COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2943 **Cir. Ct. No. 2002FA1382**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE MARRIAGE OF:

KAREN A. PINTO,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

JOHN G. HAROLD,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR. Judge. *Affirmed.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Karen Pinto appeals from an order modifying child support, denying her interest on child-related expenses owed by John Harold, and denying her attorney fees because John was not in contempt for his failure to pay.

Karen lists eleven issues and challenges the circuit court's refusal to order placement with her when the children are ill or injured, the determination of the amount of placement with each parent, the amount of income imputed to her, the amount of child support, the failure to make the child support order retroactive, the modification of how variable expenses are shared and what constitutes variable expenses, the denial of interest on unpaid variable medical expenses, and the failure to hold John in contempt and award her attorney fees; she also requests an award of appellate attorney fees. Harold cross-appeals challenging the requirement that he pay one-half of the tae kwon do (TKD) expenses incurred for the children prior to the modified support order.

¶2 The parties divorced in 2004 and they have three minor children. They have joint legal custody of the children and share physical placement under a 2005 stipulation. The 2005 stipulation leaves child support open. Under the stipulation the parties are required to share equally "[a]ll variable costs, including school lunches, activities, uninsured health care, camps, sports, music, etc." and "all clothing expenses associated with variable costs plus activities, lessons and sports."[1] The parties agreed that scouts, TKD, swimming, horseback riding, gymnastics, ballet, and rock climbing were appropriate extracurricular activities for the children. In July 2008 an order was entered approving a stipulation regarding the children's participation in TKD which required Karen to transport the children to and from TKD classes and establishing the days and events of participation.

[1] When signing the order based on the parties' stipulation, the circuit court inserted the last clause of expenses to be shared equally.

¶3 In September 2008, Karen filed a motion to modify child support and an order to show cause for John's alleged contempt in not paying his half of variable expenses over the previous thirty-seven months and not paying his half of non-covered medical expenses for over five years. John filed a motion to modify physical placement of the children so he could have placement when he was off work on a non-school day which is his placement day. On de novo review from the determination made by the family court commissioner, the circuit court entered the order appealed from.[2] The various provisions in the order will be discussed ad seriatim in addressing the multiple issues raised on appeal.

PLACEMENT WHEN CHILDREN ARE ILL OR INJURED

¶4 "A court has wide discretion in making physical placement determinations." ***Wiederholt v. Fischer***, 169 Wis. 2d 524, 530, 485 N.W.2d 442 (Ct. App. 1992). The exercise of discretion requires that the circuit court consider the facts of record in light of the applicable law to reach a reasoned and reasonable decision. ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

¶5 Determinations related to physical placement of a minor child must be consistent with his or her best interest. WIS. STAT. § 767.41(5) (2007-08)[3] ("the court shall consider all facts relevant to the best interest of the child");

[2] Waukesha County Judge James R. Kieffer heard the evidence and orally ruled. The final order was signed and entered by Judge Lee S. Dreyfus.

Before entry of the final order, Karen filed a motion to suspend and modify placement and John filed a motion to modify custody, placement and child support. Those motions were addressed by a separate order entered the same day as the final order from which these appeals are taken. The issues raised by those motions are not subject to review in these appeals.

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

§ 767.451(2) (modification of a substantially equal placement order possible if in the best interest of the child). The determination of what is in a child's best interest is a mixed question of law and fact. ***Wiederholt***, 169 Wis. 2d at 530. We will not disturb the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Where the circuit court's legal conclusion is so intertwined with the factual findings, we give weight to the circuit court's decision. ***Wiederholt***, 169 Wis. 2d at 531.

¶6 Karen requested that she be awarded placement of the children when they are ill or injured. This amounts to a request that John be denied placement on his days if the children are ill or injured. A child is entitled to physical placement with both parents unless the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health. WIS. STAT. § 767.41(4)(b). The circuit court found no credible evidence that John was unable to properly care for the children when they were with him. Karen argues that the record does not support this finding.

¶7 It is not necessary to recite John's testimony explaining the instances which Karen testified about concerning untreated injuries or illness of the children. The circuit court made a credibility determination. It believed John's explanation over Karen's view of the events. The circuit court, as the finder of fact, is entitled to judge the credibility of the witnesses and we are required to give due regard to the opportunity of the circuit court to judge such a matter. *See* ***Hughes v. Hughes***, 148 Wis. 2d 167, 171, 434 N.W.2d 813 (Ct. App. 1988). The finding that placement with John when the children are ill or injured does not endanger the children's health is not clearly erroneous. The circuit court's refusal to change placement was a proper exercise of discretion.

JOHN NOT IN CONTEMPT

¶8 Contempt requires findings that the person is able to pay and the refusal to pay is willful and with intent to avoid payment. ***State v. Rose***, 171 Wis. 2d 617, 623, 492 N.W.2d 350 (Ct. App. 1992). The circuit court's findings of fact in a contempt proceeding are conclusive unless clearly erroneous. ***Id.*** We review a circuit court's use of its contempt power to determine if it properly exercised its discretion. ***City of Wis. Dells v. Dells Fireworks, Inc.***, 197 Wis. 2d 1, 23, 539 N.W.2d 916 (Ct. App. 1995).

¶9 Karen alleged that John had failed to reimburse her for $12,851 for his share of variable expenses and a smaller sum for his half of non-covered medical expenses. She sought attorney fees based on the parties' 2005 stipulation that a party losing any contempt action would pay the attorney fees of the other party. The circuit court found that John owed Karen $17,448.89 for his share of variable expenses but refused to find John in contempt.[4] Karen argues that the record leads to only one conclusion—that John's failure to pay the variable and non-covered medical expenses was not due to an inability to pay and was willful and contemptuous.

¶10 With respect to the non-covered medical expenses, the circuit court found that Karen had not notified John of his share of the expenses until John was served with the order to show cause. It also found that at times John would not know that the children had been to the doctor and he would have no reason to

[4] Before the de novo review hearing the parties agreed on the amount John owed for non-covered medical expenses and he paid that sum in full. The circuit court found there were no medical expenses owed through the date of its oral decision.

examine explanation of benefit forms from his insurer. It found that Karen had not submitted the correct amount of the expenses to John. Again Karen's contention that the record does not support these findings is nothing more than disagreement with the circuit court's specific credibility determination favoring John. The circuit court was free to accept John's testimony over Karen's exhibits summarizing six years of medical expenses and only a sampling of emails notifying John of the children's appointments.

¶11 John challenged certain variable expenses for which Karen was seeking reimbursement. The circuit court addressed each and resolved whether the expenses for school snacks, birthday gifts, and winter recess clothing were legitimate variable expenses to be shared equally.

¶12 The vast majority of the unpaid variable expenses related to the children's extensive involvement in TKD. Karen contends that in the 2005 stipulation John specifically approved TKD and other extracurricular activities but then refused to pay his share of the expense. John testified that he questions the reasonableness of the TKD fees. The circuit court found that in the 2008 proceeding John expressed concern about the amount of time the children were spending at TKD and the TKD fees. Although it ultimately found John responsible for one-half the TKD fees, it concluded that John had valid and reasonable concerns to dispute the reasonableness of the TKD fees and other variable expenses.

¶13 It was John's burden to show that he was not in contempt. ***Rose***, 171 Wis. 2d at 623. The circuit court determined he met that burden. In a contempt proceeding willfulness is defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful. ***Currie v.***

Schwalbach, 132 Wis. 2d 29, 39, 390 N.W.2d 575 (Ct. App. 1986). Here the circuit court determined that John had not paid his share of non-covered medical expenses due to uncertainty as to the amount. It determined that John's failure to pay one-half of the variable expenses was justified by his questioning of the reasonableness of the expenses. Because John had justifiable reason for not paying, he did not volitionally act in disobedience of the variable expense requirement.

INTEREST ON PAST DUE VARIABLE EXPENSES

¶14 Karen argues that under WIS. STAT. § 767.511(6), requiring simple monthly interest on child support arrears, she is entitled to interest on the unpaid variable expenses. A circuit court has no discretion with respect to the imposition of interest on the past due amounts of child support ordered under § 767.511. ***Douglas Cnty. Child Support v. Fisher***, 200 Wis. 2d 807, 815, 547 N.W.2d 801 (Ct. App. 1996). Whether the unpaid variable expenses are child support arrears requires the application and interpretation of a statute. Questions of law are presented that we review without deference to the circuit court. ***Id.*** at 811.

¶15 We first observe that Karen did not raise the application of WIS. STAT. § 767.511(6), to variable expenses before the circuit court. We can find no point at which she cited the statute to the circuit court. We generally will not review an issue which is raised for the first time on appeal. ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992).

¶16 Karen relies on ***Kuchenbecker v. Schultz***, 151 Wis. 2d 868, 876, 447 N.W.2d 80 (Ct. App. 1989), where we held that the assignment of responsibility for health care fell under WIS. STAT. § 767.511 as a child support provision subject to revision. Interest on arrearages is subject to administration by the Department

of Children and Families or its designee. Sec. 767.511(6). Variable expenses, unlike health care expenses, are not mentioned in § 767.511 as an aspect of child support which the court must address. In contrast WIS. ADMIN. CODE § DCF 150.04(2)(b)6. and (6)(b)5., directs that "[i]n addition to the child support obligation" the court shall assign responsibility for payment of the child's variable costs in proportion to each parent's share of physical placement. Those provisions specifically except variable expenses from administration by the department or its designee except if incorporated in the fixed sum or percentage expressed child support order. The treatment of variable expenses as something ordered in addition to child support suggests it is not child support. The interest provision in § 767.511(6) applies to payments administered by the department or its designee and that does not include variable expenses. It was not error to deny interest on the past due variable expenses.

MODIFICATION OF SHARED VARIABLE EXPENSES

¶17 The circuit court ordered that commencing July 30, 2009 "all extracurricular activities must be mutually agreed to in writing" and if there is not agreement, "then the party that makes the request may continue the child's participation in the activity (as long as it does not impact on the placement time of the other parent), with the requesting party being solely responsible for the cost." This was a modification of the parties' 2005 stipulation to share the expense of extracurricular activities equally and the list of agreed upon activities. The order was made in response to the extensive involvement and expense of the children's TKD. The circuit court's order also removed school snacks and lunches from shared variable expenses and made both parties responsible for food costs of the children at school on their placement days.

¶18 Karen argues that the circuit court lacked authority to modify the shared variable expense stipulation because neither party had moved for modification of the stipulation. She also argues that the modification was an erroneous exercise of discretion because it gives one party unfettered veto power as to extracurricular activities and it makes her solely responsible for school lunches and snacks. She suggests that the circuit court made an error of law as to the scope of its authority and that the modification is not based on the facts of the case. *See* ***Steinmann v. Steinmann***, 2008 WI 43, ¶20, 309 Wis. 2d 29, 749 N.W.2d 145.

¶19 Karen's claim that the handling of variable expenses was not put in issue ignores that she sought an order setting child support. Karen asked the court to require John to pay child support of 29% and she would pay all variable expenses. The request for child support put the parties' financial arrangements in play. Further, under WIS. ADMIN. CODE § DCF 150.04(2)(b)6., once the court determined that shared-time payer formula applied, the circuit court was charged to make a provision as to variable expenses. WISCONSIN STAT. § 767.59(1c)(a)2., recognizes the authority to "[m]ake any judgment or order on any matter that the court might have made in the original action" when acting on a motion to revise child support. *See also* § 767.01(1) (circuit court has authority to do all acts and things necessary and proper to carry their orders and judgment into execution as prescribed in chapter 767). The circuit court recognized that the extracurricular expenses, particularly TKD fees, were a source of conflict between the parties. It specifically stated it wanted to put the issue to rest. The court had inherent authority to do all that was necessary to save the parties and the court from constant litigation. The circuit court did not exceed its authority in changing the way extracurricular activities would be paid for.

¶20 The circuit court was well-aware of the importance of TKD for the children. The court balanced that import with the need for less litigation over the expense of extracurricular activities and the reasonableness of the expenses. The order does not prohibit extracurricular activities entirely. It may well be, as Karen suggests, that John will refuse to agree to continued TKD for the children in terms of expense and time on his placement days. The circuit court recognized that and remarked that the children would have to talk to their father about it. The modification was not made without consideration of the facts. It was a proper exercise of discretion. With the onus now placed on the children to gain John's approval of their continued participation in TKD, both parties are well advised to remember that it is in the children's best interests if their divorced parents can agree among themselves how to handle the children's expenses. Too often "divorced parents 'allow the desire to nurture their personal animosities to overshadow the welfare of the child,'" and every effort should be made to avoid making a child "more of a football in the game of life than a player." ***Weichman v. Weichman***, 50 Wis. 2d 731, 736, 184 N.W.2d 882 (1971).

¶21 Regarding the change for school snacks and lunches, Karen believes she is now solely responsible for lunch costs since the children are placed with her every day from 6:30 a.m. until the school busses arrive. John does not respond to her argument that it was erroneous exercise of discretion to remove school lunches and snacks from the shared variable expenses. Although we might take his failure to respond as a concession of error, ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979), we do not. Karen's claim is based on an interpretation of the order that violates the spirit of the circuit court's ruling. The circuit court intended each party would bear the expense of food necessary for the school day. John has days of placement on

school days albeit that the children end and start those placement days at Karen's. We are not convinced that the circuit court intended Karen to be solely responsible for school lunches or snacks. It was not an erroneous exercise of discretion to fashion a provision that would avoid Karen's daily tally for school snacks even if in practice it proves impractical to make each party responsible for their days of placement.

CHILD SUPPORT

¶22 Modification of child support rests within the sound discretion of the circuit court. ***Thibadeau v. Thibadeau***, 150 Wis. 2d 109, 115, 441 N.W.2d 281 (Ct. App. 1989). Applying a shared-time payer formula, the circuit court ordered John to pay child support of $833 per month commencing August 1, 2009, and that variable expenses (sans extracurricular activities and school lunches) be split 55% paid by Karen and 45% paid by John.

A. Equivalent Care Credit.

¶23 Karen argues she was not given sufficient equivalent care credit in determining the percentage of time the children are placed with her. *See* WIS. ADMIN. CODE § DCF 150.02(10).[5] Karen believes that a proper determination would result in a finding that she has the children 85% of their waking time because she takes the children before and after school, even on John's placement days, and on days off from school. We consider whether the circuit court properly

[5] WISCONSIN ADMIN. CODE § DCF 150.02(10), provides: "'Equivalent care' means a period of time during which the parent cares for the child that is not overnight, but is determined by the court to require the parent to assume the basic support costs that are substantially equivalent to what the parent would spend to care for the child overnight."

exercised its discretion in reaching the physical placement percentages. *See* ***Evenson v. Evenson***, 228 Wis. 2d 676, 692, 598 N.W.2d 232 (Ct. App. 1999).

¶24 The circuit court observed that the parties' placement arrangement had not really changed since the 2005 stipulation where the parties agreed to share physical placement and child support was held open. The court noted that when that stipulation was made, the parties "built in" the option that Karen could care for the children before and after school on John's placement days and days off school. It considered that Karen had simply bargained for more time with the children without requiring financial consequences.[6] The only adjustment the court made to the established arrangement was for summer where in fact Karen had the children all day on John's placement days. That resulted in the court giving Karen credit for 17.5 days of equivalent care. The court acknowledged Karen's calculation giving her a higher percentage but determined that use of her calculation was unfair to John and ignored the previous agreement for shared time. The circuit court simply refused to let Karen dispense with the prior fiction that the actual arrangement was equal shared time and to benefit financially from her bargain for more time. The determination of the placement percentages is a reasoned one and based on the record. Therefore it is a proper exercise of discretion.

B. Imputed Income.

[6] This dovetails with the modified provision that each parent cover the cost of school lunches and snacks on his or her placement days. The circuit court recognized certain school days to be John's placement days even if Karen opted to care for the children on those school mornings.

¶25 The circuit court imputed $85,536 annual income to Karen. It was based on her previous stipulation that annual income of $75,000 should be imputed to her because approximately a year after the divorce she voluntarily left her job to be home with the children. The amount of imputed income was increased by inflation. The circuit court's determination of income is a finding of fact which we will not set aside unless clearly erroneous. ***DeLaMatter v. DeLaMatter***, 151 Wis. 2d 576, 588, 445 N.W.2d 676 (Ct. App. 1989).

¶26 Karen argues that this is a case like ***Chen v. Warner***, 2005 WI 55, ¶¶4, 20, 280 Wis. 2d 344, 695 N.W.2d 758, where the court held that a divorced mother's decision to leave her employment to stay home with the children was reasonable and did not require the imputation of income to the mother when determining child support. She claims that the circuit court failed to address the factors outlined in ***Chen***, ¶50, when determining whether income should be imputed to her. However, this is not a case like ***Chen*** in which the circuit court was being asked to decide for the first time whether the decision to voluntarily forego employment was reasonable. In 2005, after she left her job, Karen stipulated that income should be imputed to her and that formed the basis for leaving child support open between the parties. The stipulation foreclosed a court determination of whether her decision was reasonable when made.

¶27 In modification proceedings the circuit court must adhere to the original findings of fact and issues already determined cannot be retried. ***Jantzen v. Jantzen***, 2007 WI App 171, ¶13, 304 Wis. 2d 449, 737 N.W.2d 5. Thus, the circuit court appropriately looked to whether there was any change of circumstances since the time of the stipulation relating to Karen's decision not to be employed outside the home. It found nothing had changed to keep her out of the workforce earning income.

¶28 Karen also challenges the amount of income imputed to her. She argues that increasing her past salary by inflation does not reflect her current earning capacity and that there was no evidence that if she had stayed with her employer she would be earning $85,536 annually. To reverse a finding of fact the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. ***Wallen v. Wallen***, 139 Wis. 2d 217, 224, 407 N.W.2d 293 (Ct. App. 1987). In determining the amount of imputed income the court considers the parent's education, training and recent work experience, earnings during previous periods, current physical and mental health, history of child care responsibilities as the parent with primary physical placement, and the availability of work in or near the parent's community. WIS. ADMIN. CODE § DCF 150.03(3).

¶29 Karen testified that one of the reasons she left her job was that she would have been required to take a $20,000 reduction in salary. She also testified that she could not return to work with that employer or work in the same field because of changes in regulations. She opined that she could earn "in the low 40's." John testified that his internet search of jobs with the same title as Karen's former job turned up jobs paying $104,000 to $152,000 per year.

¶30 The circuit court's finding is based the competing evidence. The starting point was the stipulation of $75,000 annual income imputed to Karen. Karen could not relitigate that starting point. The court rejected Karen's explanation and opinion about her marketable job skills. A witness's statement need not be contradicted by other evidence in the record as a condition precedent to the circuit court's review of the witness's credibility. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶28, 246 Wis. 2d 648, 630 N.W.2d 752. Given the range of salaries John found, the circuit court could infer that if Karen had remained in the

field she would earn her previous salary increased by a minimum of inflation. We must accept the inference drawn by the circuit court. ***Wallen***, 139 Wis. 2d at 224. We conclude the amount of imputed income was based on the evidence available to the circuit court and is not clearly erroneous.

C. Exercise of Discretion.

¶31 The determination of appropriate amount of child support is committed to the discretion of the circuit court. ***Luciani v. Montemurro-Luciani***, 199 Wis. 2d 280, 294, 544 N.W.2d 561 (1996). Karen argues that the circuit court erroneously exercised its discretion because it did not explain why it did not adopt Karen's request that child support be set at 29% of John's income and Karen be responsible for all variable expenses, including extracurricular activities. She likens this case to ***Rumpff v. Rumpff***, 2004 WI App 197, ¶16, 276 Wis. 2d 606, 688 N.W.2d 699, affirming child support under the standard percentage guideline without a reduction under the shared-time payer provision and relieving the payer of the obligation regarding variable expenses. We recognized in ***Rumpff*** that the desire to avoid future litigation over variable expenses provides a reasonable basis to deviate from the shared-time payer formula. ***Id.***

¶32 Just because Karen and John have difficulty and conflicts over the splitting of variable expenses does not mean that the circuit court was required to adopt the ***Rumpff*** approach. It remains that the application of the shared-time payer formula is presumptively correct. ***Id.***, ¶14. Even if the circuit court failed to express its rationale to remain within the formula or deviate from it, we may search the record for facts that support the court's discretionary decision. ***Id.***, ¶19.

¶33 The burden of proof that application of the required formula is "unfair to the child or to any of the parties," WIS. STAT. § 767.511(1m), is on the

party requesting the deviation from the formula. ***Luciani***, 199 Wis. 2d at 295-96. Karen points only to the difficulty she experiences in getting John to pay his share of variable expenses and how that has prevented the children from participating in extracurricular activities as reasons to deviate from the shared-time payer formula. The circuit court made adjustments to the definition of variable expenses that it believed would prevent future litigation over those expenses. It determined the percentages of placement that it deemed a fair representation of what was occurring. It simply did not accept Karen's view that application of the shared-time payer formula was unfair to her or the children. We conclude that the circuit court properly exercise its discretion in adhering to the shared-time payer formula in setting child support.

RETROACTIVITY OF CHILD SUPPORT

¶34 Karen's motion to set child support was filed September 26, 2008. The circuit court ordered its child support determination to take effect August 1, 2009, one month after its oral decision. Karen argues that the circuit court failed to articulate any reasons for its refusal to make child support retroactive to at least November 1, 2008, the date the court commissioner's child support determination was effective.

¶35 Modification of child support may be made retroactive to the date the motion for modification was filed. ***Benn v. Benn***, 230 Wis. 2d 301, 313, 602 N.W.2d 65 (Ct. App. 1999); WIS. STAT. § 767.59(1m). We review the determination of the effective date for an exercise of discretion. *See* ***Benn***, 230 Wis. 2d at 313-14.

¶36 The circuit court stated, "I do not believe it is overall fair to then take this new change that I'm ordering today and make it retroactive back to

November 1, 2008." Fairness is an appropriate consideration. We are not convinced that the circuit court had to say more. Even assuming its fairness determination had to be further explained, we search the record for facts to sustain the discretionary determination. ***Rumpff***, 276 Wis. 2d 606, ¶19. The circuit court had closely examined the parties' 2005 stipulation leaving child support open and consequently considered the bargain then made. It also ascertained that John was current on the non-covered medical expenses and that undisputed variable expenses had been paid in accordance with the prior stipulation. The court was made aware that John had been ordered to pay $500 a month by the court commissioner since November 1, 2008. Retroactively increasing the amount of child support would have immediately put John in arrears for a lump sum. Yet John was also required to make a payment of $17,035.47 by November 1, 2009, as his share of TKD costs and the circuit court noted the impact that had on John. The determination that it was unfair to put John in a position of making two large payments is a proper exercise of discretion.

ATTORNEY FEES

¶37 Karen argues that even if John was not in contempt, she is entitled to a contribution for her attorney fees under WIS. STAT. § 767.241. Again it is a matter of discretion for the circuit court to require a contribution to one party's attorney fees. ***Wright v. Wright***, 2008 WI App 21, ¶45, 307 Wis. 2d 156, 747 N.W.2d 690. The circuit court found that the parties had valid and reasonable disputes as to the interpretation of their prior stipulation regarding variable expenses. This was not a circumstance of overtrial suggesting a contribution to attorney fees. *See* ***id.***, ¶46 (one appropriate consideration is divorced party's willingness "over try" cases at an increased expense to the ex-spouse). Although traditionally an analysis of whether to require contribution to attorney fees centers

on each parties' financial needs and capabilities, Karen left an evidentiary vacuum on that point. She only told the circuit court that she had incurred $24,000 in attorney fees but never related it to her ability to pay. The circuit court determined that Karen had imputed income and it was not required to disregard that finding when it came time to decide the attorney fees issue. The denial of contribution was a proper exercise of discretion.

¶38 We need not address Karen's request that the she be allowed on remand to recover her appellate attorney fees. We do not reverse the finding that John is not in contempt and we affirm the denial of a contribution to attorney fees under WIS. STAT. § 767.241. There is no corresponding basis to remand for an award of appellate attorney fees.

REASONABLENESS OF TKD FEES

¶39 In his cross-appeal John challenges the determination that he owes one-half the TKD fees. He argues that the circuit court failed to determine if the fees were reasonable variable expenses and that it improperly found John equitably estopped from challenging the reasonableness of the fees.

¶40 The parties' stipulation that John would pay one-half variable expenses did not include the limitation that the expenses be reasonable. The parties were operating outside of the definition of variable expenses found in WIS. ADMIN. CODE § DCF 150.02(29). Further the stipulation approved TKD as an extracurricular activity for the children. Although the circuit court found that John could question the reasonableness of the fees, it was not required to determine if the TKD fees were reasonable to enforce the terms of the parties' stipulation. There was no failure to exercise discretion.

¶41 Before turning to John's equitable estoppel argument, we emphasize that the circuit court's ruling was to enforce the parties' stipulation as written. The court was sympathetic about the cost of the TKD fees but found that sharing the cost was what the parties had agreed to do. It noted in passing that John is equitably estopped from arguing that he was not responsible for one-half the fees. The passing reference to equitable estoppel is consistent with ***Bliwas v. Bliwas***, 47 Wis. 2d 635, 178 N.W.2d 35 (1970), one of the earliest Wisconsin cases to apply the estoppel doctrine in a divorce case. In ***Bliwas***, our supreme court determined that a father who had agreed to continue to contribute to his son's educational costs after he had reached the age of majority, in exchange for a reduction in child support payments, was estopped from challenging the trial court's ability to enforce the order. *See* ***id.*** at 640-41. The supreme court reasoned that "a person who agrees that something be included in a family court order, especially where he receives a benefit for so agreeing, is in a poor position to subsequently object to the court's doing what he requested the court to do." ***Id.*** at 640. ***Bliwas*** confirmed that the remedy to undo the stipulation is to demonstrate a material change of circumstances. ***Id.*** at 641.

¶42 John characterizes the circuit court's ruling to be that John is equitably estopped from challenging the reasonableness of the TKD fees. He then points to emails he sent protesting the reasonableness of the fees and indicating that he would only pay only a certain level of fees. Since the circuit court enforced the stipulation as written without regard to reasonableness, it is not necessary to address John's attack limited to his ability to question the reasonableness of the fees. Even affording summary treatment to John's equitable estoppel argument, we conclude there was sufficient evidence from which the circuit court could find that John approved and encouraged the children's TKD

participation and that Karen acted in reliance on his conduct to her financial detriment. "In situations such as this, all that need be shown to constitute an estoppel is that both parties entered into the stipulation freely and knowingly, that the overall settlement is fair and equitable and not illegal or against public policy, and that one party subsequently seeks to be released from the terms of the court order." ***Honore v. Honore***, 149 Wis. 2d 512, 517, 439 N.W.2d 827 (Ct. App. 1989). John simply cannot get out from what he now considers a bad bargain by trying to inject reasonableness into the writing. We are convinced that the circuit court's enforcement of the stipulation was consistent with ***Bliwas***.

¶43 We affirm the order of the circuit court in all respects. No costs to either party.

By the Court.—Order affirmed.

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