

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 21, 2001

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. 01-1005

Cir. Ct. No. 99-PA-42

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE PATERNITY OF HUNTER A.T.S.:

MICHAEL J. M.,

PETITIONER-RESPONDENT,

V.

SHEILA M. S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Green County:
DANIEL L. LAROCQUE, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 ROGGENSACK, J. Sheila M.S. appeals the circuit court's determination of child support, which was entered subsequent to a judgment of

paternity finding that Michael J.M. was the father of Sheila's child. Sheila contends that the circuit court improperly relied on a stipulation regarding Michael's income when setting child support. Because the parties' stipulation had been incorporated into a court order for child support, we affirm the circuit court's conclusion that the stipulation in regard to Michael's income is binding in the absence of proof of a substantial change in circumstances. However, we remand the cause for additional findings of fact and conclusions of law on the issue of whether the undisputed increase of Michael's gross income in 2000 above his stipulated income in 1999 amounts to a substantial change in circumstances warranting an increase in child support.

BACKGROUND

¶2 Michael filed a petition to determine paternity during Sheila's pregnancy. After the child was born, the circuit court entered judgment declaring Michael the child's father. The judgment expressly held open the issue of child support.

¶3 At a hearing held on April 26, 2000, Michael and Sheila represented to the court that they had reached a stipulation concerning child support. The court incorporated the stipulation into a May 10, 2000, order as follows:

Now, upon stipulation of the parties entered on the record herein, the court hereby orders:

FINDINGS OF FACT

1. For purposes of calculating child support the court hereby finds that [Michael] has an earning capacity of \$30,000.00 annually and will add to that capacity, one-half of the [prior year's] depreciation. Depreciation claimed in 1999 was \$29,217.00. One-half of the depreciation would be \$14,608.50.

....

Now, therefore, it is [ordered] as follows:

1. [Michael] shall pay child support in the amount of \$150.00 per week with the first payment being due on Friday, April 21, 2000. Said child support amount shall be reviewed at a hearing on June 29, 2000, at 8:30 a.m., and may be adjusted at that time due to a change in the physical placement orders. However, *in reviewing the child support order, the court will use the findings with respect to [Michael's] income which [were] stated above.*

(Emphasis added.)

¶4 The June 29, 2000 hearing was not held because periods of placement had not been finally resolved. However, the circuit court revisited the issue of child support in January 2001 after the parties reached an agreement as to placement. At the outset of the January 2001 hearing, Sheila sought to withdraw from the stipulation regarding Michael's earning capacity and income. She argued that the stipulation grossly underestimated Michael's earning capacity and that his income for child support purposes should be recalculated to include substantial imputed income and to account for Michael's substantial assets.

¶5 The circuit court rejected Sheila's contention that the stipulation had no continuing effect and concluded that the findings in the initial child support order remained binding on the issue of Michael's income, absent evidence of a substantial change in circumstances. The court then invited Sheila to present any evidence she had that might establish such a change. At that point, the hearing continued and there was extensive testimony concerning Michael's income and assets.

¶6 The evidence showed that Michael is a real estate investor and property manager, who is not otherwise employed for regular wages or a salary. It is undisputed that his net worth exceeded \$800,000 at the time of the paternity

proceedings. However, his gross income for federal income tax purposes fluctuates from year to year depending on the performance of his rental properties and on the return he obtains on other real estate transactions. Michael's accountant testified that Michael's adjusted gross income for 2000 was estimated at \$96,786. This represented a near tripling of his adjusted gross income from 1999, which had been \$36,647.¹

¶7 According to the accountant, nearly the entire amount of the increase in Michael's adjusted gross income could be attributed to Michael's real estate sales in 2000.² The sales generated over \$447,000 in gross proceeds, \$123,252 of which was recognized as a taxable capital gain.³ Then, to reach the final adjusted gross income of \$96,786, the capital gain was offset by various losses in other parts of Michael's business.

¶8 At the conclusion of the hearing, the circuit court found that there was no evidence that Michael had diverted income, that he held under-productive assets or that his business operations had changed to any great degree during the course of the paternity proceedings. Accordingly, adhering to the findings of the May 2000 order, the court determined that Michael's income for child support purposes was \$46,100 (*i.e.*, the sum of his \$30,000 earning capacity plus one-half

¹ Michael's adjusted gross income in 1997 was \$11,032. In 1998, it was \$26,577.

² In the accountant's words: "This is absolutely not a typical year. He messed up a like-kind [ex]change and he's going to pay dearly for it."

³ Michael and his accountant testified that the proceeds from the sale of the properties were used to pay off loans, purchase new properties and improve existing properties.

his declared depreciation).⁴ The final amount of child support owed was then calculated to reflect the terms of placement and custody. Nowhere in the circuit court's decision does it explain why the increase in Michael's adjusted gross income for 2000 over his stipulated income in 1999 was not sufficient to support Sheila's contention that there had been a substantial change in circumstances.

DISCUSSION

Standard of Review.

¶9 To determine the legal effect of the parties' stipulation regarding Michael's income, we must interpret the circuit court's May 2000 child support order. That is a question of law, which we review *de novo*. **Schultz v. Schultz**, 194 Wis. 2d 799, 805-06, 535 N.W.2d 116, 118-19 (Ct. App. 1995).⁵

¶10 We review a determination regarding whether there has been a change in circumstances sufficient to warrant a modification of child support as a mixed question of fact and law. **Benn v. Benn**, 230 Wis. 2d 301, 307, 602 N.W.2d 65, 68 (Ct. App. 1999). We will uphold the circuit court's findings regarding what changes have occurred unless those findings are clearly erroneous,

⁴ Michael's accountant testified that Michael's year 2000 depreciation was \$32,201. This represented an increase over the depreciation figure used in the May 2000 child support order. The circuit court used the larger figure for purposes of calculating Michael's income, an adjustment that ran in Sheila's favor.

⁵ Where we conclude upon our *de novo* review of a circuit court's order that the order is ambiguous, we will defer to the circuit court's construction of its own ambiguous language. **Schultz v. Schultz**, 194 Wis. 2d 799, 808, 535 N.W.2d 116, 120 (Ct. App. 1995). However, such deference does not apply in this case because, as explained below, we conclude that the relevant portion of the circuit court's order for child support is not ambiguous.

but we will determine *de novo* whether those changes amount to a substantial change in circumstances. *Id.*

The Stipulation.

¶11 Under Sheila's view of the case, the circuit court's May 2000 order was a temporary order for child support. From that starting point, she argues that even though she stipulated to Michael's income for purposes of the temporary order, she remained free to withdraw from the stipulation at the January 2001 hearing. She further contends that because she withdrew from the stipulation, the circuit court was obligated to determine Michael's income without reference to the stipulation, in accordance with WIS. STAT. § 767.25 (1999-2000)⁶ and WIS. ADMIN. CODE § DWD 40.03. Michael contends that the terms of the stipulation were binding because they were incorporated into a court order and because Sheila failed to prove a substantial change in circumstances.

¶12 The circuit court's May 2000 order is not ambiguous. It finds that Michael's income for child support purposes, per the stipulation, equals the sum of his \$30,000 earning capacity and one-half of the prior year's depreciation. It then states:

Said child support amount shall be reviewed ... and may be adjusted at that time due to a change in the physical placement orders. However, *in reviewing the child support order, the court will use the findings with respect to [Michael's] income which [were] stated above.*

⁶ All further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(Emphasis added.) The order makes clear that the only future adjustment to child support contemplated by the circuit court was an adjustment to account for the terms of placement. The findings of fact as to Michael's income were intended to be final findings, not merely those for purposes of an initial support order.

¶13 Because the circuit court incorporated the parties' stipulation into a child support order that was intended to be conclusive on the issue of Michael's income, we conclude that the circuit court conducted the proper inquiry. That is, to the extent Sheila sought to show that the findings of income in the support order were no longer accurate, she was required to show a substantial change in circumstances. *See* WIS. STAT. § 767.32(1)(a). Contrary to Sheila's argument, this case is easily distinguished from *Evenson v. Evenson*, 228 Wis. 2d 676, 686-87, 598 N.W.2d 232, 237 (Ct. App. 1999), where we held that a stipulation regarding property division in a divorce amounted to no more than an understanding of what the parties recommended to the court and did not bind the parties until it was incorporated into the judgment. Here, the circuit court's order transformed the parties' "recommendation" into the court's own findings of fact.

¶14 Further, this is not a case where the circuit court attempted to hold the parties to a stipulation that provided no opportunity for future review of the child support order. *See, e.g., Krieman v. Goldberg*, 214 Wis. 2d 163, 177-78, 571 N.W.2d 425, 432 (Ct. App. 1997) (holding that party paying child support "retains the ability, in spite of the stipulation agreement, to come back to the court and request a modification of the support agreement if there is a change in circumstances and the best interests of the children require a modification of the payment"); *Ondrasek v. Tenneson*, 158 Wis. 2d 690, 696-97, 462 N.W.2d 915, 918 (Ct. App. 1990) (holding that an unmodifiable waiver or ceiling on child support contained in a stipulation is against public policy). The transcript of the

January 2001 hearing demonstrates that the circuit court treated Sheila's attempt to withdraw from the stipulation as a motion to increase child support due to a substantial change in circumstances. The court expressly stated that it would consider a change in child support if Sheila made the proper showing.

Substantial Change in Circumstances.

¶15 A circuit court's power to modify child support is not the power to re-try issues determined in the original judgment, but rather to adapt the decree to some distinct and definite change in the financial circumstances of the parties or the children. *Beaudoin v. Beaudoin*, 2001 WI App 42, ¶6, 241 Wis. 2d 350, 625 N.W.2d 619 (citing *Severson v. Severson*, 71 Wis. 2d 382, 387, 238 N.W.2d 116, 120 (1976)). The statute governing modifications to child support orders 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. WIS. STAT. § 767.32(1)(c). Sheila relies on the first factor.

¶16 In this case, the circuit court's written order following the January 2001 hearing contains the following findings of fact relevant to a substantial change in circumstances analysis:

2. There is not a whole lot different in [Michael's] operation today than it was prior to any of these proceedings. [Michael] has been operating his business pretty much consistently down the line.

3. The court does not find any diversion of income by [Michael]. The court does not find that it is necessary to maintain the child at the economic level that he would enjoy otherwise under a standard imputing income for child support from [Michael's] assets. The

court does not find that the evidence supports a finding that his assets are under productive.

¶17 These findings address the question of whether Michael should be deemed to have imputed income above and beyond his actual earnings. *See* WIS. ADMIN. CODE §§ DWD 40.02(15) and 40.05. We conclude that the findings are not clearly erroneous, and we affirm the circuit court's conclusion that it should impute no additional income to Michael.⁷ However, the circuit court's conclusion regarding imputed income does not address the most significant evidence of a change in circumstances introduced at the January 2001 hearing: the increase in Michael's adjusted gross income from \$36,647 in 1999 to \$96,786 in 2000.⁸ Even without imputing income to Michael, that increase alone could justify a modification of the child support order. The fact of the increase is undisputed. There may have been reasons why the circuit court deemed the \$50,686 increase above Michael's stipulated income insufficient to meet the necessary showing. However, the court did not explain those reasons, nor did it state that the increase was insufficient to establish a substantial change in circumstances warranting a change in child support.

¶18 On the current record, we cannot determine whether, as a matter of law, the increase in Michael's adjusted gross income amounts to a substantial

⁷ We also affirm the circuit court's determination, stated orally on the record at the outset of the January 2001 hearing, that Michael's substantial net worth was known to the parties at the time they entered into the stipulation. It is not a new factor that would justify a change in the level of child support.

⁸ We note that under WIS. ADMIN. CODE § DWD 40.03, it is the payer's gross income available for child support, rather than *adjusted* gross income, that is the particularly relevant figure for purposes of determining child support. To the extent that Michael's gross income differs from his adjusted gross income in any relevant year, the circuit court should consider that difference on remand.

change in circumstances. The finder of fact could reasonably draw competing inferences about the significance of the increase from the testimony, including whether a sizeable portion of it was not spendable income but rather a recapture of depreciation earlier taken on the properties sold. In addition, the parties likely contemplated at the time of the stipulation that Michael's income would fluctuate to some extent. On the other hand, Michael's realized gains from his dealings in property are a component of "gross income" as that term is defined in WIS. ADMIN. CODE § 40.02(13). There is a sufficient foundation in the testimony for the inference that, as a result of these gains, Michael had a significant increase in gross income available for child support.⁹

¶19 Therefore, we conclude that the most appropriate course of action is to remand the cause to the circuit court. The relevant question on remand will be whether, under the totality of the circumstances, the difference between Michael's income as established in the May 2001 child support order and his year 2000 gross income available for child support represents a substantial change in circumstances warranting a change in child support. A key factual determination will be whether the full amount of Michael's year 2000 adjusted gross income should be counted as "gross income available for child support." *See* WIS. ADMIN. CODE §§ 40.02(13) and 40.03. If the circuit court determines that there was a substantial change in circumstances, it should exercise its discretion to determine

⁹ Michael's accountant prepared a "cash flow" statement that was apparently intended to show the effect of the real estate transactions on Michael's cash accounts in 2000. Determining whether this testimony is reliable and whether Michael used his year 2000 capital gains for business expenses reasonably necessary to the production of income or operation of the business are matters for the circuit court to decide and explain on remand.

the extent to which the child support award should be modified. *See Benn*, 230 Wis. 2d at 307, 602 N.W.2d at 68.

CONCLUSION

¶20 Because the parties' stipulation in regard to Michael's income had been incorporated into a court order for child support, we affirm the circuit court's conclusion that the stipulation was binding in the absence of proof of a substantial change in circumstances. However, we remand the cause for additional findings of fact and conclusions of law on the issue of whether the undisputed increase of Michael's gross income in 2000 above his stipulated income in 1999 amounts to a substantial change in circumstances warranting an increase in child support.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

