

REPLACEMENT

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IN THE NEBRASKA COURT OF APPEALS

**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

Case No. A-19-985

JONI POEHLING

Plaintiff/Appellant,

v.

PATRICK POEHLING

Defendant/Appellee.

REPLY BRIEF OF JONI POEHLING, Appellant

APPEAL FROM DISTRICT COURT OF SAUNDERS COUNTY, NEBRASKA

THE HONORABLE CHRISTINA M. MARROQUIN
District Court Judge
Trial Court No. C117-67

Leta F. Fornoff #20276
1627 E. Military Ave.
Fremont, NE 68025
(402) 721-3037
e-mail: Leta@fornoffschuttlaw.com

ATTORNEY FOR JONI POEHLING, Appellant

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JURISDICTIONAL STATEMENT

Appellant relies on her original Jurisdictional Statement.

STATEMENT OF THE CASE

Appellant relies on her original statement of the Case.

PROPOSITIONS OF LAW

Appellant adds no Propositions of Law but replies to those set forth by Appellee.

STATEMENT OF FACTS

Appellant relies on her original Statement of Facts. Appellant adds the following facts:

Patrick testified that the \$650,000.00 used to purchase the Gas Stock was from the proceeds of the gifted lots. Patrick also testified that the monies used to purchase the Gas Stock came from the investment accounts which contained the proceeds from the gifted lots.(158:23-159:9) Patrick's argued that the investment account proceeds were not marital assets, the trial court found that the accounts were marital assets due to all the co mingling of funds. The court also found that Patrick did not meet his burden to proof that the funds were not marital. (T45-46) Patrick testified that he purchased the Gas Stock because he was concerned about the investments and the stock market tanking. (197:7-12)

Patrick's testified as to value of the gifted lots was \$700,000.00 to \$800,000 at his deposition.(169:21-23). Patrick testified at trial the value was

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\$800,000.00 to \$900,000.00 at trial. (211:6-11). Patrick offered no explanation as to his increase in valuation. Patrick testified \$650,000.00 from the gifted lots was used to purchase the Gas Stock and now the stock is essentially worthless and company bankrupt and it sustained taxable losses. (199:6-200:4)

Joni's valuation of the gifted lots was \$600,000.00 using the documentary stamps to determine the value. (140:14-17) Joni provided documentary evidence to support her valuation of Patrick's gifted lots at trial. (E32; E33)

Patrick attempted to get evidence into the record at trial that about potential inheritance Joni may receive from her parents. The Court sustained Appellant's relevancy objection.(150:19-152:8)(226:6-19)

RESPONSE TO APPELLEE'S ARGUMENT

Appellant stands on her arguments set forth in the Brief of Appellant and those arguments contained herein.

REPLY BRIEF AND ARGUMENTS FOR APPELLANT

Part 1: "Division of the Marital Estate." (Appellee's Brief at 20-23)

Appellee argues that the Court's award of two-thirds of the marital estate to Patrick and one-third of the marital estate to Joni is equitable following the guidelines of caselaw. (Appellee's Brief at 20)

Appellee also argues that the parties agreed on the classification of numerous items and the valuation thereof prior to and during the trial. (Appellee's brief at 20) Patrick is wrong regarding the Gas Stock. The parties did not agree

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that the Gas Stock was a non marital asset and therefore should not be considered by the Court. Joni stated that Patrick could be awarded the Gas Stock (80:6-10) Joni did not testify that the Gas Stock should not be considered in the division of the marital estate. Joni testified the Gas Stock loss should offset the value of the gifted lots. (154:22-155:5)

The Court in the July 16, 2019 decree of dissolution Order stated “The court must recognize that a significant portion of the assets of the marriage are attributable to the gifts made from John Poehling to Patrick Poehling during the marriage.” (T48) The court then awarded Patrick two thirds of the marital assets. (T49) The facts of the case do not support such a finding.

Appellant argues the court’s award of two-thirds of the marital estate to Patrick is judicial error and abuse of discretion. The court considered the gifted lots in the distribution of the marital assets but did not consider the \$650,000.00 paid for Gas Stock and the stock’s subsequent loss in value, Patrick’s high income earning history and his success as a real estate agent/broker, Joni’s contribution to the marriage, the valuation of the apartment, and the valuation of Joni’s NSEA account. It is Joni’s position that a fair and equitable distribution of the marital estate cannot be accomplished without consideration and attribution of these specific factors.

Appellant incorporates and relies on her Argument in Appellant’s brief with the following additional argument.

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Part 2: Gas Stock: Patrick stated in his brief that Joni agrees that the “gas stock” is a non marital asset (Appellee’s brief 24) This is not true. Appellant incorporates and relies on her Argument in Appellant’s brief with the following additional argument.

Joni testified that she was fine with Patrick having the gas stock free and clear from her (80:6-10) She wasn’t going to contest that Patrick should be awarded the Gas Stock. Joni did not testify that it was non marital and should not be considered by the court. Joni testified the Gas Stock loss should offset the value of the gifted lots.(154:22-155:5) Joni and Patrick both testified that the gas stock was from a brokerage account.(158:23-159:11) Patrick also testified that it was from gifted lot money from his father.(201:24-202:3) Further Patrick testified that he invested \$650,000.00 into the gas stock and that the money came out of a couple of different brokerage accounts.(159:1-6) Patrick asserted at trial that the money for the Gas Stock was from a non marital account.(225:13-15)(E48). Patrick made no attempt to contact his account brokerage firms for evidence or contact personnel for testimony at trial in his efforts to persuade the court that the account was non marital. Patrick provided no documentary evidence.(T45-46) The court determined that all the brokerage accounts were co mingled and marital assets. (T45-46)

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Joni and Patrick could not put a value on the Gas Stock. Joni did not consider it a valuable marital asset. Patrick testified that the Gas Stock was not worth much and that the company had gone “bankrupt.”(147:5-10) (199:1-24)

Joni argues due to the trial court’s consideration of the gifted lots in determining the equitable distribution of marital property the court must also take into consideration the diminution of the investment accounts and the loss of value in the Gas Stock. In the court’s decree of dissolution, the court gives Patrick the benefit in the marital distribution of gifts received from his father, but fails to take into consideration the \$650,000.00 loss of those gifts in the purchase of the Gas Stock. In the trial court’s order Patrick gets the maximum benefit of the gifted lots without taking the loss of \$650,000.00. Patrick is essentially made whole to Joni’s financial detriment.

The trial court found that it could not determine the value of the gifted lots from the evidence presented by Patrick and Joni.(T45-46). Neither Patrick nor Joni has ever argued the gifted lots had no value. Patrick and Joni both valued the gifted lots at trial.

Patrick testified that the \$650,000.00 used to purchase the Gas Stock was from the proceeds of the gifted lots. Patrick also testified that the monies used to purchase the Gas Stock came from the investment accounts which contained the proceeds from the gifted lots.(158:23-159:9) Despite Patrick’s argument that the investment account proceeds were not marital assets, the trial court found that the

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accounts were marital assets due to all the co mingling of funds. The court also found that Patrick did not meet his burden to proof that the funds were not marital.

(45-46) Patrick testified that he purchased the Gas Stock because his investments in the stock market because he was worried about the stock market tanking.

(197:7-12) Patrick unilaterally took the \$650,000.00 out of the investment account with no prior knowledge or consent from Joni.

Patrick's testified as to value of the gifted lots was \$700,000.00 to \$800,000.00 in his deposition.(169:21-23). Patrick testified at trial the value was \$800,000.00 to \$900,000.00 at trial. (211: 6-11). Patrick offered no explanation as to his increase in valuation. Patrick testified \$650,000.00 from the gifted lots was used to purchase the Gas Stock and now the stock is essentially worthless and company bankrupt and it sustained taxable losses. (199:6-200:4) The difference between the value of the gifted lots and amount paid for the now worthless stock is \$50,000.00 or \$150,000.00 using Patrick's deposition testimony of \$700,000.00 and \$800,000.00. Using Patrick's trial testimony values of \$800,000.00 or \$900,000.00 the difference between is \$150,000.00 to \$250,000.00.

Joni's valuation of the gifted lots was \$600,000.00. Joni extrapolated the values using the documentary stamps.(140:14-17) Using Joni's values for the gifted lots the difference in value the amount paid for the Gas Stock the difference is a negative \$50,000.00. Joni provided more documentary evidence to support

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her valuation of Patrick's gifted lots and did not change her valuations at trial as Patrick did. (E32; E33)

Using Patrick's highest valuation of \$900,000.00 the difference is \$250,000.00 and that is the maximum that can be put in Patrick's column in the division of assets as compared to the \$872,194.30 disparity in the court's division of the marital assets in Patrick's favor.

Any increase in the investment accounts due to the gifted lot proceeds is logically offset by the loss of increased investment value of the \$650,000 withdrawn from the investments accounts by Patrick which were used to pay for the Gas Stock.

It is Joni's position that Patrick cannot get the benefit of the gifted lots without taking into consideration the \$650,000.00 that he spent from marital funds on the Gas Stock and the resultant loss of the value. It is also Joni's position that the amount of loss in the Gas Stock equalizes the value of the gifted lots and therefore the marital property should be distributed equally to Patrick and Joni. To not do so would result in Joni taking the loss of the Gas Stock and Patrick taking all the gain from the gifted lots.

The court failed to take into consideration Patrick's history of being a high income earner and very successful real estate agent and broker. Joni testified that she had knowledge that Patrick made more money in the sale of non gifted real estate than he received from the lot gifts from his father. Further Joni testified at

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trial that when the parties separated there were at least ten boxes of real estate records and that each box was full of listings, sales receipts and commissions. (40:23-41:10) Patrick did not provide any evidence to contradict Joni's testimony.

While the matter of the value of the gifted lots and the \$650,000.00 is one significant factor in the trial court's abuse of discretion in awarding Patrick two thirds of the marital estate, these are not the only factors. Other factors include not taking into consideration the following: life insurance premium proceeds, Joni's contributions to the marriage, income producing property, valuation of the apartment and valuation of Joni's NSEA account.

Part 3: Life Insurance Policy: Patrick asserts that the district court's declined to include the life insurance policy or premiums in the in the division of the marital estate and that was appropriate. (Appellee's Brief 29) Appellant incorporates and relies on her Argument in Appellant's brief with the following additional argument.

The District Court did not decline to include the life insurance policy or premiums in the division of property, the District Court failed to address the awarding of this particular asset at all in its Order dated July 16, 2019. Joni asserts that the District Court's failure to address the matter was inadvertent.

Patrick argues in his brief that Joni failed to prove that the insurance premium proceeds of \$44,000.00 were from a joint account and that she should

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receive one half or \$22,000.00 of said proceeds that Patrick retained. (Appellee's Brief 29)

Both parties do acknowledge the existence of the life insurance policy and that Patrick received the proceeds. (Appellee's Brief 29).

It is Patrick that confirms that one half of the premiums is valued at \$22,000.00. At trial Patrick was asked if he had any objection to Joni getting credit for \$22,000.00 of the premiums that were paid for the insurance policy in which he received a check for \$73,193.82. Patrick testified that he received \$73,193.82 from the insurance proceeds.(162:4-8) Patrick testified that he had no problem with giving Joni one half of the \$44,000.00 that were paid toward the insurance premiums. Patrick stated "if I can show that they're from, like, real estate commissions and not lot sales, yes, I have no problem with that," Patrick also stated that he could not provide any documentation as to the source of the premium payments or the account in which they were paid. Patrick made no effort to contact his various brokerage accounts to determine where the source of the premiums paid were from.(162:17-164:17) By virtue of Patrick's own testimony the value of the paid premiums is \$44,000.00. Joni should be awarded \$22,000.00 because Patrick cannot prove the source of the premium payments and nor did he make any attempt to do so. Joni provided documentary evidence of a premium payment being made from First State Bank joint account.(E40). Patrick did not

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provide any controverting testimony or evidence to rebut Joni's testimony or evidence.

Joni is only requesting one half of the money for premiums paid. She is not requesting one half of the total amount that Patrick received and retained from the insurance proceeds. Patrick is still benefitting from the increase in value.

Therefore Joni is entitled to and should be awarded \$22,000.00 of said insurance premium payment that Patrick retained.

Part 4: Joni's Contribution to the Marriage

Patrick argues that Joni failed to set forth that argument that the trial court failed to take into consideration Joni's contributions to the marriage. Joni argument is set forth in the Argument #1 in Appellant's brief with the additional argument.

The trial court divided the marital estate awarding Joni one third of the marital estate. Pursuant to caselaw that is the lowest percentage that the trial court should award. Appellant can find no Nebraska case law where a court has awarded a party less than one third of the marital estate. Therefore, the trial court could not possibly have considered Joni's contributions to the marriage.

Part 5: Income Producing Property

Appellant incorporates and relies on her Argument regarding Patrick's award of income producing property as set forth in Appellant's brief. Joni further rebuts Patrick's assertions that no evidence was presented that the trial

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court regarding the large Ameritrade Account. Evidence adduced at trial that the majority of the parties' monies allocated to the investment accounts went into Ameritrade account ending in 8474. (T44-48) As a practical matter investment accounts carry different rates of risk levels and have different levels of growth. An equitable and fair way to divide the investment accounts is to divide each account at the same percentage and that eliminates all inequities in the distribution.

Part 6: Valuation of the Apartment

Appellant incorporates and relies on her Argument regarding the apartment lot set forth in Appellant's brief.

Part 7: Valuation of Joni's NSEA Account

Patrick does not dispute Joni's valuation of her NSEA account. Joni requests the Court use the \$ 20,557.72 NSEA valuation in determining what is fair and equitable division of the marital estate. While the court's error is relatively minor in terms of the overall assets, the error is indicative of the other errors and omissions in this case and should be considered in determining a fair and equitable division of the marital estate.

Alimony: Patrick asserts that alimony is not appropriate in this case. He further asserts that Joni's request for alimony basis is an equalization tool and also due to other considerations of the case.(Appellee's Brief 31)

Appellant incorporates her argument for Alimony in her Brief with the additional argument.

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At trial there was uncontroverted testimony from Joni that she purchased her house in Bennington with the guidance, representations and encouragement from Patrick based upon his assurances that she would be receiving half of all their assets. The Bennington house would be paid from her share of the sale of the marital home and that she would receive \$ 850,000.00 in investments. Joni stated that the Bennington House taxes were \$8,500.00 to \$9,000.00 per year. Patrick represented to Joni that both of them could live off the interest from the investments that would each get. He assured her that she could pay the taxes and the insurance with the interest from the investments. Joni would not have purchased the Bennington house without Patrick's assurances and representations. (35:21-36:8) She reasonably relied on his assurances.

Joni also testified at trial that she would not be able to afford to continue to live in the Bennington house unless she received an increase in a monetary award than what Patrick was requesting at trial or that she will receive monthly alimony payments.

Patrick offered a repeated theme at trial. He repeatedly stated and tried to get evidence into the record that Joni may receive a sizable inheritance from her parents and therefore she did not deserve to get more in assets or alimony. The Court found that this line of questioning, evidence was not relevant. (150:19-152:8)(226:6-19) This is alternative narrative from Patrick's assurances that Joni could afford to purchase and maintain the Bennington House. There is no

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testimony by Patrick in the record that Joni could afford the house without the \$850,000.00 in investments that he assured her she would receive. There is no testimony in the record where Patrick denies that he told Joni she would get \$850,000.00 in investments and that he gave the assurances, representations, guidance and encouragement to purchase the Bennington house as testified by Joni. (35:21-36:25)(122:8-13)

Patrick has a business degree with an emphasis in accounting. He has been a real estate agent and a real estate broker. (186:12-16) Patrick quit his job as a real estate agent and broker because he wanted a change. (168:3-11) Patrick took the lower paying job because he could afford to do so. Patrick's current job and rate of pay are not commensurate with his education, skills and experience. (119:20-22)(168:12-14)(190:17-20) Joni had been a legal secretary and gave that up to care for her young children, be a homemaker and work to help Patrick build a successful real estate business. (100:11-101:14) Joni's efforts allowed Patrick the time and provided additional support to grow his business into a success. (102:20-103:2) Joni now works as a secretary for the Fremont Public Schools and cannot afford to stay in her home in Bennington.(122:8-13)

Patrick has the financial resources to provide Joni with an award of alimony and that would be reasonable and equitable based upon his representations and his background in real estate, accounting and knowledge of the investments accrued during the marriage. The parties had a marriage of long duration, Joni's

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contributions to the marriage were significant, and she does not have the work experience and the work skills to significantly advance her employment income.
(103:5-16)

Dissolutions are cases in equity. There is no hard and fast caselaw to guide a Court regarding when an award of alimony should be awarded but there are factors for a court to consider. It is what is equitable under the circumstances. It is equitable under the circumstances for all the reasons herein and all the reasons set forth in Appellant's brief to award Joni alimony.

Attorneys Fees: Patrick argues that the Court did not award Joni attorneys fees and that is appropriate. Patrick is incorrect. The Court did not address the matter of attorney fees. Joni believes that the trial court's failure to address the attorneys fees issue was inadvertent and asks the Court to address this omission.

Appellant incorporates and relies on her argument for attorney fees as set forth in Appellant's brief and Argument herein Appellant's Reply Brief.

CONCLUSION

In conclusion, Joni sets forth to the Court that the district court abused their discretion in the determinations and order entered on July 16, 2019 decree of dissolution. Patrick received \$872,194.30 more than Joni is the court's order. Patrick received the benefit of gifted lots and no consideration was given to the \$650,000.00 Patrick paid for the Gas Stock from what he testified were funds

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taken out of what were determined to be marital accounts. Patrick is made whole to Joni's financial detriment.

The trial court failed to address or account for the life insurance premiums, attorneys' fees request and inequitably divided the marital estate as set for in Appellant's Brief and Reply Brief. The Appellant respectfully requests that the Court review these issues and find in favor of the Appellant Joni Poehling and award Joni Poehling one half of the marital estate, \$22,000.00 for one half of insurance premiums paid from marital funds of the \$73,193.82 check Patrick retained; alimony and attorney fees.

Respectfully submitted,

Leta F. Fornoff #20276
Attorney for Joni M. Poehling, Appellant
1627 E. Military Ave., Suite 100
Fremont, NE 68025
(402) 721-3037
e-mail: Leta@fornoffschuttlaw.com

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CERTIFICATE OF SERVICE

The undersigned, Leta F. Fornoff, attorney for the Appellant, hereby certifies that a copy of the replacement Reply Brief of Appellant was served on counsel for the Appellee and upon all other parties participating in the appeal by E-service, on this 20th day of April, 2020, as follows:

Bradley Holtorf, 340 E Military Ave., Fremont, NE 68025

Leta F. Fornoff, #20276
Fornoff & Schutt PC
1627 East Military Ave
Suite 100
Fremont, NE 68025
402-721-3037

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Certificate of Service

I hereby certify that on Monday, April 20, 2020 I provided a true and correct copy of this *Reply Brief-Replacement* to the following:

Patrick Poehling represented by Bradley D Holtorf (15413) service method: Electronic Service to **holtorfb@sidnerlaw.com**

Patrick Poehling represented by Linsey Moran Bryant (23380) service method: Electronic Service to **bryantl@sidnerlaw.com**

Signature: /s/ Fornoff,Leta,F, (20276)