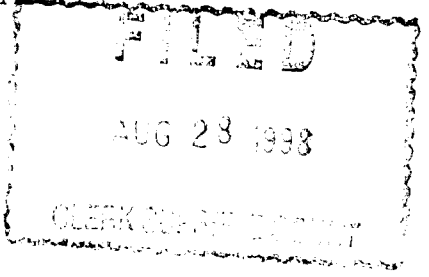
**IN THE COURT OF APPEALS OF IOWA**




No. 8-194 / 97-0469
Filed August 28, 1998

**IN RE THE MARRIAGE OF SUSAN L. SHEARER AND KIRK R. SHEARER**

**Upon the Petition of**
**SUSAN L. SHEARER,**
Appellant,

**And Concerning**
**KIRK R. SHEARER,**
Appellee.

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Appeal from the Iowa District Court for Linn County, David M. Remley, Judge.

The petitioner appeals various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Jonathan B. Hammond and Gary L. Robinson of Klinger, Robinson & Ford, L.L.P., Cedar Rapids, for appellant.

Franklin R. York, Cedar Rapids, for appellee.

Considered by Cady, C.J., and Streit and Mahan, JJ.

**STREIT, J.**

Susan Shearer appeals the trial court's calculation of her husband's income for purposes of child support and her alimony award. She also seeks trial and appellate attorney fees. We affirm the court's alimony award and the court's calculation of Kirk's income and modify his child support obligation.

***I. Background Facts & Proceedings.***

Kirk and Susan Shearer were married on July 15, 1966. The couple have two children, Kirk J., seventeen, and Kristian, fifteen. Kirk and Susan were fifty and forty-nine years old respectively.

Susan is a licensed practical nurse. She worked at Mercy Hospital in Cedar Rapids from 1968-1976. For one year she worked as an Avon representative and part-time in a nursing home. After that, she was unemployed for sixteen years. Presently, she is employed as a part-time food service assistant at Kennedy High School. Her gross income in 1996 was $3133.43. Susan suffers from fibromyalgia, or chronic pain syndrome. Due to the debilitating affects of this disease, Susan is not capable of full-time employment. She does not qualify for social security benefits because she has not worked five out of the last ten years.

Kirk has worked at Svedela Industries for twenty-nine years. He is a special accounts manager. Kirk's base salary is $41,200 per year. He receives quarterly bonuses dependent on his sales and profits. In 1996 he earned $106,122. His five-year average gross annual income is $73,466.

The couple's thirty-year marriage had been rocky for many years, with numerous separations and reconciliations. The marriage was rife with physical and emotional abuse of Susan by Kirk. Kirk's abuse contributed toward Susan's development of fibromyalgia. Susan filed for divorce in June of 1996.

Following trial, the district court granted Susan physical care of the children. Kirk was ordered to pay $1184.90 per month in child support and $700 per month in alimony. After Kirk's child support obligation ceases, his alimony obligation increases to $1200 per month until Kirk retires. Susan appeals.

***II. Standard of Review.***

Dissolutions are equitable in nature and reviewed de novo. *See* Iowa R. App. P. 4. This requires an examination of the entire record to adjudicate anew the rights of the parties. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). Weight is given to the findings of the trial court, although they are not binding. *Id.* Iowa R. App. P. 14(f)(7).

***III. Calculation of Child Support.***

Kirk's income fluctuates greatly from year to year. This is demonstrated by his gross yearly income over the last five years. He earned $86,630; $41,418; $58,853; $74,309; $106,122 in 1992 through 1996.

Susan argues the court erred in calculating Kirk's income for the purposes of determining child support. The trial court averaged Kirk's salary for the five years

prior to dissolution. Susan contends the trial court should have obligated Kirk to pay $950 per month in child support plus 37.2 percent of his yearly bonus.

The difficulty in this case is determining a fair method of calculating Kirk's fluctuating income for the purposes of child support. Iowa courts have previously considered the problems inherent in fixing child support when a person's income fluctuates widely. *In re Marriage of Powell*, 474 N.W.2d 531, 533-34 (Iowa 1991). An approved approach to dealing with a widely varying income is to average the income over a reasonable period. *Id.* Income averaging has been applied in many situations to determine child support obligations. *In re Marriage of Cossel*, 487 N.W.2d 679, 681 (Iowa App.1992)(income averaging applied to determine the child support obligations of farmer); *In re Marriage of Hoag*, 380 N.W.2d 8, 10 (Iowa App.1985)(five-year period considered in determining income for child support purposes). An additional reason to use the averaging approach is it provides stability and reliability in carrying out the child support guidelines. *In re Marriage of Robbins*, 510 N.W.2d 844, 846 (Iowa 1994). When the amount of income is fixed by ascertaining an average income, there is minimal risk either party will need to apply to the courts for a reevaluation of the current status of income. *Id.*

The trial court employed a well-accepted method of determining income by averaging Kirk's gross incomes for the last five years. The trial court's method of calculation is affirmed. Under this method, Kirk's yearly gross income is $73,466.00 per year. His net monthly income is $4071.85. Susan's net monthly income is

$294.31. Under the Iowa Child Support Guidelines, Kirk is obligated to pay Susan $1184.90 per month in child support.

Kirk argues the trial court erred in not deducting Kirk's alimony obligation from his net income before calculating his child support obligation. When a primary wage earner is orded to pay substantial alimony for an extended period of time, the alimony he or she pays should be subtracted from his income in computing child support. *In re Marriage of Allen*, 493 N.W.2d 273, 275 (Iowa App. 1992).

The trial court found Kirk's net monthly income to be $4071.85. We, therefore, modify Kirk's income for child support calculations to $3371.85. Under the guidelines, Kirk's child support obligation is $995.

***IV. Alimony Award.***

Susan contends her permanent alimony award is inadequate to meet her needs. The trial court ordered Kirk to pay Susan $700 per month until child support ceases. At that point, Kirk was ordered to pay $1200 per month until Susan dies or remarries or Kirk retires. The trial court further reduced Kirk's obligation after his retirement.

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). Alimony is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Welchel*, 476 N.W.2d 104, 110 (Iowa App. 1991). We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of*

*Dahl*, 418 N.W.2d 358, 359 (Iowa App. 1987). The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21(3) (1995).

In determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) the present standards of living and ability to pay balanced against the relative need of the other. *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983). Self-sufficiency is the goal of rehabilitative alimony. *In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa App. 1996) (citing *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989)).

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, 63 (Iowa 1989). One purpose of permanent alimony is to provide the receiving spouse with support comparable to what would be received if the marriage continued. *Id.* at 62.

Kirk's averaged yearly income is approximately $73,000; Susan's is approximately $3000. The district court's award of permanent alimony was justified by Susan's age, earning capacity, health, the duration of the marriage, and the disparity of the parties' incomes. Susan claims the amount of the award is inadequate. Susan is receiving $8400 per year until her child support ceases. At that time, she will receive $14,400 per year in alimony. This amount is enough to meet her basic needs. There is no current medical evidence that fibromyalgia prevents Susan from more productive employment. Susan is capable of obtaining employment to supplement

the alimony she receives from Kirk. The trial court did not err in its computation of Susan's alimony award. The alimony award is affirmed.

*V. Attorney Fees.*

Susan argues the district court erred in not awarding her trial attorney fees and requests an award of trial attorney fees. Susan contends the district court erred in failing to award her trial attorney fees.

Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* Awards of attorney fees must be for fair and reasonable amounts, *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. *In re Marriage of Lattig*, 318 N.W.2d 811, 817 (Iowa App. 1982). Because we find no evidence the trial court abused its discretion in denying Susan an award of attorney fees, we affirm the district court on this issue.

Susan requests this court award her appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Gilliam,* 525 N.W.2d 436, 439 (Iowa App. 1994). Each party shall pay their own attorney fees and costs of the action shall be split between the parties.

**AFFIRMED AS MODIFIED.**