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Court of Appeals of Nebraska.

Rachel WILLIAMS, appellant,
v.
Will WILLIAMS, appellee.

No. A–07–1103. | Dec. 2, 2008.

Appeal from the District Court for Brown County: Karin L. Noakes, Judge. Affirmed.

Attorneys and Law Firms

Sandy Steffen for appellant.

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellee.

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

Opinion

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

MOORE, Judge.

I. INTRODUCTION

***1** Rachel Williams filed a petition for dissolution of her marriage to Will Williams in the district court for Brown County, Nebraska. Following a trial, the court entered a decree of dissolution which granted Will custody of the two minor children of the marriage, subject to Rachel's specific parenting time, and ordered Rachel to pay child support. The decree also divided the property and debts of the parties, which was in dispute. Rachel now appeals.

II. BACKGROUND

Rachel and Will began living together in April 1997, and they married on September 18, 1999. Will has been a full-time farmer and rancher since graduating from college in 1994. Will's farm and ranch operation ranges from 5,000 to 10,000 acres, some of which his mother owns but Will manages. Rachel helped Will work on the farm and ranch off and on from the time they moved in together. Rachel also worked outside of the home at times and would help on the ranch on a part-time basis after her other employment ended for the day.

Two children were born of the marriage, the first in 2000 and the second in 2003. When the children were born, Rachel took time off from working both on the ranch and at her job outside the home. She did return to work outside the home and on the ranch at times. Rachel also tended to the ranch during periods when Will was away on business.

Rachel and Will separated on January 1, 2006. Rachel filed a petition to dissolve the marriage on January 3, 2006. In January 2006, Will was awarded temporary custody of the children. In October 2006, a baby girl was born to Rachel, and at the time of trial, she and the baby lived with the baby's father. A trial was held on July 10 and 11, 2007, in the district court for Brown County. The court filed the decree of dissolution on August 14, 2007, granting custody of the children to Will, with parenting time to Rachel. The court ordered Rachel to pay child support, divided the parties' property, and ordered Will to make 10 annual property equalization payments to Rachel in the amount of $17,347.93 each. Additional facts will be discussed below where necessary.

III. ASSIGNMENTS OF ERROR

Rachel alleges that the trial court erred in (1) awarding custody of the children to Will, (2) finding that Diamond L Land and Cattle Co. (Diamond L) was not marital property and thereby failing to award her any value for Diamond L shares, (3) finding that the Livestock

Landscapes, LLC (LLC), debt was marital debt, and (4) failing to award her interest on the deferred property settlement distribution payments.

IV. STANDARD OF REVIEW

An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.* An abuse of discretion occurs when a 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. *Schwartz v. Schwartz*, 275 Neb. 492, 747 N.W.2d 400 (2008).

V. ANALYSIS

1. CUSTODY

***2** Rachel asserts that the trial court erred in refusing to award her custody of the two minor children. Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. *Edwards v. Edwards*, 16 Neb.App. 297, 744 N.W.2d 243 (2008).

When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Id.* When both parents are found to be fit, the inquiry for the court is the best interests of the child. *Id.*

The trial court found both Will and Rachel to be fit parents but found it would be in the children's best interests to remain with Will. The court granted custody of the children to Will with reasonable rights of visitation and correspondence to Rachel.

Because the trial court found both parties to be fit parents and Rachel does not assign this as error on appeal, we review only the court's finding that it is in the best interests of the children to remain with Will. In determining the best interests of the child, Neb.Rev.Stat. § 42–364(2) (Reissue 2004) provides that such consideration shall include, but not be limited to, the following:

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child; and
>
> (d) Credible evidence of abuse inflicted on any family or household member.

In addition, courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and parental capacity to provide physical care and satisfy the educational needs of the child. *Edwards v. Edwards*, 16 Neb.App. at 321, 744 N.W.2d at 260–61.

The record indicates that Rachel was the children's primary caregiver during the marriage. She was often at home with them and at times did not have employment outside the home. She also prepared their meals, played with them, saw to their medical and emotional needs, did the housework, and continued to help with the farm and ranch work when needed, particularly when Will was away traveling. During the marriage, Will admitted that he worked approximately 10 to 12 hours per day, 6 to 7 days per week. Will also cared for the children as his

schedule permitted. A few months before the date of separation, Rachel began to go out at night with friends and sometimes stayed out until the late evening or early morning hours. After Will was granted temporary custody of the children in January 2006, he arranged for hired help on the farm and ranch so he could spend more time with the children. While Will had temporary custody of the children, he was their primary caregiver. During the pendency of the action, Rachel and Will had difficulty communicating, and Rachel would occasionally become belligerent and use profanity in front of the children. Rachel also failed to follow medication instructions with their youngest child. Will's family, friends, and the teachers at the children's school all testified favorably with respect to Will's positive relationship with and care of the children. On the other hand, testimony from a friend of Rachel's cast doubt upon Rachel's desire to have custody of her and Will's youngest child.

***3** We note that where the evidence is in conflict, we give deference to the trial judge who heard and observed the witnesses as they testified. We conclude that the trial court did not abuse its discretion in awarding custody of the minor children to Will.

2. PROPERTY DIVISION

Rachel next asserts that the court erred in dividing the parties' property. Specifically, Rachel alleges that the court erred in (1) finding that 5,000 shares of Diamond L were Will's separate property thereby failing to award her any value for Diamond L shares, (2) finding that LLC debt was marital debt, and (3) failing to award her interest on the deferred property settlement distribution payments.

The purpose of a property division is to distribute the marital assets equitably between the parties. Neb.Rev.Stat. § 42–365 (Reissue 2004). The equitable division of property pursuant to § 42–365 is a three-step process. *Gress, supra.* The first step is to classify the parties' property as marital or nonmarital. *Id.* 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. *Gress, supra.* Property which one party brings into the marriage is generally excluded from the marital estate. *Id.*

(a) Diamond L Shares

The record shows that Will owned two pieces of land, the "Burrows ground" purchased in 1994 and the "Sawle ground" purchased in 1997. Will transferred each property to Diamond L by warranty deed on March 6, 1997, and September 14, 1999, respectively. Both deeds were recorded in Brown County on September 15, 1999. On March 6, 1997, and September 14, 1999, Diamond L transferred by quitclaim deed a life estate in each property back to Will. Will owned 5,000 shares of Diamond L stock, although the record does not indicate when the 5,000 shares were issued.

The parties also signed an antenuptial agreement on September 15, 1999, 3 days prior to the marriage on September 18. The agreement listed the 5,000 shares of Diamond L stock, as well as the real estate mentioned above, as the sole property of Will. On September 17, Will executed an assignment, whereby he assigned the 5,000 shares of stock in Diamond L to Will and Rachel as joint tenants with rights of survivorship. All of these documents were prepared by Will's attorney. Rachel does not dispute that the Diamond L stock was property Will owned prior to the marriage.

In the decree, the court stated that the "stock in Diamond L is awarded to [Will]. [Rachel] was not awarded a monetary amount for the stock in Diamond L since the reduction in debt on the assets of the corporation [was] considered a marital asset." The decree contained an attachment which delineated the property, its value, and determined whether the property was marital or nonmarital. The 5,000 shares of Diamond L stock were shown as nonmarital property on the attachment, and the court assigned no value to the shares. The attachment also shows that a total of $107,832 of Diamond L debt on the two properties was paid during the marriage, which reduction in debt the court treated as a marital asset assigned to Will. Rachel challenges the award of Diamond L stock to Will as nonmarital property.

***4** The marital estate includes property accumulated and acquired during the marriage through the joint effort of the parties. *Tyma v. Tyma,* 263 Neb. 873, 644 N.W.2d 139 (2002). When determining whether property is marital or nonmarital, 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). If premarital property can be identified, it is typically set off to the spouse who brought the property into the marriage. *Olson v. Olson,* 13 Neb.App. 365, 693

N.W.2d 572 (2005). The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's determination of how the property will be divided in an action for dissolution of marriage. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002).

Rachel argues that the antenuptial agreement is unenforceable. We need not address that issue, however, because even if we disregard the agreement, the Diamond L stock was clearly owned by Will prior to the marriage. The real question in this case is whether the stock remained, and should be awarded to Will as, a nonmarital asset. In making this determination, we must first examine the effect of the subsequent assignment.

Will testified that he did not intend to gift any shares in Diamond L to Rachel. Will testified that his attorney at the time prepared the assignment and that Will did not know the purpose of all of "the antenuptial agreements, intersecting deeds, quitclaim deeds, [and] transferring of shares." Will did not issue shares to Rachel, nor did he deliver the assignment document to her. Rachel testified at trial as to two accounts of when Will told her he would transfer an interest in the corporation to her. On direct examination, Rachel testified that Will told her he would transfer the interest to her about a month after they were married. On cross-examination, she testified that on September 15, 1999, Will told her that he planned to issue half of the shares in Diamond L to her. Rachel also testified that she never received any share or stock certificates with her name on them and that Will never delivered the original or a copy of the assignment document to her. Until the divorce proceedings, Rachel was unaware that the assignment document existed and the first time she saw the document was when her attorney presented it to her as part of these proceedings. No evidence was presented as to whether the corporate books reflected the assignment of stock.

We conclude that the assignment document did not prevent the district court from finding that the Diamond L stock should be awarded to Will as nonmarital property. It is clear that Will did not intend to give Rachel half of his stock, and in fact, the delivery of stock was never effectuated. See *Ferer v. Aaron Ferer & Sons Co.*, 273 Neb. 701, 732 N.W.2d 667 (2007) (to make valid and effective gift inter vivos, there must be intention to transfer title to property, delivery by donor, and acceptance by donee). Further, in accordance with the equities of the parties' situation, the district court did not abuse its discretion in classifying the stock as nonmarital and awarding it to Will. *Medlock v. Medlock, supra.*

***5** In *Nygren v. Nygren*, 14 Neb.App. 1, 704 N.W.2d 257 (2005), the parties had an antenuptial agreement, which provided, in part, that the husband's farm was his sole property. During the marriage, the wife agreed to pay part of the husband's farm loan at which time the parties agreed to destroy the antenuptial agreement. The wife testified that it was the parties' intent to commingle their assets, and the trial court held that the husband had gifted the farm asset to the marriage. On appeal, we disagreed, citing *Schuman v. Schuman, supra*, and we held that although the parties revoked the antenuptial agreement, it did not follow that they agreed to convert their sole property into jointly owned property. We modified the property division to hold that the wife did not acquire an interest in the husband's farm, but she was entitled to be compensated for her contribution from her premarital funds to the husband's farm debt.

In the present case, although the district court awarded the Diamond L stock to Will as his nonmarital property, it included as an asset in the marital estate the reduction in Diamond L debt which occurred during the marriage. As such, Rachel was effectively compensated for her contribution during the marriage to payment of the debt on Will's separate property. Aside from Rachel's testimony that she sometimes helped out on the farm, she did not present evidence that she contributed to or improved the value of Diamond L. Under the circumstances of this case, we conclude that the district court did not abuse its discretion in awarding the Diamond L stock to Will as nonmarital property and in considering the reduction in debt of the corporation as a marital debt subject to equitable division.

(b) LLC Debt

Rachel next alleges that the trial court erred in finding that the LLC debt was a marital debt. In her brief, Rachel asserts that both the interest in the LLC and the associated debt should have been considered an asset and debt incurred after the date of separation because she was unaware of the interest in the LLC until these proceedings. The trial court determined that the interest in

the LLC was marital and valued it at $62,468. It also found that the debt incurred to purchase the interest was a marital debt in the amount of $92,167.

At trial, Will offered two exhibits regarding the LLC and they were received without Rachel's objection. The LLC was formed on October 9, 2005, and Will received a one-third interest at that time, which was valued at $112,600. As of December 31, Will was indebted to the LLC in the amount of $92,022.94. Will testified that he and Rachel had several conversations regarding the LLC and that she accompanied him to a meeting wherein he and his partners discussed forming the LLC. Rachel testified that prior to the parties' separation, she was unaware the LLC existed or that Will owned an interest in it. She also testified that the court should treat the LLC interest as a marital asset, but not the debt, because she was unsure such debt existed. Other than this testimony, Rachel did not provide evidence to support her allegation that the debt Will alleged was inaccurate or invalid. The record shows that Will valued the LLC interest at $53,098 and that Rachel valued it at $100,000. Will valued the debt at $92,167, and Rachel valued it at $0.

***6** A marital debt is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties. *Millatmal v. Millatmal,* 272 Neb. 452, 723 N.W.2d 79 (2006); *McGuire v. McGuire,* 11 Neb.App. 433, 652 N.W.2d 293 (2002). The burden to show that a debt is nonmarital is on the party making the assertion. *Id.*

We conclude that Rachel failed to sustain her burden of proving that the LLC debt was a nonmarital debt. In arriving at our decision, we give deference to the trial judge who heard and observed the witnesses as they testified. The record supports the trial court's inclusion of the LLC asset and debt in the marital estate subject to equitable division.

(c) Interest on Deferred Property Distribution Payments

Rachel alleges that the trial court erred in not awarding her interest on the deferred property distribution payments. The trial court ordered Will to pay Rachel $173,347.93 payable in 10 annual payments of $17,347.93 due on January 1 of each year beginning January 1, 2008. The court ordered no interest to accrue on any installment paid on or before the respective due date, but any delinquent payment would bear interest at the rate of 7.012 percent per annum from the due date until paid.

Nebraska's statute providing for interest on judgments, Neb.Rev.Stat. § 45–103 (Reissue 2004), does not require that a marital property distribution payable in installments bear interest running from the date of the entry of judgment. *Thiltges v. Thiltges,* 247 Neb. 371, 527 N.W.2d 853 (1995). Section 45–103 requires that when a judgment is to be paid in installments, interest begins to accrue on each individual installment only from the date it becomes due and payable. *Id.* The trial court can exercise its discretion and award interest on deferred installments payable as part of a marital property distribution. *Id.* When exercising its discretionary power, one factor the trial court should consider when determining whether a property settlement payable in installments should draw interest from the date of judgment is the burden on the payor-spouse. *Id.*

Rachel asserts that the present case is analogous to *Thiltges, supra,* in which the parties were also involved in farming. In *Thiltges,* the Nebraska Supreme Court held that the trial court abused its discretion in not awarding interest from the date of judgment on the property division payments which were payable in annual installments of $15,000 over 12 years. The payor husband in *Thiltges* alleged that his monthly income, after taxes, would be between $2,072 and $2,200. The court found that some of the husband's alleged monthly expenses were invalid, thus intimating that his available income was greater. *Id.* The court further found that the husband had been awarded all of the parties' income-producing property and that in comparison, the interest-free installment award to the wife was the kind of asset which was most susceptible to the ravages of inflation. *Id.* As a result, the property division fell substantially short of the trial court's attempt to effect an approximately equal division of the assets; however, equality could be more nearly realized with an award of interest on the cash award to the wife. *Id.* The court did not discuss whether ordering the husband to pay interest on the installment payments would be a burden.

***7** The Nebraska Supreme Court also addressed this issue in *Johnson v. Johnson,* 209 Neb. 317, 307 N.W.2d 783 (1981), wherein the marital assets consisted primarily of farmland, farm machinery, and crops. The wife was awarded, in addition to other property, annual cash installments of $15,000 for 12 years. *Id.* The court noted

that had the trial court awarded interest on the installment payments at the requested 8 percent per annum, the first year's interest would have been $12,000. *Id.* Given that the husband's annual income was only projected to be $18,307, the court held that an imposition of interest on the installment payments would have been an undue burden upon the husband.

In the present case, we must consider the burden to Will if interest is imposed on the installment payments. For purposes of calculating child support, the trial court determined Will's net monthly income to be $1,556.05 per month. The court awarded child support in the amount of $269 per month, bringing Will's net monthly income to $1,825.05. Therefore. Will's income is approximately $21,900 per year, $17,347.93 of which he has been ordered to pay Rachel each year. Although there is little evidence in the record of Will's necessary living expenses, we note that after accounting for his annual payments to Rachel, Will retains only approximately $4,552.07 per year, or $379.34 per month, on which he and the children must live.

After considering the facts of this case, we conclude that imposing interest on the installment payments as Rachel requests would impose an undue burden on Will. As such, we conclude that the trial court did not abuse its discretion in failing to order interest on the annual installment payments. Finally, we note that Will was assigned a significant amount of premarital and marital debt in the distribution and that he testified he was "maxed out" on his operating line of credit.

VI. CONCLUSION

For the aforementioned reasons, we conclude that the trial court did not err in granting custody of the children to Will or in determining and dividing the marital estate. Accordingly, we affirm.

AFFIRMED.