

IN THE COURT OF APPEALS OF IOWA

No. 2-109 / 11-1551
Filed April 25, 2012

**IN RE THE MARRIAGE OF
MAGDALEN C. O'BRIEN
AND DENNIS R. O'BRIEN**

**Upon the Petition of
MAGDALEN C. O'BRIEN,**
Petitioner-Appellant,

**And Concerning
DENNIS R. O'BRIEN,**
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

Magdalen O'Brien appeals the economic provisions of a decree dissolving her marriage to Dennis O'Brien. **AFFIRMED AS MODIFIED AND REMANDED.**

Linda A. Hall of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellant.

Timothy J. Luce of Anfinson & Luce, P.L.C., Waterloo, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

Magdalen O'Brien appeals the economic provisions of a decree dissolving her marriage to Dennis O'Brien. She claims (1) the property division was inequitable because she was not awarded a portion of Dennis's pension; (2) the spousal support award was inadequate; and (3) an award of trial attorney fees should have been made.

I. Background Facts and Proceedings

Dennis and Magdalen married in 1978 and divorced after close to thirty-three years of marriage. They had four children, only one of whom was a minor at the time of trial. The parties agreed Magdalen would assume her physical care. They disagreed on the division of their property, most notably Dennis's pension. They also disagreed on spousal support.

Dennis worked for John Deere for thirty-seven years. He took early retirement at age fifty-nine and began receiving a monthly pension payment of \$2900, \$1025 of which was a supplemental allowance that will end when he begins receiving social security benefits. A trial expert retained by Magdalen assigned the pension a present value of \$437,231.29. Dennis did not proffer a competing estimate. Dennis also had an IRA valued at \$13,704, and no debt.

During the marriage, Magdalen cared for the parties' four children and held only intermittent, part-time jobs. For the final eight years of the marriage she earned \$17.23 per hour in a part-time position and had a profit-sharing plan valued at \$34,681.64. She owed \$770 on a credit card, which she agreed to pay.

The district court awarded Magdalen the following assets: a vehicle valued at \$3890, a bank account worth \$5597, her \$34,681.64 profit-sharing

plan, a life insurance policy in Dennis's name with a cash value of \$15,018, and the parties' home, valued at \$137,000, against which no debt was owed. The court awarded Dennis the following assets: a vehicle valued at \$3190, a bank account worth \$3365, his \$13,704 IRA, a savings account worth \$17,448, and his entire John Deere pension, which the court did not value. In declining to award Magdalen a portion of Dennis's pension, the court reasoned:

By the court's calculation [Magdalen] has received free and clear \$181,169 worth of marital property. By the court's calculation, [Dennis] has received \$52,725 in marital assets. Thus, [Magdalen] has received \$128,444 in marital assets above those received by [Dennis]. Given the great disparity in property division, the court believes [Dennis] should be entitled to receive his entire pension and ultimately social security payments each month as compensation for the disparity in the marital asset distribution.¹

The district court granted Magdalen's request for spousal support, finding as follows:

The court finds that [Magdalen] is entitled to rehabilitative spousal support. Testimony at trial indicated [Magdalen] works less than full time based upon her need to be in the home or available to assist in the needs of the minor child. [Magdalen] testified that following the minor child's graduation she intended to become full time at her place of employment. The court finds that [Dennis] should pay to [Magdalen] rehabilitative spousal support in the amount of \$150 a month beginning on the 1st day of the month following the entry of this decree. Said rehabilitative support shall continue through June of 2012 or until [Magdalen] is allowed by her employer to transfer to full-time employment. [Magdalen] shall make every effort to transfer to full-time employment as soon as possible following June 15, 2012.

Finally, the court denied Magdalen's request for trial attorney fees.

¹ It appears the district court assigned the cash value of the life insurance policy to Dennis, though that asset was actually awarded to Magdalen. When this asset is properly accounted for, the amount of marital property awarded to Magdalen increases to \$196,187, while the amount awarded to Dennis decreases to \$37,707.

Magdalen filed a motion for expanded findings and conclusions on these issues. The district court summarily denied the motion, and this appeal followed.

II. Analysis

A. Pension

The Iowa Supreme Court has endorsed two methods of valuing pensions in dissolution actions: the present value method and the percentage method. *In re Marriage of Sullins*, 715 N.W.2d 242, 248 (Iowa 2006). Under the present value method, the present value of the benefits is determined and a share is allocated to the pensioner's spouse. *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996). One disadvantage of this method is that it requires a lump sum payment, which "is often beyond a pensioner's present economic ability to pay." *Id.* Under the percentage method, the non-pensioner spouse is awarded a percentage of the pensioner's benefits at maturity. *Id.* "[T]his percentage is 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." *Id.* The percentage method avoids the economic difficulty of paying a lump sum amount attendant with the present value method. *Sullins*, 715 N.W.2d at 249.

As noted, the district court did not use either method, instead electing to allocate 100% of the pension to Dennis. Given the length of the marriage, the fact that Dennis was the primary wage earner throughout the marriage, and the fact that Magdalen's decision to care for the children prevented her from accruing retirement benefits, we agree with Magdalen that she is entitled to a portion of Dennis's pension. See Iowa Code § 598.21(5)(a), (c), (i) (2009); *In re*

Marriage of Fall, 593 N.W.2d 164, 167 (Iowa Ct. App. 1999) (considering spouses' future retirement needs); *In re Marriage of Curfman*, 446 N.W.2d 88, 89 (Iowa Ct. App. 1989) (considering spouse's decision to step out of the employment arena and assume primary responsibility for parties' children).

We turn to the method of allocating Dennis's pension. As noted, Magdalen's expert assigned the pension a present value of \$437,231.29, a figure that Dennis did not controvert. Magdalen suggests we award her forty-two percent of that value (\$183,637.14) in a lump sum payment. Dennis counters that he lacks the funds to make such a payment.

The record supports Dennis's assertion. At the time of trial, he was retired, and his sole source of income was the monthly pension benefit payment. He was in no position to make a lump sum payment of the magnitude recommended by Magdalen or even of a significantly lesser magnitude. *Cf. In re Marriage of Woodward*, 426 N.W.2d 668, 670 (Iowa Ct. App. 1988) (declining wife's request for lump sum payment representing her share of husband's pension because there were "no existing assets from which equalization can be made").

That leaves the percentage method of distribution. Dennis contends an allocation of a percentage of his monthly pension benefits to Magdalen would leave him without sufficient funds to accommodate his own needs. The record suggests otherwise. First, although Dennis was ordered to pay child support of \$475 per month for the one child still at home, that payment was slated to end in May 2012. His spousal support obligation of \$150 per month was also short-term, with the payments ending upon "the minor child's graduation from high

school or the first day of the month following [Magdalen's] transfer to full-time employment with her employer." On our de novo review, we conclude Magdalen should receive a percentage of Dennis's monthly pension benefits.

This brings us to a calculation of the amount. "Under the percentage method, the non-pensioner spouse is awarded a percentage (frequently fifty percent) of a fraction of the pensioner's benefits (based on the duration of the marriage)," with the numerator the number of years the pensioner accrued benefits during the marriage, and the denominator the total number of years of benefit accrual. *Sullins*, 715 N.W.2d at 250; see also *Benson*, 545 N.W.2d at 255. Applying this formula, Magdalen alternately asked the district court to award her 42% of Dennis's monthly non-supplemental benefit amount,² which she listed as \$1875. Her proposed figure was \$658 per month. This proposed figure is equitable. See *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993) (recognizing that although an equitable award need not be equal, substantially equal property awards are generally appropriate in marriages of long duration). Absent this award, the property division would skew heavily in Dennis's favor, notwithstanding Magdalen's receipt of the parties' unencumbered home and other assets.³ This award equalizes the distribution while at the same time

² Magdalen divided the months of marriage overlapping service through the date benefits are drawn (376 months) by the months of service through the date benefits are drawn (450 months) and multiplied this figure by 100 to arrive at a percentage of 83.5%, which reflected the percentage of Dennis's pension that was subject to division. She asserted half of that percentage, or 42%, was her share.

³ We acknowledge the difficulty of comparing an income stream with hard assets. If Magdalen had liquidated the home and invested the proceeds, we are convinced her income stream would have been significantly less than the income stream Dennis is receiving from his John Deere pension.

affording Magdalen additional security in her retirement years following a lengthy marriage.

B. Survivor's Benefits

Magdalen also requests surviving spouse benefits under Dennis's pension plan. See *In re Marriage of Davis*, 608 N.W.2d 766, 770–71 (Iowa 2000) (recognizing surviving spouse benefits under statutory pension plans are a separate property right from the underlying pension benefits). Dennis did not contest this request at oral arguments. Accordingly, the dissolution decree is modified to require Dennis to designate Magdalen as the surviving spouse on his John Deere pension plan for purposes of receiving surviving spouse benefits.

C. Spousal Support

As noted, the district court ordered Dennis to pay Magdalen "rehabilitative spousal support" of \$150 per month "through June of 2012 or until [Magdalen] is allowed by her employer to transfer to full-time employment." Magdalen challenges this award on the ground that it "was premised on speculation and conjecture as to what, if any, full time employment was available to [her] at her current place of employment, or the time period necessary for [her] to obtain full time employment." She requests an award of "reimbursement alimony for life," arguing that her sacrifices during the marriage "made it possible for Dennis to advance his career at John Deere" and "accumulate a significant pension so that he could pursue early retirement."

"In assessing a claim for spousal support, we consider the property division and spousal support provisions together. . . ." *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009). A spousal support award is justified

when the division of marital assets “does not equalize the inequities and economic disadvantages suffered in marriage by the party seeking the support and there also is a need for support.” *Id.* As we have equalized the property division by awarding Magdalen a percentage of Dennis’s monthly pension benefits, we see no reason to increase the amount or duration of the spousal support award.

D. Attorney Fees

Magdalen finally contends the district court should have ordered Dennis to pay her trial attorney fees. We review this decision for an abuse of discretion. *Sullins*, 715 N.W.2d at 255. As Magdalen’s trial attorney fees were paid out of joint funds, we affirm the district court’s denial of Magdalen’s request for trial attorney fees.

Magdalen also requests appellate attorney fees. *See id.* (stating an award of appellate attorney fees rests within this court’s discretion after considering “the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal”). We order Dennis to pay \$1500 towards Magdalen’s appellate attorney fees.

III. Disposition

We affirm the dissolution decree in all respects except that we remand the case to the district court for modification of the decree to provide that Magdalen shall receive the portion of Dennis’s John Deere monthly pension benefit proposed in her qualified domestic relations order, together with survivor’s benefits, and to determine whether that portion shall be paid pursuant to a

separate qualified domestic relations order or by some other means. We also award Magdalen appellate attorney fees of \$1500.

Costs on appeal shall be split equally between the parties.

AFFIRMED AS MODIFIED AND REMANDED.