

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

JENSEN V. JENSEN

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RANDALL H. JENSEN, APPELLEE,
V.
ROCHELLE L. JENSEN, APPELLANT.

Filed September 11, 2012. No. A-11-906.

Appeal from the District Court for Buffalo County: WILLIAM T. WRIGHT, Judge.
Affirmed.

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

Heather Swanson-Murray and John M. Jensen, of Yeagley Swanson Murray, L.L.C., for
appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

MOORE, Judge.

INTRODUCTION

Rochelle L. Jensen appeals from the decree entered by the district court for Buffalo County, Nebraska, dissolving Rochelle's marriage to Randall H. Jensen. Rochelle challenges the district court's treatment of the equity in the marital home and Randall's premarital investments, its failure to find value in Randall's business, and its failure to find that Randall dissipated the marital estate. Because we find no merit to Rochelle's assignments of error, we affirm.

BACKGROUND

Randall and Rochelle were married May 8, 1999. No children were born of the marriage. This was Randall's second marriage, and he has two adult children. The parties separated in December 2009, although Rochelle was in and out of the marital residence on a regular basis. Randall filed his complaint for dissolution on February 23, 2010.

Randall graduated from college in 1975 and began employment with an insurance company in 1976, which company is now known as Principal Financial Group (Principal). He started as an agent or representative and sold life, health, and disability insurance. Randall worked out of his home and eventually moved into an outside office. Randall has continued to work exclusively for Principal through the time of trial. According to Randall, Rochelle did not contribute to Randall's employment, solicit clients, or improve his position with the insurance company.

Rochelle received her undergraduate degree in education in 1998. At the time of trial, Rochelle was working as a full-time elementary school teacher. Rochelle earned her master's degree in curriculum and instruction in 2003. Her graduate school tuition was paid out of the parties' joint checking account and with a teacher core grant. Rochelle continued to work full time as she earned her degree.

Rochelle submitted the deposition testimony of William Kennedy, a certified public accountant with an accreditation in business valuation, as evidence of the value of Randall's insurance business. Kennedy did not receive any information directly from Randall, but Rochelle provided him with their 2005 through 2009 income tax returns, which included Randall's business income and expenses. Kennedy researched sales data and revenues of similarly sized insurance brokerages over the past 5 years, including agencies that sold automobile insurance or property and casualty insurance. Based on these calculations, Kennedy opined that Randall's business should be valued at \$190,400.

Kennedy described Randall as a "statutory employee" who is self-employed but with the employer portion of his FICA taxes paid for by the company. Kennedy described Randall's insurance business as consisting of a customer base with an ongoing revenue stream.

Randall categorized himself as a career agent for Principal with a contract. He is compensated through commission and service fees for maintaining products, and Principal provides him with health insurance and a retirement plan. Principal controls what Randall sells and how he sells it. Principal has the authority to terminate Randall's employment. Randall employs secretaries, and he pays other business expenses that are deducted from his tax returns.

Randall did not agree with Kennedy's valuation of the business. Randall indicated that he does not have an insurance agency as characterized by Kennedy; rather, he stated that he is a captive agent for Principal, as opposed to having "brokerage ability" that a property and casualty agency would have, and that therefore, there is no agency to value. Randall testified that he does not have an ownership interest in the accounts that he sells, the accounts do not belong to him, and he does not have the ability to "sell" the accounts to other agents. During the marriage, Randall compensated another agent for a list of names of clients, but Randall testified that this did not amount to purchasing the other agent's "business" as Rochelle suggested he had done. The value of Randall's office equipment, furniture, and supplies was included in the division of the marital estate and awarded to Randall.

When they married, Rochelle moved into the home that Randall owned and had lived in for 30 years. At the time of the marriage, the assessed value of the home was approximately \$150,000 and there was a mortgage of \$70,000. Rochelle was not added to the deed to the home or included on the mortgage debt. Randall's mortgage debt increased during the marriage due to refinancing the home. Throughout the marriage, the parties continuously made payments on the

mortgage out of their joint account. Repairs and remodeling were done to the home during the marriage. Rochelle testified that they put in wood cabinets and wood floors, added on to the living room, converted a shed into an outdoor bathroom, and replaced the front porch. They also added a new roof, new siding, new fencing, new carpet, new paint, new furniture, and custom curtains.

Rochelle obtained an appraisal of the home which valued it at \$210,000. Rochelle disagreed with the appraisal because she was concerned that several aspects of the home were not photographed or included in the appraisal. Rochelle believed that the house should be valued at \$240,000 to account for the amount of money that was put into the various renovations. Rochelle did not offer evidence concerning the cost of the improvements or how such improvements affected the value of the home. Randall testified that the increase in value shown by the appraisal would include those improvements. Randall accepted the \$210,000 appraised value of the home.

Although Rochelle and Randall shared some joint accounts, Rochelle's name was not on their primary checking account. Randall testified that Rochelle never complained about this, that she had her own checking account he was not listed on, and that Rochelle could spend freely with their credit cards. The primary checking account was used to pay the parties' personal expenses, including the credit card debt, as well as Randall's business expenses.

Rochelle questioned several withdrawals made by Randall during the early part of 2010, after their separation. Although he was not able to specifically recall each transaction, Randall testified that both he and Rochelle incurred a lot of expenses during that period of time due to a tax audit and their separation. As a result, Randall testified that their joint credit card bills totaled approximately \$45,000 between January and April 2010, some of which was incurred by Rochelle in setting up her own household. In early 2010, Randall learned that his 2007 and 2008 income taxes were being audited by the Internal Revenue Service. Randall was informed that there were some duplicated deductions which resulted in an additional tax liability of approximately \$21,000. Randall also incurred significant accountant and attorney fees as a result of the audit. Due to these inflated expenses, Randall took distributions from some of his investment accounts. It appears from the record that the distributions were from Randall's premarital accounts; however, given the number of accounts owned by Randall and the parties, and the lack of specificity of the questions asked by counsel, it is not entirely clear. Randall testified that he was not hiding money from Rochelle and that the withdrawals were used for living expenses and the payment of debt.

Evidence was adduced that Randall also had a home equity line of credit from which he was able to draw funds when needed. Randall testified that a large part of the present debt was the result of the \$40,000 purchase of a vehicle that was included in the marital estate. The line of credit was also used for other purposes over the course of the marriage due to the fluctuation in Randall's commission-based income, including paying for some of the improvements made to the home.

Randall brought significant investment and retirement accounts into the marriage, and both parties own various investment accounts, retirement accounts, and life insurance policies. Only a handful of these accounts were not agreed upon prior to the trial and are at issue in this appeal. These funds include an annuity account and a mutual fund account owned by Randall.

Randall's annuity account had a present value of \$106,866. According to Randall's testimony, this annuity was funded with money from two other premarital accounts--\$27,798 from another annuity and \$74,978 from a mutual fund account. Randall testified that he did not make any additional contributions to the annuity during the marriage. Randall's mutual fund account mentioned above was worth \$191,186 at the time of the marriage. Although there was some testimony that additional monthly contributions may have been made into this account, the funds had a current balance of \$93,787 at the time of trial, which is less than the premarital amount after the withdrawal that went into the annuity.

On September 26, 2011, the district court entered a decree dissolving the parties' marriage, distributing the parties' assets, and awarding Rochelle alimony. In connection with the division of household goods, the court noted that its "general policy is to award an item of marital property to that party who places the higher value upon it, regardless of who possesses it or wants it," but due to "a significant amount of gamesmanship in the valuations placed by the parties on various items of property," the court awarded each party the household furnishings in their possession with a few exceptions.

With regard to Randall's business, the court concluded that the evidence at trial was that Randall is a "captive life insurance agent or life underwriter" and that he has no ownership interest in the products or accounts to which he provides sales and services. Therefore, there was no marketable business capable of valuation or division. The court found Rochelle's expert's opinion to be worthless and noted that he was "clearly poorly informed with regard to the nature of the service, compensation, and contract rights, which are the nature of Randall's business and his income."

The court found that it was undisputed that Randall owned the marital residence at the time of the marriage in 1999 and that its value at that time was \$150,000. Using the valuation of \$210,000 from the appraisal, the increase of \$60,000 was treated as marital property and was awarded to Randall. The court specifically rejected Rochelle's argument that the premarital equity in the home was spent and that Randall failed to trace the premarital equity through the marriage. Randall was also assigned all of the debt associated with the home.

In addition to dividing the other investment and retirement accounts, the district court specifically addressed some of the accounts that were contested by the parties. The district court noted Randall's testimony that the annuity policy valued at \$106,866.47 was purchased with the contents of two premarital assets. Though no other evidence clearly documented the premarital character of the funds, the court found "no reason to question Randall's testimony" and awarded that account to Randall at no value as a premarital asset. With respect to the mutual funds account, the court used the 1999 yearend statement to provide support for its value at the time of the marriage. Due to Randall's testimony that no additional funds were deposited into this fund and that there was no significant increase in its value over the course of the marriage, the account was awarded to Randall at no value as a premarital asset.

As an additional property settlement, the court awarded Rochelle a \$19,163.23 judgment against Randall. The court also awarded Rochelle \$500 per month in alimony for a total of 60 months. Finally, each party was ordered to pay their own attorney fees.

ASSIGNMENTS OF ERROR

Rochelle asserts, consolidated and restated, that the district court abused its discretion in (1) crediting Randall for the premarital equity in the marital residence, (2) awarding certain investments to Randall as premarital assets, (3) failing to find value in Randall's insurance business to be included in the marital estate, and (4) failing to find that Randall dissipated the marital estate.

In her brief, Rochelle also argues error in connection with an alleged violation of her due process rights in the district court's assertion that it would use a "bidding process" to award marital assets, but Rochelle did not separately assign this as error. Rochelle also assigns error to the failure to award her attorney fees, but she fails to argue any error in her brief. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). Therefore, we limit our analysis to only the errors both assigned and argued.

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. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009).

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. *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2009).

ANALYSIS

In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); Neb. Rev. Stat. § 42-365 (Reissue 2008). Equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. *Tyma v. Tyma, supra*. The second step is to value the marital assets and marital liabilities of the parties. *Id.* The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Tyma v. Tyma, supra*. The ultimate test for determining the appropriateness of the division of property is reasonableness as determined by the facts of each case. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

Premarital Equity in Home.

Rochelle argues that the district court erred in finding that Randall had premarital equity in the residence. She argues that the remodeling done to the house was funded with loans paid from their joint account, the premarital equity in the house was "spent," and the present equity in the house was the result of the joint labors of the parties.

Rochelle's argument ignores the undisputed fact that Randall owned the home at the time of the marriage. 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). This case does not present a situation of tracing premarital property through disposition and reinvestment during the marriage as suggested by Rochelle. See *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985) (no error to restrict credit for premarital property to identical property which is retained during marriage or to value of property at time of marriage). Evidence was adduced that the value of the home at the time of the marriage was \$150,000. The district court did not err in giving Randall credit for the premarital value of the home.

The parties lived in this home throughout the marriage, and it was still owned by Randall at the time of the dissolution. The parties made various improvements to the home, which improvements were considered in the appraisal obtained by Rochelle, which valued the home at \$210,000. Although Rochelle was dissatisfied with her appraisal and believed the home should be worth \$240,000, she provided no further evidence to support this value or that the appraisal failed to account for the improvements made to the home during the marriage.

The district court accepted the \$210,000 appraised valuation of the home. We can find no abuse of discretion in this determination. See *Thompson v. Thompson*, 18 Neb. App. 363, 782 N.W.2d 607 (2010) (trial court justified in using appraisal on marital home rather than valuation submitted by wife). The district court treated the \$60,000 in appreciation as marital property, not Randall's separate property, and placed this equity on Randall's side of the property division. Randall was assigned the liability for the current mortgage and the home equity line of credit. We find no abuse of discretion in the district court's determination of the value of the home, in its determination of the portion it found to be marital property, or in its awarding that value to Randall. Rochelle's assertion that Randall should not have been awarded the value of the home at the time of the marriage as a premarital asset is without merit.

Premarital Investments.

Rochelle argues that the district court erred in awarding certain investment accounts to Randall as premarital property. Randall owned several investment accounts prior to the marriage; however, Rochelle's argument appears to only relate to two specific accounts consisting of an annuity account and a mutual fund. Rochelle argues that Randall's testimony was insufficient to meet his burden of proof that the accounts were funded with premarital assets.

The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). To the extent that Rochelle suggests that documentary evidence is required in all instances in order to meet the burden of proof regarding premarital property, we reject her argument. A similar argument was previously considered and rejected by this court. See *Quinn v. Quinn*, 13 Neb. App. 155, 689 N.W.2d 605 (2004). In *Quinn*, the wife assigned error to the trial court's finding that the husband had used separate funds to make a downpayment on their home. Like Rochelle, the wife argued that "without receipts, canceled checks, or other evidence to show how the marital property was disposed," the husband's testimony was not sufficient to exclude the separate funds from the marital estate. *Quinn v. Quinn*, 13 Neb. App. at 167, 689 N.W.2d at 616. The husband in that case testified that he had immediately applied the proceeds from his premarital home sale to the downpayment on the marital residence. We also noted that the wife's testimony did not contradict the husband's testimony concerning the source of the funds for the

marital residence. We therefore concluded that the trial court did not abuse its discretion in tracing the husband's separate property and giving him the appropriate credit.

Although the majority of the evidence provided on the accounts in question consisted of Randall's testimony, there were some account statements provided to the court. A quarterly statement from 2006 indicated that the contract date for the annuity was in 1998. Randall testified that this account was transferred into another annuity account and was reflected in a 2007 annual statement also received in evidence. A 1999 yearend statement was also provided for the mutual fund which Randall used to estimate the value at the time of the marriage. Further, Randall's testimony regarding the accounts was quite specific as distinguished from the very general testimony by the husband that was rejected by us in *Charron v. Charron*, 16 Neb. App. 724, 729, 751 N.W.2d 645, 650 (2008), that his premarital certificate of deposit was "'in those six investments somewhere.'" Finally, Rochelle did not present evidence to contradict Randall's testimony or the exhibits mentioned above.

The district court found Randall's testimony to be credible. In our de novo review on the record, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

We find the district court did not abuse its discretion in setting aside the annuity and mutual fund accounts to Randall as his premarital property.

Valuation of Insurance Business.

Rochelle argues that the district court erred in finding that there was no determinable value to Randall's insurance business. She asserts that there was uncontroverted expert testimony providing a value and that Randall's only evidence was his own testimony stating that he was unable to sell his business. She also argues that her wages and Randall's business income were commingled in the account that was used to pay business expenses, which commingling should result in the business being considered a marital asset.

In an attempt to place a value on Randall's business interest, Rochelle presented Kennedy's deposition testimony that the value of the business was approximately \$190,000. The district court found Kennedy's valuation was "worthless" and that he was poorly informed as to the nature of the service, compensation, and contract rights involved in Randall's business and income.

Rochelle's arguments on appeal largely focus on the weight that her expert's opinion should have been given. However, expert opinions are not binding on the trial court. *Thompson v. Thompson*, 18 Neb. App. 303, 782 N.W.2d 607 (2010). The weight and credibility of an expert's testimony are a question for the trier of fact. *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008). The record reveals that Kennedy did not discuss with Randall or otherwise investigate the nature of Randall's business but only reviewed income tax returns.

Randall testified that he does not own an insurance agency or brokerage that is subject to valuation, he does not have an ownership interest in the accounts that he sells, and he is not able to "sell" the accounts to other agents. The record shows that Randall is a "captive agent" for Principal, meaning he only represents Principal. Randall did not believe that his business has a

marketable value. Randall is certainly familiar with his business, and there was sufficient foundation for him to express an opinion about its value as a going concern. See *Nygren v. Nygren*, 14 Neb. App. 1, 704 N.W.2d 257 (2005) (wife established sufficient foundation for valuations of farm equipment for purposes of calculating marital estate).

Based upon our review of the evidence and giving weight to the fact that the district court observed and heard the witnesses, we cannot say that the district court abused its discretion in rejecting the opinion of Rochelle's expert and in finding that Randall's business had no marketable value.

Dissipation of Marital Estate.

Finally, Rochelle argues that the district court erred in failing to require Randall to reimburse the marital estate for approximately \$36,500 in funds dissipated while the marriage was undergoing an irretrievable breakdown. Rochelle argues that the burden was on Randall to show what he did with the funds once she proved the unusual withdrawal and that the trial court erred by neglecting to address the issue.

Marital assets dissipated by a spouse for purposes unrelated to the marriage after the marriage is irretrievably broken should be included in the marital estate in dissolution actions. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). See, also, *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009). Dissipation of marital assets is generally defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. *Harris v. Harris, supra*.

In *Harris*, the parties were estranged in 1995, although no dissolution action was filed until 1998. The husband began making large withdrawals from the parties' savings fund in 1995. The husband was able to account, through testimonial and documentary evidence, for a portion of the withdrawals as having been used for marital expenses. The balance was treated as marital property that the husband had dissipated and was assigned to him in the division.

In the present case, Randall testified that the withdrawn funds were used for everyday expenses, the payment of debts, and in particular, the higher than usual expenses that both parties incurred in 2010 resulting from his 2007 and 2008 tax returns being audited and from helping Rochelle move out of the home. Randall was in charge of the parties' finances throughout the marriage, and there was nothing in the evidence regarding these transactions to suggest that they were intended to dissipate the marital estate. While the expenditures were admittedly unusual and Randall was unable to account for what each withdrawal specifically paid for, his testimony was sufficiently specific to show that the expenditures were for items related to the marriage. We further note that the sum in question is minor in comparison to the parties' numerous bank and investment accounts. This assignment of error is without merit.

CONCLUSION

The district court did not abuse its discretion in its determination of and division of the marital estate. Therefore, we affirm.

AFFIRMED.