COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 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 Nos. 2014AP2428
2014AP2429

Cir. Ct. Nos. 2014GN32
2014GN33

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

NO. 2014AP2428

IN RE THE VISITATION OF C. S.:

SUSAN FREDERICK,

APPELLANT,

V.

ANDREW CLAY, JANICE S. AND SUSAN MEADE,

RESPONDENTS.

NO. 2014AP2429

IN RE THE VISITATION OF M. S.:

SUSAN FREDERICK,

APPELLANT,

V.

ANDREW CLAY, JANICE S. AND SUSAN MEADE,

RESPONDENTS.

APPEALS from orders of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed*.

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. These cases involve the untimely deaths of the parents of two minor children, C.S. and M.S., a circumstance that has led to significant conflict among surviving family members about the children's rearing. Susan Frederick is the children's maternal grandmother. After her son-in-law's and daughter's deaths only a few years apart, Frederick filed petitions for guardianship of C.S. and M.S. The children's maternal grandfather, Andrew Clay, and their paternal grandmother, Janice S., also filed guardianship petitions and, in the alternative, sought visitation rights to the children pursuant to WIS. STAT. § 54.56.[1]

¶2 After a three-day trial, the circuit court appointed Frederick guardian, but ordered more visitation, or less restrictive visitation, with Janice and Clay than Frederick wanted. Frederick appeals, arguing the "expansive" visitation orders entered in these cases were contrary to both the United States Constitution and provisions within WIS. STAT. ch. 54. Frederick contends that all of these

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

authorities require that her opinions as guardian, as well as the opinions of the children's deceased mother as testified to by others at trial, regarding visitation be given presumptive force. Frederick also argues the circuit court exceeded its statutory authority to order "reasonable visitation" and erroneously exercised its discretion by ordering unsupervised, overnight visitation with Clay.

¶3 We need not decide whether the circuit court was required to presume Frederick's visitation proposal was in the children's best interests. Regardless of whether such a requirement exists, the court applied such a presumption in these cases, because it followed the procedure proposed by Frederick's attorney, and because it clearly used Frederick's visitation proposal as the template for its ultimate visitation determinations. We further conclude the circuit court did not exceed its statutory authority by entering the visitation orders at issue, nor did the court erroneously exercise its discretion with respect to Clay's visitation. Accordingly, we affirm.

BACKGROUND

¶4 Matthew and Loni S. were married and had two children. C.S. was born in 2009; M.S. was born in 2010. In November 2011, Matthew committed suicide. Following Matthew's death, Loni and the children lived with Loni's mother, Frederick, at her residence in Fall Creek, Wisconsin. In January 2012, Loni was diagnosed with cancer. She passed away two years later.

¶5 Loni's will nominated Frederick to serve as the children's guardian. Frederick filed petitions for guardianship of the children in March 2014. Clay, who is Loni's father and Frederick's ex-husband, also petitioned for guardianship, as did Janice, Matthew's mother. Clay and Janice also sought visitation pursuant

to WIS. STAT. § 54.56. The guardianship and visitation matters were the subjects of a three-day trial, occurring on May 14, May 29 and July 7, 2014.

¶6 The trial revealed that after Loni's passing, relations between family members—in particular, between Frederick and Clay and Janice—had become contentious. Frederick testified at the May 14, 2014, hearing that when Loni got sick, the "whole extended family pitched in and helped out." Frederick conceded that both Clay and Janice visited with the children before Loni's death. However, despite this whole-family effort, there were disagreements about how individual family members were caring for the children. Loni's death exacerbated the situation. Frederick acknowledged that, after Loni died, she had prohibited Janice from taking the children to Minnesota to visit family. Frederick testified she simply did not want Janice to take the children, and Frederick thought she should be the person to make such decisions because she had been caring for the children. Frederick stated the children should be allowed to see their father's side of the family, but only "when I want them to."

¶7 Frederick had not concluded her testimony by the end of the May 14 hearing. Her attorney then suggested that, pursuant to ***Martin L. v. Julie R.L.***, 2007 WI App 37, 299 Wis. 2d 768, 731 N.W.2d 288,[2] Frederick "provide a placement[3] schedule within ten days and then the other parties have ten days to object and then we enact that unless there's an objection." The circuit court

[2] Frederick's attorney did not directly cite ***Martin L. v. Julie R.L.***, 2007 WI App 37, 299 Wis. 2d 768, 731 N.W.2d 288, but rather referred to the guardian ad litem's brief which included that authority.

[3] Throughout the proceedings, the parties appear to have interchangeably used the words "placement" and "visitation." In all instances, however, the parties appear to have been discussing visitation.

appointed Frederick temporary guardian pending conclusion of the trial, but recognized that with both parents deceased and without a permanent guardian having been appointed, the children were subject to the *parens patriae* doctrine.[4] Nonetheless, the court followed Frederick's suggested procedure and ordered that Frederick, in her role as temporary guardian, provide a visitation schedule within ten days, which would be adopted absent any objections from Clay and Janice.

¶8 Shortly before the May 29 hearing, Frederick's attorney sent visitation proposals to Clay and Janice. Frederick proposed that Janice have the children between Friday at 6:00 p.m. and Sunday at 6:00 p.m. on the second weekend of every month, subject to certain conditions.[5] That weekend would be expanded to include Thursday evening in the summer months, and Janice could elect to have visitation on New Year's Eve. Frederick contemplated that Janice would "transition to a full week of placement as the boys get older." Frederick proposed that Clay receive "four hours of placement one Sunday per month," which was to be supervised by Clay's sister, Karen Hotvedt. Frederick wrote that it was her intention "that these placements would increase and that there would not be a need for supervised placement in the event the placements go well."

¶9 Clay and Janice were apparently unsatisfied with Frederick's visitation proposals. As a result, Frederick's concerns about the children's

[4] This doctrine refers to the role of the state as guardian of persons under legal disabilities, which include children who are under the age of majority, recognizing that it is the "right and duty of the state to step in and act in what appears to be the best interest of the ward." ***Eberhardy v. Circuit Court for Wood Cty.***, 97 Wis. 2d 654, 659 n.6, 294 N.W.2d 540 (Ct. App. 1980), *aff'd*, 102 Wis. 2d 539, 307 N.W.2d 881 (1981).

[5] Among other things, Frederick required Janice to child-proof her home, provide separate bedrooms for the children, and attend Catholic Mass with the children.

visitation with Clay and Janice were key issues during the remaining hearings. Frederick testified she thought supervised visitation was necessary for Clay because he and his wife, Mary, did not pay sufficient attention to the children. Frederick stated that Janice's stated concerns about Frederick's ability to care for the children were "lies." Frederick acknowledged that following Loni's death, she did not respond to Clay's or Janice's numerous requests to see the children.

¶10 At the May 29 hearing, Frederick sought to show that Loni would not have wanted Clay and Mary to have unsupervised visitation with the children. Frederick testified that Loni "didn't feel that [Clay and Mary] were capable of taking care of [the children]" and "did not want [the children] ever to have to go through a … divorce-like situation where they would be passed around back and forth for weekends." Karen, Clay's sister, similarly testified that Loni was uncomfortable with Clay and Mary having unsupervised visitation. Alexander Clay, Loni's brother, testified that Loni was not opposed to having the children spend time with Clay, but he "wasn't sure if she was comfortable completely with letting … my dad be alone with them until they were able to … establish … a foundational relationship." However, Alexander agreed that Loni "want[ed] the boys to have a relationship with everyone," and Janice testified that Loni "wanted the grandparents to be there, all the grandparents, [for] christenings, birthdays." Neither Alexander nor Janice believed Clay was abusive or neglectful.

¶11 Janice testified she saw the children regularly before her son's death. After Loni's death, Janice's view was that Frederick attempted to "control … when I can see the boys[,] or my family can[,] or anyone else for that matter." Janice had asked to see the children weekly since Loni's death, but had received no reply from Frederick. Janice testified that in addition to weekend visitation, she also wanted visitation for "at least two hours one night a week."

¶12 Frederick testified that, despite her visitation proposals, she preferred not to have an established visitation schedule. Rather, Frederick said she wanted "[e]verybody [to] just get along." Frederick testified she did not want Janice to "have to do the one specific weekend a month, and I know that Loni would not want that format [where] … the boys would [have] … a specific time they have to go see their grandma."

¶13 At the conclusion of the May 29, 2014 hearing, the circuit court observed that "because of the various animosities," the children had not seen their grandparents for some time. Consequently, the circuit court ordered a weekend visitation with Janice pursuant to the terms of Frederick's visitation proposal. Clay's attorney also requested a weekend visitation for his client, in response to which the court ordered "two separate one-day-not-overnight visitations with the sister [Karen] present." Clay's attorney objected, noting the guardian ad litem, Susan Meade, did not recommend supervision. The court responded that it was going to adhere to Frederick's proposals without much deviation until it had heard all the testimony in the case.

¶14 Janice's testimony had not concluded by the end of the May 29 hearing, so she resumed testifying on July 7. Janice testified that she and Clay had historically attended the children's activities, such as tee-ball, but that Frederick had stopped notifying them of when these activities occurred. Janice clarified that she wanted some holiday visitation with the children. She also stated that Clay and Mary "got along great" with Loni and Matthew, and that neither Loni nor Matthew expressed any concerns about Clay or Mary caring for the children or spending time with them. According to Janice, "[t]he boys were very comfortable with [Clay and his wife], and they were very comfortable with the boys." Janice testified the children were "[v]ery close" to Clay and his wife, "[l]ike grandparents

to grandchildren." Janice did not think Clay's time with the children needed to be supervised.

¶15 Michael S. and Troy S., Matthew's brothers, testified in support of visitation for Clay and Mary. Michael testified Clay and Mary were "[j]ust like any grandparent, loving, caring, wanting to be there to teach [the children] things, play with them, help … everybody." Troy testified Clay and Mary were "[v]ery normal, loving grandparents." He testified Mary was a "very loving, nurturing person." Troy stated he had no concerns with Clay or Mary having "reasonable and liberal" time with the children.

¶16 Nancy Fliehr, Clay's sister, testified that Clay and Mary were "very proud grandparents" who had a good relationship with Matthew and Loni. Clay and Mary "always would have pictures to show" and "would have stories to tell of how they had spent time with the kids." According to Fliehr, the children "absolutely love" Clay and Mary, and Fliehr testified specifically about how well Clay related to the children. Fliehr did not believe Clay or Mary would be neglectful, and she stated she would trust them with her own grandson. Fliehr knew of a number of times that the children stayed overnight at Clay and Mary's house, although she could not recall a time when they would have stayed there without their mother.

¶17 Mary and Clay also testified at the July 7 hearing. Mary testified she had "a lot of experience with children in training and working with parents and parenting programs," and she had provided court-ordered supervised visitation services for seven years for Chippewa County. She and Clay regularly attended the children's christenings and birthday parties. Mary testified that because Matthew and Loni tried to divide their time between the three families, she and

Clay saw the children approximately once per month or once every other month before Matthew's death. Mary testified that at one point after Loni became ill, Clay had told Mary that he heard Loni say she did not want Mary to care for the children at Frederick's house. Mary believed this statement was because Frederick had "gotten Loni really riled up," and Loni had apologized a few weeks later. Mary stated Frederick had acted aggressively toward her and Clay. Clay confirmed much of this testimony, adding that other than the single incident in which he overheard Loni and Frederick talking about Mary, Loni had never expressed any concerns about Mary caring for the children. Clay testified that despite repeated attempts to see the children, Frederick would not respond to their requests. Clay stated he and Mary sought a schedule similar to that desired by Janice.

¶18 After some additional brief testimony, the guardian ad litem renewed her motion that Frederick be appointed guardian, with Janice as stand-by guardian. The parties generally accepted this proposal, and it was ordered by the court, which found that even though "there is evidence of not rational behavior on the part of the nominated guardian, Miss Frederick, on occasion, I do not find that it is sufficient at this time to override the presumption that appointment [of the nominated guardian] would be in the best interest of the children." The court additionally ordered that Janice have access to all the children's medical and educational records.

¶19 Frederick renewed her request for visitation pursuant to her previous proposal, with minor modifications. The circuit court, apparently referring to Frederick's testimony that she preferred not to have a firm visitation schedule in place, stated that "unless the grandparents, and there's three sets of grandparents, have rights of visitation and … they're carved in tablets of stone, I'm not

confident that there's going to be smooth and easy visitation with the grandparents here." The court found that there needed to be "periodic weekend visitation" and holiday visitation with Clay and Janice, although it initially thought visitation every other weekend might be too much. However, the court stated it was

> not going to be able to spout a big visitation schedule today. I'm going to take into consideration everything, but I'm going to tell you about where it's going. It's going to be changed based upon how old these children are. As they get older, there's going to be the availability of longer periods of visitation, especially in the summertime, to be able to have a summer vacation. …
>
> There's going to be periodic weekend visitations for basically it's all three sets of grandparents, although [Frederick] … hopefully will actually get some grandparent time in there. … [V]isitation with the other grandparents can be seen as respite care, that is, a little bit of an opportunity to not have the responsibilities 365 days out of the year 24 hours a day.
>
> So I'm going to be looking at some sort of weekend visitation on a periodic basis. I'm not sure whether that's going to be once a month, once every five weeks because I don't want it to be where … every other weekend these children are gone, but something so that it's in place. That doesn't mean that the parties can't come up with something else, but when they can't agree, whatever's chiseled into the stone, that's what the visitation's going to end up being.

¶20 The parties returned on July 18, 2014, for a hearing at which the circuit court ordered the visitation schedule. The court acknowledged the schedule was "probably not what any one of the folks would want to have, but I'm looking at this as to what I think would be in the best interests of these children based upon the unique circumstances of where the parties are and what the situation is." Janice was awarded visitation on one weekend each month, generally the second weekend. She was also awarded some visitation on Christmas, Easter, Labor Day, and Matthew's birthday, and, because Janice lived near the children's school, after school until 5:00 p.m. on days when Janice was not working. Clay was awarded

one weekend of visitation in January, March, May, July, September, November and December, with a single six-hour day of visitation in February, April, August and October, and no visitation in June. The court did not order Clay's visitation to be supervised. Visitation with each grandparent was to expand to one full week during the summer upon the younger of the two children attaining the age of seven.

¶21 Following the circuit court's oral ruling, the parties filed additional motions, including motions for clarification of the ruling and for contempt against Frederick. The court entered clarifying orders on October 7, 2014, primarily regarding logistical issues with the visitation schedule, and it found Frederick in contempt for "intentionally and unreasonably failing to follow the Court's order[s] regarding grandparent visitation." The court ordered makeup visitations to both Clay and Janice as a remedy. Frederick now appeals the prospective visitation orders entered following the July 18 hearing, as clarified by the October 7 orders.

DISCUSSION

¶22 This case concerns grandparent visitation under WIS. STAT. § 54.56(2). That subsection, as relevant here, provides:

> If one or both parents of a minor are deceased and the minor is in the custody of the surviving parent or any other person, a grandparent … of the minor may petition for visitation privileges with respect to the minor, whether or not the person with custody is married. … Except as provided in [a subsection not applicable to this case], the court may grant reasonable visitation privileges to the grandparent … if the surviving parent or other person 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.

Id. Neither "reasonable visitation" nor "reasonable visitation privileges" are defined by the statute. A grandparent may file the petition in a guardianship proceeding, as was done in this case. ***Id.***

¶23 A circuit court's determination that grandparent visitation is in the best interests of the child is reviewed for an erroneous exercise of discretion. ***F.R. v. T.B.***, 225 Wis. 2d 628, 637, 593 N.W.2d 840 (Ct. App. 1999). Similarly, the extent of visitation ordered is a discretionary matter for the circuit court. ***Rick v. Opichka***, 2010 WI App 23, ¶¶4, 16, 323 Wis. 2d 510, 780 N.W.2d 159. "We will affirm a trial court's discretionary determination so long as [the court] 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." ***F.R.***, 225 Wis. 2d at 637. However, when the contention is that the circuit court erroneously exercised its discretion because it applied an incorrect legal standard, we review that issue de novo. ***Id.***

¶24 Here, Frederick first asserts the circuit court's orders must be reversed, as a matter of law, because the court was required, but failed, to give "special weight" to Frederick's and Loni's "opinions" regarding Clay's and Janice's visitation. Frederick relies on ***Troxel v. Granville***, 530 U.S. 57 (2000), as applied by ***Martin L***, to argue that the court should have made clear it was applying a rebuttable presumption that Frederick's opinions regarding Clay's and Janice's visitations were in the children's best interests. Frederick argues that even if her opinions, as guardian, were not entitled to benefit from the presumption, the court should have given presumptive weight to Loni's opinions as the children's parent, as those opinions were testified to by others at trial, including Frederick.

¶25 In ***Troxel***, the U.S. Supreme Court concluded the grandparent visitation order at issue was unconstitutional because it was entered without the court having given "special weight" to the surviving parent's decision regarding visitation. ***Troxel***, 530 U.S. at 69. The visitation order in that case was entered pursuant to a Washington statute authorizing courts to grant grandparent visitation rights whenever visitation served the best interests of the child. ***Id.*** at 60. The Court concluded the application of this statute implicated parents' Fourteenth Amendment liberty interest to make decisions concerning the care, custody and control of their children, because, "in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." ***Id.*** at 67.

¶26 In ***Martin L.***, this court concluded that a circuit court gives "special weight" to a surviving parent's decision regarding grandparent visitation under Wisconsin law by applying a rebuttable presumption that a fit parent's visitation decision is in the best interests of the child. ***Martin L.***, 299 Wis. 2d 768, ¶12; *see also* ***Opichka***, 323 Wis. 2d 510, ¶4. "The family court, however, is still required to independently assess what the best interests of the children are." ***Opichka***, 323 Wis. 2d 510, ¶4. This "best interests" assessment depends on firsthand observation and experience with the persons involved and, as we have stated, is reviewed for an erroneous exercise of discretion. ***Id.***

¶27 Frederick acknowledges that neither ***Troxel*** nor ***Martin L.*** involved visitation determinations made by nonparent, court-appointed guardians. She further acknowledges it is an open question in Wisconsin whether such guardians are entitled to a presumption that their desired visitation schedule is in the best interest of the child. Frederick argues that although she believes guardians are

constitutionally entitled to the same presumption as a fit parent, we need not reach this constitutional issue because the "same result is dictated by WIS. STAT. § 54.25."[6] Frederick argues that an interpretation of WIS. STAT. § 54.56(2) that does not recognize a presumption that the guardian's wishes are in the best interests of the child conflicts with the guardian's powers under § 54.25, while the alternative interpretation of § 54.56(2) "harmonizes the statutes and remedies the constitutional and policy concerns."

¶28 We need not decide whether the circuit court was required to give special weight to Frederick's opinion regarding grandparent visitation, either by virtue of the Fourteenth Amendment or under WIS. STAT. § 54.25. Regardless of whether such a requirement exists, we conclude that, in the context of these cases, the record as a whole demonstrates the circuit court did apply a presumption that the guardian's views regarding Clay's and Janice's visitations were in the children's best interests. The court simply concluded, albeit implicitly, that the presumption was overcome. Accordingly, our approach to resolving these appeals is consistent with the general rule that we decide cases on the narrowest possible grounds, in particular avoiding constitutional issues if possible. *See* ***Miesen v. DOT***, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999). For this same reason, our conclusion that the circuit court applied Frederick's desired presumption means that we need not address whether the court was statutorily required to apply the presumption in the first instance due to a perceived conflict between § 54.25 and WIS. STAT. § 54.56(2). As an additional reason for our

[6] Specifically, Frederick cites WIS. STAT. § 54.25(2)(d), which provides that when a guardian is appointed for a minor, "the guardian shall be granted care, custody, and control of the person of the minor," and § 54.25(2)(d)2.g., which permits a court to authorize a guardian the power to make decisions "related to mobility and travel."

declining to address these issues, we observe that Clay and Janice have not adequately briefed these matters, instead limiting their discussion to a single sentence in which they state the presumption "perhaps" applies in this case.

¶29 We also need not decide whether the opinions of the last surviving parent regarding grandparent visitation are entitled to "special weight," even though that parent is deceased at the time of the judicial visitation proceedings. We observe, however, that Loni's "opinions" regarding grandparent visitation were introduced at trial only through disputed testimony, including that of Frederick. That testimony was subject to the circuit court's evaluation of the witnesses' credibility. *See* ***Nicholas C.L. v. Julie R.L.***, 2006 WI App 119, ¶23, 293 Wis. 2d 819, 719 N.W.2d 508 ("[T]he trial court is the ultimate and final arbiter of the credibility of witnesses."). The court does not appear to have made any findings of fact in relation to Loni's wishes for visitation. Frederick contends Loni's opinions essentially mirrored her own. Because the circuit court gave presumptive weight to Frederick's opinions, we need not determine whether the circuit court was also required to give presumptive weight to Loni's opinions, at least as Frederick perceives them to be.

¶30 The circuit court in this case followed the procedure suggested by Frederick's attorney, which procedure counsel apparently considered consistent with ***Martin L.*** Namely, the court ordered Frederick to propose a visitation schedule within ten days of the May 14 hearing, which would then be adopted absent any objections from the grandparents. As a practical matter, then, Frederick was given the initial opportunity to craft the visitation schedule of her liking, which formed the "baseline" for the visitation schedule ultimately adopted by the court. During a subsequent hearing, Frederick appeared to distance herself from her own proposal, stating that she did not want an established visitation

schedule because it "gets to be picky, that whole thing with you have to be here exactly at five o'clock …. I lived the divorce style before, and I really don't want to do it." Frederick stated she would prefer that "[e]verybody just get along." Despite this, the court stated it would adhere to Frederick's proposed schedule when ordering interim visitation until it heard all the testimony in the case.

¶31 Consistent with the trial testimony in this case, the circuit court found a voluntary arrangement unworkable given the amount of discord and conflict amongst the family members. At the end of trial, the court concluded that unless the visitation schedule was "carved in tablets of stone," Frederick and the grandparents were unlikely to reach an amicable resolution. The court did make some modifications to Frederick's proposals, most notably with respect to the amount and nature of the children's visitation with Clay and Mary. Nonetheless, it is apparent from the totality of the record—both from the procedures used and the substance of the circuit court's decision—that the circuit court gave Frederick's proposals (and, consequently, Loni's alleged opinions) sufficient weight under ***Troxel*** and ***Martin L.*** The court, after weighing the evidence, simply concluded that Frederick's proposed visitation schedule was not quite consistent with the children's best interests. In other words, it necessarily concluded that the grandparents had presented sufficient evidence to rebut the presumption.

¶32 Frederick next contends the circuit court exceeded its authority under WIS. STAT. § 54.56(2) by ordering "expansive" visitation that was not warranted under the facts of this case. As a result, Frederick argues, the court in this case ordered something more akin to physical placement than visitation, contrary to ***Lubinski v. Lubinski***, 2008 WI App 151, 314 Wis. 2d 395, 761 N.W.2d 676. However, as Frederick concedes, ***Lubinski*** involved review of an order in a divorce proceeding "issuing an injunction to enforce physical placement

with a parent and granting visitation to a stepparent under WIS. STAT. §§ 767.43 and 767.471 [(2005-06)]." ***Lubinski***, 314 Wis. 2d 395, ¶5. ***Lubinski*** is relevant authority, but it is not the *most* relevant. That distinction belongs to ***Opichka***, which sets forth the operative law regarding visitation versus physical placement in the grandparent visitation context.

¶33 In ***Opichka***, the father opposing grandparent visitation argued that an award of overnights and a week during the summer was contrary to law because it was the equivalent of physical placement. ***Opichka***, 323 Wis. 2d 510, ¶11. We concluded "[t]here is no difference" between visitation and physical placement in terms of the quantity of time the children are out of the home. ***Id.***, ¶12. These are "both situations where children go out of the custodial home, away from the parent with whom the children reside." ***Id.*** During these excursions, whether the subject matter is physical placement or visitation, "the same rules apply: routine daily decisions [such as what and when to eat, and what clothes to wear] may be made, but nothing greater." ***Id.***, ¶13. Regardless of the amount of time ordered to be spent, a visit is still a visit; "[t]he proper amount of that time is a decision made by the family court in the best interests of the children." ***Id.*** We therefore concluded the father "misses the mark when he contends that such things as overnights and vacation weeks and weekends that comprise a more expansive visitation order are not allowed by statute because a court can make such orders only in the context of a physical placement order." ***Id.***, ¶16.

¶34 Given ***Opichka***, we cannot conclude the circuit court exceeded its authority under WIS. STAT. § 54.56(2) by ordering what Frederick characterizes as "expansive" visitation in the present case. Frederick seizes upon the dissenting view in ***Opichka***, that the majority's holding in that case was inconsistent with both ***F.R.*** and ***Lubinski***. *See* ***Opichka***, 323 Wis. 2d 510, ¶¶26-29 (Snyder, J.,

dissenting). Frederick argues that this court should "reaffirm ***F.R.*** and ***Lubinski*** by acknowledging a circuit court's authority to take a child away from a parent or guardian is more limited in a 'reasonable visitation' case under … § 54.56(2) than it is in a 'physical placement' case within a divorce proceeding." (Formatting altered.). However, ***Opichka*** has already reconciled these cases, and we will adhere to existing precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) ("[O]nly the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.").

¶35 To some degree, Frederick's "authority" argument appears to treat "reasonable visitation" as a question of law, but it is well settled that our review of that issue takes place under the erroneous exercise of discretion standard. *See* ***Opichka***, 323 Wis. 2d 510, ¶¶4, 16. Frederick's final argument is a direct challenge to the circuit court's exercise of discretion with regard to the visitation orders. Frederick argues "the circuit court made no findings of fact and offered no rationale or explanation for its visitation order." "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. We have undertaken such a search of the record.

¶36 It is important to note that Frederick only challenges the circuit court's exercise of discretion with respect to the ordered visitation with Clay, not with Janice. Frederick asserts that even if this court "chooses to search the record for evidence to justify the visitation order, it will find none that justifies the expansive, unsupervised visitation awarded to Clay." This is incorrect, as should be evident from the extensive record facts we have set forth. *See infra*, ¶¶7-18.

There was ample testimony from which the circuit court could conclude that Clay and Mary had a strong, longstanding grandparent relationship with the children, meriting twenty days of visitation per year, including sixteen overnights (both of which are to increase when the youngest child reaches the age of seven). Notably, the record reflects undisputed facts regarding their involvement in caring for the children during Loni's illness. Likewise, the trial testimony, again as previously summarized, supports the circuit court's conclusion that the children's welfare and Frederick's rights as guardian were not at risk from the children having unsupervised and overnight visitation with Clay and Mary. The circuit court's decision was reasonable, as the court obviously concluded, based on the facts of record, that if it did not order significant visitation, Frederick would not permit Clay and his family to see the children frequently enough to continue his substantial relationship with them. Although there was evidence that would have supported the contrary view, we cannot substitute our discretion for that of the circuit court. *See* ***State v. Rhodes***, 2011 WI 73, ¶26, 336 Wis. 2d 64, 799 N.W.2d 850.

By the Court.—Orders affirmed.

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