

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 16, 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.

No. 00-3365

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**SANDRA L. MATTSON, MICHAEL A. PETERSON, AND
NANCY A. PETERSON,**

PETITIONERS,

POLK COUNTY,

PETITIONER-APPELLANT,

v.

ROGER M. PETERSON,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Polk County:
JAMES R. ERICKSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Polk County Child Support Agency appeals from an order denying its motion to modify Roger Peterson's child support

obligation. The agency argues that the trial court erroneously exercised its discretion by denying its motion. Specifically, the agency contends that the trial court erred by (1) failing to conclude that Peterson had hidden additional income; and (2) refusing to consider rental income for purposes of calculating Peterson's child support obligation. We reject these arguments and affirm the order.

¶2 In August 1995, a child was born to Peterson and Sandra Mattson. In March 1999, the agency filed a petition for child support against Peterson, resulting in an initial child support order of \$209 per month. In July, the agency filed a motion to modify the child support order, alleging that Peterson had failed to disclose \$450 per month in rental income and cash payments received for various contracting jobs. The trial court denied the motion to modify child support and this appeal followed.

¶3 Generally, we review modification of child support under the erroneous exercise of discretion standard. *Jacquart v. Jacquart*, 183 Wis. 2d 372, 381, 515 N.W.2d 539 (Ct. App. 1994). A circuit court may modify child support if there has been a substantial or material change of circumstances of the parties or the children. *See Poehnelt v. Poehnelt*, 94 Wis. 2d 640, 648-49, 289 N.W.2d 296 (1980). This determination is measured by the needs of the custodial parent and children and the ability of the noncustodial parent to pay. *See Burger v. Burger*, 144 Wis. 2d 514, 523-24, 424 N.W.2d 691 (1988). The burden of demonstrating a substantial change in circumstances, however, is on the party seeking modification. *Kelly v. Hougham*, 178 Wis. 2d 546, 556, 504 N.W.2d 440 (Ct. App. 1993).

¶4 Here, it is undisputed that Peterson was employed by his parents' excavating company. At the motion hearing, the agency presented witnesses to

support its allegations that Peterson (1) received undisclosed cash payments for various private contracting jobs; (2) benefited from free use of company equipment; and (3) received cash “under the table” to supplement his hourly wage. In turn, Peterson testified that in addition to his employment with his parents’ company, he rented company equipment to do some private contracting jobs and disclosed payments for these jobs to the best of his knowledge. Likewise, Peterson’s mother testified that Peterson did not have free use of company equipment, nor was he paid cash “under the table” in addition to his hourly wage.

¶5 The trial court ultimately refused to impute any additional income to Peterson. It concluded that Peterson was not shirking and had no other present income to consider “except the rental income.” The trial court is the sole arbiter of the witnesses’ credibility. Thus, when more than one reasonable inference can be drawn from the evidence, we must accept the inference drawn by the trial court. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). Based on the record, we conclude that the trial court reasonably refused to impute income to Peterson.

¶6 With respect to the rental income, the court took judicial notice of other pending litigation between Peterson and Mattson regarding ownership of the rental property as well as entitlement to rental proceeds. The court, concluding that the other pending litigation properly framed the issues of ownership between the same two parties, declined to include the rental income for child support purposes. The court noted that “two judges ought not be struggling to resolve the same issues between the same parties,” and further, expressed its desire to avoid the possibility of conflicting orders. We therefore conclude that the trial court reasonably refused to prematurely consider the rental income for purposes of calculating child support.

¶7 Because the agency failed to establish a substantial or material change of circumstances of either the parties or the child, we conclude that the trial court did not erroneously exercise its discretion by denying the agency's motion to modify Peterson's child support obligation.

By the Court.—Order affirmed.

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

