COURT OF APPEALS

DISTRICT III

APPEAL NO. 2017-AP-001142
CIRCUIT COURT CASE NO. 2010 FA 000206

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.

APPEAL FROM THE CIRCUIT COURT
FOR CHIPPEWA COUNTY
HONORABLE JAMES M. ISAACSON PRESIDING

BRIEF OF PETITIONER-RESPONDENT

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STATEMENT OF POSITION ON ORAL ARGUMENT AND PUBLICATION

A. Oral argument is not necessary.

B. This opinion should not be published

STATEMENT OF THE FACTS AND OF THE CASE

Kelsey does agree that many of the facts in this case were undisputed. However, appellants' statement of facts does omit facts of significance and therefore is supplemented herein.

For the most part there was little dispute about the nature and extent of Kelsey's contacts with Avery. Neither parent disputed Kelsey's testimony relating to the placement calendar introduced as Exhibit 1 at trial. (R. 87, pp. 8-14). The extent of Kelsey's contact with Avery in calendar year 2016 was subject to some dispute.

Kelsey had been planning to take Avery to Disney World for some time. Those plans had been discussed in some detail with Michels, who would also be going on the trip. Michels backed out of the trip in December, 2015. (R. 87, pp. 16-22). There was differing testimony as to why this happened. This coincided with a near complete cut-off of Kelsey's time with Avery. (R. 87, pp. 22, 27-29). Neither parent voiced concern to Kelsey of her care of Avery until December, 2015. (R. 87, p. 67).

Neither parent was willing to commit to even a

minimal level of contact or time Kelsey would have with Avery. Their continued representations to the court were generalized comments that they would allow Kelsey to see Avery if time could be worked out, if they thought it was good for Avery, etc. (R. 87, pp. 69-71, 81, 88, 96, 104). Keaton has no interest in having a relationship with Kelsey. (R. 87, p. 92).

The Guardian ad Litem issued a detailed report recommending Kelsey have placement at least twice a month. (R. 29). The trial court was well aware of the applicable law. (R. 87, pp. 25-26). The trial court noted that a bad relationship existed between Kelsey and the parents. (R. 87, pp. 123-124, 126).The court was concerned about the relationship between Kelsey and Avery. The court ordered what it clearly contemplated as a minimal schedule, with the hope that the parents would voluntarily allow Kelsey additional time. (R. 87, pp. 128-129).

ARGUMENT

I. The visitation order does not violate the 14th Amendment to the United States Constitution, nor any provision of the Wisconsin Constitution.

It is appropriate to review the case *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000). This case involved application of a Washington nonparental visitation statute. Paternal grandparents were awarded visitation with the children in question. The State Court of Appeals reversed and dismissed the grandparents' Petition. The State Supreme Court upheld and the United States Supreme Court granted the grandparents' Petition for review. The Court affirmed the judgment of the State Supreme Court.

The *Troxel* court stated the Washington statute as applied unconstitutionally infringed on the fundamental right of parents to make decisions concerning the custody of their children. (Id. at 67.) The Court noted the statute was "breathtakingly broad", allowing any person to petition for visitation rights at any time. Further, it allowed a court to

grant nonparental visitation rights without according any deference to the parental decision. (Id. at 67.)

The *Troxel* court did not say that nonparental visitation statutes violate the due process clause per se. The Court described its concerns as:

> "*The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughter's best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption." (Id. at 69.)*
>
> *"And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the Court must accord at least some special weight to the parent's own determination." (Id. at 70.)*

The *Troxel* court observed the Washington statute contained no requirement assigning any weight or presumption of validity to the parental decision. (Id. at 67.)

However, the *Troxel* court further noted that the trial court did not do so either in its application of the statute. Accordingly, it determined that the Washington statute as applied was unconstitutional. (Id. at 73.)

The *Troxel* court was also careful to point out what it was not considering, nor ruling on:

> *"We do not consider….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. We do not, and need not, define today the precise scope of the parental due process right in the visitation context." (Id. at 73.)*

> *"Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter." (Id. at73.)*

Subsequent cases in Wisconsin have incorporated the *Troxel* principles. Those include *Roger D.H. v. Virginia O.*, 2002 WI. App. 35, 250 Wis. 2d 747, 641 N.W.2d 440. In this case a paternal grandmother petitioned for visitation pursuant to what is now Sec. 767.43 (3), Wis. Stats. The circuit court denied her petition concluding that *Troxel* required her to show that the custodial mother was unfit. The grandmother appealed, and the *Roger D.H.* court reversed, ruling that an erroneous legal standard was applied. It concluded that the petitioning grandparent does not have to demonstrate the custodial parent to be unfit before a court may grant such grandparent visitation.

Roger D.H. noted the concern expressed by the *Troxel* court that no "special weight" was given to the custodial mother's parents determination of their child's best interest, either in the statute itself nor in the way the Washington trial court applied it. *Roger D.H.* articulated the "special weight" standard from *Troxel* and its application to the Wisconsin grandparent visitation statute, as follows:

[6]

" We glean from Troxel two propositions relevant to the issue before us. First, due process requires that courts apply a presumption that a fit parent's decision regarding nonparental visitation is in the best interest of the child. Second, a state court may read this requirement into a nonparental visitation statute, even when the statute is silent on the topic."

The logic and rulings of ***Roger D.H.*** were subsequently adopted and embraced in ***Meister v. Meister***, 367 Wis.2d 447, 876 N.W.2d 746 (2016). In ***Meister*** the paternal grandmother (Carol) petitioned for grandparent visitation subsequent to the divorce between her son and the children's mother (Nancy). Her petition was brought under Sec. 767.43 (1), Wis. Stats., not the special grandparent provisions of Sec. 767.43 (3), Wis. Stats. Carol Meister's petition was denied by the trial court, which concluded she had not demonstrated a parent-child type relationship. The children appealed that determination and the Court of

Appeals affirmed. The *Meister* court reversed, concluding that a grandparent does not have to prove he or she has maintained a parent-child relationship.

In making its determination, the *Meister* court made considerable reference to both the *Troxel* and *Roger D.H.* rulings. The *Meister* court embraced and implicitly adopted the *Roger D.H.* standard. Nancy Meister argued the grandparent placement statute was unconstitutional, and that there needed to be a larger barrier to usurping parental control than just notice of hearing and a best interest inquiry. The Court's response in *Meister* was:

> *"We conclude that the Court of Appeals appropriately addressed and resolved this contention in Roger D.H....." (Id. at 470.)*

The argument of Avery's parents that the trial courts' reliance on *Roger D.H.* was misplaced is without merit. *Roger D.H.* involved application of the same special grandparent visitation statute at issue here. The mother in *Roger D.H.* opposed the paternal grandmother's request for visitation. Among other arguments, the mother challenged the constitutionality of the statute on the basis of the *Troxel* case.

Roger D.H. set forth its application of the "special weight" standard from *Troxel*. In the subsequent *Meister* case, our State Supreme Court reflected its agreement with the *Roger D.H.* standard. The trial court's reliance on *Roger D.H.* was entirely appropriate and correct, especially given the subsequent *Meister* decision.

The argument by Avery's parents that *Roger D.H.* is inconsistent with Wisconsin Supreme Court decisions doesn't seem logical given the *Meister* case. Avery's parents also argue that apparently, only the preponderance of the evidence standard is what is required to overcome the presumption of the parental decision. They argue this amounts to a simple "best interest of the child" standard. That clearly is not the case. A simple "best interest of the child" standard would require the trial court to make no presumption whatsoever. The court could give just as much weight to what the grandparent wants as to what the parents want. *Roger D.H.* and *Meister* require the court to apply a presumption to the parents' wishes. That is not giving equal weight to the parent wish and the grandparent wish, that is giving the "special weight" to the parental wish which *Troxel* required.

Avery's parents argue that in order for a nonparental visitation statute to pass constitutional muster, there must be applied either a "harm" standard or a "clear and convincing evidence" standard. *Troxel* imposed no such requirement, and explicitly avoided doing so, leaving it to individual states to fashion or apply the "special weight" standard it set forth. The *Meister* court did not impose such a standard either. Neither did *Meister* impose the strict scrutiny review standard argued by Avery's parents. Nothing in *Troxel*, *Roger D.H.*, or *Meister* stands for those propositions as argued by Avery's parents.

Avery's parents further argue that because they both wish to deny Kelsey visitation that *Roger D.H.* and *Meister* should not apply. Wisconsin's special grandparent visitation statute makes no such distinction. Nothing in *Troxel*, *Roger D.H.*, or *Meister* suggests or infers that a different standard or different considerations apply when both parents seek to deny a grandparent visitation, rather than just one. The "special weight" standard spelled out in *Troxel*, and subsequently incorporated in *Roger D.H.* and *Meister* apply regardless of whether one or both parents are involved. The fact that both

parents may agree simply becomes part of the presumption the trial court is required to make.

In the case of Avery's parents, the trial court explicitly noted that their views on Kelsey's visitation were identical and the trial court clearly considered that in making its determination. One could actually make the argument that with both parents in agreement to deny a grandparent visitation, there may be a greater need for state intervention. If only one parent wanted to deny visitation, the grandparent could arguably work with the other to have visitation during that parent's time. That option does not exist when both parents wish to deny visitation. When both parents wish to deny visitation, a grandparent who wishes visitation has no option but to look to court intervention.

Avery's parents also seem to argue that they were victimized or discriminated against because they are young and less educated, versus older and highly educated people who have some standing in the community. They circle this hypothetical back to the same argument that a "harm" standard or a "clear and convincing evidence" standard

should be applied in nonparental visitation cases. *Troxel* explicitly declined to impose either such standard, regardless of the age or social economic status of the parents involved.

II. The circuit court did not erroneously exercise its discretion when it granted Kelsey visitation.

> *"The decision whether to grant or deny visitation is within the circuit court's discretion. See Biel v. Biel, 114 Wis. 2d 191, 194, 336 N.W.2d 404 (Ct. App. 1983).We will affirm a circuit court's discretionary determination so long as it examines the relevant facts, applies the proper legal standard, and uses a demonstrated rational process to reach a conclusion that a reasonable judge could reach. F.R. v. T.B., 225 Wis. 2d 628, 637, 593 N.W.2d 840 (Ct. App. 1999). Additionally, we will uphold the circuit court's discretionary determination if we can independently conclude that the facts of record applied to the proper legal standards support the court's decision. See Andrew J.N. v. Wendy L.D., 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993).*

In this portion of their argument, Avery's parents argue that Sec. 767.43 (3), Wis. Stats. applies only where parents are preventing a grandparent from maintaining any relationship with the child. Carrying that argument to the extreme suggested by Avery's parents would make the statute meaningless. Avery's parents could allow Kelsey to have one telephone conversation with Avery per year and argue that meets the "any relationship" standard.

The record is clear that Judge Isaacson understood the legal standard that was to be applied. He recited the various statutory requirements and made reference to facts relating to those. The comments made by the court at the Motion for Reconsideration reinforces that the court applied the proper legal standard and the facts it considered significant in the case. (R. 88).

The record supports the decision made by the trial court. Over a period of several years Avery enjoyed substantial visitation time with Kelsey. This included monthly if not weekly, overnight placement. It involved Avery's participation in activities with Kelsey that she truly loves and

genuinely enjoys.(R. 87, pp. 8-14). Kelsey's residence was basically a 2nd home for Avery – where she's always had her own room designated only for Avery and used only by Avery. (R. 87, p. 14). A reasonable inference from the evidence is that for a number of years, Kelsey was a more involved and visible figure in Avery's life, than Avery's father was.

The trial court was able to observe the demeanor of various witnesses. The hostility that Avery's parents felt toward Kelsey was on obvious display. (R. 87, p. 126).The trial court heard Lyons say that he had no interest in having a relationship with Kelsey. (R. 87, p. 92). Michels told Kelsey she would never be allowed to see Avery again. (R. 87, pp. 55-56). Michels did not dispute making that statement. The record reflects that the relationship between Kelsey and Avery was a more intense, significant and developed relationship than the typical grandchild – grandparent relationship.

A reasonable inference for the trial court to make was that without some sort of court ordered minimum visitation schedule, it was likely that Avery's parents would allow

Avery no contact, much less visitation time, with Kelsey. Such a likelihood and the adverse effect if would have on the trial was sufficient to overcome the parental presumption. It was reasonable for the trial court to conclude that some type of minimal visitation schedule was necessary.

The court reasonably concluded that allowing a few hours of time, once per month, would allow a minimal relationship to be maintained between Kelsey and Avery, but at the same time not detract from the child spending time with other significant people in her life, and from participating in a myriad of other activities in her life. The only extended visitation allowed by the court was the one week for a summer vacation Avery would enjoy with Kelsey. This was obviously designed to minimize any adverse impact on the child's education and was designed to occur during the time when there would be fewer other demands on the child's time.

The special grandparent visitation statute is a legislative recognition that people who otherwise might be fit, good and competent parents do not always make the right

decision when it comes to contact between their child and a grandparent. The Wisconsin cases addressing this statute are a judicial recognition of that same principle. There is a state interest in at least limited circumstances in fostering and protecting those grandchild – grandparent relationships. The trial court here properly determined this case to be appropriate for the court to intervene.

Dated this 30th day of October, 2017.

Respectfully submitted:

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CONCLUSION

The trial court's decision to grant Kelsey grandparent visitation with Avery did not violate the parents' substantive due process rights. The court properly relied upon and applied the principles of *Roger D.H.*, which incorporated the standard set forth in *Troxell*. *Meister* adopted the *Roger D.H.* standard as applied to nonparental visitation cases.

The totality of the record sets forth more than sufficient facts and demonstrates that the trial court applied the proper legal standard. The trial court articulated its rationale in reaching the decision that it did. The trial court's discretionary determination granting Kelsey grandparent visitation should be affirmed.

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,973 words.

Dated this 30th day of October, 2017.

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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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 30th day of October, 2017.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on this 30th day of October, 2017, this brief was delivered to a third party commercial carrier for delivery to the Clerk of Court of Appeals within 3 calendar days. I further certify that the brief was correctly addressed.

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CERTIFICATION OF SERVICE

I hereby certify that on this 30th day of October, 2017 that three copies of this brief were sent by U.S. mail to Attorney Ryan Steffes and Attorney Kari S. Hoel at the following addresses:

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