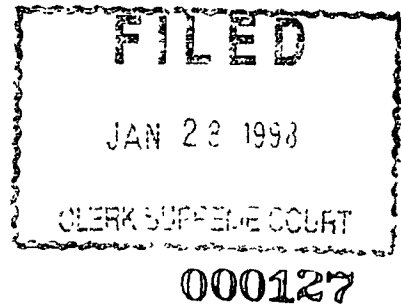


IN THE COURT OF APPEALS OF IOWA

No. 7-524 / 96-0932
Filed January 28, 1998



**IN RE THE MARRIAGE OF ROSALIE F. DAVIES
AND CLEMENT J. DAVIES**

Upon the Petition of
ROSALIE F. DAVIES,
Appellant/Cross-Appellee,

And Concerning
CLEMENT J. DAVIES,
Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Muscatine County, David Sivright, Jr.,
Judge.

Rosalie Davies appeals and Clement (Jake) Davies cross-appeals from the
economic provisions of the parties' dissolution decree. **AFFIRMED.**

Thomas G. Reidel and J.W. Conway of Conway & Reidel, Muscatine, for
appellant.

Linda A. Whittaker and Joan U. Axel of Stanley, Lande & Hunter, P.C.,
Muscatine, for appellee.

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

HUITINK, J.

Rosalie Davies appeals and Clement “Jake” Davies cross-appeals from the economic provisions of the decree dissolving their marriage. We affirm.

I. Background Facts and Proceedings.

Rosalie, age seventy-six at the time of the decree, and Jake, age eighty-two at the time of the decree, married in 1979. It was the second marriage for both parties.

In 1978, the parties signed an antenuptial agreement. The terms of the agreement provided each party keep the property belonging to him or her before the marriage in his or her personal estate. The agreement valued Rosalie’s property at \$419,450; Jake’s property was valued at approximately \$654,600.

During the marriage, Jake operated a grocery store. The business is now incorporated. Jake owns fifty-seven percent of the company’s stock. He is paid \$125 per week from the company, and he receives \$2750 per month as rent from the company for the store site.

The parties established their marital residence in Rosalie’s home. Rosalie remained a homemaker during the marriage and did not work outside the home. With a few notable exceptions, the parties consistently maintained their individual assets separately and paid most of their own expenses during the marriage. At the time of trial, Jake’s net worth exceeded \$2,200,000; Rosalie’s net worth was approximately \$539,000.

II. Standard of Review.

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We review this equitable action de novo. Iowa R. App. 4; *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the trial court's findings of fact, but we do give them deference because the trial 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).

III. Property Distribution.

The district court distributed a lump-sum property award of \$25,000 to Rosalie in lieu of reimbursement alimony. Rosalie contends the district court erred in distributing the parties' assets. She argues the court should award her \$500,000 of Jake's assets in order to obtain an equitable property distribution.

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 Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1)(1991). *See In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Initially we reject Rosalie's contention that the parties' 1978 antenuptial agreement is not valid. The antenuptial agreement is valid and enforceable. *See In re Marriage of Christensen*, 543 N.W.2d 915, 918 (Iowa App. 1995)(antenuptial

agreements generally will be upheld if they are fair between the parties and were entered into freely and understandingly). This, however, is a nonissue because the agreement's provisions are not dispositive in this case. There is nothing in the agreement precluding an award of alimony or division of property as the result of a dissolution. *See* Iowa Code §§ 598.21(1)(1) and 598.21(3)(i) (allowing courts to consider antenuptial agreements in awarding alimony, dividing property, and separate maintenance proceedings); *see also In re Marriage of Van Brocklin*, 468 N.W.2d 40, 41 (Iowa App. 1991)(considering the parties' 1972 antenuptial agreement in distributing assets in a 1989 dissolution).

Iowa Code section 598.21, which allows the court to divide the parties' property upon judgment of dissolution, annulment, or separate maintenance, contemplates the accumulation of marital assets. Division of the parties' assets in this case would be inequitable because Rosalie and Jake never contemplated an accumulation of marital assets. The antenuptial agreement, although not dispositive, is evidence of the parties' intentions to keep their assets separate during the marriage and preserve their individual assets for the benefit of their children.

We also consider what a property distribution would accomplish in this case.

As already noted, at the time of the decree, Rosalie was seventy-six years old and Jake was eighty-two. Both parties have a substantial accumulation of separate property. Neither leave the marriage at an economic disadvantage. A division of their separate assets would, as a practical matter, defeat the legitimate objects of their

antenuptial agreement. Moreover, it is Rosalie's heirs, and not Rosalie, who would enjoy the substantial benefit of the proposed property division. For the foregoing reasons, we find Rosalie is not entitled to a portion of Jake's separate assets. We affirm the district court on this issue.

IV. Alimony.

On appeal, Rosalie contends she is entitled to reimbursement alimony. She argues the district court's \$25,000 property award in lieu of reimbursement alimony is neither sufficient nor equitable. Jake argues any alimony award in this case is improper in light of the factors set forth in Iowa Code section 598.21(3).

Alimony is an allowance to a 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 factors listed in Iowa Code section 598.21(3)(1995) are considered in making the discretionary award of alimony. *See*

In re Marriage of Hayne, 334 N.W.2d 347, 350 (Iowa App. 1983). Alimony may be used to remedy inequities in a marriage and 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 distribution 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 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). Reimbursement alimony is awarded to a spouse who has made personal, economic sacrifices which directly enhanced the earning capacity of the other spouse. *In re Marriage of Grauer*, 478 N.W.2d 83, 86 (Iowa App. 1991). The court may award reimbursement alimony in a lump sum. *In re Marriage of Winegard*, 278 N.W.2d 505, 512 (Iowa 1979). Iowa Code section 598.21(1) allows the court to award a party property in lieu of reimbursement alimony.

We find an award of reimbursement alimony is warranted in this case. Rosalie and Jake were married sixteen years. The record indicates Jake's earning capacity and assets increased substantially during the marriage. Rosalie did not work outside the home during the marriage, rather she provided extensive homemaking services. We agree with the district court's assessment a lump-sum award of \$25,000 is appropriate in this case. We find this award meets the objective of compensating Rosalie for economic sacrifices she made during the marriage which directly enhanced Jake's earning capacity. We affirm the district court on this issue.

V. Cross-Appeal - Attorney Fees.

Jake requests the court award him \$3000 in appellate attorney fees.

An award of attorney fees is not a matter of right, but rests with the court's discretion. *In re Marriage of Eastman*, 538 N.W.2d 874, 877 (Iowa App. 1995). We consider the needs of the requesting party, the ability of the other party to pay, and whether the requesting party was obligated to defend the trial court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996).

We decline to make an award of attorney fees.

AFFIRMED.