

The Basics of Mental Health Alimony in Divorce

by Michael Brewer

Under Nebraska law, there are two circumstances in which a Nebraska court can order alimony. The first, and most common circumstance is under Neb. Rev. Stat. § 42-365, when the court orders alimony for an amount and duration “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.”¹ The purpose of this type of alimony “is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.”² Further, traditional alimony may be modified for good cause.³ For the purposes of this article, this will be referred to as “traditional alimony.”

The second, and much less common, circumstance in which a Nebraska court may order alimony is “[w]hen a mar-

riage is dissolved and the evidence indicates that either spouse is mentally ill, the court may, at the time of dissolving the marriage or at any time thereafter, make such order for the support and maintenance of such mentally ill person as it may deem necessary and proper, having due regard to the property and income of the parties.”⁴ Further, in contrast to traditional alimony, mental health alimony “may, if necessary, be revised from time to time on like application.”⁵

For the purposes of this article, this type of alimony will be referred to as “mental health alimony,” and it is the much less common circumstance as only a handful of cases involving mental health alimony have been argued at the appellate level in Nebraska. Therefore, the purpose of this article is to review those cases to determine the arguments that can be made on both sides of the issue if you are presented with a case involving mental health alimony.

In *Black v. Black*, the Nebraska Supreme Court examined mental health alimony for the first time.⁶ The *Black* Court found that the standard of review for mental health alimony matters is whether the trial court abused its discretion⁷ and that the payment of mental health alimony “should continue so long as, and only so long as, the mental illness continues,” or until the party receiving mental health alimony remarries.⁸

In *Black*, the parties were married for 28 years and had two children who were the age of majority at the time of trial.⁹ The wife, who was 50, suffered from schizophrenia and had worked full time as a registered nurse for three years during the middle of the marriage.¹⁰ She was hospitalized several times during the marriage due to her inability to care for herself, and she testified that her mental illness caused her to lose her job several times. At the time of the trial, she was working full-time

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as a caretaker for a disabled individual.¹¹ A psychiatrist testified that he believed the wife could take care of herself as long as she continued her treatment, but if she discontinues treatment, this would likely result in her having an inability to work.¹² The psychiatrist also described the wife's condition as chronic and requiring treatment for the rest of her life.¹³ A non-physician therapist testified that it was difficult to be optimistic about the wife's ability to care for herself independently, but if the wife followed her treatment plan, the possibilities of such would be fairly favorable.¹⁴

The district court also examined the parties' incomes and living expenses and found the husband earned about \$2,800 per month with \$800 per month in expenses, and the wife earned about \$500 per month with \$1,200 per month in expenses.¹⁵

Taking the above into account, the district court ordered the husband to pay mental health alimony in the amount \$500 per month for two years, then \$400 per month until either party dies or the wife remarries, and the husband appealed this award.¹⁶ In upholding the amount of the mental health alimony award, the Nebraska Supreme Court found that the wife had a limited ability to support herself due to her mental illness, that she had financial needs above her income, and that the husband had an income above his financial needs.¹⁷ The Court also held that mental health alimony does parallel traditional alimony in some respects, but as to mental health alimony, the "condition which triggers the support" is mental illness. Therefore, in modifying the duration of mental health alimony, the Court stated that mental health alimony should only continue as long as the payee's mental illness continues and they do not remarry.¹⁸

After *Black*, it was over 25 years before the Nebraska Court of Appeals would again examine mental health alimony in *Kearney v. Kearney*.¹⁹ In *Kearney*, the parties were married less

than three years, had a three-year-old child, and the wife suffered from schizophrenia that required hospitalization on many occasions during the marriage.²⁰ The wife received \$530 per month in income from Supplemental Social Security Income, and she had monthly living expenses of \$1,627;²¹ the husband had a net monthly income of approximately \$1,600 per month, and he had monthly living expenses of approximately \$1,500 per month.²² The district court found that the wife was mentally ill and ordered the husband to pay \$350 per month in mental health alimony until the wife "sufficiently recovered from her mental illness, remarried, or died," and the husband appealed.²³

In upholding the amount and duration of the mental health alimony award, the Nebraska Court of Appeals noted that the only previously published case involving mental health alimony was *Black*, and then relied on the *Black* Court reasoning, stating that the wife's mental health limits her ability to earn income, and that her expenses exceed that ability.²⁴ The Court also stated that the husband's income exceeds his monthly expenses, and due to these facts, the district court did not abuse its discretion.²⁵

After *Kearney*, the next time mental health alimony was examined by the Nebraska appellate courts was seven years later in *Ginn v. Ginn*.²⁶ In *Ginn*, the parties were married for nine years, and the wife, who requested mental health alimony, had been employed as a nursing assistant for most of the marriage, but she resigned a month before the divorce was filed because "she had 'an issue being around a group of people that [she did not know]. Odd strangers, being out in crowds.'" ²⁷ After a trial, the district court declined to award the wife mental health alimony, and she appealed.²⁸

On appeal, the Nebraska Court of Appeals upheld the district court's denial of mental health alimony,²⁹ finding "limited and conflicting evidence to demonstrate [the wife] was men-



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tally ill, and as a result of that mental illness, she was unable to work.³⁰ In addition, the *Ginn* Court also stated that both parties “have limited financial resources and ‘struggle’ to keep up with their financial obligations.”³¹

As to the wife’s mental health, she testified that she was unable to work because of her mental illness,³² but the court noted that she did not offer expert testimony as to her diagnosis or to explain her limitations as a result of said diagnosis.³³ The court also stated that other than the wife’s own assertions that she was mentally ill and unable to work because of that mental illness, there was little other evidence to indicate such.³⁴ Due to this, the court found, “Where the evidence does not clearly and affirmatively establish that a spouse is suffering from a mental illness or that such mental illness affects the spouse’s ability to work,” it is not an abuse of discretion to deny awarding mental health alimony.³⁵

Arguably, the *Ginn* Court could have ended its examination of mental health alimony at this point since it appears to have determined that the wife did not prove a mental illness under the evidentiary standard it announced. However, it decided to also discuss the parties’ financial circumstances, and noted that the mental health alimony statute is discretionary—mental health alimony *may* be awarded—but in determining if it should be awarded, the court must examine the parties’ property and income.³⁶

In examining the parties’ incomes, the court found that the husband had a gross monthly income of approximately \$2,300 per month and monthly living expenses of approximately \$4,700 per month, and that the wife had a gross monthly income of approximately \$1,200 per month and living expenses of over \$2,000 per month.³⁷ Using these amounts, the court found that both parties have limited financial resources, and both parties struggle to pay their bills, and as such, the district court did not abuse its discretion in denying the wife’s mental health alimony.³⁸

Mental health alimony was next examined by the Nebraska Supreme Court in *Stephens v. Stephens*.³⁹ In *Stephens*, the parties were married for 25 years,⁴⁰ the husband made approximately \$500,000 per year, and the wife, who had been unable to work for the past 10 years due to her mental illness, received approximately \$1,500 per month in Social Security disability.⁴¹ The district court ordered the husband to pay \$1,000 per month mental health alimony for 120 months. The wife appealed the duration of the mental health alimony, arguing that it should continue until she no longer has a mental illness.⁴² Despite the Court’s own language in *Black* that mental health alimony “‘should continue so long as, and only so long as, the mental illness continues’ or the spouse remarries”,⁴³ the *Stephens* Court, in affirming the district court’s ruling as to the duration of the mental health alimony, stated that nothing in



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the mental health alimony statute requires the duration to be for the period of the mental illness.⁴⁴

Finally, the Nebraska Supreme Court examined mental health alimony one year later in *Onstot v. Onstot*.⁴⁵ In *Onstot*, the parties were married for 14 years when the divorce was filed.⁴⁶ The evidence at trial showed that the wife's monthly income, which consisted of Social Security disability, spousal retirement benefits, and \$1,500 in temporary mental health alimony during the pendency of the case, was approximately \$3,453, and that her monthly living expenses were approximately \$3,700.⁴⁷ The husband's monthly income was not entirely clear, but it was arguably between \$3,850 per month and \$4,300 per month.⁴⁸ Further, his amount of monthly expenses was not determined.⁴⁹ As to the parties' incomes and expenses, the Court stated, "It appears the district court found [the husband's] credible monthly expenses to be less than his monthly income," and the wife's monthly expenses to exceed her monthly income.⁵⁰

As to the wife's mental health, the evidence at trial, provided by a psychologist, showed the wife had been "diagnosed with a mood disorder with some transient psychotic features, paranoia, depression, anxiety, and post-traumatic stress disorder," and that the symptoms from these diagnoses caused multiple hospitalizations.⁵¹

Based on the above, the district court found the wife to be

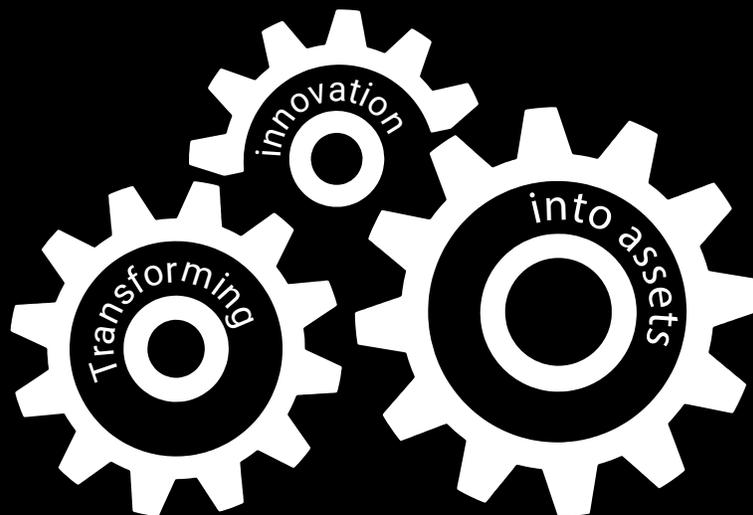
mentally ill and ordered the husband to pay \$700 per month in mental health alimony until either party dies, or until the wife remarries, cohabitates with a significant other, or until she is no longer mentally ill.⁵² The husband appealed the district court's ruling as to the awarding of mental health alimony, but he did not contest whether the wife suffered from a mental illness.⁵³ The wife cross-appealed the condition that the mental health alimony should terminate upon her cohabiting with a significant other.⁵⁴

In upholding the mental health alimony award, the Court stated that the case at bar involved a long-term marriage with a mentally ill spouse who cannot work, said spouse's monthly expenses exceed their income,⁵⁵ and based on the totality of the circumstances, the \$700 per month of mental health alimony was not an abuse of discretion.⁵⁶ The Court did note that the husband's obligation to pay the mental health alimony, combined with his other monthly expenses, may equal his monthly net income, which is concerning.⁵⁷ However, the Court found the wife to be "in an even more difficult financial position" than the husband, and as often happens in divorce, "there is not enough money to satisfy the needs of both parties."⁵⁸ As to the wife's cross-appeal, the Court vacated the provision that the mental health alimony should automatically terminate if she cohabitates with a significant other, and based its holding on previous case law that held such is a public policy matter for the Nebraska Legislature to decide.⁵⁹

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Although there haven't been many appellate cases on this issue, several conclusions can be drawn from the above cases as to the arguments that can be made—and the evidence that needs to be presented—on both sides of the issue if you are presented with a case involving mental health alimony. First, in a case involving mental health alimony, traditional alimony factors (i.e. the duration of the marriage, the raising of children, the interrupting of a career, etc.) are not relevant. Second, in order for mental health alimony to be awarded, a mental illness needs to be proven, and said mental illness must limit that person's ability to work. Third, expert witness testimony will very likely be needed to prove the mental illness and how the mental illness affects the person's ability to work. Fourth, both parties' incomes and expenses need to be proven, with the person seeking mental health alimony having monthly expenses that exceed their monthly income (and arguably, mental health alimony can also be sought if this is not the case since the mental health alimony statute does not require this). On the other side of this argument, a party can argue they do not have the ability to pay mental health alimony if their monthly expenses exceed their monthly income. And finally, if mental health alimony is awarded, it can, and often will, last until the mental illness no longer exists. However, it is possible that the award can be for a term of months. With this in mind, the payee should obviously argue for the former, and the payor should obviously argue for the latter. 

Endnotes

¹ Neb. Rev. Stat. § 42-365.

² *Id.*

³ *Id.*

⁴ Neb. Rev. Stat. § 42-362.

⁵ *Id.*

⁶ *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986).

⁷ *Id.* at 208, 819 (1986).

⁸ *Id.* at 208-09, 820.

⁹ *Id.* at 204, 817.

¹⁰ *Id.* at 204-05, 817-818.

¹¹ *Id.* at 205, 817-818.

¹² *Id.* at 204-05, 817.

¹³ *Id.* at 204-05, 817.

¹⁴ *Id.* at 205, 817.

¹⁵ *Id.* at 205-06, 818.

¹⁶ *Id.* at 206, 818.

¹⁷ *Id.* at 208, 819.

¹⁸ *Id.* at 209, 820.

¹⁹ *Kearney v. Kearney*, 11 Neb.App. 88, 644 N.W.2d 171 (2002).

²⁰ *Id.* at 90, 174.

²¹ *Id.* at 91, 174-75.

²² *Id.* at 93, 176.

²³ *Id.* at 94, 176-77.

²⁴ *Id.* at 98, 179.

²⁵ *Id.*

²⁶ *Ginn v. Ginn*, 17 Neb.App. 451, 764 N.W.2d 889 (2009).

²⁷ *Id.* at 452, 891.

²⁸ *Id.* at 452-53, 891.

²⁹ *Id.* at 457, 894.

³⁰ *Id.* at 454, 892.

³¹ *Id.*

³² *Id.* at 455, 893.

³³ *Id.*

³⁴ *Id.* at 456, 893.

³⁵ *Id.*

³⁶ *Id.* at 456, 894.

³⁷ *Id.* at 457, 894.

³⁸ *Id.*

³⁹ *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017).

⁴⁰ *Id.* at 190, 586.

⁴¹ *Id.*

⁴² *Id.* at 197, 590.

⁴³ *Id.* at 210, 597-98.

⁴⁴ *Id.* at 210, 598. This apparent contradiction can possibly be explained by the large amount of marital property involved in this case, and under Neb. Rev. Stat. § 42-362, property can be considered in determining mental health alimony.

⁴⁵ *Onstot v. Onstot*, 298 Neb. 897, 906 N.W.2d 300 (2018).

⁴⁶ *Id.* at 899, 303.

⁴⁷ *Id.* at 901, 305.

⁴⁸ *Id.* at 901, 305.

⁴⁹ *Id.* at 907, 308.

⁵⁰ *Id.*

⁵¹ *Id.* at 901, 304-05.

⁵² *Id.* at 906, 307.

⁵³ *Id.* at 906, 308.

⁵⁴ *Id.* at 908-09, 309.

⁵⁵ *Id.* at 907, 308.

⁵⁶ *Id.* at 908, 309.

⁵⁷ *Id.* at 908, 308.

⁵⁸ *Id.* at 908, 309.

⁵⁹ *Id.* at 908-09, 309.