

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 26, 2015

Diane M. Fremgen
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. 2013AP826
STATE OF WISCONSIN**

Cir. Ct. No. 2010FA1539

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

MICHEL MOREAU,

PETITIONER-APPELLANT,

V.

ALINE PEPIN F/K/A ALINE MOREAU,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michel Moreau appeals the child custody and placement portions of a judgment dissolving his marriage to Aline Pepin. Moreau argues the circuit court erroneously exercised its discretion when it determined

that the couple would share joint custody and equal placement of their children. Specifically, Moreau contends the court failed to consider the overwhelming effect of Pepin's religious practices on the children's well-being. Moreau also asserts that equal physical placement is not in the children's best interests and joint custody is not possible given the parties' inability to cooperate on custodial decisions and Pepin's inability to support the children's relationship with Moreau. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 Moreau and Pepin were married in 1996. The couple have two children—Genevieve (born in September 1997) and Camille (born in October 1999). In 2010, Moreau filed for divorce. After a 2012 trial, the court made an oral ruling that awarded the parties joint legal custody and equal physical placement of the children on an alternate week basis. A written divorce judgment was ultimately entered on January 9, 2013, and consistent with the court's oral pronouncement, the parties were awarded joint legal custody and equal physical placement, with Moreau having impasse custodial authority over medical decisions. In the interim, on January 4, 2013, Moreau moved to modify legal custody and physical placement, seeking sole custody and primary placement of the children. After a post-divorce hearing, the court denied Moreau's motion, concluding there had been no substantial change in circumstances since the time of the divorce trial. This appeal follows.

DISCUSSION

¶3 Child custody and placement determinations are committed to the sound discretion of the circuit court. *Gould v. Gould*, 116 Wis. 2d 493, 497, 342 N.W.2d 426 (1984). We will sustain a discretionary decision if the court

examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). “Although the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court’s discretionary decision.” *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. In addition, we affirm the circuit court’s findings of fact unless they are clearly erroneous, WIS. STAT. § 805.17(2) (2013-14),¹ but we independently review any questions of law, *Clark v. Mudge*, 229 Wis. 2d 44, 50, 599 N.W.2d 67 (Ct. App. 1999).

¶4 WISCONSIN STAT. § 767.41 authorizes circuit courts to make any provisions they deem “just and reasonable” concerning the legal custody and physical placement of minor children subject only to the limitations imposed by statute. Joint legal custody is presumed to be in the best interest of the child. *See* § 767.41(2)(am). There is no parallel presumption about equal placement. *See Keller v. Keller*, 2002 WI App 161, ¶12, 256 Wis. 2d 401, 647 N.W.2d 426. The court is only required to set a schedule that allows the child to have “regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent.” Section 767.41(4)(a)2.

¶5 In determining legal custody and physical placement, the court must consider several factors relevant to the best interest of the child. *See* WIS. STAT.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

§ 767.41(5). Pertinent to this appeal, one of the factors to be considered when determining custody and placement is the “child’s adjustment to the home, school, *religion* and community.” Section 767.41(5)(am)5. (emphasis added). Moreau argues that the circuit court erroneously exercised its discretion by failing to consider the overwhelming effect of Pepin’s religious practices on the children’s well-being. We are not persuaded.

¶6 In *Gould*, our supreme court interpreted WIS. STAT. § 767.41(5)(am)5:

The statute requires the court to consider the child’s adjustment to religion; it does not require the court to consider the family’s religion or to favor one parent over the other in a custody determination on the basis of the parent’s attitudes toward religion or the parent’s religious affiliation. Wisconsin has long respected families’ rights to choose the type of religious instruction, if any, their children will receive.

Gould, 116 Wis. 2d at 503-04. The *Gould* court further acknowledged that “courts should not purport to pass upon the comparative merits of various attitudes regarding religion.” *Id.* at 504 (quoting *Welker v. Welker*, 24 Wis. 2d 570, 575-76, 129 N.W.2d 134 (1964)).

¶7 Further, “[n]o liberty guaranteed by our constitution is more important or vital to our free society than is a religious liberty protected by the Free Exercise Clause of the First Amendment.” *State v. Yoder*, 49 Wis. 2d 430, 434, 182 N.W.2d 539 (1971), *aff’d*, 406 U.S. 205 (1972). A parent’s constitutional right to direct the religious upbringing of his or her children may, however, be subject to limitation “if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.” *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972).

¶8 Here, the record shows that the court recognized the critical difference between directing how a parent practices a religion and considering how the practice of that parent's religion might affect the best interests of the children. The court noted it "had no authority, as a civil court, to regulate [Pepin] and the children's practice of a religion," and acknowledged the difficulty in parsing "the belief system from the activities that flow from that belief system."

¶9 With specific reference to the children's adjustment to home, school, religion and community, the court noted that the children are "super high achievers in school" who "test in the top percentile on standard tests" and "get terrific grades." Both children ride horses, and Genevieve also plays cello in the school orchestra while Camille plays the violin and is involved in both soccer and gymnastics. Although the children do not have friends in the neighborhood, they have some friends through their religious community. The court added: "The part of me that is not sitting right in front of the flag in the judicial robe would say they should have more friends and be more social and have more activity out in the neighborhood and in school." The court recognized, however, that if their friends were through their religious community, it could not say there was something "abnormal about their adjustment or their development." Ultimately, the record reflects that the court considered appropriate statutory factors, including the children's adjustment to religion, when awarding joint custody and physical placement, with Moreau having impasse custodial authority over medical decisions.

¶10 Moreau nevertheless argues he should be awarded sole legal custody. Where, as here, the parties do not agree on custody, the court may grant sole legal custody only if it is in the child's best interest *and* the court finds that: (1) one party is incapable of performing parental duties and responsibilities or

does not wish to have an active role in raising the child; (2) one or more conditions exist at that time that would substantially interfere with the exercise of joint legal custody; *or* (3) the parties will be unable to cooperate in the future decision-making required under a joint legal custody award. *See* WIS. STAT. § 767.41(2)(b)2.

¶11 Moreau contends equal physical placement is not in the children’s best interests and joint custody is not possible given the parties’ inability to cooperate on custodial decisions and Pepin’s inability to support the children’s relationship with Moreau. With exceptions not applicable in this case, the court “may not give sole legal custody to a parent who refuses to cooperate with the other parent if the court finds that the refusal to cooperate is unreasonable.” WIS. STAT. § 767.41(2)(c).

¶12 Here, the court determined that both Moreau and Pepin had refused to cooperate with each other and both had been “somewhat unreasonable.” The court recognized that “[Moreau] has no respect or regard for [Pepin]’s faith” and Pepin effectively pretends that Moreau does not exist. Noting that neither Moreau nor Pepin were “cleaner” or “better” than the other, the court found no grounds to deny either one custody rights. Rather, the court encouraged both parties to try and figure out how to continue to raise their children. The record supports the circuit court’s decision to deny sole custody to either parent.

By the Court.—Judgment affirmed.

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

