COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1047 **Cir. Ct. No. 79FA000427**

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

IN RE THE MARRIAGE OF:

DARICE G. GRIFFIN,

PETITIONER-RESPONDENT,

V.

RONALD W. GRIFFIN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 SNYDER, J. Ronald W. Griffin appeals from an order that (1) requires him to pay child support arrearages, (2) requires him to pay one-half of the posthigh school education expenses of his two children, and (3) applies the

statute of limitations to bar his claim under the residential property division portion of the divorce settlement agreement. On appeal, Ronald abandons his claim for property division, but pursues relief on the child support arrearages and educational expense issues. We conclude that the child support arrearages and educational expense obligations imposed by the circuit court were appropriate. We do not address the property division claim because Ronald has conceded the matter.[1]

FACTS

¶2 The facts are essentially undisputed. Darice G. Griffin and Ronald were divorced in 1980, and their final stipulation was approved and incorporated into the judgment of divorce. There were two children born during the marriage, Martin (born 09/01/75) and Aislynn (born 08/09/76). The court awarded Darice care and custody of the children, and set Ronald's child support obligation at $60 per week. The judgment of divorce further provided that Ronald would "contribute one-half of the amount required for further education beyond high school for the first four years thereafter for each child."

¶3 On March 25, 1982, and again on April 14, 1983, Ronald was found in contempt of court for failing to pay child support. Upon each finding of contempt, Ronald's jail confinement was stayed on the condition that he make

[1] In his argument to this court, Ronald concedes that WIS. STAT. § 893.40 (2001-02) precludes his claim on the marital residence, and, furthermore, he states that his concession is unaltered by the fact that the triggering events for the division of equity (Darice's sale of the property or her remarriage) never occurred. We are not bound by a party's concession on a question of law. ***State v. Gomaz***, 141 Wis. 2d 302, 307, 414 N.W.2d 626 (1987). However, an issue raised in the circuit court but not argued on appeal is deemed abandoned. ***State v. Johnson***, 184 Wis. 2d 324, 344, 516 N.W.2d 463 (Ct. App. 1994). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

child support payments of $40 per week. In August 1983, Ronald filed a motion to temporarily decrease his child support obligation. That October, Darice filed a motion to increase child support from the original $60 per week to $120 per week. The court held an evidentiary hearing on both matters, and the parties dispute whether Ronald's support obligation was modified as a result of this hearing. Ronald contends that the wage assignment issued as a result of the hearing, which required a $40 per week child support payment with an additional $5 per week toward the arrears, constituted a modification of the original child support award. Darice argues that because no order was prepared, the court must have denied both parties' motions and therefore the order for child support contained in the original divorce judgment was unchanged.

¶4 The matter returned to court on May 2, 2002, when Darice filed an order to show cause seeking to have Ronald found in contempt for failing to pay child support and for failing to pay one-half of the educational expenses incurred on behalf of Martin and Aislynn. Ronald filed a motion for declaratory judgment, requesting that the court clarify his child support obligation, determine his liability for educational expenses, and determine his equity interest in the former marital residence.

¶5 Following an evidentiary hearing on November 27, 2002, the circuit court found that Ronald's child support arrearage was $18,153.31 plus interest of $36,036.42 for a total amount owed of $54,189.73, that Ronald owed one-half of the educational expenses incurred by Darice on behalf of their two children, and that Ronald's request under the property division stipulation of the original divorce judgment was barred by the twenty-year statute of limitations provided in WIS. STAT. § 893.40.

DISCUSSION

¶6 Ronald appeals from the order of the circuit court, first arguing that the court erred when it refused to apply the statute of limitations to Darice's claims for educational expenses and child support arrears. The application of a statute to the facts is a question of law which this court reviews de novo. ***Hamilton v. Hamilton***, 2003 WI 50, ¶14, 261 Wis. 2d 458, 661 N.W.2d 832.

¶7 Ronald's challenge to the circuit court's ruling on child support arrears is without merit. Our supreme court has held that while an independent action for child support arrears must be brought within twenty years of the entry of judgment awarding the support, contempt proceedings remain a viable option for persons aggrieved by a parent's refusal to pay support. ***Id***., ¶47. The contempt sanction remains available because a "parent's failure to pay child support after the child reaches majority is a continuing disobedience of a court order." ***Griffin v. Reeve***, 141 Wis. 2d 699, 708, 416 N.W.2d 612 (1987).

¶8 Ronald's attempt to raise the statute of limitations as a bar to Darice's claim for educational expenses also fails because he did not raise this argument below. An argument first raised on appeal will not be considered. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52. Although Ronald contends that the statute of limitations was raised before the circuit court and therefore is preserved for appeal, we conclude from the record that Darice raised WIS. STAT. § 893.40 below. Ronald, however, did not. We therefore deem the issue waived and decline to address it further. *See* ***Lenz Sales & Serv., Inc. v. Wilson Mut. Ins. Co.***, 175 Wis. 2d 249, 257, 499 N.W.2d 229 (Ct. App. 1993).

¶9 Next, Ronald argues that the provision of the divorce judgment related to the educational expenses is ambiguous and that recovery of these expenses should be denied due to an implied notice requirement. A stipulated provision incorporated into a judgment of divorce is in the nature of a contract. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 30, 577 N.W.2d 32 (Ct. App. 1998). The meaning of a provision in the stipulation thus presents a question of law which this court reviews de novo. *See* ***id***. Whether a provision is ambiguous is also a question of law. *See* ***id***.

¶10 The ninth paragraph of the divorce stipulation states as follows: "[Ronald] shall contribute one-half of the amount required for further education beyond high school for the first four years thereafter for each child." Ronald takes issue with the term "contribute." He argues that "contribute" connotes a sharing of expenses "as they are incurred." Ronald posits, therefore, that he should not be held responsible for the expenses incurred without his input. Ronald further asks that we construe the provision against the drafter (Darice's attorney at the time of the divorce); however, there is nothing to construe. Under the clear terms of the agreement, Ronald must pay one-half of the first four years of higher education expenses for his two children. We agree with the circuit court's conclusion that the stipulation was clear and no notice provision existed.

¶11 Ronald also asks us to reject Darice's claim for educational expenses on grounds of waiver, equitable estoppel, and laches. By failing to argue waiver and equitable estoppel before the circuit court, Ronald has forgone his opportunity to argue them here. *See* ***Wirth***, 93 Wis. 2d at 443. Consequently, we only address the issue of laches. Laches is an equitable defense to an action based on a petitioner's unreasonable delay in bringing a motion under circumstances in which such delay is prejudicial to the defendant. ***Sawyer v. Midelfort***, 227 Wis. 2d 124,

159, 595 N.W.2d 423 (1999). To successfully assert laches, Ronald must prove that (1) Darice unreasonably delayed in bringing the claim, (2) he lacked any knowledge that Darice would assert the right on which the claim is based, and (3) he is prejudiced by the delay. *See* ***id***. Ronald has not successfully demonstrated the second element. The circuit court found, and the record supports, that Ronald knew his children were reaching the age of eighteen as his support obligation decreased and that he acknowledged seeing articles about their college scholarship awards in the newspaper. We conclude that Ronald cannot credibly demonstrate that he lacked knowledge that college expenses were incurred, nor can he establish that he lacked knowledge of his obligation to pay half of the expenses. Accordingly, his defense based on laches fails.

¶12 Finally, Ronald argues that the circuit court's finding that the original child support amount had never been modified was clearly erroneous. Following an exhaustive review of the record, the circuit court determined that the postjudgment orders for payments of $40 per week were a condition of the jail confinement stay and did not constitute a modification of the original judgment. We are in an equally good position to make factual inferences based on documentary evidence and need not defer to the lower court's finding. *See* ***Cohn v. Town of Randall***, 2001 WI App 176, ¶7, 247 Wis. 2d 118, 633 N.W.2d 674. Our independent review of the postjudgment orders supports the circuit court's finding that no modification of the child support award occurred. We hold that the calculation of child support arrears was properly based on the $60 per week obligation.

CONCLUSION

¶13 We conclude that Darice's claims for child support arrears and educational expenses are not time barred by WIS. STAT. § 893.40 because Ronald did not raise the statute of limitations below. Further, the claim for child support arrears is not barred by the statute of limitations because Darice is a party to the original judgment of divorce and seeks to enforce an ongoing order of the court through a contempt proceeding. *See* ***Hamilton***, 261 Wis. 2d 458, ¶47. We also conclude that laches is not available to Ronald because he knew that he was obligated to pay fifty percent of the children's higher education expenses and he also knew that his children were going to college. Finally, we hold that the circuit court properly exercised its discretion in determining that, based on the record, no modification of the original child support portion of the divorce judgment occurred.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.