

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 20, 2010**

David R. Schanker  
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. 2009AP117**

**Cir. Ct. No. 1998FA962**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN RE THE MARRIAGE OF:**

**RAMONA A. REISER P/K/A RAMONA A. BENVENUTO,**

**PETITIONER-RESPONDENT,**

**V.**

**ANTHONY C. BENVENUTO,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County:  
PAUL F. REILLY, Judge. *Affirmed.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Anthony C. Benvenuto has appealed from an order denying his motion for a reduction in child support for his two sons, and requiring him to pay \$4015 in orthodontia expenses. We affirm the trial court's order.

¶2 This court reviews a trial court order denying a motion to modify child support under an erroneous exercise of discretion standard. *Rottscheit v. Dumler*, 2003 WI 62, ¶11, 262 Wis. 2d 292, 664 N.W.2d 525. Except as provided in WIS. STAT. § 767.59(1f)(d) (2007-08),<sup>1</sup> modification of child support may be made only upon a finding of a substantial change in circumstances. *Rottscheit*, 262 Wis. 2d 292, ¶11; § 767.59(1f)(a). The burden of establishing a substantial change in circumstances falls to the party seeking modification. *Rottscheit*, 262 Wis. 2d 292, ¶11. This court will affirm the trial court's exercise of discretion if it examined the evidence before it, applied the proper legal standards, and reached a reasonable conclusion. *Id.*

¶3 Pursuant to a stipulation and order amending the parties' judgment of divorce in 2002, Benvenuto was required to pay child support of \$1000 per month. In seeking modification of that order, Benvenuto testified that although he had been employed as a truck driver with the same company for the past six years, his income had been reduced because of a bad economy.<sup>2</sup> He relied upon a pay stub indicating that his gross income as of September 14, 2008, was \$29,193.30. He contended that this extrapolated to an expected annual income of \$39,948.72 for 2008. Applying a child support percentage standard of 25%, Benvenuto contended that child support should be reduced to \$832.25 per month.

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<sup>1</sup> The statute governing revision of child support previously constituted WIS. STAT. § 767.32 (2003-04). It now constitutes WIS. STAT. § 767.59 (2007-08). All future references to the Wisconsin statutes are to the 2007-08 version.

<sup>2</sup> Benvenuto filed his motion to reduce child support after the respondent, Ramona A. Reiser, filed a motion to increase child support. Reiser's motion was also denied.

¶4 A change in a party's income may constitute a substantial change in circumstances. *Id.*, ¶18; WIS. STAT. § 767.59(1f)(c)1. A trial court's determination as to a party's income is a finding of fact that we will not disturb unless it is clearly erroneous. *DeLaMatter v. DeLaMatter*, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989).

¶5 In this case, the trial court considered evidence that Benvenuto had gross earnings of \$53,580 in 2006 and \$49,218 in 2007. It accepted Benvenuto's argument that extrapolating from his September 2008 pay stub would produce an income for 2008 of \$39,948.<sup>3</sup> However, rather than accepting Benvenuto's argument that his income should be deemed to be \$39,948 for purposes of calculating child support, the trial court considered his income over the three-year period between 2006 and 2008, and arrived at an average annual income of \$47,582. Because application of the 25% child support standard to this figure produced a monthly child support award of \$991, the trial court concluded that no substantial change in circumstances had occurred justifying a modification of support.

¶6 Trial courts may consider income history in determining income for child support purposes. *Cf. DeLaMatter*, 151 Wis. 2d 588-90 (trial court properly considered payer's history of overtime and sideline work in determining income.) Thus, the trial court in this case was not compelled to accept that child support had to be based on a figure of \$39,948. Rather, the trial court stressed the vagaries of the trucking industry, the business of which is fluid rather than constant. The trial

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<sup>3</sup> The trial court initially arrived at a figure of \$42,168 when extrapolating from Benvenuto's pay stub, but utilized Benvenuto's figure of \$39,948 when denying his motion for reconsideration.

court determined that averaging the past three years of Benvenuto's income would more realistically portray his earnings as a trucker. It was not an erroneous exercise of the court's discretion to employ this rationale. We realize that the economy is sour at the moment and that this may be reflected by less traffic in the trucking industry. If the downturn persists and the trucking industry remains depressed for a longer period of time, Benvenuto may come back to court and show the tribunal that the pattern of wages in the trucking industry is now indeed a lower sum over the long haul instead of a momentary economic correction.

¶7 Benvenuto's challenge to the trial court's order requiring him to pay \$4015 for orthodontia expenses also fails. This sum represented one-half of the orthodontia expenses for his two sons. The trial court ordered him to pay it pursuant to a provision in section IV. B. of the parties' marital settlement agreement (MSA), which states that the parties "shall split equally the liability for all hospital, medical, dental, and related expenses not covered by insurance for each of the minor children."

¶8 Benvenuto contends that he should not be required to pay the orthodontia fees because Reiser failed to request mediation after he objected to the orthodontia treatment. However, Benvenuto's contention that mediation is required fails under the plain language of the MSA, which provides in section I. D. that "[i]n the event any disputes arise as to custody or physical placement, either party may request the family court commissioner to refer the matter to the director of family court counseling services for mediation." This section of the MSA is captioned "CUSTODY AND PHYSICAL PLACEMENT." Since a dispute over payment of orthodontia expenses is not a dispute over custody or physical placement, this provision is inapplicable.

¶9 Benvenuto also contends that the award must be set aside because no expert testimony was presented to establish that the orthodontia expenses were medically necessary. He contends that Reiser provided impermissible hearsay testimony when she testified that the children’s dentist recommended orthodontics based on the shape of one son’s palate and overcrowding in both children’s mouths. He also objects to Reiser’s testimony that she took the children to an orthodontist, who concurred with the dentist’s opinion.

¶10 The record indicates that Benvenuto objected to Reiser’s testimony about the orthodontist’s opinion on hearsay grounds, and that the trial court sustained his objection. However, the lack of expert testimony provides no basis for reversing the trial court’s award. As noted by the trial court, the MSA required the parties to split equally “the liability for all hospital, medical, dental, and related expenses not covered by insurance.” Nothing in this provision required either party to submit expert proof of medical necessity for each medical, dental, or related expense. Moreover, the MSA plainly and expressly establishes liability for “medical, dental, and related expenses” of the children that are not covered by insurance. Because orthodontia bills for teenage children are a dental-related expense, the trial court properly ordered Benvenuto to pay half of the cost.

*By the Court.*—Order affirmed.

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

