STATE OF MINNESOTA
IN COURT OF APPEALS
A09-558

In re the Marriage of:
Lowanda B. Kail, petitioner,
Appellant,

vs.

Brian T. Kail,
Respondent.

Filed December 22, 2009
Reversed and remanded
Wright, Judge
Dissenting
Stoneburner, Judge

Dakota County District Court
File No. 19-F5-92-012515

John T. Burns, Jr., Burns Law Office, 200 American Bank Building, 14300 Nicollet Court, Burnsville, MN 55306 (for appellant)

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Considered and decided by Wright, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

WRIGHT, Judge

Appellant challenges the district court's determination that the provision in the dissolution judgment and decree regarding the parties' obligation to pay the post-

secondary education expenses for their son is ambiguous and unenforceable. Appellant argues that the district court failed to adequately examine the language of the agreement to discern the parties' intent and order enforcement of the provision. We reverse and remand.

FACTS

The marriage of appellant Lowanda Kail and respondent Brian Kail was dissolved in May 1992. Prior to the dissolution, the parties, who were both represented by counsel, entered into a marital termination agreement which was approved by the district court and incorporated into the dissolution judgment and decree. The judgment and decree provides, in relevant part:

> [Appellant] and [respondent] have mutually agreed and covenanted in writing that each party is, to the extent that he/she is financially able, responsible for 50% of all necessary and reasonable post-high school education expenses of the minor child of the parties. Payment shall include reasonable tuition, books, supplies, and living expenses. The amount shall be determined after deducting scholarships and grants the child may receive, and any amounts the child voluntarily pays himself. To qualify, the child must be regularly attending a trade school, vocational school, business college, college or university and be in good standing at the institution. The parties' Agreement constitutes a legally binding contract between them, for good and valuable consideration, and shall survive the Judgment and Decree herein.

In July 2008, appellant moved to have respondent held in contempt for refusing to pay half of their son's anticipated college expenses at Augsburg College. The district court denied the motion as premature because it was unclear whether the son would be eligible for grants or financial aid, the respondent's obligation "is not clearly defined with

respect to the child's contribution . . . and the parties' financial ability to pay tuition costs," and respondent did not have notice regarding the "specific amount due and owing" for college expenses.

In October 2008, appellant moved for an order directing respondent to pay half of their son's post-secondary educational expenses, including tuition, books, supplies, parking fees, computer, printer, and monthly insurance premiums. After analyzing the language of the judgment and decree, the district court denied the motion, finding that the terms "to the extent that he/she is financially able" and "necessary and reasonable post-high school education expenses" are ambiguous. The district court further determined that there was no extrinsic evidence that would be helpful in resolving the judgment and decree's ambiguity. Concluding that the judgment and decree regarding post-secondary expenses was unenforceable, the district court struck the paragraph from the judgment and decree and denied appellant's request for relief.

In February 2009, appellant moved for amended findings and an order directing respondent to pay $1,330 per month toward their son's post-secondary education expenses. The district court denied the motion, again finding the judgment and decree to be unenforceable due to its ambiguity. This appeal followed.

D E C I S I O N

Appellant concedes that the language of the judgment and decree includes some "ambiguity or other imperfections of expression," but she argues that the district court failed to adequately examine the reasonable meaning of the language used to "obtain a just result consistent with [the parties'] intent."

The terms of a stipulated dissolution judgment and decree are construed using contract-law principles. *In re Estate of Rock*, 612 N.W.2d 891, 894 (Minn. App. 2000). Whether a dissolution judgment and decree is ambiguous presents a question of law, which we review de novo. *Tarlan v. Sorensen*, 702 N.W.2d 915, 919 (Minn. App. 2005); *see Dorsey & Whitney LLP v. Grossman*, 749 N.W.2c 409, 419 (Minn. App. 2008) (holding that whether contract provision is ambiguous is a question of law, which we review de novo). When the language of a judgment and decree provision is reasonably subject to more than one interpretation, it is ambiguous. *Halverson v. Halverson*, 381 N.W.2d 69, 71 (Minn. App. 1986). But "[i]nterpretation of a divorce decree that is ambiguous or uncertain on its face and, because of its language, is of doubtful meaning or open to diverse constructions, may be clarified by the tribunal that ordered it." *Mikoda v. Mikoda*, 413 N.W.2d 238, 241 (Minn. App. 1987), *review denied* (Minn. Dec. 22, 1987). Parol evidence may be received and considered by the district court to determine what the judgment and decree was intended to convey and to express the judgment and decree more definitely. *Id*. at 242. The whole record may be examined to ascertain the meaning of an ambiguous judgment and decree. *Id*. The meaning of an ambiguous judgment and decree provision is a question of fact, which we review for clear error. *Tarlan*, 702 N.W.2d at 919.

"[T]he law does not favor the destruction of contracts because of indefiniteness, and if the terms can be reasonably ascertained in a manner prescribed in the writing, the contract will be enforced." *King v. Dalton Motors, Inc.*, 260 Minn. 124, 126, 109 N.W.2d 51, 53 (1961) (footnote omitted). But a contract is void if it is so vague,

indefinite, or uncertain that the contract's meaning and the parties' intent is left to speculation. *Id*. at 126, 109 N.W.2d at 52.[1]

The district court found the following language to be too ambiguous to be enforceable: "each party is, to the extent that he/she is financially able, responsible for 50% of all necessary and reasonable post-high school education expenses of the minor child of the parties." Specifically, the district court found that the term "financially able" is ambiguous as to whether it refers to respondent's ability to pay based on the amount of time he had to save for this obligation or based on the financial resources available to him when the expenses are incurred. The district court also found the phrase "necessary and reasonable" to be ambiguous because questions exist regarding whether private college tuition, room and board, and an expensive computer are reasonable.

In concluding that extrinsic evidence is not adequate to ascertain the meaning of "to the extent . . . financially able," the district court relied on its interpretation that the parties agreed that they would be obligated to contribute "either 50% . . . or nothing." The allowance for no contribution whatsoever, the district court concluded, contradicts the evidence of the parties' desire for the child to go to college and renders the extrinsic evidence inadequate to determine intent.

[1] We observe that in the 1992 judgment and decree, the district court expressly adopted and approved the marital termination agreement at issue here, finding that the parties "agreed that they shall each be responsible for certain post-high school educational expenses of their minor child." Because the district court originally approved the language as representing an enforceable agreement, it is particularly important that the meaning of the terms be reasonably ascertained, if at all possible, to enforce the judgment and decree consistent with the parties' intent.

Contrary to the district court's construction, the plain meaning of the judgment and decree demonstrates that the parties did not agree to contribute 50 percent or nothing. One phrase at issue is: "each party is, to the extent that he/she is financially able, responsible for 50%." The district court's interpretation ignores the words, "*to the extent*," which signify that the parties' obligation to contribute is dependent on their capacity to do so and that 50 percent is a cap rather than an absolute level of contribution. By interpreting this phrase to mean "*if* he/she is financially able," the district court fails to give meaning to the words "to the extent" and misinterprets this term. *See Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995) (holding that a contract should be interpreted in a way that gives each of its provisions meaning). Thus, the district court's conclusion that the extrinsic evidence is insufficient to ascertain the meaning of the ambiguous terms, which relies on its incorrect interpretation that the parties had agreed to pay "50% . . . or nothing," is erroneous as a matter of law. When properly construed, the agreement is an expression of the parties' intent to be obligated to contribute as much as they are financially able, up to 50 percent of reasonable post-secondary expenses.

In order to establish respondent's obligation, the district court must first address the meaning of the phrase "necessary and reasonable . . . expenses." The determination of reasonable and necessary expenses is a question of fact for the district court. *See Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (remanding case because district court failed to make findings as to parties' expenses). In determining whether extrinsic evidence is available to ascertain the meaning of "necessary and reasonable," the district court may

find guidance by analogizing to Minnesota caselaw in which the findings of district courts as to what constitutes reasonable living expenses have been affirmed when supported by the evidence. *See, e.g.*, *Rask v. Rask*, 445 N.W.2d 849, 854 (Minn. App. 1989) (analyzing district court's calculation of reasonable living expenses for an abuse of discretion). In addition, while not precedential authority, caselaw from foreign jurisdictions that have addressed payment of post-secondary education expenses may be instructive. For example, "[i]n determining whether college expenses are reasonable, courts have appropriately considered all relevant equitable factors." *Mandel v. Mandel*, 906 N.E.2d 1016, 1022 (Mass. App. Ct. 2009) (quotation omitted). These factors include "the cost of the school, the programs offered at the school, the [student's] scholastic aptitude, how the school meets the [student's] goals, and the benefits the [student] will receive from attending the school." *Id.* An additional factor for consideration is whether there are comparable academic offerings at other area institutions to which the student may be admitted.

After ascertaining the meaning of "necessary and reasonable . . . expenses," the district court must then determine whether extrinsic evidence is available to ascertain the extent to which respondent is "financially able" to contribute to the reasonable and necessary educational expenses in order to determine what portion of those expenses respondent will be obligated to contribute. Because neither the language of the judgment and decree nor any extrinsic evidence proffered indicates that the parties contemplated that each parent was obligated to save a prescribed amount or percentage of income in anticipation of this obligation, the extent to which each party is financially able to

contribute is based on that party's current circumstances and is capped at 50 percent of the necessary and reasonable expenses. Here too, Minnesota's spousal-maintenance caselaw and caselaw from foreign jurisdictions may provide guidance to the district court. *See, e.g.*, *Rask*, 445 N.W.2d at 854-55 (reviewing district court's analysis of an obligor's ability to pay for abuse of discretion). For example, a trial court was directed to examine a party's ability to pay post-secondary education expenses by assessing the parent's "need to service pre-existing debt reasonably incurred, to pay reasonable monthly living expenses, and to support the minor child . . . ." *Shellenberger v. Shellenberger*, 906 P.2d 968, 975 (Wash. Ct. App. 1995). The district court also was instructed to consider

> the adult children's ability to contribute to their own education[ ] through grants, scholarships, student loans and summer and/or part-time employment during the school term, as well as the ability of [the other parent] to reasonably contribute, consistent with [the other parent's] own pre-existing debts reasonably incurred and [the other parent's] reasonable living expenses.

Id. Another court observed that, to determine a parent's ability to contribute to post-secondary education expenses, the district court must determine if the parent has "sufficient estate, earning capacity, or income to provide financial assistance without undue hardship," observing that "undue hardship does not imply the absence of personal sacrifice, because many parents sacrifice to send their children to college." *Wagner v. Wagner*, 989 So.2d 572, 580 (Ala. Civ. App. 2008) (quotations omitted). Although these cases are not precedential, they are instructive for a district court addressing a similar determination.

A provision with a discernable meaning should not be excised from a judgment and decree because to do so would improperly alter the parties' otherwise final rights. *See Potter v. Potter*, 471 N.W.2d 113, 114 (Minn. App. 1991) (stating that district court "has the power to clarify and construe a divorce judgment so long as it does not change the parties' substantive rights"). Here, the plain meaning of the judgment and decree's language expresses the parties' meeting of the minds that each would be obligated to pay as much as each is financially able, up to 50 percent, toward their son's reasonable and necessary post-secondary education expenses. We, therefore, reverse the district court's decision and remand for findings, consistent with this opinion, regarding whether extrinsic evidence is sufficient such that the meaning of the ambiguous terms "financially able" and "necessary and reasonable" can be reasonably ascertained consistent with the parties' intent. And if so, to set the parties' obligations accordingly. The decision to reopen the record on remand rests within the district court's discretion.

Reversed and remanded.

STONEBURNER, Judge, dissenting

I respectfully dissent. "The vice of ambiguous [contract] language is that it fails precisely and clearly to inform contracting parties of the meaning of their ostensible agreement. Because ambiguous language is susceptible of two or more reasonable meanings, each party might carry away from the agreement a different and perhaps contradictory understanding." *Anderson v. McOskar Enters., Inc.*, 712 N.W.2d 796, 801 (Minn. App. 2006).

In this case, the record amply reflects that the parties carried away substantially different understandings from their attempt to agree to contribute equally to their then 21-month-old son's post-secondary education. Appellant's affidavit, submitted with her motion to hold respondent in contempt for failing to pay one-half of their son's $33,000-per-year tuition and board, expresses her understanding that the agreement obligated each party to save for college expenses and that respondent's failure to do so does not relieve him of the obligation to pay 50% of tuition, board, and other related expenses. Appellant sought an order from the district court compelling respondent to undertake "whatever parent endorsed college loans, personal loans, second mortgages, liquidation of retirement accounts, or other financial actions" such that he can contribute 50% of the post-secondary education expenses that appellant asserts are reasonable. Respondent's affidavit reflects that he understood he was not obligated to pay more than he deems himself to be financially able to pay. Respondent details his financial woes and states that, since the dissolution, he has never been in a financial position to set aside college

funds and is currently not financially able to contribute more than $300 per month toward his son's education, and he challenges the reasonableness of the expenses claimed.

Despite the evidence in the record that the parties had no mutual agreement about the meaning of their purported contract, the majority would import language into the contract making the district court the arbiter of respondent's ability to pay as well as what constitutes "reasonable tuition, books, supplies, and living expenses" for the student and the student's ability to contribute to his own education. Because the agreement gives no guidance in determining these essential matters, the majority would further import standards from spousal-maintenance case law to guide the district court in this burdensome, expensive litigation.

An agreement should be upheld where, despite some incompleteness, a court can reasonably find the parties' intent by applying the words as the parties must have understood them. *Triple B & G, Inc. v. City of Fairmont*, 494 N.W.2d 49, 53 (Minn. App. 1992). Had the record reflected discussions or other evidence of a mutual agreement about each parent's obligation under this agreement, the agreement might have been enforceable. But, in this case, the record shows that the parties did not have a mutual understanding of the words used at the time the provision was drafted. The majority is not asking the district court to construe ambiguous contract language but is modifying the language to supply a dispute-resolution provision not agreed to by the parties. I submit that this court does not have the authority to do so. "If an alleged contract is so uncertain as to any of its essential terms that it cannot be consummated without new and additional stipulations between the parties, it is not a valid agreement."

Id. I would affirm the district court's holding that this alleged contract is so vague, indefinite, and uncertain as to place the meaning and intent of the parties in the realm of speculation, and therefore is void and unenforceable. *See King v. Dalton Motors, Inc.*, 260 Minn. 124, 126, 109 N.W.2d 51, 52 (1961).