IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

SMITH V. SMITH

KRISTIN M. SMITH, APPELLANT,
V.
GERALD H. SMITH, APPELLEE.

Filed December 31, 2012. No. A-11-495.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

James R. Welsh and Christopher P. Welsh, of Welsh & Welsh, P.C., L.L.O., for appellant.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

INBODY, Chief Judge.

I. INTRODUCTION

Kristin M. Smith appeals from the order of the Douglas County District Court dissolving her marriage to Gerald H. Smith (Jerry). Kristin contends that the district court erred in finding that one of Jerry's businesses was premarital property, in finding that the family residence did not increase in value and that she did not contribute to an increase in its value, in its child support calculation, in failing to award her alimony, and in failing to award her attorney fees.

II. STATEMENT OF FACTS

Kristin and Jerry were married in April 2001, and during the marriage, two children were born: a son born in 2003 and a daughter born in 2006. Kristin filed a complaint for dissolution of marriage in February 2009. In May of that year, Kristin was awarded temporary custody of the minor children and Jerry was ordered to pay temporary child support of $1,314.79 per month for the parties' two children and temporary alimony of $1,000 per month. Kristin was also awarded

temporary possession of the family residence, and the court ordered that she was responsible for maintaining the property, including payment of any mortgages and homeowner's insurance incurred during her sole possession of the property.

Trial was held over 3 days in August and November 2010. The parties agreed to matters of custody and visitation, leaving only matters of alimony, child support, and related financial issues such as daycare expenses and income tax exemptions, and the division of property at issue. The parties also agreed that the family residence located on Bennington Road in Omaha, Nebraska, was Jerry's premarital property; however, the parties disagreed as to whether the family residence had increased in value and whether Kristin should be awarded a portion of any increase in value. The parties also sought a determination by the district court as to whether certain businesses owned by Jerry were premarital and, depending on that determination, the division of those assets.

1. FAMILY RESIDENCE

The family residence consisted of two parcels: the first parcel consisted of approximately 16 acres with an additional 10 acres to the west. The property included a ranch-style house with a walkout basement, a 90-year-old barn, a creek running through the property, a machine shed, a chicken coop, corrals, and 100-year-old cottonwood trees. Although the parties agreed the family residence was premarital, Kristin contended that the value of the family residence had increased during the parties' marriage and that she was responsible for increasing the value of the family residence and should be awarded a portion of that increase.

Kristin testified that when they were first married, Jerry told her that the family residence was valued at approximately $180,000. Kristin testified that in her opinion, the current value of the 16 acres upon which the house sits was $500,000, and that she believed the remaining 10 acres were worth $88,000. Thus, in her opinion, the current value of the Bennington property, including both tracts of land totaling approximately 26 acres, was $588,000.

Kristin testified that during the marriage, she started a seasonal pumpkin patch business on the property. To do so, she cleared old car parts out of the barn, cleaned up the property, planted hundreds of flowers turning the property into a "showplace," and sold jams, jellies, apple pies, crafts, and pumpkins out of the barn for about 6 weeks in the fall. Kristin stated that the business started "very slow" with 30 to 40 visitors who happened to drive by to "probably thousands" during the last year of operation, the previous year. Jerry disputed Kristin's testimony that she maintained the family residence and claimed that she basically mowed the lawn and planted flowers while he took care of the majority of issues including reseeding and taking care of damage to trees.

Jerry testified that the value of the family residence at the time of the parties' marriage was about $380,000 and that the property value remained the same at the time of trial. However, in 2010, Jerry listed the value of the family residence as $500,000 on a personal valuation form he completed. Jerry testified that Kristin had let the condition of the family residence deteriorate during the pendency of the proceedings, claiming there were tree limbs on the roof of the residence, weeds and grass standing 2 to 5 feet tall, and approximately 15 to 20 branches ranging from 12 to 24 inches in diameter which had been blown down from windstorms. Kristin disputed Jerry's testimony that she did not take care of the property during the pendency of the dissolution

action, claiming that Jerry removed the equipment she needed to take care of the property such as the skid loader, the tractor with attachments, the "weed eater," brooms, shovels, rakes, and a "Kubota . . . four by four." However, Kristin admitted that the larger equipment such as the tractors and skid loaders were property belonging to one of Jerry's businesses, which equipment was used in the business for a short period of time, then sold at auction.

2. Expert Witness Testimony Regarding Family Residence

Patrick Morrissey of Morrissey Appraisal Services testified that he conducted an appraisal of the family residence located on Bennington Road. In 2009, he was able to conduct a walk-through of the residence and he walked the immediate grounds. In August of that year, Morrissey's appraised value of the property was $390,000. He conducted an updated appraisal in August 2010. During this appraisal, he did not have entry into the home, so he was unable to conduct an interior inspection of the house, but he did view the exterior of the property. Morrissey testified that in his opinion, it appeared the property had been neglected during the past year. He testified:

> [T]he grass in places was waist high or higher. It looked like it had not been cut the entire season. There was a pretty good size branch on top of the roof of the house. There [were] trees . . . that were damaged by wind storms that were not being taken care of or not being removed . . . . [E]verything was just completely overgrown and just no -- no evidence of any maintenance whatsoever.

In August 2010, Morrissey appraised the property at $380,000 with the assumptions that the interior condition of the property was similar to when he viewed it in 2009 and that there was no flooded basement and no damage to the basement finish.

Morrissey also made a determination that the 2001 value of the property was $350,000, making the assumptions that the condition of the property was approximately the same as it was in 2009 and 2010 and that the kitchen was the only upgrade since 2001, which was the information he was given by Jerry's office.

3. Jerry's Businesses

Jerry owns several businesses which the parties agree are premarital: Centaur Electrical Contractors, Inc. (Centaur Electrical), a commercial electrical company that works on the electrical systems of new commercial and existing commercial accounts; Centaur Development Corporation (Centaur Development), a development company that owns real estate and buildings; and Taylor Excavating of Nebraska, Inc. (Taylor Excavating), the second largest excavating company in Omaha. The parties disagree about whether another of Jerry's businesses, Cody Equipment, which buys and sells heavy equipment, is premarital. Additionally, Jerry owns S&N Auto and S&N Trucks. There is no accounting for S&N Auto because it is only used for a dealers' license and tax exempt certificate and everything else, including revenue, would fall under Cody Equipment. Similarly, there is no income generated from S&N Trucks.

Cody Equipment was incorporated in March 2005, under the name "Taylor Machinery, Inc.," and was then renamed "Cody Equipment" in April 2007. Jerry testified that Cody Equipment started out as a division of Taylor Excavating to dispose of excess or broken

equipment. When the business became more active, Jerry incorporated it into Taylor Machinery, which he also called "Heavy Equipment." However, vendors were sending bills to Taylor Excavating when they should have been going to Taylor Machinery/Heavy Equipment, so to clear up the confusion, the corporation was renamed "Cody Equipment" in April 2007.

At the time of the marriage, Jerry owned 100 percent of Taylor Excavating, but at the time of trial, he owned only 80 percent of the business. Likewise, at the time of the marriage, Jerry owned 100 percent of Centaur Electrical, but at the time of trial, he owned 85 percent of that business. Jerry has continually owned 100 percent of Centaur Development, and Jerry owned 100 percent of Cody Equipment at the time of trial. Jerry testified that all of the businesses he owned at the time of trial were owned by him at the time of his marriage to Kristin.

Jerry testified that although the businesses started experiencing a little bit of a downturn beginning in 2000, he did not become really concerned until 2005-06. In 2006-07, Taylor Excavating experienced a loss of over $1 million due, in part, to a loss on a job when the client declared bankruptcy. Then, in 2008, there was a slowdown in commercial construction which resulted in Centaur Electrical experiencing a loss of over $600,000 in 2009. In 2010, Centaur Electrical still lost money, but "it has stabilized." Centaur Development, a holding company for collecting rents, paying insurance on properties, and making payments on properties, has not experienced financial difficulties since 2006, because the rents being paid are by Jerry's other companies. Additionally, Jerry testified that Cody Equipment has not experienced financial difficulties since 2006, but has experienced depreciation, meaning that the equipment owned by the corporation to be sold at auction is not worth what is was when it was purchased.

4. Expert Witness Testimony Regarding Businesses

(a) William Kenedy

William Kenedy, a certified public accountant, testified for Kristin. Kenedy prepared a report dated August 19, 2010, which consists of analysis of the increase in book value of Centaur Electrical, Centaur Development, and Cody Equipment. Kenedy testified that Jerry's share of the increase in value of Centaur Electrical that occurred between 2002 and 2009 was $573,916 because he owned 85 percent of the corporation; the increase in value of Centaur Development from 2001 through 2009 was $1,581,838 and Smith owned 100 percent of that corporation; and the increase in Cody Equipment from 2005 through 2009 was $468,509 and Smith owned 100 percent of that corporation. The total increase in book value for the three entities was $2,725,543, and Jerry's share based on his ownership percentage was $2,624,263. Kenedy assumed that Jerry owned 85 percent of Centaur Electrical throughout the course of the marriage, and he admitted that if Jerry owned 100 percent of the corporation at the time of the marriage, it would increase the premarital value and lower the net increase of the book value during the marriage by about $50,000. Although Kenedy acknowledged that a change in fair market value during the marriage was the appropriate measure for marital dissolution purposes, he could not determine the fair market value of Jerry's businesses because he did not have the proper information to do so.

Kenedy testified that it is commonplace for a company to distribute the funds to the owner, then have the owner loan the funds to the other company in order to create a basis in the

other company for tax purposes and thus maximize the tax benefits of the transaction. That is what exhibit 98 shows that Jerry did with the distributions mentioned at the bottom of page 2 of Kenedy's report. Kenedy stated that Jerry took distributions, but that "obviously he put it into Taylor Excavating." Jerry testified that he was concerned that Kenedy did not include Taylor Excavating in his determinations because the majority of his losses have occurred in that corporation. As of June 30, 2010, Taylor Excavating had a negative equity of $1.3 million.

(b) Bradley Larson

Bradley Larson, a certified public accountant, testified that he calculated the decline in book value of Taylor Excavating from the time of the parties' marriage to December 31, 2009, at approximately $900,000. Additionally, he recalculated the net book value for Centaur Electrical because Jerry owned 100 percent of that company at the time of the parties' marriage, not 85 percent as calculated by Kenedy. This adjustment resulted in an additional $47,800 in the book value at the time of the marriage which then lowers the net increase of the book value during the marriage by that same amount. Larson also testified that he would include a $214,037 decrease in net book value for Cody Equipment because of a 2009 receivable from Jerry which he stated would either need to be recorded as a personal liability of Jerry's or had to be removed from the company's equity. Additionally, he recommended a similar reduction for Taylor Excavating for $363,896 from 2001. Larson testified that if a downward adjustment is not made in the companies' equity, these amounts show up as a personal liability. Larson also came up with a different initial book value for Centaur Development, based upon the figures contained in Jerry's 2000 personal financial statement, and determined that Centaur Development's net book value was $1,964,200, which was substantially higher than the $103,738 listed by Kenedy.

(c) Matt Moyer

Matt Moyer, president of Enterprise Bank, testified that he was responsible for sending a July 6, 2010, demand letter to Taylor Excavating, Cody Equipment, Centaur Electrical, and Jerry individually, for the reason that Jerry was in default on loans due to Enterprise Bank. The principal balance of the loans amounted to $3,417,752.28 as of July 14. As a result of that demand letter, Jerry and his companies have entered into a formal forbearance agreement with Enterprise Bank dated July 14, 2010. Moyer summarized the document as follows:

> [T]he borrower or borrowers have agreed to finish out the rest of the year in their construction business, remit all of the receipts from their customers to the bank. And then at the completion of the construction season, they will sell -- at their own discretion sell all of their assets and liquidate the company and attempt to pay the bank in full on its obligations.

The family residence is also pledged as collateral to Enterprise Bank for the business loans.

(d) Doug White

Doug White, a senior commercial lender with Pinnacle Bank, testified that in March 2010, Centaur Electrical had loans with the bank that were past due, so the loans were restructured with a short-term maturity date to become due in October 2010. The loan was for around $450,000 and was a working capital loan secured primarily by Centaur Electrical's

inventory and equipment. According to White, there was minimal equity in Centaur Electrical and Jerry was most likely insolvent.

(e) Dennis McMillen

Dennis McMillen, a certified public accountant, testified that he began doing corporate and personal work for Jerry in January 2005. Specifically, McMillen prepared financial statements and tax returns for Centaur Electrical, Centaur Development, Cody Equipment, and Taylor Excavating. McMillen corroborated Jerry's testimony that Cody Equipment started as an unincorporated division of Taylor Excavating sometime around 2000 or 2001. According to McMillen, on December 31, 2000, Jerry's personal net worth was $2,856,000; however, by June 30, 2010, his personal net worth had decreased to $1,990,000. Additionally, the total debts owed by Jerry and the companies as of December 31, 2009, was approximately $7.5 million.

McMillen testified that Jerry and Kristin's 2008 personal tax return showed an adjusted gross loss of $135,183. This loss was computed as follows: Centaur Electrical had an income of $232,871, Centaur Development had an allowed loss of $25,000, Taylor Excavating had a small taxable income of $45,709, then Taylor Excavating also had a loss carryover allowed of $286,972, and Cody Equipment had a loss of $188,388. Those all netted against the parties' W-2 income to get the $135,000 overall loss. McMillen explained Taylor Excavating's "carryover loss" as follows: "Carryover loss from a basis carryover would mean the losses were greater . . . from a previous year . . . than what the IRS would currently allow. And when [Jerry] put some money into Taylor Excavating in 2008, it freed that loss up and allowed it to be claimed in 2008."

In 2008, Jerry took a distribution from Centaur Electrical and Cody Equipment and, on the same day, put that money into Taylor Excavating, which put money into the business that needed equity and also created a cost basis to allow a loss from an older year to be used--which otherwise the Internal Revenue Service would not allow to be used.

Because the four companies are so interdependent, McMillen testified that it was important to evaluate their effect on each other. In 2008, Taylor Excavating had a profit of $57,000 for income tax purposes because income is frequently recognized when a job is completely finished. However, banks and bonding companies do not allow that because they want profit recognized as a job is done, so under generally accepted accounting principles, Taylor Excavating lost $156,000 in 2008. Similarly, in 2008, Centaur Electrical had net income of $693,815, but had taxable income of $273,966, because some of the work had been performed in the previous year. Additionally, Centaur Electrical had depreciation expense of $74,923. In 2008, Centaur Development showed a loss of $41,944 with depreciation expense of approximately $72,000. In 2008, Cody Equipment showed a taxable loss of $188,388 and, pursuant to generally accepted accounting principles, Cody Equipment showed a loss of $178,388. This difference arose because, for income tax purposes, income is recognized when Cody received the money; whereas for generally accepted accounting principles, income is recognized when the business sends an invoice.

McMillen testified that because the four companies are so interdependent, by conducting a category of eliminations for intercompany transactions, which eliminates the moneys that the companies owe to each other, a clearer financial picture emerges because the combined

economics of all four companies can be seen as a whole. When the loans between the companies themselves amounting to $3,427,328 are eliminated, the combined retained earnings for all four companies as of December 31, 2009, was $59,856.

5. Kristin's Employment, Jerry's Salary, and Other Testimony

At the time of the parties' marriage, Kristin had a real estate license, but Kristin testified that she let her license expire because the parties agreed that her role was going to be to take care of the parties' children and the property so that Jerry would have more time to devote to developing his businesses. Jerry testified that Kristin did not consult him prior to quitting her job as a real estate agent and that there was no agreement between them regarding what Kristin's duties would be after she quit her real estate job concerning managing the household.

Kristin testified that during the parties' marriage, she did not work outside the home, with the exception of a few part-time jobs and her pumpkin patch business. After the parties' separation, she had been employed doing telephone sales making $11 per hour, but had been laid off when her position was outsourced approximately 6 weeks prior to trial. Although Kristin testified that she had been sending out resumes and been on several interviews and second interviews, she had not received an offer of employment. However, she had been back for a second interview with a financial advising firm. She told them she had a "personal matter" to deal with and had asked for a "week or two." The salary with the financial advising firm would start around $30,000 to $40,000 with the opportunity for increases.

Kristin testified that at the time of trial, Jerry was in arrears approximately $1,400 to $1,600 on his temporary child support obligation and was in arrears approximately $12,000 on his temporary alimony obligation. She further admitted that although the temporary order required her to pay the property taxes and homeowner's insurance on the family residence, she had not done so. Jerry testified that the property taxes currently due were approximately $8,000 and that he paid for 18 months of homeowner's insurance totaling $2,476.72.

In addition to admitting that she resided in the family residence essentially rent free during the 18 months the dissolution proceedings were pending, Kristin admitted she was driving a vehicle for which she did not pay anything to purchase and for which she did not pay for insurance; her only expenses were for maintenance and gas. Kristin also admitted using dealer license plates from one of Jerry's businesses on her vehicle and refused to return them to Jerry, claiming that she could not afford to pay the licensing, taxes, and insurance on the vehicle.

Jerry testified that although he was drawing a salary of approximately $60,000 from Centaur Electrical in 2009, he had to stop drawing a salary in October of that year due to downturns in the business and had to lay off 90 percent of his staff. Jerry went approximately 8 months without drawing a salary, resuming drawing a salary in May or June 2010. At the time of trial, he had rehired about 80 percent of those that he had to lay off. Jerry testified that in his opinion, his personal financial worth in December 2000 was approximately $2.9 million and at the time of trial was approximately $1.5 million.

6. Dissolution Decree

On April 1, 2011, the district court entered the dissolution decree awarding the parties joint legal custody of the parties' minor children with the physical custody placed with Kristin subject to Jerry's visitation rights. Jerry was ordered to pay child support in the amount of $1,170 per month for two children and $825 per month for one child. Kristin was ordered to pay 32 percent of childcare and preschool expenses, and Jerry was ordered to pay 68 percent.

The court found the following were Jerry's nonmarital property and awarded him all interest therein: the family residence located on Bennington Road and Jerry's ownership interest in Taylor Excavating, Centaur Electrical, Centaur Development, and Cody Equipment. The court specifically found that Cody Equipment was a wholly owned subsidiary of Taylor Excavating and was a premarital asset. Other findings by the court are not at issue in this appeal and are not included in our discussion for that reason. Kristin has timely appealed to this court.

III. ASSIGNMENTS OF ERROR

Kristin contends that the district court erred in finding Cody Equipment to be Jerry's premarital property, in finding that the family residence did not increase in value and that she did not contribute to increase its value, in its child support calculation, in failing to award her alimony, and in failing to award her attorney fees.

IV. STANDARD OF REVIEW

In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009); *Titus v. Titus*, 19 Neb. App. 751, 811 N.W.2d 318 (2012). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Patton v. Patton*, 20 Neb. App. 51, 818 N.W.2d 624 (2012); *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009).

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); *Patton v. Patton*, *supra*.

V. ANALYSIS

1. Finding That Cody Equipment Was Premarital Property

Kristin first claims the district court erred in finding that Jerry's business, Cody Equipment, was premarital property.

The burden of proof to show 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); *Nygren v. Nygren*, 14 Neb. App. 1, 704 N.W.2d 257 (2005).

The evidence is undisputed in this case that Cody Equipment was incorporated under the name "Taylor Machinery, Inc.," in March 2005, and the name was changed to Cody Equipment

in April 2007. It is likewise undisputed that Jerry owns 100 percent of the stock in Cody Equipment and that this stock was acquired during the marriage. However, Jerry testified that from January 2000 to March 2005, Taylor Machinery/Cody Equipment began as a subsidiary of Taylor Excavating to dispose of excess or broken equipment. Jerry further testified that when the business became more active, the business was incorporated into Taylor Machinery, which was subsequently renamed "Cody Equipment." According to Jerry, all the businesses that he owned at the time of trial, he also owned at the time of his marriage to Kristin. McMillen corroborated Jerry's testimony that Cody Equipment started as an unincorporated division of Taylor Excavating sometime around 2000 or 2001.

The district court specifically found that Cody Equipment was a wholly owned subsidiary of Taylor Excavating and was a premarital asset. We give weight to the fact that the district court heard and observed the witnesses and accepted Jerry's testimony. Consequently, we find the court's determination that Cody Equipment was Jerry's premarital asset was not an abuse of discretion.

2. Family Residence

Kristin claims the district court erred in failing to find that the family residence had increased in value and in finding that she did not contribute to increase the value of the family residence.

Property acquired by a spouse through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982); *Nygren v. Nygren*, 14 Neb. App. 1, 704 N.W.2d 257 (2005). An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage. *Van Newkirk v. Van Newkirk, supra*; *Nygren v. Nygren, supra*.

There was conflicting evidence regarding the value of the family residence. Kristin testified that Jerry told her that at the time of their marriage, the value of the family residence was about $180,000. She further testified that in her opinion, the current value of the property, including the 16 acres upon which the house sits, was $500,000 and that the remaining 10 acres was worth $88,000. Thus, in her opinion, the current value of the Bennington property, including both tracts of land totaling approximately 26 acres, was $588,000.

Jerry, on the other hand, testified that the value of the family residence at the time of trial was approximately $380,000, about the same as it was worth in 2001. Jerry described the condition of the family residence at the time of trial as being "poor" and testified there were tree limbs on the roof of the residence, weeds and grass standing 2 to 5 feet tall, and approximately 15 to 20 branches ranging from 12 to 24 inches in diameter which had been blown down by windstorms. However, in 2010, Jerry listed the value of the family residence as $500,000 on a personal valuation form he completed.

Morrissey, an appraiser hired by Jerry, appraised the family residence at $390,000 in August 2009; however, in August 2010, he lowered the appraised value to $380,000, because it appeared that in the intervening year, the property had been "neglected." Morrissey testified that

in August 2010, he walked around the grounds, but did not have entry into the home so his updated 2010 appraisal was made pursuant to the assumptions that the interior of the home had not changed since 2009, that there was no flooded basement, and that there was no damage to the basement finish. Morrissey testified to his 2010 observations regarding the exterior of the property: that the grass appeared as though it had not been cut the entire season and was waist high or higher in places, trees damaged by windstorms had not been removed, a "pretty good size branch" remained on top of the roof of the home, and there was "no evidence of any maintenance whatsoever."

Upon our review of the record, it appears that the district court found credible the evidence presented by Jerry--including Morrissey's appraisals and testimony--that the family residence did not increase in value over the course of the marriage and this clearly was within the court's discretion. Furthermore, even if the value of the family residence had increased, Kristin's testimony that she maintained the family residence, cleared old car parts out of the barn, cleaned it up, and planted hundreds of flowers turning the property into a "showplace" was insufficient to establish that she significantly cared for the property enough to include any increase in value to the family residence in the marital estate. This assignment of error is without merit.

3. CHILD SUPPORT

Kristin contends that the district court erred in its child support determination because the court failed to properly include distributions in its determination of Jerry's income. Specifically, Kristin claims that the court erred in excluding evidence of sizable distributions made to Jerry by two of his corporations in 2008 and argues that this court should recalculate Jerry's income for the purposes of child support by averaging his salary over 3 years and including the 2008 distributions. She also claims that the district court erred in attributing a $2,000 earning capacity to her; she claims her earning capacity should be reduced to $1,906 per month.

The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. Neb. Ct. R. § 4-201. In general, child support payments should be set according to the Nebraska Child Support Guidelines. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009); *Citta v. Facka*, 19 Neb. App. 736, 812 N.W.2d 917 (2012). The guidelines provide that in calculating child support, a court must consider the total monthly income of both parties. See, *Citta v. Facka, supra*; Neb. Ct. R. § 4-204.

The guidelines are applied as a rebuttable presumption, and all orders for child support shall be established under the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption. *State ex rel. A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007). A court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. *Id.*

The evidence reflects that in December 2008, a distribution in the amount of $250,000 was made to Jerry from Centaur Development, and that another distribution of $170,000 from Centaur Electrical was made to Jerry. The evidence showed that the 2008 distributions were reinvested by Jerry into Taylor Excavating as paid-in capital. Kristin contends that these distributions should be treated as personal income attributable to Jerry for child support

purposes. Jerry contends that he did not take a large personal distribution, but, rather, transferred money from Centaur Electrical and Centaur Development into another closely held corporation, Taylor Excavating.

McMillen testified that the 2008 distributions from Centaur Electrical and Cody Equipment were put back into Taylor Excavating that same day. The distribution and reinvestment of the money into Taylor Excavating put money into the business that needed equity and created a cost basis to allow a loss from an older year to be used which otherwise the Internal Revenue Service would not allow to be used. This distribution was more akin to a reinvestment, not a dividend. Further, although courts have been willing to pierce the corporate veil for the purpose of determining the party's income for child support when a party is the sole or majority shareholder of a closely held corporation and determines his or her own salary, *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004), in this case, the evidence establishes that Jerry's corporations are in financial trouble. Thus, we cannot say the district court erred in excluding the 2008 distributions in its determination of Jerry's income for child support purposes.

We likewise reject Kristin's claim that the district court erred in attributing a $2,000 earning capacity to her. She contends that her earning capacity should have been calculated at $1,906 per month based on the $11 per hour she was earning after the separation. Under the child support guidelines, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. § 4-204. In the initial determination of child support, earning capacity may be used "'where evidence is presented that the parent is capable of realizing such capacity through reasonable effort.'" *Collins v. Collins*, 19 Neb. App. 529, 533, 808 N.W.2d 905, 910 (2012), quoting *Bandy v. Bandy*, 17 Neb. App. 97, 756 N.W.2d 751 (2008). Kristin testified that she had a second interview with a financial advising firm and that if she was offered and accepted that job, she would earn between $30,000 and $40,000 per year. That salary would make her earning capacity between $2,500 and $3,333 per month, which is higher than the $2,000 per month imputed to her by the district court.

4. ALIMONY

Kristin alleges that the district court erred in failing to award her alimony.

Neb. Rev. Stat. § 42-365 (Reissue 2008) provides, in part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property 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, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

In addition to the specific criteria listed in § 42-365, in dividing property and considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Titus v. Titus*, 19 Neb. App. 751, 811 N.W.2d 318 (2012). Alimony

should not be used to equalize the incomes of the parties or to punish one of the parties. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004); *Titus v. Titus*, *supra*. However, 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); *Titus v. Titus*, *supra*. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008); *Titus v. Titus*, *supra*.

Kristin and Jerry had been married for almost 8 years at the time that Kristin filed the complaint for dissolution of marriage. Although Kristin testified she gave up a career as a real estate agent in order to care for the parties' home and children, the evidence also established that she had a promising opportunity for employment at a financial advising firm at a starting salary of $30,000 to $40,000 with the potential for increases. Additionally, Kristin had been living in the family residence rent free since filing the complaint for dissolution in February 2009, and she failed to pay approximately $8,000 in property taxes and $2,476.72 in homeowner's insurance as ordered by the court. Further, although Jerry's income generally averages between $50,000 and $60,000 per year, the evidence established that Jerry's four businesses were having serious financial difficulties.

Kristin was awarded temporary alimony of $1,000 per month from April 2009 until final disposition in the case was entered 2 years later in April 2011. We note that although Kristin testified that Jerry was approximately $12,000 in arrears on his temporary alimony obligation at the time of trial, the Nebraska Supreme Court has held that "[i]nstallments of alimony ordinarily become vested as they accrue, and past-due installments become final judgments, which courts have no authority to cancel or reduce." *Bowers v. Lens*, 264 Neb. 465, 470-71, 648 N.W.2d 294, 299 (2002). The decree specifically provides that the temporary alimony arrearages are preserved in the decree and were ordered to be paid forthwith. Thus, although Kristin was not awarded any permanent alimony, Jerry is still responsible for paying Kristin the delinquent amounts of temporary alimony he owes her.

In sum, for the aforementioned reasons, including the facts that Kristin has already been awarded temporary alimony for a period of 2 years, the marriage was one of relatively short duration, Kristin has the ability to engage in gainful employment and, in fact, has a promising career opportunity, we find that the district court did not abuse its discretion in denying her request for permanent alimony.

5. Attorney Fees

Kristin contends that the district court erred in failing to award her attorney fees. In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). Having reviewed the record de novo, we simply cannot say that the district court abused its discretion in failing to award Kristin any attorney fees.

VI. CONCLUSION

We find that the assignments of error raised by Kristin are without merit, and therefore, we affirm the decision of the district court.

AFFIRMED.