COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2141

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE PATERNITY OF KAILA K.K.-E.:

TIMOTHY A.K.,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

v.

CARRIE B.C., F/K/A CARRIE B.E.,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and cross-appeal from an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Timothy A.K appeals from the trial court's order denying his motion requesting that Carrie B.C. be prohibited from moving to Arizona with their child. He asserts the following claims of error: (1) the trial court erred by applying WIS. STAT. § 767.327 instead of WIS. STAT. § 767.325 because the former statute does not expressly apply to paternity matters; and (2) by not specifically applying § 767.325, the trial court erroneously relieved the mother of her burden to bring an action to modify placement by "petition, motion or order to show cause" as well as her burden of proof.[1] On cross-appeal, Carrie B.C. argues that the trial court erroneously vacated an arrearage in child support that the father was ordered to pay. We affirm on the appeal and reverse on the cross-appeal and remand with directions.

I. BACKGROUND

¶2 This is a post-judgment paternity action concerning the physical placement of Kaila, the minor daughter of Timothy A.K and Carrie B.C. The father voluntarily accepted paternity and, although the mother always had primary physical placement of the child, he has had a substantial relationship with Kaila.[2] In March 1998, the mother sent the father a notice of her intent to move her residence to Arizona so she could be with her new husband and to take Kaila with her.[3] The father objected and brought a motion requesting that the mother be

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Kaila was born on November 10, 1988. The parties were never married. In 1990, the mother was awarded sole legal custody while the father was given "physical placement rights at all reasonable times." In 1991, the father moved to modify physical placement and was granted more time with Kaila. In 1992, the court modified custody to joint legal custody with an expanded physical placement schedule with the father.

[3] The mother's letter to the father properly gave notice to the father, pursuant to WIS. STAT. § 767.24(4)(d), which provides:

prohibited from taking Kaila with her out of state. As alternative relief, the father sought modification of the physical placement order, as well as sole legal custody.

¶3 The trial court allowed the mother to move to Arizona with Kaila pending a full hearing, determining that since the mother had primary physical placement and in essence was going to move anyway, and that the child had spent ten years with her as a consequence of the child's primary physical placement with her, that it made no sense to prevent her from taking the child to Arizona despite the father's objections. At the full hearing, the trial court placed the burden of proof on the father and applied WIS. STAT. § 767.327 to the facts of the case. The Guardian ad Litem, Ms. Gail Hochman Effros, and the psychologist, Dr. Marc J. Ackerman, recommended that Kaila move to Arizona with her mother. The trial court determined that it was in "the best interest of Kaila to move with her mother, be with her mother, the primary caregiver and the custodian for all of her life," and ordered that "primary placement of the minor child shall be with [the mother] in Arizona."

> ALLOCATION OF PHYSICAL PLACEMENT. If the court grants periods of physical placement to more than one parent, it shall order a parent with legal custody and physical placement rights to provide the notice required under s. 767.327(1).

WISCONSIN STAT. § 767.327(1) provides, as material here:

> NOTICE TO OTHER PARENT. (a) If the court grants periods of physical placement to more than one parent, it shall order a parent with legal custody of and physical placement rights to a child to provide not less than 60 days written notice to the other parent, with a copy to the court, of his or her intent to:
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> 1. Establish his or her legal residence with the child at any location outside the state.

Thus, as we will discuss, while the father is correct that the remainder of WIS. STAT. § 767.327 is inapplicable to paternity cases, the notice requirement nonetheless applies.

II. DISCUSSION

¶4 The trial court has "wide discretion in making physical placement determinations." ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442, 444 (Ct. App. 1992). The exercise of discretion requires a trial court to apply relevant law to the facts of record and to arrive at a reasonable conclusion. *See* ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (1995). "A court erroneously exercises its discretion, however, when it bases its determination on an error of law." ***Jocius v. Jocius***, 218 Wis. 2d 103, 110–111, 580 N.W.2d 708, 712 (Ct. App. 1998) (quoted source omitted). We will not set aside a trial court's findings of facts unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). Whether the trial court properly exercised its discretion is a question of law that we review *de novo*. *See* ***State Seep v. Personnel Comm'n***, 140 Wis. 2d 32, 38, 409 N.W.2d 142, 144 (Ct. App. 1987).

A. The appeal.

¶5 As noted, the father argues that the trial court improperly applied WIS. STAT. § 767.327 rather than WIS. STAT. § 767.325, relieving the mother of her burden to bring the action by "petition, motion or order to show cause," as well as her burden of proof.[4] The father also contends that because the mother did

[4] WISCONSIN STAT. § 767.327 provides, as material here:

> **Moving the child's residence within or outside the state. (3)** STANDARDS FOR MODIFICATION OR PROHIBITION IF MOVE OR REMOVAL CONTESTED. (a) 1. Except as provided under par. (b), if the parent proposing the move or removal has sole custody or joint legal custody of the child and the child resides with that parent for the greater period of time, the parent objecting to the move or removal may file a petition, motion or order to show cause for modification of the legal custody or physical placement order affecting the child. The court may modify the legal custody or physical placement order if, after considering the factors under sub. (5), the court finds all of the following:

not meet her burden of proof, she was not entitled to a modification of placement. The mother, on the other hand, argues that the trial court made the appropriate findings and that modification was warranted. We agree with the mother and the father.

¶6 Paternity actions are controlled by statute and the authority of the court is confined to those powers that are conferred by statute. *See* WIS. STAT.

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a. The modification is in the best interest of the child.

b. The move or removal will result in a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.

2. With respect to sub. 1.:

a. There is a rebuttable presumption that continuing the current allocation of decision making under a legal custody order or continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child. This presumption may be overcome by a showing that the move or removal is unreasonable and not in the best interest of the child.

b. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under that subdivision.

3. Under this paragraph, the burden of proof is on the parent objecting to the move or removal.

….

(5) FACTORS IN COURT'S DETERMINATION. In making its determination under sub. (3), the court shall consider all of the following factors:

a. Whether the purpose of the proposed action is reasonable.

b. The nature and extent of the child's relationship with the other parent and the disruption to that relationship which the proposed action may cause.

c. The availability of the alternative arrangements to foster and continue the child's relationship with and access to the other parent.

d.

§ 767.01 ("The circuit courts have jurisdiction of all actions affecting the family … as prescribed in this chapter."); *see also* ***Jocius***, 218 Wis. 2d 103, 117, 580 N.W.2d 708, 714 (Ct. App. 1998) ("absent an authorizing statutory provision, the court is usually powerless to act").

¶7 WISCONSIN STAT. § 767.51(6) expressly applies WIS. STAT. § 767.325 to paternity actions and not WIS. STAT. § 767.327.[5] This omission of § 767.327 from paternity actions was not accidental:

> When the 1995 amendment [1995 Wis. Act 70] was being drafted, adding removal to § 767.51(6) was included in the initial drafts. It was removed, however, prior to the final draft. This decision was not without a debate. Those in favor of inclusion argued that removal statutes were designed with the best interest of the child as the primary objective. … The other side of the issue argued that inclusion of paternity would be confusing and unnecessary. Many paternity mothers are relatively unsophisticated, whereas many of the respondents have little interest in their children. For those men seriously interested in their relationship with the child, the general modification statute, [WIS. STAT.] § 767.325, provides ample opportunity to contest a move.

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[5] WISCONSIN STAT. § 767.51(6) provides:

> **Paternity judgment.** Sections 767.24, 767.245, 767.263, 767.265, 767.267, 767.29, 767.293, 767.30, 767.305, 767.31, 767.32, and *767.325*, where applicable, shall apply to a judgment or order under this section.
>
> (Emphasis added.)

Section 767.325, however, excludes move-away situations under WIS. STAT. § 767.327 from its purview:

> **767.325 Revision of legal custody and physical placement orders.** Except for matters under s. 767.327 or 767.329, the following provisions are applicable to modifications of legal custody and physical placement orders….

This exclusion, however, is not significant here.

Judith Hartig-Osanka & Gregg Herman, *Removal After Kerkvliet*, WISCONSIN JOURNAL OF FAMILY Law, Vol. 20 at 33 (Apr. 2000). Thus, the legislature did not intend WIS. STAT. § 767.327 to apply to paternity actions.

¶8 This court, however, recently addressed the differences between WIS. STAT. § 767.325 and WIS. STAT. § 767.327 in ***Hughes v. Hughes***, 223 Wis. 2d 111, 588 N.W.2d 346 (Ct. App. 1998).[6] ***Hughes*** held that "[t]he difference is that under § 767.327 the move is the basis for the requisite substantial change in circumstances, whereas § 767.325 does not contain that limitation. *Compare* § 767.327(3)(a)1.b *with* § 767.325(1)(b)1.b." ***Id.***, 223 Wis. 2d at 124, 588 N.W.2d at 353. These two statutes, however, "do not conflict." ***Id.***, 223 Wis. 2d at 124, 588 N.W.2d at 352. Thus, while the father is correct and the trial court should have applied § 767.325, the trial court properly exercised its discretion with regard to the factors listed under that section. A trial court does not erroneously exercise its discretion if, on our independent review of the record, the evidence applied to a correct legal standard supports the trial court's action. *See* ***McCleary v. Stat***e, 49 Wis. 2d 263, 282, 182 N.W.2d 512, 522 (1971). Under § 767.325, the trial court can modify a physical placement order under the following conditions:

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[6] Aside from the fact that ***Hughes v. Hughes***, 223 Wis. 2d 111, 588 N.W.2d 346 (Ct. App. 1998), involved physical placement of a child in a post-divorce proceeding, rather than a post-judgment paternity action, it concerns issues strikingly similar to those found in the present case. In ***Hughes***, the mother gave notice to the father pursuant to WIS. STAT. § 767.327 of her intent to move out of state with their daughter, of whom she had primary physical placement. The father objected to the proposed move and filed a motion to modify placement of the child by awarding him primary physical placement or, in the alternative, prohibiting the mother from moving with the child. *See* ***id***., 223 Wis. 2d at 115, 588 N.W.2d at 349. The trial court determined that it could use either WIS. STAT. § 767.325 or § 767.327 in making its decision, and granted the father's motion using § 767.325. *See* ***id.***, 223 Wis. 2d at 117-118, 588 N.W.2d at 350. On appeal, the mother argued that since she filed her notice of intent to move before the father filed his motion to modify placement, § 767.327 governed. This court disagreed, holding: "[O]nce [the father] filed a motion to modify physical placement based on circumstances other than the move, the trial court could consider all relevant circumstances, including, but not limited to the move, in deciding whether to modify physical placement under § 767.325(1)(b)." ***Id***., 223 Wis. 2d 125, 588 N.W.2d at 353.

> **(1)** SUBSTANTIAL MODIFICATIONS. (b) *After 2–year period.* 1… [U]pon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:
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> a. The modification is in the best interest of the child.
>
> b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.
>
> 2. With respect to subd. 1., there is a rebuttable presumption that:
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> ….
>
> c. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.
>
> 3. A change in the economic circumstances or marital status of either party is not sufficient to meet the standards for modification under subd. 1.

¶9 Applying these factors, the evidence supported the trial court's determination to modify physical placement and allow Kaila to live in Arizona with her mother because that was in the child's best interest. The trial court considered the opinions of Dr. Ackerman and the Guardian ad Litem, both of whom supported Kaila's placement with her mother in Arizona. Dr. Ackerman's belief, as characterized by the trial court, was that Kaila was "very happy and busy in Arizona." In addition, although the father correctly argues in his brief to this court that marital status and economics cannot be grounds for a modification, *see* WIS. STAT. § 767.325(1)(b)3, as the mother points out, it was her relocation to Arizona, and not her remarriage, that caused the requisite substantial change of circumstances in this case as required by § 767.325(1)(b)1.b.

¶10 Finally, we hold that it was not necessary for the mother to file a motion under WIS. STAT. § 767.325 when the father had already done so. Indeed, such a holding would create an absurd result: the mother could simply file a motion now, putting the parties back at square one. *See* ***State v. Burkman***, 96 Wis. 2d 630, 642, 292 N.W.2d 641, 647 (1980) (statutes must be read so as to avoid an "absurd result.") Accordingly, we affirm the trial court's decision to permit the move to Arizona.

B. The cross-appeal.

¶11 On cross-appeal, the mother complains that the trial court erroneously waived an arrearage in child support owed by the father. In August 1994, the parties executed a stipulation that required the father to pay "$300 per month … or 17% of [his] gross monthly income … whichever is greater." The family court commissioner approved the stipulation in an order but mistakenly ordered a wage assignment of only "$300 per month." The father's income subsequently increased. In January 1999, the court commissioner admitted: "The wage assignment is simply wrong. The order is the order. The wage assignment must be corrected." The trial court found the mistake to be a "scrivener's error," but held that because "the mother never complained," that the court was "not going to take cognizance of that error or try to rectify it." The mother, however, complained about the error as soon as she had a basis to–namely, when she saw what the father's income was.[7] We reject the father's argument that the wage assignment order, set at $300 per month, "superceded all prior orders." Indeed, the father admits the wage assignment "order was mistakenly made." The error,

[7] The record reflects that the mother was not provided with copies of the father's tax returns, as required by the wage assignment.

as the commissioner noted, should be corrected to comport with the parties' stipulation and the order entered on that stipulation. Accordingly, we reverse and remand to the trial court with directions to recalculate the child support arrearage consistent with this opinion.

By the Court.—Affirmed in part; reversed in part and cause remanded with directions.

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