SUPREME COURT OF WISCONSIN

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

Cacie M. Michels,

Petitioner-Appellant,

v. **Appeal No. 2107AP1142**

Keaton L. Lyons,

Respondent-Appellant,

Jill R. Kelsey,

Petitioner-Respondent.

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

AMICUS BRIEF OF THE LEGAL AID SOCIETY OF MILWAUKEE, INC.

LEGAL AID SOCIETY OF MILWAUKEE, INC.
728 n. James Lovell Street, 3-N
Milwaukee, WI 53233
Karen Kotecki, State Bar No. 1011648
Phone: 414 727-5366
Fax: 414 291-4988
kkotecki@lasmilwaukee.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUE

The Court accepted this case at the request of the Court of Appeals to clarify the standard of proof required for a grandparent to overcome the presumption that the parents' decisions regarding the scope and extent of their child's visitation with the grandparent is in the child's best interest.

INTEREST OF THE LEGAL AID SOCIETY OF MILWAUKEE

The Legal Aid Society of Milwaukee (LAS) has broad experience and a decades-long interest in representing the best interests of children. Since 1981, the Guardian *ad litem* (GAL) Division has served as the court-appointed guardians *ad litem* (GALs) in Milwaukee county, representing the legal best interests of children in both Family and Children's Court. In 2017 alone, the 16 attorneys in the GAL Division represented the best interests of children in over 3,000 cases, including cases in Family court under Chapter 767, and Children's Court, under Chapters 48 and 54. Most are cases involving children of parents at or near the federal poverty guidelines. Many of these cases involve grandparent visitation issues and most parents in family court cases are unrepresented and unsophisticated in legal matters.

The Legal Aid Society of Milwaukee believes that the best interests of children are served by clear and objective rules of law that promote predictable results for the child, protect children from undue stress from involvement in litigation, and deter unwarranted disruption of the rights of fit parents to make decisions for the care and custody of their children.

Background

The essential facts are not in dispute. The parties agree that Jill Kelsey, "Ann's"[1] paternal grandmother, had a good relationship with Ann, who is now nine years old, and with Ann's parents. Ms. Kelsey had regular visits, including having Ann with her for overnight visits, particularly during Ann's preschool years. When Ann started school, the family had less time for frequent grandparent visits. Ann's mother testified that it was stressful to the family, and stressful to Ann, to have to accommodate school, activities, friends, shared placement with Ann's father and visits with Ann's

[1]We follow the Court of Appeals' choice to refer to the child in this action as "Ann" to avoid using her real name or cumbersome initials.

maternal grandparents, in addition to the time that Ms. Kelsey expected. Certification p. 2-3.

Friction escalated in December, 2015, when Ann's mother refused to allow Ms. Kelsey to take Ann on a vacation with a male friend of Ms. Kelsey's. Following the vacation dispute Ms. Kelsey sued for visitation. Certification p. 8.

The circuit court in Chippewa County entered an order granting Ms. Kelsey visits over the parents' objection, allowing her one Sunday each month and seven consecutive days in the summer with no restrictions on travel. In denying the parents' motion for reconsideration, the court addressed the parents' arguments that the visitation order violated their due process rights under *Troxel.* According to the court, it was appropriate to overrule the parents' visitation decisions, based on a finding that visits were in the child's best interest as long as the court believed it had applied a presumption in the parents' favor. *See* Petitioner-Respondent brief at p.9.

ARGUMENT

To ensure that "special" weight is given to the constitutional presumption that fit parents' decisions as to

grandparent visitation is in their child's best interest, a grandparent suing for visitation must demonstrate by clear and convincing evidence that the parents' limits on the grandparent's visits would be harmful to the child.

Introduction

In *Troxel v. Granville,* 530 U.S. 57(2000), the Supreme Court found the State of Washington's grandparent visitation statute unconstitutional specifically because it allowed a court to substitute its view, of whether guaranteed visits with the grandparent were in the child's "best interest" for those of a parent who had not been found unfit. The Court reaffirmed that, for a "fit" parent, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel* at 68-69. The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Id,* at 66.

The Court of Appeals correctly recognized that grandparent visitation decisions, falling under a parent's fundamental liberty interest in parenting, requires strict scrutiny and narrow tailoring of any statute that infringes on that interest. Certification p. 2. *See* also *Monroe Cty. DHS v. Kelli B.*, 2004 WI 48, ¶ 23, 271 Wis. 2d 51, 678 N.W.2d 831.

Wisconsin has yet to determine what showing is required to overcome *Troxel*'s constitutional presumption in favor of the parents' decision, when parents are confronted with a grandparent visitation lawsuit. The Legal Aid Society agrees with the parents that due process under *Troxel* requires a discernably heightened standard, absent in the instant case, to overcome the parents' visitation decisions. Although the circuit court asserted that it applied a presumption in the parent's favor, no special "fundamental rights" weight is apparent in the court's decision. Absent an articulation of what weight was given to any particular facts or factors, or how allowing the parents to make their own decision would be harmful, or otherwise detrimental to the child's interest, it

is impossible to discern how the circuit court's ruling was something other than the mere substitution of the court's choice for that of the parents. Wisconsin courts have in fact recognized that such substitution under the rubrick of best interest is not allowed under *Troxel*. *See e.g. Roger D.H*, at ¶ 19, quoted in *Meister* at ¶ 44. (The Due Process Clause does not tolerate a court giving no special weight to a fit parent's determination, but instead basing its decision on mere disagreement with the parents).

A. *Troxel* requires a strong showing beyond best interest to overcome the presumption in favor of a fit parent's right to determine the nature and frequency of their child's grandparent visits.

The four justice plurality in *Troxel* found Washington's grandparent visitation statute unconstitutional because it allowed a court to order grandparent visitation based only on a finding that visits would be in the child's best interest. Exercising judicial restraint, the Court did not establish a definitive test for how the presumption in favor of non-intervention can be overcome. Nonetheless, the decision signaled a high threshold for court interference,

commensurate with the fundamental family rights at issue. *Troxel* counseled that "[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. *Troxel* at 72-73. Accordingly the plurality required that at a minimum, overriding a parent's fundamental right to discretion over grandparent visits would require "special" weight be given to the "presumption" that parents' decisions were in the child's best interest. *Troxel* at 70. The Court referred to this "special" weight as "material" and "significant." *See Troxel* at 72.

Post-*Troxel*, a majority of states require a showing of harm to the child before the court can interfere with a fit parent's decision regarding grandparent visitation. *See*, Certification, p. 5, Brief of Petitioner-Appellants, p. 14-18.

B. Allowing a fit parent's decisions to be overruled by a court relying on an undefined best interest standard leads to the flawed decision making process that *Troxel* invalidated.

A judicial finding of "the child's best interest" is ultimately the dispositive factor for grandparent visitation according to the text of Wisconsin's §767.43(3).[2] However, Wisconsin courts recognize that a "best interest" determination as to grandparent visitation must be made under the constitutional constraints imposed by the Due Process clause. Accordingly "best interest" must be read to include *Troxel's* requirement that a strong presumption and "special" weight be accorded in favor of the parents' wishes. Without such added weight, best interest would impermissibly allow the court to impose its own view of the child's welfare over that of the parents. *See In re the Paternity of Roger D.H.*, 2002 WI App 35, ¶ 35 (rejecting a facial challenge to 767.43(3) based on *Troxel* because of the

[2] §767.43(3) allows courts to set reasonable visitation for a non-marital child whose parents have not subsequently married each other, where paternity has been established for the father if the father's parent is petitioning for visitation, the child has not been adopted, the grandparent has maintained or was prevented from maintaining a relationship with the child, the grandparent is not likely to act in a manner contrary to the custodial parent's decisions related to the child's physical, emotional, educational or spiritual welfare and visitation is in the best interest of the child.

judicial obligation to comply with *Troxel* regardless of the statutory text).

A *Troxel*-ized application of the Wisconsin statute in fact requires quite a lot of the circuit court's "best interest" analysis. The analysis must, at a minimum, recognize a constitutional presumption that the parent's wishes as to parental visitation will normally control and the court must also ensure that the parent's wishes are given "special" weight. In the instant case the circuit court's statement that it applied a presumption in the parents' favor was grossly insufficient to satisfy *Troxel*. Because neither the "presumption" nor the "best interest" is measurable, the circuit court's exercise of discretion does not address *Troxel's* central concern for avoiding implicit usurpation of parents' decision-making. *See Troxel* at 72-73, (parents' wishes must not be ignored simply "because the judge thinks he knows better" than the parents). An exercise of discretion is not an exercise of judicial will, but rather it requires that the court's rationale reflect a judicious thought process and correct

application of the law, with sufficient detail so as to allow appellate review. *See* e.g. *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). (in the context of criminal sentencing, discretion requires an explanation of the court's rationale).

C. Wisconsin has never adopted mere preponderance of the evidence as sufficient to satisfy the *Troxel* "special weight" /constitutional presumption for overcoming a parent's fundamental right to decide grandparent visitation.

Ms. Kelsey's effortful argument in favor of a weak "preponderance" of the evidence standard evades the central question posed by the Court of Appeals: exactly what kind of proof is necessary to overcome the *Troxel* constitutional presumption and to evidence that "special weight" was in fact accorded to fit parents' choices for their child's grandparent visits? There is no "clearly" accepted preponderance standard that the Court of Appeals simply missed, when asking this Court to address a critical gap in Wisconsin's family law jurisprudence. In fact, *Roger D.H.* and *Nicholas L.* and *Meister* never reached the question of what proof

Troxel requires in a given case. Nor does the general evidentiary presumption statute, Wis. Stat. §903.01 alone resolve the question of *Troxel* proof because *Troxel* controls over Wisconsin's evidence rules to the same extent it controls over the visitation statute.

Roger D.H., Nicholas L. and Meister together recognize only (a) that the grandparent visitation statute on its face does not violate the constitution and (b) that the *Troxel* "special weight" requirement attaches to and necessarily heightens the pro-parent presumption and any calculation of "best interest." *See In re the Paternity of Roger D.H.*, 2002 WI App 35, 250 Wis. 2d 747, 641 N.W.2d 440, (facial challenge to statute rejected because courts must read *Troxel*'s constitutional "special weight" requirement into the statute); *In re Nicholas L.*, 2007 WI App 37, 299 Wis. 2d 768, 731 N.W.2d 288 (*Troxel*'s "special weight" requirement was both acknowledged and satisfied, but it is not a "separate element" from whether the grandparent overcame *Troxel*'s constitutional presumption of deference to the parent's

wishes); *In re Marriage of Meister*, 2016 WI 22, 367 Wis. 2d 447, 876 N.W.2d 746 (as a matter of statutory interpretation of Wis. Stat. §767.43(1) a grandparent need not prove a "parent-child"- like relationship in order to petition for visitation rights). Each of these cases address a more narrow legal question and stopped well short of addressing the question of proof that the Court of Appeals identified to this Court.[3]

Ms. Kelsey's argument that preponderance of evidence is the standard of proof for overcoming any presumption, including the *Troxel* heightened burden protecting parent's fundamental rights, appears to rest entirely on Wisconsin's default rule for ordinary evidentiary presumptions, Wis. Stat. §903.01. *See* Petitioner-Respondent's brief at p. 23-29). In

3 In a passage to which Kelsey seems to attach significance, *Roger D.H.* notes that *Troxel*'s requirement is "only a presumption" and "the circuit court is still a obligated to make its own assessment of the best interest of the child." *See* Petitioner-Respondent's brief at 17-19. The quote omits the next sentence that states "What the Due Process Clause does not tolerate is a court giving 'special weight' to a fit parent's determination, but instead basing its decision on 'mere disagreement' with the parent. *See Roger D.H.* at ¶19 (also quoted in *Meister* at ¶ 44). *Roger D.H.* and the cases using the quoted passage, however, merely recognize that the *Troxel* presumption is not "irrebuttable" but it says nothing about what degree and kind of proof *Troxel*'s constitutional imperative requires.

this respect, Kelsey has a flawed understanding of the relationship between Wisconsin statutes and the United States Constitution. The question here is not what Wisconsin statutes require, but rather that the Due Process Clause and *Troxel* require of the Wisconsin statutes.

Wis. Stat. §903.01, like the visitation statute itself, is bound by the constitutional requirements imposed by the United States Supreme Court. A grandparent cannot overcome the burden with unspecified evidence that does not demonstrate that the parents' wishes were in fact accorded special weight commensurate with the fundamental right to control family decisions.

D. A factual showing of harm is necessary to protect parents' rights to determine what is in their child's best interest from arbitrary judicial interference.

As guardians *ad litem*, Legal Aid attorneys address children's "best interest" on a daily basis. The term "best interest" was not defined by *Troxel* and remains undefined in Wisconsin family law, despite being the legal touchstone in most child welfare and custody and placement disputes.

Ultimately the term "best interest" is a subjective, elusive and potentially unpredictable test, particularly when many of the parents in family court are legally unsophisticated and most are unrepresented.[4]

"Proof" of "best interest", moreover, is an inherently troubling concept in the instant case because "preponderance" or "clear and convincing" proof makes sense only for factual determinations. Best interest of the child, on the other hand, is a legal conclusion, entrusted to judicial discretion, much like sentencing in a criminal case. Addressing for the first time what *Troxel*'s "special" weight and its presumption in favor of parents' decisions require, it would be useful for practitioners and for the lower courts for this Court to address first "what" must be proven, before deciding "how much" evidence is needed, for a grandparent to prevail.

In the interest of clarity as well as adherence to *Troxel*, this *amicus* respectfully suggests that this Court follow the

[4] It is estimated that as many as 70% of family cases now involve litigants who represent themselves in court. *See* the *Wisconsin Pro Se Task Force Report*, The Wisconsin Pro Se Working Group. A Committee of the Office of Chief Justice of the Wisconsin Supreme Court (December 2000).

lead of those jurisdictions which require a factual showing of harm to the child based on a denial of court ordered grandparent visitation. Consistent with the fundamental rights at issue, the middle burden of proof of clear and convincing evidence should be required for any factual findings. *See Santosky v. Kramer*, 455 U.S. 745, 756 (1982). (The intermediate standard or proof, clear and convincing evidence, is mandated when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money).

Alternatively, the Court or legislature would provide useful guidance on meeting the *Troxel* burden by enumerating factors that a circuit court must consider. These might include the age of the child, the wishes of the child, the inconvenience, expense or stress on the custodial parent/family in accommodating grandparent visitation, the length and nature of the grandparent's relationship to the child, and any harm to the child in not having the extent or frequency of grandparent visits being sought.

These proposed factors would not control, but are *in addition to* requiring that the court articulate in sufficient detail, on the record, pursuant to *Troxel*, the manner and extent to which the court assigned "special" weight to the parents' decisions.

CONCLUSION

For the above reasons this *amicus* respectfully asks this Court to provide guidance to the lower courts by requiring that a grandparent seeking to overrule a fit parent's decisions on grandparent visitation show, by clear and convincing the evidence, that denial of the requested visitation is harmful to the child.

Dated this 20th day of August, 2018.

Legal Aid Society of Milwaukee, Inc.

By:_____
Karen Kotecki, State Bar No. 1011648
Amicus Curiae

728 N. James Lovell St., 3-N
Milwaukee, WI 53233
414 727-5300
Fax: 414 291-5488

FORM AN LENGTH CERTIFICATION

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

The length of this brief is 2,860 words.

Dated: August 20, 2018.

_____

Karen Kotecki, SBN 1011648

CERTIFICATION REGARDING ELECTRONIC BRIEF

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

I further certify that the text of the electronic copy of the brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated August 20, 2018.

_____

Karen Kotecki SBN 1011648

CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80 and 809.18, that the non-party brief of *Amicus Curiae*, was sent by U.S. mail on August 20, 2018, to the Clerk of the Wisconsin Supreme Court with three copies served on the parties as follows:

Ryan Steffes
Weld Riley, S.C.
P.O. Box 1030
Eau Claire, WI 54702-1030

Jeffrey A. Mandell
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701-1784

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

I further certify that the brief was correctly addressed and postage was prepaid.

Dated August 20, 2018.

_____
Karen Kotecki, SBN 1011648