

IN THE COURT OF APPEALS OF IOWA

No. 9-280 / 88-1258

FILED

OCT 05 1989

CLERK SUPREME COURT

IN RE THE MARRIAGE OF JANEAL HOLMES AND MERLE D. HOLMES 203

Upon the Petition of

JANEAL HOLMES,

Petitioner-Appellee/Cross-Appellant,

And Concerning

MERLE D. HOLMES

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Carroll County,
Paul E. Hellwege, Senior Judge.

Respondent-appellant Merle D. Holmes challenges the
economic provisions of his dissolution decree. **AFFIRMED AS
MODIFIED.**

Jeffrey R. Minnich of Neu, Minnich, Comito & Hall,
Carroll, for respondent-appellant/cross-appellee.

Gregory J. Siemann of Green & Siemann, Carroll, for
petitioner-appellee/cross-appellant.

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

DONIELSON, J.

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Merle and petitioner-appellee Janeal Holmes were married in 1970. At the time of trial, Merle was thirty-nine and Janeal was thirty-six. They have three children born in 1970, 1973, and 1976. The oldest child was not subject to custody or support orders. The parties were awarded joint custody of the two minor children and Janeal was awarded their physical care.

The assets and liabilities of the parties were divided and Merle was ordered to pay Janeal \$10,000 in cash. He was ordered to pay child support of \$300 per month per child and alimony of \$400 per month for an indefinite period. Merle was also ordered to pay \$2,500 towards Janeal's attorney fees.

Merle contends the property division, alimony, and attorney fee awards were inequitable. Janeal appeals the district court's decision arguing that the permanent alimony should be converted to an award of rehabilitative alimony and that Merle should be ordered to pay all of her district and appellate court attorney fees. We affirm the trial court's decision as modified herein.

This was a long-term marriage during which Janeal assumed the role of homemaker. She has completed a year of college. She is a part-time student at the Des Moines Area Community College. She works twelve to sixteen hours per week for a local doctor. She contends she would like to

obtain a business degree. Merle is a trucker and receives wages as well as self-employment income. In 1986, Janeal had adjusted gross income of about \$6,000 and Merle of about \$42,000. In 1987, Janeal's income was about \$7,500 and Merle's was about \$27,000.

The trial court determined that the parties had a net worth of approximately \$140,000. The trial court found Merle brought assets of \$5,000 into the marriage. Based on the trial court's valuations, it apportioned assets and debt resulting in Merle receiving about \$70,000 in valuation and Janeal receiving about the same amount.

Merle was ordered to pay \$2,500 toward Janeal's attorney fees.

Merle contends the valuations made by the trial court were incorrect and the property division inequitable. We find no reason to disturb the award. The \$10,000 cash award and the division of property that leaves each party with approximately \$70,000 is equitable and will not be disturbed by this court.

Merle challenges the duration of the alimony award. He does not contend that Janeal does not need alimony, but he thinks it should be limited to the three years it will take Janeal to complete her college education. Janeal would like to see the alimony award converted to 60 months of rehabilitative alimony set at the amount of \$1,000 per month. This was a long-term marriage and Janeal absented

herself from the job market to assume responsibility for the home and family. She has primary responsibility for the parties' three children. She would like to complete a four-year college degree. To do so would require an additional three years of college, which would be difficult to obtain considering, among other things, her primary responsibilities for two children, limited finances, and geographic location. Her job opportunities will remain limited while she pursues her degree.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 200 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347, 350 (Iowa App. 1983). Rehabilitative alimony is intended to provide a displaced spouse, who has been out of the work place for an extended period because of marriage, with the time and education necessary to develop adequate skills to ensure his or her entry into a position of self support in the job market.

While this is a marriage of eighteen years, Janeal is now only thirty-seven years old and to continue the alimony for an expected lifetime of nearly forty years is simply not warranted under these circumstances. This court orders that the permanent alimony award of \$400 a month is to be

converted to an award of rehabilitative alimony in the amount of \$400 a month and is to last for ten years.

Merle contends we should provide for Janeal's alimony to automatically terminate on cohabitation or remarriage. There is a rebuttable presumption that alimony terminates upon remarriage. In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985). The issue is determined by the facts existing at the time modification of the alimony award is sought. Shima, 360 N.W.2d at 829. There is no justification in this case for making the alimony automatically terminate on remarriage. Cohabitation is a relevant factor to be considered when making alimony determinations, In re Marriage of Orgren, 375 N.W.2d 710, 712 (Iowa App. 1985); however, it is not a basis for automatic denial of alimony payments. Id. at 713. We decline to modify the decree to make the alimony terminate automatically upon cohabitation by Janeal. That determination is best left to a subsequent modification hearing where the specific facts of a cohabitation situation are presented to a court.

Merle contends the trial court should not have awarded Janeal attorney fees. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. In re Marriage of Schissel, 292 N.W.2d 421, 428 (Iowa 1980). The trial court's award was adequate and will not be modified

by this court. Merle is ordered to pay \$1,000 of Janeal's attorney fees incurred on appeal.

AFFIRMED AS MODIFIED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (concurring in part and dissenting in part)

I would affirm the trial court in all respects.