

No. 1-10-1848

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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| <i>In re</i> Marriage of LAINE GURLEY-DILGER, | ) | Appeal from the Circuit Court |
|   | ) | of Cook County, Domestic      |
| Petitioner-Appellee,                          | ) | Relations Division            |
| and   | ) |                               |
|   | ) | No. 98 D 14108                |
| CHRISTOPHER J. DILGER,                        | ) |                               |
|   | ) | Honorable Jordan Kaplan,      |
| Defendant-Appellant.                          | ) | Judge Presiding.              |

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JUSTICE CAHILL delivered the judgment of the court.  
Justices McBride and R.E. Gordon concurred in the judgment.

**ORDER**

**Held:** The trial court's apportionment of petitioner Laine Gurley-Dilger's pension to respondent Christopher Dilger following their marital dissolution was reversed and remanded.

Respondent Christopher Dilger appeals from a judgment entered on June 18, 2010, apportioning the teacher's retirement system (TRS) pension of petitioner, Laine Gurley-Dilger, and denying him a share in death benefits from that pension. Christopher argues that the trial court erred by: (1) improperly apportioning the pension to him on the basis of the pension's value at the time of the dissolution of marriage, rather than the value of the benefit at the time of

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disbursement; (2) denying him an interest in the death benefit from the pension fund; and (3) failing to apportion the pension based on the proposed monthly amount in Laine's counterclaim. He also requests attorney fees. We reverse in part, affirm in part and remand for further proceedings consistent with this order.

Christopher and Laine were married on August 10, 1984. A judgment for the dissolution of their marriage was entered by the court on March 30, 2001. Laine was a participant in the TRS pension at all times during the marriage. The court addressed the TRS pension at issue in the judgment for dissolution:

“Laine has been a participant in the [TRS] for 26 years. The parties have been married for a little more than 16 years. There was no actuarial testimony concerning the value of either the marital or nonmarital portions of the pension fund. The marital portion of the pension fund was derived by payroll deductions from Laine's teacher's salary. Given the unique nature of this asset, the Court sees no reason to award either party a disproportionate share. The marital portion of Laine's TRS pension will be divided equally between Laine and Christopher by means of a Qualified Illinois Domestic Relations Order [(“QILDRO”)] as specifically authorized by 750 ILCS 5/503(b)(2).”

No QILDRO or other calculation order was entered at the time of dissolution. Laine retired on June 9, 2007. The parties disagree about whether Christopher was informed of Laine's retirement, but both parties agree that Laine kept and received 100% of the pension benefits. -

Christopher sought and obtained by agreement the entry of a QILDRO, dated October 6,

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2008, and entered by the court on December 5, 2008. This QILDRO showed that Christopher would receive 50% of the monthly pension benefits and 50% of the death benefit. On January 23, 2009, the TRS issued a QILDRO benefit adjustment letter, informing Christopher that no calculation order had been entered and that he would not be entitled to benefits until a calculation order was received.

Following a series of cross-petitions and motions, the court entered an agreed interim calculation order on November 10, 2009. Laine believed that the QILDRO was incorrect and filed a petition to correct it. In response, Christopher admitted that the retirement benefit from the TRS was \$3,933.78 per month at the time of dissolution. The trial court granted Laine's motion.

On March, 25, 2010, the court issued an order apportioning the monthly pension benefits according to their value at the time the marriage was dissolved. The trial court found the judgment for dissolution was "silent as to the method of apportioning the equally divided pension," and said it could devise its own method of apportionment under *In re Marriage of Wisniewski*, 286 Ill. App. 3d 236, 243, 675 N.E.2d 1362 (1997). Relying on *In re Marriage of Hunt*, 78 Ill. App. 3d 653, 663, 397 N.E.2d 511 (1979), the court used the value of the pension at the time of dissolution to figure Christopher's portion since that value was known. See also 40 ILCS 5/1-119(n) - Part IX(1) (West 2008) (codifying *Hunt*). In calculating the numerator of the equation, the court added the time of participation in the plan during marriage and the amount of permissive service for a total of 224.74 months. In calculating the denominator for the equation, the court combined the number of months from the date of Laine's enrollment in the plan up to

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the date of divorce with her months of permissive service, for a total of 343.74 months.

After performing the *Hunt* equation, the court determined that Christopher was entitled to collect \$1,285.97 per month from Laine's pension benefit. The court entered an amended QILDRO calculation that reflected the new apportionment amount and eliminated Christopher's interest in the death benefit for the TRS fund.

Christopher filed a motion to reconsider, which was denied. This appeal followed.

We begin our analysis by determining the proper standard of review. Christopher argues our standard of review is *de novo* because we are reviewing the application of statutory law and there are no disputed facts or issues of witness credibility. Laine contends we should review the trial court's ruling under an abuse of discretion standard because the relevant facts are disputed. Because we are asked only to review the application of law to undisputed facts, we review *de novo* whether the court properly calculated Christopher's interest in the pension. See *MidAmerica Bank, FSB v. Charter One Bank, FSB*, 232 Ill. 2d 560, 565, 905 N.E.2d 839 (2009).

Christopher first contends that the court erred when it calculated the QILDRO according to the pension's value at the time of dissolution, rather than its present-day value. Christopher argues that the pension was apportioned under the "reserved-jurisdiction" approach, which requires the benefit to be apportioned based on its value at the time of payment.

Laine responds that: (1) the judgment for dissolution called for apportionment based on the value of the pension benefit at that time; (2) jurisdiction was not reserved because the trial court neither imposed language reserving jurisdiction nor devised a formula to divide the pension benefit; (3) even if jurisdiction was reserved, it was improper where the value of the benefit was

known at the time of dissolution; and (4) the increase in the pension benefit stems solely from Laine's efforts and is not subject to marital division. In the alternative, Laine argues that if Christopher is entitled to a greater apportionment of the benefit, he must partially reimburse her for an additional contribution she made to increase the benefit's value.

We first address which approach was used in the judgment of dissolution. Courts may use two methods to divide marital property in a pension plan: the "reserved-jurisdiction" approach and the "immediate-offset" approach. *In re Marriage of Culp*, 399 Ill. App. 3d 542, 546-47, 936 N.E.2d 1040 (2010). Under the immediate-offset approach, the court "determines the present value of the pension plan, awards the entire pension to the employed party, and awards the other party enough other marital property to offset the pension award." *In re Marriage of Ramsey*, 339 Ill. App. 3d 752, 758, 792 N.E.2d 337 (2003). The immediate-offset approach should only be used "'when there is sufficient actuarial evidence to determine the present value of the pension, when the employee spouse is close to retirement age, and when there is sufficient marital property to allow an offset.'" *In re Marriage of Richardson*, 381 Ill. App. 3d 47, 54, 884 N.E.2d 1246 (2008) (quoting *Robinson v. Robinson*, 146 Ill. App. 3d 474, 476, 497 N.E.2d 140 (1986)).

Under the reserved-jurisdiction approach, the court does not compensate the nonemployee spouse at the time of dissolution. Instead, the court assigns a percentage of the marital interest to the nonemployee spouse and retains jurisdiction over the case to ensure the pension will be payable "'if, as and when' [it] becomes payable." *Richardson*, 381 Ill. App. 3d 47 at 54 (quoting *Hunt*, 78 Ill. App. 3d at 663). Due to valuation difficulties or a lack of readily

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divisible assets, reserved jurisdiction is often the more feasible approach. *Culp*, 399 Ill. App. 3d at 547.

We agree with Christopher that the court used the “reserved-jurisdiction” approach. The court specified that Christopher and Laine would each receive half the marital share by entry of a QILDRO. A plain reading of the judgment for dissolution shows the court did not use the immediate-offset approach. The judgment contains no language showing that Christopher received an allotment of property to offset his future interest in the pension, and it meets all the requirements for reserving jurisdiction. The court assigned a percentage of the marital interest to each party by finding that both Laine and Christopher would be entitled to 50 % of the marital share. The court also indicated the pension benefit would be apportioned at a future time by stating that it “will be divided equally.” Although this phrasing differed from the classic language in *Hunt*, allocating the pension “ ‘if, as and when’ the pension becomes payable,” the court did reserve jurisdiction for a future time. See *Hunt*, 78 Ill. App. 3d at 663. Here, where the court met both of the requirements of reserved jurisdiction without indicating it was using the immediate-offset approach, we believe jurisdiction was reserved.

Laine argues that reserving jurisdiction was improper because the value of the pension was known at the time of dissolution. She contends that Christopher admitted in his response to the motion to correct the QILDRO that the value of the benefit at the time of dissolution was \$3,933.78 per month. But, whether or not Christopher admitted to the value of the pension is irrelevant to the question of whether the reserved-jurisdiction approach was appropriate at the time of dissolution. The court did not have access to actuarial information and Laine has not

established that she objected to the reserved-jurisdiction approach at the time of dissolution. See *In re Marriage of Whiting*, 179 Ill. App. 3d 187, 190, 534 N.E.2d 468 (1989) (spouse barred from making argument in contempt proceeding that could have been made on appeal from dissolution of judgment). Even if the court had access to actuarial evidence at the time of dissolution it still could have used the reserved-jurisdiction approach because Laine was not close enough to retirement nor did she have sufficient assets to offset the pension's value. See *In re Marriage of Manker*, 375 Ill. App. 3d 465, 475, 874 N.E.2d 880 (2007) (holding reserved jurisdiction proper for spouse whose retirement date was unknown at dissolution). We find no error in the court's choice of the reserved-jurisdiction approach.

While the court properly used the reserved-jurisdiction approach, we believe it erred in apportioning the pension benefit based on its value at the time of dissolution. Where a court reserves jurisdiction, our case law requires the marital interest be divided according to the "amount actually received." *Ramsey*, 339 Ill. App. 3d at 758, 760; see also *Culp*, 399 Ill. App. 3d at 547, 549 ("equity requires [spouses] share in the benefits of unforeseen increases in the value of the pension as well [as the risk of loss]"); *Richardson*, 381 Ill. App. 3d at 56 ("[t]he marital shares in the pension are the same [between both spouses]"); *Whiting*, 179 Ill. App. 3d at 191 ("[t]he value of the retirement benefits [under the reserved-jurisdiction approach] is determined simply by how much is actually paid out"). This approach comports with Illinois' long-standing recognition of the "time value of money." *Wisniewski*, 286 Ill. App. 3d at 244. Christopher is entitled to the increase in the pension's value between the time of dissolution and the time of payment.

Laine argues that this rule should not apply where the increased value of her pension benefit was earned solely through her nonmarital efforts. We find this issue controlled by our holding in *Richardson*, 381 Ill. App. 3d 387. Like this case, the spouses in *Richardson* were assigned an equal share, and the pensioner spouse continued to work after the dissolution of the marriage. In addressing the argument that the increase in the pension's value was due to the pensioner spouse's nonmarital efforts, we noted that the nonpensioner spouse's "efforts during the marriage contributed to the cumulative total [benefit], not only to the benefits accrued during the marriage years." *Richardson*, 381 Ill. App. 3d at 58. Rather than treating the growth in value after dissolution as nonmarital property, we held that the parties were entitled to an equal share of the marital portion of the pension. *Richardson*, 381 Ill. App. 3d at 58. We noted that "each spouse's share of that asset must obviously be valued the same, or the division would not be equal." *Richardson*, 381 Ill. App. 3d at 58. Laine seeks to distinguish *Richardson* by pointing out that the parties in that case agreed to a 50% share of the marital property in the benefit, where here the equal division was ordered by the court. See *Richardson*, 381 Ill. App. 3d at 48. In this context, we see no difference between an agreement evenly distributing the pension benefit and a court order that does the same.

Laine also argues that her pension is distinguishable because it was calculated differently than the pension in *Richardson*. Unlike *Richardson*, where the pension benefit was based on the cumulative total of years worked, Laine's pension benefit was calculated by multiplying her final average salary by her pension multiplier. 40 ILCS 5/20-106 (West 2006). The final average salary is that for the highest-earning four consecutive years within the last ten years, while the

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pension multiplier is related to the number of pensioner's years of service. 40 ILCS 5/16-133(a)(B) (West 2006); *In re Marriage of Wenc*, 294 Ill. App. 3d 239, 243, 689 N.E.2d 424 (1998). Laine's argument overlooks that her pension multiplier, like the pension benefit in *Richardson*, increases with her years of service. This increase would not have been possible without the earlier years it was built on. Likewise, the higher salary in the later years would presumably not have been possible without the lower-salary years during the marriage. Where the parties were ordered to split the pension benefits evenly, the increase in value cannot be used to give one party a larger "equal" share. See *Richardson*, 381 Ill. App. 3d at 57.

We note that the trial court improperly construed the language in *Wisniewski* that "[where] the method of apportionment [has] not been determined earlier, the trial court [has] discretion to consider the evidence before it and devise a method of its own." *Wisniewski*, 286 Ill. App. 3d at 243. Even if the method of apportionment were left to the court's discretion, that discretion did not allow it to disregard the rule that the reserved-jurisdiction approach calls for apportionment based on the pension value at the time of payment. See *Ramsey*, 339 Ill. App. 3d at 758.

We remand this case to determine the marital share of the pension benefit based on its current value and not the value at the time of dissolution. In calculating the marital portion, the court is instructed to use a ratio of months in accordance with this approach.

Having found the trial court erred in apportioning the pension benefit based on its value at the time of dissolution, we now address Laine's contention that Christopher must reimburse her for a portion of the added benefit. Laine states that she paid a lump sum of \$10,755.76 to

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increase her pension benefit payments. Christopher may have to reimburse her for a share of a lump sum contribution paid toward upgrading the pension benefit. See *Ramsey*, 339 Ill. App. 3d at 765. As a court of review, we are not in a position to determine whether or not a lump sum was actually paid and in what amount. Because the lower court had no occasion to decide this issue, we remand for a determination in accordance with *Ramsey*.

Christopher next contends that the lower court erred when it did not assign him a portion of the pension's death benefit. Christopher argues that he is entitled to the death benefit for two reasons: (1) his marital interest included a portion of the death benefit and the circuit court was constitutionally prohibited from altering that interest, and (2) the court abused its discretion in denying him the death benefit. In response, Laine contends the TRS does not allow death benefits for former spouses.

At the time the judgment of dissolution was entered, a QILDRO could not be used to assign a portion of a death benefit to a former spouse. 40 ILCS 5/1-119(b)(4) (West 2000) (“[a] QILDRO shall not apply to or affect the payment of any \*\*\* death benefit”); see also *Culp*, 399 Ill. App. 3d at 549. When the court entered the dissolution order, it stated that the marital interest would be assigned on the basis of a QILDRO and did not grant Christopher an interest in the death benefit from the pension fund.

Because Christopher did not receive an interest in the death benefit in the judgment for dissolution, the court's order represented neither a deprivation of a constitutional interest in the pension nor an abuse of discretion. We agree with Christopher that our constitution requires that “[m]embership in any pension or retirement system of the State \*\*\* shall be an enforceable

contractual relationship, the benefits of which shall not be diminished or impaired.” Ill. Const. 1970, art. XIII, §5; see also *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill. 2d 291, 303, 735 N.E.2d 560 (2000) (“this court has construed that provision as a guarantee that all public pension benefits are to be determined under a contractual theory rather than being treated as mere gratuities”). But it is not possible to diminish an interest that does not exist. Here, Christopher had no interest in the death benefit where the court called for apportioning the pension via a QILDRO. Denying Christopher a portion of the death benefit did not diminish or impair his interest because he had no interest in the death benefit. The trial court’s decision not to grant Christopher a portion of the death benefit was proper.

Finally, we turn to Christopher’s contention that Laine agreed to a higher monthly payment amount than was ordered by the court. He argues that he submitted a proposed monthly benefit payment of \$2,129.12 in his counterclaim, which Laine never answered. He contends that Laine’s failure to answer the counterclaim should be deemed as an admission that the proposed amount was appropriate. See 735 ILCS 5/2-610(b) (West 2008) (“[e]very allegation, except allegations of damages, not explicitly denied is admitted”). We need not consider the merits of this argument because it was raised for the first time in Christopher’s reply brief, in violation of Illinois Supreme Court Rule 341(j). Ill. Sup. Ct. R. 341 (eff. July 1, 2008); *People v. Steward*, 406 Ill. App. 3d 82, 93, 940 N.E.2d 140 (2010) (“a reply brief is strictly confined to replying to arguments presented in the brief of the appellee”). Also, our examination of the record shows that this argument was made for the first time on appeal. See *Culp*, 399 Ill. App. 3d at 550 (arguments not raised before the trial court are forfeited on appeal).

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Christopher requests attorney fees to cover costs for this appeal. We may, at our discretion, award attorney fees for successful claims on appeal. 750 ILCS 5/508(a)(3.1) (West 2008) (authorizing attorney fees if the party prosecuting a claim on appeal “has substantially prevailed”); *In re Marriage of Murphy*, 203 Ill. 2d 212, 220, 786 N.E.2d 132 (2003). We will consider the award of attorney fees to Christopher on submission of a motion.

For the reasons above we reverse the court’s apportionment of the monthly pension benefit and affirm the decision not to award Christopher an interest in the death benefit. We remand for a new calculation of the apportionment of the monthly benefit based on the current value of the benefit and a determination under *Ramsey*, 339 Ill. App. 3d at 766.

Affirmed in part and reversed in part; remanded with directions.