

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 10, 2005**

Cornelia G. Clark  
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. 2004AP3012**

**Cir. Ct. No. 2001FA1133**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**BRIAN SCOTT NOOYEN,**

**PETITIONER-APPELLANT,**

**V.**

**BONITA JUNE NOOYEN,**

**RESPONDENT-RESPONDENT.**

---

APPEAL from an order of the circuit court for Brown County:  
MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Brian Nooyen, pro se, appeals an order setting his family support obligation at \$1,044.10 per month. He argues that his income has decreased, the amount of family support is unfair and that the Department of Workforce Development standards require that the court set a lower amount. We reject his arguments and affirm the order.

¶2 The parties were divorced in 2002. They have two minor children. The divorce judgment provided that Brian was to pay \$1,200 monthly family support. In August 2003, Brian moved to revise family support due to an employment layoff and reduction in income. In February 2004, the circuit court ordered that Brian's family support obligation be reduced from \$1,200 to \$1,100 per month, effective March 1, 2004, and reduced again on March 1, 2005, to \$1,000 per month. The court further ordered that on May 1, 2006, Brian's family support obligation shall be converted to child support, to be calculated according to administrative code provisions.<sup>1</sup>

¶3 In June 2004, Brian moved to revise his support obligation to \$850 per month. In August 2004, the court commissioner reduced his obligation to \$966 per month, to be reduced in March 2005 to \$833 per month. His former wife Bonita Nooyen moved for de novo review.

¶4 At the de novo hearing, Brian testified that before he filed his motion, his support obligation was \$1,100 per month. He testified that his income was reduced from \$13.15 per hour to approximately \$12.50 per hour. He stated he worked forty to forty-five hours per week.

¶5 The trial court determined that Brian established his income decreased sixty-five cents an hour. The court stated: "I'm satisfied that there is a change in circumstances because you're making \$111.00 less per month than you were in February ... given the limited amount of money that you have available to you for net disposable income ...." The court ruled that the change in

---

<sup>1</sup> In April 2004, the court found Brian in contempt of court for violating the February 2004 order and determined that Brian owed his former wife Bonita \$1,377, to bear interest at 6% per annum.

circumstances should be shared by the parties and, therefore, the court would not reduce Brian's obligation "dollar for dollar." The court concluded: "I'm satisfied that there is a substantial change in circumstances that requires the relief be granted to Mr. Nooyen. I find that should be a reduction of \$55.00 per month in the family support obligation."

¶6 The court also explained that Brian had elected to pay family support instead of child support to maximize his tax deductions.<sup>2</sup> The court further observed that based on Brian's election, Bonita waived maintenance and it would be unfair to convert the family support to child support. The court stated:

For you to come in and say now I don't think family support should apply is not fair to her because she waived her right to maintenance. She gave up that right in exchange for the family support. And now what you are really saying is you want me to look at this as a child support case which would exclude a maintenance award. This is a long-term marriage and it would have resulted in an equal division of the net disposable income. And that could have had a result that would have been far more dramatic for you than what you are experiencing right now, Mr. Nooyen. You know what's fair has to be fair across the board.

¶7 The court further ruled: "I can't go back to the divorce itself and change that decision because the problem is, that that divorce is final. And things were given up by both of you as a result of that final decision." The court also pointed out that because Brian was not exercising his physical placement times,

---

<sup>2</sup> "Family support" is a substitute for child support orders under WIS. STAT. § 767.25 and maintenance payment orders under WIS. STAT. § 767.26. The designation of payments as "family support" is designed to place the tax burden on the recipient, similar to alimony or maintenance. See *Jasper v. Jasper*, 107 Wis. 2d 59, 63, 318 N.W.2d 792 (1982).

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Bonita had greater child related expenses. The court ordered that Brian pay family support in the sum of \$1,044.10 per month. Brian appeals the order.

¶8 Brian argues, “This case has been in court for the same thing several times.” He argues that he does not bring home enough money to survive on. He argues his gross income is \$2,150 per month, and that family support should be set at \$752 per month.

¶9 Family support pursuant to WIS. STAT. § 767.261 is a substitute to child support and maintenance.<sup>3</sup> To modify a family support award, the party seeking modification must demonstrate a substantial change in circumstances.

---

<sup>3</sup> WISCONSIN STAT. § 767.261, entitled “**Family support**,” provides:

The court may make a financial order designated “family support” as a substitute for child support orders under s. 767.25 and maintenance payment orders under s. 767.26. A party ordered to pay family support under this section shall pay simple interest at the rate of 1% per month on any amount in arrears that is equal to or greater than the amount of child support due in one month. If the party no longer has a current obligation to pay child support, interest at the rate of 1% per month shall accrue on the total amount of child support in arrears, if any. Interest under this section is in lieu of interest computed under s. 807.01(4), 814.04(4) or 815.05(8) and is paid to the department or its designee under s. 767.29. Except as provided in s. 767.29(1m), the department or its designee, whichever is appropriate, shall apply all payments received for family support as follows:

- (1) First, to payment of family support due within the calendar month during which the payment is received.
- (2) Second, to payment of unpaid family support due before the payment is received.
- (3) Third, to payment of interest accruing on unpaid family support.

WIS. STAT. § 767.32. “A judge who reviews a request to modify a support award should adhere to the findings of fact made by the circuit court that handled the previous proceedings. *See Rohde-Giovanni v. Baumgart*, 2004 WI 27, ¶33, 269 Wis. 2d 598, 676 N.W.2d 452. For purposes of evaluating a substantial change in the parties’ financial circumstances, the appropriate comparison is to the set of facts that existed at the time of the most recent support order. *See Kenyon v. Kenyon*, 2004 WI 147, ¶38, 277 Wis. 2d 47, 690 N.W.2d 251. The court should compare the facts surrounding the previous order with the parties’ current financial status to determine whether the moving party has established a substantial change in circumstances. *Id.*

¶10 The amount and duration of family support are issues addressed to trial court discretion. *See Jasper v. Jasper*, 107 Wis. 2d 59, 63, 318 N.W.2d 792 (1982). Our supreme court has stated that it will not disturb a circuit court’s discretionary decision unless it represents an erroneous exercise of discretion. *Rohde-Giovanni*, 269 Wis. 2d 598, ¶17. “A discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” *Id.*, ¶¶17-18. A circuit court’s exercise of discretion is erroneous if it makes factual or legal errors. *Id.*

¶11 Here, Brian fails to demonstrate trial court error. The court properly compared the current set of facts that existed at the time of the most recent family support order. *See Kenyon*, 277 Wis. 2d 47, ¶38. The court determined that given Brian’s income, the change he reported was substantial. Therefore, it granted

Brian's request to reduce his support obligation.<sup>4</sup> Because Brian's obligation was one of family support, not simply child support, the trial court was entitled to consider fairness to Bonita in determining the amount of the reduction. *See Rohde-Giovanni*, 2004 WI 27, ¶31 (fairness must be considered with respect to the situations of both parties in determining modification of maintenance). Thus, a rational basis supports the court's decision that the parties should equally share the economic burdens presented by Brian's reduced earnings.

¶12 Brian argues that the court erred because it did not apply WIS. ADMIN. CODE ch. DWD 40. We disagree. The trial court explained that it did not apply the child support guidelines because its order was one for family support, rather than child support. Section DWD 40.01(2) states: "APPLICABILITY. This chapter applies to any petition for a temporary or final order for *child* support of a marital or nonmarital child in an action affecting a family ... or any revision of judgment under s. 767.32, Stats." (Emphasis added). Brian provides no legal authority for his premise that ch. DWD 40 applies to orders for family support, in contrast to orders for child support.<sup>5</sup> *See State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). Therefore, Brian fails to demonstrate that the trial court erred.

*By the Court.*—Order affirmed.

---

<sup>4</sup> Brian does not challenge this portion of the court's ruling.

<sup>5</sup> Brian provided materials to the trial court that eviscerated his own argument. The materials stated that the percentage standards applied to child support and, when used to calculate family support, the amount determined should be increased by the amount necessary to provide a net family support payment after taxes, of at least the amount of child support payment under the standard.

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