

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

DENNIS V. DENNIS

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BEVERLY A. DENNIS, APPELLEE,
V.
CHRISTOPHER B. DENNIS, APPELLANT.

Filed August 28, 2012. No. A-11-1055.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Edith T. Peebles and Wm. Oliver Jenkins, of Brodkey, Cuddigan, Peebles & Belmont,
L.L.P., for appellant.

Michael F. Pistillo, of Pistillo & Pistillo, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and MOORE, Judge, and CHEUVRONT, District Judge, Retired.

MOORE, Judge.

INTRODUCTION

Christopher B. Dennis appeals from an order of the district court for Douglas County, which dissolved his marriage to Beverly A. Dennis. On appeal, Christopher assigns error to the court's failure to award him alimony. Because we find no abuse of discretion by the district court, we affirm.

BACKGROUND

Christopher and Beverly were married in Iowa on July 16, 1977. The parties had two children during the marriage, both of whom reached the age of majority before the parties separated in July 2007.

Beverly filed the initial complaint for dissolution of marriage on July 28, 2008, and filed the operative complaint in the district court on May 29, 2009. Christopher filed an answer and cross-complaint to the operative complaint on June 26, in which, among other things, he sought an award of spousal support.

A trial was held before the district court over the course of five separate dates between January 4, 2010, and January 20, 2011. Because alimony is the only issue on appeal, we have summarized only the evidence relevant to that issue.

Prior to the parties' marriage, Beverly received a bachelor's degree in education. At the time the parties were married, Christopher had accumulated a number of college credits but had not received a degree. Soon after the marriage, the parties moved from Iowa to North Dakota in order for Christopher to attend college, where he ultimately received his bachelor's degree in nursing.

While Christopher attended school, Beverly initially worked at a couple of minimum-wage jobs. At some point, she received full-time employment as a teacher, after which she continued to work part-time jobs to supplement the parties' income. Christopher worked part time while attending nursing school and also had some summer employment. After receiving his nursing degree, Christopher began working full time at a hospital.

After approximately a year, Christopher applied for a 2-year anesthesia program offered through the hospital. While Christopher attended the anesthesia program, he worked part time and Beverly continued to work her full-time teaching position and her part-time jobs. When Christopher graduated from the anesthesia program, he became a nurse anesthetist.

In 1983, Christopher was offered a position at a hospital in Canton, Illinois. The parties moved to Canton, where they resided for 5 years. Upon their move, Beverly began substitute teaching until she obtained part-time teaching employment the following spring and a full-time teaching position the following fall. Christopher worked at the hospital in Canton for 4 years until he took a job at a hospital in Peoria, Illinois, to which he commuted from Canton.

The parties' two children were born in 1985 and 1987 while the parties resided in Canton. After the children's births, Beverly was the primary caregiver, although they were in the care of a babysitter during the day while she was teaching school. Beverly was primarily responsible for getting the children ready in the morning and transporting them to and from daycare or the babysitter.

Christopher returned to school while working full time at the hospital in Peoria and received his master's degree in health administration in 1987. Christopher thereafter accepted a position managing the anesthesia department at a hospital in Mason City, Iowa, and the family moved to Mason City. Beverly again obtained employment as a substitute teacher and continued to be the primary caregiver for the parties' children. During the 2 years the parties lived in Mason City, Beverly was not able to obtain a full-time teaching position. After 6 months at the hospital in Mason City, Christopher left his employment there and worked temporary jobs in the area for 1½ years.

In 1990, Christopher accepted a full-time position as an anesthesia supervisor for a hospital in Omaha, Nebraska. The family moved to Omaha, where the parties continued to reside at the time of trial. Beverly took steps to obtain her Nebraska teaching certificate, and in the spring of 1991, Beverly began substitute teaching. Christopher eventually began working at a different hospital in Omaha, but was laid off.

In 1992, after having been laid off from his previous employment, Christopher suffered severe whiplash-type injuries from a traffic accident, which eventually rendered him completely and totally disabled. The accident was the catalyst for a previously asymptomatic condition

called Arnold-Chiari malformation to become symptomatic. The condition is a result of excess pressure placed upon the brain stem at the base of the skull. Christopher treated with physical therapists, headache clinics, and surgeons in an effort to relieve the severe neck pain and constant headaches he suffered as a result of the accident. At the time of trial, Christopher suffered from chronic neck pain, migraine headaches, and a loss of equilibrium resulting in his inability to keep his balance while standing without the aid of canes.

After the accident, Christopher received a settlement of \$100,000 from the tort-feasor's insurance policy and \$280,000 from the underinsured provision of Christopher's own motor vehicle policy. With help from the settlement money and money borrowed from Christopher's family, Beverly returned to school. Beverly took a year of business classes at a community college and studied 2 years at a university, earning a degree in accounting in 1997.

After obtaining her accounting degree, Beverly worked for approximately 1½ years at Mutual of Omaha before taking a position at ConAgra in February 1999. Beverly has been continuously employed at ConAgra since 1999, rising from a staff-level accountant to her position of finance manager at the time of trial. Beverly earned \$77,402.32 in 2006; \$97,744.68 in 2007; and \$89,149.44 in 2008.

In late 2008 or January 2009, Beverly was diagnosed with breast cancer. As a result of the treatment, surgery, and doctor appointments, Beverly missed 5 months of work in 2009. ConAgra's short-term disability policy paid 100 percent of her salary. Beverly's total cash compensation for 2009 was \$95,852, including salary and bonus. Her out-of-pocket medical expenses for 2009 were approximately \$7,000. Beverly suffered complications from her surgery, and at the time of trial, she had undergone six additional surgeries attempting to repair her mastectomy wound and anticipated further surgeries to fix all of the scar tissue and bad healing. In 2010, Beverly expected to earn a total of \$116,474.98, including salary and bonus.

Christopher testified at trial that because he is disabled, he is not able to engage in an income-producing occupation. He receives Social Security disability income of \$1,704 a month. Additionally, he receives \$2,400 a month in disability income from a private disability income policy. However, the income from the disability policy ends on April 10, 2018, when Christopher reaches the age of 65. There was brief testimony by Christopher that his Social Security disability payments will also end at age 65 when he is eligible for regular Social Security benefits, although there was no evidence about the amount of his expected Social Security benefits.

In hopes of returning to work full time after the traffic accident, Christopher began to take steps toward recertification for anesthesia. As part of his recertification, Christopher was required to perform a certain amount of clinical hours. He worked at an outpatient clinic in Omaha for a number of weeks, and he also performed anesthesia clinical work at a hospital in Hastings, Nebraska. Once Christopher completed all of the recertification requirements, he continued to work in Hastings on an intermittent part-time basis. Christopher works only on a limited basis because of his physical condition. Christopher testified that the hospital does not pay him because he cannot be placed on the schedule due to the uncertainty of his physical ability to work from day to day; however, the hospital compensates him for the work he is able to do by reimbursing him for his travel expenses to and from Hastings and by paying for his malpractice insurance and for required continuing education. Since the parties' separation,

Christopher has taken trips to Alaska, Hawaii, and the Caribbean for continuing education. In 2008, the hospital paid \$21,734 for these expenditures on behalf of Christopher. Due to Christopher's physical condition and the medications required to manage the pain, he has never been able to return to a full-time position.

Christopher's monthly living expenses as of June 2009 were \$3,977.76. Christopher estimated that his monthly living expenses would increase to over \$6,000 after the divorce. While separated, Christopher remained on Beverly's health insurance offered through ConAgra and he reimbursed her monthly for the cost. Christopher has investigated the costs of providing health insurance for himself through the Nebraska Comprehensive Health Insurance Program. The program would cost \$967 a month for a 58-year-old man in Christopher's condition with a \$2,000 deductible plus the cost of copays and uncovered prescription medicines estimated to be as high as \$1,463 per month. There was some evidence that the prescription costs would be less if Christopher would use generic drugs. At the time of trial, Christopher also had Medicare coverage.

On August 8, 2011, the district court entered a decree of dissolution, dissolving the parties' marriage and dividing the marital estate. As part of the division of property, Beverly received financial accounts totaling \$133,552 and Christopher received financial accounts totaling \$153,765. In addition, Christopher received the account containing the remaining funds from his settlement, in the sum of \$73,155, and was awarded 50 percent of Beverly's ConAgra pension benefit accrued through the date of the complaint, July 28, 2008. The court also divided the proceeds from the sale of the marital residence between the parties.

The court considered Christopher's request for alimony in the amount of \$1,000 per month for approximately 11 years. In declining to award alimony to Christopher, the court stated that although the marriage was long term, consideration of most of the other relevant factors militated against an award of alimony. The court found that an award of alimony in this case would have to be an attempt to equalize the parties' incomes, which the court was not inclined to do.

Christopher filed a motion for new trial, and on November 30, 2011, the district court entered an order amending the division of a particular asset in the decree but otherwise denying Christopher's motion. Christopher subsequently perfected his appeal to this court.

ASSIGNMENT OF ERROR

Christopher asserts that the district court erred in denying him alimony despite his severe disability and despite the higher earning capacity of his spouse and length of marital period.

Christopher also asserts that the district court erred in denying him an award of attorney fees, but we have not considered this assignment because Christopher does not argue it in his brief. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012).

STANDARD OF REVIEW

In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and

attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Id.* A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Rutherford v. Rutherford*, 277 Neb. 301, 741 N.W.2d 922 (2009).

ANALYSIS

Christopher asserts that the district court erred in denying him alimony.

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. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008). 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. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Id.* In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), in dividing property and considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Millatmal v. Millatmal, supra.* Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). However, disparity in income or potential income may partially justify an award of alimony. *Id.*

The parties were married for 34 years, although separated and living independently for roughly 4 years prior to entry of the decree. Christopher was 57 years old at the time of his trial testimony, and by the time trial was completed, Beverly was 56 years old. Both parties furthered their education during the course of the marriage, with assistance from the other party. The family made several moves throughout their marriage to further Christopher's profession. Beverly was the primary caregiver for the parties' children during their minority, even while she was working and attending school. The parties' children were both over the age of minority at the time of trial, although Beverly was continuing to support their youngest child while he was in college through payment of tuition and living expenses.

Both parties had health issues during the course of the marriage. Beverly was diagnosed and underwent treatment for breast cancer, which included a mastectomy, radiation, chemotherapy, and followup surgeries due to complications. She may still have to undergo further surgeries. At the time of trial, Beverly was working 40 hours per week; prior to her diagnosis, she worked 50 hours or more. Beverly testified that she was no longer able to work

that many hours since her diagnosis and that she still suffered from fatigue as a lingering side effect of the treatments she underwent. Christopher is significantly disabled as a result of his traffic accident in 1992. He receives Social Security disability income and income from a disability insurance policy which will terminate in April 2018 when he turns 65. The cost of Christopher's health insurance and out-of-pocket expenses may increase following the divorce, although it was not clear whether Christopher intended to use the Medicare coverage available to him.

Christopher sought alimony in the amount of \$1,000 per month for approximately 11 years. The district court declined to enter an alimony award to equalize the parties' incomes, finding that most of the other factors militate against an award of alimony. We agree. We have considered the general equities in this case, as well as the duration of the marriage; the history of the parties' contributions to the marriage; the general health of both parties and their ability to engage in gainful employment; and the parties' relative economic circumstances, including the award to Christopher of accounts valued at nearly \$227,000 and a portion of Beverly's pension benefits. We find no abuse of discretion in the district court's failure to award alimony.

CONCLUSION

The district court did not abuse its discretion in failing to award alimony to Christopher.

AFFIRMED.