

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 17, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2333

Cir. Ct. No. 1995FA173

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GINEEN M. ADRIAN N/K/A GINEEN M. GOVE,

PETITIONER-APPELLANT,

V.

AARON D. PETTY,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Dunn County:
ROD W. SMELTZER, Judge. *Order reversed and cause remanded with
directions; orders reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Gineen Gove appeals an order granting primary physical placement of her daughter, Basyl, to Basyl's father, Aaron Petty. Gove asserts the court impermissibly changed placement based on Gove's religious

practices as a follower of the Amish faith. We recognize the court found Gove interfered with Petty's visitation rights and that it attempted to balance the parents' competing interests. However, the order is partially based on an impermissible consideration: the Amish view on high school education. Because we cannot determine whether the court would have made the same decision absent provisions it included for Basyl's education, we reverse the entire placement and custody order and remand for reconsideration consistent with this opinion. Gove also appeals contempt orders, which we reverse outright because they lack a factual predicate and purge conditions.

Background

¶2 Basyl was born to Gove and Petty in 1991; the couple never married. There was never an official adjudication of paternity in Wisconsin, although there was a declaration of parentage entered in Minnesota. Gove and Petty spent the next four years in an "off-and-on" relationship, finally separating in the fall of 1995. Gove married her current husband, Eric, in November 1996.

¶3 Petty moved to Minneapolis in March 1996. From 1996 to 2002, Petty had visitation with Basyl every other weekend pursuant to a written agreement with Gove.¹ The weekend visits did not always occur as scheduled or expected. Each parent blames the other for missed visits, although this was not initially a strong point of contention. It appears that from 1999 to 2001, the actual number of visits with Petty increased annually.

¹ Until the order at issue in this case was entered in August 2005, there was never a court-ordered placement schedule. The circuit court case number here, 1995FA173, originated with a petition by Menomonie County to establish Petty's child support obligation.

¶4 Gove and Eric began living in an Amish community in 1997 and were officially baptized into the Amish church in 2003, where they are presently members. Petty and his wife Maryanna are not members of the Amish community.

¶5 The visitation disputes between Gove and Petty intensified in 2003. For the first time, Petty asked for summer visitation, which Gove refused. The disputes over missed weekends became more pronounced and, citing Amish tenets, Gove began attempting to restrict the activities Basyl could participate in during her visits with Petty. For example, Gove did not want Basyl to watch television, go to baseball games, or visit public swimming areas. Gove further refused to allow Petty to take Basyl on a vacation to Europe in early 2004, objecting because Basyl would have to obtain a passport, which required swearing an oath, and fly on an airplane. Swearing an oath and flying are, according to Gove, activities contrary to the Amish faith.

¶6 A dispute also arose over whether Basyl would continue formal schooling past eighth grade. The Amish do not believe in formal education past eighth grade, for various faith-based reasons. Thus, in 2004, Petty filed this action seeking primary physical placement because, according to the petition, he wanted Basyl to have a traditional high school education. A decision on placement was delayed while the parties attempted mediation.

¶7 In early 2005, Petty proposed a trip to Mexico. The parties could not agree on conditions and Basyl eventually went on the trip pursuant to terms in a court order, but returned later than specified. After the vacation, Basyl missed regularly scheduled visits with Petty, who had to ask the court for a temporary order requiring the visits. The court ordered visitation every other weekend and

instructed that exchanges take place at the Jackson County Sheriff's Department. Basyl generally refused to go on the visitations, occasionally requiring physical intervention by the deputies and, in one instance, an escort by the judge from the courtroom to Petty's vehicle. Petty contends Basyl's refusal to cooperate with visitation was because of Gove's influence and her failure to encourage Basyl's relationship with him.

¶8 On July 26, 2005, the court conducted a trial on Petty's physical placement petition. By operation of statute, until this point, Gove had sole legal custody of Basyl. Following the trial, the court granted the parties joint legal custody of Basyl, and specifically granted joint custody "regarding the religious upbringing of the child." However, Petty was granted sole legal custody regarding health and educational decisions.

¶9 The court granted primary physical placement to Petty during the school year, ordering him to enroll Basyl in high school and ordering Basyl to take advantage of the opportunity. Gove was granted placement every other weekend and during the summer. Petty's placement was to begin August 8.

¶10 On August 8, Basyl refused to go with Petty, accompanying him only after he physically put her in his vehicle. On August 14, after a scheduled weekend visit with Gove, Basyl again refused to go with Petty. This time, Petty left without her and filed a motion for contempt against Gove. The court set a hearing on the contempt motion for August 26 and ordered Gove to produce Basyl.

¶11 Gove appeared at the hearing without Basyl and told the court Basyl had run away. She produced a handwritten letter to the court, purportedly from Basyl, in which Basyl stated Gove did not know where she was and asked the

court to reconsider its decision. The court held Gove in contempt for failing to return Basyl following the August 14 visitation and for failing to produce Basyl for the August 26 hearing. The court further held Gove in continuing contempt for her ongoing failure to return Basyl to Petty. For the August violations, the court ordered Gove to spend five days in jail. For the continuing contempt, the court ordered Gove held in jail until Basyl was produced. Gove moved for the appointment of adversarial counsel for Basyl, for modification of the placement order, and for vacation of the contempt order. The court denied the motions, although it later released Gove from jail without vacating the finding of ongoing contempt. Gove appeals.

Discussion

I. The Placement and Custody Order

¶12 Placement and custody decisions are committed to the trial court's discretion. See *Koeller v. Koeller*, 195 Wis. 2d 660, 663, 536 N.W.2d 216 (Ct. App. 1995). We sustain discretionary determinations provided the trial court examined the relevant facts, applied the proper standard of law and, using a demonstrated rational process, reached a conclusion a reasonable judge could reach. *Goberville v. Goberville*, 2005 WI App 58, ¶7, 280 Wis. 2d 405, 694 N.W.2d 503. We may search the record for reasons supporting the court's exercise of discretion. *Id.* A determination based on an error of law, however, is an erroneous exercise of discretion. *Koeller*, 195 Wis. 2d at 663-64.

¶13 WISCONSIN STAT. § 767.24(5)² provides a list of factors the trial court shall consider in its placement decision, including a child's wishes, the child's adjustment to home and community, the level of cooperation between the parents, and whether each parent can facilitate the child's relationship with the other parent. The weight assigned to each factor is left to the trial court, *see Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977), except that the best interests of the child is the dominant concern. *Racine Fam. Ct. Comm'r v. M.E.*, 165 Wis. 2d 530, 536, 478 N.W.2d 21 (Ct. App. 1991).

¶14 Gove acknowledges the statutory standard. However, she asserts that her actions Petty complains about all stem from her faith and related religious traditions. This means, Gove argues, that the court based its decision on her exercise of a constitutionally protected right—her free exercise of religion. Gove contends the court cannot base its decision on her exercise of her religious beliefs unless there is evidence such conduct would adversely impact Basyl. Petty responds that he also has a constitutional right—the right to a relationship with Basyl. He contends Gove's actions deprive him of that right and, as such, when the court considered all the statutory factors, it not only considered WIS. STAT. §§ 767.24(5)(am)10-11 the most important factors,³ but also the most heavily weighted against Gove.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. WISCONSIN STAT. ch 767 was substantially renumbered for the 2005-06 version.

³ WISCONSIN STAT. § 767.24(5)(am)10-11 list as factors:

10. The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party.

(continued)

¶15 We decline the invitation to create a test for balancing one constitutional right against another. Rather, we conclude that in this case, it was error for the trial court to consider Basyl’s education as a factor.

¶16 WISCONSIN STAT. § 48.435 confers legal custody of a nonmarital child to the mother. Legal custody is “the right and responsibility to make major decisions concerning the child....” WIS. STAT. § 767.001(2)(a).⁴ “Major decisions” include a choice of school and a choice of religion. WIS. STAT. § 767.001(2m). Because Gove had sole custody of Basyl until the August 2005

11. Whether each party can support the other party’s relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child’s continuing relationship with the other party.

⁴ We note that even though an action to modify placement falls under WIS. STAT. ch. 767, the chapter on actions affecting the family, it is chapter 48—the Children’s Code—that confers upon Gove the default status as Basyl’s sole legal custodian. Legal custody, as defined in and applicable to chapter 48, is:

a legal status created by the order of a court, which confers the right and duty to protect, train and discipline the child, and to provide food, shelter, legal services, education and ordinary medical and dental care, subject to the rights, duties and responsibilities of the guardian of the child and subject to any residual parental rights and responsibilities and the provisions of any court order.

WIS. STAT. § 48.02(12). This statute does not confer the same broad scope of rights and obligations as WIS. STAT. § 767.001(2)(a). We therefore question whether the definition in § 767.001 is correctly applied to someone asserting WIS. STAT. § 48.435 as a basis for custody.

However, we conclude the definition of custody in WIS. STAT. § 767.001 at the very least informs on the “residual parental rights and responsibilities” noted in WIS. STAT. § 48.02. Additionally, Petty does not claim the chapter 48 definition applies but, rather, makes his argument based on chapter 767. Accordingly, if there were any error, Petty has waived any challenge to it.

order, Gove was entitled to choose Basyl's religion and educational plan at least up to that point.

¶17 Adherents of the Old Order Amish faith, however, object to formal education beyond eight grade for a variety of reasons rooted in religious tradition and belief. *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972). Thus, Gove decided she would not send Basyl to high school. She did, evidently, agree to home school Basyl, seeking special permission from her community to do so, in order for Basyl to secure a GED. Gove's decision not to enroll Basyl in high school was the impetus for Petty's petition.

¶18 Had the issue of Gove's purported visitation interference never arisen—that is, had the trial court been confined to a question of whether to change placement and custody based on Basyl not enrolling in high school—we suspect the trial court would have been compelled to dismiss Petty's petition. The Supreme Court in *Yoder* had concluded the State could not penalize Amish parents under the compulsory school attendance law because doing so amounted to a violation of the parents' free exercise right. *Id.* Similarly, we do not believe Basyl's placement or custody could be changed on the singular basis that her sole legal custodian practices a religion that rejects higher education.

¶19 Here, though, the dispute evolved into a different question, with the court forced to consider a balance between Gove asserting a constitutional right to the free exercise of religion and Petty asserting a constitutional right to a relationship with his daughter. Thus, the court found, as relevant to this portion of the discussion, the following:

12. The Court is required to allow the father to have a meaningful relationship with his daughter, Basyl.

....

15. Basyl's education is part of the component of having a relationship with her father.

....

17. The Court finds that Basyl should have an opportunity to take advantage of a high school education.

¶20 We understand the difficulties this case presented the trial court. We further appreciate the court's attempt to fashion a solution that would maximize Basyl's time with both her parents and foster a relationship with Petty. But there is no evidence, or even any suggestion, that the decision not to send Basyl to high school is an act of interference or is inappropriate for some other reason. It is simply a decision with which Petty disagreed at a time when Gove had the sole and absolute right to make decisions for Basyl.

¶21 Further, nothing in the record demonstrates how or why a high school education is an important or necessary component of a father-child relationship and there is no evidence that a failure to obtain a high school diploma will harm Basyl, particularly if she follows through with her GED education. In short, nothing in the record justifies ordering Basyl to enroll in high school, so nothing exists to justify changing custody and placement to facilitate such a requirement.

¶22 We recognize the court changed placement and custody not only so Basyl could enroll in high school but also because the court found Gove interfered with Petty's visitation rights. We are uncertain, however, whether the court still would have changed placement had it divorced the educational issue from the interference problem. That is, we are uncertain whether the court would have concluded Gove's interference was serious enough by itself to justify the change

in placement. Part of our uncertainty arises from a lack of findings regarding which of Gove's actions constitute interference. The parties trade various accusations, but we cannot discern which the court believes, and it is not within our province to resolve the discrepancies.

¶23 On remand, the court must reconsider its placement and custody order. It should not consider Gove's decision not to enroll Basyl in high school as a factor justifying a change in placement and custody. Because of the problems the court did perceive, we recommend it make specific factual findings regarding the unsatisfactory actions each parent may have taken and, in particular, the actions the court believes constitute Gove's interference. We further recommend the court make findings as to whether and the extent to which Gove's interference was based on sincerely held religious beliefs. If, based on its new findings, the court still determines a change in placement is warranted, it may so order—we do not necessarily mandate a different result.

¶24 Even more problematic, however, is the inherent contradiction in the order. The court first granted the parties joint decision making on religious questions while granting Petty sole custody over educational decisions. The court then explicitly allowed Basyl to continue her practice of the Amish faith, and required Petty to respect that, while simultaneously mandating Basyl attend high school. Again, we appreciate the delicate situation the trial court faced and the great pains it took in trying to respect both parties' rights, but such a contradictory order rises to the level of an erroneous exercise of discretion. We are additionally perplexed that the court would choose to give the parties joint legal custody over religious choices for Basyl when that seems to be the very topic that has led the

parties to the courthouse.⁵ It is easy to characterize the decision over whether Basyl should attend high school as an educational choice, but mandating she attend is contrary to the religious choice the court specifically permitted Gove to make for Basyl.⁶

II. The Contempt Orders

¶25 The court found Gove in contempt of court for failing to return Basyl to Petty after the weekend visit ending August 14, 2005, and for failing to produce Basyl for the August 26 hearing. The court also held Gove in continuing contempt for failing to return Basyl to Petty’s custody. The court imposed what it believed were remedial sanctions—five days in jail for the August violations and an order that Gove would be held in jail until Basyl was returned to Petty’s custody. The court later released Gove but declined to vacate the contempt orders.

¶26 Contempt of court is, among other things, the intentional “[d]isobedience, resistance or obstruction of the authority, process or order of a court.” WIS. STAT. § 785.01(1)(b). A court may impose punitive or remedial sanctions on contemnors. WIS. STAT. § 785.02.

¶27 “Remedial contempt is imposed to ensure compliance with court orders.” *Diane K.J. v. James L.J.*, 196 Wis. 2d 964, 968, 539 N.W.2d 703 (Ct.

⁵ It is possible the court had specific expectations of how this arrangement could work. Thus, on remand, if the court still determines Gove and Petty should have joint legal custody over religious decisions, it should articulate its reasoning and offer guidance to the parties on how to comply.

⁶ Gove also claims that such an order violates Basyl’s free exercise right, but we decline to reach the issue of balancing a minor child’s constitutional rights against the competing rights of one or both of her parents.

App. 1995); *see also* WIS. STAT. § 785.01(3). It must be purgeable through compliance with the original court order or alternative purge conditions. ***Diane K.J.***, 196 Wis. 2d at 969. This contempt power serves to enforce the rights of an aggrieved litigant. ***Id.*** Punitive contempt is geared toward preserving the general authority of a court. ***Id.***, *see also* WIS. STAT. § 785.01(2). This type of contempt disciplines a party for contemptuous conduct. ***Diane K.J.***, 196 Wis. 2d at 969.

¶28 We review a court’s use of its contempt power and its fashioning of remedial sanctions for an erroneous exercise of discretion. ***Benn v. Benn***, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999).

¶29 The court sentenced Gove to five days in jail for her “failing to cooperate with the [August 14] exchange and making it happen” and for failing to bring Basyl to the August 26 hearing. Despite the court’s characterization of its sanction as remedial, it was effectively punitive because it was meant to punish Gove for past contempt. *See* WIS. STAT. § 785.01(2). It also lacked a purge condition because Gove could no longer facilitate an August 14 exchange or produce Basyl for an August 26 hearing. Punitive contempt, however, is subject to due process, WIS. STAT. § 785.03(1)(b), which the court did not afford.⁷

¶30 As to the finding of and jail sentence for Gove’s ongoing contempt for continuing failure to return Basyl, this lacks a factual basis and sets impossible purge conditions. A party may be held in contempt of court if she or he has the ability, but refuses, to comply with a court order. ***Benn***, 230 Wis. 2d at 309.

⁷ To the extent Petty argues there was an alternate purge condition—simply that Gove produce Basyl—that argument fails because there is no factual basis for concluding Gove could do so.

¶31 Here, the court stated it had to assume Gove was telling the truth that Basyl ran away without telling Gove where she was going, because there was no evidence to the contrary. Therefore, there was no basis upon which a court could find that Gove willfully refused to produce Basyl at the August 26 hearing. There is also no basis for concluding Gove would be able to retrieve Basyl to comply with the original order or the purge condition. Gove cannot be held in contempt if she lacks the ability to fulfill an order, regardless of her intent.

¶32 The custody and placement order is reversed and remanded for reconsideration consistent with this opinion. The contempt orders are simply reversed.

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

Not recommended for publication in the official reports.

