IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

SCHUETTE V. SCHUETTE

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ELLEN F. SCHUETTE, APPELLEE AND CROSS-APPELLANT,
V.
DONALD W. SCHUETTE, APPELLANT AND CROSS-APPELLEE.

Filed March 30, 2010. No. A-09-532.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed as modified.

Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellant.

Jon J. Puk, of Walentine, O'Toole, McQuillan & Gordon, for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Donald W. Schuette appeals and Ellen F. Schuette cross-appeals from a decree of dissolution entered by the district court, which decree dissolved the parties' marriage, divided the marital assets and debts, and awarded alimony to Ellen. On appeal, Donald asserts that the district court erred in the amount of alimony it awarded to Ellen, in its valuation of Ellen's marital interest in Donald's separately owned business, and in its failure to credit Donald for his payment of a portion of Ellen's attorney fees prior to trial. On cross-appeal, Ellen asserts that the district court erred in denying her reimbursement for temporary alimony payments Donald paid to her from a joint marital account, in awarding Donald certain assets as nonmarital property, and in failing to award her attorney fees. For the reasons set forth below, we affirm the district court's decision as modified.

II. BACKGROUND

Donald and Ellen were married on September 4, 1965. Two children were born of the marriage, but both children were adults during all relevant proceedings.

At the time of the parties' marriage, Ellen was employed by John Deere. She continued to work there until the parties' first child was born. At that time, Ellen discontinued working and became a stay-at-home mother. Ellen was a stay-at-home mother for approximately 16 years, until the parties' youngest son turned 14. Ellen then went back to work and was employed at various companies doing "office work." Eventually, Ellen began working full time in a management position.

Ellen continued to work in the management position until 1988, when she had a nervous breakdown. She was hospitalized for a period of time, and when she returned home, she remained in the care of a psychiatrist. Ellen has been unable to work since suffering from a nervous breakdown. In addition to Ellen's mental health problems, she suffers from Type II diabetes, glaucoma, and heart problems.

Donald worked as an electrician for 39 years. He retired in August 2006. Since his retirement, he has worked on small electrician projects outside the Omaha area. In 2003, Donald started D2 Properties, L.L.C., with one of the parties' sons. D2 Properties owns five pieces of residential real estate.

On May 4, 2006, Ellen filed a complaint for dissolution of marriage. Ellen specifically asked that the parties' marriage be dissolved, that their marital assets and debts be equitably divided, and that she be awarded alimony and attorney fees. Ellen filed a separate motion on May 24, requesting temporary alimony during the pendency of the proceedings.

In June 2006, a hearing was held on Ellen's motion for temporary alimony. Prior to the hearing, the parties negotiated a stipulated temporary order. As a part of the stipulated order, the parties agreed that Donald would pay to Ellen $2,500 per month as temporary alimony and would pay to Ellen's attorney a one-time payment of $3,500 for a portion of Ellen's accrued attorney fees. In addition, the parties agreed to be "restrained and enjoined from transferring, encumbering, hypothecating, concealing, or disposing of either real or personal property and any other marital assets of the parties other than in the usual course of business or other than for the necessities of life, or until further order of this court." The court accepted the parties' stipulations and entered a temporary order.

On August 20, 2008, trial was held. Both parties testified concerning their work histories, contributions to the marriage, present finances, and marital property.

After the trial, the district court entered a decree of dissolution. The court divided the parties' marital assets and debts, awarded Ellen alimony in the amount of $1,250 per month for the rest of Ellen's life, and ordered Donald to pay $7,300 of Ellen's attorney fees.

Both parties subsequently filed motions for new trial. In an order filed May 7, 2009, the court overruled these motions. Donald and Ellen now appeal to this court.

III. ASSIGNMENTS OF ERROR

On appeal, Donald asserts that the district court erred in the amount of alimony it awarded to Ellen, in its valuation of Ellen's marital interest in D2 Properties, and in its failure to credit Donald for his payment of a portion of Ellen's attorney fees prior to trial.

On cross-appeal, Ellen asserts that the district court erred in failing to reimburse her for temporary alimony payments Donald paid to her from a joint marital account, in awarding Donald certain assets as nonmarital property, and in failing to award her attorney fees.

IV. ANALYSIS

1. STANDARD OF REVIEW

In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge; this standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Adams v. Adams*, 13 Neb. App. 276, 691 N.W.2d 541 (2005).

2. DONALD'S APPEAL

(a) Alimony

In the decree, the district court ordered Donald to pay Ellen alimony in the amount of $1,250 per month for the rest of Ellen's life. Donald argues that such alimony is "excessive." He argues that an award of $600 per month for the rest of Ellen's life would be more appropriate and equitable considering the parties' financial circumstances.

In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), the income and earning capacity of each party as well as the general equities of each situation. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). The criteria in § 42-365 include:

> [T]he circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Disparity in income or potential income may partially justify an award of alimony. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004).

In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Hosack, supra*. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id*. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id*.

Donald and Ellen's marriage was one of long duration. The record reflects that the parties were married for approximately 43 years. Throughout their marriage, both parties made significant contributions to the marriage. Donald worked full time as an electrician for 39 years, and Ellen worked outside of the home except for the 16 years she stayed at home with the

parties' children. At the time of trial, neither party remained in full-time employment. Donald had retired from his job as an electrician, and Ellen was unable to work as a result of her physical and mental health problems.

Because Donald and Ellen are not working, their incomes are derived primarily from their Social Security benefits, retirement funds, and pensions. Ellen receives Social Security disability benefits in the amount of $427 per month. Donald receives Social Security retirement benefits in the amount of $1,565 per month.

In the decree, the court awarded each party one-half of Donald's pension and retirement benefits. As such, each party receives an additional $1,237 per month. When we add the income from the parties' Social Security benefits to the income from Donald's retirement benefits, we calculate Ellen's monthly income to be $1,664 and Donald's monthly income to be $2,802.

Ellen does not have any other means of income besides her Social Security benefits and her portion of Donald's retirement benefits; however, the record indicates that Donald has additional means of income.

Donald owns D2 Properties with one of the parties' sons. While Donald testified that he is not currently earning income from the company, he also testified that he "will eventually" earn some income from his work with D2 Properties. In addition, evidence at trial revealed that D2 Properties has equity in its real property which totals almost $150,000.

There was also evidence at trial that Donald had done some electrical work after he officially retired from the business. Donald testified that the rules and regulations of his pension plan provide that he can do electrical work for 39 hours per month as long as the work is located outside of the Omaha area. Donald testified that since his retirement, he worked for three weeks in Missouri. Donald testified that this work was "physically taxing," but there was no other evidence that Donald was physically unable to do electrical work any longer.

There was also evidence that Donald earned income from investments that he inherited from his father. In the decree, these investments were awarded to Donald as his nonmarital property.

Considering the circumstances of the parties, and in particular, the duration of the marriage, each party's contribution to the marriage, Ellen's health problems and inability to work, and Donald's ability to earn income beyond his Social Security and retirement benefits, we cannot say that the district court's award of alimony to Ellen in the amount of $1,250 per month is an abuse of discretion.

(b) Ellen's Marital Interest in D2 Properties

In the decree, the district court awarded Donald the entirety of his 50-percent ownership interest in D2 Properties. However, the court found that Donald spent $40,000 of marital funds to purchase certain real property on behalf of D2 Properties. As a result of this use of marital funds, the court determined that a portion of that real property was a marital asset. The court determined Ellen's interest in that marital asset by calculating the amount of equity in the property at the time of trial and the percentage of the property that was a marital asset. The court found Ellen's marital interest in the property to be $30,469.47. The court ordered Donald to pay Ellen her marital interest and indicated that "said judgment shall operate as a lien against D2 Properties LLC until said judgment is paid in full."

On appeal, Donald does not dispute that a portion of the property is a marital asset nor does he argue that Ellen should not be compensated for her interest in the property. Rather, he argues that the district court erred in calculating the amount of equity in the property and, thus, erred in determining the amount of Ellen's marital interest. Upon our review of the record, we agree that the court erred in calculating the amount of equity in the property.

The purchase price of the property totaled $250,000. D2 Properties paid $75,000 of the purchase price as a downpayment. The $75,000 downpayment was made up of $40,000 of marital funds, $15,000 from the parties' son, and a $20,000 mortgage secured by a different piece of property owned by D2 Properties. D2 Properties paid the remainder of the purchase price by obtaining a mortgage on the property. At the time of trial, D2 Properties owed $184,365 in mortgage debt, which included $17,843 from the $20,000 mortgage it obtained to pay a portion of the downpayment. As such, the equity in the property at the time of the trial totaled $65,635.

In its calculation of the equity, the district court did not include the remaining debt from the $20,000 mortgage obtained to pay for the downpayment. Such omission was erroneous. We recalculate Ellen's marital interest in the property using our calculation of the equity in the property at the time of trial.

The district court found that Ellen owned 36½ percent of the equity in the property. Because neither party complains that the court erred in this calculation, we apply the district court's finding to our calculation of Ellen's interest in the property. Ellen's interest in the property totals $23,956.78.

We note that Donald testified at trial that he spent $53,000 of marital funds on real property owned by D2 Properties. As discussed above, he spent $40,000 on a downpayment for one piece of property. The remaining $13,000 was spent on various expenditures for D2 Properties. Donald did testify that a portion of this money was reimbursed to him by D2 Properties. However, he did not testify about how much was reimbursed or whether the reimbursement was returned to the parties' joint account.

The district court did not address this $13,000 in the decree. However, it is clear from the record that this $13,000 came from marital funds and it is unclear whether the money was ever returned to the parties' joint account. Because the $13,000 is not tied to any specific piece of property, we award Ellen $6,500, or one-half of the $13,000 spent for the benefit of D2 Properties.

When we combine Ellen's interest in the real property and Ellen's one-half interest in the $13,000, we calculate Ellen's entire interest in D2 Properties to be $30,456.78. Although our calculation of Ellen's interest is not significantly different than the district court's original calculation of $30,469.47, we modify the decree to reflect Ellen's interest in D2 Properties to be $30,456.78.

(c) $3,500 Payment for Ellen's Attorney Fees

As a part of the parties' stipulated temporary order, both Donald and Ellen agreed to a mutual and reciprocal restraining order concerning their marital assets. In addition, Donald agreed to pay to Ellen $2,500 a month in temporary alimony and to pay $3,500 toward Ellen's attorney fees. After the entry of the temporary order, Donald withdrew approximately $14,600

from a joint marital account. At trial, Donald testified that he paid this money to his counsel. A portion of the money was to pay his own attorney fees and a portion of the money was to pay for 2 months of temporary support and the temporary attorney fees for Ellen.

In the decree, the district court indicated that Donald was precluded from withdrawing the $14,600 from the joint account because of the mutual and reciprocal restraining order. The court then ordered Donald to pay $7,300, or one-half of the $14,600, toward Ellen's attorney fees as reimbursement for his use of the $14,600.

On appeal, Donald does not assert that his use of the funds from the joint account was appropriate or that he should not have to reimburse Ellen for her one-half interest in those funds. Rather, he asserts that he should be credited the $3,500 he paid toward Ellen's attorney fees during the temporary period. Donald's assertion has no merit.

The district court ordered Donald to reimburse Ellen for his use of the funds because the parties agreed that neither would use or dissipate marital assets during the temporary period. Donald withdrew $14,600 from a joint account without Ellen's knowledge or approval. The district court's order requiring Donald to reimburse Ellen for the use of the joint funds did not have anything to do with how he spent the money. The court's order was based on Donald's violation of the parties' mutual restraining order. As such, it is immaterial that a portion of the $14,600 was spent on Ellen's attorney fees. Donald is not entitled to any credit for his use of the joint funds.

3. Ellen's Cross-Appeal

(a) Reimbursement for Temporary Alimony

Pursuant to the parties' stipulated temporary order, Donald agreed to pay to Ellen $2,500 a month in temporary alimony. In addition, both Donald and Ellen agreed to a mutual and reciprocal restraining order concerning their marital assets. Donald paid the temporary alimony from a jointly held account. Beginning in September 2006, a majority of the payments were paid directly to Ellen using checks drawn from the jointly held account.

In the decree, the district court implicitly acknowledged that Donald's use of the joint account to pay the temporary alimony was a violation of the parties' mutual restraining order. However, the court found that Ellen had "acquiesced and/or had knowledge of the payment of temporary alimony from joint marital funds." Based on this finding, the court denied Ellen's request to be reimbursed one-half of the funds taken from the joint account.

On appeal, Ellen asserts that the district court erred in failing to reimburse her for Donald's use of the joint funds during the temporary period. Ellen argues that Donald's use of the joint funds violated the mutual restraining order and that she did not acquiesce in his use of the funds because she informed him that he was not to use the joint funds during the temporary period. Based upon our review of the record, we cannot say that the district court erred in denying Ellen's request for reimbursement.

In September 2006, Donald began paying the temporary alimony payments directly to Ellen using checks drawn on their jointly held account. The checks Ellen received from Donald clearly demonstrated that they were drawn from the jointly held account. As such, it is clear that in September 2006, Ellen knew or should have known that Donald was using the joint account.

At trial, Ellen testified that she "thought" she informed Donald about her concerns with where he was getting the money to pay the temporary alimony. She did not provide any other information about her communications with Donald. She did not explain when she informed him of her concerns or exactly what was said during the conversation. Ellen also testified that her counsel brought up her concerns with Donald's use of the joint funds at Donald's deposition in April 2008.

There is no evidence that Ellen brought Donald's use of the joint funds to the district court's attention prior to the date of trial. In fact, Ellen admits in her brief that she "waited until the date of trial to bring the matter to the attention of the District Court."

Although Ellen knew that Donald was using the joint account to pay her temporary alimony in September 2006, she did not take any action to protect her interest in the funds until at least April 2008. Moreover, Ellen did not make any effort to inform the court about Donald's use of the money until the date of trial. Ellen accepted almost 2 years of alimony payments from the joint account before taking any action.

Because Ellen waited so long to protect her interest in the joint funds, we cannot say that the district court abused its discretion in denying her request for reimbursement for her portion of the joint funds. There is sufficient evidence to demonstrate that Ellen acquiesced in Donald's use of the funds to pay her temporary alimony.

(b) Distribution of Property

In December 2003, Donald inherited approximately $177,000 from his father's estate. The inheritance was divided into two parts. The first portion of the inheritance constituted a check for $70,000. That check was deposited into a new bank account in Donald's name. The parties' two sons also had an interest in that account. At trial, Donald testified that the majority of the $70,000 was invested in D2 Properties. In addition, Donald used some of the money to purchase a car.

The remaining portion of the inheritance was made up of numerous stocks and bonds that were transferred into Donald's name. Donald placed these inherited investments into a preexisting investment account held in both Donald's and Ellen's names. At trial, Donald provided evidence to demonstrate which investments in the joint account belonged to Donald and Ellen prior to Donald's inheritance and which investments belonged solely to Donald as a result of the inheritance.

In the decree, the district court awarded Donald "his 50% ownership in D2 Properties, L.L.C., free and clear of any interest of [Ellen], but subject to [an] equity payment [to Ellen for marital funds used for the benefit of D2 Properties]." The court divided the joint investment account according to Donald's explanation of which investments were obtained "pre-inheritance," which investments were obtained as a result of Donald's inheritance, and which investments were obtained subsequent to the inheritance. The court divided the preinheritance investments equally between the parties. The court awarded Donald all of the inheritance investments "free and clear of any interest of [Ellen]." The court divided the investments obtained subsequent to the inheritance such that Ellen received 30 percent of the shares and Donald received 70 percent of the shares.

On appeal, Ellen asserts that the district court erred in finding that D2 Properties and a portion of the joint investment account was Donald's nonmarital property. Specifically, Ellen alleges, "Following the disbursement of [Donald]'s father's estate, [Donald's] inheritance was non-marital property. However, [his] later actions so commingled the non-marital property with the marital property . . . that the property should have been determined as marital in nature . . . ." Brief for appellee on cross-appeal at 25.

Under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). Such exceptions include property accumulated and acquired through gift or inheritance. *Id*. However, property acquired by one of the parties through gift or inheritance must be readily identifiable and traceable to that party to be set off as nonmarital property and not considered as part of the marital estate. See *Grams v. Grams*, 9 Neb. App. 994, 624 N.W.2d 42 (2001). The burden of proof to show that property is nonmarital remains with the person making the claim. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

(i) D2 Properties

At trial, Donald testified that he deposited the $70,000 check he received from his father's estate into a new, separate account. He used the money to purchase multiple pieces of real property on behalf of his company, D2 Properties. At no time did he "commingle" the money from the separate account with money from accounts held jointly by Donald and Ellen. Donald did use some marital funds to purchase real property for D2 Properties and for other business expenditures. However, as we discussed more thoroughly above, the marital funds used were readily identifiable and, in the decree, Ellen was compensated for Donald's use of the joint funds.

The majority of the funds used to start D2 Properties and to purchase real property on behalf of the company came from Donald's separate inheritance account. As such, we cannot say that the district court erred in determining that Donald's 50-percent ownership of the company was nonmarital property. We affirm the court's decision to award Donald the entirety of his 50-percent ownership in the company subject to an equity payment to Ellen for marital funds used for the benefit of D2 Properties.

(ii) Joint Investment Account

Donald provided the district court with detailed evidence concerning which investments in the parties' joint investment account he inherited from his father. Donald provided an exhibit which listed all of the investments in his father's investment account. The investments Donald inherited were highlighted. Donald also provided an account statement from the parties' joint investment account which demonstrated when the inherited investments were transferred into the

joint account and which investments were in the account prior to the time of the inheritance. Based upon our review of the record, we agree with the district court's division of the joint investment account. Donald provided sufficient evidence to trace and separate his inherited investments from the parties' joint investments.

(c) Attorney Fees

As we discussed above, the district court ordered Donald to pay $7,300 toward Ellen's attorney fees. However, this award was actually a reimbursement for Donald's use of joint funds during the temporary period, rather than a separate and distinct award of attorney fees. The district court did not award Ellen any other attorney fees.

Ellen argues that the court erred in failing to award her attorney fees. We understand Ellen's argument to assert that the district court erred in not awarding her attorney fees beyond the $7,300 reimbursement payment that was to go toward her attorney fees.

In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Schaefer v. Schaefer*, 263 Neb. 785, 642 N.W.2d 792 (2002).

Based upon our review of the parties' circumstances, and in particular, the amount of alimony awarded to Ellen and the division of marital property, we cannot say that the court erred in failing to award Ellen attorney fees beyond the $7,300 reimbursement payment that was to go toward her attorney fees.

V. CONCLUSION

Upon our de novo review of the record, we modify the decree of dissolution to reflect Ellen's interest in D2 Properties to be $30,456.78. We affirm the judgment of the district court in all other respects.

AFFIRMED AS MODIFIED.