

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 21, 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. 96-0902-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

In re the Marriage of:

MARSHA LUBINSKI,

Petitioner-Respondent,

v.

ROBERT LUBINSKI,

Respondent-Appellant.

APPEAL from an order of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM.¹ Robert Lubinski appeals from an order modifying child support. The issue is whether the trial court erroneously

¹ This is an expedited appeal under RULE 809.17, STATS.

exercised its discretion because it did not further reduce Robert's support obligation. We conclude that the trial court appropriately exercised its discretion in reducing support when it found that Robert would become a shared-time payer, according to the parties' anticipated placement schedule (projection), despite his failure to conclusively establish the number of overnights he would have with his son, Ryan. Therefore, we affirm.

The parties' divorce judgment awarded Marsha primary placement of Ryan and awarded Robert "reasonable and liberal" visitation. Robert was paying \$265 monthly child support, which was comparable to seventeen percent of his gross income. *See* WIS. ADM. CODE § HSS 80.03(1)(a). The parties informally modified the placement schedule and during the most recent year, Robert had Ryan for eighty-nine overnights. The parties have now agreed to a new schedule in which they anticipate that Robert will have more overnights. This projection prompted Robert to move to modify child support.

The trial court concluded that the pattern of Ryan's increased placement with Robert constituted a substantial change of circumstances. It found that Robert would meet the threshold of 109.5 overnights annually, or thirty percent of the year, changing his status to a shared-time payer. *See* WIS. ADM. CODE § HSS 80.02(25) and (28). The trial court reduced Robert's child support from seventeen percent to fourteen percent of his gross income, comparable to having Ryan approximately thirty-six percent of the year. *See* WIS. ADM. CODE § HSS 80.04(2)(b). It also reasoned that "if at the end of the year" Robert could establish that he had Ryan "around 150 nights," then "another adjustment is appropriate."

The trial court has the discretion to modify a child support award once the movant has established a substantial or material change of circumstances. *See Long v. Wasielewski*, 147 Wis.2d 57, 60, 432 N.W.2d 615, 616 (Ct. App. 1988). No one disputes that there is a pattern of increased placement with Robert which constitutes a substantial change of circumstances.

Robert's criticism is that the trial court refused to reduce support to reflect the most recent placement projection. Although Robert claims that he will have Ryan a minimum of forty-one percent of the year, the trial court found

that Robert had not conclusively established the precise number of overnights he will have with Ryan over the thirty percent threshold.

The trial court considered the most recent past, along with the parties' new projection, and concluded that Robert will have Ryan a minimum of 109.5 overnights annually, meeting the thirty percent threshold of WIS. ADM. CODE HSS § 80.02(28). The trial court reduced support to reflect the pattern of Ryan's increased placement with Robert. We conclude that the trial court appropriately exercised its discretion in doing so. *Accord Schneller v. St. Mary's Hosp. Medical Ctr.*, 162 Wis.2d 296, 311-12, 470 N.W.2d 873, 879 (1991) (if the reviewing court can conclude that the trial court's finding is implicit from its review of the record and the trial court's conclusion, to order a remand only to convert an implicit finding to an explicit finding is a waste of resources).

The trial court also advised the parties that it would consider a five to ten percent increase in placement with Robert as a substantial change of circumstances, warranting further modification. Considering the parties' intention to dramatically change placement arrangements, the trial court's preference to await evidence of a pattern of consistently increased placement with Robert before severely reducing support is an appropriate exercise of discretion.

By the Court. – Order affirmed.

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