

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 97-2692

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

SUSAN M. OIMOEN (O'KANE),

PETITIONER-APPELLANT,

V.

STEVEN C. OIMOEN,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

EICH, C.J. Susan O'Kane appeals from an order dismissing her petition for revision of a Nebraska divorce judgment. The trial court ruled that it lacked jurisdiction over the subject matter of the action.

The facts, as found by the trial court, are not in dispute. O’Kane and Steven Oimoen were married in Wisconsin in 1982 and divorced in 1990 in Nebraska. O’Kane and the couple’s two minor children reside in Wisconsin. Oimoen, an active-duty Air Force officer, has resided in Ohio but presently is a legal resident of Texas. The Nebraska divorce decree gave legal custody and primary placement of the children to O’Kane and ordered Oimoen to pay child support of \$325 per month. In late 1995, O’Kane filed a petition in Dane County Circuit Court to revise the Nebraska judgment to increase child support. Oimoen moved to dismiss for lack of jurisdiction, arguing in part that, under the Uniform Interstate Family Support Act (UIFSA), § 769.611, STATS., a Wisconsin court may modify a child support order entered in another state only on the request of a nonresident of Wisconsin. Specifically, the statute provides:

769.611 Modification of child support order of another state. (1) ... [A] child support order issued in another state ... may [be modified] only if ... [the court] finds ... :

(a) That all of the following requirements are met:

1. The child, the individual obligee and the obligor do not reside in the issuing state.
2. A petitioner who is a nonresident of this state seeks modification.
3. The respondent is subject to the personal jurisdiction of the tribunal of this state.

Oimoen’s motion was heard initially by a family court commissioner, who denied it without considering § 769.611, STATS., on which the motion was based. Instead, the commissioner concluded that the court had jurisdiction over Oimoen through the “long-arm” provisions of § 801.05(1)(d), STATS., which states that a Wisconsin court with jurisdiction over the subject matter of the action has personal jurisdiction over the person served when that person “[i]s engaged in substantial and not isolated activities within this state.”

Oimoen sought a *de novo* hearing in circuit court and, as indicated, the court concluded that it lacked jurisdiction over the subject matter of the action under § 769.611(1)(a)2, STATS.

We agree with the trial court that the language of § 769.611, STATS., plainly limits its application to actions commenced by “[a] petitioner who is a *nonresident* of this state.” (Emphasis added.) O’Kane does not dispute that interpretation. She argues instead that, as the court commissioner ruled, the court could obtain personal jurisdiction over Oimoen under the general jurisdiction provisions of § 801.05, STATS. We think the argument misses the point. The trial court never discussed whether it had, or did not have, jurisdiction over Oimoen’s person.¹ It held, as we have indicated, that it lacked jurisdiction to revise a foreign judgment because the prerequisites the legislature set forth for doing so had not been met. And that is a matter of subject-matter, not personal, jurisdiction. Whether the court could, or in fact did, acquire jurisdiction over the person of Steven Oimoen—under § 801.05 or any other statute—is of no consequence if it lacked the power to entertain O’Kane’s petition in the first place. *See P.C. v. C.C.*, 161 Wis.2d 277, 297, 468 N.W.2d 190, 198 (1991) (to exercise its judicial powers

¹ The trial court’s order also stated that because O’Kane’s petition was to modify child support, and thus was not one “brought to establish or enforce a ... support obligation,” the court lacked jurisdiction “over this matter” under § 767.01(2), STATS., which provides that, in actions “to establish or enforce a child support obligation,” the circuit courts have personal jurisdiction as provided in § 801.05, STATS., and in the personal jurisdiction provisions of UIFSA, § 769.201, STATS. Unfortunately, the parties have not included the hearing transcript in the appellate record, so we do not have the benefit of the trial court’s reasoning on this point. As we have indicated, we do not reach the question of personal jurisdiction over Oimoen on this appeal, since we are satisfied that the circuit court lacked jurisdiction over the subject matter of the action. *If, by this statement, the court was holding, in the alternative, that it lacked personal jurisdiction over Oimoen under either § 801.05 or § 769.201 because the action was not of a type mentioned in § 767.01(2), we agree with that conclusion.*

over a given case, circuit court must have both subject-matter and personal jurisdiction).

While there has been much discussion in the cases in recent years on subject-matter jurisdiction and a corollary concept—the court’s “competency” to proceed in a given matter—this much is clear: (1) Wisconsin circuit courts have plenary jurisdiction over “all matters civil and criminal within this state.” WIS. CONST. art. VII, § 8; but (2) even if the court may have jurisdiction over the subject matter of the action, the power to exercise that jurisdiction depends upon the legislature’s delegation of authority to act in the particular case. *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis.2d 429, 438 n.6, 531 N.W.2d 606, 610 (Ct. App. 1995). In this case, then, we consider whether the legislature has spoken on the circuit court’s power to exercise jurisdiction over a petition to revise a child-support judgment entered in another state, and whether the legislative requirements for that exercise have been met.²

Jurisdiction in family cases is purely statutory, and the circuit court’s authority in a given case is confined to those express and incidental powers that are conferred by statute, *Haeuser v. Haeuser*, 200 Wis.2d 750, 758, 548 N.W.2d 535, 539 (Ct. App. 1996). And, as the circuit court held in this case, the legislature has spoken quite plainly on the subject in § 769.611, STATS., a statute dealing specifically and expressly with the situation before us: a petition to a

² C.f. *P.C. v. C.C.*, 161 Wis.2d 277, 298, 468 N.W.2d 190, 198 (1991), where the supreme court, recognizing that circuit courts had “constitutional” subject-matter jurisdiction to decide the custody of a child who was also the subject of a custody action in another state, went on to consider whether, under the Uniform Child Custody Jurisdiction Act, § 822.03(1), STATS., “it was proper for the ... circuit court, which is *competent* to decide child custody matters, to *make a child custody determination*.” (Internal quotation marks omitted; emphasis in the original.)

Wisconsin circuit court to revise a foreign judgment. As we have indicated, that statute unambiguously states that the Wisconsin court may modify a child support order entered in another state “*only if*” it finds that the petitioner “is a nonresident of this state.” Section 769.611(1)(a)2. It follows that the circuit court in this case properly dismissed O’Kane’s petition for lack of jurisdiction over the subject matter of the action.³

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

³ We agree with O’Kane that this may well be an undesirable, if not an unpalatable, result, for Wisconsin certainly is the most convenient forum for O’Kane and the children. The situation is further complicated, of course, by the fact that Oimoen, as a member of the armed forces, has a rather fluid residency, making application of other remedies difficult, whether under ch. 767, STATS., or other local or uniform legislation. As the circuit court also noted, however, “jurisdiction is a statutory, not an equitable, matter,” and it is not for this court to rewrite the plain and unambiguous provisions of § 769.611, STATS. Any such change would have to come from legislative, not judicial, action.

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ROGGENSACK, J. (*dissenting*). I write to dissent from the majority opinion, not because I disagree with its analysis of the subject matter jurisdictional problems it describes for the statutes addressed, but because I conclude that § 767.01(1), STATS., when combined with § 767.02(1)(i), STATS., provides a proper basis for subject matter jurisdiction in the courts of Wisconsin to modify a child support award of a foreign court. Additionally, § 769.103, STATS., clarifies that the remedies found in ch. 769 are not the exclusive means by which one can modify child support originally set by a foreign court, and I could find no precedent which limits the competence of the circuit court to proceed in this case.

This action was commenced to increase the child support for two children for whom no increase in support had been made in the eight years since their parents' divorce. While the motion to dismiss relies solely on ch. 769 as statutory authority for the relief sought, the petition does not cite ch. 769 and the factual allegations in the petition fall within the definition of an action which affects the family under ch. 767.

Section 767.01(1), STATS., provides in relevant part:

The circuit courts have jurisdiction of all actions affecting the family and have authority to do all acts and things necessary and proper in such actions and to carry their orders and judgments into execution as prescribed in this chapter....

Therefore, section 767.01(1) forms the first step to conferring matter jurisdiction. And §§ 767.02(1), and 769.103, STATS., complete the process.

Section 767.02, STATS., states in relevant part:

(1) Actions affecting the family are: ...

(i) To enforce or modify a judgment or order in an action affecting the family granted in this state or elsewhere.

Section 769.103, STATS., states:

Remedies provided by this chapter are cumulative and do not affect the availability of remedies under other law.

Because 767.02(1)(i), STATS., explicitly provides that modifying a foreign judgment is an action affecting the family and because ch. 769 is not the exclusive source for a circuit court's subject matter jurisdiction in this regard, I conclude that the problems of subject matter jurisdiction examined in the majority opinion do not preclude the circuit court from granting the relief requested, if the facts warrant an increase in support. Stated another way, the statutes cited in the dissent provide a sufficient basis for subject matter jurisdiction to modify a foreign divorce judgment. *See* 68 Atty. Gen. 106 (concluding that § 767.02(1)(i) permits commencement of all actions to modify a judgment affecting the family in any court having jurisdiction under § 767.01, STATS.).

The majority opinion does not reach the question of personal jurisdiction over Oimoen because the circuit court did not. (See footnote 2.) Rather, it states that if personal jurisdiction over Oimoen were lacking because the action before the court was not of a type described in § 767.01(2), STATS., it would so conclude as well. I agree with the majority that the basis for the circuit court's dismissal of the petition was a lack of subject matter jurisdiction. However, my reason for not addressing personal jurisdiction is that § 767.01(2) is not dispositive of the jurisdictional questions presented, either in regard to subject matter or personal jurisdiction. Personal jurisdiction may be established pursuant

to Wisconsin's long arm statute, § 801.05, STATS. And while the family court commissioner's order, which found facts sufficient to confer personal jurisdiction, may be correct, it was not the basis of the circuit court's decision. Additionally, we do not have a record before us which is sufficient to decide the issue as a matter of law. Therefore, because I conclude the circuit court has subject matter jurisdiction and competency to proceed, I would reverse the dismissal of the petition and remand for further proceedings.

