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Wednesday, June 21, 2017
Family Law Track
Room: Ballroom B

Family Law Update

8:00 a.m. – 9:00 a.m.

Presented by

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2017 ISBA ANNUAL MEETING

FAMILY LAW UPDATE

JUNE 21, 2017

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FAMILY LAW UPDATE

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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.

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. Sceary, 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).

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. Evidence – Journals. ***Fees v. Cook*, No. 15-2193 (Iowa App., 2016)**. Amanda sought to exclude Cory's journal as an exhibit in a custody contest because the journal (1) contained privileged information, (2) was unnecessarily duplicative and cumulative when viewed in combination with Cory's testimony, (3) contained inadmissible hearsay, and (4) contained inadmissible offers of compromise or communications in an effort to resolve these proceedings out of court. The Court reviewed the admitted exhibit and determined that the journal did not contain any mental-health or medical-professional records or privileged communications. Instead, it contained Cory's personal knowledge of appointments Amanda had scheduled with various mental-health providers. The privilege in section 622.10 is limited to disclosure of confidential communications *by the giving of testimony* by a mental health professional. *McMaster v. Iowa Bd. of Psychology Exam'rs*, 509 N.W.2d 754, 757 (Iowa 1993). Further, the Court did not find the journal is needlessly cumulative when viewed in combination with Cory's testimony such that its admission unfairly prejudiced Amanda. *See* Iowa R. Evid. 5.403; and that the information contained within the journal did not serve to harass or unduly embarrass Amanda.

d. Enforcement of Trial Scheduling Order. ***Schmidt v. Eft, No. 16-0238 (Iowa App., 2016).*** The district court excluded every witness James intended to call, except for himself and Ashley because he failed to comply with the trial scheduling order which required the exchange of the witness lists ten days before trial. However, though he also failed to timely exchange premarked exhibits and an updated affidavit of financial status, the court still allowed James to introduce his exhibits with proper foundation at trial. The Court of Appeals affirmed the trial court's sanction: "Pretrial scheduling orders serve an important function in our civil justice system." *Fry v. Blauvelt*, 818 N.W.2d 123, 129 (Iowa 2012). "A scheduling order encourages pretrial management and assists the trial court in controlling the direction of the litigation.. . To ensure our district courts have the tools to effectively manage pretrial conduct and control the conduct of the trial, we have recognized the inherent power of the district court to enforce pretrial orders by imposing sanctions." Ashley was prejudiced by James's failure to timely comply with the scheduling order. James had the opportunity to adequately prepare. Ashley was not afforded that same kind of preparation with some documents having been provided mere days before trial.

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

Iowa Rule of Appellate Procedure 6.904(2)(c) permits unpublished opinions of Iowa Appellate Court or any other court or agency to be cited in briefs and legal arguments so long as the opinions are properly cited and are readily accessed electronically. However, the unpublished opinions shall not constitute controlling legal authority.

9. Appellate Deference to Trial Court

***Highland v. Highland*, No. 15-0818 (Iowa App. 2016)**. A basic rule of appellate law is that a superior court should disturb the trial court's order "only when there has been a failure to do equity." *In re Marriage of Gust*, 858 N.W.2d 402, 406 (Iowa 2015) (citations omitted). This deference to the trial court's determination is decidedly in the public interest. When appellate courts unduly refine these important, but often conjectural, judgment calls, they thereby foster appeals in hosts of cases, at staggering expense to the parties wholly disproportionate to any benefit they might hope to realize. *Id*. at 407 Here, the parties were married less than eight years. Mary was 57 with significant health problems and was disabled, with disability benefits of $1,051 per month. Curtis, 53, had no health problems. The Court found that the alimony award should be increased to $300 per month. "Although this mere $150 per month increase may appear to some as tinkering, we note it is a 100% increase from that awarded by the district court."

10. 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).

11. 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.

***In re Marriage of McWilliams*, No. 15-0909 (Iowa App., 2016)**. As usual in common law marriage disputes, there was conflicting evidence supporting both parties' contentions. Aaron

introduced Donnetta as his "wife" to others. Aaron and Donnetta signed as many as seven statements similar to marriage vows over the years setting forth their intent to be married; but Aaron contended he was coerced into signing the vows. The parties separated at one time and each dated other people. Donnetta primarily used the surname McWilliams; the parties did not wear wedding rings; they did not own property together; and they had separate bank accounts. In addition, Donnetta obtained public assistance for which she would not have qualified if married. The Court noted tht claims of common-law marriage are scrutinized carefully and the burden of proof rests with the party asserting the claim. *Id*. Three elements must exist for us to find 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." *In re Marriage of Winegard*, 278 N.W.2d 505, 510 (Iowa 1979) (Winegard II). The Court concluded that Donnetta had established the existence of a common-law marriage between the two parties. The bulk of the credible evidence showed that Donnetta intended to be married; and that Aaron's actions indicated that intent. Most important, the parties cohabited together continuously for many years; and the two held themselves out publicly as married. This "acid test" of a common-law marriage had been met.

In re Marriage of Colvin, No. 16-0552 (Iowa App., 2016). Lisa filed a petition for dissolution of what she claimed was a common law marriage and requested temporary spousal support and attorney fees. After a two hour, seventeen minute hearing, the district court found that was sufficient indicia of a common law marriage to justify granting temporary spousal support of $650 per month and $1,000 temporary attorney fees. However, much of the time was consumed interpretation of the testimony of the alleged husband, Fau Van Hoang. At trial, the court ruled that the question of whether or not a common law marriage existed had been fully heard and decided at the temporary hearing, granted a dissolution, and granted spousal support and final attorney fees. The Court of Appeals found that Fau was not given an adequate opportunity to fully litigate the issue of whether the parties had a common law marriage. In *In re Marriage of Winegard (Winegard I)*, 257 N.W.2d at 615, the court states that in order to receive temporary attorney fees in a case involving a claim of a common law marriage, a party needs to create only "a fair presumption of the existence of the marital relationship.". However, in the final determination of the existence of a common marriage, the party claiming a common law marriage has the burden of proof, "and such a claim of marriage will be regarded with suspicion, there being no public policy in Iowa favoring common law marriage." *In re Marriage of Winegard (Winegard II)*, 278 N.W.2d 505, 510 (Iowa 1979). In order to establish a common law marriage, a petitioner has the burden to show by a preponderance of the evidence (1) present intent and agreement to be married, (2) continuous cohabitation, and (3) public declaration the parties are married. *In re Marriage of Gebhardt*, 426 N.W.2d 651, 652 (Iowa 1988).

12. 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 the Equal Protection Clause requires that same-sex couples who conceive through artificial insemination using an anonymous sperm donor must be treated the same as opposite-sex couples who conceive a child in the same manner.

13. Marital Tort: Invasion of Privacy & Interference With Oral Communications.

a. 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. **Papillon v. Jones, No. 15-1813 (Iowa, 2017)**. Brenda Papillon and Bryon Jones lived together in Waukee, Iowa, with their twin infants. The couple ended the relationship; and in January 2014, Bryon, without notice to Brenda, installed hidden, a sound-activated recording device in the study of their home. As their custody case progressed, Jones recorded six hours of audio files of conversations between Brenda, her friends, and her family discussing her relationship the Bryon and the plans she was making with her lawyer. Bryon gave the recorded audio files and transcripts of them to his attorney for use in the custody proceedings. He also gave the recordings to Dr. Sheila Pottebaum, the child custody evaluator. Meanwhile, in August—three months *before* the custody trial—Papillon filed a civil action in district court against Jones, alleging a violation of Iowa Code section 808B.2, which prohibits "willfully intercept[ing] . . . a[n] oral communication" without permission of one of the parties. Iowa Code § 808B.2(1)(*a*). The trial court awarded actual damages, attorney fees, and $18,000 in punitive damages, finding Jones's "motivations seem simply to hurt and harass the Plaintiff. The Supreme Court noted that *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250, 267 (Iowa 2009) requires a finding that actual knowledge that the recording is illegal before an award punitive damages under Chapter 808B is permitted. The Supreme Court found that there was sufficient evidence to support an award of punitive damages. Papillon's lawsuit under chapter 808B was served on Jones in August 2014 and put him on notice that his subsequent efforts to use the illegal recordings violated that statute. Yet he persisted in using his illegal recordings by providing them to Dr. Pottebaum and by keeping the illegal recordings on his exhibit list until the morning of the November custody trial. The Court remanded the case to the district court for a formal determination that punitive damages were appropriate, applying the correct standard set forth in *Iowa Beta Chapter* to the existing trial record.

14. Guardian Ad Litem For Prisioner.

***In re Marriage of Downs*. No. 15-0812 (Iowa App., 2016).** Travis Downs sought to vacate he decree in his dissolution action because he was confined to the Tama County Jail at the time of the hearing at which he appeared *pro se* by telephone after his attorney withdrew. The Court first reviewed the language o f we turn first to the language of Iowa R. Civ. P. 1.211: By its express terms, the rule does not apply to all incarcerated litigants but only to those confined in a penitentiary, reformatory, or state hospital. A county jail is not a penitentiary or reformatory. *In re T.C.*, 492 N.W.2d 425, 428-29 (Iowa 1992). But even assuming Rule 1.211 would apply to someone confined

in a county jail, the Court concluded that the dissolution decree was not void in this case. Travis appeared telephonically and participated in the trial. Travis did not have counsel because he did not retain a new attorney after his original counsel withdrew. The Court held that his appearance and participation satisfied the purpose of the rule of civil procedure. *See In re Marriage of McGonigle*, 533 N.W.2d 524, 525 (Iowa 1995). Rule [1.211] is not intended to go any further for the classes it protects than to place them on an equal footing with those not under one of the impediments listed.

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 impermissive ... 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 Marriage of Mauer*, No 14-0317 (Iowa 2016). The Supreme Court found it necessary to clarify its comments concerning spousal support in *In re Marriage of Gust*, 858 N.W.2d 402 (Iowa 2015) [See page 12 of this outline]. Though the *Gust* court commented favorably on spousal support guidelines which employ arithmetic formulas, the *Mauer* decision cautions that Iowa courts "are compelled to follow the traditional multifactor statutory framework" set forth in Iowa Code section 598.21A. The court stated that the guidelines might "provide a useful reality check with respect to an award of traditional spousal support." However, guidelines are not Iowa law; and they can serve neither as the starting point for a trial court nor as the decisive factor for a reviewing court on appeal. The Court considered the stautory factors and Carol Mauer's actual income and needs and set lifetime spousal support in an amount about 50% of the amount recommended under the guideline used by the trial court.

f. ***In re Marriage of Geist*, No. 15-0578 (Iowa App., 2016)**. Laura and Mark were married for over sixteen years. At the time of the marriage, Mark was unemployed, and Laura had been on disability for four years. At the time of the divorce, the district court found that Mark's unreported cash and tax return income probably totaled $92,000 and that Laura's disability income was $22,500. Whether spousal support is justified is dependent on the facts of each case. *In re Marriage of Shanks*, 805 N.W.2d 175, 178. Iowa Code § 598.21A(1). The trial court is "in the best position to balance the parties' needs, and [appellate courts] should intervene . . . only where there is a failure to do equity." *In re Marriage of Gust*, 858 N.W.2d 402, 416 (Iowa 2015) . The district court first used the American Academy of Matrimonial Lawyers guidelines suggested in *Gust*, though it acknowledged the *Gust* guidelines contemplated marriages of over twenty years' duration: From 30% of Mark's income of $92,000, $27,600, the court subtracted 20% of Laura's income, $4,500, to reach the figure of $23,100 per year of about $1,900 per month. The court however reduced the amount and ordered that Mark pay to Laura permanent spousal support of $1,100 per month. The Court of Appeals decided that Mark's earning capacity was at least $52,000 per year; and, after considering relevant section 598.21A(1) factors—including but not limited to the parties' ages, health conditions, and disparate income earning abilities, along with the length of the marriage and the property distribution , concluded that the district court's monthly spousal support award of $1100 per month was both compatible with the requirements of section 598.21A(1) and equitable.

g. ***In re Marriage of Andrews***, No. 15-1247 (Iowa App., 2016). Eron, 54, and Mary, 42, had been married for more than 17 years. Eron was a flooring installer and his annual income is $62,464. Mary had been a stay-at-home mom and had two serious liflong illnesses, but she did office clerical work and earned $16,000 annually. The distrct court ordered Eron to pay Mary $1250 per month in spousal support after the child support obligation ended for a period of fifteen-years. Eron argued that he may not be able to maintain his current pace of work until the spousal support award is set to end, and that the amount of the alimony was disproportionate to the parties' incomes. The Court held that Eron's future health and choices regarding retirement were too speculative to consider at this point. *See In re Marriage of Gust*, 858 N.W.2d 412, 416-17 (Iowa 2015) "The most consistent approach with the statutory scheme is that unless all of the factors in Iowa Code section 598.21C(1) can be presently assessed, future retirement is a question that can be raised only in a modification action subsequent to the initial spousal support order. As to Eron's claim

that the *Gust* case indicates that Mary was awarded too much of the difference in their salaries. 858 N.W.2d at 412, the Court noted that the Supreme Court in the recent case *In re Marriage of Mauer*, 874 N.W.2d 103, 107-08 (Iowa, 2016) held that no court is bound by any formula or percentage. Still, the Court held that the district court's award of $1,250 per month was overly generous, and modified the award so Eron pays Mary $1,000 per month beginning when his child support obligation ceases until the end of the fifteen-year period.

h. ***In re Marriage of Huh, No. 15-1598 (Iowa App., 2016)***. Young's annual income from his medical practice was $600,000. Veronica was unable to secure meaningful employment given her poor health and an over twenty year absence from the workforce. The trial court noted an application of the guidelines in *In re Marriage of Gust* to Young's $600,000 annual income would support an alimony award of $15,000 per month or $180,000 per year. *See* 858 N.W.2d 402, 416 n.2 (Iowa 2015). The Court of Appeals noted that, while clearly not binding on an Iowa court, the guidelines nonetheless provide a useful reality check with respect to an award of traditional spousal support." More important, using the statutory factors, the Court noted that the Huh marriage had lasted nearly twenty-one years, and awarded Veronica traditional spousal support of $13,000 per month, or $156,000 per year, until either party died or Veronica remarried. The court reasoned that Young could pay this amount of alimony, plus child support, and his own $14,000 in monthly expenses from his earned income and still have around $3000 per month in earned income to save or spend. *See Tzortzoudakis*, 507 N.W.2d 183 at 186 ("the ability of the one spouse to pay should be balanced against the needs of the other spouse"). In addition, Young's property and investments, excluding retirement accounts, will provide over $100,000 more income to him each year than Veronica receives from her property and investments. His retirement assets also surpass Veronica's retirement assets, and Young has the ability and earnings to shelter additional contributions. Veronica does not. Thus, the parties' unearned income further justified the award of alimony. *See Gust*, 858 N.W.2d at 411 ("Following a marriage of long duration, we have affirmed awards both of alimony and substantially equal property distribution, especially where the disparity in earning capacity has been great."). The Huh lifestyle did not involve squandering money; the lifestyle allowed building capital in significant amounts. On average, the parties were able to accumulate over $350,000 for each year of marriage. Victoria should also be permitted to save and build capital after the dissolution of the marriage.

i. ***In re Marriage of McWilliams*, No. 15-0909 (Iowa App., 2016)**. Aaron and Donnetta lived for 22 years as common law spouses. Donnetta received $721 per month in disability benefits; and her living expenses were $1,254 per month. Aaron was employed. His average gross income was $119,720. The Court noted that the duration of the marriage is an important factor in awarding traditional alimony. *In re Marriage of Gust*, 858 N.W.2d 402, 410 (Iowa 2015); and generally speaking, marriages of twenty years "commonly cross the durational threshold and merit serious consideration for traditional spousal support." *Id*. at 411. Here, the Court found that the parties' relationship was of sufficient length to merit the imposition of traditional alimony. The trial court's award of $1,500 per month does equity, and we will not disturb it. *See In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005).

j. **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 Marriage of McKimmy, No. 16-0872 (Iowa App., 2017)***. Crystal had mental health problems and her only income was supplemental security income in the amount of $733 per month. John, a truck driver with an income of $42,000 per year, was granted custody of the children, 14 and 10. Crystal was ordered to pay the minimum child support, $20 per month; but complained that she did not receive spousal support after the 15-year marriage. The Court noted that each case must be decided upon its own particular circumstances and precedent is of little value. *In re Marriage of Gust*, 858 N.W.2d 402, 408 (Iowa 2015). Here, the marriage was of moderate duration; Crystal has earned two post-secondary degrees but is unable to work due to her disabilities; and the parties lived modestly during the marriage, accumulating no assets. Since John had a negative net worth, modest income, and had virtually the sole obligation for the support of the children and provision of their medical care, the Court of Appeals affirmed the district court's denial of spousal support. "Where a spouse does not have the ability to pay traditional spousal support, . . . none will be awarded." *Id*. at 412; *see also In re Marriage of Woodward*, 426 N.W.2d 668, 670 (Iowa Ct. App. 1988) (declining to award spousal support to the wife because the husband did "not have income to meet more than the children's minimal needs").

d. ***Beauchamp v. Beauchamp*** **, No. 15-0107 (Iowa App., 2016)**. Missy earned $88,000 and Corey earned $42,000. The court ordered Missy to pay alimony in the amount of $400 per month for five years; and, for an unexplained reason, called it "traditional" spousal support. The court reasoned that Missy earned twice as much money as Cory per year and had greater potential for advancing her career. In limiting the amount and duration of the award, the court considered that Missy was "saddled with substantially more debt than Cory" and was required to pay child support. The parties were married for sixteen years. It is true that "the shorter the marriage, the less likely a court is to award traditional spousal support." *See Gust*, 858 N.W.2d at 410. But *Gust* did not set a bright-line rule. While both parties are in the mid-forties and generally enjoy good health, Cory has encountered some mental-health

issues. The record also showed that he faced approximately $8,000 in bills for required dental work. It was not feasible that after the divorce, Cory will become self-supporting at the standard of living the couple enjoyed during the marriage. Given these circumstances, the Court found that the modest award of spousal support was equitable. *See In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993).

e. ***In re Marriage of Nelson*, No. 15-0492 (Iowa App., 2016).** Cathy and Richard had been married for eight years. Cathy was sixty and Richard was fifty-eight. Her annual income was approximately $15,000; Richard's averaged about $70,000. The district court awarded Cathy $750 per month traditonal alimony until her death or remarriage. Richard argued that this marriage did not cross the twenty-year "durational threshold" to "merit serious consideration for traditional spousal support." *In re Marriage of Gust*, 858 N.W.2d 402, 411 (Iowa 2015). However, the Court noted that the *Gust* court did not set a bright-line test. Our court has affirmed traditional spousal support awards in marriages of shorter duration. *See*, *e.g*., *Huegli v*. *Huegli*, No. 15-0607, 2016 WL 1681435, 2 (Iowa Ct. App. Apr. 27, 2016) (eight years) In addition, the duration of the marriage is only a single factor to consider in the multifactor statutory framework. *See In re Marriage of Mauer*, 874 N.W.2d 103, 107 (Iowa 2016). The imposition and length of an award of traditional alimony is primarily predicated on the need of the payee and the payor's ability to pay. *Gust*, 858 N.W.2d at 411. The yardstick for determining need is the ability of a spouse to become self-sufficient at "a standard of living reasonably comparable to that enjoyed during the marriage." *Id*. The Court of Appeals affirmed to district court award since Cathy was sixty years of age at the time of trial and, realistically, had slim prospects of learning new skills to obtain long-term employment earning compensation that would make her self-sufficient.

e. ***Baenziger v. Baenziger*, No. 15-0457 (Iowa App., 2016)**. Gregory, 61, in good health had an earning capacity of $110,000 per year. He appealed the district court's award to Joan of twenty-five months of alimony in the amount of $1,800 per month. Joan, 59, was unemployed and had several physical and mental-health problems. At Gregory's request, Joan was evaluated by a vocational case manager. The evaluator determined Joan's mental-health related issues would impact her ability to obtain employment, her age would put her at a disadvantage for being considered in a tenured track professor position—for which the evaluator determined her chances were "bleak," her outlook for securing a job as an adjunct professor was also "somewhat limited," and her best chances of securing employment would be as a grant writer. The evaluator concluded Joan would likely not be suited for competitive employment until such time as the dissolution of marriage process has been finalized and a short period of adjustment has elapsed. The Court of Appeals affirmed the alimony award.

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. See also In re Fedorchak, No. 3-979 / 13-0466 (Iowa App., 2013).

4. Spousal Support 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). In addition, traditional spousal support is normally payable until the death of either party, the payee's remarriage, or until the dependent spouse is capable of self-support at the lifestyle to which the party was accustomed during the marriage. *See, e.g.,* In re Marriage of Becker, 756 N.W.2d at 826; In re Marriage of Francis, 442 N.W.2d at 64.

a. *In re Marriage of Gust, 858 N.W.2nd 402 (Iowa, 2015)*. Traditional spousal support is normally payable until the death of either party, the payee's remarriage, or until the dependent is capable of self-support at the lifestyle to which the party was accustomed during the marriage. *See, e.g., In re Marriage of Becker*, 756 N.W.2d at 826; *In re Marriage of Francis*, 442 N.W.2d at 64. Evidence must establish that the payee spouse has the capacity to close the gap between income and need or show that it is fair to require him or her alone to bear the remaining gap between income and reasonable needs. *See Becker at 827.* The changes which will occur at retirement are ordinarily too speculative issues to be considered in the initial spousal support award. See *In re Marriage of Michael*, 839 N.W.2d at 632, 635-39. Therefore the Court ruled that the question of whether the spousal support should be modified upon retirement must be made when retirement is imminent or has actually occurred.

***In re Marriage of Malena*, No. 15-2051 (Iowa App., 2016)**, The parties separated fifteen years after their marriage. Michael argued traditional spousal support to Mariellen of $625 per month so long as she lived and remained unmarried was inequitable. He stated that the

marriage is of only "moderate" duration not meriting traditional spousal support. *See In re Marriage of Gust*, 858 N.W.2d 402, 410-11 (Iowa 2015) ("Generally speaking, marriages lasting twenty or more years commonly cross the durational threshold and merit serious consideration for traditional spousal support."); *but see In re Marriage of Witherly*, 867 N.W.2d 856, 860 (Iowa Ct. App. 2015) ("The marriage was seventeen years long—not long enough to trigger the unlimited spousal support duration recommended by the American Academy of Matrimonial Lawyers, but by no means short."). Michael further argued that Mariellen's earning capacity was greater than her current income. *See*, *e.g.*, *Marriage of Klemme*, No. 14-0087, 2014 WL 5249247, at *5 (Iowa Ct. App. Oct. 15, 2014). The Court agreed with Michael. Both parties were in good physical and emotional health and were capable of full-time employment. Michael graduated from high school and was self-employed, paying himself an annual salary of $39,000. Mariellen had a cosmetology degree and a part-time earned income of $15,600, because of child responsibilities. The court imputed an additional $7,540 annually to Mariellen based on the reality that she will work more hours post-dissolution. Therefore, the Court reduced the spousal support to $400 per month and canceled the lifetime award. Spousal support will terminate upon Michael reaching retirement age of sixty-seven, or Mariellen's remarriage or death, whichever first occurs.

b. ***In re Marriage of Dillon, No. 16-0415 (Iowa App., 2016)***. Patrick and Shelly had a 19-year marriage. The district court ordered Patrick to pay Shelly monthly spousal support of $1,000 for three years], $750 for the next three years, and $500 for two additional years. Patrick's income as a self-employed attorney and part-time farmer was $189,434; and Shelly, 41, was in good health, had a nursing degree, and earned $40,000, although she had the potential to increase her earnings by becoming a nurse practitioner. The Court of Appeals found that spousal support totaling $75,000 over an eight-year period was not sufficient after a 19-year marriage and the significant earnings disparity. Therefore, it modified the monthly spousal support to $2,000, but limited the term to eight years. Though the length of the marriage might have supported an award of unlimited duration, the Court found that because of Shelly's relatively young age and the opportunities to improve her income, permanent spousal support was not warranted.

c. ***In re Marriage of Nelson*, No. 15-1891 (Iowa App., 2016).** The general rule is that periodic payments of alimony to a divorced wife are presumed to terminate upon the husband's death, especially in the absence of a provision in the decree which requires the payments to continue after such death. The decree must clearly provide for the continuation of alimony beyond the obligor's death before the court may hold the estate liable for those payments. *In re Estate of Jones*, 434 N.W.2d 130, 131 (Iowa Ct. App. 1988); *see*, *e.g.*, *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 487 (Iowa 2012). Dale's annual income is at least $138,699, while Marjorie's was $9,000. Because of the parties' disparate income, their twenty-three year marriage, their net worth, Marjorie's poor health, the Court found that Dale should pay $3,700 in monthly spousal support to Marjorie; that the spousal support should continue beyond Dale's death should he predecease Marjorie and that his estate would be liable for those payments. *See Jones*, 434 N.W.2d at 131.

d. 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).

e. "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).

f. 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).

g. 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.

h. 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.

i. 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).

In re Marriage of Huh, No. 15-1598 (Iowa App., 2016). The trial court decided that Young Huh's death would severely impact the lifestyle of his children and former wife and ordered Young to maintain life insurance with death benefits payable to Veronica for $1,500,000 as long as a child-support obligation exists, $1,000,000 until Veronica reaches age sixty-six, and $400,000 until alimony is no longer due. The Court of Appeals noted that " generally, life insurance secures alimony when the parties have a minimal marital estate and thus need is demonstrated. *See In re Marriage of Debler*, 459 N.W.2d 267, 270 (Iowa 1990) (ordering husband to maintain insurance where the beneficiary-homemaker spouse received only $21,000 in property). Because Veronica received more than $3,700,000 in property, the Court modified the decree and eliminate the requirement Young secure his alimony obligation with life insurance, but required him to maintain $500,000 of life insurance in favor of Veronica until his obligation to pay child support ends.

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

In re Marriage of Schriner, 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.

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 Thul*, No. 15-1209 (Iowa App., 2016)**. Brian's gross annual income was $140,000 and Susan's was $24,000, but Brian claimed Susan should not have received alimony because she received a $762,500 property settlement and because of the large debt total and private school tuition he agreed to pay. He argued that his actual net annual income, after payment of spousal support, child support, tuition, and debts was $25,000. Property division and alimony should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). Whether spousal support is proper depends on the facts and circumstances of each case. *In re Marriage of Brown*, 487 N.W.2d 331, 334 (Iowa 1992). Here, the Court considered Susan's needs and Brian's ability to pay, and found that $2,000 per month in spousal support for a period of ten years was equitable. We will disturb the district court's award of spousal support only when there has been a failure to do equity. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005).

b. ***Walker v. Lusk , No. 15 - 0784 (Iowa App., 2016)***. 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.

c. ***In re Marriage of Bjornstad, No. 15-2145 (Iowa App., 2016)***. In 2011, Edward and Dianne stipulated that in addition to$1,000.00 per month in alimony "Edward shall be responsible for the first and second mortgage payment for the family residence, including real estate

taxes and insurance". In 2014, Diane asked the court to declare that Edward would have to pay the first and second mortgages in full from his own resources and not from the real estate proceeds should she sell the property prior to loan maturity. The Court noted that it must interpret and construe the terms of a dissolution decree "like any other written instrument." *In re Marriage of Lawson*, 409 N.W.2d 181, 182 (Iowa 1987). However, the Court will enforce that which is clearly implied as well as to that which is expressed. Here, the mortgage payment obligation does not have the hallmarks of alimony: (1) "'In lieu of' means "in the place of " *Conroy v. Keith Cty. Bd. of Equalization*, 846 N.W.2d 634, 641 (Neb. 2014); (2) the decree limits the tax deductibility of the mortgage payment obligation to only the interest paid versus the entire amount paid. If the obligation were alimony, the entirety of the payment would be tax deductible. *See In re Marriage of Murray*, 213 N.W.2d 657, 660 (Iowa 1973); and (3) Diane's interpretation of the obligation would create an inequitable property division: she would be awarded $258,000 in marital property and Edward would be awarded -$80,000 in marital property. By construing the decree to require Diane to satisfy the loan obligations with the real estate sale proceeds, the parties are awarded an equitable—not equal—amount of marital property.

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. 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.

c. Hussemann v. Hussemann, No. 13-1082 (Iowa, 2014). 1991 Florida postnuptial agreement provided that wife waived all claims to husband's estate and that Florida law which enforces post-marital agreements would apply. The parties moved to Iowa in 2005; and wife filed a claim for her elective share of husband's estate when he died in 2012. The Supreme Court found that on the spectrum of public policies, the prohibition against waiver of spousal share is not "at the upper end." Such a provision is not a crime; there are no civil penalties; if the agreement had been signed shortly before rather than shortly after the parties' marriage, it would have been enforceable. *See* Iowa Code § 596.5; and other mechanisms for achieving the goal of the agreement are approved in Iowa. Therefore, the Court ruled that the parties' selection of state law and the waiver of interest in the estate should be enforced.

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 tha 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.

The Court in *In re Marriage of Sullins, 715 N.W.2d 242 (Iowa 2006),* required Mr. Sullins to assume sole responsibility of a tax debt because Mr. Sullins' tax problems were "self-imposed and largely the result of imprudent business practices." However, in*Jahnke v. Laflame-Jahnke, No. 13-1382 (Iowa App., 2014),* the Court concluded that the taxes accruing on an income earned during the pendency of a dissolution and used to support the parties or used to reduce their other marital obligations are appropriately considered a marital expense.

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).

***Beauchamp v. Beauchamp*, No. 15-0107 (Iowa App., 2016)**. Missy earned $88,000 and Corey earned $42,000. During the marriage, the parties deposited their paychecks into a joint bank account; and Missy paid the bills. When they separated in August 2012, the children spent equal time with both parents, Cory stopped depositing his check into the joint account and discontinued his contributions toward the marital residence or other family expenses. Though she had the higher income, Missy paid no child support. Corey argued, and the district court agreed, that Missy dissipated assets by running up $35,000 in credit card debt while paying no child support. Missy contended that she paid all expenses related to the marital residence and the majority of the expenses related to children's day care, camps, meals, and clothing during the almost two year separation. The Court of Appeals noted that *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007) provides that "dissipation occurs when the conduct of one spouse during the period of separation results in the loss of property otherwise subject to division at the time of the decree. *In re Marriage of Kimbro*, 826 N.W.2d 696, 700-01 (Iowa 2013). To remedy dissipation, a court will include the lost value in the marital estate and award it to the spouse who squandered the asset. *Id*. at 701. Two steps are needed to determine whether dissipation occurred: The first step is a determination as to whether the spending spouse can show how the funds were spent. The second step requires consideration of several factors to determine whether the expenditures were ". . .reasonable and expected aspect of the particular marriage." *In re Marriage of Burgess*, 568 N.W.2d 827, 829 (Iowa Ct. App. 1997). Here, the Court found that Missy satisfactorily showed how the money was spent; and that Cory did not establish the post-separation expenditures were outside the norm of the family's previous spending habits.

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.W2d 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.2d650 (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).

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 Callenious, 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).

***In re Marriage of Miller*, No. 16-0504 (Iowa App., 2016)**. Claude inherited $44,000.00 in 1999. He used some of the inheritance to pay off Julie's student loans, outstanding taxes, and the mortgage on her home. The money was placed into a joint bank account and was later transferred to a joint investment account which had a balance of about $39,819 at the time of the parites' separation. The Court noted that property that a party inherits before the marriage "is the property of that party and is not subject to a property division under Iowa Code section 598.21(6) except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." The factors the Court must consider in deciding whether to remove an inheritance from the property division are: (1) contributions of the parties toward the property, its care, preservation, or improvement; (2) the existence of any independent close relationship between the donor or testator and the spouse of the 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; (5) any other matter which would render it plainly unfair to a spouse or child to have the property set aside for the exclusive enjoyment of the donee or devisee. *In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa Ct. App. 1996). However, "[p]lacing inherited property into joint ownership does not, in and of itself, destroy the separate character of the property." *Id*. Here, the Court concluded that excluding Claude's inheritance from the divisible property is not inequitable to Julie even though the proceeds of sale of her premarriage home were included ion among the divisible assets. The proceeds from the sale of Julie's home would not have been as great if Claude had not used part of his inheritance to pay off her mortgage. In addition,

Julie also benefited from the inheritance by Claude's use of the money to pay her outstanding tax debt and her student loans. Having already benefited from the inheritance, it would be inequitable to Claude to include the inheritance in the property division to increase Julie's share of the marital property.

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).

***Mcmillan v. Jones*, No. 15-1916 (Iowa App., 2016)**. Gary sought $219,000, twenty-five percent of Janet's assets inherited from her first husband because Janet "lived off of Gary" during the marriage, The Court noted that Iowa courts "divide the property of the parties at the time of divorce, except any property excluded from the divisible estate as separate property." *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). *See* Iowa Code § 598.21(5) (2015). However, the exclusion of Janet's inherited property under section 598.21(5) is not absolute. Iowa has a hybrid system that permits the court to divide inherited . . . property if equity demands in light of the circumstances of a spouse . *See id*.; *see also* Iowa Code § 598.21(6), based on the factors listed above. Here, Janet kept most of her inherited money in accounts bearing only her name. Janet had more experience in financial management than Gary, and Janet's investment of her inheritance did not bear any characteristics of a "family decision." No independent relationship existed between the two husbands. Gary's main claim to a share of the inherited property was based on his allegation that Janet did not work and that his providing for both parties by his employment preserved the inherited property to Janet's sole benefit. However, the Court rejected Gary's claim and noted that Janet was not working at the time the parties married and that Janet independently contributed to the marriage by cooking, shopping, housekeeping, doing the laundry, preparing the parties' income tax returns, and paying the marital bills and taxes. In addition, Janet was older, had some health problems, and had not been gainfully employed for many years. Gary is younger, in good health, and will be able to continue his current employment for more than a decade, which will allow him to make additional contributions to his retirement accounts.

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).

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.

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).

***Korn v. Korn*, No. 15-2014 (Iowa App., 2016).** John argued that he was entitled to a greater portion of his retirement accounts because of his industry during the marriage, his frugality in not spending any of Karen's inherited and gifted money. Because of the gifts, Karen's post-divorce assets totaled $1,574,475.28, while John's were $219,273.00. The Court agreed with John and awarded him all of his pension benefits accumulated during the marriage. "It is appropriate to adjust the division of marital property 'on the basis that one party, far more than the other, can reasonably expect to enjoy a secure retirement." *In re Marriage of Boyer*, 538 N.W.2d 293, 296 (Iowa 1995). Karen was awarded the entirety of her family gifts and inheritance, including any appreciation and accumulated income arising during the marriage. The parties through their joint efforts preserved all of these funds.

"[A] division of pension benefits is not an absolute requirement. The allocation of a pension, like the allocation of all other property interests, comes only after the pension has been considered in the overall scheme of an equitable division." *In re Marriage of Fall*, 593 N.W.2d 164, 167 (Iowa Ct. App. 1999).

(3) ***In re Marriage of Tekippe, No. 16-1297, (Iowa App., 2017)***. The Court of Appeals warned that this case should serve as a vivid reminder to attorneys practicing matrimonial law to specifically address survivor rights when dividing retirement benefits, ". . . as our Supreme Court warned in *In re Marriage of Morris*, 810 N.W.2d 880, 881 (Iowa 2012). The parties' property settlement failed to specifically address whether the alternate payee of a retirement plan could designate a successor alternate payee. The Court noted that a dissolution decree is the final order adjudicating the parties' property rights. *See In re Marriage of Thatcher*, 864 N.W.2d 533, 538 (Iowa 2015). The QDRO is a supplemental order to enforce the property division and is not a part of the underlying decree. *See In re Marriage of Brown*, 776 N.W.2d 644. Once the district court adopts the parties' stipulation and incorporates it into the dissolution decree, it is the decree—not the parties' agreement and stipulation—that determines the parties' rights. *See Morris*, 810 N.W.2d at 886. Here, since the stipulation and decree did not authorize Joseph to name a successor alternate payee to his share of the IPERS account if he predeceases Jamie, that right could not be included in the QDRO. *Morris*, provides clear guidance that all property issues must be incorporated into the decree and the district court may not enter serial final judgments. *See In re Marriage of Thatcher*, 864 N.W.2d 533, 538 (Iowa 2015).

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 actuaries 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.

(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:

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

In re Marriage of Smith, No. 16-0597 (Iowa App., 2017). The district court ordered Brian's pension to be "divided using the *Benson* formula so that Bonnie would receive one-half of the fractional portion of the plan calculated by using 13years [the length of the marriage] as the numerator, and the years of Brian's contribution to the plan as the denominator. The decree made no provision for the entry of a QDRO. On appeal, Brian sought to reduce the numerator from 13 years to 3.75 years—the time he was *both* married *and* contributing to the plan. However, though Brian made contributions for less than 4 years, his employer contributed throughout the marriage. The Court refused to change the formula. When Brian and Bonnie were married, Brian had credited service in his pension of 23.58 years and at the date Brian's contributions ended, his total credited service was 27.33 years. However, Brian was "covered" by the plan during his entire marriage. Under *Benson*, the denominator is the number of years Brian was "covered" by the plan "prior to conclusion (maturity))." *See* In re Marriage of Benson, 545 N.W.2d at 255; see also *Faber v. Herman*, 731 N.W.2d 1, 8 (Iowa 2007). "The *Benson* formula is used to value and divide the portion of the defined benefit accrued during the parties' marriage 'in relation to the *total years of benefits accrued* at maturity. *Heath-Clark*, 2016 WL 2753779, at 6.

(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).

***In re Marriage of Schmitt*, No. 15-1207 (Iowa App., 2016)** Sixteen years before the marriage, when he was 13, James permanently lost the vision in one of his eyes and received a structured settlement comprised of a series of payments. He received $125,00.00 before the marriage. During the 17 -year marriage, James received $1.125 million; and he was scheduled to be receive a final payment of $375,000 after the dissolution. was healthy and was earning $25,000 annually. James was unemployed and receiving $1,136 in disability payments per month. Throughout their marriage, they lived at a higher standard of living than was sustainable without the regular settlement payments. The district court awarded James approximately $86,500 more than Rilla. In Iowa, only two types of property are specifically excluded by statute from the divisible estate—inherited property and gifts received by one party. *Id*.; *see also* Iowa Code § 598.21(5). In *In re Marriage of McNerney*, 417 N.W.2d 205, 206 (Iowa 1987), our supreme court determined that "proceeds from a personal injury claim are marital assets . . . to be divided according to the circumstances of each case." "Settlement proceeds thus do not automatically belong to either party." At the time of trial, both parties were living lifestyles which could not be sustained. However, James was scheduled to receive one final settlement payment worth $375,000 within months of the divorce. Therefore, the Court held that James should not also receive more of the marital property as well. Therefore, the Court ordered James to make an equalizing payment to Rilla in the amount of $43,250.

In re Marriage of Rigdon, No. 16-0768 (Iowa App., 2017). Alicia received a $195,000 settlement as the result of a dispute with her former employer in 2015. Alicia argued that the settlement compensated her for a personal injury unrelated to Ben and she should retain the settlement in its entirety. The Court of Appeals noted that proceeds of a personal-injury claim are marital assets. *In re Marriage of McNerney*, 417 N.W.2d 205, 206, 208 (Iowa 1987). However, in some cases, our courts have set aside all or parts of personal injury awards to the injured spouse. In *In re Marriage of Plasencia*, 541 N.W.2d 923, 926 (Iowa Ct. App. 1995), for example, the husband suffered a permanent disability and sought compensation through a personal injury claim. The court excluded the non-injured spouse from recovering any portion of the claim, holding, "[The husband's] claim is for injuries he sustained and should be his claim." *Id*. On the other hand, in *McNerney*, both spouses were parties to a personal injury settlement and both sustained losses as a result of the personal injury. Here, like the *Plasensia* settlement, the current proceeds compensated Alicia for an individual, isolated injury that did not involve Ben. Furthermore, Alicia received the settlement nearly two months after the divorce petition was filed. Therefore, the court held that it was equitable for Alicia to retain the remainder of the settlement proceeds.

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 Schriner, 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.

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 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

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].

***In re Marriage of Thul,* No. 15-1209 (Iowa App., 2016)**. Brian's gross income was $140,000 per year and Susan's was $24,000. His child support obligation under the guidelines would be $1,904 per month for four children, but the Court granted him a downward deviation to $1,400 per month, taking his alimony, debt, and private school tuition payment obligations into consideration. Brian sought a further downward deviation. The child support guidelines are designed to calculate an amount of funds that will cover the normal and reasonable cost of supporting a child; and there is a rebuttable presumption that the guidelines amount is the correct amount. Iowa Code § 598.21B(2)(c). See also *In re Marriage of McDermott*, 827 N.W.2d 671, 685 (Iowa 2013). Still, A court may vary from the guidelines based on a record and written findings showing application of the guidelines "would be unjust or inappropriate *Id*. § 598.21B(2)(d); and the Court may consider the amount a parent is paying for a child's tuition at a private school in its deviation assessment. *See In re Marriage of Fite*, 485 N.W.2d 662, 664-65 (Iowa 1992). Here, the Court concluded that the $500 deviation granted by the district court was sufficient.

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 revealment 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 .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, 545N.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).

***Lantz v. Lantz*, No. 15-1989 (Iowa App., 2016)**. Jared argued his support obligations should be set on his $15.57 per hour hourly base pay and not take into account his overtime

and incentive pay because they are not guaranteed. The Court's child support the calculations were based on actual earning numbers which included, base pay, overtime and incentive pay supplied by Jared's employer. Because the overtime and incentive pay fluctuated, the numbers were averaged over the time of Jared's employment. The Court found that "Overtime wages are not excluded as income." *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 333 (Iowa Ct. App. 2005). To the contrary, "[o]vertime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes." *Id*. The only exception to this is "where overtime pay appears to be an anomaly or is uncertain or speculative." *Id.* Similarly, incentive pay is considered as part of a party's income. *See Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005) ("[O]nce evidence of extra income has been introduced . . . the burden is on the recipient of the income to establish that it should be excluded from gross income as uncertain and speculative."). Further, where a party's income varies, "[i]t is unrealistic and unfair to fix child support obligations based solely on the most recent periodic income amounts." *Kupferschmidt*, 705 N.W.2d at 333 (citation omitted). Instead, as done by the State in this case, it is appropriate to calculate income by averaging the amounts made over a period of employment.

(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.

(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).

(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 Court of Appeals cases have failed to include alimony ordered in the current case in their determinations of equitable child support obligations. See 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 $25,000.00 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 $25,000.00 per month. The support payment cannot ordinarily be less than the amount specified in the Guidelines for a $25,000.00 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 $25,000.00 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.

In re Marriage of Huh, No. 15-1598 (Iowa App., 2016). Young Huh had a net monthly income of $41,000 and Veronica would receive $9,000 in net monthly income from her commercial real estate. Iowa's Child Support Guidelines for parties with a combined monthly net income of $25,000 per month require minimum child support of $3,624 for two children and $2,598 for one child. *See* Iowa Ct. R. 9.26. Because Veronica and Young's combined monthly net income *exceeds* $25,000, the guidelines place their support obligation "within the sound discretion of the court". The parties' net monthly income figures yielded the court's ratio of 82% from Young and 18% from Veronica. Therefore, applying Young's 82% to the two-child minimum payment of $3,624, the court found Young's minimum support for H.H. and E.H. was $2,962 per month. Based on the family's past spending on special programming for their children, the court found Veronica would pay around $5,000 per month on mentors, tutors, camps, and lessons for H.H. and E.H. Using its discretion, the court ordered Young to pay $2,000 of that amount, with Veronica bearing the other $3,000 of those costs. Thus, Young was required to pay $4,962 per month to support two children. and $3,123 per month when only one child is eligible for support. The court in exercising its discretion may consider that child support "may reflect the standard of living the child would have enjoyed had there not been a dissolution." *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). Based on the unique facts of this marriage, we conclude the child support set by the district court is a reasonable and necessary amount.

(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 $25,000 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 the 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).

In re Marriage of Dillon, No. 16-0415 (Iowa App., 2016). Patrick and Shelly had three children and agreed on joint physcial care. The district court ordered child support, using the joint physical care offset method, but failed to specify how the parties should contribute to the children's school and extracurricular expenses. The Court of Appeals ruled that where parents exercise joint physical care of their children and child support has been calculated pursuant to the offset method, because both parties are paying support under the offset method and both have an obligation to cover the children's expenses, each party is required to pay one-half the extracurricular expenses to make sure both spouses pay their fair share. *In re Marriage of McDermott,* 827 N.W.2d 671, 686 (Iowa 2013). *See also In re Marriage of Killian*, No. 13-1504, 2014 WL 3748304, at *4 (Iowa Ct. App. July 30, 2014).

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 presump-

tion 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.

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).

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 Vrban, 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) Parties' Stipulation Supersedes Statute. In *Shipley v. Shipley*, No. 15-1418 (Iowa App. 2016), the court found that the father could not rely on *Iowa Code* Section 598.21F to avoid his agreement to pay college expenses because of the child's poor grades and repudiation of him. The parties' decree, provided that each parent will "pay one-third of total cost of each child's college education, regardless of whether the child attends a state university or a private institution" and made no reference to section 598.21F. The stipulated-decree exceeded statutory requirements; but the parties to a dissolution are free to make agreements regarding the future college expenses of their children, which the courts may then enforce. *In re Marriage of Rosenfeld*, 668 N.W.2d 840, 848 (Iowa 2003). Divorcing parents may agree, equitably and in the best interest of their children, that they will be obliged to pay a share of college expenses even if a child repudiates them, fails to provide them progress reports, or earns a GPA below the median.

(4) 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.

(5) 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 Vrban, 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).

(6) 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.

(7) 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 Antisdel, 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 Fuscher, 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."

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. Guideline 9.12(5): Special Rule For Joint Physical Care Parents. In **In re Marriage of Van Meter, No. 16-0049 (Iowa App., 2016)**, the Court granted the Clarke and Jackie joint physical care of their child, but Clarke appealed because the Court made the parties equally responsible for all uncovered medical expenses for the child. Jackie argued that the division was equitable because she provides health insurance for the minor child. The court noted that Iowa Court Rule 9.12(5) provides that: "In cases of joint physical care, the parents shall share all uncovered medical expenses in proportion to their respective net incomes." The Court found that Jacqueline's net monthly income was $7,868 and Clarke's was $3,617. Their proportional shares of income was 68.5% and 31.5% respectively. Therefore, the court ordered Jacqueline to pay 68.5% and Clarke 31.5% of all uncovered medical expenses. *See*, *e.g.*, *In re Marriage of Petersen*, No. 15-0282, 2016 WL 1757628, at 4 (Iowa Ct. App. Apr. 27, 2016).

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.

(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 s 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 an 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.

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).

In re Marriage of Matteson, No. 16-0401(Iowa App., 2017). Taylor failed to gain primary physical care of the children, but he wanted them to attend school in Manchester where the oldest had been attending, while Cara wanted the children to attend school in Marion where she was living. The court held that as the primary care parent, Cara will have the final say as to where the children attend school. Taylor, as a joint legal custodian of the children, is entitled to "equal participation in decisions affecting the child[ren]'s legal status, medical care, education, extracurricular activities, and religious instruction." *See* Iowa Code § 598.41(5)(b). However, when the parties were unable to agree on which school, the final say on the subject should be with the parent having physical care of the children—Cara. *See In re Marriage of Hoffman*, 867 N.W.2d 26, 32 at 33, 35-36 (Iowa 2015).

(2) Section 598.41(2)(b) 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).

In re Marriage of Sutton, No. 16-0933 (Iowa App., 2017). In 2011, Patrick was given physical care of the three daughters, S.M.S. and her older twin sisters. In 2014, the district court judge found that Partrick was "one of the worst joint custodians this court has ever seen. . . angry and vengeful," and gave physical care of S.M.S. to Melissa. Less than two months after the Court of Appeals sustained this decision, Patrick filed another petition for modification requesting joint physical care of S.M.S. The Court found that Patrick had chosen tactics which had minimized and isolated Melissa's involvement with the twins. Patrick had never made the twins comply with ourt-ordered visitation and influenced them against Melissa. The Court noted that "...the legislature and judiciary of this state have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances." *In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa Ct. App. 1992). However, here, the parents' inability to communicate and Patrick's unwillingness to foster a relationship between his daughters and their mother make a change to sole legal custody appropriate. *See In re Marriage of Bolin*, 336 N.W.2d 441, 446 (Iowa 1983) ("When one parent's obduracy makes joint custody unworkable, the trial court in a modification proceeding may find the child's best interests require sole custody in the other parent.").

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).

(2) In re Marriage of Hansen, 733 N.W.2d 683 (Iowa 2007) The recent changes in Iowa Code Section 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.

***Johnson v. Hirschfield*, No. 15-1452 (Iowa App. 2016)**. Matthew Johnson and Misty Hirschfield are the never married parents of A.R.J., born in 2011. In June 2013, Hirschfield learned that her National Guard unit would deploy to Afghanistan in spring 2014, for up to one year, but that she had the option to terminate her Guard service prior to the deployment. Misty decided to reenlist and to leave A.R.J. with Matthew during Misty's absence. When Hirschfield returned to the United States in December 2014, she immediately moved to Wisconsin to live with her new boyfriend; and Matthew also had a new love interest. The Court of Appeals agreed with the trial court that Johnson should be granted primary physical care of the child with liberal visitation provisions for Hirschfield. Both parents clearly love A.R.J; and both demonstrated the ability to be successful with joint physical care. However, the current arrangement was unworkable in the long-term when A.R.J. commences school due to the distance between the parties. Several factors weighed in favor of awarding physical care of A.R.J. to Johnson. First, was the parties' care arrangement prior to the time of the action. While Hirschfield's decision to reenlist was admirable, Johnson provided sole physical care for the child in her absence. While her absence was not of great duration, it was significant given the young age of the child. Second, awarding Johnson physical care minimizes disruption in the child's life. The child has resided in Iowa since December 2013 when the parties jointly decided to move because of Johnson's family support in the area. Third, Johnson's family has built a relationship with the child and can be an ongoing source of stability and support for the child. The controlling consideration in a child custody decision is the child's best interest. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007); and in this case the most significant factor was the approximation rule: the result approximates the parents' pre-litigation parenting plan.

***Walker v. Lusk*, No. 15-0784 (Iowa App., 2016).** Brittani and Scott are the never-married parents of a four-year old daughter, A.W. Brittani appealed the award of primary care to Scott. The criteria governing custody decisions are the same whether the parents are dissolving their marriage or are unwed. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988). The controlling consideration is the best interest of the children. Iowa R. App. P. 6.904(3)(o). The Court found that both parents had shared all parental responsibilities; and that placing A.W. in Scott's physical care provides her with more stability. Scott owns his home, is financially independent, and has maintained consistent employment. In his physical

care, A.W. can remain in the only home she has ever known as well as continuing to attend the daycare and school that Scott and Brittani chose for her. Scott's mother lives on the same street and has helped with caring for A.W. Brittani chose to relocate to Minnesota—approximately four hours from the family home—and she testified that she intended to remain there. Brittani also maintained that she was the parent more likely to facilitate and support a relationship between A.W. and the other parent. However, Brittani's mother—who Brittani lives with and is financially dependent on—had refused to talk to Brittany for a year and seldom visited because she disliked Scott.

***Leib v. Leib*, No. 15-1918 (Iowa App., 2016)**. Jesse and Abby both were the parents of four minor children. Abby sought primary physical care after the trial court granted joint physical care. The Court of Appeals noted that Iowa Code § 598.41(5)(a) requires the Court to make specific findings of fact and conclusions of law that awarding joint physical care is not in the children's best interests. *In re Marriage of Hansen*, 733 N.W.2d 683, 692 (Iowa 2007). The factors to be considered in determining whether joint physical care is in the children's best interests include (1) continuity, stability, and approximation; (2)"the ability of spouses to communicate and show mutual respect"; (3) "the degree of conflict between parents"; and (4) "the degree to which the parents are in general agreement about their approach to daily matters." *Hansen*, 733 N.W.2d at 696-99. In this case, Abby had provided the most continuity, stability, and approximation. She had been the primary caregiver, and even when working full time, Abby was responsible for the children in the mornings, while Jesse worked long hours. The parties' ability to communicate and show mutual respect was poor. They had a history of poor communication, with both parties cursing, name calling, and arguing in front of the children. Their degree of conflict was high. They had a history of charge and countercharge and Jesse's shown substantial distrust of Abby's parenting ability. Finally, the parents did not generally agree on daily parenting matters. They had different parenting styles, one parent liberal and the other strict. The parties are unable to agree on appropriate discipline and where the children should be registered for school. After finding joint physical care inappropriate, the Court concluded that "the factors of continuity, stability, and approximation are entitled to considerable weight" and favor placement of the children with Abby. The children were healthy, well-adjusted and well performing is school with her as primary caregiver.

(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).

***In re Marriage of Heifner*, No. 15-1285 (Iowa App., 2016).** Jessica appealed the district court decision to grant primary physical care of the children to Thomas. When the court denies a parent's request for joint physical care, that denial "shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child[ren]." Iowa Code § 598.41(5)(a). Here, the parties communicated poorly, they showed little respect for each other, and their current relationship is marked by a high level of conflict and bitterness. The court further found nothing in the record to show the parents "would be able to set aside the harsh feelings each harbors toward the other and cooperate as partners in raising their children. The record showed Jessica is more hot-tempered and rash in imposing discipline on the children. Discord between divorced parents has a disruptive impact on the children. *See In re Marriage of Harris*, 877 N.W.2d 434, 441 (Iowa 2016)

(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.

In re Marriage of Mourton, No. 16-1099 (Iowa App., 2017). The critical question in deciding whether joint physical care is appropriate is whether the parties can communicate effectively on the myriad of issues that arise daily in the routine care of a child. *In re Marriage of Hynick*, 727 N.W.2d 575, 580 (Iowa 2007). Here, the court considered the Hansen factors [*In re Marriage of Hansen*, 733 N.W.2d 683, 697-99 (Iowa 2007)] and decided that joint physical care was in the best interest of the children. Malissa was the primary caregiver as a stay-at-home parent before the dissolution proceedings, but she need help from her parents. During the divorce proceedings, the parties struggled to communicate and conflict was prominent. Malissa made multiple accusations of domestic abuse, one supported by the school counselor, but DHS found no abuse. The parties had demonstrated the ability to communicate before the dissolution proceedings, both parents planned to remain in Webster City, and both valued the importance of the minor children's relationship with the other parent. Therefore, the Court found that the level of conflict and communication problems were likely to diminish after the dissolutions was concluded.

(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 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.

(4) 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.

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). Iowa Rule of Civil Procedure 1.503 prohibits discovery of privileged materials; and medical records are privileged materials under section 622.10. Therefore, they are not discoverable under rule 1.503. Chung v. Legacy Corp., 548 N.W.2d 147, 149 (Iowa 1996). 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.

(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).

(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).

Rodasky v. Rodasky, No. 16-1312 (Iowa App., 2016). In December 2015, Marsha agreed to allow E.R. to move to Vermillion, South Dakota, where Dan lives with his girlfriend, Joanie. Due to conflict among Dan, Joanie and Marsha, Marsha and E.R. did not communicate in January and February 2016, but they began speaking again in March and in April 2016, E.R. returned to Sioux City to live with Marsha while continuing to attend school in Vermillion. Though E.R. testified she preferred to live with Dan, the court found that Dan and Joanie's attitudes toward and comments about Marsha to E.R. had a substantial destructive influence on Marsha's relationship with E.R. At the same time, Marsha had not behaved in the same manner towards Daniel. She did not try to undermine [E.R.]'s relationship with Daniel while [E.R.] was there. Though some weight was given to the E.R.'s stated preference to live with Dan, *See* Iowa Code § 598.41(3)(f) and *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa Ct. App. 1985), the Court found that E.R.'s preference is influenced more by her desire to live and attend school in Vermillion than by a desire to live with Dan.

(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).

(c) ***Lopez v. Lopez*, No. 16-0915 (Iowa App., 2016)**. Anna and Francisco contested primary care of their thirteen year old daughter. The Court found it was in the child's best interests for Anna to have physical care of the child. First, approximation weighed heavily in favor of placing the child with Anna. *See In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 2007). Anna, including her extended family, has been the child's caretaker over the course of the parties' fairly lengthy marriage. *See In re Marriage of Ford*, 563 N.W.2d 629, 633 (Iowa 1997). Second, Anna will be able to minister more effectively to the child's needs. Both Anna and the child are bilingual—speaking Spanish and English. Francisco speaks only Spanish. Beyond this, K.A.G. had a closer relationship with the mother. Third, Anna testified it was K.A.G.'s preference to move with Anna and her extended family rather than live with the father and his new girlfriend. K.A.G. spent a great deal of time with her

extended family, and she would maintain the continuity of those relationships if placed with her mother. In contrast, the father's extended family resides in Mexico.

(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).

(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.

(b) Iowa Code Chapter 236 provides a mechanism for individuals to obtain protection from domestic abuse. 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.

Wendt v. Mead, No. 16-0928 (Iowa App., 2017). Wendy sought to extend a protective order entered under Chapter 235 for an additional year. The original order was entered by stipulation of the parties without a finding of domestic abuse. The district court did hold a contested hearing on Wendt's petition to extend the order. At the hearing, however, the district court noted there had been no previous finding of domestic abuse "and that the statute required Wendt to prove by a preponderance of the evidence that "the defendant continues to pose a threat to the safety of the victim, persons residing with the victim, or members of the victim's immediate family." Iowa Code § 236.5(2). The Court of Appeals held that the defect in original order because of its failure to include a finding of domestic abuse was waived because the order was not timely challenged; and in the current proceeding there was

sufficient evidence to establish that Mead posed a continuing threat. Wendt credibly testified she remained in fear of Mead; and Mead himself testified he believed her fear of him was sincere. *See Clark v. Pauk*, No. 14-0575, 2014 WL 6682397, at *3 (Iowa Ct. App. Nov. 26, 2014)

(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."

(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).

***Flick v. Stoneburner*, No. 15-1930 (Iowa App. 2016)**. Lindsey and Brayden were the unmarried parents of P.F, age 2. Lindsey appealed the award of primary care of the child to Brayden. Among the factors which convinced the Court of Appeals to affirm the district court was Lindsey's unwillingness to support Brayden's visitation with the child. Courts ". . .must consider the willingness of each party to allow the child access to the other party." *In re Marriage of Kunkel*, 555 N.W.2d 250, 253, 255 (Iowa Ct. App. 1996). Lindsey also refused to come to the neutral site to exchange the child and instead called the police and reported Brayden kidnapped the child. She was unable to communicate with Brayden in a non-hostile way. This lack of communication and hostile communication included not involving Braydne in health care decisions and negatively affected the child. *See In re Marriage of Berns*, No. 13-0013, 2013 WL 4009678, at *3 (Iowa Ct. App. Aug. 7, 2013). Perhaps the most significant factor was Lindsey's history of domestic abuse and violence. She was twice convicted of domestic abuse assault against Brayden. *See In re Marriage of Daniels*, 568 N.W.2d 51, 54

(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).

(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).

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 671owa 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).

(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 disguise 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 considering 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

(a) In General. 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).

(b) Right To Assign Visitation Rights of Military Persons The **2016 Iowa Legislature** in Senate File 2233 repealed Iowa Code Section 598.41D which permitted the assignment of the visitation rights of active duty military persons in two paragraphs and replaced it with the 17-page Uniform Deployed Parents Custody and Visitation Act, which accomplishes the same purpose. The new act is **Iowa Code Chapter 598C**.

(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.

(9) Right of First Refusal.

The opportunity of a parent to provide physical care for a child when the other parent is unable to do so has been termed a "right of first refusal" in our case law. *See In re Marriage of Lauritsen*, No. 13-1889, 2014 WL 3511899 (Iowa Ct. App. July 16, 2014). In most cases liberal visitation is served by granting the privilege. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). See also In re Marriage of Bevers, No. 14-0857 (Iowa App., 2015); and In re Marriage of Klemmensen, No. 14-1292 (Iowa App., 2015).

(10) International Visitation.

The Hague Convention on the Civil Aspects of International Child Abduction. is "an international treaty the purpose of which is to discourage international parental child abduction and to ensure children who are abducted or wrongfully retained in a party's country are returned to their country of habitual residence." See *In re Marriage of Rudinger*, No. 09-0281, 2009 WL 3337609, at 3 (Iowa Ct. App. Oct. 7, 2009. Though there is no explicit rule or standard, "[g]enerally, courts have approved out-of-country visitation when the country is a signatory to the Hague Convention and there is insufficient proof of an intention to wrongfully retain the child." *Abouzahr v. Matera-Abouzahr*, 824 A.2d 268, 281 (N.J. Super. Ct. App. Div. 2003). However, as a safeguard, courts often require the parent taking the child out of the country to post a bond. See *In re Marriage of Stern*, No. 13-2087 (Iowa App., 2015)

(11) 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.

(12) 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).

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 664A.7. 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 664A.7(2) provides an expedited process in which the hearing on the alleged violation of a no-contact order must be held in not less than five and not more than fifteen days after the issuance of a rule to show cause.

c. 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.

(1) Section 664A.7(4) provides that if a person is found in contempt for violation of a 664A.2 civil protective order, the person must serve a jail sentence which must be served on consecutive days.

(2) Section 664A.7(3) provides that if a person is found guilty of criminal no-contact order, the person must serve a minimum jail sentence of seven days on consecutive days, and deferred judgments and sentences are forbidden.

d. 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.

e. 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).

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).

However, in ***Spitz v. Iowa Dist. Court for Mitchell Cnty*. (Iowa, 2016)**, the Supreme Court clarified the right to counsel in civil contempt proceedings. Erika and Bradley, two former spouses were both found in contempt for willfully violating provisions of the dissolution decree. The ex-spouses appeared pro se at a hearing to determine whether they had purged themselves of contempt. The orders setting the combined hearing indicated that jail sanctions would be the subject of the hearing and that the hearing would be limited to one hour. Neither party objected. Prior to the hearing, the district court then asked each party if he or she was prepared to proceed without counsel, knowing that the result of the hearing could be an order directing them to jail. Erika answered that she would proceed. After the hearing, the district court found that that neither spouse had purged their contempt and ordered each to serve time in jail. Erika then appealed, claiming that her Fourteenth Amendment rights were violated because she was allowed to proceed without waiving counsel and because the court imposed a time limit. The Court held that the Due Process Clause does not require the provision of counsel in a civil contempt proceeding filed by an indigent private party so long as adequate procedural safeguards as to notice and opportunity to present evidence are provided. *Turner v. Rogers*, 564 U.S. 431, 441, 131 S. Ct. 2507, 2515-16, 180 L. Ed. 2d 452, 461 (2011). First, as to *notice*, Erika was on notice of the central issue in the case—whether she had provided visitation to Bradley. Second, as to *opportunity to present and dispute relevant information*, Erika offered both her own testimony and letters from each of the minor children. She was able to present an uninterrupted explanation of why visitation did not occur between Bradley and the children. Third, there were specific *court findings* made by the district court in its order. We hold that all of the procedural safeguards required under *Turner* were met here. Erika received all of those procedural safeguards here. Therefore, the Court held that Erika's due process right to counsel under the United States Constitution was not violated at the hearing to determine whether she had purged her contempt.

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. Creative Sanctions. Iowa Code §598.23 and 598.23A permit the court to impose the following sanctions in addition to requiring a condemnor to spend up to thirty days in jail: (1) withhold income under the terms and conditions of chapter 252D; (2) modify visitation to compensate for lost visitation time, or (3) establish joint custody for the child, (4) transfer custody, (5) direct the parties to provide contact with the child through a neutral party or neutral site or center, (6) impose other sanctions or specific requirements, (7) order the parties to participate in mediation to enforce the joint custody provisions of the decree, (8) require the posting of a cash bond, (9) require the performance of community service work of up to twenty hours per week for six weeks for each finding of contempt, and (10) enjoin the contemnor from engaging in the exercise of any activity governed by a license.

f. Child Support Contempt Costs. Section 598.24 provides that the court may tax the cost of the contempt action, including reasonable attorney fees, against the party held in contempt or default. *In re Marriage of Anderson*, 451 N.W.2d 187 (Iowa App., 1989), emphasizes that "default" and "contempt" are not synonymous. It is possible for a party to be in default but yet not have the requisite willfulness to have committed contempt. See *Skinner v. Ruigh*, 351 N.W.2d 182, 183 (Iowa 1984) ("The issue was not whether all of [a party's] default was

willful. Contempt was sufficiently shown if some of the default relied on was willful."). In addition, the Section 598.24, which addresses the issue of attorney fees, recognizes this distinction and provides for an award of attorney fees when one is found to be either in default or in contempt.

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) to 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 Sjulin, 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, 839 NW2d 630 (Iowa 2013). The court because of a combination of factors, not a single substantial change. Kenneth employment was uncertain and his income was smaller. Melissa's income had increased significantly and she had medical insurance and other benefits which were not contemplated at the time of the last support order.

In re Marriage of Schoper, No. 15-0702 (Iowa App., 2017). John's earnings decreased from $275,000 in 2011 to $140,000 (plus potential bonuses and stock options) at time of the modification trail. John remarried, assumed financial responsibility for his new wife's children, and moved to a state with a higher cost of living. He then asked the Court to release him from the spousal support obligation he assumed in 2011, at the time of the stipulated decree. A memo written by John during the negotiation of the 2011 settlement was presented to the Court: " John has not known anyone to be allowed to retire at 65 [by Monsanto]. An appropriate target is likely 60 years old and then he will need to retool and commence working in a much different role, likely at a tremendously lower salary." The Court found that John anticipated an end to his employment with Monsanto and that "his earnings following the divorce [m]ight decline" but agreed to the large spousal support sum in exchange for "Heidi's concession not to seek life-time alimony." In addition to being substantial, the changed circumstances must be material, "essentially permanent, and not within the contemplation of the court at the time of the decree." *In re Marriage of Sisson*, 843 N.W.2d 866, 870-71 (Iowa 2014). The Court concluded that John failed to prove a material and substantial change of circumstances not within his contemplation at the time of the dissolution decree.

h. Extraordinary Circumstances/Gross Unfairness. In re Sisson, 843 NW2d 866 (Iowa, 2014). Afronia was diagnosed with incurable blood cancer shortly after the decree was entered. 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, the court to modify can modify and amount and duration of spousal support 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).

In re Marriage of Elles, No. 16-0200 (Iowa App., 2016). The 2014 decree ordered Kevin to pay spousal support to Carolyn in the amount of $1.00 for a period of One Hundred Twenty (120) months. Kevin was unemployed at that time. In 2015, Kevin was rehired by his former employer, and Carolyn moved to modify the spousal support provision. The court then ordered Kevin to pay $1,200 per month spousal support until either party died, Carolyn's remarriage or Carolyn's 66th birthday. Kevin appealed, contending that the district court should not have increased the number of years he is required to pay spousal support to Carolyn because the record does not contain evidence of a substantial change in circumstances, except for his reemployment. The Court noted that the authority to modify spousal support includes the power to change the duration of the support from a finite period to an indefinite period." *In re Marriage of Sisson, 843 N.W. 2d* 866 at 871. However, "the circumstances to support a modification of spousal support from a finite period to an indefinite period must be 'extraordinary' and render the original award grossly unfair." *Id*. Here, the only change in circumstances from the time of the entry of the decree to the time

of the modification trial was Kevin's employment income, of which both the increase and the approximate amount were anticipated. In addition, at the beginning of the hearing, the court identified the amount of spousal support as being the issue; and Carolyn stated that her request was for "the ten-year duration." The district court, without giving the parties notice or opportunity to be heard, decided it should not have approved the original stipulation and ordered the ten-year term. The court did not have the right to write-out provisions of the decree and ignore the intent of the parties without a showing of a substantial change in other circumstances since the original decree was entered.

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.

c. Chapter 252C Proceedings: State Necessary Party.

Iowa Code Section 598.21C(3) states in pertinent part that: ". . . a modification of a support order entered under chapter . . . 252C, . . . or any other support chapter or proceeding between parties to the order is *void* unless the modification is approved by the court, after proper notice and opportunity to be heard is given *to all parties* to the order, or if services are being provided pursuant to chapter 252B, *the department is a party to the support order*." (Emphasis added) Under this provision, the State would be a "party" entitled to notice if the support payments were assigned to the department pursuant to the enumerated provisions. *See State ex. rel. Phipps v. Phipps*, 503 N.W.2d 391, 393 n.1 (Iowa 1993)

d. 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 that 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).

***Schleis v. Keiner*, No. 15-1902 (Iowa App., 2016)**. Suzanne argued that her increased child support from Tyler should be effective retroactively, beginning with the date she filed her petition to modify. The Court noted that Iowa Code section 598.21C(5) (2013) provides, "Judgments for child support or child support awards . . . which are subject to 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." However, retroactivity is not mandatory. In *In re Marriage of Ober*, 538 N.W.2d 310, 313 (Iowa Ct. App. 1995), the Court noted that the word "may" gives the trial court discretion in determining the effective date of the modification order. Here, Tyler had earned more than $130,000 in both 2013 and 2014, while Suzanne's only income was from social security disability. Therefore, the Court determined that Tyler could afford to pay the retroactive increase, and that the best interests of the minor child were served by the retroactive payment. *In re Marriage of Belcher*, 582 N.W.2d 510, 513 (Iowa 1998). However, the Court noted that the case began, not on the date the petition was filed, but on the date Tyler was served with Suzanne's petition for modification. Thus, the increased child support became effective three months from the date of service.

In re Marriage of Hoffman, No. 16-0045 (Iowa App., 2016). In 2015, the Supreme Court reversed the 2012 judgment of the district court which granted custody and child support to Ernie. The Court remanded the matter "for a determination of an appropriate visitation schedule and modification of Ernie's child support obligation based on the present financial circumstances of the parties and the child support guidelines." On remand, the district court determined that Ernie should pay child support in the amount of $2,921.40 per month; and that "the new child support obligation should not be retroactive, there having been no showing that it would be unfair to petitioner or the children for the new child support obligation to be prospective only nor any showing that the parties' children's financial needs have not always been provided for." Tracy sought child support retroactive to the date of the decree from which the appeal was taken as the Court of Appeals had initially ordered before the Supreme Court granted further review. However, the Court of Appeals held that the Supreme Court's mandate regarding child support is controlling. "The clear import of the Supreme Court's mandate was to determine a new child support obligation based on the parties' financial circumstances at the time of the remand hearing and to commence the new child support obligation at that time. *See In re Marriage of Davis*, 608 N.W.2d 766, 769 (Iowa 2000).

(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.

e. 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 Vetternack, 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).

e. 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 Eglseseder, 448 N.W.2d 703 (Iowa App. 1989); In re Marriage of Rolek, 555 N.W.2d 675 (Iowa 1996).

f. 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 a 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).

g. 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).

h. 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, 627 N.W.2d 550 (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); and *In re Marriage of Hoffman*, 867 N.W.2d 26 (Iowa, 2015).

***In re Marriage of Scott*, No. 15-2228 (Iowa App., 2016)**. Despite Anna's objections, during the pendency of the modification proceeding, Jeremiah Scott moved with the chidren to Hawaii. After the modification trial, the district court granted primary care of the children to Anna. The Court of Appeals sustained the trial court. When the custodial parent plans to relocate, the burden is on the noncustodial parent "to demonstrate the move will detrimentally affect the child[ren]'s best interests." *In re Marriage of Montgomery*, 521 N.W.2d 471, 474 (Iowa Ct. App. 1994). In determining whether to disallow removal of the children from their present home, the court must consider all of the surrounding circumstances—including the reasons for the removal, the new location, the distance to the new location, the relative advantages and disadvantages of the new location, the impact on the children, and the impact on the joint custodial and access rights of the other parent. *In re Marriage of Frederici*, 338 N.W.2d 156, 160 (Iowa 1983). Additionally, a court must consider "all the other relevant conditions affecting physical care." *In re Marriage of Thielges*, 623 N.W.2d 232, 238 (Iowa Ct. App. 2000). "If both parents are found to be equally competent to minister to the children, custody should not be changed." *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). Here, the record showed both Anna and Jeremiah were capable of providing a high level of care for their children. But the district court found Jeremiah had not put the children's best interests first when he decided to move to Hawaii and was instead "clearly acting in his own interest at that time." The court also found Jeremiah had displayed "a pattern of . . . attempts to frustrate continuing and meaningful contact between the children and their mother and was not following the decree provisions to communicate with Anna the information about the children regarding their education, activities, and health. *See In re Marriage of Fortelka*, 425 N.W.2d 671, 673 (Iowa Ct. App. 1988).

***In re Marriage of Gartner*, No. 15-1370 (Iowa App., 2016).** Heather and Melissa stipulated to joint legal custody with primary physical care to Heather in their decree. However, Heather announced plan to move to Minnesota less than three months after the decree. Heather had no real plan, job, or date for the move, but said she wanted to move to Minnesota to be near supportive family. The court found no evidence that Heather's intent was to undermine Melissa's relationship with the children, but concluded that the move was mostly about Heather and less about the children's best interests. To modify physical care, Melissa must had to establish by a preponderance of evidence that the post-decree conditions "have so materially and substantially changed" that the children's best interest requires modification. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983); and that she could minister more effectively to the children's well-being." *Id*. This heavy burden

promotes stability in the lives of children with divorced parents. *Id*. The children's best interest is the "first consideration." *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). Still, the Court found that Melissa had met this burden and modified the decree to grant her primary physical care. A material and substantial change in circumstances had occurred because: (1) the move would decrease the children's contact with Melissa and her family in Iowa; (2) the move would disrupt the children's important connections with residence, schools, therapists, and health care providers; (3) the parties' ability to communicate and cooperate had deteriorated; and (4) Heather and her mother had been hostile towards Melissa. *See* Iowa Code § 598.21D (2013). On the other hand, Melissa was committed to promoting Heather's continued involvement in the children's lives and to improve communication. *See*, *e.g*., *In re Marriage of Holst*, No. 02-0381, 2002 WL 31641452, at 2 (Iowa Ct. App. Nov. 25, 2002)

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].

In re Marriage of Ritchison, No. 16-9942 (Iowa App., 2017). In the decree, Dean and Wendy shared joint legal and joint physical care of the children. However, in a modification proceeding both the seventeen-year-old and the fourteen-year-old told the court they would rather live with their father during the week and with their mother on the weekends. Both daughters had been asking Wendy to see a therapist or counselor since before the proceedings began, but she refused to do so until Dean filed the petition for modification. According to the therapist consulted during the proceeding, both girls were experiencing some problems with their mood and also some relationship problems with Wendy, but there were no conflicts between the daughters and Dean. The Court noted that in making the physical-care determination, we consider the preferences of the children, but they are not controlling. *See McKee v. Dicus*, 785 N.W.2d 733, 738 (Iowa Ct. App. 2010); *see also* Iowa Code § 598.41(3)(f) (2015). The Court held that though the preferences of the children did not control the decision, both teenage children spoke candidly about the struggles they have been having while living in their mother's home; and although Wendy believed the children

want to live with their father because it gives them more freedom, the Court believes their stated reasons and affirmed the district court decision that modification of the decree placing M.J.R. and M.M.R. in the physical care of Dean was in their best interests.

(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 Rierson, 537 N.W.2d 806 (Iowa App. 1995).

Hurlbert v. Harris, No. 16-0421 (Iowa App., 2017). [O.H.] lived with Molly after the parties' breakup until the time of trial, but Scott had liberal visitation. [O.H.] was a happy child and does well in school. Scott sought joint physical, but the Court found that maintaining the successful past pattern was more important. In *In re Marriage of Hansen*, 733 N.W.2d 683, 696-99 (Iowa 2007), the court stated: "[S]tability and continuity of caregiving are important factors that must be considered in custody and care decisions." *Id*. at 696 (quoting a scholar for proposition that "past caretaking patterns likely are a fairly reliable proxy of the intangible qualities such as parental abilities and emotional bonds that are so difficult for courts to ascertain").

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).

***In re Marriage of Schachtner*, No. 15-2092 (Iowa App., 2016)**. Stacey moved to Colorado with the minor child R.S. with little notice to Michael; and Michael then petitioned for primary physical care. After 16 months, the case came to trial. Stacey had changed jobs and resided in three different places since they left Iowa. R.S. had attended two different schools and was having academic problems. Numerous text messages were introduced showing Stacey's lack of respect for Michael as a parent and her hostility for Michael and his girlfriend. The Court of Appeals confirmed the trial court's award of primary care to Michael. Stacey's out-of-state move and her ensuing instability affected R.S. R.S. had "suffered academically" since he was placed in Stacey's physical care. Stacey's hostility toward Michael and her efforts to undermine his relationship with R.S. were inappropriate. Stacey had played a substantially greater role than Michael in R.S.'s life and clearly there was a strong bond between Stacey and R.S. However, the Court found a greater countervailing risk in Stacey's unabated hostility toward Michael and her resistance to supporting his

relationship with R.S. "Because it is the policy of this state to preserve the parental relationships of both parents, it is in R.S.['s] best interest that his physical care be awarded to Michael. Moreover, it appears that Michael would support Stacey's relationship with R.S. and would be better able to address R.S.'s educational needs.. [and]R.S. has a better chance of getting back on track academically while in the physical care of his father, given Michael's more stable living and employment situation in Iowa.

***Myers v. Smith*, No. 15-0842 (Iowa App. 2016)**. Amber and Nick had a brief relationship, which resulted in the birth of a child in 2011. Amber first insisted that Nick terminate his parental rights and told Nick's family that she hoped "he gets blown up " while deployed by the National Guard. She refused to provide Nick with the information he needed to qualify the childas a beneficiary on his medical insurance or to list him as a dependent for military benefit purposes. She also refused to give Nick her address after she moved. Amber presented herself as still quite immature in her life choices. Nick , on the other hand, grown up; excelled in his military career; had a steady marriage for over two years; and consistently paid his child support. The Court concluded that though Amber has been the primary physical caregiver for the child and that ordinarily this factor is given great weight, the evidence established that she has stymied attempts by Nick and his wife to have a relationship with the child; and that she had refused to permit court-ordered visitation. Though moving the child's care to Nick would require an adjustment for the child, the Court determined any "resultant emotional trauma is less than the long-term effects of keeping the child with the mother who does not support the child's relationship with his father and fosters disrespect and fear of the father in the child."

(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 Malloy, No. 16-0274 (Iowa App., 2016)***. Traci and Michael agreed that the older child did not spend the night at Michael's home very frequently, but that the younger child spends the night at his home about three to four nights a week. In addition, the parties agreed that Michael remains active in the children's lives. He takes the children to their afterschool activities on nearly a daily basis; he takes them to dinner often; and he remained as active as possible in their lives. Finally, the parties agreed that the older child's anxiety problems which prevented frequent overnight visitation, did not stem from the shared-care agreement. The anxieties were more general and the child's anxieties have improved in recent years. Therefore, the Court concluded that the children had thrived and maintained a close relationship with both parents; that the lack of 50/50 overnights did not amount to a substantial change of circumstances since the decree's entry; and that the original order was still in the children's best interests.

(2) ***Christenson v. Mcnew*, No. 16-1144 (Iowa App., 2016)**. In the original decree, Ashley and Zack stipulated that Ashley would have primary physical care. After they both changed jobs and schedules, they agreed to a parenting plan which gave Zack more time with the child than was provided in the decree. Zack then asked to Court to modify the decree to grant him

joint physical care and reduce his child support. The Court of Appeals reversed the trial court's finding that the parties had modified their parenting plan to joint physical care by their actions. A decree can only be modified "only when there has been a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the child." *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). The original decree anticipated that Zach's schedule might change. The Court further ruled that parties cannot adjust the terms of the decree by their actions. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). In addition, a party may not leverage the grant of extra visitation or flexible visitation given by the custodial parent into a substantial change of circumstance claim. *In re Marriage of Wosepka*, 836 N.W.2d 152 (Iowa Ct. App. 2013). Allowing one parent to take advantage of the other's generosity and willingness to accommodate changes in schedules would discourage cooperation and effective co-parenting.

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).

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.

III. ACTIONS TO COMPEL SUPPORT

A. PATERNITY PROCEEDINGS

1. Methods to Establish Paternity

There are three methods to establish of 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.

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 brought a common law action for fraud, seeking as damages for the money he paid to Cassandra after he learned that he was not the fatherof her child. 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

TERMINATION OF PARENTAL RIGHTS: "REMOVED FROM PHYSICAL CARE"

In re Interest of C.F.-H., No. 16-0918 (Iowa, 2016). The Supreme Court had to decide when a child has been "removed from the physical care" of parents for at least twelve of the last eighteen months: one of the necessary grounds for termination of parental rights under Iowa Code section 232.116(1)(*e*) and (*f*) (2015). The father argued that the district court erred in granting termination of parental rights under Iowa Code section 232.116(1)(*e*) and (*f*) because the term "removal" in both code provisions requires a court order of removal under Iowa Code sections 232.78, 232.95 or 232.96. Under those code sections, a parent is entitled to notice of the fact that the removal of the child could have impact on his or her parental rights. The State argued that under Iowa Code section 232.116(1)(*e*) and (*f*) a formal "removal order" is not required: That the mere absence of physical custody was sufficient to satisfy the "removed from physical custody" requirement. The Supreme Court held that the statute requires a change from physical custody to lack of physical custody under chapter 232. This ensures that before termination occurs under these subsections, a parent has had a chance at physical custody in the past that has been unsuccessful; and that before termination occurs, the parent has been advised through the findings of judicial orders what the shortcomings of his or her parenting are and has been placed on clear notice that unless the situation is resolved, termination of parental rights may occur. If the statute were otherwise interpreted, many fathers, including those in military service, who are out of the country for extended periods of time might face a termination of parental rights under section 232.116(1)(*e*) and (*f*).