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11/02/2026 07:34 PM CST

Although in these cases the Supreme Court did not specifically hold that credit for presentence incarceration can never be used to satisfy a fine, the court also did not mandate that such credit must be allowed. The court's determination that credit could not be given without giving the defendant an opportunity to pay does not necessarily mean that a trial court must apply presentence incarceration time toward court costs. Thus, these cases do not support Zamarron's argument in the instant appeal. Because we cannot read into a statute a meaning that is not there, see *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009), and because the plain language of § 29-2412 does not provide for credit against costs under the circumstances present here, we conclude that the district court did not err in refusing to apply any credit for time served against costs.

CONCLUSION

We conclude that the district court erred in applying Zamarron's bond to costs, but that it did not err in refusing to apply credit for time served before sentencing against costs. Accordingly, we affirm the district court's judgment, but modify it to refund to Zamarron the remaining 90 percent of his bond rather than applying it to costs.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF E. MAXINE ROSS, DECEASED. PORTER ROSS, APPELLANT, V. SCOTT HODSON AND CONNIE GROVE, APPELLEES.

810 N.W.2d 435

Filed November 22, 2011. No. A-11-210.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates: Appeal and Error.** An appellate court, in reviewing a probate court judgment for errors appearing on the record, will not substitute its

factual findings for those of the probate court where competent evidence supports those findings.

4. **Evidence: Words and Phrases.** Competent evidence is evidence which is admissible and tends to establish a fact in issue.
5. **Decedents' Estates.** Pursuant to Neb. Rev. Stat. § 30-2314(a)(2)(ii) (Reissue 2008), the augmented estate includes any property owned by the surviving spouse at death of the decedent or previously transferred by the surviving spouse, except to the extent to which the surviving spouse establishes that such property was derived from any source other than the decedent.
6. **Witnesses: Testimony.** The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit.
7. **Decedents' Estates: Appeal and Error.** In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Appeal from the County Court for Red Willow County: ANNE PAINE, Judge. Affirmed.

G. Peter Burger, of Burger & Bennett, P.C., for appellant.

Siegfried H. Brauer, of Brauer Law Office, for appellees.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Porter Ross challenges the county court's order including six jointly owned bank accounts in the augmented estate in calculating the amount of his elective share in the estate of E. Maxine Ross (Maxine). Our decision is driven by a deferential standard of review. Because there is some competent evidence to support the court's conclusion that Porter failed to prove the funds in the accounts at Maxine's death were not derived from Maxine, we affirm.

BACKGROUND

Maxine passed away on October 29, 2006. She was survived by her husband, Porter, and several children by a previous marriage. Porter and Maxine had been married since 1990.

Maxine's nonprobate estate included joint interests in six accounts at a McCook bank. Five of these accounts were held by Maxine or Porter with right of survivorship. The sixth account was held by Maxine or Porter or Edward Troy Ross with right of survivorship. This appeal centers upon the source of funds in these accounts.

Porter filed a timely petition for elective share with the county court for Red Willow County, Nebraska. At a hearing, the parties presented evidence on the source of the accounts and of other assets in Maxine's estate. Only a relatively small portion of the evidence focused on the accounts at issue in this appeal. Specifically, Porter adduced evidence attempting to establish that the funds in the accounts at the McCook bank were derived from a source other than Maxine and, thus, were not to be included in the calculation of the elective share. We review the evidence as necessary in the analysis.

After the hearing, the court issued an order calculating the amount of elective share. The court found that Porter had failed to show that the accounts at the McCook bank were derived from a source other than Maxine and included the value of the accounts in the augmented estate. It found the value of the net augmented estate to be $280,086.71. Porter's elective share was valued at $140,043.36. Because the court found that Porter had $148,512.97 in charges against the elective share, it ordered that he should receive nothing further under the election.

Approximately 6 weeks after the court's initial decision, Porter filed a motion for new trial based on the existence of newly discovered evidence. The new evidence consisted of testimony from the vice president of the McCook bank, who further traced the history of the accounts and presented a report of ownership for the accounts of Porter and Maxine in October 1990. The court granted the motion for new trial and conducted two additional hearings in January 2011.

Despite the new evidence, the court was not persuaded to exclude the value of the accounts from the augmented estate. It made no changes to its calculation of the augmented estate or elective share—reaching the same amounts as before. Because Porter's charges against the elective share were greater than his

portion of the net augmented estate, the court again ruled that Porter would receive nothing further under the election.

Porter timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENT OF ERROR

Porter alleges that the county court erred in finding that the McCook bank accounts were a part of the augmented estate chargeable against his claim for elective share despite the evidence that this property was derived from a source other than Maxine.

STANDARD OF REVIEW

[1,2] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Estate of Craven*, 281 Neb. 122, 794 N.W.2d 406 (2011).

[3,4] An appellate court, in reviewing a probate court judgment for errors appearing on the record, will not substitute its factual findings for those of the probate court where competent evidence supports those findings. *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001). Competent evidence is evidence which is admissible and tends to establish a fact in issue. *In re Trust Created by Inman*, 269 Neb. 376, 693 N.W.2d 514 (2005).

ANALYSIS

Before we address Porter's assignment that the county court erred in including the McCook bank accounts in the augmented estate, we first recall the process by which a surviving spouse's elective share is calculated. Under Neb. Rev. Stat. § 30-2313(a) (Reissue 2008), "the surviving spouse has a right of election to take an elective share in any fraction not in excess of one-half of the augmented estate." To calculate the augmented estate under Neb. Rev. Stat. § 30-2314 (Reissue 2008), "the probate estate

is augmented by first reducing the estate by specified obligations and liabilities and then increasing the estate by the value of specified properties and transfers." *In re Estate of Fries*, 279 Neb. at 891, 782 N.W.2d at 601. Once the augmented estate is determined and the value of the surviving spouse's share is calculated, "property which is part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession or other means and which has not been renounced . . . is applied first to satisfy the elective share." Neb. Rev. Stat. § 30-2319(a) (Reissue 2008).

[5] At issue in this appeal is whether the county court erred in determining that the accounts at the McCook bank should be included in Maxine's augmented estate. Pursuant to § 30-2314(a)(2)(ii), the augmented estate includes "[a]ny property owned by the surviving spouse at death of the decedent or previously transferred by the surviving spouse, except to the extent to which the surviving spouse establishes that such property was derived from any source other than the decedent." As such, any funds in the accounts that derived from Maxine should be included in the augmented estate. But any funds in the accounts that were derived from a source other than Maxine should not be included as part of the elective share calculation.

The burden was on Porter, as the surviving spouse, to establish that the accounts were derived from a source other than Maxine. See *id.* To meet this burden, Porter adduced evidence in the form of his own testimony and the testimony of Peter Graff, vice chairman of the McCook bank. When Porter was asked "whether those accounts at [the McCook bank], if the funds from those accounts . . . were all originally derived from your savings," he testified, "That's right." Similarly, when Graff was asked, "Now, with regard to the initial deposits for those accounts, do you know where the funds came from?" he testified, "Came from Porter Ross."

Based upon this testimony alone, the county court could have found, under the precedent of *In re Estate of Ziegenbein*, 2 Neb. App. 923, 519 N.W.2d 5 (1994), that Porter met his burden of proving that the source of the accounts was other than Maxine.

[6] However, the county court was not required so to find. The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness' testimony, or any part of it, which seemed to it to be convincing, and reject so much of it as in its judgment is not entitled to credit. *General Fiberglass Supply v. Roemer*, 256 Neb. 810, 594 N.W.2d 283 (1999). Our decision in the *Ziegenbein* appeal arose in a different context—there, the county court credited the surviving spouse's testimony and excluded the joint account from the augmented estate. The question on appeal was whether the surviving spouse's testimony alone was sufficient to support the judgment. We held that it was. In the case before us, however, the county court did not accept Porter's testimony and the question is whether there is competent evidence to support the court's decision.

[7] The county court specifically expressed doubt about the credibility of Porter's testimony regarding the source of the accounts:

> Porter['s] [testimony] that he supplied all of the funds for the bank accounts and simply put Maxine's name on the accounts to provide for her in the event of his death is somewhat supported by Exhibit 46, however there is contradictory evidence even in Porter's own testimony to show that Maxine had premarital assets which were combined with these accounts and that the accounts were used to deposit both parties' income and pay both parties' expenses.

In doubting the source of the accounts, the county court also implicitly questioned Graff's testimony about the source of the original deposits. In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *In re Trust of Hrnicek*, 280 Neb. 898, 792 N.W.2d 143 (2010). Thus, given the county court's rejection of the testimonies of Porter and Graff, we turn our attention to the other evidence in the record bearing on the source of the funds in these accounts.

Because of our standard of review, we focus upon whether competent evidence existed to support the county court's decision regarding these six accounts. In order to protect the privacy of the account numbers, we refer to the accounts by the "Item No." under which they are listed on "Schedule E" of the amended inventory filed with the court on October 30, 2008. Where more than one account is listed under an "Item No.," we refer to the first account listed as "a" and the second account listed as "b."

Other than the testimonies of Porter and Graff, Porter presented evidence provided by the McCook bank tracing the history of the six accounts as best as it could. The bank found no tracing history for account No. 3 (money market account) and traced accounts Nos. 4a and 4b (certificates of deposit) to unknown sources. The bank found that account No. 1a was a checking account originally held by Maxine individually. Finally, the bank produced records indicating that accounts Nos. 1b (checking account) and 2 (money market account) were Porter's individual accounts prior to his marriage to Maxine.

Because account No. 1a was linked to Maxine herself and accounts Nos. 3, 4a, and 4b came from unknown sources, the county court's decision to include these four accounts in the augmented estate was supported by competent evidence. The court did not err in holding that Porter failed to prove that these accounts were derived from a source other than Maxine.

As to the remaining two accounts, we concede that Porter adduced some evidence that accounts Nos. 1b and 2 were derived from a source other than Maxine. In addition to his own testimony, he produced evidence at rehearing (1) showing that he individually owned the two accounts in October 1990 and (2) showing the balances in the accounts both in October 1990 and at the time of Maxine's death. Account No. 1b contained $2,991.26 in October 1990 and $5,095.64 at Maxine's death. The respective amounts for account No. 2 were $14,085.16 and $18,730.40. Thus, the evidence clearly demonstrates that in October 1990, $2,991.26 in account No. 1b and $14,085.16 in account No. 2 were provided individually by Porter and not by Maxine.

We are faced with the question, however, of whether the evidence compels the conclusion that the balances in accounts Nos. 1b and 2 *existing at the date of Maxine's death* were derived from a source other than Maxine under § 30-2314(a)(2)(ii). It is important to note that Porter did not present a complete transactional history showing deposits and withdrawals, but merely presented evidence of the account balances in October 1990 and the date of death values. Cross-examination of the bank's vice president exposed this limitation. He testified:

> Q . . . With respect to the first account listed there on that first page, [account No. 1b], . . . do you have any records with you that track what money went into or out of that account between October 1st . . . of 1990 and the year 1994?
>
> A None with me. I could, as far as funds that went in and out, I can establish balances going forward as far as what the balances were. As far as the transactions, I don't believe I would be able to provide anything.
>
> Q All right. What about the second account listed there, [account No. 2], do you have anything?
>
> A It would be similar. I could establish balances[,] but I don't believe [I could establish] transactional history.
>
> . . . .
>
> Q And for all the accounts listed on Exhibit 46?
>
> A Yeah.

Although the parties have not cited, nor have we found, any case law specifically addressing the tracing of funds in the context of determining the source of funds for purposes of the augmented estate calculation, this court's decision in *In re Estate of Ziegenbein*, 2 Neb. App. 923, 519 N.W.2d 5 (1994), provides some guidance. In *In re Estate of Ziegenbein*, the court noted the rule in Neb. Rev. Stat. § 30-2703 (Reissue 1989), the statute then governing the ownership during lifetime of joint accounts, that a joint account balance belongs to the parties in proportion to the net contributions by each to the sums on deposit. The court implicitly used the lifetime-ownership methodology to determine the portion of the

account derived from the surviving spouse and not from the decedent for purposes of the augmented estate. In the *In re Estate of Ziegenbein* evidence, it was clear that all of the deposits to the account were made by the surviving spouse. Thus, it naturally followed that the entire account was derived from a source other than the decedent—i.e., provided solely by the surviving spouse.

Like the court in *In re Estate of Ziegenbein, supra*, we also choose to note the lifetime-ownership statute and draw upon its concepts to inform our interpretation of § 30-2314. *In re Estate of Ziegenbein, supra*, involved § 30-2703, which was repealed and replaced by Neb. Rev. Stat. § 30-2722 (Reissue 2008). A definition of "net contribution" was also added. Under § 30-2722(a), a party's net contribution includes

> the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party . . . and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance.

If the county court had accepted Porter's testimony that he provided the funds for all of the deposits, § 30-2722 would produce the same result as under the former statute. However, because the court did not accept Porter's testimony, the evidence necessary to reverse the court's judgment requires thorough account histories—including deposits, payments, charges, interest, and dividends. Thus, we look to the other evidence to see whether it compels a different conclusion.

For two reasons, we cannot find error in the county court's decision. First, the bank account evidence does not fill the obvious gap—there is no evidence to show that the amounts in the accounts in October 1990 were still there at the time of Maxine's death and had not been depleted and replaced by other money. We lack any evidence of the intervening deposits and withdrawals. Second, there was evidence that Maxine had some income and that she had other property, some of which was disposed and not traced to other accounts. Porter testified to Maxine's income in the form of Social Security and farm rent:

Q And so you each had Social Security?

A That's right.

Q But you weren't working?

A No, I've never worked since —

Q And you each had some rent from her farm and your farm.

A That's right.

He also testified that Maxine owned her own trailer home, which she sold after they got married:

Q [Porter], when you and Maxine were married, I believe there was some testimony about her owning a trailer house, is that correct?

A That's right.

. . . .

Q And some time after the two of you married, did she sell that and have it moved off of that place?

A She did.

He explained that when they got married, they lived on Maxine's land:

A Yeah, and when I got married I told her, I said let's put the trailer on your property.

Q Now, this is — when you got married now, this is Maxine?

A That's right.

. . . .

A . . . I told her, I said let's put this trailer up on your property . . . . And I says, I'm older. If something happens to me you'll be sitting on your own ground. You'll have your own home.

And he testified to three different vehicles that Maxine owned when they got married, all of which she later sold or traded:

Q . . . When Maxine and you married, she had some vehicles. She was driving one at that time, is that correct?

A Yes, she was driving one, yeah.

. . . .

Q . . . She had that car when the two of you got married?

A That's right.

Q And did she own an older pickup truck?
A That's right.
Q And did she own an older, I think it was a Buick Skylark or something similar to that?
A She did.
Q And were all three of those vehicles either sold or traded during the course of your marriage?
A She sold it.

Porter argues that the court's reliance on evidence of income from or proceeds of sale of Maxine's individual property amounted to mere speculation. This argument misses the mark. Porter had the burden of persuading the county court that the funds derived from a source other than Maxine—in this context, from Porter himself. Given that he failed to do so, our standard of review requires him to show that there is no evidence to support the court's decision. However, the county court confronted evidence of (1) bank account records failing to trace the October 1990 funds to the funds existing at the time of Maxine's death and (2) Maxine's other financial activity receiving income and sale proceeds. Viewed in the light most favorable to the appellees, we determine this constituted competent evidence sufficient to support the court's decision.

CONCLUSION

Because the county court's decision that Porter failed to establish that the six jointly owned accounts were derived from a source other than Maxine was supported by competent evidence, we affirm the court's order including the accounts in the augmented estate.

AFFIRMED.