

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 30, 1996

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. 94-3048

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

BRIAN EDWARD RITCHIE,

Petitioner-Respondent,

v.

**ROBIN LYNNE AXBERG,
f/k/a ROBIN LYNNE RITCHIE,**

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County:
FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Robin Lynne Axberg, formerly Robin Lynne Ritchie, *pro se*, appeals from an order modifying the primary physical placement of her son, Silas. Axberg's original judgment of divorce from her husband, Brian Edward Ritchie, granted primary physical placement with Axberg. On

Ritchie's motion, the trial court modified the original judgment and granted Silas's primary physical placement with Ritchie.

In her *pro se* appellate brief, Axberg raises essentially four issues for review: (1) whether the trial court erred by considering evidence relating to events occurring between the time of Silas's temporary transfer of custody and the time of the final hearing on Silas's placement with his father; (2) whether the trial court misapplied certain statutory presumptions provided in § 767.325(1)(b)2.a and 2.b, STATS.; (3) whether her right to make medical decisions for her child limited the authority of the trial court to review those decisions and decide they were contrary to the best interest of the child; and (4) whether the trial court's findings of fact, on which it based its modification order, were clearly erroneous. We reject her arguments and affirm.

I. BACKGROUND.

Axberg and Ritchie were married in 1985. Silas was born in May 1985. Shortly after his birth, he was diagnosed with cystic fibrosis, a disease of the mucous glands that causes pancreatic insufficiency and pulmonary disorders. Cystic fibrosis also results in the presence of thick mucous in a patient's lungs that triggers infections and can cause irreversible lung damage. The disease also inhibits digestion, causing poor weight gain.

In June 1988, a trial court entered Lynne and Brian's judgment of divorce, awarding sole custody and primary physical placement of Silas to Axberg. The judgment provided Ritchie with limited periods of placement with his son.

As noted by the trial court, the dispute in this case arose out of the type of medical treatment Silas should receive. In March 1993, Ritchie moved the trial court to modify the judgment of divorce and grant Silas's custody and primary physical placement to him. He also sought a temporary emergency placement of Silas with him, arguing that Silas's custody and placement with Axberg was not "in the child's best interests and is dangerous to physical and emotional well-being of" Silas.

In support of this argument, he made a series of allegations concerning Axberg's actions surrounding Silas's medical treatment. Axberg was pursuing studies in "oriental medicine" or what the trial court referred to as "alternative remedies." Ritchie alleged *inter alia* that Axberg had failed to take Silas for regular checkups at the Cystic Fibrosis Clinic; that she failed to follow the medical advice of Silas's pediatricians; that she devised her own diet for Silas that excluded foods high in protein and calories and that included herbal remedies such as "lobelia and cayenne pepper;" and that she repeatedly refused and then delayed Silas's flu vaccination and antibiotic treatment for a serious lung infection. Finally, Ritchie asked for a temporary emergency order transferring Silas's custody and physical placement to him so that he could consult with the Cystic Fibrosis Clinic to establish a recommended medical and nutritional treatment for Silas.

On April 18, 1993, after a two-day hearing, the trial court followed the advice of Silas's *guardian ad litem* and granted Ritchie temporary custody and physical placement of Silas – with Axberg receiving visitation and periodic placement rights.¹ The trial court scheduled a final hearing for Ritchie's motion for permanent custody and placement for June 8, 1993. In May, the trial court issued a temporary restraining order against Axberg, denying her any periodic placement rights with Silas. The basis for this order was Axberg's refusal to administer Silas a series of prescription medicines. The trial court then issued a contempt order against Axberg for failing to administer Silas's medicine. Axberg was eventually again granted limited placement rights.

The hearing on Silas's final placement was repeatedly delayed and did not occur until August and September 1994. After hearing over five days of medical testimony, the trial court granted sole custody of Silas to Ritchie. The trial court's lengthy oral decision traced Axberg's repeated refusal to follow various doctors' medical advice concerning Silas's treatment. Axberg repeatedly changed Silas's treating doctors when they advised her to follow a treatment with which she disagreed. The trial court noted that this was a dispute between the doctors' medical advice and Axberg's preference for alternative remedies. Finally, the trial court noted the extensive improvements in Silas's health since his father was granted temporary custody; his weight has

¹ The Hon. Dominic S. Amato presided over the hearing and issued the temporary order.

improved and his lung performance tests “improved markedly.” Taking all these factors into consideration, the trial court concluded that there had been a substantial change in circumstances since the original placement order, and that it was now in the best interests of Silas that his father be granted sole custody. The court did allow Axberg's limited placement rights to continue. Finally, the trial court noted in its decision that it realized both parents loved Silas and sincerely sought to care for him and ease the suffering that accompanies cystic fibrosis. Central to its decision was the type of medical care that would best serve Silas. Axberg now appeals from the order modifying Silas's custody.

II. ANALYSIS.

A. Evidence of Silas's health.

Axberg argues that the trial court erred when it considered the change in Silas's health occurring between the time of Silas's temporary transfer of custody and the time of the final hearing on Silas's placement with his father. Axberg argues that the evidence should have been limited to the matters occurring before the temporary order, and that evidence of post-temporary order occurrences is irrelevant. We note that Axberg moved *in limine* to exclude evidence of events after Silas's temporary transfer of custody and placement, but her motion was denied.

Under the requirements of § 767.325(1)(b), STATS.,² which governs modification in placement brought after two years from the original

² Section 767.325(1)(b), STATS., provides:

- (b) *After 2-year period.* 1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:
- a. The modification is in the best interest of the child.
 - b. There has been a substantial change of circumstances since the entry of

placement order, the movant, in this case, Ritchie, must prove: (1) “a substantial change of circumstances” since the previous order; and (2) “the modification is in the best interest of the child.”

To consider whether there was a “substantial change in circumstances,” the trial court must focus on the facts. “It compares the facts then and now. It requires that the facts on which the prior order was based differ from the present facts, and the difference is enough to justify the court’s considering whether to modify the order.” *Licary v. Licary*, 168 Wis.2d 686, 692, 484 N.W.2d 371, 374 (Ct. App. 1992).

Our standard of review dictates that we must sustain the trial court's modification if the court exercised its discretion based on facts of record, employed a logical rationale and committed no errors of law. *Hartung v. Hartung*, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20, (1981). Further, whether to admit evidence, including determinations of relevance, lies within the discretion of the trial court. See *State v. Evans*, 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994).

We conclude that the trial court did not erroneously exercise its discretion by allowing the admission of facts that occurred after the entry of the temporary order when it considered the issues of substantial change of circumstances and the best interests of the child. To properly consider both factors under § 767.325(1)(b), the trial court could rightly analyze the change in Silas's condition during his temporary placement with his father. This was clearly relevant evidence for the trial court to consider.

the last order affecting legal custody or the last order substantially affecting physical placement.

2. With respect to subd. 1., there is a rebuttable presumption that:
 - a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.
 - b. Continuing the child’s physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

B. Presumptions under § 767.325(1)(b)2, STATS.

Axberg next argues that the trial court did not properly employ the presumptions under § 767.325(1)(b)2.a and 2.b, STATS. She asserts that the trial court disregarded those presumptions in reaching its conclusion. We disagree.

Subparagraphs 2.a and 2.b provide that there is a rebuttable presumption that:

- a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.
- b. Continuing the child's physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

Section 767.325(1)(b)2.a and 2.b, STATS.

Here, the trial court did not disregard the rebuttable presumptions. Indeed, the trial court stated in its written order that the evidence presented by Ritchie overcame the statutory presumptions. There was no trial court error.

C. Medical treatment/Custodial rights.

Axberg next raises the question of whether the trial court committed error in disregarding Axberg's "full custodial rights to make decisions regarding her son's medical treatment plan." Axberg's brief, however, does not contain any argument or reference to legal authorities to support this issue.

Obviously the trial court's consideration of the medical testimony was central to its ruling. Nonetheless, without a developed legal argument on why the trial court's emphasis on the medical testimony violated Axberg's custodial rights, it is beyond the capacity of this court to decide this amorphous issue. We will not examine all the potential claims that could arise from Axberg's broad question. *State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992) (stating the court of appeals may decline to review an issue inadequately briefed).

D. Trial court's findings of fact.

Finally, Axberg argues that the findings of fact on which the trial court based its decision were clearly erroneous and, therefore, the decision to modify custody was an erroneous exercise of discretion.

Axberg questions whether the trial court disregarded testimony or facts in applying the law and making its decision. Axberg does not, however, identify specific findings she believes are clearly erroneous.

We cannot engage in a fishing expedition to uncover the facts that Axberg believes were clearly erroneous. The trial court acted as fact-finder in this case. Thus, the trial court was the ultimate arbiter of the credibility of witnesses. "When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 644, 340 N.W.2d 575, 577 (Ct. App. 1983). We reject Axberg's argument.

III. SUMMARY.

In short, none of the issues Axberg raises justify reversal. We acknowledge the sensitive nature of this case and the concern that both parents have shown for Silas. Nonetheless, Axberg's arguments provide no basis to overturn the trial court's decision to grant Ritchie sole custody of Silas.

By the Court. – Order affirmed.

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