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. 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 jurisdiction and conflict of laws 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.

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, the New York version of forum non conveniens is completely nonstatutory. It is nonetheless well founded, and the recent matrimonial proceeding in Anonymous v. Anonymous 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).


See generally 1 WK&M ¶ 301.07.

however, upheld jurisdiction, pointing out that it had "continuing juris-
diction 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." 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. 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 advan-
tageous position to reach a decision consonant with the best interests
and welfare of the child."

The Anonymous court stated that its conclusion was not based
solely upon the doctrine of forum non conveniens but included a con-
cern for "the best interests and welfare of the child." That is, more is
involved than a consideration of the availability of witnesses and agen-
cies. 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 domes-
tic problems of other states.