

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 10, 2013**

Diane M. Fremgen  
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. 2013AP1521**

**Cir. Ct. No. 2004FA42**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PETITIONER-APPELLANT,**

**TANJA M. EISINGER,**

**PETITIONER,**

**v.**

**LARRY G. PECHACEK,**

**RESPONDENT-RESPONDENT.**

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APPEAL from orders of the circuit court for Pierce County:  
JOSEPH D. BOLES, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals orders setting child support. The State argues the circuit court erroneously determined there was no

substantial change in circumstances. It also argues there were no grounds to deviate from the percentage standard. We conclude the court properly determined there was no substantial change in circumstances. Accordingly, we affirm.

## BACKGROUND

¶2 Tanya Eisinger and Larry Pechacek are the parents of one child; they never married. Pechacek paid child support to Eisinger beginning in 2004. In February 2010, the parties stipulated to an increase from \$600 to \$900 monthly.

¶3 At the time of the 2010 revision, Eisinger was unemployed. She had lost her \$85,000 per year job due to a disability.<sup>1</sup> In 2013, Eisinger began receiving social security disability benefits totaling \$3,000 per month.<sup>2</sup> Also in 2013, the State sought a modification of child support on Eisinger's behalf.

¶4 The State's request asserted: (1) the child's needs were not being met without public assistance; (2) more than thirty-three months had elapsed since the last support revision; and (3) Pechacek's employment income had increased. The circuit court determined there had been a substantial change in circumstances because Eisinger had gone from having no income to having \$3,000 monthly disability benefits. However, the court determined there was no substantial change in Pechacek's income. Ultimately, the court determined it would be unfair to apply the percentage of income standard. Thus, rather than raising the monthly

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<sup>1</sup> After reviewing the facts as set forth in the State's brief, one comes away with the impression that Eisinger lost her job *after* the 2010 stipulated support revision. The misleading statement of facts is not well-received. Neither is the general tone of the brief, which is unduly critical of the circuit court.

<sup>2</sup> The benefits consisted of \$2,000 to Eisinger and \$1,000 to the child.

support payments to \$1,286 as requested by the State, the court set support at \$1,050 monthly.

¶5 The State moved for reconsideration, contending the court erroneously exercised its discretion when deviating from the percentage standard. Upon reconsideration, the court held it previously erred by determining there had been a substantial change in circumstances. After noting Eisinger’s new disability income and the “slight increase” in Pechacek’s income, the court explained:

A mere passage of 33 months from the filing of the orders, where the evidence shows that the needs of the child have not increased and the income available to support the child has increased substantially, does not constitute a substantial change of circumstances. Under the totality of the circumstances, the court hereby makes a finding of fact that there has not been a substantial change in circumstances sufficient to justify a revision of the order.

Nonetheless, because Pechacek was not challenging the court’s revised support determination, the court left support set at \$1,050 monthly. The State now appeals.

### **DISCUSSION**

¶6 The State argues the circuit court erroneously exercised its discretion by finding there was no substantial change in circumstances and by deviating from the percentage standard. We resolve this case solely on the issue of whether there was a substantial change in circumstances warranting revision of support.

¶7 The parties’ briefs are of little assistance to us. As noted, the State argues the court erroneously exercised its discretion when determining whether there was a substantial change in circumstances. That is the wrong standard of review. Perhaps, in part, because of that error, the State then fails to develop a

reasoned argument. We need not consider undeveloped arguments. *State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). On the other hand, Pechacek concedes there was a substantial change in circumstances.<sup>3</sup>

¶8 A court may revise child support only if it first determines there has been a “substantial change in circumstances.” *See* WIS. STAT. § 767.59(1f)(a).<sup>4</sup> The determination of whether there has been a substantial change of circumstances sufficient to warrant a modification of child support presents a mixed question of fact and law. *Benn v. Benn*, 230 Wis. 2d 301, 307, 602 N.W.2d 65 (Ct. App. 1999). We will not overturn a circuit court’s findings of fact regarding what changes in circumstances have occurred unless the findings are clearly erroneous. *Id.* “However, the question of whether those changes are substantial is a question of law which we review de novo.” *Id.* If a modification of child support is warranted, the circuit court then has discretion to determine the amount of the modification. *Id.*

¶9 Certain circumstances “constitute[] a rebuttable presumption of a substantial change in circumstances sufficient to justify a revision of the judgment or order[.]” WIS. STAT. § 767.59(1f)(b). As relevant here, “[u]nless the amount of child support is expressed in the judgment or order as a percentage of parental income,” the presumption exists upon “the expiration of 33 months after the date of the entry of the last child support order, including a revision of a child support order ....” WIS. STAT. § 767.59(1f)(b)2. Additionally,

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<sup>3</sup> Pechacek argues only that the court properly deviated from the percentage standard.

<sup>4</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

any of the following may constitute a substantial change of circumstances sufficient to justify revision of the judgment or order:

1. Unless the amount of child support is expressed in the judgment or order as a percentage of parental income, a change in the payer's income ....
2. A change in the needs of the child.
3. A change in the payer's earning capacity.
4. Any other factor that the court determines is relevant.

WIS. STAT. § 767.59(1f)(c)1.-4. (formatting altered).

¶10 Although the parties agree there was a substantial change of circumstances, we are not bound by the parties' interpretation of the law or obligated to accept a party's concession of law. *See State v. Carter*, 2010 WI 77, ¶50, 327 Wis. 2d 1, 785 N.W.2d 516 (citing *Bergmann v. McCaughtry*, 211 Wis. 2d 1, 7, 564 N.W.2d 712 (1997)). The court, not the parties, decides questions of law. *Id.*

¶11 The circuit court determined—the thirty-three-month presumption notwithstanding—that there was not a substantial change in circumstances warranting modification.<sup>5</sup> The court reasoned that in the time since the parties stipulated to a support amount, the child's needs had not changed, Pechacek's income had increased only slightly, and Eisinger's and the child's combined monthly income had changed from \$0 to \$3,000. While the court did not expressly state that the evidence overcame the thirty-three-month presumption, this is implicit in the decision. The State does not challenge any of the factual findings underlying the court's decision, and we agree that the facts of this case

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<sup>5</sup> The State asserts another presumption applied, but it fails to acknowledge or address the circuit court's reasoning for rejecting that argument, which the court deemed "disingenuous." This failure constitutes a concession. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

sufficiently rebut the thirty-three-month presumption.<sup>6</sup> The only change was that Eisinger’s and the child’s household had *more* income. Although this was *a* change, it was not a substantial change warranting an upward revision of child support. Accordingly, we affirm.

¶12 Because we affirm on grounds not argued by Pechacek, no WIS. STAT. RULE 809.25 costs are allowed.

*By the Court.*—Orders affirmed.

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

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<sup>6</sup> The State contends it was somehow unreasonable or inconsistent for the circuit court to determine that Eisinger’s new disability income was relevant to the substantial-change-in-circumstances inquiry, but that Pechacek’s slight increase in income was not a substantial change. The State asserts, “The circuit court justified both a change in circumstances and no change in circumstances. Intuitively, this makes no sense.” The State’s argument makes no sense.

