

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

FEBRUARY 4, 1997

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1338

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

In re the Paternity of Cheyenne S.W.:

DALE P.A.,

Petitioner-Respondent,

v.

BECKY W.P.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Becky W.P. appeals an order transferring custody of Cheyenne S.W. to her father, Dale P.A. Becky argues that the evidence does not support the trial court's finding that a change of custody was necessary to Cheyenne's best interest, the court should have received additional medical testimony regarding Cheyenne's asthma problems, the trial court exhibited bias

against Becky, and the order should be reversed in the interest of justice because the controversy was not fully tried. We reject these arguments and affirm the order.

Under § 767.325(1)(a), STATS., a change of an initial placement order within two years of its entry requires substantial evidence that the change is necessary because the current custodial conditions are physically or emotionally harmful to the best interests of the child. See *In re Stephanie R.M.*, 174 Wis.2d 745, 760-61, 498 N.W.2d 235, 239 (1993). "Necessary" embodies two concepts under this statute: (1) modification must protect the child from alleged harmful custodial conditions; and (2) the harm threatened by the current custodial condition must be severe enough to warrant modification. *Id.* It is not necessary to show that the child is in immediate danger of life, health or safety and it is not necessary to prove that the child has actually suffered harm. *Id.*

The record supports the trial court's finding that continued placement with Becky threatened Cheyenne's physical health. An allergist testified that failure to treat asthma could cause permanent and destructive changes to the lungs. Becky had testified at a previous hearing that Cheyenne "is ill all the time." Dale testified that she "coughs until she pukes a lot." Despite these symptoms and literature Dale gave Becky regarding asthma treatment, Becky did not follow any of the treatment recommendations, was reluctant to talk about the medical treatment, refused to allow Dale to show her how to administer the medication, cancelled appointments with doctors, and made none of the suggested changes to her home to eliminate irritants to the lungs. The medical record showed that Becky's home contained cats, dogs, older carpeting and, at one time, seven smokers. Becky also confirmed that she continues to smoke. This evidence provides a sufficient basis for the trial court's finding that a change of custody was necessary for Cheyenne's health.

Becky concedes that Cheyenne suffers from asthma and that Becky did not administer medication while Cheyenne was in her custody. She argues that this evidence constitutes only speculative harm to Cheyenne and did not demonstrate that Becky could not be trusted to administer medication if the court required it. The court was not required to wait until actual permanent harm was done before modifying the custody order. *In re Stephanie R.M.*, 174 Wis.2d at 761, 498 N.W.2d at 239. Likewise, the court was not required to accept Becky's eleventh hour assurance that she would care for Cheyenne's health in

the future. The credibility of Becky's assurances was a matter for the trial court to determine. See *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979).

Becky argues that "the court should have received the testimony of Dr. Turner." The court did not disallow Turner's testimony. Rather, Becky did not offer Turner's testimony. While Becky indicated that Turner was available to testify by telephone, she never called Turner as a witness. The issue cannot be raised for the first time on appeal. See *Rennick v. Fruehauf Corp.*, 82 Wis.2d 793, 802, 264 N.W.2d 264, 269 (1977).

Becky argues that the trial court's caustic comments regarding Turner's diagnosis demonstrate bias by the court. Turner's reports suggest that Dale may be overconcerned or fabricating Cheyenne's medical condition. Dr. Voss testified that Cheyenne had an "asthma episode" in his office. The diagnosis of asthma was contained in Cheyenne's medical records and did not rely on Dale's observations. In addition, on appeal, Becky admits that Cheyenne suffers from asthma. The trial court's findings that are critical of Turner's diagnosis constitute reasonable findings of fact based on the evidence and do not reflect any partiality.

Finally, there is no basis for reversal in the interest of justice. Despite the lack of Turner's testimony, the record presented to the trial court and the concessions made on appeal demonstrate that the controversy was fully and fairly tried. See § 752.35, STATS.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.