

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 19, 2004

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. 03-2110
STATE OF WISCONSIN**

Cir. Ct. No. 00FA000006

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

LISA R. STEENO,

PETITIONER-RESPONDENT,

STATE OF WISCONSIN,

RESPONDENT,

v.

JOSEPH L. STEENO,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County:
THOMAS G. GROVER, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Joseph L. Steeno appeals a circuit court order modifying child support. Steeno argues that equitable estoppel is a viable defense in child support proceedings and should have been applied here to prevent his ex-wife, Lisa R. Steeno, from moving to modify child support. We agree with Joseph that equitable estoppel is available in child support cases but disagree that it applies here. We also conclude that there was a substantial change in circumstances warranting a change in Joseph's child support obligation. We affirm the order of the circuit court.

FACTS

¶2 Joseph and Lisa commenced a divorce proceeding on January 4, 2000. While the divorce was pending, Joseph and Lisa entered into a Stipulation and Order for child support; the Stipulation and Order stated that Joseph was to pay Lisa \$82.50 per month in child support, or \$38.08 biweekly. The Stipulation and Order for Child Support further provided

The parties further stipulate and agree that this amount is in conformity with the percentage guidelines with shared placement taking into consideration the amount of time that the minor child spends with both parents and the earnings of both respective parents.

The Final Judgment of Divorce, dated August 16, 2000, incorporated a Marital Settlement Agreement and provided

[i]n recognition of the shared physical placement agreement, the respondent shall pay to the petitioner \$82.50 per month towards the support of the parties' minor child. Such payment shall commence immediately on the granting of the divorce. This order is in compliance with the state child support shared placement percentage standard based upon the respective incomes of the parties.

¶3 Three years later, on March 26, 2003, upon Lisa's application, the Shawano County Child Support Agency moved for modification of child support. Lisa's affidavit, submitted in support of the motion, indicated that at least 33 months had passed since the support order was last modified and Joseph's income had substantially increased, thus enabling him to pay an increased amount of child support.

¶4 At the hearing held on Lisa's motion, Joseph argued that Lisa was equitably estopped from challenging the current child support order and from arguing that the current order was no longer in compliance with the percentage guidelines based upon shared placement. The circuit court granted Lisa's motion to modify child support, implicitly rejecting Joseph's equitable estoppel argument. Joseph appeals.

DISCUSSION

¶5 Joseph first argues that equitable estoppel is a viable defense in child support proceedings. We agree. *See A.M.N. v. A.J.N.*, 141 Wis. 2d 99, 105, 414 N.W.2d 68 (Ct. App. 1987) (equitable estoppel is available for use in Wisconsin child support proceedings). However, we do not agree that equitable estoppel applies in this case.

¶6 To determine whether equitable estoppel applies we are required to construe the stipulation agreement. *Krieman v. Goldberg*, 214 Wis. 2d 163, 173, 571 N.W.2d 425 (Ct. App. 1997). A stipulated divorce agreement is a contract between the parties and the construction of a written contract is a question of law which we review de novo. *Id.* We conclude that the stipulation agreement does not limit either party's ability to seek modification of child support.

¶7 The stipulation agreement governing child support is clear and unambiguous. In the context of this case, the stipulation is more significant with respect to what it *does not* say than what it does say. Joseph claims the parties crafted the stipulation based on what they believed were “overnight equivalents” in conformance with the shared-placement formula of WIS. ADMIN. CODE § DWD 40.02(25). However, the stipulation makes no reference to “overnight equivalents.” Rather, the stipulation specifically states that child support is set at a level “in recognition of the *shared placement* agreement” and that the order was in compliance with the “state child support shared placement percentage standard” based on the parties’ incomes. Furthermore, the stipulation does not bar Lisa from seeking modification of child support based on a substantial change in circumstances.

¶8 We conclude that Lisa is not barred from seeking modification of Joseph’s child support obligation because the stipulation agreement unambiguously and plainly does not impose any limits on Lisa’s ability to seek modification of child support. Therefore we need not consider the four factors under *Ondrasek v. Tenneson*, 158 Wis. 2d 690, 694-95, 462 N.W.2d 915 (Ct. App. 1990) to determine whether Lisa is equitably estopped from pursuing modification of the previous child support order.

¶9 We now consider whether there was a substantial change in circumstances warranting modification of child support and whether the circuit court erroneously exercised its discretion in modifying child support. We conclude there was a substantial change in circumstances and that the circuit court properly exercised its discretion in modifying child support.

¶10 The decision to modify child support is left to the circuit court's discretion. *Rottscheit v. Dumler*, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525. Under WIS. STAT. § 767.32(1)(a) (2001-02),¹ revision to a child support judgment “may be made only upon a finding of a substantial change in circumstances.” The burden of showing that there has been a change in circumstances sufficient to justify a modification falls to the party seeking modification. *Rottscheit*, 262 Wis. 2d 292, ¶11. Unless the circuit court has erroneously exercised its discretion, the decision will not be overturned. *Id.* As we have noted, “[a]ll that is required for us to affirm a trial court's exercise of discretion is a demonstration that the court examined the evidence before it, applied the proper legal standards and reached a reasoned conclusion.” *Voecks v. Voecks*, 171 Wis. 2d 184, 189, 491 N.W.2d 107 (Ct. App. 1992). Even if a circuit court fails to articulate the reasons for its decision, we will independently review the record to determine whether there is any reasonable basis upon which we may uphold the circuit court's discretionary decision. *Rottscheit*, 262 Wis. 2d 292, ¶11.

¶11 Lisa brought her motion to modify child support more than thirty-three months after the date the previous child support order was entered. WIS. STAT. § 767.32(1)(b) establishes a rebuttable presumption of a substantial change in circumstances justifying a revision of child support² after thirty-three months

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² The parties do not dispute that more than thirty-three months have passed since the last order of child support was entered. Furthermore, the child support order was a fixed order rather than a percentage order. This is significant because under WIS. STAT. § 767.32(1)(b)2 the rebuttable presumption of a significant change in circumstances created by the lapse of thirty-three months from the date of the previous order would not apply if the child support order was a percentage order.

have expired since the date of the previous child support order. *Also Rottscheit*, 262 Wis. 2d 292, ¶17. Because the parties do not dispute that thirty-three months have passed since the previous child support order, we conclude the circuit court properly exercised its discretion in granting Lisa's motion to modify child support.

¶12 The circuit court also properly found there was a substantial change in circumstances based on a 10% increase in Joseph's income from the date of the previous child support order. Joseph concedes his income increased by 10% since the previous child support order was entered. We will not disrupt a circuit court's decision to modify child support where the circuit court rationally exercises its discretion. *Voecks*, 171 Wis. 2d at 189. Because the court's decision is well grounded in the record and because Joseph does not dispute that finding, we conclude the circuit court reasonably concluded that a 10% increase in Joseph's income from the date of the previous child support order constituted a substantial change in circumstances.

¶13 Finally, we agree that the record supports Joseph's claim that he spends more time with the minor child as compared to when the judgment of divorce was entered. The record shows that Joseph spends 137 overnights a year with Alexander. The original stipulated agreement arranged for Alexander to be with his father for 104 overnights. However, simply because Joseph spends more time with Alexander does not mean there may be no increase in child support when other facts support an increase. Based on the 137 overnights with Alexander, Joseph's gross annual income of \$34,994 and by applying WIS. ADMIN. CODE § DWD 40.02(2), the court properly determined that Joseph should pay Lisa child support in the amount of \$380 per month. We conclude there is no basis to upset the court's decision to increase Joseph's child support obligation from \$82.50 per month to \$380 per month.

CONCLUSION

¶14 We agree with Joseph that the doctrine of equitable estoppel is available in child support modification cases but we disagree that it should be applied here. Because of the substantial changes in circumstances, the circuit court was within its discretion to modify child support. We therefore affirm the order of the circuit court.

By the Court.—Order affirmed.

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