STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2022AP002046
Circuit Court Case No. 21 FA 48

In re the grandparent visitation of: M.E.H., A.J.H., and P.E.H.

Robert and Andrea Cardinal

Petitioners-Appellants

-and-

Jonathan Holger and
Nicole Stroozas

Respondents-Respondents

RESPONDENT NICOLE STROOZAS' APPELLATE BRIEF

ON APPEAL FROM THE DECISION OF THE ST. CROIX COUNTY CIRCUIT COURT, ENTERED AUGUST 3, 2022
THE HONORABLE SCOTT R. NEEDHAM PRESIDING

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ISSUE FOR REVIEW:

Did the trial court err in denying Appellants' request for visitation and dismissing Appellants' grandparent visitation petition?

The Circuit Court correctly exercised its discretion in dismissing the petition in accordance with the correct legal standard.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION:

Respondent, Nicole Stroozas anticipates the issues raised in this appeal can be addressed by the written briefs. Accordingly, Nicole Stroozas is not requesting oral argument. Nicole Stroozas is not requesting publication.

STATEMENT OF THE CASE*:*

Appellants, Robert and Andrea Cardinal (hereinafter "Appellants" collectively) filed a petition for grandparent visitation on February 16, 2021. (R.3). Appellants sought visitation of Nicole Stroozas' three children that she has with Respondent Jonathan Holger, namely: M.E.H., A.J.H., and P.E.H. Appellants are the legal parents of Nicole Stroozas. Robert Cardinal is the adoptive father of Nicole

Stroozas. Appellants' petition was contested by Nicole Stroozas (R. 10). Jonathan Holger filed his own responsive pleading contesting Appellants' petition. (R. 12).

On May 10, 2021, Nicole Stroozas filed a motion to dismiss Appellants' petition. (R. 20). On August 23, 2021, Nicole Stroozas' motion to dismiss was denied orally by Judge Scott R. Needham of the St. Croix County Circuit Court and the decision of Judge Needham was put into a written order dated August 31, 2021. (R. 37).

The Court held a two-day trial on November 24, 2021 and April 1, 2022. The Court issued an oral ruling on June 9, 2022 denying Appellants' petition and dismissing Appellants' petition for grandparent visitation. (R. 141). The Court issued its written order outlining the June 9, 2022 decision on August 3, 2022. On August 19, 2022, Appellants filed a motion to reconsider the Court's denial of their petition. (R. 152). On November 29, 2022, the trial court denied Appellants' motion for reconsideration. (R. 170). Appellants appealed the August 3, 2022 decision of the Circuit Court on November 28, 2022. (R. 173).

STATEMENT OF FACTS

Appellants in the matter are the maternal grandmother and grandfather of the three children who are the subject of this proceeding (R. 6, pg. 1). Robert Cardinal legally adopted Nicole Stroozas.(R. 187, pg. 8). At the time of adoption, Nicole Stroozas was an adult. *Id.* Nicole Stroozas is the biological and legal mother of three children at issue. (R. 11, pg. 1). Jonathan Holger is the biological and legal father of the three children at issue. (R. 192, pg. 63). Nicole Stroozas and Jonathan Holger were married when each child was born and were subsequently divorced in 2017. *Id.* Nicole Stroozas and Jonathan Holger agree that Appellants should no longer have contact with the three children. (R. 192, pg. 72); (R. 11, pg. 1). Nicole Stroozas and Jonathan Holger are not unfit in any way to make decisions regarding their children and Appellants have not made such claim of unfitness. Nicole Stroozas and Jonathan Holger have never been charged criminally or in juvenile court with neglecting or abusing the children in any way.

It is undisputed that Appellants previously had a relationship with the children, which was authorized

by either Nicole Stroozas or Jonathan Holger depending on which parent had the children that particular date under the parenting time schedule. (R. 187 and R. 192 generally) Based on the history and circumstances of that previous relationship, Nicole Stroozas and Jonathan Holger have decided that it is in the children's best interests that the children should no longer have a relationship with Appellants. (R. 11, pg. 1; R. 187 and R. 192 generally).

Both parents testified at trial as to their respective reasons for terminating contact between their children and the children's grandparents. (R. 187 and R. 192).

These facts alone, without the need for anything further, supported the Nicole Stroozas and Jonathan Holger's request that the Grandparent visitation petition be denied and led the St. Croix County Circuit Court to that decision.

The law requires that a court must find a compelling interest or reason for overriding a parent's decisions for his or her child before the Court can substitute its own judgment about a child's best interests over that of a parent. In this case the Circuit Court carefully

considered the evidence and appropriately exercised its discretion in concluding that the grandparent petitioners had not met their burden of showing the compelling interest by clear and convincing evidence. (Order of the Circuit Court dated August 3, 2022).

ARGUMENT

I. THE STANDARD OF REVIEW IS ERRONEOUS EXERCISE OF DISCRETION AND NOT DE NOVO.

A circuit court's decision to grant or deny visitation is reviewed for an erroneous exercise of discretion. Lubinski v. Lubinski, 314 Wis. 2d 395, 400-01, 761 N.W.2d 676, 679 (Wis. Ct. App. 2008).

Appellants argue that the Appellate Court should also review this case de novo because they believe that facts of the case are undisputed and the Circuit Court's decision involved an issue of statutory interpretation. This is incorrect. De novo review is only given to a circuit court determination when there is a dispute as to the language and interpretation of a statute.

> "The principle objective of statutory interpretation is to ascertain and give effect to the intent of the legislature. The court must ascertain the legislature's intent from the

> language of the statute in relation to its context, scope, history, and the objective intended to be accomplished." State v. Cole, 262 Wis. 2d 167, 663 N.W.2d 700, 2003 WI 59 (Wis. 2003).

The applicable statute in this case is Wis. Stat. § 767.43(1). As set forth below, the interpretation of this particular statute has been the subject of multiple Wisconsin Supreme Court cases, most recently *In the Matter of Visitation of A.A.L.*, 387 Wis.2d 29 (Wis. 2019). All parties to this proceeding agree that the *A.A.L.* decision is controlling as to how Wis. Stat. § 767.43(1) must be interpreted to pass constitutional muster.

Given that there is no dispute as to how the statute is to be interpreted, the only question for the Court of Appeals is whether the Circuit Court correctly exercised its discretion as to whether the grandparents' factual showing met their burden of showing by clear and convincing evidence that compelling circumstances existed to overcome the parents' decision. It is precisely the role of the Circuit Court to consider facts and determine, in its discretion, whether those facts meet the applicable legal standard. It was not an

erroneous exercise of the circuit court's discretion to determine that the grandparents had not met this burden.

A significant portion of the Appellants' brief is devoted to asking the Court of Appeals to reconsider and reweigh the facts presented below, which is not the proper role of the Appellate Court. "When reviewing fact finding, appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court could have reached but did not… The weight and credibility to be given to testimony is uniquely within the province of the trial court." *Noble v. Noble*, 706 N.W.2d 166, 2005 WI App 227, 287 Wis.2d 699 (Wis. 2005).

In sum, there is no dispute as to statutory interpretation warranting de novo review as the question in this matter is simply whether the circuit court properly exercised its discretion.

II. APPELLANTS ARE ADVOCATING FOR AN UNCONSTITUTIONAL APPLICATION OF THE LAW AS THERE IS NO FACTUAL BASIS OR COMPELLING INTEREST TO OVERCOME THE PARENTS' DECISION REGARDING THEIR CONTACT WITH THE CHILDREN.

"[U]pon petition by a grandparent, great-grandparent, stepparent or person who has maintained a

relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child." Wis. Stat. § 767.43(1).

While it is true that the Wisconsin Supreme Court held in 2016 that a grandparent who is petitioning for visitation under this statute does not have to prove that he or she has maintained a relationship similar to a parent and child relationship in order to be granted visitation, that holding made clear that the court must give deference to a parent's determination, first and foremost, and presume that the parent is acting in a child's best interests before it may override a parent's decision. Appellants concede that the Court must give and "does require that [a] [court] apply a presumption that a fit parent's decision regarding non-parental visitation is in the best interests of the child." *Id.* Citing *In re Paternity of Roger D.H.,* 250 Wis. 2d 747, 758, 641. N.W.2d 440, 445 (Wis. Ct. App. 2002).

In other words, even though the language of the statute simply states that the parents must have notice

of the hearing and the court must find that contact is in the children's best interests, the Court still must give significant deference to the wishes of the parents. The Wisconsin Supreme court stated as follows:

> Whenever someone brings a visitation petition under § 767.43(1)——whether the petitioner is a grandparent, greatgrandparent, stepparent, or other person——*Troxel* requires that the deciding court give special weight to a fit parent's opinions regarding the child's best interest as part of any best interest determination. We think it important to note that while our decision eliminates one unintended impediment for grandparents, greatgrandparents, and stepparents who seek visitation rights under Wis. Stat. § 767.43(1), it does not guarantee that they will prevail. The court must not only consider the constitutional rights of the parents but also decide, in its sound discretion, whether the facts and circumstances of the case warrant granting, modifying, or denying a visitation petition in the best interest of the child.

S.A.M. v. Meister, 876 N.W. 2d 746, 760 (Wis.2016)(emphasis added).

The Wisconsin Supreme Court in *Meister* unequivocally stated that "special weight" must be given to a fit parent's child-rearing decisions that "consider[s] the constitutional rights of the parents." Those constitutional rights have been discussed by both the United States Supreme Court and the Wisconsin

Courts. The United States Supreme Court holding in *Troxel v. Granville* was incorporated in the analysis contained in *In re Roger D.H.*, 250 Wis.2d 747, 641 N.W.2d 440 (Wis.App.2002). *See Meister* at 758. Notably, the *Roger D.H.* holding was further elaborated upon in *In re Nicholas L.*, 299 Wis.2d 768, 731 N.W.2d 288 (Wis.App.2007), and *Lubinski v. Lubinski*, 761 N.W.2d 676 (Wis.App.2008).

In these cases, the Wisconsin Appellate Court established a rule that to constitutionally apply the non-parent visitation statute, the Court must (1) "apply a presumption that a fit parent's decision regarding nonparental visitation is in the best interest of the child," and (2) "read this requirement into a nonparental visitation statute, even when the statute is silent on the topic." *Nicholas L.*, 731 N.W.2d at 292.

When interpreting a statute, the Court must start with the position that "[s]tatutes enjoy a presumption of constitutionality," and must be interpreted "so as to preserve their constitutionality." *State v. Bertrand*, 162 Wis.2d 411, 415, 469 N.W.2d 873 (Wis.App.1991).

If the statute is applied in a way that implicates a protected fundamental liberty interest, the Court must

review that application by employing a strict scrutiny standard. *Monroe County DHS v. Kelli B.*, 271 Wis.2d 51, 62, 678 N.W.2d 831 (Wis.2004) *citing Winnebago County DSS v. Darrel A.*, 194 Wis.2d 627, 639, 534 N.W.2d 907 (Wis.App.1995).

Consistent with the above constitutional parameters, the Wisconsin Supreme Court most recently confirmed how Wis. Stat. § 767.43 must be interpreted in *In the Matter of Visitation of A.A.L.*, in which it modified the holding in *Roger D.H. v. Virginia O.*, 2002 WI App 35, ¶ 9, 250 Wis.2d 747, 641 N.W.2d 440 to require a grandparent to overcome the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the decision is not in the child's best interest, and that the Court can only consider the child's prior relationship with the grandparents once the presumption has been overcome. *In the Matter of Visitation of A.A.L.*, 387 Wis.2d 29 (Wis. 2019). The Supreme Court stated "that a circuit court should only consider the nature and extent of grandparent visitation if a grandparent overcomes the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the

decision is not in the child's best interest." In the Matter of A.A.L., 387 Wis.2d 29 (Wis. 2019).

In the present matter, the circuit court carefully reviewed and considered whether Appellants had met their burden of showing a compelling interest in order to overcome Nicole Stroozas' and Jonathan Holger's right to direct the care, control, and upbringing of their children. The Circuit Court clearly agonized over the decision, but ultimately correctly exercised its discretion to find that no such compelling interest had been shown.

Appellants' brief creates a "straw man" argument when it states "[i]t appears the trial court ruled that a parent must be unfit before his/her decisions can be overruled by the trial court." Appellants' Brief at pg. 14. This is not, in fact, what the Circuit Court ruled. Specifically, the Circuit Court found, "the presumption that a fit parent's decisions are in the best interests of the children must be overcome by clear and convincing evidence." (R. 152 at pg. 4, paragraph 14). The Court further clarified its position identifying that there are situations "in which the Court can order visitation over the objection of a parent." (R. 152 at paragraph

15). The Circuit Court did not stop its analysis after determining that Nicole Stroozas and Jonathan Holger are fit parents; rather it went on to find that "[Ms/ Stroozas] was able, as I said, to articulate reasons for her decision to cut off visitation." R. 138 at p. 14).

In this case, the Circuit Court did not conclude that only an unfit parent could have grandparent visitation ordered. Rather, the Circuit Court clearly laid out and understood the legal standard that is to be reviewed in a case such as this one. First, it identified and recognized the presumption of the fit parents' decision.Then, the Court correctly shifted the onus to the Appellants to demonstrate, by clear and convincing evidence—the highest standard in civil cases, that the presumption is overcome. Only then can the Circuit Court determine if Appellants' request is in the best interests of the children and consider the nature of the past relationship the children may have had with their grandparents.

In this case, the Circuit Court reviewed the evidence and cited testimony and determined that Appellants had not met their burden by clear and convincing evidence. (R. 152, pgs. 5-7, ¶¶ 19-28). If

the Circuit Court had made its ruling solely based upon the its determination of the children's bests interests or shifted the burden to the parents to justify their reasons for terminating the relationship as advocated by the Appellants, it would be an unconstitutional application of the statute.

a. The Rights of Parents to Direct the Care and Control of His or Her Child is a Storied Constitutionally Protected Fundamental Liberty Interest.

The United States Supreme Court has made it abundantly clear that the rights of parents to the care, control, and custody of his or her child is a fundamental liberty interest entitled to heightened protection. The United States Supreme Court stated, that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

In elaborating upon the rights of parents, the *Troxel* Court cited the following examples: Parents have a right to "establish a home and bring up children" and "to control the education of their own." *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43, S.Ct. 625, 67 L.Ed.

1042 (1923). Parents have the right "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Further, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944)(emphasis added). Additional cases cited by the *Troxel* court include *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Quillion v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); and *Washington v. Glucksberg*, 512 U.S. 702, 117 S.Ct. 2258 (1997). In all of these cases the United States Supreme Court recognized that the right of parents to their child is a fundamental liberty interest such that the Fourteenth Amendment "guarantees more than fair process." *Troxel*, 530 U.S. at 65. In other words, parenting is a substantive due process

right.

The *Troxel* Court summarized the great weight of precedent by harkening back to a section of *Parham* as follows:

> [O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. at 68, *citing Parham v. J.R.*, 442 U.S. 584, 602 (1979)(internal quotation marks and citations omitted). It is undeniable, given the length and history of precedent that the rights of parents are a protected fundamental liberty interest.

The *Troxel* Court therefore held that the Washington State statute that allowed grandparents to petition for visitation with a child simply based upon an assertion that said visitation would serve the best interests of the child was unconstitutional, stating that "so long as a parent adequately cares for his or her children (i.e.,

is fit), 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* 530 US at 68-69.

Thus, the interpretation of the statute apparently sought by the Appellants in the present matter (i.e. that the Court may grant visitation simply if it disagrees with the parents' decision to deny contact with a grandparent) is impermissible.

In light of *Troxel,* the Wisconsin Court has made clear that "the due process clause does not allow the State to intervene in the child-rearing decision of a fit, custodial parent simply because the court believes there is a better decision." *Nicholas L.* at 292. Accordingly, the Wisconsin Courts have clearly acknowledged that the right of a parent to the care, custody, and control of his or her child is a protected fundamental liberty interests and that Wis. Stat. § 767.43 must be interpreted accordingly. Appellants had the opportunity to be heard and presented evidence to overcome the presumption that Nicole Stroozas' and Jonathan Holger's decision was in the child's best

interests.

The Circuit Court, in its initial ruling, and ruling following Appellants' motion for reconsideration, correctly determined that there was no sufficient compelling interest shown by Appellants and, therefore, denied Appellants' petition for grandparent visitation. This was not an erroneous exercise of the court's discretion, and is exactly what the Circuit Court is expected to do.

b. APPELLANTS DID NOT ESTABLISH A COMPELLING INTEREST TO JUSTIFY ENCROACHMENT UPON NICOLE STROOZAS OR JONATHAN HOLGER'S LIBERTY INTEREST.

It is clear that a constitutional interpretation of Wis. Stat. 767.43 requires more than simply an assertion that visitation would serve the best interests of the children. Appellants herein failed to show that there existed an affirmative and compelling reason to overcome the presumption that the Nicole Stroozas and Jonathan Holger are making decisions that serve the child's best interests. A large portion of the Appellants' brief is devoted to arguing about the facts found by the Circuit Court and their argument that the Court of Appeals should reconsider and reweigh those facts. As stated above,

this is not the role of the Court of Appeals. Even if the Court of Appeals does look at the facts, Nicole Stroozas and her witnesses testified to the issues each person had maintaining a relationship with Appellant Andrea Cardinal and the emotionally harmful tactics that she used in the past with each witness individually. Nicole Stroozas offered valid reasons, and the Circuit Court reasoned Nicole Stroozas was able "to articulate reasons for her decision to cut off visitation." (R. 152, pg. 5, paragraph 20).

The Circuit Court correctly noted that it is not the court's role to decide whether it agreed with the parents' reasons for limited contact, only that there was a valid reason for doing so, which the Court did. The Court also provided a lengthy discussion about Jonathan Holger's decision and found it to be independent. (R. 152, pg. at paragraph 24).

Given that the Respondents have: (1) A strong legal presumption in favor of the decisions they make for the children, and (2) specific factual support as to why granting the visitation petition would actually cause harm to the children; the only appropriate option for the Circuit Court was to dismiss Appellants' petition

and deny Appellants' motion for reconsideration.

Conclusion

For the reasons outlined herein, the Circuit Court's ruling should be affirmed.

Dated this 26th day of May, 2023.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b), (bm) and (c), Wis. Stats., as follows:

- Monospaced font: 10 characters per inch; double-spaced;
- 1.25 inch margin on the right and left side and 1 inch margin on the top an bottom.

The length of this brief is 20 pages.
Dated this 26th day of May, 2023.

GAPEN, LARSON & JOHNSON, LLC
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