

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2003

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. 02-1067
STATE OF WISCONSIN

Cir. Ct. No. 00-FA-952

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

JANET CASPERS, F/K/A JANET BAIKIE,

PETITIONER-APPELLANT,

V.

BRUCE D. BAIKIE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Reversed.*

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

¶1 PER CURIAM. Janet Caspers appeals an order reducing Bruce Baikie's child support obligation. Caspers argues the trial court erred by

finding a substantial change in circumstances pursuant to WIS. STAT. § 767.32(1)(a).¹ We agree and reverse the order.

¶2 Caspers and Baikie were divorced by stipulation approved by the circuit court on March 1, 2001. Pursuant to the agreement, Caspers was granted sole legal custody and primary physical placement of their minor child. Baikie agreed to pay \$2,500 per month in child support. He also agreed to place twenty percent of any bonus he received into a custodial account for the child's college expenses.

¶3 On April 5, 2001, Baikie filed a motion for revision of the judgment, seeking to reduce his child support obligation from \$2,500 to \$935 per month. After a hearing, the trial court reduced Baikie's child support obligation to \$1,706 per month. Baikie moved for reconsideration before the trial court's oral decision was reduced to a written order. Following a hearing on Baikie's reconsideration motion, the trial court further reduced Baikie's child support obligation to \$1,000 per month. This appeal follows.

¶4 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*,

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

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). Further, a change in circumstances must have been “unforeseen at the time the divorce judgment was entered.” *Ondrasek v. Tenneson*, 158 Wis. 2d 690, 695, 462 N.W.2d 915 (Ct. App. 1990).

¶5 Here, Baikie claims that the loss of his \$3,400 per month draw constituted a substantial change in circumstances.² Baikie’s financial disclosure statement listed his monthly gross income as \$15,390—consisting of a monthly \$11,990 salary plus a \$3,400 “draw” that the disclosure statement indicated was “NOT GUARANTEED.”

¶6 The stipulated settlement agreement provides, in relevant part:

- A. Until further order of the court, [Baikie] shall pay [Caspers] child support at the rate of \$2,500.00 per month as and for support of the parties’ minor child.
- B. Until further order of the court, [Baikie] shall pay twenty percent (20%) of any and all IB bonus or equivalent received. The 20% shall be calculated

² Before the trial court, Baikie raised three additional issues to justify the reduction in his child support obligation. In addition to the reduction in his monthly compensation, Baikie argued that the cost of living in California was much higher than in Wisconsin and he was now supporting a new wife and child. Baikie also emphasized the cost of travel to see his daughter in Wisconsin.

On appeal, Baikie claims he never argued before the trial court that the differential cost-of-living, support of a new wife and child and travel expenses to Wisconsin constituted a substantial change in circumstances pursuant to WIS. STAT. § 767.32(1)(a). Baikie claims, rather, that these factors were considered by the court, in light of the reduction in his monthly compensation, to calculate his reduced child support obligation. In any event, we conclude that these factors were either in existence or contemplated by the parties at the time of the marital settlement agreement and thus do not constitute a “substantial change in circumstances” pursuant to WIS. STAT. § 767.32(1)(a).

prior to any income taxes being withheld. The 20% shall be deposited by [Baikie] into a mutual fund custodial account for the minor child ... for college fund/expenses. [Baikie] shall supply to [Caspers] on a yearly basis all wage statements reflecting payments of bonuses for verification.

Despite the agreement's acknowledgment that Baikie was to pay twenty percent of "any and all IB Bonus or equivalent received," Baikie attempts to distinguish between the IB draw and the IB bonus. Baikie claims that the loss of his "draw" was not the loss of a "bonus" pursuant to the agreement, but rather, the loss of salary upon which the original child support agreement was based. Baikie's claim, however, is not supported by the record.

¶7 An April 24, 2001, letter to Baikie from his employer confirmed the following information about Baikie's employment:

Date of Employment: 4/20/94 (adjusted service date)
 Present Position: Manager Business Development
 Base Pay: \$145,000/year
 Overtime: \$0
 Incentive Bonus: \$0

As we discussed, you were not eligible to participate in the Incentive Bonus Plan as of 1/1/01. Unfortunately, you continued to receive the Incentive Bonus Plan payment due to a Payroll error. In fact, you were paid a total of \$10,200 in error. (This amount includes payment of a \$3,400 draw per month for January, February, March, 2001).

¶8 The employer makes no distinction between the IB draw and the IB bonus. Rather, the letter clarifies that Baikie was "not eligible to participate in the Incentive Bonus Plan" and instructs Baikie to repay the \$3,400 draw for the months of January through March.

¶9 Even, however, were we to conclude that Baikie’s IB draw is distinguishable from his IB bonus and somehow constituted a portion of the salary upon which the original child support agreement was based, Baikie’s financial disclosure statement, noting that the draw was “not guaranteed,” evinces Baikie’s recognition that the loss of this portion of his “salary” was foreseeable. Thus, when Baikie agreed to pay \$2,500 per month, it was with the knowledge that he might not receive the draw. Because the loss of Baikie’s draw was contemplated by the parties at the time of the stipulated agreement, we conclude the trial court erroneously exercised its discretion by finding a substantial change in circumstances.³

By the Court.—Order reversed.

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

³ We do not discuss the alternative argument advanced by Caspers. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (only dispositive issues need be addressed).

