STATE OF WISCONSIN COURT OF APPEALS DISTRICT III

In the matter of the grandparental visitation of A.A.L.:
In re the Paternity of A.A.L.:

CACIE M. MICHELS,

Petitioner-Appellant,

v. Appeal Case No.: 17-AP-1142

KEATON L. LYONS, Circuit Court Case No. 10-FA-206

Respondent-Appellant,

JILL R. KELSEY,

Petitioner-Respondent.

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

AMICUS BRIEF OF NONPARTY NATIONAL ASSOCIATION OF PARENTS, INC. IN SUPPORT OF APPELLANTS CACIE M. MICHELS AND KEATON L. LYONS

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STATEMENT OF THE INTEREST OF AMICUS

1. The National Association of Parents, Inc. (ParentsUSA) is a Georgia nonprofit corporation, with 501(c)(3) tax exempt status granted in 2013 by the IRS, with its principal place of business located at 1600 Parkwood Circle, Suite 400, Atlanta, Georgia 30339, with its mailing address being Post Office Box 680755, Marietta, Georgia 30068.

2. The missions of ParentsUSA include to preserve the parent-child relationship by protecting the Constitutional rights of parents; i.e., the right of parents to raise their children as they decide so long as the children are not harmed. In a colloquial sense, ParentsUSA works to protect the right of parents to be "adequate" and not having to conform or meet some utopian standard of parenting, no matter the good intentions, created by others (though ParentsUSA certainly encourages all parents to be the very best parent to their children).

3. ParentsUSA serves mothers and fathers, married and unmarried, and their children throughout the USA. ParentsUSA is a nonpartisan organization that is bias free, because it treats all parents the same. However, ParentsUSA never takes a position or supports a

parent's position when there is any issue whatsoever as to whether a child is being harmed. By its review of the briefs of Appellants and Respondent, ParentsUSA does not detect any allegation, contention or finding that the minor child at issue has or would suffer harm if Respondent's petition was denied by the trial court (although there is concern by both the trial court and the Appellants (parents) that the minor child would suffer harm if the Respondent's petition is granted and visitation is awarded, with or without specific direction and orders to the Respondent governing her conduct when the child is present).

4. ParentsUSA seeks to assist this Honorable Court with the resolution of the issues presented in this appeal by offering broader legal and social science perspectives than may be presented by the parties; i.e., the parents of Avery and her paternal grandparent, Ms. Kelsey.

STATEMENT OF THE ISSUES

I. Did the circuit court err when it disregarded the requirements of Wis. Stat. § 767.43(3)(d) and (e) and entered the visitation order notwithstanding the undisputed fact that the parents had not prevented grandmother from having a relationship with the minor child and the circuit court did not find that, in the absence of court awarded visitation, the grandmother's relationship with the minor child would not be maintained and in light of the circuit court finding the grandmother had acted contrary to the decisions of the parents related to the child's physical, emotional, educational or spiritual welfare?

II. Did the circuit court err when it considered the factors of Wis. Stat. § 767.41?

III. Did the circuit court err when the reasons for its entry of the visitation order pursuant to Wis. Stat. § 767.43(3) was not based on the child's best interest or for her benefit, but for the benefit of the grandmother so as to "build the relationship up" between this grandmother and the minor child and to putting this grandmother at ease that she is going to have some limited time on a regular basis that will facilitate building up the relationship.

IV. 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?

STATEMENT ON ORAL ARGUMENT

ParentsUSA agrees with Appellants that this is an important case addressing the casual disregard of a fundamental liberty interest of parents in which the orders in the case below undermine the nuclear family, disregard the parent-child relationship, which is so vital to the well-being of children, and create disharmony within extended families with parents and grandparents at odds and pit maternal and paternal grandparents, siblings, aunts, uncles, and everyone against one another and destroy the possibility of positive and harmonious gatherings such as at the child's school. This case presents an opportunity for Wisconsin to do what many other states have already done; i.e., to interpret their grandparent visitation statutes in a manner consistent with parents' substantive due process rights. ParentsUSA also suggests that this case is an opportunity to interpret Wisconsin's grandparent visitation statute as the Wisconsin legislature intended. Given the importance of the issue, oral argument is appropriate and hereby requested.

STATEMENT ON PUBLICATION

Given the importance of the issue, publication is appropriate for the same reasons as oral argument is appropriate.

STATEMENT OF THE FACTS AND OF THE CASE

ParentsUSA adopts, restates and incorporates by reference the Statement of the Facts and of the Case as set forth in the Brief of Appellants (hereinafter "Brief of Parents") and adds the following facts in the record:

a. Avery L. is (now) an 8-year-old girl.(R. 87, p. 58).

b. Petitioner-Respondent Jill R. Kelsey is Avery's paternal grandmother.(R. 87, pp. 5-6).

c. On January 23, 2016, Kelsey intervened in this 2010 paternity action. (R. 18). Kelsey petitioned for visitation rights under Wis. Stat. § 767.43(3). (R. 18).

d. In her verified Petition for Grandparent Visitation, Kelsey alleged "I have a long established and long maintained relationship with the minor child in this action." (R. 18, ¶5). Kelsey speculated that, "[i]n order for me to maintain a grandparent/grandchild relationship with Avery, I believe it is necessary that I be granted specific grandparent visitation rights." (R. 18, ¶6).

e. The record is devoid of any finding by the circuit court that Kelsey did not have a relationship with Avery. The circuit court did not make a finding that the relationship between Kelsey and Avery would end in the absence of court ordered visitation.

f. Rather, the circuit court's stated purpose in ordering visitation for Kelsey was to "build the relationship up, and to a certain extent putting Miss Kelsey at least at ease that she is going to have some limited time on a regular basis that will facilitate that." (R. 87, ll. 10-14, p. 128)

g. The circuit court granted Kelsey's petition. (R. 65, pp. 125-30) (A-Ap 1-6); (R. 44) (A-Ap 9). In doing so, the circuit court considered the factors under Wis. Stat. § 767.41 when Wis. Stat. § 767.43(3) does not call for doing so and does not permit such reference or consideration. (R. 87, l. 25, p. 127, l. 1-3, p. 128).

h. Michels and Lyons sought reconsideration,(R. 64), but 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, ParentsUSA joins with and supports Appellants Michels and Lyons and respectfully requests 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 this court finds the order does not violate Appellants' 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; Roger D.H. v. Virginia O., 2002 WI App 35, ¶ 9, 250 Wis.2d 747, 641 N.W.2d 440 (affirm only if the circuit court examined the relevant facts, applied the proper legal standard and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach).

Whether an incorrect legal standard was applied is and issue to be reviewed de novo and affirmed only if this court can independently conclude that the facts of record applied to the proper legal standards support the court's decision. *Id.* This case also raises a question of the construction of Wis. Stat. § 767.43(3), a question of law reviewed de novo. Marquardt v. Hegemann-Glascock, 190 Wis.2d 447, 451, 526 N.W.2d 834 (Ct.App.1994).

ARGUMENT

I. **The Circuit Court Erred When It Disregarded The Requirements Of Wis. Stat. § 767.43(3)(d) and (e) And Granted Visitation Notwithstanding The Undisputed Fact That The Parents Had Not Prevented Grandmother From Having A Relationship With The Child And The Court Did Not Find That, In The Absence Of Visitation, The Grandmother's Relationship With The Minor Child Would Not Be Maintained and With The Finding the Grandmother Had Acted Contrary to the Decisions of the Parents Concerning The Child's Physical, Emotional, Educational or Spiritual Welfare.**

The circuit court erred in granting Kelsey's petition without finding that "[t]he 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." Wis. Stat. § 767.43(3)(d). The undisputed evidence was to the contrary; i.e., the parents had not prevented Kelsey and Avery from maintaining a relationship. Rather, the circuit court's purpose in ordering visitation for Kelsey was to "build the relationship up, and to a certain extent putting Miss Kelsey at least at ease that she is going to have some limited time on a regular basis that will facilitate that." (R. 87, ll. 10-14, p. 128)

The circuit court also erred in granting Kelsey's petition because the circuit court failed to find that, in the absence of orders from the circuit court, "[t]he 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." Wis. Stat. § 767.43(3)(e)(emphasis added); (R. 44, ¶¶3, 4, 5, and 6)(A-Ap 9). The mandates within the visitation order required Kelsey to provide safety equipment, not to smoke in the same room or vehicle, not to provide alcohol to the child, and not to drink alcohol to excess when the child is in her care. (R. 44, ¶¶3, 4, 5, and 6). The circuit court included such orders having found that Kelsey had disregarded the directions from Avery's parents. Wis. Stat. § 767.43(3)(e).

The findings of the court and the admissions of Kelsey make undisputed that she "has maintained a relationship with [Avery]" [just not as Kelsey desires] and Kelsey "has [not] been prevented from [maintaining a relationship with Avery] by a parent who has legal custody of the child." Wis. Stat. § 767.43(3)(d)(emphasis added). Because the circuit court and Kelsey acknowledge that Kelsey does have a relationship with the child, the court erred in awarding Kelsey any visitation under Wis. Stat. § 767.43(3).

Wis. Stat. § 767.43(3) requires the circuit court to determine "all of the following [subparagraphs (a) through (f)]" before granting visitation rights. If there is a determination by the trial court that any one of

subparagraphs (a) through (f) is not true, then the inquiry ends and the petition for grandparent visitation must be denied. The trial court failed to include in its Order of April 10, 2017, findings of fact as to subparagraphs (a) through (f). Because, as noted above, the record reflects that the court could not and did not determine that subparagraphs (d) and (e) were applicable, the court erred in awarding the grandparent any visitation under Wis. Stat. § 767.43(3). Its Order should be reversed without remand.

In announcing its ruling and in the Order granting the visitation, the circuit court had determined subparagraphs (d) and (e) were not met requiring denial of Kelsey's petition. Rogers v. Rogers, 2007 WI App 50, 300 Wis.2d 532 (Ct. App. 2007) is dispositive on similar facts:

> Parents have a liberty interest in directing the care, custody and control of their children. Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The Due Process Clause does not permit a state to infringe on a fit parent's fundamental right to make child-rearing decisions simply because a court disagrees with the parent or believes a better decision could be made. *Id.* at 72-73, 120 S.Ct. 2054.
>
> We construe the grandparents' desire to secure a more generous and predictable visitation schedule as falling into the category of fashioning a "better" arrangement. But that is not enough to overcome the presumption that [mother] Mary Jo's visitation decisions are in her children's best interests and thus bar state intervention. We agree with the circuit court that the informal arrangement is sufficient to maintain the established relationship and that state

> interference in the form of court-ordered placement with the grandparents is unwarranted.

2007 WI App 50, ¶¶18, 21 (emphasis added).

ParentsUSA urges this Court to hold that a petition seeking visitation must allege that a grandparent has been prevented from maintaining a relationship by a parent who has legal custody of the child. *Id.* To avoid the horrific intrusion into the parent-child relationship, the expenditure of inordinate amounts of money, the use by grandparents of greater resources to extort arrangements more to the grandparent's liking, or greater discord within families that litigation generates, this Court should hold that, if a grandparent *has* a relationship with the child that is not being prevented by a parent, then the circuit court is not permitted to override the parent's determination of what is in the child's best interest. Rogers v. Rogers, 2007 WI App 50.

This court here has an opportunity to minimize reliance on Roger D. H., 250 Wis.2d 747, ¶¶18-19, 641 N.W.2d 440, which provides little guidance, and to emphasize Rogers v. Rogers, 2007 WI App 50, 300 Wis.2d 532 (Ct. App. 2007). In Roger D. H., the court only addressed whether a parent being found unfit was necessary to grant grandparent visitation (it was not) and whether Wis. Stat. §767.245(3)(1997-98 version) is facially unconstitutional

(finding it is not). However, without conceding the Rogers D. H. court correctly decided Wis. Stat. §767.245(3) is not unconstitutional, which ParentsUSA contends it is, Rogers D. H. did require circuit courts to give presumptive weight to the parent's decision regarding non-parental visitation, but failed to explain what that entails. Rogers v. Rogers, 2007 WI App 50, 300 Wis.2d 532 (Ct. App. 2007) clarified what presumptive weight to the parent means; i.e, a grandparent not having what the grandparent wants or making the relationship between grandparent and child better is insufficient to overcome the presumption that the parent's decision is in the best interests of the child. *Id.*

> The question is not whether the additional time sought by the grandparents with their grandchildren might be "good" for all concerned. We assume it is. Rather, the questions are whether, *under the facts of this particular case,* the state should intervene to dictate to Mary Jo, the parent with primary placement, that such added visitation time is warranted, and, if so, which parent should forfeit a portion of his or her placement time to accommodate the grandparent visitation. The facts of this case demonstrate no need for such state intervention against Mary Jo's due process rights to make decisions concerning the care, custody and control of her children.

Rogers v. Rogers, 2007 WI App 50, ¶25, 300 Wis.2d 532, 534.

Wis. Stat. § 767.43(3) and most Wisconsin appellate opinions fail adequately to address (a) the "special weight" that is to be accorded a fit parent's decision

about what is in the best interest of his or her child and (b) to consider whether visitation awarded to a grandparent over the objections of a child's parents "will not substantially interfere with the parent-child relationship[.]" Grant v. Grant, No. 80, 2017, at 1-2 (De. November 7, 2012). After all, if there is interference with the parent-child relationship by the grant of visitation to any person other than the other parent, it is inconceivable how doing so can be in the child's "best interests." Wis. Stat. § 767.43(3)(f). Rogers v. Rogers, 2007 WI App 50, 300 Wis.2d 532 (Ct. App. 2007) does give guidance as to how the special weight of a parent's views on visitation and their children's best interest is to be considered.

The Delaware Supreme Court, citing C.M.G. v. L.M.S., 2009 WL 5697870, at *8 (Del. Fam. Ct. Dec. 21, 2009) (citations omitted)), declared that the U. S. Supreme Court's requirement of "special weight," though not defined by it, "is a very strong term signifying extreme deference." Grant v. Grant at 2. As here, the trial court in Grant v. Grant "essentially found the parents' objections were not unreasonable" but nonetheless awarded grandparent visitation with terms believing that the visitation with the terms "would minimize the parents' concerns and render their objections 'clearly

unreasonable.'" *Id.*[1] The Delaware Supreme Court found there was no basis to conclude that the terms of the visitation order would adequately address the reasonable objections of the parents[2] and the grandparents did not provide evidence that the visitation "would not substantially interfere with the parent-child relationship." *Id.* at 2. The Delaware Supreme Court reversed the award of visitation and declined to remand as the Delaware Supreme Court did "not wish to put the parties through further proceedings." Instead, the Delaware Supreme Court reversed and denied the grandparents' petition. Grant v. Grant at 13.

II. The Circuit Court Erred When It Considered The Factors Of Wis. Stat. § 767.41

The circuit court erred in considering the factors under Wis. Stat. § 767.41, factors that are to be considered when the issues are between parents. Wis. Stat. § 767.43(3) does not permit such consideration. (R. 87, l. 25, p. 127, l. 1-3, p. 128). In so doing, the circuit court erroneously put Kelsey on par with a parent.

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[1] Per 13 Del. C. § 2412(a)(2)(d), if a parent objects to visitation, the grandparent must demonstrate, by clear and convincing evidence, that the objection is unreasonable; and, by a preponderance of evidence, that the visitation will not substantially interfere with the parent/child relationship. This court should hold Wis. Stat. § 767.43(3) requires the same because, in doing so, the special weight given to the parent's decisions as to his or her child or children may thereby be met.

[2] If the parents' objections are not unreasonable, as they are here, it is not for the circuit court to attempt to make the objections unreasonable by fashioning a visitation order addressing those objections. Grant v. Grant at 11.

III. The Circuit Court Erred When Its Entry Of The Visitation Order Pursuant To Wis. Stat. § 767.43(3) Was Not For The Benefit of The Child, But, Instead, For The Benefit of The Grandparent

The circuit court erred when granting visitation pursuant to Wis. Stat. § 767.43(3), not to prevent harm to this child, which would be a legitimate compelling state interest or, arguably, not to ensure a relationship exists between Avery and her grandparent. As the circuit court stated, the grant of visitation to Kelsey was to "build the relationship up" between Kelsey and Avery and to put Kelsey at ease that she is going to have some limited time on a regular basis that will facilitate building up the relationship. (R. 87, ll. 9-14, p. 128). Wis. Stat. § 767.43(3) serves a limited purpose and it is not for the benefit of grandparents.

IV. The Visitation Order Entered By The Circuit Court Violated The 14th Amendment To The U. S. Constitution And Article I, Section 1 Of The Wisconsin Constitution.

ParentsUSA joins, adopts, restates and incorporates by reference the Appellants arguments and citations of authority with respect to the challenge based upon the U. S. Constitution and the Wisconsin Constitution.

For all these reasons, the National Association of Parents requests that this court reverse the visitation order and deny the petition without remand.

Dated this 15th day of December 2017.

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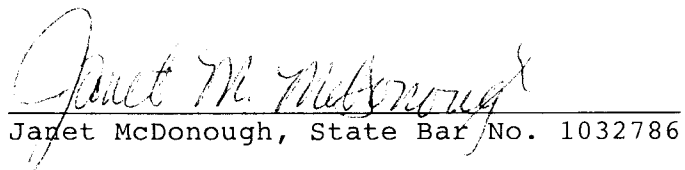
AMENDED CERTIFICATION

I hereby certify that this brief submitted December 15, 2017, conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font. The length of this brief is 13 pages.

Dated this 19th day of December 2017.

National Association of Parents, Inc.

By: 

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CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80, 801.16 and 809.18, that the **AMICUS BRIEF OF NONPARTY NATIONAL ASSOCIATION OF PARENTS, INC. IN SUPPORT OF APPELLANTS CACIE M. MICHELS AND KEATON L. LYONS** was sent via U.S. mail to the Clerk of the Wisconsin Court of Appeals, with 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 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 December 2017.

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