IN THE COURT OF APPEALS OF IOWA

No. 8-284 / 97-1237

IN RE THE MARRIAGE OF GLORIA JEAN JANDT AND ALLEN FREDERICK JANDT

Upon the Petition of
GLORIA JEAN JANDT,

Petitioner-Appellant/Cross-Appellee,

And Concerning
ALLEN FREDERICK JANDT,

Respondent-Appellee/Cross-Appellant.

FILED
JUL 31 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Petitioner appeals, and respondent cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Thomas S. Reavely of Whitfield & Eddy, P.L.C., Des Moines, for appellant.

Ronald M. Sotak and James A. Brewer of Newbrough, Johnston, Brewer, Maddux & Krauth, L.L.P., Ames, for appellee.

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

PER CURIAM.

Gloria Jandt appeals from the provisions of the parties' dissolution decree. Allen Jandt cross-appeals. Gloria contends the district court erred when it: (1) divided the property forty percent to her and sixty percent to Allen; (2) limited the award of alimony to $3000 per month for only ten years and ordered the alimony to terminate upon remarriage by Gloria; (3) did not order Allen to pay health insurance premiums for her; and (4) did not order Allen to pay $25,000 toward her attorney fees. Gloria also requests appellate attorney fees. Allen cross-appeals the district court's award of alimony. He contends the district court's award was excessive and should be reduced and shortened. We affirm as modified.

Allen and Gloria married in November 1967. At the time of dissolution they had been married a little over twenty-eight years. Neither Gloria nor Allen brought much with them to the marriage. The couple moved several times due to Allen's job.

In 1977, the parties moved to Newton and bought a Country Kitchen restaurant in Ames. At the time of dissolution, the parties were part-owners in eight Country Kitchen restaurants. The amount of work done by Gloria at the restaurants is in dispute. The parties' assets totaled approximately $2,000,000, including a house with a stipulated value of $307,000. The parties had no debts. Gloria drove a Cadillac and Allen drove two cars owned by the restaurants, a Corvette and a Jeep Cherokee.

At the time of trial, Gloria was fifty years old and Allen was fifty-four. Gloria suffers from anxiety and stress, as well as a low-functioning thyroid and high

cholesterol. Her monthly drug expense, using generics, is approximately $227. Allen suffers from asthma, but it does not appear to hinder his work or recreation.

The parties have no minor children, but Gloria contends their twenty-five-year-old daughter lives with her and is dependant on her due to a severe eating disorder.

Allen's income tax returns represent substantial income. In 1994, Allen reported a gross income of $470,092 and in 1995 he reported $427,804. Gloria's income is much lower, $4724 in 1994 and $1328 in 1995. However, Allen argues his income is actually much lower than his tax returns represent because much of the money is reinvested into the restaurants.

In 1991, Gloria began taking nursing classes at Des Moines Area Community College. In May 1993, she received a diploma as a licensed practical nurse. The staff at the school instructed Gloria she needed to get her anxiety under control or she could not work as a nurse. Approximately three months prior to the hearing in this case, Gloria began selling leather furniture in Des Moines. Her gross earnings for this period were approximately $3784.

The trial court ordered the property to be split sixty percent to Allen and forty percent to Gloria. Gloria was to receive approximately $800,000, about $740,000 of it in cash. The court awarded alimony of $3000 per month to terminate in ten years or upon the death or remarriage of Gloria, whichever occurs first.

I. SCOPE OF REVIEW. Our review of this equitable proceeding 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 Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). 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).

II. PROPERTY DIVISION. Gloria contends the district court should have split the parties' property on a fifty-fifty basis. The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997). The courts are not bound to achieve a precisely equal division in awards of marital property. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa App. 1997). The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1995). *Id.* Given the alimony award discussed below, we decline Gloria's request to modify the distribution.

III. ALIMONY. Gloria asks this court to increase the award of alimony to $5000 per month for as long as she is incapable of sole support. Allen asks us to reduce the district court's award to $1500 per month for five years or until death or remarriage.

In making the property division the district court stated:

> Allen argues that since he put more effort into the acquisition and operation of their restaurant businesses and J & J Properties, his share of the parties' assets should be somewhat greater than Gloria's. ***The Court agrees, but not for that reason. The Court is making its division because Allen will also be ordered to pay support to Gloria.***

However, the district court then ordered alimony to terminate upon the remarriage or death of Gloria, or ten years, whichever shall first occur.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Eastman*, 538 N.W.2d 874, 876 (Iowa App. 1995). When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) the present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996).

> An alimony award is justified when the distribution of the assets of the marriage does not equalize the inequities and economic disadvantages suffered in marriage by the party seeking the alimony who also has a need for support.

In re Marriage of Sychra, 552 N.W.2d 907, 908 (Iowa App. 1996).

Alimony has traditionally taken the place of support that would have been provided had the marriage continued. *In re Marriage of Francis*, 442 N.W.2d 59, 63

(Iowa 1989). It is awarded to accomplish one or more of three purposes. We have observed:

> *Rehabilitative alimony* serves to support an economically dependent spouse through a limited period of education and retraining. Its objective is self-sufficiency. An award of *reimbursement alimony* is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other. *Traditional alimony* is payable for life or for so long as a dependent spouse is incapable of self-support. The amount of alimony awarded and its duration will differ according to the purpose it is designed to serve.

O'Rourke, 547 N.W.2d at 866-67.

We find traditional alimony is appropriate in this instance. We adopt the district court's award of $3000 per month for ten years. However, we must still address the issue of termination upon remarriage.

The general rule in Iowa is that while the subsequent remarriage of a spouse does not result in automatic termination of an alimony obligation, it shifts the burden to the recipient to show extraordinary circumstances exist which require the continuation of the alimony payments. *See In re Marriage of Shima*, 360 N.W.2d 827, 828 (Iowa 1985); *In re Marriage of Von Glan*, 525 N.W.2d 427, 429 (Iowa App. 1994). The rationale behind this rule is it would be contrary to public policy to allow a party to receive support from both a prior and a current spouse. *In re Marriage of Cooper*, 451 N.W.2d 507, 509 (Iowa App. 1989). Dissolution courts may, however, provide alimony is not modifiable, does not terminate on remarriage, or is payable in a lesser sum upon remarriage. *See In re Marriage of Phares*, 500 N.W.2d 76, 79

(Iowa App. 1993); *In re Marriage of Aronow*, 480 N.W.2d 87, 89 (Iowa App. 1991) (decree provided alimony would continue upon remarriage).

In this instance, the property distribution was equitable only because the district court awarded alimony to compensate for the sixty percent-forty percent variance. Thus, the only way Gloria can receive her equitable share of the property is if the alimony obligation does not terminate upon remarriage.

We find the award of alimony shall be payable for ten years or until the death of Gloria, whichever first occurs.

IV. ATTORNEY FEES. Gloria requests appellate attorney fees of $5000. In determining whether to award attorney fees on appeal, our decision is guided by the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). We find Gloria has the capability to pay her own legal fees and deny her request for appellate attorney fees.

We have reviewed Gloria's remaining claims and find they are without merit. For the reasons stated, we affirm the district court's dissolution decree as modified. Costs on appeal shall be split evenly between the parties.

AFFIRMED AS MODIFIED.