COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1029 **Cir. Ct. No. 2004FA57**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE PLACEMENT OF M.M.C.:

KEITH COOK AND BERNADINE COOK,

PETITIONERS-RESPONDENTS,

V.

MICHELE MORRIS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Bridge and Vergeront, JJ.

¶1 VERGERONT, J. Michele Morris appeals the order of the circuit court granting scheduled visitation with her child to Keith and Bernadine Cook,

the child's paternal grandparents. Michele argues that the court failed to apply the presumption required by ***Troxel v. Granville***, 530 U.S. 57 (2000), that a parent's decision regarding visitation is in her child's best interest. The Cooks respond that the court did apply the presumption and properly determined that they had presented evidence rebutting the presumption. We conclude the circuit court did not apply the presumption. We therefore reverse and remand, as explained in more detail in paragraph 15, to allow the circuit court to apply the ***Troxel*** presumption in determining whether to grant visitation under WIS. STAT. § 767.43(3).[1]

BACKGROUND

¶2 M.M.C., born October 8, 2003, is the biological child of Michele Morris and Travis Cook. Michele and Travis never married, though they lived together during their relationship. Keith and Bernadine Cook are the father and stepmother of Travis. From her birth until mid-July 2007, the Cooks had a great deal of contact with M.M.C. M.M.C. lived with the Cooks for between one and two months after her birth while Michele was having health problems. As M.M.C. got older, she frequently visited the Cooks, often overnight, and sometimes for extended periods of time. M.M.C. also communicated with the Cooks by phone on a regular basis.

¶3 On July 20, 2007, Michele and Travis ended their relationship. Travis moved out of the home he shared with Michele and M.M.C. and apparently he did not have further contact with either. In late July or early August 2007,

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Michele asked the Cooks not to allow Travis to have contact with M.M.C. during the child's visits with them. Michele wanted Travis to spend time with M.M.C. but she wanted him to arrange that through her and not by simply stopping in when M.M.C. was at his parents' house. The Cooks did not agree to Michele's request because they felt they were being asked to "make a choice between [their] son and [their] granddaughter." The Cooks then informed Michele that they would be hiring an attorney. After that the Cooks attempted to contact Michele again, but she did not return their calls.

¶4 In October 2007, the Cooks filed this petition for grandparent visitation, asking the court to order specified periods of physical placement and to require Michele to notify them of all M.M.C.'s school events, medical appointments, and medical emergencies. At the hearing on the petition, Michele testified that she still wanted M.M.C. to have a relationship with the Cooks and she had never refused them visitation.[2] However, her attorney argued, Michele did not want an order to dictate when she had to allow the Cooks to visit M.M.C. because that would interfere with her constitutional right to parent. The Cooks' attorney argued that an order was necessary to prevent Michele from "terminat[ing]" contact as she had done when she stopped returning the Cooks' phone calls. The guardian ad litem (GAL) argued that the Cooks had a very close parent-child-like relationship with M.M.C. that should continue and an order would give M.M.C. a schedule that she could count on.

[2] Travis did not appear at the hearing. The circuit court found that neither Michele nor the Cooks knew where he was and that the Cooks properly published notice. *See* WIS. STAT. § 767.43(3) (requiring notice to both parents).

¶5 The court found the Cooks had established the requirements for visitation under WIS. STAT. § 767.43(3). It ordered that the Cooks have visitation with M.M.C. every third weekend, as well as specified times on holidays and an uninterrupted vacation period of nine days. In addition, the court ordered that the parties notify each other of medical emergencies or major health concerns involving the child and that Michele provide the Cooks with schedules of M.M.C.'s activities so that the Cooks can attend. In its findings of fact and conclusions of law, the court determined:

> 7. …Keith and Bernadine Cook have maintained a parent-like relationship with MMC since the date of her birth.
>
> ….
>
> 20. Although the relationship between the Cooks and Michelle [sic] Morris was good prior to late July of 2007, a triggering event occurred when Travis Cook left and a dispute arose between Michelle [sic] Morris and the Cooks regarding contact with Travis Cook. Subsequently, contact between the Cooks and MMC was terminated and the Cooks were not able to speak with MMC or Michelle [sic] Morris.[3]
>
> ….
>
> 23. Visitation between the Cooks and MMC is in the best interests of MMC and, in fact, is tremendously important to MMC.

(Footnote added.)

[3] *See* footnote 5 for an explanation why a parent-like relationship and "a triggering event" of a parent leaving are not requirements for grandparent visitation under WIS. STAT. § 767.43(3).

DISCUSSION

¶6 On appeal Michele argues that the circuit court erred by failing to apply a presumption that Michele's decisions regarding grandparent visitation were in M.M.C.'s best interest. Even if the court did apply the presumption, Michele contends, the Cooks did not present evidence sufficient to overcome that presumption. The Cooks respond that the court did apply the presumption but found that the evidence rebutted that presumption.

¶7 The decision whether to grant or deny a petition for grandparent visitation is committed to the circuit court's discretion. ***Roger D.H. v. Virginia O.,*** 2002 WI App 35, ¶9, 250 Wis. 2d 747, 641 N.W.2d 440. We will uphold the circuit court's decision if it considered the relevant facts, applied a proper legal standard, and, using a rational process, reached a reasonable conclusion. ***Id.*** "When a party contends that the circuit court erroneously exercised its discretion because it applied an incorrect legal standard, we review that issue de novo." ***Id.***

¶8 The parties agree that WIS. STAT. § 767.43(3), the "Special Grandparent Visitation Provision," applies in this case. This subsection provides:

> Special Grandparent Visitation Provision. The court may grant reasonable visitation rights, with respect to a child, to a grandparent of the child if the child's parents have notice of the hearing and the court determines all of the following:
>
> (a) The child is a nonmarital child whose parents have not subsequently married each other.
>
> (b) Except as provided in sub. (4), the paternity of the child has been determined under the laws of this state or another jurisdiction if the grandparent filing the petition is a parent of the child's father.
>
> (c) The child has not been adopted.

> (d) The grandparent has maintained a relationship with the child or has attempted to maintain a relationship with the child but has been prevented from doing so by a parent who has legal custody of the child.
>
> (e) The grandparent is not likely to act in a manner that is contrary to the decisions that are made by a parent who has legal custody of the child and that are related to the child's physical, emotional, educational or spiritual welfare.
>
> (f) The visitation is in the best interest of the child.

¶9 The parties also agree that WIS. STAT. § 767.43(3)(a) through (c) have been satisfied in this case: Travis and Michele never married, paternity has been determined, and M.M.C. has not been adopted. The court found that subsecs. (d) and (e) were satisfied and Michele does not challenge these findings on appeal. Thus, the parties' dispute is limited to subsec. (f): did the court correctly determine that court-ordered visitation was in the best interest of the child.

¶10 We begin our analysis with ***Troxel***. That case holds that parents have a "fundamental right … to make decisions concerning the care, custody, and control of their children" that is protected by the due process clause of the Fourteenth Amendment to the United States Constitution. 530 U.S. at 66. A state may not interfere with this right merely because a court believes that a "better" decision could be made. ***Id.*** at 72-73. In ***Roger D.H.***, we recognized that ***Troxel*** requires courts to presume that a fit parent's decisions regarding visitation are in the child's best interest and held that this requirement should be read into WIS. STAT. § 767.43(3). 250 Wis. 2d 747, ¶19.[4] Therefore, the starting point for the

[4] The special grandparent visitation provision at issue in ***Roger D.H. v. Virginia O.***, 2002 WI App 35, 250 Wis. 2d 747, 641 N.W.2d 440, was WIS. STAT. § 767.245(3) (1997-98). That provision was renumbered WIS. STAT. § 767. 43(3) by 2005 Wis. Act. 443, §§ 101, 183, effective June 6, 2006. The two provisions are identical in every way relevant to this opinion.

circuit court in determining whether to grant visitation under § 767.43(3) is the parent's offer of visitation, which the circuit court must presume is in the child's best interest. ***Martin L. v. Julie R.L.***, 2007 WI App 37, ¶12, 299 Wis. 2d 768, 731 N.W.2d 288. "It is up to the party advocating for nonparental visitation to [attempt to] rebut the presumption by presenting evidence that the offer is not in the child's best interests." ***Id.*** The court then determines whether the presumption has been rebutted and, if it determines it has been, it enters an order for visitation that is in the child's best interest. ***Id.***

¶11 It does not appear that the circuit court applied the ***Troxel*** presumption in this case. The court did not mention the presumption at the hearing or in its written findings of fact and conclusions of law. We do not fault the circuit court for this because it appears that none of the parties brought ***Troxel***, ***Roger D.H.***, or ***Martin L.*** to the circuit court's attention.[5] Likely for this reason,

[5] Michele's attorney in her argument in the circuit court focused on whether the Cooks had shown that they had maintained a "parent-child relationship" with M.M.C. and whether a "triggering event" had occurred. She contended the evidence showed neither. Understandably, then, the circuit court made findings on these points. The court determined that the evidence established both. However, the "parent-child relationship" and "triggering event" standards do not apply to visitation under WIS. STAT. § 767.43(3).

The existence of "a parent-child relationship" *is* required in visitation petitions under WIS. STAT. § 767.43(1), which provides:

> Petition, who may file. Except as provided in subs. (1m) and (2m), upon 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.

(Emphasis added). However, subsec. (1) does not apply to petitions under § 767.43(3). Section 767.43(2m). Subsection (3) states what must be proved about the relationship between the grandparents and the child—that the grandparent has maintained a relationship with the child or attempted to maintain a relationship, but was prevented from doing so by the parent with legal (continued)

the court did not make specific findings on Michele's position regarding visitation, which is the starting point of the analysis in applying the ***Troxel*** presumption. ***Martin L.***, 299 Wis. 2d 768, ¶12.

¶12 The Cooks, as we understand it, argue that the court implicitly found Michele's decision regarding visitation was not to allow any contact between the Cooks and M.M.C. As a basis for this, they point to the court's finding that, because Michele did not return the Cooks' phone calls after their dispute about Travis, she "terminated" their contact with M.M.C. However, it is not clear to us that this is a finding that Michele's position was that the Cooks could have no more contact with M.M.C., and Michelle's testimony indicates this is not her position. Michele testified that, when the Cooks told her they would seek an

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custody. Section 767.43(3)(d). Subsection (3), unlike subsection (1), does not require a showing of "a relationship similar to a parent-child relationship."

As for the "triggering event" standard, this was discussed in ***Holtzman v. Knott***, 193 Wis. 2d 649, 533 N.W.2d 419 (1995), a case involving a petition for nonparent visitation brought by the same-sex former partner of the child's biological parent. ***Id.*** at 659-63. The court held that WIS. STAT. § 767.245 (1991-92), a predecessor to and substantially the same as WIS. STAT. § 767.43(1), did not apply because the legislature had limited the "triggering event" for its application to the dissolution of a marriage. ***Id.*** at 658, 680. However, the court held, a circuit court has the authority to hear a visitation petition in equity if it finds evidence of a parent-like relationship and a significant triggering event. ***Id.*** at 658, 694. In reaching this conclusion, it examined the policy underlying the visitation statutes that there needed to be a triggering event "warrant[ing] state interference in an otherwise protected parent-child relationship." ***Id.*** at 668-74, 689, 693-94.

We have questioned the relevance of ***Holtzman*** to grandparent visitation under WIS. STAT. § 767.43(1). *See* ***Rogers v. Rogers***, 2007 WI App 50, ¶14, 300 Wis. 2d 532, 731 N.W.2d 347. However, even if it is relevant to grandparent visitation under that subsection, § 767.43(1), as noted above is not applicable where, as here, § 767.43(3) applies. *See* § 767.43(2m). In essence, the requirements of § 767.43(3)(a) through (c)—that the child's parents have never married each other, that paternity has been established by law if the grandparents are the parents of the child's father, and that the child has not been adopted—substitute for the dissolution of marriage as "a triggering event."

attorney, she became scared and did not know how to respond so she did not return their subsequent phone calls. She also testified as follows:

> [MICHELE'S ATTORNEY]: … that August 9th date when [the Cooks] were planning to take [M.M.C.], you said that they could still take her?
>
> [MICHELE]: Yes.
>
> ….
>
> [MICHELE]: I have never once said they could not take her.
>
> [MICHELE'S ATTORNEY]: And they have been very helpful to you over the years, have they not?
>
> [MICHELE]: Yes, they have been very helpful. The—they have been there for me. You know, I mean this whole thing's been hard on me too.

At this point the court expressed its view that there was not really a disagreement but a misunderstanding between reasonable people. However, the court did not agree with Michele's attorney's position that there should not be a court order, apparently feeling that one was necessary to resolve the situation.

¶13 Michele testified that she did not want a court order because she wanted to be able to arrange M.M.C.'s visits with the Cooks depending on what else was going on in M.M.C.'s life rather than having a fixed schedule she had to follow. She also expressed uncertainty about overnight visits because, Michele testified, M.M.C. was going through a difficult time as the result of her father leaving and had trouble spending nights away from her. This testimony does not indicate that Michele intends to deny all visitation to the Cooks, but it is not clear what visitation she is willing to offer.

¶14 Evidence and findings on whether and under what circumstances Michele was willing to allow visitation with the Cooks is essential because it is

that position that the court must presume is in the child's best interest. In addition, before the court may order visitation it must determine that position, even with the presumption, is not in the child's best interest.

¶15 Accordingly, we reverse and remand to the circuit court for the following purposes: (1) to make findings regarding whether, how often, and under what circumstances Michele was willing to allow visitation with the Cooks; (2) to apply the ***Troxel*** presumption to Michele's position on visitation; (3) to decide if the evidence rebuts that presumption; and (4) only if the court decides that it does, to enter an order requiring the visitation that the court determines is in the best interest of M.M.C. The court may conduct such further proceedings as it considers appropriate, including taking additional evidence.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.