



Brunner v. Brunner

2004 | Cited 0 times | Nebraska Supreme Court | June 15, 2004

(not designated for permanent publication)

Timothy P. Brunner appeals from an order of the district court for Douglas County dissolving his marriage and ordering him to pay alimony and attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

Timothy and Donna L. Brunner were married April 11, 1980, in Omaha, Nebraska. During the marriage, they had two children: Jason, born February 25, 1981, and Jennifer, born April 22, 1985. Donna has a high school diploma, but it appears from the record that Timothy does not. During the marriage and at the time of the divorce, Timothy worked for the Pamida Corporation, earning \$12.45 per hour. His net income was \$1,832.54 per month. Donna provided in-home daycare throughout the marriage. Donna had also worked part time at a nursing home since late 1999 or early 2000, earning \$7 per hour. While her daycare earnings were not presented on a W-2 or 1099 tax form, the parties apparently agreed that her net income was \$1,049.47 per month.

At the time of trial, Timothy and Donna owned a house with equity of \$11,500. Timothy's 401K retirement account was valued at \$12,215.95, but there were two outstanding loans against it totaling \$4,737.42, reducing its actual vested value to \$7,478.53. The proceeds from the first loan were used to pay the parties' joint debts. The second loan of \$4,600, of which \$4,398.86 was outstanding, had been taken out after the parties' separation, and the proceeds were used to rent Timothy's apartment, to buy Jennifer a bedroom set, and to pay down the second mortgage on the parties' house.

The parties had joint debt totaling \$981.30. Three hundred dollars of that debt was for furniture purchased during the marriage. Donna testified that those items were in her possession and that she intended to keep them.

Timothy filed a petition for dissolution of marriage in the district court for Douglas County on July 5, 2001. After the trial, the district court entered the decree of dissolution on June 18, 2002. Pursuant to the decree, the parties were to have joint custody of Jennifer, with Timothy having primary physical custody. Donna was ordered to pay child support in the amount of \$245 per month. Timothy was ordered to pay Donna alimony of \$520 per month for 120 months and \$1,405.97 in attorney fees.

Each party was awarded a car and his or her individual retirement accounts, with Timothy being responsible for the debt against his 401K account. Donna was awarded the marital residence.



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Timothy was ordered to pay one-half of the parties' utility bills accrued prior to his filing for divorce, \$238; one-half of the fees from the parties' marriage counselor, \$102.50; and the cable television bill (cable bill) arrearage, an amount undisclosed by the record.

Timothy filed a motion for a new trial, which was denied. He now appeals.

ASSIGNMENTS OF ERROR

Timothy alleges the district court erred in (1) awarding Donna \$520 per month as alimony for 120 months, (2) dividing the parties' marital estate, and (3) awarding attorney fees to Donna.

STANDARD OF REVIEW

In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Crawford v. Crawford*, 263 Neb. 37, 638 N.W.2d 505 (2002).

ANALYSIS

Alimony

Timothy argues that the trial court erred in awarding Donna \$520 per month as alimony for 120 months. Alimony may be used to assist a spouse during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment. *Bauerle v. Bauerle*, *supra*. Neb. Rev. Stat. § 42-365 (Reissue 1998) 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



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employment without interfering with the interests of any minor children in the custody of such party.

Accord *Bauerle v. Bauerle*, *supra*.

The parties were married for 21 years. Neither party has a college education, and only Donna completed high school. Whereas there is disparity in the parties' incomes, we also note that Donna is physically capable of working full time, but apparently chooses not to do so. Donna provided in-home daycare prior to the marriage, continued to provide daycare throughout the marriage, and plans to continue doing so in the future. At the time of trial, Donna was working part time (16 hours every 2 weeks) at a nursing home and was providing in-home daycare for only one child. She is in her mid-40's (i.e., relatively young), has no health problems, expresses no desire for further education or training, and has no minor children living with her--the parties' only minor child, Jennifer, turned 19 in April of this year. In short, there is no reason why Donna cannot support herself, and the economic circumstances of the parties, whether married or divorced, are hardly such that Timothy needs to provide anything more than a brief "bridge" for Donna to adjust to working full time. The reality is that this was a working-class household before the divorce and will now become two such households. Donna testified that she did not give up educational or career opportunities for the sake of the marriage.

Timothy's net earnings are only as high as they are because he works overtime. The Nebraska Supreme Court has held that it is appropriate to consider overtime wages in setting child support and alimony payments if the overtime is a regular part of the employment and the employee can actually expect to earn regularly a certain amount of income for working overtime. *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991). There is little, if any, evidence in the record showing whether Timothy's overtime is a regular part of his employment, whether he can expect to earn overtime in the future, or even how much overtime he has worked in the past. Therefore, we find that Donna has not shown that Timothy's overtime wages should be a substantial consideration for determining alimony in this case.

Given the above circumstances, including the fact that Timothy is a blue-collar worker, we have little hesitancy in finding that the term and amount of alimony awarded to Donna by the trial court constituted an abuse of discretion. Donna asked for 7 years of alimony at \$600 per month, but was awarded 10 years of alimony at \$520 per month by the trial court--\$10,000 more than she requested. The trial court gave no rationale for awarding her the extra 3 years, and we find none in the record. While the evidence supporting an award of alimony under the well-established criteria is extremely thin, there is some inequality in earnings and thus some need for a "bridge" in order for Donna to adjust to working full time. However, given the length of these proceedings, we determine that a "bridge" until December 2004--approximately 30 months after Donna started receiving alimony--is appropriate. Therefore, we terminate Donna's award of alimony upon receipt of her December 2004 payment.



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Property Division

Timothy argues that the trial court erred in its order with regard to the payment of the parties' overdue utility bills. The court ordered that Timothy and Donna were each responsible for one-half of the overdue utility bills and that Timothy was responsible for the cable bill arrearage. Timothy argues that because the total amount for utilities included the cable bill, it was error for the court to order him to pay one-half of the cable bill and the whole cable bill at the same time. We find that the court did not err. Timothy is responsible for the entire cable bill referenced in the decree. Furthermore, Timothy and Donna are each responsible for one-half of the remaining overdue utility bills referenced in the decree.

Timothy further argues that the court erred in its division of the marital estate. Though generally a division of one-third to one-half of the marital estate is appropriate, property divisions are not subject to any rigid mathematical formula. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). In determining the appropriateness of a division of marital property, the ultimate test is one of reasonableness. *Id.* Generally, the division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

The marital estate in this case consisted of two items of value--the marital residence and Timothy's 401K account. Donna was awarded the marital residence, with \$11,500 equity value, and Timothy was awarded his 401K account, with an adjusted vested value of \$7,478.53. Thus, Donna was awarded 60 percent of the marital estate. This unequal division of property is further justification of our reduction of the alimony award. After our adjustment to the alimony award, the property division is not inequitable.

Attorney Fees

Timothy argues the trial court erred in awarding attorney fees to Donna. The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002). In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Id.* We find no abuse of discretion in the district court's award of attorney fees.

CONCLUSION

For the reasons stated above, we affirm the district court's order with regard to property division and the award of attorney fees. The award of alimony is affirmed as modified.



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Affirmed as modified.

