STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1523

In re the Marriage of:

Lowanda B. Kail, petitioner,
Appellant,

vs.

Brian T. Kail,
Respondent.

Filed May 3, 2011
Reversed and remanded
Ross, Judge

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

John T. Burns, Jr., Burns Law Office, Burnsville, Minnesota (for appellant)

Brian T. Kail, Robbinsdale, Minnesota (pro se respondent)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

ROSS, Judge

In this second appeal we again address the district court's decision to deem unenforcable an agreement between divorcing parties to each pay up to half of their then-toddler's eventual college expenses. Lowanda and Brian Kail agreed to split the "reasonable" and "necessary" expenses for their son's "trade school, vocational school, business college, college or university" costs "to the extent" that each was "financially able." After their son enrolled in college, Lowanda Kail asked the district court to enforce the agreement and require Brian Kail to pay half the tuition and expenses. The district court held that the agreement as embodied in the dissolution decree was unenforceable. Lowanda Kail appealed and we reversed and directed the district court to construe, if possible, the meanings of the ambiguous terms "financially able" and "necessary and reasonable" and to set the parties' obligations under the agreement accordingly. The district court again held that the provisions were too ambiguous to be enforced, sparking this second appeal. Because the district court clearly erred by concluding that the parties' obligations could not be ascertained and that Brian Kail cannot pay any college expenses, we reverse and remand with specific instructions.

FACTS

Brian and Lowanda Kail were married in 1988 and divorced in 1992 when their only child was a toddler. They agreed in writing that they would eventually each pay up to half their son's college expenses and the agreement was incorporated into their judgment and decree as follows:

> [Lowanda Kail] and [Brian Kail] mutually agree and covenant as part of this Agreement that each party shall be, 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. It is intended that this Agreement constitutes a legally binding contract between the parties hereto, for good and valuable consideration and shall survive the subsequent Judgment and Decree herein.

Sixteen years later their son enrolled at Augsburg College. According to Lowanda Kail, the yearly tuition and board is approximately $33,000. She calculated additional expenses, including $663 for books, supplies, and parking fees, and $1,778 for a computer and printer. She added $417 for the monthly premium for dental, medical, prescription, and auto insurance, and $350 monthly for clothing, medical and dental copayments, uncovered medical and dental expenses, gas, entertainment, and other sundries. After totaling the costs, she unsuccessfully asked Brian Kail to pay "his half," so she moved the district court for an order requiring him to pay half of her listed expenses, along with her attorney fees for bringing the motion.

The district court found that the two phrases, "to the extent that he/she is financially able" and "necessary and reasonable post-high school education expenses" are ambiguous. It therefore denied the motion and struck the provision from the decree.

Lowanda Kail appealed and we reversed, holding that "the district court's . . . incorrect interpretation that the parties had agreed to pay '50% . . . or nothing', is

erroneous as a matter of law." *Kail v. Kail*, No. A09-558, 2009 WL 4910601, at *3 (Minn. App. Dec. 22, 2009). We further held that "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." *Id.* We then remanded the case to the district court "for findings, consistent with [the] 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." *Id.* at *4. If so, the district court was to "set the parties' obligations accordingly." *Id.*

The district court conducted no hearing on remand and did not reopen the record. Instead, it referred to its earlier decision and found again that the extrinsic evidence is insufficient to provide the meaning of the ambiguous phrases. It also found that even if it could define the ambiguous terms, thereby recognizing an enforceable agreement, "[Brian Kail] is not financially able to pay *any* amount towards *any* reasonable and necessary post-secondary education costs."

Lowanda Kail appeals again.

D E C I S I O N

We must decide whether the district court erroneously concluded that it could not construe the dissolution decree's provision requiring Brian Kail to pay, "to the extent" he is "financially able," up to one-half of his son's "reasonable" and "necessary" "college or university" expenses, or by concluding that even if it could construe the provision, Brian

Kail is not required to pay any of the college expenses because private-college tuition and other related expenses are neither "reasonable" nor "necessary" given Brian Kail's limited financial means. Because we have previously concluded that some phrases are ambiguous as a matter of law, the meaning of the ambiguous language becomes a question of fact, which we review for clear error. *Tarlan v. Sorensen*, 702 N.W.2d 915, 919 (Minn. App. 2005). We review and apply any unambiguous language de novo. *See Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003).

Because this case comes to us on appeal from remand, it is important to look at our mandate to the district court. *See State ex rel Murphy Motor Freight Lines, Inc. v. Dist. Court of Ramsey County*, 230 Minn. 560, 563, 42 N.W.2d 426, 427 (1950) ("[A]ll parties are entitled to have strict compliance by the lower court with the mandate of this court."). In *Kail v. Kail*, we held that the parties' college-expenses provision "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." 2009 WL 4910601, at *3. On remand, we anticipated that the district court would enforce the judgment by ascertaining the meaning of "necessary and reasonable . . . expenses" based on extrinsic evidence and caselaw. *See id.* Specifically, we recommended that it consider how the term "reasonable" has been used in other Minnesota cases and other courts and consider factors articulated in *Mandel v. Mandel*, 906 N.E.2d 1016, 1022 (Mass. App. Ct. 2009), a Massachusetts case on the same subject. *See id.*

We think that, despite the discretionary language in the remand in some particulars, the remand clearly enough called for the district court to undertake a factual

assessment and to analyze the legal issues sufficient to enforce the parties' intentions to the greatest extent possible. Without gathering any extrinsic evidence to effectuate the remand or providing further analysis, the district court reaffirmed its earlier determination that ascertaining the parties' intent was impossible.

The district court's explanation for why it found it impossible to enforce the judgment rests on three findings: (1) that the parties did not agree on the same thing; (2) that Augsburg College tuition is not necessary or reasonable; and (3) that Brian Kail cannot afford to pay anything whatsoever towards his son's college expenses. We review each of these findings in turn, and we think they are unsupported and contradicted by the evidence.

Meeting of the Minds

The district court found that "the parties carried away different understandings from their attempt to agree to contribute equally to their son's post-secondary education." It added that "the extrinsic evidence shows that the parties each had a different intent such that it is impossible for this Court to reconcile their intents[.]" Although the parties' present arguments about the scope of their agreement differ, the language in the agreement clearly demonstrates a meeting of the minds. The language requiring "each party" to be responsible for "50% of all necessary and reasonable post-high school education expenses" that each can pay "to the extent that he/she is financially able," reflects a meeting of the minds in principle.

On the particulars, at a minimum, the parties both understood that each was expected to pay at least some amount of their son's college expenses. That intention is

clear not only in the agreement, but carried forward by the parties; Brian Kail acknowledges, "Back when I entered into that agreement, I thought that college might cost $5,000 a year total for our son, which, at that rate, I likely would be able to afford. I just can't afford to pay almost $17,000 a year."

We believe that it was clearly erroneous for the district court to conclude that the parties carried away unenforceably different and unascertainable understandings.

Brian Kail's Financial Ability to Pay Anything

The district court's finding that Brian Kail is unable to pay "any amount towards any" college expenses is not sustainable in the face of Brian Kail's admitting that he could budget $300 monthly for those college expenses. He testified by affidavit, "I am willing to voluntarily make a monthly cash payment to our son for a few hundred dollars to help defray some of our son's costs on a monthly basis while he is attending school full-time, depending on his own income level." He said specifically, "I have budgeted $300 per month for our son." The district court clearly erred by finding that Brian Kail has no money whatsoever available to contribute to any college expenses.

Reasonable and Necessary

The district court's findings regarding its attempt to ascertain the meaning of "necessary" and "reasonable" are incongruent. First it held that the words "reasonable" and "necessary" are indefinable by extrinsic evidence. But then it held that the expenses listed by Lowanda Kail, particularly private-college tuition, are decidedly neither "reasonable" nor "necessary." This incongruence in reasoning necessarily undermines the resulting conclusion.

Regarding the term "reasonable," the district court held, "A determination of what is a reasonable . . . expense is necessarily intertwined with what a party is financially able to pay." And "if a party has minimal assets and significant debt, and insufficient income to pay for expenses and ongoing debt repayment, any expenses claimed may be unreasonable under the circumstances, especially when the parties contemplated that a party's financial ability would be determinative of what contributions are made."

Addressing the term "necessary," the district court held, "While the Court recognizes that post-secondary education is never strictly necessary, it is clear . . . that the parties intended their child to attend a college of some type. What is not clear, though, is what they considered to be strictly necessary in order for the expenses relating thereto be covered by this paragraph." It added that "there was no persuasive evidence presented that this child needs to attend a private school[.]"

By defining "reasonable" as reasonable in relation to what each party can afford, the district court deemed relevant the amount Brian Kail can afford. We know from his own assessment that he can afford approximately $300 monthly. And by defining "necessary" as including tuition for a college of "some type," the district court deemed relevant the fact that one of the agreed-upon expenses is tuition. Augsburg College is a college of some type, and it requires tuition.

According to the district court's construction, a $300 monthly contribution is both reasonable (because Brian Kail admits to his ability to afford it) and necessary (because tuition is required for the chosen college). The district court placed much emphasis on the choice of a private school rather than a public school. When the contract language is

clear, which it is on this point, we do not defer to the district court's construction. *Wolfson v. City of St. Paul*, 535 N.W.2d 384, 386 (Minn. App. 1995), *review denied* (Minn. Sept. 28, 1995). The college-expenses provision does not distinguish between private and public schools; it broadly includes "trade school, vocational school, business college, college or university." Most colleges in Minnesota are private.[1] We see no justification on this record to read into the provision a public-school qualification.

We agree with the district court that nothing in the record would support a conclusion that the parties necessarily intended that the other expenses (computer, parking, insurance premiums, entertainment, and so on) are reasonable and necessary expenses under the agreement. But because we emphasized the importance of ascertaining the meaning of the terms, if at all possible, to enforce the judgment and decree, *Kail*, 2009 WL 4910601 *2 n.1, and because it is clear from the parties' own admissions in the record that both parties expected each to pay at least some amount towards their son's college tuition, and because Brian Kail admits to being able to afford $300 per month, the district court clearly erred by concluding that the provision was entirely unenforceable and that Brian Kail was entirely unable to pay.

We are not unsympathetic to Brian Kail's position or to the district court's apparent difficulty with what may seem to be a less than equitable circumstance. For reasons undiscernible in the record, Brian Kail was given no role in the choice-of-college decision, and under those circumstances Lowanda Kail's demanding such things as

[1] The U.S. Department of Education lists 156 colleges in Minnesota, of which over 100 are private.

entertainment and parking fees and the like might appear to be piling on unfairly. And the record indicates that Brian Kail had reasonably attempted through mediation to arrive at a resolution in the neighborhood of his $300 monthly capacity a long time ago, to no avail. But at the heart of this case is the clear intention and sufficient language to bind the parties to pay for up to half the reasonable and necessary college expenses to the extent each is able.

Given Brian Kail's clearly limited resources, his willingness to pay $300 monthly, the acrimony between the parties, and the unlikelihood that a more equitable solution would be achieved through yet more litigation, we choose not to remand to the district court to determine some more precise amount reflecting Brian Kail's reasonable ability to pay. We therefore reverse and remand with specific instructions. We direct the district court to issue an amended order obligating Brian Kail to pay $300 monthly toward his son's college tuition, prospectively only.

Reversed and remanded.