

**IN THE COURT OF APPEALS OF IOWA**

No. 6-746 / 06-0098  
Filed November 30, 2006

**IN RE THE MARRIAGE OF KATHY KAY KOLBO  
AND TIMOTHY LEE KOLBO**

**Upon the Petition of  
KATHY KAY KOLBO,**  
Petitioner-Appellee/Cross-Appellant,

**And Concerning  
TIMOTHY LEE KOLBO,**  
Respondent-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Linn County, David L. Baker,  
Judge.

Timothy Lee Kolbo appeals the district court's ruling in his dissolution proceeding. Kathy Kay Kolbo cross-appeals. **AFFIRMED AS MODIFIED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Frank Nidey of Nidey, Peterson, Erdahl & Tindal, P.L.C., Cedar Rapids,  
for appellant.

Matthew Brandes of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar  
Rapids, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ. Baker, J., takes  
no part.

**MAHAN, J.**

Timothy Lee Kolbo appeals the district court's ruling in his dissolution proceeding. He argues the district court incorrectly (1) divided his pension and (2) awarded alimony. Kathy Kay Kolbo cross-appeals, arguing (1) the alimony award is inequitable and (2) the district court erred in failing to award her attorney fees. Both parties request appellate attorney fees. We affirm as modified and remand on appeal and affirm on cross-appeal.

**I. Background Facts and Proceedings**

Tim and Kathy Kolbo were married on April 18, 1980. Tim was forty-nine years old and employed as a journeyman pipefitter at the time of trial. His annual income is approximately \$68,000. He is in relatively good health, but suffers from some back and neck strain due to his work. Kathy was forty-seven years old and employed at ACT at the time of trial. Her annual income is approximately \$35,160. She suffers from migraine headaches, but is otherwise in good health.

Kathy filed a petition for dissolution on May 11, 2004. After a trial, the court awarded Kathy \$1000 alimony per month until Tim begins to draw on his Pipefitters National Pension Plan. It also ordered Tim to prepare a qualified domestic relations order (QDRO) splitting the pension equally between the parties. Finally, it ordered both parties to pay their own attorney fees. Tim appeals the pension distribution and the alimony award. Kathy cross-appeals the alimony award and the court's refusal to award attorney fees.

## II. Standard of Review

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

## III. Merits

### A. Pension

Tim argues that in dividing his pension equally the court enabled Kathy to receive any post-dissolution increases in the pension. He claims the court should have distributed the pension according to the percentage method outlined in *In re Marriage of Benson*, 545 N.W.2d 252, 254 (Iowa 1996). *See also Sullins*, 715 N.W.2d at 248-50.

We agree. Tim may continue working as a pipefitter, and thus contributing to his pension, until he is sixty-two. He also contributed to his pension for two years before his marriage to Kathy. In dividing the pension equally, the district court failed to ensure Kathy did not receive benefits earned by Tim before the marriage and after the dissolution. The pension is a defined-benefits plan, and should therefore be divided according to the percentage method outlined by our supreme court in *Benson* and *Sullins*. *See id.* at 248. According to this method, Kathy's share is equal to the number of years Tim accrued benefits under the plan during the marriage divided by the total number of years of his benefit accrual, multiplied by fifty percent of the value of the monthly pension benefit. Therefore, we modify the decree and remand to provide for a QDRO dividing the pension accordingly.

## **B. Alimony**

Both parties argue the district court erred in awarding alimony. Tim claims the alimony award should either be eliminated or reduced, while Kathy argues it should be increased. Alimony is not an absolute right. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). In determining whether to award alimony, the district court is to consider the factors in Iowa Code section 598.21(3) (2003). That section allows the court to consider the property division in connection with the alimony award. *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004). We only disturb the district court's determination if there is a failure to do equity. *Anliker*, 694 N.W.2d at 540; see Iowa Code § 598.21(3)(c).

In this case, given the length of the parties' marriage, their accustomed standard of living, the difference between their incomes, and their respective abilities to pay, we conclude the district court's alimony award is equitable.

## **C. Attorney fees**

Kathy argues the district court abused its discretion in failing to award her trial attorney fees. Attorney fees are not a matter of right but are within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We review the district court's award of attorney fees for abuse of discretion. *Sullins*, 715 N.W.2d at 255. In the district court, the controlling factor in determining an award of attorney fees is the ability to pay the fees. *Id.* When awarding appellate fees, we look to the need of the party requesting fees, the other party's ability to pay, and the merits of the appeal. *Id.* We conclude the

district court did not abuse its discretion when it refused to award Kathy trial attorney fees.

Both parties request appellate attorney fees. An award of appellate attorney fees is also 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 needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Both parties' requests for appellate attorney fees are denied. Costs are taxed one-half to each party.

**AFFIRMED AS MODIFIED AND REMANDED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**