

SUPREME COURT OF NEBRASKA

Liming v. Liming

272 Neb. 534 (2006) · No. No. S-06-015 · Decided November 3, 2006

SUMMARY

The Nebraska Supreme Court considered whether a former spouse waived appellate review of a marital-property division by accepting a lump-sum alimony payment while the appeal was pending. The court held that acceptance of benefits does not bar appellate review when the accepted benefit is conceded, independently due, or severable and cannot be affected by the appeal. Applying that rule, the court rejected the waiver conclusion but affirmed the judgment because the district court did not abuse its discretion in dividing the marital estate.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Gerrard, J.; Wright, J.; Connolly, J.; Stephan, J.; McCormack, J.; Miller-Lerman, J.
JURISDICTION	Nebraska
DECIDED	November 3, 2006
DOCKET	No. S-06-015
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appellant sought further review of the Nebraska Court of Appeals' summary affirmance of a district court dissolution judgment. The appeal challenged the marital-property division and alimony award, but the Supreme Court addressed whether acceptance of a lump-sum alimony payment waived appellate review of the property division and whether the property division constituted an abuse of discretion.
STANDARD OF REVIEW	Whether waiver under the acceptance-of-benefits rule occurred was reviewed as a question of law independently of the Court of Appeals' determination. The marital-property division was reviewed de novo on the record and affirmed absent an abuse of discretion.
PRECEDENTIAL VALUE	Published, precedential Nebraska Supreme Court opinion
PARTIES	Gail Ann Liming v. Lonnie Lee Liming

TOPICS

dissolution of marriage

equitable distribution

alimony

appellate procedure

family law procedure

PRACTICE AREAS

family law

appellate procedure

QUESTIONS PRESENTED

1. Whether Gail's acceptance and cashing of the \$5,400 lump-sum alimony payment waived her right to appellate review of the separate marital-property division.
2. Whether the district court abused its discretion in dividing the marital estate without an equalization payment, including whether the \$21,000 lottery proceeds should have been included in or credited against the marital estate.

HOLDINGS

1. A spouse who accepts benefits under a divorce judgment does not waive appellate review when the spouse's right to the accepted benefits is conceded, the spouse was entitled to them as a matter of right such that the appeal could not affect that entitlement, or the benefits arise from a severable award not subject to appellate review. Gail's acceptance of the lump-sum alimony payment did not waive her challenge to the separate property division.
2. The district court did not abuse its discretion in awarding the marital residence to Lonnie, Gail's retirement account to Gail, and no equalization payment, even though the district court did not make specific findings concerning the value of several assets or the treatment of the lottery proceeds.

KEY QUOTATIONS

"We hold that a spouse who accepts the benefits of a divorce judgment does not waive the right to appellate review under circumstances 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 the benefits accepted such that the outcome of the appeal could have no effect on the right to those benefits, or the benefits accepted are pursuant to a severable award which will not be subject to appellate review."

"To the extent that Shiers v. Shiers, 240 Neb. 856, 485 N.W.2d 574 (1992), and Giese v. Giese, 243 Neb. 60, 497 N.W.2d 369 (1993), limit the exceptions to the acceptance of benefits rule in a dissolution of marriage action to issues affecting the interests and welfare of children, they were inconsistent with Kassebaum, supra, and are hereby disapproved."

FACTUAL BACKGROUND

Gail and Lonnie Liming were married in 1969 and had no children. Their principal marital assets were Gail's retirement account and a Lincoln home, whose value and indebtedness were disputed; Lonnie also claimed that \$21,000 in lottery proceeds should be offset against the home's equity. The district court awarded the home to Lonnie and the retirement account to Gail without an equalization payment, and awarded Gail \$300 monthly alimony for 18 months. After Lonnie paid the alimony in a \$5,400 lump sum, Gail cashed the payment while pursuing appellate review of the property division.

PROCEDURAL HISTORY

The district court dissolved the parties' marriage, awarded the marital residence to Lonnie and Gail's retirement account to Gail, ordered no equalization payment, and awarded Gail \$300 per month in alimony for 18 months. Gail appealed to the Nebraska Court of Appeals, and Lonnie moved for summary affirmance based on Gail's acceptance of a \$5,400 lump-sum alimony payment. The Court of Appeals granted the motion, but the Nebraska Supreme Court sustained Gail's petition for further review, held that acceptance of the alimony did not waive review of the separate property-division issue, and affirmed the judgment on the merits.

DISPOSITION

affirmed

CASES CITED

- Trimble v. Wescom, 267 Neb. 224, 673 N.W.2d 864 (2004)
- Webster v. Webster, 271 Neb. 788, 716 N.W.2d 47 (2006)
- Giese v. Giese, 243 Neb. 60, 497 N.W.2d 369 (1993)
- Dovel v. School Dist. No. 23, 166 Neb. 548, 90 N.W.2d 58 (1958)
- State ex rel. Heintze v. County of Adams, 162 Neb. 127, 75 N.W.2d 539 (1956)
- Nuss v. Nuss, 148 Neb. 417, 27 N.W.2d 624 (1947)
- Hoesly v. Department of Roads and Irrigation, 143 Neb. 387, 9 N.W.2d 523 (1943) (on rehearing)
- Larabee v. Larabee, 128 Neb. 560, 259 N.W. 520 (1935)
- McKee v. Goodrich, 84 Neb. 479, 121 N.W. 577 (1909)
- Meade Plumbing, Heating & Lighting Co. v. Irwin, 77 Neb. 385, 109 N.W. 391 (1906)
- Weston v. Falk, 66 Neb. 198, 93 N.W. 131 (1903) (on denial of rehearing)
- Harte v. Castetter, 38 Neb. 571, 57 N.W. 381 (1894)
- Saxon v. Cain, 19 Neb. 488, 26 N.W. 385 (1886)
- Gray v. Smith, 17 Neb. 682, 24 N.W. 340 (1885)
- Hamilton County v. Bailey, 12 Neb. 56, 10 N.W. 539 (1881)
- Kassebaum v. Kassebaum, 178 Neb. 812, 135 N.W.2d 704 (1965)
- Reynek v. Reynek, 193 Neb. 404, 227 N.W.2d 578 (1975)
- Hicklin v. Hicklin, 244 Neb. 895, 509 N.W.2d 627 (1994)
- Fletcher v. Fletcher, 227 Neb. 179, 416 N.W.2d 570 (1987)
- Berigan v. Berigan, 194 Neb. 185, 231 N.W.2d 131 (1975)
- Shiers v. Shiers, 240 Neb. 856, 485 N.W.2d 574 (1992)
- Paulsen v. Paulsen, 11 Neb. Ct. App. 362, 650 N.W.2d 497 (2002)
- United States v. Hougham, 364 U.S. 310, 312, 81 S. Ct. 13, 5 L. Ed. 2d 8 (1960)
- Anderson v. Anderson, 72 Wis. 2d 631, 242 N.W.2d 165 (1976)
- Sommers v. Sommers, 660 N.W.2d 586 (N.D. 2003)

- Dietz v. Dietz, 351 Md. 683, 720 A.2d 298 (1998)
- In re Marriage of Fonstein, 17 Cal. 3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976)
- Newman v. Rehr, 263 Neb. 111, 638 N.W.2d 863 (2001)
- Gangwish v. Gangwish, 267 Neb. 901, 678 N.W.2d 503 (2004)
- Gress v. Gress, 271 Neb. 122, 710 N.W.2d 318 (2006)
- Pendleton v. Pendleton, 242 Neb. 675, 496 N.W.2d 499 (1993)