

# 2016 Annual Meeting Conference

## Family Law Track Grand Ballroom B

Modification:

What is a Material Change in Circumstance?

4:00 p.m. - 5:00 p.m.

### **Presented by**

Hon. Chad Kepros  
District Court Judge  
Sixth Judicial District of Iowa

Hon. Robert Hutchison  
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Fifth Judicial District of Iowa

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# MONDAY, JUNE 13

# **THE BASICS OF MODIFICATION ACTIONS**

**Judge Robert A. Hutchison**  
District Court Judge  
Fifth Judicial District of Iowa

**Judge Chad A. Kepros**  
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## **I. CHILD CUSTODY AND VISITATION**

### **A. Modifications of Legal Custody**

A heavy burden is placed on the party seeking modification of custody based on the principle that once custody is fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Bergman, 466 N.W.2d 274 (Iowa App. 1990).

“The legislature and judiciary of this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances.” In re the Marriage of Smith, 756 N.W.2d 48 (Table), 2008 WL 2746316 \*5 (Iowa Ct. App.)(citing In re Marriage of Winnike, 497 N.W.2d 170, 173 (Iowa Ct.App.1992)). If either parent requests joint custody the court must order joint custody unless it cites clear and convincing evidence, pursuant to the factors in Iowa Code section 598.41(3), that joint custody is unreasonable and not in the best interest of the children to the extent that the legal custodial relationship between the children and a parent should be severed. Iowa Code § 598.41(2)(b).

In Smith, the mother and father were granted joint physical care. The father filed for a modification to grant him physical care. That modification was granted. The child was then sexually assaulted three times while in the mother’s care. The father filed another modification requesting limited visitation for the mother and sole legal custody for himself.

The Court of Appeals affirmed the District Court’s award of sole legal custody to the father. The Court of Appeals reasoned that the repeated abuse against the child while in the mother’s care, the mother’s refusal to believe the child that she was sexually abused, and the mother’s behavior related to the child’s therapist was sufficient to award the father sole legal custody. The Court did not believe the father’s refusal to allow visitation based upon the recommendation of the child’s therapist and law enforcement, while improper legal advice, was

sufficient to prove the father could not support the mother's relationship with the child to negate the determination for sole legal custody.

The Court of Appeals awarded sole legal custody upon finding: (1) the parents do not get along and are barely civil to one another, (2) The parents are unable to communicate with one another and unwilling to support the other parent's relationship with the child, (3) one parent has made unfounded child abuse reports against the other, and (4) the parties could not agree on medical care for the child. In re the Marriage of Liebich, 547 N.W.2d 844, 849 (Iowa Ct. App. 1996).

## **B. Modifications of Physical Care**

When attempting to modify the physical care determination in a dissolution of marriage decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

It is well established in Iowa law that once custody of the children is fixed, it should be disturbed only for the most cogent of reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980). The burden for a party seeking to modify is heavy because children deserve the security of knowing where they will grow up. In re Marriage of Rosenfeld, 524 N.W.2d 212, 214 (Iowa Ct. App. 1994). A "substantial change in circumstances" involves changed conditions which are material as opposed to trivial, permanent or continuous as opposed to temporary, "and must be such as were not within the knowledge or contemplation of the court when the decree was entered." In re Marriage of Pals, 714 N.W.2d 644, 646-47 (Iowa 2006) (citations omitted).

The question is not which home is better, but whether the moving party can offer superior

care. In re Marriage of Whalen, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). If both parties can equally minister to the child, custody should not change. In re Marriage of Whalen, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997)(citing In re Marriage of Smith, 491 N.W.2d 538, 541 (Iowa App.1992)).

Modifications of physical care based on the physical care parent moving are very fact specific. Compare the Court's decisions in In re the Marriage of Hoffman, 867 N.W.2d 26 (Iowa 2015) and In re the Marriage of Koenig, 2016 WL 743243 (Iowa Ct. App.) In Hoffman, the Court denied the father's request for a modification. The Iowa Supreme Court determined that the mother's decision to move the children 70 miles away from their previous home, change the children's schools, and move in with her new husband, was not sufficient for a substantial and material change of circumstances. The Court reasoned that the mother's decision to move in with her new husband was a legitimate reason not related to limiting the father's access to the children. Both parents were good parents and they communicated well regarding their children. Furthermore, the oldest daughter's strong opinion that she wanted to stay in her father's care was not sufficient by itself or in combination with the other facts for a substantial and material change of circumstances.

In Koenig, the Iowa Court of Appeals affirmed the trial court that found a change from the mother's physical care to the father's physical care was appropriate. The mother moved the children 30 miles away from their father and placed the children in a new school district without discussing the move with him. The parties did not get along or communicate well. The father actively attempted to undercut the mother's relationship with all three children. The oldest child moved in with her father after having a confrontation with her new stepfather. The younger children had a strained relationship with the mother and stepfather and wished to live with their

father as well. All the children had a good relationship with their stepmother. The Court reasoned that Kathleen's decision to move in with her husband was selfish and she was not looking out for what her daughters want. Her relationship was strained with all three children making it clear that the father was the lesser of two evils and could provide superior care for the children.

### **C. Modifications of Visitation**

Iowa courts have consistently held that modification of visitation rights shall occur only upon a showing of a significant change in circumstances since the prior order. In re Marriage of Rykhoek, 525 N.W.2d 1 (Iowa App. 1994); Nicolou v. Clements, 516 N.W.2d 905 (Iowa App. 1994). The burden of proof necessary to modify visitation is lower than what is required for a modification of legal custody or physical care. The focus should always be on the best interests of the children. Id.; Iowa Code § 598.41(1)(a). It is generally in the children's best interests to have the opportunity for maximum continuous physical and emotional contact with both parents. Iowa Code § 598.1(1); Iowa Code § 598.41(1)(a).

A modification of the care schedule without changing the joint physical care label requires the lower burden of proof similar to a modification of visitation. In re the Marriage of Brown, 778 N.W.2d 47, 52 (Iowa Ct. App. 2009).

### **D. Typical Changes Alleged for Modification**

#### **1. Change of Residence**

A move of 150 miles or more may be considered a change of circumstances sufficient for a modification. Iowa Code § 598.21D. In re the Marriage of Westcott, 471 N.W.2d 73 (Iowa Ct. App. 1991), In re the Marriage of Hoffman, 867 N.W.2d 26 (Iowa 2015).

When the party with physical care plans to relocate, the burden is on the non-physical

care parent to demonstrate how the move will detrimentally affect the best interests of the child. In re Marriage of Montgomery, 521 N.W.2d 471 (Iowa Ct. App. 1994); In re the Marriage of Smith, 491 N.W.2d 538 (Iowa Ct. App. 1992); In re the Marriage of Witzenburg, 489 N.W.2d 34 (Iowa Ct. App. 1992); In re the Marriage of Hoffman, 867 N.W.2d 26 (Iowa 2015).

If a parent moves frequently and does not provide stability for a child, the Court can consider that as a substantial and material change of circumstances. Gengler v. Wetrosky, 868 N.W.2d 201 (Table), 2015 WL 3613336 (Iowa Ct. App.)(mother's repeated moves created a transient lifestyle that was harming the child); In re the Marriage of Rierison, 537 N.W.2d 806 (Iowa Ct. App. 1995)(physical care awarded to father because mother had drinking problems, moved frequently, and changed live-in boyfriends several times creating instability for the children); In re the Marriage of Scott, 457 N.W.2d 29 (Iowa Ct. App. 1990)(mother's move to Virginia and father acting as physical care parent for two years was sufficient to award physical care to father on modification); In re the Marriage of Kelley, 839 N.W.2d 676 (Table), 2013 WL 5229763 (Iowa Ct. App.)(holding in part the mother's multiple moves and multiple ongoing relationships [are] not permanent or stable in nature and her many changes of residence which has resulted in [the child at issue] changing schools at least six times constitute a substantial change in the circumstances).

## **2. Abuse of Alcohol, Drugs, or Others**

In re the Marriage of Hammer, 2000 WL 1825450 (Iowa Ct. App.)(District Court correctly modified and awarded the father physical care when evidence showed the mother was using drugs, had a meth lab near her home, and was living with the operator of the meth lab); Buschom v. French, 752 N.W.2d 33 (Table), 2008 WL 680404 (Iowa Ct. App.)(mother's alcohol relapse and drunk driving with the child in her vehicle were sufficient to prove a



substantial and material change of circumstances); In re Marriage of LeGrand, 495 N.W.2d 118 (Iowa Ct.App.1992)(court modified physical care based on evidence of chronic alcohol abuse that endangered the children); In re the Marriage of Blythe, 2002 WL 31114761 (Iowa Ct. App.)(Michael's undisputed and repeated criminal convictions for drug possession and substance abuse are a sufficient change of circumstances justifying modification); Allen v. Polito, 670 N.W.2d 431 (Table), 2003 WL 22016959 (Iowa Ct. App.)(mother's verbal abuse and erratic behavior towards father of children and against the children was sufficient for a modification to father's physical care).

In re the Marriage of Cohrs, 682 N.W.2d 81 (Table), 2004 WL 433800, (Iowa Ct. App.) (domestic abuse shown by the evidence consisted of isolated incidents insufficient to demonstrate a substantial change in circumstances); Frank v. Cother, 711 N.W.2d 732 (Table), 2006 WL 133233 (Iowa Ct. App.)(father's assaultive behavior to step-mother was sufficient for a modification of physical care to the mother).

### **3. Law Breaking**

In re the Marriage of Hammer, 2000 WL 1825450 (Iowa Ct. App.)(District Court correctly modified and awarded the father physical care when evidence showed the mother was using drugs, had a meth lab near her home, and was living with the operator of the meth lab); In re the Marriage of Stockdale, 781 N.W.2d 101 (Table), 2010 WL 624912 (Iowa Ct. App.)(holding joint physical care no longer appropriate when father was convicted for soliciting sexual activity from two under-aged females, being placed on the sex offender registry, and lying to the mother of the children about his residence); In re the Marriage of Blythe, 2002 WL 31114761 (Iowa Ct. App.)(Michael's undisputed and repeated criminal convictions for drug possession and substance abuse are a sufficient change of circumstances justifying modification).

#### **4. New Significant Others**

In re the Marriage of Johnson, 863 N.W.2d 36 (Table), 2015 WL 1054980 (Iowa Ct. App.)(holding modification appropriate because relationship between parents deteriorated when father began a new relationship and no one anticipated the level of animosity and antagonism between the parents).

In re the Marriage of Malloy, 687 N.W.2d 110, 113-14 (Iowa Ct. App. 2004)(finding a substantial change in circumstances warranting modification of child custody when the mother moved in with a man with a history of drug and alcohol abuse).

In re the Marriage of Dostal, 715 N.W.2d 771 (Table), 2006 WL 929379 (Iowa Ct. App.)(Court denied mother's modification based on poor communication between mother and father's new girlfriend).

#### **5. Fighting and Bad Communication**

The Iowa Supreme Court recently decided the Harris case. In re the Marriage of Harris, 2016 WL 1165767 (Iowa 2016). In Harris, the parents agreed to joint physical care despite their communication problems. Following the divorce, their communication problems continued. They were unable to agree on important matters related to the health and behavior of their children. They did not communicate in a civil manner with each other. The Iowa Supreme Court determined that “Iowa courts have modified custody when ‘shared custody provisions...incorporated into the decree have not evolved as envisioned by either of the parties or the court’ or when the parents simply ‘cannot cooperate or communicate in dealing with the children.’” The Supreme Court determined physical care with the mother was appropriate and awarded the father visitation.

In re the Marriage of Grantham, 698 N.W.2d 140, 146 (Iowa 2005)(holding father's lack

of communication and disrespect of the mother was sufficient for a modification of physical care).

## **6. Changing Needs and Preferences of Children**

In re the Marriage of Vande Stouwe, 2002 WL 1332790 (Iowa Ct. App.)(holding child's struggles with education was not sufficient to modify physical care, but the court ordered the parents to enroll the child in public school to address the child's special educational needs).

A child's preference is a factor for the Court to consider in a modification action. In re the Marriage of Thielges, 623 N.W.2d 232, 239 (Iowa Ct. App. 2000). It is given less weight in a modification action than an original child custody determination. Id. at 239. In re the Marriage of Dickey, 832 N.W.2d 384 (Table), 2013 WL 1453067 (Iowa Ct. App.)(mother's modification denied because she failed to prove a substantial material change of circumstances related to the children's ADHD, communication issues between the parents, and other claims).

In determining the weight to be given to a child's preference the court considers (1) the age and educational level the child(ren), (2) the strength of the preference(s), (3) a child's intellectual and emotional makeup, (4) a child's relationship with family members, and (5) the reason for the child's decision. In re Marriage of Ellerbroek, 377 N.W.2d 257, 258-60 (Iowa Ct.App.1985). A child's preference is not sufficient by itself to grant a modification. In re the Marriage of Stoos, 725 N.W.2d 659 (Table), 2006 WL 3313954 (Iowa Ct. App).

## **II. SPOUSAL SUPPORT**

### **A. Standards for Modifications of Spousal Support**

The court may modify orders for spousal support only when there has been a substantial change in circumstances. Iowa Code ' 598.21C(1); In re Marriage of Skiles, 419 N.W.2d 586, 588 (Iowa Ct. App.1987); In re Marriage of Kolpek, 810 N.W.2d 896, 4 (Table) (Iowa Ct. App.

2012). The changed circumstances must not have been in the contemplation of the court when the original decree was entered, and the changes must be more or less permanent, not temporary. In re Marriage of Wessels, 542 N.W.2d 486, 490 (Iowa 1995); Skiles, 419 N.W.2d at 588. Courts may retroactively increase spousal support, but courts cannot retroactively decrease or terminate spousal support awards. Wessels, 542 N.W.2d at 490.

The court considers the factors in Iowa Code §598.21C(1) in determining if there has been a substantial change of circumstances. The factors are:

- a. Changes in the employment, earning capacity, income, or resources of a party.
- b. Receipt by a party of an inheritance, pension, or other gift.
- c. Changes in the medical expenses of a party.
- d. Changes in the number or needs of dependents of a party.
- e. Changes in the physical, mental, or emotional health of a party.
- f. Changes in the residence of a party.
- g. Remarriage of a party.
- h. Possible support of a party by another person.
- i. Changes in the physical, emotional, or educational needs of a child whose support is governed by the order.
- j. Contempt by a party of existing orders of court.
- k. Entry of a dispositional or permanency order in juvenile court pursuant to chapter 232 placing custody or physical care of a child with a party who is obligated to pay support for a child. Any filing fees or court costs for a modification filed or ordered pursuant to this paragraph are waived.
- l. Other factors the court determines to be relevant in an individual case.

The general rule in Iowa is that while the subsequent remarriage of a spouse does not result in automatic termination of an alimony obligation, it shifts the burden to the recipient to show extraordinary circumstances exist that require the continuation of the alimony payments. In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985). When a provision for alimony is silent on the issue of payment of alimony to a former spouse after his or her

remarriage, the burden is on the former spouse contending the alimony should continue to show extraordinary circumstances warrant continuing the alimony. In re Marriage of Cooper, 451 N.W.2d 507, 509 (Iowa Ct.App.1989).

## **B. Typical Changes Alleged for Modification**

### **1. Changes in Income**

In re the Marriage of Rietz, 585 N.W.2d 226 (Iowa 1998)(husband's inability to work in previous field of employment that resulted in reduction of income was not intentional and was a substantial and material change of circumstances); Ellis v. Ellis, 262 N.W.2d 265 (Iowa 1978)(modification not allowed where payor spouse voluntarily retired when he still had substantial earning capacity); In re the Marriage of Bales, 439 N.W.2d 228 (Iowa 1989)(modification not allowed where obligor quit job to take lesser paying job); In re the Marriage of Powell, 758 N.W.2d 840 (Table), 2008 WL 4308223 (Iowa Ct. App.)(payor's decrease in income was sufficient to warrant a modification of the spousal support award).

### **2. Changes in Payor's Ability to Pay or Payee's Needs**

In re the Marriage of Michael, 839 N.W.2d 630 (Iowa 2013)(holding Kenneth's increasing medical expenses, other changes in Michael's finances, and the increase in Melissa's income and financial situation were sufficient to decrease Kenneth's spousal support obligation).

In re the Marriage of Sisson, 843 N.W.2d 866 (Iowa 2014)(Afronia's cancer diagnosis was substantial material change of circumstances to increase the amount and duration of her spousal support award); In re the Marriage of Wessels, 542 N.W.2d 486 (Iowa 1995)(holding wife's downward spiral related to medical conditions prevented her from being self supporting and modification of rehabilitative spousal support to permanent spousal support was appropriate).

### **3. Cohabitation by Payee**

Cohabitation is shown where the evidence establishes an unrelated person of the opposite sex lives or resides in the dwelling house of the former spouse, they live together in the manner of husband and wife, and there is unrestricted access to the home as is ordinarily enjoyed in a conventional husband and wife relationship. In re the Marriage of Sturdy and Sampson, 851 N.W.2d 546 (Table), 2014 WL 1999191 \*2 (Iowa Ct. App.) Once the payor raises and proves cohabitation as a substantial change of circumstance, the issue then becomes whether the burden should shift to the recipient, as it does with remarriage, to prove a need for continued support. In re the Marriage of Ales, 592 N.W.2d 698 (Iowa Ct. App. 1999).

#### **C. Revival of Spousal Support**

Iowa law allows for an equitable revival of spousal support even if it has terminated pursuant to the terms of a decree of dissolution of marriage or modification action. In re the Marriage of Carlson, 338 N.W.2d 136, 140-41 (Iowa 1983); In re the Marriage of Marshall, 394 N.W.2d 392 (Iowa 1986). The Supreme Court of Iowa articulated the basic legal concept of alimony revival in 1974 when the Court reinstated an obligor's duty to pay alimony (spousal support) after recipient-wife's subsequent remarriage terminating alimony was annulled. The condition ending the obligation of alimony (i.e. recipient's remarriage) no longer applied even though the obligor's duty to pay alimony had terminated some time ago. The Supreme Court of Iowa did not limit the conditions upon which the doctrine of revival might apply. Peters v. Peters, 214 N.W.2d 151, 155 (1974) as noted at p. 156 and 157, "This situation illustrates the fallacy of positing an inflexible rule in derogation of ordinary principles of equity." ... "Such an approach amounts to judicial prejudgment of a situation which may be entirely different than presupposed by it..."

“Under our cases there are some rare situations where, notwithstanding an agreement and decree to the contrary, later occurrences are so extreme in nature as to render the initial understanding grossly unfair and therefore subject to change.” In re the Marriage of Wessels, 542 N.W.2d 486, 489 (Iowa 1995). For the Court to revive a spousal support obligation it must find that “subsequent changes demand that the original order cannot, in fairness and equity, continue to stand.” Wessels at 489.

The Iowa Supreme Court determined that the onset of cancer was sufficient to revive a spousal support obligation in Marshall. The Iowa Supreme Court in Wessels also determined that the recipient’s deteriorating condition related to post traumatic stress disorder and depression was sufficient for a revival of spousal support.

### **III. CHILD SUPPORT**

#### **A. Standards for Modifications of Child Support**

The court may modify orders made under Iowa Code §598.21C when there is a substantial change in circumstances. Iowa Code §598.21C(1). In determining whether there has been a substantial change in circumstances, the court considers the following factors:

- a. Changes in the employment, earning capacity, income or resources of a party.
- b. Receipt by a party of an inheritance, pension or other gifts.
- c. Changes in the medical expenses of a party.
- d. Changes in the number or names of dependents of a party.
- e. Changes in the physical, mental or emotional health of a party.
- f. Changes in the residence of a party.
- g. Remarriage of a party.
- h. Possible support of a party by another person.
- i. Changes in the physical, emotional or educational needs of a child whose support is governed by the order.
- j. Contempt by a party of existing order support.
- k. Other factors the court determines to be relevant in an individual case.

Iowa Code §598.21C(1)(a-k)

To justify modification of child support, the change of circumstances relied on must be material and substantial, not trivial, more or less permanent or continuous, not temporary, and must be such as were not within the contemplation of the court when the decree was entered. In re Marriage of Bethards, 526 N.W.2d 871 (Iowa App. 1994).

In addition, a substantial change of circumstances exists when the previous court order for child support varies by 10% or more from the amount which would be due pursuant to the most current child support guidelines. Iowa Code §598.21C(2)(a).

The birth of a child does not automatically entitle a party to the Qualified Additional Dependent Deduction and a change in the child support obligation. Iowa Rule 9.8(2). The Court must first find a substantial and material change of circumstances before the QADD may be applied on a downward modification of an existing order. Iowa Rule 9.8(2).

The family law practitioner should be careful to include language supporting a variance from the guidelines. In In re the Marriage of Mihm, 842 N.W.2d 378, the Iowa Supreme Court approved the mother's request to modify the child support obligation in part because the court that entered the decree did not state the reasons for the substantial downward variance.

The court may order a child support modification to apply retroactively. The modification must be an increase in child support and not a decrease in child support for it to be retroactively applied. In re the Marriage of Barker, 600 N.W.2d 321, 324 (Iowa 1999). Furthermore, the retroactive date cannot be earlier than three months after the notice of the petition for modification is served on the opposing party. Iowa Code §598.21C(5).

## **B. Typical Changes Alleged for Modification**

### **1. Payor or Payee Unemployed**

In re Marriage of Foley, 501 N.W.2d 497, 500 (Iowa 1993) (finding that obligor's



reduction in income due to termination of employment for insubordination was not voluntary or self-inflicted); In re Marriage of Drury, 475 N.W.2d 668, 672 (Iowa App.1991) (finding honorable discharge from military and concomitant loss of military pay for failure to comply with weight limits was not voluntary or self-inflicted); In re Marriage of Dawson, 467 N.W.2d 271, 275-76 (Iowa 1991) (refusing to reduce child support obligation for obligor who quit job to finish education and take a job with lower pay); Vetternack, 334 N.W.2d at 763 (court unwilling to modify obligation for obligor who committed felony and was incarcerated but who had equity in home from which obligation could be satisfied); Ellis v. Ellis, 262 N.W.2d 265, 267-68 (Iowa 1978) (finding obligor's voluntary retirement at time when he still had substantial earning capacity to be voluntary and self-inflicted).

## **2. Payor or Payee Underemployed**

Reed v. Reed, 260 Iowa 1166, 1168-69, 152 N.W.2d 190, 191 (1967) (refusing to modify support obligation when obligor voluntarily quit job to return to school); In re the Marriage of Frasher, 868 N.W.2d 881 (Table), 2015 WL 3884847 (Iowa Ct. App.)(father's reduction in income was not intentional and therefore a modification of child support was appropriate); In re the Marriage of Blum, 526 N.W.2d 164 (Iowa Ct. App. 1994); In re the Marriage of Fidone, 462 N.W.2d 710 (Iowa Ct. App. 1990).

## **3. Increase in Income for Payor or Payee**

Christy v. Lenz, 2016 WL 740516 (Iowa Ct. App.)(holding father's increase in income sufficient to modify child support); In re the Marriage of Ginger, 2014 WL 5478145 (Iowa Ct. App.)(father's move to Georgia and increase in income sufficient for modification of visitation and child support); In re the Marriage of Dickey, 832 N.W.2d 384 (Table), 2013 WL 1453067 (Iowa Ct. App.)(change of incomes for parties resulted in more than 10% change in child support

calculation and mother's child support obligation was modified).

#### **IV. TEMPORARY MODIFICATION OF PERMANENT ORDERS**

##### **A. Temporary Modifications of Child Support**

Iowa Code § 598.21C(4) states, “While an application for modification of a child support or child custody order is pending, the court may, on its own motion or upon application by either party, enter a temporary order modifying an order of child support...”

In order to seek a temporary modification of child support in a dissolution of marriage case, the party must file a petition for modification along with a motion requesting a temporary hearing to modify the child support.

It is not as clear what the proper procedure is in a case where the parties were not married and the previous child support order was established by the Child Support Recovery Unit. In March of 2016, the Iowa Court of Appeals decided Seward v. Hane, 2016 WL 902838 (Iowa Ct. App). In Seward, CSRU established child support against the father. He later filed a paternity action where child support was litigated. The Child Support Recovery Unit was not given notice and the Iowa Court of Appeals decided the child support judgment in the private paternity action was a modification of the previous child support obligation. Since CSRU was entitled to receive benefits because the children were on state health insurance, it was a party to the lawsuit and the failure to notify CSRU made the modification void pursuant to Iowa Code § 598.21C(3).

However, it is permissible for two separate child support calculations to exist. Iowa Code §252A.6(7). The Child Support Recovery Unit has taken the position in recent cases that a child support calculation in an original paternity action is not a modification of the administrative order. Therefore, CSRU does not require notice of the proceedings. If at all possible, it would be best to file a modification in the administrative order case. However, if there is a separate

paternity action where child support could be established, the family law practitioner should send notice to CSRU and get them to file an acceptance of service and a notice to the Court. In the notice to the Court the Child Support Recovery Unit should state its position on whether it will be involved in the child support modification or not.

## **B. Temporary Modifications of Physical Care/Visitation Orders**

As a general rule, the filing of a petition to modify the child custody provisions of a dissolution decree does not carry with it a right for the determination of temporary custody. In re Marriage of Grantham, 698 N.W.2d 140, 145 (Iowa 2005). As stated in Grantham:

“Modification proceedings differ from original actions in this regard because, an original action for dissolution, the parties start out with equal rights to child custody, and their separation creates a need for temporary orders until permanent orders are entered at the conclusion of the litigation. As the court of appeals correctly noted, once child custody has been finally settled in a dissolution decree, the provisions of the decree should continue in force until such time as the decree is modified. No need exists for temporary orders in interim.” Grantham, 698 N.W.2d at 145-146.

In Grantham, the Court found that the district court did have authority to act in the matter because the parent was absent from his parental role as a result of his military service which necessitated that a temporary reassignment of custodial responsibilities be made without delay. In Grantham, the district court’s authority to act in the matter was in no way dependent on the filing of the petition for a permanent change of custody, but was rather necessary that the court act due to the service member’s absence. The Court’s authority to temporarily reassign custodial responsibilities is a limited one. For example, in the unpublished opinion of In re Marriage of Curtis, the Court of Appeals stated only that an emergency temporary modification order may be appropriate in rare circumstances. In re Marriage of Curtis, 735 N.W.3d 202, 2007 W.L. 1201758 (Iowa App.)

The Court also has jurisdiction to temporarily modify a permanent child custody order

pursuant to its Temporary Emergency Jurisdiction. Iowa Code § 598B.204(3).

Iowa Code § 598.41C and § 598.41D have been repealed. In its place the Iowa Legislature has enacted the Uniform Deployed Parents Custody and Visitation Act. The Statute will be codified as Iowa Code Ch. 598C. It allows for temporary modifications and delegations of physical care, visitation provisions, and legal custody decision making when a parent has been called into active military deployment. The new statutory scheme allows for expedited temporary modification/delegation proceedings as well as automatic modification provisions when the period of active military deployment has ended.

This statute is a substantial departure from long established legal principles in Iowa. Make sure to read through this statute. It is not clear how frequently Iowans are called to active military deployment, but the family law practitioner will want to be acquainted with the statute and any arguments regarding its constitutionality.