

James LaGrange, Appellant and Cross-Appellee,

v.

Dawn LaGrange, Appellee and Cross-Appellant.

No. A-07-020

Court of Appeals of Nebraska

March 18, 2008

OPINION IS NOT DESIGNATED FOR
PERMANENT PUBLICATION

Severs, Carlson, and Moore, Judges.

**MEMORANDUM OPINION AND JUDGMENT
ON APPEAL**

Sievers, Judge.

James LaGrange and Dawn LaGrange were married a matter of months before they divorced. James appeals from the decision of the district court for Sarpy County. James complains that the district court erred by failing to properly classify, value, and divide the marital estate and by ordering him to repay Dawn for certain payments and expenditures she made on his behalf before their marriage.

**FACTUAL AND PROCEDURAL
BACKGROUND**

James and Dawn met in approximately May 2004, and they were married on July 29, 2005. Before James and Dawn met, in April 1998, Dawn suffered brain damage in a car crash with a drunk driver, and thereafter she had difficulties with her physical health and her speech which negatively affected her ability to work, according to her testimony.

When James and Dawn met, James was Dawn's financial advisor through a company called Primerica, for which he was paid on a commission basis. Once they became romantically involved and then engaged to marry one another, James advised Dawn to use her assets to pay down various debts that he had incurred before their relationship began. James owed \$13,850 to the Navy Federal Credit Union and \$3,100 on a Visa card through the Navy Federal Credit Union. Dawn paid off these debts by liquidating her personal savings and investments. James advised her to do so, stating that when they were married it would improve their financial situation.

Before the marriage, Dawn also made several

purchases for James: \$802 worth of clothing from the Men's Wearhouse, \$500 for a downpayment on a new home that they were to live in once they were married, \$2,224.40 in closing costs on that home, \$3,402.52 for a motorcycle, and \$325 for a motorcycle trailer. James also persuaded Dawn to sell her home in St. Joseph, Missouri, to Ashley Monarch, a friend of Dawn's. To enable Monarch to purchase the home immediately, James persuaded Dawn to pay Monarch \$1,700 to enable Monarch to pay off her apartment lease on which she was still obligated at the time.

Before the marriage, Dawn was working for Systems Service Tech in St. Joseph and earned approximately \$20,000 per year. In order to be with James, Dawn left this job, and at the time of the trial, she was earning at the level of \$14,000 to \$16,000 per year. At the time of the trial, James was earning \$72,565.16 based on his employment with Northrop Grumman as well as benefits received from the Navy.

James and Dawn were married on July 29, 2005, and on January 23, 2006-less than 6 months later-James filed a complaint for the dissolution of the marriage. The trial judge awarded James and Dawn all of their property that they each owned before the marriage. The trial judge also awarded their residence to James, \$25,904.22 to Dawn for contributions she made to James before their marriage, and a \$4,500 equalization payment from James to Dawn. The trial judge did not award any alimony or attorney fees.

James timely appealed, and Dawn cross-appealed. During the pendency of the appeal, James has filed a motion to dismiss Dawn's cross-appeal.

ASSIGNMENTS OF ERROR

James assigns the following errors to the district court: (1) failing to properly define and value the marital estate, (2) ordering James to pay Dawn for gifts and contributions to his debts she made to him prior to their marriage, (3) ordering James to pay Dawn for certain payments she made to third parties, (4) ordering James to pay Dawn for equalization of the debts and assets, and (5) abusing its discretion.

Dawn cross-appeals and assigns error to the district court's failure to award her alimony or attorney fees.

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 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*, 263 Neb. 27, 637 N.W.2d 898 (2002).

In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Schaefer v. Schaefer*, 263 Neb. 785, 642 N.W.2d 792 (2002).

James' assignments of error all revolve around two paragraphs of the district court's order, which we quote:

23. [James] is hereby ordered to pay [Dawn] \$25,904.22 to repay amounts taken from the premarital funds of [Dawn] to pay the following premarital debts of [James]:

- a. Navy Federal Credit Union (\$13,850.00);
- b. Navy Federal Credit Union Visa Card (\$3,100.00);
- c. Alliance Real Estate (\$500);
- d. Homeland Title (\$2,224.40);
- e. Men's Wearhouse (\$802.30) [clothes for James]; f Ashley Monarch (\$1,700);
- g. American National Bank (\$3,402.52) [motorcycle];
- h. Kenneth Lagrange (\$325) [motorcycle trailer.] 24. To equalize the division of debts and assets, [James] is hereby ordered to pay [Dawn] \$4,500.00 within 90 days of the entry of this Decree.

First, we address the \$25,904.22 that the district

court ordered James to repay to Dawn. It is undisputed that in preparation for their marriage, on James' advice, Dawn liquidated certain of her premarital assets in order to pay down James' debts to the Navy Federal Credit Union (items a. & b., *supra*). In preparation for their marriage, Dawn also paid a downpayment of \$500 to Alliance Real Estate (item c, *supra*) for a new house the couple was to live in, paid \$1,700 to Ashley Monarch (item f, *supra*) on James' advice to facilitate the sale of Dawn's old house, and paid \$2,224.40 in closing costs on the new house to Homeland Title (item d., *supra*). Additionally, Dawn bought James a \$3,402.52 motorcycle (item g., *supra*), \$802.30 worth of new clothes (item e., *supra*), and a \$325 motorcycle trailer (item h., *supra*).

James argues that because these contributions occurred before their marriage, they were gifts and should not have been considered part of the marital estate when the district court made its dissolution. James asserts that the district court erred in step one of the process for division of property, classifying the parties' property as marital or nonmarital, arguing that the district court's inclusion of "acts and payments occurring prior to the date of marriage constitutes error in identifying the marital estate."

However, James' argument fails to recognize that "(t)he ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). Here, the district court determined that in order for the division of property to be fair and reasonable, James would be required to repay Dawn for all of her money that she used for his sole benefit before they were married. Undoubtedly, the district court took into account the following facts when making this determination: (1) Dawn contributed more than \$25,000 to James by either paying his debts or buying him things for his use; (2) Dawn made these contributions in contemplation of their marriage; (3) Dawn made these contributions on the advice of James, who was her paid financial advisor before they became romantically involved; (4) Dawn is a woman with impairment due to a brain injury that apparently limits her earning capacity; (5) Dawn's occupations during the timeframe surrounding her relationship with James paid her between \$7 to \$10 per hour, and at the time of the trial, her annual income was approximately \$14,000 per year; (6) James' occupation in recent years has paid him approximately \$30 to \$32 per hour, and at the time of the trial, James' annual income was \$72,565.16; and (7) the couple was married less than 6 months. James' financial position has been and continues to be significantly better than Dawn's. In short, for a good number of reasons, it is inequitable and unreasonable to allow James to better his financial position by some \$25,000 when he was the one advising her to do things which only benefited James while impoverishing Dawn--a woman of limited means and capabilities. In so concluding, we have considered

the entirety of the circumstances including the brevity of the marriage.

Moreover, the doctrine of unjust enrichment supports the majority of the district court's award of \$25,904.22 to Dawn. To recover on a claim of unjust enrichment, the plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff. See *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 618 N.W.2d 429 (2000). Here, James' clearly received and retained money from Dawn, and as we have discussed above, fairness and justice support that the majority of these monies be returned to her.

We note that James asserts that Dawn did not plead unjust enrichment and that therefore such a claim should not be considered on appeal. However, Dawn requested an equitable distribution of their property, which is enough to invoke the doctrine-given that fundamentally unjust enrichment is a core equitable doctrine. See *Schumacher v. Schumacher*, 627 N.W.2d 725 (Minn. App. 2001) (district court erred in requiring unjust enrichment to be pled with specificity when plaintiff was clearly seeking equitable relief). But see *CAM. Concepts, Inc. v. Gwyn*, 206 Or. App. 122, 136 P.3d 60 (2006) (holding that unjust enrichment must be specifically pled). And even though Dawn did not specifically plead unjust enrichment, in a dissolution of marriage case, we are required to perform an equitable analysis of the property division, and unjust enrichment should not be excluded in the calculus of arriving at an equitable result in a dissolution action. For example, in applying the doctrine of unjust enrichment, the court in *Ahrens v. Dye*, 208 Neb. 129, 133, 302 N.W.2d 682, 684 (1981), quoted as follows:

In 66 Am. Jur. 2d *Restitution and Implied Contracts* § 3 at 945 (1973), the author notes that unjust enrichment is "a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated where it is just and equitable that such restitution be made A person is enriched if he has received a benefit, and he is unjustly enriched if the retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another."

Therefore, we reject James' claim that the court cannot consider whether he was unjustly enriched by Dawn's premarital expenditures on his behalf, and the evidence is clear that James was in fact unjustly enriched to the extent hereinafter set forth.

James also complains that the values the district court assigned the motorcycle, motorcycle trailer, and

Men's Wearhouse clothing were based on their purchase price as opposed to the current value of those items. Part of the argument advanced by James is by analogy to the engagement ring cases, citing *Ward v. Ward*, 7 Neb. App. 821, 585 N.W.2d 551 (1998) (engagement ring paid for from husband's premarital property became unconditionally the wife's nonmarital property, citing *Smith v. Smith*, 797 S.W.2d 879 (Mo. App. 1990), and *Winer v. Winer*, 241 N.J. Super. 510, 575 A.2d 518 (1990). We believe that the clothes, the motorcycle, and the trailer are, in fact, analogous to the engagement ring cases, and these purchases fall in the category of premarital gifts. Therefore, we remove the sums of \$802.30, \$3,402.52, and \$325 respectively for these three items, a total of \$4,529.82, from the amount James is ordered to pay Dawn, and it follows that the three items of property, the clothes, the motorcycle, and the motorcycle trailer are James' sole and separate premarital property.

Having reviewed the record de novo, we do not find an abuse of discretion in the district court's order to James to repay Dawn for premarital expenditures she made, although as outlined above we reduced the amount of the repayment to \$21,374.40.

We now turn to the district court's division of the marital property. Equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000).

If the district court used this process, it is not apparent from the record or decree. One of the advantages of the three-step process is that it enables the parties to understand how the trial court divided the property, and of course, in the event of an appeal, it materially facilitates our review of the trial court's decision. Nonetheless, given our de novo review, the relative absence of contested factual questions, and our belief that the parties should not be unnecessarily penalized by delay and additional costs because of the trial court's failure to follow this well established methodology, we shall determine the matter without any remand.

First, James and Dawn each brought separate personal property into their marriage, and each person should retain their nonmarital property. See *Olson v. Olson*, 13 Neb. App. 365, 693 N.W.2d 572 (2005). The evidence is that Dawn possessed the following nonmarital assets and liabilities at the time of the trial, and the following are set over to Dawn as her sole and separate property:

- 2000 Honda Accord
- Mutual fund in the amount of \$3,000
- UMB account in the amount of \$1,500
- UMB credit card debt with a balance of \$2,250
- Refrigerator
- Washer and dryer
- Miscellaneous furniture

The evidence is that James had the following nonmarital assets and liabilities at the time of the trial, and we find that he should retain such property and be solely responsible for the listed debts:

- Mitsubishi Montero
- Navy Federal Credit Union Visa card balance
- Navy Federal Credit Union line of credit balance
- Navy Federal refinance balance
- Citimortgage mortgage
- Citibank mortgage
- Nebraska Furniture Mart balance
- Men's Wearhouse clothing
- All-terrain vehicle
- Motorcycle trailer
- Miscellaneous furniture, washer, and dryer
- Retirement benefits
- Bank of America account
- Suitcase

James and Dawn purchased a house on Bryan Avenue in Bellevue, Nebraska, approximately a month before they were married, but the downpayment of \$500 and substantial closing costs of \$2,224 were paid from Dawn's premarital assets. Additionally, although Dawn wanted to retain her home in St. Joseph, James convinced her to sell it. But, to sell it Dawn had to help the purchaser (her friend Monarch) buy herself out of her rental lease of \$1,700-which Dawn provided. James complains that the district court considered this house marital property even though it was bought before the marriage. Remembering that the house was purchased before the marriage, using exclusively Dawn's money, we tend to agree with James that the house is not marital property. However, we will not disturb the award of the house to James because to the extent that there was any

equity in it, such was apparently awarded to Dawn via the \$4,500 equalization payment, and while the trial court did not expressly make this finding as it should have under the three-step process, we think that it is reasonable to surmise that is what the trial court was doing. In any event, upon our de novo review, we conclude that she should have such amount because it was only through the use of her premarital assets that the house was acquired. Thus, any equity should properly be awarded to her.

Should Dawn Be Awarded Alimony or Attorney Fees?

James has made a motion to dismiss Dawn's cross-appeal for alimony and attorney fees. James argues that because Dawn has begun garnishing his wages in order to collect on the judgment of the district court, she has waived her right to appeal from that judgment, which did not grant her alimony or attorney fees.

As a general rule, a party who accepts the benefits of a decree waives the right to prosecute an appeal from it, and the appellate courts have held that a litigant cannot voluntarily accept payment of that part of a judgment that is in his or her favor and thereafter prosecute an appeal from that part of the judgment against him or her. See, *Edwards v. Edwards*, 16 Neb. App. 297 (2008), citing *Harte v. Castetter*, 38 Neb. 571, 57 N.W. 381 (1894), and *Larabee v. Larabee*, 128 Neb. 560, 259 N.W. 520 (1935). However, there are exceptions to that rule where a spouse who accepts payments under the alimony or property settlement provisions of a divorce judgment does not waive the right to appellate review where the spouse's right to the benefits accepted is conceded by the other spouse, the spouse was entitled as a matter of right to alimony or a share of the marital estate such that the outcome of the appeal could have no effect on the right to the payment accepted, or the payment accepted is under a separable award which will not be subject to further review. *Liming v. Liming*, 272 Neb. 534, 723 N.W.2d 89 (2006). Here, whether we find that Dawn is entitled to alimony or attorney fees has no effect on the portion of her property division award from the district court that she collected because the district court awarded her no alimony or attorney fees.

However, after our de novo review, we conclude that Dawn is not entitled to either alimony or attorney fees. 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. *Kosiske v. Kosiske*, 8 Neb. App. 694, 600 N.W.2d 840 (1999). In dividing property upon a dissolution of marriage and in determining alimony, a court should consider four factors: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children and interruption of

personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Id.* Here, we note the particularly short duration of Dawn and James' marriage-6 months-and see it as a primary factor in determining that Dawn is not entitled to alimony. Because of the short duration of the marriage, there was little opportunity for Dawn to develop reliance on James' income, and there was not enough time for significant contributions to be made from one party to another. Further, Dawn was clearly supporting herself before the dissolution of the marriage, and nothing has changed her ability to do so in the future. For these reasons, we do not find that the district court erred in not awarding Dawn alimony.

The division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In our de novo review, where the evidence is in conflict, we will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another. *Thiel v. Thiel*, 230 Neb. 806, 433 N.W.2d 539 (1989). Here, there is nothing in the record suggesting that the trial court erred in not awarding Dawn attorney fees.

CONCLUSION

For the reasons stated above, we affirm the district court's decree of dissolution with regard to the equalization payment that James pay Dawn \$4,500. We modify the decree to provide that in addition to the foregoing payment, Dawn's judgment for expenditure of her premarital assets for James' benefit shall be reduced from \$25,904.22 to \$21,374.40 because of the "gifts" she purchased for James. Dawn shall have a judgment against James in the amount of \$21,374.40. We order that the parties retain their nonmarital property as described above, and we affirm the district court's decree in all other respects.

Affirmed as modified.