

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0179**

In re the Marriage of: Sonja Vogen Baertsch, petitioner,
Respondent,

vs.

Andrew Baertsch,
Appellant.

**Filed February 5, 2018
Reversed and remanded
Hooten, Judge**

St. Louis County District Court
File No. 69DU-FA-11-802

Elizabeth A. Storaasli, Mark L. Knutson, Dryer Storaasli Knutson & Pommerville, Ltd.,
Duluth, Minnesota (for respondent)

Robin C. Merritt, Jacob J. Baker, Leah L. Fisher, Hanft Fride, P.A., Duluth, Minnesota (for
appellant)

Considered and decided by Hooten, Presiding Judge; Smith, T., Judge; and Smith,
J., Judge.*

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant contends that the district court erred in its grant of respondent's motion
to apportion income tax liabilities by determining that the parties' stipulated marriage

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

dissolution judgment and decree unambiguously divided their potential tax liabilities arising from an Internal Revenue Service (IRS) audit of the parties' 2009 to 2011 joint income tax returns. He also contends that the district court abused its discretion in awarding respondent conduct-based attorney fees for bringing the motion. Because we conclude that the language in the parties' stipulated marriage dissolution judgment and decree is ambiguous as to each parties' obligation for the tax liabilities arising from the IRS audit, and because it is not clear from the record what the amount and source of any tax deficiencies owed will be as a result of the parties' on-going dispute with the IRS, we reverse and remand.

FACTS

Respondent Sonja Baertsch filed a petition for legal separation from her then-husband appellant Andrew Baertsch in August 2011. In March 2012 the parties received a letter informing them that the IRS would be auditing their joint income tax returns for 2009 and 2010. The audit was later expanded to cover 2011. While negotiating the terms of the dissolution judgment, respondent claims her attorneys "became concerned about potential tax liabilities related to business ventures [appellant] was engaging in and deductions he was claiming." As a result, she says, her attorneys included language in the parties' stipulated marriage dissolution judgment and decree (the Decree), as part of Conclusion of Law 12, that requires each party to indemnify and hold the other harmless from "tax audits and tax deficiencies" that are "on or associated with any item of property awarded to that party." Appellant claims that the IRS audit was not discussed during the

negotiation of their divorce, and that Conclusion of Law 12 does not apply to the audit of their personal income tax returns. The key paragraph in Conclusion 12 states:

Except as herein otherwise specifically set forth each party shall be solely obligated for any debts, liabilities or encumbrances on or associated with any item of property awarded to that party including tax audits and tax deficiencies pursuant to this paragraph and shall indemnify and hold the other party harmless therefrom. Each party has an affirmative obligation to the extent possible to remove the other from any such liabilities encumbering the property. Each party is obligated to disclose to the other party any and all debts, liens and encumbrances incurred prior to the date of this Judgment.

In September 2012, the district court entered the Decree, which dissolved the marriage and divided the marital estate based on the parties' stipulated agreement. The relevant portions of the property division for purposes of this appeal are Springhill Enterprises, Inc., awarded to appellant in Conclusion of Law 12, and real property in Montana (the Montana property), awarded to respondent in Conclusion of Law 19.

The parties received a detailed notice in April 2015 from the IRS of the claimed deficiencies in their joint income tax returns for 2009 to 2011. It is unclear from the record what the current status of the IRS audit is, but the parties are still contesting the results of the audit with the IRS.

Respondent sent appellant a letter demanding that he indemnify her in the tax audit for all properties other than the Montana property, based on Conclusion of Law 12 in the Decree. When appellant denied any obligation to indemnify respondent, she moved the district court for an order: (1) requiring appellant to indemnify, defend, and hold her harmless from all claims, deficiencies, and liabilities arising from assets awarded to him as

part of the Decree; (2) requiring appellant to remove her from any tax liability for any item of property other than the Montana property; (3) determining that she is only responsible “for any claims, deficiencies and liabilities including penalties and interest, in the current IRS Tax Audit of the parties for years 2009-2011, arising from the ‘Montana’ property,” and that he “is responsible for all other claims, deficiencies and liabilities in the IRS Tax Audit of the parties for years 2009-2011, including penalties and interest in that audit and all remaining defense costs and attorneys’ fees associated therewith”; and (4) for conduct-based attorney fees. The district court granted the motion in full, and after receiving respondent’s application detailing the attorney fees incurred in bringing the motion, ordered appellant to pay her \$24,310.69 in conduct-based attorney fees. This appeal followed.

D E C I S I O N

I. Interpreting the Decree

Whether the language of a dissolution judgment is ambiguous is a question of law subject to de novo review. *Tarlan v. Sorensen*, 702 N.W.2d 915, 919 (Minn. App. 2005). “A writing is ambiguous if it is reasonably subject to more than one interpretation.” *Ertl v. Ertl*, 871 N.W.2d 410, 415 (Minn. App. 2015) (citations omitted). Deciding whether an ambiguity exists “cannot be made by reading words in isolation.” *Landwehr v. Landwehr*, 380 N.W.2d 136, 139 (Minn. App. 1985) (citing *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 352, 205 N.W.2d 121, 124 (1973)). If the language used “is plain and unambiguous there is no room for construction.” *Starr v. Starr*, 312 Minn. 561, 562–63, 251 N.W.2d 341, 342 (1977). If there is ambiguity in a stipulated provision in a

dissolution judgment, we apply rules of contract construction. *Blonigen v. Blonigen*, 621 N.W.2d 276, 281 (Minn. App. 2001), *review denied* (Minn. Mar. 13, 2001). Extrinsic evidence may be used to construe the language, and interpreting the provision “is a question of fact . . . unless such evidence is conclusive.” *Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 369 (Minn. 2005). We interpret contract language “to determine the intent of the parties.” *Ertl*, 871 N.W.2d at 415 (quoting *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012)).

Appellant argues that the district court erred by determining that the Decree unambiguously requires that he indemnify respondent for tax liabilities due to the IRS audit of the parties’ joint income tax returns. Appellant notes that there is no specific provision in the Decree that requires such indemnification and that the Decree, including the provisions relied upon by the district court, is ambiguous. We agree.

On first glance, the language “tax audits and tax deficiencies” from Conclusion of Law 12 appears to apply to and resolve this dispute. However, when the Decree is read as a whole, the “tax audits and tax deficiencies” language is subject to more than one reasonable interpretation and extrinsic evidence is needed to decide what the parties intended the language to mean. *See Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525 (Minn. 1990) (“We construe a contract as a whole and attempt to harmonize all clauses of the contract.”); *see also Hickman*, 695 N.W.2d at 369.

First, it is ambiguous whether Conclusion of Law 12 applies to “tax audits and tax deficiencies” that were already assessed as a debt, liability, or encumbrance at the time of the Decree, or if it applies to tax audits and deficiencies that are assessed after the Decree,

or to both. At a minimum, the language does not state whether it applies to debts that have not yet been assessed. And the last sentence in the relevant paragraph, which requires each party to disclose “any and all debts, liens and encumbrances incurred prior to the date of [the Decree],” supports the interpretation that the paragraph applies only to liabilities that actually existed at the time of the Decree because the paragraph only requires informing the other party of debts or liabilities incurred prior to the Decree, and is silent on debts or liabilities assessed after the Decree. Moreover, the Decree states elsewhere that the parties’ “unsecured debts are nominal,” and “[t]hat the unsecured debts . . . incurred prior to the date of commencement of this action have been paid.” But this potential debt is far from nominal—appellant reports that the IRS is claiming up to \$1.9 million in tax deficiencies, interest, and penalties—and it has not been paid. While the parties may have intended for Conclusion of Law 12 to divide the liability for this tax audit, we cannot reach that conclusion from the language of the Decree alone.

Second, appellant’s interpretation that Conclusion of Law 12 applies to “tax audits and tax deficiencies” that are assessed only on personal property divided by that Conclusion is a reasonable interpretation. The Conclusion is two single-spaced pages long, and the first page and a half divides up various items of personal property from cars to bank accounts to business interests. Only two paragraphs in the Conclusion address debts or liabilities, and only one mentions “tax audits and tax deficiencies.” Without the tax audits and tax deficiencies language, the paragraph would read:

Except as herein otherwise specifically set forth each party shall be solely obligated for any debts, liabilities or encumbrances on or associated with any item of property

awarded to that party . . . pursuant to this paragraph and shall indemnify and hold the other party harmless therefrom. Each party has an affirmative obligation to the extent possible to remove the other from any such liabilities encumbering the property. Each party is obligated to disclose to the other party any and all debts, liens and encumbrances incurred prior to the date of this Judgment.

There is little question that this language would make each party responsible for debts that arise from the items of personal property awarded to them in Conclusion of Law 12, whether the debt was specifically attached to the personal property, or was assessed on them as individuals but was a debt associated with the piece of personal property. But, it would not apply to debts assessed on the parties as individuals that do not stem from the personal property awarded in Conclusion of Law 12.

The additional language in the Decree, “including tax audits and tax deficiencies,” makes it explicit that any tax audits or tax deficiencies are part of the “debts, liabilities or encumbrances” discussed in Conclusion of Law 12. However, it does not make clear whether “tax audits and tax deficiencies” refers only to tax deficiencies on the items of personal property awarded in the Decree. Respondent points to the broad language “on or associated with” to conclude that because the deficiencies in the audit of the parties’ personal income tax returns *can* be “associated with” items of property awarded in the Decree, the Conclusion *is* apportioning the liabilities from the audit of the parties’ personal income tax returns. But, the second sentence gives each party “an affirmative obligation . . . to remove the other from any such liabilities encumbering the property.” This language refers to liabilities encumbering the personal property. But the IRS audit is of the parties’ joint personal income tax returns, and the claimed deficiencies are based on the parties

taking deductions for, among other things, losses suffered by Springhill Enterprises and interest incurred on a mortgage on the Montana property.

In conjunction with respondent's motion, the parties submitted documents and evidence describing the IRS's disallowance of purported business deductions related to Springhill Enterprises and the Montana property. The record shows that during their marriage the parties owned Springhill Enterprises, which they claimed was a business. Springhill Enterprises owns and trains horses in dressage, and offers training and boarding to other horse owners. Springhill Enterprises also owns an airplane, which was used by the parties for travel to horse competitions and the Montana property, and offered for lease to third parties. The IRS disallowed deductions taken on the parties' personal income tax returns for the losses Springhill Enterprises suffered because the IRS claims that the horse and airplane activity is not for profit and therefore the deductions are not from business activity.

During the marriage, the parties also owned Spring Hill Properties, LLLP, through which they mortgaged and purchased real property in Montana in 2005. They constructed a single-family residence on the vacant property, which was completed in 2008. Because they were unable to obtain a mortgage through Spring Hill Properties for the residential construction, Spring Hill Properties was dissolved and the Montana property was distributed to the parties prior to construction, who then obtained a mortgage to finance the construction. The parties deducted the interest payments on those mortgages as investment interest on their personal income tax returns. However, the IRS claimed that the Montana

property was not an investment, but is a personal residence, and therefore disallowed the deductions as investment interest.

The IRS is not assessing Springhill Enterprises or the Montana property directly for these deficiencies. For example, the IRS is not claiming that Springhill Enterprises owes money for failing to properly withhold FICA taxes; rather, the IRS is arguing that the parties improperly classified Springhill Enterprises as a business instead of a hobby—which would disallow deductions the parties took for business expenses associated with Springhill Enterprises. Appellant claims that these debts will be assessed personally against the parties as a result of their joint tax returns, and that they should share any liability or responsibility for payment of any deficiencies. Respondent claims that because the deficiencies are related to the specific items of property divided by Conclusion of Law 12, each party is responsible for the deficiencies related to the property he or she was awarded. Neither position is an unreasonable interpretation of the Decree, but we cannot determine from the language alone which interpretation the parties intended. Therefore, we must conclude that the relevant provision in the Decree is ambiguous.

Our conclusion that the relevant provision is ambiguous is confirmed by the fact that some of the claimed liabilities cannot be apportioned based on Conclusion of Law 12. The IRS identified a wage reporting error and an incorrectly reported board of director's fee, neither of which is associated with a piece of personal property awarded in Conclusion of Law 12. And while respondent and the district court treated the Montana property as if it were awarded in Conclusion of Law 12—and thus is governed by “tax audits and tax deficiencies” language—it is actually awarded as part of Conclusion of Law 19. This

matters because Conclusion of Law 12 apportions the “debts, liabilities or encumbrances on or associated with any item of property awarded to that party including tax audits and tax deficiencies *pursuant to this paragraph*.” (Emphasis added.)

Third, the phrase “pursuant to this paragraph” adds more ambiguity. If “pursuant to this paragraph” is modifying “tax audits and tax deficiencies,” then that part of the sentence does not make sense because nothing else in Conclusion of Law 12 discusses tax audits and tax deficiencies. Thus, because nothing else in Conclusion of Law 12 says how to assign tax audits and deficiencies, that part of the sentence would have no meaning. It is more likely that the phrase is supposed to be modifying “any item of property awarded to that party,” making the meaning: “any item of property awarded to that party pursuant to this paragraph.” While that interpretation gives “pursuant to this paragraph” an effect, it creates an ambiguity as to how the paragraph applies to this dispute because not all of the IRS’s claimed deficiencies can be apportioned to property awarded by Conclusion of Law 12. This includes the Montana property, which both respondent and the district court treated as subject to the “tax audits and tax deficiencies” language, even though it was not awarded pursuant to Conclusion of Law 12. And, the fact that respondent is treating the Montana property as if it is covered by the tax language in Conclusion of Law 12 makes it more unclear what the parties intended because a reasonable interpretation of the Conclusion makes the Montana property not subject to the tax language because it was not awarded to respondent as part of that Conclusion.

Fourth, there is a Conclusion of Law that deals entirely with the parties’ personal income taxes, Conclusion 11, but does not address the audit, adding to the ambiguity of the

Decree. This is a potential unliquidated debt that could cost the parties well over \$1 million. While we will not know the amount of the debt or what the final source of the deficiencies will be until after the IRS audit and appeal process is complete, we do know that the debt stems from their personal income taxes. And yet, it is not addressed in the part of the Decree about their personal income taxes, but is ostensibly located in a paragraph about debts and liabilities associated with personal property divided between the parties. While the parties could have intended that Conclusion of Law 12 applies to the audit of their personal income tax returns, the lack of any mention of tax audits or tax deficiencies in the part of the Decree dealing with their personal income tax returns makes it unclear whether the parties intended for the Decree to apportion liabilities stemming from an audit of their personal income tax returns.

It is also revealing that the parties went to great length to equally split their marital estate, with appellant paying respondent to equalize the value of the assets each received. But, not only is this IRS audit not mentioned anywhere in the Decree, the Decree even includes a spreadsheet detailing the parties' assets, liabilities, and calculating the equalization payment, and the spreadsheet does not include this audit as a liability. There is nothing in the Decree that makes it clear that the parties intended for the Decree to apportion a potential debt from this IRS audit.

Fifth, the district court's reliance on the parties' knowledge of the upcoming audit at the time of drafting actually supports the conclusion that the paragraph is ambiguous as applied to this dispute. If we did not know whether the parties were aware of an upcoming audit when they drafted the language, it would be a stretch to say that this language

unambiguously applies to tax deficiencies from a tax audit that is not mentioned in the Decree and was not completed until years after the Decree was entered into. The parties' knowledge of the audit weighs in favor of this language addressing liabilities that might stem from that audit. But, that argument cannot be considered in deciding whether the Decree is unambiguous. While it is well settled that "parol evidence is admissible . . . 'to show how the instrument should be corrected to reflect the actual intent of the parties,'" what the parties knew or were aware of at the time of the drafting is extrinsic evidence. *Johnson v. Johnson*, 379 N.W.2d 215, 219 (Minn. App. 1985) (quoting *Rosen v. Westinghouse Electric Supply Co.*, 240 F.2d 488, 491 (8th Cir. 1957)); see also 36 Am. Jur. 3D *Proof of Facts* § 331 (1996) (stating "[p]arol evidence is routinely admissible to show what was in *the minds of the parties* at the time of the agreement's execution, if the language is ambiguous or susceptible to more than one interpretation" (emphasis added)). Thus, while the district court can look at "the facts on which the language depends for meaning" when interpreting the Decree, what the parties knew or were aware of at the time of drafting is not a fact of the dispute, but extrinsic evidence that can only be considered when interpreting ambiguous language. See *Erickson v. Erickson*, 449 N.W.2d 173, 178 (Minn. 1989).

The district court can and should consider the parties' knowledge of the IRS audit when it interprets the Decree on remand, but that evidence must be considered along with appellant's claims that this provision was never negotiated, and that he did not view it as

applying to the upcoming IRS audit of their personal income taxes, but as referring to any audits or deficiencies of the property divided up by Conclusion of Law 12.¹

Respondent argues that the Decree must be interpreted to give effect to every provision, and that interpreting the “tax audits and tax deficiencies” language as not applying to this dispute would render that part of the Decree meaningless. But if appellant’s interpretation is accepted, it would not mean the language has no effect. Rather, the language would either (a) apply only to tax liabilities that were assessed on the personal property—such as the businesses, or a loan secured by specific personal property awarded in the Conclusion, or a loan secured by specific property owned by a business and not discussed in the Decree because it is a business asset, or (b) apply only to tax deficiencies that were already assessed at the time of the Decree, but not apply to unassessed but potential future tax deficiencies.

Appellant claims that Conclusion of Law 11 applies and that it resolves the dispute in his favor. He argues that the result of the audit is to assign additional income to the parties, and that Conclusion of Law 11 deals with assigning income. The whole paragraph reads:

For the tax year 2011 the parties shall file jointly, or using such other status as will result in the least amount of tax due. The parties will file separate returns for the year 2012 with Petitioner having the right to claim the minor child as an exemption, dependent and deduction on her State and Federal Income Tax Returns. A pro forma tax return for the first six

¹ Our holding is only that the Decree is ambiguous. The ambiguity of the provision renders its meaning a factual matter and it is the job of the district court to decide how much weight, if any, to give to the evidence submitted by the parties when interpreting the Decree. See *Hickman*, 695 N.W.2d at 369; *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

months of 2012 will be drafted by a mutually agreed upon CPA. All income earned by either or both parties up to the date of signing of the Stipulation will be credited one-half to each party. All income earned after date of signing the Stipulation will be credited to the party that earned such income. The parties have paid a first and second quarter 2012 tax estimate and that payment shall be credited one-half to each party.

Appellant points to the following sentence as dividing up all income equally: “All income earned by either or both parties up to the date of signing of the Stipulation will be credited one-half to each party.” Read in isolation, this sentence appears to support his argument. When read in context, the sentence is intended to deal only with 2012 income, and not any other years. The paragraph begins with a sentence on the parties’ tax filing status for 2011. Then the next sentence moves on to discuss 2012, and the rest of the paragraph deals with 2012-related tax issues. And, the sentence in question directly follows a sentence discussing use of a pro forma tax return for the first half of 2012. Thus, while the sentence read on its own does not state that it deals only with 2012, read in the context of the entire paragraph it becomes evident that it is limited to how the parties divided income for the first half of 2012. This argument does support that Conclusion of Law 12 is ambiguous and does not apply because the audit is adjusting the parties’ income, and Conclusion of Law 12 does not address adjustment of income but debts associated with personal property. But, the argument that Conclusion of Law 11 resolves the dispute has little merit because it does not address how income is assigned from 2009 to 2011.

Finally, both parties make arguments about how this court should interpret the Decree if it is found ambiguous. But, because the language is ambiguous and we cannot discern the parties’ intent from the language alone, these are arguments for the district court

to resolve on remand. See *Hickman*, 695 N.W.2d at 369 (“If there is ambiguity . . . construction of the contract is a question of fact”); *Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (stating that “[i]t is not within the province of [appellate courts] to determine issues of fact on appeal” (quoting *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966))). See generally *Johnson v. Johnson*, 902 N.W.2d 79, 84–86 (Minn. App. 2017) (discussing interpretation of “hold harmless” provision in dissolution judgment).

II. Attorney Fees

District courts may require a party who “unreasonably contributes to the length or expense of the proceeding” to pay the other party’s attorney fees. Minn. Stat. § 518.14, subd. 1 (2016). The party asking for fees bears the burden of establishing that the other party’s conduct unreasonably contributed to the length or expense of the proceeding. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001). And the district court must make findings that explain the basis for an award of conduct-based fees. *Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007). Specifically, the district court must identify the conduct that justifies the award and determine that it occurred during the litigation. *Geske*, 624 N.W.2d at 819. We review an award of conduct-based attorney fees for an abuse of discretion. *Sanvik v. Sanvik*, 850 N.W.2d 732, 737 (Minn. App. 2014).

Because we agree with appellant that the Decree is ambiguous, we hold that his conduct in challenging respondent’s motion did not unreasonably contribute to the length or expense of the proceedings, and therefore that the district court abused its discretion in awarding respondent attorney fees for bringing this motion.

Because we hold that the Decree is ambiguous as to whether it apportions the parties potential liabilities from the IRS audit of their 2009 to 2011 joint income tax returns, we reverse the district court's June 20, 2016 order granting respondent's motion, reverse its December 14, 2016 order awarding respondent attorney fees, and remand to the district court for further proceedings consistent with this opinion.

Reversed and remanded.