IN THE SUPREME COURT FOR THE STATE OF IOWA
No. 19-0969

MATTHEW TAIT MILLER
Petitioner-Appellant/Cross-Appellee,

vs.

KARRI ANN MILLER
Respondent-Appellee/Cross-Appellant

APPEAL FROM THE DISTRICT COURT
FOR BLACK HAWK COUNTY,
Honorable George L. Stigler, Judge

APPELLANT'S/CROSS-APPELLEE'S FINAL REPLY BRIEF

Heather A. Prendergast AT0006316
Roberts, Stevens & Prendergast, PLLC
321 E. 4th Street, P.O. Box 956
Waterloo, IA 50704-0956
Telephone:(319) 234-4600
Facsimile: (319) 234-7878
Email:heather@neialaw.com
ATTORNEY FOR PETITIONER-APPELLANT/CROSS-APPELLEE

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Petitioner-Appellant/Cross-Appellee's Final Reply Brief with the Electronic Document Management System with the Appellate Court on the 18th day of December 2019.

The following counsel will be served by Electronic Document Management System:

Andrew B. Howie
5015 Grand Ridge Drive, Suite 100
West Des Moines, IA 50265-5749
Telephone: 515-223-4567
Email: howie@sagwlaw.com

D. Raymond Walton
620 Lafayette Street, Suite 300
Waterloo, IA 50704
Telephone: 319-234-1766
Email: rwalton@beecherlaw.com
ATTORNEYS FOR RESPONDENT-APPELLEE/CROSS-APPELLANT

I hereby certify that on the 18th day of December 2019, I did serve the Petitioner-Appellant/Cross-Appellee's Final Reply Brief on Petitioner-Appellant/Cross-Appellee, listed below, by mailing one copy thereof to the following Petitioner-Appellant/Cross-Appellee:

Matthew Tait Miller
Petitioner-Appellant/Cross-Appellee

By: /s/ *Heather A. Prendergast*
Heather A. Prendergast AT0006316
Roberts, Stevens & Prendergast, PLLC
321 E. 4th Street, P.O. Box 956
Waterloo, IA 50704-09566
Telephone: (319) 234-4600
Facsimile: (319) 234-7878
Email: heather@neialaw.com
ATTORNEY FOR PETITIONER-APPELLANT/CROSS-APPELLEE

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ARGUMENT

I. THE O'CONNOR CASE IS CONTROLLING IOWA PRECEDENT AND AS SUCH, THE DISTRICT COURT ERRED IN DIVIDING MATT'S DISABILITY PENSION

Karri's brief argues that the legal principles cited by Matt in his brief have no effect on the Court's decision to divide that asset. Karri's brief obviously argues the controlling applicable Iowa caselaw of *In re Marriage of O'Connor* and its clear instruction on dividing a disability pension is in error or inapplicable. Secondarily, Karri's brief argues that Matt's argument is one of fault. Karri's argument in that regard is a red herring and has lost sight of the fact that marriage and the property obtained therein is the result of joint efforts. "In general, the division of property is based upon each marriage partner's right to adjust an equitable share of the property accumulated as a result of their joint efforts." *In re Marriage of Dean*, 642 N.W.2d 321 (Iowa Ct. App. 2002).

Notably, before the Court can even divide Matt's disability pension, it must determine it to be a marital asset. While Chapter 411 benefits are subject to division by a marital property order, this Court has previously addressed a scenario almost factually identical to the one before it today. "A disability pension, unlike a pension paid on retirement, is not compensation

for past services. Rather, it is compensation to replace income that would have been earned had the employee not been injured." *In re Marriage of Howell*, 434 N.W.2d 629 (Iowa 1989). The *O'Connor* case specifically identified that the fact that a pension is considered marital property doesn't mean it must be divided. *O'Connor* at 576. The Court must do what is equitable by considering all of the factors under Iowa Code Chapter 598 as well as prior case law. Arguably, a disability pension is not a marital asset because it is compensation for an injury and not compensation for past services.

Matt was not the individual who made the argument that the marriage was "effectively over." That was a finding made by the District Court that the marriage was effectively over soon after it began. Matt argues this was not a pension that was accumulated by the joint efforts of the parties but rather is a pension that is meant to reimburse him for his loss of income and was not something that was contributed to by both parties throughout the course of the marriage. Karri spends a great deal of time in her brief arguing that Matt is alleging fault in the division of this pension. Again, that is a distraction of an argument and ignores controlling Iowa caselaw, specifically the *O'Connor* case.

Upon review of Chapter 598.21 and the factors contained therein, there is no question that the length of this marriage was short. In fact, it was so short that the Court made a finding that it was effectively over before it even began. This is not a marriage of a 10-year duration or a 15-year duration where both parties were participating in the joint venture of a marriage. Secondarily, the factor of the age and physical health of the parties must be considered in light of Matt's significant disability and Karri's lack thereof. Karri with her bachelor's degree has just as much of an earning capacity as Matt does, in fact more so as a result of her lack of disability. There were no written agreements by the parties entering into this marriage and there are no significant tax consequences to consider as a result of the division property. Karri received her one-half of the joint effort in regard to the marital home. Matt has never argued, nor is it his position, that Karri should not receive benefits from her joint efforts. The one item of joint effort the parties participated in was the marital home and the parties stipulated to splitting the proceeds from its sale. Karri therefore received her equity component of their joint efforts in regard to the marital home.

An award to Karri of Matt's current disability pension would significantly reduce Matt's monthly income and would in fact award Karri

an income meant to supplement Matt's lack thereof. Furthermore, the *O'Connor* case involved a marriage of much longer duration of 19 years. Matt, by his own independent actions, has obtained employment that adapts and recognizes his PTSD diagnosis which is a unique and not easily identifiable employment. Any argument in regard to a difference in the party's current incomes is misplaced in light of the fact that Karri waived spousal support and as such, did not argue that she needed additional income for her support at this juncture. While Matt's pension at the time of his retirement may be a marital asset, his disability pension now is compensation to replace income that would have been earned had he not been injured and is not an asset in which Karri contributed to by any effort during the marriage.

Furthermore, the similarities between the *O'Connor* case and the case at hand are striking. Mr. O'Connor had obtained employment at Hawkeye Community College while his ex-wife was working at Peoples Health Clinic for about 25 hours per week. There was approximately a $20,000 disparity in income between those two parties, however, Mr. O'Connor's ex-wife was seeking a Bachelor of Science degree and in this case Karri already has a degree from Mount Mercy where she majored in psychology and criminal

justice. It can be argued that Karri's ability to earn an income is even better than what Ms. O'Connor's was as evidenced by Karri's obtaining a fulltime position with significant benefits. Matt's position on this appeal is not that every Iowa court must "resort to recrimination of who was to blame," but rather every Iowa court must firstly recognize disability pensions as income replacement as a result of the disability, and secondarily consider all the factors Chapter 598 enumerates; including length of the marriage and contributions of the parties in determining an equitable division of a pension. The District Court erred in dividing Matt's disability pension and this Court should reverse the District Court's decision in that regard and award Matt the entirety of his disability pension.

II. IOWA CODE AND APPLICABLE CASE LAW SUPPORTS THE DISTRICT COURT ERRED IN AWARDING KARRI A PORTION OF MATT'S TIAA-CREF RETIREMENT ACCOUNT

Iowa Code and applicable case law supports the District Court erred in awarding Karri a portion of Matt's TIAA-CREF retirement account. Karri seeks in her cross-appeal that she be awarded one-half of the increase in value of Matt's sole premarital asset which accumulated fortuitously through market fluctuations during the marriage. Her argument is simply, "In fact, to make the division more equitable, Karri deserved to receive substantially

more than $20,000 from the TIAA-CREF account." Absent from Karri's argument is an explanation as to why it is inequitable for her to receive $20,000 from the TIAA-CREF account and secondarily, why it would be more equitable for her to receive half of an account in which she did not contribute to in any fashion with this extremely short marriage. The argument appears to be simply because she was married to Matt she deserves half of the accumulation in value of an asset.

Iowa case law recently addressed this very issue in regard to premarital property and its analysis in the division of marital assets. "In considering premarital property, we may look to the length of the marriage. We have stated that the claim of a party to the premarital property owned by the other spouse in a short-term marriage is minimal at best." *In Re Marriage of Verdoorn,* No. 18-0969 (Iowa Ct. App. 2019), citing *In re Marriage of Hansen,* 886 N.W. 2d 868 (Iowa Ct. App. 2016). In the Verdoorn case, The Court of Appeals set aside the full value of a premarital home to the spouse requesting it be considered premarital only because of the short duration of the marriage just as the case at hand.

> "We find the marriage in this case was relatively short in nature. See *In re Marriage of Shanks*, 805 N.W.2d 175, 180, (Iowa Ct. App. 2011) (finding marriage of eight years was short term). As noted, in short-term marriages, the claim of a spouse to the premarital property

> of the other spouse is minimal at best. It was due to Shelly's sole efforts the Glen Avenue home was worth $93,200 at the time of the marriage. We determine the amount of $93,200 should be set aside to Shelly as her premarital property." *Verdoorn* at 5. See also *In re Marriage of Moeller*, No. 18-0362 (Iowa Ct. App. 2019).

It is worth noting that the only reason Matt's TIAA-CREF was worth $166,000 at the time of divorce was through Matt's sole efforts through his work at Veridian prior to the marriage. There were zero cash contributions or accumulations into that retirement account during the marriage. While it is true that the asset increased in value during the marriage due to market fluctuations, this was an incredibly short marriage, one where neither party contributed to that asset in any fashion other than Matt's sole efforts prior to the marriage, and to award Karri any portion of that account is to award her funds "just because she was married." Again, this argument is not one based upon fault, but is one based upon facts. There was no joint effort implemented into this asset, nor was there even management in a joint fashion of this asset. The District Court erred in awarding Karri any portion of Matt's TIAA-CREF retirement and Matt requests the Court reverse the District Court's decision in that regard. Matt further requests that Karri's request for additional funds from the TIAA-CREF Retirement Fund is inequitable and not supported by Iowa Case law.

III. THE DISTRICT COURT ERRED IN AWARDING KARRI'S MOTHER A WINDFALL

Karri appears to argue in her brief that because the debt to Karri's mother was not included in the Court's division of assets and liabilities, it was not in error. However, Karri's brief fails to address the windfall issue presented by Karri's mother receiving double payment for the loan. Karri admitted a trial that her mother was paid over $11,000 from April of 2017 until the time of trial in this matter. Karri testified that of the debts she believed Matt to be responsible for, it was only the one-half of the closing costs, earnest money and taxes from the purchase of the Audubon home. One-half of that obligation was only approximately $5,800. As such, Karri's mother was more than paid from joint contributions of the parties up until the time of trial for Matt's half.

Matt requests that because he cannot comply with the Court's order which awards Karri the Capital Group American Funds Roth IRA And all the Veridian financial accounts with the exception of account 5220, that the court strike that portion of the order in order to offset the windfall given to Karri's mother. Karri's brief fails to address the issue which Matt has raised, which is that it's impossible for him to comply with the Court's order which awarded her the Capital Group American Funds account valued at $8,843

and the Veridian equity savings account valued at $4,301 because they are the same asset. Similarly, Matt testified at the time of trial the balance in the joint account 5220 was $0.00 because of the mortgage payment being paid, yet the Court appeared to award him $1,500 that didn't exist at the time of trial. Equity in this case demands that the Court strike the provisions of the Decree awarding Karri said accounts which in essence offsets the windfall to her mother.

IV. IT WOULD BE INEQUITABLE FOR KARRI TO RECEIVE A PORTION OF MATT'S NATIONAL GUARD RETIREMENT PENSION

Karri's brief argued she should receive a *Benson* formula division of Matt's military retired pay. A brief review of the Uniform Services Former Spouses Protection Act (USFSPA, 10 U.S.C. §1408) is helpful in this matter. Many commonly refer to the rule applicable in this case as the 10/10 rule. In property division cases involving the division of military retired pay incident to a divorce or separation, there is a requirement that the parties be married for at least 10 years during which time the military member performed at least 10 years of creditable military service. Without this, the Defense Finance and Accounting Service (DFAS) cannot honor an

application for the direct payment of any court ordered division of retired military pay as property.

> "Authority for court to treat retired pay as property of the member spouse - (2) if the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the members eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse." See 10 U.S.C. §1408.

The clear intent of this provision under the federal code is to require that marriages be of a length and duration long enough to justify a division of retired pay. The Miller marriage did not reach said prerequisite. Because of this requirement, this court has no jurisdiction to enter an order requiring DFAS to divide or direct pay anything to Karri in this matter. Karri has waived spousal support and/or alimony. Matt will not be eligible to receive any portion of his disposable retired pay until his RPED date of December 28, 2034. (App. P. 274). The overwhelming majority of Matt's military service was completed prior to the marriage in this matter and Karri now seeks both a survivor benefit portion as well as a percentage that Matt is to pay personally each month following 2034.

At the time of Matt's retirement, should that occur in December of 2034, his only source of income will be his retired military pay, his police pension and his veterans disability award. Any award to Karri of a portion of his retired pay will reduce his disposable income and an award of a survivor benefit will also reduce his disposable income as discussed below. In a marriage of this short of duration with this lack of contribution from both parties towards this marital asset it would be inequitable for Karri to receive the division of retired pay that she is requesting.

V. IT WOULD BE INEQUITABLE TO AWARD KARRI SURVIVOR BENEFITS ON EITHER MATT'S DISABILITY PENSION OR MATT'S NATIONAL GUARD RETIREMENT PENSION

Karri requests in her cross-appeal that in this very short marriage in length she should be entitled to survivorship benefits in both Matt's National Guard military pension as well as his Municipal Fire and Police Retirement System Disability Pension. "The circumstances under which a designation (of a survivorship benefit) should occur depend on the facts of each case and whether the allowance of survivorship rights effectuates an equitable distribution of the party's assets." *In re Marriage of Duggan*, 659 N.W.2d 556 (Iowa 2003). As this Court is aware, any surviving spouse benefit ultimately decrease the award to the participant of a respective plan. (App.

P. 274). As such, survivorship rights may be awarded to ensure the spouse receives a share of the pension plan in the event of the employee spouse's untimely death, but such an award is not normal and typical. *In re Marriage of Dow*, 918 N.W.2d 503 (Iowa Ct. App. 2018). Any award of survivorship benefits to Karri in this matter would be inequitable in light of the very short duration of the marriage compared to other marriages wherein survivorship benefits have been awarded. Most recently, this Court declined to award survivorship benefits in a marriage of a duration of 16 years, far in excess of the one here. *In re Marriage of Freudenberg*, No. 17-1569 (Iowa App. 2018).

It's important to note that the vast majority of Matt's pension benefit in his National Guard pension was accumulated long before the marriage. While Matt did participate in his fourth and final deployment during the first year of the marriage, by November 2014 the Veteran's Administration diagnosed him with PTSD. Matt's initial enlistment occurred in November of 1993 and he didn't even meet Karri until November of 2009 and they weren't married until April of 2010. As such, 17 years of Matt's enlistment in the military were prior to the marriage. Matt is of a young age and may choose to marry in the future and as such, pursuant to Iowa caselaw, Matt

should be allowed to assign a survivorship benefit as he sees fit in his future. *In re Marriage of Klinghammer*, No. 02-0112, 2003 WL 201070599 at 4 (Iowa Ct. App. 2003).

Similarly, Matt's pension through the Municipal Fire and Police Retirement System was earned from March of 2008 until his disability retirement in September of 2015. (App. P. 263). The parties had only been married for five years at that juncture, not a marriage wherein an individual participated in involvement in the police force as income for a 20-year marriage. Again, Karri has the opportunity to continue to contribute to retirement funds and other employment for over 25 years of a continued career without the disadvantage of a significant disability such as PTSD. Matt requests this Court deny Karri's request for an order requiring survivorship benefits.

CONCLUSION

For all of the reasons stated above, Matt requests this Court reverse the District Court's order in regard to his Municipal Police and Fire Disability Pension. Matt requests this Court reverse the District Court's order pertaining to Karri's receipt of any premarital funds specifically his TIAA-CREF account, and his premarital Roth IRA erroneously duplicated

in the Court's findings. Matt requests this Court reverse the District Court's decision pertaining to the windfall created for Karri's mother and reverse the District Court's order as it pertains to Matt's military pension available to him in 2034. Karri received one-half of the equity in the marital asset in which she participated. She received one-half of the equity in the marital home. That is equitable in this case as she presumably contributed in some fashion to its maintenance by otherwise preserving the home. "The underlying premise of a Court's analysis is that an equitable property division of any appreciated value of property should be a function of the tangible contributions of each party and not the mere existence of a marital relationship." *In re Marriage of Lattig*, 318 N.W.2d 811 (Iowa Ct. App. 1982). The mere fact that two individuals are married does not automatically mandate that a party receive a share of the other's pension or work. Marriage is a joint venture and our caselaw supports that when it occurs. The Miller marriage was not a joint venture.

/s/ *Heather A. Prendergast*
Heather A. Prendergast AT0006316
ROBERTS, STEVENS & PRENDERGAST, PLLC
321 E. 4th Street, P.O. Box 956
Waterloo, IA 50704-0956
Telephone:(319) 234-4600
Fax:(319) 234-7878
heather@neialaw.com

ATTORNEY FOR PETITIONER-APPELLANT/CROSS-APPELLEE

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This final brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this brief contains 4,077 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

This final brief complies with the typeface requirements of Iowa R. of App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using font size 14, Times New Roman.

/s/ *Heather A. Prendergast* Dated: December 18, 2019
Heather A. Prendergast