IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-1257

MARY KATHRYN C. WALLACE,

Petitioner-Appellant,

v.

"Kristin W. Wildensee and Mary Kathryn C. Wallace as Executors of the Estate of Douglas Ayer Wallace,
Respondent-Appellee

APPEAL FROM IOWA DISTRICT COURT OF JOHNSON COUNTY

Johnson County No. DRCV083264

HONORABLE PAUL MILLER

SIXTH JUDICIAL DISTRICT OF IOWA

AMENDED BRIEF OF AMICUS CURIAE

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STATEMENT OF INDENTITY OF AMICUS CURIAE

This amicus curiae has been appointed by order of this Court entered November 30, 2022 to submit a brief defending the District Court's final order. This brief has been written without the assistance of the lawyers for either party. They have not authored this brief in whole or in part. No one has contributed money directly to fund the preparation or submission of this brief.

ARGUMENT

I. IOWA CODE SECTIONS 597.3 and 597.4 DO NOT SUPPORT THE REQUEST IN THE DISTRICT COURT FOR A QDRO.

The parties to this law suit, Mary Katheryn C. Wallace (hereinafter "Mary") and Douglas Ayer Wallace (hereinafter "Douglas"), have argued that Iowa Code Sections 597.3 and 597.4 (2022) support their right to enter into the Interspousal Agreement that underlies this case and their right to bring their case to court to request a QDRO. (See Br. Of Appellant filed by Stannard p. 15-16.) As will be shown below, neither statute supports their case.

Iowa Code Section 597, passed in 1873, constitutes Iowa's Married Women's Property Rights Act and Married Women's Earnings Acts. R. Richard Geddes and Sharon Tennyson, "Passage of the Married Women's Property Acts and Earnings

Acts in the United States: 1850 to 1920" in *Research in Economic History* p. 145-189, 153 (2013).

A purpose of these laws was to protect married women and their property from their husband's creditors. The laws allowed married women to retain control of real property they brought into the marriage and any real property they obtained during the marriage. By retaining her property, a wife and her children would not risk financial ruin from a husband's bad debts. See Bernie D. Jones, "Revisiting the Married Women 's Property Acts: Recapturing Protection in the Face of Equality", 22 Journal of Gender, Social Policy, and the Law 91, 99 (2013). As this Court found in *Acuff v. Schmit*, 78 N.W. 2d 480, 485 (Iowa 1956), these and similar statutes "clearly indicate the intention of the legislature to remove the common law restrictions of coverture."

A. The District Court Correctly Ruled That The Contract Presented Was Not Enforceable.

The parties based their request for a QDRO on a contract between them. This contract, they claim, was made under Iowa Code Section 597.4 (2022) and was therefore enforceable. (See Br. Of Appellant filed by Stannard p.16.) Their contract, however, was not in fact entered into under that statute.

Iowa Code Section 597.4 (2022) should be understood in light of the history presented above. The statute states, "A conveyance, transfer, or lien, executed by

either husband or wife to or in favor of the other, shall be valid to the same extent as between other persons." Iowa Code Section 597.4 (2022). The parties claim that this statute protects the Interspousal Agreement between them change ownership of the profit-sharing plan from Douglas to Mary.

The statute, however, relates to real property, not personal property. The Oxford English Dictionary defines "conveyance" in the legal sense as meaning, "The transference of property (esp. real property) from one person to another by any lawful act (in modern use only by deed or writing between living persons). *Oxford English Dictionary*, 2nd ed, p.331, Clarendon Press, Oxford, England (1994). That dictionary cites examples of the use of the word "conveyance" as a legal term from 1523 to 1893 including citing to Blackstone to show that "conveyance" is primarily for real estate.

Black's Law Dictionary has a similar definition. It states "In its most common usage, [conveyance is] transfer of land from one person, or class of persons, to another by deed. Term may also include assignment lease, mortgage or encumbrance of law. Generally, every instrument in writing by which an estate or interest in the realty is created." *Black's Law Dictionary*, 6th ed, p. 333, West Publishing Company, St. Paul, MN (1990). These definitions would have been familiar to the Iowa Legislature when it passed Iowa Code Section 597.4.

Further showing that the legislature meant the word "conveyance" in Iowa Code Section 597.4 to relate to real estate are the other words used with "conveyance". Those words are "transfer" and "lien." In context, the statute allows spouses to transfer real property from one to the other. This transfer can occur by contract, by will, or by other means. *Baker v. Syfritt*, 125 N.W. 2d 998, 1002 (Iowa 1910). Moreover, this Court has found, concerning Iowa Code Section 597.4, "From this statute we infer a legislative intent that commercial dealings between spouses shall be given no different treatment than those between other parties. The fact that Arlene is the holder of the $14,000 promissory note should not be a relevant consideration." *Matter of Tollefsrud's Estate*, 275 N.W. 2d 412, 418 (Iowa 1979). This statement was in the context of a promissory note and second lien on real estate.

If the Interspousal Agreement is not recognized under Iowa Code Section 597.4, the trial Judge was correct not to issue the QDRO based on it.

B. Iowa Code Section 597.3 (2022) Does Not Confer Jurisdiction On The Court To Enter The QDRO Requested.

Despite the fact that Iowa Code Section 597.4 (2022) applies to real estate and not to retirement accounts, the parties base the jurisdiction of the Court on Iowa Code Section 597.3 (2022) which states, "Should the husband or wife obtain possession or control of property belonging to the other before or after marriage,

the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and extent as if they were unmarried." The parties argue that this statutes allows spouses to sue each other to enforce contracts they entered. (See Br. Of Appellant filed by Stannard p. 16.)

There is very little case law related to this code section even though it was enacted in 1873. In one case, this Court found that a contract giving a wife ownership in land in exchange for contributions from her separate real property was enforceable. *See McElhaney v. McElhaney*, 101 N.W. 90 (Iowa 1904).

In another early case, however, this Court drastically limited the Married Women's Property Acts and the right of a wife to sue her husband under them. It found such suits are " limited to actions for property, or rights growing out of the same." Heacock v. Heacock, 79 N.W. 353, 355 (Iowa, 1899), citing *Peters v. Peters*, 42 Iowa 182, 184 (Iowa 1875) (a case denying the right of a wife to bring a tort action against her husband for repeated spousal abuse). That Court refused to recognize any other basis for a suit between spouses. Both the *Heacock* Court and the *Peters* Court held that the statute currently codified as Iowa Code Section 597.3 (2023) only allowed wives to sue third parties. *Heacock, v. Heacock* at 354-5; *Peters v. Peters* at 184.

These rulings, though not overturned, have questionable application in 2023. Early in the *Heacock* opinion, the Court sets forth its understanding of the then

new Married Women's Property Acts. "While the legislature of this state has made many and very radical changes in the common law relating to husband and wife, yet it is a serious mistake to assume that the legal unity of oneness of husband and wife has been entirely obliterated by our statutes. Indeed, there is no state that has gone to such an extent." *Heacock v. Heacock* at 354. Today, the law of Iowa cannot recognize coverture or the so-called oneness of spouses as binding Iowa law. *See Iowa Constitution* Article I Section 1, and Article I Section 6. *See also* ***Acuff v. Schmit***, 78 N.W. 2d 480, 485 (Iowa 1956)

The case law appears to allow suits under Iowa Code Section 597.3 when the contract dealt with ownership of real property. It does not seem to cover other kinds of property. Without a statute granting the District Court jurisdiction to hear a case, it cannot rule on it. As this Court found in *Molitor v. City of Cedar Rapids*, 360 N.W. 2d 568, 569 (Iowa 1985) (citations omitted), "The parties, for obvious reasons, contended that the court had jurisdiction of the case, but parties cannot confer jurisdiction by consent… Jurisdiction of a case is given to a court solely by law."

The only statutes that clearly allow the District Court to divide the property of spouses are those that permit dissolution of marriage or petitions for separate maintenance. The District Court correctly stated that only those statutes as contained in Iowa Code Section 598 (2022) would permit the entry of a QDRO.

(App. P. 24). Since the parties were not seeking a divorce or separate maintenance, the Court was not permitted by law to enter a QDRO.

C. The District Court Was Correct To Find There Was No Jurisdiction Because Neither Party Was Refusing to Abide By The Agreement.

The District Court also found that it did not have jurisdiction to enter the QDRO in part because there was no case in controversy. Although the Appellants correctly argue that the United States Supreme Court rulings regarding the issue of case in controversy are not binding on Iowa Courts, (See Br. Of Appellant filed by Stannard p. 20-27), there are still limits on cases that the Iowa Courts can hear. For instance, this Court found that a case could not be brought until there was actually a controversy over which a ruling was sought. *See Nichols v. Fierce*, 212 N.W. 151, 152 (Iowa, 1927).

With so little case law defining Iowa Code Section 597.3, the District Court was correct in finding that there was no appropriate lawsuit in this case. Even if the contract between the spouses were enforceable, neither spouse was trying to evade or refuse enforcement of the contract. Thus the Court correctly ruled that the parties did not require the Court to "enforce the agreement." (App. P. 24).

The Interspousal Agreement at issue appears to do two things. In the "whereas" clauses, it states that Douglas will give Mary his entire profit-sharing plan. (App. p. 48) In the "therefore" clauses stating what will happen, the Interspousal

Agreement says Mary will first pay Douglas $10 and then Douglas will give Mary his entire Profit Sharing Plan. (App. p. 49 Section 2). The Agreement then has the parties agreeing to have the Court take certain acts including issue a QDRO. (App. p. 49 Section 4). Parties, of course, cannot make an enforceable agreement that a Court will issue a specific order. That is the sole province of the Court.

The parties could completely carry out those parts of the Agreement that were enforceable, namely have Mary pay the $10 and then, as Douglas's power of attorney, have Mary transfer the plan to her name. There is no accusation in the Petition or the Affidavits that either party refused to follow this part of the Agreement. What the parties needed the Court to do was to carry out the provisions of the Agreement which purported to tell the Court what to do. They needed the Court to enter a QDRO solely to save them money on their taxes. (App. p. 22 paragraph 15).[1] There is nothing in Iowa Code Section 597.3 that supports filing that type of lawsuit. Therefore, the parties cannot rely on Iowa Code Section 597.3 for this action. If there is no statute authorizing a law suit, the

[1] It appears from the Affidavit of Jamie Long, (App. p. 19-23), that the parties were seeking to remove the profit-sharing plan from Douglas's name so he would have fewer assets if he needed to be in a nursing home and might qualify for Medicaid sooner. *See Clark v. Iowa Dept of Human Services*, 555 N.W. 2d 472,473 (Iowa 1996).

Court does not have jurisdiction to consider it. *See Molitor v. City of Cedar Rapids*, 360 N.W. 2d 568,569 (Iowa 1985).

II. THE DISTRICT COURT CORRECTLY RULED THAT THE INTERSPOUSAL AGREEMENT LACKED CONSIDERATION AND WAS NOT ENFORCEABLE.

The law of Iowa is clear that for a contract to be enforceable there must be consideration. *See Margeson v. Artis*, 776 N.W. 2d 652, 655 (Iowa, 2009). The District Court found that the contract in this case lacked consideration. (App. P. 24). Consideration can be found in two ways:

> First, consideration exists if the promisee, in exchange for a promise by the promisor, does or promises to do something the promisee has no legal obligation to do. *See Meincke v. Nw Bank & Trust Co.*, 756 N.W.2d 223, 227-8 (Iowa 2008) (noting the rule that " [c]onsideration can be either a legal benefit to the promisor, or a legal detriment to promisee"). Second, consideration exists if the promisee refrains, or promises to refrain, from doing something the promisee has a legal right to do. 3 Samuel Williston & Richard A Lord, *A Treatise on the Law of Contracts* Section 7:4, at 61 (4th ed. 2008).

Margeson v. Artis at 656..

In this case, the contract purports to require that Mary pay Douglas $10 before Mary gets Douglas's entire profit sharing plan. (App. p. 49). In the original Interspousal Agreement, the transfer of the profit sharing plan was deemed a gift and there was no requirement for Mary to pay Douglas any funds. (See Interspousal Agreement submitted to the Court in *Wallace v. Wallace*,

DRCV083001 as exhibit A to the Joint Petition in Johnson County.) It was only after that case was denied that the Interspousal Agreement was modified to include a supposed $10 payment.

Yet even with the inclusion of a payment, the issue of adequate consideration remains. *See Atlas Coal Co. v. Jones*, 61 N.W. 2d 663, 669 (Iowa 1953). The affidavit of Jamie Long, submitted to the Court by the parties, states that the taxes that could be incurred if the profit-sharing plan were paid out to Douglas and then transferred directly Mary without a QDRO could total $50,000 to $150,000. (App. p. 22 paragraph 15). This implies that the value of the profit-sharing plan was well over $150,000. Given that, the $10 cannot be deemed adequate consideration.

There are additional concerns regarding the validity of the contract submitted to the District Court that support the notion that there was inadequate consideration. For instance, the Interspousal Agreement in its "wherefore" sections states, "[E]ach party has been advised to and has had the opportunity to retain legal counsel of his or her selection and each has been advised to and has had the opportunity to be fully, separately and independently apprised and advised of his or her respective legal rights, privileges and obligations as a result of this Agreement." (App. p. 48).

The problem with this paragraph is that Mary signed the contract for herself and also signed the contract as the power of attorney for Douglas. (App. p. 50, and 42-47). It is, therefore, not possible for the parties to have "had the opportunity to be fully, separately and independently apprised and advised" of their legal rights. (App. p. 48). They could not have been separately advised because each party was, in reality, the same person.

A similar provision to the one above appears in the agreement section. It states, "Each party has had the opportunity to consult with and obtain independent legal advice by counsel of his or her own selection. Hillary Strayer, Attorney, represents Douglas through Mary Kathryn C. Wallace, who is serving as Douglas' attorney-in-fact acting under a general power of attorney." (App. p. 49 paragraph 6). It goes on to say that Mary in her own capacity is *pro-se*. If both parties are, in fact, Mary Kathryn C. Wallace just in two different capacities, they have not really had the opportunity stated.

These facts as well as the small consideration listed support the idea that there was not adequate consideration to support a Court order entering a QDRO based on the Agreement.

III. THE PARTIES EQUAL PROTECTION RIGHTS WILL NOT BE IMPINGED BY A REFUSAL TO ISSUE A QDRO.

The parties argue that limiting QDROs to being available only through divorce proceedings or through a Petition for Separate Maintenance violates their equal protection rights under the United States Constitution Amend XIV and the Iowa Constitution Art. I section 6. (Br of Appellant filed by Stannard, p. 29-33). Under the Iowa Constitution, the Court must determine if the groups being compared are similarly situated:

> This requirement of equal protection—that the law must treat all similarly situated people the same—has generated a narrow threshold test. Under this threshold test, if plaintiffs cannot show as a preliminary matter that they are similarly situated, courts do not further consider whether their different treatment under a statute is permitted under the equal protection clause.

Varnum v. Brien, 763 N.W. 2d 862, 882 (Iowa 2009).

Through much of the Appellants' equal protection argument, the comparison is between married couples and unmarried couples. (Br of Appellant filed by Stannard, p. 30-31) That, however, is not the correct comparison. Unmarried couples would have no access to a QDRO. Thus, the Wallaces were being treated equally when they were denied a QDRO.

Further in their brief, the Appellants make the comparison between people contracting to divide their property pursuant to a dissolution of marriage and those contracting to divide their property under Iowa Code Section 597. (Br of Appellant filed by Stannard, p. 32-33). Those two groups are not similarly situated. People seeking a divorce must go to Court in order to obtain one. They cannot just make a

contract to divorce. *See Boddie v. Connecticut*, 401 US371, 376-7 (1971). As part of an Iowa Court's ruling in a dissolution case, a determination as to the division of property is made. Iowa Code Section 598.21 (2022). If one or both parties have a pension plan, division of the pension established through a QDRO is part of the work of the court. *In the Matter of Brown*, 776 N.W. 2d 644, 647-8 (Iowa 2009). An Interspousal Contract, even if made under Iowa Code Section 597, does not by definition require a court's action. Thus, the two categories of people are not similarly situated.

IV. THE COURT'S DENIAL OF THE QDRO DOES NOT INTERFERE WITH THE STATE'S POLICY IN SUPPORT OF MARRIAGE.

Undoubtedly, the state of Iowa has an interest in the support of marriage. As this Court found in *Varnum v. Brien*:

> [W]e have said our marriage laws "are rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society." *Laws v. Griep*, 332 N.W.2d 339, 341 (Iowa 1983); *see also Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, 58 (1993) (stating civil marriage is " 'a partnership to which both partners bring their financial resources as well as their individual energies and efforts' " (quoting *Gussin v. Gussin*, 73 Haw. 470, 836 P.2d 484, 491 (1992)). These laws also serve to recognize the status of the parties' committed relationship. *See Madison v. Colby*, 348 N.W.2d 202, 206 (Iowa 1984) (stating " 'the marriage *state* is not one entered into for the purpose of labor and support alone,' " but also includes " 'the comfort and happiness of the parties to the marriage contract' " (quoting *Price v. Price*, 91 Iowa 693, 697–98, 60 N.W. 202, 203 (Iowa 1894))

> (emphasis added)); *Hamilton v. McNeill*, 150 Iowa 470, 478, 129 N.W. 480, 482 (1911) ("The marriage to be dissolved is not a mere contract, but is a status."); *Turner v. Hitchcock*, 20 Iowa 310, 325 (1866) (Lowe, C.J., concurring) (observing that marriage changes the parties' "legal and social status").

Varnum v. Brien, 763 N.W. 2d 862, 883 (Iowa 2009). The District Court's ruling in no way undermined the state's interest in and support of the institution of marriage or Mary and Douglas' marriage.

The parties imply that the only way to effectuate their Agreement under ERISA, 1056(d)(3)(a) and 29 U.S.C. Section 1056(d)(3)(b) was to have a court issue a QDRO. (Br of Appellant filed by Stannard, p. 18) They cite *Clark v. Dept of Human Services*, 555 N.W. 2d 472 (Iowa 1996) for this proposition. (Br of Appellant filed by Stannard, p. 18-19). The Clark case, however, weakens their argument because it illustrates the correct way to obtain a QDRO, become eligible for Medicaid, and transfer the profit-sharing plan. In *Clark*, a wife was trying to reduce her husband's income to qualify him for Medicaid. First, she filed a Petition for Separate Maintenance and was awarded spousal support. The Court found that in considering the income of the husband, money paid to him was what mattered not the money left to him after he paid spousal support. *Clark* at 474. She then filed another Petition for Separate Maintenance. The District Court ordered that the husband's pension be transferred to the possession of the wife and

that a QDRO be entered. Once the QDRO was entered the husband was indeed eligible for Medicaid. *Clark* at 475.

Thus, Mary could have filed a Petition for Separate Maintenance asking the Court to award her the pension and issue a QDRO. The Court could have done that. Iowa Code Section 598.28. (2022) An order in a Separate Maintenance case does not end the marriage. Mary could have continued to have the close loving relationship with her husband that she desired (Br of Appellant filed by Stannard, p. 28-29) while at the same time obtaining an order for separate maintenance that would have included a requirement for the issuance of a QDRO.

Essentially, the parties are rigidly trying to control every aspect of their plan and have Iowa law bend to what they seek. They want to make Douglas eligible for Medicaid by giving Mary his biggest asset. Then they want to avoid having to pay taxes on the withdrawal of the funds from the profit-sharing plan by seeking a QDRO. They, however, refuse to seek the QDRO using the ways provided by Iowa law that have been upheld by this Court, namely filing for divorce or for separate maintenance. They do this by trying to fit their "Interspousal Agreement" into a set of laws that do not apply to these types of contracts. (See arguments I and II above). Iowa law need not bend to fit this narrow path the parties seek.

V. **PUBLIC POLICY SUPPORTS CAREFUL CONSIDERATION OF ANY INTERSPOUSAL AGREEMENT BEFORE ENFORCEMENT OF IT**.

There are several issues that raise concerns when deciding the enforceability of Interspousal Agreements generally. In this case, Mary is Douglas's power of attorney and through that authority is making a contract with herself to transfer her husband's biggest asset to herself. (See App. p. 48-50). Here, it is clear Mary is acting pursuant to the advice of a financial planner to ensure that both Mary and Douglas receive the health care and other care they need. (See App. p. 19-23). However, there could likely be other cases where the transfer of assets is not based on financial planning but rather a method of elder financial abuse. See Iowa Code Section 235F.1(5)(a)(4) (2022). Courts should be skeptical of these kinds of agreements to ensure that they are not for the purpose of financial exploitation.

Another concern with the enforcement of Interspousal Agreements is the possibility of coercion. If there is domestic abuse in the marriage, the abusing spouse could easily coerce the victim to sign an agreement giving the abuser all of the victim's assets. There are several Iowa statutes aimed to protect victims of domestic abuse ranging from providing no contact orders, Iowa Code Section 236 2022), to considering a history of domestic abuse in determining custody, Iowa Code Section 598.41(1)(b) (2022), ordering or waiving mediation, Iowa Code Section 598.7(1) (2022), and conciliation, Iowa Code Section 598.16(2) (2022). A party should be able to defend against enforcement of an interspousal agreement if it is the result of domestic abuse.

Additionally, an Interspousal Agreement does not seem to require any of the protections that are required for prenuptial agreements. The Iowa Code lists specific circumstances under which a prenuptial agreement will not be enforced:

> 1. A premarital agreement is not enforceable if the person against whom enforcement is sought proves any of the following:
> a. The person did not execute the agreement voluntarily.
> b. The agreement was unconscionable when it was executed.
> c. Before the execution of the agreement the person was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse; and the person did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other spouse.

Iowa Code Section 596.8 (2022). These conditions are intended to protect the rights of the parties who enter into the agreement. *In Re Marriage of Gonzalez*, 561 N.W. 2d 94, 97 (Iowa App. 1997). None of these safeguards are required in an Interspousal Agreement. The Interspousal Agreement in this case purports to meet these protections. It contains paragraphs in both the "whereas" clauses and the action clause that state that both parties have been given opportunities to consult with lawyers and other conditions pointing to the fairness of the Agreement. (App. p. 48-50). However, as described above those protections are doubtful given the fact that Mary signed on her own and as power of attorney for Douglas.

Courts must consider Interspousal Agreements when brought before them. Of course, dissolution stipulations are a form of Interspousal Agreement that are regularly brought to courts to support Dissolution Decrees. Judges regularly

review such agreements to see if appropriate for the entry of a decree especially if both parties are pro-se. When other types of Interspousal Agreements are brought to District Courts they should be scrutinized to allow each party to make arguments as to why they should not be enforced. If the Agreement is found to be inappropriate, courts should be free to reject them or to accept them as modified.

CONCLUSION

For the reasons stated above, amicus requests that the Court uphold the ruling of the District Court in this case.

Respectfully submitted,

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[2] Counsel would like to thank law student Sarah Moody for her assistance on this brief.

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/s/ Sally Frank
Sally Frank

February 23, 2023
Date