

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2008AP316

Cir. Ct. No. 2006GN68

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE GRANDPARENTAL VISITATION OF STEFANI M. A.:

ANITA A.,

PETITIONER-APPELLANT,

v.

CASSANDRA B.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Anita A. appeals an order denying her petition for specific periods of physical placement with her granddaughter. Anita has not overcome the presumption that a fit parent's decision regarding grandparent visitation is in the best interest of the child. We affirm.

¶2 The essential facts are undisputed. Stefani, born in 1995, is the nonmarital child of Cassandra B. and John A., Anita's son. John, Cassandra and Stefani resided together until Stefani was about three. In January 2002, John was awarded primary placement of Stefani. Cassandra had secondary placement of Stefani on alternate weekends and one evening a week. Except for five months in 2002 and five months in 2003, John and Stefani lived with Anita. Even when they did not reside together, Anita had virtually daily contact with her granddaughter.

¶3 On May 6, 2006, John died in a motor vehicle accident. At the time, he and Stefani both resided with Anita. Within days of John's death, Cassandra removed Stefani from Anita's home. Anita filed a guardianship petition, which she later voluntarily dismissed. She also brought a petition for grandparent visitation pursuant to WIS. STAT. § 880.155 (2003-04)¹ requesting periods of physical placement and access to Stefani's medical and school records. Temporary orders granted Anita visitation every third weekend from 4:00 p.m. on Friday until 7:00 p.m. on Sunday.

¶4 After a three-day bench trial, the court asked the parties to brief their positions. Anita requested "substantial, expansive" visitation, specifically, that

¹ WISCONSIN STAT. § 880.155 (2003-04) was renumbered to WIS. STAT. § 54.56 effective May 25, 2006. *See* 2005 Wis. Act 387, § 373. For clarity, we will use the current statute number. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Stefani reside with her year-round from Sunday night through Thursday night, and with Cassandra from Friday after school until Sunday evening and that the parties have similar holiday visitation as Cassandra and John had agreed to in a 2000 Parenting Agreement. In the alternative, Anita requested that she be awarded the every-Friday-through-Sunday arrangement she first proposed for Cassandra's award. The court denied Anita's petition because she had not established that Cassandra was an unfit mother and therefore had not rebutted the presumption that Cassandra, as the mother, "enjoys a constitutional advantage" whose decisions about visitation should be respected. The court dismissed Anita's petition for expanded visitation.

¶5 Granting or denying visitation is a matter within the trial court's discretion. *Martin L. v. Julie R. L.*, 2007 WI App 37, ¶4, 299 Wis. 2d 768, 731 N.W.2d 288. We will affirm the court's discretionary determination so long as it examines the relevant facts, applies the proper legal standard, and uses a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *Id.* We review de novo a party's claim that the circuit court erroneously exercised its discretion because it applied an incorrect legal standard. *Id.* The interpretation and application of statutes and case law to the facts of a particular case also present questions of law which we decide de novo. *Id.*

¶6 Anita's appeal hinges on the appropriate legal standard to apply. She contends the statutes and the case law are clear that "the legal standards for awarding grandparent visitation are different when a parent of the child is deceased." She asserts that because she brought her petition for grandparent visitation pursuant to WIS. STAT. § 54.56(2), which applies if a parent is

deceased.² Instead, she asserts, the trial court erroneously looked to WIS. STAT. § 767.43, which addresses grandparent visitation of a child who is the subject of a paternity action.³ Both permit “reasonable visitation rights” and both require that

² WISCONSIN STAT. § 54.56(2) provides in relevant part:

(2) If [a] parent[] of a minor [is] deceased and the minor is in the custody of the surviving parent ... a grandparent ... of the minor may petition for visitation privileges with respect to the minor, whether or not the person with custody is married.... [T]he court may grant reasonable visitation privileges to the grandparent ... if the surviving parent ... who has custody of the minor has notice of the hearing and if the court determines that visitation is in the best interest of the minor.

³ Current WIS. STAT. § 767.43, formerly WIS. STAT. § 767.245(3), was renumbered effective January 1, 2007. *See* 2005 Wis. Act 443, §§101, 267.

Cassandra’s counsel responds that Anita’s claim that the circuit court applied WIS. STAT. § 767.43 is merely an attempt to “set up a straw man” but that Anita “[u]nfortunately ... mis-reads[sic]” the court’s decision:

There was no possibility or even evidence that the trial court applied the wrong statute.... Nowhere did the trial court ever reference [WIS. STAT. §] 767.43, discuss 767.43, apply 767.43 standards, or as far as we know, ever dream about 767.43. This statute had nothing whatsoever to do with the proceedings at hand.

Cassandra’s counsel goes on to observe:

Judge Schroeder’s Decision ... *on the very front page* ... references a paternity case that expressly applies [WIS. STAT. §] 767.245, which itself is cited by Anita A. (although now renumbered to [WIS. STAT. §] 767.41(5)[I]) on page 9 of her brief as being “the appropriate standard for determining the best interests of the child under [WIS. STAT. § 54.56(2)].” (Emphasis supplied by Cassandra’s counsel.)

(continued)

grandparent visitation be in the “best interest of the child.” Anita submits, however, that § 54.56 does not require a showing of parental unfitness, of a prohibition by the surviving parent of grandparent-grandchild contact, or of a risk of harm to the child before a court may order visitation. All § 54.56 requires, she contends, is that the parent has notice of the hearing and the visitation is in the minor’s best interest. The “best interest” analysis invokes the sixteen WIS. STAT. § 767.41(5) factors which, she claims, the court ignored here.

¶7 Anita is correct that WIS. STAT. § 767.41(5) sets out the appropriate standard for determining the best interests of the child for the grandparent visitation statutes. *See Martin L.*, 299 Wis. 2d 768, ¶6. We nonetheless disagree with her on several fronts. We disagree that the court ignored § 767.41(5), that it used an incorrect legal standard, or that it read into WIS. STAT. § 54.56 a requirement of parental unfitness, harm to the child or denial of contact with the deceased parent’s family in order to award grandparental visitation.

¶8 The trial court did not hold that unfitness, harm and denial of contact were specifically required prior to awarding visitation under WIS. STAT. § 54.56. Rather, we construe its comments in that regard as part of the court’s broader analysis. The court began, and appropriately so, by crediting the presumption that

Counsel for Cassandra misrepresents Anita’s arguments. The court may not have directly mentioned WIS. STAT. § 767.43, but—as counsel notes—its decision cited *Roger D.H. v. Virginia O.*, 2002 WI App 35, ¶19, 250 Wis. 2d 747, 641 N.W.2d 440, which in turn cites to WIS. STAT. § 767.245(3). And just as Anita states, § 767.245(3) was renumbered to § 767.43. Counsel also claims that page 9 of Anita’s brief cites to § 767.245. It does not. It cites to WIS. STAT. § 767.24(5), a different statute. If these are honest mistakes, counsel should exercise greater care before lambasting his opponent. If not, his sleight-of-hand flirts with the unethical, and we admonish him that in the future he is well-advised to avoid such tactics, as well as the sarcasm that marks virtually his entire brief.

Cassandra's wishes deserved special weight. See *Roger D.H v. Virginia O.*, 2002 WI App 35, ¶11, 250 Wis. 2d 747, 641 N.W.2d 440 (“The due process clause ... prevents a court from starting with a clean slate when assessing whether grandparent visitation is in the best interests of the child.”). It became Anita's burden to rebut the presumption by presenting evidence that Cassandra's offer of visitation was not in Stefani's best interests, at which point the court then would make its own assessment. See *Martin L.*, 299 Wis. 2d 768, ¶12.

¶9 That is precisely what happened here. The court observed that “the standard by which [it was] obliged to judge this case is that a presumption exists that [Cassandra's] decision is not to be lightly disturbed.” Multiple witnesses testified during the three-day trial. The court heard evidence of Anita's close relationship with her granddaughter, Cassandra's wishes, Stefani's wishes, Stefani's relationships and interactions with members of her mother's and father's families, the limitations Cassandra's and Anita's work hours impose, Stefani's adjustment to her new school, other persons living in Cassandra's and Anita's households, Cassandra's willingness to permit continued contact with Anita and Cassandra's alcohol usage. Cassandra's voluntary decision to permit contact properly factored into an analysis of Stefani's best interests, given Anita's substantial contact with Stefani over the years. The court referenced its appreciation for the guardian ad litem's “carefully and thoughtfully” analyzed report and recommendations. The court may not have enumerated the sixteen best-interest factors one by one, but the facts serving as the basis of its decision are reasonably derived by inference from the record. See *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

¶10 The trial court noted Anita's repeated acknowledgement that she did not consider Cassandra an unfit parent. Anita protests that WIS. STAT. § 54.56

does not require that she prove Cassandra's unfitness, only that Cassandra's visitation offer was not in Stefani's best interest. This is not quite correct. We have recognized, in the context of § 54.56, the "rebuttable presumption that the fit 'parent's decision regarding grandparent visitation is in the best interest of the child.'" *Martin L.*, 299 Wis. 2d 768, ¶¶6, 12 (citation omitted). A challenger need not prove unfitness, therefore, but must in some way overcome the presumption that a fit parent's decision governs. Here, the court found that Anita did not surmount that hurdle. Emphasizing that "this is not merely a choice between two equals," the court stated that its examination of the evidence convinced it that Anita "has not sustained her burden to show that what is sought would be better for the child than what exists under parental control." This comment was made in the context of recognizing the presumption afforded fit parents. If Cassandra was not "unfit," therefore, she presumptively could make decisions regarding Anita's visitation.

¶11 Anita contends that our decision in *F.R. v. T.B.*, 225 Wis. 2d 628, 593 N.W.2d 840 (Ct. App. 1999), demonstrates that her request for "expansive" visitation is reasonable. *F.R.* arose under the predecessor to WIS. STAT. § 54.56. See *F.R.*, 225 Wis. 2d at 636. There, T.B., the father, challenged the visitation awarded to his nonmarital child's maternal grandmother after the child's mother died. *F.R.*, 225 Wis. 2d at 632-34. We concluded under the facts there that while the substantial visitation award to the grandmother might be expansive, it was not unreasonable. *Id.* at 646. Anita asserts that our decision in *F.R.* "demonstrates that courts granting visitation based upon a longstanding and significant grandparent-grandchild relationship is appropriate under the statute and does not violate a parent's constitutional right to raise [his or her] child."

¶12 We would amend Anita’s assertion from “is appropriate” to “may be appropriate.” Visitation decisions are matters within the trial court’s discretion. *Martin L.*, 299 Wis. 2d 768, ¶4. “Discretion” contemplates a measure of latitude which recognizes that one trial court might reach a decision that another judge or court might not reach, without making what the trial court did erroneous. *See Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Discretionary determinations are not tested on appeal by our sense of what might be a “right” or “wrong” decision in the case. *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶16, 296 Wis. 2d 337, 723 N.W.2d 131. Rather, the determination will stand “unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.” *Id.* (citation omitted). In other words, we do not affirm a particular result, but a proper process. In *F.R.*, therefore, we affirmed the trial court’s decision as not being an erroneous exercise of its discretion. Our standard of review dictates that we also affirm the decision in this case, for the same reason.

¶13 Anita conceded at trial that her request for “substantial, expansive” visitation really was an effort to secure placement of Stefani. Cassandra’s parenting limitations notwithstanding, we must presume that Cassandra’s decision to permit visitation, albeit not the significant revision that Anita seeks, controls. Anita has not rebutted the presumption. Our review of the record satisfies us that the trial court undertook a reasonable examination of the facts, applied the correct legal standard and sufficiently set forth its reasoning. Its decision stands.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

