

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 7, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2101-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

TERRY LEE RAILING,

Petitioner-Appellant,

v.

JACQUELINE S. RAILING,

Respondent-Respondent.

APPEAL from an order of the circuit court for Jefferson County: JOHN M. ULLSVIK, Judge. *Affirmed.*

ROGGENSACK, J.¹ Terry Lee Railing appeals from an order of the circuit court of Jefferson County directing him to pay \$1,675.59 in attorney's fees and costs incurred by his former wife, Jacqueline S. Railing, in proceeding on an order to show cause why Terry should not be held in contempt of court

¹ This appeal is decided by one judge pursuant to § 752.31(2)(h), STATS.

for failing to pay monies required under the judgment of divorce. Because this court concludes that the court commissioner's implicit finding that Terry was in contempt of court on January 9, 1996, was never properly appealed, and that the circuit court did not abuse its discretion in finding that Jacqueline reasonably incurred \$1,675.59 in attorney's fees and costs to secure Terry's compliance with the judgment of divorce, the order is affirmed.

BACKGROUND

Terry and Jacqueline were divorced on July 6, 1994. Their divorce judgment incorporated the stipulation of the parties, which required each to contribute one-half of their child, Patricia's, college tuition, room, board, books and fees, limited by the amount of those costs at the University of Wisconsin-Madison.

Patricia started college in August of 1995. After learning what her costs and fees were, Jacqueline asked Terry to pay half. When he failed to do so, Jacqueline first tried informally to persuade Terry to comply with his obligations under the divorce judgment, and when those efforts were unsuccessful, Jacqueline brought an order to show cause why Terry should not be held in contempt of court for failing to comply with the judgment of divorce. Terry responded to Jacqueline's order to show cause with a motion to revise the judgment.

On January 9, 1996, Terry appeared in person before the court commissioner, who made the following findings:

Patricia's college expenses through January 31, 1996, totaled \$4,054.54.

Petitioner (Terry) has not paid any of his share of these expenses.

... (Terry) is ordered to deposit his share of the college expenses, a total of \$2,027.27, into Attorney Benskey's trust account by February 9, 1996 ...

The Petitioner has the ability to make the above ordered payments
in 30 days by borrowing against his assets

The court commissioner also ordered Terry to pay a minimal contribution to Jacqueline's attorney's fees. He held open the issue of interest on the unpaid college expenses and attorney's fees for the period after the January 9th hearing. The court commissioner did not make a written finding about whether Terry was in contempt of court. Additionally, he did not hear Terry's motion to revise the judgment because the local rules for Jefferson County require that motions to revise the judgment be heard by a circuit court judge.

On January 19, 1996, Jacqueline moved the circuit court for a *de novo* review of the portion of the family court commissioner's decision regarding Terry's contribution to the attorney's fees she incurred as a result of his failure to obey the divorce judgment. On March 27, 1996, the Jefferson County Circuit Court held a *de novo* review of the court commissioner's determination in regard to attorney's fees. Jacqueline presented evidence of \$2,497.84 of attorney's fees and costs which she alleged were reasonably incurred due to Terry's failure to comply with the divorce judgment. Terry presented expert witness testimony that the fees and costs were excessive. Prior to the hearing, Terry had paid his portion of Patricia's college expenses.

At the conclusion of the hearing, the circuit court reduced the amount of attorney's fees Jacqueline had requested because it concluded some of the legal services were not reasonably necessary, and thereafter it ordered Terry to pay \$1,675.59. The court ordered payment under § 785.04(1)(a), STATS., as a sum of money sufficient to compensate Jacqueline for the fees she incurred as a result of Terry's being in contempt of court on January 9, 1996.

Terry appeals, contending that the circuit court could not find him in contempt of court on March 27, 1996 because he was then in compliance with the judgment of divorce; that the circuit court could not find him in contempt on March 27th because he had no notice that contempt was to be a subject of the March 27th hearing; and that the circuit court could not award attorney's fees as a remedy for contempt because the fees were not reasonable. We reject each of Terry's arguments and affirm the order of the circuit court.

DISCUSSION

Scope of Review.

We review the use of the court's contempt power under the clearly erroneous standard and we will not set aside a determination that a person has committed contempt of court unless the findings which support that determination are clearly erroneous. *N.A. v. G.S.*, 156 Wis.2d 338, 341, 456 N.W.2d 867, 868 (Ct. App. 1990). In a like manner, we will uphold a trial court's determination of the amount of attorney fees which are reasonable in a given case, unless the trial court has erroneously exercised its discretion. *Michael A.P. v. Solsrud*, 178 Wis.2d 137, 153, 502 N.W.2d 918, 925 (Ct. App. 1993).

Contempt of Court.

In order to be found in contempt of court for failure to comply with a court order, one must receive notice of the proceedings and have an opportunity to be heard. Additionally, the court must make findings that the putative contemnor had the ability to comply with the court's order but has not done so. *Balaam v. Balaam*, 52 Wis.2d 20, 29, 187 N.W.2d 867, 872 (1971). In civil contempt proceedings, the burden of proof is on the alleged contemnor. *Id.* at 30, 187 N.W.2d at 872.

Terry argues that the circuit court could not hold him in contempt of court because he had no notice that anything other than attorney's fees were to be under review at the March 27th hearing, and he also argues contempt was not available because he was then in compliance with the divorce judgment. He cites *Dennis v. Dennis*, 117 Wis.2d 249, 344 N.W.2d 128 (1984), to support his lack of notice argument and *State v. King*, 82 Wis.2d 124, 262 N.W.2d 80 (1978), to support his argument that civil contempt is no longer available when one has come into compliance with a court judgment.

In order to consider Terry's arguments, it is necessary to understand what the circuit court was asked to do on March 27th. Those proceedings were a *de novo* review of only the issue for which review had been

requested, *i.e.*, Terry's contribution to Jacqueline's attorney's fees and costs pursuant to § 785.04(1)(a), STATS. The circuit court did not disturb other determinations made by the court commissioner for which a review had not been requested. Rather, it expressed what was apparent from the uncontested findings of the court commissioner: that Terry was in contempt of court on January 9, 1996.

Prior to January 9th, Terry had notice that Jacqueline had instituted a contempt action to enforce the divorce judgment because he had received an order to show cause why he should not be found in contempt of court² for failing to pay half of Patricia's college expenses. Terry appeared at the hearing where the court commissioner found that Terry had the ability to comply with the divorce judgment by paying half of Patricia's \$4,054.54 in college expenses, but had not done so. He does not argue that he was not afforded an opportunity to be heard on January 9th. The attorney's fees that were ordered then, and reviewed *de novo* by the circuit court, were grounded in § 785.04(1)(a), STATS.³ Although the court commissioner did not make an explicit finding of contempt, it is implicit from the authority invoked in the order to show cause; from the finding of ability to comply with the judgment and failure to do so; and from the court commissioner's award of attorney's fees.⁴ Terry did not seek a *de novo* review of any portion of that order; therefore, he may not now challenge those findings on appeal. *First Bank v. H.K.A. Enters.*, 183 Wis.2d 418, 426-27 n.10, 515 N.W.2d 343, 347 (Ct. App. 1994).

Terry next argues that the circuit court erred because he was in compliance with the divorce judgment on March 27th, and therefore, it does not matter what the facts were on January 9th. He cites *State v. King*, which arose

² The parties' marital settlement agreement, which was incorporated into the judgment of divorce, made disobedience with its provisions punishable through contempt proceedings, thereby giving him general notice as well. See *Dennis*, 117 Wis.2d at 260-61, 344 N.W.2d at 133.

³ Section 785.04 was specifically invoked in the order to show cause which Terry received.

⁴ A contribution to attorney fees can be made in family law matters, pursuant to § 767.262, STATS., but to do so requires findings of need and ability to pay, which were not made here. Therefore, the court commissioner's award must have been made pursuant to § 785.04(1)(a), STATS.

as the result of a labor dispute, to support his position. There, certain persons were enjoined from striking, but disregarded the court's order and struck in defiance of it. After the striking workers had returned to work and were no longer defying the court's order, the State initiated contempt proceedings against the union and certain designated employees, for violating the injunction. The supreme court concluded that the remedy of civil contempt was not available because it expired when the strike was settled. *King*, 82 Wis.2d at 138, 262 N.W.2d at 86.

This court does not find *King* persuasive for at least two reasons. First, it was on January 9th that the contempt hearing was held. Terry does not argue that he was in compliance with the divorce judgment then. Since the circuit court was conducting a *de novo* review of only the attorney fees issue on March 27th, Terry's contempt had already been implicitly determined on January 9th. The remedy of civil contempt was available when the order to show cause was filed and also when the court commissioner made its factual findings. Therefore, *King* is not controlling.

Second, to ignore the fact that Jacqueline had to incur unnecessary attorney's fees and use scarce judicial resources to force Terry's compliance with the divorce judgment, when he had the ability to comply, would encourage contemptuous conduct rather than voluntary compliance with court orders. Therefore, the controlling date in regard to Terry's contempt is January 9th. The circuit court made this clear by stating that Terry was in contempt of court on January 9, 1996, the date on which the family court commissioner heard the motion for contempt. Terry does not draw this court's attention to any portion of the record which would cause those findings to have required additional testimony on March 27th. Therefore, this court concludes that the remedy of civil contempt was available on January 9, 1996, and that the court commissioner made explicit factual findings consistent with contempt of court, from which findings Terry did not request a *de novo* review. The circuit court's statement that Terry was in contempt of court on January 9th was not a new factual finding, but rather an acknowledgement of the court commissioner's contempt finding, from which no review was sought.

Reasonableness of Attorney's Fees.

The court may award reasonable attorney fees and other litigation costs which were incurred in connection with a contempt proceeding. Section 785.04, STATS.; *Town of Seymour v. City of Eau Claire*, 112 Wis.2d 313, 320, 332 N.W.2d 821, 824 (Ct. App. 1983). Section 785.04 states in relevant part:

(1) **Remedial sanction.** A court may impose one or more of the following remedial sanctions:

(a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.

The circuit court has the inherent power to determine the reasonableness of attorney fees. *Harro, McAndrews & Porter v. Gerhardt*, 62 Wis.2d 179, 185, 214 N.W.2d 401, 404 (1974). This court independently reviews attorney fees when they are challenged on appeal. *Seymour*, 112 Wis.2d at 321, 332 N.W.2d at 824. Factors which we consider are the amount and type of services, the time required by the contempt proceeding, the skill of the attorney, and the importance of the litigation. *Id.*

Terry contends that the trial court erred because it did not accept Attorney Martin Harrison's testimony that the fees sought were "excessive". However, Attorney Harrison's testimony showed he did not consider any of the costs that Jacqueline incurred, or the parties' stipulation which had to be drafted to accommodate Terry's request for a continuance, or the time the parties had actually spent in court proceedings. He did agree that if Terry had paid nothing toward Patricia's college expenses when the parties appeared before the court commissioner that he could not have been in compliance with the divorce judgment at that time.

The court carefully considered Attorney Harrison's testimony and agreed that Terry should not be required to pay Jacqueline's attorney's fees incurred to meet his motion to modify the judgment. The court made specific reductions in the requested fees in that regard, and awarded \$822.25 less than Jacqueline requested. We have reviewed the bill for legal services which details the time spent and the hourly rates charged. Given the nature of the

proceedings, the fact that only Jacqueline had an attorney when most of the fees were generated, and the appropriate reductions made by the trial court, we conclude the trial court properly exercised its discretion. See *Stan's Lumber, Inc. v. Fleming*, 196 Wis.2d 554, 572, 538 N.W.2d 849, 856 (Ct. App. 1995).

Terry also contends that the amount of money which he owed, \$2,027.27, was small by comparison to the attorney's fees requested; and therefore, the fees in and of themselves were unreasonable. His argument was considered by the circuit court, which was concerned that the "sum seems greater than its parts." However, after studying each part of the bill from Jacqueline's attorney, it found that most were reasonably incurred in order to obtain Terry's compliance with the judgment of divorce. We find no error in the circuit court's determination; and therefore, we affirm its decision in regard to the remedy it applied, pursuant to § 785.04(1)(a), STATS.

CONCLUSION

By the Court. – Order affirmed.

Not recommended for publication in the official reports.