

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

BACKEN V. BACKEN

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CHRISTINA L. BACKEN, APPELLEE,
V.
RAYMOND L. BACKEN, APPELLANT.

Filed May 15, 2012. No. A-11-661.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge.
Affirmed.

Robin L. Binning, of Binning & Plambeck, for appellant.

John A. Kinney and Jill M. Mason, of Kinney Law, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Raymond L. Backen appeals a decree of the district court for Sarpy County, Nebraska, dissolving Raymond's marriage to Christina L. Backen. On appeal, Raymond challenges the district court's treatment of Raymond's premarital stock holdings and the court's alimony award. Finding no merit to Raymond's assignments of error, we affirm. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

II. BACKGROUND

Raymond and Christina were married May 25, 1992. At the time of the marriage, both were employed by Peter Kiewit & Sons (Kiewit)--Raymond worked as a site manager overseeing construction projects and Christina was an office manager at a jobsite.

Evidence was adduced indicating that Raymond has moved on numerous occasions related to his work for Kiewit. When the parties met, both were located in Hawaii. After Hawaii,

the parties lived in Alaska, Colorado, and then in Nebraska. The parties moved to Nebraska in 2002.

Raymond has a civil engineering degree. Raymond's employment history indicates that he has been employed by Kiewit since 1983. At the time of trial, his gross earnings exceeded \$170,000 annually, with additional annual bonuses that averaged over \$18,000 annually between 2003 and 2010. In addition, the record indicates that Raymond had received dividends every year since 1992, with the dividends totaling in excess of \$180,000 annually in 2008 and 2009.

Christina has no college degree and has engaged in a variety of employments after high school, including working at a bank, working in the accounting department at a magazine, working with horses, waitressing, and working as the office manager on construction sites for Kiewit. She testified that she did not work outside the home for approximately the first 15 years of the marriage. She then worked part time for a modeling agency, but testified that she quit that job "because, according to Ray, [she] wasn't getting [her] work done at home: Wasn't getting the yard mowed, the weeds trimmed, the house clean enough, wasn't taking care of business at home." At the time of trial, she was working between 8 and 20 hours per week as a receptionist at a veterinarian office, earning \$8 per hour. Christina's highest earnings were right before meeting and marrying Raymond, when she earned approximately \$22,000 in 1990.

Throughout the marriage, Christina stayed home and was the primary caregiver for the parties' two children, aged 18 and 17 at the time of trial. Throughout most of the marriage, Raymond traveled extensively for work and was usually home "every second or third weekend" of the month, "coming in on Friday night or first thing Saturday morning and then leaving on Sunday evening or first flight Monday morning."

Throughout his employment with Kiewit, Raymond was periodically given the opportunity to purchase stock in Kiewit. Kiewit is a closely held corporation and is not publicly traded; nonemployees are not allowed to purchase or hold Kiewit stock. Kiewit does not offer retirement accounts, but instead offers employees the option to purchase stock periodically as a means of accumulating wealth. At the time of marriage, Raymond held 2,450 shares of Kiewit stock. The testimony at trial indicated that the parties had a line of credit and that it was used to purchase stock whenever Kiewit made a stock offer. The line of credit was also used for purposes over the course of the marriage, including the purchase of automobiles, houses, and vacations, as well as other purchases whenever the parties did not have sufficient money available in their bank accounts. Raymond testified that the parties took out loans "against the stock" over the course of the marriage, using the line of credit.

Raymond testified that the options to purchase stock are offered "based on a fairly ambiguous set of criteria" that included individual employee potential, contribution, and tenure. Periodically, Kiewit "redeems" stock or engages in stock splits. Raymond testified that over the course of the marriage, his stock changed on a number of occasions; Kiewit split the stock on multiple occasions and redeemed stock on a number of occasions, and Kiewit subsequently offered the option to purchase new shares on multiple occasions. Raymond testified that he was not able to personally trace the stock he owned prior to the marriage because of the "myriad of changes" it had gone through during the marriage.

Raymond offered the testimony of a forensic accountant who opined that tracing of the premarital stock was possible, even though the actual shares owned prior to the marriage were,

according to everyone, no longer in existence. That accountant testified that Raymond owned 2,450 shares of stock at the time of the marriage, that those shares split into 9,800 shares after the marriage, and that the account always included a total of at least 9,800 shares of stock throughout the marriage. He testified that although the specific shares owned at the time of the marriage “are gone,” there had always been a number of shares at least equal to those owned prior to the marriage. Upon questioning from the court, the accountant acknowledged that his opinion on being able to trace the stock equated to an opinion that the redemptions during the marriage always reduced the shares of marital stock, rather than the shares of premarital stock. Raymond, however, testified that whenever Kiewit redeems stock, “what they redeemed was the oldest in, because that’s how they redeem stock.”

Christina presented the testimony of an accountant who opined that the premarital stock could not be traced. He testified that because the premarital stock had all been redeemed and the proceeds had been used to pay off the debt owed on the parties’ line of credit, which was used for the purchase of a variety of marital assets, there was no way to trace the premarital stock or its proceeds directly to any currently existing marital asset.

At the time of trial, Raymond owned over 23,000 shares of Kiewit stock. At the time the complaint was filed, the per share value of the stock was \$92.75. At the time a temporary order was entered prior to trial, the per share value of the stock was \$113.10. The parties maintained separate finances after the temporary order was entered. At the time of trial, the per share value of the stock was \$153.05.

On July 12, 2011, the district court entered a decree dissolving the parties’ marriage, distributing the parties’ assets, and awarding Christina alimony. Most of the property was distributed in accordance with agreements of the parties. The court concluded that Raymond’s premarital stock could not be adequately traced to marital assets and that the value of the premarital stock could not be set aside as nonmarital. The court valued the shares of stock Raymond owned as of the time of trial (which totaled in excess of \$3.5 million) and included one-half of the value in an equalization payment owed from Raymond to Christina; the stock itself could not be awarded to Christina because Kiewit does not allow nonemployees to own stock.

The court also awarded Christina alimony in the amount of \$4,000 per month for 48 months, \$2,000 per month for 48 months, and \$1,000 per month for 12 months. In awarding alimony, the court explained over the course of three pages in the decree that the award was based on the length of the parties’ marriage (20 years), the employment history of the parties, the contributions to the marriage through employment and through being the primary caregiver for the minor children, and the disparity in earning capacity between the parties. The court also noted evidence of Christina’s rheumatoid arthritis, while concluding that there was no indication that her condition disqualified her from being able to work. Finally, the court concluded that the decision for Christina to not work significantly outside of the home during the marriage was a joint decision of the parties and that based on that mutual decision, Christina had lost opportunities to develop and advance in a career path.

This appeal followed.

III. ASSIGNMENTS OF ERROR

Raymond has assigned 11 errors on appeal. These 11 assertions of error can be consolidated for discussion to 2 primary challenges to the district court's dissolution decree: First, Raymond asserts that the court erred in its treatment of his premarital stock, and second, Raymond asserts that the court erred in its award of alimony.

IV. ANALYSIS

Raymond challenges the district court's treatment of his premarital stock and its award of alimony to Christina. Upon our de novo review of the record, we find no abuse of discretion by the trial court and we affirm.

In an action for 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; those determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Zoubenko v. Zoubenko*, 19 Neb. App. 582, ___ N.W.2d ___ (2012). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

1. PREMARITAL STOCK

Raymond first asserts a variety of assignments of error concerning the district court's treatment of Raymond's premarital stock in Kiewit. Raymond challenges both the court's failure to conclude that it was appropriate to trace the premarital stock to stock owned at the time of dissolution and the court's valuation of the stock owned at the time of dissolution. Upon our de novo review of the record, we find no abuse of discretion concerning either determination of the court.

The division of property is entrusted to the discretion of the trial court and on appeal will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial court's discretion. *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988). Property which one party brings into the marriage is generally excluded from the marital estate. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). The burden of proof to show that property is a nonmarital asset remains with the person making the claim. *Id.*; *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003).

The law is that if premarital property can be identified, it is typically set off to the spouse who brought the property into the marriage. *Charron v. Charron*, 16 Neb. App. 724, 751 N.W.2d 645 (2008). But when the actual premarital property no longer exists, then the question of whether there should be a setoff becomes more problematic. *Id.* The Supreme Court has noted inherent problems with tracing premarital property through disposition and reinvestment during the marriage. See *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985) (noting that parties tend to suggest tracing only when there is improvement in value but noting it is not error to restrict credit to identical property which is retained during marriage or to value of property at time of marriage or when disposed of during marriage). So long as it can be traced and identified, separate property remains separate through changes and transitions. See *Quinn v. Quinn*, 13 Neb. App. 155, 689 N.W.2d 605 (2004).

In the present case, there is no dispute that Raymond owned 2,450 shares of Kiewit stock at the time of the marriage. There is also no dispute that those shares of stock were no longer in existence at the time of the dissolution, having been redeemed by Kiewit throughout the course of the marriage. The proceeds paid to Raymond when the shares were redeemed were used to pay off balances due on a line of credit.

Although the testimony indicates that the line of credit was used to purchase each subsequent offer of stock from Kiewit, the line of credit was also used for a variety of other marital purchases, including automobiles, houses, and vacations. There is no dispute that the line of credit was used for a variety of marital purchases in addition to the purchase of shares of stock. As a result, the outstanding balance on the line of credit at the time of any particular redemption of stock could not be said to consist solely of a balance accumulated for the purchase of stock.

Both parties adduced expert testimony on the subject of tracing. Christina's expert testified that the parties' use of the line of credit for the purchase of stock and also other marital assets resulted in a commingling of the use of proceeds from stock redemptions such that it was impossible to accurately trace the proceeds from the redemption of Raymond's premarital stock to any of the stock that was owned at the time of dissolution. The district court's conclusion in this regard is not an abuse of discretion, and we find no merit to Raymond's assertion to the contrary.

With respect to the valuation of the shares, the parties disputed at trial whether the court should value the stock as of the date of filing, as of the date of the temporary order after which the parties kept their finances separate, or as of the date of dissolution. The date upon which the marital estate is valued should be rationally related to the property composing the marital estate. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). The district court chose to value the stock as of the date of dissolution. We find no abuse of discretion concerning this decision.

Our de novo review of the record indicates that the parties consistently valued other assets to be distributed as of the date of trial. For example, Raymond testified that the values he placed on the parties' automobiles for distribution purposes were the current values; he testified that bank account values used for distribution purposes were current to within 1 month of the dissolution trial.

Additionally, the district court explained its decision to value the stock as of the date of trial in part because of the nature of the Kiewit stock. As the court noted, in a typical case, Christina could simply have been awarded a percentage of the stock and she would have enjoyed whatever value it had as of the date of trial. In the present case, because Kiewit stock cannot be held by nonemployees, such a distribution was impossible. Alternatively, if the court elected to order Raymond to sell the stock in order to provide Christina with her interest, the stock would be sold for the price as of the time of trial. As such, the court concluded that Christina was entitled to the value of the stock as of the date of dissolution. We find no abuse of discretion in this determination, and we find no merit to Raymond's assertions to the contrary.

Raymond also challenges the court's failure to reduce the value of the stock by potential tax consequences. There was expert testimony adduced indicating that the potential tax consequences were speculative and could not reasonably be predicted without knowing if or

when another forced redemption of stock would happen. We find no abuse of discretion in the district court's refusal to reduce the value by these potential tax consequences.

2. ALIMONY

Raymond also assigns numerous errors in which he asserts that the court erred in its award of alimony to Christina. Based upon our de novo review of the record, we find no abuse of discretion in the court's award of alimony on the facts and circumstances of the present case.

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Zoubenko v. Zoubenko*, 19 Neb. App. 582, ___ N.W.2d ___ (2012). 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.*

Factors which should be considered by a court in determining alimony include: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; 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.* See Neb. Rev. Stat. § 42-365 (Reissue 2008). The criteria listed in § 42-365 are not an exhaustive list, and the income and earning capacity of each party as well as the general equities of each situation must also be considered. *Zoubenko v. Zoubenko, supra.* However, alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Id.*

In challenging the court's award of alimony, Raymond asserts that the court erred in its acceptance of Christina's assertions of her monthly expenses, in its use of his past dividend income in determining his earning capacity, in its consideration of her arthritis, and in awarding an excessive amount of alimony. We have reviewed the record in this case de novo and find that there was sufficient evidence to support the district court's reasoning in awarding alimony, and we find no abuse of discretion.

The evidence presented uniformly established that Raymond has progressed in his career throughout the course of the marriage and enjoys substantial earnings, in the form of his salary, bonuses, and regular dividend payments, in addition to the opportunity to purchase Kiewit stock. Although Raymond testified that bonuses, dividends, and stock options are not guaranteed and may or may not be offered at any point in the future, the evidence demonstrated that he has substantial annual earnings. The evidence presented also uniformly established that Christina did not work substantially outside the home during the marriage, did not obtain higher education or progress in any career field during the marriage, and has essentially been out of the job market for the majority of the past 20 years. Christina testified that this was a mutual decision of the parties, but also testified that Raymond strongly discouraged her from working outside of the home because of his desire that she focus her attention on caring for the home and the children.

In its award of alimony, the district court recognized that this was a marriage of long duration, being approximately 20 years in length. The court recognized that while Raymond had been very successful with his career's development throughout the marriage, Christina had been the primary caregiver for the children and had focused her energy on caring for the parties' home

and property. The court specifically recognized that the dividend income was not assured, but recognized that for the years between 2002 and 2009 the average dividend income had been in excess of \$100,000 and had been steady. Finally, although the court recognized that Christina suffered from arthritis, the court also recognized that she was not precluded from significant work as a result of her physical condition and the court recognized that she had marketable skills with regard to bookkeeping and caring for horses and that she could advance her education to qualify for additional work.

Considering all of these circumstances, the court concluded that alimony was appropriate. The court also structured the alimony payments to decrease significantly over the course of the alimony term, so that for the last 12 months the alimony payment is only one-quarter of the amount for the first 48 months. Upon our de novo review of the record, we find no abuse of discretion and we find no merit to Raymond's assertions to the contrary.

V. CONCLUSION

Upon a de novo review of the record, we find no abuse of discretion concerning the district court's treatment of Raymond's premarital stock or its award of alimony to Christina. We affirm.

AFFIRMED.