

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 13, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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

No. 96-2712

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

LORRAINE K. KERBELL (NOW RUTH),

PETITIONER-RESPONDENT,

V.

ROBERT A. KERBELL,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, P.J., Myse and Fox, JJ.

PER CURIAM. Robert Kerbell appeals an order dismissing his motion and declining to exercise jurisdiction with respect to issues concerning the placement of his daughter who now lives in North Carolina. Kerbell argues that

(1) federal law mandates that Wisconsin exercise its jurisdiction; (2) the trial court erroneously exercised its discretion; (3) the trial court erroneously found that Wisconsin is an inconvenient forum; and (4) the legislature amended § 767.327, STATS., to permit the trial court to deny permission to a custodial parent to move. Because the record reflects a reasonable exercise of discretion, we affirm the order.

The underlying facts are not subject to dispute. In 1992, the parties were divorced after an eleven-year marriage. They share joint custody of their daughter, who was born in 1987. Following the divorce, Kerbell's former wife, Lorraine, remarried and took up residence in North Carolina with their daughter. Robert has periods of physical placement at any reasonable time upon reasonable notice. He also has extended visitation in the summer.

The parties' marital settlement agreement anticipated that Lorraine would move to North Carolina, so it provided that Kerbell's rights to physical placement would include times that he is in North Carolina, in addition to reasonable opportunities to have his daughter with him in Wisconsin. Kerbell lives in Wisconsin and travels to North Carolina biweekly to spend time with his daughter. He pays \$3,500 per month child support.

Kerbell filed a motion with the trial court in Wisconsin seeking an order requiring his daughter to return to live in Wisconsin. His motion does not seek sole custody or primary physical placement. As the basis for the motion, Kerbell states that he agreed to his former wife's move to North Carolina with their daughter because, at the time of his divorce, he could not prohibit such move under Wisconsin law without challenging primary physical placement. He states

that he would not have agreed to the move if he had had any legal basis to prevent it.

Kerbell further states that the legislature has since amended § 767.327, STATS., to provide courts with authority to prohibit moving a child's residence out of state. Despite his extraordinary efforts to visit his child every other week in North Carolina, the move disrupted his close relationship with his daughter. Because of increasing difficulties in arranging business and personal life to accommodate travel, Kerbell fears that the distance will cause his relationship with his daughter to deteriorate.

Kerbell also states that his daughter has extended family in Eau Claire, and friendships that were cultivated in kindergarten. He believes that the educational opportunities are greater in Wisconsin. Kerbell also expressed concern that his daughter's current home in North Carolina is in a crime ridden, dangerous neighborhood. He believes that it is in his daughter's best interests to return to live in Wisconsin.

Lorraine filed a motion to dismiss under § 822.07, STATS., alleging that Wisconsin is an inconvenient forum, and requesting that the trial court decline to exercise its jurisdiction and find it in the best interests of the minor child for North Carolina, the state of her residence, to assume jurisdiction. The trial court granted the motion. It concluded that North Carolina is the most convenient forum for further proceedings regarding custody and physical placement and declined to exercise its jurisdiction over further proceedings.

Custody and placement issues are addressed to trial court discretion. *Hollister v. Hollister*, 173 Wis.2d 413, 416, 496 N.W.2d 642, 643 (Ct. App. 1992). We will not reverse a discretionary decision if the record discloses that

discretion was in fact exercised and we can perceive a reasonable basis for the decision. *Prahl v. Brosamle*, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987). The term "discretion" contemplates a process of reasoning which depends on facts that are in the record or reasonably derived by inference from the record and yields a conclusion based on logic and founded on proper legal standards. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). A misinterpretation of the law results in an erroneous exercise of discretion. *State v. Hutnik*, 39 Wis.2d 754, 763, 159 N.W.2d 733, 737 (1968). We review questions of law de novo. *Ball v. District No. 4 Area Bd.*, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

Kerbell argues that because no custody determinations have been made in North Carolina, the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, preempts the choice of forum language outlined in the Uniform Child Custody Jurisdiction Act, ch. 822, STATS., and therefore Wisconsin must retain jurisdiction. We disagree. Kerbell's argument does not address § 1738A(f), which permits a court of a state to modify a child custody determination of another state under certain circumstances:

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

Interpreting this section, our supreme court observed: "Even if the federal and state criteria for continuing jurisdiction are met, the first state's courts

can, if they choose, voluntarily relinquish their jurisdiction in favor of a court better situated to assess the child's needs." *Michalik v. Michalik*, 172 Wis.2d 640, 653, 494 N.W.2d 391, 396 (1993) (citations omitted).

Kerbell does not claim that North Carolina, as the daughter's home state, would not have jurisdiction under its state laws. Instead, he argues that the trial court failed to properly exercise its discretion and erroneously concluded that Wisconsin is an inconvenient forum. Because we conclude that the trial court reasonably declined to exercise its jurisdiction, we reject his argument.

Section 822.07, STATS., provides that a court may decline to exercise its jurisdiction if it finds that it is an inconvenient forum and a court of another state is a more appropriate forum.¹

¹ Section 822.07, STATS., provides:

Inconvenient forum. (1) A court which has jurisdiction under this chapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child. Motions under this subsection may be heard on the record as prescribed in s. 807.13.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) If another state is or recently was the child's home state;

(b) If another state has a closer connection with the child and family or with the child and one or more of the contestants;

(c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(d) If the parties have agreed on another forum which is no less appropriate; and

(continued)

In its oral decision, the trial court made the following observations based upon undisputed facts. At the time of the marital settlement agreement, the move to North Carolina was anticipated. The court at that time would have had the authority to change custody or placement if it determined the out of state move was not appropriate. The parties agreed to the move, and the court concluded it was in the child's best interests at that time. The parties' child has lived in

(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in s. 822.01.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this chapter if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

North Carolina for more than two years. There is no dispute she is doing well in school. Her mother has remarried and is running a business. There is no issue as to the competency of her mother to continue as caretaker or any issue as to the stability of their home in North Carolina.

The trial court observed that, although Kerbell's frequent visits to North Carolina are causing inconvenience both in his business and personal affairs, he has substantial financial means to permit him to continue the visits and has purchased a home in North Carolina. The court noted that there was an issue as to the dangerousness of the child's neighborhood in North Carolina, but determined that issue would be better addressed by a North Carolina court. Also, the relative merits of the respective school systems is not an issue that would be more easily decided in one state instead of another. The information could be equally available to either court. Based on the circumstances, the court decided that North Carolina was a more appropriate forum and that it was inconvenient for the Wisconsin court to handle the matter.

We conclude that the trial court considered proper factors. Also, there is no dispute that North Carolina is the child's home state, and that the child and her mother have lived there for more than two years. As a result, substantial evidence concerning the child's present care is more readily available in North Carolina. *See Vorpahl v. Lee*, 99 Wis.2d 7, 13-14, 298 N.W.2d 222, 226 (Ct. App. 1980). Consequently, we reject Kerbell's claim that the trial court erroneously concluded that Wisconsin is an inconvenient forum. The record reflects a reasonable exercise of discretion.

Finally, we reject Kerbell's argument that changes to § 767.327, STATS., has any bearing on this appeal. Section 767.327 applies when a custodial

parent seeks permission to move out of state. Here, the move has already been accomplished. As a result, the legislative changes to the section have no application to the matter before us. Because the record reveals the trial court reasonably exercised its discretion when it declined to exercise its jurisdiction in the case before us, we affirm.²

By the Court.—Order affirmed.

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

² The record does not reveal whether an action has been commenced in the State of North Carolina; however, neither party raises the issue whether the pendency or lack thereof of a North Carolina action is material to the trial court's decision.

