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VI. CONCLUSION

The district court's order sustaining Florea's motion to discharge based upon a violation of his statutory right to a speedy trial was clearly erroneous. Accordingly, we sustain the State's exception and, because jeopardy did not attach, we remand the case to the district court for further proceedings.

EXCEPTION SUSTAINED, AND CASE REMANDED FOR FURTHER PROCEEDINGS.

JANET FAE SMITH, APPELLANT, V. ROBERT BYRON SMITH, APPELLEE.

823 N.W.2d 198

Filed October 9, 2012. No. A-12-075.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for dissolution of marriage, an appellate court reviews de novo on the record the trial court's determination of alimony; a determination regarding alimony, however, is initially entrusted to the trial court's discretion and will normally be affirmed in the absence of an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Alimony.** In considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation.
4. ____. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
5. ____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
6. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Terrance A. Poppe and Benjamin D. Kramer, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellant.

Sheri Burkholder and Zachary L. Blackman, Senior Certified Law Student, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Janet Fae Smith appeals an order of the district court for Lancaster County, Nebraska, dissolving her marriage to Robert Byron Smith, distributing the marital estate, and ordering her to pay alimony to Robert. On appeal, Janet challenges only the court's order of alimony. We do not find an abuse of discretion, and we affirm.

II. BACKGROUND

Janet and Robert were married on May 2, 1981. There was one child born of the marriage, but she had reached adulthood before the dissolution of marriage proceedings. At the time of the trial in this matter, Janet was 54 years of age and Robert was 63 years of age.

At trial, the parties agreed on the resolution of most issues. The issues left for the court to decide included Robert's request for alimony, determination of who should pay attorney fees, and disposition of the marital estate.

There was evidence adduced at trial demonstrating that Janet had been employed at her then place of employment for approximately 13 years, and the tax documents presented to the court established that her average annual income was approximately $70,000 per year, which amounts to approximately $5,833 per month. Janet presented an exhibit to the court in which she calculated her average monthly expenses to be approximately $3,322 per month.

There was evidence adduced at trial demonstrating that Robert had been employed at his then place of employment for approximately 6 years, and he testified that he worked 40 hours per week and was paid $10.68 per hour; this amounts to approximately $22,214 per year or $1,851 per month. Robert presented an exhibit to the court in which he calculated his average monthly expenses to be approximately $4,190 per month; of this amount, approximately $1,170 per month was attributed to prescription medication and medical expenses that were not covered by insurance.

Robert also testified that he suffers from a variety of medical conditions, including anxiety disorder, chronic back pain, diabetes, sinusitis, and complications related to a stroke suffered several years prior to trial. Robert testified that health insurance available through his employer was increasing in cost dramatically at the time of trial. Robert acknowledged that he would be eligible for Social Security and Medicare at some point within the next few years, and he also testified that he loved his job and did not intend to retire until he had to.

The parties owned a marital home, a car, a truck, and a variety of bank and retirement accounts. With respect to the marital home, Janet presented evidence valuing the home at approximately $160,000. The evidence indicated that approximately $32,700 of that amount was appropriately set aside to Robert as a premarital asset and that there remained an outstanding mortgage in the amount of approximately $34,662. Robert testified that the monthly mortgage payment on the house was approximately $890 per month.

At trial, Janet testified that she proposed the sale of the marital home and then an equal distribution of the resulting equity. Janet had moved out of the marital home and was living elsewhere at the time of trial, while Robert remained in the home. Robert testified that he wanted to remain in the home, rather than sell it, and that his anxiety disorder was a consideration in that preference. He also testified that he had looked into apartments in the area, but that the monthly rent for an apartment would be as much or more than the monthly mortgage payment on the home.

Robert requested an alimony award of $2,600 per month for 15 years. He testified that such an award would allow him to meet his basic monthly needs and that he is dependent on Janet's income to meet his basic needs. Janet testified that she did not believe an alimony award to Robert was justified in this case. She testified that she believed such an award was not justified because she helped to raise Robert's son from a prior relationship without support from the child's mother and had helped to pay for drug and alcohol counseling for the son, because Robert had been periodically unemployed during the marriage, and because Robert had been physically and verbally

abusive toward her during the marriage. Robert acknowledged having used "filthy" language toward Janet during the marriage and admitted to having been intimidating, but denied physically assaulting her.

In the decree, the court dissolved the parties' marriage, divided the marital estate, ordered each party to pay his or her own attorney fees, and awarded Robert alimony of $1,500 per month for a period of 10 years. With respect to the property division, the court divided the marital estate roughly in half; the court awarded Robert the marital home, as part of his half of the estate, rather than ordering it sold.

With respect to the alimony award, the court specifically found that the alimony award was based on a finding that Janet's annual income is approximately $70,000 and that Robert's annual income is approximately $22,200. The court noted that the parties had been married for 30 years, that there was a significant disparity in the incomes of the parties, that Robert had a need for alimony, and that Janet had the ability to pay.

This appeal followed.

III. ASSIGNMENT OF ERROR

On appeal, Janet's sole assignment of error is that the court erred in ordering her to pay Robert alimony of $1,500 per month for a period of 10 years.

IV. ANALYSIS

Janet's sole assignment of error on appeal is that the district court erred in ordering her to pay Robert alimony of $1,500 per month for a period of 10 years. She argues that the circumstances of the parties and the evidence adduced at trial do not support the amount of alimony or its duration. Upon our review of the record, we cannot say that the court abused its discretion.

[1,2] In an action for dissolution of marriage, an appellate court reviews de novo on the record the trial court's determination of alimony; a determination regarding alimony, however, is initially entrusted to the trial court's discretion and will normally be affirmed in the absence of an abuse of that

discretion. See, *Titus v. Titus*, 19 Neb. App. 751, 811 N.W.2d 318 (2012); *Thompson v. Thompson*, 18 Neb. App. 363, 782 N.W.2d 607 (2010). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Zoubenko v. Zoubenko*, 19 Neb. App. 582, 813 N.W.2d 506 (2012).

[3,4] Neb. Rev. Stat. § 42-365 (Reissue 2008) provides:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other . . . 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.

In addition to the criteria listed in § 42-365, in considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Titus v. Titus, supra*. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Zoubenko v. Zoubenko, supra*.

[5,6] In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id*. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id*.

In the present case, Janet argues that the factors to be considered in assessing alimony weigh in favor of no alimony award and that even if some award is appropriate, the duration of the award entered by the district court is an abuse of discretion. She argues that she was the primary contributor during the course of the marriage, that she helped to care for Robert's child from a previous relationship, and that Robert did not give up any career or educational opportunities during the marriage.

She also argues that Robert will be eligible to receive Social Security and Medicare benefits within a few years.

Janet also argues that the alimony award was improper because there was evidence that she "had to endure physical and verbal abuse at his hands." Brief for appellant at 11. She acknowledges that "the testimony regarding this issue is limited." *Id*. We do not find this a basis for overturning the alimony award. See *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985) (in system of no-fault divorce, misconduct does not determine entitlement to alimony).

Based upon our review of the record, we cannot say that the district court abused its discretion in making its alimony award. The parties were married for 30 years, and the record does not indicate that either party forewent career or educational opportunities during the marriage. The parties' only child is no longer a minor, so custody is not a factor.

The record indicates that Robert is gainfully employed and that he was employed throughout the marriage. However, the record also clearly indicates a significant disparity in the parties' incomes and earning capacities. While Janet is employed in a position where she earns approximately $70,000 per year, Robert is paid an hourly wage and earns approximately $22,200 per year.

The record indicates that Janet's monthly income of approximately $5,800 exceeds her monthly expenses of approximately $3,320 by approximately $2,480. The record indicates that Robert, on the other hand, suffers from a variety of health-related issues that contribute to his monthly expenses of approximately $4,190—exceeding his monthly income of approximately $1,850 by approximately $2,340. The record indicates that Robert has a need for continued support to meet his expenses and that Janet has the ability to provide support while still being able to meet her expenses.

Janet argues that the costs Robert will incur to pay for medical insurance from his employer, prescription costs, and other medical costs that are not covered by insurance should be discounted because she agreed to provide insurance for Robert for 6 months and because he will be eligible for Medicare within a few years. Although Janet is certainly correct in noting that

she agreed to provide insurance coverage for 6 months and that there was testimony Robert believed he would be eligible for Medicare within a few years, it was not an abuse of discretion by the district court to consider those costs in assessing Robert's need for alimony. Robert presented evidence concerning what he expected his insurance costs would be when the 6-month period expired and Janet was no longer providing insurance coverage. There was no evidence adduced to indicate when exactly Robert would be eligible for Medicare or how or to what extent Medicare would cover any of Robert's current medical needs.

Because of the ages of the parties, with Robert's being 63 years of age at the time of trial, it is clear his circumstances may change within the next few years. As he testified, he will likely be eligible to start receiving Social Security benefits and he will likely be eligible to start receiving Medicare benefits. However, there is nothing in the record to indicate that the parties contemplated or had any idea how those circumstances might impact his situation. There is nothing in the record to indicate that the parties contemplated what his Social Security benefits might be or how eligibility for Social Security benefits might impact his earnings. There is nothing in the record to indicate that the parties contemplated how Medicare benefits might impact his monthly health-related expenses, including personal health insurance premiums, prescriptions, or other expenses not covered by his personal insurance.

On the record provided, we disagree with Janet's assertion that it was not reasonable to base the alimony award on Robert's known income and known expenses instead of concluding that his income "will increase when he receives Social Security payments" or concluding that "he will only have to cover himself for health insurance purposes for a short period of time." Brief for appellant at 8, 9.

Janet also argues that Robert's expenses should be discounted because he is choosing to remain in the marital home with a monthly mortgage of $890. However, Robert testified that he had looked into other places to live but that rental costs for an apartment would be as much as or more than the mortgage payment on the home. There was no evidence presented

to contradict this, and on the record provided, we cannot conclude, as Janet argues, that there are "surely less expensive options." Brief for appellant at 9. We also do not find merit to Janet's assertion that we should discount Robert's monthly expenses because they could "be reduced further if [Robert] were willing to live in a more modest environment that did not include things like $196.14 monthly bills for a home phone, internet and cable or approximately $236.54 for water, electricity, gas and garbage." *Id.*

The record in this case supports the district court's conclusion that Janet's average earnings over the past several years were approximately $70,000 per year, or approximately $5,800 per month. The record supports a finding that her monthly expenses are approximately $3,320 per month. Thus, the record supports a finding that Janet has approximately $2,480 per month income over and above her monthly expenses. The record supports a finding that Robert's earnings are approximately $22,200 per year, or approximately $1,850 per month. The record supports a finding that his monthly expenses are approximately $4,190 per month. Thus, the record supports a finding that Robert's monthly needs, including medical needs related to his health issues, exceed his income by approximately $2,340.

Based on the circumstances of the parties, including the length of the marriage, the relative economic situation of the parties, Robert's need for additional support, and Janet's ability to provide additional support, the award of alimony was not an abuse of discretion. An award of alimony for 10 years is not an abuse of discretion, given the 30-year length of the marriage. The award did not serve to equalize the parties' incomes, and after paying alimony of $1,500 per month, Janet will still have nearly $1,000 per month income over and above her other monthly expenses; Robert will still be nearly $1,000 short of having enough income to cover all of his expenses. We find no merit to Janet's assertions on appeal.

V. CONCLUSION

We find no abuse of discretion in the alimony award. We affirm.

AFFIRMED.