

ALIMONY IN IOWA

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There are three purposes to this part of the presentation. First, I am going to give the practitioner a general basis of knowledge on alimony in Iowa. Second, I'm going to provide the practitioner with information on the tax consequences of alimony and discuss how alimony is affected by various factors such as property division, prenuptial agreements, child support, and workman's compensation. Third, I will discuss some of the more recent changes in Iowa case law regarding alimony. Finally, I will provide some sample interrogatories to obtain information from the payor of alimony.

I. Purposes

The Supreme Court of Iowa has defined alimony as a court-ordered stipend to a spouse in lieu of the other spouse's legal obligation for support. In re Marriage of Francis, 442 N.W.2d 59, 62 (Iowa 1989). Alimony is not an absolute right, but depends upon the circumstances of each particular case. In re Marriage of Anliker, 694 N.W.2d 535, 540 (Iowa 2006). Courts award alimony to serve three general purposes. An alimony award will differ in amount and duration according to the purpose it is designed to serve. The case of In re Marriage of Francis outlines those purposes.

A. Traditional Alimony. Traditional or permanent alimony is generally awarded because of a "traditional marriage," i.e. one

spouse works outside the home, while the second spouse works inside the home, the marriage is of long duration and the second spouse has been out of the work force for an extended time and is not capable of self-support. This type of award is payable for life or for so long as a dependent spouse is incapable of self-support. Its purpose is to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued. Francis at 63.

B. Rehabilitative alimony. This type of alimony is a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting. Francis at 63 citing Krauskopf in *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*.

"Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be limited or extended depending on the realistic needs of the economically dependent spouse, tempered by the goal of facilitating the economic independence of the ex-spouses." Francis at 64 citing Krauskopf.

C. Reimbursement Alimony. This type of alimony is based "upon economic sacrifices made by one spouse during the marriage that directly enhances the future earning capacity of the other." It should not be subject to modification or termination until full compensation is conceived. Similar to a property award, but based on future earning capacity rather than a division of tangible

assets, it should be fixed at the time of the decree. The court grants reimbursement alimony when the marriage was one of "short duration devoted almost entirely to the educational advancement of one spouse." In re Marriage of Probasco, 676 N.W.2d 179, 186 (Iowa 2004). In recognition of the personal nature of the award and the current tax laws, however, a spouse's obligation to pay reimbursement alimony must terminate upon the recipient's death. Francis at 64.

II. Statutory Guidelines

In Iowa, alimony is governed by Iowa Code Section 598.21A, subsection 1. Though courts continue to use the word "alimony," it has disappeared from Iowa statutory law in 1980 and is now statutorily termed "spousal support." Iowa Code § 598.21A; see In re Marriage of Will, 489 N.W.2d 445 (Iowa Ct. App. 1997). Iowa Code 598.21A allows the Court to grant an order requiring support payments to either party for a limited or indefinite length of time. Subsection 1 enumerates the factors the Court must consider before awarding support. They include:

A. The length of the marriage. See In re Marriage of Brown, 487 N.W.2d 331 (1992) (alimony awarded after a marriage of almost 19 years duration).

B. The age and physical and emotional health of the parties. See In re Marriage of Imhoff, 461 N.W.2d 343 (Iowa Ct. App. 1990) (alimony awarded to wife unemployed for 20 years because of

muscular dystrophy). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa Ct. App. 1983) (alimony awarded where wife had reached age where it would be difficult, if not impossible to find employment).

C. The distribution of property made pursuant to 598.21. See In re Marriage of Knight, 507 N.W.2d 728 (Iowa Ct. App. 1993) (award depends upon facts and circumstances of each particular case, including property division). See In re Marriage of Misol, 445 N.W.2d 411 (Iowa Ct. App. 1989) (profit sharing trust account helped supplement alimony to provide for sufficient income); In re Marriage of Hardy, 539 N.W.2d 729 (Iowa Ct. App. 1995).

D. The educational level of each party at the time of marriage and at the time the action is commenced. See In re Marriage of McLaughlin, 526 N.W.2d 342 (Iowa Ct. App. 1994) (education is a factor to be considered with respect to each party's earning capacity).

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 the appropriate employment. See In re Marriage of Wegner, 434 N.W.2d 397 (Iowa Ct. App. 1988) (court should consider not simply present income, but future earning capacity). See In re Marriage of Vanderpol, 529 N.W.2d 603 (Iowa Ct. App. 1994) (alimony limited where wife had substantial

experience in banking and was in good health). See In re Marriage of Brown, 462 N.W.2d 683 (Iowa Ct. App. 1990) (wife was not awarded support, even though wife had been absent from workforce for ten years, her earning capacity had not been affected).

F. The feasibility of the party seeking maintenance to become 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. See In re Marriage of Hansen, 465 N.W.2d 906 (Iowa Ct. App. 1990) (alimony was not warranted where wife had sufficient resources to support herself and dependent child in reasonable style); In re Marriage of Hayne, 334 N.W.2d 347 (Iowa Ct. App. 1983) (standard of living during the marriage considered).

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. In re Marriage of Handland, 564 N.W.2d 445 (Iowa Ct. App. 1997) (an agreement to waive alimony may be considered, if not inequitable).

J. Other factors the court may determine to be relevant in an individual case. In re Marriage of Brown, 487 N.W.2d 331 (Iowa 1992) (amount of child support considered).

Modification. Under Iowa Code 598.21C, the court may modify support awards when there has been a substantial change in

circumstances. In re Marriage of Johnson, 781 N.W.2d 553, 557-58 (Iowa 2010). When determining if a substantial change in circumstances exists, the court must consider, among other factors, changes in the employment or resources of a party, changes in the needs of a party, changes in the residence of a party, remarriage of a party, and the possible support of a party by another person. Id.; IOWA CODE § 598.21C(1)(a), (c), (d), (f), (g), (h). The burden is on the person seeking the modification to prove a substantial change in circumstances by a preponderance of the evidence. Johnson, 781 N.W.2d at 557-58; In re Marriage of Wessels, 542 N.W.2d 486, 489-90 (Iowa 1995).

III. Gender Neutral:

Gender is to be ignored when considering alimony. In re Marriage of Miller, 524 N.W.2d 442 (Iowa Ct. App. 1994) (totally disabled 51-year-old male without a high school education was granted \$125.00 per month alimony to supplement social security and pension benefits.) See also Orr v. Orr, 440 U.S. 268 (1979); In re Marriage of Bethke, 484 N.W.2d 604 (Iowa Ct. App. 1992.)

IV. Termination Upon Remarriage

_____The general rule in Iowa is that alimony does not automatically stop upon remarriage; rather the recipient has the burden to prove extraordinary circumstances exist which necessitate

continuation of alimony. Johnson, 781 N.W.2d at 558. Recognized extraordinary circumstances include: (1) the annulment or invalidity of the second marriage, (2) the inability of the subsequent spouse to furnish support, (3) the death of the subsequent spouse, or (4) the dissolution of the subsequent marriage. Id.; In re Marriage of Shima, 360 N.W.2d 827, 829 (Iowa 1985). Courts that do not terminate alimony on remarriage reason that it is not fair to prejudge the circumstances that may exist at the time of remarriage. In re Marriage of Von Glan, 525 N.W.2d 427 (Iowa Ct. App. 1994). However, "parties can contract and dissolution courts can provide alimony is not modifiable, does not terminate on remarriage, or is payable on a lesser sum on remarriage." In re Marriage of Aronow, 480 N.W.2d 87, 89 (Iowa 1991.)

V. Tax Consequences of Alimony

It is extremely important for domestic relations attorneys to consider the potential tax consequences of divorce. These consequences may have great effects on the client, and the failure to consider such consequences may also expose the attorney to malpractice claims.

The Internal Revenue Code restricts the definition of alimony to any payment in cash. I.R.C. § 71(b)(1). This signifies a change from prior law, wherein the pre-1984 statute could be

satisfied by a payment in kind. The purpose of the change was to separate cash payment from in kind transfers of property.

A. Requirements for alimony.

1. **Cash payments.** Only cash payments qualify as deductible Section 71 payments. Yet, cash payments for the release of property rights still qualify for a deduction. I.R.C. § 71(b) (1) (B) .

2. **Written obligation.** All obligations for payments must be made under a qualified divorce or separation instrument. I.R.C. § 71(b) (1) (A) .

3. **Not members of the same household.** Payments qualify as alimony in the case of an individual legally separated from his or her spouse under a decree of divorce or of separate maintenance when the parties are not members of the same household at the time such payment is made. I.R.C. § 71(b) (1) (C) . Spouses are not considered as members of the same household when the tax payor is preparing to depart from a household of the other spouse in a short time. A dwelling unit formerly shared by both spouses shall not be considered two separate households even if the spouses physically separate themselves within the unit. If spouses continue to live under the same roof they will be considered as members of the same household. However, parties that live in separate residences on the same property are not considered members of the same household. Myrna LaBow, Paragraph 83, 417 P-H Memo T.C.

4. Termination upon death. The Tax Reform Act of 1986 eliminated from I.R.C. § 71 the requirement that terms of a divorce or separation explicitly state that there is no liability for such payment after the death of the payee. I.R.C. § 71(b)(1)(D). Therefore, payments do not qualify as alimony if they are to continue after the payee's death.

5. Election to designate tax treatment. Perhaps the most significant change provided by the tax reforms was to make elective the treatment of cash payments under Section 71. This election to treat cash payments as nontaxable income must be made within the divorce or separation instrument, and will be taxable as income if there is no such designation. I.R.C. § 71(b)(1)(B). In effect, if the parties do not elect to make cash payments nontaxable, the payments are taxable. However, if payments, or parts of payments, from one ex-spouse to another which otherwise satisfy all the elements of alimony do not have to be treated as alimony for federal income tax purposes if this election is clearly stated within the decree. As noted earlier, this is an area to consider when planning on tax consequences relative to the divorce.

B. Deductions. The Internal Revenue Code provides for the deduction of Section 71 payments in Section 215. As a general rule, in the case of an individual, there shall be allowed a deduction in an amount equal to the alimony or separate maintenance payments paid during that individual's taxable year. I.R.C. §

215(a).

C. Excessive Front-Loading of Maintenance (or Recapture).

Congress sought to put a stop to the practice of front-loading alimony payments in the first three years following a divorce or separation when it enacted the Tax Reform of 1986. This was achieved by Congress through the recapture rules.

1. The rules of recapture. Section 71(f) of the Internal Revenue Code (as amended by the TRA), allows for recapture of any excess Section 71 payments in year three if alimony paid in year one exceeds the average annual alimony paid in years two and three by more than \$15,000. I.R.C. § 71(f). Recapture may occur only once, during the third post-separation year. I.R.C. § 71(f)(1)(a). Also, in instances where front-loading occurred, the payor is required to include the excess in income and the payee is allowed a corresponding deduction in computing adjusted gross income. I.R.C. § 71(f)(1)(B). Finally, similar recapture occurs if payments in year two exceed payments in year three by more than \$15,000. I.R.C. § 71(f).

2. The mechanics of recapture. There are three steps that need to be followed when calculating recapture.

(a) **Step 1:** Alimony payments made during the third year are subtracted from alimony payments made during the second year. A difference in excess of the \$15,000 "safe harbor"

constitutes "excess alimony payments for the second post-separation year."

(b) **Step 2:** The amount determined in Step 1 is then subtracted from payments made during the second post-separation year. The balance of qualified payments made during the second year are added to the payments made during the third year. This amount is then averaged. The average is subtracted from payments made during the first post-separation year. The excess of this result over \$15,000 constitutes "excess alimony payments for the first post-separation year."

(c) **Step 3:** The amount to be recaptured is the sum of the amounts in steps 1 and 2. A negative result is disregarded.

3. The exceptions to recapture. As with most provisions in the tax code, the recapture rules are not without their exceptions.

First, no recapture results if the payments cease as a result of the death of either party or on remarriage of the payee spouse. I.R.C. § 71(f)(5)(A). However, if the payments are only reduced with the death of the payor spouse or the remarriage of the payee spouse, recapture will not be prevented.

Second, recapture rules do not apply where payments are made under a temporary support order as described in § 71(b)(2)(C).

Finally, if payments are measured as a fixed portion of income from a business or property or from compensation from employment or self-employment, the recapture rules do not apply. I.R.C. § 71(f)(5)(C). This is referred to as "payments not within the control of the payor spouse."

4. Tax Strategies in Recapture. The best way to plan around the problems of recapture is to closely look at the rules when planning the separation agreement so as not to exceed the \$15,000 safe harbor that is provided. However, since temporary-order payments are not subject to the recapture rules, they can be an effective tax-planning tool. Timing is an important factor in the tax planning of the temporary orders. For example, temporary order payments beginning near the end of the year which are at a higher level than the divorce decree would set a few months later avoids recapture and can help in settling cases.

VI. Other Legal Factors and Their Effect on Alimony

A. Alimony and Division of Property: Iowa Courts consider alimony and property distribution together in assessing their individual sufficiency. Neither an alimony award or a property distribution "are made nor subject to evaluation in isolation from one another." In re Marriage of McLaughlin, 526 N.W.2d 342, 345 (Iowa Ct. App. 1994); In re Marriage of Griffin, 356 N.W.2d 606,

608 (Iowa Ct. App. 1984).

Further, Iowa courts have used alimony as a way to remedy an unfair property distribution. In In re Marriage of Hazen, the court affirmed such an application. In Hazen, the district court Judge originally intended to award the wife \$1000 a month alimony. In re Marriage of Hazen, 778 N.W.2d 55, 58-89 (Iowa Ct. App. 2009). However, to offset an unequal property division, the court awarded the wife the lesser sum of \$334. Id.

B. Alimony and Child Support: As a matter of equity, the court also considers child support payments when awarding and determining alimony. Iowa courts have repeatedly stated that "equity requires that payor's child support obligation be recalculated when his or her obligation to pay alimony ends." See, e.g., In re Marriage of Russell, 511 N.W.2d 890, 892 (Iowa Ct. App. 1993); In re Marriage of Louviere, 2004 WL 1813212, *2 (Iowa Ct. App. Aug. 11, 2004). The court has reasoned that "failure to do so would result in substantial injustice to the children." Id. The court may also consider the *amount* of child support ordered under the decree when determining if spousal support is to be awarded and, if so, the appropriate amount of the award. In re Marriage of Will, 489 N.W.2d 394, 400 (Iowa 1992).

The court will always consider the spousal support payments from a previous case. The Child Support Guidelines provide that a

non-custodial parent's income may only be reduced for prior obligations of child support and spousal support actually paid pursuant to a court or administrative order. Child Support Guidelines (2009). In re Marriage of Miller, 475 N.W.2d 675, 679 (Iowa App. 1991). Generally, the guidelines do not provide for a deduction of spousal support when considering child support. In re Marriage of Miller, 475 N.W.2d 675, 679 (Iowa App. 1991); In re Marriage of Lalone, 469 N.W.2d 695, 697 (Iowa 1991).

However, the court has found occasions to deviate from the child support guidelines and include present spousal support in the custodial parent's income and deduction by the non-custodial parent of present alimony payments. In re Marriage of Russell, 511 N.W.2d 890 (Iowa App. 1993); In re Marriage of Miller, 475 N.W.2d 675 (Iowa App. 1991). A deviation from the Child Support Guidelines requires a court finding that such adjustment is necessary to provide for the needs of the children and to do justice between the parties under the special circumstances of the case and usually only happens when the alimony award is a substantially large amount. Child Support Guidelines (2009); In re Marriage of Miller, 475 N.W.2d 675, 680 (Iowa App. 1991) (inclusion of spousal support in payee's income and deduction of spousal support from payor's income not allowed). If there is a substantial award of alimony, then the court will consider the subtraction of funds in the child

support determination. Finally, this decision to consider spousal support payments in its calculation of child support is within the discretion of the trial court. In re Marriage of Lalone, 469 N.W.2d 695, 697 (Iowa 1991). The court may consider alimony in an attempt to do justice between the parties. Id.

C. Alimony and Prenuptial Agreements: The waiver of spousal support in a prenuptial agreement is not binding in Iowa. In re Marriage of Van Regenmorter, 587 N.W.2d 493, 495 (Iowa Ct. App. 1998). However, a court may consider such a waiver, along with the other factors of 598.21A, when determining a spousal support award.

In re Marriage of Becker, 2009 WL 1212750, *4, the parties signed a prenuptial agreement that provided: "in the event of dissolution or annulment of their marriage, neither shall be entitled to alimony or support from the other in any form or to any extent." The court found this provision of the prenuptial agreement was not enforceable because section 596.5(2) provides, "The right of a spouse or child to support shall not be adversely affected by a premarital agreement." Iowa Code §596.5(2).

D. Alimony and Inheritance: Inherited property is not subject to property division unless the court finds that a failure to do so is inequitable to the other party or the children. IOWA CODE § 598.21(6); In re Marriage of Lilland, 2009 WL 928526 (Iowa Ct. App. Apr. 8, 2009).

The Court has also found that undistributed income from family trust, which was created by wife's parents and which included the wife as beneficiary, could not be treated as current source of financial support that would alleviate the wife's need for alimony in divorce action. In re Marriage of Rhinehart, 7041 N.W.2d 677 (Iowa 2005). The Court reasoned that the wife's interest in the trust was not vested because the trust could be unilaterally amended by her father at any time, and payment of trust income was at the discretion of the co-trustees. Id. at 680-81. However, income from a trust that has already been distributed to a spouse-beneficiary can be treated as a source of financial support that would reduce the need for alimony. Id. at 681n.2.

____ **E. Alimony and Veteran's Pension:** While military disability benefits are not considered marital property, they may be considered in alimony and support. In re Marriage of Miller, 524 N.W.2d 442, 444 (Iowa Ct. App. 1994). Military disability benefits are not solely for the benefit of the veteran, but for his family as well. In re Marriage of Anderson, 522 N.W.2d 99, 102 (Iowa Ct. App. 1994). Similarly, the courts may consider a party's social security disability benefits when awarding alimony. In re Marriage of Orwig, 1999 WL 1136656 (unreported).

____ Iowa courts consider military pensions when determining alimony. In the 2007 case In re Marriage of Pinkal, No. 06-1555,

2007 WL 2257115 (Iowa Ct. App. Aug. 8, 2007), the Court of Appeals affirmed a distribution of spousal support and military pension benefits. Id. at *1. The District Court awarded the wife, after 31 years of marriage, one-half of the husband's military pension. To provide the parties with approximately equal incomes until the pay-out of the pension, the court ordered that the husband pay the wife spousal support of \$1,361 per month until she started receiving one-half of his military pension, at which time the husband's spousal support payments would be reduced to \$381 per month. Id. at *2.

F. Alimony based on Overtime: In 2005, the Iowa Supreme Court held that, for purposes of calculating alimony, a party's overtime pay is an appropriate factor in determining their income. In re Marriage of Schriner, 695 N.W.2d 493 (Iowa 2005). The court based its justification on a like-minded application of overtime pay to child-support determinations: The Court stated that when the "overtime has been consistent, will be consistent, and is somewhat voluntary" and when the "overtime pay is not an anomaly or speculative," the noncustodial parent's overtime pay is properly considered in determining the amount of child support and spousal support due. Schriner, 695 N.W.2d at 500 (quoting In re Marriage of Brown, 487 N.W.2d 331, 334 (Iowa 1992)); see also In re Marriage of Elbert, 492 N.W.2d 733, 735

(Iowa Ct. App. 1992).

TIP: To help determine if “overtime pay has been consistent,” one should examine the last three to five years of tax returns to determine if overtime pay has been received over a longer period of time.

G. Worker's Compensation Benefits and Alimony: The Schriner Court also held that workers’ compensation benefits received and retained by the husband during course of marriage constituted “marital property” subject to equitable distribution and that any workers’ compensation benefits received by the husband after dissolution constituted his separate property. Schriner, 695 N.W.2d 493. The court recognized the post-dissolution compensation benefits as income for purposes of determining child support, regardless of whether received in a lump sum or paid weekly. In re Marriage of Swan, 526 N.W.2d 320, 325 (Iowa 1995). Workers’ compensation benefits represent income in a dissolution because the benefits essentially replace income that would otherwise have been earned had the worker not been injured. Id. It will be interesting to see if they follow a similar path and, like overtime-pay, extend this application to alimony as well.

H. Alimony and cohabitation: Cohabitation generally affects alimony because there is an “underlying rationale that it is illogical and unreasonable for a person to receive equivalent

obligations of support from two persons at the same time.” In re Marriage of Johnson, 781 N.W.2d 553, 558 (Iowa 2010) (citing In re Marriage of Wendell, 581 N.W.2d 197, 200 (Iowa Ct. App.1998)). The Iowa Court of Appeals further refined the process of handling cohabitation and alimony payments in the 1999 case of In re Marriage of Ales, 592 N.W.2d 698 (Iowa Ct. App. 1999). In that case, a former husband attempted to decrease or terminate his spousal support obligation to his former wife because she was cohabitating with another man for four years. Citing Iowa Code § 598.21(8), the Court held that the burden rests on the party seeking the alimony modification to show that there has been a substantial change in circumstances. Then, the burden shifts to the recipient to show that he or she has a continuing need for support despite the cohabitation or other changed circumstances. In this case, the court found that the former wife’s cohabitation was a substantial change in circumstances. However, the Court found that the former wife had provided sufficient evidence to justify the continuation of spousal support because her boyfriend’s contributions to the household were just enough to cover the cost of his presence in the home.

Moreover, the Court stated that “the question of whether the recipient spouse’s remarriage will terminate spousal support primarily depends in part on the purpose behind the original

award. In re Marriage of Wendell, 581 N.W.2d 197 (Iowa Ct. App. 1998). Rehabilitative and reimbursement alimony are the types of alimony most often continued after a recipient spouse's remarriage. Reimbursement alimony is not subject to modification because it is based on the economic sacrifices made by one spouse during the marriage that directly enhanced the future earning capacity of the other spouse. Rehabilitative alimony, on the other hand, serves to support an economically dependent spouse through a limited period of education and retaining; its primary goal is self-sufficiency.

I. Assignment of Income for Alimony. In 1998, the Supreme Court held that a woman could garnish 60 percent of her former husband's wages in order to collect past-due alimony. In re Marriage of Eklofe, 586 N.W.2d 357 (Iowa 1998). The federal Consumer Protection Act restricts creditors from garnishing more than "25 percent of their debtors' disposable earnings for that week." 15 U.S.C. § 1673(a). "However, that restriction does not apply in three situations, including cases involving an 'order for the support of any person.'" 15 U.S.C. § 1673(b)(1)(A). Under this federal law, up to 65 percent of an individual's disposable earnings may be garnished. The Court stated that while "Iowa adopts the federal pay period restrictions, it provides additional protections for debtors by further

restricting the maximum amount of earnings which may be garnished in each *calendar year*." (emphasis added) The Iowa garnishment statute is Iowa Code § 642.21. According to the statute, the maximum amount of those earnings which may be garnished depends on the debtor's annual salary. The Court combined the federal and state statute as one. Thus, the federal statute's restrictions did not apply, but the Iowa statute's restrictions did apply because there is no exemption for the collection of alimony payments under the Iowa law. As a result, the former wife could not collect more than \$800 per year.

In an earlier case, the Court canceled the former wife's order for mandatory income withholding for payment of alimony because Iowa Code § 252D.1(1) provides that the court may order mandatory income withholding for payment of spousal support only if the alimony obligation is contained in a child support order. In re Marriage of Eklofe, 549 N.W.2d 523 (Iowa 1996).

J. Reinstatement of Temporary Order. Under state law, a temporary award of alimony is ordinarily terminated upon entry of the final divorce decree. However, the Supreme Court of Iowa held that a temporary alimony order entered during the course of a divorce proceeding should have been reinstated when an award of permanent alimony was later vacated. The court reasoned that as a general rule, if a divorce decree is vacated or annulled, the

parties return to their pre-divorce status. In re Marriage of Wagner, 604 N.W.2d 605, 610 (Iowa 2000). Therefore, when a support award in a final decree is vacated, a temporary award is automatically reinstated as if there had been no final decree. Id. at 610.

K. Bankruptcy and Alimony. In 1998, the Iowa Court of Appeals held that a bankruptcy discharge may be considered in a divorced party's property settlement when determining whether to modify his or her alimony obligation. In re Marriage of Trickey, 589 N.W.2d 753 (Iowa Ct. App. 1998). The Court reasoned that if a trial court merely considered the changed financial circumstances resulting from a discharge and the fact that one party will not receive the property settlement payments, then the modification of alimony will not violate federal bankruptcy law. However, the Court stressed that modification is not permitted where it is essentially an "end run" around a discharge in order to reinstate the property settlement.

In Trickey, the divorce decree required the husband to pay two lump-sum property settlement payments to the wife. Later, the husband filed for bankruptcy, and the bankruptcy court discharged the lump-sum property settlements (although as a result of the bankruptcy, the net proceeds from liquidation of the husband's IRA were distributed to the wife.) The wife then filed a petition to modify the alimony award in their divorce

decree, stating that bankruptcy improved the husband's financial condition.

The trial court granted the modification. However, the Court of Appeals held that the lower court should not have considered the discharge because the divorce court was aware of the speculativeness of the future financial success of the struggling business. The Court reasoned that a modification may be proper if the discharge and the consequences thereof are demonstrated to satisfy the principles set forth in Iowa case law as governing modification of a divorce decree and the modification does not contravene the policies underlying the Bankruptcy Code. Federal case law holds that attempts to collect a discharged property settlement violate the standing injunction against collecting a discharged debt.

L. Alimony, Pension Benefits, and the Older Client. There are several factors that need to be considered when representing older clients when assessing alimony awards if your client or their soon-to-be ex-spouse is approaching age 70½. You need to consider that pension plans and IRS Rules may require the participant (or alternate payee) to begin withdrawing from the plan a minimum amount each year. That amount is calculated by dividing the account balance by the number of years the participant is predicted to live under standard actuarial tables. If there is a failure to withdraw less than the IRS requires

there may be a 50% penalty on the amount left in the account.

M. Social Security and Alimony. Traditional alimony is generally "payable for life or so long as a spouse is incapable of self-support." Francis, 442 N.W.2d at 64. Therefore, a change such as receipt of social security benefits may alter the support picture and warrant a modification. Id. Because a party is able to support themselves with social security benefits, Iowa courts generally terminate alimony obligations "on the death of either party, on reaching retirement age of sixty-five, or on party's remarriage." See In re Marriage of Olson, 705 N.W.2d 312, 318 (Iowa 2005); In re Marriage of Chladek, 2010 WL 1050051 (Iowa Ct. App. Mar. 24, 2010).

If a marriage lasted ten years or more a former spouse can collect on their ex-spouses Social Security even after the divorce. There are two threshold requirements to draw Social Security benefits based on a former spouse's earnings credits:

- (1) the marriage was valid under the party's state law; and
- (2) the marriage lasted ten years or more before the divorce was final.

If both requirements are met, so long as the client isn't entitled to an equal or greater benefit from their own earnings. The client may be entitled to a spousal benefit in an amount equal to one-half of the benefit paid to the former spouse.

It is beneficial to calculate what the client might receive

from their own earnings base and compare that to their potential payment based on the earnings of the former spouse.

Social Security benefits are not a property right and a judge cannot award any part of a party's Social Security benefit to their spouse. But in equity a court can consider the disparity in the potential social security benefit when determining an alimony award. Other Social Security Rules to consider:

- (1) A person can receive retirement benefits from their own or their spouse's record at age 62, then switch to the other benefit when they reach full retirement age if the other one is higher.
- (2) If your client has been divorced for at least two years, they may be entitled to benefits through the former spouse even though they are not yet receiving benefits but are eligible.

TIP: If your client is thinking about a divorce and the ten year mark of marriage is near they might want to slow down the process to ensure the divorce is final after the ten year anniversary.

N. Income Producing Assets and Alimony. Courts also consider various forms of income-producing property when determining the spousal support basis. In In re Marriage of Dieger, the court stated it would be unwise to merely value the

stock at its fair market price and that a court should consider "outstanding performance of a dividend of stock" when determining property distribution and spousal support. In re Marriage of Dieger, 584 N.W.2d 567, 569 (Iowa Ct. App. 1998). To determine the effect of the dividends on a party's income the Dieger Court applied something similar to an Income Stabilization Approach.¹ Id. The court continued: "It stretches the bounds of reasonableness to value a goose for slaughter price when it lays golden eggs." Id. In In re Marriage of Elliot, 690 N.W.2d 697, 2004 WL 1857101 (Iowa Ct. App. July 28, 2004), the court included the husband's dividend and interest income of \$6500.00 in his gross income, and therefore considered it in the spousal support award.

"The court also considers each party's earning capacity, as well as the parties' present standards of living and ability to pay, balanced against the relative needs of the other." In re Marriage of Nelson, Slip-Op, 2010 WL 3325620 (Iowa Ct. App. Aug.

¹ A set of procedures in which an appraiser derives a value indication for income-producing property by converting anticipated benefits into property value. This conversion is accomplished either by (1) capitalizing a single year's income expectancy or an annual average of several year's income expectancies at a market-derived capitalization rate or a capitalization rate that reflects a specified income pattern, return on investment, and change in the value of the investment; or (2) discounting the annual cash flows for the holding period and the reversion at a specified yield rate. Dieger, 584 N.W.2d at 569.

25, 2010) (citing In re Marriage of Hettinga, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997)). In Nelson, the court considered both the husband's income from his full time job, and his incoming producing farm property and trucking company when determining alimony payments to his spouse.

However, the court has found situations to distinguish between wealth-increasing and income-producing property. In re Marriage of Jones, 779 N.W.2d 79 (Table), 2009 WL 5125493 (Iowa App. Ct. Dec. 30 2009), involved a case of gifted stock to the husband. The stock hadn't paid out dividends for almost 20 years. Id. at *2. The court concluded that while the stock increased the wealth of the holder it did not produce any income. Id. The court found that, with the exception that it may have increased their borrowing power, the stock did not improve the parties lifestyle and that the parties essentially lived on the husband's salary of \$20,000 plus/month. Because the stock was not income producing, it could not be included in the spousal-support basis. See also In re Marriage of Thielen, 728 N.W.2d 853, 2007 WL 258182 at *1 (Iowa Ct. App. Jan. 31, 2007) (refusing to include dividends that are immediately reinvested in a corporation as income-producing property for purposes of support basis).

In situations involving physical income producing property where the income produced is relatively stable, such as rent or

crops, the court will look to the past three to five years, determine a typical "income-producing year" and use that as a suitable base to estimate the party's income. In re Marriage of Waters, 778 N.W.2d 66 (Table), 2009 WL 4069373 at *6 (Iowa Ct. App. Nov. 25, 2009).

Courts also consider other non-traditional income producing business assets so long as they produce an ongoing stream of revenue. However, unlike stocks with dividends, the valuation seems to be "fair market value" and seems to apply only to equitable property distribution. For example, In re Marriage of Gubbels involved greyhound dogs as income producers. In re Marriage of Gubbels, 767 N.W.2d 421 (Table), 2009 WL 778562 (Iowa Ct. App. Mar. 26, 2009). The district court established, and the appellate court affirmed a fair market value of \$40,000 for 18 racing dogs, and included that fair market value in the property distribution.

Iowa App., 2009.

March 26, 2009

**Sample Spousal Support
Interrogatories Directed to Payor**

INTERROGATORY 1: Describe in detail your spouse's contributions to the marriage, giving appropriate economic value to contributions for homemaking and childcare services.

INTERROGATORY NO. 2: Describe in detail the exact contribution your spouse has made to your education, training or increased earning power.

INTERROGATORY NO. 3: Describe in detail the exact contribution you claim to have made to the education, training or increased earning power of your spouse.

INTERROGATORY NO. 4: Describe in detail your education level at the time of your marriage to your spouse.

INTERROGATORY NO. 5: Describe in detail your educational level at the time this action was commenced.

INTERROGATORY NO. 6: Describe in detail your earning capacity, including in detail how you claim your educational background, training, employment skills, work experience and length of any absence from the job market impacts your earning capacity.

INTERROGATORY NO. 7: State what employment you have had since the date of your marriage to the present, and set forth in detail:

- (a) name of employer;
- (b) business address where you worked;
- (c) dates of employment;
- (d) position, job title and description of work;
- (e) salary or rate of pay:

INTERROGATORY NO. 8: State your current average monthly gross income and your current average monthly net income, identifying all deductions taken from gross income to arrive at net income. In connection with your answer, please provide the last six wage statements from your employment and your tax returns for the last five calendar years.

INTERROGATORY NO. 9: If you claim there is a limited time and limited expense necessary for your spouse to acquire

sufficient education or training to enable your spouse to find appropriate employment, please state in detail the time and expense which you believe is necessary and what you consider to be sufficient education or training to enable your spouse to find appropriate employment.

INTERROGATORY NO. 10: Describe in detail whether you and your spouse had any mutual agreement concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other. If you claim such a mutual agreement, please state whether it is written or oral, the date of the agreement and any corroborative evidence you claim to support the existence of such an agreement.

INTERROGATORY NO. 11: If not previously provided in your other answers to interrogatories, describe in detail how you think the following factors should affect, if at all, your claim for spousal support:

- a) the length of your marriage to your spouse;
- b) your age and physical and emotional health;
- c) the age and physical and emotional health of your spouse;
- d) the distribution of property you anticipate in a dissolution decree;
- e) your educational level at the time of the marriage and at the time this action was commenced;
- f) the educational level of your spouse at the time of the marriage and at the time this action was commenced;
- g) your earning capacity, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable you to find appropriate employment;
- h) the feasibility of you 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;

- i) any mutual agreements made between you and your spouse concerning the financial or service contributions by one of you with the expectation of future reciprocation or compensation by the other;
- j) the provisions of any prenuptial agreement; and
- k) other factors which you consider relevant to your individual situation.