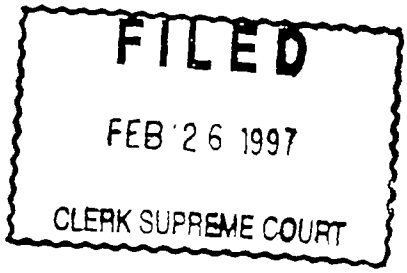
IN THE COURT OF APPEALS OF IOWA

No. 6-380 / 95-0895

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IN RE THE MARRIAGE OF CAROL J. ROSSOW AND WILLIE W. ROSSOW

Upon the Petition of
CAROL J. ROSSOW,
Petitioner-Appellant,

And Concerning
WILLIE W. ROSSOW,
Respondent-Appellee.

Appeal from the Iowa District Court for Delaware County, John Bauercamper, Judge.

Carol Rossow appeals certain economic provisions in the parties' dissolution of marriage decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Mark A. Roeder, Roeder Law Firm, Manchester, for appellant.

Timothy G. Goen, Cedar Rapids, for appellee.

Considered by Habhab, C.J., Huitink, J. and McCartney, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

The appellant, Carol J. Rossow (Carol), and the appellee, Willie E. Rossow (Willie), were married in July of 1984. Their marriage was dissolved by judgment entered in March of 1995.

Carol appeals the provisions of the decree of dissolution asserting that the trial court erred in awarding to Willie all of his Iowa Public Employment Retirement System account (IPERS) and IRA accounts without granting her a portion. She further asserts the court erred in permitting certain testimony regarding the value of a motor home.

This marriage was the second marriage for both parties. Carol had adult children from her first marriage while Willie had custody of his minor children from his first marriage. The parties, however, have no issue from their marriage.

Carol was born in June 1942 and was therefore forty-two years of age at the time of marriage, Willie being born in January 1939 was forty-five years of age at the time of marriage. At the time of trial, Willie had been a Delaware County highway department employee for some twenty-nine years. During the marriage Carol worked as a waitress and after some six years into the marriage, she purchased a small restaurant. Both parties worked in the cafe, with Willie helping in the evenings. The cafe consistently lost money, and as a consequence, the losses incurred in this business operation were used to offset the income that Willie received, which resulted in reduced income tax liability to the parties during the years of cafe ownership. As

a consequence they received substantial income tax refunds every year of restaurant ownership.

Willie's salary from Delaware County at the time of trial was approximately $26,000 per year. During the marriage, Carol assisted in the management of the home and provided considerable services in the raising of Willie's minor children.

Our review is de novo and we give considerable credence to the trial court findings since it had the opportunity to observe the parties and judge their credibility. *In re Marriage of Steele*, 502 N.W.2d 18, 20 (Iowa App. 1993); Iowa R. App. P.4.

Carol asserts that it was error for the trial court not to provide her with portions of the IPERS account that Willie accrued during the period of the marriage, and she likewise asserts that the court was in error in not providing her with a portion of the IRA accounts that Willie had accumulated during the marriage.

These claims of error require a review of the disposition of property made by the trial court.

Carol brought into the marriage in 1984 a $9,000 cash account representing the equity of the sale of her previously-owned home. She also had a Sunbird automobile worth approximately $4,600, for a total of $13,600. In addition to that, she had the usual household goods and furnishings.

Willie brought into this second marriage $30,000, being the net proceeds from the sale of a home he owned previous to the marriage to Carol, together with some $6,000 in IRA accounts, $1,500 realized from the sale of machinery, and $4,000,

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which was the trade-in value of a camper he used to acquire a newer camper during the marriage. He also had household goods and furnishings and some other vehicles, but values of those items was not established. He owed his former wife some $9,000 which Carol paid from her resources. He, therefore, brought into the marriage $32,500.

At the time of the decree of dissolution, the parties had acquired substantial assets over and above what each had brought into the marriage.

The trial court awarded Carol restaurant equipment, furniture and fixtures, a bank account, an automobile, and a portion of a tax refund, all of which totaled $18,200. The court, however, attributed to her a debt against the cafe equipment of $2,200, so that Carol received net assets of $16,000. In addition to that, the court directed Willie to pay from the assets he received the sum of $40,000 in a property settlement so that Carol receives net property of $56,000.

Willie received property with a value of $176,957, consisting of the home, a vacant lot, several motor vehicles, furniture and fixtures, one-half of the tax refund due the parties, his IRA accounts, and his IPERS account. Against that, Willie was charged with the mortgage debt against the home and lot of $15,900, making a net distribution to Willie of $161,057. This must be reduced, however, by $40,000 he is required to pay Carol over a period of years. Thus, Willie receives $121,057 in property.

The parties, during their marriage, had a net gain of $130,957. This calculation is based upon the $177,057 which the parties together receive on the dissolution, i.e. $16,000 net to Carol and $161,057 net to Willie less the $46,100 they together brought into the marriage ($13,600 from Carol and $32,500 from Willie). If the IPERS account valued at $33,657 is removed from these calculations, Willie receives net $87,400 ($121,057 minus $33,657).

Carol receives net property of $56,000 as set forth above, and when that is reduced by the value of the property brought by her into the marriage, of $13,600, she realizes $42,400 over and above the property she brought into the marriage. Willie, again laying aside his IPERS account, receives $87,400, and when that is reduced by the value of the property he brought into this second marriage of $32,500, he receives $54,900.

These calculations however do not satisfy the requirements of a fairly equitable distribution of property acquired during the marriage, giving each credit for the value of property brought by them into this marriage. She receives over and above that contribution $42,400 and Willie receives over and above his contribution into the marriage $54,900. All the foregoing calculations are made without taking into account the IPERS accounts. A more equitable division would be to increase the property settlement to Carol from $40,000 to $45,000. This increases her property to $47,000 over and above what she brought into the marriage and reduces Willie's similar gain

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from $54,900 to $49,900. This effects an equitable distribution; absolute equality is not required. *In re Marriage of Conley,* 284 N.W.2d 220, 223 (Iowa 1979).

The foregoing calculations also account for the additions to his IRA accounts made by Willie during the marriage.

To effect a better distribution of the IPERS account, we hold that Carol should receive a portion of those benefits. We therefore further modify the decree and order the parties to present to the district court a Qualified Domestic Relations Order (QDRO) equal to 50% of Willie's IPERS pension earned or accumulated during the marriage (eleven years).[1] Although a formula award of the pension benefits, based upon the number of years of benefits accumulated during the marriage may be equitable, a QDRO, when available, is preferable. *In re Marriage of Kurtt,* ___N.W.2d. ___ (Iowa App. 1997). In the 1996 Regular Session, the Iowa Legislature amended Iowa Code section 97B.39 to provide for a QDRO with an IPERS account. *See* 1996 Iowa Acts ch. 1187, § 10 (codified at Iowa Code § 97B.39 (1997)).

Carol's contribution to this marriage has been substantial. She worked during the marriage as a waitress and as a cafe owner; she helped raise and maintain the family and the home and initially assisted Willie in paying a debt owed by him to his then former wife. Both parties are now in their fifties, and Carol has no secure

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[1] The QDRO shall be in a form approved by the Plan Administrator pursuant to Internal Revenue Code section 401(a)(13) and ERISA ssection 206(d)(3).

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retirement program whereas Willie has both his IPERS accounts and substantial social security benefits. The foregoing adequately accounts for the gain in property acquired by the parties during their marriage, including the IPERS benefits acquired by Willie during this eleven-year marriage.

Turning to the testimony as to the value of the motor home, the value of $12,000 placed upon the home by the trial court was within its permissible range of evidence. *In re Marriage of McCamey*, 522 N.W.2d 95, 97 (Iowa App. 1994). This was the value placed on it by Willie in his affidavit of financial status. The court advised the parties that it intended to consider the file as part of the evidence. We, therefore, do not believe it appropriate to disturb the findings of the trial court in this regard.

Carol asks for attorney fees on appeal, which are a matter of discretion with the court.

Considering the cash award given her by the trial court, which is modified on this appeal, we do not believe she should receive all the attorney fees she requests. We do, however, considering the disparate ability to earn, grant her the sum of $500 to apply toward her attorney fees.

Based upon the foregoing, we affirm the decision of the trial court as modified. We remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

AFFIRMED AS MODIFIED AND REMANDED.