

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

MINOR V. MINOR

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KIMBERLY E. MINOR, APPELLANT AND CROSS-APPELLEE,  
V.  
RICHARD D. MINOR, JR., APPELLEE AND CROSS-APPELLANT.

Filed March 4, 2008. No. A-06-1006.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

In this appeal, Kimberly E. Minor and Richard D. Minor, Jr., dispute certain portions of a decree of the district court for Cherry County, Nebraska, that dissolved their marriage and divided their marital estate and other property. We affirm in all respects, and although we apply our decision in *Shafer v. Shafer*, 16 Neb. App. 170, 741 N.W.2d 173 (2007), we do not disturb the trial court's division of the marital estate.

FACTUAL AND PROCEDURAL BACKGROUND

Kimberly and Richard, 49 and 48 years of age, respectively, at the time of the trial, were married on April 7, 1979. Kimberly filed for divorce in the district court for Cherry County on December 21, 2004. A trial was held with hearings on May 30, 31, and June 1, 2006.

Kimberly and Richard have one adult child. Kimberly is a licensed practical nurse and also works at a jewelry store. Richard manages a ranch which primarily provides livestock to rodeos. The ranchland is held in the names of both Kimberly and Richard. Throughout the marriage, Kimberly made contributions to the ranch both through performing manual labor and administrative duties and through investing in the ranch portions of her earnings from her work as a nurse.

During the marriage, Richard inherited stock in the J.H. Minor Company from his grandfather, which he sold on June 29, 1994, for \$1,350,000. At trial, it was established that \$214,659.52 of this amount was used to purchase land and that therefore such amount was set aside to Richard separate from the marital estate.

At trial, the values of two parcels of property that make up Kimberly and Richard's ranch were determined by the trial court: the North Ranch was valued at \$2,091,000 and the South Ranch was valued at \$2,529,000. Kimberly adduced evidence of higher values for those properties: \$2,250,000 for the North Ranch and \$3,025,000 for the South Ranch.

The Minors spent \$595,351 on cattle purchases between June 1994 and March 1998. Richard claimed that the funds for these cattle came from his inheritance; however, the district court found that Richard had failed to carry his burden to trace any particular cattle to his inherited funds. Richard also claimed that an additional \$200,000 spent by the couple on a feedlot in 1994 was traceable to his inherited funds, but the district court rejected this claim.

The district court determined that the marital estate was worth \$5,008,514, and it awarded Richard the property and Kimberly \$2 million in cash. Kimberly was to be paid \$1 million by October 27, 2006, and \$1 million in equal, annual distributions of \$62,500 over the course of the next 16 years. Kimberly was not awarded interest on any of the award, nor was she awarded alimony.

Kimberly timely appealed, and Richard timely cross-appealed.

#### ASSIGNMENTS OF ERROR

Kimberly assigns the following errors to the district court's decree of dissolution: (1) allowing Richard a credit of \$214,659.52 as nonmarital property; (2) accepting John Childears' appraisal of certain real estate instead of the appraisal of Gary Hessler; (3) failing to require Richard to pay interest on the \$1 million awarded to Kimberly over time in 16 annual installments; (4) awarding Kimberly only one-third of the marital estate; and (5) failing to award alimony to Kimberly.

On cross-appeal, Richard assigns the following errors to the district court's decree of dissolution: (1) failing to trace \$200,000 spent on a feedlot in 1994 to Richard's nonmarital property and (2) failing to include certain cattle purchases as Richard's nonmarital property.

#### STANDARD OF REVIEW

In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). 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. *Id.*

#### ANALYSIS

Under Neb. Rev. Stat. § 42-365 (Reissue 1998), the purpose of a property division is to distribute the marital assets equitably between the parties. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002). The marital estate generally does not include property acquired by one of the parties through gift or inheritance. *Van Newkirk*

*v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). The polestar in property division matters is fairness and reasonableness as determined by the facts of each case. *Gibilisco v. Gibilisco*, *supra*.

We first consider whether the trial court properly traced as nonmarital property \$214,659.52 in land purchase payments to Richard's inherited funds. Kimberly's argument on this issue is flawed because it appears to rest largely on a proposition from our opinion in *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), that was later disapproved by the Nebraska Supreme Court in *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). Kimberly asserts based on *Gerard-Ley* that because Richard deposited this \$214,659.52 into their joint account, there is a presumption that he intended to gift that money, or at least half of it, to her. But to whatever extent *Gerard-Ley* may have announced such a rule, it was clearly disapproved by the Supreme Court in *Schuman v. Schuman*, *supra*. The *Schuman* court reiterated the familiar rule that the burden of proof to show that property is a nonmarital asset remains with the person making the claim. *Schuman* expressly disapproved the language in *Gerard-Ley*, where we said: "[W]hen a husband and wife take title to a property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other . . ." 265 Neb. at 469, 658 N.W.2d at 39.

The Supreme Court in *Schuman* said that to the extent that our holding in *Gerard-Ley* could be interpreted to mean that nonmarital property which during a marriage is titled in joint tenancy cannot be considered as a nonmarital asset during a divorce, such interpretation of our holding was disapproved. The *Schuman* court then held that how inherited property will be considered in determining the division of property must depend upon the facts of the particular case and the equities involved and that if an inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate.

The burden to prove that property is a nonmarital asset remains with the person making the claim. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). Here, the district court found that the \$214,659.52 worth of checks for certain land that were written between September 30, 1994, and November 7, 1997, all followed deposits Richard received from his inheritance between June 30, 1994, and January 12, 1996. Richard testified that the land payments in question were made from these funds from his inheritance, and the district court accepted such evidence of tracing of the land payments back to Richard's inheritance. Therefore, the district court did not abuse its discretion in crediting Richard with \$214,659.52 in nonmarital property.

Next, we turn to the issue of whether the district court abused its discretion by accepting Childears' appraisal of the North Ranch and the South Ranch. We have said that an appellate court will affirm a trial court's valuation of a business if the court finds that the method of valuation used has an acceptable basis. *Olson v. Olson*, 13 Neb. App. 365, 693 N.W.2d 572 (2005). This rule obviously holds true with respect to the valuation of farm and ranch land.

Here, Childears' appraisal clearly has abundant foundation and an acceptable basis. Childears is a certified general appraiser, with nearly 28 years of experience appraising agricultural properties; he does between 20 and 40 appraisals of such per year; and he has substantial education and advanced training as an appraiser. Childears conducted a daylong

visual inspection of the properties and used a “market value” definition of value for the properties. He provided a 78-page summary which details his appraisal of the property. Kimberly’s primary complaint about Childears’ appraisal is that it did not take into account an upward trend in values of similar property, which Kimberly claims exists based on the University of Nebraska-Lincoln extension service publications on real estate. However, Childears explained at trial that while he takes account of these publications and was aware of some increases in value of similar property, he nevertheless based his appraisal on a wide variety of factors, determining that the value he assigned to the Minors’ property was correct. The district court noted that Childears said that the values in those publications were not necessarily representative of the values of the Minors’ ranches because they failed to take account of different soil types in different districts. Clearly, the trial court carefully considered the matter of the valuation of the ranchland. Further, it is notable that Childears was initially selected by Kimberly and Richard to appraise the land. Only after Childears’ appraisal was made did Kimberly seek a second appraisal. Thus, Kimberly’s complaints about the use of Childears’ appraisal by the trial court seem to actually rest on the simple fact that the appraiser she hired on her own came in with a larger valuation. It is clear that the trial court did not abuse its discretion in accepting Childears’ appraisal of the Minors’ property, and this assignment of error is without merit.

Next, we consider whether the district court erred in not requiring Richard to pay Kimberly interest on the \$1 million that he is to pay her in annual installments for the next 16 years. Most importantly, we note that Neb. Rev. Stat. § 45-103 (Reissue 2003) does not mandate that interest be paid on a marital deferred property distribution, and the Supreme Court has said whether to award interest on marital deferred property distribution is in the discretion of the trial court. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995). Our primary concern is that the distribution of the marital assets be equitable, fair, and reasonable. Here, Kimberly was awarded \$1 million cash virtually immediately and \$1 million to be paid over the next 16 years, which means that she will have more than adequate assets by nearly any measure, despite her protest that her award will be devoured due to the ravages of time and inflation. Even at a moderate rate of interest on the first \$1 million, she will have at least \$100,000 at her disposal each year--most of it tax free because it is property division, and without ever spending the first \$1 million. Under all the circumstances, it was well within the discretion of the trial court not to award Kimberly interest on the \$1 million to be paid to her in installments during the next 16 years. Thus, we find no reason to disturb this aspect of the trial court’s award.

Next, we turn to Kimberly’s argument that the district court abused its discretion in awarding her only one-third of the marital estate. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

It is difficult on its face to see how the district court abused its discretion in awarding Kimberly approximately 40 percent of the estate when such an award is clearly in line with the general rule. Further, it is notable that Richard brought \$1,378,498 in nonmarital property into the marriage, which clearly played a material part in the creation of Richard and Kimberly’s substantial net worth of more than \$5 million. While it is undisputed that Kimberly also

contributed substantially to the accumulation of this wealth, her contribution is sufficiently recompensed in the district court's award of \$2 million. Again, the purpose of a property division is to distribute the marital assets equitably between the parties, and here this was done. The division becomes even more reasonable and equitable given the outcome of Richard's cross-appeal, which has the bottom line effect of substantially increasing Kimberly's percentage of the marital estate. As a result, the district court did not abuse its discretion in awarding Kimberly \$2 million from the parties' marital estate--which, as explained below, we find to have been \$4,487,763.

Next, we consider Kimberly's argument that the district court erred in failing to award her alimony. However, we note that the issue of alimony was not included in the pretrial order and was not heard at trial. For purposes of determining whether a pleading states a cause of action, issues set out in the pretrial order supplant those raised in pleadings. *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996). The participants in a pretrial conference are held to have waived questions not there presented. *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 89 N.W.2d 245 (1958). Therefore, by failing to raise the issue of alimony at the pretrial conference and at trial, Kimberly waived that issue. That said, we observe that at Kimberly's age with her education and earning capacity plus the award of marital property, this is really not a case for alimony.

#### *Richard's Cross-Appeal.*

We now turn to Richard's assignments of error. First, Richard argues that certain cattle were purchased with premarital funds from the liquidation of Richard's inherited stock and that therefore such amount should be set off from the marital estate. The trial court noted that the first payment for cattle occurred before any of Richard's inherited stock was liquidated and therefore could not have been made with Richard's nonmarital assets. Having reviewed this finding de novo on the record, we find no error and affirm the trial court in this regard.

However, as we consider the other cattle purchases, we note that the district court issued its decree before our opinion in *Shafer v. Shafer*, 16 Neb. App. 170, 741 N.W.2d 173 (2007), was released. Nonetheless, we apply our reasoning from that case to the matter at hand. In *Shafer*, we said that we viewed the cattle herd when it was an ongoing part of the parties' operation as a single asset--rather than taking a "cow by cow" approach to the tracing issue. There, we determined that the sum of \$59,600, which was attributable to the value of husband's premarital cattle, was to be set aside as husband's separate property, even though it was apparent that through the years the original cattle were long gone. In *Shafer*, we relied on the fact that there had continuously been a cattle herd and a cow-calf operation during the term of the marriage--and the same is true here. In *Shafer*, the value of the premarital cattle was traceable, even though the individual animals the husband had at the time of the marriage were obviously no longer in existence or part of the husband's operation. We relied on the undisputed evidence in *Shafer* that it had been the husband's practice to sell cattle and use the proceeds to purchase additional or replacement cattle. Similarly, here, it was not disputed that Richard's nonmarital proceeds from the liquidation of his inherited stock was used to purchase \$520,751 worth of cattle. Therefore, based on *Shafer, supra*, we reverse the trial court's finding on this matter and order that \$520,751 be set aside from the marital estate in favor of Richard as his separate

property. But, the question remains as to whether doing so should change Kimberly's award from the marital estate.

The trial court found that the value of the net marital estate was \$5,008,514. Subtracting \$520,751 from this amount to reflect the value of Richard's nonmarital asset that was largely responsible for creation of the cattle herd, valued at the time of trial at \$2,926,338, puts the net value of the marital estate at \$4,487,763. Based on the reduced marital estate amount, Kimberly's award of \$2 million thereof is 44.6 percent of the marital estate. This amount falls in the upper range of the one-half to one-third division that is our polestar for determining a spouse's share of the marital estate. Given Kimberly's substantial contributions to the creation of the material estate, we are disinclined to adjust the amount of her award from the marital estate. In short, on this record, we see no reason to disturb the trial court's award to Kimberly, even though Richard has prevailed on his argument regarding the set aside for the cattle herd.

Regarding Richard's claim that he is entitled to \$459,920 for lease payments made from his inherited funds, we find that such payments are not traceable to any readily identifiable asset that is now part of the marital estate. In order for a party to receive credit for an expenditure of nonmarital property, such a party must be able to trace such an expenditure to a readily identifiable asset. See, *McGuire v. McGuire*, 11 Neb. App. 433, 652 N.W.2d 293 (2002); *Grams v. Grams*, 9 Neb. App. 994, 624 N.W.2d 42 (2001). Here, the lease payments are properly viewed as a business expenditure or a cost of doing business. In short, there is no longer a readily identifiable asset with an ascertainable value, and therefore Richard cannot receive any set aside from the marital estate for lease payments.

Richard also claims that \$200,000 should be traced to his inherited funds for a check written for land. However, the evidence does not show that this amount came from Richard's inherited funds. Contrary to Richard's assertions, Kimberly denied that this payment was from Richard's inherited funds and stated instead that it was from a bank loan. Thus, a factual dispute was presented which the trial court resolved against Richard. We cannot say that decision was error. Therefore, the district court did not abuse its discretion in considering this amount as part of the marital estate.

#### CONCLUSION

For the reasons stated above, we affirm the decree of the district court except with regard to its classification of certain cattle, which we have modified based on our opinion in *Shafer v. Shafer, supra*. However, given Kimberly's substantial contribution over many years to the success of the Minors' ranch operation, we determine that no adjustment should be made to the trial court's division of the marital estate even though we have calculated the amount of the marital estate a bit differently than did the trial court. Therefore, we affirm the district court's decree in all respects.

AFFIRMED.