COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1315 **Cir. Ct. No. 2010FA51**

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

IN THE MATTER OF THE GRANDPARENTAL AND OTHER VISITATION OF S.J., O.J. & A.J.:

AMANDA BRYAN AND MELISSA DIERKS,

PETITIONERS,

TERRI KEOPPLE,

PETITIONER-RESPONDENT,

V.

PAUL JENSEN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Reversed*.

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Paul Jensen appeals a circuit court order eliminating a restriction imposed in a prior order awarding Terri Keopple grandparent visitation rights with Jensen's children. The restriction limited Keopple's right to allow Jensen's children to have contact with their mother's sister, Melissa Dierks, and their mother's cousin, Amanda Bryan, during Keopple's visitation times. Jensen argues the record does not support the circuit court's determination that Keopple overcame the presumption that his decision not to allow his children to have contact with Dierks and Bryan was in his children's best interest. Jensen also argues that deciding who his children associate with constitutes a "major" parental decision, which Keopple may not disregard. We agree that the evidence presented did not overcome the presumption and reverse on that basis.

BACKGROUND

¶2 Paul and Monica Jensen married and had three children: S.J., born in 2000; O.J., born in 2002; and A.J., born in 2004. Monica passed away in April 2007 after a battle with cancer. It is undisputed that prior to 2009, Keopple, the children's maternal grandmother, Melissa Dierks and Amanda Bryan had extensive involvement in the lives of the Jensen children. However, in 2009, Jensen terminated all contact between his children and Keopple, Dierks and Bryan.

¶3 In 2010, Keopple petitioned for visitation rights with the children under WIS. STAT. § 54.56(2) (2011-12),[1] and Dierks and Bryan petitioned for

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

visitation rights under WIS. STAT. § 767.43(1). Jensen conceded that Keopple had standing as a grandmother to seek visitation with the children under WIS. STAT. § 54.56(2), but he challenged Dierks' and Bryan's right to seek visitation privileges. The circuit court ultimately dismissed Dierks and Bryan's petition. The court concluded that Dierks had not alleged sufficient facts to invoke the court's equitable power to determine visitation with the children,[2] and that although Bryan had alleged sufficient facts to invoke the court's equitable power, she had failed to meet her burden of proof to establish that a parent-like relationship existed between her and the children.

¶4 In September 2010, the circuit court entered an order regarding Keopple's visitation rights under WIS. STAT. § 54.56(2), which was "[b]ased upon stipulation and also evidence given" at a hearing held on July 9, 2010.[3] The court ordered that Keopple shall have visitation with the children one weekend every six weeks, one evening every other week, and four consecutive days in the summer. The court ordered that Keopple's visitation rights are restricted as follows: "[t]he Children shall have no[] contact with Ms. Melissa Dierks or Amanda Bryan[] of any kind during [Keopple's] visitation times. Also Ms. Keopple is prohibited from giving copies of the schedules she is given … to Ms. Melissa Dierks or Amanda Bryan[]."

[2] We affirmed the court's decision in ***Dierks v. Jensen***, 2010AP1705, unpublished (June 1, 2011).

[3] Neither the stipulation, nor the transcript of the July 9, 2010 hearing is part of the record on appeal.

¶5 In October 2010, Jensen filed contempt motions against Keopple.[4] Jensen averred that contrary to the terms of the September 2010 order, Keopple admittedly provided S.J. with a phone during an overnight visitation and allowed S.J. to exchange text messages with Dierks and Bryan. The court found Keopple in contempt of the September 2010 order for failing to abide by the order's restrictions. It is undisputed that, following the court's contempt ruling, Keopple requested the court to modify the restriction preventing her from allowing the Jensen children to have any contact with Dierks and Bryan during Keopple's periods of visitation.

¶6 Following hearings on Keopple's request, the circuit court entered an order lifting the restriction in the September 2010 order prohibiting Keopple from permitting the Jensen children from having any contact with Dierks and Bryan during her visitation periods. In a written decision, the court stated that it began with the presumption that Jensen was acting in the children's best interest by not allowing Dierks and Bryan to have contact with the children during Keopple's visitation periods. It determined, however, that the presumption had been overcome and that it was in the children's best interest that they see Dierks and Bryan during their visitation time with Keopple. Jensen appeals. Additional facts will be discussed below as necessary.

DISCUSSION

¶7 Jensen contends the circuit court erroneously exercised its discretion by modifying the September 2010 visitation order to eliminate the restriction

[4] Keopple also filed a motion for contempt against Jensen; however, neither that motion, nor the court's ruling on that motion, is at issue here.

preventing Keopple from allowing Dierks and Bryan to have any contact with the Jensen children during their visitation time with Keopple. Jensen argues that the record does not support the circuit court's finding that Keopple overcame the presumption that his decision is in the best interest of his children and, assuming that she did, that having contact with Dierks and Bryan is in the children's best interest. We agree with Jensen that the circuit court erred in determining that Keopple presented sufficient evidence to rebut the presumption in favor of Jensen's decision not to allow his children to have contact with Dierks and Bryan during the children's time with Keopple.[5]

¶8 We review a circuit court's order regarding grandparent visitation for an erroneous exercise of discretion. *See* ***Martin L. v. Julie R.L.***, 2007 WI App 37, ¶4, 299 Wis. 2d 768, 731 N.W.2d 288. We will affirm the circuit court's discretionary determination so long as the court examined the relevant facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Id.***

¶9 WISCONSIN STAT. § 54.56(2) authorizes a circuit court to grant visitation to a grandparent when one parent of a minor is deceased and the minor is in the custody of the surviving parent. Section 54.56(2) provides that the grandparent of the minor child may petition the court for visitation privileges with

[5] Jensen also argues that the court erred in eliminating the restriction pertaining to Dierks and Bryan because deciding who his children associate with constitutes a "major" parental decision and that because Keopple has only visitation rights with his children, she may not make any decisions that are inconsistent with that decision. Because our decision on the issue of whether Keopple overcame the presumption in favor of Jensen's decision is dispositive, we do not reach this argument. ***Cholvin v. DHFS***, 2008 WI App 127, ¶34, 313 Wis. 2d 749, 758 N.W.2d 118 (if a decision on one point disposes of the appeal, we will not decide other issues raised).

the minor child and "the court may grant reasonable visitation privileges to the grandparent … if the surviving parent … has notice of the hearing and if the court determines that visitation is in the best interest of the minor." The circuit court is given authority to "modify the visitation privileges" under WIS. STAT. § 54.56(4); however, doing so must be in the best interest of the child or children involved. *See* § 54.56(2).

¶10 In ***Troxel v. Granville***, 530 U.S. 57, 66 (2000), the United States Supreme Court observed that parents have "the fundamental right … to make decisions concerning the care, custody, and control of their children." This fundamental right gives rise to "a presumption that fit parents act in the best interests of their children." ***Id.*** at 68. "[S]o 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." ***Id.*** at 68-69. Thus, according to the Supreme Court, "if a fit parent's decision … becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." ***Id.*** at 70.

¶11 We have since interpreted ***Troxel*** to require, in the context of grandparent visitation under WIS. STAT. § 54.56, that courts must apply a rebuttable presumption that the decisions made by the living parent regarding visitation are in the child's best interest. ***Opichka v. Opichka***, 2010 WI App 23, ¶¶3-4, 323 Wis. 2d 510, 780 N.W.2d 159. *See also* ***Martin L. v. Julie R.L.***, 2007 WI App 37, ¶¶10-13, 299 Wis. 2d 768, 731 N.W.2d 288; ***Roger D.H. v. Virginia O.***, 2002 WI App 35, ¶18, 250 Wis. 2d 747, 641 N.W.2d 440. In doing so,

> the court is to tip the scales in the parent's favor by making that parent's offer of visitation the starting point for the

> analysis and presuming it is in the child's best interests. It is up to the party advocating for nonparental visitation to rebut the presumption by presenting evidence that the offer is not in the child's best interests. The court is then to make its own assessment of the best interests of the child.

Martin L., 299 Wis. 2d. 768, ¶12. We observed in ***Opichka*** that a circuit court uses an appropriate standard of review when it begins its decision with the presumption that the parent's decisions pertaining to outside visitation under § 54.56 is made with his or her children's best interests in mind and then weighs the best interests of the child factors in deciding if the grandparent has met his or her "heavy burden of rebutting that presumption." ***Opichka***, 323 Wis. 2d 510, ¶6.

¶12 In the present case, the circuit court stated that it began its decision by presuming that "Jensen [was] acting in the best interest of the children" in deciding that his children should not have any contact with Dierks and Bryan. The court, found, however, that Keopple met her heavy burden of rebutting that presumption.

¶13 The circuit's court's determination that Keopple had overcome the presumption that Jensen's decision not to allow any contact between his children and Dierks and Bryan was grounded on its disagreement with the importance Jensen gave to certain incidents that underlie his decision. The court found that Jensen's decision was largely based on the following:

- In October 2008, Dierks took the Jensen children to the cemetery where Monica is buried. While there, Dierks got into an argument with her ex-husband and then left, leaving the children. Dierks returned to the cemetery within five minutes after she had left.

- In October 2008, Dierks got into an argument with Jensen's girlfriend in the parking lot of the local high school and referred to Jensen's girlfriend as "the fucking whore who's fucking my dead sister's husband," in front of Jensen's girlfriend's child.

- In January 2009, Dierks, who was a member of the board of directors for the Monica Jensen Foundation, informed board members at a meeting that "either [Jensen] can stay on the board or I will … but I'm not going to stay on if he's going to."

- In the fall of 2009, Dierks and Bryan got into an argument at a family function regarding Bryan's adherence to Jensen's request that she not allow the children to have contact with Dierks when the children were spending time with her.

- In February 2009, Dierks got into an argument with Jensen's girlfriend at a local YMCA. Dierks asked Jensen's girlfriend if she was there to watch one of Jensen's children swim, to which Jensen's girlfriend stated "leave me alone." Dierks then pushed against Jensen's girlfriend's shoulder.

- A report was filed with the St. Croix County Department of Human Services regarding Jensen's care of the children. Although the individual who made the report is unknown, Jensen believed that it was Dierks, Bryan or Keopple who reported him.

¶14 In its written decision, the court discounted each of these incidents except for the fight between Dierks and her ex-husband at the cemetery, stating they did not directly involve the Jensen children. The court found that "many of the episodes described did not directly involve the Children, but they are the ones

being hurt by the restriction of visitation with Keopple and Dierks/Bryan." Noting that Dierks and Bryan "were among the closest to the [c]hildren before and after Monica's death," the court concluded that Keopple had overcome the burden that Jensen's decision that Dierks and Bryan not be present during the children's visitation with Keopple was in the children's best interest.

¶15 The Due Process Clause does not permit a state to infringe on a fit parent's fundamental right to make child-rearing decisions simply because the court disagrees with the parent or believes a better decision could be made. ***Troxel***, 530 U.S. at 72-73. However, so far as the record here discloses, this is exactly what occurred in this case.

¶16 The court pointed to the incidents set forth above in ¶13 and concluded that Jensen needlessly decided to exclude Dierks and Bryan from the lives of his children. The court, in effect, jumped ahead to the question of whether contact with Dierks and Bryan would be in the children's best interest without giving proper deference to Jensen's parental decision.

¶17 We do not view this as an easy case. It was not unreasonable for the circuit court to conclude that Jensen made a poor choice and that the children would be better off if they were able to have contact with Dierks and Bryan. However, there must be more to overcome the strong presumption in favor of deferring to parental decisionmaking.

¶18 In our view, the evidence was insufficient to overcome the presumption. The record reflects that since Monica's death, Dierks has shown a lack of respect toward Jensen's parenting decisions and toward individuals who are part of the children's lives. Dierks has admittedly disregarded Jensen's decisions pertaining to the children. For example, she has continued to have

contact with the children despite being aware that Jensen did not want her to have contact with them. On one occasion, Dierks took it upon herself to change the clothing of one of the children prior to a school program without Jensen's permission. Dierks has also shown open hostility toward both Jensen and Jensen's girlfriend, an important person in Jensen's life and, because she may end up being in a parent-like relationship with the children, in his children's lives. For example, Dierks has told Jensen that he deserves a life without his deceased wife and has been confrontational with Jensen's girlfriend in front of other people in the parking lot of a local high school and pushing into her at a local YMCA. The record also reflects that on occasion, Dierks has been unable to control her emotions around the Jensen children. Dierks admittedly engaged in a public fight with her ex-husband in front of the Jensen children, who were in her care at the time, at the gravesite of the children's mother, and left the children there temporarily. The record reflects that Bryan has likewise chosen to disregard decisions Jensen has made pertaining to his children. Despite being aware that Jensen did not want the children to be taken to the cemetery where their mother is buried or to have contact with Dierks, on Mother's Day 2009, Bryan took the children to their mother's grave where they met up with Keopple and Dierks.[6]

¶19 Although the circuit court noted that most of the incidents described did not directly involve Jensen's children, it was not plainly unreasonable for Jensen to surmise that Dierks and Bryan might undermine both his parenting choices and the children's relationship with his girlfriend. The examples plainly

[6] Bryan maintained that it was a coincidence that Keopple and Dierks were at the cemetery the same time that she took the children. However, the court did not find that claim to be credible. The circuit court is the ultimate arbiter of a witness's credibility. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

indicate that Dierks especially has difficulty controlling her anger, which could impact the children's welfare, and that both she and Bryan have been unwilling to cooperate with Jensen's parenting style and objectives.

¶20 Although it is undisputed that Dierks and Bryan had close relationships with the Jensen children prior to and immediately following Monica's death, and that the children desire to spend time with them, that alone is not sufficient to overcome the presumption that Jensen is entitled to decide that, at the present time, not having contact with Dierks and Bryan during the children's visitation with Keopple is in the children's best interest. Accordingly, we reverse the order of the circuit court eliminating the restriction that the Jensen children are not permitted to have contact with Dierks and Bryan during their visitation time with Keopple.

By the Court.—Order reversed.

Not recommended for publication in the official reports.