

IN THE COURT OF APPEALS OF IOWA

No. 6-172 / 95-737

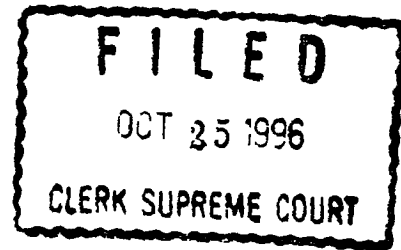
**IN RE THE MARRIAGE OF RANDALL
SCOTT PRIBYL AND NANCY ANN PRIBYL**

Upon the Petition of
RANDALL SCOTT PRIBYL,

Petitioner-Appellee/Cross-Appellant,

And Concerning
NANCY ANN PRIBYL,

Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Nancy appeals from the district court's order modifying the parties' dissolution decree to reduce Randall's child support payments. Randall cross-appeals arguing the court erred in not reducing his child support obligation to forty-percent of his monthly income. **AFFIRMED AS MODIFIED ON APPEAL. AFFIRMED ON CROSS-APPEAL.**

Arthur L. Buzzell, Davenport, for appellant.

Michael C. Walker of Goebel & Koury Law Offices, Davenport, for appellee.

Considered by Sackett, C.J., Cady and Vogel, JJ.

CADY, J.

This is an appeal and cross-appeal from an order by the district court modifying the child support provision of a decree for dissolution of marriage. Nancy Pribyl claims the trial court improperly deviated from the child support guidelines in determining the modified support obligation. Randall Pribyl claims the deviation by the district court should have been greater, and his obligation under the original decree to satisfy the monthly mortgage payments on the marital residence should have been eliminated.

Randall and Nancy dissolved their marriage in October 1993. Nancy was given primary physical care of their four children, and Randall was required to pay monthly child support of \$3,765. Additionally, Randall was ordered to pay the monthly mortgage of \$1,075 on the parties' home until Nancy reached the age of 60 years or remarried. Nancy and Randall were awarded the home as tenants in common, and Nancy was given a lien of \$45,000 together with the right to occupy the home. In the event the house was sold, Randall was required to continue to pay \$1,075 towards Nancy's new home mortgage. If the new mortgage was less than \$1,075, Randall was required to pay the difference to Nancy as alimony.

The terms of the original decree were based on Randall's income for 1992. He was employed as a stockbroker and earned gross income of \$127,657. Nancy's gross income at the time of divorce was \$11,806.

Randall filed a petition to modify the decree in July 1994. The hearing was held on December 1, 1994. Randall actually accumulated gross earnings in excess of \$150,000 in 1993, but began to experience a reduction in his income in 1994. He believed this reduction was due to cyclical market forces as well as the closing of a program he managed. He also incurred greater secretarial expenses. His net monthly income for the first eleven months of 1994 averaged \$5,823.20, with a high of \$9,205 in March and a low of \$1,964 in the month just prior to the hearing. His net monthly income in July and August was less than \$3,000.

The district court modified the child support obligation based on a finding that Randall's net monthly earning capacity had been reduced to \$5,823.20. It then deviated from the guideline amount of \$2,329.28, based on a finding that Randall's additional obligation to pay the mortgage created a substantial injustice. The district court set the monthly child support at \$1,900.

Nancy appeals. She only claims a deviation from the guidelines was not justified. She asked the modified amount be set at \$2,329, plus \$40 for each month to compensate for life insurance premiums as required under the original decree.

Randall cross-appeals. He asks that monthly child support be set at \$1,421.53. He also requests the mortgage obligation be eliminated.

Our review is de novo. Iowa R. App. P. 4. We review the entire record and decide the case anew, based on the issues presented.

We first consider Randall's net monthly income. It is often difficult to determine "net monthly income" under the guidelines when parents experience fluctuations in their income from month to month. *In re Marriage of Cossel*, 487 N.W.2d 679, 682 (Iowa App. 1992). Consequently, it is generally appropriate to average monthly income over a period of time to arrive at "net monthly income." *See Id.* at 681.

We reject Randall's claim that his income should be based on his average net earnings from June 1994 through November 1994. This limited period of time results in distortion, a concept which equity abhors. Nancy does not challenge the "net monthly income" figure of \$5,823.20, and that is the amount we will utilize to compute Randall's child support obligation.

Courts may set child support at variance with the uniform guidelines only if the variance is necessary to provide for the needs of the children or do justice between the parties under the special circumstances of the case. Iowa Code section 598.21(4)(a) (1995). We find no special circumstances to support a deviation from the guidelines in this case.

Randall has an ownership interest in the house and is responsible for satisfying the note and mortgage against the house. The payment is a monthly expense, not unlike the other monthly living expenditures of a person of Randall's means. The guidelines consider the normal expenses of the noncustodial parent. A deviation from the guidelines is not justified merely because the normal overall expenses of the

noncustodial parent make it burdensome to pay support at the guideline level. *See State ex rel. Weber v. Denniston*, 498 N.W.2d 689, 691 (Iowa 1993). Under the particular circumstances of this case, we find no justification to support a deviation.

We modify the order of the district court and set Randall's monthly support obligation at \$2,369 (including the \$40 insurance premium), retroactive to February 21, 1995, the date the modified decree was entered. We deny Randall's claims on his cross-appeal. Costs are assessed to Randall.

AFFIRMED AS MODIFIED ON APPEAL. AFFIRMED ON CROSS-APPEAL.

Vogel, J., concurs; Sackett, C.J., partially dissents.

SACKETT, C.J. (concurring in part; dissenting in part)

I concur in part and dissent in part.

The first question I need to address is whether the trial court correctly computed Randall's "net monthly income" for the purpose of applying the child support guidelines at the time of the modification hearing. Before applying the guidelines, there needs to be a determination of the net monthly income of the custodial and noncustodial parent. See *In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991) (court must determine the parents' current income from most reliable evidence presented); *In re Marriage of Lalone*, 469 N.W.2d 695, 696 (Iowa 1991) (application of child support guidelines chart first involves determination of net monthly income of each parent); *In re Marriage of Miller*, 475 N.W.2d 675, 678 (Iowa App. 1991) (first step in using the child support guidelines is to arrive at "net monthly income").

Where a parent is not salaried and has wide and varied fluctuations in income, computation of "net monthly income" as defined by the guidelines can be difficult. *In re Marriage of Cossel*, 487 N.W.2d 679 (Iowa 1992); see also *In re Marriage of Gaer*, 476 N.W.2d 324, 326-30 (Iowa 1991) (in determining income available for child support, self-employed truck driver would be allowed deduction for straight-line method of depreciation of truck); *Powell*, 474 N.W.2d at 533-34 (court may determine current monthly income based upon income prior to temporary

unemployment); *State ex rel. Dept. of Human Serv. v. Burt*, 469 N.W.2d 669, 671 (Iowa 1991) (amount father ordered to pay to be applied toward his accrued obligation for public assistance advanced in past is not deductible from gross income in determining net income under child support guidelines); *Lalone*, 469 N.W.2d at 697 ("net monthly income" excluded alimony paid); *In re Marriage of Mayfield*, 477 N.W.2d 859, 861-62 (Iowa App. 1991) ("net income" was properly found to equal average of last two years of taxable income); *Miller*, 475 N.W.2d at 678-79 ("net monthly income" did not exclude alimony paid); *In re Marriage of Jennings*, 455 N.W.2d 284, 287-88 (Iowa App. 1990) ("net monthly income" under the guidelines means gross monthly income less specifically enumerated deductions).

To establish a monthly income for a self-employed person or one who has fluctuating monthly income, it generally is best to use an average of income from a period that accurately reflects the fluctuations in income. *Cossel*, 487 N.W.2d at 681; *see also In re Marriage of McQueen*, 493 N.W.2d 681, 691 (Iowa App. 1992). That is basically what the trial court did in this case. I find no reason to depart from the trial court's determination of Randall's "net monthly income" for child support purposes.

The next question is whether the trial court properly considered Randall's obligation to make mortgage payments in adjusting his support obligation downward. Randall contends the payment was alimony and Nancy contends it was a property settlement. The payment was structured according to the parties' agreement to help

Nancy retain a home for the children and to provide for Randall an income tax deduction for interest and property taxes paid on the house. It also had a guarantee that if he did not pay \$1075 per month, that additional amount would be paid as alimony. The payment has some characteristics of both a property settlement and alimony and yet does not meet the true definition of either. The question though is whether the trial court abused its discretion in considering the payment in arriving at a modified child support figure. The guidelines give discretion to the district court in setting child support to adjust amounts as necessary to do justice under the special circumstances of each case. *Lalone*, 469 N.W.2d at 695; *Miller*, 475 N.W.2d at 679-80. I do not find under the circumstances the trial court abused its discretion in considering the mortgage payment.

I would, as did the majority, reject the issues Randall raises on cross-appeal.