

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 10, 2009**

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. 2007AP2567**

**Cir. Ct. No. 1995FA131**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**LAURA A. THALACKER,**

**PETITIONER-RESPONDENT,**

**V.**

**JOHN G. THALACKER, JR.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Dunn County:  
WILLIAM C. STEWART, JR., Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. John Thalacker, Jr., appeals from an order revising child support arrears. John argues he is entitled to additional credits. We reject his arguments and affirm.

¶2 John and Laura Thalacker were divorced on January 21, 1998. They had four minor children. Laura was awarded primary placement and John was ordered to pay 29% of his gross income for child support.

¶3 Shortly after the divorce was final, the parties began cohabitating. They resided together with the children from October 1999 through August 2005, although they did not remarry. Neither party sought modification of the child support order.

¶4 In December 2005, the child support agency filed a motion to modify John's percentage support obligation to a fixed sum on the basis that only one child was still a minor. The court ordered the support obligation revised from a percentage standard to the fixed sum of \$515 monthly, and also ordered reconciliation of arrears. Evidentiary hearings were held on December 19, 2006, and May 25, 2007. The circuit court issued a written decision on August 6, 2007, which credited John for the percentage child support reduction that would have applied upon the children's respective emancipation dates. The court also credited John for certain contributions he made for the years 2001 through 2005.

¶5 John argues on appeal he should have received additional credit. He first contends he was entitled to credit for "payments made directly to Laura" between August 27, 2000, and May 10, 2004. John relies upon trial exhibit one, consisting of sixteen photocopied checks or check receipts varying between \$16 and \$450, in the total amount of \$2,670. John insists that, because Laura could not recall what the payments were for, the court erred by not awarding him credit for those amounts.

¶6 John also claims he made \$250 monthly payments to Laura as a contribution to rent from November 2004 to July 2005. John contends he

provided “some documentation to support those payments.” John argues he was entitled to credit for those payments in the total amount of \$2,250.

¶7 A circuit court may retroactively revise child support under the limited circumstances specified in WIS. STAT. § 767.59(1r)(b)-(f).<sup>1</sup> Subsection (b) permits the court to grant credit if:

The payer shows by documentary evidence that the payments were made directly to the payee by check or money order, and shows by a preponderance of the evidence that the payments were intended for support and not intended as a gift to or on behalf of the child, or as some other voluntary expenditure, or for the payment of some other obligation to the payee.

¶8 Here, Laura testified that only one of the sixteen checks identified in exhibit one “may have been” for support. The circuit court also specifically noted John had no earnings subject to social security withholding during 1999, and in 2000 his earnings were less than \$1,200. The court found, “The respondent’s purported contributions to the household during 1999 and 2000 exceed his reported taxable income.” The court also found John had a side business repairing vehicles. Laura testified that John wrote her checks for purposes other than support, including “if there was [sic] parts that needed to be picked up, things like that, I would run and do that and he would write me a check to cover it.” The court concluded

both parties have failed to retain and present, as evidence in this case, sufficient evidence so as to accurately reflect to the Court the nature and extent of each party’s contribution

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<sup>1</sup> References to Wisconsin Statutes are to the 2007-08 version unless otherwise noted. WISCONSIN STAT. § 767.32(1r) (2003-04), was recodified as § 767.59(1r) (2005-06). Because the parties use the recodified statutes, we refer to § 767.59(1r) throughout.

towards the support of the minor children during the years in question....

¶9 The court’s findings are not clearly erroneous.<sup>2</sup> WIS. STAT. § 805.17(2). The court was not required to accept John’s characterization of the payments. The circuit court is the ultimate arbiter of witnesses’ credibility. *Cogswell v. Robertshaw Controls*, 87 Wis. 2d 243, 249, 274 N.W.2d 647 (1979). The court did not err in concluding John failed to satisfy his burden of proving the alleged direct payments were intended for support and not for some other purpose. *See* WIS. STAT. § 767.59(1r)(b).

¶10 John also argues he was entitled to additional credits for expenditures for household supplies, and for the purchase and repair of vehicles Laura and the children used during the period of cohabitation. WISCONSIN STAT. § 767.59(1r)(c) requires the payer prove by “clear and convincing evidence, with evidence of a written agreement, that the payee expressly agreed to accept the payments in lieu of child ... support....” The child support agency responds in its brief, “There was no evidence of a written agreement offered by Mr. Thalacker.” John did not file a reply brief and this argument is thus unrefuted. Unrefuted arguments are deemed admitted. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). The circuit court did not err in concluding John failed to satisfy his burden of proof.

¶11 Finally, John argues he was entitled to credit for “shared placement”<sup>3</sup> during the period of cohabitation following the divorce. This

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<sup>2</sup> The Social Security Administration records demonstrate John’s FICA earnings for 1990 were \$0 and for 2000 were \$1,182.

<sup>3</sup> The parties’ decision to cohabit does not constitute shared placement as set forth in WIS. ADMIN. CODE § DWD 40.04(2) (2007).

argument is difficult to discern, but essentially John urges this court to apply portions of WIS. STAT. § 767.59(1r)(e) and (f).

¶12 WISCONSIN STAT. § 767.59(1r)(f) permits the court to grant credit against arrears if the payer proves by a preponderance of the evidence “that the payer and payee resumed living together” with the children and, during the period for which a credit is sought, “the payer directly supported the family by paying amounts at least equal to the amount of unpaid court-ordered support that accrued during that period.” John concedes he did not prove payments “at least equal to the amount of unpaid court-ordered support that accrued during that period.” Nevertheless, he argues “simply because John may not have retained documentation to show his contribution under (f), it should not mean that he is not entitled to have his credit adjusted via application of (e).”

¶13 John’s argument has no merit. WISCONSIN STAT. § 767.59(1r)(e) contemplates credit when “the child lived with the payer.” This means living with John instead of with Laura. That was not the situation here. Rather, the parties “resumed living together,” thus invoking the provisions of subsection (f). John insists, “Nothing in the statute indicates that (e) and (f) can’t both apply to a situation.” John would have this court apply both subsections, but without subsection (f)’s requirement of payments “at least equal to the amount of unpaid court-ordered support that accrued during that period.” This we will not do, because John offers no legal analysis to support his position.

*By the Court.*—Order affirmed.

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

