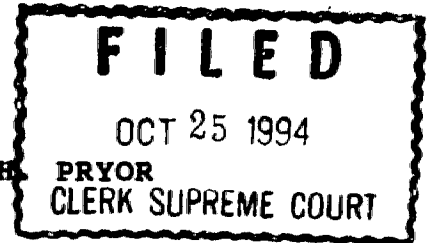


IN THE COURT OF APPEALS OF IOWA

No. 3-657 / 93-582



IN RE THE MARRIAGE OF DEBRA S. PRYOR AND NOLAN H. PRYOR

Upon the Petition of

DEBRA S. PRYOR,

Appellee,

And Concerning

NOLAN H. PRYOR,

Appellant.

Appeal from the Iowa District Court for Black Hawk
County, George L. Stigler, Judge.

Nolan H. Pryor appeals the provisions of a decree
dissolving his marriage to Debra S. Pryor. **AFFIRMED AS
MODIFIED.**

Donna Lesyshen of Tyler & Lesyshen, Waterloo, for
appellant.

Robert C. Andres of Fulton Law Firm, Waterloo, for
appellee.

Heard by Sackett, P.J., Habhab, J., and Peterson, S.J.*

*Senior judge from the first judicial district serving
on this court by order of the Iowa Supreme Court.

PETERSON, S.J.

Debra Sue Pryor and Nolan Herbert Pryor's marriage was dissolved on March 8, 1993. They had two children, Leroy, born May 21, 1972, and Crystal, born October 19, 1974. Both children live with Debra but only Crystal was eligible for child support.

The district court ordered Nolan to pay \$115 per week in child support and \$125 per week in alimony. Alimony was to continue until either party died or until Nolan retired at age sixty-two or thereafter. If Nolan retired prior to this time, it would not constitute a substantial change in circumstances justifying a modification of alimony. Further, when Nolan's child support obligation ceased, alimony would increase to \$240 per week. The court also awarded Debra the homestead, a one-third interest in a real estate contract sale, one-half of the John Deere pension and the Deere Community Credit Union account. The court further awarded the household goods and certain other personal property.

Nolan appeals. He argues the district court erred in ordering the amount and duration of the alimony award. He claims the order forces him into Involuntary Servitude. He contends alimony should continue only until the death of either party or Debra's remarriage or cohabitation. He also contends Debra should receive rehabilitative alimony and the testimony about Debra's bad health was hearsay. He further claims that if he retires early, the district court

order should be modified to consider this a substantial change in circumstances.

Finally, Nolan argues the property division was unfair. He claims he should be awarded the entire interest in the real estate contract, the majority of the household goods and the money in the credit union account.

Debra requests attorney fees on appeal.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

Debra Sue Pryor and Nolan Herbert Pryor were married in Waterloo, Iowa, on October 17, 1968. Debra is living at 1309 State Street, Cedar Falls, Iowa, along with Crystal and Leroy. Crystal graduated from high school in May of 1993. She intended to live with Debra after her graduation. Leroy was also living with Debra at the State Street address and was unemployed. Debra has attempted to get him to secure employment, however, at the time of the trial had been unsuccessful. She provides his support and he does not contribute anything toward the living expenses of the trio.

Debra is unemployed and the record does not show she has any marketable skills. Nolan has been employed at the John Deere Tractor Company for approximately twenty-nine

years. His gross weekly income for a forty-hour week is \$634.00. After deductions for the normal payroll taxes and union dues, his net weekly income is \$445.08. This would be a net monthly income of \$1913.84, assuming four and three-tenths weeks in a month.

Nolan is eligible to retire after thirty years of service. This would enable him to retire under this program on December 3, 1993. He would be entitled to a pension at that time of \$2000 per month or, after the normal payroll taxes, \$1660 per month. This would continue until he reached sixty-two years of age, plus one month. At that time, his base pension would be reduced to \$970.50 per month. He would be eligible for social security benefits at that time of \$850 per month. His total income at that time, before any adjustment for any possible taxes, would be \$1820.50.

At the time of the trial, Nolan said he planned on working until December 4, 1993, and then he planned on retiring. He stated he was definitely going to retire "and there was no doubt about it." When asked about his reasons for retiring at that time, other than the fact he was eligible for the "thirty-year" retirement program, he said he was "just more or less tired of working, you know, and sacrificing for nothing." When asked what he intended to do with the rest of his life he said "just to enjoy life instead of working." When asked if he felt any commitment to provide support for his wife, he indicated "that's all I

have ever done." His response to the question "So you have no specific plans come December other than to retire?" was "That's right. There is such a minimal difference in what I am working for than to be retired, it's not worth working."

The record does not reveal that Nolan has any health problems. However, Debra has undergone three back operations. Two were performed by Dr. Delbridge and the last one by Dr. Crouse. According to Dr. Crouse, she should avoid work which requires repetitive bending and stooping.

Debra and Nolan acquired certain assets during their lifetime. These consist of a home at 1309 State Street in Cedar Falls, Iowa. This is a two-story home, with aluminum siding, which was built in 1910. There is a total of six rooms with three bedrooms and one and one-half bath. It has a total living area of 1328 square feet. It has a value of \$35,500. It does, however, require some roof repair inasmuch as there is a leak in the roof over the kitchen and the bathroom and the front and back door. They sold some real estate on contract and the balance due on this is \$49,700. This is payable in monthly installments of \$400 and there is a balloon due in March of 1995. The amount of the balloon payment was not shown. They have a 1985 Dodge automobile that has a value of \$2500, 1970 Chevrolet Monza that has a value of \$1000, and a 1975 Chevrolet station wagon that has a value of \$500.

The present value of Nolan's accrued retirement benefits, as of June 13, 1992, was \$30,174.79. Debra's financial statement shows an account at the John Deere Community Credit Union in the sum of \$1277. Nolan's financial statement does not show that account. The record contains financial statements filed by the parties shortly after the dissolution was filed and both of them indicate an account at the credit union in the sum of \$5300. At the time the parties separated, they divided their savings accounts and the account in the sum of \$1277 is the remaining share of that account that Debra received.

The parties accumulated the normal household goods and furnishings. Petitioner's exhibit C lists these items. Debra has indicated on the exhibit certain items which belong to the children and certain items that were in the possession of Nolan. She has also listed her opinion as to their value. The record does not indicate how she arrived at this figure. Nolan has also established a value of each item which was the purchase price new. Consequently, there is a substantial difference in the value that the parties attribute to these items.

After the parties separated, Nolan purchased a home at 646 Sherman in Cedar Falls, Iowa. He paid \$9500 for this home and borrowed the money from his father. He is paying this back at the rate of \$250 per month. This house is twenty-four feet by twenty-four feet and has one bedroom and a single garage. He contends the house needs a new

roof and a cement platform in the garage and some trees need to be cut down. He has furnished this home and spent, as he indicated, "thousands and thousands of dollars." He identified one bill from Slumberland in the sum of \$1230. The other items were not shown.

Nolan initially contends the trial court erred in establishing the amount of alimony he is required to pay and the duration he is required to pay the alimony. He also contends the trial court erred in finding early retirement would not constitute a substantial and material change in circumstances to warrant a modification of the alimony. This is really an issue about the amount of income that should be ascribed to Nolan in determining his alimony responsibilities. It is his contention that, upon his retirement in December of 1993, his income for determining alimony should be \$1660 per month, which would be his pension. Debra contends it should be based on his net monthly income while employed at the John Deere Tractor Company or \$1913.84 per month.

It is the earning capacity of the spouse that determines his liability for support payments as opposed to his present income. In re Marriage of Wegner, 434 N.W.2d 397, 398 (Iowa 1988). A party cannot minimize their support obligations if the reduction in income that supports the claimed reduction is voluntarily assumed or is self-inflicted. In re Marriage of Foley, 501 N.W.2d 497, 500 (Iowa 1993); Ellis v. Ellis, 262 N.W.2d 265, 268 (Iowa

1978). The supreme court in the Ellis case considered a "early retirement" that was voluntarily entered into and found it could not be the basis for a modification of support obligations. Ellis, 262 N.W.2d at 268. The supreme court said:

a defendant cannot voluntarily abandon his employment, reduce his wages, or by other conduct bring about a reduced income and thereby avoid or cause a reduction of a reasonable support order.

Id., quoting Commonwealth ex rel. Mazon v. Mazon, 163 Pa.Sup. 502, 505, 63 A.2d 112, 114 (1949). We believe the basis for determining Nolan's support obligation is his net monthly income as an employee of John Deere Tractor Company.

Nolan next contends that using his net monthly income as an employee to determine his support obligations violates the Involuntary Servitude provisions of the Iowa and United States Constitution.

The thirteenth amendment of the United States Constitution provides:

Neither slavery nor involuntary servitude, except as a punishment for a crime where the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Article I, section 23 of the Iowa Constitution provides:

There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of a crime.

"Involuntary servitude" means a condition of servitude in which the victim is forced to work for a person by the use

or threat of physical restraint or physical injury, or by the use of threat or coercion through law or legal process. United States v. Kozminski, 487 U.S. 931, 952, 108 S.Ct. 2751, 2765, 101 L.Ed.2d 788, 811 (1988). This definition encompasses situations in which a person holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion. Id., 108 S.Ct. at 2765, 101 L.Ed.2d at 811. The thirteenth amendment does not prohibit the state or federal governments from compelling citizens, by threat of criminal sanctions, to perform certain civic duties such as jury service or military service. Id. at 943-944, 108 S.Ct. at 2760, 101 L.Ed.2d at 805.

The Iowa Supreme Court considered this section of the Iowa Constitution only once in Flanagan v. Jepson, 177 Iowa 393, 158 N.W. 641 (1916). It held that imprisonment was not servitude but labor enforced as a punishment was Involuntary Servitude unless the person had been convicted of a crime by the evidence beyond a reasonable doubt. In Flanagan, the defendant had been sentenced as a result of a contempt of court charge. Because he had not been convicted of a crime, it was held the statute he was sentenced under was unconstitutional. The constitution authorizes Involuntary Servitude only as a punishment for a crime. Id. at 399, 158 N.W. at 644. We believe requiring Nolan to pay support based on his earning capacity as opposed to his present income does not amount to Involuntary Servitude.

The trial court ordered support payments in the total sum of \$240 per week. Initially, this was denominated as child support in the sum of \$115 per week and alimony in the sum of \$125 per week. When Crystal reached eighteen or graduated from high school, then the support payments remained the same but were denominated entirely as alimony. Crystal was eighteen when she graduated from high school in May of 1993, which was approximately two months after the decree was entered.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. In re Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 1989). Child support is based on the parent's mutual duty to support their children. Brown v. Brown, 269 N.W.2d 819, 822 (Iowa 1978). We believe the alimony should be determined independent of the child support obligation.

Nolan contends the trial court should have granted rehabilitative alimony as opposed to traditional alimony. Rehabilitative alimony is a way of supporting an economically dependent spouse through a limited period of reeducation or retraining following a divorce, thereby creating an incentive and opportunity for that spouse to become self-supporting. Francis, 442 N.W.2d at 63. On the other hand, traditional alimony is in lieu of support which would have taken place had the marriage continued. Id.

The criteria for determining alimony is set forth in section 598.21(3). This was a marriage of almost

twenty-five years duration. Nolan has been employed for the entire marriage and enjoys good health. Debra, on the other hand, has not been employed during the marriage and has suffered three surgeries in the recent past and has limitations upon her physical activities. The record does not show that she has any skills or training that would allow her to enter the labor market and the record does not show any plans that she has for additional training.

We do not believe this is a situation in which rehabilitative alimony should be awarded. We do believe, however, alimony should be awarded, and we believe \$185 per week is a reasonable amount. We believe this should continue until Nolan reaches sixty-two years of age or until Debra remarries or cohabitates or either party dies. We therefore modify the dissolution decree to make this change.

Nolan also contends the court erred in holding early retirement would not constitute a substantial and material change in circumstances such to warrant an alteration in the payment of alimony. Because we have held Nolan's ability to earn income as opposed to his actual income is the basis for determining his alimony obligations, it is not necessary that we consider this issue. We would only note that appellate courts of this state, although stopping short of forbidding the practice of retention of jurisdiction to modify decrees absent the showing of material change in circumstances, discourage it. In re Marriage of Luebbert, 400 N.W.2d 80, 82 (Iowa App. 1986).

Nolan contends the testimony concerning Debra's bad health was hearsay. We presume he is referring to petitioner's exhibit F, and her testimony about what Dr. Crouse told her. The appendix does not contain any reference to petitioner's exhibit F and there was no objection to her testimony concerning the instructions from Dr. Crouse. Accordingly, we find the respondent has failed to preserve error on this issue.

Nolan next contends the property division was unfair. The trial court awarded Debra a greater percentage of the assets of this marriage. However, we believe, under the circumstances of this case, the trial court's division was appropriate. A percentage division of the assets of a marriage has been rejected and the question is what is equitable under the circumstances. In re Marriage of Callenius, 309 N.W.2d 511, 514 (Iowa 1981). We would note Nolan requests that he be awarded the monies in the credit union. The monies in the credit union at the time the parties separated were equally divided and the monies remaining in the credit union at the time of the dissolution was that portion of Debra's from the initial division. We would also note the trial court did not establish a value on the household goods and furnishings that were rewarded to the parties. The record does contain some information submitted by the parties with respect to the value of those items. However, the difference was so great, we believe it is impossible to determine the value awarded to the parties from this record.

To summarize, we affirm the trial court with the exception of the amount of alimony awarded to Debra. Inasmuch as we have based our award of alimony on Nolan's ability to earn income as opposed to his actual income and alimony shall continue until he reaches the age of sixty-two, Debra should not be awarded a portion of his John Deere pension. At this time we prefer to leave that question for the courts to decide at such time as Nolan reaches sixty-two years of age.

Debra seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We find each party should pay his or her own attorney fees. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.

Habhab, J., concurs; Sackett, P.J., specially concurs.

SACKETT, P.J. (Specially concurs)

I concur in the result only.