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MARTIN E. TITUS, APPELLANT, V. PHYLLIS A. TITUS, APPELLEE.

811 N.W.2d 318

Filed April 17, 2012. No. A-11-222.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** 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.
2. **Divorce: Property Division: Alimony.** In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), in dividing property and considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation.
3. **Alimony.** Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
4. ____. Disparity in income or potential income may partially justify an award of alimony.
5. ____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
6. **Alimony: Appeal and Error.** An appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
7. **Divorce: Property Division: Equity.** The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided.
8. **Divorce: Property Division: Appeal and Error.** As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate, and the date of valuation is reviewed for an abuse of the trial court's discretion.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Elizabeth Stuht Borchers and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., and J. Schaad Titus, of Titus, Hillis, Reynolds, Love, Dickman & McCalmon, for appellant.

John S. Slowiaczek, Virginia A. Albers, and Jesse S. Krause, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Martin E. Titus appeals from an order of the district court for Douglas County, which dissolved his marriage to Phyllis A. Titus. On appeal, Martin challenges the amount and duration of the court's award of alimony to Phyllis and the date the court used for valuation of certain marital property. Because we find no abuse of discretion in either regard, we affirm.

BACKGROUND

The parties were married in Texas in March 1986 and lived in Omaha, Nebraska, at the time of trial. Two children were born to the parties, with only the youngest child, born in 1992, still a minor at the time of trial. At the time of trial, the parties' oldest child was a senior in college but still resided at home with Phyllis. The youngest child was living at home, was being home-schooled by Phyllis, but was also attending community college classes and had plans to attend college full time in the fall.

The parties separated in July 2009 but continued to operate the finances of their respective homes out of joint checking accounts into which Martin continued to deposit his paychecks and bonuses during the pendency of these proceedings. Martin filed a complaint for dissolution of marriage in the district court on March 15, 2010, and Phyllis answered and filed a counterclaim on April 7.

The parties entered into a property settlement agreement, which contained provisions for the division of real and personal property, the payment of debts, custody, child support, health insurance, and attorney fees and costs. We note that Martin's child support obligation for the youngest child terminated in June 2011, although Martin agreed to continue to provide health insurance and pay any unreimbursed expenses for both children as long as they were students and eligible under the coverage terms of his insurance plan.

The parties' property settlement agreement provided for an equal division of the marital estate. Under the settlement agreement, Phyllis received a debt-free house valued at $415,000. Martin received a debt-free house valued at

$221,556, a time-share valued at $20,000, and a certificate of deposit valued at $54,354. The parties each received a debt-free 2009 vehicle. Business interests, investment accounts, and a joint checking account were divided equally between the parties based on their values as of December 31, 2010, although exact values were not specified in the settlement agreement. Phyllis agreed to make an equalizing payment to Martin of $59,545, resulting in a net award of the specifically valued assets of $355,455 to each party. At trial, Martin was asked approximately how much value Phyllis would be receiving under the terms of the parties' agreement, and he testified that in addition to the debt-free house and vehicle, Phyllis would be receiving at least $1.3 million in cash; retirement funds of at least $200,000; and business interests valued between $700,000 and $1 million. Martin was to receive similar assets of equal value.

The parties were unable to agree on the issues of alimony and the valuation date for retirement accounts, and trial was held on these issues on January 13, 2011.

At the time of the marriage, Martin, a college graduate, was working in the energy industry in Texas earning $24,891 per year. Over the course of the marriage, Martin changed jobs several times, requiring relocation to Missouri, Colorado, and finally Nebraska. In 1995, Martin began working in Omaha for Tenaska Marketing Ventures (Tenaska), a company which is in the business of trading and marketing natural gas. Martin was a senior vice president at the time of trial.

Martin's Social Security statement, which was admitted into evidence, reflects a steady and gradual increase in his taxed Medicare earnings through 2000, when his earnings were $208,862. From 2001 through 2004, his taxed Medicare earnings fluctuated below and above $500,000, and in 2005, they were $728,191. In 2006, Martin entered into a 5-year employment contract with Tenaska, causing his income to increase to over $1 million a year. Martin testified that Tenaska pays a base salary and that successful employees can earn significant bonuses. Martin's annual base salary under the contract was approximately $187,000 with minimal cost-of-living increases. The record shows that Martin has earned significant bonuses

while employed with Tenaska. The parties' joint tax returns show that Martin's adjusted gross income was $1,127,605 in 2006; $2,189,505 in 2007; $1,762,051 in 2008; and $1,508,291 in 2009. Martin's 2010 earnings statement from Tenaska showed earnings of $1,083,721.48. Martin described his compensation under the 5-year contract as "[e]xtraordinary" and testified that he anticipates changes in his income once the contract ends due to various developments in the natural gas industry. Martin expected that his income for 2011 would be "give or take some $500,000" and that in 2012, it would be half of that amount. However, Martin admitted that he could not state with certainty what would happen with regard to the natural gas market in 2011 and beyond and that such predictions were somewhat speculative. Martin also agreed that his future income was "totally unknown." Martin testified that when the 5-year contract ends, he assumes that a new agreement of some type will be reached, which will include a base salary, bonuses, and some type of incentive payment. Martin testified that he would like to work until about age 60.

Martin testified that his monthly expenses were approximately $6,155, and an exhibit reflecting these expenses was received in evidence.

Phyllis did not graduate from college but took courses over a 4- to 5-year period, first in education and then in English and journalism. Phyllis' work experience after high school was mostly administrative and clerical. Phyllis earned $6,018 in taxed Medicare earnings in 1986, the year the parties were married, and her highest yearly income during the marriage was $15,190 in 1989. The last time she had any earned income was in 1990, when she earned $1,227. The parties agreed that Phyllis would not return to work after the birth of their first child and that she would homeschool their children. At the time of trial, Phyllis' duties in regard to home-schooling the parties' youngest child had greatly diminished. Phyllis has been involved in various volunteer activities related to home-schooling and has served on the board of the Home Educators Network, serving as president for 4 years. At the time of trial, Phyllis did not have any specific plans for further education for herself, but she testified that it was something

she would consider after the parties' youngest child finished high school.

Phyllis offered an exhibit estimating her monthly expenses at $6,813. In preparing the exhibit, Phyllis utilized checking account statements and credit card receipts for the previous 3 years. The exhibit identifies the monthly amount for Phyllis' health insurance as "unknown" because at the time Phyllis created the document, Martin was still paying her health insurance. Phyllis estimated that health insurance would cost her $450 to $500 per month once she was no longer covered under Martin's policy. Phyllis also testified that since she prepared the exhibit, her real estate taxes have gone up slightly.

In her testimony, Phyllis requested alimony in the amount of $15,000 per month, although the proposed findings she submitted to the court requested alimony of $18,000 per month until the death of either party or Phyllis' remarriage. Phyllis testified that after paying state and federal taxes on $15,000 in alimony, she would be left with just over $10,000. In addition to covering her monthly expenses, Phyllis hoped to place 10 percent of the alimony payments in savings. During the marriage, the parties contributed 10 percent of their income to their church, and both parties hoped to continue this practice following the divorce.

Phyllis acknowledged that she would be able to earn interest income if she invested the cash she was to receive from the division of the marital estate. Phyllis recalled seeing a spreadsheet prepared by Martin on which he estimated that she should be able to earn around $46,000 a year in interest if she "managed those finances." Phyllis testified that she hoped she would not have to take income from any such investments and that they could be allowed to grow for her retirement.

Martin agreed that an award of alimony was appropriate and testified that he would be willing to pay $10,000 a month in alimony for 5 years.

The district court entered a decree of dissolution on March 9, 2011. The court approved the parties' settlement agreement and incorporated it into the decree. The court found that the retirement accounts should be valued and divided as of December 31, 2010, and that each party's share of the accounts

should be adjusted for investment gain or loss from the date of valuation until the time the accounts were divided. With respect to alimony, the court stated that it had considered the criteria set forth in Neb. Rev. Stat. § 42-365 (Reissue 2008); specifically, the relative economic circumstances of the parties, the history of the contributions to the marriage of both parties, and Phyllis' interruption of her career for the care and education of the parties' children. The court ordered Martin to pay alimony to Phyllis at the rate of $15,000 a month for a term of 120 months, after which time Martin's obligation would be reduced to $7,500 for a term of 24 months.

ASSIGNMENTS OF ERROR

Martin asserts, consolidated and restated, that the district court abused its discretion in (1) entering an alimony award of $15,000 per month for 10 years followed by $7,500 per month for an additional 2 years and (2) valuing the retirement accounts on December 31, 2010, rather than the date of separation or the date the complaint was filed.

STANDARD OF REVIEW

[1] 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).

ANALYSIS

Alimony.

Martin asserts that the district court abused its discretion in entering an alimony award of $15,000 per month for 10 years followed by $7,500 per month for an additional 2 years.

[2] Section 42-365 provides, in part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the

> marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

In addition to the specific criteria listed in § 42-365, in dividing property and considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

[3-5] Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). However, disparity in income or potential income may partially justify an award of alimony. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

Martin does not dispute that an award of alimony was proper, but he asserts that the court erred in the amount and length of the alimony award and argues that the award is excessive based on Phyllis' needs. Martin also argues that Phyllis' monthly expenses are overstated, that the award creates an unjust result because Phyllis will have no incentive to seek employment or further education, and that the award of $15,000 per month represents nearly 100 percent of his monthly base salary, requiring him to invade the corpus of his share of the property division.

The parties were married for 25 years. At the time of trial, Phyllis was 52 years old and in good health. While she attended college and took courses over a period of years, she does not have a college degree. Phyllis was employed in a secretarial capacity early in the marriage, but she has not worked since 1990, when the parties agreed that she would stop working outside the home in order to care for and homeschool the parties' children. The parties' children have both reached the

age of majority, so their care will not be a factor in Phyllis' postdivorce efforts to provide for herself, although it does not appear that Phyllis has any concrete plans to pursue either further education or employment. Phyllis' earnings prior to 1990 were nominal when compared to those of Martin, who was earning over $1 million at the time of trial. Martin's average gross monthly income, including the base salary and bonuses, for 2006 through 2010 was $124,000 per month, although the annual amount had declined from over $2 million in 2007 to just over $1 million in 2010. Martin was almost 50 at the time of trial and anticipated working for another 10 years. He also anticipated that his income would be decreasing after the end of the 5-year contract due to changes in the natural gas industry; however, he admitted that his future income was speculative. Both parties have relatively similar monthly expenses, both parties reside in debt-free homes, and each party received assets valued at approximately $355,455, as well as equal shares of cash, investments, and business interests—which combined are of significant value, and from which the parties may earn additional income.

There is little guidance in Nebraska jurisprudence relating to alimony awards in high-income cases, and the usual statutory factors and precedential case law do not specifically address the circumstances in such a case as this. Indeed, most cases involving alimony involve circumstances in which "there is not enough money to go around." Martin urges us to focus on the "need" factor, indicating that the award of alimony was beyond what Phyllis needs to meet her monthly expenses, particularly considering her ability to receive interest income from assets awarded to her in the division of property. Martin argues that the award of alimony goes beyond what is necessary to assist Phyllis "during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment." See *Bauerle v. Bauerle*, 263 Neb. 881, 890, 644 N.W.2d 128, 135 (2002).

While need is certainly a factor in analyzing alimony, it is only one of several factors that our analysis comprises. Indeed, if we were to focus solely on the element of need, as suggested by Martin, we would be inclined to note that neither

party really "needs" income beyond that which is necessary to meet their monthly expenses. Focusing solely on Phyllis' needs would require us to ignore several of the other factors relevant to an alimony award. Such factors include the relative economic circumstances, the disparity in the parties' incomes and earning capacities, and the general equities of the case.

This court previously dealt with the issue of alimony in a situation where there was a great disparity between the parties' incomes. In *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008), we found that an award to the wife of $3,000 per month until she reaches the age of 65 years, dies, or remarries was not an abuse of discretion. In that case, the parties were married for nearly 30 years and each party made substantial contributions to the marriage. The husband earned more than $800,000 in each of the 2 years preceding trial. The wife had previously earned $60,000 a year, but at the time of trial was earning $25 per hour working part time while being primarily responsible for raising the parties' three children. Rejecting the husband's claim that the alimony award was unreasonable, we concluded that an award of $36,000 per year for a maximum of approximately 10 years "seems rather insignificant and completely appropriate" and that the husband will have "no problem" paying the alimony. *Id.* at 933, 756 N.W.2d at 541.

In *Kricsfeld v. Kricsfeld*, 8 Neb. App. 1, 588 N.W.2d 210 (1999), this court was asked to review an alimony award involving relatively high income. The parties had been married for 27 years and had three children, the youngest of whom was nearly 18 years old at the time of trial. The wife had a college degree in education; however, her teaching certificate had lapsed due to her taking care of the children. At the time of trial, the wife had been working part time as a substitute teacher and was taking courses to get her recertification. The record showed that if the wife obtained a teaching position after receiving her recertification, she could earn approximately $21,000 a year. The wife also hoped to get her master's degree. The husband had an annual income of $372,000 and a net monthly income of $17,196. He was also awarded assets of significant value in the property division. The wife was awarded nearly $495,000

of the husband's profit-sharing plan and additional personal property valued at $146,000. The trial court awarded the wife alimony in the sum of $6,000 per month until she reaches age 65, dies, or remarries. At the time of trial, the wife was 48 years of age and the husband was 50 years old. On appeal, the wife claimed that the alimony award was inadequate to meet her monthly needs, which she estimated to be approximately $6,140. The husband challenged the duration of the alimony award. After reviewing the statutory and case law criteria for alimony awards, which mirrors what we have set forth above, this court determined that the alimony award was not an abuse of discretion in either amount or duration.

[6] In reviewing the award of alimony in the case at hand, we are mindful that an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008). After considering all of the factors involved in an award of alimony and the particular facts of this case, we cannot say that the trial court's award is untenable. The award of $15,000 per month is approximately 16 percent of Martin's gross monthly income from 2010. Both parties have the same opportunity to realize additional income from the assets awarded to them in the division of property. Unlike the wives in *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008), and *Kricsfeld v. Kricsfeld, supra*, Phyllis does not have a college degree and has not worked outside the home for 20 years. The award of $15,000 per month for 10 years, and $7,500 per month for 2 years thereafter, is not an abuse of discretion.

Martin expresses concerns about being able to seek a modification of his alimony obligation at a later date since he testified that he expected his income to decline after the 5-year contract ends. See *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009) (changes in circumstances within contemplation of parties at time of decree do not justify change or modification of alimony order). In order to address that concern, we find that our decision to affirm the award of alimony is based upon Martin's earnings prior to the time of trial and not

upon Martin's testimony about future changes to his income, which testimony we find to be speculative. We find that in the event a motion to modify because of a reduction in Martin's income is filed, such a change shall not be deemed a change that was in the contemplation of, or anticipated by, the parties. See *Thompson v. Thompson*, 18 Neb. App. 363, 782 N.W.2d 607 (2010).

Valuation Date.

Martin asserts that the district court erred in valuing the retirement accounts on December 31, 2010, rather than the date of separation or the date the complaint was filed. He argues that the marriage was clearly over at the time the parties separated and that Phyllis made no contributions to the marriage during the separation which would justify considering the retirement accounts as marital property during that time. Alternatively, he argues that the court should have used the date the complaint was filed or the date Phyllis filed her answer and counterclaim, because she admitted in the answer and counterclaim that the marriage was irretrievably broken.

[7,8] The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided. *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008). As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate, and the date of valuation is reviewed for an abuse of the trial court's discretion. *Id.*

The valuation date used by the district court is consistent with the date used by the parties in valuing other assets in the settlement agreement, and we note that the parties maintained joint finances through the date of trial. Trial was held on January 13, 2011. The court did not abuse its discretion in valuing the retirement accounts on December 31, 2010.

CONCLUSION

The district court did not abuse its discretion in its award of alimony or in valuing the retirement accounts on December 31, 2010.

AFFIRMED.