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June 23, 2016

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You are hereby notified that the Court has entered the following order:

2015AP1466 In re the marriage of: Robin Lanette North v. Spencer Todd Farris (L.C. # 1998FA689)

Before Curley, P.J., Kessler and Brash, JJ.

Spencer Todd Farris appeals a circuit court order that he pay his former wife, Robin Lanette North, $24,681.03 for tuition, books, and a share of room and board relating to the college education of the couple's daughter Natalie for a period that spans the years 2012-2014. We conclude that additional fact finding is required. Accordingly, we retain jurisdiction of this appeal and remand for further proceedings pursuant to WIS. STAT. § 808.075(6) (2013-14).[1]

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Farris and North divorced in 1998 when their daughters were eleven and seven years old. In conjunction with the divorce, Farris and North signed a marital settlement agreement that provided, in pertinent part:

> 10. College education. [Farris] shall pay the cost of tuition and books for the college education of the parties[']minor children for a period of time not to exceed five (5) years based upon the tuition then being charged to attend the University of Wisconsin Madison. The parties shall share in their children's expenses for room and board as their circumstances allow.

In 2009, the parties' youngest daughter, Natalie, entered the University of Wisconsin-Madison as a college freshman. She graduated in May 2014. North requested and received reimbursement from Farris for Natalie's college costs, including the costs of two summer semesters, incurred for the period from fall of 2009 through the 2011-12 school year. In September 2014, North filed a motion to hold Farris in contempt for failing to meet his obligations for tuition, books, and a share of Natalie's room and board for the period after the 2012 spring semester, including the summer semesters of 2012 and 2013. Farris reimbursed North for the 2012-13 school year tuition, the 2013 summer semester tuition, and a portion of the room and board requested for those periods. He disputed his obligation to pay additional room and board because, he contended, the amounts were not reasonable and his circumstances did not permit him to make the payments requested. He also disputed his obligation to pay tuition and related expenses for the fall semester of 2013 and the spring semester of 2014, contending that he agreed to pay college tuition, books, room, and board for five school years and that he fulfilled his agreement by paying for eleven semesters of college tuition and related expenses.

A family court commissioner heard the dispute and concluded:

> "[t]he language of the parties[']agreement is reasonably construed to mean five (5) school years which would include a Fall and Spring semester per calendar year. [Farris] did pay for the 3 summer sessions under the assumption the child was attempting to complete her education in less than 5 calendar years. Neither the child nor mother consulted him regarding any of the expenses, what he could afford or his "circumstances would allow" for room and board, or the need or reason for the child attending summer school.
>
> Parties had the same agreement for the older child and [Farris] paid all the expenses submitted for the 5 years without being consulted. Those expenses did not include summer school.
>
> Based on all of the above [the] Court finds that [Farris] satisfied his obligation upon payment of the summer 2013 session. The balance remaining due from [Farris] on the numbers provided by [North's counsel] would be $820.

North sought *de novo* review of the family court commissioner's decision. At the outset of the hearing, the circuit court said it would not consider the proceedings before the commissioner, explaining that, in the circuit court's opinion, affording the commissioner's decision any consideration would be an error of law. The circuit court then held that the language in paragraph ten of the marital settlement agreement is susceptible to only one "real straightforward literal interpretation.... I interpret it as five years from the date she starts to the date she ends, period." Although the circuit court allowed Farris to give some testimony about the history of the agreement and his understanding of the meaning of paragraph ten, the circuit court explained that it was "just letting him sing his song because I think Mr. Farris knows where I am already but he has a right to speak within a reasonable period of time and I'm going to let him do that." North did not testify or present evidence.

Following the hearing, the circuit court entered an order stating that, pursuant to the parties' marital settlement agreement, Farris is required: (1) "to pay the cost of tuition and books

for the college education for the parties' children for a period of time not to exceed five (5) calendar years"; and (2) "to share in the children's expenses for room and board as the parties' circumstances allow for a period of time not to exceed five (5) calendar years." The order goes on to direct Farris to pay $24,681.03, the entirety of the amount North requested, "as and for tuition, books, and his share of room and board for the years 2012, 2013, and 2014 relating to the college education of the parties' child, Natalie."[2] The order does not include findings of fact to support the circuit court's decision.[3]

A marital settlement agreement is a type of contract. *See* ***Taylor v. Taylor***, 2002 WI App 253, ¶7, 258 Wis. 2d 290, 653 N.W.2d 524. The construction of a contract presents a question of law that we review *de novo*. *See* ***id.*** When a contract is unambiguous, we construe it as it stands. *See* ***id.*** A document is ambiguous when its language is reasonably susceptible to more than one meaning. ***Id.*** Whether a contract is ambiguous is also a question of law for our *de novo* review. *See* ***Spencer v. Spencer***, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987).

Farris asserts that paragraph ten of the marital settlement agreement is ambiguous. He maintains that the language requiring him to pay his daughters' college tuition for a period "not to exceed five years" reflects the parties' agreement that he pay tuition for not more than five school years. North disagrees, contending the language imposes an obligation on Farris to pay

[2] The order also requires Farris to pay North's attorney's fees in the amount of $3000.

[3] It appears that the specific amounts North requested were listed in a document that her counsel described on the record as a "summary that [his] office prepared." We are unable to locate the summary in the record, although the circuit court apparently received a copy and appeared to reference it during the hearing. Farris describes the document as a "handout" from North's counsel and he both reproduces it in his brief and includes a copy in his appendix. Because we remand this matter for fact finding, the parties will have a further opportunity to ensure that the appellate record is complete when it returns for our review.

tuition for five years without any "such qualifiers as 'school years,' 'semesters,' or 'summer school.'" Citing WIS. STAT. § 990.01(49), North asserts "a year means a calendar year, unless otherwise expressed." She concludes that paragraph ten unambiguously requires Farris to pay for as much tuition as Natalie chose to incur during "five years."

In ***State v. Parmley***, 2010 WI App 79, 325 Wis. 2d 769, 785 N.W.2d 655, we discussed various interpretations of the word "year" in the context of statutory construction. We canvassed relevant cases, particularly noting Wisconsin authority that distinguishes between "a year," meaning 365 days, and "a calendar year," meaning a twelve-month period that begins on January 1 and ends on December 31. *See* ***id.***, ¶¶8, 19-20 & n.3. We ultimately concluded we must construe the statutory language in a manner consistent with legislative intent and overarching state policy. *See* ***id.***, ¶¶22-23.

Upon review of the record and the parties' briefs, and in light of our discussion in ***Parmley***, we conclude that paragraph ten of the parties' marital settlement agreement is ambiguous in requiring Farris to pay college tuition for "a period of time not to exceed five years." The period may refer to five periods of 365 days each, or to five school years, or to five calendar years. All of these interpretations of paragraph ten appear reasonable in this case, given the context of the language. Accordingly, the provision is ambiguous as a matter of law. *See* ***Winters v. Winters***, 2005 WI App 94, ¶16, 281 Wis. 2d 798, 699 N.W.2d 229.

A court may determine the meaning of an ambiguous contract by considering extrinsic evidence. *See* ***Spencer***, 140 Wis. 2d at 450. "Where the evidence permits more than one reasonable inference concerning the parties' intent, the [circuit] court, not the appellate court, must make the factual determination.... [T]he object is to ascertain and effectuate the parties'

intent. Intent may be gathered from surrounding circumstances as well as from words." ***Id.*** (internal citations omitted).

Unfortunately, the existing record is insufficient to permit this court to resolve the parties' dispute about the meaning of Farris's obligation to pay tuition "for up to five years." The circuit court heard little testimony and indicated that the testimony allowed was not received for the purpose of influencing the circuit court's decision. The circuit court then entered an order without including any factual findings on which it is based. We will therefore remand this matter to permit the circuit court to take testimony, receive evidence, and make findings about the parties' intent with regard to Farris's obligation to pay the cost of college tuition and books "for a period of time not to exceed five years."[4]

The parties also dispute the meaning of their agreement to "share in their children's expenses for room and board as their circumstances allow." Farris contends that the amounts claimed for room and board must be reasonable, while North contends that he "fail[s] to demonstrate that his 'reasonableness' argument has any relevance to the language of the agreement." The problem with North's position in this regard is that "'[e]very contract implies good faith and fair dealing between the parties,'" *see* ***Beidel v. Sideline Software, Inc.***, 2013 WI 56, ¶27, 348 Wis. 2d 360, 842 N.W.2d 240 (citation omitted), and this court has explained that "[t]he touchstone of good faith is honesty in fact and reasonableness," *see* ***Schaller v. Marine Nat'l Bank***, 131 Wis. 2d 389, 403, 388 N.W.2d 645 (Ct. App. 1986). Moreover, although North

[4] We observe that, although the circuit court's written order states that Farris must pay tuition under the marital settlement agreement for "five calendar years," the effect of the circuit court's order is to require him to pay tuition for a period that spans a total of six calendar years: 2009-2014.

contends that the agreement imposes an unqualified obligation on each party to pay half the expense of room and board for Natalie during periods when she is enrolled in college, the language of the agreement qualifies the obligation to share the expense by use of the phrase "as their circumstances allow."

While we agree with Farris that the amounts claimed under paragraph ten must be reasonable, nonetheless, we are again unable to resolve the parties' disputes on the existing record. First, the circuit court did not make factual findings that Natalie incurred all of the expenses claimed or that the amounts she spent are the reasonable and necessary costs of room and board for a college student attending the University of Wisconsin-Madison during the periods at issue.[5] Second, the circuit court did not make findings as to each party's relevant circumstances or what those circumstances allowed during the relevant time periods. Additionally, Farris asserted that Natalie did not attend college at all during the summer semester of 2012. Nonetheless, the circuit court ordered Farris to reimburse North for costs of room and board Natalie allegedly incurred during that semester without resolving the dispute about her attendance. Accordingly, on remand the circuit court must determine the costs Natalie actually incurred for room and board during periods when she attended college, the reasonableness of those costs, and the scope of Farris's obligation to share in those costs.

[5] For example, the record indicates North granted Natalie a "food allowance" of $500 per month and requested reimbursement of half that amount from Farris. The circuit court did not make any findings as to whether $500 is a reasonable amount for a college student to spend on feeding herself each month, or whether Natalie in fact spent $500 each month to feed herself.

We add that, as a component of the circuit court's obligations on remand, the circuit court shall consider the family court commissioner's decision. WISCONSIN STAT. § 757.69(8) provides:

> [a]ny decision of a circuit court commissioner shall be reviewed by the judge of the branch of court to which the case has been assigned, upon motion of any party. Any determination, order, or ruling by a circuit court commissioner may be certified to the branch of court to which the case has been assigned, upon a motion of any party for a hearing *de novo*.

Id. (italics added). The circuit court appears to have construed § 757.69(8) as forbidding any consideration of the proceedings before the family court commissioner, stating that "it is error for [the circuit court] to consider any of [the family court commissioner's] rational reasoning." We must disagree.

WISCONSIN STAT. § 757.69(8) affords a party a *de novo* hearing '"conducted as if the original hearing did not take place,'" *see* ***Stuligross v. Stuligross***, 2009 WI App 25, ¶12, 316 Wis. 2d 344, 763 N.W.2d 241 (citation omitted), but the statute also affords "*review of all decisions*, upon motion," *see* ***Nehls v. Nehls***, 2012 WI App 85, ¶13, 343 Wis. 2d 499, 819 N.W.2d 335 (emphasis added). Construing the statute to forbid review renders a portion of the statutory language mere surplusage, a result that we avoid. *See* ***State v. Matasek***, 2014 WI 27, ¶12, 353 Wis. 2d 601, 846 N.W.2d 811. Moreover, a construction that forbids review of the court commissioner's decision defeats the statute's goal of judicial efficiency. *Cf.* ***Nehls***, 343 Wis. 2d 499, ¶13. As both this court and the supreme court frequently observe, a reviewing court conducting a *de novo* review benefits from the analysis of the lower court. *See, e.g.* ***Salfinger v. Fairfax Media Ltd.***, 2016 WI App 17, ¶13, 367 Wis. 2d 311, 876 N.W.2d 160;

Hoffer Properties, LLC v. State DOT, 2016 WI 5, ¶14, 366 Wis. 2d 372, 874 N.W.2d 533. The circuit court should not cheat itself out of a similar benefit here.

Therefore,

IT IS ORDERED that the record in this matter is remanded for fact finding pursuant to WIS. STAT. § 808.075(6), but this court retains jurisdiction over the appeal.

IT IS FURTHER ORDERED that the circuit court shall, within sixty days after the date of this order, conduct a hearing at which the circuit court takes testimony and receives evidence, and shall thereafter enter written findings of fact and conclusions of law regarding the matters discussed in this order. The findings and conclusions must include, but are not necessarily limited to: (1) the meaning of paragraph ten of the marital settlement agreement, including the extent to which Farris is obligated to pay college tuition for Natalie and the scope of his responsibility to share in the costs of her room and board; (2) the specific semesters that Natalie attended college from 2009 through the date of her graduation in 2014 and, of those, the semesters for which Farris is obligated to pay her tuition; (3) the expenses that she actually incurred for tuition, books, room, and board during the semesters she attended college from January 2012 through the date of her graduation; (4) the reasonableness of Natalie's claimed expenses for room and board for each school semester from January 2012 forward during which she attended college; and (5) an allocation of responsibility, after determining Farris's and North's relevant circumstances, what those circumstances allow, and the extent of each party's

obligations under the marital settlement agreement, for Natalie's reasonable expenses for room and board for each semester she attended college from January 2012 through her graduation.[6]

IT IS FURTHER ORDERED that, as a component of the proceedings on remand, the circuit court shall review and consider the family court commissioner's decision of January 7, 2015.

IT IS FURTHER ORDERED that Farris shall file a statement on transcript within fifteen days after the conclusion of the hearing.

IT IS FURTHER ORDERED that the clerk of circuit court shall return the record to this court within fifteen days after the date that the transcript of proceedings is filed in circuit court, or within fifteen days after the circuit court enters its written findings and order, whichever is later. The record shall include documents filed pursuant to this remand, transcripts of proceedings held pursuant to this remand, the circuit court's findings of fact, and a written decision and order of the circuit court.

IT IS FURTHER ORDERED that any party aggrieved by the circuit court's findings and order entered after remand shall file in this court a written statement of objections to the order within fourteen days after the record is returned to the clerk of the court of appeals. *See* WIS. STAT. § 808.075(8). The statement of objections may be in the form of a brief and shall not exceed twenty-five pages in length if a monospaced font is used or 5500 words if a proportional serif font is used.

[6] The parties are, of course, free to reach agreements about the cost of any specific expense and the reasonableness of that cost.

IT IS FURTHER ORDERED that any party not aggrieved by the circuit court's findings and order shall file a statement in support of the circuit court's order after remand within thirty days of the date that the record is returned to the clerk of the court of appeals, or within fourteen days after the party is served with a statement of objections, whichever is later. The statement in support of the circuit court's order may be in the form of a brief and shall not exceed twenty-five pages in length if a monospaced font is used or 5500 words if a proportional serif font is used.

IT IS FURTHER ORDERED that this appeal is held in abeyance pending further order of this court.

Diane M. Fremgen
Clerk of Court of Appeals