

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STEHLIK V. STEHLIK

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DIANNE R. STEHLIK, APPELLEE,
V.
ROGER E. STEHLIK, APPELLANT.

Filed April 22, 2008. No. A-07-521.

INBODY, Chief Judge, and IRWIN and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In this marital dissolution proceeding, Roger E. Stehlik appeals from the district court's award of alimony to Dianne R. Stehlik and the court's refusal to set aside the parties' property settlement agreement. While Roger claims that Dianne fraudulently diverted business cash, he knew that the cash was being kept in the home and used for marital purposes. Because we find no abuse of discretion by the district court, we affirm.

BACKGROUND

This is a case involving the dissolution of a 38-year marriage. Roger and Dianne were married on December 1, 1968. Two children were born of the marriage, but both were adults during all relevant proceedings. On September 1, 2005, Dianne filed a complaint for dissolution of the marriage. At that time, the parties had been separated for about 1 month. Upon their separation, Dianne continued to live in the marital residence and Roger moved out of the residence. In her complaint for dissolution, Dianne requested an equitable division of the marital property and debts, temporary and permanent alimony, and reasonable attorney fees.

On November 23, 2005, the district court entered an order, mirroring the terms of a joint stipulation filed by the parties, requiring Roger to pay temporary spousal support to Dianne in the sum of \$500 per month and Dianne's telephone and utility bills.

A trial on the dissolution was held on November 21 and December 8, 2006. Prior to commencement of the trial, the parties entered into a partial property settlement agreement (the Agreement). The Agreement showed that Roger received Social Security disability benefits in

the sum of \$1,504 per month and Dianne received Social Security disability benefits of \$394 per month. The Agreement divided the parties' property and debts and resolved all issues related to the divorce with the exception of alimony. The Agreement recited that the parties were familiar with the extent of all property and debts accumulated during the marriage and that each party was satisfied as to the value of the assets and debts. The parties agreed that "any deliberate failure to provide complete disclosure constitutes grounds for setting aside this Agreement."

The Agreement divided the parties' personal property and funds and awarded each party a vehicle. The Agreement gave Roger the marital residence, but specified that Dianne did not have to vacate the residence until January 15, 2007, or until a specified portion of the monetary award due to Dianne from Roger pursuant to the Agreement had been paid. The total value of the assets awarded to Roger under the Agreement was \$299,553.73. The total value of assets awarded to Dianne was \$56,472.41. To equalize the property division, the Agreement required that Roger pay Dianne \$121,530.66.

The district court approved the Agreement. Thereafter, trial commenced on the issue of alimony. The testimony revealed that neither party worked at the time of trial. We now summarize the other evidence adduced.

Dianne was 59 years old at the time of trial and had a high school education. She worked as a dental assistant prior to and immediately after the parties married. She quit working when the parties had their first child because she and Roger agreed that she would stay home to raise their children. After 10 years, Roger began operating an automotive repair shop. Roger originally operated the repair shop as one of three partners, but then bought out the other partners to become a sole proprietor. Dianne worked at the repair shop performing many duties, including bookkeeping. She did not receive a salary for her work. Instead, Roger made payments on her behalf to the Social Security Administration. In addition to her employment, she continued to care for the parties' children after work and prepared meals for the family. She continued her employment with the repair shop until October 15, 2005.

Dianne testified that as the bookkeeper for the repair shop, she handled and deposited cash received by the business. She testified that she always reported the cash that she received in her capacity as the bookkeeper.

Dianne testified that she has numerous medical problems. She testified that she was diagnosed with type 2 diabetes about 4 years prior to the trial, which caused infections in her feet that confined her to a wheelchair. She also suffers from diabetic retinopathy and is legally blind. She testified that she receives no assistance from the State and does not have medical insurance, but receives Medicare benefits and Social Security disability benefits in the amount of about \$394 per month. However, an exhibit shows that in 2005, she received Social Security benefits of \$5,582.20, which would equate to \$465.18 per month. She opined that there was no type of work she could perform and testified that she has no retirement or pension plan.

Dianne testified that she was searching for housing, but had not found a place to live at the time of the trial. She testified that she was seeking housing where rent ranged from \$400 to \$500 per month. She testified that her disability benefits made up her entire monthly income. She requested alimony of \$750 per month.

Roger testified that he graduated from Southeast Community College and has a degree in business management. He testified that he has been handicapped since 1969, when he lost a

hand. He worked for 37 years despite his handicap. He then developed arthritis in his knees, lower back, and a finger. He also developed type 2 diabetes, high blood pressure, and high cholesterol. He was deemed disabled by Social Security standards on August 1, 2006. He thereafter sold his automotive repair business because the building he operated from was sold and he had no other place to go. He testified that he has no health insurance, but receives care through the Veterans' Administration.

Roger testified that around September 2005, Dianne gave him the 2005 bookkeeping records from the repair shop so he could complete income ledgers, expense ledgers, and employee payroll. In October 2005, she gave him the remaining records in her possession, which dated back to 1999. Roger testified that after he began looking through records, he discovered that there were no deposit slips for cash received by the business. He testified that some of the cash earned by the repair shop from 1999 to 2005, totaling \$91,784.98, had not been deposited into the bank. He testified that Dianne was responsible for making deposits and inferred that she kept the money for herself.

Roger testified that he left the marital residence in August 2005 and moved in with his parents. He testified that since that time, he has helped Dianne with utilities and other expenses relating to the residence. Roger estimated that his future expenses, after he paid Dianne a portion of the divorce settlement and took possession of the marital residence, would be \$1,814 per month. Included in this figure was a mortgage payment of \$663 per month. Roger testified that he included a mortgage payment in his estimate because he believed he would have to take out a mortgage to pay Dianne the amount provided for in the Agreement. He testified he could not afford to pay Dianne alimony.

On January 4, 2007, the court entered a decree dissolving the marriage. The court enforced the terms of the Agreement, concluding that the Agreement was "fair and reasonable." The court awarded Dianne alimony in the sum of \$550 per month. In support of this award, the court set forth several pages of factual findings regarding the education, work history, and expenses of each party. The court emphasized the length of the marriage and also discussed the parties' respective disabilities. In particular, it addressed Dianne's blindness and her other serious medical problems, and Dianne's lack of medical insurance and a retirement plan. In addition, the court stated in paragraph 1L:

After [Roger] was determined to be disabled, he sold his business assets. In September, 2006, the business records were given to him by [Dianne]. [Roger] discovered that his business' cash receipts were not deposited into the bank. For the years 2000-2005, \$91,784.98 in cash receipts were not deposited. Although [Dianne] denies any knowledge of this failure, it is clear that she deposited these funds into her pocket without the knowledge of [Roger].

Despite these findings, the court opined that Roger had assets that he could liquidate in order to pay the property settlement. It estimated Roger's monthly expenses, without food and gas, to be \$800.30--much lower than Roger's own estimate.

On January 11, 2007, Roger filed a motion for new trial, arguing that the court "committed an error at law in refusing to grant [Roger] an offset on the issue of alimony, notwithstanding the fact that the [c]ourt specifically made a finding of fraud against [Dianne], and for the further reason that the distribution of property without said offset is unequal and

inequitable.” On January 16, Dianne filed a motion for new trial, asserting that the court committed an error at law in determining that she deposited business funds for her personal use without Roger’s knowledge. On March 26, Roger filed an application for modification of the support order. He asserted that the support order was premised upon Roger’s being employed, but that there had been a change in circumstances in that he was no longer employed due to his disability. He asserted that under the court’s order, a good portion of his disability benefits were being spent on utilities, telephone bills, and other amenities for Dianne. He further asserted that Dianne had “unclean hands” because she previously diverted funds from the repair business.

On April 2, 2007, the court held a hearing on the parties’ motions. The parties stipulated that “there was evidence that was not presented to [the court] previously.” The court therefore granted the motions for new trial “based upon the agreement of counsel that [the court] had not been in receipt of all of the evidence.” The parties then presented additional evidence to the court. Pursuant to the parties’ agreement, each side was allotted one-half hour in which to present supplemental evidence.

Dianne’s deposition, taken on March 24, 2007, was entered into evidence. During the deposition, Dianne testified regarding the procedure used for cash receipts when she was the bookkeeper for the repair shop. She testified that when cash was received by the business, Roger gave the cash to her and she put it into her desk drawer without recording the amount thereof. Roger later moved the cash into his gun safe.

Dianne initially denied taking any cash received by the business for her personal use. She subsequently admitted that she spent some of the cash, but stated that she spent it on groceries and like items and that Roger was aware of her expenditures. She testified that Roger was always the party who removed the cash from the safe. She denied using any of the cash to purchase jewelry.

At trial, Dianne again admitted that she used some cash received by the business to buy groceries, but testified that she asked Roger for permission before using the cash and that Roger always had knowledge of her expenditures. She testified that Roger used the cash for personal expenditures, which Roger confirmed. She also testified that on February 14, 2003, she began working from the parties’ residence rather than from the business office. She testified that after this date, Roger made all bank deposits. She also testified that in October 2005, she turned over all of the bookkeeping to Roger.

Roger testified that after the initial trial he discovered that personal charges had been made by Dianne to a credit card that was paid by the repair shop. He testified that Dianne made personal charges in the sum of \$26,786.13 and that he was unaware at the time that she was making such charges.

On cross-examination, Roger admitted that of the more than \$26,000 he alleged that Dianne spent, he could not be sure that the entire amount was used to purchase personal items. He also admitted that he made all of the parties’ bank deposits after February 2003 and that throughout the marriage, Dianne had given him cash in sums up to \$500. He also acknowledged that during settlement negotiations, the parties discussed the \$91,784.98 that had not been deposited into the business account. Further, during Roger’s testimony, it was pointed out that in a prior deposition Roger had stated that prior to entering into the Agreement he had discovered discrepancies between work records and deposits made by Dianne. While responding to a

question by the court, he admitted that before he signed the Agreement, he had in his possession all documents that came into evidence at trial. Despite this, he testified that he did not discover that Dianne had used business money for personal expenses until December 2006. He testified that he did not discover the charges before he signed the Agreement because he had not looked through the documents.

On April 16, 2007, the court entered an order. In its order, the court recited that Roger had filed an amended motion for new trial on February 15. We do not have the amended motion in our record. From the district court's description, we assume that it was similar in material respects to Roger's original motion for new trial and proceed with the district court's findings.

We begin by observing that the court stated in its order that "this [c]ourt is not convinced that Roger is entitled to a new trial, despite the stipulation by the parties that he was." However, the court clearly granted a new trial, the purpose of which was for the parties to present evidence to supplement the evidence that had been presented at the original trial.

In its order, the district court found that "[i]t is obvious that Dianne had paid personal expenses from the business account," but that it was unclear exactly how much of the \$26,786.13 in dispute she used for personal expenses. The court also stated that these "personal expenses" were "marital expenses." In addition, the court found that Roger was aware that Dianne kept in the home some cash that she had not deposited. The court also found that Roger had access to this cash. The court concluded that he had access to the business records for a significant amount of time before he signed the Agreement and that he failed to review these records thoroughly before signing the Agreement.

The court concluded that "Dianne's conduct did not perpetuate a fraud on Roger that requires this [c]ourt to void the Agreement." The court also denied Roger's application for modification of the alimony award.

The court also found that, in light of the evidence adduced at the April 2, 2007, hearing, paragraph 1L of the decree should be amended to state:

After [Roger] was determined to be disabled, he sold his business assets. In September, 2005 or 2006, the business records were given to him by [Dianne]. [Roger] discovered that his business' cash receipts were not deposited into the bank. For the years, 2000-2005, \$91,784.98 in cash receipts were not deposited. Although [Dianne] denies any knowledge of this failure, it is clear that she deposited these funds into her pocket. While the extent of [Roger's] knowledge of [Dianne's] behavior is unclear, [Roger] had some knowledge that significant amounts of business cash receipts were kept in the house.

Roger timely appeals the court's order. Pursuant to authority granted to this court under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Roger assigns that the district court abused its discretion in overruling his motion for a new trial. He also assigns that the district court erred in failing to equitably divide the parties' property, refusing to set aside the Agreement on the basis of unconscionability after a finding of fraud, and awarding Dianne alimony.

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. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Simpson v. Simpson*, 275 Neb. 152, 744 N.W.2d 710 (2008).

When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

ANALYSIS

Motion For New Trial.

Roger asserts that the district court abused its discretion in overruling his motion for new trial, but is incorrect in his characterization of the district court's order as overruling his motion. Although the court stated in its April 16, 2007, order that it was "not convinced that Roger is entitled to a new trial," the court clearly granted a new trial that was limited to a one-half hour presentation of supplemental evidence by each party. This assignment of error lacks merit.

Agreement.

Roger asserts that Dianne stole approximately \$91,784.98 from his business. He argues that he had no knowledge at the time that Dianne was converting business funds for her personal use. He argues that Dianne's actions in stealing business funds without his knowledge constitute fraud, making the Agreement unconscionable under Neb. Rev. Stat. § 42-366 (Reissue 2004).

Section 42-366 grants parties to dissolution proceedings the right to enter into a property settlement agreement for the disposition of their property. The terms of such agreement shall be binding upon the court unless it finds, after considering "the economic circumstances of the parties and any other relevant evidence," that the agreement is unconscionable. *Id.*

If the agreement between the parties is not unconscionable, the agreement binds both the parties and the court. *Dobesh v. Dobesh*, 216 Neb. 196, 342 N.W.2d 669 (1984). If the agreement is unconscionable it is not binding, and the court may make orders for the disposition of the property and maintenance. *Id.*

With regard to the meaning of "unconscionable," the Supreme Court has interpreted that word to mean "manifestly unfair or inequitable." *Id.* at 198, 342 N.W.2d at 671, quoting *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978). The question is whether the evidence shows any circumstance, economic or otherwise, which operates to render the effect of the agreement unjust to either party or obviously excessive in respect to benefits or burdens on either side. *Id.*

The trial court, in reviewing the property agreement, is admonished not to regard the agreement lightly, but, rather, is required to carefully scrutinize the agreement in order to be sure

that neither party takes an unconscionable advantage over the other through fraud. *Colson v. Colson*, 215 Neb. 452, 339 N.W.2d 280 (1983).

What constitutes fraud is a matter of fact in each case. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive. *Id.* It is generally held that a fraudulent intent or the equivalent thereof is an essential element of fraud and that such intent may be established by appropriate inference or presumption from the facts proved. *Pasko v. Trela*, 153 Neb. 759, 46 N.W.2d 139 (1951).

In the instant case, the district court concluded in its April 16, 2007, order that funds converted by Dianne for personal use were “clearly delineated on the business ledgers.” The district court emphasized that Roger testified that “he was aware that at least some of the cash not deposited by Dianne was kept in the home, and that he had access to it,” and that “Roger had access to the financial ledgers for a significant amount of time prior to the time he signed the Agreement.” The court concluded that Dianne did not commit fraud.

Upon our de novo review, we conclude that the district court did not abuse its discretion in concluding that Dianne’s conduct did not constitute fraud and in refusing to set aside the Agreement. There is no indication that Dianne had a fraudulent intent. Both Dianne and Roger testified that Roger had knowledge of the fact that Dianne withheld cash from the business. She testified that she used this cash for groceries and other marital expenses. Roger could not show that she was using the cash for purely personal expenses. There is no evidence that at the time of the dissolution, Dianne retained any of this money. In addition, the evidence shows that Roger knew that Dianne was using the cash and had the opportunity to review the business records prior to signing the Agreement. Based upon these facts, we conclude that this assignment of error lacks merit.

Alimony.

The district court awarded Dianne \$550 per month in alimony and overruled Roger’s application to modify the alimony award. Roger asserts that the award of alimony was unreasonable.

When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other . . . 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
Neb. Rev. Stat. § 42-365 (Reissue 2004).

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id.*

In reviewing an alimony award, 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. *Id.* 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).

Roger asserts that the alimony award was unreasonable because Dianne “stole more than \$100,000.00 from Roger” and because the settlement reached by the parties required Roger to pay Dianne over \$120,000 to equalize the property division. Brief for appellant at 20. As we previously concluded, Dianne did not commit fraud and Roger had knowledge of Dianne’s use of the business funds prior to voluntarily signing the Agreement.

We conclude that the alimony award was reasonable. Evidence adduced at trial showed that Dianne has a high school education and severe health problems that have kept her from working. The only employment she engaged in after the parties’ children were born was for Roger’s business. She had no insurance and no retirement plan at the time of trial.

While Roger is also disabled, his situation is more favorable. The disability benefits he receives every month are significantly higher than the benefits Dianne receives. He has some post-secondary education. Although he estimated his expenses would be \$1,814 per month after the divorce, the district court estimated that his expenses would be closer to \$800. We conclude that the district court did not abuse its discretion in awarding Dianne alimony of \$550 per month.

We further conclude that the district court did not abuse its discretion in overruling Roger’s application to modify the alimony award. Pursuant to § 42-365, alimony orders may be modified or revoked for good cause shown. Good cause means a material and substantial change in circumstances and depends on the circumstances of each case. *Simpson v. Simpson*, 275 Neb. 152, 744 N.W.2d 710 (2008). To determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought. *Id.* The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award. *Id.* We conclude that Roger failed to meet this burden. This assignment has no merit.

CONCLUSION

We conclude that Roger’s assignment of error attacking the district court’s resolution of his motion for new trial lacks merit. We also conclude that the district court did not abuse its discretion in approving the Agreement and awarding Dianne alimony. Further, the court did not abuse its discretion in overruling Roger’s motion to modify the alimony award. We therefore affirm the district court’s order in its entirety.

AFFIRMED.