

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 2004

Cornelia G. Clark
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. 03-1955
STATE OF WISCONSIN**

Cir. Ct. No. 01FA000208

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

SUSAN MARIE MELTON,

PETITIONER-APPELLANT,

v.

TEDD ALLEN MELTON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County:
MARY KAY WAGNER, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Susan Marie Melton appeals from the postjudgment order entered by the circuit court. The issue on appeal is whether the circuit court erred when it denied Susan's request to be allowed to move to

Texas with her son, and instead transferred primary placement to the child's father, Tedd Allen Melton. Because we conclude that the circuit court did not err, we affirm.

¶2 Susan and Tedd were divorced in 2001. They have two children. Susan was awarded sole custody of their daughter. They were awarded joint custody of their son, Cory, with Susan having primary placement. Susan subsequently remarried. She and her new husband, Mario Baroz, planned to move to Texas where her husband could find a job with a higher salary and more benefits.

¶3 In August 2002, Susan sent a Notice of Intent to Move to Tedd and filed a copy with the circuit court. Tedd then filed an objection to the notice. The parties went to mediation and agreed that their daughter could move with Susan. They did not reach an agreement about Cory. A guardian ad litem was appointed to represent Cory, and a hearing was held before the circuit court. After the hearing, the court ruled that Susan could not move with Cory to Texas. The court then changed the primary placement of Cory from Susan to Tedd. Susan appeals.

¶4 Susan argues that the circuit court did not properly exercise its discretion in deciding that she cannot move to Texas with Cory. In making this argument, Susan relies on *Kerkvliet v. Kerkvliet*, 166 Wis. 2d 930, 945-46, 480 N.W.2d 823 (Ct. App. 1992), which held that a circuit court has no authority to deny a custodial parent permission to move. In reaching this decision, the court in *Kerkvliet* relied on WIS. STAT. § 767.327(3) (1989-90). *Kerkvliet*, 166 Wis. 2d at 936-37. At the time the case was decided, that statutory section was entitled: "Standards for modification if move contested," and it did not allow the court to prohibit the move. *Id.* at 936. The statute, however, has since been amended. It

is now entitled: “Standards for modification or prohibition if move or removal contested.” WIS. STAT. § 767.327(3) (2001-02).¹ The statute specifically provides that “[t]he court may prohibit the move or removal if, after considering the factors under sub. (5), the court finds that the prohibition is in the best interest of the child.” Sec. 767.327(3)(c). To the extent the *Kerkvliet* case ruled differently, that part of the case has been legislatively overruled.

¶5 Susan argues, however, that the circuit court did not consider the appropriate factors under WIS. STAT. § 767.327(5) in deciding that she could not move with Cory to Texas. We disagree. The statute states that the court may order the modification if, after considering the factors listed in subsec. (5), it determines that the modification is in the best interests of the child and the move would result in a substantial change in circumstances. Sec. 767.327(3)(a)1. Neither party disputes that moving Cory from Wisconsin to Texas would result in a substantial change in circumstances. The issue, then, is whether the circuit court properly considered the best interests of the child.

¶6 In making a determination under WIS. STAT. § 767.327(3), the court shall consider:

- (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 alternative arrangements to foster and continue the child’s relationship with and access to the other parent.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Sec. 767.327(5). The court may, in its discretion, consider the child's adjustment to "home, school, religion and community." Sec. 767.327(5m).

¶7 We conclude that the circuit court properly considered the factors under WIS. STAT. § 767.327(5) and (5m). The guardian ad litem recommended against allowing the move. He asserted that the move would disrupt Cory's relationship with his father. He also argued that Cory was well adjusted to his home in Kenosha county and might have difficulty adjusting to the move to Texas.

¶8 The court determined that the move was being made for the financial benefit of Susan and her new husband, and not for Cory's best interests. The court further determined that Cory had an important relationship with his father and that disruption of that relationship would be "problematic" for the child. The court acknowledged that Cory's relationship with his mother would be disrupted by the move, but stated that "she is making that choice apparently." The court also considered alternative arrangements to foster Cory's relationship with Tedd, but noted that the alternative arrangement of summer placement could apply equally to Susan. The court concluded that it would adopt the recommendation of the guardian ad litem and not allow Susan to move with Cory.

¶9 Susan then indicated her intention to move to Texas. Apparently, Tedd had not been aware that she would move regardless of the court's decision. At that point, Tedd asked that primary placement be changed to him and the court granted that motion. The court gave primary placement to Tedd, with summers, Christmas, and spring vacations with Susan. We conclude on this record that the circuit court considered all of the statutory factors under WIS. STAT. § 767.327(5) and (5m). The court's decision was reasonable based on the law and the facts. Therefore, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

