COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1283 **Cir. Ct. No. 2011FA335**

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

IN RE THE MARRIAGE OF: NANCY M. MEISTER AND JAY E. MEISTER:

S. A. M., A. L. M., O. M. M. AND J. E. M., MINORS,
BY THEIR GUARDIAN AD LITEM, JENNIFER WEBER,

APPELLANTS,

V.

NANCY M. MEISTER,

RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. The minor children of Nancy Meister and Jay Meister appeal the circuit court's order denying their paternal grandmother's

motion, filed five months after their parents divorced, for visitation rights.[1] The court concluded that the grandmother had not presented facts showing that the grandmother had a relationship similar to a parent-child relationship with the children and therefore, under the applicable statute, she was not eligible to receive visitation rights. The children appeal, arguing that the court erred when it required that the grandmother, in order to be eligible to receive visitation rights, show that she had a relationship similar to a parent-child relationship with them. In the alternative, the children argue that even if the circuit court applied the correct standard, it erred when it required that the grandmother show that she had resided with the children for an extended period. We reject the grandmother's arguments and affirm.

BACKGROUND

¶2 At the time of Nancy and Jay's divorce, they had four minor children. After the divorce, the children's paternal grandmother filed a motion "to Establish Visitation Rights for a Grandparent" under WIS. STAT. § 767.43(1) (2011-12).[2] The family court commissioner granted the motion, and Nancy sought de novo review. Over the course of two hearings, the court heard testimony by the grandmother and oral argument by counsel for the parties and by the children's guardian ad litem. After the hearings, the parties filed briefs addressing the issue of what constitutes a relationship similar to a parent-child relationship for purposes of § 767.43(1).

[1] Nancy and Jay Meister share a surname, and therefore we identify them by first name.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 The grandmother testified in relevant part as follows:

> I have been supplementing the children's education whenever I'm with them in all kinds of areas....
>
> And I tutored them on our trip to Florida in October of 2012. We were there for a week, and I tutored on the way in the van, while we were at the condo, and on the way back .... I had them for spring break in 2013 without their father. They were with me solely, and I provided their meals; we did reading, and there again, supplementing the education of the children ....
>
> ... [W]hen we went to Florida in October 2012, they only had their pajamas on, so we had to stop at the resale shop and buy clothes....
>
> And as far as every time that they came to visit me in Ohio, we were purchasing shoes, clothes, medicines that they needed and required, and when we came up to Wisconsin we were also taking them to Walmart and getting food for them, provide. So there was a lot of monetary provisions, as well as me shipping clothing and educational items up to their father so they could — he could carry on, continue working with the children as far as the reading problems, math.
>
> And he works with them on their homework, and sometimes they'll consult by phone ....
>
> [Question by the court:] So did you ever live with the children?
>
> [Answer by the witness:] ... [W]hen we came up [to Wisconsin], most of the time we stayed with them at their home and did a lot of babysitting, took care of them, changed their diapers and fed them their formula and —
>
> [Question by the court:] And were you living in the same house as the children and the parents, or were the children just living in your house?
>
> [Answer by the witness:] The only time they were living at my house was when they were in Ohio, and for spring break, long weekends, on Christmas and New Year's they would stay with us.
>
> ....

... [I]t was July of ... 2006, when there were just the three children. They brought them to Ohio, and then they proceeded to go on to Florida, and the children were left with my household ... and they were with us, I believe it was, an extended weekend....

....

[Question by the court:] Why did they go to Florida, was that —

[Answer by the witness:] That was just a vacation for them.

....

[Question by the court:] ... Did the children ever come to live with you, like, one or two of them, to stay and maybe stay the school year or anything like that?

[Answer by the witness:] No, although their father has — has voiced that he would like — he would really like to have that ....

....

[Question by the court:] ... Is there more to your care of the children?

[Answer by the witness:] Absolutely. I was here a week in September, spent [time] with them. I was here a whole week in October and now I'm here again. I get — I got to see the children when they had the placement time with their — with their father ....

....

And so that's why I've been coming up more, because he has requested that, Mom, can you come up for a week, you know, they got this problem and need to iron it out. So that's where it is becoming more and more often that I'm able to come now that I'm retired, and he sees me as such a good resource person....

And the children call me Grandma Ohio 'cause that's where I live, and they call me frequently, almost daily sometimes, depending on the activities of the week. And so they really miss me when I'm not up here so that they call me on the phone when I'm back in Ohio....

¶4 The circuit court ruled that to be eligible to receive visitation rights under WIS. STAT. § 767.43(1), a grandparent must show that he or she has a relationship similar to a parent-child relationship, and that to prove such a relationship the grandparent must show that he or she "resides or resided in the same household as the [children] and ... assumes(ed) 'significant responsibilities' for the [children's] care, education and development." The court found that the grandmother's relationship here was "admirable and beneficial," but that it was not similar to a parent-child relationship because it was "of too short duration and frequency" and because the children had not resided with her for an extended period. Therefore, the court concluded that the grandmother was not eligible to receive visitation rights and vacated the family court commissioner's order granting those rights.

DISCUSSION

¶5 On appeal, the children argue that the circuit court applied the wrong legal standard when it required that, in order to be eligible to receive visitation rights, the grandmother show that she had a relationship similar to a parent-child relationship with the children. In the alternative, the children argue that even if the court applied the correct standard, it erred when it required that the grandmother show that she had resided with the children for an extended period to meet that standard.

¶6 We reject the children's first argument as contrary to controlling case law. We reject the children's second argument because, regardless of whether residing in the same household for an extended period is a requirement for establishing a relationship similar to a parent-child relationship, the circuit court also based its decision on its finding that the grandmother failed to show that

she assumed significant responsibilities for the children's care, and the children do not contest that finding, either (1) as a factor for establishing a relationship similar to a parent-child relationship, or (2) as clearly erroneous. In the following sections, we first set out the governing statute and the applicable standard of review, and then address each of the children's arguments in turn.

A. Governing statute and applicable standard of review.

¶7 The grandmother moved for visitation rights under WIS. STAT. § 767.43(1), which provides:

> [U]pon petition by a grandparent, greatgrandparent, 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.

¶8 Our supreme court set out the history of this law in ***Holtzman v. Knott***, 193 Wis. 2d 649, 668-82, 533 N.W.2d 419 (1995). "Prior to 1975, the courts determined without statutory authorization the visitation rights of non-custodial parents and others." ***Id.*** at 668. In 1975, the legislature enacted a grandparent visitation statute that "was the precursor to the current ch. 767 visitation statute" and expressly authorized a circuit court to grant "'reasonable visitation privileges to a grandparent of any minor child if the court determines that it is in the best interest and welfare of the child.'" ***Id.*** at 669 (quoted source omitted). This 1975 precursor to the current WIS. STAT. ch. 767 statute "'codifie[d] the authority of the court in actions affecting marriage to grant visitation privileges to grandparents where it is in the best interest of the child.'" ***Id.*** at 682 n.28 (quoting the Legislative Reference Bureau Drafting Record, 1975 S.B. 1311, Wisconsin State Law Library). In 1977 the legislature revised the

statute to provide, "'The court may grant reasonable visitation privileges to a grandparent or greatgrandparent of any minor child upon the grandparent's or greatgrandparent's petition to the court with notice to the parties if the court determines that it is in the best interests and welfare of the child.'" ***Id.*** at 670 (quoted source omitted).

¶9 In 1988, the legislature amended the grandparent visitation statute "to extend 'the current law permitting the court, upon petition, to grant visitation rights to a grandparent or greatgrandparent to: (1) a stepparent; and (2) any person who has maintained a relationship similar to a parent-child relationship with the child.'" ***Id.*** at 672. The legislature's intent in enacting this amendment "was to expand the [grandparent visitation provision] ... to grant visitation privileges to a stepparent or any person who has maintained a parent-child type relationship with the child." ***Soergel v. Raufman***, 154 Wis. 2d 564, 567 n.2, 453 N.W.2d 624 (1990) (citing Comments—1987 Act 355, sec. 767.245, Stats. Ann. (West 1989 Supp.)). That statute, WIS. STAT. § 767.245, was subsequently renumbered to WIS. STAT. § 767.43, the statute at issue here. ***Rogers v. Rogers***, 2007 WI App 50, ¶1 n.1, 300 Wis. 2d 532, 731 N.W.2d 347.

¶10 It is apparent from the proceedings below and the arguments on appeal that the circuit court and the parties understand the current statute to set up a three-step process for seeking visitation rights: (1) the parents must have notice of the hearing; (2) the petitioner must establish, at the hearing, that he or she is eligible to receive visitation rights because he or she is a "grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child"; and then (3) the circuit court must determine whether "visitation is in the best interest of the child." *See* WIS. STAT. § 767.43(1). We agree that this is how the statute reads. This appeal concerns

only the second step, whether the grandmother here was eligible to receive visitation rights, and whether the circuit court correctly concluded that she was not eligible because she did not establish that she had a relationship similar to a parent-child relationship with her grandchildren.

¶11 We review the circuit court's order denying the grandmother's motion for visitation rights under WIS. STAT. § 767.43(1) as an exercise of discretion:

> Whether to grant or deny grandparent visitation is within the circuit court's discretion. We will affirm if the circuit court examined the relevant facts, applied the proper legal standard and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. When a party alleges an erroneous exercise of discretion because the circuit court applied an incorrect legal standard, we review that issue de novo and affirm if we can independently conclude that the facts of record applied to the proper legal standards support the court's decision. In addition, this case in part raises a question of the construction of WIS. STAT. § [767.43], a question of law that we review de novo.

Rogers, 300 Wis. 2d 532, ¶7 (citations omitted).

B. Whether a grandparent must show that he or she has a relationship similar to a parent-child relationship with a child in order to be eligible to receive visitation rights.

¶12 The children first argue that the circuit court applied the wrong legal standard when it required that the grandmother, in order to be eligible to receive visitation rights, show that she had a relationship similar to a parent-child relationship with them.

¶13 As set out above, the statute authorizes a circuit court to grant visitation to a "grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child."

WIS. STAT. § 767.43(1). The children argue that to interpret the statute to require that a grandparent seeking visitation show that he or she had a relationship similar to a parent-child relationship with the child is wrong for three reasons. First, they assert that such a construction violates the "rule that qualifying or limiting clauses in a statute are to be referred to the next preceding antecedent." *See* ***Vandervelde v. City of Green Lake***, 72 Wis. 2d 210, 215, 240 N.W.2d 399 (1976). The children argue that following this rule, the clause, "who has maintained a relationship similar to a parent-child relationship," refers only to the "next preceding antecedent," that is, to a "person," and not to "a grandparent, greatgrandparent, stepparent." Second, they assert that the statutory history set out above establishes that the legislature did not intend to require a grandparent "to prove she had some extra-special relationship with her grandchildren" beyond her status as a grandmother. Third, they assert that it makes no sense that the legislature would impose a heavier evidentiary burden on grandparents of marital children than on grandparents of non-marital children, who must show only that the grandparent maintained or tried to maintain *a* relationship with the child under WIS. STAT. § 767.43(3)(d).[3]

¶14 Nancy responds, and the children acknowledge, that this court previously stated in ***Rogers*** that the statute requires that grandparents petitioning under WIS. STAT. § 767.43(1) have a relationship similar to a parent-child relationship in order to be eligible for visitation rights. *See* ***Rogers***, 300 Wis. 2d

[3] The children also argue that the use of the phrase "parent-like relationship" in ***Rogers*** established a different showing from the "relationship similar to a parent-child relationship" set forth in the statute. *See* ***Rogers***, 300 Wis. 2d 532, ¶¶6, 11, 15. However, we agree with Nancy that the court in ***Rogers*** did not intend to convey a different concept in using the phrase "parent-like relationship."

532, ¶11. The children concede that this case law controls, and they concede that no party argued before the circuit court to the contrary. They assert that it was precisely because the rule stated in ***Rogers*** bound the circuit court that they did not challenge it there, and they raise their challenge on appeal only to preserve it for supreme court review.

¶15 We agree that ***Rogers*** binds this court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) ("[T]he court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals."). Although it does not appear that the issue was disputed in ***Rogers***, our statement on that topic is a clear declaration that any person seeking visitation rights under WIS. STAT. § 767.43(1) must first show that he or she has a relationship similar to a parent-child relationship in order to establish that he or she is eligible to receive visitation rights. *See* ***Rogers***, 300 Wis. 2d 532, ¶11. Under such circumstances, we are bound by that declaration and must conclude that the circuit court correctly required that the grandmother show that she had a relationship similar to a parent-child relationship in order to establish that she was eligible to receive the visitation rights she sought.

C. Whether the circuit court erred in concluding that the grandmother here did not show that she had a relationship with her grandchildren similar to a parent-child relationship.

¶16 In the alternative, if the circuit court properly required that the grandmother show that she had a relationship similar to a parent-child relationship to be eligible to receive visitation rights, the children argue that the court applied the wrong legal standard when it required that to make that showing the grandmother must have resided with the grandchildren for an extended period. However, as we explain below, the circuit court relied only in part on this factor,

and, regardless whether it did so correctly, it also relied on other factors that in and of themselves sufficed to support its decision.

¶17 The circuit court required that the grandmother show that she had resided with the children for an extended period, and also that she had assumed significant responsibilities for their care, education, and development, based on a four-part test set out in ***Holtzman***. 193 Wis. 2d at 694-95. In ***Holtzman***, a non-biological parent partner in a dissolved same-sex relationship sought visitation rights to her ex-partner's biological child. ***Id.*** at 657, 659-61. Our supreme court concluded that, "a circuit court has equitable power to hear a petition for visitation when it determines that the petitioner has a parent-like relationship with the child," and set out the following four-part test for demonstrating the existence of a relationship similar to a parent-child relationship:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Id. at 694-95 (footnote omitted).

¶18 It is not clear that this equitable test, developed for a situation involving two persons who had jointly raised a child but whose relationship fell outside the parameters of state statutes concerning child custody and visitation rights, readily applies to a situation involving grandparents seeking visitation rights to children of divorced parents under WIS. STAT. § 767.43(1). Moreover,

the supreme court in ***Holtzman*** expressly stated, "We do not by this opinion mean to interpret what conditions satisfy the statutory requirement of 'a relationship similar to a parent-child relationship with the child' in sec. 767.245(1) [the precursor to WIS. STAT. § 767.43(1)]." ***Id.*** at 659 n.3; *see* ***Rogers***, 300 Wis. 2d 532, ¶¶1 n.1, 14 ("[W]e question the relevance of ***Holtzman*** to this case. While ***Holtzman*** is an important nonparent visitation case, it is not a grandparent visitation case and the supreme court's only reference to WIS. STAT. § 767.245 was to explain why the statute did not apply."); *see also* ***Wohlers v. Broughton***, 2011 WI App 122, ¶¶2, 19, 337 Wis. 2d 107, 805 N.W.2d 118 (stating that ***Holtzman*** does not apply to the grandparent visitation statute governing nonmarital children, WIS. STAT. § 767.43(3)).

¶19 However, we need not resolve that question, because regardless whether the circuit court correctly applied the "resided with for an extended period" factor, the court also relied on other factors that in and of themselves sufficed to support its decision. Specifically, the circuit court also considered whether the grandmother had assumed "'significant responsibilities' for the [children's] care, education and development," and made the additional factual finding that the grandmother's relationship was "of too short duration and frequency to be legally 'significant.'" We understand the court to be concluding that whatever responsibilities the grandmother assumed for the children's care, education and development, they were not sufficiently significant to establish the existence of a relationship similar to a parent-child relationship.

¶20 The children do not argue that weighing the degree to which the grandmother assumed significant responsibilities for the children's care, education, and development is an inappropriate factor for establishing the existence of a relationship similar to a parent-child relationship. Indeed, in their

briefing before the circuit court, the children cited non-Wisconsin case law to support the proposition that the assumption of the obligations of parenthood, meaning significant responsibilities for the children's care, education, and development, is an appropriate factor for establishing the existence of a relationship similar to a parent-child relationship. On appeal, the children do not contest the circuit court's finding that the grandmother had not shown that she met that factor.[4]

¶21 In sum, the circuit court's weighing of the degree to which the grandmother assumed significant responsibilities for the children's care, education, and development, itself, sufficed to support the court's conclusion that the grandmother failed to show that she had a relationship similar to a parent-child relationship. And, the children fail to persuade us that anything about the facts related to whether the grandmother resided with them for an extended period significantly tipped the scales in the other direction. In other words, the children effectively challenge only the use of the "resided with" facts against the grandmother; but they fail to show how those facts undermined the circuit court's conclusion based on the "assumption of significant responsibilities" facts; and they fail to challenge the correctness of either the court's reliance on the "assumption of significant responsibilities" factor or its application of that factor to the facts, to

[4] Thus, we need not, and do not, address the children's two arguments specifically targeted only at the "lived together for some period of time" factor. The children argue that (1) relying on the amount of time that the children and the grandmother resided together is inappropriate because it creates an artificial distinction between two classes of grandparents—those who lived with and those who did not live with their grandchildren—with no support in the statute; and (2) the evidence here does not support the finding that they never resided in the same household with their grandmother. *See* ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15 ("Issues that are not dispositive need not be addressed.").

support its conclusion that the grandmother did not show that she had a relationship similar to a parent-child relationship with her grandchildren.

CONCLUSION

¶22 For the reasons stated above, the children fail to show that the circuit court erred in concluding that their grandmother was not eligible to receive visitation rights because she had not shown that she had a relationship that was similar to a parent-child relationship.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.