Presented by the ISBA's Family and Juvenile Law Section

2016 Family Law Seminar

October 27-28, 2016

West Des Moines Marriott

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SCHEDULE -THURSDAY, OCTOBER 27
7:30 - 8:00 – **Registration**

8:00 - 10:00
• The New Lawyer: Embracing the Pro Se Revolution and A Consumer Approach to Family Law Practice
• Effectively Delivering Unbundled Legal Services
• The First Consultation
• New Unbundling Lawyer Roles
Speaker: Forrest “Woody” Mosten

10:00 - 10:15 – Break

10:15 - 11:30
• Monitoring and Modifying Limited Scope Services
• Ethical Challenges of Delivering Unbundled Services
• Successful Models of Unbundling
Speaker: Forrest “Woody” Mosten

11:30 - 12:00 - **Self - Compassion for the Family Lawyer** - Speakers: Kimberly Stamatelos, Stamatelos & Tollakson and Ashley Tollakson, Stamatelos & Tollakson

12:00 - 1:00 - **Lunch** (included in registration fee)

1:00 - 1:30 - **How to Build a Unbundling Practice** - Speaker: Amy Skogerson, Skogerson Law PC and Chad Eichorn, Chad W. Eichorn, P.C.

1:30 - 2:45
• Unbundled Representation of Clients in Family Mediations
• Unbundling Collaborative Practice
Speaker: Forrest “Woody” Mosten

2:45- 3:00 – **Break**

3:00 - 5:00
• Providing Unbundled Preventive Legal Wellness for Family Law Clients
• Kick Starting Your Unbundled Family Law Practice
Speaker: Forrest “Woody” Mosten

5:00 - 6:00 - **Chair’s Reception** - Join us for complementary drinks and snacks, greet old friends, make new acquaintances, meet our speakers, discuss the days events and tomorrow’s topics. The Iowa State Bar Association would like to thank HDH Advisors LLC for sponsoring the Chair's Reception.

SCHEDULE -FRIDAY, OCTOBER 28
7:30 - 8:00 - **Registration**

Juvenile Law Breakout Session:
To provide juvenile law specialists with the three hours of CLE credit required each year, the following sessions will be offered separate from the regular program between 8:00 and 10:00 a.m. The final juvenile CLE hour will be provided by the New Every Student Succeeds Act presentation at 1:00 p.m.

8:00 - 9:00 - **Placements Stability for Kids in Care** – Speaker: Wendy Rickman, DHS

9:00 - 10:00 - **Transition Planning for Kids with Special Needs** – Speaker: Cole Mayer,Masterson Bottenberg & Eichorn, LLP; Jan Huff, DHS; and Jennifer Sorensen, Community Support Advocates

Regular Session:
8:00 - 9:00 - **Family Law Case Update** - Speaker: James Meade, Meade Law Office

9:00 - 10:00 - **Conduct Your Family Court Trial to Withstand Appeal** - Speakers: Andrew Howie, Hudson Mallaney Shindler & Anderson PC and Hon. Richard Doyle, Iowa Court of Appeals

10:00 - 10:15 – Break

10:15 - 11:00 - **Family Law Task Force Reports** - Moderator: Matthew Brandes, Simmons Perrine Moyer Bergman PLC

11:00-12:00 - **The Fourteen Most Popular Ways To Be Disbarred or Suspended** - Speakers: Kim Baer, Baer Law Office and Andrew Howie, Hudson Mallaney Shindler & Anderson

12:00 - 1:00 - **Lunch** (provided with registration)

1:00 - 2:00 - **What Family Law Attorneys Need to Know About the New Federal Every Student Succeeds Act** - Speaker: Thomas Mayes, Iowa Department of Education

2:00 - 2:30 - **Chapter 598C - Assignment of Visitation Rights by Active Duty Military Parents** - Speaker: Captain Ben F, Iowa Army National Guard

2:30 - 3:00 - **Family Law Habeas Corpus Proceedings** – Erik Fisk, Whitfield & Eddy PLC

3:00 - 3:15 – **Break**

3:15 - 4:15 - **War of the Words: Best Practices in High-Conflict Divorces** - Moderator: Diane Dornburg, Carney & Appleby, PLC
Panel: Elizabeth Albright-Battles, Iowa Coalition Against Domestic Violence; Hon. Robert Hutchison, District Court Judge; Shannon Archer, Polk County Attorney's Office and Daniel Bray, Bray & Klockau PLC

4:15 - 5:00 - **Living the Dream: What You Need to Know about the Rule 39.18 Death or Disability Plan** - Speaker: Joseph Feller, Koopman Kennedy & Feller

MARITAL DISSOLUTION SERVICES

- Business valuations
- Tax alternatives (ramifications)/settlement projections
- Analysis of pre-marital/marital assets and liabilities
- Analysis of privately-owned business for identification of owner perks
- Value of retirement benefits "earned" during marriage
- Reimbursement alimony calculations
- Commercial real estate appraisals

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- Ownership Succession
- Business Transfer
- Fairness Opinions

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2016 FAMILY LAW SEMINAR

Self-Compassion for the Family Lawyer

11:30 a.m.- 12:00 p.m.

Presented by

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THURSDAY, OCTOBER 27

CHECKING IN WITH YOURSELF

BREATH (Greek = pnevma)

- Most important life sustaining process.
- Breathing deeply:
  - Improves quality of health and emotions.
  - Improves ability to be more fully present and centered.
  - Helps us show up more fully open and available for both the beauty and challenges of life.

SETTING YOUR INTENTION

YOUR ROLE IN THIS WORKSHOP

- Being fully present without technology distractions.
- Taking notes on things that resonate.
- Recognizing the power and gift of our breath.
- Being continuously awake and aware of your intention (purpose) for this time together.

INTENTION FOR THIS WORKSHOP

- To introduce you to the idea of using compassion in your work so you can be a more effective problem solver and help clients act in their *enlightened* self interest.

BEFORE WE BEGIN: A QUESTION

- Can you explore the topic of compassion without fear, judgment or resistance?
- If the answer is no, what is getting in the way?

WHAT IS COMPASSION?

Deep awareness of the suffering of another accompanied by a strong desire to alleviate the suffering.

WHAT COMPASSION IS NOT

- Just being nice
- Being a doormat
- Letting go of healthy boundaries
- Allowing others to walk all over you
- Staying quiet instead of speaking your truth

EMOITIONAL CONTAIGON

- 2002 Yale Study confirms it exists.
- Actor made eye contact, enthusiastic smiled often
- Registered higher in cooperation, fairness, collaboration and overall group performance.

OUR INTENTION AS LAWYERS

Over-arching theme of *compassion* and *positive emotion*.

WHAT ABOUT SELF-COMPASSION?

"Instead of mercilessly judging and criticizing yourself for various inadequacies or shortcomings, self-compassion means you are kind and understanding when confronted with personal failings – after all, who said you were supposed to be perfect?"

– Kristin Neff

SELF-COMPASSION IS NOT

- Self esteem (positive self worth; I'm a good person.)
- Self pity
- A sign of weakness
- Selfish
- An excuse to stay stuck or complacent

Self compassion research shows

1. Valuable Source of Resiliency and Coping

1. Being Good to Yourself Helps You be Good to Others

HOW TO PRACTICE SELF COMPASSION

1. Acknowledge you're suffering and worthy of compassion.
   - The Inner Critic
2. Recognize Suffering is the universal condition. (undramatic quiet failure is the norm)
   - Pause and Make a Choice
3. Switch to self compassion mode.
   - The Inner Mentor

4. Use soothing touch.





BIGGEST SABOTEURS

- All or none thinking
- Feeling self-indulgent
- Triggers (hunger, tired, overworked)
- Perfectionism
- Putting everyone else's needs first

Exercising Self-Care

2012 Olympic Trials Marathon – Houston, Texas

Minimizing Triggers

1. Sleep –getting enough sleep is vital to our physical and spiritual well-being. The way you feel when you're awake depends in part on what happens while you're sleeping. Sleep plays a role in all of the following:

- Healthy Brain Function and Emotional Well-Being
- Physical Health
- Daytime Performance and Safety

How much sleep is enough?

Age	Recommended Amount of Sleep
Newborns	16–18 hours a day
Preschool-aged children	11–12 hours a day
School-aged children	At least 10 hours a day
Teens	9–10 hours a day
Adults (including the elderly)	7–8 hours a day

- If you routinely lose sleep or choose to sleep less than needed, the sleep loss adds up. The total sleep lost is called your **sleep debt**. For example, if you lose 2 hours of sleep each night, you'll have a sleep debt of 14 hours after a week.

EXERCISE / PHYSICAL ACTIVITY

- **Benefits of Regular Physical Activity**
  1. Exercise controls weight
  2. Exercise combats health conditions and diseases
  3. Exercise improves mood
  4. Exercise boosts energy
  5. Exercise improves brain function
  6. Exercise improves sleep

Food / Nutrition

- Tips to develop a healthy eating plan:

1. Pay attention to portion control.
2. Always drink plenty of water.
3. Vary your food choices to make sure you get a wide variety of vitamins. and other nutrients to avoid boredom.
4. Know the recommended daily calorie intake for your age, weight, height, activity level and gender.
5. Don't deprive yourself of foods you love; just enjoy them in moderation.

- WHAT DO YOU DO NOW FOR SELF-COMPASSION AND SELF-CARE?
- WHAT CAN YOU DO DIFFERENTLY GOING FORWARD?

A Self Compassion Meditation

- *"This is really painful, but I realize that I am not alone in my suffering. May I be loving towards myself and accept myself just the way I am."*

2016 FAMILY LAW SEMINAR

How to Build a Unbundling Practice

1:00 p.m.- 1:30 p.m.

Presented by

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Skogerson Law PC
PO Box 252
Van Meter, IA 50261
Phone: 515-996-4045

Chad Eichorn
Chad W. Eichorn, P.C.
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THURSDAY, OCTOBER 27

Unbundled Legal Services

FROM APPEARANCE TO WITHDRAWAL

AMY SKOGERSON

CHAD EICHORN

Is it Ethically Permissible?

- **IRPC Rule 32:1.2c**: A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
  - The client's informed consent must be confirmed in writing unless the representation of the client consists solely of telephone consultation the representation is provided by a lawyer employed by a nonprofit legal services program or participating in a nonprofit or court-annexed legal services program and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms; or the court appoints the attorney for a limited purpose that is set forth in the appointment order.

Is it Ethically Permissible?

- **IRPC Rule 32:1.2(c) (cont.):** If the client gives informed consent in a writing signed by the client, there shall be a presumption that the representation is limited to the attorney and the services described in the writing; and the attorney does not represent the client generally or in any matters other than those identified in the writing.

Appearance Under Limited Scope of Representation

- **IRCP Rule 1.404 (3)** Limited Appearance. Pursuant to Iowa Rule of Professional Conduct 32:1.2(c), an attorney's role may be limited to one or more individual proceedings in the action, if specifically stated in a notice of limited appearance filed and served prior to or simultaneously with the proceeding. If the attorney appears at a hearing on behalf of a client pursuant to a limited representation agreement, the attorney shall notify the court of that limitation at the beginning of that hearing.

Document Drafting

- **IRCP Rule 1.423(1)** *Disclosure of limited representation*. Every pleading or paper filed by a pro se party that was prepared with the drafting assistance of an attorney who contracted with the client to limit the scope of representation pursuant to Iowa Rules of Professional Conduct 32:1.2(c) shall state that fact before the signature line at the end of the pleading or paper that was prepared with the attorney's assistance. The attorney shall advise the client that such pleading or other paper must contain this statement...

Document Drafting

- **IRCP Rule 1.423(1) (cont.) ...**The pleading or paper shall also include the attorney's name, personal identification number, address, telephone number and, if available, facsimile transmission number, but shall not be signed by the attorney. If the drafting assistance was provided as part of services offered by a nonprofit legal services organization or a volunteer component of a nonprofit or court-annexed legal services program, the name, address, telephone number and, if available, facsimile transmission number of the program may be included in lieu of the business address, telephone number, and facsimile transmission number of the drafting attorney.

Document Drafting (cont.)

- **IRCP Rule 1.423(2)** *Drafting attorney's duty*. In providing drafting assistance to the pro se party, the attorney shall determine, to the best of the attorney's knowledge, information, and belief, that the pleading or paper is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not filed for any improper purpose, such as to harass or to cause an unnecessary delay or needless increase in the cost of litigation. The attorney providing drafting assistance may rely on the pro se party's representation of facts, unless the attorney has reason to believe that such representation is false or materially insufficient, in which instance the attorney shall make an independent, reasonable inquiry into the facts.

Document Drafting (cont.)

- **IRCP Rule 1.423(3)**. *Not an appearance by attorney*. The identification of an attorney who has provided drafting assistance in the preparation of a pleading or paper shall not constitute an entry of appearance by the attorney for purposes of rule 1.404(1) and does not authorize service on the attorney or entitle the attorney to service as provided in rule 1.442

Service

- **IRCP 1.442(2)**. *How service is made*. Service upon a party represented by an attorney shall be made upon the attorney unless service upon the party is ordered by the court. Service on an attorney who has made a limited appearance for a party shall constitute valid service on the represented party only in connection with the specific proceedings for which the attorney has appeared, including any hearing or trial at which the attorney appeared. Service shall be made by delivering, mailing, or transmitting by fax (facsimile) a copy to the attorney or to the party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of court.

Service (cont.)

- **IRCP 1.442(2) (cont.)**. Delivery within this rule means: handing it to the attorney or to the party; leaving it at the attorney's or party's office; or, if the office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion residing therein. Service by mail is complete upon mailing.

Service (cont.)

- **IRCP 1.442(2) (cont.)**. Service may also be made upon a party or attorney by electronic mail (e-mail) if the person consents in writing in that case to be served in that manner. The written consent shall specify the e-mail address for such service. The written consent may be withdrawn by written notice served on all other parties or attorneys. Service by electronic means is complete upon transmission, unless the party making service learns that the attempted service did not reach the person to be served.

Communication with Opposing Parties under Limited Representation

- **IRPC Rule 32:4.2(a)**: In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

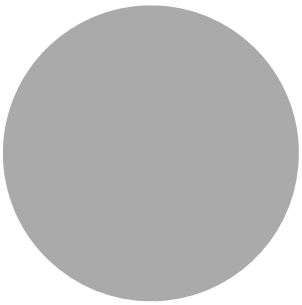
Communication with Opposing Parties Using Limited Representation Counsel

- **IRPC Rule 32:4.2(b)**: An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with rule 32:1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited-representation lawyer as to the subject matter within the limited scope of representation.

Termination of Limited Appearance

- **IRCP1.404(4)** *Termination of limited appearance*. At the conclusion of a proceeding in which an attorney has appeared pursuant to a limited representation agreement, the attorney's role terminates without the necessity of leave of court upon the attorney's filing a notice of completion of limited appearance. The notice of completion of limited appearance shall state that the attorney was retained to perform a limited service; shall describe the limited service; shall state that the service has been completed; and shall include the personal identification number, address, telephone number and, if available, facsimile transmission number of the client. The attorney shall serve a copy of the notice on the client and all other parties to the action or their attorneys.

FORMS



2016 FAMILY LAW SEMINAR

Juvenile Law Track
Placements Stability for Kids in Care

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

Presented by

Wendy Rickman, LISW
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Division of Adult, Children and Family Services
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Phone: (515) 281-5521

FRIDAY, OCTOBER 28

Iowa Department of Human Services

SFY18 Child Welfare Service Procurements, Placement Stability and Iowa's Child Welfare System of Care

By Wendy Rickman, LISW
Iowa Department of Human Services
October 28, 2016

1

New Child Welfare Service Contracts Planned To Begin July 1, 2017 for SFY18

- Child Welfare Emergency Services (CWES)
- Foster Group Care Services (FGCS)
- Supervised Apartment Living (SAL)
- Recruitment and Retention of Resource Families (R&R)
- Training and Peer Support

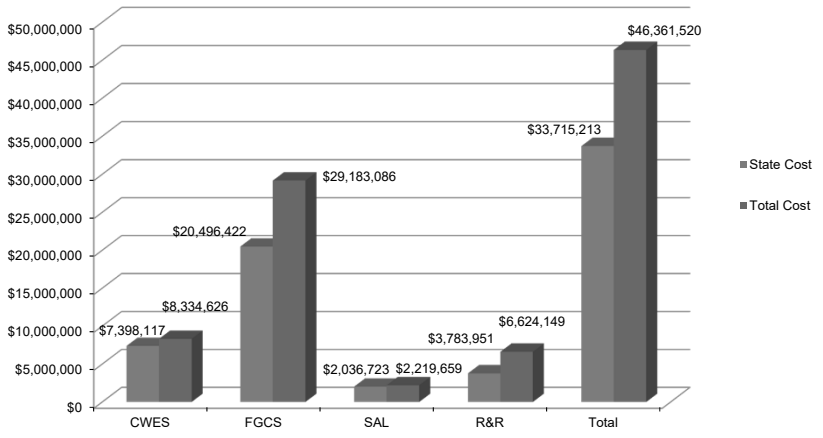
2

Contractor Capacity and Services Provided in SFY15

- Child Welfare Emergency Services
  - 13 Contractors with 15 shelters across Iowa and a daily average census of 156
- Foster Group Care Services
  - 14 Contractors with 63 licensed units across Iowa; 1,447 children were served
- Supervised Apartment Living
  - 6 Contractors with a monthly average of 71 youth
- Recruitment and Retention of Resource Families
  - 2,129 family foster care settings serving an average of 1,740 children monthly

3

Costs Of These Four Child Welfare Services In SFY15



4

Guiding Principles For Iowa's Future Child Welfare System

Safety for children emerges and is enhanced when we do all the following:

1. Families, children, youth and caregivers will be treated with dignity and respect while having a voice in decisions that affect them.
2. The ideal place for children is with their families; therefore, we will ensure children remain in their own homes whenever safely possible.
3. When services away from the family are necessary, children will receive them in the most family-like setting and together with siblings whenever possible.

5

Guiding Principles For Iowa's Future Child Welfare System

4. Permanency connections with siblings and caring and supportive adults will be preserved and encouraged.
5. Children will be reunited with their families and siblings as soon as safely possible.
6. Community stakeholders and tribes will be actively engaged to protect children and support families.
7. Services will be tailored to families and children to meet their unique needs.

6

Guiding Principles For Iowa's Future Child Welfare System

8. Child welfare professionals will be supported through ongoing development and mentoring to promote success and retention.
9. Leadership will be demonstrated within all levels of the child welfare system.
10. Decision making will be outcome based, resource-driven and continuously evaluated for improvement.

7

Movement Toward A Child Welfare System Of Care

- Iowa's child welfare system must develop more evidence based and data driven approaches that support strong children and strong families
- Community networks that focus on the whole person and meet the needs for growth and development must be developed or strengthened

8

Anticipated Procurement and Related Events Schedule

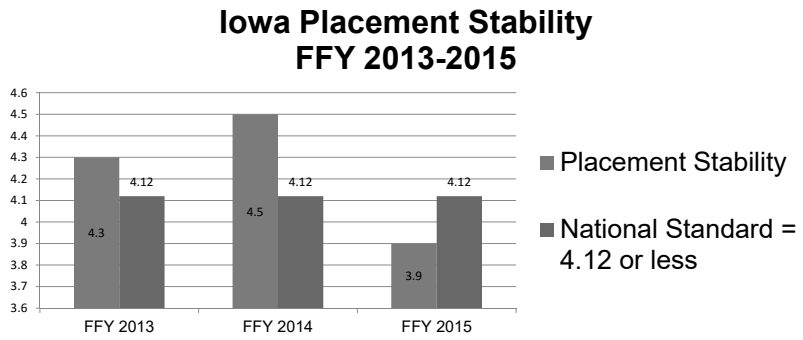
- Public/private collaborations and input currently and ongoing
- Technical assistance provided for DHS, key stakeholder, and private providers beginning in February 2016 with other phases through the calendar year
- RFPs published in the fall 2016 with competitive bids accepted through early 2017
- New contractors begin services July 1, 2017
- Further Information can be found at: http://dhs.iowa.gov/node/2585

9

Placement Stability Performance Measure

- Child and Family Services Review – Round 3 (See Capacity Building Center for States Fact Sheet – Placement Stability)
- Measures moves per day in foster care for children who entered foster care in a 12-month period.
- Each move that occurs during the monitoring period is counted, but the initial placement is not.
- Risk adjusted for age at entry into foster care.
- Formula computation result multiplied by 1,000 to derive a rate of moves per 1,000 days in care
- National Standard = 4.12 moves or less per 1,000 days in care

Iowa Performance



Source: Results Oriented Management (ROM)

Service Area Efforts to Increase Placement Stability

- Eastern Iowa Service Area:
  - Improvement Strategies:
    - Updated placement folders with DHS documents, tips, tools, and contact information for DHS and other parties to case.
    - 6 Week Placement Support Process – Checklist and desk aid for foster parents, IFAPA, IKN, FSRP, and DHS staff to use that outlines support milestones, including interventions to be utilized.
    - Stability Staffings - Addresses behaviors of children by wrapping supports around caregiver to stabilize behaviors, identify needs, and implement appropriate interventions.

Service Area Efforts to Increase Placement Stability Continued

- Cedar Rapids Service Area:
  - Improvement Strategies:
    - Condensing individualized placement packets for foster parents and relative caregivers to make them more helpful.
    - Improving communication through coordinating contact between DHS, FSRP, IKN and others with a goal of weekly contact with the placement family within the first month and effective communication established within the first six weeks of placement.
    - Improving communication links between the placement family and the child's family when the child is first placed.
    - Building a Crisis Stability Staffing model in order to proactively address red flags of potential situations that lead to instability.
    - Exploring short-term alternatives to placement (i.e. up to 23 hours) that would be a resource to parents as opposed to formal placement.

Service Area Efforts to Increase Placement Stability Continued

- Northern Iowa Service Area:
  - Improvement Strategies:
    - Utilize placement packets, 1 for foster parents and 1 for relative caregivers, with information important to caregivers.
    - Implemented a dedicated supervisor managing a telephone call line and answers questions caregivers have.
    - Created newsletter with Iowa Kids Net.
    - Enhanced communication between supervisors and DHS workers with better communication to foster parents.
    - Supervisors looking at cases earlier.
- Des Moines Service Area:
  - Staff visiting relative caregivers within first few days of placement.

Questions

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Division of Adult, Children and Family Services

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CFSR Round 3
Statewide Data Indicator Series

The Children's Bureau conducts Child and Family Services Reviews (CFSRs) in partnership with State child welfare systems in all 50 States, the District of Columbia, and Puerto Rico. CFSRs enable the Children's Bureau to assess conformity with Federal child welfare requirements, determine child and family experiences while receiving State child welfare services, and help States identify agency and program strengths and areas for improvement. Statewide data indicators are used in the evaluation of child outcomes related to safety and permanency. CFSRs also focus on child and family well-being as well as systemic requirements.

Capacity Building
CENTER FOR STATES

CFSR Permanency Outcome 1:

Children have permanency and stability in their living situations.

Placement Stability

This indicator measures whether the agency ensures that children who the agency removes from their homes experience stability while they are in foster care.

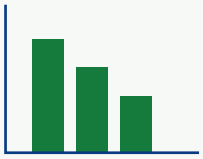
Definition:

Of all children who enter foster care in a 12-month period, what is the rate of placement moves per day of foster care?

National Standard:

4.12 moves per 1,000 days in care

(A lower value is desirable)



Numerator:

Of the children in the denominator, the total number of placement moves during the 12-month period

Denominator:

Among the children who enter foster care in a 12-month period, the total number of days that these children were in foster care as of the end of the 12-month period

Per Adoption and Foster Care Analysis and Reporting System (AFCARS)

Changes From Round 2:

During CFSR Round 2, placement stability consisted of three measures that created a composite measure. The new indicator controls for the length of time that children spend in foster care, so only one indicator is needed. The new indicator looks at moves per day of foster care, rather than children as the unit of analysis. In Round 2, moves that took place prior to the monitoring period were counted. In Round 3, only those moves that occur during the monitoring period are counted and the initial placement is not counted. In addition, the Round 2 measure treated children who moved two times in an episode the same as children who moved 15 times; both failed to meet the measure. The new indicator counts each move, so it continues to hold States accountable for children who have already moved several times.

Data Quality Checks Performed

- Dropped records (>10%)
- AFCARS IDs do not match from one period to the next (>40%)
- Missing date of birth (>5%)
- Missing date of latest removal (>5%)
- Date of birth after date of entry (>5%)
- Date of birth after date of exit (>5%)
- Age at entry is greater than 21 (>5%)
- Age at discharge is greater than 21 (>5%)
- In foster care more than 21 years (>5%)
- Enters and exits care the same day (>5%)
- Exit date is prior to the removal date (>5%)
- Missing number of placement settings (>5%)
- Percentage of children on first removal (>95%)

Data Periods Used to Calculate the National Standard	
AFCARS 13B, 14A	
Primary Data Elements Required for Calculation	
AFCARS FC Element #1	Title IV-E Agency
AFCARS FC Element #4	Record Number
AFCARS FC Element #21	Date of Latest Removal
AFCARS FC Element #23	Date of Placement in Current Foster Care Setting
AFCARS FC Element #24	Number of Placement Settings During This Removal Episode
AFCARS FC Element #56	Date of Discharge From FC
Additional Data Elements Required for Risk-Adjusted Analysis	
AFCARS FC Element #6	Child's Date of Birth

Risk is adjusted on age at entry.

Adjusting on age controls for the fact that children of different ages have different likelihoods of experiencing the outcome, regardless of the quality of care that a State provides.

Notes

INCLUSIONS

Only placement settings that are required to be counted in the AFCARS file are used for this indicator. If the child is moved to a living arrangement or setting that would not result in the State increasing the number of placement settings reported in AFCARS, those moves are not included in this indicator (e.g., trial home visit episodes; runaway episodes; respite care; and changes in a single foster family home's status, for example, to reflect a licensing change from a foster care home to a home dually licensed for adoption).

Counts only the days in care within the 12-month period. The days in care and moves during the placement episodes are cumulative across episodes reported in the same year.

EXCLUSIONS

Children in care less than 8 days and children who enter care at age 18 or older are excluded from this measure.

For youth who enter at age 17 and turn 18 during the period, any time in foster care beyond the 18th birthday or placement changes after that date are not counted.

The initial removal from the home (and into care) is not counted as a placement move.

ADJUSTMENTS

Expressed as a rate per 1,000 days in care. The result of the numerator divided by the denominator is multiplied by 1,000 to produce larger numbers that are easier to understand.

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FRIDAY, OCTOBER 28

Assimilation of EDMS Rules into the Iowa Rules of Appellate Procedure

All appeals are now filed through the electronic document management system (EDMS).

The current interim Chapter 16 of the Iowa Court Rules governing EDMS are not published, but are instead buried in the bowels of the Judicial Branch website: www.iowacourts.gov (Home>eFiling>Overview>Chapter 16 Rules>Chapter 16, Appellate Rules).

Proposed amendments assimilating EDMS rules into the Rules of Appellate Procedure are out for public comment until October 31, 2016. The August 29, 2016 supreme court order and proposed appellate rules amendments are available on the Judicial Branch website (Home>About the Courts>Supreme Court>Orders). Orders are listed in reverse chronological order. Also, the proposed final rules for EDMS (Iowa Rules of Electronic Procedure—Chapter 16 of the Iowa Court Rules) are out for public comment until October 14, 2016. *See* September 15, 2016 supreme court order and rules on the Judicial Branch website. When or if these changes will become effective is unknown.

Highlights of the Proposed Amendments to the Rules of Appellate Procedure

Rule 6.100(1) mandates use of EDMS for appellate cases. Rule 6.100(2) applies the Iowa Rules of Electronic Procedure to appellate court cases.

The amendments abandon the requirement that parties file and serve multiple documents. *See*, *e.g.*, rules 6.201(1)(b), 6.202(2), & 6.9o1(8). So, when filing with the clerk's office, please do not click on "send" 18 times.

Rule 6.110 clarifies a filing party's responsibility in handling protected information and confidential materials. The amended rules require separate appendices for confidential information. Thus, an appendix

with one confidential document will not be confidential. *See* rules 6.110(2)(c) & 6.905(14).

Rule 6.201(2) bars a party from joining another party's petition on appeal in a termination-of-parental-rights appeal.

Emailing or faxing documents does not constitute electronic filing under Rule 6.701(2).

Rule 6.702(1) requires that a filer ensure all required service is accomplished pursuant to Iowa Rs. Elec. P. 16.315 & 16.319(1)(c).

Rule 6.803(2)(f) no longer permits condensed transcripts.

Rule 6.803(2)(g) requires electronic transcripts to be searchable.

Rules 6.903(1) and 6.905(3) clarify that electronically filed appellate briefs and appendices should have white covers with consecutive page numbering in Arabic numbers beginning with the cover page and including any blank pages. Page numbers must match the digital page numbers of the electronic document. Rule 6.903(1)(g) reduces the maximum printing cost per page from $4.00 to $1.00.

Rule 6.904(2)(a) removes the requirement to use L.Ed. cites.

Rule 6.904(2)(d)(2) requires that citations to treatises, textbooks, and encyclopedias include the edition, and the section or page as applicable.

In referencing the record, Rule 6.904(4) requires final briefs to contain a reference to the original page and line numbers of the transcript.

Rule 6.904(5) allows hyperlinks.

Under Rule 6.905(3)(c), if an appendix consists of multiple volumes, the volumes may not be consecutively paginated and references to the page numbers must include both the volume number and the page number, e.g., appendix v. II p. 256.

Under Rule 6.905(4), if the appendix consists of multiple volumes, the table of contents *in each volume* must disclose the contents and page numbers of *all* volumes.

Rule 6.905(7) allows, but does not require, relevant portions of an electronically filed transcript or evidentiary deposition to be included in the appendix.

Under Rule 6.905(14), confidential or protected information that is not or cannot be redacted must be included in a separate volume of the appendix, and only that volume must be certified as confidential.

The Brief

The United States Court of Appeals for the Seventh Circuit has an excellent *Practitioner's Handbook for Appeals* on its website: www.ca7.uscourts.gov (Home>Rules and Procedures>Handbook). Your time would be well spent reading the tips included in the handbook's sections on "Writing a Brief" and "Requirements and Suggestions for Typography in Briefs and Other Papers."

A concise introductory paragraph (omitting unnecessary facts) is helpful to the court and screening staff. Iowa R. App. P. 6.903(2)(e). What is the case about? What did the district court decide? Why was the district court wrong (or right)? What relief do you seek?

It is said that you only have one chance to make a first impression. The brief is your first impression to the appellate court. We are cognizant of the temporal constraints and economic pressures of today's law practice, but an obviously hurried, error-filled, sloppy cut-and-paste-job does not impress. Have the brief proofread by someone other than you.

Edit out the chaff. To be sure, it takes more time to be succinct, but be aware that a rambling 60- or 70-page brief that bumps up against the 14,000-word maximum is not greeted with enthusiasm. In many cases, less is more. Assume you are writing for persons afflicted with attention deficit disorder.

Boilerplate is annoying and unnecessarily lengthens your brief.

While brevity is preferred, random mention of an issue, without elaboration or supportive authority, is not sufficient to raise the issue for our review. *See EnviroGas, L.P. v. Cedar Rapids/Linn Cty. Solid Waste Agency*., 641 N.W.2d 776, 785 (Iowa 2002).

Don't be a Del Griffith.[1] Tell a story, and tell the story with interest—and have a point. Lay out the facts in a logical fashion. Give enough honest relevant facts to set the context for your asserted points of error.

Use the parties' names, or a descriptive term, such as "the paramour," "the husband," or "the decedent." Iowa R. App. P. 6.904(1). Use of designations such as "appellant" or "appellee" can be confusing and are discouraged.

Every fact asserted in your brief must be supported by a reference to the record or appendix. Iowa R. App. P. 6.903(2)(f). Citation to the district court's findings of fact is not sufficient.

Do not reference matters that are not in the record or occurred after the appeal was taken.

You may include charts, diagrams, photographs, or portions of relevant documents. Inclusion of a graphic can be worth a thousand words—and may save you from having to write that many.

Choose and narrow your issues carefully. Don't sling mud at the wall just to see what sticks. Trivial arguments can detract from your strong ones.

Tell us how/where each issue was raised and preserved in the record. Iowa R. App. P. 6.903(2)(g)(1). Merely stating error was preserved by filing a notice of appeal will not do. "While this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation." Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in*

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[1] Chatty shower curtain ring salesman played by John Candy in the 1987 movie *Planes, Trains and Automobiles* whose pointless anecdotes wearied fellow traveling companion, Neal Page.

Iowa: Perspectives on Present Practice, 55 Drake Law Rev. 39, 48 (Fall 2006).

Generally, the court will not consider an issue not raised before or decided by the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Set out the scope and standard of review for each issue you raise. Iowa R. App. P. 6.903(2)(g)(2).

Do not ignore or misrepresent bad facts. Address them head-on.

Support your argument with authority, for failure to do so may be deemed a waiver of that issue. Iowa R. App. P. 6.903(2)(g)(3). And be honest in citing case law. Although a West® headnote may say precisely what you wish, confirm that the case actually stands for the proposition asserted.

When citing to a case, give a pinpoint or jump cite (i.e., the particular page or pages of the case on which the cited material appears). Iowa R. App. P. 904(2)(a). Check your citations for accuracy. For unpublished opinions, you must include the electronic cite. E.g., No. __-____, ____ WL ____, at * ___ (___ 20__). Iowa R. App. P. 6.904(2)(c). Lexis® cites are not helpful as the court has no access to that service. A North West Reporter cite to a table of unpublished opinions is not particularly helpful either.

Hyperlinks and other electronic navigational aids may be included as an aid to the court. Interim Iowa Ct. R. 16.1231(1).

If your case involves some arcane area of the law, educate us. Set out relevant portions of applicable statutes and rules.

If you are asking us to decide an issue for which there is no Iowa authority, point us to other authority that supports your argument—the law from other states, federal law, and legal treatises. Do not expect the court to do your legal research for you.

Emotional appeals and exaggeration have little effect on an appellate court (other than to induce a collective rolling of the eyes) and only

undermines your credibility. The brief should be written to persuade the court, not to impress your client.

Do not raise discovery disputes in the briefs and at oral argument unless there is a discovery issue on appeal. If the fact that one side was not forthcoming during the pretrial phase did not become an issue during trial and is not an identified issue on appeal, there is no need for us to hear it.

Every brief should conclude with a statement telling us the relief you seek. Iowa R. App. P. 6.903(2)(h).

Do you want oral argument or not? Iowa R. App. P. 6.903(2)(i). Assignment for oral argument will delay disposition of your appeal. Appellees: Do not conditionally ask us to grant oral argument "only if we are thinking of reversing the district court." Do not ask for oral argument unless you really want it and think it would be helpful. Iowa R. App. P. 6.908(2). If you do not request oral argument and we think it will be useful, we will order it anyway.

As former Justice Mark McCormick once wrote, "To be understood, the writing must be clear and organized. To be clear, it must be as simple as possible. To be simple, it must be focused. To be persuasive, it must be clear, simple and focused." A tight 20-page brief is more likely to be reread than a muddled 50-page brief.

The Appendix

Only include material relevant to the appeal and those items required by the rules. The trial court record is available to us in the form of an electronic "Trial Court Binder." Much like the old paper files, the trial court binder is not indexed or paginated and filings are arranged in reverse chronological order. Transcripts of proceedings may or may not be included. You are not prevented from relying on parts of the record not included in the appendix. Iowa R. App. P. 6.905(10)(b). Also, do not include matters outside the record. If it is not in the district court file before us, we cannot consider it.

Wholesale inclusion of voluminous medical and financial records will not endear you to the court or its staff. There is no need to duplicate documents in the appendix—one copy of a document is enough.

Do your really need to include all those Facebook pictures and postings, nastygrams, emails, text messages, and family photo albums?

In the table of contents, give a concise description of each exhibit included in the appendix. Iowa R. App. P. 6.905(4)(c).

Please place the contents of the appendix in the order prescribed by rules 6.905(2)(b) & 6.905(6).

List the *relevant* docket entries. Iowa R. App. P. 6.905(2)(b)(2). Just slapping the district clerk of court's multi-page computer-generated docket sheet in the appendix is not helpful and most readers just scroll right past it. Usually the copy is barely legible. It is full of gobblygook. Many entries just reference "Other order," sometimes with no description of the subject matter of the order.

If a photograph or document cannot be reproduced legibly in the appendix, don't bother including it. Instead, refer us to the court record where we can view the presumably legible original exhibit. It is implicit in the rules that all exhibits included in the appendix must be legible. Poorly reproduced documents are of no help to the court. If the exhibit is a color photograph, a color-coded map, diagram, or document, copy or scan it in color if possible. The court would like to view the exhibits just as the fact-finder viewed them. Generally, black and white reproductions of color photographs are of poor quality.

If you include transcripts of testimony, the name of the witness *must* be placed at the top of each page where the witness's testimony appears. Iowa R. App. P. 6.905(7)(*c*). It is helpful, but not required, to indicate whether the testimony is direct, cross, re-direct, or re-cross examination. Include all portions of the transcript you cite to in your brief, but you have to make the call whether you want to include more. If the transcript portions set out in the appendix are too choppy (I call it the "every-other-page syndrome"), we note to you that the appendix will be set aside and the original deposition or trial transcript from the district court file will be read instead. Indicate transcript page omissions by a set of three asterisks. Iowa R. App. P. 6.905(7)(e). (**Note**: Oddly, the current Chapter 16 Appellate Rules

prohibit inclusion in the appendix of any portion of an electronically filed transcript. Rule 16.1232(2). This is truly unfortunate as some of our senior judges do not have ready access to the electronic transcript and must make a trip to the Judicial Branch Building to obtain one. Proposed Iowa R. App. P. 6.905(7) allows, but does not require, relevant portions of an electronically filed transcript to be included in the appendix.)

Although condensed versions of a transcript are currently permitted by rule 6.905(7)(f), they are ***not*** favored by the court or its staff. (Proposed rule 6.803(2)(f) bans condensed transcripts.) As it is, even with that rare clean and clear copy, the more mature members of the court must whip out magnifying glasses in order to assist their weary eyes in reading such tiny print. The all too common poor scan makes the task next to impossible, and electronically increasing the size of fuzzy text only exacerbates the problem. Furthermore, reading a condensed transcript on a computer or tablet screen is unduly cumbersome and time consuming.

Protected and Confidential Information

Before trial, familiarize yourself with Iowa Rule of Civil Procedure 1.422 and EDMS rules 16.601 through .609 to determine what information *must be* omitted or redacted and *what may* be omitted or redacted.

With some exceptions, Social security numbers; financial account numbers; personal identification numbers; and other unique identifiers *must* be omitted or redacted. Iowa R. Civ. P. 1.422(1). Other information: personal identifying numbers, such as driver's license numbers; medical treatment and diagnosis; employment history; personal financial information; trade secrets; home address; dates of birth; names of minor children, *may* be omitted or redacted. Iowa R. Civ. P. 1.422(2).

On appeal, familiarize yourself with Iowa R. App. 6.110 (which incorporates Iowa R. Civ. P. 1.422). Omission or redaction is not required if the appendix is certified as confidential under rule 6.110(2). If the appendix contains confidential information as defined by statute or court rule, the appendix must be certified confidential. If not certified confidential, the appendix is a public

record available for all to see. The certification can be affixed to the cover of the appendix. The best practice would be to redact protected and confidential information prior to an exhibit's offer in the district court. Briefs are not confidential and shall not contain confidential information. Iowa R. App. P. 6.110(5).

Housekeeping Details

Avoid a "benchslap" by following the rules. So, before you start your appeal, read up on the rules of appellate procedure, particularly if you haven't handled an appeal in a while. Many attorneys delegate appellate tasks to staff, particularly preparation of the appendix, so make sure your staff is familiar with the current rules. If in doubt, call an experienced appellate lawyer or the clerk of the supreme court.

Before filing, take a look at the brief or appendix yourself. Make sure all documents, diagrams and photographs are legible and have not been degraded in the scanning or copying process. Make sure page numbers and portions of documents have not been cut off. Remove any comment bubbles from your filing.

There is no need for you to include opposing counsel's name and address on the cover of your brief. Iowa R. App. P. 6.903(1)(b)(5).

Use underlining, italics, and bolding sparingly. Do not bold the entire text of your brief.

The Oral Argument

Despite myths to the contrary, oral arguments can change a judge's mind—and have. An effective argument can make a real difference in close cases.

Do not spend much of your precious argument time reciting mundane facts, or basic legal concepts, or talking about the standard of review unless there is a disagreement between the parties or the court asks about it. Assume the court has read the briefs and is familiar with the facts. If we have a specific question about the facts, we will ask. So, limit yourself to the facts central to your argument. Ten minutes is a very short time in which to make an argument.

Do not refer to matters outside the record, including events or matters that have occurred since the record closed.

Do not misrepresent the facts.

Although it is sometimes tempting to put on a show for the client who accompanied you to the courtroom, avoid the histrionics—it just distracts from the merits of your argument. The appellate court is not persuaded with theatrics. As *Dragnet's* Sgt. Joe Friday might likely implore: "Just the facts and the law, ma'am."

It has been said that "you have to stoop to cut." Spending time running down the opposing party may weaken, not strengthen, your argument.

Be responsive to your opponent's position. If your opponent says *Smith v. Jones* is controlling or persuasive, tell us why it is not.

View oral argument as a conversation with the court. Anticipate and welcome questions. It's not law school. The court isn't trying to play a game of "Gotcha!" by asking trick questions—although we may be fishing for an admission.

Answer questions directly and immediately. Don't say, "I'll get to that later"— you won't. And if you don't know the answer, just admit it instead of going on a tangent answering a different question you do know the answer to.

Take a breath occasionally; it will give the more reserved judge an opportunity to ask a question without interrupting you.

If you finish your argument before time has expired, feel free to sit down, but please don't immediately bolt for the counsel table. A pause at the podium affords the judges an opportunity to pursue unasked questions.

Respect the red light. Ask to briefly finish your thought. If allowed to continue (some presiding judges are more lenient than others), do not abuse the privilege by droning on and on with a rehash of what you

have already said. Finish your thought with a sentence, not the rest of your argument on that issue.

Postscript

"The principal role of the court of appeals is to dispose justly of a high volume of cases." Iowa Ct. Rule 21.11. And a high volume it is.[2] The court of appeals filed an average of more than 1150 opinions each year during the five-year period from 2011-2015. Having filed 1040 opinions through September, the court is on track to file over 1300 opinions in 2016. The record for a single filing was broken when the court filed 112 opinions on August 17. If transfers from the supreme court continue at the current pace, the court will receive nearly 1600 cases to decide this year.

Rule compliance lightens the court's burden and promotes judicial efficiency because compliance begets uniformity, and uniformity eases the court's navigation through the thousands of briefs and appendices it reviews each year. With your help, the Iowa Court of Appeals will continue to decide appeals in a timely manner.

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[2] The current pace of transfers to the court brings to mind that classic scene in the sitcom episode where Lucy Ricardo and Ethel Mertz attempt to wrap chocolates coming down a speeding conveyor belt in a candy factory. I Love Lucy (TV Series), *Job Switching* episode from Season 2 (Desilu Productions 1952).

CONDUCT YOUR FAMILY COURT TRIAL TO WITHSTAND APPEAL

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Friday, October 28, 2016
ISBA FAMILY LAW SEMINAR

About the Author

Andrew B. Howie is a shareholder with the firm of Shindler, Anderson, Goplerud & Weese, P.C., in West Des Moines. Andrew earned his Bachelor's Degree from Wartburg College in Waverly, Iowa, in 1993, and his J.D. *with distinction* from the University of Iowa in 1996. He is licensed to practice in Iowa (1996), the Northern and Southern Districts of the U.S. District Court of Iowa (1996), Eighth Circuit of the U.S. Court of Appeals (1996), and the U.S. Supreme Court (1999).

Andrew has practiced primarily in Polk County since 1997, after clerking for the Iowa District Court in Burlington for a year immediately following law school. He practices in family and appellate law, having appeared in over 180 rulings from Iowa's appellate courts and hundreds of family law cases in trial court. He has been a member of the Iowa State Bar Association and the Iowa Association for Justice since 1997. He has actively participated in the ISBA's Family and Juvenile Law Section since 2002, having served as its Chair (2009-10), Vice-chair (2008-09), and chair of its Forms and Practice subcommittee (2004-08, 2010-present). In 2014, he joined the ISBA's Jury Instruction Committee. He also been a member of the ISBA's Appellate Practice Committee since 2005, and served as its Chair (2012-13). He authored the *Family Law Manual* published by the Iowa State Bar Association in 2008 and 2012. In 2015, the *American Academy of Matrimonial Lawyers* admitted Andrew as a Fellow.

1. CONTEXT

a. **de novo review**

i. De novo review is "not trial de novo or trial anew . . . [the appellate court] is a court of review, without original jurisdiction to 'retry' dissolution proceedings." *In re Marriage of Huston*, 263 N.W.2d 697, 699 (Iowa 1978).

ii.

> "Even though our review is de novo, we accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity. 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."

In re Marriage of Benson, 545 N.W.2d 252, 258 (Iowa 1996) (citations omitted); *see In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

b. "[A] trial court, as first-hand observer of witnesses, holds a distinct advantage over an appellate court which necessarily must rely on a cold transcript." *In re Marriage of Udelhofen*, 444 N.W.2d 473, 474 (Iowa 1989).

2. TRIAL

a. **Am I trying this case for an appeal?**

i. Yes, always. This is a bench trial, not a jury trial

ii. Protect your record

(1) Your witnesses are testifying, not you

(a) don't lead

(b) let them answer the question

(c) did they answer the question that was asked

(2) Enter and Keep Track of your Exhibits

b. **Preservation of Error**

i. Preservation of Error

(1) Though it is de novo review, the error raised in the appeal must have been tried to and ruled upon by the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 538 (Iowa 2002).

(2) Timely filing a notice of appeal does not preserve the trial court's error for appellate review. *State v. Lange*, 831 N.W.2d 844, 846-47 (Iowa Ct. App. 2013). "While this is a common statement in briefs, it is erroneous, for the notice of appeal has nothing to do with error preservation." *Id.* (quoting Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 48 (Fall 2006) (footnote omitted)).

(3) All issues raised in an appeal must have been raised and decided by the district court to be preserved for review on appeal. *In re Marriage of Gensley*, 777 N.W.2d 705, 718-19 (Iowa Ct. App. 2009) (holding that an issue not presented to the trial court will not be considered for the first time on appeal); *see also State v. Lange*, 831 N.W.2d 844, 846-47 (Iowa Ct. App. 2013) (noting that the timely filing of a notice of appeal "has nothing to do with error preservation").

ii. Evidentiary Objections

(1) Even in equity, you have to object and cite the appropriate legal principle to exclude the evidence

(2) Evidence is admitted subject to the objection. *In re Marriage of Anderson*, 509 N.W.2d 138, 142 (Iowa Ct. App. 1993) ("The trial court should have received objections to evidence but not ruled on the objections and allowed the evidence in the record. That way we would have the evidence and could make our own determination as to its admissibility.")

(a) If the court excludes the evidence, an *offer of proof is necessary* to preserve error on a claim the district court improperly excluded evidence. *In re Marriage of Daniels*, 568 N.W.2d 51, 55 n.2 (Iowa Ct. App. 1997); *see Strong v. Rothamel*, 523 N.W.2d 597, 599 (Iowa Ct. App. 1994) ("Because no offer of proof was made, the record is not sufficient for us to address plaintiff's claimed error, and we find it was not preserved on this issue.").

(b) Although the appellate court's scope of review was de novo, evidentiary rulings are reviewed for an abuse of discretion. *In re N.N.*, 692 N.W.2d 51, 54 (Iowa Ct. App. 2004).

iii. Ultimately, it is the appellant's obligation to make a record in the trial court to affirmatively demonstrate the alleged error. *In re Marriage of Ricklefs*, 726 N.W.2d 359, 362 (Iowa 2007) (though judge's alleged pretrial statements could have been grounds for recusal, the lack of record prevented appellate review).

iv. Standing Objections

(1) Disfavored, but allowed. *Nepple v. Weifenbach*, 274 N.W.2d 728, 732 (Iowa 1979) (holding that when evidence is properly objected to the objection need not be repeated when other evidence of the same class is offered.)

(2) Be careful, a standing objection may not preserve error. *Prestype, Inc. v. Carr*, 248 N.W.2d 111, 117 (Iowa 1976); *Ackerman v. James*, 200 N.W.2d 818, 824 (Iowa 1972)

v. Motion Limine

(1) Legal Effect of Ruling on Motion in Limine:

The primary purpose of a motion in limine is to preclude reference to

potentially prejudicial evidence prior to the trial court's definitive ruling on its admissibility. *State v. Davis*, 240 N.W.2d 662, 663 (Iowa 1976). Generally, any error based on the trial court's disposition of a motion in limine is not preserved unless the record includes a timely objection when the challenged evidence is offered at trial. *Id.* The resolution of a preservation of error issue is "not controlled by the title of the motion or its prayer." *State v. O'Connell*, 275 N.W.2d 197, 202 (Iowa 1979). Our concern is "what the ruling of the trial court does or purports to do." *Id.* A ruling limited to protection from prejudicial references must be distinguished from a ruling on the admissibility of the challenged evidence. *State v. Miller*, 229 N.W.2d 762, 768 (Iowa 1975). If the trial court's ruling is dispositive on the issue of admissibility, it is considered final for purposes of appeal and no further objection is necessary. *Id.*

State v. Jensen, Case No. 06-0879, 2007 WL 2963955 at *3 (Iowa Ct. App., filed Oct. 12, 2007).

(2) The *Jensen* court held that because the district "court, without condition or admonition, expressly precluded [an expert witness'] testimony . . . No additional trial objections were necessary to preserve error on this issue." *Id.* at *3.

vi. Trial Briefs - raising an issue only in a trial brief is *not* sufficient to preserve error. *Lamp v. American Prosthetics, Inc.*, 379 N.W.2d 909, 911 (Iowa 1986); *see also* Iowa R. Civ. P. 1.442(4) ("no party shall file legal briefs or memoranda, except in support of or resistance to a motion for summary judgment, unless expressly ordered by the court"; therefore, trial briefs typically are not part of the appeal record).

3. TIME TO FILE APPEAL; CROSS-APPEAL; 1.904(2) MOTION

a. Notice of Appeal – Deadline

i. **30 days** from filing of final order, *except* in Termination-of-parental-rights and child-in-need-of-assistance cases under Iowa Code chapter 232. R. 6.101(1)(b).

ii. **15 days** from filing of final order in Termination-of-parental-rights and child-in-need-of-assistance cases under Iowa Code chapter 232. R. 6.101(1)(a).

iii. "Tolling of filing deadline by timely service. The time for filing a notice of appeal is tolled when the notice is served, provided the notice is filed with the district court clerk within a reasonable time. *See* Iowa R. Civ. P. 1.442(4)." R. 6.101(4).

iv. ***Extensions of time to file notice of appeal***: "The supreme court may extend the time for filing a notice of appeal if it determines the clerk of the district court failed to notify the prospective appellant of the filing of the appealable final order or judgment. A motion for an extension of time must be filed with the clerk of the supreme court and served on all parties and the clerk of the district court no later than 60 days after the expiration of the original appeal deadline as

prescribed in rule 6.101(1)(a) or (b). The motion and any resistance shall be supported by copies of relevant portions of the record and by affidavits. Any extension granted shall not exceed 30 days after the date of the order granting the motion."

v. ***Missing the deadline = Dismissal.*** Failing to timely file a notice of appeal will result in the dismissal of the appeal because Iowa's appellate courts lose subject matter jurisdiction to decide the appeal. *Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 771 (Iowa 2009). "Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel, but is conferred solely by constitutional or statutory authority." *In re Guardianship and Conservatorship of Cerven*, 334 N.W.2d 337, 340 (Iowa Ct. App. 1983).

b. Final vs. Interlocutory

i. A party only has the *right* to appeal a final order. Iowa R. App. P. 6.103(1).

ii. What is a "final order"?

(1) Rule 6.103(1) defines a "final order" as: "orders and judgments of the district court involving the merits or materially affecting the final decision . . . An order granting or denying a new trial is a final order. An order setting aside a default judgment in an action for dissolution of marriage or annulment is a final order. An order setting aside a default judgment in any other action is not a final order."

(2) The Iowa Supreme Court defined a final order as "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, 572 (Iowa 1999) (internal quotation marks and citations omitted).

iii. All orders that are not final are interlocutory. *See* Iowa R. App. P. 6.103(1). Rule 6.103(3) states:

> No interlocutory order may be appealed until after the final judgment or order is entered except as provided in rule 6.104. Error in an interlocutory order is not waived by pleading over or proceeding to trial. If no appeal was taken from an interlocutory order or a final adjudication in the district court under Iowa R. Civ. P. 1.444 that substantially affected the rights of the complaining party, the appellant may challenge such order or final adjudication on appeal of the final order or judgment.

iv. Examples:

(1) orders on temporary matters concerning child or spousal support or attorney fees ***are final orders***. *In re Marriage of Denly*, 590 N.W.2d 48, 49-50 (Iowa 1999); *In re Marriage of Winegard*, 257 N.W.2d 609, 614 (Iowa 1977); Iowa R. App. P. 6.103(1).

(2) orders on temporary matters concerning child custody ***are interlocutory orders***. *In re Marriage of Denly*, 590 N.W.2d 48, 50-51 (Iowa 1999); Iowa R. App. P. 6.103(1), .104.

v. Appealing an interlocutory order.

(1) NO RIGHT TO APPEAL. A party may only appeal an interlocutory order with the Supreme Court's permission. *See* Iowa R. App. P. 6.103(1), .104.

(2) DEADLINE TO FILE. An application to appeal an interlocutory order must be filed within 30 days of the district court's order, but within 15 days in termination-of-parental-rights and child-in-need-of-assistance cases under Iowa Code chapter 232. Iowa R. App. P. 6.104(1)(b); *see MC Holdings, L.L.C. v. Davis County Bd. of Review*, 830 N.W.2d 325, 328 n.1 (Iowa 2013) (applying this rule to *denials* of summary judgment). However, a party *does not waive* the right to appeal an erroneous interlocutory order by failing to file an application for interlocutory appeal, and the party can challenge that error in the appeal from the final order. Rule 6.103(3).

(a) Tolling the deadline to file an interlocutory appeal:

(i) "[I]f a motion is timely filed under Iowa R. Civ. P. 1.904(2), the application must be filed within 30 days after the filing of the ruling on such motion." R. 6.104(1)(b)(2).

(ii) *However*, if the application for interlocutory appeal is from a *denial* of summary judgment, the 1.904(2) "tolling exception" does not apply; therefore, a party must file the interlocutory review application within the 30(15)-day deadline under Rule 6.104(1)(b). *Pundt v. Gazette Co.*, No. 12-1666, 2013 WL 5962909 at *2-*3 (Iowa Ct. App. 2013).

(3) GROUNDS FOR INTERLOCUTORY APPEAL. In order to grant the application to appeal an interlocutory order, the appellate court must find:

> (1) that the court's order involves substantial rights; (2) the order will materially affect the final decision; and (3) that a determination of the order's correctness before trial on the merits will better serve the interests of justice. *See* Iowa R. App. P. [6.104(1)]; *Banco Mortgage Co. v. Steil*, 351 N.W.2d 784, 787 (Iowa 1984) (test for granting permission to appeal for those appeals improvidently taken from interlocutory orders is same as test applied under rule [6.104(1)]). We note that in prior cases "[w]e have been very reluctant to allow interlocutory appeals in this manner." *In re W.D. III*, 562 N.W.2d 183, 186 (Iowa 1997); *see also In re Marriage of Graziano*, 573 N.W.2d 598, 600 (Iowa 1998) ("We . . . cannot and do not grant permission under rule [6.104] merely because child placement is implicated.").

In re Marriage of Denly, 590 N.W.2d 48, 51-52 (Iowa 1999).

c. Tolling the Deadline to File a Notice of Appeal

i. When a party timely files a motion under rule 1.904(2), rule 6.101(1)(b) tolls the time to file a notice of appeal to within 30 days of the filing of the district court's ruling on the 1.904(2) motion.

ii. However, not all 1.904(2) motions will toll the appeal deadline. The Supreme Court, in *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 668-69 (Iowa 2013) (emphasis added), explained the difference:

> Rule 1.904(2) provides that the "findings and conclusions" of the district court may be enlarged or amended and the judgment or decree modified accordingly "[o]n motion with or filed within the time allowed for a motion for new trial." Iowa R. Civ. P. 1.904(2). We have explained that a motion to enlarge or amend is available only to address rulings on factual issues tried without a jury and that any legal issues raised in the motion must have been addressed in the context of an issue of fact tried by the court without a jury. *See Meier v. Senecaut*, 641 N.W.2d 532, 538 (Iowa 2002). **When a rule 1.904(2) motion amounts to nothing more than a rehash of legal issues previously raised, we will conclude the motion does not toll the time for appeal.** *Explore Info. Servs. v. Ct. Info. Sys.*, 636 N.W.2d 50, 57 (Iowa 2001). **By contrast, when used to obtain a ruling on an issue that the court may have overlooked, or to request the district court enlarge or amend its findings when it fails to comply with rule 1.904(1), the motion is proper and will toll the time for appeal.** *See In re Marriage of Okland*, 699 N.W.2d 260, 266–67 (Iowa 2005).

d. R. 1.904(2) motion

i. Deadline

(1) A posttrial motion, including one per Iowa Civil Procedure Rule 1.904(2), must be filed within **fifteen days** of the date the final order is filed. Iowa R. Civ. P. 1.1007 ("Motions under rules 1.1003 and 1.1004 and bills of exception under rule 1.1001 must be filed within fifteen days after filing of the verdict, report or decision with the clerk or discharge of a jury which failed to return a verdict, unless the court, for good cause shown and not ex parte, grants an additional time not to exceed 30 days."); *see* R. 1.904(2) ("On motion joined with or filed within the time allowed for a motion for new trial, [R. 1.1004].")

(2) The mail rule – adding three days to the time period permitted to file a response – does ***not*** apply to 1.904(2) motions. Iowa R. Civ. P. 1.443(2) ("Such additional time shall not be applicable where a court has prescribed the method of service of notice and the number of days to be given or where the deadline runs from entry or filing of a judgment, order or decree.").

e. Should I file a 1.904(2) motion?

i. Iowa Civil Procedure Rule 1.904(2) states:

> On motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise. Resistances to such motions and replies may be filed and supporting briefs may be served as provided in rules 1.431(4) and 1.431(5).

ii. Rule 1.904(2) permits an aggrieved party to file a motion requesting enlargement or expansion of the court's findings or conclusions which "is primarily designed for the party faced with an adverse judgment, not for the party defending the judgment." *In re Marriage of Okland*, 699 N.W.2d at 267.

(1) "The rule can be used by a party, with an appeal in mind, as a tool for preservation of error. Similarly, it can be used to better enable a party to attack 'specific adverse findings or rulings in the event of an appeal' by requesting additional findings and conclusions. Additionally, it can be used, with no appeal in mind, to obtain a ruling on an issue that the court may have overlooked in making its judgment or decree." *Id.* at 266.

(2) "[W]hen the district court fails to make specific findings, a rule 1.904(2) motion is an appropriate mechanism to preserve error. Moreover, if the movant asks the court to examine facts it suspects the court overlooked and requests an expansion of the judgment in view of that evidence, then the motion is proper." *Sierra Club Iowa Chapter v. Iowa Dept. of Transp.*, 832 N.W.2d 636, 641 (Iowa 2013) (citations omitted).

(3) **Proper.** When using a rule 1.904(2) motion to preserve error, it is proper for the motion to address "purely legal issue[s]" presented to the district court prior to its ruling but not decided by it. *Sierra Club*, 832 N.W.2d at 641.

(4) **Essential.** "[If] the district court failed to make sufficiently specific findings and conclusions, then the [party] must file a rule 1.904(2) motion to preserve [the error]." *Lamasters v. State*, 821 N.W.2d 856, 863, 864 n.2 (Iowa 2012); *accord Meier v. Senecaut*, 641 N.W.2d 532, 538-39 (Iowa 2002).

(5) **Improper.**

A "rule 1.904(2) motion is improper where the motion only seeks additional review of a question of law with *no* underlying issue of fact. Additionally, if the posttrial motion amounts to no more than a rehash of legal issues raised and decided adversely to the movant, the motion is not appropriate. ***Thus, a rule 1.904(2) motion is not proper if it is used merely to obtain reconsideration of the district court's decision.***"

Sierra Club Iowa Chapter v. Iowa Dept. of Transp., 832 N.W.2d 636, 641 (Iowa 2013) (emphasis added, internal quotations omitted, and citations omitted).

iii. **New Amendments.** (*See* attached Order.) The Supreme Court has submitted for public comment significant amendments to R. 1.904(2) and 6.901.

(1) "These amendments . . . are intended to supersede prior caselaw that held a timely rule 1.904(2) must also have been 'proper' to extend the time for appeal."

(2) Therefore, "any timely 1.904(2) motion" automatically extends the period to file a notice of appeal, *except* as provided by amended Rule 1.904(4). *Amended* Rule 1.904(4) states:

> *Successive rule 1.904(2) motions.* Successive rule 1.904(2) motions by a party are prohibited unless the court has modified its order, ruling, judgment, or decree and the subsequent rule 1.904(2) motion is directed only at the modification.

f. **Cross-Appeal.**

i. Only if client also wants to review district court's decision

ii. "Failure to bring a cross-appeal in the manner provided by the Rules of Civil Procedure precludes examination of this question upon appeal. Review is de novo as respondent states but it is such only on matters properly presented to this court." *In re Novak's Marriage,* 220 N.W.2d 592, 598 (Iowa 1974) (holding that wife's failure to bring cross appeal from trial court's decree in marriage dissolution proceeding precluded her raising on appeal issue of award of custody of minor son to husband) (citing *In re Marriage of Williams*, 199 N.W.2d 339, 346 (Iowa 1972); *see Becker v. Central States Health & Life Co. of Omaha*, 431 N.W.2d 354, 356 (Iowa 1988), *overruled in part by Johnston Equipment Corp. of Iowa v. Industrial Indem.*, 489 N.W.2d 13, 16 (Iowa 1992) ("a *successful* party need not cross-appeal to preserve error on a ground urged but ignored or rejected in trial court") (emphasis added).).

iii. If no cross-appeal is filed, then the appellee only defends the district court's decision, the appellee cannot ask for his or her own modification of the ruling, except the appellee can ask for appellate attorney fees without having to cross-appeal.

Statement of Facts

Desmond and Molly Jones had been married for 5½ years when they separated November 15, 2004. (*See* Tr. 9:11-17, 22:23-23:3.) They separated when Desmond left Molly and Maxwell and moved out of the marital home. (Temp. Matters Tr. 3:16-25.) At the time of their May 2005 divorce trial, Desmond was 38 years-old and Molly was 42. (Decree p2-3.)

Both parties were previously divorced and had children by their previous spouses. (Tr. 11:17-23, 123:15-19.) Molly's elder son, Chuck, was 10 years-old at the time of this trial, while Desmond's elder son, Dave, was 16 years-old. (Tr. 11:20-12:5, 91:5-9; *see* Tr. 9:23-24.) Both parties had physical custody of their elder sons. (Tr. 11:20-23, 12:17-13:7, 123:15-124:6.) Desmond admitted that "[f]rom time to time [he had] not been flexible" with varying in the visitation schedule with his ex-wife, Penny. (Tr. 93:24-94:3.) In contrast, whenever Molly's ex-husband asked to see Chuck, they would "work it out." (Tr. 123:20-124:6.)

Since Maxwell's birth, Molly has been his primary caregiver. (Tr.85:17-86:6, 106:7-20; Temp. Matters Tr. 38:3-39:3; see Tr. 108:3-5; Temp. Matters Tr. 19:24-20:20, 21:19-21, 22:17-20, 43:18-23.) Molly worked part-time as a substitute teacher for the Tucson school district. (Tr. 115:6-10.) Her work schedule varied. (Tr. 115:11-18.) Molly has a bachelor's degree in Human Resources management and business administration. (Tr. 165:9-13.) Long before they separated and Desmond began this dissolution action, Molly and Desmond jointly decided that Molly would go back to school. (Tr. 87:10-23, 134:6-23.) Molly was enrolled in a graduate program, working toward her Master's degree in curriculum and guidance and counseling. (Tr. 126:2-6; see Tr. 87:10-18, 105:16-22.) Her "ultimate goal would be to be a school guidance counselor." (Tr. 126:2-6.) Molly is on schedule to graduate in 2005. (Tr. 105:16-22, 134:6-23, 137:12-19, 165:23-165:1, 195:1-11.)

Since May 2012, Desmond worked for Sony/ATV as an Engineer. (Tr. 10:19-22; Temp. Matters Tr. 5:2-5, 7:15-17.) He earned $90,000 annually. (Tr. 10:23-25.) For his previous job, Desmond had worked for Northern Limited for sixteen years. (Tr. 20:4-6.)

Though he denied having a romantic relationship with Loretta Martin at the January 2013 temporary matters hearing, (Temp. Matters Tr. 16:25-17:4, 24:2-4), by the time of trial, Desmond was involved in a "fairly serious" relationship with her. (Tr. 28:9-29:2, 30:17-21; Decree p5.) Loretta had a criminal history of violence. (See Temp. Matters Tr. 24:5-13.) In the months immediately prior to trial, Desmond and Maxwell spent almost all of their time at Loretta's residence, including overnights, rather than at Desmond's residence. (Tr. 98:21-99:8; *see* Tr. 29:13-15.) Though he effectively resided with Loretta already, Desmond testified that he may begin living with Loretta and her two daughters, ages ten and six, full-time after the trial. (Tr. 29:3-8, 31:1-8, 98:21-99:8; *but see* Decree p5.) Desmond testified that Maxwell spent overnights in the same bedroom as Loretta's six year-old daughter, Rita, but having his own bed. (Tr. 29:16-30:2, 99:9-22.) When staying with Loretta, Desmond admitted that Maxwell "seems a little off right when he gets there, but within a few hours, he's back to, you know, normal Maxwell so." (Tr. 31:18-22.)

Molly was Maxwell's historical primary caregiver. (Tr. 106:7-20, 258:14-259:2; *see* Temp. Matters Tr. 19:24-20:20, 22:17-20.) Soon after Maxwell's birth, the parties chose that Molly would become a full-time stay-at-home mother. (*See* Tr. 85:17-86:6; Temp. Matters Tr. 19:24-21:21, 43:18-23.) Desmond trusted Molly to properly raise Maxwell. (See Tr. 108:3-5.) Desmond admitted that having Molly in that role was ideal for him and the

children. (Temp. Matters Tr. 21:19-21.) His work required long hours, and significant travel away from home, often overnight. (*See* Tr. 109:19-110:6.) Even when Desmond was home, he spent 55-60 hours working in his home office each week. (Tr. 107:2-14.) Desmond admitted that Maxwell and Molly were very close. (Tr. 107:15-19.)

Molly supported Maxwell's relationship with Desmond. (Tr. 137:21-138:22.) As with her first marriage, she encouraged Chuck's father to have a relationship with his son, but Chuck's father chose not to. Molly understood the importance of Desmond in Maxwell's life. (Tr. 122:15-17.) She was flexible with Desmond's visitation schedule to accommodate unexpected occasions. (Tr. 122:20-123:14.) Unfortunately, Desmond dwelled at trial on the few times during this case's pendency that Molly would not grant Desmond's demand for extra visitation. Desmond then exaggerated these isolated occurrences and argued that Molly was never flexible.

To see how Molly will support Maxwell's relationship with Desmond and Desmond's extended family, Chuck's relationship with his paternal grandparents establishes a clear basis. Chuck's father, Rocky R., lived a significant distance away, so Chuck did not see him on a regular basis, but, whenever Rocky asked, Molly worked out arrangements for visitation. (Tr. 123:20-124:6, 238:1-5.) Molly and Rocky regularly communicated by email about Chuck. (Tr. 123:20-124:6.) Molly was sad and frustrated that Rocky was not more involved in Chuck's life. (Tr. 124:18-125:2; *see* Tr. 238:1-5.) Molly has encouraged and fostered Chuck's relationship with his paternal grandparents. (Tr. 124:7-14, 237:22-25.) Chuck spent alternating weekends in his father's parent's care, and they regularly attended Chuck's sporting and music programs. (Tr. 124:7-14, 238:6-12, 241:16-17, 242:6-10.) The court did not credit Molly for the close relationship that she has maintained between Chuck and his paternal grandparents and other family even though Chuck's father is not a strong figure in his life. (*See generally* Decree p13-14.)

For a significant part of the trial, the parties offered evidence of a particular event concerning who would care for Maxwell. The evidence focuses on events that occurred on April 21, 2005. That day, Molly learned that Desmond was out-of-town for work, and he left Maxwell in the care of his paramour Loretta. (Tr. 118:13-120:14.) Molly wrongly believed that the temporary order gave her first right to have Maxwell in her care if Desmond was unavailable. (Tr. 118:13-120:14.) When she learned of her misinterpretation, she stopped trying to retrieve Maxwell, and nothing else happened.

At trial, Desmond gave his version of the events on April 21, 2005:

> [Molly] demanded that she pick him up and drove to where Maxwell was. Maxwell was at Sam's house. My parents were on their way to Sam's house. He was there for twenty minutes with the other kids. My parents were on their way there. Molly drove to Sam's house, demanded that Maxwell be sent out, even though my parents were there to pick him up already, and she sat outside of Sam's house in the car calling and texting myself, and I don't know who else for over an hour and then drove off. *** I found him hiding in one of the bedrooms upstairs. He was terrified and confused and he didn't know why all the drama was going on.

(Tr. 26:23-27:20; *see* Tr. 224:24-227:22 (Desmond's mother's testimony of the same event).) The very evening after the events of April 21, Desmond wrote an email to Molly entitled "The Sunday spectacle", describing his observations and feelings regarding the

incident:

> By the time that I got to the house, Maxwell was convinced that he had to stay in hiding so that you wouldn't take him. He was terrified. He has asked Frank and Cindy to lock their doors when he goes when he goes to their house tonight. Maxwell made it clear to me that what I feared is true; he is afraid of his own mother.
>
> For future reference, the driveway you pulled into and sat in for an hour in is private property. Stalking is a crime. Sam and the girls should not need to be afraid in their own home because some crazy person threatens to harm them. I have made it clear to her that I support her 100% should she feel the need to pursue police protection.
>
> I have done everything I can to make sure we are communicating effectively about Maxwell, and yet you continue to terrorize everyone involved. I truly feel that you need to seek professional help in dealing with your anger and other issues. Please stop using the children as pawns in whatever game you are playing. Seriously, I'm not just saying this to be mean. You really need to reach out to someone for help.

(Ex. 1; Tr. 27:21-28:8 (Desmond's explanation of this email); *see also* Ex. 3 (Desmond emailing Molly "What the hell is your problem?").) Desmond's allegations are false because Molly never got out of the car – she merely sat in her car in Loretta's driveway waiting for Loretta to usher Maxwell outside. As Molly testified:

> I went up to the location. I didn't get out of the car. I didn't say a word. I parked in the driveway. I let Desmond know that I was coming and that was it. I was on the phone trying to understand, like, what I was supposed to do or not because it was a Sunday, you know. I wasn't sure what legal rights I had. I've never been in that situation, so once I received word from the police department that this really wasn't a matter that can be addressed, I left. . . . [There was no] incident. I didn't communicate at all to anybody. I didn't get out of the car. I didn't yell anything. I just – I let Desmond know that I was coming to get Maxwell since he was not available to be with him and instead of him being left at Sam's, and then he was being transported to his parent's house.

(Tr. 119:20-120:12.) Molly only spoke with Desmond. (*Id.*; Tr. 26:23-27:20) She never spoke with Loretta, never approached Loretta's door, and never got out of the car. (*See* Tr. 224:24-227:22.)

Desmond's reaction to Molly on April 21, and contempt for Molly is on full display in an email Desmond had written and sent Molly only six days before which said:

> You have a lot to answer for. Why the fuck is my six year son upset and again talking about how he will be moving away? Why the fuck is my six year old son telling me that his "mom" has informed him that his opinion is that I am "evil". It is the parent's job to help kids make it through divorce as unscathed as possible, not fucking add to the problems and twist kids up, confuse them,

> and feed them full of hurtful bullshit. I would tell you to grow the fuck up, but that's impossible. *You are poison to these boys. You are poison to everyone around you.* You are dishonest, manipulative, and hurtful to kids who you are supposed to love and help through difficult times. It is disgusting. I hope that someday you can start actually trying to help those boys instead of acting like the universe revolves around you.

(Ex. 5 (emphasis added); *see* Tr. 107:20-108:2 (Desmond admitting that he had said some unkind things to Molly), 133:18-134:5.)

In the Iowa Supreme Court

Request for Public Comment on Proposed Amendments to Iowa Rule of Civil Procedure 1.904 and Iowa Rule of Appellate Procedure 6.101	)))))	**Order**

The Iowa Supreme Court seeks public comment on proposed amendments to rules 1.904 and 6.101 relating to the timeliness of appeals when the notice of appeal is filed more than thirty days after the original court order or judgment but within thirty days after an order on a motion to reconsider, enlarge, or amend that order or judgment. The court has noted concerns about the existing state of the law in this area. *See, e.g., Hedlund v. State*, 875 N.W.2d 720, 725 (Iowa 2016). Accordingly, the court has proposed and seeks comment on possible rule changes to address this problem. The proposed changes are to both rule 1.904 and rule 6.101 and are intended to be parallel and similar in effect. These amendments are intended to reduce controversies over whether an otherwise timely motion to reconsider, enlarge, or amend a court order or judgment is also "proper" so as to toll the appeal deadline.

Prior to further consideration of the proposed amendments to these rules, the court seeks public comment on them. The proposed amendments are provided with this order and may be found on the Iowa Judicial Branch website at: http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Orders/.

Any interested organization, agency, or person may submit comments regarding the proposed amendments. All comments must refer to the specific rule number (for example, rule 1.904) and the specific numbered line or lines to which the comments refer. Comments sent by email must be emailed to

rules.comments@iowacourts.gov, must state **"Proposed Amendments to Rules 1.904 and 6.101"** in the subject line of the email, and must be sent **as an attachment to the email in Microsoft Word format**. Instead of submission by email, comments may be delivered in person or mailed to the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, 50319.

The deadline for submitting comments is 4:30 p.m. on October 31, 2016.

Dated this 29th day of August, 2016.

The Iowa Supreme Court

By Mark S. Cady
Mark S. Cady, Chief Justice

Iowa Rules of Civil Procedure

Rule 1.904 Findings by court.

1.904(1) *Findings; conclusions; judgment.* The court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, shall find the facts in writing, separately stating its conclusions of law, and direct an appropriate judgment. A party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by motion or otherwise. No request for findings is necessary for purposes of review. Findings of a master shall be deemed those of the court to the extent it adopts them.

1.904(2) *Motion to reconsider, enlarge, or amend.* On motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions may be reconsidered, enlarged, or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. ~~But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by motion or otherwise~~ Resistances to such motions and replies may be filed and supporting briefs may be served as provided in rules 1.431(4) and 1.431(5).

1.904(3) *Motions to reconsider, enlarge, or amend other court orders, rulings, judgments, or decrees; time for filing.* In addition to proceedings encompassed by rule 1.904(1), a rule 1.904(2) motion to reconsider, enlarge, or amend another court order, ruling, judgment, or decree will be considered timely if filed within 15 days after the filing of the order, judgment, or decree to which it is directed.

1.904(4) *Successive rule 1.904(2) motions.* Successive rule 1.904(2) motions by a party are prohibited unless the court has modified its order, ruling, judgment, or decree and the subsequent rule 1.904(2) motion is directed only at the modification.

COMMENT:

Rule 1.904(2)–(4). These amendments and a corresponding amendment to rule 6.101 serve the same purpose. They are intended to supersede prior caselaw that held a timely rule 1.904(2) motion must also have been "proper" to extend the time for appeal. *See, e.g.*, *Hedlund v. State*, 875 N.W.2d 720, 725 (Iowa 2016). To obviate controversies over whether a rule 1.904(2) motion tolls the time for appeal, the amended rule now authorizes any timely rule 1.904(2) motion to extend the appeal deadline, subject to one exception in rule 1.904(4).

Under the amended rule 1.904, the timely filing of a rule 1.904(2) motion extends the deadline for filing a notice of appeal or an application for interlocutory appeal. *See* Iowa R. App. P. 6.101(1)(*b*) & 6.104(1)(*b*)(2). However, the amended rule does not address whether a rule 1.904(2) motion preserves error for purposes of appeal as to

evidence or arguments raised for the first time in that motion. *See, e.g., Tenney v. Atlantic Associates*, 594 N.W.2d 11, 14 (Iowa 1999). The amended rule also is not intended to affect prior caselaw concerning a court's inherent authority to reconsider. *See Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 395–96 (Iowa 1988).

Chapter 6

Rules of Appellate Procedure

Division I

Case Initiation: Civil and Criminal; Parties and Attorneys; Protected Information; and Confidential Materials

Rule 6.101 Time for appealing final orders and judgments appealable as a matter of right.

6.101(1) *Time for filing a notice of appeal from final orders and judgments.*

a. Termination-of-parental-rights and child-in-need-of-assistance cases under Iowa Code chapter 232. A notice of appeal from a final order or judgment entered in Iowa Code chapter 232 termination-of-parental-rights or child-in-need-of-assistance proceedings must be filed within 15 days after the filing of the order or judgment. However, if a motion is timely filed in good faith under Iowa R. Civ. P. 1.904(2) or Iowa R. Civ. P. 1.1007, the notice of appeal must be filed within 15 days after the filing of the ruling on such motion.

b. All other cases. A notice of appeal must be filed within 30 days after the filing of the final order or judgment. However, if a motion is timely filed in under Iowa R. Civ. P. 1.904(2) or Iowa R. Civ. P. 1.1007, the notice of appeal must be filed within 30 days after the filing of the ruling on such motion.

c. Timely filing of motion defined. For purposes of subparts *a* and *b* above, a motion is considered timely if it has been filed by the applicable deadline and asks the court to reconsider, enlarge, or amend its order, ruling, judgment, or decree. Whether a motion is proper or not does not affect its timeliness. Provided, however, that a motion will not be considered timely if the same party has previously filed a motion to reconsider, enlarge, or amend the court's order, ruling, judgment, or decree, unless the court has modified its order, ruling, judgment, or decree and the subsequent motion is directed only at the modification.

d. Exception for final orders on partial dispositions. A final order dismissing some, but not all, of the parties or disposing of some, but not all, of the issues in an action may be appealed within the time for appealing from the judgment that finally disposes of all remaining parties and issues to an action, even if the parties' interests or the issues are severable.

. . . .

Comment: This amendment to rule 6.101(1)(*c*) and a corresponding amendment to rule 1.904 serve the same purpose. They are intended to supersede prior caselaw that held a timely rule 1.904(2) motion must also have been "proper" to extend the time for appeal. *See, e.g.*, *Hedlund v. State*, 875 N.W.2d 720, 725 (Iowa 2016). To obviate controversies over whether a rule 1.904(2) motion tolls the time for appeal, the amended rule 6.101 now authorizes any timely rule 1.904(2) motion to extend the appeal deadline, subject to an exception for successive motions.

Under the amendment, the timely filing of a rule 1.904(2) motion extends the deadline for filing a notice of appeal or an application for interlocutory appeal. See Iowa R. App. P. 6.101(1)(*b*) & 6.104(1)(*b*)(2). However, the amended rule does not address whether a rule 1.904(2) motion preserves error for purposes of appeal as to evidence or arguments raised for the first time in that motion. *See, e.g.*, *Tenney v. Atlantic Associates*, 594 N.W.2d 11, 14 (Iowa 1999). The amended rule also is not intended to affect prior caselaw concerning a court's inherent authority to reconsider. *See Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 395–96 (Iowa 1988).

2016 FAMILY LAW SEMINAR

The Fourteen Most Popular Ways to Be Disbarred or Suspended

11:00 a.m.- 12:00 p.m.

Presented by

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Phone: 515-279-2000

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FRIDAY, OCTOBER 28

THE 14 MOST POPULAR WAYS TO BE DISBARRED OR SUSPENDED

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About the Authors

Kimberley K. Baer is the owner of Baer Law Office located in Des Moines, Iowa. Kim earned her Bachelor's Degree from the University of Iowa in 1985 and earned her J.D. summa cum laude from American University in Washington DC. She is licensed to practice law in Iowa as well as the Northern and Southern Districts of the U.S. District Court of Iowa.

Kim began her legal practice at a large firm in Chicago, Skadden Arps, practicing in the area of business litigation and class actions. Kim moved to Des Moines in 1994 and joined the Dickinson firm. She also worked at Wandro & Baer before starting her own law firm in 2010. Kim has served as an appointee on the Ethics Commission for 5C for several terms and she is currently serving as a Commissioner on the Judicial Nominating Commission for District 5c. Kim practices in general litigation, business law, personal injury and family law. The Baer Law Office was named the Best Law Firm in Des Moines in the 2015 CityView Poll and was named Runner-Up in 2014. Kim has also been named one of the Top 100 Civil Plaintiff Attorneys by the National Trial Lawyers Association and she was named one of the Top 10 Best Attorneys in 2015 for Client Satisfaction by the American Institute of Personal Injury Attorneys. Kim was named "Immigrant Champion of the Year" in 2012 for her legal work with immigrant litigants in Iowa.

Andrew B. Howie is a shareholder with the firm of Shindler, Anderson, Goplerud & Weese, P.C., in West Des Moines. Andrew earned his Bachelor's Degree from Wartburg College in Waverly, Iowa, in 1993, and his J.D. with distinction from the University of Iowa in 1996. He is licensed to practice in Iowa (1996), the Northern and Southern Districts of the U.S. District Court of Iowa (1996), Eighth Circuit of the U.S. Court of Appeals (1996), and the U.S. Supreme Court (1999).

Andrew has practiced primarily in Polk County since 1997, after clerking for the Iowa District Court in Burlington for a year immediately following law school. He practices in family and appellate law, having appeared in over 180 rulings from Iowa's appellate courts and hundreds of family law cases in trial court. He has been a member of the Iowa State Bar Association and the Iowa Association for Justice since 1997. He has actively participated in the ISBA's Family and Juvenile Law Section since 2002, having served as its Chair (2009-10), Vice-chair (2008-09), and chair of its Forms and Practice subcommittee (2004-08, 2010-present). In 2014, he joined the ISBA's Jury Instruction Committee. He also been a member of the ISBA's Appellate Practice Committee since 2005, and served as its Chair (2012-13). He authored the *Family Law Manual* published by the Iowa State Bar Association in 2008 and 2012. In 2015, the *American Academy of Matrimonial Lawyers* admitted Andrew as a Fellow.

Generally.

The Iowa Supreme Court rescinded the "Code of Professional Responsibility for Lawyers" in 2005. In its place, the Court adopted, effective July 1, 2005, the "Iowa Rules of Professional Conduct." Iowa Ct. R. ch. 32. "The Rules" govern the professional and to an extent the personal conduct of all attorneys licensed to practice in Iowa. *Iowa Supreme Court Disciplinary Bd. v. Curtis*, 749 N.W.2d 694, 696 n.2 (Iowa 2008); *Iowa Att'y Disciplinary Bd. v. Schmidt*, 796 N.W.2d 33, 40-41 (Iowa 2011). Of course, the same ethical standards apply to the family law practitioner as to any other member of the bar licensed to practice in Iowa. *See* Iowa Ct. R. ch. 32; *see, e.g.*, *In re Marriage of Stark*, 2004 WL 2676431 (Iowa Ct. App. 2004) (affirming sanction against attorney noting that the district court was "appalled at counsel's conduct which the court characterized as a 'misuse of the judicial process'").

1. Don't have an affair with your client.

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Blessum, 861 N.W.2d 575 (2015). Attorney license suspended in part due to sexual relationship between attorney and client. The Court held the sexual relationship under Rule 32:1.8(j), need not constitute sexual harassment or involve coercion to violate the rule. Even purely consensual sexual relationships are prohibited as between client and attorney under a similarly worded prior ethical rule. "Professional responsibility involves many gray areas, but sexual relationships between attorney and client is not one of these." *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Furlong*, 625 N.W.2d 711, 714 (Iowa 2001)

Rule 32:1.8 provides, "A lawyer shall not have sexual relations with a client, or a representative of a client, unless the person is the spouse of the lawyer or the sexual relationship predates the initiation of the client-lawyer relationship." The rule forbids such relationships even if the relationship is consensual. *See* R. 32:1.8 cmt. 17 ("[T]his rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client."); *Iowa Supreme Court Attorney Disciplinary Bd. v. Johnson*, No. 16-0625, 2016 WL 4585877, at *3 (Iowa Sept. 2, 2016) (suspending attorney for 30 days who began intimate relationship with client well after attorney commenced her representation of client in several criminal and civil matters, and client was not attorney's spouse). The unequal nature of the relationship between an attorney and his or her client renders it impossible for the vulnerable layperson to be considered consenting to the sexual relationship. A sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. Any sexual relationship with a current client is prohibited, regardless of the circumstances.

Even sexual relationships between attorney and client that do not involve an exchange for fees violate Rule 32:1.8(j) because a client cannot, by definition, consent to a relationship with his or her attorney. The rule contains an exception for sexual relationships that predate the attorney's representation of the client. *Blessum*.

The *Blessum* Court held that the existence of an attorney-client relationship is governed by contract principles and may be either express, such as a relationship based on an actual written agreement, or implied from the conduct of the parties. An attorney-client relationship is established when three elements are met: (1) a person sought advice or assistance from an attorney; (2) the advice or assistance sought pertained to matters within the attorney's professional competence; and (3) the attorney expressly or impliedly agreed to give or actually gave the desired advice or assistance

Attorneys who violate this rule face suspension. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Monroe*, 784 N.W.2d 784, 788 (Iowa 2010) (suspending attorney's license for at least thirty days because attorney admitted having sexual relationship while representing client in an ongoing divorce action, even though Supreme Court found client "was not coerced by Monroe to engage in an intimate relationship with him, that there was no understanding or anticipation that her attorney fees would be reduced by virtue of their relationship, and that she felt it was her own decision to be in or out of the relationship"); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Marzen*, 779 N.W.2d 757, 768-69 (Iowa 2010) (finding attorney's sexual relationship with extremely vulnerable client, whom he represented in an involuntary commitment proceeding, warranted six-month suspension); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Morrison*, 727 N.W.2d 115, 119-20 (Iowa 2007) (imposing three-month suspension on attorney who engaged in sexual relationship with client after he had been previously admonished for making sexual advances toward another client); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. McGrath*, 713 N.W.2d 682, 703-4 (Iowa 2006) (suspending attorney's license for at least three years for attempting to obtain and accepting sexual favors as payment for legal services); *Furlong*, 625 N.W.2d at 713-14 (imposing eighteen-month suspension on attorney who performed "uninvited and unwelcome" sex acts on client and sexually harassed at least two other clients by making unwanted sexually motivated physical contact with them).

2. Don't put a client's case at risk if s/he is behind on your bill.

Blessum. Court held neglect involves a consistent failure to perform obligations the lawyer has assumed or a conscious disregard for the responsibilities a lawyer owes to a client and may arise when an attorney repeatedly fails to meet deadlines. In the context of a dissolution-of-marriage case, the Supreme Court of Iowa has found a violation of Rule 32:1.3 when an attorney ceased working on the divorce, resulting in a default decree being entered against his client.

3. Don't take the money without giving your client's notice.

Blessum. A lawyer accepting advance fee or expense payments must notify the client in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The attorney must transmit such notice no later than the date of the withdrawal, Iowa Ct. R. 45.7(4).

4. Don't take the money from a flat fee until you have done the work.

Blessum. Prematurely withdrawing fees violates Iowa Rules of Professional Conduct 32:1.15(c) and 45.7(3). *Blessum*, 861 N.W.2d at 590-91. These rules require flat fees to be deposited in a trust account and withdrawn only when earned. Rule 32:1.15(c) requires fees to be withdrawn by the lawyer only as earned. Failure to render a contemporary accounting when withdrawing a fee violates Rules 32:1.15(c) and 45.7(4). contemporary accounting. *Blessum*, 861 N.W.2d at 591. Flat fees are nothing more than an advance fee payment and that these "[f]unds remain the property of the client until the attorney earns them". *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Apland*, 577 N.W.2d 50, 55 (Iowa 1998).

5. Do not take money from your trust account for fees or expenses until you have actually incurred the expense.

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Cross, 861 N.W.2d 211 (2015). Advance expense payments are defined as "payments for contemplated expenses in connection with the lawyer's services that are made to the lawyer prior to the incurrence of the expense." *Id.* R. 45.7(2). "A lawyer must deposit advance fee and expense payments from a client into the trust account and may withdraw such payments only as the fee is earned or the expense is incurred." *Id.* R. 45.7(3).

6. Pay your payroll and income taxes.

Cross. The Supreme Court found that Cross violated rule 32:8.4(b), but not rules 32:8.4(c) and (d).[1]

> First, we find Cross violated rule 32:8.4(b) by failing to file employee-payroll-withholding-tax declarations and pay the required taxes for years 2009 through 2011 and by failing to timely file his state and federal income tax returns for years 2009 through 2011. Cross clearly failed to file quarterly withholding-tax declarations with respect to employee payroll taxes and failed to make appropriate deposits. He admitted these facts in his amended and substituted answer. He further admitted that he had failed to file state and federal income tax returns from 2009 through 2011 in violation of 26

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[1] Iowa Ct. R. 32:8.4 states, in relevant part:

> It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;(d) engage in conduct that is prejudicial to the administration of justice . . . .

> U.S.C. § 6012 (2006). This conduct reflects adversely on his fitness as a lawyer. *See* [*Iowa Supreme Ct. Att'y Disciplinary Bd. v. Lustgraaf*, 792 N.W.2d 295, 299 (Iowa 2010)]; *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Fields*, 790 N.W.2d 791, 797 (Iowa 2010). We find Cross violated rule 32:8.4(b).

Cross, 861 N.W.2d at 222–23.

7. Justice delayed can result in an ethical violation.

Discovery Delays/Issues. *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Kennedy*, 837 N.W.2d 659 (2013). Iowa Rule of Professional Conduct 32:3.4 governs fairness to opposing counsel and the Court found Kennedy specifically violated Rule 32:3.4(d) that "forbids lawyers from "fail[ing] to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party." *Id.* at 669-70; *see also Iowa Supreme Court Att'y Disciplinary Bd. v. McCarthy*, 814 N.W.2d 596, 606 (Iowa 2012) (concluding an attorney who failed to serve timely interrogatory answers violated rule 32:3.2); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Cunningham*, 812 N.W.2d 541, 548 (Iowa 2012) ("Cunningham failed to appear at hearings and failed to participate in discovery in a timely manner. Failing to appear at hearings and participate in discovery does not constitute a reasonable effort to expedite litigation and therefore violates rule 32:3.2.").

Failing to Follow Appellate Rules. *Iowa Supreme Court Att'y Disciplinary Bd. v. Dolezal*, 796 N.W.2d 910, 914-15 (Iowa 2011) (finding a rule 32:3.2 violation where an attorney failed to meet appellate deadlines, resulting in dismissal); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Hoglan*, 781 N.W.2d 279, 283-84 (Iowa 2010) (finding a rule 32:3.2 violation when an attorney repeatedly failed to prosecute several appeals in different client matters).

8. Don't do drugs or drink and drive.

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Roush, 827 N.W.2d 711 (2013). The Court found that two convictions for possession of illegal substances is pattern of criminal conduct which included admitted use of cocaine and violated Rule 32:8.4. The Court looked at attorney's habit of conduct for which he had already received criminal sanctions bears a connection to the practice of law. *See Iowa Supreme Court Att'y Disciplinary Bd. v. Cannon*, 821 N.W.2d 873, 879 (Iowa 2012) (noting that "a prior conviction is relevant to determining whether an attorney has displayed a pattern of criminal conduct."); *Iowa Supreme Court Att'y Disciplinary Bd. v. Weaver*, 812 N.W.2d 4, 11 (Iowa 2012) ("Weaver's three convictions for the same offense certainly indicate a pattern of criminal conduct and demonstrate a disregard for laws prohibiting the operation of motor vehicles while intoxicated."); *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Ax*t, 791 N.W.2d 98, 101 (Iowa 2010) (finding a pattern of conduct in an attorney's second alcohol-related conviction for domestic abuse and violations of court orders); *Iowa Supreme Court Att'y Disciplinary Bd. v. Templeton*, 784 N.W.2d 761, 766-68 (Iowa 2010) (finding that an

inactive attorney violated rule 32:8.4(b) in light of repeated incidents of peeping into homes and a guilty plea to six counts of invasion of privacy).

9. Don't beat up your significant other.

Iowa Supreme Court Att'y Disciplinary Bd. v. Deremiah, 875 N.W.2d 728 (Iowa 2016). The Court appears to have departed from its prior holdings that "domestic-abuse conduct did not affect [the attorney's] behavior toward his clients, fellow lawyers, or judges." *Id.* (citing *Schmidt*, 796 N.W.2d at 44; *Iowa Supreme Court Att'y Disciplinary Board v. Axt,* 791 N.W.2d 98, 102 (Iowa 2010)). In *Deremiah*, the Court held:

> These observations in *Schmidt* and *Axt* were used only in the sense that the specific acts of misconduct in question had no direct impact on a particular identifiable case or client. Yet, our other cases recognize that a lawyer's misconduct can have an indirect impact on the lawyer's ability to practice law. For example, in *Roush*, the attorney's illegal drug usage did not have a direct impact on a particular case or client. 827 N.W.2d at 718. We noted, however, that a criminal attorney's illegal drug use could lead to difficult situations in his law practice when he represented drug offenders. *Id.* We noted that Roush was violating the category of laws that he regularly encountered in his work. *Id.*
>
> Here, Deremiah's practice included family and criminal law. A competent family lawyer must be able to recognize and effectively deal with situations involving domestic abuse. *See In re Walker, 597 N.E.2d at 1272;* [*In re Magid*, 655 A.2d 916, 919 (N.J. 1995)] (stating an attorney's commission of domestic violence calls into question the zealousness of his advocacy when representing victims of such crimes or prosecuting perpetrators).

Deremiah, 875 N.W.2d at 736-37. The attorney's license was suspended for three months.

10. Don't interfere with the police.

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Roush, 827 N.W.2d 711 (2013). The Court found attorney's course of conduct also shows disrespect for the rule of law and for law enforcement officials. Upon being arrested in 2011, Roush told officers falsely that he had swallowed the crack cocaine. *See Cannon*, 821 N.W.2d at 879 (noting the attorney falsely denied he had been driving the car before being arrested for OWI). The attorney also claimed it was all about the "whore." *Roush* at 717.

11. Beating the criminal charge is not a shield to an ethical violation.

Iowa Supreme Ct. Att'y Disciplinary Bd. v. Stowers, 823 N.W.2d 1 (2012). "[L]awyers do not shed their professional responsibility in their personal lives." *Id.* (citing *Comm. on Prof'l Ethics & Conduct v. Hall*, 463 N.W.2d 30, 35 (Iowa 1990)).

> It is also important to note that rule 32:8.4(b) does not require a criminal conviction, but only that an attorney committed a "criminal act." *Iowa Supreme Ct. Att'y Disciplinary Bd. v. Lustgraaf*, 792 N.W.2d 295, 299 (Iowa 2010) (holding respondent's failure to file tax returns in accordance with federal law was a violation of rule 32:8.4(b), even though he was never criminally charged); *see also Hall*, 463 N.W.2d at 33, 35 (holding respondent's commission of theft constituted violation of DR 1-102(A)(3), even though respondent was not charged with or convicted of a crime).

Stowers, 823 N.W.2d at 13.

> Accordingly, the absence of criminal charges, or even acquittal of criminal charges, is not a defense to this rule. The Board simply must prove the attorney committed the act by a convincing preponderance of the evidence. "This burden is less than proof beyond a reasonable doubt, but more than the preponderance standard required in the usual civil case." It is also a less stringent burden than clear and convincing evidence, which is "the highest civil law standard of proof." Further, there must be a "rational connection" between the criminal act and the lawyer's fitness to practice law.

Stowers, 823 N.W.2d at 13 (Iowa 2012) (citations omitted).

12. You cannot represent both spouses in a pending divorce.

"In no event shall a lawyer represent both parties in dissolution of marriage proceedings." Iowa Ct. R. 32:1.7(c). Comment 17 of this rule calls this situation a "nonconsentable conflict" of interest. *See Iowa Supreme Court Att'y Disciplinary Bd. v. McCarthy*, 722 N.W.2d 199, 204 (Iowa 2006) (suspending attorney's license because attorney represented husband and wife in joint bankruptcy petition, while simultaneously representing husband in a dissolution of marriage action and using knowledge obtained in dissolution to affect bankruptcy to wife's detriment).

13. Contingency fees in family law matters.

"A lawyer shall not enter into an arrangement for, charge, or collect . . . any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof[.]" Iowa Ct. R. 32:1.5(d)(1). "This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony, or other financial orders because such contracts do not implicate the same policy concerns." *Id.* cmt. 6.

14. Are lawyers responsible for predicting and advising their client's on every possible legal issue?

Generally, "lawyers only represent clients on matters they have been engaged to discharge. An attorney does not have a duty to inquire into matters that do not pertain to the discharge of the duties undertaken by the attorney." *Sabin v. Ackerman*, 846 N.W.2d 835, 842 (Iowa 2014).

2016 FAMILY LAW SEMINAR

What Family Law Attorneys Need to Know About the New Federal Every Student Succeeds Act

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

Presented by

Thomas Mayes
Iowa Department of Education
400 E. Fourteenth St.
Des Moines, IA 50319
Phone: (515) 242-5614

FRIDAY, OCTOBER 28

What Family Law Attorneys Need to Know About The New Federal *Every Student Succeeds Act*

Iowa State Bar Association
Family Law Seminar
October 28, 2016

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On December 10, 2015, President Obama signed the Every Student Succeeds Act ("ESSA") (Pub. L. 114-95). ESSA reauthorizes the Elementary and Secondary Education Act of 1965 ("ESEA") (20 U.S.C. §§ 6301 *et seq.*) and replaces the No Child Left Behind Act of 2001 ("NCLB") (Pub. L. 107-110), the ESEA's most recent reauthorization. A bipartisan effort, ESSA does several key things; it—

1. Retains ESEA's core mission of improving academic performance of children who are disadvantaged.
2. Retains NCLB's focus on accountability while eliminating NCLB's largely punitive accountability structure.
3. Provides greater flexibility to the States to adopt meaningful accountability systems and to provide supports to struggling schools, in contrast to NCLB's one-size-fits-all approach to school improvement.
4. Provides greater clarity of purpose for schools in serving children in foster care, and aligns with, and adds to, several key provisions of Fostering Connections (Pub. L. 110-351).

How will this be implemented in Iowa? This is a complex law that replaces a complex law, and its implementation is still ongoing. For that reason, the information in this presentation is not necessarily the opinion or policy of the Iowa Department of Education, any other state agency, or the United States Department of Education (Note the first-person singular pronoun in many of the items that follow.).

ESSA's General Principles

- The United States Department of Education's role in education has moved from directive to supportive. The locus of authority has shifted back to the States, such as prohibiting the federal government from directing what challenging academic achievement standards that States must adopt.

- Replaces single-factor accountability – focusing solely on a single summative academic assessment – with a more balanced accountability system, which must give "substantial weight" to academic outcomes but must also include a measure of school quality (such as school safety or college-and-career readiness).
- Replaces inflexible SINA/DINA lists and punitive corrective action and restructuring with scaffolds of support for schools with needs.
    - *Comprehensive support and improvement* to the following categories of schools:
        - lowest five percent of schools
        - high schools graduating fewer than 2/3 of its students
        - schools with low performing subgroups (in the same manner as schools in the lowest performing five percent of schools): students of low income, students of color, students with disabilities, and students who are English language learners
    - Targeted support and improvement for schools with "consistently underperforming" subgroups
    - State supports to schools with need must be evidence-based.

ESSA and Children in Foster Care

- School districts and the State must annually and publicly report on the educational achievement (achievement testing and graduation rates) of children in foster care. Note the State is not required to include foster care as a subgroup for accountability purposes, but it may choose to if it wishes.
- For purposes of ESSA, foster care is defined as follows:

    > 24-hour substitute care for children placed away from their parents or guardians and for whom the child welfare agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State, Tribal or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

- The State's Title I plan, in consultation with the Department of Human Services, must address the needs of children in foster care.
- Iowa's Title I plan must provide that children in foster care must remain in their school of origin unless their best interest requires otherwise. The best interest determination must be multifactored, including considerations of the child's educational needs and the proximity of the school to the placement.

- If the child's school placement is changed, the child is entitled to immediate and appropriate enrollment in the receiving district and immediate transfer of records.
- If placement is changed, school districts and DHS must address transportation to remain in schools of origin. ESSA creates three ways of funding that transportation.
    - 100 percent support by the school district of origin
    - 100 percent support by DHS
    - 50 percent support by the school district of origin and 50 percent by DHS
- The Department of Education must have point of contact for foster care. At the Department level, the point of contact cannot be the McKinney-Vento coordinator. A local district must appoint a point of contact if DHS provides the district notice of DHS's point of contact.
- For the Department and districts to perform their important work, they must know which children are in care. For that reason and to the extent necessary, I would contend that ESSA's reporting and communication requirements would require state law to the contrary to yield. However, that may not be necessary, given the passage of Senate File 2288. Senate File 2288 amended Iowa Code section 232.147(3). As amended, chapter 232 now requires juvenile court records, including records in foster care cases, to be disclosed to school districts and accredited nonpublic schools. This should address data flow problems from DHS to LEA.
- The McKinney-Vento Homeless Assistance Act has been amended to remove "awaiting foster care" from the definition of "homeless."

For More Information

- Iowa Code § 280.29: https://www.legis.iowa.gov/docs/code/2016/280.29.pdf
- Iowa Code § 282.19: https://www.legis.iowa.gov/docs/code/2016/282.19.pdf
- SF 2288: https://www.legis.iowa.gov/docs/publications/LGE/86/SF2288.pdf
- ESSA's full text: https://www.gpo.gov/fdsys/pkg/BILLS-114s1177enr/pdf/BILLS-114s1177enr.pdf
- United States Department of Education's ESSA page: http://www.ed.gov/essa?src=rn
- United States Departments of Education & Health and Human Services, "Non-Regulatory Guidance: Ensuring Educational Stability for Children in Foster Care": http://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf
- Iowa Department of Education's ESSA page: https://www.educateiowa.gov/pk-12/every-student-succeeds-act
- ABA Legal Center for Foster Care and Education's ESSA fact sheet: http://www.fostercareandeducation.org/Portals/0/documents/QA%20ESSA%202015%20FINAL%202%2019%2016.pdf

2016 FAMILY LAW SEMINAR

Chapter 598C
Assignment of Visitation Rights by Active Duty Military Parents

2:00 p.m.- 2:30 p.m.

Presented by

Captain Ben Hayek
Iowa Army National Guard
7105 NW 70th Ave
Johnston, IA 50131

FRIDAY, OCTOBER 28

A Roadmap for the Uniform Deployed Parents Custody and Visitation Act

by Mark E. Sullivan*

*Mr. Sullivan, a retired Army Reserve JAG colonel, practices in Raleigh with Sullivan & Tanner, P.A. He drafted the predecessor of the UDPCVA, G.S. 50-13.7A, and he served for two years on the committee of the Uniform Law Commission (ULC) which wrote the UDPCVA. He serves as a consultant or co-counsel in military divorce cases and as an expert witness regarding military pension division and other military family law issues.

Q. Drop everything – I need some help right now! I have a new appointment in an hour; it's a military custody case… and my hair's on fire! What do I need to know?

A. For claims and motions filed after October 1, 2013, the operative law for much of a military custody case will be the Uniform Deployed Parents Custody and Visitation Act. The UDPCVA is the law in five states already – Nevada, Oklahoma, North Dakota, North Carolina and Colorado – and it was only approved February 2013 by the American Bar Association House of Delegates. It contains many *must-know* rules for cases involving deployment, military custodians, delegated visitation rights, return from military absence, electronic testimony and expedited hearings, just to name a few. Lawyers in North Carolina, which has the third-largest military population in the country, should be familiar with the contours of the Act, the detours, the roadblocks, the highways and the byways.

Q. First of all, I need find it. Where's the UDPCVA located?

A. Most of it is found in Article 3 of Chapter 50A of the General Statutes, but a small section is found at G.S. 50-13.2(f). The latter provides that, in military custody cases, the judge cannot consider the military parent's past or future deployment as the sole basis in deciding the best interest of the child.

Q. Well, hold on right there – I have lots of problems with that! What if the deployment has a major impact on the child or children? And what about "best interest of the child" – isn't that the sole issue in custody cases?

A. The first of these concerns – the impact on the children – is covered in the second sentence of G.S. 50-13.2(f), which says that "The court may consider any significant impact on the best interest of the child regarding the parent's past or possible future deployment." The second point, that "best interest" is the only issue in custody cases, is a common misconception about custody. While BIOC (best interest of the child) is a central issue, it is by no means the only focal point.

- BIOC plays <u>no role</u>, for example, when the judge is deciding whether there has been a change of circumstances sufficient to justify a modification of custody. Only after a determination that such a change exists can the court examine BIOC. Judicial efficiency takes precedence over BIOC in this situation. Why inquire into BIOC if there has been no substantial change of circumstances?
- Likewise, public policy prevents consideration of BIOC in the initial stage of a third-party custody claim. The court can inquire into BIOC only if it first decides that the parents of a child are unfit or have neglected the child's welfare. The policy of North Carolina is to prefer custody for parents rather than non-parents.
- There is also no consideration of BIOC in determining whether the court's jurisdiction is based on "home state" or "significant connection/substantial evidence," under the terms of Section 201 of the Uniform Child Custody Jurisdiction and Enforcement Act, or whether the court loses jurisdiction under Section 202.
- Finally, BIOC plays no role in a motion for stay of proceedings under the Servicemembers Civil Relief Act, 50 U.S.C. App. 522. The court must decide the issue of whether to stay the case based solely on the issues in the statute, not on the child's best interest. The Supremacy Clause in the U.S. Constitution and the concerns of Congress in protecting the civil rights of servicemembers have priority over the issue of BIOC.

In all of these areas, public policy priorities override the notion that BIOC is "all there is" in a custody case.

Q. You mentioned deployment. The judges in my county are not exactly "spittin' distance" from the nearest military base, so I'll need to explain this when I'm in court. What is" deployment," and why is it important?

A. In the opening scene of "The Music Man," the assembled salesmen all agree that "you've got to know the territory." The same is true with military custody legislation. A lot of terms are used in this arcane arena, and the judge and practitioner must know the territory and speak the language. Mobilizations and tours of duty which are "unaccompanied" (e.g., without authorization to bring dependents) include temporary duty assignments (TDY), transfers to a combat zone or high-risk environment, and remote assignments. According to the Act, "deployment" means "The movement or mobilization of a service member to a location for more than 90 days, but less than 18 months, pursuant to an official order that (i) is designated as unaccompanied; (ii) does not authorize dependent travel; or (iii) otherwise does not permit the movement of family members to that location." G.S. 50A-351(9). Members of the "uniformed services" are covered, meaning "(i) the active and reserve components of the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States; (ii) the Merchant Marine, the commissioned corps of the Public Health Service, or the commissioned corps of the National Oceanic and Atmospheric Administration of the United States; or (iii) the National Guard." G.S. 50A-351(18).

Q. When a servicemember has custody and is about to deploy, what happens to custody of the child?

A. There are several deployment rules under the UDPCVA which need to be understood. First of all, the deploying parent must give written notice to the non-deploying parent within seven days of learning of the deployment. An exchange of proposed parenting plans is required, and the reasonableness of a parent's efforts to comply with this may be considered in a custody determination. G.S. 50A-354.

Q. Can the non-deploying parent leave the state and "go back home" to Montana, without notice to the military parent on deployment?

A. No. While there is no restriction on the ability of the non-deploying parent to "go back home," he or she must give address-change information to the deploying parent and to the court. There is an exception if an existing order prohibits this disclosure (e.g., a domestic violence case). G.S. 50A-355.

Q. Can't that unrestricted ability to "go back home" have an impact on custody jurisdiction? After all, now no one is living in North Carolina! Didn't the ULC think of that in drafting this Act?

A. Quite to the contrary, the issue of custody jurisdiction was "front and center" in the ULC drafting committee meetings as a result of a recent case involving Colorado and Maryland involving a custodial parent who was "called to the colors."[1]

The mother had a Maryland custody order and she lived with the daughter in that state. Mobilized by the Army, she and the child moved to Ft. Hood, Texas, for a year, and then she was deployed to Iraq for six months. Upon her return to Texas, she was ordered back to Maryland for a non-deployable assignment.

In accord with the Army's rules and her own Family Care Plan, the mother turned over custody to her ex-husband in Colorado when she was deployed. Upon her return to the U.S., the parties agreed that the child would stay in Colorado for the next seven months to finish the school year, ending in May 2011. In May 2011, the father filed in Colorado for the court to assume custody jurisdiction, since neither mother nor child "currently resided" in Colorado. He also filed a motion to change custody. The trial judge agreed with the father and issued an order assuming jurisdiction.

Pursuant to the UCCJEA, the judges from Maryland and Colorado conferred about custody jurisdiction by telephone. But they could not agree. Each one maintained that *his state* was properly exercising jurisdiction.

The mother filed for an extraordinary writ in the Colorado Supreme Court. She asked that court to grant an order to show cause—which it did—arguing that the district court erred in finding that she no longer

[1] *In re* Marriage of Brandt, 268 P.3d 406 (Colo. 2012).

resided in Maryland for custody jurisdiction purposes. The Colorado Supreme Court disagreed with the trial judge's custody jurisdiction ruling, stating that the phrase "presently reside" in the UCCJEA is not the same as "currently reside" or "physical presence," and that the judge must make an inquiry into the totality of the circumstances, examining what makes up a person's permanent home, her *domicile*. The Court further held that the parent who claims that the initial state has lost "exclusive, continuing jurisdiction" has the burden of proof in showing this before the trial judge. Accordingly, the Supreme Court reversed and vacated the district's judge's order assuming jurisdiction. Any other solution, the Court noted, would mean that the UCCJEA could be interpreted as allowing one parent to re-litigate custody simply by winning the race to the courthouse when the other parent, under military orders, is temporarily absent from the issuing state.[2]

Q. So what did the ULC do about the problem? Where's the solution found in the UDPCVA?
A. The answer is found in G.S. 50A-353, which states that the residence of the deploying parent is not changed by reason of deployment for the purposes of UCCJEA during the deployment. This provision ensures that a temporary absence in compliance with military orders does not disadvantage the servicemember in a custody proceeding. However, the section stops there. The Act does not modify the Uniform Child Custody Jurisdiction and Enforcement Act, and it does not attempt to create or refine rules for initial or subsequent custody jurisdiction.

Q. What's covered next in the UDPCVA?
A. Parts 2 and 3 deal with matters that come up upon notice of deployment and during the actual absence, depending on whether the case is resolved by settlement or litigation. Central to military custody cases and to the UDPCVA is the concept of anticipating "military absence." Military absences may include deployment, TDY, or a remote tour of duty. Such absences require military parents to prepare a temporary plan for custody and visitation arrangements during their absence, and to reduce the plan to writing. After the absence is over, the temporary plan ends and the parties return to the *status quo ante*. The Act encourages parents who wish to settle visitation and custody issues. Where there is a negotiated settlement, Part 2 sets out the substantive terms and procedural protections that cover the agreement.

Q. What does Part 2 say about agreements for custody in a *deployment situation*?
A. Pursuant to G.S. 50A-361, temporary agreements must be in writing, and signed by the parents and by any nonparent to whom custody duties are given. Such a temporary custody agreement may –

- Identify (to extent feasible) the destination, duration and conditions of the deployment
- Specify the allocation of caretaking authority among deploying parent, other parent and any nonparent
- Specify any decision-making authority that accompanies caretaking
- Specify any grant of limited contact to a nonparent
- Provide for dispute resolution when the agreement provides for shared custodial responsibility between a parent and a nonparent, or between two nonparents
- Specify the frequency, duration and means of contact between the deployed parent and the child, the role of other parent in facilitating contact, and the allocation of costs between them
- Specify the contact between the deploying parent and the child during any period of leave
- Acknowledge that a party's child support obligation only be changed during deployment by the appropriate court, not by the agreement, during the deployment
- Provide for termination upon return from deployment under Article 4 procedures.

If the agreement must be filed under G.S. 50A-364, it needs to specify which parent will do so.

Q. What else does Part 2 of the UDPCVA do?
A. It states that the temporary custody agreement ends upon return from deployment; it does not create independent rights or authority in persons to whom responsibility is given, and any nonparent given authority or contact rights has standing to enforce agreement. G.S. 50A-361. The agreement may be modified by mutual consent of both parents and any nonparent who will exercise custodial responsibility

[2] *Id.* at 416.

under the agreement. G.S. 50A-362. The deploying parent may delegate all or part of his or her custodial responsibility to a nonparent through a power of attorney for the period of deployment; it is revocable by the deploying parent through a revocation of the power of attorney signed by the deploying parent. G.S. 50A-363. The Act requires the filing of the agreement and/or power of atty. with court or agency within reasonable period of time. G.S. 50A-364.

Q. I've had a few custody cases in which the parties couldn't agree on anything except the existence of their child. What happens when there's no agreement and no prospect of reaching one?
A. When court is the last resort, it's important to know that – under G.S. 50A-370 – the judge can issue a temporary custody order for custodial responsibility after a parent receives notice of deployment and also during deployment. This is allowed unless there is a prohibition or restriction pursuant to the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 521-522 (misstated in G.S. 50A-370 and -379 as "50 U.S.C. §§ 521-522"). A court cannot enter a permanent custody order in the absence of the deploying parent without his or her consent.

Q. The Servicemembers Civil Relief Act? Isn't that what used to be called the Soldiers' and Sailors' Civil Relief Act? What does that say about custody cases?
A. Yes. It was completely rewritten in 2003 and renamed. Section 521 deals with entry of orders in default of the appearance of the servicemember, and Section 522 covers a request by the servicemember for a stay of proceedings. You can find a full explanation of these sections in "A Judge's Guide to the Servicemembers Civil Relief Act."[3]

Q. What if Navy Commander Jane Doe wants to get her affairs in order before she deploys? Is there anything in the Act which can light a fire under good ol' Judge Foonblatt and prioritize her custody and visitation case here in Cowpie County?
A. Pursuant to G.S. 50A-371, the court is required to conduct an expedited hearing if a motion to grant custodial responsibility is filed before a deploying parent deploys. In addition, a party or witness who is not reasonably available to appear personally may appear and provide testimony and present evidence by electronic means unless the court finds good cause to require a personal appearance. G.S 50A-372.

Q. By "electronic means"? What's that? We don't do *Facetime* in Judge Foonblatt's court!
A. It can be just about anything that allows the missing person to testify electronically. For example, use of the telephone, *Facetime* or *Skype* would certainly be included in the scope of this section.

Q. Does the judge have to enforce a previous agreement under Part 2?
A. Yes – G.S. 50A-373 states that the court will enforce a prior written agreement of the parties for custodial responsibility in the event of deployment, whether made under Part 2 or not, unless it is contrary to the best interest of the child.

Q. Commander Jane Doe tells me that she wants her new husband, Richard, to step into her shoes during the deployment and take over her time with Grizelda, her daughter. Can the court do that?
A. G.S. 50A-374(a) and (b) state that, upon her motion, the court may grant caretaking authority to a nonparent who is an adult family member, or who has close and substantial relationship with child. It must be found to be in the child's best interest to do so. Unless the other parent agrees, caretaking time is limited to –

- Ordinary visitation time of the deploying parent in the existing order (plus unusual travel time, if necessary)
- If there is no existing order, the time that the deploying parent cared for child prior to notice of deployment (plus unusual travel time, if necessary).

[3] Found at the website of the North Carolina State Bar's military committee, www.nclamp.gov > Resources (last visited Oct. 26, 2013). See also Mark E. Sullivan, "The New Servicemembers Civil Relief Act," 11 N.C. ST. B.J. 22 (2006).

The court may grant part of the decision-making authority for Grizelda to Richard (if Jane isn't able to exercise such authority), and the order must specify the areas of decision-making (e.g., health, education and religion). G.S. 50A-374(c). Any nonparent to whom caretaking authority or decision-making authority is granted must be made a party to the action until the grant is terminated. G.S. 50A-374(d).

Q. What is caretaking authority?
A. It's the right to live with and care for a child on a day-to-day basis, including physical custody, parenting time, right to access, and visitation. G.S. 50A-351(2).

Q. What about a more limited form of access for Richard?
A. The judge can order "limited contact," for Richard, which is the opportunity for a nonparent to visit with a child for a limited period of time. The term includes authority to take the child to a place other than the residence of the child. Once again, Richard must be made a party to the action. G.S. 50A-375. A grant of authority or limited contact order is temporary, ending upon Jane's return from deployment. It does not create independent rights or authority in those to whom responsibility is given. G.S. 50A-376(a). If however, there is a violation of a court order, a nonparent who has been granted authority or contact rights has standing to enforce the grant. G.S. 50A-376(b).

Q. Why was there a need for these provisions?
A. In a series of visitation cases, military parents have fought to keep contact through their new spouses or their parents when the children are denied such access by the children's mothers. In such cases, courts have found that the court can delegate or assign visitation rights to family members during a deployment.[4] In each of these cases, the nonmilitary parents have objected to attempts to involve the rest of the SM's family in substitute visitation, have argued that visitation is a personal right that belongs only to the deployed parent, and have claimed that when the SM is absent there are *no visitation rights available*. Such assertions have often been rejected in favor of "substitute visitation." The Act codifies the results in the five leading cases in this area.

Q. What must a temporary custodial order do?
A. Under G.S. 50A-377, an order granting custodial responsibility must state that it is temporary, and it must identify (to the extent feasible) the destination, duration and conditions of the deployment. In addition, if applicable, a temporary custodial responsibility order must –

- Specify the allocation of caretaking authority among the deploying parent, the other parent and any nonparent
- Provide for dispute resolution when an agreement shares custodial responsibility between a parent and a nonparent, or between two nonparents
- Provide for liberal communication between the deploying parent and the child during deployment, including through electronic means (unless this contrary to the best interest of the child), and allocate any costs of communications
- Provide for liberal contact between the deploying parent and the child during the time the deploying parent is on leave or is otherwise available, unless contrary to the best interest of the child
- Provide for reasonable contact between the deploying parent and child following return from deployment until the temporary order is terminated, which may include more time than the deploying parent spent with the child before entry of the temporary order
- Specify any decision-making authority that accompanies caretaking
- Specify any grant of limited contact to a nonparent
- Provide for termination upon return from deployment under Part 4 procedures.

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[4] Webb v. Webb, 148 P.3d 1267 (Ida. 2006); Settle v. Galloway, 682 So. 2d 1032 (Miss. 1996); *In re* Marriage of DePalma, 176 P.3d 829 (Colo. App. 2008); *In re* Marriage of Sullivan, 795 N.E.2d 392 (Ill. App. Ct. 2003); McQuinn v. McQuinn, 866 So. 2d 570 (Ala. Civ. App. 2003). *But see* Lubinski v. Lubinski, 761 N.W.2d 676 (Wis. Ct. App. 2008) (not allowing stepmother to exercise father's physical placement rights when he is on military duty).

Q. What if the court transfers custody from Jane Doe to her ex-husband, John Doe? Wouldn't he be entitled to child support?
A. Yes – just because Jane is deployed and halfway around the world does not mean that there should be no child support. The court's power to address this issue is in G.S. 50A-378, which says that when there is a caretaking authority order, or an agreement under Part 2 granting caretaking authority, the court may enter a temporary order for child support consistent if jurisdiction exists under UIFSA, the Uniform Interstate Family Support Act, found at Chapter 52C of the General Statutes.

Q. What if the court had granted limited contact to Jane's current husband, Richard, and he later became unsuitable for that role? Could the court modify the limited contact order to replace Richard with Al and Alicia, Jane's parents (and the maternal grandparents of Grizelda)?
A. Yes. So long as the court's actions are consistent with the Servicemembers Civil Relief Act, the court may modify or terminate a grant of caretaking authority, decision-making authority, or limited contact when that action is in the best interest of the child. This is contained in G.S. 50A-379, which also states that any modification will be temporary, terminating after the end of deployment according to the procedures under Part 4, unless the grant has been terminated earlier.

Q. Where does the UDPCVA explain how to bring an end to all of this? Is there a termination section?
A. The section of the Act on termination procedures is Part 4, "Return from Deployment."

Q. How does termination work for an agreement under Part 2?
A. This is covered at G.S. 50A-385, and it can be done at any time after the end of deployment upon the signatures of both parents. Otherwise the agreement ends on the termination date which is set out in it.

Q. What if there was no date set out in it for termination, and there is no written agreement to terminate?
A. In that case, it ends 60 days from date the deploying parent gives notice to other parent of his or her return from deployment, unless earlier terminated upon the date stated in an order terminating the temporary grant of custodial responsibility or the death of the deploying parent. G.S. 50A-385. If the temporary agreement was filed with the court under G.S. 50A-364, then the agreement to terminate must be filed within a reasonable period of time after signing.

Q. Suppose that there is a court order containing a temporary grant of custodial responsibility and the parties agree to end the temporary grant. How do they go about it?
A. At any time after return from deployment, both parents may file with court an agreement to terminate custodial responsibility order. After this is filed, the court will issue order ending the temporary order on the date set out in agreement to terminate. If there is no date set out, then the order is issued immediately. G.S. 50A-386.

Q. What about terms for interim visitation after the deploying parent returns? Can the judge enter an order for temporary access pending termination of the agreement or the temporary order for custodial responsibility?
A. Yes. After the servicemember's return from deployment and until termination of a temporary agreement (under Part 2) or an order (under Part 3) for custodial responsibility, the court shall enter a temporary order granting the deploying parent reasonable contact with the child, unless this is contrary to the best interest of child. The court may enter an order for access time exceeding that which the deploying parent spent with child before deployment.

Q. When there has been a temporary order entered for custodial responsibility under Part 3 of the Act, how is that terminated?
A. If there's no filing of an agreement between the parties for termination under G.S. 50A-386, then the temporary order ends 60 days from the date the deploying parent gives notice of having returned from deployment or upon the death of the deploying parent, whichever occurs first.

Q. All of this seems a lot simpler now that I've seen how the UDPCVA operates. Do you have some parting tips on how to avoid problems in a custody case where the child's custodian wears a military uniform?

A. A key concept in the UDPCVA is thinking ahead to anticipate "military absence." Military absences may include deployment, TDY, or a remote tour of duty. Such absences require military parents to prepare a temporary plan for custody and visitation arrangements during their absence. The military calls this document a Family Care Plan. After the absence is over, the temporary plan ends and the parties return to the *status quo ante*.

When there isn't an intact family unit, keep in mind "Plan A and Plan B" as the best approach to an agreement or consent order as to visitation and custody. The usual situation – transfer of the child to the other parent – can be drafted in general terms as follows:

> Since Jane Doe is a member of the U.S. Navy and may be deployed in the future on an unaccompanied tour (that is, an assignment where family members are not allowed), her former husband, John Doe, is hereby designated alternate custodian of Grizelda Doe, the minor child of the parties, in such an event. He shall hold and exercise all the rights and responsibilities of a custodial parent during such a deployment and shall promptly return the child to Jane Doe at the deployment's end.

When the military parent is the one with custody and the nonmilitary parent is the alternate or successor custodian in the event of military absence, the agreement or consent order should always include appropriate findings of fact and conclusions of law regarding the present fitness of the parent and the best interest of the child. To state it simply, an order awarding physical custody to an active-duty or Guard/Reserve military custodian ("Plan A") should always contain a "Plan B" in the event of the parent's mobilization or deployment.

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Resolution Supporting Passage of the Uniform Deployed Parents Custody and Visitation Act

Adopted by the American Academy of Matrimonial Lawyers

WHEREAS, deployment of men and women in the national uniformed services generate child custody issues that are not adequately dealt with by the law in most states;

WHEREAS, notice of deployment may be sudden as to make it difficult to resolve parenting and custody issues before deployment by alternate dispute resolution methods or post-judgment motions;

WHEREAS, the overseas deployment of a parent raises special and complex problems with the parent-child relationship during a parent's absence;

WHEREAS, return from deployment requires parents to negotiate and resolve the termination of a temporary custody situation and when the permanent custody arrangement resumes;

WHEREAS, there is a need to ensure that parents who serve their country are not penalized for their service, while giving adequate weight to the legal interests of the other parent, and, most importantly, the best interests of the child;

WHEREAS, national service in the military may mean that a child will live in or move to different states than the deployed service member, federal and state custody issues may thereby involve two or more states;

WHEREAS, variance in state laws concerning child custody and modification may significantly affect the consistency and efficacy of parenting orders;

WHEREAS, some states have adopted statutes that specifically address custody issues for service members, but these statutes provide significantly different degrees of protection to serve members and children;

WHEREAS, other states have adopted no laws that specifically apply to custody issues relating to service member;

WHEREAS, a uniform law would substantially increase predictability and certainty for families, and ensure that the same standards no matter where the parents live or a family is posted before deployment; and

WHEREAS, the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) provides a comprehensive and consistent solution to child custody and visitation when parents are deployed in national service;

NOW, THEREFORE, IT IS RESOLVED that the American Academy of Matrimonial Lawyers urges the States to adopt this Uniform Act and recommends that its Chapters support the passage of the Uniform Deployed Parents Custody and Visitation Act.

THE UNIFORM DEPLOYED PARENTS CUSTODY AND VISITATION ACT (UDPCVA) – PROBLEMS AND THE SOLUTIONS

This table serves several functions. First of all, it sets out the general structure and specific sections of the Uniform Deployed Custody and Visitation Act. This summary shows the extent of coverage and topics in the UDPCVA and serves as a helpful guide to facilitate passage of the Act. In addition, the table includes some examples of problems that might occur in the area of military custody and visitation. It sets forth questions and issues that courts seek to address in this area are identified. The summary sections to the right of these "problems and questions" show how the Act can resolve these questions and problems.

It should be noted that no statute is a solution for all of the problems it aims to solve. The purpose behind a statute establishing positive norms, restrictions and authorizations is not simply to set standards so that transgressors may be punished. It is also intended to set prescriptive standards for lawyers and the public so that citizens may conform their conduct to what the law requires, and so that lawyers can advise and encourage their clients to comply with the law's standards. In the latter area, the law performs a preventive role, helping to keep cases out of court (and sometimes out of the arms of lawyers) by promoting appropriate conduct and communications by the parties.

Problem or Issue	How UDPCVA Addresses It	Section
	General Provisions	**Article 1**
Sample initial questions – Who should be covered? What is "deployment"? Should the law cover only active-duty personnel, or should it also include Guard/Reserve members? What is "caretaking authority"?	Definitions (e.g., "adult," "caretaking authority," "close and substantial relationship," "deployment," "service member" and "uniformed services")	Sec. 102
The need for specific statutory authority to impose sanctions and grant attorney fees when a party does not comply with the statute or the court's orders.	Remedies for Noncompliance: This includes attorney fees and costs	Sec. 103
Upon receipt of deployment orders, Sergeant Jane Doe leaves the state that initially entered a custody order, taking with her the two children in her legal custody. She turns them over temporarily to their father (her ex-boyfriend, Jerry) and then reports for duty. Jerry tries to get his own state to assert jurisdiction over custody, despite the prior custody order and the fact that Jane is only temporarily absent from the initial state. He argues that no one resides in the original state, and thus his own state has jurisdiction.[1] This section deals with the issues of residence and transfer of	Jurisdiction: The residence of the deploying parent is not changed by reason of deployment for the purposes of UCCJEA	Sec. 104

[1] See, *e.g., In re Marriage of Brandt*, 268 P.3d 406 (Colo. 2012).

Problem or Issue	How UDPCVA Addresses It	Section
a military member to another state upon receipt of military orders.		
Captain Richard Roe tries to hide his impending deployment in the Middle East from his ex-wife, so she will not be able to get a court order for custody before he leaves. He plans, instead, to leave the children with his mother[2] His keeping this information from hhis ex-wife precluded her from negotiating with him regarding a suitable parenting plan for the children during his absence. It also forced her to hire an attorney on "emergency terms," which usually costs a lot more than a non-emergency case.	Notice Required of Deploying Parent: The deploying parent must give at least 7 days' notice of deployment (in general); exchange of proposed parenting plans is required; reasonableness of a parent's efforts to comply may be considered in custody determination	Sec. 105
Roberta Roe, the ex-wife of the above-mentioned Captain Richard Roe, plans to move away as soon as Richard is overseas. She doesn't want to let Richard know where she will be, hoping to cause him maximum difficulties in reconnecting with his children.	Duty to Notify of Change of Address: Non-deploying parent must give address-change info to the deploying parent and the court; exception if an existing order prohibits this disclosure (e.g., domestic violence case)	Sec. 106
The ex-husband of Sergeant Jane Doe moves for modification of the custody decree on the ground that the mobilizations, deployments and TDY transfers of his ex-wife make her an inappropriate parent for continued custody.	Gen'l Considerations in Custody Proceeding of a Parent's Mil. Service: Past and possible future deployments may not be considered in determining the best interest of the child, but court may consider "any significant impact" on child of such deployments	Sec. 107
	Agreement Addressing Custodial Responsibility During Deployment	**Article 2**
When deployment approaches, transfers and agreements are often done on the fly – with a handshake, a phone call or a simple power of attorney. This section specifies what should be in the custody transfer agreement, how it should be executed, and under what circumstances a court order is required.	Form of Agreement: Temporary agreement must be in writing, signed by parents and by any nonparent to whom custody duties are given. It may… - Identify (to extent feasible) the destination, duration and conditions of the deployment - Specify the allocation of caretaking authority among deploying parent, other parent and any nonparent - Specify any decision-making authority that accompanies caretaking - Specify any grant of limited contact to a nonparent - Provide for dispute resolution when agreement shares custodial responsibility between parent and nonparent, or between two nonparents - Specify the frequency, duration and means of contact between deployed parent and child, role of other parent in facilitating contact, and allocation of any costs involved	Sec. 201

[2] See, *e.g.*, *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005).

Problem or Issue	How UDPCVA Addresses It	Section
	- Specify contact between the deploying parent and child during any period of leave - Acknowledge that child support may only be changed during deployment by the appropriate court, not by the agreement of the parties - Provide for termination upon return from deployment under Article 4 procedures - If agreement must be filed under Section 205, state which parent will do so	
When a nonparent is granted caretaking authority or limited contact, he or she may have "grand designs" about extending this authority beyond the end of deployment; this section makes it clear that the above grants are simply temporary expedients with a clear end-point. In addition, the non-parent delegee may need to apply to the court for an order to back up the rights or powers that he or she is granted, since the other parent may at some point have a "change of heart" and decide to resist the sharing of time or responsibilities which was agreed upon previously.	Nature of Authority Created by Agreement: Agreement is temporary and ends upon return from deployment; it does not create independent rights or authority in persons to whom responsibility is given; a nonparent given authority or contact rights has standing to enforce agreement	Sec. 202
During the deployment, it becomes clear that the custody arrangement is unworkable, or the child's schedule changes because he or she joins a new activity.	Modification of Agreement: Agreement may be modified by mutual consent of both parents and any nonparent who will exercise custodial responsibility under the agreement	Sec. 203
Captain Richard Roe is deployed on short notice and seeks to transfer custody to his current wife, the child's stepmother. May he do so without a court order?Alternatively, Capt. Roe seeks to transfer his visitation rights to his parents during the term of his deployment by means of a power of attorney. [3]	Power of Attorney: Deploying parent may delegate all or part of custodial responsibility to a nonparent through power of attorney for the period of deployment under certain circumstances	Sec. 204
Parents in the military can, if allowed by case law or statute, transfer the rights of access and visitation to another party during their deployment. [4] Without the filing of an agreement or power of attorney, the court and law enforcement authorities will not be on notice as to the terms of an agreement or power of attorney for purposes of enforcement. This clarifies for law enforcement purposes	Filing Agreement or Power of Atty. with Court: Requires filing of agreement and/or power of atty. with court or agency within reasonable period of time..	Sec. 205

[3] See, *e.g., Webb v. Webb*, 148 P.3d 1267 (Ida. 2006) (Father who was about to be deployed designated his parents to exercise his visitation rights pursuant to Idaho statute which allowed the designation for up to 12 months for one in the military serving beyond the territorial limits of the United States. His ex-wife, the mother of their two children, objected to the designation. The trial court approved and the Supreme Court affirmed, stating that the clear language of the statute allowed the father to grant visitation by power of attorney to his parents.)

[4] Id.

Problem or Issue	How UDPCVA Addresses It	Section
who has legal custody of a child.		
	Judicial Procedure for Granting Custodial Responsibility During Deployment	**Article 3**
Roberta Roe decides that now – when her ex-husband has just received deployment orders – is the perfect time to get custody of the children. She files for custody (or moves the court for a change of custody if there is already a custody case), asking the court for "full custody" or "permanent custody" in light of the impending absence of the children's current custodian, Captain Richard Roe. Section 301 makes it clear that the court cannot grant a permanent custody order except with the deployed parent's agreement, and that temporary orders must comply with the Servicemembers Civil Relief Act (SCRA), which provides for a stay of proceedings (50 U.S.C. Appx. 522) and bars a default judgment if the servicemember has not entered an appearance (50 U.S.C. Appx. 521).	Proceeding for Temporary Custody Order: Court may issue temporary custody order unless barred by Servicemembers Civil Relief Act, 50 U.S.C. Appx. 521-522; no permanent custody order except with consent of deploying parent	Sec. 301
When Sergeant Jane Doe is about to deploy and wants to transfer custody of her child to her mother, she needs a prompt hearing so she can put her affairs in order, especially if the other parent will not agree, pursuant to Article 2, to terms for custody and visitation during her absence. This section provides explicit authority for the court's allowing a peremptory setting for her motion for relief under Article 3, especially if the child's father realizes that delay benefits him i, that all he needs to do is wait till she's gone and that there is no one to oppose his actions regarding the child's custody or monitor his conduct.	Expedited Hearing: Court shall conduct expedited hearing upon motion for same before deployment	Sec. 302
Jane's deployment orders do not allow time for her to appear and testify in person regarding custody and visitation matters. Current state statutes only provide limited authority for electronic testimony. When the case involves two different states, Section 316(f) of the Uniform Interstate Family Support Act (UIFSA) provides for parties to "testify by telephone, through audiovisual means or by any other electronic means." In interstate custody cases, Section 111 of the Uniform Child Custody Jurisdiction and Enforcement	Testimony by Electronic Means: A party or witness who is not reasonably available may testify and present evidence by electronic means unless good cause for personal appearance.	Sec. 303

Problem or Issue	How UDPCVA Addresses It	Section
Act (UCCJEA) permits an individual to be deposed or to testify by telephone, audiovisual means or electronic means. This section give the court authority, even if the case involves only in-state custody issues which are not covered by the UCCJEA, to allow testimony by electronic means, such as telephone, Skype, Polycom or FaceTime.		
Capt. Richard Roe wants to leave his children with his parents on his deployment, although the custody order entered at the time he divorced states that his ex-wife will have custody on deployment. Roberta, his ex-wife, opposes Richard's assigning custody to his parents.	Effect of Prior Judicial Decree or Agreement: Prior order for custodial responsibility in case of deployment is binding unless circumstances justify modification; court shall enforce agreement of parties for custodial responsibility unless contrary to best interest of child.	Sec. 304
Jane Doe wants the court to allow her current husband to have the children while she is on deployment orders. He has a good relationship with the kids, the children have lived with him since birth, and he is fit and proper for this role. Jane's ex-boyfriend, Jerry – the father of the children – raises strenuous objections, stating that Jane is impermissibly trying to establish parental rights for her new husband that the husband could not obtain in his own right. Jerry states that he has paramount and presumptive parenting rights with the kids when Jane is not available, meaning that he should have them on a full-time 100% basis. He says that he should not be forced to give up his own parenting time in favor of a nonparent.[5]	Grant of Caretaking or Decision-Making Authority to Nonparent: Upon motion of deploying parent, court may grant caretaking authority to nonparent who is adult family member, or who has close and substantial relationship with child, if in child's best interest. Absent agreement by other parent, caretaking time is limited to… - Ordinary visitation time of deploying parent in existing order (plus unusual travel time, if necessary) - If no existing order, the time that deploying parent cared for child prior to notice of deployment (plus unusual travel time, if necessary). Court may grant part of decision-making authority for a child to said nonparent, and order shall specify areas of decision-making, including health, education and religion	Sec. 305
Richard Roe wants to have his parents visit with the children one Saturday a month while he's deployed. Roberta, his ex-wife, opposes this request on the ground that it would violate her primary right to custody of the children when Richard isn't around. She claims that she alone has the right to determine with whom the children associate. Roberta says that visitation rights are personal, exercisable only by Richard; they cannot be delegated to another by the court for	Grant of Limited Contact: Upon motion of deploying parent, court shall grant caretaking authority to nonparent who is adult family member, or who has close and substantial relationship with child, unless court finds this not in child's best interest.	Sec. 306

[5] See, *e.g., In re Marriage of DePalma*, 176 P.3d 829 (Colo. App. 2007) (rejecting all of the arguments raised above).

Problem or Issue	How UDPCVA Addresses It	Section
the limited time of Richard's absence, regardless of whether this is in the best interest of the children.[6]		
Roberta Roe also claims that the court cannot extend "special rights" to the grandparents, that they must apply for such rights in their own names, and that they are not legally authorized to do so since both parents are fit and proper. She maintains that these "independent rights" cannot be awarded to Richard's parents.	Nature of Authority Granted by Order: Grant of authority is temporary, ends upon return from deployment; it does not create independent rights or authority in persons to whom responsibility is given; nonparent granted authority or contact rights has standing to enforce the grant. See also notes at Section 202 above.	Sec. 307
Jerry, Jane Doe's ex-boyfriend, refuses to facilitate any communication between Jane and the children. He says that "It's her problem that she decided to stay in the Army Reserve," and that he needn't go out of his way or expend any effort to put the kids in touch with their mother while she is absent. If there are any costs involved, he says, she will need to bear 100% of the charges since it is she who chose military service, with the ever-present possibility of TDY or deployment. Jerry also contends that he has no duty to facilitate access of Jane with her children during Jane's two-week mid-tour leave. Besides, he states, he has already made plans to be elsewhere with the kids during that time. When Jane returns, Jerry seeks to claim that the order for transfer of the children to him during deployment was *not* a temporary order, and that Jane must show a substantial change of circumstances to obtain return of the children.[7]	Content of Temporary Custody Order: An order granting custodial responsibility must… - designate order as temporary - Identify (to extent feasible) the destination, duration and conditions of the deployment If applicable, temporary order for custodial responsibility must… - Specify the allocation of caretaking authority among deploying parent, other parent and any nonparent - Provide for dispute resolution when agreement shares custodial responsibility between parent and nonparent, or between two nonparents - Provide for liberal communication between the deploying parent and the child during deployment, including through electronic means, unless contrary to the best interest of the child, and allocate any costs of communications - Provide for liberal contact between the deploying parent and the child during the time the deploying parent is on leave or is otherwise available, unless contrary to the best interest of the child - Provide for reasonable contact between deploying parent and child following return from deployment until the temporary order is terminated, which may include more time than the deploying parent spent with the child before entry of the temporary order - Specify any decision-making authority that accompanies caretaking - Specify any grant of limited contact to a nonparent - Provide for termination upon return from deployment under Article 4 procedures	Sec. 308

[6] See, *e.g.*, *McQuinn v. McQuinn*, 866 So.2d 570 (Ala. Civ. App. 2003) and *In re Marriage of Sullivan*, 342 Ill. App. 3d 560, 795 N.E.2d 392 (2003) (rejecting all of the arguments raised above).

[7] See, *e.g., Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006) (after agreement to transfer custody from servicemember-mother to the child's father for duration of mother's absence, father reneged and challenged status of the court order in Kentucky Court of Appeals and Supreme Court, claiming that the initial order was not a temporary one but rather a custody order which required the mother to show a change of circumstances to regain custody).

Problem or Issue	How UDPCVA Addresses It	Section
	Order for Child Support: If caretaking order issued or agreement executed, court may order temporary child support if there is jurisdiction under UIFSA	Sec. 309
Jane's new husband, to whom she assigned custody during deployment, develops a substance abuse problem during her absence. Alternatively, Jane and and Jerry end their marriage during the deployment.[8]	Modifying or Terminating Assignment or Grant of Custodial Responsibility to Nonparent: The court may modify or terminate an order providing for caretaking, decision-making or limited contact. Any modification is temporary and ends upon return from deployment, unless earlier terminated. On motion of deploying parent, court shall end order of limited contact.	Sec. 310
	Return from Deployment	**Article 4**
Richard Roe returns from deployment on June 1 and notifies his ex-wife of his return. She agrees to the return of custody. What do they need to do to end the temporary custody agreement?	Procedure for Terminating Temporary Grant of Custodial Responsibility Established by Agreement: At any time after return from deployment, a temporary custodial responsibility agreement may be terminated upon signatures of both parents. If no agreement to terminate is reached, the temporary custody arrangement ends 60 days from date the deploying parent gives notice to other parent of return from deployment. If temporary agreement was filed with court/agency under Sec. 205, then agreement to terminate must also be filed within reasonable period of time after signing. Case number and heading must be provided.	Sec. 401
Jane Doe returns from deployment and wants custody back from her ex-husband, who agrees that custody should be returned to her. That custody, however, had been transferred by court order during the deployment. Must they return to court again?	Consent Procedure for Terminating Temporary Grant of Custodial Responsibility Established by Court Order: At any time after return from deployment, both parents may file with court an agreement to terminate custodial responsibility order. After agreement is filed, court shall issue order ending the temp. order on date set out in agreement. If no date set out, then order is issued immediately.	Sec. 402
Roberta Roe, in efforts to avoid returned custody to her ex-husband on his return from deployment, serves discovery on him, changes lawyers, demands continuances and does everything in her power to stop the children's return. She alleges that he is suffering from battle fatigue and PTSD, and she obtains a temporary order barring the return of full custody to Richard. Given the court's schedule for "fully contested cases," this may mean 6-8 months before a plenary hearing with no visitation for Richard.	Visitation before Termination of Temporary Grant of Custodial Responsibility: After return from deployment and until order or agreement is terminated, court shall enter temporary order granting deploying parent reasonable contact with child (unless contrary to best interest of child), even though time may exceed that spent with child before deployment.	Sec. 403
Jerry doesn't want to give the children back to Jane Doe when she returns. He has no lawyer, no grounds and no money. He just wants to keep the kids and he refuses to	Termination by Operation of Law of Temporary Grant of Custodial Responsibility Established by Court Order: If no agreement to end temporary order for custodial responsibility, then it ends 60 days from date the deploying parent gives notice of	Sec. 404

[8] See, *e.g., Diffin v. Towne*, 849 N.Y.S.2d 687 (N.Y. Ct. App. 2008) (custody transferred to child's father after, among other things, separation of servicemember-mother and her new husband, to whom she had previously attempted to delegate all responsibility for the child, without consent of the child's fully fit father).

Problem or Issue	How UDPCVA Addresses It	Section
respond to any of her requests for the children. He refuses to execute an agreement for the return of the children to Jane.	return from deployment to other parent and any nonparent given custodial responsibility. Any proceeding to prevent termination of temporary custodial responsibility order is governed by other provisions of state law.	
	Miscellaneous Provisions	**Article 5**
	Uniformity of Application and Construction: Court should consider need for uniformity.	Sec. 501
	Relation to Electronic Signatures in Global and National Commerce Act: This Act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 *et seq*., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. 7003(b).	Sec. 502
	Transition Provision: Act does not affect validity of temp. order re custodial responsibility during deployment that was entered before the effective date of Act.	Sec. 503
	Effective Date: This Act takes effect….	Sec. 504

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MEMORANDUM

TO: State legislators and others considering passage of the Uniform Deployed Parents Custody and Visitation Act (UDPCVA)

FROM: Maxine Eichner, Reef Ivey Professor of Law, University of North Carolina School of Law, Reporter for the Drafting Committee of the UDPCVA

DATE: April 1, 2014

RE: The UDPCVA and the Constitutional Rights of Parents

INTRODUCTION

The Uniform Law Commission studied, drafted and promulgated the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) for adoption by state legislatures in July 2012. In February 2013, the American Bar Association's Board of Governors approved it for consideration by the 50 states. The UDPCVA's Drafting Committee included judges, law professors, and practicing lawyers. Attorneys appointed by the American Bar Association (and its appropriate Sections) and representatives of the military actively participated in all drafting meetings.

The UDPCVA is intended to facilitate resolution of the child custody issues that arise when a parent is deployed for military or other national service on orders that do not permit accompaniment by family members. The Act seeks to ensure that parents who serve their country are not penalized for their service, while still giving adequate weight to the interests of the other parent and, most importantly, the best interest of the child.

Article 3 of the UDPCVA provides that if a child's parents cannot reach agreement on custody issues upon notice of deployment, they may seek judicial resolution of these issues. Sections 306 and 307 of this Article allow a judge resolving such issues, at the request of a deploying parent, temporarily to assign a portion of that parent's custodial rights to a nonparent or another person with a close relationship to the child if such an assignment would be in the child's best interest. The Uniform Law Commission contemplated that these provisions would allow, for example, a judge to rule that a child who had been living with his father, stepmother, and half-siblings, could remain under the care of his stepmother in his home and at his current school during the deployment, rather than having to move out of state to live with the other parent, if the judge determined it was in the child's best interest. Of course, if the judge determined that the child's best interest was served by living with the nondeploying parent, the Act would require that the judge order temporary custody to that parent.

The UDPCVA's Drafting Committee considered the U.S. Supreme Court's decision in *Troxel v. Granville*[1] and comparable state law while drafting Article 3. Based on this consideration, the Drafting Committee concluded that judicial assignment of the deploying parent's custody rights to a nonparent in the circumstances permitted by Article 3 is constitutionally permissible.

Troxel Does Not Dictate the Outcome in Article 3 Cases Since These Cases Involve Two Parents with Conflicting Views Regarding Care and Custody of their Children, Each of Whom Possesses Constitutional Rights.

In the *Troxel* case, the U.S. Supreme Court struck down the application of a Washington State statute that allowed visitation of a child's grandparents over the objections of the child's mother. In that case, the grandparents' son, who was the child's father, was deceased. The statute at issue provided that a court could grant visitation to nonparents based on "the best interest of the child." The Supreme Court struck down the Washington statute's application in the case before it because the trial court, in granting visitation over the mother's objection, "gave no special weight at all to Granville's determination of her daughters' best interests."[2] In the Court's words, so long as a parent is deemed "fit," the state may not "infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."[3] *Troxel* stands for the proposition that the fundamental right of parents to make decisions concerning the care, custody, and control of their children means that their decisions regarding a child's best interest must be accorded significant weight in custody determinations.[4] A number of states have developed similar doctrines based on their state constitutions.[5]

The Drafting Committee determined that judicial assignment of a portion of the deploying parent's custodial responsibility to a nonparent in the circumstances permitted by Article 3 is constitutional under *Troxel* and parallel state law. Cases under Article 3, the Committee concluded, involve two critical differences from the facts presented in *Troxel*:

- First, they do not involve the uncontradicted determination of a child's parent regarding custody. Instead, they involve *two* parents whose views regarding are in conflict on the issue: the deploying parent, who wants the child to stay in the care of a nonparent; and the nondeploying parent, who wants the child to stay with himself or herself.

- Second, cases under Article 3 do not involve the independent grant of custodial responsibility to a nonparent, as was the case in *Troxel*. Instead, Article 3 provides for

[1] 530 U.S. 57 (2000).

[2] *Id.* at 69.

[3] *Id.* at 72-73.

[4] The Court declined to define the precise scope of exceptional circumstances that would warrant overruling a fit parent's views. *Id.* at 73.

[5] *See, e.g.,* Downs v. Scheffler, 80 P.3d 775, 781 (Ariz. 2003); In re Guardianship of D.A. McW., 460 So.2d 368, 370 (Fla. 1984); Durkin v. Hinich, 442 N.W.2d 148, 153 (Minn. 1989); Petersen v. Rogers, 445 S.E.2d 901, 905 (N.C. 1994).

> the temporary assignment of a portion of the deploying parent's custodial responsibility to the nonparent, leaving the rights of the nondeploying parent intact. As such, a grant of custody under Article 3 constitutes the exercise of the deployed parent's own custodial rights to determine the care of his or her child. In this respect it is similar to the generally recognized right of parents to leave the child with another responsible adult when they go away on vacation.[6]

In these circumstances, the Drafting Committee concluded, neither parent's wishes is presumptively entitled to overrule the wishes of the other parent as a constitutional matter. Instead, a court's assignment of custody or visitation to a nonparent pursuant to Article 3 is constitutionally permissible.

A Substantial Majority of Courts Have Upheld the Constitutionality of Assigning Custody or Visitation to a Nonparent When a Parent Deploys.

The great majority of courts that have considered the assignment of visitation or custodial rights to a nonparent during a parent's military deployment have upheld the assignment on these grounds. For example, in a 2013 decision, *In re Trotter*[7] the Iowa Court of Appeals upheld the trial court's order allowing the father to assign his custodial rights over his son, X.B., to the father's wife, (the child's stepmother,) during the father's one-year deployment. The child's mother had challenged the facial constitutionality of Iowa's military custody statute, which allowed a custodial parent called to active duty to ask the court to "temporarily assign the parent's physical care parenting time to a family member of the minor child . . . ."[8] The mother contended that the statute allowed the court to grant custody to a nonparent over a parent, in violation of the fundamental rights of a parent pursuant to *Troxel*.

The Court of Appeals, however, rejected the mother's argument that the temporary assignment of custody under the statute "should be imputed to the nonparent and treated as a request by the nonparent for parenting time."[9] Instead, the Court held that a custody dispute between parents on the deployment of one parent is correctly treated as conflict between *both* parents, each of whom possesses constitutional rights regarding the child.[10] The Court therefore upheld the constitutionality of the military custody statute, determining that "there is a reasonable fit between the[se] provisions . . . and the State's interest in not penalizing military service people for their public service while deployed, avoiding a chilling effect on people volunteering for military service due to fear of losing custody of their children, and furthering the long-range best interests of children by maintaining stability and consistency for the children during a parents' temporary deployment."[11]

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[6] *See, e.g.,* McQuinn v. McQuinn, 866 So.2d 570, 573-74 (Ala. Civ. App. 2003); In re Marriage of DePalma, 176 P.3d 829, 833 (Colo. App. 2007).
[7] In re Trotter, No. 12–0902, 829 N.W.2d 191, at *1 (Iowa Ct. App. 2013) (Table) (unpublished disposition, text in Westlaw).
[8] *Id.* at *2 (citing IOWA CODE § 598.41D).
[9] *Id.* at *3.
[10] *Id.*
[11] *In re Trotter*, No. 12–0902 at *3.

The *Trotter* Court then turned from assessing the facial constitutionality of the Iowa statute to the mother's constitutional challenge to the trial court's assigning of custody to the child's stepmother, rather than to herself, in the case at bar. The Court rejected the mother's assertion that, as the natural parent of the child, "her claim to temporary custody is clearly superior to that of . . . the minor child's stepmother."[12] According to the Court:

> [I]t is important to note the district court treated this matter as a dispute between two parents regarding the arrangements for the care of their child during the custodial parent's parenting time, rather than a dispute between a nonparent seeking parenting time and a parent opposing it. Specifically, this dispute concerns John's physical care of X.B., and John's determination, as set forth in his application for temporary assignment of his physical care parenting time, that it would be in the best interest of X.B. to allow him to continue the usual physical care schedule, maintain his relationship with his stepmother and stepsister, and not relocate several states away during John's temporary deployment.
>
> Iowa courts recognize a presumption that fit parents act in the best interests of their children. . . . Because this case concerns a dispute between a mother and father, the district court was correct in weighing the wishes of both and considering the other relevant factors to determine what was in X.B.'s best interests.[13]

The Appellate Division of the New Jersey Superior Court arrived at a similar conclusion in the 2009 decision of *Faucett v. Vasquez*.[14] The minor child in that case had lived with his father, his stepmother, and his step-siblings for several years before the father was notified of his impending deployment overseas. In opposing the mother's application for full custody during the deployment, the father asked the court to allow the child to continue to live with his wife. The trial court agreed with the father, finding "no evidence that the child's best interest w[ould] be served . . . by an abrupt change of custody," particularly given that the child would be living in an "intact family unit" of which he had been a part since 2002.[15]

In assessing the constitutionality of the trial court's ruling, the Appellate Division began by noting two fundamental principles underlying custody law: First, "that 'a legal parent has a fundamental right to the care, custody and nurturance of his or her child;'" second, that "when the dispute is between a fit parent and a third party, only the fit parent is presumed to be entitled to custody."[16] The Court stated that, although on first blush these principles might appear to resolve the case before it, a "more careful examination" of the issue revealed that "the parental presumption does not apply when one parent seeks modification of a previously-entered court order regarding custody solely because of the other parent's impending military deployment."[17] In such a dispute, the Court stated, the nondeploying parent's rights were not being curtailed by a nonparent; that parent retained the same right to legal custody of the child that he or she possessed before the deployment. What changed, instead, was simply that the deployed parent

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[12] *Id.* at *4.
[13] *Id.*
[14] 984 A.2d 460 (N.J. Super. Ct. App. Div. 2009).
[15] *Id.* at 465.
[16] *Id.* at 466 (citations omitted).
[17] *Id.* at 475.

temporarily allowed the child's stepmother to exercise a portion of his custodial responsibility.[18]

The Court added that "[t]here are other reasons why the parental presumption ought not to apply when the [parent with primary custody] is facing *temporary* military deployment. . . . [P]laintiff will hopefully return from his deployment in good health and in a relatively short, finite period of time, after which he can resume his relationship with [the child] as before."[19] The Appellate Court also noted that "reported cases [from other jurisdictions] support our conclusion that the parental presumption does not apply to this dispute."[20]

Likewise, the Court of Civil Appeals of Alabama held that a father's delegation of his visitation rights to family members during his deployment was constitutionally permissible in *McQuinn v. McQuinn.*[21] In that case, the appellate court reversed the trial court's refusal to allow visitation with the father's family. According to the Court:

> We note that although the mother, not the father, is the primary physical custodian of the children, the father's fundamental right to direct the care, control, and association of his children is no less fundamental and protected than the right of the mother to do the same. *See Troxel v. Granville*, 530 U.S. at 66, 120 S.Ct. 2054. The decision in *Troxel* does not differentiate between custodial and noncustodial parents as to their fundamental rights to determine the care, control, and association of their children.
>
> The mother incorrectly labels this a "grandparent-visitation" case, and claims that the trial court improperly attempted in its original judgment to grant "de facto" visitation with the father's parents and family members. . . . What the mother misunderstands is that this case does not involve whether grandparents or third parties have a right to visitation, but instead involves the father's right, during his visitation periods, to determine with whom his children may visit. . . . [T]he mother is free to leave the children in day care during her working hours, with babysitters when she has social engagements, and apparently (based upon the statement of her counsel at trial) with her sister (or other family members) in Tennessee for what her counsel described as extended "regular visitation periods," all without his approval or even his knowledge. Essentially, the mother argues that the father, as the noncustodial parent, has been stripped of the rights of a parent and that she, and only she, may exercise those parental rights. She is mistaken.[22]

The Colorado Court of Appeals applied similar reasoning in rejecting the challenge of a nondeploying parent in the 2007 decision, *In re Marriage of DePalma*.[23] In that case, the mother appealed the trial court's order granting the deployed father's request to allow his wife (the children's stepmother) to care for the parties' children during the father's allotted parenting time.

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[18] *Faucett*, 984 A.2d. at 468.
[19] *Id.*
[20] *Id.* at 469 (citing In re Marriage of DePalma, 176 P.3d 829, 831 (Colo. App. 2007); Lebo v. Lebo, 886 So.2d 491, 492 (La. Ct. App. 2004); In re Marriage of Rayman, 47 P.3d 413, 416 (Kan. 2002).
[21] 866 So.2d 570 (Ala. Civ. App. 2003).
[22] *Id.* at 573-74.
[23] 176 P.3d 829 (Colo. App. 2007).

The Court of Appeals held that the mother was not constitutionally entitled to the father's parenting time:

> [T]he trial court treated this matter as a dispute between two fit parents regarding the arrangements for the care of the children during father's parenting time, rather than a dispute between a nonparent seeking parenting time and a parent opposing it. We are not persuaded that the court erred in doing so. Stepmother never requested parenting time in her own right, and we are aware of no authority for the proposition that a parent's request that a stepparent or other nonparent be permitted to provide care for a child should be imputed to the nonparent and treated as a request by the nonparent for parenting time.
>
> Because the dispute was between mother and father, and not between mother and stepmother, the presumption that a parent has a 'first and prior' right to the custody of his or her child was not implicated, and there was no need for the court to comment upon the presumption that a parent's right to custody is superior to that of a nonparent.
>
> Because the dispute was between mother and father, the court did not err in according the presumption that a fit parent acts in the best interests of the children to father as well as to mother.[24]

The Court of Appeals also observed that:

> [P]arents routinely entrust their children to the care of teachers, family, and daycare providers during their parenting time. Although mother suggests that there is a substantive difference between leaving a child with a nonparent on a short-term basis and doing so for an extended period, she has not cited any authority in support of this proposition or explained why she believes this to be true. Nor has she explained why the entrustment of children to the care of a nonparent over a longer period necessarily requires the extension of parental rights to the nonparent.[25]

The Supreme Court of Kansas employed a similar approach to custody issues on a father's deployment to Korea for one year in *In re Marriage of Rayman.*[26] In that case, the court below had ruled in favor of the father, who had primary residential custody of the two children for the four years before the deployment and who sought to allow the children to remain in the care of his present wife, the children's stepmother. Although the Court did not explicitly address the mother's constitutional argument (on the ground that it was not properly raised below), it did consider whether the trial court's ruling violated the presumption of parental custody established by the Kansas custody statute. On this issue, the Kansas Supreme Court stated:

> This is not a contest as to custody between a natural parent and a grandparent or nonparent who have no permanent right to the child's custody . . . . What [the mother] in fact appears to request on appeal . . . is for a bright line rule that a parent with residential custody of his or her children loses that custody when required to be away from his or her

[24] *Id.* at 832.
[25] *Id.* at 833.
[26] 47 P.3d 413 (Kan. 2002).

> children for an extended period of time such as a 5 ½-month military tour to Korea, followed by a month's time with his or her family, and then followed by an additional 5 ½ -month military tour back to Korea. We decline to adopt such a bright line rule requiring change of residential custody to the noncustodial parent.
>
> Each situation involving military families has distinct differences, as do the facts of temporary changes which relate to nonmilitary custodial relationships. The temporary transfer of the parent with residential custody must not automatically trigger a custody change. We reject [the mother's] argument that the parental preference doctrine was violated by the trial court's ruling under the facts of this case. Custody is an issue to be determined on a case-by-case basis as the trial court did here.[27]

Finally, the Appellate Court of Illinois analyzed the military deployment issue similarly in upholding a trial court's ruling that assigned a deploying father's visitation rights to his family over the mother's objection. In *In re Marriage of Sullivan*,[28] the Court rejected the mother's argument that the assignment violated her constitutional rights as a parent under the Illinois Constitution:

> [T]he present case does not involve grandparents filing petitions in their own capacity seeking to visit their grandchildren. Rather, this case involves a father petitioning to modify his visitation rights so that his family can visit his son while he is serving in the military overseas. As such, . . . this case does not involve a judge deciding what is in the best interest of a child between a fit parent and a nonparent. . . . Instead, this case involves the trial court's weighing of the wishes of two fit parents to determine what is in the child's best interests. . . . [T]he trial court has the authority to make such a determination.[29]

Besides these cases, other appellate courts have approved of the assignment of a service member's custody rights to a nonparent without explicitly addressing the issue of the parent's rights to determine custody issues. Thus in *Webb v. Webb*,[30] the Supreme Court of Idaho upheld entry of an order allowing the service member father to delegate his visitation rights to his parent pursuant to an Idaho statute addressing military custody issues. In addition, the Court of Appeals of Louisiana upheld a service member's assignment of custody in *Lebo v. Lebo*,[31] on the ground that a custodial parent who was called to active duty in Afghanistan could leave the child with his current wife since "the law gives [the custodial parent] the authority to make all decisions affecting the child unless otherwise provided in a custody implementation order."[32] The Court held, however, that the Louisiana custody statute did not give the domiciliary parent the ability to unilaterally change custody by a power of attorney; the existing statute allowed modification of custody only through the courts.[33]

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[27] *Id.* at 416-17.
[28] 795 N.E.2d 392 (Ill. App. Ct. 2003).
[29] *Id.* at 396-97.
[30] 148 P.3d 1267 (Idaho 2006).
[31] 886 So.2d 491 (La. Ct. App. 2004).
[32] *Id.* at 492.
[33] *Id.* at 492-93.

The Two Appellate Decisions Holding That a Nondeploying Parent Is Presumptively Entitled to Custody Over a Nonparent Failed to Consider the Deploying Parent's Own Constitutional Rights.

Against the weight of these cases, only two appellate decisions have held that, in the deployment context, the constitutional rights of the nondeploying parent require that he or she be presumptively granted custody or visitation over a nonparent designated by the deploying parent. In *Lubinski v. Lubinksi*,[34] the Wisconsin Court of Appeals concluded that a service member improperly sought to transfer his physical placement rights to his new wife, reasoning that the "[father] cannot seek to enforce his physical placement with [the child] by transferring that placement to [the stepmother]."[35] While the *Lubinski* court cited *Troxel* for the proposition that "a fit parent's decision regarding . . . visitation" should be given particular weight,[36] the court considered only the preferences of the nondeploying parent in its analysis, and failed to consider the fundamental rights of the deploying parent to make decisions regarding visitation. Thus, while the court in *Lubinski* ultimately concluded that there is a constitutional limit on the father's transfer of parental rights, it did so under an incomplete framing of the issue: by viewing the father's action as an independent transfer of legal rights to the stepmother, rather than as a temporary delegation of a portion of his own custodial responsibility, and therefore an exercise of his own constitutional rights as a parent.

Likewise, in *In re Marriage of Grantham*,[37] the Iowa Supreme Court upheld the trial court's order granting temporary custody in favor of the mother after the father was called to active duty. Although most of the opinion involved the Court's determination that the Servicemembers Civil Relief Act[38] did not prohibit entry of a temporary custody order, the Court also stated that the mother's "claim to temporary custody was clearly superior to that of [the service member's] mother."[39] As with *Lubinski*, the Court did not consider the alternative framing of the issue as one of conflicting custody preferences on the part of both parents; indeed, this issue was only raised obliquely by the deploying father.[40]

CONCLUSION

The Drafting Committee for the UDPCVA spent many hours considering the rights of parents, the import of the *Troxel* decision, and the need to respect the unique abilities of parents

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[34] 761 N.W.2d 676 (Wis. Ct. App. 2008).
[35] *Id.* at 681.
[36] *Id.* (citing *Troxel*, 530 U.S. at 68-69).
[37] 698 N.W.2d 140 (Iowa 2005).
[38] 50 U.S.C. Appx. 501 *et seq*..
[39] *Id.* at 145.
[40] *See* Appellant's Brief and Request for Oral Argument, In re Marriage of Grantham, 698 N.W.2d 140 (Iowa 2005) (No. 03-2100) 2004 WL 4928736. In Diffin v. Towne, No. V-00560-04/04A, 2004 WL 1218792, at *1 (N.Y. Fam. Ct. May 21, 2004), the trial court applied a similar analysis to that of the court in In re Marriage of Grantham. The trial court found that no extraordinary circumstances existed that would allow a nonparent to assume custody as against a natural parent. The opinion reached this conclusion without considering the possibility that the case should be treated as a conflict between the two wishes of two fit parents, which would therefore make application of the natural-parent preference inappropriate.

to decide the best interest of their children. Based on the substantial weight of legal authority, the Committee determined that a limited grant of authority to a nonparent, which temporarily assigns a portion of the deployed parent's custody or visitation rights at that parent's request, comports with *Troxel* and comparable state law. A court may constitutionally assign a portion of a deployed parent's custodial responsibility to a nonparent under Article 3 of the Uniform Deployed Parents Custody and Visitation Act.[41]

[41] In the event that a court might reach a contrary result based either on state law or the federal constitution, the UDPCVA ensures that this result will be incorporated into the Act through Section 306's requirement that any grant of custodial responsibility be "in accordance with law of this state other than this [act]." The result would be that, in the event of such a ruling, courts could subsequently grant custody to a nonparent under section 306 only where some ground existed to overrule the presumption of parental custody on the facts of that case be treated as a conflict between the two wishes of two fit parents, which would therefore make application of the natural-parent preference inappropriate.

TERRY E. BRANSTAD
GOVERNOR

OFFICE OF THE GOVERNOR

KIM REYNOLDS
LT. GOVERNOR

April 13, 2016

The Honorable Paul Pate
Secretary of State of Iowa
State Capitol Building
LOCAL

Dear Mr. Secretary:

I hereby transmit:

Senate File 2233, an Act creating the uniform deployed parents custody and visitation act, and repealing current code provisions relating to parents on active military duty.

The above Senate File is hereby approved this date.

Sincerely,

Terry E. Branstad

Terry E. Branstad
Governor

cc: Secretary of the Senate
Clerk of the House

Senate File 2233

AN ACT

CREATING THE UNIFORM DEPLOYED PARENTS CUSTODY AND VISITATION ACT, AND REPEALING CURRENT CODE PROVISIONS RELATING TO PARENTS ON ACTIVE MILITARY DUTY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

DIVISION I

ARTICLE I

GENERAL PROVISIONS

Section 1. NEW SECTION. **598C.101 Short title.**

This chapter shall be known and may be cited as the *"Uniform Deployed Parents Custody and Visitation Act"*.

Sec. 2. NEW SECTION. **598C.102 Definitions.**

As used in this chapter, unless the context otherwise requires:

1. *"Adult"* means an individual who has attained eighteen years of age or is an emancipated minor.

2. *"Caretaking authority"* means the right to live with and care for a child on a day-to-day basis. *"Caretaking authority"* relative to a child includes physical custody, parenting time, right to access, and visitation.

3. *"Child"* means any of the following:

a. An unemancipated individual who has not attained eighteen years of age.

b. An adult son or daughter by birth or adoption, or under a law of this state other than this chapter, who is the subject of a court order concerning custodial responsibility.

4. *"Close and substantial relationship"* means a relationship in which a significant bond exists between a child and a nonparent.

5. *"Court"* means a tribunal, including an administrative agency, authorized under a law of this state other than this chapter to make, enforce, or modify a decision regarding custodial responsibility.

6. *"Custodial responsibility"* includes all powers and duties relating to caretaking authority and decision-making authority for a child. *"Custodial responsibility"* includes physical custody, legal custody, parenting time, right to access, visitation, and authority to grant limited contact with a child.

7. *"Decision-making authority"* means the power to make important decisions regarding a child, including decisions regarding the child's education, religious training, health care, extracurricular activities, and travel. *"Decision-making authority"* does not include the power to make decisions that necessarily accompany a grant of caretaking authority.

8. *"Deploying parent"* means a service member who is deployed or has been notified of impending deployment and is any of the following:

a. A parent of a child under a law of this state other than this chapter.

b. An individual who has custodial responsibility for a child under law of this state other than this chapter.

9. *"Deployment"* means the movement or mobilization of a

service member for more than ninety days but less than eighteen months pursuant to uniformed service orders that meet any of the following conditions:

a. Are designated as unaccompanied.

b. Do not authorize dependent travel.

c. Otherwise do not permit the movement of family members to the location to which the service member is deployed.

10. *"Family member"* means a sibling, aunt, uncle, cousin, stepparent, or grandparent of a child or an individual recognized to be in a familial relationship with a child under a law of this state other than this chapter.

11. *"Limited contact"* means the authority of a nonparent to visit a child for a limited time. *"Limited contact"* includes authority to take the child to a place other than the residence of the child.

12. *"Nonparent"* means an individual other than a deploying parent or other parent.

13. *"Other parent"* means an individual who, in common with a deploying parent, is one of the following:

a. A parent of a child under a law of this state other than this chapter.

b. An individual who has custodial responsibility for a child under a law of this state other than this chapter.

14. *"Record"* means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

15. *"Return from deployment"* means the conclusion of a service member's deployment as specified in uniformed service orders, less any terminal, medical, or annual leave authorized to the service member.

16. *"Service member"* means a member of a uniformed service.

17. *"Sign"* means, with present intent to authenticate or adopt a record, to execute or adopt a tangible symbol or to attach to or logically associate with the record an electronic symbol, sound, or process.

18. *"State"* means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

19. *"Uniformed service"* means any of the following:

a. Active and reserve components of the army, navy, air force, marine corps, or coast guard of the United States; the United States merchant marine; the commissioned corps of the United States public health service; or the commissioned corps of the national oceanic and atmospheric administration of the United States.

b. The national guard of a state, whether or not activation or performance of duties is pursuant to federal or to state authority.

Sec. 3. NEW SECTION. **598C.103 Remedies for noncompliance.**

In addition to other remedies under a law of this state other than this chapter, if a court finds that a party to a proceeding under this chapter has acted in bad faith or intentionally failed to comply with this chapter or a court order issued under this chapter, the court may assess reasonable attorney fees and costs against the party and order other appropriate relief.

Sec. 4. NEW SECTION. **598C.104 Jurisdiction.**

1. A court may issue an order regarding custodial responsibility under this chapter only if the court has jurisdiction under chapter 598B, the uniform child-custody jurisdiction and enforcement Act.

2. If a court has issued a temporary order regarding custodial responsibility pursuant to article III, the residence of the deploying parent is not changed by reason of the deployment for the purposes of chapter 598B, the uniform child-custody jurisdiction and enforcement Act, during the deployment.

3. If a court has issued a permanent order regarding custodial responsibility before notice of deployment and the parents modify that order temporarily by agreement pursuant to article II, the residence of the deploying parent is not changed by reason of the deployment for the purposes of chapter 598B, the uniform child-custody jurisdiction and enforcement Act.

4. If a court in another state has issued a temporary order regarding custodial responsibility as a result of impending or current deployment, the residence of the deploying parent

is not changed by reason of the deployment for the purposes of chapter 598B, the uniform child-custody jurisdiction and enforcement Act.

5. This section does not prevent a court from exercising temporary emergency jurisdiction under chapter 598B, the uniform child-custody jurisdiction and enforcement Act.

Sec. 5. NEW SECTION. **598C.105 Notification required of deploying parent.**

1. Except as otherwise provided in subsection 4, and subject to subsection 3, a deploying parent shall notify the other parent, in a record, of a pending deployment, not later than seven days after receiving notice of deployment, unless reasonably prevented from doing so by the circumstances of service. If the circumstances of service prevent giving notification within the seven days, the deploying parent shall give the notification as soon as reasonably possible.

2. Except as otherwise provided in subsection 4, and subject to subsection 3, each parent shall provide the other parent with a plan in a record for fulfilling that parent's share of custodial responsibility during deployment. Each parent shall provide the plan as soon as reasonably possible after notification of deployment is given under subsection 1.

3. If a court order currently in effect prohibits disclosure of the address or contact information of the other parent, notification of deployment under subsection 1 or notification of a plan for custodial responsibility during deployment under subsection 2 may be made only to the issuing court. If the address of the other parent is available to the issuing court, the court shall forward the notification to the other parent. The court shall keep confidential the address or contact information of the other parent.

4. Notification in a record under subsection 1 or 2 is not required if the parents are living in the same residence and both parents have actual notice of the deployment or plan.

5. In a proceeding regarding custodial responsibility, a court may consider the reasonableness of a parent's efforts to comply with this section.

Sec. 6. NEW SECTION. **598C.106 Duty to notify of change of address.**

1. Except as otherwise provided in subsection 2, an individual to whom custodial responsibility has been granted during deployment pursuant to article II or III shall notify in a record the deploying parent, and any other individual with custodial responsibility for a child, of any change of the individual's mailing address or residence until the grant is terminated. The individual shall provide the notice to any court that has issued a custody or child support order concerning the child which is currently in effect.

2. If a court order currently in effect prohibits disclosure of the address or contact information of an individual to whom custodial responsibility has been granted, a notification under subsection 1 may be made only to the court that issued the order. The court shall keep confidential the mailing address or residence of the individual to whom custodial responsibility has been granted.

Sec. 7. NEW SECTION. **598C.107 General consideration in custody proceeding of parent's military service.**

In a proceeding for custodial responsibility of a child of a service member, a court shall not consider a parent's past deployment or probable future deployment in general in determining the best interest of the child.

ARTICLE II

AGREEMENT ADDRESSING CUSTODIAL RESPONSIBILITY DURING DEPLOYMENT

Sec. 8. NEW SECTION. **598C.201 Form of agreement.**

1. The parents of a child may enter into a temporary agreement under this article granting custodial responsibility during deployment.

2. An agreement under subsection 1 shall comply with all of the following:

a. Be in writing.

b. Be signed by both parents and any nonparent to whom custodial responsibility is granted.

3. Subject to subsection 4, an agreement under subsection 1, if feasible, must provide all of the following:

a. Identify the destination, duration, and conditions of the deployment that is the basis for the agreement.

b. Specify the allocation of caretaking authority among the deploying parent, the other parent, and any nonparent.

c. Specify any decision-making authority that accompanies a grant of caretaking authority.

d. Specify any grant of limited contact to a nonparent.

e. If under the agreement custodial responsibility is shared by the other parent and a nonparent, or by other nonparents, provide a process to resolve any dispute that may arise.

f. Specify the frequency, duration, and means, including electronic means, by which the deploying parent will have contact with the child, any role to be played by the other parent in facilitating the contact, and the allocation of any costs of contact.

g. Specify the contact between the deploying parent and child during the time the deploying parent is on leave or is otherwise available.

h. Acknowledge that any parent's child support obligation cannot be modified by the agreement, and that changing the terms of the child support obligation during deployment requires modification in the appropriate court.

i. Provide that the agreement will terminate according to the procedures under article IV after the deploying parent returns from deployment.

j. If the agreement must be filed pursuant to section 598C.205, specify which parent is required to file the agreement.

4. The omission of any of the items specified in subsection 3 does not invalidate an agreement under this section.

Sec. 9. NEW SECTION. **598C.202 Nature of authority created by agreement.**

1. An agreement under this article is temporary and terminates pursuant to article IV after the deploying parent returns from deployment, unless the agreement has been terminated before that time by court order or modification under section 598C.203. The agreement does not create an independent, continuing right to caretaking authority, decision-making authority, or limited contact in an individual to whom custodial responsibility is given.

2. A nonparent who has caretaking authority, decision-making authority, or limited contact by an agreement under this article has standing to enforce the agreement until

it has been terminated by court order, by modification under section 598C.203, or under article IV.

Sec. 10. NEW SECTION. **598C.203 Modification of agreement.**

1. By mutual consent, the parents of a child may modify an agreement regarding custodial responsibility made pursuant to this article.

2. If an agreement is modified under subsection 1 before deployment of a deploying parent, the modification must be in writing and signed by both parents and any nonparent who will exercise custodial responsibility under the modified agreement.

3. If an agreement is modified under subsection 1 during deployment of a deploying parent, the modification must be agreed to in a record by both parents and any nonparent who will exercise custodial responsibility under the modified agreement.

Sec. 11. NEW SECTION. **598C.204 Power of attorney.**

A deploying parent, by power of attorney, may delegate all or part of the deploying parent's custodial responsibility to an adult nonparent for the period of deployment if no other parent possesses custodial responsibility under a law of this state other than this chapter, or if a court order currently in effect prohibits contact between the child and the other parent. The deploying parent may revoke the power of attorney by signing a revocation of the power of attorney.

Sec. 12. NEW SECTION. **598C.205 Filing agreement or power of attorney with court.**

An agreement or power of attorney under this article must be filed within a reasonable time with any court that has entered an order on custodial responsibility or child support that is in effect concerning the child who is the subject of the agreement or power of attorney. The case number and heading of the pending case concerning custodial responsibility or child support must be provided to the court with the agreement or power of attorney.

ARTICLE III

JUDICIAL PROCEDURE FOR GRANTING CUSTODIAL RESPONSIBILITY DURING DEPLOYMENT

Sec. 13. NEW SECTION. **598C.301 Proceeding for temporary custody order.**

1. After a deploying parent receives notice of deployment and until the deployment terminates, a court may issue a temporary order granting custodial responsibility unless prohibited by the federal Servicemembers Civil Relief Act, 50 U.S.C. app. §§521 and 522 or the Iowa national guard civil relief provisions contained in chapter 29A, subchapter VI. A court shall not issue a temporary order granting custodial responsibility without notice to the deploying parent. A court shall not issue a permanent order granting custodial responsibility without the consent of the deploying parent.

2. At any time after a deploying parent receives notice of deployment, either parent may file a motion regarding custodial responsibility of a child during deployment. The motion must be filed in a pending proceeding for custodial responsibility in a court with jurisdiction under section 598C.104 or, if there is no pending proceeding in a court with jurisdiction under section 598C.104, in a new action for granting custodial responsibility during deployment.

Sec. 14. NEW SECTION. **598C.302 Expedited hearing.**

If a motion to grant custodial responsibility is filed under section 598C.301, subsection 2, before a deploying parent deploys, the court shall conduct an expedited hearing.

Sec. 15. NEW SECTION. **598C.303 Testimony by electronic means.**

In a proceeding under this article, a party or witness who is not reasonably available to appear personally may appear, provide testimony, and present evidence by electronic means unless the court finds good cause to require a personal appearance. For purposes of this section, *"electronic means"* includes communication by telephone, video conference, or the internet.

Sec. 16. NEW SECTION. **598C.304 Effect of prior judicial order or agreement.**

In a proceeding for a grant of custodial responsibility pursuant to this article, the following rules shall apply:

1. A prior judicial order designating custodial responsibility in the event of deployment is binding on the court unless the circumstances meet the requirements of a law of this state other than this chapter for modifying a judicial

order regarding custodial responsibility.

2. The court shall enforce a prior written agreement between the parents for designating custodial responsibility in the event of deployment, including an agreement executed under article II, unless the court finds that the agreement is contrary to the best interest of the child.

Sec. 17. NEW SECTION. **598C.305 Grant of caretaking or decision-making authority to nonparent.**

1. On motion of a deploying parent and in accordance with a law of this state other than this chapter, if it is in the best interest of the child, a court may grant caretaking authority to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship.

2. Unless a grant of caretaking authority to a nonparent under subsection 1 is agreed to by the other parent, the grant is limited to an amount of time not greater than one of the following:

a. The amount of time granted to the deploying parent under a permanent custody order, but the court may add unusual travel time necessary to transport the child.

b. In the absence of a permanent custody order that is currently in effect, the amount of time that the deploying parent habitually cared for the child before being notified of deployment, but the court may add unusual travel time necessary to transport the child.

3. A court may grant part of a deploying parent's decision-making authority, if the deploying parent is unable to exercise that authority, to a nonparent who is an adult family member of the child or an adult with whom the child has a close and substantial relationship. If a court grants the authority to a nonparent, the court shall specify the decision-making powers granted, including decisions regarding the child's education, religious training, health care, extracurricular activities, and travel.

4. In determining the best interest of the child, the court shall ensure all of the following:

a. That the specified adult family member or adult with whom the child has a close and substantial relationship is not a sex

offender as defined in section 692A.101.

b. That the specified adult family member or adult with whom the child has a close and substantial relationship does not have a history of domestic abuse, as defined in section 236.2. In determining whether a history of domestic abuse exists, the court's consideration shall include but is not limited to commencement of an action pursuant to section 236.3, the issuance of a protective order against the individual or the issuance of a court order or consent agreement pursuant to section 236.5, the issuance of an emergency order pursuant to section 236.6, the holding of an individual in contempt pursuant to section 664A.7, the response of a peace officer to the scene of alleged domestic abuse or the arrest of an individual following response to a report of alleged domestic abuse, or a conviction for domestic abuse assault pursuant to section 708.2A.

c. That the specified adult family member or adult with whom the child has a close and substantial relationship does not have a record of founded child or dependent adult abuse.

d. That the specified adult family member or adult has established a close and substantial relationship with the child and that granting caretaking authority or decision-making authority to the specified individual will provide the child the opportunity to maintain an ongoing relationship that is important to the child.

e. That the specified adult family member or adult with whom the child has a close and substantial relationship demonstrates an ability to personally and financially support the child and will support the child's relationship with both of the child's parents during the grant of caretaking authority or decision-making authority.

Sec. 18. NEW SECTION. **598C.306 Grant of limited contact.**

On motion of a deploying parent, and in accordance with a law of this state other than this chapter, unless the court finds that the contact would be contrary to the best interest of the child, a court may grant limited contact to a nonparent who is a family member of the child or an individual with whom the child has a close and substantial relationship.

Sec. 19. NEW SECTION. **598C.307 Nature of authority created**

by temporary custody order.

1. A grant of authority under this article is temporary and terminates under article IV after the return from deployment of the deploying parent, unless the grant has been terminated before that time by court order. The grant does not create an independent, continuing right to caretaking authority, decision-making authority, or limited contact in an individual to whom it is granted.

2. A nonparent granted caretaking authority, decision-making authority, or limited contact under this article has standing to enforce the grant until it is terminated by court order or under article IV.

Sec. 20. NEW SECTION. **598C.308 Content of temporary custody order.**

1. An order granting custodial responsibility under this article must do all of the following:

a. Designate the order as temporary.

b. Identify to the extent feasible the destination, duration, and conditions of the deployment.

2. If applicable, an order for custodial responsibility under this article must do all of the following:

a. Specify the allocation of caretaking authority, decision-making authority, or limited contact among the deploying parent, the other parent, and any nonparent.

b. If the order divides caretaking authority or decision-making authority between individuals, or grants caretaking authority to one individual and limited contact to another, provide a process to resolve any dispute that may arise.

c. Provide for liberal communication between the deploying parent and the child during deployment, including through electronic means, unless contrary to the best interest of the child, and allocate any costs of communications.

d. Provide for liberal contact between the deploying parent and the child during the time the deploying parent is on leave or otherwise available, unless contrary to the best interest of the child.

e. Provide for reasonable contact between the deploying parent and the child after return from deployment until the

temporary order is terminated, unless it is contrary to the best interest of the child, which may include additional contact time to compensate for contact time lost during deployment.

f. Provide that the order will terminate pursuant to article IV after the deploying parent returns from deployment.

Sec. 21. NEW SECTION. **598C.309 Order for child support.**

If a court has issued an order granting caretaking authority under this article, or an agreement granting caretaking authority has been executed under article II, the court may enter a temporary order for child support consistent with a law of this state other than this chapter if the court has jurisdiction under chapter 252K, the uniform interstate family support Act.

Sec. 22. NEW SECTION. **598C.310 Modifying or terminating grant of custodial responsibility to nonparent.**

1. Except for an order under section 598C.304, and except as otherwise provided in subsection 2, and consistent with the federal Servicemembers Civil Relief Act, 50 U.S.C. app. §§521 and 522 and the Iowa national guard civil relief provisions contained in chapter 29A, subchapter VI, on motion of a deploying or other parent or any nonparent to whom caretaking authority, decision-making authority, or limited contact has been granted, the court may modify or terminate the grant if the modification or termination is consistent with this article and it is in the best interest of the child. A modification is temporary and terminates pursuant to article IV after the deploying parent returns from deployment, unless the grant has been terminated before that time by court order.

2. The court may appoint a guardian ad litem or an attorney to represent the best interest of the child or may require an appropriate agency to make an investigation of the parties as provided in section 598.12.

ARTICLE IV

RETURN FROM DEPLOYMENT

Sec. 23. NEW SECTION. **598C.401 Procedure for terminating temporary grant of custodial responsibility established by agreement.**

1. At any time after return from deployment, a temporary

agreement granting custodial responsibility under article II may be terminated by an agreement to terminate signed by the deploying parent and the other parent.

2. A temporary agreement under article II granting custodial responsibility terminates on one of the following dates:

a. If an agreement to terminate under subsection 1 specifies a date for termination, on that date.

b. If the agreement to terminate does not specify a date, on the date of the last signature of the deploying parent or the other parent.

3. In the absence of an agreement under subsection 1 to terminate, a temporary agreement granting custodial responsibility terminates under article II sixty days after the deploying parent gives notice in a record to the other parent that the deploying parent returned from deployment.

4. If a temporary agreement granting custodial responsibility was filed with a court pursuant to section 598C.205, an agreement to terminate the temporary agreement also must be filed with that court within a reasonable time after the signing of the agreement. The case number and heading of the case concerning custodial responsibility or child support must be provided to the court with the agreement to terminate.

Sec. 24. NEW SECTION. **598C.402 Consent procedure for terminating temporary grant of custodial responsibility established by court order.**

At any time after a deploying parent returns from deployment, the deploying parent and the other parent may file with the court an agreement to terminate a temporary order for custodial responsibility issued under article III. After an agreement to terminate has been filed, the court shall issue an order terminating the temporary order effective on the date specified in the agreement. If a date is not specified, the order is effective immediately.

Sec. 25. NEW SECTION. **598C.403 Visitation before termination of temporary grant of custodial responsibility.**

After a deploying parent returns from deployment and until a temporary agreement or order for custodial responsibility

established under article II or III is terminated, the court may issue a temporary order granting the deploying parent reasonable contact with the child unless it is contrary to the best interest of the child, which may include additional contact time to compensate for contact time lost during deployment.

Sec. 26. NEW SECTION. **598C.404 Termination by operation of law of temporary grant of custodial responsibility established by court order.**

1. If an agreement between the parties to terminate a temporary order for custodial responsibility under article III has not been filed, the order terminates sixty days after the deploying parent gives notice in a record to the other parent and any nonparent granted custodial responsibility that the deploying parent has returned from deployment.

2. A proceeding seeking to prevent termination of a temporary order for custodial responsibility is governed by the law of this state other than this chapter.

ARTICLE V

MISCELLANEOUS PROVISIONS

Sec. 27. NEW SECTION. **598C.501 Uniformity of application and construction.**

This chapter shall be applied and construed with consideration given to the need to promote uniformity of the law with respect to its subject matter among states that enact the uniform deployed parents custody and visitation Act.

Sec. 28. NEW SECTION. **598C.502 Relation to Electronic Signatures in Global and National Commerce Act.**

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001 et seq., but does not modify, limit, or supersede section 101(c) of that Act, 15 U.S.C. §7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that Act, 15 U.S.C. §7003(b).

Sec. 29. NEW SECTION. **598C.503 Applicability.**

This chapter does not affect the validity of a temporary court order concerning custodial responsibility during deployment which was entered before July 1, 2016.

DIVISION II

Sec. 30. REPEAL. Sections 598.41C and 598.41D, Code 2016, are repealed.

PAM JOCHUM
President of the Senate

LINDA UPMEYER
Speaker of the House

I hereby certify that this bill originated in the Senate and is known as Senate File 2233, Eighty-sixth General Assembly.

MICHAEL E. MARSHALL
Secretary of the Senate

Approved April 13, 2016

TERRY E. BRANSTAD
Governor

2016 FAMILY LAW SEMINAR

Family Law Habeas Corpus Proceedings

2:30 p.m.- 3:00 p.m.

Presented by

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FRIDAY, OCTOBER 28

WRITS OF HABEAS CORPUS
IN CHILD CUSTODY CASES
Get Your Client's Child Back . . . *FAST!!*

Materials prepared by Diana L. Miller and Sarah S. James

I. WHY WOULD MY CLIENT NEED A WRIT OF HABEAS CORPUS?

One of the most challenging aspects of family law is dealing with child custody issues. A habeas corpus proceeding can be a powerful tool for a parent whose child has been wrongfully detained by another individual or by a state agency. Habeas corpus proceedings relating to child custody are governed by Iowa Code Chapter 663[1]. Writs of habeas corpus might be one of the best enforcement mechanisms available to your client under those circumstances. While most cases involving child custody in Iowa arise in dissolution of marriage actions or their modification (Iowa Code Chapter 598B), or by paternity actions or their modification (Iowa Code Chapter 600B), in limited circumstances, habeas writs may offer a unique way to establish custodial rights, as outlined below.

Writ of Habeas Corpus

A writ of habeas corpus is a court order that requires that the person or agency who has unlawful custody of a child to return the child to the person who has lawful custody. For example, the writ could be directed at a parent who has refused to return a child pursuant to court order, at an agency that has improperly removed the child from the care of a parent, or at any other person who is keeping the child from the person with lawful custody. Kirkner, Kristin, "Custody Enforcement through Writ of Habeas Corpus," Dec. 28, 2012 (*available at* https://www.kirknerfamilylaw.com/custody-enforcement-through-writ-of-habeas-corpus/). In Iowa, the writ may be used to get a court to make a determination as to the proper custody of a child, under limited circumstances. *Lamar v. Zimmerman*, 169 N.W.2d 819 (Iowa 1969) (noting

[1]The relief available under Iowa Code Chapter 822 is limited to criminal matters and does not apply to child custody matters.

that if a custodial parent dies, habeas corpus is the appropriate remedy to determine custody). The use of a habeas corpus proceeding to determine custody varies among the states; while some states (for example, Mississippi) have habeas statutes that specifically outline their use in the child custody context, Iowa does not. *See* Iowa Code Chapter 663.

Enforcement Proceedings

Another common use of a writ of habeas corpus is to enforce custody orders or to challenge an existing custody order. Writs may be used in the following instances:

1. To order a custodial agency to court for taking or keeping a child in violation of a court order or to enforce an agreement (for example, where a state agency has taken custody of a child, a parent or other interested person may file for a writ of habeas corpus to contest the right of the agency to keep the child). *See* Iowa Code Chapter 663.

2. To order another custodian to court for unlawfully taking or keeping a child or to enforce a custody agreement that has been broken (for example, where one parent refuses to return a child to another parent in violation of a custodial order). *See* Iowa Code Chapter 663.

3. In cases where parents cannot care for a child, other parties (for example, relatives of the child) may also use a writ of habeas corpus to challenge custody. *Lamar v. Zimmerman*, 169 N.W.2d 819 (Iowa 1969).

4. Under some very limited circumstances, to address inter-state custody matters through a federal writ.[2]

[2] Writs of habeas corpus in child custody cases through the federal court system are very rare and are not the focus of this Presentation. The UCCJEA and other jurisdictional statutes have been established and widely adopted to limit re-litigation and forum shopping in child custody cases. The development of these uniform statutes, along with U.S. Supreme Court decisions on the role of federal habeas in child custody cases, have substantially limited the relief available from the federal courts. *See Habeas Corpus Litigation in Child Custody Matters: An Historical Mine Field*, 11 J. Am. Acad. Matrim. Law 1, Paul J. Buser (1993).

II. HOW DO I GET A WRIT OF HABEAS CORPUS?

STEP 1: Consult the Client's Order/Decree

The first step is to refer to the most recent orders from the Court on your client's case. Review the Order or Decree carefully to ensure the time and date your client is supposed to have the child. If the Order or Decree requires the return of the child at a specific time or on a specific date and the other parent does not comply, that parent is in violation of the court's orders and you should consider taking action.

But what should you do if there is no court order directing right to possession of the child? For example, this would happen if your client has not previously adjudicated his or her rights and duties regarding the child. If the right to possession of a child is not governed by an Order or Decree, the court in a habeas corpus proceeding involving the right of possession of the child:

1. could order the child to be returned to the parent if the right of possession is between a parent and a nonparent; or

2. may order the child to be returned or issue temporary orders if the parties have received *notice* of a hearing on temporary orders set for the same time as the habeas corpus proceeding. *Melsha v. Wegmuller*, No. 07-0376, 2007 WL 4322235, at *2 (Iowa Ct. App. Dec. 12, 2007).

If the order provides that your client has a right of possession, the first step, as always, should be for your client to contact the other parent to try to resolve the issue without litigation.

STEP 2: Take action right away

Once you have consulted your client's orders and determined that he or she has the right of possession and the other parent has not returned the child, you need to move quickly to enforce your client's rights.

Allowing too much time to expire might cause difficulties in asserting your client's rights. While this analysis under a petition for writ of habeas corpus does not set a specific time limit under Iowa law, Iowa courts have denied habeas requests, at least partially, on the basis of a

parent's failure to act. *Eddards v. Suhr*, 193 N.W.2d 113, 116 (Iowa 1971)(denying a habeas corpus request and holding that a parent's apparent indifference or acquiescence to the child's placement with the other parent is entitled to consideration); *Melsha v. Wegmuller*, No. 07-0376, 2007 WL 4322235, at *2 (Iowa Ct. App. Dec. 12, 2007) (lending importance to the fact that over an approximately eight month period, mother did nothing to try to get the child returned to her care).

STEP 3: Habeas Corpus

As indicated above, a writ of habeas corpus under Chapter 663 of the Iowa Code can be used by the parent with a legal right to possession of a child in an effort to regain possession from a person wrongfully retaining the child. The focus in a habeas corpus proceedings (related to child custody) is whether the person who is claiming the right to the possession of the child is currently entitled to possession of a child by virtue of a valid court order. (Again, this is why a careful reading of the current Order or Decree is essential before filing).

The procedures for habeas are outlined in **Iowa Code Chapter 663**, and are attached to this outline.

The first step in obtaining the writ is to file a petition with the court. Your petition must include:

1. That the child is being unlawfully detained, by whom the child is being kept, and the place where the child is being kept, if known. These facts should include as much detail as possible. Iowa Code § 663.1(1).

2. The alleged reason for the restraint, if known, attaching any documentation. Iowa Code § 663.1(2).

3. A statement that the restraint of the child is illegal. Iowa Code § 663.1(3).

4. A statement that the legality of the restraint has not already been adjudicated in an earlier proceeding of the same character, to the applicant's best knowledge. Iowa Code § 663.1(4).

5. Whether the same petition has been previously made and refused by any court or judge. If so, you need to attach that petition and outline the reasons for the refusal. If

you cannot attach the previous petition, you need to provide reasons for your failure to do so. Iowa Code § 663.1(5).

The Petition should also include the information required by Iowa Code section 598B.209, as discussed in more detail below and outlined in the draft Petition provided with this outline. The requisite information may also be provided by separate affidavit.

The parent entitled to possession may file the petition for a writ of habeas corpus with the court or judge most convenient in point of distance to the applicant. If the applicant goes to a more remote court or judge, the court or judge may refuse the petition unless a sufficient reason is provide for not making the application to the more convenient Judge or Court. Iowa Code § 663.4.

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, Iowa Code Chapter 598B, and the Parental Kidnaping Prevention Act, 28 U.S.C.A. § 1738A, if the right to possession of a child is directed by court order, the court in a habeas corpus proceeding involving the right to possession of the child must direct return of the child to the parent with the right to possession only if the court finds that parent is entitled to possession under the order. *See Barcus v. Barcus*, 278 N.W.2d 646 (1979)(while this case interpreted the *UCCJA*, it still may provide a helpful background for your analysis); Moon, John Henry, "Habeas Corpus Child Custody—Get Your Child Back," October 20, 2015 (*available at* http://www.moonlawfirm.com/blog/2015/10/20/habeas-corpus-child-custody-get-your-child-back).

The Court may issue temporary orders in a habeas proceeding. The Iowa Court of Appeals has indicated, *citing Lamar v. Zimmerman*, 169 N.W.2d 819, 822-23 (Iowa 1969) and the best interests of the child, that the court may render an appropriate temporary order in a habeas proceeding. *Melsha v. Wegmuller*, No. 07-0376, 2007 WL 4322235, at *2 (Iowa Ct. App. Dec. 12, 2007).

Next, the petition is presented to the Court. Depending on the judge, you and your client may be required to appear personally to testify in favor of granting the writ, although this is not required by statute.

The usual form of the writ is as follows:

> "THE STATE OF IOWA, to: _____
>
> YOU ARE HEREBY COMMANDED to have the body of _____, by you unlawfully detained, as is alleged, before the Court, at _____, on _____ (or, after immediately being served with this writ), to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises."

Iowa Code § 663.8. We have modified this slightly in the attached form proposed writ, to cater it more specifically to custody matters and to update the language.

The writ is served, and the return made, by any person whom the court may appoint in writing or by the sheriff. Iowa Code § 663.13.

The person upon whom the writ is served is required to have the person for whose benefit the writ is issued personally before the court at the appointed time. Iowa Code § 663.28. The sheriff may arrest the Defendant if he or she attempts to elude service or to wrongfully leave the state with the child after service of the writ. Iowa Code § 663.23.

The costs are assessed against the Defendant if the child is discharged (unless the defendant is an officer holding the child under a commitment). If the petition is refused, the costs are assessed to the parent filing the case. Iowa Code § 663.44.

Remember, a habeas proceeding is **not** the proper way under Iowa law to modify an Order or Decree. It is a temporary way to get relief and have an order enforced. If a modification is necessary, you will want to file that action at the time you file your habeas petition.

> ***Practice Tip #1***: Don't convey that your case is an emergency unless it is truly an emergency. If you don't need an immediate hearing, let the Court know that a hearing on the next regular court service day will suffice. Be open and honest with the Court about the factual scenario. If there is a good reason for the petitioner's delay in seeking a writ of habeas corpus, alert the Court to that information at the time of filing.

Practice Tip #2: If faced with an interstate custody issue, and you know your client will be forced to enforce whatever relief you obtain in Iowa in another state, request the piece of paper that will be easiest to enforce in the other jurisdiction based on their laws. For instance, if your client will be enforcing custody in the state of Mississippi or Texas, a writ of habeas corpus should work well. That type of relief seems more prevalent in those states. However, if your client will be enforcing custody in another state where habeas relief is exceedingly rare, an order under Iowa Code Section 598B.311 (Iowa's version of the UCCJEA) may be the better route and is broader than the habeas statute. Be sure to ask the judge to make specific findings of fact about jurisdiction in the writ or court order to ensure it can be easily enforced in the sister state.

III. HOW DOES A WRIT FOR HABEAS CORPUS WORK WITHIN THE CONFINES OF THE UCCJEA?

Iowa has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) at Iowa Code Chapter 598B. This statute, along with Iowa Code Chapters 598 (Dissolutions) and 600B (Paternity cases), outline how most custody cases in Iowa are initiated, adjudicated, and enforced.

In any child-custody proceeding[3] in Iowa, there is certain information that must be provided to the Court—habeas cases involving child custody are no exception. Iowa Code § 598B.209. Section 598B.209 requires the party filing a case to furnish:

- the child's present address or whereabouts;
- the places where the child has lived during the last five years;
- the names and present addresses of the persons with whom the child has lived during the past five years;

[3] Iowa law defines a child-custody proceeding as: "a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for dissolution of marriage, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under article III." Iowa Code § 598B.102(4).

- whether the party has participated as a party or a witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child-custody determination, if any;

- whether the party knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and

- whether the party knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those person.

Make certain that all of this information is provided in your verified Petition for Writ of Habeas Corpus (or by separate affidavit), if reasonably ascertainable or, in the alternative, state that it is not known by the petitioner.

The importance of providing the information required by Iowa Code 598B.209 should not be undervalued. The affidavit provides the Court with important information about how long the child has been out of the possession of the proper custodial parent. Including the child's residences for the past five years may alert the Court to important information about whether Iowa has subject matter jurisdiction to issue a writ of habeas corpus and may also be used by the Court to evaluate whether the petitioner seeking a writ has been excessively dilatory in asserting their custodial rights to a child, which may either affect how quickly the Court sets a Petition for hearing or whether the Court is willing to issue a writ at all. *See Eddards* and discussion *supra*.

The advent of the UCCJEA and development of state law regarding custody and enforcement—particularly covering emergency situations—has made habeas proceedings exceedingly less common.

Enforcement Provisions

One of the major purposes of the revision of the UCCJEA was to establish a procedure and remedies for interstate visitation and custody cases. As with child support, state borders have become a significant barrier to enforcement of custody and visitation orders. If either parent

leaves the State where the custody determination was made, the other parent may face difficulty in following the provisions outlined in the UCCJEA to enforce the visitation and custody provisions of the Order or Decree. Locating the child, making service of process, and preventing adverse modification in a new forum can all involve challenging legal issues that cannot be resolved inexpensively.

Article III of the UCCJEA provides its own enforcement tools that are also very effective tools for the family law practitioner to be aware of. While this presentation does not discuss those tools, it is critical to have an understanding of those provisions. *See* Iowa Code § 598B.301 et. seq.

IV. ALTERNATIVE REMEDIES

If you find that filing a Petition for writ of habeas corpus may not afford your client the relief he or she needs, it is important to consider other tools that might be available.

Injunctive Relief: Consider reviewing Iowa Rules of Civil Procedure 1.5101 through 1.1511. Iowa attorneys have had some success using this as a vehicle for rapid Court intervention when one parent is withholding the child from the other, in defiance of a court order.

Contempt Proceedings: If you already have a Court order in place, and the other parent is in violation of that Court Order, you might consider filing an application for rule to show cause at the same time you file your habeas petition. While this is a slower remedy, it may strategically be important if you are facing a modification.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

[PLAINTIFF], Plaintiff, v. [DEFENDANT], Defendant.	Case No. ABCD1234 **PETITION FOR WRIT OF HABEAS CORPUS**

COMES NOW Plaintiff, [PLAINTIFF], and for her Petition for Writ of Habeas Corpus, states as follows:

1. Plaintiff, [PLAINTIFF], is a resident of _____ County, Iowa. Defendant, [DEFENDANT] is a resident of _____ County, Iowa.

2. [CHILD] was born to [DEFENDANT/(or name of parents)] on ___.

3. [DEFENDANT] abandoned all custody and control over child.

4. [CHILD] has lived with [PLAINTIFF] since _____, in a safe home, receiving appropriate care, affection, and support from [PLAINTIFF].

5. Plaintiff is the only parent the child has ever known.

[OR]

3. On _____, the marriage between Defendant and [CHILD]'s [MOTHER/FATHER] was dissolved.

4. The Court placed the child in the [MOTHER/FATHER]'s custody and the child remained in [HIS/HER] care until [HE/SHE] died on _____.

5. During such time, [PLAINTIFF] assisted the [MOTHER/FATHER] in rearing and caring for the child, acting as a parental figure.

[OR]

3. Defendant removed the child from [school the child was attending *or* from Plaintiff's home, etc.], without Plaintiff's assent, and claims the right to detain the child under [outline the circumstances].

4. Defendant now refuses to return [or prevents the child from returning] to Plaintiff's care.

[. . .]

6. This restraint is illegal.

7. The child's best interests require his or her return to Plaintiff, and to the home, friends, care, surroundings, and advantages to which the child has become accustomed.

8. The child's best interests will be prejudiced and the child's progress impeded if the child remains with Defendant, in new surroundings and circumstances.

9. No prior proceeding has adjudged that Defendant's restraint of the child is legal.

10. No application of the writ herein asked has been made to or refused by any judge. Iowa Code § 633.1(5).

11. The following information is furnished pursuant to Iowa Code Section 598B.209 with regard to the child whose custody is sought in this action:

a. [The child's name, age, and birth date];

b. [The current residence of the child];

c. [The addresses at which the child has resided during the past 5 years];

d. [The names and present addresses of persons with whom the child has resided for the past five (5) years];

e. Plaintiff has not participated as either a party of a witness or in any other capacity, in any other litigation concerning the custody of the child in this or in any other state;

f. Plaintiff does not know of any custody proceeding concerning the child pending in a court of this or any other state;

g. Plaintiff does not know of any person not a party to these proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

WHEREFORE Plaintiff asks this Court to order the production of the minor child, for his release and restoration to Plaintiff's custody and care; and for such further relief as the Court may deem just and equitable.

[SIGNATURE BLOCK]

By /s/ Jane Doe
Jane Doe
ATTORNEY FOR PLAINTIFF

Original Filed.

V E R I F I C A T I O N

STATE OF IOWA)
) ss:
COUNTY OF POLK)

I, [PLAINTIFF], being first duly sworn on oath, depose and state that I am the Plaintiff in the above action; that I have read the above and foregoing Petition for Writ of Habeas Corpus; and that the statements contained therein are true and correct to the best of my knowledge and belief.

_____
[PARENT], Plaintiff

Subscribed and sworn to before me this ____ day of _____, 2016.

_____
Notary Public in and for the State of Iowa

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

[PLAINTIFF], Plaintiff, v. [DEFENDANT], Defendant.	Case No. ABCD1234 **WRIT OF HABEAS CORPUS**

TO: [DEFENDANT]

YOU ARE HEREBY COMMANDED to bring the minor child, [CHILD], by you unlawfully detained, as is alleged, before the Court at _____ o'clock, on [DATE], to be dealt with according to law.

IT IS SO ORDERED.

CHAPTER 663

HABEAS CORPUS

Referred to in §331.653

Postconviction procedure, see chapter 822

663.1 Petition.

The petition for the writ of habeas corpus must state:

1. That the person in whose behalf it is sought is restrained of the person's liberty, and the person by whom and the place where the person is so restrained, mentioning the names of the parties, if known, and if unknown describing them with as much particularity as practicable.

2. The cause or pretense of such restraint, according to the best information of the applicant; and if by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence.

3. That the restraint is illegal, and wherein.

4. That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant.

5. Whether application for the writ has been before made to and refused by any court or judge, and if so, a copy of the petition in that case must be attached, with the reasons for the refusal, or satisfactory reasons given for the failure to do so.

[C51, §2213; R60, §3801; C73, §3449; C97, §4417; C24, 27, 31, 35, 39, §**12468;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.1]

Referred to in §822.1

663.2 Verification — presentation to court.

The petition must be sworn to by the person confined, or by someone in the confined person's behalf, and presented to some court or officer authorized to allow the writ.

[C51, §2214; R60, §3802; C73, §3450; C97, §4418; C24, 27, 31, 35, 39, §**12469;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.2]

Referred to in §822.1

663.3 Writ allowed — service.

The writ may be allowed by the supreme or district court, or by a supreme court judge or district judge, and may be served in any part of the state.

[C51, §2215; R60, §3803; C73, §3451; C97, §4419; C24, 27, 31, 35, 39, §**12470;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.3]

Referred to in §822.1

663.4 Application — to whom made.

Application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to therefor, may refuse the same unless a sufficient reason be stated in the petition for not making the application to the more convenient court or a judge thereof.

[C51, §2217; R60, §3805; C73, §3452; C97, §4420; S13, §4420; C24, 27, 31, 35, 39, §**12471;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.4]

Referred to in §663.5, §822.1

663.5 Inmates of state or federal institutions.

When the applicant is confined in a state or federal institution, other than a penal institution, the provisions of section 663.4 relating to the court to which or the judge to whom applications must be made are mandatory, and the convenience or preference of an attorney or witness or other person interested in the release of the applicant shall not be a sufficient reason to authorize a more remote court or judge to assume jurisdiction.

[S13, §4420; C24, 27, 31, 35, 39, §**12472;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.5]

Referred to in §822.1

663.6 Writ refused.

If, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the court or judge must refuse to allow the writ.

[C51, §2218; R60, §3806; C73, §3453; C97, §4421; C24, 27, 31, 35, 39, §**12473;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.6]

Referred to in §822.1

663.7 Reasons endorsed.

If the writ is disallowed, the court or judge shall cause the reasons thereof to be appended to the petition and returned to the person applying for the writ.

[C51, §2221; R60, §3809; C73, §3454; C97, §4422; C24, 27, 31, 35, 39, §**12474;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.7]

Referred to in §822.1

663.8 Form of writ.

If the petition is in accordance with the foregoing requirements, and states sufficient grounds for the allowance of the writ, it shall issue, and may be substantially as follows:

> The State of Iowa,
>
> To.....:
>
> You are hereby commanded to have the body of ....., by you unlawfully detained, as is alleged, before the court (or before me, or before ....., judge, etc., as the case may be), at ....., on ..... (or immediately after being served with this writ), to be dealt with according to law, and have you then and there this writ, with a return thereon of your doings in the premises.

[C51, §2219; R60, §3807; C73, §3455; C97, §4423; C24, 27, 31, 35, 39, §**12475;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.8]

2000 Acts, ch 1058, §53

Referred to in §822.1

663.9 How issued.

When the writ is allowed by a court, it must be issued by the clerk, but when by a judge, the judge must issue it personally, subscribing the judge's name thereto.

[C51, §2220; R60, §3808; C73, §3456; C97, §4424; C24, 27, 31, 35, 39, §**12476;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.9]

Referred to in §602.8102(114), §822.1

663.10 Penalty for refusing.

Any judge, whether acting individually or as a member of the court, who wrongfully and willfully refuses the allowance of the writ when properly applied for, shall forfeit to the party aggrieved the sum of one thousand dollars.

[C51, §2222; R60, §3810; C73, §3457; C97, §4425; C24, 27, 31, 35, 39, §**12477;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.10]

Referred to in §822.1

663.11 Issuance on judge's own motion.

When any court or judge authorized to grant the writ has evidence, from a judicial proceeding before the court or judge, that any person within the jurisdiction of such court or officer is illegally restrained of the person's liberty, such court or judge shall issue the writ or cause it to be issued, on the court's or judge's own motion.

[C51, §2223; R60, §3811; C73, §3458; C97, §4426; C24, 27, 31, 35, 39, §**12478;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.11]

Referred to in §822.1

663.12 County attorney notified.

The court or officer allowing the writ must cause the county attorney of the proper county to be informed thereof, and of the time and place where and when it is made returnable.

[C51, §2240; R60, §3828; C73, §3459; C97, §4427; C24, 27, 31, 35, 39, §**12479;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.12]

Referred to in §822.1

663.13 Service of writ.

The writ may be served by the sheriff, or by any other person appointed in writing for that purpose by the court or judge by whom it is issued or allowed. If served by any other than the sheriff, the person appointed possesses the same power, and is liable to the same penalty for a nonperformance of the duty, as though the person were the sheriff.

[C51, §2224; R60, §3812; C73, §3460; C97, §4428; C24, 27, 31, 35, 39, §**12480;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.13]

Referred to in §822.1

663.14 Mode.

The service shall be made by leaving the original writ with the defendant, and preserving a copy thereof on which to make the return of service, but a failure in this respect shall not be held material.

[C51, §2225; R60, §3813; C73, §3461; C97, §4429; C24, 27, 31, 35, 39, §**12481;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.14]

Referred to in §822.1

663.15 Defendant not found.

If the defendant cannot be found, or if the defendant has not the plaintiff in custody, the service may be made upon any person who has, in the same manner and with the same effect as though the person had been made defendant therein.

[C51, §2226; R60, §3814; C73, §3462; C97, §4430; C24, 27, 31, 35, 39, §**12482;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.15]

Referred to in §822.1

663.16 Power of officer.

If the defendant hides, or refuses admittance to the person attempting to serve the writ, or if the defendant attempts wrongfully to carry the plaintiff out of the county or the state after

the service of the writ, the sheriff, or the person who is attempting to serve or who has served it, is authorized to arrest the defendant and bring the defendant, together with the plaintiff, forthwith before the officer or court before whom the writ is made returnable.

[C51, §2227; R60, §3815; C73, §3463; C97, §4431; C24, 27, 31, 35, 39, §**12483;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.16]

Referred to in §822.1

663.17 Arrest.

In order to make the arrest, the sheriff or other person having the writ possesses the same power as is given to a sheriff for the arrest of a person charged with a felony.

[C51, §2228; R60, §3816; C73, §3464; C97, §4432; C24, 27, 31, 35, 39, §**12484;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.17]

Referred to in §822.1

663.18 Repealed by 70 Acts, ch 1276, §16.

663.19 Defects in writ.

The writ must not be disobeyed for any defects of form or misdescription of the plaintiff or defendant, provided enough is stated to show the meaning and intent thereof.

[C51, §2234; R60, §3822; C73, §3466; C97, §4434; C24, 27, 31, 35, 39, §**12486;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.19]

Referred to in §822.1

663.20 Penalty for eluding writ.

If the defendant attempts to elude the service of the writ, or to avoid the effect thereof by transferring the plaintiff to another, or by concealing the plaintiff, the defendant shall be guilty of a serious misdemeanor, and any person knowingly aiding or abetting in any such act shall be subject to like punishment.

[C51, §2253; R60, §3841; C73, §3467; C97, §4435; C24, 27, 31, 35, 39, §**12487;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.20]

Referred to in §822.1

663.21 Refusal to give copy of process.

An officer refusing to deliver a copy of any legal process by which the officer detains the plaintiff in custody to any person who demands it and tenders the fees therefor, shall forfeit two hundred dollars to the person who demands it.

[C51, §2254; R60, §3842; C73, §3468; C97, §4436; C24, 27, 31, 35, 39, §**12488;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.21]

Referred to in §822.1

663.22 Preliminary writ.

The court or judge to whom the application for the writ is made, if satisfied that the plaintiff would suffer any irreparable injury before the plaintiff could be relieved by the proceedings above authorized, may issue an order to the sheriff, or any other person selected instead, commanding the sheriff or other person to bring the plaintiff forthwith before such court or judge.

[C51, §2230; R60, §3818; C73, §3469; C97, §4437; C24, 27, 31, 35, 39, §**12489;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.22]

Referred to in §822.1

663.23 Arrest of defendant.

If the evidence is sufficient to justify the arrest of the defendant for a criminal offense committed in connection with the illegal detention of the plaintiff, the order must also direct the arrest of the defendant.

[C51, §2231; R60, §3819; C73, §3470; C97, §4438; C24, 27, 31, 35, 39, §**12490;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.23]

Referred to in §822.1

663.24 Execution of writ — return.

The officer or person to whom the order is directed must execute the same by bringing the defendant, and also the plaintiff if required, before the court or judge issuing it, and the defendant must make return to the writ in the same manner as if the ordinary course had been pursued.

[C51, §2232; R60, §3820; C73, §3471; C97, §4439; C24, 27, 31, 35, 39, §**12491;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.24]

Referred to in §822.1

663.25 Examination.

The defendant may also be examined and committed, or bailed, or discharged, according to the nature of the case.

[C51, §2233; R60, §3821; C73, §3472; C97, §4440; C24, 27, 31, 35, 39, §**12492;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.25]

Referred to in §822.1

663.26 Informalities.

Any person served with the writ is to be presumed to be the person to whom it is directed, although it may be directed to the person served by a wrong name or description, or to another person.

[C51, §2235; R60, §3823; C73, §3473; C97, §4441; C24, 27, 31, 35, 39, §**12493;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.26]

Referred to in §822.1

663.27 Appearance — answer.

Service being made in any of the modes herein provided, the defendant must appear at the proper time and answer the petition, but no verification shall be required to the answer.

[C51, §2236; R60, §3824, 4182; C73, §3474; C97, §4442; C24, 27, 31, 35, 39, §**12494;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.27]

Referred to in §822.1

663.28 Body to be produced.

The defendant must also produce the body of the plaintiff, or show good cause for not doing so.

[C51, §2237; R60, §3825; C73, §3475; C97, §4443; C24, 27, 31, 35, 39, §**12495;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.28]

Referred to in §822.1

663.29 Penalty — contempt.

A willful failure to comply with the above requirements will render the defendant liable to be attached for contempt, and to be imprisoned till the defendant complies, and shall subject the defendant to the forfeiture of one thousand dollars to the party thereby aggrieved.

[C51, §2238; R60, §3826; C73, §3476; C97, §4444; C24, 27, 31, 35, 39, §**12496;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.29]

Referred to in §822.1

663.30 Attachment.

Such attachment may be served by the sheriff or any other person authorized by the court or judge, who shall also be empowered to produce the body of the plaintiff forthwith, and has, for this purpose, the same powers as are above conferred in similar cases.

[C51, §2239; R60, §3827; C73, §3477; C97, §4445; C24, 27, 31, 35, 39, §**12497;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.30]

Referred to in §822.1

663.31 Answer.

The defendant in the answer must state whether the defendant then has, or at any time has had, the plaintiff under the defendant's control and restraint, and if so the cause thereof.

[C51, §2241; R60, §3829; C73, §3478; C97, §4446; C24, 27, 31, 35, 39, §**12498;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.31]

Referred to in §822.1

663.32 Transfer of plaintiff.

If the defendant has transferred the plaintiff to another person, the defendant must state that fact, and to whom, and the time thereof, as well as the reason or authority therefor.

[C51, §2242; R60, §3830; C73, §3479; C97, §4447; C24, 27, 31, 35, 39, §**12499;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.32]

Referred to in §822.1

663.33 Copy of process.

If the defendant holds the plaintiff by virtue of a legal process or written authority, a copy thereof must be annexed.

[C51, §2243; R60, §3831; C73, §3480; C97, §4448; C24, 27, 31, 35, 39, §**12500;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.33]

Referred to in §822.1

663.34 Demurrer or reply — trial.

The plaintiff may demur or reply to the defendant's answer, but no verification shall be required to the reply, and all issues joined therein shall be tried by the judge or court.

[C51, §2244; R60, §3832; C73, §3481; C97, §4449; C24, 27, 31, 35, 39, §**12501;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.34]

Referred to in §822.1

663.35 Commitment questioned.

The reply may deny the sufficiency of the testimony to justify the action of the committing magistrate, on the trial of which issue all written testimony before such magistrate may be given in evidence before the court or judge, in connection with any other testimony which may then be produced.

[C51, §2245; R60, §3833; C73, §3482; C97, §4450; C24, 27, 31, 35, 39, §**12502;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.35]

Referred to in §822.1

663.36 Nonpermissible issues.

It is not permissible to question the correctness of the action of a court or judge when lawfully acting within the scope of their authority.

[C51, §2246; R60, §3834; C73, §3483; C97, §4451; C24, 27, 31, 35, 39, §**12503;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.36]

Referred to in §822.1

663.37 Discharge.

If no sufficient legal cause of confinement is shown, the plaintiff must be discharged.

[C51, §2247; R60, §3835; C73, §3484; C97, §4452; C24, 27, 31, 35, 39, §**12504;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.37]

Referred to in §822.1

663.38 Plaintiff held.

Although the commitment of the plaintiff may have been irregular, if the court or judge is satisfied from the evidence that the plaintiff ought to be held or committed, the order may be made accordingly.

[C51, §2248; R60, §3836; C73, §3485; C97, §4453; C24, 27, 31, 35, 39, §**12505;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.38]

Referred to in §822.1

663.39 Repealed by 70 Acts, ch 1276, §20.

663.40 Plaintiff retained in custody.

Until the sufficiency of the cause of restraint is determined, the defendant may retain the plaintiff in the defendant's custody, and may use all necessary and proper means for that purpose.

[C51, §2250; R60, §3838; C73, §3487; C97, §4455; C24, 27, 31, 35, 39, §**12507;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.40]

Referred to in §822.1

663.41 Right to be present waived.

The plaintiff may, in writing, or by attorney, waive the right to be present at the trial, in which case the proceedings may be had in the plaintiff's absence. The writ will in such cases be modified accordingly.

[C51, §2251; R60, §3839; C73, §3488; C97, §4456; C24, 27, 31, 35, 39, §**12508;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.41]

Referred to in §822.1

663.42 Disobedience of order.

Disobedience to any order of discharge will subject the defendant to attachment for contempt, and also to the forfeiture of one thousand dollars to the party aggrieved, besides all damages sustained by the plaintiff in consequence thereof.

[C51, §2252; R60, §3840; C73, §3489; C97, §4457; C24, 27, 31, 35, 39, §**12509;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.42]

Referred to in §822.1

663.43 Papers filed with clerk.

When the proceedings are before a judge, except when the writ is refused, all the papers in the case, including the judge's final order, shall be filed with the clerk of the district court of the county wherein the final proceedings were had, and a memorandum thereof shall be entered by the clerk upon the judgment docket.

[C51, §2255; R60, §3843; C73, §3490; C97, §4458; C24, 27, 31, 35, 39, §**12510;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.43]

Referred to in §602.8102(114), §822.1

663.44 Costs.

1. If the plaintiff is discharged, the costs shall be assessed to the defendant, unless the defendant is an officer holding the plaintiff in custody under a commitment, or under other legal process, in which case the costs shall be assessed to the county. If the plaintiff's application is refused, the costs shall be assessed against the plaintiff, and, in the discretion of the court, against the person who filed the petition in the plaintiff's behalf.

2. Notwithstanding subsection 1, if the plaintiff is confined in any state institution and is discharged in habeas corpus proceedings, or if the habeas corpus proceedings fail, and costs and fees cannot be collected from the person liable to pay costs and fees, the costs and fees shall be paid by the county in which such state institution is located. The facts of such payment and the proceedings on which it is based, with a statement of the amount of fees or costs incurred, with approval in writing by the presiding judge appended to the statement or endorsed on the statement, shall be certified by the clerk of the district court under the seal of office to the state executive council. The executive council shall review the proceedings and authorize reimbursement for all such fees and costs or such part of the fees and costs as the executive council finds justified, and shall notify the director of the department of administrative services to draw a warrant to such county treasurer for the amount authorized. There is appropriated from moneys in the general fund not otherwise appropriated an amount necessary to pay the reimbursement authorized by the executive

council. The costs and fees referred to above shall include any award of fees made to a court appointed attorney representing an indigent party bringing the habeas corpus action.

[C97, §4459; C24, 27, 31, 35, 39, §**12511;** C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §663.44]

86 Acts, ch 1237, §40; 2003 Acts, ch 145, §286; 2011 Acts, ch 131, §39, 158

Referred to in **§8.59**, **§602.8102(114)**, **§822.1**

Appropriation limited for fiscal years beginning July 1, 1993; see §8.59

2016 FAMILY LAW SEMINAR

War of the Words: Best Practices in High-Conflict Divorces

3:15 p.m.- 4:15 p.m.

Presented by

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Hon. Robert Hutchison
District Court Judge

FRIDAY, OCTOBER 28

No Contact Order/Orders of Protection

Family Law CLE, Fall 2016

Shannon Archer, Assistant Polk County Attorney

	Who	Requirements	Procedures	Duration	Specifics	Guns*	Enforcement
Temporary Order of Protection (Civil) §236.4 ***Victim vs. Defendant***	Victim of Domestic Abuse plus children	Allegation of abuse + Domestic relationship §236.2	V goes to courthouse, appears pro se (or with private counsel), D is NOT present Court makes finding. Orders personal service by deputy Is NOT valid until service Arrest/police report not required	Approximately 14 days or until hearing	Visitation is *rarely* ordered Allowed 1 trip to protected residence	May still possess	Probable cause = mandatory arrest AFTER service §236.11 Contempt of court: 7-180 days. §664A.7 D has right to court appointed counsel Victim is pro se (or private counsel)
Permanent Order of Protection (Civil) §236.5 ***Victim vs. Defendant***	Victim of Domestic Abuse plus children	Allegation of abuse + Domestic relationship §236.2	Hearing V and D are present D may challenge allegations No right to court-appointed counsel Arrest/police report not required	1 year May be extended	Likely discuss visitation and division of property	Must turn over firearms AND ammunition within 24 hours Possession may be charged as Class D Felony. §724.26(2)	Probable cause = mandatory arrest §236.11 Contempt of court: 7-180 days. §664A.7 D has right to court appointed counsel V is pro se (or private counsel)
No Contact Order (Criminal) §664A.1 ***State of Iowa vs. Defendant***	Victim of crime plus immediate family members and household members §664A.3	Victim of public offense §664A.1	D is served (usually) at initial appearance If D posts bond prior to or is given a citation, sheriff's office will serve D has right to counsel	Initial order - until further order of the court Sentencing order - 5 years May be extended §664A.8	May request 1 trip to protected residence (not guaranteed)	Must turn over firearms AND ammunition within 24 hours IF V is an intimate partner (box will be checked) Possession may be charged as Class D Felony. §724.26(2)	Probable cause = mandatory arrest §236.11 Contempt of court: 7-180 days. §664A.7 D has right to court appointed counsel

*May also have some federal gun restrictions where state law does not apply.

Representing the Abusing Spouse: Ethical and Practical Considerations

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With 24,067 survivors getting services in Iowa in 2010 alone, domestic violence is an unfortunate reality in Iowa.[1] Chances are most attorneys practicing in family law matters will encounter domestic violence in the course of their work. There are a variety of complex legal, ethical and practical issues that surround representing an abusing spouse as a client. In these ethically challenging situations lawyers should follow the requirements of the Iowa Rules of Professional Responsibility while also recognizing the need to strive for optimal ethical behavior beyond the minimum set by these rules.[2] This article will address some of the most relevant rules and practical considerations unique to representing an abusing spouse.

Understanding the dynamics of domestic abuse is critical to a successful representation for attorney and client. Abusive acts vary widely but may involve physically, sexually, and emotionally harmful behaviors. A lawyer must recognize these acts are ultimately designed to achieve power and control over the other spouse. An attorney must also understand that this pattern of controlling behavior will not cease just because of the initiation of some type of legal proceedings.

Some behaviors an attorney representing an abusing spouse should be prepared to address include:

- Isolation of the other spouse;
- Intimidation and Threats;
- Sexual Abuse;
- Economic Control;
- Emotional Abuse and Manipulation;
- Use of children as tools of control.

Navigation of this particular attorney-client relationship requires sensitivity, skill and an awareness of the existing dynamic between the spouses. The following rules and explanations are offered to encourage thought about the balance an attorney must strike to be both a zealous and ethical advocate.

The Duty of Competence. A very basic proposition- that an attorney must "provide competent representation"[3] can have significant meaning when representing an abusive spouse. Iowa Rule 32:1.1 requires legal knowledge and skill as well as thoroughness and preparation. Just as the rule advices against jumping into a new practice area without sufficient information, so to should an attorney avoid representing

[1] Iowa Coalition Against Domestic Violence, Facts and Stats on the Prevalence of Domestic Violence in Iowa (Feb. 2012).

[2] Geoffrey C. Hazard Jr., Legal Ethics: Legal Rules and Professional Aspirations, 30 Clev. St. L. Rev. 571, 574 (1981) (discussing the ABA model rules as "abandon[ing] any attempt to state aspirational norms and limit themselves to being law"); E. Norman Veasey, Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000") Chair's Introduction (August 2002) (stating that the ABA Model Rule drafters were resisting the temptation to preach aspirationally about "best practices" or professionalism concepts").

[3] Iowa R. of Prof'l Conduct 32:1.1

an abusing spouse without careful thought and research.

A lawyer should represent an abusing spouse only if the lawyer has the necessary knowledge of domestic abuse as well as the necessary counselling and legal skills. These necessary skills include: successfully avoiding furthering a power and control dynamic, knowing when not to encourage settlement through negotiation, and being able to successfully navigate a relationship fraught with turbulence while not disparaging the domestic violence survivor spouse.

The Duty of Confidentiality. Iowa Rule of Professional Conduct 32:1.6 lays forth a complex framework for permissible disclosures under the rules of attorney-client confidentiality. Lawyers representing an abusing spouse must familiarize themselves with the permissive as opposed to mandatory language written into this provision. An attorney *shall* reveal information to the extent reasonably believed necessary to prevent imminent death or substantial bodily harm.[4] This could include situations of physical or sexual abuse of children in the relationship. Any other reveals permitted by this section are optional and require the attorney to engage in careful balancing of client and external interests.

When *may* an attorney reveal normally confidential information? The instances more likely to arise in the context of an abusing spouse include to prevent reasonably certain substantial bodily harm, to comply with another law or court order, or possibly to prevent or rectify a client's commission of a crime reasonably certain to result in substantial injury to the financial interests of another. The lawyer should also consider an information sharing relationship with the client's therapist. A client must give informed consent prior to this attorney-therapist disclosure. If this information sharing seems useful in the course of representing a client, the lawyer should have an up-front discussion about the benefits and drawbacks of consent to this type of disclosure

Withdrawing from Representation. There are times where the representation of an abusing spouse may become problematic for an attorney and withdrawal may be appropriate. Fortunately, a lawyer has many options when it comes to permissive withdrawal. Under Iowa Rule 32:1.16 acceptable situations for withdrawal include when the client insists upon action the lawyer finds repugnant or has a fundamental disagreement with, any situation where withdrawal won't have a materially adverse effect on the client's interest and when "other good cause" exists.[5]

The flexibility of this provision means an attorney can avoid situations where a client attempts to use the lawyer's skill to intimidate or isolate the domestic violence survivor in the courtroom. A lawyer could also withdraw in situations where personal feelings or experiences involving domestic violence make it impossible to provide high quality representation. Additionally, a lawyer can withdraw under this provision if an abusing spouse client fails to abide by an

[4] Iowa R. of Prof'l Conduct 32:1.6.

[5] Iowa R. of Prof'l Conduct 32:1.16.

agreement as to the terms or limits on the objectives of the representation.[6]

The Attorney as Advisor. Iowa Rule 32:2.1 requires that a lawyer use independent judgment when representing a client and render candid advice which can include considerations of moral, economic, and social factors.[7] When representing an abusing spouse an attorney should use candor to emphasize a need for change in behavior to achieve a successful legal outcome as well as advise a client to seek counseling where needed.

A lawyer should be aware of the risk of the client seeking to utilize the lawyer's services to further the relationship control dynamic. An attorney must make clear that the attorney is charged with determining appropriate courtroom presentation despite the client's control over broad outcome goals. Discussing the goals of the client upfront allows the attorney to know if further representation would be repugnant to their professional or personal sensibilities.

A lawyer should inform the client about the emotional and behavioral aspects of domestic abuse. This includes providing the client with a checklist of abusive behaviors survivors commonly identify. Through this technique, a lawyer may allow an abusing spouse to develop some insight into the effects of their behavior. One of the primary roles for the attorney as advisor when dealing with an abusing spouse is to provide the client with an understanding of how his or her behavior effects the pending legal matter and the client's stated goals such as reconciliation.

Zealous Advocate or Principled Advisor? Perhaps most difficult for any attorney representing an abusing spouse is the balance between zealous advocate and doing what is "right". In the preamble of the Iowa Rules of Professional Conduct, lawyers are advised that when it comes to difficult issues it takes sensitive professionalism along with moral judgment to make the tough calls.[8] Attorneys should be zealous advocates while also being courteous to all involved in the legal system.

A lawyer should seek to find the balance between zealous advocate and courteous professional. An attorney shouldn't further their client's manipulation or power and control struggle through courtroom tactics or intimidation. When representing an abusing spouse, a lawyer should know it is not appropriate to encourage settlement through mediation in many cases of domestic violence.[9] A lawyer should encourage therapy for their client when appropriate. Finally, an effective lawyer should know when the issue of domestic violence makes them an ineffective advocate and withdrawal is necessary. The guiding principles of the preamble and rules

[6] *See id*. at cmt. 8.
[7] Iowa R. of Prof'l Conduct 32:2.1.

[8] Iowa R. of Prof'l Conduct Preamble cmt 9.
[9] Karla Fischer, Neil Vidmar & Rene Ellis, The Culture of Battering and the Role of Mediation in Domestic Violence Cases, 46 S.M.U. L. Rev. 2117, 2121 (1993); Linda K. Girdner, Mediation Triage: Screening for Spouse Abuse in Divorce Mediation, 7 Mediation Q. 365, 365 (1990); Alexandria Zylstra,Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators, 2001 J. Disp. Resol. 253, 255 (2001).

set out in the Iowa Code of Professional Conduct can serve as useful tools for an attorney representing an abusive client even when specific rules may be lacking.

Representing an abusing spouse is a challenging opportunity for a lawyer to affect personal and social change for their clients. It must be accepted by both the lawyer and the client that the purpose of the representation is not to perpetuate the power and control struggle. The lawyer must be up to this task or should refuse the representation entirely.

The following rules are provided for reference in reading this article. *See* Iowa Rules of Professional Conduct, last updated October 2015.

Iowa R. of Prof'l Conduct Preamble cmt 7-9.

[7] Many of a lawyer's professional responsibilities are prescribed in the Iowa Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Iowa Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Iowa R. of Prof'l Conduct 32:1.1.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Iowa R. of Prof'l Conduct 32:1.6.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm.

(d) A lawyer shall make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Iowa R. of Prof'l Conduct 32:1.16.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Iowa Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

Iowa R. of Prof'l Conduct 32:2.1.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation.

NATIONAL Center on Domestic Violence, Trauma & Mental Health

Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges:

A Handbook for Attorneys

Written by

Mary Malefyt Seighman, JD ♦ Erika Sussman, JD ♦ Olga Trujillo, JD

On behalf of the

National Center on Domestic Violence, Trauma & Mental Health

Edited by

Carole Warshaw, MD

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- Mary Malefyt Seighman, Erika Sussman, and Olga Trujillo

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domestic violence and has written or co-written a number of articles, educational tools, manuals, and model policies for attorneys, advocates, law enforcement, and others.

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Olga Trujillo is an attorney, trainer, speaker, and author who has devoted her career to helping advocates, first responders, and others in the field better understand the impact of trauma on survivors of sexual assault, domestic violence, and child abuse. Olga was a recipient of a Sunshine Lady Foundation 2006 Peace Award for her work for battered women and their children. Her memoir, THE SUM OF MY PARTS (New Harbinger), was released in October 2011. Olga writes a regular blog on trauma and dissociation for PSYCHOLOGY TODAY.

About the National Center on Domestic Violence, Trauma & Mental Health:

The mission of the National Center on Domestic Violence, Trauma & Mental Health is to ensure that all survivors of domestic violence and their children who are experiencing the mental health effects of trauma and/or living with a psychiatric disability can access the resources that are essential to their safety and well-being. To these ends, the National Center is committed to developing responses to the range of trauma-related issues faced by survivors and their children that are accessible, culturally relevant, and both domestic violence- and trauma-informed. The Center's work is survivor-defined and rooted in principles of social justice.

The efforts of the Center are organized into four strategic objectives:

- ***Raising public awareness** about the intersection of domestic violence, trauma, substance abuse and mental health through up-to-date analysis of research, policy and practice.*
- ***Building the capacity of systems and agencies** to address the traumatic*

effects of abuse and to facilitate healing and recovery.

- ***Promoting policies*** *that support collaboration and improve system responses to survivors and their children experiencing the impact of domestic violence and other lifetime trauma.*
- ***Contributing to research*** *that advances knowledge and builds the evidence base for responding to trauma in the lives of DV survivors and their children.*

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Introduction

In recent years, those who work with survivors of domestic violence have become increasingly aware of the connection between trauma and domestic violence, as well as other effects of domestic violence on a survivor's mental health. The release of relevant research findings and available technical assistance that address this intersection through specialized trainings, educational materials, and tailored consultations have influenced the perspectives and work of many domestic violence advocates. It has catalyzed changes in the ways that local domestic violence programs offer and provide services to survivors living with trauma-related and other mental health impacts of domestic violence, influenced program standards and policies promulgated by statewide domestic violence coalitions, and prompted advocates to begin or renew efforts to engage with mental health providers in order to make services more accessible and appropriate for survivors who seek them.

Still, survivors who turn to the legal system for protection from the abuser, custody of their children, and assistance with other civil legal needs encounter significant barriers. This can occur for different reasons. First, the processes in which a survivor must engage to achieve legal objectives can trigger the effects of trauma, making it difficult for a survivor to fully participate in her case. Second, in many cases, the opposing party proffers testimony or introduces other evidence about the mental health of the survivor in an attempt to use societal stigma about mental health for the purpose of damaging her credibility and/or raising doubt about her parenting abilities.

We envisioned this project as a vehicle for creating a tool to assist attorneys who represent survivors when trauma or other mental health challenges are a factor in a case. Specifically, we wanted to offer lawyers practical information about the ways in which trauma and mental health can intersect and impact the civil legal cases of survivors and provide guidance on how to partner with a survivor and zealously represent her. To support this work, the National Center on Domestic Violence, Trauma & Mental Health applied for and received Violence Against Women Act funding through the Technical Assistance Program of the Office on Violence Against Women, U.S. Department of Justice.[1]

As a first step in the project, the National Center convened a roundtable meeting of individuals who interact with survivors in the course of a legal case. Participants representing attorneys, domestic violence advocates, the judiciary, the research field, mental health peer support, and mental health providers gathered for a one-day meeting in

[1] For more information about the Office on Violence Against Women, go to www.ovw.usdoj.gov.

Chicago to offer their perspectives on the barriers that survivors face when trauma or other mental health challenges affect a legal case, share their experiences and strategies, and provide input on the kinds of materials that might be useful to attorneys.

While the input offered by the roundtable participants was useful in formulating ideas and learning about strategies, it also highlighted the need to gather more specific information about the barriers that individual survivors are facing in the legal system with regard to trauma and other mental health challenges.[2] To this end, we embarked upon the second phase of the project, in which we conducted telephone interviews with survivors for the purpose of learning about their experiences with the legal system when they were involved in a case in which trauma or other mental health challenges were a factor. We received the names and contact information for 50-75 women. We contacted and conducted a brief screening interview (either by phone or email, depending on the information that we received) with each person who expressed an interest in being interviewed. Of all of the women with whom we spoke or emailed, seven had the most relevant experience. Most of those whom we did not interview had not participated in a civil legal or criminal case against the abuser or had not done so within the last ten years. All of the survivors that we interviewed had been a party in a civil legal case against the abuser; all but one of these interviewees was also a victim in a criminal case against the abuser, and one was a survivor who was charged with a criminal offense against the abuser. During the interviews, which typically lasted two hours, we asked a variety of questions to capture information about survivors' perceptions of the strengths and weaknesses of the representatives of the various disciplines with whom they had interacted including community-based advocates, mental health providers, attorneys, custody evaluators, child protective services, judges, law enforcement, prosecutors, and victim-witness specialists. At the conclusion of the interview phase, we produced a summary of the interview findings, organized by discipline. We included a compilation of system gaps and needs, based on what we learned from the interviewees and the individuals who had participated in the roundtable meeting.

What we learned through these processes reaffirmed our belief that survivors encounter serious barriers when it comes to participating in legal cases and achieving the legal outcomes they desire, especially when trauma or other mental health challenges are a factor. In terms of attorneys, the survivors that we interviewed spoke about the positive attributes of the lawyers with whom they had worked – including their zealous advocacy, treating them as partners in the process, and their knowledge of domestic abuse. However, they also highlighted the ways in which attorneys fell short, including offering ineffective or harmful legal and strategic advice, failing to fight for the survivor, and exhibiting a lack of understanding about the intersection of trauma, mental health, and domestic violence. The

[2] While some of the meeting participants are survivors of domestic violence, none had been involved in a civil legal case against the abuser within the past ten years.

survivors with whom we spoke also offered recommendations about what is needed for attorneys to better work with and represent survivors. Their suggestions included a need for more information about working with survivors who have experienced trauma and building the case in a way that does not allow the mental health challenges to overshadow the domestic violence that they have experienced. In particular, survivors felt it was important for attorneys to be able to show that trauma and other mental health challenges are often caused by the domestic violence itself and therefore should not operate to penalize survivors in their legal cases. Additionally, survivors indicated that attorneys should listen to survivors more, view and include them as partners in the legal process, and recognize and value their expertise.

This handbook was created for the overall purpose of providing guidance to attorneys so that they can help survivors achieve their civil legal objectives when trauma or other mental health challenges are a potential factor in a case. We do this in two ways. First, it is our intent to help attorneys identify when trauma may be an issue so that they can partner with the survivor to craft personal and legal strategies that help her to stay safe, avoid circumstances that can potentially trigger the effects of trauma, and develop plans for when triggers do arise. Second, we offer guidance on each step of a civil case related to the possibility of the opposing party or others raising issues about the mental health of the survivor. The handbook is intended to help attorneys anticipate with their clients the kinds of mental health-related case theories and evidence that the opposing party may attempt to procure and introduce, respond to such attempts, deal with custody evaluators, decide whether to negotiate or proceed to trial, choose and utilize experts, cross-examine the opposing party, and craft a closing argument.

The handbook features strategies that aim to keep trauma and other mental health challenges from becoming the central focus or even a consideration in the survivor's case, and guidance for limiting it when mental health evidence is introduced by the opposing party. We do not advocate for the anticipatory introduction of mental health records or other evidence related to the mental health of the survivor in an effort to defuse attempts by the opposing party to use mental health information against her. The authors understand, though, that some attorneys have had some success in doing so.[3] The handbook is grounded in survivor-defined advocacy – an adaptation of the "women-defined advocacy" model that Jill Davies, Eleanor Lyon, and Diane Monti-Catania wrote about in their 1998 book, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* (Sage Publications); we advocate partnering with survivors to plan for safety, assess risks, develop strategies, and plot the course of her case.

3 For more information, see Denice Wolf Markham, Mental Illness and Domestic Violence: Implications for Family Law Litigation, Journal of Poverty Law and Policy 23, 30 (2003).

Finally, a note about language. In this handbook, "survivor" means an individual who has experienced domestic violence. We use this term interchangeably with "client." For purposes of brevity and simplicity, survivors/clients are referred to as female but we intend to be inclusive of both men and women. All abusers and opposing parties are referred to as male, but it is understood that there are also abusers who are women. We use the term "opposing party" to refer to an individual who perpetrated domestic violence upon the survivor and/or her children, and who is a party to a survivor's civil legal case.

Section One: Interviewing

Do Not Exacerbate the Harm or Risks

Lawyers working with survivors who are experiencing trauma and other mental health-related challenges should aim to ensure that their representation does not exacerbate the harm done to a client or create additional harms. Every domestic violence survivor faces risks. Some risks are batterer-generated; some risks are life-generated.[4] Survivors who are experiencing trauma or other mental health challenges may face additional risks when they come in contact with systems and individuals who are ill equipped to address their particular mental health needs. Thus, attorneys must take steps to ensure that their relationship with the client does not exacerbate the risks or further harm the mental health of the survivor.

Be Aware of the Signs of Trauma

Lawyers working with survivors of domestic violence should be aware of signs of trauma and mental health challenges, such as:

- The client does not talk about her experience(s) in a linear manner. She may go off on tangents or her speech may not seem coherent.
- What would seem to be highly emotional facets of her experience are expressed with little emotion both in terms of facial expression and body language, and in terms of the tone of her voice (sometimes referred to as "flat affect"). She may be intellectually present but emotionally detached.
- The client develops a deep, blank stare or an absent look during meetings with her; this could be a sign that she is dissociating.
- The client is unable to remember key details of the abuse.

If you notice any of the above signs, you will want to take steps to avoid triggering feelings that are disruptive to your client as you work together on her case. While an attorney cannot ensure that an individual remains present and does not dissociate or otherwise disengage, there are steps you can take to remove as many barriers as possible to help your client be psychologically present for her own advocacy.

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[4] *See* Jill Davies, Eleanor Lyon, and Diane Monti-Catania, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* (Sage Publications 1998).

Survivor-Defined Representation When the Client is Living with Trauma-Related or Other Mental Health Conditions

Survivor-defined advocacy requires that attorneys tailor their advocacy approach to meet the individualized needs of survivors. For survivors facing mental health challenges, this means that lawyers must:

- Gain an understanding of the ways in which *this client's* challenges impact her ability to engage in the advocacy process, and
- Tailor interviewing and counseling approaches to meet the needs of and maximize the self-determination of each individual client.

Survivors facing mental health challenges will often require more time and resource-intensive advocacy than other survivors. To use their time and resources wisely, lawyers must consider how to tailor their advocacy approach to be responsive to the issues and needs of survivors experiencing trauma related conditions and mental health concerns.

Begin a Dialogue about the Survivor's Mental Health Needs

The lawyer should begin a dialogue with the survivor about her mental health needs as it relates to the lawyer/client relationship. This type of conversation provides a space for the survivor to explain her circumstances and for both lawyer and survivor to develop strategies for accommodating those challenges in the course of their relationship.

Lawyers need not, and should not, try to gather the client's entire mental health history at this stage in the process. Rather, these preliminary conversations about the client's mental health should focus upon how any mental health challenges affect her functioning. To get this conversation going, lawyers might ask, "Is there anything that I should know to help us work better together?" Or, "How can I, as your lawyer, accommodate what you need in this process?" For example, if the lawyer's office creates too much sensory stimulation or causes sensory overload, your client might suggest meeting somewhere else. If she has difficulty focusing for long periods of time, the attorney might suggest taking several breaks or scheduling shorter appointments.

It is best practice for lawyers working with survivors to take the time necessary to build relationships and trust with their clients. Trust is key to developing the type of lawyer-client relationship required for effective representation. There are times, however, when lawyers have a limited amount of time or are meeting clients just before a hearing. In these situations, you need to gather as much information as possible, as quickly as possible, in preparation for your case. It is important to know that, when working under such tight deadlines, your client may not feel comfortable enough yet to disclose details about trauma

and mental health conditions. In those situations, you are not likely to get complete and accurate information about this from your client. Under such circumstances, you may want to partner with an advocate who has been working with the survivor to assist in gathering this information and to provide you with the context necessary to understand and advocate for the comprehensive and individual needs of the survivor.

Techniques for Building Trust and Ensuring Informed Consent with Survivors Who Experience Trauma and/or Mental Health Symptoms

Survivor-centered interviewing skills are critical to providing comprehensive, individualized advocacy to survivors of domestic violence, whether or not a survivor has experienced trauma or mental health concerns. First, by offering a survivor the space to tell her own story, from her own perspective, an attorney can begin to lay the foundation for building trust. Second, when an attorney actively listens to a survivor's story, she gains a more comprehensive, contextual understanding of the survivor's needs. This rich understanding, when combined with a working relationship based on trust and respect for survivor agency, forms the basis of an effective survivor-attorney partnership that can work toward the expressed goals and objectives of the survivor.

Oftentimes in the lives of survivors, people were abusive or let them down, service providers responded ineffectively to them, and/or systems ignored or added to their pain. Each survivor has a unique perspective of these realities and lives with the effects of these negative experiences. A survivor's cultural background will also impact the way in which she perceives her prior experiences.

Many survivors who have experienced violence from an intimate partner and/or have trauma related concerns are often likely to accommodate what they think you want. This can play out in different ways. A client may ask you directly, "What do you think I should do?" Or, a client may intuitively pick up from your discussion with her what she believes you want her to do. You may think the survivor is making an informed decision when in fact she is trying to do what she thinks you want.

To overcome the distrust that survivors who are dealing with trauma-related or other mental health symptoms experience, lawyers must take steps to nurture a respectful working relationship with them. Lawyers should:

- Develop a basic understanding of trauma-related and mental health conditions that survivors may experience;
- Be skilled in listening and asking questions to understand a survivor's perspective and needs; and
- Know how to decide what information and options to offer to meet those needs.

It is within the context of a respectful relationship that lawyers can provide opportunities for survivors experiencing trauma and mental health challenges to access the resources they need and to exercise more control over their own lives.

Jill Davies has crafted a list of the ways in which advocates can offer concrete assistance to survivors who have experienced trauma resulting from multiple victimizations. Attorneys for survivors who are dealing with mental health challenges can assist clients by:

- Recognizing that survivors may be unable to access all of the details;
- Providing options and the time and space for survivors to make fully-informed decisions;
- Validating the survivor's feelings throughout the process;
- Being responsive to a survivor's requests for information and support, even if she asks for the same information several times;
- Partnering with survivors to identify alternative coping strategies, when they are engaging in self-harming behaviors;
- Finding supports for developing alternative or additional coping strategies;
- Connecting survivors who are experiencing a mental health crisis with a trusted mental health referral/resource; and
- Offering support to survivors who are using alcohol and/or drugs by safety planning and strategizing to the greatest extent possible at the time (including assessing risks and developing strategies that mitigate the risks posed by alcohol and drug use) and encouraging them to contact you again.[5]

[5] Adapted from Jill Davies, Helping Sexual Assault Survivors with Multiple Victimizations and Needs, A Guide for Agencies Serving Sexual Assault Survivors (July 2007).

Section Two: Client Counseling

Survivor-centered advocacy is based upon a partnership between the attorney and the survivor. The partnership draws upon the experience and knowledge of the survivor and the skills and resources of the attorney. The goal is to combine the expertise of both survivor and attorney to devise strategies that address the particular and comprehensive needs of the individual survivor. This partnership can proceed in three steps: (1) analyzing the risks, (2) reviewing previous/current safety plans, and (3) devising legal strategies.[6]

Work With The Survivor To Gain An Understanding Of Batterer-Generated And Life-Generated Risks.

Lawyers cannot begin to devise legal strategies for an individual client without gaining an understanding of the batterer-generated and life-generated risks she faces.

Trauma-informed legal advocacy takes time, but in the long run, it leads to more efficient, more effective legal advocacy for survivors. Here are some pointers for gathering the critical context:

- Be sure to schedule adequate client meeting time for you to gather this critical context.
- Give the client space to tell her story, so that she can identify her concerns as she prioritizes them.
- Use open-ended questions to facilitate information sharing.
- Listen more than you talk.

It is common for an abuser to attempt to use information about the mental health of a survivor to further the abuse and to gain advantage in a legal case. Develop an understanding of the ways in which the battering partner has used the survivor's mental health history in the past to further his power and control.[7] Examples might include a batterer:

- Using a psychiatric diagnosis to silence his partner (e.g., "Who will believe a woman who is bipolar?").
- Threatening to sue for custody of the children and use her mental health history against her during the custody proceedings.

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[6] Jill Davies, An Approach to Legal Advocacy with Individual Battered Women (2003).

[7] *See* Mary Malefyt Seighman & Erika Sussman, Interviews with Survivors of Domestic Violence Who Have Experienced Trauma or Mental Health: Reflections on Their Experiences in the Justice System: Summary and Recommendations (2010).

- Using a survivor's mental health history to convince systems (e.g., law enforcement, courts) that the survivor is not credible, that she is not a fit parent, that she needs to be institutionalized, etc.

Engage the client in analyzing the batterer-generated mental health risks that she faces now and in the future. Analysis of mental health risks may be complex. For example: a survivor who has suffered depression and anxiety as a result of her partner's abuse may suffer additional risks if her partner continues to abuse her upon her departure.

Battered women who lived with mental health conditions before they were with their partner may find that they have limited options available to them. For example: a survivor may face a greater risk of losing custody of her children, and she may be more vulnerable to future physical attack.

Partner With The Survivor To Devise Legal Options That Fit Within The Broader Context Of The Survivor's Safety Plan (Including Both Short And Long Term Goals)

The process of legal strategizing with survivors must take place within the broader context of safety planning. That context is what makes legal advocacy on behalf of survivors challenging; this is certainly true for survivors who are experiencing trauma-related and/or other mental health concerns.

Functionality and the Americans with Disabilities Act

Trauma-informed legal advocacy for domestic violence survivors requires that the lawyer work with the survivor to ensure that she can participate in the process fully. The Americans with Disabilities Act (ADA) is a critical piece of federal legislation that can assist survivors in accessing full participation.[8]

The ADA entitles individuals to protections stemming from their disabilities—related both to one's physical health as well as mental health.[9] Lawyers should think with their clients about how the ADA can assist a survivor in the course of the legal advocacy process. Clearly, just because an accommodation is available does not mean that a client will want to avail herself of the accommodation. Therefore, the lawyer and client must dialogue about

[8] Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§12101 *et seq.* (1990).
[9] Under the ADA, an individual with a "disability" is a person who has a physical *or mental* impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. Under Title II of the Act, no qualified individual with a disability shall be unreasonably discriminated against, or excluded from participation in or benefits of the services, programs, or activities of state and local government, including the judicial branch.

the challenges she anticipates during the course of advocacy and in the courtroom and consider the risks and benefits of requesting particular accommodations.

Exploring Legal Options

Jill Davies suggests the following process to engage survivors in exploring the legal options that a survivor may have available.* Attorneys who have more recently begun working with survivors of domestic violence may especially wish to review this list.

Options—Consider the various legal remedies that are available to address the survivor's circumstances. For example: civil protection order, custody order, criminal charges, public benefits, VAWA self-petition, etc.

Requirements - Examine whether the survivor meets the legal requirements for the remedy. Who is eligible? What does the person need to prove to be eligible?

Legal Process - Know the legal process required to access the option. Which court? What forms are required? When is the court open? Are there unique requirements established by local court or judge?

Additional Considerations—Know about other considerations. Will the legal option enhance her safety and that of her children? Could seeking this legal option make things worse for her? Does she have control over whether to initiate the court case or is the case in the hands of someone else (i.e., a prosecutor)?

Examine each of the above steps in partnership with the survivor. The answers to many of the questions will have a direct impact upon the survivor's life and her safety plan. She will need to know about the specific practical realities so that both she and you can: identify the barriers, craft solutions that address the barriers, and determine whether the remedies can address and meet her individual risks and needs.

*Jill Davies, An Approach to Legal Advocacy with Individual Battered Women (2003).

Examining Accommodation Strategies

Engage in a nuanced conversation with your client about how her ability to function will come into play during a courtroom proceeding. The key question is: *does your client feel that she can participate in the litigation process?*

The answer to this question will depend greatly upon the challenges that your client anticipates and the types of accommodation strategies you and she develop together to address those challenges. The following are some ideas to consider:

- Practice direct and cross-examination of your client to help her feel more comfortable with the process.
- Bring a support person to the hearing or trial (family member, friend, therapist, advocate, etc.).
- If your client begins to dissociate or to look like she's shutting down, request a recess from the court.
- If you do take a recess, work with your client to explain what happened and re-orient her to where she is.
- If your client is unable to recover that day, connect her with a mental health practitioner who can help her to re-enter the courtroom space with less trauma and equip her with strategies to help her get through her testimony and fully participate in the process to the best of her ability.

Attorney Self-Assessment

All lawyers doing this work should partake in an honest self-assessment to determine whether they are prepared and able to address the particular needs of a survivor facing trauma and mental health challenges. It may be helpful to ask yourself the following questions:

- Do I have the desire, patience, temperament needed to advocate for survivors who are struggling with trauma and mental health challenges?
- Do I have the skills needed to support survivors when they find themselves triggered by the legal advocacy process?
- If I don't personally possess all of those skills, who can I collaborate with to ensure that my client is getting the accommodations and support that she needs to fully participate in the process?

When Your Client is Unable to Testify

Under some circumstances, courts may consider a person to be "unable to testify" under the rules of evidence, and therefore entitled to an out-of-court deposition. Such a deposition allows a witness to contribute her testimony while avoiding the trauma of testifying in the courtroom. It is generally permissible provided the testimony meets the

other applicable rules of evidence. Some state courts (e.g., Ohio and Rhode Island) have developed special provisions that allow for out-of-court testimony by victims of sex crimes, abuse, and neglect who live with mental disabilities, thereby helping them to avoid retraumatization in the courtroom.

Assessing the Risks and Benefits of Accommodations

Lawyers will want to discuss with survivors the pros and cons of requesting accommodations. At the very least, a request for accommodations requires that the litigant disclose her disability.

Pros of Requesting Accommodations:

- If your client anticipates that mental health will be raised during the course of the trial, disclosure may carry little risk.
- Accommodations may help your client to participate more fully in the proceedings by reducing the potential negative impacts of participation (e.g., triggering of the effects of trauma).

Cons:

- If mental health is unlikely to be raised otherwise, the risk of stigma or unwarranted prejudice may be greater.
- Disclosure may result in mental health or trauma being raised as a substantive issue by the opposing party.
- In a custody case, this additional attention drawn to the mental health of your client may influence the weight given to this factor in the best interest consideration.

The calculus has real implications for your client and the way that she will experience the legal process. Therefore, she must be involved in analyzing and ultimately making this important decision.

Collaborating with Trauma- And Domestic Violence-Informed Mental Health Professionals to Address The Survivor's Range Of Legal And Mental Health Needs

Even the most seasoned domestic violence lawyers cannot know all there is to know about mental health issues facing survivors. Nor can attorneys take on the role of mental health professionals. For these reasons, it is critical to develop relationships with qualified mental health providers. Note that it will be important, prior to taking on any one case, to identify individual mental health practitioners who understand the political and individual context of coercive control and have expertise in trauma-related mental health conditions. During the course of your representation, you may consult with this mental health provider in crafting safety plans, in identifying remedies, and, when needed, to serve as an expert

witness. As with all collaborations that an advocate builds, you must obtain the informed consent of the survivor prior to sharing any information with the mental health provider. Be sure to be specific with your client about the scope, content, and time frame of the consent she is providing.

Encouraging Survivor-Driven Decision-Making

Many survivors who have experienced violence from an intimate partner and/or have trauma related concerns are often likely to accommodate what they think their attorneys want. As the attorney of a survivor living with trauma, you may experience this in several ways. Your client may ask you directly, "What do you think I should do?" or, from your conversation, she may intuitively pick-up on what she *thinks* that you want her to do.

As a result, you may think the survivor is making a decision for herself, when in fact she is trying to do what she thinks you want her to do. This is a problem that many lawyers (and other "helping professionals") face. We are often asked what we think the client should do. We believe it is our job to answer this question. However, it is critical that we resist the temptation to tell our clients what to do. Knowing the law is not enough. You do not know the survivor's life circumstances well enough to make this judgment. Even you did, it is the survivor who will have to live with the consequences of the decision. Lacking such context, you may suggest something that is not safe for the survivor. Or the survivor may not be able, for other reasons, to take the steps that you are recommending; she may then lose trust in you. Indeed, she may stop working with you altogether, without explanation.

In any of these situations: If a survivor is trying to accommodate what you have suggested without thinking through how it impacts her own circumstances, then she is not determining the course of her legal advocacy.

To avoid this, and to promote her active decision-making, you might try the following:

- Do not present legal options until you have had time to gather a contextual understanding of your client's life circumstances and the abuse she has experienced.
- Make sure that you thoroughly discuss the choices. Do not move forward based upon a simple yes or a nod.
- When you present an option, engage your client in analyzing both the risks and the benefits, based on her individual life circumstances, as she anticipates them. You might ask:
  - If you were to do X, what about it might cause you to worry? What negative consequences can you foresee? What are the possible benefits?

- Once you have identified specific risks related to particular legal strategies, work closely with the survivor to create options that mitigate the risks she has identified. Then, engage her in considering the risks and benefits of those solutions.
- Give the survivor time outside of your meeting to make decisions, so that she can consider the options with the support of her family, friends, or an advocate.

Section Three: Discovery and Evidence

This section discusses important considerations related to mental health records and testimony on civil legal cases involving issues of domestic violence. It examines the implications of mental health treatment, the importance of conducting a risk assessment with your client about the disclosure of mental health information, and the development of strategies to respond to attempts by the opposing party to obtain and introduce mental health information about a client. Attorneys should consider the factors and strategies discussed below in light of the survivor's expressed needs and desired outcomes, the facts and circumstances of the case, and the culture of the court. The use of experts is covered in Section 6: Selecting and Preparing Expert Witnesses.

Consider the Implications of Mental Health Treatment on a Case

During your initial interview(s) with your client, you likely learned whether she has sought or is currently seeking treatment from a mental health care provider. The opposing party may try to seek release of information related to mental health treatment to impeach her credibility, and to demonstrate that she is emotionally or mentally unstable and therefore an unfit parent. Societal stigma related to mental health diagnoses and symptoms can carry significant weight in a case. Mental health may also be considered as a factor in the determination of the best interest of a child as part of a custody case.[10] If your client has ever received mental health services, you will need to work closely with her to consider the implications of the release of her mental health-related information and develop strategies to combat attempts by the opposing party to use it to damage your client's case.

In order to do this in a manner that continues to build trust and further solidify the partnership you are creating with your client, you will have to initiate and proceed with this conversation in a delicate manner. Remember that the stigma and shame of mental health-related conditions are often internalized. In your discussions about these issues, try to avoid feeding into that shame and stigma.

For example, you could say, "*I understand that you have been proactive in taking care of yourself and making sure you can be an even better parent for your child(ren). I admire your fortitude and courage in doing this work on your mental health concerns. Unfortunately, the other side may try to use your efforts to show that there is something wrong with you and that you are an unfit mother. So, let's talk about how we might address that possibility. First, do they know about your mental health concerns and your efforts to address them? Second,*

[10] Consult your state's family code for the factors that a court may consider in making custody decisions, and the weight given to particular items.

how do you feel about bringing it up before they do? Third, can we involve your therapist in our case as a witness on your behalf?

Taking this strength-based approach will help your client to see her efforts in a positive manner. If you continue to talk about it with her in this way you will reinforce what her therapist has likely also brought to her attention: that her foresight in dealing with these concerns is very positive and will help her to be the best parent she can be. Doing this will help her to respond better to the opposing party's efforts to attack her with information about her mental health challenges or treatment that she has sought.

Conduct a Risk Analysis with Your Client About Disclosure of Mental Health Information

If you or your client believe that your client's mental health will be a factor that will affect the case outcome, you will need to conduct a risk analysis related to mental health-related evidence.

A risk analysis considers:

- What evidence will potentially be available;
- How difficult or easy it will be for the opposing party to obtain it;
- What information it will contain;
- Whether it will be damaging and, if so:
  - To what degree;
  - What would the consequences be of the introduction of such evidence; and
  - Would introducing it affirmatively bolster the case and mitigate its harmful effects.

Conducting a risk analysis will help to prepare you and your client for the possibility that documentary and/or testimonial evidence of mental health challenges will be utilized by the opposing party. It will also help you to develop and implement a strategy to defeat the effect intended by the opposing party.

Affirmative release of mental health information

Potential Benefits:

Some attorneys believe that pre-emptive release of information about a client's mental health and providing up-front explanations about it can be beneficial to a case. This approach can be useful in certain circumstances. It can send a message to the court and the opposing party that you and your client are not concerned about your client's mental health and that you do not consider it to be damaging. For example, you may decide to

introduce direct testimony from a mental health provider who has treated your client in which she states that your client is completely functional; that she is a responsible and competent parent, employee, and member of the community; and that the trauma and/or mental health symptoms that she sometimes experiences do not negatively impact her life (or the lives of her children, in a custody or visitation case). This can work to the advantage of your client and can *normalize* the fact that your client lives with mental health challenges.

Potential Risks:

However, entering mental health records and other information or introducing mental health professionals' testimony, can result in unintended harmful consequences once they are in the hands of the opposing party. There may be information in mental health records, for example, that did not appear to be damaging when you examined it, but that is used to demonstrate that your client lacks credibility or has demonstrated poor parenting skills.

Analyzing Whether to Preemptively Disclose:

If, after you conduct a risk assessment, you determine that it is likely that the opposing party already has or will obtain potentially harmful information about your client's mental health, you will need to discuss with your client whether it is more likely than not that preemptively disclosing it would support your case, or whether it would have negative consequences for the desired case outcome, your client's life goals, the safety of your client or family members, her economic status, or her privacy.[11] Additionally, releasing mental health information about your client – if it has not already been raised by the opposing party – could possibly elevate your client's mental health to a central focus of the case rather than keeping it on the violence that the opposing party perpetrated.

As a first step, after consulting with your client about proceeding with the case, and with the permission of your client, it is important to obtain and examine your client's mental health records and assess them for aspects that may be helpful or harmful to the case. Factors in this decision will likely include: the type of case on which you are representing your client, the case timeline, the relative ease or difficulty of obtaining records, and cost. Conducting a risk analysis will help you to make a decision about and aid in the development of your overall case strategy with regard to mental health.

[11] Office on Violence Against Women grantees and subgrantees receiving Violence Against Women Act funds must protect the confidentiality and privacy of persons receiving services to ensure their safety and their families' safety. Check with your OVW program manager about the confidentiality requirements with which you/your agency may be required to comply.

Consider:

(1) **Types of evidence** that may be available about your client's mental health such as:

- Insurance records that include diagnoses and services provided, and medications prescribed to alleviate symptoms.
- Mental health treatment provider files including examination or assessment results, diagnoses, and clinician notes.
- File notes kept by victim service providers including domestic violence programs or organizations providing more general services to victims of crime.
- Children's school records.
- Testimony of your client's mental health provider(s) related to mental health diagnosis, symptoms, treatment, and concerns.

Discussing Evidence with Your Client

It is important to discuss the risks and the types of evidence with your client in a non-judgmental fashion. People living with mental health challenges are often encouraged to seek support from friends and family in addressing these issues. Talking about their diagnoses can help normalize the condition for the survivor and lead to acceptance. This is critical for healing. The manner in which you discuss these points will affect how they feel about their actions. Recognizing that a survivor was proactive in seeking help and support for mental health concerns is an important message to convey. The more you do this, the more a survivor will believe you and believe it of themselves. It also further strengthens your partnership and trust.

(2) **Statutory confidentiality and privilege provisions** that may apply, such as:

- What your state's code requires for insurance records to be released as part of a civil legal case or child protective services administrative proceedings.
- What your state's code requires for mental health records to be released as part of a civil legal case or child protective services administrative proceedings. Does the statute provide standards for release that are relatively difficult or easy to meet?
- Does your state code explicitly provide for a psychotherapist-patient or a counselor-client privilege? Who qualifies under the privilege? What are the exceptions?
- What do the rules of evidence say about release of information?

Applicable exemptions or exceptions related to statutory confidentiality and privilege statutes, which would allow disclosure or release of information to particular individuals or under certain circumstances such as:

- Family members or others who are participating in the diagnosis or treatment. If so, what information may have already been made available to them related to diagnoses, treatment goals, and medications?
- Hospitalization proceedings.
- Any breach of duty by the psychotherapist or the patient.
- When the mental state of a client is an element of a claim or a defense.
- Child custody cases when the mental state of a party is an issue and resolution of the issue requires disclosure.
- Counselors whose duties and role do not strictly meet the definition of counselor included in the statute.
- Suspected child abuse or neglect.
- Past civil or criminal proceedings in which the judge ordered a mental health assessment or examination, or which were required as part of a child protective services case.
- Collection proceedings for unpaid mental health services.

(4) Whether any of your client's **mental health information has previously been released** as part of another legal case or administrative proceedings, whether they are now considered part of the public record, and whether they can be accessed at the court that had jurisdiction over the case or elsewhere.

(5) Whether your client has signed any **blanket or limited releases** allowing a psychotherapist, counselor, or advocate to disclose information about her mental health or services provided, the information that may be released, and the circumstances under which information may be disclosed.

(6) Whether state statute or case law allows for a blanket **exception to mental health record confidentiality or psychotherapist or counselor privilege** pursuant to a subpoena, and how likely the court is to grant a request to subpoena your client's mental health records or the appearance of her/his mental health care provider(s).

(7) Whether your client's mental health treatment was ever covered by a **health insurance policy provided** by the opposing party's employer or which was privately purchased by the opposing party.

Developing Strategies Related to the Disclosure of Mental Health Information

If you believe that written records or the testimony of a mental health care provider or others will be available to the opposing party and you wish to prevent the opposing party from admitting them into evidence, you should discuss what actions you will take to prevent their inclusion and what your response will be if they are admitted. You will need to consider the culture of the court and the facts and circumstances of the case in determining whether to object to introduction of mental health evidence, and at what point in the case (i.e., pre-trial or during a hearing or trial).

You will need to prepare for the following possible circumstances:

- Attempts by the opposing party to obtain information about your client's mental health status or treatment – either informally (e.g., attempting to learn information about your client on the phone or via office visits with the mental health provider) or through formal channels such as by asking the court to issue a subpoena for the provider' records, testimony, or deposition.
- Attempts by a court-assigned evaluator to contact your client's mental health provider and interview him/her about your client, or obtain records.
- Attempts by a child protective services agency to contact your client's mental health provider to learn information about your client through records, an interview, deposition, or testimony.

Possible strategies that you consider with your client may include the following:

(1) Communicate with Your Client's Mental Health Provider(s)

Talk with your client about the reasons why she may want to inform her mental health provider that she is currently or will be a party to a civil legal case involving issues of domestic violence. This includes:

(a) Privilege and Confidentiality: The necessity of the mental health provider maintaining the privilege and/or confidentiality over communications and records regarding services provided to your client.

The provider may receive a subpoena for records or to appear at a deposition, hearing, or trial for the purpose of providing testimony about your client. You should request that the provider contact you immediately if the opposing party or anyone else makes any attempts to gather information about your client (whether by subpoena, phone call, email, or other means). Response to a

subpoena is generally required quickly (e.g., within ten days); the sooner you know, the more quickly you can generate a response and prevent the release of information.

(b) Record Keeping. The provider should consider the case context when she makes future records about your client. You, your client, and the mental health provider should be aware that all information is potentially discoverable. Talk with the provider about how notes of sessions with your client could be misinterpreted or used against her in the case.

(c) Preparation for Trial. If your client agrees, the mental health provider needs to be a part of the team that is preparing the case. The provider can contribute by helping your client to prepare documents that illustrate and demonstrate her positive attributes including her competence as a parent, her foresight in seeking and receiving mental health assistance when she needs it, and her contingency planning for the future. The provider can also help you craft arguments related to your client's mental health symptoms and how they do not impact her credibility related to the abuse or care for the child(ren).

(d) Waiver for Communication with Provider. If your client is willing, she can sign a written waiver allowing you to communicate directly with her mental health provider. Any such waiver should be very specific in terms of the information that can be disclosed and the time period for which it is operational.

Remember that these conversations need to be handled carefully so that your client is making a decision based on what she knows and believes, not on what she thinks you want her to do. You do not want your client agreeing to something simply to accommodate you. This is very important for maintaining the trust that you have built with her. It is also critical to her continued participation in the case that she think this through thoroughly. You may suggest that she talk it over with her advocate, a close friend, or her therapist. The risk in not taking the time here is that a decision to accommodate you could potentially derail your case at the last moment if she changes her mind. This is less likely to happen if it is truly her decision.

(2) Response to Subpoena. If the opposing party obtains a subpoena for the mental health records of your client, or for the deposition or trial testimony of your client's mental health, you can prepare and file a motion to quash that argues that the subpoena should be cancelled or nullified on the grounds that:

(a) *Production of the records or testimony of the individual would violate the counselor-patient privilege or confidentiality.* You should directly address all exceptions enumerated in the relevant state code section that could possibly apply in the case. Cite the relevant statutory authority – e.g., counselor-patient privilege, confidentiality of mental health and/or medical records – and/or case law.

(b) *It is unduly burdensome in terms of time or cost.* For example, you could argue that traveling to or appearing at a deposition or hearing would mean that the mental health provider would have to forego client appointments and fees, and that it would be financially burdensome to be required to do so.

(c) *The information requested is irrelevant to the case issues* because:
   (i) The mental health of your client has not been shown to be at issue in the case.
   (ii) The information sought is too old (e.g., older than one year) to be relevant to the case.
   (iii) The information contained in the provider's records contains personal information that is not related to the case and could be misleading.

(d) *Release to non-professionals of raw psychological data (e.g., from personality inventories or other instruments, notes from therapy sessions) is unethical* because of the inability of the non-professionals to correctly interpret them and, as such, it may be unduly prejudicial.

(e) If you or your client believes that the opposing party is using this attempt to gain access to your client's mental health records as a continuation of his pattern of power and control over your client, you can argue that, in addition to being irrelevant in the case, *the opposing party is seeking the information for the purpose of attempting to intimidate your client and continue his pattern of abuse.*

The mental health provider can also file a separate motion to quash, as well, if he/she chooses.

(3) Response to Attempts to Introduce Mental Health Information. If the opposing party is successful in obtaining mental health information about your client (or already had the information in his or her possession) and attempts to introduce it into evidence, you can file a motion *in limine* to try to keep the evidence out. A motion *in limine* is a request that the court either exclude or include evidence. It can be a powerful tool that can be used to remove support for arguments that the opposing party was planning to rely upon and to

gauge whether the court will find information about your client's mental health to be probative.

The arguments included in a motion *in limine* can include those enumerated in the section on Motions to Quash, above. Additionally, if the opposing party is attempting to introduce evidence about your client's mental health status or treatment that he obtained while they were in a relationship, or through means other than subpoena, you can include additional or alternate arguments such as:

(a) The opposing party obtained the information improperly by manipulating the mental health provider as part of his pattern of abuse.

(b) The opposing party obtained the information by improperly accessing your client's private records, such as by opening her mail.

(c) But for the opposing party's abuse, your client would not have sought mental health treatment; inclusion of mental health evidence about your client would be prejudicial and unjust.

References and Additional Resources

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Section Four: Custody and Mental Health Evaluations

What is a Custody Evaluation?

A custody evaluator is generally appointed to conduct an "evaluation" of the parties and the circumstances of the case. The judge will often delineate specific questions that the evaluation should address, including what custody arrangement is in the best interests of the child. If the case includes issues of domestic violence or child abuse, the evaluator is often charged with making a determination as to whether any such abuse exists or poses a risk to the child. Custody evaluations can vary, but generally include psychological testing of both parents, interviews of collateral witnesses, interviews with the children, observations of parent/child interactions, and review of documents.

Objecting to the Use of Any Custody Evaluator

Many courts across the nation routinely order custody evaluations in every child custody case. However, custody evaluations are not warranted in many, perhaps most, cases involving domestic violence. Indeed, there is a great deal of data (both scientific and anecdotal) demonstrating that custody evaluations often result in dangerous outcomes for protective parents and their children.

Custody Evaluators and Domestic Violence

Even if an evaluator has performed numerous evaluations does not mean that she is qualified to address cases involving domestic violence. Such an evaluation requires specialized knowledge and understanding. For example, an evaluator must have an understanding of the ways in which battering impacts children and protective parents. When an evaluator lacks that qualification, he or she is likely to misinterpret information, perhaps even attributing adaptive or protective strategies to a psychopathology. For all of these reasons, attorneys may wish to consider whether to object to assignment of a custody evaluator at the start of the custody case. Factors to examine in this decisionmaking process include the culture of the particular court, the facts and circumstances of the case, and the laws of the jurisdiction.

The following may serve as the bases for an objection to an appointment of a custody evaluator:

(1) The Law Requires Grant of Custody. Under the law of many states, where there is evidence of domestic violence, no evaluation is needed to determine that a child's best interests are served by granting custody to the protective parent.[12] The custody determination should be driven by a statutory presumption against granting custody or visitation to an abusive parent or by the court's own determination that evidence of domestic abuse necessitates that custody be granted to the non-abusive parent. When there are no previous findings of domestic abuse or when public records do not exist, attorneys for survivors may argue that the current custody case provides a forum for each party to present evidence that enables the judge to make a finding regarding the presence of domestic abuse. This level of due process is what is required of the adversarial process. While courts may feel that additional information is necessary to inform a best-interest analysis, such information will be provided by the parties and must be subject to the rules of evidence, as required by constitutional law.

(2) Trauma Caused By the Abusive Parent Cannot Be Used Against Victims in Custody Case. Attorneys should consult with their local statutes to determine the law governing child custody evaluators. Some states have statutory provisions that state that the *effects of domestic violence cannot be used against victims in custody litigation*. Therefore, whether operating in a state that follows a best interest of the child framework or a presumption against ordering custody to an abusive parent, attorneys may invoke this statute to argue that the abusive parent cannot use the protective parent's alleged mental health condition (caused by the abusive parent's acts) to deprive her of custodial access.

> Example: In Louisiana, the Post-Separation Family Violence Relief Act creates a rebuttable presumption against awarding sole or joint custody to perpetrators of family violence. The section that sets forth the standard for rebutting the presumption further states, "the fact that the abused parent suffers from the effects of the abuse shall not be grounds for denying that parent custody." La. R.S. 9:364.

[12] National Council of Juvenile and Family Court Judges, Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide, at 13 (revised 2006).

Choosing an Evaluator[13]

Minimize the Risk

Once it is clear that the court will appoint an evaluator, attorneys should take steps to avoid or minimize the likelihood that an unqualified evaluator will be appointed:

You may ask the court for:

- The opportunity to submit the names of proposed evaluators;
- Time to investigate the proposed evaluator's qualifications; and/or
- Time to submit any appropriate objections to the court.

Assess the Qualifications of a Custody Evaluator

First, determine whether your jurisdiction has guidelines for designating evaluators with particular competence in domestic violence. For example, Louisiana requires that the custody evaluator have "current and demonstrable training and experience working with perpetrators and victims."[14] Attorneys should use these legal standards to advocate for qualified custody evaluators.

The National Council on Juvenile and Family Court Judges (NCJFCJ) recommends that courts consider the following in identifying a qualified custody evaluator:[15]

- Whether the evaluator has been certified as an expert in, or competent in, issues of domestic violence by a professional agency or organization, and the criteria for "certification" (including whether it involved a bona fide course of study or practice);
- What courses or training (over what period of time) the evaluator has taken that focused on domestic violence;
- The number of cases involving domestic violence that the evaluator has handled in practice or to which he or she has been appointed. *Remember, however, that such experience may simply reflect the mechanism used by the court in identifying potential evaluators, rather than any relevant expertise*; and
- The number of cases in which the evaluator has been qualified as an expert in domestic violence.

[13] Much of Section Four is drawn from training materials developed by Becki Truscott Kondkar for a teleconference training hosted by the Center for Survivor Agency and Justice in 2006. For a copy of the training materials and other resources on the topic of Custody Evaluators in Domestic Violence Cases, go to: www.csaj.org.

[14] La. R.S. 9:365

[15] Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide, *supra*, note 11.

Oppose the Evaluator Before the Evaluation Begins

Attorneys should oppose the custody evaluator before he or she begins the evaluation. The following are grounds for opposition:

- Qualifications/experience
- Costs/fees
- Limiting the scope of the evaluation to areas appropriate for the skills and expertise held by the evaluator
- Use of unreliable, untested, or unethical evaluation practices

Psychological Testing

According to the NCJFCJ's Guide to Navigating Custody Evaluations, "psychological testing is not appropriate in domestic violence situations."[16] Such testing has the potential to misdiagnose non-abusive parent's normal response to the abuse or violence as indicative of mental illness, diverting attention from the coercive behaviors of the abusive parent.[17]

The Guide suggests that courts consider the following relevant questions:

- What is the test being used to measure?
- How is the test relevant to issues of custody and visitation?
- Is the test valid for purposes for which it is being used?
- Is the test recognized and accepted by experts in the field?
- What are the qualifications necessary to use the instrument?
- Does the expert have those qualifications?

Relevance and Reliability of Psychological Testing

The NCJFCJ Guide emphasizes the following points with regard to the relevance and reliability of psychological testing in child custody cases:

- Research shows that "there are no psychological tests that have been validated to assess parenting directly."[18]
- There is no psychological test that can accurately determine whether someone is an abuser or has been abused.[19]
- Standard psychological tests measuring personality, psychopathology, intelligence or achievement do not address the issues most relevant to children or parents' child-rearing attitudes and capacities.[20]

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[16] Id.
[17] Id at 20.
[18] Id.
[19] Id.
[20] Such tests include: the Minnesota Multiphasic Personality Assessment Inventory (MMPI-2), Rorschach Inkblot Test, Children's Apperception Test (CAT), Thematic Apperception Test (TAT), Wechsler Adult Intelligence Scale (WAIS-III), and Wide Range Achievement Test (WRAT-3).

- Standard tests may confuse symptoms resulting from domestic violence with psychopathology.[21]
- Tests intended to address trauma (e.g. Trauma Symptom Inventory (TSI)) may assist in determining treatment, but are not appropriate to determine whether a traumatic incident occurred.[22]

Parental Alienation Syndrome Has Been Discredited

Parental Alienation Syndrome (PAS) has been discredited by the scientific community, and courts should not accept this testimony. Lawyers should object to the admissibility of such evidence, based on its lack of validity and reliability, as required by *Daubert* and *Frye*. The NCJFCJ Guidelines state:

> Unfortunately, an all too common practice. . . is for evaluators to diagnose children who exhibit a very strong bond and alignment with one parent and, simultaneously, a strong rejection of the other parent, as suffering from "parental alienation syndrome" or "PAS." Under relevant evidentiary standards, the court should not accept this testimony.[23]

Apart from the evidentiary problems it presents, PAS fails to recognize that a child's alignment with one parent or a parent's seemingly "alienating" behavior may in fact represent a parent's strategies aimed at protecting children from harm posed by the battering parent. Indeed, it is for that reason that the American Psychiatric Association determined that there was not sufficient scientific evidence supporting PAS to include it in the DSM V.

How to Proceed when the Evaluator Has Been Appointed and the Evaluation Has Been Performed

Reading the Evaluation

Attorneys representing survivors in child custody cases should familiarize themselves with acceptable evaluation practices.

- Know the ethical and professional guidelines that govern custody evaluations.
- Seek professional help in reading the evaluation.
- Receive training on how to read custody evaluations

[21] National Council of Juvenile and Family Court Judges, *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide*, (2004, Revised 2006).
[22] Id.
[23] NCJFCJ *Guidebook* at 24.

- Conduct research for each evaluation

Consult With the Following Sources for Professional and Ethical Guidelines for Custody Evaluations

- American Professional Society on the Abuse of Children
- American Psychological Association
- National Children's Advocacy Center
- State Licensing Board
- Statutory criteria in your state

Know the Red Flags

When reviewing a custody evaluation, be sure to look out for the following red flags:

- Dual Roles—The evaluator has acted as or suggested that he/she act as both an evaluator and as a therapist.
- Reliance on Discredited Science—The evaluator has relied upon professionals or theories that are discredited in the field.
- References to "bad science" (i.e., inappropriately applied theories and diagnoses, and problematic terms); examples include:
  - Parental alienation syndrome
  - Munchausen's
  - Enmeshment
  - Batterer Profiles
  - Sex offender or pedophile profiles
  - False Allegations
  - False Memory Syndrome or False Memory

Conduct Discovery

Lawyers for survivors should always conduct discovery to learn more about the basis for the evaluation and the evaluator. Discovery should inquire about:

- Training, qualifications, and experience of the evaluator.
- Testing procedures used in the evaluation. You should ask the following questions:
  - What protocols were followed in conducting the evaluation?
  - Where can those protocols be found in the professional literature?
  - What was the purpose of the evaluation?
  - What were the specific inquiries?
  - What was the purported purpose of the various tests administered?
  - Is that testing designed to specifically ascertain the information sought?

- ❖ What testing procedures were used?
- ❖ What are the qualifications of anyone else involved in administering the testing?

Sources of Information

Whenever possible, custody evaluators should base their evaluations not only on interviews with the parties, but also on corroborating sources of information. There are many reasons for this: the abusive partner may deny their use of violence and coercive control, and their assessment of their partner's parenting may be a reflection of their abusive criticism and/or manipulation; the survivor may present as emotionally unstable, when in fact their behavior is a result of their partner's abuse and/or the survivor is triggered; and a child may identify with the abusive parent out of self-protection.

Collateral sources may include:

- ♦ Other family members, friends, neighbors, co-workers of the abused parent, and former partners;
- ♦ Doctors, clergy, teachers, and counselors; and/or
- ♦ Domestic violence advocates and professionals who have become involved with the family due to the abuse.

Pertinent records may include:

- ♦ Police reports;
- ♦ Child protection reports;
- ♦ Court files in the present case and prior cases;
- ♦ Medical, mental health and dental records; and/or
- ♦ School records.

File a Motion in Limine

If your review of the evaluation and the evaluator yield troublesome findings, you may wish to file a *motion in limine* to exclude the evaluator's report, opinions, or testimony.

- ♦ If it appears that the evaluator has used "junk science" such as PAS, you should move to exclude the evaluator's report and testimony.
- ♦ Determine the evidentiary standard governing admissibility of scientific evidence in your jurisdiction. Most states follow some version of the *Daubert*[24] or *Frye*[25] standards.[26]

[24] *Daubert v. Merrell Down Pharmaceuticals*, 509 U.S. 579 (1993).
[25] *Frye v. U.S.* 293 F. 1013 (D.C. Cir. 1923).
[26] *See* Jennifer Hoult, The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy, Children's Legal Rights Journal, 26(1) (Spring 2006)(analyzing PAS admissibility under Frye, Daubert, Kumho Tire, and Federal Rule of Evidence 702).

- *Daubert*/Federal Rule 702 standard: Reliable Principles and Methods
- *Frye* Standard: General Acceptance Test
- Note: "Any testimony that a party to a custody case suffers from PAS should be ruled inadmissible and/or stricken from the evaluation report under both the standard established in *Daubert* and the earlier *Frye* standard."

Discrediting/Impeaching an Incompetent Evaluator

When a motion *in limine* is not successful, you will want to use your cross-examination of the custody evaluator to discredit or impeach him or her. Tips include:

- Retain an expert of your own, and
- Impeach the evaluator by using authoritative professional literature (including, where possible, publications by organizations to which the evaluator belongs).

Mental Health Evaluations in General

Most state statutory schemes limit the circumstances under which you can ask for a mental health evaluation. Most statutes say that you must make a finding of good cause. Although some state statutes say that a request for child custody puts mental health at issue, it is the exception. Therefore, it is critical that attorneys for survivors in custody cases review their statutes. Remember: just because it is a custody case, does not necessarily mean the batterer or the court have the right to have your client's mental health evaluated. That said, you will want to consider whether to object to a mental health evaluation, based on the court and the particular facts of your case. Once a mental health evaluation enters into evidence, your job will be to analyze and formulate arguments regarding its relevance to the legal issues at hand.

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Section Five: Deciding Which Course to Take and Preparing Your Client for Mediation/Negotiation or Trial

As with all legal cases, those involving domestic violence and trauma require that you and your client weigh the pros and cons of mediation, negotiation, and pursuing a case in court. As an attorney, you consider the law, the court, the facts, and the risks of losing. Your client considers the risks that each of the proceedings could potentially present to her physical and mental health. Together, you and your client develop options that address the risks and optimize the chances of meeting her particular goals – both legal and otherwise. The survivor decides upon whether to pursue negotiation or trial, based upon all of the strategies that you and she have developed.

Know the Proceedings in Your Jurisdiction and Court

Make sure that you know the structure of the proceedings – negotiation, mediation, and trial – in your particular jurisdiction and under your particular judge. Lawyers for survivors must know more than just the legal remedies available. They must understand the legal requirements and the process for accessing the option. The legal process itself is often just as, and often more, important to a survivor's sense of safety and autonomy. For example, if a survivor feels that the courtroom will expose her to triggers, she may decide that the risks that trial presents to her mental health outweigh the potential legal benefits.

The following are common processes that are important to consider:

Mandatory Custody Mediation and Domestic Violence

Some jurisdictions require mediation in every child custody case. Many statutes waive this requirement in domestic violence cases, though others do not. Be sure to know the rules regarding domestic violence custody mediation in your jurisdiction. If there is an exception and your client wishes to avail herself of that exception, submit a motion or be prepared to articulate to the court why mediation is not appropriate in your client's case. You will need to prepare your client if mediation is required and/or if she wishes to pursue mediation. This is especially true in cases involving domestic violence and cases where a survivor has mental health concerns that could be exacerbated. See below for further discussion of how to prepare for negotiation.

Domestic violence exceptions to mandatory mediation came about for good reason. For years, advocates and lawyers have argued that the power dynamics inherent in relationships involving domestic violence make mediation ineffective and potentially dangerous for survivors. Abusers are likely to coerce and intimidate their former partners into accepting terms that they do not want and that are against their and their children's best interests. Attorneys should draw from their jurisdiction's rules and statutory provisions to illustrate the potential harm in the instant case. Despite the risks posed by mediation, some survivors, may choose this course to safeguard against the very real risks associated with trial. As an attorney, you must share the potential risks and benefits of each of these processes and discuss the implications for your client. Do not make assumptions based on generalizations about the litigation process. Rather think with your client about how the processes available are likely to play out in her life.

Mandatory Protection Order Negotiation

Some jurisdictions, such as the District of Columbia, require that parties to a civil protection order attempt to negotiate their case prior to moving to trial. There may be a "court negotiator" who talks to each of the parties and aims to strike a negotiated order to avoid the time and expense of the courtroom. Some may engage in a "shuttle negotiation," in which the court negotiator communicates with each party separately, while others may pull each of the parties into the same room and require that the survivor and abuser be present. Be familiar with the level of involvement required. In other words, some negotiations are a mere formality—a stepping stone before trial. Other jurisdictions require a genuine attempt to settle the matter and avoid the courtroom.

Other than the process concerns, attorneys for survivors should be cognizant of the impact that negotiated orders may have on their enforceability and on subsequent legal cases. Negotiated orders are not subject to an evidentiary proceeding and are, therefore, not subject to due process requirements. As such, the remedies are not supported by factual findings and cannot be used in future proceedings. For example, in jurisdictions that grant custody based on a finding of domestic violence, a negotiated protection order will not suffice as evidence of such abuse.

Testifying at Trial

While the outcome of a trial may be positive, the process may pose risks to the survivor that preclude it as a possibility altogether. This is particularly true for survivors who are experiencing trauma and other mental health challenges. Trials are inherently adversarial in nature. Indeed, the entire process is built upon each side's zealous case presentation. The trial process is likely to present challenges for your client. A range of strategies is discussed later in this section. However, it is worth noting that there are some jurisdictions and courts that allow for evidentiary exceptions that enable survivors to present testimony that

was obtained in advance of trial in lieu of trial testimony. For example, Ohio has enacted a provision that allows victims of sexual crimes, abuse, or neglect, or who have mental disabilities, to avoid the trauma of appearing in court by allowing them to be deposed out-of-court. These depositions may be introduced in court provided they meet the ordinary rules of evidence.

Consider the Risks and Benefits Depending Upon What the Survivor Wants and What She Knows About the Batterer and Herself

In cases where mediation/negotiation is not required, there are a number of factors to take into consideration to determine which route to take. For example:

- Is the survivor going to be at greater risk of harm from the abuser if you take this case to court?
- Is negotiating a settlement or is having a mediated resolution a safer course of action for the survivor and her child(ren)?
- Do the mediators have any expertise in domestic violence?
- Would a court proceeding be in the best interest of the child(ren)?

As you think about all these factors you want to also consider how a negotiation would impact the survivor's mental health concerns versus a court proceeding.

If you have noticed the symptoms of trauma, as discussed in Section Six (Selecting, Preparing and Challenging Experts) and you have discussed it with the survivor, her response should be a significant factor in your decision-making process.

For example, if she is aware of her symptoms but does not want her diagnosis disclosed, a trial could jeopardize her ability to keep that information from the opposing party.

If she is aware of her symptoms without any diagnosis, the opposing attorney may also capitalize on her symptoms to discredit her. He can use the symptoms that may come up – a deep, blank stare or an absent look, lack of coherent memory, flat demeanor and/or an overreaction to a comment, gesture, look, or smell – to discredit her. A judge or jury may be persuaded to think that the survivor is unstable, untruthful, or an unfit mother.

The risks to the survivor increase if she is unaware of her symptoms and has no diagnosis. It is possible that if you have noticed these symptoms, the opposing party has, as well. They may be planning to use them to portray the survivor as "crazy," and a trial could entail a psychological evaluation. This creates unpredictability for the survivor and for your case, depending on who is selected to conduct the evaluation, and how the evaluation is conducted. Oftentimes, symptoms of trauma and dissociation are not recognized as such

and survivors are misdiagnosed as having other, more stigmatized mental health conditions. While it may be easier to link the experience of abuse to diagnoses commonly associated with trauma (e.g., PTSD and other anxiety disorders, dissociative disorders, and depression) other mental health conditions can also be exacerbated by domestic violence and this should be made clear, as well.

If she is aware of her symptoms and is comfortable with disclosure, then you should prepare for how to address any mental health issues that may be raised at trial. You can have an expert normalize her symptoms as those of trauma and common coping mechanisms for the violence that she has suffered. In that case, what you can then focus on is preparing the survivor for trial and how to best manage what could happen so that you know how to help her to stay involved, engaged, and emotionally and physically safe.

Considering Negotiation

Negotiation may not be better for the survivor. Being in an intimate setting with the opposing party, the person who has abused her, may feel threatening and may be "triggering" for the survivor. It is something you will need to consider as you work with the survivor and contemplate whether to pursue negotiation or trial. The negotiation environment, or anticipation of it, could elicit trauma-related responses including dissociation, flashbacks, panic attacks, and/or depression. It could precipitate a mental health crisis or could exacerbate other mental health symptoms. Your client's response may appear to be an overreaction to a seemingly normal situation, but it is deeply rooted in the trauma caused by the abuse.

As you proceed, discuss the possible risks of negotiation carefully with the survivor. Once you have provided her with information about the negotiation process, partner with her to identify the risks and benefits. Explore the requirements of the jurisdiction you are in around mediation/negotiation and how they look and feel. Respectfully discuss with her the potential risks to her physically, to her case, and to her emotional and mental well-being. Strategize with her what is required and what may be waived, modified, or avoided. Figure out together what might be the best course of action given her situation. Come up with a plan with her as to how she might best proceed. Then, prepare your client for what you cannot control. Discuss with her what may arise during either process, the impact of mental health evidence on the case, the legal structure in your jurisdiction and whether there are exceptions to mediation/negotiation requirements. Examine the different types of negotiation and what may work best.

Preparing Your Client for Court

Once the survivor decides to pursue trial, you then need to prepare her for what to expect. When a survivor has mental health concerns, you may want to discuss the impact the court proceedings may have on her mental health.

Introduce the Court Process

Walk the survivor through each step of the court proceeding and help her to think about her possible reactions.

- If feasible, meet at the court where the case will be held. With each step, be sure to explain the things that could happen. There is a balance here of giving her enough information to help her know what to expect and giving her too much information, which could possibly overwhelm her.
- Let her guide you. Check in as you discuss each stage of the process and ask how certain things make her feel, whether she has concerns about the process, and whether there are strategies that you might employ to mitigate her concerns.
- Ask the survivor if she would like to have one or two supportive people at the court proceeding that can help, should she have a hard time with the process.

Attorney Tip

Some people who have experienced trauma need to know what to expect when proceeding with a totally new experience. It helps reduce anxiety and it builds trust. It is a very important step in preparing a survivor for court.

Discuss Strategies for Mental Health Symptoms in the Courtroom

If you haven't already, you should gently discuss with the survivor any symptoms that you have noticed during the course of your work together thus far. Make sure she understands that you are only sharing your observations to help the two of you strategize about the court proceedings – it is not due to a lack of confidence in her, or a lack of belief in her case. You are working with her to make sure the two of you are prepared for the court case. For example:

- If you notice that, when she recounts violent incidents that occurred, she has a flat tone and a deep, blank stare or an absent look, ask her about this. Often, this is a result of an overwhelmingly traumatic experience and the survivor has dissociated in order to cope with it. Her reporting of the experience will be from that safe distance and will lack the terror and physical pain.

- If she has noticed talk about how counsel for the opposing party may use this against her and say that she is lying, talk about how you might counter that claim.

If the survivor is aware of her affect, you can ask about it during the proceeding so that she may explain her lack of emotion to the court. If not, you may want to discuss using an expert to counter the opposing side's allegations (see Section Six: Determining Whether You Should Have an Expert Witness).

Develop Strategies to Address Your Client's Fears About the Court Process

In addition to the symptoms you have noticed, you also will want to discuss and plan for fears that the survivor may express about the court case. You should ask if the survivor has had panic attacks or if she feels intense fear when the opposing party is in the same room with her. Ask her if she has any strategies for dealing with those. If she has a clinician she sees, ask her to discuss with her therapist strategies to get her through the court proceeding and how you might be able to help.

Whether she has a mental professional helping her or not, suggestions you can offer include the following:

- Using your body to block the view to the opposing party as much as possible while she is in the courtroom, including while testifying. When you are not able to block his view she should look away from the other side, either focusing on you or a supportive person or advocate at the court.

- Asking the court for a recess when the survivor feels she needs one or when you notice some of the symptoms of trauma coming up (e.g., if she is dissociating and her responses to questions are slow and incomplete). This is usually a sign of a deeper level of dissociation usually brought on by intense fear or reliving of a particular attack or experience. Discuss whether she knows if this happens to her and how you can help.

- Once the court is adjourned, in a calm voice, ask her to take some deep breaths and ask her if she knows where she is and what day it is. This is useful for helping a survivor to ground herself in the present and bringing them out of the past. You may need to remind the survivor that she is in the courtroom, her abuser can't hurt her, the opposing attorney asked her a question intended to scare her, she got scared, she "went away," and nothing bad happened. A similar response can also help if the opposite reaction occurs and the survivor is triggered and she is crying uncontrollably or screams at the opposing party. A calm voice reminding the

survivor where she is and what just happened should help her to feel more calm and restore a sense of balance.

- ❖ Discuss this strategy with the survivor before trial. You may not be the best person to help her. Ask her if this would be helpful and if so who she would want to take her through this process. It may be better left to one of her support persons. If she asks you to conduct this exercise with her make sure you feel comfortable doing so. If you do not, it is important to let her know and tell her why. For example, if you are afraid you will not do it right and may cause her harm then it is important to tell her this. This kind of transparency builds trust. If she thinks you are the best person to do it or the only person she has, you may want to practice with her ahead of time.

You want to have extensive discussions with the survivor prior to the court proceedings to help both of you anticipate possible reactions. She is the expert on her own circumstances, so partnership is critical here. Ask her to guide you through any reaction she can think of that may happen.

Preparing your Client for Negotiations

Preparing a client for mediation or settlement negotiations follows a similar course. Walk her through the process step-by-step, so she knows what to expect. Carefully listen to any fears or concerns that she raises. Another important thing to know is that a lot of survivors will sound and talk about their experience as though it was not as bad as it was. This is again part of a coping strategy that helps the survivor deal with the high levels of fear she experienced. We don't always understand this as a coping mechanism. So listen to her concerns carefully. Do not disregard any of them because you do not hear or see a heightened concern on her part.

Discuss strategies for addressing those fears or concerns. For example:

- ♦ Shuttle Negotiation: If she wants to know if she has to be in the same room with the opposing party during the negotiation, see if shuttle negotiation is possible. The survivor may feel better being in another room with her advocate or a supportive friend or family. Arrange for this, if you can. If this is not possible, thoroughly discuss what she is afraid might happen and strategize with her about how you might help her.
- ♦ Breaks: Another strategy is to take breaks so she can get space away from the abusive partner.
- ♦ Support Person: Offer the survivor the opportunity to have her advocate or a support person present with her during negotiation.

- Attorneys Only: If your client wishes, see how much you can negotiate with the opposing attorney without the abuser and your client present.

The contextual, individualized strategizing described above takes time and patience. Listen carefully and respond to all of your client's concerns. This will help you to help her in the best way you can. Strategies that make her more comfortable and that mitigate the impact of the legal process on her mental health ensure more effective legal representation and better case outcomes.

Section Six: Determining Whether You Should Have an Expert Witness

In the course of representing a client who has survived domestic violence, child abuse, or other violent crimes, he or she may have trauma-related concerns requiring a specific and thoughtful strategy in court. This section will provide a number of strategies for thinking about the use of an expert. As with all stages of the litigation process, carefully consider whether these strategies fit the needs and desired outcomes expressed by your client, the culture of the court, and the laws of the jurisdiction.

Respect Your Client's Coping Skills

Your client is using valuable coping skills in response to trauma and you should respect them as such. *Do not ever try to force your client to feel or "face" what happened to her or connect the thoughts and feelings, even though you believe that this integrity of memory and emotion may help the legal proceeding—that it will make her seem more believable or that it will make it easier for her to assist you.* This form of coping with trauma is instinctive. It is the mind's way of protecting your client from fully knowing or feeling something that may overwhelm her consciousness. If you push her, you may end up with a client who is in crisis, with a diminished capacity to participate in her case or assist you.

Outward Signs of Trauma

Signs of trauma that you may notice personally are:

- Dissociating during conversations;
- Having a dazed look or a flat demeanor when describing violent events;
- Overreacting to seemingly benign situations or events;
- Startling easily and in a manner that doesn't seem to fit the situation; and/or
- Having an unusually poor memory for certain topics.

Your client may mention to you other signs of trauma, such as difficulty concentrating, difficulty sleeping, nightmares, and having disruptive flashbacks of a painful event sometimes accompanied by a dazed look or inattentiveness. Your client might mention signs of depression such as having trouble getting up in the morning, an inability to stop crying, a lack of energy, a feeling of hopelessness, feeling sad most of the time, or having thoughts of suicide.

Strategize to Optimize Her Coping Behaviors

Instead, proceed cautiously. If you have not yet discussed the signs you have observed with your client, do so at this point. If your client is aware of these symptoms as trauma-related, it will be a straightforward conversation. If your client is not aware of how she has been affected by her traumatic experiences, do not try to push her to see this. Restrict your discussion to a strategic analysis of what you see and how her demeanor may influence court proceedings. She may have heard similar observations about herself before. In either case, discuss what you have noticed in a gentle, nonjudgmental, and matter-of-fact manner.

For example, you may gently point out that you noticed that her demeanor changed during discussions about a particular incident, describing the violent situation in a flat tone, almost as if she was talking about someone else, and developing a deep, blank stare. You can ask her if she has noticed this, as well. It is very possible that she has not given it a second thought. You can tell her you are aware that this is a common coping mechanism, and that it has probably kept her safe and calm in times of crisis. Discuss also how others may misinterpret these signs of trauma, or that the opposing party's attorney may mischaracterize her coping skills as a problem in her ability to function.

Discuss the options she has in court for addressing this. As stated in Section Two, if the opposing party is not already aware of your client's way of coping with trauma, weigh the pros and cons of disclosure. Again, proceed in a respectful manner, valuing the coping mechanism as opposed to seeing it as a problem. This will help your client to see it this way as well, which will reflect positively in her testimony. Work diligently to avoid feeding into the stigma and shame associated with many mental health concerns.

At the same time, it will be important to account for the court's negative perception of individuals facing mental health challenges. Whether or not your client identifies as someone who is living with trauma-related or other mental health effects of abuse, it can be an issue that is raised by the opposing party for the purpose of gaining advantage in a case. Disclosing that your client has mental health concerns related to the trauma she has endured may leave the judge feeling that she is incapable of caring for her child(ren). It may also have an impact on your client's ability to get or keep a job - another factor that can be used against her. You have to plan for this to come up. Make your respect for your client and her resilience clear, while at the same time acknowledging and strategizing to address the realities presented by courts and other third parties.

The strategy that you and your client develop may include bringing in an expert who is familiar with the dynamics of domestic violence in general and trauma in particular. This expert may help explain that the signs the two of you have discussed is normal for someone

who has experienced trauma. Make sure your client has a chance to think about this strategy, ask questions, and discuss it with a friend, advocate, or other support person before deciding. This ensures that she is indeed in agreement and is not just accommodating your recommendation.

Finding the Best Expert Witness

If she decides that use of an expert is a good strategy to help normalize her behavior to the court, look for a trauma expert that is familiar with the dynamics of domestic violence, specifically the power and control aspects. There are many theories explaining domestic violence: the theory of power, control, and violence as being an entitlement of gender; the cycle of violence theory; psychological theories that hold that abusers suffer from low self-esteem, rage disorders, or simply lack good communication skills. Explore the working theory of any expert you consider and make sure it reflects your theory that domestic violence is a product of power and control and gender privilege. You don't want them contradicting your theory or your case. They need to understand that their role as expert is to normalize the symptoms of and responses to trauma, and help the court understand that these symptoms do not impair your client's ability to function or care for her child. Naturally, the expert must be careful not to pathologize your client's responses.

Can Testify to the Signs of Trauma

At a minimum, your expert should be able to testify to how your client's flat affect and dazed look indicates that your client dissociated when she was attacked, if applicable. The expert could explain how the terror must have been so high that your client instinctively put the attack into her subconscious and that is why her memory is not complete. The expert may be able to infer how terrifying the situation was to your client, given the signs of trauma that she displays when asked about these incidents.

Other expert characteristics to look for include the following:

(1) Can Testify Regarding Triggering. Ideally, the expert will also be able to show how an abusive party can "trigger" your client by his mere presence. The expert may be able to describe how the abusive party knows exactly how and what to say to cause your client to react in a manner that appears "crazy." An expert can explain how a look on the other party's face—or a gesture or smell—can cause your client to re-experience a traumatic incident through a flashback and thereby appear unreasonable, irrational, and even hysterical, when in fact she is actually a calm, creative, intelligent person who has been traumatized.

(2) Can Explain Coercive Control. It is ideal to introduce the opinions of an expert that can see through what appear to be benign comments or actions that are intended to manipulate the expert or intimidate and trigger your client. This type of expert is difficult to find. You are more likely to find someone who is familiar with trauma and other mental health concerns that can explain and normalize your client's actions, demeanor, and behavior. Carefully interview experts on their view of trauma and dissociation, but also on the dynamics of domestic violence. You do not want an expert that is unable to discern tactics of power and control; someone who minimizes interpersonal violence, coercion, and intimidation; or someone who believes that the actions of an abusive party are caused by both parties ("She made him do it." "She pushes his buttons." "It's not really so bad." "She started it."). In all likelihood, content of this nature will frame the opposing party's position. Rather, your expert should be able to articulate and reinforce your assertion that coercive control is a pattern of tactics designed to intimidate, terrorize, and maintain control over another, and that individuals who engage in coercive control should be held accountable for their abusive and violent behavior.

(3) Understands that Dissociation Arises from Traumatic Experiences. The expert's view of trauma and dissociation is important, as well. An expert who only sees trauma as Post Traumatic Stress Disorder (PTSD) may not understand the complexity of the client's dissociation. Dissociation is one component of Trauma or DESNOS (Disorders of Extreme Stress Not Otherwise Specified) as well as a central component of the Dissociative Disorders spectrum. Sometimes, a clinician may diagnose a survivor as having PTSD with multiple co-morbidities including anxiety disorders, phobias, Bipolar Disorder, Borderline Personality Disorder, or Schizophrenia to explain the symptoms that could be part of a dissociative disorder. You will want an expert that knows both trauma-related conditions and dissociative disorders and who also understands the power and control tactics of domestic violence.

Finding a Qualified Expert

In searching for a qualified expert, contact a local non-profit advocacy program that works with victims who have experienced trauma, such as a rape crisis center or a child abuse program. They tend to have a mental health approach to their programs and refer survivors for healing from the victimization that they have experienced. Local domestic violence programs and state domestic violence coalitions may have trauma experts that they can refer you to. Contacting your state's sexual assault coalition and/or state children's advocacy chapters may also be an option. You may also contact a national

resource center or referral program; there are a number of these that address trauma and dissociation.[27]

Make sure your selection process includes a meeting between any potential expert witness and your client. Your expert should treat your client with respect – modeling the attitude you want the court to take – and also recognize the importance of gaining her trust. Speak to your client privately after the meeting to determine if she is comfortable using this expert. You will have to be careful here to not influence her decision. If this is the only expert available, your discussion with her should center on what her concerns are about the expert and whether they are so strong that she would rather proceed without one. It may be that she does not like the expert's manner but is still willing to proceed. Make sure that you fully discuss the pros and cons of this decision and let her think about it before deciding.

After the meeting, interview the expert again. Ask her how she views your client. Questions might include:

- What symptoms did you notice?
- What do you believe is the client's mental health concern?
- How do these symptoms arise?
- Is this normal given the situation that the client was in?
- Does her mental health concern affect her ability to parent? If so, how?
- What resilience factors did the expert identify? What protective factors?
- What does the expert believe to be the best result in this case?
- Does she consider domestic violence (including coercion and intimidation) to be influencing your client's behavior?
- Is her response to domestic violence normal?

This discussion will let you know whether this is the expert you want to use in your client's case. If she sees trauma and dissociation as an explanation for behavior others would see as odd, and views domestic violence as a series of tactics to gain and retain power and control over your client, then you likely have an expert with whom you can work.

[27] The National Center on Domestic Violence, Trauma & Mental Health provides technical assistance on the intersection of trauma and domestic violence. Go to www.nationalcenterdvtraumamh.org. You can look for trauma experts through various web sites. The International Society for the Study of Trauma and Dissociation (ISSTD) has a directory of clinicians who practice in trauma and dissociation. See www.isst-d.org; Sidran Institute also maintains a list of clinicians, see www.sidran.org. See also the International Society for Traumatic Stress Studies (ISTSS) at www.istss.org.

Preparing the Expert Witness

The expert should meet with your client and her child(ren) in order to determine your client's ability to function and parent her child(ren), despite the trauma she endured. The central issue here is the well-being of the child(ren). If your client can parent well with some limitations, the expert should show the court how resilient and resourceful the client is and how she is showing her child(ren) how much she loves them. The expert should not enter into an analysis of her diagnosis outside of its relevance to her role as a parent.

Challenging the Opposing Party's Experts

You can use the same strategies in finding an expert to challenge the opposing side's witness. Is the witness an expert on trauma and dissociation? Does the expert know the meaning of a flat affect or dazed look? Is she only familiar with Post Traumatic Stress Disorder? This is only one of a number of issues that can develop when a person has been traumatized. Is your expert familiar with the concept of complex developmental trauma? Does the expert conduct clinical work? What kind of clients does the expert normally work with? If she does not routinely work with individuals experiencing trauma and dissociation, then hers may be a superficial analysis. A person who routinely works with clients experiencing trauma and dissociation is in the best position to normalize the behavior. Anyone else is likely to psychopathologize the behavior and conclude that the individual is limited. Does the expert understand both complex trauma and dissociation? Is he or she able to put trauma-related symptoms in context and recognize them as adaptations and as coping mechanisms to survive overwhelming trauma and to help the judge/jury make sense of the survivor's responses in the face of ongoing abuse? However, it is important to *not* raise this if your own witness does not meet this standard. If you do, you will impeach your own witness.

You may also challenge the expert's knowledge of interpersonal violence, and, in particular, the tools of power and control that abusers use. Be cautious here, though, if your expert is not familiar with these issues.

Section Seven: Cross-Examining the Opposing Party

In many custody and protection order cases, the opposing party will attempt to bolster his or her case and refute allegations of abuse by claiming that the survivor has mental health problems and therefore:

(a) She cannot be believed;
(b) She becomes out of control and violent and needs to be restrained; and/or
(c) She is an incompetent parent.

One way that the opposing party will try to demonstrate this is through his direct testimony. Below are some examples of testimony that an abuser may proffer:

- The opposing party may claim that he has observed the survivor behaving in bizarre, unusual, or unsafe ways due to mental illness.

- The opposing party may argue that, because the survivor has been diagnosed with a particular mental health disorder, she suffers from delusions that distort her perceptions and, therefore, her claims and testimony lack credibility.

- If there is evidence of an incident in which the opposing party used force or threatened the use of force against the survivor (e.g., police reports documenting an incident of abuse or the survivor's and/or another witness's direct testimony), the opposing party may claim that he only touched her to "restrain" her because she was "out of control" (leading him to believe that she would imminently assault him), she made direct threats to harm him, or to defend himself because she used force against him. While many judges understand the concept of the primary or predominant aggressor, they may be more likely to believe that the survivor acted in a violent manner when the mental health of the survivor has been raised as an issue. Given the stigma that is associated with mental health and the myth that individuals with mental illness are more likely to be violent, this can be a convincing argument to some judges.

- The opposing party may offer information about the kinds of medications that the survivor has been prescribed or has taken.

- He may claim that your client has engaged in self-harm due to her mental health symptoms.

- The opposing party may offer details of treatment that the survivor has received, including hospitalizations, and information about communications with her mental health provider(s).

- The opposing party may claim that your client is not capable of fulfilling her parental responsibilities due to mental health symptoms.

- Apart from the affirmative opportunity to tell her own story during direct examination, you can use cross-examination to discredit the opposing party's testimony. You can also use cross-examination to support aspects of your client's case.

Cross-Examination Points to Remember

- The scope is limited to areas about which the witness testified during direct-examination and, therefore, must be relevant. The judge has the discretion to determine the subject matter boundaries.
- If the questions you wish to ask are outside of the subject matter about which the witness testified during direct examination, you can recall the witness during presentation of your client's case-in-chief and question him as a hostile witness.
- Look for answers that will support closing argument statements.
- Craft your questions so that they are narrow and leading.
- Try to limit your questions to those that require a yes or no answer and avoid open-ended responses.
- Never ask a question that you don't know the answer to already.

Listed below are some areas to consider focusing upon during cross-examination. Depending on the facts of the case, the strategy you have developed with your client, and the direct testimony of the opposing party, you may not need to cover all of the following.

(1) The opposing party's abuse of your client.

(a) He was the predominant aggressor.

For example, if the opposing party has claimed that he used force against your client only to restrain her because she was threatening him, using violence, or was out of control, you can ask questions designed to demonstrate that he was the predominant aggressor such as circumstances that triggered his violence, his mood, and her injuries versus his.

Example:

She wasn't listening to you, right?
Her comments were disrespectful?
They made you angry?

(b) His lack of fear of your client.

If he claims that he had to use force against your client because he was afraid of her violence or threats, you can ask him to verify his height and weight and your client's, you can ask questions that demonstrate that he was not afraid and did not take action to keep himself safe.

Example:

You care about your health, right?
You work out at the gym?
You encourage your wife to exercise, too?
But she rarely does?
You are a big guy?
You are 6 feet tall, correct?
You weight about 200 pounds?
Your wife is about 5 feet, four inches tall?
She weighs about 130 pounds?

(c) Prior acts of abuse.

The opposing party may have provided direct testimony that he is not a domestic abuser and that your client has perpetrated violence. He may, for example, testify that he had to restrain her because she was "out of control" due to her mental health challenges and that her claims of his abuse against her are false. If you have collateral evidence of prior abuse against your client or another individual, you can

impeach him by asking him about past abusive behavior[28] including civil protection orders entered against the opposing party, criminal orders, or arrests or convictions for crimes of domestic violence. If the opposing party denies any of these, you can show the opposing party documentation of the prior act(s) and ask that it be entered into evidence.

Example:

When you met my client, you were dating another woman, correct?
Ms. Palmer?
You shared an apartment?
That relationship ended in 2000?
She ended it, didn't she?
She ended it because you had been physically abusive to her, right?
Regardless of it how ended, you did engage in acts of abuse against her, right?
Isn't it true that Ms Palmer obtained a Civil Protection Order against you?

If he answers no, proceed with the following impeachment:

I would like to show the witness a document marked Exhibit A for impeachment purposes. Your Honor, may I have permission to approach the witness?
Do you recognize this document?
This is a Civil Protection Order entered by this court in the year 2000, correct?
If you look at the top of the document that says Petitioner, it lists Lisa Palmer, correct?
You understand that Petitioner means the person seeking the Civil Protection Order, right?
Under Respondent, it has your name, right?
And Respondent is the person against whom protection is sought?
Isn't it true that on June 1, 2000, the Superior Court of XY entered an Order of Protection against you?

[28] In a custody case or protection order case, you may be able to enter evidence of prior acts of abuse, in your case-in-chief, as well, because many State custody statutes direct the court to consider domestic violence when conducting a best interest analysis, and evidence of past acts of abuse is often allowable in a protection order proceeding.

(2) The opposing party's manipulation of your client's mental health and exacerbation of mental health symptoms.

(a) Infliction of psychological abuse on your client.

If the opposing party testified that your client demonstrates symptoms of depression or other mental health conditions, you can ask questions designed to demonstrate that he has inflicted psychological abuse upon your client. For example, you can ask about attempts to shame, embarrass, or induce guilt in your client.

Example:

You were home on Sunday morning?
Your wife was in the kitchen, right?
She was making breakfast?
You smelled something burning?
You saw smoke coming from the frying pan?
Your wife had burnt the pancakes, right?
She wasn't paying attention?
She messes things up in the kitchen?
She doesn't know how to cook?
You told her that, right?
She doesn't know how to take care of her family?
You told her that, right?
She's a slow learner?

(b) Actions that were designed to trigger trauma and exacerbate mental health symptoms.

If the opposing party has testified about behaviors that he attributes to your client's mental health condition or diagnosis, you can ask questions that point to his manipulation of her mental health. For example, you can ask questions about how he has deprived your client of sleep, food or other basic necessities, prescription medications, or access to other treatment.

Example:

Your wife takes medications, right?
For her psychiatric condition?
You think she doesn't need the medications?
You try to help her?
You keep them in a safe place?

So that she's not tempted to take them?
She is supposed to see her psychiatrist once a month, right?
She needs you to drive her there?
Because you have the only car?
She has no other way to get there?
You took her there last year?
Two times?
She couldn't get her prescriptions refilled?
Because she needed to see her psychiatrist for that, right?

Additionally, you can ask questions designed to point to the opposing party's use of coercion, force, or other pressure on your client to use alcohol, illegal drugs, or prescription drugs that were not prescribed to her.

(c) Apparent self-harm by your client was actually perpetrated by the opposing party.
If the opposing party claims that any overdoses that your client experienced were the result of a suicide attempt, you can ask questions designed to point to the fact that your client suffered the overdose due to his use of force, coercion, duress, or fraud that compelled your client to take the drugs.

Example:

Your wife needed to get help?
She went to a psychiatrist?
The psychiatrist gave her pills?
You wanted her to feel better?
You encouraged her to take the pills?
You were standing there while she took the pills?
You got the water for her?
She took 20 of these pills?
While you were standing there?

(d) The opposing party's abuse led to or exacerbated your client's mental health symptoms.
You can ask questions designed to highlight the fact that your client did not suffer from trauma or other mental health challenges before she met and became involved with the opposing party. This goes to the fact that she developed symptoms of depression, anxiety, and/or trauma after beginning a relationship with the opposing party, and that they were natural reactions to and results of his abuse.

Example:

When you met your wife, you fell in love?
She was beautiful?
She was kind?
She was happy?
But, she has changed, hasn't she?
The changes started a couple of years ago?
She couldn't get out of bed some mornings?
She didn't go out as much?

(e) The opposing party attempted to manipulate mental health providers and your client by interfering with treatment or fabricating information designed to trigger her hospitalization.

The opposing party may have offered testimony in which he painted himself as a compassionate partner and who was concerned about the mental health of your client. You can ask questions designed to point to the opposing party's attempts to manipulate mental health providers and further his control over your client by providing false information to them.

Example:

You told the police that your wife had gone crazy, right?
That she had smashed the mirror?
That she had torn up the place?
Because she had mental health problems?
You were afraid that she was going to hurt you or the kids?
She had come after you?
You had to restrain her?
That's how she got those red marks?
You recommended that the police bring your wife to the hospital, right?
You knew they would keep her at the hospital for 36 hours, isn't that right?
Last time, the hospital held your wife for 36 hours?

(3) Your client's strength and resilience.

(a) Your client has excellent parenting skills that are not affected by any mental health challenge.

You can ask questions designed to refute any claims that the opposing party has made about your client's ability to parent the child(ren) because of her mental

health symptoms and his argument that she is not the primary caretaker. For example, you can ask leading questions that demonstrate and bolster your client's direct examination testimony that your client fulfills the majority of the parenting roles and takes care of the children/ren's physical needs (e.g., preparing meals, getting them ready for school, dropping off or picking them up at school or daycare, caring for them when they are ill, taking them to the doctor, overseeing their bedtime routine, reading to them or helping them with homework, taking them on outings, purchasing their clothing and school supplies, etc.), social-emotional needs (e.g., comforting, being affectionate, talking with the child(ren) about their day and about things that happened, discussing social expectations, etc.), and mental growth/schooling needs (e.g., answering questions about how the world works, providing help with homework, involvement with their school activities and attending parent-teacher meetings, etc.). You can ask questions designed to illustrate that your client has fulfilled these roles at times that the opposing party says that she was exhibiting mental health symptoms.

Example:

Your wife gets the kids up in the morning, right?
She makes them breakfast?
And helps them get dressed?
And makes their lunches for school?
She makes sure they brush their hair and their teeth?
She walks them to the bus stop and waits with them every morning, right?
In the afternoon she meets them at the bus stop?
And walks them home?
She helps them with their homework while she makes dinner, doesn't she?
She helps them get ready for bed and reads to them?
Etc.

(b) Your client has shown strength by seeking mental health support when necessary.
If the opposing party has testified that your client's mental health challenges prevent her from being a good parent to the child(ren), you can ask questions designed to illustrate that your client's help-seeking behavior is a strength. For example, you can ask leading questions about when your client first sought assistance from a domestic violence advocate or mental health provider.

Example:

Your wife was feeling tired?

She had trouble sleeping at night?
And she didn't know what was wrong?
She asked you to take her to the doctor?
And her doctor gave her a prescription, right?
She got the prescription filled at the pharmacy, didn't she?
She also went to see a social worker?
The social worker had been recommended by her doctor?
You didn't want her to go?
But she went anyway?

(c) Your client has anticipated times when her mental health symptoms may be exacerbated and has taken steps to ensure that her children will be cared for.

If your client has symptoms of or a diagnosis of a serious mental illness for which symptoms can recur, you can ask questions designed to draw out information about how your client has taken steps to ensure that the children are taken care of and have their needs met in the event that she becomes temporarily unavailable.

Example:

Your wife told you that if she needed to go to the hospital again, that she wanted her mother to take care of the kids, right?
She wanted to make sure that the kids would be cared for during that time?
She wanted you to take them to her mother's house?
Her mother agreed to this?
Her mother would take them to school?
And help them with their schoolwork?
And give them anything they needed?

Section Eight: Closing Argument

The closing argument is a summation of your case theory and the evidence that you have presented. Do not opt out of a closing argument, even if you think that the judge has all of the information that he or she needs to make a decision. The closing is the only opportunity you have to present your entire case theory along with the supporting evidence. In a custody case that involves allegations regarding your client's mental health, it is your final chance to articulate your legal argument regarding best interests of the child, to highlight your client's strengths, resilience, and parenting skills, and to remind the court that the opposing party has abused your client to the point of causing or exacerbating mental health symptoms. In a protection order case, you can use your closing argument to review the standard of proof, the elements of the protection order statute, and the testimony and other evidence that meet the criteria and demonstrate the need for the relief your client seeks.

Below are suggestions for closing arguments that specifically relate to cases in which the opposing party has raised the mental health of your client as a reason why her allegations of domestic violence should not be believed and/or why she the court should not award custody of the child(ren) to her. When crafting your argument, consider the culture of the court, the facts of the case, the laws of your jurisdiction, and the needs and desired outcomes expressed by your client.

Focus on Your Client's Strengths

When seeking custody, emphasize your client's fitness and competence as a parent – reiterate her skills as primary caretaker. Highlight her resilience. Depending on the type of mental health evidence that the opposing party introduced (through testimony, experts, or mental health records), review your client's protective parenting strategies and the strengths that your client and others presented in their testimony related to any mental health challenges. This includes her help-seeking behaviors and caring for her children even while experiencing symptoms. If relevant, review the ways that she has planned for mental health contingencies, such as through the preparation of advance directives.

Review the Legal Standard Governing Custody Cases Involving Domestic Violence

If your state has a presumption against an award of custody to a parent who has committed intimate partner abuse, articulate the presumption provision and highlight

the evidence of abuse in the case before the court. If your state requires that the court consider domestic violence in its best interest determination, highlight the statutory language for the court and illustrate the impact of the batterer's conduct on the child and the protective parent.

Remind the Court that the Opposing Party Caused Your Client's Mental Health Challenges

If the opposing party has introduced evidence about your client's mental health in an effort to discredit her testimony or impugn her parenting abilities, highlight the expert testimony or other evidence that shows that your client's trauma and/or other mental health challenges were created or exacerbated by the opposing party's abuse. Argue that the opposing party should not gain advantage in the case due to the trauma that he caused your client. If your state has a statutory provision that prohibits the effects of domestic violence from being used against a party in a custody case, reiterate the requirements of the code section. Refer to any social science research that you introduced during the course of the case demonstrating that the mental health of survivors improves when the abuse ceases.

Demonstrate How Your Expert's Opinions Support a Custody Award to Your Client

Review your expert's testimony regarding your client's strengths, resilience, and protective factors, and any other evidence that normalizes your client's mental health response to living with an abuser. If the opposing party introduced evidence of your client's mental health diagnosis, refer to expert testimony clarifying that this does not negate her ability to function as a stable, competent, and loving parent. Review your expert's testimony about the spectrum of mental health challenges and your client's ability to manage any symptoms she may experience in the future. Refer to testimony that explains your client's behavior in court or any behavior that the opposing party claims is indicative of instability.

Highlight Prior Acts of Abuse

While the focus of closing should not be entirely on the opposing party, you should highlight prior acts of abuse that you introduced, including the batterer's use of power and control, rulemaking, and the ways that he has manipulated your client's mental health.

Point Out False Statements

If the opposing party presented false or misleading testimony related to your client's mental health, the abuse, or any other factor, summarize the evidence that refuted it, including testimony that the opposing party gave during cross-examination as well as that which your client offered on rebuttal.

Discredit the Custody Evaluator's Findings

If the opposing party used an expert and/or if there was a custody evaluator, point out the lack of training or expertise in domestic violence and trauma (and their intersection), and/or bias. Demonstrate gaps in the evaluator's investigation or assessment, or other problems with the evaluation process (including improper use of psychological testing and misinterpretation of statements or behaviors). If the custody evaluator has relied upon Parental Alienation Syndrome or any other questionable theory, clarify that the evaluation findings (if the recommendation is for an award of custody to the opposing party) rest upon discredited or disproven theories.

Additional Resources

Materials

Deborah Bray Haddock, MEd, MA, LP, The Dissociative Identity Disorder Sourcebook (McGraw-Hill 2001).

Edward W. Gondolf, Assessing Woman Battering in Mental Health Services (Sage Publications 1997).
http://www.sagepub.com/books/Book6702

Frank W. Putnam, Dissociation in Children and Adolescents: A Developmental Perspective (Guilford Press 1997).

From Child Sexual Abuse to Adult Sexual Risk: Trauma, Revictimization, and Intervention (Linda J. Koenig, Lynda S. Doll, Ann O'Leary and Willo Pequegnat, eds., American Psychological Association 2004).

Jill Davies, Advocacy Beyond Leaving: Helping Battered Women in Contact with Current or Former Partners (Family Violence Prevention Fund 2009).
http://www.vawnet.org/summary.php?doc_id=2674&find_type=web_sum_GC

Jill Davies, An Approach to Legal Advocacy with Individual Battered Women (Greater Hartford Legal Assistance 2003).
http://www.csaj.org/documents/384.pdf

Jill Davies, Eleanor Lyon, and Diane Monti-Catania, Safety Planning with Battered Women: Complex Lives/Difficult Choices (Sage Publications 1998).

Jill Davies, Helping Sexual Assault Survivors with Multiple Victimizations and Needs, A Guide for Agencies Serving Sexual Assault Survivors (July 2007).
http://www.nsvrc.org/publications/guides/helping-sexual-assault-survivors-multiple-victimizations-and-needs-guide-agencie

Jill Davies, Safety Planning With Battered Women (Greater Hartford Legal Assistance 1997).
http://new.vawnet.org/Assoc_Files_VAWnet/BCS_SafePlan.pdf

The Journal of Trauma and Dissociation
http://www.isst-d.org/jtd/journal-trauma-dissociation-index.htm

Judith Herman, MD, Trauma and Recovery: The Aftermath of Violence – From Domestic Abuse to Political Terror (Basic Books 1997).

Lisa A. Goodman and Deborah Epstein, Listening to Battered Women: A Survivor-Centered Approach to Advocacy, Mental Health and Justice (American Psychological Association 2008).

Marlene E. Hunter, MD, Understanding Dissociative Disorders: A Guide for Family Physicians and Health Care Professionals (Crown House Publishing 2004).

Olga R. Trujillo, JD, The Sum of My Parts: A Survivor's Story of Dissociative Identity Disorder (New Harbinger Publications 2011).

Organizations and Web Sites

Center for Survivor Agency and Justice
www.csaj.org

The International Society for the Study of Trauma and Dissociation
www.isst-d.org

Judge David L. Bazelon Center for Mental Health Law
www.bazelon.org

National Center on Domestic Violence, Trauma & Mental Health
www.nationalcenterdvtraumamh.org

Sidran Institute
www.sidran.org

The Significant Other's Guide to Dissociative Identity Disorder
http://www.op.net/~jeffv/so1.htm

UPenn Collaborative on Community Integration
www.med.upenn.edu/psych/RRTC.html

When a Parent Has a Mental Illness: Child Custody Issues (Mental Health America)
http://www.nmha.org/go/information/get-info/strengthening-families/when-a-parent-has-a-mental-illness-child-custody-issues

2016 FAMILY LAW SEMINAR

Living the Dream: What You Need to Know about the Rule 39.18 Death or Disability Plan

4:15 p.m.- 5:00 p.m.

Presented by

Joseph Feller
Koopman, Kennedy & Feller
P.O. Box 37
Sibley, IA 51249
Phone: 712-754-4654

FRIDAY, OCTOBER 28

"Living the Dream" and Other Comments Regarding Rule 39.18 Requirement for Death or Disability Plan

Presented by:

Joe Feller

Past President

Iowa State Bar Association

Chair

Rule 39.18 Study Committee

Koopman Kennedy & Feller

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Sibley, Iowa 51249

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I. INTRODUCTION

A. "Living the Dream"

B. Overview of Rule 39.18

C. ISBA Response to New Rule

1. Effective date delayed to 1-1-17 initially, now 1-1-18

2. Work with Iowa Academy of Trust & Estate Counsel

a. Prepare Updated Documents

3. Appoint our Study Committee

4. Study Committee Report

II. BACKGROUND FOR RULE FROM OPR

A. Diligence Rule Iowa Ct. Rs. 32:1.3

B. Trustee Appointments and Cost

1. Growing numbers of sole practitioners both at start and end of careers

C. Handbook for Succession Planning with Forms

D. Seven Year Marketing Plan

E. Trust Accounts

F. Disposition of Clients Files

G. Original Wills and Abstracts

III. REPORT OF RULE 39.18 STUDY COMMITTEE

IV. IOWA SUPREME COURT RESPONSE TO COMMITTEE REPORT

V. WHAT TO DO NOW

A. Get your office in Order

1. Adopt a file retention and storage policy

2. Modify your engagement letters to reference your file retention and storage policy and tell your clients you have attorney backup in case of death or disability

3. Manage your files and clients lists

4. Organize all user names and passwords for your electronic accounts

5. Prepare your New Law Practice Succession Plan Agreement and find your Designated Attorneys

6. Prepare your New Durable Limited Power of Attorney for management of law practice upon incapacity or inability to practice law for any reason

7. Change your Last Will and Testaments to include language dealing with the closure and sale of your practice

VI. CONCLUSION AND QUESTIONS

APPENDIX

1. Rule 39.18 Requirement for Death on Disability Plan
2. Background material from Office of Professional Regulation
3. Report of 39.18 Study Committee
4. Order Filed August 26, 2016

APPENDIX 1

Rule 39.18 Requirement for death or disability plan.

39.18(1) Each sole practitioner must have a written plan that designates a primary and an alternate active Iowa attorney in good standing to review client files, notify each client of the attorney's death or disability, and determine whether there is a need for other immediate action to protect the interests of clients. The primary and alternate attorneys must consent in writing to their designation in the plan.

39.18(2) The plan must authorize the designated attorneys to prepare final trust accountings for clients, make trust account disbursements, properly dispose of inactive files, and arrange for storage of files and trust account records. The plan must identify the location of electronic files and records, authorize the designated attorneys to access electronic files and records as necessary to perform duties as a designated attorney, and provide the designated attorneys access to passwords and other security protocols required to access those electronic files and records.

39.18(3) The plan may authorize the designated attorneys to collect fees, pay firm expenses and client costs, compensate staff, terminate leases, liquidate or sell the practice, or perform other law firm administration tasks.

39.18(4) The plan must include language sufficient to make the designated attorneys' powers durable in the event of the sole practitioner's disability. *See* Iowa Code § 633B.1; Iowa R. Prof'l Conduct 32:1.3 cmt. [5].

39.18(5) The plan must be made available for review upon request by the director of the office of professional regulation or by any representative of the client security commission

.

39.18(6) The plan must be reviewed and updated annually.

39.18(7) A designated attorney must not examine any documents or acquire any information containing real or potential conflicts with the designated attorney's clients. Should any such information be acquired inadvertently, the designated attorney must, as to such matters, protect the privacy interests of the planning attorney's clients by prompt recusal or refusal of employment.

39.18(8) For purposes of this rule, a sole practitioner includes an attorney practicing alone, an attorney practicing only with other attorneys who do not own equity in the practice, an attorney practicing in an association of sole practitioners, or any other structure in which no other attorney owns equity in the practice.

[Court Order November 20, 2015, effective January 1, 2016; November 24, 2015, effective March 1, 2016;

January 15, 2016, effective January 1, 2017]

APPENDIX 2

BACKGROUND MATERIAL REGARDING RULE 39.18 FROM PAUL WIECK II, DIRECTOR, OFFICE OF PROFESSIONAL REGULATION

Joe Feller asked that I share with the committee in written form the comments I offered during the initial telephone conference call. I want to accomplish that mission with this message. Here is recap of my comments during the teleconference, with a few additions I hope will be helpful.

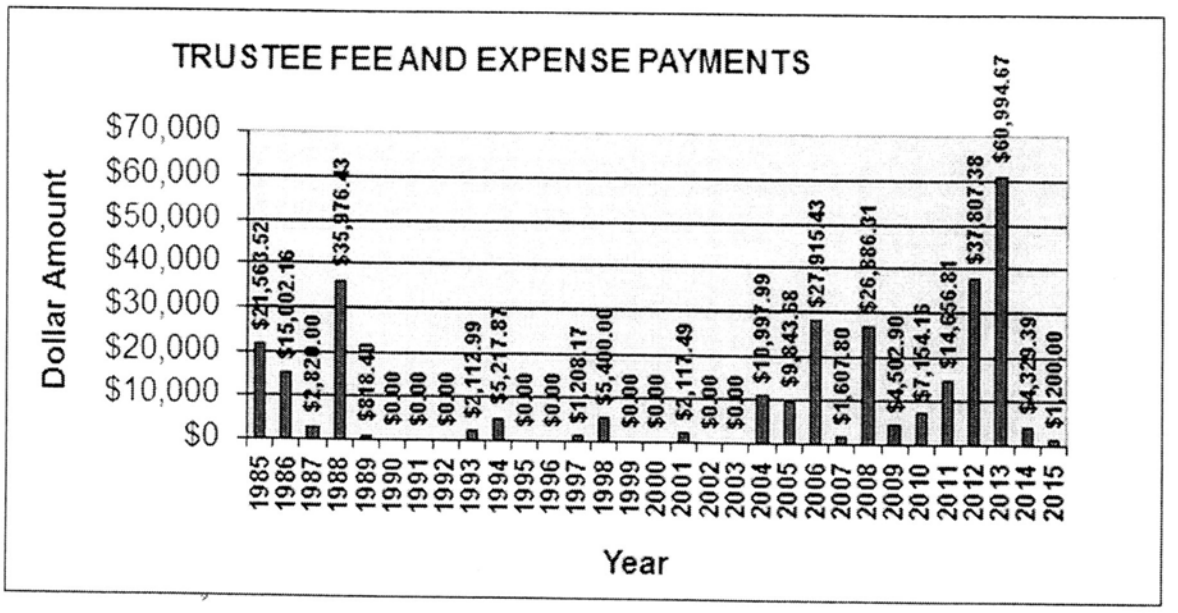
I am excited to see the bar association taking such a decisive role in the law firm succession arena, and am honored and pleased to be a member of the committee. At OPR, our involvement in the succession planning arena began in 2005. Until 2005, no Iowa rule specifically required that lawyers prepare their practices for maintenance, closure, or sale incident to their disability or death. The Iowa Rules of Professional Conduct, adopted in 2005, addressed the requirement for sole practitioners in a comment to the diligence rule:

To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. *See* Iowa Ct. Rs. 35.16(6), 35.17 (where reasonable necessity exists, the local chief judge shall appoint a lawyer to serve as trustee to inventory files, sequester client funds, and take any other appropriate action to protect the interests of the clients and other affected persons of a deceased, suspended, or disabled lawyer).

Iowa R. of Prof'l Conduct 32:1.3, cmt. 5.

Coincidentally, in 2005 or 2006 OPR began receiving inquiries regarding the proper procedure for closing the practice of a deceased sole practitioner. Often the decedent practitioner had plans in place to avoid formal probate of his or her estate, but did not specifically plan for transition or disposition of the law practice after death. The lawyer engaged by a surviving family member then would contact OPR to ascertain who had or could acquire authority to transfer active case files, close out the decedent's trust account, dispose of old case files, and perhaps sell the practice.

Also beginning in 2005 and 2006, OPR observed a general increase in trustee appointments and requests for reimbursement of fees and expenses under Iowa Court Rules 35.17 and 35.18. These two rules are the authority for appointment of a trustee to administer the practice of a deceased or disabled lawyer, or the practice of a lawyer whose license to practice has been suspended or revoked. The following chart shows the payments made from the Client Security Trust Fund in recent years to reimburse trustee fees and expenses.



The trend in trustee appointments and fees prompted OPR to initiate a marketing effort in 2008. The marketing effort included publishing a tri-fold handout for lawyers on succession planning. A recent version of that handout is attached. Trust account auditors with the Client Security Commission were briefed on the flyer and comment 5 to Iowa Rule of Professional Conduct 32:1.3. The auditors performing routine trust account audits began asking sole practitioners about their succession plans, sharing the tri-fold handout, and encouraging sole practitioners to prepare written succession plans.

By early 2011, OPR was taking one or two telephone calls a month from practitioners or even family members of deceased practitioners, seeking guidance on how to administer the practice of a deceased attorney. Clients generally were requesting their files and refunds of trust account balances, and frequently there were years of old client files to be properly disposed of. OPR attempted to assess the demographics of Iowa's practitioners to ascertain if death or disability of sole practitioners would continue to be an issue. The data OPR was able to piece together at that time was not conclusive, but was worrisome because it suggested our sole practitioner cohort was aging:

There were over 4,300 lawyers in full-time practice in Iowa. (Client Security Commission statistics as of May 9, 2011)

Over twenty percent of members in firms of five or fewer lawyers had been in practice 31 or more years. (Iowa State Bar Association, The Economics of Law Practice in Iowa: Breakdown of firms 5 or less for 2006 Solo and Small Firm Conference)

The median age of the private practitioners in firms of five or fewer lawyers was 51 to 55 in 2006, up from 49 in 2000, and 44 in 1995.

Twenty-six percent of the 4,300 private practitioners appeared to be engaged as sole practitioners. (Iowa State Bar Association, The Economics of Law Practice in Iowa - 2006)

In an attempt to avoid "reinventing the wheel" we went looking for ideas in other states. The result was that in late 2011, OPR published a handbook on succession planning with forms, based on similar work

done by the state bar association in Oregon. The handbook was made available through the Client Security Commission web page. The client security auditors added the handbook and forms to their marketing work regarding succession plans. Staff from OPR also made several CLE presentations regarding the need for succession planning by sole practitioners.

The marketing effort, intended to bring our sole practitioner along gently, has been underway now for seven years. Our auditors are making repeat visits to practitioners since the marketing effort began. We are finding that only a minority of the sole practitioners - probably not exceeding 20% - have prepared succession plans. Based on the continuing trend in trusteeships, and the need to better safeguard the interests of clients, OPR recommended to the Supreme Court that a specific rule be adopted requiring preparation and maintenance of succession plans. The result of that recommendation is the new Iowa Court Rule 39.18.

I also committed to Joe that I would provide comments on a few of the more difficult issues we have encountered at the Office of Professional Regulation (OPR) with respect to succession planning and administration of law practices. I plan to offer some short messages regarding these additional topics over the course of the next week or so. Those additional topics include:

1. The types of law practices we generally have seen involved in trusteeships and in the inquiries we receive at OPR regarding closure of practices.

2. The issue of trust account signature authority, the provisions of Iowa Court Rule 45.11, and how it might be used.

3. How we have seen client files handled in trusteeships, and some thoughts on how the client file disposition issue can be minimized.

Administering a Trust Account

The actual process of administering a trust account is fairly straightforward. All outstanding checks on the trust account must be accounted for, and interest owed the Lawyer Trust Account Commission must be properly disbursed by the bank or credit union. Monies owed clients must be returned to the clients entitled thereto, with appropriate accounting under Iowa Court Rule 45.2(2), so that no remaining client monies exist in the trust account. Sometimes there are earned but unpaid fees that can be collected from the client funds once proper billing and accounting is completed under Iowa Court Rule 45.7. If a particular client cannot be found, it may be necessary to complete the "stale funds" procedure and remit funds to the State Treasurer using the procedures specified in Iowa Code sections 556.11 and 556.13 (the "Great Iowa Treasure Hunt"), before closing the account.

Authority to Administer the Account

Often the sole practitioner is the sole signatory on the trust account, so authority to administer the account effectively ends upon his or her death or disability. Even when a non-lawyer staff member has been given signature authority under Iowa Court Rule 45.2(3)(b)(1), banks are reluctant to honor instruments executed by the non-lawyer if the lawyer no longer is supervising. In either case, the account cannot be administered until someone is equipped with signature authority the bank will recognize. Traditionally there have been two approaches to this issue, but the comparatively new Iowa Court Rule 45.11 offers a third approach.

The Iowa probate code offers one of the traditional approaches. The personal representative of the decedent appears to have authority to administer the practice as part of the general administration of the decedent's estate. Iowa Code § 633.350; *see* Ethics Op. 79-72. The personal representative is entitled to assistance from the attorney designated to assist in administration of the estate. Iowa Code § 633.82. If necessary, another lawyer can be specially appointed under Iowa Code section 633.84 (delegation of authority to outside specialists with court approval) to assist with administration of the practice. If the bank is reluctant to recognize the fiduciary's authority to administer the bank account based on the standard fiduciary appointment order, it is possible to get a more detailed appointment order from the district court describing the trust account administration authority in more detail.

The second traditional approach is appointment of a lawyer (or lawyers) as trustee or trustees to administer the practice under Iowa Court Rules 35.17 (disability) or 35.18 (death, suspension, or disbarment). Authority for these appointments rests with the chief judge in the district where the lawyer practiced. The trustee's duty to protect the interests of the clients is narrower than the duties of a fiduciary for a deceased lawyer's estate. For this reason, trustees sometimes are able to move more quickly to advise active clients of their need to engage new counsel, distribute trust account balances to those persons entitled to them, and distribute files to clients. The appointment order in trusteeships generally refers specifically to the trustee's duty to take charge of the trust account and administer it, so bank recognition of trustee authority in these situations has not been an issue.

Often we find that a deceased sole practitioner has his or her personal affairs structured so that no formal probate is necessary. When this is the case, the decedent's family and their counsel generally want to close the law practice without court supervision also. Informal administration of a law practice generally is dependent on knowledgeable, experienced staff members or family members available to assist. A lawyer known to the family generally assists with informal administration of the practice. The major stumbling block in informal practice administration often has been the trust account. Often it has been necessary to seek a trustee appointment under rule 35.18 for the limited purpose of administering and closing the decedent lawyer's trust account.

Iowa Court Rule 45.11 was adopted in December of 2012. The primary purpose of rule 45.11 is to facilitate administration of the trust account in situations where the remainder of the law practice and the lawyer's estate can be administered without formal probate or appointment of a trustee under rule 35.18. The new rule authorizes a lawyer who is the sole signatory on a trust account to designate another Iowa lawyer to serve as successor signatory, whose authority becomes effective upon occurrence of an event described in the appointment instrument. The qualifying events may include death, disappearance, abandonment of the law practice, incapacity, suspension, or disbarment.

Rule 45.11 has another possible application, however. I suspect that some planning attorneys will be reluctant to share their entire succession agreement with the bank where their trust account is held. And there is some risk that when it comes time to implement the agreement, the bank will not recognize the trust account provisions of the succession agreement as sufficient to clothe the primary and alternate attorneys with trust account signature authority. It may be preferable to have a separate document designating the successor signatory or signatories as authorized by rule 45.11, that can be shared with the bank immediately upon execution, to get the bank's assent to honor that document when and if it has to be implemented. I am attaching a prototype. This is modeled this after the successor signatory documents used for UGMA accounts.

Disposition of Client Files

A second troublesome issue in administration of a sole practitioner's practice is disposition of client files. Iowa lawyers tend to keep everything. It is common to find that client files have not been reviewed for client property or periodically purged by the lawyer. Our experience at OPR is that trustees and

fiduciaries devote considerable time and expense to proper handling of these files. What follows is the customary advice we give when queried by a trustee or fiduciary.

The Iowa Supreme Court has adopted the "entire file" approach to the question of who owns the contents of a client's file. *Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812 (Iowa 2007). Subject to narrow exceptions, the client owns the entire file, including attorney work product. *Gottschalk*, 729 N.W.2d at 819-820.

Unless the deceased or disabled lawyer addressed disposition of client files in his or her engagement letters, fee contracts, or termination letters, it will not be permissible for the fiduciary, trustee, or assisting attorney to summarily destroy client files. Before any file is destroyed, it should be checked for original documents (wills, abstracts, conveyance instruments) and any other specific client property that must be removed from the file and returned to the rightful owners. (See the separate comments below regarding handling of abstracts and original wills.) The custodian then should attempt to contact the clients and return all files to the clients involved. If a client refuses to take custody of the file or otherwise fails to respond after being contacted and advised of the impending destruction of the file, the custodian would be authorized to destroy the remaining contents of the file if the normal file retention period has passed.

With respect to those files for which a client address cannot be found or is not available, the normal procedure ordered in the trustee cases has been to publish notice regarding the files, and then retain those files that are unclaimed for a prescribed period, during which these clients may come forward and claim their file. The court order directing retention also authorizes destruction at the end of the prescribed retention period. For several years, the common practice was to set a retention period of five years for all of the files. Recently, a more refined approach has been used, such that only files less than five or six years old are retained for the prescribed period, and older files are approved for destruction as soon as the published notice and claim period has ended. A secure method such as shredding should be used to destroy the files, and a record of when and how each file was destroyed should be retained.

Lawyers can minimize the burden of file disposition upon termination of their practice by adopting some procedures in their daily practice:

Consider including an agreement and consent regarding file destruction in your initial engagement letter or fee agreement with each client, or in the arrangements made upon termination of each representation.

Periodically examine all files for which the last action was completed more than six years ago (or more than whatever minimum retention period is prescribed by your professional liability carrier, if it is longer than six years); remove documents or other client property for transfer to the client; and consider destruction of the file provided client consent exists.

Use a secure method to periodically destroy those client files that are eligible, such as shredding, and document for future reference when and how each file was destroyed.

Original Wills

Original wills should be returned to the testator if the testator is alive and can be located. *See* Iowa Court Rule 45.2(2) (duty to account and return property to person entitled thereto). If the testator is deceased or cannot be located, an original will should be delivered to the clerk of the district court having jurisdiction of the testator's estate. Iowa Code §§ 633.285, 633.286.

Abstracts

Abstracts should be returned to the persons entitled to them, if that person can be determined and located. *See* Iowa Court Rule 45.2(2). Local abstractors may be willing to assist with determination of the owner of an abstract. (The current record owner of the real estate generally is a good place to start.) Unlike the authority for storage of wills, no statutory directive appears to exist for storage of abstracts by a public official. If the owner cannot be determined or located, a local abstractor or a local law firm may be willing to hold the abstracts pending appearance of the owner. If the owner cannot be determined or located, and a local abstractor or a local law firm is not willing to hold the abstracts pending appearance of the owner, the Client Security Commission may be willing to accept abstracts for storage, depending on the volume. However, the Client Security Commission generally is the least attractive storage alternative because the likelihood of linking an abstract to the rightful owner seems to decline once the abstract leaves its home county. Regardless of who will provide storage, the custodian should seek a court order directing and approving storage, setting the retention period, and providing destruction instructions and authority.

APPENDIX 3

Report of the Rule 39.18 Study Committee

July 2016

On November 20, 2015 the Iowa Supreme Court adopted Court Rule 39.18 requiring sole practitioners to have a written plan of succession for their practice effective January 1, 2016. The rule was adopted after receiving just one comment during the 30 day public comment period. After adoption, it quickly became apparent to the Iowa State Bar Association and the Court that more time was needed to study the impact of the rule on Iowa lawyers and the rule effective date was eventually delayed to January 1, 2017. In response to questions raised by the bar concerning the rule, then President Bruce Walker formed and the Board of Governors approved the appointment of the Rule 39.18 Study Committee to be chaired by Past President Joe Feller from Sibley.

The additional members of the committee were Past Presidents David Beckman, Burlington, Nick Critelli Jr., Des Moines and Joe Holland, Iowa City, along with John (Rick) Bierman III, Grinnell, Phil Brooks, Cedar Rapids, Frank Hoyt Jr., West Des Moines, Kate Kohorst, Harlan, Michel Nelson, Carroll, Deb Petersen, Council Bluffs, Office of Professional Regulation Director Paul Wieck II and ISBA Executive Director Dwight Dinkla (ex-officio).

President Walker charged the committee to research the implementation of the rule and how it was to be interpreted. As initially adopted Rule 39.18 applied to many more lawyers than just the traditional sole practitioners and bar leadership was concerned that application of the rule would create liabilities for the assisting attorneys as well as financial costs to the estate of the deceased or disabled attorney.

The Committee met in person on four occasions, March 16, 2016, April 27, 2016, May 18, 2016 and June 13, 2016. On July 22, 2016, the Committee met by phone conference, approved this report and concluded its work.

The Committee concluded that the present Rule 39.18 requiring sole practitioners to prepare mandatory succession plans should be vacated and replaced with a rule described below that would not require a written succession plan, make compliance easier and apply to all private practice attorneys, while at the same time protecting the interests of our clients and the public.

All the members of the Committee agree that succession planning is very important both for our clients and our families and that the Court and the bar should encourage all lawyers to complete written succession plans and also take steps to improve their office practice management procedures so that their offices are ready for succession in the event of death or disability. At each meeting of the Committee the members engaged in very dynamic discussions regarding many different issues related to the implementation of Rule 39.18 as currently adopted.

The Committee reviewed the background for the current rule, numbers of attorneys affected by the rule, immunity/liability for the designated attorneys, role of professional liability insurance, compensation for designated attorneys, definitions for "disability", fiduciary duties of designated attorneys and conflicts of interest, and dealing with electronic and traditional client files, along with other issues. Many of the Committee members had personal experience helping to close the law office for a deceased attorney and their perspectives were very helpful. Succession planning necessarily encompasses many more issues than this Committee was formed to review and while a discussion of those issues was necessary to properly evaluate Rule 39.18, a full examination and proposed resolutions to deal with those issues is beyond the work of this Committee.

Eventually the Committee narrowed its focus to a review of Rule 39.18 and while recognizing the need for succession planning, struggled with the requirement that only sole practitioners were required to have written succession plans rather than all private practitioners. However, the Committee did not believe that the requirements of the current Rule 39.18 should be extended to all private practitioners either. In the end the Committee resolved the matter with its current recommendations that would require all attorneys answer a few more questions in connection with the annual license renewal and promote written succession plans on a voluntary basis. The Committee concluded that we would recommend the Court revise the current Rule 39.18 to make compliance easier for attorneys and also provide a method for the Office of Professional Regulation to gather the information the office needs in advance of an event where a law office is left unattended due to death or disability of the practitioner.

The revision of Iowa Court Rule 39.18 and associated rules proposed by the Committee would create two tiers of succession planning. The first tier would be a mandatory short form designation of an assisting attorney or entity as part of the annual questionnaire filed with the Client Security Commission. The authority of the assisting attorney or entity designated in the mandatory short form would be focused on tasks necessary to protect the interests of clients and complete trust account matters. The second tier would be a written plan created by the planning attorney that would be optional but encouraged. In the optional written plan, the planning attorney would be able to authorize additional tasks, mostly in law firm management and administration.

The Committee believes that adding a mandatory short form designation as part of the annual client security questionnaire would make it easier for Iowa attorneys to fulfill the basic planning requirement, place information regarding every private practitioner's plan in the possession of the Client Security Commission for quick retrieval, prompt annual updating by the attorney as part of the annual reporting process, and obviate the need for auditors of the Client Security Commission to check on succession planning during trust account audits. Iowa attorneys nonetheless would have the option of authoring their own, more expansive written plans to address matters not covered in the mandatory short form designation.

The concept recommended by the Committee would require all attorneys in private practice to complete a new portion of the annual client security questionnaire that identifies their assisting attorney, law firm (which can be their firm, if they are in a firm), or qualified lawyer servicing association, identifies where their records are located including their current client list, and authorizes the assisting attorney or entity to perform certain tasks in the event of the planning attorney's death or disability. Maintenance of a current client list would be required. The assisting attorney or entity would be authorized to apply to the district chief judge for an order confirming the death or disability. The listed tasks include reviewing client files, notifying clients of the planning attorney's death or disability, determining if other actions are necessary to protect the clients' interests, and administering the planning attorney's trust account. A qualified lawyer servicing association would be defined as a bar association all or part of whose members are admitted to practice in Iowa, a company authorized to sell professional liability insurance to Iowa attorneys, or an Iowa bank with trust powers issued by the Iowa Department of Banking.

Attorneys not in private practice in Iowa would be permitted to provide that response to a direct question on the annual questionnaire, and would not be required to complete the remainder of that portion of the questionnaire pertaining to succession planning.

Attorneys would still be permitted (and encouraged) to have their own written plan that provides further guidance and authority to perform law firm management and administrative tasks. Those tasks include collecting fees, paying law firm expenses and client costs, compensating staff, terminating leases, and selling the practice.

The assisting attorney or entity would be authorized to petition for appointment of a trustee under the provisions of Iowa Court Rules 34.17 or 34.18, as applicable, if the assisting attorney or entity believes it beneficial to be court appointed as a trustee, or believes it appropriate that an independent trustee be appointed. In any situation in which a trustee appointment under rules 34.17 or 34.18 is applied for, the new rules would require the chief judge to give due regard to any designation or stand by nomination made by a planning attorney under the provisions of Iowa Court Rule 39.18.

The Committee also recommends that the Office of Professional Regulation would not implement the new mandatory portion of the annual client security report until the 2018 reporting season.

The Committee further recommends that the ISBA continue to work with the Iowa Academy of Trust and Estate Counsel to provide updated law practice succession planning documents to our members. And finally the Committee recommends that the ISBA continue to provide continuing legal education to our members to assist them with their succession planning.

Copies of the original Rule 39.18 as well as the Committee's new proposed language for Rules 34.17, 34.18 and 39.18 are attached to this report.

ATTACHMENT A – (CURRENT RULE)

Rule 39.18 Requirement for death or disability plan.

39.18(1) Each sole practitioner must have a written plan that designates a primary and an alternate active Iowa attorney in good standing to review client files, notify each client of the attorney's death or disability, and determine whether there is a need for other immediate action to protect the interests of clients. The primary and alternate attorneys must consent in writing to their designation in the plan.

39.18(2) The plan must authorize the designated attorneys to prepare final trust accountings for clients, make trust account disbursements, properly dispose of inactive files, and arrange for storage of files and trust account records. The plan must identify the location of electronic files and records, authorize the designated attorneys to access electronic files and records as necessary to perform duties as a designated attorney, and provide the designated attorneys access to passwords and other security protocols required to access those electronic files and records.

39.18(3) The plan may authorize the designated attorneys to collect fees, pay firm expenses and client costs, compensate staff, terminate leases, liquidate or sell the practice, or perform other law firm administration tasks.

39.18(4) The plan must include language sufficient to make the designated attorneys' powers durable in the event of the sole practitioner's disability. *See* Iowa Code § 633B.1; Iowa R. Prof'l Conduct 32:1.3 cmt. [5].

39.18(5) The plan must be made available for review upon request by the director of the office of professional regulation or by any representative of the client security commission

.

39.18(6) The plan must be reviewed and updated annually.

39.18(7) A designated attorney must not examine any documents or acquire any information containing real or potential conflicts with the designated attorney's clients. Should any such information be acquired inadvertently, the designated attorney must, as to such matters, protect the privacy interests of the planning attorney's clients by prompt recusal or refusal of employment.

39.18(8) For purposes of this rule, a sole practitioner includes an attorney practicing alone, an attorney practicing only with other attorneys who do not own equity in the practice, an attorney practicing in an association of sole practitioners, or any other structure in which no other attorney owns equity in the practice.

[Court Order November 20, 2015, effective January 1, 2016; November 24, 2015, effective March 1, 2016; January 15, 2016, effective January 1, 2017]

ATTACHMENT B - (CURRENT RULE WITH PROPOSED REVISIONS)

34.17 Disability suspension.

34.17(1) In the event an attorney is at any time in any jurisdiction duly adjudicated a mentally incapacitated person, or a person with a substance-related disorder, or is committed to an institution or hospital for treatment thereof, the clerk of any court in Iowa in which the adjudication or commitment is entered must, within 10 days, certify the adjudication or commitment to the supreme court clerk.

34.17(2) Upon the filing of an adjudication or commitment certificate or a like certificate from another jurisdiction, upon a supreme court determination pursuant to a sworn application on behalf of a local bar association, or upon a disciplinary board determination that an attorney is not discharging professional responsibilities due to disability, incapacity, abandonment of practice, or disappearance, the supreme court may enter an order suspending the attorney's license to practice law in this state until further order of the court. Not less than 20 days prior to the effective date of the suspension, the attorney or the attorney's guardian, and the director of the institution or hospital to which the attorney has been committed, if any, must be notified in writing, directed by restricted certified mail to the last address as shown in the records accessible to the supreme court, that the attorney has a right to appear before one or more justices of the supreme court at a specified time and place and show cause why such suspension should not take place. Upon a showing of exigent circumstances, emergency, or other compelling cause, the supreme court may reduce or waive the 20-day period and the effective date of action set forth above. Any hearing will be informal and the strict rules of evidence will not apply. The decision rendered may simply state the conclusion and decision of the participating justice or justices and may be orally delivered to the attorney at the close of the hearing or sent to the attorney in written form at a later time. A copy of such suspension order must be given to the suspended attorney or to the attorney's guardian and to the director of the institution or hospital to which the suspended attorney has been committed, if any, by restricted mail or personal service as the supreme court may direct.

34.17(3) Upon the voluntary retirement of an Iowa judicial officer for disability under Iowa Code section 602.9112, or upon the involuntary retirement of an Iowa judicial officer for disability under Iowa Code section 602.2106(3)(a), the supreme court may enter an order suspending the retired judicial officer's license to practice law in this state in the event the underlying disability prevents the discharge of an attorney's professional responsibilities. The suspension is effective until further order of the supreme court. A copy of the suspension order must be given to the suspended attorney or to the attorney's guardian and to the director of the institution or hospital to which the suspended attorney is committed, if any, by restricted mail or personal service as the supreme court may direct.

34.17(4) Any attorney suspended pursuant to rule 34.17 must refrain, during the suspension, from all facets of ordinary law practice including, but not limited to, the examination of abstracts; consummation of real estate transactions; preparation of legal briefs, deeds, buy and sell agreements, contracts, wills, and tax returns; acting as a fiduciary; and when possible, remove all advertising of the attorney's services or holding out to the public that he or she is a licensed attorney. The suspended attorney may, however, act as a fiduciary for an estate, including a conservatorship or guardianship, of any person related to the suspended attorney within the second degree of affinity or consanguinity.

34.17(5) No attorney suspended due to disability under rule 34.17 may engage in the practice of law in this state until reinstated by supreme court order.

34.17(6)

a. Upon being notified of the suspension of an attorney, the chief judge in the judicial district in which the attorney practiced may appoint an attorney or attorneys to serve as trustee to inventory the attorney's files, sequester client funds, and take any other appropriate action to protect the interests of the attorney's clients and other affected persons. In appointing a trustee, the chief judge will give due regard to any designation or stand-by nomination made under the provisions of Iowa Court Rule 39.18. Any trustee appointment is subject to supreme court confirmation. The appointed attorney serves as a special member of the board and as a commissioner of the supreme court for the purposes of the appointment.

b. While acting as trustee, the trustee must not serve as an attorney for the clients of the disabled attorney or other affected persons. The trustee also must not examine any papers or acquire any information concerning real or potential conflicts with the trustee's clients. Should any such information be acquired inadvertently, the trustee must, as to such matters, protect the privacy interests of the disabled attorney's clients by prompt recusal or refusal of employment.

c. The trustee may seek reasonable fees and reimbursement of costs of the trust from the suspended attorney. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a claim for payment from the Clients' Security Trust Fund of the Bar of Iowa. The Client Security Commission, in the exercise of its sole discretion, must determine the merits of the claim and the amount of any payment from the fund.

d. When the suspended attorney is reinstated to practice law in this state, all pending representation of clients is completed, or the purposes of the trust are accomplished, the trustee may apply to the appointing chief judge for an order terminating the trust.

e. Trustee fees and expenses paid by the Client Security Commission must be assessed to the disabled attorney by the Client Security Commission and are due upon assessment. Trustee fees and expenses assessed under this rule must be paid as a condition of reinstatement and may be collected by the Client Security Commission as part of the annual statement and assessment required by rule 39.8.

Rule 34.18 Death, suspension, or disbarment of practicing attorney.

34.18(1) Upon a sworn application on behalf of a local bar association, an attorney or entity designated or nominated on a stand-by basis as described in Iowa Court Rule 39.18, or the disciplinary board showing that a practicing attorney has died or has been suspended or disbarred from the practice of law and that a reasonable necessity exists, the chief judge in the judicial district in which the attorney practiced may appoint an attorney to serve as trustee to inventory the attorney's files, sequester client funds, and take any other appropriate action to protect the interests of the attorney's clients and other affected persons. In appointing a trustee, the chief judge will give due regard to any designation or stand-by nomination made under the provisions of Iowa Court Rule 39.18. The appointment is subject to supreme court confirmation. The appointed attorney serves as a special member of the disciplinary board and as a commissioner of the supreme court for the purposes of the appointment.

34.18(2) While acting as trustee, the trustee must not serve as an attorney for the clients of the disabled attorney or other affected persons. The trustee also must not examine any papers or acquire any information concerning real or potential conflicts with the trustee's clients. If the trustee acquires such information inadvertently, the trustee must, as to such matters, protect the privacy interests of the disabled attorney's clients by prompt recusal or refusal of employment.

34.18(3) The trustee may seek reasonable fees and reimbursement of costs of the trust from the deceased attorney's estate or the attorney whose license to practice law has been suspended or revoked. If reasonable efforts to collect such fees and costs are unsuccessful, the trustee may submit a claim for payment from the Clients' Security Trust Fund of the Bar of Iowa. The Client Security Commission, in the exercise of its sole discretion, must determine the merits of the claim and the amount of any payment from the fund.

34.18(4) When all pending representation of clients is completed or the purposes of the trust are accomplished, the trustee may apply to the appointing chief judge for an order terminating the trust.

34.18(5) Trustee fees and expenses paid by the Client Security Commission must be assessed to the deceased, suspended, or disbarred attorney by the Client Security Commission and are due upon assessment. Trustee fees and expenses assessed under this rule must be paid as a condition of reinstatement and may be collected by the Client Security Commission as part of the annual statement and assessment required by rule 39.8.

ATTACHMENT C - (PROPOSED REVISED RULE)

Rule 39.18 Requirement for death or disability designation and authorization.

39.18(1) *Required designation and authorization in annual questionnaire.*

a. Each attorney in private practice must identify and authorize each year, as part of the annual questionnaire required by Iowa Court Rule 39.11, a qualified lawyer servicing association, an Iowa law firm that includes Iowa attorneys in good standing, or an active Iowa attorney in good standing, to serve as the attorney's designated representative or representatives under this rule. An attorney may identify and authorize an Iowa law firm of which the attorney is a member to serve under this rule.

b. The attorney or entity designated under this rule is authorized to review client files, notify each client of the attorney's death or disability, and determine whether there is a need for other immediate action to protect the interests of clients.

c. The attorney or entity designated under this rule also is authorized to serve as a successor signatory for any client trust account maintained by the private practitioner under Iowa Court Rule 45.11, prepare final trust accountings for clients, make trust account disbursements, properly dispose of inactive files, and arrange for storage of files and trust account records.

d. The authority of the attorney or entity designated under this rule takes effect upon the death or disability of the designated attorney. The designated attorney or entity may apply to the chief judge of the judicial district in which the designating attorney practiced for an order confirming the death or disability of the designating attorney.

39.18(2) *Client list and location of key information.* Each attorney in private practice must maintain a current list of active clients, in a location accessible by the attorney or entity designated under this rule. As part of the annual questionnaire required by Iowa Court Rule 39.11, each attorney in private practice must identify the custodian and the location of the client list, the custodian and location of electronic and paper files and records, and the custodian and location of passwords and other security protocols required to access the electronic files and records. The attorney or entity designated under this rule is authorized to access electronic and paper files and records as necessary to perform duties as a designated attorney, and is authorized to access passwords and other security protocols required to access those electronic files and records.

39.18(3) *Supplemental plan.* An attorney in private practice may prepare a written plan that is supplemental to the designation and authority in the annual client security questionnaire. The supplemental written plan may designate an attorney or entity to collect fees, pay firm expenses and client costs, compensate staff, terminate leases, liquidate or sell the practice, or perform other law firm administration tasks. The supplemental written plan also may nominate an attorney or entity to serve as trustee if proceedings are commenced under the provisions of Iowa Court Rules 34.17 or 34.18.

39.18(4) *Durability.* A designation or plan under this rule must include language sufficient to make the designated attorneys' or entity's powers durable in the event of the private practitioner's disability. *See* Iowa Code § 633B.104; Iowa R. Prof'l Conduct 32:1.3 cmt. [5].

39.18(5) *Conflicts of interest.* A designated attorney or entity must not examine any documents or acquire any information containing real or potential conflicts with the designated attorney's clients. Should any such information be acquired inadvertently, the designated attorney or entity must, as to such matters, protect the privacy interests of the planning attorney's clients by prompt recusal or refusal of employment.

39.18(6) *Availability of Trustee Provisions.* A designated attorney or entity may petition the court, at any time, for appointment as the trustee or appointment of an independent trustee under the provisions of Iowa Court Rules 34.17 or 34.18, as applicable.

39.18(7) *Definitions.* For purposes of this rule, the following definitions apply:

A "*qualified lawyer servicing association*" is a bar association all or part of whose members are admitted to practice law in the state of Iowa; a company authorized to sell lawyers professional liability insurance in Iowa; or an Iowa bank with trust powers issued by the Iowa Department of Banking.

A "*law firm*" is a minimum of two attorneys in a law partnership, professional corporation, or other association authorized to practice law.

An "*attorney in private practice*" includes an active Iowa attorney who resides outside Iowa but engages in the private practice of law in Iowa.

ATTACHMENT D – (PROPOSED CHANGES TO QUESTIONNAIRE)

Death or Disability Planning Addendum to Annual Client Security Questionnaire

Questions 25 through 30 implement the requirement in Iowa Court Rule 39.18 that each attorney in private practice designate annually an attorney or entity to perform certain duties in the event of the designating attorney's death or disability. If you are not engaged in private practice in Iowa, you may answer No to question 25 and skip questions 26 through 30. If you are engaged in private practice in Iowa, you must answer questions 25 through 30. An attorney in private practice in Iowa includes any active Iowa attorney who resides outside Iowa or maintains a virtual law practice but serves Iowa clients.

You may designate an active Iowa lawyer in good standing, a law firm that includes Iowa attorneys in good standing, or a qualified lawyer servicing association. A qualified lawyer servicing association includes a bar association all of part of whose members are admitted to practice law in Iowa, a company authorized to sell lawyers professional liability insurance in Iowa, or an Iowa bank with trust powers issued by the Iowa Department of Banking. If you are a member of a law firm that includes other Iowa attorneys in good standing, you may designate your own firm to perform these duties.

25. I am engaged in the private practice of law in Iowa Yes / No

26. I designate the following named active Iowa attorney in good standing, qualified lawyer servicing association, or Iowa law firm that includes Iowa attorneys in good standing, as my representative or representatives under Iowa Court Rule 39.18:

Name of Designated Attorney or Entity:

Address Line 1:

Address Line 2:

Address Line 3:

City:

State:

Zip Code:

Zip Plus 4:

Telephone Number:

27. My list of active clients can be found in the custody of the following named person at the location indicated:

Name of Custodian:

Address Line 1:

Address Line 2:

Address Line 3:

City:

State:

Zip Code:

Zip Plus 4:

Telephone Number:

28. My electronic files and records can be found in the custody of the following named person at the location indicated:

If the same person listed in response to question 27 has custody of your electronic files and records, click the toggle here and proceed to question 29: O

Name of Custodian:

Address Line 1:

Address Line 2:

Address Line 3:

City:

State:

Zip Code:

Zip Plus 4:

Telephone Number:

29. My paper files and records can be found in the custody of the following named person at the location indicated:

If the same person listed in response to question 27 has custody of your paper files and records, click the toggle here and proceed to question 30:

Name of Custodian:

Address Line 1:

Address Line 2:

Address Line 3:

City:

State:

Zip Code:

Zip Plus 4:

Telephone Number:

30. The passwords and other security protocols required to access my electronic files and records can be found in the custody of the following named person at the location indicated:

If the same person listed in response to question 27 has custody of your passwords and other security protocols, click the toggle here and proceed to the questionnaire certification: O

Name of Custodian:

Address Line 1:

Address Line 2:

Address Line 3:

City:

State:

Zip Code:

Zip Plus 4:

Telephone Number:

The authority of the attorney or entity I have designated above takes effect upon my death or disability. The designated attorney or entity may apply to the chief judge of the judicial district

in which the designating attorney practiced for an order confirming my death or disability. The authority contained in this designation is durable in the event of my disability.

I authorize the attorney or entity I have designated above to review client files, notify each client of my death or disability, and determine whether there is a need for other immediate action to protect the interests of my clients. I also authorize the attorney or entity designated above to serve as a successor signatory under Iowa Court Rule 45.11 for any client trust account I may have, prepare final trust accountings for clients, make trust account disbursements, properly dispose of inactive files, and arrange for storage of files and trust account records. I further authorize the attorney or entity designated under this rule to access my paper and electronic files and records as necessary to perform duties as a designated attorney, and to access passwords and other security protocols required to access those electronic files and records.

I certify that I have read and answered completely and truthfully this statement/questionnaire.

_____ _____

Date Signature

Make check payable to: Client Security Trust Fund

Mail report and check to: Office of Professional Regulation
Client Security Commission
Judicial Branch Building
1111 East Court Ave.
Des Moines, Iowa 50319
Telephone: (515) 725-8029

APPENDIX 4

In the Iowa Supreme Court

Request for Public Comment on Proposed Changes Regarding Death and Disability Planning by Iowa Attorneys	))))	**Order**

The Iowa Supreme Court seeks public comment on proposed amendments to Iowa Court Rule 39.18 and associated rules regarding death and disability planning by Iowa attorneys.

After a previous 60-day public comment period, during which time the court did not receive any comment relating to then-proposed rule 39.18, the court on November 20, 2015, adopted Iowa Court Rule 39.18 requiring sole practitioners to have a written succession plan for their law practices.

The proposed amendments to rule 39.18 now before the court originated from The Iowa State Bar Association Rule 39.18 Study Committee (ISBA committee). The key provisions of the ISBA request include the following:

- The proposed amendments would create two "tiers" of succession planning. The first tier would be a mandatory short form designation of an assisting attorney or entity as part of the annual questionnaire filed with the Client Security Commission. The designation would identify the assisting attorney, law firm (which could be the planning attorney's own firm, if the planning attorney is a member of a firm), or qualified lawyer servicing association. The designation also would identify where records are located, including the current client list, and authorize the assisting attorney or entity to perform tasks necessary to protect the interests of clients. The listed tasks include reviewing client files, notifying clients of the planning attorney's death or disability, determining if other actions are necessary to protect the clients' interests, and administering the planning attorney's trust account.

- The second tier would be a written plan created by the planning attorney that would be optional but encouraged. In the optional written plan, the planning attorney would be able to provide further guidance and authority to perform law firm management and administrative tasks. Those tasks include collecting fees, paying law firm expenses and client costs, compensating staff, terminating leases, and selling the practice.

- All attorneys in private practice would be required to complete the first

tier, mandatory short form designation, as part of the annual client security questionnaire. If a planning attorney is a member of a law firm that includes other Iowa attorneys in good standing, the planning attorney may designate his or her own firm as the assisting law firm.

- Attorneys not in private practice in Iowa would be permitted to provide that response to a direct question on the annual questionnaire, and would not be required to complete the remainder of that portion of the questionnaire pertaining to succession planning.

- Maintenance of a current client list would be required on the part of all attorneys in private practice.

- The assisting attorney or entity would be authorized to apply to the district chief judge for an order confirming the death or disability of the planning attorney.

- A qualified lawyer servicing association would be defined as a bar association all or part whose members are admitted to practice in Iowa, a company authorized to sell professional liability insurance to Iowa attorneys, or an Iowa bank with trust powers issued by the Iowa Department of Banking.

- The assisting attorney or entity would be authorized to petition for appointment of a trustee under the provisions of Iowa Court Rules 34.17 or 34.18, as applicable, if the assisting attorney or entity believes it beneficial to be court appointed as a trustee, or believes it appropriate that an independent trustee be appointed. In any situation in which a trustee appointment under rules 34.17 or 34.18 is applied for, the new rules would require the chief judge to give due regard to any designation or stand-by nomination made by a planning attorney under the provisions of Iowa Court Rule 39.18.

- The Office of Professional Regulation would not implement the new mandatory portion of the annual client security report until the 2018 reporting season.

- The proposed amendments to rule 39.18 would include appropriate amendments to rule 34.17 (disability suspension) and rule 34.18 (death, suspension, or disbarment of practicing attorney).

The ISBA committee studying rule 39.18 believes that adding a mandatory short form designation as part of the annual client security questionnaire would make it easier for Iowa attorneys to fulfill the basic planning requirement, place information regarding every private practitioner's plan in the possession of the Client Security Commission for quick retrieval,

prompt annual updating by the attorney as part of the annual reporting process, and obviate the need for auditors of the Client Security Commission to check on succession planning during trust account audits. Iowa attorneys nonetheless would have the option of authoring their own, more expansive written plans to address matters not covered in the mandatory short form designation.

Prior to further consideration of the proposed amendments to rule 39.18, the court seeks public comment on the amendments. The proposed amendments, the report of the ISBA Rule 39.18 Study Committee, and a letter against the ISBA committee report are provided with this order and may be found on the Iowa Judicial Branch website at: http://www.iowacourts.gov/About_the_Courts/Supreme_Court/Orders. In addition, copies are available at the office of the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

Any interested organization, agency, or person may submit comments regarding the proposed amendments. All comments must refer to the specific rule number (for example, rule 39.18(3)) and the specific numbered line or lines to which the comments refer. Comments sent by email must be emailed to **rules.comments@iowacourts.gov**, must state **"Proposed Amendments to Rule 39.18"** in the subject line of the email, and must be sent **as an attachment to the email in Microsoft Word format**. Instead of submission by email, comments may be delivered in person or mailed to the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, 50319.

The deadline for submitting comments is 4:30 p.m. on October 31, 2016.

To accommodate further consideration of rule 39.18 and the 60-day

public comment period on proposed amendments to the rule, the court amends by this order the effective date for the current Iowa Court Rule 39.18—Requirement for Death or Disability Plan, which currently is January 1, 2017. **The effective date for current rule 39.18, is now delayed until January 1, 2018.**

Dated this 29th day of August, 2016.

The Iowa Supreme Court

By _____
Mark S. Cady, Chief Justice