

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 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. 04-2078

Cir. Ct. No. 93FA000002

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

TERI S. CLARKSON (N/K/A TERI S. KLINE),

PETITIONER-RESPONDENT,

V.

DALE E. CLARKSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Taylor County:
GARY L. CARLSON, Judge. *Reversed and cause remanded.*

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Dale Clarkson appeals a post-divorce judgment order denying his motion for increased child support. The trial court held that Clarkson failed to establish the substantial change of circumstances necessary for

increased support. *See* WIS. STAT. § 767.32(1) (2003-04).¹ We conclude otherwise, and therefore reverse.

¶2 Clarkson and Teri Kline divorced in 1993 and have two minor children. They share legal custody. Over the years the parties have had different physical placement arrangements and several child support adjustments. Initially, Clarkson paid Kline support. In August 2001, the circuit court entered an order that neither party had to pay child support because each had primary physical placement with one child. Approximately four months later Clarkson became primary caretaker for both children. The parties stipulated that Kline's support obligation would be "\$588.20 per month, but not less than \$500.00 per month." Twenty percent of Kline's gross income was \$588.20, and the stipulation acknowledged that this constituted a deviation from the twenty-five percent that Kline would pay using the child support guidelines set by the Department of Health and Family Services. The circuit court approved the stipulation in January 2002.

¶3 In May 2004, Clarkson moved to increase support to twenty-five percent of Kline's gross income, pursuant to the guidelines. At the hearing he testified that he had been disabled with a back injury and unable to work at his prior employment since 1999. Until October 2002, he received \$1,880 per month in disability income. After that date he received \$810 per month. He had undergone back surgeries in 1999 and 2001, and further surgery was scheduled in July 2004. During his disability he had obtained a technical college degree in

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

computer science, but he had not yet obtained employment in that field. He testified that his upcoming surgery would prevent any employment for several more months, while he recuperated.

¶4 Clarkson also testified that he had agreed to hold support at twenty percent of Kline's gross income because she needed the additional five percent of her income to qualify for a home loan. When he so stipulated he knew that his disability income would decrease in October 2002, but at the time he expected to replace that loss with employment income. At the time of the hearing in June 2004, Kline's income had not substantially changed since January 2002.

¶5 The trial court denied increased support. The court determined that Clarkson had failed to show a substantial change of circumstances because he was aware in January 2002 that his income would soon drop to \$810 per month. This appeal results from that determination.

¶6 The material facts in this case are not in dispute. Consequently, whether Clarkson demonstrated a substantial change of circumstances is a question of law, which we review de novo. *See Benn v. Benn*, 230 Wis. 2d 301, 307, 602 N.W.2d 65 (Ct. App. 1999).

¶7 WISCONSIN STAT. § 767.25(1n) provides that if the child support order deviates from the percentage standard established under WIS. STAT. § 767.25(1j), the court must state on the record the reasons for the deviation. If the court has not done so, its failure in that regard creates "a rebuttable presumption of a substantial change in circumstances sufficient to justify a revision of a judgment or order" in an action to modify support. Section 767.32(1)(b)4.

¶8 In this case the court did not make the necessary findings under WIS. STAT. § 767.25(1n). Consequently, Clarkson was entitled to the presumption that the circumstances have substantially changed. Kline did not present evidence rebutting that presumption, and that fact alone requires reversal.

¶9 Additionally, the evidence Clarkson presented establishes a substantial change of circumstances even without the presumption. His income had decreased by more than half since the prior order. Although Clarkson anticipated the reduction, he did not expect it would be prolonged by his lack of employment and continued health problems. A change of income that is expected does not justify a modified award. See *Hefty v. Hefty*, 172 Wis. 2d 124, 134-35, 493 N.W.2d 33 (1992). However, Clarkson's loss of income had lasted longer than expected.

¶10 Clarkson also contended that circumstances had substantially changed because the children's expenses had increased. Other than some minimal school athletic fees, Clarkson did not specify any amounts, nor substantiate his conclusory assertions of other increased expenses. He did not establish a substantial change of circumstances on that basis.

¶11 Once a party has established a substantial change of circumstances, the trial court retains discretion to set the modified level of support. See *Sellers v. Sellers*, 201 Wis. 2d 578, 585, 549 N.W.2d 481 (Ct. App. 1996). We remand for that discretionary determination.

By the Court.—Order reversed and cause remanded.

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

