

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 14, 1995

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. 95-1267-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TERRY W. STULTS,

Petitioner-Appellant,

v.

**SUSAN C. PORFILIO
f/k/a SUSAN C. STULTS,**

Respondent-Respondent.

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

Before Dykman, Sundby, and Vergeront, JJ.

PER CURIAM. Terry Stults appeals from an order of the circuit court modifying his divorce judgment from Susan Porfilio, f/k/a Susan Stults. For the reasons set forth below, we affirm.¹

The parties were divorced in 1983. At that time, no support was ordered, as the parties were each assigned financial responsibility for two of the four children of the marriage. At the time, the children spent equal amounts of time with both parents, but over time, the children came to reside mainly with Porfilio. Porfilio and Stults went into mediation in 1984, and again in 1987, and the result was an agreement that the children would live mainly with Porfilio. Stults was given visitation, and each party continued to be financially responsible for two of the four children. Neither party paid support.

In 1995, Porfilio commenced this action, requesting that Stults be required to pay support. Porfilio testified that although Stults continued to have financial responsibility for two of the children, the fact that they were living with her meant that she paid a disproportionate amount of their expenses. Other testimony at the hearing indicated that Stults' income more than doubled since the time of the original divorce judgment, and that the children's expenses (especially clothing and medical care) had increased.

The circuit court found as a matter of fact that the 1984 and 1987 agreements reached in mediation were informal agreements, not approved by a judge or intended to be contracts. The circuit court also found a change in circumstances, based primarily on the increase in Stults' income since the original divorce decree. The court ordered Stults to pay support for the minor children at the current child support guidelines (WIS. ADM. CODE ch. HSS 80).

Stults reads *Jacquart v. Jacquart*, 183 Wis.2d 372, 515 N.W.2d 539 (Ct. App. 1994), to hold that if a father has been paying an essentially fair amount under a prior agreement, then it is error for a circuit court to change the amount payable by the father. Stults misreads *Jacquart*. In *Jacquart*, the parties had a prior contractual agreement that the father would make payments in lieu of child support and maintenance payments. In the exercise of its discretion,

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

the circuit court upheld the parties' contractual arrangements over the mother's challenge. It reasoned that the mother was bound by the contract, and that because the father was complying with the judgment of divorce and paying all the children's needs, there was no reason to upset the contract. *Id.* at 386-87, 515 N.W.2d at 544. The *Jacquart* court also noted that the father in that case was a high-end payor, and that the circuit court had specifically found that the percentage guidelines might not apply in such a situation. *Id.* at 389 n.9, 515 N.W.2d at 545.

Stults' situation is not on point with *Jacquart*. As the circuit court correctly found, Stults and Porfilio have no contract and Stults is not a high-end payor. Further, even read generously, *Jacquart* does not stand for the proposition that a circuit court cannot correctly exercise its discretion and modify a divorce judgment. Rather, "modification of child support rests within the sound discretion of the family court and will not be overturned on appeal absent a misuse of the court's discretion.... This discretion is properly exercised when the court has considered the needs of the custodial parent and children, and the ability of the noncustodial parent to pay." *Jacquart*, 183 Wis.2d at 381, 515 N.W.2d at 542 (citation omitted).

No misuse of circuit court discretion has been demonstrated here. The court specifically found that there had been a substantial change in circumstances, and correctly noted that Stults had not been paying within the current DHSS guidelines. We therefore affirm the order which has the effect of imposing DHSS guidelines in this case.

By the Court. – Order affirmed

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