COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 99-1705

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE MARRIAGE OF:

KARI L. SPARISH, N/K/A KARI L. KAITSCHUCK,

PETITIONER-RESPONDENT,

V.

RICHARD P. SPARISH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Richard Sparish appeals an order transferring primary physical placement of his daughter to her mother, Kari Kaitchuck. The trial court found that Sparish violated a stipulation and order that he refrain from drinking while the child was placed with him. He argues that the court erred when

it conducted an *in camera* examination of the twelve-and-one-half-year-old child rather than allowing Sparish to question her in open court and when it allowed a medical doctor to testify by telephone. He also argues that the court applied an incorrect standard and that the evidence does not support the decision under the correct standard. We reject these arguments and affirm the order.

¶2 The trial court properly exercised its discretion when it interviewed the child in chambers rather than subjecting her to questioning in open court. When a child is called upon to testify in a family dispute, the trial court has discretionary authority to control the presentation of evidence under WIS. STAT. § 906.11(1)[1] to protect the child from harassment or undue embarrassment. The trial court questioned the child on the record in chambers with the guardian ad litem present, reported the gist of her statements to the attorneys, and then questioned her again utilizing the questions proposed by the attorneys. The court properly weighed the benefits of having the child testify in open court against the apparent psychological effects on her, and reasonably determined that it should protect her from testifying in open court. *See* ***Hughes v. Hughes***, 223 Wis. 2d 111, 132, 588 N.W.2d 346 (Ct. App. 1998).

¶3 The trial court also properly exercised its discretion when it allowed the child's pediatrician, Peter Karofsky, to testify by telephone. Telephone testimony is allowed by WIS. STAT. § 807.13(2) for good cause shown. That statute identifies factors to be balanced in determining whether good cause exists. Karofsky practices 230 miles from the site of the hearing, and it would be unrealistic and economically unjustifiable to require him or the attorneys to travel

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

that distance for his testimony. Sparish complains that he was not given adequate notice that Karofsky would testify by telephone and was therefore disadvantaged by not having access to the medical records. Sparish had access to the medical records that were on file at the time. The transcript of Karofsky's cross-examination shows that he utilized the medical records in his cross-examination. Karofsky had testified in a previous hearing. The record reflects no undue surprise or prejudice to Sparish from allowing the testimony by telephone.

¶4 The trial court applied the correct standard under WIS. STAT. § 767.325(1)(b) when it found that modifying the physical placement order was in the child's best interests. The more strict standard set out in § 767.325(1)(a) applies to a modification within two years after the initial placement order. Here, the "initial" order was entered ten years earlier.

¶5 Even if the higher burden applied, the trial court made sufficient findings to establish that modification was necessary because the custodial conditions at the time of the hearing were emotionally harmful to the child's best interests. *See* ***In Re Paternity of Stephanie R.N.***, 174 Wis. 2d 745, 760, 498 N.W.2d 235 (1993). Sparish notes that his daughter frequently responded "I don't know" or "I don't remember," and argues that her statements that she saw him drinking do not provide an adequate basis in the court's decision. The child's frequent use of "I don't know" appears to be a pattern of speech, not a statement that she literally does not know. As the arbiter of credibility, the trial court could reasonably construe her testimony as a clear statement that she saw her father drink beer on two occasions. The issue before the trial court was not whether Sparish's drinking directly endangered the child, but whether it emotionally harmed her. The court found that she was in turmoil, "an emotional mess," and that this is "terribly hurtful" to her. She agonized over her father's use of alcohol

despite his assurance that he would abstain when he had physical placement of her. These findings were based on the court's personal observation of the child and are not clearly erroneous. *See* WIS. STAT. § 805.17(2). Sparish does not address these findings in his brief, and we deem them conceded. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

By the Court.—Order affirmed.

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