



## Lutz v. Lutz

2003 | Cited 0 times | Nebraska Court of Appeals | July 29, 2003

Not Designated for Permanent Publication

### INTRODUCTION

Following an appeal from the order of the district court for Lancaster County modifying and extending the alimony obligation of Ronald L. Lutz (Ron) to his former wife, Jean A. Lutz, wherein this court reversed said order, Ron sought a judgment against Jean for a refund of the temporary alimony he paid during the pendency of the appeal. The district court entered a judgment in favor of Ron and against Jean in the sum of \$5,720.47, payable in monthly installments of \$25. Ron appeals this order and assigns as error the district court's provisions that the judgment should not bear interest and that it would terminate upon the death of either party. Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2000), this case was ordered submitted without oral argument. For the following reasons, we affirm in part, and in part reverse and remand for further proceedings consistent with this opinion.

### BACKGROUND

Ron and Jean were divorced in a decree of dissolution dated October 30, 1995. The decree awarded Jean 50 percent of Ron's monthly Air Force retirement benefits, civil service annuity, and Veterans Affairs disability benefits. The decree also ordered Ron to pay Jean alimony in the amount of \$200 per month beginning November 1, 1995, and continuing until September 1, 1999. Jean thereafter sought modification of the decree, contending in part that Ron had failed to comply with the decree by refusing to pay her one-half of his disability benefits. Ron likewise filed a motion seeking to invalidate the portion of the decree which awarded Jean 50 percent of his disability benefits. The district court granted Ron's motion and struck that portion of the decree, finding that it violated 10 U.S.C. § 1408(a)(4)(B) (1994). The district court also granted Jean's motion for temporary relief and ordered Ron to pay Jean modified alimony in the amount of \$406 per month from May 1 through September 1, 1999, and \$350 per month thereafter for a period of 72 months or until Jean's remarriage or death, whichever should occur first. Ron appealed the alimony modification, and this court reversed the district court's order, finding that the parties' financial circumstances did not support the extension of Ron's alimony obligation to Jean. We directed the district court to vacate its order modifying and extending the alimony. *Lutz v. Lutz*, No. A-00-408, 2001 WL 909184 (Neb. App. Aug. 14, 2001) (not designated for permanent publication).

On November 6, 2001, Ron filed a motion to set aside temporary relief and judgment, requesting that



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the district court vacate its order of May 26, 2000, awarding Jean temporary alimony, pursuant to Neb. Rev. Stat. § 42-351(2) (Reissue 1998), during the pendency of the foregoing appeal. Ron further sought a judgment against Jean "for the alimony payments made from and after September 31, 2000, [sic] for the reason that he had no alimony obligation to [Jean] after said date." The transcript reflects that the district court entered an order on November 30, 2001, following a hearing at which evidence in the form of an affidavit from Jean and records from the clerk of the district court were presented. The November 30 order granted Ron's request for a refund of temporary alimony and awarded Ron a judgment against Jean in the amount of \$5,720.47 payable by Jean in equal monthly installments of \$25 beginning March 1, 2002, and continuing on the first of the month thereafter until paid in full, the death of Ron, or the death of Jean, whichever should occur first. The district court also specified that "[t]his judgment shall not bear interest." Ron appeals from this order.

We initially note that the record presented to us on appeal does not contain the May 26, 2000, order which apparently awarded Jean temporary alimony during the first appeal, nor is there a bill of exceptions from the November 30, 2001, hearing on Ron's motion to set aside temporary relief and judgment. The record does contain an affidavit from a court reporter indicating that there was no record made at the November 30 hearing. Accordingly, we do not have the evidence presented to the district court from which it determined the principal amount due Ron. However, neither party contests the entry or the principal amount of the judgment. While a bill of exceptions in this appeal is not necessary to determine the correctness of the judgment because there is no alleged error with regard to the entry or the principal amount of judgment, a question remains as to whether a bill of exceptions is necessary to preserve the alleged error concerning the imposition of interest on the judgment, an issue we address further below. See *Foster v. Foster*, 266 Neb. 32, 662 N.W.2d 191 (2003) (when transcript, containing pleadings and order in question, is sufficient to present issue for appellate disposition, bill of exceptions is unnecessary to preserve alleged error of law regarding proceedings under review).

### ASSIGNMENTS OF ERROR

Ron asserts that the district court erred in awarding a judgment for the repayment of money (1) that "did not provide for interest" and (2) that terminates at the death of either party.

### STANDARD OF REVIEW

On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999).

### ANALYSIS

Interest.



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Ron argues that the district court erred in providing that "[t]his judgment shall not bear interest." A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002). Neb. Rev. Stat. 45-103.01 (Cum. Supp. 2002) provides that interest "shall accrue on decrees and judgments for the payment of money from the date of entry of judgment until satisfaction of judgment." The language of § 45-103.01 is mandatory, and a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money. *Gallner v. Gallner*, supra; *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). In *Welch*, supra, the Supreme Court explained that a "decree or judgment for the payment of money [under the postjudgment interest statutes] is one which is immediately due and collectible where its nonpayment is a breach of duty on a judgment debtor. . . . Interest does not accrue until the debt becomes due." (Citations omitted.) 246 Neb. at 452-53, 519 N.W.2d at 274.

In the instant case, we are presented with a judgment that is not immediately due, but, rather, is payable in installments. It has been well established that Neb. Rev. Stat. § 45-103 (Cum. Supp. 2000) does not require interest to be charged on a marital deferred property distribution. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996). See *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995). However, it is within the discretionary power of the district court to award interest on deferred installments payable as part of a marital property distribution, and those decisions will be upheld absent an abuse of discretion. *Priest*, supra. When utilizing this discretionary power, a factor the district court and the Court of Appeals should take into consideration is the burden on the payor spouse. *Id.* See *Thiltges*, supra. On the other hand, the Supreme Court in *Bowers*, supra, held that pursuant to § 45-103.01, interest on monthly alimony payments began to accrue as each payment became due, as a final judgment, on the first day of each month.

In the present case, the judgment is not an award of alimony or part of a marital property division; rather, it is a refund of temporary alimony payments made during the pendency of an appeal, because the award of temporary alimony was later determined to be in error. Nevertheless, it is still a judgment ordered in the context of a marital dissolution proceeding, and therefore, we find that the foregoing rules regarding interest on deferred installments payable as part of a marital property distribution are applicable. The problem in this case is that a record was not made of the hearing wherein the judgment was determined, and despite the presentation of evidence as reflected in the order, we have no way of evaluating whether the district court abused its discretion in failing to award interest on the refunded alimony payments.

Pursuant to Neb. Ct. R. of Prac. 5A(1) (rev. 2000), "The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon, oral motions, and stipulations by the parties. This record may not be waived." *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002); *Presle v. Presle*, 262 Neb. 729, 634 N.W.2d 785 (2001). See, also, Neb. Ct. R. of Official Ct. Rptrs. 3 (rev. 2000).



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Because a record was not prepared in connection with the evidentiary proceeding on Ron's motion seeking a refund of his temporary alimony payments, we must reverse that provision of the district court's order specifying that the judgment should not bear interest and remand the cause for a new evidentiary hearing limited to the issue of the imposition of interest.

### Termination of Judgment.

Ron also alleges that the district court erred in providing that the judgment would terminate upon the death of either party. Under Neb. Rev. Stat. § 42-365 (Reissue 1998), judgments for the payment of alimony normally terminate upon the death of either party or the remarriage of the recipient. However, the judgment in the instant case is not for the payment of alimony, but, rather, is for the refund of temporary alimony payments that Ron should not have been ordered to pay. As such, it should be treated as any other judgment for the payment of money under Neb. Rev. Stat. § 42-371(1) (Cum. Supp. 2002) whereby a judgment does not terminate upon the death of either party. We conclude that the district court erred in providing that the judgment would terminate upon the death of either party, and on remand, we direct the district court to strike such language from the judgment.

### CONCLUSION

The district court's provisions that the judgment entered in favor of Ron should not bear interest and that it would terminate upon the death of either party are reversed, and the cause is remanded to the district court with directions to strike the language regarding termination upon the death of either party and to conduct a new evidentiary hearing on the sole issue of the imposition of interest. The district court's order is otherwise affirmed.

Affirmed in part, and in part reversed and remanded for further proceedings.

