

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 16, 2002

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. 01-2686
STATE OF WISCONSIN**

Cir. Ct. No. 93-PA-56

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE PATERNITY OF ERIN M.R.:

**STACY S. AND THE STATE OF WISCONSIN,
PETITIONERS-RESPONDENTS,**

v.

**BRIAN R.,
RESPONDENT-APPELLANT.**

APPEAL from an order of the circuit court for Shawano County:
THOMAS G. GROVER, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

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

¶1 PER CURIAM. Brian R. appeals from a portion of a circuit court order refusing to grant Brian credit against a child support obligation and child

support lien.¹ Brian argues that the court erroneously refused to grant him over \$23,000 in credit toward his child support obligation. We affirm the court's decision to deny Brian credit for child support imposed pursuant to a 1993 order and reinstated in a 1996 order. However, because the court did not make findings of fact or explain the reasoning for its exercise of discretion with respect to credit for time Brian lived with Stacy S. and for the \$1,024 he paid her directly, we reverse and remand that portion of the order with directions that the court make findings and explain the reasoning behind its exercise of discretion. Finally, because the State concedes that Brian is entitled to a credit of \$109.83 for a three-day period of time he continued to live with Stacy, we direct the court on remand to grant Brian a credit of \$109.83.

STATEMENT OF FACTS

¶2 Brian and Stacy, who were never married, are the parents of Erin R. and Brandon S., born in April 1993 and November 1994, respectively. In August 1993, after Erin's birth, the State filed a petition to establish paternity. In addition to seeking a determination of paternity, the petition sought an order requiring Brian to pay child support and to contribute toward Erin's medical expenses and the costs associated with the pregnancy.

¶3 Brian responded by filing a written waiver of his first appearance in which he agreed that he was Erin's father and indicated that his gross income from self-employment was \$84,000 a year. The parties entered a stipulation pursuant to

¹ The order also requires Brian and Stacy to participate in mediation regarding placement and sets Brian's future support obligation at \$387 per month. None of the parties has appealed those portions of the order.

which Brian was adjudicated Erin's father and was ordered to pay \$1,135 per month in child support. However, the stipulation also provided: "THIS ORDER SHALL BE SUSPENDED AS THE RESPONDENT AND THE CUSTODIAL PARENT ARE RESIDING TOGETHER. SHOULD BOTH PARTIES SEPARATE, THIS ORDER SHALL BE REINSTATED." The stipulation was incorporated into the judgment adjudicating Brian to be Erin's father.

¶4 In November 1994, Brandon was born. Although Brian was ultimately ordered to pay additional expenses associated with Brandon's birth, the court did not issue a new child support order. Instead, Brandon's case was consolidated with Erin's.

¶5 On July 4, 1996, Brian and Stacy, who had been living together since at least 1993, separated. On August 1, the State filed a motion seeking reinstatement of the child support payments that had been ordered in 1993. However, the State did not send a copy of the motion to either Brian or Stacy. Instead, the State sent both of them a copy of the order after the court signed it on August 12.

¶6 In June 1997, the State filed an order to show cause and an affidavit for contempt, alleging that Brian's child support arrearage was \$11,725. The circuit court found that Brian was in contempt for failing to pay his child support order and the order with respect to birthing expenses. The court ordered that Brian serve thirty days in jail, but stayed that order pending Brian's compliance with purge conditions. In August, Brian and Stacy stipulated to reduce the monthly amount of child support to \$800, effective September 1.

¶7 In April 2001, Brian filed a motion seeking to reduce his future child support obligation, reduce the amount of a child support lien based on certain

credits and increase his periods of physical placement. After a hearing, the circuit court agreed to reduce Brian's future support to \$387 a month. However, the court denied Brian's request for credit against his arrearages. This appeal followed.

¶8 Brian presents four arguments: (1) he should not have had to pay any child support from July 1, 1996, through August 30, 1997, because the 1996 order reinstating the 1993 child support order was entered without prior notice and without a hearing; (2) alternatively, if he is not entitled to credit for those fourteen months, he was not required to pay support from July 1, 1996, through August 12, 1996, the time that elapsed between the parties' separation and the court's order reinstating the support obligation; (3) he is entitled to a credit for \$1,024 that he paid directly to Stacy; and (4) he is entitled to an \$8,000 credit for the time he and Stacy lived together between 1998 and 2000.

DISCUSSION

I. The 1996 order reinstating child support

¶9 Brian argues that the August 1996 order reinstating his child support obligation was improperly entered. Therefore, Brian contends he should receive credit of \$15,890 for July 1, 1996 through August 31, 1997. Resolution of this question requires interpretation of WIS. STAT. § 767.32 and its application to a set of facts. These are questions of law we review de novo. *Reyes v. Greatway Ins. Co.*, 227 Wis. 2d 357, 364-65, 597 N.W.2d 687 (1999).

¶10 Brian explains:

In the normal course of events, if an original divorce or paternity judgment does not set support to commence immediately, a new hearing is required before support can begin and support cannot be ordered to be paid retroactively to any time period prior to notice of the new

hearing. This requirement of the statute is found in Sec. 767.32(1m) Stats., which provides ... “the court may not revise the amount of child support ... due, prior to the date that notice of the action is given to the respondent.”

In short, Brian contends that even though the original judgment established child support at \$1,135 and suspended support only for as long as Brian and Stacy lived together, the State was required to provide prior notice and a hearing before reinstating the order.

¶11 In response, the State argues that a hearing was not required. The State explains that in 1993, “the Court incorporated the stipulation into its order and set the support amount. That amount was suspended and if the condition precedent occurred (Stacy and Brian’s separation), the support would go into effect.” Stacy adds that even if a hearing were required, Brian cannot now be heard to complain when he failed to object to the 1996 reinstatement order or seek a modification.

¶12 We agree that the circuit court properly reinstated the child support obligation without providing Brian advance notice or a hearing.² There is no dispute that the 1993 order was valid. Contrary to Brian’s assertion, reinstating the child support order consistent with the condition precedent expressly defined in the 1993 order did not constitute a revision or alteration under WIS. STAT. § 767.32(1)(a). The amount of child support remained exactly the same. The 1996 order reinstating the child support obligation only effectuated what the original stipulation, incorporated in the 1993 order, provided: that if the parties separated, Brian would pay child support of \$1,135 a month. Brian does not

² Accordingly, we need not address Stacy’s argument that Brian waived his rights through inaction.

dispute that the condition precedent was satisfied when the parties separated in July 1996.

¶13 Brian suggests that when his child support obligation was reinstated in 1996, his financial circumstances had changed. Assuming this was true, his remedy was to bring an action to modify the amount of child support. His failure to do so did not relieve him of his obligation to pay child support beginning in July 1996.

II. Payments required for July 1, 1996, through August 12, 1996

¶14 Next, Brian argues that he is entitled to a credit for child support payments ordered for July 1, 1996, through August 12, 1996. He contends that he had no obligation to pay support until the circuit court signed the order reinstating support on August 12. We reject this argument because the August 1996 order reinstating child support only formalized the obligation that took effect as soon as Brian and Stacy separated. Pursuant to the 1993 order, Brian became obligated to pay \$1,135 a month as soon as they separated. The August 1996 order did not affect that obligation; it enforced it. Accordingly, the circuit court correctly concluded that Brian is not entitled to a credit for the time that elapsed between the separation and the order reinstating child support.

¶15 However, the State concedes that because Brian and Stacy did not separate until July 4, Brian did not owe child support for three days in July. Accordingly, the State asserts that Brian is entitled to credit of \$109.83. On remand, we direct the court to credit Brian \$109.83 consistent with the State's concession.

III. Credit for payments made directly to Stacy

¶16 Brian asked the circuit court to give him credit for \$1,024 in payments that he made directly to Stacy in 1996. It is undisputed that at some point, Stacy sent the State a handwritten letter asking the State to give Brian credit for four payments he made in 1996. The clerk of courts denied her request, indicating that no credit would be given for payments not made through the clerk's office.

¶17 WISCONSIN STAT. § 767.32(1r) provides that in an action to revise a judgment or order with respect to child support or family support, “the court may grant credit to the payer against support due prior to the date on which the petition, motion or order to show cause is served for payments made by the payer” in certain circumstances. Brian seeks credit for direct support payments pursuant to § 767.32(1r)(b), which provides that the court may award 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.

¶18 The State concedes that Brian could potentially have been awarded credit pursuant to WIS. STAT. § 767.32(1r)(b), but asserts that the circuit court reasonably exercised its discretion when it denied Brian's request. The State asserts, “The Court here stated that it was not going to grant credits, that decision has a rational[] basis, and should be upheld.”

¶19 We will find an erroneous exercise of discretion if the record demonstrates that the trial court failed to exercise its discretion, if the trial court

applied the wrong legal standard, or if the facts fail to support the trial court's decision. *Finley v. Culligan*, 201 Wis. 2d 611, 626-27, 548 N.W.2d 854 (Ct. App. 1996). We have reviewed the hearing transcript and the circuit court's written order and conclude that the court did not directly address Brian's request for credit pursuant to WIS. STAT. § 767.32(1r)(b). Specifically, the court did not make findings with respect to whether Brian had shown by documentary evidence that the payments were made directly to the payee by check or money order and that the payments were intended for support. *See id.*

¶20 The circuit court also did not explain why, if the facts were established, it was choosing to deny Brian's request. Finally, the court's language suggests that the court believed it lacked the authority to credit Brian for payments he made directly to Stacy. Based on the record, we conclude that the court erroneously exercised its discretion because it failed to exercise its discretion and may have applied the wrong legal standard. *See Finley*, 201 Wis. 2d at 626-27. Accordingly, we reverse that portion of the order denying Brian's request for credit and remand so that the court can make the requisite findings of fact and, if the requisite facts are established, decide whether to give Brian credit for payments he made directly to Stacy.

IV. Credit for periods of time that Brian and Stacy lived together

¶21 Brian contends that he is entitled to credit for two periods of time between 1998 and 2000 that he and Stacy lived together. WISCONSIN STAT. § 767.32(1r)(f) provides that the circuit court may grant credit to the payer if:

The payer proves by a preponderance of the evidence that the payer and payee resumed living together with the child and that, 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.

¶22 As with Brian's request for credit for amounts he paid Stacy directly, the circuit court did not make findings of fact or explain the reasons why it was denying Brian's request. It also suggested that it lacked authority to modify the arrearage. Based on the record, we conclude that the court erroneously exercised its discretion because it failed to exercise its discretion and may have applied the wrong legal standard. See *Finley*, 201 Wis. 2d at 626-27. Accordingly, we reverse that portion of the order denying Brian's request for credit and remand so that the court can make the requisite findings of fact and, if the requisite facts are established, decide whether to give Brian credit for periods of time that he lived with Stacy.

CONCLUSION

¶23 We affirm the circuit court's conclusion that the 1996 order reinstating child support was valid and its denial of Brian's request for credit for payments required pursuant to the order. However, we reverse the court's denial of Brian's request for credit for direct payments he made to Stacy and for periods of time the two lived together and remand for further proceedings on those issues. Finally, we direct the court to grant Brian a credit of \$109.83.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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

