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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-368 / 89-985

IN RE THE MARRIAGE OF TEDDY W. WALLACE AND SALLY I. WALLACE

Upon the Petition of

TEDDY W. WALLACE,

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Petitioner-Appellant/Cross-Appellee,

And Concerning

SALLY I. WALLACE,

Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Monroe County, Richard J. Vogel, Judge.

Husband appeals economic provisions awarded in dissolution decree. **AFFIRMED.**

Kermit L. Dunahoo and Victoria E. Lawry of the Dunahoo Law Firm, Des Moines, for appellant.

Steven Gardner of Kiple, Kiple, Denefe, Beaver & Gardner, Ottumwa, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Sally and Teddy Wallace were married in 1949. They had five children, and four are surviving. The children have all reached majority. Both parties have ninth grade educations. Mr. Wallace is a self-employed auto mechanic. His annual income has varied over the years from $21,000 to $13,000 and is currently $8,600. However the record reflects that he deals in cash quite often and does not consistently report his earnings.

Mrs. Wallace worked outside the home for a period of two months during the thirty-nine-year marriage. The record indicates that she has serious health problems. She has had eleven surgeries and most recently experienced a broken jaw inflicted upon her by her husband during their separation.

The district court awarded the homestead to Mrs. Wallace. The court also divided the personal property. The court ordered Mr. Wallace to pay lifetime alimony to her in the amount of $600 per month until she is able to draw social security, at which time the alimony shall increase by $100 per month and be decreased by the amount of social security. He appeals and she cross-appeals.

Mr. Wallace challenges the alimony award. He contends that the award is inequitable because Mrs. Wallace received a disproportionate share of the property.

On cross-appeal Mrs. Wallace claims that she is entitled to an additional amount of attorneys fees. She also requests appellate attorney fees.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. **Alimony.** Mr. Wallace contends the trial court erred in ordering him to pay $600 per month in alimony. He raises this issue claiming the property division was inequitable and is such that he will be unable to meet the $600 per month payment.

Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432 (Iowa 1981). When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983).

The record reflects that Mrs. Wallace suffers from significant medical problems. She has undergone eleven surgeries which were necessary for a variety of medical reasons. She has had operations on both of her legs for varicose veins and has considerable difficulty standing. She also suffers from low blood pressure and experiences

blackout spells. Most recently she underwent surgery for a broken jaw, and is still experiencing considerable difficulties with her jaw.

It is worth noting that Mrs. Wallace's jaw injury was inflicted upon her by her husband during their separation. The record further reflects that in all likelihood Mrs. Wallace will need further medical attention with regard to her jaw including the possibility of new dentures and further surgery to remove the wire from her jaw.

Mr. Wallace claims the property division was skewed in favor of Mrs. Wallace and therefore the award of $600 is inequitable. He further contends that because Mrs. Wallace has not attempted to obtain employment she should not receive alimony. We disagree.

We consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Dahl, 418 N.W.2d 358, 359 (Iowa App. 1987); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984). The only substantial difference between the property settlement of the two individuals is the home in which Mrs. Wallace currently resides. The home was valued at $13,000.

The record reflects significant problems with the home including the fact that it does not have a foundation and is sitting on blocks, the windows are in a state of disrepair and the paint on the outside of the home is in poor condition. Mr. Wallace contends that Mrs. Wallace could sell the home and gain 100% of the net proceeds.

However even if Mrs. Wallace could find a buyer for the home it would inevitably be very difficult for her to find any type of permanent residence for $13,000. Furthermore, it would be inequitable, considering Mrs. Wallace's ill health and age, to liquidate the property and require her to find an alternative residence.

Mr. Wallace contends he does not make enough money to pay the $600 per month alimony payment. He bases this argument on recent years' tax returns. However the record reveals and the trial court recognized Mr. Wallace's habit of handling his business dealings on a cash basis. At the time of separation he had $2,500 underneath the seat of his van which his wife took. He, however, removed $2,000 from a savings account.

The importance of the property distribution in relation to determining an alimony award appears most important when the spouse seeking support receives income producing property. In re Marriage of Misol, 445 N.W.2d 411, 413-414 (Iowa App. 1989). In this case, Mrs. Wallace did not receive any income producing property. And while we recognize that neither party has a great deal of money, we find that Mr. Wallace is in a better position to earn a living than Mrs. Wallace.

We base this determination on a finding that during all but two months of this thirty-nine year marriage Mrs. Wallace did not work outside the home. She has a ninth-grade education and has had no formal job training.

The record indicates she stayed at home and cared for the children at the express wish of her husband.

Where assets received by the spouse seeking support are not sufficient to generate income, the marriage is of a long duration, and there is a disparity in earning capacity, the court should grant a substantial amount of alimony. In re Marriage of Hitchcock, 309 N.W.2d 432,438 (Iowa 1974). Mrs. Wallace has no present earning capacity and in view of her background, education and age, there is no reasonable likelihood of achieving any measurable earning capacity. We find the award of $600 per month appropriate.

II. **Attorney Fees.** An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Iowa trial courts are permitted considerable discretion in allowing attorney's fees and costs in dissolution actions. In re Marriage of Morehead, 224 N.W.2d 242, 245 (Iowa 1974).

Because trial court's are granted a significant amount of discretion in awarding attorney fee's we will not disturb the award unless there is an abuse of discretion.

We find there has been no abuse of discretion in this case and affirm the award granted by the trial court. We do however see a necessity for appellate attorney fees. We award Mrs. Wallace $500 towards her appellate attorney fees for she was required to defend this appeal brought by her husband.

AFFIRMED.