3]To say the issue was not raised by the parties in Meister is to put it politely. The respondent's supreme court brief was 9 pages long. The term "strict scrutiny" does not appear in the brief. The entirety of the constitutional analysis is a passing cite to Troxel. There is no mention of the fact that other jurisdictions to consider the issue have overwhelmingly found the constitution requires more than Roger D.H.'s presumption.

2. Roger D.H. is factually distinguishable in a way that dictates a different outcome in this case.

Totally apart from the fact that Roger D.H. and Meister never considered whether strict scrutiny review must apply, there is an important fact that sets this case apart from those cases and from the vast majority of grandparent visitation cases– here there are *two* fit parents who ***both*** agree the visitation sought is contrary to the best interests of their child. (R. 87, pp. 67, 95-96). In Roger D.H., the father was totally absent, and it was his mother who petitioned for visitation. 250 Wis.2d 747 at ¶ 3-5. Meister involved the aftermath of an ugly divorce where the paternal grandmother petitioned for visitation after the mother received primary custody. 367 Wis. 2d 447 at ¶ 8-9. In Troxel, the father committed suicide. 530 U.S. at 60. The mother then drastically reduced visitation with the father's parents. Id. at 60-61.

Those cases are typical grandparent visitation cases. The Wisconsin Supreme Court has recognized they are the sort of cases visitation statutes are intended to address:

> "Despite the confusion surrounding the conditions that must exist before a circuit court may consider a petition for visitation under sec. 767.245, the statute and cases reveal a thread consistently woven into the law of visitation: a concern that state intervention in a parent's determination of how to rear a child, a constitutionally protected liberty interest, must be justified by a triggering event. With respect to visitation, this triggering event must be more than a claim that a third party's visitation is in a child's best interest." In re the Custody of H.S.H., 193 Wis.2d 649, 679-80, 533 N.W.2d 419 (1995).

There is no such triggering event in this case. It is not a case where a parent died, and the surviving parent cut off contact with the deceased parent's side of the family. It is not a case where the parents divorced, and the parent who got custody arbitrarily cut off contact with his or her former in-laws. It is not a case where a single parent arbitrarily cut off contact with a grandparent who previously had a parent-like relationship with the child. Rather, Avery's two fit parents ***both*** agreed reduced grandparent visitation was in Avery's best interests. (R. 87, pp. 61, 67, 64-65, 95-96).

Even if Roger D.H. correctly holds that a presumption that can be overcome by a preponderance of the evidence is all that is required to make Wis. Stat. § 767.43(3) constitutional in a case where one parent cuts off contact with the other parent's mother or father, more must be required in a case, like this one,

where both parents are fit and ***both*** are in agreement as to what level of visitation is in their child's best interest. Anything less cannot be squared with Troxel:

> "(I)t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children...(S)o 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." 530 U.S. at 66, 68-69. (Parenthetical in Original).

The state cannot prevent fit parents from teaching a child a foreign language, even if it concludes doing so is not in the best interests of the child or society. Meyer v. Nebraska, 262 U.S. 390, 403, 43 S.Ct.625 (1923). The state cannot prevent fit parents from sending a child to private school, even if the state believes the method or substance of teaching is not in the best interests of the child. Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S.Ct. 571 (1925). The state cannot prevent parents from ceasing a child's formal education after eighth grade, even if the state believes additional education is in the child's best

interests.[4] Wisconsin v. Yoder, 406 U.S. 205, 234-35, 92 S.Ct. 1526 (1972).

How then can the state overrule the grandparent visitation decisions of *two fit parents* without a showing that the parents' decision would result in harm to the child or, at an absolute minimum, without a showing by clear and convincing evidence that the visitation is in the child's best interests? If parents' substantive due process rights mean anything, the state cannot do so. This court should so find and should accordingly find the visitation order violates Michels' and Lyons' substantive due process rights.

For the reasons set forth in Section I(B) below, the court should then find that, at least in cases where two fit parents ***both*** agree visitation is not in their child's best interests, the Fourteenth Amendment of the United States Constitution and Section I, Article 1 of the Wisconsin Constitution prohibit a court from ordering grandparent visitation under Wis. Stat.

[4]Yoder admittedly involves the intersection of parental rights with the right to free exercise of religion. However, the United States Supreme Court has noted it would not have ruled in the parents' favor in Yoder if not for their substantive due process rights in the care, custody and upbringing of their children. Employment Division, DHR of Oregon v. Smith, 494 U.S. 872, 881, 110 S.Ct. 1595 (1990).

§ 767.43(3) without a showing that not granting visitation would harm the child or, at a minimum, without the grandparent showing by clear and convincing evidence that visitation is in the child's best interests. Roger D.H. can be limited to the more common scenario where one parent, following a death, divorce or other triggering event, is seeking to cut off visitation with the other parent's parent(s).

B. Substantive due process requires that a party seeking visitation under Wis. Stat. § 767.43(3) show that not granting visitation would cause harm to the child.

Section 767.43(3) must be subject to strict scrutiny review. Zachary B., 271 Wis.2d 51 at ¶ 23-24; Jodie W., 293 Wis.2d 530 at ¶ 41; Gwenevere T., 333 Wis. 2d 273 at ¶ 52. Once state courts in other jurisdictions have recognized as much, they have, unanimously as far as the undersigned can tell, held that a grandparent must show a child would be harmed if no visitation order is entered in order to overcome a fit parent's liberty interest in the care, custody and upbringing of his or her children. The Hawaii Supreme Court explained and held:

> "Other jurisdictions have held that the strict scrutiny inquiry is satisfied only where denial of visitation to the nonparent third party would result in significant harm to the child ... *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203, 222 (2003) ("Because the Grandparent Visitation Statute

is an incursion on a fundamental right (the right to parental autonomy), ... it is subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest. Our prior jurisprudence establishes clearly that the only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child."); *Roth v. Weston*, 259 Conn. 202, 789 A.2d 431, 445 (2002) ("Without having established substantial, emotional ties to the child, a petitioning party could never prove that serious harm would result to the child should visitation be denied. This is as opposed to the situation in which visitation with a third party would be in the best interests of the child or would be very beneficial. The level of harm that would result from denial of visitation in such a situation is not of the magnitude that constitutionally could justify overruling a fit parent's visitation decision."); *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417, 418 (1998) (agreeing with the intermediate appellate court's conclusion that "[f]or the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find actual harm to the child's health or welfare without such visitation"); *In re Parentage of C.A.M.A.*, 154 Wash.2d 52, 109 P.3d 405, 413 (2005) (concluding that "RCW 26.09.240's presumption in favor of grandparent visitation is unconstitutional under *Troxel* and the application of the 'best interests of the child' standard rather than a 'harm to the child' standard is unconstitutional under [*Smith*, 969 P.2d 21, *aff'd sub nom., Troxel*, 530 U.S. 57, 120 S.Ct. 2054]"); *In re Herbst*, 971 P.2d 395, 399 (Okla.1998) ("[A] vague generalization about the positive influence many grandparents have upon their grandchildren falls far short of the necessary showing of harm which would warrant the state's interference with this parental decision regarding who may see the child."); *Beagle v. Beagle*, 678 So.2d 1271, 1276 (Fla.1996) (concluding under the privacy clause of the Florida Constitution, that the state has a compelling interest in ordering grandparent visitation over the wishes of a fit parent only "when it acts to prevent demonstrable harm to the child"); *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769, 773 (1995) ("[W]e find that implicit in Georgia cases, statutory and constitutional law is that state interference with parental rights to custody and control of children is permissible only where the health or welfare of the child

> is threatened."); *Hawk*, 855 S.W.2d at 582 ("We hold that Article I, Section 8 of the Tennessee Constitution protects the privacy interest of these parents in their child-rearing decisions, so long as their decisions do not substantially endanger the welfare of their children. Absent some harm to the child, we find that the state lacks a sufficiently compelling justification for interfering with this fundamental right."). We agree with these jurisdictions that proper recognition of parental autonomy in child-rearing decisions requires that the party petitioning for visitation demonstrate that the child will suffer significant harm in the absence of visitation before the family court may consider what degree of visitation is in the child's best interests." Doe, 172 P.3d at 1079-80

The reasoning of these courts is persuasive. Justice Thomas, in Troxel, doubted that states *ever* have a compelling interest in "second-guessing a fit parent's decision regarding visitation with third parties." 530 U.S. at 80 (J. Thomas, concurring). But if such an interest exists at all, it exists only in cases where a petitioner satisfies a court that not granting visitation rights would result in harm to the child, i.e., cases where a child has enjoyed a substantial relationship with a grandparent, a parent has arbitrarily deprived the child of that relationship and the child has been harmed as a result. Smith, 969 P.2d at 30.

The Connecticut Supreme Court's concern that any lesser standard would leave some parents unable (or less able) to defend their fundamental liberty interest in the care, custody and

upbringing of their children is also persuasive. Roth, 789 A.2d at 448-49. At the circuit court level, Michels and Lyons asked the court to consider whether it would have reached the same result in this case if they were older, married and highly educated. (R. 63, pp. 6-7). The point was not to suggest courts would *intentionally* discriminate against younger, poorer or less educated parents. The point was that such discrimination is inherent in the best-interests-of-the-child standard or any variation thereof.

The best-interests-of-the-child standard requires the court to second-guess a parent's decision about what is best for his or her child. It will naturally be harder for a court to second-guess highly educated parents who have some standing in the community – those parents' decisions will always get more weight (and likely always get dispositive weight) in any best-interests-of-the-child analysis. On the other hand, it will be much easier for a court to second-guess young, unmarried, less educated parents. As the court very casually did in this case. (R. 65, pp. 125-30) (A-Ap 1-6).

Because Michels and Lyons ***both*** objected to Kelsey's petition, nothing about this case would be substantively different if they were married.[5] This court should ask itself whether Michels' and Lyons' decisions regarding grandparent visitation would have been overruled by the circuit court if all facts remained the same but Michels and Lyons were 40 year-old doctors. If the answer to that question is anything short of "absolutely," which it is, it demonstrates the best-interests-of-the-child standard is insufficient to protect parents' substantive due process rights. The existence and extent of those rights should not hinge on the parents' socioeconomic status.

This court should follow the lead of its sister courts throughout the country and find that visitation can be ordered under Wis. Stat. § 767.43(3) only upon a showing that not ordering visitation would cause harm to the child. Alternatively, and at an absolute minimum, the court should find that visitation can be ordered under Wis. Stat. § 767.43(3) only upon a showing, by clear and convincing evidence, that visitation is in

[5]In that case, Kelsey's petition would be pursuant to Wis. Stat. § 767.43(1) rather than Wis. Stat. § 767.43(3). Between those two provisions, subsection (1) actually imposes *fewer* requirements on a grandparent seeking visitation rights.

the child's best interests. Even courts that have not adopted the harm standard have found substantive due process at least requires a petitioner seeking visitation to meet that higher burden of proof. For instance, the Colorado Supreme Court held:

> "(I)n order to effectuate the General Assembly's intent consistent with *Troxel*, we construe Colorado's statute to contain a presumption that parental determinations about grandparent visitation are in the child's best interests. (citing Troxel). However, this presumption is rebuttable in the context of a section 19-1-117 petition when the grandparent articulates facts in the petition and goes forward with clear and convincing evidence at a hearing that the parent is unfit to make the grandparent visitation decision, or that the visitation determination the parent has made is not in the best interests of the child." In re the Matter of Petition for Adoption of C.A., 137 P.3d 318, 327-28 (2006).

The Minnesota Supreme Court held:

> "We believe that in order to afford due deference to the fit custodial parent, the burden of proof must be on the party seeking visitation, and the standard of proof must be clear and convincing evidence. We base this conclusion on the following analysis. The Supreme Court has explained that 'the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. *Santosky v. Kramer*, 455 U.S. 745, 755, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)." Soohoo, 731 N.W.2d at 823.

Thus, even if this the court finds a showing of harm to the child is not constitutionally required, it should at least recognize, as the above courts have, that at an absolute

minimum, substantive due process limits a court's power to order visitation under Wis. Stat. § 767.43(3) to cases where the grandparent shows, by clear and convincing evidence, that visitation is in the child's best interests.

C. Under either the "harm" standard or the "clear and convincing evidence" standard, Kelsey's petition must be denied.

Michels and Lyons are both fit parents. The circuit court even found them to be "good parents." (R. 88, p. 26) (A-Ap 35). There was nothing arbitrary about their decision to decrease Avery's visitation with her grandparents. They found that trying to maintain the same level of visitation once Avery's life "started filling up with other things," such as school, friends and extracurricular activities, was exhausting Avery and negatively affecting her relationship with Lyons. (R. 87, pp. 61, 64-65, 95-96).

Kelsey presented no evience to support a finding that not granting the visitation she sought would harm Avery or any evidence that could clearly and convincingly show Michels' and Lyons' decision was contrary to Avery's best interests. In fact, Kelsey's entire claim is based on the fact that she has a loving

relationship with Avery. That does absolutely *nothing* to cast doubt on Michels' and Lyons' opinion that maintaining the pre-kindergarten level of visitation with Kelsey was exhausting Avery and taking her away from activities that were equally or more beneficial than spending time with Kelsey.

Further, Michels and Lyons expressed concern regarding Kelsey's judgment and the advisability of her having custody of Avery for any extended period of time. The concerns were based on undisputed facts: 1) Kelsey allowing Avery to drink "a sip" of alchol when she was 4 years-old; 2) Kelsey allowing Avery to go horseback riding without a helmet after Michels and Lyons explicitly told her not to do so; 3) Kelsey asking Michels to lie to Lyons regarding the proposed Disney World trip; and 4) Kelsey berating and threatening Michels upon Michels resisting he demand to take Avery to Disney World. (R. 87, pp. 54, 66) (R. 65, p. 20) (R. 62).

In light of those undisputed facts underlying Michels' and Lyons' concerns, it is impossible to find that their decision to decrease Avery's contact with Kelsey caused harm to Avery or that their decision was clearly and convincingly wrong. It is

also noteworthy that Kelsey conceded Michels and Lyons were not seeking to cut off visitation entirely. She merely alleged her visitation opportunities were significantly reduced. (R. 87, p. 39). (Kelsey complaining "I was turned down more than I was allowed when I would ask (to spend time with Avery)); (R. 87, p. 36) (Kelsey admitting it is "very possible" Avery stayed at her house on January 21, 2016 and was scheduled to do the same on February 11, 2016); (R. 87, pp. 87-97) (Michels and Lyons provided Kelsey with schedules of extracurricular activities she could attend to see Avery); (R. 65, p. 21) (Kelsey admitting she was never "shut down" from seeing Avery). The court in Troxel, in noting that second-guessing a fit parent's visitation decision is particularly problematic when the parent has not cut off visitation entirely, explained:

> "(W)e note that there is no allegation that Granville ever sought to cut off visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays." 530 U.S. at 71.

Even Wis. Stat. § 767.43(3) explicitly limits visitation to cases where:

> "The grandparent has maintained a relationship with the child...but has been prevented from doing so by a parent who has legal custody." Wis. Stat. § 767.43(3)(d).

Kelsey concedes she was not being prevented from maintaining a relationship with Avery. She just wanted a more significant relationship and wanted to be the one who dictated the terms of the relationship. (R. 87, p. 39) (R. 87, p. 36) (R. 87, pp. 87-97) (R. 65, p. 21).

In light of all of the above, Kelsey's petition must fail under either the harm standard or the clear and convincing evidence standard (or even, as noted in Section II below, under the unconstitutional standard applied by the circuit court).

D. If this court concludes Roger D.H. dictates the outcome of this case, it should certify the case to the Wisconsin Supreme Court.

The court of appeals is a unitary court. It cannot overrule a published court of appeals opinion. 208 Wis.2d 166 at ¶ 53. However, the Wisconsin Supreme Court has instructed:

> "The court of appeals...is not powerless if it concludes that a prior decision of the court of appeals...is erroneous. It may signal its disfavor to litigants, lawyers and this court by certifying the appeal to this court, explaining that it believes a prior case was wrongly decided. Alternatively, the court of appeals may decide the appeal, adhering to a prior case but stating its belief that the prior case was wrongly decided." Id. at ¶ 54.

Roger D.H. has not aged well. The court's cursory analysis – the terms "substantive due process" and "strict scrutiny" do not appear in the opinion – cannot be squared with parents' fundamental liberty interest in the care, custody and upbringing of their children. Decisions from other courts throughout the country resoundingly demonstrate as much. Wisconsin owes it to parents to defend "perhaps the oldest of the fundamental liberty interests recognized by (the United States Supreme Court)." This case presents the opportunity to do so.

II. Even If the Circuit Court's Decision Is Not Constitutionally Defective, the Court Erroneously Exercised its Discretion When it Granted Kelsey's Petition.

A circuit court erroneously exercises its discretion when it applies the wrong legal standard or makes a decision not reasonably supported by the facts of record. Johnson v. Cintas Corp. No. 2, 2012 WI 31, ¶ 22, 339 Wis. 2d 493, 811 N.W.2d 756. The circuit court did both in this case. Before a circuit court can order visitation, Wis. Stat. § 767.43(3) requires:

> "The grandparent has maintained a relationship with the child...but has been prevented from doing so by a parent who has legal custody." Wis. Stat. § 767.43(3)(d).

The court never made that finding, nor would the record have permitted it to do so. Even Kelsey concedes Michels and Lyons were not preventing her from having a relationship with Avery. (R. 87, p. 39); (R. 87, p. 36); (R. 87, pp. 87-97); (R. 65, p. 21). Her complaints were merely that she wanted a more substantial relationship and wanted her contacts with Avery to be on her terms. (R. 87, p. 39); (R. 87, p. 36); (R. 87, pp. 87-97); (R. 65, p. 21). Section 767.43(3) simply does not apply in those circumstances. Wis. Stat. § 767.43(3)(d). Rather, it only applies where parents are preventing a grandparent from maintaining *any* relationship with a child. Id.

Additionally, even under the minimal standard imposed by Roger D.H., the court must find that visitation with Kelsey was in Avery's best interests or, put more awkwardly, must find that Kelsey had rebutted by a preponderance of the evidence the presumption that Michels' and Lyons' visitation decision was in Avery's best interest. The record does not permit that finding in this case.

Kelsey admittedly has a loving relationship with Avery. And it may be true that Avery benefits from spending time with

Kelsey. But those facts are insufficient to show that Michels' and Lyons' visitation decisions were wrong because they do *nothing* to show that the benefits of spending time with Kelsey outweigh the negative effects of being spread "between three different places" or that the benefits of spending time with Kelsey outweigh the benefits Avery would realize by instead spending the time with her friends, with her father, with her maternal grandparents, playing baseball, reading a book, visiting a museum, or doing a thousand other things that can enrich a child's life.

Accordingly, even if the circuit court's decision was not constitutionally defective, it should be reversed as an erroneous exercise of discretion.

CONCLUSION

The Chippewa County Circuit Court disagreed with Michels' and Lyons' decisions regarding how much and what sort of visitation with Kelsey was in their daughter's best interest. It then concluded that was enough, under Wis. Stat. § 767.43(3) and Roger D.H., to overrule Michels' and Lyons' decisions and to order them to give their daughter to Kelsey at the times and on the terms the court deemed best. If that is not a violation of Michels' and Lyons' fundamental liberty interest in the care, custody and upbringing of their daughter, then the liberty interest ceases to exist.

This court should find the visitation order violates Michels' and Lyons' substantive due process rights under the federal and state constitutions. It should find Roger D.H. is fundamentally inconsistent with Wisconsin Supreme Court decisions that require any statute infringing on a fundamental liberty interest be subject to strict scrutiny review. Zachary B., 271 Wis.2d 51 at ¶ 24; Jodie W., 293 Wis.2d 530 at ¶ 41; Gwenevere T., 333 Wis. 2d 273 at ¶ 52. Alternatively, it should refuse to apply Roger D.H. to a case involving two fit parents

who ***both*** agree the visitation sought is contrary to their child's best interests.

In either case, the court should then find that, to comply with substantive due process requirements, a court can order visitation under Wis. Stat. § 767.43(3) only upon a showing that failure to do so would harm the child. Alternatively, and at an absolute minimum, the court should find a court can order visitation under Wis. Stat. § 767.43(3) only upon a showing, by clear and convincing evidence, that the parents' visitation decision was wrong. The court should then find that, under either standard, Kelsey's petition fails.

Finally, even if this court finds Roger D.H.'s restated best-interests-of-the-child standard adequately protects parents' constitutional rights (or if it feels Roger D.H. controls the outcome even though its holding is indefensible), the court should overturn the visitation order as an erroneous exercise of the circuit court's discretion.

For all the reasons noted above, Michels and Lyons respectfully request the court reverse the visitation order.

Dated this 25th day of September, 2017.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced using the following font:

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Dated this 25th day of September, 2017.

WELD RILEY, S.C.

By: /s/
Ryan J. Steffes, State Bar No. 1049698
Attorneys for Appellants,
Cacie M. Michels and Keaton L. Lyons

CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80 and 809.18, that the Brief of Appellants Cacie M. Michels and Keaton L. Lyons, was sent by U.S. mail on September 25, 2017, to the Clerk of the Wisconsin Court of Appeals, with three (3) copies served on the parties as follows:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of September, 2017.

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of September, 2017.

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