IN THE COURT OF APPEALS OF IOWA

No. 7-921 / 07-1081
Filed December 28, 2007

**IN RE THE MARRIAGE OF JUDY SMOCK
AND CHARLES DEAN SMOCK**

**Upon the Petition of
JUDY SMOCK,**
Petitioner-Appellee,

**And Concerning
CHARLES DEAN SMOCK,**
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

Husband appeals from the spousal support and division-of-pension economic provisions of dissolution decree. **AFFIRMED.**

John Walker of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellant.

Cheryl Weber of Dutton, Braun, Staack, Hellman, P.L.C, Waterloo, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

BAKER, J.

Charles Dean Smock appeals from the spousal support and division-of-pension economic provisions of his decree of dissolution of marriage. On de novo review, we find the district court's resolution is equitable in all respects and therefore affirm.

I. Background and Facts

Charles Dean and Judy Smock were married on July 7, 1973. The marriage was dissolved by decree on May 23, 2007. Two children, who were adults at the time of dissolution, were born of the marriage.

Dean, born on October 20, 1953, is a firefighter, from which he earns approximately $50,000 annually. In the past, he has earned up to $4500 annually from his woodworking and construction business. Dean has a pension from the Municipal Fire and Police System of Iowa. His future pension benefit will be based on his length of service and income.

Judy, born on February 6, 1954, did not work outside the home during the first part of the marriage. She began working in 1986, and has earned as much as $21,840 annually. She currently works for a company owned by her brother, and earns approximately $20,000 annually.

The district court awarded Judy "an amount equal to 50% of a fraction of [Dean's] pension," cost of living increases, and 75% survivor benefits. The court also awarded "something that has similarities to both rehabilitative and traditional" spousal support of $750 per month until Dean's death or her first payment from his pension plan, whichever occurs first. The court awarded Dean the majority of the marital assets, including the marital residence, and ordered he

pay Judy $32,000 to balance the property division. Dean appeals the spousal support and the division-of-pension provisions of the decree.

II. Merits

We conduct a de novo review of dissolution of marriage proceedings. Iowa R. App. P. 6.4; *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We accord the district court considerable latitude and will disturb the court's spousal support and property distribution determinations only when there has been a failure to do equity. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005); *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005).

> This deference to the trial court's determination is decidedly in the public interest. When appellate courts unduly refine these important, but often conjectural, judgment calls, they thereby foster appeals in hosts of cases, at staggering expense to the parties wholly disproportionate to any benefit they might hope to realize.

In re Marriage of Benson, 545 N.W.2d 252, 257 (Iowa 1996).

A. Spousal Support

Dean first contends the district court erred in awarding Judy monthly spousal support of $750, which would not terminate until he retires from his employment as a firefighter. He cites no case authority, however, in support of this issue. By failing to cite any authority, Dean has waived this issue, and we decline to consider it on appeal. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue."). Even if not waived, we would have found his assertion to be without merit on this record. Given the length of the marriage and the disparity in earning capacities, the court's award of spousal support was equitable. *See In re Marriage of Brown*, 462 N.W.2d 683, 684-85 (Iowa Ct. App.

1990) (noting relevant considerations in granting spousal support include the length of the marriage and the parties' earning capacities (citing Iowa Code § 598.21(3) (1989) now found at § 598.21(5) (2007)). We affirm the spousal support provision of the decree.

B. Pension Plan

Dean next contends the district court erred in its distribution of pension benefits from the Municipal Fire and Police Retirement System of Iowa.

i. Defined Benefit Plan

Dean contends the district court erred by relying on *Benson*, 545 N.W.2d 252, for authority in its distribution and division-of-pension benefits. "Pensions are divisible marital property." *In re Marriage of Sullins*, 715 N.W.2d 242, 248 (Iowa 2006). "Although the particular benefits at issue in this case are derived from a statutory retirement plan, [the Iowa Supreme C]ourt has held that a fireman's pension is marital property subject to division in a dissolution proceeding." *In re Marriage of Duggan*, 659 N.W.2d 556, 559 (Iowa 2003) (citations omitted).

The court awarded Judy an interest in Dean's pension benefits as follows:

> When [Dean] retires, [Judy] shall receive an amount equal to 50% of a fraction of [Dean's] pension. The numerator of the fraction shall be the number of months benefits accrued while the parties were married not to exceed the denominator of the fraction which shall be the number of months during which benefits accrued prior to being paid. [Judy] is also awarded cost of living increases and 75% survivor benefits.

This method, known as the percentage method, awards a percentage of the pension benefit "based on the number of years the employee accrued benefits

under the plan during the parties' marriage in relation to the total years of benefits accrued at maturity." *Benson*, 545 N.W.2d at 255.

Dean contends that, because he contributes nearly $5000 annually to the pension plan, it is a defined contribution plan, and *Benson* is therefore inapplicable. We disagree. A defined benefit plan pays future benefits based upon a formula that "uses a '*percentage of earnings per year of service* formula, which provides a benefit that is related to the employee's earnings and length of service.'" *Sullins*, 715 N.W.2d at 249 (quoting *Benson*, 545 N.W.2d at 254-55). A party's contribution to a pension plan does not preclude the application of the percentage method for dividing the pension benefit. *See, e.g.*, *Duggan*, 659 N.W.2d at 560 (noting the district court had properly determined that the husband's pension benefits through the Municipal Fire and Police Retirement System of Iowa should be divided between the parties); *Sullins*, 715 N.W.2d at 249 (identifying IPERS, to which employees contribute, as a defined-benefit plan). We find no merit to Dean's argument that, because he contributes to the pension plan, *Benson* is inapplicable.

ii. Future Growth

Dean also argues that by using a "formula which relies upon the denominator being based upon the date when benefits are paid, the Court is inevitably dividing a percentage of growth attributable to future contributions made by the employee." We find no merit to this argument.

In *Benson*, the husband similarly argued the use of the percentage method would enable the wife "to receive a percentage of any post-dissolution increases in pension benefits," to which the husband claimed he alone was

entitled. 545 N.W.2d at 256. In rejecting this argument, the court noted that if the value of the wife's interest were calculated and frozen at the time of dissolution, the employee-spouse would "reap the benefits of the earnings attributable to the nonemployee spouse's separate property interest in the fund." *Id.* at 257 (quoting Steven R. Brown, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-judgment Partition Actions: Cures for the Inequities in* Berry v. Berry, 39 Baylor L. Rev. 1131, 1188-89 (1987)). It is therefore "preferable to set the value of the benefit for purposes of the equation at the time of maturity." *Id.* The district court used the preferred method to divide the pension. *See Faber v. Herman*, 731 N.W.2d 1, 8-9 (Iowa 2007) (noting the service factor percentage method, which "divides the pension according to a percentage multiplied by a factor based on the member's service during the marriage and the member's total service" is the preferred method for dividing a defined-benefit pension plan). We find the division was equitable and reject Dean's contention that the district court erred in applying this formula because it divides a percentage of growth attributable to future contributions made by him.

iii. Cost-of-Living Adjustments

Dean relies on *Duggan* to support his contention that Judy should not be entitled to any cost-of-living increases since Dean was not retired at the time of the decree. 659 N.W.2d 556. In *Duggan*, the court held "cost-of-living adjustments accruing postdissolution should be treated as marital property where the employee-spouse is retired at the time of trial." *Id.* at 561. In making its decision, the court considered the rule that "any posttrial increase in pension benefits should not be considered marital property subject to division in the

dissolution action." *Id.* (citing *Benson*, 545 N.W.2d at 255). "The rationale for this rule is the notion that '[a]n increase in pension rights *resulting from contributions made after a decree of dissolution but before retirement* is the result of efforts made after the dissolution' and therefore 'should not be included in the allocation of assets of the marital estate.'" *Id.* (quoting *In re Marriage of Klein*, 522 N.W.2d 625, 628 (Iowa Ct. App. 1994)). The court held, however, that since cost-of-living increases occurring after the spouse has retired "are a result of the joint efforts of the parties," the cost-of-living adjustments accruing postdissolution should be treated as marital property where the employee-spouse is retired at the time of trial. *Id.* (citing *Moore v. Moore*, 553 A.2d 20, 23 (N.J. 1989) (noting that postretirement cost-of-living increases should be included in an equitable distribution award to the extent they are attributable to the joint efforts of the parties)).

We do not believe *Duggan* precludes an award of cost-of-living increases simply because Dean has not yet retired. The rationale used in *Duggan*, i.e., that cost-of-living increases that are not attributable to efforts made by the employee-spouse after the dissolution should be treated as marital property, applies here. Cost-of-living increases, whether pre- or post-retirement, are equally passive.

> [T]hey are not attributable to any efforts made by . . . the employee-spouse, after the dissolution. Rather, these increases flow from [the employee's] employment during the marriage; in other words, they are a result of the joint efforts of the parties.

Id.

There exists no basis from this rationale to differentiate a spouse who is retired from one who is not. This is not an increase in pension rights resulting from contributions made after a decree of dissolution; Judy is merely receiving

cost-of-living increases on those benefits that she accumulated during the marriage.

Further, "a number of cases from other states have addressed the issue and have held that a spouse upon divorce is entitled to share in COLA adjustments in retirement benefits applicable to the percentage of retirement benefits awarded." *Brown v. Brown*, 828 S.W.2d 601, 602 (Ark. Ct. App. 1992) (holding an award of one-half of a percentage of gross retirement benefits carries with it the same portion of any cost-of-living increases that occur subsequent to the divorce); *see also Lentz v. Lentz*, 353 N.W.2d 742, 747-48 (N.D. 1984) (finding no merit to argument that a cost-of-living adjustment constitutes a division of property acquired by employee-spouse after the divorce since the benefits were accumulated through employee-spouse's past service, not through any post-dissolution efforts); *Moore*, 553 A.2d at 29 ("To determine the post-retirement cost-of-living increases subject to equitable distribution" the court used the percentage method "to determine the percentage of those increases that are attributable to the employee spouse's participation in the pension." (citations omitted)); *Boyd v. Boyd*, 67 S.W.3d 398, 408 (Tex. App. 2002) ("[P]ost-divorce cost-of-living increases and other increases in value that are not attributable to the employee's continued employment after divorce are community property subject to division."). We hold that Judy is entitled to those cost-of-living increases that accrue on the portion of the pension awarded to her.

iv. Surviving Spouse Benefits

Dean also argues that the district court erred in its distribution of the pension plan that included surviving spouse benefits because, if given survivor

benefits, Judy will be awarded "Dean's separate future interest in his pension plan." Pursuant to the Iowa law governing this pension plan, "a former spouse is not considered a 'surviving spouse' unless 'the division of assets in the dissolution of marriage decree . . . grants the former spouse rights of a spouse.'" *Duggan*, 659 N.W.2d at 560 (quoting Iowa Code § 411.1(19) (2001) (now found at Iowa Code § 411.1(20) (2007)). "[T]he circumstances under which that designation should occur depend on the facts of each case and whether the allowance of survivorship rights effectuates an equitable distribution of the parties' assets." *Id.* Spouse survivorship rights may be awarded to ensure the spouse receives her share of the pension plan in the event of the employee-spouse's untimely death. *Id.*

Here the court found that "75% survivor benefits . . . would be of considerable benefit to [Judy] without unduly reducing what each party would receive when [Dean] finally retires." We find it was equitable to award Judy 75% survivor benefits and affirm the division-of-pension provisions of the decree.

C. Attorney Fees

Judy requests $2500 in appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the parties' respective abilities to pay, and whether the requesting party was defending the district court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). We determine Judy was forced to defend the district court's decision and was successful in her defense. We therefore award her $1000 in appellate attorney fees.

III. Conclusion

Because Dean failed to cite any authority to support his spousal support argument, and therefore waived this issue, we decline to consider it on appeal. Because there was no failure to do equity, we affirm the division-of-pension provision of the decree. We award Judy $1000 in appellate attorney fees.

AFFIRMED.