

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 9, 2001

Cornelia G. Clark  
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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 00-2485**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:  
RANDALL M. KOLSTAD V. KIM M. KOLSTAD**

**SHEBOYGAN COUNTY CHILD SUPPORT ENFORCEMENT  
AGENCY,**

**PETITIONER-RESPONDENT,**

**v.**

**RANDALL M. KOLSTAD,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Sheboygan County:  
TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Randall M. Kolstad appeals from an order modifying child support. The sole issue is whether a substantial change of circumstances existed. The circuit court's observation that the stipulated child support order was not working as the parties expected was a proper basis to conclude that a substantial change of circumstances existed. We affirm the order of the circuit court.

¶2 Randall and Kim M. Kolstad were divorced in 1993. They stipulated that as support for their three minor children, Randall would pay twenty-nine percent of his gross income "from working no more than fifty (50) hours per week." The number of hours against which the percentage was to be applied reduced to forty-five hours on October 1, 1994, and to forty hours per week on October 1, 1996. In 1996, Kim moved for a modification of child support alleging that Randall intentionally reduced his work hours in an effort to decrease the required child support payment. Her motion was denied. The circuit court concluded that there was no evidence that Randall was intentionally shirking his support obligation.

¶3 In May 2000, the Sheboygan County Child Support Enforcement Agency moved for a modification of the child support order. As a result, the circuit court ordered Randall to pay child support in the amount of twenty-nine percent of all his gross income per month, not just a forty-hour work week.

¶4 The modification of child support based on a substantial or material change of circumstances is within the discretion of the circuit court. *Thibadeau v. Thibadeau*, 150 Wis. 2d 109, 114-15, 441 N.W.2d 281 (Ct. App. 1989). We review whether the court examined the relevant facts, applied the proper legal

standards and reached a logical decision. *Zutz v. Zutz*, 208 Wis. 2d 338, 342, 559 N.W.2d 919 (Ct. App. 1997).

¶5 The first step in a substantial change of circumstances analysis is a factual inquiry requiring a determination of the parties' past financial circumstances and a determination of their present financial circumstances. *Peters v. Peters*, 145 Wis. 2d 490, 493, 427 N.W.2d 149 (Ct. App. 1988). If a change in financial circumstances has occurred, the second step is to determine whether, as a matter of law, the change is substantial. *Id.*

¶6 The circuit court found a change of circumstances due to increased expenses related to the children's increased ages and range of activities.<sup>1</sup> The court also recognized that Randall's income had increased. Randall does not challenge either of these findings as clearly erroneous. Rather, he argues that the changes are not substantial because the parties anticipated those changes at the time of their stipulation. Randall correctly points out that when the parties have stipulated to child support, a change in circumstances justifying modification must be something "unforeseen at the time the divorce judgment was entered." *Krieman v. Goldberg*, 214 Wis. 2d 163, 173, 571 N.W.2d 425 (Ct. App. 1997). However, a written stipulation must give way to the best interests of the children. *Ondrasek v. Tenneson*, 158 Wis. 2d 690, 695, 462 N.W.2d 915 (Ct. App. 1990).

¶7 We recognize, as the circuit court did, that the stipulation was drafted in a reducing manner to capture the natural cost of living increases in Randall's income while maintaining a sufficient level of support. However, the

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<sup>1</sup> Because the circuit court had reviewed the parties' situation in 1996, it used 1996 as a the starting point in determining what changes occurred.

parties' expectation that support would remain constant and sufficient did not come to fruition because of fluctuations in Randall's income. Randall works in the construction field; some weeks he works forty hours plus overtime, other weeks he does not work a forty-hour week.<sup>2</sup> Indeed, Kim testified that the support payments were not always equal. Payments to her ranged between \$175 to \$330 per week. She had difficulty meeting the children's needs because of the fluctuation in payments and the inability to plan for such fluctuations. The history of payments under the stipulation did not meet the parties' expectations that a consistent level of support would be paid. This was a substantial change from the parties' expectations under their stipulation.

¶8 Having found that a substantial change in circumstances occurred, it was within the circuit court's discretion to modify or refuse to modify the child support award. *Long v. Wasielewski*, 147 Wis. 2d 57, 60, 432 N.W.2d 615 (Ct. App. 1988). Discretion is properly exercised if the court considers the needs of the custodial parent and the children and the ability of the noncustodial parent to pay. *Id.* at 60-61. The circuit court addressed these considerations by inquiring whether it was fair to Randall to require him to pay support based on all of his income. The court recognized that in the past Randall had the benefit of reduced support because of the forty-hour limitation. It found that payment on all income

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<sup>2</sup> The circuit court found that for a person in Randall's employment, it "tends to be feast and famine," albeit Randall testified that he had not experienced much "famine" in recent times.

would be equitable to “even out the peaks and valleys” in the income stream.<sup>3</sup>  
This was a proper exercise of discretion.

*By the Court.*—Order affirmed.

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

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<sup>3</sup> This case is the opposite of *Zutz v. Zutz*, 208 Wis. 2d 338, 344, 559 N.W.2d 919 (Ct. App. 1997), and *Jacquart v. Jacquart*, 183 Wis. 2d 372, 388-89, 515 N.W.2d 539 (Ct. App. 1994), where the courts refused to modify support because they found that the parties’ stipulated agreements were serving the needs of the children and accommodating the changes in their circumstances.

