

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

HARLEY LEE EVERETT,

Petitioner,

vs.

KATHLEEN CLAIRE EVERETT,

Respondent.

Case No. CI01-48

ORDER AMENDING DECREE

DATE OF HEARING: March 4, 2002.

DATE OF RENDITION: March 13, 2002.

DATE OF ENTRY: Court clerk's file-stamp date, per § 25-1301(3).

APPEARANCES:

For petitioner:

Forrest F. Peetz without petitioner.

For respondent:

Kathleen K. Rockey initially without respondent, however respondent later arrived during arguments.

SUBJECT OF ORDER: Petitioner's motion for new trial.

PROCEEDINGS: See journal entry filed March 5, 2002.

FINDINGS: The court finds and concludes that:

1. The petitioner timely filed his motion for new trial. However, upon argument it became clear that the petitioner does not really desire a new trial. Rather, the petitioner endeavored to convince this court that it ought to alter or amend the judgment in certain respects. In this regard, the motion should be construed as a motion to alter or amend the judgment, which is now expressly authorized by statute in manner and effect similar to a motion for new trial. NEB. REV. STAT. §§ 25-1329 and 25-1912(3) (Cum. Supp. 2000).

2. The petitioner sought reconsideration of the decree in three respects. First, he asserted that the court erred in utilizing an interest rate greater than the statutory judgment rate in paragraphs 14C and 14E. A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is

recoverable as a matter of right. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994); *Kullbom v. Kullbom*, 215 Neb. 148, 337 N.W.2d 731 (1983); *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975).

3. After review of the above authorities, the court concludes that it should not have ordered the amount in paragraph 14C to be paid in installments, and should have provided for interest at the judgment rate. The decree should be amended accordingly.

4. The petitioner next claimed that the court erred in requiring the petitioner to pay all medical and other related expenses not covered by health insurance. Guideline O of the Nebraska Child Support Guidelines states that “the court may apportion all nonreimbursed children’s health care costs between the parents according to the same formula used to determine each parent’s share of support.” The Appendix “B” attached to the decree shows that 100% of the children’s support is attributable to petitioner’s earnings and that 0% is attributable to the respondent’s earnings. Although in other respects the calculations on Appendix “B” differ slightly from the worksheet attached to the pretrial order, the percentage contributions are exactly the same. The court’s order implements Guideline O. The decree should not be amended as to this matter.

5. Finally, the petitioner asserted that the court erred in awarding alimony for 21 years following dissolution of a 14-year marriage. However, the actual argument was more finely crafted. The petitioner argued that the court erred in considering the respondent’s partial disability from a pre-marital automobile accident, even if the condition worsened during the marriage, because the respondent obtained a premarital settlement against the tortfeasor which has been allocated as premarital property. The petitioner asserted that consideration of such disability would constitute a double recovery by the respondent for the injury.

6. Although discussed in the context of subrogation, the equitable principles relating to a “full recovery” aid this court’s similar analysis of the equitable claims of the parties. *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998); *Neumann v.*

American Family Ins., 5 Neb. App. 704, 563 N.W.2d 791 (1997); *Motor Club Ins. Assn. v. Bartunek*, 3 Neb. App. 292, 526 N.W.2d 238 (1995); *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994); *Shelter Ins. Co. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993).

7. The evidence shows that the respondent settled her tort claim and no jury verdict issued. The evidence persuades the court that the disability has worsened during the marriage. That deterioration limits the respondent's ability to engage in employment activities to a greater extent than her condition permitted at the time of marriage. The deterioration also exceeds the type of change that the respondent reasonably anticipated at the time of the settlement.

8. The petitioner joined in a calculation of income, which considered respondent's earning capacity, for child support calculation purposes at the time of the pretrial conference. That calculation, showing no income for respondent, was incorporated in the pretrial order. None of the evidence regarding the respondent's situation persuades this court that the respondent possesses any substantial employment skills or any real ability to earn her own way. This court concludes that the rather modest monthly alimony award does not constitute a double recovery and that the length of the payments is not excessive under the circumstances.

9. The petitioner's motion, construed as a motion to alter or amend the judgment, should be granted to the extent of the stated relief and otherwise denied.

ORDER: IT IS THEREFORE ORDERED that:

1. The petitioner's motion for new trial, construed as a motion to alter or amend the judgment, is granted to the extent of the relief set forth below and is otherwise denied.

2. The following is substituted for paragraph 14 of the decree, which as now amended provides:

14. PREMARITAL PROPERTY:

a. The respondent provided compelling evidence to trace \$20,000.00 of premarital property paid over into the possession of the

petitioner. At the time of transfer, the transaction was intended as a loan and not as a gift. After the marriage, the property was converted from a loan into an investment in cattle that were subsequently liquidated and the proceeds utilized in the purchase of real estate. The respondent's evidence as to the other \$10,000.00 that was placed into a certificate of deposit is wholly unsatisfactory as to the ultimate disposition thereof.

b. The petitioner's evidence as to his premarital property persuades the court that the petitioner brought at least \$5,000.00 of net equity in cattle ownership to the marriage. The petitioner's evidence otherwise fails to persuade the court of the proper value attributable to premarital property.

c. The respondent shall have a judgment against the petitioner for premarital property in the amount of \$15,000.00, to be paid in full within 120 days after the date of entry of the decree.

d. Such amounts shall be paid to the court clerk for disbursement to respondent.

e. The judgment shall bear interest from the due date thereof at the judgment rate (5.442% per annum).

3. The reference to "date of entry of the decree" in paragraph 14 as amended means the date of entry of the original decree on February 6, 2002.

4. All other requests or claims for relief by either party are denied. All requests for further attorneys' fees are denied. This is a final order determining the "terminating" motion.

Signed at **O'Neill**, Nebraska, on **March 13, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

- : Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- : Note the decision on the trial docket as: [date of filing] **Signed "Order Amending Decree" entered.**
Done on _____, 20____ by _____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20____ by _____.
- : Enter **the amendment of the** judgment on the judgment record.
Done on _____, 20____ by _____.

BY THE COURT:

William B. Cassel
District Judge

Mailed to: