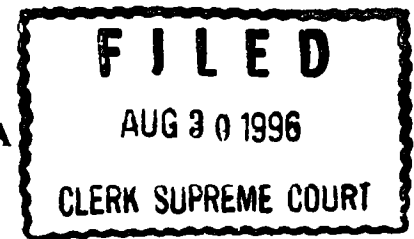


IN THE COURT OF APPEALS OF IOWA

No. 6-331 / 95-1419



IN RE THE MARRIAGE OF JANICE K. WADE AND CHRISTOPHER D. WADE

Upon the Petition of
JANICE K. WADE,
Appellant,

And Concerning
CHRISTOPHER D. WADE,
Appellee.

Appeal from the Iowa District Court for Jasper County, Michael J. Streit, Judge.

Janice Wade appeals the alimony provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED.

Dennis F. Chalupa of the Brierly Law Office, Newton, for appellant.

Lee M. Walker of Walker, Knopf & Billingsley, Newton, for appellee.

Considered by Sackett, C.J., and Habhab and Huitink, JJ. Streit, J., takes no
part.

HUITINK, J.

Janice Wade challenges the sufficiency of the alimony award included in the decree dissolving her marriage to Christopher Wade. We affirm as modified.

Christopher and Janice Wade have been married for twenty-six years. Janice was 45-years-old and Christopher was 46- years-old at the time the case was tried.

Janice is a high school graduate with one year of college. Her work experience has been primarily clerical. Janice works for the Mid-Iowa Savings Bank. Her net income is \$1083 after payroll deductions for taxes and medical insurance.

Christopher has a degree in commercial art. He is employed by Impulse Merchandising. Christopher's base salary is \$4000 per month plus commissions averaging another \$3000 monthly. His average net monthly income is \$4,564. Christopher's employee benefits include medical insurance.

Although the parties have enjoyed a substantial income, they have a modest net worth. Neither has access to a significant pension or retirement savings. The property division netted each of them an automobile and one half of their personal property.

I. Alimony.

The district court awarded Janice alimony in the amount of \$1750 per month for two years followed by \$1400 per month for the next two years and \$1000 per month for the next two years. At the expiration of six years from the commencement of Christopher's alimony payments the amount was reduced to one dollar. The decree also

provided this obligation would terminate on Janice's remarriage or cohabitation after the first four years. The district court ordered that the award would survive Christopher's death for the first six years and would thereafter terminate on his death.

The district court found Janice was "substantially working to her best ability given her education, experience, and background." The district court expressly distinguished this award as something other than rehabilitational alimony because Janice would probably not "go back to school and be rehabilitated."

On appeal Janice argues that her alimony award should be increased in both its amount and duration. She cites her age, education, earning capacity and the absence of a significant property division as reasons why she needs more alimony. She also argues Christopher has the ability to pay significantly more alimony because of his greater earning capacity.

Our review of this equitable action is de novo. Iowa R.App.P. 4. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but we do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). When determining the appropriateness of alimony, the court must consider "(1)

the earning capacity of each party, and (2) present standards of living and ability to pay balanced against the relative needs of the other." *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994); *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted).

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Miller*, 532 N.W.2d at 162; *In re Marriage of Whelchel*, 476 N.W.2d 104, 110 (Iowa App. 1991); *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21(3)(1995). See *In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). Alimony may be used to remedy the inequities in a marriage and to compensate a spouse who leaves the marriage at a financial disadvantage. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993); *In re Marriage of Earsa*, 480 N.W.2d 84, 86 (Iowa App. 1991). Following a marriage of long duration, we have affirmed awards of both alimony and substantially equal property distribution, especially where the disparity in earning capacity has been great. *In re Marriage of Geil*, 509 N.W.2d at 742; *In re Marriage of Hitchcock*, 309 N.W.2d 432, 438 (Iowa 1981).

We consider alimony and property division together in assessing their individual sufficiency. They are neither made nor subject to evaluation in isolation from one another. *In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa App. 1994); *In*

re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984). 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 Weiss*, 496 N.W.2d 785, 787 (Iowa App. 1992). The court should also consider the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. *In re Marriage of Debblor*, 459 N.W.2d 267, 270 (1990); Iowa Code § 598.21(3)(f).

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). Rehabilitative alimony is awarded to support an economically dependent spouse through a limited period of retraining. *Id.* The duration of this type of award depends on the particular needs of the dependent spouse. *Id.* at 63. Traditional or permanent alimony in contrast is usually payable for life or for so long as the dependent spouse is incapable of self-support. *Id.* at 62. The purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to that he or she would receive if the marriage continued.

We determine that an award of traditional or permanent alimony is appropriate in this case. This is a twenty-six-year marriage. There is also a great disparity in the parties' earning capacities. We agree with the district court's assessment that Janice's

present employment is commensurate with her earning capacity. Moreover, there has been no showing that additional education or retraining will result in more lucrative employment for Janice. Accordingly, the objective of the alimony award in this case should be to take the place of the financial support Janice would receive from Christopher if the marriage continued.

The same considerations were inherent in the district court's award of "transitional alimony." The award was intended to provide Janice with support until she achieved self-sufficiency. Although this award is sufficient in terms of its amount, it does not accomplish its intended purpose because the duration of Janice's need for support exceeds the potential duration of the award.

We are also concerned with the termination provisions included in the district court's decree. The obligation to pay alimony usually ends on the death of one of the parties or the remarriage of the recipient. *In re Marriage of Von Glan*, 525 N.W.2d 427, 431 (Iowa App. 1994); *In re Marriage of Weinberger*, 507 N.W.2d 733, 736 (Iowa App. 1993). Moreover, the absence of provisions for terminating Christopher's obligation on his death compromises the deductibility of his alimony payments from his taxable income. *See* I.R.C. § 71(b)(1)(D).

We accordingly modify the district court's decree by extending Christopher's \$1000 per month alimony obligation until he is age 65. We also modify the decree by providing for the termination of Christopher's obligation on the death of either party

or in the event of Janice's remarriage or cohabitation without regard to the time of its occurrence. The remainder of the decree's alimony provisions are affirmed.

II. Attorney Fees.

Janice has also requested that Christopher be ordered to pay her attorney fees on appeal given her limited ability to pay and Christopher's substantial income. 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 Eastman*, 538 N.W.2d 874, 877 (Iowa App. 1995); *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987).

As noted above, there is a significant disparity between the incomes of the two parties. We order Christopher to pay \$500 toward Janice's attorney fees.

AFFIRMED AS MODIFIED.

Habhab, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concur in part; dissent in part)

I concur with the majority in all respects except I would not order alimony automatically be terminated on remarriage.