

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 25, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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**No. 99-2668**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**PATRICIA MARIE JIRSCHLE (N/K/A PATRICIA M.  
SIMKOWSKI),**

**PETITIONER-APPELLANT-CROSS-  
RESPONDENT,**

**V.**

**STEVEN JOSEPH JIRSCHLE,**

**RESPONDENT-RESPONDENT-CROSS-  
APPELLANT.**

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APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Reversed and cause remanded.*

¶1 VERGERONT, J.<sup>1</sup> Patricia Simkowski appeals from an order denying her request for the attorney's fees she incurred in bringing a successful motion for contempt against Steven Jirschele. The circuit court found Jirschele in contempt for failing to contribute equally to the post-secondary education of the parties' child as required in the judgment of divorce, but did not order attorney's fees because it concluded that Jirschele's defense to the motion for contempt was not frivolous. Simkowski contends on appeal that the circuit court applied an incorrect legal standard in deciding whether to award attorney's fees. Jirschele cross-appeals, contending the provision of the divorce judgment at issue was too vague and ambiguous to enforce, and the court erred in finding Jirschele in contempt.

¶2 We conclude the provision at issue is not too vague and ambiguous to enforce, and the circuit court did not err in finding Jirschele in contempt. We also conclude the court did apply an incorrect legal standard in deciding whether to award attorney's fees for the contempt. We therefore reverse that part of the circuit court's order denying the request for attorney fees and remand to permit the court to consider that request according to the correct legal standard.

### BACKGROUND

¶3 The parties' child, Amber, was born May 11, 1980. The judgment of divorce was entered on March 4, 1988. It incorporated by reference the final stipulation of the parties, which was attached to the judgment and made part of the judgment of the court. One of the terms of the final stipulation incorporated into

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<sup>1</sup> This appeal is decided by one judge pursuant to [WIS. STAT. § 752.31\(2\)\(h\)](#).

the judgment was: “Both parties agree that they will be equally responsible for the support of their child if said child pursues post-secondary education.”

¶4 Simkowski brought a motion requesting the court to find Jirschele in contempt of this provision, which was heard by an assistant family court commissioner on September 23, 1998. The grounds asserted for the motion were that Amber was enrolled in post-secondary education at the University of Wisconsin in Milwaukee (UWM); the approximate annual cost of the program of post-secondary education was to be \$11,800, including tuition, room and board, dormitory room furnishings, books, supplies, fees and insurance; and Simkowski had sought contribution from Jirschele for one-half of those expenses but he had refused to contribute. Simkowski requested that Jirschele be held in contempt, that immediate assignment of his income be ordered to insure timely payment of his obligation, and that he be ordered to pay the costs and attorney’s fees that she had incurred because of his failure to comply with the divorce judgment. The assistant family court commissioner found Jirschele in contempt, and he requested a trial de novo in the circuit court.

¶5 Before the circuit court the parties stipulated to receipt into evidence of the following documents: affidavit of Amber explaining her course of study at UWM and that she had received funds to pay her expenses from her mother, a student loan for which her mother had assumed responsibility, and her own savings from employment; an itemization of her expenses at UWM; correspondence from Simkowski to Jirschele informing him of the amount she had paid for Amber’s college expenses and unsuccessful efforts to obtain grants, and requesting that he advise her how he planned to pay his half of the expenses; and Jirschele’s response in which he did not make any commitment to contributing to Amber’s expenses. The parties also stipulated to the receipt into evidence of

Jirschele's responses to interrogatories, which stated that his contribution to Amber's post-secondary education to date had been \$400 in transportation, food and miscellaneous items, and that the divorce judgment did not obligate him to contribute to Amber's post-secondary education expenses. In addition, counsel asked the court to take judicial notice that it had been necessary for the court to issue a bench warrant previously against Jirschele in this action, and the court agreed to do so.

¶6 No witnesses testified before the circuit court. The court heard argument of counsel. Jirschele's position was that the law of contract applied because the provision concerning Amber's post-secondary education had been agreed to by the parties and could not have been ordered by the court in the absence of an agreement, and the provision was too vague to be enforceable.

¶7 The court found Jirschele in contempt. The court first noted that the parties had written in the word "post" in handwriting in front of the word "secondary" in the provision and they had both initialed it, so there was no doubt that both had agreed to share equally in the expenses for the post-secondary education of their child. The court concluded the provision was unambiguous. It rejected the argument that because the provision did not itemize the various expenses that were included it was too vague to enforce. The court also observed that if Jirschele had felt it was not clear what expenses were included, he had an obligation to request that from the court. The court found that he had simply ignored the court order. The court adopted the order of the assistant family court commissioner, which ordered that Jirschele purge his contempt by reimbursing Simkowski for one-half of the tuition fees, books and dormitory fees already paid for Amber within sixty days, and that in the future Jirschele be responsible for and

pay one-half of those expenses when they are due or within thirty days upon presentation of a receipt from Simkowski for the expenses she had already paid.

¶8 With respect to Simkowski's request for attorney's fees, the court stated as follows:

The issue of attorney's fees I understand Mr. Jacobson's argument, and I think to grant attorney's fees in this case, although I disagree with Mr. Jacobson's opinion, it does have—I can't say that the issue surrounding this was frivolous, and the reason I say this is, quite frankly, um, the provision which has been the bone of contention between the parties in this case is not a model of draftsmanship, and given that, um, the issue regarding the enforceability is—and the argument by counsel for the respondent [Attorney Jacobson], the court does not believe to be frivolous. I just happen to disagree with those arguments. Therefore I don't think the attorney's fees would be appropriate under this circumstance.

## DISCUSSION

¶9 We address first the cross-appeal. We review a circuit court's use of its contempt provision to determine if it properly exercised its discretion. *City of Wisconsin Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995). We affirm discretionary determinations if the circuit court applied the correct law to the facts of record and, using a rational process, reached a result that a reasonable judge could reach. *See Rodak v. Rodak*, 150 Wis. 2d 624, 631, 442 N.W.2d 489 (Ct. App. 1989). We accept the circuit court's findings of fact unless they are clearly erroneous, but we review de novo issues of law the circuit court resolves in its decision. *See City of Wisconsin Dells*, 197 Wis. 2d at 23.

¶10 Jirschele's first challenge is that the circuit court erred by enforcing the provision in the divorce judgment because it was too vague and ambiguous. This aspect of the court's ruling—construction of a divorce judgment

incorporating a stipulation of the parties— presents a question of law when there are no disputed facts. *See Keller v. Keller*, 214 Wis. 2d 32, 37, 571 N.W.2d 182 (Ct. App. 1997).

¶11 The circuit court did not wrongly rely on *Bliwas v. Bliwas*, 47 Wis. 2d 635, 178 N.W.2d 35 (1970), as Jirschele contends. *Bliwas* held that when a party stipulates that a term be made part of the divorce judgment—a term that would not be enforceable without the stipulation—the party is estopped from challenging that term in the judgment, and it may be enforced by the court’s contempt powers. *Id.* at 639-41. In *Bliwas* the term stipulated to concerned contribution to the child’s education beyond the age required by statute. *Id.* at 637-38. The principle established in *Bliwas* is applicable in this case, and obligates Jirschele to comply with the provision in the divorce judgment that he is “equally responsible for the support of [Amber if she] pursues post-secondary education.” The fact that the provision in *Bliwas* was more detailed does not make the principle established in *Bliwas* inapplicable to this case: the holding in *Bliwas* was not based on the specificity of the provision but rather on the general rule that “a party who procures or consents to the entry of the decree is estopped to question its validity.” *Id.* at 640.

¶12 We also agree with the circuit court’s conclusion that the provision was not too vague or ambiguous to enforce. The provision plainly requires the parties: (1) to bear equal responsibility, (2) for the support of their child, (3) if she pursues post-secondary education. While the outer reaches of the expenses included in this obligation might be ambiguous, there is no room for reasonable argument that this provision does not obligate the parents to share equally in expenses for post-secondary tuition fees, books, room and board. This is not a situation in which Jirschele did not pay particular expenses because he interpreted

the provision not to include them. His position that he has no obligation to pay any expenses because the expenses are not itemized has no merit.

¶13 We also reject Jirschele’s argument that the circuit court erred in finding him in contempt. He faults the court for not expressly stating that his failure to comply was intentional and for not finding that he had an ability to pay. The court found that Jirschele “simply ignored the order of the court.” That came after a discussion of the court’s view that the provision plainly required Jirschele to contribute equally in the support of his daughter while she is pursuing secondary education, and that Jirschele had never requested a clarification of the provision which he now contends is too ambiguous to comply with. The only reasonable interpretation of the court’s comments are that it was finding that Jirschele intentionally failed to comply with the provision, and the documents accepted into evidence by stipulation support that finding. Jirschele presented no evidence that he did not pay because he did not have the ability to pay, and did not even make that argument through counsel.

¶14 We now address Simkowski’s contention on her appeal that the circuit court erred in using the standard of frivolousness in deciding whether to award her attorney’s fees. [WISCONSIN STAT.](#) § 785.04(1)(a) (1997-98)<sup>2</sup> authorizes “[p]ayment of a sum of money sufficient to compensate a party for loss or injury suffered by the party as the result of a contempt of court.” Attorney fees incurred by an injured party as a result of another’s contempt may be awarded as compensation for a party’s loss or injury under this section. *Town of Seymour v. City of Eau Claire*, 112 Wis. 2d 313, 320, 332 N.W.2d 821 (Ct. App. 1983).

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<sup>2</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Simkowski presented this authority to the circuit court asking for an award of attorney's fees. We are not aware of any authority, either statutory or case law, that uses the standard of frivolousness in deciding whether or not to award attorney fees under § 785.04(1)(a), and Jirschele has not presented us with any. Rather, he argues that since attorney fees under § 785.04(1)(a) are within the circuit court's discretion, it is a reasonable exercise of discretion not to award attorney fees where, as here, the court concluded that Jirschele's position was honestly debatable.

¶15 We agree with Simkowski's argument that the standard of frivolousness is distinct from the standard applicable under [WIS. STAT. § 785.04\(1\)\(a\)](#). Attorney fees are awarded under [WIS. STAT. § 814.025](#) for frivolousness when an attorney or litigant knew or should have known that the position asserted had no reasonable basis in law or equity and could not be supported by a good faith argument for a modification, extension or reversal of existing law. All doubts about whether a position is frivolous are resolved against a conclusion of frivolousness, so as not to discourage innovative positions or the zealous advocacy of a client attorneys are obligated to undertake. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 235, 517 N.W.2d 658. In contrast, the purpose of attorney fees as a sanction for contempt is to compensate a party for the financial loss caused by the person in contempt, whose conduct necessitated a legal action to obtain compliance. While the merits of a defense to a motion for contempt is an appropriate factor for a court to take into account in deciding whether or not to award attorney fees under § 785.04(1)(a), a proper exercise of discretion requires that the desirability of compensating a party for the loss or injury incurred as a result of a contempt of court must also be taken into account.



¶16 Although the appropriate remedial sanction, once a court has found someone in contempt of a court order, is within the court's discretion, the circuit court erroneously exercises its discretion if it applies an incorrect legal standard. *See City of Wisconsin Dells*, 197 Wis. 2d at 23; *Rodak*, 150 Wis. 2d at 631. It may be, as Jirschele argues, that the circuit court did understand it had the authority to order the attorney's fees to compensate Simkowski even if Jirschele's position was not frivolous, but decided not to do so. However, since the only explanation the circuit court gave for not awarding the attorney's fees was that Jirschele's position was not frivolous, we are uncertain whether the circuit court recognized that distinction and, thus, we are uncertain whether it applied the correct standard. We are therefore persuaded the appropriate course is to reverse the circuit court's ruling denying the request for attorney's fees, and remand so the circuit court may consider that request consistent with this decision. By this remand, we do not intend to suggest the proper outcome on remand, or to limit the factors the circuit court may, in the proper exercise of its discretion, decide are relevant.

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

This opinion will not be published. See [WIS. STAT. RULE 809.23\(1\)\(b\)4](#).

