SUPREME COURT OF WISCONSIN

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

CACIE M. MICHELS,

Appeal No.: 17-AP-1142

Petitioner-Appellant,

v.

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 PETITIONER-RESPONDENT JILL R. KELSEY

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COUNTER-STATEMENT OF THE ISSUE

The Court of Appeals certified one question, distinct from both of those in Appellants' docketing statement. (R.75) It asked this Court "to clarify the standard of proof required for a grandparent to overcome the presumption that parents' decisions regarding the scope and extent of their child's visitation with the grandparent is in the child's best interest." (Certification at 1-2) This Court also has jurisdiction to decide, should it wish, the issues contained in the docketing statement.

COUNTER-STATEMENT OF THE CASE

A. The parties to this case

Ann[1] was born in 2009 and will turn nine years old this October. (R.29; R.87 at 6:9-10)[2] Cacie Michels is Ann's mother. (R.87 at 6:11-12) Ann lives with Cacie. (R.87 at 59:21-60:6)

Keaton Lyons is Ann's father. (R.87 at 5:25-6:4) Not long after Ann was born, Keaton and Cacie, who never married, split up. (R.87 at 58:25-59:4) In a 2010 action initiated

[1] This brief continues the practice of referring to A.A.L. as Ann. It refers to adult parties by their first names for simplicity.

[2] Record citations use R.__ to indicate document numbers on the record index transmitted to the court of appeals on August 14, 2017.

by Chippewa County, Keaton stipulated to paternity and child support. (R.3-R.6; R.16)

Though the parents have joint custody (R.3), Keaton was "not … very involved" in the first six years of Ann's life. (R.87 at 18:10-12) However, since the latter part of 2015, when Ann turned six, she has spent every other weekend with Keaton, his girlfriend, and their son Mason under an informal agreement. (R.87 at 62:5-14, 69:14-20)

Jill Kelsey—who Ann calls Grandma Gigi—is Ann's paternal grandmother (Keaton's mother). (R.87 at 5:25-6:4, 44:19-20) Jill works for Chippewa County Public Health as a registered nurse. (R.87 at 5:1-10) In 2014, Jill received an honorable discharge from the U.S. Army Reserves as a Captain after nearly 27 years of service. (R.87 at 5:11-24)

B. Jill and Ann's relationship

The depth and breadth of the relationship Jill and Ann share is uncontested. Cacie testified that Ann "loves Jill." (R.87 at 65:13) Keaton "absolutely" agreed that Ann "really loves spending time with her grandmother." (R.87 at 92:25-93:2) Jill, who owns horses and is an avid rider, keeps a pony for Ann, and the two rode regularly, both at weekly summer rodeo events in Mondovi and around Jill's neighborhood.

(R.87 at 6:24-8:7) Ann has a bedroom at Jill's house, furnished and decorated for her. (R.87 at 14:2-24) For years, Ann regularly spent the night at Jill's home without her parents, both after weekly summer rodeo events and on other occasions. (R.87 at 6:21-23, 7:4-6, 53:15-22, 56:12-20) Ann often celebrated holidays, including Christmas and Easter, with Jill. (R.35; R.87 at 11:14-12:10, 15:11-21)

In December 2015, Cacie and Keaton "drastically" and "abruptly" reduced Jill's contact with Ann. (R.87 at 22:7-24, 39:15-23; *see also* R.87 at 27:8-28:16) There is a dispute about how much Ann and Jill saw one another early in 2016. (R.87 at 22:7-24, 35:19-36:17, 74:11-16) Once Jill petitioned for a visitation order under Wis. Stat. § 767.43(3), Cacie and Keaton cut off Ann's visits to Jill's house. (R.18; R.87 at 78:22-80:23) The circuit court appointed a Guardian ad Litem and held an extensive evidentiary hearing. (R.24; R.87)

Jill introduced into evidence a calendar (R.35) that documents significant, sustained contact with Ann from birth until the end of 2015. It was undisputed that the calendar under-estimated the time Jill and Ann spent together, because, as Jill explained, it included "only [visits] that I can actually prove through pictures and dates," even though "not every time that

I had [Ann] did I take pictures." (R.87 at 9:6-22) The calendar especially under-counted winter visits, when Jill did not take pictures because "we were just in the house watching Disney movies or coloring." (R.87 at 9:16-20)

The calendar also reflected that Jill had "about as much time" with Ann in all of 2016 as "she had probably in any given month all of the years prior to that." (R.87 at 118:17-20) Jill testified that her requested visitation schedule—which was more extensive than what the circuit court ultimately ordered—"is basically what I had the first six years of [Ann's] life." (R.87 at 28:24-25)

C. Clarifying what the record shows

The record shows that Ann is safe with Jill. Neither Cacie nor Keaton expressed any concerns about safety prior to this litigation. (R.87 at 16:1-10, 29:17-20) Indeed, Cacie testified that Ann "has always been safe when she was with Jill," and Keaton called Jill "a good grandmother to [Ann]." (R.87 at 90:18-23, 102:5-7) The Guardian ad Litem recommended visitation. (R.29; R.87 at 123:11-20) And the circuit court found, based on the evidence, that Jill "has maintained a relationship with" Ann and "is not likely to act in

a manner inconsistent" with the parents' rules, such that visitation is in Ann's best interest. (R.88 at 16:3-15)

Cacie and Keaton distort the record and resort to insinuation in an effort to call Jill's judgment into question. The record includes Jill's unrebutted testimony that "I don't smoke in the house when [Ann] is around. I don't smoke with [Ann] in the car." (R.87 at 37:5-7) The record contains Jill's uncontested explanation of the circumstances in which she once allowed Ann a small sip of an alcoholic beverage and reflects that she immediately told Cacie, who laughed about and expressed no concerns over the incident for years, until this visitation dispute. (R.87 at 54:6-55:10) The record also indicates that Jill complied with Cacie and Keaton's request that Ann wear a helmet while horseback riding, after that request was made in December 2015. (R.87 at 30:15-21, 37:12-16, 44:24-45:16)[3] In sum, the record does not support Cacie and Keaton's attacks on Jill's judgment when it comes to Ann.

[3] Cacie and Keaton cite Jill's deposition transcript—which was neither offered nor admitted into evidence—for the proposition that she subsequently allowed Ann to ride without a helmet once, because the weather was too cold for a helmet that left Ann's ears uncovered. (R.65, Exh. 2 at 29:7-17) The deposition transcript is not part of the trial record. *See Commerce Ins. Co. v. Merrill Gas Co.*, 271 Wis. 159, 168, 72 N.W.2d 771 (1955). But, to the extent this Court wishes to consider it, the transcript also indicates that Jill went to great lengths to honor Cacie and Keaton's

Nor does the record support Cacie and Keaton's characterizations of Jill as a liar. Jill and Cacie discussed and subsequently planned to take Ann to Disney World and to swim with dolphins. (R.87 at 16:17-17:8) They discussed this trip for nearly two years, waiting for Ann to reach the minimum age for swimming with the dolphins. (R.87 at 16:11-17:12) As Ann's sixth birthday approached, Jill and Cacie cemented their plans and Jill purchased plane tickets while Cacie was on the phone, confirming every step of the plan. (R.87 at 17:9-18:4) This coincided with Keaton getting more involved in Ann's life. (R.87 at 18:10-12) Because she had recently stopped providing Keaton direct financial support, Jill was hesitant to tell him that she was paying to take Ann and Cacie to Florida. (R.87 at 18:5-21:4, 20:3-5, 52:7-11) But the record does not support Cacie and Keaton's assertion that Jill lied.[4] Similarly,

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request, borrowing from a neighbor a child-sized helmet when Keaton forgot to pack Ann's. (R.65, Exh. 2 at 18:24-19:23)

The trial record is unequivocal that, since Cacie and Keaton expressed a preference that Ann wear a helmet, Jill has ensured she does so. (R.87 at 37:12-16, 44:24-45:16)

[4] Again, Cacie and Keaton go outside the record to cite Jill's deposition transcript. But there Jill testified that she had *not* lied to Keaton. (R.65, Exh. 2 at 31:24-32:17) Jill acknowledged that she had not been fully forthcoming with Keaton, but the only references to lying are injected by Cacie and Keaton's counsel and resisted by Jill. (R.65, Exh. 2 at 32:2-15)

the voicemail message they reference is not part of the trial record,[5] and to the extent it is referenced in the trial record, those mentions do not support Cacie and Keaton's incendiary characterizations. (R.87 at 35:4-18, 66:3-9)

D. The visitation order and subsequent proceedings

After considering the entire record and the relevant legal standard, the circuit court ordered visitation, albeit on a less-frequent schedule than Jill had requested or the Guardian ad Litem had recommended.[6] (R.87 at 125:9-16, 127:19-20) The order ensures that Ann and Jill will have at least some visitation—one afternoon per month and one-week during the summer. (R.45; R.87 at 128:20-25, 129:14-17)

Once Jill sought to enforce the order (R.51), Keaton, through new counsel, requested the circuit court reopen the judgment and reconsider the visitation order, arguing both that the court "misunderstood its role and the standards it was

[5] Like Jill's deposition transcript, this recording was neither offered nor accepted into evidence. (R.62 at ¶1)

[6] Cacie and Keaton assert that the order requires the parents "to cede custody." (Br. at 6, 30; *see also id.* at 35, 42) This is inaccurate. "Custody" is defined at Wis. Stat. § 767.001(2). On distinctions among the terms "custody," "placement," and "visitation," see *In re Opichka*, 2010 WI App 23, ¶13, 323 Wis. 2d 510, 780 N.W.2d 159; *Lubinski v. Lubinski*, 2008 WI App 151, ¶¶8-9, 314 Wis. 2d 395, 761 N.W.2d 676.

required to apply" and that Jill's "judgment with regard to [Ann] has, at least at times, been quite poor."[7] (R.63 at 2, 6) After briefing and a hearing on the merits, the circuit court denied the motion. (R.73; R.88 at 14:8-18:12) With regard to the facts, the circuit court reiterated that Ann "has had a significant and ongoing relationship with her grandma [Jill]," such that it was not in her best interest "then or now to just cut off cold turkey her contact with grandma." (R.88 at 8:24-9:1, 16:13-15; *accord* R.88 at 16:22-23, 18:3-6) After Keaton's new counsel acknowledged not reviewing the trial record (R.88 at 5:21-22), the circuit court explained:

> Now, if you had been here for the hearing, you would have heard that for years, I am talking not just a couple of months, I am talking years, grandma had this child -- I can be corrected, I'm sure, by [the Guardian ad Litem] -- but two days a week was almost the norm for several years before this. There was a calendar introduced into evidence that had dates circled, and she was there a lot, particularly in the summertime when there was these horse events. … [G]randma had a role, a significant role, I think, significant contact with [Ann].

(R.88 at 15:11-24) With regard to the law, the circuit court allowed that it "was not very articulate in my decision perhaps"

[7] The motion paperwork reflects that Keaton alone filed the motion. (R.63-64) At the reconsideration hearing, new counsel represented both Cacie and Keaton. (R.88 at 1:16-2:11)

but affirmed that it reviewed and applied relevant precedent. (R.88 at 14:22-15:10, 17:25-18:3)

Throughout the proceedings below, the circuit court was mindful of and faithfully applied the governing legal standard. (R.86 at 3:16-18; R.87 at 25:13-24, 26:19-22; R.88 at 15:13-16:10, 19:8-11) The circuit court "applied the presumption a fit parent's decision on placement is in the child's best interest." (R.88 at 15:4-6) But, as Jill's trial counsel noted, "[t]here was overwhelming evidence in the record to overcome the parental presumption." (R.70 at 4) The Guardian ad Litem echoed this, noting that the visitation order accorded with her recommendation and the evidence. (R.88 at 12:10-12)

Cacie and Keaton appealed from the visitation order (but not the reconsideration order). (R.74) They identified two issues: whether Wisconsin precedent, as applied by the circuit court, is unconstitutional and, if not, whether the circuit court exceeded its discretion. (R.75) The court of appeals certified a specific threshold question, seeking clarification about the applicable standard of proof. (Certification at 1-2)

STANDARD OF REVIEW

The Court has been asked to clarify the standard of proof required to overcome the presumption in favor of a parental decision regarding grandparent visitation. This requires interpretation of Wis. Stat. § 767.43(3). The meaning and application of the statute are questions of law that the Court addresses de novo. *See In re Marriage of Meister*, 2016 WI 22, ¶19, 367 Wis. 2d 447, 876 N.W.2d 746.

To the extent the Court also takes up Cacie and Keaton's constitutional challenge, that "likewise presents a question of law requiring [this Court's] independent review." *State v. McKellips*, 2016 WI 51, ¶29, 369 Wis. 2d 437, 881 N.W.2d 258. To prevail on an as-applied constitutional challenge, "the challenger must show that his or her constitutional rights were actually violated," *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶13, 357 Wis. 2d 360, 851 N.W.2d 302 (quoting *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63), and "must prove beyond a reasonable doubt that as applied to him or her the statute is unconstitutional," *Mayo v. Wis. Injured Patients & Families Fund*, 2018 WI 78, ¶58, --- Wis. 2d ---, 914 N.W.2d 678.

Should the Court opt to reach the merits of the visitation order, the standard of review differs. The decision below was an exercise of the circuit court's discretion. *Meister*, 2016 WI 22, ¶47. This Court affirms discretionary determinations as long as the circuit court "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶13, 312 Wis. 2d 1, 754 N.W.2d 439. In reviewing "a circuit court's discretionary determination," this Court "look[s] for reasons to sustain" the action below. *Miller v. Hanover Ins. Co.*, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493 (citing *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610). This Court "will not reverse a discretionary determination by the circuit court if the record shows that discretion was in fact exercised and [it] can perceive a reasonable basis for the court's decision." *Id.* (quoting *Sukala*, 2005 WI 83, ¶8).

ARGUMENT

The Court should confirm the well-settled law that the presumption a parent's decision regarding grandparent visitation is in the best interests of the child can be rebutted by a preponderance of the evidence. That should end this matter, as the visitation order meets that standard and was a lawful, proper exercise of the circuit court's discretion. However, in the event this Court overturns precedent and changes the applicable legal standard, it should remand for further circuit court proceedings under that new standard.

Cacie and Keaton argue that the circuit court's actions—which followed Wisconsin law governing presumptions—violated their constitutional rights. As a threshold matter, this argument was forfeited below, when Cacie and Keaton failed to object to the circuit court's application of the legal standard they now challenge. If the Court reaches the merits, it should rule that the question certified by the court of appeals regarding the appropriate standard of review has been definitively answered and that the standard is neither unclear nor unconstitutional. Disagreements with that standard are policy questions properly answered by the legislature. To the extent that this Court wishes to address

Cacie and Keaton's further constitutional arguments, those arguments too, are unavailing and should be rejected.

I. Cacie And Keaton Forfeited TheirRight To Object To The Legal Standard Applied By The Circuit Court.

As a threshold matter, the Court should dismiss this appeal because Cacie and Keaton failed to lodge a timely objection to the legal standard used by the circuit court. "[T]he rule requiring issues to be raised first in the circuit court is 'a bedrock principle of appellate practice.'" Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 3.4 (7th ed. 2016) (quoting *In re Ambac Assur. Corp.*, 2012 WI 22, ¶35, 339 Wis. 2d 48, 810 N.W.2d 450).

At trial, the circuit court clearly articulated the legal standard it understood to apply, and asked the parties to speak up if they disagreed:

> THE COURT: … I believe the standard is still best interest, and I still believe that the Supreme Court believes that the fit parents' decisions about placement is *[sic]* to be presumptively in the child's best interest. Am I wrong about that, anybody?
>
> [CACIE AND KEATON'S COUNSEL]: No, Your Honor. That is spot on.
>
> THE COURT: Mr. Smetana.
>
> [JILL'S COUNSEL]: There is an initial presumption, Your Honor, but it's only a presumption. It is a rebuttable presumption. …

(R.87 at 25:13-24) If Cacie and Keaton believed that the quantum of proof needed to overcome the presumption here differed from other presumptions under Wisconsin law, they needed to say so. They did not. Accordingly, they forfeited the argument that the circuit court applied the wrong standard.[8] *See, e.g.*, *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177; *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612.[9]

This Court has enforced forfeiture, even where the court of appeals has not. In *Bostco LLC v. Milwaukee Metropolitan Sewerage District*, the plaintiff alleged inverse condemnation of timber pilings supporting its building. 2013 WI 78, ¶82, 350 Wis. 2d 554, 835 N.W.2d 160. On appeal, Bostco alleged for the first time that its inverse-condemnation theory included the

[8] Nor can Cacie and Keaton argue the circuit court was unaware of the constitutional dimension of this case. At the hearing to appoint the Guardian ad Litem, the circuit court summarized the case as one that involved Cacie and Keaton's "right to parent and raise their own child." (R.86 at 3:16-18). And in her closing argument at trial, Cacie and Keaton's counsel argued that Jill's visitation petition was "interfering with [Cacie and Keaton's] rights to take care of this child and to be the parent of this child." (R.87 at 122:6-8)

[9] The constitutional dimension of this case does not require an exception to the forfeiture rule. The so-called constitutional exception involves only those rights—"including the right to the assistance of counsel, the right to refrain from self-incrimination, and the right to have a trial by jury"—"that the Framers thought indispensable to a fair trial." *Ndina*, 2009 WI 21, ¶¶31-32 (internal quotation marks omitted).

groundwater under the building. *Id.*, ¶83. This Court held that Bostco's appeal raised "a fundamentally different argument than that which it raised and tried before the circuit court" and, on that basis, "decline[d] to address the inverse condemnation/ takings claim, notwithstanding the court of appeals' decision to reach this issue." *Id*. The same logic applies here, where Cacie and Keaton—like Bostco—attempt to obtain reversal by raising a fundamentally different argument on appeal than they made at trial. That is not permitted. *Id.*

Indeed, there is even greater reason to dismiss this appeal, because Cacie and Keaton invited the ruling they now point to as error. By endorsing the circuit court's articulation of the controlling legal standard as "spot on" (R.87 at 25:20), Cacie and Keaton "affirmatively contributed to what [they] now claim[] was trial court error." *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989) (declining to consider merits of Gove's appeal in the interests of justice).

II. Wisconsin Law Clearly Establishes The Standard Of Proof Required To Overcome The Presumption That A Parental Visitation Decision Reflects The Child's Best Interest.

Should the Court choose not to dismiss this case based on forfeiture, it should hold that Wisconsin law already clearly

establishes the applicable standard of proof. Cacie and Keaton correctly assert that, when a grandparent seeks to rebut the presumption in favor of a parental visitation decision, Wisconsin precedent applies a preponderance-of-the-evidence standard, in full accord with the Wisconsin Rules of Evidence. But Cacie and Keaton err when they attack that precedent on constitutional grounds. The presumption that has been imposed by both the court of appeals and this Court in prior cases provides greater protection to parents than anticipated by the Supreme Court of the United States or required by due process. The applicable principles of Wisconsin law are neither unclear nor unconstitutional.

A. This Court has affirmed that *Roger D.H.* "appropriately addressed and resolved" the presumption prescribed in *Troxel*.

In 2002, the court of appeals rejected a constitutional challenge to Wisconsin's grandparent-visitation statute. *See In re the Paternity of Roger D.H.*, 2002 WI App 35, ¶¶13-20, 250 Wis. 2d 747, 641 N.W.2d 440.[10] The court held that, in

[10] *Roger D.H.* addresses Wis. Stat. § 767.245(3), subsequently renumbered without substantive alteration as section 767.43(3). *See Meister*, 2016 WI 22, ¶17 n.9.

In addition to actions under chapter 767, grandparents and other parties may also petition for visitation subsequent to the adoption of a minor child (Wis. Stat. § 48.925), following the death of a parent (Wis.

considering petitions under the grandparent-visitation statute, "circuit courts must apply the presumption that a fit parent's decision regarding grandparent visitation is in the best interests of the child." *Id.*, ¶19. "At the same time," the court held, "this is only a presumption and the circuit court is still obligated to make its own assessment of the best interest of the child." *Id.*

The *Roger D.H.* court read this presumption into the grandparent-visitation statute to satisfy due-process concerns articulated by the Supreme Court of the United States in *Troxel v. Granville*, 530 U.S. 57 (2000). That case, challenging the State of Washington's grandparent-visitation statute, was largely inconclusive and yielded an array of separate opinions. While six Justices affirmed the judgment reversing the visitation order in that case, the Court was unable to assemble a majority in support of any rule. For the plurality opinion, the "problem" was "not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the parent's] determination of her daughters' best interests." *Id.* at 69. Essentially, the Washington statute, as

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Stat. § 54.56), and pursuant to a court's general equitable authority to protect a child's best interest. *See In re Custody of H.S.H.-K.,* 193 Wis. 2d 649, 691, 533 N.W.2d 419 (1995).

applied by the trial court, eliminated the parents from the decision-making process with regard to visitation. In the plurality's view, "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.

Roger D.H. applied the *Troxel* plurality's teachings. It explained that "[w]hat 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." 2002 WI App 35, ¶19 (quoting *Troxel*, 530 U.S. at 68-69). By imposing a presumption in favor of the parental decision, *Roger D.H.* constrained how circuit courts apply the grandparent-visitation statute. *See id.* The case's guidance ensured that Wisconsin law avoids the pitfalls identified in *Troxel*. Indeed, in light of *Roger D.H.*, Wisconsin law is the opposite of the Washington law rejected in *Troxel*, which imposed upon "the fit custodial parent[] the burden of *disproving* that visitation would be in the best interest of her daughters." 530 U.S. at 69 (emphasis in original).

Roger D.H.'s guidance has worked in practice. As one case explains:

> Pursuant to *Troxel* and *Roger D.H.*, the court accords special weight by applying a rebuttable presumption that the fit parent's decision regarding grandparent visitation is in the best interest of the child. *In other words, ... 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.

In re Nicholas L., 2007 WI App 37, ¶12, 299 Wis. 2d 768, 731 N.W.2d 288 (emphasis added; internal quotation marks and citations omitted). Subsequent decisions indicate no confusion over this guidance. *See, e.g.*, *In re A.M.K.*, 2013 WI App 128, ¶¶17-18, 351 Wis. 2d 223, 838 N.W.2d 865 (unpublished) (citing *Troxel*, *Roger D.H.*, and *Nicholas L.* (which it refers to as *Martin L.*)).

Wisconsin's application of *Troxel* reached this Court in 2016. Though the issue arose under a broader visitation provision, Wis. Stat. § 767.43(1), this Court expressly affirmed the *Roger D.H.* decision. *Meister*, 2016 WI 22, ¶40 ("We conclude that the court of appeals appropriately addressed and resolved this contention [that *Troxel* renders the visitation statute unconstitutional] in *Roger D.H.*"); *see also id.*, ¶6

("[W]e conclude that the legislature's decision to allow courts to grant visitation rights to grandparents … when visitation is in the best interest of the child does not unconstitutionally infringe on parents' constitutional rights because any best interest determination must give special weight to a fit parent's decisions regarding the child's best interest.").[11]

Cacie and Keaton dismiss *Meister*'s constitutional analysis as "quite limited" (Br. at 25), but they fail to substantiate that characterization. The parties to that case addressed this issue in briefing and oral argument, *see Meister*, 2016 WI 22, ¶40, and this Court explored constitutionality in a full section of the opinion—four pages of the Wis. 2d reporter, *see id.*, ¶¶39-47. There is no basis to suggest that this Court's decision was ill-considered or ill-informed.

B. Settled Wisconsin law provides for uniform treatment of presumptions, including the one imposed by *Roger D.H.* and *Meister*.

Contrary to Cacie and Keaton's argument, the presumption imposed by *Roger D.H.* and *Meister* is in accord

[11] The lead opinion, written by Justice Prosser, was joined by Chief Justice Roggensack and Justice A.W. Bradley. Justice Ziegler, joined by Justice Gableman, also endorsed *Roger D.H.* 2016 WI 22, ¶80 (Zieger, J., concurring) (joining all but ¶23 of the lead opinion). Justice R.W. Bradley did not participate. *Id.*, ¶49. Justice Abrahamson wrote separately without addressing the *Roger D.H.* decision. *Id.*, ¶¶50-79.

with well-settled Wisconsin law on presumptions, as set forth in the Wisconsin Rules of Evidence. The absence from the decisions in *Roger D.H.* and *Meister* of any discussion about the quantum of proof required to rebut the presumption (adopted in *Roger D.H.* and affirmed in *Meister*) neither constitutes an oversight nor creates any ambiguity.

Rule of Evidence 903.01 governs presumptions. It provides:

> Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Wis. Stat. § 903.01. It establishes a default principle applicable in any instance where a civil statute does not expressly establish a different standard. *See id.*; *accord Judicial Council Committee's Note*—1973, 59 Wis. 2d R41, R46-R47. Because the grandparent-visitation statute "is silent with respect to the effect of the presumption on the opposing party … and because [visitation] is civil in nature, the presumption is governed by sec. 903.01, Stats." *In re Interest of Kyle S.-G.*, 194 Wis. 2d 365, 373, 533 N.W.2d 794 (1995) (internal citation omitted).

By its plain text, section 903.01 provides that a presumption allows proof of a basic fact to suffice for the establishment of a presumed fact, unless the opposing party proves, by a preponderance of the evidence, that the presumed fact is more likely than not untrue. *See Kruse v. Horlamus Indus., Inc.*, 130 Wis. 2d 357, 365-66, 387 N.W.2d 64 (1986); *see also Judicial Council Committee's Note*—1973, 59 Wis. 2d at R50; Wis. JI-Civil 352; Daniel D. Blinka, *Wisconsin Evidence* (Wisconsin Practice Series vol. 7) § 301.2 (4th ed. 2017). This Court has noted that section 903.01 implicitly imposes "a uniform quantum of proof for every presumption." *Kruse*, 130 Wis. 2d at 366 (citing *Judicial Council Committee's Note*—1973, 59 Wis. 2d at R46).[12] That uniform standard "is equivalent to 'the greater weight of the credible evidence' required by the ordinary burden of proof." *Id.*[13]

[12] *Accord Judicial Council Committee's Note*—1973, 59 Wis. 2d at R44 ("There seems to be no basis for the *[sic]* perpetuating a distinction between presumptions. Elimination of the distinction may serve to eliminate confusion in the applicable law.").

[13] To be sure, the uniform burden of proof is not without exception. Section 903.01's opening clause excepts those presumptions to which statutes expressly apply a higher burden of proof. Wis. Stat. § 903.01. This Court has echoed section 903.01, applying the uniform standard to "[a]ll presumptions at common law and all statutory presumptions which do not express a quantum of proof." *Kruse*, 130 Wis. 2d at 366 (citing *Judicial Council Committee's Note*—1973, 59 Wis. 2d at R46). Here, the exception does not apply.

That is how the circuit court proceeded in this case. The basic fact is that Cacie and Keaton oppose Jill's request for visitation. The presumed fact is that visitation is not in Ann's best interest. Jill produced evidence that visitation serves Ann's best interest—evidence rebutting the presumption. Under section 903.01, the circuit court properly engaged in "its own assessment of the best interest of [Ann]." *Roger D.H.*, 2002 WI App 35, ¶19; *Nicholas L.*, 2007 WI App 37, ¶12. Applying the standard of proof required by settled law, it concluded that the evidence rebutted the presumed fact. (R.87 at 123:17-20; R.88 at 16:3-17:25)

C. The application of settled Wisconsin law on presumptions in the grandparent-visitation context meets constitutional requirements.

Cacie and Keaton argue that the circuit court's actions —which followed Wisconsin law governing presumptions— violated their constitutional rights. Their arguments fail.

1. The *Roger D.H./Meister* presumption is not rendered "meaningless" by section 903.01's preponderance standard.

Cacie and Keaton's brief distorts how presumptions work. They argue that "[i]f the presumption in favor of the parent can be overcome by a preponderance of the evidence

that visitation is in the child's best interests, then the presumption is meaningless." (Br. at 22) This is not a constitutional argument, but one about the way presumptions function. And it is incorrect.

In offering a dictionary definition of "presumption," Cacie and Keaton invite confusion by quoting only the last of three sentences in the Black's Law Dictionary definition. (Br. at 22) Cacie and Keaton misconstrue that sentence's reference to "opposing party," reading it as the party opposing the ultimate relief sought in the trial court, rather than (as the previous sentence in the definition establishes) the party adversely affected by, and thus opposing, the presumption itself. *See Presumption*, Black's Law Dictionary (10th ed. 2014).[14] Essentially, Cacie and Keaton contend that anytime a presumption benefits a party not bearing the overall burden of proof, the presumption is "meaningless." That is just plain wrong, as shown in this Court's *Kruse* decision.

[14] The full definition reads: "A legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption."

The *Kruse* case considered the presumption that "the person establishing a legal title to the premises is presumed to have been in possession of the premises within the time required by law." *Kruse*, 130 Wis. 2d at 365 n.5 (quoting Wis. Stat. § 893.30). This Court held that a presumption is *not* rendered meaningless by the application of a preponderance standard for rebuttal. *Id.* at 365. This holding follows from the fact that, "even where rebutting evidence has been produced, the inference from the presumption survived and is sufficient to support a jury verdict until the presumption is met by evidence of equal weight." *Id.* at 365-66 (citing *Judicial Council Committee's Note*—1973, 59 Wis. 2d at R42). The Court then went further, expressly rejecting the notion that rebuttal of a presumption should require a heightened standard of proof and holding instead that the existence of the presumption "tends to justify a *lower* burden of proof." *Id.* at 366 (emphasis added).

The *Kruse* analysis presages *Nicholas L.*'s holding in the grandparent-visitation context that "the rebuttable presumption *is* the legal means of giving the parent's decision special weight." 2007 WI App 37, ¶12 (emphasis added; internal quotation marks omitted). Notably, *Nicholas L.* itself

belies Cacie and Keaton's argument that Wisconsin law renders the parental presumption "meaningless." While the grandparents in that case rebutted the parental presumption with respect to two grandchildren, the supposedly "meaningless" presumption held with respect to the third. *See id.*, ¶1 n.1.

Cacie and Keaton's argument is not novel and has already been rejected by this Court. A dissenting opinion in *Kruse* considered Cacie and Keaton's approach to presumptions:

> The majority's analysis of the presumption makes it a legal theory with no value to the beneficiary. … Under this standard, the opponent of a presumption only has a burden to come forth with equal evidence. It does not give any value to a presumption that cannot be overcome by merely evidence of equal weight. The opponent of the presumption does not have a burden of proof. It is not really a presumption under that test, but merely an advantage to not have to initially produce evidence [contrary to the presumed fact].

130 Wis. 2d at 374-75 (Steinmetz, J., dissenting). No other Justice joined the dissent, and, in the 30 years since, this Court has neither proposed an amendment to section 903.01 nor reversed *Kruse's* analysis, even as Wisconsin courts routinely face the need to apply presumptions.

2. The *Roger D.H./Meister* presumption exceeds the protections prescribed by the *Troxel* plurality for parental preferences.

Although Cacie and Keaton characterize the presumption imposed in *Roger D.H.* (and affirmed in *Meister*) as feeble, it is stronger than *Troxel* anticipates. This is true because presumptions operate more robustly under Wisconsin law than under Federal Rule of Evidence 301.

In adopting section 903.01, Wisconsin followed the then-proposed federal rule, based upon the Uniform Rules of Evidence and work by Edmund M. Morgan. *See Judicial Council Committee's Note*—1973, 59 Wis. 2d at R41-R45. But Congress rejected the proposed federal rule, adopting instead Federal Rule of Evidence 301, which mirrors the Model Rules, based upon work by James Bradley Thayer. *See* Blinka, *supra*, § 301.2 ("Thayer's ideas are captured in Fed. R. Evid. 301. Morgan's theory is embraced by Wis. Stat. § 903.01 (and the original draft of the federal rules)."); Fed. R. Evid. 301.[15]

[15] The full text of Federal Rule of Evidence 301 provides: "In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."

This historical divergence is both significant and instructive. A "Morgan presumption" shifts both the burden of production and the burden of persuasion to the party seeking to rebut it. *See Morgan presumption*, Black's Law Dictionary (10th ed. 2014); Blinka, *supra*, § 301.4. By contrast, a "Thayer presumption" operates as a "bursting bubble"; it shifts only the burden of production and, once a party seeking to rebut the presumption produces any evidence, the presumption bursts and the parties equally bear the burden of persuasion. *See Thayer presumption*, Black's Law Dictionary (10th ed. 2014); Blinka, *supra*, § 301.3. As a result, "[t]he Morgan approach confers much greater power on the presumption." Blinka, *supra*, § 301.2. And, because Wisconsin adopted Morgan's views while the federal rules embraced Thayer's, it follows that Wisconsin law grants "much greater power" to presumptions than federal law does. *Id.*; *see also, e.g.*, *id.* at § 301.3 (Congress rejected the proposal on which Wisconsin Rule 903.01 is based "in favor of a Thayerian rule that gives only a modest force to presumptions in civil cases.").

Thus, the "special weight" in favor of the parental decision applies more forcefully in Wisconsin than *Troxel* plurality anticipated, simply by virtue of the weight Wisconsin

law gives to presumptions.[16] Nothing in *Troxel* suggests that affording the parental presumption the treatment provided under the Federal Rules of Evidence (and the similar rules in most states, including Washington, where *Troxel* originated) would violate due process. Given that, affording that same presumption the benefit of the "much greater power" that Wisconsin's section 903.01 confers easily clears the due-process bar.

3. *Troxel* does not require a heightened burden of proof for rebutting the presumption that a fit parent's decision is in the best interests of their child.

Applying section 903.01's preponderance standard to evidence rebutting the parental presumption comports with the teachings of *Troxel*. Cacie and Keaton argue that, post-*Troxel*, there are only two ways for states to maintain grandparent-visitation statutes: by requiring a showing of harm in the absence of visitation or by imposing a heightened clear-and-convincing-evidence standard to evaluate arguments contrary to the parental preference. (Br. at 14) Not so. Wisconsin's

[16] Indeed, Wisconsin is in the minority of states to apply Morgan presumptions. *See* Lynn McLain, 5 *Maryland Evidence*, § 301:2 (2018) (noting the "majority American common law approach" is to follow Thayer's theory, while "at least eleven states," including Wisconsin, have adopted Morgan's approach).

presumption standard is consistent with *Troxel*. As this Court has already concluded, Wisconsin's grandparent-visitation statute "does not unconstitutionally infringe on parents' constitutional rights." *Meister*, 2016 WI 22, ¶6.

Notably, the *Troxel* plurality declined to define "the precise scope of the parental due process right in the visitation context." 530 U.S. at 73. Although the Washington Supreme Court had adopted a harm requirement in its decision below, the *Troxel* plurality declined to follow suit. *See id.* ("[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.").

Instead, the plurality proceeded mostly through indirect comments, cataloguing the shortcomings of the Washington court proceedings rather than offering a normative statement of what the law should be. The only concrete guidance the opinion provided is the prescription that, "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 (emphasis added).

Cacie and Keaton labor in vain to weave an elaborate tapestry from these few threads.

Cacie and Keaton's assertion that, post-*Troxel*, states have followed one of two paths—adopting either a harm requirement or a clear-and-convincing-evidence standard—over-simplifies matters considerably. The reality is that, both before and after *Troxel*, different states have approached this issue in a variety of ways. Cacie and Keaton's argument draws a false dichotomy between two distinct concepts and in doing so fails to distinguish between the substantive showing a state requires (harm, best interest of the child, or a variety of other options) and the standard of proof applied (clear-and-convincing evidence, preponderance, or something else) to determine whether the substantive showing has been met. A survey of state laws reveals they are a hodgepodge, mixing and matching different substantive requirements with various standards of proof. The resulting laws defy neat categorization.

Counting Wisconsin, a dozen states—also Indiana, Kansas, Louisiana, Mississippi, Missouri, New Hampshire, New Mexico, New York, North Dakota, Ohio, and Wyoming—have statutes that look to the best interest of the child (rather than a showing of harm) and do not require a heightened

evidentiary standard (like clear and convincing evidence) to visitation petitions where additional criteria are satisfied.[17] In most of these states, the grandparent-visitation statute has survived constitutional scrutiny.[18] Other states have taken different approaches. Some apply a clear-and-convincing-evidence standard. Some require a showing of harm. A few

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[17] *See, e.g.*, Ind. Code § 31-17-5-2; Kan. Stat. Ann. § 23-3301; La. Civ. Code Ann. art. 136; Miss. Code Ann. § 93-16-3; Mo. Rev. Stat. § 452.402; N.H. Rev. Stat. Ann. § 461-A:13; N.M. Stat. Ann. § 40-9-2; N.Y. Dom. Rel. Law § 72; N.D. Cent. Code § 14-09-05.1; Ohio Rev. Code Ann. § 3109.12; Wyo. Stat. Ann. § 20-7-101.

[18] *See Kulbacki v. Michael*, 845 N.W.2d 625, 629-30 (N.D. 2014) ("North Dakota's provision for consideration of the best interests of the child … passes constitutional muster under both the Federal and North Dakota Constitutions."); *Smith v. Wilson*, 90 So. 3d 51, 60 (Miss. 2012) (holding Mississippi statute constitutional after noting it is narrower than the one in *Troxel*); *In re Rupa*, 13 A.3d 307, 313 (N.H. 2010) (affirming constitutionality of grandparent-visitation statute where statutory factors regarding best interest of the child and interference with parental relationship are given extra weight); *In re K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 462 (Ind. 2009) (where courts apply presumption in favor of parental decision, grandparent-visitation statute "does not substantially infringe on a parent's fundamental right to control the upbringing, education, and religious training of their children" (internal quotation marks omitted)); *Matter of E.S. v. P.D.*, 863 N.E.2d 100, 101 (N.Y. 2007) (holding grandparent-visitation provision "is constitutional, both on its face and as applied"); *Harrold v. Collier*, 836 N.E.2d 1165, 1172, ¶44 (Ohio 2005) ("Ohio's nonparental-visitation statutes are narrowly tailored to serve [a child's best interest and] are not, therefore, unconstitutional under *Troxel*."); *Blakely v. Blakely*, 83 S.W.3d 537, 538 (Mo. 2002) (en banc) (holding grandparent-visitation statute as interpreted in court "constitutional under the standards set out in *Troxel*"); *State Dep't of Social & Recreation Servs. v. Paillet*, 16 P.3d 962, 971 (Kan. 2001) (holding that Kansas statute is not "called into question by the Supreme Court's decision in *Troxel*").

Louisiana, New Mexico, and Wyoming have not decided constitutional challenges to their grandparent-visitation laws.

have adopted both.[19] Importantly, in most states, these judgments are legislative policy decisions, disturbed by courts only if the statute is unconstitutional. Cacie and Keaton insist that a showing of harm is constitutionally mandated, but *Troxel* does not require as much and many states—including Arizona, California, Colorado, Kentucky, Montana, Nebraska, New York, Ohio, Oregon, Pennsylvania, and West Virginia—have rejected that same argument.[20]

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[19] *See, e.g.*, Fla. Stat. Ann. § 752.011(3); Ga. Code Ann. § 19-7-3(c)(1); Okla. Stat. Ann. tit. 43, § 109.4(A)(1)(b). Notably, Florida, Georgia, and Oklahoma's state constitutions provide greater protection to parental prerogatives than the federal Due Process Clause does. *See Patten v. Ardis*, No. S18A0412, --- S.E.2d ---, 2018 WL 3193970, at *1 (Ga. June 29, 2018); *Neal v. Lee*, 14 P.3d 547, 550-51 (Okla. 2000); *Beagle v. Beagle*, 678 So. 2d 1271, 1272 (Fla. 1996). These states' decisions to adopt grandparent-visitation statutes more stringent than most, therefore, reflects unique local circumstances, not a divergent view of what *Troxel* teaches. With respect to substantive due process, this Court's decisions "find no substantial difference between the due process protections provided" by "the Fourteenth Amendment to the United States Constitution and [] art. I, § 1 of the Wisconsin Constitution." *Dowhower ex rel. Rosenberg v. W. Bend Mut. Ins. Co.*, 2000 WI 73, ¶12, 236 Wis. 2d 113, 613 N.W.2d 557.

[20] *See, e.g.*, *In re Marriage of Friedman & Roels*, 418 P.3d 884, 889, ¶19 (Ariz. 2018) (overturning decision that, under *Troxel*, "nonparent who seeks visitation … must prove that the child's best interests will be substantially harmed absent judicial intervention" (internal quotation marks omitted)); *Walker v. Blair*, 382 S.W.3d 862, 872 (Ky. 2012) (best-interest standard is consistent with *Troxel* and "showing harm to the child is not the only way that a grandparent can rebut the presumption in favor of the child's parents"); *Matter of E.S.*, 863 N.E.2d at 105 ("Reasoning from *Troxel,* we conclude that [grandparent-visitation statute that does not include harm requirement] is facially constitutional."); *Hiller v. Fausey*, 904 A.2d 875, 888-90 (Pa. 2006) (rejecting argument that, under *Troxel*, "grandparents must demonstrate that a child will suffer harm as a result of the denial of visitation"); *In re Adoption of C.A.*, 137 P.3d 318, 319 (Colo. 2006) (en banc) (*Troxel* "did not require the standard of harm or potential harm to the child that the court of appeals adopted in this case" but "left to

The disparity in how states have approached this issue underscores that a variety of approaches satisfy due process. If due process mandated one specific approach, *Troxel* would have said so and there would be uniformity among the states. The flexibility of the constitutional standard explains the *Troxel* plurality's preference to allow "state-court adjudication in this context [to] occur[] on a case-by-case basis." 530 U.S. at 73. In Wisconsin and several other states, that adjudication has yielded a best-interest inquiry, with a presumption in favor of the parental decision. Though Cacie and Keaton dislike that result, it is neither an outlier nor unconstitutional.

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each state the responsibility for enunciating how its statutes and court decisions give 'special weight' to parental determinations in the context of grandparent visitation orders."); *Hamit v. Hamit*, 715 N.W.2d 512, 527-28 (Neb. 2006) (rejecting argument that Nebraska statute failed to satisfy *Troxel* because, "under Nebraska's grandparent visitation statutes as a whole, the best interests of the child consideration does not deprive the parent of sufficient protection"); *Polasek v. Omura*, 136 P.3d 519, 522-23, ¶15 (Mont. 2006) (setting out three inquiries in light of *Troxel*, with harm not being one of them); *Harrold*, 836 N.E.2d at 1172, ¶44 (nonparental-visitation statute that does not require a showing of harm is constitutional in light of *Troxel*); *In re Marriage of Harris*, 96 P.3d 141, 151 (Cal. 2004) (statute, which does not include harm standard, "does not suffer from the constitutional infirmities that plagued the Washington statute considered in *Troxel*"); *In re Marriage of O'Donnell-Lamont*, 91 P.3d 721, 740 (Or. 2004) (rejecting argument that harm standard is required by federal constitution; holding that *Troxel* requires presumption in favor of fit parent's visitation decision but "goes no further"); *State ex rel. Brandon L. v. Moats*, 551 S.E.2d 674, 687 (W. Va. 2001) (concluding grandparent-visitation statute, which does not require showing of harm, is "well within the constitutional concerns addressed in *Troxel*").

D. Public policy counsels caution in upsetting settled law in the way Cacie and Keaton propose.

Because Wisconsin's grandparent-visitation statute, as interpreted in *Roger D.H.* and affirmed in *Meister*, is within constitutional bounds, this Court should not overrule the legislative policy decisions it reflects. Public policy militates in favor of recognizing that *Meister* already answered the question certified by the court of appeals and declining Cacie and Keaton's invitation to adjudicate the issue anew.

1. This court should not disturb the legislature's policy decisions absent constitutional necessity.

Where "the legislature has acted, 'the judiciary is limited to applying the policy the legislature has chosen to enact, and may not impose its own policy choices.'" *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶60, 281 Wis. 2d 300, 697 N.W.2d 417 (quoting *Fandrey v. Am. Family Mut. Ins. Co.,* 2004 WI 62, ¶16, 272 Wis. 2d 46, 680 N.W.2d 345); *accord Meyers v. Bayer AG*, 2007 WI 99, ¶53, 303 Wis. 2d 295, 735 N.W.2d 448 ("We decline to substitute our judgment for that of the legislature."); *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, ¶24, 576 N.W.2d 245, 252 (1998)

("This court has long held that it is the province of the legislature, not the courts, to determine public policy.").

This Court already applied this principle to section 767.43: "We conclude that *the legislature's decision* to allow courts to grant visitation rights to grandparents … when visitation is in the best interest of the child does not unconstitutionally infringe on parents' constitutional rights." *Meister*, 2016 WI 22, ¶6 (emphasis added). The Court should continue upholding that policy decision out of respect for the legislature as a co-equal branch of government.

2. Adopting the rule Cacie and Keaton advocate would undermine fundamental principles of Wisconsin family law.

It is axiomatic that "each unhappy family is unhappy in its own way." Leo Tolstoy, *Anna Karenina* 1 (Richard Pevar & Larissa Volokhonsky, trans., Penguin 2000) (1878). Family law deals almost exclusively with families that are unhappy in some respect. (Hence their presence in family court.) For this reason, family law as a discipline eschews broad rules in favor of fact-intensive, case-by-case adjudication. *See Wendland v. Wendland*, 29 Wis. 2d 145, 149, 138 N.W.2d 185, 187 (1965) ("Each custody case must turn on its own facts and circumstances."). The *Troxel* plurality recognized as much,

explaining its reticence to adopt a broad constitutional rule "[b]ecause much state-court adjudication in this context occurs on a case-by-case basis." 530 U.S. at 73.

Moreover, "[t]he best interest of the child is an organizing principle of Wisconsin family law." *In re F.T.R.*, 2013 WI 66, ¶120, 349 Wis. 2d 84, 833 N.W.2d 634 (Abrahamson, J., concurring). In adjudicating the interests of families, this Court has repeatedly held that "the polestar is the best interests of the children." *E.g.*, *Johnson v. Johnson*, 78 Wis. 2d 137, 148, 254 N.W.2d 198 (1977). Whether in considering custody and placement, guardianship, adoption, child support, or a CHIPS petition, Wisconsin law takes seriously the effects various potential outcomes will have on the children. "The legislature has clearly and repeatedly expressed the policy that courts are to act in the best interest of children." *In re Custody of H.S.H.-K.*, 193 Wis. 2d at 682. So important is ensuring that the courts have a clear-eyed assessment of children's interests that Wisconsin law requires, in family law disputes involving minor children, the appointment of a Guardian ad Litem, whose sole obligation is to investigate and represent before the court the children's best

interests.[21] Wis. Stat. § 767.407(1), (4); *see also In re C.L.F.*, 2007 WI App 6, ¶8, 298 Wis. 2d 333, 727 N.W.2d 334; *Guardians ad Litem in Family Court: Answering Your Legal Questions*, State Bar of Wisconsin (2012), available at https://www.wisbar.org/forPublic/INeedInformation/Pages/Guardians-Ad-Litem.aspx (last visited Aug. 2, 2018).

Cacie and Keaton urge this Court to adopt a broad rule that will apply to all cases and substantially favor—if not guarantee vindication of—parental preferences in visitation disputes. (*See* Br. at 41-42) Such an approach would undermine both of the fundamental principles above. It would give a sweeping new rule precedence over careful, fact-focused, case-by-case adjudication; indeed, that is precisely why the *Troxel* plurality declined to proceed as Cacie and Keaton propose. And it would read the constitutional rights of parents so broadly that in many cases the children's interests, as represented by the Guardian ad Litem, would be irrelevant. This contravenes the very nature of family law, and it is inconsistent not only with the policy choices embodied in the

[21] Notably, there is no reference in *Troxel* to a Guardian ad Litem or children's advocate. This underscores the plurality's concern that the visitation decision there elevated the trial judge's personal preference over legal principle. *See* 530 U.S. at 72.

grandparent-visitation statute, but also with the policy choices underlying the requirement that courts appoint Guardians ad Litem to represent children's interests.

This Court should regard proposed sea changes in the law warily. *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, ¶59, 319 Wis. 2d 91, 768 N.W.2d 674 (A.W. Bradley, J., concurring). That is especially true where, as here, the proposed change would overturn precedent. *See, e.g.*, *State v. Luedtke*, 2015 WI 42, ¶40, 362 Wis. 2d 1, 863 N.W.2d 592 ("This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law. … [The doctrine] promotes evenhanded, predictable, and consistent development of legal principles ... and contributes to the actual and perceived integrity of the judicial process." (internal quotation marks and citations omitted)). Even where "a large majority of other jurisdictions" agree on a question—and here that is *not* the case—their decisions are "not a sufficient reason for this court to overrule its precedent." *State v. Suriano*, 2017 WI 42, ¶29, 374 Wis. 2d 683, 893 N.W.2d 543 (quoting *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶100, 264 Wis. 2d 60, 665 N.W.2d 257).

III. Strict Scrutiny Does Not Apply, But The Grandparent-Visitation Statute Nevertheless Meets That Test.

Though the issue was not certified, Cacie and Keaton devote much of their brief to facially challenging the constitutionality of section 767.43(3). The Court should reject that challenge.

"Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). "It falls to the party challenging the constitutionality of a statute to prove that the statute is unconstitutional beyond a reasonable doubt." *State v. Grandberry*, 2018 WI 29, ¶12, 380 Wis. 2d 541, 910 N.W.2d 214 (quoting *State v. Cole*, 2003 WI 112, ¶11, 264 Wis. 2d 520, 665 N.W.2d 328). Cacie and Keaton cannot clear these hurdles.

The first problem is that Cacie and Keaton incorrectly assume strict scrutiny applies. (*See* Br. at 30) Notably, in *Troxel*, "Justice Thomas was alone in calling for application of the strict scrutiny standard." David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 Rutgers L.J.

711, 713 (2001) (citing *Troxel*, 530 U.S. at 80 (Thomas, J., concurring in the judgment). "Instead of strict scrutiny," most of the Court "embraced an essentially pragmatic approach to the constitutional problem of parents' rights," seeking "a more flexible, less outcome-determinative standard." *Id.* at 711, 722. The plurality studiously avoided defining either "the precise scope of the parental due process right in the visitation context" or the applicable legal standard. *Troxel*, 530 U.S. at 73. Consequently, "missing from *Troxel* is any real effort to decide the case by reference to something that might pass as a constitutional theory or bedrock principle." Meyer, *supra*, at 712.

By insisting that strict scrutiny applies here, Cacie and Keaton ignore *Troxel*'s reliance on "an undefined but less exacting standard" and the fact that the plurality "stressed the nuanced, case-specific nature of the inquiry." *O'Donnell-Lamont*, 91 P.3d at 729-30. Indeed, several state courts have held, post-*Troxel*, that grandparent-visitation statutes are not subject to strict scrutiny. *See, e.g.*, *id.*; *Blakely*, 83 S.W.3d at 545-48; *Crafton v. Gibson*, 752 N.E.2d 78, 91-92 (Ind. Ct. App. 2001). These decisions are "consistent with the fact that parental rights, although of prime importance, must be

balanced with other rights." *Blakely*, 83 S.W.3d at 546. And they recognize that "it should matter to any constitutional assessment of visitation whether the court's order contemplates brief, infrequent contact or something closer to shared physical custody." Meyer, *supra*, at 726. Wisconsin courts have come to a similar conclusion. *See, e.g.*, *Lubinski*, 2008 WI App 151, ¶9 ("Visitation" as used in Wis. Stat. § 767.43 "does not incorporate the rights associated with legal custody or physical placement."). And so have other courts. *See, e.g.*, *Blakely*, 83 S.W.3d at 541 (recognizing that grandparent "visitation rights … *are less than substantial encroachment* on a family," as they entail "*occasional, temporary visitation*, which may only be allowed if a trial court finds visitation to be in the best interest of the child" (emphases in original; internal quotation marks omitted)).

Against *Troxel* and these reasoned opinions, Cacie and Keaton have little to offer in support of strict scrutiny. The cases they cite (as well as the cases those rely upon in turn) involve permanent termination of parental rights. (*See* Br. at 31 (citing *In re Max G.W.*, 2006 WI 93, ¶¶40-41, 293 Wis. 2d 530, 716 N.W.2d 845, and *In re Zachary B.*, 2004 WI 48, ¶¶17, 23, 271 Wis. 2d 51, 678 N.W.2d 831)) Termination cases differ in

kind from this one: they require courts "to balance the interests between a lonely individual and an overbearing state." Meyer, *supra*, at 722. For that reason, "common sense" dictates "that the Constitution should demand extra justification from the state when it seeks to *terminate* parental rights than when" visitation is at issue. *Id.* at 725 (emphasis in original). By contrast, strict scrutiny is inappropriate in reviewing the visitation order at issue here—a minor intrusion on Cacie and Keaton's rights to "the custody, care, and control" of Ann.

Applying less than strict scrutiny fully accords with Wisconsin law, which holds that the applicable level of scrutiny "depends on the degree to which the law burdens a fundamental right." *In re Commitment of Alger*, 2015 WI 3, ¶39 n.16, 360 Wis. 2d 193, 858 N.W.2d 346 ("A law that implicates a fundamental right is not necessarily subject to strict scrutiny."); *Zablocki v. Redhail*, 434 U.S. 374, 386-88 (1978) (rational basis review applies to "reasonable regulations that do not significantly interfere with" the fundamental right to marry; strict scrutiny applies to a law that "significantly interferes" with that right). Where, as here, the burden is not substantial, strict-scrutiny is inapposite. *See* Meyer, *supra*, at 722 ("When the state is asked to 'referee' such an internal

family squabble, stacking the deck heavily in favor of a particular combatant [by applying strict scrutiny] does not seem calculated to *avoid* state interference so much as mandate its particular *substance*." (emphases in original)).

The second problem Cacie and Keaton face is that section 767.43(3) survives even a strict-scrutiny analysis. "Strict scrutiny requires a showing that the statute, as applied, is narrowly tailored to advance a compelling state interest." *In re Gwenevere T.*, 2011 WI 30, ¶52, 333 Wis. 2d 273, 797 N.W.2d 854. Wisconsin courts have concluded that the state has a compelling interest in using visitation "to contribute to the child's well-being by providing a sense of continuity" within a non-intact family and that the "rebuttable presumption in favor of the parent's decision regarding visitation ensures that the visitation orders are closely tailored to achieve th[at] purpose." *In re Opichka*, 2010 WI App 23, ¶22. That analysis is sound, fits with *Meister*'s holding that section 767.43 passes constitutional muster, and should be adopted here.

IV. If This Court Reviews The Circuit Court's Discretionary Visitation Decision, It Should Affirm.

There is no need for this Court to review the circuit court's discretionary grant of visitation to Jill. However, if it does so, it should affirm the visitation order. The record confirms that the circuit court knew the legal standard set forth in *Roger D.H.* and applied that standard appropriately. *See Sands*, 2008 WI 89, ¶13 (court "will sustain discretionary acts" where the trial judge "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach").

In particular, the circuit court knew that a presumption was to be applied in favor of the parental decision. (R.86 at 3:16-18; R.87 at 25:13-24, 26:19-22) The circuit court also knew that, once Jill presented evidence contesting the assertion that denying her visitation petition would serve Ann's best interests, it had an obligation "to make its own assessment of the best interest of the child." *Roger D.H.*, 2002 WI App 35, ¶19; *Nicholas L.*, 2007 WI App 37, ¶12. As the circuit court explained at the reconsideration hearing, it applied the presumption in favor of Cacie and Keaton's decision and

considered the evidence offered to rebut that presumption. (R.88 at 15:3-6) And the circuit court looked specifically to the requirements set forth in Wis. Stat. § 767.43(3) to determine whether a visitation order was appropriate. (R.88 at 15:24-16:6)

The record contains ample facts supporting the circuit court's determination that Jill successfully rebutted the presumption:

- The record contains extensive evidence establishing Ann's "significant and ongoing relationship with her grandma." (R.88 at 8:24-9:1)

- The circuit court accepted a calendar into evidence, showing times Ann visited her and frequent sleepovers; Jill provided unrebutted testimony that the calendar necessarily understated the time Ann spent at her house. (R.35; R.87 at 6:21-8:7, 9:6-22, 11:14-12:10, 15:11-21, 53:15-22, 56:12-20) The circuit court found the calendar significant. (R.88 at 15:11-24)

- The record shows that Jill and Ann particularly share a love of horseback riding, which was an activity that they engaged in frequently together. (R.87 at 6:24-8:7; R.88 at 8:24-9:3)

- The testimony made clear that all parties agree Ann loves Jill and treasures spending time with her. (R.87 at 65:13, 92:25-93:2)

- Cacie and Keaton testified that Ann is safe with Jill and that Jill is "a good grandmother to [Ann]." (R.87 at 16:1-10, 29:17-20, 90:18-23, 102:5-7)

- The record establishes that Cacie and Keaton "drastically" and "abruptly" reduced Jill's contact with Ann beginning in December 2015. (R.87 at 22:7-24, 39:15-23; *see also* R.87 at 27:8-28:16)

- The record reflects that the Guardian ad Litem conducted an investigation and recommended, in her role speaking for Ann's best interests, that visitation be granted. (R.29; R.87 at 123:11-20)

- Notwithstanding Cacie and Keaton's attempts to call Jill's judgment into question, the record shows that the circuit court, like the Guardian ad Litem, concluded that Jill "is not likely to act in a manner inconsistent" with Cacie and Keaton's rules for Ann. (R.88 at 16:3-15)

Taking those factors into account, the circuit court granted Jill's petition but provided for less-frequent visitation than either Jill had requested or the Guardian ad Litem had recommended. (R.45; R.87 at 125:9-16, 127:19-20) The visitation order ensures that Ann and Jill will be able to see each other one afternoon per month and one-week during the summer. (R.45; R.87 at 128:20-25, 129:14-17)

The circuit court "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Sands*, 2008 WI 89, ¶13. There is no basis for finding that the circuit court erroneously exercised its discretion.

V. If The Court Adopts A New Legal Standard, It Should Remand For Further Proceedings.

Cacie and Keaton urge this Court to adopt a new legal standard and dismiss Jill's visitation petition. (Br. at 34, 38) As discussed above, this Court should not establish a new standard of proof for rebutting the presumption that favors parental decisions in grandparent-visitation actions. However, if this Court does overturn precedent and adopt a new legal standard, it should remand to allow circuit court proceedings under that standard. The circuit court, having heard the testimony at trial, is in the best position to apply any new legal standard to the evidence.

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal or, alternatively, reaffirm the well-settled standard of proof under Wisconsin law and, on that basis, affirm the circuit court's visitation order.

Dated: August 10, 2018

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I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

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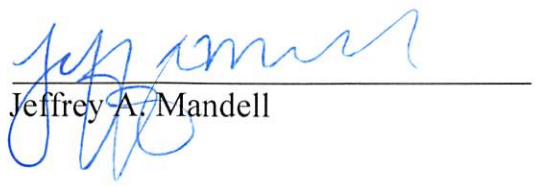

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I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12).

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I certify that the brief was hand delivered to the Clerk of the Supreme Court on August 10, 2018.

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