

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 9, 1997

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. 96-1055

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

GARY B. LARSEN,

Petitioner-Respondent,

v.

KAREN S. LARSEN, N/K/A KAREN S. BEHLE,

Respondent-Appellant.

APPEAL from an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Reversed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Karen S. Larsen appeals from an order reducing the amount of limited-term maintenance she was receiving from Gary B. Larsen from \$2,100.00 per month to \$1,100.00 per month. The circuit court reduced the maintenance because it concluded that Karen failed to make progress toward

her college degree as required by the parties' stipulation. Because we conclude that the undisputed facts do not support this conclusion, we reverse.

BACKGROUND

Gary and Karen were granted a divorce on September 14, 1993. The stipulation of divorce provided that Gary pay Karen maintenance of \$2,100.00 per month. The stipulation further stated:

This maintenance obligation shall continue until March 1, 1998, subject to the provisions recited herein. Maintenance will terminate if Karen S. Larsen ... fails to continue progress toward her college degree and certification, except for emergency reasons or temporary periods, which the parties understand to be if she became ill or disabled in some way or manner and could not attend college for a semester. If, during the period of this maintenance obligation, Karen S. Larsen obtains her degree and certification as currently contemplated, as long as none of the other conditions recited herein apply, then the maintenance obligation of Gary B. Larsen shall be reduced to [\$1,100.00] per month

On January 9, 1996, Gary brought a motion to reduce or terminate maintenance on the grounds that Karen had failed to make progress toward her degree.¹ At the motion hearing, Karen testified that she had been attending the University of Wisconsin-Stout for two years before quitting in 1968 to marry Gary. She had accumulated sixty-six credits at that time. She resumed her education in 1992, enrolling in the dietetics and food science program at the

¹ Gary also moved to modify maintenance on the grounds that Karen was involved in a *de facto* marriage with another man and that the financial circumstances of both Gary and Karen had changed since the divorce. The circuit court refused to reduce or terminate maintenance on these grounds, and Gary does not appeal this portion of the circuit court's decision.

University of Wisconsin-Madison. At the time of her divorce, her anticipated graduation date was May 1997.

At the University of Wisconsin-Madison, Karen earned the following credits:

Fall 1992:	12 credits earned
Spring 1993:	12 credits earned
Summer 1993:	2 credits earned
Fall 1993:	12 credits earned
Spring 1994:	9 credits earned
Summer 1994:	3 credits earned
Fall 1994:	9 credits earned
Spring 1995:	0 credits earned
Summer 1995:	0 credits earned
Fall 1995:	10 credits earned

Karen dropped Organic Chemistry, a three-credit course, during both the spring 1994 and fall 1994 semesters and failed this same course during the spring 1995 and summer 1995 sessions. She also dropped Accounting Principles, another three-credit course, during the spring 1995 semester. She passed both courses during the fall 1995 semester.

In October 1995, Karen received a letter from the University indicating the courses she needed to complete in order to graduate in the spring or summer of 1997. The letter indicated that Karen was thirty-six credits short of graduation. Karen completed ten of these required credits during the fall 1995 semester.

The circuit court reduced maintenance to \$1,100.00 per month because Karen had failed to make progress toward her degree. The court reasoned:

In this case, the evidence shows that [Karen] has failed to make [progress toward her college degree].... She has taken light course loads. Regularly dropped courses and failed other courses. She has an academic

average of 2.062 on a four-point scale. There is no way that she will complete her degree if her progress in the future is equal to that in her past.²

Karen appeals. She does not contest the court's findings that she dropped courses, failed others, and had a grade point average of 2.062 at one point. Rather, she argues that these facts do not establish that she failed to make progress toward her degree.

STANDARD OF REVIEW

A stipulation incorporated into a divorce judgment is in the nature of a contract. *Kastelic v. Kastelic*, 119 Wis.2d 280, 287, 350 N.W.2d 714, 718 (Ct. App. 1984). The construction of a written contract presents a question of law, which we review *de novo*. *Ondrasek v. Tenneson*, 158 Wis.2d 690, 694, 462

² Although the stipulation provided that maintenance would terminate if Karen failed to continue progress toward her college degree, the court did not terminate maintenance, but instead reduced it to \$1,000.00 per month. The court reasoned:

The agreement incorporated in the judgment also provided that, if [Karen] obtains her degree or certification, the maintenance is to be reduced to \$1,100 per month. It is difficult to ascertain the intent of the parties in agreeing to that provision and further providing for a termination of maintenance if [Karen] is not making progress toward a degree. It is impossible to believe that the parties contemplated that [Karen] would have need for some further limited term maintenance if she completed her degree but would have no need for such maintenance if she abandoned that effort or didn't pursue it diligently.

It is necessary for this court to reconcile those two provisions. It is the conclusion of the court that her failure diligently to pursue and make progress toward a degree should not put her in a worse position than if she completed such a degree. Therefore, the court will order that maintenance continue at the same rate as would be in effect if she had completed her degree.

Neither party takes issue with this determination.

N.W.2d 915, 917 (Ct. App. 1990). Whether a contract is ambiguous is also a question of law that we decide independently of the circuit court's decision. See *Jacobson v. Jacobson*, 177 Wis.2d 539, 547, 502 N.W.2d 869, 873 (Ct. App. 1993).³

DISCUSSION

The disposition of this appeal turns on the definition of "progress toward her college degree." When the terms of a contract are plain and unambiguous, we will construe the contract as it stands. *Borchardt v. Wilk*, 156 Wis.2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). Contractual language is ambiguous when it is "reasonably or fairly susceptible of more than one construction." *Id.* We give words in a contract their common and ordinary meaning. *State ex rel. Siciliano v. Johnson*, 21 Wis.2d 482, 487, 124 N.W.2d 624, 627 (1963).

We may look to a dictionary for the ordinary and plain meaning of a word. *Frank v. Wisconsin Mut. Ins. Co.*, 198 Wis.2d 689, 695, 543 N.W.2d 535, 537 (Ct. App. 1995). We see no reason why the parties would have intended to give the word "progress" a meaning other than the ordinary definition found in a dictionary. Therefore, we turn to a dictionary to determine the parties' intent in using the word "progress."

³ In their briefs, the parties argue that the circuit court's determination that Karen had failed to make progress toward her degree was a discretionary decision. We disagree. The parties confuse the court's modification of maintenance here with a modification of maintenance ordered pursuant to § 767.32, STATS. Section 767.32 allows the circuit court to modify maintenance when it concludes that there has been a substantial change in circumstances. Modification of maintenance under § 767.32 is within the discretion of the trial court. *Moore v. Moore*, 89 Wis.2d 665, 669-70, 278 N.W.2d 881, 883 (1979).

In reducing Karen's maintenance, the circuit court did not determine that there was a substantial change in circumstances. Therefore, we do not review the circuit court's decision under the erroneous exercise of discretion standard. Rather, the circuit court interpreted the parties' stipulation of divorce in determining that Karen had failed to make progress toward her degree. Because the court's decision turned on its interpretation of a stipulation, we review its determination *de novo*. See *Duhamel v. Duhamel*, 154 Wis.2d 258, 262, 453 N.W.2d 149, 150 (Ct. App. 1989).

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1813 (1993) defines "progress" as "an advance or movement to an objective or toward a goal." This definition is unambiguous. It does not require a minimum rate of advancement or movement or a diligent effort toward achieving a goal. It simply requires *an* advance or movement toward a goal or objective.

Using the ordinary and plain meaning of word "progress," we conclude that Karen continues to make progress toward her college degree. Karen testified that at the time of her divorce, her anticipated graduation date was May 1997. The October letter from the university indicates that she is on course to graduate in the spring or summer of 1997. Karen continues to take courses that are required for her degree and has also attended summer school. Therefore, she continues to advance toward her goal of attaining a college degree.

We realize that Karen did not earn any credits during either the spring 1995 or summer 1995 session. But during both sessions, she was enrolled in Organic Chemistry, a course required for her degree. Although she dropped the course in the spring and fall of 1994 and failed the course in the spring and summer of 1995, she eventually passed the course in the fall of 1995. She also dropped Accounting Principles, another required course, in the spring of 1995, but passed this course in the fall of 1995 as well.

The stipulation does not require that Karen establish a minimum level of proficiency in organic chemistry and accounting to continue receiving \$2,100.00 per month in maintenance. It requires only that she continue to make progress toward her degree. Although her difficulties in these courses slowed her progress, she continued to make progress toward her degree and her anticipated graduation date has not changed.

The stipulation also does not require that Karen maintain a minimum grade point average, and no testimony was offered to establish that Karen must achieve a minimum grade point average to earn a degree in dietetics. Therefore, the circuit court's observation that Karen's grade point average was 2.062 is irrelevant.

Gary argues that many of the courses Karen enrolled in after their divorce were not aimed at obtaining a degree in dietetics and that this "was not

the type of conduct contemplated by the parties when they entered into the agreement to divorce in this matter." Gary argues that the "trial court determined, and properly so, that it was the contemplation of the parties that [Karen] work diligently toward completion of her degree." He concludes: "What the trial court did in reality was to determine that [Karen] should have graduated with her degree by the time of the motion hearing."

But when a contract is plain and unambiguous, we will construe it as it stands without looking to extrinsic evidence to determine the intent of the parties. See *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis.2d 105, 115, 479 N.W.2d 557, 562 (Ct. App. 1991). We have already determined that the word "progress" as used by the parties is plain and unambiguous. If the parties had intended that Karen "work diligently toward completion of her degree" to receive \$2,100.00 per month maintenance, they would have said so. Had Gary intended that Karen earn her degree at a faster pace, he should have negotiated a more specific stipulation.

The stipulation does not provide that Karen must take a minimum class load. The stipulation does not provide that Karen must graduate by a certain date. Instead, the stipulation provides only that Karen must make progress toward completion of her degree. She has done so, though not as fast as Gary would prefer. We therefore reverse the circuit court's order.

By the Court. – Order reversed.

Not recommended for publication in the official reports.