



1995 SENATE BILL 421

November 14, 1995 - Introduced by JOINT LEGISLATIVE COUNCIL. Referred to Committee on Judiciary.

- 1 **AN ACT to renumber and amend** 767.32 (1r); and **to create** 767.32 (1r) (b) of
2 the statutes; **relating to:** granting credit against child or family support.

Analysis by the Legislative Reference Bureau

This bill is explained in the NOTES provided by the joint legislative council in the bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

PREFATORY NOTE: This bill was prepared at the direction of the joint legislative council's special committee on child custody, support and visitation laws.

The bill authorizes a court to grant a credit against child or family support due, in specified circumstances. Current statutes provide that in an action to revise a judgment or order providing for child support or family support, the court may not grant credit to the payer against support due prior to the date on which the action is commenced for payments made by the payer on behalf of the child other than payments made to the clerk of court or as otherwise ordered by the court. This provision was enacted by 1993 Wisconsin Act 481 and appears to overrule several Wisconsin court decisions authorizing a court to grant an equitable credit against child support in certain circumstances. For example, the Wisconsin supreme court, in *In re: the Marriage of Schulz v. Ystad*, 155 Wis. 2d 574, 456 N.W. 2d 312 (1990), held that in seeking a credit against arrearages for payments, made either under the compulsion of the circumstances or with the express or implied consent of the other parent, a parent obligated to pay support must prove by clear and convincing evidence that the direct expenditures for which the credit is sought were made in substantial compliance with the spirit and intent of the order or judgment for support; that the custodial parent either expressly or impliedly consented that the expenditures would serve as an alternative to the parent's obligation to pay child support; and that granting the credit would not do an injustice to either the custodial parent or the child. *Schulz v. Ystad*, 456 N.W. 2d, at 324. The payments for which a credit may be granted are limited, however, as courts have held that although gifts and voluntary payments made by the payer outside the child support order or judgment are to be

encouraged, such gifts or other voluntary payments cannot be the basis of a request for an equitable credit.

This bill provides that a court may grant credit to the payer against support due prior to the date on which the action is commenced for payments made by the payer on behalf of the child other than payments made to the clerk of court or as otherwise ordered by the court regardless of when the judgment or order of support was entered, if the court finds that: (1) the parties to the action agree to the credit; (2) the parties do not agree to the credit but the court finds by clear and convincing evidence that all of the following apply: (a) that the payments were made in substantial compliance with the spirit and intent of the order or judgment of support; (b) that the other parent either expressly or impliedly consented that the payments would serve as an alternative to the payer's obligation to pay child support or that the payments were made under compulsion of the circumstances; (c) that the payments were not made as gifts or similar voluntary payments or expenditures; (d) that the credit would not do an injustice to either the other parent or the child; and (e) if the child's right to support is assigned to the state due to the child's receipt of AFDC, that the county child support agency has been served; or (3) the parties transferred the child's primary physical placement to the payer without court approval and the payer has directly provided for the support of the child.

1 **SECTION 1.** 767.32 (1r) of the statutes is renumbered 767.32 (1r) (a) and
2 amended to read:

3 767.32 (1r) (a) ~~In~~ Except as provided in par. (b), in an action under sub. (1) to
4 revise a judgment or order with respect to child support or family support, the court
5 may not grant credit to the payer against support due prior to the date on which the
6 action is commenced for payments made by the payer on behalf of the child other than
7 payments made to the clerk of court under s. 767.265 or 767.29 or as otherwise
8 ordered by the court.

NOTE: Adds a reference to par. (b) which contains the language permitting a judge to grant a credit against support due in certain circumstances.

9 **SECTION 2.** 767.32 (1r) (b) of the statutes is created to read:

10 767.32 (1r) (b) A court may grant credit to the payer against support due prior
11 to the date on which the action is commenced for payments made by the payer on
12 behalf of the child other than payments made to the clerk of court under s. 767.265
13 or 767.29 or as otherwise ordered by the court only if the court finds any of the
14 following:

15 1. That the parties to the action agree to the credit.

1 2. That the parties do not agree to the credit but the court by clear and
2 convincing evidence finds all of the following:

3 a. That the payments were made in substantial compliance with the spirit and
4 intent of the order or judgment for support.

5 b. That the payee either expressly or impliedly consented to accept the
6 payments as an alternative to the payer's obligation to pay child support or that the
7 payments were made under compulsion of circumstances.

8 c. That the payments were not made as gifts or similar voluntary payments or
9 expenditures.

10 d. That the credit would not do an injustice to either the payee or the child.

11 e. If the child's right to support is assigned to the state under s. 49.19 (4) (h) 1.
12 b., that the child support program designee under s. 59.07 (97) of the county in which
13 the action is commenced has been served in compliance with s. 767.15.

14 3. That the parties transferred the child's primary physical placement to the
15 payer without court approval under s. 767.329 and the payer has directly provided
16 for the support of the child.

NOTE: Sets forth the circumstances in which a court may grant credit to a child or
family support payer for payments made by the payer other than those to the clerk of
court or as otherwise ordered by the court.

17 **SECTION 3. Initial applicability.**

18 (1) This act first applies to arrearages existing and child or family support
19 payments past due on the effective date of this subsection regardless of when the
20 judgment or order under which the arrearages accrued or the child or family support
21 is owed was entered.

NOTE: Provides that the authority to grant a credit for payments of past due child
or family support first applies to arrearages existing and support payments past due on

the effective date of the act, regardless of when the judgment or order for child or family support was entered.

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(END)