

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 18, 2001

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.

No. 01-0019

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

TINA GOUTY-YELLOW,

PETITIONER-RESPONDENT,

V.

FRANCIS YELLOW,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Shawano County:
JAMES P. JANSEN, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Francis Yellow appeals from an order modifying his child support payments to his ex-wife, Tina Gouty-Yellow, in response to a

motion by the State of Wisconsin.¹ He claims the State failed to meet its evidentiary burden of showing a substantial change of circumstances since entry of the prior order, and that, even assuming there was sufficient evidence from which a substantial change could have been found, the trial court erred by failing to make a substantial change finding. Yellow also claims the trial court erroneously exercised its discretion by failing to specify the amount of child support which would be required under the child support guidelines and by failing to explain the basis for its deviation from that amount. Finally, Yellow contends that he was given insufficient notice of the hearing. We agree that the trial court failed to make several findings necessary to support its award, and therefore reverse and remand for further proceedings consistent with this opinion. In light of our decision, we do not address the notice issue.

BACKGROUND

¶2 Yellow and Gouty-Yellow were married in South Dakota in 1987 and had two children together during the marriage. Gouty-Yellow filed for divorce in Wisconsin in 1994. Yellow did not appear at the divorce hearing because he was living in Minnesota at that time. Gouty-Yellow introduced a financial disclosure statement listing her gross income as an attorney in private practice as \$3010 per month and her monthly budget as \$3080. The judgment of divorce listed Yellow's occupation as an artist and teacher and set forth no factual findings as to Yellow's income, but required Yellow to pay Gouty-Yellow \$1137

¹ The State was acting as an interested party under WIS. STAT. § 767.075 (1999-2000). All further references to the Wisconsin Statutes in this opinion are to the 1999-2000 version unless otherwise noted.

per month in child support. That was the approximate amount needed to cover the gap between Gouty-Yellow's budget and her net income.

¶3 In 1998, the parties stipulated to modify the child support payments to the greater of 25% of Yellow's income or \$140 per month. Yellow's tax returns showed annual income in the amount of \$2800 for 1998 and \$2500 for 1999. Yellow also received a compensatory award of \$16,035.69 in 1999 as the result of personal injury litigation.

¶4 In July of 2000, the State of Wisconsin moved for a modification of the child support order based upon alleged increases in the children's needs and in Yellow's ability to pay. The motion was scheduled to be heard on August 9, 2000, but neither Yellow nor Gouty-Yellow appeared. The trial court indicated that it would reschedule the hearing and notify the parties of the new date, but apparently neglected to send notification.

¶5 On September 7, 2000, Gouty-Yellow filed a motion to show cause why an order to comply with provisions of the divorce judgment dealing with a Nordic track, a computer, medical bills, and the children's tribal enrollment should not be entered, and a hearing was set for September 14, 2000. On September 9, 2000, Gouty-Yellow mailed to Yellow notices of a hearing set on September 14, 2000, for both her "motion to comply" and for a "continued child support review."

¶6 Yellow received the notices on September 11, 2000. He appeared at the hearing, but objected to the sufficiency of the notices because he had been unable to obtain counsel within the three days prior to the hearing. The trial court noted that Yellow had had since August to obtain counsel, and decided to proceed given the distances that he and Yellow had traveled to attend.

¶7 The evidence presented consisted of Yellow’s tax returns from 1998 and 1999 and his testimony about his current circumstances and his earnings over the years as an artist and guest art lecturer. The trial court noted that it was impressed with the honesty of Yellow’s responses and acknowledged that Yellow was a serious artist, but nonetheless modified the child support amount to \$300 per month, citing Yellow’s intelligence, education, and ability to become employed, and noting that “the obligation to support your children is paramount to being an inspired artist.”

DISCUSSION

¶8 WISCONSIN STAT. § 767.32(1)(a) permits the modification of a child support order “only upon a finding of a substantial change in circumstances.” This requires a comparison between the parties’ past and present financial circumstances. *Erath v. Erath*, 141 Wis. 2d 948, 953, 417 N.W.2d 407 (Ct. App. 1987). The burden is upon the party seeking modification to show that the circumstances upon which the initial order was based have materially changed. *Thies v. MacDonald*, 51 Wis. 2d 296, 301, 187 N.W.2d 186 (1971). The burden may be met by evidence that there has been a change in the needs of the child or the payer’s earning capacity, or a change in the payer’s income unless the amount of child support was expressed as a percentage of income. WIS. STAT. § 767.32(1)(c).

¶9 We review a determination regarding whether there has been a change in circumstances sufficient to warrant a modification of child support as a mixed question of fact and law; we will uphold the trial court’s findings regarding what changes have occurred in the circumstances of the parties unless those findings are clearly erroneous, but we will independently consider the legal

significance of those changes. *Rosplock v. Rosplock*, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998). If the record supports a determination that there has been a substantial change of circumstances, we will review the trial court's decision regarding the amount of the modification under the erroneous exercise of discretion standard. See *Benn v. Benn*, 230 Wis. 2d 301, 307-08, 602 N.W.2d 65 (Ct. App. 1999).

¶10 Here, the trial court made no finding regarding whether there had been a substantial change in circumstances. Ordinarily, when a trial court fails to expressly make a finding necessary to support its legal conclusion, we may assume that the trial court made the finding in the way that supports its decision. *State v. Echols*, 175 Wis. 2d 653, 673, 499 N.W.2d 631 (1993). However, it is not clear what evidence the trial court could have relied upon to make a finding of a substantial change in circumstances based on the record before it.

¶11 There was evidence that Yellow had obtained an artistic grant which exceeded his income from the prior two years. However, because the stipulated order was expressed as a percentage of Yellow's income, a mere change in his income would not constitute a substantial change of circumstances under WIS. STAT. § 767.32(1)(c)1. Nor would the record support a finding of a change in the needs of the child under § 767.32(1)(c)2, because there was no evidence presented regarding the children's needs or Gouty-Yellow's budget, either at the time of the hearing or the time of the prior stipulation.

¶12 There was evidence presented relating to Yellow's earning capacity which could be relevant under WIS. STAT. § 767.32(1)(c)3. However, Yellow's testimony regarding his education, his past teaching positions, and the amount of money he could get for his paintings was not presented in a chronological order.

Rather, it appeared to span at least a dozen years, dating back well into the marriage, and there was no specific reference to how much money Yellow was earning, or capable of earning, at the time of the stipulated order. Furthermore, Yellow testified that chronic pain in his hands limited his ability to teach or produce art at the rate he was able to prior to his automobile accident. We are therefore uncertain what basis the trial court may have relied upon to determine that there had been an upward change in Yellow's earning capacity since the time of the last child support award. We are, however, reluctant to conclude that an implied finding to that effect was clearly erroneous without first giving the trial court the opportunity to explain whether it would in fact have made such a finding, and, if so, upon what basis.

¶13 Therefore, we remand the case to allow the trial court to exercise its discretion in accordance with the standard applicable to support modification motions. At a minimum, the trial court must state on the record whether it believes the State has shown a substantial change in circumstances under WIS. STAT. § 767.32(1)(c) since entry of the prior stipulated child support order, and if so, explain the facts upon which it relies for that finding. In addition, if the trial court finds there has been a substantial change of circumstances, it must further explain explicitly why it believes a deviation from the 25% order that was in effect, and is presumptively valid under the guidelines, is warranted under the circumstances of this case. WIS. STAT. § 767.32(2) and (2m).

¶14 Given the time that has passed since the hearing, and the trial court's continuing supervision over family matters under WIS. STAT. § 767.32, we conclude it would be appropriate to allow the trial court to reopen the matter for additional evidence on remand if it wishes to do so. If it does so, however, we

direct it to make any resulting order prospective only. In light of our decision, we do not address the notice issues Yellow raised on this appeal.

By the Court.—Orders reversed and cause remanded with directions.

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

