

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 3, 2003**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 02-2272  
STATE OF WISCONSIN**

Cir. Ct. No. 91-FA-2059

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**PATRICIA MARIE WATHEN,**

**PETITIONER-APPELLANT,**

**v.**

**ROBERT W. MOORE,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County:  
DANIEL R. MOESER, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Roggensack, JJ.

¶1 PER CURIAM. Patricia Wathen appeals the circuit court's order dismissing her motion for increased child support. Wathen raises several

arguments in support of her claim that the circuit court erred in dismissing her motion. We affirm.

A child support order may only be modified when there is a substantial change in the parties' circumstances. WIS. STAT. § 767.32(1)(a) (2001-02).<sup>1</sup> "The parent seeking the modification has the burden of establishing that there has been a substantial change." *Long v. Wasielewski*, 147 Wis. 2d 57, 60, 432 N.W.2d 615 (Ct. App. 1988). "Whether a change in circumstances is substantial or material is a legal standard which is ordinarily a question of law." *Id.* "Because the legal conclusion is intertwined with the trial court's factual findings, however, this court will give weight to the trial court's conclusion that a change in circumstances is substantial." *Id.*

We conclude that the circuit court did not err in concluding that Wathen had not shown a substantial change in circumstances. As evidence of changed circumstances, Wathen pointed to: (1) the fact that Amanda has been living with Wathen, rather than sharing placement with both parents; (2) the fact that Wathen is bearing more of the children's variable expenses; and (3) the fact that Wathen has lost some of her employment, reducing her income. We agree with the circuit court that Amanda's living situation is not a substantial change in circumstances because the placement order itself has not been modified. Instead, Amanda is not following the placement schedule that has been set for her, an issue that is the subject of a separate appeal. So, too, Wathen's increased variable expenses for Amanda are not a substantial change in circumstances because they are a result of

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the fact that Amanda has been staying with her mother only in violation of the placement order. To the extent Wathen claims increased variable expenses for the other two children, we agree with the circuit court that she has not stated what these expenses are and how her burden has increased with sufficient specificity.<sup>2</sup> Finally, we agree with the circuit court that Wathen's employment situation is not a substantial change in circumstances because the child support order is based on Wathen's earning capacity, not her actual earnings.

Wathen argues that she is entitled to a presumption that there has been a substantial change in circumstances because Moore has not provided her with his financial information, citing WIS. STAT. § 767.27(2m). That statute requires the annual exchange of information between parties in cases where child support has been set. In this case, the parties are required to exchange information in April. Wathen filed her motion in March. Therefore, the circuit court correctly concluded that whether Moore had provided the information was irrelevant to the issue of the sufficiency of Wathen's motion for child support.

Wathen also appears to argue that she is entitled to a more child support, regardless of the substantial-change-in-circumstances test, under WIS. STAT. § 767.25(3), which provides that “[v]iolation of physical placement rights by the custodial parent does not constitute reason for failure to meet child support obligations.” Here, however, Moore *has* paid child support as ordered and has met

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<sup>2</sup> The appellate record contains a handwritten note from Wathen to the circuit court judge that she is moving for increased child support and an affidavit from Wathen in support of the motion. It is unclear whether the handwritten note is the motion itself, or whether a motion was filed in the circuit court that has not been made part of the appellate record. In any event, Wathen's affidavit, which *is* part of the appellate record, sets forth the reasons she believes child support should be modified and the affidavit appears to be the document the circuit court considered in making its ruling.

his child support obligations. This statute, which prohibits parents who are wrongly denied physical placement from withholding child support, does not allow a parent who violates a placement order and keeps a child more than they are allowed to rely on that additional placement for additional support.

In sum, the circuit court did not err in denying Wathen's motion for child support as insufficient on its face without a hearing.

*By the Court.*—Order affirmed.

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

