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DISTRICT IV

April 3, 2013

To:

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You are hereby notified that the Court has entered the following opinion and order:

2011AP2197 In re the marriage of: Mark Christensen v. Mindy Roys (L.C. # 2011FA12)

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

Mark Christensen appeals a postdivorce order that decreased the amount of time that he has physical placement of his two teenaged children. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

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

The sole issue presented on appeal is whether the circuit court erroneously exercised its discretion by basing its decision primarily upon the wishes of the children when, Christensen contends, those wishes were not "clear, particular, and expressed on the record."[2] The children's wishes were conveyed to the circuit court through the guardian ad litem's written report and oral recommendation to the court. The GAL informed the court that the children had told him "they would like to spend less time with their father but neither one of them had a specific schedule in mind." Christensen contends this was an insufficient evidentiary basis. We disagree.

First, contrary to Christensen's assertion, the children's preference to spend less time with him was expressed "on the record." This is not a situation where the children were precluded from testifying, or where the court conducted an in camera interview without disclosing what the children said. There is no requirement that the children *themselves* testify in open court in order to have their wishes known. To the contrary, the statute explicitly authorizes a child's guardian ad litem to communicate the child's wishes to the court—which he did, on the record at the hearing on the motion to modify placement.

Second, Christensen's contention in his reply brief that a child must express "substantial reasons" for a placement preference before the court is obliged to take the child's wishes into account is based on a misunderstanding of the cases he cites. In ***Edwards v. Edwards***, 270 Wis. 48, 56, 71 N.W.2d 366 (1955), a child expressed desire to stay with his foster family, and in ***Seelandt v. Seelandt***, 24 Wis. 2d 73, 78-79, 128 N.W.2d 66 (1964), a child expressed a desire to

[2] The appellant also makes allegations in his brief that the circuit court was inconsistent in its rulings on the admission of hearsay relating the children's preferences. He does not, however, challenge any specific ruling or develop a separate argument as to how those rulings would warrant reversal of the circuit court's order.

live with her grandparents. In each of those cases, the "substantial reasons" language arose in the context of weighing the rights of a parent against a third party. Christensen has not cited any cases that employ "substantial reasons" language in a custody dispute between two parents, to which WIS. STAT. § 767.41(5) applies. Rather, the statute directs that the circuit court *shall* take the wishes of the child into account, and it does not mandate that the wishes be expressed in any particular form or with any particular specificity. We therefore conclude that the circuit court was within its discretion to rely upon the children's expressed preference to spend less time with their father, relayed to the court by the guardian ad litem.

IT IS ORDERED that the order modifying physical placement is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals