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

---

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

---

WELD RILEY, S.C.
Ryan J. Steffes, State Bar No. 1049698
3624 Oakwood Hills Parkway
PO Box 1030
Eau Claire, WI 54702-1030
(715) 839-7786; (715) 839-8609 Fax

Attorneys for Appellants, Cacie M. Michels and
Keaton L. Lyons

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

### Statutes



### Cases

**Other Authorities**

## ARGUMENT

### I. Wisconsin Law Dictates That Wis. Stat. § 767.43(3) Be Subject to Strict Scrutiny Review.

Kelsey does not argue otherwise. Nor could she. Parents who have a substantial relationship with their child have a fundamental liberty interest in parenting the child. In re the Termination of Parental Rights to Zachary B., 2004 WI 48, ¶ 23, 271 Wis.2d 51, 678 N.W.2d 831. Any statute that infringes on that liberty interest is subject to strict scrutiny review. Kenosha Cnty. DHS v. Jodie W., 2006 WI 93, ¶ 41, 293 Wis.2d 530, 716 N.W.2d 845. Section 767.43(3) infringes on the liberty interest because it allows the state to second-guess parents' visitation decisions and to order parents to cede custody of their children to a third party against their will. It must therefore be subject to strict scrutiny review. Id.

Roger D.H. and Meister did not consider whether Wis. Stat. § 767.43(3) (or Wis. Stat. § 767.43(1)) is subject to strict scrutiny review. The issue was not considered *because it was not raised.* The issue *has been raised* in this case, and this court must decide it. If it decides Wis. Stat. § 767.43(3) is subject to strict scrutiny review, Roger D.H. and Meister are not

controlling, or even helpful. They say nothing about whether Wis. Stat. § 767.43(3) (or Wis. Stat. § 767.43(1)) is narrowly tailored to advance a compelling state interest that justifies interference with a fundamental liberty interest. Zachary B., 271 Wis.2d 51 at ¶ 17 (to survive strict scrutiny review, the statute must be narrowly tailored to advance a compelling state interest that justifies interference with the parent's fundamental liberty interest). No Wisconsin appellate court has considered that question.

Fortunately, courts in other jurisdictions have. Once those courts have concluded that their respective grandparent visitation statutes are subject to strict scrutiny review, they have unanimously, as far as the undersigned can tell, concluded that only a showing of harm to the child can overcome the parent's substantive due process rights in the care, custody and upbringing of his or her children. See Doe v. Doe, 116 Hawaii 323, 172 P.3d 1067, 1079-80 (2007) (compiling cases). For example, they have held:

> "(T)he requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process." In re the Custody of Smith, 137 Wash. 2d 1, 969 P.2d 21, 30 (1998).

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

> "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, 191 (Iowa 2003).

The Wisconsin Supreme Court has concluded that protecting children from harm is a compelling state interest that justifies interference with a parent's substantive due process rights. In re the Termination of Parental Rights to Max G.W., 2006 WI 93, ¶ 41, 293 Wis.2d 530, 716 N.W.2d 845; Zachary B., 271 Wis.2d at ¶ 25. Kelsey does not cite a case where the court has found that *anything less than harm to the child* creates a sufficiently compelling interest to justify interference with a fundamental liberty interest.

In addition to the lack of a compelling state interest, Wis. Stat. § 767.43(3) is not narrowly tailored. On the contrary, it

gives circuit courts nearly boundless discretion. This case is a perfect example. Kelsey *never* had custody of Avery for a week (or anything more than two or three days), and Michels and Lyons *never* would have given her such custody. (R. 87, pp. 8-9); (R. 35); (R. 87, pp. 67, 95-96). Yet, the court ordered Michels and Lyons to cede custody of Avery to Kelsey for one week each year, with no restriction on where Kelsey can take Avery during that week. (R. 65, pp. 125-30) (A-Ap 1-6); (R. 44) (A-Ap 9). To be narrowly tailored, the statute would have to impose some limiting principle to prevent such absurd results.

This court should find: 1) Wisconsin law dictates that Section 767.43(3) is subject to strict scrutiny review because it infringes on a fundamental liberty interest; and 2) Wisconsin law dictates that the only circumstance that justifies such infringement is protecting a child from harm. It should then find that Wis. Stat. § 767.43(3), as applied in this case, violated Michels' and Lyons' substantive due process rights because the circuit court did not apply the constitutionally required "harm" standard and because Kelsey could never satisfy that standard.

## II. This case is also factually distinguishable from *Roger D.H.* and *Meister* in a way that dictates a different outcome.

As previously stressed, this is the rare grandparent visitation case that involves ***two*** fit parents who ***both*** agree the visitation sought is contrary to their child's best interests. Incredibly, Kelsey argues visitation should be granted *more liberally* in such cases. In reality, interference with a parent's fundamental liberty interest is more easily justified in the more common scenario, where there is often an inference that the absent or deceased parent would have wanted the child to have the visitation sought by the grandparent.

There is no such inference in this case. To order visitation here, the state has to overcome ***both parents***' substantive due process rights. The burden on the grandparent should be higher in such cases, even if this court determines Roger D.H.'s best-interests-of-the-child standard satisfies substantive due process requirements in the more common visitation petition scenario.

## III. The *Roger D.H.* presumption, as understood by the circuit court and by this court in *Nicholas L.*, is meaningless.

A presumption is only meaningful if it shifts or otherwise alters the burden of production and/or the burden of persuasion.[1] That is the entire point of a presumption. *Black's Law Dictionary* instructs:

> "A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." *Black's Law Dictionary* (9th ed.), p. 1304.

The Roger D.H. presumption does not shift the burden of production. Even in the absence of the presumption, the grandparent petitioning for visitation would bear the burden. Wisconsin Realtors Assoc. v. Public Service Commission, 2015 WI 63, ¶ 67, n. 26, 363 Wis.2d 430, 867 N.W.2d 364, *citing* 2 Kenneth S. Brown, *McCormick on Evidence*, § 337, at 648 (7th ed. 2013). Only a presumption *favoring the grandparent* would

---

[1]The burden of persuasion is sometimes "loosely" referred to as the "burden of proof." *Black's Law Dictionary* (9th ed.), p. 223. As used in this brief, "burden of persuasion" refers to a party's "duty to convince the fact-finder to view the facts in a way that favors that party." *Black's Law Dictionary* (9th ed.), p. 223. The burden of persuasion in civil cases is typically by the preponderance of the evidence. In criminal cases, it is beyond a reasonable doubt. The "middle" burden of persuasion is clear and convincing evidence. As used in this brief, "burden of proof" includes both the burden of production and the burden of persuasion. *Black's Law Dictionary* (9th ed.), p. 223.

shift the burden of production. For instance, if there was a presumption that spending time with a grandparent was in the best interests of a child, *that* would shift the burden of production and be meaningful. As it is, however, the Roger D.H. presumption does not shift or otherwise alter the burden of production.

The presumption could still be meaningful if it heightened or otherwise altered the burden of persuasion. If, in order to overcome the presumption, the grandparent petitioning for visitation was required to show harm to the child or to show *by clear and convincing evidence* that visitation was in the child's best interests, the presumption would be meaningful because it would heighten the grandparent's burden of persuasion (and thus his or her burden of proof). But that is not how the presumption has been interpreted or applied. For instance, this court noted:

> "'(T)he 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.)." In the Interest of Nicholas L.,

2007 WI App 37, ¶ 12, 299 Wis.2d 768, 731 N.W.2d 288 (Emphasis Added).

The first italicized sentence confirms that the grandparent has the burden of production. As noted above, that would be the case even in the absence of the presumption. The second italicized sentence strongly implies that the burden of persuasion is the standard civil burden – preponderance of the evidence. The court simply decides what it thinks is best for the child. Id. That is the same burden of persuasion the grandparent would have to meet in the absence of the presumption.

Since the Roger D.H. presumption does not shift or otherwise alter the burden of production or the burden of persuasion, it is meaningless. It is just a clunky restatement of the best-interests-of-the-child standard. With or without the presumption, a grandparent, to prevail, has to put forth evidence that convinces the court, by a preponderance of the evidence, that visitation is in the best interests of the child. The intent of the presumption may have been to accord "special weight" to parents. In practice, however, it simply does not do that. In fact, it does nothing at all.

The best-interest-of-the-child standard, whether in its original or restated form, violates parents' substantive due process rights and is unconstitutional. Troxel makes that clear:

> "(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.

Kelsey argues: "*Troxel* explicitly declined to impose (the "harm" or clear and convincing evidence) standard." (Kelsey Brief, p. 13). That is misleading. The court did not "decline" to impose those standards. It simply did not consider, much less decide, what standard is constitutionally required. Troxel, 530 U.S. at 73. It left that question for another day and, in the meantime, for state appellate courts (and legislatures).

Fortunately, courts in other jurisdictions have spent a lot of time analyzing and deciding the question. Those courts are not in lockstep agreement as to what substantive due process requires, but they all agree it requires something more than Roger D.H.'s "presumption." A majority of them hold that it requires something significantly more, namely limiting state-compelled grandparent visitation to cases where the grandparent

can show that not granting visitation would harm the child. (See cases cited on pp. 16-19 of Michels' and Lyons' initial brief).

## IV. Under Either the "Harm" Standard, the "Clear and Convincing Evidence" Standard or Even the Best-Interests-of-the-Child Standard, Kelsey's Petition must Be Denied.

Kelsey contends Michels and Lyons significantly reduced her visitation with Avery because she left Michels the ugly voicemail. (Kelsey Brief, p. 2). There are two problems with that contention. First, Michels testified she and Lyons had already begun reducing Avery's grandparent visitation by that time, and the record supports that claim. (R. 87, pp. 21, 39); (R. 35).

Second, and more importantly, even if the voicemail was truly the impetus to reduce Avery's visitation with Kelsey, doing so would not have been an arbitrary or unreasonable decision. The recording of the voicemail was sent to this court as a "non-electronic record item." The court should listen to it. Kelsey calls Michels "selfish." She purports to possess and threatens to publicize unflattering information regarding Michels, Lyons and their significant others. She threatens to sue and implies that because she has a lawyer and resources, she will win.

What reasonable parent would want their child to spend time with a grandparent who behaves that way? Plus, Kelsey can hardly dismiss the voicemail as just one bad moment. She also gave alcohol to a four year-old child. (R. 87, p. 54). She ignored Michels' and Lyons' demand that Avery always where a helmet when horseback riding. (R. 65, p. 20). She asked Michels to lie to Lyons about the proposed Disney trip. (R. 65, p. 20). She concedes that Lyons, her own son, wants nothing to do with her and does not believe she is or was a positive influence on his life. (Kelsey Brief, p. 3).

Kelsey argues "(t)he hostility that Avery's parents felt toward Kelsey was on obvious display (at the trial)." (Kelsey Brief, p. 15). The problem for Kelsey is that the record evidences that any such hostility was not unreasonable. If a fact dispute genuinely existed as to whether Michels and Lyons reduced Kelsey's visitation because of the strain on Avery's schedule, because Kelsey's behavior made them further doubt whether time with her was in Avery's best interest or because of some combination of the two, it was not a *material* fact dispute

because, in any case, Michels and Lyons acted reasonably in reducing Kelsey's visitation with Avery.

Where parents have a reasonable basis for their visitation decisions, the grandparent simply cannot establish that not getting more visitation is harming the child or that more visitation is clearly and convincingly in the child's best interests. Michels and Lyons had a reasonable basis for their decisions.

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

The court's decision is not reasonably supported by the facts of record for all of the reasons noted in the section above. As for whether the court applied the proper legal standard, Wis. Stat. § 767.43(3) imposes the following requirement:

> "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." Wis. Stat. § 767.43(3)(d).

Does that require the grandparent to show the parent has prevented him or her from maintaining *any* relationship with the child? Does it require the grandparent to show the parent has *limited* an existing relationship with the child? Does it only

require the grandparent to show the existence of *any* relationship with the child?

The first option is most consistent with the plain language of the statute. Kelsey does not argue otherwise. She merely contends that interpretation would produce absurd results. (Kelsey Brief, p. 14). It does not. Given parents' substantive due process rights in the care, custody and upbringing of their children, it is perfectly reasonable to limit visitation petitions to cases where a parent has totally cut-off a child's contact with a grandparent. Troxel suggested that might be a limiting principle to protect parents' substantive due process rights:

> "(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.

For either factual and/or legal reasons this court can find the circuit court decision was an erroneous exercise of discretion. If it does not find the decision constitutionally defective, it should do so.

## CONCLUSION

There are several paths to the just result in this case, as outlined above and in Michels' and Lyons' initial brief. The clearest begins with the question of whether Wis. Stat. § 767.43(3) infringes on a fundamental liberty interest such that it must survive strict scrutiny review to accord with constitutional requirements. Wisconsin law clearly dictates the answer – strict scrutiny must apply.

As a result, Section 767.43(3) must be narrowly tailored to advance a compelling state interest. Zachary B, 271 Wis.2d 51 at ¶ 17. Both Wisconsin law and the weight of authority from other jurisdictions demonstrate that the only interest compelling enough to justify state interference with parents' substantive due process rights is preventing harm to children. This court should so find and should hold that the federal and state constitutions require Wisconsin courts to read that "harm" standard into Wis. Stat. § 767.43(3).

The court should then reverse the visitation order entered in this case. The circuit court did not apply the constitutionally

required "harm" standard, and the record makes clear that Kelsey cannot meet that standard.

Whatever path the court chooses to follow, Michels and Lyons respectfully request the court reverse the visitation order and restore their fundamental right to make decisions regarding the care, custody and upbringing of their child.

Dated this 15th day of November, 2017.

**WELD RILEY, S.C.**

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

**ADDRESS**
3624 Oakwood Hills Pkwy
PO Box 1030
Eau Claire, WI 54702-1030
(715) 839-7786
(715) 839-8609 Fax

## 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:

> Proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body test. The length of this brief is 2,908 words.

Dated this 15th day of November, 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 Reply Brief of Appellants Cacie M. Michels and Keaton L. Lyons, was sent by U.S. mail on November 15, 2017, to the Clerk of the Wisconsin Court of Appeals, with three (3) copies served on the parties as follows:

Daniel M. Smetana
Smetana Law Office
2211 E. Clairemont Ave., #4
Eau Claire WI 54701

Kari S. Hoel, Attorney at Law
Hoel Law Office, LLC
103 N. Bridge Street, Ste. 240
Chippewa Falls WI 54729

Dated this 15th day of November, 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 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 15th day of November, 2017.

**WELD RILEY, S.C.**

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

\\wrprlacy\PMDocs\69499.0000\Appeal Reply Brief_20171113.wpd