

Forum Non Conveniens: Court Recognizes that Sister State Is in More Advantageous Position To Determine Best Interests of Child in Custody Proceeding

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As noted above, it has not generally been the rule that courts will dismiss an action in the exercise of discretion if one of the parties is a New York resident or the cause of action arose here. One exception has been posited in situations where the parties have contractually designated another forum in which to settle their grievances.¹⁸⁸ *Pharo* has added a second exception, which, dogmatically speaking, is not tenable. Yet, it is apparent that *forum non conveniens* questions cannot be considered in the abstract. Inroads in the areas of jurisdiction¹⁸⁹ and conflict of laws¹⁹⁰ have affected persons and effected results in a manner heretofore impossible. Thus, the *forum non conveniens* doctrine should be flexible enough to insure fairness to all of the litigants, and the residence of the parties should not be the sole factor in determining convenience.¹⁹¹

Forum non conveniens: Court recognizes that sister state is in more advantageous position to determine best interests of child in custody proceeding.

Unlike some jurisdictions,¹⁹² the New York version of *forum non conveniens* is completely nonstatutory.¹⁹³ It is nonetheless well founded, and the recent matrimonial proceeding in *Anonymous v. Anonymous*¹⁹⁴ provides an excellent illustration of its practicality. In *Anonymous* the parties had previously had their marriage declared a nullity and custody of their child awarded to the wife by a New York court. Subsequently, both parties became domiciliaries of New Jersey, where they currently reside. The husband sought to modify the award of custody, recent libertine-like behavior being alleged on the part of the wife. Jurisdiction was contested on the ground that mere personal service of notice of the instant application upon the wife in New Jersey was insufficient to secure in personam jurisdiction in New York. The court,

the lower court to retain jurisdiction should not be overturned. 34 App. Div. 2d at 753, 310 N.Y.S.2d at 123, citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1946). It should be noted that *Gulf Oil* involved a commercial transaction. Assuming, *arguendo*, that a consideration of special circumstances was permitted in *Pharo*, the criterion for tort cases is opposite that of *Gulf Oil*, i.e., the burden rests on the plaintiff to prove special circumstances warranting the retention of jurisdiction. See 7B MCKINNEY'S CPLR 301, supp. commentary at 104 (1967).

¹⁸⁸ See *Hernandez v. Cali, Inc.*, 32 App. Div. 2d 192, 301 N.Y.S.2d 397 (1st Dep't 1969); *Export Ins. Co. v. Mitsui S.S. Co.*, 26 App. Div. 2d 436, 274 N.Y.S.2d 977 (1st Dep't 1966).

¹⁸⁹ See, e.g., *Parke-Bernet v. Franklyn*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970).

¹⁹⁰ See, e.g., *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

¹⁹¹ See H. PETERFREUND & J. McLAUGHLIN, *NEW YORK PRACTICE* 54 (2d ed. 1968).

¹⁹² See, e.g., *Wis. STAT. ANN.* § 262.19 (1957).

¹⁹³ See generally 1 WK&M ¶ 301.07.

¹⁹⁴ 62 Misc. 2d 758, 309 N.Y.S.2d 966 (Sup. Ct. Queens County 1970).

however, upheld jurisdiction, pointing out that it had "continuing jurisdiction after the entry of judgment in a matrimonial action over the parties and over the incidental subject matter of its decree along with the power to modify or amend its judgment."¹⁹⁵ This "continuing jurisdiction," coupled with the service of notice to the wife, was, in the court's opinion, sufficient to secure in personam jurisdiction.

While asserting its own jurisdiction, the court recognized that New Jersey could also maintain the action, that state having, in fact, a more substantial interest in the child. The court further noted that New Jersey, as *parens patriae*, would not be required to give full faith and credit to a New York custody decree.¹⁹⁶ Finally, the court referred to the problem of availability and convenience of witnesses and agencies if the proceedings were heard in New York. Taking all of these factors together, the court concluded that New Jersey "is in the most advantageous position to reach a decision consonant with the best interests and welfare of the child."¹⁹⁷

The *Anonymous* court stated that its conclusion was not based solely upon the doctrine of *forum non conveniens* but included a concern for "the best interests and welfare of the child." That is, more is involved than a consideration of the availability of witnesses and agencies. *Anonymous* reflects a public policy approach that New York courts can easily survive the "affront on their dignity" resulting from the recognition that a sister state is not only capable of, but in a more advantageous position for, determining which spouse is entitled to custody of the children. The same cannot be said of the child whose welfare is jeopardized when New York courts interfere with the domestic problems of other states.¹⁹⁸

¹⁹⁵ *Id.* at 759, 309 N.Y.S.2d at 968. See also *Fox v. Fox*, 263 N.Y. 68, 188 N.E. 160 (1933).

¹⁹⁶ See *Casteel v. Casteel*, 45 N.J. Super. 338, 132 A.2d 529 (1957); see also Ehrenzweig, *Interstate Recognition of Custody Decrees, Law and Reason v. the Restatement*, 51 MICH. L. REV. 345, 349-55 (1953); Wadlington, *Fourteenth Annual Survey of Virginia Law: Domestic Relations*, 55 VA. L. REV. 1200, 1204 (1969).

¹⁹⁷ 62 Misc. 2d at 761, 309 N.Y.S.2d at 969.

¹⁹⁸ See *In re Lang*, 9 App. Div. 2d 401, 410, 193 N.Y.S.2d 763, 771 (1st Dep't 1959).