

IN THE COURT OF APPEALS OF IOWA

No. 1-064 / 90-753

FILED

SEP 24 1991

CLERK SUPREME COURT

**IN RE THE MARRIAGE OF LUANNE C. SNYDER AND THOMAS JOHN
SNYDER**

Upon the Petition of

LUANNE C. SNYDER,

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Appellee/Cross-Appellant,

And Concerning

THOMAS JOHN SNYDER,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Scott County,
Margaret S. Briles, Judge.

The husband has appealed from a dissolution decree,
challenging its economic provisions. The wife has
cross-appealed, contending the district court should have
awarded her trial attorney's fees. She also requests
attorney's fees on appeal. **AFFIRMED BY OPERATION OF LAW.**

Carol A. H. Freeman of Lane & Waterman, Davenport, for
appellant/cross-appellee.

Janice Hanrahan Roemer, Davenport, for appellee/cross-
appellant.

Considered by en banc.

DONIELSON, J.

The court being equally divided, the judgment is affirmed by operation of law. Iowa Code § 602.5106(1) (1989).

AFFIRMED.

For affirmance: Oxberger, C.J., Schlegel, and Sackett, JJ.

For modification: Donielson, Hayden, and Habhab, JJ.

Judge Donielson writes separately.

I dissent and write separately due to the substantial injustice caused by the result in this case.

LuAnne and Thomas Snyder were married in 1972. They have three children. The trial court's judgment, as it stands, provides alimony to a forty-year-old, healthy woman in the amount of \$5,000 per month for her lifetime. Her life expectancy is approximately forty years. This marriage only lasted eighteen years. This award is to be paid by a self-employed individual whose medical practice earns only what he is capable of generating through long hours and hard work. While Thomas's income is substantial, this decision is neither fair nor reasonable.

Thomas is a physician in private practice. His income varies radically, and he has limited control over these fluctuations. The district court determined his earning potential to be approximately \$231,000 per year.

LuAnne is a high school graduate with a few college credits. Since the first child's birth in 1979 she has not been employed outside the home, except for a part-time job in 1989. She plans to return to college, and she hopes eventually to obtain a doctorate in psychology.

Over the eighteen-year marriage, the parties had accumulated substantial assets. The court awarded LuAnne \$278,210 and awarded Thomas \$278,209 in property.

The district court ordered Thomas to pay alimony to LuAnne in the amount of \$5,000 per month until LuAnne's death, subject to various complex conditions. If LuAnne remarries, the alimony will terminate when she receives her doctorate or ten years after the dissolution decree, whichever occurs first. If LuAnne's gross income ever exceeds \$75,000, her alimony for the following year will be reduced by the amount of the excess. The parties are to exchange income tax returns in order that Thomas will be alerted to increases in LuAnne's income.

The decree also directed Thomas to pay child support totaling \$2,733.17 per month. Assuming that Thomas will earn \$231,000 per year, he will have \$124,656.60 after making his payments. LuAnne will have \$121,343.40 in child support, alimony, property settlement, back support, and interest income derived from the property awarded to her. After taxes it appears that LuAnne will have approximately \$104,000 and Thomas will have approximately \$68,000.

Thomas has appealed from the dissolution decree, and LuAnne has cross-appealed.

I. Alimony. I am primarily concerned with the provisions of the decree relating to the trial court's award of alimony. Thomas contends the alimony award is excessive both in amount and in duration. LuAnne disagrees and argues in addition that the amount of her alimony award should not be contingent upon her taxable income being less than \$75,000 per year. She further challenges the district court's related order that the parties exchange tax returns annually.

A. Amount and Duration of the Award. 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, 220 (Iowa 1976). The discretionary award 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 (Iowa App. 1983). Property division and alimony must be considered together in evaluating their individual sufficiency; they are neither made nor subject to evaluation in isolation from one another. In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

The considerations enumerated in section 598.21(3) commonly lead courts to award alimony for one or more of three general purposes. See In re Marriage of Francis, 442 N.W.2d 59, 62-63 (Iowa 1989). The award will differ in its amount and duration according to the end it is designed to serve.

"Today, when possible, spousal support is used as a method of rehabilitating the spouse disadvantaged by the divorce." Sackett & Munyon, Alimony: A Retreat From Traditional Concepts of Spousal Support, 35 Drake L. Rev. 297, 315 (1985-86) (citing Smith v. Smith, 326 N.W.2d 697, 700 (N.D. 1982)). It is not used to give the receiving spouse a lifetime annuity. Id. (citing In re Marriage of Schulte, 546 S.W.2d 41, 49 (Mo. Ct. App. 1977)).

"Rehabilitative alimony sets a definite term of payment. It does not contemplate that the husband should be required to subsidize a lifetime of employment inactivity by a former wife." Id. (citing Ware v. Ware, 461 So. 2d 467, 469 (La. Ct. App. 1984)). Rather, rehabilitative alimony is awarded "to establish the capacity for self-support in the receiving spouse, through redeveloping previous skills or providing new training to develop potential supportive skills." Id. at 314 (quoting Pierson v. Pierson, 462 So. 2d 613, 614 (Fla. Dist. Ct. App. 1985)).

"Permanent maintenance should only be awarded in the case of an older, dependent spouse in a lengthy 'traditional' marriage where there is little likelihood that the dependent spouse will become self-sufficient." Id. at 318-19 (citing Peterson v. Peterson, 367 N.W.2d 90, 94 (Minn. Ct. App. 1985)).

Reimbursement alimony is predicated on the goal of compensating one spouse for the economic sacrifices made

during the marriage which directly enhanced the earning capacity of the other. See Francis, 442 N.W.2d at 64. The goals of reimbursement are usually fulfilled through an award of rehabilitative alimony. That is, an award of alimony tailored to help the disadvantaged spouse increase his or her earning potential will often both rehabilitate and reimburse.

In the present case, the award is essentially permanent because its duration is within the exclusive control of LuAnne. Whether the award is one of lifetime maintenance is solely dependent upon LuAnne's future actions. So long as she does not work or remarry, she is entitled to \$60,000 per year in alimony alone.

Permanent maintenance is not appropriate under the circumstances of this case. While the parties were married for eighteen years, LuAnne is only forty years old and in good health. She has a high school diploma, college credits, some employment experience and has expressed her desire to continue her education.

The appropriate award under these circumstances is one of rehabilitative alimony. Certainly, this permanent award does nothing to encourage LuAnne to return to work or increase her earning capacity in any way. For every dollar LuAnne earns, she loses one dollar in alimony. Therefore, until LuAnne earns over \$60,000 per year on her own, she will realize no financial gain from her efforts.

It seems doubtful, in LuAnne's current situation, that she will soon possess such an earning capacity. Nevertheless, she can become capable of self-support. The district court's award is inappropriate because it operates as a disincentive for LuAnne to become self-supporting. It will discourage LuAnne from returning to school and increasing her earning capacity. Even, assuming LuAnne does return to school, this award will not encourage her to complete her studies in a timely fashion.

The Iowa Supreme Court has stated that "both parties [in a dissolution action], if they are in reasonable health, need to earn up to their capacities . . . and not lean unduly on the other party for permanent support." In re Marriage of Wegner, 434 N.W.2d 397, 399 (Iowa 1988). I do not believe the result reached by the district court adequately addresses this concern. "Society would be better served, and so would the woman herself, if she were encouraged to enter the job market and given a chance to be retrained and use her potential skills." See Sackett & Munyon, supra, at 319.

In support of the permanent nature of the award, LuAnne contends that even if she is able to achieve her goal of attaining a Ph.D. in twelve years, she will not be able to come close to supporting herself at her present standard of living.

Alimony is a stipend made to one ex-spouse in lieu of the other's legal obligation for support. See Francis, 442

N.W.2d at 62 (citing Wegner, 434 N.W.2d at 398; In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981)). Were the parties still married, Thomas would have no legal obligation to finance such an extravagant lifestyle. I do not believe it is appropriate to obligate him to do so upon dissolution of the marriage.

Iowa Code section 598.21(3)(f) directs the court to consider, among many other factors, "[t]he feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage" In interpret this phrase to mean that the spouse with the higher earning capacity should contribute to the other's efforts to become self-supporting if it seems feasible that the disadvantaged spouse will be capable of self-support in the future.

The key variable, then, is whether the disadvantaged spouse is capable of becoming self-supporting. The answer to this question greatly influences whether the court awards permanent maintenance or rehabilitative alimony. This is a question for the court's determination, not a set of options between which a disadvantaged spouse may choose. In answering this question, the court is to consider objective factors including, for example, (1) the age of the disadvantaged spouse, (2) his or her physical and mental health, (3) his or her level of education, training or skill, and (4) the length of his or her absence from the job market. The court should not place

substantial weight on subjective factors such as LuAnne has raised--a desire to stay home with the children. The fact that she wants to stay home has little bearing on the feasibility of her rehabilitation.

The district court's alimony award has the effect of delegating the decision to LuAnne. LuAnne's stated intentions seem contradictory. She states that she desires and plans to obtain a Ph.D., yet she states that it is questionable whether she will ever be able to develop a remunerative calling of her own. Additionally, while she states that she plans to go to school, she also states that she is unwilling to leave her children with baby-sitters in order to take a reasonable course load in pursuit of her education. LuAnne should bear the burden of her own indecision, not Thomas.

In In re Marriage of Hayne, we stated:

The equitable principles that we have recognized and enforced in the past require, in dissolution cases, that the spouse with the lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the marriage as possible, to the extent that that is possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well. But once the dependent spouse's standard of living is assured, there is no reason, in equity, for the supporting spouse to provide still more.

334 N.W.2d at 351 (emphasis added).

I would modify the district court's alimony award, and set the award at \$5,000 per month for ten years. Whatever LuAnne decides, she would have ten years in which to do

it. This ten-year period would give LuAnne the incentive to utilize the alimony wisely, and it would give Thomas some degree of certainty to help in the management of his financial affairs.

Allowing the trial court's decision to stand does not comport with fairness. It is simply not a reasonable disposition. Sixty thousand dollars per year for an expected lifetime of approximately forty years is simply outrageous.