

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 19, 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. 99-1194

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE PATERNITY OF JAMIE A.B.:

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

MICHAEL I.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rusk County:
FREDERICK A. HENDERSON, Judge. *Affirmed.*

¶1 HOOVER, P.J. The Rusk County Department of Child Support appeals an order denying the County's application for an increase in Michael I.'s child support obligation. The County contends that the court erroneously exercised its discretion by considering Michael's loss of tribal benefits by determining that there was no substantial change in circumstances to justify

revising the child support order, and by crediting the total cost of health insurance premiums as child support when determining that there were reasons to deviate from the percentage guidelines. Because the court properly considered Michael's increased cost of living and financial status, and because the County failed to produce other evidence of a substantial change in circumstances as required by § 767.32(1)(a), STATS., it did not erroneously exercise discretion. Accordingly, the order is affirmed.

¶2 Michael was subject to an order to pay \$57 per week in child support for his son, Jamie. He was also ordered to pay the reasonable cost of health insurance. In 1984, when the support order was entered, Michael's annual gross income was approximately \$25,000; in 1998, it was approximately \$46,800.

¶3 Michael is presently married and has three children born of that marriage. All three children were born after Jamie. Michael is a member of the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians. As his income increased from the time of the earlier order until 1998, he lost access to certain tribal benefits, including, commodities, free school lunches, subsidized housing, energy assistance and a jacket-exchange program.

¶4 Jamie's mother requested that the County review Michael's child support obligation. The County thereafter sought to modify the child support order to the percentage standards under § 767.32(1)(c), STATS., based upon a change in Michael's earnings.

¶5 At the hearing, the County introduced evidence of Michael's change in income through a child support specialist and then rested. Michael appeared pro se and testified to his loss of tribal benefits as his income increased. The court determined that the County failed to prove a substantial change to justify

modifying Michael's child support obligation and, even if there were a substantial change, there were reasons to deviate from the guidelines and not modify Michael's support obligation.

¶6 The court's treatment of a motion to modify child support involves the question whether the court engaged in a proper exercise of discretion. *See Burger v. Burger*, 144 Wis.2d 514, 523, 424 N.W.2d 691, 695 (1988). Our review of such discretionary decisions is confined to whether the court examined the relevant facts, applied the proper legal standards and reached a logical decision. *See Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

¶7 The County claims that the court considered an inappropriate factor in denying the request for a child support increase. It contends that the court could not consider Michael's loss of tribal benefits as a result of his increased income. In particular, the County claims that the loss of tribal subsidies or benefits is not an appropriate factor for the court to consider when reviewing whether there is a substantial change in circumstances justifying a child support revision because WIS. ADM. CODE § HSS 80.02(13)(i),¹ excludes public assistance when determining gross income.² This court disagrees.

¹ WISCONSIN ADM. CODE § HSS 80 has been renumbered to § DWD 40.

² WISCONSIN ADM. CODE § HSS 80.02(13)(i) provides, in part:

(13) "Gross income" means:

....

(i) All other income, whether taxable or not, except that gross income does not include public assistance

¶8 Under § 767.32(1)(a), STATS., a judgment providing for child support may be revised "only upon a finding of a substantial change in circumstances." The statute 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. Section 767.32(1)(c), STATS. In *Beaupre v. Airriess*, 208 Wis.2d 238, 244-45, 560 N.W.2d 285, 288 (Ct. App. 1997), this court reiterated the factors a circuit court is to consider when determining whether to modify child support:

An increase in support payments will be granted only where the party seeking such increase demonstrates that there has been a substantial or material change in the circumstances upon which the existing payments were predicated, and that such an increase is justified. 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. at 245, 560 N.W.2d at 288 (quoted source omitted).

¶9 The court considered Michael's increase in income but also considered his cost of living and financial status. His tribal benefits decreased as his income increased and, as a result, he had to pay more for items that he previously received free or at a lower cost. This court disagrees that WIS. ADM. CODE § HSS 80.02(13)(i) prohibits the family court from considering Michael's loss of tribal benefits when reviewing whether there is a substantial change in circumstances justifying a child support revision. That section is used for the

determination of a child support amount. *See* WIS. ADM. CODE § HSS 80.01(1).³ The court did not consider the decrease in benefits to determine a child support amount, but instead properly considered the loss of benefits to determine whether there was a substantial change in circumstances.

¶10 Having determined that the court could consider Michael's loss of benefits, this court examines whether the County proved a substantial change in circumstances to justify a change in child support. It did not. The County's evidence addressed only the increase in Michael's income.⁴ The County failed to show that Michael's financial circumstances had substantially changed because it presented no evidence of the value of the tribal benefits that Michael was no longer receiving.⁵

¶11 Because the court applied proper legal standards, considered the relevant facts and reached a logical conclusion, it did not erroneously exercise its discretion by determining that the County failed to show a substantial change in

³ WISCONSIN ADM. CODE § HSS 80.01(1), provides, in part:

AUTHORITY AND PURPOSE. This chapter is promulgated ... for the purpose of establishing a standard to be used in *determining child support* under ss. 767.02, 767.08, 767.10, 767.23, 767.25, 767.32 and 767.51, Stats. (Emphasis added.)

⁴ The County made no argument either on appeal or before the trial court that Jamie's mother's income had decreased or that any of the statutory presumptions contained in § 767.32(1)(b), STATS., applied. We therefore do not address those issues.

⁵ The County was on notice that the court might consider the decline in tribal benefits that Michael and his family received because the court had denied an earlier motion to increase his child support for that reason. The County made no attempt to quantify the value of the benefits Michael lost. The court placed the burden of coming forward with evidence that "notwithstanding the programs that [Michael] and his family are no longer able to take advantage of because of the fact that his gross income has risen, that it is still a substantial change of circumstances that demands modification." The County does not argue that coming forward with this evidence is not its burden. This court therefore declines to address the issue.

circumstances to justify revising Michael's child support order. This court declines to address the County's other arguments; the determination that there was no substantial change in circumstances is dispositive. *See Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

