COURT OF APPEALS
DECISION
DATED AND RELEASED

March 14, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2839-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

CARL J. SWENEY,

Petitioner-Appellant,

v.

PHYLLIS J. SWENEY,

Respondent-Respondent.

APPEAL from an order of the circuit court for Columbia County: DANIEL S. GEORGE, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Carl J. Sweney appeals from an order denying his motion to reduce child support.[1] The issue is whether the trial court

[1] This is an expedited appeal under RULE 809.17, STATS.

erroneously exercised its discretion when it concluded that there was no substantial change in circumstances. Because we conclude that it did not, we affirm.

As part of the Sweneys' comprehensive divorce settlement, Carl agreed to pay to his former spouse, Phyllis, twenty-nine percent of his gross base earnings, exclusive of overtime and bonus income, as support for the parties' three children.[2] At that time the parties contemplated equal periods of physical placement. Two years later, Carl moved to reduce child support, contending that he is entitled to the rebuttable presumption of § 767.32(1)(b)4, STATS.,[3] ("statutory presumption") of a substantial change in circumstances. He sought a reduction because: (1) the child support standards had been revised since the divorce; and (2) various factual changes had occurred. The trial court denied Carl's motion and he appeals.

Carl contends that the trial court's analysis is fundamentally flawed because it failed to apply the statutory presumption which would shift the burden of proving a substantial change in circumstances to Phyllis. However, Carl's criticism stresses form over substance. Despite its failure to expressly refer to the statutory presumption, the court found facts and concluded that some of the changes offset one another, and others were "no more onerous for one parent than the other." Those conclusions could only be reached because the court found that Phyllis rebutted much of Carl's testimony. We conclude that the court's failure to expressly refer to the statutory presumption in light of its memorandum decision does not, in and of itself, constitute an erroneous exercise of discretion.

Carl believes that he should receive a reduction in his support payments because he is a shared-time payer under the recently revised child support standards. WIS. ADM. CODE § HSS 80.04(2)(c). However, the evidence

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[2] That comprehensive settlement agreement also precluded: (1) Carl from seeking child support payments from Phyllis; and (2) Phyllis from seeking maintenance. Phyllis also received a disproportionately large share of the marital estate as her property division.

[3] Section 767.32(1)(b)4, STATS., creates the rebuttable presumption of a substantial change in circumstances, justifying a revision in child support, if there is "[a] difference between the amount of child support ordered by the court to be paid by the payer and the amount that the payer would have been required to pay based on the percentage standard . . . ."

shows that the amount of time the children spend with Carl has not changed since the divorce. The trial court noted that "a change in the administrative rules concerning child support guidelines does not meet the criteria of demonstrating a substantial change of factual circumstances." We agree because revision of a support award generally is based on a change in factual, not legal, circumstances. *See* ***Severson v. Severson,*** 71 Wis.2d 382, 386, 238 N.W.2d 116, 119-20 (1976) ("The judgment entered on a certain state of facts is thus given the effect of *res adjudicata* so long as that factual situation has not materially changed."); § 767.32(1)(a), STATS.

Carl also testified about the following factual changes: (1) the children's expenses have increased; (2) he now furnishes the oldest child with a car and insurance; (3) his employer now requires him to contribute to his monthly health insurance premium; (4) Phyllis's annual federal and state earned income credit has increased; and (5) Phyllis's live-in friend contributes financial support to Phyllis and the children. However, the trial court concluded that Phyllis refuted some of Carl's contentions altogether, and on the others, it concluded that these changes were not sufficiently substantial to warrant a reduction in support.

By the Court.—Order affirmed.

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