

IN THE COURT OF APPEALS OF IOWA

No. 1-361 / 10-1831

Filed July 13, 2011

**IN RE THE MARRIAGE OF CINDY SCHMELL
AND G. MATTHEW SCHMELL**

**Upon the Petition of
CINDY SCHMELL,**
Petitioner-Appellee,

**And Concerning
G. MATTHEW SCHMELL,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

G. Matthew Schmell appeals from a district court order concerning the
entry of a Qualified Domestic Relations Order (QDRO). **AFFIRMED.**

Eric Borseth and Judy Johnson of Borseth Law Office, Altoona, for
appellant.

Kodi A. Brotherson and Leslie Babich of Babich Goldman, P.C., Des
Moines, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

EISENHAUER, P.J.

G. Matthew Schmell appeals from the district court order regarding the qualified domestic relations order effectuating the terms of the decree dissolving his marriage to Cindy Schmell. He contends the court erred in awarding Cindy Schmell an interest in any future Deferred Retirement Option Program benefit because he was not eligible for the program at the time of dissolution and therefore it is a future asset and not divisible. Because we conclude the court properly determined Cindy is entitled to a proportional share of the benefits, we affirm.

I. Background Facts and Proceedings. Matthew and Cindy Schmell were married in 1996. The decree dissolving their marriage was entered on October 15, 2009. The parties entered a formal stipulation resolving all issues, including division of Matthew's four retirement accounts. One of these accounts, a 411 retirement account, was earned through Matthew's work as a police officer.

Three options are given for retiring officers with a 411 retirement account through the Municipal Fire and Police Retirement System. One of these options is the Deferred Retirement Option Program (DROP), eligible to an officer who reaches the age of fifty-five with at least twenty-two years of service. The DROP program provides an incentive for certain long-term Municipal Fire and Police Retirement System members to remain in their positions for another three to five years after they become eligible to retire. In lieu of taking a traditional retirement fixed benefit, officers who take advantage of the DROP receive an additional benefit. Their 411 retirement benefit is fixed, and the retiree and the employer

continue to make contributions to the DROP account. A DROP benefit is then determined based on the number of years of participation in the DROP.

The dissolution decree states Matthew's retirement accounts are to be divided pursuant to the formula established in *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996). No particular election for retirement was specified in regard to the 411 retirement account. Cindy submitted a proposed Qualified Domestic Relations Order (QDRO) including language regarding the DROP retirement option; she sought a division of the DROP benefit based upon the years of service while they were married. Matthew argued any DROP benefit could not be divided because he had not reached the requisite age or years of service and his DROP eligibility would be based solely off post-dissolution contributions.

Because the parties were unable to agree upon the language of the QDRO dividing Matthew's retirement accounts, Matthew filed an application for a hearing regarding the QDRO. A hearing was held on September 22, 2010, and on October 15, 2010, the court entered its ruling and order. The court held the DROP needed to be specifically addressed in the QDRO and further held Cindy is entitled to a proportional share. The ruling states, "[T]he DROP program cannot be considered totally separate because it still depends upon the Respondent's years of service for a determination of the amounts to be paid out to the Respondent." Matthew filed a timely notice of appeal from this ruling.

II. Scope and Standard of Review. Our review of dissolution of marriage proceedings is de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). We give weight to the trial court's fact-findings, especially with

respect to witness credibility, but we decide the issues raised on appeal anew. *Id.* Our determination depends on the facts of a particular case. *Id.*

III. Analysis. Matthew contends the court erred in awarding Cindy an interest in his potential future DROP benefit. He notes only assets in existence at the time of a divorce can be divided. Because he was not eligible for the DROP at the time of dissolution as he had not reached the requisite age or years of service, he argues the DROP benefit cannot be divided.

In determining Cindy is entitled to a proportional share of any future DROP benefit Matthew may elect to take, the district court cited *In re Marriage of McGinley*, 724 N.W.2d 458 (Iowa Ct. App. 2006). In that case, the husband was eight and one-half years away from being eligible to take an early retirement benefit from his employer at the time of the dissolution. *McGinley*, 724 N.W.2d at 460. The matter came back before the court after the husband elected to take early retirement. The court noted the husband was not yet eligible at the time of the decree because he was still fully employed and not at retirement age, he had accumulated twenty-one years of employment during the marriage, which together with the post-dissolution years of employment qualified him for early retirement. *Id.* at 461.

To hold that a spouse would only benefit from the [early retirement] option if the employee was eligible for it at the time of the dissolution would essentially allow a fair division of pension benefits only for those who were at retirement age at the time of a dissolution. Such an absurd result cannot stand under an equitable distribution analysis.

Id.

On appeal, Matthew attempts to distinguish the court's holding in *McGinley*. He notes the divisible portion of the retirement benefits in *McGinley* accrued during the marriage. In contrast, he argues that while his 411 benefits also accrued during the marriage, his future DROP benefits had not.

We are not persuaded by Matthew's attempt to distinguish the holding in *McGinley* from the facts of the current case. Although Matthew was not eligible for the DROP at the time of dissolution, the thirteen years of service accumulated during the marriage contributed to his eligibility. Participation in the DROP locks in the amount of monthly 411 retirement account benefits received; Cindy's portion of the monthly 411 benefit would not increase if Matthew participates in the DROP program. However, if Matthew continued to work the pension benefit would likely increase based on increases in income.¹ Such a result would be inequitable. Cindy is entitled to share in the increases in Matthew's pension, whether it is the 411 retirement plan or the DROP account when it is payable. Accordingly, we find no error in the ruling awarding Cindy a proportional share of any DROP benefits Matthew elects to take.

IV. Attorney Fees. Cindy seeks an award of her appellate attorney fees.

An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request

¹ Pension benefits are calculated based on the average of a pensioner's highest three years of income.

was obligated to defend the district court's decision on appeal. See *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999).

We decline to award Cindy her appellate attorney fees. Costs are taxed to Matthew.

AFFIRMED.