

IN THE COURT OF APPEALS OF IOWA

No. 8-528 / 07-1811

Filed July 30, 2008

**IN RE THE MARRIAGE OF RUSSELL
H. SOLOMON AND SHIRLEY P. SOLOMON,**

UPON THE PETITION OF RUSSELL H. SOLOMON,
Petitioner-Appellant,

And Concerning
SHIRLEY P. SOLOMON,
Respondent-Appellee.

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

Russell Solomon appeals from the economic provisions of the decree granting separate maintenance in his marriage to Shirley Solomon. **AFFIRMED AS MODIFIED; REMANDED WITH DIRECTIONS.**

James Peters, Independence, for appellant.

Curtis Klatt and Teresa Rastede of Dunakey & Klatt, P.C., Waterloo, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

VOGEL, P.J.

This is an appeal from a ruling upon a petition seeking separate maintenance. Russell and Shirley Solomon were married in 1969. Russell was the family's sole wage earner during the marriage, retiring from John Deere in 2001 after thirty-seven years. Shirley was a homemaker throughout the marriage and never worked outside of the home. At the time of the trial on the petition for separate maintenance, Russell was sixty-years old and Shirley was sixty-two. She suffered from a number of medical conditions and has little employable skills.

Russell is eligible to receive a pension from John Deere. At the time of trial he was eligible to receive a gross monthly benefit of \$4980. When he turns sixty-two in 2009 and becomes eligible to receive monthly social security benefits of \$1535, his pension will reduce to \$4125 per month.

In its separate maintenance ruling, among other things, the court ordered that a QDRO be prepared entitling Shirley to one-half of Russell's John Deere pension. The court then noted that "when [Russell] turns 62 and becomes eligible for social security because this is a separate maintenance action as opposed to a dissolution matter, [Shirley] will not be able to receive a 50 percent share of that monthly social security payout." Accordingly, to "protect" her, the court ordered that when Russell turns sixty-two and starts drawing social security, Shirley shall be entitled to monthly spousal support of \$600.

On appeal, Russell claims that the court's assumption regarding Shirley's ineligibility to receive social security benefits when he turns sixty-two is incorrect. Therefore, because the court's award of spousal support to Shirley was based

entirely on this erroneous assumption, he asks this court to reverse and remand for a determination of social security income available to each party and appropriate adjustment. Russell cites to 20 C.F.R. 404.330, which provides that a spouse is eligible to claim benefits based on the wife or husband's benefits if, among other elements, the relationship has lasted at least one year, the spouse is sixty-two or older, and he or she applies for benefits. Assuming she applies when Russell turns sixty-two, Shirley appears to meet all other eligibility requirements.

Shirley now concedes that she will qualify to receive social security benefits under 20 C.F.R. 404.330. However, she notes that it is uncertain whether she will actually apply to receive the benefits, and cautions that Congress could amend, alter, or delete her entitlement at any time. Thus, because of the "tenuous" nature of her entitlement, and because of her physical and mental problems, she asserts this court should affirm the district court's award or in the alternative, adjust the amount of the award.

We conclude that because the sole basis of the court's award of \$600 in monthly spousal support was an incorrect reading of social security law, the award cannot stand. We believe the appropriate remedy is to remand to the district court for a reconsideration of Shirley's eligibility for social security benefits and the amount thereof. The award of spousal support, if any, should then be determined based on a correct reading of the social security entitlement law. Costs are assessed to Shirley.

AFFIRMED AS MODIFIED; REMANDED WITH DIRECTIONS.