WISCONSIN SUPREME COURT

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

CACIE M. MICHELS,

Petitioner-Appellant,

v.

Appeal No.: 17-AP-1142
Circuit Court Case No.: 10-FA-206

KEATON L. LYONS,

Respondent-Appellant,

JILL R. KELSEY,

Petitioner-Respondent.

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

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

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I. Kelsey Overstates Several Facts and Takes Others out of Context.

Kelsey asserts that she 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." (Kelsey Brief, p. 4). In fact, Ann had an overnight visit with Kelsey on January 21, 2016 and was scheduled to have another on February 11, 2016. (R. 87, p. 36). That was not a dramatic change from previous Januaries and Februaries. (R. 35). Had this lawsuit not been filed, Kelsey would have continued to have visitation, including overnight visits, in 2016 and beyond. (R. 87, pp. 66, 74, 78). The frequency of the visits would simply have been reduced to accommodate Ann's busier schedule. (R. 87, pp. 61, 64-65, 95-96).

Michels and Lyons only stopped sending Ann to Kelsey's house *after they became aware Kelsey had sued them*. (R. 87, pp. 78-80). Even then, they invited Kelsey to attend Ann's tee-ball games and a grandparent event at school. (R. 87, p. 87). Further, in or around October 2016, Michels and Lyons, despite no obligation to do so, agreed to a "gentlemen's agreement"

under which Ann visited Kelsey twice a month, which was more often than she was visiting her maternal grandparents. (R. 87, pp. 43, 48).

Kelsey contends the visitation the court ordered was "basically what (she) had the first six years of Ann's life." (Kelsey Brief, p. 4). In fact, she conceded she had never had Ann for a week-long visit. (R. 87. p. 50). Her own calendar evidences the longest visit was two nights (and that was only on one occasion). (R. 35).

Kelsey contends Michels and Lyons never expressed concerns regarding Ann's safety prior to this litigation. (Kelsey Brief, p. 3). In fact, Michels gave Kelsey a list of rules that addressed her and Lyons' concerns more than a month before Kelsey filed her lawsuit. (R. 87, p. 67).

Kelsey contends the record does not support the assertion that she lied to Michels and/or Lyons regarding the proposed Disney trip. (Kelsey Brief, p. 6). Michels and Lyons actually asserted that Kelsey had asked Michels to lie to Lyons regarding the funding of the trip. (Michels Brief, p. 6). Kelsey does not dispute that assertion. As for whether she lied, she testified:

Q …At the end of the day, were you honest with Keaton (regarding the proposed Disney trip)?

A No.

(R. 65, p. 32).

Kelsey contends the visitation ordered by the court was less than that recommended by the guardian ad litem. (Kelsey Brief, p. 7). In fact, the guardian ad litem did **not** recommend Kelsey have a week-long visit every summer. (R. 29). She also recommended that Kelsey not be permitted to take Ann more than 60 miles from home without written consent from a parent. (R. 29).

Kelsey criticizes the undersigned attorney for not having reviewed the trial transcript prior to asking the court to reconsider its decision. (Kelsey Brief, p. 9). What she fails to note is that there was no trial transcript because Michels and Lyons could not afford to have one prepared after spending

thousands of dollars defending Kelsey's lawsuit.[1] (R. 67, p. 4, n.1); (R. 88, p. 5); (R. 87, p. 103).

Finally, Kelsey criticizes Michels and Lyons for citing her deposition transcript and the recording of the voicemail. (Kelsey Brief, pp. 6-7). She argues the transcript and voicemail should not be cited because they were not part of the *trial* record. They are, however, part of the *circuit court record*. (R. 65); (R. 62); (Non-Electronic Record Item). They were considered by the circuit court when it decided whether the standard it applied was constitutional. (R. 62); (R. 65). Kelsey did not argue it was improper for the court to consider them. (R. 70). Nor did she argue it was improper for the court of appeals

[1]In her voicemail to Michels, Kelsey suggested Michels should just give in to her demands because she had resources to hire a good attorney and would get whatever visitation she wanted. The Connecticut Supreme Court, in concluding that only the harm standard sufficiently protects parents' substantive due process rights, expressed well-founded concern regarding the wealth gap that often exists in cases like this: "(T)here is no real barrier to prevent a party, who has more time and money than the child's parents, from petitioning the court for visitation rights. A parent who does not have the up-front out-of-pocket expense to defend against the petition may have to bow under the pressure even if the parent honestly believes it is not in the best interest of the child. (citation omitted). The prospect of competent parents potentially getting caught up in the crossfire of lawsuits by relatives…demanding visitation is too real a threat to be tolerated in the absence of protection afforded through a stricter burden of proof." Roth v. Weston, 259 Conn. 202, 789 A.2d 431, 449 (2002).

to consider them before this case was certified. (Kelsey Court of Appeals Brief).

II. Michels and Lyons Have Not Forfeited Their Right to Object to the Legal Standard Applied by the Circuit Court.

Michels and Lyons raised their objection before the circuit court. (R. 63); (R. 64). Kelsey did not argue the issue had been forfeited or waived, and the circuit court decided the issue on its merits. (R. 70); (R. 88, pp. 14-16). Michels and Lyons raised the same objection on appeal. (Michels Court of Appeals Brief). In her court of appeals brief, Kelsey did not argue the issue had been forfeited or waived. (Kelsey Court of Appeals Brief). Only now, before this court, does Kelsey make that argument. It is thus *Kelsey's* argument that has been forfeited. Ironically, she concedes as much by correctly noting that Wisconsin appellate courts generally refuse to consider arguments made for the first time on appeal.

III. The *Roger D.H.* Presumption, as Understood and Applied by the Circuit Court and the Court of Appeals in *Nicholas L.*, Is Meaningless.

In their initial brief, Michels and Lyons observed:

> "With or without the presumption, a grandparent, to prevail, has to put forth evidence that convinces the court,

> by a preponderance of the evidence, that visitation is in the best interests of the child." (Michels Brief, p. 24).

Despite devoting a large portion of her brief to the issue, Kelsey makes no effort to explain how that observation is untrue. (Kelsey Brief, pp. 15-29). Instead, she urges this court to wade into esoteric debates regarding how presumptions that actually shift the burden of production from one party to another should be understood. Those debates are "a place fraught with danger, an impenetrable jungle, a mist laden morass - where more than one academician has been known to lose his way and, once returned, is never quite the same." In re the Interest of Kyle S., 194 Wis.2d 365, 384-85, 533 N.W.2d 794 (1995) (J. Abrahamson, dissenting), quoting Ronald B. Lansin, *Enough is Enough: A Critique of the Morgan View of Rebuttable Presumptions in Civil Cases*, 62 Or. L. Rev. 485, 485 (1983).

Luckily, the issue in this case is far more basic. It is whether a presumption that does not shift the burden of production or alter the burden of persuasion is meaningful. The above-quoted observation from Michels' and Lyons' brief demonstrates it is not meaningful. None of the authority Kelsey cites demonstrates otherwise.

Kelsey first relies on Wis. Stat. § 903.01. That section provides that common law presumptions can be overcome by disproving the presumed fact by a preponderance of the evidence. Wis. Stat. § 903.01. In other words, it simply dictates what the burden of persuasion will be once a presumption has shifted the burden to prove a fact from one party to another. This court recognized as much in Kyle S.:

> "(Section 903.01) recognizes that once established, a presumption *shifts the burden of production and persuasion to the party opposing the presumption*." 194 Wis.2d at 374 (emphasis added).

The presumption at issue in this case does not shift the burden of production from the parents to the petitioning grandparent and does not shift or alter the grandparent's burden of persuasion. In the absence of the presumption, the petitioning grandparent *already* had the burden to prove, by a preponderance of the evidence, that court-ordered visitation was in the child's best interests. With the presumption, the grandparent bears *the exact same burdens*.

Kelsey relies on this court's decision in Kruse v. Horlamus Industries, Inc., 130 Wis.2d 357, 387 N.W.2d 64 (1986). Her reliance is misplaced. The statute at issue in Kruse

was Wis. Stat. § 893.30. It provides that in every action to recover or for possession of real property, and in every defense based on legal title, the person who has legal title to the property is presumed to have been in possession of the property within the time required by law to avoid losing the property via adverse possession. Wis. Stat. § 893.30.

Thus, pursuant to Wis. Stat § 893.30, if a title holder initiates a declaratory judgment action to resolve a dispute over the ownership of property to which he holds title, he is relieved of the burden to produce evidence that he was in possession of the property. Id. Instead, he only has to prove he holds title to the property. The court must then presume he was in possession, even though he may have no evidence of possession. Id. The defendant then bears the burden to produce evidence of non-possession. Id. Section 893.30 thus shifts the burden of production on the issue of possession of the property from the plaintiff to the defendant. Similarly, in a case where a title holder is a defendant asserting a defense that requires proof of possession of the property, the statute shifts the burden on that element from the defendant to the plaintiff.

This court in Kruse held only that *once the burden of production has shifted from the title holder to the non-title holder*, the non-title holder can overcome the presumption by proving non-possession by a preponderance of the evidence. 130 Wis.2d at 366-67. The title holder in Kruse had argued the non-title holder should be required to prove non-possession *by clear and convincing evidence*. Id. at 365. In either case, however, the presumption was meaningful because it relieved the title holder of the burden of proving a fact he otherwise would have had to prove. The presumption simply would have been *more* favorable to the title holder had the non-title holder been required to prove non-possession by clear and convincing evidence.

This case is fundamentally different because the presumption at issue, unlike the presumption in Wis. Stat. § 893.30, will *never* relieve the party who is supposed to benefit from the presumption from the burden to produce evidence of a fact needed to prove a claim or affirmative defense. The procedural posture of grandparent visitation cases is always the same. The grandparent is the petitioner. The parent is the

respondent. Even without the presumption, the grandparent, as petitioner, will *always* have the burden to produce evidence that the requested visitation is in the child's best interests. The presumption will therefore never shift the burden of production on that issue.

Kelsey correctly notes the difference between a Morgan presumption and a Thayer or "bursting bubble" presumption. (Kelsey Brief, pp. 27-29). In a case involving Wis. Stat. § 893.30, if the presumption is a Morgan presumption, the non-title holder must produce enough evidence of non-possession to prove non-possession by a preponderance of the evidence. If his evidence is insufficient, the title holder will prevail by virtue of the presumption even if there is no evidence of possession. On the other hand, if the presumption is a "bursting bubble" presumption, once the non-title holder produces *any* evidence of non-possession, both parties equally bear the burden of persuasion, and the title holder can only prevail by producing evidence of possession that is more convincing than the non-title holder's evidence of non-possession.

The difference between the two types of presumptions is meaningless in this case because both presuppose the shifting of the burden of production on an issue from one party to the other. If that were not the case, a "bursting bubble" presumption would actually benefit the party *opposing* the presumption by easing his burden of production and leaving both parties equally bearing the burden of persuasion.

IV. No Other State Supreme Court Has Concluded That a Restated Best-Interests-of-the-Child Standard Is Sufficient to Protect Parents' Substantive Due Process Rights.

Kelsey, in two footnotes, lists more than a dozen foreign cases she contends support her view that the Roger D.H. presumption is enough "special weight" to protect parents' fundamental liberty interest in raising their children as they deem best. (Kelsey Brief, pp. 32-34). All the cases are distinguishable in one or more important ways.

Several cases actually require the petitioning grandparent to prove *by clear and convincing evidence* that the visitation sought is in the child's best interests. In re Adoption of C.A., 137 P.3d 318, 328-29 (Colo. 2006); Walker v. Blair, 382 S.W.3d 862, 874-75 (Ky. 2012); Polasek v. Omura, 2006 MT 103, ¶ 15

332 Mont. 157, 136 P.3d 519; Hamit v. Hamit, 271 Neb. 659, 715 N.W.2d 512, 526 (2006); In re Marriage of O'Donnell-Lamont, 337 Or. 86, 91 p.3d 721 733 (2004) (interpreting statute that imposed clear-and-convincing-evidence standard on grandparents who did not have a parent-like relationship with a child). Other cases Kelsey cites involve statutes that were narrowly tailored in a way courts found sufficient to protect parents' due process rights. Blakely v. Blakely, 83 S.W.3d 537, 543-44 (Mo. 2002); Hiller v. Fausey, 588 Pa. 342, 904 A.2d 875, 886-87; In re Rupa, 161 N.H. 311, 13 A.3d 307, 318 (2010); Smith v. Wilson, 90 So.3d 51, ¶ 23 (Miss. 2012); Kulbacki v. Michael, 2014 ND 83, ¶ 9 845 N.W.2d 625. For instance, the Pennsylvania statute limited visitation to grandparents whose child had died. Hiller, 904 A.2d at 886. The Missouri statute provided that no visitation could be ordered unless the parents had entirely denied visitation for a period of 90 days and even then allowed only for "minimal visitation." Blakely, 83 S.W.3d at 544.

Section 767.43(3) is not in any way narrowly tailored. It is not limited to grandparents whose child has died or to

grandparents who have a parent-like relationship with a grandchild. In fact, it is not even limited to grandparents who maintained some relationship with the child. It applies even to those who merely "attempted to maintain a relationship with the child." Wis. Stat. § 767.43(3)(d). It does not limit the visitation a court can order, as evidenced by this case, where the court granted Kelsey a week-long visit she never previously had and that both fit parents would have never agreed to. (R. 87, pp. 50, 67, 95-96).

Other cases Kelsey relies on require courts to give a parent's opinion regarding the best interests of her child "special weight" *beyond* the presumption that a fit parent acts in her child's best interests. K.I. ex rel. J.I. v. J.H., 903 N.E.2d 453, 462 (Ind. 2009); E.S. v. P.D., 8 N.Y.3d 150, 863 N.E.2d 100, 106 (2007); In re Marriage of Friedman and Roels, 244 Ariz. 111, ¶ 16-17 418 P.3d 884 (2018); Harrold v. Collier, 107 Ohio St. 3d 44, ¶ 42, 836 N.E.2d 1165 (2005). One case Kelsey cites distinguishes between cases where the non-custodial parent supports the visitation petition and cases where no parent supports the petition. In re Marriage of Harris, 34 Cal. 4th 210,

96 P.3d 141, 152 (2004). This case, of course, is the rarest of visitation cases. It has two fit parents who *both* believe the visitation sought is contrary to the best interests of their child.

As noted in Michels' and Lyons' initial brief, the majority of state supreme courts to have considered grandparent visitation statutes similar to Wis. Stat. § 767.43(3) have concluded that requiring the petitioning grandparent to show harm to the child is the only way to protect parents' fundamental liberty interest in the care, custody and upbringing of their children. The reasoning of those courts is persuasive and should be adopted by this court.

V. Protecting Parents' Substantive Due Process Rights Would Not Undermine Fundamental Principles of Wisconsin Law.

It is hard to imagine a principle of law more fundamental than the one enshrined in Article I, Section 1 of the Wisconsin constitution. Nevertheless, Kelsey argues that protecting the fundamental right enshrined therein undermines the "organizing principle of Wisconsin family law" - the best interests of the child. (Kelsey Brief, p. 37). It does not.

Courts in family law cases are commonly called on to determine the best interests of a child when the child's parents are unfit or when fit parents cannot agree as to what is in the child's best interests. In those cases, the court is *forced* into trying to determine what would be in the child's best interests. There is no one else to fill that role. This case is fundamentally different. It presents a threshold question - Who should be making the subjective determinations of whether and how much grandparent visitation is in the child's best interests? The two fit parents who raised the child since birth? Or a circuit court judge who hears a few hours of testimony? If Wisconsin parents' fundamental liberty interest in raising their children as they deem best means anything, the parents should be making the decision in all cases except those where a grandparent can show the parents' decision is harming the child.

VI. Section 767.43(3) Must Be Subject to Strict Scrutiny.

Kelsey's argument that strict scrutiny does not apply is based primarily on a pro-grandparent law review article. (Kelsey Brief, pp. 40-44, relying on David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32

Rutgers L.J. 711 (2001)). She argues that court-ordered grandparent visitation only incidentally affects parents' fundamental liberty interest and does not actually infringe on that interest. She cites Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673 (1978), where the United States Supreme Court struck down a Wisconsin law that provided that residents who were obligated to support minor children not in their custody could not marry without court approval. In doing so, the court noted:

> "It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships…By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subject to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. (citation omitted). The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry." 434 U.S. at 386-87.

Section 767.43(3) plainly falls in the category of laws that interfere directly and substantially with a fundamental right. It empowers courts to order parents to cede care and control of their children to a third party against their will. It does not limit the amount of visitation that can be compelled. It therefore infringes directly on a fit parent's interest in the care, custody

and upbringing of her children and must be subject to strict scrutiny review.

The vast majority of state supreme courts to have considered the question have concluded that statutes like Wis. Stat. § 767.43(3) are subject to strict scrutiny review. Doe v. Doe, 116 Hawaii 323, 172 P.3d 1067, 1079-80 (2007) (collecting cases). This court should do the same. Once it does, it is clear Wis. Stat. § 767.43(3), as applied in this case, cannot survive strict scrutiny.

Under strict scrutiny review, a statute must be narrowly tailored to advance a compelling state interest that justifies interference with the fundamental liberty interest. In re the Termination of Parental Rights to Zachary B., 2004 WI 48, ¶ 24, 271 Wis.2d 51, 678 N.W.2d 831. As noted in Michels' and Lyons' initial brief, this court has never found that anything less than harm to a child is sufficiently compelling to justify interference with parents' fundamental liberty interest. Further, even if something less were sufficiently compelling, Wis. Stat. § 767.43(3) is anything but narrowly tailored, as noted in Section IV above.

CONCLUSION

Michels and Lyons respectfully request this court remand the case with instructions to dismiss Kelsey's petition.

Dated this 24th day of August, 2018.

WELD RILEY, S.C.

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CERTIFICATION

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

> Proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body test. The length of this brief is 2,936 words.

Dated this 24th day of August, 2018.

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CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80 and 809.18, that the Supreme Court Reply Brief of Appellants Cacie M. Michels and Keaton L. Lyons, was sent by U.S. mail on August 24, 2018, to the Clerk of the Wisconsin Supreme Court, with three (3) 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, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 24th day of August, 2018.

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