

IN THE COURT OF APPEALS OF IOWA

No. 0-268 / 89-1425

FILED

AUG 30 1990

CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF FAY R. ORCUTT, Deceased.

BETTY JANE ORCUTT,

Plaintiff-Appellee,

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vs.

GEORGE NACOS, Executor of the Estate of FAY R. ORCUTT,

Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County,
R.J. Curnan, Judge.

Appellant appeals order requiring it to pay alimony to
plaintiff. **REVERSED.**

James J. Roth and Mary M. Schumacher of Roth &
Schumacher, Dubuque, for appellant.

Donald R. Breitbach of Reynolds & Kenline, Dubuque, for
appellee.

Considered by Oxberger, C.J., and Sackett and Habhab,
JJ.

PER CURIAM

The sole question is whether the trial court erred in providing the defendant-appellant, the Estate of Fay R. Orcutt, was obligated to pay alimony to plaintiff-appellee Betty Jane Orcutt. Betty was a former wife of the deceased. We find the estate was not liable and reverse the trial court.

The dissolution decree of decedent and Betty had the following provision regarding alimony:

That by way of alimony Petitioner (the decedent) shall pay into the Clerk of the above-entitled court the sum of \$700 monthly on the last secular day of each month commencing . . . and thereafter until Respondent (Betty Jane Orcutt) shall remarry or die."

The general rule is payments of alimony to a former spouse following a dissolution terminate upon the death of the person ordered to pay alimony, absent a clear provision in the decree requiring payment to continue following the death of the person required to pay alimony. See In re Roberts' Estate, 257 Iowa 1, 4, 131 N.W.2d 458, 460 (1964); Matter of Estate of Jones, 434 N.W.2d 130, 131 (Iowa App. 1988); In re Marriage of Bornstein, 359 N.W.2d 500, 503 (Iowa App. 1984). Language providing that "respondent is required to pay petitioner \$100 per month commencing . . . until such time as respondent dies or remarries," does not express a clear intent to hold respondent's estate liable. Jones, 434 N.W.2d at 131-32; see also Mullen v. Mullen, 246 Iowa 1255, 1262-63, 69 N.W.2d 420, 424 (1955).

The decree provided the responsibility to pay alimony was personal to decedent. There is no language to support a finding the alimony would be a charge on his estate. We reverse the trial court and dismiss plaintiff's claim.

REVERSED.

Oxberger, C.J., and Sackett, J., concur; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

I concur in the result only. I would merely find that the decree does not express clear intent to hold decedent's estate liable for the alimony payments. Iowa recognizes and follows the general rule that periodic payments of alimony to a divorced wife terminate, or at least are presumed to terminate, upon the husband's death, especially in the absence of a provision in the decree which requires the payments to continue after such death. In re Roberts' Estate, 257 Iowa 1, 4, 131 N.W.2d 458, 460 (1964).

Thus, when evaluating a circumstance similar to the one before us, we start with the rule of law that it is presumed that alimony payments which the decedent was obligated to pay during his lifetime terminated on his death. Since it is only a presumption, we must next turn to the evidence to see if this presumption has been overcome. In this instance the evidence relied on is the court decree which must be considered in its totality.

I can well appreciate the hesitancy of the trial court when it concluded that the estate was liable for the alimony payments. As the trial court so aptly stated:

Such conclusions (the finding that the estate was liable) are reached with the same hesitancy and with the same basis for such hesitancy as pronounced by this court in the Roberts case plus the additional factor of the approximately only ten-year marriage.

But it is because of this hesitancy that I believe the

estate should not be liable. I reach this result for several reasons. First and foremost, the appellee was faced with the presumption that the alimony payments terminated on the death of her former husband. With this presumption before her, it was then necessary for her to come forward with evidence to overcome it. I am unable to find that she met this heavy burden for the decree itself is not that clear.

As it relates to the question of "clarity," our supreme court in Roberts, after recognizing that courts, under then section 598.14¹ of the Code, have the authority to extend alimony beyond the death of a person charged with payment so as to bind his estate, further stated:

When it is determined that a decree clearly provides for such continuation, the estate of the husband will be liable for those payments.

Id. When I again read the disputed language I reach the conclusion that the decree does not rise to that level of clarity demanded in Roberts to overcome the general rule of termination at death. Thus, I join the majority in the conclusion it reached. I agree with the majority that the language in dispute is more akin to that found in In re Estate of Jones, 434 N.W.2d 130, 131 (Iowa App. 1988), than the cited Roberts case.

1. It is now the firmly-established law of this state that the court does have the authority to require payment of alimony after death. The authority is derived from section 598.21(3); In re Marriage of Shirley J. Dibler and Donald C. Dibler, No. 89-1095 (Iowa July 18, 1990).