

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 2013

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. 2012AP1466
STATE OF WISCONSIN

Cir. Ct. No. 2010FA505

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

ELIZABETH S. JACOB,

PETITIONER-APPELLANT,

V.

PAUL V. PALLICKAL,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Racine County:
FAYE M. FLANCHER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Elizabeth S. Jacob appeals from a circuit court order denying her motion for relief from an earlier court order permitting the removal of her son from the state and her motion for revision of her son's legal custody and physical placement. For the reasons discussed below, we affirm.

¶2 Jacob and Paul Pallickal were divorced in March 2011. They have one child, Jeffrey, who was three years old at the time of the divorce and is hearing impaired in both ears. Pursuant to their Marital Settlement Agreement, the parties were awarded joint legal custody of Jeffrey. Meanwhile, Pallickal was awarded primary physical placement and Jacob was awarded periods of placement “as the parties may agree in the State of Wisconsin.”

¶3 In July 2011, Pallickal filed a notice of intent to remove Jeffrey from the state and take him to India. Jacob filed an objection to the proposal. Eventually, Pallickal moved for modification of judgment so as to allow him to move to India with Jeffrey.

¶4 Pallickal’s attorney served the motion on Jacob’s trial counsel, Attorney Meredith Lewis, and attempted personal service on Jacob. According to Pallickal’s attorney, Attorney Lewis informed him that “she has e-mailed [Jacob] three times in relation to the post-judgment activity, and Ms. Jacobs [sic] had not even bothered to respond to the last two e-mails.” The record indicates that Jacob evaded personal service.¹

¶5 The circuit court held a hearing on Pallickal’s motion at which Jacob did not appear. The court proceeded anyway, finding that Pallickal had done all he could to give Jacob notice. At the hearing, Pallickal testified that he wished to move to India to care for his ailing father and look for employment. He further testified that Jeffrey would receive schooling and medical care there. Pallickal explained that he had offered physical placement of Jeffrey to Jacob while he was

¹ The process server submitted an affidavit of due diligence, indicating that it was unable to effect process upon Jacob because of evading.

in India, but Jacob was nonresponsive. He then tried to make arrangements with a babysitter to care for Jeffrey while he was away, but Jacob sabotaged his efforts by contacting the local police.² Finally, Pallickal observed that Jacob was not involved with Jeffrey, having visited him on only two occasions since the divorce was final.

¶6 After Pallickal's testimony, the Guardian ad Litem (GAL) noted that he held Jeffrey's passport at one time and it may have expired. Accordingly, he recommended that sole legal custody be granted to Pallickal so that he could obtain a passport for Jeffrey without Jacob's consent.

¶7 At the conclusion of the hearing, the circuit court granted Pallickal's motion to remove Jeffrey from the state and take him to India. It awarded Pallickal sole legal custody so that he could get Jeffrey a valid passport. It also suspended Jacob's physical placement rights. In doing so, the court noted, "This does not prohibit mom from coming back to court, whether that be in India or anywhere else from getting placement rights again." The court entered a written order on January 4, 2012. No appeal was taken from the order.

¶8 On February 7, 2012, Jacob filed a motion for relief from the January 4, 2012 order pursuant to WIS. STAT. § 806.07 (2011-12).³ She also moved for revision of Jeffrey's legal custody and physical placement.

² According to Pallickal, Jacob falsely told police that Jeffrey was abandoned and abused.

³ All references to the Wisconsin Statutes are to the 2011-12 version.

¶9 The circuit court held a hearing on Jacob's motions. There, Jacob testified that she did not receive any notice of the motion regarding Jeffrey's removal. She also testified why, in her opinion, it was in Jeffrey's best interests to stay in the United States and live with her in New York.⁴ In particular, Jacob expressed concern that Jeffrey would not receive appropriate medical care and quality education in India.

¶10 Ultimately, the circuit court denied both of Jacob's motions. The court determined that Jacob had not met her burden for the relief requested. Additionally, it noted that there was nothing in the record to indicate that Jeffrey was not getting appropriate medical care and quality education in India. This appeal follows.

¶11 Whether to grant relief under WIS. STAT. § 806.07 and whether to modify a physical placement or legal custody order are matters directed to the circuit court's discretion. *See Schauer v. DeNeveu Homeowners Ass'n, Inc.*, 194 Wis. 2d 62, 70-71, 533 N.W.2d 470 (1995); *Keller v. Keller*, 2002 WI App 161, ¶6, 256 Wis. 2d 401, 647 N.W.2d 426. We will affirm a discretionary determination when the court applies the correct legal standard to the facts of the case and reaches a reasonable result. *Keller*, 256 Wis. 2d 401, ¶6. In general, we look for reasons to sustain the court's exercise of discretion. *Id.*

¶12 Jacob first contends that the circuit court erroneously exercised its discretion by refusing to grant her relief from the January 4, 2012 order pursuant to WIS. STAT. § 806.07. Specifically, she complains that (1) Pallickal's service

⁴ Jacob had moved to New York while the divorce was pending to study podiatry.

was not sufficient for the circuit court to proceed on his motion for modification of judgment; (2) there was not sufficient evidence to warrant the change in legal custody and physical placement; and (3) the circuit court failed to consider necessary factors under § 806.07.

¶13 With respect to Jacob's first complaint, we conclude that service was sufficient to proceed on Pallickal's motion. As noted, Pallickal's attorney served the motion on Jacob's trial counsel, Attorney Lewis. Once an action has begun and an attorney has appeared in the action on behalf of a party, papers may be served upon the attorney of record. *Gangler v. Wisconsin Elec. Power Co.*, 110 Wis. 2d 649, 657, 329 N.W.2d 186 (1983) (citing WIS. STAT. § 801.14(2)). Thus, service was accomplished in this case despite Jacob's subsequent efforts to evade personal service and disregard her attorney's emails on the matter.

¶14 With respect to Jacob's second complaint, we begin by noting that the sufficiency of the evidence adduced at the hearing on Pallickal's motion is not directly before us. That is because Jacob did not appeal the January 4, 2012 order, and the time for doing so has long since expired.⁵ Even if that were not the case, we are satisfied that the circuit court's decision to award Pallickal sole legal custody and suspend Jacob's physical placement rights is supported by the record. As indicated by the GAL, sole legal custody was necessary to ensure that Jeffrey had a valid passport for his travels. Moreover, Jacob had repeatedly failed to exercise periods of physical placement, having visited Jeffrey on only two occasions since the divorce was final. *See* WIS. STAT. § 767.451(2m).

⁵ Consequently, we do address the propriety of the circuit court's January 4, 2012 order.

¶15 With respect to Jacob's third complaint, there was no need for the circuit court to discuss in greater detail the various factors under WIS. STAT. § 806.07. After all, Jacob's motion did not specify the subsection of the statute under which she sought relief. Upon review of the record, we are satisfied that the circuit court properly exercised its discretion in refusing to grant Jacob relief from the January 4, 2012 order.

¶16 Jacob next contends that the circuit court erroneously exercised its discretion by denying her motion for revision of Jeffrey's legal custody and physical placement. She maintains that the court should have granted primary physical placement to her.

¶17 Because Jacob's motion for revision was filed within two years after the final judgment determining legal custody or physical placement, she needed to show by substantial evidence that modification was necessary because the existing orders were physically or emotionally harmful to Jeffrey. *See* WIS. STAT. § 767.451(1)(a). She failed to meet this burden. Although Jacob questioned Pallickal's ability to provide appropriate medical care and quality education for Jeffrey in India, there was nothing in the record to support her concerns. Consequently, the circuit court properly denied Jacob's motion.

¶18 Finally, Jacob contends that the circuit court erred in ordering that future requests for physical placement be sought in India. She maintains that the Wisconsin court continues to have jurisdiction of the case.

¶19 Contrary to Jacob's assertion, the circuit court did not definitively order that future requests for physical placement be sought in India. Indeed, at the conclusion of the hearing on Pallickal's motion, it observed, "This does not prohibit mom from coming back to court, whether that be in India or anywhere

else from getting placement rights again.” The court subsequently heard Jacob’s motion for revision of Jeffrey’s legal custody and physical placement. There is no reason to believe that the court will not do so again, assuming that there is a basis for such a motion.

By the Court.—Order affirmed.

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

