COURT OF APPEALS
DECISION
DATED AND FILED

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1679

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

IN RE THE PATERNITY OF CALLY A.C.:

DAVID A.C.,

PETITIONER-APPELLANT,

V.

VERONICA L.D.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

PER CURIAM. David A.C. appeals from an order in a custody dispute. That order grants joint legal custody of Cally C. to her father David and her mother, Veronica L.D., with Veronica receiving primary physical placement. David contends that the court erred by retrying the custody issue within two years

of its initial order in the matter, in violation of § 767.325(1)(a), STATS. We disagree, and therefore affirm.

Cally was born in 1990 in Mexico. David commenced this action in 1992 seeking a paternity adjudication. The parties stipulated to paternity in October 1992, and also stipulated to joint legal custody with equal placement. The trial court approved the stipulation and entered an order incorporating its terms.

Within six weeks the trial court issued an *ex parte* order assigning primary physical placement to David, with limited supervised placement for Veronica. The court acted on information provided by David that Veronica was acting inappropriately in front of Cally, and was threatening to flee to Mexico with her.

The parties finally brought the matter to trial in May 1994, resulting, partly by stipulation, in a September 1994 order awarding David sole legal custody and primary physical placement until June 1, 1997, and further ordering that the parties would then resume a joint legal custody arrangement.

In December 1994, the trial court determined it to be in Cally's best interests to vacate the September order because the parties continued to dispute its terms and, in the court's view, to frustrate its intent to amicably resolve the issue. The matter was fully tried in 1996 resulting in the order David now appeals.

Section 767.325(1)(a), STATS., provides that the trial court may not modify an order of legal custody or substantially modify physical placement within two years of its initial order, except on a showing that modification is necessary to prevent physical or emotional harm to the child. David contends that

the trial court violated this provision because the 1996 trial commenced within two years of the initial order, entered in September 1994. We disagree.

The court entered its initial order in October 1992. David then applied for a custody change in November 1992, based on his allegations that one was necessary to prevent physical and emotional harm to Cally. The September 1994 order temporarily resolved the matter, but the trial court then vacated the order because the parties continued to dispute its terms and other matters. The 1996 proceeding was therefore necessary and authorized to resolve David's pending motion to modify the original order. As the moving party, David is in no position to contend otherwise.

By the Court.—Order affirmed.

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