IN THE COURT OF APPEALS OF IOWA

No. 9-108 / 08-0948
Filed May 29, 2009

IN RE THE MARRIAGE OF DAVID A. BROWN AND PAMELA S. BROWN

Upon the Petition of
DAVID A. BROWN,
Petitioner-Appellant,

And Concerning
PAMELA S. BROWN,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Mary Jane Sokolovske, Judge.

David Brown appeals following entry of the district court's order dividing his pension. **AFFIRMED.**

R. Scott Rhinehart of Rhinehart Law, P.C., Sioux City, for appellant.

Francis L. Goodwin of Baron, Sar, Goodwin, Gill & Lohr, Sioux City, for appellee.

Heard by Sackett, C.J., Vogel, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

NELSON, S.J.

David Brown appeals the district court's order regarding construction of the Qualified Domestic Relations Order (QDRO) dividing his pension. We affirm.

I. Background Facts and Proceeding.

David and Pamela Brown's nearly twenty-seven-year marriage was dissolved by decree on June 30, 1999. Paragraph twenty of the decree governed dispersal of David's retirement account:

> 20. David has an IPERS pension plan which is currently valued at approximately $22,500.00. This plan should be divided so that David receives 60% of it and Pamela receives 40% of it. This is to account in the disparity in value of the property previously awarded the parties. A separate Qualified Domestic Relations Order should be entered in such regard. The parties should submit such an order to the Court for its signature.

Both parties submitted proposed QDROs to the court in March 2007, after the error had been discovered. David's proposed QDRO divided the pension so that Pamela would receive $9000 plus interest from June 30, 1999.[1] Pamela's proposed QDRO divided the pension under the percentage method, as adopted by our supreme court in *In re Marriage of Benson*, 545 N.W.2d 252, 255-56 (Iowa 1996) (stating Iowa law gauges the value of the spouse's share in the pension plan from the time of maturity at actual retirement, rather than freezing the spousal share at the time of dissolution). David contended Pamela's proposed

[1] David calculated the $9000 amount using the dissolution decree's award to Pamela of forty percent of David's IPERS pension, which the court valued at $22,500. According to David's proposed QDRO, his pension would be divided as follows:

> IPERS is directed to pay benefits to the Alternate Payee [Pamela] as a marital property settlement under the following formula: $9,000 plus interest accumulated from June 30, 1999, of the Member's [David] gross lump sum payment at the time of distribution if paid as a lump sump benefit, or $300 or the Member's gross monthly payment at the time of distribution if paid as a monthly allowance until $9,000 plus interest is reached.

QDRO was not appropriate because the formula incorporated, for Pamela's benefit, the eight years of contributions by David since the 1999 dissolution decree.

A hearing on the entry of the QDRO was held on April 7, 2007. On August 30, 2007, the district court issued its order adopting Pamela's proposed QDRO. The court concluded the *Benson* percentage method applied and the pension should be divided at the time of maturity, not frozen at the time of dissolution. As the court stated:

> The court finds that in considering the case law set out in *Benson* and the arguments of counsel in relation to the Decree of Dissolution, paragraph 20, that it is appropriate in this instance to apply the percentage method as proposed by the respondent [Pamela]. The court agrees with the reasoning set forth in *Benson* at pages 256 and 257 wherein the court examined the inequity that would result to the non-pensioner spouse if her benefit was "frozen" on the date of dissolution.

Therefore, according to the court's order, David's pension was to be divided as follows:

> IPERS is directed to pay benefits to the Alternate Payee [Pamela] as a marital property settlement under the following formula: 40% of the gross monthly or lump sum benefit payable at the date of distribution to the Member multiplied by the "service factor." The numerator of the service factor is the number of quarters covered during the marriage period of October 7, 1972 through June 30, 1999 and the denominator is the Member's [David] total quarters of service covered by IPERS and used in calculating the Member's benefit.

David appealed on August 30, 2007. Meanwhile, on August 27, 2007, Pamela filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), to resolve several wording issues of the proposed QDRO, which David later resisted. David's appeal was dismissed as premature while Pamela's motion

was pending, and on April 18, 2008, the court granted Pamela's motion.[2] Thereafter, David filed a rule 1.904(2) motion to amend, enlarge, and clarify on April 23, 2008, contending the court incorrectly applied the *Benson* percentage method to the distribution of his pension. The court denied the motion on May 16, 2008. David appeals.

II. Scope and Standards of Review.

We review dissolution decrees de novo. Iowa R. App. P. 6.4; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Though we are not bound by them, we give weight to the district court's factual findings and credibility determinations. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Merits.

Pensions are divisible marital property. *Id.*; *In re Marriage of Branstetter*, 508 N.W.2d 638, 640 (Iowa 1993). Iowa recognizes two accepted methods for dividing pensions: the present-value method and the percentage method. *Sullins*, 715 N.W.2d at 248. Furthermore, "there are two main types of pension plans: defined-benefit plans and defined-contribution plans." *Id*. IPERS is a defined-benefit plan. *Id*. at 249. As our supreme court recognized in *Benson*, IPERS uses a "percentage of earnings per year of service formula." *Benson*, 545 N.W.2d at 254-55. Such formula "provides a benefit that is related to the employee's earnings and length of service." *Id*. at 255.

[2] The court's ruling (1) prohibited David from taking a lump sum distribution that would effectively deny Pamela her entitlement and (2) allowed for any interest on both preretirement and postretirement death benefits.

Although both methods can be used to divide both types of pension plans, it is usually preferable to use the percentage method when dividing a defined-benefit plan such as IPERS. *Sullins*, 715 N.W.2d at 248. Under the percentage method, a QDRO awards the non-pensioner spouse a percentage of a fraction of the pensioner's benefits (based on the duration of the marriage), and the QDRO is paid off when the benefits mature. *See id*. at 250; *Benson*, 545 N.W.2d at 255. With regard to calculation under the percentage method:

> The fraction represents the portion of the pension attributable to the parties' joint marital efforts. The numerator in the fraction is the number of years the pensioner accrued benefits under the plan during the marriage, and the denominator is the total number of years of benefit accrual.

Sullins, 715 N.W.2d at 250 (internal citations omitted).

We first note that the decree was unresolved at the time the district court received the parties' proposed QDROs in 2007, as the QDROs were never submitted to the decretal court for approval in 1999. Therefore, the district court was correct in making an initial valuation and distribution. With such an undistributed asset, it was appropriate for the court to make the delayed distribution.

Although we find merit in David's contention that the decretal court intended for the pension to be divided under the present-value method,[3] we conclude the court correctly interpreted Iowa law and entered a QDRO ordering David's pension to be divided under the percentage method. Division of David's

[3] The decretal court specifically stated the pension was "currently valued at $22,500" and then proceeded to divide it so that David received sixty percent and Pamela received the remaining forty-percent in order to "account for disparity in value of the property previously awarded to the parties."

pension under the present-value method would be inequitable and unacceptable under the circumstances of this case. The decretal court specified the percentage to be divided was of the plan, not of the current value.[4] Furthermore, the decretal court's determination of the present value of David's pension was not based on actuarial evidence. David's affidavit of financial status accounted for the "current cash value" of his IPERS pension plan, based on his personal contributions to the plan (and interest earned on those contributions) over the years of his employment. However, the present value of David's IPERS pension is more than the present value of his contributions.[5]

Under Iowa law, the percentage method is the accepted method for division of IPERS pension plans. *See, e.g.*, *id.* at 248; *Benson*, 545 N.W.2d at 254-56; *In re Marriage of Scheppele*, 524 N.W.2d 678, 679-80 (Iowa Ct. App. 1994). We conclude the most equitable solution in this case is to divide David's pension under the percentage method. We further find the district court's delayed distribution under that method was appropriate. We therefore affirm the district court's order entering a QDRO dividing David's pension according to the percentage method, as well as the court's subsequent rulings with regard to such order. Costs on appeal are assessed to David.

AFFIRMED.

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

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[4] As the decretal court stated, "*This plan* should be divided . . ." (emphasis added).

[5] David's pension has no relation to the present value of his future benefits and is not limited to the value of his vested contributions because such contributions are not used to calculate benefits. *See* Iowa Code § 97B.49A(3) (2007); *Sullins*, 715 N.W.2d at 249. "Instead, the benefits are ultimately tied to a percentage of the of the employee's average *wages*." *Sullins*, 715 N.W.2d at 249.

SACKETT, C.J. (dissenting)

I dissent. I believe the district court and the majority have impermissibly modified the property provision of the Brown's dissolution decree in changing the allocation of David Brown's IPERS benefits made in the original decree.

Pension benefits are a form of property. *In re Marriage of Martin*, 641 N.W.2d 203, 204 (Iowa Ct. App. 2001); *see also In re Marriage of Wilson*, 449 N.W.2d 890, 892 (Iowa Ct. App. 1989); *In re Marriage of Jensen*, 396 N.W.2d 367, 369 (Iowa Ct. App. 1986); *In re Marriage of Byall*, 353 N.W.2d 103, 106 (Iowa Ct. App. 1984). Ordinarily, a dissolution decree settles all property rights and interests of the parties. *Prochelo v. Prochelo*, 346 N.W.2d 527, 529 (Iowa 1984); *see also Walker v. Walker*, 203 N.W.2d 320, 322 (Iowa 1972); *Carr v. Carr*, 185 Iowa 1205, 1211, 171 N.W. 785, 787 (1919). In the context of a modification proceeding, the property division of a decree is not subject to change in the absence of extraordinary grounds. *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980). In divorce proceedings, property rights that have not been otherwise settled must, of necessity, be settled by the decree, and it can make no difference where the title rests. *Prochelo*, 346 N.W.2d at 529. If title is left undisturbed, it is, in effect, adjudged in the party who holds it. *Id.* In other words, property rights are settled and are adjudged in a divorce decree whenever the parties own property. *Id.*; *see also In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa Ct. App. 1997).

In the original decree entered in June of 1999, the district court determined the parties' respective interests in David's IPERS pension account.

The court valued it at approximately $22,500[6] and the plan was divided so that Pamela was to receive forty percent of the $22,500, meaning that Pamela received about $9000 in value on June 30, 1999, and nothing more. David's proposal for a QDRO that would allow Pamela to receive $9000 plus interest from June 30, 1999, is in accord with the division made in the decree. No appeal was taken from this decree, consequently the valuation and division made there of the IPERS account is no longer subject to challenge. Yet, the order approved by the district court and the majority opinion gives Pamela a greater interest in the pension account than she was ordered to receive under the original decree.

The majority has justified the modification of the property division of the original decree under the guise that the decree was "unresolved"[7] because the QDRO was not yet entered. I see the majority's reasoning taking us down a slippery slope. It seems the majority is holding that a decree is "unresolved" and the property division is subject to modification after it is issued until that time when divisions of property ordered in the decree are actually accomplished.[8] I believe the "unresolved decree" the majority is attempting to create conflicts with authorities that say a dissolution decree settles all property rights and interests of the parties. *See Prochelo*, 346 N.W.2d at 529; *Roberts v. Playle*, 150 Iowa 279, 280, 129 N.W. 945, 946 (1911); *Ruter*, 564 N.W.2d at 851.

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[6] This represented David's contributions to IPERS to the date of the dissolution.

[7] They cite no authority nor do I find any that defines an "unresolved decree." Nor do they cite authority to support a finding that we recognize an "unresolved decree."

[8] For example, is the majority saying the allocation of the proceeds of a particular piece of property ordered transferred to one party or sold, can be modified at any time until a conveyance of the property or sale is accomplished?

I recognize that in *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996), the court, in an appeal from an original decree, found it preferable to set the value of pension benefits at maturity.[9] However, unlike the majority, I do not find this case controlled by *Benson*. First and most importantly, we are interpreting a decree, not making an initial valuation and division of the IPERS account. Second, I believe that *Benson* does no more than suggest a way to divide pension accounts to allow the nonpension spouse to receive benefit from the fact his or her interest is locked in until retirement. David's proposed QDRO gives Pamela credit for her interest remaining in the account until his retirement by providing that she shall have interest on her $9000. Third, the valuation and division of the account was made in the original decree, and the fact that another division may have been more equitable is not the question. Fourth, I disagree with the majority's reasoning that the result they reached is justified because the dissolution court specified the percentage to be divided was of the plan, not its current value. We value property at the time of the decree. The date of the dissolution is the only reasonable time when an assessment of the parties' net worth should be undertaken. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968). We value property for division purposes at the time of the dissolution. *See Locke*, 246 N.W.2d at 252. It is the net worth of the parties at the time of trial which is relevant in adjusting property rights. *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994).

[9] Justices Lavorato, Larson, and Ternus dissented from this holding. *See Benson*, 545 N.W.2d at 258-62.

The majority also appears to suggest the result they reached is justified by the fact that the pension value was not based on actuarial evidence.[10] This suggestion takes us further down the slippery slope indicating that a property division can be modified later when a party may have missed getting a high enough valuation on a piece of property. In *Ruter*, this court addressed an issue similar to what we have here, where a wife filed an application for modification, claiming it was equitable to award her a portion of a husband's IPERS account even though she had received no portion of it in the original decree. *Ruter*, 564 N.W.2d at 850. Her financial statement filed in the original proceedings acknowledged that she was aware her then husband made biweekly contributions to his IPERS account and there was evidence it had been discussed. *Id.* The district court found the husband's IPERS benefit was personal property that escaped disposition in the decree and awarded her a part of his monthly benefits. *Id.* This court determined the resolution of the issue required an interpretation of the decree dissolving the Ruters' marriage. *Id.* at 851. This court determined the district court's conclusion that the IPERS benefits were not distributed by the decree conflicted with the rule of *Prochelo*, 346 N.W.2d at 529, and *Roberts* 150 Iowa at 280, 129 N.W. at 946, that a dissolution decree settles all property rights and interests of the parties. *Id.*

For these reasons, I would reverse and direct the district court to approve David's proposed QDRO.

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[10] Both parties had the same information as to the pension value, consequently there can be no claim that its value was misrepresented by David.