

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 29, 1999

Marilyn L. Graves  
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 § 808.10 and RULE 809.62, STATS.

**No. 98-2279**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**KATHERINE KELLNER,**

**PETITIONER-RESPONDENT,**

**v.**

**DEAN A. KELLNER,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Wood County:  
DENNIS D. CONWAY, Judge. *Affirmed.*

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

ROGGENSACK, J. Dean Kellner appeals from an order of the circuit court denying his motion for modification of a stipulated child support order. The circuit court concluded that pursuant to § 767.32, STATS., Dean had not established a substantial change in circumstances warranting the modification.

Dean argues that the stipulated child support order was inconsistent with § 767.25(1j) and (1m), STATS., requiring the use of the Department of Health and Social Services (DHSS)<sup>1</sup> percentage guidelines or a determination that the application of the guidelines is unfair. Dean also contends that the circuit court improperly construed his motion as a motion to modify the judgment under § 767.32, rather than a motion to conform the order to comply with the requirements of § 767.25. We conclude that the circuit court properly dismissed Dean's motion to modify for failure to establish a substantial change in circumstances. Further, Dean's appeal of the judgment of divorce was not timely filed with this court, and we do not address Dean's motion to revise the judgment of divorce based on mistake or inadvertence because that issue was not raised in the circuit court and was first presented to us in the reply brief. Accordingly, we affirm.

### **BACKGROUND**

Katherine and Dean Kellner have six minor children. During the course of their divorce, they entered into a stipulation whereby four of the minor children were primarily placed with Katherine, and two of the minor children were primarily placed with Dean. Pursuant to the stipulation, child support was set at thirty-one percent of Dean's income, and a detailed visitation schedule was established. The child support agreement deviated from the DHSS guidelines under which Dean would have qualified as a split-custody payor and also as a shared-time payor, which would have resulted in a lower support rate.

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<sup>1</sup> The Department of Health and Social Services is now the Department of Health and Family Services.

On April 30, 1997, the circuit court held a final hearing during which Dean stated that he had reviewed the stipulation, understood it, and entered into it freely and voluntarily. The circuit court granted the judgment of divorce. As a part of its findings of fact in the written judgment of divorce entered on August 25, 1997, the court adopted the stipulation in its entirety finding it to be “fair and reasonable.”

On October 20, 1997, Dean filed a motion to modify the judgment of divorce to conform with the DHSS guidelines. On December 4, 1997, following a hearing, the circuit court dismissed Dean’s motion to modify support because he had not established a substantial change in circumstances since the divorce, pursuant to § 767.32, STATS. This appeal followed.

## DISCUSSION

### **Standard of Review.**

The question of 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, 37 (Ct. App. 1998). The circuit court’s findings of fact regarding the “before” and “after” circumstances and whether a change has occurred will not be disturbed unless clearly erroneous; however, whether the change is substantial is a question of law which we review *de novo*. *Id.* at 33, 577 N.W.2d at 37.

### **Modification of Support Order.**

After a child support order is entered, the circuit court may revise that order upon a finding of substantial change in the circumstances of the parties. Section 767.32, STATS. A substantial or material change in circumstances should

be such that it would be unjust or inequitable to strictly hold either party to the judgment. *Rosplock*, 217 Wis.2d at 33, 577 N.W.2d at 37. Based on the evidence presented at the December 4, 1997 hearing, Dean's income remained approximately the same as it had been at the date of the divorce, and the circumstances of the children had not changed. Therefore, the circuit court properly concluded that Dean had not established a substantial change in circumstances warranting modification of the support order. *See* § 805.17(2), STATS.

Dean also contends that the circuit court erred in entering the judgment of divorce and approving the child support agreement which did not conform with the DHSS guidelines. *See* §§ 767.10(2), 767.25(1j) and (1m), STATS. However, Dean did not appeal the original judgment of divorce, and the time for initiating an appeal has passed. *See* § 808.04(1), STATS.

Finally, in his reply brief, Dean argues that pursuant to § 807.06(1)(a), STATS., he is entitled to relief from the judgment of divorce on the basis of mistake or inadvertence. Because Dean raised this argument for the first time in his reply brief, we do not address it. *See Schaeffer v. State Personnel Comm'n*, 150 Wis.2d 132, 144, 441 N.W.2d 292, 297 (Ct. App. 1989).

## CONCLUSION

The circuit court properly denied Dean's motion to modify the judgment because he failed to establish a substantial change in circumstances subsequent to the divorce. Further, Dean cannot now raise issues from the judgment of divorce because he did not timely file an appeal. And finally, we do not address Dean's motion to revise the judgment of divorce based on mistake or

inadvertence because that issue was not raised in the circuit court and was first presented to us in the reply brief.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

