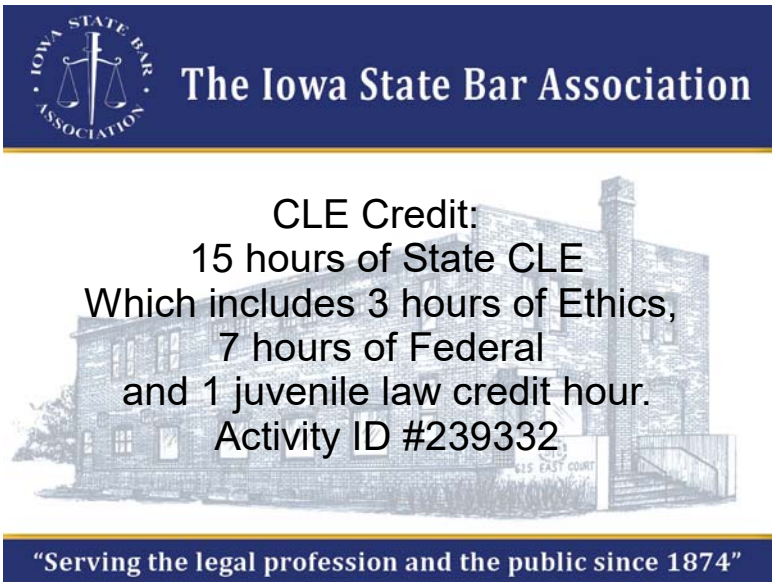
Bridge the Gap Seminar

September 8-9, 2016
West Des Moines Marriott

The Iowa State Bar Association's
Young Lawyers Division presents

2016 Bridge the Gap Seminar



Caveat

The printed material contained in this book and the oral presentations of the speakers are not intended to be a definitive analysis of the subjects discussed. The reader is cautioned that neither the program participants nor The Iowa State Bar Association intends that reliance be placed upon these materials in advising your clients without confirming independent research.

Bridge the Gap Seminar

SCHEDULE - THURSDAY, SEPTEMBER 8

7:30	**Registration**
8:00 – 8:30	**Legislative Update** Speaker: Senator Rob Hogg
8:30 – 9:00	**Estate Recovery** Speaker: Benjamin Chatman, SUMO Group Inc.
9:00 – 10:00	**Substance Abuse** Speaker: Dan Moore Moore Heffernan Moeller Johnson & Meis Iowa Lawyers Assistance Program President
10:00 - 10:15	**Break**
10:15 - 11:00	**Alimony** Speaker: Mary Zambreno, Dickinson Mackaman Tyler & Hagen PC
11:00 - 12:00	**The Science and the Art of Ethical Witness Preparation** Tim Semelroth, RSH Legal No materials at this time
12:00 - 1:00	**Lunch** (not provided with registration)
1:00 - 2:00	**Federal Case Law Update** Speaker: Hon. Helen Adams United States Magistrate Judge for Southern District of Iowa
2:00 - 2:45	**Farm Valuation and Farm Lease Terms** Speaker: Fred Greder, Benchmark Agribusiness
2:45 - 3:00	Break
3:00 - 4:00	**Ethics of Technology** Speaker: Nick Critelli, Critelli Law PC
4:00 - 5:00	**Search and Seizure in the Digital Age** Speaker: Robert Rehkemper, Gourley Rehkemper & Lindholm PLC

SCHEDULE - FRIDAY, SEPTEMBER 9

7:30	**Registration**
8:00 - 9:00	**Concurrent Jurisdiction** Speaker: Sara Strain Linder, Bray & Klockau PLC
9:00 – 10:00	**Federal Sentence Guidelines** Speaker: Nicholas Klinefeldt, Faegre Baker Daniels LLP
10:15 - 10:45	**Elder Abuse** Speaker: Chantelle Smith, Iowa Attorney General's Office
10:45 - 11:45	**Business Continuity Planning** Speaker: August "Dutch" Geisinger, Safeguard Iowa Partnership
11:45 – 12:45	**Lunch** (not provided with registration)
12:45 - 1:45	**State Case Law Update** Speaker: Hon. Paul Ahlers, District Associate Judge, District 2B
1:45 - 2:15	**Practical Strategies for Handling and Resolving Estate and Trust Disputes** Speaker: Christine Halbrook Bradshaw Fowler Proctor & Fairgrave, PC
2:15 – 2:30	**Break**
2:30 – 3:00	**Federal Laws Associated with Operating Drones** Speaker: Brett Hoben, Des Moines Flight Standards District Office
3:00 - 3:30	**Electronic Discovery in Iowa** Speaker: James Weston, Tom Riley Law Firm PLC
3:30 - 4:00	**The First Adoption Step: Termination of Parental Rights** Speaker: David Grooters, Pappajohn Shriver Eide & Nielsen PC
4:00 - 5:00	**Ethics Panel** No materials provided Moderator: Michael Streit, Ahlers & Cooney PC

Bridge the Gap Seminar

Thursday
September 8, 2016

The Iowa State Bar Association's
Young Lawyers Division presents

Bridge the Gap Seminar

Legislative Update

8:00 a.m. - 8:30 a.m.

Presented by:
Senator Rob Hogg
Elderkin & Pirnie PLC
PO Box 1968
Cedar Rapids, IA 52406
Phone: 319-286-2336

Thursday, September 8, 2016

2016 BRIDGE THE GAP SEMINAR

IOWA LEGISLATIVE UPDATE

September 8, 2016

Prepared by:

JIM CARNEY
Legislative Counsel
Iowa State Bar Association

DOUG STRUYK
SHANNON HENSON
Assistant Legislative Counsel
Iowa State Bar Association

400 Homestead Building
303 Locust Street
Des Moines, IA 50309
Ph. 515/282-6803
Fax 515/282-4700
E-Mail: carney@carneyappleby.com
henson@carneyappleby.com
struyk@carneyappleby.com

Because of the voluminous nature of this material, it is not possible to provide copies of these bills. You can obtain copies by contacting the Secretary of the Senate for Senate Bills and the Chief Clerk of the House for House Bills at the State Capitol Building or by contacting the Public Information Office at the State Capitol Building, Des Moines, Iowa 50319. Legislative information, including copies of Bills, is also available via the internet at http://www.legis.iowa.gov.

TABLE OF CONTENTS

Page

2016 LEGISLATIVE UPDATE

I. LEGISLATORS AND COMMITTEE INFORMATION

A. Political Composition of the Iowa General Assembly

SENATE

1. 26 Democrats, 24 Republicans
2. Senate Leadership:
   a. Pam Jochum (D-Dubuque), President
   b. Michael Gronstal (D-Council Bluffs), Majority Leader
   c. Bill Dix (R-Shell Rock), Minority Leader

HOUSE OF REPRESENTATIVES

1. 57 Republicans, 43 Democrats
2. House Leadership:
   a. Linda Upmeyer (R-Garner), Speaker
   b. Matt Windschitl (R- Missouri Valley), Speaker Pro Tempore
   c. Chris Hagenow (R-Windsor Heights), Majority Leader
   d. Mark Smith (D-Marshall), Minority Leader

B. 2016 Lawyer Legislators

House:

HD47	R	Rep. Chip Baltimore
~~HD55~~	~~R~~	~~Rep. Darrel Branhagen~~
~~HD14~~	~~D~~	~~Rep. Dave Dawson~~
HD25	R	Rep. Stan Gustafson
HD43	R	Rep. Chris Hagenow
HD02	R	Rep. Megan Jones
HD33	D	Rep. Brian Meyer - Primary
HD09	D	Rep. Helen Miller
HD41	D	Rep. Jo Oldson - Primary
HD31	D	Rep. Rick Olson
~~HD67~~	~~R~~	~~Rep. Kraig Paulsen~~
HD52	D	Rep. Todd Prichard
HD98	D	Rep. Mary Wolfe

Senate:

SD33	**D**	**Rob Hogg**
SD13	**R**	**Julian Garrett**
SD22	**R**	**Charles Schneider**
SD19	**R**	**Jack Whitver**

2016 Lawyer Legislator Candidates:

SD16	**D**	**Nate Boulton – Primary**
SD38	**D**	**Dennis Mathahs**
SD48	**D**	**Scott Peterson**
HD29	**R**	**Pat Payton**
HD58	**R**	**Andy McKean – Primary**
HD67	**D**	**Mark Seidl**

C. Judiciary Committee Members

SENATE

Steve Sodders, Chair	Wally Horn	Rich Taylor
Rob Hogg, Vice-Chair	Kevin Kinney	Jack Whitver
Charles Schneider, Ranking Member	Janet Petersen	Brad Zaun
Tony Bisignano	Herman Quirmbach	
Julian Garrett	Tom Shipley	

HOUSE OF REPRESENTATIVES

Chip Baltimore, Chair	~~Dave Dawson~~	Zach Nunn
Stan Gustafson, Vice-Chair	Greg Heartsill	Jo Oldson
Mary Wolfe, Ranking Member	Dave Heaton	Rick Olson
Marti Anderson	Megan Jones	~~Kraig Paulsen~~
Terry Baxter	Bobby Kaufmann	Todd Prichard
~~Deborah Berry~~	Brian Meyer	Ken Rizer
~~Darrel Branhagen~~		Walt Rogers
		Matt Windschitl

D. Justice Systems Appropriations Subcommittee Members

SENATE

Tom Courtney, Chair	Julian Garrett, Ranking Member
Rob Hogg, Vice-Chair	Rich Taylor
Mark Chelgren	

HOUSE OF REPRESENTATIVES

Gary Worthan, Chair	Todd Taylor, Ranking Member
~~Darrel Branhagen, Vice-Chair~~	Steven Holt
Marti Anderson	Jerry Kearns
Chip Baltimore	Brian Meyer
Stan Gustafson	

II. IOWA STATE BAR ASSOCIATION
2016 Affirmative Legislative Program

Updated 8/22/2016

Bill No.	Subject	Bill Description	Bill Status
HF 2400	2014 Amendments to Uniform Voidable Transactions Act (Current IA Code Chapter 684, "Fraudulent Transfers")	The Uniform Fraudulent Transfer Act was approved by the Uniform Law Commission in 1984. It has not been revised or updated since its original approval. Iowa adopted the Act, which is presently found in IA Code Chapter 684. In 2014, the Uniform Law Commission adopted amendments to update the Act, which are being proposed to update IA Code Chapter 684 as follows: • Change the name of the Act from "Uniform Fraudulent Transfer Act" to "Uniform Voidable Transactions Act". • Choice of Law- Provide that a claim for relief is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or obligation is incurred. • Evidentiary Matters- Provide uniform rules on allocation of burden of proof and standards of proof relating to operation of the UVTA. • Delete the special definition of "Insolvency" for partnerships. • Revise provisions relating to defenses available to a transferee or obligee. • Clarifies that the UVTA applies to transactions in which a series organization engages. • Replace references to "writing" with "record".	Signed by Governor Branstad on 3/30/16.
SSB 3076	Benefit Corporations	Amends IA Business Corporation Act (Chapter 490) to authorize formation of "Benefit Corporations", which are formed not only for the purpose of shareholder profitability but also for a social purpose or public benefit.	Referred to Senate Judiciary Committee. Did not advance.
HF 2359	Corrective amendments to IA Business Corporation Act (Code Chapter 490)	Amends Code Sections 490.1320(1) and .1320(3)(a) and (b), "Notice of Appraisal Rights", to replace references to "part" and "chapter" with references to "division".	Signed by Governor Branstad on 4/6/16.

HF 2447 (Formerly HSB 645/SSB3174; Formerly SF 376	Calculation of Probate Court Costs	Relates to how the clerk of probate court determines and collects charges in connection with services provided in probate matters. Excludes from the determination of court costs property over which the court lacks probate jurisdiction and for which the clerk renders no services. Specifies that for purposes of calculating the costs for other services performed by the court in the settlement of the estate of any decedent, minor, person with mental illness, or other persons laboring under legal disability, the value of such a person's personal property and real estate is equal to the gross assets of the estate listed in the probate inventory minus, unless the proceeds of the gross assets are payable to the estate, joint tenancy property, transfers made during such person's lifetime such as to a revocable trust, and assets payable to beneficiaries.	Recorded as a Study Bill; Assigned to Ways and Means; Fiscal Note issued on 4/4/16. Did not advance.
SF 2112	Uniform Fiduciary Access to Digital Assets Act (UFADAA)	Adopted by the Uniform Law Commissioners in July 2014, the Act ensures that legally appointed fiduciaries can access, delete, preserve, and pass along a person's digital assets (i.e., documents, photographs, e-mail, and social media accounts) as appropriate.	Senate amended and passed on 2/22/16, 49-0. Referred to House Judiciary Committee on 2/24/16. Did not advance.
HF 2335/ SF 2184	Notice Under the Iowa Trust Code; IA Probate Code Amendment; Iowa Uniform Power of Attorney Act Technical Corrections	This proposal does the following: • Amends Iowa Trust Code by inserting new Section 633A.1109 ("Methods and Waiver of Notice"), which provide for notices to trust beneficiaries and notices of judicial proceedings. The Trust Code currently provides for notice provisions for creditors, heirs and surviving spouses, but otherwise, notice provisions default to the Iowa Rules of Civil Procedure. The proposed amendment would address such notices except as otherwise provided. • Amends Iowa Probate Code Section 633.389 to simplify notices regarding sale of property. • Makes several technical corrections to Iowa Code Chapter 633A, "Iowa Uniform Power of Attorney Act".	HF 2335 signed by Governor Branstad on 4/13/16.

SSB 3032	Attorney Fees and Court Costs in Action to Quiet Title After Request for a Quitclaim Deed.	Updates Code Section 649.5, which relates to attorney fees and court costs for a party who succeeds in an action to quiet title and who requested a quitclaim deed from the party holding an apparent adverse interest prior to bringing the action to quiet title. Brings the dollar amounts closer to current market rates and maintains the moving party's ability to request attorney fees.	Referred to Senate Judiciary Committee. Did not advance.
HF 2326/ SF 2150	Forcible Entry & Detainer Actions After Forfeiture of Real Estate Contracts	Makes changes to procedures for eviction after forfeiture of a real estate contract. Grants statutory authority under Code Chapter 648 for a vendor in a real estate installment contract to seek Forcible Entry & Detainer action against holdover vendee who fails to vacate after forfeiture proceedings are complete, while affording holdover vendees proper due process. Allows small claims magistrates to hold preliminary hearings in forfeiture cases and to enter judgments of removal only if the defendant defaults or appears and does not raise facts which would constitute a defense to eviction. Provides that a judgment of eviction also operates against persons holding under the defendant, such as subtenants, the defendant's children, and persons living on the premises by permission of the defendant.	Senate deferred on 4/12/16. Did not advance.
SF 220	Expert Witness Fees	Amends Code Section 622.72 to remove the $150 per day cap on expert witness fees and to permit the district court to assess as costs a fair and reasonable expert witness fee in an amount not to exceed $2,500 for the expert's time testifying at trial or in depositions used at trial.	Senate passed 48-2 on 3/10-/15. Referred to House Judiciary Committee 3/11/15. Did not advance.
SF 2232	Redemption from Tax Sale of Property Owned by Persons with Disabilities	Remedies issues arising from Iowa Court of Appeals decision *Firestone v. FT13* (Filed 4-30-14) relating to redemption issues arising from ownership of property by minors or persons of unsound mind.	Senate passed on 2/23/16, 50-0. Referred to House Judiciary Committee on 2/24/16. Did not advance.
HSB 577/ SSB 1248	Requirements for Timely Filing of Releases or Satisfactions of Mortgages	Remedies ambiguities and inconsistencies in existing statutes & provides remedies for failure of mortgagees to issue releases of mortgages.	Bills referred to House & Senate Judiciary Committee respectively. Placed on hold by ISBA for further work.

HF 2282/ SF 2060	Appointment of Guardian Ad Litem (GAL) for Minor Child in Adoption Proceedings	Amends Code Section 600.5 to require an adoption petition to state whether a GAL should be appointed for a minor child to be adopted, and if not, the reasons why a GAL should not be appointed. Adds New Code Section 600.6A which requires the Court, prior to ordering a hearing on the adoption petition, to make a determination of the need for a GAL for a minor child to be adopted and, in writing, appoint or waive the appointment of a GAL for purposes of the adoption proceeding in the order setting the adoption hearing.	Signed by Governor Branstad on 4/6/16.
SF 2264	Clarification of Roles in Child Representation	Amends Code Section 598.12 to clarify roles of child's attorney, guardian ad litem, and custody investigator. Existing 598.12 provisions for child representation are not compliant with ABA standards for child representation.	Passed by Senate. Passed House Judiciary Subcommittee 3/09/16 Funneled. Did not advance.
SSB 3033	Waiver of 90-Day Waiting Period in Dissolutions	Allows for waiver of 90-day waiting period at the court's discretion upon the agreement of the parties. Current Code Section 589.19 requires a 90-day waiting period before the court can grant a decree dissolving a marriage unless grounds of emergency or necessity exist which satisfy the court that immediate action is warranted or required.	Referred to Senate Judiciary Committee. Did not advance.
HF 2270/ SF 2062	Amendment of Code Section 232.2(39) Definition of "Parent"	Amends the definition of "parent" to include a father whose paternity has been legally established by operation of law. The Iowa Supreme Court in *In re J.C.*, 857 N.W.2d 495 (Iowa, 2014) determined that a legal father of a child (not a biological parent but father whose paternity was established by operation of law by marriage to the mother) was NOT a necessary party to a Child in Need of Assistance proceeding. This proposal makes the legally established parent a necessary party and conforms the definition of "parent" in Code Section 232.2(39) with the Bridge Order statute [Section 232.103A(1)(b)].	Signed by Governor Branstad on 4/13/16.
	Codify Formula for Division of Defined Benefit Plans	The case of *In re Marriage of Benson* provides a formula for division of a defined benefit plan. This proposal amends Code Section 598.21(6) to codify the formula.	Placed on hold by ISBA for further drafting work.

HSB 525/ SSB 3029	Uniform Child Support Payment Processing	Child support payments are processed differently depending on the type of case and the existence of an income withholding order. This proposal amends Code Section 598.22, Chapters 252B & 252D so that all child support payments will be paid into the Collections Services Center (CSC).	HSB 525 referred to House Judiciary Committee. SSB 3029 referred to Senate Judiciary Committee. Neither bill advanced this session.
HF 2378	Appeal Deadline for Private Termination of Parental Rights Actions	Amends Code Section 600A.9(2) to reduce the 30-day appeal deadline for private termination of parental rights (TPR) actions to a 15-day appeal deadline to be consistent with Chapter 232, which governs TPR actions initiated by the State.	Approved by House Judiciary Committee and placed on House Calendar on 2/22/16. Funneled. Did not advance.
SF 2233	Uniform Deployed Parents Custody & Visitation Act (UDPCVA)	Approved by the Uniform Law Commission in 2012, the UDPCVA addresses issues of child custody and visitation that arise when parents are deployed in military or other national service.	Signed by Governor Branstad on 4/13/16.
	Proceedings to Establish Paternity	Amends Code Section 600B.8 to allow fathers to file an action to establish paternity consistent with the Iowa Supreme Court's decision in *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999). Updates Code Chapter 600B.	Placed on hold by ISBA for further drafting work.

In addition to the above legislative proposals, the Iowa State Bar Association supports the following positions as a part of its 2016 Affirmative Legislative Program:

- Full funding of indigent defense and adoption of legislation providing for an automatic, periodic increase in indigent defense fees.
    - **SF 2109** provides a supplemental appropriation of $3 million for the indigent defense fund for fiscal year 2016. Signed by Governor Branstad on 4/29/16.
    - **HF 2458** appropriates $29.6 million for fiscal year 2017. Signed by Governor Branstad on 5/27/16.
- Full funding of the Judicial Branch.
    - The Judicial Branch requested a 4.6% increase for a total request of $190 million.
    - **HF 2457** provided funding consistent with fiscal year 2016 at $181.78 million. Signed by Governor Branstad on 5/27/16.
- Polk County Justice Center
    - **SF 2324 ("RIIF")** Allocates $6.7 million for furniture and equipment at the Polk County Courthouse. This bill was signed by Governor Branstad on 4/17/16.
- Full funding for Legal Services.
    - **HF 2458** appropriates $2.4 million for fiscal year 2017. Signed by Governor Branstad on 5/27/16.
- Full funding of the IA Secretary of State's Office as requested by IA Secretary of State Paul Pate.
    - **SF 2314** allocates $25,800 for Safe at Home Program; $120,400 for the address confidentiality program; $300,000 for the voter registration system update. Signed by Governor Branstad on 5/27/16 and vetoed Section 17, which related to fee and reporting provisions and an interim study on fees and on ceremonial space at the Capitol Complex.

- Full funding for the Office of Substitute Decision Maker to protect the interests of Iowans who have no one else to manage their financial and health care needs.
    - **HF 2460** increases funding from $144,333 from fiscal year 2016 to $350,000 for fiscal year 2017 and provides an additional year to establish local offices.
- Support child abuse prevention and treatment efforts and funding for child abuse prevention and treatment.
- Oppose the legalization of title insurance.
    - No bill was introduced on this subject this session.
- Will monitor issues regarding lawyer abstracting under Iowa Title Guaranty.
    - **HF 2164** regarding waiver requirements was introduced but did not succeed.
- Oppose absolute immunity legislation.
    - **SF 2218** regarding possession of emergency drugs by first responders was signed by Governor on 4/6/16.
- **SF 2117** regarding student loans would allow a person to deduct the full amount of interest paid on a student loan for income from Iowa income tax purposes. This bill did not advance.

III. BILLS OF INTEREST PASSED DURING 2016 LEGISLATIVE SESSION

ADMININISTRATIVE LAW

SF 2194 **Administrative Law Judges Appointed by Public Relations Board.** Adds Administrative Law Judges to Section 8A.415, and states that such judges are subject to the merit system. Further states that an ALJ subject to this section, upon being dissatisfied with a response to a grievance, shall file an appeal with an ALJ employed by the administrative hearings division of the department of inspections and appeals, whose decision shall constitute a final agency action. *Signed by Governor on 4/6/16. Effective 7/1/16.*

SF 2162 **Electronic Filing System for Administrative Hearings.** Adds a new Section to Iowa Code Chapter 10A. Establishes an electronic filing system for administrative proceedings by the administrative hearings division of the department of inspections and appeals. Also states that an electronic record, including a recording or transcription of proceedings, shall be the official record in a contested case and maintenance of this record in the system satisfies the agency's obligation to file and maintain such a record. *Signed by Governor on 4/6/16. Effective 7/1/16.*

HF 2449 **Administrative Rulemaking Requirements.** This bill adds a new subsection to Iowa Code Section 17A.4, which sets for certain rulemaking procedures for state agencies. For state agencies expressly required by Iowa law to engage in rulemaking, the agency must do one of the following within 180 days of the effective date of the provision:

1) Submit a notice of intended action to the administrative rules coordinator and the administrative code editor; or,
2) Submit written notification to the administrative rules review committee that the agency has not submitted a notice of intended action to the administrative rules coordinator and the administrative code editor.

BUSINESS LAW

SF 2111 **Notarial Acts by Law Enforcement Officers.** Amends Iowa Code Section 9B.17, relieving peace officers and other law enforcements officials of their obligation to use a notarial stamp under some circumstances when administering oaths or acknowledging signatures. It does not apply to a peace officer administering an oath or acknowledging a signature under Iowa Code 80.9A, subsection 3. Signed by Governor on 4/6/16. Effective Date 7/1/16.

SF 2260 **Medicaid-Disclosure of Ownership for Nonprofit Organizations.** Amends Iowa Code Section 22.7 as it pertains to individuals with an ownership or control interest who is an officer of a nonprofit organization. Requires that any information required to be provided to a disclosing entity pursuant to 42 C.F.R. §455.104, an individual with an ownership or control interest who is an officer or director of a nonprofit corporation, is only required to disclose the department of human services, as the single state agency designated to administer or supervise the administration of the Medicaid program. Any Medicaid managed care organization contracting with the state shall not require disclosure or collection of ownership or control information for any nonprofit organization. DHS may only disclose information related to ownership or control to a managed care organization to the extent that is it necessary to ensure compliance with federal law. Signed by Governor on 4/13/16. Effective Date 4/13/16.

HF 2359 ***Corrective Amendments to Iowa Business Corporations Act.*** *Amends Code Sections 490.1320(1) and 490.1320(3)(a) and (b), "Notice of Appraisal Rights", to replace references to "part" and "chapter" with references to "division". Signed by Governor on 4/6/16. Effective 7/1/16.*

COMMERCIAL LAW & BANKRUPTCY

HF 2400 ***Iowa Uniform Voidable Transactions Act.*** *Iowa Adopted the Uniform Fraudulent Transfer Act in 2014. The Act, found in Iowa Code Section 684, had not been updated or revised since 1984. This bill updates Code Section 684, in the following ways:*

- *Changes the name of the Act from "Uniform Fraudulent Transfer Act" to "Uniform Voidable Transactions Act".*
- *Provides that a claim for relief is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or obligation incurred.*
- *Addresses evidentiary concerns, providing uniform rules on allocation of the burden of proof and standards of proof relating to the operation of the Uniform Voidable Transactions Act.*
- *Deletes the special definition of "insolvency" for partnerships.*
- *Revises provisions relating to defenses available to a transferee or oblige.*
- *Clarifies the UVTA applies to transactions in which a series organization engages.*
- *Replaces "writing" with "record".*

Signed on 3/30/16. Effective Date 7/1/16.

CRIMINAL LAW

HF 2268 **Confidentiality of Public Employee Support Information.** Amends Iowa Code Section 22.7 to add a new section to include public employee support information submitted to the public relations board within the category of documents which are to be subject to confidentiality absent a court order requiring their release. Signed by Governor on 3/23/16. Effective Date 7/1/16.

SF 2164 **Expungement of Criminal Offenses Related to Alcohol Consumption.** Amends Iowa Code 123.46 as it relates to expungement of offenses for public intoxication, simulated intoxication, and related local ordinances. After the expiration of two years from the date of conviction of an offense under Iowa Code 123.46, an individual may petition the court to expunge his record, including for any violation of a local ordinance arising from the same transaction or occurrence. Upon such petition, the court shall expunge the record and the criminal history related to this record shall be removed by the clerk of the district court. Signed by Governor on 4/6/16. Implementation Deadline is 7/1/17.

SF 2115 **Interference with Acts of a Jailer**. Amends Iowa Code Section 719.1 to create an offense for interference with official acts of a jailer. This section previously applied to peace officers, emergency medical providers, and firefighters. The definition of interference with official acts remains the same. The offense is committed when an individual knowingly resists or obstructs anyone known to be a peace officer, jailer, or emergency medical provider under Iowa Code Section 147A, or firefighter, whether paid or volunteer, in their performance of any act within the lawful duty or authority of that individual. Signed 3/30/16. Effective Date 7/1/16.

SF 2110 **Access to Criminal History.** Amends Iowa Code 692.5 to allow a person or that person's attorney to access and examine their criminal history by providing the individual's fingerprints to the department of public safety. It further strikes a provision that had required written authorization as well as fingerprints in order to examine and obtain one's criminal history. The bill also requires that when the criminal investigation division of the department of public safety corrects an individual's criminal history, they must also inform the federal bureau of investigation to correct their own files related to that individual's criminal history. Signed 4/6/16. Effective Date 7/1/16.

SF 2059 **Work Release and Parole Participants.** Amends Iowa Code Chapter 905.11 to *permit*, rather than *require,* the department of corrections to establish a violator facility for individuals participating in a work release program. It further removes the requirement that an individual serving a 70 percent sentence on work release or parole to serve one year in a residential facility operated by the judicial district. Under the new law, such individuals must only reside in a residential facility until a recommendation is made by the district department that the individual may be supervised in the community rather than in a residential facility. Signed 4/6/16. Effective Date 7/1/16.

HF 2278 **Limitation of Criminal Actions in Kidnapping and Human Trafficking Offenses.** Adds two new sections to Iowa Code Chapter 802, creating a statute of limitations for the offenses of kidnapping and human trafficking.

As it relates to kidnapping, the bill provides that an indictment or information for kidnapping in the second degree or kidnapping in the third degree committed on or with a person who is under the age of 18, shall take place within 10 years after the person upon whom the kidnapping is committed attains 18 years of age. Under the current law, such an indictment must take place within three years of the victim attaining the age of 18.

As it relates to human trafficking, information or an indictment for any human trafficking offense in violation of Iowa Code Section 710A.2, committed on or with a person under the age of 18, shall be found within 10 years after the person upon whom the offense is committed attains 18 years of age. Under the current law, such an indictment must take place within three years of the victim attaining the age of 18.
The law also provides for penalties for these offenses as follows:

Kidnapping in the first degree is a class "A" felony punishable by confinement for life without possibility of parole. Kidnapping in the second degree is a class "B" felony punishable by confinement of no more than 25 years. Kidnapping in the third degree is a class "C" felony punishable by confinement for no more than ten 10 years a fine of at least $1,000 but not more than $10,000.

Human Trafficking committed on or with a person under 18 years of age remain either a class "B" felony or class "C" felony under Code Section 710A.2(1).

Signed 3/30/16. Effective Date 7/1/16.

SF 2185 **Privacy and Criminal Trespass.** Amends Code Section 716.7 by providing that a person commits criminal trespass if the person intentionally views, photographs, or films another person through the window or any other aperture of a dwelling without a legitimate purpose, while present on the property upon which the dwelling is located, or while placing upon or retrieving from such property equipment to view, photograph, or film another person, if the subject person has a reasonable expectation of privacy and does not, or cannot consent to being viewed, photographed, or filmed. A person in violation of this section commits a serious misdemeanor. Signed 4/13/16. Effective Date 7/1/16.

HF 2064 **Child Endangerment and Mandatory Minimums for Criminal Offenses.** Amends Section 124.413 to make non-violent drug offenders eligible for parole after serving half of the mandatory minimum sentence, unless classified as high-risk to reoffend. The law currently requires these individuals to serve 70 percent of their sentence. It further creates a new offense for robbery in the third degree (robbery involving a simple assault). Finally, it adds a mandatory minimum sentence for convictions of intentional child endangerment resulting in the death of a child. Signed 5/12/16. Effective Date 7/1/16.

ECONOMIC DEVELOPMENT

SF 2300 **Renewable Chemical Production Tax Credit Program.** Amends the high quality jobs program and creates a production tax credit program for renewable chemicals.

High Quality Jobs Program. Limits the amount of tax credits that may be allocated to the high quality jobs program to $105 million for each fiscal year between the period of July 1, 2016 to June 30, 2021. For each fiscal year between July 1, 2021 and ending June 30, 2022, the Economic Development Authority shall not allocate more than $105 million if the aggregate amount of renewable chemical production tax credits issued between July 1, 2018 and before July 1, 2021 equals or exceeds $27 million. Requires the EDA to notify the General Assembly as soon as practicable after June 30, 2021, of the aggregate amount of renewable chemical production tax credits awarded under this section.

Renewable Chemical Tax Credit. Creates a renewable chemical tax credit to be administered by the EDA. The program provides tax credits to eligible businesses that produce renewable chemicals. Eligible businesses are required to submit an application to the EDA and enter into an agreement with the EDA, and comply with EDA requirements prior to being issued a tax credit under the program.

Signed 4/06/16. Effective Date 7/1/16.

ELDER LAW

HF 2266 **Unclaimed Cremated Remains.** Amends Iowa Code Section 144.27 to allow a funeral director responsible for filing a death certificate, after cremated remains are unclaimed for over 180 days, to release to the department of veterans affairs the name of the deceased individual for the purposes of determining whether that individual is a veteran or dependent of a veteran and therefore eligible for inurnment at a veterans cemetery. The funeral director may also release identifying information including the person's social security number and any military discharge documents. The department must notify the funeral director in the event the deceased individual is determined to have been a veteran. It further provides that a funeral director is immune from liability arising from any act performed under these provisions, except in the case of intentional misconduct. Signed 3/30/16. Effective Date 7/1/16.

FAMILY AND JUVENILE LAW

SF 2288 **Confidentiality of Juvenile Records.** Amends Iowa Code Chapter 232 as it relates to confidentiality of juvenile court records in the following ways:

Confidentiality. Section 232.147(3) makes juvenile court records confidential except in cases that would be a forcible felony under Iowa Code 702.11 if committed by an adult.

Confidentiality Orders. 232.14A requires a court to order juvenile records confidential if they would be considered a forcible felony if committed by an adult where the case has been dismissed and the individual is no longer subject to the jurisdiction of the juvenile court.

Access to Records. Unless the record has been sealed, juvenile records deemed confidential may still be accessed by judges and other court professionals, the child and child's counsel, the child's parents or guardian, a guardian ad litem or court-appointed advocate, foster care providers, or members of the child advocacy board.

Signed on 3/09/16. Effective Date 7/1/16.

HF 2265 **Address Confidentiality Program.** Adds a new section to Iowa Code Section 9E, which states that an individual participating in the address confidentiality program under Iowa Code Section 9E.5 shall not be compelled to disclose his or her address during discovery or during proceedings before a court unless both of the following are met: 1) the information is necessary for litigation to proceed; and, 2) there are no other practical means of obtaining the information or evidence. Under Iowa Code Section 9E.5, individuals who are victims of domestic abuse, stalking, human trafficking, or sexual abuse, are eligible to be program participants. Signed on 3/23/16. Effective Date 7/1/16.

HF 2386 **Termination of Parental Rights in Sexual Abuse Cases.** Amends Iowa Code Section 232.116 to add a new section and subsection related to termination of parental rights in cases in which the mother is a victim of sexual abuse committed by a child's biological father. Under the new section, it is grounds for termination of parental rights where the court finds by clear and convincing evidence that a child was conceived as a result of sexual abuse against the mother, as defined in Iowa Code 709.1, and the parent against whom the sexual abuse was committed requests the court terminate the other biological parent's parental rights. Signed on 3/31/16. Effective Date 7/1/16.

SF 2258 **Child Welfare.** Transition Plans. Amends Iowa Code Section 232.2 to state that if a child is 14 years or older, the child shall be involved in development of a case permanency plan, including having the option to select two members of a case planning team, both of which are subject to DHS approval. This bill also lowers the age at which the department of human services must create a transition plan for children in foster care services from 16 to 14. This bill also requires the transition plan to include life skills such as money management, and must be reviewed every six months.

Sex Trafficking. The bill also includes sex trafficking activities including recruitment, harboring, transporting, or soliciting, within the definition of "child abuse" under Iowa Code Section 232.68. It further requires DHS to report and provide services to any child under the control or supervision of DHS, whom DHS suspects of being a victim or at risk of being a sex trafficking victim.

Signed on 4/6/16. Effective Date 7/1/16.

HF 2282 ***Appointment of Guardian Ad Litem in Adoption Proceedings.*** *This bill amends Iowa Code Section 600.5 to require an adoption petition to state whether a GAL should be appointed for a minor child to be adopted, and if not, the reasons why a GAL should not be appointed. Adds New Code Section 600.6A which requires the Court, prior to ordering a hearing on the adoption petition, to make a determination of the need for a GAL for a minor child to be adopted*

and, in writing, appoint or waive the appointment of a GAL for purposes of the adoption proceeding in the order setting the adoption hearing. Signed 4/6/16. Effective Date 7/1/16.

SF 2233 **Uniform Deployed Parents Custody Act.** Amends Iowa Code Chapter 598 to adopt the Uniform Deployed Parents Custody Act, adding new chapters establishing guidelines for custody and visitation agreements during military deployment. The bill:

- Requires a deploying parent to provide notice of deployment within seven days unless such notice is not reasonably possible.
- Requires parents to create a plan for fulfilling parental responsibilities during deployment period.
- Requires an individual to whom custodial responsibility has been granted during deployment to provide notice of any changes in mailing address.
- States that a court may not consider a parent's past deployment or possible future deployment in making custody determinations.
- Provides for entering an agreement for custodial responsibility during deployment and states that any such agreement will terminate upon end of deployment unless previously terminated.
- Allows deploying parent to delegate all or part of his or her parental responsibilities to another individual.
- Prohibits a court from entering a permanent order granting custodial responsibility during the period of deployment.
- Permits a grant of parenting authority to an adult non-parent who is a relative or has a close relationship with the child provided that it is not contrary to the child's best interests.

Signed on 4/13/16. Effective Date 7/1/16.

GOVERNMENT PRACTICE

HF 2364 **Public Notice and Meeting of Governmental Bodies.** This bill provides an exception to the Open Meetings Law requirement that 24-hour notice be provided to the public prior to holding a meeting of a governmental body. Where a body is prevented from convening a properly noticed meeting provided that an amended notice of the meeting is provided which conforms with notice requirements. Signed on 3/23/16. Effective Date 7/1/16.

HF 2261 **Authorization of Political Subdivisions to Invest in Investment Trusts.** Amends Iowa Code Section 12B.10, which currently allows political subdivisions to invest public funds in joint investment trusts, to require that such trusts must either be operated in accordance with federal laws concerning money market funds *or* the governmental accounting standards board's for external investment pools. Signed on 3/30/16. Effective Date 7/1/16.

HF 2363 **Member Attendance at Closed Session Meeting.** Adds a new subsection to Iowa Code Section 21.5 which states that a governmental body shall not exclude a member of that body from a closed session meeting unless that individual's presence at the meeting would create a conflict of interest. Signed on 4/6/16. Effective Date 7/1/16.

JUDICIAL ADMINISTRATION

HF 2354 **Electronic Recordings for Magistrates.** Adds a new subsection to Iowa Code 602.1209 which requires that trials and contested hearings before magistrates be electronically recorded unless a party provides a certified court reporter at that party's expense. Signed on 3/23/16. Effective Date 7/1/16.

SF 2316 **Delinquent Court Debt.** The bill specifies that delinquent court debt remains with the collection entity, whether county attorney or a private debt collection company, collecting the debt. It also requires the DOT to immediately lift a driver's license suspension for a delinquency if the case is included in an executed installment agreement. It further allows a person in default on the repayment for a license to provide a new financial statement and to have their repayment agreement reinstated. The bill also allows the county attorneys to notify the judicial branch about certain court debts and requires county attorneys to file a memo of understanding with the State Court Administrator for the assigned debt cases. It further requires filings by the county attorney on the decision to stop collecting delinquent court debt.

Formula. Distributes 28% of the debt collected by the county attorney to the county General Fund. Pays 72% of the collected debt to the clerk of the district court for distribution.

Incentives. Changes the thresholds for incentives to encourage county attorneys to collect debt and establishes other requirements on collecting threshold amounts.

The bill also requires the Auditor to review the collection rates of the counties that file a full commitment notice to collect debt and to report on those collections.

Signed by Governor on 5/27/16. Effective Date 7/1/16.

LITIGATION

HF 2265 **Address Confidentiality Program.** Adds a new section to Iowa Code Section 9E, which states that an individual participating in the address confidentiality program under Iowa Code Section 9E.5 shall not be compelled to disclose his or her address during discovery or during proceedings before a court unless both of the following are met: 1) the information is necessary for litigation to proceed; and, 2) there are no other practical means of obtaining the information or evidence. Under Iowa Code Section 9E.5, individuals who are victims of domestic abuse, stalking, human trafficking, or sexual abuse, are eligible to be program participants. Signed on 3/23/16. Effective Date 7/1/16.

HF 2354 **Electronic Recordings for Magistrates.** Adds a new subsection to Iowa Code 602.1209 which requires that trials and contested hearings before magistrates be electronically recorded unless a party provides a certified court reporter at that party's expense. Signed on 3/23/16. Effective Date 7/1/16.

HF 2266 **Unclaimed Cremated Remains.** Amends Iowa Code Section 144.27 to allow a funeral director responsible for filing a death certificate, after cremated remains are unclaimed after 180 days, to release to the department of veterans affairs the name of the deceased individual for the purposes of determining whether that individual is a veteran or dependent of a veteran and therefore eligible for inurnment at a veterans cemetery. The funeral director may also release identifying information including the person's social security number, and any military discharge documents. The department must notify the funeral director in the event the deceased individual is determined to have been a veteran. It further provides that a funeral director is immune from liability arising from any act performed under these provisions, except in the case of intentional misconduct. Signed 3/30/16. Effective Date 7/1/16.

SF 2218 **Administration of Emergency Drugs.** Adds a new section to Iowa Code Section 135.190, which permits emergency medical service programs, law enforcement, registered nurses, and the fire department to obtain and maintain a supply of opioid antagonists. It further permits first responders and other individuals in a position to assist, to possess these opioid antagonists for the purposes of administering them to an overdose victim. It further directs the department of public health to implement and administer the bill including standards and procedures for prescription, distribution, storage, and replacement as well as administration of opioid antagonists and further directs that the department of public safety implement training procedures for first responders in the administration of opioid antagonists. The bill also states that an individual in a position to assist who has acted reasonably and in good faith shall not be liable for any injury arising from his or her administration or assistance with administration of the opioid antagonists. Signed on 4/6/16. Effective Date 7/1/16.

PROBATE & TRUST LAW

HF 2266 **Unclaimed Cremated Remains.** Amends Iowa Code Section 144.27 to allow a funeral director responsible for filing a death certificate, after cremated remains are unclaimed for 180 days, to release to the department of veterans affairs the name of the deceased individual for the purposes of determining whether that individual is a veteran or dependent of a veteran and therefore eligible for inurnment at a veterans cemetery. The funeral director may also release identifying information including the person's social security number, and any military discharge documents. The department must notify the funeral director in the event the deceased individual is determined to have been a veteran. It further provides that a funeral director is immune from liability arising from any act performed under these provisions, except in the case of intentional misconduct. Signed 3/30/16. Effective Date 7/1/16.

REAL ESTATE & TITLE LAW

HF 2265 **Address Confidentiality Program.** Adds a new section to Iowa Code Section 9E, which states that an individual participating in the address confidentiality program under Iowa Code Section 9E.5 shall not be compelled to disclose his or her address during discovery or during proceedings before a court unless both of the following are met: 1) the information is necessary for litigation to proceed; and, 2) there are no other practical means of obtaining the information or evidence. Under Iowa Code Section

9E.5, individuals who are victims of domestic abuse, stalking, human trafficking, or sexual abuse, are eligible to be program participants. Signed on 3/23/16. Effective Date 7/1/16.

SF 2164 **Expungement of Criminal Offenses Related to Alcohol Consumption.** Amends Iowa Code 123.46 as it relates to expungement of offenses for public intoxication, simulated intoxication, and related local ordinances. After the expiration of two years from the date of conviction of an offense under Iowa Code 123.46, an individual may petition the court to expunge his record, including for any violation of a local ordinance arising from the same transaction or occurrence. Upon such petition, the court shall expunge the record and the criminal history related to this record shall be removed by the clerk of the district court. Signed by Governor on 4/6/16. Implementation Deadline is 7/1/17.

SF 2276 **Standards for Land Surveying.** Amends Iowa Code 331.606B by adding a new section and subsections, which does the following:

- Provides for formatting requirements for documents prepared by a land surveyor and presented for recording with the county recorder's office.
- Requires that if during the construction of a public improvement project, the individual or entity responsible for the project determines that a monument may be disturbed during the course of construction, the individual or entity must hire a land surveyor to locate and preserve the monument.
- Requires the land surveyor to review all relevant documents necessary to locate and preserve any monument and to conduct a field survey of the construction corridor to preserve the location and elevation of any such monument.
- Requires the land surveyor to prepare a monument preservation certificate and record the monument preserved.
- Prohibits a certificate from being produced in place of a plat survey or acquisition plat where a true land boundary is required to be prepared to identify survey corners or right-of-way corners.
- Requires a surveyor to prepare a retracement of plat survey for each survey performed for the purpose of surveying an existing recorded description of land and defines "retracement plat of survey".
- Specifies the form of a retracement plat and requires that the retracement plat contain the lengths and bearings of boundaries of land survey, as well as all monuments and control monuments contained on the land surveyed. Further requires that the retracement plat be captioned, dated, and accompanied by a description on the parcel.
- Requires distance to be shown in decimal feet and curve data to be stated in terms of radius, central angle, and length of curve.
- Requires that if a boundary of surveyed land contains an irregular line, the land surveyor enclose that part of the land with a meander line or offset line with as much certainty as can be determined.
- Requires acreage to be shown to the nearest 0.01 of an acre.
- Adds retracement plat to the documents which a land surveyor must record with the county recorder within 30 days after signature.

Signed by Governor on 4/6/16. Effective Date 7/1/16.

TAX LAW

SF 2301 **Iowa Educational Savings Plan Trust.** Amends the Iowa College Savings 529 Plan to includes 501(c)(3) non-profit organizations as eligible plan participants. Under the new sections, these organizations will be able to open accounts for individual beneficiaries and make contributions for the future post-secondary education of those beneficiaries. These changes are retroactive to January 1, 2016. Signed by Governor on 5/25/16, effective upon signing.

IV. AFFIRMATIVE LEGISLATION AND BILLS OF INTEREST THAT DID NOT PASS DURING 2016 LEGISLATIVE SESSION

HF 2447 ***Probate Court Costs.*** *Relates to how the clerk of probate court determines and collects charges in connection with services provided in probate matters. Excludes from the determination of court costs property over which the court lacks probate jurisdiction and for which the clerk renders no services. Specifies that for purposes of calculating the costs for other services performed by the court in the settlement of the estate of any decedent, minor, person with mental illness, or other persons laboring under legal disability, the value of such a person's personal property and real estate is equal to the gross assets of the estate listed in the probate inventory minus, unless the proceeds of the gross assets are payable to the estate, joint tenancy property, transfers made during such person's lifetime such as to a revocable trust, and assets payable to beneficiaries. This bill was assigned to the Ways and Means Committee and a fiscal note was issued, but ultimately it did not advance.*

SF 2112 ***Uniform Fiduciary Access to Digital Assets Act (UFADAA).*** *Adopted by the Uniform Law Commissioners in July 2014, the Act ensures that legally appointed fiduciaries can access, delete, preserve, and pass along a person's digital assets (i.e., documents, photographs, e-mail, and social media accounts) as appropriate. This bill was referred to the House Judiciary Committee but did not advance.*

SSB 3032 ***Attorney Fees in an Action to Quiet Title.*** *This bill would update Code Section 649.5, which relates to attorney fees and court costs for a party who succeeds in an action to quiet title and who requested a quitclaim deed from the party holding an apparent adverse interest prior to bringing the action to quiet title. Brings the dollar amounts closer to current market rates and maintains the moving party's ability to request attorney fees. This bill was referred to the judiciary committee but did not advance.*

HF 2326 ***Forcible Entry and Detainer Actions.*** *This bill makes changes to procedures for eviction after forfeiture of a real estate contract. Grants statutory authority under Code Chapter 648 for a vendor in a real estate installment contract to seek Forcible Entry & Detainer action against holdover vendee who fails to vacate after forfeiture proceedings are complete, while affording holdover vendees proper due process. Allows small claims magistrates to hold preliminary hearings in forfeiture cases and to enter judgments of removal only if the defendant defaults or appears and does not raise facts which would constitute a defense to eviction. Provides that a judgment of eviction also operates against persons holding under the defendant, such as subtenants, the defendant's children, and persons living on the premises by permission of the defendant. The Senate deferred on this bill and it did not advance.*

SF 220 ***Expert Witness Fees.*** *This bill amends Code Section 622.72 to remove the $150 per day cap on expert witness fees and to permit the district court to assess as costs a fair and reasonable expert witness fee in an amount not to exceed $2,500 for the expert's time testifying at trial or in depositions used at trial. This bill passed the Senate and was referred to the House Judiciary Committee but did not advance.*

SF 2232 ***Redemption from Tax Sale of Property Owned by Persons with Disabilities.*** *Remedies issues arising from Iowa Court of Appeals decision Firestone v. FT13 (Filed 4-30-14) relating to redemption issues arising from ownership of property by minors or persons of unsound mind. Referred to Judiciary Committee but did not advance.*

HF 2264 ***Clarification of Roles in Child Representation.*** *Amends Code Section 598.12 to clarify roles of child's attorney, guardian ad litem, and custody investigator. Existing 598.12 provisions for child representation are not compliant with ABA standards for child representation. This bill was passed by the Senate and passed the House Judiciary Subcommittee but was ultimately funneled.*

SSB 3033 ***Waiver of 90-day Waiting Period.*** *This bill would allow for waiver of 90-day waiting period at the court's discretion upon the agreement of the parties. Current Code Section 589.19 requires a 90-day waiting period before the court can grant a decree dissolving a marriage unless grounds of emergency or necessity exist which satisfy the court that immediate action is warranted or required. This bill was referred to Senate Judiciary Committee but did not advance.*

HF 2378 ***Appellate Deadlines for Private Termination of Parental Rights****. This bill amends Iowa Code Section 600A.9(2) to reduce the 30-day appeal deadline for private termination of parental rights (TPR) actions to a 15-day appeal deadline to be consistent with Chapter 232, which governs TPR actions initiated by the State. Passed the House Judiciary Committee but ultimately funneled.*

SF 2063 **Sexual Exploitation by Attorney**. This bill creates a criminal offense for sexual exploitation by an attorney and includes provisions for civil causes of action for damages caused to the client as a result of such exploitation. Any such action must be brought within five years of termination of the attorney's legal services. This bill was referred to the Judiciary Committee but did not advance.

HF 2332 **Statute of Repose for Construction Defects.** This bill would limit the cause of action brought for a construction defect case to mirror language commonly used in relation to a statute of limitations. It would limit actions to two years after the act or omission of defendant alleged in the action to have been the cause of the injury or death is discovered or would have been discovered had reasonable diligence been exercised, whichever occurs first. This bill was referred to the Judiciary Committee but did not advance.

SSB 1029 **Judicial Residency Requirements.** This bill distinguishes between the nomination

process and qualifications for district judges and the nomination process and qualifications for appeals judges or supreme court justices. The bill states that a district court judge appointee must be a resident of the judicial district to which the appointment is made prior to assuming office. In cases where the judicial district is divided into judicial election districts, the court requires that the appointee shall be a resident of the judicial election district to which the appointment is made prior to commencing any judicial duties.

HF 2432 **Judicial Salaries.** Under current law, salaries of judicial officers are set by the general assembly. This bill would modify existing law to grant authority to the supreme court to set salaries for judicial officers. It further provides that the salaries are to be paid from the general operating funds for the judicial branch. The bill also changes the current law, which apportions the number of district associate judges based on population, and requires instead that the supreme court prescribe a formula for determining the number of judges in each judicial district based on a model that would consider case-related workload, travel time, and other judicial duties.

SF 2178 **Final Disposition Orders.** This bill concerns the final disposition of a person's remains. It provides that a written declaration designating a person to make decisions regarding the final disposition of a person's remains is not required to be contained in or attached to a durable power of attorney for health care. The bill also states that any such declaration may include a directive indicating whether the declarant wishes to be cremated, and that if such a declaration is made, the designated individual may not make a decision to the contrary concerning whether cremation does or does not occur. Any written declaration must contain alternative statements, one of which shall be initialed by the declarant, indicating whether the declarant wishes to be cremated.

HF 2090 **Joint Legal Custody and Physical Care.** This bill changes current law to *require* rather than *permit*, a judge to order joint physical custody in instances where the court award joint legal custody, with the exception of when the court makes a finding that joint physical custody is not in the best interests of the child.

HF 2048 **Body Cameras for Law Enforcement.** This bill requires certain peace officers, including tribal law enforcement officers to wear and use body cameras. The requirement applies to county sheriffs or deputy sheriffs, city peace officers, peace officers members of the department of public safety, peace officers at a regents institution, conservation officers, employees of the department of transportation designated as peace officers, employees at the aviation authority designated as peace officers, and certified tribal law enforcement officers. Under the bill, these individuals would be required to wear body cameras at all times while on duty and in uniform.

SF 2117 **Transfer on Death Deeds.** This bill allows an individual to execute a transfer on death deed outside of probate to one or more beneficiaries, effective upon the death of the transferor. Certain requirements must be met for the deed to be valid, including that it must contain all the essential elements of a properly recordable inter vivos deed. It must state that the transfer to the designated beneficiary is to occur at the time of the transferor's death and must be recorded in the county recorder's office prior to the death of the transferor. The transfer on death deed is revocable, even if the deed states that it is irrevocable. During the course of the transferor's lifetime, the transfer on death deed does not affect the transferor's interest in the property.

Bridge the Gap Seminar

Estate Recovery

8:30 a.m. - 9:00 a.m.

Presented by:
Benjamin Chatman, SUMO Group Inc.
Estate Recovery Program
317 6th Avenue, Suite 600
Des Moines, IA 50309
Phone: 515-246-9841

Thursday, September 8, 2016

IOWA MEDICAID ESTATE RECOVERY

BEN CHATMAN, ESTATE RECOVERY PROGRAM
Iowa Department of Human Services
Iowa Medicaid Enterprise, Revenue Collections Unit
Health Management Systems

Mailing Address:
Estate Recovery Program
P.O. BOX 36445
Des Moines IA 50315

Street Address:
Estate Recovery Program
317 6th Avenue, Suite 600
Des Moines IA 50309

www.iowa-estates.com
estates@sumogroup.com
bchatman@sumogroup.com
bchatma@dhs.state.ia.us
Phone: 515/246-9841
Fax: 515/246-0155
Toll-free 877-463-7887

Revised 8/16

Iowa Medicaid Estate Recovery

I. History of Medicaid Estate Recovery in Iowa

II. Estate Recovery – Iowa Code Section 249A.53(2)
- A. Establishment of the debt
  1. Provision of services rendered
  2. Medicare Buy-in, ACA, MCO's, and other capitation fees
  3. Medicare Improvements for Patients and Providers Act (MIPPA)
- B. Waiver (or deferral) of the debt
  1. Waiver for spouse or child -- 249A.53(2)(a)(1)
  2. Waiver for undue hardship – 249A.53(2)(a)(2)
- C. Probate Assets
  1. Bank accounts – 633.356(8)(b)
  2. Excess burial funds -- 523A.303
  3. Real estate
  4. Household goods and personal effects
  5. Litigation -- 633.336 and 147.136
- D. Expanded Probate – 249A.53(2)(c)&(d), 42 U.S.C. 1396p(b)(4)(B)
  1. Jointly held property
  2. Life estates
  3. Interests in Trusts
  4. Annuities, POD's, TOD's, IRA's, IPERS, etc.
  5. Life insurance -- 633.5, 523A.303
- E. Expenses
  1. Higher priority expenses--633.425
     a. Court costs and administrative expenses
     b. Funeral and medical expenses
     c. Taxes and debts owed to Federal and State governments
  2. Bankruptcy Issues – Post-petition debt
- F. Other provisions
  1. Interest – 249A.53(2)(e)
  2. Reporting and referrals – 249A.53(2)(f)(1)
  3. Liability for personal representatives – 249A.53(2)(f)(2)

III. Estate Recovery Procedure
- A. Referral process
- B. History process and Initial Contact to Representative
- C. Probate Notices -- 633.410; 633.231; 633.304A; 635.13
- D. Deposit process and other matters

IV. Income Trusts and Special Needs Trusts – Chapter 633C

IOWA APPELLATE ESTATE RECOVERY CASES

I. History of Medicaid Estate Recovery in Iowa

Congress passed the first estate recovery law for Title XIX medical assistance in 1982 that encouraged voluntary compliance by the states. Several states had similar programs in place prior to 1982 for the recovery of long-term care expenses and readily adopted estate recovery, but others refused to implement these regulations. The federal Budget Reconciliation Acts of 1993 and 1994 then mandated that states recoup Medicaid payments from the estates of recipients. See 42 U.S.C. 1396p(b).

Iowa complied with the federal mandate effective July 1, 1994. All states now have an estate recovery program, but they vary greatly in their policies, procedures, and efforts. The Iowa Department of Human Services ("IDHS") has contracted with Health Management Systems, Inc., to administer the program since 1994, which subcontracts with SUMO Group, Inc., an Iowa corporation, located in Des Moines.

Prior to July 1, 1994, only medical assistance that was incorrectly paid was recoverable as a debt due the State, and it was classified as a claim with taxes, as then provided in 249A.5(1). The legislature retained the language of this section, but also added the words, "except as provided in subsection 2". Estate Recovery was then established by statute in 249A.5(2), with medical assistance debts being due to the IDHS. References in all of the cases on the previous page are therefore to 249A.5(2). However, in 2013, as recommended by the Iowa Code Editor, the Estate Recovery provisions were moved to 249A.53(2), with no changes to the text of the statute.

II. Estate Recovery -- Iowa Code Section 249A.53(2)

A. Establishment of the debt.

1. *Provision of services*

A debt is due for medical assistance upon the recipient's death 1) when the recipient was age 55 or older; or 2) when the recipient was under 55 and a resident of a nursing facility, intermediate care facility for persons with an intellectual disability, or mental health institute, who cannot reasonably be expected to return to the individual's home. Title XIX medical assistance is often known as Medicaid, and provides funding for several programs such as Medically Needy, the Iowa Health and Wellness Plan, and Elderly Waiver.

Medicaid is generally for persons who cannot afford to pay their own medical bills and who meet certain criteria for assets and income. Eligibility for Medicaid is obtained through IDHS. Any funds expended on behalf of a recipient who meets the above qualifications are treated very similarly to a loan or a line of credit that must be repaid at the time of death from any assets the recipient had at that time. However, the medical assistance debt is not based upon a contract like a loan or line of credit. The debt is created by statute in Section 249A.53(2) based on the provision of medical assistance to an individual.

2. *Medicare Buy-in and other capitation fees*

Title XIX medical assistance, or Medicaid, is often confused with Medicare, which is similar to an insurance program for the elderly. Unlike Medicare, Medicaid is intended for indigent individuals who qualify by having less than the required amounts of income. Assets are also a factor in determining

eligibility under most Medicaid programs. As Medicaid members often do not have resources to pay their Medicare premiums, part of the medical assistance provided may be for the payment of the Medicare premiums.

Medicaid also pays for health insurance premiums for the Iowa Health and Wellness Plan, which was adopted to comply with the Affordable Care Act. This Act is for those persons of working age population, ages 21 to 65, who are not in long-term care. Under the Iowa Health and Wellness Plan, most recipients whose income is less than 133% of the poverty level are enrolled in a Managed Care Organization like other recipients under Iowa Health Link. Assets are not considered as part of the eligibility determination for those who receive Medicaid benefits pursuant to the Iowa Health and Wellness Plan. However, as other Medicaid programs, the estates of those persons over 55 years of age are subject to estate recovery. (Under the Affordable Care Act, those with incomes over 133% of the poverty level are not part of the Medicaid program, but may receive subsidized payments through the federal health insurance exchange.)

The medical assistance program also pays other capitation rates which are defined in 441 IAC 88.61 as “the fee the department pays monthly to the contractor for each enrolled Medicaid member for the provision of covered, required, and optional services, whether or not the enrollee received services during the month for which the fee is paid.” In accordance with 441 IAC 88.63(2), Medicaid members “shall be subject to mandatory enrollment in the Iowa Plan for Behavioral Health, established as the managed care plan to provide mental health and substance abuse treatment.”

3. *Medicare Improvement for Patients and Providers Act*

Congress passed the Medicare Improvements for Patients and Providers Act (MIPPA) in July 2008 that was effective January 1, 2010. This Act limits the recovery of medical assistance, by excluding those who are enrolled pursuant to the Medicare Cost Sharing ("MCS") Program. The Estate Recovery Program excludes these amounts incurred after January 1, 2010 when obtaining debt information for those who receive benefits pursuant to the MCS program.

Medicaid payments made on and after January 1, 2010 for Medicare cost-sharing benefits are excluded for estate recovery for members who are:

- ♦ Eligible for QMB
- ♦ Eligible for SLMB
- ♦ Eligible for E-SLMB
- ♦ Eligible for Qualified Disabled Working People (QDWP)
- ♦ Dually eligible for a full Medicaid coverage group and QMB
- ♦ Dually eligible for a full Medicaid coverage group and SLMB

B. Waiver (or deferral) of the debt

Waivers for estate recovery are, in effect, a deferral of the collection of a debt. Spouse and child waivers are described in 249A.53(2)(a)(1), (b)(1), and (b)(2), and waivers for undue hardship are described in 249A.53(2)(a)(2) and (b)(3). See also 441 IAC 75.28(7)(g-h). The collection of the debt is not waived as to assets received by persons who do not qualify for the waivers. Upon the death of the waiver recipient, the debt is again collectible to the extent of the

assets received by the waiver recipient or to the extent of the debt, whichever is less.

1. *Waiver for spouse or child -- 249A.53(2)(a)(1), 249A.53(2)(b)(1) and (2)*

If the deceased Medicaid member had a surviving spouse, a minor child, or a blind or disabled child at the time of the recipient's death, the collection of the debt is waived. The collection of the debt is only waived 1) to the extent that collection of the debt would result in a reduction of the amount received by the spouse or child and 2) only until the death of the surviving spouse, or the blind or disabled child, or until the minor child reaches the age of 21. Upon the death of the spouse or disabled child or the minor child reaching the age of 21, the debt is then collectible to the extent that the spouse or child received assets from the deceased medical assistance recipient.

Often, inquiries are received as to whether the medical assistance "lien" will affect the transfer of real estate. Other states routinely provide for liens to be placed on real estate, but Iowa has not adopted this approach. Heirs may consent to a lien against the property to confirm and clarify the IDHS's position as to the heirs in the future, but ordinarily, there is no real estate lien for a medical assistance debt. The real estate may be sold during this period when the collection of the debt is waived. In fact, real estate is often sold to pay for the care of the spouse or disabled child. There is no estate recovery during the lifetime of the surviving spouse or disabled child provided all of the decedent's assets went to those persons.

2. Waiver for undue hardship – 249A.53(2)(a)(2)

To be eligible for an undue hardship waiver, the heir or beneficiary must receive assets from the estate, and have 1) an income level of less than 200% of the poverty level; 2) less than $10,000 in resources, not including the house; and 3) the application of estate recovery would deprive the person of food, shelter, clothing, or medical care such that life or health would be endangered. See 441 IAC 75.28(7)(g)(2). The most frequent application of this section is when the sale of a house passing solely to a son or daughter of a deceased medical assistance recipient will deny that person of a place to live. The undue hardship waiver applies when the above-described waivers for a spouse or child do not apply. Collection of the debt returns at the time of the waiver recipient's death (just as in the waiver for a spouse or disabled child) or when the waiver recipient no longer meets the undue hardship criteria.

If a waiver is approved by IDHS, the files are placed in a separate location until the death of the surviving spouse, disabled or blind child, or hardship waiver recipient, or if the hardship waiver recipient no longer meets the hardship waiver guidelines. Information regarding the assets received by a waiver recipient may reduce the amount of the debt collected when the waiver expires, so it is important to provide that information at the time of the waiver.

There is no interest on waived debts during the time of the waiver period as interest commences six months after the debt comes due. See 249A.53(2)(e).

C. Probate Assets

Medical assistance recipients generally must have less than a certain amount of assets to be eligible for assistance. These assets are then determined to be exempt for eligibility purposes, but at death these exemptions are no longer available, and so they become subject to recovery. The most common types of assets are the funds in bank accounts, excess burial trust funds, and real estate. If there is no real estate, there is usually no probate estate opened.

The Estate Recovery Program must analyze the assets of the decedent as if a snapshot was taken of net worth at the time of death. There is no five-year look back for estate recovery. However, if the Estate Recovery Program identifies an *inter vivos* transfer that appears to be improper, a referral can be made to the Economic Divestiture Unit of the Iowa Department of Inspections and Appeals, which is part of a federally mandated Medicaid Fraud Control Unit (MFCU).

1. *Bank Accounts* – Most medical assistance recipients are allowed to have a bank account of no more than $2,000. This is often the only remaining asset of the recipient. For example, if a burial fund is used to pay for funeral and burial expenses, and there are no other higher priority expenses, the remaining amounts in the bank account are then paid to IDHS through the Estate Recovery Program by one of the following: a joint account holder whose name is on the account for convenience; an affidavit pursuant to 633.356(3) or 633.356(8)(b); or through a probate of the estate along with other assets. A bank account with a pay-on-death clause may transfer to another person as a joint bank account does, but the funds remain subject to the medical assistance debt as these funds were an asset of the recipient at the time of death pursuant to 249A.53(2)(c).

Occasionally, memorial money will be placed in a bank account. Heirs of a decedent may receive money as a memorial to pay for the funeral, luncheon expenses, or other items in memoriam of the decedent. Since these funds are not an asset of the decedent at the time of death, but rather given to the family after death, the estate does not have an interest in these funds at the time of death. There is no obligation to pay memorial funds to reimburse the debt. The family may pay expenses out of the decedent's bank account until no further funds remain for the Estate Recovery Program, and then use memorial money if necessary. The family may keep memorial money, as it is not a recoverable asset for estate recovery.

2. *Excess burial funds* -- Often a recipient will have a non-guaranteed irrevocable burial trust fund at the time of death. This includes burial trusts funded by annuities or insurance. Pursuant to 523A.303, the "Seller," which is generally the funeral home, must provide notice to the Director of IDHS if funds remain in the trust account after payment of reasonable funeral expenses. Since IDHS automatically forwards these notices to the Estate Recovery Program, it is preferable to forward these notices directly to the Estate Recovery Program. This can be done online at the website indicated on the cover sheet to this Outline. If a probate estate is not opened, the seller must remit the excess funds to the Estate Recovery Program up to the amount of the claim of medical assistance.

The seller may retain up to $50.00 for administering these funds, and should forward the remaining funds to the Estate Recovery Program after receiving confirmation that a debt is due. This confirmation must be made within

60 days of the notice to the Estate Recovery Program, or the seller may disburse the funds to the next of kin. Section 523A.303 protects the seller from liability if the funds are disbursed to the next of kin pursuant to this Section. However, the funds are still an asset of the estate and may be recovered from next of kin pursuant to 249A.53(2).

3. *Real estate* -- All assets of the estate of a medical assistance recipient are subject to probate in accordance with 249A.53(2)(d), but the amount of remaining assets often do not justify opening an estate. A probate estate is generally opened to transfer real estate when the deceased medical assistance recipient has title to, or an interest in, real estate at the time of death, and there are no other surviving owners. Most probate cases in which there is an estate recovery claim can be probated pursuant to the Small Estate Chapter, which is Iowa Code Chapter 635, as estate assets are generally less than $100,000. This chapter provides slightly better fee provisions for executors and attorneys than Iowa Code 633. See 635.8(3).

4. *Household goods and personal effects* – All personal property is recoverable pursuant to 249A.53(2)(c). However, the value of the remaining items often does not justify the costs of the sale of this property. While the value of these items is recoverable, the personal representative is responsible to value these items just as if a probate estate was opened and there was no medical assistance debt.

5. *Litigation* – Most litigation involving a Medicaid recipient's claims against third parties is within the provisions of 249A.54 for living recipients, and

not 249A.53(2). The proceeds of any settlement or judgment are distributed pursuant to 249A.54(5) and not in accordance with normal subrogation rules. The term “subrogation” was deleted from 249A.54 apparently in response to Hill v. State, Department of Human Services, 493 N.W. 2nd 803 (Iowa 1992), and replaced with the word “lien” for pre-death recoveries.

If, however, the Medicaid recipient dies and meets the qualifications for estate recovery as stated above, the estate recovery provisions of 249A.53(2) and 633.425(7) will apply if the estate of the recipient has an interest in recovering in the litigation. This includes when a decedent has a pending action for personal injuries pursuant to 147.136 for medical negligence, to the extent that the collection of the damages must be paid to the estate. Then these assets, like other litigation assets, are recoverable for payment of the medical assistance debt pursuant to 633.425(7) before payment to heirs or beneficiaries.

If the wrongful death statute as found in 633.336 is applicable and there is a surviving spouse, child, or parent, the recoverable medical assistance from the litigation is reduced to the amount of medical assistance related to the injury and provided between the time of the injury and the date of death. However, if there is no surviving spouse, parent, or child, the assets are distributed as personal property of the estate. A wrongful death action is subject to recovery of Medicaid related to the injury, even if the person may not qualify for estate recovery by being over 55 or residing in long term care. In Estate of Clark, Filed October 5, 2011, Unreported Decision, (Iowa Court App.), the Court held that the case was

not ripe for review where the Plaintiff had not yet proven any damages or liability against the alleged wrongdoer long term care facility.

D. Expanded Probate Assets

Assets of the estate for purposes of estate recovery are defined as "any real property, personal property, or other asset in which the recipient, spouse, or child had any legal title or interest at the time of the recipient's, spouse's, or child's death." See 249A.53(2)(c), which was adopted in Iowa to implement 42 U.S.C. 1396p(b)(4)(B). These expanded probate assets are subject to probate pursuant to 249A.53(2)(d). The reference to the spouse or child in this section pertains to the collection of debts that have returned after a waiver.

1. *Jointly held property* – Section 249A.53(2)(c) specifically includes jointly held property as an asset of an estate for the purposes of the recovery of the medical assistance debt. In Estate of Serovy 711 N.W. 2nd 290 (Iowa 2006), the Court held that a deceased recipient's one-third jointly held interest in a home was subject to probate and could be sold to pay the medical assistance debt. The Court required a partition action or a buyout figure to settle the claim, rather than allowing the sale of the entire house within the estate proceedings.

In Estate of Kirk, 591 N.W. 2nd 630 (Iowa 1999), the Court held that as to the jointly held property in the case, the executor could not disclaim the recipient's proportional interest, which must become part of his or her estate. The only interest available for the recipient to disclaim was the accretive interest that would have passed to her upon the predeceased spouse's death. The Court held

that a disclaimer only applies to property that passes upon death to the disclaimant, not to property owned by the disclaimant prior to the death.

The court further held in Kirk that the Iowa Code disclaimer provisions in 633.704 (now in Chapter 633E) can be used to frustrate the collection of Medicaid claims, since a disclaimer is merely viewed as a refusal to accept property from another. The Kirk case and disclaimers do not apply to eligibility issues as the Iowa Code was amended subsequent to Kirk, which limited the case's potential applicability. See 633E.15, and 249A.3(11)(c).

In Estate of Lovan, Filed 2/23/2011, Unreported Decision (Iowa App 2011), the Court upheld the District Court's conclusion that there was not clear and convincing evidence to overcome the presumption that the medical assistance recipient and her son held equal interests in property, which was held as tenants in common.

2. *Life Estates* – Another real estate issue is a decedent's interest in a life estate. A life estate interest owned by a person at the time of death is recoverable pursuant to both 249A.53(2)(c) and 42 U.S.C. Section 1396p(b)(4)(B). Congress intended the definition of "estate" to be broader under 42 U.S.C. Section 1396p than common law definitions and therefore non-probate transfers of assets on death are subject to estate recovery.

Section 249A.53(2)(c) was amended on April 5, 2002, to include "retained life estates" as a specific type of asset that is recoverable, and a definition is provided for retained life estates in 249A.2(11) that includes property that was

previously owned by a spouse of the recipient. If the life estate interest is not "retained" as defined in 249A.2(11), then there is no recovery from that interest.

In Estate of Laughead, 696 N.W.2d 312 (Iowa 2005), the Court held that a life estate may be included in the probate estate of a deceased medical assistance recipient, and that the estate is therefore liable for the payment of the medical assistance debt from the value of the life estate. The Court also found that "the phrase 'at the time of death' means the time immediately before the Medicaid recipient's death".

IDHS allows the Estate Recovery Program to use the Iowa Department of Revenue life estate remainder mortality table to determine the value of the life estate for deaths after April 5, 2002, and this table was revised effective July 1, 2004. However, for eligibility considerations, IDHS uses the federal life estate remainder tables. All three tables can be found on the Estate Recovery website: www.iowa-estates.com.

Often, if the recipient has a "retained life estate" at the time of death, the real estate must be sold or the remaindermen must pay the value of the life estate before they can obtain clear title to the property. Also, depending on the date and circumstances surrounding the transfer, the entire value of the real estate may be recoverable if the transfer was within five years prior to eligibility for medical assistance. See 249F.2(2).

If, for example, the recipient owns the real estate at the time of death, but the will grants the spouse a life estate with a remainder interest to their children, the entire value of the property is a recoverable asset. The life estate portion is

waived from the collection of the medical assistance pursuant to 249A.53(2)(a)(1) for the lifetime of the spouse. The remainder interest is recoverable from the estate of the recipient at the time of the recipient's death, and the waiver of collection only defers the time for payment. The property may be sold and apportioned according to the table, or the spouse may reside in the premises, as long as the interest of IDHS is protected so that when the spouse passes away, then the entire property can be used to repay the debt.

In Estate of Jones, Filed 8/6/2009, WL 2424579 (Iowa App. 2009) the estate did not dispute that a life estate interest was subject to the medical assistance debt pursuant to Section 249A.53(2)(c), but the attorney requested fees based on a percentage of the entire real estate value instead of the life estate interest. The Court of Appeals held that it was proper to use the entire real estate value as the maximum amount of fees, but that the burden of showing the services rendered and value thereof rested upon the persons claiming those fees. Subsequently, the attorney provided an itemized statement of fees.

In Estate of Escher, Filed 4/8/2010, Unreported Decision (Iowa App 2010), the deceased medical assistance recipient had entered into a real estate contract within a year of her death to sell her home to her sister-in-law and retain a life estate. She also left the home in her will to her sister-in-law, who also filed a claim alleging that she had provided care to the decedent. The sister-in-law argued that either by virtue of the contract, the will, or the care she provided, she should have a priority over the medical assistance claim. The Court rejected these arguments and upheld the priority of the medical assistance claim.

3. *Trusts* – Interests in trusts are specifically included as an asset for Estate Recovery in 249A.53(2)(c). Generally, a pure discretionary trust in which the recipient has no interest at the time of death will not be subject to Estate Recovery. Also, a trust that provides for only the net income to be paid to the recipient will only be recoverable to the extent of the net income to which the recipient was entitled. However, a trust that provides for the support of a recipient, as well as any other "interests in trusts" of the Medicaid recipient will be subject to repayment of the medical assistance debt.

In certain trusts, there is an element of discretion drafted into the terms of a support trust. In In re Barkema Trust, 690 N.W. 2d 50 (Iowa 2004), the Court held that if the recipient had an interest in a trust, pursuant to 249A.53(2)(c), then there is recovery to the extent of the recipient's interest in the trust. See also Estate of Gist, 763 N.W. 2d 561 (Iowa 2009), where the Court held that the funds in a spendthrift trust can be recovered for the reimbursement of the medical assistance debt as medical assistance is a necessary expense. This principle has been codified in 633A.2302(3)(a). See also Trust of Kinsel, Filed 2/10/2010, WL 446551, (Iowa App. 2010) addressing the potential impact of 633A.4702 on a trust that has both support and discretion. Also, in Estate of Roth, Filed 12/22/2010, Unreported Decision (Iowa App 2010), the Court held that the funds set aside for the care of a spouse must be used to reimburse a medical assistance claim despite there also being discretion in the trustee to make distributions. Further, in Estate of Melby, 841 N.W. 2d 867 (Iowa 2014) the Court

held that the intent of the trustors to pay their indebtedness must include the medical assistance debt owed to IDHS.

4. *Annuities, POD's, TOD's, IRA's, IPERS, etc*.– An annuity is not life insurance but is rather an investment to create income by payments over fixed intervals of time. Although there may be a "beneficiary" designation, the "beneficiary" is not entitled to the funds if there is an outstanding medical assistance debt and the deceased recipient had an interest in the funds at the moment before death. An annuity may be assigned to IDHS and received by the Estate Recovery Program or a commuted value may be used for reimbursement of medical assistance. The funds in an annuity are subject to the medical assistance debt just as a bank account or other investment. Medicaid compliant annuities should have IDHS named as the beneficiary, or in the second position after a spouse, pursuant to the Deficit Reduction Act of 2005, codified at 42 USC 1396p(c)(1)(F) and (G) and 42 USC 1396p(e).

A pay-on-death clause does not alter the status of these funds since an investment is an asset of the recipient at the time of death pursuant to 249A.53(2)(c) and subject to probate pursuant to 249A.53(2)(d). These same principles apply to other accounts with a beneficiary designation such as pay-on-death accounts, transfer on death accounts, individual retirement accounts and IPERS death benefits. To the extent that the recipient had an interest in these funds at the moment before death, they are subject to reimbursement of the medical assistance debt.

5. *Life insurance* – Life insurance policies are typically not property of the estate of a decedent pursuant to 633.5. Life insurance benefits payable to a named beneficiary and are neither property of the estate nor recoverable in most circumstances. Life insurance is generally not recoverable because it is a contract based on risk and there is little or no cash value at the moment before death. However, the funds are recoverable if the policy is assigned or made payable to a funeral home pursuant to 523A.303; if the deceased recipient was the beneficiary (not the insured); or if the policy was not reported to IDHS when obtaining eligibility, and would have made the person ineligible.

E. Expenses

1. *Higher priority expenses* -- Regardless of whether a probate estate is opened, the Estate Recovery Program must use 633.425 to determine the distribution of the assets, as this section is incorporated by reference in Section 249A.53(2)(f)(2). In Vandewalker v. Lau, 581 N.W. 2d 644, (Iowa 1998), the Iowa Supreme Court held that the property of an estate must be distributed in accordance with 633.425. If the claim does not have a higher priority, it cannot be paid before the medical assistance debt.

a. Court costs and costs of administration fees have top priority, see 633.425(1) and 633.425(2). Costs of administration include attorney's fees and executor's fees, as in Iowa Code 633.197 et.seq. and 635.8. These may also include the expenses of preparing and selling real estate or other property, including property taxes.

b. Funeral and burial expenses have the next priority at 633.425(3) and typically include all services provided by the funeral home and the costs of burial as long as the costs are reasonable. Higher priority funeral expenses may include a luncheon; phone calls or postage for notification of death; honorariums for the priest or pastor, organist, or other music; and a burial marker. See the definitions of “Cemetery merchandise” “Funeral merchandise” and “Funeral services” in 523A.102. Travel expenses for family members are not allowed as a higher priority expense, nor are donations to charities.

c. Federal debts and taxes have the next priority at 633.425(4) and state taxes are at 633.425(6). Federal debts may include a loan backed by a federal agency for improvements to a property; a Medicare subrogation claim; or the federal income taxes on the proceeds of an annuity if they were inadvertently paid to a beneficiary prior to the payment of the medical assistance debt.

d. Reasonable and necessary medical and hospital expenses of the last illness are at 633.425(5). Only expenses of the last illness are allowed by statute, and the personal representative has the duty to determine whether the medical expenses are of last illness. Caregiving by relatives is not a medical or hospital expense and should not be paid before the medical assistance debt. See Long v Northup 279 NW 104 (Iowa 1938).

The medical assistance debt is at 633.425(7), ahead of labor claims at 633.425(8), child support at 633.425(9) and other allowed claims at 633.425(10).

2. Bankruptcy Issues – Occasionally, the executor, heirs, or beneficiaries of a deceased medical assistance recipient will claim that the filing of a

bankruptcy petition will cut off the claims of a decedent prior to the time the bankruptcy was filed. In other words, the bankrupt debtor's heirs claim that the bankruptcy will discharge the medical assistance debt. However, bankruptcy courts have held that since the medical assistance debt does not come due until the death of the decedent, the debt is necessarily a post-petition debt, so the bankruptcy filing does not discharge a medical assistance debt.

F. Other Provisions

1. *Interest* -- Interest on a medical assistance debt accrues from six months after the date of death at the same rate as interest on judgments pursuant to 249A.53(2)(e), which incorporates by reference 535.3. The rate is variable at the State Court Administrator's published rates plus two percent. This rate is set six months after the date of death or after a waiver expires. This is the same rate as if a judgment was entered in a personal injury case. See 668.13(3).

2. *Reporting and referrals* – Personal representatives and long-term care facilities are responsible for reporting deaths to IDHS within ten days of the date of death in accordance with 249A.53(2)(f)(1), which will then forward this information to the Estate Recovery Program.

3. *Liability* – In accordance with 249A.53(2)(f)(2), if a distribution is made prior to the payment of obligations pursuant to 633.425 from the estate of the decedent, whether that estate is probated or not, the personal representative or executor may be held personally liable. "Executor" is defined as in 633.3 and "personal representative" is defined in 249A.53(2)(f)(3) as a person who filed a medical assistance application on behalf of the recipient or who manages the

financial affairs of the recipient. Liability is for the amount of medical assistance paid on behalf of the recipient to the full value of any property belonging to the estate that was under the control of the personal representative or executor.

III. Estate Recovery Procedure

A. Referral process

There are consistently over 800 Title XIX recipients or former recipients that die every month in Iowa that are subject to estate recovery. Many of the referrals of these deceased persons are received by letter, fax, phone, or email. Some are received through the estate recovery website: www.iowa-estates.com. A list of deceased recipients is also received monthly from IDHS after the deaths are reported to the Central Office from the county offices. Data is also used from state and national vital statistics records and matched against Medicaid eligibility files. Notification to the personal representatives may be six to eight weeks after death under the automated processes. Direct referrals from attorneys, family members, funeral homes, and other entities are encouraged to expedite the estate recovery process.

When writing or calling, the Estate Recovery Program should be advised of the name of the decedent, the date of death, the date of birth, and the social security number. Information regarding the spouse must be provided to verify whether there is any debt for a predeceased spouse, or if there is a surviving spouse, or if the decedent was divorced or never married at the time of death.

Often discovering the name of the person who is winding up the affairs of the recipient is more difficult than identifying a deceased recipient. Sometimes, this information can only be found in the will. The computer generated lists from the IDHS and from Vital Statistics do not always have the proper contact person. Consequently, letters are occasionally sent to nursing homes, disinterested heirs, or payees that have no further responsibilities in the matter. Direct referrals from attorneys or personal representatives can be very helpful to prevent delays in processing these cases. When inherited funds are spent and then must be repaid, the heirs often become upset that they received the funds in the first place. So, notifying the Estate Recovery Program directly of the death will move the process along more efficiently.

B. History process and Initial Contact to Representative

When a name, birth date, date of death, and social security number are referred to the estate recovery office, the balance due for medical assistance is obtained. The history report generally shows a complete list of all medical assistance payments for services that were paid on the recipient's behalf since July 1, 1994. If the recipient turned 55 years of age after July 1, 1994, and they were not in a long-term care facility before they turned 55, the report should include all medical assistance provided on and after their 55th birthday. If the recipient entered a facility before age 55 and could not reasonably have been expected to return home, the report should show medical assistance provided from that date forward. An additional separate report, known as the buy-in report,

is obtained if the medical assistance program paid Medicare premiums on behalf of the recipient.

Letters to attorneys and representatives include general information on estate recovery and a response form, but generally do not contain the history report. These are provided upon request. If a Probate Notice is received, which is now required in all probate estates pursuant to 633.231, 633.304A, and 635.13, a claim will be filed rather than sending a letter and a form.

Medical assistance providers may submit claims up to one year after the provision of medical assistance. Payment to the providers may be made within 30 days after submission of the claim. Full, final medical assistance history reports and the final amounts due therefore may not be available for thirteen months after the date of death. However, since there is a strong desire by families, funeral homes, attorneys, and others to wind up the affairs of a decedent, an initial amount is sent typically within a few weeks of the referral. If assets exceed the amount of the claim, a final amount is provided when the assets are ready to be distributed. IDHS allows the Estate Recovery Program to obtain a report and consider it final, provided the report is run at least four months after death.

C. Probate Notice and Probate Process

In accordance with Iowa Code 633.231 and 633.304A, effective July 1, 2010, the attorney probating the estate “shall” send a Notice of Probate by electronic transmission on a form approved by the Iowa Department of Human Services to the Estate Recovery Program. The small estate chapter also requires

a notice pursuant to these sections in Iowa Code 635.13. Iowa Code 633.410 provides that the medical assistance debt may be time barred after six months of sending notice by electronic transmission on the designated forms to the Estate Recovery Program, if a claim has not been filed and the proper notice was given. In Estate of Scrimsher, 728 N.W. 2d 852 (Iowa Ct. App. 2007), the Court held that under the previous statute, notice was required by both publication and service of notice by ordinary mail before a claim could be barred as untimely.

Claims are generally filed as soon as practicable after a probate notice is received. However, as explained above, since medical providers often submit claims after death to be paid by the medical assistance program, the Estate Recovery Program must wait at least four months after the date of death to obtain an amount that it can consider as a final amount. Generally, a final amount is not necessary if the debt is much larger than the remaining assets. However, if there are sufficient assets to pay the debt, attorneys and executors should only make payment after they have received a final payoff amount.

If a notice of disallowance is filed, a hearing will be requested on the claim if assets remain to pay the claim. A disallowance of the claim is unnecessary if there are no assets, or insufficient assets, to pay the claim in full.

D. Deposit Process

After the initial letter, cases are reviewed periodically and follow-up efforts are made if the Estate Recovery office receives inadequate information or no response. Checks should be made payable to “Iowa Department of Human Services”. Checks are deposited in an Iowa bank account upon receipt and proof

that there is a claim due for the recipient. All payments are acknowledged with a letter. All of the deposited funds are placed in an account of the Iowa Medicaid Enterprise for payment of future medical assistance benefits.

IV. Special Needs Trusts and Miller Trusts

Medical Assistance Special Needs Trusts and Medical Assistance Income Trusts (also known as MAIT's or Miller Trusts) are trusts to provide medical care and obtain Medicaid eligibility for a person who would not be eligible if the funds in the special needs trust or the individual's income were considered in the eligibility determination. The funds remaining in these types of trusts are paid to IDHS at the time of death, after certain other medical and administrative expenses, pursuant to 633C.2 and 633C.3, as IDHS is the residual beneficiary of the trusts. For this reason, these types of trusts are often called "payback trusts."

Medical Assistance Special Needs Trusts are defined in 42 USC 1396p(d)(4)(A). Also included in the definition of Special Needs Trusts in Iowa Code 633C.1(7) is a type of medical assistance special needs trust where the trustee is a non-profit corporation as defined in 42 USC 1396p(d)(4)(C), and known as a "pooled trust".

The term Miller Trust was derived the federal case of Miller v. Ibarra, 746 F. Supp. 19 (Co. 1990). The holding has since been codified in 42 USC 1396p(d)(4)(B). If a person has too much income to qualify for Medicaid, but has less income than necessary to pay for long term care, then a medical assistance

income trust can be set up for that person. The creation of the trust keeps the trust funds from being counted for Medicaid eligibility.

The Estate Recovery Program is under contract with IDHS, to recover the residual amount in these trusts upon termination of the trusts although the debt may not fall within the definition of estate recovery pursuant to 249A.53(2). The Estate Recovery Program recovers these funds because the trusts are terminated typically at the time of the death of a medical assistance recipient, and IDHS is the beneficiary.

The primary difference between the assets from MAIT or Special Needs Trust and other recoverable assets is that since IDHS is the residual beneficiary of these trusts, the funds are not subject to any waivers or higher priority debts. The funds are payable in accordance with the terms of the trust and not in accordance with the probate code or the estate recovery statute. Occasionally, a trust is terminated before death, and the Estate Recovery Program will also collect the funds for IDHS as residual beneficiary in those cases.

IDHS established the Medicaid Trust Program in 2012 to approve and monitor Medicaid payback trusts. Annual reports are required from these trusts to confirm that they are being administered pursuant to Iowa Code 633C. The Medicaid Trust Program has a website: www.Iowa-MedicaidTrusts.com . This program is operated with the same personnel as the Estate Recovery Program and from the same office, and uses a PO Box of 36565, Des Moines IA 50315.

Conclusion

The Estate Recovery Program engages in public awareness programs by distributing brochures, speaking to organizations regarding the program, and through a web site. Questions or comments are always welcome regarding the administration of the program.

Bridge the Gap Seminar

Substance Abuse

3:00 p.m. - 4:00 p.m.

Presented by:
Dan Moore
Moore Heffernan Moeller Johnson & Meis
PO Box 3207
Sioux City, IA 51102
Phone: 712-252-0020

Friday, September 9, 2016

Lawyers In Need of Assistance: The Impact on the Person, Ethics and the Profession

Hugh Grady
ILAP Executive Director

Today's Outline

- Some facts about the profession
- What exactly is an impaired lawyer?
- Correlations between lawyer impairment and disciplinary chaos
- Golden Rules

Scope of The Impairment Problem

Impact on the Person

Some Data

2015 ABA/Hazelden Betty Ford Foundation Study

- Published in February 2016 Journal of Addiction Medicine
- 12,825 licensed employed attorneys & judges
- Males 53.4%
- Females 46.5%

Alcohol Use- AUDIT 10

- 20.6 % scored at a level consistent with problematic drinking-Using Audit 10 = problem behaviors and levels of use
  - Problematic drinking = hazardous drinking and possible dependence
  - More males (25.1%) than females (15.5%) among lawyers
- Using the Audit 3 = levels of use
  - Physicians 15% problematic drinking
  - Lawyers 36.4%
  - More females than males among lawyers
- Position in the field
  - Higher scores for those working in private firms

Self Reporting-Concerns

- 22.6% felt their use of alcohol or substances was a problem sometime during their lives
- 27.6% reported problematic use prior to law school
- 14.2% reported problematic use started during law school
- **47.7 % reported problematic use started within the first 15 years following law school**
- 14.5% reported problematic use started more than 15 years after law school.

DRUG USE-DAST
Smaller sample 26.7% completed the DAST n= 3419

- Low rates of abuse = 76%
- Intermediate = 20.9%
- Substantial = 3.0%
- Severe = .01%

Depression, Anxiety and Stress Scale = DASS-21

- Depression 28%
- *Males higher levels of depression than females*
  - *Same inverse relationship*
  - Rates decreases as age increased
  - Junior positions = higher rates

ANXIETY/STRESS

- Anxiety 19%
  - *Females higher than males*
- Stress 23%
- Higher scores on Audit correlated with higher scores on the DASS
- DASS scores deceased as age and years in the field increased- similar to Audit

Self Reporting of Mental Health Concerns

- Anxiety 61%
- Depression 45.7%
- Social Anxiety 16.1%
- ADHD 16.1%
- Panic Disorder 8.0%
- Bipolar Disorder 2.4%

Suicidal Thoughts and Self Harm

- 11.5% reported suicidal thoughts during their career
- 2.9% reported self injurious behaviors
- 0.7% reported at least one suicide attempt

Help Seeking Behaviors- Two Common Barriers

- Not wanting others to find out they needed help-Stigm
- Concerns regarding privacy or confidentiality

SIGNS AND SYMPTOMS OF IMPAIRMENT

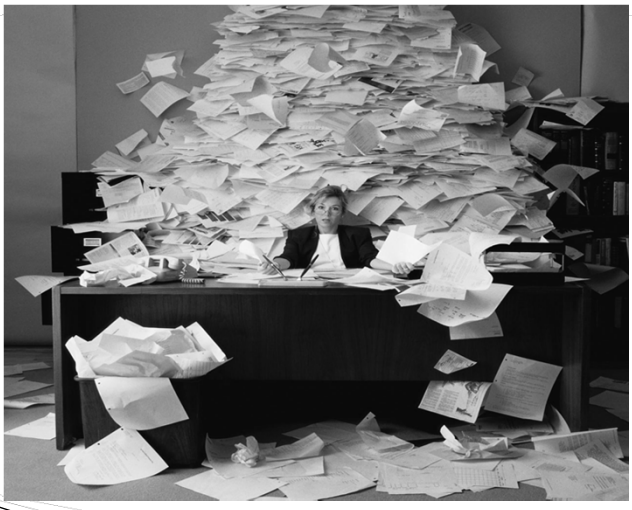
Attendance

- Routinely arrives late or leaves early
- Regularly returns late from or fails to return from lunch
- Fails to keep scheduled appointments
- Fails to appear at depositions or court hearings
- Decreased productivity
- Has frequent sick days and unexplained absences

Job Performance

- Procrastinates, pattern of missed deadlines
- Neglects prompt processing of mail or timely return of calls
- Decline of productivity
- Quality of work declines
- Overreacts to criticism, shifts blame to others, withdraws
- Smells of ETOH in office or during court appearances
- Client complaints
- Co-mingles or "borrows" client funds

Look/Feel Familiar?



Personal Behavior

- Gradual deterioration of personal appearance/hygiene/health
- Loses control at social gatherings or where professional decorum is expected
- Distorts the truth, is dishonest
- OMVI, public intoxication arrest or possession of illegal drug
- Poor time management, failure to timely file tax payments
- Pattern of family crisis
- Pattern of mood swings

IMPAIRMENT AND DISCIPLINE

Rule 32:1.3 Diligence

- A lawyers work must be controlled so that each matter can be handled competently.
- Perhaps no professional shortcoming is more widely resented than procrastination.

Rule 32:3.2 Expediting Litigation

- Reasonable efforts to expedite litigation
- Consistent with interests of client
- Dilatory practices bring the administration of justice into disrepute
- Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client

Rule 32:3.3: Candor Toward The Tribunal

- A lawyer shall not knowingly make a false statement of fact or law to a tribunal.
- Or fail to correct a false statement of material fact or law previously made.

Rule 32:5.1Responsibilities of Partners,Managers, and Supervisory Lawyers

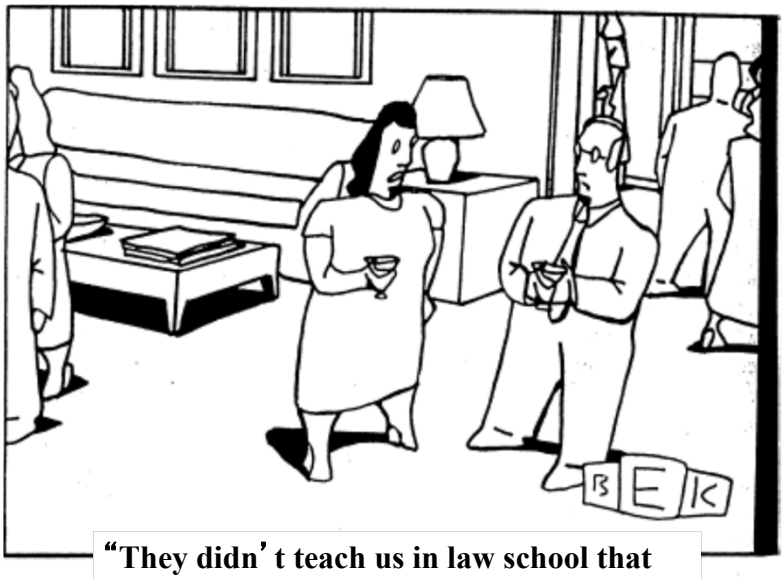
- Reasonable efforts to ensure compliance with Rules of Professional Conduct
- Knowledge and ratification of specific conduct
- Failure to take remedial action

Rule 32:8.3 Reporting Professional Misconduct

- Knowledge requires reporting when one lawyer has knowledge of another
- Judges
- Iowa Lawyers Assistance Program exception
- Confidentiality

What Hurts More than Helps?

- Alcohol or Drug abuse or dependence
- Gambling or other addictions
- Depression or other mental illness
- General sense of imbalance which decreases intrinsic motivation–may lead to the above
- Lack of purpose or connectedness



"They didn't teach us in law school that people are crazy!"

Impact of Stress=Imbalance

- Georgetown Journal of Legal Ethics 2001 cited depression as a significant factor in lawyer discipline
- Louisiana study found 80% of their Client Protection Fund cases involved addictions including gambling.

A

D
O
G'
S

L
I
F
E

The 20 Golden Rules

Richard S. Massington, Miami Fl.

1. Behave yourself
2. Answer the phone
3. Return your phone calls
4. Pay your bills
5. Hands off clients money
6. Tell the truth
7. Admit ignorance
8. Be honorable
9. Defend the honor of your fellow attorneys
10. Be gracious and thoughtful
11. Value the time of your fellow attorneys
12. Give straight answers
13. Avoid the need to go to court
14. Think first
15. Define your goals
16. There is no such thing as billing 3000 hours a year
17. Tell your clients how to behave
18. Solve problems – don't become one
19. Have ideals you believe in
20. Call your mother

Bridge the Gap Seminar

Alimony

10:15 a.m. - 11:00 a.m.

Presented by:
Mary Zambreno
Dickinson Mackaman Tyler & Hagen PC
699 Walnut St
Suite 1600
Des Moines, IA 50309
Phone: 515-246-4512

Thursday, September 8, 2016

598.21A ORDERS FOR SPOUSAL SUPPORT.

1. *Criteria for determining support.* Upon every judgment of annulment, dissolution, or separate maintenance, the court may grant an order requiring support payments to either party for a limited or indefinite length of time after considering all of the following:

a. The length of the marriage.

b. The age and physical and emotional health of the parties.

c. The distribution of property made pursuant to section 598.21.

d. The educational level of each party at the time of marriage and at the time the action is commenced.

e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.

g. The tax consequences to each party.

h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.

i. The provisions of an antenuptial agreement.

j. Other factors the court may determine to be relevant in an individual case.

2. *Necessary content of order.* Orders made pursuant to this section need mention only those factors relevant to the particular case for which the orders are made but shall contain the names, birth dates, addresses, and counties of residence of the petitioner and respondent.

Section History: Recent Form

96 Acts, ch 1106, §18; 2005 Acts, ch 69, §39
Referred to in § 252A.3, 252A.6, 598.20, 598.21, 598.22

Previous Section 598.21 Next Section 598.21B

FACT PATTERN:

- At the time of trial, Husband and Wife were married for 17 years.

- They had two minor children – one in high school and one in elementary school. Both kids are in relatively good health.

- Husband was 48 years old. Wife was 50 years old. Both are in relatively good health.

- Husband was self-employed. His average gross income for the past three years was $130,000.

- Wife earned about $20,000 a year doing some part-time work here and there but for the most part, she was the primary caretaker of the children.

- Assume a 50/50 split of the marital estate.

QUESTION: Would you award alimony? If so, how much and how long?

21 J. Am. Acad. Matrim. Law. 61

Journal of the American Academy of Matrimonial Lawyers

2008

RE-THINKING ALIMONY: THE AAML'S CONSIDERATIONS FOR CALCULATING ALIMONY, SPOUSAL SUPPORT OR...

Mary Kay Kisthardt Journal of the American Academy of Matrimonial Lawyers *(Approx. 22 pages)*

Article

RE-THINKING ALIMONY: THE AAML'S CONSIDERATIONS FOR CALCULATING ALIMONY, SPOUSAL SUPPORT OR MAINTENANCE

Mary Kay Kisthardt [a1]

I. Introduction

The mission of the American Academy of Matrimonial Lawyers is "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be protected." [1] In 2003 President Sandra Joan Morris appointed a Commission (AAML Commission) to critically review the American Law Institute's Principles of the Law of Family Dissolution: Analysis and Recommendations (2002) (Principles), to analyze the Principles and to make recommendations consistent with the mission of the Academy. The Commission's first project was the Academy's Model for a Parenting Plan which was adopted in November 2004 and published in 2005. [2]

After concluding the Parenting Plan, the Commission focused on spousal support (also referred to as alimony or maintenance), which remains a difficult issue for practitioners, judges, legislatures and litigants. [3] The ALI Commission conducted a review of Chapter 5 of the Principles on Compensatory Payments. The Principles are premised on the theory that, absent extraordinary ***62** circumstances, spousal support should be based exclusively on compensation for losses that occurred as a result of the marriage, a proposition that was rejected by the AAML Commission. [4] The AAML Commission also considered extensive feedback from members of the Academy which was gathered through a national survey, a general meeting of the membership and a discussion session that followed an AAML Commission CLE presentation on the issue.

After considering all these sources of information the Commission concluded that there are two significant and related problems associated with the setting of spousal support. The first is a lack of consistency resulting in a perception of unfairness. [5] From this flows the second problem, which is an inability to accurately predict an outcome in any given case. [6] This lack of consistency and predictability undermines confidence in the judicial system and further acts as an impediment to the settlement of cases, because without a reliable method of prediction clients are in a quandary and lawyers can only offer forecasts based on experiential, rather than empirical, backing. [7]

***63** In response to these concerns, many jurisdictions have adopted a formula approach to setting spousal support. [8] This approach is similar to that used to set child support, although the standards for setting spousal support are not the same as those for setting child support. [9] The AAML Commission recognized these differences and its approach for recommending both the amount and length of a spousal support award reflects and responds to the challenges of arriving at a fair result in these cases.

This article will highlight some of the problems inherent in setting alimony awards, review the traditional rationales for alimony, the evolution of the remedy and discuss approaches to addressing the concerns, including the use of guidelines and the AAML Considerations.

II. Current Problems

There are three economic issues involved in most divorce actions: property division, spousal support and child support. Property division is generally based on a partnership model of marriage which suggests that at the dissolution of the partnership, the spouses should share the assets that have been acquired during the marriage. [10] While not all jurisdictions require an even split of the assets, most jurisdictions will generally begin with this assumption. *64 [11] The theory behind child support is obvious: parents have a duty to support their children regardless of marital status and the amounts are set by mandatory guidelines. [12] Spousal support, however, remains the most difficult of the economic issues to resolve because it lacks both the underlying rationale of the other issues as well as any standards by which to predict the amount of the award. [13]

The lack of a coherent rationale undermines the ability to provide consistency in awards. Alimony statutes vary significantly from state to state with some authorizing payments in a wide variety of situations and others restricting it to very narrow circumstances. [14] But in almost all states judges are given a great deal of discretion with the result that these awards are rarely overturned. [15] Because of an inability to come to a consensus regarding the underlying rationale for alimony, legislatures often include a long list of factors for judges to consider. One commentator found over sixty factors mentioned in the fifty states. [16] Unfortunately there are often internal inconsistencies in the factors and no state provides a priority ranking. [17] Judges struggle with *65 how to apply a myriad of factors to reach a fair result. [18] Statutory criteria, with no rules for their application, then result in a "pathological effect on the settlement process by which most divorces are handled." [19]

Without a reliable method of prediction, clients are often uncertain about whether to assume the risk of trial. This situation may present the greatest challenge for women who often do not have the financial resources to fund protracted litigation with an uncertain outcome. [20] A study in Maryland found that courts made very few alimony awards even though a majority of the marriages studied had lasted more than ten years and at the time of the divorce the average income of the husbands was almost double that of the wives. [21] What was striking was the number of cases in which the economically dependent spouse did not seek an award. The authors concluded that this was due in large part to the reluctance to expend money on litigation costs without the likelihood of any beneficial result. [22]

III. In Search of a Rationale

A. The Traditional Theory of Alimony

The initial rationale for alimony or support had its origins in the English common law system. Historically there were two remedies from the bonds of marriage. Although an absolute divorce was theoretically possible, it required an act of Parliament and *66 was therefore hardly ever used. [23] More commonly a plea was made for a separation from bed and board (mensa et thoro). This action available from the ecclesiastical courts constituted a legal separation as absolute divorce was prohibited under canon law. [24] A husband who secured such a divorce retained the right to control his wife's property and the corresponding duty to support his wife. [25] Even after Parliament authorized the courts to grant absolute divorces, the concept of alimony remained. [26] The initial rationale appeared be premised on the fact that women gave up their property rights at marriage and after the marriage ended they were without the means to support themselves. [27] The original award of alimony was similar to the wife's claim of dower, and courts used the traditional one-third of the property standard so instead of one-third of the estate at the husband's death she would receive one-third of the income of her husband at the time of the divorce. [28] The concept of alimony came across the Atlantic with the founding of the colonies but seemingly without a corresponding rationale. [29]

The introduction of the Married Women's Property Acts changed the ability of women to retain property, but alimony remained. [30] It appears that at least one rationale was based on contract *67 theories because, for many courts, the role of fault played a significant role. [31] Alimony then became damages for breach of the marital contract reflected in the fact that in most states it was only available to the innocent and injured spouse. [32] The measure of damages often approximated the standard of living the wife would have enjoyed but for her husband's breach. [33] Alternatively it represented compensatory damages for tortious conduct. [34]

B. The Beginning of the "Modern Era"

In the 1970's the economic picture of spouses at divorce began to change. Many states adopted principles of equitable distribution allowing for property acquired during the marriage to be divided between the spouses regardless of how it was titled. This allowed economically dependent spouses to retain assets that were previously unavailable to them. Property division was used to address the inequities. These statutes resulted in decreasing spousal support awards. [35]

In addition, women, who were historically the economically dependent spouses, joined the workforce in increasing numbers. [36] ***68** The previous assumption that women would be unable to support themselves through employment gave way to the idea that dependence could no longer be used as a rationale for alimony. However, the practical reality of women's financial dependency remained in many marriages. [37]

With the advent of no-fault divorce, alimony also lost its punitive rationale. The Uniform Marriage and Divorce Act (UMDA) changed the character of these awards to one that was almost exclusively needs based and at the same time gave spousal support a new name: maintenance. [38] Maintenance was only available to the spouse who had an inability to meet his or her reasonable needs through appropriate employment. The marital standard of living was only one of six factors relied upon in making awards under the UMDA, where the focus was now on "self-support" even if it was at a substantially lower level than existed during the marriage. In addition, when awards were made they were generally only for a short term, sufficient to allow the dependent spouse to become "self-supporting." [39] This spousal support reform often left wives, who were frequently the financially dependent spouses in long term marriages, without permanent support. [40]

Maintenance was sometimes awarded for "rehabilitative" purposes such as providing income for the time it takes the recipient to acquire skills or education necessary to become self-supporting. ***69** [41] Short term transitional awards were used to make a spouse economically self sufficient as soon as possible. [42]

C. 1990's Reforms

In response to the denial of long term awards for those most in need of them, the "second wave" of reform took place in the 1990's and expanded the factors justifying an award beyond "need." [43] This new legislation encouraged courts to base awards more on the unique facts of a case and less on broad assumptions about need and the obligation to become self-supporting in spite of the loss of earning capacity that often occurs in long term marriages. The use of vocational experts to measure earning capacity became more widespread and there were attempts to quantify the value of various aspects of homemaker services as part of a support award. [44]

As a result of the frustration in developing a cohesive theory of alimony that would in turn lead to more consistent awards, many commentators turned to an analysis premised on compensation for loss of human capital by virtue of non-market work engaged in by the claimant during the marriage. [45] In the human capital view, a claim for post-divorce support is based on an economic analysis that assumes that during a marriage the parties are engaged ***70** in a search for economic efficiency. These models assume that in addition to income generation, the parties also value child-rearing, and the development of income producing skills and abilities. [46] Rational economic decisionmaking guides the parties in choices that will maximize the ability of the partnership to realize the largest gains. In most instances since women are less likely to command as high a wage in the job market, the efficiency model would lead to a decision that the non-market tasks be assumed by her. [47] While this results in an economically satisfactory arrangement during the marriage, it often means that at divorce the non-market spouse will be disadvantaged if there is insufficient compensation for the efforts that were devoted to the partnership. [48]

Several commentators have chosen to use this analysis as the basis for arriving at "compensation." For instance, Prof. Ira Mark Ellman would allow compensation for loss of earning capacity as a result of decisions made during the marriage. [49] The measure of the award is based on the claimant's earning capacity at the end of the marriage compared to what it would have been had the ***71** claimant remained single, thus the "marriage cost" that should be compensated. This compensation is only available if the claimants' "sacrifice" of development of human capital assets is economically rational, with the exception of child care because it is based on traditional values. There need not be a corresponding gain to the non-sacrificing spouse. [50]

Another theory based on compensation for efforts during the marriage that seeks not to focus on losses but on unrealized gain is Prof. Robert Kirkman Collins' theory of "marital residuals." [51] It is based on the premise that during the marriage efforts were made by both spouses to maximize gains for the partnership and that at divorce there are residual economic benefits that flow from those efforts. He analogizes this to a partner in a law firm receiving compensation for "works in progress" for the efforts that were already expended but for which the benefits have not yet been fully realized. [52] The compensation for the marriage partners should be a sharing of the post-dissolution income that was due in part to the efforts expended during the marriage. The length of income sharing is dependent on the duration of the marriage when joint efforts were expended and reduces over time, becoming an increasingly smaller percentage of the parties' post-divorce differences in income. [53] In this way it captures both the needs rationale by focusing on the differences in income and the value of prior contributions as a function of the number of years of joint contribution. [54]

*72 Another theory for deciding an alimony award based on contribution for acquisition of career assets has been proposed by Marshall Willick. He suggests that there are generally both separate contributions (natural ability) and marital contributions to the career asset that "could be weighted and attributed as separate or marital contributions to the future income stream." [55] At that point the duration of the income could be calculated using market data and factors relevant to the present case. The income from the career asset is then divided as each partner shares in its value. When it no longer has a value (for instance at retirement), the alimony would cease. [56]

D. The ALI Principles

In response to the problems highlighted above, the ALI in its Principles recommends the setting of presumptions or guidelines. [57] The ALI focuses on spousal payments as compensation for economic losses that one of the spouses incurred as a result of the marriage. The ALI guidelines are premised on the assumption that when a marriage is dissolved there are usually losses associated with it such as lost employment opportunities or opportunities to acquire education or training that lead to disparities in post-divorce earning capacities. [58] The ALI takes the position that these losses, to the extent they are reflected in a difference in incomes at the time of dissolution, should be shared by the partners. [59] The Principles assume a loss of earning capacity when one parent has been the primary caregiver of the children. [60] They also make provisions for compensation for losses in short term marriages where sacrifices by one spouse leave that spouse with a lower standard of living than he or she enjoyed prior to the marriage. Finally, under the Principles, compensation could be awarded based on a loss of a return on an investment in *73 human capital (where one spouse has supported the other through school). [61] This would be most important in the vast majority of states that do not recognize enhanced earning capacity or a degree or license as a divisible marital partnership asset. In setting the amount and duration, the ALI recommends a formula that is based on a specified percentage of the difference in the spouses' post-divorce income for a period of time that is dependent on the length of the marriage. [62]

E. Guidelines

While the ALI chose to focus on both the substantive rationale for alimony as well as a guideline approach to ensuring some predictability, increasing numbers of jurisdictions have chosen to focus primarily on the prediction problem by turning to mathematical formulas or guidelines. In almost all instances [63] these guidelines are intended to be used as a starting point for discussion and do not constitute a presumption. [64] Most guidelines are confined to temporary or pendente lite awards [65] and are the result of local, not state-wide adoption.

In California, the Santa Clara guidelines were initially adopted in 1977. [66] They were eventually adopted by many counties in the state. [67] The Santa Clara formula is used to calculate both the amount and the duration of an award. In a simplified form the amount of temporary support is computed by taking 40 percent of the net income [68] of the payor, minus 50 percent of the net income of the payee, adjusted for tax consequences. If there is child support, temporary spousal or partner support is calculated on net income not allocated to child support and/or child-related *74 expenses. [69] The temporary spousal support calculations apply these assumptions. The duration factor is based on the length of the marriage. For marriages under ten years, the award should be one half of the months the parties were married. Between ten and twenty years the award gradually increase until it hits a maximum of the number of months married. [70]

As is the case with most mathematical formulas, the resulting amount must be adjusted by incorporating deviations necessary to achieve a fair result. In California these include additional payments that the payor is making for the children's benefit, such as education, whether the payor is assuming a greater portion of the marital debt and whether either of the parties is underemployed.[71]

In Arizona, the Maricopa County Family Court published guidelines that are based on the ALI recommendations. They are designed to apply to marriages that lasted over five years and in which the payee's income is no more than 75 percent of the payor's.[72] The guideline amount is determined by multiplying the difference between the parties' post-dissolution income by a marital duration factor. The duration factor equals the number of years of marriage times .015 with a maximum of .50.[73] Initially the committee chose a duration factor of .6 times the number of years married.[74] However after an empirical study revealed a correlation of only .21 between those cases under the guidelines and 160 actual cases, the committee revised its recommendation with respect to duration. The guideline duration now reflects not ***75** a single number but a range of years. It is calculated as between .3 and .5 of the number of years married.[75]

Pennsylvania has gone a step further by taking alimony factors and incorporating them into actual monetary guidelines that are statutorily mandated in temporary alimony situations.[76] First a determination must be made that alimony is necessary based on the statutory factors. Once this is established, a temporary award is made pursuant to statewide guidelines. The guideline is based on the reasonable needs of the spouse seeking support and the ability to pay of the supporting spouse. Net income is used and the earning capacities of the spouses are considered. The guidelines are income driven and do not contemplate consideration of individual "reasonable needs." Deviations are permitted for special circumstances, but the court is required to specify in writing the reasons for a deviation.[77]

In Michigan, some practitioners use a complicated formula that takes into consideration the length of marriage, the income and age of the payee and his or her education and training of the spouse claiming alimony, disability and number of children.[78] The formula uses tables that correlate the factors into gross and weighted points which are totaled and compared to a five level scale that an attorney uses to evaluate the strength of the alimony ***76** claim. This is done using a computer software program.[79] The program has been endorsed by the Family Law Council of the Michigan Bar Association.[80]

In New Mexico the presiding judge of the Family Court in Albuquerque appointed a commission to study the "alimony problem" and make recommendations on whether guidelines would be appropriate for use in Bernalillo (encompassing Albuquerque) County.[81] After consideration of several different approaches, the committee concluded that a formula based on a simple percentage coupled with a durational factor would be most appropriate.[82] Specifically the goals of the committee were: "(1) the selection of percentage and durational factors that were equitable given usual spousal support circumstances, (2) have the formula be simple enough for practitioners (and pro se litigants) to calculate a bottom line, and (3) yet be capable of calculation on a single page worksheet."[83] Ultimately the committee chose not to include a durational factor. Like the ALI formula, New Mexico uses a different calculation when child support is also ordered. If there are no children, the amount is calculated by taking 30 percent of the payor's gross income and subtracting 50 percent of the payee's gross income. If the there are children for whom support is being paid, the percentages change to 28 percent and 58 percent, respectively.[84] The New Mexico Guidelines also include a list of circumstances where the guidelines are generally not appropriate. These include high income cases, cases involving special child support consideration such as shared custody or multiple family support cases. In addition some equitable factors similar to those articulated by the ALI are mentioned. These include care of family members that result in lost employment opportunities, relocation for the payor's benefit and contributions to the payor's education.[85]

*77 The Fairfax County Virginia Bar Association has used support guidelines since 1981.[86] The guidelines are used primarily in pendente lite cases but when applied to post divorce alimony they must include reliance on the statutory factors. Like some of the other guidelines that make a distinction between cases involving child support. Where there is no child support being paid, the spousal support is calculated by taking 30 percent of the payor's income minus 50 percent of the payee's income. For cases with child support, the formula is 28 percent of the payor's income minus 58 percent of the

payee's income.[87] The commentary suggests that they may not be appropriate in high income cases.[88]

Various forms of guidelines are also used in jurisdictions in Nevada,[89] Oregon[90] and Kansas.[91] The Kentucky Court of Appeals has also proposed guidelines.[92]

*78 **IV. The American Academy of Matrimonial Lawyers' Considerations**

The AAML ALI Commission worked for over two years gathering data and soliciting input from Academy members prior to making its final report. After reviewing the ALI position the Commission rejected the substantive changes in the law that the ALI proposed--i.e., moving to a compensatory rationale for spousal support. The Commission sought not to make recommendations for changes in the substantive law but rather to come up with a tool that its members could use in any jurisdiction.

With this in mind, the Commission conducted an extensive review of the guidelines being used in jurisdictions throughout the country. Like the New Mexico committee, the Commission wished to provide a simplified formula that could be used as a starting point in negotiations. The common denominators in all the guidelines reviewed were income of the spouses and duration of the marriage.[93] These two factors therefore became the focus of the AAML Considerations. The amount is be calculated by taking 30 percent of the payor's gross income minus 20 percent of the payee's gross income. The additional limitation is that the alimony amount, so calculated, when added to the gross income of the payee, shall not result in the recipient receiving in excess of 40 percent of the combined gross income of the parties. To test whether the formula would yield results similar to those applying other guidelines a common hypothetical was used and support amounts were calculated using the proposed AAML Considerations and seven other guidelines currently in use or proposed. The result was that the amounts arrived at using the AAML Considerations were well within the norm.

Recognizing that certain circumstance would render an award based solely on the Considerations unfair, the Commission also included factors that would suggest a deviation. Deviations may be justified when a spouse is the primary caretaker of a dependent *79 minor or a disabled adult child; when a spouse has pre-existing court-ordered support obligations; when a spouse is complying with court-ordered payment of debts or other obligations (including uninsured or unreimbursed medical expenses); when a spouse has unusual needs, or has received a disproportionate share of the marital estate or where there are unusual tax consequences. An additional deviation factor allows consideration of those instances where the application of the formula would result in an award that is inequitable. Finally, a respect for private ordering is honored by the inclusion of an exception for the parties' agreement to an alternative amount.

The proposed Considerations were presented to the Board of Governors of the Academy at its March 2007 meeting. A lengthy discussion ensued, with individual Academy fellows raising important issues. One result of the discussion was the addition of two deviation factors: one considers the age and health of the spouses; the other focuses on those situations where a spouse has given up a career, a career opportunity or otherwise supported the career of the other spouse. The Board of Governors then approved the Report.

V. Conclusion

The proposed Considerations are designed to be used in conjunction with state statutes that first determine eligibility for an award. They are not intended to replace existing state public policy regarding eligibility for an award. In addition, the factors that are listed as deviations are intended to address the considerations for setting an amount and duration of an award found in most states' statutes. These recommendations are ones that the Commission hopes Academy members can utilize in advocating for a fair result for their clients.

*80 **Appendix A**

The AAML Commission Recommendations

Adopted by Board of Governors

March 9, 2007

The AAML Commission studied approaches used in many jurisdictions. While there are certainly many variations, there are two factors that are

considerations in virtually all jurisdictions - income of the parties and the length of the marriage. Seeking to provide a formula that Academy members could use regardless of where they practice, the Commission chose to utilize these two universal factors. It should be noted that the application of the proposed AAML considerations yielded results that were comparable to those reached under the majority of approaches adopted in a significant number of jurisdictions.

The AAML Commission recognizes that the amount arrived at may not always reflect the unique circumstances of the parties. Therefore, deviation factors are used to address the more common situations where an adjustment would need to be made.

The recommendations are:

Amount:

Unless one of the deviation factors listed below applies, a spousal support award should be calculated by taking 30% of the payor's gross income minus 20% of the payee's gross income the alimony amount, so calculated, however, when added to the gross income of the payee shall not result in the recipient receiving in excess of 40 % of the combined gross income of the parties.

Length:

Unless one of the deviation factors listed below applies, the duration of the award is arrived at by multiplying the length of the marriage by the following factors: 0-3 years (.3); 3-10 (.5); 10-20 years (.75), over 20 years, permanent alimony.

"Gross Income" is defined by a state's definition of gross income under the child support guidelines, including actual and imputed income.

*81 The spousal support payment is calculated before child support is determined.

This method of spousal support calculation does not apply to cases in which the combined gross income of the parties exceeds $1,000,000 a year.

Deviation factors:

The following circumstances may require an adjustment to the recommended amount or duration:

1) A spouse is the primary caretaker of a dependent minor or a disabled adult child;

2) A spouse has pre-existing court-ordered support obligations;

3) A spouse is complying with court-ordered payment of debts or other obligations (including uninsured or unreimbursed medical expenses);

4) A spouse has unusual needs;

5) A spouse's age or health;

6) A spouse has given up a career, a career opportunity or otherwise supported the career of the other spouse;

7) A spouse has received a disproportionate share of the marital estate;

8) There are unusual tax consequences;

9) Other circumstances that make application of these considerations inequitable;

10) The parties have agreed otherwise.

*82 The Appendix to this report contains examples of the application of the recommendations to several fact patterns.

Respectfully Submitted,

_____

Mary Kay Kisthardt, Reporter

November 2006

Members of the Commission:

Marlene Eskind Moses, Co-Chair

Barbara Ellen Handschu, Co-Chair

Michael Albano

Arthur E. Balbirer

Gaetano Ferro

James T. McLaren

Joanne Ross Wilder

Thomas Wolfrum

***83** **Table I Spouse #1's Income: $100,000/year ($8,333/month) Spouse #2's Income: $20,000/year ($1,666/month)**

Type of Support Awarded	Amount of Support Awarded	Resulting Gross Incomes After Support, Pre-tax		Resulting Net Spendable Incomes After Support & After Tax		Duration of Spousal Support			
		Spouse #1	Spouse #2	Spouse #1	Spouse #2	0-3 Yrs (0. 3)	4-10 Yrs (0.5)	11-20-Yrs (0.75)	20 Yrs + (1.0)
No Spousal Support No Child Support	$-	$8,333	$1,666	$5,578	$1,387	N/A	N/A	N/A	N/A
Spousal Support	$2,167	$6,166	$3,833	$4,127	$3,022	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
No Child Support	$-								
Spousal Support	$2,167	$5,514	$4,485	$3,475	$3,932	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Child Support (1 Child)	$652								
Spousal Support	$2,167	$5,291	$4,708	$3,252	$4,299	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Child Support (2 Children)	$875								

***84** **Table II Spouse #1's Income: $240,000/year ($20,000/month) Spouse #2's Income: $0/year ($0/month)**

Type of Support Awarded	Amount of Support Awarded	Resulting Gross Incomes After Support, Pre-tax		Resulting Net Spendable Incomes After Support & After Tax		Duration of Spousal Support			
		Spouse #1	Spouse #2	Spouse #1	Spouse #2	0-3 Yrs (0.3)	4-10 Yrs (0.5)	11-20-Yrs (0.75)	20 Yrs + (1.0)
No Spousal Support No Child Support	$-	$20,000	$-	$12,823	$-	N/A	N/A	N/A	N/A
	$-								

Spousal Support	$6,000	$14,000	$6,000	$9,183	$4,623	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
No Child Support	$-								
Spousal Support	$6,000	$12,925	$7,075	$8,108	$6,033	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Child Support (1 Child)	$1,075								
Spousal Support	$6,000	$12,578	$7,422	$7,731	$6,551	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Child Support (2 Children)	$1,422								

***85 Table III Spouse #1's Income: $80,000/year ($6,666/month) Spouse #2's Income: $40,000/year ($3,333/month)**

Type of Support Awarded	Amount of Support Awarded	Resulting Gross Incomes After Support, Pre-tax		Resulting Net Spendable Incomes After Support & After Tax		Duration of Spousal Support			
		Spouse #1	Spouse #2	Spouse #1	Spouse #2	0-3 Yrs (0.3)	4-10 Yrs (0.5)	11-20-Yrs (0.75)	20 Yrs + (1.0)
No Spousal Support	$-	$6,666	$3,333	$4,565	$2,554	N/A	N/A	N/A	N/A
No Child Support	$-								
Spousal Support	$1,333	$5,333	$4,666	$3,659	$3,460	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
No Child Support	$-								
Spousal Support	$1,333	$4,769	$5,230	$3,095	$4,359	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Child Support (1 Child)	$564								
Spousal Support	$1,333	$4,576	$5,423	$2,902	$4,704	0 to 18 months	18 to 60 months	60 to 180 months	180+ months
Child Support (2 Children)	$757								

Footnotes

a1 Professor of Law, University of Missouri-Kansas City.

1 The American Academy of Matrimonial Lawyers, www.aaml.org (last visited Apr. 12, 2008).

2 See Mary Kay Kisthardt, The AAML Model for a Parenting Plan, 19 J Am. Acad. Matrim. Law. 223 (2005).

3 See Ann Laquer Estin, Maintenance, Alimony, and the Rehabilitation of Family Care, 71 N.C. L. Rev. 721, 741 (1993) ("One recurring difficulty in

contemporary divorce law has been the problem of grounding alimony and maintenance awards in a coherent theory.").

4 The approach has been criticized by others. See Penelope Eileen Bryant, Vacant Promises?: The ALI Principles of the Law of Family Dissolution and the Post-Divorce Financial Circumstances of Women, 8 Duke J. Gender L & Pol'y 167 (2001). For an argument that adoption of the Principles may help some women, see, Tonya L. Brito, Spousal Support Takes on the Mommy Track: Why the ALI Proposal is Good for Working Mothers, 8 Duke J. Gender L & Pol'y 151 (2001).

5 See Lara Lenzotti Kapalla, Comment, Some Assembly Required: Why States Should Not Adopt the ALI's System of Presumptive Alimony Awards in Its Current Form, 2004 Mich. St. L. Rev. 207.

6 Marti E. Thurman, Maintenance: A Recognition of the Need for Guidelines, 33 U. Louisville J. Fam. L. 971 1995 (arguing that the lack of adequate guidance by maintenance statutes damages settling parties even more so than those parties who go to trial).

7 See Marsha Garrison, The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?, 8 Duke J. Gender & Pol'y 119, 120 (2001) (suggesting that because of the myriad of conflicting considerations the judge may consider "like cases simply do not produce like results").

8 See Twila Larkin, Guidelines for Alimony: The New Mexico Experiment, 38 Fam. L.Q. 29, 38-49 (2004) (describing many of the existing guidelines). See also infra notes 63-92 and accompanying text.

9 See Brenda L. Storey, Surveying the Alimony Landscape: Origin, Evolution and Extinction, 25 Fam. Advoc. 10, 12 (Spring 2003) (noting that unlike child support, which hinges solely on the incomes of the parents, alimony is required to take into account a significantly greater array of economic and noneconomic factors). See also Brett R. Turner, Spousal Support in Chaos, 25 Fam. Advoc. 14, 18 (Spring 2003) (noting that efforts to adopt statewide guidelines often have foundered on an assertion that the law of spousal support is "not as uniform" as the law of child support; recognizing that there are too many types of marriages with too many different possible fact situations to permit creation of reasonable guidelines).

10 See, e.g., Developments in the Law, Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law, 116 Harv. L. Rev. 2075 (2003); Calvin G.C. Pang, Slow Baked, Flash-Fried, Not to Be Devoured: Development of the Partnership Model of Property Division in Hawaii and Beyond, 20 U. Haw. L. Rev. 311 (1998).

11 See Alicia Brokars Kelly, Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life, 19 Wis. Women's L.J. 141, 173 (2004).

12 Ira Mark Ellman & Tara O'Toole Ellman, The Theory of Child Support, 45 Harv. J. on Legis. 107, 137 (2008).

13 Ira Mark Ellman, The Maturing Law of Divorce Finances: Toward Rules and Guidelines, 33 Fam. L.Q. 801, 809 (1999) (calling alimony "a remedy without a rationale").

14 See, e.g., Mary Frances Levy & Jeffrey L. Levy, From Riches to Rags: Does Rehabilitative Alimony Need to Be Rehabilitated?, 38 Fam. L.Q. 3, 13 (2004).

15 2 Homer Harrison Clark, The Law of Domestic Relations in the United States 257-58 (1987).

16 Robert Kirkman Collins, The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony, 24 Harv. Women's L.J. 23, 32-33 (2001).

17 Id. at 28, quoting Lloyd Cohen, Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life," 16 J. Legal Stud. 267, 276 (1987). ("'[b]oth the trial and appellate courts look to a hodgepodge of factors, weighing them in an unspecified and unsystematic fashion.'").

18 Collins, supra note 16, at 32 n.39, quoting Margaret F. Brinig & June R. Carbone, The Reliance Interest in Marriage and Divorce, 62 Tul. L. Rev. 855, 893 n.151 (1988) (citations omitted):

> The most common statutory prescription for spousal support is to list a set of appropriate considerations ... without any guidance as to the relative importance of the factors or their purpose in being considered. In determining spousal support, the courts then recite the appropriate list of considerations and announce a result, again without reference to any rational ordering of the factors or explaining their importance. Almost totally absent from these decisions is an explanation of the role spousal support is intended to play.

19 A.L.I., Principles of the Law of Family Dissolution: Analysis and Recommendations § 5.02 (2002) [hereinafter Principles].

20 Susan Elgin, Alimony Guidelines Is It Time?, 38 Md. B.J. 46 (2005).

21 Id. at 48.

22 Id. at 51.

23 "Parliament granted this permission only 317 times in the century and a half prior to the passage of the Matrimonial Causes Act in 1857." Collins, supra note 16, at 29 (citing 13 Halsbury's Laws of England 245 (1975)).

24 See Vivian Hamilton, Principles of U.S. Family Law, 75 Fordham L. Rev. 31, 51 (2006).

25 Jennifer L. McCoy, Comment, Spousal Support Disorder: An Overview of Problems in Current Alimony Law, 33 Fla. St. U.L. Rev. 501, 504 (2005).

26 Id. at 505.

27 Id. at 506.

28 June Carbone, The Futility of Coherence: The ALI's Principles of the Law of Family Dissolution, Compensatory Spousal Payments, 4 J.L. & Fam. Stud. 43, 46-47 (2002).

29 Clark, supra note 15, at 257-58:

> When the English institution of alimony, which served the plain and intelligible purpose of providing support for wives living apart from their husbands, was utilized in America in suits for absolute divorce, however, its purpose became less clear... Notwithstanding [this] logical objection to alimony as an incident to absolute divorce, it has been granted in the United States from the earliest colonial times to the present.

30 Carbone, supra note 28, at 49; McCoy, supra note 25, at 506.

31 Carbone, supra note 28, at 49-51.

32 Barbara Bennett Woodhouse, Sex, Lies and Dissipation: The Discourse of Fault in a No-Fault Era, 82 Geo. L.J. 2525, 2536 (1994) (citations omitted) (noting that "some jurisdictions make a dependent spouse's fault dispositive. In such jurisdictions, a dependent spouse would be barred from receiving alimony if found at fault. Some states also require a showing of the supporting spouses fault before awarding alimony.").

33 Larry R. Spain, The Elimination of Marital Fault in Awarding Spousal Support: The Minnesota Experience, 28 Wm. Mitchell L. Rev. 861, 867 (2001) (describing the various states' approaches to describing the role of fault).

34 Jana B. Singer, Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony, 82 Geo. L.J. 2423, 2424 (1994); see also Carbone, supra note 28, at 49-51.

35 Marsha Garrison, Good Intentions Gone Awry: the Impact of New York's Equitable Distribution Law on Divorce Outcomes, 57 Brook. L Rev. 621, 701 (1991). In marriages of twenty years or longer, "Seventy-one percent of these wives were awarded alimony in 1978, as compared to 59% in 1984. Unemployed wives married ten or more years also suffered a loss in the likelihood of an alimony award greater than that of their employed counterparts and employed wives married less than ten years." Id.

36 Jane Rutherford, Duty in Divorce: Shared Income as a Path to Equality, 58 Fordham L. Rev. 539, 549 (1990) (noting that "the number of families in which both spouses were earners increased from 12,990,000 in 1980 to 14,955,000 in 1987" (citing United States Dep't of Commerce, Bureau of the Census, National Data Book and Guide to Sources, Statistical Abstract of the United States 407 (1989) [Statistical Abstract])).

37 Id. at note 147 ("Women over age 25 still only earn 67 percent of what men do. Thus, in 1987, female workers, age 25 and older, earned $321 per week, while male workers in the same age bracket earned $477 per week." (citing Statistical Abstract at 406)).

38 Unif. Marriage and Divorce Act § 308, 9A U.L.A. 147, 347 (1987).

39 Singer, supra note 34, at 2425.

40 Studies showed that women suffered substantial economic losses, "particularly when they had foregone wage-earning work in order to care for children and the household during marriage." Laura A. Rosenbury, Two Ways to End a Marriage: Divorce or Death, 2005 Utah L. Rev. 1227, 1239 (citing studies); see also Garrison, supra note 35.

41 Brett R. Turner, Rehabilitative Alimony Reconsidered: The Second Wave of Spousal Support Reform, 10 Divorce Litig. 185 (1998); see also McCoy, supra note 25, at 511-12.

42 O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712 (N.Y.1985) (Thus, the concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the marriage was over, was replaced with the concept of maintenance which seeks to allow "the recipient spouse an opportunity to achieve [economic] independence." See David S. Rosettenstein, Alimony and Alimony Surrogates and the Imputation of Income in American Family Law, 25 Q.L.R. 1, 5 (2006).

43 Turner, supra note 9, at 18.

44 Unfortunately these reforms were deemed to be unsuccessful. See Joan Williams, Is Coverture Dead? Beyond a New Theory of Alimony, 82 Geo. L.J. 2227, 2250 (1994) (awards of both child support and alimony thus reflect the underlying property law assumption that "he who earns it, owns it." This assumption is so strong that typically it is not overcome even by explicit statutory language allowing courts to give wives entitlements that reflect their domestic contributions).

45 Rosettenstein, supra note 42, at 5.

46 Id. at 13.

47 This discussion focuses on the compensation for losses occurred during the marriage. The human capital theorists also include those whose focus on gains, such as those who benefit from a spouse's contribution to their education. See, e.g., Joan M. Krauskopf, Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital, 28 U. Kan. L. Rev. 379 (1980); Cynthia Starnes, Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault, 60 U. Chi. L. Rev. 67 (1993).

48 Cynthia Lee Starnes, Mothers as Suckers: Pity, Partnership, and Divorce Discourse, 90 Iowa L. Rev. 1513 (2005):

> Many mothers have been stunned to learn that after years of viewing themselves as proud and valuable contributors to marriage, to family, to a new generation, the law of divorce views them as suckers. Surely this is a mistake, a mother might insist, a confusion of identities, a dialectical lapse that will be corrected as soon as it is discovered. Sadly, there is no mistake. The dispiriting message is that primary caretakers, the vast majority of whom are mothers, have been duped into providing free family caretaking at great personal economic cost; a price they must pay for their imprudent ways.

Id. (citation omitted).

49 Ira Mark Ellman, The Theory of Alimony, 77 Cal. L. Rev. 1, 42-49 (1989).

50 Id. at 67-73.

51 Collins, supra note 16, at 49-50.

52 Id. at 49.

53 Id. at 55.

54 The formula provides that disposal incomes (net) would initially be shared equally with transfers reduced by 10 percent during each four successive periods of equal length. There would then be 5 separate periods of maintenance at 50 percent, 40 percent, 30 percent, 20 percent and 10 percent. The length of the periods is determined by the length of the marriage. For marriages up to ten years the period is one month for each year of marriage (four year marriage would mean a decrease every four months) For marriages between ten and thirty years the period would be initially 1.00 for each year of marriage increasing by .05 for each year over ten that the marriage lasted up to a maximum of 2.0 (at thirteen years the period would be 1.15 for each year of marriage (15 months), at fifteen it would be 1.25 months per year of marriage (19 months) and at twenty-five it would be 1.75 for each year of marriage (44 months) For marriages over thirty years it would be 2 months for each year of the marriage.

Id. at 53.

55 Marshal Willick, In Search of a Coherent Theoretical Model for Alimony, 15 Nev. Law. 40, 42 (Apr. 2007).

56 Id.

57 Principles, supra note 19, at § 5.

58 Id. at § 5.02.

59 Id.

60 Id. at § 5.05.

61 Id. at § 5.12.

62 Id. at § 5.04.

63 Pennsylvania is the exception as its guideline approach is mandatory for pendente lite orders. See infra notes 76-77.

64 Larkin, supra note 8, at 32.

65 Id. at 29.

66 Victoria M. Ho & Jennifer Cohen, An Update on Florida Alimony Case Law: Are Alimony Guidelines a Part of Our Future? Part II, 77 Fla. B.J. 85 (2003).

67 Id. at 18 (citing Robert E. Gaston, Alimony: You are the Weakest Link!, 10 Nev. Law. 36, 38 (Nov. 2002)).

68 Which is gross income less taxes and social security payments.

69 Superior Court of California, County of Santa Clara, Family Court Rule 3B, available at http://www.sccsuperiorcourt.org/family/rule3.3.htm#B

70 Ho supra note 66 at 86 "If the marriage lasts less than 10 years, the alimony should be one-half the length of the months the parties were married. If the parties were married 10 to 20 years, the duration of alimony should be not less than the number of months in the following formula: (months married/240) x (months married)."

71 Id.

72 Ellman, supra note 13 at 811-12. They do not distinguish between childless and other marriages.

73 Id. at 812.

74 Id. at 813.

75 Larkin, supra note 8, at 48.

76 The purpose of the Uniform Support Guidelines, which is explained in the comments of the rule, is to "promote (1) similar treatment of persons similarly situated, (2) a more equitable distribution of the financial responsibility for raising children, (3) settlement of support matters without court involvement, and (4) more efficient hearings where they are necessary." Pa. R. Civ. P. 1910.16-1, explanatory comment.

77 In Mascaro v. Mascaro, 803 A.2d 1186, 1191 (Pa. 2002), the Pennsylvania Supreme Court noted that determining spousal support based upon the parties' net incomes and obligor's other support obligations "treats similarly situated persons similarly, which is the goal expressed in § 4322 of the Divorce Code." The court also noted that allowing for deviations prevents the "goal of uniformity from leading to an unnecessarily harsh result where findings of fact justify the amount of the deviation." Id. at 1193.

78 Larkin, supra note 8, at 42.

79 Thurman, supra note 6, at 981. The software was developed by Craig Ross see Craig Ross, Support 2004: Software Solutions for the Active Family Law Attorney, (Ann Arbor, Michigan, 2004), http://www.marginsoft.net.

80 Larkin, supra note 8, at 42.

81 Id. at 29.

82 Id. at 38.

83 Id. at 32.

84 Larkin, supra note 8, at 56.

85 Larkin supra note 8, at 55-56.

86 Id. at 44. The guidelines are now available on the internet at Fairfax Bar Association, Child and Spousal Support Guidelines, Item No. 0206 (Fairfax, Va., Nov. 2002), available at http://www.fairfaxbar.org/pub_order_ form.asp.

87 Larkin, supra note 8, at 46.

88 Fairfax Bar Association, supra note 86.

89 Todd L. Torvinen, The So-called "Tonopah Formula for Alimony Explained, 17 Nev. Fam. L. Rep. 9, 11 (Sept. 2002), available at http://www.nvbar.org/sections/FamilyLaw/NFLR/sept2002.pdf. (last visited Apr. 12, 2008).

90 Larkin, supra note 8, at 50-51.

91 Kansas, Johnson Co. Bar Assoc., Fam. Law Guidelines, Maintenance, Pt. V (Rev. Feb. 2001), available at http://www.jocobar.org/pdf/2001_family_

law_guidelines.pdf. (last visited Apr. 12, 2008). Guidelines in Kansas are used in several counties, based on gross income. For parties without children, the award is determined by calculating 25 percent of the difference between the incomes of the parties up to a difference of $50,000 per year. For a difference in excess of $50,000 per year, 22 percent of the excess is added. The Kansas guidelines also include a durational factor. For marriages of five years or less the number of years divided by 2.5, for more than five years 2 plus 1/3 of the number of years in excess of five years. It should be noted that Kansas has a ten year cap on court-ordered maintenance, with a renewal for the same period at the court's discretion. Id. at 55-56.

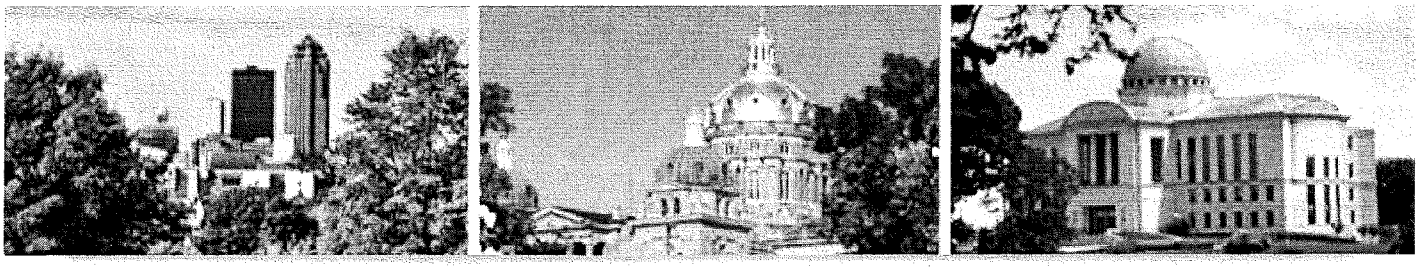
92 Atwood v. Atwood, 643 S.W.2d 263, 266 (Ky. Ct. App. 1982).

93 See Principles, supra note 19, at § 5.02 ("The factors of marital duration and relative spousal income have long been recognized in alimony cases."); see also Garrison, supra note 35, at 706 (pointing to relative spousal income as the most important factor and marital duration as an important factor in a study of litigated, settled, and defaulted divorces in New York).

End of Document

Iowa Support Master by Alft & Wilson Publishing

It figures!



Links:
Home

Alft & Wilson Publishing
3775 EP True Parkway
Suite 282
West Des Moines, IA 50265

Sales/Guidelines Support:
888-805-0363

Tech Support:
800-735-9426

Search

Search Our Website

SPOUSAL SUPPORT CALCULATOR

Various Spousal Support Formulas in relation to Child and Medical Support Under the Current Iowa Guidelines and using the 2016 Tax Code

How many children to consider for support?..... 2

Noncustodial Court Ordered Visitation Days per year.... 0 to 127

	Noncustodial Parent	Custodial Parent
Yearly gross wage income		20000
Yearly gross self-employment income	130000	
Yearly alimony income		
Yearly interest income		
Qualified Additional Dependents	0	0
Number of children as tax dependents	1	1
Tax Filing Status	Single If remarried, select married filing separated	Head of Household If remarried, select married filing separated
Yearly Union Dues		
Yearly Mandatory Pension		
Yearly Medical Insurance (child's portion)		
Yearly Child Support (prior order)		
Yearly Spousal Support (prior order)		
Yearly Medical Support (prior order)		
Yearly Custodial Parent Child Care Expenses		
Number of kids in childcare		0

Years Married 17

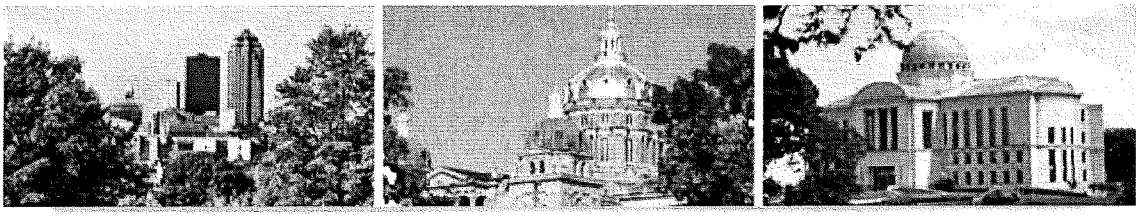
Who pays spousal support? Noncustodial

Click Here To Calculate Spousal Support

Start over

Iowa Support Master by Alft & Wilson Publishing

It figures!



Links:
Home

Alft & Wilson Publishing
3775 EP True Parkway
Suite 282
West Des Moines, IA 50265

Sales/Guidelines Support:
888-805-0363

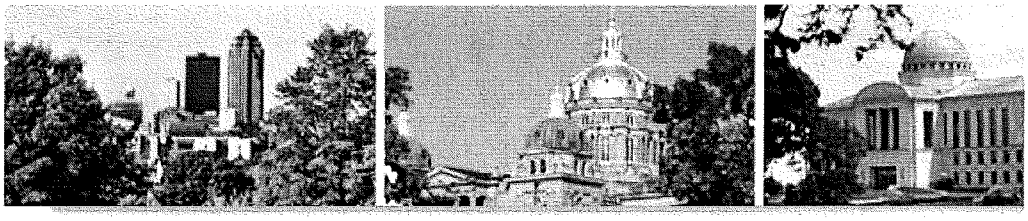
Tech Support:
800-735-9426

Search

Search Our Website

Iowa Support Master by Alft & Wilson Publishing

It figures!



Links:
Home

Alft & Wilson Publishing
3775 EP True Parkway
Suite 282
West Des Moines, IA 50265

Sales/Guidelines Support:
888-805-0363

Tech Support:
800-735-9426

Search

Search Our Website

This information is scheduled to be updated December, 2016.

Spousal Support Results

Iowa has not adopted spousal support support guidelines.
These calculations are from other states with sources provided.

Print this page

Results are shown in yearly|monthly format

Years Married: 17

Iowa Child and Medical Support
$17,735.76 | $1,477.98 Child Support per month
$6,500.00 | $541.67 Cash Medical Support per month
$24,235.76 | $2,019.65 **Total Obligation**

Payor is Noncustodial Parent
$130,000.00 | $10,833.33 gross income
$75,776.83 preliminary adjusted net
$0.00 | $0.00 child/dependent care tax credits
$22,860.17 | $1,905.01 federal tax liability
$6,687.40 | $557.28 state tax liability
$18,175.60 | $1,514.63 fica liability

Payee is Custodial Parent
$20,000.00 | $1,666.67 gross income
$18,817.43 preliminary adjusted net
$0.00 | $0.00 child/dependent care tax credits
$0.00 | $0.00 federal tax liability
$392.57 | $32.71 state tax liability
$1,530.00 | $127.50 fica tax liability

Spousal support formulas and results are shown below as they are added or modified.

American Academy of Matrimonial Lawyers [Source]

Spousal Support: $35,000.00 | $2,916.67

Spousal support awarded with no child support:
Payor gross income (pretax) minus spousal support: $90,000.00 | $7,500.00
Payee gross income (pretax) plus spousal support: $60,000.00 | $5,000.00

Spousal support awarded with Iowa child support:
Payor gross income (pretax) minus spousal & child & medical support: $65,764.24 | $5,480.35
Payee gross income (pretax) plus spousal & child & medical support: $84,235.76 | $7,019.65

Length of spousal support: 12.75 years | 153 months

Arizona - Maricopa County [Source]

Spousal support: $28,050.00 | $2,337.50

Length of spousal support: Undetermined

California - Santa Clara County [Source]

Spousal support: $23,872.02 | $1,989.33

Length of spousal support: 14.45 years | 173.4 months

Kansas - Johnson County [Source]

Spousal support: $25,700.00 | $2,141.67

Length of spousal support: 6.00 years | 72.00 months

Maine [Source]

Spousal support: Undetermined

Length of spousal support: 8.50 years | 102.00 months

Pennsyvania [Source]

Spousal support: $22,783.76 | $1,898.65

Length of spousal support: Undetermined

Texas [Source]

Spousal support: $26,000.00 | $2,166.67 (CAP or 'Not To Exceed')

Length of spousal support: 5.00 years | 60.00 months (maximum)

Highly restrictive by statute: In Texas a court may order alimony only if the payor committed an act of family violence with 2 years of the divorce, or if the marriage was 10 years or longer and the recipient is unable to support themselves due to disability, taking care of a disabled child, or clearly lacks income earning ability.

Virginia - Fairfax County [Source]

Spousal support: $29,000.00 | $2,416.67

Length of spousal support: Undetermined

Massachusetts [Source]

A. Alimony Reform Act of 2011 (Currently used)

Spousal support: $37,793.12 | $3,149.43

Length of spousal support: 13.60 years | 163.20 months

B. 'Rough Cut 1/3-1/3-1/3 Rule of Thumb' Formula (Previously considered)

Spousal support: $25,000.00 | $2,083.33

C. Judge 'Ginsburg' formula (Previously considered)

Spousal support: $46,666.67 | $3,888.89

Length of spousal support: Permanent

Michigan

[Work on this calculation is in progress]

Relevent data from Iowa Court of Appeals (1995 to present)

[Still collecting data]

A sample of prelinary raw data is available by clicking **this link** so you can see the manner in which data is being collected.

All the Court of Appeals spousal support data going back from 1995 to present is expected by end of December, 2012.

A short analysis and summary of Court of Appeals spousal support data will be presented at the CLE on October 26th.

Original Image of 858 N.W.2d 402 (PDF)

858 N.W.2d 402
Supreme Court of Iowa.

In re Marriage of Gust
Supreme Court of Iowa. January 16, 2015 858 N.W.2d 402 *(Approx. 30 pages)*

Upon The Petition of Steven Michael Gust, Appellant,
and
Concerning Linda Leann Gust, Appellee.

No. 13–0356.
Jan. 16, 2015.

Synopsis

Background: Divorce action was brought. The District Court, Polk County, Robert B. Hanson, J., divided the assets and debts of the parties and required husband to pay traditional spousal support in the amount of $1400 per month for as long as he was paying child support for a minor son, and $2000 per month thereafter. Husband appealed, and wife cross-appealed. The Court of Appeals affirmed, and Supreme Court granted further review.

Holdings: The Supreme Court, Appel, J., held that:
1 traditional spousal support of unlimited duration in the amount of $2000 per month was fair and equitable, and
2 question of whether husband's spousal support obligation should be modified upon his retirement had to be made in a modification action.

Affirmed.

Wiggins, J., concurred in part and dissented in part and filed opinion in which Waterman and Mansfield, JJ., joined.

West Headnotes (21)

Change View

1 **Divorce** Spousal Support
Appellate court will disturb the trial court's alimony order only when there has been a failure to do equity.

5 Cases that cite this headnote

2 **Divorce** Nature and purpose of spousal support; property award distinguished
Purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued.

5 Cases that cite this headnote

3 **Divorce** Extent of Time of Payments
Traditional spousal support is ordinarily of unlimited or indefinite duration.

3 Cases that cite this headnote

4 **Divorce** Length of marriage
Duration of the marriage is an important factor for an award of traditional spousal support.

SELECTED TOPICS

Divorce

Permanent Alimony
Alimony and Child Support Award of Per Month
Lump Sum Award of Spousal Alimony
Alimony, Allowances, and Disposition of Property
Considerations of Income and Need

Secondary Sources

s 31:25. Factors considered in establishing spousal support or alimony

2 Ia. Prac., Methods of Practice § 31:25

...Every judgment, dissolution, or decree for separate maintenance may include an order for support payments to either party for a limited or indefinite period of time after considering the following: the...

Earning capacity or prospective earnings of husband as basis of alimony

139 A.L.R. 207 (Originally published in 1942)

...(Supplementing annotation in 6 ALR 192.) The following additional cases sustain the rule stated in the earlier annotation that even though it appears, on an application for alimony pendente lite, that ...

Excessiveness or inadequacy of lump-sum alimony award

49 A.L.R.5th 441 (Originally published in 1997)

...This annotation collects and discusses the modern state and federal cases in which the courts have considered whether a lump-sum amount of money, awarded as temporary or permanent alimony, or maintenan...

See More Secondary Sources

Briefs

Appellant's Brief and Argument Request for Oral Argument

2004 WL 4912261
Donna ANLIKER, Petitioner-Appellee, v. Scott ANLIKER, Respondent-Appellant.
Supreme Court of Iowa.
Apr. 13, 2004

...The standard of review upon appeal of the economic provisions of a divorce decree is de novo. In Re Marriage of Campbell, 623 N.W.2d 585, 586 (Ia. App. 2001). This standard of review means the appellat...

Appellant's Brief

1997 WL 34579849
In re the Marriage of David William CLARK, Jr. and Linda Diane Clark. Upon the Petition of David William Clark, Jr., Petitioner-Appellee, Linda Diane Clark, Respondent-Appellant.
Supreme Court of Iowa.
June 11, 1997

...The scope of review is de novo. Iowa R.App.P. 4. The Court has ".a duty to examine the entire record and adjudicate anew the issues properly presented." In Re Marriage of Erickson, 553 N.W.2d 905, 907 ...

Petition for Writ of Certiorari

1997 WL 33548852
Selisia C. ARLEAUX, Plaintiff, v. Stephan M. ARLEAUX, Defendant.
Supreme Court of the United States
Dec. 11, 1997

9 Cases that cite this headnote

5 **Divorce** Standard of living and station in life
Divorce Earnings; earning capacity
Divorce Length of marriage
Traditional spousal support is used in long-term marriages where life patterns have been largely set and the earning potential of both spouses can be predicted with some reliability.

2 Cases that cite this headnote

6 **Divorce** Length of marriage
The shorter the marriage, the less likely a court is to award traditional spousal support.

9 Cases that cite this headnote

7 **Divorce** Length of marriage
Generally speaking, marriages lasting twenty or more years commonly cross the durational threshold and merit serious consideration for traditional spousal support.

3 Cases that cite this headnote

8 **Divorce** Relative needs and abilities to pay in general
Divorce Length of marriage
In marriages of relatively long duration, imposition and length of an award of traditional alimony is primarily predicated on need and ability. I.C.A. § 598.21A(1).

1 Case that cites this headnote

9 **Divorce** Relative needs and abilities to pay in general
Divorce Standard of living and station in life
Standard for determining need for alimony is objectively and measurably based upon the predivorce experience and private decisions of the parties, not on some externally discovered and imposed approach to need, such as subsistence or adequate living standards or amorphous notions of self-sufficiency. I.C.A. § 598.21A(1).

1 Case that cites this headnote

10 **Divorce** Earnings; earning capacity
In determining need for alimony, courts focus on the earning capability of the spouses, not necessarily on actual income. I.C.A. § 598.21A(1).

2 Cases that cite this headnote

11 **Divorce** Earnings; earning capacity
Divorce Length of marriage
In marriages of long duration, the historical record ordinarily provides an objective starting point for determining earning capacity of persons with work experience for alimony purposes. I.C.A. § 598.21A(1).

12 **Divorce** Evidence
In order to establish earning capability for persons without work experience or who are arguably unemployed, for alimony purposes, the parties may use vocational and other experts to assist the court in making the determination. I.C.A. § 598.21A(1).

13 **Divorce** Earnings; earning capacity
Divorce Award in General; Calculation
Where there is a substantial disparity in earning capacity, courts do not employ a mathematical formula to determine the amount of spousal support. I.C.A. §

...The party to this petition is Selisia C. Arleaux Plaintiff/Appellee and Krystal Leigh-Anna Arleaux/Adult Daughter / Beneficiary. Note: Table of Contents page numbers missing in original document Note: ...

See More Briefs

Trial Court Documents

Upon the Petition of Jeffrey T. HANKINS, Petitioner, And Concerning April L. BAKER, Respondent.

2000 WL 35442996
Upon the Petition of Jeffrey T. HANKINS, Petitioner, And Concerning April L. BAKER, Respondent.
Iowa District Court.
Mar. 01, 2000

...On January 10 through January 14, 2000, this matter came before the Court for trial on a Petition for Dissolution of Marriage. Petitioner Jeffrey T. Hankins was present with Attorney Patricia Kamath. R...

In re The Marriage of Kenneth Morton INGALLS and Paula Ann Ingalls. Upon the Petition of Kenneth Morton Ingalls, Petitioner, Paula Ann Ingalls, Respondent.

2001 WL 35818709
In re The Marriage of Kenneth Morton INGALLS and Paula Ann Ingalls. Upon the Petition of Kenneth Morton Ingalls, Petitioner, Paula Ann Ingalls, Respondent.
Iowa District Court.
Sep. 26, 2001

...On August 13 and August 14, 2001 trial in the above-captioned matter was held pursuant to assignment. Both parties personally appeared; Petitioner was represented by Sharon Mellon, and Respondent was r...

In re: the Marriage of Kevin CASTLE and Deirdre Castle. Upon the Petition of Kevin Castle, Petitioner, Deirdre Castle, Respondent.

2002 WL 33945082
In re: the Marriage of Kevin CASTLE and Deirdre Castle. Upon the Petition of Kevin Castle, Petitioner, Deirdre Castle, Respondent.
Iowa District Court.
June 05, 2002

...On May 6 and 7, 2002, this matter came before the Court for contested trial on a Petition for Dissolution of Marriage. Petitioner Kevin Castle was present with his attorneys, Timothy White and Brent Ol...

See More Trial Court Documents

598.21A(1).

1 Case that cites this headnote

14 **Divorce** Relative needs and abilities to pay in general
Where a spouse does not have the ability to pay traditional spousal support, none will be awarded. I.C.A. § 598.21A(1).

15 **Divorce** Factors considered in general
In order to limit or end traditional spousal support, the evidence must establish that the payee spouse has the capacity to close the gap between income and need or show that it is fair to require him or her alone to bear the remaining gap between income and reasonable needs. I.C.A. § 598.21A(1).

16 **Divorce** Rehabilitative awards; awards until self-supporting
Spousal support may end where the record shows that a payee spouse has or will at some point reach a position where self-support at a standard of living comparable to that enjoyed in the marriage is attainable. I.C.A. § 598.21A(1).

2 Cases that cite this headnote

17 **Divorce** Relative needs and abilities to pay in general
Divorce Standard of living and station in life
Divorce Earnings; earning capacity
Traditional spousal support of unlimited duration in the amount of $2000 per month was fair and equitable in divorce action involving wife who was stay-at-home mom and was married for 27 years; although wife had returned to the workforce, her economic prospects were limited, and, while she might be expected to earn $22,500 per year, spousal support was necessary for her to live in a fashion approaching her lifestyle during the marriage, husband earned $92,000 per year, spousal support award allowed wife to live in a fashion that approached the lifestyle to which she was accustomed in the marriage without undermining husband's ability to do the same, and wife's need for support to maintain the lifestyle she had grown accustomed to and husband's ability to pay should remain unchanged for the indefinite future. I.C.A. § 598.21A(1).

2 Cases that cite this headnote

18 **Divorce** Sexual relations, cohabitation, or remarriage
Divorce Death
Traditional spousal support is ordinarily unlimited in duration except upon the remarriage of the payee spouse, or death of either party.

3 Cases that cite this headnote

19 **Divorce** Needs
Divorce Spousal Support
Trial court is in the best position to balance the parties' needs when making alimony award, and appellate courts should intervene on appeal only where there is a failure to do equity.

3 Cases that cite this headnote

20 **Divorce** Earnings; earning capacity
Future retirement will ordinarily be considered to raise too many speculative issues to be considered in the initial spousal support award.

4 Cases that cite this headnote

21 **Divorce** Employment and wage or salary issues
Question of whether husband's spousal support obligation should be modified upon his retirement had to be made in a modification action when retirement was imminent or had actually occurred and not in initial spousal support action.

4 Cases that cite this headnote

Attorneys and Law Firms

*404 Kodi A. Brotherson of Becker and Brotherson Law Firm, Sac City, for appellant.

Michael B. Oliver of Oliver Law Firm, P.C., Windsor Heights, for appellee.

Opinion

APPEL, Justice.

In this case, we consider the duration and amount of a spousal support award in a dissolution of marriage. Based on the evidence at trial, the trial court ordered the petitioner to pay $1400 per month in spousal support, increasing to $2000 per month upon the termination of child support, for life. The trial court also divided the assets of the parties approximately equally, rejected a dissipation-of-assets claim raised by the respondent, and declined to award the respondent trial attorneys' fees.

The petitioner appealed and the respondent cross-appealed. We transferred the case to the court of appeals, which affirmed the order of the district court. We granted further review.

On further review, we limit our review to questions arising from the award of spousal support. On the other issues raised in the petitioner's appeal and the respondent's cross-appeal, the order of the district court as upheld by the court of appeals is affirmed.

I. Background Facts and Proceedings.

In this case, we consider the spousal support award made by the district court in connection with the dissolution of Steven and Linda Gust's marriage after trial in May of 2012. In its order, the district court, among other things, divided the assets and debts of the parties and required Steven to pay traditional spousal support in the amount of $1400 per month for as long as he was paying child support for a minor son, and $2000 per month thereafter.

Steven filed a posttrial motion seeking to expand the findings of the district court. Among other things, Steven asked that the spousal support begin at $1400 per month, but that it be reduced after a period of time to $1000. Steven also asked the court to place a termination date on spousal support at Steven's retirement. The district court denied the motion.

Steven appealed and Linda cross-appealed. Steven challenged the spousal support amount as excessive in amount and duration. In her cross-appeal, Linda challenged the district court's division of assets and sought attorneys' fees for trial and appellate proceedings. We transferred the case to the court of appeals, which affirmed the order of the district court. We granted further review.

Based upon our review of the entire record, we make the following findings of fact. Steven and Linda Gust were married in 1985. At the time of trial, Steven and Linda had two children, aged seventeen and twenty-one. At the time of the entry of the district court's order in this case, Steven was fifty-seven years old and Linda was fifty-two years old.

Steven received his bachelor's degree in economics from Iowa State University in *405 1977. After working at several construction companies, he testified he began working at MD Construction in approximately 2005, rising to his current position of general manager. Steven testified his base salary from MD Construction was $76,000 per year. In 2011, the year prior to trial, Steven received incentive payments of about $16,000. For 2012, Steven expected to receive incentive payments of between $6000 and $8000. Through his work, Steven received partially paid health insurance, paid vacation, and paid sick leave. We, like the district court, find that Steven's earning capacity from his position is $92,000 per year. Additionally, although Steven has type 1 diabetes, the disease does not prevent full-time employment.

Steven also testified regarding the operations of an entity called Sound Real Estate, LLC (Sound). Linda and Steven were the sole members of Sound and under the operating agreement were entitled to equal amounts of any distributions to members. The original purpose of Sound was to flip houses. More recently, Steven restructured Sound and obtained subcontractors to engage in lead-based paint removal for MD Construction.

Steven has certifications as a lead abatement contractor, a lead abatement worker, and lead abatement trainer.

Steven testified the business of Sound was a result of grants administered by the U.S. Department of Housing and Urban Development for Sioux City and Polk County. Steven's role in Sound's business focused on completing paperwork for lead abatement projects performed under the grants. Because of the exhaustion of grant funds, Steven's desire not to work nights and weekends, and Steven's concern about aggravating his diabetes, Sound ceased to be active, and Steven resigned from the entity in 2012.

During 2011 Steven withdrew $64,000 from Sound, which, combined with his compensation from MD Construction, yielded a total gross income for 2011 of approximately $156,000. The funds were largely used, however, to pay credit card debt and to provide temporary support for Linda during the pendency of the dissolution proceeding.

Steven testified he has no desire to continue Sound's business or open a similar business at the present time. Because Sound's business focused on completing paperwork that is no longer required in connection with lead paint abatement projects, there is no current prospect that the business could be resuscitated. Because Steven has a full-time job and because Sound has no current business viability, we do not include earnings from Sound in our calculation of Steven's present earning capacity.

At the same time, however, we find that Steven paid $50 to the Iowa Secretary of State for filing fees on behalf of SafeCon, a business owned by his girlfriend that provides lead-based abatement services to community colleges. Steven testified he had "no idea" whether he would work for SafeCon in the future, but emphasized he was done working two jobs. We find that Steven has no plans to work for SafeCon or any other similar entity while he is employed full time by MD Construction. There is at least a possibility, however, that utilizing his lead abatement training and expertise, Steven will work with SafeCon or a similar entity sometime in the future.

Linda testified that she was almost fifty-two at the time of the trial and lived in a rented townhouse with the parties' minor son. She attended Des Moines Area Community College in the distant past, where she was close to obtaining a two-year degree. Between 1982 and 1986, Linda *406 worked as a secretary for an accounting firm. She also worked as a bookkeeper in Steven's business, H & S Builders, Ltd., from 1992 to 1994 and had done some work for Generavivity, an assisted nursing care facility in Lake Panorama. Aside from this employment, Linda, with the agreement of Steven, took care of the house and kids until 2008 while Steven earned an income to support the family.

Beginning in 2008 as the children grew older, Linda became employed outside the home. She currently holds two part-time jobs with the Ankeny Community School District, one involving work in the media center, which pays $12 per hour, and another barcoding textbooks, which pays $9 per hour. The combination of jobs yields $15,000 in income per year. She does not, however, receive benefits from these two part-time jobs.

At trial, Steven offered expert testimony suggesting that Linda had an earning capacity of between $29,619 and $30,400 per year. Based upon our review of the record, we agree with the district court that while the expert report overstates Linda's earning capacity somewhat, Linda's earning capacity is $22,500 per year.

The property owned by the parties is accurately described in the appendix attached to the district court order. The district court divided the parties' assets roughly equally, with Steven receiving a net equity of $62,249 and Linda $81,651. In the attached appendix, the district court determined Steven was to be awarded approximately $136,000 (valued in 2012) in retirement accounts, and Linda $58,000. The parties had equally divided the proceeds from the sale of the marital home with the expectation that the proceeds would pay each party's attorneys' fees.

With respect to maintaining the standard of living the parties were accustomed to, we find because of the inefficiencies resulting from the establishment of two households and because the parties used credit card debt to live beyond their means during the marriage, neither party will be able to maintain their predivorce lifestyle in the postdivorce world. We find Steven's current living expenses at the time of trial were $4387 per month (assuming no reduction of principal of credit card debt). While Linda claimed $4623.99 in current living expenses, we find this amount was somewhat overstated. Making adjustments for lower costs of health insurance, food and household expenses, cable costs, and

eliminating the savings component, we find Linda's current monthly expenses at the time of trial were $3819 per month.

II. Standard of Review.

An appeal regarding the dissolution of marriage is an equitable proceeding. Iowa Code § 598.3 (2011). Our review is therefore de novo. Iowa R.App. P. 6.907; *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 484 (Iowa 2012). We give weight to the factual determinations made by the district court; however, their findings are not binding upon us. Iowa R.App. P. 6.904(3)(*g*).

1 In reviewing questions related to spousal support, while our review is de novo, we have emphasized that " 'we accord the trial court considerable latitude.' " *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005) (quoting *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996)); *see also* *In re Marriage of Schenkelberg*, 824 N.W.2d at 486. We will disturb the trial court's order " 'only when there has been a failure to do equity.' " *In re Marriage of Olson*, 705 N.W.2d at 315 (quoting *In re Marriage of Spiegel*, 553 N.W.2d at 319). We noted in *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996):

> ***407** This deference to the trial court's determination is decidedly in the public interest. When appellate courts unduly refine these important, but often conjectural, judgment calls, they thereby foster appeals in hosts of cases, at staggering expense to the parties wholly disproportionate to any benefit they might hope to realize.

III. Discussion.

A. Overview of Iowa Law Regarding Spousal Support. We begin our discussion with an overview of Iowa law regarding spousal support. Originally, the Iowa legislature provided that in a divorce action the court could enter an order with respect to maintenance of the parties "as shall be right." Iowa Code § 1485 (1851). In awarding spousal support under this wide-open provision, Iowa courts considered a range of facts and circumstances, which were reprised in *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968). In *Schantz* the court laid out "a general formula" for considering the equitable determinations in divorce proceedings, including "the troublesome problem inherent in awarding alimony." *Id.* at 405. Although the *Schantz* general formula consisted of five premarital and ten postmarital criteria distilled from prior caselaw, the court pointed out that each element is not always present or important in every case. *Id.*

2 3 In 1970, the legislature enacted no-fault divorce. *See* 1970 Iowa Acts ch. 1266 (codified at Iowa Code ch. 598 (1971)); *see also* *In re Marriage of Williams*, 199 N.W.2d 339, 344 (Iowa 1972) (noting "the overriding legislative purpose of the dissolution act is to remove fault-based standards for termination of marriages"). A decade later, the *Schantz* approach (except for provisions related to fault of the parties) was largely adopted by our legislature. *See* 1980 Iowa Acts ch. 1175, § 3 (codified at Iowa Code § 598.21(3) (1981)). Under the current version of Iowa Code section 598.21A(1) (2011), a court

> may grant an order requiring support payments ... for a limited or indefinite length of time after considering *all* of the following:
>
> *a.* The length of the marriage.
>
> *b.* The age and physical and emotional health of the parties.
>
> *c.* The distribution of property made pursuant to section 598.21.
>
> *d.* The educational level of each party at the time of marriage and at the time the action is commenced.
>
> *e.* The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
>
> *f.* The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.

g. The tax consequences to each party.

h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.

i. The provisions of an antenuptial agreement.

j. Other factors the court may determine to be relevant in an individual case.

***408** (Emphasis added.) Our cases applying the statute have identified three kinds of support: traditional, rehabilitative, and reimbursement. *See In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008); *In re Marriage of Francis*, 442 N.W.2d 59, 63–64 (Iowa 1989). While the categories may overlap in some cases, *see, e.g., In re Marriage of Becker*, 756 N.W.2d at 827 (involving spousal support award the court could not characterize as strictly rehabilitative or traditional), this case involves traditional spousal support. "The purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued." *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct.App.1997). Traditional support is ordinarily of unlimited or indefinite duration. *See In re Marriage of Francis*, 442 N.W.2d at 64.

Our cases repeatedly state that whether to award spousal support lies in the discretion of the court, that we must decide each case based upon its own particular circumstances, and that precedent may be of little value in deciding each case. *See, e.g., In re Marriage of Becker*, 756 N.W.2d at 825–26; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007); *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). Our cases tend to emphasize the need to closely examine all the statutory factors and the entire record in each case. *See, e.g., In re Marriage of Schenkelberg*, 824 N.W.2d at 484–87. Further, the various factors listed in Iowa Code section 598.21A(1) cannot be considered in isolation from each other. *See* Iowa Code § 598.21A(1) (noting "all" factors are to be considered by trial court in awarding spousal support); *In re Marriage of Schenkelberg*, 824 N.W.2d at 486 (emphasizing that spousal support is calculated based on "all" the factors in 598.21A(1)).

The law of spousal support under the multifactored statutory approach has been criticized for its arbitrary nature and lack of predictability. *See* Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 Harv. Women's L.J. 23, 24–25 (2001). According to the critics, the terms of the statutes embracing multifactored tests for spousal support are not well defined and the standards are so vague that just about any outcome, including those based on the personal preference of an individual judge, may be justified by citation to pliable statutory factors. *See id.;* David A. Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 Nev. L.J. 325, 326 (2009) (characterizing spousal support as "judge-specific, idiosyncratic, inconsistent, and unpredictable"). Some courts have joined the fray. *See, e.g., Bacon v. Bacon*, 819 So.2d 950, 954 (Fla.Dist.Ct.App.2002) (Farmer, J., concurring specially) ("[B]road discretion in the award of alimony is no longer justifiable and should be discarded in favor of guidelines, if not an outright rule."); *Melzer v. Witsberger*, 505 Pa. 462, 480 A.2d 991, 994 (1984) (noting under Pennsylvania law "a total lack of organization with respect to how these principles interact and how they should be applied in order to arrive at an appropriate award of support"). The criticisms are not entirely off the mark, as a multifactored legal test in which all factors are relevant and none are dispositive can be extraordinarily difficult to consistently apply.

In part in response to such criticisms, reform efforts have been undertaken as reflected in the National Conference of Commissioners on Uniform State Laws, Uniform Marriage and Divorce Act (UMDA), in 1970 (abandoning concept of fault, limiting the reliance on spousal support, and emphasizing self-support even if ***409** at a substantially lower level than existed during the marriage), the American Law Institute (ALI), Principles of the Law of Family Dissolution: Analysis and Recommendations, in 2000 (establishing presumptions or guidelines based more on compensation for loss than upon need to provide predictability and consistency for setting spousal support award), and the guidelines of the American Academy of Matrimonial Lawyers, AAML Commission Recommendations, in 2007, *see* Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support, or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61, App. A (2008) [hereinafter Kisthardt] (proposing a presumptive formula based upon duration of marriage and earning capability of the parties). As is

invariably the case when a family law change is proposed, these reform efforts produced fervent supporters and bitter detractors. *See, e.g.*, John J. Sampson, *Uniform Family Laws and Model Acts*, 42 Fam. L.Q. 673, 685 (2008) (noting the UMDA generated considerable controversy but limited support); Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 Fam. L.Q. 573, 577 (2008) (noting the ALI's Principles of the Law of Family Dissolution sparked immense commentary but have only been examined in about 100 cases). Although these reform efforts were diverse in terms of their underlying theories and substantive content, they all sought to more clearly define the law of spousal support, to provide greater structure to the application of multifactored tests, and to enhance the predictability of outcomes.

In recent years, there has been a movement to statutorily modify multifactored spousal support statutes. Colorado and Massachusetts have recently amended their law to provide more detailed guidelines for the award of spousal support. *Cf.* Colo.Rev.Stat. Ann. §§ 14–10–114(3)(b)(II), 14–10–122 (West, Westlaw through 2d Reg. Sess. of 69th Gen. Assemb.); Mass. Gen. Laws ch. 208, §§ 48–55 (West, Westlaw through ch. 389 of 2014 2d Ann. Sess.).

A major impetus to the legislation in Massachusetts was the question of the impact of retirement on spousal support (referred to as alimony in Massachusetts). Rachel Biscardi, *Dispelling Alimony Myths: The Continuing Need for Alimony and the Alimony Reform Act of 2011*, 36 W. New Eng. L.Rev. 1, 30–31 (2014); *see also* Mass. Gen. Laws ch. 208, § 49(f) ("[G]eneral term alimony orders shall terminate upon the payor attaining the full retirement age."). In 2009, the Massachusetts Supreme Judicial Court declined to create a presumption in favor of the payor's request to be relieved of alimony obligations upon retirement. *See* *Pierce v. Pierce*, 455 Mass. 286, 916 N.E.2d 330, 344–45 (2009).[1] In response, the Massachusetts legislature amended its alimony statute to provide, among other things, that general (or traditional) alimony should not presumptively continue beyond the payor reaching full retirement age, absent ***410** a showing of good cause. *See* Mass. Gen. Laws ch. 208, §§ 49(f), 53(e). The Alimony Reform Act of 2011 also provides that a court may consider alimony for an indefinite period only for marriages of twenty years or more and generally limits support payments to between thirty and thirty-five percent of the difference between the parties' gross incomes at the time of the alimony order, unless there are circumstances warranting deviation. *See* 2011 Mass. Legis. Serv. ch. 124, § 3 (West) (codified at Mass. Gen. Laws ch. 208, §§ 49(c), 53(b), 53(d)); *see also* Biscardi, 36 W. New Eng. L.Rev. at 17–37; Charles P. Kindregan, *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 Suffolk U.L.Rev. 13, 24–41 (2013) (same).

A new statute in Colorado uses an approach similar to that in Massachusetts. The Colorado statute provides guidance regarding the duration of spousal support (referred to as spousal maintenance in Colorado), noting that in a marriage lasting more than twenty years, the court may award spousal maintenance for a specific term or an unlimited term, but in no event for less than ten years without making specific findings for ordering such reduction. Colo.Rev.Stat. § 14–10–114(3)(b)(II). The new statute addresses retirement situations by providing that retirement upon reaching full retirement age gives rise to a rebuttable presumption that the retirement is in good faith, thereby providing structure when the retiring payor spouses seek to terminate or reduce spousal maintenance in a modification action. *See id.* § 14–10122(2)(b). The statute presents a guideline for the amount of spousal maintenance. *Id.* § 14–10–114(3)(b)(I). Notably, the Colorado statute also preserves a previous procedure whereby a district court may retain jurisdiction to consider adjustments to spousal maintenance in the future based on specifically described events. *Id.* § 14–10–114(3)(g); *In re Marriage of Caufman*, 829 P.2d 501, 502 (Colo.App.1992).

Iowa was one of the very first states to adopt no-fault divorce after the promulgation of the UMDA. *See* *In re Marriage of Williams*, 199 N.W.2d at 344 ("California was the first to make the move in 1969 followed by Iowa and Michigan in 1970."). However, the legislature did not adopt the spousal support approach of the UMDA, and there has been no legislative action as in Massachusetts and Colorado to alter our traditional multifactored statutory framework for spousal support determinations. As a result, we are compelled to follow the traditional multifactor statutory framework. A number of general principles emerge from our caselaw, however, that suggest the comparative weight or importance of various factors and provide at least a degree of structure for traditional spousal support determinations.

4 5 6 7 First, our caselaw demonstrates that duration of the marriage is an important factor for an award of traditional spousal support. Traditional spousal support is often used in long-term marriages where life patterns have been largely set and "the earning potential of both spouses can be predicted with some reliability." *In re Marriage of Francis*, 442 N.W.2d at 62–63; *see also In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa Ct.App.1997). Further, particularly in a traditional marriage, when the parties agree a spouse should stay home to raise children, the economic consequences of absence from the workplace can be substantial. *See, e.g., In re Marriage of Becker*, 756 N.W.2d at 827. While neither we nor the legislature have established a fixed formula, the shorter the marriage, the less likely a court is to award traditional spousal support. Generally speaking, marriages lasting ***411** twenty or more years commonly cross the durational threshold and merit serious consideration for traditional spousal support. *See, e.g., In re Marriage of Michael*, 839 N.W.2d 630, 632, 635–39 (Iowa 2013) (twenty-three years); *In re Marriage of Olson*, 705 N.W.2d at 315–17 (twenty-three years); *In re Marriage of Geil*, 509 N.W.2d 738, 740, 742 (Iowa 1993) (nearly nineteen years); *In re Marriage of Debler*, 459 N.W.2d 267, 268–70 (Iowa 1990) (twenty-two years); *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661–62 (Iowa 1989) (twenty years); *In re Marriage of Wegner*, 434 N.W.2d 397, 397–99 (Iowa 1988) (twenty-six years); *In re Marriage of Murray*, 213 N.W.2d 657, 659–61 (Iowa 1973) (nineteen years); *In re Marriage of Boyd*, 200 N.W.2d 845, 854 (Iowa 1972) (twenty years).

8 9 Second, the cases emphasize that in marriages of relatively long duration, "[t]he imposition and length of an award of traditional alimony is primarily predicated on need and ability." *In re Marriage of Wendell*, 581 N.W.2d 197, 201 (Iowa Ct.App.1998). For over forty years, by virtue of both judicial decision and legislative provision, the yardstick for determining need has been the ability of a spouse to become self-sufficient at "a standard of living reasonably comparable to that enjoyed during the marriage." Iowa Code § 598.21A(1)(*f*); *accord Schantz*, 163 N.W.2d at 405; *see In re Marriage of Becker*, 756 N.W.2d at 827 (noting support payments needed until payee can become "self-supporting at a standard of living reasonably comparable to that she enjoyed during the marriage"); *In re Marriage of Olson*, 705 N.W.2d at 316 (same); *In re Marriage of Geil*, 509 N.W.2d at 742 (same). The standard for determining need is thus objectively and measurably based upon the predivorce experience and private decisions of the parties, not on some externally discovered and imposed approach to need, such as subsistence or adequate living standards or amorphous notions of self-sufficiency.

10 11 12 In determining need, we focus on the earning capability of the spouses, not necessarily on actual income. *See In re Marriage of Wegner*, 434 N.W.2d at 398–99 ("We have consistently examined the earning capacity [of the parties] beyond simply ascertaining present income."). In marriages of long duration, the historical record ordinarily provides an objective starting point for determining earning capacity of persons with work experience. *See, e.g., id.* In order to establish earning capability for persons without work experience or who are arguably unemployed, the parties may use vocational and other experts to assist the court in making the determination. *See generally* Edward M. Mazze & Candace E. Mazze, *Putting a Vocational Expert to Work in a Divorce Case*, 36–WTR Fam. Advoc. 26, 26–30 (2014) (describing the expertise of vocational experts and the process by which they determine the earning capacity of the parties); Brett R. Turner, *Earning Capacity and Spousal Support: The Uses and Abuses of Vocational Evidence in Divorce Cases*, 14 No. 12 Divorce Litig. 213 (2002) (noting that "determining income capacity is a field which particularly requires experience and personal contacts-factors which trial judges are not equipped to develop").

13 14 With respect to ability to pay, we have noted that "[f]ollowing a marriage of long duration, we have affirmed awards both of alimony and substantially equal property distribution, especially where the disparity in earning capacity has been great." *In re Marriage of Geil*, 509 N.W.2d at 742; *accord In re Marriage of Hitchcock*, 309 N.W.2d 432, 438 (Iowa 1981). Where there is a substantial disparity, ***412** we do not employ a mathematical formula to determine the amount of spousal support. *See In re Marriage of Conley*, 284 N.W.2d 220, 223 (Iowa 1979); *In re Marriage of Andersen*, 243 N.W.2d 562, 564 (Iowa 1976); *cf. In re Marriage of Huffman*, 453 N.W.2d 246, 248 (Iowa Ct.App.1990) (determining an equitable property division "cannot be reduced to a precise mathematical formula"). We have, however, approved spousal support where it amounts to approximately thirty-one percent of the difference in annual income between spouses. *See In re Marriage of Michael*, 839 N.W.2d at 638 & n. 7. Where a spouse does not have the ability to pay traditional spousal support, however, none will be awarded. *See In re*

Marriage of Woodward, 426 N.W.2d 668, 670 (Iowa Ct.App.1988) (noting the payor did not have the income to meet more than the parties' children's minimal needs).

15 16 With respect to duration, we have observed that an award of traditional spousal support is normally payable until the death of either party, the payee's remarriage, or until the dependent is capable of self-support at the lifestyle to which the party was accustomed during the marriage. *See, e.g., In re Marriage of Becker*, 756 N.W.2d at 826; *In re Marriage of Francis*, 442 N.W.2d at 64. In order to limit or end traditional support, the evidence must establish that the payee spouse has the capacity to close the gap between income and need or show that it is fair to require him or her alone to bear the remaining gap between income and reasonable needs. *See* Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 Fam. L.Q. 573, 583 (1988); Joan M. Krauskopf, *Maintenance: A Decade of Development*, 50 Mo. L.Rev. 259, 308 (1985). Spousal support may end, however, where the record shows that a payee spouse has or will at some point reach a position where self-support at a standard of living comparable to that enjoyed in the marriage is attainable. *See, e.g., In re Marriage of Becker*, 756 N.W.2d at 827.

B. Impact of Retirement on Award of Traditional Spousal Support. Although traditional spousal support is generally awarded for life, the question arises how the prospective retirement of a payor or payee spouse should be considered in the spousal support analysis. Cases across the country have produced a variety of answers that have been catalogued in an extensive annotation. *See* Jane Massey Draper, Annotation, *Retirement of Husband as Change of Circumstances Warranting Modification of Divorce Decree—Prospective Retirement*, 110 A.L.R.5th 237, 258–276 (2003) [hereinafter Draper]; *see also* Colleen Marie Halloran, *Petitioning a Court to Modify Alimony When a Client Retires*, 28 U. Balt. L.Rev. 193, 207–229 (1998). The issue of continuing spousal support after retirement is particularly pressing in light of longer lifespans and the fears that persons approaching retirement may outlive their money.

We have considered the impact of future retirement on support awards in only a handful of cases. Our most recent case dealing with retirement benefits in the context of traditional spousal support is *In re Marriage of Michael*, 839 N.W.2d at 632, 638. In this case, a sixty-three-year-old payor spouse sought modification of a prior spousal support order. *Id.* at 632. Among other things, the district court modified the order to provide that spousal support should terminate when the payor spouse reached the age of sixty-seven. *Id.* The court of appeals reversed. *Id.* at 634. We sided with the court of appeals on this issue. *Id.* at 634, 640. We held that the question of whether the payor spouse's obligation should terminate at his retirement ***413** "will depend on the circumstances of the parties prevailing at that time." *Id.* at 639 n. 8. Thus, the payor spouse in *In re Marriage of Michael* was required to wait until actual retirement to seek a reduction in his spousal support payments through a modification action based upon the impact of his retirement on his ability to pay. *See id.; see also In re Marriage of Maro*, No. 04–1043, 2005 WL 427720, at *3 (Iowa Ct.App. Feb. 24, 2005) (reversing trial court order which found that if a fifty-five-year-old payor spouse retired before the payee spouse reaches the age of sixty-five, this would constitute a significant change of circumstance meriting modification, reasoning that such a determination was premature and must await circumstances that will prevail at the time of trial of any future modification action).

We took a somewhat different path several decades ago in *Locke v. Locke*, 246 N.W.2d 246 (Iowa 1976). In *Locke*, we noted that the future receipt of social security benefits was a factor to consider under the *Schantz* support formulation. *Id.* at 254. Yet, we held the record was inadequate to calibrate the appropriate amount of spousal support because there was an absence of important testimony regarding the value of marital assets. *Id.* As a result, we remanded the case to the district court to develop an adequate record. *Id.* The implication of *Locke* is that although the record on appeal was inadequate, the trial court's consideration of the impact of future retirement on support obligations when the initial support order was being crafted was appropriate in that case. *See id.* The inadequacy in the record, however, was not based upon lack of evidence regarding future events, but present valuations. *See id.*

In another dated case, *Craft v. Craft*, 226 N.W.2d 6, 8–9 (Iowa 1975), we considered a support order where support of $200 per month continued until the payor applied for social security benefits and filed proof that payee was receiving benefits as a divorced spouse. Upon such a showing, the amount of social security benefits paid to the payee spouse would be a credit against the original support obligation. *Id.* at 9; *see also In re Marriage of Helmle*, 514 N.W.2d 461, 464 (Iowa Ct.App.1994) (reducing spousal support

payments when payee is entitled to social security benefits by amount of such benefits). The case does not suggest a reevaluation of the need for spousal support so much as merely providing a credit against preestablished spousal support for future retirement benefits.

Other Iowa appellate court cases have addressed the issue of the impact of future retirement on support obligations in a variety of ways. Sometimes the initial support obligation has been adjusted based upon the future receipt of retirement benefits by the *payee* spouse. For example, in *In re Marriage of Ennenga,* No. 04–1641, 2005 WL 2756723, at *3 (Iowa Ct.App. Oct. 26, 2005), the court of appeals held that because the disparity in the parties' income will be significantly reduced when the payee spouse retired, support should terminate upon her receipt of social security benefits. Similarly, in *In re Marriage of Schriner,* No. 03–1131, 2004 WL 1898484, at *3–4 (Iowa Ct.App. Aug. 26, 2004), *opinion vacated in part on other grounds by* 695 N.W.2d 493, 495 (Iowa 2005), the court of appeals held a reduction of support payments from $1400 to $700 per month based upon the payee's retirement was equitable in light of the expert testimony adduced in the case.

The court of appeals has also held support obligations are affected by the date the *payor* retires. For example, in ***414** *In re Marriage of Markham,* No. 02–1134, 2003 WL 21074445, at *1–2 (Iowa Ct.App. May 14, 2003), the court of appeals approved an order where support terminated when the payor retired or reached sixty-five. *See also In re Marriage of Miller,* 524 N.W.2d 442, 444–45 (Iowa Ct.App.1994) (involving support order in which payor's obligation to make spousal support payments terminated when payee retired, either party died, or when the payor took social security benefits). On the other hand, in *In re Marriage of Bell,* 576 N.W.2d 618, 623 (Iowa Ct.App.1998), *abrogated on other grounds by In re Marriage of Wendell,* 581 N.W.2d at 200, the court of appeals held that under all the facts and circumstances a support obligation should not be affected by retirement and that if the payor was unable to continue support he could petition for modification of the decree.

Our caselaw also reveals other instances where spousal support orders take future retirement into account in reducing but not eliminating traditional spousal support. In *In re Marriage of McCurnin,* 681 N.W.2d 322, 326, 331 (Iowa 2004), we modified the trial court award of spousal support and ordered a more appropriate award of $1500 per month until the payor retired or the payee reached sixty-five, whichever occurred last, and then reduced the payments to $1500 minus the payee's social security payments. Another payments-reduction case is *In re Marriage of Bell,* 576 N.W.2d at 621, 623, where the district court reduced support payments by fifty percent on the date of retirement. In *In re Marriage of Ask,* 551 N.W.2d 643, 644 (Iowa 1996), the parties stipulated to an arrangement whereby the $1000 per month support payments would be reduced upon the payor's retirement to one-half of the payor's monthly IPERS payment. Further, "[t]he parties would combine their social security benefits and each would receive one-half of the combined amount." *Id.*

There is also authority for the proposition that traditional spousal support may terminate upon reaching retirement. In *In re Marriage of Anliker,* 694 N.W.2d 535, 539 (Iowa 2005), the district court imposed an award of traditional spousal support until the payee attained the age of sixty-five or either party dies. While the limitation was not challenged on appeal, we found the traditional spousal support so limited was "equitable and [therefore, it] should not be disturbed." *Id.* at 541; *accord* *In re Marriage of Soloski,* No. 05–0310, 2006 WL 623583, at *2, 3–4 (Iowa Ct.App. March 15, 2006) (holding spousal support which terminated when payor reached age sixty-five equitable as to amount and duration); *In re Marriage of Aronson,* No. 05–0373, 2006 WL 334250, at *3–5 (Iowa Ct.App. Feb. 15, 2006) (holding termination of spousal support when payor reached age sixty-five equitable where fifty-one-year-old wife received one-half of payor's retirement benefits at that time).

On the other hand, some appellate court cases have held that retirement has no effect on traditional spousal support under the facts and circumstances of the case. *See In re Marriage of Wiedemann,* 402 N.W.2d 744, 749 (Iowa 1987) (holding trial court did not err in awarding traditional spousal support without decrease at time of retirement where there was disparity in parties' earning capabilities, husband would receive much higher rate of social security, and husband was awarded greater share of assets); *In re Marriage of Hayne,* 334 N.W.2d 347, 353 (Iowa Ct.App.1983) (holding trial court did not err in ordering former husband to continue to pay spousal support after his retirement).

C. Analysis.

17 1. *Introduction.* In analyzing the questions posed in this case, we consider two related but separate issues. The first ***415** issue is the general question of whether traditional spousal support of unlimited duration in the amount of $2000 per month was fair in this case. We next consider how we should treat the issue of the potential impact of Steven's future retirement on the spousal support obligation.

2. *Initial spousal support obligation.* We begin our analysis here by canvassing the traditional factors that have had a substantial bearing on the determination of spousal support. We note the marriage was of long duration, nearly twenty-seven years. As is often the case where traditional spousal support is awarded, Linda spent many years as a stay-at-home mom. The length of the marriage is comfortably within our caselaw where a spouse may be considered for indefinite spousal support. *See, e.g., In re Marriage of Michael,* 839 N.W.2d at 632, 635–39; *In re Marriage of Olson,* 705 N.W.2d at 315–17; *In re Marriage of Geil,* 509 N.W.2d at 740, 742.

Further, the record establishes Linda will not be able to be self-supporting in a lifestyle to which she was accustomed during the marriage. Although she has now returned to the workforce, her economic prospects are limited. While she may be expected to earn $22,500 per year, spousal support would be necessary for her to live in a fashion approaching her lifestyle during the marriage. *See, e.g., In re Marriage of Becker,* 756 N.W.2d at 827; *In re Marriage of Olson,* 705 N.W.2d at 316; *In re Marriage of Geil,* 509 N.W.2d at 742.

Steven, on the other hand, earns $92,000 per year. There is thus considerable disparity between the annual income Linda can reasonably be expected to earn, $22,500, and Steven's expected income, $92,000. *See, e.g., In re Marriage of Geil,* 509 N.W.2d at 742; *In re Marriage of Hitchcock,* 309 N.W.2d at 438. We further note that under the trial court's order, Linda will live off income and support of approximately $46,500 per year ($24,000 in spousal support a year, plus $22,500 in salary), while Steven will have approximately $68,000 per year ($92,000 in salary, minus $24,000 per year in spousal support payments) at his disposal.

We recognize it may be that neither party will be able to maintain their marital lifestyle, as the parties at times lived beyond their means using credit card debt, and two households are inevitably more expensive to maintain than one. However, the spousal support award allows Linda to live in a fashion that approaches the lifestyle to which she was accustomed in the marriage without undermining Steven's ability to do the same.

18 In considering duration of the award, we note that traditional spousal support is ordinarily unlimited in duration except upon the remarriage of the payee spouse, or death of either party. *See, e.g., In re Marriage of Cooper,* 451 N.W.2d 507, 509 (Iowa Ct.App.1989); *In re Marriage of Bornstein,* 359 N.W.2d 500, 503 (Iowa Ct.App.1984); *In re Marriage of Hayne,* 334 N.W.2d at 351. There can, however, be exceptions to the general rule. For example, in *In re Marriage of Becker,* 756 N.W.2d at 827, we limited spousal support in a twenty-two year marriage where the record showed that after a period of rehabilitation and retraining, the income of the payee spouse "should allow her to become self-supporting at a standard of living reasonably comparable to the standard of living she enjoyed during the marriage." In contrast, in this case, there is no reason to believe Linda will ever be able to generate enough income to support herself at the standard of living she enjoyed during the marriage. Under the record of this case, Linda's need for support to maintain the lifestyle she has grown accustomed to and Steven's ability to pay should remain unchanged for the indefinite future. *See* ***416** *Schroeder v. Schroeder,* 924 S.W.2d 22, 25–27 (Mo.Ct.App.1996) (holding where evidence indicates that dependent spouse's financial prospects will not improve materially in the future and the means of the spouse providing maintenance are not likely to decrease, original maintenance should stay in place).

19 We also recognize the trial court was in the best position to balance the parties' needs, and we should intervene on appeal only where there is a failure to do equity. *See In re Marriage of Olson,* 705 N.W.2d at 315; *In re Marriage of Benson,* 545 N.W.2d at 257. Setting aside the retirement issue, we do not find the award of $2000 per month fails to do equity in this case. [2]

3. *Treatment of future retirement.* The fighting issue in this case is whether the district court erred in not fashioning a spousal support order that took into account the future retirement of Steven. In this regard, we have several options. First, we could follow the

approach in *In re Marriage of Michael,* 839 N.W.2d at 639 n. 8, and hold that the question is not ripe for review and must await Steven's actual retirement. Second, we could consider a flexible approach which allows the district court wide latitude to consider the issue when there is an adequate factual record, but to defer the question to a modification action where there is a paucity of information. Third, we could simply do our best to consider the likely impact of retirement on both the parties in light of their ongoing needs as well as the reduced ability to pay that ordinarily flows from retirement.

20 We think the best course in this case is to follow *In re Marriage of Michael.* Under this approach, future retirement will ordinarily be considered to raise too many speculative issues to be considered in the initial spousal support award. In this case, as in *In re Marriage of Michael,* we simply do not know important facts. For starters, we do not know when Steven will actually retire. He may retire at his normal social security retirement ***417** age, but he may also continue to work at a time when Linda still has significant need. We do not know what the relative financial position of the parties will be at the time of Steven's eventual retirement. When Steven does retire, he may maintain consulting relationships or other arrangements that enhance his retirement income. We do not know whether there will be health considerations that would impact the equities. We do not know what the impact of Linda's retirement will have on the party's relative financial posture. And, we do not know whether the retirement will be motivated by a desire to avoid or reduce support obligations, a factor that normally would not support a reduction in support benefits. *See Smith v. Smith,* 419 A.2d 1035, 1037–38 (Me.1980) (noting "retirement of the payor spouse for the primary purpose of avoiding alimony does not of itself bring about the substantial change in the payor's circumstances needed to justify a reduction in alimony").

Our approach in *In re Marriage of Michael* is not an outlier. A number of courts in other jurisdictions appear to have taken a similar approach and deferred consideration of the impact of retirement upon spousal support obligations. *See, e.g., DeShazo v. DeShazo,* 582 So.2d 564, 565 (Ala.Civ.App.1991) (affirming award of alimony because ability of husband to pay alimony in future is speculative); *Chaney v. Chaney,* 145 Ariz. 23, 699 P.2d 398, 401–02 (Ct.App.1985) (holding that though future retirement was contemplated by parties at time decree was issued, precise date and what payor's benefits would amount to were speculative and therefore did not bar later modification); *Frost v. Frost,* 203 Ark. 1147, 155 S.W.2d 895, 896 (1941) (indicating payor spouse retiring in the next few years will have opportunity at time of retirement to show that he is required to pay support in a sum beyond his means); *In re Marriage of Kuppinger,* 48 Cal.App.3d 628, 639, 120 Cal.Rptr. 654 (Ct.App.1975) (holding mere eligibility to retire at age sixty-five not a basis for adjustment in spousal support); *Ryan v. Ryan,* 697 A.2d 60, 61–62 (Me.1997) (holding parties should be allowed to reopen the relative economic issues at a more "propitious time," as payor's retirement was speculative and payee's future earning ability was unknown); *Sommer v. Sommer,* 636 N.W.2d 423, 430–31 (N.D.2001) (declining to reduce support in the future based upon payor's retirement noting exact date of retirement is unknown and there was no evidence the reduction of income that would occur); *Mottice v. Mottice,* 118 Ohio App.3d 731, 693 N.E.2d 1179, 1183 (1997) (holding because payor spouse submitted he was considering retirement, but provided no details as to retirement income or when he was going to retire, therefore, his anticipated retirement did not constitute a basis for reduction or termination of support payments); *In re Marriage of Wilson,* 186 Or.App. 515, 63 P.3d 1244, 1249 (2003) ("[E]ven if husband's retirement was foreseeable when the parties' marriage was dissolved, the timing of its occurrence was speculative and, thus, it could not have affected his support obligations at that time."); *Browder v. Browder,* 382 S.C. 512, 675 S.E.2d 820, 824 (Ct.App.2009) ("Any change in circumstances regarding Husband's retirement may warrant a modification of alimony when that event occurs; however, consideration of this anticipated but speculative occurrence at this time was inappropriate."); *Lambertz v. Lambertz,* 375 N.W.2d 645, 646–47 (S.D.1985) (per curiam) (holding trial court was aware that husband might retire after decree issued; however, evidence was speculative and did not bar modification based on substantial reduction in income); ***418** *Adamson v. Adamson,* No. 20010516–CA, 2002 WL 31770882, at *1 (Utah Ct.App. Dec. 12, 2002) (finding payor's speculative retirement was not ripe for decision). Lengthy annotations outline various situations in which state courts have considered whether a spousal support order should be modified based upon retirement. *See, e.g.,* Draper at 258–76.

Further, the legislature has expressly directed that in order to modify spousal support awards, a court must consider a number of specific factors. Iowa Code § 598.21C(1). Some of these factors cannot be properly considered at the time the initial spousal

support award is determined (changes in resources, changes in medical expenses, changes in health, possible support of a party by another person). *See id.* The most consistent approach with the statutory scheme is that unless all of the factors in Iowa Code section 598.21C(1) can be presently assessed, future retirement is a question that can be raised only in a modification action subsequent to the initial spousal support order.

21 Based upon *In re Marriage of Michael*, the authorities in other jurisdictions, and our desire to vindicate the statutory scheme established by the legislature, we conclude the question of whether Steven's spousal support should be modified upon his retirement must be made in a modification action when retirement is imminent or has actually occurred.

IV. Conclusion.

For all the above reasons, we affirm the decision of the court of appeals.

AFFIRMED.

All justices concur except WIGGINS, WATERMAN, and MANSFIELD, JJ., who concur in part and dissent in part.

WIGGINS, Justice (concurring in part and dissenting in part).
I respectfully concur in part and dissent in part.

When we decide whether to award spousal support and its duration, the first step is to determine which party has the burden of proof to show he or she is entitled to alimony and its duration. We said long ago, the person seeking spousal support has the burden to show he or she is entitled to spousal support. *Moore v. Moore*, 192 Iowa 394, 395–96, 184 N.W. 732, 732 (1921).

In 1921, when we made this statement, the Code required a party to verify the petition for dissolution and establish the allegations in the petition by competent evidence. Iowa Code § 6622 (1919). In this regard, the Code has not changed. A party must still verify the petition for dissolution and establish the allegations in the petition by competent evidence. Iowa Code § 598.5(2)–(3) (2011).[3]

Moreover, putting the burden of proof on the party requesting spousal support is consistent with the general legal principle that the "burden of proof in an action ordinarily rests with the party who is seeking recovery." *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 370, 374 (Iowa 2000). In the present case, Linda requested spousal support in her answer to Steve's petition for dissolution. Accordingly, Linda bears the burden of proof to establish from the competent evidence produced at trial that she is entitled to spousal support, and if she is entitled to spousal support, its amount and duration.

In proving her claim for spousal support and its duration, it is important to note the legal principles associated with her burden of proof. The legislature has set forth the ***419** criteria a court should use to determine spousal support awards. These are:

a. The length of the marriage.

b. The age and physical and emotional health of the parties.

c. The distribution of property made pursuant to section 598.21.

d. The educational level of each party at the time of marriage and at the time the action is commenced.

e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.

g. The tax consequences to each party.

h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.

i. The provisions of an antenuptial agreement.

j. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21A(1).

I agree with the district court that Linda is entitled to spousal support. I also agree the amount of the support should be $1400 per month while Steve is paying child support, and then increase to $2000 after child support terminates. I reach this conclusion for a number of reasons.

First, at the time of the decree, Linda's earning capacity was around $22,500 per year compared to Steve's actual earnings of $92,000 per year. Second, at Steve's and Linda's present ages, there is not much either party can do to increase his or her earning capacity. Finally, this award will allow both parties to live at a standard of living reasonably comparable to what they enjoyed during the marriage.

I cannot agree, however, with the spousal support award continuing beyond when Steve reaches age sixty-six[4] or retires, whichever is later. The record is void of any evidence and Linda has failed to meet her burden to show Steve will have the income or the assets to support such an award after his retirement. If we look at the assets awarded Steve, he netted $64,249 worth of assets while Linda netted $81,651 worth of assets. We can calculate the net asset value awarded to Steve by taking the district court's award of gross assets in the amount of $167,125 and subtracting the court awarded liabilities of $102,876 from the gross assets. Linda leaves this marriage with no liabilities.

In analyzing the assets the court awarded Steve, we can break those down into four types. They are as follows:

Type of Asset	Value
Vehicles	$22,235.00
Cash Value Life Insurance	$4,371.00
Cash	$4,582.00
Retirement	$135,937.00
TOTAL	$167,125.00

The liabilities Steve received are in the form of his truck loan, credit card expenses, and back taxes. He must pay ***420** these debts in the near future. To do so would require him to liquidate his retirement funds and the cash value of his life insurance. The liquidation of these funds has tax consequences, which we must also consider. Hence, after paying these debts, he would be left with little or no assets to generate any income after his retirement. Thus, I would find that once his income stops after his retirement his main income would be his social security, which is not sufficient to support a $2000 per month payment. Therefore, I would conclude Linda did not prove Steve would have the income to support the spousal support payments ordered by the court after his retirement.

Had these parties remained married beyond Steve's retirement, it is apparent to me they would not have much more than their social security, IPERS, and any retirement benefits left after paying their debts. This is the lifestyle Linda would have had after retirement. Under the property settlement in the decree, Linda will have available to her $56,738 in IRAs, a social security benefit based upon Steve's earnings,[5] and her IPERS. She will also have her earnings until she retires. I find these amounts would be equal to, if not greater than, the amounts she would have available to her if she and Steve had remained married. Lifetime spousal support puts her in a much better situation than she would have been if she had stayed married.

I also think the majority's reliance on the notion of traditional alimony is misplaced. We first referenced the notion of traditional alimony in 1989. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989). We said traditional alimony is "payable for life or so long as a spouse is incapable of self-support, a change in status (e.g., remarriage) may alter the support picture and warrant a modification." *Id.* at 64. At the same time, we introduced the terms of reimbursement alimony and rehabilitative alimony. *Id.* at 63–64. These classifications served us well in 1989, but should not totally drive our decisions on spousal support awards twenty-five years later. As we said in a recent case, it is not necessary for the court to characterize alimony as traditional, reimbursement, or rehabilitative. *In re*

Marriage of Becker, 756 N.W.2d 822, 827 (Iowa 2008). What the legislature requires us to do is to apply the factors set forth in Iowa Code section 598.21A to determine a fair and equitable spousal support. For all the reasons stated above, applying the principle contained in section 598.21A, spousal support should not continue after Steve reaches sixty-six years of age or retires, whichever occurs later.

Contrary to the majority's position, I do not think Steve would be able to modify the spousal support payments upon his retirement. Our law is clear and well settled—you can only modify a decree if there is a substantial change in circumstances not contemplated by the court at the time of the entry of the decree. *In re Marriage of Sisson*, 843 N.W.2d 866, 870–71 (Iowa 2014).

At the time of the entry of this decree, the court contemplated Steve would retire at some time in the future. It also contemplated his only retirement income would be from his social security and any retirement accounts he had after paying off the liabilities the court assigned to him. As I previously stated, this would not be enough to pay the $2000 a month spousal support. Therefore, when he comes back to court after his retirement and asks for a ***421** modification on the basis his income will not justify the spousal support, the court should deny the modification because the court contemplated his earning situation at retirement when it entered the original decree. The more logical and equitable approach is to terminate Steve's spousal support obligation when he reaches age sixty-six or retires, whichever is later. At that time, if his financial situation has improved beyond the contemplation of the court at the time it entered the original decree, Linda can file for a modification to have the support continued.

Finally, I think the majority's reliance on *In re Marriage of Michael* is misplaced. 839 N.W.2d 630 (Iowa 2013). *Michael* supports my view that Steve's spousal support obligation should cease when he reaches age sixty-six or retires, whichever is later. *Michael* is a modification action, modifying a decree the court previously modified. *Id.* at 631–33. Both modifications required the husband to file appeals.[6] *Id.* Each modification was necessary because the court in the original decree awarded lifetime spousal support without knowing what the future held for these litigants. Modification actions are not only very expensive to the litigants, but also use valuable judicial resources.

In *Michael* we lowered the amount of spousal support, but did not end it on his retirement. *Id.* at 638–39. We did this because the original decree and the first modification had a provision for lifetime spousal support. *Id.* at 632, 639. Moreover, the husband in *Michael* did not appeal the original award of lifetime spousal support. Obviously, the husband in *Michael* did not contest the fact that the facts and circumstances in existence at the time the original decree was entered supported lifetime spousal support. In contrast, Steve is appealing the original decree awarding lifetime spousal support.

We can avoid the lessons of *Michael* by basing the duration of spousal support on the proof presented at trial. Linda has not met her burden of proof to allow the court to award lifetime spousal support. Linda has not proved Steve has the ability to pay lifetime spousal support and that her standard of living will be significantly worse off than if the parties had stayed married and Steve retired. In other words, the legislative mandates of section 598.21A(1) do not allow the district court to award lifetime spousal support.

For these reasons, I must dissent to that part of the majority's opinion requiring Steve to pay spousal support after he reaches age sixty-six or retires, whichever is later.

WATERMAN and MANSFIELD, JJ., join this concurrence in part and dissent in part.

All Citations

858 N.W.2d 402

Footnotes

1 Absent statutory directive, most courts that have considered this issue have declined to impose a presumption of termination of support when the payor retires at a certain age. *See, e.g.*, *Bogan v. Bogan*, 60 S.W.3d 721, 731 (Tenn.2001) ("Although an obligor's retirement age may be considered in assessing the overall reasonableness of the retirement, we are reluctant to establish a presumptive age for an objectively reasonable retirement."); *Coates v. Coates*, No. 97–3118, 1998 WL 734476, at *2, *4 (Wis.Ct.App.

Oct. 22, 1998) (finding payor's voluntary retirement at age sixty-eight was unreasonable, and he could reasonably be expected to work until the payee was sixty-five).

2 We note our resolution on this issue is consistent with the recommendation of the American Academy of Matrimonial Lawyers. *See* Kisthardt, 21 J. Am. Acad. Matrim. Law. at 80–85. The Academy urges a guideline approach where marriages over twenty years qualify for unlimited spousal support. *See id.* at 80. The amount of unlimited spousal support is determined by taking 30% of the payor's gross income minus 20% of the payee's gross income. *See id.* In this case, application of the AAML guideline formula would produce a presumptive unlimited support payment of $23,100 per year.

> The AAML guidelines, of course, are not Iowa law, but the similarity between the AAML guidelines and our application of Iowa Code section 598.21A(1) factors is apparent. While clearly not binding on an Iowa court, the AAML guidelines nonetheless provide a useful reality check with respect to an award of traditional spousal support. *See, e.g.*, *Boemio v. Boemio*, 414 Md. 118, 994 A.2d 911, 925–26 (2010) (citing AAML guidelines in applying multifactored state statute).
>
> Our resolution is also consistent with ALI's Principles of the Law of Family Dissolution, which suggest in an illustration that unlimited traditional spousal support is presumptively appropriate in thirty-year marriages where the claimant is fifty-five years of age, but not for a twenty-year marriage where the claimant was forty years of age. Principles of the Law of Family Dissolution § 5.06, at 949–50. Here, Linda was fifty-two years of age when the decree was entered and the marriage lasted nearly twenty-seven years, just shy of the facts presented in the ALI illustration that presumptively qualified for unlimited spousal support and well away from the facts of the illustration where only term support was merited. *See id.* In this case, even if Linda was not entitled to unlimited spousal support under the ALI framework, the length of her definite term spousal support under section 5.05 according to an illustration would entitle her to support for seventeen years, or to age sixty-nine. *See id.* § 5.05, at 939–40.

3 All references to the Iowa Code are to the 2011 Code unless otherwise noted.

4 At age sixty-six and two months, Steve is entitled to his full benefits under Social Security.

5 A divorced spouse whose marriage lasted ten years or longer can receive benefits based upon their ex-spouse's earning record. 42 U.S.C. §§ 402(b), 416(d)(1) (2012).

6 The parties settled the first modification while it was on appeal. *Michael*, 839 N.W.2d at 633.

End of Document

Original Image of 874 N.W.2d 103 (PDF)

874 N.W.2d 103
Supreme Court of Iowa.

In re Marriage of Mauer
Supreme Court of Iowa. January 29, 2016 874 N.W.2d 103 *(Approx. 12 pages)*

Upon the Petition of Richard C. Mauer, Appellee,
and
Concerning Carol K. Mauer, Appellant.

No. 14–0317.
Jan. 29, 2016.

Synopsis

Background: Husband filed petition to dissolve his marriage to wife. The District Court, Black Hawk County, Jon Fister, J., ordered husband to pay $9,100 per month in spousal support initially, decreasing to $7,000 per month when wife reached retirement age and $5,000 per month when husband reached retirement age or actually retired, whichever occurred later. Both parties appealed. The Court of Appeals, 863 N.W.2d 35, affirmed as modified, ordering husband to pay $25,000 per month in spousal support until wife's remarriage or death of either party. Both parties sought further review, which was granted.

Holding: The Supreme Court, Wiggins, J., held that wife was entitled to $12,600 in spousal support initially, decreasing to $6,500 per month upon wife's retirement and $5,000 per month upon husband's retirement.

Court of Appeals decision affirmed in part and vacated in part; district court judgment affirmed as modified.

West Headnotes (9)

Change View

1 **Divorce** Decisions of intermediary courts
Supreme Court would exercise its discretion to review only Court of Appeals' decision on spousal support award, in marriage dissolution proceedings, and, thus, Court of Appeals' decision affirming trial court's dissolution decree as modified would stand as final decision of Supreme Court in all other respects, including property distribution, child support, life support, and appellate attorney fees.

2 **Divorce** Review
When considering an application for further review in a divorce case, Supreme Court has discretion to review all the issues raised on appeal or in the application for further review or only a portion thereof.

3 **Divorce** Amendments, additional proofs, and trial of cause anew
Standard of review of marriage dissolution proceedings is de novo. I.C.A. § 598.3; I.C.A. Rule 6.907.

1 Case that cites this headnote

4 **Divorce** Findings of court or chancellor

SELECTED TOPICS

Appeal and Error

Appellate Review of Trial Judge Discretion

Divorce

Alimony, Allowances, and Disposition of Property
Alimony Request
Fixed Term Rehabilitative Spousal Maintenance Award

Secondary Sources

Spousal Support on Termination of Marriage

32 Am. Jur. Proof of Facts 2d 439 (Originally published in 1982)

...The marital relationship creates, for each spouse, a set of rights and obligations. One of the husband's obligations is to support and maintain his wife. There is no correlative common-law obligation o...

P1900 INTRODUCTION

Mandated Health Benefits - COBRA Guide ¶1900

...Tab 1900 provides a comprehensive list of the court decisions in which COBRA figured prominently, and the general legal principles involved in these cases. The tab includes the following sections: 1. A...

APPENDIX III - JUDICIAL OPINIONS

FDA Enforcement Man. Appendix III

...No. 74-215 Supreme Court of the United States 421 U.S. 658; 95 S. Ct. 1903 2d 489 Argued March 18-19, 1975 June 9, 1975 Mr. Chief Justice Burger delivered the opinion of the Court. We granted certiorar...

See More Secondary Sources

Briefs

Brief for the United States

1995 WL 17078156
Pat M. BARRETT, Jr., and Joyce Barrett, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.
United States Court of Appeals, Fifth Circuit
June 19, 1995

...Note: Pages ii missing in original document. On January 24, 1994, Pat M. Barrett, Jr., and Joyce Barrett (taxpayers) timely filed the instant action in the United States District Court for the Southern...

Appellant's Reply Brief

2012 WL 4901385
UNITED STATES OF AMERICA, Plaintiff / Appellee, v. Judith A. BARNES, Defendant / Appellant.
United States Court of Appeals, Eleventh Circuit.
Oct. 04, 2012

...In rebutting Appellant's opening Brief, the Appellee, United States of America ("United States") combines Appellant, Judith Barnes' ("Barnes") first two (2) arguments under one (1) category arguing tha...

Brief of Respondent

2010 WL 636030
Paul RENICO, Warden, Petitioner, v. Reginald LETT, Respondent.
Supreme Court of the United States
Feb. 19, 2010

Although Supreme Court gives weight to the factual findings of the district court in a divorce case, Supreme Court is not bound by them. I.C.A. Rule 6.14(6)(g).

5 **Divorce** Questions of Fact, Verdicts, and Findings
Supreme Court will disturb a district court determination in a divorce case only when there has been a failure to do equity.

2 Cases that cite this headnote

6 **Divorce** Award in General; Calculation
Divorce Spousal Support
Even if spousal support guidelines may provide a useful reality check in some cases, because they are not state law, they can serve neither as the starting point for a trial court nor as the decisive factor for a reviewing court on appeal. I.C.A. § 598.21A(1).

1 Case that cites this headnote

7 **Divorce** Grounds and Defenses in Determining Existence and Amount of Obligation
Divorce Award in General; Calculation
When application of the factors contained in statute governing orders for spousal support results in a spousal support calculation that is inconsistent with a spousal support calculation under any guidelines-based approach, a court's application of the statutory factors must prevail over the guidelines-based determination. I.C.A. § 598.21A(1).

4 Cases that cite this headnote

8 **Divorce** Multiple factors
Divorce Extent of Time of Payments
Former wife was entitled to $12,600 in spousal support initially, decreasing to $6,500 per month when wife reached retirement age and $5,000 per month when husband reached retirement age or actually retired, as opposed to $25,000 per month until wife's remarriage or death of either party, in marriage dissolution proceedings; Court of Appeals failed to apply factors set forth in statute governing spousal support when awarding wife $25,000 per month in support, wife was capable of earning $57,000 per year in employment and investment income but required $12,583.33 per month to maintain standard of living reasonably comparable to that she enjoyed during marriage, and husband's substantial income was more than adequate to support award. I.C.A. § 598.21A(1).

9 **Divorce** Grounds and Defenses in Determining Existence and Amount of Obligation
Divorce Spousal Support
Any court, including appellate courts, must apply the factors set forth in statute governing orders for spousal support in making spousal support determinations. I.C.A. § 598.21A(1).

4 Cases that cite this headnote

Attorneys and Law Firms

**104* Jacob R. Koller of Simmons Perrine Moyer Bergman, PLC, Cedar Rapids, for appellant.

Allison M. Heffern and Diane Kutzko of Shuttleworth & Ingersoll, PLC, Cedar Rapids, and Max E. Kirk of Ball, Kirk & Holm, P.C., Waterloo, for appellee.

Opinion

WIGGINS, Justice.

Both parties seek further review of the financial provisions in their dissolution decree. Pursuant to our discretion to consider issues raised on further review, we let the court of appeals decision stand with respect to the property distribution, child support, life insurance, and appellate attorney fees. We do find, however, that the spousal support award by the district court was too low and the spousal support award as modified by the court of appeals was too high. Accordingly, we modify the spousal support award in the dissolution decree as set forth in this opinion.

I. Prior Proceedings.

Richard Mauer filed a petition to dissolve his marriage to Carol Mauer. Following a trial, the district court weighed conflicting evidence submitted by the parties as to the value of various business assets and real property. It then distributed the Mauers' substantial assets, ordering Richard to make an equalization payment to Carol in installments and pay her half the net proceeds from the sale of three commercial lots they owned. The court ordered Richard to pay $18,000 per month in spousal support, decreasing to $10,000 per month when Carol reaches retirement age and $5000 per month when Richard reaches retirement age or actually retires, whichever occurs later.

The court also awarded joint legal custody of the Mauers' two minor children to Richard and Carol, with Carol responsible for their primary physical care. Accordingly, the court ordered Richard to pay $3624 per month in child support initially, decreasing to $2598 per month upon the high school graduation of the older minor child. In addition, the court ordered Richard to designate Carol as beneficiary on one of his existing life insurance policies until the entire equalization payment was paid.

Both parties filed posttrial motions to amend or enlarge the findings or rulings of the district court. The district court issued an order amending the decree and a stipulated nunc pro tunc order. In its order amending the decree, the court adjusted the equalization payment to ***105** $243,458 to correct errors in its original calculation. The court also concluded the spousal support award was set too high and amended the decree to order Richard to pay $9100 per month in spousal support initially, decreasing to $7000 per month when Carol reaches retirement age and $5000 per month when Richard reaches retirement age or actually retires, whichever occurs later. The court declined to order Richard to maintain life insurance to secure these support obligations.

Both parties appealed, and we transferred the case to the court of appeals. The court of appeals affirmed the property valuations and distribution in the decree, finding both to be equitable. In addition, the court affirmed the child support determination in the decree as being within the sound discretion of the district court. However, the court concluded the spousal support award by the district court was inequitable and modified the decree in this respect, ordering Richard to pay $25,000 per month in spousal support until Carol's remarriage or the death of either party. In doing so, the court found its determination to be consistent with the American Academy of Matrimonial Lawyers (AAML) guidelines. The court also affirmed the district court's refusal to require Richard to secure his spousal support obligations with life insurance.

Both parties sought further review, which we granted. In his application for further review, Richard alleges the court of appeals improperly awarded Carol lifetime spousal support in the amount of $25,000 per month. In her application for further review, Carol alleges the district court and the court of appeals erred in failing to order Richard to secure his spousal support obligations with life insurance.

II. Background Facts.

Richard and Carol married in July 1985. At the time of the trial, they had been married for twenty-eight years. Carol was fifty-six years old, and Richard was fifty-five years old. During the course of the marriage, the couple had four children. Two of the children were still minors upon dissolution of the marriage, including a daughter who was a senior in high school and a son who was a freshman.

Richard and Carol met in 1984. At the time, Richard was in medical school at the University of Iowa, where he had previously completed his undergraduate degree in science in 1977. Carol had recently received a master's degree in business administration from the University of Iowa, having previously graduated from Cornell College with a double major in German and biology. Upon Richard's graduation from medical school, he completed an internship in internal medicine in Des Moines. During his internship, he decided he was passionate about ophthalmology. He was accepted into a residency program in Detroit, Michigan. While awaiting the start of his residency, he

worked for one year as an emergency-room doctor in Ottumwa and Des Moines. During that year, Richard and Carol were married.

While Richard was completing his three-year residency, Carol worked in computer sales. She was the primary breadwinner for the couple during that period, and Richard received only a small stipend as a resident. Richard completed his residency in 1989. That same year, Carol stopped working just before their first child was born. The couple moved to Waterloo the following month, where Richard began working as an ophthalmologist.

Once the couple arrived in Waterloo, Richard rapidly developed a successful ophthalmology practice that continued to grow over time. Over the years, he also ***106** launched numerous business endeavors, some of which were more successful than others. At the time of the trial, Richard was the sole owner of three closely held corporations: Cedar Valley Ophthalmology, P.C.; Mauer Vision Center, P.C.; and D'Vine Medical Spa, L.L.C. Cedar Valley Ophthalmology does business as Mauer Eye Center in Waterloo, Iowa, and has forty-five to fifty employees. Mauer Vision Center is located in Waverly, Iowa, and has several employees. In addition, Richard and Carol each owned an interest in Mauer Land, L.L.C., a limited liability company that owns the building housing both Mauer Eye Center and D'Vine Medical Spa. The couple also owned three commercial lots at Pinnacle Prairie in Cedar Falls and a commercial property leased by Veridian Credit Union.

Following the birth of the couple's first child, Carol devoted herself to being a mother and homemaker. Although she offered to return to work several times, Richard preferred she stay home with the children. In addition to caring for the children and the family home, Carol devoted herself to various community activities. In 2007, she became a licensed massage therapist and began practicing Reiki, massage, and shamanism at D'Vine Medical Spa. For the next several years, she worked approximately twenty-five to thirty hours per week. Unbeknownst to her, Richard paid her through contributions to a 401k retirement account. From 2009 to 2012, Carol also taught classes at a massage school, for which she was paid approximately $3000 per year. However, she has not had a regular income from employment since 1989.

Richard petitioned for divorce in August 2012 and moved out of the family home a few days later in September 2012. Carol remained in the home with the two minor children who were still in high school. While they awaited trial, Richard continued to pay between $11,000 and $12,000 per month for the benefit of Carol and the two minor children, which was consistent with his obligations under a temporary support order.

III. Scope of Review.

1 2 When considering an application for further review, we have discretion to review all the issues raised on appeal or in the application for further review or only a portion thereof. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 483 (Iowa 2012). In this case, we exercise that discretion to review only the spousal support award. Thus, the court of appeals decision affirming the dissolution decree as modified will stand as the final decision of this court in all other respects.

3 4 5 Marriage dissolution proceedings are equitable proceedings. Iowa Code § 598.3 (2011); *Schenkelberg*, 824 N.W.2d at 483. Thus, the standard of review is de novo. *Schenkelberg*, 824 N.W.2d at 483; *see* Iowa R.App. P. 6.907. Although we give weight to the factual findings of the district court, we are not bound by them. *Schenkelberg*, 824 N.W.2d at 483; *see* Iowa R.App. P. 6.14(6)(*g*). But we will disturb a district court determination only when there has been a failure to do equity. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005).

IV. Spousal Support.

Before we begin our analysis concerning the spousal support award in this case, we think it is important to discuss the general principles governing such awards.

A. General Principles. We considered the subject of spousal support in ***In re Marriage of Gust*, 858 N.W.2d 402, 407–14 (Iowa 2015)**. Although we acknowledged a few states determine spousal support awards by employing alternative approaches ***107** that rely on arithmetic formulas, we cautioned Iowa courts "are compelled to follow the traditional multifactor statutory framework" set forth in Iowa Code section 598.21A. ***Id.* at 407–10**. Under the statutorily mandated approach, a court may grant spousal support

> for a limited or indefinite length of time after considering all of the following:
>
> a. The length of the marriage.

b. The age and physical and emotional health of the parties.

c. The distribution of property made pursuant to section 598.21.

d. The educational level of each party at the time of marriage and at the time the action is commenced.

e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.

g. The tax consequences to each party.

h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.

i. The provisions of an antenuptial agreement.

j. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21A(1). The legislature has not authorized Iowa courts to employ any fixed or mathematical formula in applying spousal support. ***Gust*, 858 N.W.2d at 410–12.** Rather, it has instructed courts to equitably award spousal support by considering each of the above criteria. Iowa Code § 598.21A(1); *see id.* § 598.3.

Our recognition in ***Gust*** that, over time, our cases have established general principles governing spousal support awards in no way diminishes the statutory mandate to consider each criterion set forth in section 598.21A(1). ***See* 858 N.W.2d at 410.** On the contrary, we merely observed our cases establish the comparative weight or importance of certain statutory criteria relative to others. ***Id.* at 410.** Thus, we recognized fair and equitable consideration of the section 598.21A(1) criteria ordinarily places some degree of emphasis on the duration of the marriage and the earning capacities of the spouses as demonstrated by the historical record. ***Id.* at 410–12.**

In attempting to assist courts applying the spousal support analysis required by section 598.21A(1), we responded in part to advocates for reform who criticized the traditional approach to spousal support embraced by our legislature as lacking predictability and consistency. *See* ***id.* at 408–09.** However, we recognize some degree of inconsistency is inevitable in this context, because the financial decisions spouses make are highly personal and responsive to idiosyncratic facts and circumstances.

Although some advocates for reform have argued that using guidelines to determine spousal support might alleviate predictability and consistency concerns, agreement is lacking as to what appropriate guidelines might look like. *See id.* The American Law Institute (ALI) and the AAML have each suggested substantively different guidelines-based approaches to ***108** spousal support determination. *Compare* Principles of the Law of Family Dissolution: Analysis and Recommendations ch. 5, at 874–1009 (Am. Law Inst.2002), *with* Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance,* 21 J. Am. Acad. Matrim. Law. 61, 78–81 (2008). *See also* ***Gust*, 858 N.W.2d at 408–10.** In addition, numerous commentators have offered their own suggestions for reform, some of which begin with consideration of the ALI or AAML guidelines. *See, e.g.,* Cynthia Lee Starnes, *The Marriage Buyout: The Troubled Trajectory of U.S. Alimony Law* 161–68 (2014); Jill C. Engle, *Promoting the General Welfare: Legal Reform to Lift Women and Children in the United States Out of Poverty,* 16 J. Gender Race & Just. 1, 39–43 (2013); Lara Lenzotti Kapalla, *Some Assembly Required: Why States Should Not Adopt the ALI's System of Presumptive Alimony Awards in Its Current Form,* 2004 Mich. St. L. Rev. 207, 232–36 (2004); Alicia B. Kelly, *Sharing Inequality,* 2013 Mich. St. L. Rev. 967, 973 (2013). Furthermore, a few state and local jurisdictions have adopted their own guidelines-based approaches to spousal support determinations. *See* ***Gust*, 858 N.W.2d at 408–09**; Kisthardt, 21 J. Am. Acad. Matrim. Law. at 73–77.

In *Gust*, we noted our resolution on the spousal support issue was consistent with the presumptive spousal support award that would have resulted from application of the AAML guidelines to the facts before us. ***Gust*, 858 N.W.2d at 416 n. 2.** However, we clearly acknowledged the AAML guidelines are not Iowa law and therefore clearly are not binding on Iowa courts. ***Id.*** Nonetheless, we suggested the AAML guidelines might "provide a useful reality check with respect to an award of traditional spousal support." *Id.*

6 7 However, even if spousal support guidelines may provide a useful reality check in some cases, because they are not Iowa law, they can serve neither as the starting point for a trial court nor as the decisive factor for a reviewing court on appeal. *See id.* When application of the factors contained in section 598.21A(1) results in a spousal support calculation that is inconsistent with a spousal support calculation under any guidelines-based approach, the court's application of the statutory factors must prevail over the guidelines-based determination.

8 **B. Application of Iowa Code Section 598.21A(1).** In reviewing the spousal support determination by the district court, the court of appeals noted this case involves traditional spousal support. The court of appeals agreed with the district court that the monthly budget of approximately $23,000 Carol submitted at trial was excessive and she could eventually downsize her home without decreasing her quality of life. However, the court of appeals disagreed with the district court's finding that Carol's healing arts practice was unlikely to amount to anything more than a hobby, concluding Carol could be expected to earn $25,000 per year working part-time as a massage therapist. Despite its conclusion that Carol would bring in more income than the district court accounted for, the court of appeals concluded the district court's spousal support award was inequitable because Carol was accustomed to a standard of living well beyond the standard of living she could afford with $9100 per month in spousal support.

Based on the evidence Richard provided of his annual income over the past several years, the court of appeals concluded his expected income was at least $1,000,000 per year. The court of appeals then determined the $25,000 in monthly spousal support Carol requested would achieve equity ***109** between the parties. The entire analysis applying the section 598.21A(1) factors was contained in two sentences:

> Upon our de novo review, we believe the district court's award of $9100 per month fails to do equity in this case. We conclude that awarding Carol her request for $25,000 per month in spousal support would achieve equity between the parties.

In a footnote citing ***Gust*,** the court of appeals acknowledged it consulted the AAML guidelines in reaching this conclusion:

> We observe our resolution on this issue is consistent with the recommendation of the American Academy of Matrimonial Lawyers (AAML). In this case, application of the AAML guideline formula would produce a presumptive unlimited support payment of $295,000 per year.

(Citations omitted.)

9 We disagree with the court of appeals' analysis for a number of reasons. First and foremost, any court, including our appellate courts, must apply the section 598.21A(1) factors in making spousal support determinations. As seen later in our analysis, the spousal support awarded by the court of appeals is inconsistent with this requirement.

In *Gust*, we indicated in a footnote after applying the section 598.21A(1) factors that our resolution of a spousal support issue was consistent with the presumptive result under the AAML guidelines. *See* ***Gust*, 858 N.W.2d at 416 n. 2.** However, we did not use the AAML guidelines to determine whether the spousal support awarded was equitable—we used the section 598.21A(1) factors and principles suggesting the comparative weight of those factors derived from our relevant caselaw. ***Id.* at 410–12, 414–16.**

We also find the court of appeals was incorrect to conclude awarding Carol $25,000 per month was consistent with the AAML guidelines. First, as previously noted, the court of appeals expressly found Richard's gross income exceeds $1,000,000 per year. The AAML formula for determining presumptive spousal support "does not apply to cases in which the combined gross income of the parties exceeds $1,000,000 a year." Kisthardt, 21 J. Am. Acad. Matrim. Law. at 80–81. Second, the guidelines name several circumstances that may justify an adjustment to the presumptive amount or duration of spousal support, and some of those circumstances were present in this case. Namely,

Carol was the primary caretaker of the dependent minors and gave up her career or otherwise supported Richard's career. *See id.* In addition, the age and health of the parties and other circumstances may make application of the presumptive formulas inequitable in this case. *See id.* Carol was less than ten years from full retirement age, suffered from recurrent shoulder pain that prevents her from working full-time, and received a substantial property distribution in the decree. The court of appeals concluded "application of the AAML guideline formula would produce a presumptive unlimited support payment of $295,000 per year" without addressing whether any of these circumstances called for adjusting that presumptive determination. Even if this case had been considered in a jurisdiction in which the AAML guidelines were binding, [1] reliance on the presumptive determination in setting the amount or duration of spousal support without addressing whether the above circumstances called for departure would have been erroneous. *See id.*

***110** More fundamentally, as previously noted, when application of the factors contained in section 598.21A(1) results in a spousal support calculation inconsistent with a calculation under any guidelines-based approach, the calculation determined by application of the statutory factors must prevail because the guidelines have not been adopted or sanctioned by our legislature.

Upon its de novo review, the court of appeals determined a spousal support award exceeding the amount accounted for in Carol's excessive budget was necessary to achieve equity between the parties even though it acknowledged a lesser amount would allow her to maintain the standard of living she enjoyed during the marriage. We find this determination was incompatible with the requirements of section 598.21A(1).

We begin our de novo review of the spousal support award by reviewing the district court determinations in this case. Following its initial award of spousal support, the district court reviewed its decision after both parties filed motions to amend or enlarge findings of fact or conclusions of law. In the final decree, the court reduced the spousal support awarded in the original decree. In doing so, the court noted the temporary support Carol had been receiving for more than a year had satisfied her needs and the minor children's needs well enough that she made no complaint during trial that she or the children were suffering any economic deprivation.

At the time of the trial, the parties had been married for twenty-eight years. Both were in their fifties, and both were in relatively good health. At the time of the marriage, both Richard and Carol had completed advanced degrees, and he was completing his residency while she provided primary support for the couple. After their first child was born, they jointly decided Carol should give up her employment and dedicate herself to raising their children. This decision allowed Richard to build his ophthalmology practice knowing his children were being cared for. Later in the marriage, Carol became a massage therapist. Although Carol did not knowingly practice massage therapy for traditional monetary compensation during the course of the marriage, we agree with the court of appeals that her earning capacity at the time of the trial was approximately $25,000 per year. Without spousal support, she will be unable to maintain the lifestyle she enjoyed prior to the dissolution of the marriage.

The district court awarded Carol a property settlement valued at $1,762,118. This property settlement included approximately $693,000 in liquid assets she could rely upon to generate preretirement income. [2] Carol was also to receive half the proceeds from the sale of the commercial lots in Pinnicle Park, which have a net value of approximately $244,000. After paying commission and closing costs following the sale of these lots, Carol should net at least an additional $107,000. Thus, the district court awarded Carol investable preretirement assets totaling approximately $800,000. Assuming a four percent return, which is the rate of return her own expert conceded she could realize, Carol is capable of generating approximately $32,000 in annual investment income from these assets. We therefore conclude Carol is capable ***111** of earning $57,000 per year in employment and investment income.

To determine how much income Carol would require to support herself at a standard of living reasonably comparable to that she enjoyed during the marriage, we begin with the budget Carol provided to the district court. Carol acknowledged the budget was essentially an estimate of historical expenditures for the entire family before the dissolution. Because it included past expenditures Carol was no longer obligated to pay at the time of the trial, the budget was an inaccurate basis for projecting her post-dissolution support needs. After adjusting the budget to eliminate every inaccuracy pointed out by

the district court, to remove child-specific items that could be paid for using child support, and to appropriately reduce the cost of food, clothing, travel, and household supplies, we find Carol requires approximately $13,000 per month, or approximately $156,000 per year, to enjoy a standard of living approaching that she enjoyed during her marriage to Richard.

In determining how much spousal support Carol requires to support herself at that standard of living, we must also consider the tax consequences. Like employment income and investment income, spousal support is taxable. Assuming an effective tax rate of twenty-five percent, Carol requires approximately $208,000 in pretax income from her employment, her investments, and spousal support. Thus, because we find Carol can generate approximately $57,000 in pretax income per year through her employment and her investments, we conclude she requires approximately $151,000 in spousal support annually to maintain a standard of living reasonably comparable to that she enjoyed during the marriage. This equates to $12,583.33 per month. Richard's substantial income from his ophthalmology practice is more than adequate to support this award. *Schenkelberg*, 824 N.W.2d at 485–87. Accordingly, we determine $12,600 per month constitutes an equitable spousal support award in this case.

Termination of spousal support may be appropriate when "the record shows that a payee spouse has or will at some point reach a position where self-support at a standard of living comparable to that enjoyed in the marriage is attainable." ***Gust*, 858 N.W.2d at 412**. But based upon her age, educational background, training, employment skills, work experience, and the length of her absence from the job market, there is no reason to believe Carol's earnings will ever increase such that she will become capable of earning enough to maintain a comparable standard of living to that she enjoyed during her marriage to Richard. *See Schenkelberg*, 824 N.W.2d at 484–87. Consequently, we find Carol is entitled to lifetime spousal support. *See id.* at 487. Nonetheless, for the following reasons, we agree with the district court that equity requires the spousal support award to decrease when Carol reaches retirement age and when Richard reaches retirement age.[3]

When Carol reaches retirement age, in addition to drawing income from the liquid assets she was awarded in the property distribution, she can also draw income from the retirement assets we did not consider in setting her preretirement spousal support. At the time of the dissolution, the retirement and IRA accounts Carol was awarded in the property distribution were valued at $854,856. Because ***112** these accounts will continue to grow tax-free until Carol begins to draw upon them, by the time Carol reaches retirement age, their value will have significantly increased. Moreover, upon reaching retirement age, Carol will be eligible to draw social security benefits based on her own prior employment.

In contrast, when Richard retires from his ophthalmology practice, his income will decrease dramatically. In addition, once he begins drawing his social security benefits, Carol will qualify to receive increased social security benefits based on his prior employment.

Based on these facts and circumstances, we conclude section 598.21A(1) requires us to account for the retirement of both parties in setting spousal support. When Carol reaches the age of sixty-six years and six months, Richard shall pay spousal support in the amount of $6500 per month. When Richard reaches the age of sixty-six years and six months or actually retires as a practicing ophthalmologist, he shall pay spousal support in the amount of $5000 per month. If Richard retires as a practicing ophthalmologist before Carol reaches the age of sixty-six years and six months, Richard shall pay $5000 per month in spousal support upon his retirement. Spousal support shall cease upon any one of the following contingencies: Carol's remarriage, Carol's death, or Richard's death.

V. Disposition.

We affirm the court of appeals decision affirming the district court with respect to the property distribution, child support, life insurance, and appellate attorney fees. We vacate the decision of the court of appeals as to the spousal support award and modify the judgment of the district court with respect to spousal support as follows. Richard shall pay Carol $12,600 per month in spousal support until Carol reaches the age of sixty-six years and six months. At that time, Richard shall pay spousal support in the amount of $6500 per month. When Richard reaches the age of sixty-six years and six months or actually retires as a practicing ophthalmologist, he shall pay spousal support in the amount of $5000 per month. If Richard retires as a practicing ophthalmologist before Carol reaches

the age of sixty-six years and six months, Richard shall pay $5000 per month in spousal support upon his retirement. Spousal support shall cease upon Carol's remarriage, the death of Carol, or Richard's death.

We assess half the costs on appeal to each party.

DECISION OF COURT OF APPEALS AFFIRMED IN PART AND VACATED IN PART; DISTRICT COURT JUDGMENT AFFIRMED AS MODIFIED.

All Citations

874 N.W.2d 103

Footnotes

1 Our research indicates no state legislature has enacted the AAML guidelines.

2 Following the dissolution of her marriage to Richard, Carol retained retirement assets valued at $854,856, including $831,662 in 401k accounts she was awarded in the property distribution and $23,194 in a rollover IRA account she inherited. We do not consider these assets in determining Carol's preretirement earning capacity.

3 Neither party disputes that the question of whether or how the parties' prospective retirements should impact the spousal support award was ripe. *See* ***Gust*****, 858 N.W.2d at 416–18.**

End of Document

Bridge the Gap Seminar

Federal Case Law Update

1:00 p.m. - 2:00 p.m.

Presented by:
Hon. Helen Adams
United States Magistrate Judge
United States District Court
Southern District of Iowa
123 E. Walnut, Room 420
Des Moines, IA
Phone: 515-284-6217

Thursday, September 8, 2016

FEDERAL CASE UPDATE
SELECTED 2016
EIGHTH CIRCUIT AND
SUPREME COURT CASES

Helen C. Adams

United States Magistrate Judge
United States District Court
Southern District of Iowa
123 E. Walnut, Rm. 420
Des Moines, Iowa
(515) 284-6217
Fax: (515) 284-6442

I. CIVIL LITIGATION AND PROCEDURE

A. Jurisdiction

1. *Spokeo, Inc. v. Robins*, __ U.S. ___, 136 S. Ct. 1540 (2016). To establish Article III standing, a plaintiff must plead facts alleging an injury that is both concrete *and* particularized; thus, a plaintiff alleging a bare procedural violation of the Fair Credit Reporting Act must allege some harm arising from the violation.

2. *Merrill Lynch v. Manning*, __ U.S. __, 136 S. Ct. 1562 (2016). Case was properly remanded to state court where plaintiff's complaint alleged only violations of state securities laws; the jurisdictional test established by § 27 of the Securities Exchange Act of 1934, which grants federal district courts exclusive jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules or regulations thereunder," is the same as the one used to decide if a case "arises under" a federal law under 28 U.S.C. § 1331.

3. *Wittman v. Personhuballah*, ___ U.S. ___, 136 S. Ct. 1732 (2016). Intervenors, who were members of Congress, did not have Article III standing to appeal a judgment from a three-judge panel of the district court striking down a congressional redistricting plan adopted by the Commonwealth of Virginia, where the intervenors did not present any evidence that alternative redistricting plans would impact their chances of reelection.

4. *Hageman v. Barton*, 817 F.3d 611 (8th Cir. 2016). *Rooker-Feldman* doctrine did not bar federal jurisdiction over plaintiff's Fair Debt Collection Practices Act claims against attorney who attempted to enforce a Missouri default judgment against plaintiff in Illinois courts because plaintiff was not seeking relief from the judgment or garnishment proceedings but alleged statutory violations and sought statutory penalties for attorney's conduct in obtaining the judgment and garnishment order.

5. *Wong v. Minn. Dep't of Human Servs.*, 820 F.3d 922 (8th Cir. 2016). In lawsuit seeking review of a state agency determination, alleging violations of the ADA and Rehabilitation Act, and asserting due process and equal protection claims under § 1983 after plaintiff was denied "shelter needy" benefits under a Minnesota Supplemental Aid program, district court erred in relying on a Minnesota statute concerning state court review to find it lacked jurisdiction over the state agency review claims—state statutes cannot limit federal jurisdiction.

6. *Mallak v. City of Baxter*, 823 F.3d 441 (8th Cir. 2016). Interlocutory appeal from partial denial of motion for summary judgment dismissed for lack of jurisdiction where the appellants' entitlement to sovereign immunity would turn on the resolution of factual questions not yet decided by the district court.

7. *Nucor Steel-Ark. v. Big River Steel, LLC*, ___F.3d ___, 2016 WL 3184491 (8th Cir. 6/8/2016). Court lacked subject-matter jurisdiction over citizen-suit claims under the Clean Air Act by plaintiff steel mill operators against competitor, in which plaintiffs challenged the validity of competitor's construction permit. Plaintiffs failed to allege the competitor had engaged in repeated or ongoing violations and the circuit refused to construe 42 U.S.C. § 7475(a) as setting forth requirements in addition to those needed to obtain a permit.

8. *Automated Matching Sys. Exch., LLC v. SEC*, ___ F.3d ___, 2016 WL 3383870 (8th Cir. 6/20/2016). District court lacked jurisdiction over plaintiff's declaratory judgment action seeking to compel the SEC to grant its application for a limited transaction volume exemption from registration as a national securities exchange under 15 U.S.C. § 78e as the Act clearly placed the venue for review directly with the courts of appeals.

9. *Doe v. McCulloch*, ____ F.3d ____, 2016 WL 3383727 (8th Cir. 6/20/2016). In declaratory judgment action involving grand juror's First Amendment challenge to Missouri law preventing grand jurors from discussing their experience on grand juries, district court erred in applying *Burford* abstention, but it could exercise *Pullman* abstention until the parties litigated the state-law question in the Missouri state courts.

10. *Schaefer v. Putnam*, ____ F.3d ____, 2016 WL 3568064 (8th Cir. 7/1/2016). Plaintiffs' legal malpractice claims were barred by res judicata (claim preclusion) and collateral estoppel (issue preclusion) as plaintiffs had previously brought state negligence claims against their attorney, which resulted in a jury verdict in favor of the attorney.

11. *United States ex rel. Fields v. Bi-State Dev. Agency*, ___ F.3d __, 2016 WL 3743094 (8th Cir. 7/13/2016). Eighth Circuit lacked jurisdiction over state-agency defendant's Eleventh Amendment sovereign immunity argument as the issue was not raised in its summary judgment motion, which had been denied by the district court. The agency had argued it was not a person for purposes of the False Claims Act in the district court, a statutory question which could not be decided on interlocutory appeal.

12. *Pudlowski v. The St. Louis Rams, LLC*, ___ F.3d ___, 2016 WL 3902660 (8th Cir. 7/19/2016). District court abused its discretion and should have considered post-removal affidavits submitted in support of diversity jurisdiction in determining whether removed class action case should be remanded to state court. Defendants did not have to submit evidence in support of removal with their notice of removal.

13. *Missourians for Fiscal Accountability v. Klahr*, ___ F.3d ___, 2016 WL 4056057 (8th Cir. 7/29/2016). The self-censorship/First Amendment claims of a campaign committee formed less than 30 days before a general election in 2014 in violation of Missouri law were ripe for consideration—plaintiff presented evidence of fees that the state had imposed on other campaign committees for violation of the statute.

B. Procedure

1. *Dietz v. Bouldin*, ___U.S. ___, 136 S. Ct. 1885 (2016). In a case involving trial judge's recall of jury after realizing error in verdict (all but one juror were still in the building), the Supreme Court holds federal district courts have the "limited inherent power" to rescind a jury discharge order and recall a civil trial jury after a verdict error is identified based on consideration of certain factors to avoid prejudice. The Supreme Court found those factors were met in this case and rejects a categorical bar on jury recall after discharge.

2. *Kirtsaeng v. John Wiley & Sons, Inc.*, ___ U.S. ___, 136 S. Ct. 1979 (2016). At the conclusion of a case involving claims under the Copyright Act, 17 U.S.C. § 109, the Supreme Court held that district court "should give substantial weight to the objective reasonableness of the losing party's position," among other factors, in determining whether to award attorney fees under § 505 of the Act.

3. *Cuozzo Speed Techs. LLC v. Lee*, ___ U.S. ___, 136 S. Ct. 2131 (2016). The Supreme Court held that the Patent Office's decision to institute inter partes review in a patent case is not appealable under 35 U.S.C. § 314(d).

4. *Andover Healthcare v. 3M Co.*, 817 F.3d 621 (8th Cir. 2016). District court properly denied plaintiff's discovery request under 28 U.S.C. § 1782 (which permits court to order production of documents for use in foreign proceedings)—defendant from whom plaintiff sought production was a defendant in a parallel German infringement suit; German court had said it would grant discovery request if necessary; the requested discovery was "highly sensitive" and it was uncertain the information would remain confidential; and considerations of comity weighed in favor of awaiting the German court's discovery determination.

5. *IBEW Local 98 Pension Fund v. Best Buy Co*., 818 F.3d 775 (8th Cir. 2016). District court erred in finding defendants had not adequately rebutted the fraud-on-the-market presumption at class certification stage in a Rule 10b-5 lawsuit as the evidence defendants provided was not only strong but supported by plaintiff's expert.

6. *Federated Mut. Ins. Co. v. Moody Station*, 821 F.3d 973 (8th Cir. 2016). Court had subject matter jurisdiction of interpleader action pursuant to Fed. R. Civ. P. 22 and 28 U.S.C. § 1332 diversity statute as the stakeholder insurance company was diverse as to the claimants to the fund and their claim in good faith exceeded $75,000, even though the stakeholder disclaimed interest as to a portion of the stake, which would have brought the amount in controversy below the $75,000 amount.

7. *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016). District court should not have denied plaintiff's attempt to certify a class asserting claims under the Telephone Consumer Protection Act (TCPA)—for receipt of unsolicited faxes from defendant which did not display an opt-out notice—due to members of the class being unascertainable. Fax logs which showed the numbers receiving the faxes in question qualified as "objective criteria" which made the recipients ascertainable.

8. *Hubbard v. Midwest Bus Sales, Inc.*, 823 F.3d 448 (8th Cir. 2016). District court's grant of motion to dismiss on res judicata (claim preclusion) grounds affirmed on alternate theory of collateral estoppel (issue preclusion), where the key issues raised by plaintiffs/appellants were "actually litigated and determined" in prior state court litigation.

9. *Ebert v. General Mills, Inc.*, 823 F.3d 472 (8th Cir. 2016). In case involving vapor contamination caused by widespread groundwater contamination in a residential neighborhood, the Eighth Circuit reversed the district court's certification of class action under Rule 23 for lack of commonality, where it was clear that individualized questions of liability and damages would predominate.

10. *Amplatz v. Country Mut. Ins. Co.*, 2016 WL 2997598 (8th Cir. 5/25/2016). In a lawsuit involving coverage for hail damage to rental properties owned by insured, which resulted in an award for exterior damages but none for interior water damage, the Eighth Circuit held the district court did not abuse its discretion in excluding portions of plaintiff's supplemental expert reports as a sanction for failing to serve them per the deadlines in the case progression order.

11. *Sapp v. City of Brooklyn Park*, ___ F.3d ___, 2016 WL 3361467 (8th Cir. 6/17/2016). Eighth Circuit construed district court's dismissal without prejudice of plaintiff's complaint arising under the Driver's Privacy Protection Act as granting plaintiff leave to amend her complaint. Plaintiff's choice not to amend and instead to request entry of final judgment with prejudice on original complaint, then proceeding with appeal without waiting for that judgment, required dismissal of the appeal for lack of jurisdiction as no final judgment had been entered.

12. *Cottrell v. Duke*, ___ F.3d ___, 2016 WL 3947811 (8th Cir. 7/22/2016). Shareholder derivative lawsuits were dismissed as the allegations made about the futility of shareholders demanding action from the board of Wal-Mart with respect to Wal-Mex investigation did not satisfy the requirements of Rule 23.1. There were no particularized facts alleged concerning how seven of the fifteen directors might face personal liability: what facts they may have known about a prior internal investigation; how they may have learned about the investigation.

C. Causes of Action

1. *Simmons v. Himmelreich*, ____ U.S. ____, 136 S. Ct. 1843 (2016). Inmate's negligence lawsuit against prison officials was dismissed under the discretionary function exception to the Federal Tort Claims Act. His subsequent constitutional tort lawsuit against individual BOP employees for the same incident was not precluded by the FTCA's judgment bar provision. The Supreme Court held the judgment bar did not apply to claims that were dismissed because they fell within the "Exceptions" section of the FTCA.

2. *Universal Health Servs., Inc. v. United States ex rel Escobar*, ___U.S. - ___, 136 S. Ct. 1989 (2016). The Supreme Court found the theory of implied false certification can serve as a basis for False Claims Act liability when the claim submitter makes specific representations about the goods/services billed, but fails to disclose material noncompliance with requirements of the contract, statute or regulation. As applied to the case at hand, this ruling allowed a *qui tam* suit to go forward that claimed the death of respondents' daughter was caused by medication prescribed by employees who were not licensed to prescribe medications, which resulted in a violation of the FCA because Universal Health submitted reimbursement claims but failed to disclose they had not met staff qualifications and licensing requirements for the billed services. However, the Supreme Court limited the scope of liability to violations of requirements which are material to the government's payment decision, not just any minor or insubstantial noncompliance.

3. *RJR Nabisco, Inc. v. European Cmty.*, ___ U.S. ___, 136 S. Ct. 2090 (2016). Although some of the RICO claims made by the EU and member states against American cigarette manufacturer overcame the presumption against extraterritoriality, the lack of asserted domestic injury in the United States required dismissal of the RICO claims because RICO does not allow recovery for foreign injuries.

4. *DeCoursey v. Am. Gen. Life Ins. Co.*, 822 F.3d 469 (8th Cir. 2016). Insurance policy holder's claim that insurer owed her interest on an unpaid life insurance policy was not brought within the applicable statute of limitations period under Missouri law, where insured first received notice that her claim was denied seventeen years prior to bringing suit. In addition, district court erred in granting summary judgment to insured on insurer's claim for restitution, where insurer mistakenly paid her even though the policy had expired.

5. *United States v. Hirani*, ___F.3d ___, 2016 WL 3064743 (8th Cir. 5/31/2016). In this civil action in which the government sought to revoke defendant's citizenship, the district court correctly granted summary judgment in favor of the government. The court could rely on circumstantial evidence, did not err in considering defendant's use of another name in finding he had procured naturalization by willful misrepresentation, and the legal Form N-400 was sufficient to show defendant made misrepresentations.

6. *United States v. $11,071,188.64*, ___ F.3d ___, 2016 WL 3144679 (8th Cir. 6/6/2016). The government sought civil forfeiture of funds in banks and brokerage accounts on the basis the funds held were proceeds from money-laundered drug trafficking. The corporate owner of the accounts, the sole shareholder, and three children of the sole shareholder filed claims, asserting innocent owner and other defenses. On summary judgment, the claims were dismissed, the corporation's because it failed to comply with discovery orders to appear for depositions (after the court gave it three chances to comply) and the sole shareholder's because she failed to prove her innocent owner defense as she could not prove an ownership interest in the funds, which she had transferred to the corporation.

7. *Moore v. Kan. City Public Sch.*, ___ F.3d ___, 2016 WL 3629086 (8th Cir. 7/7/2016). Plaintiff's negligent supervision and premises liability claims arising from sexual assault of student on school premises did not state claims arising under IDEA—reference to plaintiff's IEP in the complaint was intended to show she was a vulnerable student and she did not seek changes or amendments to the IEP. The circuit found no federal jurisdiction existed and remanded the case back to state court.

D. Evidence

1. *Am. Home Assurance Co. v. Greater Omaha Packing Co., Inc.*, 819 F.3d 417 (8th Cir. 2016). Jury verdict in favor of meat patty manufacturer against raw meat supplier in *E. coli* outbreak case upheld where the methodology used by patty manufacturer's epidemiology experts met the standard for admissibility; district court did not commit abuse of discretion when it determined the probative value of certain documents outweighed any prejudicial effect; and taken as a whole, the jury instructions fairly and adequately submitted the questions to the jury. In addition, there was no apparent reason to believe that the jury had reached an impermissible compromise verdict.

2. *Coterel v. Dorel Juvenile Group*, ___ F.3d ___, 2016 WL 3606620 (8th Cir. 7/5/2016). In products liability case brought after plaintiff's 23-month-old son climbed out of his bed, got past a doorknob cover designed to stop him from opening the door, and drowned in a neighboring pond, plaintiffs did not prove the court's admission of evidence that plaintiffs failed to secure a chain lock that night was in error as the circuit could not tell from the general verdict form the basis on which the jury found defendant was not liable.

II. CRIMINAL LAW

A. Criminal Acts

1. *Nichols v. United States*, ___ U.S. ___, 136 S. Ct. 1113 (2016). The Supreme Court held that the Sex Offender Registration and Notification Act itself does not require sex offenders to update their registrations in states in which they no longer reside, although observing that recent changes in legislation provided sex offenders could not leave the United States without notifying their departure jurisdictions.

2. *Ocasio v. United States*, ___ U.S. ___, 136 S. Ct. 1423 (2016). After defendant police officer was convicted of conspiracy to violate the Hobbs Act in connection with a kickback scheme whereby he (and other officers) sent damaged vehicles from accident scenes to an auto repair shop in exchange for payments from the shop owners, the Supreme Court held the government only need to prove "an agreement that *some conspirator* commit each element of the substantive offense," which was met by the evidence here that the police officer and shop owner agreed the police officer would obtain property from the shop owner while officer acted in his official capacity.

3. *Taylor v. United States*, ___ U.S. ___, 136 S. Ct. 2074 (2016). The Supreme Court holds that the commerce element of a Hobbs Act robbery case is satisfied upon a showing a "defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds."

4. *McDonnell v. United States*, ___ U.S. ___, 136 S. Ct. 2355 (2016). The Supreme Court set aside convictions of former Virginia governor on honest services fraud and Hobbs Act extortion charges, holding that in order for defendant's actions in setting up a meeting, hosting an event or calling another official to qualify as an "official act," the public official must also "make a decision or take an action on a question or matter, or agree to do so." Jury instructions that inadequately explained the elements of an "official act" may have led the jury to convict Governor McDonnell for conduct which was not unlawful. Remanded for further proceedings.

5. *Voisine v. United States*, ___ U.S. ___, 136 S. Ct. 2272 (2016). The Supreme Court held that state law reckless domestic assault convictions qualify as "misdemeanor crime of domestic violence" for purposes of applying felon in possession of a firearm provisions of 18 U.S.C. § 922(g)(9).

6. *United States v. Dodson*, 817 F.3d 607 (8th Cir. 2016). In case charging defendant with aiding and abetting embezzlement from an agency receiving federal funds, there was sufficient evidence to support the jury's finding of guilt—defendant "cashed checks for work he knew he did not do," lied to a bank teller and investigator about doing work, and kept most of the money received.

7. *United States v. Hill*, 820 F.3d 1003 (8th Cir. 2016). The Eighth Circuit follows other circuits in using a "circumstance-specific approach" to determining whether defendant's prior offense qualifies as a sex offense against a minor to be covered by Sex Offender Registration and Notification Act. In this case, defendant's prior offense for indecent exposure, which included a sex act in the presence of a minor, qualified as a sex offense against a minor.

8. *United States v. Stacks*, 821 F.3d 1038 (8th Cir. 2016). District court did not err in granting judgment of acquittal on two charges against defendant charged with wire fraud, submitting false claims, and making false statements. As to one charge, defendant's statement that he had no "substantial adverse change in his financial condition" over a certain period of time was not false as "substantial adverse change" (as defined in the loan agreement documents) did not cover additional loans he incurred, debts owed to suppliers or a suggestion to change lenders. As to the second charge, that defendant falsely certified his original application was true, correct and complete, the government failed to identify a statement which did not comply with that and there was no definition of "current" or "delinquent" in the Schedule of Liabilities on which the government relied to charge false certification.

9. *United States v. Frison*, ___ F.3d ___, 2016 WL 3184476 (8th Cir. 6/8/2016). Where the evidence showed defendant flea market owner understood his tenants were selling counterfeit goods and that he actively helped facilitate that conduct to his financial benefit, his vagueness challenge to the statutes under which he was convicted, 18 U.S.C. §§ 2, 371, 2319, 2320 and 17 U.S.C. § 506, failed as defendant reasonably understood his conduct was proscribed.

10. *United States v. Davis*, ___ F.3d ___, 2016 WL 3457264 (8th Cir. 6/24/2016). The Eighth Circuit held there was sufficient evidence to support defendant's conviction for conspiracy to distribute heroin and cocaine—there was substantial evidence defendant distributed drugs received from others over several years and that they knew he was redistributing some from his residence; thus a jury could reasonably conclude he knowingly joined in a conspiracy to distribute.

11. *United States v. Wynn*, ___ F.3d ___, 2016 WL 3568108 (8th Cir. 7/1/2016). VA hospital housekeeping employee's telephone threats to shoot his supervisor over work-related issues qualified as a threat against a federal official under 18 U.S.C. § 115(a)(1)(B). The Eighth Circuit found that the supervisor qualified as a covered "official" under the statute.

12. *United States v. Sterling*, ___ F.3d ___, 2016 WL 3615721 (8th Cir. 7/6/2016). The Eighth Circuit held that impersonating a foreign diplomatic officer in violation of 18 U.S.C. § 915 does not require a showing the government in question was "accredited," only that defendant presented himself as being a diplomat entitled to immunity from traffic violations, etc. Here, defendant presented himself to a state trooper as a diplomat of the Republic of Conch, a fictional country associated with Key West, Florida.

13. *United States v. Horse Looking*, ___ F.3d ___, 2016 WL 3672053 (8th Cir. 7/11/2016). Applying the "modified categorical approach" to defendant's state law misdemeanor conviction for simple assault under a statute with alternative elements, the circuit examined the state court records and proceedings to determine the subsection under which defendant was convicted. While defendant could have been convicted under the subsection that included intentionally causing bodily injury as an element, the plea colloquy did not exclude the possibility he was convicted under a subsection which only addressed threat or menace. Therefore, the circuit held the prior conviction was not a qualifying crime that would prohibit defendant from possessing a firearm, requiring dismissal of the unlawful possession charge.

14. *United States v. Prickett*, ___ F.3d ___, 2016 WL 4010515 (8th Cir. 7/27/2016). After defendant shot his wife multiple times while they were camping in a national park, trial court did not err in denying motion to dismiss charge of use of firearm during a crime of violence on *Johnson* grounds as the residual clause of 18 U.S.C. § 9124(c)(3) functions differently that the residual clause of the Armed Career Criminal Act found to be unconstitutional in *Johnson*. Defendant's act of shooting his wife several times, as charged in another count of the indictment, involved a substantial risk that physical force was used in the course of committing the offense and was not an "idealized ordinary case of crime" as contemplated by the *Johnson* court.

B. Procedure

1. *Foster v. Chatman*, ___U.S. ___, 136 S. Ct. 1737 (2016). Georgia prosecutors' strikes of prospective black jurors in a capital murder case violated *Batson* where prosecutors' trial files, obtained years after the fact, contained notes focused on keeping black individuals off the jury, and state's explanations for the preemptive strikes contained factual inconsistencies.

2. *United States v. Muhammad*, 819 F.3d 1056 (8th Cir. 2016). Defendant's allegations that a juror's husband took notes during trial and "continually stared" at defendant's family during trial did not present "a colorable claim of outside influence" warranting an evidentiary hearing on defendant's claim of juror misconduct in support of his motion for new trial.

3. *United States v. Briggs*, 820 F.3d 917 (8th Cir. 2016). No error occurred when district court did not allow defendant to withdraw his guilty plea—defendant's asserted misunderstanding about applicable guidelines calculation was not a reason to withdraw a plea, even if the result of erroneous legal advice, as at the time of the plea the district court advised him of the statutory range for sentencing, that a PSR would be prepared, and how the court would calculate a sentencing range.

4. *United States v. Qattoum*, ___ F.3d ___, 2016 WL 3443579 (8th Cir. 6/23/2016). Defendant attempted to withdraw his plea to conspiracy to distribute/possess with intent to distribute controlled substances or analogues and conspiracy to commit money laundering, arguing there was no factual basis to show he knew the product he was selling was illegal, that it was a controlled substance, or that he knew its chemical composition. The Eighth Circuit held there was sufficient circumstantial evidence of defendant's knowledge, including his admissions at the plea hearing, to support the distribution count. The circumstances of defendant's agreed use of money orders to buy drugs was sufficient to demonstrate defendant reached agreement with another to launder money.

5. *United States v. Trevino*, ___ F.3d ___, 2016 WL 3844851 (8th Cir. 7/14/2016). Trial court did not err in denying defendant's motion to withdraw his guilty plea based on claim of ineffective assistance of counsel—plea colloquy demonstrated defendant did not assert objections to counsel's performance at the time of plea. Denial of counsel's motion to withdraw at the plea hearing was not an abuse of discretion as again, defendant had expressed satisfaction with counsel's representation at plea hearing, counsel filed extensive objections to the PSR on defendant's behalf, and continued with "vigorous representation" even though he had filed a motion to withdraw on behalf of defendant.

C. Fourth Amendment

1. *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056 (2016). Although officer's investigatory stop of defendant after he was observed leaving a house which had been under surveillance for drug activity may have been unlawful, the fruits of the search incident to arrest made after officer discovered a valid, pre-existing outstanding warrant for defendant were admissible under the attenuation doctrine of *Brown v. Illinois*, which "provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance." Here, the intervening circumstance was the discovery of the outstanding warrant.

2. *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160 (2016). In cases challenging state laws of North Dakota and Minnesota criminalizing the refusal to undergo BAC testing, the Supreme Court holds warrantless breath tests incident to arrest for OMVUI are permitted under the Fourth Amendment, but not warrantless blood tests.

3. *United States v. Scott*, 818 F.3d 424 (8th Cir. 2016). Police officer's stop of defendant's car was lawful where officer testified he smelled PCP through window as he drove by. In addition, a subsequent stop and search of the same defendant's car was lawful where the facts collectively provided a basis for reasonable suspicion.

4. *United States v. Tamayo-Baez*, 820 F.3d 308 (8th Cir. 2016). Officer had reasonable suspicion to make a traffic stop of defendant to investigate whether he was illegally in the United States after they obtained information (during the course of another investigation) that defendant was affiliated with a Jeep registered to his wife, discovered he had been convicted of domestic abuse assault in Iowa several years after he had been removed to Mexico, found a picture in social media showing him in front of the same Jeep, and in staking out the residence observed a man leaving the house matching defendant's description.

5. *United States v. Pile*, 820 F.3d 314 (8th Cir. 2016). After undercover officer's attempt to purchase methamphetamine from defendant fell through, officers decided to arrest defendant on outstanding warrants at the campsite where they had attempted the buy. After apprehending defendant, officer asked defendant if there was anyone else at campsite and was told defendant had a friend in the camper. Officer approached the camper, announced "Sheriff's Office" and saw an individual inside, then opened the door and asked the individual to exit the camper. While the door was open the officer viewed drug paraphernalia on a table inside and provided that information for a warrant to search the camper. In affirming a denial of defendant's subsequent motion to suppress, the Eighth Circuit held the protective sweep exception applied as a reasonable officer would be concerned with securing the arrest scene and his security.

6. *United States v. Smith*, 820 F.3d 356 (8th Cir. 2016). After arresting defendant outside his home on outstanding warrants, police officers' warrantless entry into his house to check to see if a half-way house resident was present (after receiving a report she had not returned on schedule and the caller believed defendant was holding the resident against her will) was reasonable under the community caretaking function: the officers knew the resident had not returned at the scheduled time; the caller provided background information on the relationship between defendant and the resident; the resident could not be located elsewhere; officers had responded to a prior call at the residence about use of a firearm; and officers noticed a face in a window of the house after arresting defendant.

7. *United States v. Makeeff*, 820 F.3d 995 (8th Cir. 2016). Probation officers had reasonable suspicion to seize USB drive at defendant's house (subsequently found to contain child pornography) as one of the conditions of defendant's supervised release required him to submit to a search of his residence on reasonable suspicion of contraband or evidence of violation of a condition of release—the facts amounting to reasonable suspicion included defendant's prior conviction for possession of child pornography; his conditions prohibiting possession of any pornography; the prohibition on his accessing or possessing a computer without the approval of his probation officer; a modification of the conditions of supervised release after defendant admitted viewing adult pornography; probation office received a "tip" defendant had bragged about possessing a computer and viewing child pornography; during home visit they found unauthorized USB drive in conformity with the tip; and both defendant and his wife denied owning the USB drive in spite of its discovery in the residence.

8. *United States v. Berger*, ___ F.3d ___, 2016 WL 3027156 (8th Cir. 5/26/2016). Supervised releasee's consent to search of his home by probation officer included forensic search of hard drive which officer confiscated during search. Under the special conditions of defendant's supervised release he was barred from accessing the internet or possessing any internet-capable software without prior written approval from the probation officer, his prior conviction involved use of internet to engage in sexual chat with a minor, and the conditions of supervision also required defendant to submit to home visits by probation officers and allowed them to seize contraband in plain view.

9. *United States v. Hopkins*, ___F.3d ___, 2016 WL 3063344 (8th Cir. 5/31/2016). Although dog sniff at front door of defendant's townhouse was unconstitutional under *Florida v. Jardines* because the area in front of the door qualified as curtilage, good faith exception applied as the officer had an objectively reasonable belief that since the door led onto an outside common area, *Jardines* did not apply and the dog sniff could be legal; and the officer disclosed the facts of the dog sniff to the state court judge who authorized the warrant.

10. *United States v. DE L'Isle*, ___ F.3d ___, 2016 WL 3184475 (8th Cir. 6/8/2016). Warrantless search of magnetic strips on credit/debit/gift cards seized during traffic stop was permitted by the Fourth Amendment as the court holds scanning the cards was not a physical intrusion into a protected area and defendant failed to show he had a reasonable expectation of privacy. That defendant's name was on some of the cards did not create that expectation and since the purpose of the cards is to make purchases, during which the holder transfers information to the seller, the privacy interest is negated.

11. *United States v. Roberts*, ___ F.3d ___, 2016 WL 3184911 (8th Cir. 6/8/2016). Warrantless entry into defendant's apartment after officers accidentally knocked the door open while looking for a potentially dangerous homicide suspect was justified by exigent circumstances.

12. *United States v. Dillard*, ___ F.3d ___, 2016 WL 3201119 (8th Cir. 6/9/2016). Officers had reasonable suspicion to stop defendant based on their observations of his behavior outside a car as they were patrolling in a high-crime area. When they returned to make a car check, the car had left at what officers believed was likely a high-rate of speed, circumstances which then gave them reasonable suspicion to believe criminal activity may be occurring.

13. *United States v. Nowak*, ___ F.3d ___, 2016 WL 3361475 (8th Cir. 6/17/2016). After defendant fled the scene of a traffic stop, leaving his backpack in his friend's car, officer's search of the backpack that disclosed a handgun did not violate the Fourth Amendment as Eighth Circuit held defendant abandoned it when he fled the scene without asking his friend to take possession of the backpack.

14. *United States v. Faulkner*, ___ F.3d ___, 2016 WL 3513995 (8th Cir. 6/27/2016). The Eight Circuit finds that "although a close call" evidence from a confidential informant concerning defendant's use of vehicles to travel between Minneapolis and Chicago to obtain heroin for distribution, which contained corroborating residential address and vehicle ownership information, was sufficient to support issuance of warrant for GPS tracker device. Installation of the tracker on the vehicle when it was in a neighboring county instead of the specified county was not a Fourth Amendment violation.

15. *United States v. Roelandt*, ___ F.3d ___, 2016 WL 3563323 (8th Cir. 6/30/2016). Defendant charged with felon in possession moved to suppress evidence of the gun, found in his pocket when an officer made an investigatory stop while defendant was walking through a high crime area. Officer had reasonable suspicion to make stop: defendant was looking around the area suspiciously, he recognized defendant as a convicted felon; knew he was a member of a street gang, was familiar with past reports that defendant carried a gun, and knew a few hours earlier a fellow gang member had been admitted to the hospital with a gunshot wound, all of which in the totality of the circumstances supported the officer's stop.

16. *United States v. Colbert*, ___ F.3d ___, 2016 WL 3648333 (8th Cir. 7/8/2016). Affidavit in support of wiretap application contained sufficient information to support the necessity requirement of 18 U.S.C. § 2518(1)(c). The affidavit detailed traditional investigative techniques that had been attempted, such as physical surveillance, controlled buys, and pen register and trap-and-trace devices on defendant's cell phone, but failed. Warrant for search of defendant's home after he had been indicted on drug and money laundering charges contained sufficient information to support a nexus between the home and the money laundering charges: defendant was renovating the residence, owned expensive cars and jewelry although he had not filed taxes for several years and had no apparent source of income, and two witnesses provided information about drug transactions with defendant. The issuing court could reasonably conclude the house, improvements, jewelry, and cars were being paid for from proceeds of defendant's drug-trafficking.

17. *United States v. Montgomery*, ___ F.3d ___, 2016 WL 3671728 (8th Cir. 7/11/2016). Officers had reasonable suspicion to detain defendant, who they found sleeping in an unmarked van loaded with copper pipes in an area known to be used for selling and processing stolen scrap metal, as they recently had arrested another individual in the same backyard who had been dismantling a stolen car to sell for scrap.

18. *United States v. Woods*, ___ F.3d ___, 2016 WL 3853807 (8th Cir. 7/15/2016). Police officer made traffic stop after observing defendant's car windows were too darkly tinted and defendant threw litter out his window. Based on his knowledge that defendant was a drug trafficker and his vehicle contained hidden compartments to hide drugs, officer reasonably extended the stop by twenty minutes to wait for drug-sniffing dog after defendant consented to a search of the vehicle: officer detected odor of marijuana, believed a fake iPhone was digital scales, and occupants of vehicle gave conflicting stories about destination.

19. *United States v. Conerd*, ___ F.3d ___, 2016 WL 3878223 (8th Cir. 7/18/2016). "Emergency-aid exception" to Fourth Amendment warrant requirement covered officer's warrantless entry into the curtilage (here the side yard) of defendant's residence: officer had received a report defendant had assaulted one individual and was assaulting another, knew of defendant's history of domestic assaults, had information defendant might have a firearm and a closed-circuit camera on the front door, and observed the only light on was in the basement where the assault was reported to be taking place.

20. *United States v. Rodriguez*, ___ F.3d ___, 2016 WL 3902657 (8th Cir. 7/19/2016). Given the condition of defendant's probation from another conviction that he submit to search of his "person, place of residence and vehicle" at any time by a probation officer with or without a warrant, he had a diminished expectation of privacy in his vehicle such that a warrantless search of his vehicle when he was arrested on outstanding state warrants did not violate the Fourth Amendment.

21. *United States v. Hawkins*, ___ F.3d ___, 2016 WL 3996705 (8th Cir. 7/26/2016). Neither of two searches of defendant (both of which found him in possession of a firearm) violated the Fourth Amendment: at time of first search, officers observed defendant seated in student cafeteria, apparently intoxicated; he was not a student, had a criminal history and was known to be armed. When officer asked defendant about bulge in his pocket and defendant refused to allow retrieval, notice by officer they were going to search and reaching toward defendant did not transform what had become a *Terry* stop to an arrest and defendant was not touched until he attempted to flee, leading to search when he was caught and restrained. As for the second occasion he was searched, officer's oral notification on prior occasion that defendant should not trespass on university grounds in the future was sufficient notice to support an arrest for trespass when he appeared in the same cafeteria a month later, and a search incident to arrest was permissible.

22. *United States v. Evans*, ___ F.3d ___, 2016 WL 4011174 (8th Cir. 7/27/2016). Officer who observed a car parked in an abandoned carwash parking lot late at night in a high-crime area had reasonable suspicion criminal activity might be occurring, and when he observed defendant, a known felon, standing by another car in the bay in the dark, reasonably was concerned for his safety as an officer. This justified his entry into the carwash with a flashlight, with which he recognized marijuana and a firearm in the car when he checked to see if anyone was hiding in it. Seizure of the items from the car without a warrant was justified by the plain view doctrine; therefore, defendant's subsequent motion to suppress was properly denied.

D. Fifth Amendment

1. *Puerto Rico v. Sanchez Valle*, ___ U.S. ___, 136 S. Ct. 1863 (2016). The Supreme Court held Puerto Rico is not a separate sovereign for dual-sovereignty purposes because the source of its prosecutorial power remains in the U.S. Congress; therefore, defendants could not be successively prosecuted for the same conduct under equivalent laws, in the present case, selling a firearm without a permit.

2. *United States v. Morris*, 817 F.3d 1116 (8th Cir. 2016). Prosecutor's comment to jury during closing arguments regarding co-conspirator's willingness to take the stand did not violate Fifth Amendment's prohibition on direct comment by the government on a defendant's failure to testify, where district court immediately instructed the jury to disregard the comment.

3. *United States v. Adams*, 820 F.3d 317 (8th Cir. 2016). Defendant's statement to officers during a custodial interrogation that "I don't want to talk, man" followed by continued conversation with the officers was not an "unambiguous invocation" of his right to remain silent; therefore, district court did not commit clear error in denying suppression motion concerning defendant's subsequent statements.

4. *United States v. Laurita*, 821 F.3d 1020 (8th Cir. 2016). Defendant's motion to suppress should have been denied as no custodial interrogation occurred: agents met with defendant in a conference room at his workplace, identified themselves and the purpose for their visit (investigating child pornography), were conversational in tone with defendant, did not handcuff or physically or verbally restrain defendant in the room, did not use "strong arm" tactics or pressure defendant, did not arrest defendant at the end of the interview, and defendant's supervisor only escorted defendant to conference room and made no threats nor did it appear he had any knowledge of the investigation.

5. *United States v. Harvey*, ___ F.3d ___, 2016 WL 3743074 (8th Cir. 7/13/2016). Because defendant's convictions for receipt of child pornography and possession of child pornography arose out of the same act/transaction, they violated Double Jeopardy—case remanded to vacate one of the convictions and re-sentence defendant.

6. *United States v. Shackelford*, ___ F.3d ___, 2016 WL 4010513 (8th Cir. 7/27/2016). Officers had probable cause to conduct warrantless search of defendant's automobile after stopping it to investigate a report the occupant was armed and coming to "shoot up" another individual's house. The officers had received information there had been an assault the day before and defendant was returning to create another disturbance, that defendant had been seen with a gun, that he was possibly armed, and that he was a convicted felon. The information was sufficiently credible as officers received it from two different sources who gave consistent and sufficiently specific information about the car defendant would be driving. Search sustained under the automobile exception.

7. *United States v. Wolff*, ___ F.3d ___, 2016 WL 4010514 (8th Cir. 7/27/2016). In the face of the testimony from three officers that defendant not only authorized the search of a shed on his father's property but also used a pair of bolt cutters to help cut off lock, the trial court did not err in denying defendant's subsequent motion to suppress evidence of the guns found within the shed upon which the government had charged defendant with being a felon in possession.

E. Due Process/Evidence

1. *Williams v. Pennsylvania*, ___ U.S. ___, 136 S. Ct. 1899 (2016). State supreme court chief judge's refusal to recuse himself from consideration of petitioner's post-conviction relief action in death penalty case, sought because the judge was the acting district attorney who approved the trial prosecutor's death penalty request during the original trial, was a violation of the Due Process Clause of the Fourteenth Amendment.

2. *United States v. Spight*, 817 F.3d 1099 (8th Cir. 2016). Conviction for being a felon in possession of a firearm upheld where district court expressly addressed the credibility of the witnesses and minor discrepancies in their testimony did not raise a reasonable doubt that defendant possessed a firearm.

3. *United States v. Golliher*, 820 F.3d 979 (8th Cir. 2016). Exclusion of defendant's proffered emails with alleged prostitutes to show he previously turned down offers of underage sex was not an abuse of discretion where defendant failed to present the actual substance of the emails to the Eighth Circuit for review or preserve them in the record for review.

4. *United States v. Naing*, 820 F.3d 1006 (8th Cir. 2016). Defendant charged with failing to depart after Board of Immigration Appeals held he was removable failed to prove a due process violation at the original immigration hearings arising from lack of counsel: defendant was advised of his right to counsel, was given opportunities to obtain counsel, and failed to appear with an attorney.

5. *United States v. Dean*, 823 F.3d 422 (8th Cir. 2016). In felon in possession of a firearm case, trial court did not err by admitting as substantive evidence a prior inconsistent statement given by a key witness during the grand jury proceeding. Trial court also did not err by admitting victim's 911 call under the present sense impression exception to the hearsay rule.

6. *United States v. Cotton*, 823 F.3d 430 (8th Cir. 2016). District court did not conduct the full analysis required by Rule 404(b) before admitting evidence of defendant's prior conviction, but any error was harmless because the government presented ample competent evidence to support conviction. In addition, district court did not abuse its discretion in admitting the post-arrest statement of a co-conspirator where the statement was admitted as a prior consistent statement to rehabilitate the credibility of the co-conspirator, who had been impeached by a prior inconsistent statement.

7. *United States v. House*, 823 F.3d 482 (8th Cir. 2016). Photographic lineup that included photograph of defendant as the only person with a ponytail was not "impermissibly suggestive" as the individual photos selected had same eye color, complexions and hair color and ponytail was not prominently displayed; therefore, trial court did not err in denying motion to suppress witness's identification of defendant in the photo lineup.

8. *United States v. Emmert*, ___ F.3d ___, 2016 WL 3343364 (8th Cir. 6/15/2016). In case charging defendant with possession of child pornography, admission of evidence of defendant's prior conviction for sexual abuse of a minor and uncharged allegations of sexual abuse of his daughter, with a limiting instruction under Rule 414, was not an abuse of discretion and was probative of defendant's interest in underage girls.

9. *United States v. Lomas*, ___ F.3d ___, 2016 WL 3512237 (8th Cir. 6/27/2016). Admission of evidence that defendant, charged with bank robbery, had discarded a firearm a few weeks before the credit union robbery committed in the present case was not an abuse of discretion. Under R. 404(b), the evidence was relevant as it showed defendant had knowledge of firearms; had carried a similar-looking firearm before the robbery in a fashion similar to that used by the bank robber (in his pants waistband); and had been associated with the accomplice whose minivan was used as getaway vehicle. Its potential prejudice was balanced by lack of testimony that defendant brandished or used a firearm illegally and the court gave a limiting instruction to diminish any danger the jury would use the evidence improperly.

10. *United States v. Rojas*, ___ F.3d ___, 2016 WL 3513902 (8th Cir. 6/27/2016). In case charging credit card fraud, use of counterfeit access devices and related offenses, admission of unchallenged testimony by investigating agent that use of credit card would constitute identity theft, even if error, did not affect defendant's substantial rights as there was ample evidence to support the jury's conviction: officers found more than 200 counterfeit access devices in a storage locker belonging to defendant and witnesses identified defendant as the man who was shown making fraudulent purchases on video on two separate dates.

11. *United States v. Gonzalez*, ___ F.3d ___, 2016 WL 3513820 (8th Cir. 6/27/2016). Trial court did not abuse its discretion in permitting the jury's request to listen to defendant's recorded interview, which had been properly admitted in evidence.

12. *United States v. Strong*, ___ F.3d ___, 2016 WL 3513774 (8th Cir. 6/27/2016). In case charging defendant with aggravated sexual abuse, admission of evidence of defendant's prior sexual assault offense was not an abuse of discretion. The court conducted the proper Rule 403 balancing, recognizing the Rule 413 evidence might spill over into the non-sexual-assault offenses charged and severed the aggravated sexual abuse count accordingly. Defendant's proffered expert witness testimony on a victim being struck by a car was properly excluded—it did not meet the Rule 702 requirements of assisting the jury. In addition, evidence about how the victim ended up in front of the car was minimally probative in the face of evidence defendant kept her "captive for three days, beat her, sexually assaulted her, and threatened her life."

13. *United States v. Drapeau*, ___ F.3d ___, 2016 WL 3568065 (8th Cir. 7/1/2016). Defendant was charged with assault by strangulation, assault and domestic abuse by a habitual offender after he assaulted his girlfriend. Admission of her testimony that defendant had abused her on three prior occasions, for which defendant was convicted in tribal court proceedings, was not an abuse of discretion as the court instructed the jury the evidence was only admissible to show defendant's prior convictions. Defendant did not offer to stipulate to the prior convictions as predicate offenses and the trial court gave its curative instruction several times.

14. *United States v. Combs*, ___ F.3d ___, 2016 WL 3595641 (8th Cir. 7/5/2016). Trial court did not err in denying defendant's motion to dismiss indictment based on outrageous government conduct: defendant was targeted in a reverse sting operation as he was part of "an established home-invasion robbery crew" and the conduct of undercover investigators in setting up a "realistic stash-house robbery scenario" or to facilitate the robbery did not shock the conscience under the Due Process clause.

15. *United States v. Boone*, ___ F.3d ___, 2016 WL 3648328 (8th Cir. 7/8/2016). Former police officer was convicted on charge of willfully using excessive force in violation of arrestee Hill's Fourth Amendment rights. Admission of incident of defendant's prior use of force against another arrestee some four years before the charged incident was not an abuse of discretion: defendant testified he did not intend to hurt Hill when he kicked him in the head as he was being secured by other officers, putting his state of mind "squarely at issue" and opening the door to evidence of specific intent. That the use of force in the two incidents was not similar in kind did not change the analysis as the prior act did not need to be a duplicate—in both incidents defendant used excessive force to subdue a disruptive individual then falsified his reports concerning his use of force.

16. *United States v. Borders*, ___ F.3d ___, 2016 WL 3723786 (8th Cir. 7/12/2016). Defendants were convicted of crime involving the transportation and sale of stolen goods and vehicles and challenged evidentiary rulings, among other grounds for appeal. The district court may have erred in admitting evidence of Department of Transportation civil violations by two of the defendants, which the government urged was relevant to establish their tendency to abuse trucks necessitating the theft of other trucks, because no limiting instruction was given; however, the error was harmless as there was substantial evidence to support the convictions. As for the court's limits on cross-examination of cooperating witnesses regarding the benefits they received for testifying, there was no abuse of discretion as the court allowed questions about the witnesses' charges, the sentence imposed and what lesser sentence they hoped to receive.

17. *United States v. Eason*, ___ F.3d ___, 2016 WL 3769477 (8th Cir. 7/14/2016). During felon in possession trial, court did not abuse its discretion in not permitting defendant to present dash cam video during defendant's initial cross-examination of one of officers involved in his arrest in the face of counsel's concession the video was not material to the substantive issue of the case, nor in disallowing its showing when defendant attempted to recall the officer to impeach his testimony. While not subject to exclusion as a Rule 16 discovery violation because it was impeachment evidence, defendant did not show how his substantial rights were affected or that there was "more than a slight influence" on the verdict from not showing it.

18. *United States v. End of Horn*, ___ F.3d ___, 2016 WL 3853808 (8th Cir. 7/15/2016). Admission of hearsay statement from deceased victim's former husband that defendant beat her, while perhaps not admissible under Rule 807, was harmless error given the convincing corroborating evidence that defendant assaulted the victim: witnesses observed him arguing with victim, saw him strike her face with an open hand, heard screams coming from the vehicle as the witnesses left the area, another witness saw defendant striking the victim on the head and face, and other witnesses observed defendant had abrasions on his right knuckles and swelling on his hands after the incident.

19. *United States v. Schropp*, ___ F.3d ___, 2016 WL 3947813 (8th Cir. 7/22/2016). In arson case, while government's authentication of photographs of premises taken five years after the subject fire was inadequate with respect to whether the photographs accurately showed the appearance of the premises at the time of the fire, admission was deemed harmless as the photographs had little influence on the verdict convicting defendant in the face of substantial evidence of his guilt.

20. *United States v. Wardlow*, ___ F.3d ___, 2016 WL 4056063 (8th Cir. 7/29/2016). Exclusion of evidence that defendant's minor victim (who was a prostitute) formed a relationship with another individual after her "business" relationship with defendant ended was the proper result of Rule 412—consent of the minor to participate was "insignificant and hardly relevant".

F. Sixth Amendment

1. *Luis v. United States*, ___ U.S. ___, 136 S. Ct. 1083 (2016). The Supreme Court held that the Sixth Amendment prohibited pretrial restraint of untainted assets needed to retain counsel.

2. *Betterman v. Montana*, __ U.S. __, 136 S. Ct. 1609 (2016). After pleading guilty to bail jumping, petitioner was jailed for more than fourteen months while awaiting sentence and argued that the delay violated his right to a speedy trial. The Supreme Court held that the Sixth Amendment's guarantee of a speedy trial protects the accused from arrest or indictment through trial or plea, but does not apply to the sentencing phase of a criminal proceeding.

3. *United States v. Bryant*, ___ U.S. ___, 136 S. Ct. 1954 (2016). The Supreme Court holds that use of defendant's prior tribal-court domestic assault convictions to support a charge of domestic assault by a habitual offender was permissible because the convictions occurred in proceedings which complied with Indian Civil Rights Act (the terms of imprisonment for the convictions did not exceed one year), even though the convictions were uncounseled.

4. *Kelly v. United States*, 819 F.3d 1044 (8th Cir. 2016). Trial counsel was not ineffective at sentencing for failing to object to use of a state law domestic-abuse assault conviction as one of the predicate offenses for a crime of violence career-offender enhancement—the government met its burden under the modified categorical approach to the state simple-assault statute, which eliminated the possibility defendant had been convicted under a non-violent offense provision of the statute.

5. *Fiorito v. United States*, 821 F.3d 999 (8th Cir. 2016). Defendant was not denied his Sixth Amendment right to counsel when court granted his *pro se* request to withdraw his guilty plea; the court was not required to conduct a *Faretta* hearing. Defendant was represented by counsel, ignored counsel's advice not to withdraw the plea, and made the personal choice to withdraw his plea.

6. *United States v. Krug*, 822 F.3d 994 (8th Cir. 2016). Trial court did not err in denying defendant's motion to proceed *pro se* as during the requisite colloquy defendant refused to answer questions directly and did not affirm that he understood the charges or the consequences that could flow from a guilty verdict, or that he would follow the court's rules. Subsequently, defendant sent mailings which were "unintelligible or irrelevant" to the case and rejected the jurisdiction of the court. *But see Smith* below.

7. *United States v. Smith*, ___ F.3d ___, 2016 WL 4056060 (8th Cir. 7/29/2016). Trial court erred in denying defendant's pretrial motion to proceed *pro se*—he was not attempting to delay trial and was prepared to go trial as scheduled with stand-by counsel. While defendant may have an unorthodox defense to the government's tax prosecution charges, he was entitled to "go down in flames" if not disruptive or defiant at trial. His failure to respond to pretrial issues, including a plea agreement offer by the government, was not seriously obstructive conduct.

G. Eighth Amendment

1. *Kansas v. Carr*, ___ U.S. ___, 136 S. Ct. 633 (2016). This is Justice Scalia's last authored opinion involving an Eighth Amendment challenge to death sentences imposed by jury. The Supreme Court held the Eighth Amendment did not require a jury to be instructed that mitigating circumstances "need not be proved beyond a reasonable doubt" nor did joint sentencing proceedings violate the Eighth Amendment.

H. Sentencing

1. *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016). The Supreme Court holds that *Johnson*, in which the Court held the residual clause of the Armed Career Criminal Act was unconstitutional, is a substantive rule that should apply retroactively to cases on collateral review.

2. *Molina-Martinez v. United States*, ___ U.S. ___, 136 S. Ct. 1338 (2016). In cases where a district court has applied an incorrect Guidelines range but sentenced within the correct range, the Supreme Court held that reviewing courts should not require a defendant to provide additional evidence that use of the incorrect range in fact affected the ultimate sentence.

3. *Lynch v. Arizona*, ___U.S. ___, 136. S. Ct. 1818 (2016) (per curiam). Death penalty sentence overturned where Arizona court did not permit defendant's request to instruct the jury that the only alternative sentence to death was life without parole, in violation of *Simmons* rule.

4. *Mathis v. United States*, ___ U.S. ___, 136 S. Ct. 2243 (2016). In case out of the Southern District of Iowa involving application of Armed Career Criminal Act minimum sentence for defendant convicted on felon in possession of firearm charges, defendant's prior burglary convictions under Iowa's broader burglary law ("which set out alternative means of fulfilling a single locational element") could not be a basis for application of the enhancement as the Supreme Court has previously held state crimes cannot qualify as ACCA predicate offenses if the elements of the state law are broader than the generic offense.

5. *United States v. Walker*, 818 F.3d 416 (8th Cir. 2016). After defendant was convicted of mail and wire fraud, conspiracy to commit mail and wire fraud, witness tampering, and tax evasion, 300-month prison sentence based on fraud loss calculation of $57 million (based on investors' total loss instead of net loss urged by defendant) and an abuse-of-trust enhancement (evidence showed defendant used his controlling corporate trust position to conceal his substantial fraud offenses) was not imposed in error.

6. *United States v. Knowles*, 817 F.3d 1095 (8th Cir. 2016). Defendant's enhanced sentence under 18 U.S.C. § 2252(b)(1) upheld; following Supreme Court's decision in *Lockhart v. United States*, ___U.S.____, 136 S. Ct. 958, 961 (2016) interpreting § 2252(b)(1), Eighth Circuit concluded that prior conviction for third degree sexual assault triggered enhanced sentence under § 2252(b)(1) even though prior offense did not involve a minor or ward.

7. *United States v. Sigsbury*, 817 F.3d 1114 (8th Cir. 2016). District court did not abuse its discretion by imposing sentence at top end of sentencing guidelines where district court properly considered factors in 18 U.S.C. § 3553(a) in case involving child pornography.

8. *United States v. Ford*, ___F.3d___, 2016 WL 1696769 (8th Cir. 4/28/2016). District court's imposition of mandatory life sentence for distribution of a controlled substance within 1,000 feet of a protected location upheld where sentence was not an "extreme sentence that is grossly disproportionate to the crime" (quotation and citation omitted).

9. *United States v. Bailey*, 820 F.3d 325 (8th Cir. 2016). Prison sentence imposed after parties agreed to a sentence under a Rule 11(c)(1)(C) plea agreement was not eligible for reduction after the Sentencing Commission reduced drug quantity base offense levels because the sentence was not "based on" the Guidelines, but on a negotiated deal intended to avoid a career-offender enhancement.

10. *United States v. Schaffer*, 818 F.3d 796 (8th Cir. 2016). In applying Armed Career Criminal Act enhancement to felon in possession of firearm, defendant's prior state-court conviction for domestic assault under Minnesota law was correctly considered a violent felony under the modified categorical approach because defendant's conviction had as an element the "threatened use of physical force against the person of another," which did not require evidence of the victim's mental state.

11. *United States v. Alcalde*, 818 F.3d 791 (8th Cir. 2016). After defendant entered guilty plea to charge of conspiracy to distribute methamphetamine, 188-month prison sentence after application of aggravating role adjustment and calculation of drug quantity was not in error. Evidence showed defendant directed two of five conspirators to deposit drug proceeds and directed one to send photos of the drug packages.

12. *United States v. Garcia-Longoria*, 819 F.3d 1063 (8th Cir. 2016). In determining the base offense level for defendant's felon in possession offense, district court did not err in finding defendant's prior state conviction for assaulting a police officer was a crime of violence as defendant did not object to facts concerning the crime in the PSR and conceded it was a crime of violence, which relieved the government of the duty to submit court documents at sentencing.

13. *United States v. Edwards*, 820 F.3d 362 (8th Cir. 2016). In felon in possession of firearm case, application of two-point obstruction of justice enhancement was not in error: defendant sent letter to co-defendant through third party asking him to provide an alibi. Government did not have to show it was prejudiced by defendant's unsuccessful attempt.

14. *United States v. Iceman*, 821 F.3d 979 (8th Cir. 2016). Where defendant was convicted of the offense of strangulation, for which the Sentencing Commission had not yet promulgated a sentencing guideline, district court correctly found the Domestic Violence guideline to be most analogous for sentencing purposes.

15. *United States v. Denton*, 821 F.3d 1012 (8th Cir. 2016). On resentencing after amendment to Sentencing Guidelines lowered the range for defendant's drug trafficking offense, court did not abuse discretion in declining to grant the maximum reduction available—a 294-month sentence in the middle of the amended guideline range was supported by the court's findings and not inconsistent with its prior decision.

16. *United States v. Martinez*, 821 F.3d 984 (8th Cir. 2016). Defendant's 262-month prison sentence originally based in part on career offender enhancement in residual clause to § 4B1.2(a)(2) was substantively unreasonable, even if considered an alternative sentence. The level of violence displayed in defendant's two prior crimes (upon which the court relied for its upward departure from a range 121 to 151 months to a range of 262 to 327 months) did not justify an additional nine years: in one instance he threw an elbow at a police officer without striking the officer and ran a short distance and evidence of defendant's gang ties did not show him engaging in violent behavior.

17. *United States v. Nshanian*, 821 F.3d 1013 (8th Cir. 2016). After defendant was convicted of wire fraud in real estate investment scheme, application of two-level increase for obstruction of justice, resulting in a sentence of 42 months in prison, was supported by court's finding defendant committed perjury. Although court did not expressly state defendant's false testimony was willful, finding that defendant's testimony concerning his knowledge of misrepresentations in loan applications concerning a material matter was adequate.

18. *United States v. Pledge*, 821 F.3d 1035 (8th Cir. 2016). Sentencing court did not err in concluding defendant's three burglaries occurring on the same day but at different residences within twelve miles of each other qualified as separate and distinct offenses for purposes of applying an Armed Career Criminal Act enhancement to his felon in possession of firearm sentence.

19. *United States v. Johnson*, 821 F.3d 1031 (8th Cir. 2016). Defendant potato farmer was convicted on charge of conspiracy to defraud the United States, making false statements to the Department of Agriculture and to law enforcement, resulting from a scheme to intentionally damage his potato crop and claim disaster relief under crop insurance policies. District court did not clearly err in applying a two-point sentencing enhancement based on obstruction of justice as evidence showed conversations between defendant and informant/witness that could be interpreted as attempted bribe. Application of fourteen-point enhancement based on total loss amount was also affirmed as this was the enhancement defendant had argued should apply.

20. *United States v. Dixon*, 822 F.3d 464 (8th Cir. 2016). For felon in possession of firearm sentencing, under Missouri law a weapon is "readily capable of lethal use," even if the weapon is non-functional for purposes of determining whether defendant had committed a predicate "felony offense" for purposes of applying four-level enhancement.

21. *United States v. Terrell*, 822 F.3d 467 (8th Cir. 2016). Sentence vacated and case remanded for resentencing where the district court mistakenly stated the guideline range, and district court's mistake impacted the length of the sentence.

22. *United States v. Jefferson*, 822 F.3d 477 (8th Cir. 2016). Class 1 drug trafficking felony in Illinois qualified as a "serious drug offense" under the Armed Career Criminal Act, 18 U.S.C. § 924(e), because it was punishable by up to fifteen years imprisonment, even though defendant's actual sentence for the prior felony was for "boot camp," making the operative maximum term of his imprisonment eight years, rather than fifteen.

23. *United States v. Dieguez*, ___F.3d ___, 2016 WL 3031077 (8th Cir. 5/27/2016). Defendant explicitly waived any argument challenging the adequacy of the court's explanation of the 21-month sentence imposed for failing to register as a sex offender when at time of sentencing he requested only clarification on the date of arrest and advised the court he had "no other questions or concerns."

24. *United States v. Davis*, ___ F.3d ___, 2016 WL 3124838 (8th Cir. 6/3/2016). Sentence of 46 months for criminal contempt after defendant refused to testify before a federal grand jury, even under a § 6002 order, vacated and remanded for resentencing. Base offense level of 20 based on application of accessory after the fact guideline (as most analogous offense guideline) was not error nor was application of four-level enhancement for possession of a firearm in connection with another felony offense; however, court committed plain error by applying two-level enhancement for possession of a stolen handgun in connection the underlying offense because the enhancement required that defendant knew gun was stolen, and there was no evidence in the sentencing record to support such a finding.

25. *United States v. Hall*, ___ F.3d ___, 2016 WL 3144681 (8th Cir. 6/6/2016). Above-Guidelines sentence for felon in possession was appropriately based on defendant's extensive criminal history and the circumstances of the offense (defendant fled from police, leading to high speed chase, committed assault on a law enforcement officer, and was in possession of drugs and a firearm at the time of arrest, all while on state-court probation). The sentencing court's denial of request that federal sentence run concurrently with a not-yet-imposed state sentence was not an abuse of discretion given the court's explanation that a short state sentence could result in defendant serving too little time in prison.

26. *United States v. House*, ___ F.3d ___, 2016 WL 3144735 (8th Cir. 6/6/2016). Mandatory life sentence imposed after defendant was convicted of Hobbs Act robbery of jewelry store was not clear error as the robbery qualified as a "serious violent felony" because the crime contained as an element the use or threatened use of physical force and defendant had two qualifying predicate offenses.

27. *United States v. Hernandez-Marfil*, ___F.3d ___, 2016 WL 3176471 (8th Cir. 6/7/2016). Denial of defendant's motion to reduce sentence was not an abuse of discretion. While defendant was eligible for a reduction under § 3582(c)(2), he did not have a right to it and his existing sentence fell within the amended Guidelines range. Court was not required to make an adjustment based on defendant's good conduct while in prison.

28. *United States v. Mitchell*, ___ F.3d ___, 2016 WL 3184417 (8th Cir. 6/8/2016). After defendant was convicted on two counts of bank robbery, sentencing court's procedural error in calculating the applicable Guidelines range, resulting in a 151-month sentence, was harmless. Application of two-level threat of death enhancement on the basis defendant mentioned a gun in one of his bank robbery notes was not supported by the evidence; however, court did not rely on this finding when determining the sentence and based the sentence on defendant's criminal history and "unusual circumstances of timing" which prevented him from qualifying as a career offender.

29. *United States v. Torres-Rivas*, ___ F.3d ___, 2016 WL 3202581 (8th Cir. 6/9/2016). Where PSR did not contain a recommendation for acceptance of responsibility reduction, the government did not have an obligation under plea agreement to affirmatively recommend decrease for acceptance of responsibility. Although rejecting an obstruction-of-justice enhancement arising from evidence defendant attempted to threaten cooperating witnesses after his plea, court's denial of an acceptance of responsibility reduction was supported by "ample evidence" of the post-plea events.

30. *United States v. Salsberry*, ___ F.3d ___, 2016 WL 3212499 (8th Cir. 6/10/2016). District court did not err in relying in part on results of a preliminary field test to find defendant violated conditions of supervised release by using methamphetamine. The court did not rely solely on those results, but also on the testimony of a county jailer who administered the test, who testified defendant was evasive about his drug use; the testimony of two other government witnesses; and defendant's testimony, which the court found to be unbelievable.

31. *United States v. Kobriger*, ___ F.3d ___, 2016 WL 3212498 (8th Cir. 6/10/2016). Twenty-one month sentence after defendant pled guilty to charge of embezzlement by a bank employee was not unreasonable. While the evidence offered to persuade the court to grant a downward variance was useful (a character letter from her former employer, her lack of criminal history and the amount of restitution paid prior to sentencing), the court did not abuse its discretion in denying the variance and adequately articulated the factors supporting the sentence.

32. *United States v. Prophet*, ___ F.3d ___, 2016 WL 3254219 (8th Cir. 6/14/2016). Following defendant's guilty plea to bank fraud and aggravated identity theft after embezzling from multiple employers, sentence of 216 months on the bank fraud charges and 24 months on the identity theft charges, to run consecutively, was not illegal as the combined maximum penalty was 384 months. As defendant waived appeal of sentence (if not illegal) in her plea agreement, appeal was dismissed.

33. *United States v. Grimes*, ___ F.3d ___, 2016 WL 3254218 (8th Cir. 6/14/2016). Concurrent sentences of 92 months in prison were substantively reasonable after defendant was convicted of possessing an unregistered firearm and being a felon in possession. Although acquitted on a count charging him with possession of a firearm with obliterated serial number, court correctly applied four-level enhancement as knowledge of the obliterated serial number was not a requirement to apply the enhancement. Sentence was within and at the bottom of the Guideline range and not an abuse of discretion.

34. *United States v. Jones*, ___ F.3d ___, 2016 WL 3348485 (8th Cir. 6/16/2016). Sentencing court did not abuse its discretion in denying a reduction in defendant's 235-month sentence for distributing heroin within 1,000 feet of a school based on Amendment 782 (which reduced base offense levels in drug quantity tables) as the original sentence was not based on drug quantity but on other sentencing factors such as criminal history and the serious nature of the underlying criminal conduct.

35. *United States v. Coles*, ___ F.3d ___, 2016 WL 3361473 (8th Cir. 6/17/2016). Application of four-level sentencing enhancement for defendant's role as "organizer or leader" of mail fraud conspiracy was supported by the factual admissions in his plea agreement.

36. *United States v. Robinson*, ___ F.3d ___, 2016 WL 3407698 (8th Cir. 6/21/2016). In felon in possession case appealing a 75-month sentence based on acts the court found qualified as crimes of violence, it was necessary to remand for re-sentencing as the Eighth Circuit could not tell if the sentencing court relied on the residual clause or the force clause in determining the prior offenses qualified. If sentenced under the force clause, defendant would be entitled to plain-error relief based on *Molina-Martinez* from the Supreme Court.

37. *United States v. Lindsey*, ___ F.3d ___, 2016 WL 3523829 (8th Cir. 6/28/2016). When defendant failed to make a timely objection to the fact of his three prior state convictions for second degree assault contained in the PSR, the district court did not commit clear error in relying on those convictions to impose a four-level enhancement for defendant's use or possession of a firearm in connection with another felony offense, resulting in a prison sentence of 262 months for felon in possession of firearm.

38. *United States v. Johnson*, ___ F.3d ___, 2016 WL 3548308 (8th Cir. 6/29/2016). After defendant violated the conditions of his supervised release, twenty-four month revocation sentence, to run consecutive to any state sentence imposed for the conduct which led to revocation of his supervised release, was not an abuse of discretion as it did not exceed statutory limitations and the consecutive nature of the sentence was authorized by the Guidelines.

39. *United States v. Sholds*, ___ F.3d ___, 2016 WL 3568058 (8th Cir. 7/1/2016). Sentence of 960 months in prison after defendant pled guilty to four counts of production of child pornography and one count of possession of child pornography was not substantively unreasonable. Although defendant argued he could have shot just one continuous video instead of starting and stopping it to end up with four videos, the court could hold defendant accountable for that filming choice.

40. *United States v. Tidwell*, ___ F.3d ___, 2016 WL 3568060 (8th Cir. 7/1/2016). Resentencing court did not err in assigning criminal history points for conviction that was imposed after defendant's original sentencing. The cause for resentencing was not from remand after appeal but as post-conviction relief under § 2255, the court correctly applied the Guidelines in effect at the time of resentencing, which allowed use of the intervening sentence as a "prior sentence," and the conduct was severable and distinct from the conduct for which defendant was originally convicted.

41. *United States v. Lewis*, ___ F.3d ___, 2016 WL 3568112 (8th Cir. 7/1/2016). While acknowledging the sentencing court did not correctly calculate the amended Guideline range in denying defendant's § 3582(c)(2) sentencing reduction motion, the circuit held the procedural error was harmless as there would have been only a one-level reduction if correctly calculated and the court referenced its reasoning from the original sentence as the justification for retaining the original sentence.

42. *United States v. Valure*, ___ F.3d ___, 2016 WL 3606361 (8th Cir. 7/5/2016). After defendant pled guilty to armed bank robbery while he was on supervised release from two other felony bank robbery convictions, district court did not err in ordering his revocation sentences to run consecutive to each other and to the underlying sentence. Statute gives the court discretion to run sentences concurrently or consecutively and all the sentences imposed fell with the Guidelines range for each.

43. *United States v. Reid*, ___ F.3d ___, 2016 WL 3606371 (8th Cir. 7/5/2016). District court's perjury finding based on defendant's trial testimony that guns found when his girlfriend's residence was searched did not belong to him was not in error—it was not plausible defendant's testimony resulted from confusion, mistake, or faulty memory in the face of evidence that the guns were found in a bedroom containing his possessions, including a cell phone, wallet, ID, clothing, a to-do list defendant had written the day before, and some folders with documents containing his name, and defendant had keys to the residence. Resulting two-level increase for obstruction of justice was not clear error.

44. *United States v. Boyd*, ___ F.3d ___, 2016 WL 3606579 (8th Cir. 7/5/2016). Relying on defendant's extensive criminal history and his misconduct during incarceration (over thirty disciplinary violations), sentencing court did not err in denying a sentencing reduction under Amendment 782, after granting other reductions under prior amendments. Trial court explicitly considered § 3553(a) factors and defendant's misconduct reports showed he had failed to improve his behavior and was a serious danger to the

community.

45. *United States v. DeCoster*, ___ F.3d ___, 2016 WL 3615684 (8th Cir. 7/6/2016). Three-month prison sentences for "responsible corporate officers" who pled guilty to misdemeanor violations after their company introduced eggs containing salmonella into interstate commerce were not unconstitutional nor unreasonable. The sentences were relatively short, were misdemeanor convictions only and were not "grossly disproportionate to the gravity" of the misdemeanor offenses, given the public's reliance on companies to provide unadulterated foods.

46. *United States v. Clayton*, ___ F.3d ___, 2016 WL 3615733 (8th Cir. 7/6/2016). After defendant pled guilty to bank robbery, brandishing a firearm in connection with a bank robbery, and being a felon in possession of a firearm, a 279-month prison sentence was not substantively unreasonable nor did the court commit procedural error. While the court's discussion of § 3553(a) factors was brief, it showed the court was aware of and considered the factors and a sentence fifteen months longer than the statutory minimum was not unwarranted based on defendant's criminal history and his conduct during his offense.

47. *United States v. Ewert*, ___ F.3d ___, 2016 WL 3635763 (8th Cir. 7/7/2016). Defendant entered guilty plea to charges of making a false statement to purchase a firearm and being a felon in possession after he was involved in domestic abuse incident. His 84-month prison sentence was not substantively unreasonable—the sentening court properly applied a four-level enhancement for use or possession of a firearm in connection with another felony offense (here in connection with first degree harassment under Iowa law) and discussed the § 3553(a) factors adequately.

48. *United States v. Chavarria-Ortiz*, ___ F.3d ___, 2016 WL 3629018 (8th Cir. 7/7/2016). Imposition of 84-month prison sentence and three years of supervised release after defendant pled guilty to illegal reentry after removal was not based on procedural error—defendant did not object to the adequacy of the court's explanation of the sentence at the time of sentencing and the sentence was within Guidelines range; downward variance was not warranted because defendant had three prior convictions for illegal reentry in addition to other criminal convictions.

49. *United States v. Leanos*, ___ F.3d ___, 2016 WL 3695968 (8th Cir. 7/11/2016). Defendant who pled guilty to drug trafficking and being an illegal alien in possession of a firearm was not entitled to safety valve relief from 120-month mandatory minimum sentence—*Alleyne* requirement that facts increasing mandatory minimum must be submitted to a jury did not apply to the issue whether safety valve applies in sentencing and defendant stipulated in his plea agreement he possessed firearms, which were found with drug stashes that made him ineligible for safety valve relief.

50. *United States v. Brave Bull*, ____ F.3d ____, 2016 WL 3671702. Defendant entered guilty plea to voluntary manslaughter and assault with a dangerous weapon after she was involved in altercations with individuals that resulted in injury to one and the death of another. Sentence of 162 months imprisonment after court departed upward from criminal history category I to category VI was not an abuse of discretion—the sentencing court found defendant's conduct in pushing a victim down the stairs and leaving her there without calling for help was "outside the heartland" of conduct in a manslaughter case, supporting the departure.

51. *United States v. Powers*, ___ F.3d ___, 2016 WL 3671507 (8th Cir. 7/11/2016). Defendant entered guilty plea to charge of possessing pseudoephedrine with intent to manufacture methamphetamine and on motion received a reduced sentence of 108 months, the top of the sentencing range. Court did not abuse its discretion in doing so—obstruction of justice enhancement, while increasing defendant's base offense level, did not take into account the exceptional nature of defendant's obstructionist conduct as he nearly ran over an officer during a high speed chase and the original sentence was also imposed at the high end of the guideline range.

52. *United States v. Hart*, ___ F.3d ___, 2016 WL 3743101 (8th Cir. 7/13/2016). After defendant was convicted of assault with a dangerous weapon and assault resulting in serious bodily injury, defendant challenged the conditions of supervised release which would require him to provide financial information to the USPO upon request and prohibited him from incurring new credit card charges or opening lines of credit without approval of USPO. Eighth Circuit affirmed the conditions, finding they related to the circumstances of the crime for which he was convicted (which occurred after he asked his stepmother for money) and to prior convictions where he made terroristic threats related to money. Defendant would also owe restitution, including contributing to the cost of drug treatment.

53. *United States v. Nguyen*, ___ F.3d ___, 2016 WL 3878217 (8th Cir. 7/18/2016). Defendant was convicted on charges of attempted naturalization fraud, theft of government funds, social-security fraud, false use of a social security number, aggravated identity theft, false statements to a government agency, health care fraud and mail fraud. Application of a two-level sentencing enhancement on the basis her fraud offenses involved at least ten victims was supported by evidence that defendant used the identifying information of three individuals to receive SSI and other benefits, the identities of two more individuals to obtain food assistance, and deposited the checks of six other individuals into her own account. Her 87-month sentence was not substantively unreasonable as the court adequately weighed and articulated the § 3553(a) factors, commenting on the means and ways in which defendant committed fraud over a long period of time and noting defendant continued to engage in criminal activity while on release pending sentencing.

54. *United States v. Hess*, ___ F.3d ___, 2016 WL 3878221 (8th Cir. 7/18/2016). The Eighth Circuit held a 27-month prison sentence for defendant's Lacey Act conviction after he was involved in the purchase and sale of a pair of black rhinoceros horns was not substantively unreasonable. Court's statement during sentencing that helping to establish a market for black rhino horns (from an endangered species) was "a serious offense against the planet" was supported by testimony during sentencing from a Fish and Wildlife agent who explained how the elevated prices for rhinoceros horns contributed to and increased a poaching epidemic in Africa.

55. *United States v. Protsman*, ___ F.3d ___, 2016 WL 3923889 (8th Cir. 7/21/2016). Admission of hearsay testimony about defendant's alleged new law violations and other conditions of supervised release during revocation hearing was not an abuse of discretion—confrontation with witnesses in Arizona was not practicable and the court was not required by Eighth Circuit law to have them testify by telephone, evidence about wire transfers to defendant was corroborated, and a document from the Navy Federal Credit Union identifying a transfer as likely fraudulent was a routine document in the industry maintained in the normal course of business.

56. *United States v. Valencia*, ___ F.3d ___, 2016 WL 3947814 (8th Cir. 7/22/2016). Defendant's waiver of an illegal sentence (defined as one which exceeded the statutory maximum) in his plea agreement required dismissal of his appeal challenging application of organizer or leader enhancement as the 240-month sentence that resulted was below the statutory maximum of life imprisonment. Co-defendant's challenge to application of manager enhancement was considered as the magistrate judge who took plea misstated the scope of appellate waiver; however, there was sufficient evidence to support application of the enhancement as defendant directed other members of the drug-trafficking organization, at least during one shipment; told couriers where to meet him; asked another participant to bring a scale to weigh a new shipment; and fronted drugs to a local seller.

57. *United States v. Torres-Ojeda*, ___ F.3d ___, 2016 WL 3947817 (8th Cir. 7/22/2016). Prison sentence of 48 months after defendant pled guilty to illegal reentry charge below the bottom of the Guidelines range and below what the government argued was not based on sentencing error nor substantively unreasonable. The sentencing court acknowledged defendant's desire to return to his family in Mexico, but noted his history of felony domestic assault required imprisonment before deportation.

58. *United States v. West*, ___ F.3d ___, 2016 WL 3947815 (8th Cir. 7/22/2016). After defendant was convicted on three counts of tax evasion, he was sentenced to 51 months in prison and three years supervised release. On appeal he challenged conditions requiring him to refrain from creating or establishing new internet websites, and to take down existing websites (defendant had owned/managed several websites promoting a fraudulent tax scheme and promoting non-taxpayer propaganda), and prohibiting him from using computers/electronic devices capable of connecting to the internet without written approval of the USPO. The Eighth Circuit found the first condition was overbroad to the extent it prohibited all content and the second overbroad as the sentencing court could have narrowed its restriction in a way which would allow defendant to continue his career as a computer technician. Conditions vacated and case remanded for resentencing.

59. *United States v. Kimball*, ___ F.3d ___, 2016 WL 4010512 (8th Cir. 7/27/2016). Revocation of defendant's supervised release because he failed to abide by the rules of the halfway house was not an abuse of discretion. The court had clearly stated that as a condition of release defendant must follow the rules, this was defendant's second revocation, and he had committed violation within only a few days of his release. Sentence of eight months imprisonment with another four years of supervised release including a requirement of residence at a residential reentry center again was within the Guidelines range and was presumed reasonable.

60. *United States v. Musa*, ___ F.3d ___, 2016 WL 4045304 (8th Cir. 7/28/2016). After defendant entered guilty plea to fourteen counts of failing to pay employee tax withholdings to IRS, 51-month sentence vacated and remanded for resentencing as district court failed to make required findings to impose a four-level leadership enhancement.

61. *United States v. Holdsworth*, ___ F.3d ___, 2016 WL 4039706 (8th Cir. 7/28/2016). Revocation sentence of 51 months imprisonment was not procedurally erroneous nor substantively unreasonable. After being given probation sentence for felon in possession of firearm charge, defendant was in and out of substance abuse treatment programs and halfway house placements during his probation. The district court modified his probation five times, yet defendant returned to drug use after his last modification and committed six violations of his conditions. District court could rely on criminal history score based on range of sentences available at time of original sentence, the resulting sentence was within the statutory limit, and court's reference to defendant's need for sobriety did not indicate the sentence was chosen for the particular purpose of participation in drug treatment program.

62. *United States v. Aden*, ___ F.3d ___, 2016 WL 4056061 (8th Cir. 7/29/2016). Sentencing court's amount of loss calculation relied upon in sentencing defendant with Supplemental Nutrition and Assistance Program fraud was not clearly erroneous—comparative analysis of SNAP transactions at convenience stores in same zip code with transactions at defendant's stores was an accepted method of proof of loss and court was not required to adopt defendant's argument for loss amount based only on transactions observed by video surveillance evidence.

63. *United States v. Krebs*, ___ F.3d ___, 2016 WL 4056058 (8th Cir. 7/29/2016). In sentencing defendant on possession of child pornography charge, district court did not err in finding prior conviction for indecent contact with a child was a qualifying predicate offense for application of mandatory statutory penalty under § 2252(b)(2), resulting in a ten-year prison sentence. The court found the Iowa statute under which defendant had been charged was divisible and examined the charging document to consider the offense for which defendant had been convicted.

I. Habeas

1. *Woods v. Etherton*, __U.S.__, 136 S. Ct. 1149 (2016). Applying Antiterrorism and Effective Death Penalty Act's "doubly deferential" standard of review for habeas petitions based on ineffective assistance of counsel claims, the Supreme Court holds that a "fairminded jurist" could have concluded that petitioner's counsel was not ineffective, where his appellate counsel failed to challenge the inclusion of a hearsay statement on Confrontation Clause grounds.

2. *Kernan v. Hinojosa*, __U.S.__, 136 S. Ct. 1603 (2016). California Supreme Court's summary denial of prisoner's habeas petition was "on the merits," and therefore the prisoner's federal habeas petition should be reviewed under the Antiterrorism and Effective Death Penalty Act's deferential review standard, which prohibits federal courts from granting habeas relief unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law."

3. *Johnson v. Lee*, ___ U.S. ___, 136 S. Ct. 1802 (2016). Federal habeas review denied where defendant did not raise her claim on direct appeal; California's "Dixon" rule, which bars a defendant who fails to raise a claim on direct appeal from raising the claim on collateral review, was "firmly established and regularly followed" by California's courts.

4. *Shelton v. Mapes*, 821 F.3d 941 (8th Cir. 2016). Eighth Circuit affirms district court's denial of habeas petition; the state court's decision relating to petitioner's counsel's failure to object to a jury instruction was not "contrary to" clearly established law or unreasonable.

5. *Gordon v. Arkansas*, 823 F.3d 1188 (8th Cir. 2016). Defendant's federal habeas petition was time-barred and no statutory tolling applied because defendant's state court post-conviction relief petition was not properly filed. Although defendant was on treatment-precaution status for some of the period in which he could file, he could not explain why he could not have filed during the period he was not in that status.

6. *White v. Kelley*, ___ F.3d ___, 2016 WL 3082035 (8th Cir. 6/1/2016). State court's finding of no prejudice arising from counsel's conduct in making a last-minute decision to abandon a justification defense, which meant petitioner did not testify at his criminal

trial, was not unreasonable under *Strickland*. Counsel was concerned petitioner would be a poor witness and vulnerable under cross-examination based on his prior felonies.

7. *Woods v. Norman*, ___ F.3d ___, 2016 WL 3147748 (8th Cir. 6/1/2016). State appellate court's failure to clearly articulate the *Strickland* reasonable probability language did not demonstrate its decision upholding petitioner's drug trafficking conviction was contrary to *Strickland*'s prejudice standard. The failure of petitioner's trial counsel to call a co-defendant as a witness with respect to drug-trafficking charges against petitioner (during which he would have taken full responsibility for the drugs found) did not prejudice petitioner: the long relationship between petitioner and the co-defendant created potential bias, the co-defendant had already pled guilty and had "little to lose by taking full responsibility," and co-defendant could provide no details to corroborate his assertion that petitioner had no knowledge of the drugs.

8. *Taylor v. Kelley*, ___ F.3d ___, 2016 WL 3201101 (8th Cir. 6/9/2016). With respect to petitioner's claim that his trial counsel was ineffective for failing to present medical testimony to show petitioner could not have run as officers testified to, the Arkansas Supreme Court correctly applied the *Strickland* standard in finding the proposed testimony would have been cumulative because another witness testified about the alleged injuries and the doctor whose testimony petitioner offered in his post-conviction proceedings based his opinion only on medical records and information from counsel and not on an examination of petitioner.

9. *Donnell v. United States*, ___ F.3d ___, 2016 WL 3383831 (8th Cir. 6/20/2016). Petitioner's second/successive habeas motion could not be authorized as he sought to extend the effect of *Johnson* regarding the constitutionality of the Armed Career Criminal Act residual clause to the residual clause of USSG § 4B1.2(a)(2), a new right not "recognized by the Supreme Court or made retroactive on collateral review."

10. *Hogan v. Kelley*, ___ F.3d ___, 2016 WL 3383944 (8th Cir. 6/20/2016). Trial counsel's assistance at trial was not ineffective by failing to file a motion to suppress as under the "inevitable-discovery exception" the drug contents of the bag searched would have been admissible as officers searching for a long-barreled handgun pursuant to a search warrant found drugs and drug paraphernalia in plain view during the search, which likely would have led them to secure a warrant to search the bag which was located near those items.

11. *Davis v. Grandlienard*, ___ F.3d ___, 2016 WL 3627332 (8th Cir. 7/7/2016). Decision of Minnesota Supreme Court that trial court committed harmless error by admitting petitioner's statement to the police at trial for felony murder was not contrary to nor an unreasonable application of clearly established federal law.

12. *Munt v. Grandlienard*, ___ F.3d ___, 2016 WL 3769298 (8th Cir. 7/14/2016). Eighth Circuit found state appellate court did not unreasonably refuse to follow the Supreme Court when it reviewed and denied his claim that the trial court should have removed a juror from the jury based on her response to the prosecutor's question about petitioner's mental illness defense. The present case was distinguishable from Supreme Court precedent in *Morgan*

as petitioner's counsel followed up on the juror's partiality, did not challenge her for cause, and did not request further questioning.

13. *Herrera v. United States*, ___ F.3d ____, 2016 WL 3853811 (8th Cir. 7/15/2016). Petitioner's 120-month mandatory minimum sentence for drug trafficking, one count of which involved distribution near a playground or school, was not the result of counsel's alleged failure to challenge the quantity and purity of methamphetamine petitioner sold. Petitioner pled guilty to distributing mixtures totaling 87.5 grams of pure methamphetamine, requiring application of the mandatory minimum.

14. *Allen v. United States,* ____ F.3d ____, 2016 WL 3913441 (8th Cir. 7/20/2016). Counsel's failure to object to the empaneling of an anonymous jury in death penalty case was not ineffective assistance as the state of the law at that time permitted anonymous juries under a similar procedure and failure of counsel to argue for an extension of existing law is not deficient performance.

15. *Williams v. Kelley*, ____ F.3d ____, 2016 WL 4039704 (8th Cir. 7/28/2016). Petitioner's habeas petition was time-barred even though his appellate counsel's pursuit of appeal and related remedies was not effective as record showed petitioner was not diligent in pursuing his rights.

III. EMPLOYMENT LAW

A. Disability

1. *Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624 (8th Cir. 2016). Plaintiff's failure to accommodate claim failed as her acceptance of a cashier position that was less strenuous than stocking, accompanied by a pay raise, did not qualify as adverse employment action.

2. *Scruggs v. Pulaski Cty.*, 817 F.3d 1087 (8th Cir. 2016). Plaintiff did not establish a prima facie case of discrimination under the ADA where the ability to lift 40 pounds was an essential function of plaintiff's job, and plaintiff did not meet her burden to show there was a reasonable accommodation available that would allow her to perform that function.

3. *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104 (8th Cir. 2016). Eighth Circuit affirmed district court's grant of summary judgment in favor of railroad affirmed where plaintiff could not show he was denied employment due to a physical impairment; for obesity to be considered a physical impairment under the ADA, it must result from an underlying physiological disorder or condition.

4. *Dick v. Dickinson State Univ.*, ___ F.3d ___, 2016 WL 3442405 (8th Cir. 6/23/2016). Employee who had sensitivity to certain cleaning products brought failure to accommodate claims under first the ADA and then the Rehabilitation Act that were dismissed on summary judgment. Many of the purported adverse employment actions employee claimed (failure to transfer to other employment, to grant leave, to limit work year, continued exposure to neurotoxins, etc.) were not relevant to the failure to accommodate claim but to a constructive discharge claim plaintiff had waived. As for the actions claimed in support of the Rehabilitation Act claim, the summary judgment record showed plaintiff had been relieved of all duties putting her in contact with chemicals and had been transferred twice to different locations where there was less vinyl flooring on which the products were used.

B. Race/Gender/Retaliation

1. *CRST Van Expedited, Inc. v. EEOC,* __ U.S. ___, 136 S. Ct. 1642 (2016). After dismissal of certain sexual harassment/hostile work environment claims brought by the EEOC because the EEOC did not satisfy Title VII's pre-suit requirements, the district court awarded the employer $4 million in attorneys' fees, which the Eighth Circuit reversed on the basis that the employer did not prevail "on the merits." The Supreme Court held that a party in a Title VII suit need not prevail "on the merits" in order to recover under Title VII's attorney fee provision.

2. *Green v. Brennan*, __U.S.__, 136 S. Ct. 1769 (2016). Where an employee in a Title VII case resigns, giving rise to a constructive-discharge claim, the limitations period for the 45-day window to initiate contact with an EEO counselor does not begin to run until the employee's resignation.

3. *Olivares v. Brentwood Indus.*, 822 F.3d 426 (8th Cir. 2016). District court did not abuse its discretion by denying plaintiff's requests for reinstatement and front pay following jury verdict in his favor on employment discrimination claim, where district court found that comparable positions had already been filled, there was lingering animus between the plaintiff and his former employer, and plaintiff had not satisfied his evidentiary burden on front pay claim.

4. *Blackwell v. Alliant Techsystems, Inc.*, 822 F.3d 431 (8th Cir. 2016). Summary judgment in favor of employer affirmed where employee did not establish a prima facie case on the basis of any protected class status because she did not show that her employer treated similarly situated employees in a disparate manner, nor that the employer failed to follow its own policies.

5. *Henry v. Hobbs*, ___ F.3d ___, 2016 WL 3064567 (8th Cir. 5/31/2016). Former correctional officer failed to show termination of his employment was based on race—the Caucasian comparator offered by plaintiff as being treated more favorably when suspected of selling contraband to inmates was not given a computerized voice-stress analysis ("CVSA") test as had been given to plaintiff nor did he escort an inmate into a prohibited area, which was the conduct on which the institution relied in firing plaintiff. Additionally, defendants offered evidence of another Caucasian employee suspected of selling contraband to inmates who failed a CVSA test and was also fired.

6. *Beacom v. Oracle Am., Inc.*, ___ F.3d ___, 2016 WL 3144730 (8th Cir. 6/6/2016). Adopting the *Sylvester* standard that an employee's mistaken belief his/her employer has engaged in conduct violating Sarbanes-Oxley Act may be objectively reasonable, the Eighth Circuit held that plaintiff's belief that Oracle was defrauding its investors was not objectively reasonable given the minor discrepancy in missed projections ($10 million in a company that generated billions of dollars annually). Summary judgment in favor of defendant affirmed.

7. *Jones v. City of St. Louis*, ___ F.3d ___, 2016 WL 3201393 (8th Cir. 6/9/2016). Plaintiff's claim of race discrimination with respect to a pretermination investigation failed as he did not identify an adverse employment action—depletion of his accrued medical leave when he suffered emotional distress as a result of the investigation did not qualify as his working conditions were not changed, his employment was not terminated, his pay and benefits were not cut, and his request for medical leave was approved. As for his discrimination claim associated with the City's evaluation of his performance and placement on a mandatory improvement plan, he failed to show comparator employees were similarly situated to plaintiff in that the conduct involved was different from plaintiff's.

8. *Smith v. United Parcel Serv.*, ___ F.3d ___, 2016 WL 3726032 (8th Cir. 7/12/2016). Plaintiff's claim he was terminated based on his race failed on summary judgment as he failed to put forward evidence to rebut UPS's stated reason for termination—plaintiff's conduct. The record showed plaintiff cursed in the workplace, had conflicts with other employees and his supervisor, and disagreed with the company's efforts to resolve the problems.

9. *Banks v. John Deere and Co.*, ___ F.3d ___, 2016 WL 3769553 (8th Cir. 7/14/2016). In the absence of any evidence in the summary judgment record that race motivated Deere to discipline plaintiff for "running scrap" (producing parts that did not comply with manufacturing specifications) plaintiff failed to establish the reason for his suspension was a pretext for discrimination. Unsworn statements from co-workers that they heard a co-worker (who operated the same machine as plaintiff on a different shift) use racially derogatory names in referring to plaintiff were insufficient to create a factual issue on racial motivation.

10. *Cherry v. Siemens Healthcare Diagnostics, Inc.*, ___ F.3d ___, 2016 WL 3923883 (8th Cir. 7/21/2016). Where evidence showed that plaintiff's supervisor did not know of a planned reduction in force at the time he gave plaintiff negative performance evaluations, the summary judgment court did not err in failing to apply a "cat's paw theory of liability" to plaintiff's claim that he was terminated on the basis of race discrimination.

C. FMLA

1. *Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, ___ F.3d ___, 2016 WL 3514019 (8th Cir. 6/27/2016). Plaintiff claimed her health care employer interfered with her FMLA rights and then refused to renew her employment contract when she exercised her FMLA rights. On the summary judgment record before the trial court, it did not err in finding that while the employer did direct plaintiff to complete work-related tasks from home during her FMLA leave, plaintiff did not complain about it and was trying to reduce her personal time off while on leave, consistent with regulations which permit "voluntary and uncoerced" work by employees on FMLA leave so long as the work was not a condition of employment. Plaintiff's summary judgment evidence failed to show that employer's reason for not renewing her contract, that she had been late in completing required medical charting in spite of several notices in her records, was a pretext for discrimination.

2. *Smith v. AS Am., Inc.*, ___ F.3d ___, 2016 WL 3769322 (8th Cir. 7/14/2016). Plaintiff's back pain could be considered a chronic condition under FMLA regulations as he had two visits to an urgent care clinic for the condition. Award of liquidated damages was merited as defendant failed to show the good faith exception applied to the mandatory statutory award—court found employer knew plaintiff was trying to take FMLA leave and rescinded leave previously granted before even receiving plaintiff's leave application.

3. *Hernandez v. Bridgestone Americas Tire Operations, LLC*, ___ F.3d , 2016 WL 4136959 (8th Cir. 8/4/2016). Where overtime hours were mandatory, rather than voluntary, employer correctly deducted missed overtime hours for FMLA-qualifying reasons from employee's FMLA leave entitlement; however, the overtime hours also should have been included when calculating employee's total FMLA leave allotment. *Petition for rehearing granted and substituted op. on 8/4/2016*—case remanded for further consideration of plaintiff's request for costs for computerized legal research as part of attorney fee award.

D. FLSA

1. *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S. Ct. 1036 (2016). In "donning and doffing" case under FLSA, the Supreme Court held it was not error to certify and maintain a Rule 23(b)(3) class action. Plaintiff's submission of representative sample "to fill evidentiary gap created by the employer's failure to keep adequate records" was "a permissible means of showing individual hours worked" to establish class-wide liability.

2. *Encino Motorcars, LLC v. Navarro*, ___U.S. ___, 136 S. Ct. 2117 (2016). In case alleging automobile dealership failed to pay FLSA overtime to service advisors, the Supreme Court held that the Department of Labor's 2011 regulation, which interpreted "salesman" exemption in statute to mean only employees who sell vehicles but gave little to no explanation for abandoning a long-time practice of treating service advisors as exempt, could not be given controlling weight in assessing the plaintiffs' claims. The Supreme Court held that the lack of a "reasoned explanation" for the change in the face of "significant reliance interests" on the long practice of exemption meant the regulation was not entitled to *Chevron* deference. Case remanded for interpretation of the statute as applied to the claims raised.

3. *Perez v. Contingent Care, LLC*, 820 F.3d 288 (8th Cir. 2016). Custodial day care center qualified as a "preschool" under the FLSA, thus the overtime requirements applied.

4. *Williams v. Cent. Transp. Int'l, Inc.*, ___ F.3d ___, 2016 WL 4039705 (8th Cir. 7/28/2016). District court did not err in classifying plaintiff's "switcher" job as a "loader" for purposes of FLSA exemption under Supreme Court precedent—the summary judgment record demonstrated a substantial part of his work consisted of loading activities and the governing standard was not "exercising judgment and discretion."

E. Miscellaneous Employment Cases

1. *Heffernan v. City of Paterson*, ___ U.S. ___, 136 S. Ct. 1412 (2016). The Supreme Court held an employee is entitled to challenge an employer's action intended to prevent the employee from engaging in protected political activity, even if the employer's actions were based on a factual mistake about the employee's conduct.

2. *MikLin Enters., Inc. v. NLRB*, 818 F.3d 397 (8th Cir. 2016). The NLRB's finding that Jimmy John's franchisee engaged in unfair labor practices was upheld by the Eighth Circuit—statements in pro-union posters were protected under the NLRA, postings by supervisors and managers about pro-union employee interfered with protected rights, as did removal of employee's postings about settled unfair-labor charges from in-store community bulletin board.

3. *St. Jude Med. S.C., Inc. v. Biosense Webster, Inc.*, 818 F.3d 785 (8th Cir. 2016). In lawsuit by employer against a former employee and competitor who hired him away from the company, district court did not err in finding former employee's employment agreement was not a restrictive covenant as it was enforceable only by damages and not injunctive relief and was a term-of-years agreement.

4. *Silgan Containers v. Sheet Metal Works Int'l Ass'n, Loc. Union No. 2*, 820 F.3d 366 (8th Cir. 2016). District court did not err in vacating arbitration award regarding employer's contributions to pension fund pursuant to a collective bargaining agreement as the validity and formation of the contract provision was not within the scope of the arbitration agreement.

5. *Wilson v. Miller*, 821 F.3d 963 (8th Cir. 2016). In case alleging defendant employer gave plaintiff negative performance evaluations and suspensions and refused to promote her based on plaintiff's protected speech, plaintiff failed to show the evaluations affected the hiring decisions made or that they were actually used in the promotion decisions.

6. *Messina v. N. Cent. Distrib.*, 821 F.3d 1047 (8th Cir. 2016). Employer waived its right to arbitration in wrongful termination case where it proceeded in federal district court for eight months before invoking arbitration agreement, thereby prejudicing employee who spent time and resources litigating.

7. *Minn. Nurses Ass'n v. N. Mem'l Health Care*, 822 F.3d 414 (8th Cir. 2016). Arbitrator resolving dispute between nurse/employee and hospital/employer arising from collective bargaining agreement acted beyond the scope of authority created by the collective bargaining agreement where arbitrator's ruling attempted to remedy future, theoretical disputes that were not at issue in the case.

8. *Elkharwily v. Mayo Holding Co.*, 823 F.3d 462 (8th Cir. 2016). Summary judgment in favor of hospital affirmed where there was no evidence in the record to suggest that termination of doctor was pretext for retaliation, and the hospital articulated a legitimate, nondiscriminatory reason for terminating his employment—poor job performance.

9. *DePriest v. Milligan*, 823 F.3d 1179 (8th Cir. 2016). With respect to plaintiff's First Amendment claim that she was terminated from her position as chief deputy because of her political affiliations after defendant was elected to the position of circuit clerk, defendant showed the job requirements for the chief deputy position were changed to include personal and political loyalty in the position and the addition of duties related to policymaking and politics which had not previously been performed by plaintiff; therefore, it was permissible for defendant to dismiss plaintiff on the basis of her political affiliation. As for plaintiff's gender discrimination claims, plaintiff failed to show she applied for open positions or that she was qualified for a job which was posted. Finally, with respect to her failure to hire retaliation claims, plaintiff failed to show the reason given for not hiring her (that the applicants hired had experience with a new computer system which plaintiff lacked) was a pretext.

10. *Von Rohr v. Reliance Bank*, ___ F.3d ___, 2016 WL 3407710 (8th Cir. 6/21/2016). FDIC's determination that compensation plaintiff sought after he was terminated from employment with a bank qualified as a prohibited "golden parachute" under the FDIC Act was based on a reasonable application of the statutory language and therefore was not arbitrary or capricious. Because bank was barred from making the payment under Missouri law, its defense of impossibility applied to bar plaintiff's breach of contract claim.

11. *Day v. Celadon Trucking Services*, ___ F.3d ___, 2016 WL 3606682 (8th Cir. 7/5/2016). With respect to WARN Act claims arising after trucking company was sold, circuit agreed the transaction was more than a sale of assets as defendant purchased the company with intent to continue the existing trucking business, purchased all assets central to that business, and entered into non-compete agreements with officers. The APA for sale required all employees to remain employed for two weeks following the sale date, therefore under WARN they were considered employees of the buyer.

12. *Symphony Diagnostic Servs. No. 1 v. Greenbaum*, ___ F.3d ___, 2016 WL 3615700 (8th Cir. 7/6/2016). Company that purchased assets of another company brought action against former employees of the other company to enforce non-compete and confidentiality agreements the employees had signed with their former employer. Applying Missouri law, the circuit found the non-compete and confidentiality agreements could be assigned without the consent of the employees as they were not personal services contracts which would have required affirmative action on the part of the employees.

13. *Stewart v. Nucor Corp.*, ___ F.3d ___, 2016 WL 3853814 (8th Cir. 7/15/2016). Applying Arkansas law, exculpatory clause in employment contract that waived claims against employer's clients was enforceable—plaintiff (who was injured on the job premises) had time to read it, did not ask any questions about it, and could read and understand the contract.

IV. CONSTITUTIONAL LAW

A. First Amendment

1. *Bennie v. Munn*, 822 F.3d 392 (8th Cir. 2016). Even though the record reflected that state financial regulators' heightened scrutiny of financial advisor was motivated in part by his protected political activities, the district court's finding that the regulatory scrutiny would not have a chilling effect on "a person of ordinary firmness" was not clearly erroneous, and thus the district court's finding in favor of the state on plaintiff's First Amendment claim was affirmed.

2. *Miller v. City of St. Paul*, 823 F.3d 503 (8th Cir. 2016). An evangelical Christian plaintiff who was prevented from engaging in religious speech at an Irish Fair sponsored by a private nonprofit organization under permits from the city failed to show that the permits granted to the private entity would authorize prosecution of plaintiff if he engaged in the speech he wanted to make at the event, therefore he lacked standing to bring First Amendment claims against the city and officer in her official capacity. Plaintiff did have standing with respect to claims against the officer in her individual capacity on the theory she overstepped her authority.

3. *Young v. Ricketts*, ___ F.3d ___, 2016 WL 3207859 (8th Cir. 6/9/2016). After Director of the Nebraska Real Estate Commission sent plaintiff, a California real estate broker, letters ordering her to cease and desist from advertising the sale of Nebraska real estate without a Nebraska real estate broker's license, plaintiff filed a § 1983 action seeking a declaration the Nebraska Real Estate License Act violated her rights under the First Amendment, Due Process, Equal Protection, and Privileges or Immunities clauses. The Eighth Circuit affirmed the summary judgment ruling that the Act on its face did not regulate speaking or publishing, but was a legitimate regulation of the real estate broker profession.

4. *Bernbeck v. Gale*, ____ F.3d ____, 2016 WL 3769481 (8th Cir. 7/14/2016). Plaintiff who brought claims against Nebraska state officials alleging procedures they enforced for placing initiatives on state and municipal ballots violated his First and Fourteenth Amendments did have standing to bring his Fourteenth Amendment claim. His interest in placing an initiative on the ballot was merely a statement of intent which did not constitute injury in fact. His interest as a petition signer failed as plaintiff did not show he was registered to vote in Nebraska.

B. Fourth Amendment

1. *V.L. v. E.L.*, ___ U.S. ___, 136 S. Ct. 1017 (2016). In a *per curiam* decision, the Supreme Court held that Full Faith and Credit Clause required Alabama courts to respect a Georgia state court judgment that had allowed a lesbian to adopt her partner's children. Thus, Alabama courts (where partner had moved after the relationship ended) had jurisdiction to award visitation rights based on the Georgia adoption judgment.

2. *Procknow v. Curry*, ____ F.3d ____, 2016 WL 3383776 (8th Cir. 6/20/2016). In case alleging officers used excessive force during a third use of a stun gun during defendant's arrest, trial court did not err in admitting over plaintiff's motion in limine a conviction for impersonating a peace officer as probative of his credibility and a conviction for attempted first degree murder, which was relevant to the reasonableness of the officers' use of force, even though it was prejudicial.

3. *Shultz v. Buchanan*, ____ F.3d ____, 2016 WL 3902653 (8th Cir. 7/19/2016). With respect to unlawful entry and excessive force claims against officer who entered home and used a taser on plaintiff in effecting his arrest on public intoxication charge, officer was entitled to qualified immunity. The Eighth Circuit held that the circumstances before the officer were "close enough to the line of a valid entry," given his observation upon arrival at the scene that plaintiff had been drinking, was upset and had knocked over a chair when he approached the officer and after plaintiff entered the home, the officer heard yelling, children screaming and a loud thud, which gave the officer reasonable grounds to believe someone inside was in need of immediate aid. The *de minimis* nature of injury which plaintiff sustained from the tasing also supported granting qualified immunity to the officer.

C. Due Process/Equal Protection

1. *Harris v. Ariz. Ind. Redistricting Comm'n*, ___ U.S. ___, 136 S. Ct. 1301 (2016). Arizona's redistricting plan upheld by the Supreme Court as a deviation below 10% did not make out a prima facie case of invidious discrimination.

2. *Fisher v. Univ. of Tex. at Austin*, ___U.S. ___, 136 S. Ct. 2198 (2016). The Supreme Court holds university's affirmative action admissions program lawful under the Equal Protection Clause.

3. *Glasgow v. Nebraska*, 819 F.3d 436 (8th Cir. 2016) and *Kruger v. Nebraska*, 820 F.3d 295 (8th Cir. 2016). Plaintiffs, whose son and wife respectively were killed by recently paroled inmate, sued state under federal and state law. Eighth Circuit applied general rule that state is not required by the Due Process Clause to protect its citizens against private actors, and no exceptions apply in these cases.

4. *Mickelson v. Cty. of Ramsey*, 823 F.3d 918 (8th Cir. 2016). County jail's policy of deducting a $25 booking fee from a detained arrestee's cash upon booking and subsequent return of remaining funds in the form of a prepaid debit card (in accordance with state statute allowing counties to require payment of a booking fee) did not violate Fourth or Fourteenth Amendment rights. Pre-deprivation hearing was not required constitutionally based on the state's legitimate interest in collecting the fee, the amount at issue was small and the deprivation temporary since fee could be refunded under certain conditions.

5. *Helmig v. Fowler*, ____ F.3d ____, 2016 WL 3675475 (8th Cir. 7/11/2016). Plaintiff had been convicted of the murder of his mother, but the conviction was set aside and the state decided not to retry plaintiff. He subsequently brought a § 1983 lawsuit against law enforcement officers, claiming (in part) they fabricated evidence and failed to disclose exculpatory evidence. The Eight Circuit affirmed the trial court's summary judgment ruling dismissing the case, holding the sheriff was protected by absolute immunity with respect to the claim that evidence of a reported altercation between plaintiff and his mother had been fabricated, as the sheriff only learned of the report during trial at the same time as the prosecutor and defense counsel and did not learn the report was unsubstantiated until after trial and his trial testimony that plaintiff's mother had contacted his office a number of times during her divorce from plaintiff's father was not inconsistent with evidence of five to fifteen contacts, thus no *Brady* violation occurred.

6. *Truong v. Hassan*, ____ F.3d ____, 2016 WL 3769456 (8th Cir. 7/14/2016). Metro bus passenger brought § 1983 claim against bus driver for violation of his rights to substantive due process after plaintiff was kicked off a bus. The intent-to-harm standard was appropriate to apply as the situation was evolving quickly and the bus driver had to make "instant judgments about a passenger who he knew to ride the bus without paying, refused to exit the bus, and who, after [defendant] removed him from the bus, responded by jumping onto the front of the bus as it attempted to drive away." The Eighth Circuit agreed that on the summary judgment record and viewing a video of the incident, defendant driver's objective was to remove plaintiff from the bus and he did not act maliciously or sadistically to cause plaintiff physical harm, even though the driver grabbed plaintiff by his shoulders and pushed him off the bus, followed by a kick in plaintiff's direction that may/may not have made contact; started and stopped the bus to try to get plaintiff off the front; and allowed some other passengers to exit the bus, confront plaintiff and remove him from the bus. The Eighth Circuit found on this record the conduct of defendant driver did not amount to a substantive due process violation.

D. Eighth Amendment

1. *Barton v. Taber*, 820 F.3d 958 (8th Cir. 2016). Evidence decedent became unconscious at the scene of a single-car accident, was not responsive necessitating checking his pulse, could not stand or walk on his own and could not answer questions and fell off a bench at the detention center onto the floor, all of which defendant officer observed, were sufficient to establish on summary judgment that decedent had an objectively serious medical need, even if the officer did not know it was a heart condition. As to the subjective component of the analysis, the officer's failure to obtain medical attention was sufficient to establish deliberate indifference on summary judgment. The case law at the time was such that a reasonable officer would recognize the failure to seek medical care was a constitutional violation, therefore the officer was not entitled to qualified immunity defense.

2. *Dadd v. Anoka Cty.*, ____ F.3d ____, 2016 WL 3563424 (8th Cir. 6/30/2016). Pretrial detainee, who had undergone dental surgery the day before his arrest and was on pain killers, brought § 1983 claim against jail, jailers and jail medical staff after he was not given his pain medication in spite of his complaints. District court denied defendants' motion to dismiss on the ground of qualified immunity as the complaint made plausible allegations of the nurse's and deputies' knowledge of defendant's pain and need for medication, it was not necessary the delay in treatment last days or weeks instead of two days as occurred here, and the right to treatment was clearly established.

3. *Corwin v. City of Indep.*, ___ F.3d ___, 2016 WL 3878216 (8th Cir. 7/18/2016). Plaintiff brought action against jail staff after he was not taken to doctor for treatment of a broken hand (injured during the altercation which landed him in jail) but received only ibuprofen and an ACE wrap for his wrist. The summary judgment record showed jail nursing staff provided treatment and placed his complaint form in a folder which placed him on the list to be transported for medical assistance and plaintiff was discharged before he could be transported. The Eighth Circuit found at most the nurse was negligent, which does not support a § 1983 claim of deliberate indifference.

4. *Montgomery v. City of Ames*, ___ F.3d ___, 2016 WL 3913442 (8th Cir. 7/20/2016). After plaintiff was seriously injured when former boyfriend, who had been arrested for domestic abuse of plaintiff, escaped from his halfway house placement, broke into plaintiff's home, shot her and then himself, her due process claims against the state defendants failed on summary judgment. There was no evidence manager of halfway house knew about the boyfriend's abuse history or that plaintiff had called that afternoon communicating concern for her safety; the employees at the halfway house did not know the boyfriend had violated a no-contact order when they authorized him to visit a local grocery store, and there was no evidence any danger to plaintiff was newly created by the halfway house since the danger existed before the boyfriend was placed there.

E. Miscellaneous Constitutional Claims

1. *Caetano v. Massachusetts*, ____ U.S. ____, 136 S. Ct. 1027 (2016). Applying the Second Amendment in a *per curiam* decision, the Supreme Court held that a state law prohibiting the possession of stun guns violated the Second Amendment.

2. *Bank Markazi v. Peterson*, ___ U.S. ___, 136 S. Ct. 1310 (2016). The Supreme Court held 22 U.S.C. § 8772, which makes assets of the Iranian government available to satisfy judgments obtained by victims of Iran-sponsored acts of terrorism, does not violate separation of powers.

3. *Whole Woman's Health v. Hellerstedt*, ___ U.S. ___, 136 S. Ct. 2292 (2016). The Supreme Court held that Texas laws placing admitting privileges and surgical center requirements on physicians who performed abortions placed an undue burden on women's constitutional right to abortions and thus were unconstitutional.

4. *Eggenberger v. W. Albany Twp.*, 820 F.3d 938 (8th Cir. 2016). Plaintiff's claims that township violated his rights to political speech, free speech, association, and petition under the Minnesota constitution failed to state a claim as Eighth Circuit found there was no private cause of action for violations of the Minnesota constitution.

5. *Dixon v. Tanksley*, 822 F.3d 437 (8th Cir. 2016). Summary judgment in favor of police officers in § 1983 case granted where there was no evidence to support notion that officer falsified accident report, and therefore no need to decide whether there could ever be a successful due process claim based on a false police report that causes the denial of an insurance claim for accidental death benefits.

6. *Ingrassia v. Schafer*, ____ F.3d ____, 2016 WL 3228409 (8th Cir. 6/13/2016). Civilly committed individual brought claim against the treatment center to which he was committed, claiming he was denied adequate nutrition in violation of his rights under the Fourteenth Amendment. The trial court did not err in denying defendants' summary judgment on qualified immunity grounds as there were contested facts whether his BMI and lab results were normal, sometimes he received only 1200 calories a day instead of the recommended 2000, he lost 11 pounds in less than two months, and some food was improperly held under a "no liquids" order.

7. *North Dakota v. Heydinger*, ___ F.3d ___, 2016 WL 3343639 (8th Cir. 6/15/2016). The Eighth Circuit held a Minnesota statue restricting the importation of power from out-of-state power facilities violated the Commerce Clause, in response to challenge by the state of North Dakota and members of an interstate transmission system organization that provided power to members in Minnesota.

V. PRISONERS' RIGHTS

A. Miscellaneous

1. *Ross v. Blake*, ___U.S. ___, 136 S. Ct. 1850 (2016). The Fourth Circuit's "special circumstances" exception to Prison Litigation Reform Act exhaustion requirements was not supported by the PLRA; however, prison inmate's excessive force claims were not necessarily barred as unexhausted as the lower courts needed to consider whether the prison's grievance process was available to the inmate since there was a separate Internal Investigative Unit procedure to look into charges of prison staff misconduct that might bar an inmate's relief through the administrative remedy process. Case remanded for further inquiry.

2. *Jenner v. Nikolas*, ___ F.3d ___, 2016 WL 3648329 (8th Cir. 7/8/2016). Because plaintiff did not have a protected liberty interest in a parole hearing, her due process complaints that inclusion of pictures of her deceased daughter (who plaintiff had been convicted of killing) in her parole file had no basis in the law.

VII. MISCELLANEOUS

1. *Sturgeon v. Frost*, ___ U.S. ___, 136 S. Ct. 1061 (2016). In case challenging the federal Park Service's application of its hovercraft regulation to plaintiff's conduct in piloting a hovercraft over a stretch of river owned by the State of Alaska but contained within a national preserve, the Supreme Court held the Alaska National Interest Lands Conservation Act ("ANILCA") created an exception to the Park Service's general authority over federally managed preservation areas, rejecting the Ninth Circuit's interpretation, which upheld the Park Service's regulatory authority.

2. *Nebraska v. Parker*, ___ U. S. ___, 136 S. Ct. 1072 (2016). In dispute whether Omaha Tribe could apply its Beverage Control Ordinance to retailers in village purchased under the terms of the 1882 Act regarding survey and sale of tracts of Indian land, the Supreme Court holds the 1882 Act did not diminish the Omaha Indian Reservation. The Court did not, however, reach questions about laches and acquiescence curtailing the Tribe's authority to tax retailers in the village.

3. *Evenwel v. Abbott*, ___ U.S. ___, 136 S. Ct. 1120 (2016). The Supreme Court holds the one-person, one-vote principle is satisfied by state legislative districts based on total population, not just total voter population.

4. *Hughes v. Talen Energy Mktg. LLC*, ___U.S. ___, 136 S. Ct. 1288 (2016). The Supreme Court held that Maryland's energy regulatory program to encourage in-state generation of power was preempted by Federal Power Act and its interstate wholesale rate structure, although Maryland was not foreclosed from encouraging new production so long as not conditioned on payments outside Federal Energy Regulatory Commission rates.

5. *Franchise Tax Bd. of Cal. v. Hyatt*, ___U.S. ___, 136 S. Ct. 1277 (2016). Because the Court was equally divided, it held Nevada courts could exercise jurisdiction over California's state agency, but could not apply a Nevada rule of law that awarded damages against California greater than the courts could award against Nevada in similar circumstances.

6. *Husky Int'l Elecs., Inc. v. Ritz*, ___ U.S. ___, 136 S. Ct. 1581 (2016). Bankruptcy Code provision prohibiting debtors from discharging debts obtained by "actual fraud" encompasses forms of fraud such as fraudulent conveyance; "actual fraud" is not limited to situations where the debtor made a false representation to obtain the loan.

7. *Zubik v. Burwell*, ___ U.S. ___, 136 S. Ct. 1557 (2016). Non-profit organizations that provide health insurance to their employees brought a suit under the Religious Freedom Restoration Act of 1993 challenging federal regulations requiring them to submit a form to their insurer or the government if they wish to opt out of covering contraceptives. In an unsigned opinion, and without deciding on the merits, the eight-member court remanded to the Third, Fifth, Tenth, and D.C. Circuits to allow the parties to fashion a compromise approach.

8. *Luna Torres v. Lynch*, __ U.S. ___, 136 S. Ct. 1619 (2016). A state crime is an "aggravated felony" within the meaning of the Immigration and Nationality Act ("INA") if it corresponds to one of the federal offenses listed in the INA in all respects; in this case, the petitioner's guilty plea of arson under state law was an "aggravated felony" within the meaning of the INA.

9. *Army Corps of Eng'rs v. Hawkes Co., Inc.*, ___ U.S. ___, 136 S. Ct. 1807 (2016). An approved "Jurisdictional Determination" issued by the Army Corps of Engineers, which is the Corps' definitive decision as to whether a particular body of water is a "water of the United States" subject to the Clean Water Act, is a final agency action under the Administrative Procedures Act, and therefore judicially reviewable.

10. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, ___U.S. ___, 136 S. Ct. 1923 (2016). The Supreme Court held that the Federal Circuit's *Seagate* test for enhanced damages is inconsistent with 35 U.S.C. § 284 of the Patent Act and rejects the rigid formula for an award of enhanced damages under the statute as well as the Federal Circuit's tripartite appellate review framework.

11. *Puerto Rico v. Franklin Cal. Tax-Free Trust*, ___ U.S. ___, 136 S. Ct. 1938 (2016). The Supreme Court held that Puerto Rico's Recovery Act (intended to enable public utility corporations to restructure debt) is pre-empted by § 903(1) of the Bankruptcy Code.

12. *Kingdomware Techs., Inc. v. United States*, ___U.S. ___, 136 S. Ct. 1969 (2016). In case involving bid protest to Department of Veteran's Affairs' procurement of multiple contracts through the Federal Supply Schedule without following the statutory "Rule of Two" set-aside provision of 28 U.S.C. § 8127(a), the Supreme Court holds the statute unambiguously requires use of the Rule of Two in government contracting.

13. *Trevarton v. South Dakota*, 817 F.3d 1081 (8th Cir. 2016). Plaintiff-landowners' quiet title actions with respect to former railroad right-of-ways, seeking declaration quieting title in plaintiffs, failed to state a claim upon which relief could be granted as the state acquired a "new easement" to the right-of-way (which the railroad had quitclaimed to it) under the Trails Act and did not stand in the shoes of the railroad, which had abandoned the right-of-way.

14. *Abdull v. Lovaas Inst. for Early Intervention Midwest*, 819 F.3d 430 (8th Cir. 2016). In case against an early childhood behavioral therapy center involving discrimination claims under state and federal law, Eighth Circuit affirmed summary judgment in favor of defendant where there was no evidence that defendant's treatment of plaintiff's child was motivated by plaintiff or child's national origin.

15. *Foster v. Vilsack*, 820 F.3d 330 (8th Cir. 2016). USDA determination that a portion of plaintiffs' farmland was a wetland subject to Swampbuster provisions upheld as there was sufficient evidence to support the agency's final decision and the agency's use of a comparison site was not arbitrary, capricious, or contrary to law.

16. *Country Mut. Ins. Co. v. Orloske*, 820 F.3d 335 (8th Cir. 2016). After Orloske tripped on the stairs with a loaded gun and fatally shot his brother, in subsequent declaratory judgment action by homeowner insurer seeking to establish its policy did not provide coverage for the incident, the Eighth Circuit held Minnesota's reasonable-expectations doctrine did not invalidate a criminal-acts exclusion in the policy.

17. *Brown v. Louisiana-Pacific Corp.*, 820 F.3d 339 (8th Cir. 2016). In lawsuit alleging fraudulent misrepresentation by manufacturer of exterior housing trim board, plaintiff failed to show justifiable reliance as there was no evidence builder received materials regarding the quality of the TrimBoard from the manufacturer, only that the advertisements were consistent with what the builder thought he was purchasing.

18. *Am. Family Mut. Ins. Co. v. Donaldson*, 820 F.3d 374 (8th Cir. 2016). In matter of first impression under Minnesota insurance law, the Eighth Circuit holds that insured's entry into a Miller-Shugart settlement (in which liability is admitted) after the insurer had already protected insured from liability under a Drake-Ryan settlement was a breach of the cooperation clause of the umbrella policy, voiding coverage under that policy.

19. *32nd St. Surgery Ctr. v. Right Choice Managed Care*, 820 F.3d 950 (8th Cir. 2016). Summary judgment in favor of insurer on plaintiff medical provider's claims of *quantum meruit*, unjust enrichment, vexatious refusal, and injunctive relief and as well as dismissal of breach of reimbursement obligation, breach of contract, and declaratory judgment claims arising from dispute regarding reimbursement rates affirmed. Ancillary-provider agreement clearly set out the medical provider's acceptance of rate for services for insureds belonging to all of the insurers' networks.

20. *Nat'l Sur. Corp. v. Dustex Corp*., 820 F.3d 988 (8th Cir. 2016). In insurance-coverage dispute, irrespective of whether Iowa or Georgia law applied, trial court's finding that Dustex understood the insurer was defending an arbitration claim under a reservation of rights was not clearly erroneous based on the evidence in the record.

21. *Associated Elec. & Gas Ins. Servs. v. Bendtec, Inc.*, 822 F.3d 420 (8th Cir. 2016). In case involving an allegedly defective product installed at a power plant, the Eighth Circuit upheld the district court's grant of summary judgment in favor of the defendant where Minnesota's two-year statute of limitations for contract and tort claims "arising out of the defective and unsafe condition of an improvement to real property" barred the action.

22. *Bamford, Inc. v. Regent Ins. Co.*, 822 F.3d 403 (8th Cir. 2016). Following jury verdict in insured's favor against insurer for bad faith refusal to settle within policy limits, District Court's denial of insurer's post-verdict motion for judgment as a matter of law or a new trial were affirmed where the insured presented sufficient evidence that its insurance company failed to take insured's potential liability for an excess judgment into account during settlement discussions.

23. *Burger v. Allied Prop. and Cas. Ins. Co.*, 822 F.3d 445 (8th Cir. 2016). Language in insurance policy was unambiguous where underinsured motorist ("UIM") endorsement defined UIM as having a policy with a limit of liability less than $50,000; the driver who caused the accident in question had a $100,000 limit of liability, so UIM endorsement did not apply.

24. *State Bank of Bellingham v. BancInsure,* 823 F.3d 456 (8th Cir. 2016). Following a fraudulent transfer of funds that occurred as the result of a computer breach, bank sought to recover losses from issuer of financial institution bond that provided coverage for losses caused by computer system fraud. The bond issuer denied coverage because employees had not followed computer security protocols, and the bank alleged breach of contract. Applying Minnesota law, the Eighth Circuit concluded that the "overriding cause" of the bank's loss was the computer breach and illegal wire transfer, which was not a foreseeable and natural consequence of the failure to follow security policies.

25. *Feed Mgmt. Sys., Inc. v. Comco Sys., Inc*, 823 F.3d 488 (8th Cir. 2016). In case arising as a result of defendant's refusal to indemnify plaintiff under the terms of a Management Agreement between the parties, the Eight Circuit holds the plain language of the agreement covered litigation between plaintiff and a third party with which both plaintiff and defendant had dealings. In addition, district court did not err in limiting plaintiff's recovery to $87,350 out of the $1 million-plus fees, costs, and expenses resulting from the underlying litigation.

26. *Gosiger, Inc. v. Elliott Aviation, Inc.*, 823 F.3d 497 (8th Cir. 2016). In action by owner of damaged aircraft against servicing company which damaged it, the Eighth Circuit affirmed the district court's grant of summary judgment in favor of servicer on whether plaintiff was entitled to diminution in value damages. Neither a specification agreement nor a return to service agreement between the parties authorized diminution damages.

27. *Bruhn Farms Joint Venture v. Fireman's Fund Ins. Co.*, 823 F.3d 1161 (8th Cir. 2016). Insurance dispute over adjusted value of hail-damaged crops required remand for further proceedings as there was factual dispute whether insurer breached the contract, which prevented entry of summary judgment on either claim.

28. *Bell v. Blue Cross and Blue Shield of Oklahoma*, 823 F.3d 1198 (8th Cir. 2016). Provision under the Federal Employees Health Benefits Act, 5 U.S.C. §§ 8901–14, preempted plaintiff's state-law defense to a claim she must reimburse her insurer for medical benefits paid by a tortfeasor's insurer.

29. *Bull v. Nationwide Mut. Fire Ins. Co.*, ___ F.3d ___, 2016 WL 3034479 (8th Cir. 5/27/2016). In lawsuit against homeowners' insurer for breach of contract based on insurer's refusal to pay for damages caused by water leaking from pipe located under the garage-floor slab of plaintiff's home, the trial court correctly found the claim fell within a policy exclusion for property loss which resulted from "water or water-borne material below the surface of the ground" as the language of the exclusion was unambiguous.

30. *Soo Line R.R. Co. v. Werner Enters.*, ___ F.3d ___, 2016 WL 3176822 (8th Cir. 6/7/2016). Lawsuit arising after defendant's truck driver struck a train causing a tanker car to spill its chemical load went to trial on negligence claims only after plaintiff railroad's trespass and nuisance claims were dismissed on summary judgment. Summary judgment evidence showed the driver did not enter track intersection intentionally, which would be required to support a trespass claim, and the jury's finding the driver was not negligent supported the trial court's determination no wrongful conduct occurred under Minnesota nuisance statute.

31. *Lincoln Composites, Inc. v. Firetrace USA, LLC*, ___F.3d ___, 2016 WL 3186895 (8th Cir. 6/8/2016). After fire detection tubing failed and defendant seller refused to refund purchase price, plaintiff-buyer's claims went to a jury, resulting in a damages verdict against the seller in excess of $900,000 on a breach of express warranty claim. Denial of defendant's motion for new trial was not an abuse of discretion as there was sufficient evidence on which the jury could find defendant's limited repair or replace remedy failed of its essential purpose and that defendant was on notice of plaintiff's terms and conditions of contract.

32. *Gateway Customer Sols., LLC v. GC Servs. Ltd. P'ship*, ___ F.3d ___, 2016 WL 3212993 (8th Cir. 6/10/2016). In declaratory judgment action arising out of a business referral agreement between the parties, trial court's determination that a subsequent agreement was a new one instead of a renewal of the old agreement was supported by the applicable law (Delaware) and the unambiguous definition of "renewals" defined in an addendum to the contract.

33. *Ventura v. Kyle*, ___ F.3d ___, 2016 WL 3228373 (8th Cir. 6/13/2016). Defamation and unjust enrichment case by Jesse "The Body" Ventura against the author who claimed he had "laid out" the celebrity (unnamed in book) in a bar fight. Eighth Circuit held that remarks of plaintiff's counsel during closing arguments, coupled with improper cross-examination of two witnesses about insurance coverage for defendant, prevented defendant from receiving a fair trial and trial court erred in denying new trial. Unjust enrichment claim (on which jury made advisory award of $1.35 million) dismissed as it had no support under Minnesota law. Defamation claim remanded for new trial.

34. *Richland/Wilkin Joint Powers Auth. v. Army Corps of Eng'rs*, ___ F.3d ___, 2016 WL 3383978 (8th Cir. 6/20/2016). Power authorities of Minnesota and North Dakota brought suit against the Corps of Engineers, alleging that construction of a river ring levee by the Corps' local partner violated the National Environmental Policy Act. Preliminary injunction was granted. On appeal, the Eighth Circuit affirmed the district court, finding no error in its determination that the ring levee was a component of a larger diversion project still under review for environmental impact statement, which would violate the Minnesota Environmental Procedure Act.

35. *Clarke Cty. Dev. Corp. v. Affinity Gaming, LLC*, ___ F.3d ___, 2016 WL 3457613 (8th Cir. 6/24/2016). Case involving a dispute between a non-profit county development corporation and casino operator concerning casino management agreement. In light of fact issues concerning the parties' intent in a memorandum of understanding and whether board approval was a condition precedent to enforcement of a contract, Eighth Circuit reversed summary judgment in favor of casino operator and remanded case for further proceedings.

36. *Whitney v. The Guys, Inc.*, ___ F.3d ___, 2016 WL 3457263 (8th Cir. 6/24/2016). In cross-litigation between shareholder and corporate defendants involving shareholder-rights claims and cross claims that shareholder caused payments to be diverted to a personal bank account, district court did not err in concluding on summary judgment record that shareholder was on notice of the accrual of his claims before October 2007, thus his shareholder claims which pre-dated that time were barred by statute of limitations.

37. *Cooper v. Gen. Am. Life Ins. Co.*, ___ F.3d ___, 2016 WL 3523757 (8th Cir. 6/28/2016). Plaintiff's claim for discretionary breach of contract attorney's fees under Arkansas statutes failed as he did not suffer a "loss" as defined by the statute when his annuity transaction got reversed until the issuer obtained a replacement treasury warranty.

38. *United States v. Tolin*, ___ F.3d ___, 2016 WL 3606648 (8th Cir. 7/5/2016). In suit concerning the priority of the U.S. government's tax lien over other competing interests in real property in Missouri, release of a 2004 deed of trust on 5/22/2006 allowed a 2004 tax lien recorded 3/30/2006 to rise in priority over a 2006 loan for property, which the court found was not a replacement mortgage as argued by the bank because it was not the "same transaction" based on the two-month-plus gap between release of the old deed and recordation of the new deed.

39. *Carlson v, Midwest Prof'l Planners*, ___ F.3d ___, 2016 WL 3675401 (8th Cir. 7/11/2016). Negligence suit against insurance company after its agent did not list decedent's business partners, former policy beneficiaries, as co-owners of the policy failed as from the time the policy was first issued with decedent as the sole owner, the agent did not have authority to change the policy to correct any mistake and could not force the owner to make a change.

40. *Nelson v. Midland Credit Mgmt.*, ___ F.3d ___, 2016 WL 3672073 (8th Cir. 7/11/2016). Agent for creditor did not violate Fair Debt Collection Practices Act by filing a proof of claim in plaintiff's bankruptcy case for a time-barred debt. The proof of claim, while time-barred, was accurate and complete and did not qualify as "false, deceptive, misleading, unfair, or unconscionable" under the Act.

41. *Others First, Inc. v. Better Bus. Bureau of Greater St. Louis, Inc.*, ___ F.3d ___, 2016 WL 3727747 (8th Cir. 7/12/2016). Charitable organization's tort claims for injurious falsehood and interference with business expectancy failed on summary judgment because defendant's news release in which it voiced concern about plaintiff's vehicle donation program did not contain an actionable falsehood—the eight challenged statements in the news release either contained truthful facts or protected opinions.

42. *Compart's Boar Store v. United States*, ____ F.3d ____, 2016 WL 3743095 (8th Cir. 7/13/2016). After the National Veterinary Services Laboratories tested plaintiff's pigs for Porcine Reproductive and Respiratory Syndrome virus and reported "inconclusive" results to China, that country suspended all imports from the producer. Producer's lawsuit against the United States under the Federal Tort Claims Act failed as the discretionary function exemption to the waiver of sovereign immunity applied because the policy under which the labs took the blood samples used permissive instead of mandatory language; therefore the court did not have jurisdiction over the claims.

43. *Blake Marine Grp. v. CarVal Inv'rs*, ___ F.3d ___, 2016 WL 3743075 (8th Cir. 7/13/2016). Plaintiff's lawsuit in which it alleged defendant tortiously interfered with plaintiff's contract to lease a barge and crane to a third party was dismissed as barred by the applicable statute of limitations, which the trial court found was governed by Alabama's two-year limitations period and not by Minnesota's six-year limitations period. Plaintiff was an Alabama corporation and defendant a Minnesota corporation; the lawsuit was brought in Minnesota district court and Minnesota choice-of-law analysis applied. Of the applicable factors, the Eighth Circuit agreed with the district court in applying Alabama law and its limitations period.

44. *Parks v. Ariens Co.*, ____ F.3d ____, 2016 WL 3769525 (8th Cir. 7/14/2016). District court and Eighth Circuit agreed product manufacturer could satisfy its duty of care to a purchaser by making available an optional safety feature (which would have prevented the lawnmower accident that led to the litigation), the "optional equipment doctrine."

45. *Capson Physicians Ins. Co. v. MMIC Ins. Inc.*, ___ F.3d ___, 2016 WL 3902654 (8th Cir. 7/19/2016). New insurer for physician was entitled to equitable rescission of prior-acts coverage as the failure of the physician (and new hospital he was joining) to disclose a pending malpractice lawsuit while prior-acts coverage was under consideration amounted to a false material misrepresentation under Iowa law.

46. *Barkley, Inc. v. Gabriel Bros., Inc.*, ___ F.3d ___, 2016 WL 3974161 (8th Cir. 7/25/2016). Plaintiff's damages claim in breach of contract action were liquidated under Missouri law—it made a fixed demand for payment and the method of calculation was not in dispute—therefore, trial court erred in failing to award prejudgment interest.

Bridge the Gap Seminar

Farmland Observations: Markets, Marketing & Ratings

2:00 p.m. - 2:45 p.m.

Presented by:
Fred Greder
Benchmark Agribusiness, Inc.
23 Third Street NW
Mason City, IA 50401
Phone: 641-424-6983

Thursday, September 8, 2016

Farmland Observations: Markets, Marketing & Ratings

Bridge the Gap Seminar

September 8, 2016

Iowa State Bar Association


REAL LIFE ADVENTURES
ARE YOU READY TO GET UP AND PRESENT?
I'M REAL NERVOUS.
WELL, TRY TO BE IN THE MOMENT.
I AM TRYING TO BE IN THE MOMENT. JUST NOT THIS ONE.
WISE/ALDRICH

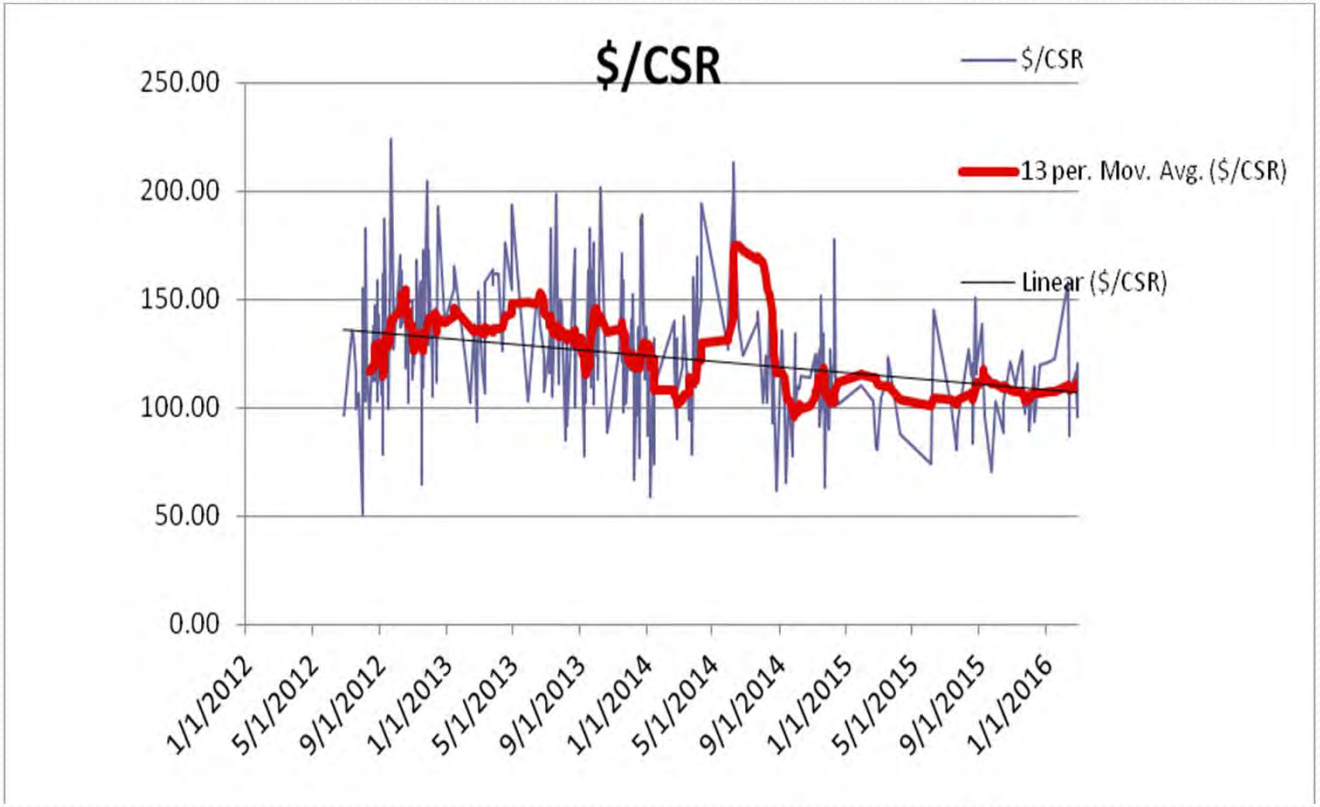
Only 52 hours to the big game!

FARMLAND MARKET

What's happened since the peak in the Fall of 2012?

Farmland Auction Sales Results

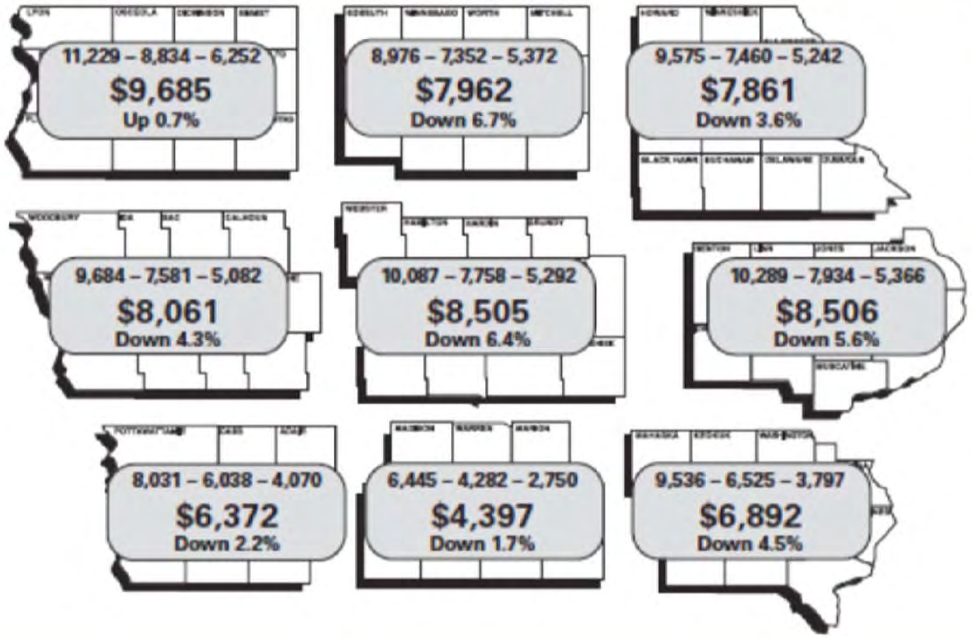
North Central Iowa – July 2012 to Present
All classes of tillable cropland



IOWA STATE UNIVERSITY
Extension and Outreach

CARD
Center for Agricultural and Rural Development

Figure 3. 2015 Iowa land values by crop reporting district



Estimates of average dollar value per acre for high-, medium-, and low-grade farmland (top row) on Nov. 1, 2015, by Iowa Crop Reporting District; (middle row) the Crop Reporting District average; and (bottom row) the average percentage change from Nov. 1, 2014. The estimates are based on a survey conducted by Iowa State University, Center for Agricultural and Rural Development, and Iowa State University Extension and Outreach.

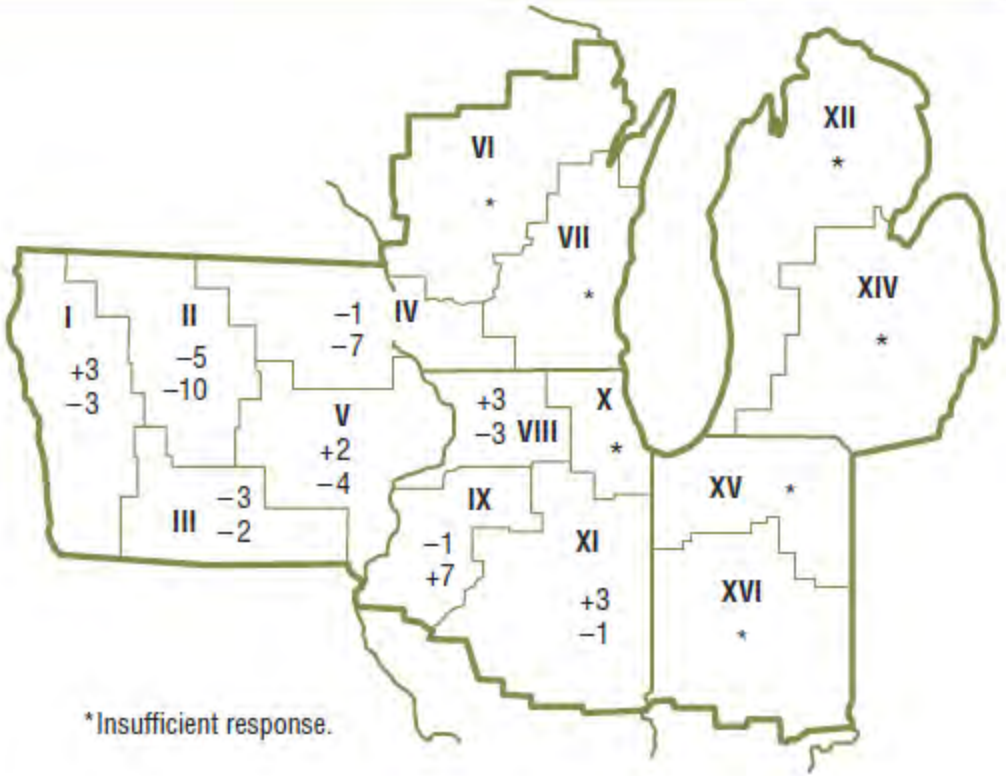
The Agricultural Newsletter
from the Federal Reserve Bank of Chicago
Number 1973 *August 2016*

AgLetter

Percent change in dollar value of "good" farmland

Top: April 1, 2016 to July 1, 2016
Bottom: July 1, 2015 to July 1, 2016

	April 1, 2016 to July 1, 2016	July 1, 2015 to July 1, 2016
Illinois	+2	+1
Indiana	−3	−2
Iowa	0	−6
Michigan	−1	−1
Wisconsin	+5	+7
Seventh District	+1	−1



*Insufficient response.

ACCREDITED LAND CONSULTANTS
IOWA CHAPTER #2
REALTORS® LAND INSTITUTE

March 2016

Iowa REALTORS® Land Institute (RLI) Chapter #2
Survey of Farm Land Values In Dollars Per Acre

Land Classification By Potential Corn Production

	High Quality Crop Land		Medium Quality Crop Land		Low Quality Crop Land		Non - Tillable Pasture Per Acre		Timber Per Acre		Percent Change in Tillable Cropland Values Past 6 Months
	September	March	September	March	September	March	September	March	September	March	%
Central	9,886	9,507	7,259	6,837	4,802	4,317	2,881	2,783	2,402	2,400	-5.9%
East Central	10,072	9,992	7,406	7,157	4,668	4,468	2,796	2,734	2,119	2,124	-2.4%
North Central	9,417	9,074	7,314	6,905	4,978	4,714	2,400	2,262	1,829	1,713	-4.7%
Northeast	9,415	9,089	7,102	6,691	4,623	4,453	2,675	2,629	2,638	2,508	-4.3%
Northwest	11,350	10,939	8,392	8,078	5,771	4,918	3,002	2,934	2,551	2,375	-6.2%
South Central	7,205	6,905	5,148	4,686	3,225	3,020	2,873	2,780	2,500	2,517	-6.2%
Southeast	9,821	9,318	6,530	6,242	4,002	3,697	2,419	2,404	2,017	1,982	-5.4%
Southwest	8,835	8,125	6,594	6,238	4,767	4,638	3,289	3,413	2,257	2,186	-5.9%
West Central	9,646	9,368	7,646	7,355	5,393	5,025	2,830	2,750	2,392	2,225	-4.1%
State	9,516	9,146	7,043	6,688	4,692	4,361	2,796	2,743	2,301	2,225	-5.0%

FARMLAND MARKETING

What is the difference between efficient and effective?

Efficient means:

Doing things right.

Effective means:

Doing the right thing.

The Dos & Don'ts of Conducting Grade A Sealed Bid Auctions

DO recognize that not every type of real estate sale is suited to an auction format. Recreational land, rural residential properties and highly improved properties are likely to be more successful when sold through a broker.

DON'T try to auction a "blended" property, or, if you do, offer the components separately.

1) Offer the rural residential acreage separate from the surrounding cropland
2) Split the recreational woods from the cropland.

DO consider an auction as an effective way to meet a deadline, such as:

- End of the fiscal year.
- Before a foreclosure filing.

DO consider an auction if your client's ultimate goal is getting top dollar. An auction may not be the right approach if they are more interested in seeing a neighbor or relative get the property.

DO advertise beyond the local paper. Skimping on advertising will cost you potential bidders.

If **I** don't know about your auction, neither do your best buyers.

Do make a sale brochure available online to provide easy access to information for interested buyers.

DON'T advertise an appraised value or high minimum bid.

DON'T make it complicated.

- Terminate leases.
- Avoid the growing season.
- Don't include a refusal option.

DO schedule the bid opening at a time and location that are convenient for the most likely buyers.

DON'T limit the number of bidders.

DO open bids on the same day bids are due.

DO give bidders plenty of time to raise their bids and allow bidders back in even if they passed on an earlier round.

Components of a Grade A Sealed Bid Auction

1. Is it **APPROPRIATE**?
2. Have I created **AWARENESS** through **ADVERTISING**?
3. Are the time and location **AVAILABLE** to promote **ATTENDANCE**?
4. And, finally, can I keep the bidders' **ADRENALINE** pumping?

Access the **Dos & Don'ts of Sealed Bid Auctions** on the Benchmark Agribusiness Inc. website at www.benchmarkagribusiness.com/pdf/BenchmarkNov05.pdf.

FARMLAND RATINGS

The new Corn Suitability Ratings!
a/k/a "CSR2"

•CSR - Corn Suitability Rating - An index that is used to rate a soil's potential for intensive row crop production over time. Ratings range from 100 for soils with no physical limitations to as low as 5 for soils with severe limitations for row crops.

Above average soils with production hazards that can be improved probably went up. Examples would be:

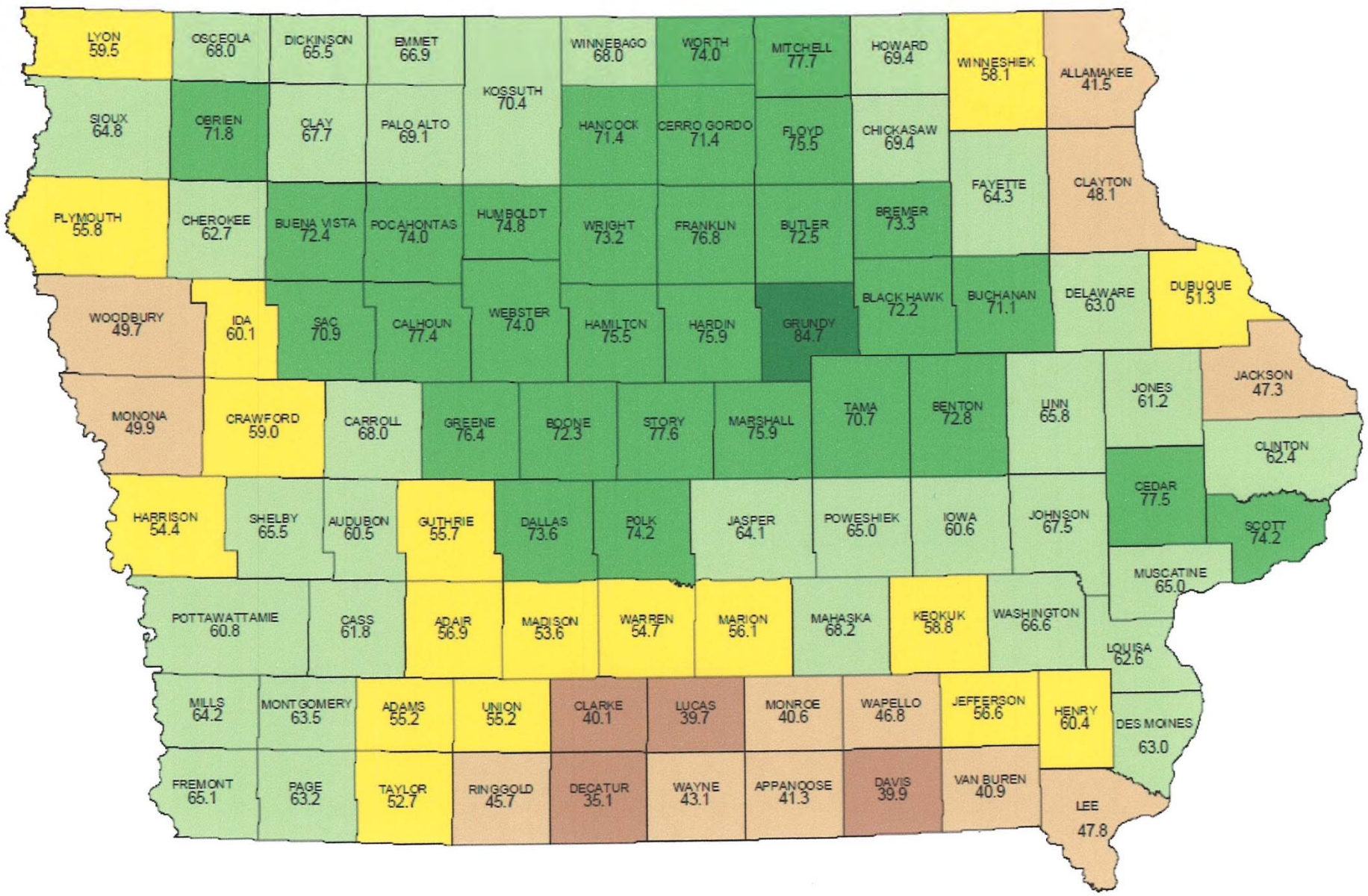
1) Heavy ground with access to an artificial drainage outlet
2) Land with long erodible slopes

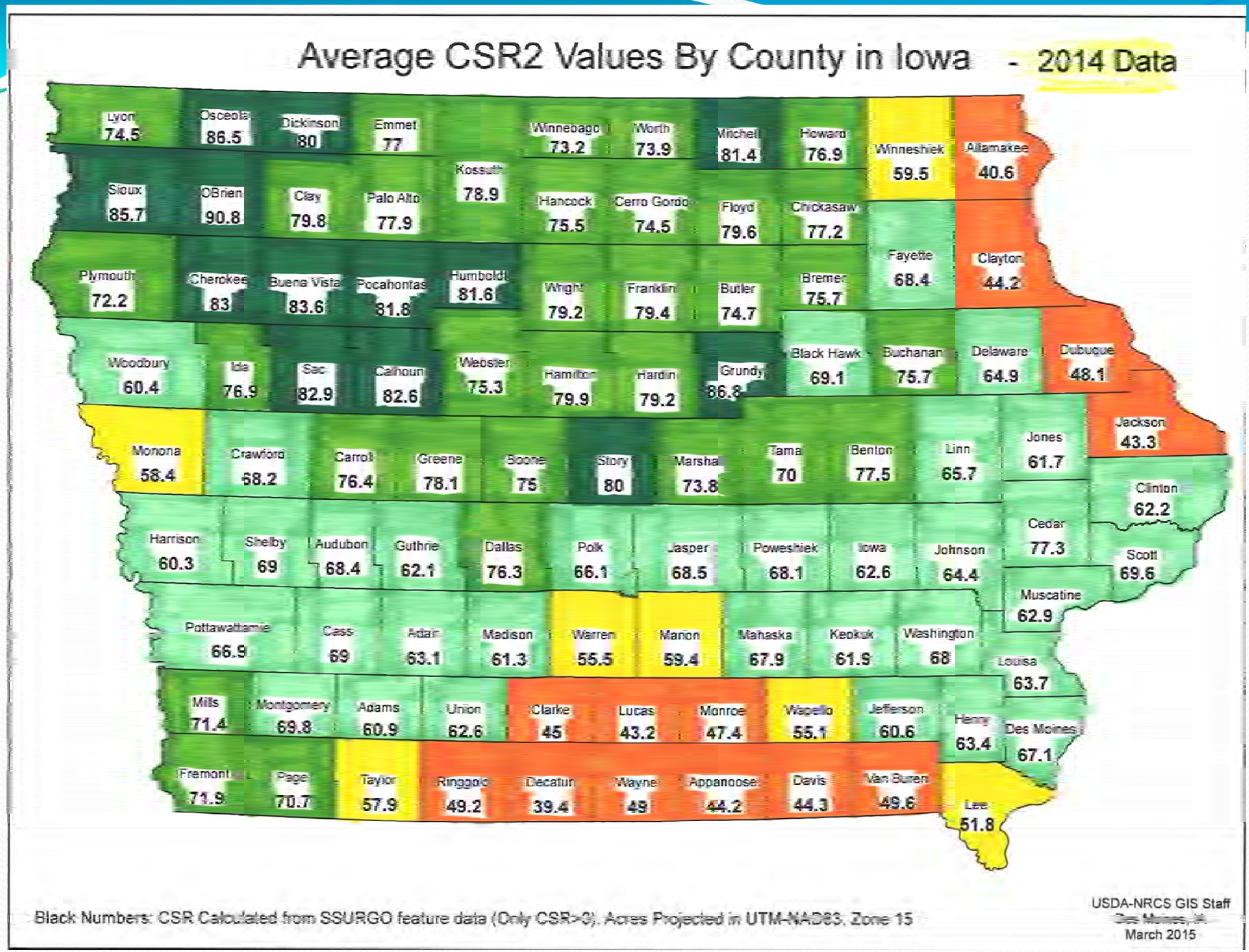
Below average soils with production hazards that can't be fixed probably went down. Examples would be:

1) High organic matter, peat beds;
2) Droughty soils underlain with sand & gravel

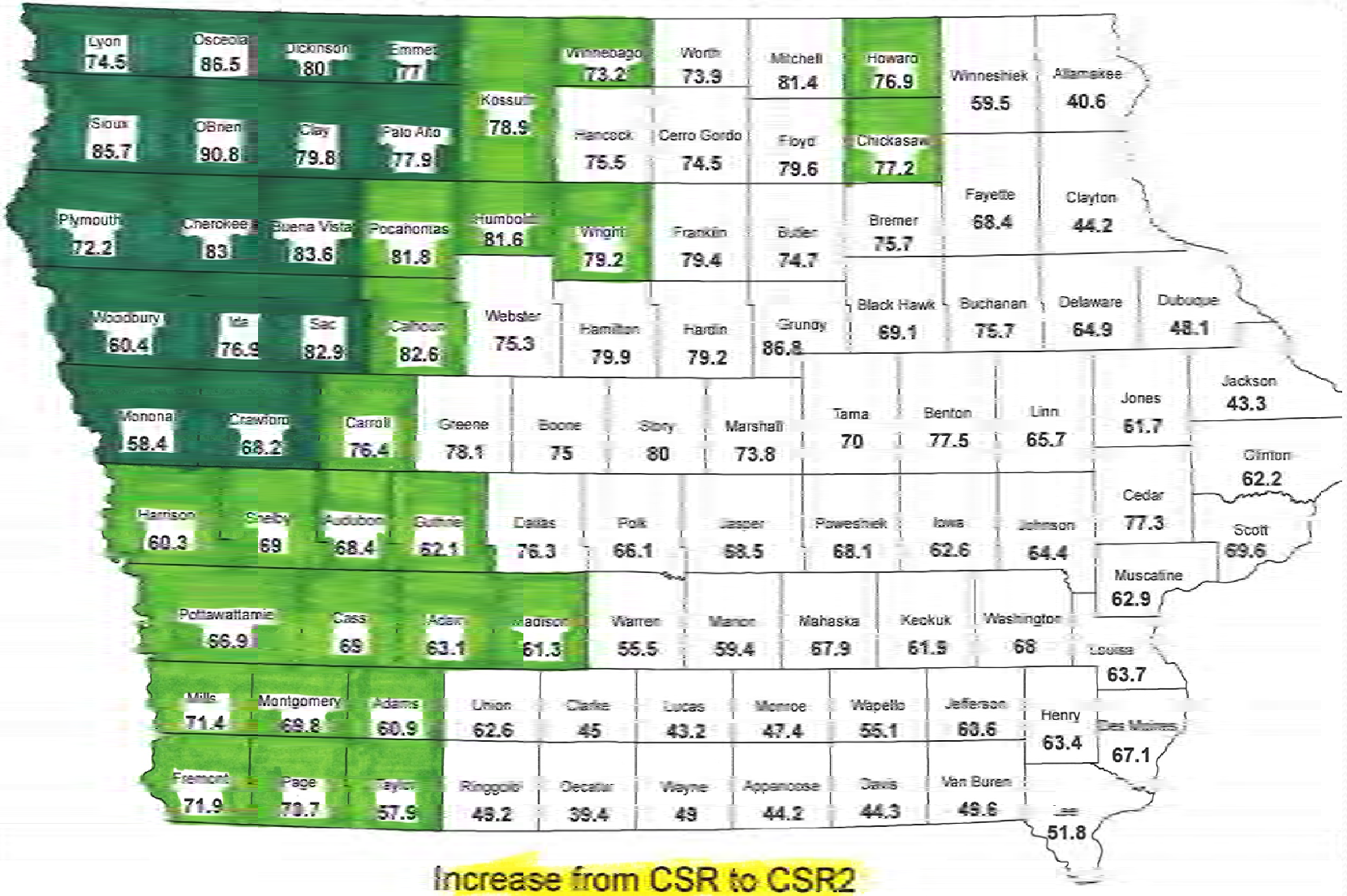
Risk Management

Average CSR per County - 2010 data




Average CSR2 Values By County in Iowa - 2014 Data
Lyon 74.5
Osceola 86.5
Dickinson 80
Emmet 77
Winnebago 73.2
Worth 73.9
Mitchell 81.4
Howard 76.9
Winneshiek 59.5
Allamakee 40.6
Kossuth 78.9
Sioux 85.7
OBrien 90.8
Clay 79.8
Palo Alto 77.9
Hancock 75.5
Cerro Gordo 74.5
Floyd 79.6
Chickasaw 77.2
Fayette 68.4
Clayton 44.2
Plymouth 72.2
Cherokee 83
Buena Vista 83.6
Pocahontas 81.8
Humboldt 81.6
Wright 79.2
Franklin 79.4
Butler 74.7
Bremer 75.7
Woodbury 60.4
Ida 76.9
Sac 82.9
Calhoun 82.6
Webster 75.3
Hamilton 79.9
Hardin 79.2
Grundy 86.8
Black Hawk 69.1
Buchanan 75.7
Delaware 64.9
Dubuque 48.1
Jackson 43.3
Monona 58.4
Crawford 68.2
Carroll 76.4
Greene 78.1
Boone 75
Story 80
Marshall 73.8
Tama 70
Benton 77.5
Linn 65.7
Jones 61.7
Clinton 62.2
Harrison 60.3
Shelby 69
Audubon 68.4
Guthrie 62.1
Dallas 76.3
Polk 66.1
Jasper 68.5
Poweshiek 68.1
Iowa 62.6
Johnson 64.4
Cedar 77.3
Scott 69.6
Muscatine 62.9
Pottawattamie 66.9
Cass 69
Adair 63.1
Madison 61.3
Warren 55.5
Marion 59.4
Mahaska 67.9
Keokuk 61.9
Washington 68
Louisa 63.7
Mills 71.4
Montgomery 69.8
Adams 60.9
Union 62.6
Clarke 45
Lucas 43.2
Monroe 47.4
Wapello 55.1
Jefferson 60.6
Henry 63.4
Des Moines 67.1
Fremont 71.9
Page 70.7
Taylor 57.9
Ringgold 49.2
Decatur 39.4
Wayne 49
Appanoose 44.2
Davis 44.3
Van Buren 49.6
Lee 51.8
Black Numbers: CSR Calculated from SSURGO feature data (Only CSR>3). Acres Projected in UTM-NAD83, Zone 15
USDA-NRCS GIS Staff
Des Moines, IA
March 2015

Average CSR2 Values By County in Iowa

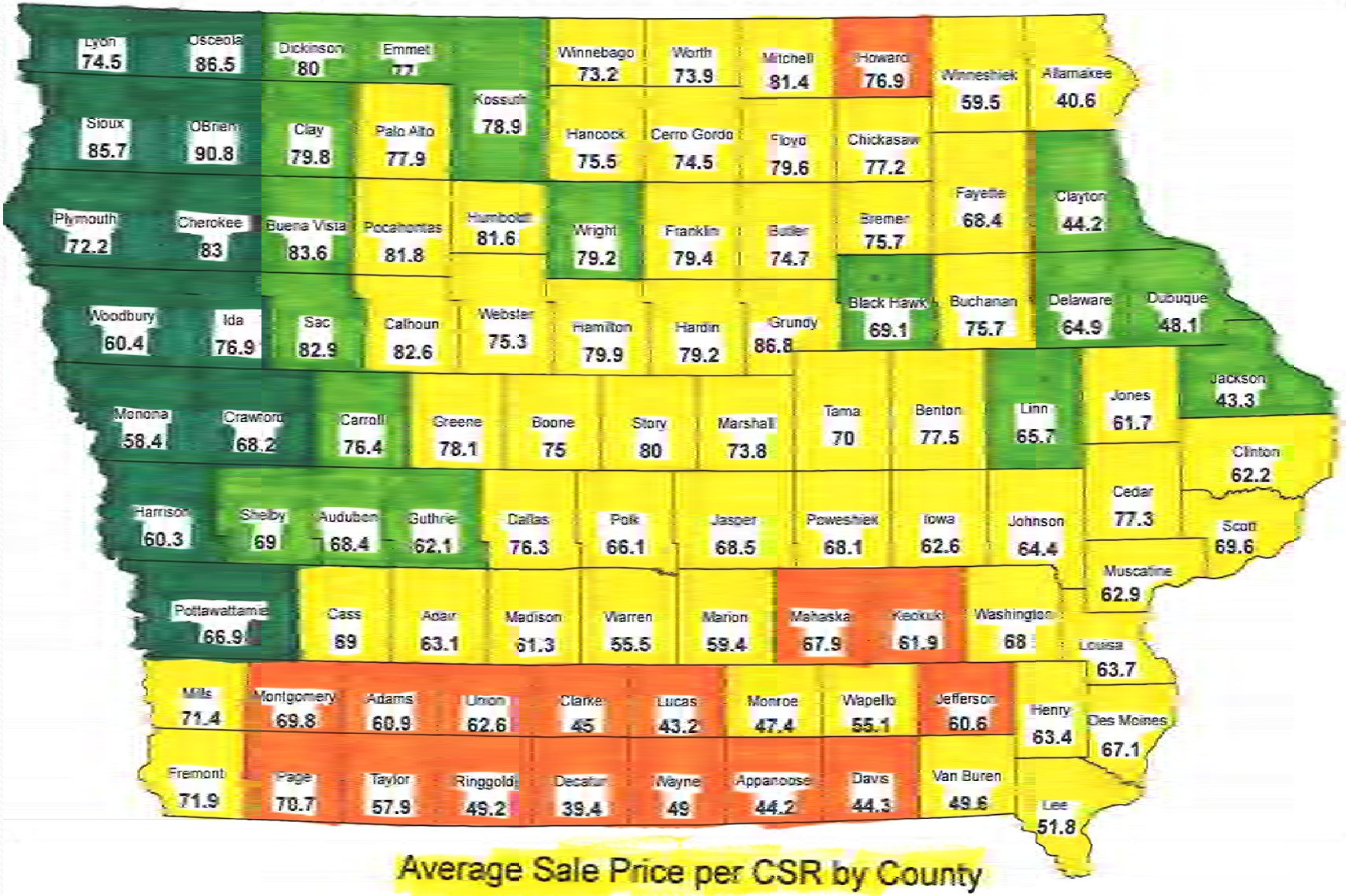


Increase from CSR to CSR2

Black Numbers: CSR Calculated from SSURGO feature data (Only CSR>0). Acres Projected in UTM-NAD83. Zone 15

USDA-NRCS GIS Sta
Des Moines, IA
March 2015

Average CSR2 Values By County in Iowa



Average Sale Price per CSR by County

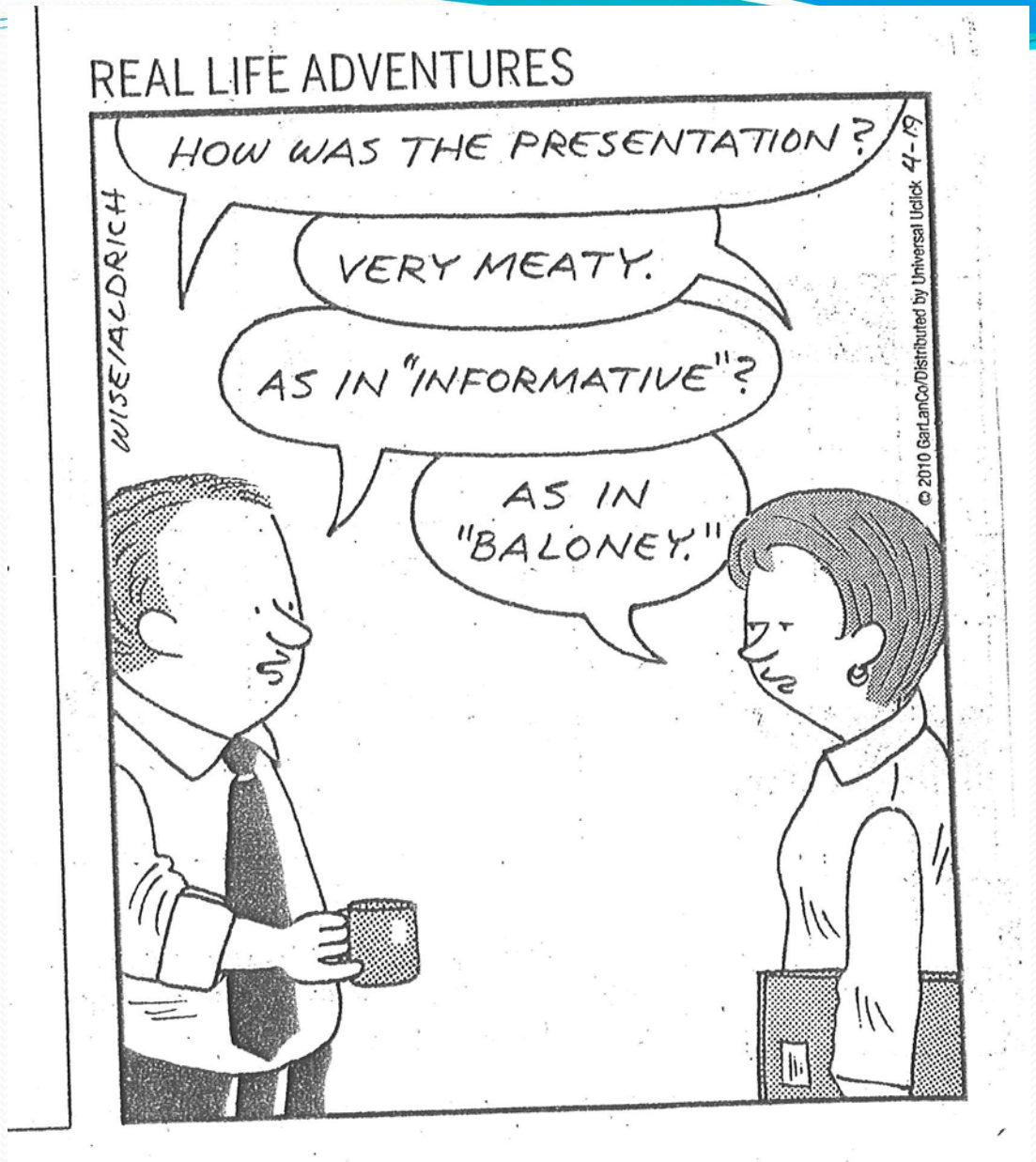
Black Numbers: CSR Calculated from SSURGO feature data (Only CSR>0). Acres Projected in UTM-NAD83, Zone 15

USDA-NRCS GIS Staff
Des Moines, IA
March 2015

QUESTIONS

COMMENTS


... AND THAT'S OUR PRESENTATION. ANY QUESTIONS?
I'M SORRY. MR. BOVEE CHECKED OUT OF THE CONFERENCE CALL ABOUT AN HOUR AGO.
HE HUNG UP?
NOPE. DIED. I THINK THE EMTS SAID, "BORED TO DEATH."
WISE/ALDRICH
10-2
© 2015 GarfieldDistributed by Universal Uclick


REAL LIFE ADVENTURES
HOW WAS THE PRESENTATION?
VERY MEATY.
AS IN "INFORMATIVE"?
AS IN "BALONEY."
WISE/ALDRICH
4-19
© 2010 GarLanCo/Distributed by Universal Uclick

REAL LIFE ADVENTURES

FRANK AND EARNEST

Thanks for having me!

Benchmark
AGRIBUSINESS, INC

Fred Greder, ARA
23 Third Street NW
Mason City, Iowa 50401
641-424-6983
www.benchmarkagribusiness.com

Bridge the Gap Seminar

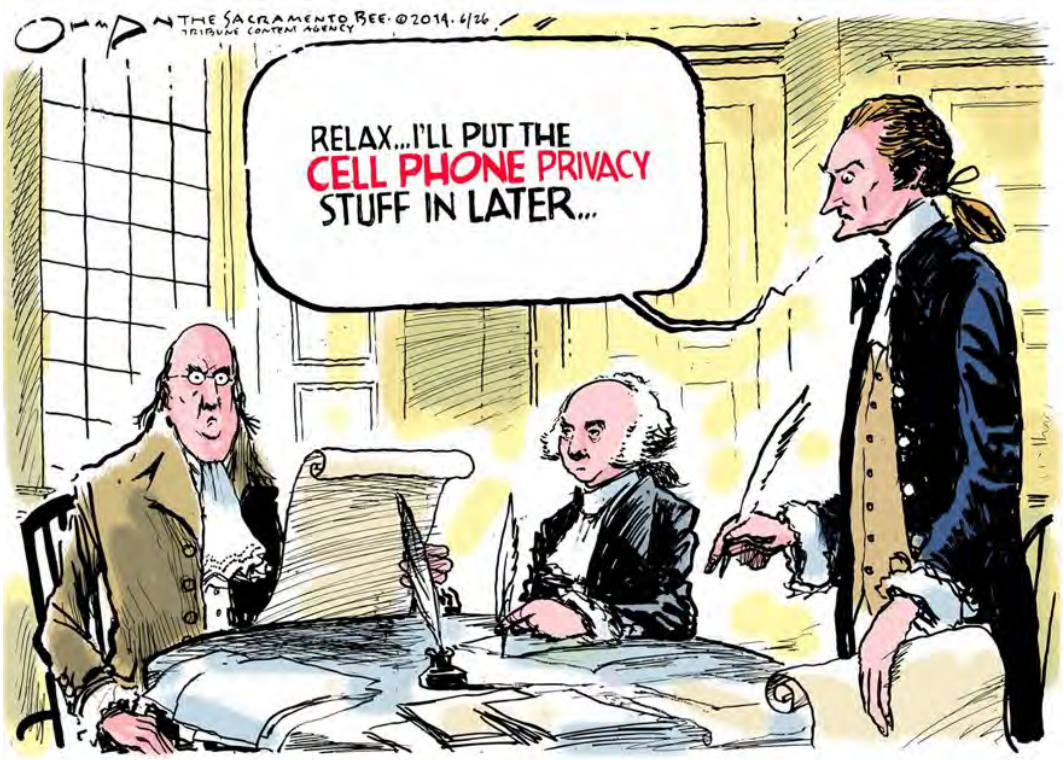
Search and Seizure in the Digital Age

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

Presented by:
Robert Rehkemper
Gourley Rehkemper & Lindholm PLC
440 Fairway Dr, Suite 210
West Des Moines, IA 50266
Phone: 515-226-0500

Thursday, September 8, 2016

SEARCH AND SEIZURE IN THE DIGITAL AGE



Robert Rehkemper
Gourley, Rehkemper & Lindholm, PLC
440 Fairway Dr., Suite 210
West Des Moines, IA 50255
(515) 226-0500
rgrehkemper@grllaw.com

A. Search and Seizure 101

a. Search: "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable, is infringed." *United States v. Karo,* 468 U.S. 705, 712 (1984)

"When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Florida v. Jardines*, 133 S.Ct. 1409, 1414 ; Quoting *United States v. Jones*, 132 S.Ct. 945, 950-951, n.3 (2012).

b. Seizure: "A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interest in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

"A seizure occurs when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *California v. Hodari D.*, 499 U.S. 621, 625 (1991).

c. Expectation of Privacy: "The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection [citations omitted]. But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." *Katz v. United States*, 398 U.S. 347, 351 (1967).

Two-Part Analysis

i. Has the individual, by his conduct, exhibited an actual (subjective) expectation of privacy?

ii. Is the individual's subjective expectation of privacy one that society is prepared to recognize as reasonable?

Iowa Beta Chapter of Phi Delta Theta Fraternity v. State of Iowa, et. Al, 763 N.W.2d 250, 261 (Iowa 2009)

B. Technologies Impact on Expectation of Privacy

a. Cell Phone Stored Content - *Riley v. California*, 134 S.Ct. 2473 (2014) – The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

Person has an expectation of privacy in the digital data stored on their cell phones.

b. GPS Location - *United States v. Jones*, 132 S.Ct. 945 (2012) – Attachment of a GPS tracking device to vehicle and subsequent use of that device to monitor vehicle's movements on public streets was a search within the meaning of the Fourth Amendment.

Used property trespass principals.

c. Cell-Site Simulators aka Stingray – ***United States v. Lambis* – F.Supp.3d --, 2016 WL 3870940 (S.D.N.Y) –** Warrantless use of cell-site simulator, to located defendant's apartment as place of use for the target cell phone, was an unreasonable search.

Law enforcement's "pings" of target cell phone to the nearest cell site was not information readily available "to anyone who wanted to look" without the use of the cell-site simulator technology.

***State v. Andrews*, 134 A.3d 324 (Md.App. 2016)** – Use of cell site simulator requires a search warrant based on probable cause.

***Tracey v. State*, 152 So.3d 504 (Fl. 2014**) – Warrantless use of real time cell site location information regarding location of cellular telephone was objectively reasonable and required search warrant.

d. Information Stored by Third Parties

**** Pay attention to compliance with Stored Communications Act, 47 U.S.C. § 1001 et. seq. and Iowa Code Chapter 808B.3**

i. **Pen Registers - *Smith v. Maryland***, 99 S.Ct. 2577 (1979) – A person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.

"Regardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police."

ii. **Cell Phone Records – *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) –** Government obtaining telephone subscriber records, phone toll records and corresponding geographic data records obtained from 3rd party cell provider did not constitute a search.

iii. **Historical Location - *United States v. Graham*, -- F.3d – 2016 WL 3068018 (4th Cir. 2016) –** Government did not violate expectation of privacy in obtaining historical cell-site location information from defendant's cell phone provider without a warrant.

BUT SEE

- ***In re: Application for Telephone Information Needed for a Criminal Investigation*, 119 F.Supp.3d 1011 (N.D.CA 2015)** – Cell phone users' expectation of privacy in the historical cell site location information associated with their cell phones was reasonable such that the government requesting such information pursuant to the Stored Communications Act was a search subject to the Fourth Amendment.

- ***In Re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. To Disclose Records to Gov't*, 620 F.3d 304 (3rd Cir. 2010)** – Cell phone customer has not "voluntarily" shared his location information with a cellular provider in any meaningful way.

iv. **CURRENT Location** – ***State v. Earls,* 70 A.3rd 630 (N.J. 2013)** – Expectation of privacy existed in user's current location information so that a warrant was required under the State Constitution.

"Using a cell phone to determine the location of its owner can be far more revealing than acquiring toll billing, bank, or Internet subscriber records. I tis akin to using a tracking device and can function as a substitute for 24/7 surveillance without police having to confront the limits of their resources."

- **IMPORTANT SIDE NOTE –** This case mentions a number of other expanded privacy interests under the New Jersey State Constitution.
  - Telephone numbers dialed in one's own home
  - Internet subscriber information
  - Bank records

C. Technologies Impact and Law Enforcement's Duties

a. *Missouri v. McNeely*, 133 S.Ct. 1552, 1561-63 (2013).

"The State's proposed *per se* rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple."

"Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing."

"But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency."

b. ***Riley v. California*, 134 S.Ct. 2473, 2493 (2014)**

"Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient. See *McNeely*, 569 U.S., at ——, 133 S.Ct., at 1561–1563; *id.*, at ——, 133 S.Ct., at 1573 (ROBERTS, C.J., concurring in part and dissenting in part) (describing jurisdiction where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes").

c. ***Birchfield v. North Dakota*, 136 S.Ct. 2160, 2192 (2016)** Sotamayor (concurring in part and dissenting in part)

Both North Dakota and Minnesota give police a 2–hour period from the time the motorist was pulled over within which to administer a breath test. N.D. Cent.Code Ann. § 39–20–04.1(1) (2008); Minn.Stat. § 169A.20, subd. 1(5) (2014).[8]

During this built-in window, police can seek warrants. That is particularly true in light of "advances" in technology that now permit "the more expeditious processing of warrant applications." *McNeely*, 569 U.S., at —— – ——, and n. 4, 133 S.Ct., at 1562, and n. 4(describing increased availability of telephonic warrants); *Riley*, 573 U.S., at ——, 134 S.Ct., at 2493–2494 (describing jurisdictions that have adopted an e-mail warrant system that takes less than 15 minutes); Minn. Rules Crim. Proc. 33.05, 36.01–36.08 (2010 and Supp. 2013) (allowing telephonic warrants); N.D. Rules Crim. Proc. 41(c)(2)–(3) (2013) (same). Moreover, counsel for North Dakota explained at oral argument that the State uses a typical "on-call" system in which some judges are available even during off-duty times.[9] See Tr. of Oral Arg. 42.

Where “an officer can ... secure a warrant while” the motorist is being transported and the test is being prepared, this Court has said that “there would be no plausible justification for an exception to the warrant requirement.” *McNeely*, 569 U.S., at ——, 133 S.Ct., at 1561. Neither the Court nor the States provide any evidence to suggest that, in the normal course of affairs, obtaining a warrant and conducting a breath test will exceed the allotted 2–hour window.

d. ***State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015).** Chief Justice Cady (concurring specially)

“[A] recognized exception to the warrant requirement cannot live beyond the life of the justification responsible for its existence.”

“An automatic exception to the warrant requirement, particularly one based on exigency, must account for the new world of technology and must not continue to exist simply because it existed in the past.”

Bridge the Gap Seminar

Friday
September 9, 2016

The Iowa State Bar Association's
Young Lawyers Division presents

Bridge the Gap Seminar

Concurrent Jurisdiction

8:00 a.m. - 9:00 a.m.

Presented by:
Sara Strain Linder
Bray & Klockau PLC
402 S Linn St
Iowa City, IA 52240
Phone: 319-338-7968

Friday, September 9, 2016

Concurrent Jurisdiction: Juvenile Cases Impacting Other Cases

1. Legal Background – 232.3
    a. Exclusive Jurisdiction over children
    b. To receive orders in other actions, you need permission from the Juvenile Court
        i. You can file, but the other court cannot issue an order
        ii. What does "pendency" mean?
            1. Does the filing of a petition mean that other courts can't enter orders?
            2. Or is an adjudication required?

2. Child Custody
    a. Between parents
        i. Divorce: Bifurcation
            1. In re Marriage of Thatcher, 864 N.W.2d 533 (Iowa 2015)
            2. Property division must be done at the same time as the divorce decree
            3. What about child custody?
                a. Prior to Thatcher, judges would bifurcate the divorce and custody
                b. 598.41 does not contain the same language as 598.21 that says it must be done contemporaneously
        ii. Child Custody
            1. District Court cannot take action until Juvenile Court grants permission
            2. Guess who are your main witnesses?
                a. The Juvenile File
                    i. The case workers
                    ii. Law prevents them from testifying unless directed by the court
                        1. Subpoenas do not overcome this
                        2. What do you do? You ask the judge to direct the witness to answer
        iii. Bridge Orders 232.103A
            1. When can you do this?
                a. Disposition has already happened
                b. No prior court orders between the parents
                c. Paternity established
                    i. Marriage
                    ii. Court Order
                    iii. Birth certificate
                d. The Juvenile Court determines that the case can close if there is the custodial order between the parents
                e. A parent qualifies for court appointed counsel

2. How do you do this?
    a. Somebody file a Motion
    b. Set the hearing 30 days after the Motion
    c. The parties get together and create a parenting plan and submit it to the Court
    d. The Court then enters a Bridge Order transferring jurisdiction
    e. The District Court enters a Decree
3. What if the parents don't agree?
    a. Varies judge to judge
    b. Some judges feel that Juvenile Court is not set up for contested custody cases between parents
    c. Some judges feel that Juvenile Court knows these families best and should make the determination

b. Guardianships
    i. 232.3 applies here, too
    ii. 232.107 permanency
        1. Like a Bridge Order
        2. Juvenile Court enters the Order transferring it to the probate court
        3. GAL should sign a Notice Re: Guardianship Powers for the child
        4. Then Guardian needs to sign Oath and Notice of powers
        5. Then the probate court takes over
            a. Initial Report
            b. Annual reporting thereafter
            c. If the parents want, they can contest the guardianship in the probate court

3. Child Support
    a. The State now has an interest
        i. It is providing services, so it wants to be reimbursed
        ii. Therefore, a portion of the child support a parent receives may be reduced by the State's cut
    b. What happens if a child is placed in a "non-custodial" parent's care?
        i. The Juvenile Court cannot establish child support
        ii. The payor needs to get into district court
            1. Concurrent jurisdiction is not needed for this
            2. Special provision: 598.21C(1)(k)
                a. Waives the filing fee
            3. Notice
                a. Something developed in the 6th District
                b. May not be needed as you could just include the dispositional order
            4. All this will do is suspend the child support, it cannot order the other parent to pay

4. Disestablishment of Paternity
    a. Legal fathers are not necessary parties to CINA cases 232.91
    In re Interest of J.C., 857 N.W.2d 495 (Iowa 2014)
        i. This means once someone is determined not to be a biological father, he is dismissed from the case
    b. However, legal fathers may be on the hook for child support
    c. Additionally, a disestablishment may need to be done if there is a divorce pending between mother and legal father
        i. Disestablishment must be done in District Court and need concurrent Jurisdiction
    d. Use the CINA case to your advantage
        i. Get DHS to do the DNA testing with court ordered funds
        ii. Re-use your GAL
            1. GAL is required for disestablishment (Iowa Code 598.21E(3))
            2. The GAL knows the circumstances because of the CINA
            3. Therefore, the GAL won't need to do a new fact investigation and you won't have to pay for someone else to acquire the information
5. No Contact Orders
    a. Between Parents
        i. Can come from criminal cases or Chapter 236 cases
        ii. Parents can attend court – usually in order
        iii. Parents cannot attend
            1. Visits
            2. Family team meetings
            3. Foster Care Review Board
            4. Parenting
            5. Medical appointments
            6. Substance abuse treatment
        iv. What to do?
            1. Seek a modification of the NCO
            2. What is the DHS position? What is the GAL position?
    b. Between Parents and Children
        i. Can come from criminal cases such as child endangerment
        ii. Could come from a 236 case
        iii. Parents cannot attend
            1. Visits
            2. Medical Appointments
            3. Can really stall any progress a parent may make
                a. The original permanency goal is reunification with parent
                b. That can't happen if the parent can't have contact
        iv. What do to?
            1. Seek a modification of the NCO
            2. A judge will really want to know the DHS and GAL positions

v. Constitutional Argument
    1. Parents have fundamental constitutional rights to be parents
    2. An NCO is issued only after probable cause of an act
    3. Is that sufficient to infringe on a constitutional right?

6. Juvenile Delinquencies
    a. In a JD, a child can be ordered to do services like a CINA
        i. Out of home placement
        ii. Counseling
        iii. Substance abuse treatment
    b. Usually the JCO and DHS work together
    c. Interesting intersections:
        i. If a child refuses to do something in a CINA, he or she is usually not held in contempt
        ii. If a child refuses to do something in a JD, he or she can be held in contempt or suffer other restrictions
        iii. Delinquent acts while in treatment
            1. If the child is assaulting staff or destroying facility property, it is unlikely he or she will be charged
            2. If the child commits something more serious, he or she could be charged
                a. The adjudication takes place where the act occurred
                b. The disposition can be transferred to the county where the CINA is

Contact Information
Sara Strain Linder
Bray & Klockau, P.L.C.
402 S. Linn Street
Iowa City, IA
52240
Ph: (319)338-7968
Fax: (319)354-4871
slinder@bkfamilylaw.com

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

IN THE INTEREST OF	)	Case No: JVJVXXXX
	)	
CHILD,	)	
	)	**MOTION FOR CONCURRENT**
MINOR CHILD.	)	**JURISDICTION**

COMES NOW, the father, by and through his attorney, Sara Strain Linder, and in support of his motion herein states:

1. On November 30, 2015, the Court placed the minor child in the custody of his father.

2. On January 22, 2016, the minor child herein was adjudicated as a child in need of assistance.

3. There is no custodial order entered in the District Court between the parents as it relates to the custody of the minor child herein.

4. There is an order relating to the provision of child support for the minor child. The father requests that the Court grant concurrent jurisdiction pursuant to Iowa Code § 232.3(2) so that the parties may litigate the permanent custody of the minor child.

5. It is in the best interests of the minor child that concurrent jurisdiction be granted as there is no permanent custodial order between these parents which will be needed regardless of the outcome of the juvenile case.

6. No party would be prejudiced by the grant of concurrent jurisdiction.

WHEREFORE, the father requests that the Court grant concurrent jurisdiction pursuant to Iowa Code § 232.3(2) so that the parties may litigate permanent custody of the minor child herein.

Respectfully submitted this ___ day of _____, 2016.

_____
Sara Strain Linder, AT0009286
BRAY & KLOCKAU, P.L.C.
Attorney for Petitioner
402 South Linn Street
Iowa City, Iowa 52240
Telephone:(319) 338-7968
Facsimile:(319) 354-4871

IN THE DISTRICT COURT OF IOWA, IN AND FOR MUSCATINE COUNTY
(JUVENILE DIVISION)

IN THE INTEREST OF **CHILDREN** **Children.**	**Juvenile No.** **"BRIDGE ORDER" TRANSFERRING JURISDICTION OF THE CHILD IN INTEREST TO THE DISTRICT COURT**

THERE COMES before the Court a request by the parties to transfer jurisdiction over the custody, physical care, and visitation of the children in interest to the district court in and for Muscatine County, Iowa. After affording parties the opportunity for notice and hearing and being fully apprised in the circumstances the Court FINDS:

1. The child in interest is under the jurisdiction of the Court having been adjudicated to be a children in need of assistance.

2. A dispositional order was entered herein pursuant to Iowa Code Section 232.101 or 232.102 placing custody of the children in interest with Cheryl George, the children's parent, such being a safe placement for the children.

3. Upon transfer of custody, physical care and visitation to the district court, no services or supervision currently being provided by the juvenile court, the Iowa Department of Human Services, or their contracted provider agencies will be required.

4. A parent of the children qualified for a court appointed attorney in the CINA case, i.e., met the requirement for indigency as provided in Iowa Code Section 815.9.

5. The best interest of the children will be served by a transfer of jurisdiction of this matter to the district court without the need for a continuation of the dispositional order in the juvenile case.

6. Upon transfer of jurisdiction of the children's custody, physical care, and visitation to the district court, the dispositional order entered herein may be terminated because the purposes of the order will have been accomplished and the children in interest will no longer be in need of supervision, care or treatment to be afforded by the juvenile court as provided in Iowa Code Section 232.103(4)(a).

7. MOTHER, the children's mother, should be named as the "Petitioner" for purposes of this bridge order; and FATHER, the children's father, should be named as the "Respondent" for purposes of this bridge order and a separate decree be entered with said caption detailing the custody, physical care, and visitation to be ordered.

IT IS THEREFORE ORDERED as follows:

1. That **jurisdiction** over the custody, physical care and visitation of the children in interest should be and is hereby **transferred** to the District Court of the State of Iowa in and for Muscatine County. The Clerk of the Juvenile Court in and for Muscatine County, Iowa, is directed to prepare a certified copy of all the filings herein including this order, and forward them to the Clerk of the District Court in and for Muscatine County, Iowa, as provided in Iowa Code Section 232.103A. The District Clerk shall maintain records from the juvenile case as confidential as provided in Iowa Code Section 232.147 for non-delinquency cases.

2. Upon receipt of this order, the Clerk of the District Court shall docket the matter as an appropriate domestic relations case. All filing fees and court costs normally associated with opening and maintaining a domestic relations case are hereby waived.

3. Upon docketing the domestic relations case in the district court, the clerk shall present this matter to the juvenile court to enter an order terminating the dispositional order and closing the juvenile case.

Clerk to provide a copy of this order to the child, child's parents, child's guardian, counsel of record, Iowa Department of Human Services, and District Clerk for Muscatine County, Iowa.

SO ORDERED this date.

IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY
JUVENILE DIVISION

IN THE INTEREST OF CHILDREN Children.	No. JV DRCV_____ DECREE CONCERNING CHILD CUSTODY, PHYSICAL CARE, AND VISITATION PURSUANT TO A "BRIDGE ORDER"

After affording parties the opportunity for notice and hearing and being fully apprised in the circumstances the Juvenile Court has determined it appropriate to enter a "Bridge Order" Transferring Jurisdiction over the children in a Child in Need of Assistance case to the District Court and in so doing has made a determination as to custody, physical care, and visitation regarding the children of the Petitioner and Respondent. The court FINDS:

1. The best interest of the children in interest will be served by placing the children in the sole legal custody of MOTHER, the children's mother. Clear and convincing evidence has been shown that it would not be in the children's best interests to order the children into the joint legal custody of both parents.

2. The best interests of the children in interest will be served by placing the children in the primary physical care of MOTHER, the children's mother. Joint physical care of the children under a shared placement arrangement is not in the children's best interests because the father has failed to comply with the expectations in juvenile court and remains at fully supervised visitation, which he has not regularly exercised. The record in the juvenile court is clear that shared physical care is not in the children's best interests at this time.

3(A). The best interests of the children in interest will be served by the visitation arrangement set forth in the Proposed Bridge Order Parenting Plan submitted in the Juvenile Proceeding and included herein by reference as though set forth in full herein. Pursuant to the parenting plan, visitation between FATHER, the children's father, and the children shall be conditioned upon supervision by an approved family member.

IT IS THEREFORE ORDERED that CHILDREN, the children in interest, are placed in the sole legal custody and primary physical care of MOTHER, the children's mother, subject to visitation between the children and FATHER, the children's father, as set forth in the Proposed Bridge Order Parenting Plan approved by the Juvenile Court, with visitation being supervised by an appropriate family member.

Clerk to provide a copy of this Order to all of the parties in the underlying juvenile action.

IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY
JUVENILE DIVISION

IN THE INTEREST OF CHILDREN Children.	No. JV DRCV_____ ORDER TRANSFERRING JURISDICTION OVER THE CHILDREN'S CUSTODY, PHYSICAL CARE AND VISITATION TO THE DISTRICT COURT THROUGH A BRIDGE ORDER PURSUANT TO IOWA CODE § 232.103A AND DISCHARGE ORDER

THERE COMES before the Court a request by the guardian ad Litem to transfer jurisdiction over the custody, physical care, and visitation of the child in interest to the District Court in and for Muscatine County, Iowa. After affording the parties the opportunity for notice and hearing and being fully apprised in the circumstances the Court FINDS:

1. The children in interest are under the jurisdiction of the Court having been adjudicated to be children in need of assistance.

2. A dispositional order was entered herein pursuant to Iowa Code Section 232.101 or 232.102 placing custody of the children in interest with Mother, the children's parent, such being a safe placement for the children.

3. Upon transfer of custody, physical care and visitation to the district court, no services or supervision currently being provided by the juvenile court, the Iowa Department of Human Services, or their contracted provider agencies will be required.

4. A parent of the children qualified for a court appointed attorney in the CINA case, i.e., met the requirement for indigency as provided in Iowa Code Section 815.9.

5. The best interest of the children will be served by a transfer of jurisdiction of this matter to the district court without the need for a continuation of the dispositional order in the juvenile case.

6. Upon transfer of jurisdiction of the children's custody, physical care, and visitation to the district court, the dispositional order entered herein may be terminated because the purposes of the order will have been accomplished and the children in interest will no longer be in need of supervision, care or treatment to be afforded by the juvenile court as provided in Iowa Code Section 232.103(4)(a).

7. MOTHER, the children's mother, should be named as the "Petitioner" for purposes of this bridge order; and FATHER, the children's father, should be named as the "Respondent" for purposes of this bridge order.

8. The best interest of the children in interest will be served by placing the children in the sole legal custody of the Petitioner, the children's mother. Clear and convincing evidence has been shown that it would not be in the children's best interests to order the children into the joint legal custody of both parents.

9. The best interest of the children in interest will be served by placing the children in the primary physical care of Mother, the children's mother. Joint physical care of the children under a shared placement arrangement is not in the children's best interests because the father continues to struggle with substance abuse issues and consistency with visitation. He has not complied with case plan expectations.

10. The best interest of the children in interest will be served by the following visitation arrangement with Father, the children's father:

The Guardian ad Litem has submitted a proposed parenting plan which sets forth the terms and conditions of custody and visitation. Such proposed parenting plan is adopted herein and made a part of this Order by reference as though set forth in full herein. Pursuant to the parenting plan, visitation between Father, the children's father and the children shall be conditioned upon supervision by an approved family member.

11. The Court accepts the proposed parenting plan that has been submitted herewith and such terms are incorporated into this Order by reference thereto.

IT IS THEREFORE ORDERED as follows:

1. That jurisdiction over the custody, physical care and visitation of the children in interest should be and is hereby **transferred** to the District Court of the State of Iowa in and for Muscatine County. Judicial notice of the juvenile case shall be taken in the district court case and the Clerk of Court shall relate the juvenile case to the district court case, as provided in the Iowa Code Section 232.103A for paper or electronic document viewing by the court. **The District Court Clerk shall maintain records from the juvenile case as confidential as provided in Iowa Code Section 232.147 for non-delinquency cases**.

2. Upon receipt of this order, the Clerk of the District Court shall docket the matter as an appropriate domestic relations case. All filing fees and court costs normally associated with opening and maintaining a domestic relations case are hereby waived.

3. Upon docketing the domestic relations case in the district court, the district court clerk shall advise the juvenile court clerk that the bridge order has been docketed. Upon notification to the juvenile court clerk that the matter has been duly docketed in the district court, the dispositional order(s) entered herein is hereby terminated, the children are discharged from the jurisdiction of the juvenile court, the Iowa Department of Human Services is relieved of any

further duties of supervision in the matter, counsel of record is hereby relieved of further duties of representation herein, all hearing scheduled before the juvenile court herein are canceled, and the juvenile case closed.

4. CHILD, DOB, and CHILD, DOB, the children in interest, are placed in the sole **legal custody** and in the primary physical care of Mother, the children's mother, and subject to **visitation** between the children and Father, the children's father, as is set forth in the parenting plan on file herein and incorporated as if attached hereto and which is approved by the Juvenile Court, with visitation being supervised by an approved family member.

Clerk to provide a copy of this order to the child, children's parents, children's guardian, counsel of record, Iowa Department of Human Services, and District Clerk for Muscatine County, Iowa.

SO ORDERED this DATE

IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY
JUVENILE DIVISION

IN THE INTEREST OF CHILDREN Children.	No. JVJV DRCV_____ PARENTING PLAN

1. Information for the Court

A. Children *List all children born to or adopted by Petitioner and Respondent.*

First, middle, & last initials of each child	Year of Birth
(1)CHILD	xxxx
(2)CHILD	xxxx

b. Mother is Petitioner.

Father is Respondent.

2. Plan

A. Read these definitions of legal custody and physical care:

(1) **Legal custody** means a parent has legal rights and responsibilities for the child. These including making decisions about medical care, education, extracurricular activities, and religious instruction.

(2) **Joint legal custody** means both parents have equal legal rights and responsibilities for the child. These include making decisions about medical care, education, extracurricular activities, and religious instruction.

(3) **Physical care** means providing the main home for the child and taking care of the child.

(4) **Joint physical care** means both parents have equal rights and responsibilities for providing the main home for the child and taking care of the child.

B. **Legal custody** should be
Check one

(1) ____ Joint legal custody to both parents pursuant to the care schedule as outlined below.
(2) _X_ Sole Legal Custody to Petitioner
(3) ____ Sole Legal Custody to Respondent
(4) ____

If the Court has checked Sole Legal Custody, the Court finds clear and convincing evidence that Joint Legal Custody is unreasonable and not in the best interests of the child to the extent that the legal relationship between the child and a parent should be severed and all of the following factors apply pursuant to Iowa Code Section 598.41(3):

_x_ Respondent would not be a suitable custodian for the child.

___ The psychological and emotional needs and the development of the child would suffer due to lack of active contact with and attention from both parents.

__ The parents cannot communicate with each other regarding the child's needs.

___ The Respondent/Petitioner cannot support the other parent's relationship with the child.

___ The child has strong opposition (if the child is age appropriate).

___ The Petitioner/Respondent is opposed to joint custody

___ The geographic proximity of the parents prohibits joint legal custody.

X The safety of the child, other children or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.

___ There is a history of domestic abuse, as defined in section 236.2.

___ The Petitioner/Respondent has allowed a person custody or control of, or unsupervised access to a child after knowing the person is required to register or is on the sex offender registry as a sex offender under chapter 692A.

C. **Physical care** should be
Check one
(1) _X_ To Petitioner
(2) ____ To Respondent
(3) ____ Joint physical care to both parents *If you check (3), identify the Joint physical care schedule below:*
(4)
(5)

D. Visitation - *Use D only if one parent will have physical care. This is the schedule for the other parent to see the children.*

(1) Visitation for
Check one
a. ____ Petitioner
b. _X_ Respondent

(2) Visitation
Check a, b, or c.
a. ____ Visitation should not be allowed because: _____
_____
_____
b. _X_ Visitation should be supervised because: _Respondent's instability and substance abuse_____

The supervisor for visitation should be _Respondent's sister or mother
A visitation schedule will be arranged with the supervisor or as indicated in 2C(vi)

c. ____ Regular visitation schedule as the parents agree:
Check all that apply.
i. ____ Reasonable visitation at the discretion of the custodial parent.
ii. _X_ Weekend Visitation
The non-custodial parent shall have visitation every other weekend beginning at 12 pm on Saturday and continuing until 5 pm on that Saturday.

iii. _____ Weekday Visitation

M Tu W Th F from ____ __m. to ____ __.m.

(3) Transportation. The parents will share equally in transportation of the child(ren).
Check all that apply
a. ___ The parents will agree about arrangements for transportation, pick up and drop off for each visit.

b. X The non-custodial parent will pick up the children at the custodial parent's residence at the beginning of visitation and the custodial parent will pick up the children from the non-custodial parent's residence at the end of visitation.

c. X Only certain people are approved to assist with transportation. Other than Petitioner and Respondent, only the following persons are permitted to transport the child(ren): Respondent's mother, Respondent's sister, Petitioner's mother,

_____

d. ___ Other arrangements for visitation For example, Petitioner and Respondent will meet at a location between their residences. Explain:

_____

_____

(4) The parent not having care of the children may contact the children by

Check all that apply

a. X As the parents agree

b. ___ Calling the children

Check one

i. ___ At reasonable hours as determined by the parents.

__ a.m. __ p.m.

ii. ___ Any day from _____ __ p.m. to _____ __ p.m.

Phone number (_____) _____

Phone number where children can be contacted.

c. ___ Emailing the children at this address:

_____

Email where children can be contacted.

d. ___ Other Explain

_____

(5) Changes to the schedule

Check all that apply

a. X The parties may agree to additional visitation or changes to the schedule, such agreements should be put into writing.

b. ___ If one parent fails to arrive at the appointed time, then the other parent will wait for at least _____ minutes before canceling the visit.

c. ___ No changes allowed except by a court order.

d. ___ Other Explain

_____

_____

_____

_____

3. Oaths and Signatures

A. Petitioner's Oath and Signature

I,_____, certify under penalty of perjury and pursuant to the
Print Petitioner's name

laws of the State of Iowa that I have read this Parenting Plan, and I agree with the Plan. I ask the court to adopt this Parenting Plan.

_____

_____
Month *Day* *Year* *Petitioner's signature**

_____

_____
Mailing address *City* *State* *ZIP code*

(_____)_____ _____
Phone number *Email address*

_____
Additional email address – if available

* *Whether filing electronically or in paper, you must handwrite your signature on this form. If you are filing electronically, scan the form after signing it and then file electronically.*

B. Respondent's Oath and Signature

I,_____, certify under penalty of perjury and pursuant to the
Print Respondent's name

laws of the State of Iowa that I have read this Parenting Plan, and I agree with the Plan. I ask the court to adopt this Parenting Plan.

_____

_____
Month *Day* *Year* *Respondent's signature**

_____

_____*Mailing address* *City* *State* *ZIP code*

(_____)_____ _____
Phone number *Email address*

_____
Additional email address – if available

C. Guardian ad Litem's Approval of Plan

I,_____, am the Guardian ad Litem appointed in this matter for the minor child. I have prepared the above proposed Parenting Plan, and I agree with the Plan. I ask the court to adopt this Parenting Plan.

Date: _____

(Guardian ad Litem signature block)

D. DHS Approval of Plan

I,_____, the DHS worker assigned to this case have reviewed the above Parenting Plan, find it to be appropriate as proposed and ask that the Court adopt the Parenting Plan.

Date: _____

(DHS signature block)

E. State's Approval of Plan

I, _____, am the Assistant County Attorney assigned to this case. I have reviewed the above Parenting Plan as proposed above, find it to be appropriate, and ask that the Court adopt it.

Date: _____

(Asst. County Attorney Signature Block)

* *Whether filing electronically or in paper, you must handwrite your signature on this form. If you are filing electronically, scan the form after signing it and then file electronically.*

IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY
JUVENILE DIVISION

IN THE INTEREST OF:)	
	Juvenile No. JVJV00xxxx
CHILD,)	
	NOTICE RE GUARDIANSHIP POWERS
A Minor Child.)	

To: CHILD, Proposed Ward:

You are hereby given written notice of guardianship powers pursuant to Iowa Code Section 633.562. If a guardian is appointed for you, the guardian may, without court approval provide for your care, manage your personal property, and effects, assist you in developing self-reliance and receiving professional care, counseling, treatment or services as needed, and ensure that you receive necessary emergency medical services. You are also advised that, upon the Court's approval, the guardian may change your permanent residence to a more restrictive residence, and arrange for major elective surgery or any other non-emergency major medical procedure.

YOU ARE HEREBY NOTIFIED THAT IN A PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN FOR YOU AS A CHILD, YOU ARE ENTITLED TO REPRESENTATION. IF YOU ARE INDIGENT OR INCAPALBE OF REQUESTING COUNSEL, THE COURT SHALL APPOINT AN ATTORNEY TO REPRESENT YOU AND, IF YOU ARE INDIGENT, THE APPOINTMENT OF SUCH COUNSEL SHALL BE AT THE COUNTY'S EXPENSE, IF YOU ARE A MINOR, THE COURT SHALL DETERMINE WHETHER, UNDER THE CIRCUMSTANCES OF THE CASE, YOU ARE ENTITLED TO REPRESENTATION. THE DETERMINATION REGARDING REPRESENTATION SHALL BE MADE ONLY AFTER SUCH NOTICE TO YOU IS MADE AS THE COURT DEEMS NECESSARY. YOU HAVE A RIGHT TO COUNSEL IF YOU SO CHOOSE, YOU MAY USE YOUR OWN ATTORNEY INSTEAD OF AN ATTORNEY APPOINTED BY THE COURT, AND YOU HAVE A RIGHT TO BE PERSONALLY PRESENT AT ALL PROCEEDINGS. THE APPOINTMENT OF A GUARDIAN FOR YOU INVOLVES A POTENTIAL DEPRIVATION OF YOUR CIVIL RIGHTS.

The proposed ward, by and through her Attorney herein acknowledges receipt of the above notice this ____ day of December, 2015.

_____

Sara Strain Linder, AT0009286
BRAY & KLOCKAU, P.L.C.
402 South Linn Street
Iowa City, Iowa 52240-4929
Telephone: (319) 338-7968
Facsimile: (319) 354-4871
slinder@bkfamilylaw.com
ATTORNEY FOR MINOR CHILD

IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY

IN THE INTEREST OF:	)	
		No. _____
CHILD,	)	
		NOTICE OF PROBATE
GUARDIAN'S		
A Minor Child.	)	**RESPONSIBILITIES AND**
OTHER		
		DUTIES
	)	

To: GUARDIAN, Proposed Guardian:

Pursuant to Iowa Code Section 232.104(7)(b), you are hereby notified that if as proposed, you are appointed by the probate court as the guardian of the child in interest, you will have certain reporting and other duties concerning the ward.

Iowa Code Section 633.3(20) provides that a **"guardian"** is "the person appointed by the court to have the custody of the person of the ward under the provisions of this probate code."

Iowa Code Section 633.562 requires that a proposed ward be provided with **written notice** of your guardianship powers as follows: that the guardian may, without court approval, provide for the care of the ward, manage the ward's personal property and effects, assist the ward in developing self-reliance and receiving professional care, counseling, treatment or services as needed, and ensure that the ward receives necessary emergency medical services; and that with prior court approval the guardian may change the ward's permanent residence to a more restrictive residence and arrange for major elective surgery or any other nonemergency major medical procedure. The notice must also state in bold face type of a minimum of ten points of the right to counsel and potential deprivation of the proposed ward's civil rights. The notice must also state that the ward may use his or her own attorney rather than the one appointed by the court. A copy of such notice is attached.

Iowa Code Section 633.635 provides that as guardian for the ward you have the following **responsibilities to the ward:** those which the court may grant and be exercised without prior court approval and those which require prior court approval. Those that the court may grant and may be exercised by the guardian

without prior court approval include: (a) providing for the care, comfort and maintenance of the ward, including the appropriate training and education to maximize the ward's potential; (b) taking reasonable care of the ward's clothing, furniture, vehicle and other personal effects; (c) assisting the ward in developing maximum self-reliance and independence; (d) ensuring the ward receives necessary emergency medical services; (e) ensuring the ward receives professional care, counseling, treatment or services as needed with anesthesia if required; and (f) any other powers or duties the court may specify. Those that the court may grant but must be exercised only with prior court approval include the following: (a) changing, at the guardian's request, the ward's permanent address if the proposed new residence is more restrictive of the ward's liberties that the current residence; (b) arranging the provision of major elective surgery or any other nonemergency major medical procedure; and (c) consenting to the withholding or withdrawal of life-sustaining procedures in accordance with chapter 144A.

Iowa Code Section 633.669(1) provides that as guardian for the ward you have the following **reporting** responsibilities: the guardian is to file an initial report within 60 days of appointment and annual report within 90 days of the close of the reporting period, and a final report within 30 days of termination of the guardianship. The reports must include the ward's current mental and physical condition, the present living arrangement of the ward, including a description of each residence where the ward has resided during the reporting period, a summary of the medical, education, vocation and other professional services provided for the ward, a description of the guardian's visits with and activities on behalf of the ward, a recommendation as to the need for continued guardianship, and any other information requested by the court or useful in the opinion of the guardian. A simplified reporting form is attached and contained in the Iowa Court Rules, Chapter 7, Form 7.11.

Iowa Code Section 633.669(4) provides that the clerk of the court shall provide information and assistance to the guardian in filing of reports.

NOTIFICATON MADE this date.

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY
JUVENILE DIVISION

IN THE INTEREST OF:	)	
		Juvenile No. JVJV00xxxx
CHILD	)	
		ORDER ESTABLISHING GUARDIANSHIP
A Minor Child.	)	

On this date, pursuant to Iowa Code Section 232.104(7)(b), the Court has appointed Guardian as the proposed guardian for the minor child.

IT IS THEREFORE ORDERED that upon the proposed guardian filing an oath of office and identification pursuant to Section 602.611, the Clerk shall issue Letters of Appointment for the guardianship and docket the case in probate.

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

IN THE MATTER OF	)	No. _____
THE GUARDIANSHIP AND CONSERVATORSHIP OF	)	**COURT OFFICER'S OATH INDIVIDUAL (STATUTORY)**
CHILD,	)	
Proposed Ward.	)	

I, the undersigned, do solemnly swear (or affirm) that as a Court Officer and as Fiduciary in the above matter, I will faithfully discharge the duties imposed by law, including the duty to account, to the best of ability.

I certify under penalties of perjury and pursuant to the laws of the State of Iowa that the preceding is true and correct.

Dated: _____

_____
GUARDIAN

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

IN THE INTEREST OF	)	Case No: JVJV00xxx
	)	
CHILD,	)	
	)	**APPLICATION FOR NOTICE**
MINOR CHILD.	)	**REGARDING CHILD SUPPORT**

COMES NOW, the father, by and through his attorney, Sara Strain Linder, and in support of his application herein states:

1. In the March 2, 2016, Dispositional Order, the Juvenile Court transferred custody of the minor child from the mother to the father.

2. In Muscatine County case DRCV0xxxx the father has been previously ordered to pay child support for the minor child.

3. As the minor child is now in the custody of the father, equity dictates that he should no longer be ordered to pay child support.

4. The father requests that the Juvenile Court issue a notice of suspension of child support. See A.R. v. The Iowa District Court for Johnson County, 820 NW2d 770 (Iowa Ct. App. 2011).

5. The mother, through counsel, objects to the father's application and requests hearing on this matter.

WHEREFORE the father requests that the Court set a hearing on his application and following said hearing issue the notice

to suspend child support and such other relief as just and fair under the circumstances.

Respectfully submitted this ___ day of _____, 2016.

_____
Sara Strain Linder, AT0009286
BRAY & KLOCKAU, P.L.C.
Attorney for Petitioner
402 South Linn Street
Iowa City, Iowa 52240
Telephone:(319) 338-7968
Facsimile:(319) 354-4871

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

IN THE INTEREST OF	)	Case No: JVJV00xxxx
	)	
CHILD,	)	
	)	**NOTICE OF SUSPENSION**
MINOR CHILD.	)	**OF CHILD SUPPORT**

Pursuant to a dispositional order, this Court has now transferred custody of the above child from MOTHER to FATHER. Based on this change of custodian, the Juvenile Court requests that the District Court enter a suspension of child support for the court-ordered custodian of the child who has an existing child support obligation. The parties are directed to provide to the District Court the appropriate names and case files that establish the current child support obligation for the court-ordered custodian, a copy of this Notice, and the attached Order so that an appropriate suspension of support may be entered by the District Court.

Clerk to notify.

IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY

STATE OF IOWA, EX REL., CHILDREN, PETITIONER,	)	EQUITY NO. DRCV0xxxxx
VS.	)	**APPLICATION TO MODIFY CHILD SUPPORT**
FATHER, RESPONDENT.	)	

COMES NOW Respondent by and through his attorney and in support of his application pursuant to Iowa Code § 598.21C states as follows:

1. The youngest child of Respondent is subject to a Child in Need of Assistance action in Muscatine County.

2. Pursuant to a Dispositional Order, the Juvenile Court has placed custody of the minor child, CHILD, with Respondent. Notice from the Juvenile Court is attached hereto.

3. Pursuant to Iowa Code § 598.21C(i)(k), Respondent requests that the Court suspend his child support as it relates to CHILD.

WHEREFORE the Respondent requests that the Court set his application for hearing and at the time of hearing grant his application and such other relief is just and equitable in the circumstances.

Respectfully submitted this _____ day of April, 2016.

Sara Strain Linder AT0009286
BRAY & KLOCKAU, P.L.C.
402 South Linn Street
Iowa City, Iowa 52240-4929
Telephone: (319) 338-7968
Facsimile: (319) 354-4871

IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY

STATE OF IOWA, EX REL.,	)	
CHILDREN,	)	EQUITY NO. DRCV0xxxx
PETITIONER,	)	**ORDER REGARDING**
	)	**APPLICATION TO MODIFY**
VS.	)	**CHILD SUPPORT**
	)	
FATHER,	)	
RESPONDENT.	)	

The Court having received Respondent's Application to Modify Child Support and having heard the arguments of the parties hereby finds that the Application to Modify Child Support should be granted.

IT IS THEREFORE ORDERED that Respondent is to pay child support in the amount of x per month for current child support and x per month toward his arrearages.

Federal Sentence Guidelines

9:00 a.m. - 10:00 a.m.

Presented by:
NicK Klinefeldt
Faegre Baker Daniels LLP
801 Grand Ave., 33rd Floor
Des Moines, IA 50309
Phone: 515-447-4717

Friday, September 9, 2016

Federal Sentencing Guidelines

Iowa State Bar Association
Bridge the Gap Seminar

Nick Klinefeldt

Sept. 9, 2016

FAEGRE BAKER DANIELS

What Happens After Guilty

- Initial Presentence Investigation Report ("PSR")
- Objections to PSR
- Final PSR
- Sentencing Memos
- Sentencing Hearing

Importance of Sentencing Guidelines

- Sentencing Guidelines
  - Not mandatory
  - Not presumptive
  - But difficult to appeal
- Other § 3553(a) Factors
  - Nature and circumstances of the offense and the history and characteristics of the defendant
  - The purposes of sentencing
  - Kinds of sentences available
  - Policy statements issued by the Sentencing Commission
  - Need to avoid unwanted sentencing disparities
  - Need to provide restitution
- Mandatory minimums

Sentencing Table

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
Zone C	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46

FAEGRE BAKER DANIELS

Offense Level

- Step One: Select the Offense Guideline
- Step Two: Determine the Base Offense Level
- Step Three: Apply Specific Offense Characteristics
- Step Four: Check for Cross References or Special Instructions
- Step Five: Apply Adjustments Related to the Victim, Defendant's Role, or Obstruction of Justice
- Step Six: Grouping
- Step Seven: Apply Acceptance of Responsibility Reduction

Criminal History Category

- Three points if:
  - Prior sentence at least 13 months
  - Unless at least 15 years since release
- Two points if:
  - Prior sentence at least 60 days
  - Unless at least 10 years since release
- One point if (max of 4):
  - All other sentences, unless for some minor crimes
  - Or unless at least 10 years since release
- Add two points if offense committed while on probation, supervised release, parole, work release, or escape status

Sentencing Enhancements

- Career Offender
  - Current offense is a crime of violence or controlled substance offense
  - Two prior convictions for crime of violence or controlled substance offenses
  - Result: Higher Offense Level and Crim. History Cat. VI
- Armed Career Criminal
  - Current offense is typically felon in possession
  - Three prior convictions for violent felony or serious drug offense
  - Result: 15 year mandatory minimum
- Current issue (*Johnson v. United States*):
  - Relies on residual clause for definition of crime of violence/violent felony

Departures & Variances

- Departure= Increase or reduction to offense level or criminal history category recognized in the Guidelines
- Variance=Increase or reduction to Guideline sentence that is not supported by the Guidelines

Cooperation & Safety Valve

- Safety valve
  - No more than 1 criminal history point, no threats of violence or possession of weapon, no leadership
  - Told Government about relevant conduct
  - Reduces offense level plus relief from mandatory minimum
- Cooperation
  - Motion for substantial assistance or Rule 35 motion
  - Allows Court to reduce sentence and go below mandatory minimum

Fines & Restitution

- $100 Special Assessment
- Fines
  - Individuals
  - Companies
- Restitution is mandatory

Serving the Sentence

- Custody or Self-Report
- Placement in BOP Institution
  - Security levels
  - Locations
- Must serve 85%
- “Good Time” credit
- No parole
- Halfway Houses & Home Confinement
- Supervised Release

Bridge the Gap Seminar

Elder Abuse

10:15 a.m. - 10:45 a.m.

Presented by:
Chantelle Smith
Iowa Attorney General's Office
Hoover Building
1305 East Walnut
Des Moines, IA 50319
Phone: 515-281-8811

Friday, September 9, 2016

ELDER ABUSE: HITTING TOO CLOSE TO HOME

Chantelle Smith
Assistant Attorney General
Iowa Attorney General's Office

Aging in our Community

- *491k aged 65+*
- *40 counties > 20% of population 65+*
- *Ringgold is the "oldest" county; Johnson is the "youngest"*
- *2nd in percentage of adults 85+; North Dakota is first*
- *Iowans 65+*
- *7.4% live in poverty*
- *Mean household income is $52,482*
- *10% have annual incomes over $100,000*

ELDER ABUSE

- Physical abuse
- Sexual abuse
- Emotional abuse
- Financial exploitation
- Neglect

ELDER ABUSE, CON'T.

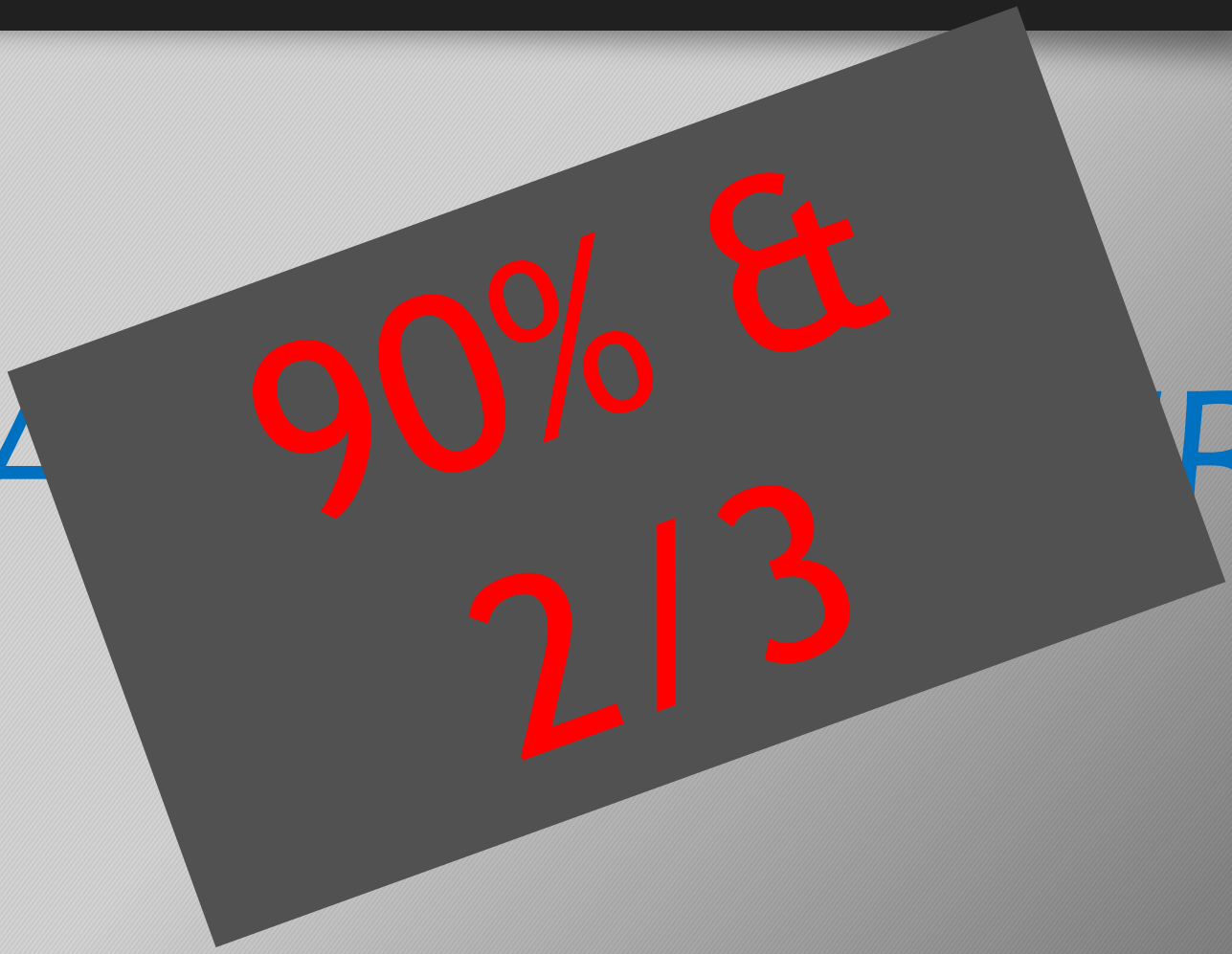
- Age: Iowa law=65+; federal law=60+
- Abuse in Later Life grant=50+
- Relationship/expectation of trust
- Greed
- Power and control dynamics
- Domestic violence

AGEISM

- Prejudice or discrimination against a particular age group—particularly older individuals
- Think about how it affects the way you treat your clients or address an issue
  - Q's about cognitive ability
  - Husbands and wives
  - Adult children and parents
  - Farms and land
  - Guardianships and conservatorships
  - POA

THINGS TO KNOW ABOUT ELDER ABUSE—TEN OF THEM, ANYWAY

PERPETRATORS



FA RS

UNDERREPORTED

Source: NYS Elder Abuse Prevalence Study; Weill Cornell Medical College, NYC Department for the Aging; Lifespan; (2011)
Slide courtesy of Life Long Justice

DEPENDENCY=VULNERABILITY

- Most victims are dependent upon their abuser
- Threat of a nursing home
- Loss of independence
- Physical assistance

HOME IS NOT SAFE

- Home
  - Department of Human Services (DHS); ch. 235B (dependent adult abuse in community)
  - Elder Abuse Relief Act; ch. 235F (civil)
  - POA Act; ch. 633B (civil)
- Facilities
  - DIA (Department of Inspections and Appeals); ch. 235E (dependent adult abuse in facilities/programs)

FINANCIAL EXPLOITATION

- Most commonly reported form of abuse; not necessarily most common form
- Gateway drug for other types of abuse
- POA ≠ license to steal
- Conservatorship abuse

SEXUAL ABUSE

- **It. Happens.**
- Home or institutional setting
- Reports are more easily dismissed
- Inability to report
- Dependency
- Cost of independence
- Older victims are the BEST witnesses!

IT CAN BE DOMESTIC VIOLENCE

- Elder abuse is domestic abuse
- Assault committed between family or household members who resided together at the time of the assault
- Persons in an intimate relationship
- Separated spouses or divorced persons
- Persons who have been family or household members residing together within the past year

Wheel adapted by NCALL with permission from Domestic Abuse Intervention Project, Duluth, MN in 2006

THEY WILL STAY AND, NO, IT'S NOT ABOUT YOU

- Victims will on average leave and return to their abuser 8 times before finally leaving
- Caregiver stress is real but is not an excuse
- Dependency, shame, embarrassment, religious and cultural beliefs,
- Nowhere to go…

IT KILLS

- Est. that the risk of death is 300 times higher for a person who is the victim of elder abuse
- Generally tend to die within 6 mos. of discovery/reporting of exploitation

NOT A CRIME IN IOWA

- Iowa has no criminal elder abuse law
- DAA laws only
  - DAA in community or facilities
  - Wanton neglect of a DA
  - Felony neglect of DA
  - Nonsupport of a dependent person
- Must rely on general criminal statutes
  - Assault
  - Theft
  - Stalking
  - Harassment
  - Domestic violence assault

ABUSE IN LATER LIFE GRANT

- U.S. Dept. of Justice—Office on Violence Against Women
  - AG's Office partnered with DHS, Aging, DPS, LTCO, Polk County Attorney and Sheriff, Dallas County Attorney, and ICADV
  - $400,000 over 3 years
  - Training and services to end abuse in later life
  - Training for judges, prosecutors, law enforcement, professionals (**you!**) and providers
  - Direct victim services (approx. $200,000)
    - Emergency housing, medication, assistive devices, emergency legal services, transportation, pet needs

THANK YOU FOR YOUR TIME AND ATTENTION!

Chantelle Smith
Assistant Attorney General
515/281-8811
Chantelle.Smith@iowa.gov

Bridge the Gap Seminar

Business Continuity Planning

10:45 a.m. - 11:45 a.m.

Presented by:
August “Dutch” Geisinger
Safeguard Iowa Partnership
Phone: 515-868-1795

Friday, September 9, 2016

BUSINESS EMERGENCY GUIDE

Every employee has a responsibility to understand different emergencies and how to prepare in advance for a disaster. Become familiar with the building's floor plan and know where the emergency exits, sheltering areas and assembly locations are located.

USING THIS GUIDE

Emergencies can happen at any time without warning. This guide is designed to help you respond to emergency situations and contains valuable information for staff, as well as our customers and guests while at our business.

Depending on the type of emergency, the most important decision is whether you stay where you are (shelter) or go away from the danger (evacuate).

This guide will provide steps to respond safely to many different types of emergencies. This guide does not supersede any of our business emergency plans or procedures. This guide was created by Safeguard Iowa Partnership, a nonprofit organization working to strengthen the capacity of the state to prevent, prepare for, respond to and recover from disasters through public-private collaboration. To download additional free resources visit www.safeguardiowa.org.

Version 2.0 (2014)

INFORMATION SECURITY

- Know the classification of the information you handle and take appropriate measures to protect it based on the classification
- Only disclose confidential information to those who have a business need-to-know
- Only access the information you need to perform your job
- Keep passwords private. Do not share with anyone, including your manager
- Lock your computer screen every time you leave your desk
- When not in use, secure confidential information out of sight
- Properly dispose of confidential information
- Develop a list of contacts for when an incident occurs

INFORMATION SECURITY

FIRE

Fire is one of the most common disasters. Fire causes more deaths and damage to more businesses than any other type of disaster. But fire doesn't have to be deadly if you know your emergency procedures and act immediately when there is an alarm.

DO NOT HESITATE TO ACT:

- Call 911
- If alarm sounds, leave now
- If you notice smoke and no alarm:
  - Leave now and tell others to leave
  - Pull fire alarm
  - Let management know
- Follow planned routes or emergency exit signs
- If you reach smoke or fire, go a different way
- If caught in smoke, drop to your hands and knees and crawl. Breathe through clothing as a filter
- STOP, DROP, and ROLL if your clothing or hair catches on fire
- Go outside to a safe assembly location and let others know you are okay
- Always follow emergency instructions and do not return until the "ALL CLEAR" has been given

IF YOUR EXIT IS BLOCKED:

- Find another exit, if possible
- Call 911 from a cellular phone or a landline and advise them of your situation and location
- If smoke is entering room, if possible place wet towels or clothing under door
- Breathe through your nose and use your blouse, shirt or jacket as a filter
- DO NOT break windows

FIRE

EVACUATION

Evacuation is simply getting away from a dangerous situation. Depending on your building and the danger, that may be moving to another floor or leaving the building and getting as far away as you can. If asked to evacuate, or you see something dangerous, don't wait, leave immediately.

- Leave immediately when alarm and/or announcement is made
- Follow designated routes or lit EXIT signs and instructions
- Do not use elevators unless instructed to do so
- Before opening any doors feel with back of hand. If hot, do not open, seek alternate exit
- Keep to right side of stairwells and hallways
- Proceed directly to the assembly location for accountability and further directions
- Smoke:
    - If you see smoke, fire or other danger, find a different way out, let others know of the danger
    - If you must go through smoke, stay as low as you can (heat and dangerous smoke will rise)

ACCESS AND FUNCTIONAL NEEDS

If you are not able to evacuate:

- Ask for help and go to an area of refuge away from immediate danger. Use one of three choices.
    - Horizontal evacuation: using building exits to the outside ground level or going into unaffected areas of the building
    - Stairway evacuation: using steps to reach ground level exits
    - Area of refuge: a pre-designated area that may be pressurized stair enclosures in high rise buildings, open air exit balconies, or nearby fire rated stairwells, corridors or entryways

SHELTERING

When a danger or threat exists outside, sheltering inside is the safest option:

- If applicable, go to the designated shelter area
- Stay inside, move to inner corridor or office
- In a multi-story building move to interior spaces
- Stay away from windows and do not open them
- Do not use elevators

EVACUATION & SHELTERING

MEDICAL EMERGENCIES

Medical emergencies can happen from accidents or medical conditions. The role of employees in a medical emergency is to provide care to the victim until first responders arrive. Employees should NOT provide any first aid beyond their training. Often the person experiencing the emergency does not acknowledge or denies the situation is serious. If in doubt, take immediate action.

- Before providing any assistance, employees should survey the scene for additional hazards and ensure it is safe to render aid
- DO NOT move the victim(s), especially if you suspect a head or neck injury, unless safety is a concern
- Check victim for medical alert bracelet or necklace
- Call 911 and give:
  - Name
  - Phone Number
  - Address
  - Description of the problem and patient
- Send someone to meet emergency personnel and show to location
- Employees should comfort the victim and reassure them that medical attention is on the way
- Assist emergency personnel with pertinent information about the incident
- Remain with the victim until trained help arrives
- Report incident to management

MEDICAL EMERGENCIES

DEMONSTRATION/PROTESTS

In general, participants have the right to protest, demonstrate, picket or march as long as they:

- Remain on public property
- Do not trespass
- Do not harass or interfere with staff, customers or guests entering or exiting the building

If demonstration is near, but not on property:

- Preplan for this by designating protest area around the building
- Notify management
- Notify and consult with law enforcement in developing a plan of action
- Notify staff
- Encourage staff not to participate in employees-led or public demonstrations and to maintain the business environment
- Monitor situation and make decisions based on developing information
- Consider communication venues (e.g. Web site posting, e-mail)
- Consider lockdown with warning procedures

If demonstration is on property:

- Notify management
- Notify and consult with law enforcement
- Identify who asks the demonstrators to leave
- Develop an action plan
- Notify staff
- Consider lockdown
- Ensure safe entry into and exit from the building
- Monitor situation and make decisions based on developing information
- Consider communication venues (e.g. Web site posting, email)

DEMONSTRATION/PROTESTS

WORKPLACE VIOLENCE

We are dedicated to the safety of all employees, so the company has developed procedures to identify potential threats and prevent violent incidents from occurring. Employees should report threats of violence or perceived threats and safety concerns to:

- Their immediate supervisor or management
- In the event of immediate danger, call 911
- Remember – all threats or perceived threats should be taken seriously

POTENTIAL SCENARIOS:

- An employee verbally threatens or intimidates a coworker
- An employee makes a veiled or implied threat to a supervisor
- A customer makes threatening comments or gestures to an employee
- A family member or significant other of an employee is a threat to the employee, coworkers or workplace
- An employee receives a threatening e-mail at work from a coworker, customers or family member
- A stranger calls the workplace and says that an employee is making threats from a workplace phone or computer

SIGNS OF POTENTIAL VIOLENCE:

- An entitled or blaming view of disputes with the business
- Unsettling references to other incidents of violence
- Regular threats to physically harm themselves or commit suicide
- Direct or indirect statements to harm or kill others
- Inappropriate outbursts, can't control impulsive behavior
- Excessive focus on firearms, weapons, or military gear
- Physical or behavioral signs of substance abuse
- Follows or watches others
- Persistent unwanted contact of others
- Gestures of violence toward self or others
- Physical aggression or intimidation
- Frequent misinterpretation of others' behaviors
- Obsessive thoughts about a person or issue
- Unrealistic fears of being mistreated by others
- Changes or losses in personal support system
- Recent loss of a primary relationship or child custody
- Financial, legal or employment troubles

WORKPLACE VIOLENCE

HAZARDOUS MATERIALS

In the event of a natural or propane gas leak or odor – EVACUATE IMMEDIATELY.
In all other cases, first responders will take command of the situation and determine the steps to take regarding evacuation, shelter-in-place and ventilation systems (HVAC).

In the event of a hazardous material incident inside building:

- Call 911 and notify management
- Report location and type (if known) of the hazardous material
- Move employees away from the immediate danger zone
- Report any employees missing or injured
- If safe, close doors to the affected area
- Render first aid as needed
- Develop an action plan with emergency responders (e.g., evacuation, shelter-in-place, shutdown ventilation system)

In the event of a hazardous material incident outside building:

- Call 911 and notify management
- Report location and type (if known) of hazardous material
- Move employees away from the immediate vicinity of the danger
- Develop an action plan with emergency responders
- Avoid turning on and off lights

HAZARDOUS MATERIALS

EMERGENCY CONTACT INFORMATION

PUBLIC UTILITIES

Electric Company:

Contact Person _____

Position _____

24-hr emergency number(s) _____

Gas Company:

Contact Person _____

Position _____

24-hr emergency number(s) _____

Water Company:

Contact Person _____

Position _____

24-hr emergency number(s) _____

LOCAL EMERGENCY CONTACTS:

Local emergency management director

_____

(Name and numbers)

Poison Control Center:

_____

Crime Victim Services:

_____

County Social Services (Child Protection):

_____

County Public Health:

_____

Post-Crisis Intervention/Mental Health Services:

_____

EMERGENCY CONTACT INFORMATION

WORKPLACE SAFETY/SECURITY

- Remain alert and aware to what is going on around you at all times. Be suspicious of strange or unusual individuals, situations and objects. Most importantly – TRUST YOUR INSTINCTS! Report suspicious or unusual individuals, situations or objects to your manager. If you feel threatened or if you feel that you are in imminent danger, immediately all 911.
- If you notice an unauthorized person in your work area, acknowledge the person and ask if s/he requires assistance. Don't take "no" for an answer; follow-up by ensuring that the person is truly authorized to be there. If you are uncomfortable approaching the person, unable to approach the person, the person acts in a suspicious or strange manner when you approach him/her, or the person runs from the work area, immediately call 911 and then report to your manager.
- Theft is often a crime of opportunity. Do not leave purses or wallets in plain view. Keep them on you or in a locked desk at all times. Never leave them unattended, even for a few moments.
- Clear your desk of any valuable personal or company property at the end of each day and secure it in a locked desk drawer or file cabinet. Ensure you lock all of your desk drawers and file cabinets when they are unattended.
- Ensure all portable computers, DVDs, and other items of value that can be easily carried away are secured when unattended.
- Never prop open doors that normally remain secured. Do not allow "piggybacking" through secure doors or elevators. Safeguard company keys or access cards the same way you would safeguard your home or car keys.
- Develop the practice of inspecting your work area on a daily basis. This will help you identify suspicious items or other things that are out of the ordinary. Report anything suspicious.
- When arriving for work, ensure you park your car in a well-lit area (if it is daylight, park near light poles or other sources of light). This is especially important in the winter months. When leaving work, survey the parking area for suspicious individuals or vehicles before existing the building. If you note something suspicious, trust your instincts and DO NOT LEAVE. When possible, walk to your car with a co-worker or in groups. Keep an eye out for each other and help ensure your co-workers get to their cars and leaves the area safely.

WORKPLACE SAFETY/SECURITY

SEVERE WEATHER

Watches: Indicate conditions are right for development of a weather hazard. Watches provide advance notice.
Warnings: Indicate a hazard is imminent or the probability of occurrence is extremely high.

If a tornado or severe thunderstorm WATCH includes all or part of the area of the business's location:
- Monitor National Weather Service (NOAA) weather radio, all-hazard or emergency alert radio
- Notify impacted buildings and employees in the area
- Consider moving all persons inside building(s)
- Consider closing windows, if it is safe to do so
- Review severe weather sheltering procedures and location of shelter areas

If a tornado or severe thunderstorm WARNING has been issued or a tornado has been spotted near the office:
- Locate emergency to-go-kit and employee roster
- Take shelter immediately (pre-designated or away from outside windows and walls)
- Shelter areas are interior restrooms or rooms away from exterior walls and windows and large rooms with long-span ceilings in permanent structures
- Crouch low to the floor
- Continue to monitor National Weather Service (NOAA) weather radio, all-hazard or emergency alert radio or television stations
- When wind strikes, cover your neck and head
- Stay away from windows until all clear is given
- In the event of building damage, evacuate employees to safer areas
- If evacuation does occur, do not re-enter the building until an "All Clear" signal is issued

LIGHTNING
Lightning is the deadliest weather event and can strike miles away from a thunderstorm and up to 30 minutes after.
- Stay inside
- If you feel your hair stand on end (indicator of a lightning strike)
  - Squat low to the ground on the balls of your feet
  - Place your hands over your ears and your head between your knees
- Make yourself the smallest target possible and minimize your contact with the ground
- DO NOT lie flat on the ground

FLOODING
Flooding is very dangerous and causes many deaths each year:
- DO NOT walk through moving water. Six inches of moving water can make you fall
- If you have to walk through standing water, use a stick to check the firmness of the ground in front of you
- DO NOT drive into flooded areas, a foot of water will float many vehicles
- If floodwaters rise around your car, abandon the car and move to higher ground if you can do so safely. You and the vehicle can be quickly swept away

SEVERE WEATHER

SUSPICIOUS PACKAGES/MAIL

Characteristics of a suspicious package or letter include excessive postage or excessive weight; misspellings of common words; oily stains, discolorations, or odor; no return address or a city or state postmark that does not match the return address; or a package that is not anticipated by someone in the building or is not sent by a known vendor.

If you receive a suspicious package or letter by mail or delivery service:

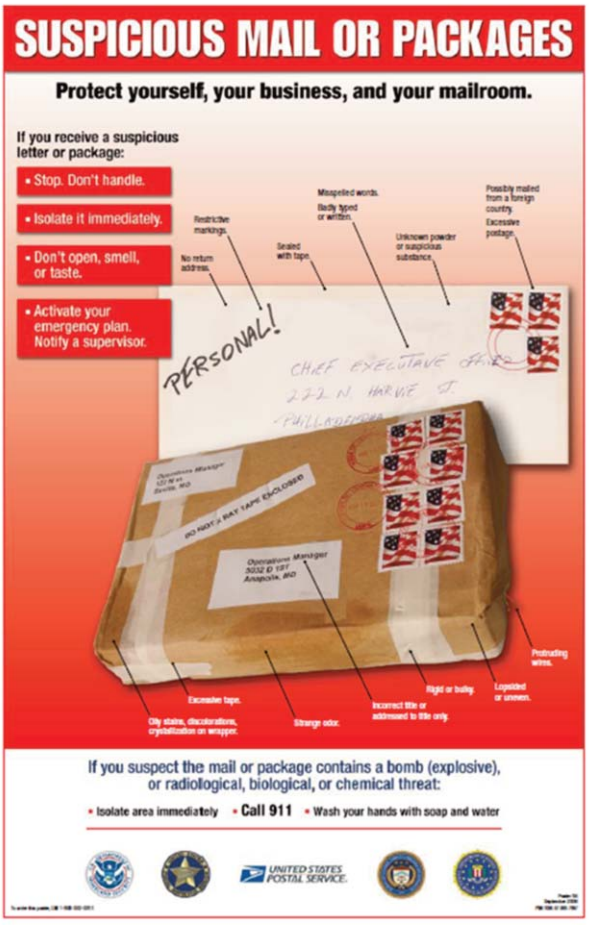
- DO NOT OPEN package or letter
- Notify management
- Call 911
- Limit access to the area where the suspicious letter or package is located to minimize the number of people who might directly handle it
- Preserve evidence for law enforcement

If a letter/package contains a written threat but no suspicious substance:

- Notify management
- Call 911
- Limit access to the area in which the letter or package was opened to minimize the number of people who might directly handle it
- Preserve evidence for law enforcement

If a letter or package is opened and contains a suspicious substance:

- Notify management
- Call 911
- Limit access to the area in which the letter or package was opened to minimize the number of people who might directly handle it
- Isolate the people who have been exposed to the substance to prevent or minimize contamination
- Turn the letter or package over to law enforcement
- Complete Threat Incident Report Form
- Consult with emergency officials to determine:
  - Need for decontamination of the area and the people exposed to the substance
  - Need for evacuation or shelter-in-place



SUSPICIOUS PACKAGES/MAIL

BOMB THREATS

ALL bomb threats must be taken seriously until they are assessed. As a business we are responsible for assessing the threat. The decision to evacuate rests with the business, not emergency responders, unless a device is located.

Responding to a telephone bomb threat:
- Use the Bomb Threat form to document the threat
- Call 911 to notify law enforcement
- Consult with first responders on credibility of the threat

Responding to a written bomb threat:
- Save the threat document and all of the materials associated with the threat, including any envelopes, containers, samples of handwriting or typewriting, paper and postal marks
- Handle these items as little as possible
- If possible, place all items in an envelope or box to protect them

If the threat is determined to be credible:
- Implement appropriate lockdown procedures
- Scan office or designated areas for suspicious items
- DO NOT touch any suspicious devices, packages, etc. If a device is located, it should be pointed out to emergency responders
- Limit the use of cellular phones, radios or fire alarm system
- Determine if evacuation should be initiated

If an evacuation is initiated:
- Notify employees of need to evacuate
- DO NOT use cell phones, radios or fire alarm system because of risk of activating a device
- Ensure evacuation routes and area(s) are clear of suspicious items

**When responding to a bomb threat, law enforcement and first responders generally will not search a building unless requested.

BOMB THREATS

BOMB THREAT FORM

Date: _____ Time: _____

Number at which call was received: _____

Questions to ask:

- When is the bomb going to explode? _____
- Where is the bomb right now? _____
- What does the bomb look like? _____
- What kind of bomb is it? _____
- What will cause the bomb to explode? _____
- Why did you place the bomb? _____
- What is your name? _____
- What is your address? _____
- Exact wording of threat _____

_____

_____

o Keep the caller on the phone as long as possible
o Ask as many questions as possible
o If the caller hesitates, go to the next question
o Note response word-for-word
o Pay attention to background noises
o Call 911 to report to local law enforcement

Caller's Voice/demeanor:

❍ Calm	❍ Normal	❍ Despondent	❍ Angry
❍ Distinct	❍ Deep breathing	❍ Excited	❍ Slurred
❍ Cracking	❍ Slow	❍ Nasal	❍ Disguised
❍ Rapid	❍ Stutter	❍ Accent	❍ Soft
❍ Lisp	❍ Familiar	❍ Loud	❍ Raspy
❍ Laughter	❍ Deep	❍ Crying	❍ Intoxicated

If familiar, who did it sound like? _____

Background sounds

❍ Street	❍ Vehicles	❍ Local	❍ Airplane
❍ Office	❍ Long distance/cell	❍ Voices	❍ Factory
❍ Party	❍ PA system	❍ Animals	❍ Train
❍ Music	❍ Clear/none	❍ House	❍ Static

Other: _____

Caller vocabulary/language/information

❍ Excellent	❍ Incoherent	❍ Reading from note	❍ Fair
❍ Taped	❍ Poor		

Sex of caller: ❍ Male ❍ Female

Approximate age: _____

Comments/notes:

State Case Law Update

12:45 p.m. - 1:45 p.m.

Presented by:
Hon. Paul Ahlers
District Associate Judge
Webster City, IA 50595
Phone: 515-832-9600

Friday, September 9, 2016

IOWA CASE LAW UPDATE

PAUL B. AHLERS
District Associate Judge
Webster City, Iowa
(515)832-9600
paul.ahlers@iowacourts.gov

(Covering volumes 858 to 874 of the Northwestern Reporter, Second Series)

TABLE OF CONTENTS

ADMINISTRATIVE LAW

What Constitutes "Other Agency Action"

Ghost Player, L.L.C. v. State, 860 N.W.2d 323 (Iowa 2015)
"Other agency action" is action taken by an agency that is "neither rulemaking nor a contested case." In other words, agency action taken without a hearing required by a statute or constitution or action taken after a required hearing that does not rise to the level of an evidentiary hearing is other agency action. When "other agency action" is involved, claimant must exhaust administrative remedies prior to bringing an action in district court under the Administrative Procedure Act. The actions taken by the agency in denying Claimants' tax credits in this case was other agency action, requiring Claimants to exhaust their administrative remedies. Since Claimants did not exhaust those remedies, their suit in district court was properly dismissed.

"Primarily Adjudicative" Agency Action

Branstad v. State ex rel. Natural Resources Comm'n, 871 N.W.2d 291 (Iowa 2015)
Farmer ordered to pay restitution for a fish kill caused by farm runoff challenged the restitution amount and won. Farmer then sought attorney fees pursuant to Iowa Code Section 625.29(1). The Court held that the State's role in this case – the final decision of the Commission regarding the amount of restitution for the fish kill – was "primarily adjudicative" and fell within the exception for attorney fees set forth in Section 625.29(1)(b).

APPELLATE PROCEDURE

EDMS Event From Which Appeal Deadline Is Measured

Concerned Citizens v. City Development Bd., 872 N.W.2d 399 (Iowa 2015)
Notice of appeal must be filed within thirty days of the date the final judgment is electronically filed, not the date of the notice of filing.

ATTORNEY DISCIPLINE

Trust Account Violations

Sup. Ct. Atty. Disciplinary Bd. v. Eslick, 859 N.W.2d 198 (Iowa 2015)
Thirty-day suspension for numerous trust account violations. Violations included depositing personal funds in the trust account, failing to deposit advance fees in the trust account, failing to maintain journals or ledger records, failing to perform monthly reconciliations, and failing to notify clients when withdrawals from the account were made. Prior reprimand and the fact that the trust account deficiencies

were not isolated incidents were aggravating factors. Attorney's acknowledgment of the need for help with attention deficit disorder, attorney's lack of attempt to deceive the auditor or the board, and the fact that no clients were harmed were mitigating factors.

Magistrate Signing Search Warrant for Client's House

In re Krull, 860 N.W.2d 38 (Iowa 2015)
Public reprimand to part-time magistrate for signing a search warrant authorizing the search of the house of the magistrate's client. The magistrate represented the client in a custody case as part of the magistrate's private practice. Sanction was raised to a private reprimand due to the magistrate's prior private admonishment for signing a search warrant authorizing the search of the house of an adverse party in a custody case several years earlier.

Neglect, Fee Payment, and Misrepresentation in Estate Proceedings

Sup. Ct. Atty. Disciplinary Bd. v. Bartley, 860 N.W.2d 331 (Iowa 2015)
Six-month suspension for neglect, fee payment violations, and misrepresentations by the attorney handling two estate matters. Neglect included failing to timely file tax returns, failing to settle an outstanding debt, and taking over twelve years to close one estate and five years to close the other. Fee violations included taking full payment several years before filing the final reports or receiving court orders for the fees and failing to deposit unapproved fees in the trust account. Misrepresentations included deceiving the court and her law firm and preparing fraudulent documents to aid in the deceit.

Sexual Harassment of and Sexual Relations With Clients

Sup. Ct. Atty. Disciplinary Bd. v. Moothart, 860 N.W.2d 598 (Iowa 2015)
Thirty-month suspension for sexual harassment of five clients, sexual relations with two of the clients, and conflict of interest based on the attorney's relationship with one of the clients. The Court adopted a broad definition of "sexual harassment in the practice of law" to mean sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Violations occur even if the victim of sexual harassment is not a client, as long as the attorney is engaged in the practice of law. Consent is not a defense. Attorney was found to be in an attorney-client relationship with the five victims. Violations included repeated comments about the clients' breasts, asking to see a client's breasts, paying a client for oral sex, and the conflict of interest that arose when the attorney was sexually involved with a client who was the victim in a domestic abuse case in which the attorney represented the domestic abuse perpetrator.

Trust Account Violations & Failure to Pay Taxes

Sup. Ct. Atty. Disciplinary Bd. v. Cross, 861 N.W.2d 211 (Iowa 2015)
One-year suspension for multiple trust account violations, including commingling personal/business funds with client funds, failing to deposit advance fees into trust, withdrawing fees and expenses before they were earned, failing to maintain proper financial records (e.g., client ledgers, check registers, reconciliations), and failing to notify clients of withdrawals. Violations also included dishonesty by submitting false client security questionnaires certifying compliance with rules regarding handling of client funds and trust accounts. Violations also included failing to file employee-payroll-withholding-tax declarations and failing to pay the required taxes and failing to file income tax returns. Violations also included failure to respond to disciplinary authority. Attorney did not violate rules against practicing under a trade name by having a bank account set up under a corporate name when the lawyer did not hold himself out to the public as practicing under the corporate name on the account.

Diligence, Sex With Client, and Trust Account

Sup. Ct. Atty. Disciplinary Bd. v. Blessum, 861 N.W.2d 575 (Iowa 2015)
Eighteen-month suspension for having sex with a client, being convicted of assaulting the client after the relationship deteriorated, and prematurely withdrawing funds from trust with no contemporaneous accounting. Lengthy delay in finalizing a QDRO for the client did not violate rule requiring the attorney to act with diligence. The rule prohibiting sex with a client was violated even though there was no "sex for fees." There was a nexus between attorney's crime of assault and his fitness to practice law, justifying disciplinary action. Attorney was not allowed to present expert testimony that there was no nexus between the crime and attorney's fitness to practice.

Misappropriation of Client Funds

Sup. Ct. Atty. Disciplinary Bd. v. Crum, 861 N.W.2d 595 (Iowa 2015)
Once the Board presents evidence of theft of client funds by misappropriation, the burden shifts to the attorney to prove the attorney has a colorable future claim to the funds. In this case, the attorney took money from four clients prior to earning it and then ceased all contact with the clients despite the clients' request to return the unused parts of any retainers and property. The attorney failed to present evidence that she had a colorable future claim to the funds and property. The Court found the attorney to have committed theft by misappropriation, resulting in revocation of her license. Noting that the record was replete with examples of other unethical conduct, including a pattern of neglect, lack of communication with clients, lack of regard for administration of justice, dishonest statements to clients and the court, and a failure to cooperate with the Board, the Court did not address those violations because the theft by misappropriation warranted revocation.

Adequate Notice of Violations - Neglect and Trust Account Violations

Sup. Ct. Atty. Disciplinary Bd. v. Cepican, 861 N.W.2d 841 (Iowa 2015)
The complaint before the commission did not provide adequate notice to the attorney of the charge of theft of client funds. The lack of notice denied the attorney a reasonable opportunity to defend himself against the claim and the sanction of revocation, so the Court did not decide whether the attorney committed theft of retainer funds. However, six-month suspension was imposed for neglect of client matters, failure to follow proper procedures for deposit of retainers in trust, and failure to respond to the board.

Neglect, Failing to Expedite Litigation, and Lack of Cooperation

Sup. Ct. Atty. Disciplinary Bd. v. Hedgecoth, 862 N.W.2d 354 (Iowa 2015)
Three-month suspension and conditions for reinstatement as a result of neglecting client appeals and litigation, failing to expedite litigation on appeals and at trial court level, failing to obey court orders with respect to compliance with discovery requests, failing to comply with legally proper discovery requests, failing to respond to inquiries from the board, and prejudicing the administration of justice. Prior discipline for similar conduct was an aggravating factor, as was the attorney's delayed responses to the board and his career experience teaching ethics and professional responsibility. An identified mitigating factor was that no clients were harmed.

Failing to Properly Pursue Appeal

Sup. Ct. Atty. Disciplinary Bd. v. Weiland, 862 N.W.2d 627 (Iowa 2015)
Public reprimand for failing to timely file combined certificate on appeal, failing to serve the combined certificate on the court reporter, and ultimately allowing the appeal to languish and be administratively dismissed. Lone dissenter would have imposed a 30-day suspension due to prior disciplinary record and forty prior delinquency notices from the clerk of the Supreme Court.

Neglect & Failure to Cooperate in Process

Sup. Ct. Atty. Disciplinary Bd. v. Ryan, 863 N.W.2d 20 (2015)
Six-month suspension for a variety of violations involving one client. Attorney took retainer to represent client in child custody case and then left town and failed to withdraw or even contact the client. Violations included failing to conclude or properly terminate attorney-client relationship, failing to keep client reasonably informed, failing to respond to client inquiries, failing to safeguard the client's interests, failing to return client's files, withdrawing unearned funds from trust, failing to provide appropriate accounting, failing to refund unearned money, failing

to enter into an agreement regarding fees, failing to explain the fee arrangement, and failing to respond to client inquiries regarding fees. However, since the Board never alleged the attorney stole or misappropriated client funds in its complaint, the attorney could not be found to have stolen or misappropriated funds. In terms of sanctions, the attorney's failure to cooperate with the Client Security Commission audit and failure to respond to the ethics complaint were aggravating factors. The vulnerability of the client was also an aggravating factor. Dissenter disagreed that the attorney was not on notice of the claim of conversion of client funds and would have revoked the attorney's license.

Trust Account & Failure to Communicate Hourly Rate

Sup. Ct. Atty. Disciplinary Bd. v. Santiago, 869 N.W.2d 172 (Iowa 2015)
Thirty-day suspension for failing to deposit client funds in trust, failing to keep proper client ledgers and perform reconciliations, withdrawing funds from trust account without notifying clients or providing a timely accounting, and failing to communicate the attorney's hourly rate to client in a timely manner. Attorney did not charge an unreasonable fee or engage in dishonesty. Mitigating factors included attorney's representation of non-English speaking, underserved members of the Hispanic community and his cooperation with auditors, the commission, and the board. Even if the complainant acted out of spite, as alleged, the motive of the complainant is not a mitigating factor. Aggravating factors included attorney's experience and failure to comply with trust account requirements despite having the same issues addressed during an audit approximately three years earlier.

Poor Communication With Client, False Statements & Fee Problems

Sup. Ct. Atty. Disciplinary Bd. v. Said, 869 N.W.2d 185 (Iowa 2015)
Thirty-day suspension for failing to reasonably inform client about the status of client's case after a missed deadline, failing to explain the missed deadline matter to client, making a false statement to a tribunal (that the attorney would self-report to disciplinary officials that attorney had missed deadline, but attorney failed to do so), withdrawing funds under a flat fee contract with no clear connection to any milestone in the case, any work performed, or any relationship to the services remaining to be performed, and failing to provide written notice to client when fees were withdrawn. Aggravating factors included four prior private admonitions, including one for conduct similar to the conduct in this case. Mitigating factors included taking corrective measures regarding trust account issues, providing legal services to an underserved community, and performing substantial *pro bono* work.

Trust Account Issues

Sup. Ct. Atty. Disciplinary Bd. v. Lubinus, 869 N.W.2d 546 (Iowa 2015)
Thirty-day suspension for failing to deposit advance fee in trust account rather than attorney's account, prematurely depositing entire advance fee into operating account, transferring funds from trust account before attorney had earned them, failing to maintain accurate trust account records, and failing to notify clients when transfers were made from trust account. Mitigating factors included lack of disciplinary history, attorney's forthright and cooperative self-reporting, lack of harm to clients, and the taking of corrective measures. Aggravating factors included attorney's admission that attorney knowingly removed unearned funds from trust prematurely because attorney was in financial difficulty and the fact that the violations consisted of a series of incidents rather than a one-time aberration.

Conduct Involving Dishonesty

Sup. Ct. Atty. Disciplinary Bd. v. Haskovec, 869 N.W.2d 554 (Iowa 2015)
Public reprimand for engaging in conduct involving dishonesty. Attorney procured the signature of a witness to a will attesting that the witness was signing in the presence of the testator and the other witness when, in fact, the witness was not (the witness had actually witnessed the signing, but did not attest to that at the time). Even though attorney stipulated that attorney had violated an additional ethical rule (prohibiting attorney from failing to disclose a material fact to a third party when disclosure is necessary to avoid assisting fraud by a client), the Court found no violation of that rule. Mitigating factors included the fact that attorney did not forge the witness's signature, attorney immediately and without hesitation disclosed to the probating attorney that the witness did not sign the will in the presence of the testator and other witness, attorney's disclosure came before an attempt to probate the will so no harm came to the courts or public, and attorney had no disciplinary history.

Neglect and Related Issues

Sup. Ct. Atty. Disciplinary Bd. v. Kingery, 871 N.W.2d 109 (Iowa 2015)
Sixty-day suspension for a variety of violations. Violations included neglect of multiple client matters, including failing to appear for court appearances of clients in criminal matters, failure to communicate with clients, failure to respond to client inquiries, failure to withdraw from representation in spite of known problems with bipolar disorder and alcoholism, failure to expedite litigation, and conduct prejudicial to the administration of justice because the attorney's neglect caused numerous delays in the judicial process. Sheer number of clients affected and the adverse consequences to some of them were aggravating factors. Acceptance of responsibility and the attorney's "robust rehabilitative efforts" to control or eliminate her alcoholism were mitigating factors.

Changing Hourly Rate and Trust Account Violations

Sup. Ct. Atty. Disciplinary Bd. v. Nelissen, 871 N.W.2d 694 (Iowa 2015)
The Board failed to prove that attorney failed to expedite litigation by requesting continuances (continuances were found to be justified, brief, and nonprejudicial) and failed to prove that attorney failed to properly keep the client informed. Although not always prompt in responding to client inquiries, the communication was not so deficient as to amount to an ethical violation. Thirty-day suspension imposed for raising hourly rate without notice to client, committing various trust account violations (including failing to inform client of withdrawals, failing to deposit additional payment toward a retainer in trust, withdrawing fees before they were earned, failing to retain records for six years, and not performing monthly reconciliations of bank statements with trust account records), misrepresenting facts on client security report by claiming that attorney had performed monthly trust account reconciliations, and ignoring the Board's requests for information. Prior discipline for trust account violations was a "significant aggravating factor." Mitigating factors included lack of client harm and lack of pervasiveness of the problem (noting that the attorney generally had a functioning trust account, kept a client trust account ledger, and maintained individual client ledger records).

Delay in Resolving Medicare Lien in Personal Injury Case

Sup. Ct. Atty. Disciplinary Bd. v. Silich, 872 N.W.2d 181 (Iowa 2015)
Thirty-day suspension for thirty-three month delay in resolving Medicare lien in personal injury settlement, failure to respond to inquiries from the Board, and failing to obey court orders requiring attorney to provide copies of documents to attorney's client. Attorney's conduct violated rules relating to due diligence, client communication, and expediting litigation. Aggravating factors included prior discipline and failure to timely respond to the Board's investigation.

CIVIL PROCEDURE

New Trial for Only One Defendant

Jack v. Booth, 858 N.W.2d 711 (Iowa 2015)
During a medical malpractice suit against two doctors, a juror fainted. One of the defendant doctors went to the juror's aid, the other did not. Trial court denied plaintiffs' motion for mistrial and the jury returned a verdict in favor of the doctors. The Court of Appeals reversed and granted a new trial as to both defendants. The doctor that did not render aid to the juror sought further review. The Supreme Court held that it is permissible to grant a new trial as to less than all defendants. Here, where there were two separate procedures resulting in injuries claimed by

plaintiff, each attributable to a different doctor, it would be permissible to order a new trial for one doctor but not the other. However, the Supreme Court declined to grant a new trial to the doctor that did not render aid. Plaintiffs' assertion that the humanitarian efforts of the doctor that rendered aid benefited anyone in the profession was not enough to warrant a conclusion that the trial court abused its discretion in denying a new trial.

Personal Jurisdiction – False Claims on Website

Sioux Pharm, Inc. v. Summit Nutritionals Int'l, 859 N.W.2d 182 (Iowa 2015)
In a case of first impression, nonresident corporate defendant's inaccurate statements on a website that it has a manufacturing facility in Iowa does not subject defendant to general personal jurisdiction in Iowa. However, the totality of nonresident defendant's contacts with Iowa, including its website statement, Iowa supply contract, and its sale of its product to plaintiff in Iowa were sufficient to subject defendant to specific jurisdiction in Iowa on claims related to those contacts.

When a Legal Malpractice Claim Accrues

Vossoughi v. Polaschek, 859 N.W.2d 643 (Iowa 2015)
Speculative injury does not give rise to a legal malpractice claim. An injury arising from legal malpractice is actionable when it is actual, not when it is merely potential. The cause of action accrues when the client sustains an actual, nonspeculative injury and has actual or imputed knowledge of the other elements of the claim. Also, insecurity alone arising from the absence of a mortgage lien against real estate and a perfected security interest in personal property does not constitute an actual injury. Until the vendees under the contract stopped making payments, vendor was not injured, and the statute of limitations does not begin to run. A fact question was generated on whether attorneys' failure to record an addendum to a deed would have deterred a risk-averse lender from extending credit to the property owner and whether the lender's actual taking of a mortgage on the property prevented the vendor from collecting on its claim against breaching vendees.

Personal Jurisdiction Over Foreign Tire Manufacturer

Book v. Doublestar Dongfeng Tyre Co., Ltd., 860 N.W.2d 576 (Iowa 2015)
The "stream of commerce test" for determining whether exercising personal jurisdiction comports with Due Process remains good law. Applying that test, a large, high volume tire manufacturer from China that sells to a national market is subject to personal jurisdiction in Iowa for products liability claim brought by injured person. This conclusion was based on the manufacturer's direct shipments to Iowa of thousands of tires and indirect shipments of thousands more to Iowa through its American distributor in Tennessee. Personal jurisdiction existed even though the tire at issue was sent to the distributor in Tennessee and not directly to Iowa.

Manufacturer had the requisite minimum contacts with Iowa and assertion of personal jurisdiction would comport with fair play and substantial justice.

Discovery of Personal Injury Plaintiff's Mental Health Records

Fagen v. Grand View University, 861 N.W.2d 825 (Iowa 2015)
Personal injury plaintiff, who was injured after being attacked by fellow students, sought to preclude defendants from gaining access to plaintiff's mental health records. In a 4-3 decision (one concurring with the result, but not the analysis), the plurality rejected the absolute positions pitched by both sides (plaintiff claiming the records were absolutely undiscoverable and defendants claiming the records were absolutely discoverable) and adopted a new protocol to address discovery of the records under Iowa Code Section 622.10(2) and I.R.Cv.P. 1.503. When a party refuses to provide a requested patient's waiver, the party requesting the waiver must make a showing that the party has a reasonable basis to believe the specific records are likely to contain information relevant to an element or factor of the claim or defense of the person claiming the privilege. The person seeking the records need not establish the records sought actually contain admissible evidence, but must advance some good faith factual basis demonstrating how the records are reasonably calculated to lead to admissible evidence germane to an element or factor or a claim or defense. The plurality placed great emphasis on plaintiff's argument that plaintiff was not claiming mental disability, but claiming "garden variety" mental anguish that would come from being assaulted. The dissenters urged that the process was driven by the pleadings and, since plaintiff claimed mental distress damages, plaintiff was entitled to obtain the records.

Discovery – Redesignating Protected Documents

Sioux Pharm, Inc. v. Eagle Laboratories, 865 N.W.2d 528 (Iowa 2015)
In an interlocutory appeal from a discovery ruling in this misappropriation of trade secrets case, the Court addressed a stipulated protective order that permitted the parties to designate documents in different classes of protection. The stipulated order provided a procedure and standards for redesignating materials produced. The Court held that trial court abused its discretion in redesignating documents produced by plaintiffs under the stipulated protective order from "attorneys' eyes only" (parties are not allowed to see the documents) to "confidential" (parties are allowed to see the documents). Defendants did not argue that plaintiffs had improperly designated materials under the order and did not provide any basis for modifying the order other than conclusory assertions and a statement that they, unlike plaintiffs, had elected not to hire an expert in order to save money. On the record before the Court, these grounds were not enough. While the trial court may have had other valid grounds for ordering redesignation, the grounds were not apparent from the terms of the trial court's ruling.

Claim Preclusion in Declaratory Judgment Actions

Gansen v. Gansen, 874 N.W.2d 617 (Iowa 2016)
In dispute between landlord and tenant over long-term farm lease, prior declaratory judgment action between the parties related to good faith negotiations regarding rental rate did not trigger claim preclusion that prevented a second declaratory judgment action to challenge the constitutionality of the farm lease. Under these circumstances, the general rule set forth in Restatement (Second) Judgments, Section 33, was followed, which is that only issue preclusion, but not claim preclusion, applies to declaratory judgment actions.

COMMERCIAL LAW

Antitrust in Health Insurance Field

Mueller v. Wellmark, Inc., 861 N.W.2d 563 (Iowa 2015)
Wellmark was sued by chiropractors claiming antitrust violations because Wellmark contracted with health care providers in Iowa to provide services at certain reimbursement rates. By agreement, Wellmark makes those rates available both to self-insured Iowa plans that it administers and to out-of-state Blue Cross and Blue Shield affiliates. Those agreements are held to not amount to *per se* violations of Iowa antitrust law, as they are not the simple horizontal conspiracies that historically have qualified for *per se* treatment. Since plaintiffs stipulated they were proceeding only under a *per se* theory and not under the rule of reason, their claims were dismissed.

UCC – Open Account and Counterclaim on Construction Dispute

Trustees of Laborers v. Ankeny Comm. School, 865 N.W.2d 270 (Iowa App. 2014)
Masonry manufacturer sued masonry contractor on open account and contractor counterclaimed for damages for defective products. Contractor's failure to plead condition precedent of timely notice did not preclude claim as pleadings gave manufacturer sufficient notice to adequately respond. As a factual matter, contractor failed to give timely notice of defects to manufacturer under the UCC because it continued to install the defective blocks long after discovering the defects but before giving notice of the defects. Contractor's loss of future contracting partners was reasonably foreseeable at the time of contracting and the amount of damages was proven and not speculative, so contractor was entitled to consequential damages in the form of lost profits. Manufacturer's claim against contractor constituted a valid open account and contractor was obligated to pay for the goods it accepted. The amount owed by the contractor on open account may be used to offset damages owed by the manufacturer.

CONSTITUTIONAL LAW

Mootness & Public-Importance Exception

Homan v. Branstad, 864 N.W.2d 321 (Iowa 2015)
Court declines to address the merits of whether an injunction was properly issued preventing the Governor and the Director of the DHS from closing the Iowa Juvenile Home in Toledo. Instead, the Court found the issue to be moot since the legislature expressly decided not to appropriate funds for the facility's operation. After a concise review of the "public-importance" exception to the mootness doctrine, the Court found that the exception did not apply and vacated the injunction.

Telemed Abortions

Planned Parenthood v. Board of Medicine, 865 N.W.2d 252 (Iowa 2015)
Board of Medicine rule requiring personal examination by a physician before abortion-inducing drugs can be administered had the effect of prohibiting telemedicine abortions. The Court declined to address the issue of whether the Iowa Constitution affords greater protections than the U.S. Constitution because the Board's rule violates the controlling "undue burden" test announced by the U.S. Supreme Court as the federal constitutional test.

Anti-Discrimination Ordinance

Baker v. City of Iowa City, 867 N.W.2d 44 (Iowa 2015)
City ordinance prohibiting discrimination in employment that purported to apply to employers with only one employee had previously been found to violate the Iowa constitution because it exceeded the city's home rule authority. However, city and civil rights commission were not liable for Section 1983 damages because the ordinance did not violate employer's federal constitutional rights of freedom of association, freedom of speech, due process, or equal protection. Rational basis analysis was applied to the applicable federal constitutional provisions.

CONTRACTS

Slot Machine Bonus Error

McKee v. Isle of Capri Casinos, Inc., 864 N.W.2d 518 (Iowa 2015)
Rules of casino slot machine form the relevant contract between the casino and the patron and it is an express contract. Fact that patron failed to read the rules is not

relevant. Rules of the game did not provide for the $41 million bonus claimed by the patron playing penny slots even though a message appeared on the screen proclaiming the bonus. Patron's breach of contract claim failed as a result. Patron also could not recover under theories of equitable or promissory estoppel because there was no evidence that the casino made any representations or that the patron detrimentally relied on anything. Consumer fraud claim failed because there was no "ascertainable loss of money or property," as required by the statute.

CORPORATIONS

Organizing Residential Cooperatives

Dolphin Residential Co-op v. Bd. of Review, 863 N.W.2d 644 (Iowa 2015)
In a 5-2 decision, the Court holds that forming a residential cooperative under Iowa Code Chapter 499A by using two lawyers as the organizers does not meet the required "organizational test" of the *Krupp* case. This is because the organizers did not "organize themselves," as required by the statute, when they had no subsequent involvement in the cooperative. Since the cooperative was not properly established, it was not entitled to the benefit of being taxed at residential rates rather than commercial rates.

Organizing Residential Cooperatives II

City of Iowa City v. Iowa City Review Bd., 863 N.W.2d 663 (Iowa 2015)
Iowa Code Chapter 499A (dealing with residential cooperatives) requires "two or more persons of full age" to be organizers. The two or more required organizers can be corporations and do not need to be natural persons. Chapter 499A does not require a one-apartment-unit-per-member ownership ratio for a multiple housing cooperative to be properly organized. Looking beyond what is required to properly organize the cooperative to how the membership certificates are held "meanders into the actual use of the property," which is an improper inquiry under the standard set in *Krupp*.

CRIMINAL LAW

No Merger of Drug Possession & Introduction Charges

State v. Stewart, 858 N.W.2d 17 (Iowa 2015)
The crimes of Possession of a Controlled Substance and Introduction of a Controlled Substance Into a Detention Facility do not merge and may be simultaneously charged in one criminal prosecution.

No Suspension of Serious Injury by Vehicle Sentence

State v. Rouse, 858 N.W.2d 23 (Iowa App. 2014)
Defendant entered *Alford* pleas to Serious Injury by Vehicle (a class D felony under Section 707.6A(4)) and OWI. Section 707.6A(7) prohibits suspension of the sentence for a violation of "subsection 4 involving the operation of a motor vehicle while intoxicated." Even though Defendant only pled to the "reckless driving" theory of Serious Injury by Vehicle, since there was no question that Defendant's crime "involved" operating a motor vehicle while intoxicated, Section 707.6A(7) applied and prohibited suspension of the sentence. Such an outcome does not violate the Equal Protection clauses of the state or federal constitutions.

Merger of Willful Injury & Assault With Intent

State v. Love, 858 N.W.2d 721 (Iowa 2015)
Defendant was convicted of Assault With Intent to Inflict Serious Injury (as a lesser included offense of Attempted Murder) and Willful Injury Causing Bodily Injury. The Court agreed with Defendant's argument that the two crimes must be merged. Both sides and the Court agreed that there was sufficient evidence to support a finding of two separate assaults. They also agreed that Assault With Intent to Inflict Serious Injury is a lesser included offense of Willful Injury. If the case had been tried differently or different instructions had been given to the jury (e.g., asking the jury to determine whether there was a sufficient "break in the action" so as to support a finding of separate assaults), the charges would not be required to be merged. However, since no such explanatory instructions were requested by the State or given by the trial court, the two charges were required to be merged in this case. A concurring opinion spelled out how the ruling should be implemented in the trial courts in the future.

Level of Confinement Needed to Support Kidnapping Charge

State v. Robinson, 859 N.W.2d 464 (Iowa 2015)
Applying the *Rich* three-pronged test, the Court finds insufficient evidence to support a kidnapping conviction. The confinement of the victim to sexually assault her was incidental to the underlying sexual assault. Tossing the victim's cell phone, locking of the doors to the apartment and to a bedroom in the apartment, covering of the victim's mouth, and the additional confinement associated with moving the victim from the hallway to the bedroom did not substantially increase the risk of harm to the victim, significantly lessen the risk of detection, or significantly facilitate escape.

Standards for Instructing on Intoxication Defense

State v. Cordero, 861 N.W.2d 253 (Iowa 2015)
Intoxication defense only applies to specific intent crimes and is not sustained by mere evidence of intoxication. An instruction on the defense is not required until the evidence would permit the fact finder to conclude the intoxication caused the defendant to lack the mental ability to act with the required specific intent. Here, the evidence was that the murder defendant had consumed beer on the day of the crime, but nearly all witnesses testified he was not intoxicated. One witness said he was "probably intoxicated," but no evidence was presented to back up this tenuous and conclusory observation.

Acquittal-First Instruction on Murder Charge

State v. Ambrose, 861 N.W.2d 550 (Iowa 2015)
The Court declines to address an issue which has not been decided, which is whether it is improper to instruct the jury that it must first decide the defendant's guilt or innocence on the greater offense (i.e., murder) before considering a lesser offense (i.e., voluntary manslaughter). Error was not preserved on the issue and there was no ineffective assistance of counsel because evidence of guilt on the greater charge was overwhelming. Five instructions addressing inferences were not an improper comment on the evidence. While the stock instructions could be repetitive or improper comment in certain cases, they were not in this case, as each corresponded with a specific offense.

Burglary – Scope of "Occupied Structure"

State v. Rooney, 862 N.W.2d 367 (Iowa 2015)
Overturning a jury verdict finding a scrapper guilty of burglary, the majority in a 4-3 decision finds that a dilapidated building owned by the city that had been boarded up, that had no electricity or running water, that was falling apart, that the city had decided to demolish, that was the subject of a contract for demolition, and that was subject to imminent demolition was not an "occupied structure" under the burglary statute because it did not meet either the "type" or "purpose" prong of the statute. The dissenters noted that it was a fact question both whether the house was the "type" of structure covered by the statute and whether the "purpose" of the house was the storing of valuables, and that sufficient evidence of both was introduced to support the conviction.

Elements and Jury Instructions – Fraudulent Practices

State v. Hoyman, 863 N.W.2d 1 (Iowa 2015)
In a fraudulent practice case under Iowa Code Section 714.8(4) (entry in public records), the jury should be instructed that "false" means the defendant made the

entry or alteration *with intent to deceive*, not just that the entry was untrue. An instruction need not mirror the precise language of the statute; conversely, an instruction is not necessarily adequate just because it repeats what the statute says. The term "false," as used in the statute, should have been defined for the jury to mean "with intent to deceive." Also, appropriate instructions under the pre-2014 fraudulent practices law must make it clear that in determining the degree of fraudulent practice based on an aggregation theory, the State must prove beyond a reasonable doubt that the defendant *obtained* some money, property, or service through each act being aggregated.

Front Steps of Single Family House Are Not a Public Place

State v. Paye, 865 N.W.2d 1 (Iowa 2015)
Distinguishing a prior case (*Booth*) that held that the front steps and common hallway of an apartment house are public places, a unanimous court holds that the front steps of a single-family home are not a public place under the Public Intoxication statute unless the home's residents make them public by extending a general invitation to the public at large to come upon the property.

Statute of Limitations – Sexual Abuse As Lesser Included

State v. Walden, 870 N.W.2d 842 (Iowa 2015)
Exception to the three-year statute of limitations for Sexual Abuse of a minor does not apply to a Kidnapping to Commit Sexual Abuse of a Minor charge because Kidnapping is not one of the enumerated exceptions. This is true even though Sexual Abuse in the Second Degree is a lesser included offense of the Kidnapping to Commit Sexual Abuse of a Minor charge. The Court declines to apply the "absurd-results" doctrine even though its interpretation of the statute results in a determination that a shorter limitation period applies to the greater charge than to a lesser included offense.

Intent As Element of Voluntary Manslaughter – Merger Issues

State v. Ceretti, 871 N.W.2d 88 (Iowa 2015)
After accepting a favorable plea agreement on a First Degree Murder charge, Defendant challenged his convictions for Attempted Murder, Willful Injury Causing Serious Injury, and Voluntary Manslaughter based on merger. The Court holds that the crime of Voluntary Manslaughter contains no specific intent to kill element, so it does not merge with Attempted Murder or Willful Injury under the Blockburger test. However, Rule 2.23(2) prevents the State from punishing Defendant for both attempting and completing the same homicide when the convictions are based on the same acts directed against the same victim. The remedy for the problem was to vacate all three convictions and the entire plea bargain and remand the case. At

the trial court level, the State is permitted to reinstate any charges and file any additional charges supported by the evidence.

Causation in Criminal Case – Principal & Aiding & Abetting

State v. Tyler, 873 N.W.2d 741 (Iowa 2016)
Defendant convicted of Murder in the Second Degree. Defendant's punch knocked the victim down and then others in Defendant's group kicked and stomped the victim to death. Principles of causation normally associated with civil tort litigation are pertinent in criminal cases. Defendant was guilty as a principal, even though his punch did not kill the victim and Defendant did not kick or stomp the victim. The chain of causation was not attenuated. The Court continues to decline to answer whether the "legal cause" aspect of the former proximate cause doctrine has any continuing viability in criminal cases after the decision in Thompson v. Kaczinski. Defendant was also guilty under an aiding and abetting theory. Defendant's act of throwing a bunch when a group had surrounded the victim was at least as much encouragement as a "let's get him" statement would have been. Although it was a close call, evidence was insufficient to establish that there was a plan in place between Defendant and the others in the group when Defendant struck the first blow. Thus, Defendant could not be criminally liable under a joint criminal conduct theory. Since the jury instructions included joint criminal conduct theories and there was a general verdict, Defendant was entitled to a new trial because there was no way of knowing whether the guilty verdict rested on the improper joint criminal conduct theory.

Delivery of Drugs Resulting in Death of Purchaser

State v. Miller, 874 N.W.2d 659 (Iowa App. 2015)
Defendant sold heroin to a man and woman, both of whom ingested it. The man died and Defendant was found guilty of Involuntary Manslaughter. In a 2-1 decision, the majority found insufficient evidence to support a finding of recklessness to support the verdict. There is no *per se* rule that delivery of heroin, without more, is always substantial evidence of recklessness. Distinguishing other cases where a verdict had been upheld, the Court noted that there was no evidence of the quality of the heroin to support an inference of Defendant's knowledge of a greater likelihood of death, of Defendant's knowledge of the decedent's health issues, of Defendant's knowledge that the two purchasers had also been drinking, or establishing the probability of heroin overdose. Also, purchasers were only at Defendant's residence for five minutes and Defendant was not present when the heroin was ingested.

CRIMINAL PROCEDURE

Restitution Modification

State v. Morris, 858 N.W.2d 11 (Iowa 2015)
District court erred by rescinding a prior order that, at the inmate's request, had increased the amount of restitution deducted from the inmate's prison earnings. The prior order increasing the amount paid to restitution resulted in less money being available to other categories of distributes under the statutory scheme (i.e., the Department of Corrections and the general fund), but, since it did not change the priority of any classes of distributes, it was error for the district court to rescind it.

PCR Challenges to Jury Instructions & Discharge Dates

James v. State, 858 N.W.2d 32 (Iowa App. 2014)
In postconviction relief proceedings, the rule permitting challenges to an illegal sentence at any time cannot be used as a vehicle to re-examine errors occurring at trial or other proceedings prior to the imposition of sentence. Challenges to jury instructions do not implicate the legality of a sentence, so cannot be raised at any time. Such challenges were barred by the three-year statute of limitations. Also, arguments that the manner in which minimum parole and temporary discharge dates were calculated deprived the claimant of prison services is essentially a challenge to conditions of confinement and not a challenge to the legality of the sentence. Consequently, such claim is also barred by the statute of limitations.

In-Person Meetings Between Counsel & Inmate Awaiting Trial

State v. Robinson, 859 N.W.2d 464 (Iowa 2015)
Iowa Code Section 804.20, giving a detainee the right to meet in-person and confidentially with counsel, applies to the period after arrest but prior to the formal commencement of criminal charges. It does not apply to the period of time from commencement of charges through trial. Thus, Section 804.20 does not give counsel the right to "barrier-free" access to counsel's client in jail leading up to trial. Claims that the lack of barrier-free access to counsel violated defendant's constitutional rights were not properly preserved and were not addressed.

Conflicted Defense Counsel

State v. Vaughan, 859 N.W.2d 492 (Iowa 2015)
A new trial is not required when the trial court replaces a conflicted defense attorney with a conflict-free attorney more than three months before trial and there is no showing that the previous conflict had ongoing adverse effects on the representation.

Excited Utterance, Confrontation Clause & Turecek

State v. Tompkins, 859 N.W.2d 631 (Iowa 2015)
Trial counsel was not ineffective for failing to object on Confrontation Clause grounds to evidence of statements made to law enforcement by domestic abuse victim that were admitted under excited utterance exception to the hearsay rule. When the declarant (i.e., the victim) appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of the declarant's prior testimonial statements. This is true even when the declarant is not asked to testify about any of the subject matter in the declarant's out-of-court statement that was offered through a different witness. Also, when a witness's hearsay statement is admissible to prove the truth of the matter asserted, there is no *Turecek* violation. The issue of whether trial counsel should have objected to officer's testimony about what another witness said about the incident was preserved for postconviction relief.

Invalid Alternative Theory in Jury Instructions

State v. Thorndike, 860 N.W.2d 316 (Iowa 2015)
Trial court instructed the jury on two alternative theories of Lascivious Acts, namely that (1) Defendant fondled the victims, or (2) Defendant permitted or caused the victims to fondle him. The first theory was not supported by the evidence; the second was. Even though it was improper to instruct on the first theory, trial counsel was not ineffective in failing to object to the instruction because Defendant failed to show prejudice because it was unlikely the instruction had any effect on the jury's decision. This conclusion was bolstered by the fact that the State offered no evidence of the first theory and the State, in closing argument, conceded that the first theory "probably doesn't apply" and argued that the State was relying on the second theory.

Factors to Consider at Resentencing

State v. Hopkins, 860 N.W.2d 550 (Iowa 2015)
On first appeal, one of Defendant's six drug-related convictions was reversed. Neither party objected to resentencing. At resentencing, trial court did not abuse its discretion in imposing the same concurrent prison sentences (less the sentence for the conviction that had been reversed) and declining to grant probation. Trial court is to consider the rehabilitation efforts of Defendant while in prison between the original sentencing and the resentencing, but rehabilitation efforts are only one of many factors to consider. Getting an updated PSI prior to resentencing is neither statutorily required nor prohibited, but an updated PSI may be a useful tool. Record was inadequate to determine whether trial counsel was ineffective for failing to request an updated PSI report.

Ineffective Assistance in Plea Bargaining

Dempsey v. State, 860 N.W.2d 860 (Iowa 2015)
Assuming without deciding that trial counsel failed to perform an essential duty when counsel overstated by one year the maximum sentence to which client would have been exposed under the terms of the first plea offer, postconviction claim for ineffective assistance of counsel failed because client could not demonstrate prejudice. Reasonable probability that the first plea offer would have been accepted if accurate information was provided was not shown. Client's subjective, self-serving testimony was not sufficient. Furthermore, evidence established that client rejected the first plea offer, not because of deficiencies of counsel, but because the client was expecting that victim and eyewitness would not cooperate with prosecution. The first offer was withdrawn and a less favorable offer was made and accepted after the witnesses arrived for depositions.

Determining Internal Conflicts of Interest in Public Defender's Office

State v. McKinley, 860 N.W.2d 874 (Iowa 2015)
Once an attorney is appointed, the attorney should not be removed absent a factual and legal basis to terminate the appointment. Court can disqualify defendant's preferred attorney if the circumstances present an actual or a serious potential for conflict of interest. State public defenders representing murder defendant had no actual or serious potential for conflict as a result of other attorneys in that public defender's office having represented three of the State's witnesses in the past on unrelated matters. Such representation also did not violate duties owed to the former clients because the past representation of the witnesses by other public defender attorneys was not "substantially related" to this murder charge, even though the former clients' prior convictions from the past representation would likely be used to impeach the witnesses. Current attorneys for murder defendant had no knowledge of details of prior representation, had not reviewed the former clients' files, and had taken prophylactic measures shielding themselves from the files. Two concurring justices wanted to resolve an issue the majority chose not to decide by holding that a public defender's office is not a firm and an individual public defender's conflict of interest is not automatically imputed to the entire public defender's office.

Shackling of Defendant at Trial

Johnson v. State, 860 N.W.2d 913 (Iowa App. 2014)
A due process violation occurs if the defendant is shackled in the presence of the jury, without articulated reasons why the shackling is necessary. Prejudice need not be shown if this occurs. *On direct appeal*, the burden is on the State to prove beyond a reasonable doubt that the shackling did not contribute to the verdict.

However, in a case of first impression, on postconviction relief based on claimed ineffective assistance of counsel, the burden is not on the State. When a postconviction applicant raises an ineffective-assistance claim alleging counsel breached an essential duty by failing to object to the applicant's shackling at trial, the applicant still must show a reasonable probability the result of the proceeding would have been different but for counsel's breach of duty. The case was remanded to apply that standard. Applicant waived attorney-client privilege by alleging ineffectiveness of counsel. Applicant was not entitled to a state-funded expert at postconviction proceedings to address his intoxication at the time of the crime, as the applicant had tried to obtain such an expert at trial, but the expert did not agree that the applicant was intoxicated to the point his judgment was impaired.

Speedy Indictment Rule – Delayed OWI Charge

State v. Penn-Kennedy, 862 N.W.2d 384 (Iowa 2015)
Forty-five-day speedy indictment rule was not violated when subsequent OWI charge was filed more than 45 days after the defendant's arrest for Public Intoxication. This is true even though the defendant may have reasonably believed he also was arrested for OWI on the night of the incident. The reasonable belief of arrest rule of *Wing* is narrow and limited to those cases in which an arrest is not promptly followed by any prosecution.

Stating Reasons for Sentence

State v. Thacker, 862 N.W.2d 402 (Iowa 2015)
Written guilty was submitted and sentencing was done without a hearing. The sentencing order stated that the reason for the sentence as "the plea agreement." However, no plea agreement was contained in the written guilty plea or elsewhere in the record. In a 4-3 decision, the majority noted that when the trial court imposes a sentence agreed to by the parties, it does not exercise discretion in a fashion that requires a statement of reasons on the record. However, since there is no record of the plea agreement, there is no way of knowing whether the plea agreement was followed or whether the trial court deviated. The sentence was vacated and the case was remanded. The dissenters said the ruling elevated form over substance since no claim was made that the district court deviated from the plea agreement.

Counsel on Prior Offenses Used to Enhance Current Charge

State v. Young, 863 N.W.2d 249 (Iowa 2015)
Under the Iowa constitution, a misdemeanor defendant has a right to the assistance of counsel when the defendant faces the possibility of imprisonment. Because the defendant in this case was not provided the assistance of counsel in a prior case and the State stipulated that there was not a valid waiver of the defendant's right to

counsel in the prior case, the prior misdemeanor conviction cannot be used as a predicate offense to enhance a later charge. Three concurring justices would have refused to allow the tainted prior conviction based on the Iowa Rules of Criminal Procedure, rather than under the Iowa constitution.

Administrative Order to Address Criminal No Contact Orders

Ostergren v. Iowa Dist. Ct. for Muscatine County, 863 N.W.2d 294 (Iowa 2015)
District court has the authority to issue and enforce an administrative order setting forth a procedure for addressing requests from protected parties requesting modification or cancellation of no contact orders issued in criminal proceedings. Since trial court has authority to modify or terminate the orders *sua sponte*, trial court has the authority to modify or terminate at the request of the protected party without a request from the County Attorney. This is true even though protected parties are not parties to the action because the protected parties have a particularized interest at stake. While upholding the administrative order, the Court observed that it continued to discourage "a proliferation of idiosyncratic local rules," especially ones establishing a procedural protocol for a single county within a judicial district.

Use of Habeas Corpus To Challenge Effectiveness of Counsel

State v. Hernandez-Galarza, 864 N.W.2d 122 (Iowa 2015)
In a good review of the history and procedure of habeas corpus proceedings, Defendant was denied habeas corpus relief due to failure to comply with pleading requirements of Iowa Code Chapter 663 and failure to demonstrate facts sufficient to sustain a writ of habeas corpus. Defendant who was potentially suffering immigration consequences as a result of a guilty plea and deferred judgment sought habeas corpus relief based on a claim of ineffective assistance of counsel. Defendant had completed probation and had his record expunged. The Court declined to conclude that collateral consequences of Defendant's criminal proceedings were sufficient to show that the State of Iowa was somehow detaining or had custody of Defendant.

Juror Misconduct and Bias

State v. Webster, 865 N.W.2d 223 (Iowa 2015)
In a good review of the standards for addressing juror misconduct and bias (and the differences between the two concepts), the Court found no juror misconduct in the following events of this murder case: (1) while getting pizza at a convenience store during trial, the juror gave an ambiguous "yeah" response to fellow patrons who stated that "everyone knows he's guilty." Juror did not initiate the conversation, did not engage in an extended discussion of the merits, and tried to end the nettlesome

interaction; and (2) researching the age of one of the key participants in the altercation that resulted in the murder was not misconduct because the research was done after the verdict was rendered. On the issue of juror bias (the juror knew members of the victim's family), there was no evidence the juror provided false testimony during *voir dire* or in an *in camera* examination of the juror when the relationship came to light during trial. Failure to volunteer an answer to an unasked question does not amount to juror misconduct or a finding of bias. The closest issue involved the juror, during trial, "liking" the victim's stepmother's post on Facebook that said "give me strength." The Court stated that "liking" the post was a communication that violated the admonition (although the admonition was unreported), but did not relate to the guilt or innocence of the defendant. While strongly criticizing the juror's actions, the Court found the trial court did not abuse its discretion in not granting a new trial. One dissenter would have granted a new trial because of the close relationship between the juror and the victim's stepmother.

Factors to Consider in Sentencing Juveniles for LWOP Offenses

State v. Seats, 865 N.W2d 545 (Iowa 2015)
Defendant, who was a juvenile at the time he committed murder, was resentenced in light of Miller, but was still given life without parole (LWOP). In a 4-3 decision, the Court reversed, holding that sentencing of a juvenile for an offense that would otherwise carry LWOP sentence requires the sentencing judge to consider: (1) the Supreme Court's pronouncement that sentencing a juvenile to LWOP should be rare and uncommon; (2) that children are constitutionally different from adults; (3) the circumstances of the homicide offense, including the extent of the juvenile's participation in the conduct and the way familial and peer pressure may have affected the juvenile; and (4) that juveniles are more capable of change than are adults. Fact that the child was nearly 18 when the offense occurred did not matter, as the constitutional cutoff is 18, not almost 18. The Court criticized the sentencing judge for using the juvenile's family and home environment, underdeveloped sense of responsibility, and vulnerability to peer pressure as aggravating factors, when they are required to be considered mitigating factors. Resentencing was ordered. The majority expressly declined to reach the issue of whether sentencing a juvenile to LWOP categorically violates the Iowa constitution prohibition on cruel and unusual punishment. The dissenters strongly criticized the majority for avoiding both the issue of whether LWOP sentences for juvenile offenders are categorically unconstitutional and the issue of whether, even if not categorically unconstitutional, such a sentence was unconstitutional in this case. As part of that criticism, the dissenters pointed out that resentencing was unnecessary, as the trial court had already applied the relevant case law standards.

Resentencing Juveniles on First Degree Murder – Available Options

State v. Louisell, 865 N.W.2d 590 (Iowa 2015)
On resentencing of Defendant, who was 17 years old at the time she committed first degree murder, trial court did not have authority to impose a determinate term of twenty-five years in prison. Although trial court did have authority after considering the *Miller* factors to resentence Defendant to life in prison with eligibility for parole, trial court did not have authority at the time of resentencing to order commencement of Defendant's eligibility for parole to begin after serving 25 years in prison. The Court left for another day the issue of whether current parole standards, which Defendant argued were being applied to deny meaningful opportunity for parole, were constitutional. Three dissenters pointed out that recent legislative changes give three options and the trial court should be allowed to choose one of those options rather than being told what the sentence must be.

Attempted Murder & Voluntary Manslaughter – "One Death, One Homicide" Rule

Termaat v. State, 867 N.W.2d 853 (Iowa App. 2015)
Attempted Murder is not a homicide offense. As a result, being sentenced for both Voluntary Manslaughter and Attempted Murder was not an illegal sentence because the sentences did not violate the "one death, one homicide" rule.

Speedy Trial – Trial Within One Year of Arraignment

State v. Elder, 868 N.W.2d 448 (Iowa App. 2015)
Defendant's right to be brought to trial within one year of arraignment was violated. There is no question that Defendant did not waive the right. Even though Defendant sought and obtained numerous delays, no delays within the last month prior to expiration of the deadline were attributable to Defendant. Therefore, the State failed to meet its "heavy burden" to show that delay attributable to Defendant or other "good cause" required continuing trial beyond one year. The Court reiterated that the general press of court business is insufficient to avoid dismissal, especially when the "court congestion" is chronic as opposed to being caused by unique, non-recurring events. The Court also mentioned that the pattern of continuances – always for four, five, or six weeks and always into a subsequent month – strongly suggested a "regular" trial schedule which was adhered to even at the cost of violating Defendant's speedy trial rights. The Court also emphasized that judicial resources are supposed to be prioritized to address criminal matters over civil matters, suggesting that it is necessary to pull other judges from civil matters in order to bring the case to trial in a timely manner to avoid a finding of a violation of the speedy trial right.

Disqualification of Prosecutor Due to Threats by Defendant

State v. Dist. Ct. for Dubuque County, 870 N.W.2d 849 (Iowa 2015)
In a case of first impression, the Court unanimously holds that a defendant's threats alone to a prosecutor do not require disqualification or recusal of the prosecutor. When a threat to a prosecutor does not form the basis for a separate criminal prosecution, and when the prosecutor is not the victim, the prosecutor does not have a disqualifying conflict of interest in the underlying prosecution. Trial court abused its discretion in disqualifying individual prosecutor and, therefore, abused its discretion in disqualifying the entire county attorney's office.

Breach of Plea Agreement at Sentencing & Two Victim Impact Statements

State v. Lopez, 872 N.W.2d 159 (Iowa 2015)
This case gives a thorough review of plea bargaining and the obligation of the State to comply with plea agreements. Prejudice is presumed when defense counsel fails to object to the State's breach of a plea agreement at sentencing. Father of a minor child victim is a "victim" under Chapter 915 and entitled to give a victim impact statement. Child victim's GAL from a CINA proceedings is not automatically a proper designated person to give a victim impact statement for the child, but may be the proper person to give a victim impact statement, provided the GAL is properly designated as the child's representative under Section 915.21(1)(e). When there is no indication that the prosecutor solicited the victim impact statements given by the father and the GAL, the prosecutor, regardless of any plea agreement, cannot block victims from giving victim impact statements. Prosecutor breached the plea agreement by introducing photographs of the child victim's injuries and using them to cross-examine Defendant's witnesses at sentencing. Prosecutor, who had agreed to recommend deferred judgment as part of plea agreement, effectively undermined the recommendation by using the photos to suggest a more onerous sentence was warranted. Remedy for breach of the plea agreement was to remand for resentencing before a different judge.

Honoring Plea Agreement at Sentencing

State v. Frencher, 873 N.W.2d 281 (Iowa App. 2015)
When plea agreement calls for the State to make a sentencing recommendation, "mere compliance is inadequate; the State must comply with the spirit of the agreement as well." Here, although the prosecutor discussed Defendant's criminal history and some of the negative information in the PSI, the prosecutor strongly advocated for the recommended sentence and did not express a material reservation regarding the sentencing recommendation. Therefore, the prosecutor did not breach the plea agreement and Defendant's counsel was not ineffective for failing to object to the prosecutor's statements.

State Appellate Defender Must Be Appointed First

Weiler v. State Public Defender, 873 N.W.2d 286 (Iowa App. 2015)
Private attorney appointed to represent a defendant on appeal was denied compensation by the State Public Defender. Because statute requires the State Appellate Defender to be appointed first and that was not done in this case, the State Public Defender was not obligated to pay the claim. In spite of the trial court's effort to require payment to avoid unfairness to appointed counsel, the Court denied the claim due to noncompliance with the statute.

Ex Parte Hearing Required on Defense Request for Investigator

State v. Dahl, 874 N.W.2d 348 (Iowa 2016)
Defendant seeking to have a private investigator appointed at public expense is entitled to have the hearing on the application conducted *ex parte* to avoid disclosing defense strategy. The case gives a detailed explanation of the protocol to follow in that instance.

DEBTOR / CREDITOR

Secured Lender Priority Over Receiver Costs

Dept. of Human Services v. Community Care, 861 N.W.2d 868 (Iowa 2015)
Neither Iowa Code Section 249A.44(3) nor Section 680.7 authorizes the expenses of a receiver appointed under Section 249A.44(3) to be charged against a secured creditor's collateral. Instead, Iowa follows the general equitable rule on receiverships, under which the costs of a receiver may be charged against a third party's security interest only to the extent the secured party has been shown to benefit from the receiver's services or in the event the secured party has consented to the receiver. Secured party did not consent to the receiver. Remand was necessary to determine if and how much the secured party had received benefit.

Certification of Class Action – Sequencing of NSF Transactions

Legg v. West Bank - I, 873 N.W.2d 756 (Iowa 2016)
In a good review of the procedure to follow in certifying a class action, class certification was affirmed on claims that bank violated contractual duty of good faith when it changed sequencing of transactions from "low to high" to "high to low" in calculating NSF charges.

Sequencing of NSF Transactions & Usury

Legg v. West Bank - II, 873 N.W.2d 763 (Iowa 2016)
Bank's payment of overdraft amounts on bank card transactions does not constitute

an extension of credit under the Iowa Consumer Credit Code ("ICCC"). Consequently, usury claims based on complaints of overdraft charges were properly dismissed. Because the issue of sequencing was expressly covered by the account agreement contract between the parties, depositors had no unjust enrichment claim based on the bank's use of "high to low" sequencing of checks and bank card transactions. The same express contract governed the bank's duty to act in good faith. Bank was not entitled to summary judgment on the claim that its change in sequencing from "low to high" to "high to low" without notifying customers violated bank's duty to act in good faith. Since the customers' claims of lack of good faith were based on written contractual obligation (i.e., the account agreement) rather than the implied duty of good faith, there is a 10-year statute of limitations rather than a 5-year limitation period.

Failed Forbearance Agreement & Set-Off of Accounts

First American Bank v. Urbandale Laser Wash, 874 N.W.2d 650 (Iowa App. 2015)
Acceptance of offer must conform strictly to the offer. Bank's email detailing terms of a forbearance agreement were not accepted in whole by delinquent loan customer. Loan customer's reply email detailing terms the customer did not agree to resulted in a lack of acceptance of the offer and no meeting of the minds to form a forbearance agreement. Loan and account documents gave the bank the right to freeze and apply funds in the accounts to outstanding loan amounts and expenses related to mortgaged property. Bank's voluntary decision to provide a demand letter did not require the bank to wait until the deadline stated in the demand letter to exercise the right to freeze and set-off. Bank's decision to freeze the accounts for several months before actually applying the funds (retroactively to the date of freezing) was not improper, as it actually worked to customer's advantage by leaving flexibility for the parties to continue to try to work out a resolution.

DIVORCE / FAMILY LAW

Retirement's Impact on Spousal Support

In re Marriage of Gust, 858 N.W.2d 402 (Iowa 2015)
In a 4-3 decision, the question of whether the payor's spousal support should be reduced upon the payor's retirement must be made in a modification action when retirement is imminent or has actually occurred. Dissenters would have ended spousal support when payor reaches the age when payor would be eligible for full Social Security retirement benefits or actually retires, whichever is later. Dissenters pointed out that retirement is in the contemplation of the trial court, so the payor cannot win a modification action upon retirement.

No Dissolution Decree With Property Division to Follow

In re Marriage of Thatcher, 864 N.W.2d 533 (Iowa 2015)
Iowa Code Section 598.21(1) requires a dissolution decree to divide the property at the same time the decree is entered. Courts do not have the authority to bifurcate the proceedings by entering a decree dissolving the marriage and later issuing a decree dividing the property. Since the trial court improperly bifurcated, the dissolution decree was vacated, meaning that the parties were still married when the wife died (the trial court had bifurcated knowing the wife was going to die).

Limitations on Garnishment for Back Child Support & Interest

State ex rel. Benson v. Jager, 865 N.W.2d 608 (Iowa App. 2015)
Child support obligor had disability payments garnished to pay current and delinquent support obligations as well as interest. The "United States Rule" regarding applying payments to interest first and then to principal when retiring a judgment did not apply in this situation because the obligor was having 50% of her disability payments garnished – an amount in excess of normal garnishment limits that is only permitted for support obligations (a defined term which does not include interest). Judgment holder was not entitled to use the benefits of the excess garnishment (which would not be available to collect interest) to collect larger amounts and then apply them to interest first. Collected amounts using garnishment in excess of the usual cap went to pay past due child support payments first. After the arrearage (not including interest) was paid off, the excess garnishment is not permitted and garnishment is limited to the usual caps on garnishment as interest is paid off.

Relocation of Custodial Parent Does Not Warrant Modification

In re Marriage of Hoffman, 867 N.W.2d 26 (Iowa 2015)
Mother had primary physical care and father had extraordinary visitation. Both remarried. Mother then moved 70 miles away and father sought to modify physical care. In a 4-3 decision, the Court vacated the trial court's decision to modify and transfer physical care to the father, finding the father failed to meet the heavy burden to show a substantial change in circumstances and failed to show a superior ability to minister to the needs of the children. In reaching this conclusion, the Court disregarded the trial court finding that the mother's move was motivated by her self-interest rather than the children's best interests, disregarded the preferences of the children (ages approximately 10 and 13), disregarded the guardian ad litem's recommendation, and disregarded information about the differences in the quality of the school systems at issue.

Spousal Support & Order to File Joint Tax Returns

In re Marriage of Witherly, 867 N.W.2d 856 (Iowa App. 2015)
The title of whether alimony is "traditional, rehabilitative, or reimbursement" is not important. What is important is whether the award of alimony was appropriate in terms of amount and duration. Court of Appeals reduced the alimony award to the wife (who was 49 years old) from $2600 per month until 65, death, or remarriage to $2600 per month for five years and $1300 per month thereafter until 65, death, or remarriage. Trial court acted within its authority in declining to let the wife control the method of filing tax returns while the parties were married. Thus, trial court properly ordered the parties to file a joint tax return for 2012 (the tax year before the divorce was concluded), which would result in $16,000 in tax savings. However, the trial court lacked authority to order the parties to file a joint tax return in 2013 (the year in which the divorce decree was entered).

Spousal Support – No Guidelines

In re Marriage of Mauer, 874 N.W.2d 103 (Iowa 2016)
Spousal support guidelines promulgated by various groups may provide a useful reality check in some cases, but they cannot serve as the starting point for a trial court or as the decisive factor for a reviewing court on appeal. Court of Appeals' reliance on spousal support guidelines to set spousal support at $25,000 per month was inappropriate. Applying the statutory factors, spousal support was reduced to $12,600 per month until the recipient wife retired, $6,500 per month after the wife retired, and $5,000 per month when the husband reached retirement age or retired.

No Attorney Fees for Contempt Action Under Chapter 600B

In re Myers, 874 N.W.2d 679 (Iowa App. 2015)
Unwed custodial parent who successfully brings a contempt action under Iowa Code Section 600B.37 to enforce a child support order cannot recover attorney fees.

EMPLOYMENT

Section 216.6A Prospective Only & Each Paycheck Starts New Limitation Period

Dindinger v. Allsteel, Inc., 860 N.W.2d 557 (Iowa 2015)
Answering certified questions from federal court, the Court holds that Iowa Code Section 216.6A (Iowa's equal pay law) and the accompanying remedial language in Section 216.15(9)(a)(9) apply on a prospective basis only to conduct occurring after the statutes' effective date of July 1, 2009. The statutes are substantive, rather than remedial, so they applied prospectively only. As for claims of wage discrimination under the preexisting law (namely Section 216.6, which was in effect

prior to July 1, 2009), each paycheck is a discriminatory practice and a new 300-day limitations period applies to each check.

Collective Bargaining – Procedures for Staff Reduction

Board of Regents v. Iowa PERB, 861 N.W.2d 268 (Iowa App. 2014)
Public Employment Relations Board ("PERB") decided that UNI's early separation incentive program was a procedure for staff reduction. Therefore, the program was subject to mandatory collective bargaining. PERB's determination was not illogical, unreasonable, arbitrary, capricious, or an abuse of discretion, so was affirmed pursuant to the Iowa Administrative Procedure Act.

Unemployment for Part-Time Employee

Powell v. Employment Appeal Board, 861 N.W.2d 279 (Iowa App. 2014)
Part-time music professor at DMACC filed a claim for unemployment benefits. The Board found that the professor was not entitled to benefits for reduced time over the summer and during breaks, as the professor's reduction in hours during those times was contemplated by the original contract of hire. Since substantial evidence supported the Board's finding, it was affirmed. Pursuant to Iowa Code Section 96.3(7), the professor was required to return the benefits paid to him, notwithstanding his lack of fault in receiving the overpayment.

Scope of Liability Under Respondeat Superior

Giudicessi v. State, 861 N.W.2d 606 (Iowa App. 2015)
Psychiatrist employed by the State of Iowa at UIHC had a sexual relationship with a former patient. Patient sued the psychiatrist and also sued the State under a respondeat superior theory. The Court found no genuine issue of material fact that would support the claim against the State. The sexual relationship began four months after the patient's discharge from treatment. The psychiatrist and the patient knew the relationship was wrong. The psychiatrist knew his actions were far outside the scope of his employment duties. The psychiatrist and patient both tried to keep the relationship a secret. No evidence was presented that the psychiatrist represented that the sexual relationship was a continuation of treatment. The psychiatrist pursued the relationship for his own personal interest and not the interest of UIHC. Under these facts, the psychiatrist's acts were "so far removed" from his employment duties that the State could not be held liable because the psychiatrist was not acting within the scope of his employment.

Overriding Business Justification in Wrongful Termination

Rivera v. Woodward Resource Center, 865 N.W.2d 887 (Iowa 2015)
Employee in a wrongful-discharge-in-violation-of-public-policy claim is not required

to prove that there was no overriding business justification for the employer's firing decision. Employee challenged portions of one jury instruction that employee claimed improperly placed this burden on the employee. Although the portion of the jury instruction challenged by the employee provided no additional guidance and was not approved, the majority found that it was not misleading or confusing in light of the totality of the instructions.

Pregnancy Discrimination

McQuistion v. City of Clinton, 872 N.W.2d 817 (Iowa 2015)
Pregnant employee denied ability to perform light duty filed discrimination suit against the employer. Court rejected the argument that the Iowa Civil Rights Act ("ICRA") established as facially discriminatory any exclusion of a pregnant employee from any policy or plan that provides benefits for any other temporary disability. However, the ICRA did establish that the exclusion of pregnant employees and applicants by an employment policy or practice because of their pregnancies constituted prima facie evidence of discrimination. Case is then analyzed using the *McDonnell Douglas* framework, requiring the employer to offer a legitimate, nondiscriminatory reason for excluding pregnant employees. Using rational basis analysis, the Court rejected equal protection and substantive due process claims under the Iowa Constitution.

Attorney Fees Under FMLA

Lee v. State, 874 N.W.2d 631 (Iowa 2016)
State sovereign immunity bars an award of attorney fees and costs incurred in an action by an employee seeking retroactive monetary relief in an action brought against state officials under *Ex parte Young*, to remedy violations of the self-care provisions of the Federal Medical Leave Act ("FMLA"). However, state sovereign immunity does not bar an award of attorney fees and costs incurred in seeking prospective relief in such actions.

EVIDENCE

Preserving Error on Rulings in Limine

Wailes v. Hy-Vee, Inc., 861 N.W.2d 262 (Iowa App. 2014)
Plaintiff in slip-and-fall case expressed an intent to introduce evidence that salt and sand were applied to the parking lot after she fell. The trial court, ruling on a motion in limine, excluded the evidence. Plaintiff failed to preserve error on the issue by failing to attempt to introduce the evidence. The trial court's ruling in limine was equivocal, as the trial court indicated that "things can change at trial," "I could change the ruling," and "if it changes during trial, then I'll revisit it."

Foundation for Admitting Pseudoephedrine Purchase Logs & Video

State v. Burgdorf, 861 N.W.2d 273 (Iowa App. 2014)
Defendant convicted of conspiracy to manufacture methamphetamine challenged admission of electronic pseudoephedrine tracking records. Since the State did not call a witness from the Governor's Office of Drug Control Policy or obtain a certification from the Office stating that the proffered records were what they purported to be, proper foundation under Rule 5.902(4) was not established and the records should not have been admitted. Video from Wal-Mart showing Defendant purchasing pseudoephedrine was also inadmissible because no Wal-Mart representative testified that the video was an accurate reproduction of what it depicts. Defendant was prejudiced by the admission of the pseudoephedrine purchase records. Since there was sufficient evidence to uphold the conviction when the inadmissible evidence was considered, the remedy was remand for a new trial rather than dismissal.

Assaultive Nature of Murder Victim

State v. Webster, 865 N.W.2d 223 (Iowa 2015)
Trial court did not abuse its discretion in excluding evidence Defendant tried to introduce that alleged murder victim punched his pregnant ex-wife. Defendant was asserting the defense of defense of others, claiming he was keeping the alleged victim from sexually assaulting the alleged victim's girlfriend. Trial court permitted evidence of the assault to show alleged victim's tendency to be violent toward women (a key part of Defendant's defense), but found the relevance of her pregnancy to be greatly outweighed by the risks of undue prejudice under Rule 5.403.

Use of Confession As Basis for Medical Examiner's Opinion

State v. Tyler, 867 N.W.2d 136 (Iowa 2015)
In this murder case, in a 4-3 decision, trial court abused its discretion in allowing the medical examiner to testify to the cause and manner of baby's death because the medical examiner based his opinions primarily, if not exclusively, on Defendant's inconsistent and uncorroborated statements to the police as opposed to objective, subjective, or medical evidence. For the same reason, the trial court should have redacted any reference to cause and manner of death in the autopsy report.

Bad Acts – Showing Knowledge and Intent

State v. Tyler, 873 N.W.2d 741 (Iowa 2016)
Defendant convicted of Murder in the Second Degree. Defendant's punch knocked the victim down and then others in Defendant's group kicked and stomped the

victim to death. Evidence of prior similar behavior by Defendant and the other assailants was properly admitted, as this "bad acts" evidence was for the legitimate purpose of proving Defendant's knowledge and intent that a group beating would take place.

INSURANCE

Loss Caused by Rainwater

Amish Connection v. State Farm Fire & Cas., 861 N.W.2d 230 (Iowa 2015)
In a 4-3 decision in a case of first impression, business policy did not provide coverage for damage caused by rainwater escaping a ruptured interior drainpipe that carried rainwater from the roof to the storm sewer. Whether the damage was caused by "rain" or "rainwater," it was "caused by rain" and thus did not fall within the grant of coverage. Dissenters argued there was a fact question as to the cause of the damage, thus precluding summary judgment.

Claim Preclusion Bars Subsequent Bad Faith Claim

Villarreal v. United Fire & Cas. Co., 873 N.W.2d 714 (Iowa 2016)
In a 4-3 decision, following the Restatement (Second) of Judgments, the Court holds that a first-party bad faith claim based on denial of insurance benefits without a reasonable basis ordinarily arises out of the same transaction as a breach-of-contract claim for denial of those same benefits. This means a final judgment in the breach-of-contract case bars the bringing of a subsequent, separate lawsuit due to claim preclusion. However, when the bad-faith claim is based on conduct after the breach-of-contract suit is filed, then claim preclusion would not bar the suit. The case discusses issues pertaining to discovery and bifurcation of trials if the breach-of-contract and bad faith claims are brought in the same suit.

JUVENILE

TPR Based on Prior CINA Adjudication

In re A.R., 865 N.W.2d 619 (Iowa App. 2015)
Termination of parental rights is not permitted under Iowa Code Section 232.116(1)(d) when there is no evidence that prior CINA adjudication was based on a finding of physical or sexual abuse or neglect. Reference to "previous adjudication" in termination statute means an adjudication in *either* a prior or the current proceedings so long as the adjudication is previous to the filing of the termination petition. Appellate court is not permitted to affirm termination on

grounds alleged in the State's petition but not ruled upon by the trial court when the State files neither a Rule 1.904(1) motion at the trial court level nor a cross-appeal.

Ineffective Assistance Claims & Constitutionality of Expedited Appeal Process

In re T.S., 868 N.W.2d 425 (Iowa App. 2015)
Mother and fathers had their parental rights terminated. Mother's CINA and TPR counsel was not ineffective because the claims the mother sought to raise were meritless. Expedited termination of parental rights appeal process does not create a *per se* violation of terminated parents' due process rights. Evidence supported termination of parental rights.

Ineffective Assistance in Delinquency – No Adjudication After Consent Decree

In re M.L., 868 N.W.2d 456 (Iowa App. 2015)
The Court adopts the *Strickland* test for effective assistance of counsel in the juvenile delinquency context. After the juvenile court suspended proceedings by entry of a consent decree, the child must be given the opportunity to comply with the terms and conditions of the consent decree before an adjudication proceeding (on a separate alleged delinquent act stemming from the same event) in the same case could be commenced. Child was not provided effective assistance of counsel when counsel allowed the child to be adjudicated delinquent for the new charge when no petition was pending on that charge and after the child had been granted a consent decree on the first charge.

Tolling Appeal Deadline & Obligation to Provide Sign Language Interpreter

In re J.L., 868 N.W.2d 462 (Iowa App. 2015)
Mother's motion challenging trial court's decision to terminate on a ground not pled in the TPR petition was a proper motion for new trial which tolled the time for filing notice of appeal. On the merits, the DHS's refusal to immediately furnish a sign language interpreter to the deaf and mute mother amounted to a violation of the DHS's statutory reasonable efforts obligation and a failure of proof on the statutory termination element alleged by the State.

Finding of Child Abuse Based on Domestic Violence

Taylor v. Iowa Dept. of Human Services, 870 N.W.2d 262 (Iowa App. 2015)
Substantial evidence supported finding that father assaulted mother in the presence of their child. However, the DHS applied outdated versions of the relevant Iowa Code sections and administrative regulations to conclude father committed child abuse by denial of critical care. Mental injury does not include emotional harm or "negative emotional impact" unless the harm rises to the level of a mental injury as

defined in the Code. The DHS findings did not distinguish between theoretical risk and a real possibility of harm.

Competency to Stand Trial on Delinquency Charges

In re J.K., 873 N.W.2d 289 (Iowa App. 2015)
Presumption of competency and placing burden on the child to prove incompetency by a preponderance of the evidence does not violate due process standards. Juvenile court is not obligated to accept the conclusion of the child's evaluator, even when the State calls no competing expert. Child's expert was inexperienced, prepared a report that chafed at the presumption of competency, failed to review the child's juvenile court file or consult with his counselor, was hampered by the child's lack of cooperation in the evaluation, and expressed conclusions that were inconsistent with the standards for competency to stand trial. Consequently, the child did not meet his burden to establish incompetency.

MISCELLANEOUS

Transitional Release of Sexually Violent Predator

In re Detention of Curtiss, 860 N.W.2d 893 (Iowa 2015)
Once a court determines the State has failed to meet its burden to show that a sexually violent predator (SVP) is likely to engage in predatory acts if released, release with supervision of the SVP is proper when the SVP still suffers from a mental abnormality. Here, when the trial court released the SVP with supervision, the trial court did not release him from the Civil Commitment Unit for Sexual Offenders (CCUSO). Instead, he was released to the transitional release side of the CCUSO. When the SVP violated release conditions, the trial court acted within statutory authority by returning the SVP to the secure side of the CCUSO. This is because the SVP was never released from the CCUSO when he was placed on the transitional release side and the SVP did not appeal from that order. The appeal deadline was thirty days after the order placing him on the transitional release side of the CCUSO, which deadline had long passed.

Release of SVP With Supervision

In re Detention of Matlock, 860 N.W.2d 898 (Iowa 2015)
Sexually violent predator (SVP) challenged the constitutionality of continued supervision after the SVP was determined to continue to suffer from a mental abnormality, but the State was unable to prove that the SVP was likely to engage in predatory acts if discharged. The Court held that the statutory scheme does not violate the Due Process clause of either constitution as long as (1) the person continues to suffer from a mental abnormality; (2) evidence establishes the need for

supervision; and (3) the supervision strikes the right balance between the need to protect the community and the person's liberty interest. In this case, the evidence supported the need for release with supervision. However, the case was remanded to address the scope of the release conditions to make sure the conditions were not punitive because the current conditions appeared more consistent with the terms imposed upon a person just being paroled from prison rather than a person just released from a civil commitment.

MOTOR VEHICLES / OWI

Implied Consent – Suspicion of Drugs

State v. McIver, 858 N.W.2d 699 (Iowa 2015)
In a 4-3 decision, the Court holds that Iowa Code Section 321J.6(3), dealing with implied consent when there is suspicion of drugs besides alcohol, imposes an obligation on drivers, not law enforcement. Peace officer is not obligated to affirmatively request a blood or urine test when the officer has reasonable grounds to believe the motorist is under the influence of a drug other than just alcohol. Rather, the driver has the obligation to submit to such a request under those circumstances if a request is made, or the driver will be subject to license revocations for refusal. Dissenters argued that Section 321J.6(3) requires the peace officer to request a blood or urine test in these circumstances, to aid in the driver's prescription drug defense, or the State would be obligated to proceed only on the theory of intoxication by alcohol and no other drug.

Constitutionality of Speed Cameras

City of Sioux City v. Jacobsma, 862 N.W.2d 335 (Iowa 2015)
Owner of vehicle who was issued a municipal infraction speeding violation via a speed camera challenged the constitutionality of the ordinance that created a presumption that the owner was the speeding driver. Based on the record, which included a stipulation that the defendant was the owner and the vehicle was speeding and no evidence that the owner was not the driver, the ordinance was upheld in spite of substantive due process attacks under both constitutions. A rational basis test was used. The ordinance also did not violate the Inalienable Rights Clause of the Iowa Constitution and was not preempted by provisions of the Iowa Code.

Timing and Scope of Phone Calls Offered to Detainee

State v. Lyon, 862 N.W.2d 391 (Iowa 2015)
Defendant was permitted to make phone calls after *Miranda* warnings and reading of implied consent. He made the calls before the actual request for a breath sample

was made. The Court held that the officer, when faced with a question whether the goal of the phone calls was so that the detainee could be released, had no obligation to advise the detainee that the purpose of the phone call was to get advice on whether to take the test. Also, officer did not act improperly in offering the phone calls before the actual request for a test was made.

MUNICIPAL CORPORATIONS

General Fund of City Exempt From Execution

R.U.S.S. v. City of Mount Union, 874 N.W.2d 120 (Iowa 2016)
General funds in a city's bank account constitute "other public property." Additionally, substantial evidence supported a finding that the funds were necessary and proper for carrying out the general purpose for which the city was organized. Consequently, the funds were exempt from execution under Iowa Code Section 627.18.

PROBATE / GUARDIANSHIP / CONSERVATORSHIP

(No Cases)

REAL PROPERTY

Defense of Necessity – Homeless Camps

City of Des Moines v. Webster, 861 N.W.2d 878 (Iowa App. 2014)
City sought to remove homeless persons from camps that were set up on various city properties. Homeless persons asserted the defense of necessity. The Court adopted Restatement (Second) of Torts Section 197 regarding the defense of necessity, but rejected the defense in this case. Factors weighing against the defense (e.g., threats associated with the heating methods in the camps, danger to the lives of homeless persons and first responders in the event of fire) outweighed the factors supporting the defense (e.g., individuals' desire not to attend crowded homeless shelters, desire to sleep in a familiar place and not on a hard plastic bench, and desire to keep their possessions).

Eminent Domain Power With Private Members of Acquiring Agency

Clarke County Reservoir Commission v. Robins, 862 N.W.2d 166 (Iowa 2015)
Private parties lack eminent domain power. A 28E commission with members lacking the power of eminent domain cannot itself exercise the power of eminent

domain or serve as an acquiring agency seeking a declaratory judgment of public use under Iowa Code Section 6A.24(2). Postjudgment withdrawal of the private members of the commission did not render the appeal moot.

Timing on Rescission of Foreclosure

U.S. Bank Nat'l Ass'n v. Lamb, 874 N.W.2d 112 (Iowa 2016)
The statute of limitations for a mortgagee's rights, which governs the timeliness of rescission, is not the two-year special statute of limitations for enforcement of judgment liens created in Iowa Code Section 615.1. Instead, it is either a ten-year or twenty-year statute of limitations pursuant to Iowa Code Sections 614.1(5) (dealing with written contracts) or 614.21 (dealing with mortgage foreclosures). The "all liens" language of Iowa Code Section 615.1(1) applies only to all judgment liens and the two-year special statute of limitations in Iowa Code Section 615.1(1) does not limit the period of time for a mortgagee to rescind a prior foreclosure judgment.

Constitutionality of Long-Term Farm Lease

Gansen v. Gansen, 874 N.W.2d 617 (Iowa 2016)
Farm lease provided for an initial five-year term with five additional five-year terms, which extensions occurred automatically unless the tenant served a notice of termination. Because one of the parties may be locked into the agricultural lease for more than twenty years, Article I, Section 24 of the Iowa Constitution would be violated if that contingency occurs. Such a lease is valid for twenty years, but is unconstitutionally infirm after the twenty-year period expires.

Conclusiveness of Tax Deed After Three Years

Adair Holdings v. Matthew Thomas Trucking, 874 N.W.2d 669 (Iowa App. 2015)
Running of the three-year statute of limitations entitled tax deed holder to a determination that it had a valid tax deed to the parcel in question as a matter of law. Tax deed holder's past failed attempts to gain possession and title to the property did not preclude its entitlement to such a determination once the three-year limitation period expired.

Attorney Fees Following Sale and Claimed Disclosure Violations

Payton v. DiGiacomo, 874 N.W.3d 673 (Iowa App. 2015)
Purchaser sued sellers for a wet basement, claiming breach of disclosure requirements. Sellers won at trial and then claimed attorney fees under the terms of the parties' purchase agreement. The claim was denied. When a deed is accepted in compliance with the terms of a real estate contract, the contract is merged in the deed. Making it clear that the result depends on the facts and terms

of the documents, the Court noted that the purchase agreement in this case contained no provisions regarding disclosures required by Chapter 558A and there was no evidence of collateral agreements or conditions that survived the merger of the purchase agreement with the deed. Accordingly, the attorney fee clause of the purchase agreement did not survive the merger into the deed.

SEARCH AND SEIZURE

Aberrant Driving Raises Suspicion of Impairment

State v. McIver, 858 N.W.2d 699 (Iowa 2015)
Vehicle was observed in the parking lot of a closed business shortly after bar-closing time, left the parking lot by driving over the grassy area surrounding the parking lot, down the sidewalk, and over the curb, instead of leaving the parking lot through either of the exits to the street, and then weaved within its lane of travel. Under the totality of these circumstances, officer had reasonable suspicion that the driver was impaired so as to justify a stop to investigate further, even if it was assumed that there was no observed violation of a rule of the road.

Stop for No License Plate Lamp

State v. Lyon, 862 N.W.2d 391 (Iowa 2015)
There are two prongs to the statute requiring illumination of a vehicle's license plate: (1) required illumination; and (2) legibility of the plate from a distance of 50 feet. When a vehicle is stopped on suspicion that the license plate is not illuminated *at all*, the officer is permitted to make that observation from more than 50 feet. Therefore, the stop was justified under the first prong. The Court held that its holding is not inconsistent with *Reisetter*, which only addressed the second prong. If the ruling is inconsistent with *Reisetter*, then *Reisetter* is overruled.

Search Incident to Arrest – Locked Safe in Car

State v. Gaskins, 866 N.W.2d 1 (Iowa 2015)
Analyzing the search incident to arrest ("SITA") exception to the warrant requirement when police unlocked a safe in a van after arrest, the Court, in a 4-3 decision relying on the Iowa Constitution, declines to adopt the "evidence-gathering rationale" of *Gant*. The search of the van and safe was not a valid SITA under the Iowa Constitution because, at the time of the search, there was no danger to the officer or likelihood that the occupants could access the van to obtain a weapon or destroy evidence.

Probable Cause Supporting Search Warrant – Informants

State v. McNeal, 867 N.W.2d 91 (Iowa 2015)
Court reviewing a search warrant does not independently determine probable cause. Instead, the reviewing court "merely decides whether the issuing judge had a substantial basis for concluding probable cause existed." Here, the officer requesting the warrant independently verified three of the four components of an anonymous tip. The issuing judge was permitted to consider the subject's prior criminal record in determining probable cause. Named informant's information was considered reliable. Even if the challenged consideration of an anonymous tip and the subject's criminal history was ignored, based on the totality of the circumstances, the application and supporting information still established probable cause to support issuance of the warrant.

Warrantless Search of Parolee's Residence

State v. King, 867 N.W.2d 106 (Iowa 2015)
In a 4-3 decision interpreting Article I, Section 8, of the Iowa constitution, the Courts answers the question left unanswered in previous parolee search cases. The Court adopts a special-needs exception that authorizes parole officers to search the home of a parolee without a warrant for purposes of parole supervision. Warrantless searches for the purpose of law enforcement generally remain prohibited. The dissenters point out, among other points, that they believe the case is limited to parole officers (not law enforcement officers) searching for drugs when the underlying crime is a drug offense and when reasonable suspicion has been determined to be present.

Search of Hotel Room Crime Scene and Confessions

State v. Tyler, 867 N.W.2d 136 (Iowa 2015)
In this murder case, in a 4-3 decision, trial court erred in denying motion to suppress evidence obtained during the search of Defendant's hotel room based solely on the legal conclusion that Defendant had no expectation of privacy in the room because Defendant obtained the room for the purpose of committing a crime (i.e., killing her baby). Remand was necessary for further hearing concerning the applicability of exceptions to the warrant requirement or exclusionary rule. Trial court properly refused to suppress Defendant's statements made to police during initial contact, at the police station, and at the hospital.

Preclusive Effect of Prior Ruling & Prolonging Stop for Dog Sniff

In re Pardee, 872 N.W.2d 384 (Iowa 2015)
Vehicle stopped for minor traffic violations as part of State Patrol interdiction efforts.

A ruling on suppression motion filed in criminal case in which Defendant was acquitted is not given preclusive effect in subsequent forfeiture proceeding, because Defendant had no motive to appeal the suppression ruling following acquittal. On the merits, the majority in a 5-2 decision holds that detention of vehicle occupants for approximately 25 minutes preceding a dog sniff was improper under the Fourth Amendment. Trooper developed reasonable suspicion of other criminal activity – if at all – only by prolonging the initial stop beyond the time reasonably necessary to execute the traffic violation warnings. In doing so, the trooper violated Defendant's federal constitutional rights.

Voluntariness of Consent Under Federal Constitutional Standards

State v. Prusha, 874 N.W.2d 627 (Iowa 2016)
Defendant did not raise the Iowa Constitution as a basis for suppression of consent to search until appeal. Therefore, error was not preserved, and the Court declined to answer the question left unanswered in Pals, which is whether the Iowa Constitution requires police to "advise an individual of his or her right to decline to consent to a search." The challenge was analyzed under the Federal Constitution only. The officer did not provide a consent advisory, but the Fourth Amendment Schneckloth standard does not require one. Instead, it is one factor in a totality of the circumstances analysis. While the failure to give a consent advisory weighs against voluntariness, the other circumstances indicated that Defendant voluntarily consented to the search, so the search was valid under the Fourth Amendment.

TAXATION

Exhausting Administrative Remedies to Receive Tax Credits

Ghost Player, L.L.C. v. State, 860 N.W.2d 323 (Iowa 2015)
Claimants sought tax credits under the Film, Television, and Video Project Promotion Program (Iowa Code Section 15.391). The actions taken by the agency in denying the credits was other agency action, requiring Claimants to exhaust their administrative remedies. Since Claimants did not exhaust those remedies, their suit in district court was properly dismissed. The process used by the agency in processing the claims for tax credits did not violate the Due Process Clauses of the Iowa or U.S. Constitutions.

Taxation of Delivery of Natural Gas

LSCP, LLLP v. Kay-Decker, 861 N.W.2d 846 (Iowa 2015)
A rational basis exists for the variable excise tax imposed on the delivery of natural gas under Iowa Code Section 437A.5. Accordingly, statutory scheme did not violate the Equal Protection Clauses of the state or federal constitutions. The natural gas

delivery tax framework also does not obstruct interstate commerce or discriminate against it in violation of the dormant Commerce Clause.

Burden of Proof and Taxation of Improvement to Real Property

Wendling Quarries v. Property Assess. App. Bd., 865 N.W.2d 635 (Iowa App. 2015)
Burden of proof in challenge to assessment of quarry scale as improvement to real estate was on the property owner. Quarry scale was not a taxable improvement to real property because, while attached to concrete piers, the scale's components were easily able to be disassembled and removed and bought and sold between mining operations.

TORTS

False Arrest Standards

Veatch v. City of Waverly, 858 N.W.2d 1 (Iowa 2015)
Peace officer who has reasonable ground (i.e., probable cause) to believe that an indictable offense has been committed and reasonable ground for believing that the person to be arrested has committed it may make a warrantless arrest pursuant to Iowa Code Section 804.7(3). In a false arrest action, the standard for evaluating probable cause under Section 804.7(3) is an objective one. Consequently, an arrest can be sustained by probable cause for a more serious offense than the crime the officer considered or announced at the time of arrest. Here, since there was probable cause for the arresting officer to believe the plaintiff had committed the indictable offense of Dependent Adult Abuse, the fact that the plaintiff was only arrested for simple misdemeanor assault did not create a jury question on the plaintiff's false imprisonment claim. While a contentious history between a complainant and the arrestee can sometimes engender a fact question as to whether probable cause supported an arrest, there was no fact question generated in this case due to the thoroughness of the officer's investigation, his consideration of information from sources other than from the complainant, and the fairly limited nature of the claimed contentiousness between the complainant and arrestee.

Scope and Application of the Continuing Storm Doctrine

Wailes v. Hy-Vee, Inc., 861 N.W.2d 262 (Iowa App. 2014)
The "continuing storm doctrine" holds that the failure to remove the *natural* accumulation of snow and ice prior to the cessation of the weather event giving rise to such accumulation is not a breach of the duty of ordinary care as a matter of law. The doctrine does not apply and liability may result if the efforts the landowner takes toward removal of snow and ice creates a hazardous condition (e.g., creating ridges and piles of snow that patrons need to step over). However, since the

plaintiff's claims for negligence included both the timing of removal of the natural accumulation and the creation of hazardous piles/ridges of snow, the trial court properly gave the "continuing storm doctrine" instruction regarding the natural accumulation.

Prison Required for "Wrongfully Imprisoned Person" Claim

State v. Nicoletto, 862 N.W.2d 621 (Iowa 2015)
Iowa Code Chapter 663A enables wrongfully imprisoned persons to receive compensation from the State. To qualify as a "wrongfully imprisoned person," incarceration in prison is required. Time in jail between the time of sentencing and posting of an appeal bond does not meet the statutory requirements.

Dramshop Liability – Implied Sale as Part of Resort Stay

Sanford v. Fillenwarth, 863 N.W.2d 286 (Iowa 2015)
Dramshop statute requires alcohol to be "sold and served" before liability attaches. The term "sale" includes indirect sales when the renting of lodging at a lakeside resort includes the advertised amenities of "free" drinks on the resort's boat cruises. Adult son of person renting the room was a third-party beneficiary of the contract and was considered to have been "sold" alcohol.

Immunity Exception for Criminal Acts

Sanon v. City of Pella, 865 N.W.2d 506 (Iowa 2015)
Parents of children who drowned in municipal swimming pool filed suit against city. In a 4-3 decision, the majority concluded that the parents alleged violations of administrative rules that constituted criminal offenses under the Iowa Code. Thus, if the city violated the rules, the city is not entitled to immunity under Iowa Code Section 670.4(12). Parents must prove by a preponderance of the evidence that the city's acts or omissions constituted involuntary manslaughter to remove it from the immunity granted by Section 670.4(12); proof is not required to be beyond a reasonable doubt. Dissenters argued that a violation of pool regulations promulgated by the Iowa Department of Public Health is not a criminal offense defeating immunity, as the legislature chose to criminalize only statutory violations and not violations of the department's regulations.

Immunity for Doctor Participating in Child Abuse Assessment

Nelson v. Lindaman, 867 N.W.2d 1 (Iowa 2015)
Infant's adoptive parents sued hospital and surgeon who treated child for a broken arm for failing to detect child abuse, resulting in the child returning to a parent who further injured the child. A physician responding in good faith to inquiries from a child abuse investigator is entitled to immunity pursuant to Iowa Code Section

232.73 from claims alleging not only negligence, but the willful, wanton, or reckless conducted required for punitive damages. In a 5-2 decision, the Court found that the surgeon and hospital were entitled to summary judgment because there was no factual dispute that the surgeon acted in good faith.

Respondeat Superior – Outside the Scope of Employment

Giudicessi v. State, 868 N.W.2d 418 (Iowa App. 2015)
Patient at university hospital's eating disorder clinic who became sexually involved with her psychiatrist sued the psychiatrist. Patient also sued the State under the theory of respondeat superior. The acts of the psychiatrist were so far removed from his employment duties that the State could not be held liable under the doctrine of respondeat superior. Summary judgment was granted to the State.

Sufficient Evidence, Additur & Attorney Fees in Legal Malpractice Suit

Quad City Bank & Trust v. Elderkin & Pirnie, 870 N.W.2d 249 (Iowa App. 2015)
Bank sued its former law firm for malpractice after losing suit against accounting firm. Law firm's statements to bank during litigation against accounting firm provided sufficient proof to show collectability from accounting firm if bank had prevailed in underlying suit. Bank presented sufficient evidence to establish that bank suffered damage even though there was uncertainty as to the amount of damage. Bank presented sufficient evidence of proximate cause in the underlying suit based on the testimony of the law firm's own attorneys and an expert's testimony. Clear evidence supported bank's claim that law firm's failure to procure an expert during the underlying trial (the expert procured was not allowed to testify) affected the outcome of the underlying trial. Bank was not required to procure an expert in the malpractice case to say how the jury in the underlying case would have ruled had a properly qualified expert testified. Offering expert testimony on this issue was not only unnecessary but would have been an improper invasion of the malpractice jury's function. Trial court properly granted additur to correct jury's calculation of damages in answer to a jury verdict question calling for total damages incurred because the jury clearly reduced the damage figure by the amount of fault it attributed to the bank (comparative fault could not be attributed to the bank in the malpractice suit, although it was to be considered in determining the amount of damages in the underlying suit). Attorney fees paid to law firm in underlying suit are a component of damages recoverable in a legal malpractice action. The case was remanded for a new trial only on the issue of the amount of attorney fees component of damages.

Finding of Negligence But No Causation

Crow v. Simpson, 871 N.W.2d 98 (Iowa 2015)
Moped operator brought personal injury suit against contractor for leaving the

contractor's end loader in the street, allegedly resulting in an accident. The jury found the contractor negligent, but found that the negligence was the not the cause of moped operator's damages. The Court found substantial evidence supporting the verdict, reasoning that the jury could have found the moped operator's conduct to be the sole cause of damages. For the same reason, the jury's finding of negligence without a finding of causation was not inconsistent. Since the jury found contractor negligent, trial court did not err in denying moped operator's motion for directed verdict on the issue of negligence *per se* (i.e., when the jury returns a verdict favorable to the party making the motion for directed verdict, any error is harmless). Trial court did not abuse its discretion in refusing to grant a new trial, as the evidence supported the verdict.

Inconsistent Verdicts & Scope of Retrial

Bryant v. Rimrodt, 872 N.W.2d 366 (Iowa 2015)
Jury verdict in personal injury car accident case awarding nearly $17,000 for past medical bills and $1 for past pain and suffering was inconsistent such that a new trial was required. On retrial, liability would not be retried, but all elements of damages would be, even though the original jury awarded nothing for future damages.

WORKER'S COMPENSATION

Healing Period Benefits Upon Review-Reopening

Hill Concrete v. Dixson, 858 N.W.2d 26 (Iowa App. 2014)
Section 85.34(1) governs when healing period benefits can be awarded in a review-reopening proceeding. The standard for awarding healing period benefits does not change in a review-reopening proceeding. Substantial evidence supported the commissioner's award of additional healing period benefits for the period of recovery following claimant's hip replacement surgery.

Fresh-Start Rule and Effect of 2004 Amendments

Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015)
The 2004 amendments to the workers compensation statute only modify the fresh-start rule with respect to successive injuries with the same employer. The amendments preserve the fresh-start rule for an employee sustaining successive injuries resulting in permanent partial disability in the course of employment with different employers. Consequently, the employer was not entitled to apportion its liability for permanent partial disability benefits by the liability previously assessed to prior employers.

Fresh-Start Rule and Effect of 2004 Amendments – Part II

Warren Properties v. Stewart, 864 N.W.2d 307 (Iowa 2015)
An employer who is liable to compensate an employee for a successive unscheduled work injury is not liable to pay for the preexisting disability that arose from employment with a different employer or from causes unrelated to employment when the employee's earning capacity was not reevaluated in the competitive job market or otherwise reevaluated prior to the successive injury.

Disclosure of Surveillance Videos

Iowa Ins. Inst. v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015)
In a 6-1 decision, the Court holds that the disclosure requirements of Iowa Code Section 85.27(2) do not override work product immunity and do not require disclosure of surveillance video of a claimant before the claimant is deposed. Section 85.27(2) is limited to health-care-related privileges such as the physician-patient privilege. Section 85.27(2) does not affect privileges and protections related to the litigation process such as the work product doctrine.

Assessment of Cost of Independent Medical Examination

D.A.R.T. v. Young, 867 N.W.2d 839 (Iowa 2015)
In a 4-3 decision, the Court holds that Iowa Code Section 85.39 provides the exclusive method for reimbursement of an independent medical examination obtained by a claimant. Commissioner may not tax the expense of the examination as costs incurred in the hearing under an administrative rule authorizing the taxation of costs of obtaining reports by doctors.

Running Healing Period Benefits

Eaton Corp. v. Archer, 872 N.W.2d 194 (Iowa App. 2015)
Running healing period benefits were awarded. Substantial evidence supported the commissioner's finding that worker was unable to return to similar employment. Although employer cited evidence that may support a finding that worker was capable of returning to substantially similar employment, appellate court's task is not to determine whether substantial evidence supports different findings, but, rather, the findings actually made.

Tolling Statute Under Discovery Rule

Baker v. Bridgestone, 872 N.W.2d 672 (Iowa 2015)
Whether a work-related injury arises because of a single event or develops cumulatively over time, the discovery rule applies in determining whether a workers' compensation claim has been filed within two years after the occurrence of the injury. That limitation period does not begin to run until the claimant knows or in

the exercise of reasonable diligence should know "the nature, seriousness, and probable compensable character" of the injury.

Standard of Review – Ignoring Record Evidence

JBS Swift & Co. v., Hedberg, 873 N.W.2d 276 (Iowa App. 2015)
On intra-agency review of award of permanent total disability, commissioner's designee ignored or overlooked record evidence. Multiple statements in the designee's decision were "demonstrably incorrect." Where the record shows the agency did not review and consider the evidence, as was the case here, then substantial evidence review is inapplicable. The agency is entitled to reconcile competing evidence, not ignore competing evidence. Designee's action was unreasonable, arbitrary, capricious, an abuse of discretion, and the product of illogical reasoning. Case was remanded for re-evaluation of the evidence.

Bridge the Gap Seminar

Practical Strategies for Handling and Resolving Estate and Trust Disputes

1:45 p.m. - 2:15 p.m.

Presented by:
Christine Halbrook
Bradshaw Fowler Proctor & Fairgrave, PC
801 Grand Ave, Suite 3700
Des Moines, IA 50309
Phone: 515-246-5882

Friday, September 9, 2016

PRACTICAL STRATEGIES FOR HANDLING AND RESOLVING ESTATE AND TRUST DISPUTES

Christine Halbrook
halbrook.christine@bradshawlaw.com

AVOIDING DISPUTES

Disputes are oftentimes foreseeable. Last minute changes to an estate plan, writing an individual out of an estate plan, and large death-bed bequests can quickly become big issues for estate planning practitioners. Here are some ideas for avoiding the potential disputes that accompany some of these situations:

I. Create a pattern regarding testator's intent
   a. Have testator execute several wills with similar terms

II. Make gifts within lifetime
   a. Discuss whether it makes sense to transfer the intended bequest during clients' lifetime as opposed to at death

III. After testator dies, give notice to everyone
   a. Consider giving notice to people who might not be statutorily required to receive notice but might be someone affected by the will (i.e., someone who was in a will before but was written out at the last moment)

IV. Drafting and executing the will and/or trust
   a. Use clear language regarding testator's desires and consider including language in a will or trust to help explain testator's wishes

i. I give the remainder of my estate to my daughter, Jane Doe. If my daughter should not survive me, then I give the remainder of my estate to my daughter's descendants, per stirpes. I love my son, John Doe, but I specifically exclude my son from benefitting under this Article IV as I have already provided for him during my lifetime.

ii. **Practice Pointer:** If you are writing a descendant out of a will, make sure your disaster clause does not include a reference to intestate distribution that would unintentionally include the disinherited individual

b. Selecting a personal representative
   i. Clients should think about personalities and family history when selecting a personal representative
   ii. Consider having a corporate fiduciary
      1. Experience with process
      2. Independent party capable of handling difficult family dynamics

c. Encourage testators to have conversations with beneficiaries regarding their wishes before they die
   i. Explain who is selected as personal representative and why they were selected
   ii. May be equally as important with the preference for Guardian of a child

d. Potential competency fight?
   i. Obtain physician's statement regarding competency
   ii. Have will/trust/document signed on the same day as the date of physician's assessment

e. Alternative Dispute Resolution Clauses
   i. George Washington's will contained an arbitration clause (will dated July 9, 1799 – available in full text at http://gwpapers.virginia.edu/documents/will/text.html):

1. "My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants--each having the choice of one--and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."

ii. **Practice Pointer:** ADR clauses in wills may not be enforceable

1. Case law regarding arbitration clauses suggests they may not be binding (*see In re Will of Jacobovitz*, 295 N.Y.S.2d 527 (1968); *Schoneberger v. Oelze*, 96 P.3d 1078 (Ariz. Ct. App. 2004))
2. A few states have passed legislation to enforce ADR provisions in wills and/or trusts, including Hawaii, Oregon, Georgia, New Hampshire, and Michigan

iii. Mediation – sample provisions

1. "In the unlikely event that there should be any disagreement or dispute . . . I would be deeply disappointed if the estate that I have left for the benefit of my family and/or other beneficiaries would result in any negative impact on the relationships among them. Therefore, it is my fervent wish and directive that any such disagreement or dispute be resolved with the utmost civility, decency and consideration, and that all parties resolve it by mediation in good faith through the use of a neutral third-party. It would be to my

profound and eternal sorrow that what I have provided in the interest of benefiting my loved ones would lead to any injury to their relationship." (LELA P. LOVE & STEWART E. STERK, Leaving More Than Money: Mediation Clauses in Estate Planning Documents, 65 Wash. & Lee L. Rev. 539, 571 FN128 (2008))

iv. Arbitration – sample provision (adopted from sample clause provided by the American Arbitration Association)

1. In order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation of my will (or my trust) or the administration of my estate or any trust under my will (or my trust), I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association under its Arbitration Rules for Wills and Trusts then in effect. Nevertheless the following matters shall not be arbitrable questions regarding my competency, attempts to remove a fiduciary, or questions concerning the amount of bond of a fiduciary.

V. In Terrorem Clauses (aka No Contest Clause)

a. A provision in the will which threatens being excluded from inheriting if the beneficiary challenges the legality of the will

b. Example:

i. In case any beneficiary shall contest the terms of this Will, in part or in whole, and attempt to prevent the proof thereof, then I declare that such contest and such attempt shall cancel and terminate all provisions for or in favor of the beneficiary making or inciting such contest, without regard to whether such contest shall succeed or not, and I hereby declare all and any provisions herein in favor of the

beneficiary so making such contest, or attempting to, or inciting the same, to be revoked and of no force and effect

c. *Cocklin* tell us the condition or forfeiture will not be enforced against one who contests in good faith and for probable cause (*In re Estate of Cocklin*, 17 N.W.2d 129 (Iowa 1945))
    1. If objector acts upon advice of counsel, that often is enough to not invoke the forfeiture clause (*In re Estate of Cocklin*, 17 N.W.2d 129 (Iowa 1945))
        a. "[A]dvice of counsel constitutes good faith and probable cause, and rarely is a beneficiary unable to find an attorney who will recommend litigation." MARTIN D. BEGLEITER, Anti-Contest Clauses: When you Care Enough to Send the Final Threat, 26 Ariz. St. L.J. 629, 679 (Fall 1994).
    2. If objector fails to offer substantial proof and is unsuccessful on their objection, it does not mean that they automatically forfeit as the determination of "good faith and for probable cause" is considered under all the facts and circumstances (*Geisinger v. Geisinger*, 41 N.W.2d 85 (Iowa 1950))
d. An in terrorem clause is not necessarily invoked when a beneficiary objects to the final report (*See In re Shriver Estate*, 10 N.W.2d 59 (Iowa 1943))
e. The Executor is the proper person to bring a proceeding regarding whether or not a beneficiary has forfeited their share after the contest the will or otherwise violate the clause (*In re Estate of Cocklin*, 17 N.W.2d 129 (Iowa 1945))

RESOLVING DISPUTES ONCE UNAVOIDABLE

No matter how well you plan, there are some disputes that are unavoidable. Once you are faced with a good old-fashioned family food fight, consider the following techniques:

I. Family Settlement Agreement – Appendix A for example
   a. "In upholding such settlements, courts have reasoned that beneficiaries under a will may, immediately after the distribution, divide the property as they see fit and there is no reason why they may not make such division before they receive the property. Also that beneficiaries are not compelled to accept provisions of the will." *In re Swanson's Estate*, 31 N.W.2d 385, 389 (Iowa 1948)
   b. Exceptions or limitations to the rule permitting family settlement agreements (*See In re Swanson Estate*, 31 N.W.2d 385, 390 (Iowa 1948)):
      i. Beneficiaries under a will cannot defeat a trust
         1. Court has held that the income beneficiaries of a trust have no interest in the trust property except for the income. *In re French's Estate*, 44 N.W.2d 706 (Iowa 1950)
      ii. Agreement may not deprive a non-consenting party of their rights
         1. Make sure you have all necessary parties
            a. Not only the heirs/beneficiaries, but also consider others that not be affected by the agreement.
               i. Court held that family settlement agreement was void as it violated a spouse's homestead rights and spouse was not party to the agreement. *In re*

Gustafson Estate, 551 N.W.2d 312 (Iowa 1996)

b. Cannot prejudice creditors who do not consent to agreement

c. If agreement is reached before estate is probated, proposed executor is not a necessary party (executor fought agreement and tried to have will probated because it denied him his statutory fees; court denied his argument – *see In re Swanson Estate*, 31 N.W.2d 385 (Iowa 1948))

c. Court Approval

i. If the agreement is a valid contract, then it is enforceable as such

ii. Court approval should be sought to approve the family settlement agreement and to direct the personal representative to follow the family settlement agreement

d. **Practice Pointer:** Iowa Department of Revenue and Finance doesn't have to follow a Family Settlement Agreement when computing inheritance tax according to the Administrative Rules

> Iowa Administrative Code 701-86.14(2) *Family settlements.* Beneficiaries of an estate may contract to divide real or personal property of the estate, or both, in a manner contrary to the will of the decedent. The court of competent jurisdiction may approve the settlement contract of the beneficiaries. However, the department is not a party to the contract and is not bound to compute the shares of the estate based on the settlement contract. Instead, the department must compute the shares

of the estate based upon the terms of the decedent's will, unless a court of competent jurisdiction determines that the will should be set aside. See *In re Estate of Bliven*, 236 N.W.2d 366 (Iowa 1975).

II. Alternative Dispute Resolution (ADR)

a. Parties can agree to submit a dispute to mediation or arbitration, even in absence of a court order or a mandate in a will

b. Authority under Iowa Code to settle disputes with ADR

i. Trustee has authority, under Iowa Trust Code, to "settle a claim by or against the trust by compromise, arbitration, or otherwise . . . ." Iowa Code Section 633A.4402(21)

ii. Personal representative and a contingent creditor can "determine, by agreement, arbitration or compromise, the value thereof, according to its probably present worth, and upon approval thereof by the court, it may be allowed and pain in the same manner as an absolute claim . . . ." Iowa Code Section 633.424(1)

iii. A conservator, subject to the approval of the court, may "compromise or settle any claim by or against the ward or the conservator; to adjust arbitrate or compromise claims in favor of or against the ward or the conservator." Iowa Code Section 633.647(5)

c. Mediation

i. Pros of Mediation (as taken from LELA P. LOVE & STEWART E. STERK, Leaving More Than Money: Mediation Clauses in Estate Planning Documents, 65 Wash. & Lee L. Rev. 539, 541 (2008)).

1. Avoids one winner and one loser mentality

a. Can get case-specific solutions and can be creative with solutions

b. A court can only rule on what is being presented to the court

2. Non-adversarial
3. Gives participants control of the process and the outcome
4. Lower cost (no discovery)
5. Private and confidential

ii. Many other states have formal probate mediation programs

1. Most states with formal probate mediation programs are reactive states (meaning, once the dispute arises, the mediation is offered/mandated) but they are only a few that are proactive (meaning, they have legislation to permit testators to require mediation or have the court order mediation)
2. Polk County Probate Mediation Pilot Project
    a. Allows Probate Judge to identify contested probate matters and require mediation
    b. All probate cases in Polk County are available for mediation – estate, trust, guardianship, conservatorship, etc.
    c. Cost is divided equally among the contesting parties (services available at low cost or no cost depending on need and qualifications)

d. Arbitration

i. Pros of Arbitration

1. Usually lower costs than discovery and trial
2. Faster than litigation and results in a binding decision
3. Flexible
4. Private and confidential
5. Less formal than traditional court

III. Nonjudicial Settlement Agreements for Trusts (Iowa Code § 633A.6308)

a. Works great for (633A.6308(4)):
    i. Interpretation or construction of the terms
    ii. Approval of trustee's report or accounting
    iii. Resignation or appointment of a trustee
    iv. Trustee compensation determination
    v. Transfer of principal place of administration
    vi. Liability of trustee re trust action
b. Does not work for (633A.6308(2) and (3)):
    i. Modification of trust (requires court approval)
    ii. Termination of trust (requires court approval)
    iii. Violations of a material purpose of trust
    iv. Terms and conditions that could not otherwise be approved by the court
c. Even though it is *nonjudicial* settlement, still consider obtaining the court's blessing (633A.6308(5))

Appendix A

Sample Application for Approval of Family Settlement Agreement

Sample Family Settlement Agreement

Sample Order Approving Family Settlement Agreement

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IN THE MATTER OF THE ESTATE OF JANE DOE, Deceased.	)	PROBATE NO.: ESPR 11111 APPLICATION FOR APPROVAL OF FAMILY SETTLEMENT AGREEMENT

COMES NOW, the undersigned, and in settlement of their claims under the Last Will and Testament of Jane Doe, hereby make this application as follows:

1. On January 1, 2014, Jane Doe died testate, a resident of Des Moines, Iowa and this estate was opened on January 17, 2014.

2. Mark Doe is a beneficiary pursuant to the will of Jane Doe, dated October 31, 2008.

3. Mark Doe wishes to receive, in exchange for full satisfaction of his share of the Jane Doe Estate, the house located at 1234 E Street, Des Moines, IA 50312 now owned by the Estate.

4. Mark Doe, Cindi Doe, and John Doe have entered into a Family Settlement Agreement which is attached as Exhibit A. *See In re Bradley's Estate*, 231 N.W. 661, 662 (Iowa 1930) ("Our court upholds the friendly settlement of differences over property arising among heirs of deceased persons.").

WHEREFORE, the undersigned Executor of the Jane Doe Estate asks the court to approve the Family Settlement Agreement attached as Exhibit A.

Dated this _____ day of _____, 2016.

_____
John Doe
Executor of the Jane Doe Estate

FAMILY SETTLEMENT AGREEMENT

Family Settlement Agreement (the "Agreement"), dated as of 11th day of August, 2016, between John Doe, 1111 B Street, Des Moines, IA 50312 (hereinafter "**Executor**" or "**John Doe**"), acting as Executor of this estate and as a beneficiary of the Jane Doe Estate, Mark Doe of 12345 C Street, Des Moines, IA 50312 (hereinafter "**Mark Doe**") and Cindi Doe of 999 D Street, Des Moines, IA 50312 (hereinafter "**Cindi Doe**"), as beneficiaries of the Jane Doe Estate.

RECITALS

On January 1, 2014, Jane Doe died testate, a resident of Des Moines, Iowa. A probate estate was commenced January 17, 2014, with John Doe appointed as Executor. John Doe; Mark Doe; and Cindi Doe are beneficiaries in the Last Will and Testament of Jane Doe. Mark Doe is a one-third (1/3) beneficiary of the property of Jane Doe pursuant to the will. Mark Doe wishes to receive the house located at 1234 E Street, Des Moines, IA 50312 (hereinafter "**Property**") now owned by the Estate and is willing to forego and release his right in the Estate in exchange for the Property.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual promises and covenants set forth in this Agreement, the receipt, sufficiency, and adequacy of which are hereby acknowledged, the parties agree as follows:

1. **Representation of Mark Doe and Release**. Mark Doe hereby warrants and represents that he is a beneficiary of the Estate. Mark Doe irrevocably and unconditionally releases any and all claims he may have to all or any part of the Estate in exchange for the receipt of the Property. Mark Doe accepts the foregoing in full, final and complete settlement of all claims he may have, and which he is releasing, against the Estate.

2. **Representation of Remaining Beneficiaries**. Cindi Doe hereby warrants and represents that she is a beneficiary of the Estate. Executor hereby warrants and represents that he is a beneficiary of the Estate, and the Executor of the Estate, and entering into this Agreement in such capacities. Executor, in such capacities, acknowledges the transfer of the Property to Mark Doe in procurement of the release to the Estate and warrants that said transfer is permanent and nonrefundable. Executor warrants and represents that the Estate, after the transfer of the Property to Mark Doe, will be divided as follows:

a. One-half (1/2) to Cindi Doe
b. One-half (1/2) to John Doe

3. **Governing Law**. The terms and provisions of this Agreement shall be construed under the laws of the State of Iowa. Venue shall be proper in Polk County, Iowa.

4. **Effect and Amendment of Agreement**. This Agreement embodies the full and complete Agreement of the parties, and no amendments, alterations, modifications or changes shall be effective or binding upon the parties unless the same are reduced to writing by the parties.

5. **Failure to Enforce is not a Waiver.** The failure of either party to attempt to enforce any of its rights under this Agreement shall not constitute a waiver of its right to pursue any prior or subsequent breach of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have set their hands as of the day and year first above written.

_____
John Doe

_____
Mark Doe

_____
Cindi Doe

_____
John Doe
Executor of the Jane Doe Estate

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IN THE MATTER OF THE ESTATE OF JANE DOE, Deceased.	PROBATE NO.: ESPR 11111 ORDER APPROVING FAMILY SETTLEMENT AGREEMENT

NOW on this _____ day of _____, 2016, the Executor's Application for Approval of Family Settlement Agreement comes on for hearing and this Court, having examined the file and being fully advised in the premises, finds:

1. Mark Doe is a beneficiary pursuant to the Last Will and Testament of Jane Doe and John Doe is the duly appointed Executor of said will.
2. The Settlement Agreement resolves all conflicts and disputes between the parties regarding the distribution of property from the Estate.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Court that the Settlement Agreement of the Estate between John Doe, Mark Doe, and Cindi Doe is hereby approved.

Bridge the Gap Seminar

Electronic Discovery in Iowa

9:00 a.m. - 9:30 a.m.

Presented by:
James Weston
Tom Riley Law Firm P.L.C.
1210 Highway 6 West
P.O. Box 3088
Iowa City, IA 52244
Phone: 319-351-4996

Thursday, September 8, 2016

Bridge the Gap 2016
Electronic Discovery in Iowa

JAMES K. WESTON II
Tom Riley Law Firm, P.L.C.
1210 Highway 6 West
P. O. Box 3088
Iowa City, IA 52244-3088
Ph: (319) 351-4996
Fax: (319) 351-7063
Email: jimw@trlf.com

ELECTRONIC DISCOVERY IN IOWA

I. INTRODUCTION

This presentation is a non-exhaustive discussion of electronic discovery, with a focus on routine civil litigation in Iowa. I will not discuss in detail the many computer programs, technical litigation assist companies, etc., that would apply to, say, class action suits, major products liability cases, etc. These case often involve thousands or millions of electronic documents and require specialized document management software, often customized to the case. Specialized bar groups are a great place to get started; the ABA and ISBA have some excellent resources if this is an area of need. This presentation will focus on more day-to-day electronic discovery issues that face Iowa lawyers in civil or general practice.

II. IOWA RULES

In general, electronic data is governed by the same Rules of Civil Procedure as non-electronic data. There are a few areas that specifically treat electronically stored information that we will discuss.

A. Iowa Rule of Civil Procedure 1.512: Production of documents, electronically stored information and things. The rule includes electronically stored information within the meaning of "document" for production purposes. Rule 1.512(1)(a) requires the ESI to be "translated, if necessary, by the respondent into a reasonably usable form." The author is not aware of any Iowa cases discussing in detail what is reasonably usable form. The rule goes on to state "If a request does not specify the form for producing electronically stored information, the responding party must produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable." Iowa R. Civ. P. 1.512(2)(d)(2).

B. Iowa Rule of Civil Procedure 1.507: Trial Scheduling and Discovery Plan. The rule requires the parties to meet and formulate a discovery plan. The form (Rule 23.5 form 2 [for

standard cases] and form 3 [for expedited civil actions] both attached at the end of this outline) requires the parties to make a statement about electronically stored information (part 7 [form 2]; part 6 [form 3]). The form allows the parties latitude in setting the procedure for electronic discovery, and also allows the parties to tell the court they have not been able to agree and to request a hearing.

C. Iowa Rule of Civil Procedure 1.504: Protective Orders: Rule 1.504(2) states: "A party need not provide discovery of electronically stored information form sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery, or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of rule 1.503(8) ["scope of discovery: limitations on frequency and extent"]. The court may specify conditions for the discovery."

III. E-DISCOVERY IN "ROUTINE" CASES

A. SOCIAL MEDIA:

1. Facebook
2. Other social media
3. Your client
4. Opposing party
5. Informal discovery
6. Formal discovery
7. Objections

B. E-MAIL

C. CELL PHONE/TEXT MESSAGING

D. VIDEO AND PHOTOS

E. MS WORD DOCUMENTS

F. MEDICAL RECORDS

G. BUSINESS RECORDS

H. EMPLOYMENT RECORDS

IV. OTHER ISSUES INVOLVING E-DISCOVERY

A. Preserving ESI

B. Ethical Issues

C. Practice considerations

V. CONCLUSION

Although electronic discovery can be intimidating, especially to those not fully comfortable with computers and modern technology, no special training, equipment, or software is required to comply with e-discovery rules in routine Iowa civil cases. In most cases, software programs already on your computer, such as MS Word, Adobe, etc., are sufficient. Remember, in general the same discovery rules for paper documents apply to electronic documents. In fact, viewing electronically stored information as completely different from traditionally stored information can cause problems.

Rule 23.5—Form 2: ***Trial Scheduling and Discovery Plan***

Do not file this form in an Expedited Civil Action case, instead use Form 3.

- This form is to be filed within 7 days after the parties' discovery conference and before the trial-setting conference with the court.
- The parties should complete the entire form except as otherwise indicated.

In the Iowa District Court for _____ County

_____ **Plaintiff(s) / Petitioner(s)** *Full name: first, middle, last* vs. _____ **Defendant(s) / Respondent(s).** *Full name: first, middle, last*	No._____ **Trial Scheduling and Discovery Plan** *Use of this form is mandatory* Date Petition filed:_____/ _____/ _____ *mm dd yyyy* Case type: ☐ Law ☐ Equity ☐ Other ☐ PCR ☐ Judicial Review Trial type: ☐ Jury ☐ Nonjury Expected trial length: _____ days The amount in controversy exceeds $10,000. ☐ Yes ☐ No

Appearances:
Plaintiff(s) / Petitioner(s)

Defendant(s) / Respondent(s)

It is ordered:

1. **Trial** *Note to parties: Unless you have obtained a trial date from court administration, leave this date blank; the court will enter the date after the trial-setting conference.*

   Trial of this case is set for _____ _____, 20 _____, at _____:_____ ☐ a.m. ☐ p.m.
   Month Day Year Time

   in the district court in the courthouse of the county named above.

2. **Pretrial conference** *Check one. Note to parties: If box* A *is checked, leave the date blank unless you have obtained a pretrial conference date from court administration. If you do not have a pretrial conference date and check box* A, *the court will enter the date, by order, after the trial-setting conference.*

   A. ☐ A pretrial conference will be held on _____ ___, 20____, at _____:_____ ☐ a.m. ☐ p.m.
   Month Day Year Time

   The conference may be held telephonically with prior approval of the court.

   B. ☐ A pretrial conference will be held upon request.

3. **New parties**

   No new parties may be added later than 180 days before trial or _____ / _____ / _____.
   mm dd yyyy

If you need assistance to participate in court due to a disability, contact the disability coordinator at: (_____) _____ Persons who are hearing or speech impaired may call Relay Iowa TTY (1-800-735-2942). Disability coordinators cannot provide legal advice. Disability coordinator contact information available at: http://www.iowacourts.gov/Administration/Directories/ADA_Access/

4. Transcripts and records

All required agency records or prior criminal transcripts will be filed within 30 days of the date of this Plan or by _____ / _____ / _____.
mm *dd* *yyyy*

5. Pleadings

Pleadings will be closed 60 days before trial or _____ / _____ / _____.
mm *dd* *yyyy*

6. Initial disclosures *Check all that apply*

A. ☐ The parties have exchanged initial disclosures.

B. ☐ The parties will provide initial disclosures no later than _____.

C. ☐ The parties have stipulated that the following will not be included in initial disclosures:
List items not included

D. ☐ The parties have stipulated not to provide any initial disclosures.

E. ☐ The following party objects to providing initial disclosures on the following grounds:
Identify the party and state all applicable grounds

7. Discovery

The parties have held a discovery conference as required by Iowa Rule of Civil Procedure 1.507.

All written discovery will be served no later than 90 days before trial. All depositions will be completed no later than 60 days before trial. Or, all discovery will be completed by

_____ / _____ / _____.
mm *dd* *yyyy*

Check all that apply

A. ☐ No discovery of electronically stored information is expected in this case.

B. ☐ The parties have conferred about discovery of electronically stored information and reached agreement as set out in Attachment ____.

C. ☐ The parties have conferred about discovery of electronically stored information and have been unable to reach an agreement. *Note to parties: If box* C *is checked, leave the following information blank unless the parties have obtained a hearing date, time, and location from court administration.*

A hearing is set for _____ /_____ /_____, at: _____:_____ ☐ a.m. ☐ p.m.
mm *dd* *yyyy* *Time*

☐ at the _____ County Courthouse, courtroom _____, or
County *Courtroom number*

☐ at the following location: _____.

D. ☐ The parties have agreed to a discovery plan, and their agreement is set forth in Attachment ___.

E. ☐ The parties have agreed to deviate from the limits on discovery otherwise applicable to this action, and their agreement is set forth in Attachment ___.

F. ☐ The parties have agreed to conduct discovery in phases, and their agreement is set forth in Attachment ____.

G. ☐ The parties have reached an agreement under Iowa Rule of Evidence 5.502 as set forth in Attachment ____.

H. ☐ The parties have reached an agreement under Iowa Rule of Civil Procedure 1.504 as set forth in Attachment ____.

I. ☐ The parties have conferred about a discovery plan and have been unable to reach agreement on the issues set forth in Attachment ____. *Note to parties: If box* I *is checked, leave the following information blank unless the parties have obtained a hearing date, time, and location from court administration.*

A hearing is set for _____ /_____ /_____, at: _____:_____ ☐ a.m. ☐ p.m.
mm *dd* *yyyy* *Time*

☐ at the _____ County Courthouse, courtroom _____, or
County *Courtroom number*

☐ at the following location: _____.

8. Expert witnesses

A. A party who intends to call an expert witness, including rebuttal expert witnesses, shall certify to the court and all other parties the expert's name, subject matter of expertise, and qualifications, within the following time period, unless the Iowa Code requires an earlier designation date (*see, e.g.,* Iowa Code section 668.11):

(1) Plaintiff: 210 days before trial or _____ /_____ /_____.
mm *dd* *yyyy*

(2) Defendant/Third Party Plaintiff: 150 days before trial or _____ /_____ /_____.
mm *dd* *yyyy*

(3) Third Party Defendant/Others/Rebuttal: 90 days before trial or _____ /_____ /_____.
mm *dd* *yyyy*

B. Any disclosures required by Iowa Rule of Civil Procedure 1.500(2)(*b*) will be provided:
Check each that applies

(1) ☐ At the same time the expert is certified.

(2) ☐ According to the following schedule:

a. Plaintiff: _____ /_____ /_____.
mm *dd* *yyyy*

b. Defendant/Third Party Plaintiff: _____ /_____ /_____.
mm *dd* *yyyy*

c. Third Party Defendant/Others/Rebuttal: _____ /_____ /_____.
mm *dd* *yyyy*

C. This section does not apply to court-appointed experts.

The deadlines listed in paragraphs 5, 6, 7, *and* 8 *may be amended, without further leave of court, by filing a Stipulated Amendment to this Plan listing the dates agreed upon and signed by all attorneys and self-represented litigants. Such Stipulated Amendment may not override any requirement of the Iowa Court Rules and cannot serve as a basis for a continuance of the trial date or affect the date for pretrial submissions.*

9. Pretrial submissions

At least **14 or** ____ (the parties may enter another number but not less than **7**) **days before trial**, counsel for the parties and self-represented litigants must:

A. File a **witness and exhibit** list with the clerk of court, serve a copy on opposing counsel and self-represented litigants, and exchange exhibits. In electronic cases, witness and exhibit lists must be electronically filed, and the EDMS system will serve copies on all registered parties. Exhibits must be electronically submitted in lieu of exchanging them. These disclosures must

include the following information about the evidence that the disclosing party may present at trial other than solely for impeachment:

(1) The name and, if not previously provided, the address, telephone numbers, and electronic mail address of each witness, separately identifying those the party expects to present and those the party may call if the need arises.

(2) The page and line designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition.

(3) An identification of each document or other exhibit, including summaries of other evidence, separately identifying those items the party expects to offer and those it may offer if the need arises. The following rules govern exhibits and exhibit lists:

a. Plaintiff will use numbers and Defendant will use letters. Pretrial exhibit lists will identify each exhibit by letter or number and description. Exhibits must be marked before trial.

b. Immediately before commencement of trial, the court must be provided with a bench copy, and the court reporter with a second copy, of the final exhibit list for use in recording the admission of evidence.

c. In nonjury cases, immediately before commencement of trial, parties must provide the court with a bench copy of all exhibits identified on the exhibit lists.

d. Within 7 days after the filing of an exhibit list, or within 4 days if the deadline for filing of the list is less than 10 days before trial, counsel and self-represented litigants must file with the clerk of court, and serve on each party, any identification, authentication, and foundation objections to the exhibits listed; otherwise such objections are deemed **waived** for trial purposes. In electronic cases, any identification, authentication, and foundation objections will be electronically filed, and the EDMS system will serve copies on all registered parties. Electronic filing of these objections must be done within 7 days of the filing of an exhibit list, or within 4 days if the deadline for filing of the list is less than 10 days before trial; otherwise, such objections are deemed **waived** for trial purposes.

B. File and serve **motions in limine**, with supporting legal authority.

C. File and serve **all proposed jury instructions** in a form to be presented to the jury, including a statement of the case, the stock jury instruction numbers, and verdict forms. The court must be provided the instructions in written form and electronically.

D. Deliver to the judge and serve a concise **trial brief** addressing factual, legal, and evidentiary issues, with citation to legal authorities.

10. Motions

All motions including motions for summary judgment and except motions in limine, must be filed with the clerk of court's office or electronically filed at https://www.iowacourts.state.ia.us/EFile/ at least 60 days before trial, with copies to the assigned judge.

11. Settlement conference

Note to parties: If A *or* B *is checked, leave any date blank; the court will enter the settlement conference date, by order, after the trial-setting conference.*

A. ☐ A settlement conference will be held on _____ ___, 20___, at _____:_____ ☐ a.m. ☐ p.m.
Month *Day* *Year* *Time*

at the _____ County Courthouse.

All parties with authority to settle must be present.

B. ☐ A settlement conference will be held on _____ ___, 20___, at _____:_____ ☐ a.m. ☐ p.m.
Month *Day* *Year* *Time*

at the following location _____.

All parties with authority to settle must be present.

C. ☐ A settlement conference will occur at a date, time, and location arranged by the parties.

All parties with authority to settle must be present.

D. ☐ A settlement conference will be held upon request.

The parties are encouraged to consider alternative dispute resolution including private mediation or arbitration.

12. Settlements

The parties are responsible for immediately notifying the court administrator of settlement.

13. Late settlement fees

Late settlement fees under Iowa Rule of Civil Procedure 1.909 are applicable.

14. Continuances

Continuances are discouraged and will only be granted for good cause. Motions to continue are governed by Iowa Rule of Civil Procedure 1.910. In the event the trial date is continued, all time deadlines in this Plan and any Stipulated Amendments remain in effect relative to the new trial date unless the court approves new deadlines.

15. Notice

Failure to comply with any of the provisions of this Plan or Stipulated Amendments to this Plan may result in the court imposing sanctions pursuant to Iowa Rule of Civil Procedure 1.602(5), including limitation and exclusion of evidence and witnesses and payment of costs or attorney fees. The court will resolve disputes regarding oral agreements on scheduling by reference to this Plan or any Stipulated Amendments to this Plan.

At least one signature to the Trial Scheduling and Discovery Plan is required. The signer certifies that all listed parties have joined in this Trial Scheduling and Discovery Plan, subject to any objections noted.

I certify that all parties and attorneys to this action have agreed to this Trial Scheduling and Discovery Plan and have been served with a copy.

_____ _____, 20_____ /s_____

Signed: Month Day Year Party's or attorney's signature

_____ _____

Printed name Attorney's law firm, if applicable

_____ _____ _____ _____

Mailing address City State ZIP code

(_____) _____ _____ _____

Phone number Email address Additional email address, if available

Original filed with the clerk of court or electronically filed at https://www.iowacourts.state.ia.us/EFile/.

Copies to: counsel of record, self-represented litigants, and court administration.

For questions regarding documents filed with the court in this case, please see www.judicial.state.ia.us/Online_Court_Services/Online_Docket_Record/ or call the clerk of court.

Rule 23.5—Form 3: ***Trial Scheduling and Discovery Plan for Expedited Civil Action***

Use of this form is mandatory in Expedited Civil Actions under Iowa Rule of Civil Procedure 1.281.

- This form is to be filed within 7 days after the parties' discovery conference and before the trial-setting conference with the court.
- The parties should complete the entire form except as otherwise indicated.

In the Iowa District Court for _____ County

_____ **Plaintiff(s) / Petitioner(s)** *Full name: first, middle, last* vs. _____ **Defendant(s) / Respondent(s)** *Full name: first, middle, last*	No._____ **Trial Scheduling and Discovery Plan for Expedited Civil Action** Date Petition filed:_____/_____/_____ *mm dd yyyy* Case type: ☐ Law ☐ Equity ☐ Other ☐ PCR ☐ Judicial Review Trial type: ☐ Jury ☐ Nonjury Expected trial length: 2 days The amount in controversy exceeds $10,000. ☐ Yes ☐ No

Appearances:
Plaintiff(s) / Petitioner(s)

Defendant(s) / Respondent(s)

1. **Trial** *Note to parties: Unless you have obtained a date from court administration, leave this date blank; the court will enter the date after the trial-setting conference.*

   Trial of this case is set for _____ _____, 20___, at _____:_____ ☐ a.m. ☐ p.m.
   Month Day Year Time

   in the district court in the courthouse of the above-named county.

2. **Pretrial conference** *Check one. Note to parties: If box* A *is checked, leave the date blank unless you have obtained a pretrial conference date from court administration. If you do not have a pretrial conference date and check box* A, *the court will enter the date, by order, after the trial-setting conference.*

   A. ☐ A pretrial conference will be held on _____ _____, 20____, at _____:_____ ☐ a.m. ☐ p.m.
   Month Day Year Time

   The conference may be held telephonically with prior approval of the court.

   B. ☐ A pretrial conference will be held upon request.

3. **New parties**

   No new parties may be added later than 180 days before trial or _____ / _____ / _____.
   mm dd yyyy

If you need assistance to participate in court due to a disability, contact the disability coordinator at: (_____) _____ Persons who are hearing or speech impaired may call Relay Iowa TTY (1-800-735-2942). Disability coordinators cannot provide legal advice. Disability coordinator contact information available at: http://www.iowacourts.gov/Administration/Directories/ADA_Access/

4. Pleadings

Pleadings will be closed 60 days before trial or _____ / _____ / _____.
mm *dd* *yyyy*

5. Initial disclosures. *Check all that apply*

A. ☐ The parties have exchanged initial disclosures.

B. ☐ The parties will provide initial disclosures no later than _____.

C. ☐ The parties have stipulated that the following will not be included in initial disclosures:
List items not included

D. ☐ The parties have stipulated not to provide any initial disclosures.

E. ☐ The following party objects to providing initial disclosures on the following grounds:
Identify the party and state all applicable grounds

6. Discovery

The parties have held a discovery conference as required by Iowa Rule of Civil Procedure 1.507.

All written discovery will be served no later than 90 days before trial. All depositions will be completed no later than 60 days before trial. Or, all discovery will be completed by

_____ / _____ / _____.
mm *dd* *yyyy*

Check all that apply and attach any appropriate exhibits

A. ☐ No discovery of electronically stored information is expected in this case.

B. ☐ The parties have conferred about discovery of electronically stored information and reached agreement as set out in Attachment ____.

C. ☐ The parties have conferred about discovery of electronically stored information and have been unable to reach an agreement. *Note to parties: If box* C *is checked, leave the following information blank unless the parties have obtained a hearing date, time, and location from court administration.*

A hearing is set for _____ /_____ /_____, at: _____:_____ ☐ a.m. ☐ p.m.
mm *dd* *yyyy* *Time*

☐ at the _____ County Courthouse, courtroom _____, or
County *Courtroom number*

☐ at the following location: _____.

D. ☐ The parties have agreed to a discovery plan, and their agreement is set forth in Attachment ___.

E. ☐ The parties have agreed to deviate from the limits on discovery otherwise applicable to this action, and their agreement is set forth in Attachment ___.

F. ☐ The parties have agreed to conduct discovery in phases, and their agreement is set forth in Attachment ____.

G. ☐ The parties have reached an agreement under Iowa Rule of Evidence 5.502 as set forth in Attachment ____.

H. ☐ The parties have reached an agreement under Iowa Rule of Civil Procedure 1.504 as set forth in Attachment ____.

I. ☐ The parties have conferred about a discovery plan and have been unable to reach agreement on the issues set forth in Attachment ____. *Note to parties: If box I is checked, leave the following information blank unless the parties have obtained a hearing date, time, and location from court administration.*

A hearing is set for _____ /_____ /_____, at: _____:_____ ☐ a.m. ☐ p.m.
mm *dd* *yyyy* *Time*

☐ at the _____ County Courthouse, courtroom _____, or
County *Courtroom number*

☐ at the following location: _____.

7. Health care provider statement

Unless otherwise stipulated or ordered by the court, a copy of any completed Health Care Provider Statement in Lieu of Testimony, Iowa R. Civ. P. 1.281(4)(*g*)(3), must be served on all parties at least 150 days before trial. Any objection to the Health Care Provider Statement must be filed with the court, together with a copy of the statement, within 30 days after receipt of the statement.

8. Expert witnesses

A. A party who intends to call an expert witness, including rebuttal expert witnesses, must certify to the court and all other parties the expert's name, subject matter of expertise, and qualifications, within the following time period, unless the Iowa Code requires an earlier designation date (*see, e.g.,* Iowa Code section 668.11):

(1) Plaintiff: 210 days before trial or _____ /_____ /_____.
mm *dd* *yyyy*

(2) Defendant/Third Party Plaintiff: 150 days before trial or _____ /_____ /_____.
mm *dd* *yyyy*

(3) Third Party Defendant/Others/Rebuttal: 90 days before trial or _____ /_____ /_____.
mm *dd* *yyyy*

B. Any disclosures required by Iowa Rule of Civil Procedure 1.500(2)(*b*) will be provided:
Check each that applies

(1) ☐ At the same time the expert is certified.

(2) ☐ According to the following schedule:

a. Plaintiff: _____ /_____ /_____.
mm *dd* *yyyy*

b. Defendant/Third Party Plaintiff: _____ /_____ /_____.
mm *dd* *yyyy*

c. Third Party Defendant/Others/Rebuttal: _____ /_____ /_____.
mm *dd* *yyyy*

C. This section does not apply to court-appointed experts.

The deadlines listed in paragraphs 4, 5, 6, 7, *and* 8 *may be amended, without further leave of court, by filing a Stipulated Amendment to to this Plan listing the dates agreed upon and signed by all counsel and self-represented litigants. Such Stipulated Amendment may not override any requirement of the Iowa Court Rules and cannot serve as a basis for a continuance of the trial date or affect the date for pretrial submissions.*

9. Pretrial submissions

At least **14 or** ____ (the parties may enter another number but not less than **7**) **days before trial**, counsel for the parties and self-represented litigants must:

A. File a **witness and exhibit** list with the clerk of court, serve a copy on opposing counsel and self-represented litigants, and exchange exhibits. In electronic cases, witness and exhibit lists must be electronically filed, and the EDMS system will serve copies on all registered parties. Exhibits must be electronically submitted in lieu of exchanging them. These disclosures must include the following information about the evidence that the disclosing party may present at trial other than solely for impeachment:

(1) The name and, if not previously provided, the address, telephone numbers, and electronic mail address of each witness, separately identifying those the party expects to present and those the party may call if the need arises.

(2) The page and line designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition.

(3) An identification of each document or other exhibit, including summaries of other evidence, separately identifying those items the party expects to offer and those it may offer if the need arises. The following rules govern exhibits and exhibit lists:

a. Plaintiff will use numbers and Defendant will use letters. Pretrial exhibit lists will identify each exhibit by letter or number and description. Exhibits must be marked before trial.

b. Immediately before commencement of trial, the court must be provided with a bench copy, and the court reporter with a second copy, of the final exhibit list for use in recording the admission of evidence.

c. In nonjury cases, immediately before commencement of trial, parties must provide the court with a bench copy of all exhibits identified on the exhibit lists.

d. Within 7 days after the filing of an exhibit list, or within 4 days if the deadline for filing of the list is less than 10 days before trial, counsel and self-represented litigants must file with the clerk of court, and serve on each party, any identification, authentication, and foundation objections to the exhibits listed; otherwise such objections are deemed **waived** for trial purposes. In electronic cases, any identification, authentication, and foundation objections must be electronically filed, and the EDMS system will serve copies on all registered parties. Electronic filing of these objections must be done within 7 days of the filing of an exhibit list, or within 4 days if the deadline for filing of the list is less than 10 days before trial; otherwise, such objections are deemed **waived** for trial purposes.

B. File and serve **motions in limine**, with supporting legal authority.

C. File and serve a complete set of **joint jury instructions and verdict forms**, in a form to be presented to the jury or judge, including a statement of the case and any stock jury instruction numbers. If there is any disagreement about an instruction or verdict form, each side must include its specific objections, supporting authority, and a proposed alternative instruction or verdict form for the court's approval. The court must be provided the instructions in written form and electronically.

D. Deliver to the judge and serve a concise **trial brief** addressing factual, legal, and evidentiary issues, with citation to legal authorities.

10. Motions

All motions including motions for summary judgment and except motions in limine, must be filed with the clerk of court's office or electronically filed at https://www.iowacourts.state.ia.us/EFile/ at least 90 days before trial, with copies to the assigned judge.

11. Settlements

The parties are responsible for immediately notifying the court administrator of settlement.

12. Late settlement fees

Late settlement fees under Iowa Rule of Civil Procedure 1.909 are applicable.

13. Continuances

Continuances are discouraged and will only be granted for good cause. Motions to continue are governed by Iowa Rule of Civil Procedure 1.910. In the event the trial date is continued, all time deadlines in this Plan and any stipulated amendments remain in effect relative to the new trial date unless the court approves new deadlines.

14. Notice

Failure to comply with any of the provisions of this Plan or Stipulated Amendments to this Plan may result in the court imposing sanctions pursuant to Iowa Rule of Civil Procedure 1.602(5), including limitation and exclusion of evidence and witnesses and payment of costs or attorney fees. The court will resolve disputes regarding oral agreements on scheduling by reference to this Plan or any Stipulated Amendments to this Plan.

At least one signature to the Trial Scheduling and Discovery Plan is required. The signer certifies that all listed parties have joined in this Trial Scheduling and Discovery Plan, subject to any objections noted.

I certify that all parties and attorneys to this action have agreed to this Trial Scheduling and Discovery Plan and have been served with a copy.

_____ _____, 20_____ /s_____

Signed: Month Day Year *Party's or attorney's signature*

_____ _____

Printed name *Attorney's law firm, if applicable*

_____ _____ _____ _____

Mailing address *City* *State* *ZIP code*

(_____) _____ _____ _____

Phone number *Email address* *Additional email address, if available*

Original filed with the clerk of court or electronically filed at https://www.iowacourts.state.ia.us/EFile/.

Copies to: counsel of record, self-represented litigants, and court administration.

For questions regarding documents filed with the court in this case, please see www.judicial.state.ia.us/Online_Court_Services/Online_Docket_Record/ or call the clerk of court.

PRODUCING A FACEBOOK DISCOVERY FILE

- Log in to Facebook
- On the Home page, click the "gear" on the top-right of the screen, at the end of the blue bar.
- Click "Account Settings" from the resulting drop-down menu, which opens the "General Account Settings" Screen.
- On the "General Account Settings" screen, click "Download a copy of your Facebook data"
- Click "Start My Archive" and follow instructions.

ANSWER: Plaintiff objects to providing her social media usernames and passwords on the basis that the request in overbroad and would allow unfettered access of the Defendant into the private sections of the Plaintiff's social media that would be irrelevant to the claims and defenses in this lawsuit and unlikely to lead to relevant information. Defendant is free to serve Interrogatories and documents requests that seek information from the accounts that is relevant to the claims and defenses in this lawsuit. Plaintiff's counsel can then access the private sections of Plaintiff's social media accounts and provide the information and documents responsive to the discovery request.

Sample facebook objection

Plaintiffs object to subparts d, e, f, and g as overbroad and unduly burdensome and as invading on Plaintiffs' constitutionally protected right to privacy. Plaintiffs have not claimed that they are completely incapable of engaging in daily activities as a result of Defendants' conduct or that they cannot feel emotion or are depressed 100% of the time. Multiple courts have found that these kinds of requests for all posts, comments, groups joined, etc. are on their face unduly burdensome, overbroad, and unreasonable to the extent that they seek (1) information from sections designated as private by the party, and (2) where the opposing party has not made a threshold showing that something in the Plaintiffs' posting in some way undermines their claims in this case. See. e.g., Tompkins v. Detroit Metropolitan Airport, 278 F.R.D. 387 (E.D.Mich. 2012) (Customer's entire social networking website account, including those sections she designated as private in order to preclude viewing by general public, were not discoverable, as irrelevant and overly broad and contained voluminous personal material having nothing to do with her lawsuit); Artt v. Orange Lake Country Club Realty, Inc., 2015 WL 4911086, at *1 (M.D.Fla. 2015) (The court found that Defendant's request for every online profile, post, message, tweet, reply, retweet, status update, wall comment, group joined, activity stream, blog entry, photograph, video, online communication, and all other information contained in the plaintiff's Facebook, MySpace, Instagram, LinkedIn or other social networking accounts was on its face, overbroad, unduly burdensome, and unreasonable.); Devries v. Morgan Stanley & Co. LLC, 2015 U.S. Dist. LEXIS 27293, at *15-19, 2015 WL 893611 (S.D.Fla. Mar. 2, 2015); Palma v. Metro PCS Wireless. Inc., No. 8:13-cv-698-T-33MAP, 18 F.Supp.3d 1346, 1347-48 (M.D.Fla. April 29, 2014); Davenport v. State Farm Mutual Auto. Ins. Co., No. 3:11-cv- 632-J-JBT, 2012 WL 555759, at *2 (M.D.Fla. Feb.21, 2012) (Defendant "does not have a generalized right to rummage at will through information that Plaintiff has limited from public view."); Keller v. National Farmers Union Property & Cas. Co., 2013 WL 27731, at *1 (D.Mont. 2013) (A party pleading "a host of physical and emotional injuries" does not entitle the opposing party to their social media accounts absent a showing that the public postings in some way undermine their claim.); Potts v. Dollar Tree Stores, Inc., 2013 WL 1176504, at *3 (M.D.Tenn. 2013) (Where the defendant lacked any evidentiary showing that the plaintiff's public Facebook profile contained information that would reasonably lead to the discovery of admissible evidence, the defendant was not entitled to the plaintiff's entire Facebook page); Ogden v. All-State Career School, 299 F.R.D. 446, 450 (W.D.Pa. 2014) ("Ordering plaintiff to permit access to or produce complete copies of his social networking accounts would permit defendant to cast too wide a net and sanction an inquiry into scores of quasi-personal information that would be irrelevant and non-discoverable. Defendant is no more entitled to such unfettered access to plaintiff's personal email and social networking communications than it is to rummage through the desk drawers and closets in plaintiff's home.").

ANSWER:

The only social networking site that Claimant maintains is a Facebook page, under the username _____.

Claimant objects to the remainder of the information requested in this interrogatory, on the basis that it is overly broad, unduly burdensome, and is a fishing expedition which goes far beyond what could reasonably be calculated to lead to the discovery of relevant evidence, therefore resulting in harassment, unnecessary and time consuming delay, and increase in the cost of litigation. Claimant is providing the username(s) for the social media the claimant utilizes. The username provides access to what is available to the general public, and is a legally sufficient response to this Interrogatory. See Langford v. Tyson Foods, File No. 5035375 (Ruling on Motion To Compel, 3/13/14) ([D]oing what defendant requests would be a huge invasion of claimant's privacy rights. This is akin to asking for a key to his office or residence to enable a search for any incriminating photos. I doubt that the employer would be willing to turn over its user names and passwords to gain access to their computer records in a fishing expedition for videos or photos that will be helpful to Claimant. There must be a reasonable limit to such fishing expeditions. Limiting Facebook access in discovery to only what is viewable by the public appears to be a reasonable limit, absent some specific evidence that certain photos or videos are actually present that then can be reviewed for relevancy.); Williams v. Apria HealthCare, File No. 5046557 (Ruling on Motion to Compel, 6/6/14) (finding a reasonable limit must be placed on discovering Facebook information by restricting access to information that is not available to the general public, and holding that providing the username was deemed compliance with the defendants' requests.); Hall v. Girl Scouts, File No. 5042619 (Ruling on Motion to Compel, 4/14/14) (refusing to compel production of any of the requested information on social media, or copies of social media, preliminarily noting: the undersigned finds defendants' request for claimant's usernames and passwords inappropriate. Not only would granting defendants unlimited access to claimant's social media be a violation of the privacy of claimant and other individuals not a party to this action, doing so would draw any evidence gleaned from those sources into question, as it would be possible for defendants' agents to manipulate such evidence.); Moran v. Eichelberger Farms, File No. 5052035 (Ruling on Motion to Compel, 8/14/15) (denying defendant's motion to compel any social media information, holding that I.C.§85.27(2) does not apply to social media, because: The latest instruction on this matter comes from the Iowa Supreme Court and the Court limits discovery under this Code section to only health care provider records. Iowa Insurance Institute et al. v. Core Group of the Iowa Association for Justice, No. 13-1627 (Iowa, June 12, 2015). More specifically, Claimant objects that the remainder of the requested information is non discoverable, as it would:

* Enable defense attorneys, employers, adjusters, private investigators, nurse case managers, etc., to friend or follow Claimant, thereby enabling direct communication with the Claimant, in violation of Iowa Rules of Professional Conduct, Rules 32:4.2(a) and 32:8.4(a);
* Enable defense attorneys, employers, adjusters, private investigators, nurse case managers, etc.; to access information concerning claimant, regardless of whether or not the posts have any relevance to Claimant's physical or mental condition relative to the workers compensation claim, such as: pictures of, or information concerning, Claimant's political or religious beliefs; etc.¦;
* Open Claimant up to legal recourse by facebook (See ttps://www.facebook.com/legal/terms) for sharing her password;
* Enable defense attorneys, employers, adjusters, private investigators, nurse case managers, etc.¦ to access her account, in direct violation of Facebook's Statement of Rights and Responsibilities with which Claimant is required to comply as a term of use;
* Enable defense attorneys, employers, adjusters, private investigators, nurse case managers, etc.¦ to access the private information of Claimant, despite the Claimant having enacted enhanced privacy settings so as to allow only very limited access to their social media accounts (such as exclusively to immediate family), or having sent private emails or messages directly to a specific individual and not made available to anyone else, with the Claimant thereby having engaged in social media with a reasonable expectation of privacy;
* Enable defense attorneys, employers, adjusters, private investigators, nurse case managers, etc.¦ through links to directly access and search the private information of other social media friends or followers, who have enacted enhanced privacy settings with the intent of allowing only very limited and non-public access to their social media accounts; AND
* Enable defense attorneys, employers, adjusters, private investigators, nurse case managers, etc.¦ to pose as claimant and post from her account, or like or share information posted by other facebook friends, thereby disseminating such information without the consent of Claimant.

Claimant further objects that this interrogatory does not contain any temporal limitations on the request (such as from the date to the present) so as to reasonably limit the inquiry to matters concerning the physical or mental condition of the Claimant relative to the claim.

Furthermore, subject to and without waiving the forgoing objections, all information on any social media site, which has not deliberately been made private by the claimant and therefore shared solely based on Claimant's reasonable expectation of privacy, is equally accessible and available to defense attorneys, employers, adjustors, private investigators, nurse case managers, etc. through a basic Google search, using claimant's name.

The First Adoption Step: Termination of Parental Rights

9:30 a.m. - 10:00 a.m.

Presented by:
David Grooters
Pappajohn Shriver Eide & Nielsen PC
103 East State Street, Suite 800
Mason City, IA 50401
Phone: 641-423-4264

Thursday, September 8, 2016

THE FIRST ADOPTION STEP: TERMINATION OF PARENTAL RIGHTS

David A. Grooters

Pappajohn, Shriver, Eide & Nielsen P.C.

103 East State Street, Suite 800

Mason City, Iowa 50401

(641) 423-4264 (phone)

(641) 423-3145 (facsimile)

grooters@pappajohnlaw.com

www.iowaadoptionattorney.com

Fellow: American Academy of Adoption Attorneys

The adoption of a minor child in the state of Iowa consists of two (2) separate legal proceedings: (1) Termination of Parental Rights ("TPR") pursuant to Iowa Code Chapter 600A (or Chapter 232 if initiated by the State of Iowa), and thereafter (2) Adoption pursuant to Iowa Code Chapter 600. TPR legally and permanently severs the child's relationship to his or her biological parents, while adoption legally establishes the child's relationship to the adoptive parent(s).

Termination of Parental Rights (Chapter 600A)

1. Precious few things can be done prior to the birth of the child.

2. The adoptive family is or may be present at the child's birth depending on whether it is an open or closed adoption and whether there is an adoption agency

involved.

3. If biological parents are still agreeable to adoption, the child is "placed" with the agency or adoptive family while in the hospital.

4. The parents then sign a Release of Custody which places the custodianship of the child with an agency, attorney or other intermediary allowed by Iowa law. The Release of Custody cannot be signed before 72 hours after the child's birth. NO EXCEPTIONS! Signing starts the 96-hour period in which birthparents can change their mind for any reason. Once expired, birthparents can change their minds only for "good cause" up to time of TPR hearing. Iowa Code 600A.4. ***I TAKE THE POSITION THAT MOST/ALL JUDGES WOULD NONETHELESS ALLOW BIOLOGICAL PARENTS TO REVOKE THEIR RELEASE OF CUSTODY AFTER 96 HOURS FOR ANY REASON, GOOD CAUSE NOTWITHSTANDING.**

5. Iowa law does not allow a Release of Custody to place custody of a minor child to be adopted with the potential adoptive family directly (see above) unless a prospective adoption petitioner is related within the 4th degree of consanguinity. Iowa Code 600A.4.

6. Birth parents must be offered (they can refuse) a minimum of three (3) hours of birth parent and adoption counseling prior to signing a Release of Custody. Iowa Code 600A.4(2)(d).

7. File Petition for Termination of Parental Rights. The contents of the Petition as set out in Iowa Code 600A.5 and venue of the Court are very specific. Attach to the Petition the voluntary Releases of Custody. Many times the alleged (referred to as "putative") father cannot be identified or located, in which case you simply attach the biological mother's Release of Custody which is by itself effective for placing custody with the intermediary party. See 600B.40 which states that a mother of a child born out of wedlock has sole custody of the child.

8. Grounds for termination set forth in Iowa Code 600A.8 include voluntary execution of release of custody, failure to object after having been given notice and opportunity to do so, and abandonment of the minor child.

9. After filing the Petition, obtain a Court order which sets the termination of parental rights hearing date and appoints a required Guardian ad Litem for the minor child Appoint Custodian in same order. If doing notice by publication, form of publication is set out in 600A.5(5). Parties may accept service of notice also.

10. Service on parties of Original Notice, Petition, and Order Setting Hearing and Appointing GAL is required within statutory time frame. Personal Service is always preferred unless you can get the parties to sign an Acceptance of Service. Publication notice is allowed but query how effective is notice via the legal section

of a newspaper? Sometimes this is the only way with fathers who cannot be identified or located. If you are going to use publication notice, be prepared to explain to the Judge what efforts you made to locate the father/party. Use of Facebook, social media, people finder sites, and persons who might know of a person's location is expected! **The tendency of many parties is to not want to try to hard to locate the father/etc. but this is potentially fatal if the father later alleges that he was not notified; convince your client to locate, it's your job.**

11. **Any parent having their parental rights terminated in a 600A "private" TPR is entitled to representation if they cannot afford it.** The Petitioner is responsible for the cost unless the Petitioner is also indigent.

12. Do an Affidavit of Paternity in which biological mother states identity of putative father(s) and the circumstances of conception of said child. This can vary widely. Might be an unknown father. Might be several fathers. Affidavit is signed under penalty of perjury. Criminal violation is merely a simple misdemeanor for deliberate misstatements.

13. Make sure to send an inquiry to the putative father registry at the Iowa Department of Public Health to determine if anyone registered as the father of the minor child. **I have had one father ever register but you still have to try.** You get a letter back from the IDPH which you should file with the Court.

14. **One of the most frequent questions that I get from "cold calls" is from**

adopted children looking for their biological parents. Iowa law deals with this issue by allowing access to an adoption file only if the biological parents executed and filed in the court file an Affidavit to Reveal (or Not Reveal) Name if the child ever seeks court permission for identifying information. See 600.16A. Since the law allowing such an affidavit was not passed until recently, children from "older" adoptions have no possibility to access these records.

15. Termination Hearing. **I set these for court service days with the assumption that it will be uncontested.** If someone shows up wanting to "contest" and not have their rights terminated, I then set the "trial" for a full day down the road. This gives time to exchange discovery (I send interrogatories and requests for production of documents to verify fitness to parent). If parents have not changed their mind, they do not need to attend. Hearing cannot be sooner than 7 days after birth of child and must be reported. After termination, a "guardian" is named for the child (usually an agency or an attorney) and will have to consent to adoption after six-month waiting period. **Appeal period is 30 days, which cannot be waived or extended.** Child can be adopted anytime after expiration of the appeal period (Iowa has a 180 day waiting period unless an adoption petitioner is related to the child). TPR records are sealed after expiration of appeal period.

II. Adoption: The Second and Final Adoption Step

Thinking Ahead: Adoption Issues to Consider at TPR Stage

1. Obtain medical and social history information from biological parents as soon as you can. Iowa Code Section 600A.4(2)(f).

2. Ensure that a valid home study is in place prior to the child residing the adoptive family. This is required unless an adoptoin petitioner is a relative. Iowa has a six-month minimum residency requirement with post-placement supervision prior to placement.

3. Adoption Variations: infant child, "DHS child", relative adoption: fourth degree of consanguinity, agency adoption, private adoption, single parent adoption, adult adoption, foreign adoption, stepparent adoption.

4. Indian Child Welfare Acts (ICWA and Iowa ICWA)

5. Interstate Compact on the Placement of Children