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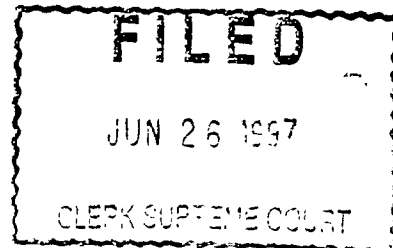
IN THE COURT OF APPEALS OF IOWA

No. 6-521 / 95-1450

IN RE THE MARRIAGE OF JUDY A. AURAND AND GEORGE D. AURAND

Upon the Petition of
JUDY A. AURAND,
Appellee/Cross-Appellee,

And Concerning
GEORGE D. AURAND,
Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Clinton County, John A. Nahra,
Judge.

Respondent appeals, and petitioner cross-appeals, various economic provisions
of the parties' dissolution decree. **AFFIRMED.**

Richard W. Farwell and Christopher L. Farwell of Farwell & Bruhn, Clinton,
for appellant.

Carole J. Anderson and Maria Mihalakis Waterman of Lane & Waterman,
Davenport, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

VOGEL, J.

George Aurand appeals, and Judy Aurand cross-appeals from various economic provisions of the parties' dissolution decree. George contends the district court erred in: (1) failing to enforce the parties' antenuptial agreement; (2) determining the profit-sharing plan administered by Hawkeye Bank was marital property; (3) awarding rehabilitative alimony; (4) calculating child support; (5) failing to award an equitable distribution of property; and (6) failing to grant his motion for new trial. On cross-appeal, Judy maintains she should be awarded trial and appellate attorney fees.

Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4; *In re Marriage of Lux*, 489 N.W.2d 28, 30 (Iowa App. 1994). We must examine the entire record and in so doing adjudicate anew the rights of the parties on the issues properly presented. *In re Marriage of Estlund*, 344 N.W.2d 276, 279 (Iowa App. 1983). We give weight to the findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Background facts and proceedings. George was 41 and Judy was 23 when they were married on September 20, 1975. George had three children from a previous marriage. This was Judy's first marriage. George and Judy adopted one child, Sarah, born May 22, 1981.

George is a physician. In 1963, George established a medical family practice in Clinton. He later left that clinic and opened a women's health care clinic. George

then entered into a partnership with Dr. German, a dermatologist. His practice is now limited to dermatology. Judy attended Clinton Community College for two years, and was employed at a local law firm as a legal secretary. In 1982, she began working part-time for George as a receptionist. She continued working for George up to the time of trial.

George had acquired a one-third interest in two farms prior to the marriage, known collectively as the Kingfisher Hollow Farms. Following the marriage, George acquired a total of one-half interest valued at \$100,000. The total debt of \$97,742.42 was paid in full over the course of the marriage. George and Judy acquired the marital residence located on Tenth Avenue North. The residence was valued at \$70,000 with no encumbrance. George also acquired a one-half interest in his office building, valued at \$52,500.

George additionally began placing funds in a pension fund at Hawkeye Bank. At the time of trial this asset had a value of \$299,788.55. George did not establish this pension until after his marriage to Judy, thus the court properly characterized it as a marital asset. George set up a profit sharing account in 1985 at the Clinton National Bank and it was valued at \$121,609 at the time of trial. The parties acquired numerous other pension and profit sharing plans with various companies, including New York Life, valued at \$22,052.27, Northwest Mutual Life, valued at \$32,646.64, and IRAs totaling \$88,639. George and Judy acquired considerable personal and

household items, including furs, jewelry, furniture, and silverware. Judy received an inheritance in the amount of \$33,958.

Judy filed a petition for dissolution on October 4, 1994. The district court accepted most of Judy's valuations of the marital property, concluding that George lacked candor, was arrogant, argumentative, and less credible. The court ruled the antenuptial agreement was void. The district court made the following findings:

During the week preceding the parties' wedding, the Respondent [George] requested the Petitioner [Judy] to be present at the office of Attorney Bryce Oakley. The Petitioner did not know why her presence was requested, but the Respondent admits the purpose of this meeting was to acquire the signature of the Petitioner upon a prenuptial agreement which has been submitted to this Court and identified as Petitioner's Exhibit 34. The Petitioner did not have a copy of the agreement before her attendance at the Respondent's attorney's office. She had no opportunity to receive counsel or advice upon reviewing the document. This court finds that the Petitioner did not understand or know the effect this agreement would have upon her legal rights. She had no input in the preparation of the agreement and was told to sign the agreement before leaving the attorney's office. This was the first marriage for the Petitioner, and she had a big wedding planned. The wedding could not be easily canceled, and therefore the Petitioner signed the Antenuptial Agreement.

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This Court specifically finds that after execution of the agreement the same was retained by the Respondent. This Court further finds that the Petitioner did not have sufficient time with which to review this agreement and that she did not understand the terms therein. Specifically, she did not understand that if she failed to maintain a list of property during marriage that the same would become the property of the Respondent upon dissolution of marriage. Further, this Court finds that since the Respondent retained the Antenuptial Agreement and further failed to maintain the list of property acquired during marriage that the resulting effect is to divest the Petitioner of any interest in

property acquired during marriage, and therefore, the agreement is unconscionable. This Court therefore finds that the Antenuptial Agreement is void as it relates to the division of property acquired by the parties during marriage.

George was awarded marital property in the amount of \$474,333.71, and Judy was awarded property valued at \$419,730.50. George appropriately received what was his prior to the marriage. The court ordered that “the parties shall retain as their own assets those which the court indicated . . . were premarital assets not subject to division, or inherited property not subject to division, or gifts received by either party not subject to division.”

George was ordered to pay child support in the amount of \$1050 per month and awarded the income tax exemption for Sarah. He was also ordered to pay \$850 per month for rehabilitative alimony for sixty months. The court declined to award attorney fees to either party. George subsequently filed a rule 179(b) motion and motion for new trial. Except for a few changes, the district court affirmed its decree. George has appealed, and Judy has cross-appealed.

I. Validity of antenuptial agreement. The antenuptial agreement provides:

The parties may maintain a list of tangible personal property acquired during their marriage which shall be considered “joint property” and to which the survivor shall be fully entitled in the event of death and which shall be equally divided in value in the event of the dissolution of their marriage. Personal property acquired by Judy prior to the marriage and clothing and personal effects whenever acquired shall in any event remain as hers and any other real or personal property, whether tangible or intangible, not so acquired, described, or on the list shall be the property of George or his estate whether the marriage relation is terminated by death or legal proceedings.

The language of the agreement indicates any property acquired not on the list shall be the property of George or his estate. The effect of this paragraph is to divest Judy of any property interest acquired during this marriage other than her clothing and personal effects.

Prenuptial agreements are favored in the law as evidenced through the history of Iowa case law. *See, e.g., In re Marriage of Spiegel*, 553 N.W.2d 309, 313 (Iowa 1996); *In re Marriage of Winegard*, 278 N.W.2d 505, 512 (Iowa) *cert. denied*, 444 U.S. 951, 100 S. Ct. 425, 62 L.Ed.2d 321 (1979); *Norris v. Norris*, 174 N.W.2d 368, 269 (Iowa 1970); *In re Estate of Parish*, 236 Iowa 822, 830, 20 N.W.2d 32, 37 (1945); *In re Estate of Mansfield*, 185 Iowa 339, 342, 170 N.W. 415, 416 (1919). However, we note Iowa courts will only uphold prenuptial agreements if they are “fair between the parties and fairly, freely and understandingly entered into.” *Spiegel*, 553 N.W.2d at 314 (quoting *Norris*, 174 N.W.2d at 369).

The *Spiegel* case is instructive in our analysis. Judy, as the party challenging the antenuptial agreement must prove (1) its terms are unfair, or (2) her waiver of rights was not knowing and voluntary. *Spiegel*, 553 N.W.2d at 316. This hybrid test implicates both substantive fairness and procedural fairness. In applying this test, we are mindful that we strike a proper balance between protecting the interests of a party unknowingly waiving valuable property rights, and preserving the rights of competent parties to contract as they desire.

A. Fairness of the antenuptial agreement. Antenuptial contracts are no different from other contracts; we consider, treat, and interpret them as we do ordinary contracts. See *Spiegel*, 553 N.W.2d at 313-314; *In re Marriage of Pillard*, 448 N.W.2d 714, 715 (Iowa App. 1989) (citing *O'Dell v. O'Dell*, 238 Iowa 434, 435, 26 N.W.2d 401, 412 (1947)). Every contract must have consideration, i.e., there must be a benefit to the promisor and/or a loss or detriment to the promisee. *Test v. Heaberlin*, 254 Iowa 521, 523, 118 N.W.2d 73, 74 (1962). If an agreement lacks consideration, no contract is formed. *Johnson v. Dodgen*, 451 N.W.2d 168, 172 (Iowa 1990). The terms of an agreement are fair when the provisions thereto are “mutual or the division of property is consistent with the financial conditions of the parties at the time of execution.” *Spiegel*, 553 N.W.2d at 316; see *In re Estate of Ascherl*, 445 N.W.2d 391, 393 (Iowa App. 1989) (holding agreement containing mutual waivers fair).

If this antenuptial agreement were effected, all of the benefits would inure to George, as he would receive all real and personal property, tangible or intangible, acquired during the marriage. He would suffer no legal detriment. Conversely, Judy would gain nothing at the expense of giving up all her rights to marital assets. This is not consonant with the concept of fairness as articulated in Iowa case law. See *Spiegel*, 553 N.W.2d at 316.

We distinguish this case from *Spiegel* where the wife did *not* forfeit all marital rights when the court determined the antenuptial agreement was valid. In that case,

the wife received a joint interest in the marital home and her net worth increased during the marriage. *Spiegel*, 553 N.W.2d at 316. The court also found in *Spiegel* the “relinquishment of marital rights in the event of dissolution was *mutual, as were all other provisions of the agreement.*” *Id.* (Emphasis added.)

This was not the case between George and Judy. The effect of this agreement was to divest Judy of all interest acquired during the marriage, while George would receive everything.

Additionally, the agreement provided “the parties may maintain a list of tangible personal property acquired during their marriage” and the listed property would be considered “joint property” to be equally divided in the event of dissolution of marriage. All property not placed on the list, (except Judy’s premarital property and personal effects), would exclusively belong to George. George cannot now claim Judy was responsible for being divested of her share of jointly acquired property because she failed to maintain her own separate list of property acquired during the marriage as the parties had no unilateral right to maintain their own respective property lists. Rather, the language, “*the parties* may maintain a list,” would require each party to consent to the other party including an item of property on the list. No such acts were accomplished.

We find the antenuptial agreement contained no mutual benefits nor detriments to the parties, as all the benefits, in case the marriage dissolved, inured to George and

to the detriment to Judy. As such the provisions in the contract were without consideration, and must fail.

B. Knowing and voluntary waiver of property rights. The second prong of the validity test as articulated in *Spiegel* deals with whether Judy's waiver of rights when she signed the agreement were knowing and voluntary. Iowa law requires that parties to an antenuptial agreement must have understood it and entered into it freely at the time it was executed. *In re Estate of Ascherl*, 445 N.W.2d 391 (Iowa App. 1989); *Norris*, 174 N.W.2d at 389.

Judy was not sophisticated in the business sense, had never been married before, lived with her parents, and had only two years of college education at the time she entered into the agreement. George had a medical degree, years of business experience, and had recently been divorced.

Just prior to the parties' marriage, George requested Judy to go with him to his attorney's office. George presented the antenuptial agreement to Judy and asked her to sign it. She did not understand all the terms or effect of the agreement. Judy had no independent counsel with her. George's attorney was her employer. She knew she was expected to sign the agreement that day, only three days before the wedding. While these facts are not wholly determinative of the validity of the agreement, they are significant to our analysis.

The *Spiegel* court upheld an antenuptial agreement signed shortly before marriage. The parties were more evenly matched in experience (both parties were,

e.g., previously divorced with children, closer in age, and both well-educated), the agreement had been discussed between the parties prior to the presentation and execution date, and independent legal advice had been obtained to insure both parties understood the content and the legal effect of the agreement. *See generally* Spiegel, 553 N.W.2d 309 (Iowa 1996). Conversely, in this case, the parties were unmatched in experience, the agreement was not discussed by Judy and George prior to the day of its presentation and execution, and Judy did not have independent legal counsel present to apprise her of the meaning of and consequences of signing the agreement. Accordingly, we cannot impute to Judy a full knowledge and true appreciation for the meaning of the agreement and the implications arising out of her signing the instrument. We find Judy did not knowingly and voluntarily waive her property rights in the antenuptial agreement.

Judy further argues George failed to fully and frankly disclose his assets in the agreement. *See In re Marriage of Sell*, 451 N.W.2d 28, 30 (Iowa App. 1989). The agreement states it was “entered into with a *full knowledge* on the part of each party as to the extent and probable value of the estate of the other” (Emphasis added.) Additionally George attached an affidavit of property stating his “approximate *net worth*” and further stated that “this affidavit is given for the purpose of making *full disclosure* pursuant to the terms of the antenuptial agreement” (Emphasis added.) Yet, George only reported the total value of heavily encumbered property, not his equity therein. Judy was unaware this listing of gross values (and not net

values) of assets meant the couple would expend their joint efforts to help pay off sizable loans on George's properties to which Judy would have no claim. Accordingly, we find George failed to make full and frank disclosure of his assets in the prenuptial agreement.

We affirm the district court's determination that the antenuptial agreement is unenforceable.

C. Abandonment of agreement. Judy argues that even if the agreement had been entered into fairly, freely, and understandingly the agreement was, in the alternative, abandoned. Where the course of the parties' conduct evidences abandonment, an express agreement to abandon the antenuptial agreement is not necessary. *In re Marriage of Pillard*, 448 N.W.2d 714, 715 (Iowa App. 1989). In *Pillard*, the court found that the commingling of the parties' respective properties and funds was tantamount to an abandonment of the antenuptial agreement. The parties in *Spiegel* actually lived by the agreement and kept separate accounts, whereas George and Judy never discussed the agreement after it was signed and never created nor maintained a list of joint property as provided in the agreement. Moreover, Judy found the agreement over nineteen years later, in a desk drawer, torn in half. George also testified he had forgotten the agreement even existed.

Additionally, the parties commingled proceeds from the sale of property and an asset on the antenuptial agreement. They used these proceeds for various joint purposes, including household expenses, vehicles, profit sharing plans, jewelry,

vacations, and for purchasing a farm subsequently sold and used for family purposes. Moreover, Judy's income was used for family purposes such as household supplies, groceries, and things for their daughter. A portion of the parties' joint efforts and income went to paying alimony and child support to George's first wife. Judy also provided in part from her employment for two of George's children from a prior marriage who came to live with Judy and George for a period of time not specified in the record. For nineteen years, George and Judy commingled their finances and failed to live by the suggested terms of the agreement. We find this course of conduct attests to the fact Judy and George in effect abandoned the antenuptial agreement.

II. Alimony. The trial court ordered George to pay \$850 monthly for 60 months or to cease upon Judy's death, whichever first occurs. George argues the district court erred in awarding rehabilitative spousal support, or in the alternative, erred in setting its amount, duration and scope.

Alimony is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Welch*, 476 N.W.2d 104, 110 (Iowa App. 1991). Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995); *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). We consider property division and alimony together in evaluating their individual sufficiency. *Welch*, 476 N.W.2d at 110.

More specifically, rehabilitative alimony is typically awarded to a spouse who may need further training or education to secure employment after the dissolution. *Miller*, 532 N.W.2d at 162. It provides support to ~~an~~ economically dependent spouse through a limited period of re-education or retraining following a divorce, which creates the incentive and opportunity for the spouse to become self-supporting. *Id.* The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21(3) (1995). We look to such factors as the earning capacity of each party, including educational background, training, absence from the job market, custodial responsibilities for the children, and the expense necessary to provide training or re-education to a spouse so that the spouse may become self-supporting at a standard of living comparable to that enjoyed during the marriage. See Iowa Code § 598.21(f); *In re Marriage of Wineberger*, 507 N.W.2d 733, 735.

Judy worked during the marriage only one to two days each week. She spent the rest of her time at home since 1981 caring for the parties' daughter. While George argues Judy is healthy and is already trained to be a receptionist, there is no evidence Judy can find employment in this area for more money than George had paid her in the past as his office receptionist. Further, we note Judy did not have an extensive educational background, nor any certification that would allow her to earn the amount of money to which she was accustomed during the marriage.

George's gross income from his medical practice, according to the 1992 and 1993 federal tax return, was \$292,888 and \$276,514 respectively. After deductions,

including large property purchases the income was \$118,314 and \$105,948 respectively. In addition, there is other income from interest, dividends, and partnership income of \$5537 and \$2041 respectively from 1992 and 1993.

After reviewing the above factors, the entire record before us, and given the disparity of available income of the parties, we conclude the award of alimony is appropriate.

III. Child support. The district court ordered George to pay \$1050 per month in child support. He argues this amount is excessive. We disagree. We note George failed to provide income information, except for earnings from his medical practice, on his financial affidavit.

The child support guidelines create a “rebuttable presumption that the amount of child support that would result from the application of the guidelines is correct.” *In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991). Thus, we are disinclined to vary the amount of child support without a written finding the guidelines as applied would be unjust or inappropriate. *See Powell*, 474 N.W.2d at 533. The record is bereft of evidence to this effect. We conclude the district court took into account the proper considerations and correctly determined the amount of \$1050 per month in child support. We accordingly affirm on this issue.

IV. Distribution of Property. George asserts the district court erred in holding the Hawkeye Bank profit sharing plan was marital property subject to division. He

additionally argues the district court incorrectly concluded one-half of the debt reduction on Kingfisher Hollow Farms was attributable to the marriage.

The division of property between parties in a dissolution must be equitable to both parties. Iowa Code § 598.21 (1995). The parties should each receive an equitable share of the property accumulated through their joint efforts. *In re Marriage of Pothast*, 539 N.W.2d 199, 202 (Iowa App. 1995). An equal or percentage division of property is not required; however, the determining factor is what is fair and equitable under the circumstances. *In re Marriage of Johnson*, 499 N.W.2d 326, 328 (Iowa App. 1993). A court looks to many factors in arriving at an equitable division of assets, including the contribution of each party to the marriage, both monetary and non-monetary. Iowa Code § 598.21(1)(c) (1995); *In re Marriage of Callenius*, 309 N.W.2d 510 (Iowa 1981).

It is appropriate for us to “consider whether the appreciation which occurred during the marriage was fortuitous or due to the efforts of the parties.” *In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa App. 1982). Thus, where accumulated property is not a result of the joint efforts of both parties, or where one party brings property into the marriage, a division of property may not be necessary. *Id.*

In Iowa, pension benefits are properly treated as marital property and subject to equitable distribution. *In re Marriage of Imhoff*, 461 N.W.2d 343 (Iowa App. 1990) (citing *In re Marriage of Mott*, 444 N.W.2d 507, 510-11 (Iowa App. 1989) and

Iowa Code § 598.21(1)(I). George did not establish the Hawkeye State Bank pension until after his marriage to Judy in 1975, and the record does not contain any evidence that George made any contributions to this pension before 1976. We find the district court properly treated this pension as a marital asset as this finding was supported by the evidence.

The district court correctly concluded one-half of the debt reduction on the Kingfisher Hollow Farms was attributable to the marriage. Kingfisher Hollow is now worth more, not because of a fortuity and the result of economic factors, but rather because, through the joint efforts of both parties, George's interest was increased and the large debt on the property has been paid off.

Having considered these and all the other property issues the parties raised, we affirm the district court's property distribution determination.

V. Motion for new trial. George argues the district court erred in failing to grant his motion for a new trial. After reviewing the entire record, including the district court's disposition of the Rule 179(b) motion, we are unable to conclude George is entitled to a new trial. We note the district court, in response to the motion, made factual corrections and adjusted valuations of certain assets, thereby abdicating the need for a new trial.

VI. Attorney fees. Judy requests trial level attorney fees, should this court disturb any economic provisions of the district court's decree as modified by its Rule 179(b) motion. We have not disturbed those findings and accordingly decline to

award Judy trial attorney fees. Judy also requests reasonable attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request 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 determine Judy is entitled to an award of appellate attorney fees in the amount of \$ 2000. Costs on appeal are assessed to George.

Having duly considered all the arguments on appeal, and having reviewed the entire record, we affirm the findings of the district court.

AFFIRMED.