

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 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. 96-2261

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

**DAWN M. MALINOWSKI,
N/K/A DAWN M. POLLOCK,**

PETITIONER-RESPONDENT,

v.

BRIAN G. MALINOWSKI,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Reversed and cause remanded with directions.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Brian G. Malinowski appeals from an order which finds him in contempt and modifies the provision of a 1988 judgment of divorce with respect to responsibility for utility, maintenance, repair and capital

improvement expenses on a duplex Brian jointly owns with his former wife, Dawn M. Pollock. We reverse the order and remand for entry of an order affirming the court commissioner's order dismissing the order to show cause and refunding to Brian the sum paid under the contempt order.

The judgment of divorce incorporated a marital settlement agreement between the parties. Under the agreement Brian and Dawn's joint tenancy ownership of a duplex homestead property was converted to ownership by tenancy in common. Dawn has occupancy of one-half of the duplex until the parties' children reach majority. Dawn collects the rent on the other half of the duplex and is responsible for paying the mortgage, real estate taxes and insurance.

The agreement provides:

- (f) The costs of routine repairs and maintenance for 2008 South Grand Avenue [the rental unit] shall be divided equally between the parties. With respect to repairs or maintenance for 2006 South Grand Avenue [the homestead unit], [Dawn] shall be responsible for the first \$100.00 of any such single repair or maintenance expense. If any such expense exceeds \$100.00, the parties shall equally divide the entire expense. Except in case of emergency, the party seeking contribution for any such expense must first notify the other party and obtain his/her permission. The Court shall retain jurisdiction over the reasonableness and necessary [sic] of any such expense incurred. Neither party shall reasonably withhold his/her consent for repairs or maintenance.

....

- (j) If either party undertakes a capital improvement (excluding maintenance) with respect to this property with a total cost of \$500.00 or more, the party undertaking such expense shall, with the prior consent of the other party, be entitled to a credit from the net sales proceeds at the time of sale.

Between 1991 and 1995, Dawn made a number of expenditures at the property for which she sought reimbursement from Brian, including water utilities and pest control, lawn, snowplowing and advertising expenses. When Brian failed to reimburse her as requested, Dawn filed a motion to find Brian in contempt.

An order to show cause issued. The court commissioner found that certain items Dawn sought reimbursement for did not constitute repair or maintenance and that Brian had paid Dawn the proper amount under the divorce judgment. The court commissioner dismissed the order to show cause.

Dawn sought a de novo review before the trial court. The trial court found that the divorce judgment was ambiguous as to the responsibility for maintenance, repair and capital improvement expenses on the duplex. It concluded that many of the expenses Dawn incurred were necessary to maintain the rental unit as an income-producing property. It interpreted the judgment by the following provision:

- (a) The following items are considered to be repair and maintenance items covered under the Marital Settlement Agreement, and the respondent [Brian] is required to pay one-fourth of the total cost of said items.
 - (1) All water utility payments relating to the duplex.
 - (2) All payments made to Orkin for pest control.
 - (3) All expenditures relating to exterior painting of the duplex.
 - (4) Snowplowing and sidewalk maintenance.
- (b) The following items are considered to be capital improvements, and the respondent is not responsible for reimbursement of expenses to the petitioner:
 - (1) Remodeling expenses relating to the bathrooms located in the duplex.
 - (2) Lawn repair and maintenance.

- (c) All advertising expenses plus costs relating to the rental unit are to be split equally between the parties as well as all other expenses that directly relate to the rental unit which are considered to be repair and maintenance items.

The trial court found that Brian owed Dawn \$883.41 for his share of repair and maintenance expenses. It found Brian in contempt of court and required him to purge the contempt by paying the sum due within ninety days. The trial court also ordered that “the Judgment of Divorce is hereby modified and amended consistent with the Findings of the Court set forth herein.”

Dawn argues that Brian’s appeal from the finding of contempt is moot because Brian purged his contempt. A party’s involuntary compliance with an order requiring payment to purge or avoid a contempt finding may render the controversy moot. *See Fort Howard Paper Co. v. Fort Howard Corp.*, 273 Wis. 356, 360-61, 77 N.W.2d 733, 735-36 (1956). An appeal is moot when a resolution of the issues will not have any practical effect upon an existing controversy. *See State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis.2d 220, 228-30, 340 N.W.2d 460, 464-65 (1983). Despite Brian’s payment, resolution of the issues presented has a meaningful effect. Brian is entitled to return of his money if the trial court’s interpretation of the judgment was erroneous. Moreover, there may be further disputes between the parties over expenses for the duplex and the appeal avoids uncertainty. *See G.S. v. State*, 118 Wis.2d 803, 805, 348 N.W.2d 181, 182 (1984) (review a moot issue when it is likely to arise again and should be resolved by the court to avoid uncertainty). We do not consider the appeal moot.

“We review the trial court’s use of its contempt power to determine if the trial court properly exercised its discretion.” *Haeuser v. Haeuser*, 200 Wis.2d 750, 767, 548 N.W.2d 535, 543 (Ct. App. 1996). The trial court’s findings of

fact that a person has committed a contempt of court will not be set aside unless clearly erroneous. *See id.* at 767, 548 N.W.2d at 542. A finding must be made that the person's refusal to pay sums due is willful and with intent to avoid payment. *See id.* at 767, 548 N.W.2d at 543.

The trial court found, and Dawn concedes, that the provision in the divorce judgment about sharing expenses for maintenance and repair is ambiguous. The trial court commented that Brian had taken a reasonable approach towards his obligation to reimburse Dawn for expenditures. Any finding that Brian's refusal to pay some expenses was a willful violation of the judgment is clearly erroneous. A party cannot willfully violate a provision in a judgment subject to misunderstanding. *See Balaam v. Balaam*, 52 Wis.2d 20, 30, 187 N.W.2d 867, 873 (1971) (failure to pay not willful when based on a misunderstanding). We reverse the contempt finding.

We further conclude that in the context of finding Brian in contempt, the trial court misinterpreted the divorce judgment. We construe divorce judgments at the time of their entry and in the same manner as other written instruments. *See Jacobson v. Jacobson*, 177 Wis.2d 539, 546, 502 N.W.2d 869, 873 (Ct. App. 1993). We apply the rules of contract construction to a divorce judgment. *See Spencer v. Spencer*, 140 Wis.2d 447, 450, 410 N.W.2d 629, 630 (Ct. App. 1987). This is true even when the divorce judgment is based on the parties' stipulation. In divorce actions, stipulations are in the nature of a contract. *See Kastelic v. Kastelic*, 119 Wis.2d 280, 287, 350 N.W.2d 714, 718 (Ct. App. 1984).

Terms used in contracts are to be given their plain or ordinary meaning set forth in a recognized dictionary. *See Just v. Land Reclamation, Ltd.*, 155 Wis.2d 737, 745, 456 N.W.2d 570, 573 (1990). The court commissioner's

decision set forth the dictionary definitions of repair and maintenance: “repair” is defined as to return to sound condition or good condition after damage, and “maintenance” is defined as keeping in an unimpaired condition or improper condition. Those definitions are adequate to determine the parties’ obligations on items which clearly fall within those terms.

To the extent that there is ambiguity by silence about other types of expenses related to the rental unit,¹ the parties’ intent governs. “When interpreting a contract, we must ascertain the parties’ intentions as expressed by the contractual language.” *Save Elkhart Lake, Inc. v. Village of Elkhart Lake*, 181 Wis.2d 778, 791, 512 N.W.2d 202, 207 (Ct. App. 1993). The parties hold the property as tenants in common. Thus, each has an equal right to manage the property. However, the judgment provides that Dawn is responsible for collecting rents on the rental unit and paying the mortgage, real estate taxes and insurance. In essence, Dawn is the “landlord” and she accounts for all usual expenses related to the rental unit. The judgment seeks to protect Brian’s capital interest in the duplex while giving Dawn the ability to generate income sufficient to meet expenses. If Dawn failed to charge the tenant for water utilities or a sufficient rent, she must bear the excess expenses as the landlord.

We conclude that the trial court erred in its interpretation.² Therefore, we reverse the order modifying the divorce judgment and finding Brian in contempt. On remand the trial court shall enter an order affirming the court commissioner’s

¹ Although the judgment provides that Dawn is responsible for utilities on her half of the duplex, it is silent about the payment of utilities on the rental unit. There is no provision for expenses associated with the management of a rental property, i.e., advertising and court costs.

² Therefore, we need not decide Brian’s contention that the trial court lacked authority to modify a provision in the divorce judgment relating to property division.

determination and requiring Dawn to reimburse Brian for the sum paid under the contempt order.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

