COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1770 **Cir. Ct. No. 1994FA903**

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

IN RE THE MARRIAGE OF:

JACQUELINE M. GROSSHANS N/K/A JACQUELINE SULESKI,

PETITIONER-RESPONDENT,

V.

WILLIAM J. GROSSHANS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

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

¶1 PER CURIAM. William Grosshans appeals a post-divorce order directing him to pay his ex-wife Jacqueline Suleski $9150 towards the first year of

college expenses for their oldest child. For the reasons discussed below, we affirm the order.

BACKGROUND

¶2 Grosshans and Suleski were divorced in 1997. The divorce judgment incorporated a marital settlement agreement with the following provision:

> **9. POST-HIGH SCHOOL EDUCATION.**
>
> Each of the parties agrees to contribute to the post-high school education costs of the minor children according to their respective abilities to pay, up to the cost of four years of undergraduate education including the cost of in-state tuition, room and board and books.

In 2004, the parties' oldest child, Ashley, enrolled at a private college costing $20,721.25 after grants and scholarships. For the 2004-05 term, tuition, room and board, and related expenses at UW-Madison were $15,250 and at UW-Milwaukee were $15,498.

¶3 Suleski's annual income as a part-time paralegal was $23,091. She could earn about $46,000 per year if she were working full time. Her household income, including her new husband's income and child support paid by William, was about $264,000.

¶4 Grosshans' annual income was $96,948, and his household income was $158,359. He also presented evidence that he had outstanding debts of $27,000 for a kitchen remodeling project, $23,000 for the adoption of a child, and $5500 for city-mandated street repair.

DISCUSSION

¶5 Grosshans first argues that the college expenses clause of the marital settlement agreement was too vague to be enforceable. *See* ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Group, Inc.***, 2004 WI App 134, ¶10, 275 Wis. 2d 349, 685 N.W.2d 564, *review denied*, 2004 WI 138, 276 Wis. 2d 28, 689 N.W.2d 56 (No. 2003AP1917) (a contract can be enforced when there is "sufficient definiteness of an intent to contract, even if an essential term is left vague or indefinite"). We are satisfied, however, that the language of the clause at issue here was sufficiently definite to evince an intent on the part of each party to contribute, according to ability to pay, for four years of undergraduate education for each child, capped by the cost of attending an in-state public college. The agreement to provide for the postsecondary education of the children was not some marginal provision, but plainly a significant commitment on the part of both parties in the context of the overall property settlement. *See generally* ***Bliwas v. Bliwas***, 47 Wis. 2d 635, 640-41, 178 N.W.2d 35 (1970) (upholding the enforceability of a stipulated marital settlement agreement for parties to contribute to children's postsecondary education). The fact that the clause here may have contained some ambiguity does not render it unenforceable. Rather, any such ambiguity may be resolved according to standard principles of contract construction. *See generally* ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 30, 577 N.W.2d 32 (Ct. App. 1998) (a stipulation incorporated into a divorce judgment is treated as a contract).

¶6 Whether a contract is ambiguous is a question of law. ***Lambert v. Wrensch***, 135 Wis. 2d 105, 115 n.8, 399 N.W.2d 369 (1987). "A document is ambiguous when its words and phrases are reasonably susceptible to more than one construction." ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629

(Ct. App. 1987). The marital settlement agreement at issue here is reasonably susceptible to more than one construction regarding what expenses should be included in college costs, as well as whether the parties' ability to pay should be based on their individual income or household income. We therefore conclude that it is ambiguous in those two respects.

¶7 If a contract is ambiguous in some respect, the parties' intent ordinarily becomes a question of fact on which the circuit court may consider extrinsic evidence. *See* ***Lambert***, 135 Wis. 2d at 115 n.8. Grosshans complains that the trial court made no explicit findings of fact regarding the parties' intent with respect to ambiguous terms. However, the record shows that, when they had the opportunity to do so, the parties introduced no evidence regarding the settlement negotiations leading to the contested provisions. Rather, the evidence at the hearing focused on the parties' current financial situation and the costs of attending various state colleges. Furthermore, Grosshans' letter-brief to the trial court did not argue that the parties' conduct during settlement negotiations supported a particular construction of the agreement, but rather that the entire agreement should be construed against Suleski because she had drafted it. Therefore, the trial court's failure to make any factual findings regarding the parties' intent is directly attributable to the parties' failure to present evidence on intent, while nonetheless asking the court to render a decision on the construction of the agreement. *See* ***Schwittay v. Sheboygan Falls Mut. Ins. Co.***, 2001 WI App 140, ¶16 n.3, 246 Wis. 2d 385, 630 N.W.2d 772 ("A party must raise an issue with sufficient prominence such that the trial court understands that it is called upon to make a ruling."); ***State v. Wollenberg***, 2004 WI App 20, ¶12, 268 Wis. 2d 810, 674 N.W.2d 916 (Ct. App. 2003) (an appellate court need not review an alleged error that was invited or induced by the appellant in the circuit court).

¶8 Under these circumstances, and given our prior conclusion that the agreement was not so vague as to be unenforceable, the parties effectively presented the trial court with only one option—choosing from among the interpretations urged by the parties. Thus, we conclude Grosshans has waived the argument that there is no factual basis for choosing Suleski's proffered interpretations over his based on the parties' intent regarding what expenses were included in the term "costs" and whether ability to pay should be based on individual or household income.

¶9 Looking at the disputed issues individually, Grosshans claims that the college costs subject to the contribution agreement should be limited to the explicitly mentioned items—namely, tuition, room and board, and books—and should not include transportation costs or other miscellaneous expenses. In order to resolve this issue, the trial court needed to decide whether the term "including" meant "including only" the items explicitly identified in the agreement as Grosshans argued, or meant "including, but not limited to" the list of specified items, as Suleski argued. As we have explained, however, the parties presented no evidence regarding whether they originally intended the list to be exhaustive or nonexhaustive. Therefore, Grosshans cannot now complain about which competing interpretation the trial court chose to employ. In any event, given the apparent purpose of the agreement to provide for Ashley's postsecondary education, it was entirely reasonable for the trial court to construe the list to be nonexhaustive and to include all normal college expenses.

¶10 Grosshans also claims that there was no basis for the trial court to calculate ability to pay based on the parties' individual, rather than household, incomes. We agree that the language of the agreement, on its face, does not resolve this question. Again, however, Grosshans presented no evidence

regarding how the parties intended ability to pay to be calculated. Yet, the trial court could not decline to decide the issue. Consequently, Grosshans has waived any objection to the court's interpretation of the provision. Moreover, as Suleski points out, "ability to pay" is a term of art in the child support context, and it would be fair to infer that the parties intended the term to be used in its usual way. Consequently, we see no error in the trial court's use of general child support principles in its analysis of the parties' ability to pay.

¶11 Furthermore, we are satisfied that the record supports the trial court's application to this case of the child support standard for ability to pay. The trial court imputed additional income to Suleski based on her ability to earn more, and explained why it was not going to reduce Grosshans' obligation based on debts he had incurred while the motion was pending. Contrary to Grosshans' contention, there is no reason to believe the trial court failed to take Grosshans' other debts into account. The 60/40 ratio the court ultimately used was more favorable to Grosshans than would be the case had the court based its decision entirely on the parties' respective household incomes without taking some of Grosshans' debt into account.

¶12 Grosshans also challenges the trial court's decision to use the cost of attending UW-Madison, as opposed to one of the less expensive state campuses, to calculate the cap on the parties' contribution to college costs. Grosshans submitted evidence that the cost for Ashley to attend UW-Sheboygan would be only $2000 per semester, if she lived with her grandmother. However, there was no showing that Ashley's grandmother had actually invited Ashley to live with her, or that Ashley had ever agreed to do so. Moreover, since the agreement expressly mentioned room and board as an included cost, there could be no reasonable inference that the parties contemplated that Ashley would live with a

relative or in some other rent-free environment. Grosshans also submitted evidence that it would be less expensive for Ashley to attend UW-Milwaukee than UW-Madison. However, the figure Grosshans submitted for attending UW-Milwaukee was based on an outdated estimate of the prior year's costs. Therefore, the only viable option the trial court had, based on the information before it, was to use the figures for attending UW-Madison in 2004-05 to calculate the cap on the parties' contribution.

¶13 Grosshans also argues that the term "contribute" should not be construed to obligate the parties to pay the entire cost of Ashley's college attendance, without assistance from Ashley herself. The trial court's ruling, however, did not require the parties to pay the entire cost of Ashley's attendance at college. Rather, the amount of the parties' required contribution was capped by the marital settlement agreement at the amount of attending an in-state public college. There is nothing in the trial court's order which relieves Ashley of the obligation to pay for the additional costs of attending a private college.

¶14 Finally, Grosshans complains that Suleski unilaterally chose to pay Ashley's tuition and room and board up front in a lump sum, rather than have Ashley take out student loans. However, because Ashley was not a party to the agreement, we do not see what basis the trial court would have had to require her to take out student loans and then be reimbursed by her parents. In any event, the fact that Suleski unilaterally chose to pay the first year of college tuition up front out of her savings does not automatically mean that Grosshans was also required to reimburse Suleski out of his savings. If Grosshans wanted to spread his own payments out, he retained the option of taking out a loan to cover his reimbursement to Suleski.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).