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Court of Appeals of Nebraska.

Lisa R. STADLER, appellee and cross-appellant,
v.
Steven N. STADLER, appellant and
cross-appellee.

No. A-10-1218. | Oct. 11, 2011.

Appeal from the District Court for Kearney County: Stephen R. Illingworth, Judge. Affirmed in part, and in part reversed and remanded with directions.

Attorneys and Law Firms

Mitchel L. Greenwall, of Greenwall Bruner, L.L.C., for appellant.

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IRWIN, CASSEL, and PIRTLE, Judges.

Opinion

IRWIN, Judge.

I. INTRODUCTION

*1 Steven N. Stadler appeals and Lisa R. Stadler cross-appeals from a decree of dissolution entered by the district court, which decree dissolved the parties' marriage, divided the marital assets and debts, awarded Lisa custody of the parties' minor children, and ordered Steven to pay child support, alimony, and a portion of Lisa's attorney fees. On appeal, Steven asserts that the district court erred in failing to award the parties joint custody of the minor children, in determining his parenting time with the children, in calculating the marital

estate, in awarding Lisa a "Grace award," and in awarding Lisa alimony and attorney fees. On cross-appeal, Lisa asserts that the district court erred in valuing certain portions of the marital estate and in calculating Steven's child support obligation.

Upon our review of the record, we find that the district court made numerous mathematical errors in its calculation of the parties' marital estate. As a result of these errors, we remand the matter to the district court to recalculate the value of the parties' marital estate and to redistribute the assets and debts between the parties. In addition, we reverse the district court's determinations concerning Lisa's "Grace award," alimony award, and attorney fees, as the court should reconsider these awards in light of the changes made to the valuation of the marital estate. We affirm the decision of the district court in all other respects.

II. BACKGROUND

Steven and Lisa were married on June 6, 1987. Three children were born of the marriage. The oldest child was born in May 1992, the second child was born in August 1994, and the youngest child was born in July 1997. All three children were minors at the time of the trial.

Throughout the majority of the parties' marriage, Steven has been the primary financial provider for the family. He is employed as a farmer for Stadler Farms, Inc., a family-owned farming operation. Steven also owns an interest in Stadler Farms and in another family-owned farming operation, L & V Stadler, Inc., as a result of gifts of stock given to him by his parents. In addition, Steven is a co-owner and operator of Stadler Brothers Partnership alongside his brother. Stadler Brothers Partnership is also a farming operation.

Lisa has been a stay-at-home mother for a majority of the parties' marriage. She quit her job as an advertising director for a clothing store when she was pregnant with the parties' first child in 1992 and did not return to the workforce until the parties separated in 2007.

On February 27, 2007, Lisa filed a complaint for dissolution of marriage. Lisa specifically asked that the parties' marriage be dissolved; that their marital assets and debts be equitably divided; that she be awarded

custody of their minor children; and that she be awarded child support, alimony, and attorney fees.

On March 19, 2007, Steven filed an answer and cross-complaint for dissolution of marriage. In his cross-complaint, he asked that he be awarded custody of the children.

*2 On March 30, 2007, the district court entered a temporary order awarding Lisa custody of the children pending a trial and subject to Steven's "reasonable and liberal visitation rights." The court ordered Steven to pay child support in the amount of \$1,763 per month. The court also ordered Steven to pay the house payment on the marital home in lieu of temporary alimony and ordered him to pay \$20,000 toward Lisa's attorney fees.

On February 2, 2010, trial was held. The trial continued on February 3. At trial, both parties testified concerning their work histories, their relationships with the children, their contributions to the marriage, their present finances, and their marital property. In addition, the parties presented a great deal of evidence concerning the amount of income Steven derives from his work for the family-owned farming operations and the value of the ownership interest he holds in the three entities.

After the trial, the district court entered a decree of dissolution. The court divided the parties' marital assets and debts; awarded Lisa custody of the children subject to Steven's parenting time; and ordered Steven to pay child support, alimony, and a portion of Lisa's attorney fees.

Steven appeals and Lisa cross-appeals from the decree of dissolution.

III. ASSIGNMENTS OF ERROR

On appeal, Steven assigns six errors. He asserts that the district court erred in failing to award the parties joint custody of the minor children; in determining his parenting time with the children; in calculating the marital estate; in awarding Lisa a "Grace award"; in awarding Lisa alimony in the amount of \$1,250 per month for 120 months; and in ordering him to pay \$23,500 toward Lisa's attorney fees.

On cross-appeal, Lisa assigns three errors. She asserts, renumbered and restated, that the district court erred in

valuing a parcel of land owned by Stadler Brothers Partnership, in including the value of the minor children's bank accounts in its calculation of the marital estate, and in calculating Steven's child support obligation.

IV. ANALYSIS

1. STANDARD OF REVIEW

An appellate court's review in an action for dissolution of marriage is 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 custody, child support, division of property, alimony, and attorney fees. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Adams v. Adams*, 13 Neb.App. 276, 691 N.W.2d 541 (2005).

2. STEVEN'S APPEAL

(a) Custody

In Steven's cross-complaint for dissolution of marriage, he asked that he be awarded sole custody of the parties' children. Steven continued to ask for sole custody through the time of his deposition, which was held 7 or 8 months prior to trial. However, 3 or 4 months prior to the trial, Steven decided he wanted to share joint custody of the children with Lisa. At trial, Lisa indicated that she had not been informed until that day that Steven had changed his mind and was now asking for joint custody of the children. Lisa testified that she did not believe joint custody was in the children's best interests because the children rely on the structure and organization she provides in their lives and because she is concerned that Steven would not effectively communicate with her about the children.

*3 In the decree, the district court awarded Lisa sole custody of the children. The court indicated that it did not consider joint custody because Steven had failed to provide Lisa with sufficient notice of his request. In addition, the court indicated that, even if joint custody was a consideration, it believed that the custody arrangement set out in the temporary order, naming Lisa as the sole custodial parent, had been working well for the parties and for the children.

On appeal, Steven argues that the court erred in failing to award the parties joint custody of the children. He asserts that even though Lisa did not receive much notice of his request for joint custody, she had an adequate opportunity to present evidence opposing his request. In addition, he argues that there was sufficient evidence presented demonstrating that the parties work well together for the benefit of their children and that a joint custody arrangement would be in the children's best interests. Upon our review of the record, we do not find that the court abused its discretion in failing to consider joint custody or in awarding Lisa sole custody of the children.

Under Neb.Rev.Stat. § 42-364(3) (Reissue 2008), the court may place custody of minor children with both parents on a joint legal or physical custody basis, or both, when both parents agree to such or if the court specifically finds that joint custody is in the best interests of the minor children regardless of parental agreement or consent. When making custody determinations under § 42-364(3), if both parties do not agree, the court can award joint custody only if it holds a hearing and makes the required finding that joint custody is in the best interests of the children. See *Kay v. Ludwig*, 12 Neb.App. 868, 686 N.W.2d 619 (2004). The parties did not agree to joint custody—Lisa sought sole custody of the children. As such, according to the language in § 42-364(3), the court could only consider awarding joint custody to the parties if it held a hearing on the issue and determined that joint custody was in the children's best interests.

In the decree, the district court indicated that it could not award joint custody because it had not held a full hearing on the issue. The district court found that Steven did not give adequate notice about his request for joint custody and that, as a result, Lisa did not have a reasonable opportunity to oppose the request. In his brief on appeal, Steven argues that the issue of joint custody was adequately addressed during the trial. In support of this assertion, Steven points to testimony from both he and Lisa concerning their views on the joint custody issue.

The Nebraska Supreme Court has held that a hearing to determine whether joint custody is in the children's best interests when the parents do not agree on a joint custodial arrangement must be exercised in a manner consistent with due process requirements. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). Such requirements include timely notice, a reasonable opportunity to refute or defend against a charge or accusation, and a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation. *Id.* The Supreme Court has also held that when one of the parties in a marital dissolution action has requested joint custody of the parties' children, the other party has clear notice that this custody arrangement will be an issue at trial. See *id.*

*4 Here, Steven and Lisa both requested sole custody of the children in their complaints for dissolution of marriage. Steven testified that he changed his mind about his request for sole custody approximately 3 or 4 months prior to trial; however, he did not inform Lisa of this change of heart until the day of trial. As a result, Lisa did not have notice of Steven's desire for joint custody until she arrived at court for trial. Clearly, Lisa did not receive "timely notice." And, although she was able to testify concerning her opposition to a joint custody arrangement, she was not given the opportunity to prepare or present any additional evidence on the topic of joint custody. The Supreme Court has indicated that the factual inquiry for awarding joint custody is substantially different from that for an award of sole custody. See *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010). As a result, a party must receive adequate due process in order to adequately prepare for a hearing specifically involving joint custody.

Because Steven did not provide adequate notice to Lisa about his intent to request joint custody of the children, we do not find that the district court erred in failing to consider joint custody. Moreover, we do not find that the court abused its discretion in awarding Lisa sole custody of the children. The majority of the evidence presented at trial revealed that the children were thriving under the temporary custody order which named Lisa as their custodial parent. The children had adjusted to the situation, and Lisa testified that she did not believe any change in the status quo would be in the best interests of the children. Steven did not provide any persuasive testimony to demonstrate why a change in the temporary custody arrangement would be in the children's best interests. Based on the evidence presented, we affirm the

order of the district court awarding Lisa sole custody of the parties' three children.

(b) Parenting Time

In the decree, the district court awarded Steven parenting time with the minor children to include, at a minimum, alternating weekends, 8 weeks during the summer, and various holidays. Steven argues that the district court erred in determining his parenting time. He asserts that the parenting time awarded to him in the decree is actually less than the parenting time he was provided from the time of the parties' separation in March 2007 through the time of trial. During that time, Steven and the children spent Wednesday nights together each week in addition to alternating weekends. In support of his argument, Steven points to testimony by Lisa that the parenting time schedule used prior to trial was appropriate and what the children wanted. Upon our review of the record, we cannot say that the district court abused its discretion in determining Steven's parenting time.

The temporary order entered by the district court in March 2007 granted Lisa custody of the parties' children, but did not order any specific parenting time between Steven and the children. The evidence presented at trial revealed that Steven and Lisa agreed on and implemented their own visitation schedule. The children visited their father every other weekend and on Wednesday nights after school. In addition, Lisa and Steven were able to "work out" the holiday and summer visitation schedule together. In fact, one year, Steven was able to take the children with him on vacation over the Christmas and New Year's holidays.

*5 Lisa testified that she has always granted Steven's requests to have parenting time with the children and indicated that she is very flexible with scheduling such parenting time. Lisa testified that she intended on keeping the same visitation schedule after trial because "it works" and is what the children want. She also testified that anytime Steven wants more time with the children, all he has to do is ask her.

Steven also testified that he and Lisa were able to agree

on a visitation schedule prior to the trial. He indicated that the parties were able to accommodate each other in terms of scheduling parenting time and that they both have the children's best interests in mind when working together on any scheduling issues. Steven also testified that he would like to be able to see the children as much as possible.

Based on our reading of the parties' testimony, it appears that Steven and Lisa are committed to working together to ensure that their children have adequate time with each parent. They have the children's best interests in mind, and they were able to cooperate and agree upon an appropriate visitation schedule for the 3 years between their separation and the time of trial. Our understanding of the district court's decision concerning Steven's parenting time is that the court included in the decree only the minimum amount of visitation between Steven and the children, allowing for the parties to continue making their own decisions about any additional visitation time. Because the parties each indicated an ability to continue to cooperate on the issue of Steven's visitation, we cannot say that the court abused its discretion in deciding to order only the minimum amount of visitation between Steven and the children.

(c) Calculation of Marital Estate

Steven alleges that the district court made multiple mathematical errors in calculating the parties' marital estate. Steven argues that the mathematical errors significantly affect the district court's property division. We agree.

The district court's calculations for the net marital estate contain significant mathematical errors. According to the numbers utilized by the district court in its calculations, the court undervalued the marital assets awarded to Lisa by \$10,000. The court's calculations appear as follows in the decree:

Household Items

\$18,123.00

Checking and Savings Accounts	\$1,560.78
Automobiles	\$11,400.00
Life Insurance/Retirement Plans	\$62,560.17
Total Value of Marital Property	<hr/> \$83,643.95

According to our math, Lisa was actually awarded marital property totaling \$93,643.95.

The district court made another mathematical error in calculating the marital property awarded to Steven. According to the numbers utilized by the district court in its calculations, the court undervalued the marital assets

awarded to Steven by over \$200,000. The court's calculations appear as follows in the decree:

Household Items	\$9,067.00
Checking and Savings Accounts	\$4,130.26
Real Estate (Marital Home)	\$440,000.00
Interest in Stadler Bros. Partnership	\$262,009.42
Total Value of Marital Property	<hr/> \$479,406.68

*6 According to our math, Steven was actually awarded marital property totaling \$715,206.68.

Because of the mathematical errors, the district court significantly undervalued the parties' marital estate. The errors affected the court's calculation of the net value of property awarded to each party and affected the court's

calculation of an equalization payment awarded to Lisa. We conclude that it is necessary to remand the matter to the district court with instructions to recalculate the marital estate and to reassess the division of property and the equalization payment in light of the recalculations.

(d) “Grace Award”

After the district court calculated the marital estate and divided the parties’ marital assets and debts, it determined that a “Grace award” was “merited on equitable principles.” The court awarded Lisa a “Grace award” of \$200,000. On appeal, Steven argues that the district court erred in determining that any “Grace award” was warranted under the facts of this case. Because we have determined that it is necessary to remand the matter to the district court to recalculate the marital estate, we reverse the district court’s decision concerning the “Grace award.”

A “Grace award” has become a common term of art in dissolution cases, particularly involving farms and ranches, and it is derived from the Supreme Court’s opinion in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). A “Grace award” is a device to fairly and reasonably divide marital estates where the prime asset in contention is one spouse’s gifted or inherited stock or property in a family agriculture organization. *Walker v. Walker*, 9 Neb.App. 834, 622 N.W.2d 410 (2001). The Supreme Court has described a “Grace award” as a cash award as compensation for the inadequacy of the marital estate. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002).

In the decree, the district court indicated that a “Grace award” is warranted in this case because “[n]o arguments can change the facts that without a “Grace” award [Lisa] would receive about twenty-two [percent] of property accumulated over the course of the marriage. She would be receiving about twenty-two percent [] of about \$878,000.00 and [Steven] the rest.” The district court clearly based its decision to award Lisa a \$200,000 “Grace award” on its calculation of the parties’ nonmarital assets and the parties’ marital estate. However, as we discussed above, the district court made significant mathematical errors in its calculation of the value of the marital estate and we determined that it is appropriate to remand the matter to the district court for a recalculation of the parties’ marital estate.

In light of our decision to remand the matter for a recalculation of the marital estate, we reverse the district court’s decision to award Lisa a “Grace award” of \$200,000 and direct the court to reconsider the “Grace award” in light of the changed circumstances resulting from the recalculation of the value of the marital estate.

(e) Alimony and Attorney Fees

*7 In the decree, the district court ordered Steven to pay Lisa alimony in the amount of \$1,250 per month for a period of 120 months and to pay \$23,500 toward Lisa’s attorney fees. On appeal, Steven argues that such awards are an abuse of discretion. Because we have determined that it is necessary to remand the matter to the district court to recalculate the marital estate, we also reverse the district court’s decisions concerning alimony and attorney fees.

We recognize that the district court’s alimony award and award of attorney fees may change given the court’s adjustments to the value of the marital estate and, ultimately, to the property division. The adjustments made by the district court may alter the equities involved in the award of alimony because such an award is intricately tied to the relative financial circumstances of each party as well as to the general equities of each situation. See Neb.Rev.Stat. § 42–365 (Reissue 2008). See, also, *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). Similarly, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995). Thus, we also reverse the district court’s awards of alimony and attorney fees. We specifically do not find that the district court abused its discretion in entering these awards; rather, we simply direct the district court to reconsider the issues of alimony and attorney fees in light of the changed circumstances resulting from the recalculation of the value of the marital estate.

3. LISA’S CROSS-APPEAL

(a) Valuation of “Eddy’s Quarter”

Stadler Brothers Partnership owns 160 acres of land, which is referred to in the record as “Eddy’s Quarter.” The district court determined the value of Steven’s interest in Eddy’s Quarter to be \$180,000. On appeal, Lisa asserts that the district court erred in its valuation of Eddy’s Quarter. She argues that the court should have valued the land at \$258,000 pursuant to the testimony of a real estate appraiser who appraised the land. Upon our de

novo review of the record, we find that Lisa's assertion has no merit.

The parties presented conflicting testimony concerning the value of Eddy's Quarter. Lisa presented the testimony of a certified real estate appraiser, who testified that the value of Steven's interest in the land is \$258,000. He testified that he calculated the value of the land and then divided that value in half to determine Steven's interest. To the contrary, Steven testified that the value of his interest in Eddy's Quarter is only \$180,000. He testified that based upon the amount that he and his brother paid for the land and the possible uses of the land, he believed the land was worth much less than the appraiser's appraised value. Steven also argues that he and his brother hold the parcel of land as tenants in common and that this tenancy affects the value of his interest.

***8** In a review de novo on the record, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). There is sufficient evidence in the record to support the district court's valuation of Eddy's Quarter at \$180,000. Although Lisa presented testimony in opposition to this valuation, the district court clearly accepted Steven's testimony in this regard, and we do not find that the court's decision was an abuse of discretion.

(b) Inclusion of College Savings Plans in Marital Estate

In the decree, the district court awarded Lisa the value of 10 separate retirement and investment accounts. Six of these accounts were designated as college savings plans for the parties' three children. The college savings plans total \$13,042.15. On appeal, Lisa argues that the value of these college savings plans should not have been treated as marital property or included in the marital estate because the accounts are the property of the parties' children. Upon our review of the record, we find that Lisa's assertion has no merit.

At trial, Lisa asked that she be awarded all of the retirement and investment accounts, including the accounts designated as the children's college savings plans. She indicated that she wished to manage the

college savings plans on behalf of the children.

It is apparent from the record that although the accounts at issue are designated as college savings plans for the benefit of the parties' children, the accounts were funded, owned, and controlled by the parties. There was no evidence presented that the accounts were restricted such that the money in the accounts could only be withdrawn for the benefit of the children. As such, now that Lisa has been awarded sole ownership of the accounts, she could choose to utilize the funds in the accounts for the benefit of her children or, arguably, for some other purpose. The money is now entirely in her control. Because Lisa possesses such control over the funds, we cannot say that the district court erred in treating the money contained in the accounts as marital property and in including it in the calculation of the marital estate.

(c) Child Support

The district court ordered Steven to pay \$1,345.49 per month in child support. The court based this amount on its calculation of the parties' current incomes. Specifically, the court found that Steven's gross monthly income totals \$6,244.67. The court indicated that in calculating Steven's gross monthly income, it relied on an average of Steven's annual income from 2004 through 2008 as represented on his tax returns and on evidence that he receives additional benefits from his employment, including health insurance, use of a vehicle, automobile insurance, fuel, and utilities. The court found that Lisa's gross monthly income totals \$2,762.75. The court based this finding on Lisa's 2009 income tax return.

***9** On appeal, Lisa alleges that the district court erred in calculating Steven's child support obligation because it erred in calculating Steven's current income. She argues that the court should not have relied on Steven's income tax returns in calculating his income because those returns do not include all of the money Steven has access to as a result of his work for the family farming operations. Upon our review of the record, we conclude that the district court did not abuse its discretion in calculating Steven's current income or in determining his child support obligation.

At trial, there was evidence that Steven is paid only once per year by his employer, Stadler Farms. In order to pay his expenses throughout the year, he borrows money from

Stadler Farms. The amount of money borrowed each year varies, but Steven maintained that any amount of money that is borrowed from Stadler Farms must be repaid with interest because the money is only a loan and not a form of permanent compensation. There was some suggestion that Steven has not been required to repay the majority of the money that he has borrowed over the years, but there was evidence to demonstrate that he is working on repaying his debts.

In her brief to this court, Lisa appears to argue that the district court should have included any amount borrowed from Stadler Farms in Steven's annual income. She indicates that because Steven has ready access to these funds, it would not be fair to disregard the money in calculating his child support obligation.

Contrary to Lisa's arguments, we cannot say that the district court abused its discretion in failing to include the borrowed money in its calculation of Steven's income. There was sufficient evidence presented to demonstrate that the money is merely a loan that must be repaid. Steven should not have to continue to incur a debt in order to be able to pay his child support obligation. Lisa's assertion has no merit.

V. CONCLUSION

Upon our de novo review of the record, we find that the district court made numerous mathematical errors in its calculation of the parties' marital estate. As a result of these errors, we remand the matter to the district court to recalculate the value of the parties' marital estate and to redistribute the assets and debts between the parties. In addition, we reverse the district court's determinations concerning Lisa's "Grace award," alimony award, and attorney fees, as the court should reconsider these awards in light of the changes made to the valuation of the marital estate. We affirm the decision of the district court in all other respects, including the court's decisions as to custody of the parties' children, Steven's parenting time, and Steven's child support obligation.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.