

IN THE COURT OF APPEALS OF IOWA

No. 1-404 / 90-770

FILED

JAN 29 1992

CLERK SUPREME COURT

IN RE THE MARRIAGE OF JEANETTE K. RHOTEN AND JOHN R. RHOTEN

Upon the Petition of
JEANETTE K. RHOTEN,

525

Appellee/Cross-Appellant,

And Concerning
JOHN R. RHOTEN,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Dallas County,
Peter A. Keller, Judge.

Respondent husband appeals various economic provisions
of the decree dissolving the parties' marriage. **AFFIRMED
AS MODIFIED.**

Steven H. Shindler and Michael E. Marshall of Smith,
Schneider, Stiles, Mumford, Schrage, Zurek, Wimer & Hudson,
P.C., Des Moines, for appellant.

Martin E. Spellman of Spellman, Spellman, Spellman,
Spellman, Kealhofer & Spellman, Perry, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab,
JJ.

SCHLEGEL, P.J.

John and Jeanette Rhoten were married on March 26, 1961. The parties had five children, two of whom were still minors at the time of the divorce proceedings. The parties' daughter, Joan, was seventeen at the time of the dissolution, and their son, Jay, was fourteen. During the marriage the parties lived in rural Dallas County.

John was fifty-three years of age, and Jeanette was fifty at the time of the trial. The Rhotens were engaged in farming. Previously, they also owned a grain elevator. John's average net income was about \$40,000. The district court found this would be reduced to about \$30,000 per year in the future because of the property distribution.

Recently, Jeanette began working part-time outside the home for American Express. Her actual net income is \$446.33 per month. The district court found she had an earning capacity of \$900 per month, or \$10,800 per year.

The district court entered the decree of dissolution on March 26, 1990. The trial court awarded the parties joint physical custody of the two minor children. John was granted physical care of Joan, and Jeanette was granted physical care of Jay.

Concerning the division of marital property, the trial court awarded John a 360-acre farm valued at \$338,000, on which there was a debt of \$27,636. The trial court awarded Jeanette a 160-acre farm, valued at \$200,000, with a debt of \$87,664 to be paid by John. Jeanette is allowed to live

in the house on the farm awarded to John until the year 1994, when Jay becomes eighteen years old. As part of the property settlement, the trial court ordered John to pay Jeanette \$40,000 over a five-year period, or \$8,000 per year at an interest rate of ten percent. In total, Jeanette was awarded property valued at \$304,250, while John was awarded property valued at \$412,400.

John was ordered to pay child support for Jay in the amount of \$229 per month, which will increase to \$442.50 upon the termination of John's support obligations for Joan. John was also ordered to pay Jeanette \$750 per month in permanent alimony until her death or remarriage. John was ordered to maintain a life insurance policy in the amount of \$150,000 naming Jeanette as beneficiary with the children as contingent beneficiaries.

John has appealed, and Jeanette has cross-appealed.

I. Our scope of review in dissolution cases is de novo. In re Marriage of Craig, 462 N.W.2d 692, 693 (Iowa App. 1990). While not bound by the trial court's determination of factual findings, we will give them considerable weight, especially when considering the credibility of witnesses. Id.

II. John objects to both the property division and the award of spousal support to Jeanette. He points out that because Jeanette was awarded part of the farmland, his net income is expected to be about \$30,000 per year in the future. However, he states that under the terms of the

decree he is expected to pay a total of \$24,300 per year for the next several years in child support, spousal support, property settlement, and life insurance. John must also support Joan, the child living with him.

John also points out that Jeanette will have a future income of at least \$24,356 per year, which includes her actual net earnings of \$5,356 per year, alimony of \$9,000, and income of \$10,000 from the farm awarded to her. Jeanette will also receive \$8,000 per year in property settlement for the next five years.

John believes he will have to sell his farm in order to meet his obligations under the decree. He proposes that the parties sell all of their assets and split the proceeds in half. Under this proposal John would only be responsible for child support in the future; Jeanette would receive no spousal support.

We consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each particular circumstance. Id.

In considering the record, it is apparent that the financial burden placed upon John leaves him with an almost impossible obligation. We have no reason to disagree with the trial court's determination of the prospective income John can expect with the reduction of his farming

enterprise resulting from the award of a farm to Jeanette. Unless he can produce more income than it appears will be the case, he can only meet the obligations imposed upon him by the decree of the trial court by liquidation of at least part of his assets. The trial court ordered him to pay child support in the amount of \$229 so long as he was obligated to support Joan, a seventeen-year-old daughter at the time of the decree. Following that obligation of support, the child support payable to Jeanette increases to \$442.50 per month, or a total of \$5310 per year. Added to alimony in the amount of \$9,000 per year, plus a payment of \$8,000 principle and \$4,000 interest, his obligation exceeds \$26,000 per year. At the same time, Jeanette will have cash available to her during the first five years of nearly \$40,000. It is apparent that the decree is clearly inequitable. The amounts set out here do not include payments upon the debt against the farm awarded to Jeanette nor the premiums upon the life insurance, which are obligations imposed upon John as a result of the decree.

We eliminate the obligation to pay the \$40,000 property settlement. While this will eliminate the cash available to Jeanette from that source, it will still leave her with an income of more than \$24,000 per year from her employment, alimony and child support, and income from the farm. At the same time, the elimination of payments of \$8,000 plus interest at the rate of ten percent on the property settlement amount, John should be able to maintain

the payments of alimony and child support and to support Joan.

We also eliminate John's obligation to carry life insurance in the amount of \$150,000 with Jeanette as the primary beneficiary and the children as contingent beneficiaries. In the event of John's death before his obligation for child support shall cease, adequate support for any child under the age of eighteen is provided by survivor benefits from Social Security.

III. In her cross-appeal, Jeanette asks that her alimony be increased to \$1,250 per month.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). Id. at 110-111.

We affirm the award of alimony made by the district court. We consider that Jeanette has actual net earnings of \$5,356 per year, \$10,000 in income from her farm, plus alimony of \$9,000, for a total of \$24,356. At the same time John must pay \$9,000 from his net income of \$30,000, which gives him \$21,000. We do not see any reason to increase Jeanette's alimony. We do, however, modify the alimony provision of the decree by providing that such alimony shall cease at Jeanette's remarriage or the death of either John or Jeanette.

IV. Jeanette contends the district court should have awarded her attorney fees. At the time of the dissolution Jeanette had paid her attorney \$6,000 out of joint funds. John had paid his attorney \$1,775 out of joint funds. The district court ordered the parties to pay the balance of their own attorney fees.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award the complaining party must show that the trial court abused its discretion. Id.

We hold the district court did not abuse its discretion here. Jeanette has sufficient income and assets to pay her trial attorney fees.

V. Jeanette also asks for attorney fees for this appeal.

An award of attorney fees is not a matter of right, but rests within the court's decision and the parties' financial positions. Id. 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. Id.

We find the parties should pay their own appellate attorney fees. Costs of this appeal should be paid one-half by each party.

VI. In summary, we have modified the decree to eliminate the \$40,000 property settlement to Jeanette and the requirement that John carry \$150,000 in life insurance with Jeanette as the primary beneficiary and the children as contingent beneficiaries. We affirm the provisions of the decree of dissolution as set forth by the district court in all other respects.

AFFIRMED AS MODIFIED.

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

SACKETT, J. (concurring in part and dissenting in part)

I concur with the majority in all respects except I do not agree with the majority's decision to include a provision Jeanette's alimony automatically terminate on her remarriage. There already exists a common law presumption it does terminate. The general rule in Iowa, and elsewhere, is that while the subsequent remarriage of a spouse does not result in automatic termination of an alimony obligation, it shifts the burden to the recipient to show that extraordinary circumstances exist which require the continuation of the alimony payments. In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985). Should Jeanette remarry, there might be extraordinary circumstances that would justify continuing her alimony. See id. at 829. The majority has prejudged the circumstances that might exist should Jeanette remarry. I find no equity in this position.