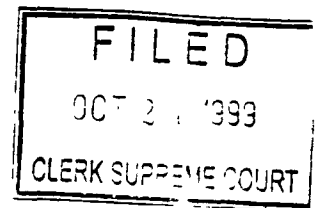


IN THE COURT OF APPEALS OF IOWA

No. 9-472 / 98-0541
Filed October 27, 1999



**IN RE THE MARRIAGE OF DWIGHT ALFRED MASSON and
ELLEN KATE MASSON**

**Upon the Petition of
DWIGHT ALFRED MASSON,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
ELLEN KATE MASSON,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Scott County, Patrick J. Madden,
Judge.

Dwight Masson appeals the trial court's award of alimony to Ellen in a dissolution action. Ellen cross-appeals and claims her total disability and limited assets warrant more alimony than she was awarded by the district court. She also requests an award of appellate attorney fees. **AFFIRMED AS MODIFIED.**

James Bryson Clements, Davenport, for appellant.

**Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for
appellee.**

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Dwight Alfred Masson appeals from the alimony provisions of a dissolution decree which ordered him to pay \$375 per month. Ellen Kate Masson cross-appeals contending the district court's alimony award should be increased to \$500 per month.

I. Factual Background. The parties were married May 6, 1989. It was the second marriage for both. At the time of the marriage, Dwight was thirty-nine years of age, and Ellen was fifty-one. No children were born of the marriage.

Though he was unemployed from time to time during the marriage, Dwight is now employed as the manager of an auto parts store in Detroit, Michigan. He earns a gross salary of \$30,000 per year. Dwight's health is good with the exception of hypertension which is controlled by medication.

Ellen's health was poor prior to the marriage. She suffered from depression, anxiety, asthma, headaches, lumbar degenerative disc disease, and grand mal seizures which, as early as 1987, had impaired her ability to operate a day care facility. By the time of the marriage, these health problems had caused her to limit her day care clientele to only one child. Soon after the marriage, she discontinued day care altogether and was found to be totally disabled by the Social Security Administration. She receives \$862 per month as her social security benefit.

Among the assets Ellen brought into the marriage is a house. Valued at \$83,500, the parties lived in it during the marriage, and used it as collateral to borrow \$30,000 for living expenses. The monthly mortgage and escrow payments on the real

estate total \$640. Dwight owned a condominium at the time of the marriage. He subsequently sold it and used the net proceeds (approximately \$6700) for the parties' living expenses. A \$10,000 retirement account owned by Dwight at the time of the marriage was cashed and used for travel and living expenses during the marriage.

The district court's decree divided the assets and debts of the parties, and ordered Dwight to pay Ellen \$375 per month for alimony "until either of the parties becomes deceased or the respondent [Ellen] remarries, at the earliest of which times such alimony shall terminate." Dwight contends no alimony should have been ordered under the circumstances of this case. Ellen asserts the alimony award should be increased to \$500 per month, and requests an award of attorney fees for the appeal.

II. Standard Of Review. Review in this equity action is de novo. Iowa R. App. P. 4. We give weight to the district court's fact findings, but we are not bound by them. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981).

III. Alimony Award. Alimony is not an absolute right. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The factors to be considered by the court in assessing whether alimony should be awarded, the amount thereof, if any, and its duration are set forth in Iowa Code section 598.21(3). When determining the appropriateness of alimony, the court must consider: (1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other. *In re Marriage of Hitchcock*, 309 N.W.2d 432, 436-37 (Iowa

1981). Where circumstances justify it, alimony may be ordered for a transitional period. *In re Marriage of Smith*, 573 N.W.2d 924, 927 (Iowa 1998).

The provisions of the decree leave Dwight with a negative net worth of \$15,700. This fact is offset by the fact he maintains an earning capacity of at least \$30,000 per year. Though the decree grants Ellen the residential real estate, permitting her to leave the marriage with a net worth of approximately \$50,000, she has no residual earning capacity. Ellen contends her social security income will not be sufficient to pay the residential mortgage payments and her other living expenses unless she receives alimony of \$500 per month from Dwight. Having reviewed the relevant factors and the record in this case, we conclude the district court correctly set the amount of Dwight's monthly alimony obligation at \$375 per month. We decide, however, the term of Dwight's spousal support obligation should be limited to a period of three years. Ellen's severe health problems which form the primary basis for alimony were present prior to the marriage, as evidenced by the fact her period of disability for purposes of social security disability began in 1987. Though she did not actually begin to receive disability benefits until after the marriage, to support her claim for social security, Ellen proved she was totally disabled in 1987, before she married Dwight. Though there is some evidence in the record Ellen's health deteriorated during the marriage, she makes no assertion the progression of any disease or condition should be attributed to Dwight or the marriage.

Under the circumstances, the district court correctly found Ellen is entitled to some alimony. Her health problems have eliminated her earning capacity, and her income will likely be limited to social security benefits. Dwight has employment which gives him the ability to pay some spousal support notwithstanding his negative net worth. Under the circumstances of this case, however, Dwight's alimony obligation should not extend for an indefinite duration. We conclude he should pay \$375 per month during a transitional period of three years. This will allow Ellen time, if she chooses, to market her residential real estate and establish a residence that may be more appropriate for her in terms of size and cost.

IV. Attorney Fees On Appeal. An award of appellate attorney fees is not a matter of right, but such fees are allowable when the relative financial condition of the parties justifies it. *In re Marriage of Erickson*, 228 N.W.2d 57, 59 (Iowa 1975). In this case, Dwight's earning capacity is substantially greater than Ellen's. We direct Dwight pay \$500 for Ellen's attorney fees incurred on this appeal. We do not fix the fee to which her attorney is entitled, but merely limit the amount which Dwight is required to pay *Id.* This attorney fee award shall be assessed against Dwight as part of costs.

AFFIRMED AS MODIFIED.