

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 7, 1998

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. 97-3135-FT

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT III

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IN RE THE MARRIAGE OF:

CATHY J. DOMBROWSKI, N/K/A CATHY J. ZAHORIK,

JOINT-PETITIONER,

STATE OF WISCONSIN,

APPELLANT,

V.

DAVID A. DOMBROWSKI,

JOINT-PETITIONER-RESPONDENT.

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APPEAL from an order of the circuit court for Door County:  
JOHN D. KOEHN, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. The State of Wisconsin appeals an order<sup>1</sup> denying a motion for increased child support.<sup>2</sup> It contends that the father's failure to exercise periods of physical placement constitutes a substantial change in circumstances justifying a modification of his child support obligations. Because the record is devoid of facts demonstrating the degree to which the father failed to exercise rights to physical placement, and fails to demonstrate how his failure affects the mother's financial circumstances, we affirm the order.

David Dombrowski and Cathy Zahorik were divorced in 1992. At the time of the divorce, Cathy earned \$1,861 per month as a buyer at Peterson Builders, Inc., and David earned \$2,052 per month as an electrical technician at Peterson Builders, Inc. Joint legal custody of the parties' two children was ordered, with primary physical placement with Cathy. The judgment ordered that David pay 21% of his gross income, or \$101 per week, whichever was greater, as child support. Gross income was defined as regular pay, vacation pay, and profit sharing, but not overtime pay.

The trial court deviated from the 25% standard set forth in WIS. ADM. CODE § HSS 80, because the parties agreed to the deviation, David had significant physical placement of the children, and paid all uninsured medical expenses except dental, which was to be equally divided. The judgment stated that David was to have placement of the children at reasonable times and upon reasonable notice, including, but not limited to alternate weekends from Friday

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<sup>1</sup> This is an expedited appeal under RULE 809.17, STATS.

<sup>2</sup> The State entered its appearance as the real party in interest pursuant to §§ 767.075 and 767.15, STATS.

after school until Sunday afternoon, two evenings each week until 7:30 p.m., and every other week during summer vacation.

In 1997, the State brought a motion to revise the judgment pursuant to § 767.32, STATS. On behalf of Cathy, it requested that the judgment be revised to require David to pay 25% of his gross monthly income as child support. As a basis for the motion, Cathy contended that David did not exercise his rights to physical placement as scheduled and paid only one-half the cost of optical expenses and prescriptions.

At the motion hearing, Cathy testified that she earned \$560 per week at Peterson Builders, Inc. She remarried and now lives in another community approximately twenty-five miles away. She was aware that due to layoffs at Peterson Builders, David had found another position earning \$11 per hour, compared to the \$12 per hour he earned at Peterson Builders. She testified that David has not had the children with him during the summer as scheduled in the divorce decree. She also testified that she has trouble getting reimbursed from David for the children's pharmaceutical expenses.

The trial court found that the change of circumstances was not sufficiently substantial to permit revision of the judgment and denied the motion. The State appeals.

The State argues that the court erroneously exercised its discretion when it refused to modify the judgment. We disagree. The modification of child support rests within the trial court's discretion. *Jacquart v. Jacquart*, 183 Wis.2d 372, 381, 515 N.W.2d 539, 542 (Ct. App. 1994). "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." *Id.* The party seeking

to modify a child support order has the burden of demonstrating that a substantial change in circumstances has occurred and that it justifies a modification of the support order. See *Thibadeau v. Thibadeau*, 150 Wis.2d 109, 115, 441 N.W.2d 281, 283 (Ct. App. 1989). We must search the record for reasons to support a discretionary decision. *Loomans v. Milwaukee Mut. Ins. Co.*, 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968).

Here, there is no dispute that Cathy's income has increased from the time of the divorce when she earned \$1,861 per month, to the time of the motion hearing, when she earned over \$2,400 per month. During the same time frame, David's wages decreased from \$12 per hour to \$11 per hour. There is no real claim of a substantial change in circumstances other than the contention that David failed to visit the children in accordance with the established visitation schedule and pay certain health care expenses as provided in the divorce judgment.

The State argues that because David has failed to discharge these responsibilities, Cathy is entitled to a modification of the support order. The record fails to support the State's claim. There is no elaboration to Cathy's contention that David failed to visit as scheduled. Cathy did not testify as to how often he visited the children, or how much money was involved as a result of his failure to visit or pay the health care expenses.<sup>3</sup>

While we agree that the failure to exercise rights to physical placement may be sufficient to justify modification of a judgment, the record falls short here. The State has failed to demonstrate the degree to which David did not

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<sup>3</sup> The State also argues that with overtime and bonuses, David's total annual income has also increased, and he earned \$31,222.24 in 1996. Because this was not the basis of the motion presented to the trial court, it is not a basis for reversal on appeal.

exercise his rights to placement and how it affected Cathy's financial circumstances. The party seeking the modification has the burden of demonstrating a substantial change that justifies the modification of the divorce decree. Based on the record before us, we conclude that the trial court did not erroneously exercise its discretion when it concluded the circumstances did not justify a modification.

*By the Court.*—Order affirmed.

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

