

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 18, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1214

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ELLEN WALL PAYNE,

PETITIONER-RESPONDENT,

v.

PHILLIP CHARLES BRANDE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM J. HAESE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Phillip Charles Brande appeals from an order granting to his former wife, Ellen Wall Payne, sole legal custody and primary physical placement of their minor child. Brande argues that the trial court lacked jurisdiction to enter the order. We reject Brande's argument and affirm the order.

BACKGROUND

¶2 Brande and Payne married in 1986 in North Carolina. On November 2, 1988, Payne gave birth to their only child, Michael. Brande and Payne separated in February of 1992, and agreed at that time that Michael would live with Payne. Brande and Payne divorced in 1993. The judgment of divorce, which was rendered in North Carolina, acknowledged that one child had been born of the marriage, but did not contain a provision regarding the custody of the child. Michael continued to live with Payne after the divorce, but often visited Brande and had several overnight stays with Brande.

¶3 On August 30, 1996, Payne married a Wisconsin resident. On October 31, 1996, Payne and Michael moved from North Carolina to Wisconsin, to be with Payne's new husband. Four days later, on November 4, 1996, Payne filed an action in Wisconsin seeking sole legal custody and primary physical placement of Michael and child support from Brande.

¶4 On December 5, 1996, Brande filed a response and counterclaim, subject to jurisdictional objections, opposing Payne's petition and requesting that he be granted sole legal custody and primary physical placement of Michael. On December 31, 1996, Brande obtained a North Carolina temporary *ex parte* order granting him "immediate temporary custody" of Michael. The temporary order concluded that North Carolina, as Michael's home state, had jurisdiction to decide the custody dispute, and that Payne had removed Michael from North Carolina in order to avoid its jurisdiction. Thereafter, on January 7, 1997, Brande filed a motion to dismiss Payne's Wisconsin petition for lack of jurisdiction.

¶5 On January 9, 1997, Payne filed a motion in North Carolina to stay the North Carolina order granting Brande temporary custody, pending the

Wisconsin court's ruling on jurisdiction. On January 24, 1997, the North Carolina court amended the temporary order to provide that Michael should not be delivered to Brande's custody unless the Wisconsin court declined jurisdiction and dismissed the proceedings against Brande; the amended order further provided that if the Wisconsin court decided to exercise jurisdiction, the North Carolina court would hold a hearing to determine what further action to take.

¶6 The Wisconsin court determined that it had jurisdiction to make a custody determination, and that North Carolina also had jurisdiction. Therefore, the Wisconsin court set the action for a hearing during which the parties would participate in a conference call to the judge of the North Carolina court to determine which court should exercise jurisdiction. Pursuant to the conference call, the Wisconsin court assumed jurisdiction of the action. The Wisconsin court awarded sole custody and primary physical placement of Michael to Payne, and ordered Brande to pay child support.

DISCUSSION

¶7 Chapter 822, the Uniform Child Custody Jurisdiction Act, provides:

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(a) This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(b) It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's

present or future care, protection, training, and personal relationships; or

(c) The child is physically present in this state, and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with par. (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

(2) Except under sub. (1) (c) and (d), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine custody.

WIS. STAT. § 822.03 (1997–98). The jurisdictional requirements of § 822.03 must be met at the commencement of the custody proceedings. *See P.C. v. C.C.*, 161 Wis. 2d 277, 302, 468 N.W.2d 190, 200 (1991). Whether the trial court properly exercised jurisdiction under § 822.03 is a question of law, subject to *de novo* review. *See N.J.W. v. State*, 168 Wis. 2d 646, 652, 485 N.W.2d 70, 72 (Ct. App. 1992). The factual findings underlying the trial court’s jurisdictional decision, however, will be sustained unless they clearly erroneous. *See Vorpahl v. Lee*, 99 Wis. 2d 7, 10, 298 N.W.2d 222, 224 (Ct. App. 1980).

¶8 Brande asserts that the trial court lacked jurisdiction to make a custody determination. He argues that Wisconsin did not have jurisdiction under § 822.03(1)(a) because North Carolina was Michael’s home state. He further argues that, at the time Payne commenced the custody proceeding in Wisconsin, Michael did not have a significant connection with Wisconsin, and there was not substantial evidence in Wisconsin concerning Michael’s care, protection, training,

and personal relationships; therefore, Brande asserts, the trial court did not have jurisdiction under § 822.03(1)(b). Brande argues that Michael had been in Wisconsin for only a few days, and that most of the evidence concerning Michael's extended family and personal relationships was in North Carolina.

¶9 Payne responds that both she and Michael had a significant connection to Wisconsin because her new husband, Michael's step-father, was a Wisconsin resident, and the family had moved to Wisconsin. She further asserts that substantial evidence concerning Michael's care, protection, training, and personal relationships was available in Wisconsin because she had been Michael's primary caregiver throughout his lifetime and could provide the most evidence on these issues. Therefore, Payne asserts, it was in Michael's best interest for Wisconsin to exercise jurisdiction, and the trial court had jurisdiction under § 822.03(1)(b).

¶10 Alternatively, Payne argues that the trial court had jurisdiction under § 822.03(1)(d). She asserts that, after the conference call with the Wisconsin court, the North Carolina court declined to exercise jurisdiction on the ground that Wisconsin was the more appropriate forum, and that, as previously asserted, it was in Michael's best interest for Wisconsin to assume jurisdiction. Brande offers no reply to this argument. We therefore deem Payne's assertions admitted and conclude that the trial court had jurisdiction to make the custody determination pursuant to § 822.03(1)(d). See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed admitted).

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5 (1997–98).

