IN THE SUPREME COURT OF IOWA

IN RE THE MARRIAGE OF
MATTHEW TAIT MILLER AND KARRI ANN MILLER

Upon the Petition of	)	
	)	
MATTHEW TAIT MILLER,	)	
	)	
Petitioner-Appellant/Cross-Appellee,	)	
	)	**S.C. NO. 19-0969**
and Concerning	)	
	)	
KARRI ANN MILLER n/k/a KARRI ANN,	)	
	)	
Respondent-Appellee/Cross-Appellant.	)	

APPEAL FROM
THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY
THE HONORABLE GEORGE L. STIGLER, JUDGE

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

Andrew B. Howie
SHINDLER, ANDERSON, GOPLERUD & WEESE, P.C.
5015 Grand Ridge Drive, Suite 100
West Des Moines, Iowa 50265
515-223-4567; Fax: 515-223-8887
howie@sagwlaw.com
ATTORNEY FOR APPELLEE/ CROSS-APPELLANT

Table of Contents

Page

Table of Authorities

Cases **Page**

Rules **Page**

Statement of Issues Presented for Review

1. The district court did not err in awarding Karri a portion of Matt's Municipal Fire and Police Retirement System Disability Pension per the *Benson* formula.

In re Marriage of Branstetter, 508 N.W.2d 638 (Iowa 1993)

In re Marriage of Denuys, 543 N.W.2d 894 (Iowa 1996)

In re Marriage of O'Connor, 584 N.W.2d 575 (Iowa Ct. App. 1998)

2. In Matt's appeal, Matt argues he should have received his entire TIAA-CREF retirement account; instead, for Karri's cross-appeal, the appellate court should award Karri more of that account than the $20,000 awarded by the district court.

In re Marriage of Terry, No. 11-1903, 2012 WL 2819333 (Iowa Ct. App. 2012)

3. Karri's mother is not receiving a windfall.

4. The district court did not err by awarding Karri a portion of Matt's National Guard retirement pension.

Carranza v. Carranza, 765 S.W.2d 32 (Ky. Ct. App. 1989)

Deason v. Deason, 611 N.W.2d 369 (Minn. Ct. App. 2000)

In re Marriage of Beltran, 183 Cal. App. 3d 292, Cal. Rptr. 924 (Ct. App. 1986)

In re Marriage of Howell, 434 N.W.2d 629 (Iowa 1989)

Scott v. Scott, 519 So. 2d 351 (La. Ct. App. 1988)

Iowa Code § 598.21 (2019)

10 U.S.C. § 1408(d)(2)

5. In Karri's cross-appeal, the district court erred by failing to grant Karri a right to survivor benefits of both Matt's Municipal Fire and Police Retirement System Disability Pension and Matt's National Guard retirement pension.

In re Marriage of Klein, 522 N.W.2d 625 (Iowa Ct. App. 1994)

In re Marriage of Morris, 810 N.W.2d 880 (Iowa 2012)

Argument

1. The district court did not err in awarding Karri a portion of Matt's Municipal Fire and Police Retirement System Disability Pension per the *Benson* formula.

Matt does not want to share his Municipal Fire and Police Retirement System Disability Pension with Karri. Matt has been and will continue to receive monthly pension payments for the rest of his life. (App. at 219-22, 117:11-16, 145:10-13.) At the time of trial, he received $2,651 monthly. (*Id.*) The district court awarded Karri her *Benson* share of the pension. This court should affirm.

First, Matt argues: "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." (Appellant's Reply Br. p8.) If so, the district court made the finding based on the evidence and arguments Matt offered. (Tr. 71:1-10 (Matt testifying: "It felt like we were more roommates than a couple"); *see* Appellant's Br. p14-15 (arguing how the parties' "marriage lacked any physical intimacy and Karri and Matt were roommates rather than a married couple."), p35 ("Karri's participation in this marriage was that of a roommate, not a spouse.").)

Second, as argued in Karri's main brief, *In re Marriage of O'Connor*, which Matt relies to support his argument is not applicable to this case. *See In re Marriage of O'Connor*, 584 N.W.2d 575 (Iowa Ct. App. 1998). The *O'Connor* court chose

not to divide the pension in that case because the facts showing such a division would be inequitable. *See id.* Karri articulated the distinctions between *O'Connor* and this case in her main brief. (Appellee's Br. p25.) However, a key factual distinction is this finding from the *O'Connor* opinion: "Michael's disability has decreased his earnings. While he has an earning limitation of $35,611.32, there is no showing he will be able to earn additional income." *O'Connor*, 584 N.W.2d at 577. Here, Matt experienced the opposite. Matt is working full-time, earning a significant income, with likelihood that employment would continue indefinitely.

Matt claims his PTSD limits his employment options and that his current employment provides him with special considerations he would not otherwise receive. Because of his condition, he falls under two protected classes: he is a Veteran and he has a disability. Not only would he have to receive accommodations from any employer, he can exercise veteran's preference in many situations. In addition, Matt has a Master's degree. All of these combined make him a desirable candidate. Matt's earning limitation is only set by himself. (*See* App. at 197:2-21 (Matt admitting he has "limitations, but not disabilities" that do not affect his ability to work fulltime).)

With an eight-year marriage where both parties supported each other, benefitted from their respective contributions to the marriage, and utilized this pension during the marriage to jointly benefit themselves, each should receive an equitable share of the pension after the divorce. *See In re Marriage of Denuys*, 543

N.W.2d 894, 898 (Iowa 1996) (Municipal Fire and Police Retirement System disability pension is property subject to division); *In re Marriage of Branstetter*, 508 N.W.2d 638, 640 (Iowa 1993).

2. In Matt's appeal, Matt argues he should have received his entire TIAA-CREF retirement account; instead, for Karri's cross-appeal, the appellate court should award Karri more of that account than the $20,000 awarded by the district court.

It is equitable to increase Karri's share of Matt's TIAA-CREF from $20,000 to $46,042.45 which is one-half the account appreciated during the marriage (166,237.20-74,152.30). The district court awarded Karri $20,000 "[b]ecause of the significant difference in assets awarded to each of these parties". (App. at 36.) Unfortunately, $20,000 is insufficient to create an equitable division of all their property. As the Table in Karri's main brief shows, the overall property split had Matt receiving net worth of $161,486.35, while Karri received only $47,739.21. (Appellee's Br. p35.) Increasing Karri's share of Matt's TIAA-CREF to $46,042.45 will help correct that inequity.

Justifying an increase in Karri's share of Matt's TIAA-CREF is the case *In re Marriage of Terry*, No. 11-1903, 2012 WL 2819333 (Iowa Ct. App. 2012). In *Terry*, the parties had been married for only five years when the court granted their dissolution, and their "marriage experienced problems from the very beginning." *Id.* at *1-*2. With a shorter and much more tumultuous marriage

than Karri and Matt's, the *Terry* court affirmed the lower court's award to the wife of one-half of the husband's appreciated value in a premarital retirement savings account. *Id.* at *5. There, the court of appeals held:

> It is undisputed that Troy did not contribute to his retirement savings plan during the marriage. At the beginning of their marriage, the savings plan had a value of $58,253, less an outstanding loan of $5246.52, for a net value of $53,006.48. At the end of their marriage, it had appreciated in value to $92,684.90, less an outstanding loan of $8309.48, for a net value of $84,375.42. The district court awarded half of the increased value to Angie. The net increase in value is $31,368.94, of which Angie is entitled to half, or $15,684.47. Angie does not request an award of half the total value of the savings plan, only half of the appreciated value. Under the facts and circumstances of this case, we see no compelling reason to disturb the reasoning of the district court in dividing what is clearly a marital asset. To the extent that this opinion varies from the formula articulated by the district court in its post-trial order, we affirm as modified.

Terry, 2012 WL 2819333, at *5. This court should do the same and increase Karri's share of Matt's TIAA-CREF from $20,000 to $46,042.45.

Finally, Matt incorrectly states: "There were zero cash contributions or accumulations into that retirement account during the marriage." (Appellant's Reply Br. p13.) In fact, Matt testified that after he began working at the University of Iowa, when Karri and Matt were married to each other, Matt contributed to the account. (App. at 110:16-23.) So, "there is there is a little over a year of payments [Matt] made into this account". (App. at 110:16-23.)

3. Karri's mother is not receiving a windfall.

Matt misunderstands the evidence. Karri testified that both she and Matt borrowed significant funds from her mother, as reflected in Exhibit O. (App. at 299-300.) As Exhibit O shows, the parties owed Karri's mother $19,443 before April 2017. (*Id.*) From that amount, Matt admitted that money borrowed from Karri's mother – "closing costs of $6500, earnest money of $2000 and taxes of $3243" – totaling $11,743 was a joint debt, and he should pay one-half, i.e., $5,871.50. (App. at 122:13-124:9 (denying that he owed for Karri's braces or her father's funeral expenses); *see* App. at 299-300.) Based upon Matt's promise to pay $5,871.50, Karri deducted $5,871.50 from the total debt owed to Karri's mother, shown at the top of Exhibit O. (App. at 299-300, 189:25-191:6.) The payments that Karri made to her mother after April 2017 that are reflected on the several lines of Exhibit O were Karri's sole personal debts that she paid back to her mother.[1] (App. at 189:25-191:6; *cf.* App. at 124:10-125:10 (Matt's misinterpretation of Ex. O).) Matt's $5,871.50 remained unpaid and owing at the

[1] Notably, the same time Karri is paying her mother with joint funds, Matt is contributing joint funds to his TIAA-CREF account that he wants to receive solely without Karri receiving any of that account. (*See* Appellant's Br. part II(c).)

time of trial.[2] (Tr. 163:11-165:7; App. at 193:14-21.) If Matt is not ordered to pay his share of $5,871.50 from the house sale proceeds, then Matt would be receiving an unjust windfall. By ordering Karri's mother repaid from the house sale proceeds, Karri's mother did not receive a windfall. This court should affirm the district court.

4. The district court did not err by awarding Karri a portion of Matt's National Guard retirement pension.

The district court ordered Matt's National Guard pension be divided per the *Benson* formula. (App. at 36.) Matt claims that 10 U.S.C. § 1408(d)(2) prohibits the court from awarding Karri any of Matt's retirement pay. (Appellant's Br. p37-38; Appellant's Reply Br. part IV.) That argument is wrong.

Section 1408(d)(2) states:

> If the … 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 member's 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

---

[2] The $11,000 that Matt claims was repaid to Karri's mother was Karri's repayment of the additional loans she took *after* April 2017, not the $5,871.50 that Matt owed prior to April 2017, and remained his debt at the time of the divorce trial.

> as property of the member or property of the member and his spouse.

10 U.S.C. § 1408(d)(2).

Based on § 1408(d)(2), Matt argues that because the parties' marriage did not last ten years, the district court lacked jurisdiction to divide his military pension. (Appellant's Br. p37-38; Appellant's Reply Br. part IV.) However, that fact does not prevent the court from awarding a portion of Matt's military retirement pay from being awarded to Karri. First, Matt's retirement pay is a marital asset subject to division. *In re Marriage of Howell*, 434 N.W.2d 629, 632 (Iowa 1989) ("We find that Willis' military pension is marital property to be divided equitably by the parties.") So, the only remaining question is whether the ten-year requirement prevents the district court from awarding Karri a share of his retirement pay. Applying *Howell*, the answer is no. Though Iowa appellate courts have not ruled on the effect of the ten-year requirement in § 1408(d)(2), several other states have found that the ten-year limitation only applies on *how the money is collected*, while still finding that the pension is a divisible asset. *Carranza v. Carranza*, 765 S.W.2d 32, 33–34 (Ky. Ct. App. 1989) ("We agree with the interpretation of the Hardin Circuit Court, as well as the interpretations made by courts of other states on this issue, that the 10–year requirement of 10 U.S.C. § 1408(d)(2) is not a barrier to the division of military retirement pay, but only a factor in determining how the entitlement is to be collected."); *Scott v. Scott*, 519

So. 2d 351, 353 (La. Ct. App. 1988) ("subsection (d)(2) is a limitation only upon direct payments made to the former spouse pursuant to a court order served upon the Secretary."); *In re Marriage of Beltran*, 183 Cal. App. 3d 292, 298, 227 Cal. Rptr. 924, 927 (Ct. App. 1986) ("We hence conclude that the 10–year requirement acts only as a limitation upon direct payments from the government to the former spouse pursuant to a court order served upon the secretary. When direct payments are not required, then subsection (d)(2) has no application."); *see Deason v. Deason*, 611 N.W.2d 369, 371–72 (Minn. Ct. App. 2000) (approving and citing numerous cases concluding that § 1408(d)(2) *governs only the method of payment* and does not preclude the division of military pensions where the ten-year requirement has not been met.)

Based on these other states' cases, Iowa should adopt the same rule. The ten-year limitation only affects Karri's ability to receive direct payments from a pension account pursuant to a court order served on the Secretary of Defense. That ten-year requirement does not exempt Matt's military retirement from being marital property subject to division. *Id.*; *see Howell*, 434 N.W.2d at 632 (applying Iowa Code § 598.21). It is precisely because of *Howell* and § 1408(d)(2) why the district court properly modified its divorce decree to provide:

> The order of court requiring petitioner Matthew Tait Miller to enter into a qualified domestic relations order for a division of his National Guard pension is WITHDRAWN. Petitioner Matthew Tait Miller shall be liable for the payment of the amount set forth;

however, this amount shall be paid by Mr. Miller personally rather than through a QDRO.

(App. at 66 ¶2.)

Finally, Matt argues it would inequitable for Karri to receive a share of his military pension. Matt claims in his reply brief that his only sources of income at that time will be his military retirement, police pension, and VA disability. In December 2034, Matt will turn 58 years-old. At that time, it is highly likely Matt will still be working. Those three guaranteed income sources alone are more than most people have at that age. He will also eventually have access to the retirement he is building now and will continue to do so. None of those facts support denying Karri her marital share. This court should affirm.

5. In Karri's cross-appeal, the district court erred by failing to grant Karri a right to survivor benefits of both Matt's Municipal Fire and Police Retirement System Disability Pension and Matt's National Guard retirement pension.

Matt's arguments do not refute an award to Karri of at least a *Benson* share of survivor benefits in a Matt's pension plan. The district court erred by failing to award Karri survivor benefits. *See In re Marriage of Morris*, 810 N.W.2d 880 (Iowa 2012) (discussing the importance for the divorce court to set forth survivorship rights in a pension divided by the court). Despite Karri requesting at trial and her post-trial motion that she receive survivor benefits of Matt's pension, (App. at 183:19-186:21, 187:8-16, 274-292, 50-51 ¶3), the court refused

even though the court awarded her a share of each pension via *Benson*, (*see* App. at 39 ¶6, 66 ¶3; *but see* App. at 183:19-186:21, 198:9-200:18, 274-292.) For the same reasons it is equitable to award Karri a share of Matt's police and National Guard pensions as calculated by the *Benson* formula, the district court should have ordered that the qualified domestic relations order require Karri to be listed as a survivor in the same fraction-amount she is entitled prior to Matt's death. *See In re Marriage of Klein*, 522 N.W.2d 625, 628 (Iowa Ct. App. 1994).

Conclusion

Based on the foregoing, the appellate court should:

1. Affirm on all issues raised by Matt in his appeal;
2. Modify the Decree to provide that Matt designate Karri as a survivor in any benefits he receives on both his Municipal Fire and Police Retirement System Disability Pension and his National Guard retirement pension;
3. Increase the amount Karri receives from the TIAA-CREF to $46,042.45 of Matt's TIAA-CREF;
4. Since the October 2018 Decree, Matt has received periodic payments from his Municipal Fire and Police Retirement System Disability Pension. Karri is entitled to her *Benson* share as of October 2018, and Matt should be ordered to pay her share of the pension retroactive to the date of the divorce. *In re Marriage of Duggan*, 659 N.W.2d 556, 561 (Iowa 2003); and
5. order Matt to pay the court costs in this matter.

Request for Oral Argument

Counsel for Appellant respectfully requests to be heard in oral argument upon submission of this case.

Respectfully submitted,

/s/ Andrew B. Howie
Andrew B. Howie, AT0003716
SHINDLER, ANDERSON, GOPLERUD & WEESE, P.C.
5015 Grand Ridge Drive, Suite 100
West Des Moines, Iowa 50265
515-223-4567; Fax: 515-223-8887
howie@sagwlaw.com

Certificate of Service

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 19th day of December 2019, the Brief was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ Andrew B. Howie
Andrew B. Howie

Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(*g*)(1) or (2) because:

[X] this brief has been prepared in a proportionally spaced typeface using Garamond in 14 point font and contains 2,534 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1) or

[ ] this brief has been prepared in a monospaced typeface using Garamond in 14 point font and contains _____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(2) .

/s/ Andrew B. Howie
Signature

December 19 , 2019
Date