IN THE COURT OF APPEALS OF IOWA

No. 4-071 / 93-0866

IN RE THE MARRIAGE OF LEROY LELAND ROBBINS AND LINDA JOYCE ROBBINS

Upon the Petition of
LEROY LELAND ROBBINS,

Petitioner-Appellant,

And Concerning
LINDA JOYCE ROBBINS,

Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs, Judge.

Leroy appeals from the economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Robert L. Sudmeier of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellant.

Max E. Kirk of Ball, Kirk, Holm & Nardini, P.C., Waterloo, for appellee.

Heard by Habhab, P.J., and Cady, JJ., and Schlegel, S.J.*.

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

PER CURIAM

Former husband, Leroy Robbins appeals the economic provisions of the parties' dissolution decree. We affirm as modified.

Leroy and Linda Robbins were married in 1974. Each had children from their previous marriage. The parties did not have children together.

Leroy and Linda separated in July 1991. Leroy filed a petition for dissolution on December 19, 1991. A hearing on the petition was held December 7 and 8, 1992.

Linda was fifty years of age at the time of the dissolution hearing. She worked in the chemistry department of University Hospitals until 1977, when she started law school at the University of Iowa. During law school, Linda worked as a research assistant for a professor and taught a course at the Pharmacy School during her last year of law school, for which she was paid $1000. She also took out a $5000 student loan and withdrew approximately $6000 from her TIAA/CREFF to pay for her law school expenses. Additional financial support came from Leroy. Linda received her law degree in 1980. She has been a partner in Irvine and Robbins since January 1985 and currently has a fifty-one percent partnership interest in that firm. Her average annual income from the partnership for 1988-1992 was approximately $100,000. Linda has accumulated two IRAs valued at about $10,000 and profit sharing in the firm valued at about $24,000.

In 1988 Linda settled a case, opting to have her fee paid over a period of twenty years. At the time of the hearing the fee was represented by the United Pacific Life Annuity, valued at $118,053: according to the terms of the annuity, $11,072 per year is paid to the law partnership, not directly to Linda.

Leroy was sixty-five years of age at the time of the hearing. He has worked full-time for St. Luke's since the 60's and currently holds the title of Administrative Medical Technologist, earning $64,800 per year. Leroy has a pension plan from St. Luke's, 55.63 percent of which accumulated during marriage. Also during the marriage, Leroy accumulated several tax sheltered annuities and an IRA with an approximate value at the time of hearing of $53,000.

Most of the marital property was divided by agreement of the parties. The disputed property issues dealt with the St. Luke's pension plan, the United Pacific Life Annuity, and the partnership interest in the law firm. Leroy also sought an award of alimony.

The district court found that Linda would be named a qualified joint survivor of Leroy's pension plan, in part because of "the disparity in the amount of retirement funds accumulated from joint marital assets and the length of the marriage." The district court made valuations of Linda's interest in the law firm, found that the United Pacific Life Annuity was not an asset subject to present division, considered the agreed upon division of other marital property and awarded Linda the parties' boat. Leroy was not awarded alimony. Leroy appeals.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division of percentage distribution. Id. The determining factor is what is fair and equitable in each circumstance. Id. The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

I. **Alimony**.

First we turn to Leroy's request for alimony. Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983).

We agree with the trial court that an allowance of alimony for Leroy is not warranted under the facts and circumstances of this case. As to our reasoning, we adopt by reference the trial court's statements concerning the denial of alimony.

II. Union Pacific Life Annuity.

We next consider Leroy's contention that the district court erred in concluding the United Pacific Life Annuity was not marital property and therefore not subject to division. He argues that to equalize the property division he should be awarded all benefits of his pension plan and the boat. In the alternative, Leroy contends he should have been awarded periodic alimony or a cash settlement keyed to the Life Annuity.

We agree with Leroy the United Pacific Life Annuity was marital property and therefore subject to division. The proceeds that make up this annuity came from a fee earned by Linda from her law practice during the course of the marriage. The fee was fully earned, due and payable.

It is undisputed Linda could have received cash for the fee. Instead, she elected to take her fee in the form of a structured settlement with the fee being paid over a period of twenty years.

The annuity is valued at $118,053, and according to its terms Linda receives $11,072 per year. The trial court treated this amount as future income "not unlike Leroy's retirement annuity" rather than an asset subject to present division.

We agree with Leroy that the annuity should be considered as a marital asset. However, for the reasons explained in division III of this opinion, we concur with the trial court that it should be awarded to Linda.

III. <u>Leroy's St. Luke's Defined Benefit Plan</u>.

The trial court made an award of a component of Leroy's pension plan, worth $25,085 in value, to Linda by entry of a qualified domestic relations order.

Section 598.21 of our code directs that property divisions be done equitably having due regard to the considerations set forth in that section at subparagraphs (a) through (m). To achieve equity here, and after taking into consideration that Linda is to receive the full benefit of her annuity, we believe the decree should be modified by removing the component award to Linda of Leroy's pension plan. The dissolution decree in this respect is so modified.

We have considered all other issues raised by the appellant and find them to be without merit.

Costs of this appeal are assessed to one-half to appellant and one-half to appellee.

AFFIRMED AS MODIFIED.