



Family Law Update

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Presented by:

James M. Meade

1200 Valley West Drive

Suite 206-02

West Des Moines, IA 50266

Phone: (515) 868-0163

Fax: (515) 225-7546

E-mail: jmmeade@aol.com



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IOWA STATE BAR ASSOCIATION

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FAMILY LAW UPDATE

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*Prepared by
James M. Meade
1200 Valley West Drive, Suite 206-02
West Des Moines, IA 50266
Phone: (515) 868-0163
Fax: (515) 225-7546
E-mail: jmmeade@aol.com*

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Table of Contents

	<u>Page No.</u>
I. DISSOLUTION OF MARRIAGE.....	1
A. Procedural Aspects.....	1
1. Personal Jurisdiction.....	1
2. In Rem Jurisdiction	2
3. Subject Matter Jurisdiction.....	2
4. Res Judicata/Issue/Claim Preclusion.....	3
5. Soldier's and Sailor's Relief Act.....	4
6. Control of Trial.....	4
7. Off the Record Communication.....	5
8. Citation of Unpublished Appellate Decisions.....	5
9. Default Judgment for Non-Compliance With Discovery.....	5
10. Elements of Common Law Marriage.....	5
11. Same Sex Marriage.....	5
12. Marital Tort: Invasion of Property.....	6
B. Alimony.....	7
1. Traditional Alimony.....	7
2. Rehabilitative Alimony.....	9
3. Reimbursement Alimony.....	11
4. Alimony Termination.....	12
5. Alimony Payment	13
6. Alimony QDRO.....	13
7. Alimony Insurance/Security.....	13
8. Veterans Pension Available for Alimony.....	14
9. Income Available for Alimony.....	14
10. Alimony and Property Division.....	14
11. Attorney Fees.....	15
C. Division of Property.....	16
1. Choice of Law.....	16
2. Factors in Equitable Division.....	16
3. Premarital Agreement.....	20
4. Post-Marital Agreements.....	21
5. Property Settlements Installment Terms.....	21
6. Separate Property: Inherited or Gifted.....	22
7. Premarriage Property.....	24
8. Appreciation of Value of Separate Property.....	25
9. Retirement and Pension Plans.....	26
10. Division of Other Assets.....	30

Table of Contents (continued)

	<u>Page No.</u>
D. Child Support.	32
1. Interstate Jurisdiction for Child Support Orders.	32
2. Child Support Guidelines.	32
3. Determination of Gross Income.	34
4. Calculation of Guideline Net Income.	43
5. Special Circumstances-Adjustment of Guideline Support.	43
6. Other Child Support Issues.	46
7. Termination of Support Obligation.	48
8. Post-Secondary Education Subsidy.	48
9. Life Insurance.	53
10. Court-Ordered Trusts.	53
11. Disabled Adult Child.	54
12. Medical Support.	54
E. Child Custody and Visitation.	55
1. Jurisdiction of the Court.	55
2. Custody of Embryos.	58
3. Joint Custody.	59
4. Determination of Primary Caretaker.	63
5. Tortious Interference with Custody.	71
6. Appointment of Guardian Ad Litem or Child's Attorney.	72
7. Visitation & Other Rights & Responsibilities of Joint Custody.	72
II POST DECREE PROCEEDINGS.	77
A. Post Decree Motions.	77
B. Appeal.	79
1. Jurisdiction During Appeal.	79
2. Jurisdiction After Appeal.	79
3. Support During Appeal.	79
4. Appellate Waiver Doctrine.	80
5. No Plain Error Rule.	80
6. Attorney Fees on Appeal.	80
7. Final Action.	80
C. Contempt Proceedings.	81
1. Statutory Provisions.	81
2. Contempt Defenses.	81
3. Right to Court-Appointed Attorney.	82
4. Burden and Degree of Proof.	82
5. Punishment for Contempt.	82

Table of Contents (continued)

	<u>Page No.</u>
D. Modification of Decree.....	83
1. Personal Jurisdiction Over Parties.....	83
2. Modification Venue.....	84
3. Substantial Change in Circumstances: A Warning.....	84
4. Property Settlement Not Modifiable.....	84
5. Alimony Modification.....	84
6. Child Support Modification.....	86
7. Custody Modification.....	90
8. Visitation Modification.....	93
III. ACTIONS TO COMPEL SUPPORT.....	95
A. Paternity Proceedings.....	95
1. Methods to Establish Paternity.....	95
2. Limitations on Actions.....	95
3. Proof.....	95
4. Right of Putative Father to Establish Paternity.....	96
5. Setting Aside Paternity Order.....	96
6. Attorney Fees in Paternity Proceedings.....	97
7. False Allegation of Paternity: Actionable Fraud.....	97
B. Uniform Interstate Family Support Act.....	97
1. Uniform Support of Dependents Law Replaced.....	97
2. Statute of Limitations.....	98
3. Retroactive Support.....	98
4. Both Parents are Liable.....	98
5. Enforcement Quashed/Denial of Child Contact.....	98
IV. JUVENILE LAW:	99

FAMILY LAW UPDATE

Table of New Cases

Adoptive Couple v. Baby Girl , 133 S.Ct. 2552, 570 U.S., 186 L.Ed.2nd 729 (2013).....	57
In re Al-Jurf , No. 3-611/12-1354 (Iowa App., 2013).....	7, 19
In re Bakk , No. 3-864 / 12-1936 (Iowa App., 2013).....	62, 75
In re Marriage of Barnhart , No. 386/12-2251 (Iowa App., 2013).....	92
Bates v. Myers , No. 3-980 / 13-0469 (Iowa App., 2013).....	92
In re Beattie , No. 3-372/12-1524 (Iowa App., 2013)).	14
In re Berger , No. 3-148/12-1389 (Iowa App. 2013).....	8, 32
Bishop v. Leighty , No 3-995 / 12-1732 (Iowa App., 2013).....	93
In re Boyd , No. 2-1023/11-2064 (Iowa App., 2013).....	10, 23
In re Burke , No. 3-836 / 12-2249 (Iowa App., 2013).....	10
In re Marriage of Cerwick , No. 3-300/12-1188 (Iowa App., 2013).....	61
Cline v. Swanson , No. 3-375/12-1575 (Iowa App., 2013).....	61
In re Conner , No. 2-398/11-0790 (Iowa App., 2013).....	58
Doyle v. Doyle , No. 3-895 / 13-0753 (Iowa App., 2013).....	68
In re Fedorchak , No. 3-979 / 13-0466 (Iowa App., 2013).....	11
Freerking v. Preul , No. 3-849 / 13-0592 (Iowa App., 2013).....	76
In re Marriage of Friedman , No. 3-274/12-1978 (Iowa App., 2013)).	54
Gartner v. Iowa Dep't of Pub. Health , No. 12-0243(Iowa, 2013).....	6
Gaswint v. Robinson , No 3-618/12-2149 (Iowa App., 2013).....	60
In re Marriage of Griffith , No. 2-1192-0801 (Iowa App., 2013).....	14
In re Marriage of Harris , No. 12-1969 (Iowa 2013).....	4
In re Harter , No. 3-130/12-0765 (Iowa App., 2013)).....	9
Hendrickson v. Hendrickson , No. 3-848 / 13-0540 (Iowa App., 2013).....	86

FAMILY LAW UPDATE
Table of New Cases (Continued)

In re Hinshaw , No. 3-416 / 12-1783 (Iowa App., 2013).	93
In re Johnson , No. 3-779 / 13-0155 (Iowa App., 2013).....	37
In re Kelley , No. 3-785 / 13-0413 (Iowa App., 2013)	92
In re Kilfoyle , No 3-380/12-1775 (Iowa App., 2013).....	94
In re Kragel , No. 3-740 / 12-0925 (Iowa App., 2013).	8
In re Leuer , No. 3-346/12-1663 (Iowa App., 2013).....	94
In re Loucks , No. 3-949 / 13-0698 (Iowa App., 2013).....	22
In re Marsh , No. 3-231/12-1573(Iowa App. 2013).....	78
Maruna v. Peters , No. 2-945/12-0759 (Iowa App., 2013).....	69
In re Michael , No. 12-0912 (Iowa 2013).....	85
In re Mihm , No. 12-1928 (Iowa, 2014).....	45
In re Marriage of Nurre , No. 3-065/12-0998 (Iowa App. 2013).	10
In re Peiffer , No. 3-672 / 12-1746 (Iowa App., 2013).	25
In re Pelletier , No.30378/12-1704 (Iowa App. 2013).	59
In re Marriage of Pereault , No. 2-913/12-1178 (Iowa App., 2013).	56
In re Rasmusson , No. 3-1019 / 13-0535 (Iowa App., 2013).....	28
In re Reich , No. 3-584/12-1994 (Iowa App., 2013).	10
In re Marriage of Reineke , No. 3-370/12-1375 (Iowa App. 2013).....	28
In re Marriage of Renes , No. 3-070/12-1136 (Iowa App., 2013).	46
In re Marriage of Reynolds , No. 3-151/12-1456 (Iowa App. 2013).....	24
In re Marriage of Richardson , No. 3-512/12-1461 (Iowa App., 2013).....	95
In re Marriage of Risbeck , No. 3-158/12 -1828 (Iowa App. 2013).	67, 82
Root v. Toney , No.12-0122 (Iowa 2013).....	67
Schwering v. Coleman , No. 3-873 / 13-0357 (Iowa App., 2013).	15

FAMILY LAW UPDATE

Table of New Cases (Continued)

In re Marriage of Sisson , No. 12-1023 (Iowa, 2014).....	86
Soi v. Soi , No. 3-902 / 13-0020 (Iowa App., 2013).....	4
State v. Iowa Dist. Court for Warren Cnty. No. 11-2031(Iowa 2013).	99
In re Steddom , No. 3-1066 / 13-0435 (Iowa App., 2013).....	15
In re Stichter , No. 30959 / 13-0756 (Iowa App., 2013).....	65
In re Tech , No. 13-1123 / 13-0682 (Iowa App., 2013).	72
In re Thoms , No 3-841/13-0352 (Iowa App., 2013),	40
Ward v. Robinson , No. 3-153/12-1518 (Iowa App., 2013).....	96
In re Marriage of Wasson , No. 3-405/12-1033 (Iowa App., 2013).....	8, 66
Wegman ex rel. W.W. v. Wegman , No. 3-555 / 12-1933 (Iowa App., 2013).	68
In re Marriage of Williams , No. 30414/12-1682 (Iowa App., 2013).	18

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Prepared by
James M. Meade
1200 Valley West Drive, Suite 206-02
West Des Moines, IA 50266
E-mail: jmmeade@aol.com
(515) 868-0163

I. DISSOLUTION OF MARRIAGE

A. PROCEDURAL ASPECTS

1. Personal Jurisdiction

The constitutional standard for determining whether a state can enter a binding judgment against a non-resident under the principles of due process adopted by I.R.C.P. 56.2 is "... (whether) a defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' ... Kulko v. California Superior Court, 436 U.S. 84, 92, 98 S.Ct. 1690, 1696-97 (1978) ... (W)e must look to 'some act' by which the defendant purposefully avails ... (her)self of the privilege of conducting activities within the forum state.' Kulko, 436 U.S. at 94, 98 S.Ct. at 1698." Egli v. Egli, 447 N.W.2d 409, 411 (Iowa App. 1989).

a. To implement the principles of the Kulko case, Iowa uses a five-factor test, the first three being the most important:

- (1) the quantity of the contacts;
- (2) the nature and quality of the contacts;
- (3) the source and connection of the cause of action with those contacts;
- (4) the interest of the forum state;
- (5) the convenience of the parties.

Hodges v. Hodges, 572 N.W.2d 549 (Iowa 1997); see also Larsen v. Sholl, 296 N.W.2d 785 (Iowa 1980).

b. State ex rel. Houk v. Grewing, 586 N.W.2d 224 (Iowa App. 1998). The determination of whether a state court has personal jurisdiction over the resident of another state is a two-step process: (1) Iowa must have sufficient minimum contacts with the out-of-state resident to satisfy the Due Process requirements of the federal constitution. In determining whether a party's contacts with Iowa are sufficient to confer jurisdiction, the Kulko five-factor test is applied. After the five-factor test is satisfied, the Court must also be satisfied that the Respondent was given at least the fundamental elements of procedural due process: reasonable notice of the proceeding and an opportunity to be heard.

- c. “The critical focus in any jurisdictional analysis must be the relationship among the defendant, the forum, and the litigation. ... This tripartite relationship is defined by the defendant’s contacts with the forum state, not by the defendant’s contacts with residents of the forum.” Meyers v. Kallestad, 476 N.W.2d 65, 68 (Iowa 1991). See also In re Marriage of Crew, 549 N.W.2d 527, 529 (Iowa 1996).

2. In Rem Jurisdiction

- a. Pennoyer v. Neff, 95 U.S. 714 (1877) and Williams v. North Carolina, 317 U.S. 287 (1942) established that Due Process does not require a state court to have personal jurisdiction over an individual to adjudicate the civil status and capacities of its residents. Thus, a state may grant a divorce to a resident or determine custody or parental rights of resident children though the state has no significant contacts with an out-of-state spouse or parent. See Bartsch v. Bartsch, 636 N.W.2d 3 (Iowa 2001).
- b. As indicated above, jurisdiction to grant a dissolution of marriage is not to be tested by the minimum contacts standard of the Kulko case. The United States Supreme Court adopted the "Divisible Divorce Doctrine" in Estin v. Estin, 334 U.S. 541, 549; 68 S.Ct. 1213, 1218; 92 L.Ed. 1561, 1568-69 (1948). The divisible divorce doctrine recognizes the Court's limited power where the court has no personal jurisdiction over the absent spouse to grant a divorce to one domiciled in the state, but no jurisdiction to adjudicate the incidents of marriage, for example, alimony and property division. See In re Marriage of Kimura, 471 N.W.2d 869 (Iowa 1991) and Brown v. Brown, 269 N.W.2d 918 (Iowa 1978).

3. Subject Matter Jurisdiction

- a. "Subject matter jurisdiction" is broadly defined as the power of the Court to hear and determine cases of the general class to which a particular case belongs. Lack of subject matter jurisdiction may be raised at any time and cannot be waived or vested by consent. In re Marriage of Russell, 490 N.W.2d 810 (Iowa 1992); In re Jorgensen, 623 N.W.2d 826, 831 (Iowa 2001).
- b. A court has the Common Law inherent equitable jurisdiction to take jurisdiction when the petition states a claim of paternity and requests for child custody and support. Bruce v. Sarver, 472 N.W.2d 631 (Iowa App. 1991). The Sarver court ruled that the trial court should not have dismissed because paternity had never been established when the putative father petitioned for custody or visitation.
- c. However, in In re Marriage of Martin, 681 N.W.2d 612 (Iowa 2004), the Supreme Court stated that the rights and remedies of Iowa Code Chapter 598, the dissolution of marriage statute, are not available to unmarried persons. The court also has no broad equitable powers to divide property accumulated by unmarried persons based on cohabitation. Instead, to secure subject matter jurisdiction, the parties must allege a recognized legal theory outside marriage to support property claims between unmarried cohabitants, including claims of contract, unjust enrichment, resulting trust, constructive trust, and joint venture.

- d. In re Estate of Carlisle, 653 N.W.2d 368 (Iowa 2002) A separate maintenance decree does not cut off the rights of a spouse under Chapter 633. Section 598.28 which provides that all applicable provisions of Section 598.20 specifically provides that the forfeiture of spousal rights only occurs A[w]hen a dissolution of marriage is decreed.
- e. Schott v. Schott, 744 N.W.2d 85 (Iowa 2008) Two women formed a relationship and adopted Jamie's two children. When the relationship ended, Heather sought visitation and offered to support the children. The trial judge dismissed Heather's petition on his own motion for lack of subject matter jurisdiction. The Supreme Court reversed and remanded the case, finding that since neither adoption was appealed, the judgements are final. See In re Estate of Falck, 672 N.W.2d 785, 792 (Iowa 2003) . The adoption could not be collaterally attacked because the district court did not lack jurisdiction and not parent attacked the judgments on due process grounds. See In re Infant Girl W., 845 N.E.2d 229, 246 (Ind.Ct.App.2006). The Supreme Court refused to decide whether second parent adoptions are permissible in Iowa for purposes of this appeal.

4. Res Judicata/Issue/Claim Preclusion

- a. Issue Preclusion or Collateral Estoppel serves two purposes: to protect litigants from the vexation of relitigating identical issues and to promote judicial economy. State ex rel. Casas v. Fellmer, 521 N.W.2d 738 (Iowa 1994). To establish Issue Preclusion, four prerequisites must be established: (1) the issue must be identical; (2) the issue must have been raised and litigated in the previous action; (3) the issue must have been material and relevant to the disposition of the previous action; and (4) the previous determination of the issue must have been necessary and essential to the earlier judgment. See also In Re Marriage of Van Veen, 545 N.W.2d 263 (Iowa 1996) and Audas v. Searcy, 549 N.W.2d 520 (Iowa 1996).
- b. The Supreme Court has ruled that issue preclusion has not been eliminated as a factor in reexamining paternity cases. Section 600B.41A, Code of Iowa, specifically provides for actions to *overcome* paternity that has been *previously legally established*. There is no corresponding statutory provision to establish paternity when a person has previously been found not to be the biological father. In re Marriage of Rosenberry, 603 N.W.2d 606 (Iowa 1999).
- c. In re Marriage of Ginsberg, 750 N.W.2d 520 (Iowa 2008). The Supreme Court ruled that claim preclusion does not prevent the enforcement of the decree provision which required John to pay a debt owned to Tanya's father in an unspecified amount. The "hold harmless" provision of the decree was the equivalent of an indemnification contract where one party promises to reimburse or hold harmless another party for loss, damage, or liability." Maxim Techs., Inc. v. City of Dubuque, 690 N.W.2d 896, 900 (Iowa 2005). When an indemnification obligation is breached, further proceedings are often needed to determine the amount the person, who is secondarily liable, has been compelled to pay as a result of the indemnitor's negligence or other wrong." Howell v. River Prods. Co., 379 N.W.2d 919, 921 (Iowa 1986).

5. Soldier's and Sailor's Civil Relief Act

In re Marriage of Grantham, 698 N.W.2d 140 (Iowa 2005). The Soldiers and Sailors Civil Relief Act (SSCRA), 50 U.S.C. app. 501-591, which provides for a stay of proceedings at any stage thereof any action or proceeding in any court in which a person in military service is involved, is not a complete bar to litigation. Here, the Court found no substantial prejudice to the serviceman's rights.

6. Judicial Control of Trial

- a. Fair Opportunity to Resolve Dispute. A trial judge's discretion to manage the trial is always constrained by due process principles, requiring all litigants in the judicial process to be given a fair opportunity to have their disputes resolved in a meaningful manner. Judges should impose time limits only when necessary, after making an enlightened analysis of all available information from the parties. In re Marriage of Ihle, 577 N.W.2d 64 (Iowa App. 1998).

In re Marriage of Harris, No. 12-1969 (Iowa 2013). During the two-year pendency of the dissolution action, Angela had five separate attorneys. After the latest continuance, the court advised Angela that she should retain representation for the trial soon. Nevertheless, she failed to do so until six days before trial; and the district court judge refused another continuance. The financial and emotional strain of the litigation was taking its toll on both the parties and their children. Given these circumstances, the Court of Appeals held that Angela was largely responsible for any lack of preparation and any ineffectiveness in the presentation of her case; Further delay, the court suggested, would leave the parties and children in a state of unnecessary and undesirable unrest. Iowa Rule of Civil Procedure 1.911(1) provides that the district court may allow a continuance "for any cause not growing out of the fault or negligence of the movant, which satisfies the court that substantial justice will be more nearly obtained." Angela was clearly at fault and negligent and not entitled to a further continuance. See Michael v. Harrison Cnty. Rural Elec. Coop., 292 N.W.2d 417, 419 (Iowa 1980).

- b. Time Limits. The trial court has broad discretion under the Iowa Rules of Evidence to exclude otherwise relevant and admissible evidence if the evidence's probative value is substantially outweighed by considerations of undue delay or waste of time. See Rules 403 and 611. However, a court should impose time limits only when necessary, after making an analysis of all available information from the parties. In Re Marriage of Thielges, 623 N.W.2d 232 (Iowa App. 2000).
- c. Motions To Continue. **Soi v. Soi, No. 3-902 / 13-0020 (Iowa App., 2013)**. John had been represented by counsel who was prepared for trial. His attorney only petitioned to withdraw after John went against her advice and filed a pro se motion to continue; and John consented to the withdrawal. The trial court denied the continuance; and John appealed claiming that denial of his motion to continue was an abuse of discretion because it resulted in a failure to substantially administer justice. We measure the reasonableness of the court's decision by the rule stated in State v. Birkestrand, 239 N.W.2d 353, 360-61 (Iowa 1976): "Where a motion for continuance is filed without delay, alleging a cause not stemming from the movant's own fault or negligence, the court must determine whether substantial justice will be more nearly obtained by granting the request. Under the circumstances of this case, the Court of Appeals decided that the trial judge had not abused his discretion in denying the motion.

7. Off-the Record Communications

In re Marriage of Ricklefs, 726 N.W.2d 359 (Iowa 2007). The court and the lawyers are best advised to have all off-the-record conversations reported when those conversations turn to the merits of the controversy. See Iowa R. Civ. P. 1.903. If a party wants to appeal unreported remarks, that party needs to establish the record, including any objections made, through a bill of exceptions under Iowa Rule of Civil Procedure 1.1001 or a statement of evidence under Iowa Rule of Appellate Procedure 6.10(3).”

8. Citation of Unpublished Appellate Decisions

The Iowa Supreme Court has amended Iowa Rule of Appellate Procedure 6.14(b) to permit unpublished opinions of Iowa Appellate Courts in briefs and legal arguments. However, the unpublished opinions shall not constitute controlling legal authority. A copy of the unpublished opinion must be attached to the brief and shall be accompanied by a certification that counsel has conducted a diligent search for and fully disclosed any subsequent disposition of the unpublished opinion.

9. Default Judgment for Noncompliance with Discovery

- a. A former wife had been prejudiced when former husband refused to respond to a request for production of documents and interrogatories for more than four months because plans for a child’s education had to be made. Therefore, entry of a default judgment was an appropriate sanction for willful noncompliance with the discovery requests. In re Marriage of Williams, 595 N.W.2d 126 (Iowa 1999).
- b. Fenton v. Webb, 705 N.W.2d 323 (Iowa App. 2005). Tammie failed to comply with many discovery requests and court orders for discovery; the trial court as a sanction for her contempt, entered a default judgment granting Kenneth primary physical care. The Court of Appeals approved the entry of default as a sanction See In re Marriage of Williams, 595 N.W.2d 126, 130 (Iowa 1999) . However, the Court held that district court should not have proceeded to established primary care without a hearing to confirm that custody to Kenneth was in Rachel's interest. See Flynn v. May, 852 A.2d 963, 975 (Md.Ct.Spec.App.2004), Iowa R. Civ. P. 1.973(2); and In re Marriage of Courtade, 560 N.W.2d 36, 37 (Iowa Ct.App.1996).

10. Elements of Common Law Marriage

In re Marriage of Winegard, 278 N.W.2d 505, 510 (Iowa 1979). Three elements must exist to create a common law marriage: "(1) [present] intent and agreement . . . to be married by both parties; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife." Winegard II, 278 N.W.2d at 510. The requirement of a present intent and agreement to be married reflects the contractual nature of marriage. However, an express agreement is not required.. The public declaration or holding out to the public is considered to be the acid test of a common law marriage. There can be no secret common law marriage.

11. Same Sex Marriage

- a. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). In a national landmark decision the Iowa Supreme Court unanimously decided that the Iowa Code §595.2(1), which provides that “only a marriage between a male and female is valid”, is unconstitutional. The Equal

Protection Clause is an evolving, dynamic concept which must be determined by the standards of each generation; and that in reviewing legislation under the Equal Protection Clause, different levels of scrutiny are used by the courts. The Court determined that the homosexual minority was entitled to the intermediate standard of scrutiny: the discriminatory classification must be justified because it is substantially related to an important governmental objective. Sherman v. Pella Corp., 576 N.W.2d 312, 317 (Iowa 1998). After examining each governmental objective cited by the County, the Court concluded that Iowa Code Section 595.2 is unconstitutional because no constitutionally adequate justification was given for excluding homosexuals from the institution of civil marriage.

- b. **Gartner v. Iowa Dep't of Pub. Health**, No. 12-0243 (Iowa 2013). Iowa Code §144.13(2) requires the Iowa Department of Public Health to list as a parent on a child's birth certificate the **husband** when a child is born to one of the spouses during the couple's marriage. The Supreme Court found that statute could not be interpreted to include lesbian non-birthing spouse because the legislature did not envision same-sex marriages when it enacted §144.13(2) , 39 years before Varnum was decided. However, Article I, section 1 of the Iowa Constitution states: "All men and women are, by nature, free and equal" and Article I, section 6 does not permit a statute to violate equal protection guarantees. Varnum v. Brien, 763 N.W.2d 878. Equal Protection analysis first requires the Court to determine if the "laws treat all those who are similarly situated with respect to the purposes of the law alike." *Id.* at 883. Here, the Gartners were similarly situated to married opposite-sex couples for the purposes of applying the presumption of parentage: They are in a legally recognized marriage; and married lesbian couples require accurate records of their child's birth, as do their opposite-sex counterparts. After determining that lesbian couples with children born during their marriage have the same concerns as opposite sex couples, Equal Protection analysis then requires proof that denial of the benefits of §144.13(2) to same-sex couples is justified by a substantial governmental objective. Here, the Court found that the state's stated objectives: the accuracy of birth records, administrative efficiency and effectiveness, and the ensurance of financial support of the child were not served by refusing to allow married lesbian couples to have the non-birthing spouse's name on the birth certificate. The statute treats married lesbian couples who conceive through artificial insemination using an anonymous sperm donor differently than married opposite-sex couples who conceive a child in the same manner. Since the Department of Human Services was not able to identify a constitutionally adequate justification for refusing to list on a child's birth certificate the non-birthing spouse in a lesbian marriage, the Supreme Court concluded that the language in §144.13(2) limiting the requirement to "the name of the husband" on the birth certificate is unconstitutional as applied to married lesbian couples who have a child born to them during marriage. However, instead of striking §144.13(2) from the Code, the Court ordered that it was preserved as to married opposite-sex couples, but required the Department to apply the statute to married lesbian couples.

12. Marital Tort: Invasion of Privacy

In re Marriage of Tigges, 758 N.W. 2d 824 (Iowa 2008), Jeffrey installed secret video and audio taping systems in the headboard of the parties' bed and other places around their home. The tort of invasion of privacy requires proof of an unreasonable intrusion upon a individual's seclusion, and the intrusion must be highly offensive to a reasonable person. Restatement (Second) of Torts §652B cmt. c, d; Steersman v. Am. Black Hawk Broadcasting Co., 416 N.W.2d 685, 687 (Iowa 1987). The Court approved the \$22,500 award to Cathy as part of the dissolution action.

B. ALIMONY

Alimony is awarded to accomplish one or more of three general purposes. Rehabilitative Alimony serves to support an economically dependent spouse through a limited period of education and retraining. Its objective is self-sufficiency. An award of Reimbursement Alimony is predicated upon economic sacrifices made by one spouse during the marriage that directly enhanced the future earning capacity of the other. Traditional Alimony is payable for life or for so long as a dependent spouse is incapable of self-support. The amount of alimony awarded and its duration will differ according to the purpose it is designed to serve. In re Marriage of Francis, 442 N.W.2d 59, 63-64 (Iowa 1989). In Re Marriage of O'Rourke, 547 N.W.2d 864 (Iowa App. 1996).

1. Traditional Alimony

Traditional Alimony is an allowance to a former spouse in lieu of a legal obligation for support which will continue ordinarily so long as the dependent spouse lives and remains unmarried. "When determining the appropriateness of alimony, the Court must consider the (1) earning capacity of each party, and (2) their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Williams, 449 N.W.2d 878 (Iowa App. 1989).

- a. The property settlement and alimony are interrelated. The Court declined to award alimony to wife because though her income alone might be insufficient to permit her to be self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, the property settlement provided her with sufficient funds to support herself. In re Marriage of Grady-Woods, 577 N.W.2d 851 (Iowa App. 1998).
- b. In marriages of long duration, alimony can be used to compensate a spouse who leaves the marriage at a financial disadvantage, especially where the disparity in earning capacities is great. In re Marriage of Clinton, 579 N.W.2d 835 (Iowa App. 1998). See also In re Marriage of Weinberger, 507 N.W.2d 733 (Iowa App. 1993); and In re Marriage of Craig, 462 N.W.2d 692 (Iowa App. 1990).
- c. "We ignore gender in determining the alimony issue. To do otherwise would be contrary to Chapter 598 and constitutionally impermissible ... Orr v. Orr, 440 U.S. 268, 278-79, 99 S.Ct. 1102, 1111, 59 L.Ed.2d 306, 318- 19 (1979)." The husband, 51, totally disabled, without a high school education, was granted \$125 per month alimony to supplement his \$849 social security and \$117 pension benefits. The wife's gross income was \$2,060.00. In re Marriage of Miller, 524 N.W.2d 442 (Iowa App. 1994). See In re Marriage of Bethke, 484 N.W.2d 604 (Iowa App. 1992).
- d. The "... spouse with a lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the marriage as possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well." In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa App. 1983) (emphasis added); In re Marriage of Stark, 542 N.W.2d 260 (Iowa App. 1995).
- e. **In re Al-Jurf, No. 3-611/12-1354 (Iowa App., 2013).** After a 45-year marriage, the Court divided the parties' property equally; and also divided their income

equally. The Court calculated the partes' total income; divided the total by two; and then required the husband to pay as alimony the difference between one-half of the total and the social security benefit his wife was receiving. In determining alimony as well as in determining property settlements, the difference in social security benefits of the parties can be taken into consideration. In re Marriage of Miller, 475 N.W.2d 675, 678 (Iowa Ct. App. 1991); In re Marriage of Hogeland, 448 N.W.2d 678, 682 (Iowa Ct. App. 1989). The Court rejected the husband's argument that his alimony be reduced because of the loss of household services formerly performed by his wife.

- f. **In re Marriage of Wasson**, No. 3-405/12-1033 (Iowa App., 2013). James had an annual income of \$53,000: from his job at Boone Cable Works, plus his military pension, and disability payments. Tammy had two part-time jobs, and earned \$12,516 annually. Tammy spent much of that time away from the workforce, acting as the sole parent while James was serving in the military. The district court ordered James to pay Tammy "traditional alimony" in the amount of \$250 a month until she dies, is remarried, or cohabitates with another male. The Court looked at the factors set out in Iowa Code 598.21A and affirmed the trial court award, noting that after working two part-time, minimum wage jobs, Tammy's income was less than forty percent of the amount James earned.
- g. **In re Kragel**, No. 3-740 / 12-0925 (Iowa App., 2013). After a 30- year marriage, Randall earned at least \$339,683, while Leisha was earning \$15,925 per year working part-time at a nursing home. The district court awarded Leisha rehabilitative alimony of \$5000 per month for eight years and then \$3000 per month for two years after that. However, the Court of Appeals found that the district court should have awarded Leisha traditional alimony. "Traditional alimony analysis may be used in long-term marriages where life patterns have largely been set and the earning potential of both spouses can be predicted with some reliability." In re Marriage of Kurtt, 561 N.W.2d 385, 388 (Iowa Ct. App. 1997). The Court required that Randall should be required to pay alimony of \$6,000 per month until he reaches the age of sixty-five, and then \$4,000 per month until either party dies or Leisha remarries.
- h. **In re Berger**, No. 3-148/12-1389 (Iowa App. 2013). Joe, 48, sought to reduce his permanent alimony. His averaged income over the previous six years was \$633,122 . However, he testified that sometime between the age of 50 and 55 most obstetrician/gynecologists discontinue their obstetrics practices due the long hours and late night calls and experienced 1/3 reductions in their incomes. Since Joe had not yet decided to retire from obstetrics and any possible income reduction was speculative, the Court refused to reduce or alter his alimony payments: five years of spousal support at \$8000 per month and \$6000 per month thereafter. If Joe alters his practice and experiences a substantial reduction of income, he may petition the court for a modification of the decree. See In re Marriage of Bell, 576 N.W.2d 618, 623 (Iowa Ct. App. 1998)
- i. **The Factors**: Courts consider many factors in determining if alimony is to be awarded and what amount should be awarded: the **amount of the property division** [In re Marriage of Hardy, 539 N.W.2d 729 (Iowa App. 1995)]; the **amount of child support** under the decree [In re Marriage of Brown, 487 N.W.2d 331 (Iowa 1992)]; the **earning capacity of each party** [In re Marriage of Wegner, 434 N.W.2d 397, 398 (Iowa 1988)]; the **wife's needs of support and the**

husband's ability to pay toward that support [In re Marriage of Jones, 309 N.W.2d 457, 460 (Iowa 1981)]; an **agreement to waive alimony** (if not inequitable) [In re Marriage of Handeland, 564 N.W.2d 445 (Iowa App. 1997)]; and the **statutory factors** listed in Iowa Code section 598.21(3) [In re Marriage of Will, 489 N.W.2d 394 (Iowa 1992)].

2. Rehabilitative Alimony

Rehabilitative alimony serves to support 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." In re Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 1989).

- a. "The dependent spouse's premarriage standard of living is irrelevant. Nowhere does the Code direct the Court to restore an ex-spouse to his or her premarital standard of living. Rather, Iowa Code '598.21(3)(f) directs the Court to consider, among other factors, '[t]he feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage...' " In re Marriage of Grauer, 478 N.W.2d 83, 85 (Iowa App. 1991).
- b. In re Marriage of Becker, 756 N.W.2d 822 (Iowa 2008). The parties divided 3.3 million dollars in the property settlement. Though the Court found that Laura's property settlement would allow her to live comfortably, her earning capacity was less than 10% of Fred's. Therefore, instead of forcing Laura to spend her nest egg for living and education expenses, the Court awarded three years of support of \$8000 per month to allow Laura to complete her education and seven years at \$5000 per month to give Laura time to develop her earning capacity.
- c. In re Harter, No. 3-130/12-0765 (Iowa App., 2013). Steven's parents sold their company and placed their assets into a trust for the benefit of their children and grandchildren. At the end of the 20-year marriage, Steven, 60, was retired, had some health problems, and had received \$10,000 per month from the Trust for several years, though at the current rate of payout, the Trust may only last another 11 years. Cindy, 46, was in good health and, like Steven, prior to the divorce, had not worked outside the home since 2002. At the time of the divorce, she worked at a full time at minimum wage—gross wages of around \$1,421 per month. The court reviewed the factors set out in Iowa Code, § 598.21A(1) and awarded Cindy rehabilitative spousal support of \$3,500 per month for one hundred and twenty months, with the payments to "immediately cease" upon the death of either party or Cindy's remarriage. The Court reasoned that there is no likelihood that Cindy can achieve the lifestyle on her own that she has enjoyed during the marriage; and that it was equitable to provide spousal support for Cindy. Steven's trust is a spendthrift trust and the corpus of the trust cannot be divided or assigned to Cindy as a marital asset. However, Steven's legal obligation to pay spousal support under the Decree and under Iowa law is personal. Once Steven has received a distribution from the trust, the money in his hands is subject to his obligation to pay spousal support. The Court concluded that in the future, if the Trust payments are reduced or cease, a modification of the obligation is possible, but that the alimony was fair based on Steve's \$10,000 per month income.

- d. **In re Burke**, No. 3-836 / 12-2249 (Iowa App., 2013). Paula was fifty-seven years old with a high school degree. She did not work outside the home during the marriage; she was disabled and received a social security disability benefit of \$454 each month. Michael was sixty-eight years old with a high school and some trade school education. He was retired and received social security benefits of \$1788 and \$243 per month in VA disability benefits each month. The district court awarded Paula \$1,000 per month alimony. An award of spousal support is not an absolute right, but instead depends on the circumstances of each particular case. In re Marriage of Dieger, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). After considering the factors enumerated in Iowa Code section 598.21A (2011), the Court reduced the alimony to \$450 per month for 10 years because the district court incorrectly calculated Michael's monthly expenses as \$1,178, when the actual amount, including mortgage payments was \$2,925. The Court noted that in addition to the alimony, Paula would receive real estate contract payments each month as part of the property settlement.
- e. **In re Boyd**, No. 2-1023/11-2064 (Iowa App., 2013). After a 21-year marriage the court ordered Bryan to pay Tammy \$500 per month in spousal support for 48 months. During the last 9 years of the marriage Tammy worked only part-time in order to care for the couple's children. She planned to quit work for 2 years to attend school full-time at a monthly cost of \$750 to obtain a degree in elementary education. As a teacher Tammy believed she could start at \$27,284 per year. In addition to the planned education expenses, Tammy had permanent, significant monthly medical expenses for diabetes and other conditions. Bryan was in good health and earned \$78,000 per year. The Court concluded that spousal support should be increase to \$750 per month for 2 years in order to allow Tammy time to return to school; and thereafter, spousal support should continue for an additional 3 years at \$500 per month so that she can secure a job, develop her earning capacity, and add to her retirement funds. See In re Marriage of Becker, 756 N.W.2d 822, 827 (Iowa 2008) and In re Marriage of Schenkelberg, 824 N.W.2d 481, 486.
- f. **In re Marriage of Nurre**, No. 3-065/12-0998 (Iowa App. 2013). After a 5-year marriage, Mike was 42 and earned \$74,000 at Whirlpool Amana and as a musician. Tara's employment history had been inconsistent because she had degenerative disc disease. Tara's medical condition would require COBRA insurance at \$385 per month. Though the marriage was of relatively short duration, the Court held that Tara's inferior earning capacity and her physical limitations justified an award of rehabilitative spousal support of \$500 per month for forty-eight months. See In re Marriage of Smith, 573 N.W.2d 924, 927 (Iowa 1998)
- g. **In re Reich**, No. 3-584/12-1994 (Iowa App., 2013). Kim devoted almost a decade of service to the family plumbing business. She is not a plumber and will not be able to take her skills to another plumbing business. Her education was limited; and she was not likely in middle age to obtain further skills. She was working for \$11.00 per hour as a bank teller. Rehabilitative spousal support 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. In re Marriage of Becker, 756 N.W.2d 822, 825 (Iowa 2008). Here, the court ordered Bruce to pay Kim spousal support in the amount of \$450 per month for five years. Though neither

part had an abundance of assets or income, the court's award recognizes the support Kim provided to Bruce's business and helps Kim provide for herself while she establishes and advances her career.

3. Reimbursement Alimony

Where divorce occurs shortly after an advanced decree is obtained by one spouse, traditional alimony analysis would often work a hardship because, while they may have few tangible assets and both spouses have modest incomes at the time of divorce, one is on the threshold of a significant increase of earnings. Therefore, the Supreme Court in the Francis case, established the concept of "Reimbursement Alimony" to be based upon economic sacrifices by one spouse during the marriage that directly enhanced the future earning capacity of the other. Reimbursement Alimony is not subject to modification or termination until full compensation is achieved, though because of the personal nature of the award and the current tax laws, the payments must terminate on the recipient's death. In re Marriage of Francis, 442 N.W.2d 59 (Iowa 1989).

- a. In re Marriage of Probasco, 676 N.W.2d 179 (Iowa 2004). The Supreme Court denied reimbursement alimony because the facts did not meet the criteria: the marriage was not one of short duration devoted almost entirely to the educational advancement of one spouse. The parties had a substantial net worth which provided the "supporting" spouse a generous property settlement. The district court awarded reimbursement alimony because the husband had received the business which would produce income for him in the future, and the wife had no such asset. This reasoning ignored that the valuation of the business took into consideration the future earnings of the business.
- b. With In re Marriage of Jennings, 455 N.W.2d 284 (Iowa App. 1990), the court of appeals began to define the limits of Reimbursement Alimony by denying any alimony to a former spouse after a five-year marriage. The court of appeals ruled that where, as here, the "supporting spouse" does not make substantial sacrifices to assist in the attainment of the degree and where sufficient assets exist to provide some compensation, alimony may be denied. See also In re Marriage of Grauer, 478 N.W.2d 83 (Iowa App. 1991).
- c. However, the Court of Appeals rejected the husband's argument that the award of reimbursement alimony should be set off by the amount of rehabilitative alimony. In re Marriage of Farrell, 481 N.W.2d 528 (Iowa App. 1991). These two types of alimony are designed to achieve different goals and may not be offset against each other.
- d. In re Marriage of Mouw, 561 N.W.2d 100 (Iowa App. 1997), the Court of Appeals held that Francis formula should not be applied to all cases. Here, the contributing spouse also received a very valuable education with a bright future and a number of other factors should be considered: "this is not so much a computation of dollars and cents as a balancing of equities." Mouw, at 102.
- e. **In re Fedorchak, No. 3-979 / 13-0466 (Iowa App., 2013)**. Bernard sought alimony based on Virginia's educational advances and increased income during the marriage. In 1997, Virginia began a pharmacy degree at the University of Iowa. She graduated with honors in 2002, and began working full time as a pharmacist, eventually earning \$120,000 a year. Virginia was forty-nine years old

and Bernard was sixty-two years old and was working as a quality specialist, earning \$35,000 a year. Because Bernard is currently employed and supporting himself on his salary, there is no need for traditional spousal support. Rehabilitative spousal support is "a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce." In re Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 2005). However, Bernard has not left the job force since his marriage, does not claim he needs any re-education or retraining; so the facts do not support an award of rehabilitative spousal support. Reimbursement spousal support is "predicated upon economic sacrifices made by one spouse during the marriage that directly enhanced the future earning capacity of the other." Francis, 442 N.W.2d at 6. However, there was no evidence Bernard did anything in any way that assisted Virginia in obtaining this advanced degree and no evidence of any economic sacrifices by Bernard which assisted Virginia in increasing her future earning capacity. Accordingly, Bernard is not entitled to reimbursement spousal support.

4. Alimony Termination

The general rule is that alimony does not automatically terminate upon remarriage; however, the burden shifts to the recipient to show extraordinary circumstances exist which require the continuation of alimony payments. In re Marriage of Whalen, 569 N.W.2d 626 (Iowa App. 1997). See also In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985) and In re Marriage of Von Glan, 525 N.W.2d 427 (Iowa App. 1994).

- a. Whether alimony should continue after remarriage or cohabitation depends upon the purpose behind the award of alimony. Continued alimony after remarriage most often occurs with rehabilitative and reimbursement alimony because the purposes to be accomplished by these kinds of alimony will not be ordinarily affected by remarriage or cohabitation. In addition, retirement benefits which function as a distribution of property but are classified as alimony may also continue upon remarriage. In re Marriage of Bell, 576 N.W.2d 618 (Iowa App. 1998).
- b. "Parties can contract and dissolution courts can provide that alimony is not modifiable, does not terminate on remarriage, or is payable in a lesser sum on remarriage". In re Marriage of Aronow, 480 N.W.2d 87, 89 (Iowa 1991).
- c. Rehabilitative alimony may be terminated when the dependent spouse becomes "self-supporting". However, for purposes of modification of alimony decrees, the standard of living sought to be established by alimony awards is the lifestyle established by the parties during the marriage. In re Marriage of Boyd, 200 N.W.2d 845, 854 (Iowa 1972). See also In re Marriage of Gilliland, 487 N.W.2d 363 (Iowa App. 1992).
- d. In re Marriage of Wendell, 581 N.W.2d 197 (Iowa App. 1998), the Court of Appeals revisited its long-standing policy of generally providing in an original decree that alimony will terminate upon cohabitation of the recipient with a member of the opposite sex as well as upon remarriage. The Court held that "... cohabitation has too many variables to be a defined future event, like remarriage, in a dissolution decree. . . . Although we have tied cohabitation to remarriage in the past, we will no longer use cohabitation as an event to terminate alimony. . . . Like cohabitation, we believe events such as employment and self-sufficiency should be reserved for modification action.
- e. With In re Marriage of Ales, 592 N.W.2d 698 (Iowa App. 1999), the Court of Appeals

further refines the process of handling of cohabitation by specifying the burdens of proof. In future cases, the Petitioner in a modification action will be required to show there is a cohabitation to meet the substantial change of circumstances requirement under Iowa Code Section 598.21(8). Then, the burden will shift to the recipient to show why spousal support should continue in spite of the cohabitation because of an on-going need or because the original purpose for the support award makes it unmodifiable.” Ales, at 703.

- f. The most important facts which establish cohabitation: “(1) an unrelated person of the opposite sex living or residing in the dwelling house of the former spouse, (2) living together in the manner of husband and wife, and (3) unrestricted access to the home. In re Marriage of Harvey, 466 N.W.2d 916, 917 (Iowa 1991). See In re Marriage of Gibson, 320 N.W.2d 822, 824 (Iowa 1982).

5. Alimony Payment

- a. Assignment of Income. In In re Marriage of Debler, 459 N.W.2d 267 (Iowa 1990), the Supreme Court ruled that though Section 598.22 only specifically permits automatic assignment of income for payment of child support, the District Court has the inherent equitable power to order comparable assignments of income for payment of delinquent alimony. Where, as here, the former husband's support record is poor and he works out of state, use of the Court's power to order assignment is appropriate.
- b. Order to Withhold Income can now be issued as an alternative to punishment for contempt under Section 598.23 or pursuant to a recently revised Chapter 252D.

6. Alimony QDRO

The issuance of a Qualified Domestic Relations Order (QDRO) directing the assignment of former husband's pension benefits to pay alimony obligation does not constitute unlawful modification of a property settlement. It was an effort to enforce provisions of the prior decree. In re Marriage of Bruns, 535 N.W.2d 157 (Iowa 1995). See also In re Marriage of Rife, 529 N.W.2d 280 (Iowa 1995)[federal law prohibits garnishment of pension benefits for ordinary debts, but 29 U.S.C. Section 1056(d)(3)(B) specifically exempts QDRO's].

7. Alimony Insurance/Security

- a. Courts do not always require that provision be made to protect the dependent spouse if the payor dies while alimony is still needed. However, in In re Marriage of LaLone, 469 N.W.2d 695 (Iowa 1991), the Supreme Court held that alimony must terminate upon the death of the recipient to be considered tax-deductible alimony under I.R.C. 71(b)(1)(D) and should ordinarily terminate on the death of the payor where substantial life insurance is payable to the recipient on the death of the payor.
- b. In re Marriage of Hettinga, 574 N.W.2d 920 (Iowa App. 1997). The Court held that: “The district court has the authority to secure performance of future alimony payments by requiring adequate security or imposing appropriate liens on the obligor's property. . .” However, it removed liens against the payor's land and canceled a provision which provided that if a husband should predecease the wife, his estate was obligated to purchase an annuity or otherwise, to the satisfaction of the wife, to guarantee payment of the alimony for her lifetime. See also In re Marriage of Lytle, 475 N.W.2d 11 (Iowa App. 1991) and In re Marriage of Van Ryswk, 492 N.W.2d 728 (Iowa App. 1992).

- c. Where there are significant reasons for providing life insurance as security for the payee; and the cost to the payor of providing such insurance is known and not burdensome, a provision in a dissolution decree that requires a party to maintain life insurance is appropriate and enforceable. Stackhouse v. Russell, 447 N.W.2d 124, 125 (Iowa 1989); In re Marriage of Debler, 459 N.W.2d 267, 270 (Iowa 1990). Iowa Code §598.21A(1) is broad enough to permit spousal support payments after death. In re Marriage of Weinberger, 507 N.W.2d 733, 736 (Iowa Ct.App.1993).
8. Veteran Pension Available for Alimony

Veteran's benefits are not provided solely for the veteran but for his family as well. Family support, child support and alimony, can be ordered to be paid from V.A. benefits without violating the Supremacy Clause of the U.S. Constitution. In re Marriage of Anderson, 522 N.W.2d 99 (Iowa App. 1994).
9. Income Available for Alimony
 - a. Overtime. In re Marriage of Schriener, 695 N.W.2d 493 (Iowa 2005). Though he was earning substantial overtime at the time of trial, John testified that a recent injury was likely to cause him to stop working more than the minimum. The Supreme Court decided that child support precedent's stating that overtime income should be considered when "overtime has been consistent, will be consistent, and is somewhat voluntary" and when the "overtime pay is not an anomaly or speculative," [In re Marriage of Brown, 487 N.W.2d 331, 333 (Iowa 1992)] should apply to alimony considerations.
 - b. Earning Capacity/Imputed Income. **In re Beattie**, No. 3-372/12-1524 Iowa App., 2013). Daniel Beattie argued that the district court erred in its calculation of his income and the spousal support order of \$300.00 per month to Charlene, as well as in ordering him to pay for half of the monthly mortgage for the parties' marital home. The court decided his yearly gross income was \$29,000. Daniel had an advanced academic degree, but had not recently found lucrative work. He admitted that he had refused a higher income job because he believed that the hours would interfere with his time with the children. In addition, he had been offered substitute teaching hours, and he testified he could return to his career as a pastor. Therefore the district court found his reduced income was voluntary, and that the average of four years of pre-divorce income more accurately reflected his annual earning capacity than did his current income. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991).
10. Alimony and Property Division

In assessing a claim for spousal support, we consider the property division and spousal support provisions together in determining their sufficiency. See In re Marriage of Lattig, 318 N.W.2d 811, 815 (Iowa Ct.App.1982). However, there are important differences between property division and alimony. A property division divides the property at hand and is not modifiable, Iowa Code § 598.21(7), while a spousal support award is made in contemplation of the parties' future earnings and is modifiable. *Id.* §598.21C (2007). See also In re Marriage of McLaughlin, 526 N.W.2d 342, 344 (Iowa Ct.App.1994); and In re Marriage of Russell, 473 N.W.2d 244, 246-47 (Iowa Ct.App.1991).

 - a. **In re Marriage of Griffith**, No. 2-1192-0801 (Iowa App., 2013). Ed argued that since his pension was divided as marital property in the decree, his share of the pension could not be considered in determining his ability to pay alimony to Jane. While the Court in

In re Marriage of Huffman, 453 N.W.2d 246, 248 (Iowa Ct. App. 1990) refused to require the husband to pay alimony out of his pension because it would be his only substantial source of income after the dissolution, Huffman does not bar consideration of pension benefits when determining spousal support. In In re Marriage of McLaughlin, 526 N.W.2d 342, 345 (Iowa Ct. App. 1994), a wife received a significant portion of her husband's pension plan, and in granting her alimony, the Court held that "[w]e consider alimony and property division together in assessing their individual sufficiency." Jane and Ed were married almost 23 years. Both parties treated Jane's teaching career as secondary and supplemental to Ed's career. Given Jane's age and absence from the job market, she would not easily find employment similar to her previous teaching career or employment that will allow her a standard of living comparable to that which she enjoyed during the marriage. Ed had sufficient income to contribute to her support while still maintaining his own comfortable and comparable lifestyle.

- b. **In re Steddom, No. 3-1066 / 13-0435 (Iowa App., 2013).** Matt, fifty-two, was in good health. He had a college degree and earned about \$81,000 annually plus bonus.. In contrast, Victoriae,, fifty-one, unemployed for 15 years, was in poor health; and she suffered from a variety of ailments . Victoriae's only source of income is Social Security Disability benefits of \$1070 per month. Instead of alimony, Matt proposed an unequal property settlement: Victoriae would receive the parties' marital home, valued at \$65,900, and he would pay the \$60,000 mortgage debt. The court found that both parties' standard of living will decline as a result of the dissolution of marriage; but that because of her medical condition and inability to obtain employment, Victoriae's standard of living would sharply decline without continuing financial support from Matt. See In re Marriage of Becker, 756 N.W.2d 822, 826 (Iowa 2008) . Since Victoriae's need for support will continue past the time Matt satisfied the debts secured by the mortgages on the marital home, the court ordered \$1,900.00 per month alimony and required Victoriae to make the mortgage payments.

11. Attorney Fees

- a. **Financial Circumstances of Parties.** Trial courts have considerable discretion in awarding fees. In exercising its discretion to award attorney fees, the court should make an award which is fair and reasonable in light of the parties' financial positions. In re Marriage of Grady-Woods, 577 N.W.2d 851 (Iowa App. 1998). See also In re Marriage of Titterington, 488 N.W.2d 176 (Iowa App. 1992). In re Marriage of Willcoxsin, 250 N.W.2d 425, 427 (Iowa 1977); In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).
- b. **Frivolous Litigation.** In addition, the Supreme Court has decided that the frivolous litigation tactics and meritorious applications, in addition to disparity in incomes, are factors the court should consider in awarding attorney fees. Seymour v. Hunter, 603 N.W.2d 625 (Iowa 1999).
- c. **Failure to Cooperate in Discovery.** An award of attorney fees is appropriate when one party is less than cooperative in producing discovery. See In re Marriage of Crosby, 66,9 N.W.2d 255 (Iowa 2005). Here, the Court approved \$5,000 in trial attorney fees and granted Amy \$5,000 in appellate attorney fees. See also In re Marriage of Miller, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996).
- d. **Prevailing Party.** **Schwering v. Coleman, No. 3-873 / 13-0357 (Iowa App., 2013).** The district court awarded Willetta Coleman attorney fees because it found she became the

prevailing party when John Schwering voluntarily dismissed his petition. In a proceeding to determine custody or visitation under chapter 600B, the district court "may award the prevailing party reasonable attorney fees. Iowa Code § 600B.26. The court relied on In re Marriage of Roerig, 503 N.W.2d 620, 622-23 (Iowa Ct. App. 1993), a case in which the petitioner voluntarily dismissed her modification petition on the first day of trial. However, in Roerig, the court noted that a plaintiff's voluntary dismissal does not always render a defendant a prevailing party for purposes of a statute awarding fees. *Id.* at 623. See Gray v. Kay, 120 Cal. Rptr. 915, 917 (1975). In this case, Schwering voluntarily dismissed his petition because he was being deployed to Afghanistan. Unlike Roerig, Schwering did not wait until trial to seek dismissal. Schwering served the dismissal on Coleman several days before the scheduled pretrial conference. Under Rule 1.943, Schwering did not require an order of the court to dismiss his petition. Where a party voluntarily dismisses a petition before any trial date is scheduled, and by rule dismissal does not require a court order, the other party has not prevailed in the action.

- e. Expert Fees. The court has considerable discretion in awarding. In re Marriage of Maher, 596 N.W.2d at 568; and the court may consider expert fees in an award of attorney fees. See In re Marriage of Muelhaupt, 439 N.W.2d at 662-63; see also Tydings v. Tydings, 567 A.2d 886, 891 (D.C. 1989).

C. DIVISION OF PROPERTY

1. Choice of Law

- a. Iowa courts had not previously determined the choice of law rule applicable in determining which states' law applies to issues of property characterization and distribution in divorce actions involving parties who own personal property in a community property state. In In re Marriage of Whelchel, 476 N.W.2d 104 (Iowa App. 1991), the Iowa Court of Appeals adopts Restatement (Second) of Conflict of Laws Section 258(1): The interest of a spouse in personal property acquired during the marriage will generally be determined by the law of the state where the spouses were domiciled at the time the item of personal property was acquired.
- b. However, the importance of the Whelchel case may be limited because in Nichols v. Nichols, 526 N.W.2d 346 (Iowa App. 1994), Whelchel and the choice of law issue were ignored. The Court of Appeals ignored the law of the state where the asset was acquired, and applied Iowa law.

2. Factors in Equitable Division

a. Equality of Division

- (1) While Iowa Courts do not require an equal division or percentage distribution of marital assets (In re Marriage of Hoak, 365 N.W.2d 185, 194 [Iowa 1985]), "... it should nevertheless be a general goal of trial courts to make the division of property approximately equal. In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1979)." In re Marriage of Miller, 552 N.W.2d 460 (Iowa App. 1996). See also, In re Marriage of Russell, 473 N.W.2d 244 (Iowa App. 1991).
- (2) In Marriage of Bonnette, 584 N.W.2d 713 (Iowa App. 1998), Since the trial court failed to explain a \$20,000 difference between the values of the

assets awarded to each party, the Court of Appeals granted the wife an additional \$10,000 property settlement.

b. Gender Neutral

"We must approach this issue from a gender-neutral position avoiding sexual stereotypes. See In re Marriage of Bethke, 484 N.W.2d 604, 608 (Iowa App. 1992)...It is important...that we respect the rights of individuals to designate a primary wage earner during the marriage and erase any gender bias that because [the husband] is male, it was incumbent upon him to have employment." In re Marriage of Pratt, 489 N.W.2d 56, 58 (Iowa App. 1992). See also In re Marriage of Swartz, 512 N.W.2d 825 (Iowa App. 1993).

c. Tax Consequences/Selling Costs

The Court should consider tax consequences of the sale of assets where the property settlement requires liquidation of the assets.

- (1) Section 598.21(1)(j) requires the Court to consider the tax consequences of the property settlement where the adverse tax consequences cannot reasonably be avoided. In re Marriage of Hogeland, 448 N.W.2d 678 (Iowa App. 1989).
- (2) However, subtracting an estimate of the expense of capital gains taxes and selling costs in the event corporate stock was sold is not appropriate where sale is not pending or contemplated. The Supreme Court reversed the Trial Court which had reduced the value of the wife's interest in corporate stock from \$637,000.00 to \$336,000.00 by deducting the estimated costs of sale and income taxes. In re Marriage of Friedman, 466 N.W.2d 689 (Iowa 1991). See In re Marriage of Haney, 334 N.W.2d 347 (Iowa App. 1983); but see In re Marriage of Hoak, 334 N.W.2d 185 (Iowa 1985) and In re Marriage of Dahl, 418 N.W.2d 358 (Iowa App. 1987).
- (3) In re Marriage of McDermott, 827 N.W.2d 671 (Iowa 2013). The Court refused to reduce the property division equalization payment by \$750,000 to allow for the tax and sale costs. Stephen argued that he would have to sell land and incur taxes and selling expenses to make a \$1 million equalization payment. The Court rejected this argument because Stephen was offered a mortgage loan to make the payment by his bank; and his cash flow was sufficient to permit him to make the payment without selling any land. The Court must often award a farm to the spouse who operated it and set a schedule of property settlement payments so the farmer-spouse might retain ownership of the farm. In re Marriage of Callenius, 309 N.W.2d 510, 515 (Iowa 1981) (citing In re Marriage of Andersen, 243 N.W.2d 562, 564 (Iowa 1976)). However, a party's interest in preserving the farm should not work to the detriment of the other spouse in determining an equitable settlement.

d. Property in Lieu of Alimony/Support

Given the wife's preference to be self-supporting and the acrimonious relationship between the parties, the Supreme Court agreed with the trial court that additional assets in the property division should be awarded to her in lieu of an alimony award. In re Marriage of Goodwin, 606 N.W.2d 315 (Iowa 2000).

e. No Bonus Property for Domestic Abuse

However, in In re Marriage of Goodwin, 606 N.W.2d 315 (Iowa 2000), the Supreme Court refused an additional share of the parties' assets as compensation for domestic abuse claimed to have been suffered during the marriage. We reject this argument because it would introduce the concept of fault into a dissolution of marriage action, a model rejected by our Legislature in 1970. See In re Marriage of Williams, 199 N.W.2d 339, 341 (Iowa 1972)

f. Accumulation During Separation

In In re Marriage of Driscoll, 563 N.W.2d 640 (Iowa App. 1997), the Court held that ordinarily, the value of the assets should be determined as of the date of trial. Locke v. Locke, 246 N.W.2d 246 (Iowa 1976). However, "[t]here may be occasions when the trial date is not appropriate to determine values. Equitable distributions require flexibility, and concrete rules of distribution may frustrate the Court's goal of obtaining equitable results." Driscoll, at 42. See also In re Marriage of Muelhaupt, 439 N.W.2d 656 (Iowa 1989); In re Marriage of Clinton, 579 N.W.2d 835 (Iowa App. 1998), In re Marriage of McLaughlin, 526 N.W.2d 342 (Iowa App. 1994); In re Marriage of Meerdink, 530 N.W.2d 458 (Iowa App. 1995); and In re Marriage of Campbell, 623 N.W.2d 585 (Iowa App. 2001).

g. Failure of Duty to Disclose

"Both parties are required to disclose their financial status. ... Iowa Code Section 598.13 ... failure to comply with the requirements of this section constitute failure to make discovery as provided in Rule of Civil Procedure 1.517 (formerly Rule 134)." In re Marriage of Meerdink, 530 N.W.2d 458, 459 (Iowa App. 1995). See also, In re Marriage of Hanson, 475 N.W.2d 660 (Iowa App. 1991); In re Marriage of Williams, 421 N.W.2d 160, 164 (Iowa Ct. App. 1988).

h. Tax Obligations.

In re Marriage of Williams, No. 30414/12-1682 (Iowa App., 2013). Charlyn argued that because the parties separated a few months into 2010, she should not be responsible for any of the tax debt from Eric's self-employment. Eric countered that allocating all of the tax debt to him would be inequitable because after the parties separated, he still paid for Charlyn's car payment, car insurance, home mortgage, utilities, and home insurance. He argued that failure to divide the tax debt would leave him with a highly disproportionate burden of the couples' debt: Charlyn would receive \$13,341 in assets and Eric would receive \$83,865 in debts. Though in In re Marriage of Sullins, 715 N.W.2d 242 (Iowa 2006), the court required a self-employed husband to be fully responsible for his tax liability, the parties had filed separately and the tax problems were caused by the husband. Here, the court found that since Charlyn benefitted from Eric's income, allocation of the tax debt jointly was a necessary part of an equitable division of the parties' assets and debt.

i. Dissipation of Assets.

(1) In re Marriage of Burgess, 568 N.W.2d 827 (Iowa App. 1997). Conduct which causes loss of marital property and dissipation or waste of assets may generally be considered in making a property division. However, the focus should not be on whether one spouse or the other is personally responsible for a debt, but whether the payment of an obligation was a reasonable and expected aspect of the

particular marriage. Here, the wife knew that her husband had alimony and child support obligations which would be part of her marriage prior to the marriage.

- (2) However, in In re Marriage of Bell, 576 N.W.2d 618 (Iowa App. 1998), the Court held that “conduct of a spouse which results in loss or disposal of property otherwise subject to division at the time of divorce may be considered in making an equitable distribution of property.” Bell at 624. The record indicated that the husband had spent significant portions of marital assets on gambling prior to the dissolution. This waste of marital assets can be considered in the property distribution and supports the unequal division of the parties’ assets. See also In re Marriage of Goodwin, 606 N.W.2d 315 (Iowa 2000); In re Marriage of Cerven, 335 N.W.2d 143, 1446 (Iowa 1983); In re Marriage of Wendell, 581 N.W.2d 197 (Iowa App. 1998); and In re Marriage of Martens, 680 N.W.2d 378 (Iowa App. 2004).
- (3) In In re Marriage of Crosby, 699 N.W.2d 255 (Iowa 2005), the Court divided the assets equally, but then reimbursed Clayton’s wife for litigation expenses she incurred which were caused by Clayton's failure to disclose, secretion of assets, and transfer of assets during the dissolution process because of his conduct. These acts must be dealt with harsh. . Otherwise the dissolution process becomes an uncivilized procedure and the issues become not ones of fairness and justice but which party can outmaneuver the other. In re Marriage of Williams, 421 N.W.2d 160, 164 (Iowa Ct. App. 1988).
- (4) In re Marriage of Fennelly, 737 N.W.2d 97 (Iowa 2007). Michele alleged that Ted *indirectly* dissipated their marital assets, not by paying out large amounts but by accumulating large amounts of debt which would eventually reduce the parties’ net worth. In determining whether dissipation has occurred, courts must decide “(1) whether the alleged purpose of the expenditure is supported by the evidence, and if so, (2) whether that purpose amounts to dissipation under the circumstances.” Lee R. Russ, *Spouse's Dissipation of Marital Assets Prior to Divorce as Factor in Divorce Court's Determination of Property Division*, 41 A.L.R.4th 416, 421 (1985). See In re Marriage of Burgess, 568 N.W.2d 827, 829 (Iowa Ct.App.1997).
- (5) **In re Al-Jurf, No. 3-611/12-1354 (Iowa App., 2013).** To determine whether dissipation of marital assets has occurred, the Court must consider many factors, including: (1) the proximity of the expenditure to the parties' separation, (2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage, (3) whether the expenditure benefitted the "joint" marital enterprise or was for the benefit of one spouse to the exclusion of the other, and (4) the need for, and the amount of, the expenditure. In re Marriage of Fennelly, 737 N.W.2d 97, 104 (Iowa 2007). Here, the wife contended that her physician husband had dissipated money by travelling frequently to the Middle East and secreting money on the trips allegedly with her sister. The trips were three and thirteen years prior to the divorce. The Court found that expenditures that far removed from the separation of the parties would generally not be considered dissipation of marital assets. Furthermore, given the family income , th physician would be expected to travel in a Spartan-like atmosphere.

3. Premarital Agreements

- a. Since 1992, Chapter 596, Iowa's version of the Uniform Premarital Agreement Act, controls premarriage agreements in Iowa. The Statute made significant changes in the manner in which premarital agreements are prepared and enforced.
- b. Content. Premarital agreements may include provisions relating to the following issues: (a) property rights and obligations of the parties; (b) rights of disposing of, managing and controlling property; (c) disposition of property upon death or divorce; (d) the making of wills, trusts, or other arrangements to carry out the provisions of the agreement; (e) disposition of life insurance death benefits; (f) choice of law; and (g) any other matter not in violation of public policy or a criminal statute. However, unlike the standard Uniform Act, an Iowa premarital agreement cannot contain a provision which adversely affects the right of a spouse or child to support. This is consistent with current Iowa precedent: "Any provision of an antenuptial agreement which may be interpreted as prohibiting alimony is contrary to public policy and thus void." In re Marriage of Van Brocklin, 468 N.W.2d 40 (Iowa App. 1991). See also In re Marriage of Gudenkoff, 204 N.W.2d 586, 587 (Iowa 1973).
- c. Alimony Waiver. Iowa Code Section 596.5(2) prohibits provisions in premarital agreements which adversely affect the right of a spouse or child to support. However, In re Marriage of Van Regenmorter, 587 N.W.2d 493 (Iowa App. 1998) holds that premarital agreements entered from 1980 through 1991 may contain provisions for elimination of spousal support. However, any such alimony waiver provision is not binding on a court, though it must be considered with the other factors of Section 598.21(3) in making the spousal support award.
- d. Revocation/No Abandonment. Section 596.7 provides that premarital agreements may be revoked only by a written agreement signed by both spouses or by a finding that the agreement was not voluntarily executed or was unconscionable. Agreements entered into before January 1, 1992 will be enforced under prior Iowa precedents which provide that premarital agreements like any other contract can be "abandoned" by conduct in addition to express agreement. In re Marriage of Pillard, 448 N.W.2d 714 (Iowa App. 1989); In re Marriage of Elam, 680 N.W.2d 378 (Iowa App. 2004).
- e. When parties enter a prenuptial agreement, in the absence of fraud, mistake, or undue influence, the contract is binding. If the court were to award different assets than those agreed by the parties, it would, in effect, be rewriting the premarital agreement. In re Marriage of Applegate, 567 N.W.2d 671 (Iowa App. 1997).
- f. "Iowa cases have long held prenuptial agreements are favored in the law. ... They allow parties to structure their financial affairs to suit their needs and values and to achieve certainty. This certainty may encourage marriage and may be conducive to marital tranquility..." In re Marriage of Spiegel, 553 N.W.2d 309 (Iowa 1996). "The person challenging the agreement must prove its terms are unfair or the person's waiver of rights was not knowing and voluntary ... The terms of an agreement are fair when the provisions of the contract are mutual or the division of property is consistent with the financial condition of the parties at the time of execution. Of course, the affirmative defenses of fraud, duress, and undue influence are also available to void a prenuptial agreement as with any other contract." Spiegel, at 316.

- g. In re Marriage of Shanks, 748 N.W.2d 506 (Iowa 2008) Premarital agreements executed after 1991 must conform to the Iowa Uniform Premarital Agreement Act (IUPAA), Iowa Code Chapter 596. The IUPAA provides three independent bases for finding a premarital agreement unenforceable: (1) The person did not execute the agreement voluntarily. (2) The agreement was unconscionable when it was executed. (3) Before the execution of the agreement the person was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse. In re Marriage of Spiegel, 553 N.W.2d at 317. Also, the IUPAA requires that unconscionability be determined as of the time when the agreement was executed.

4. Post-Marital Agreements

Iowa Code Section 598.21(k) requires that the Court consider any written agreement of the parties (except perhaps those which have been rejected or repudiated) but (a) it is only one of the considerations the Court must address; and (b) any stipulated property settlement is a contract between the parties which only becomes final when it is accepted and approved by the Court. See In re Marriage of Bries, 499 N.W.2d 319 (Iowa App. 1993) and In re Marriage of Hansen, 465 N.W.2d 906 (Iowa App. 1990).

- a. The Court retains the power to reject a stipulation, but should do so in dissolution matters only if the court determines the stipulation is unfair or contrary to law. Matter of Ask, 551 N.W.2d 643 (Iowa 1996). In reviewing post-marriage agreements, the Court will use basic contract analysis to determine whether an agreement was made and should be enforced. In re Marriage of Masterton, 453 N.W.2d 650 (Iowa App. 1990). See also In re Marriage of Butterfield, 500 N.W.2d 95, 98 (Iowa App. 1993)[the Stipulation becomes final when it is accepted and approved by the Court]; In re Marriage of Zeliadt, 390 N.W.2d 117, 119 (Iowa 1986)[A stipulated settlement should be approved and enforced only if a district court determines the settlement will not adversely affect the best interests of the parties' children]; and In re Marriage of Udelhofen, 538 N.W.2d 308 (Iowa App. 1995); In re Marriage of Briddle, 756 N.W.2d 35 (Iowa 2008).
- b. Once the court enters a decree, the stipulation has no further effect. The decree, not the stipulation, determines what rights the parties have. In re Marriage of Jones, 653 N.W.2d 589 (Iowa 2002). See Bowman v. Bennett, 250 N.W.2d 47, 50 (Iowa 1977). A party's remedy for post-trial events lies in an application to modify the decree.
- c. In re Marriage of Cooper, 769 N.W.2d 582 (Iowa 2009) A reconciliation agreement, which imposed severe penalties in the event of infidelity, could be considered by the Court under Iowa Code § 598.21(1) (k). However, post-marital agreements are only considered, among other factors, in making property divisions. More important, Iowa will not enforce contracts which attempt to regulate spouse's personal conduct. Miller v. Miller, 78 Iowa 177, 179, 42 N.W. 641, 641 (1889). "Our no-fault divorce law is designed to limit acrimonious proceedings. A contrary approach would empower spouses to seek an end-run around our no-fault divorce laws through private contracts." See Diosdado v. Diosdado, 118 Cal.Rptr.2d 494, 496 (Ct.App.2002).

5. Property Settlement Installment Terms/Interest

- a. The Supreme Court held that Iowa Code Section 535.3 requires interest to accumulate at a rate calculated according to Section 668.13 when the decree or judgment makes no reference to the matter of interest on all money due on judgments or decrees and fixed awards of money for child support, alimony and property settlement. In re Marriage of

Dunn, 455 N.W.2d 923 (Iowa 1990). See Arnold v. Arnold, 140 N.W.2d 874, 877 (Iowa 1966). However, in In re Marriage of Kinney, 478 N.W.2d 624 (Iowa 1991). The Supreme Court ruled that in many cases, it would be equitable to award interest to offset an award to one party of income-producing property (for example, a family home is not income-producing).

In re Loucks, No. 3-949 / 13-0698 (Iowa App., 2013). Stephen appealed the district court order requiring him to pay ten percent annual interest on a property settlement equalization payment. The Court of Appeals found that Iowa Code section 535.3 provides for interest on judgments and decrees at a variable rate calculated under section 668. Section 535.3 further provides that interest on periodic payments for child, spousal, or medical support shall not accrue until thirty days after the payment becomes due and owing, but that interest shall accrue at a rate of ten percent per annum thereafter. Because the equalization payment under the property distribution is not a periodic payment for child, spousal, or medical support, the proper interest rate, 2.14 percent, was calculated using the indexed rate section 668.13. Though a dissolution of marriage court may specify an amount different from the statutory rate in special situations, this case provided no rationale for setting the interest rate at almost eight percent higher than the statutory interest rate. See Hunt v. Kinney, 478 N.W.2d 624, 626 (Iowa 1991); In re Marriage of Dunn, 455 N.W.2d 923, 925 (Iowa 1990).

- b. In re Marriage of Keener, 728 N.W.2d 188 (Iowa 2007). Interest may not be necessary in every case, but it certainly is where the amount of the total being paid is large and the goal is the approximate equal division of the parties' marital assets. The court must consider the time value of money. See In re Marriage of Conley, 284 N.W.2d 220, 223 (Iowa 1979). In addition, the Supreme Court found that a judgment lien against real estate as provided by Iowa Code section 624.23 and a UCC lien pursuant to Iowa Code chapter 554 against corporate stock were appropriate to secure the obligation.. See generally Siragusa v. Brown, 971 P.2d 801 (Nev.1998). Finally, the Court ordered that an acceleration clause was appropriate to require immediate payment if the ability to make the property settlement payments in the future becomes doubtful.
- c. However, trial courts in dissolution proceedings, sitting in equity, retain the power to deny interest on property settlement judgments or to award interest at amounts less than required by Iowa Code Section 535.3. In re Marriage of Friedman, 466 N.W.2d 689 (Iowa 1991). See also In re Marriage of Callenius, 309 N.W.2d 510 (Iowa 1981).
- d. The party who seeks an interest rate less than that ordinarily required by §535.3 must show circumstances of the property settlement which warrant a departure from the statutory interest rate. In re Marriage of Blume, 473 N.W.2d 629 (Iowa App. 1991). In In re Vanderpol, 529 N.W.2d 603 (Iowa App. 1994).

6. Separate Property: Inherited or Gifted

Iowa Code Section 598.21(2) requires that gifts or inheritances received by one party during marriage are not subject to division unless failure to do so would be inequitable. Property brought into the marriage by each party is not treated as a special category like gifts and inheritances. The premarriage assets are only a factor for the court to consider.

- a. Iowa Code Section 598.21(2) and the Case Law (see In re Marriage of Thomas, 319 N.W.2d 209 [Iowa 1982] and In re Marriage of Van Brocklin, 468 N.W.2d 40 (Iowa App.

1991)) start with the premise that inherited property is not subject to division; but this premise yields where its application would be unjust.

- b. The first step in the division of property is to set aside the inherited or gifted assets and the debts associated with these assets. Thereafter, the marital assets and debts should be distributed. In re Marriage of Mayfield, 477 N.W.2d 859 (Iowa App. 1991). See In re Marriage of Sparks, 223 N.W.2d 264 (Iowa App. 1982).
- c. The fact that gifts have been commingled with marital assets or placed in joint ownership is not the controlling factor in determining whether an equitable distribution of gifts or inherited property is warranted. In re Marriage of Fall, 593 N.W.2d 164 (Iowa App. 1999). "...the manner a married couple titles or holds inherited or gifted property is not a controlling factor in assessing its treatment as a gift or inheritance under Section 598.21(2)." Fall at 167. See also In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982)[the factors to be considered before dividing inherited and gifted property]; In re Marriage of Wertz, 492 N.W.2d 460 (Iowa App. 1996); In re Marriage of Higgins, 507 N.W.2d 725 (Iowa App. 1993)[husband's inheritance deposited to the wife's solely-owned credit union account remained the husband's separate property, not marital property]; In re Marriage of Cupples, 531 N.W.2d 656 (Iowa App. 1995); and In re Marriage of Dean, 642 N.W.2d 321 (Iowa App. 2002).
- d. The length of the marriage is one of the most important circumstances considered in determining whether the commingled gift or inheritance has become a marital asset. In re Marriage of Oler, 451 N.W.2d 9, 11 (Iowa App. 1989). See also In re Marriage of Hardy, 539 N.W.2d 729 (Iowa App. 1995).
- e. Even though the property is found to be separate property, the court must examine factors established in In re Marriage of Muelhaupt, 439 N.W.2d 656, 659 (Iowa 1989) to determine whether or not the asset should nevertheless be divided. Factors to consider in determining whether inherited property should be divided include: (1) contributions of the parties towards the property, its care, preservation, or improvement; (2) the existence of any independent, close relationship between the donor or testator and the spouse of one to whom the property was given or devised; (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them; (4) any special needs of either party; and (5) any other matter which would render it plainly unfair to a spouse or a child to have the property set aside for the exclusive enjoyment of the donee or devisee. See also In re Marriage of Goodwin, 606 N.W.2d 315 (Iowa 2000) and In re Marriage of Liebich, 547 N.W.2d 844 (Iowa App. 1996).

In re Boyd, No. 2-1023/11-2064 (Iowa App., 2013). Bryan inherited 346 acres of farmland, which included a home, several outbuildings, and grain bins. The farm was appraised at \$770,000 in 2004 and \$2,428,000 in 2011. Though Inherited property is normally awarded to the individual spouse who owns the property, this exclusion is not absolute, and §598.21(6) creates a unique hybrid system that permits the court to divide inherited property if equity so demands. See In re Marriage of Schriner, 695 N.W.2d 493, 496 (Iowa 2005), In re Marriage of Goodwin, 606 N.W.2d 315, 319 (Iowa 2000), and In re Marriage of Muelhaupt, 439 N.W.2d 656, 659 (Iowa 1989)). In addition to the Muelhaupt factors, we also consider the length of the marriage, the amount of time the property was held after it was devised, and whether the parties enjoyed a substantial rise in their standard of living as the result of the inheritance. Goodwin at 319-20. Here, Tammy contributed toward the improvement of the farm home, enjoyed the family

homestead the last third of the marriage and she had special needs as a result of medical conditions. This was also long-term marriage of 21 years, and the parties benefited from the inheritance the last seven years of the marriage. However, Bryan testified that Tammy kept her income separate from his, and she did not contribute to the payments on the farm loan. In addition, the fact that the appreciation in the inherited land value was fortuitous does not automatically entitle Tammy to share in the appreciation. The division of the appreciated value of inherited property "should be a function of tangible contributions and not the mere existence of the marital relationship." In re Marriage of Richards, 439 N.W.2d 876, 882 (Iowa Ct. App. 1989). The trial court division left Bryan with a net worth of approximately \$2.1 million (93% of the property) and Tammy with approximately \$151,200 (7% of the property). The Court decided to increase the lump sum property settlement award to Tammy by \$175,000, 11% of the farm's appreciation from 2004 to the time of trial. This modification results in Bryan receiving a net of \$1.925 million (86%) and Tammy a net of \$326,200 (14%). Bryan was ordered to pay Tammy the additional \$175,000 property settlement without interest in ten annual installments of \$17,500.

- f. The homestead, held in joint ownership, was given to Linda by her father because she cared for him during the marriage. Since substantial monies were advanced during the marriage for improvements and maintenance to the home and David supported the family during the time Linda cared for her father, the classification of the homestead as marital property in the property division was equitable. In re Marriage of Clark, 577 N.W.2d 662 (Iowa App. 1998).

In re Marriage of Reynolds, No. 3-151/12-1456 (Iowa App. 2013). Roger inherited \$52,000 from his father in 1992. He invested the money wisely and after his marriage to Carrie in 2001, he purchased the marital home for cash in 2005. Nevertheless, the trial court awarded \$32,500, one-half the value of the home, to Carrie. The Court of Appeals recognized that though Iowa Code §598.21(6) usually requires that inherited property is not subject to a property division, inherited property may be divided where awarding the inheritance to one spouse would be unjust. In re Marriage of McDermott, 827 N.W.2d 671 (Iowa 2013), Carrie, 41, worked as a waitress and Roger, 64, received Social Security and was disabled. Both parties worked and contributed to the expenses and maintenance of the property during the marriage. However, were it not for Roger's wisely invested inheritance, the couple would not have been able to purchase the home, and to maintain it free of debt. Therefore, the Court found it more equitable to divide the value of the home one-fourth to Carrie and three-fourths to Roger.

- g. In re Marriage of Rhinehart, 704 N.W.2d 677 (Iowa 2005). The Court considered Deborah's \$500,000.00 future interest in a family trust fund in deciding whether there was an equitable division of the parties' property. Since Deborah's future need for marital assets was considerably less than Scott's need due to the anticipated inheritance, the court approved the award to Scott of \$73,895 more in marital property than Deborah received. In an obvious response to the Rhinehart decision, the 2007 Iowa Legislature amended §598.21(5)(I) to omit from property division. ". . . expectancies or interests arising from inherited or gifted property created under a will or other instrument under which the [fiduciary] has the power to remove the party in question as a beneficiary."

7. Premarriage Property

- a. Our law does not treat assets brought into the marriage in the same manner as inherited or gifted property. That property was brought into the marriage is only a factor to be

considered in determining an equitable property division under Section 598.21(1)(b). In In re Marriage of Garst, 573 N.W.2d 604 (Iowa App. 1997), the Court of Appeals held that the wife should receive a substantial share of the assets even though the parties' net worths had declined during the marriage and virtually all of the remaining assets had been brought to the marriage by David: "One factor the court considers in making an equitable division of property is what each party brought into the marriage. See Iowa Code Section 598.21(1)(b) ... the statute also directs us to consider contributions to a marriage in determining what each party receives upon the dissolution of the marriage. See Iowa Code Section 598.21(1). This factor draws considerable attention when premarital assets have appreciated in value and the dispute is over how much of the assets with the attendant appreciation will be divided. However, when the value of premarital assets remains constant or decreases during the marriage, the same statutory factor -- the contribution of the parties -- is considered. The change in value of the asset is not critical to the analysis." Garst at 606-607.

In re Peiffer, No. 3-672 / 12-1746 (Iowa App., 2013. Belinda claimed that she should have received a portion of the value of the rental properties Kevin owned before their marriage. Under section 598.21(5), all property, except inherited property or gifts received by one party, should be equitably divided between the parties. See In re Marriage of Schriner, 695 N.W.2d 493, 496 (Iowa 2005). However, the marriage here was of relatively short duration, seven years. See In re Marriage of Shanks, 805 N.W.2d 175, 179 (Iowa Ct. App. 2011). The claim of either party to the property owned by the other prior to a marriage of this brief duration is minimal at best." *Id.* The court can also award a share of the appreciation of premarital assets See In re Marriage of Grady-Woods, 577 N.W.2d 851, 853 (Iowa Ct. App. 1998). However, here the properties were never profitable and had not increased in value "to an extent that fairness, equity and good conscience dictate an award of value to [Belinda]."

- b. However, the court often treats pre-marriage property differently than assets acquired during the marriage. "Property brought into a marriage by one party need not necessarily be divided. In re Marriage of Lattig, 318 N.W.2d 811, 815-16 (Iowa App. 1982)." In re Marriage of Johnson, 499 N.W.2d 326 (Iowa App. 1993). The court distinguished between the \$4,500.00 of tools brought into the marriage from the \$500.00 of tools acquired during the marriage and granted the husband a \$4,500.00 greater share in the property distribution.
- c. In re Marriage of Sullins, 715 N.W.2d 242 (Iowa 2006). Donna's premarital annuity and Ray's retirement savings acquired prior to marriage were not separate property, not to be considered part of the marital assets. "All property of the marriage that exists at the time of the divorce, other than gifts and inheritances to one spouse, is divisible property. *Id.* (citing Iowa Code § 598.21(1) (2003)). In re Marriage of Brainard, 523 N.W.2d 611, 616 (Iowa Ct.App.1994). The trial court may place different degrees of weight on the premarital status of property, but it may not separate the asset from the divisible estate and automatically award it to the spouse that owned the property prior to the marriage.

8. Appreciation of Value of Separate Property

- a. The appreciation in value of separate property often requires detailed investigation and analysis by the Court. "[T]he division of property is based upon each marital partner's right to a just and equitable share of property accumulated during the marriage as a result of their joint efforts." In re Marriage of Oakes, 462 N.W.2d 730 (Iowa App. 1990); but see In re Marriage of Campbell, 623 N.W.2d 585 (Iowa App. 2001) in which Oakes'

concentration on joint contributions was overruled. See also In re Marriage of Johnson, 455 N.W.2d 281 (Iowa App. 1990).

- b. Barring special circumstances, when an inheritance is used to buy property, any appreciation or loss in the value of the property may be characterized as marital property. In re Marriage of White, 537 N.W.2d 744 (Iowa 1995).
- c. Several factors must be considered in determining an equitable division of property owned prior to the marriage and appreciated during the marriage: (1) “tangible contributions of each party” to the marital relationship, including homemaking; (2) whether the appreciation of property is due to fortuitous circumstances or the efforts of the parties; (3) the length of the marriage; and (4) the statutory factors specified in Section 598.21(1). In re Marriage of Grady-Woods, 577 N.W.2d 851 (Iowa App. 1998).
- d. However, in In re Marriage of Fennelly, 737 N.W.2d 97 (Iowa 2007), the Supreme Court seemed to reject the Grady-Woods approach and divided the appreciation of all premarital assets equally. The Court said “. . . marriage does not come with a ledger. See In re Marriage of Miller, 552 N.W.2d 460, 464 (Iowa Ct.App.1996). Spouses agree to accept one another “for better or worse.” Each person's total contributions to the marriage cannot be reduced to a dollar amount. Nor do we find it appropriate when dividing property to emphasize *how* each asset appreciated-fortuitously versus laboriously-when the parties have been married for nearly fifteen years.”

9. Retirement and Pension Plans

a. General Principles

- (1) Iowa Code Section 598.21(1)(I) requires the Court to consider pension benefits, vested and unvested, of each party in determining the property distribution. In re Marriage of Johnston, 492 N.W.2d 206 (Iowa App. 1992). See also In re Marriage of Imhoff, 461 N.W.2d 343 (Iowa App. 1990). Our Courts have become increasingly aware that pension benefits are often among the most valuable assets a couple accumulates during their marriage.
- (2) However, where the marriage is brief, each party had separate retirement plans established before the marriage, and no pension plans were depleted or diminished during the marriage, equity does not require an equal division of pension assets accumulated during the marriage. In re Marriage of Knust, 477 N.W.2d 687 (Iowa App. 1991). See also In re Marriage of Campbell, 451 N.W.2d 192 (Iowa App. 1989).

b. Methods of Compensation for Pensions

(1) Alimony

Social security disability benefits, like military disability benefits, are not compensation for past services rendered, like a pension, and will not be considered an asset in the property division. However, like veterans disability payments, social security disability will be considered in the equitable granting of alimony or support. In re Marriage of Miller, 524 N.W.2d 442 (Iowa App. 1994). See also, In re Marriage of Williams, 449 N.W.2d 878 (Iowa App. 1989) [veterans disability benefits].

(2) Present Valuation

One method used by Iowa Courts in disposing of pensions as part of the property division is to value the pension interest based on its current worth or present value. This method is generally used where sufficient information, especially accountant or actuary testimony, is available, and the parties have sufficient assets other than the pension to permit a lump-sum property settlement or when benefits will be received in the distant future.

- (a) In re Marriage of Fidone, 462 N.W.2d 710 (Iowa App. 1990). The Court of Appeals took judicial notice of the value of the husband's employment benefits to affirm the award of a greater share of the home equity to the wife.
- (b) However, expert valuations can vary widely, and courts have difficulty choosing between divergent technical arguments. "The substantial difference in valuations fixed by experts in the field bring us to the conclusion that the Decree should be modified by providing for the payments out of future benefits when received." In re Marriage of Scheppele, 524 N.W.2d 678, 680 (Iowa App. 1994). The husband was awarded 50% of the marital portion of the wife's pension, and she was awarded more of the other assets.

(3) Division of Pension – Percentage Method

- (a) In re Marriage of Sullins, 715 N.W.2d 242 (Iowa 2006). There are two accepted methods of dividing pension benefits: the present-value method and the percentage method. Additionally, there are two main types of pension plans: defined-benefit plans and defined-contribution plans. Although both methods of dividing pension benefits can be used with both types of pension plans, it is normally desirable to divide a defined-benefit plan by using the percentage method because determining the present value of a defined-benefit plan requires the testimony of an actuary or accountants, and often the pensioner cannot pay a lump-sum amount equal to the present value of a defined-benefit plan.
- (b) Increasingly, the preferred method of handling a pension benefit is to divide the plan through a Qualified Domestic Relations Order which, in essence, separates the pension into two separate accounts. "Although [the Present Value Method] has the advantage of immediate distribution, it also has several disadvantages. Valuation of pension is complicated (especially when the plan is unvested) and requires the services of an actuary. Moreover, the financial obligation resulting from a lump sum payment is often beyond the pensioner's present economic ability to pay." In re Marriage of Benson, 545 N.W.2d 252, 255 (Iowa 1996). See also In re Marriage of McLaughlin, 526 N.W.2d 342 (Iowa App. 1994); In re Marriage of Kurtt, 561 N.W.2d 385 (Iowa App. 1997).
- (c) In re Marriage of Duggan, 659 N.W.2d 556 (Iowa 2003) In addition to granting the spouse one-half of the pension benefit earned during the marriage, the Court required the Husband to name his former wife as his designated beneficiary for one-half of the surviving spouse benefit and one-half of any cost-of-living increases because only by giving her survivorship rights as to her share of the payments can we ensure that she will receive her one-half share of the pension plan.
- (d) However, note that surviving spouse benefits are recognized as a separate property right from the underlying pension benefits [In re Marriage of Davis, 608 N.W.2d 766, 770-71 (Iowa 2000)]. In In re Marriage of Estrada, 2007 WL 914029 (Iowa App.) the non-

pensioned spouse was denied the surviving spouse benefit because the decree and stipulation did not require designation of Wendy as a surviving spouse.

- (e) The division of pension rights is only a part of the overall scheme of equitable division. In In re Marriage of Fall, 593 N.W.2d 164 (Iowa App. 1999), the court awarded all of the wife's pension benefits to her because the husband left the marriage with a substantially greater net worth because of his receipt of substantial inherited property which reduced his need for retirement benefits.

In re Rasmusson, No. 3-1019 / 13-0535 (Iowa App., 2013). Teresa was no longer able to work or contribute to her retirement plan due to the disability resulting from the stroke. The monthly disability benefit from her private disability insurance plan would soon cease, and she will have to live off of her social security and the money in her 401(k) for the rest of her life. At the time of trial, Gary was healthy and younger than Teresa. He was employed full time and still capable of contributing to his retirement savings. Under these circumstances, the court found that it was appropriate to grant Teresa all of her retirement account. The court must divide the marital property after considering all the factors in Iowa Code section 598.21(5) (2011). In awarding the 401(k) to Teresa, the district court focused on "the age and physical and emotional health of the parties" and (f) "the earning capacity of each party;" and the district court's decision to award the entire 401(k) to Teresa was equitable in this case. See In re Marriage of Crosby, 699 N.W.2d 255, 259 (Iowa 2005).

In re Marriage of Reineke, No. 3-370/12-1375 (Iowa App. 2013). Tony argued that the court should have only divided the portions of the parties' retirement accounts accumulated since the date of their marriage. They had cohabited for thirteen years before their marriage. Debra argued the district court was correct in using the full amounts because the accounts were created during the couple's entire twenty years of being together. Iowa is an equitable distribution state meaning "courts divide the property of the parties at the time of divorce, except any property excluded from the divisible estate as separate property, in an equitable manner in light of the particular circumstances of the parties." In re Marriage of Sullins, 715 N.W.2d 242, 247 (Iowa 2006). Pensions are divisible marital property regardless of whether they existed before the marriage. A 50/50 split of the total accounts in this case was approved because the parties did not contribute to their retirement accounts until they began cohabitating.; and Tony's premarital contributions were attributable to the parties' joint efforts. See In re Marriage of Benson, 545 N.W.2d 252, 255 (Iowa 1996).

- (f) Federal legislation has permitted this third alternative to the Court in disposing of a pension asset. The Uniform Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730, codified in part at 10 U.S.C. Section 1408; the Civil Service Retirement Benefit Act Amendments of 1978, 22 U.S.C. Section 4054; the Retirement Equity Act of 1984, Pub. L. No. 98-397; and the Railroad Retirement Act of 1986 have given the state courts the power to divide federal pensions and all private pensions between the spouses in a dissolution of marriage action if strict, formal requirements followed.

[1] Hisquierdo v. Hisquierdo, 439 U.S. 572, 590-91, 99 S.Ct. 802 (1972) bars state courts from dividing Social Security or Railroad Retirement Tier I benefits, directly or indirectly, in formulating the economic terms of dissolution decrees. However, in In re Marriage of Boyer, 538 N.W.2d 293 (Iowa 1995), the court approved an unequal division of property favoring the wife, based in part upon a

finding that the present value of the wife's social security benefits was \$22,539.00, while the husband's benefits were worth \$87,861.00.

[2] In re Marriage of Crosby, 699 N.W.2d 255 (Iowa 2005). Clayton, as an employee of the United States Postal Service, participates in the postal service retirement system, which is a government program for postal employees in lieu of social security. The district court allowed Jean one-half of Clayton's pension, accumulated during the marriage. The court of appeals reduced Jean's share to twenty-five percent because she is younger, healthier, has a longer expected work life, and she will have her own social security benefits on which to draw. Also, Clayton has no comparable claim to Jean's social security benefits.

(g) In what has become a landmark case, In re Marriage of Benson, 545 N.W.2d 252 (Iowa 1996), the Supreme Court prescribed a new formula for dividing pensions using the Percentage Method. The non-employee spouse's share of the pension is determined by first calculating the marital share of the pension by computing a fraction, the numerator being the number of years during the marriage the employee spouse accrued pension benefits and the denominator being the total number of years the benefits accrued before the benefits are "matured" (immediately available). The marital share of the pension is then multiplied by the non-employees' share of the marital assets (usually 50%). Finally, this second figure is multiplied by the total accrued monthly pension benefit at the time of "maturity" of the pension, usually at the time of the employee spouse's retirement. The equation can be shown as follows:

$$\text{Non-employee Spouse's Share} = \frac{\begin{array}{l} \text{\# of years employee was both} \\ \text{married \& covered by pension} \\ \text{\# of years covered by} \\ \text{Plan up to maturity (retirement)} \end{array}}{\text{}} \times 50\% \times \text{Value of Monthly Benefit at Retirement}$$

(h) Payments required to equitably divide pension benefits are property settlement payments, not alimony, and are, therefore, not to terminate on remarriage or cohabitation and are not modifiable. In re Marriage of Huffman, 453 N.W.2d 246 (Iowa App. 1990). In addition, the spouse's share is payable as soon as the benefits are received. In re Marriage of Robison, 542 N.W.2d 4 (Iowa App. 1995).

(i) A disability pension is a marital asset, available to benefit the spouse and children as well as the disabled employee. However, a disability pension, unlike a retirement pension, is to replace income that would have been earned had the employee not been injured, not compensation for past services and the husband's child support was based on his total income. Therefore, the Court awarded the disability portion of the pension to the husband but ordered that the wife would begin to receive one-half of the marital share of the pension when the husband attained the age of 55, the earliest retirement age under the pension plan. In re Marriage of O'Connor, 584 N.W.2d 575 (Iowa App. 1998).

(j) In Schultz v. Schultz, 591 N.W.2d 212 (Iowa 1999), Iowa followed the majority rule that divorce or dissolution per se does not void the designation of a named spouse of a life insurance policy or a retirement account. The mere award of the policy or account to one party in a Decree or stipulation does not cancel the other's rights as beneficiary. Additional language must be included in which the beneficiary party's expectancy interest is canceled or waived.

(k) In re Marriage of Morris, (Iowa 2012). The stipulated decree did not mention survivor benefits, and in 2010, Kathy sued to compel Dennis to share the survivor rights as well as the retirement benefits. Though the property division generally is not modifiable, the district court retains

authority to interpret and enforce its prior decree. See In re Marriage of Brown, 77,6 N.W.2d at 650. The court remanded the action to the district court for further proceedings to determine whether the district court in the original decree intended that half of the Marine Corps retirement should include survivor benefits or, instead, simply an equal division of the monthly retirement payments.

10. Division of Other Assets

a. Business Interests

- (1) As an exception to the general trend 50/50 property divisions, courts have approved awards of less than 50% of farms and small business to nonoperating spouses to permit the operating spouse to retain ownership and to manage the farm or business as a single economic unit. In re Marriage of Callenious, 309 N.W.2d 510 (Iowa 1981).
- (2) However, where there are enough other assets to permit an almost equal split, the Court will do so. In fact, in In re Marriage of Lacaeyse, 461 N.W.2d 475 (Iowa App. 1990), the wife received more of the net assets than the husband. The Court of Appeals ruled that the division was equitable because the husband got all of the income-producing farmland and equipment.
- (3) In dividing the property, the Court should not ordinarily force the parties into a continuing business relationship after the divorce. In re Marriage of Lundtvedt, 484 N.W. 2d 613 (Iowa App. 1992).
- (4) The Trial Court is given much leeway in the difficult task of valuing closely held businesses. In re Marriage of Steele, 502 N.W.2d 18 (Iowa App. 1993). See In re Marriage of Hitchcock, 309 N.W.2d 432, 435-36 (Iowa 1981).
 - (a) However, the Court cannot delegate this responsibility to the parties through a private auction between parties. In re Marriage of Dennis, 467 N.W.2d 806 (Iowa 1991).
 - (b) In In re Marriage of Coulter, 502 N.W.2d 168 (Iowa App. 1993), the Court approved a valuation of a closely-held corporation which included a 30% discount for the husband's minority interest and the division of only the appreciation in value of the business interest from the date of the marriage to the date of the divorce.
 - (c) The share of the value dependent upon post-dissolution services should not be included in the allocation of assets. In re Marriage of Russell, 473 N.W.2d 244 (Iowa App. 1991). Also, the good will of a professional practice should not be valued because it is dependent upon the ability of the professional to continue his or her profession, and is based upon the professional's future earning potential. In re Marriage of Bethke, 484 N.W.2d 604 (Iowa App. 1992).
 - (d) In re Marriage of Keener, 728 N.W.2d 188 (Iowa 2007). Anecdotal evidence (even from an expert) is simply an insufficient basis upon which to determine the fair market value of intangible assets. Therefore, the Court found that the district court erred by speculating as to the value of these assets; and reduced their value.

b. Family Residence

- (1) Iowa Code Section 598.21(1)(g) requires the Court to consider "the desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of any children." the most common disposition of the family residence is to award the family home to the custodial parent while granting the noncustodial parent a continuing ownership interest or a lien against the property.
- (2) The attorney drafting a lien against real estate must be careful in the dissolution decree to provide that the lien is made subject to future unpaid child support so that any arrearage will be deducted from the amount of the lien. In Smith v. Brown, 513 N.W.2d 732 (Iowa 1994).
- (3) However, though it is desirable to award the family home and contents to the physical custodian of the children, here, the mother and children had resided in the homestead for only six months prior to the separation and the wife's business and its assets were part of the homestead. Therefore, the Court ordered the house and contents sold and the proceeds divided. In re Marriage of Hoffman, 493 N.W.2d 84 (Iowa App. 1992).
- (4) A party's ability to meet the financial obligations of a dissolution decree is a relevant factor to consider in determining an equitable division of property. In re Marriage of Siglin, 555 N.W.2d 846, 849-50 (Iowa App. 1996). See In re Marriage of Lovetinsky, 418 N.W.2d 88, 89-90 (Iowa Ct.App.1987) [required sale of the parties' home because it was unclear that the wife could "afford to maintain the residence and its attendant expenses"].

c. Personal Injury Claim

The proceeds of a personal injury case are divided according to the circumstances of each case. Settlement proceeds do not automatically belong to either party. However, here, where the husband sustained a permanent disability and the wife had a greater earning capacity, the husband was granted the claim for his personal injuries and the wife was limited only to pursuing her claim for consortium. In re Marriage of Pasencia, 541 N.W.2d 923 (Iowa App. 1995).

d. Miscellaneous Assets

- (1) **Lottery Winnings/Book Royalties**. Iowa Courts have ruled that the following items are assets subject to division: **lottery winnings** [In re Marriage of Swartz, 512 N.W.2d 825 (Iowa App. 1993)]; **book royalties** [In re Marriage of White, 537 N.W.2d 744 (Iowa 1995)];
- (2) **Advanced Degree**. An advanced education degree is not considered a marital asset. See In re Marriage of Wagner, 435 N.W.2d 372 (Iowa App. 1988). However, the potential increased earnings of the person earning the advanced degree is a factor to be considered in determining the equitable division of the property. In re Marriage of Plasencia, 541 N.W.2d 923 (Iowa App. 1995).
- (3) **Bonus**. A bonus due to husband was considered by the court in its income calculations in determining alimony, college expense contributions, and the child support. Therefore, the court refused to grant the wife a share of the bonus as part of the property division. In Re Marriage of O'Rourke, 547 N.W.2d 864 (Iowa App. 1996). See also Hayes v. Hayes, No. 2-279/11-1847 (Iowa App. 2012).

- (4) **Workers Compensation.** In re Marriage of Schrinier, 695 N.W.2d 493 (Iowa 2005). The Supreme Court, in this case of first impression, adopted the "mechanistic approach" to divide a workers' compensation award. The award is property subject to division if the award was received, or the right to receive the award accrued, during the marriage. However, the Court ruled that workers' compensation proceeds received after the divorce are separate property of the injured spouse.
- (5) **Pets.** In In re Berger, No. 3-148/12-1389 (Iowa App. 2013), Joe and Cira fought for custody of their dog, Max. Max was licensed to Cira; the "GEO tracker" device associated with Max is in Cira's name alone; Cira took Max to training classes and got Max medical attention, even though he was in Joe's care at the time; and Cira also has physical care of the parties' youngest child, who has known Max all of her life. A dog is personal property. In re Marriage of Stewart, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984). While a family pet should not be put in a position of being neglected or abused, courts do not have to determine a pet's best interests when making a proper division. *Id.*; but see Houseman v. Dare, 966 A.2d 24, 28 (N.J. 2009) (recognizing pets have special "subjective value" to their owners); Eric Kotloff, Note, All Dogs Go to Heaven . . . Or Divorce Court: New Jersey Un"leashes" a Subjective Value Consideration to Resolve Pet Custody Litigation in *Houseman v. Dare*, 55 Vill. L. Rev. 447, 447-49 (2010) (recognizing while current legal framework does not coincide with modern public sentiment about pets, the law is changing). The Court of Appeals confirmed the district court's award of Max to Cira.

D. CHILD SUPPORT

1. Interstate Jurisdiction for Child Support Orders
 - a. The Full Faith and Credit for Child Support Orders Act (FFCCSOA) is federal legislation which controls support orders throughout the U.S. under the authority of the Supremacy Clause of the U.S. Constitution. 28 U.S.C. Section 1738B(e)(2) provides that a court of any state other than the original issuing state may modify a child support order only if: (1) the issuing state is no longer the state of residence of the child or any other individual contestant; or (2) the parties must file a written consent to another state assuming jurisdiction. In re Marriage of Zahnd, 567 N.W.2d 684 (Iowa App. 1997). See also In re Marriage of Carrier, 576 N.W.2d 97 (Iowa 1998).
 - b. Chapter 252K, the Uniform Interstate Family Support Act (UIFSA), adopted in Iowa in 1997, discussed in more detail later in the section on child support enforcement, adopts jurisdiction principles similar to FFCCSOA
2. Child Support Guidelines
 - a. Guidelines. The Supreme Court establishes Child Support Guidelines to be used by courts in establishing child support obligations. Effective, July 1, 2009 the Supreme Court adopted the "pure income shares" method of calculating child support.
 - (1) The Pure Income Shares Guidelines provide specific guidance for parents with combined incomes from \$0 through \$25,000 per month. Noncustodial parents with low incomes qualify for the low-income adjustment section of the Schedule of Basic Support Obligations, based

upon their incomes alone. Other parents' child support obligations are based upon the combined incomes of both parents.

- (2) The proper child support amount for persons with combined net incomes in excess of \$25,000 per month " ... is deemed to be within the sound discretion of the court ... The amount of support payable by parents with monthly combined incomes of \$25,001 or more shall be no less than the dollar amount as provided in the Guidelines for parents with a monthly income of \$25,000.
- (3) The Guidelines grant a Qualified Additional Dependent Deduction, to a party who can demonstrate a legal obligation to support children other than those affected by the current support order. The monthly deduction for qualified additional dependents range from 8% for one child [up to \$800 per month to 16% [up to \$1,600 per month] for five or more children.
- (4) The Guidelines also grant an Extraordinary Visitation Deduction to noncustodial parents whose court-ordered visitation exceeds 127 overnights per year, he or she shall receive a credit to the guideline amount as follows: 128 - 147 = 15% credit; 148 - 166 = 20% credit; and 167 or more = 25% credit.

In re Marriage of Jones, 653 N.W.2d 589 (Iowa 2002), the parties' stipulated at trial that Father would qualify for the extraordinary visitation credit. However, when the decree was finally prepared the minimum scheduled overnights were less than 127; and Mother sought to eliminate the credit on appeal. The Supreme Court found the decree does not have to specify the dates. The precise timing of the visitation can be left to the parties.

- (5) The Guidelines establish a guideline method for computing taxes:
 - (a) An unmarried parent must be assigned either single or head of household filing status: household head if one or more of the mutual children reside with the parent;
 - (b) A married parent shall be assigned married filing separate status;
 - (c) If the parties have joint physical care, an unmarried parent shall use the head of household status and a married parent shall use the married filing separate status;
 - (d) The standard deduction shall be used;
 - (e) Each parent shall receive a personal exemption plus that for each child residing with him or her, unless allocated to the noncustodial parent;
 - (f) Earned income tax credit income is ignored; and
 - (g) The court may consider adjusting the support payment if the amount of taxes actually paid differs substantially from the amount calculated under the guideline method.
- (6) In both joint physical care cases and split or divided care cases, the support obligations of both parties are calculated, and the net difference is paid to the party with the lower child support amount.

- (7) New Federal requirements are incorporated in the Guidelines which require that an Order for Medical Support must be ordered in every case.
- (a) If a parent has medical insurance available at a “reasonable cost” [which is determined by a provided table], the parents are required to share the incremental premium cost of covering the child through an adjustment to the calculated base child support.
 - (b) If neither parent has medical insurance available at a “reasonable cost”, if appropriate, the court shall order cash medical support of from 1% to 5% of the noncustodial parent’s income.
 - (c) The custodial parent is required to pay the initial medical expenses of the children not covered by insurance: the first \$250.00 per year for each child up to a maximum of \$800 per year for all children. Thereafter, the uncovered expenses are to be divided by the parents in proportion to their respective incomes.

b. Apply to Every Case

The Supreme Court order requires that the guidelines be considered in every case. The Guidelines provide that "The court shall not vary from the amount of child support which would result from the application of the guidelines without a written finding that the guidelines would be unjust or inappropriate as determined under the following criteria:

- (1) Substantial injustice would result to the payor, payee or child;
- (2) Adjustments are necessary to provide for the needs of the child and to do justice between the parties, payor, or payee under the special circumstances of the case; and
- (3) Circumstances contemplated in Iowa Code Section 234.39 (1989) [applies to foster care services only].

3. Determination of Gross Income

a. Affirmative Duty to Provide Information

- (1) "...[B]efore the amount of support can be fixed in accordance with the Guidelines, an honest and complete revelation of income must be made." In re Marriage of Lux, 489 N.W.2d 28, 30 (Iowa App. 1992).
- (2) "It is not the Court's responsibility to search the record for the proper figures to use for applying the child support guidelines. We will not do so." In re Marriage of Hansen, 514 N.W.2d 109 (Iowa App. 1994). The child support payor complained that the trial court varied from the guidelines without articulating reasons, but provided no information to the court as to how he claimed the child support should have been calculated.

b. Average Fluctuating Income

- (1) "The Court must determine the net monthly income from the most reliable evidence presented. This often requires the Court to carefully consider all of the circumstances relating to the parent's income. Where the parent's income is subject to substantial fluctuations, it may be necessary to average the income over reasonable period when determining current monthly income." In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). See also In re Marriage of Knickerbocker, 601 N.W.2d 48 (Iowa 1999) Here, the Supreme Court approved using a four-year average of a farmer's income in determining his income available for child support.
- (2) Non-recurring income should not be considered. In re Marriage of Will, 602 N.W.2d 202 (Iowa App. 1999). Since the interest from the proceeds of the sale of a homestead, now reinvested in a new home, is not recurring income, the District Court should not have included the entire amount of the interest in computing the father's income for the purposes of calculating child support guideline income.
- (3) "The definition of income as used in the Guidelines is most readily adaptable to the parent employed for a set monthly wage...the definition of income in the Guidelines is not easily applied to the earnings of persons such as [the father] who are compensated for their services through commissions and who experience month-to-month and/or year-to-year fluctuations in income." In re Marriage of McQueen, 493 N.W.2d 91 (Iowa App. 1992). See also In re Marriage of Hardy, 539 N.W.2d 729 (Iowa App. 1995); In Re Marriage of Roberts, 545 N.W.2d 340 (Iowa App. 1996) [a lawyer's gross income for the previous three years was averaged to determine his guideline gross income]; In re Marriage of Clifton, 526 N.W.2d 574 (Iowa App. 1994), [refused to average the wages where unemployed during much of one year].
- (4) In re Marriage of Hagerla, 698 N.W.2d 329 (Iowa 2005). In some cases the only equitable way to determine income for purposes of child support is to average income over a period of time. In re Marriage of Cossel, 487 N.W.2d 679, 681 (Iowa Ct. App. 1992). The Court of Appeals based the child support on the father's base pay in his current employment, rather than an average of his earnings from his old job.

c. Overtime Pay

- (1) "Overtime wages are not excluded as income. Overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes. ...[I]n circumstances where overtime pay appears to be an anomaly or is uncertain or speculative, a deviation from the Child Support Guidelines may be appropriate. We also agree that a parent's child support obligation should not be so burdensome that the parent is required to work overtime to satisfy it." In re Marriage of Brown, 487 N.W.2d 331 (Iowa 1992). See also In re Marriage of Heinemann, 309 N.W.2d 151, 152-53 (Iowa App. 1981).
- (2) In In re Marriage of Elbert, 492 N.W.2d 733 (Iowa App. 1992), the Court included in the payor's gross income his actual average overtime income of \$7,000.00 per year over five years in setting the child support amount. The Court found that the overtime had been consistent throughout the past five years and was not speculative or likely to decline in the future. See also In re Marriage of Geil, 509 N.W.2d 738 (Iowa 1993).

d. Second Job Income

In State Ex Rel. Weber v. Denniston, 498 N.W.2d 689 (Iowa 1993), the Supreme Court concluded that second job income (in this case from the National Guard) is similar to overtime, and it should be included to determine gross income where it is steady, not speculative and voluntary. But see In re Marriage of Griffin, 525 N.W.2d 852 (Iowa 1994).

e. Bonus Pay

- (1) "All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligations. When deciding whether bonuses are to be included in gross income, we examine the employment history of the payor over the past several years to determine whether the amount of money paid from year to year was consistent. If so, the bonuses should be included in gross income." In re Marriage of Nelson, 570 N.W.2d 103 (Iowa 1997). See also In re Marriage of Lalone, 469 N.W.2d 695, 698 (Iowa 1991) and In re Marriage of Pettit, 493 N.W.2d 865 (Iowa App. 1992).
- (2) In Seymour v. Hunter, 603 N.W.2d 625 (Iowa 1999), the Court found that "Income, for purposes of guidelines, need not be guaranteed. History over recent years is the best test of whether such a payment is expected or speculative. In calculating the expected bonuses, the court should consider and average them as earnings over recent years and decide whether the receipt of an annual payment should be reasonably expected.
- (3) The Court of Appeals approved another method for handling bonus income in In re Marriage of Allen, 493 N.W.2d 273 (Iowa App. 1992). The father was required to pay a percentage of any bonus if and when received. However, noting the difficulty which would arise in requiring payment of the Guideline percent of the net bonus after mandatory deductions, the Court of Appeals ordered the father to pay a smaller percentage of the total bonus income before any deductions.

f. Incentive Pay

"Monthly Income" under the Guidelines should include "incentive pay" which had been regularly received in addition to base pay. The case requires all "extra" income to be included in calculating Guideline Support unless this would result in an injustice or require the payor to work overtime in order to pay support. "Here, there is no problem with burdening Burge by requiring him to work additional hours; his incentive pay is based solely on increased productivity, not overtime." State Dept. of Human Services v. Burge, 503 N.W.2d 413, 415 (Iowa 1993).

g. Value of Employee Benefits/Imputed Income

- (1) The value of benefits provided to an employee (e.g. home subsidy, real estate taxes, insurance, utility, gasoline and other vehicle expenses) should be considered in determining Gross Annual Income for child support purposes. In re Marriage of Beecher, 582 N.W.2d 510 (Iowa 1998); but only the after-tax value of these benefits should be added to the payor's net salary to arrive at net income. In re Marriage of Titterington, 488 N.W.2d 176 (Iowa App. 1992). See also, In re Marriage of Huisman, 532 N.W.2d 157 (Iowa App. 1995).
- (2) "Imputing income from an income-producing asset is analogous to imputing income to an unemployed or under-employed person based on that person's earning capacity." The Court can impute income from sources like rent and conservation programs from a

substantial asset like a farm. State Ex Rel. Pfister v. Larson, 569 N.W.2d 512, 515 (Iowa App. 1997).

h. Nontaxable Income

- (1) "The Guidelines do not limit the definition of gross income to that income reportable for Federal Income tax purposes. Although veterans' disability benefits, social security disability or retirement payments and worker's compensation benefits are exempt from federal taxes, they are properly considered as income in determining if a substantial change in circumstances has been established and in determining the amount of child support. See In re Marriage of Howell, 434 N.W.2d 629, 633 (Iowa 1989) (Veterans' Retirement and Disability Benefits); In re Marriage of Stuart, 252 N.W.2d 462 (Iowa 1977) (Social Security Disability Payments); In re Marriage of Swan, 526 N.W.2d 320 (Iowa 1995) (Workers' Compensation Benefits). Only public assistance payments are specifically excluded as income under our Guidelines." In re Marriage of Lee, 486 N.W.2d 302 (Iowa 1992).
- (2) The Supreme Court ruled has also ruled that social security disability benefits, whether they are paid to the disabled parent or to the former spouse for the child shall be considered income to the disabled parent in determining child support under the Child Support Guidelines. In addition, disability benefits received by the custodial parent shall be credited to the disabled parent's support obligation. In re Marriage of Hilmo, 623 N.W.2d 809 (Iowa 2001). The dependent benefits are replacement income to the disabled parent and should be considered income to that parent for the purposes of establishing child support. Iowa Code Section 598.22C codifies the Hilmo rules.

In re Johnson, No. 3-779 / 13-0155 (Iowa App., 2013). Troy applied for Social Security Disability benefits; and while the dissolution action was pending, the Social Security Administration paid the child \$12,756 lump-sum social security dependent benefit, which covers the time period from June 2010 through January 2012. The district court ordered these funds be placed in a 529 plan account for the child; but Troy argued that the payment should be credited to his child support obligation. The Court of Appeals noted that our supreme court has held a child support award may be offset by social security benefits during the period the benefits are received, and—in an "exceptional case"—a lump-sum payment of social security benefits may be applied toward an outstanding child support obligation. In re Marriage of O'Brien, 565 N.W.2d 619, 622 (Iowa 1997). In O'Brien, the child support obligation which was satisfied by the lump-sum payment accrued during the period for which the lump-sum payment was made. Here, initially, the child was living with Troy and Kristy and was later in their joint physical care. Kristy was the sole provider for the family when they resided together and she paid child support to Troy when they separated. Therefore, a credit to Troy's future child support was inappropriate. Unlike O'Brien, Kristy did not receive any of the lump-sum dependent payment. Therefore, there is no unique set of circumstances that necessitates reimbursing Troy. Considering the purpose of social security dependent benefits, the Court found that ordering the lump-sum payment to be placed in a 529 plan account is equitable.

- (3) In re the Marriage of Belger, 654 N.W.2d 902 (Iowa 2002) extends the logic of the Hilmo case to Social Security retirement benefits. The Supreme Court ruled that the former husband was entitled to credit against his child support obligation reflecting dependent child's receipt of social security dependent retirement benefits on his behalf, overruling State ex rel. Pfister v. Larson, 569 N.W.2d 512.

- (4) Deferred income may also be considered in setting child support. In re Marriage of Will, 602 N.W.2d 202 (Iowa App. 1999). The Court added \$4,300.00 to the father's child support guideline income for the prorata amount of income earned on Series E, U.S. Savings Bonds. There is no direction in the child support guidelines for including deferred income. However, there are circumstances that substantial investments earning deferred income may justify an upward modification from the guidelines.

i. Contributions from Family

- (1) Stepparent/Live-In Income. "[T]he support obligation of the noncustodial parent should not be reduced to an amount less than that provided under the child support guidelines because a stepparent or the custodial parent's boyfriend or girlfriend makes contributions to the household. The contribution of the stepparent or boyfriend or girlfriend is only relevant to the extent his or her contribution may increase the cost of the child's maintenance by reason of the higher standard of living the children may experience by reason of him or her living in the home. See In re Marriage of Mueller, 400 N.W.2d 86, 88-89 (Iowa App. 1986)." In re Marriage of Koepke, 483 N.W.2d 605 (Iowa App. 1992).
- (2) Gifts from Others. Generally, financial assistance or support from sources other than a support obligor's income is not an appropriate consideration in determining a support obligation. See In re Marriage of Drury, 475 N.W.2d 668, 672 (Iowa Ct. App. 1991) (holding that possible support available to payor father from another person is not a consideration the district court must weigh in setting the child support award); see also In re Marriage of Will, 602 N.W.2d 202, 206 (Iowa Ct. App. 1999) (holding that income as defined by the guidelines does not include the income of a current spouse).

j. Business Expenses

- (1) Straight-Line Depreciation. Some consideration must be given to business expenses necessary to maintain a business or occupation. These expenses may include a reasonable allowance for straight-line depreciation. After considering these matters the Court-- where warranted--should adjust gross income before applying the Guidelines. Any other approach may discriminate between wage earners and self-employed persons. In re Marriage of Worthington, 504 N.W.2d 147 (Iowa App. 1993). See also In re Marriage of Hoksbergen, 587 N.W.2d 490 (Iowa App. 1998) [recalculation of a farmer's income available for child support by increasing his income by \$14,500 per year which he had deducted on his tax returns as accelerated depreciation]; In re Marriage of Knickerbocker, 601 N.W.2d 48 (Iowa 1999) [reasonable straight-line depreciation on farm machinery and other assets related to the farm business was an expense reasonably necessary to maintain that business, and that such expenses should be considered in determining the payor's income]; In re Marriage of Maher, 510 N.W.2d 888 (Iowa App. 1993); In re Marriage of Gaer, 476 N.W.2d 324 (Iowa 1991) and In re Marriage of Cossel, 487 N.W.2d 679 (Iowa App. 1992). In Maher, Gaer, Cossel, Hoksbergen, and Knickerbocker, the courts permitted the full amount of the straight-line depreciation as a deduction. However, in Worthington, and in In re Marriage of Starcevic, 522 N.W.2d 855 (Iowa App. 1994), the Court's denied depreciation deductions to avoid "paper losses" and a "windfall" of reduced child support.
- (2) Other Expenses. The Court of Appeals approved the deduction of out-of-pocket business expenses of a self-employed person, including depreciation, postage, office expenses and promotion, but denied the artificial deduction of 27.5 cents per mile for mileage where the self-employed person's vehicles were fully depreciated and his employer furnished gas and oil. In re Marriage of Golay, 495 N.W.2d 123 (Iowa App. 1992).

k. Appreciation in Net Worth

There may be circumstances where a substantial nontaxed increase in the net worth of the noncustodial parent justifies a departure from the Guidelines. However, variations in market prices of stored farm commodities owned by a farmer with modest assets does not justify a variation from the Guidelines. The value of farm commodities is best established when the commodity is sold. When sold, the proceeds will be reflected in income used to establish child support. In re Marriage of Cossel, 487 N.W.2d 679 (Iowa App. 1992).

l. Voluntary Income Reduction

- (1) "Child support is generally not reduced because of self-inflicted or voluntary reduction in income. In addition, parents must give their children's needs high priority and be willing to make reasonable sacrifices to assure their care. In re Marriage of Fidone, 462 N.W.2d 710 (Iowa App. 1990). See also In re Marriage of Vetternack, 334 N.W.2d 761 (Iowa 1983). "The self-infliction rule applies equitable principles to the determination of child support in order to prevent parents from gaining an advantage by reducing their earning capacity and ability to pay through improper intent or reckless conduct..." In re Marriage of Foley, 501 N.W.2d 497 (Iowa 1993). See also In re Marriage of McKenzie, 709 N.W.2d 528 (Iowa 2006); In re Marriage of Duggan, 659 N.W.2d 556, 562 (Iowa 2003); and State ex rel. Reaves v. Kappmeyer, 514 N.W.2d 101, 10405 (Iowa 1994) [may consider the combined incomes of the supporting parent and new partner].
- (2) However, in In re Marriage of Walters, 575 N.W.2d 739 (Iowa 1998), the Supreme Court reversed earlier cases and reduced support due to a reduction in income and earning capacity which was the result of incarceration because of criminal activity. Although voluntary, the criminal conduct was not done with an improper intent to deprive his children of support. See also In re Marriage of Barker, 600 N.W.2d 321 (Iowa 1999), (the earning capacity of the obligor as a prisoner is substantially less than that prior to her conviction. Therefore, she is entitled to a reduced amount of child support) and In re Marriage of Rietz, 585 N.W.2d 226 (Iowa App. 1998).
- (3) Another way to reduce income is to create a false expense. Where the support payor "...is the principal in a business that employs his or her spouse, we will look at the salary paid to his or her spouse to determine whether the allocation is fair or if it results in a salary that is larger than average salaries for comparable employment...absent evidence showing a valid basis for the excess salary, we will attribute that portion of the salary to the obligor spouse." In re Marriage of Aronow, 480 N.W.2d 87 (Iowa 1991).
- (4) Still another strategy is to transfer assets. The Court of Appeals ruled that the income from assets transferred to payor's wife should be considered in setting child support. "Income as defined by the child support guidelines does not include income of a current spouse ... [however], it is reasonable to consider the income Roger's current wife receives on the gifted property not as part of Roger's net monthly income as defined by the guidelines, but as a factor that justifies deviating from the guideline amounts." In re Marriage of Will, 602 N.W.2d 202 (Iowa App. 1999).
- (5) However, before earning capacity can be used to calculate child support, rather than actual earnings, the Guidelines require the Court to enter findings that use of actual income would be inequitable because: (1) substantial injustice would otherwise result to the payor, payee or child; or, (2) that adjustments are necessary to provide for the needs of the child or to do justice between the payor or the payee. In re Marriage of Salmon, 519 N.W.2d 94 (Iowa

App. 1994). See also Iowa Dept. of Human Services v. Gable, 474 N.W.2d 581 (Iowa App. 1991).

- (6) The Court will not always find that the reduction of income creates an in justice. Though the mother had worked full-time during her first marriage, the Court found “ ... as a mother of four, it was eminently reasonable for her to choose to spend half of her working hours parenting the children, including the two from the parties’ marriage.” In re Marriage of Nelson, 570 N.W.2d 103 (Iowa 1997). See also In re Marriage of Montgomery, 521 N.W.2d 471 (Iowa App. 1994) and In re Marriage of Bonnette, 492 N.W.2d 717 (Iowa App. 1992).
- (7) However, the Court of Appeals clarified its position with regard to a parent declining to work outside the home: “While we respect a parent’s wish to remain at home with his or her children, we cannot look at this fact in isolation in determining earning capacity...We reject any suggestion in In re Marriage of Bonnette ...to the contrary.” Moore v. Kriegel, 551 N.W.2d 887, 889 (Iowa App. 1996).

In re Thoms, No 3-841/13-0352 (Iowa App., 2013). We may deviate from the child support guidelines' requirement to use a parent's actual income if an adjustment is necessary to provide for the children's needs and to do justice under the special circumstances of the case. In re Marriage of McKenzie, 709 N.W.2d 528, 533 (Iowa 2006). Also of importance is whether the parent's reduction in income was voluntary or involuntary. *Id.*; see also In re Marriage of Duggan, 659 N.W.2d 556, 562 (Iowa 2003). Angela worked as a part-time nursing assistant and earned \$6240 per year. When she worked full-time, she had earned \$20,800 a year. She did not argue she cannot work full-time; instead she states she did not pursue full-time employment so that she could be available to transport the children, but this was irrelevant after she lost primary care of the children.

- (8) In addition, the Court may disregard earning capacity where reduction of income is temporary or for a good reason. The custodial parent's decision to quit a teaching job to go back to college to become a civil engineer was not made with the purpose of reducing her child support obligation but to better support them once she graduates. In Re Marriage of Hart, 547 N.W.2d 612 (Iowa App. 1996). See also In re Marriage of Weiss, 496 N.W.2d 785 (Iowa App. 1992) and In re Marriage of Blum, 526 N.W.2d 164 (Iowa App. 1994).
- (9) Still, in cases where the parties' incomes are limited or the Court suspects that a party has reduced income to manipulate the child support amount, the courts have generally used the earning capacity of the parents to calculate the guideline child support, rather than their actual incomes. In In re Marriage of Raue, 552 N.W.2d 904 (Iowa App. 1996). The same approach was followed in State ex.rel DHS v. Cottrell, 513 N.W.2d 765 (Iowa 1994). (The Supreme Court found that the mother had voluntarily reduced her income and attributed to her a net monthly income based on the monthly income she received on her last job.) See also State ex. rel. Schaaf v. Jones, 515 N.W.2d 568, Iowa App. 1994; In re Marriage of Blume, 473 N.W.2d 629 (Iowa App. 1991); State Ex Rel. Lara v. Lara, 495 N.W.2d 719 (Iowa 1993) (Court imputed to custodial parent the average amount she earned from her part-time job which she had voluntarily quit); and In re Marriage of Fogle, 497 N.W.2d 487 (Iowa App. 1993) (set child support based on estimated earning capacity of the minimum wage of \$4.65 per hour for 40 hours per week, though the payor had been unemployed since 1989).

4. Calculation of Guideline Net Income

a. Income Tax.

If the Court calculates the payor-spouse's income with the children considered as his dependents, the Court should formally award the dependency exemptions to the payor in the Decree. In re Marriage of Miller, 475 N.W.2d 675 (Iowa App. 1991). In addition, the net income for child support purposes should be calculated deducting income taxes calculated to reflect the changes in filing status to single persons after the decree. In re Marriage of Huisman, 532 N.W.2d 157 (Iowa App. 1995).

b. Support of Parent's Other Dependents

The Child Support Guidelines include deductions for "prior obligation for child support actually paid" and "qualified additional dependents". If the a prior obligation does not exist and a payor can show a legal obligation to support other children, the monthly qualified additional dependent deduction from income will be permitted in amounts ranging from \$90 for one child to \$255 for five children.

(1) "First Mortgage Approach" is applied to permit the "prior support obligation" deduction for the child support calculation only when the date of the original court or administrative order, for another child is prior to the original support order for the child before the court. Iowa Administrative Code Rule 441-99.2(4) and prior cases dealing with multiple family obligations permit only the qualified additional dependent deduction in other calculations. State ex. rel. Spencer v. White, 584 N.W.2d 572 (Iowa App. 1998).

(2) Payments on delinquent support obligations have never been allowed as "prior obligation of child support...actually paid" and are not deductible from gross income to determine net income for the Guidelines. State Ex Rel. DHS v. Burt, 469 N.W.2d 669 (Iowa 1991). It makes no difference whether the payments are for an obligation from a prior case or whether the children are emancipated. State Ex Rel. Davis by Eddins v. Bemer, 497 N.W.2d 881 (Iowa 1993).

c. Payments on Delinquent Income Tax

Though the Guidelines permit deduction for federal income taxes to arrive at net income available for child support, the Guidelines specifically do not allow deduction for payment of debts. Just as payments on delinquent child support are not deductible, payments on delinquent income taxes cannot be deducted. Nielson v. Nielson, 521 N.W.2d 735 (Iowa 1994). See also McIntire v. Leonard, 518 N.W.2d 793 (Iowa 1994).

d. Alimony Consideration

(1) The deduction of alimony in the current case from a child support payor's gross income constitutes a variance from the guidelines. Deductions for prior obligations of child support and spousal support actually paid pursuant to court or administrative order are permitted, but the Guidelines do not provide a deduction for spousal support paid under the present decree. Iowa Ct. R. 9.5

(2) Though a variance permitting the deduction of alimony in the current case requires a finding by the Court that the amount of child support which would result from

application of the guidelines would be unjust or inappropriate under criteria listed in the guidelines. Iowa Ct. R. 9.9, most courts in calculating child support when substantial alimony is ordered in the current case, have granted the variance, approved the deduction of alimony from the payor's income, and included the payment in the payee's income. In re Marriage of Lalone, 469 N.W.2d 695, 697 (Iowa Ct.App.1991); In re Marriage of Russell, 511 N.W.2d 890, 892 (Iowa Ct.App.1993).

- (3) However, some recent Court of Appeals cases have failed to include alimony ordered in the current case in their determinations of equitable child support obligations.
 - (a) In In re Marriage of Richter, No. 2-783/12-0392 (Iowa App. 2012). Jeffrey never proposed nor argued that the court should subtract any alimony he would be ordered to pay in determining his child support obligation, and the Court decided that consideration of the alimony in the calculation would have resulted in an inadequate child support amount.
 - (b) In In re Marriage of Sawvel, No. 2-809 /12-0448 (Iowa App., 2012), the Court refused to deduct Eric's \$1,000 alimony to determine his net monthly income because it found that Eric could afford to pay spousal support and child support as ordered.

e. Parents' Income Over \$20,000.00 Per Month

With the adoption of child support guidelines, a court is no longer required to consider the statutory factors of Iowa Code Sections 598.21(4) and 598.21(8). A court, however, may consider the statutory factors when the guidelines require judicial discretion or if the guideline's award would be unjustified or inappropriate. Judicial discretion is required under the latest child support guidelines when the parents' combined net guideline income is over \$20,000.00 per month. The support payment cannot ordinarily be less than the amount specified in the Guidelines for a \$20,000.00 per month income. However, the amount awarded in child support above the guideline amount rests within the sound discretion of the court. In re Marriage of Maher, 596 N.W.2d 561 (Iowa 1999) [father was required to continue paying \$4,500.00 per month in child support for his three children out of his \$10,161.00 per month net income because their mother could not maintain their \$9,875.00 per month budget without this assistance].

- (1) The Guidelines also give the Court discretion to lower support below the amount required at \$20,000.00 on the guidelines chart. However, In re Marriage of Beecher, 582 N.W.2d 510 (Iowa 1998), shows that the power will be rarely used. Child support was not be reduced for any of the following reasons: (1) the father paid the children's medical expenses [he was allowed a deduction for these expenses in the guideline support calculation], (2) the high cost of the father's new home in California, (3) the cost of the children's transportation for visitation, (4) the father's voluntary support for the older children's college expenses, or (5) the remarriage of the custodial parent.
- (2) Few other cases have explored the amount of support above the Guidelines amount which will be ordered when the parents' incomes are above the amount covered by the Guidelines. However, cases dealing with Payor's incomes in excess of the old \$3,000 and \$6,000 per month guideline limits should provide guidance in dealing with parents whose combined incomes are over \$20,000 per month. Clearly, the support can be generous. "Although Iowa Code §598.21(4)(a) provides that the child support amount should be reasonable and necessary, the support award is not limited to the actual current needs of the

child but may reflect the standard of living the child would have enjoyed had there not been a dissolution. In re Marriage of Campbell, 451 N.W.2d 192, 194 (Iowa App. 1989). A reasonable award would include consideration of the factors set out in In re Marriage of Zollner, 219 N.W.2d 517, 528 (Iowa 1974)." In re Marriage of Powell, 474 N.W.2d 531 (Iowa 1991). See also Mason v. Hall, 482 N.W.2d 13 (Iowa App. 1992) [income over \$800,000 per year, support of \$52,000 with \$39,000 to trust]; Nielson v. Nielson, 521 N.W.2d 735 (Iowa 1994).

- (3) However, two cases decided when the payor's guidelines ceiling was \$3,000.00 per month, indicate that the percentage of the payor's income above the level covered by the Guidelines which will be required for child support will be much less than the percentage required from the income up to \$20,000.00 per month. In In re Marriage of Steele, 502 N.W.2d 18 (Iowa App. 1993) [support was \$1,000.00 per month--14.6% of the father's net income, and 6.4% of the father's income over \$3,000.00 per month was tapped]; and In re Marriage of Van Ryswk, 492 N.W.2d 728 (Iowa App. 1992), [support was \$1,500.00 per month, only about 15% of the payor's \$10,000.00 per month net income for three children].

f. Split/Divided Physical Care

The Guidelines [Rule 9.15] provide that when a split or divided physical care arrangement is entered into (at least one child in the primary care of each parent), the trial court must calculate the amount of child support from each parent while assuming the other parent is the non-custodial parent. The parent obligated to pay the larger amount is required to pay that amount, less a setoff for the amount owed by the other parent. See also In re Marriage of Will, 489 N.W.2d 394 (Iowa 1992). In re Marriage of Hansen, 465 N.W.2d 906, 911 (Iowa App. 1990); and Section 598.21(4)(d).

g. Joint Physical Care

The Guidelines [Rule 9.14] provide that when a joint (equally divided) physical care arrangement is ordered, the court must calculate the amount of child support from each parent while assuming the other parent is the non-custodial parent. The parent obligated to pay the larger amount is required to pay that amount, less a setoff for the amount owed by the other parent. See also In re Marriage of Swanson, 586 N.W.2d 527 (Iowa App. 1998).

In re Seay, 746 N.W.2d 833 (Iowa 2008). The parties and the trial court called the parenting plan "joint physical care," but the parenting schedule had the children with Mr. Seay for 158 overnights, while they would be with Ms. Thomas for 206 nights. The Supreme Court held that joint physical care does not require virtually equal division of the children's time between the parental homes. In re Marriage of Hynick, 727 N.W.2d 575, 579 (Iowa 2007). Therefore, offset method should be used whenever the parties or the court define the parenting plan as "joint physical care". However, where as here, the division of time is significantly unequal the court can make written findings that application of the guidelines would be unjust and grant a departure from an award of child support calculated pursuant to the offset method.

5. Special Circumstances for Adjustment of Guideline Support

Before considering an upward or a downward adjustment of child support, the Court must first calculate the Guideline support amount. State ex. rel Reaves v. Kappmeyer, 514 N.W.2d 101 (Iowa

1994). The Guidelines create a rebuttable presumption that the Guideline amount is correct. However, " ... the Guideline amount may be adjusted upward or downward if the Court finds an adjustment necessary to provide for the needs of the child and to do justice between the parties in the special circumstances of the case." State ex. rel. DHS v. Cottrell, 513 N.W.2d 765 (Iowa 1994).

a. Statutory Factors

With the adoption of Guidelines, the Court is no longer required to consider the statutory factors of Iowa Code Section 598.21(4) except where the Guidelines require judicial discretion or if the Guidelines would be unfair and inappropriate. In re Marriage of Powell, 474 N.W.2d 531 (Iowa 1991). See also In re Marriage of Linberg, 462 N.W.2d 698 (Iowa App. 1990).

b. Parent's Living Expenses

In establishing Guidelines, the Supreme Court balanced the needs of children against the legitimate needs and expenses of the payor parent. In In re Marriage of Nelson, 570 N.W.2d 103 (Iowa 1997). "With very rare exceptions, involving persons of affluence, child support payments are more than the obligor can readily afford -- and much less than reasonably needed for the child or children involved. The Guidelines were drafted with full appreciation of this dismal reality and specify the priorities to be considered in fixing support orders ... Retirement of indebtedness is expressly made a lower priority of the needs of the children." See also In re Marriage of Reedholm, 497 N.W.2d 477 (Iowa App. 1993) and State Ex Rel. DHS v. Burt, 469 N.W.2d 669 (Iowa 1991).

c. Children's Extra Expenses

The Guidelines are intended to include expenses for clothes, school supplies, and recreation activities. Therefore, an order requiring contribution to these expenses in addition to payment of guidelines cash support was improper without a finding that the guidelines amount would be unjust or inappropriate. In re Marriage of Gordon, 540 N.W.2d 289 (Iowa App. 1995). See also, In re Marriage of Fite, 485 N.W.2d 662 (Iowa 1992) (private school tuition did not provide a basis for increasing the child support above the Guidelines amount).

d. Parent's Other Dependents

- (1) The Child Support Guidelines [Rule 9.7] provides a deduction for "qualified additional dependents". If a party can show a legal obligation to support other children, a monthly deduction from income for the qualified additional dependents will be permitted in amounts ranging from \$135 for one child to \$383 for five or more children.
- (2) However, in Gilley v. McCarthy, 469 N.W.2d 666 (Iowa 1991), the Court recognized that there are cases where inflexible application of the Guidelines will produce unreasonable or absurd results. See also State Ex. Rel. Miles v. Minar, 540 N.W.2d 462 (Iowa App. 1995). The Guidelines create only a rebuttable presumption of fairness and the Court can vary the amount when necessary to do justice between the parties or to provide for the needs of the child. See also In re Marriage of Fite, 485 N.W.2d 662 (Iowa 1992), and In re Marriage of Gulsvig, 498 N.W.2d 725 (Iowa 1993).
- (3) In most cases, appellate courts have not found sufficient justification in the special circumstances raised to make an adjustment from the Guideline amount. In State ex. rel. DHS v. Cottrell, 513 N.W.2d 765 (Iowa 1994), the father provided no evidence of any special circumstances to justify an adjustment. In State ex. rel. Schaaf v. Jones, 515 N.W.2d 568 (Iowa App. 1994), the Court found that the parties were in equally difficult financial

circumstances; so no deviation from the Guidelines was ordered. In In re Nielson v. Nielson, 521 N.W.2d 735 (Iowa 1994), the Court found that the \$50,000 income of the father was sufficient to permit him to pay the Guideline amount without creating hardship for the children in his home. See also State ex rel. Cacek v. Cacek, 484 N.W.2d 592 (Iowa 1992).

e. Special Needs of Child Above Guidelines

An extra payment in addition to the Guideline child support amount is appropriate to provide for a retarded child's special needs. In re Marriage of Ludwig, 478 N.W.2d 416 (Iowa App. 1991).

f. Child's Own Income

The Child Support Guidelines make no provision for the reduction of the non-custodial parent's support obligation because of the child's receipt of personal income. Therefore, the adoptive father, income \$80,000.00 was required to pay the full Guideline amount though the children were entitled to \$1,095.00 per month Social Security benefits because of the death of their natural father. In re Marriage of Foley, 501 N.W.2d 497 (Iowa 1993).

g. Agreement of the Parties

In In re Marriage of Handeland, 564 N.W.2d 445 (Iowa App. 1997), the wife attempted to obtain alimony after she had entered into a stipulation which waived her right to alimony after an eighteen-year marriage in return for child support of one-half of the Guidelines amount. The mother's waiver of alimony constituted just cause for deviating from the Guidelines and did not adversely affect the best interests of the children.

In re Mihm, No. 12-1928 (Iowa, 2014). The parties' 2009 stipulated decree included an agreement to a child support amount much below the amount provided by the child support guidelines. Melissa testified that she agreed to the below-guidelines child support amount because she wanted custody of her children and wanted the divorce proceedings to end. The Court pointed out that it is not for the parties to determine an appropriate level of child support. By statute, appropriate level of child support must be set by the court after the court is fully advised of the circumstances of the parties. Iowa Code section 598.21B prohibits a court from considering a variation from the child support guidelines "without a record or written finding, based on stated reasons, that the guidelines would be unjust or inappropriate." Iowa Code § 598.21B(2)(d). See State ex rel. Nielsen v. Nielsen, 521 N.W.2d 735, 737 (Iowa 1994) There is nothing in the record that discloses the district court was advised by counsel that the child support deviated from the child support guidelines. If the parties want the district court to deviate from the child support guidelines, and also want to avoid subsequent modification of that award based on an evaluation of changed circumstances or the ten percent deviation, counsel and the district court need to insure that the dissolution decree explains the reasons for the deviation and that those reasons are factually and legally valid. See Iowa Ct. R. 9.11; see also In re Marriage of Nelson, 570 N.W.2d 103, 108 (Iowa 1997).

h. Reduction for Social Security Payments

In In re Marriage of O'Brien, 565 N.W.2d 619 (Iowa 1997), social security disability benefits received because a non-custodial parent's spouse is disabled are received only because of the mother's relationship to the stepfather and are intended as replacement for the stepfather's income lost because of disability. Therefore, the benefits should be applied to the mother's support obligation.

i. No Reduction for Repudiation by Children

In re Marriage of Hoksbergen, 587 N.W.2d 490 (Iowa App. 1998). "We have held a child's repudiation of a non-custodial parent may relieve that parent from paying college support. In re Marriage of Baker, 485 N.W.2d 860, 862-63 (Iowa App. 1992). College support is not child support. ... The withholding of visitation does not stop an obligation for child support. ... Other actions such as contempt or modification of visitation or physical care are available to Allen to enforce these rights should Marlys not begin to recognize her responsibilities as joint custodian."

6. Other Child Support Issues

a. Normally No Suspension During Visits

(1) Ordinarily, child support should be ordered for a twelve-month year. The custodial parent's expenses for childcare are only slightly reduced during the child's absence. The Court of Appeals reversed the Trial Court's order that support be suspended during the yearly two-month visit with the father. In re Marriage of Oakes, 462 N.W.2d 730 (Iowa App. 1990). See also State Ex Rel. Lara v. Lara, 495 N.W.2d 719 (Iowa 1993); and In re Marriage of Mrkvicka, 496 N.W.2d 259 (Iowa App. 1992).

(2) However, in two cases in which custody of the children was granted to the more financially secure father, the mother's child support obligation was altered during periods of extended summer visitation. See In re Marriage of Toedter, 473 N.W.2d 233 (Iowa App. 1991) and In re Marriage of McElroy, 475 N.W.2d 221 (Iowa App. 1991).

b. Stepparent -- No Obligation

An Iowa court cannot ordinarily order support for a stepchild after a dissolution of marriage, nor may one who accepts responsibility for a child as *in loco parentis* be required to furnish support for the child after a divorce. In re Marriage of Carney, 206 N.W.2d 107 (Iowa 1973). However, in In re Marriage of Gallagher, 539 N.W.2d 479 (Iowa 1995), the Iowa Supreme Court adopted the Equitable Parent Doctrine which permits a stepfather to gain full parental rights and responsibilities if he has assumed the role of a parent in good faith and the relationship is in the best interest of the child."

c. Payment Through Clerk of Court

Iowa Code §598.22 provides that "payments made to persons other than the Clerk of the District Court and the Collection Services Center do not satisfy the support obligations created by the orders or judgments..." The only exception to the above rule is provided by §598.22A, which permits a credit to be entered if payment is confirmed by an affidavit of the payee, approved by the Court. Hurd v. Iowa Dept. of Human Services, 580 N.W.2d 383 (Iowa 1998). See also In re Marriage Caswell, 480 N.W.2d 38 (Iowa 1992).

In re Marriage of Renes, No. 3-070/12-1136 (Iowa App., 2013). Charles failed to pay support through the Friend of the Court. Then 30 years after the decree was entered and 10 years after the support obligation ended, Jeri sought to collect the support judgment. The question on appeal was whether laches and promissory estoppel prevent Jeri from recovering sums she claims were past-due. The elements of promissory estoppel "are: (1)

a clear and definite oral agreement, (2) proof that plaintiff acted to his detriment in reliance thereon, and (3) a finding that the equities entitle plaintiff to [the] relief." In re Marriage of Harvey, 523 N.W.2d 755, 756-57 (Iowa 1994). Though equitable estoppel should only be applied in cases of this kind on rare occasions, the Court found that Charles and Jeri had agreed that he would directly support the family rather than make the court-ordered support payments. Credible evidence strongly supported Charles' position: Jeri, despite decades of opportunity, failed until recently, to claim contempt or bring an action to enforce the decree. In addition, though Jeri had little earnings throughout most of the period, she never applied for or received public assistance.

d. Income Withholding Orders

- (1) Chapter 252D controls the use of Income Withholding Orders in all proceedings which require child support payments and mandates use of a uniform Income Withholding Order form which can be sent to any employer or income source in or outside Iowa.
- (2) In In re Marriage of Winnike, 573 N.W.2d 608 (Iowa App. 1997), the Court held that the statute [Iowa Code Section 252D.8(1)] provides an ex parte order may issue assigning income from benefits or other income to pay child support. Even a disability benefit can be tapped.
- (3) In In re Marriage of Ballstaedt, 606 N.W.2d 345 (Iowa 2000), the Court held that before contract payments are subject to an Order of Mandatory Income Withholding the Court must determine how much of the payment is due to the payor personally and how much was due to his corporation; and if payments are due to the corporation, the Court must consider whether conditions justify "piercing the corporate veil".

e. Cost-of-Living Increases

The child support guidelines preempt COLA provisions in dissolution decrees because the child support guidelines are subject to periodic review at least once every four years and such reviews will presumably take into consideration cost-of-living increases. In re Marriage of Maher, 596 N.W.2d 561 (Iowa 1999). See also In re Marriage of Ludwig, 478 N.W.2d 416 (Iowa App. 1991). Nevertheless the 1997 Legislature amended Chapter 252H to permit cost-of-living alteration of support orders in cases supervised by the Child Support Recovery Unit with the mutual consent of both the payor and payee.

f. Joint Account for Joint Physical Care Support

In re Marriage of Munger, 2007 WL 1063048 (Iowa App.) The Court of Appeals approved a trial court's requirement that the parties established a shared special expense fund, whereby each parent would equally contribute to a joint checking account to pay for the children's expenses. The parties' attitudes and belief systems about money and its uses varied widely; and the Court anticipated that disputes might arise over economic expense needs of the children. The structure of a shared fund will have the benefit of a clear and unambiguous accounting for the uses of money for expenses for the children.

7. Termination of Support Obligation

- a. Section 598.1(6) provides that the obligation to pay child support "... shall include support for a child who is between the ages of 18 and 19 years who is engaged full-time in completing high school graduation or equivalency requirements in a manner which is reasonably expected to result in completion of the requirements prior to the person reaching 19 years of age ..."
- b. The Court does not have the power to require child support to be continued for an 18-year-old who is not disabled and not attending school simply because he remains in the parental home without income. In re Marriage of Ludwig, 478 N.W.2d 416 (Iowa App. 1991). See In re Marriage of Holcomb, 457 N.W.2d 619 (Iowa App. 1990) and In re Marriage of Keller, 478 N.W.2d 424 (Iowa App. 1991) [child eighteen but still in junior year of high school].

8. Post-Secondary Education Subsidy

a. Discriminates for Children of Divorce

- (1) The Code Section 598.1(8) provides for post-secondary education subsidy for children of divorced parents. Although the statute discriminates in favor of children of divorced parents, the discrimination is a permissible one and is not violative of equal protection. In re Marriage of Vrbanc, 293 N.W.2d 198 (Iowa 1980).
- (2) In Johnson v. Louis, 654 N.W.2d 886 (Iowa 2002), the Supreme Court found that illegitimate persons are not entitled to support after age 18 or the education subsidy, and that this is not a violation of the Equal Protection Clause. Neither common law or the statutory law (Chapters 252A and 600B) require support to a nondisabled child beyond the age of 18; and the provisions of Chapter 598 which permit the court to order a postsecondary education subsidy apply only to actions for annulment, dissolution or separate maintenance. The Court stated that 'illegitimates' are treated the same as children whose parents continue to be married to each other; that the educational benefit is a quid pro quo for the loss of stability resulting from divorce; and that children whose parents never sought State involvement to formalize or dissolve their relationships, cannot claim the loss of stability such change in status brings.

b. Parental Contribution and Court Supervision Not Mandatory

Since the Legislature used the word "may" rather than "shall" in Section 598.1(8), the Legislature contemplated circumstances where awarding college support would be improper. In re Marriage of Pendergast, 565 N.W.2d 354 (Iowa App. 1997) approved the denial of education assistance to an adult child who, at age 12, wrote a letter "disowning" her father and continued the behavior with the apparent encouragement of her mother for several years. See also In re Marriage of Baker, 485 N.W.2d 860 (Iowa App. 1992). However lack of contact between the parent and child should not be considered as a factor in denying support for higher education where the lack of contact was due to circumstances of the parents' own making. State ex. rel. Tack v. Sandholdt, 519 N.W.2d 414 (Iowa App. 1994).

c. Less Parental Sacrifice Required

In re Marriage of Longman, 619 N.W.2d 369 (Iowa 2000), the Supreme Court ruled that the mother did not have a sufficient, positive cash flow after her reasonable monthly expenses to make any contribution towards the children's college expenses. "We do not believe that a parent is required to make the same amount of parental sacrifice toward assisting in the college education of a child that is required to provide subsistent support for minor children." In addition, the court warned that because Section 598.21F(3) provides for payment only to the child or to the educational provider, a parent cannot advance education expenses and then demand reimbursement from the other. See also In re Marriage of Vaughan 812 NW2d 688 (Iowa 2012).

d. Requirements of Statute

- (1) Definition of Post-Secondary Education Subsidy. The Subsection 598.1(8) defines the subsidy as follows: "...an amount which either of the parties may be required to pay under a temporary order or final judgment or decree for educational expenses of a child who is between the ages of eighteen and twenty-two years if the child is regularly attending a course of vocational-technical training either as a part of a regular school program or under special arrangements adapted to the individual person's needs; or is, in good faith, a full-time student in a college, university, or community college; **or has been accepted for admission to a college, university, or community college and the next regular term has not yet begun.**" Note that the obligation can fill the gap between the end of high school and the beginning of the freshman year and the months between regular school terms.
- (2) Procedures and Criteria. Subsection 598.21F specifies procedures and criteria for determining whether good cause exists for ordering a "post-secondary education subsidy. In re Marriage of Neff, 675 N.W.2d 573, 579 (Iowa 2004).
 - (a) The Statute requires the court to determine the cost of post- secondary education based upon the cost of attending an in-state public institution and permits only reasonable costs for necessary post-secondary education expenses.
 - (b) The court is then required to determine the amount, if any, which the child may reasonably expected to contribute, considering the child's financial resources, including but not limited to the availability of financial aid and the ability of the child to earn income while attending school.
 - (c) The court is then required to deduct the child's expected contribution from the cost of post-secondary education and to apportion responsibility for the remaining cost to each parent. However, the amount paid by each parent shall not exceed 33 1/3% of the total cost of post-secondary education.
 - (d) The post-secondary education subsidy shall be payable to the child, to the educational institution, or to both, but shall not be payable to the custodial parent.
 - (e) A post-secondary education subsidy shall not be awarded if the child has repudiated the parent by publicly disowning the parent, refusing to acknowledge the parent, or by acting in a similar manner.
 - (f) The statute further requires that the child shall forward to each parent reports of grades awarded at the completion of each academic session within ten days of receipt of the reports and the subsidy may be terminated upon the child's

completion of the first calendar year of a course of instruction if the child fails to "maintain a cumulative grade point average in the median range or above during that first calendar year."

- (3) Good Cause. In re Marriage of Moore, 702 N.W.2d 517 (Iowa App. 2005) There is no obligation at common law to support an adult child who is not under a disability. In addition, under § 598.21(F) the Court must also determine if good cause exists to award a postsecondary education subsidy. The Court must assess the ability of the child to complete postsecondary education and actual financial needs. This threshold issue must be resolved before the court goes to the next step of calculating and ordering the parties' contributions.
- (4) Assumption of Greater Obligation. The precise limitations of Section 598.21(F) are present in all orders for post-high school support whether or not specified by the Court. In re Marriage of Vrbanc, 293 N.W.2d 198 (Iowa 1980). However, a parent can voluntarily assume post-high school obligations in excess of the statute. See, e.g., Chambers v. Chambers, 231 N.W.2d 23 (Iowa 1975); In re Marriage of Halbach, 506 N.W.2d 808 (Iowa App. 1993).
- (5) Retroactive Application. Section 598.21F(6), which provides: "A support order, decree, or judgment entered or pending before July 1, 1997, that provides for support of a child or children for college, university, or community college expenses, may be modified in accordance with this subsection." In re Marriage of Pals, 714 N.W.2d 644 (Iowa 2006). The post-secondary-education-subsidy statute applies whether or not the original decree provided for college-aged support.
- (6) Obligation Ends at Age 23. In re Marriage of Neff, 675 N.W.2d 573 (Iowa 2004), The Court reexamined the statutory language specifying the age at which the postsecondary education subsidy should end. Section 598.1(8) states that the applicable time frame is "between the ages of eighteen and twenty-two." Given the traditional ages at which students attend college, the ages which define this time frame should be read inclusively, i.e. students qualify so long as they are older than seventeen but less than twenty-three, to effect legislative intent.

e. Full-Time Student

A "full-time student" for purposes of the statute is not necessarily the same as the college's definition of "full time". In re Marriage of Huss, 438 N.W.2d 860 (Iowa App. 1989).

f. Good Faith

The requirement of Section 598.1(8) of "good faith" "...places a duty on the student to show that he or she actually is intent on preparing to start his or her education on a full-time basis at the next available term...Generally, the period of waiting for admission should not exceed three months unless the student shows extraordinary circumstances that justify a longer period." In re Marriage of Voyer, 491 N.W.2d 189 (Iowa App. 1992).

g. Child's Assets/Resources.

In re Marriage of Kupferschmidt, 705 N.W.2d 327 (Iowa App. 2005). Accounts for children established by the parents at the time of the divorce for the purpose of providing for their children's educations, Series EE U.S. savings bonds and accounts under the Uniform Transfers to Minors Act must be considered as a resource available to the children, prior to determining the parents'

education subsidy even if the children do not want to use these assets. See In re Marriage of Rosenfeld, 668 N.W.2d 840, 848 (Iowa 2003). To do otherwise would discourage parents from saving for the postsecondary education of their children.

h. Necessary Expenses

- (1) The expenses to which a parent can be expected to contribute are limited to those which are "necessarily incident" to a post-high school education. In re Marriage of Hull, 491 N.W.2d 177 (Iowa App. 1992). See also, In re Marriage of Hess, 522 N.W.2d 861 (Iowa App. 1994).
- (2) "Standing alone, providing a home base for school vacations does not rise to the level of contribution to a child's college educational expenses. However, when a child lives at home during the school year, saving the expense of room and board normally paid to the school, the term "home base" becomes economically significant." In re Marriage of Wood, 567 N.W.2d 680 (Iowa App. 1997).
- (3) In re Marriage of Dolter, 644 N.W.2d 370 (Iowa App. 2002) The Court of Appeals held that "...the term 'necessary postsecondary education expenses' means tuition, room, board, and books, including mandatory fee assessments for such things as laboratory, student health, and computer use. The definition and limitation as set out above does not preclude the parties from entering into a stipulation covering additional expenses."
- (4) In re Marriage of Goodman, 690 N.W.2d 279 (Iowa 2004). Because the parties had agreed to share their oldest's daughter's sorority expense, the younger child's sorority dues were ruled to be a necessary college expense. In addition, a cash allowance is necessary for a college student to participate in the social, cultural, and educational experiences outside the classroom; and that the parties' financial circumstances showed they had the means to provide this assistance. The expenses were ordered to be paid one third by each parent and the child. In addition, the Supreme Court held that if a child is entitled to a postsecondary education subsidy, the subsidy payments may begin upon graduation from high school if she is accepted for admission to a college, university, or community college and the next regular term has not begun.
- (5) In re Marriage of Sullins, 715 N.W.2d 242 (Iowa 2006). The statute's contribution requirement is based solely on the costs of a college education at an in-state public institution. See Iowa Code §598.21F(2)(a). Therefore, the subsidy can fall short for students of divorced parents who desire to attend a private college or an out-of-state institution. Since the court is not authorized to make a parent responsible to pay more than one third of the cost of an in-state public institution, Deborah was not entitled to help because she received loans and federal work-study money in excess of the total costs of attending a public in-state college. Thus, her parents could not be made legally responsible under the statute to subsidize any additional costs of an out-of-state college education.

i. Repudiation

Estrangement between parent and child alone is not sufficient to justify release of a parent from the obligation to contribute to higher education expenses. See In re Marriage of Dolter, 644 N.W.2d 370, 373 (Iowa Ct. App. 2002)[the child did not encourage his mother to attend his high school graduation ceremony but did not argue with her when she said she was going to attend] and State ex rel. Tack v. Sandholdt, 519 N.W.2d 414, 418 (Iowa Ct.App. 1994)[lack of contact was due to the parent's harassing conduct].

j. Five-Step Process

In In re Marriage of Vaughan 812 NW2d 688 (Iowa 2012), the Supreme Court set out the following process determining a parent's obligation: (1) First, determine whether good cause exists for the post-secondary education subsidy after considering the age of the child, the ability of the child relative to postsecondary education, the child's financial resources, whether the child is self-sustaining, and the financial condition of each parent. § 598.21F(2); (2) After good cause is established, determine the cost of postsecondary education based upon "the cost of attending an in-state public institution." (3) Determine the amount, if any, the child may reasonably be expected to contribute, considering the child's financial resources, the availability of financial aid such as scholarships, grants, or student loans, and the ability of the child to earn income while attending school; (4) Then deduct the child's expected contribution from the cost of postsecondary education to arrive at a figure for the "remaining cost" of the postsecondary education; and (5) When the remaining cost has been determined, the court must apportion the responsibility of the remaining cost to each parent. However, the statute caps the amount apportioned to each parent to no more than thirty-three and one-third percent of the total cost of the child's postsecondary education at a state institution. See also In re Marriage of Daly, 2008 WL 4308278 (Iowa App.).

k. Education Trust Funds

- (1) Section 598.21F provides authority for a court to set aside some of a parent's money in a separate fund for the support of the children. Here, there was evidence that the father had a serious drug problem; however, no evidence was provided to establish that he was unwilling or unable to pay for the children's college expenses as they came due. Absent such evidence, there was no justification for requiring him to advance \$75,000.00 for payment of the girls' college expenses to be held by his former wife. In re Marriage of Williams, 595 N.W.2d 126 (Iowa 1999).
- (2) In In re Marriage of Murphy, 592 N.W.2d 681 (Iowa 1999). The Supreme Court canceled an order that the parties contribute in equal shares to a trust fund for their seven year old daughter to be used for her education beyond high school. Iowa Code Section 598.21F(2) requires threshold determinations concerning the ability of the child and the child's actual financial needs. The court could not make the threshold determinations eleven years before the education was to begin.
- (3) Where a \$45,000 trust for education was currently sufficient to meet the child's education expenses, the Court should not order additional monthly support to the parent with whom the child resided. In re Marriage of Hansen, 514 N.W.2d 109 (Iowa App. 1994). See also In re Marriage of Steele, 502 N.W.2d 18 (Iowa App. 1993); but see, State ex. rel. Tack v. Sandholdt, 519 N.W.2d 414 (Iowa App. 1994).

l. Court May Impose Obligation If Decree Silent

In re Marriage of Mullen-Funderburk, 696 N.W.2d 607 (Iowa 2005). When a dissolution decree is silent about college-age educational support, the issue is controlled by sections 598.1(8) and 598.21F of the Code. The procedure to be followed is an original adjudication. It is not necessary to show a substantial change in circumstances. The district court's determination should be based upon the facts and law in existence when the determination is made. Also, the district court is to consider each parent's obligation for the child's college education expenses.

m. Premature Setting of Obligation

The Trial Court has jurisdiction to continue support between ages eighteen and twenty-two. However, "...provision for the support to continue [beyond age eighteen] is premature...[where] the children, ten and thirteen at trial, are too young for the trial court to properly apply the four Vrban factors." In re Marriage of Mayfield, 477 N.W.2d 859 (Iowa App. 1991).

9. Life Insurance

- a. The courts are not charting a consistent course on the issue of whether the payor should be required to maintain life insurance payable to the children. In re Marriage of Mayfield, 477 N.W.2d 859 (Iowa App. 1991), a dentist-father with a net income of \$55,000.00 per year was required to maintain a life insurance policy payable to his children. However, in In re Marriage of Farrell, 481 N.W.2d 528 (Iowa App. 1991), the physician-father with a net income of \$87,000.00 per year was not required to provide life insurance for his children with the justification that social security benefits would replace the father's obligation to support and educate his children.
- b. In In re Marriage of Mouw, 561 N.W.2d 100 (Iowa App. 1997), the trial court required one million dollars of life insurance payable to the mother so long as any support obligation continued. The Court of Appeals reduced the amount of life insurance the father was required to carry by \$50,000.00 every twelve months: "Life insurance should be limited to the amount necessary to secure an obligation." Mouw, at 102.

10. Court-Ordered Trusts

- a. To Guarantee Support and Medical Expenses. Iowa Code Section 598.21(5) provides: "The Court may protect and promote the best interests of children of the parties by setting aside a portion of the property of the parties In a separate fund or conservatorship for the support, maintenance, education and general welfare of the minor children".
 - (1) Though support payments were current, they were sporadic. The father had a poor record of paying the children's medical expenses, and he almost completely refused to help the children with their higher education costs. Therefore, the Court created a trust with his share of jointly owned real estate. In re Marriage of Antisdell, 478 N.W.2d 864 (Iowa App. 1991).
 - (2) In Mason v. Hall, 482 N.W.2d 919 (Iowa 1992), the Court found that the reasonable cost for support of the child was \$250 per week, but ordered the establishment of a trust under the provisions of the paternity statute, Section 675.27, noting the father's poor payment history and the uncertainty of his income as a Major League baseball player.
 - (3) Though the father had been delinquent in child support payments, he had been generally prompt prior to the termination of his employment by injury. Now that support payments had been set at a level consistent with his new income, the Court ruled that a trust was not needed over the lump-sum worker's compensation settlement to insure payment. In re Marriage of Swan, 526 N.W.2d 320 (Iowa 1995). But see Jahnke v. Jahnke, 526 N.W.2d 159 (Iowa 1994); In re Marriage of Foley, 501 N.W.2d 497 (Iowa 1993).

- b. Children's Assets. The Court of Appeals approved a decree provision which required the father and mother to hold all of the children's accounts "...In trust so that said account cannot be transferred, liquidated or managed without the joint approval without both Petitioner and Respondent while the respective child is a minor." In re Marriage of Fuschner, 477 N.W.2d 864 (Iowa App. 1991).

11. Disabled Adult Child

- a. "598.1(9) defines the support obligation and includes support of 'a child of any age who is dependent on the parties to the dissolution proceeding because of physical or mental disability.'...The child support guidelines do not apply to cases involving a dependent adult child...the obligation should be apportioned according to the ability of each parent to contribute." In re Marriage of Davis, 462 N.W.2d 703, 704 (Iowa App. 1990). See also In re Marriage of Bornstein, 359 N.W.2d 500 (Iowa App. 1984); and In re Marriage of Hansen, 514 N.W.2d 109 (Iowa App. 1994).
- b. The support obligation for a disabled adult child is based on the child's need for assistance and her parents' ability to contribute to this need, and not all disabled adult children qualify for parental support. In re Marriage of Nelson, 654 N.W.2d 551 (Iowa 2002); In re Marriage of Clark, 577 N.W.2d 662 (Iowa App. 1998).

12. Medical Support

Chapter 252.E governs Medical Support, a category of child support.

- a. Order for Medical Support. When an order for child support is entered pursuant to Chapter 234, 252A, 252C, 598, or 675, the Court is required to order Medical Support, if a health benefit plan is available to either parent at a reasonable cost. In In re Marriage of See, 566 N.W.2d 511 (Iowa 1997), Section 598.21(4)(a) requires Trial Courts to " ... order as child medical support a health benefit plan ... if available to either parent at a reasonable cost."

In re Marriage of Friedman, No. 3-274/12-1978 (Iowa App., 2013). Keith was a self-employed chiropractor, averaging approximately \$70,000 in annual earnings. Jolene was a Certified Nursing Assistant, but was attending night school to earn her nursing degree. Keith asserted it was "inherently unjust to require him to provide cash medical support for the children, because he was unable to secure health insurance coverage due to the mental disabilities of the child C.W. He also argued Jolene was "unjustly enriched" by the cash medical support payment because C.W.'s insurance was provided at no cost to Jolene through the Medicaid program. The Court found that the cash medical support was not 'manifestly unjust', but rather is statutorily required. See Iowa Code § 252E.1A. The children both received Medicaid through the State of Illinois; and the cash medical support would assigned to the State of Illinois, and would not unjustly enrich Jolene.

- b. The Supreme Court incorporated provisions for medical support along with the Child Support Guidelines mandated by Section 598.21(4).
- c. Procedures. Chapter 252E sets up an elaborate system for enrolling and maintaining medical benefits for dependents which the obligor, obligee, or the Department of Human Services can use when the order for medical support is entered and later, when circumstances or benefits change. The employer and the insurer are required to cooperate in the establishment and maintenance of medical benefit plans for dependents in much the same

way employers are required to cooperate and participate In the assignment of earnings for payment of support obligations.

- d. Where the father earned \$105,000.00 and the mother \$25,000.00 plus \$12,000.00 in alimony, an 80%-20% split of medical expenses not covered by insurance was approved. In Re Marriage of Roberts, 545 N.W.2d 340 (Iowa App. 1996). See also In re Marriage of Russell, 559 N.W.2d 636 (Iowa App. 1996).
- e. In re Marriage of Okland, 699 N.W.2d 260 (Iowa 2005). The decree required that statements of unreimbursed medical expenses be submitted by one parent to the other within 30 days of receipt of an uninsured debt. The Supreme Court canceled a judgment for the former husband's share of the children's expenses because their mother failed, without justification, to satisfy this condition precedent to the right to reimbursement: the procedure to timely inform her former husband of the expenses so that he could reimburse her as the expenses were incurred.
- f. In re Marriage of Nielsen, 759 N.W.2d 345 (Iowa App. 2008) Estoppel by acquiescence applies when: (1) a party has full knowledge of his rights and material facts; (2) remains inactive for a considerable time; and (3) acts in a manner that leads the other party to believe the act [now complained of] has been approved. Markey v. Carney, 705 N.W.2d 13, 21 (Iowa 2005). Here, Randall, an attorney, knew he was only obligated to pay seventy-five percent. He did not seek to have Peggy pay her twenty-five percent for over eight and one-half years; and this behavior without an accounting led Peggy to reasonably believe he was waiving her twenty-five percent contribution.

E. CHILD CUSTODY AND VISITATION

1. Jurisdiction of the Court

a. Parental Kidnaping Prevention Act

Before an Iowa court can accept custody jurisdiction, the requirements of the federal Parental Kidnaping Prevention Act [PKPA] and the Uniform Child Custody Jurisdiction Act [UCCJA] must be satisfied. The PKPA and UCCJA require that before Iowa can modify, it must be the children's "home state" (six months' residence) and the state which entered the previous order must decline to exercise jurisdiction. In re Guardianship of T.H., 589 N.W.2d 67 (Iowa 1999).

b. Uniform Child Custody Jurisdiction and Enforcement Act

The Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA], Iowa Code Chapter 598B, amended the Uniform Child Custody Jurisdiction Act in 1999 to bring it into conformity with the PKPA and the Uniform Interstate Family Support Act (UIFSA).

- (1) In determining initial jurisdiction, the Act gives the "home state" priority as did the UCCJA; however, the concept of Exclusive Continuing Jurisdiction is adopted from the PKPA and UIFSA: the original decree state has the right to determine whether it or another state shall modify custody and visitation so long as the child or either parent remain the original state.

In re Marriage of Pereault, No. 2-913/12-1178 (Iowa App., 2013). In June 2010, Shallon and Brian agreed that their child, K.P. would live with Brian in Washington State temporarily and that the child would return to Shallon in Iowa in May 2011. However, in December 2010, Brian's intent changed when he learned of that Shallon had been charged with burglary and possession of drug paraphernalia and controlled substances. He decided he wanted K.P. to remain with him in Washington permanently; and on May 20, 2011, Brian filed a petition for custody in Washington. In July, 2011, Shallon filed the current action, claiming that Iowa, not Washington had jurisdiction to decide custody of K.P. Iowa Child Custody Jurisdiction and Enforcement Act Section 598B.102(7) defines "home state" as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding. A period of temporary absence of any of the mentioned persons is part of the period. Whether the jurisdictional requisites of the UCCJEA have been met is a question of subject matter jurisdiction. See In re Jorgensen, 627 N.W.2d 550, 554-55 (Iowa 2001). The Court held that while intent is a significant consideration in determining whether an absence is a "temporary absence," the intent of the parties should not be restricted to their intent existing at the time of leaving. In this case, the Court concluded that when Brian filed the petition for custody in Washington, K.P. was no longer temporarily absent from Iowa; and that Washington, not Iowa, was the child's "home state" when Shallon filed her petition for custody.

- (2) Emergency jurisdiction is given separate consideration, and interstate judicial communication is required in emergency and simultaneous filings in different states.
- (3) The "Unclean Hands" provision of the Act requires a court to deny jurisdiction if a party's unjustifiable conduct provided the basis for jurisdiction.
- (4) The Act also provides a new registration process for out-of-state orders and a new procedure based on habeas corpus for expedited enforcement of child support and visitation.
- (5) In the Matter of Guardianship of Deal-Burch, 759 N.W.2d 341 (Iowa App. 2008). Chapter 598B, the Uniform Child Custody Jurisdiction and Enforcement Act is the exclusive determinate of jurisdiction in child custody cases, including guardianship procedures. Iowa Code § 598B.102(4). Since Iowa was the "home state" on the date of the guardianship was filed: "the state in which a child lived with a parent ... for at least six consecutive months immediately before the commencement of a child-custody proceeding", no court of any other state would have jurisdiction. However, the home state can decline to accept jurisdiction. Iowa Code §598B.207(1), (3).

c. Indian Child Welfare Act

The 2003 Iowa Legislature adopted substantial amendments to the Iowa Indian Child Welfare Act, Chapter 232, Iowa Code. Previously the Iowa Indian Child Welfare Act simply implemented the Federal Indian Child Welfare Act, United States Code, Title 25, Chapter 21. The Iowa Act was substantially different than the federal act and was intended to apply to more cases and require more deference and removal to Indian tribal courts. However, the application of the statute has been significantly limited by recent decisions:

- (1) Both statutes seek to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society. However, the Iowa law's much more expansive definition of children who are "Indian" has resulted in a finding that the statute is unconstitutional. In re A.W., 741 N.W.2d 793 (Iowa 2007), the Winnebago Tribe attempted to intervene in a juvenile court case under ICWA, though the child was ineligible for tribal membership. The Supreme Court ruled that the Iowa ICWA's definition of "Indian Child" which did not require eligibility for tribal membership violates the Equal Protection Clauses of both the U.S. and Iowa Constitutions. United States Supreme Court and lower court decisions confirm that Congress may constitutionally legislate only with respect to tribal Indians. United States v. Antelope, 430 U.S. 641, 645, 97 S.Ct. 1395, 1399, 51 L.Ed.2d 701, 707 (1977).
- (2) The provisions of the ICWA do not apply to paternity or child support, actions for protective orders, or custody proceedings which only involve the biological parents of a child who is or might be considered an "Indian".
- (3) However, the provisions of the ICWA do apply to terminations of parental rights, adoption and preadoption proceedings, foster care proceedings and guardianships: cases in which the custody of the child could be transferred to a caretaker who is not a biological parent. In a child involved in such a proceeding is alleged to have native American heritage, the case must be delayed until a special notice can be sent to the tribe or to the Secretary of the U.S. Department of Interior in Washington, D.C. and until tribal courts have an opportunity to review the case and decide whether or not to remove the case to tribal court. Iowa Code §232B.5(4); In the Interest of R.E.K.F., 698 N.W.2d 147 (Iowa 2005).
- (4) In re N.N.E., 752 N.W.2d 1 (Iowa 2008) The Iowa Indian Child Welfare Act required that a child must be placed with a member of the Indian child's family, other members of the tribe, another Indian family or a non-Indian family approved by the tribe or one committed to enabling the child to remain connected with the tribe unless there is *clear and convincing evidence* that placement would be harmful to the Indian child. The Supreme Court found that such a high burden to deviate from the placement preferences in a voluntary termination case violated substantive due process. Parents' interest in their children's care, custody, and control is " 'perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].' " Santi v. Santi, 633 N.W.2d 312, 317 (Iowa 2001) (quoting Troxel v. Granville, 530 U.S. 57, 65-66. The Federal statute provides a less rigorous "good cause" standard which permits exceptions to the statute's preference for placement with an Indian family.
- (5) In re N.V., 744 N.W.2d 634 (Iowa 2008). However, the ICWA still has some impact. In a child in need of assistance (CINA) case, the Supreme Court found that the transfer to tribal court was required because Iowa Indian Child Welfare Act Section 232B.5(10) mandates that a court *shall* transfer the proceeding to a tribal court upon a petition from the parents.
- (6) **Adoptive Couple v. Baby Girl**, 133 SC 2552, 570 U.S., 186 LEd2nd 729 (2013). The United States Supreme Court that held that several sections of the Indian Child Welfare Act (ICWA) do not apply to Native American (Indian) biological fathers who were not custodians of an Indian child. In 2009, a couple from South Carolina sought to adopt a child whose father is an enrolled member of the Cherokee Nation and whose mother was predominantly Hispanic. The Federal Indian Child Welfare Act bars involuntary termination of parental rights in the absence of a heightened showing that serious harm to

the Indian child is likely to result from “continued custody” of the child. 25 U.S.C. §1912(f). Here, Biological Father informally agreed to relinquish his parental rights while the mother was pregnant and provided no financial assistance for the duration of the pregnancy and for the first four months after the child was born. However, when the adoptive parents served Biological Dad with notice of the pending adoption, Biological Father denied his consent and sought custody. Biological Father won his cases in trial court and on appeal with the state supreme court. However, the U.S. Supreme Court held: (1) ICWA §1912(f) requires a “heightened showing” only when the rights of a “custodial” parent is intended to be terminated, and here Biological Father never had custody; (2) ICWA §1912(d) requires “remedial services” before termination only when the “break up” of an established parent-child relationship is intended, and here there was no relationship; and (3) that ICWA §1915(a)’s preference for placement in a tribal family applied only when the objecting party is seeking an adoption, and here Biological Father was arguing that his parental rights should not be terminated.

d. Temporary Custody Order Due Process.

In re Conner, No. 2-398/11-0790 (Iowa App., 2013). The police raided Debbie Conner’s home and found a methamphetamine laboratory. Her former husband immediately took the three children into his care and filed an application for emergency temporary custody and a writ of injunction to prevent Debbie from removing the children. The court granted the temporary injunction and placed temporary physical care with Shane. Debbie argued that the injunction denied her of her parental rights without the opportunity for a fair hearing because she was not permitted to cross-examine Shane’s witnesses. A temporary injunction is a preventive remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation. A temporary injunction must be based on some evidence—an affidavit or sworn testimony or equivalent. Kleman v. Charles City Police Dep’t, 373 N.W.2d 90, 96 (Iowa 1985). Sworn testimony supported this injunction, which is very narrow in scope: it enjoined and restrained Debbie from removing the children from Shane’s care and enjoined both parents from taking the children without prior court approval. Debbie cited no authority stating the lack of cross-examination renders the proceeding constitutionally inadequate. See State v. Willard, 756 N.W.2d 207, 214 (Iowa 2008)

2. Custody of Embryos

In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003). As the result of in vitro fertilization procedures, the parties were responsible for seventeen fertilized eggs remained in storage under an “Embryo Storage Agreement.” Tamera sought “custody” to have the embryos implanted in her or a surrogate mother. Trip did not want the embryos destroyed, but he did not want Tamera to use them. The Supreme Court adopted the Contemporaneous Mutual Consent Model: The court will enforce agreements entered into at the time in vitro fertilization is begun, subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored preembryos. Thus, no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors. If a stalemate results, the embryos are stored indefinitely and any expense associated with maintaining the embryos will be borne by the person opposing destruction.

3. Joint Custody

a. Preference for Joint Custody

Joint custody of the minor children with physical care granted to one parent and liberal visitation to the other has become the norm in Iowa.

- (1) There is a difference between custody and physical care. "Custody" refers to a parent's rights and responsibilities toward the child in matters such as decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction. See Iowa Code Section 598.41(5). In Iowa, there is a preference for joint custody. Iowa Code Section 598.41. "Physical care", on the other hand, refers to the right and responsibility to maintain the principal home of the minor child and provide for the routine care of the child. See Iowa Code Section 598.1(5).
- (2) Section 598.41 requires the Court to consider granting joint custody even in cases where the parties do not agree to joint custody and sets out factors which the Court must consider before determining that joint custody is unreasonable and not in the best interest of the child. "To deny joint custody requires a finding by clear and convincing evidence that joint custody is not reasonable and not in the best interests of the child to the extent that the legal custodial relationship between the child and the parent should be severed. In re Marriage of Holcomb, 471 N.W.2d 76 (Iowa App. 1991). See also In re Marriage of Bulanda, 451 N.W.2d 15 (Iowa App. 1989).

b. Sole Custody

- (1) The parents' lack of communication and mutual support or a history of domestic abuse may overcome the preference for joint custody.
- (2) The Court found that joint legal custody was unworkable and ordered sole legal custody to the father because the parents did not get along and were barely civil to one another. In re Marriage of Winnike, 497 N.W.2d 170 (Iowa App. 1992). See also In re Marriage of Eilers, 526 N.W.2d 566 (Iowa App. 1994) and In re Marriage of Brainard, 523 N.W.2d 611 (Iowa App. 1994).
- (3) "It is very likely that the parties will not be able to agree on many of the fundamental decisions that must be made in children's lives, such as education and medical treatment. The vesting of such decision-making power in one parent thus seems preferable. In re Marriage of Rolek, 555 N.W.2d 675 (Iowa 1996).
- (4) **In re Pelletier**, No.30378/12-1704 (Iowa App. 2013). Paul and Karen had severe difficulties in communicating and in supporting one another. Paul was responsible for one documented incident of domestic abuse. However, the Court found this insufficient to constitute a history of abuse under the statute. In re Marriage of Forbes, 570 N.W.2d 757, 760 (Iowa 1997). More important a broad examination of Paul's behavior and parenting history, showed that joint custody would have a positive impact on the parties child, N.P. Joint custody is preferred because it will often encourage the parties to improve their relationship and allow both to enjoy parenthood. In re Marriage of Weidner, 338 N.W.2d 351, 359 (Iowa 1983). Sole legal custody must be justified by convincing evidence that joint custody is

unreasonable and warrants the serious step of severing the parental relationship between the child and noncustodial parent. See In re Marriage of Bartlett, 427 N.W.2d 876, 878 (Iowa Ct. App. 1988). Both parties had placed N.P. in the middle by failing to shield the child from the ugliest aspects of this dissolution, and Karen listened in on telephone calls between N.P. and Paul. Paul had spoken in a derogatory and inaccurate way about Karen in front of the child, and he placed both mother and child in peril by disconnecting utilities and refusing to allow the home to be sold, which would be to the financial advantage of all. Since Karen and Paul were unable to deal with one another in a respectful and reasonable manner, joint physical care was impossible; so the Court concluded that Karen was in the best position to care for N.P. on a daily basis as primary caretaker.

c. Joint Physical Care

- (1) Joint physical care is defined as: ‘An award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child including, but not limited to, shared parenting time with the child, maintaining homes for the child, providing routine care for the child and under which neither parent has physical care rights superior to those of the other parent.’ Iowa Code Section 598.1(4) (2003).

Gaswint v. Robinson, No 3-618/12-2149 (Iowa App., 2013). The trial court awarded joint physical care of NBG to Brad and Diane, though neither party had requested joint physical care. No magic words are required to request joint physical care. In re Marriage of Fennelly, 737 N.W.2d 97, 102 (Iowa 2007). However, Iowa Code § 598.41(5)(a) does not permit the court to consider joint physical care without *the request of either party*. If there is no request for joint physical care, the Court must select a primary caretaker by considering the factors enumerated in Iowa Code section 598.41(3) and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), to determine which of the two parents is most likely to provide an environment that brings the child to health, both physically and mentally, and to social maturity. In re Marriage of Hansen, 733 N.W.2d at 695-96. Here both parties love the child and both parties are committed to providing the child the care and environment that will bring him to a healthy physical, mental, emotional, and social maturity. However, Brad's response to NBG's school behavioral issues was superior to Diane's; and Brad had also made greater efforts to co-parent with Diane. Therefore, the Court granted primary physical care to Brad. Though NBG had a close bond with his half-brother who lived with Diane, the older son was 17 and would soon be leaving the area for college.

- (2) In re Marriage of Hansen, 733 N.W.2d 683 (Iowa 2007) The recent changes in Iowa Code §598.41(5) do not create a presumption in favor of joint physical care. However, old case law strongly disfavoring joint physical care are outdated. Each case must be decided on its unique facts. The traditional factors set out in Iowa Code § 598.41(3) and cases like In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), still control; and physical care issues must focus not on what is fair for the *parents*, but primarily upon what is best for the *child*. The Court identified **four primary factors to be taken into consideration**:

- (a) **Stability and Continuity** is the most significant factor where there are two suitable parents is stability and continuity of caregiving. In re Marriage of Bevers, 326 N.W.2d 896, 898 (Iowa 1982). Long-term, successful, joint care is a significant factor in considering the viability of joint physical care after divorce. In re Marriage of Ellis, 705 N.W.2d 96, 103. The American Law Institute's

Principles of Family Law, suggests an “**Approximation Rule**”: custodial responsibility should be allocated “so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation”*Principles* § 2:08, at 178. By focusing on historic patterns of caregiving, the approximation rule provides a relatively objective factor for the court to consider though other circumstances may outweigh considerations of stability, continuity, and approximation.

Cline v. Swanson, No. 3-375/12-1575 (Iowa App., 2013). Bonnie and Lee were granted joint physical care of Caroline in alternating weeks until the child begin kindergarten. At that time, Lee was granted primary physical care. Although both parties provide excellent care for their daughter, the evidence showed that Lee is the more stable parent. Stability was the tie-breaker: Lee has shown more constancy in his work and living arrangements than Bonnie. Bonnie changed not only jobs, but careers. She has moved frequently, including a relocation that placed Caroline a significant distance away from her father. Lee had held the same job in the same location since 2008 and had a better support system because he maintained bonds with friends he has known since childhood.

- (b) **Communication and Respect.** A lack of trust poses a significant impediment to effective co-parenting and it is an important factor that the Court directs for consideration in determining whether to require joint physical care. The parents must have the ability to communicate and show mutual respect. In re Marriage of Hynick, 727 N.W.2d 575, 579 (Iowa 2007) at 580; In re Marriage of Ellis, 705 N.W.2d 96 (Iowa Ct.App.2005) at 101; Iowa Code §598.41(3)(c).
 - (c) **The Degree of Conflict.** Joint physical care requires substantial and regular interaction between divorced parents on a myriad of issues. Where the parties' marriage is stormy and has a history of charge and countercharge, the likelihood that joint physical care will provide a workable arrangement diminishes.
 - (d) **Agreement about Child Rearing Practices.** The degree to which the parents are in general agreement about their approach to daily matters is important, especially when the past relationship has been turbulent. In re Marriage of Burham, 283 N.W.2d 269 (Iowa 1979) (citing *Dodd v. Dodd*, 93 Misc.2d 641, 647, 403 N.Y.S.2d 401 (S.Ct.1978).
- (3) **In re Marriage of Cerwick** No. 3-300/12-1188 (Iowa App., 2013). Neither Justin nor Machelles requested joint physical care. Both parties conceded that joint physical care was not appropriate; and the record showed that the parties' relationship was "highly contentious and filled with acrimony"—including several unfounded child abuse allegations and police intervention. Nevertheless the trial court grant joint physical care to the parties. However, the Court of Appeals reversed, finding that the issue of joint physical care not properly before the district court and not in the children's best interest. See Iowa Code § 598.41(5)(a); In re Marriage of Fennelly, 737 N.W.2d 97, 102 (Iowa 2007) and In re Marriage of Hynick, 727 N.W.2d 575, 580 (Iowa 2007). Justin alleged that Machelles' parenting style is irresponsible, that she improperly clothed the children and is responsible for the children's frequent tardiness and absence from school. Machelles attacked Justin's parental style as overly controlling and physically and verbally abusive. The Court ruled that since Justin had been the primary caregiver since the parties separated in February, 2011; and because the children have enjoyed relative stability and responsible care under

his supervision. The principles of continuity, stability, and approximation favored placing physical care with Justin. See In re Marriage of Hansen, 733 N.W.2d at 700.

- (4) In re Marriage of Ellis, 705 N.W.2d 96 (Iowa App. 2005). The trial court had no confidence in the ability of the parties to reach mutually agreed decisions. The Court of Appeals stated that section 598.41(5) “constitutes neither a ringing endorsement of joint physical care, nor a mandate for courts to grant joint physical care unless the best interest of the child requires a different physical care arrangement.” Still, the Court noted the parties’ highly successful shared care of Paxton from his birth to the time of the dissolution trial; and awarded the parties joint physical care of Paxton.
- (5) In re Marriage of Hynick, 727 N.W.2d 575 (Iowa 2007). Before and during dissolution, Holly obtained no-contact orders against Bradley. Several times during the proceeding, harassing, threatening and immature incidents occurred; and police intervention was needed at least twice. Joint physical care parents not only will have equal, or roughly equal, residential time with the child.; but since neither parent has rights superior to the other with respect to the child’s routine care, joint physical care also envisions shared decision making on all routine matters. Obviously, such decision making requires good communication between the parents as well as mutual respect. The history of domestic abuse and inability to cooperate in this case made joint physical care impossible.
- (6) **In re Bakk, No. 3-864 / 12-1936 (Iowa App., 2013)**. The parties were granted joint physical care of their four year old daughter, who attended regular daycare. Liz is a teacher who does not teach during the summer; and she intends to remove the child from daycare at certain times during the summer so they may spend time together. Josh argued educational activities occur in the morning at daycare and the child should not be removed from daycare during the mornings unless good cause was shown. The courts must step in as arbiter when joint custodians disagree on issues with the care of a child. See Harder v Anderson, 764 N.W.2d 534, 538 (Iowa 2009); and educational decisions fall within this category. In such situations, the court must seek a solution which best serves the interest of the child. Here, the court found that because Liz was an educator, well suited to tend to the educational development of the child, she should be permitted to remove the child from daycare during the mornings.

d. Split/Divided Custody

- (1) Split custody or divided physical care occurs when each parent is granted primary physical care of at least one of the children of the parties.
- (2) “Split custody of children is warranted if good and compelling reasons exist for dividing custody ... Specifically, separation of children is justified when it is found to better promote their long-range best interest.” In re Marriage of Harris, 530 N.W.2d 473, 474 (Iowa App. 1995). See also in In Re Marriage of Pundt, 547 N.W.2d 243 (Iowa App. 1996).
- (3) Aside from the caretaking capability of the parties, other factors are considered in determining whether separation is in the best interests of the children. For example, a court should consider the difference in age between the children separated, e.g., In re Marriage of Kurth, 438 N.W.2d 852, 854 (Iowa App. 1989); whether the children would have been together if split physical care was not ordered, e.g., Id.; the [relationship] between the children, e.g., Jones, 309 N.W.2d at 461; and the likelihood that one of the parents or children would turn other children against the other parent, e.g., In re Marriage of Wahl, 246 N.W.2d 268, 270-71 (Iowa 1976). These and other factors are also discussed In

Annotation, Child Custody: Separating Children by Custody Awards to different Parents-Post-1975 Cases, 67 A.L.R.4th 354 (1989)." In re Marriage of Will, 489 N.W.2d 394 (Iowa 1992).

4. Determination of Primary Caretaker

a. Basic Factors/Winter Case

The fundamental guidelines for the determination of custody were set out in In re Marriage of Winter, 223 N.W.2d 165, 166-167 (Iowa 1974). Though these factors were established as guidelines to the Court in determining sole custody, the principles are equally applicable to the determination of the primary physical custodian of the child: (1) The characteristics of each child, including age, maturity, mental and physical health; (2) the emotional, social, moral, material and educational needs of the child; (3) the characteristics of each parent, including age, character, stability, mental and physical health; (4) the capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the child; (5) the interpersonal relationship between the child and each parent; (6) the interpersonal relationship between the child and its siblings; (7) the effect on the child of continuing or disrupting an existing custodial status; (8) the nature of each proposed environment, including its stability and wholesomeness; (9) the preference of the child, if the child sufficient age and maturity; (10) the report and recommendation of the attorney for the child or other independent investigator; (11) available alternatives; and (12) any other relevant matter the evidence in a particular case may disclosed.

In Neubauer v. Newcomb, 423 N.W.2d 26 (Iowa App. 1988) the Court confirmed that the Winter criteria governing the determination of custody apply whether parents are dissolving a marriage or are unwed. See also Lambert v. Everist, 418 N.W.2d 40 (Iowa 1988); In re Marriage of Dunkerson, 485 N.W.2d 483 (Iowa App. 1992).

b. General Principles

(1) Long-Range Best Interests

In determining child custody the Court's major concern is the best interests of the child and the objective is placement in an "...environment most likely to bring the children to healthy physical, mental and social maturity." In re Marriage of Bartlett, 427 N.W.2d 876 (Iowa App. 1988). See also In re Marriage of Collingwood, 460 N.W.2d 486 (Iowa App. 1990); In re Marriage of Krone, 530 N.W.2d 468 (Iowa App. 1995); and In re Marriage of Buttrey, 538 N.W.2d 322 (Iowa App. 1995).

(2) Deference to Trial Court: Credibility and Demeanor.

In re Rhyan, 755 N.W.2d 140 (Iowa 2008) The Supreme Court reversed the Court of Appeals in a close case in which for every claim against one of the parties, a balancing explanation exists. The district court had the opportunity to observe the parties and witnesses and concluded that it was in the child's best interests to grant primary physical care to the mother. "This case represents a 'prime example of a close custody case where we should defer to the trial court's detailed fact-findings and credibility assessment.'" See In re Marriage of Fennelly, 737 N.W.2d 97, 101 (Iowa 2007) ." See also In re Marriage of Engler, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993).

(3) Psychological Factors

- (a) “ ... Care must be exercised in judging a parent based on activities which take place during a particular time frame of the marriage, such as the separation or break up of the relationship. Instead, a better picture of a parent can be found by viewing the total circumstances and putting isolated events into perspective. In re Marriage of Ihle, 577 N.W.2d 64, 69 (Iowa App. 1998).
- (b) In re Marriage of Rebouche, 587 N.W.2d 795 (Iowa App. 1998). To effectively aid the court in making difficult custody determinations, the court should be able to have confidence in the neutrality of the evidence and testimony provided by the very experts the court appoints to carry out this critical function. Absent that neutrality, the expert testimony fails in its function, and the court has lost the assistance it anticipated.
- (c) The Court of Appeals approved the Trial Court's decision to give little weight to the psychologist's testimony because the psychologist was not revealed in advance and had not met with the custodial parent before making a custody recommendation. In re Marriage of Scheffert, 492 N.W.2d 203 (Iowa App. 1992). See also In re Marriage of Lacaeyse, 461 N.W.2d 475 (Iowa App. 1990).
- (d) Ashenfelter v. Mulligan, 792 N.W.2d 665 (Iowa, 2010). In this case, grandparents sought visitation rights with their grandchild on the grounds that their daughter, Amy, the child's mother, was unfit and sought her mental health records in discovery to prove her mental unfitness. However, the Supreme Court pointed out that Iowa Rule of Civil Procedure 1.503 prohibits discovery of privileged materials; that medical records are privileged materials under section 622.10,; and that they are not discoverable under rule 1.503. Chung v. Legacy Corp., 548 N.W.2d 147, 149 (Iowa 1996). Though Section 622.10 provides an exception to the privilege in certain circumstances when a patient is also a litigant, but "[t]he statute requires the condition be an element or factor of the claim or defense *of the person claiming the privilege.*" 548 N.W.2d at 150. The grandparents finally argued that the constitutional right to privacy in medical and mental health records is "not absolute, but qualified." State v. Cashen, 789 N.W.2d 400, 408-10 (Iowa 2010); and that a balancing test weighs an individual's privacy interest against other public interests. However, the Court noted that the United States Supreme Court has suggested that a balancing test will never be appropriate in a civil case. Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996); and, in any event, that the Ashenfelters had not asserted a counterbalancing consideration that would override Amy's privilege in her mental and medical health records.

(4) Preference for Primary Caretaker

The fact that a parent was the primary caretaker prior to separation does not assure he or she will be the custodial parent. See In re Marriage of Toedter, 473 N.W.2d 233, 234 (Iowa App. 1991). However, consideration is given in any custody dispute to allowing the child to remain with a parent who has been a primary caretaker so as to enable the children to have continuity in their lives. In re Marriage of Moorhead, 224 N.W.2d. 242, 244 (Iowa 1974). See also In Re Marriage of Kunkel, 555 N.W.2d 250 (Iowa App. 1996). But see In re Marriage of Wilson, 532 N.W.2d 493 (Iowa App. 1995).

(5) Sexual Orientation of Parent

"Discreet homosexual parents will not be denied visitation or custody merely because of their sexual orientation ... the district court properly saw Kelly's sexual orientation as a non-issue and focused its decision on the relative parenting abilities of [the parties]." In re Marriage of Cupples, 531 N.W.2d 656, 657 (Iowa App. 1995). See also, Hodson v. Moore, 464 N.W.2d 699, 701 (Iowa App. 1990); In re Marriage of Wiarda, 505 N.W.2d 506 (Iowa App. 1993).

(6) Moral Misconduct/Child Endangerment

We do not place great emphasis on [the mother's] relationship with another man during the latter part of the marriage. Although "moral misconduct" is a consideration in custody determinations, it is only one factor ... the children were never placed in danger by her activities." In re Marriage of Wilson, 532 N.W.2d 493 (Iowa App. 1995). See also In re Marriage of Burkle, 525 N.W.2d 43917 (Iowa App. 1994); In Re Marriage of Kunkel, 546 N.W.2d 634 (Iowa App. 1996).

In re Stichter, No. 30959 / 13-0756 (Iowa App., 2013). Nicole stated Brian did a good job of playing with G.S., but he has difficulty separating playtime from his responsibilities. In addition, Nicole claimed Brian's temper and preoccupation with on-line sex interfered with his parenting. The parties were both capable parents and had similar parenting styles. However, they were unable to reach agreement on even small daily concerns. The court considered the four nonexclusive factors articulated in Hansen: (1) the stability and continuity of care-giving for the children; (2) the ability of the parents to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) the degree in which parents are in general agreement about their approach to daily matters and decided that primary physical care should be granted to Nicole. Brian's sexual preoccupation was of great concern to the Court because it showed a lack of judgment and maturity.

(7) Hostility/Promote Noncustodian's Relationship

Iowa courts do not tolerate hostility exhibited by one parent to the other, and the parents have a responsibility to assure that their parents will not interfere with the other's relationship with the children. Here, the Court found that the maternal grandparents had shown excessive animosity based on the father's failure to provide financial support, but found that the grandparents' conduct was not sufficient to deny custody to the mother. In re Marriage of Crotty, 584 N.W.2d 714 (Iowa App. 1998). See also In re Marriage of Rosenfeld, 524 N.W.2d 212 (Iowa App. 1994); In re Marriage of Shanklin, 484 N.W.2d 618 (Iowa App. 1992); and In re Marriage of Abkes, 460 N.W.2d 184 (Iowa App. 1990).

(8) Gender of Parent Irrelevant

No hard and fast rule governs which parent should have custody. However, the Court abandoned the inference that young children should be in the custody of their mother. In re Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974). "The real issue is not the sex of the parent but which parent will do better in raising the children" and "neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding." 219 N.W.2d at 688. See also In re Marriage of Pokrzywinski, 221 N.W.2d 283 (Iowa 1974); In re Marriage of Lacaeyse, 461 N.W.2d 475 (Iowa App. 1990); In re Marriage of Sprague, 545 N.W.2d 325 (Iowa 1996).

(9) Marital Status/Cohabitation

The criteria governing child custody determinations are the same regardless of whether the parents are dissolving their marriage or have never been married to each other. Hodson v. Moore, 464

N.W.2d 699, 700 (Iowa App. 1990). See also In re Marriage of Pettit, 493 N.W.2d 865 (Iowa App. 1992).

(10) Religion

Section 598.41(5) provides that both parents should be involved in decisions about religious instruction. However, the court will not prescribe the kind of instruction the children will receive. Each parent may be a role model and provide his or her own instruction to the children. In re Marriage of Moore, 526 N.W.2d 335 (Iowa App. 1994). See also, Petition of Deierling, 421 N.W.2d 168 (Iowa App. 1988); In re Marriage of Rodgers, 470 N.W.2d 43 (Iowa App. 1991); In re Marriage of Anderson, 509 N.W.2d 138 (Iowa App. 1993).

(11) Cultural Beliefs

The mother, born in Havana, was volatile emotionally and perhaps a bit erratic, and she maintained because of her Hispanic cultural beliefs, she could not be an adequate parent unless she was the custodial parent. The Supreme Court granted custody to her, rather than her more stable and flexible family therapist husband. Although she could adjust her style to accommodate the non-custodial role, the adjustment would be particularly difficult. In re Marriage of Kleist, 538 N.W.2d 273 (Iowa 1995).

(12) Stable Environment

(a) “Minimal changes in physical environment may result in greater emotional stability. However, our case law places greater importance on the stability of the relationship between the child and the primary caregiver over the physical setting of the child.” Here, the father could provide environmental stability, but the mother had provided the majority of care to the children and had been their emotional anchor. In re Marriage of Williams, 589 N.W.2d 759 (Iowa App. 1998).

(b) A mother quit her job as a teacher to obtain a degree in civil engineering. Both parties were good parents, but primary care was granted to the father because he had more stability in his life and would keep the children in the same school district, while the mother’s future depended on where she found employment after her degree was earned. In Re Marriage of Hart, 547 N.W.2d 612 (Iowa App. 1996). See also In Petition of Anderson, 530 N.W.2d 741 (Iowa App. 1995).

(13) Child's Preference

In In re Marriage of Ellerbroek, 377 N.W.2d 257 (Iowa App. 1985), the Court of Appeals delineated the considerations for determining the weight to be given a child's preference In determining custody: (1) Age and educational level, (2) Strength of preference, (3) Intellectual and emotional makeup of child, (4) Relationship with family members, (5) Reason for decision, (6) Advisability of recognizing teenagers' wishes, and (7) Recognition that we are not aware of all factors that influence decision. See also In Re Marriage of Fynaardt, 545 N.W.2d 890 (Iowa App. 1996).

In re Marriage of Wasson, No. 3-405/12-1033 (Iowa App., 2013). The trial court granted joint physical care of the two children to Tammy and James. Parenting time was equally divided: each had the children in alternate weeks. James appealed and sought primary physical care of the children because both children testified they prefer to live with him. Here, the Court found that both parents are capable and suitable custodians and that they satisfied the four-factor test for joint physical care. In re Marriage of Hansen, 733 N.W.2d 683, 685 (Iowa 2007). The Court also

considered the wishes of the children. See Iowa Code § 598.41(3)(f). The children were old enough at the time of trial that their wishes deserve some weight in our determination. See In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981). However, the Court was not swayed by the children's stated preference, especially because there was some question as whether the daughters' desire to live with their father was motivated by economic concerns: James bought the younger daughter an iPod in the days leading up to trial and had paid the bill to have the older daughter's cell phone turned back on after a fight she had with Tammy.

In re Marriage of Risbeck, No. 3-158/12 -1828 (Iowa App. 2013). Kellie was held in contempt of court and gave custody of their 13-year-old daughter to Matthew. Kellie maintained she withheld visitation to protect the child, the Court found that she "has completely and totally alienated her child from [Matthew]." Because of the alienation, the child did not want to live with Matt. Iowa Code section 598.41(3)(f) (2011) provides that a child's custody preference should be considered when the child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment. However, the analysis involved in deciding custody is "far more complicated than asking children with which parent they want to live." In re Marriage of Hunt, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991). The Court found that the efforts by Kellie to prevent Matthew and the child from having a relationship outweigh the thirteen year-old's desire to remain with Kellie. In addition, a child's preference is entitled to less weight in a modification action than would be given in an original custody proceeding. In re Marriage of Behn, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987).

(14) Domestic Abuse

(a) Chapter 598 and several other statutes were amended in 1995 to add provisions which dramatically affect the way domestic relations courts deal with families in which there has been a history of domestic abuse.

- [1] Section 598.41(1)(b) now provides that if the court finds that a history of domestic abuse exists, a rebuttable presumption against the awarding of joint custody exists; and Section 598.41(2)(c) now provides that if a history of domestic abuse exists, which is not rebutted, this factor shall outweigh consideration of any other factor in determination of awarding of custody.
- [2] Section 598.41(1)(c) now provides that the requirement that visitation be structured to provide for maximum continuing contact between the non-custodial parent and child will be eliminated if the court determines that a history of domestic abuse exists between the parents.
- [3] Section 598.41(1)(d) provides that if a history of domestic abuse exists, the court shall not consider the relocation or absence of a parent as a factor against that parent in awarding custody or visitation if the parent is a domestic abuse victim.

Root v. Toney, No.12-0122 (Iowa 2013). Teri fled her home in Decatur County to escape her abusive husband, Talton, taking their children with her. She found a safe house 250 miles away in Howard County, near her parents' residence, and filed for an order of protection within two days of her arrival. The trial court entered the protective order. Iowa Code §236.3(1) governs venue under the Domestic Abuse Act, Iowa Code chapter 236, and states "[v]enue shall lie where either party resides." In Kollman v. McGregor, 240 Iowa 1331, 39 N.W.2d 302 (1949), the Iowa Supreme Court noted that "residence" is distinguishable from domicile as residence indicates the place of dwelling, which may be either permanent or temporary. The Supreme Court held that more relaxed residency requirement is

appropriate to effectuate the purpose of chapter 236—protecting victims of domestic abuse. Section 236.4 provides for expedited orders of protection. By omitting a minimum waiting period in section 236.3(1), the legislature presumably intended to allow emergency injunctive relief immediately upon the victim's arrival in the new county where she relocated to live to escape her abuser. Accordingly, the Court adopted the "actual residence" requirement: parties seeking orders of protection under chapter 236 need only demonstrate that they are currently living in the county, maintaining a "place of dwelling, which may be either permanent or temporary." See Kollman, 240 Iowa at 1333, 39 N.W.2d at 303.

- (b) Section 236.2(e) includes among the persons protected from domestic abuse those in "intimate relationships". The statute includes a list of factors to be considered to determine whether an intimate relationship existed at the time of the abuse, but defines an "intimate relationship" as a significant romantic involvement that need not include sexual involvement, but is something more than a social or professional relationship. In addition, the statute recognizes that a person may be involved in more than one "intimate relationship" at the same time.

Wegman ex rel. W.W. v. Wegman, No. 3-555 / 12-1933 (Iowa App., 2013). Dawn filed a domestic abuse petition on behalf of her son who had allegedly injured in a fight with his father. However, the Court dismissed the petition. Iowa Code section 236.2(4) defines "Family or household members" for the purposes of domestic abuse as: "a. . . spouses, persons cohabiting, parents, or other persons related by consanguinity or affinity. b. [this term] does not include children under age eighteen of persons listed in paragraph 'a'." See D.M.H. by Hefel v. Thompson, 577 N.W.2d 643 (Iowa 1998). However, does not mean that these children have no protection against domestic abuse. The child protective service and d.h.s. workers can take action to protect abused children.

- (c) Even before the statutes were amended, the Court of Appeals denied custody to a father largely because of his history of domestic abuse. The Court found that children raised in homes touched with domestic abuse are often left with deep scars revealed in increasing anxiety, insecurity, a greater likelihood for later problems in interpersonal relationships, and low self-esteem. Also abuse places children at greater risk of being physically abused. In re Marriage of Brainard, 523 N.W.2d 611 (Iowa App. 1994).
- (d) In re Marriage of Ford, 563 N.W.2d 629 (Iowa 1997). The 1995 amendments create a rebuttable presumption against joint custody, but, " ... any evidence of abuse does not automatically and as a matter of law preclude joint custody. Rather, we must consider the evidence in determining whether such a presumption is sustainable."

Doyle v. Doyle, No. 3-895 / 13-0753 (Iowa App., 2013). Daniel Doyle has appealed the trial court's ruling extending for another year the protective order issued to Melanie under Iowa Code chapter 236 (2011). One year earlier, in the midst of a dissolution action Dan threw a blanket at Melanie, grabbed her by the shoulders, and caused her to fall to the floor. Melanie was granted a protective order and sought to extend the term of the order when it was about to expire. There had been no further threats or physical contact, but Melanie had received many letters and e-mails which Melanie believed were sent or instigated by Dan in which she was referred to as "Melanoma," "a cancer on our neighborhood," a "liar" and "cheat," and which exhorted her to move. However, Melanie admitted she had been in Daniel's home with him as many as thirteen times since the protective order was entered and had asked him to drive her to work. Iowa Code section 236.3 requires that the court must find the "defendant continues to pose a threat to the safety of the victim or their family" in

order to extend a protective order beyond one year. There was little evidence that Dan was a threat; but, more important Melanie, a lawyer, ignored the court's protective order at will. She in effect aided and abetted Daniel's violation of the court order and may also have been subject to a claim of contempt. Henley v. Iowa Dist. Ct., 523 N.W.2d 199, 202 (Iowa 1995).

- (e) "We do not minimize the seriousness of domestic abuse and the negative impact it has on children. However, we also recognize some relationships are mutually aggressive, both verbally and physically. In those situations, a claim of domestic violence must not be used by either party to gain an advantage at trial, but should be reserved for the intended purpose -- to protect victims from their aggressors." In re Marriage of Barry, 588 N.W.2d 711 (Iowa App. 1998). See also In re Marriage of Forbes, 570 N.W.2d 757 (Iowa 1997).
- (f) However, a history of domestic abuse is not easily overcome. "We believe evidence of untreated domestic battering should be given considerable weight in determining the primary caretaker, and under some circumstances, should even foreclose an award of primary care to a spouse who batters." In re Marriage of Daniels, 568 N.W.2d 51 (Iowa App. 1997).
- (g) In Wilker v. Wilker, 630 N.W.2d 590 (Iowa 2001), Paula stood by while others pushed, held, and roughed up Timothy while she removed the child from the house. The Court held that an "assault" is any act which is intended to cause pain or injury or result in physical conduct which will be insulting or offensive to another and "aiding and abetting" is assenting to or lending countenance and approval by active participation or encouragement.

(15) Preference for Parent

- (a) There is a presumption in favor of the parents in custody determinations. See The Code Section 633.559 (preference for parents to serve as guardians of minors). The preference for natural parents extends to non-custodial parents where the custodial parent has died or has been judicially adjudged incompetent. Iowa Code Section 598.41(6). In applying this principal " ... we have acted in some cases to remove children from conscientious, well-intentioned custodians with a history of providing good care ... and placed them with a natural parent. Zvorak v. Beireis, 519 N.W.2d 87 (Iowa 1994). Northland v. McNamara, 581 N.W.2d 210 (Iowa App. 1998). Parents should be encouraged in time of need to seek assistance in caring for their children without risk of losing custody. In re Guardianship of Sams, 256 N.W.2d 570, 573 (Iowa 1977).

Maruna v. Peters, No. 2-945/12-0759 (Iowa App., 2013). Cory Maruna and Samantha Peters, unmarried parents of a child, born in 2005, were young, had problems, and agreed to place the child in a guardianship with Samantha's mother, Kimberly. The child was later diagnosed with cerebral palsy and received excellent physical and mental care from Kim until 2012 when Cory sought custody. Both Samantha and Cory had matured into responsible adults. The Court noted that Cory expressed a keen interest in the child and had assisted in caring for the child in recent years, but he only attended one cerebral palsy clinic and only four of seventeen special therapy appointments in the previous year. Additionally, Cory conceded that the child would have to change schools if he acquired custody, leading to further disruption of the physical and mental health of this fragile child. For that reason, the Court of Appeals reversed the district court's termination of the guardianship and dismissed Cory's custody and termination of guardianship petitions. Iowa Code §633.559 grants a preference for custody to parents; and Kimberly had "the burden to overcome the parental preference and show that the best interest of [the child] required continuation of

the guardianship." In re Stewart, 369 N.W.2d 821. However, the Court found she proved that return of custody to the natural parent would likely have a seriously disrupting and disturbing effect upon the child's development. In re Guardianship of Knell, 537 N.W.2d 778, 782 (Iowa 1995).

- (b) Iowa Code Section 232.104(7) permits the Juvenile Court to close a Child in Need of Assistance case by transferring jurisdiction over the child's guardianship to the probate court for continuing supervision. Section 633.559 has been amended to cancel the statutory preference granted to parents in cases which have been transferred under Section 232.104.
 - (c) Preference Rebuttable. The preference favoring parents as custodians is rebuttable due to the essential governing consideration, that being the best interest of the child. However, a non-parent may gain custody if the parent seeking custody is proven to be unfit or substantially inferior. In Matter of Guardianship of Stodden, 569 N.W.2d 621 (Iowa App. 1997). "A parent who fails to develop a relationship with his or her child while that child is establishing a family relationship with a stepparent must recognize the child thereby puts down roots that are of critical importance. Courts must carefully deal with those roots in determining the child's best interests. ... If return of custody to the child's natural parent is likely to have a seriously disrupting and disturbing effect on the child's development, this fact must prevail." In re Guardianship of Knell, 537 N.W.2d 778 (Iowa 1995)." Stodden at 624-625. See also In re Marriage of Halvorsen, 521 N.W.2d 725 (Iowa 1994); In re Marriage of Liebich, 547 N.W.2d 844 (Iowa App. 1996) (grandmother intervened in dissolution action); In re Marriage of Corbin, 320 N.W.2d 539 (Iowa 1982) (foster parent intervened in dissolution action and was awarded custody in dissolution decree); In re Marriage of Reschly, 334 N.W.2d 720 (Iowa 1983) (custody awarded to grandparents on Petition of Intervention); and In re Marriage of Swanson, 586 N.W.2d 527 (Iowa App. 1998) [temporary custody to a stepfather].
 - (d) In re Guardianship of Hall, 666 N.W.2d 619 (Iowa App.2003). The law presumes that the children's best interests will best be served by placing them in the care of their natural parents, assuming they are qualified and suitable. In re Guardianship of Stewart, 369 N.W.2d 820, 822 (Iowa 1985). The guardians have the burden to rebut the presumption of suitability and show that the child's best interests require a continuation of the guardianship. Stewart, 369 N.W.2d at 824. The only evidence sufficient to overcome the preference for the parents is proof that the transfer of custody to a parent would have a "seriously disrupting effect upon the child's development, this fact must prevail." Painter v. Bannister, 258 Iowa 1390, 1396, 140 N.W.2d 152, 156 (1966). That showing was not made here.
- (16) Equitable Parent Doctrine.
- (a) In In re Marriage of Gallagher, 539 N.W.2d 479 (Iowa 1995), the Iowa Supreme Court established a far-reaching new principle when it adopted the Equitable Parent Doctrine. In doing so, the Court distinguished several cases, notably Petition of Ash, 507 N.W.2d 400, 403 (Iowa 1993) and In re Halvorson, 521 N.W.2d 725, 728 (Iowa 1994), in which it had specifically rejected the equitable parent doctrine. "Applying general equitable principles, we believe equitable parenthood may be established in a proper case by a father who establishes all of the following: (1) he was married to the mother when the child was conceived and born; (2) he reasonably believes he is the child's father; (3) he establishes a parental relationship with the child; and (4) shows that judicial recognition of the relationship is in the best interest of the child."

- (b) Although Section 600B.41A, the Action to Overcome Paternity Statute, was not argued in Gallagher, the Gallagher court noted that the then newly created Section 600B.41A "may control future cases presenting similar issues."
- (c) In Callender v. Skiles, 591 N.W.2d 182, 186 (Iowa 1999), the Supreme Court recognized the legislative distinction between an action to establish paternity and an action to overcome paternity. Once paternity has been established by operation of law, established paternity can be overcome only through Section 600B.41A. The law deems the husband to be the child's father by virtue of his marriage to the child's mother. In Skiles, the Court found a denial of Due Process Iowa Code Section 600B.41A(3) which denied a biological parent the right to establish his paternity because he was not authorized under the statute to commence an action to overcome paternity. The case was remanded for a determination of whether the biological father had waived his right to challenge the established paternity.

(17) Nomination In Will

There are three tiers of preference for guardians in Iowa Code Section 633.559: (1) parents; (2) will-nominated guardians; and (3) qualified and suitable people requested by minors 14 years old or older. "Subject to these preferences, the Court shall appoint as guardian a qualified and suitable person who is willing to serve in that capacity ... These statutory preferences create a rebuttable presumption." In re Marriage of Robinson, 530 N.W.2d 90, 92 (Iowa App. 1994).

(18) Preference for Other Family Members

- (a) "The Court should not simply make an effort to select the best person to raise the child, irrespective of family ties...we believe our past jurisprudence...emphasizes the importance of keeping the child within the family whenever possible." Matter of Guardianship of Reed, 468 N.W.2d 819 (Iowa 1991). See also Holmes v. Derrey, 127 Iowa 625, 103 N.W. 973 (1905).
- (b) A person may intervene only during the pendency of an action (IRCP 75). To have standing to initiate a modification proceeding, a person must have a specific, personal, and legal interest in the litigation and be injuriously affected. This a grandparent does not have. In re Marriage of Mitchell, 531 N.W.2d 132 (Iowa 1995). Still, a grandparent (or others) may file a petition for guardianship or initiate a proceeding to have the child found to be in need of assistance in juvenile court.

5. Tortious Interference with Custody

Wolf v. Wolf, 690 N.W.2d 887 (Iowa 2005). To establish a claim of tortious interference with custody, a plaintiff must show (1) the plaintiff has a legal right to establish or maintain a parental or custodial relationship with his or her minor child; (2) the defendant took some action or affirmative effort to abduct the child or to compel or induce the child to leave the plaintiff's custody; (3) the abducting, compelling, or inducing was willful; and (4) the abducting, compelling, or inducing was done with notice or knowledge that the child had a parent whose rights were thereby invaded and who did not consent. See 67A C.J.S. Parent and Child §322, at 409 (2002). Wood v. Wood, 338 N.W.2d 123 (Iowa 1983). Here, the mother kept her daughter for nearly three years after her former husband was awarded physical care; she provided the child with the means to run away, and she disobeyed direct orders from the judge to keep the child in Iowa.

6. Appointment of Guardian Ad Litem or Child's Attorney

Iowa Code §598.12(1) applies to a child's attorney and gives the attorney power to make independent investigations and to call witnesses relating to the legal interests of the children. Section 598.12(2) gives a guardian ad litem more extensive duties, including interviewing the parties, visiting the home, interviewing others providing services to the child, and obtaining firsthand knowledge of the facts and parties involved in the matter. However, an attorney for the child has no power to testify as a witness. Even a GAL's report, like a social worker's narrative would be inadmissible as hearsay. The supreme court has stated, "Unless a social worker's written report is properly before the court by agreement or stipulation, it should not be considered after a proper objection." In re Marriage of Williams, 303 N.W.2d 160, 163 (Iowa 1981).

In re Tech, No. 13-1123 / 13-0682 (Iowa App., 2013). An attorney was appointed to be guardian ad litem for the children in a dissolution custody dispute. Troy asked for the GAL's report and testimony to be stricken because he was unable to question her about the children's statements. The district court overruled his objection, but the Court of Appeals reversed. In re Marriage of Joens, 284 N.W.2d 326, 329 (Iowa 1979), the Supreme Court held that the guardian ad litem is required to investigate and to secure the testimony of witnesses helpful to the cause of the children. There is no provision that he "report" or that he make recommendations. ". . . What the attorney discovers is frequently hearsay, sometimes only rank rumor or gossip. Therefore, those who know the facts should testify in order to provide a reliable basis for the trial court's ultimate decision." Unless a report is properly before the court by agreement or stipulation, it should not be considered after a proper objection by a party. See In re Marriage of Williams, 303 N.W.2d 160, 163 (Iowa 1981).

7. Visitation and Other Rights and Responsibilities of Joint Custody

a. Statutory Criteria

- (1) Section 598.1(6) and Section 598.41(1) now provide that, except in unusual circumstances, the best interests of the child require "...the opportunity for maximum continuous physical and emotional contact with both parents, and that refusal by one parent to provide this opportunity to the other without just cause, shall be considered a significant factor in determining the proper custody arrangement.
- (2) Both parents shall have legal access to information concerning the child, including but not limited to medical, educational and law enforcement records (Section 598.41[1]); and joint custodial parents are entitled to "...equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities and religious instruction." (Section 598.4[5]). However, if a history of domestic abuse exists, a party's visitation rights can be seriously affected.

b. Rights and Responsibilities of Joint Custodians

(1) Basic Rights and Responsibilities

In re Marriage of Fortelka, 425 N.W.2d 671 Iowa App. 1988) specifies the following rights and responsibilities of joint custodians: (a) to participate equally in decisions affecting the child's legal status, medical care, education, extracurricular activities and religious instruction; (b) to communicate with each other; in particular, the physical custodian has a responsibility, except in emergencies to share information (conference slips, report cards, medical appointments, etc.) about the need to make

decisions and to make the information available to the other parent; (c) to support the other parent's relationship with the child; (d) to put away personal animosities and work together as mature adults with medical and school personnel to meet the child's needs; (e) to structure visitation flexibly, taking the child's educational and social activities into consideration; and (f) to assure that transition between homes is without problems.

(2) Religious Instruction

"Under the plain language of this provision [Iowa Code Section 598.41(5)], both parties are entitled to participate in deciding questions regarding the religious instruction of the children. We will not prescribe what type or form of religious instruction should be provided for the children, nor which parent should be responsible for the religious instruction of the children." In re Marriage of Craig, 462 N.W.2d 692 (Iowa App. 1990).

(3) Access to Law Enforcement Records

A non-custodial parent has a right to access to information concerning his or her minor child's law enforcement records. ... The duty to keep juvenile law enforcement records confidential does not exclude either parents' access. Here the District Court had quashed the father's subpoena to juvenile court demanding his son's records. In re Marriage of Maher, 510 N.W.2d 888 (Iowa App. 1993).

(4) Access to Child's Psychological Records

Harder v. Anderson, 764 N.W.2d 534 (Iowa 2009). Although Iowa Code §598.41(1)(e) guarantees both parents "legal access" to a child's medical records, the section does not give either parent an absolute right to those records. Under Chapter 598, the best interests of the child always prevail. See In re Marriage of Bingman, 209 N.W.2d 68, 71 (Iowa 1973). The Court concluded that Susan was not entitled to obtain the mental health records of her children because the release of the records was not in the best interest of the children; overruling Leaf v. Iowa Methodist Med. Ctr., 460 N.W.2d 892 (Iowa App. 1990).

(5) Right to Name Child

- (a) In an initial determination of a child's name, each parent has the right to equally participate in decisions affecting "the child's legal status" under Iowa Code Section 598.41(2); and an infant child's name is an incident of the child's "legal status". In re Marriage of Gulsvig, 498 N.W.2d 725, 728 (Iowa 1993). The court's name change authority for children born outside of marriage derives from section 600B.40 which makes section 598.41 applicable to proceedings concerning the custody and visitation of a child born to unmarried parents. In re Petition of Purscell, 544 N.W.2d 466, 468 (Iowa Ct. App. 1995).
- (b) However, both parent's must consent to a name change under the Name Change Statute, Chapter 674, unless the father's name is not on the birth certificate. Section 674.6 "The legislature specifically limited the required consent to 'parents as stated on the birth certificate.'" In re Name Change of Reindl, 671 N.W.2d 466 (Iowa 2003).
- (c) Braunschweig v. Fahrenkrog, 773 N.W.2d, 888 (Iowa 2009). In an action to challenge to the legitimacy of a child's name unilaterally chosen by one parent, the

decision is controlled by Iowa Code Chapter 598; and the Court must decide what would be in the child's best interests. Montgomery v. Wells, 708 N.W.2d 704, 708 (Iowa Ct.App.2005); In re Name Change of Quirk, 504 N.W.2d 879, 882 (Iowa 1993). However, if the child's surname was or could have been an issue in an earlier proceeding, the doctrine of res judicata may require that the Chapter 674, the Name Change Statute, which permits change only if both parents agree, will control the court's decision. Spiker v. Spiker, 708 N.W.2d 347, 353 (Iowa 2006).

c. Visitation

The specific visitation rights of visiting or visited parents, whether the parent is a joint legal custodian or not, are somewhat confusing and unsettled. The Code Section 598.41(1) requires that visitation be established to assure "maximum continuing physical and emotional contact with both parents." However, a substantial conflict in the cases exists due to the paradoxical task of reconciling the goal of maximum parental contact with the desire to avoid excessive disruption of the child's life.

(1) Cases Stressing Avoidance of Excessive Disruption

In the following cases, the court seems to be most concerned with the maintenance of a stable environment for the child: In re Marriage of Miller, 390 N.W.2d 596 (Iowa 1986) (alternate weekend visitations, four weeks' visitation each summer and one week at Christmas). See also In re Marriage of Weidner, 338 N.W.2d 351, 359 (Iowa 1983) (alternating two-week intervals of summer visitation instead of four consecutive weeks would not be granted because such arrangement would be confusing and upsetting to the children); In re Marriage of Guyer, 238 N.W.2d 794, 797 (Iowa 1976) (visitation on every weekend instead of alternating weekends found to be "unduly disruptive"); In re Marriage of Martens, 406 N.W.2d 819 (Iowa App. 1987) (visitation modified on appeal to terminate alternate weekend visitation on Sunday evening instead of Monday evening "...In order to allow preparation time for school and other weekday activities."); and in In re Marriage of Kurth, 438 N.W.2d 852 (Iowa App. 1989), (reduced the summer visitation from six weeks to three weeks).

- (a) Sections 598.41(1) and 598.1(6) do not require the Court to apportion at least one-half of the available time to the non-custodial parent in order to meet the requirement of maximum continuous physical and emotional contact. In re Marriage of Bunch, 460 N.W.2d 890, 892 (Iowa App. 1990).
- (b) Liberal visitation rights are in the best interests of the children, but the primary custodian is entitled to enjoy weekend time with the children. In re Marriage of Lacaeyse, 461 N.W.2d 475 (Iowa App. 1990).
- (c) In In re Marriage of Hunt, 476 N.W.2d 99 (Iowa App. 1991), the Court found that the approach of middle school with increased school and friendship-related activities and increased travel time between the parties' homes made restricted visitation reasonable, equitable and in the child's best interests.
- (d) Generally, courts will not impose conditions on a parent's visitation such as prohibiting use of alcohol and profanity or prohibiting contact with unrelated adults. In re Marriage of Rykhoek, 525 N.W.2d 1, 5 (Iowa App. 1994). See also, In re Marriage of Fite, 485 N.W.2d 662 (Iowa 1992).

In re Bakk, No. 3-864 / 12-1936 (Iowa App., 2013). Josh contended the district court erred in failing to require Liz to submit to random alcohol testing. The Court rejected Josh's request and found the request was more about a desire to control Liz than about the child's safety. Liz presented evidence of significant progress in her recovery and she has cared for the child frequently, for extended periods of time, without incident since she began addressing her alcoholism.

(2) Cases Stressing Maximum Parental Contact

- (a) The Court of Appeals has held that the non-physical custodian is entitled to midweek overnight visitation with the child in addition to visitation on alternating weekends in accordance with the statutory preference for maximum contact. In re Marriage of Toedter, 473 N.W.2d 233 (Iowa App. 1991).
- (b) "Visitation should include not only weekend time, but time during the week when not disruptive to allow the non-custodial parent the chance to become involved in the child's day-to-day activity as well as weekend fun." In re Marriage of Ertmann, 376 N.W.2d 918, 922 (Iowa App. 1985). See also In re Marriage of Muell, 408 N.W.2d 774 (Iowa App. 1987).
- (c) Generally, liberal visitation is in the child's best interests. In re Marriage of Stepp, 485 N.W.2d 846, 849 (Iowa App. 1992). It is important, however, not to impose a shared-type of physical care arrangement under the guise of expansive visitation because it deprives children of the needed stability in their lives. See In re Marriage of Roberts, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996).

(3) Overnight Visitors

The Court of Appeals has stricken a trial Court's restriction on a mother's visitation rights which prohibited her from having adult males present in her living quarters "to whom she was not married or related within the third degree of affinity or consanguinity" while the minor child was with her. The Appeals Court held the provision to be unduly restrictive. In re Marriage of Ullerich, 367 N.W.2d 297 (Iowa App. 1985).

(4) Homosexuality

A seven-year marriage ended when the husband announced that he was homosexual. The Supreme Court ruled that both Sections 598.21(4) and 598.41(1) show a legislative determination that a child needs close contact with both parents unless some compelling reason to the contrary is shown. In re Marriage of Walsh, 451 N.W.2d 492, 493 (Iowa 1990). The record showed that "...Michael was a good, loving and responsible father..." Michael testified that he would not expose the children to his private sex life.

(5) Custodial Parent Visits During Summer Visitation

Where the mother was granted four weeks of summer visitation, not necessarily consecutive, the Court provided that where the mother had visitation for more than fourteen consecutive days, the father would be entitled to a weekend visit. In re Marriage of Manson, 503 N.W.2d 427 (Iowa App. 1993). See also In re Marriage of Wiarda, 505 N.W.2d 506 (Iowa App. 1993). However, though the Court encouraged the father to permit his daughter to visit her mother during the extended summer visit, it declined to order a visitation schedule. In re Marriage of Russell, 473 N.W.2d 244 (Iowa App. 1991).

(6) Control by Expert Improper.

In re Marriage of Brown, 778 N.W.2d 47 (Iowa Ct. App. 2009) and Iowa Code §598.41 (providing the factors the court should consider in awarding custody and visitation rights) require that the obligation to modify a decree cannot be delegated to a counselor or any other person or entity because that person or entity has no jurisdiction to render such a decision. The legislature has granted to the court the responsibility to make an impartial and independent determination as to what is in the best interests of the child, and this decision cannot be controlled by the agreement or stipulation of the parties. See Walters v. Walters, 673 N.W.2d 585, 592 (Neb. Ct. App. 2004).

(7) Parent's Right to Pick Alternate Caretakers

Joint custody parents must be reasonable with each other. Reasonableness entails putting away petty differences and accepting that things will not be perfect. Reasonable behavior anticipates there will be times when each parent's needs to designate alternate child care providers. However, a joint custody parent may refuse to deliver the child to an irresponsible child care provider and has the right to be notified in advance as to the identity of the alternate care giver. Petition of Holub, 584 N.W.2d 731 (Iowa App. 1998).

Iowa Code Section 598.41D permits a parent serving active duty in the military who has been granted court-ordered visitation to file an application to temporarily assign his or her visitation rights to a family member who has an established an important relationship with the child. If necessary, proceedings will be expedited and conducted by electronic means.

(8) Visitation for Biological Father Unknown to Child

In Callender v. Skiles, 623 N.W.2d 852 (Iowa 2001), the Supreme Court remanded the case in 1999 to the trial court after ruling that the biological father had been unconstitutionally denied his right to establish his paternity (see Paternity Rights section supra). The Court approved visitation which increased to two weekends per month after 3 months, but found no precedent for a judge-ordered timeline for telling the child of her ancestry (before kindergarten begins); and modified the decision to leave the decision to the mother, the sole custodial parent, as to when Samantha should be told of her parentage.

Freerking v. Preul, No. 3-849 / 13-0592 (Iowa App., 2013). The court granted Sophia's request for sole legal custody of the child, because Zachary was serving a 10-year sentence for burglary and domestic abuse assault against her. However, the Court denied her request that no visitation between the child and Zachary be permitted. "We have consistently interpreted the provisions of section 598.41(1)(a) to find a parent's visitation should not be restricted unless a child or parent is likely to suffer direct physical harm or significant emotional harm. E.g., In re Marriage of Rykhoek, 525 N.W.2d 1, 4 (Iowa Ct. App. 1994). The Court permitted bimonthly two-hour visits. Given the controlled and supervised nature of the prison facility, the Court found it unlikely the child will suffer physical harm. Sophia's primary concern of emotional harm, fearing that Zach or his parents would try to turn the child against her, was lessened because Sophia was permitted to nominate a second woman may accompany Zach's sister during the visits. In addition, the court's order specifically stated that each party is not to criticize the other in front of the child or cast them in an unfavorable light; and while such provisions are difficult to enforce, the visitation provisions can be modified if Zachary or his family acts in a manner to undermine Sophia's relationship with the child. See In re Marriage of Leyda, 355 N.W.2d 862, 866 (Iowa 1984). "Zachary committed a crime and he is being punished accordingly. However, the child is entitled to ongoing contact with both parents and should not be punished for Zachary's misdeeds by being denied a relationship with him."

(9) Grandparent\Great-Grandparent Visitation

- (a) The U.S. Supreme Court decision in Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000) , the Iowa Supreme Court's Santi v. Santi, 633 N.W.2d 312 (Iowa 2001), and subsequent decisions establish that the parents' interest in the care, custody, and control of their children is the oldest of the fundamental liberty interests recognized by the law; and that the decisions concerning visitation of fit parents are unchallengeable unless the court finds the custodial parent is unfit. See also In re Marriage of Howard, 661 N.W.2d 183 (Iowa 2003); Lamberts v. Lillig, 670 N.W.2d 129 (Iowa 2003); and Spiker v. Spiker, 708 N.W.2d 347 (Iowa 2006).
- (b) Iowa Code Section 600C.1 permits grandparents and great-grandparents to petition for visitation rights only if the child's parent to whom they are related is dead and codifies and elaborates upon the limitations placed upon visitation by established by the Supreme Courts.

(10) Other Third Party Visitation

The Supreme Court's decision in In re Marriage of Gallagher, 539 N.W.2d 479 (Iowa 1995) discussed in detail in the Custody section of this outline, established the Equitable Parent Doctrine In Iowa after previously rejecting the doctrine in the Ash and Halverson cases cited below. These cases were distinguished, not specifically overruled. However, the impact of the Gallagher case on the rights and responsibilities of non-parents will have to be defined in future cases.

- (a) Former Cohabitant. A custodial parent holds veto power over visitation rights of anyone except the other parent. In two recent cases, the Supreme Court rejected the efforts of men to gain the right to visit and support children where a parent-child relationship had been established though blood tests proved they were not the biological fathers. In each case the men asserted that the mother should be prevented from denying their parenthood through the doctrine of equitable estoppel. The courts ruled that the necessary false representations were not made and that "willful ignorance is not a good substitute for a lack of knowledge of the true facts." In re Marriage of Halverson, 521 N.W.2d 725 (Iowa 1994). See also In re Marriage of Freel, 448 N.W.2d 26 (Iowa 1989); Bruce v. Sarver, 522 N.W.2d 67 (Iowa 1994); and Petition of Ash, 507 N.W.2d 400 (Iowa 1993).
- (b) Sibling Visitation. The custodial parents' veto power over visitation extends to siblings. The Supreme Court has ruled that children have no common law or statutory right to visitation with their siblings." Lihs by Lihs v. Lihs, 504 N.W.2d 890 (Iowa 1993). However, Northland v. McNamara, 581 N.W.2d 210 (Iowa App. 1998), without referring to any of the precedents in this area, the Court of Appeals granted visitation (one weekend per month, plus two weeks in the summer) between the child and his stepbrother in the home of his stepfather.

II. POST DECREE PROCEEDINGS

A. POST DECREE MOTIONS

1. Motion to Set Aside or Vacate Judgment.

- a. In In re Marriage of Wagner, 604 N.W.2d 605 (Iowa 2000), the Supreme Court ruled, based on its review of American common law, that "the vacation of the Decree places the parties in the status in which they were

before the divorce ... the effect of vacating an Order is the same as though it had never existed. ... Under these principles, when a support award in a final decree is vacated, a temporary award is automatically reinstated as if there had been no final decree, unless the court's order vacating the support award shows otherwise."

- b. Iowa Rule of Civil Procedure 1.1012(2) [formerly Rule 252(b)] provides that a final judgment may be vacated if irregularity or fraud was practiced in obtaining the judgment or order. "Irregularity" ordinarily does not relate to the parties to the judgment but deals with an adverse ruling due to action or inaction by the court or court personnel; "Fraud" covers the conduct of a party who obtains a judgment. "Proving fraud is a difficult task. A plaintiff must prove several factors by clear and convincing evidence including (1) misrepresentation or failure to disclose when under a legal duty to do so, (2) materiality, (3) scienter, (4) intent to deceive, (5) justifiable reliance, and (6) resulting injury or damage." In re Marriage of Cutler, 588 N.W.2d 425 (Iowa 1999) .
 - c. If due process has not been denied, proof of extrinsic fraud is necessary to vacate a judgment under Iowa R. Civ. P. 1.1013(1). "Fraud is of two types: extrinsic and intrinsic. Extrinsic fraud is 'some act or conduct of the prevailing party which has prevented a fair submission of the controversy' ... In contrast, intrinsic fraud inheres in the judgment itself; it includes, for example, false testimony and fraudulent exhibits. ... Fraud sufficient to vacate a judgment under Rule 1.1012 (formerly Rule 252(b)) must be extrinsic to the judgment." In re Adoption of B.J.H., 564 N.W.2d 387 at 392 (Iowa 1997). See also In re Marriage of Kinnard, 512 N.W.2d 821 (Iowa App. 1993); In re Marriage of Cutler, 588 N.W.2d 425, 429 (Iowa 1999); and In re Marriage of Heneman, 396 N.W.2d 797, 800 (Iowa Ct.App.1986).
- In re Marsh**, No. 3-231/12-1573(Iowa App. 2013). On December 20, 2011, the clerk of court set a hearing for default judgment for January 12, 2012 because the case had been on file for more than ninety days after service of process. Brandon had not filed an appearance , but was given notice of the hearing. However, on January 5, 2012, during order hour, Jasmine presented an to the district court an application for default judgment and obtained a default decree of dissolution of marriage without notifying the judge of the pending hearing. Rule 1.1013 provides that the court may correct, vacate or modify a final judgment or order, or grant a new trial on any of severa; grounds, including ". . . Irregularity or fraud practiced in obtaining it." "Irregularity" is not defined in the rule, but the question for the court under this rule is whether the judgment was obtained following some action or inaction of the court or court personnel in violation of a recognized rule, procedure, or court practice. See In re Marriage of Cutler, 588 N.W.2d 425, 429 (Iowa 1999). When the decree was presented to the district court, the judge was "not given the facts other than the fact that there was no answer." Had the judge been informed of the default hearing set for January 12, the decree by default on January 5. Entering judgment prior to a scheduled hearing was "inconsistent with the court's design to bring matters to resolution by proper procedure."
- d. In a case of first impression, the Supreme Court held that the ex-wife's flight to avoid domestic abuse was an "unavoidable casualty" warranting the vacation of the dissolution of marriage decree. In re Marriage of Marconi, 584 N.W.2d 331 (Iowa 2005).

2. Motion to Amend or Enlarge Decree.

In re Marriage of Oakland, 699 N.W.2d 260 (Iowa 2005). A Rule 1.904(2) motion filed after a new judgment or decree has been entered by the court in response to a prior Rule 1.904(2) motion is permitted under the rule and extends the time for appeal.

3. Motion to Set Aside Default.

Iowa Rule of Civil Procedure 1.977 provides, “[o]n motion and for good cause ... the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty.” The court considers four factors: to determine whether “excusable neglect” was proved: (1) whether the defaulting party actually intended to defend; (2) whether the defaulting party asserted a claim or defense in good faith; (3) did the defaulting party willfully ignore or defy the rules of procedure or was the default simply the result of a mistake; and (4) relief should not depend on who made the mistake. Sheeder v. Boyette, 764 N.W.2d 778, 780 (Iowa 2009) See Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977)

B. APPEAL

1. Jurisdiction During Appeal

“When an appeal is perfected, the trial court loses jurisdiction over the merits of the controversy. In re Marriage of Novak, 220 N.W.2d 592, 596 (Iowa 1974). The trial court may, enforce its judgment during the appeal unless a supersedeas bond is filed. Lutz v. Darbyshire, 297 N.W.2d 349, 352 (Iowa 1980). Here...the trial court entered a new order modifying the dissolution decree after the appeal was taken ...The trial court's order is a nullity because it...had lost jurisdiction.’ In re Marriage of Russell, 479 N.W.2d 592, 596 (Iowa App. 1991)” In re Marriage of Courtney, 483 N.W.2d 346 (Iowa App. 1992).

2. Jurisdiction After Appeal

- a. The District Court retains jurisdiction after an appeal from its final judgment to enforce the appellate decision, but does not have the authority to revisit decide differently the issues concluded by the appeal. In re Marriage of Hoffman, 515 N.W.2d 549 (Iowa App. 1994).
- b. In In re Marriage of Davis, 608 N.W.2d 766 (Iowa 2000), the Supreme Court ruled that “when, as here, an appellate court remands for a special purpose, the district court upon such remand is limited to do the special thing authorized by the appellate court in its opinion and nothing else.

3. Support During Appeal

Appellate courts as well as trial courts have jurisdiction to grant temporary alimony or suit money while an appeal is pending, even if an appeal bond has stayed enforcement proceedings to collect support under the appealed district court ruling. However, unless a party seeking temporary alimony pending appeal shows a need for such alimony, the opposing party should have the benefit of the supersedeas bond to stay enforcement of a decree for alimony. In re Marriage of Spiegel, 553 N.W.2d 309 (Iowa 1996).

4. Appellate Waiver Doctrine

Where a party, knowing the facts, voluntarily accepts the benefits or a substantial part thereof, accruing to him under a judgment, order, or decree, such acceptance operates as a waiver or release of errors, and estops him from afterward maintaining an appeal or writ of error to review the judgment, order, or decree or deny the authority which granted it. Kettells v. Assurance Co., 644 N.W.2d 299, 300 (Iowa 2002); 4 C.J.S. Appeal & Error §193, at 267-68 (1993). However, when an amount accepted under a judgment or decree is part of a sum admittedly due and does not cover the amount claimed, its acceptance does not alone constitute acquiescence in the provision of the judgment or decree under which the amount is awarded. In re Marriage of Abild, 243 N.W.2d 541, 543 (Iowa 1976).

5. No Plain Error Rule

Iowa courts have consistently refused to recognize a plain error rule; even issues of constitutional dimension must be preserved. State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987). If a person believes the district court's decision was wrong or was inequitable, he or she must bring these matters to the attention of the district court either before or after judgment is entered and secure a ruling in respect to the issues.

6. Attorney Fees on Appeal

In In re Marriage of Kurtt, 561 N.W.2d 385 (Iowa App. 1997), the Court of Appeals held that in determining whether to award appellate attorney fees, the court considers the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial court on appeal. See also In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987); and In re Marriage of Titterington, 488 N.W.2d 176 (Iowa App. 1992).

7. Final Action

- a. In a question of first impression in Iowa, the Court of Appeals ruled that the thirty-day period for the filing of a writ of certiorari begins on the date set for the sentencing in a contempt proceeding, not the date of the finding of contempt. This Rule will give district courts the ability to fashion remedies prior to sentencing without losing jurisdiction. Rater v. Dist. Court for Polk County, 548 N.W.2d 588 (Iowa App. 1996).
- b. “Final judgment is one that conclusively adjudicates all of the rights of the parties and places the case beyond the power of the court to return the parties to their original positions.” In re Marriage of Welp, 596 N.W.2d 569 (Iowa 1999). See also In re Marriage of Graziano, 573 N.W.2d 598 (Iowa 1998).
- c. Temporary custody orders are not final judgments appealable as a matter of right, but rather are interlocutory orders from which permission to appeal must be obtained from the Supreme Court. In re Marriage of Denly, 590 N.W.2d 48 (Iowa 1999). In so ruling, the Supreme Court overruled In re Marriage of Swanson, 586 N.W.2d 527 and several other cases with similar holdings.

C. CONTEMPT PROCEEDINGS

1. Statutory Provisions

Contempt proceedings to enforce any temporary order or final decree are authorized by Iowa Code Sections 598.23, 665.5 and 236.8. Procedures are governed by Chapter 665.

- a. Chapter 665 provides a comprehensive procedure for contempt proceedings. Section 665.4 permits punitive sanctions for past disobedience to court orders; and Section 665.5 permits coercive sanctions to encourage performance of affirmative acts required by an order. In addition, both punitive and coercive sanctions can be imposed in the same proceeding. Amro v. Iowa District Court for Story County, 429 N.W.2d 135 (Iowa 1988).
- b. Section 598.23(1) limits the maximum punishment for punitive sanctions under Section 665.4 to 30-day jail terms, but the Court can impose more severe sanctions under Section 665.5 for coercive purposes.
- c. Code Section 598.23(A) provides that if a person fails to make payments under a support order or to provide medical support as ordered, the person may be cited and punished by the Court for contempt. The Court may require performance of community service work, or the posting of a cash bond in an amount equivalent to the current arrearages and an additional amount which is equivalent to at least twelve months future support obligations.
- d. Punishment for contempt for converting property creates a debt, but the court is not prevented from punishment for contempt by Iowa Code Section 626.1 which prohibits enforcement of a debt by contempt. Harris v. Iowa Dist. Court for Cherokee County, 584 N.W.2d 562 (Iowa 1998) [former wife punished for selling assets awarded to husband in decree].

2. Contempt Defenses

- a. The laches defense to child support collection may only be used if the payor shows that he was prejudiced by the delay. State ex rel. Holleman v. Stafford, 584 N.W.2d 242, 245 (Iowa 1998). The waiver/estoppel by acquiescence defense may be used when there is an implication that party intended to waive or abandon right.
- b. In re Marriage of Harvey, 523 N.W.2d 755, 757 (Iowa 1994) the Supreme Court held that the former wife was equitably estopped from collecting support judgment because of oral agreement to forego payments. In rare, special circumstances, Courts should apply the doctrine of equitable estoppel to prevent collection of child support where equity clearly requires relief. The basic elements to be proven are: (1) a clear and definite oral agreement; (2) proof that Plaintiff acted to his detriment in reliance thereon; and (3) a finding that the equities entitle Plaintiff to relief. See also In re Marriage of Yanda, 528 N.W.2d 642 (Iowa App. 1994).
- c. Farrell v. Iowa District Court for Polk County, 747 N.W. 2d 789 (Iowa App. 2008). John did not pay his child support for two months because he wanted to get his former wife's attention on joint parenting issues. This type of self-help measure is not a basis for avoiding a contempt citation. Christensen v. Iowa Dist. Ct., 578 N.W.2d 675, 678 (Iowa 1998). Issues of child support and custody or visitation

are independent. Problems with one do not justify withholding of the other. See State ex rel. Wagner v. Wagner, 480 N.W.2d 883, 885 (Iowa 1992).

- d. **In re Marriage of Risbeck**, No. 3-158/12 -1828 (Iowa App. 2013). When a party claims ineffective assistance of counsel, the ultimate concern is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696 (1984)). The party claiming ineffective assistance of counsel must show (1) counsel's performance was deficient, and (2) actual prejudice resulted. Kellie claimed that her attorney in a contempt action allowed her to incriminate herself on the stand, without offering any defense or rationale for her actions. However, Kellie freely admitted in her testimony she willfully violated the court order, feeling justified in her actions. In addition, there was no prejudice because there was ample evidence of her contemptuous conduct in the record independent of her testimony.

3. Right to Court-Appointed Attorney

An indigent cited for contempt is entitled to be represented by counsel in the contempt hearing if there is a significant likelihood that the sentence will include incarceration if the individual is found to be in contempt. In re Marriage of Bruns, 535 N.W.2d 157 (Iowa 1995). See also McNabb v. Osmundson, 315 N.W.2d 9 (Iowa 1982).

4. Burden and Degree of Proof

- a. Only willful disobedience of a court order will justify a conviction for contempt. In this context, a finding of willful disobedience requires evidence of conduct that is intentional and deliberate and contrary to a known duty. Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980). In re Marriage of Schradle, 462 N.W.2d 705 (Iowa App. 1990).
 - (1) The test for determining an ability to pay is not merely whether the contempter is presently working or has current funds or cash on hand, but whether he has any property out of which payment can be made. Even though the withdrawal of these monies would have meant loss of his employee status with the State's retirement fund, the payor's personal finances cannot take priority over his obligations to his children. Christensen v. Iowa Dist. Court, 578 N.W.2d 675 (Iowa 1998). See also McKinley v. Iowa District Court for Polk County, 542 N.W.2d 822, 825 (Iowa 1996).
 - (2) Gimzo v. Iowa Dist. Court, 561 N.W.2d 833 (Iowa App. 1997). Since the payor was not present at the hearing because his employment took him away, the fact that he was employed showed some ability to pay and establishes that some of the non-payment was willful. See also Rater v. Dist. Court for Polk County, 548 N.W.2d 588 (Iowa App. 1996); and Matlock v. Weets, 531 N.W.2d 118 (Iowa 1995).
- b. In a contempt proceeding, the payor alleged that the payee had agreed to defer collection until civil litigation he was involved in was resolved. The Supreme Court held that the alleged agreement might not terminate the support obligation (In re Marriage of Sundholm, 448 N.W.2d 688 (Iowa App. 1989)). However, such an agreement may be considered in determining whether nonpayment was willful. Huyser v. Iowa Dist. Court, 499 N.W.2d 1 (Iowa 1993).

5. Punishment for Contempt

- a. The Supreme Court held that contempt orders may be enforced against victims and non-parties who act (1) with knowledge of the order, and (2) in concert with the person to whom the order is directed ... although we are sympathetic with Henley's plight as a victim, her willful disregard for her own safety cannot deter us from upholding an enforceable order for her protection." Henley v. Iowa Dist. Court for Emmet County, 533 N.W.2d 199, 202-203 (Iowa 1995).
- b. Since the application for contempt did not give clear notice of the multiple accusations, the Court of Appeals directed a new sentence to a term of incarceration of no more than 30 days rather than a separate sentence for each alleged offense. In re Marriage of Bruns, 535 N.W.2d 157 (Iowa 1995).
- c. An Iowa court's contempt power is inherent, but the power to punish may be limited by statute. Iowa Code Section 665.4(2) allows the district court to impose a fine and/or imprisonment in a county jail not exceeding six months. The trial court did not have the power to require an individual to serve his one-half hour jail time, hand-cuffed, in the courtroom. Christensen v. Iowa Dist. Court, 578 N.W.2d 675 (Iowa 1998).
- d. In Gizmo v Iowa Dist. Court, 561 N.W.2d 833 (Iowa App. 1997), the Court of Appeals held that Iowa Code Section 665.5 provides that a person may be imprisoned until he performs an act only if he has the present power to perform the act.
- e. Child Support Contempt Costs. Section 598.24 provides that the Court must tax the cost of the contempt action, including reasonable attorney fees, against the party held in contempt for failure to pay child support for at least six months or for failure to permit visitation. The taxing of costs for other acts of contempt is optional.

D. MODIFICATION OF DECREE

1. Personal Jurisdiction Over Parties

- a. After the dissolution decree is entered, the district court retains subject matter jurisdiction to modify its decree. In re Marriage of Meyer, 285 N.W.2d 10, 11 (Iowa 1979). The parties, however, are entitled to notice and a reasonable opportunity to appear and be heard before changes in the original decree are made. See In re Marriage of Garretson, 487 N.W.2d 366 (Iowa App. 1992); Catholic Charities of Archdiocese of Dubuque vs. Zalesky, 232 N.W.2d 539, 547 (Iowa 1975).
- b. Iowa Code Section 598.21(8) provides that if support payments have been assigned to the State for foster care or medical support, in addition to ADC, the State shall be considered a party to the support order. If notice is not given to the State in a modification proceeding, the modification order is void.

2. Modification Venue

Niles v. Iowa District Court, 683 N.W.2d 539 (Iowa 2004). The parties were divorced in Polk County in 1992, but in 2003 when Randy filed a petition for modification in the Polk County District, he resided in Boone County while his former wife and child had resided in Linn County for over nine years. The Supreme Court overruled the Court of Appeals and held that the county of the original decree continues to have continuing jurisdiction of the case, unless one of the parties files a motion for change of venue under Iowa Code section 598.25 to establish that a county other than the original county is a more appropriate forum for the modification.

3. Substantial Change in Circumstances : A Warning

a. In In re Marriage of Vandergaast, 573 N.W.2d 601 (Iowa App. 1997), “[T]he Supreme Court has discouraged retention of jurisdiction to modify dissolution decrees without a showing of change of circumstances. In re Marriage of Schlenker, 300 N.W.2d 164, 165-66 (Iowa 1981). “The court, when granting a divorce, should not make a mere temporary order for custody when this can be avoided. . . . “We find in future cases that prior to entering any provision into a decree of dissolution allowing for future review of child custody with the necessity of showing change in circumstances, the trial court must require a showing that the case is within the exception circumstances contemplated by the Supreme Court in Schlenker.” Vandergaast at 603.

b. Modification is appropriate only if a material and substantial change in the circumstances has occurred **and** if the change must was not contemplated by the court issuing the original decree. See In re Marriage of Sjulín, 431 N.W.2d 773, 776 (Iowa 1988) and In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977).

4. Property Settlement Not Modifiable

a. The basic principle that property settlements are not subject to modification is well established, and indirect efforts to change the terms of the decree will be resisted. The only grounds upon which the property settlement can ordinarily be modified are those found in Iowa Rule of Civil Procedure 252, necessary to set aside or change any other judgment. In re Marriage of Ruter, 564 N.W.2d 849 (Iowa App. 1997). See also In re Marriage of Knott, 331 N.W.2d 135 (Iowa 1983).

b. In re Marriage of Martin, 641 N.W.2d 203 (Iowa App. 2001) The use of the term "alimony" to describe the nature of a financial obligation in a decree is not conclusive as to whether or not the obligation is modifiable or is part of the property settlement. In re Marriage of Von Glan, 525 N.W.2d 427, 430 (Iowa Ct.App.1994). However, here the decree provided that the obligation would cease upon the death of either party, or upon [recipient's] remarriage, terms which indicated an alimony award.

5. Alimony Modification

a. Limited to Marital Lifestyle. Ordinarily, an alimony payee is not entitled to share in the economic good fortune of his or her spouse after the marriage, but is only entitled to modifications to maintain a style of living comparable to that enjoyed during the marriage. In re Marriage of Schettler, 455 N.W.2d 686 (Iowa App. 1990).

b. Conversion of Rehabilitative to Permanent. In re Marriage of McCurnin, 681 N.W.2d 332 (Iowa 2004). Iowa Code section 598.21(8) allows for a modification of an alimony award

"when there is a substantial change in circumstances." See also In re Marriage of Wessels, 542 N.W.2d 486 (Iowa 1995)[the wife's psychological condition took a drastic downward spiral due to marriage incident]; In re Marriage of Trickey, 589 N.W.2d 753 (Iowa App. 1998)[extended rehabilitative alimony because self-support not achieved].

- c. Impact of Inheritance. An inheritance or a gift received by the alimony recipient after the dissolution can be considered in assessing the need for alimony. In re Marriage of Halbach, 506 N.W.2d 808 (Iowa App. 1993).
- d. Effects of Bankruptcy. The property division and alimony should be considered together in evaluating their individual sufficiency. Bankruptcy attempts to provide the debtor with a "fresh start" in life unhampered by pre-existing debt. Therefore, marriage property settlements are generally not recoverable by the spouse to whom the payments were originally due. However, alimony modification may be appropriate after bankruptcy if its consequences caused a substantial and material change in circumstances not contemplated by the trial court. In re Marriage of Trickey, 589 N.W.2d 753 (Iowa App. 1998).
- e. Cohabitation. Cohabitation can cause changes in a former spouse's financial condition which justify modification or termination of alimony. In In re Marriage of Harvey, 466 N.W.2d 916 (Iowa 1991), the Supreme Court ruled that cohabitation is established when the (1) an unrelated person of the opposite sex is living or residing in the dwelling house and (2) the parties are living together in the manner of husband and wife. The key element of cohabitation is unrestricted access to the home.
- f. Remarriage. The recipient spouse has the burden to show extraordinary circumstances justifying the continuation of the alimony payments after remarriage. In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985). 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. Shima, 360 N.W.2d at 829. See also Johnson v. Johnson, 781 N.W.2d (Iowa 2010).
- g. Relative Change In Economic Circumstances. **In re Michael, No. 12-0912 (Iowa 2013)**. The 1998 support order required Kenneth to pay alimony to Melissa in the amount of \$480.00 week; and he was required to provide medical insurance for her. Since that time, he changed jobs; and though his salary grew from \$78,000 to \$85,000, he no longer received large bonuses. Twelve years later, his health was deteriorating and his employment future was less secure because his new job was more physically demanding. In addition, the court noted that inflation and increasing costs of living made Kenneth's 2011 compensation significantly smaller in real terms than his 1998 compensation. See, e.g., Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974) . At the time of the modification trial, Melissa earned about \$42,000, more than twice what she earned at the time of the 1998 modification; and she received substantial medical, dental, and vision insurance coverage. The court concluded that a substantial change in circumstances had occurred. Kenneth faced new uncertainty regarding his employment and his income was smaller, relative to his income at the time of the 1998 modification. In addition, the court found that Melissa's substantial increase in income and her accrual of significant benefits were not contemplated at the time of the last support order. See Iowa Code § 598.21C(1)(a); see also In re Marriage of McCurnin, 681 N.W.2d 322 (Iowa 2004) and American Law Institute, *Principles of the Law of Family Dissolution* § 5.08 cmt. d, at 970 (2000) [explaining modification may be appropriate when "the former spouses' living standards are less disparate than expected because of a decline in the obligor's income"]. Though Melissa's

current income remains significantly less than Kenneth's, the changes in the relative positions of the parties justified the modification of Kenneth's weekly support obligation to \$285 per week, and the termination of his medical insurance payment obligation.

- h. Illness. **In re Sisson, No. 12-1023 (Iowa, 2014).** The original decree required Travis to pay alimony of \$1,500 per month for eighteen months to Afronia. She planned to become a cosmetologist. However, shortly after the divorce, Afronia discovered that she had incurable blood cancer; so she cancelled her education plans and returned to work as a sales clerk. Travis argued that Afronia voluntarily reduced her income; but the Court concluded that she had suffered a substantial reduction in her earning capacity due to her medical condition. The change is permanent and will continue to adversely impact her earning capacity as her disease progresses. Provisions for the payment of support in a decree of dissolution of marriage are normally final as to the circumstances existing at the time. Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973). However, courts are permitted to "modify child, spousal, or medical support orders when there is a substantial change in circumstances." Iowa Code § 598.21C(1); and the authority of courts to modify spousal support also includes the power to change the duration of the support from a finite period to an indefinite period if the circumstances to support modification are "extraordinary" and render the original award grossly unfair. See In re Marriage of Wessels, 542 N.W.2d 486, 489 (Iowa 1995) and In re Marriage of Marshall, 394 N.W.2d 392, 396-97 (Iowa 1986). Since Afronia's life expectancy is between five and seven years from diagnosis, the court decided that she should be required to use some of the assets she has maintained for her retirement years as a source of funds to be used for current living expense. Under all the circumstances, the Court increased the spousal support to \$1,600 per month and modified the duration from eighteen months to the remainder of her life.

6. Child Support Modification

a. Duty to Disclose Income

The father resisted an increase in child support because he said his income was actually much higher at the time the Decree was entered than he had stated in his Financial Statement to his wife and the Trial Court. The Supreme Court ruled that the Court would use the amount shown on the original Financial Statement for its determination of substantial change. "[The father] benefitted from [the mother's] lack of knowledge once. We will not allow him to benefit a second time." In re Marriage of Guyer, 522 N.W.2d 818 (Iowa 1994).

b. Redetermination of Paternity

Section 598.21(4A) and Section 600B.41A permit the modification of a decree to redetermine paternity and cancel child support, subject to certain conditions and limitations.

Hendrickson v. Hendrickson, No. 3-848 / 13-0540 (Iowa App., 2013). Katherine and Corey married in 1999; and in 2001, they signed a paternity affidavit pursuant to Iowa Code section 252A.3A (2001) establishing Corey as the child's father. However, both knew when they signed the affidavit that Corey was not the child's biological father. In February, 2012, when the child was fourteen years old, Katherine filed a petition to disestablish Corey's paternity and to establish Dennis Vaughn as the child's father—though she and Corey were still married and planned to continue their relationship with each other. In addition, they intended that Corey's parental relationship with the child would continue. Katherine also sought payment from Dennis for future and past support for the minor child.

The court held that though Iowa Code section 600B.41A permits disestablishment of paternity when paternity is established through “fraud, duress, or material mistake of fact”, the legislature intended chapter 600B to be a means to force parents to comply with their obligation to support their children.. Callender v. Skiles, 591 N.W.2d 182, 184 (Iowa 1999). The statute does not require the court to become an accomplice to Katherine in her efforts to obtain child support from a man whose connection to her child she chose not to acknowledge for fourteen years. The fraud required to activate Iowa Code section 600B.41A(3)(f)(2) is “[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.” Black’s Law Dictionary 731 (9th ed. 2009). Fraud must induce a party to sign the paternity affidavit. Fraud on the State and the biological parent by the party signing the affidavit is contrary to the purpose of the statute.

c. Temporary and Retroactive Modification

- (1) Section 598.21(8) provides that “... a modification proceeding may be retroactively modified only from three months after the date the notice of the pending petition for modification is served on the opposing party. [and] ... any retroactive modification which increases the amount of child support or any order for accrued support under this paragraph shall include a periodic payment plan.” In In re Marriage of Barker, 600 N.W.2d 321 (Iowa 1999), the Court ruled that “although a support order may be retroactively increased, it may not be retroactively decreased ... prior to the time that modification is ordered.” Barker, at 223-224. However, the Court further held that if the accrued support obligation is beyond the obligor’s ability to pay in addition to current Guideline support, the Court may reduce the obligor’s future support to an amount less than the Guidelines which the obligor can afford to pay along with a payment on the back amount, if the children will not suffer from lack of support.
- (2) "However, saying that a court may order higher support payments to be paid retroactively is not the same as saying that it must do so. Where the record is not sufficient to support a finding that the grounds for modification existed at the time of the filing of the modification petition, the order for increased support should not be payable retroactively." In re Marriage of Koepke, 483 N.W.2d 612 (Iowa App. 1992). See also, In re Marriage of Ober, 538 N.W.2d 310 (Iowa App. 1995); and In re Marriage of Bircher, 535 N.W.2d 137 (Iowa App. 1995).
- (3) Section 598.21C(4) authorizes the trial court to temporarily modify a child support order during a modification proceeding after a temporary hearing. The statute applies to support orders entered under any Iowa statute.
- (4) In In re Marriage of Griffey, 629 N.W.2d 832 (Iowa 2001), the Supreme Court reaffirmed the long-standing principle of Iowa law which prohibits modification of past-due support payments. See Newman v. Newman, 451 N.W.2d 843, 844-45 (Iowa 1990). A child support judgment was referred to Texas for collection, all payments were vested and not subject to modification by an Iowa court. The court held that Texas could not enter an order reducing the child support since an Iowa court could not do so.

d. Application of Guidelines to Modifications

(1) Trends

The Supreme Court has noted several principles regarding child support modification which can be gleaned from recent cases: (1) there must be a substantial and material change in circumstances occurring after the entry of the Decree; (2) there is a growing reluctance to modify Decree; (3) not every change in circumstances is sufficient; (4) continued enforcement of the original Decree would create a positive wrong or injustice because of the changed condition; current inability to pay is less important than the long-range capacity to earn money; the change must be permanent or continuous; (5) the change in circumstances must not have been within the contemplation of the trial court when the last support order was entered; and (6) any voluntariness in diminished earning capacity is an impediment to modification. In re Marriage of Walters, 575 N.W.2d 739 (Iowa 1998). See also In re Marriage of Maher, 596 N.W.2d 561 (Iowa 1999); State Ex. Rel. LeClere v. Jennings, 523 N.W.2d 306, 309 (Iowa App. 1994); and In re Marriage of Vetterneck, 334 N.W.2d 761 (Iowa 1983).'

(2) Burden of Proof

The party seeking modification has the burden to prove that a substantial change in circumstances has occurred making it equitable and just that different terms be fixed. See In re Marriage of Lee, 486 N.W.2d 302 (Iowa 1992).

(3) Determination of Substantial Change: The 10% Rule

Section 598.21(C)(2)(a) now provides that a substantial change in circumstances exists when the Court order for child support deviates by 10% or more from the amount which would be due pursuant to the most current child support guidelines. In re Marriage of Nelson, 570 N.W.2d 103 (Iowa 1997). See also In re Marriage of Wilson, 572 N.W.2d 155 (Iowa 1997)[applies the 10% Rule to split custody cases.]; and In re Marriage of Bolick, 539 N.W.2d 357 (Iowa 1995)[10% Rule does not apply in the discretionary range: where incomes \$10,000+].

(4) Changes in Net Worth Can Justify Departure from Guidelines

"Certain factors, including changes in net worth, can justify departure from the guidelines. See In re Marriage of Lalone, 468 N.W.2d 695, 697. [However], Michael as a farmer relies on his assets to assist him in producing income. There is no showing he has not accurately reported his income." Though Father's net worth had increased from \$100,000 to \$260,000, while Mother's assets had declined, the Court here found no justification to vary from the Guidelines. In re Marriage of Thede, 568 N.W.2d 59 (Iowa App. 1997).

(5) Stepparent's Assets and Income

In In re the Marriage of Shivers, 557 N.W.2d 532 (Iowa App. 1996) the Court held that the assets and income of the new spouses of divorced persons must be revealed and may be considered in certain circumstances in modification proceedings: "Although other familial obligations (and assets) do not automatically justify a departure from the Guidelines, they are factors to be taken under consideration when determining whether the Guidelines should be deviated from and whether the Court, in fixing support, has achieved justice between the parties." Shivers, at 534. See also In re Marriage of Gehl, 486 N.W.2d 284 (Iowa 1992);

In re Marriage of Dawson, 467 N.W.2d 271, 276 (Iowa 1991); State ex rel. Epps v. Epps, 473 N.W.2d 56, 59 (Iowa 1991).

f. Dependent Exemptions

Dependent exemptions are the proper subject for modification since they are directly related to the matter of child support. The decree can be modified with respect to deductions even if they were not mentioned in the original decree and if the only change in circumstances established is the change of IRS regulations. In re Marriage of Feustel, 467 N.W.2d 261 (Iowa 1991). See also In re Marriage of Hobben, 260 N.W.2d 401 (Iowa 1977); In re Marriage of Eglseeder, 448 N.W.2d 703 (Iowa App. 1989); In re Marriage of Rolek, 555 N.W.2d 675 (Iowa 1996).

g. Voluntary Income Reduction

- (1) In In re Marriage of Rietz, 585 N.W.2d 226 (Iowa App. 1998), the Court of Appeals took a new look at voluntariness: “. . . a primary factor to be considered in determining whether support obligations should be modified is whether the obligor's reduction in income and earning capacity is the result of activity which, although voluntary, was done with an improper intent to deprive his or her dependents for support.” See also In re Marriage of Walters, 575 N.W.2d 739 (Iowa 1998) [conviction for embezzlement was based on voluntary conduct, but not done with intent to avoid support obligation]; In re Marriage of McKenzie, 709 N.W.2d 528, 533 (Iowa 2006) [a parent may not place selfish desires over the welfare of a child].
- (2) Though not specifically overruled, cases which have refused modification when intentional conduct reduced income without considering intent appear to be less important. See In re Marriage of Hester, 565 N.W.2d 351 (Iowa App. 1997); In re Marriage of Dawson, 467 N.W.2d 271 (Iowa 1991); and In re Marriage of Flattery, 537 N.W.2d 801 (Iowa App. 1995).

h. Higher Education

- (1) Even though the original decree did not specifically provide for the parents to pay for college, the Court has jurisdiction to modify child support to continue through the child's education pursuant to Iowa Code Section 598.1(2). In re Marriage of Holcomb, 457 N.W.2d 619 (Iowa App. 1990).
- (2) Chronic fatigue syndrome constituted a substantial change and the five to seven year expected course of the illness was long enough in a 57-year old man to constitute a permanent change which justified termination of the father's obligation to contribute to the child's college costs. In re Marriage of Cooper, 524 N.W.2d 204 (Iowa App. 1994).

i. Modification Attorney Fees

The Court of Appeals ordered the child support payee to pay \$600.00 towards the payor's \$1,200.00 trial fee and \$400.00 towards his \$816.00 appellate fee and the appellate court costs where she knew or should have known that she had made a mistake in seeking a modification to increase the child support after discovery procedures early in the proceeding. In re Marriage of Roerig, 503 N.W.2d 620 (Iowa App. 1993).

7. Custody Modification

a. Jurisdiction to Modify Out-of-State Orders

A significant case, In re Jorgensen, 623 N.W.2d 826 (Iowa 2001), the Supreme Court sets out the step by step procedure which is required to determine whether an Iowa Court has jurisdiction to modify child custody decision made in another state. The first step in the Jorgensen analysis to determine whether Iowa can modify an out-of-state custody order is to determine whether the federal Parental Kidnaping Prevention Act [PKPA: U.S.C. Section 1738A(c)(2)] requires Iowa to give Full Faith and Credit to the out-of-state decision. If the PKPA does not require Iowa to enforce the out of state order, the second step is to determine whether Iowa Code Chapter 598A, the Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA], requires Iowa to honor the out-of-state custody order.

b. Burden of Proof

- (1) A heavy burden is placed on the party seeking modification of custody based on the principle that once custody is fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Bergman, 466 N.W.2d 274 (Iowa App. 1990). In a modification of custody, the question is not which home is better, but whether the moving party can offer superior care. If both parties can equally minister to the children, custody should not change. The burden for the party petitioning for a change of custody is heavy. In re Marriage of Rosenfeld, 524 N.W.2d 212 (Iowa App. 1994). See also In re Marriage of Rife, 529 N.W.2d 280 (Iowa 1995); In re Marriage of Gravatt, 371 N.W.2d 836, 838-40 (Iowa Ct.App.1985); In re Marriage of Jahnel, 506 N.W.2d 473, 474 (Iowa Ct.App.1993).
- (2) In In re Marriage of Thielges, 623 N.W.2d 232 (Iowa App. 2000) The Court held that Section 598.21(8A) which specifies that a substantial change in circumstances occurs if a child's residence is relocated 150 miles or more does not change the burdens of proof applicable to custody modification requests. If the non-custodial parent proves only a substantial change in circumstances, Section 598.21(8A) explicitly contemplates only a visitation modification. "Our case law places greater importance on the stability of the relationship between children and their primary caregiver than on the physical setting of the children." Thielges at 236

c. Relocation

- (1) The parent having physical care of the children must, as between the parties, have the final say concerning where their home will be. This authority is implicit in the right and responsibility to provide the principle home for the children. In re Marriage of Westcott, 471 N.W.2d 73 (Iowa App. 1991). See also In re Marriage of Frederici, 338 N.W.2d 156 (Iowa 1983). But see In re Marriage of Kleist, 538 N.W.2d 273 (Iowa 1995).
- (2) However, a change in residence involving a substantial distance can frustrate the important underlying goal that the children should be assured maximum continuing physical and emotional contact with both parents. A change of residence by the primary caretaker may justify a change of custody if the reasons for the move and the quality of the new environment do not outweigh the adverse impact of the move on the children. Dale v. Pearson, 555 N.W.2d 243 (Iowa App. 1996). See also In

re Marriage of Scott, 457 N.W.2d 29 (Iowa App. 1990); In re Marriage of Malloy, 687 N.W.2d 110, 113 (Iowa Ct.App.2004).

- (3) 150-Mile Rule. Subsection 598.21D provides that a substantial change in circumstances is established if a parent is to relocate the residence of a minor child 150 miles or more from the residence at the time custody was granted. Though a substantial change has occurred, the non-custodial parent must still show that he can render superior care. In re Marriage of Mayfield, 577 N.W.2d 872 (Iowa App. 1998). See also In re Marriage of Crotty, 584 N.W.2d 714 (Iowa App. 1998).
- (4) When the party with primary physical care plans to relocate, the burden is on the non-custodial parent to demonstrate how the move will detrimentally affect the child's best interests. In re Marriage of Montgomery, 521 N.W.2d 471 (Iowa App. 1994). See also In re Marriage of Smith, 491 N.W.2d 538 (Iowa App. 1992); In re Marriage of Witzenburg, 489 N.W.2d 34 (Iowa App. 1992).

d. Predetermined Definition of Substantial Change Discouraged

In their dissolution decree, the parties stipulated that if the primary caretaker moved out of the current school district, a substantial change in circumstances regarding modification of custody of the minor children would occur. We strongly disapprove of custody provisions, whether stipulated by the parties or mandated by the Court, that predetermine what future circumstances will warrant a future modification. A court should not try to predict the future for families, nor should it try to limit or control their actions by such provisions. In re Marriage of Thielges, 623 N.W.2d 232 (Iowa App. 2000).

e. Child's Preference/Problems

- (1) When a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling, may be considered by the Court, with other relevant factors, in determining child custody rights. However, a child's preference is entitled to less weight in a modification action than would be given in an original custody proceeding. In re Marriage of Thielges, 623 N.W.2d 232 (Iowa App. 2000) Here, the evidence showed that the 14-year old daughter could adjust to either custody arrangement and that her preference had more to do with her Iowa friends and school than with her parents. Given these circumstances, the court decided not to separate her from her siblings and her current custodial parent. See also In re Marriage of Hunt, 476 N.W.2d 99 (Iowa App. 1991); In re Marriage of Mayfield, 577 N.W.2d 872, 873 (Iowa App. 1998); and In re Marriage of Jahnel, 506 N.W.2d 473 (Iowa App. 1993) [the child's expressed preference is diminished where there is evidence of manipulation or domination by the chosen parent].
- (2) The custodial parent cannot be held responsible for defects in a child's personality: some character traits develop despite the best efforts of the best parents. In re Marriage of Kimmerle, 447 N.W.2d 143 (Iowa App. 1989).

f. More Stable Lifestyle

Custody was granted to the father who petitioned to modify after he had remarried and established a stable home. The mother had drinking problems, had a series of live-in boyfriends, and moved often. In re Marriage of Rierison, 537 N.W.2d 806 (Iowa App. 1995).

In re Kelley, No. 3-785 / 13-0413 (Iowa App., 2013). Eva contended that physical care of the child should not have been changed. Dean had a history of criminal activities and substance abuse issues, but had no criminal involvement since 2000. The Court found that Dean and his wife had learned from their mistakes and matured. On the other hand, while in Eva's care, the child had performed poorly in school, including high levels of unexcused absences and tardies. In addition, Evan moved many times, had multiple, unstable, ongoing relationships, and she had mental issues.

Bates v. Myers, No. 3-980 / 13-0469 (Iowa App., 2013). Valerie Bates attempted suicide in 2012; and Tim Myers immediately gained custody of their child and filed a petition to modify custody. Bates argued that Myers was not a suitable custody because he had been convicted twice for domestic abuse. One incident occurred in the presence of the child. A history of domestic abuse is an important consideration. See In re Marriage of Forbes, 570, N.W.2d 757, 759 (Iowa 1997). A court must weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom directed." *Id.* in making the physical care decision. However, the Supreme Court held that the district court's failure to mention the domestic abuse history in its decision was not fatal. As always, the primary concern is the best interests of the child. In re Marriage of Junkins, 240 N.W.2d 667, 668 (Iowa 1976). Considering the significant risk to the safety of the child created by Bates's mental health condition, the Court found that physical care of the child should continue with Myers despite the history of domestic violence. Bates's attempt to punish her husband by attempting suicide indicates the needs of the child were not paramount. Until Bates has adequately addressed her mental health issues, the best interests of the child will not be served by being in her physical care.

g. Character of Companion

If a parent seeks to establish a home with another adult, that adult's background and his or her relationship with the children becomes a significant factor in a custody dispute. In re Marriage of Decker, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003). The companion will have an impact on the children's lives, and the type of relationship the parent has sought to establish and the manner in which he or she has established it is an indication of the parent's priorities.

h. Denial of Visitation/Contact

- (1) Iowa courts do not tolerate hostility exhibited by one parent toward the other. See In re Marriage of Rosenfeld, 524 N.W.2d 212, 215 (Iowa App. 1994); see also In re Marriage of Udelhofen, 444 N.W.2d 473, 474-76 (Iowa 1989); In re Marriage of Leyda, 355 N.W.2d 862, 865-67 (Iowa 1984); In re Marriage of Wedemeyer, 475 N.W.2d 657, 659-60 (Iowa Ct. App. 1991).
- (2) Custody can be changed where the custodial parent substantially and unreasonably interferes with the rights of the non-custodial parent to visit and contact the children. In re Marriage of Clifford, 515 N.W.2d 559 (Iowa App. 1994). See also In re Marriage of Wedemeyer, 475 N.W.2d 657 (Iowa App. 1991).
- (3) Section 598.23(2)(b) gives the Court the power to modify visitation to compensate with lost visitation, to establish joint custody, and to transfer custody as punishment for contempt. Kirk v. Iowa Dist. Court, 508 N.W.2d 105 (Iowa App. 1993).

i. Breakdown of Joint Physical Care.

- (1) **In re Marriage of Barnhart**, No. 386/12-2251 (Iowa App., 2013), Tami sought to modify the joint physical care arrangement put in place by stipulation in the dissolution decree.

Tami testified that Bradley had promised not to put the children in the middle of their disputes, but that he was calling her and her husband, Jason, profane names to the children and that he threatened to physically harm Jason and burn down Jason's house. Bradley has also told the children they must love just one of their parents and choose between them. The Court noted that a joint physical care arrangement only works if the parties communicate effectively about the children. In re Marriage of Hansen, 733 N.W.2d 683, 700 (Iowa 2007). The parties must respect their former spouse and their children; recognize that cooperation and communication are important to the children's welfare; and put that welfare ahead of their own needs and petty differences. Melchiori v. Kooi, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002), 44 N.W.2d at 368. A social worker, after meeting with the children two or three times, suggested to Tami to consider modifying to obtain primary physical care because the social worker observed "emotional abuse to the children perpetrated by their father. The Court concluded that evidence offered at trial showed that Bradley at this point is unable to support the children's relationship with Tami and approved primary care to her. See In re Marriage of Crotty, 584 N.W.2d 714, 716 (Iowa Ct. App. 1998); see also Iowa Code § 598.41 (2011)

- (2) **Bishop v. Leighty, No 3-995 / 12-1732 (Iowa App., 2013).** Eric Leighty and Barbara Bishop's March 2010 paternity decree established a joint physical parenting plan. However, the parties' ability to get along and communicate effectively about their child steadily decreased from the time of the decree's entry until Barbara petitioned for modification in January, 2012. The decree, which was the result of a joint agreement between the parties, envisioned a level of cooperation and communication that is not being achieved. The record of this case, showed serious conflict and failure to communicate constructively and required the modification of the joint shared care arrangement. See In re Marriage of Rolek, 555 N.W.2d 675, 677 (Iowa 1996) (holding modification of a decree granting joint physical care is appropriate when the parties' actions indicate that they are no longer able to cooperate).
- (3) **In re Hinshaw, No. 3-416/12-1783 (Iowa App., 2013).** Lori obtained a modification of the joint physical care parenting plan which originally provided for two-day, two-day, three-day exchanges of the twin girls. The new plan was alternate week parenting. She testified that the transfer of custody were "very disruptive" to the girls and transition days were especially emotional. She explained the short turnaround diminished the quality of interaction. James argued there he wanted to minimize the time between visits and that there was no evidence that the children were harmed by the original schedule. The court was convinced by Lori's testimony that the twins were living out of a suitcase: bringing belongings back and forth and never really get comfortable in either home. The Court and parents must focus on the girls' best interest. In determining a physical care award, the paramount concern is the children's best interest. In re Marriage of Gensley, 777 N.W.2d 705, 714 (Iowa Ct. App. 2009); see Iowa Code § 598.41. Our concern must not be based on perceived fairness to the spouses, but what is in the best interest of the children, seeking an environment most likely to foster a long-term healthy environment, both physically and mentally. In re Marriage of Hansen, 733 N.W. at 695.

8. Visitation Modification

- a. Appellate courts in this state have consistently held that modification of visitation rights shall occur upon a showing of a significant (not substantial) change in circumstances since the previous Order. The degree of change required for a modification of visitation rights is much less than the change required in a modification of custody. In re Marriage of Rykhoek, 525 N.W.2d 1 (Iowa App. 1994).

- (1) **In re Leuer**, No. 3-346/12-1663 (Iowa App., 2013). In 2008, after a year of negotiation, Sandra and Scott, worked out a stipulation intended to deal with all future parenting disputes. Sandra filed a petition to modify the visitation provisions. Sandra sought to gain more inaction between the child and his half sister; argued that Scott's liberal visitation made regular extra-curricular activities difficult and that, as custodial parent, she should have more control over her son's activities, education, and life as a whole. However, she provided little evidence that the current schedule had an adverse impact on their son. The Court denied the petition. Even though a modification of a visitation schedule is less demanding than an actual change in custody, there must be a change in circumstances to support the modification. **In re Marriage of Thielges**, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). The best interest of the child is always paramount when issues affecting children are involved. **In re Marriage of Downing**, 432 N.W.2d 692, 693 (Iowa Ct. App. 1988). Primarily the liberal visitation is inconvenient to Sandra. Although there may be situations where too much visitation with a noncustodial parent adversely affects the child, they are rare.
 - (2) **In re Kilfoyle**, No 3-380/12-1775 (Iowa App., 2013). At the time of the 2008 modification, Brandon was on active duty serving abroad. His visitation with Raegan then required international travel through a major airport. He is now stationed for the foreseeable future domestically. He sought to change the visitation provisions, but the Court ruled that his eventual return to the United States was part of the 2008 plan: provisions were included for variation in his visitation rights in the future, depending on different possible distances from Raegan's home. Therefore, this does not represent a material change in circumstances unforeseen at the time of the decree. "To constitute a substantial change in circumstances, the changed conditions must be material and substantial, not trivial, more or less permanent or continuous, not temporary, and must be such as were not within the knowledge or contemplation of the court when the decree was entered" **In re Marriage of Pals**, 714 N.W.2d 644, 646 (Iowa 2006). This standard follows the criteria used in actions to modify child custody, except a much less extensive change in circumstances is generally required in visitation cases." **In re Marriage of Salmon**, 519 N.W.2d 94, 95-96 (Iowa Ct. App. 1994).
- b. However, in **Nicolou v. Clements**, 516 N.W.2d 905 (Iowa App. 1994), the Court held that a parent cannot modify based on negative changes created by the Petitioner. The court ruled that to allow the custodial parent to instill such anxieties and then use that as a justification to block visitation would open a Pandora's Box of abuse which no court could tolerate.
- c. Children's best interest are generally served if they have maximum continuous physical and emotional contact with both of their parents. See Iowa Code Sections 598.1(1) and 598.41(1). However, such contact can be assured by means other than a traditional alternating-weekends visitation schedule. For example, Section 598.21(8A) states that when a court determines a long-distance relocation constitutes a substantial change in circumstances, the court can modify the custody order at issue by granting the non-relocating parent. An extended visitation during summer visitations and school breaks and scheduled telephone contact. **In re Marriage of Thielges**, 623 N.W.2d 232 (Iowa App. 2000). Here, the court granted the father eight weeks of summer visitation, half of the winter school break, alternate Thanksgiving and spring breaks, reasonable visitation whenever one parent visits the other's home state, and liberal telephone and Internet communications.

- d. **In re Marriage of Richardson**, No. 3-512/12-1461 (Iowa App., 2013). After the Missouri divorce, when Crystal moved to Dyersville from Missouri, she and Jamie agreed that she would be responsible for all visitation transportation to and from Kansas City. She then married, became full-time employed, and had two more children. She alleged, and the guardian ad litem agreed, that the previous schedule had become unworkable in light of the amount of time spent traveling and their son's desire to become more involved in extracurricular activities in his home community. The Court of Appeals approved the modification which requires the parties to meet in Des Moines, Iowa, the halfway point; and creates more time with Jamie and less conflict over dates. The petitioner has a lesser burden to justify a modification of visitation provisions than a modification of custody. Nicolou v. Clements, 516 N.W.2d 905, 906 (Iowa Ct. App. 1994). Crystal had satisfied her obligation to show that there had been a change in circumstances since the last modification judgment, not a substantial change in circumstances; and she sustained the burden of showing that the requested change is in the best interest of the child. In re Marriage of Salmon, 519 N.W.2d 94, 95-96 (Iowa Ct. App 1994).

III. ACTIONS TO COMPEL SUPPORT

A. PATERNITY PROCEEDINGS

1. Methods to Establish Paternity

There are three methods to establish paternity. Paternity may be established (1) by court or administrative order, (2) admission by the alleged father in court upon concurrence of the mother, or (3) by affidavit of paternity.

2. Limitations on Actions

- a. Statute of Limitations. Section 600B.33 sets the time limitations for paternity and support proceedings. An action to establish paternity and support under this chapter may be brought within one year after the child attains adulthood.
- b. Estoppel and Laches. Markey v. Carney, 705 N.W.2d 13 (Iowa 2005). A delay in bringing an action may be reasonable when lack of funds precludes a party from retaining a lawyer to pursue a claim. The Court held that to determine retroactive child support, the proper analysis starts with the amount that would have been paid under the guidelines if there had been no delay.

3. Proof

- a. Burden of Proof. Paternity must be proven by a preponderance of the evidence, but the law presumes the legitimacy of children born during a marriage. The practical effect is to place the burden of proving nonpaternity on the putative father. In re Marriage of Hopkins, 453 N.W.2d 232 (Iowa App. 1990). Where there was no scientific evidence and no proof of "lack of access" the husband failed to show nonpaternity by clear, strong evidence.
- b. Blood and Genetic Tests. Section 600B.41 provides that a verified expert's report shall be admitted at trial. The court testimony by the expert is not

required. Results that show statistical probability of paternity are admissible. A rebuttable presumption is triggered by results of 95% or higher, and a motion or partial summary judgment will be granted unless a written challenge has been filed within twenty days after the expert's report has been filed with the Clerk of Court. The burden shifts to the alleged father to disprove paternity, and the presumption can be rebutted only by clear and convincing evidence. If the results of the expert's report are less than 95%, the Court can weigh the test results along with other evidence.

- c. Abandonment. **Ward v. Robinson**, No. 3-153/12-1518 (Iowa App., 2013). Mary Beth Robinson and Emory Ward had a child in 2005. In 2011, Ward filed a petition to establish paternity, and Mary Beth filed an action to terminate Ward's parental rights on the ground that he abandoned the child. Ward lived in California and Mary Beth Robinson lived in Texas, and then Iowa. He visited the child four times in 2007, five times in 2008, three times in 2009, and twice in 2010. The parents' relationship deteriorated in 2011. Ward also gave Mary Beth cash to assist with the child's support. She had received a total of \$17,400 in voluntary payments from Ward, plus gifts and cards for the child. Termination of parental rights due to the abandonment of a minor child under Iowa Code § 600A.2(19) requires that a parent be shown to have rejected the duties imposed by the parent-child relationship, . . . which may be evinced by the person, while being able to do so, making no provision or making only a marginal effort to provide for the support of the child or to communicate with the child. The Court refused to find that Ward had abandoned the child: He did not "reject[] the duties imposed by the parent-child relationship. He visited the child as much as he could in light of the distance and expense, and he provided monetary contributions whenever he was able.

4. Right of Putative Father to Establish Paternity

- a. The Supreme Court found in Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999) that the Due Process Clause of the Iowa Constitution makes Iowa Code Section 600B.41A unconstitutional to the extent it denied a putative father standing to prove his fatherhood: That right, however, like other constitutional rights, can be waived, and this may be the threshold question to consider before addressing paternity. If the challenge is not a serious and timely expression of a meaningful desire to establish parenting responsibility, it may be lost.
- b. Huisman v Miedema, 644 NW 2d 321 (Iowa 2002) In In re B.G.C., 496 N.W.2d 239 (1992). Here, the Court found that the biological father had waived his right to challenge an established father's paternity because for more than seven years, the biological father let another man raise a child that he knew was possibly his own because it served his need to keep his affair with the child's mother a secret.

5. Setting Aside Paternity Order

- a. Section 598.21(4A) provides that redeterminations of paternity may be considered if all of the statutory requirements are met. The modification of the paternity and child support judgment can be prospective only and cannot eliminate accrued or delinquent support.
- b. Iowa Code Section 600B.41A permits a father whose paternity has been legally established to overcome that legal presumption when genetic testing indicates he is not the biological father. If genetic test results show that the established father is not the biological father, the established father's rights and responsibilities are terminated unless the established father requests that paternity be preserved and the court finds that this is in the child's best

interests. The statute cancels the result of Dye v. Geiger, 554 N.W.2d 538 (Iowa 1996) which continued the obligations of the established father after his paternity was disproved.

- c. The legislature has explicitly made the appointment of a guardian ad litem a condition precedent to a finding that paternity should be overcome. *See* Iowa Code §600B.41A(3)(d). This requirement is one of six statutory conditions to overcoming the paternity that "must be satisfied by the petitioner." Dye v. Geiger, 554 N.W.2d at 539. The guardian ad litem's role assures that the biological father of the child is correctly identified, and that the appropriate individual is either established or disestablished as a parent of the child. This assures the child not only a right to support from her biological parent, but also her right to inherit from, and receive other economic benefits upon, his death.

6. Attorney Fees in Paternity Proceedings.

Section 600B.26 provides for the award of attorney fees to the prevailing party in actions to determine custody and visitation under the chapter or to modify a paternity custody, visitation, or support order. Previously, the statute only permitted fee awards in actions to establish paternity.

7. False Allegation of Paternity: Actionable Fraud

Dier v. Peters, 815 NW2d 1 (Iowa, 2012). Joseph Dier made voluntary contributions to Cassandra Peters based on her alleged fraudulent representation that he was the father of her child. Dier brought a common law action for fraud, seeking as damages for the money he paid after he learned that he was not the father. The Supreme Court noted that Iowa courts have held that a parents cannot obtain retroactive relief from court-ordered child support after paternity is disproved. *See State ex rel. Baumgartner v. Wilcox*, 532 N.W.2d 774, 776-77 (Iowa 1995). However, the Court held that Wilcox does not control this case because Dier's cause of action was based on the concepts of traditional fraud law: (1) [the] defendant made a representation to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended to deceive the plaintiff, (6) the plaintiff acted in [justifiable] reliance on the truth of the representation , and (7) the representation was a proximate cause of [the] plaintiff's damages. *See Spreitzer v. Hawkeye State Bank*, 779 N.W.2d; Rosen v. Bd. of Med. Exam'rs, 539 N.W.2d 345, 350 (Iowa 1995).

B. UNIFORM INTERSTATE FAMILY SUPPORT ACT

1. Uniform Support of Dependents Law Replaced

- a. Chapter 252K, the Uniform Interstate Family Support Act (UIFSA), simplifies the process of child support enforcement and modification and reduces confusion surrounding the multiplicity of orders for child support growing out of the divorce process in our increasingly mobile society.
- b. The basic approach of UIFSA is summarized by the phrase: One Order, One Place, One Time": Section 252K.205 provides that an order, once entered, is the only order for child support that may be enforced unless the obligor, individual obligee, and the child have all gone to another state. If the order is modified by another state, then that order becomes the "One Order." The parties can confer jurisdiction on another state by mutual consent.

2. Statute of Limitations

The time for bringing a Chapter 252A action for a child was extended by operation of Section 614.8 which provides that minors "shall have one year from and after termination" of their minority to commence such actions. Stearns v. Kean, 303 N.W. 2d 408, 413 (Iowa 1981).

3. Retroactive Support

Relying upon The Code sections 252A.4(2) and 252A.5(5) and the rationale of Brown v. Brown, 269 N.W.2d 819 (Iowa 1978) the Court has approved an award of past child support, retroactively, in addition to current support. Foreman v. Wilcox, 305 N.W.2d 703 (Iowa 1981). See also, State ex. rel Schaaf v. Jones, 515 N.W.2d 568 (Iowa App. 1994). See also, State Dept. of Human Services v. Burge, 503 N.W.2d 413 (Iowa 1993).

4. Both Parents are Liable

- a. Section 252A.3(2) provides that both parents have obligations to support their children, not necessarily equally. In State of S.D. v. Riemenschneider, 462 N.W.2d 686 (Iowa App. 1990).
- b. In actions brought by the state for reimbursement for public assistance, the state is entitled to recover in its own right without regard to terms of court orders between the parents. State Ex. Rel. Heidick v. Balch, 533 N.W.2d 209 (Iowa 1995).
- c. Section 252C.2(2) prevents a support debt from accruing against a responsible person for the period during which that person receives public assistance. Therefore, though the AFDC father had a support obligation accruing while living with his wife and children, the Department of Human Services is precluded from collecting the assigned support. Hundt v. Iowa Dept. of Human Services, 545 N.W.2d 306 (Iowa 1996).

5. Enforcement Quashed/Denial of Child Contact

- a. "The principle purpose of the uniform support laws is to simplify and expedite the interstate enforcement of child support awards...the object of the act would be destroyed if litigants could use it as a vehicle for litigating other divorce-related issues Beneveneti v. Beneveneti, 185 N.W.2d 219, 222 (Iowa 1971)" State ex rel. Wagner v. Wagner, 480 N.W.2d 883 (Iowa 1992). However, in Wagner, the Supreme Court quashed the efforts of Florida authorities to use mandatory income withholding procedures against a father who had not seen his children for more than six years because the mother was hiding.
- b. Section 252D.1(2) permits the quashing, modification, or termination of an Order for mandatory income withholding if the support delinquency has been paid in full or the amount to be withheld exceeds the amount permitted by the federal wage garnishment statute or upon termination of the child support obligation. Where the payor seeks relief because his income has changed, he should file a Petition for Modification, not a Motion to Quash the withholding Order. Hammond v. Reed, 508 N.W.2d 110 (Iowa App. 1993).

IV. JUVENILE LAW: DELINQUENCY: CONSENT DECREE

State v. Iowa Dist. Court for Warren Cnty. 820 NW2nd 159 (Iowa 2013). The juvenile court issued a consent decree withholding the delinquency adjudication of fifteen-year-old J.W.R. who had been charged with committing acts of incest upon his 12-year-old sister. The court placed J.W.R. in the legal custody of juvenile court services, with the Department of Human Services as payment agent, for purposes of placement in a residential facility. The Supreme Court reversed the court's action, holding that the legislature did not grant authority to juvenile courts in Iowa Code 232.46 to authorize a juvenile court to change temporary custody, send a child to a residential facility, and require State payment. Instead, §232.46 is a less restrictive alternative, analogous to the suspended judgment, whereby a child can remain with his parent or parents under supervision, restrictions, or restitutionary obligations without being adjudicated delinquent. J.W.R. could be placed in the group foster home under §232.52(2)(d) following an adjudication of delinquency. An even better alternative would be to avoid the adjudication of delinquency, to find him to be a Child in Need of Assistance under §232.2(6)(l). A CINA proceeding would allow a lot more flexibility in treating the needs of this entire family.