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JAN 25 1979

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DAVID JAMES WILSON AND NAOMI MARY WILSON

Upon the Petition of)

DAVID JAMES WILSON,)

Filed January 25, 1979

Appellant,)

And Concerning)

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NAOMI MARY WILSON,)

2-61510

Appellee.)

Appeal from Franklin District Court - L. E. Plummer, Judge.

Petitioner husband appeals and respondent wife cross-appeals from the economic provisions of a dissolution of marriage decree. - Affirmed as modified.

James Coonley II, of Coonley & Coonley, Hampton, for Appellant.

Philip L. Garland, Mason City, for Appellee.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner David James Wilson appeals and respondent Naomi Mary Wilson cross-appeals from the economic portions of the dissolution of marriage decree. Our review is de novo. In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977); rule 4, Rules of Appellate Procedure. However, we do give weight to the trial court's findings of fact, but are not bound by them. Willcoxson, supra; rule 14(f)(7), R. App. P.

In reviewing alimony and property settlements we are guided by the criteria set forth in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), excluding considerations of fault as mandated by In re Marriage of Williams, 199 N.W.2d 339, 344-45 (Iowa 1972). Factors to be considered in analyzing child support awards are contained in In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). Finally, the elements to be considered in determining reasonable attorney fees are set out in In re Marriage of Jennerjohn, 203 N.W.2d 237, 245 (Iowa 1972), and In re Marriage of Jayne, 200 N.W.2d 532, 534 (Iowa 1972). Zoellner, supra. Nevertheless, precedents are of little value and each case must be decided upon its own factual situation. In re Marriage of Romig, 207 N.W.2d 780, 783 (Iowa 1973).

David and Naomi had been married eleven years at the time of trial and were ages 36 and 34 respectively. Two children were born during the marriage, James Bartlett Wilson, born October 4, 1968, and Jeremy Wayne Wilson, born September 25, 1971. David is a successful osteopathic surgeon but testified he has reduced his practice to some extent because of cardiac arrhythmia which was bothering him the year previous to trial. Otherwise, the family is all in good health. Naomi has generally not been employed outside the home since the parties moved to Hampton in January, 1973. However, she did help David when he first opened his practice by answering phones, making out-patient records and by doing some bookkeeping; she also operated a children's clothing store for approximately one year known as "The Mushroom".

David's first complaint is that the trial court erred in setting off to Naomi, as part of the property settlement, the parties' residence valued at between \$90,000 and \$100,000 with a mortgage of \$41,500. He argues that by not ordering the house

sold and the proceeds used to buy a more modest house, the 'dye was cast' insofar that alimony and support payments would out of necessity be high. We disagree.

Because of the type of assets owned by the Wilsons, the greatest values were those associated with David's medical practice and it was only natural that they be set-off to David. The only remaining asset with any appreciable value was the family's residence. In an attempt to equitably divide these assets, the logical alternative was to set-off the house to Naomi. If she elects a more modest setting in which to raise her family, it should be her choice. By keeping the house, she is using her largest single asset to raise their children. The trial court did not err.

Secondly, David argues the trial court erred in awarding Naomi \$500 per month alimony until she becomes deceased or remarries. The evidence shows Naomi has experienced limited employment. In fact, David's testimony indicated that at the time she started "The Mushroom", his preference was that she not work. Her only qualification is for general office secretarial work. Finally, the parties' oldest son, James, suffers from a learning disability known as dyslexia, and it is important that he have some assistance with his education through the home. The trial court did not err in applying the Schantz criteria. We modify the monthly alimony provision, however, to terminate when Naomi becomes deceased, remarries or in any event not later than ten years from the date of the trial court's decree.

Next, David argues the trial court erred in awarding child support of \$300 per child or \$600 per month. Child support, alimony and property settlements must be considered together in evaluating their individual sufficiency. They are neither made nor subject to evaluation in isolation from one another. In re Marriage of McFarland, 239 N.W.2d 175, 179 (Iowa 1976). The trial court also awarded periodic alimony of \$3000 per year for eleven years. As a result, David's monthly obligations are \$500, \$600, and \$250 respectively. Of this, the \$500 and \$250 are deductible to him and includable in Naomi's taxable income. David's monthly income to his corporation is between \$5000 and \$6000; he testified his monthly spendable income is between \$2500 and \$3000. Based upon the family's need, the Zoellner criteria and David's ability to pay, the child support award is not excessive.

Fourthly, David argues the court erred in requiring him to pay the debt owed by Naomi of \$13,100 to his professional corporation or in the alternative he should have received a credit against the lump-sum/installment alimony award. A review of the evidence indicates this argument is without merit. The debt owed by Naomi to a corporation also owned by the Wilsons neither increased nor decreased their total assets. The cancellation of that debt or its assumption by David has no overall effect. There was no error.

Fifth, David argues the lump sum alimony award of \$3000 per year for eleven years was excessive. David received assets with a value of between \$188,000 and \$201,000. Naomi received the equity in the house and the family car for a total of \$59,300. The award of an extra \$33,000 over the next eleven years without interest is not excessive.

Finally, David argues the court erred in requiring him to pay \$4000 towards Naomi's attorney fees. The elements to be considered in determining reasonable fees are contained in Jennerjohn and Jayne, supra. Attorney fees are not recoverable as a matter of right, and any allowance depends upon the wife's financial needs and the ability of the husband to satisfy them. Zoellner, supra at 523. Under these guidelines, there was no error.

In her cross-appeal, Naomi cites several errors. First, she argues the court should have awarded medical insurance as a portion of child support; she argues that even when she starts working, it is doubtful whether she can obtain adequate medical insurance. David should have the option of paying the children's medical bills or providing medical insurance on their behalf and the decree is modified to that extent.

Secondly, Naomi argues the additional award of alimony of \$33,000 payable over eleven years without interest is inadequate in view of the total net worth of the parties. We think the property awarded Naomi was inadequate. Accordingly, the additional alimony that was awarded is increased to \$75000 payable in equal annual installments as provided in the original decree but over 15 years and with no interest. Finally, she argues the court erred in not deeding Horizon Corp. to the children or to David in trust for their use. Although David acknowledged the

purpose of the property was for the benefit of the children, in light of his other responsibilities under the decree as amended, the trial court did not err in giving the property to him.

Naomi has also asked for attorney fees for this appeal. With the increased additional alimony, Naomi will have sufficient funds from which to pay her attorney. Her request for additional fees is denied. Costs taxed to petitioner.

Affirmed as Modified.

All judges concur, except Oxberger, C. J., and Johnson, J., who dissent.

OXBERGER, C. J. (dissenting)

The majority correctly finds that Naomi is entitled to a lump sum award of \$75,000 instead of the \$33,000 awarded by the trial court. By making this award payable over 15 years with no interest, however, the majority substantially reduces its value. Payment over a period of years reduces the investment potential of the award. The denial of interest further decreases its value by failing, even partially, to offset the impact of inflation. To adequately compensate Naomi for her contribution to the marital partnership, the \$75,000 amount should be payable in annual installments with 7% interest.

JOHNSON, J., joins in this dissent.