

**IN THE COURT OF APPEALS OF IOWA**

No. 8-369 / 07-1949

Filed May 29, 2008

**IN RE THE MARRIAGE OF LYNDA EILEEN PENNISTON  
AND ROBERT LEROY PENNISTON**

**Upon the Petition of  
LYNDA EILEEN PENNISTON,**  
Petitioner-Appellee,

**And Concerning  
ROBERT LEROY PENNISTON,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Wapello County, Annette J. Scieszinski, Judge.

Robert Penniston appeals the alimony and trial attorney fee provisions of the trial court's decree dissolving the parties' marriage. **AFFIRMED.**

David D. Dixon of Heslinga, Heslinga, Dixon & Moore, Oskaloosa, for appellant.

Bryan J. Goldsmith of Webber, Gaumer & Emanuel, P.C., Ottumwa, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

**HUITINK, J.**

Robert Penniston appeals the alimony and trial attorney fee provisions of the trial court's decree dissolving the parties' marriage. We affirm.

**I. Background Facts and Proceedings**

Robert and Lynda Penniston were married in May 1984. Lynda filed for divorce on February 12, 2007. At the time this case was tried in September 2007, Robert was fifty-three years of age. He had worked full-time as a production scheduler at Clow Valve for thirty-five years. In 2006 Robert earned \$59,998, including overtime compensation. Robert plans to retire at age sixty-six. His projected retirement includes \$1635 in monthly Social Security benefits and \$1370.32 in monthly pension benefits. Robert also had \$17,000 in his 401K account.

Lynda was fifty-nine years, eleven months of age. She has no postsecondary education. After graduating from high school, Lynda worked part-time as a cashier and as a secretary. During the marriage, Lynda worked part-time as a merchandiser and as a bank representative. She was currently working as a part-time teacher's associate at a local school district. In 2006 Lynda earned \$14,061. She has \$4000 in her IPERS account. If Lynda retires at age sixty-six, her projected income includes \$665 in monthly Social Security benefits and \$366.36 in monthly IPERS benefits. Lynda also has the option of electing to receive one-half of the amount of Robert's Social Security benefits.

The trial court's October 29, 2007 decree awarded Lynda half of Robert's monthly pension benefit accrued during the marriage, effective when Robert retires. It also provides:

Lynda's present inability to be fully self-supporting is a permanent condition. She requires ongoing and permanent support from Robert until such time---if ever---as she is able to access retirement benefits or other income that would cover her reasonable day-to-day living expenses and afford her a lifestyle comparable to that she enjoyed in this marriage. The amount of support Robert should pay must reflect his own ability to pay as well as Lynda's anticipated needs and resources, the marital debt burdens he will continue to bear, and his own living expenses. Also of relevance, is the favorable income-tax treatment of alimony for the payor. Under the sum of circumstances here, it is reasonable for Robert to pay \$1,000 per month to Lynda. Once she becomes eligible for retiree benefits and the parties' relative financial circumstances are known, the support amount should be reviewed.

Here, Lynda's permanent need for financial support is in the nature of traditional alimony. Although she is presently incapable of becoming self-supporting, she could attain additional work that would loosen her tight financial circumstances some. At her age, in her health situation, and in light of her low level of motivation, it is not reasonable to expect her to retrain for a different occupation---thus negating rehabilitative alimony; and, her need is not predicated upon any real economic sacrifices she made to advance Robert's income-production ability.

(Citations omitted.) Finally, the trial court awarded Lynda \$3000 in attorney fees.

On appeal, Robert contends both the amount and duration of the alimony awarded are excessive. He also contends the record does not support an award of attorney fees and the trial court abused its discretion by concluding otherwise.

## **II. Standard of Review**

We review the provisions of a dissolution decree de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinhart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078,

156 N.W.2d 845, 846 (1968). We, however, give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g). Prior cases have little precedential value; therefore, we must base our decision on the particular facts of this case. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

### **III. Alimony**

Alimony is “a stipend to a spouse in lieu of the other spouse’s legal obligation for support.” *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004) (quoting *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989)). It is not an absolute right; an award of alimony depends on the circumstances of the particular case. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). Although we review the trial court’s award of alimony de novo, “we give that court considerable latitude in making this determination.” *Id.* We will disturb the trial court’s alimony determination “only when there has been a failure to do equity.” *Id.*

The trial court may award alimony after considering the factors in Iowa Code section 598.21A(1) (2007). *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa Ct. App. 1993). These factors include: (1) the length of the marriage, (2) the age of and physical and emotional health of the parties, (3) the property distribution, (4) the educational level of the parties at the time of the marriage and at the time the dissolution action is commenced, (5) the earning capacity of the party seeking alimony, (6) the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed

during the marriage, and (7) the tax consequences to the parties. Iowa Code § 598.21A(1)(a)-(g).

“An alimony award will differ in amount and duration according to the purpose it is designed to serve.” *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). Traditional or permanent alimony “is usually payable for life, or for so long as the dependent spouse is incapable of self-support.” *Id.* Its purpose “is to provide the receiving spouse the support comparable to what he or she would receive if the marriage continued.” *Id.* In appropriate circumstances, the obligation to pay traditional alimony may continue after retirement. *See, e.g., In re Marriage of Bell*, 576 N.W.2d 618, 623 (Iowa Ct. App. 1998) (holding wife was unable to work and needed husband’s support even after he retired), *overruled on other grounds by In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998); *In re Marriage of Hayne*, 334 N.W.2d 347, 353 (Iowa Ct. App. 1983) (holding wife had no source of support other than alimony and age (fifty-seven) was an impediment to substantial employment).

Based on our de novo review of the record, we conclude neither the amount nor the duration of the alimony awarded is excessive, considering the length of the parties’ marriage, Lynda’s age (fifty-nine years, eleven months), the fact that Lynda will not receive half of Robert’s pension benefits until Robert retires, her limited education and resulting reduction in her earning capacity, as well as the favorable tax consequences Robert will receive for paying alimony. Like the trial court, we also conclude it would be premature to determine whether Robert’s alimony obligation will terminate upon his retirement. We accordingly affirm on this issue.

**IV. Attorney Fees.**

Attorney fees are not recoverable as a matter of right, but rest within the discretion of the trial court and depend upon the parties' respective financial needs and ability to pay. *In re Marriage of Sprague*, 545 N.W.2d 325, 328 (Iowa Ct. App. 1996). Based on our review of the record, we are unable to say the trial court's award of \$3000 attorney fees to Lynda was an abuse of discretion and affirm on this issue. We decline to award either party appellate attorney fees. Costs are assessed to Robert.

**AFFIRMED.**