

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 5, 2007**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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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. 2006AP2611**

**STATE OF WISCONSIN**

**Cir. Ct. No. 1993PA118237**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE PATERNITY OF G.M.T.  
VERONICA MARTIN, N/K/A VERONICA BUTZLAFF,**

**PETITIONER-RESPONDENT,**

**v.**

**MELVIN LEE TORRES,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
DOMINIC S. AMATO, Judge. *Reversed and cause remanded.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Melvin Lee Torres appeals a circuit-court order denying his motion to modify child support. He claims that the circuit court erroneously exercised its discretion because it did not: (1) assess whether a substantial change

in circumstances warranted modification, or (2) explain why it deviated from the Wisconsin child-support percentage guidelines. We agree, and reverse and remand for further proceedings.

I.

¶2 Torres was adjudicated G.M.T.'s father. In December of 2004, Torres sought modification of the then-existing child-support order requiring him to pay G.M.T.'s mother, Veronica Martin, now known as Veronica Butzlaff, \$292 per month.

¶3 The circuit court held a bench trial in December of 2005. Torres's accountant was the only witness to testify. According to the accountant, from January through October of 2005, Torres's gross income from his car detailing and repair business was \$105,000, while his net income was \$19,500. The accountant testified that Torres's overhead was approximately eighty-one percent of his gross income but that, generally, a reasonable overhead is around fifty-five to sixty percent. The accountant also testified that Torres used the same checking account for his business and personal expenses and made withdrawals from that account at a casino's automated teller machine.

¶4 When the circuit court asked Torres about his employment potential, Torres replied that he had a general high-school-equivalency diploma and that he did not have any mental, emotional, or physical diseases that prevented him from working. Torres also told the circuit court that he was going to Las Vegas at the end of December, but that his girlfriend had paid for most of the trip.

¶5 The circuit court ordered Torres to pay \$798 per month based on the 2005 Health and Human Services Poverty Guidelines, *see* 70 Fed. Reg. 8373–02 (Feb. 18, 2005), finding, among other things, that:

- Torres co-mingled his business and personal assets;
- Torres’s business had “an overhead which is too high to survive”; and
- Torres had not met his “burden of proof that he is unable to pay adequate support”: “He goes to the casino and gambles and is taking a trip to Las Vegas.”

The circuit court did not consider the Wisconsin child-support percentage guidelines. *See* WIS. STAT. § 767.25(1m) (2003–04) (court may deviate from percentage guidelines if after considering factors in § 767.25(1m) it finds that use of the guidelines is unfair to the child or to any of the parties). It entered its written order in January of 2006.

¶6 Torres sought a new trial or, in the alternative, reconsideration, arguing that the circuit court did not set the amount of child support pursuant to the Wisconsin child-support percentage guidelines. At a hearing on Torres’s motion, the circuit court acknowledged that it “did not apply the standard, the family court standards.” It then heard the parties’ arguments and orally ordered Torres to pay \$803 per month:

You gross[ed] \$105,000 in ten months, projected out to be \$126,000 in twelve months.

....

But your overhead, 80 percent, by your own expert, who testified that it shouldn’t be more than 50 or 55 percent, that’s reasonable. Anything more than that, the

court did not find reasonable. It found [it] to be unreasonable.

And it had the form of almost shirking, to get your child support reduced. And that's why I reached out for all those reasons ... and looked at the guidelines too.

I'm going to find that from the evidence of your own expert that a 55 percent overhead is appropriate ....

Your earlier income approximated \$126,000. And you'll pay 17 percent, after your overhead is reduced by 45 percent, excuse me, by 55 percent. Which is according to your lawyer, and [Butzlaff's lawyer], \$803 or \$805. I'll round it off to \$803.

The circuit court entered its written order on March 13, 2006.

¶7 On March 16, 2006, Torres asked the circuit court to modify his child-support obligation, alleging that there had been a substantial change in his circumstances. *See* WIS. STAT. § 767.32(1)(a) (2003–04)<sup>1</sup> He alleged that the lease for his car detailing and repair business would be “terminated” on March 31, 2006, and asked the circuit court to adjust his child support when he found a new job.

¶8 The circuit court held a hearing on Torres's motion in June of 2006. Torres's lawyer told the circuit court that Torres had found a new job as a car salesperson on April 2, and that from April 2 to June 23, Torres earned a net income of \$1,283 per month. Torres's lawyer then asked the circuit court to adjust Torres's child support to seventeen percent of Torres's gross income or \$243 per month. Torres's gross-income earnings were not mentioned at the hearing. *See*

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<sup>1</sup> Effective January 1, 2007, WIS. STAT. § 767.32 (2003–04) was recreated as WIS. STAT. § 767.59. *See* 2005 Wis. Act 443, §§ 148–159, 227, 228.

WIS. ADMIN. CODE § DWD 40.03(1)(a) (seventeen percent of monthly income available for support of one child).

¶9 The circuit court orally denied Torres's motion and referred to its findings made after the December, 2005, hearing:

He's basically shirking. He's run a high overhead and mixing his business with his personal life.

Plus he's gambling .... [A]nybody who spends thousands of dollars for gambling, and co[-]mingles their business assets with their personal assets, and goes to a casino, and is paying di minimis [*sic*] amounts in child support, has an unacceptable, manipulative overhead, I'm not reducing child support.

That's not acting in good faith. That's not trying. That's shirking at this point in time.

Based on the trial that occurred and what is being brought today, I certainly will keep an open mind and be fair and impartial, if you can show me a substantial change of circumstance [*sic*] that are legitimate, not his own volition or act.

Torres's lawyer then asked the circuit court whether it was finding that Torres was shirking. See *Chen v. Warner*, 2004 WI App 112, ¶11, 274 Wis. 2d 443, 448, 683 N.W.2d 468, 470 ("Shirking is an employment decision to reduce or forgo income that is both voluntary and unreasonable under the circumstances."), *aff'd*, 2005 WI 55, 280 Wis. 2d 344, 695 N.W.2d 758. The circuit court responded that it was not: "No, I'm not. I'm saying I'm not changing anything based upon what the current posture of the record is." The circuit court entered its written order in August of 2006.

## II.

¶10 A circuit court may modify a child-support order “only upon a finding of a substantial change in circumstances.” WIS. STAT. § 767.32(1)(a) (2003–04).<sup>2</sup> Thus, the circuit court must determine whether there has been a change in the parties’ financial circumstances and, if so, whether the change is “substantial.” *Peters v. Peters*, 145 Wis. 2d 490, 493, 427 N.W.2d 149, 151 (Ct. App. 1988). The ultimate decision of whether a substantial change of the parties’ financial circumstances warrants modifying a child-support order is within the circuit court’s discretion. *Ibid.*

¶11 The circuit court did not evaluate Torres’s financial circumstances or determine whether there had been a substantial change in those circumstances. The circuit court also did not give any reason why it deviated from the Wisconsin child-support percentage guidelines.

¶12 On appeal, Torres relies on WIS. STAT. § 767.25(1m) (2003–04) to argue that the circuit court did not comply with the percentage guidelines and Butzlaff does not contend that § 767.25(1m) (2003–04) does not apply.<sup>3</sup>

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<sup>2</sup> As we have seen, effective January 1, 2007, WIS. STAT. § 767.32 (2003–04) was recreated as WIS. STAT. § 767.59. *See* 2005 Wis. Act 443, §§ 148–159, 227, 228.

<sup>3</sup> On appeal, Torres cites to WIS. STAT. § 767.511 (2005–06). Section 767.511 was created by Wis. Act 443, §§ 103, 105, 219, and became effective on January 1, 2007. Its predecessor, WIS. STAT. § 767.25(1m), was in effect during the relevant proceedings in this case, and provided:

Upon request by a party, the court may modify the amount of child support payments determined under sub. (1j) if, after considering the following factors, the court finds by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties:

- (a) The financial resources of the child.

(continued)

WISCONSIN STAT. § 767.32(2m) (2003–04), however, permits a circuit court to

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(b) The financial resources of both parents.

(bj) Maintenance received by either party.

(bp) The needs of each party in order to support himself or herself at a level equal to or greater than that established under 42 USC 9902 (2).

(bz) The needs of any person, other than the child, whom either party is legally obligated to support.

(c) If the parties were married, the standard of living the child would have enjoyed had the marriage not ended in annulment, divorce or legal separation.

(d) The desirability that the custodian remain in the home as a full-time parent.

(e) The cost of day care if the custodian works outside the home, or the value of custodial services performed by the custodian if the custodian remains in the home.

(ej) The award of substantial periods of physical placement to both parents.

(em) Extraordinary travel expenses incurred in exercising the right to periods of physical placement under s. 767.24.

(f) The physical, mental and emotional health needs of the child, including any costs for health insurance as provided for under sub. (4m).

(g) The child's educational needs.

(h) The tax consequences to each party.

(hm) The best interests of the child.

(hs) The earning capacity of each parent, based on each parent's education, training and work experience and the availability of work in or near the parent's community.

(i) Any other factors which the court in each case determines are relevant.

modify child-support orders only “after considering the factors listed in s. 767.25 (1m).” Thus, whether this matter is viewed as a modification under § 767.25(1m) (2003–04), as the parties seem to agree, or under § 767.32(2m) (2003–04), the circuit court’s obligation is essentially the same—the circuit court must consider the factors set out in § 767.25(1m) (2003–04) and give its reasons for either modifying or not modifying the child-support order:

If the court finds under sub. (1m) that use of the percentage standard is unfair to the child or the requesting party, the court shall state in writing or on the record the amount of support that would be required by using the percentage standard, the amount by which the court’s order deviates from that amount, its reasons for finding that use of the percentage standard is unfair to the child or the party, its reasons for the amount of the modification and the basis for the modification.

Sec. 767.25(1n) (2003–04); *see also* **Richmond v. Richmond**, 2002 WI App 25, ¶12, 250 Wis. 2d 647, 654, 640 N.W.2d 220, 224, *disapproved of on other grounds by* **Derr v. Derr**, 2005 WI App 63, ¶46 n.12, 280 Wis. 2d 681, 717 n.12, 696 N.W.2d 170, 187 n.12. Not making these findings is an erroneous exercise of discretion. **Richmond**, 2002 WI App 25, ¶13, 250 Wis. 2d at 654, 640 N.W.2d at 224.

¶13 Here, the circuit court kept Torres’s child-support obligation at \$803 per month without considering the factors in WIS. STAT. § 767.25(1m) (2003–04) or giving any reason why it deviated from the seventeen-percent standard. Generally, when a circuit court does not explain its reasons for a child-support order, we may, but are not required to, search the Record to determine whether that Record supports the circuit court’s decision. **Randall v. Randall**, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 8, 612 N.W.2d 737, 740. The Record here, however, does not give us sufficient information as to why the circuit court deviated from



the percentage standard, or why it rejected Torres's contention that there had been a substantial change in his financial circumstances, especially in light of the circuit court's comments on whether Torres was "shirking," and its ultimate finding that he was not. Accordingly we reverse the circuit court's August 8, 2006, order denying Torres's motion to modify child support, and remand the case to the circuit court for further proceedings consistent with the direction in *Richmond*, 2002 WI App 25, ¶12, 250 Wis. 2d at 654, 640 N.W.2d at 224.

*By the Court.*—Order reversed and cause remanded.

Publication in the official reports is not recommended.

