DRAKE LAW SCHOOL

2018 GENERAL PRACTICE REVIEW

FAMILY LAW UPDATE

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FAMILY LAW UPDATE

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I. DISSOLUTION OF MARRIAGE

A. PROCEDURAL ASPECTS

1. Personal Jurisdiction

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

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

(1) the quantity of the contacts;

(2) the nature and quality of the contacts;

(3) the source and connection of the cause of action with those contacts;

(4) the interest of the forum state;

(5) the convenience of the parties.

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

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

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

2. In Rem Jurisdiction

a. Pennoyer v. Neff, 95 U.S. 714 (1877) and Williams v. North Carolina, 317 U.S. 287 (1942) established that Due Process does not require a state court to have personal jurisdiction over an individual to adjudicate the civil status and capacities of its residents. Thus, a state may grant a divorce to a resident or determine custody or parental rights of resident children though the state has no significant contacts with an out-of-state spouse or parent. See Bartsch v. Bartsch, 636 N.W.2d 3 (Iowa 2001).

b. As indicated above, jurisdiction to grant a dissolution of marriage is not to be tested by the minimum contacts standard of the Kulko case. The United States Supreme Court adopted the "Divisible Divorce Doctrine" in Estin v. Estin, 334 U.S. 541, 549; 68 S.Ct. 1213, 1218; 92 L.Ed. 1561, 1568-69 (1948). The divisible divorce doctrine recognizes the Court's limited power where the court has no personal jurisdiction over the absent spouse to grant a divorce to one domiciled in the state, but no jurisdiction to adjudicate the incidents of marriage, for example, alimony and property division. See In re Marriage of Kimura, 471 N.W.2d 869 (Iowa 1991) and Brown v. Brown, 269 N.W.2d 918 (Iowa 1978).

3. Subject Matter Jurisdiction

a. "Subject matter jurisdiction" is broadly defined as the power of the Court to hear and determine cases of the general class to which a particular case belongs. Lack of subject matter jurisdiction may be raised at any time and cannot be waived or vested by consent. In re Marriage of Russell, 490 N.W.2d 810 (Iowa 1992); In re Jorgensen, 623 N.W.2d 826, 831 (Iowa 2001).

b. A court has the Common Law inherent equitable jurisdiction to take jurisdiction when the petition states a claim of paternity and requests for child custody and support. Bruce v. Sarver, 472 N.W.2d 631 (Iowa App. 1991). The Sarver court ruled that the trial court should not have dismissed because paternity had never been established when the putative father petitioned for custody or visitation.

c. However, in In re Marriage of Martin, 681 N.W.2d 612 (Iowa 2004), the Supreme Court stated that the rights and remedies of Iowa Code Chapter 598, the dissolution of marriage statute, are not available to unmarried persons. The court also has no broad equitable powers to divide property accumulated by unmarried persons based on cohabitation. Instead, to secure subject matter jurisdiction, the parties must allege a recognized legal theory outside marriage to support property claims between unmarried cohabitants, including claims of contract, unjust enrichment, resulting trust, constructive trust, and joint venture.

d. In re Estate of Carlisle, 653 N.W.2d 368 (Iowa 2002) A separate maintenance decree does not cut off the rights of a spouse under Chapter 633. Section 598.28 which provides that all applicable provisions of Section 598.20 specifically provides that the forfeiture of spousal rights only occurs A[w]hen a dissolution of marriage is decreed.

4. Res Judicata/Issue/Claim Preclusion

a. Issue Preclusion or Collateral Estoppel serves two purposes: to protect litigants from the vexation of relitigating identical issues and to promote judicial economy. State ex rel. Casas v. Fellmer, 521 N.W.2d 738 (Iowa 1994). To establish Issue Preclusion, four prerequisites must be established: (1) the issue must be identical; (2) the issue must have been raised and litigated in the previous action; (3) the issue must have been material and relevant to the disposition of the previous action; and (4) the previous determination of the issue must have been necessary and essential to the earlier judgment. See also In Re Marriage of Van Veen, 545 N.W.2d 263 (Iowa 1996) and Audas v. Sceary, 549 N.W.2d 520 (Iowa 1996).

b. The Supreme Court has ruled that issue preclusion has not been eliminated as a factor in reexamining paternity cases. Section 600B.41A, Code of Iowa, specifically provides for actions to *overcome* paternity that has been *previously legally established*. There is no corresponding statutory provision to establish paternity when a person has previously been found not to be the biological father. In re Marriage of Rosenberry, 603 N.W.2d 606 (Iowa 1999).

c. In re Marriage of Ginsberg, 750 N.W.2d 520 (Iowa 2008). The Supreme Court ruled that claim preclusion does not prevent the enforcement of the decree provision which required John to pay a debt owned to Tanya's father in an unspecified amount. The"hold harmless" provision of the decree was the equivalent of an indemnification contract where one party promises to reimburse or hold harmless another party for loss, damage, or liability." Maxim Techs., Inc. v. City of Dubuque, 690 N.W.2d 896, 900 (Iowa 2005). When an indemnification obligation is breached, further proceedings are often needed to determine the amount the person, who is secondarily liable, has been compelled to pay as a result of the indemnitor's negligence or other wrong." Howell v. River Prods. Co., 379 N.W.2d 919, 921 (Iowa 1986).

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

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

6. Judicial Control of Trial

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

b. Time Limits. The trial court has broad discretion under the Iowa Rules of Evidence to exclude otherwise relevant and admissible evidence if the evidence's probative value is substantially outweighed by considerations of undue delay or waste of time. See Rules 403 and 611. However, a court should impose time limits only when necessary, after making an analysis of all available information from the parties. In Re Marriage of Thielges, 623 N.W.2d 232 (Iowa App. 2000).

c. Motions to Continue and Set Aside Default.

Bailey v. Murphy, No. 16-1835 (Iowa App., 2017). On July 1, Bonnie Bailey sent a letter to the trial court which was treated as a pro se Motion to Continue the July 28 custody trial. Bailey's letter stated that she was likely to be in the hospital having a baby on the trial day, but she provided no further detail or medical confirmation of her condition. Bailey failed to appear at the July 19 hearing on the motion; and the Court of Appeals found that the district court did not abuse its discretion in denying the continuance because Iowa Rule of Civil Procedure 1.911(1) requires that the court be satisfied that substantial justice required a new trial date. However, the court also found that the Motion to Set Aside Default filed two days after the judgment by an attorney should have been granted. Iowa Rule of Civil Procedure 1.977 requires the court to consider the following: (1) Did the defaulting party actually intend to defend? (2) Whether the party moved promptly to set aside the default is significant on this point. (3) Does the defaulting party assert a claim or defense in good faith? and (4) Did the defaulting party willfully ignore or defy the rules of procedure or was the default simply the result of a mistake? Cent. *Nat'l Ins. Co. of Omaha v. Ins. Co. of N. Am.*, 513 N.W.2d 750, 753 (Iowa 1994). Here, the court concluded that the default judgment should have been set aside based on good cause shown by excusable neglect. Bailey's intent to "actually defend" is indicated by the fact that she filed her motion to set aside the default judgment only two days after judgment was entered. She offered a good-faith claim that it is not in the child's best interest that physical care be changed. In addition, Bailey did not "willfully ignore or defy the rules; rather, her failure to appear was a result of her simplistic and rather poor communication with the court.

d. **In re Marriage of Fleming, No. 17-1200 (Iowa App., 2018)**. Cory and Teresa were divorced in Davis County, but Teresa filed her modification petition in her current home county, Hardin. Cory, who still resided in Davis County, filed a pre-answer motion to transfer venue to Davis County. The Court of Appeals noted that venue refers to the place where an action must be tried. *In re Marriage of Engler*, 532 N.W.2d 747, 748 (Iowa 1995). Venue for a custody modification action lies in the county where either party resides or in the county in which the original decree was entered. Iowa Code §§ 598.2, 598.25 (2017). The legislature did not intend to require that a petition for modification must be filed in the county where the decree was entered, irrespective of the present residences of the parties. *Niles v. Iowa Dist. Court*, 683 N.W.2d 539, 541 (Iowa 2004). Because Teresa filed her petition for modification in a proper county, the district court may not transfer the case to another county under Iowa Rule of Civil Procedure 1.808(1), which applies when an action is brought in the wrong county. *See Engler*, 532 N.W.2d at 749. The proper motion would have been an application to transfer, based on Forum non conveniens. This is a facet of venue. *In re Marriage of Kimura*, 471 N.W.2d 869, 878 (Iowa 1991). The doctrine presupposes proper venue lies in two forums and allows a district court to "decline to proceed with an action though venue and jurisdiction are proper" to avoid "unfair, vexatious, oppressive actions in a forum away from the defendant's domicile." *Id.* In this case, Cory did not allege, and the district court did not find, that trying Teresa's modification action in Hardin County imposed an unreasonable burden on Cory.

7. Off-the Record Communications

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

8. Citation of Unpublished Appellate Decisions

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

9. Default Judgment for Noncompliance with Discovery

a. A former wife had been prejudiced when former husband refused to respond to a request for production of documents and interrogatories for more than four months because plans for a child's education had to be made. Therefore, entry of a default judgment was an appropriate sanction for willful noncompliance with the discovery requests. In re Marriage of Williams, 595 N.W.2d 126 (Iowa 1999).

b. Fenton v. Webb, 705 N.W.2d 323 (Iowa App. 2005). Tammie failed to comply with many discovery requests and court orders for discovery; the trial court as a sanction for her contempt, entered a default judgment granting Kenneth primary physical care. The Court of Appeals approved the entry of default as a sanction *See In re Marriage of Williams,* 595 N.W.2d 126, 130 (Iowa 1999) . However, the Court held that district court should not have proceeded to established primary care without a hearing to confirm that custody to Kenneth was in Rachel's interest. *See Flynn v. May,* 852 A.2d 963, 975 (Md.Ct.Spec.App.2004), Iowa R. Civ. P. 1.973(2); and *In re Marriage of Courtade,* 560 N.W.2d 36, 37 (Iowa Ct.App.1996).

10. Common Law Marriage

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

11. Same Sex Marriage

a. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009). In a national landmark decision the Iowa Supreme Court unanimously decided that the Iowa Code §595.2(1), which provides that "only a marriage between a male and female is valid", is unconstitutional. The Equal Protection Clause is an evolving, dynamic concept which must be determined by the standards of each generation; and that in reviewing legislation under the Equal Protection

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

b. Gartner v. Iowa Dep't of Pub. Health, No. 12-0243 (Iowa 2013). Iowa Code §144.13(2) requires the Iowa Department of Public Health to list as a parent on a child's birth certificate the **husband** when a child is born to one of the spouses during the couple's marriage. The Supreme Court found that the Equal Protection Clause requires that same-sex couples who conceive through artificial insemination using an anonymous sperm donor must be treated the same as opposite-sex couples who conceive a child in the same manner.

12. Marital Torts.

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

b. Papillon v. Jones, No. 15-1813 (Iowa, 2017). Bryon, without notice to Brenda, installed hidden, a sound-activated recording device in the study of their home. As their custody case progressed, Jones recorded six hours of audio files of conversations between Brenda, her friends, and her family. Bryon gave the recorded audio files and transcripts of them to his attorney and the child custody evaluator; and continued to list the recordings as exhibits until just before trial. However, three months *before* the custody trial, Brenda filed a tort action; and, after the dissolution was completed, proved Bryon's violation of Iowa Code section 808B.2, which prohibits "willfully intercept[ing] . . . a[n] oral communication" without permission of one of the parties. The Supreme Court confirmed the trial court award of actual damages, attorney fees, and punitive damages, finding Jones's "motivations seem simply to hurt and harass the Plaintiff. Though Bryon sought to avoid punitive damages because he was not aware of Section 808B.2 when he made the recordings, the Court found that punitive damages were appropriate because Bryon persisted in using his illegal recordings even after Brenda filed her tort action.

B. ALIMONY

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

1. Traditional Alimony

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

a. The property settlement and alimony are interrelated. The Court declined to award alimony to wife because though her income alone might be insufficient to permit her to be self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, the property settlement provided her with sufficient funds to support herself. In re Marriage of Grady-Woods, 577 N.W.2d 851 (Iowa App. 1998).

b. In marriages of long duration, alimony can be used to compensate a spouse who leaves the marriage at a financial disadvantage, especially where the disparity in earning capacities is great. In re Marriage of Clinton, 579 N.W.2d 835 (Iowa App. 1998). See also In re Marriage of Weinberger, 507 N.W.2d 733 (Iowa App. 1993); and In re Marriage of Craig, 462 N.W.2d 692 (Iowa App. 1990).

c. "We ignore gender in determining the alimony issue. To do otherwise would be contrary to Chapter 598 and constitutionally impermissive ... Orr v. Orr, 440 U.S. 268, 278-79, 99 S.Ct. 1102, 1111, 59 L.Ed.2d 306, 318- 19 (1979)." The husband, 51, totally disabled, without a high school education, was granted $125 per month alimony to supplement his $849 social security and $117 pension benefits. The wife's gross income was $2,060.00. In re Marriage of Miller, 524 N.W.2d 442 (Iowa App. 1994). See In re Marriage of Bethke, 484 N.W.2d 604 (Iowa App. 1992).

d. The " . . . spouse with a lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the marriage as possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well." In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa App. 1983) (emphasis added); In re Marriage of Stark, 542 N.W.2d 260 (Iowa App. 1995).

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

f. **In re Marriage of Stenzel, No. 16-1481 (Iowa App., 2018).** Joel's income had recently increased to more than $600,000 per year; and he argued that his alimony should be based on Cheryl's need and the lesser lifestyle the parties had experience throughout most of the marriage, not on providing Cheryl with support comparable to what she would have enjoyed if the marriage continued. He resisted Cheryl's budget which included substantial charitable donations and retirement plan payments. The Court agreed that the past standard of living of the parties sets the highest level of spousal support, but this sum may then be adjusted by consideration of the payee's income or earning capacity and the payor's ability to pay. *See In re Marriage of Gust* 858 N.W.2d 402 at 411. However, though the past standard of living is considered, some future projections are necessary. For example, a spouse may need to procure health insurance and other new expenses after the marriage is dissolved. Ideally, the support should be fixed so the continuation of both parties' standard of living can continue, if possible. *See In re Marriage of Bornstein*, 359 N.W.2d 500, 502 (Iowa Ct. App. 1984). Cheryl's earnings will likely never increase such that she will become self-supporting at a comparable standard of living to that she enjoyed during her marriage. The record showed that the parties had paid over $20,000 in charitable donations and transferred over $20,000 per year into their retirement accounts. Though there were no Iowa cases approving substantial charitable donations or retirement savings, the court concluded that since the court must consider the past standard of living, not just basic needs or necessities, charitable donations and retirement savings in reasonable sums may be a part of the needs analysis in fixing spousal support. With respect to Joel's ability to pay Cheryl's unmet expenses, the court found that though Joel wanted to focus on past lifestyle, not his current income, the court's task is to consider his current "ability to pay." *See Gust*, 858 N.W.2d at 411. The court found Joel's income was likely to stay at more than $600,000 for the next several years, and that he was quite able to pay $144,000 per year in spousal support, including $6,000 each for Cheryl's charities and retirement, and still have more than $456,000 remaining.

g. ***In re Marriage of Thomas, No. 16-1838 (Iowa App., 2017)***. The Court noted that Cheryl and Steven presented facts similar to those in *In re Marriage of Gust*, 858 N.W.2d 402 (Iowa 2015). In *Gust*, the husband earned $92,000 per year and the wife earned $22,500. In this case, Steven earns $120,000 per year and Cheryl earns approximately $20,000. The Gust marriage lasted twenty-seven years, while the Thomas marriage lasted approximately twenty-six. The *Gust* court awarded traditional alimony in the amount of $24,000 per year. Here, the district court awarded traditional alimony in the amount of $30,000 per year. The court decided the spousal support award was equitable. "The purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued." *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). However, in most cases, "We recognize it may be that neither party will be able to maintain their marital lifestyle, as . . . two households are inevitably more expensive to maintain than one." *Gust*, 858 N.W.2d at 415. Such is the case here. The parties do not have sufficient assets or income to maintain the marital lifestyle. They will both be left worse off.

h. ***In re Marriage of El Krim, No. 16-1620 (Iowa App., 2017)***. Mohamed, an Egyptian citizen, apparently living in Dubai and the Untited States was required to pay child support though he claimed to be unemployed and provided no income information. The court found it reasonable to impute Mohamed's income at the minimum wage in American dollars based on a forty-hour work week after considering his education and training as a computer network architect and his experience working in that field in Egypt, Dubai, and the United States. However, since the trial court found that Amanda was "in need of spousal support" but could not "determine Mohamed's actual earnings, ordered Mohamed to pay "$1 per

year in traditional spousal support to Amanda until she dies, remarries or reaches the age of sixty-five. The court also specifically ordered that if Amanda obtains information concerning Mohamed's actual earnings, that fact shall be a material change of circumstances justifying a modification in the amount of spousal support. The Court of Appeals ruled that this place-holder spousal-support award was justified under the circumstances. *See In re Marriage of Horstmann*, 263 N.W.2d 885, 892 (Iowa 1978).

i. **The Factors**: Courts consider many factors in determining if alimony is to be awarded and what amount should be awarded: the **amount of the property division** [In re Marriage of Hardy, 539 N.W.2d 729 (Iowa App. 1995)]; the **amount of child support** under the decree [In re Marriage of Brown, 487 N.W.2d 331 (Iowa 1992)]; the **earning capacity of each party** [In re Marriage of Wegner, 434 N.W.2d 397, 398 (Iowa 1988)]; the **wife's needs of support and the husband's ability to pay** toward that support [In re Marriage of Jones, 309 N.W.2d 457, 460 (Iowa 1981)]; an **agreement to waive alimony** (if not inequitable) [In re Marriage of Handeland, 564 N.W.2d 445 (Iowa App. 1997)]; and the **statutory factors** listed in Iowa Code section 598.21(3) [In re Marriage of Will, 489 N.W.2d 394 (Iowa 1992)].

In re Marriage of Goodrich, No. 16-1211 (Iowa App., 2017). Robert argued that his alimony obligation should be $1000 a month, based on a calculation suggested in *In re Marriage of Gust*, 858 N.W.2d 402, 416 n.2 (Iowa 2015). Under, guidelines of the American Academy of Matrimonial Lawyers, which suggest basing alimony on 30% of payor's gross income minus 20% of payee's gross income. Teresa questioned Robert's income calculation and contended that the obligation should be $2600 a month. The court noted that the AAML guidelines may "provide a useful reality check in some cases," they may "serve neither as the starting point for a trial court nor as the decisive factor for a reviewing court on appeal." *See Mauer*, 874 N.W.2d at 108. Instead, the factors in Iowa Code Section 598.21A. The marriage lasted for 30 years; Teresa was 56; Robert was 60; and both were in reasonably good health. Teresa had a college degree, but she had been out of the workforce for several years. Teresa could earn at least $22,880 a year which would not cover her estimated monthly expenses of $3,356. Robert did not have a college degree, but was earning $58,599. The court concluded that the $1,000 amount suggested by Robert and the *Gust* calculation was the appropriate alimony amount.

In re Marriage of Arevalo, No. 16-1326 (Iowa App., 2017). Erenia was not employed and cared for the children during most of the marriage; her highest income year was 2015, when she worked two jobs and earned less than $16,000; and she was unlikely to be able to earn substantially more. Edgar earned approximately $66,000 in 2015, also working two jobs. The court found that it would be unfair to require Edgar to continue to work two jobs and that his ability to pay spousal support was limited by a substantial child support obligation. Still, Edgar's established earning capability was multiple times larger than Erenia's. The court may consider the amount of child support under the decree when setting the spousal support amount. *In re Marriage of Will*, 489 N.W.2d 394, 400 (Iowa 1992); and it is not uncommon for awards of spousal support to increase as the obligation of the party paying child-support decreases. *See*, *e.g.*, *In re Marriage of Gust*, 858 N.W.2d 402, 415 (Iowa 2015). Here, though the marriage lasted less than 15 years; and *Gust* referred to twenty years as the "durational threshold" for serious consideration for traditional or permanent support , this is not a "bright-line test". *Gust at* 858 N.W.2d at 410; *see also In re Marriage of Nelson*, No. 15-0492, 2016 WL 3269573, at *3 (Iowa Ct. App. June 15, 2016) . Therefore, the court awarded Erenia permanent spousal support of $400 monthly to increase to $600 following the high school graduation of the parties'

youngest child with no limit upon the duration, except upon Erenia's remarriage or the death of either party. *See*, *e.g.*, *Gust*, 858 N.W.2d at 415.

In re Marriage of Tieskoetter, No.16-2111 (Iowa App., 2018). Mark and Cathy were married for forty years. Mark's income was $145,000 per year, and he had been found guilty of hiding or dissipating assets. Cathy's income was $51,000 per year; and based upon Cathy's age, educational background, training, employment skills, and work experience, her earnings would likely never increase . The court awarded lifetime spousal support of $2000 per month, this amount plus Cathy's $51,000 annual income gave her $75,000 per year, leaving Mark'swith a total income above $100,000 per year. The court can consider an intentional dissipation of assets to avoid future support payments when it makes an award of alimony." *In re Marriage of Olson*, 705 N.W.2d 312, 317 (Iowa 2005).

2. Rehabilitative Alimony

Rehabilitative alimony serves to support an economically dependent spouse "through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting." In re Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 1989).

a. "The dependent spouse's premarriage standard of living is irrelevant. Nowhere does the Code direct the Court to restore an ex-spouse to his or her premarital standard of living. Rather, Iowa Code '598.21(3)(f) directs the Court to consider, among other factors, '[t]he feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage..." In re Marriage of Grauer, 478 N.W.2d 83, 85 (Iowa App. 1991).

b. In re Marriage of Becker, 756 N.W.2d 822 (Iowa 2008). The parties divided 3.3 million dollars in the property settlement. Though the Court found that Laura's property settlement would allow her to live comfortably, her earning capacity was less than 10% of Fred's. Therefore, instead of forcing Laura to spend her nest egg for living and education expenses, the Court awarded three years of support of $8000 per month to allow Laura to complete her education and seven years at $5000 per month to give Laura time to develop her earning capacity.

c. **In re Marriage of Rogers, No. 16-1571 (Iowa App., 2017)**. Jason and Jessica were married almost thirteen years. Jessica was 38 and Jason was 40. Jessica was a licensed cosmetologist but worked little during the marriage because Jason had to both travel and study to obtain an MBA, while working full-time. Jason earned $267,968.00 . Jessica earned about $6,000; and would need time to rebuild her cosmetology practice. The court found that Jessica's income at the end of the marriage was a direct result of the parties' agreement she would focus her energy at home rather than the workforce, and she testified it will take at least one or two years for her to build up her clientele at the salon. Therefore, Jason was required to pay Jessica $3,000 per month for five years in addition to child support of $1,798. In addition, Jessica was awarded 10% of Jason's gross bonus for the same duration. When determining the appropriateness of the alimony award, we must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996). "Alimony may be used to remedy inequities in a marriage and compensate a spouse who leaves the marriage at a financial disadvantage."

d. ***In re Marriage of Van Genderen, No. 15-0790 (Iowa App., 2017)***. Jana and Mike were married for seven and a half years, including a year of separation. Jana initially worked as a graphic artist making $23,000 per year. Prior to the marriage, Jana received a certificate from DMACC in architectural technologies but never held a job in the field and worked as a waitress. During the marriage, Jana assisted Mike with his business and cared for their children. Jana is now pursuing a degree in elementary education and works part-time as a waitress in Newton. Mike argued Jana was immediately employable at her former earning capacity of $23,000 per year. The court approved rehabilitative spousal support of $500.00 per month for thirty-six months. The court noted that whether spousal support is justified is dependent on the facts of each case." *In re Marriage of Shanks*, 805 N.W.2d 175, 178 (Iowa Ct. App. 2011). Iowa Code § 598.21A(1); see also *Gust*, 858 N.W.2d at Jana had been absent from the job market for several years in order to fulfill her role as the primary caretaker for the parties' two young children. Furthermore, Jana is unlikely to achieve the standard of living by her own efforts at this time to live reasonably. Therefore, she will require time and education to attain comparable employment.

e. ***In re Marriage of Wilson, No. 16-1114 (Iowa App., 2017)***. Amanda earned approximately $8.90 per hour as a part-time substitute in the Sigourney Community School District; and Ryan earned a technical degree and could earn $90,000 as a journeyman lineman. Ryan's career advancement—at least partially—was made possible by Amanda's support at home. *See In re Marriage of Smith*, 573 N.W.2d 924, 927 (Iowa 1998). During the marriage, Amanda was removed from the workforce while she raised three children. Her employment was limited to one short-lived job and part-time retail experience. She needed additional education, training, and employment in order to become self-sufficient. Therefore, the court ruled that Amanda was entitled to a limited period of rehabilitative spousal support. The court also rejected Ryan's argument that an award of spousal support is precluded because Amanda's "[fiancé] provide[s] for all Amanda's needs." Our courts have acknowledged that remarriage and cohabitation is not always an appropriate triggering event for the termination of alimony because its purpose is to establish self-sufficiency for the dependent spouse. *See In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998). Though the court did not award any non-modifiable reimbursement spousal support, the court noted that Ryan's potential to earn $90,000 per year was largely attributable to his journeyman status, which Amanda made possible by her support at home; and concluded that spousal-support of $1,000 per month for four years was equitable in this situation.

3. Reimbursement Alimony

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

a. In re Marriage of Probasco, 676 N.W.2d 179 (Iowa 2004). The Supreme Court denied reimbursement alimony because the facts did not meet the criteria: the marriage was not one of short duration devoted almost entirely to the educational advancement of one spouse. The parties had a substantial net worth which provided the "supporting" spouse a generous

property settlement. The district court awarded reimbursement alimony because the husband had received the business which would produce income for him in the future, and the wife had no such asset. This reasoning ignored that the valuation of the business took into consideration the future earnings of the business.

In re Marriage of Erpelding, No. 16-1419 (Iowa App., 2017). Tim and Jodi lived together for five years on the Erpelding family farm before executing a prenuptial agreement and marrying in 1997. At that time, Tim—a lifelong farmer—listed his net worth at more than $500,000, while Jodi had a net worth of $41,000. After the trial, based on the parties' agreement, the court awarded Jodi assets worth approximately $810,000 and no debt; and awarded Tim $6,300,000 in net assets. The district court rejected Jodi's request for reimbursement alimony but awarded her traditional alimony in the amount of $1,166 per month. Jodi requested $600,000 in reimbursement alimony to recognize her contributions to the family which freed up marital cash for Tim to accumulate farmland in his own name. She argued that reimbursement alimony "should not be limited to only the traditional reimbursement alimony situations involving professional degrees. Tim argued that this was a marriage of long duration—eighteen years—and that this case was not similar to "degree cases" where there is "little or no property to be divided." Jodi was awarded $810,000 in assets with no debt. After reviewing Iowa case law, the court agreed with Tim. *In re Marriage of Probasco*, 676 N.W.2d 179, 183 (Iowa 2004) explains that our courts have consistently limited reimbursement alimony to situations similar to those described in Iowa's seminal case on reimbursement alimony, *In re Marriage of Francis*, 442 N.W.2d 59, 61 (Iowa 1989): marriages of short duration . . . devoted almost entirely to the educational advancement of one spouse and yield[ing] the accumulation of few tangible assets." Jodi cited no case from *any* jurisdiction applying a "degree analysis" to the acquisition of farmland during a long-term marriage. However, the court noted that in a case without a prenuptial agreement, this economic benefit conferred by Jodi would be reflected in a much more generous property settlement. Therefore, the court affirmed Jodi's traditional alimony of $1,166 per month, terminating upon death or Jodi's remarriage.

b. With In re Marriage of Jennings, 455 N.W.2d 284 (Iowa App. 1990), the court of appeals began to define the limits of Reimbursement Alimony by denying any alimony to a former spouse after a five-year marriage. The court of appeals ruled that where, as here, the "supporting spouse" does not make substantial sacrifices to assist in the attainment of the degree and where sufficient assets exist to provide some compensation, alimony may be denied. See also In re Marriage of Grauer, 478 N.W.2d 83 (Iowa App. 1991).

c. However, the Court of Appeals rejected the husband's argument that the award of reimbursement alimony should be set off by the amount of rehabilitative alimony. In re Marriage of Farrell, 481 N.W.2d 528 (Iowa App. 1991). These two types of alimony are designed to achieve different goals and may not be offset against each other.

d. In re Marriage of Mouw, 561 N.W.2d 100 (Iowa App. 1997), the Court of Appeals held that Francis formula should not be applied to all cases. Here, the contributing spouse also received a very valuable education with a bright future and a number of other factors should be considered: "this is not so much a computation of dollars and cents as a balancing of equities." Mouw, at 102. See also In re Fedorchak, No. 3-979 / 13-0466 (Iowa App., 2013).

4. Spousal Support Termination

The general rule is that alimony does not automatically terminate upon remarriage. However, the burden shifts to the recipient to show extraordinary circumstances exist which require the continuation of alimony payments. In re Marriage of Whalen, 569 N.W.2d 626 (Iowa App. 1997). See also In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985) and In re Marriage of Von Glan, 525 N.W.2d 427 (Iowa App. 1994). In addition, traditional spousal support is normally payable until the death of either party, the payee's remarriage, or until the dependent spouse is capable of self-support at the lifestyle to which the party was accustomed during the marriage. *See, e.g.,* In re Marriage of Becker, 756 N.W.2d at 826; In re Marriage of Francis, 442 N.W.2d at 64.

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

b. **In re Marriage of Goodrich, No. 16-1211 (Iowa App., 2017).** Robert contended that his $1,000 per month alimony obligation should automatically reduce at retirement to $500 per month. His estimated social security benefits are $2,301; so he would be left with only $1,301 after paying his alimony obligation, while Teresa would have $2,250 ($1000 of alimony plus one half of Robert's social security benefits). Teresa claimed that future retirement raises too many speculative issues to be considered in the initial spousal support award. *In re Marriage of Gust*, 858 N.W.2d 402, 416 n.2 (Iowa 2015). The court decided that Robert's retirement did not raise too many speculative issues. The court in *In re Marriage of Mauer*, 874 N.W.2d 103, 106 (Iowa 2016) found that Section 598.21A(1) required court to account for the retirement of both parties in setting spousal support. Although Robert testified he planned to work at least another ten years "to maximize [his] social security income," the court ordered that Robert's alimony obligation be reduced to $500 per month when he obtained full retirement age and began receiving social security benefits.

In re Marriage of Kenne, No. 16-0467 (Iowa App., 2017)). Daniel and Heather divorced after twenty-five years. Heather's income from full and part-time jobs was $44,000. Daniel's annual salary was $77,000, plus a car allowance of $525 per month or $6,300 per year. After including child support and the trial court award of spousal support of $975 per month initially and then $575 per month when the parties' child's expensive ice hockey career ended. Daniels disposable income immediately after the decree would be $67,400 and Heather's was $59,900. The court approved the spousal-support award because it was meant to maintain for Heather "a standard of living reasonably comparable to that enjoyed during the marriage." *In re Marriage of Gust*, 858 N.W.2d 402, 411 (Iowa 2015). In this case, that standard of living means continuing the minor child's involvement in hockey—an activity that demands much of the parties' time and resources. Daniel also challenges the duration of the award: "until the death of either party or Heather's remarriage. Daniel

sought termination when the child reaches majority, if the minor child no longer partakes in hockey, or when Heather is capable of self-support. The court found that Heather was not likely to earn an amount that will provide her the standard of living she was accustomed to during the marriage. *Id* at 406. "Spousal support may end, however, where the record shows that a payee spouse has or will at some point reach a position where self-support at a standard of living comparable to that enjoyed in the marriage is attainable." *Id.*

c. Whether alimony should continue after remarriage or cohabitation depends upon the purpose behind the award of alimony. Continued alimony after remarriage most often occurs with rehabilitative and reimbursement alimony because the purposes to be accomplished by these kinds of alimony will not be ordinarily affected by remarriage or cohabitation. In addition, retirement benefits which function as a distribution of property but are classified as alimony may also continue upon remarriage. In re Marriage of Bell, 576 N.W.2d 618 (Iowa App. 1998).

d. "Parties can contract and dissolution courts can provide that alimony is not modifiable, does not terminate on remarriage, or is payable in a lesser sum on remarriage". In re Marriage of Aronow, 480 N.W.2d 87, 89 (Iowa 1991).

e. Rehabilitative alimony may be terminated when the dependent spouse becomes "self-supporting". However, for purposes of modification of alimony decrees, the standard of living sought to be established by alimony awards is the lifestyle established by the parties during the marriage. In re Marriage of Boyd, 200 N.W.2d 845, 854 (Iowa 1972). See also In re Marriage of Gilliland, 487 N.W.2d 363 (Iowa App. 1992).

g. In re Marriage of Wendell, 581 N.W.2d 197 (Iowa App. 1998), the Court of Appeals revisited its long-standing policy of generally providing in an original decree that alimony will terminate upon cohabitation of the recipient with a member of the opposite sex as well as upon remarriage. The Court held that ". . . . cohabitation has too many variables to be a defined future event, like remarriage, in a dissolution decree. . . . Although we have tied cohabitation to remarriage in the past, we will no longer use cohabitation as an event to terminate alimony. . . . Like cohabitation, we believe events such as employment and self-sufficiency should be reserved for modification action.

h. With In re Marriage of Ales, 592 N.W.2d 698 (Iowa App. 1999), the Court of Appeals further refines the process of handling of cohabitation by specifying the burdens of proof. In future cases, the Petitioner in a modification action will be required to show there is a cohabitation to meet the substantial change of circumstances requirement under Iowa Code Section 598.21(8). Then, the burden will shift to the recipient to show why spousal support should continue in spite of the cohabitation because of an on-going need or because the original purpose for the support award makes it unmodifiable." Ales, at 703.

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

5. Alimony Payment

a. Assignment of Income. In In re Marriage of Debler, 459 N.W.2d 267 (Iowa 1990), the Supreme Court ruled that though Section 598.22 only specifically permits automatic

assignment of income for payment of child support, the District Court has the inherent equitable power to order comparable assignments of income for payment of delinquent alimony. Where, as here, the former husband's support record is poor and he works out of state, use of the Court's power to order assignment is appropriate.

b. Order to Withhold Income can now be issued as an alternative to punishment for contempt under Section 598.23 or pursuant to a recently revised Chapter 252D.

6. Alimony QDRO

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

7. Spousal Support Insurance/Security

a. Courts do not always require that provision be made to protect the dependent spouse if the payor dies while alimony is still needed. However, in In re Marriage of LaLone, 469 N.W.2d 695 (Iowa 1991), the Supreme Court held that alimony must terminate upon the death of the recipient to be considered tax-deductible alimony under I.R.C. 71(b)(1)(D) and should ordinarily terminate on the death of the payor where substantial life insurance is payable to the recipient on the death of the payor.

b. In re Marriage of Hettinga, 574 N.W.2d 920 (Iowa App. 1997). The Court held that: "The district court has the authority to secure performance of future alimony payments by requiring adequate security or imposing appropriate liens on the obligor's property. . ." However, it removed liens against the payor's land and canceled a provision which provided that if a husband should predecease the wife, his estate was obligated to purchase an annuity or otherwise, to the satisfaction of the wife, to guarantee payment of the alimony for her lifetime. See also In re Marriage of Lytle, 475 N.W.2d 11 (Iowa App. 1991) and In re Marriage of Van Ryswk, 492 N.W.2d 728 (Iowa App. 1992).

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

In re Marriage of Tieskoetter, No.16-2111 (Iowa App., 2018). The district court required Mark to secure his $24,000 per year spousal support obligation with $400,000 of life insurance. The Court noted that if the party requesting the security has demonstrated a need and the cost of such a policy would not be unduly burdensome, the court may order the security of a life insurance policy. See *In re Marriage of Olson*, 705 N.W.2d 312, 318 (Iowa 2005) ; *see also In re Marriage of Debler*, 459 N.W.2d 267, 270 (Iowa 1990); *In re Marriage of Muow*, 561 N.W.2d 100, 102 (Iowa Ct. App. 1997). However, the court found that though Cathy demonstrated a need for continued support, she did not demonstrate that the cost of such a policy in the amount ordered by the district court would not be unduly

burdensome. Therefore, the court reduced the obligation to the $100,000 policy Mark already had in force.

8. Veteran Pension Available for Alimony

Veteran's benefits are not provided solely for the veteran but for his family as well. Family support, child support and alimony, can be ordered to be paid from V.A. benefits without violating the Supremacy Clause of the U.S. Constitution. In re Marriage of Anderson, 522 N.W.2d 99 (Iowa App. 1994).

9. Income Available for Alimony

In re Marriage of Schriner, 695 N.W.2d 493 (Iowa 2005). Though he was earning substantial overtime at the time of trial, John testified that a recent injury was likely to cause him to stop working more than the minimum. The Supreme Court decided that child support precedent's stating that overtime income should be considered when "overtime has been consistent, will be consistent, and is somewhat voluntary" and when the "overtime pay is not an anomaly or speculative," [In re Marriage of Brown, 487 N.W.2d 331, 333 (Iowa 1992)] should apply to alimony considerations.

10. Alimony and Property Division

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

11. Attorney Fees

a. Financial Circumstances of Parties. Trial courts have considerable discretion in awarding fees. In exercising its discretion to award attorney fees, the court should make an award which is fair and reasonable in light of the parties' financial positions. In re Marriage of Grady-Woods, 577 N.W.2d 851 (Iowa App. 1998). See also In re Marriage of Titterington, 488 N.W.2d 176 (Iowa App. 1992). In re Marriage of Willcoxsin, 250 N.W.2d 425, 427 (Iowa 1977); In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

b. Frivolous Litigation. In addition, the Supreme Court has decided that the frivolous litigation tactics and meritorious applications, in addition to disparity in incomes, are factors the court should consider in awarding attorney fees. Seymour v. Hunter, 603 N.W.2d 625 (Iowa 1999).

c. Failure to Cooperate in Discovery. An award of attorney fees is appropriate when one party is less than cooperative in producing discovery. See In re Marriage of Crosby, 669 N.W.2d 255 (Iowa 2005). Here, the Court approved $5,000 in trial attorney fees and granted Amy $5,000 in appellate attorney fees. See also In re Marriage of Miller, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996).

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

C. DIVISION OF PROPERTY

1. Choice of Law

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

b. However, the importance of the Whelchel case may be limited because in Nichols v. Nichols, 526 N.W.2d 346 (Iowa App. 1994), Whelchel and the choice of law issue were ignored. The Court of Appeals ignored the law of the state where the asset was acquired, and applied Iowa law.

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

2. Factors in Equitable Division

a. Equality of Division

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

(2) In Marriage of Bonnette, 584 N.W.2d 713 (Iowa App. 1998), Since the trial court failed to explain a $20,000 difference between the values of the assets awarded to each party, the Court of Appeals granted the wife an additional $10,000 property settlement.

b. Gender Neutral

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

c. Tax Consequences/Selling Costs

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

(1) Section 598.21(1)(j) requires the Court to consider the tax consequences of the property settlement where the adverse tax consequences cannot reasonably be avoided. In re Marriage of Hogeland, 448 N.W.2d 678 (Iowa App. 1989).

(2) However, subtracting an estimate of the expense of capital gains taxes and selling costs in the event corporate stock was sold is not appropriate where sale is not pending or contemplated. The Supreme Court reversed the Trial Court which had reduced the value of the wife's interest in corporate stock from $637,000.00 to $336,000.00 by deducting the estimated costs of sale and income taxes. In re Marriage of Friedman, 466 N.W.2d 689 (Iowa 1991). See In re Marriage of Haney, 334 N.W.2d 347 (Iowa App. 1983); but see In re Marriage of Hoak, 334 N.W.2d 185 (Iowa 1985) and In re Marriage of Dahl, 418 N.W.2d 358 (Iowa App. 1987).

(3) In re Marriage of McDermott, 827 N.W.2d 671 (Iowa 2013). The Court refused to reduce the property division equalization payment by $750,000 to allow for the tax and sale costs. Stephen argued tha he would have to sell land and incur taxes and selling expenses to make a $1 million equalization payment. The Court rejected this argument because Stephen was offered a mortgage loan to make the payment by his bank; and his cash flow was sufficient to permit him to make the payment without selling any land. The Court must often award a farm to the spouse who operated it and set a schedule of property settlement payments so the farmer-spouse might retain ownership of the farm. In re Marriage of Callenius, 309 N.W.2d 510, 515 (Iowa 1981) (citing In re Marriage of Andersen, 243 N.W.2d 562, 564 (Iowa 1976)) . However, a party's interest in preserving the farm should not work to the detriment of the other spouse in determining an equitable settlement.

d. Property in Lieu of Alimony/Support

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

e. No Bonus Property for Domestic Abuse

However, in In re Marriage of Goodwin, 606 N.W.2d 315 (Iowa 2000), the Supreme Court refused an additional share of the parties' assets as compensation for domestic abuse claimed to have been suffered during the marriage. We reject this argument because it would introduce the concept of

fault into a dissolution of marriage action, a model rejected by our Legislature in 1970. See In re Marriage of Williams, 199 N.W.2d 339, 341 (Iowa 1972)

f. Accumulation During Separation

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

g. Failure of Duty to Disclose

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

h. Tax Obligations.

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

i. Dissipation of Assets.

(1) In re Marriage of Burgess, 568 N.W.2d 827 (Iowa App. 1997). Conduct which causes loss of marital property and dissipation or waste of assets may generally be considered in making a property division. However, the focus should not be on whether one spouse or the other is personally responsible for a debt, but whether the payment of an obligation was a reasonable and expected aspect of the particular marriage. Here, the wife knew that her husband had alimony and child support obligations which would be part of her marriage prior to the marriage.

(2) However, in In re Marriage of Bell, 576 N.W.2d 618 (Iowa App. 1998), the Court held that "conduct of a spouse which results in loss or disposal of property otherwise subject to division at the time of divorce may be considered in making an equitable distribution of property." Bell at 624. The record indicated that the husband had spent significant portions of marital assets on gambling prior to the dissolution. This waste of marital assets can be considered in the property distribution and supports the unequal division of the parties' assets. See also In re Marriage of Goodwin, 606 N.W.2d 315 (Iowa 2000); In re Marriage of Cerven, 335 N.W.2d 143, 1446 (Iowa 1983); In re Marriage of Wendell, 581 N.W.2d 197 (Iowa App. 1998); and In re Marriage of Martens, 680 N.W.2d 378 (Iowa App. 2004).

(3) In In re Marriage of Crosby, 699 N.W.2d 255 (Iowa 2005), the Court divided the assets equally, but then reimbursed Clayton's wife for litigation expenses she incurred which were caused by Clayton's failure to disclose, secretion of assets, and transfer of assets during the dissolution process because of his conduct. These acts must be dealt with harsh. . Otherwise the dissolution process becomes an uncivilized procedure and the issues become not ones of fairness and justice but which party can outmaneuver the other. In re Marriage of Williams, 421 N.W.2d 160, 164 (Iowa Ct. App. 1988).

(4) In re Marriage of Fennelly, 737 N.W.2d 97 (Iowa 2007). Michele alleged that Ted *indirectly* dissipated their marital assets, not by paying out large amounts but by accumulating large amounts of debt which would eventually reduce the parties' net worth. In determining whether dissipation has occurred, courts must decide "(1) whether the alleged purpose of the expenditure is supported by the evidence, and if so, (2) whether that purpose amounts to dissipation under the circumstances." Lee R. Russ, *Spouse's Dissipation of Marital Assets Prior to Divorce as Factor in Divorce Court's Determination of Property Division*, 41 A.L.R.4th 416, 421 (1985). See In re Marriage of Burgess, 568 N.W.2d 827, 829 (Iowa Ct.App.1997).

In re Marriage of Nelson, No. 16-0293 (Iowa App., 2017). Mary claimed the Kenneth dissipated marital assets because he used marital assets to pay spousal support, his household expenses were unreasonably high compared to previous years and benefitted him only, and he decreased his farming operations and increased his farm expenses compared to prior years, including many items of expense paid to his family members. The court applied a two-pronged test to the dissipation claim. The court must decide : (1) Whether the alleged improper action was proven; and (2) Whether that action amounts to dissipation under the circumstances." *In re Marriage of Fennelly*, 737 N.W.2d *97, 104; See also In re Marriage of Kimbro*, 826 N.W.2d 696, 700 (Iowa 2013). The the court valued the marital estate at $1,387,000, including a $250,000 addition based on Kenneth's dissipation. The court valued Kenneth's portion of the marital assets at $1,234,600 and Mary's portion at $152,800. Based on that valuation, the court ordered Kenneth to pay Mary an equalization payment of $540,000.

In re Marriage of Tieskoetter, No.16-2111 (Iowa App., 2018). During a long marriage, Mark essentially controlled the parties' money but for a few accounts Cathy held. Cathy was able to show that at least $36,000 was missing marital savings account from December 2012 to December 2015. Mark claimed that the withdrawn money was either used for home or business expenses, but provided no evidence. " A court may generally consider a spouse's dissipation or waste of marital assets prior to dissolution when making a property distribution." *In re Marriage of Kimbro*, 826 N.W.2d 696, 700 (Iowa 2013). A spouse dissipates assets when they lose or dispose of assets that should have been in the marital property division at the time of the dissolution. *See id.* at 700-01. The Court awarded Cathy $7,400 as her share of the assets Mark had dissipated.

3. Premarital Agreements

a. Since 1992, Chapter 596, Iowa's version of the Uniform Premarital Agreement Act, controls premarriage agreements in Iowa. The Statute made significant changes in the manner in which premarital agreements are prepared and enforced.

b. Content. Premarital agreements may include provisions relating to the following issues: (a) property rights and obligations of the parties; (b) rights of disposing of, managing and controlling property; (c) disposition of property upon death or divorce; (d) the making of wills, trusts, or other arrangements to carry out the provisions of the agreement; (e) disposition of life insurance death benefits; (f) choice of law; and (g) any other matter not in violation of public policy or a criminal statute. However, unlike the standard Uniform Act, an Iowa premarital agreement cannot contain a provision which adversely affects the right of a spouse or child to support. This is consistent with current Iowa precedent: "Any provision of an antenuptial agreement which may be interpreted as prohibiting alimony is contrary to public policy and thus void." In re Marriage of Van Brocklin, 468 N.W.2d 40 (Iowa App. 1991). See also In re Marriage of Gudenkoff, 204 N.W.2d 586, 587 (Iowa 1973).

c. Alimony Waiver. Iowa Code Section 596.5(2) prohibits provisions in premarital agreements which adversely affect the right of a spouse or child to support. However, In re Marriage of Van Regenmorter, 587 N.W.2d 493 (Iowa App. 1998) holds that premarital agreements entered from 1980 through 1991 may contain provisions for elimination of spousal support. However, any such alimony waiver provision is not binding on a court, though it must be considered with the other factors of Section 598.21(3) in making the spousal support award.

In re Marriage of Erpelding, No. 16-1419 (Iowa, 2018). Tim and Jody executed a premarital agreement waiving the right to seek an award of attorney fees in the event of a dissolution of their marriage. Under Iowa law, premarital agreements are subject to the Iowa Uniform Premarital Agreement Act [IUPAA], codified in Iowa Code chapter 596. Iowa Code Section 596.5 regulates the matters about which parties may contract in a premarital agreement, and provides in Section 596.5(2): "The right of a spouse or child to support shall not be adversely affected by a premarital agreement." The court noted that the IUPAA provides more protection to vulnerable parties than does the standard uniform statute. The court observed that because "children and financially dependent spouses are vulnerable parties, it is logical to conclude we should interpret IUPAA provisions to explicitly protect children or dependent spouses. The ability to pursue and exercise the right to spousal support is especially imperative where a premarital agreement will result in a substantially disproportionate property distribution because alimony is a means of mitigating such inequity. *See In re Marriage of Schenkelberg*, 824 N.W.2d at 487. An interpretation of section 596.5(2) concluding the right to support is not adversely affected by an attorney fee waiver could result in a financially dependent parent being unable to adequately litigate the issue of child support. The court concluded that a premarital-agreement waiver of attorney fees related to child support or spousal support adversely affects the right to such support and is therefore unenforceable under Iowa Code section 596.5(2).

d. Revocation/No Abandonment. Section 596.7 provides that premarital agreements may be revoked only by a written agreement signed by both spouses or by a finding that the agreement was not voluntarily executed or was unconscionable. Agreements entered into before January 1, 1992 will be enforced under prior Iowa precedents which provide that premarital agreements like any other contract can be "abandoned" by conduct in addition to express agreement. In re Marriage of Pillard, 448 N.W.2d 714 (Iowa App. 1989); In re Marriage of Elam, 680 N.W.2d 378 (Iowa App. 2004).

e. When parties enter a prenuptial agreement, in the absence of fraud, mistake, or undue influence, the contract is binding. If the court were to award different assets than those

agreed by the parties, it would, in effect, be rewriting the premarital agreement. In re Marriage of Applegate, 567 N.W.2d 671 (Iowa App. 1997).

f. "Iowa cases have long held prenuptial agreements are favored in the law. ... They allow parties to structure their financial affairs to suit their needs and values and to achieve certainty. This certainty may encourage marriage and may be conducive to marital tranquility..." In re Marriage of Spiegel, 553 N.W.2d 309 (Iowa 1996). "The person challenging the agreement must prove its terms are unfair or the person's waiver of rights was not knowing and voluntary ... The terms of an agreement are fair when the provisions of the contract are mutual or the division of property is consistent with the financial condition of the parties at the time of execution. Of course, the affirmative defenses of fraud, duress, and undue influence are also available to void a prenuptial agreement as with any other contract." Spiegel, at 316.

g. In re Marriage of Shanks, 748 N.W2d 506 (Iowa 2008) Premarital agreements executed after 1991 must conform to the Iowa Uniform Premarital Agreement Act (IUPAA), Iowa Code Chapter 596. The IUPAA provides three independent bases for finding a premarital agreement unenforceable: (1) The person did not execute the agreement voluntarily. (2) The agreement was unconscionable when it was executed. (3) Before the execution of the agreement the person was not provided a fair and reasonable disclosure of the property or financial obligations of the other spouse. In re Marriage of Spiegel, 553 N.W.2d at 317. Also, the IUPAA requires that unconscionability be determined as of the time when the agreement was executed.

4. Post-Marital Agreements

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

a. The Court retains the power to reject a stipulation, but should do so in dissolution matters only if the court determines the stipulation is unfair or contrary to law. Matter of Ask, 551 N.W.2d 643 (Iowa 1996). In reviewing post-marriage agreements, the Court will use basic contract analysis to determine whether an agreement was made and should be enforced. In re Marriage of Masterton, 453 N.W.2d650 (Iowa App. 1990). See also In re Marriage of Butterfield, 500 N.W.2d 95, 98 (Iowa App. 1993)[the Stipulation becomes final when it is accepted and approved by the Court]; In re Marriage of Zeliadt, 390 N.W.2d 117, 119 (Iowa 1986)[A stipulated settlement should be approved and enforced only if a district court determines the settlement will not adversely affect the best interests of the parties' children]; and In re Marriage of Udelhofen, 538 N.W.2d 308 (Iowa App. 1995); In re Marriage of Briddle, 756 N.W.2d 35 (Iowa 2008).

b. Once the court enters a decree, the stipulation has no further effect. The decree, not the stipulation, determines what rights the parties have. In re Marriage of Jones, 653 N.W.2d 589 (Iowa 2002). See Bowman v. Bennett, 250 N.W.2d 47, 50 (Iowa 1977). A party's remedy for post-trial events lies in an application to modify the decree.

In re Marriage of Erlandson, No. 16-0989 (Iowa App., 2017). Here, the court had to decide whether a separation decree controls the disposition of property and spousal support

in a subsequent dissolution proceeding. After Gary and Susan were married for nine years, they separated and formalized their status in a stipulation for separation which was approved and confirmed by the court in a "decree of separation". The stipulation specifically stated "The parties agree that if this matter should continue and proceed to a dissolution of marriage, that the above agreement and Stipulation for Separation shall remain in effect." The Erlandsons reconciled for several years but maintained separate finances; and finally, Gary petitioned for a dissolution. The district court gave the home to Susan, required Gary to pay part of the mortgage obligation, and gave Susan half of Gary's pension as specified in stipulation. On appeal, Gary sought to avoid the mortgage obligation and to have the court award the parties all of their individual retirement accounts.

The Court of Appeals first confirmed that the "decree of separation" was, in effect, a Chapter 598 "separate maintenance" decree. *See In re Marriage of Kurtz*, 199 N.W.2d 312, 314 (Iowa 1972); and the court then noted that Iowa Code § 598.21(7) states that a property division under chapter 598 is "not subject to modification". Therefore, since the stipulation and separate maintenance decree control the disposition of property in a subsequent dissolution action, Gary was foreclosed from arguing the disposition of the home and retirement accounts was inequitable.

c. In re Marriage of Cooper, 769 N.W.2d 582 (Iowa 2009) A reconciliation agreement, which imposed severe penalties in the event of infidelity, could be considered by the Court under Iowa Code § 598.21(1) (*k*). However, post-marital agreements are only considered, among other factors, in making property divisions. More important, Iowa will not enforce contracts which attempt to regulate spouse's personal conduct. Miller v.. Miller, 78 Iowa 177, 179, 42 N.W. 641, 641 (1889). "Our no-fault divorce law is designed to limit acrimonious proceedings. A contrary approach would empower spouses to seek an end-run around our no-fault divorce laws through private contracts." See Diosdado v. Diosdado, 118 Cal.Rptr.2d 494, 496 (Ct.App.2002).

5. Property Settlement Installment Terms/Interest

a. The Supreme Court held that Iowa Code Section 535.3 requires interest to accumulate at a rate calculated according to Section 668.13 when the decree or judgment makes no reference to the matter of interest on all money due on judgments or decrees and fixed awards of money for child support, alimony and property settlement. In re Marriage of Dunn, 455 N.W.2d 923 (Iowa 1990). See Arnold v. Arnold, 140 N.W.2d 874, 877 (Iowa 1966). However, in In re Marriage of Kinney, 478 N.W.2d 624 (Iowa 1991). The Supreme Court ruled that in many cases, it would be equitable to award interest to offset an award to one party of income-producing property (for example, a family home is not income-producing).

b. In re Marriage of Keener, 728 N.W.2d 188 (Iowa 2007). Interest may not be necessary in every case, but it certainly is where the amount of the total being paid is large and the goal is the approximate equal division of the parties' marital assets. The court must consider the time value of money. *See In re Marriage of Conley,* 284 N.W.2d 220, 223 (Iowa 1979). In addition, the Supreme Court found that a judgment lien against real estate as provided by Iowa Code section 624.23 and a UCC lien pursuant to Iowa Code chapter 554 against corporate stock were appropriate to secure the obligation.. *See generally Siragusa v. Brown,* 971 P.2d 801 (Nev.1998). Finally, the Court ordered that an acceleration clause was appropriate to require immediate payment if the ability to make the property settlement payments in the future becomes doubtful.

c. However, trial courts in dissolution proceedings, sitting in equity, retain the power to deny interest on property settlement judgments or to award interest at amounts less than required by Iowa Code Section 535.3. In re Marriage of Friedman, 466 N.W.2d 689 (Iowa 1991). See also In re Marriage of Callenious, 309 N.W.2d 510 (Iowa 1981).

d. The party who seeks an interest rate less than that ordinarily required by §535.3 must show circumstances of the property settlement which warrant a departure from the statutory interest rate. In re Marriage of Blume, 473 N.W.2d 629 (Iowa App. 1991). In In re Vanderpol, 529 N.W.2d 603 (Iowa App. 1994).

6. Separate Property: Inherited or Gifted

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

a. Iowa Code Section 598.21(2) and the Case Law (see In re Marriage of Thomas, 319 N.W.2d 209 [Iowa 1982] and In re Marriage of Van Brocklin, 468 N.W.2d 40 (Iowa App. 1991)) start with the premise that inherited property is not subject to division; but this premise yields where its application would be unjust.

Leo v. Leo, No. 16-0557 (Iowa App., 2017). Michael received gifts totalling $400,000 from his aunt and uncle. Lori claimed the gifts were to both her and Michael; and she received a $20,000 inheritance and a $19,500 annuity from her mother. After thirty-three years, both parties were in their mid-fifties, and their children were adults. The court considered the *Thomas* factors: (1) the contributions each party made "toward the property, its care, preservation or improvement," (2) whether there existed "any independent close relationship" between Lori and Michael's aunt and uncle, (3) "separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them," (4) the existence of any special needs for either Lori or Michael, and (5) whether it would be plainly unfair to Lori or the parties' children to have the property set aside for Michael. *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). The length of the marriage was also an important factor. *See In re Marriage of Hardy*, 539 N.W.2d 729, 731 (Iowa Ct. App. 1995). Lori consistently provided financial security for the family during the marriage and permitted Michael to pursue his various business endeavors, pursuits in which Lori actively provided support. While making this contribution, Lori was also involved in providing care for Michael's aunt and uncle. After awarding the parties their respective portions of the assets and debts—which, as valued by the district court, left Lori with $344,384 in assets and Michael with $890,219—the district court awarded Lori a $200,000 equalization payment—leaving Lori and Michael with $544,384 and $690,219, respectively.

b. The first step in the division of property is to set aside the inherited or gifted assets and the debts associated with these assets. Thereafter, the marital assets and debts should be distributed. In re Marriage of Mayfield, 477 N.W.2d 859 (Iowa App. 1991). See In re Marriage of Sparks, 223 N.W.2d 264 (Iowa App. 1982).

c. The fact that gifts have been commingled with marital assets or placed in joint ownership is not the controlling factor in determining whether an equitable distribution of gifts or inherited property is warranted. In re Marriage of Fall, 593 N.W.2d 164 (Iowa App. 1999). ...the manner a married couple titles or holds inherited or gifted property is not a controlling

factor in assessing its treatment as a gift or inheritance under Section 598.21(2)." Fall at 167. See also In re Marriage of Thomas, 319 N.W.2d 209, 211 (Iowa 1982)[the factors to be considered before dividing inherited and gifted property]; In re Marriage of Wertz, 492 N.W.2d 460 (Iowa App. 1996); In re Marriage of Higgins, 507 N.W.2d 725 (Iowa App. 1993)[husband's inheritance deposited to the wife's solely-owned credit union account remained the husband's separate property, not marital property]; In re Marriage of Cupples, 531 N.W.2d 656 (Iowa App. 1995); and In re Marriage of Dean, 642 N.W.2d 321 (Iowa App. 2002).

d. The length of the marriage is one of the most important circumstances considered in determining whether the commingled gift or inheritance has become a marital asset. In re Marriage of Oler, 451 N.W.2d 9, 11 (Iowa App. 1989). See also In re Marriage of Hardy, 539 N.W.2d 729 (Iowa App. 1995).

e. Even though the property is found to be separate property, the court must examine factors established in In re Marriage of Muelhaupt, 439 N.W.2d 656, 659 (Iowa 1989) to determine whether or not the asset should nevertheless be divided. Factors to consider in determining whether inherited property should be divided include: (1) contributions of the parties towards the property, its care, preservation, or improvement; (2) the existence of any independent, close relationship between the donor or testator and the spouse of one to whom the property was given or devised; (3) separate contributions by the parties to their economic welfare to whatever extent those contributions preserve the property for either of them; (4) any special needs of either party; and (5) any other matter which would render it plainly unfair to a spouse or a child to have the property set aside for the exclusive enjoyment of the donee or devisee. See also In re Marriage of Goodwin, 606 N.W.2d 315 (Iowa 2000) and In re Marriage of Liebich, 547 N.W.2d 844 (Iowa App. 1996).

Spence v. Spence, No. 16-1035 (Iowa App., 2017). In 2005, Linda received a number of financial payments as a result of the sky-diving death of her son. She spent$372,000, building and furnishing a new home, which was completed in 2008. The home was built on land the parties had purchased together for $10,300. Iowa Code § 598.21(6) (2015) provides factors to be considered to determine whether inherited or gifted property should be included with marital property in he property division: (1) contributions of the parties toward the property; (2) the existence of any independent close relationship with the decedent; (3) separate contributions by the parties to their economic welfare; and (4) any special needs of either party. Todd did not contribute much to the construction of the house; and he did not have a close relationship with his stepson. He earned $60,000 annually and should be able to secure other housing. *See In re Marriage of Thomas*, 319 N.W.2d 209, 212 (Iowa 1982) ; while Linda was closer to retirement and had lost half of her retirement account in the property division. Todd had received $233,942 in net marital assets, while Linda had received $176,392—a $57,550 difference; and the court decided that it was not unjust or inequitable to set aside the full value of the home to Linda. *See In re Marriage of Liebich*, 547 N.W.2d 844, 851 (Iowa Ct. App. 1996) ("[I]t is important to note the act of placing gifts or inheritances received by one spouse into joint ownership and/or commingling the same with other marital assets is not controlling in deciding whether the property should be divided as a marital asset.").

In re Marriage of Repp-Danis, No. 16-0251 (Iowa App., 2017). Inherited property "is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage." Iowa Code § 598.21(6) (2015). *In rel Marr*iage *of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989) sets out many factors a court may consider in deciding whether gifted or inherited property

should be included in the marital property division. Here, the marriage lasted sixteen years. The relationship actually began in 1999 but could not have been legally recognized, even as a common law marriage, so the court calculated the length of the marriage from their legally recognized marriage on January 12, 2010. Michele had made significant contributions in improving the inherited house; she was also responsible for much of the upkeep of the property; and she used an inheritance she was bequeathed to finance the parties' lifestyle and to fund improvements to the house. In addition, Michele also had special needs, a degenerative disc disease, which limited with her ability to work in her chosen field. Finally, Michele was made a tenant-in-common with Beth and used her own income to help maintain the property, pay household bills, and pay for the mortgage the parties used to consolidate the extensive credit card debt that financed their lifestyle. Therefore, the court concluded that it would be "plainly unfair" to leave the equity of the house for Beth's enjoyment alone. See *Muelhaupt*, 439 N.W.2d at 659.

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

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

7. Premarriage Property

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

b. However, the court often treats pre-marriage property differently than assets acquired during the marriage. "Property brought into a marriage by one party need not necessarily

be divided. In re Marriage of Lattig, 318 N.W.2d 811, 815-16 (Iowa App. 1982)." In re Marriage of Johnson, 499 N.W.2d 326 (Iowa App. 1993). The court distinguished between the $4,500.00 of tools brought into the marriage from the $500.00 of tools acquired during the marriage and granted the husband a $4,500.00 greater share in the property distribution.

c. In re Marriage of Sullins, 715 N.W.2d 242 (Iowa 2006). Donna's premarital annuity and Ray's retirement savings acquired prior to marriage were not separate property, not to be considered part of the marital assets. "All property of the marriage that exists at the time of the divorce, other than gifts and inheritances to one spouse, is divisible property. *Id.* (citing Iowa Code § 598.21(1) (2003)). In re Marriage of Brainard, 523 N.W.2d 611, 616 (Iowa Ct.App.1994). The trial court may place different degrees of weight on the premarital status of property, but it may not separate the asset from the divisible estate and automatically award it to the spouse that owned the property prior to the marriage.

8. Appreciation of Value of Separate Property

a. The appreciation in value of separate property often requires detailed investigation and analysis by the Court. "[T]he division of property is based upon each marital partner's right to a just and equitable share of property accumulated during the marriage as a result of their joint efforts." In re Marriage of Oakes, 462 N.W.2d 730 (Iowa App. 1990); but see In re Marriage of Campbell, 623 N.W.2d 585 (Iowa App. 2001) in which Oakes' concentration on joint contributions was overruled. See also In re Marriage of Johnson, 455 N.W.2d 281 (Iowa App. 1990).

b. Barring special circumstances, when an inheritance is used to buy property, any appreciation or loss in the value of the property may be characterized as marital property. In re Marriage of White, 537 N.W.2d 744 (Iowa 1995).

c. Several factors must be considered in determining an equitable division of property owned prior to the marriage and appreciated during the marriage: (1) "tangible contributions of each party" to the marital relationship, including homemaking; (2) whether the appreciation of property is due to fortuitous circumstances or the efforts of the parties; (3) the length of the marriage; and (4) the statutory factors specified in Section 598.21(1). In re Marriage of Grady-Woods, 577 N.W.2d 851 (Iowa App. 1998).

d. However, in In re Marriage of Fennelly, 737 N.W.2d 97 (Iowa 2007), the Supreme Court seemed to reject the Grady-Woods approach and divided the appreciation of all premarital assets equally. The Court said ". . . marriage does not come with a ledger. See In re Marriage of Miller, 552 N.W.2d 460, 464 (Iowa Ct.App.1996). Spouses agree to accept one another "for better or worse." Each person's total contributions to the marriage cannot be reduced to a dollar amount. Nor do we find it appropriate when dividing property to emphasize *how* each asset appreciated-fortuitously versus laboriously-when the parties have been married for nearly fifteen years."

9. Retirement and Pension Plans

a. General Principles

(1) Iowa Code Section 598.21(1)(I) requires the Court to consider pension benefits, vested and unvested, of each party in determining the property distribution. In re Marriage of Johnston, 492 N.W.2d 206 (Iowa App. 1992). See also In re Marriage of Imhoff, 461 N.W.2d 343 (Iowa App. 1990). Our Courts have become

increasingly aware that pension benefits are often among the most valuable assets a couple accumulates during their marriage.

(2) However, where the marriage is brief, each party had separate retirement plans established before the marriage, and no pension plans were depleted or diminished during the marriage, equity does not require an equal division of pension assets accumulated during the marriage. In re Marriage of Knust, 477 N.W.2d 687 (Iowa App. 1991). See also In re Marriage of Campbell, 451 N.W.2d 192 (Iowa App. 1989).

(3) In re Marriage of Morris, (Iowa, 2012). The stipulated decree did not mention survivor benefits, and in 2010, Kathy sued to compel Dennis to share the survivor rights as well as the retirement benefits. Though the property division generally is not modifiable, the district court retains authority to interpret and enforce its prior decree. See In re Marriage of Brown, 77,6 N.W.2d at 650. The court remanded the action to the district court for further proceedings to determine whether the district court in the original decree intended that half of the Marine Corps retirement should include survivor benefits or, instead, simply an equal division of the monthly retirement payments.

However, the Court of Appeals has recently given the district court much less power to create QDROs with terms not specified in the original decree:

In re Marriage of Tinker, No. 17-0327 (Iowa App., 2017). The parties' dissolution decree simply provided that Carol would receive a portion of Geoffry's IPERS pension calculated pursuant to the *Benson* formula. When Carol's lawyer submitted a proposed QDRO, it directed Geoffry to select a particular IPERS benefit option, designate Carol as the beneficiary of his preretirement death benefit, and name Carol as a contingent annuitant. At a hearing to approve the QDRO the district court found that Carol's proposed language accomplished the intent and purpose of the decree and Geoffry appealed. The Court of Appeals found that because the plain language of the decree addressed only the proper division of Geoffry's IPERS benefit and did not in any way limit or constrain Geoffry's ability to elect his IPERS benefit, the QDRO in this case was an impermissible modification of the property division or an impermissible serial final judgment. *See In re Marriage of Thatcher*, 864 N.W.2d 533, 538 (Iowa 2015). See also In re Marriage of Tekippe, No. 16-1297, (Iowa App., 2017).

b. Methods of Compensation for Pensions

(1) Alimony

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

(2) Present Valuation

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

(a) In re Marriage of Fidone, 462 N.W.2d 710 (Iowa App. 1990). The Court of Appeals took judicial notice of the value of the husband's employment benefits to affirm the award of a greater share of the home equity to the wife.

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

(3) Division of Pension – Percentage Method

(a) In re Marriage of Sullins, 715 N.W.2d 242 (Iowa 2006). There are two accepted methods of dividing pension benefits: the present-value method and the percentage method. Additionally, there are two main types of pension plans: defined-benefit plans and defined-contribution plans. Although both methods of dividing pension benefits can be used with both types of pension plans, it is normally desirable to divide a defined-benefit plan by using the percentage method because determining the present value of a defined-benefit plan requires the testimony of an actuaries or accountants, and often the pensioner cannot pay a lump-sum amount equal to the present value of a defined-benefit plan.

(b) Increasingly, the preferred method of handling a pension benefit is to divide the plan through a Qualified Domestic Relations Order which, in essence, separates the pension into two separate accounts. "Although [the Present Value Method] has the advantage of immediate distribution, it also has several disadvantages. Valuation of pension is complicated (especially when the plan is unvested) and requires the services of an actuary. Moreover, the financial obligation resulting from a lump-sum payment is often beyond the pensioner's present economic ability to pay." In re Marriage of Benson, 545 N.W.2d 252, 255 (Iowa 1996). See also In re Marriage of McLaughlin, 526 N.W.2d 342 (Iowa App. 1994); In re Marriage of Kurtt, 561 N.W.2d 385 (Iowa App. 1997).

(c) In re Marriage of Duggan, 659 N.W.2d 556 (Iowa 2003) In addition to granting the spouse one-half of the pension benefit earned during the marriage, the Court required the Husband to name his former wife as his designated beneficiary for one-half of the surviving spouse benefit and one-half of any cost-of-living increases because only by giving her survivorship rights as to her share of the payments can we ensure that she will receive her one-half share of the pension plan.

(d) However, note that surviving spouse benefits are recognized as a separate property right from the underlying pension benefits [In re Marriage of Davis, 608 N.W.2d 766, 770-71 (Iowa 2000)]. In In re Marriage of Estrada, 2007 WL 914029 (Iowa App.) the non-pensioned spouse was denied the surviving spouse benefit because the decree and stipulation did not require designation of Wendy as a surviving spouse.

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

In re Marriage of Huinker, No. 16-1663 (Iowa App., 2017). The district court gave Dody a portion of Kevin's IPERS pension plan from the date of their marriage in 2002 until they separated in 2011, but Dody also sought to receive a share of the pension accumulated from the separation date to the date of the trial in 2015. The court noted that the percentage method of dividing retirement benefits outlined in *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996), takes the entire term of the marriage into consideration. However, "[e]quitable distributions require flexibility and concrete rules of distribution may frustrate the court's goal of obtaining equitable results." *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997). In particular, "when parties separate several years before even filing a petition for dissolution of marriage, an alternate valuation date is appropriate." *Id*. (citing *In re Marriage of Tzortzoudakis*, 507 N.W.2d 183, 186 (Iowa Ct. App. 1993). Here, the court denied Dody any part of the pension earned during the four-year separation, not only because the parties' economic partnership changed, but also because Kevin waived any interest in the equity in Dody's house.

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

[1] Hisquierdo v. Hisquierdo, 439 U.S. 572, 590-91, 99 S.Ct. 802 (1972) bars state courts from dividing Social Security or Railroad Retirement Tier I benefits, directly or indirectly, in formulating the economic terms of dissolution decrees. However, in In re Marriage of Boyer, 538 N.W.2d 293 (Iowa 1995), the court approved an unequal division of property favoring the wife, based in part upon a finding that the present value of the wife's social security benefits was $22,539.00, while the husband's benefits were worth $87,861.00.

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

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

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

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

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

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

10. Division of Other Assets

a. Business Interests

(1) As an exception to the general trend 50/50 property divisions, courts have approved awards of less than 50% of farms and small business to nonoperating spouses to permit the operating spouse to retain ownership and to manage the farm or business as a single economic unit. In re Marriage of Callenious, 309 N.W.2d 510 (Iowa 1981).

(2) However, where there are enough other assets to permit an almost equal split, the Court will do so. In fact, in In re Marriage of Lacaeyse, 461 N.W.2d 475 (Iowa App. 1990), the wife received more of the net assets than the husband. The Court

of Appeals ruled that the division was equitable because the husband got all of the income-producing farmland and equipment.

(3) In dividing the property, the Court should not ordinarily force the parties into a continuing business relationship after the divorce. In re Marriage of Lundtvedt, 484 N.W. 2d 613 (Iowa App. 1992).

(4) The Trial Court is given much leeway in the difficult task of valuing closely held businesses. In re Marriage of Steele, 502 N.W.2d 18 (Iowa App. 1993). See In re Marriage of Hitchcock, 309 N.W.2d 432, 435-36 (Iowa 1981).

(a) However, the Court cannot delegate this responsibility to the parties through a private auction between parties. In re Marriage of Dennis, 467 N.W.2d 806 (Iowa 1991).

(b) In In re Marriage of Coulter, 502 N.W.2d 168 (Iowa App. 1993), the Court approved a valuation of a closely-held corporation which included a 30% discount for the husband's minority interest and the division of only the appreciation in value of the business interest from the date of the marriage to the date of the divorce.

(c) The share of the value dependent upon post-dissolution services should not be included in the allocation of assets. In re Marriage of Russell, 473 N.W.2d 244 (Iowa App. 1991). Also, the good will of a professional practice should not be valued because it is dependent upon the ability of the professional to continue his or her profession, and is based upon the professional's future earning potential. In re Marriage of Bethke, 484 N.W.2d 604 (Iowa App. 1992).

(d) In re Marriage of Keener, 728 N.W.2d 188 (Iowa 2007). Anecdotal evidence (even from an expert) is simply an insufficient basis upon which to determine the fair market value of intangible assets. Therefore, the Court found that the district court erred by speculating as to the value of these assets; and reduced their value.

b. Family Residence

(1) Iowa Code Section 598.21(1)(g) requires the Court to consider "the desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of any children." the most common disposition of the family residence is to award the family home to the custodial parent while granting the noncustodial parent a continuing ownership interest or a lien against the property.

(2) The attorney drafting a lien against real estate must be careful in the dissolution decree to provide that the lien is made subject to future unpaid child support so that any arrearage will be deducted from the amount of the lien. In Smith v. Brown, 513 N.W.2d 732 (Iowa 1994).

(3) However, though it is desirable to award the family home and contents to the physical custodian of the children, here, the mother and children had resided in the homestead for only six months prior to the separation and the wife's business and its assets were part of the homestead. Therefore, the Court ordered the house and contents sold and the proceeds divided. In re Marriage of Hoffman, 493 N.W.2d 84 (Iowa App. 1992).

(4) A party's ability to meet the financial obligations of a dissolution decree is a relevant factor to consider in determining an equitable division of property. In re Marriage of Siglin, 555

N.W.2d 846, 849-50 (Iowa App. 1996). See In re Marriage of Lovetinsky, 418 N.W.2d 88, 89-90 (Iowa Ct.App.1987) [required sale of the parties' home because it was unclear that the wife could "afford to maintain the residence and its attendant expenses"].

c. Personal Injury Claim

The proceeds of a personal injury case are divided according to the circumstances of each case. Settlement proceeds do not automatically belong to either party. However, here, where the husband sustained a permanent disability and the wife had a greater earning capacity, the husband was granted the claim for his personal injuries and the wife was limited only to pursuing her claim for consortium. In re Marriage of Pasencia, 541 N.W.2d 923 (Iowa App. 1995). See also In re Marriage of Rigdon, No. 16-0768 (Iowa App., 2017).

d. Miscellaneous Assets

(1) **Lottery Winnings/Book Royalties**. Iowa Courts have ruled that the following items are assets subject to division: **lottery winnings** [In re Marriage of Swartz, 512 N.W.2d 825 (Iowa App. 1993)]; **book royalties** [In re Marriage of White, 537 N.W.2d 744 (Iowa 1995)];

(2) **Advanced Degree**. An advanced education degree is not considered a marital asset. See In re Marriage of Wagner, 435 N.W.2d 372 (Iowa App. 1988). However, the potential increased earnings of the person earning the advanced degree is a factor to be considered in determining the equitable division of the property. In re Marriage of Plasencia, 541 N.W.2d 923 (Iowa App. 1995).

(3) **Bonus** . A bonus due to husband was considered by the court in its income calculations in determining alimony, college expense contributions, and the child support. Therefore, the court refused to grant the wife a share of the bonus as part of the property division. In Re Marriage of O'Rourke, 547 N.W.2d 864 (Iowa App. 1996). See also **Hayes v. Hayes**, No. 2-279/11-1847 (Iowa App. 2012).

(4) **Workers Compensation**. In re Marriage of Schriner, 695 N.W.2d 493 (Iowa 2005). The Supreme Court, in this case of first impression, adopted the"mechanistic approach" to divide a workers' compensation award. The award is property subject to division if the award was received, or the right to receive the award accrued, during the marriage. However, the Court ruled that workers' compensation proceeds received after the divorce are separate property of the injured spouse.

D. CHILD SUPPORT

1. Interstate Jurisdiction for Child Support Orders

a. The Full Faith and Credit for Child Support Orders Act (FFCCSOA) is federal legislation which controls support orders throughout the U.S. under the authority of the Supremacy Clause of the U.S. Constitution. 28 U.S.C. Section 1738B(e)(2) provides that a court of any state other than the original issuing state may modify

a child support order only if: (1) the issuing state is no longer the state of residence of the child or any other individual contestant; or (2) the parties must file a written consent to another state assuming jurisdiction. In re Marriage of Zahnd, 567 N.W.2d 684 (Iowa App. 1997). See also In re Marriage of Carrier, 576 N.W.2d 97 (Iowa 1998).

b. Chapter 252K, the Uniform Interstate Family Support Act (UIFSA), adopted in Iowa in 1997, discussed in more detail later in the section on child support enforcement, adopts jurisdiction principles similar to FFCCSOA

2. Child Support Guidelines

a. Guidelines. The Supreme Court establishes Child Support Guidelines to be used by courts in establishing child support obligations. Effective, January 1, 2018, the Supreme Court adopted revisions in the "pure income shares" method of calculating child support.

(1) The Pure Income Shares Guidelines provide specific guidance for parents with combined incomes from $0 through $25,000 per month. Noncustodial parents with low incomes qualify for the low-income adjustment section of the Schedule of Basic Support Obligations, based upon their incomes alone. Other parents' child support obligations are based upon the combined incomes of both parents.

(2) The proper child support amount for persons with combined net incomes in excess of $25,000 per month " ... is deemed to be within the sound discretion of the court ... The amount of support payable by parents with monthly combined incomes of $25,001 or more shall be no less than the dollar amount as provided in the Guidelines for parents with a monthly income of $25,000.

(3) The Guidelines grant a Qualified Additional Dependent Deduction, to a party who can demonstrate a legal obligation to support children other than those affected by the current support order. The monthly deduction for qualified additional dependents range from 8% for one child [up to $800 per month to 16% [up to $1,600 per month] for five or more children.

(4) The Guidelines also grant an Extraordinary Visitation Deduction to noncustodial parents whose court-ordered visitation exceeds 127 overnights per year, he or she shall receive a credit to the guideline amount as follows: 128 - 147 = 15% credit; 148 - 166 = 20% credit; and 167 or more = 25% credit.

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

(5) The Guidelines establish a guideline method for computing taxes:

(a) An unmarried parent must be assigned either single or head of household filing status: household head if one or more of the mutual children reside with the parent;

(b) A married parent shall be assigned married filing separate status;

(c) If the parties have joint physical care, an unmarried parent shall use the head of household status and a married parent shall use the married filing separate status;

(d) The standard deduction shall be used;

(e) Each parent shall receive a personal exemption plus that for each child residing with him or her, unless allocated to the noncustodial parent;

(f) Earned income tax credit income is ignored; and

(g) The court may consider adjusting the support payment if the amount of taxes actually paid differs substantially from the amount calculated under the guideline method.

(6) In both joint physical care cases and split or divided care cases, the support obligations of both parties are calculated, and the net difference is paid to the party with the lower child support amount.

(7) The Supreme Court in Court Rule 9.14(6) as part of the Guidelines Review effective in 2018 requires a mandatory step-down provision in every support order with multiple children. The support order shall include a provision which automatically adjusts the child support amount as the number of children entitled to support changes, unless subsequently modified by the court.

(8) Federal requirements are incorporated in the Guidelines which require that an Order for Medical Support must be ordered in every case.

(a) If a parent has medical insurance available at a "reasonable cost" [which is determined by a provided table], the parents are required to share the incremental premium cost of covering the child through an adjustment to the calculated base child support. 2018 Guideline 9.14(5) provides that when children other than the children in the pending action are covered by the insurance, the allowable children's portion of the premium is the excess over the premium cost for single coverage divided by the number of persons other than the provider covered by the plan, and then multiplied by the number of children in the pending action.

(b) If neither parent has medical insurance available at a "reasonable cost", if appropriate, the court shall order cash medical support of from 1% to 5% of the noncustodial parent's income.

(c) 2018 Revised Guideline 9.12(3) provides that cash medical support will not be ordered if the children are eligible for the government subsidized Hawk-I or Healthy and Well Kids Iowa programs and the premiums for these programs is less than the cash medical support amount.

(d) The custodial parent is required to pay the initial medical expenses of the children not covered by insurance: the first $250 per year for each child up to a maximum of $800 per year for all children. Thereafter, the uncovered expenses are to be divided by the parents in proportion to their respective incomes.

b. Apply to Every Case

Guidelines provide that "The court shall not vary from the amount of child support which would result from the application of the guidelines without a written finding that the guidelines would be unjust or inappropriate as determined under the following criteria:

(1) Substantial injustice would result to the payor, payee or child;

(2) Adjustments are necessary to provide for the needs of the child and to do justice between the parties, payor, or payee under the special circumstances of the case; and

(3) Circumstances contemplated in Iowa Code Section 234.39 (1989) [applies to foster care services only].

3. Determination of Gross Income

a. Affirmative Duty to Provide Information

(1) "...[B]efore the amount of support can be fixed in accordance with the Guidelines, an honest and complete revealment of income must be made." In re Marriage of Lux, 489 N.W.2d 28, 30 (Iowa App. 1992).

(2) "It is not the Court's responsibility to search the record for the proper figures to use for applying the child support guidelines. We will not do so." In re Marriage of Hansen, 514 N.W.2d 109 (Iowa App. 1994). The child support payor complained that the trial court varied from the guidelines without articulating reasons, but provided no information to the court as to how he claimed the child support should have been calculated.

b. Average Fluctuating Income

(1) "The Court must determine the net monthly income from the most reliable evidence presented. This often requires the Court to carefully consider all of the circumstances relating to the parent's income. Where the parent's income is subject to substantial fluctuations, it may be necessary to average the income over reasonable period when determining current monthly income." In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991). See also In re Marriage of Knickerbocker, 601 N.W.2d 48 (Iowa 1999) Here, the Supreme Court approved using a four-year average of a farmer's income in determining his income available for child support.

(2) Non-recurring income should not be considered. In re Marriage of Will, 602 .W.2d 202 (Iowa App. 1999). Since the interest from the proceeds of the sale of a homestead, now reinvested in a new home, is not recurring income, the District Court should not have included the entire amount of the interest in computing the father's income for the purposes of calculating child support guideline income.

(3) "The definition of income as used in the Guidelines is most readily adaptable to the parent employed for a set monthly wage...the definition of income in the Guidelines is not easily applied to the earnings of persons such as [the father] who are compensated for their services through commissions and who experience month-to-month and/or year-to-year fluctuations in income." In re Marriage of

McQueen, 493 N.W.2d 91 (Iowa App. 1992). See also In re Marriage of Hardy, 539 N.W.2d 729 (Iowa App. 1995); In Re Marriage of Roberts, 545N.W.2d 340 (Iowa App. 1996) [a lawyer's gross income for the previous three years was averaged to determine his guideline gross income]; In re Marriage of Clifton, 526 N.W.2d 574 (Iowa App. 1994), [refused to average the wages where unemployed during much of one year].

(4) In re Marriage of Hagerla, 698 N.W.2d 329 (Iowa 2005). In some cases the only equitable way to determine income for purposes of child support is to average income over a period of time. *In re Marriage of Cossel,* 487 N.W.2d 679, 681 (Iowa Ct. App. 1992). The Court of Appeals based the child support on the father's base pay in his current employment, rather than an average of his earnings from his old job.

c. Overtime Pay

(1) "Overtime wages are not excluded as income. Overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes. ...[I]n circumstances where overtime pay appears to be an anomaly or is uncertain or speculative, a deviation from the Child Support Guidelines may be appropriate. We also agree that a parent's child support obligation should not be so burdensome that the parent is required to work overtime to satisfy it." In re Marriage of Brown, 487 N.W.2d 331 (Iowa 1992). See also In re Marriage of Heinemann, 309 N.W.2d 151, 152-53 (Iowa App. 1981).

(2) In In re Marriage of Elbert, 492 N.W.2d 733 (Iowa App. 1992), the Court included in the payor's gross income his actual average overtime income of $7,000.00 per year over five years in setting the child support amount. The Court found that the overtime had been consistent throughout the past five years and was not speculative or likely to decline in the future. See also In re Marriage of Geil, 509 N.W.2d 738 (Iowa 1993).

d. Second Job Income

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

e. Bonus Pay

(1) "All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligations. When deciding whether bonuses are to be included in gross income, we examine the employment history of the payor over the past several years to determine whether the amount of money paid from year to year was consistent. If so, the bonuses should be included in gross income." In re Marriage of Nelson, 570 N.W.2d 103 (Iowa 1997). See also In re Marriage of Lalone, 469 N.W.2d 695, 698 (Iowa 1991) and In re Marriage of Pettit, 493 N.W.2d 865 (Iowa App. 1992).

(2) In Seymour v. Hunter, 603 N.W.2d 625 (Iowa 1999), the Court found that "Income, for purposes of guidelines, need not be guaranteed. History over recent years is the best test of whether such a payment is expected or speculative. In calculating the expected bonuses, the court should consider and average them as earnings over recent years and decide whether the receipt of an annual payment should be reasonably expected.

(3) The Court of Appeals approved another method for handling bonus income in In re Marriage of Allen, 493 N.W.2d 273 (Iowa App. 1992). The father was required to pay a percentage of any bonus if and when received. However, noting the difficulty which would arise in requiring payment of the Guideline percent of the net bonus after mandatory deductions, the Court of Appeals ordered the father to pay a smaller percentage of the total bonus income before any deductions.

f. Incentive Pay

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

g. Value of Employee Benefits/Imputed Income

(1) The value of benefits provided to an employee (e.g. home subsidy, real estate taxes, insurance, utility, gasoline and other vehicle expenses) should be considered in determining Gross Annual Income for child support purposes. In re Marriage of Beecher, 582 N.W.2d 510 (Iowa 1998); but only the after-tax value of these benefits should be added to the payor's net salary to arrive at net income. In re Marriage of Titterington, 488 N.W.2d 176 (Iowa App. 1992). See also, In re Marriage of Huisman, 532 N.W.2d 157 (Iowa App. 1995).

(2) "Imputing income from an income-producing asset is analogous to imputing income to an unemployed or under-employed person based on that person's earning capacity." The Court can impute income from sources like rent and conservation programs from a substantial asset like a farm. State Ex Rel. Pfister v. Larson, 569 N.W.2d 512, 515 (Iowa App. 1997).

h. Nontaxable Income

(1) "The Guidelines do not limit the definition of gross income to that income reportable for Federal Income tax purposes. Although veterans' disability benefits, social security disability or retirement payments and worker's compensation benefits are exempt from federal taxes, they are properly considered as income in determining if a substantial change in circumstances has been established and in determining the amount of child support. See In re Marriage of Howell, 434 N.W.2d 629, 633 (Iowa 1989) (Veterans' Retirement and Disability Benefits); In re Marriage of Stuart, 252 N.W.2d 462 (Iowa 1977) (Social Security Disability Payments); In re Marriage of Swan, 526 N.W.2d 320 (Iowa 1995) (Workers' Compensation Benefits). Only public assistance payments are specifically excluded as income under our Guidelines." In re Marriage of Lee, 486 N.W.2d 302 (Iowa 1992).

(2) The Supreme Court ruled has also ruled that social security disability benefits, whether they are paid to the disabled parent or to the former spouse for the child shall be considered income to the disabled parent in determining child support under the Child Support Guidelines. In addition, disability benefits received by the custodial parent shall be credited to the disabled parent's support obligation. In re Marriage of Hilmo, 623 N.W.2d 809 (Iowa 2001). The dependent benefits are replacement income to the disabled parent and should

be considered income to that parent for the purposes of establishing child support. Iowa Code Section 598.22C codifies the Hilmo rules.

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

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

i. Contributions from Family

(1) Stepparent/Live-In Income. "[T]he support obligation of the noncustodial parent should not be reduced to an amount less than that provided under the child support guidelines because a stepparent or the custodial parent's boyfriend or girlfriend makes contributions to the household. The contribution of the stepparent or boyfriend or girlfriend is only relevant to the extent his or her contribution may increase the cost of the child's maintenance by reason of the higher standard of living the children may experience by reason of him or her living in the home. See In re Marriage of Mueller, 400 N.W.2d 86, 88-89 (Iowa App. 1986)." In re Marriage of Koepke, 483 N.W.2d 605 (Iowa App. 1992).

(2) Gifts from Others. Generally, financial assistance or support from sources other than a support obligor's income is not an appropriate consideration in determining a support obligation. See In re Marriage of Drury, 475 N.W.2d 668, 672 (Iowa Ct. App. 1991) (holding that possible support available to payor father from another person is not a consideration the district court must weigh in setting the child support award); see also In re Marriage of Will, 602 N.W.2d 202, 206 (Iowa Ct. App. 1999) (holding that income as defined by the guidelines does not include the income of a current spouse).

j. Business Expenses

(1) Straight-Line Depreciation. Some consideration must be given to business expenses necessary to maintain a business or occupation. These expenses may include a reasonable allowance for straight-line depreciation. After considering these matters the Court-- where warranted--should adjust gross income before applying the Guidelines. Any other approach may discriminate between wage earners and self-employed persons. In re Marriage of Worthington, 504 N.W.2d 147 (Iowa App. 1993). See also In re Marriage of Hoksbergen, 587 N.W.2d 490 (Iowa App.1998) [recalculation of a farmer's income available for child support by increasing his income by $14,500 per year which he had deducted on his tax returns as accelerated depreciation]; In re Marriage of Knickerbocker, 601 N.W.2d 48 (Iowa 1999) [reasonable straight-line depreciation on farm machinery and other assets related to the farm business was an expense reasonably necessary to maintain that business, and that such expenses should be considered in determining the payor's income]; In re Marriage of Maher, 510 N.W.2d 888 (Iowa App. 1993); In re Marriage of Gaer, 476 N.W.2d 324 (Iowa 1991) and In re Marriage of Cossel, 487 N.W.2d 679 (Iowa App. 1992). In Maher, Gaer, Cossel, Hoksbergen, and Knickerbocker, the courts permitted the full

amount of the straight-line depreciation as a deduction. However, in Worthington, and in In re Marriage of Starcevic, 522 N.W.2d 855 (Iowa App. 1994), the Court's denied depreciation deductions to avoid "paper losses" and a "windfall" of reduced child support.

(2) Other Expenses. The Court of Appeals approved the deduction of out-of-pocket business expenses of a self-employed person, including depreciation, postage, office expenses and promotion, but denied the artificial deduction of 27.5 cents per mile for mileage where the self-employed person's vehicles were fully depreciated and his employer furnished gas and oil. In re Marriage of Golay, 495 N.W.2d 123 (Iowa App. 1992).

k. Appreciation in Net Worth

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

l. Voluntary Income Reduction

(1) "Child support is generally not reduced because of self-inflicted or voluntary reduction in income. In addition, parents must give their children's needs high priority and be willing to make reasonable sacrifices to assure their care. In re Marriage of Fidone, 462 N.W.2d 710 (Iowa App. 1990). See also In re Marriage of Vetternack, 334 N.W.2d 761 (Iowa 1983). "The self-infliction rule applies equitable principles to the determination of child support in order to prevent parents from gaining an advantage by reducing their earning capacity and ability to pay through improper intent or reckless conduct..." In re Marriage of Foley, 501 N.W.2d 497 (Iowa 1993). See also In re Marriage of McKenzie, 709 N.W.2d 528 (Iowa 2006); In re Marriage of Duggan, 659 N.W.2d 556, 562 (Iowa 2003); and State ex rel. Reaves v. Kappmeyer, 514 N.W.2d 101, 10405 (Iowa 1994) [may consider the combined incomes of the supporting parent and new partner].

(2) However, in In re Marriage of Walters, 575 N.W.2d 739 (Iowa 1998), the Supreme Court reversed earlier cases and reduced support due to a reduction in income and earning capacity which was the result of incarceration because of criminal activity. Although voluntary, the criminal conduct was not done with an improper intent to deprive his children of support. See also In re Marriage of Barker, 600 N.W.2d 321 (Iowa 1999), (the earning capacity of the obligor as a prisoner is substantially less than that prior to her conviction. Therefore, she is entitled to a reduced amount of child support) and In re Marriage of Rietz, 585 N.W.2d 226 (Iowa App. 1998).

In re Marriage of Knust, No. 16-1664 (Iowa App., 2017). Shanee fought the reduction of Kevin's child support payments after he was transferred to a lower paying job as a result of his conviction for operating while intoxicated. Kevin's annual salary decreased from $93,000 to $51,688. The Court noted that a parent is not free to make choices without regard to his or her obligation to their children. *See re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006). However, modification is not denied in all cases when the noncustodial parent's income decreases. *See*, *e.g.*, *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998); *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993). Even though Kevin's current financial status is a result of his voluntary criminal action, "some consideration of his earning capacity and ability to pay is necessary." *Walters*, 575 N.W.2d

at 743. Kevin's "reduction in income and earning capacity is the result of his criminal activity which, although voluntary, was not done with an improper intent to deprive his children of support." *Id*. While the reduction of support "will impact the parties' children, we must base our decision on reality rather than an unattainable utopia." *Id*.

(3) Another way to reduce income is to create a false expense. Where the support payor "...is the principal in a business that employs his or her spouse, we will look at the salary paid to his or her spouse to determine whether the allocation is fair or if it results in a salary that is larger than average salaries for comparable employment...absent evidence showing a valid basis for the excess salary, we will attribute that portion of the salary to the obligor spouse." In re Marriage of Aronow, 480 N.W.2d 87 (Iowa 1991).

(4) Still another strategy is to transfer assets. The Court of Appeals ruled that the income from assets transferred to payor's wife should be considered in setting child support. "Income as defined by the child support guidelines does not include income of a current spouse ... [however], it is reasonable to consider the income Roger's current wife receives on the gifted property not as part of Roger's net monthly income as defined by the guidelines, but as a factor that justifies deviating from the guideline amounts." In re Marriage of Will, 602 N.W.2d 202 (Iowa App. 1999).

(5) However, before earning capacity can be used to calculate child support, rather than actual earnings, the Guidelines require the Court to enter findings that use of actual income would be inequitable because: (1) substantial injustice would otherwise result to the payor, payee or child; or, (2) that adjustments are necessary to provide for the needs of the child or to do justice between the payor or the payee. In re Marriage of Salmon, 519 N.W.2d 94 (Iowa App. 1994). See also Iowa Dept. of Human Services v. Gable, 474 N.W.2d 581 (Iowa App. 1991).

(6) The Court will not always find that the reduction of income creates an in justice. Though the mother had worked full-time during her first marriage, the Court found " ... as a mother of four, it was eminently reasonable for her to choose to spend half of her working hours parenting the children, including the two from the parties' marriage." In re Marriage of Nelson, 570 N.W.2d 103 (Iowa 1997). See also In re Marriage of Montgomery, 521 N.W.2d 471 (Iowa App. 1994) and In re Marriage of Bonnette, 492 N.W.2d 717 (Iowa App. 1992).

(7) However, the Court of Appeals clarified its position with regard to a parent declining to work outside the home: "While we respect a parent's wish to remain at home with his or her children, we cannot look at this fact in isolation in determining earning capacity...We reject any suggestion in In re Marriage of Bonnette ...to the contrary." Moore v. Kriegel, 551 N.W.2d 887, 889 (Iowa App. 1996).

(8) In addition, the Court may disregard earning capacity where reduction of income is temporary or for a good reason. The custodial parent's decision to quit a teaching job to go back to college to become a civil engineer was not made with the purpose of reducing her child support obligation but to better support them once she graduates. In Re Marriage of Hart, 547 N.W.2d 612 (Iowa App. 1996). See also In re Marriage of Weiss, 496 N.W.2d 785 (Iowa App. 1992) and In re Marriage of Blum, 526 N.W.2d 164 (Iowa App. 1994).

(9) Still, in cases where the parties' incomes are limited or the Court suspects that a party has reduced income to manipulate the child support amount, the courts have generally used the earning capacity of the parents to calculate the guideline child support, rather than their actual incomes. In In re Marriage of Raue, 552 N.W.2d 904 (Iowa App. 1996). The same

approach was followed in State ex.rel DHS v. Cottrell, 513 N.W.2d 765 (Iowa 1994). (The Supreme Court found that the mother had voluntarily reduced her income and attributed to her a net monthly income based on the monthly income she received on her last job.) See also State ex. rel. Schaaf v. Jones, 515 N.W.2d 568, Iowa App. 1994; In re Marriage of Blume, 473 N.W.2d 629 (Iowa App. 1991); State Ex Rel. Lara v. Lara, 495 N.W.2d 719 (Iowa 1993) (Court imputed to custodial parent the average amount she earned from her part-time job which she had voluntarily quit); and In re Marriage of Fogle, 497 N.W.2d 487 (Iowa App. 1993) (set child support based on estimated earning capacity of the minimum wage of $4.65 per hour for 40 hours per week, though the payor had been unemployed since 1989).

4. Calculation of Guideline Net Income

a. Income Tax.

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

b. Support of Parent's Other Dependents

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

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

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

c. Payments on Delinquent Income Tax

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

d. Alimony Consideration

(1) The Child Support Guidelines amended effective January 1, 2018, provide in Court Rule 9.5 that all traditional and rehabilitative supposal support paid and received by the parties shall be considered in the calculation of child support in the current case. All traditional and rehabilitative spousal support paid to the current or former spouses must be deducted from the gross income of the payor spouse and included in the gross income of the payee spouse.

(2) Reimbursement spousal support payments shall not be added to the payee's income or deducted from the payor's income in the child support calculation.

e. Parents' Income Over $25,000.00 Per Month

With the adoption of child support guidelines, a court is no longer required to consider the statutory factors of Iowa Code Sections 598.21(4) and 598.21(8). A court, however, may consider the statutory factors when the guidelines require judicial discretion or if the guideline's award would be unjustified or inappropriate. Judicial discretion is required under the latest child support guidelines when the parents' combined net guideline income is over $25,000.00 per month. The support payment cannot ordinarily be less than the amount specified in the Guidelines for a $25,000.00 per month income. However, the amount awarded in child support above the guideline amount rests within the sound discretion of the court. In re Marriage of Maher, 596 N.W.2d 561 (Iowa 1999) [father was required to continue paying $4,500.00 per month in child support for his three children out of his $10,161.00 per month net income because their mother could not maintain their $9,875.00 per month budget without this assistance].

(1) The Guidelines also give the Court discretion to lower support below the amount required at $25,000.00 on the guidelines chart. However, In re Marriage of Beecher, 582 N.W.2d 510 (Iowa 1998), shows that the power will be rarely used. Child support was not be reduced for any of the following reasons: (1) the father paid the children's medical expenses [he was allowed a deduction for these expenses in the guideline support calculation], (2) the high cost of the father's new home in California, (3) the cost of the children's transportation for visitation, (4) the father's voluntary support for the older children's college expenses, or (5) the remarriage of the custodial parent.

(2) Few other cases have explored the amount of support above the Guidelines amount which will be ordered when the parents' incomes are above the amount covered by the Guidelines. However, cases dealing with Payor's incomes in excess of the old $3,000 and $6,000 per month guideline limits should provide guidance in dealing with parents whose combined incomes are over $25,000 per month. Clearly, the support can be generous. "Although Iowa Code §598.21(4)(a) provides that the child support amount should be reasonable and necessary, the support award is not limited to the actual current needs of the child but may reflect the standard of living the child would have enjoyed had there not been a dissolution. In re Marriage of Campbell, 451 N.W.2d 192, 194 (Iowa App. 1989). A reasonable award would include consideration of the factors set out in In re Marriage of Zollner, 219 N.W.2d 517, 528 (Iowa 1974)." In re Marriage of Powell, 474 N.W.2d 531 (Iowa 1991). See also Mason v. Hall, 482 N.W.2d 13 (Iowa App. 1992) [income over $800,000 per year, support of $52,000 with $39,000 to trust]; Nielson v. Nielson, 521 N.W.2d 735 (Iowa 1994).

(3) However, two cases decided when the payor's guidelines ceiling was $3,000.00 per month, indicate that the percentage of the payor's income above the level covered by the Guidelines

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

f. Split/Divided Physical Care

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

g. Joint Physical Care

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

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

5. Special Circumstances for Adjustment of Guideline Support

Before considering an upward or a downward adjustment of child support, the Court must first calculate the Guideline support amount. State ex. rel Reaves v. Kappmeyer, 514 N.W.2d 101 (Iowa 1994). The Guidelines create a rebuttable presumption that the Guideline amount is correct. However, " ... the Guideline amount may be adjusted upward or downward if the Court finds an adjustment necessary to provide for the needs of the child and to do justice between the parties in the special circumstances of the case." State ex. rel. DHS v. Cottrell, 513 N.W.2d 765 (Iowa 1994).

a. Statutory Factors

With the adoption of Guidelines, the Court is no longer required to consider the statutory factors of Iowa Code Section 598.21(4) except where the Guidelines require judicial discretion or if the Guidelines would be unfair and inappropriate. In re Marriage of Powell,

474 N.W.2d 531 (Iowa 1991). See also In re Marriage of Linberg, 462 N.W.2d 698 (Iowa App. 1990).

b. Child Care Expenses

The Guidelines direct the calculation of the child support amount without consideration of child care expenses. The custodial parent is then responsible for all of the child care expense as well as the child's other routine expenses such as clothing, school lunches and supplies, extracurricular activities, etc. However, the 2018 Supreme Court revision of the Guidelines includes new Court Rule 9.11A which encourages consideration of child care expenses as the basis for a variance and provides guidance for the court's consideration.

c. Parent's Living Expenses

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

d. Children's Extra Expenses

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

e. Parent's Other Dependents

(1) The Child Support Guidelines [Rule 9.7] provides a deduction for "qualified additional dependents". If a party can show a legal obligation to support other children, a monthly deduction from income for the qualified additional dependents will be permitted in amounts ranging from $135 for one child to $383 for five or more children.

(2) However, in Gilley v. McCarthy, 469 N.W.2d 666 (Iowa 1991), the Court recognized that there are cases where inflexible application of the Guidelines will produce unreasonable or absurd results. See also State Ex. Rel. Miles v. Minar, 540 N.W.2d 462 (Iowa App. 1995). The Guidelines create only a rebuttable presumption of fairness and the Court can vary the amount when necessary to do justice between the parties or to provide for the needs of the child. See also In re Marriage of Fite, 485 N.W.2d 662 (Iowa 1992), and In re Marriage of Gulsvig, 498 N.W.2d 725 (Iowa 1993).

(3) In most cases, appellate courts have not found sufficient justification in the special circumstances raised to make an adjustment from the Guideline amount. In State ex. rel. DHS v. Cottrell, 513 N.W.2d 765 (Iowa 1994), the father provided no evidence of any special circumstances to justify an adjustment. In State ex. rel Schaaf v. Jones, 515 N.W.2d 568 (Iowa App. 1994), the Court found that the parties were in equally difficult financial circumstances; so no deviation from the Guidelines was ordered. In In re Nielson v. Nielson, 521 N.W.2d 735 (Iowa 1994), the Court found that the $50,000 income of the father was sufficient to permit him to pay the Guideline amount without creating hardship for the children in his home. See also State ex rel. Cacek v. Cacek, 484 N.W.2d 592 (Iowa 1992).

f. Special Needs of Child Above Guidelines

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

g. Child's Own Income

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

h. Agreement of the Parties

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

i. Reduction for Social Security Payments

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

j. No Reduction for Repudiation by Children

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

6. Other Child Support Issues

a. Normally No Suspension During Visits

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

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

b. Stepparent -- No Obligation

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

c. Payment Through Clerk of Court

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

d. Income Withholding Orders

(1) Chapter 252D controls the use of Income Withholding Orders in all proceedings which require child support payments and mandates use of a uniform Income Withholding Order form which can be sent to any employer or income source in or outside Iowa.

(2) In In re Marriage of Winnike, 573 N.W.2d 608 (Iowa App. 1997), the Court held that the statute [Iowa Code Section 252D.8(1)] provides an ex parte order may issue assigning income from benefits or other income to pay child support. Even a disability benefit can be tapped.

(3) In In re Marriage of Ballstaedt, 606 N.W.2d 345 (Iowa 2000), the Court held that before contract payments are subject to an Order of Mandatory Income Withholding the Court must determine how much of the payment is due to the payor

personally and how much was due to his corporation; and if payments are due to the corporation, the Court must consider whether conditions justify "piercing the corporate veil".

e. Cost-of-Living Increases

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

f. Joint Account for Joint Physical Care Support

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

g. Retroactive Support: Paternity Proceedings - Chapter 600B.

Thomas v. Westfall, No. 16-0889 (Iowa App., 2017). In a paternity action Charles sought to avoid retroactive payment of Tyne's medical expenses during her pregnancy and the birth of the child because she had kept him out of the child's life as much as possible. He also claimed that he should be give $2,000 credit against his retroactive child support obligation because of the diapers, formula, and other items he had provided to Tyne since the child's birth. The court found that Section 600B.25(1) gives the court the authority "to order the father to pay amounts the court deems appropriate for the past support and maintenance of the child and for the reasonable and necessary expenses incurred by or for the mother in connection with prenatal care, the birth of the child, and postnatal care of the child and the mother, and other medical support." There is no authority for denying medical support because of interference with access to the child; and Charles provided no evidence to support his claim of in-kind child support.

7. Termination of Support Obligation

a. Section 598.1(9) provides that the obligation to pay child support "... shall include support for a child who is between the ages of 18 and 19 years who is engaged full-time in completing high school graduation or equivalency requirements in a manner which is reasonably expected to result in completion of the requirements prior to the person reaching 19 years of age ..."

b. The Court does not have the power to require child support to be continued for an 18-year-old who is not disabled and not attending school simply because he remains in the parental home without income. In re Marriage of Ludwig, 478 N.W.2d 416 (Iowa App. 1991). See In re Marriage of Holcomb, 457 N.W.2d 619 (Iowa App. 1990) and In re Marriage of

Keller, 478 N.W.2d 424 (Iowa App. 1991) [child eighteen but still in junior year of high school].

8. Post-Secondary Education Subsidy

a. Discriminates for Children of Divorce

(1) The Code Section 598.1(8) provides for post-secondary education subsidy for children of divorced parents. Although the statute discriminates in favor of children of divorced parents, the discrimination is a permissible one and is not violative of equal protection. In re Marriage of Vrban, 293 N.W.2d 198 (Iowa 1980).

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

b. Parental Contribution and Court Supervision Not Mandatory

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

c. Less Parental Sacrifice Required

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

In re Marriage of Anderson-Gerels, No. 16-0820 (Iowa App., 2017). Jay received $1,713 per month in disability benefits and netted $1441 after taxes. He claimed monthly expenses

of $2,875.00. However, Jay also reported assets totaling $179,795. The Court agreed that "a post-secondary education subsidy must not cause undue financial hardship on a parent." *In re Marriage of Vaughan*, 812 N.W.2d 688, 695 (Iowa 2012); *see also In re Marriage of Longman*, 619 N.W.2d 369, 370-71 (Iowa 2000). In addition, the parties did not yet know what financial aid the child would receive. However, Jay did not dispute his child was eligible for a postsecondary education subsidy; and given Jay's financial situation, his child would be required to pay substantially all of the cost of her education. Therefore, Jay was required to subsidize his child's education with $1,000 per year, $500 at the beginning of each fall and spring semester; and his former wife was given a lien on Jay's retirement account to secure the payments.

d. Requirements of Statute

(1) Definition of Post-Secondary Education Subsidy. The Subsection 598.1(8) defines the subsidy as follows: ". . .an amount which either of the parties may be required to pay under a temporary order or final judgment or decree for educational expenses of a child who is between the ages of eighteen and twenty-two years if the child is regularly attending a course of vocational-technical training either as a part of a regular school program or under special arrangements adapted to the individual person's needs; or is, in good faith, a full-time student in a college, university, or community college; or has been accepted for admission to a college, university, or community college and the next regular term has not yet begun." Note that the obligation can fill the gap between the end of high school and the beginning of the freshman year and the months between regular school terms.

(2) Procedures and Criteria. Subsection 598.21F specifies procedures and criteria for determining whether good cause exists for ordering a "post-secondary education subsidy. In re Marriage of Neff, 675 N.W.2d 573, 579 (Iowa 2004).

(a) The Statute requires the court to determine the cost of post- secondary education based upon the cost of attending an in-state public institution and permits only reasonable costs for necessary post-secondary education expenses.

(b) The court is then required to determine the amount, if any, which the child may reasonably expected to contribute, considering the child's financial resources, including but not limited to the availability of financial aid and the ability of the child to earn income while attending school.

(c) The court is then required to deduct the child's expected contribution from the cost of post-secondary education and to apportion responsibility for the remaining cost to each parent. However, the amount paid by each parent shall not exceed 33 1/3% of the total cost of post-secondary education.

(d) The post-secondary education subsidy shall be payable to the child, to the educational institution, or to both, but shall not be payable to the custodial parent.

(e) A post-secondary education subsidy shall not be awarded if the child has repudiated the parent by publicly disowning the parent, refusing to acknowledge the parent, or by acting in a similar manner.

(f) The statute further requires that the child shall forward to each parent reports of grades awarded at the completion of each academic session within ten days of receipt of the reports and the subsidy may be terminated upon the child's

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

(g) The Child May Sue to Enforce this Obligation. In **In re Marriage of Jacobs, No. 16-2005 (Iowa App., 2017)**, Natalie filed a petition seeking a declaration of her parents' obligations to contribute to her postsecondary educational expenses. The decree was entered when she was 2 years old and ordered that child support could be continued to permit postsecondary education beyond age 18. When Natalie filed this action, she had graduated from college. However, in 2013, as soon as Natalie turned eighteen and graduated from high school, Scott sought a determination and an order absolving him of any obligation to pay a postsecondary education subsidy, Instead, the district court had ruled that Scott's ongoing child support obligation should be modified to a postsecondary education subsidy with the amount to be determined after further proceedings. After Natalie obtained an associate of arts degree in dental hygiene, she filed a contempt application alleging Scott refused to contribute to the cost of her attendance at her Illinois community college. Scott argued that *In re Marriage of Neff*, 675 N.W.2d 573 (Iowa 2004), provides that the subsidy "can only be awarded prospectively for expenses incurred after the filing of the petition." Here, the court found that in *Neff*, "neither [the party] nor her attorney ensured she received *a determination of and order* for a subsidy" prior to incurring the expenses. 675 N.W.2d at 578. In this case, the court found that Jacobs obligation to pay a subsidy was in place in 2013, before Natalie began college, and before she incurred the costs she wished to have subsidized. Therefore, Natialie was entitled to obtain a declaration of the amount of her postsecondary subsidy. See also **In re Marriage of Kruse, No. 17-1018 (Iowa App., 2017)**.

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

(4) Good Cause. In re Marriage of Moore, 702 N.W.2d 517 (Iowa App. 2005) There is no obligation at common law to support an adult child who is not under a disability. In addition, under § 598.21(F) the Court must also determine if good cause exists to award a postsecondary education subsidy. The Court must assess the ability of the child to complete postsecondary education and actual financial needs. This threshold issue must be resolved before the court goes to the next step of calculating and ordering the parties' contributions.

(5) Assumption of Greater Obligation. The precise limitations of Section 598.21(F) are present in all orders for post-high school support whether or not specified by the Court. In re Marriage of Vrban, 293 N.W.2d 198 (Iowa 1980). However, a parent can voluntarily assume post-high school obligations in excess of the statute. See, e.g., Chambers v. Chambers, 231 N.W.2d 23 (Iowa 1975); In re Marriage of Halbach, 506 N.W.2d 808 (Iowa App. 1993).

(6) Retroactive Application. Section 598.21F(6), which provides: "A support order, decree, or judgment entered or pending before July 1, 1997, that provides for support of a child or children for college, university, or community college expenses, may be modified in accordance with this subsection." In re Marriage of Pals, 714 N.W.2d 644 (Iowa 2006). The post-secondary-education-subsidy statute applies whether or not the original decree provided for college-aged support.

(7) Obligation Ends at Age 23. In re Marriage of Neff, 675 N.W.2d 573 (Iowa 2004), The Court reexamined the statutory language specifying the age at which the postsecondary education subsidy should end. Section 598.1(8) states that the applicable time frame is "between the ages of eighteen and twenty-two." Given the traditional ages at which students attend college, the ages which define this time frame should be read inclusively, i.e. students qualify so long as they are older than seventeen but less than twenty-three, to effect legislative intent.

e. Full-Time Student

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

f. Good Faith

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

g. Child's Assets/Resources.

In re Marriage of Kupferschmidt, 705 N.W.2d 327 (Iowa App. 2005). Accounts for children established by the parents at the time of the divorce for the purpose of providing for their children's educations, Series EE U.S. savings bonds and accounts under the Uniform Transfers to Minors Act must be considered as a resource available to the children, prior to determining the parents' education subsidy even if the children do not want to use these assets. See In re Marriage of Rosenfeld, 668 N.W.2d 840, 848 (Iowa 2003). To do otherwise would discourage parents from saving for the postsecondary education of their children.

h. Necessary Expenses

(1) The expenses to which a parent can be expected to contribute are limited to those which are "necessarily incident" to a post-high school education. In re Marriage of Hull, 491 N.W.2d 177 (Iowa App. 1992). See also, In re Marriage of Hess, 522 N.W.2d 861 (Iowa App. 1994).

(2) "Standing alone, providing a home base for school vacations does not rise to the level of contribution to a child's college educational expenses. However, when a child lives at home during the school year, saving the expense of room and board normally paid to the school, the term "home base" becomes economically significant." In re Marriage of Wood, 567 N.W.2d 680 (Iowa App. 1997).

(3) In re Marriage of Dolter, 644 N.W.2d 370 (Iowa App. 2002) The Court of Appeals held that "...the term 'necessary postsecondary education expenses' means tuition, room, board, and books, including mandatory fee assessments for such things as laboratory, student health, and computer use. The definition and limitation as set out above does not preclude the parties from entering into a stipulation covering additional expenses."

(4) In re Marriage of Goodman, 690 N.W.2d 279 (Iowa 2004). Because the parties had agreed to share their oldest's daughter's sorority expense, the younger child's sorority dues were ruled to be a necessary college expense. In addition, a cash allowance is necessary for a college student to participate in the social, cultural, and educational experiences outside the classroom; and that the parties' financial circumstances showed they had the means to provide this assistance. The expenses were ordered to be paid one third by each parent and the child. In addition, the Supreme Court held that if a child is entitled to a postsecondary education subsidy, the subsidy payments may begin upon graduation from high school if she is accepted for admission to a college, university, or community college and the next regular term has not begun.

In re Marriage of Larsen, (Iowa, 2018). There was no dispute that "good cause" existed for parental contribution to postsecondary education. *In re Marriage of Goodman*, 690 N.W.2d 279, 282-83 (Iowa 2004); Iowa Code §598.21(F)(2). Therefore, a **Three-Step Process** was followed to determine the amount owed by each parent. **First Step:** the court must ascertain the reasonable and necessary cost of postsecondary education. Iowa Code § 598.21F(2)(*a*). Here, the court held for the first time that the cost of attendance required by Congress to be published by each educational institution pursuant to 20 U.S.C. §1087*ll* is presumed to be the reasonable and necessary cost of attending an in-state public institution for a course of instruction when a court makes its calculation under Iowa Code §598.21F(2)(*a*). If a party can show a special need or some other circumstances that the presumptive cost is not the reasonable and necessary cost of attending an in-state public institution, the court may vary from the presumptive cost. Here, the parties argued over sorority fees and an expense allowance, but the court found no reason to increase the child's budget above the Iowa State published amount. **Second Step:** the court must ascertain the amount of the child's reasonably expected contribution. §598.21F(2)(*b*). Here, the court found that $5,525 of scholarships, $1,000 from the child's anticipated part-time work, and $500 from the child's personal savings should constitute the child's contribution. However, since the parents had substantial incomes and had saved over $63,000 for the child's education, this child should not be required to work during the summers or take out a $5,500 unsubsidized student loan. *In re Marriage of Neff*, 675 N.W.2d 573, 579-80 (Iowa 2004) requires that in some circumstances, available loans and extensive employment should be considered in calculating the child's contribution to her education, but the inclusion of the loans and anticipated student income must be reasonable under all the facts and circumstances of the particular case. Here, the parents' incomes and education savings made substantial loans and extensive student employment unreasonable and unnecessary. **Third Step:** the court must subtract the child's expected contribution from the total cost of postsecondary education. *Id*. § 598.21F(2)(c) and apportion the remaining cost between the parents. Here, after subtracting $7,025 for the expected child contributions from the ISU calculated budget of $19,750, the amount left was $12,725. The court divided the $12,725 in half to establish a per-parent contribution of $6,362 because this amount was less than the maximum contribution required by § 598.21: one-third of the $19,750 total.

(5) In re Marriage of Sullins, 715 N.W.2d 242 (Iowa 2006).The statute's contribution requirement is based solely on the costs of a college education at an in-state public institution. *See* Iowa Code §598.21F(2)(a). Therefore, the subsidy can fall short for

students of divorced parents who desire to attend a private college or an out-of-state institution. Since the court is not authorized to make a parent responsible to pay more than one third of the cost of an in-state public institution, Deborah was not entitled to help because she received loans and federal work-study money in excess of the total costs of attending a public in-state college. Thus, her parents could not be made legally responsible under the statute to subsidize any additional costs of an out-of-state college education.

i. Repudiation

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

In re Marriage of Kruse, No. 17-1018 (Iowa App., 2017). Tari, age 19, brought this action to compel her father, Benjamin Kruse, to contribute $2,000 per semester to her college education expenses. When Tari was 3, Benjamin moved to Georgia and visited Tari once or twice a year. When Tari was 10, he returned to Iowa, but saw Tari only sporadically. The district court approved Tari's request, but Benjamin appealed, claiming that no postsecondary education subsidy should be awarded, because Tari repudiated him by publicly disowning the him and refusing to acknowledge him as a parent. Iowa Code § 598.21F(4) (2016). Tari had changed her name to her stepfather's surname; and she had failed to give Benjamin a a rose at her high school graduation. He also cited the lack of contact between them and a text message in which Tari stated she considered her step-father to be her real father. The court pointed to case law requiring "that the children take significant steps to publicly disown the parent." In cases where repudiation has been found, the children have purposefully discontinued contact and visitation with the repudiated parent. *See In re Marriage of Pendergast*, 565 N.W.2d 354, 356 (Iowa Ct. App. 1997) *In re Marriage of Baker*, 485 N.W.2d 860, 862 (Iowa Ct. App. 1992) . The court concluded that Benjamin was responsible for the breakdown in the relationship; and that Tari's behavior was disrespectful and immature, but ultimately, it was Benjamin's decision not to seek visitation that caused a breakdown in the relationship.

j. Five-Step Process

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

k. Education Trust Funds

(1) Section 598.21F provides authority for a court to set aside some of a parent's money in a separate fund for the support of the children. Here, there was evidence that the father had a serious drug problem; however, no evidence was provided to establish that he was unwilling or unable to pay for the children's college expenses as they came due. Absent such evidence, there was no justification for requiring him to advance $75,000.00 for payment of the girls' college expenses to be held by his former wife. In re Marriage of Williams, 595 N.W.2d 126 (Iowa 1999).

(2) In In re Marriage of Murphy, 592 N.W.2d 681 (Iowa 1999). The Supreme Court canceled an order that the parties contribute in equal shares to a trust fund for their seven year old daughter to be used for her education beyond high school. Iowa Code Section 598.21F(2) requires threshold determinations concerning the ability of the child and the child's actual financial needs. The court could not make the threshold determinations eleven years before the education was to begin.

(3) Where a $45,000 trust for education was currently sufficient to meet the child's education expenses, the Court should not order additional monthly support to the parent with whom the child resided. In re Marriage of Hansen, 514 N.W.2d 109 (Iowa App. 1994). See also In re Marriage of Steele, 502 N.W.2d 18 (Iowa App. 1993); but see, State ex. rel. Tack v. Sandholdt, 519 N.W.2d 414 (Iowa App. 1994).

l. Court May Impose Obligation If Decree Silent

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

m. Premature Setting of Obligation

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

9. Life Insurance

a. The courts are not charting a consistent course on the issue of whether the payor should be required to maintain life insurance payable to the children. In re Marriage of Mayfield, 477 N.W.2d 859 (Iowa App. 1991), a dentist-father with a net income of $55,000.00 per year was required to maintain a life insurance policy payable to his children. However, in In re Marriage of Farrell, 481 N.W.2d 528 (Iowa App. 1991), the physician-father with a net income of $87,000.00 per year was not required to provide life insurance for his children with the justification that social security benefits would replace the father's obligation to support and educate his children.

b. In In re Marriage of Mouw, 561 N.W.2d 100 (Iowa App. 1997), the trial court required one million dollars of life insurance payable to the mother so long as any support obligation continued. The Court of Appeals reduced the amount of life insurance the father was required to carry by $50,000.00 every twelve months: "Life insurance should be limited to the amount necessary to secure an obligation." Mouw, at 102.

10. Court-Ordered Trusts

a. To Guarantee Support and Medical Expenses. Iowa Code Section 598.21(5) provides: "The Court may protect and promote the best interests of children of the parties by setting aside a portion of the property of the parties In a separate fund or conservatorship for the support, maintenance, education and general welfare of the minor children".

(1) Though support payments were current, they were sporadic. The father had a poor record of paying the children's medical expenses, and he almost completely refused to help the children with their higher education costs. Therefore, the Court created a trust with his share of jointly owned real estate. In re Marriage of Antisdel, 478 N.W.2d 864 (Iowa App. 1991).

(2) In Mason v. Hall, 482 N.W.2d 919 (Iowa 1992), the Court found that the reasonable cost for support of the child was $250 per week, but ordered the establishment of a trust under the provisions of the paternity statute, Section 675.27, noting the father's poor payment history and the uncertainty of his income as a Major League baseball player.

(3) Though the father had been delinquent in child support payments, he had been generally prompt prior to the termination of his employment by injury. Now that support payments had been set at a level consistent with his new income, the Court ruled that a trust was not needed over the lump-sum worker's compensation settlement to insure payment. In re Marriage of Swan, 526 N.W.2d 320 (Iowa 1995). But see Jahnke v. Jahnke, 526 N.W.2d 159 (Iowa 1994); In re Marriage of Foley, 501 N.W.2d 497 (Iowa 1993).

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

11. Disabled Adult Child

a. "598.1(9) defines the support obligation and includes support of 'a child of any age who is dependent on the parties to the dissolution proceeding because of physical or mental disability.'...The child support guidelines do not apply to cases involving a dependent adult child...the obligation should be apportioned according to the ability of each parent to contribute." In re Marriage of Davis, 462 N.W.2d 703, 704 (Iowa App. 1990). See also In re Marriage of Bornstein, 359 N.W.2d 500 (Iowa App. 1984); and In re Marriage of Hansen, 514 N.W.2d 109 (Iowa App. 1994).

b. The support obligation for a disabled adult child is based on the child's need for assistance and her parents' ability to contribute to this need, and not all disabled adult children qualify

for parental support. In re Marriage of Nelson, 654 N.W.2d 551 (Iowa 2002); In re Marriage of Clark, 577 N.W.2d 662 (Iowa App. 1998).

12. Medical Support

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

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

b. The Supreme Court incorporated provisions for medical support along with the Child Support Guidelines mandated by Section 598.21(4).

c. Procedures. Chapter 252E sets up an elaborate system for enrolling and maintaining medical benefits for dependents which the obligor, obligee, or the Department of Human Services can use when the order for medical support is entered and later, when circumstances or benefits change. The employer and the insurer are required to cooperate in the establishment and maintenance of medical benefit plans for dependents in much the same way employers are required to cooperate and participate In the assignment of earnings for payment of support obligations.

d. Where the father earned $105,000.00 and the mother $25,000.00 plus $12,000.00 in alimony, an 80%-20% split of medical expenses not covered by insurance was approved. In Re Marriage of Roberts, 545 N.W.2d 340 (Iowa App. 1996). See also In re Marriage of Russell, 559 N.W.2d 636 (Iowa App. 1996).

e. Guideline 9.12(5): Special Rule For Joint Physical Care Parents. Iowa Court Rule 9.12(5) provides that in cases of joint physical care, the parents shall share all uncovered medical expenses in proportion to their respective net incomes.

f. In re Marriage of Okland, 699 N.W.2d 260 (Iowa 2005). The decree required that statements of unreimbursed medical expenses be submitted by one parent to the other within 30 days of receipt of an uninsured debt. The Supreme Court canceled a judgment for the former husband's share of the children's expenses because their mother failed, without justification, to satisfy this condition precedent to the right to reimbursement: the procedure to timely inform her former husband of the expenses so that he could reimburse her as the expenses were incurred.

g. In re Marriage of Nielsen, 759 N.W.2d 345 (Iowa App. 2008) Estoppel by acquiescence applies when: (1) a party has full knowledge of his rights and material facts; (2) remains inactive for a considerable time; and (3) acts in a manner that leads the other party to believe the act [now complained of] has been approved. Markey v. Carney, 705 N.W.2d 13, 21 (Iowa 2005). Here, Randall, an attorney, knew he was only obligated to pay seventy-five percent. He did not seek to have Peggy pay her twenty-five percent for over eight and one-half years; and this behavior without an accounting led Peggy to reasonably believe he was waiving her twenty-five percent contribution.

E. CHILD CUSTODY AND VISITATION

1. Jurisdiction of the Court

a. Parental Kidnaping Prevention Act

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

b. Uniform Child Custody Jurisdiction and Enforcement Act

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

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

(2) Emergency jurisdiction is given separate consideration, and interstate judicial communication is required in emergency and simultaneous filings in different states.

(3) The "Unclean Hands" provision of the Act requires a court to deny jurisdiction if a party's unjustifiable conduct provided the basis for jurisdiction.

(4) The Act also provides a new registration process for out-of-state orders and a new procedure based on habeas corpus for expedited enforcement of child support and visitation.

(5) In the Matter of Guardianship of Deal-Burch, 759 N.W.2d 341 (Iowa App. 2008). Chapter 598B, the Uniform Child Custody Jurisdiction and Enforcement Act is the exclusive determinate of jurisdiction in child custody cases, including guardianship procedures. Iowa Code § 598B.102(4). Since Iowa was the "home state" on the date of the guardianship was filed: "the state in which a child lived with a parent ... for at least six consecutive months immediately before the commencement of a child-custody proceeding", no court of any other state would have jurisdiction. However, the home state can decline to accept jurisdiction. Iowa Code §598B.207(1), (3).

In re Guardianship of A.L.G.B., 16-1937 (Iowa App., 2017). In July, 2015, Raney asked the appellees to take A.L.G.B. to Iowa from Missouri to live with them while she sought treatment for her heroin addiction. Less than one month later, the appellees filed a petition for temporary guardianship and Raney filed a consent to the appointment. Iowa was not the "home state" of A.L.G.B., as statutorily defined at that time. *See* Iowa Code § § 598B.204(1). In January, 2016, the appellees set a hearing on a petition to be appointed permanent guardians, and Raney filed a motion to dismiss the guardianship for lack of subject matter jurisdiction. Here, the dispute was whether Iowa could become te "home state" and acquire subject matter jurisdiction during the pendency of the proceedings when the temporary order did not advise or warn that the temporary order could become permanent. The Court of Appeals ruled that because the temporary guardianship order did not contain language advising that it could become a final determination, the district court did not acquire subject matter jurisdiction to enter the final guardianship order. *See* Iowa Code § 598B.204(2): "[A] child-custody determination made under this section becomes a final determination, *if it so provides* and this state becomes the home state of the child." Therefore, the final order appointing the appellees guardians of A.L.G.B. was dismissed, but the court pointed out that the appellees could commence new proceedings to be appointed the guardians of A.L.G.B.

c. Indian Child Welfare Act

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

(1) Both statutes seek to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society. However, the Iowa law's much more expansive definition of children who are "Indian" has resulted in a finding that the statute is unconstitutional. In re A.W., 741 N.W.2d 793 (Iowa 2007), the Winnebago Tribe attempted to intervene in s juvenile court case under ICWA, though the child was ineligible for tribal membership. The Supreme Court ruled that the Iowa ICWA's definition of "Indian Child" which did not require eligibility for tribal membership violates the Equal Protection Clauses of both the U.S. and Iowa Constitutions. United States Supreme Court and lower court decisions confirm that Congress may constitutionally legislate only with respect to tribal Indians. United States v. Antelope, 430 U.S. 641, 645, 97 S.Ct. 1395, 1399, 51 L.Ed.2d 701, 707 (1977).

(2) The provisions of the ICWA do not apply to paternity or child support, actions for protective orders, or custody proceedings which only involve the biological parents of an child who is or might be considered an "Indian".

(3) However, the provisions of the ICWA do apply to terminations of parental rights, adoption and preadoption proceedings, foster care proceedings and guardianships: cases in which the custody of the child could be transferred to a caretaker who is not a biological parent. In a child involved in such a proceeding is alleged to have native American heritage, the case must be delayed until a special notice can be sent to the tribe or to the Secretary of the U.S. Department of Interior in Washington, D.C. and until tribal courts have an opportunity to review the case and decide whether or not to remove the case to tribal court. Iowa Code §232B.5(4); In the Interest of R.E.K.F., 698 N.W.2d 147 (Iowa 2005).

(4) In re N.N.E., 752 N.W.2d 1 (Iowa 2008) The Iowa Indian Child Welfare Act required that a child must be placed with a member of the Indian child's family, other members of the tribe, another Indian family or a non-Indian family approved by the tribe or one committed to enabling the child to remain connected with the tribe unless there is *clear and convincing evidence* that placement would be harmful to the Indian child. The Supreme Court found that such a high burden to deviate from the placement preferences in a voluntary termination case violated substantive due process. Parents' interest in their children's care, custody, and control is " 'perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].' " Santi v. Santi, 633 N.W.2d 312, 317 (Iowa 2001) (quoting Troxel v. Granville, 530 U.S. 57, 65-66. The Federal statute provides a less rigorous *"good cause"* standard which permits exceptions to the statute's preference for placement with an Indian family.

(5) In re N.V., 744 N.W.2d 634 (Iowa 2008). However, the ICWA still has some impact. In a child in need of assistance (CINA) case, the Supreme Court found that the transfer to tribal court was required because Iowa Indian Child Welfare Act Section 232B.5(10) mandates that a court *shall* transfer the proceeding to a tribal court upon a petition from the parents.

2. Custody of Embryos – Surrogacy.

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

b. ***P.M. v. T.B., No. 16-1419 (Iowa, 2018)***. T.B. responded to the Ms' Craigslist advertisement for a surrogate. She and her husband met and soon signed a contract in which they accepted $13,000.00 and medical expenses and agreed that T.B. would gestate two embryos fertilized in vitro with P.M.'s sperm and the eggs of an anonymous donor. This procedure is called a gestational surrogacy agreement because T.B. is not genetically related to the child. The court first decided that the Surrogacy Agreement was consistent with Iowa Code § 710.11, the statute which states that traditional "surrogacy arrangements" do not violate the criminal statute that prohibits selling babies. Next, the court held that Surrogacy Agreement did not violate Iowa statutes relating to adoption or termination of parental rights. T.B. did not give up her own genetically related child. Instead, she joined with the Ms to create a child, Baby H, would otherwise would not exist; and the Ms would not have entrusted their embryos fertilized with P.M.'s sperm to T.B. if they thought she would attempt to raise the child herself. Next, the court considered whether the Surrogacy Agreement was against public policy. The court noted that "[t]o strike down a contract on public policy grounds, we must conclude that 'the preservation of the general public welfare . . . outweigh[s] the weighty societal interest in the freedom of contract.' " *In re Marriage of Witten*, 672 N.W.2d 768, 780 (Iowa 2003). The court concluded that the state's public

policy favoring families was not violated; and found in fact that gestational surrogacy agreements *promote* families by enabling infertile couples to raise their own children and help bring new life into this world through willing surrogate mothers. Finally, the court considered whether enforcement of the Surrogacy Agreement violates T.B.'s substantive due process and equal protection rights; and agreed with the California Supreme Court that such cases "do not support recognition of parental rights for a gestational surrogate. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) at 785. To the contrary, that case based the constitutional rights on Mr. M's biological connection to the child, which here is superior to any parental interest claimed by T.B. or her husband. Further, the court held that T.B. and her husband had waived their fundamental liberty interests by contractually waiving their rights to raise their own constitutional claims or claims on the child's behalf in the Surrogacy Agreement.

3. Joint and Sole Legal Custody.

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

a. There is a difference between legal custody and physical care. "Custody" refers to a parent's rights and responsibilities toward the child in matters such as decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction. See Iowa Code Section 598.41(5). In Iowa, there is a preference for joint custody. Iowa Code Section 598.41. "Physical care", on the other hand, refers to the right and responsibility to maintain the principal home of the minor child and provide for the routine care of the child. See Iowa Code Section 598.1(5).

b. Section 598.41(2)(b) requires the Court to consider granting joint custody even in cases where the parties do not agree to joint custody and sets out factors which the Court must consider before determining that joint custody is unreasonable and not in the best interest of the child. "To deny joint custody requires a finding by clear and convincing evidence that joint custody is not reasonable and not in the best interests of the child to the extent that the legal custodial relationship between the child and the parent should be severed. In re Marriage of Holcomb, 471 N.W.2d 76 (Iowa App. 1991). See also In re Marriage of Bulanda, 451 N.W.2d 15 (Iowa App. 1989).

c. Sole Custody

(1) The parents' lack of communication and mutual support or a history of domestic abuse may overcome the preference for joint custody.

(2) The Court found that joint legal custody was unworkable and ordered sole legal custody to the father because the parents did not get along and were barely civil to one another. In re Marriage of Winnike, 497 N.W.2d 170 (Iowa App. 1992). See also In re Marriage of Eilers, 526 N.W.2d 566 (Iowa App. 1994) and In re Marriage of Brainard, 523 N.W.2d 611 (Iowa App. 1994).

(3) "It is very likely that the parties will not be able to agree on many of the fundamental decisions that must be made in children's lives, such as education and medical treatment. The vesting of such decision-making power in one parent thus seems preferable. In re Marriage of Rolek, 555 N.W.2d 675 (Iowa 1996).

In re Marriage of Davis, No. 16-1574 (Iowa App., 2017). Liz and George had a short marriage and two children. Liz admitted several incidents in which she had violently attacked George which resulted in a five-year criminal protective order. The trial court granted George sole legal custody of the children, Liz claimed that the statutory rebuttable presumption against joint legal custody when there is a history of domestic abuse [Iowa Code Section 598.41(2)(c)] was overcome because she claimed George was also guilty of abuse. See *In re Marriage of Forbes,* 570 N.W.2d 757, 760 (Iowa 1997). However, the trial court had an opportunity to view the demeanor of the witnesses and did not find Liz' claims credible. The Court of Appeals accepted the trial judge's findings and ruled that George could provide the environment most likely to bring the children to health, both physically and mentally, and to social maturity." *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

In re Marriage of Stanley, No. 16-1822 (Iowa App., 2017). Joanna challenged the modification of the child custody provisions of the decree to grant Tyler sole legal custody and physical care of the children. Joanna acted unilaterally to change the children's school district and to provide unnecessary therapy for the children without informing Tyler. She made custody exchanges as difficult as possible for Tyler. She failed to communicate about extracurricular activities, as well as medical and dental concerns; and Joanna's animosity toward Tyler permeated her interactions with him. The court found that degree of conflict between the parties prevented them from co-parenting. Joint legal custody is preferred in Iowa. *See In re Marriage of Bartlett*, 427 N.W.2d 876, 878 (Iowa Ct. App. 1988); and *In re Marriage of Miller*, 390 N.W.2d 596, 601-02 (Iowa 1986), but Joanna's actions and decisions had negatively impacted the children. Tyler had shown a superior ability to put the children's needs first in order to act in accordance with their best interests. The court concluded that the evidence was compelling that the children's best interests required that Tyler be granted sole legal custody.

In re Marriage of Morrison, No. 16-0886 (Iowa App., 2017). Cassie and Kyle had serious problems communicating and cooperating with respect to their children. Therefore, Cassie asked the court to define "joint legal custody" to mean she has the "sole right to make decisions concerning the routine care of the children," which would include the right to: (1) make decisions on the children's routine and non-emergency health care; (2) make all doctor's appointments for the children; (3) make decisions regarding the children's daycare and extracurricular activities; (4) manage and make decisions regarding the children's education; and (5) be the only parent who is allowed to communicate with the children's doctors, providers, and caretakers. The court held that Cassie misunderstood the meaning of joint legal custody. A parent's request for information regarding the parent's children is not an "interference" with the other parent's care of the children. Cassie's proposed definitions of "routine care" go far beyond "the myriad of details associated with routine living"; and sought de facto sole legal custody. Cassie had not shown a material and substantial change in circumstances that would justify sole legal custody. *In re Marriage of Leyda*, 355 N.W.2d 862, 865 (Iowa 1984).

4. <u>Joint Physical Care</u>

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

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

(1) **Stability and Continuity** is the most significant factor where there are two suitable parents is stability and continuity of caregiving. In re Marriage of Bevers, 326 N.W.2d 896, 898 (Iowa 1982). Long-term, successful, joint care is a significant factor in considering the viability of joint physical care after divorce. In re Marriage of Ellis, 705 N.W.2d 96, 103. The American Law Institute's *Principles of Family Law,* suggests an **"Approximation Rule"**: custodial responsibility should be allocated "so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation ...."*Principles* § 2:08, at 178. By focusing on historic patterns of caregiving, the approximation rule provides a relatively objective factor for the court to consider though other circumstances may outweigh considerations of stability, continuity, and approximation.

In re Marriage of Wilson, No. 16-1114 (Iowa App., 2017). Both Ryan and Amanda had shortcomings, but both were good parents. However, after reviewing the Hansen factors, the court ruled that joint physical care was not in the best interests of the children. The parties' strained communications and tension between them did not support a joint-physical-care arrangement. Furthermore, the physical distance between the parties' residences is unworkable. Alternating school districts was not feasible; and spending nearly ninety minutes per day in a car while in Amanda's care would cause unnecessary stress on the children. *See In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998). The court decided Ryan would provide the physical care that is most likely to bring the children to healthy physical, mental, and social maturity because of the children's familiarity with the schools, teachers, friends, and community in Brooklyn, Iowa. Uprooting the children by placing them in Amanda's care would disturb the children's already stable environment, in which they were thriving. *See In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

In re Marriage of Thompson, No. 17-0481 (Iowa App., 2017). After considering the four factors involved in making a joint physical care determination, the court concluded that the approximation factor heavily favored Katrina. *In re Marriage of Hansen,* 733 N.W.2d 683 (Iowa 2007). She had been the homemaker and primary child care giver since 2012. This role included taking the children to visits to the doctor, school conferences, and activities. "While no post-divorce physical care arrangement will be identical to predissolution experience, preservation of the greatest amount of stability possible is a desirable goal. In contrast, imposing a new physical care arrangement on children that significantly contrasts from their past experience can be unsettling, cause serious emotional harm, and thus not be in the child's best interest." *See Hansen*, 733 N.W.2d at 696-97.

In re Marriage of Walker, No 17-0963 (Iowa App., 2018). Both Ryan and Amber were suitable parents, loving and conscientious; and both had been the primary caregiver at different times in the marriage. However, the trial court granted primary physical care of the children to Ryan because he had been the primary caretaker during the latter part of the marriage, after Amber left the home. However, the Court of Appeals found that the trial court failed to acknowledge that Ryan's advantage in late marriage caretaking was created

because Ryan forced Amber out of the home and restricted her visitation severely. The court must consider not only the continuity of caregiving, but also the full array of factors established in *In re Marriage of Hansen, 733 N.W.2d 683 (Iowa 2007)*. When all factors were considered, the court found that joint physical care was in the best interests of the children.

(2) **Communication and Respect.** A lack of trust poses a significant impediment to effective co-parenting and it is an important factor that the Court directs for consideration in determining whether to require joint physical care. The parents must have the ability to communicate and show mutual respect. In re Marriage of Hynick, 727 N.W.2d 575, 579 (Iowa 2007) at 580; In re Marriage of Ellis, 705 N.W.2d 96 (Iowa Ct.App.2005) at 101; Iowa Code §598.41(3)(c).

(3) **The Degree of Conflict**. Joint physical care requires substantial and regular interaction between divorced parents on a myriad of issues. Where the parties' marriage is stormy and has a history of charge and countercharge, the likelihood that joint physical care will provide a workable arrangement diminishes.

Fuerstenberg v. Frette, No. 16-1592 (Iowa App., 2017). Kory and Leah were both heavily involved in the life of their child. Leah had been the primary caregiver, but both parties maximized the time they could spend with the child. The Court reviewed the *Hansen* factors: (1) Neither was superior after considering continuity, stability, and approximation, because both parents spent quality time with the child; (2) the parties had long been able to communicate about the child, though there was a marked increase in conflict between the parties just before the trial; (3) the parties had a history of name-calling and an incident where police were involved to resolve a custody dispute, but there were no other disputes regarding care for the child herself; and (4) the parties were both willing and able to be suitable custodians and provide for the needs of the child. Therefore, the court found that the parties' communication conflicts are not substantial enough to conclude "that the awarding of joint physical care is not in the best interest of the child." Accordingly, the Court modified the decree to award joint physical care of the minor child to the parties. See *In re Marriage of Hansen*, 773 N.W.2d 683 at 699; *see also* Iowa Code § 598.41(3); and *In re Marriage of Winter*, 223 N.W.2d 165 at 166.

(d) **Agreement about Child Rearing Practices**. The degree to which the parents are in general agreement about their approach to daily matters is important, especially when the past relationship has been turbulent. In re Marriage of Burham, 283 N.W.2d 269 (Iowa 1979) (*citing Dodd v. Dodd,* 93 Misc.2d 641, 647, 403 N.Y.S.2d 401 (S.Ct.1978).

c. In re Marriage of Ellis, 705 N.W.2d 96 (Iowa App. 2005). The trial court had no confidence in the ability of the parties to reach mutually agreed decisions. The Court of Appeals stated that section 598.41(5) "constitutes neither a ringing endorsement of joint physical care, nor a mandate for courts to grant joint physical care unless the best interest of the child requires a different physical care arrangement." Still, the Court noted the parties' highly successful shared care of Paxton from his birth to the time of the dissolution trial; and awarded the parties joint physical care of Paxton.

d. In re Marriage of Hynick, 727 N.W.2d 575 (Iowa 2007). Before and during dissolution, Holly obtained no-contact orders against Bradley. Several times during the proceeding, harassing, threatening and immature incidents occurred; and police intervention was needed at least twice. Joint physical care parents not only will have equal, or roughly equal, residential time with the child.; but since neither parent has rights superior to the other with respect to the child's routine care, joint physical care also envisions shared decision making on all routine matters. Obviously,

such decision making requires good communication between the parents as well as mutual respect. The history of domestic abuse and inability to cooperate in this case made joint physical care impossible.

5. Split/Divided Physical Care.

a. Split custody or divided physical care occurs when each parent is granted primary physical care of at least one of the children of the parties.

b. "Split custody of children is warranted if good and compelling reasons exist for dividing custody ... Specifically, separation of children is justified when it is found to better promote their long-range best interest." In re Marriage of Harris, 530 N.W.2d 473, 474 (Iowa App. 1995). See also in In Re Marriage of Pundt, 547 N.W.2d 243 (Iowa App. 1996).

c. Aside from the caretaking capability of the parties, other factors are considered in determining whether separation is in the best interests of the children. For example, a court should consider the difference in age between the children separated, e.g., In re Marriage of Kurth, 438 N.W.2d 852, 854 (Iowa App. 1989); whether the children would have been together if split physical care was not ordered, e.g., Id.; the [relationship] between the children, e.g., Jones, 309 N.W.2d at 461; and the likelihood that one of the parents or children would turn other children against the other parent, e.g., In re Marriage of Wahl, 246 N.W.2d 268, 270-71 (Iowa 1976). These and other factors are also discussed In Annotation, Child Custody: Separating Children by Custody Awards to different Parents-Post-1975 Cases, 67 A.L.R.4th 354 (1989)." In re Marriage of Will, 489 N.W.2d 394 (Iowa 1992).

In re Marriage of Erpelding, No. 16-1419 (Iowa App., 2017). During the pendency of the action, after mediation, the parties agreed to a pre-decree plan for the upcoming school year: The younger child, D.E., would live in Clear Lake with Jodi and attend public school for fourth grade, and W.E. would live with Tim on the farm and attend ninth grade at Garrigan high school in Algona. A guardian ad litem was appointed and reported that he could see nothing beneficial by forcing one child or the other to relocate. Both were thriving, and the parents were getting along well. There is a presumption that siblings should not be separated. Split physical care is generally opposed because it deprives children of the benefit of constant association with one another. "The rule is not ironclad, however, and circumstances may arise which demonstrate that separation may better promote the long-range interests of children." Good and compelling reasons must exist for a departure. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). The court considered the GAL report and numerous other factors—each parent's caretaking capability, the age difference between the separated children, the relationship between the children, and the likelihood that one of the parents or children would turn a child against the other parent and found "good and compelling reasons" for split physical care in the circumstances of this case. While each boy loves both parents and his brother, the boys are five grades apart, their social lives and activities are obviously unalike, and as recognized by the district court, their age difference "means that they are not going to be in constant association with each other. Their interests are necessarily going to diverge." In addition, Jodi was the historical caretaker for the boys, and her more flexible work schedule, especially in June and July when D.E. is not in school, allows her to "better minister" to D.E.'s needs as a younger child. The court concluded that "any disposition other than split physical care will cause significant emotional harm to at least one of the two children, which may take years to resolve, if ever; and that it was in the children's best interests to be placed in split physical care. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984)

6. Determination of Primary Caretaker

a. Basic Factors/Winter Case

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

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

b. General Principles

(1) Long-Range Best Interests

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

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

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

(3) Psychological Factors

(a) " ... Care must be exercised in judging a parent based on activities which take place during a particular time frame of the marriage, such as the

separation or break up of the relationship. Instead, a better picture of a parent can be found by viewing the total circumstances and putting isolated events into perspective. In re Marriage of Ihle, 577 N.W.2d 64, 69 (Iowa App. 1998).

(b) In re Marriage of Rebouche, 587 N.W.2d 795 (Iowa App. 1998). To effectively aid the court in making difficult custody determinations, the court should be able to have confidence in the neutrality of the evidence and testimony provided by the very experts the court appoints to carry out this critical function. Absent that neutrality, the expert testimony fails in its function, and the court has lost the assistance it anticipated.

(c) The Court of Appeals approved the Trial Court's decision to give little weight to the psychologist's testimony because the psychologist was not revealed in advance and had not met with the custodial parent before making a custody recommendation. In re Marriage of Scheffert, 492 N.W.2d 203 (Iowa App. 1992). See also In re Marriage of Lacaeyse, 461 N.W.2d 475 (Iowa App. 1990).

(d) Ashenfelter v. Mulligan, 792 N.W.2d 665 (Iowa, 2010). Iowa Rule of Civil Procedure 1.503 prohibits discovery of privileged materials; and medical records are privileged materials under section 622.10. Therefore, they are not discoverable under rule 1.503. Chung v. Legacy Corp., 548 N.W.2d 147, 149 (Iowa 1996). Section 622.10 provides an exception to the privilege in certain circumstances when a patient is also a litigant, but "[t]he statute requires the condition be an element or factor of the claim or defense *of the person claiming the privilege.*" 548 N.W.2d at 150.

(4) Preference for Primary Caretaker

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

(5) Sexual Orientation of Parent

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

(6) Moral Misconduct/Child Endangerment

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

(7) Hostility/Promote Noncustodian's Relationship

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

(8) Gender of Parent Irrelevant

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

(9) Marital Status/Cohabitation

The criteria governing child custody determinations are the same regardless of whether the parents are dissolving their marriage or have never been married to each other. Hodson v. Moore, 464 N.W.2d 699, 700 (Iowa App. 1990). See also In re Marriage of Pettit, 493 N.W.2d 865 (Iowa App. 1992).

Thomas v. Westfall, No. 16-0889 (Iowa App., 2017). Tyne and Charles were unmarried parents of 3-year-old D.A. Both parties genuinely wanted the maximum amount of time parenting D.A., were employed and had appropriate residences, had familial support, and posed no identifiable safety risk to D.A. Both Tyne and Charles contributed to the tension in their relationship. Tyne consistently refused Thomas' requests for more time with D.A. and unilaterally made important decisions—including where she and D.A. would live, which medical professionals D.A. would see, and where D.A. would attend daycare. Although Charles consistently requested additional time with D.A., he did not make specific visitation proposals, and he did not always take initiative in attempting to be involved in the child-rearing decisions. Tyne had historically been the primary caregiver but this was largely due to herrefusal to allow Charles to assume a greater parenting role in D.A.'s life. The court noted that pursuant to section 600B.40, the court must consider custody, visitation, and support matters respecting unmarried parents as we would married parents under Section 598.41. *See also Montgomery v. Wells*, 708 N.W.2d 704, 707 (Iowa Ct. App. 2005). Here, since both parties were willing and capable of providing D.A. exceptional care, the court decided it was in D.A.'s best interests to grant joint physical care so that D.A. will have the maximum time possible with each parent to allow him to establish a relationship with both Tyne and Charles. *See* Iowa Code § 598.41(1)(a) We therefore affirm the district court's determination the parties will have joint physical care of D.A. and the corresponding care schedule fixed by the district court.

(10) Religion

Section 598.41(5) provides that both parents should be involved in decisions about religious instruction. However, the court will not prescribe the kind of instruction the children will receive. Each parent may be a role model and provide his or her own instruction to the children. In re

Marriage of Moore, 526 N.W.2d 335 (Iowa App. 1994). See also, Petition of Deierling, 421 N.W.2d 168 (Iowa App. 1988); In re Marriage of Rodgers, 470 N.W.2d 43 (Iowa App. 1991); In re Marriage of Anderson, 509 N.W.2d 138 (Iowa App. 1993).

(11) Cultural Beliefs

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

(12) Stable Environment

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

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

(c) ***Baker v. Jones, No. 16-1164 (Iowa App., 2017)***. Michael and Mandie had a five-year-old son, E.J. Mandie was scheduled to be relocated by her employer to Louisiana within two months after the decree. The Court approved joint physcial care of the child in alternate weeks until Mandie relocated, and the award of primary physical to Mandie after relocation, subject to Michael's visitation during the summer and three-day weekends during the school year. The parties were ideal candidates for joint physcial care, if they intended to remain in the same geographic locality. However, permanent joint physical care was no longer an option. The court decided the Mandie could best provide for E.J.'s long-term best interests.*In re Marriage of Shanklin*, 484 N.W.2d 618, 619 (Iowa Ct. App. 1992) Before and after the parties separated, Mandie had been the primary caregiver during times of the child's illness and has been the parent who has made all arrangements for the child's care, treatment, and activities. In addition, Mandie's job in Louisiana offers work hours from 8:00 a.m. to 4:30 p.m., whereas Michael's employment in Iowa has extended evening and weekend hours.

(13) Child's Preference

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

(14) Domestic Abuse

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

[1] Section 598.41(1)(b) now provides that if the court finds that a history of domestic abuse exists, a rebuttable presumption against the awarding of joint custody exists; and Section 598.41(2)(c) now provides that if a history of domestic abuse exists, which is not rebutted, this factor shall outweigh consideration of any other factor in determination of awarding of custody.

[2] Section 598.41(1)(c) now provides that the requirement that visitation be structured to provide for maximum continuing contact between the non-custodial parent and child will be eliminated if the court determines that a history of domestic abuse exists between the parents.

[3] Section 598.41(1)(d) provides that if a history of domestic abuse exists, the court shall not consider the relocation or absence of a parent as a factor against that parent in awarding custody or visitation if the parent is a domestic abuse victim.

(b) Iowa Code Chapter 236 provides a mechanism for individuals to obtain protection from domestic abuse. Section 236.2(e) includes among the persons protected from domestic abuse those in "intimate relationships". The statute includes a list of factors to be considered to determine whether an intimate relationship existed at the time of the abuse, but defines an "intimate relationship" as a significant romantic involvement that need not include sexual involvement, but is something more than a social or professional relationship. In addition, the statute recognizes that a person may be involved in more than one "intimate relationship" at the same time.

(c) Even before the statutes were amended, the Court of Appeals denied custody to a father largely because of his history of domestic abuse. The Court found that children raised in homes touched with domestic abuse are often left with deep scars revealed in increasing anxiety, insecurity, a greater likelihood for later problems in interpersonal relationships, and low self-esteem. Also abuse places children at greater risk of being physically abused. In re Marriage of Brainard, 523 N.W.2d 611 (Iowa App. 1994).

(d) In re Marriage of Ford, 563 N.W.2d 629 (Iowa 1997). The 1995 amendments create a rebuttable presumption against joint custody, but, " ... any evidence of abuse does not automatically and as a matter of law preclude joint custody. Rather, we must consider the evidence in determining whether such a presumption is sustainable."

(e) "We do not minimize the seriousness of domestic abuse and the negative impact it has on children. However, we also recognize some relationships are mutually aggressive, both verbally and physically. In those situations, a claim of domestic violence must not be used by either party to gain an advantage at trial, but should be reserved for the intended purpose -- to protect victims from their aggressors." In re Marriage of Barry, 588 N.W.2d 711 (Iowa App. 1998). See also In re Marriage of Forbes, 570 N.W.2d 757 (Iowa 1997).

(f) However, a history of domestic abuse is not easily overcome. "We believe evidence of untreated domestic battering should be given considerable weight in determining the primary caretaker, and under some circumstances, should even foreclose an award of

primary care to a spouse who batters." In re Marriage of Daniels, 568 N.W.2d 51 (Iowa App. 1997).

(g) In Wilker v. Wilker, 630 N.W.2d 590 (Iowa 2001), Paula stood by while others pushed, held, and roughed up Timothy while she removed the child from the house. The Court held that an "assault" is any act which is intended to cause pain or injury or result in physical conduct which will be insulting or offensive to another and "aiding and abetting" is assenting to or lending countenance and approval by active participation or encouragement.

(15) Preference for Parent

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

(b) Iowa Code Section 232.104(7) permits the Juvenile Court to close a Child in Need of Assistance case by transferring jurisdiction over the child's guardianship to the probate court for continuing supervision. Section 633.559 has been amended to cancel the statutory preference granted to parents in cases which have been transferred under Section 232.104.

(c) Preference Rebuttable. The preference favoring parents as custodians is rebuttable due to the essential governing consideration, that being the best interest of the child. However, a non-parent may gain custody if the parent seeking custody is proven to be unfit or substantially inferior. In Matter of Guardianship of Stodden, 569 N.W.2d 621 (Iowa App. 1997). "A parent who fails to develop a relationship with his or her child while that child is establishing a family relationship with a stepparent must recognize the child thereby puts down roots that are of critical importance. Courts must carefully deal with those roots in determining the child's best interests. ... If return of custody to the child's natural parent is likely to have a seriously disrupting and disturbing effect on the child's development, this fact must prevail." In re Guardianship of Knell, 537 N.W.2d 778 (Iowa 1995)." Stodden at 624-625. See also In re Marriage of Halvorsen, 521 N.W.2d 725 (Iowa 1994); In re Marriage of Liebich, 547 N.W.2d 844 (Iowa App. 1996) (grandmother intervened in dissolution action); In re Marriage of Corbin, 320 N.W.2d 539 (Iowa 1982) (foster parent intervened in dissolution action and was awarded custody in dissolution decree); In re Marriage of Reschly, 334 N.W.2d 720 (Iowa 1983) (custody awarded to grandparents on Petition of Intervention); and In re Marriage of Swanson, 586 N.W.2d 527 (Iowa App. 1998) [temporary custody to a stepfather].

In re Guardianship of B.E.W, **No. 16-0358** ***(Iowa App., 2017)***. B.E.W. was born in 2009 to Sarah Weaver who struggled with many issues that affected her ability to care for B.E.W. In 2011, she agreed to a temporary guardianship of B.E.W. with the James and Christian Ford. The child bonded with the Ford's and with Kim and Jeff Steffensmeiers, Sarah's maternal aunt and uncle. The couples had a good relationship, but in 2014, the Fords' petitioned to terminate Webster's parental rights; Webster resisted and sought to have the guardianship terminated; and in January 2015, the Steffensmeiers sought to be appointed

guardians. The district court denied Webster's application to have the guardianship terminated and found it was in the best interests of the child to transfer the guardianship to the Steffensmeiers. The Fords argued that B.E.W.—who was just six years old at the time of trial—had been in their care for more than four years and was bonded to them. Webster conceded she had no bond with the child but believed B.E.W. should live with the Steffensmeiers in the hope a mother-daughter bond could be established. The court concluded that the child's immediate and long-term best interests required guardianship to the Steffensmeiers, they had a good relationships with both Webster and the Fords; "would be able to ensure maximum contact between B.E.W. and [Webster];" and would also be willing to continue B.E.W.'s contact with the Fords. *In re Guardianship of Roach*, 778 N.W.2d 212, 214 (Iowa Ct. App. 2009).

In re S.K.M., No. 16-1537(Iowa App. , 2017). Eric and Christy accepted guardianship of S.K.M, their grandson, after Eric's daughter decided she could not care for the child and the child's father, Jared was not ready to accept the responsibility. Jared moved out of state, paid support, and visited occasionally. After Eric and Christy failed to terminate Jared's parental rights in 2013, Jared sought to terminate the guardianship in 2014. He claimed the statutory presumption in favor of placing children with their biological parents. See Iowa Code section 633.559. The court noted that the parental preference was "lessened" because Jared had ignored the original the guardianship petition. *In re Guardianship of Stewart*, 369 N.W.2d at 820. In addition, a parent is not entitled to the presumption if there was a prior custody determination involving a full evidentiary hearing and the presumption was overcome. *See Stewart*, 369 N.W.2d at 824. Also, "a parent who has taken an extended holiday from the responsibilities of parenthood' may not take advantage of the parental preference for custody." *In re Guardianship of Roach*, 778 N.W.2d 212, 214-16 (Iowa Ct. App. 2009. However, Jared never expressly or impliedly waived his constitutional or statutory right to the care, custody, and control of his child; he paid support for the child without fail; and he exercised continuous and regular visitation with the child in-person or telephonically since the time of the child's birth. Therefore, the guardianship was terminated and custody granted to Jared because there was no clear and convincing evidence that Jared was unqualified. Instead, Jared now had the financial means to provide for the physical needs of the child; and he had demonstrated the ability to meet the child's social and emotional need.

(d) In re Guardianship of Hall, 666 N.W.2d 619 (Iowa App.2003). The law presumes that the children's best interests will best be served by placing them in the care of their natural parents, assuming they are qualified and suitable. In re Guardianship of Stewart, 369 N.W.2d 820, 822 (Iowa 1985). The guardians have the burden to rebut the presumption of suitability and show that the child's best interests require a continuation of the guardianship. Stewart, 369 N.W.2d at 824. The only evidence sufficient to overcome the preference for the parents is proof that the transfer of custody to a parent would have a "seriously disrupting effect upon the child's development, this fact must prevail." Painter v. Bannister, 258 Iowa 1390, 1396, 140 N.W.2d 152, 156 (1966). That showing was not made here.

In re Guardianship of L.O., No. 15-1598 (Iowa App., 2017). The mother placed L.O. and D.O. in a guardianship with their paternal aunt in 2014 because her attorney advised her to avoid potential termination proceedings, she could voluntarily place the children into a guardianship; and that she would be allowed to get the children back if she turned her life around. Since the establishment of the guardianship, the mother made progress. She had been "clean and sober and employed; she also has stable housing and a valid driver's license. However, during the guardianship, she had been convicted of operating while intoxicated and driving with license suspended, and she had her parole and work release revoked. When the mother petitioned for termination of the guardianship and parenting time in 2016, the Court noted that parents "should be encouraged to look for help with the children, from those who love them without the risk of thereby losing the custody of the children

permanently." *Painter v. Bannister*, 140 N.W.2d 152, 156 (Iowa 1966). However, in this case, the "court's jurisdiction over the child's guardianship was established . . . in accordance with [a permanency order]." The natural parent preference of Iowa Code §633.559 (2015) applies only if the court's jurisdiction is not established by a transfer from juvenile court and if the transfer of custody is not taken "in a time of need." *In re Marriage of Knell*, 537 N.W.2d at 782 (Iowa 1995). Since the guardian was appointed due to the transfer of the case pursuant to Iowa Code section 232.101A,"the court shall not enter an order terminating the guardianship before the child becomes age eighteen unless the court finds by clear and convincing evidence that the best interests of the child warrant a return of custody to the child's parent." Iowa Code § 633.675(2). The court found that the mother had not presented such clear and convincing evidence.

(16) Equitable Parent Doctrine.

(a) In In re Marriage of Gallagher, 539 N.W.2d 479 (Iowa 1995), the Iowa Supreme Court established a far-reaching new principle when it adopted the Equitable Parent Doctrine. In doing so, the Court distinguished several cases, notably Petition of Ash, 507 N.W.2d 400, 403 (Iowa 1993) and In re Halvorson, 521 N.W.2d 725, 728 (Iowa 1994), in which it had specifically rejected the equitable parent doctrine. "Applying general equitable principles, we believe equitable parenthood may be established in a proper case by a father who establishes all of the following: (1) he was married to the mother when the child was conceived and born; (2) he reasonably believes he is the child's father; (3) he establishes a parental relationship with the child; and (4) shows that judicial recognition of the relationship is in the best interest of the child."

(b) Although Section 600B.41A, the Action to Overcome Paternity Statute, was not argued in Gallagher, the Gallagher court noted that the then newly created Section 600B.41A "may control future cases presenting similar issues."

(c) In Callender v. Skiles, 591 N.W.2d 182, 186 (Iowa 1999), the Supreme Court recognized the legislative distinction between an action to establish paternity and an action to overcome paternity. Once paternity has been established by operation of law, established paternity can be overcome only through Section 600B.41A. The law deems the husband to be the child's father by virtue of his marriage to the child's mother. In Skiles, the Court found a denial of Due Process Iowa Code Section 600B.41A(3) which denied a biological parent the right to establish his paternity because he was not authorized under the statute to commence an action to overcome paternity. The case was remanded for a determination of whether the biological father had waived his right to challenge the established paternity.

(17) Nomination In Will

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

(18) Preference for Other Family Members

(a) "The Court should not simply make an effort to select the best person to raise the child, irrespective of family ties...we believe our past jurisprudence...emphasizes the importance of keeping the child within the family whenever possible." Matter

of Guardianship of Reed, 468 N.W.2d 819 (Iowa 1991). See also Holmes v. Derrey, 127 Iowa 625, 103 N.W. 973 (1905).

(b) A person may intervene only during the pendency of an action (IRCP 75). To have standing to initiate a modification proceeding, a person must have a specific, personal, and legal interest in the litigation and be injuriously affected. This a grandparent does not have. In re Marriage of Mitchell, 531 N.W.2d 132 (Iowa 1995). Still, a grandparent (or others) may file a petition for guardianship or initiate a proceeding to have the child found to be in need of assistance in juvenile court.

5. Tortious Interference with Custody

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

6. Appointment of Guardian Ad Litem, Attorney For Minor Child, Child Custody Investigators, and Child and Family Reporters. In House File 133, the 2017 Iowa Legislature amended Iowa Code §598.12 and created new §598.12A to clarify and expand the roles of the guardian ad litem and attorney for minor child.

a. Guardian Ad Litem and Attorney For Minor Child.

(1) §598.12 now clearly states that the guardian ad litem "shall be solely responsible for representing the best interests of the minor child" and that the attorney must be independent of the court and the parties and may not serve as attorney for th minor child or as the newly created "child or family reporter."

(2) New §598.12A states that the attorney for the minor child "shall be soley responsible for representing the minor child;" and, like the guardian ad litem must be independent of the court and the parties and may not serve as attorney for th minor child or as the newly created "child or family reporter."

(3) Though not specifically stated, the distinction between the two roles appears to be that the guardian ad litem must make his or her personal assessment of the "best interests" of the child and advocate for that result, while the attorney for the minor child is charged with advocating for the stated wishes of his minor client without imposing his or her personal assessment of the minor client's best interests.

(4) Both the guardian ad litem and the attorney for minor child are given the responsibility and powers to fully investigate on behalf of their client and to participate in all aspects of the case, including discovery and trial. However, neither shall testify, serve as a witness, or file a written report.

b. Child Custody Investigators, and Child and Family Reporters. House File 133 also created new §598.12B to authorize appointment and define the roles of child custody investigators and Child and Family Reporters.

(1) The section empowers the court to appoint a child custody investigator or child and family reporter to obtain information regarding both parties' home conditions, parenting capabilities, and other matters pertinent to the best interests of the child.

(2) A report of the information obtained shall be submitted to the court and be available to both parties. The report shall be part of the record of the case unless the court orders otherwise. This provision may be tested because it conflicts with the Supreme Court's ruling in In re Marriage of Williams, 303 N.W.2d 160, 163 (Iowa 1981) in which the court held that unless a social worker's written report is properly before the court by agreement or stipulation, it should be considered inadmissible hearsay.

(3) The Supreme Court is directed to prescribe and maintain standards for child custody investigators and child and family reporters.

7. Visitation and Other Rights and Responsibilities of Joint Custody

a. Statutory Criteria

(1) Section 598.1(6) and Section 598.41(1) now provide that, except in unusual circumstances, the best interests of the child require "...the opportunity for maximum continuous physical and emotional contact with both parents, and that refusal by one parent to provide this opportunity to the other without just cause, shall be considered a significant factor in determining the proper custody arrangement.

(2) Both parents shall have legal access to information concerning the child, including but not limited to medical, educational and law enforcement records (Section 598.41[1]); and joint custodial parents are entitled to "...equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities and religious instruction." (Section 598.4[5]). However, if a history of domestic abuse exists, a party's visitation rights can be seriously affected.

b. Rights and Responsibilities of Joint Custodians

(1) Basic Rights and Responsibilities

In re Marriage of Fortelka, 425 N.W.2d 671owa App. 1988) specifies the following rights and responsibilities of joint custodians: (a) to participate equally in decisions affecting the child's legal status, medical care, education, extracurricular activities and religious instruction; (b) to communicate with each other; in particular, the physical custodian has a responsibility, except in emergencies to share information (conference slips, report cards, medical appointments, etc.) about the need to make decisions and to make the information available to the other parent; (c) to support the other parent's relationship with the child; (d) to put away personal animosities and work together as mature adults with medical and school personnel to meet the child's needs; (e) to structure visitation flexibly, taking the child's educational and

social activities into consideration; and (f) to assure that transition between homes is without problems.

(2) Religious Instruction

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

(3) Access to Law Enforcement Records

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

(4) Access to Child's Psychological Records

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

(5) Right to Name Child

(a) In an initial determination of a child's name, each parent has the right to equally participate in decisions affecting "the child's legal status"under Iowa Code Section 598.41(2); and an infant child's name is an incident of the child's "legal status". In re Marriage of Gulsvig, 498 N.W.2d 725, 728 (Iowa 1993). The court's name change authority for children born outside of marriage derives from section 600B.40 which makes section 598.41 applicable to proceedings concerning the custody and visitation of a child born to unmarried parents. In re Petition of Purscell, 544 N.W.2d 466, 468 (Iowa Ct. App. 1995).

(b) However, both parent's must consent to a name change under the Name Change Statute, Chapter 674, unless the father's name is not on the birth certificate. Section 674.6 "The legislature specifically limited the required consent to 'parents as stated on the birth certificate.' In re Name Change of Reindl, 671 N.W.2d 466 (Iowa 2003).

Thomas v. Westfall, No. 16-0889 (Iowa App., 2017). In an initial name determination under Sections 598.41 and 600B.40, the court may use a best interests test to decide the appropriate surname for a child as part of its determination of the child's legal status and custody. *Montgomery v. Wells*, 708 N.W.2d 704, 707 (Iowa Ct. App. 2005). However, if both parties participated original naming of the child, its name can only be changed later under Sections 674.1 and 674.6.

Peckosh v. Wenger, No. 11-0119, 2011 WL 4578532 (Iowa Ct. App. 2011). Tyne Westfall argued that her surname should remain on the child's birth certificate because CharlesWestfall had participated in the child's naming, and she did not intend to change her surname in the event she gets married. Charles argued that he only participated in selecting the child's first name, but also rejected a hypenated name because a hyphenated surname would cause the child embarrassment in the future due to its implication of an unmarried birth. The court found that Charles had not participated in the initial selection of the child's surname; that in recent years ""more courts have recognized the benefits of using a hyphenated surname for a child whose parents live separately." *In re Uker*, No. 10-1829, 2011 WL 2420702, at *3 (Iowa Ct. App. June 15, 2011).; and that the best interests of the child would be served by a hyphenated surname. Having both parents surnames will promote the bond the child has with both parents and with theif extended families.

(c) Braunschweig v. Fahrenkrog, 773 N.W.2d, 888 (Iowa 2009). In an action to challenge to the legitimacy of a child's name unilaterally chosen by one parent, the decision is controlled by Iowa Code Chapter 598; and the Court must decide what would be in the child's best interests. Montgomery v. Wells, 708 N.W.2d 704, 708 (Iowa Ct.App.2005); In re Name Change of Quirk, 504 N.W.2d 879, 882 (Iowa 1993). However, if the child's surname was or could have been an issue in an earlier proceeding, the doctrine of res judicata may require that the Chapter 674, the Name Change Statute, which permits change only if both parents agree, will control the court's decision. Spiker v. Spiker, 708 N.W.2d 347, 353 (Iowa 2006).

c. Visitation

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

(1) Cases Stressing Avoidance of Excessive Disruption

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

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(a) Sections 598.41(1) and 598.1(6) do not require the Court to apportion at least one-half of the available time to the non-custodial parent in order to meet the

requirement of maximum continuous physical and emotional contact. In re Marriage of Bunch, 460 N.W.2d 890, 892 (Iowa App. 1990).

(b) Liberal visitation rights are in the best interests of the children, but the primary custodian is entitled to enjoy weekend time with the children. In re Marriage of Lacaeyse, 461 N.W.2d 475 (Iowa App. 1990).

(c) In In re Marriage of Hunt, 476 N.W.2d 99 (Iowa App. 1991), the Court found that the approach of middle school with increased school and friendship-related activities and increased travel time between the parties' homes made restricted visitation reasonable, equitable and in the child's best interests.

(d) Generally, courts will not impose conditions on a parent's visitation such as prohibiting use of alcohol and profanity or prohibiting contact with unrelated adults. In re Marriage of Rykhoek, 525 N.W.2d 1, 5 (Iowa App. 1994). See also, In re Marriage of Fite, 485 N.W.2d 662 (Iowa 1992).

(2) Cases Stressing Maximum Parental Contact

(a) The Court of Appeals has held that the non-physical custodian is entitled to midweek overnight visitation with the child in addition to visitation on alternating weekends in accordance with the statutory preference for maximum contact. In re Marriage of Toedter, 473 N.W.2d 233 (Iowa App. 1991).

(b) "Visitation should include not only weekend time, but time during the week when not disruptive to allow the non-custodial parent the chance to become involved In the child's day-to-day activity as well as weekend fun." In re Marriage of Ertmann, 376 N.W.2d 918, 922 (Iowa App. 1985). See also In re Marriage of Muell, 408 N.W.2d 774 (Iowa App. 1987).

(c) Generally, liberal visitation is in the child's best interests. In re Marriage of Stepp, 485 N.W.2d 846, 849 (Iowa App. 1992). It is important, however, not to impose a shared-type of physical care arrangement under the disguise of expansive visitation because it deprives children of the needed stability in their lives. See In re Marriage of Roberts, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996).

(3) Overnight Visitors

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

(4) Homosexuality

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

(5) Custodial Parent Visits During Summer Visitation

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

(6) Control At Discretion of Expert or Other Parent Improper.

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

Thompson v. Fowler, No. 17-0284 (Iowa App., 2017). Justin did not progress in probation and sex-offender therapy; and he admitted his sexual attraction to children. The court found that he put his daughter at risk, and granted Allyson sole legal custody and physical care of the child and ordered that any visitation between Justin and the child shall be at Allyson's discretion. "The rule is well established in all jurisdictions that the right of access to one's child should not be denied unless the court is convinced such visitations are detrimental to the best interest of the child." *Smith v. Smith*, 142 N.W.2d 421, 425 (Iowa 1966). "The feasible exercise of a parent's right of visitation should be safeguarded by a *definite provision* in the order or decree of the court awarding custody of the child to another person. *Id*. "[d]elegation of visitation parameters to the opposing party is particularly troublesome." *In re Marriage of Retterath*, No. 14-1701, 2015 WL 6509105, at 4 (Iowa Ct. App. Oct. 28, 2015). The Court of Appeals remanded for a order defining Justin's visitation rights based on his then current progress in therapy.

(7) Parent's Right to Pick Alternate Caretakers

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

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

(8) Visitation for Biological Father Unknown to Child

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

(9) Right of First Refusal.

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

(10) International Visitation.

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

(11) Grandparent\Great-Grandparent Visitation

(a) The U.S. Supreme Court decision in Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054 (2000) , the Iowa Supreme Court's Santi v. Santi, 633 N.W.2d 312 (Iowa 2001), and subsequent decisions establish that the parents' interest in the care, custody, and control of their children is the oldest of the fundamental liberty interests recognized by the law; and that the decisions concerning visitation of fit parents are unchallengeable unless the court finds the custodial parent is unfit. See also In re Marriage of Howard, 661 N.W.2d 183 (Iowa 2003); Lamberts v. Lillig, 670 N.W.2d 129 (Iowa 2003); and Spiker v. Spiker, 708 N.W.2d 347 (Iowa 2006).

(b) Iowa Code Section 600C.1 permits grandparents and great-grandparents to petition for visitation rights only if the child's parent to whom they are related is dead and codifies and elaborates upon the limitations placed upon visitation by established by the Supreme Courts.

(12) Other Third Party Visitation

The Supreme Court's decision in In re Marriage of Gallagher, 539 N.W.2d 479 (Iowa 1995) discussed in detail in the Custody section of this outline, established the Equitable Parent Doctrine

In Iowa after previously rejecting the doctrine in the Ash and Halverson cases cited below. These cases were distinguished, not specifically overruled. However, the impact of the Gallagher case on the rights and responsibilities of non-parents will have to be defined in future cases.

(a) Former Cohabitant. A custodial parent holds veto power over visitation rights of anyone except the other parent. In two recent cases, the Supreme Court rejected the efforts of men to gain the right to visit and support children where a parent-child relationship had been established though blood tests proved they were not the biological fathers. In each case the men asserted that the mother should be prevented from denying their parenthood through the doctrine of equitable estoppel. The courts ruled that the necessary false representations were not made and that "willful ignorance is not a good substitute for a lack of knowledge of the true facts." In re Marriage of Halverson, 521 N.W.2d 725 (Iowa 1994). See also In re Marriage of Freel, 448 N.W.2d 26 (Iowa 1989); Bruce v. Sarver, 522 N.W.2d 67 (Iowa 1994); and Petition of Ash, 507 N.W.2d 400 (Iowa 1993).

(b) Sibling Visitation. The custodial parents' veto power over visitation extends to siblings. The Supreme Court has ruled that children have no common law or statutory right to visitation with their siblings." Lihs by Lihs v. Lihs, 504 N.W.2d 890 (Iowa 1993). However, Northland v. McNamara, 581 N.W.2d 210 (Iowa App. 1998), without referring to any of the precedents in this area, the Court of Appeals granted visitation (one weekend per month, plus two weeks in the summer) between the child and his stepbrother in the home of his stepfather.

II. POST DECREE PROCEEDINGS

A. POST DECREE MOTIONS

1. Motion to Set Aside or Vacate Judgment.

a. In In re Marriage of Wagner, 604 N.W.2d 605 (Iowa 2000), the Supreme Court ruled, based on its review of American common law, that "the vacation of the Decree places the parties in the status in which they were before the divorce ... the effect of vacating an Order is the same as though it had never existed. ... Under these principles, when a support award in a final decree is vacated, a temporary award is automatically reinstated as if there had been no final decree, unless the court's order vacating the support award shows otherwise."

b. Iowa Rule of Civil Procedure 1.1012(2) [formerly Rule 252(b)] provides that a final judgment may be vacated if irregularity or fraud was practiced in obtaining the judgment or order. "Irregularity" ordinarily does not relate to the parties to the judgment but deals with an adverse ruling due to action or inaction by the court or court personnel; "Fraud" covers the conduct of a party who obtains a judgment. "Proving fraud is a difficult task. A plaintiff must prove several factors by clear and convincing evidence including (1) misrepresentation or failure to disclose when under a legal duty to do so, (2) materiality, (3) scienter, (4) intent to deceive, (5) justifiable reliance, and (6) resulting injury or damage." In re Marriage of Cutler, 588 N.W.2d 425 (Iowa 1999) .

c. If due process has not been denied, proof of extrinsic fraud is necessary to vacate a judgment under Iowa R. Civ. P. 1.1013(1). "Fraud is of two

types: extrinsic and intrinsic. Extrinsic fraud is 'some act or conduct of the prevailing party which has prevented a fair submission of the controversy' ... In contrast, intrinsic fraud inheres in the judgment itself; it includes, for example, false testimony and fraudulent exhibits. ... Fraud sufficient to vacate a judgment under Rule 1.1012 (formerly Rule 252(b)) must be extrinsic to the judgment." In re Adoption of B.J.H., 564 N.W.2d 387 at 392 (Iowa 1997). See also In re Marriage of Kinnard, 512 N.W.2d 821 (Iowa App. 1993); In re Marriage of Cutler, 588 N.W.2d 425, 429 (Iowa 1999); and In re Marriage of Heneman, 396 N.W.2d 797, 800 (Iowa Ct.App.1986).

d. In a case of first impression, the Supreme Court held that the ex-wife's flight to avoid domestic abuse was an "unavoidable casualty" warranting the vacation of the dissolution of marriage decree. In re Marriage of Marconi, 584 N.W.2d 331 (Iowa 2005).

2. Motion to Amend or Enlarge Decree.

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

3. Motion to Set Aside Default.

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

B. APPEAL

1. Jurisdiction During Appeal

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

2. Jurisdiction After Appeal

a. The District Court retains jurisdiction after an appeal from its final judgment to enforce the appellate decision, but does not have the authority to revisit decide differently the issues concluded by the appeal. In re Marriage of Hoffman, 515 N.W.2d 549 (Iowa App. 1994).

b. In In re Marriage of Davis, 608 N.W.2d 766 (Iowa 2000), the Supreme Court ruled that "when, as here, an appellate court remands for a special purpose, the district court upon such remand is limited to do the special thing authorized by the appellate court in its opinion and nothing else.

3. Support During Appeal

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

4. Appellate Waiver Doctrine

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

5. No Plain Error Rule

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

6. Attorney Fees on Appeal

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

7. Final Action

a. In a question of first impression in Iowa, the Court of Appeals ruled that the thirty-day period for the filing of a writ of certiorari begins on the date set for the sentencing in a contempt proceeding, not the date of the finding of contempt. This Rule will give district courts the ability to fashion remedies prior to sentencing without losing jurisdiction. Rater v. Dist. Court for Polk County, 548 N.W.2d 588 (Iowa App. 1996).

b. "Final judgment is one that conclusively adjudicates all of the rights of the parties and places the case beyond the power of the court to return the parties to their original positions." In re Marriage of Welp, 596 N.W.2d 569 (Iowa 1999). See also In re Marriage of Graziano, 573 N.W.2d 598 (Iowa 1998).

c. Temporary custody orders are not final judgments appealable as a matter of right, but rather are interlocutory orders from which permission to appeal must be obtained from the Supreme Court. In re Marriage of Denly, 590 N.W.2d 48 (Iowa 1999). In so ruling, the Supreme Court overruled In re Marriage of Swanson, 586 N.W.2d 527 and several other cases with similar holdings.

C. CONTEMPT PROCEEDINGS

1. Statutory Provisions

Contempt proceedings to enforce any temporary order or final decree are authorized by Iowa Code Sections 598.23, 665.5 and 664A.7. Procedures are governed by Chapter 665.

a. Chapter 665 provides a comprehensive procedure for contempt proceedings. Section 665.4 permits punitive sanctions for past disobedience to court orders; and Section 665.5 permits coercive sanctions to encourage performance of affirmative acts required by an order. In addition, both punitive and coercive sanctions can be imposed in the same proceeding. Amro v. Iowa District Court for Story County, 429 N.W.2d 135 (Iowa 1988).

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

c. Section 598.23(1) limits the maximum punishment for punitive sanctions under Section 665.4 to 30-day jail terms, but the Court can impose more severe sanctions under Section 665.5 for coercive purposes.

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

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

d. Code Section 598.23(A) provides that if a person fails to make payments under a support order or to provide medical support as ordered, the person may be cited and punished by the Court for contempt. The Court may require performance of community service work, or the posting of a cash bond in an amount equivalent to the current arrearages and an additional amount which is equivalent to at least twelve months future support obligations.

e. Punishment for contempt for converting property creates a debt, but the court is not prevented from punishment for contempt by Iowa Code Section 626.1 which prohibits enforcement of a debt by contempt. Harris v. Iowa Dist. Court for Cherokee County, 584 N.W.2d 562 (Iowa 1998) [former wife punished for selling assets awarded to husband in decree].

2. Contempt Defenses

a. The laches defense to child support collection may only be used if the payor shows that he was prejudiced by the delay. State ex rel. Holleman v. Stafford, 584 N.W.2d 242, 245 (Iowa 1998). The waiver/estoppel by acquiescence defense may be used when there is an implication that party intended to waive or abandon right.

b. In re Marriage of Harvey, 523 N.W.2d 755, 757 (Iowa 1994) the Supreme Court held that the former wife was equitably estopped from collecting support judgment because of oral agreement to forego payments. In rare, special circumstances, Courts should apply the doctrine of equitable estoppel to prevent collection of child support where equity clearly requires relief. The basic elements to be proven are: (1) a clear and definite oral agreement; (2) proof that Plaintiff acted to his detriment in reliance thereon; and (3) a finding that the equities entitle Plaintiff to relief. See also In re Marriage of Yanda, 528 N.W.2d 642 (Iowa App. 1994).

c. Farrell v. Iowa District Court for Polk County, 747 N.W. 2d 789 (Iowa App. 2008). John did not pay his child support for two months because he wanted to get his former wife's attention on joint parenting issues. This type of self-help measure is not a basis for avoiding a contempt citation. Christensen v. Iowa Dist. Ct., 578 N.W.2d 675, 678 (Iowa 1998). Issues of child support and custody or visitation are independent. Problems with one do not justify withholding of the other. *See State ex rel. Wagner v. Wagner,* 480 N.W.2d 883, 885 (Iowa 1992).

3. Right to Court-Appointed Attorney

An indigent cited for contempt is entitled to be represented by counsel in the contempt hearing if there is a significant likelihood that the sentence will include incarceration if the individual is found to be in contempt. In re Marriage of Bruns, 535 N.W.2d 157 (Iowa 1995). See also McNabb v. Osmundson, 315 N.W.2d 9 (Iowa 1982). However, in Spitz v. Iowa Dist. Court for Mitchell Cnty. (Iowa, 2016), the Supreme Court clarified the right to counsel in civil contempt proceedings. The Court held that the Due Process Clause does not require the provision of counsel in a civil contempt proceeding filed against an indigent private party so long as adequate procedural safeguards as to notice and opportunity to present evidence are provided. *Turner v. Rogers*, 564 U.S. 431, 441, 131 S. Ct. 2507, 2515-16, 180 L. Ed. 2d 452, 461 (2011).

4. Burden and Degree of Proof

a. Only willful disobedience of a court order will justify a conviction for contempt. In this context, a finding of willful disobedience requires evidence of conduct that is intentional and deliberate and contrary to a known duty. Lutz v. Darbyshire, 297 N.W.2d 349, 353 (Iowa 1980). In re Marriage of Schradle, 462 N.W.2d 705 (Iowa App. 1990).

(1) The test for determining an ability to pay is not merely whether the contempter is presently working or has current funds or cash on hand, but whether he has any property out of which payment can be made. Even though the withdrawal of these monies would have meant loss of his employee status with the State's retirement fund, the payor's personal finances cannot take priority over his obligations to his children. Christensen v. Iowa Dist. Court, 578 N.W.2d 675 (Iowa 1998). See also McKinley v. Iowa District Court for Polk County, 542 N.W.2d 822, 825 (Iowa 1996).

(2) Gimzo v. Iowa Dist. Court, 561 N.W.2d 833 (Iowa App. 1997). Since the payor was not present at the hearing because his employment took him away, the fact that he was employed showed some ability to pay and establishes that some of the non-payment was willful. See also Rater v. Dist. Court for Polk County, 548 N.W.2d 588 (Iowa App. 1996); and Matlock v. Weets, 531 N.W.2d 118 (Iowa 1995).

b. In a contempt proceeding, the payor alleged that the payee had agreed to defer collection until civil litigation he was involved in was resolved. The Supreme Court held that the alleged agreement might not terminate the support obligation (In re Marriage of Sundholm, 448 N.W.2d 688 (Iowa App. 1989). However, such an agreement may be considered in determining whether nonpayment was willful. Huyser v. Iowa Dist. Court, 499 N.W.2d 1 (Iowa 1993).

5. Punishment for Contempt

a. The Supreme Court held that contempt orders may be enforced against victims and non-parties who act (1) with knowledge of the order, and (2) in concert with the person to whom the order is directed ... although we are sympathetic with Henley's plight as a victim, her willful disregard for her own safety cannot deter us from upholding an enforceable order for her protection." Henley v. Iowa Dist. Court for Emmet County, 533 N.W.2d 199, 202-203 (Iowa 1995).

b. Since the application for contempt did not give clear notice of the multiple accusations, the Court of Appeals directed a new sentence to a term of incarceration of no more than 30 days rather than a separate sentence for each alleged offense. In re Marriage of Bruns, 535 N.W.2d 157 (Iowa 1995).

c. An Iowa court's contempt power is inherent, but the power to punish may be limited by statute. Iowa Code Section 665.4(2) allows the district court to impose a fine and/or imprisonment in a county jail not exceeding six months. The trial court did not have the power to require an individual to serve his one-half hour jail time, hand-cuffed, in the courtroom. Christensen v. Iowa Dist. Court, 578 N.W.2d 675 (Iowa 1998).

d. In Gizmo v Iowa Dist. Court, 561 N.W.2d 833 (Iowa App. 1997), the Court of Appeals held that Iowa Code Section 665.5 provides that a person may be imprisoned until he performs an act only if he has the present power to perform the act.

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

f. Child Support Contempt Costs. Section 598.24 provides that the court may tax the cost of the contempt action, including reasonable attorney fees, against the party held in contempt or default. *In re Marriage of Anderson*, 451 N.W.2d 187 (Iowa App., 1989), emphasizes

that "default" and "contempt" are not synonymous. It is possible for a party to be in default but yet not have the requisite willfulness to have committed contempt. See *Skinner v. Ruigh*, 351 N.W.2d 182, 183 (Iowa 1984) ("The issue was not whether all of [a party's] default was willful. Contempt was sufficiently shown if some of the default relied on was willful."). In addition, the Section 598.24, which addresses the issue of attorney fees, recognizes this distinction and provides for an award of attorney fees when one is found to be either in default or in contempt.

D. MODIFICATION OF DECREE

1. Personal Jurisdiction Over Parties

a. After the dissolution decree is entered, the district court retains subject matter jurisdiction to modify its decree. In re Marriage of Meyer, 285 N.W.2d 10, 11 (Iowa 1979). The parties, however, are entitled to notice and a reasonable opportunity to appear and be heard before changes In the original decree are made. See In re Marriage of Garretson, 487 N.W.2d 366 (Iowa App. 1992); Catholic Charities of Archdiocese of Dubuque vs. Zalesky, 232 N.W.2d 539, 547 (Iowa 1975).

b. Iowa Code Section 598.21(8) to provides that if support payments have been assigned to the State for foster care or medical support, in addition to ADC, the State shall be considered a party to the support order. If notice is not given to the State in a modification proceeding, the modification order is void.

2. Modification Venue

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

3. Substantial Change in Circumstances : A Warning

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

b. Modification is appropriate only if a material and substantial change in the circumstances has occurred **and** if the change must was not contemplated by the

court issuing the original decree. See In re Marriage of Sjulin, 431 N.W.2d 773, 776 (Iowa 1988) and In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977).

In re Marriage of Morrison, No. 16-0886 (Iowa App., 2017). Cassie violated Kyle's rights as joint legal custodian of A.M. by arranging counseling sessions for A.M. without first consulting Kyle. The court did not agree with Cassie that this was appropriate because the counseling dealt with Kyle's threatening behavior. However, the court ruled that modification of primary care was not the appropriate remedy for this behavior. The burden on the party seeking modification is a heavy one. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) . The remedy, on the present record, is not to change physical care of the children, but instead, to initiate contempt proceedings.

4. Property Settlement Not Modifiable

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

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

5. Alimony Modification

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

b. Conversion of Rehabilitative to Permanent. In re Marriage of McCurnin, 681 N.W.2d 332 (Iowa 2004). Iowa Code section 598.21(8) allows for a modification of an alimony award "when there is a substantial change in circumstances." See also In re Marriage of Wessels, 542 N.W.2d 486 (Iowa 1995)[the wife's psychological condition took a drastic downward spiral due to marriage incident]; In re Marriage of Trickey, 589 N.W.2d 753 (Iowa App. 1998)[extended rehabilitative alimony because self-support not achieved].

c. Impact of Inheritance. An inheritance or a gift received by the alimony recipient after the dissolution can be considered in assessing the need for alimony. In re Marriage of Halbach, 506 N.W.2d 808 (Iowa App. 1993).

d. Effects of Bankruptcy. The property division and alimony should be considered together in evaluating their individual sufficiency. Bankruptcy attempts to provide the debtor with a "fresh start" in life unhampered by pre-existing debt. Therefore, marriage property settlements are generally not recoverable by the spouse to whom the payments were originally due. However, alimony modification may be appropriate after bankruptcy if its

consequences caused a substantial and material change in circumstances not contemplated by the trial court. In re Marriage of Trickey, 589 N.W.2d 753 (Iowa App. 1998).

e. Cohabitation. Cohabitation can cause changes in a former spouse's financial condition which justify modification or termination of alimony. In In re Marriage of Harvey, 466 N.W.2d 916 (Iowa 1991), the Supreme Court ruled that cohabitation is established when the (1) an unrelated person of the opposite sex is living or residing in the dwelling house and (2) the parties are living together in the manner of husband and wife. The key element of cohabitation is unrestricted access to the home.

f. Remarriage. The recipient spouse has the burden to show extraordinary circumstances justifying the continuation of the alimony payments after remarriage. In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985). Recognized extraordinary circumstances include: (1) the annulment or invalidity of the second marriage, (2) the inability of the subsequent spouse to furnish support, (3) the death of the subsequent spouse, or (4) the dissolution of the subsequent marriage. Shima, 360 N.W.2d at 829. See also Johnson v. Johnson,781 N.W.2d (Iowa 2010).

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

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

In re Marriage of Kragel, No. 16-2229 (Iowa App., 2018). Randall average farm income dropped approximately one-third from $339,683 to $226,500 since the original decree in 2010. He complained that he had to sell part of the approximate $2,000,000 in assets awarded to him under the original decree to pay $6,000 per month in alimony. The court found that temporary fluctuations in both crop prices and in Randall's net income would have been within the contemplation of the original trial court. However, the one-third drop in his income consituted a substantial change of the circumstances. However Leisha had monthly living expenses of $7,487; and she earned only $9,699. Therefore, the court concluded that Randall should receive only a moderate reduction to $5,000 per month until he reaches age sixty-five and then $3,000 per month until either party dies or Leisha

remarries. The court recognized that Randall would likely have to sell more property or incur more debt to pay the obligation until the farm economy improves, but Leisha would also be required to use a portion of her resources to meet her needs.

h. Extraordinary Circumstances/Gross Unfairness. In re Sisson, 843 NW2d 866 (Iowa, 2014). Afronia was diagnosed with incurable blood cancer shortly after the decree was entered. Provisions for the payment of support in a decree of dissolution of marriage are normally final as to the circumstances existing at the time. Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973). However, the court to modify can modify and amount and duration of spousal support if the circumstances to support modification are "extraordinary" and render the original award grossly unfair. See In re Marriage of Wessels, 542 N.W.2d 486, 489 (Iowa 1995) and In re Marriage of Marshall, 394 N.W.2d 392, 396-97 (Iowa 1986).

6. Child Support Modification

a. Duty to Disclose Income

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

b. Redetermination of Paternity

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

c. Chapter 252C Proceedings.

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

(2) Change of Circumstances May Not Be Required. ***In Seward v. Hane, No. 16-1686 (Iowa App., 2017)***, Troy Hane and LaDawn Seward are the unmarried parents of two children. Because Seward received State medical assistance, the CSRU obtained a support order of $152 per month against Hane under Chapter 252C. Seward subsequently filed a petition under Iowa Code section 252A to establish paternity, care, custody and visitation and Seward also sought temporary and permanent child support. Troy appealed the district court's modification of his child support obligation because LaDawn had not shown a change of circumstances to justify a modification. The court rejected this argument because Iowa Code Section 252A.8 states, "[T]his chapter shall be construed to furnish an additional

or alternative civil remedy and shall in no way affect or impair any other remedy, civil or criminal, provided in any other statute and available to the petitioner in relation to the same subject matter." The court was not constrained by the child support figure in its prior 252C order because the two actions were independent and the two orders coexisted. *See State ex. rel. Phipps v. Phipps*, 503 N.W.2d 391, 392 (Iowa 1993) *Iowa Dep't of Human Servs., ex. rel. Greenhaw v. Stewart*, 435 N.W.2d 749, 751 (Iowa 1988. Because the paternity decree was entered in an independent action rather than a modification of the 252C order, Seward did not have to establish a change of circumstances from the time of the 252C order to obtain a higher support order in the paternity action.

d. Temporary and Retroactive Modification

(1) Section 598.21C(5) provides that "... a modification proceeding may be retroactively modified only from three months after the date the notice of the pending petition for modification is served on the opposing party. [and] ... any retroactive modification which increases the amount of child support or any order for accrued support under this paragraph shall include a periodic payment plan." In In re Marriage of Barker, 600 N.W.2d 321 (Iowa 1999), the Court ruled that "although a support order may be retroactively increased, it may not be retroactively decreased ... prior to the time that modification is ordered." Barker, at 223-224. However, the Court further held that if the accrued support obligation is beyond the obligor's ability to pay in addition to current Guideline support, the Court may reduce the obligor's future support to an amount less that the Guidelines which the obligor can afford to pay along with a payment on the back amount, if the children will not suffer from lack of support.

(2) "However, saying that a court may order higher support payments to be paid retroactively is not the same as saying that it must do so. Where the record is not sufficient to support a finding that the grounds for modification existed at the time of the filing of the modification petition, the order for increased support should not be payable retroactively." In re Marriage of Koepke, 483 N.W.2d 612 (Iowa App. 1992). See also, In re Marriage of Ober, 538 N.W.2d 310 (Iowa App. 1995); and In re Marriage of Bircher, 535 N.W.2d 137 (Iowa App. 1995).

(3) Section 598.21C(4) authorizes the trial court to temporarily modify a child support order during a modification proceeding after a temporary hearing. The statute applies to support orders entered under any Iowa statute.

(4) In In re Marriage of Griffey, 629 N.W.2d 832 (Iowa 2001), the Supreme Court reaffirmed the long-standing principle of Iowa law which prohibits modification of past-due support payments. See Newman v. Newman, 451 N.W.2d 843, 844-45 (Iowa 1990). A child support judgment was referred to Texas for collection, all payments were vested and not subject to modification by an Iowa court. The court held that Texas could not enter an order reducing the child support since an Iowa court could not do so.

e. Application of Guidelines to Modifications

(1) Trends

The Supreme Court has noted several principles regarding child support modification which can be gleaned from recent cases: (1) there must be a substantial and material change in circumstances occurring after the entry of the Decree; (2) there is a growing reluctance to modify Decree; (3) not every change in circumstances is sufficient; (4) continued

enforcement of the original Decree would create a positive wrong or injustice because of the changed condition; current inability to pay is less important than the long-range capacity to earn money; the change must be permanent or continuous; (5) the change in circumstances must not have been within the contemplation of the trial court when the last support order was entered; and (6) any voluntariness in diminished earning capacity is an impediment to modification. In re Marriage of Walters, 575 N.W.2d 739 (Iowa 1998). See also In re Marriage of Maher, 596 N.W.2d 561 (Iowa 1999); State Ex. Rel. LeClere v. Jennings, 523 N.W.2d 306, 309 (Iowa App. 1994); and In re Marriage of Vetternack, 334 N.W.2d 761 (Iowa 1983).'

(2) Burden of Proof

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

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

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

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

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

(5) Stepparent's Assets and Income

In In re the Marriage of Shivers, 557 N.W.2d 532 (Iowa App. 1996) the Court held that the assets and income of the new spouses of divorced persons must be revealed and may be considered in certain circumstances in modification proceedings: "Although other familial obligations (and assets) do not automatically justify a departure from the Guidelines, they are factors to be taken under consideration when determining whether the Guidelines should be deviated from and whether the Court, in fixing support, has achieved justice between the parties." Shivers, at 534. See also In re Marriage of Gehl, 486 N.W.2d 284 (Iowa 1992); In re Marriage of Dawson, 467 N.W.2d 271, 276 (Iowa 1991); State ex rel. Epps v. Epps, 473 N.W.2d 56, 59 (Iowa 1991).

e. Dependent Exemptions

Dependent exemptions are the proper subject for modification since they are directly related to the matter of child support. The decree can be modified with respect to deductions even if they were not mentioned in the original decree and if the only change in circumstances established is the

change of IRS regulations. In re Marriage of Feustel, 467 N.W.2d 261 (Iowa 1991). See also In re Marriage of Hobben, 260 N.W.2d 401 (Iowa 1977); In re Marriage of Eglseseder, 448 N.W.2d 703 (Iowa App. 1989); In re Marriage of Rolek, 555 N.W.2d 675 (Iowa 1996).

f. Voluntary Income Reduction

(1) In In re Marriage of Rietz, 585 N.W.2d 226 (Iowa App. 1998), the Court of Appeals took a new look a voluntariness: ". . . a primary factor to be considered in determining whether support obligations should be modified is whether the obligor's reduction in income and earning capacity is the result of activity which, although voluntary, was done with an improper intent to deprive his or her dependents of support." See also In re Marriage of Walters, 575 N.W.2d 739 (Iowa 1998) [conviction for embezzlement was based on voluntary conduct, but not done with intent to avoid support obligation]; In re Marriage of McKenzie, 709 N.W.2d 528, 533 (Iowa 2006) [a parent may not place selfish desires over the welfare of a child].

In re Marriage of George, No. 15-2180 (Iowa App., 2017). Jennifer sought to avoid the reduction in her child support because Adam had voluntarily quit his job at the time of the marriage to take a lower paying job and because a higher income should not be imputed to her because a full-time job would not produce a higher net income after transportation and child care expenses. Adam quit his job as a pilot which resulted in a salary reduction of $38,000.00 for two consecutive years. Though he was about to get a substantial raise when his probationary status at his new airline ended, his new income would still less than the income at the time of the divorce. Adam argued that his move from Texas to Iowa and employment change were caused by a desire to live near his children and have a greater earning capacity in the long run. The court found that Adam's change of employment to be closer to where his children live was made in good faith, and his current employment status does not warrant denial of a finding of substantial change of circumstances. See *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa Ct. App. 1996); *see also In re Marriage of Blum*, 526 N.W.2d 164, 165-66 (Iowa Ct. App. 1994). On the other hand, Jennifer's argument that full-time employment as a teacher would result in her working more than sixty hours per week and would force her to seek, and pay for, child care was rejected. The children were 11 and 7 and not in need of full-time child care. Therefore, the need to care for and provide transportation for the children did not justify Jennifer's voluntary decision to remain employed part-time for the purposes of a child-support award determination.

In re Marriage of Lockard, No. 17-0732 (Iowa App., 2018). John had degrees in computer engineering and many years of information-technology experience. In his last two jobs, in which he had worked for 18 years, he earned $120,000. The court found that John had the intellectual and technical capacity to readily update his talents and abilities. However he refused to update his skills. Instead, he was looking for $60,000 per year jobs. The court concluded that John's reluctance to take the reasonable steps necessary to maximize his earnings potential was not a burden Laura should have to suffer. Therefore, though John's employment changed and his current income was substantially lower, his earning capacity remained much higher than his current earnings. *See* Iowa Ct. R. 9.11(4) (allowing the court to impute income based on earning capacity where a person is voluntarily unemployed or underemployed); *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006). Although the loss of his prior job was involuntary, his decision to limit his current income constitutes a voluntary act. *See In re Marriage of Sisson*, 843 N.W.2d 866, 872 (Iowa 2014). The court therefore imputed what it found to be a realistic income level: $95,000, in calculating his new child support obligation.

(2) Though not specifically overruled, cases which have refused modification when intentional conduct reduced income without considering intent appear to be less important. See In re Marriage of Hester, 565 N.W.2d 351 (Iowa App. 1997); In re Marriage of Dawson, 467 N.W.2d 271 (Iowa 1991); and In re Marriage of Flattery, 537 N.W.2d 801 (Iowa App. 1995).

g. Higher Education

(1) Even though the original decree did not specifically provide for the parents to pay for college, the Court has jurisdiction to modify child support to continue through the child's education pursuant to Iowa Code Section 598.1(2). In re Marriage of Holcomb, 457 N.W.2d 619 (Iowa App. 1990).

(2) Chronic fatigue syndrome constituted a substantial change and the five to seven year expected course of the illness was long enough in a 57-year old man to constitute a permanent change which justified termination of the father's obligation to contribute to the child's college costs. In re Marriage of Cooper, 524 N.W.2d 204 (Iowa App. 1994).

h. Modification Attorney Fees

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

7. Custody Modification

a. Jurisdiction to Modify Out-of-State Orders

A significant case, In re Jorgensen, 627 N.W.2d 550 (Iowa 2001), the Supreme Court sets out the step by step procedure which is required to determine whether an Iowa Court has jurisdiction to modify child custody decision made in another state. The first step in the Jorgensen analysis to determine whether Iowa can modify an out-of-state custody order is to determine whether the federal Parental Kidnaping Prevention Act [PKPA: U.S.C. Section 1738A(c)(2)] requires Iowa to give Full Faith and Credit to the out-of-state decision. If the PKPA does not require Iowa to enforce the out of state order, the second step is to determine whether Iowa Code Chapter 598A, the Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA], requires Iowa to honor the out-of-state custody order.

b. Burden of Proof

(1) A heavy burden is placed on the party seeking modification of custody based on the principle that once custody is fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Bergman, 466 N.W.2d 274 (Iowa App. 1990). In a modification of custody, the question is not which home is better, but whether the moving party can offer superior care. If both parties can equally minister to the children, custody should not change. The burden for the party petitioning for a change of custody is heavy. In re Marriage of Rosenfeld, 524 N.W.2d 212 (Iowa App. 1994). See also In re Marriage of Rife, 529 N.W.2d 280 (Iowa 1995); In re

Marriage of Gravatt, 371 N.W.2d 836, 838-40 (Iowa Ct.App.1985); In re Marriage of Jahnel, 506 N.W.2d 473, 474 (Iowa Ct.App.1993).

(2) In In re Marriage of Thielges, 623 N.W.2d 232 (Iowa App. 2000) The Court held that Section 598.21(8A) which specifies that a substantial change in circumstances occurs if a child's residence is relocated 150 miles or more does not change the burdens of proof applicable to custody modification requests. If the non-custodial parent proves only a substantial change in circumstances, Section 598.21(8A) explicitly contemplates only a visitation modification. "Our case law places greater importance on the stability of the relationship between children and their primary caregiver than on the physical setting of the children." Thielges at 236.

In re Marriage of Morrison, No. 16-0886 (Iowa App., 2017). Cassie violated Kyle's rights as joint legal custodian of A.M. by arranging counseling sessions for A.M. without first consulting Kyle. The court did not agree that this was appropriate because the counseling dealt with Kyle's threatening behavior. However, the court ruled that modification of primary care was not the appropriate remedy for this behavior. The burden on the party seeking modification is a heavy one. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) . The remedy, on the present record, is not to change physical care of the children, but instead, to initiate contempt proceedings.

c. Relocation.

(1) The parent having physical care of the children must, as between the parties, have the final say concerning where their home will be. This authority is implicit in the right and responsibility to provide the principle home for the children. In re Marriage of Westcott, 471 N.W.2d 73 (Iowa App. 1991). See also In re Marriage of Frederici, 338 N.W.2d 156 (Iowa 1983). But see In re Marriage of Kleist, 538 N.W.2d 273 (Iowa 1995).

(2) However, a change in residence involving a substantial distance can frustrate the important underlying goal that the children should be assured maximum continuing physical and emotional contact with both parents. A change of residence by the primary caretaker may justify a change of custody if the reasons for the move and the quality of the new environment do not outweigh the adverse impact of the move on the children. Dale v. Pearson, 555 N.W.2d 243 (Iowa App. 1996). See also In re Marriage of Scott, 457 N.W.2d 29 (Iowa App. 1990); In re Marriage of Malloy, 687 N.W.2d 110, 113 (Iowa Ct.App.2004).

(3) 150-Mile Rule. Subsection 598.21D provides that a substantial change in circumstances is established if a parent is to relocate the residence of a minor child 150 miles or more from the residence at the time custody was granted. Though a substantial change has occurred, the non-custodial parent must still show that he can render superior care. In re Marriage of Mayfield, 577 N.W.2d 872 (Iowa App. 1998). See also In re Marriage of Crotty, 584 N.W.2d 714 (Iowa App. 1998).

(4) When the party with primary physical care plans to relocate, the burden is on the non-custodial parent to demonstrate how the move will detrimentally affect the child's best interests. In re Marriage of Montgomery, 521 N.W.2d 471 (Iowa App. 1994). See also In re Marriage of Smith, 491 N.W.2d 538 (Iowa App. 1992); In re Marriage of Witzenburg, 489 N.W.2d 34 (Iowa App. 1992); and *In re Marriage of Hoffman*, 867 N.W.2d 26 (Iowa, 2015).

d. Predetermined Definition of Substantial Change Discouraged

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

e. Child's Preference/Problems

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

(2) The custodial parent cannot be held responsible for defects in a child's personality: some character traits develop despite the best efforts of the best parents. In re Marriage of Kimmerle, 447 N.W.2d 143 (Iowa App. 1989).

f. More Stable Lifestyle

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

Dietz v. McDonald, No. 17-0032 (Iowa App., 2018). The professionals who testified agreed that M., Nick and Tammy's son, had ADHD and autism spectrum characteristics and benefited from a consistent, predictable routine. Tammy had been granted primary care in the original decree. However, though Tammy could secure medical attention for the child's needs, she struggled to provide a consistent environment and lifestyle. Tammy asserted Nick made the child do chores all the time and that she should have physical care so the child could be "a child." She also sought to have M. assigned no homework. The experts testified that the child needed less protection and insulation and more activities which would help build self esteem. A number of witnesses testified favorably regarding Nick's consistency and predictability, and that the child appeared to gain self-esteem and self-reliance in his father's care. Therefore, the court concluded that substantial and material changes had occurred, and that Nick had met his burden to establish he could provide superior care by more effectively providing for M.'s long-term needs.

g. Character of Companion

If a parent seeks to establish a home with another adult, that adult's background and his or her relationship with the children becomes a significant factor in a custody dispute. In re Marriage of

Decker, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003). The companion will have an impact on the children's lives, and the type of relationship the parent has sought to establish and the manner in which he or she has established it is an indication of the parent's priorities.

h. Denial of Visitation/Contact

(1) Iowa courts do not tolerate hostility exhibited by one parent toward the other. See In re Marriage of Rosenfeld, 524 N.W.2d 212, 215 (Iowa App. 1994); see also In re Marriage of Udelhofen, 444 N.W.2d 473, 474-76 (Iowa 1989); In re Marriage of Leyda, 355 N.W.2d 862, 865-67 (Iowa 1984); In re Marriage of Wedemeyer, 475 N.W.2d 657, 659-60 (Iowa Ct. App. 1991).

(2) Custody can be changed where the custodial parent substantially and unreasonably interferes with the rights of the non-custodial parent to visit and contact the children. In re Marriage of Clifford, 515 N.W.2d 559 (Iowa App. 1994). See also In re Marriage of Wedemeyer, 475 N.W.2d 657 (Iowa App. 1991).

(3) Section 598.23(2)(b) gives the Court the power to modify visitation to compensate with lost visitation, to establish joint custody, and to transfer custody as punishment for contempt. Kirk v. Iowa Dist. Court, 508 N.W.2d 105 (Iowa App. 1993).

i. Breakdown of Joint Physical Care.

(1) **In re Marriage of Kapfer, No. 17-0683 (Iowa App., 2017).** Zach and Jill used a web-based system, *Talking Parents*, to resolve their disputes, but the program apparently had the opposite effect. In a string of electronic messages, Jill and Zachary took turns berating the other for attempting to communicate via other means. In particular, Zach often sent Jill lengthy messages that were both "condescending and critical." Transitions between the two homes were "very difficult" for the children because Zachary and Jill imposed different rules and employed different parenting philosophies. This took a toll on the children. In addition, Zachary and his new wife, Janné, insisted the children call Janné "mom" and they referred to Jill as "the other mom." The court noted that when shared custody provisions do not evolve as envisioned by the parents or the court issuing the decree, and parents cannot cooperate or communicate concerning their children, it is appropriate for a district court to find a substantial change in circumstances and modify custody. *In re Marriage of Harris*, 877 N.W.2d 434 at 441. The court in *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002) noted “Discord between parents that has a disruptive effect on children's lives has been held to be a substantial change of circumstance that warrants a modification of the decree to designate a primary physical caregiver if it appears that the children, by having a primary physical caregiver, will have superior care. Here, granted primary care to Jill because she would be more encouraging of Zach’s relationship with the children than he would promote interaction with Jill.

(2) ***Rose v. Rose, No. 16-1023 (Iowa App., 2017)***. Less than a year after the entry of the dissolution decree, Stephanie filed an application to modify joint physical care plan set out in the decree. The district court found the level of conflict between the mother and the father was far beyond what either party had expected at the entry of the original decree. Shane insisted that a witness be present at any meeting of the parties, and they could not communicate by text messages. The level of conflict negatively affected the child. In order to modify a dissolution decree there must be "a change in circumstances since the date of the decree which substantially relates to the welfare of the children and which was not within the contemplation of the parties and the court at the time the decree was entered."

In re Marriage of Wagner, 272 N.W.2d 418, 421 (Iowa 1978). Here, the court found a fundamental, systemic, and complete disagreement between the parents in which modification of a dissolution decree was proper after a short period of time. Since joint physical care was impossible, the court found that Stephanie was offered superior care. She consistently acted as the child's primary caregiver; brought the child to medical appointments, including therapy, acted as the primary contact for education and child care, and administered and organized the child's life to a greater degree than did Shane.

8. Visitation Modification

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

b. However, in Nicolou v. Clements, 516 N.W.2d 905 (Iowa App. 1994), the Court held that a parent cannot modify based on negative changes created by the Petitioner. The court ruled that to allow the custodial parent to instill such anxieties and then use that as a justification to block visitation would open a Pandora's Box of abuse which no court could tolerate.

c. Children's best interest are generally served if they have maximum continuous physical and emotional contact with both of their parents. See Iowa Code Sections 598.1(1) and 598.41(1). However, such contact can be assured by means other than a traditional alternating-weekends visitation schedule. For example, Section 598.21(8A) states that when a court determines a long-distance relocation constitutes a substantial change in circumstances, the court can modify the custody order at issue by granting the non-relocating parent. An extended visitation during summer visitations and school breaks and scheduled telephone contact. In re Marriage of Thielges, 623 N.W.2d 232 (Iowa App. 2000). Here, the court granted the father eight weeks of summer visitation, half of the winter school break, alternate Thanksgiving and spring breaks, reasonable visitation whenever one parent visits the other's home state, and liberal telephone and Internet communications.

d. **In re Marriage of Slife, No. 17-0251 (Iowa App., 2017).** Brian and Megan's child had severe PTSD to the extent that he feared Brian and visits caused him extreme distress. Therefore, Brian agreed to a visitation provision in the 2014 dissolution decree which set out a two-year schedule of therapist supervised counseling and therapy for Brian, Megan, and the child with increasing contact between father and child. In 2017, Brian had not yet had any in person contact with his son, and the mental health professionals could not predict when they felt such contact would be safe. The court noted that a parent seeking to modify visitation need only show "there has been a *material change in circumstances* since the decree and that the requested change in visitation is in the best interests of the [child]." *In re Marriage of Brown*, 778 N.W.2d 47, 51 (Iowa Ct. App. 2009). In addition, the district court's judgment privided that Brian was not required to establish a change in circumstances concerning visitation. At the time the decree was entered, the parties and the mental-health professionals believed it would take around six months to get the child comfortable with contact from his father. When Brian filed his petition seeking modification, he had not seen his son in almost two years. The child had made little to no progress in therapy. This was clearly not something that was contemplated at the time of entry of the decree. The court concluded that the child's extreme fear of Brian was not supported by the facts in the record

and decided this irrational fear could not justify withholding Brian's involvement in his son's life through a nearly permanent deprivation of visitation. Therefore, the court ordered a firm new visitation schedule, not controlled by professionals, to slowly reunite the child and his father.

III. ACTIONS TO COMPEL SUPPORT

A. PATERNITY PROCEEDINGS

1. Methods to Establish Paternity

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

2. Limitations on Actions

a. Statute of Limitations. Section 600B.33 sets the time limitations for paternity and support proceedings. An action to establish paternity and support under this chapter may be brought within one year after the child attains adulthood.

b. Estoppel and Laches. Markey v. Carney, 705 N.W.2d 13 (Iowa 2005). A delay in bringing an action may be reasonable when lack of funds precludes a party from retaining a lawyer to pursue a claim. The Court held that to determine retroactive child support, the proper analysis starts with the amount that would have been paid under the guidelines if there had been no delay.

3. Proof

a. Burden of Proof. Paternity must be proven by a preponderance of the evidence, but the law presumes the legitimacy of children born during a marriage. The practical effect is to place the burden of proving nonpaternity on the putative father. In re Marriage of Hopkins, 453 N.W.2d 232 (Iowa App. 1990). Where there was no scientific evidence and no proof of "lack of access" the husband failed to show nonpaternity by clear, strong evidence.

b. Blood and Genetic Tests. Section 600B.41 provides that a verified expert's report shall be admitted at trial. The court testimony by the expert is not required. Results that show statistical probability of paternity are admissible. A rebuttable presumption is triggered by results of 95% or higher, and a motion or partial summary judgment will be granted unless a written challenge has been filed within twenty days after the expert's report has been filed with the Clerk of Court. The burden shifts to the alleged father to disprove paternity, and the presumption can be rebutted only by clear and convincing evidence. If the results of the expert's report are less than 95%, the Court can weigh the test results along with other evidence.

4. Right of Putative Father to Establish Paternity

a. The Supreme Court found in Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999) that the Due Process Clause of the Iowa Constitution makes Iowa Code Section 600B.41A unconstitutional to the extent it denied a putative father standing to prove his fatherhood: That right, however, like other constitutional rights, can be waived, and this may be the threshold question to consider before addressing paternity. If the challenge is not a serious and timely expression of a meaningful desire to establish parenting responsibility, it may be lost.

b. Huisman v Miedema, 644 NW 2d 321 (Iowa 2002) In In re B.G.C., 496 N.W.2d 239 (1992). Here, the Court found that the biological father had waived his right to challenge an established father's paternity because for more than seven years, the biological father let another man raise a child that he knew was possibly his own because it served his need to keep his affair with the child's mother a secret.

5. Setting Aside Paternity Order

a. Section 598.21(4A) provides that redeterminations of paternity may be considered if all of the statutory requirements are met. The modification of the paternity and child support judgment can be prospective only and cannot eliminate accrued or delinquent support.

b. Iowa Code Section 600B.41A permits a father whose paternity has been legally established to overcome that legal presumption when genetic testing indicates he is not the biological father. If genetic test results show that the established father is not the biological father, the established father's rights and responsibilities are terminated unless the established father requests that paternity be preserved and the court finds that this is in the child's best interests. The statute cancels the result of Dye v. Geiger, 554 N.W.2d 538 (Iowa 1996) which continued the obligations of the established father after his paternity was disproved.

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

6. Attorney Fees in Paternity Proceedings.

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

7. False Allegation of Paternity: Actionable Fraud

Dier v. Peters, 815 NW2d 1 (Iowa, 2012). Joseph Dier brought a common law action for fraud, seeking as damages for the money he paid to Cassandra after he learned that he was not the fatherof her child. Iowa courts have held that a parents cannot obtain retroactive relief from court-ordered child support after paternity is disproved. See State ex rel. Baumgartner v. Wilcox, 532 N.W.2d 774, 776-77 (Iowa 1995). However, the Court held that Wilcox does not control this case because Dier's cause of action was based on the concepts of traditional fraud law: (1) [the] defendant made a

representation to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended to deceive the plaintiff, (6) the plaintiff acted in [justifiable] reliance on the truth of the representation , and (7) the representation was a proximate cause of [the] plaintiff's damages. See Spreitzer v. Hawkeye State Bank, 779 N.W.2d; Rosen v. Bd. of Med. Exam'rs, 539 N.W.2d 345, 350 (Iowa 1995).

B. UNIFORM INTERSTATE FAMILY SUPPORT ACT

1. Uniform Support of Dependents Law Replaced

a. Chapter 252K, the Uniform Interstate Family Support Act (UIFSA), simplifies the process of child support enforcement and modification and reduces confusion surrounding the multiplicity of orders for child support growing out of the divorce process in our increasingly mobile society.

b. The basic approach of UIFSA is summarized by the phrase: One Order, One Place, One Time": Section 252K.205 provides that an order, once entered, is the only order for child support that may be enforced unless the obligor, individual obligee, and the child have all gone to another state. If the order is modified by another state, then that order becomes the "One Order." The parties can confer jurisdiction on another state by mutual consent.

2. Statute of Limitations

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

3. Retroactive Support

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

Hines v. Newborn, No. 16-1492 (Iowa App., 2017). Karlee Hines and Carlos Newborn are the parents of a child, born in 2015. Iowa Code section 600B.25(1) (2016)provides that a court may order a parent to pay amounts the court deems appropriate for the past support and maintenance of the child after considering "all the surrounding facts and circumstances to determine the amount in light of the purpose of child support and the duty of a parent to pay child support." *Markey v. Carney*, 705 N.W.2d 13, 24 (Iowa 2005). One of the circumstances for consideration is "the amount of support that would have been paid under the guidelines if no delay had occurred." *Id*. Another is a parent's "present personal financial circumstances" and "ability to pay back support." *Id*. At the time of trial, Newborn about $35,000 per year. The Court ordered $2,000 in retroactive child support, payable at the rate of $50 per month.

4. Both Parents are Liable

a. Section 252A.3(2) provides that both parents have obligations to support their children, not necessarily equally. In State of S.D. v. Riemenschneider, 462 N.W.2d 686 (Iowa App. 1990).

b. In actions brought by the state for reimbursement for public assistance, the state is entitled to recover in its own right without regard to terms of court orders between the parents. State Ex. Rel. Heidick v. Balch, 533 N.W.2d 209 (Iowa 1995).

c. Section 252C.2(2) prevents a support debt from accruing against a responsible person for the period during which that person receives public assistance. Therefore, though the AFDC father had a support obligation accruing while living with his wife and children, the Department of Human Services is precluded from collecting the assigned support. Hundt v. Iowa Dept. of Human Services, 545 N.W.2d 306 (Iowa 1996).

5. Enforcement Quashed/Denial of Child Contact

a. "The principle purpose of the uniform support laws is to simplify and expedite the interstate enforcement of child support awards...the object of the act would be destroyed if litigants could use it as a vehicle for litigating other divorce-related issues Beneveneti v. Beneveneti, 185 N.W.2d 219, 222 (Iowa 1971)" State ex rel. Wagner v. Wagner, 480 N.W.2d 883 (Iowa 1992). However, in Wagner, the Supreme Court quashed the efforts of Florida authorities to use mandatory income withholding procedures against a father who had not seen his children for more than six years because the mother was hiding.

b. Section 252D.1(2) permits the quashing, modification, or termination of an Order for mandatory income withholding if the support delinquency has been paid in full or the amount to be withheld exceeds the amount permitted by the federal wage garnishment statute or upon termination of the child support obligation. Where the payor seeks relief because his income has changed, he should file a Petition for Modification, not a Motion to Quash the withholding Order. Hammond v. Reed, 508 N.W.2d 110 (Iowa App. 1993).

IV. JUVENILE LAW

A. TERMINATION OF PARENTAL RIGHTS

1. Child Under Age Three.

In re L.M., No. 17-027, 904 N.W.2d 835 (Iowa, 2017). L.M. at her birth, tested positive for methamphetomines. Amphetamine, and benzoidazepines and was promptly removed from Katherine's custody by the Juvenile Court. At the time of the termination hearing when L.M. was about two years old and in foster care, Katherine remained in prison, but was optimistic that she would be released within four months because of exemplary conduct while incarcerated. The Court noted that Section 232.116(1)(h) permits termination if the following elements are established: (1) The child is three years of age or younger; (2) The child has been adjudicated a child in need of assistance; (3) The child has been removed at least six months of the last twelve months; and (4) There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents.

Here, the only question was whether L.M. could be returned to Katherine. Though DHS must make reasonable efforts to reunify the parent and child, Katherine never objected to the services provided to her by DHS or to D.H.S's failure to provide visitation or any other service. Though Katherine commendably continued to intently focus on her sobriety and a healthy reentry to life outside the prison, L.M. needed permanency and stability immediately.

2. Exceptions To Termination.

In re A.S., No. 17-0851 (Iowa, 2018). The Mother's three-month-old daughter was sexually abused by Father, with whom Mother had left the child knowing he was intoxicated. The Court noted first that Iowa Code section 232.116(1)(*h*) permits termination when: (1) The child is three years of age or younger; (2) The child has been adjudicated a child in need of assistance; (3) The child has been removed from the physical custody of the child's parents for at least six months of the last twelve months; and (4) The child cannot be returned at the present time. The Court found that A.S. was given over one year to demonstrate her ability to care for her child, and even after participating in the services provided, A.S. remained unable to care for the child on her own. The court noted that "[c]hildren simply cannot wait for responsible parenting." *In re C.K.*, 558 N.W.2d 170, 175 (Iowa 1997). In addition, A.M. was unable to establish the only possible exception to termination provided by Section 232.116(3): the establishment of a guardianship by a relative. Although the child's maternal grandparents had legal custody of the child, A.S. did not testify at the termination hearing, nor did her parents. No witness at trial even mentioned the idea of a guardianship; and the DHS case manager and the guardian ad litem both recommended termination of A.S.'s parental rights, after personally observing the maternal grandparents interact with the child.

3. Termination – Private Action

In re Q.G., No 16-2152 (Iowa, 2018). A.P. sought to terminate B.G.'s parental rights through a private termination under Iowa Code chapter 600A. The statute requires a two-step process. *See* Iowa Code §§ 600A.1, .8: (1) the petitioner must first show by clear and convincing evidence a threshold event has occurred; and (2) after the threshold showing, the petitioner next must show, by clear and convincing evidence, termination of parental rights is in the best interest of the child. *In re R.K.B.*, 572 N.W.2d 600, 602 (Iowa 1998). The threshold requirement was easily met: B.G. had abandoned the children, failed to support them, and had been imprisoned for a abuse of one of the children. In conducting the "best interests" analysis, the Court noted that B.G. had a history of depression and suicidal ideation, two OWI convictions, two counts of domestic assault involving strangulation, one count of child endangerment, one count of possession of methamphetamines, and federal weapons convictions. In addition, B.G. had not fully taken responsibility for his actions; had issues with anger and thoughts of revenge; he had no meaningful bond with the children; and A.P. had a stepfather, willing to provide for the children's needs and willing to adopt the children. *See In re G.A.*, 826 N.W.2d 125, 131 (Iowa Ct. App. 2012). However, the court found that B.G. had a good prison record; he had not had any major behavioral problems; and had completed prison courses involving parenting and anger management. B.G. also had perfect attendance at Narcotics Anonymous; an extended family willing to provide additional support for his parenting activities. *See Dale v. Pearson*, 555 N.W.2d 243, 246 (Iowa Ct. App. 1996); and he had a job lined up. The Court concluded that A.P. did not show by clear and convincing evidence the best interest of the children would be advanced by termination of B.G.'s parental rights. The

Court stated that it was not ready to write off B.G.'s potential positive contributions to his sons' lives, but that any relapse could justify termination.

B. CHILD IN NEED OF ASSISTANCE: IMMINENT DANGER OF ABUSE

In re L.H., No. 17-0920 (Iowa, 2017). Danielle is the mother of ten-year-old A.D., four-year-old G.G., and two-year-old L.H. Danielle and Ryan have been in a relationship for approximately three years and have resided together intermittently during this time. At the juvenile court hearing the State did not present evidence showing that Ryan had ever physically abused L.H., the State did present evidence that Ryan abused L.H.'s half-sibling, A.D., that he was named the perpetrator of abuse of one of his other children after he struck the child's mother so hard that she fell to the ground while she was holding the child. The court concluded ". . . we have no 'serious or substantial doubts as to the correctness [of the juvenile court's] conclusions of law drawn from the evidence" that Ryan is imminently likely to abuse L.H., thereby rendering L.H. a child in need of assistance. The precedent governing the imminent likelihood of abuse establishes that neglect or physical or sexual abuse need not "be on the verge of happening before adjudicating a child as one in need of assistance" under Iowa Code section 232.2(6)(*b*). *See In re J.S.*, 846 N.W.2d 36 at 43. "Nor should we require that showing." *Id*. The State presented clear and convincing evidence that Danielle will continue to place L.H. under Ryan's supervision, thereby making it imminently likely that L.H. wouldl be subject to abuse as required to adjudicate L.H. a child in need of assistance under Iowa Code section 232.2(6)(*b*). *In re D.W.*, 791 N.W.2d at 706 (quoting *In re C.B.*, 611 N.W.2d at 492). "Studies estimate that children living in a home with a batterer have a 70 percent chance of becoming the victim of abuse themselves. In addition, 40 percent of suspected child abuse involves a history of family violence." Amy Allen & Susan Myres, *The Impact of Domestic Violence on Children*, 42 Hous. Law. 18, 20 (Sept./Oct. 2004).