



Maxson v. Maxson

2010 | Cited 0 times | Nebraska Court of Appeals | July 13, 2010

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

MOORE and CASSEL, Judges.

INTRODUCTION

Joel Lynn Maxson appeals the order of the district court for Garfield County dissolving his marriage to Rhonda Lea Maxson. For the following reasons, we affirm as modified.

STATEMENT OF FACTS

Joel and Rhonda were married on October 1, 1988. Four children were born of the marriage: Travis, born in April 1990; LaNae, born in May 1992; Miranda, born in July 1994; and Alissa, born in August 1996. Throughout the entire marriage, the family resided in Burwell, Nebraska.

On August 17, 2007, Rhonda filed a complaint for dissolution of marriage. A temporary hearing was held, and Rhonda was awarded custody of all four children and exclusive use of the family residence, while Joel was ordered to pay \$930 a month in child support. On October 15, 2008, Joel filed a "motion for adjustment of temporary child support and expressly stated visitation," which alleged that the parties' oldest child, Travis, began living with him on July 26; on August 22, Travis moved to Lincoln to attend the University of Nebraska-Lincoln; Joel had provided auto insurance, gas, and spending money for Travis; Joel's mother had provided Travis a vehicle; and when Travis was home from college, he stayed with Joel. The motion further requested visitation with the three girls. Joel also requested that the \$930 temporary child support order be adjusted to \$500 per month for August 1, 2008, through April 2009 and adjusted to \$750 per month from May 1, 2009, through any finalized decree. At a hearing on the matter, Joel argued that he wanted a modification of custody and visitation. The court determined that the parties had previously agreed on custody and the issue would not be revisited until the final hearing and ordered that Joel have visitation with the three girls. Joel's request for an adjustment of child support was not addressed by the court.

In April 2009, Travis turned 19 years old. On May 5, the parties filed a parenting plan in which the parties agreed that Rhonda retain custody of LaNae, Miranda, and Alissa with a visitation schedule



Maxson v. Maxson

2010 | Cited 0 times | Nebraska Court of Appeals | July 13, 2010

for Joel. Furthermore, that parenting plan indicates that Joel would have primary custody of Travis. Child support was not agreed upon in the parenting plan.

Final hearing on the matter was held on August 25, 2009, prior to which the parties stipulated that the valuation date for assets and debts would be September 1, 2007. The parties further stipulated that child support would be based off the parties' 2008 tax information, subject to Joel's request for a deviation for his child support obligation, and the parties also stipulated to the admission of exhibits 9 through 35.

Rhonda testified that she had requested that she be awarded the residence where she was living with the three girls. Rhonda testified that the home in which she still resided was purchased in 1991 for \$32,000 and that it had recently been appraised at \$40,000, but she did not know how the purchase was financed. Rhonda explained that around the time of the purchase, 3 years into the marriage, Rhonda went to the bank to sign papers for the house which she understood that she would be liable if Joel failed to pay, but had no other knowledge about the purchase. Rhonda testified that she had never made a house payment; that throughout the marriage, each of the parties had separately maintained their own finances; and that Joel's finances were none of her business. Rhonda testified that Joel filed the income tax returns each year and that she had not ever been involved in that process.

Rhonda testified that near the end of July 2008, she changed the locks on the home and told Travis that he needed to live with Joel because she was concerned that Travis had allowed Joel back into the home when she was not around. Rhonda explained that the court had previously ordered temporary child support for \$930, but that she was not receiving the full amount at the time Travis moved out. Rhonda testified that during the next year, while Travis was a freshman in college, Travis stayed with Joel when he returned home, but that she still supported him by sending him food, paying for the entire portion of his wisdom teeth removal, and paying for other medical costs not covered by the health insurance which she continued to maintain for all four children.

Gary Garnick, executive vice president for the First National Bank branch in Ord, Nebraska, testified that he had been an officer with the bank for 35 years and had a banking relationship with Joel since approximately 1978. Garnick testified that in April 1986, Joel had an approximate net worth of \$113,000, which increased to approximately \$121,025 in 1989, and that through early 1991, that figure remained near \$113,000. Garnick testified that from 1991 to 2002, there was little or no activity on Joel's account, and that from 2002 through 2007, there was only a small amount of activity consisting of small loans.

Joel submitted numerous exhibits which indicated his financial activity and standing prior to the marriage. Joel also submitted his passbook from the bank which listed his deposits and withdrawals, in addition to his financial statement and settlement sheets from the sale of livestock. Joel testified that when he sold livestock, he deposited the money into his personal savings account, and that when



Maxson v. Maxson

2010 | Cited 0 times | Nebraska Court of Appeals | July 13, 2010

he purchased livestock, he only used those funds from the same account, essentially using the account in the same manner as an operating note would function. Joel testified that throughout his life, this account would fluctuate up and down with the buying and selling of livestock through the account. The record indicates that the account fluctuated from \$400 to thousands of dollars at any given time. At the time the complaint for dissolution was filed, there was approximately \$800 in the account.

Joel testified that in August 1991, he rented the home now at issue and eventually purchased the home in December 1991. The family has lived in the home throughout the parties' marriage. Joel testified that he purchased the home for \$32,000 using \$32,000 withdrawn from his savings account on February 4, 1992. Joel explained that he did not intend to gift Rhonda a one-half interest in the residence and requested that the court classify the house as non-marital property. On cross-examination, Joel testified that he did not pay any of the house expenses, including all utilities and groceries, and that all of those expenses were paid for by Rhonda.

Joel testified that during the marriage, his net worth never fell below \$113,000, but at some point he had lost approximately \$79,500 feeding cattle. Joel testified that he quit farming full time in 2004 and that he did not feed any cattle after that time. Joel testified that Rhonda did not assist him with the farming at anytime, except for sorting cattle on occasion. Joel explained that in 2004 and 2006, he sold some of the farming machinery at a public auction and deposited the proceeds into his savings account, but was unsure of the dates and specific amounts deposited from the sale. In September 2006, Joel withdrew \$100,000 for an investment/partnership with another individual in First American Insurance Service.

Joel then testified regarding his request for a child support deviation or credit that, at one time, when Travis turned 19, he took his child support obligation of \$930, divided by four and then multiplied it by three and paid that amount in child support. Joel then testified that he had paid the \$930 for child support in full while Travis was living with him and was requesting a deviation because he was still contributing to the support of Travis. Joel testified that while Travis was in school, Joel paid for Travis' auto insurance, gas, and a portion of his vehicle. Joel also testified that Travis came home nearly every weekend and lived with Joel.

The district court took the matter under advisement, and on September 3, 2009, it issued a decree of dissolution. The decree set forth that Rhonda, according to the parenting plan, was awarded custody of the parties' three girls. The court ordered that Joel pay \$932 child support for three children, \$825 for two children, and \$616 for one child. A child support worksheet was attached to the decree. The court further found that Joel was entitled to a credit against his child support payments in the amount of \$100 per month for the months of September 2008 through March 2009 when Travis was living with him, and awarded Joel a judgment of \$700. The district court further found that the residence was marital property and awarded the home to Rhonda.



Maxson v. Maxson

2010 | Cited 0 times | Nebraska Court of Appeals | July 13, 2010

The district court also discussed the \$100,000 investment which Joel claimed was also non-marital property by virtue of assets he brought to the marriage and his premarital net worth. The court found that Joel had attempted to trace the \$100,000 investment made in 2006, through premarital assets such as \$103,000 in livestock and \$35,000 in CD's and other assets. The court determined that Joel's premarital net worth had been approximately \$138,000, but found that there were no livestock remaining, Joel had quit farming in 2004, and he testified to losing \$79,500 in the farming operation, which coupled with the purchase of the home, equated to Joel's claimed premarital assets. The court then ordered Rhonda to pay Joel \$22,056 through a qualified domestic relations order to equalize the property distribution. Joel has timely appealed to this court.

ASSIGNMENTS OF ERROR

Joel assigns, rephrased, that the district court erred in determining that the home the parties had resided in since 1991 was marital property, in failing to give Joel credit for any of his premarital net worth, and in the amount of credit given to Joel while the parties' oldest child was in his custody.

STANDARD OF REVIEW

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 discretion. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009); *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

ANALYSIS

Classification of Parties' Residence as Marital Property

Joel argues that the district court erred in determining that the residence was marital property. Joel contends that he used premarital funds to purchase the home and further, did not intend to gift Rhonda a one-half interest in the home, even though it was titled in both of their names.

Generally, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000); *Simon v. Simon*, 17 Neb. App. 834, 770 N.W.2d 683 (2009).

It is apparent Joel's argument stems mainly from his contention that the money used to purchase the home was from premarital funds and that, therefore, the home is not marital property. Under the specific facts of this case, we find no merit to this argument. The facts in the record before us are clear: the parties were married in October 1988; the home was purchased in December 1991, 3 years after the marriage; and the home was titled in both Joel's and Rhonda's names. Joel submitted



Maxson v. Maxson

2010 | Cited 0 times | Nebraska Court of Appeals | July 13, 2010

evidence at trial that he used money from his separate account to purchase the home, yet in the approximately 16 years that followed, he did not pay any other expense for the home. Instead, Rhonda paid for any and all of the other home expenses, which included utilities and groceries for the family. Thus, since the house was acquired during the marriage and does not fall within any exception to that rule, it is a part of the marital estate. The district court did not abuse its discretion in determining that the home was marital property, and Joel's assignment of error is without merit.

Premarital Net Worth

Joel next argues that the district court erred by failing to give Joel credit for any of his premarital net worth. Joel contends that in 1986, 3 years prior to the marriage, his financial statements indicated that he had a net worth of approximately \$139,000, which he claims to have maintained throughout the marriage.

We find Joel's contentions and arguments without merit. Joel testified that he financed the operation of his farming and livestock through his own personal savings account. The record indicates that over the years, several large withdrawals and several large deposits were made to the account, which Joel explained were a result of the sale or purchase of livestock. Joel contends that the \$100,000 investment he made, which the district court included in the property equalization worksheet, was from those premarital funds from the sale of farm machinery when he quit farming in 2004. However, Joel did not present any evidence, other than his testimony, to indicate or trace the source or amounts of the deposits of the farm machinery, nor does Joel claim that the machinery was non-marital property. The district court found that the money which Joel had attempted to trace to premarital funds was no longer in existence, and we agree. The district court did not err in failing to give Joel \$139,000 credit for premarital funds which were no longer in existence.

Child Support

Joel argues that the district court erred in the duration and the amount of credit given to him for the timeframe of August 2008 through March 2009, when he had custody of the parties' oldest child, Travis.

As discussed above, the record indicates that on September 25, 2007, the district court awarded Rhonda temporary custody of all four children and ordered Joel to pay \$930 child support per month effective October 1. The record does not include any indication of how that \$930 child support calculation was determined. At the final hearing, the district court ordered that Joel be credited \$100 per month for September 2008 through March 2009. Joel was awarded a \$700 judgment for those months.

The difficulty in considering this assignment of error is that the record is insufficient for us to address this matter. Joel has failed to provide this court with any evidence in the record of how the



Maxson v. Maxson

2010 | Cited 0 times | Nebraska Court of Appeals | July 13, 2010

temporary child support obligation of \$930 was reached at the hearing on September 25, 2007. The record includes no child support worksheet or testimony which would allow this court to fully analyze Joel's assignment of error. See, *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000); *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998) (appellant bears burden of presenting adequate record on appeal).

This court could go through the mental gymnastics of possible calculations and numbers used to reach the \$930 calculated at the temporary hearing, based upon information presented at trial, in an attempt to determine a calculation. We could attempt to use the income information received at trial that resulted in the final allocation of child support, but any of these exercises would be total speculation for this court to attempt and determine a split custody calculation using those or any other possible numbers for the 8-month period during which Joel had custody. Therefore, based upon the record, we cannot say that the district court's credit of \$100 per month awarded to Joel was an abuse of discretion.

However, we do find that the district court erred in its calculation of dates from which it awarded Joel a credit for September 2008 through March 2009. In this case, we are dealing with an initial determination of permanent child support after a temporary child support award, and therefore, unlike the circumstances presented in a modification wherein no adjustment would be made until the installment accruing on the first day of the month following the date of the filing of the complaint for modification, the entire period for time and the amounts of support are properly before the court. The undisputed evidence and testimony given by both parties indicates that Travis moved into his father's house and custody during the last weekend of July 2008. Therefore, Joel should have been awarded a credit for August 2008, and accordingly, we modify the dissolution decree such that Joel is awarded one additional \$100 per month credit for the month of August 2008, for a total judgment of \$800.

CONCLUSION

Upon our review of the record, we find the district court did not abuse its discretion by finding that the parties' residence was marital property and that Joel's premarital net worth was no longer in existence, and by crediting him with \$100 per month for child support paid while he had custody of the parties' oldest child. We do find that the district court erred by calculating the custody timeframe from September 2008 to March 2009 and modify the decree to add the month of August 2008 and an additional \$100 credit to the judgment. Therefore, we affirm the district court's order as modified.

INBODY, Chief Judge, participating on briefs.

CASSEL, Judge, concurring.

I write separately only to further address Joel's assignment of error regarding the district court's



Maxson v. Maxson

2010 | Cited 0 times | Nebraska Court of Appeals | July 13, 2010

credit against temporary child support for the time period during which the parties' oldest child lived with Joel. The court allowed a reduction of \$100 per month. Joel contends that the credit should have been calculated using worksheet 2, which applies to split custody calculations.

Although Joel asserts the court should have used worksheet 2, he did not provide such a worksheet to the trial court and the one attached to his brief on appeal does not fully address the circumstances.

This court can use the information adduced at trial to retroactively calculate what Joel's temporary support obligation would have been under a split custody arrangement, assuming no other changes from the circumstances existing at trial. In the interest of brevity, I merely summarize the pertinent numbers from a properly calculated worksheet 2. Using the district court's calculation of income and expenses at the time of trial provides net monthly income of \$1,969.81 for Rhonda and \$1,972.53 for Joel. Under the table, the support for four children would have been \$1,777. Applying the proper percentage shares for each child would show that Rhonda owed Joel \$221.99 per month and that Joel owed Rhonda \$666.78 per month, resulting in a net amount owed by Joel of \$444.79 before the children's health insurance premium adjustment. Joel's percentage share of the \$340 monthly premium would be \$170.10, thus resulting in a calculation that Joel should have been paying \$614.89 (\$444.79 + \$170.10) per month during the period the oldest child lived with him. Thus, Joel could be viewed as having "overpaid" \$2,520.88 for the 8-month period from August 1, 2008, through March 2009 $((\$930 - \$614.89) \times 8)$.

AFFIRMED AS MODIFIED.

But Joel's argument disregards that under the calculation for four children using the income information presented at the time of trial, he should have been paying temporary support of \$1,059.14 per month for the time period before the oldest child came to live with him, rather than the \$930 per month ordered by the court. Thus, he "underpaid" by \$129.14 $(\$1,059.14 - \$930)$ per month for the 10-month period from October 1, 2007, to July 31, 2008, or a total of \$1,291.40. Joel cannot "have his cake and eat it too." If he expects a precise adjustment for the period the oldest child lived with him, he should also accept that there must be an adjustment for the earlier time when all four children lived with Rhonda.

The net result of these backward-looking calculations of temporary child support would be that Joel "overpaid" a total of \$1,229.48. The district court granted a credit of \$100 per month, and because we have modified the period from 7 months to 8, he receives a credit of \$800 rather than the \$1,229.48 supposedly resulting from the more "precise" calculations.

Because the difference is relatively modest and because the calculation of temporary child support represents only an estimation based on imperfect information, I agree that the district court did not abuse its discretion in limiting the credit to \$100 per month.



Maxson v. Maxson

2010 | Cited 0 times | Nebraska Court of Appeals | July 13, 2010

I also think it is likely that the underlying assumption--that all other circumstances remained the same for the entire period from establishment of the temporary order to the time of trial--is flawed. It seems to me that in most cases, recalculating temporary child support at the time of trial in order to achieve some mathematical precision is wasteful of valuable judicial resources and costly to the parties--i.e., the costs far outweigh the benefits--in light of this inherently flawed assumption.

While I have engaged in the exercise of making this calculation, I do not expect trial judges to do so without the assistance of counsel in providing illustrative calculations and I question whether even with counsel's assistance, such calculations would provide a significantly fairer result than the reasonable estimate obviously employed by the district court in the case before us.

