**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 18, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-2081** **Cir. Ct. No. 96FA000524**

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

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**IN RE THE MARRIAGE OF:**

**CYNTHIA J. DANIELSON (N/K/A CYNTHIA J. PAULSON),**

**PETITIONER-APPELLANT,**

**V.**

**STEVEN G. DANIELSON,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Eau Claire County: EUGENE HARRINGTON, Judge. *Reversed.*

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

¶1 PER CURIAM. Cynthia Danielson appeals an order reducing child support from more than $1,813.34 to $750 per month. She raises numerous issues on appeal, but we address only the dispositive issue: whether the record discloses

a substantial change in circumstances to permit the reduction to Steven Danielson's child support obligation. Although the record reveals a number of changes since the parties' 1997 divorce, it fails to demonstrate a substantial change in circumstances that WIS. STAT. § 767.32[1] requires to justify a child support reduction. Therefore, we reverse the order.

¶2 Cynthia and Steven Danielson were divorced in 1997.[2] They shared joint legal custody of their son and daughter under the terms of their marital settlement agreement that was incorporated into their divorce judgment. Cynthia was designated as the primary caretaker, and Steven had scheduled overnight placement. According to the divorce decree, the children resided with Cynthia 59% of the time and with Steven 41% of the time.[3]

¶3 The stipulated divorce decree required Steven to pay 16% of his gross income as child support, to be reduced to 11% when their oldest, the daughter, reached "eighteen years of age or is earlier emancipated, or until [she] reaches nineteen, so long as [she] is pursing an accredited course of instruction leading to the acquisition of a high school diploma or its equivalent." At the modification hearing, Steven testified that at the time of divorce he earned

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] The record reflects that the parties divorced effective December 17, 1997, although the judgment was not filed until February 5, 1998.

[3] The parties also agreed to divide "variable expenses" according to a 41% and 59% formula, but this is not an issue on appeal.

$100,000 per year, but Cynthia disputes this. The court made no specific finding of Steven's 1997 income, other than to say generally that it has increased.

¶4 The record reflects that between 1998 and 2002, Steven's annual income with bonuses ranged from $233,827 to $278,830. In his brief, Steven states that 16% of his monthly paychecks equals $1,813.34. However, his salary is structured to pay him a large portion of income as a year-end bonus. For that reason, Cynthia responds that 16% of Steven's annual gross income is between $3,118 and $3,718 per month and that is the amount that Steven has paid since the time of the divorce. In addition to income earned from his profession, Steven earns investment income, which was not counted in the income available for child support. Cynthia raises no issue with respect to the investment income.

¶5 Cynthia was unemployed at the time of the divorce and at the time of the post-divorce proceeding. Her limited term employment as a graphic designer at $12 per hour ended before the post-judgment hearing. She was unemployed but actively seeking employment. However, she had not received any job offers. Cynthia was in good health, but under medical care for depression and posttraumatic stress and anxiety. She testified that she believed her condition may affect the way she presents herself at a job interview, thereby having a limiting effect on her employability.[4]

¶6 The stipulated property division awarded Steven property valued at $607,965 and awarded Cynthia property valued at $442,827.78. In addition,

[4] The record indicates that in 1998, Cynthia's income tax return showed a $34,500 capital gain. She also reported $24,000 as "alimony." From 1999 to 2000, she reported $24,000 "section 71" payments. She also reported various interest and dividend payments each year approximating $4,000.

Steven stipulated to pay Cynthia $2,000 per month "section 71" payments for seventy-two consecutive months, taxable to her and deductible to him. Maintenance was denied.

¶7 At the hearing, Steven contended two changes justified a reduction in his child support obligation. First, for the last eight months and until a week before the hearing, their son lived with him alternate weeks. The placement order had not been formally modified, however, and Cynthia believes that the alternate week arrangement was detrimental to the child's best interest.[5]

¶8 Second, their daughter turned eighteen and, due to a criminal conviction, was under the jurisdiction of the Department of Corrections and confined at a residential facility from September 26, 2002, until May or June of 2003. Cynthia testified, however, that their daughter comes home on weekend passes two times a month. She attends the public high school in a special education department and had not yet graduated. She was pursuing a high school diploma with an anticipated June 2003 graduation date.

¶9 Cynthia listed monthly expenses totaling $5,214.67. The record discloses that many of Cynthia's monthly expenses relate to the children regardless of the time they spend in her home, such as property taxes, heating costs, pet care, automobile insurance, summer camp, vacation expenses, school lunches, clothing and shoes, cell phone, medical, dental, pharmaceutical and lesson expenses. She testified that during the previous August, each party paid $2,000 toward their son's braces. Cynthia also testified that while their daughter

[5] The record indicates that proceedings to modify placement were pending at the time of the child support hearing.

was confined at the residential facility, Cynthia continued to maintain a car and purchased clothing and personal items for her.

¶10 At the hearing on Steven's motion, the court found that Steven listed monthly expenses of $4,368 but that Steven's portion was limited to $2,000 per month, because Steven shared a residence with his new wife and her children.[6] The court found that Steven's income had increased, that their daughter was incarcerated and her essentials were provided at the state's expense. The court noted that Cynthia provides auto insurance and miscellaneous expenses for their daughter, but that the child had emancipated herself by her conduct and, under the agreement incorporated into the divorce decree, Steven's obligation to support her ended.

¶11 With respect to their son, the court found that the child was older, his expenses have increased and his apparent need for special educational tutoring had not been addressed by either parent. The court also stated: "Even with [Steven's] sharing of placement, [Cynthia] must maintain an appropriate home, duly furnished for this teenage boy." The court also found: "The child's lifestyle has not changed in many respects." In addition, the court concluded

> that [the] child support previously awarded exceeds the reasonable needs of the child.
>
> [Steven] is not obligated to pay child support above and beyond the reasonable needs of his child. He has been doing so. If, however, [Cynthia] had been saving the excess child support for the children's future needs, one could certainly justify the continued payment. [Cynthia] has not, however, saved any of that child support. Rather, she has purchased a lifestyle appropriate to her personal

[6] The record does not reflect, and the court did not make any findings, with respect to the parties' expenses at the time of the 1997 divorce.

> station in life without regard for the long-term interest of the children. This situation is unfair to both [Steven and their son].[7]

¶12 The court determined that there was a substantial change in circumstances and reduced child support to $750 per month. It also ordered that Steven pay $500 per month into a savings account for post high school education or other extraordinary expenses. However, should the child not pursue post high school education, Steven may close the account and apply the proceeds as he sees fit. Before doing so, however, he is to give Cynthia notice. Cynthia appeals the order.

## DISCUSSION

¶13 Whether support provisions should be modified is discretionary, but only upon a finding of a substantial change in circumstances under WIS. STAT. § 767.32(1)(a).[8] ***Peters v. Peters***, 145 Wis. 2d 490, 493, 427 N.W.2d 149 (Ct. App. 1988). The burden of showing that there has been a change in circumstances sufficient to justify a modification falls to the party seeking modification. ***Rottscheit v. Dumler***, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525.

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[7] It is undisputed that Cynthia has $15,000 in a savings account, although it is not earmarked for any specific purpose.

[8] There is one exception, not applicable here. Under WIS. STAT. § 767.25(1)(a), "The support order must be expressed as a fixed sum unless the parties have stipulated to expressing the amount as a percentage of the payer's income and the requirements under § 767.10(2)(am) 1. to 3. are satisfied." ***Rottscheit v. Dumler***, 2003 WI 62, ¶15 n.5, 262 Wis. 2d 292, 664 N.W.2d 525.

The court is not required to make a finding of a substantial change in circumstances to change to a fixed sum a child support order that was expressed in a percentage. WIS. STAT. § 767.32(1)(d). Here, the court not only changed the manner, but also the amount, of child support. Consequently, the exception does not apply.

¶14 The question whether there has been a substantial change of circumstances presents a mixed question of fact and law. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998). The first step in a substantial change of circumstances analysis is a factual inquiry requiring a determination of the parties' financial circumstances when the award was made and a determination of their present financial circumstances. ***Erath v. Erath***, 141 Wis. 2d 948, 953, 417 N.W.2d 407 (Ct. App. 1987). The trial court's findings of fact regarding the "before" and "after" circumstances and whether a change has occurred will not be disturbed unless clearly erroneous. ***Harris v. Harris***, 141 Wis. 2d 569, 573, 415 N.W.2d 586 (Ct. App. 1987).

¶15 If a change in financial circumstances has occurred, the second step under WIS. STAT. § 767.32 is to determine whether, as a matter of law, the change is substantial. ***Harris***, 141 Wis. 2d at 573. Whether the change is substantial is a legal standard, ordinarily one we review independently of the trial court. ***Id.*** Nonetheless, a determination that something is "substantial" requires the court to make a value judgment, heavily dependent upon interpretation and analysis of underlying facts. Therefore, we "give weight to a trial court's conclusion that a change in circumstances is substantial." ***Id.*** at 575.

¶16 WISCONSIN STAT. § 767.32(1)(c) lists four factors that may constitute a substantial change in circumstances: (1) a change in the payer's income, where the amount of child support is not expressed as a percentage of income; (2) a change in the child's needs; (3) a change in the payer's earning capacity; or (4) any other factor the court deems relevant. ***Id.***; ***In re Marriage of Beaudoin***, 2001 WI App 42, ¶7, 241 Wis. 2d 350, 625 N.W.2d 619. The aging of the children, the increased cost of living, the ability of the noncustodial parent to pay, the marital status of the parents, and the financial status of the parents and

their spouses are among the relevant factors to be considered in determining whether a material change in the circumstances has occurred. ***Id.***, ¶6. The change in amount of placement days does not, in and of itself, establish a substantial change in circumstances. *See* ***Peters,*** 145 Wis. 2d at 494.

¶17 With these standards in mind, we turn to Cynthia's argument that the trial court erroneously concluded that Steven proved a substantial change in circumstances since the entry of the divorce judgment. We agree with Cynthia. The record fails to support a conclusion that the parties' present circumstances are substantially changed from the parties' circumstances at the time of the divorce. Therefore, we reverse the order.

¶18 We are unpersuaded that the changes in placement demonstrate a substantial change in circumstances under WIS. STAT. § 767.32. While for eight months their son alternated weeks spent in his parents' home, the placement order was not modified and Cynthia objected to the arrangement. Whether the court would ultimately modify the placement order, the alternating week arrangement resulted in a 9% increase in the time Steven had with one child, from 41% to 50%. Steven did not prove the financial consequences of this arrangement. As the trial court observed, however, their son's lifestyle had not changed in many respects and, "Even with [Steven's] sharing of placement, [Cynthia] must maintain an appropriate home, duly furnished for this teenage boy." Thus, we conclude that the informal and temporary eight-month alternating placement did not constitute a substantial change in the parties' financial circumstances.

¶19 Also, although their daughter was confined until May or June of 2003, Steven failed to demonstrate that she had no need of a home until that date. Cynthia testified that their daughter is home two weekends a month, and Cynthia

maintained a car and bought clothing and personal items for their daughter.[9] Steven argues that the legal fees he incurred for his daughter's representation support the trial court's conclusion that a substantial change in circumstances occurred. Steven does not elaborate regarding the amount of legal fees in question, other than to direct our attention to an exhibit, whereon he listed a $600 expenditure. This expenditure falls into the category of an extraordinary expense. We are unpersuaded that Steven has shown a substantial change in financial circumstances due to their daughter's change in placement.

¶20 Steven also argues that the child support previously awarded exceeds the children's reasonable needs. The court's power under WIS. STAT. § 767.32 is not the power to grant a new trial or to retry the issues determined in the original decree, but only to adapt the decree to some distinct and definite change in the financial circumstances of the parties or children. ***Beaupre v. Airriess***, 208 Wis. 2d 238, 245, 560 N.W.2d 285 (Ct. App. 1997). This argument therefore fails to support a finding of a substantial change in circumstances.

¶21 We further conclude that the court's observations regarding Cynthia's affluent lifestyle do not support its legal conclusion that there has been a substantial change. The divorce judgment left both parties with significant assets, with Steven receiving more property than Cynthia. Apparently in order to equalize the property division, Cynthia was awarded $2,000 per month "section 71" payments for seventy-two months. It is evident that the divorce judgment contemplated that the parties would maintain an affluent lifestyle. We are not persuaded that the parties' significant assets, along with an increase in

[9] The parties are not required to reimburse the state for their daughter's cost of incarceration.

Steven's income, establish a substantial change justifying a child support reduction.

¶22 Steven argues that several other changes have occurred. For instance, Cynthia earned her college degree in graphic design, thereby increasing her earning capacity. First, the trial court made no specific findings to this effect. Cynthia had a bachelor's degree in a different field before the divorce. Her graphic design degree had not yet materialized into employment. Steven also points out that Cynthia sold a home, used the proceeds to purchase another home and summer cottage, and had a capital gain of $34,000 in 1998. Under the parties' circumstances, the fact that Cynthia sold an asset resulting in a capital gain and purchased another does not establish a substantial change in financial circumstances.

¶23 Steven also relies on his testimony that his son could be supported for $750 per month. That testimony, however, is insufficient to demonstrate a substantial change in circumstances, because of the lack of evidence showing the amount needed for his support at the time of the divorce.

## CONCLUSION

¶24 The record establishes that at the time of the modification hearing, the parties' daughter was not yet nineteen, was pursuing a high school diploma, and was not yet emancipated under the terms of the divorce decree. Therefore, the trial court erred when it concluded Steven's obligation to support the daughter had ended.[10] We further conclude that Steven has failed to present sufficient evidence

[10] Because these issues are dispositive, we do not address the other arguments Cynthia raises on appeal.

that there has been a "distinct and definite change in the financial circumstances of the parties or children" as a result of the changes that occurred since the divorce. ***Severson v. Severson***, 71 Wis. 2d 382, 387, 238 N.W.2d 116 (1976). The trial court made no specific findings as to the before and after circumstances, and the record before us fails to support its conclusion. Without a substantial change of circumstances of the parties or children, "this constitutes a re-trying of an issue" previously decided. ***Id.*** at 387-88. Accordingly, we conclude the trial court erred as a matter of law when it concluded there was a substantial change in circumstances and, as a result, erroneously exercised its discretion when it modified the divorce judgment to decrease child support payments. *See* ***Peters***, 145 Wis. 2d at 494.

*By the Court.*—Order reversed.

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